Law Commission
Reforming the law

Intestacy and Family Provision Claims on Death

Analysis of Consultation Responses

Consultation Paper No 191 (Responses)
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THE LAW COMMISSION

INTESTACY AND FAMILY PROVISION CLAIMS ON DEATH

ANALYSIS OF CONSULTATION RESPONSES

This document analyses the responses of consultees to the Law Commission's Consultation Paper, *Intestacy and Family Provision Claims on Death* (2009) Law Commission Consultation Paper No 191, and to the Supplementary Consultation Paper published in May 2011. This analysis is designed to be read in conjunction with these consultation papers and the final Report, *Intestacy and Family Provision Claims on Death* (2011) Law Com No 331, which is available from the project page of the Law Commission website at http://www.lawcom.gov.uk.

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PART 1
INTRODUCTION

HUMAN RIGHTS

1.1 **We invite consultees' views on the human rights implications of the provisional proposals made, and the issues discussed, in this Consultation Paper.**

[Consultation Paper paragraphs 1.57 and 8.2]

1.2 The question was addressed by 23 of the 124 respondents to the Consultation Paper. Of those responses, seven thought there were potential human rights implications, six did not think there would be potential human rights implications and nine responded with "no comment". One of the responses was from a law firm where some of those who contributed to the response considered there may possibly be human rights implications but the other contributors did not.

1.3 Of the nine consultees who responded to this question with "no comment", a number thought it would be inappropriate for them to comment or felt that the question was outside the scope of their expertise. The Law Society noted that any human rights implications "will be considered in detail by Parliament".

Introduction

1.4 The Human Rights Act 1998 incorporates into domestic law the rights and freedoms which UK citizens have under the European Convention of Human Rights and Fundamental Freedoms ("ECHR"). All legislation must be compliant with these rights and freedoms.

1.5 Throughout the project, we have considered the possible human rights implications of our proposals. In particular, we considered article 8 of the ECHR and article 1 of the First Protocol to the ECHR. Article 8 recognises a right to respect for private and family life, home and correspondence, while article 1 of the First Protocol recognises the right to peaceful enjoyment of possessions.

The responses

Consultees who thought the provisional proposals had no human rights implications

1.6 Sidney Ross (barrister) and Paul Saunders (trust administrator) explained why they thought the proposals would not have human rights implications.

1.7 Sidney Ross (barrister) reasoned that the current law did not interfere with the ECHR rights mentioned above, and the proposals were "not of a nature and extent likely to alter that perception". Paul Saunders (trust administrator) noted that the intestacy rules are a "default code" and that "there is no one who cannot contract out of that code by the making of a will". He suggested that the ability to make a will and opt out of the intestacy rules meant that the proposals would not have any human rights implications.

Consultees who identified possible human rights implications

1.8 Most of the seven responses which suggested that there were potential human rights implications identified the areas in which they thought those implications might arise.

RIGHTS FOR COHABITANTS

1.9 Two consultees (Samantha Hamilton (solicitor) and Donald Jolly (retired solicitor)) thought that legal rights for cohabitants could have implications under the Human Rights Act 1998.

1.10 Samantha Hamilton commented that:

> I have the right to marry if I so choose, but this law would mean that some of the obligations of marriage would be imposed on me without a religious ceremony or civil contract.

1.11 Donald Jolly thought that some cohabitants might consider it "an infringement of their human rights not to be tied legally to another human person".

COHABITANTS WHEN THERE IS A SURVIVING SPOUSE

1.12 Donald Jolly (retired solicitor) also noted that our provisional proposal at paragraph 4.107 of the Consultation Paper that a cohabitant should not be entitled on intestacy when the deceased leaves a surviving spouse could raise human rights implications. He suggested that the aggrieved party would be a cohabitant who had lived with the deceased for a long time but on the death did not inherit under the intestacy rules due to an estranged spouse.

EXTENSION OF THE TIME LIMIT FOR 1975 ACT CLAIMS

1.13 Christopher Jarman (barrister) suggested there could be an incompatibility with the ECHR, under both the current law and our proposals, in relation to time limits for family provision claims. Under the current law a claim must be brought within six months of a grant of representation. Mr Jarman pointed out that this can leave joint tenants of the deceased's property in an uncertain position indefinitely, which may affect their rights under both article 1 of the First Protocol and article 8 of the ECHR. The proposed discretion for the courts to extend the time limit for applications brought after the current six-month limit would, Mr Jarman suggested, exacerbate the incompatibility which in his view arises under the current law.

PART 2
CURRENT LAW

2.1 We made no provisional proposals in Part 2 of the Consultation Paper.

PART 3
THE SURVIVING SPOUSE

SURVIVING SPOUSE BUT NO CHILDREN

3.1 **We provisionally propose that, where a person dies intestate survived by a spouse but no descendants, the whole estate should pass to the spouse, whether or not there are other family members surviving.**

[Consultation Paper paragraphs 3.36 and 8.3]

3.2 This provisional proposal was addressed by 41 of the 124 respondents to the Consultation Paper. Of those responses, 29 agreed with the proposal, four agreed but had reservations, six disagreed and two were neutral.

The responses

Consultees who agreed with the provisional proposal

3.3 Richard Dew (barrister) made the general comment that the current intestacy rules are "unsatisfactory". This was supported by Richard Wallington (barrister) who noted that the estate passing to parents or siblings "looks like a 19th-century leftover and is difficult to justify in current conditions".

3.4 A number of respondents recognised that the proposal would bring the law more in line with people's expectations. It was suggested that most people already think that a surviving spouse takes everything in this situation (Andrew East (legal executive) and the Norwich and Norfolk Law Society). Consultees thought that the proposal would better reflect normal practice for those who make a will (the Woodland Trust (charity), the Society of Trust and Estate Practitioners, Cripps Harries Hall LLP (solicitors), Convenient Wills (firm) and Roland D'Costa (probate registrar)). Paul Saunders (trust administrator) and Title Research (firm) both commented that the proposal would make the intestacy rules more straightforward.

3.5 Many consultees referred to the practical benefit that the proposal would have; there would be fewer dependent parents or siblings needing to claim under the Inheritance (Provision for Family and Dependants) Act 1975 ("the 1975 Act") than there are surviving spouses who currently have to make a claim. Consultees thought that this would result in a decrease in applications under the 1975 Act (Chancery Bar Association, Association of Her Majesty's District Judges (organisation) and Sidney Ross (barrister)).

3.6 Some consultees, such as the Society of Trust and Estate Practitioners, viewed the continuing ability of a dependent parent or sibling to make a 1975 Act claim as key to their support of the proposal, and thought that would address any injustice the proposal could have on dependent parents or siblings.

3.7 There were a number of principled arguments put forward in support of the proposal. Sidney Ross argued that:

> The deceased's obligations are to those with whom a relationship has come into being by his or her own act, rather than those to whom he or she is related through the accident of birth.

3.8 The Society of Legal Scholars working group formed to respond to the consultation thought that the proposal would reflect the "economic contribution" that the surviving spouse would have made during the deceased's lifetime and therefore it would be appropriate for the surviving spouse to take the whole estate when there are no children or other direct descendants. A related point made by the Norwich and Norfolk Law Society was that the proposal reinforced "the shared financial commitment of marriage".

3.9 Helen Whitby (probate registrar) thought that, where there was a surviving spouse or children, no other relatives should be entitled to inherit on intestacy.

3.10 Some consultees noted (as we did in the Consultation Paper) that very few estates would be affected by this reform. This was generally cited as a reason to pursue reform that would ensure that all surviving spouses in a similar position are treated in the same way.

Consultees who disagreed with the provisional proposal

3.11 There was a degree of support for retaining the current law (Daniel Matthews, Donald Jolly (retired solicitor), Sheila Campbell (solicitor) and the Judges of the Chancery Division and of the Family Division of the High Court). In particular, the Judges of the Chancery Division and of the Family Division of the High Court thought that the current system provides "fair and principled outcomes". They did not consider reducing the number of 1975 Act claims to be necessary, stating:

> We therefore do not regard the family provision jurisdiction as an undesirable blot on the system which must be removed by ensuring that in most cases everything passes to the surviving spouse.

3.12 Sheila Campbell suggested that parents who were not dependent on the deceased should nevertheless share the estate with a surviving spouse. She also suggested that the larger estates which qualify for sharing under the current rules are likely to be estates where family money has been inherited; in such cases she thought it appropriate that wider family members be included in the intestacy rules. Ms Campbell suggested that farms and businesses which had been owned by a family could suffer from such a change in the intestacy rules as they would move further from a family's control.

3.13 Christopher Jarman (barrister) said that, although the provisional proposal "seems deceptively attractive at first sight", he felt "a convincing reason of principle" was necessary to justify a change from the current law.

3.14 Some consultees felt that the length of the marriage or civil partnership would affect how just the outcome of the proposal would be (Paul Saunders (trust administrator), Law Reform Committee of the Bar Council, Money and Property Committee of the Family Justice Council). If a surviving spouse from a long marriage or civil partnership had to pay out to other relatives it would be unfair; conversely, if a surviving spouse from a short marriage took the entire estate this would be seen as unfair. Of those who raised this point, both Paul Saunders and the Money and Property Committee of the Family Justice Council on balance supported the proposal. Paul Saunders said that:

> The intestacy provisions are a default position and should be relatively straightforward. For them to reflect the length and nature of a marriage will add unnecessary complexity and uncertainty.

Other issues raised

3.15 The Family Education Trust objected to the use of the term "spouse" to refer to a person's husband, wife or civil partner. They stated that:

> To apply to same-sex relationships language that has long been associated uniquely with marriage is to confuse two quite separate things and to imply a parity between two quite different types of relationship.

3.16 Paul Saunders (trust administrator) raised two wider issues for the intestacy rules. First, whether the intestacy rules ought to set out the position for polygamous spouses. Secondly, how surviving spouses of such marriages (who may not know of the existence of another spouse) should be treated. Mr Saunders suggested that they should be treated in the same way as a surviving cohabitee under the current law.

SURVIVING SPOUSE AND CHILDREN

3.17 **Do consultees think that the intestacy rules should be reformed so as to provide that an entire intestate estate should pass to the surviving spouse, whether or not the deceased also leaves children or other descendants?**

If not, which of the following models do consultees prefer:

(1) **the current law, which gives the surviving spouse a statutory legacy and then a life interest in the balance (if any);**

(2) **a structure that gives the surviving spouse a statutory legacy and a fixed share of the balance (if any) and, if so, what share; or**

(3) **a sharing structure that gives priority to the family home, either by providing that the surviving spouse inherit the deceased's share in the family home in any event, or by raising the statutory legacy but requiring the surviving spouse to account, against that legacy, for any share of the family home passing by survivorship?**

[Consultation Paper paragraphs 3.96 and 8.4]

3.18 Of the 124 respondents to the Consultation Paper, 58 addressed this question.

The responses

All to spouse in every case

3.19 There were some consultees who expressed support for this option, for example LV= (organisation), the Yorkshire Law Society, Convenient Wills (firm) and Professor Chris Barton (academic), though he expressed his preference "with rather less conviction" than in the past. Francesca Quint (barrister) was "content" with this approach, or with sharing option 2.

3.20 One of the merits of this option recognised by consultees such as Boodle Hatfield (solicitors) and Robin Lecoutre (solicitor) was its simplicity. Sidney Ross (barrister) commented that it had "the virtue of simplicity" even though he did not support it and Jo Miles (academic) concluded that there was "a lot of merit in the simple answer". LV= (organisation) said: "the alternative solutions introduce added complexity without any clear evidence that they would be beneficial".

3.21 A number of consultees including the Law Society noted that this option would, in the words of Jo Miles (academic) "just bring the law into line with the way that it operates in practice already in the vast majority of cases". In addition Convenient Wills, Boodle Hatfield and the Woodland Trust (charity) thought that it would "certainly follow the trend with Will writing" (Woodland Trust). Convenient Wills added that most people think that if they die intestate their whole estate will pass to their spouse.

3.22 Robin Lecoutre (solicitor) and Boodle Hatfield (solicitors) noted that it "is of course the most inheritance tax efficient scenario". Robin Lecoutre also thought that it had the benefit of not entitling a child to a large sum of money on turning 18. Instead, the surviving spouse would be "given the power to decide when money should be used for the children". He also noted that this option would "minimise the ongoing debate/reviews of the size of the statutory legacy".

3.23 The majority of the consultees who commented on this option pointed out problems it would cause or outlined arguments against it. The main issue was the risk of disinheriting children of the deceased. Simon Evers stated: "I do not think that the children or other dependants should be completely excluded in favour of the spouse". Similar comments were made by Finders (firm) and Giles Harrap (barrister). Richard Wallington (barrister) suggested that if an estate was big enough to go around then "why shouldn't descendants be included?".

3.24 A number of consultees further expressed concern that children of the deceased who were not also children of the surviving spouse would be at greater risk of losing any benefit from their parents' estate, as it might not be passed on to them through the surviving spouse. Giles Harrap (barrister), Richard Frimston (solicitor) and Sheila Campbell (solicitor) commented that this could be a growing problem with the increase of what Mr Frimston described as "patchwork families" which include children from more than one relationship. The Association of Contentious Trust and Probate Specialists submitted that the proposal:

> … provides no recognition for the devolution of dynastic wealth to natural heirs and encourages the reality and perception of a surviving spouse as a "gold digger".

3.25 Andrew Robertson (solicitor) said:

> I do not think it is right that a surviving spouse's entitlement should be the same whether or not they are the other parent of the deceased's surviving children. As the [Consultation Paper] states, a surviving spouse who is not the parent of the deceased's children may very well make no provision for those children on their subsequent death, and by definition those children would get nothing on the survivor's subsequent death intestate.

3.26 Similarly, Amanda Freeman (solicitor) commented:

> We are consulted two or three times a year by adult children whose parents have re-married and died intestate, so that the whole estate passes to the surviving spouse. I consider that insufficient weight has been given to the very real and long-lasting unhappiness caused when children are, or are at risk of being, disinherited in this way.

3.27 Lay Yap argued that, where the deceased had been married previously, the children from the deceased's first marriage should be prioritised, adding:

> This rule will encourage the deceased and the cohabitee to give thoughts to the children of the 1st wife before entering into the relation.

3.28 Consultees including the Society of Legal Scholars working group, the Family Law Bar Association, Maxwell Hodge (solicitors), John Dilger (retired solicitor) and the City of Westminster and Holborn Law Society were concerned about the potential for disinheriting children, in particular children from previous relationships. Boodle Hatfield (solicitors) explained that when there are children from a previous relationship their clients often make a will. In the light of such worries, the Institute of Professional Willwriters limited their support of this option to cases where any children are the children of the deceased and the surviving spouse.

3.29 The Chancery Bar Association also raised this concern and highlighted that it could cause an increase in litigation. The Society of Legal Scholars working group explored the difficulties of such litigation, noting that adult children face difficulties in claiming family provision unless there are special circumstances to justify an award. Christopher Jarman (barrister) noted that an unusual situation could occur when both spouses have children from a previous relationship; he said that it "would be entirely capable of capricious results according to which of the couple in fact dies first".

3.30 On the other hand, Robin Lecoutre (solicitor) felt that the benefit of this proposal to a young spouse "outweighs the prejudice that may be suffered by children from a previous relationship". Sidney Ross (barrister) acknowledged that in addition to the arguments put forward in the Consultation Paper, "changes in life expectancy made it much less likely that the surviving spouse will have dependent children to support". He thought that concerns about property passing down the deceased's bloodline "must take second place to the need to ensure that adequate provision has been made for the surviving spouse".

Sharing option 1: retaining the current law

3.31 Donald Jolly (retired solicitor) thought that if the statutory legacy was regularly updated on a fixed basis then the current law should be retained. Sheila Campbell (solicitor) and Finders (firm) also preferred this option. In response to criticism about life interests, Ms Campbell pointed out that they affect "relatively few estates" and the administration of them "is relatively easy where a house is involved". Cripps Harries Hall LLP (solicitors) preferred this option though they thought that the statutory legacy should be increased to £300,000 and that there should be a requirement that the spouse was cohabiting with the deceased at the date of death.

3.32 The Chancery Bar Association said that the current law "gives rise to practical problems". Criticism centred on the problems created by life interest trusts, which were described by the Family Law Bar Association as "a problem".

3.33 Life interest trusts were criticised as expensive, inefficient and burdensome by a number of consultees. Richard Wallington (barrister) explained that the idea of creating life interest trusts in these circumstances came from a time when wealth was owned by husbands and passing it on to descendants was very important. Richard Dew (barrister) criticised them as "more or less useless" and noted that they are "expensive to set up and maintain". Sidney Ross (barrister) agreed that life interests cause "a considerable amount of administration", are "a potential source of family dissention" and can often be over "a relatively small fund". The Norwich and Norfolk Law Society noted that such life interests limit the surviving spouse's control over their assets.

3.34 Dr Luckraft commented on the problems which arise from life interests, stating that they create:

> … unnecessary complications but also, where money is involved, gives little benefit to the holder of the life interest and because of inflation, little ultimate benefit to the final beneficiary.

3.35 The Judges of the Chancery Division and of the Family Division of the High Court explained that, if properly administered, a life interest is expensive and inconvenient and, if not, "it may as well not exist". Others who noted problems with life interests included the Money and Property Committee of the Family Justice Council, the Law Society and Dr Stephen Cretney (academic).

3.36 Giles Harrap (barrister) stated that:

> My experience is that clients repeatedly express a strong preference for clean break solutions as opposed to life interests.

3.37 This question divided opinion among members of the Society of Legal Scholars working group. Some thought that the life interest "had a useful role to play to protect the interests of children from a previous relationship, but should be confined to this context". The Society also had members who recognised the "complexities" of a life interest and who did not think that such interests should be part of the intestacy rules.

3.38 There were other arguments put forward against retaining the current law. Simon Evers was concerned about the expectations and entitlement of relatives other than the surviving spouse; in particular, children. He disliked having fixed values for the statutory legacy and thought that it should be a percentage of the estate, to avoid the situation where children receive nothing. Taryn Butler shared with us her experience of and problems with the current law. She said that the statutory legacy was not enough to cover the cost of a family home in London and felt that the current law "serves lawyers" and not those who have been bereaved.

3.39 Christopher Jarman (barrister) suggested that the current law be retained but reform should "reverse the default position in relation to the capitalisation of the life interest". He suggested that the entitlement of the surviving spouse could be a percentage of the residue (but not a "fixed" share) and "a corresponding proportion of the residuary income". Then if any spouse, perhaps for tax reasons, wished to "surrender the life interest in whole or part" they could. He went on to explore the detail required for such a proposal to work in practice.

Sharing option 2: a fixed share

3.40 A number of consultees preferred this option, including Christine Riley (probate registrar), the Chancery Bar Association, the Association of Her Majesty's District Judges, Anne Thom (solicitor), Title Research (firm), Gregory Hill (barrister), Dr Stephen Cretney (academic), Giles Harrap (barrister), the Norwich and Norfolk Law Society, the Law Society, the Family Law Bar Association, the Law Reform Committee of the Bar Council and the Money and Property Committee of the Family Justice Council.

3.41 Sidney Ross (barrister) noted that if a surviving spouse wanted a life interest there would be nothing preventing him or her from investing his or her fixed share. The Society of Trust and Estate Practitioners commented that this option "provides certainty and avoids the admitted costs of managing potentially very small trusts". The Family Law Bar Association and Maxwell Hodge (solicitors) both saw the simplicity of this option as a virtue and recognised that it offered a "clean break". The Office of the Official Solicitor preferred this solution to the current law and thought the removal of life interests was "a sensible reform".

3.42 Gregory Hill (barrister) said that this option had "the advantage of simplicity and finality", though he would also support a spousal right to appropriate the family home. He recognised that if the lower level of the statutory legacy was not met then there would be a risk of the spouse taking all to the exclusion of any children of the deceased; he noted that "there is a balance to be struck" between the surviving spouse and children of the deceased.

3.43 Other benefits of this option were recognised by consultees. The Norwich and Norfolk Law Society observed that under this option inheritance would come at "a more useful time of life" for children. The Chancery Bar Association thought it "may well lead to a reduction in claims under the 1975 Act". The Money and Property Committee of the Family Justice Council recognised that it did not always disinherit children from a previous relationship, a problem consultees raised in relation to the "all to spouse" option put forward in the Consultation Paper.

3.44 The Consultation Paper discussed whether the spouse's fixed share under this option should be half or one third of the remainder of the estate. Consultees who expressed a preference for a half share included the Chancery Bar Association, Anne Thom (solicitor), the Law Reform Committee of the Bar Council and the Money and Property Committee of the Family Justice Council.

3.45 Others, including the Association of Her Majesty's District Judges, Sidney Ross (barrister), the Society of Trust and Estate Practitioners, the Norwich and Norfolk Law Society and the Law Society, thought that a third share was preferable. A number of consultees reasoned that a third share was closest to the division under the current law. If they had to choose from the options put forward in the Consultation Paper, the City of Westminster and Holborn Law Society stated that their preferred option would be a one-third share to the spouse and a larger statutory legacy.

3.46 Francesca Quint (barrister) suggested that if this option was taken forward, the share which a surviving spouse would take should depend on the number of children with whom they would be sharing. Giles Harrap (barrister) and Title Research (firm) thought that the system which operates in Northern Ireland would be best; namely that if there was one child of the deceased, the spouse would get a half share; and if there was more than one child then the spouse would receive a third. Giles Harrap (barrister) commented that "in the general run of cases this will achieve broadly acceptable fairness".

3.47 Christopher Jarman (barrister) opposed giving the surviving a spouse a fixed share that applied in all cases, and disagreed with the analysis at paragraph 3.80 of the Consultation Paper:

> I am far from convinced that it is an appropriate result that any reform should make a younger surviving spouse – with a greater chance of having young and now orphaned children – worse off (with a corresponding shift in favour of her children being better off) than under the present law.

VARIATIONS ON SHARING OPTION 2

3.48 A number of consultees suggested variations on sharing option 2.

3.49 Richard Frimston (solicitor) thought that "the cost of maintaining life interest trusts, generally does not apply to the main residence"; he suggested that "a combination" of a life interest in the family home as well as an outright portion of the balance would be best, but he thought that any property which passed by survivorship ought to be taken into account.

3.50 The Royal Bank of Scotland Trust & Estate Group preferred option 2 (with the spouse receiving a half share), but thought that the remaining half beyond the statutory legacy for the children should be "only to the extent of any NRB [nil rate band] for IHT [inheritance tax]" as this would "preserve the non taxable nature of the estate".

3.51 Richard Wallington (barrister) suggested a statutory legacy and:

> … half to descendants and half to spouse up to an amount equal to the amount of the fixed net sum in excess of the fixed net sum, and two thirds to descendants and one third to spouse in respect of any of an estate which exceeds twice the net sum.

3.52 Helen Whitby (probate registrar) thought that the statutory legacy should remain "only where there were minor children of the intestate who are not in the care of the spouse" and that sharing option 2 should be in place. If the statutory legacy had to remain for all, she also preferred this option as it "would be easier to understand and operate and would remove the need for trusts".

3.53 Roland D'Costa (probate registrar) thought that sharing option 2 was preferable, with a half share of anything over the statutory legacy going to the spouse absolutely. However, he added that if the estate contained a house which exceeded the value of the spouse's entitlement, the spouse should receive an interest "which would subsist until death, remarriage or co-habitation, whichever occurred first".

3.54 The Judges of the Chancery Division and of the Family Division of the High Court suggested "consideration of a division which varies with the number of members in the class of distributees"; so, for example, the surviving spouse should take twice as much as any child.

Sharing option 3: focus on the family home

3.55 Only a few consultees agreed with an approach which focused on the family home. Withy King LLP (solicitors) found that "respondents preferred a sharing structure that gives priority to the family home". Andrew East (legal executive) took into consideration potential disputes arising out of intestate deaths where a surviving spouse and children from another relationship were left. He also considered the needs of a surviving spouse and the issue of the family home. He concluded that "the surviving spouse's share of the family home should be taken into account"; he thought that a joint tenancy should be "regarded as severed and the deceased's half therefore available to satisfy either the statutory legacy or be appropriated to the life interest trust of the balance".

3.56 Richard Dew (barrister) pointed out that all the options "suffer their own problems and highlight the difficulties of devising a proper structure". Although he did not specify which option he preferred, he thought "priority should be given to ensuring the spouse keeps the family home".

CONSULTEES WHO DISAGREED WITH AN APPROACH WHICH PRIORITISES THE FAMILY HOME

3.57 Giles Harrap (barrister) thought that this approach might be seen "as creating an unfair distortion of distribution by value". He thought this could cause particular problems in the scenario where a couple move before death, perhaps in order to cover the cost of care. He thought "it would be a very major change that risks causing unnecessary injustice in a small number of cases". The Law Reform Committee of the Bar Council simply stated that, "any structure which gave priority to the family home might lead to unfairness".

3.58 The Norwich and Norfolk Law Society said that:

> … regardless of the sentimental value that a home can have, it was not always appropriate to treat assets which were held in bricks and mortar differently to assets held in other forms… .

3.59 This point was also made by Richard Wallington (barrister), who did not agree with "the quantum of the rights on intestacy varying according to what assets are in the estate".

3.60 The Law Society did not agree with this proposal as they thought it "would introduce unwelcome complexity and discrepancies". The Family Law Bar Association was also concerned about the potential discrepancies which could be caused by giving priority to the family home; they mentioned the discrepancies which could occur across the country due to differences in house prices.

3.61 David Iwi (retired barrister) did not think that the issue should be approached on the basis that "there is overwhelming hardship in having to move out of the matrimonial home". He thought that it was normal for people who find themselves in different circumstances to consider moving. Professor Roger Kerridge (academic) criticised "the recent English obsession with housing" and stated that there is "nothing wrong with the idea that smaller 'families' need smaller dwellings, and it is nonsense to pretend some kind of sentimental 'attachment to the family home'". Sheila Campbell (solicitor) also thought this option put too much emphasis on the house shared by the deceased. She went on to point out that people move house more often now and people may move to a smaller house after the death of a spouse as they find their shared home has become too big.

3.62 Jo Miles (academic) emphasised the "very small numbers" of spouses whose "residential situation is under threat". She also pointed out the ambiguity as to whether this option was aiming to provide a home for the spouse or to protect the particular family home shared with the deceased.

ACCOUNTING FOR THE FAMILY HOME

3.63 One idea explored in the Consultation Paper was to require a surviving spouse who jointly owned the family home with the deceased to account for any share of the property acquired automatically on death by the doctrine of "survivorship" that operates when property is owned by two or more people as "beneficial joint tenants". The Chancery Bar Association thought sharing option 3 would be "unwieldy in its application, particularly if it required a surviving spouse to account for the value of a share in the family home passing by survivorship". On the other hand, Sheila Campbell (solicitor) thought that anything passing by survivorship should be taken into account in calculating the statutory legacy.

3.64 In relation to setting off any right in property which passes from the deceased to the surviving spouse, Sidney Ross (barrister) commented:

> As a general point, it seems retrogressive, having simplified the law of intestate succession by abolishing the hotchpot rules, to bring hotchpot back in another area, particularly one where it will apply in many more cases than did the former ss 47(1)(iii) and 49(4) of the Administration of Estates Act 1925.

3.65 He also argued that taking the interest in the family home into account could leave a surviving spouse with "insufficient resources". In addition, if the proposals for cohabitants were given effect, this could have a severe effect on a surviving cohabitant as property would be less likely to be jointly owned.

3.66 Anne Thom (solicitor) thought that the surviving spouse having to account would be "inequitable" as "the common practice in families is now for homes to be purchased in joint names". The Norwich and Norfolk Law Society opposed a structure which required jointly owned property to be offset against the statutory legacy. Christopher Jarman (barrister) said that "the scope for generating hard cases – or for creating unduly complex legislation, or possibly even both – seems far too great".

3.67 Richard Wallington (barrister) was also against interests taken by survivorship "being taken into hotchpot against the intestacy entitlement". He commented that the intestacy rules need to be kept simple and that those with estates larger than the fixed net sum or who have "complicated arrangements" need to make a will. He said "there is a limit to what the intestacy rules can be expected to achieve in the way of fairness and distribution of larger estates". He made these comments in support of the argument that there should not be special provisions for those with children who are not also the children of the surviving spouse.

3.68 The City of Westminster and Holborn Law Society thought it would be "unfair and inappropriate for the spouse's entitlement to be reduced because of property which he or she already owned". The Law Reform Committee of the Bar Council thought that having to account "against the statutory legacy for any share of the family home passing by survivorship would be complicated, difficult to apply and likely to add to costs".

3.69 The accounting model put forward in the Consultation Paper was partly attributed to Professor Roger Kerridge. Professor Kerridge in his response to the Consultation Paper recognised that the model was based on one of his ideas but stated the "original version has been modified in a way of which I do not approve". He explained that what he described as "hotchpot" does not involve giving priority to the family home, but should apply when any property passes by survivorship and there is a statutory legacy. He went on to suggest that his version of hotchpot, which is used in Scotland, has nothing to do with giving priority to the family home and "should be considered entirely by itself", applying for example "if a couple have joint bank and/or savings accounts".

VARIATIONS ON SHARING OPTION 3

3.70 Daniel Matthews thought that a surviving spouse's rights "need only mirror the life of the couple prior to death". He thought the surviving spouse should inherit the primary residence outright and that "only the remainder of the estate be subject to the £250k threshold with any excess being divided among other relatives/children from prior marriage etc". Taryn Butler thought that the family home should be transferred to the spouse "when there are children who are still at home".

3.71 The Institute of Professional Willwriters said that if there was a surviving spouse and children of another relationship, provision should be made "along the lines of Model 3". They thought that if there was a family home the surviving spouse should have a life interest in the deceased's share but that the value of assets passing by survivorship should be taken into account when making provision for children.

3.72 David Iwi (retired barrister) criticised the way that the statutory legacy had increased over the years. He said:

> … the response to the growth in the value of properties and the number of properties which are owner/occupied should not have been to increase the statutory legacy to enable the surviving spouse to appropriate the matrimonial home absolutely. The proper response should be that the primary benefit obtained by a surviving spouse, where there are also children, is a life interest in the matrimonial home.

3.73 He therefore objected to any proposal that would give a surviving spouse the family home outright. He said:

> … to justify defeating the natural expectations of both parents and children that the children should inherit the parents' property in due course, there would need to be compelling circumstances. In the case of the matrimonial home, there are certainly no adequate circumstances to justify it.

3.74 Lord Millett (retired Lord of Appeal in Ordinary) agreed with Mr Iwi's view:

> He [David Iwi] is particularly concerned at a proposal to give the matrimonial home to the widow absolutely even though the intestate may have children living by his first wife. I agree with him that this would be seriously wrong.

Other suggestions and comments

GENERAL COMMENTS

3.75 Richard Wallington (barrister) commented that "the decision is only relevant to the minority of intestates' estates which are large enough for descendants to take a share". J P King simply stated that the intestacy laws for married people "should be reviewed to reflect modern times". Convenient Wills (firm) commented that "education of the public is required" to encourage people to make wills. They suggested that this was the way to encourage those with children from previous relationships to protect against disinheritance.

3.76 One suggestion made by members of the Society of Legal Scholars working group was that perhaps the statutory legacy should be "a fraction of the estate rather than a set figure" so that it would not need updating and would not confine children's inheritance to larger estates.

3.77 Jo Miles (academic) pointed out that as life expectancy has increased, children will often be older when their parents die and are "quite probably fully established in life already". She noted that some of the roles inheritance plays, such as helping children onto the property ladder, will be fulfilled during parents' lifetimes.

CHILDREN FROM PREVIOUS RELATIONSHIPS

3.78 A number of consultees raised concerns about children from previous relationships and the effect of the special treatment given to the surviving spouse in the intestacy rules on such children.

3.79 Professor Roger Kerridge (academic) expressed the view that the Law Commission has an agenda which "consists of being extra-nice, extra-generous, to spouses at the expense of issue". He disagreed with all the options presented in the Consultation Paper as they did not "take into account whether children (or other issue) are issue of the marriage". John Dilger (retired solicitor) thought that conduit theory was "still very much alive", as in his experience of drafting wills "men and women conformed to a seemingly innate natural instinct and regarded their progeny as their posterity".

3.80 Jan Morgan objected to the operation of the intestacy rules which she felt favour the surviving spouse at the expense of minor children of another relationship. She felt strongly that the law should not assume that minor children would be living with the surviving spouse given that "in today's society there are many single parent families". Simon Evers was also concerned that children of a different relationship should not be totally excluded by a surviving spouses' entitlement. The Institute of Professional Willwriters recognised this was "one of the greatest injustices in the existing intestacy rules" and acknowledged "that it is also the most difficult to resolve".

3.81 Dr Luckraft thought that where there was a surviving spouse and children from a different relationship, the statutory legacy should be reduced significantly and the balance of the estate distributed between the spouse and the children. He also suggested that in these circumstances any "abnormal amounts" received by the deceased in a period before death, for example a large inheritance, should be divided between the children (80%) and the surviving spouse (20%). Dr Luckraft recognised that his suggestions had the disadvantage of adding complexity to the intestacy rules.

3.82 Richard Dew (barrister) thought that the only way to resolve potential problems which can arise out of complex family structures is for the deceased to make a will. He thought "legislation could never hope to strike the right balance in all cases". Giles Harrap (barrister) thought that attempts to come up with a scheme which took into account children of a former relationship "all seem too complex" and that such problems should be dealt with under the 1975 Act.

3.83 Jo Miles (academic) questioned "the rationale for giving the spouse such privileged status" and whether it would be unfair to put step-parents in a different position to other spouses, given they will often know that the family situation is different and, when they do not, there is the option of making an application under the 1975 Act "to boost the share".

ALTERNATIVE OPTIONS PUT FORWARD

3.84 One of the suggestions put forward by the City of Westminster and Holborn Law Society was that the surviving spouse should get half of the estate outright and half on trust with the remainder to the children. They thought such an option would prevent children being cut out by the statutory legacy in relation to smaller estates. The other option they put forward was that the surviving spouse would receive a statutory legacy but would have the right to elect to take half of the estate and half on trust for life.

3.85 Paul Saunders (trust administrator) suggested a mix between the fixed share model (option 2) and an accounting model (option 3):

> I believe a fair balance would be to allow the survivor to take the family home and for the remainder of the estate to be divided between the survivor and the children.

3.86 He went on to elaborate, stating that the surviving spouse should receive the deceased's interest in the family home. Alternatively, to take account of varying house prices, the spouse should be able to opt for the statutory legacy instead. If there was no family home owned, Mr Saunders thought that the surviving spouse should take the statutory legacy and split the balance with any children. In terms of sharing, he suggested following the Northern Ireland example, where a surviving spouse receives half of the estate if the deceased left one child and a third of the estate if the deceased is survived by two or more children. He thought that other property jointly held should be taken into account but recognised that this "might not be straightforward". However, if the family home passed by survivorship he did not think that the statutory legacy should be reduced.

3.87 Farrer & Co (solicitors) suggested their own system. This involved any estate which did not exceed £1 million, before tax, passing all to the spouse, as in their experience children did not feel disinherited as the "spouse will usually be considered a 'reliable conduit'". Where the value of the estate is between £1 million and £1.5 million they thought that the children should have an absolute share in half the residue over the £1 million statutory legacy. If the estate was over £1.5 million then they suggested that the surviving spouse should have a life interest in the whole (though with an option to partition 50/50 outright) with the remainder to the children. They thought children ought to be defined as anyone under 25. If the deceased left a surviving spouse with children from a different relationship they proposed that the surviving spouse receive a statutory legacy of £500,000 with a life interest and the remainder should go to the children. They also thought that step-children should not benefit on intestacy and could use the 1975 Act if they felt "aggrieved" by such a rule.

3.88 Mary Welstead (academic) thought that a surviving spouse should receive a 50% share in the deceased's estate and an additional sum "expressed as a percentage share of the family home for life" if the initial 50% was not enough to allow them to remain in the family home. And this should "revert to the deceased's children or other descendants on the spouse's death". David Iwi (retired barrister) suggested that the spouse should have a life interest in the estate to a capped value so as "not to extend to a property that is clearly too large but would in that case extend to a suitable alternative smaller property".

PERSONAL CHATTELS

3.89 **We provisionally propose that a revised and simplified statutory definition of personal chattels be provided, and that it should exclude items used by the deceased exclusively or principally for business purposes at the date of his or her death.**

[Consultation Paper paragraphs 3.132 and 8.5]

3.90 This provisional proposal was addressed by 35 consultees, Of those responses, 33 agreed that the definition of chattels needs to be updated, and two disagreed.

The current law

3.91 Section 55(1)(x) of the Administration of Estates Act 1925 defines chattels as:

> Carriages, horses, stable furniture and effects (not used for business purposes), motor cars and accessories (not used for business purposes), garden effects, domestic animals, plate, plated articles, linen, china, glass, books, pictures, prints, furniture, jewellery, articles of household or personal use or ornament, musical and scientific instruments and apparatus, wines, liquors and consumable stores, but do not include any chattels used at the death of the intestate for business purposes nor money or securities for money.

The responses

Consultees who agreed with the provisional proposal

3.92 A number of the respondents who agreed with our proposal raised issues which would be faced in modernising the definition.

3.93 Consultees emphasised that disputes over chattels can become heated and "completely out of all proportion to their intrinsic value" (Paul Saunders (trust administrator)). Similar comments were made by Sidney Ross (barrister), Association of Contentious Trust and Probate Specialists and Christopher Jarman (barrister).

3.94 A number of consultees agreed that the current definition is outdated. The Family Law Bar Association commented that:

> A definition which starts with items from the history books such as carriages, horses & stable furniture invites complaint that the same is not relevant in the 21st century and thus should be updated and simplified.

3.95 Some consultees were concerned that modernising the definition should not result in a change to the substantive law. Richard Dew (barrister) commented that there is, "no reason for a significant change but a sensible modernisation is appropriate". Giles Harrap (barrister) warned that "nothing should be done which could create disputes about chattels". The Society of Trust and Estate Practitioners suggested that any revised definition of personal chattels should apply to pre-existing wills.

3.96 In relation to chattels used for business purposes, consultees broadly welcomed the proposed reform. The Society of Trust and Estate Practitioners recognised that changing working patterns, such as more people working from home, made clarification of the law necessary. The Norwich and Norfolk Law Society reasoned that the purpose of allowing a surviving spouse to take the chattels is that they have sentimental value and chattels used for business purposes will not have the same sentimental value. The Law Society warned that there may be initial uncertainty about what is considered a chattel "principally used for business purposes" and that such uncertainty would need to be resolved. Consultees agreed to the clarification that chattels used principally for business purposes should not be included in the spouse's entitlement to the deceased's personal chattels.

Consultees who disagreed with the provisional proposal

3.97 Two consultees disagreed with the proposal. The Royal Bank of Scotland Trust & Estate Group thought there was "no reason to change the current definition". They felt that the existing definition "is well worn and is covered by extensive case law" and that a new definition "runs the same risk of being less than comprehensive". Richard Wallington (barrister) agreed with the proposal but commented that "replacing it is not a priority".

3.98 Christopher Jarman (barrister) disagreed with the proposal stating that in practice he had not come across any serious problems with the current definition. He questioned whether changing the definition was "a case of academic concerns for tidiness". He went on to recognise that there were legitimate concerns in relation to chattels used for business purposes.

3.99 Mr Jarman also saw some merit in setting a limit on the proportion of the value of an estate that could pass to a surviving spouse as personal chattels. But he did not support setting a limit on the value of individual chattels, as mooted in the Consultation Paper (and nor did any other consultee). Paul Saunders (trust administrator) suggested that aircraft, large boats and caravans should be specifically excluded from the definition of personal chattels. He also suggested that a spouse should receive either the family home and its contents, or a statutory legacy with which to purchase any chattels.

UPDATING THE STATUTORY LEGACY

3.100 **We provisionally propose that the level of the statutory legacy (if it is retained) should be reviewed at least every five years.**

[Consultation Paper paragraphs 3.143 and 8.6]

3.101 **We provisionally propose that the statutory legacy, if it is retained and if it is still required to be linked to house prices, should be raised in line with the average rate of increase, if any, of house prices across England and Wales on each occasion.**

[Consultation Paper paragraphs 3.144 and 8.7]

3.102 Of the 124 respondents to the Consultation Paper, 40 addressed one or both of these provisional proposals.

3.103 All agreed with the general principle that the statutory legacy should be periodically reviewed, although views differed as to the appropriate interval between reviews and the measure of inflation that would be appropriate.

The responses

Review of the statutory legacy at least every five years

3.104 A number of consultees noted that the most recent increase in the statutory legacy was, as the Norwich and Norfolk Law Society commented, "long overdue". The Law Reform Committee of the Bar Council suggested that the "failure to raise it for many years has been inexcusable, and caused considerable injustice".

3.105 The majority of respondents agreed with the proposal that the level of the statutory legacy should be reviewed every five years. Review of the statutory legacy on a regular basis was described as "eminently sensible" by the Money and Property Committee of the Family Justice Council. Those in agreement included the Association of Her Majesty's District Judges, the Society of Trust and Estate Practitioners, the Money and Property Committee of the Family Justice Council and the Office of the Official Solicitor.

3.106 It was suggested that reviews could be more frequent than every five years. Professor Chris Barton (academic) was worried about the unpredictability of inflation rates over five years, and thought that reviews every year would not be too burdensome. Christopher Jarman (barrister) suggested that reviews every other year may not be "unreasonable". The Judges of the Chancery Division and of the Family Division of the High Court were also worried that five years might be too infrequent to take account variables like hyperinflation, which they noted "is not unknown".

3.107 On the other hand, some consultees thought that a review every five years would be "too frequent and potentially troublesome" (Richard Dew (barrister), who suggested that a full review should be carried out every 10 or 20 years). Sheila Campbell (solicitor) also preferred reviews every 10 years as she thought this would give people a chance to become familiar with the level of the legacy. Convenient Wills (firm) agreed that reviews should be every 10 years as this would be better "from an administrative point of view".

3.108 The Chancery Bar Association (organisation) noted the suggestion in the Consultation Paper that there should be an opportunity for consultation on the level of the statutory legacy, where that is thought to be desirable, and stated that:

A regular review of the statutory legacy is supported but the necessity to allow for regular consultation, except on an exceptional basis, is not accepted.

3.109 Consultees made a number of other suggestions in relation to reviewing the statutory legacy. The Chancery Bar Association and Christopher Jarman (barrister) suggested that reviews should be "upwards only" so that the level of the statutory legacy is never reduced. Mr Jarman also commented that reviews should be as close to automatic as possible so as "to avoid the potential for either a waste of time and resources in frequent consultation or criticism for failure to consult". Sheila Campbell (solicitor) recognised that a delicate balance had to be struck between "the effect of inflation (or deflation)" and the need for "certainty for the public".

3.110 While Dr Stephen Cretney (academic) recommended that there be discretion to review the level on other occasions, Convenient Wills (firm) were keen to ensure that the statutory legacy did not "become some sort of political tool used for inheritance purposes to raise taxes". Dr Cretney also suggested that any review of the statutory legacy should have the option of recommending no change.

3.111 The Office of the Official Solicitor noted that, in the past, the statutory legacy being at a low level has caused difficulties, though the most recent increase, which took effect for deaths from 1 February 2009, has all but rectified those difficulties. The Association of Her Majesty's District Judges commented that keeping the statutory legacy "apace with economic factors" would be likely to reduce the number of claims under the 1975 Act.

Raise the statutory legacy in line with the average rate of increase of house prices

3.112 There were 37 consultees who responded to this provisional proposal. Of the 37 responses received, 25 agreed with our proposal, seven disagreed and five agreed but had reservations.

3.113 The majority of respondents agreed with the provisional proposal, including the Family Law Bar Association, the Royal Bank of Scotland Trust & Estate Group, the Law Reform Committee of the Bar Council and the Chancery Bar Association. Many of these consultees agreed that, if the policy is to ensure that the surviving spouse receives the family home, then indexing the statutory legacy in line with average house prices is sensible.

3.114 Convenient Wills (firm) thought that any update should be rounded up to the next £10,000. On the other hand, Jonathan Larmour thought that the proposal "would only be sensible if it may also decrease if house prices fall".

3.115 A number of respondents had reservations about the link with average house prices, though not with the idea of indexing the statutory legacy. They picked up on the problems we identified in the Consultation Paper: that house prices vary across different areas of the country and that a number of estates will not include real property. The Institute of Professional Willwriters worried that a surviving spouse's entitlement on intestacy could end up as a "postcode lottery". Sheila Campbell (solicitor) and the Judges of the Chancery Division and of the Family Division of the High Court noted that house prices will vary across the country but the level of the statutory legacy is set nationally and so a link to house prices could lead to disparities across the country. Sheila Campbell recognised that it would be too difficult to take the variations in house prices into account but thought that it showed a need for "flexibility to take into account different factors".

3.116 The Law Society thought that the problems identified in the Consultation Paper warranted further research which should be conducted before a decision was made as to the rate of inflation to which the statutory legacy should be linked. One of the problems identified in the Consultation Paper was that property prices could rise sharply at a time when general prices did not. As a solution to this, and as a suggestion generally, Farrer & Co (solicitors) thought that the statutory legacy ought to be linked to both the Retail Prices Index and the average rate of increase of house prices. The Society of Trust and Estate Practitioners agreed: they too thought that house prices should be one of a number of factors taken into account when determining the statutory legacy but should not be the "sole basis" on which it is set.

3.117 Dr Mary Welstead (academic) and Paul Saunders (trust administrator) disagreed with the premise of the proposal – that the level of the statutory legacy should be linked to house prices – and identified groups to whom this would not be relevant. Mr Saunders commented that many houses are held on joint tenancies and so the surviving spouse would receive the deceased's share of the house anyway. He thought in that situation a surviving spouse would be gaining a double benefit and suggested that the statutory legacy should be fixed to "a widely recognised index" such as the Retail Prices Index. Dr Welstead emphasised the problem noted in the Consultation Paper, that surviving spouses or civil partners may be living in rented accommodation or in care homes, and that a statutory legacy set by average house prices would be irrelevant to them.

Other issues raised

3.118 Consultees brought to our attention that the rate of interest on the statutory legacy was high. Richard Wallington (barrister) noted that it is "a whopping (by current standards) 6 per cent". We also received comments from David Brydon (solicitor) and Paul Saunders (trust administrator) noting that the current rate of interest is far above current interest rates and suggesting that as part of our project we consider the rate of interest on the statutory legacy generally.

3.119 Three issues emerged from the consultation responses of David Brydon (solicitor) and Paul Saunders (trust administrator).

(1) Is the rate of interest on the statutory legacy too high?

(2) Is the rate of interest on the statutory legacy simple or compound and should this be the case?

(3) What is the tax status of interest on the statutory legacy?

3.120 Paul Saunders (trust administrator) also queried whether the interest rate for the statutory legacy and for a cash sum given under a will ought to be the same.

THE NOTIONAL DIVORCE TEST

3.121 In the Consultation Paper we discussed the requirement for the court, when considering an application by a surviving spouse for family provision, to have regard to the provision which the applicant might reasonably have expected to receive if the marriage or civil partnership had been terminated by divorce or dissolution rather than by death.

3.122 We made no provisional proposals but invited consultees' views as to whether it requires amendment or clarification. Farrer & Co (solicitors) addressed this at length in their response. They said:

> In our view, the notional divorce test is not an appropriate test for following reasons. After *White v White* and introduction of the yardstick of equality, it enables the surviving spouse to claim half the estate. This may well be contrary to the deceased's wishes and thus upset careful estate planning. This is particularly inappropriate for very large estates. It can be particularly problematic in second marriages, where the deceased leaves children from the first marriage and the surviving second spouse has her own children, whose interests she is seeking to safeguard. This test can exacerbate disharmony within the family. Moreover, there is considerable uncertainty as to the state of law in relation to ancillary relief. There is no good reason for importing principles developed for ancillary relief into this field. Different considerations apply - such as the wishes of the deceased and the needs and interests of the deceased's wider family. We suggest there should be a more flexible approach which does not afford preferential treatment for the surviving spouse.

3.123 We did not ask any other consultation questions about the law of family provision as it relates specifically to a surviving spouse. Henry Legge (barrister) suggested a reform to section 10 of the 1975 Act, which allows the court to bring into account assets transferred before the death of the deceased with the intention of defeating a subsequent application for family provision. Mr Legge said that the law can produce unfair results if one spouse dies while proceedings for ancillary relief on divorce or dissolution of a civil partnership are ongoing. He suggested that section 10 should be amended to give the court powers which match those it has under the Matrimonial Causes Act 1973 (and the equivalent powers in the Civil Partnership Act 2004) to set aside transactions made by parties prior to their divorce or the dissolution of their civil partnership.

PART 4
COHABITANTS

INTESTACY

4.1 **We provisionally propose that a cohabitant of the deceased should have an entitlement on intestacy, subject to conditions.**

[Consultation Paper paragraphs 4.59 and 8.8]

4.2 Seventy-nine consultees addressed this provisional proposal. Thirty-three of those consultees agreed with the provisional proposal; 40 disagreed. Six consultees offered mixed views, but did not expressly agree or disagree; some made alternative suggestions.

The responses

Consultees who disagreed with the provisional proposal

4.3 There were a number of arguments which appeared repeatedly in the responses of consultees who disagreed with the proposal. Those arguments were that the proposals would undermine the institution of marriage; those who choose to cohabit may not want their partner to inherit on their death; there is a risk of litigation increasing; and there is a potential for fraud. It was also suggested that reform is unnecessary: if cohabitants want an entitlement on death there are already means of securing this under the current law. Consultees' discussion of these arguments is examined in full below.

THE PROPOSALS WOULD UNDERMINE MARRIAGE

4.4 A number of consultees disagreed with the proposals relating to cohabitants because they thought they would undermine the institution of marriage. Such consultees included Jonathan Larmour, Marcus Bishop, Pat Traynor, Ralph Stanger (solicitor), Dawn Jones (solicitor) and Sheila Campbell (solicitor).

4.5 Christian Action Research and Education (charity) thought that the "changes are highly likely to encourage yet more couples to cohabit and thus to embrace a family structure that is inherently unstable for adults and their children" and would be detrimental "to the institution of marriage itself". They worried that a change to "address a small number of cases" could "end up with a situation that negatively impacts far more people".

4.6 Emily Goodwin said that the proposals would "undermine the value of marriage as the legal framework to strengthen and provide security for a family unit in today's society". Siobhan Macdonald thought that such rights would be "another nail in the coffin for marriage" and the Family Education Trust argued that the proposals undermine "the uniqueness of marriage" and would "weaken the incentive for people to make a lifelong commitment to each other".

4.7 John Carter warned that the Law Commission "should not be distracted by the current trendy slippage in standards … marriage is an essential state within civilised society that helps society function effectively". Chris Kellers commented "I believe in the sanctity of marriage and that these proposals would erode further the institution of marriage". Mike Thorpe was concerned that the proposals would undermine marriage but also thought that the law should not encourage cohabitation as it was "regrettable for many reasons, not least the welfare of children". He thought the law "must be framed in such a manner as to uphold and strengthen the institution of marriage, not undermine it". Mr Thorpe concluded by describing the proposals as "tantamount to institutionalised idiocy".

COHABITANTS MAY NOT WANT AUTOMATIC ENTITLEMENT ON INTESTACY

4.8 Dawn Jones (solicitor) said that the proposal "imposes obligations on those that may not desire them". Stephen Gratwick QC (barrister) agreed, saying "some cohabitants will wish to have the law left as it is so that they have the freedom to separate and to ignore each other's situation, which they possess today". Sheila Campbell (solicitor) explained that cohabitants may choose not to marry because they "do not wish the partner to have a greater claim to their assets than their own children"; she thought it would make "a lottery out of who inherits".

4.9 David Smith expressed concern that "the unfairness of sharing assets is one of the main reasons that marriage has reduced". He thought that people who currently cohabit to avoid the financial implications of marriage would be put off even cohabiting, risking the stability of family life further. Marcus Bishop made a similar point.

4.10 Dave Collingwood said that he, as a cohabitant, did not think such proposals should be imposed on people who have chosen not to marry. He advocated making a will, though he did note that the "credit crisis" shows how "people generally do not seem capable of taking responsibility for their own actions". Daniel Matthews questioned "how the law can presume to know the wishes of the deceased" when a cohabitant may not have wanted his or her partner to inherit. Oliver Ellis thought that the government would be "taking away from the free will and independence of its population" if it followed through with reform for cohabitants.

4.11 J P King was concerned that the proposals "could potentially alter the current situation so dramatically which would force decisions on people who may not wish this to be the case". He stated that "people who choose not to marry have a right to expect that they don't have the law interfering in their private arrangements". Emily Goodwin said the proposals seemed "to bestow rights on cohabiting couples without their consent or knowledge" which would "make the law vulnerable to abuse". Convenient Wills (firm) made similar comments.

4.12 Christian Action Research and Education (charity) thought that many of the people who cohabit would not want laws tailored specifically for cohabitants. They were:

> … unconvinced that there is a significant number of vulnerable persons in cohabitation relationships for whom there is a justifiable need for significant change in the law.

They went on to state that the proposals would deprive cohabitants of "the very freedoms that they have deliberately elected to have, freedom from having their lives regulated by the rules and responsibilities of marriage" and described them as "intrusive and unnecessary", expressing concern at what they saw as an emphasis on rights at the expense of responsibilities.

RISK OF INCREASING LITIGATION

4.13 Some consultees thought that there would be litigation to determine the meaning of "cohabitant"; others thought litigation would increase as relatives challenged the cohabitants' entitlement using the 1975 Act. Ralph Stanger (solicitor) said that it "may well lead to much dispute, even litigation".

4.14 Christian Action Research and Education (charity) thought that a consequence of the provisional proposal would be "considerable litigation over the next decade to establish how it operates in practice". They wanted the "impact on already overworked courts, stretched legal aid resources, and on other family law cases" to be taken into account. The Royal Bank of Scotland Trust & Estate Group thought that the proposal could lead to "expensive conflict".

4.15 Jonathan Rudge said that the proposal would be "detrimental to the claims of descendants of previous relationships" and Viju Chhagan (solicitor) noted that it would deprive the blood relatives and could lead to fraudulent claims. The Family Education Trust was concerned about the impact "on other members of the deceased's family, particularly on any previous spouse and children from a previous marriage".

FRAUD

4.16 A number of consultees were concerned that intestacy rights for cohabitants could open up the possibility for fraud. For example, Dawn Jones (solicitor) thought that it "must surely encourage fraud/dishonesty" as people may claim to have cohabited with the deceased. The Family Education Trust and Convenient Wills (firm) were also concerned about the possibility of fraud. The Woodland Trust (charity) thought that the proposals "would be open to abuse" and that "extremely difficult evidence" would be needed to show cohabitation.

4.17 Jonathan Rudge thought that the provisional proposal would encourage "gold diggers" and fraudulent claims by cohabitants aiming to secure an entitlement on intestacy. He summarised that it was "a recipe for injustice and a charter for fraud". The City of Westminster and Holborn Law Society thought that there was "an obvious risk that the surviving cohabitant will wrongly recollect, or indeed deliberately misrepresent, material facts".

COHABITANTS CAN SECURE ENTITLEMENT ON THE DEATH OF THEIR PARTNER THROUGH OTHER MEANS

4.18 A number of consultees thought that reform was unnecessary because there are already measures which cohabitants can take to secure an entitlement on the death of their partner, and that these existing solutions (getting married or entering into a civil partnership, writing a will, or making a 1975 Act claim) were preferable. Educating the public about the legal consequences of cohabiting and the need to make a will was also a suggested alternative to reform.

Marriage

4.19 Stephen Gratwick QC (barrister) said that the Law Commission should "abandon the whole enterprise of studying cohabitation and state quite baldly that it is a mistaken enterprise; that the law needs no alteration and should have none; and that the world should be left to make its choice between cohabitation and marriage". Siobhan Macdonald and Joyce Bennell (solicitor) were among the other consultees who agreed with Mr Gratwick's view. On the other hand, Maxwell Hodge (solicitors) said that to argue that cohabitants could just get married is "to ignore the evolution of society and reject the conscious, lifestyle choice many responsible adults now make".

Writing a will

4.20 Stephen Gratwick QC (barrister), Duncan Strachan (solicitor), Christopher Jarman (barrister), Joyce Bennell (solicitor), Davenport Lyons LLP (solicitors) and Emily Goodwin were among the consultees who suggested this was a viable option for cohabitants. Dave Collingwood thought couples in this situation should make a will as it is "a reasonable simple and inexpensive process". Ralph Stanger (solicitor) thought that "the existing provisions for making a Will are clear and easy to follow" and so cohabitants could simply make a will.

4.21 Jonathan Larmour thought that making a will was a suitable solution but suggested simplifying the legal requirements for doing so or having an online procedure, facilitated by the government, for registering one's wishes (he also suggested that this link up with the organ donor register). Convenient Wills (firm) thought that if the intestacy rules changed people would have less incentive to make a will. They did not think that the intestacy rules could offer the same "flexibility and individuality" that making a will would provide and so it would be better for couples to make a will and for the intestacy rules to be left as simple as possible.

Applying for family provision under the 1975 Act

4.22 Consultees who thought that the existing procedure under the 1975 Act was a satisfactory way for a cohabitant to claim an interest in the estate of a deceased partner included Davenport Lyons LLP (solicitors), Christian Action Research and Education (charity), Duncan Strachan (solicitor) and the Woodland Trust (charity). The Norwich and Norfolk Law Society felt that the 1975 Act was the most appropriate method for cohabitants to receive an entitlement on the death of their partner as "a consideration of fairness in an individual case was crucial" given that "the nature of cohabitant relationships varies widely".

4.23 The Judges of the Chancery Division and of the Family Division of the High Court thought that a claim under the 1975 Act was the "appropriate mechanism" and noted that in such claims the "derivation of the property comprised in the deceased's estate" is taken into account, which would not be the case if property passed automatically to a cohabitant on intestacy. The City of Westminster and Holborn Law Society thought that the 1975 Act provided a better way of determining such entitlement, suggesting that a cohabitant's claim should not be dealt with administratively but that "the function is truly a judicial one and must be exercised by a judge". Ralph Stanger said "the existing provisions for making a claim against an estate … are clear and adequate".

Raising public awareness

4.24 Jonathan Larmour thought that "better public education" was needed about the importance of making a will and the benefits of marriage. Simon Evers agreed that "the cure for this is to publicise the need to make a will". Similar comments were made by Chris Kellers, Dawn Jones (solicitor), Christopher Jarman (barrister) and Daniel Matthews. Emily Goodwin submitted that "the problem isn't that the current law is unfair; the problem is that too many people are unaware of their legal rights" and suggested that greater awareness was necessary.

4.25 Dave Collingwood argued: "this is not something to be solved with mandatory law making but with education" while Samantha Hamilton (solicitor) said "the best way to address the ignorance of those who cohabit without arranging their affairs is to educate the public". Stephen Gratwick QC (barrister) thought that "what is required is not a change in the law but education in it" and "it is not the law which causes the hardship but either disregarding it, or being in ignorance of it".

4.26 J P King thought that education could include free courses run at local colleges on the implications of not having a will, "a government subsidised will writing service" and information for school and other groups. Christian Action Research and Education (charity) also suggested a campaign to inform people of the difference between marriage and cohabitation and to explain the remedies available to them.

Other suggestions

4.27 Jonathan Larmour suggested that civil partnerships be opened up to same-sex couples so that those with "irrational hang-ups" about marriage could enter into a similar legal framework. Graham (no surname provided) suggested that the law should require people to make legally binding wills once they have been in a relationship for five years.

General comments from consultees who disagreed with the provisional proposal

4.28 Consultees who disagreed with the provisional proposal also made more general comments.

4.29 A common view was that defining who qualified as a cohabitant would be problematic. This view was expressed by Graham (no surname provided), Daniel Matthews and Samantha Hamilton (solicitor), who said that who qualified as a cohabitant would "need to be carefully defined otherwise those in a flat share or even a shared room in residential care may end up with one or more cohabitees". Christopher Jarman (barrister) considered that there would be no definitive point when cohabitation could be said to have started and so it would not be clear at what point previously entitled relatives would be displaced by a cohabitant. He went on to suggest that this could mean that people would not have a trigger to prompt them to make a new will, as they might have if they were anticipating marriage.

4.30 The Yorkshire Law Society thought that "the definition may be difficult to apply in each particular case". The Family Education Trust was concerned about difficulties which could arise if there were successive relationships involving cohabitation. Duncan Strachan (solicitor) put forward a practical concern about how cohabitants would be able to prove themselves within any definition in order to apply for a grant of administration.

4.31 Problems in defining cohabitation were linked to a possible increase in litigation costs by a number of consultees. The Royal National Mission to Deep Sea Fishermen thought that the definition of cohabitant "would lead to a wider number of claims" and that the proposals could "lessen the responsibility of making a will". Whilst in agreement with the general proposals, Richard Wallington (barrister) expressed some concern about the "scope for dispute" with the definition of cohabitant, but thought that "sociological reasons should prevail over the desire for legal certainty".

4.32 Similarly, Dawn Jones (solicitor) said that introducing cohabitation brings "enormous uncertainty to the law" as cohabitants "can never be within clearly defined boundaries" and so proof of cohabitation may be difficult. The Royal Bank of Scotland Trust & Estate Group said they thought it was "difficult to see how this could be applied in practice" and that the entitlement could be "complex and costly to prove".

4.33 A number of consultees felt very strongly against giving rights to cohabitants in any form. Simon Evers wanted "no change to the law regarding cohabitants, unless it be to give them less rights than they currently have". He summarised the proposals as "marriage by death" which he thought was "a dreadful concept". Daniel Matthews was "totally and vehemently against" change. Marcus Bishop said the proposals were a "retrograde step" which was "totally unnecessary" and asked "why change a system that works perfectly well". Alastair Harris disagreed with the proposals, commenting that "if you just sleep with someone soon you will have to give them half your money, ridiculous!!!!"

4.34 There was a concern amongst some consultees that automatic entitlement on intestacy for cohabitants would discourage will making. The Roy Castle Lung Cancer Foundation (charity) and the People's Dispensary for Sick Animals (charity) both said that it is "likely only to exacerbate the likelihood of people failing to take responsibility and plan for death". Similar sentiments were expressed by the Institute of Legacy Management and World Vision UK (charity). However, the Woodland Trust (charity) suggested that an entitlement for cohabitants on intestacy would make very little difference to charities and would not be a disincentive to will writing.

4.35 Samantha Hamilton (solicitor) said that "any law that seeks to legislate for the ignorance of the population is bad law". She also thought that the proposals might interfere with private, family and property rights and so might be subject to challenge under the Human Rights Act 1998. Siobhan Macdonald also picked up on the issue of public ignorance, questioning "who is to say that the general public will be any the wiser about new legislation than they are regarding current legislation in this area". She was also concerned that "fewer people will choose to live together". The City of Westminster and Holborn Law Society said that "popular ignorance of the law is a dubious basis for law reform".

4.36 Donald Jolly (retired solicitor) referred to the Law Commission's 1989 Report on intestacy (Distribution on Intestacy (1989) Law Com No 187) and said that the reasons stated in paragraph 4.5 of that Report for "rejecting the basic principle which is now embodied in the present provisional proposal are as relevant today as they were in 1989". Christopher Jarman (barrister) felt strongly that it would be wrong to equate cohabitants with spouses.

4.37 The Judges of the Chancery Division and of the Family Division of the High Court said:

> This represents a fundamental shift in social policy which ought not to occur in the guise of reforming the law of succession. What is required is a comprehensive review of the property rights of cohabitants to produce a coherent scheme that applies during life and upon death.

4.38 The Judges said that the choices of parties who decide not to marry or become civil partners to avoid the consequences of those relationships ought to be respected

Consultees who agreed with the provisional proposal

4.39 Consultees who agreed with the provisional proposal included Andrew Cannon, the Institute of Professional Willwriters, Francesca Quint (barrister), the Society of Trust and Estate Practitioners, Professor Chris Barton (academic), Roland D'Costa (probate registrar), Paul Saunders (trust administrator), Farrer & Co (solicitors), the Law Reform Committee of the Bar Council, the Law Society, Gregory Hill (barrister), Maxwell Hodge (solicitors) and Helen Whitby (probate registrar) and the Association of Muslim Lawyers.

4.40 Many of those who agreed with the proposal cited the problems with the current law and/or changes in society as a reason for supporting reform and some consultees described their own experiences. These are explored further below. A number of consultees also made general observations or comments.

4.41 The Association of Her Majesty's District Judges said that giving cohabitants an entitlement on intestacy "reflects modern life, people's expectations and will reduce claims under the [1975] Act". Richard Wallington (barrister) agreed with the proposals and was encouraged by the experience of other common law jurisdictions where reform of this area of the law has already been enacted. Resolution (organisation) thought that the proposals would not cause problems for lay administrators. On the other hand, Boodle Hatfield (solicitors) were concerned about "conditions and options" making the intestacy rules "too complex to easily administer", though they did "broadly support" cohabitants having an entitlement on intestacy. They recognised the difficult balance between cohabitants who have chosen to cohabit but not marry, so that their assets will not pass to their partner on death, and those who mistakenly believe that their assets will automatically pass under the intestacy rules.

4.42 Christine Riley (probate registrar) agreed but with reservations. She recognised the "drive to cater for co-habitants without the need for litigation in every case" but noted that if short-term relationships generated entitlement on intestacy there could be "contention within families" and even "an increase in contentious proceedings". Dr Stephen Cretney (academic) said he was "prepared to accept" the proposals, though he too had reservations. In particular he was concerned about the ability to define cohabitants and thought that the discretionary jurisdiction under the 1975 Act might be a better place to deal with them. The Family Law Bar Association supported some automatic provision in principle but highlighted problems in the detail of the further proposals.

4.43 The Association of Contentious Trust and Probate Specialists broadly supported the proposal to "recognise how society now works" and "discourage 1975 Act claims". The Law Society agreed with the proposal and also pointed out the discrepancy between entitlement on death and lifetime separation which would occur and would need to be considered.

4.44 Gary Horn agreed with the proposal but thought there should be an opt-out option for cohabitants so that they would not have to make a will and could instead rely upon the current rules of intestacy. He noted that the responses to the consultation paper would "contain a disproportionately large number of those opposed to the plans" because "those within the population of cohabitants will be younger and therefore more apathy will exist amongst this part of the population".

4.45 Jean Hill agreed with the proposal, but thought that the definition of cohabitant should be broader:

> I make an impassioned plea for blood-tie relatives who have shared their lives, their homes, looked after parents and other family members willing so, often at great personal cost. It seems logical and right that they should be afforded the same rights in law as those with certificates of marriage and civil partnerships.

PROBLEMS WITH THE CURRENT LAW

4.46 Some consultees felt that reform was necessary so that cohabitants no longer had to make claims under the 1975 Act. Resolution (organisation) pointed out that claims under the 1975 Act bring "emotional and financial costs" while the Chancery Bar Association thought that the use of the 1975 Act by cohabitants was "a common occurrence … which should be avoided".

4.47 The Money and Property Committee of the Family Justice Council thought that cohabitants should have an entitlement on intestacy so that they would not have to go through the "uncertainties" of litigation under the 1975 Act, with the associated costs. They recognised that there were difficulties in setting up the framework for such an entitlement and noted that there was always the option to opt-out by making a will. Giles Harrap (barrister) pointed out that the lack of provision for cohabitants on intestacy currently results in many disputes under the 1975 Act.

4.48 The Office of the Official Solicitor thought that there would be an effect on litigation but that it was hard to say in which direction the effect would be felt. The Office noted the possible decrease in 1975 Act claims by cohabitants, the possible increase in 1975 Act claims by other relatives against cohabitants and the possibility of litigation to determine the precise meaning of "cohabitant". There was concern to ensure that administrators could "distribute the estate without fear of well founded litigation". The Office concluded that "these issues almost certainly do not outweigh the general benefit of making more modern provision for cohabitants but should be taken into account".

4.49 Richard Dew (barrister) said that, whilst in many cases the 1975 Act works well, it is expensive and therefore less effective for small estates; he acknowledged that this could be a "neutral (non-political) case for making some default provision". However, given the diversity of the types of relationship which cohabitants can have, he expressed some reservations as to whether such reform would really be worthwhile.

4.50 Contrary to the view, expressed by many opposed to the reforms, that increased public awareness about cohabitants' legal rights would remove the need for reform, Sidney Ross (barrister) stated that "it is clear that no amount of exhortation is going to persuade the majority of parties who cohabit to make wills" and that the deceased's estate "should not be swallowed up in the costs of family provision litigation".

SOCIAL CHANGE

4.51 The increase in the number of cohabitants was recognised by many consultees and cited as a reason for legislative change. For example, Andrew East (legal executive) thought that "given the very large incidence that we now have of unmarried couples" there was a need to make provision for them in the intestacy rules. Resolution (organisation) stated that surveys show "wide-spread and growing support for the view that deserving cohabitants should be provided for".

4.52 Similarly, Sidney Ross (barrister) said that "cohabitation has become so generally accepted as a way of life that reconsideration of the position of cohabitants under the law of intestacy is essential". Richard Wallington (barrister) also thought there was "a very strong case" for provision even "putting to one side questions of governmental policy". He noted that "cohabitation without marriage is so common in modern society, and in particular is common among the less well-off who die intestate".

4.53 Title Research (firm) found that in their experience there was an expectation among the public that a cohabitant would benefit on intestacy. They also had experience of relatives entering into a deed of variation to allow the cohabitant to inherit. They recognised the potential evidential problems and the issues for administrators but still supported the proposal on the basis of their professional experience.

4.54 Dr Luckraft thought that there should be some recognition given that cohabitation is more common and socially acceptable now. However, he thought that "the recognition should not be as great as the recognition given to a marriage" and outlined a detailed alternative scheme.

PERSONAL EXPERIENCE

4.55 A number of people who responded to the consultation expressing support for the provisional proposal shared with us their personal experience under the current law. The difficulties that they had experienced led them to support reform to give cohabitants an entitlement on intestacy. Because of the personal nature of this aspect of their responses, we do not name these individual consultees below.

4.56 One consultee had to cope not only with the sudden death of her partner in a car accident but also with the subsequent financial disputes which occurred as neither her nor her partner had a will. She commented that she "would not want anyone to under go the stress I did" and that "it is vital to have a more refined legal system in place".

4.57 Another consultee was shocked to find that when her partner of 23 years passed away she did not have an entitlement on intestacy. She urged that "if there is anything you can do to prevent other people suffering the way I have done, please, please try and push forward the change to the law".

4.58 Finally, a consultee described the problems she faced having to litigate after the death of her partner. She thought the law should be brought in line with the twenty-first century and that people should not be "penalised for not being married".

Other comments

4.59 Jo Miles (academic) was "somewhat undecided on this issue". She acknowledged that "it is undoubtedly the case that the general public wants cohabitants to inherit on intestacy". However, she expressed "lingering concerns" about the operation of the law and was particularly concerned to protect the position of administrators. Christopher Jarman (barrister) disagreed with the proposal but said that if it was to go ahead the position of administrators would need to be protected. Withy King LLP (solicitors) had mixed views. Christian Action Research and Education (charity) preferred an opt-in scheme.

4.60 John Lyons suggested "one simple law":

> … cohabiting couples will be regarded as married after 2 years cohabiting and make it a legal obligation to register the date of the start of cohabitation with the register of births, deaths, marriages and cohabiting within one month of it starting.

4.61 Richard Wallington (barrister) suggested that "any proposals of this kind should be detachable from the rest of the proposals for intestacy". Gregory Hill (barrister) supported the proposals but was concerned that a bigamist should not become entitled through the proposed provisions for cohabitants.

4.62 The City of Westminster and Holborn Law Society suggested that a solution to the potential problem of fraud would be for the Non-Contentious Probate Rules 1987 – which determine who is entitled to administer an estate – not to follow the entitlement on intestacy when it comes to cohabitants. In other words, although a cohabitant might be entitled to part of the estate he or she would not be entitled to administer the estate. They noted, however, that the administrator and beneficiary would then have directly conflicting interests, which could be problematic.

4.63 Professor Roger Kerridge (academic) offered an alternative suggestion. He thought that if a cohabiting couple had issue from a previous marriage, they should not inherit from each other on intestacy. If a couple had children from their cohabitation and no other issue, he was not opposed to them having an entitlement but thought that it should be less than that which a married couple would receive. If a cohabiting couple did not have children, he felt that it would probably be better for them not to inherit automatically. If the couple had some children from previous unions and some children from the cohabitation then he thought such cohabitants should have lesser rights than married couples.

4.64 The Association of Muslim Lawyers argued that:

> If there is documentary proof, signed by the cohabitants before independent witnesses that the couple were living together, or for all intents and purposes following the written document as husband and wife at the time of death, we consider that document should be deemed as sufficient evidence of a commitment of an intimate relationship and the sharing of a joint household, hence cohabitants who should qualify for inclusion under the rules. This will assist personal representatives when dealing with a Muslim estate to identify a qualifying surviving cohabitant. The personal representative will simply need to request the nikah contract (Islamic marriage contract/certificate) and this contract should be sufficient evidence.

4.65 The Association suggested that this would help to educate the Muslim community and leaders on the importance of a written nikah contract in an accepted standardised form, preferably registered in a central recognised place.

DEFINITION OF COHABITANTS

4.66 **We provisionally propose that for the purposes of the intestacy rules a cohabitant should be defined as a person who, immediately before the death of the deceased:**

(1) **was living with the deceased as a couple in a joint household; and**

(2) **was neither married to nor a civil partner of the deceased.**

[Consultation Paper paragraphs 4.60 and 8.9]

4.67 Thirty-five consultees addressed this question. Twenty-three consultees broadly supported the proposed definition though many made comments on its practical implications or suggested amendments. Nine consultees stated that they disagreed with the proposed definition and three consultees expressed neither agreement nor disagreement but gave substantive comments.

The responses

Consultees who agreed with the definition

4.68 A number of consultees agreed with the proposed definition, including: Andrew East (legal executive), Francesca Quint (barrister), the Norwich and Norfolk Law Society, Professor Chris Barton (academic), Maxwell Hodge (solicitors), Jo Miles (academic), Farrer & Co (solicitors), the Law Reform Committee of the Bar Council and the majority of those who contributed to the response of Withy King LLP (solicitors).

4.69 The Association of Her Majesty's District Judges and the Money and Property Committee of the Family Justice Council both agreed with the proposed definition, noting that it would accord with the definition proposed in an earlier Law Commission Report (Cohabitation: The Financial Consequences of Relationship Breakdown (2007) Law Com No 307).

4.70 The current definition which is used for cohabitants under the 1975 Act was a reference point for a number of consultees who thought that the proposal was an improvement on it. Giles Harrap (barrister) thought that it usefully avoided arguments about "commitment" under the 1975 Act definition. The Chancery Bar Association also considered the definition to be better than the current 1975 Act definition but noted that it did not specifically exclude couples within the prohibited degrees of relationship for marriage. Sidney Ross (barrister) looked to practical experience under the 1975 Act, and noted that there had been little difficulty with the definition of cohabitant in that Act and so did not anticipate difficulty with this definition.

4.71 There were consultees who expressed agreement with the provisional proposal but still had reservations about aspects of it. In particular, consultees discussed the concept of a "joint household". On the one hand, Resolution (organisation) thought that this element was unnecessary. If a qualification was needed they preferred "in the same household" to be used as it mimics section 1(3) of the Fatal Accidents Act 1976. On the other hand, the Law Society thought that "household" ought to have the same interpretation as it does under the 1975 Act. The Institute of Professional Willwriters focused on how the concept would work, questioning the point at which a joint household would be formed. They were concerned that there would be litigation to test the matter and thought that if the definition was not easy to use in practice then rights for cohabitants when they do not have children could not go ahead. They suggested that further work should be done on the point.

4.72 Another aspect of the definition to which consultees drew attention was the word "couple". The Yorkshire Law Society noted that "living as a couple" could "mean different things for different people" and so there could be some difficulty settling the definition, though overall they thought the definition sensible. Roland D'Costa (probate registrar) also saw the potential for "couple" to cause problems and thought that it should be defined "to exclude persons who merely shared a house and outgoings over a long period of time". Sidney Ross (barrister) thought that the definition should spell out the requirement of a domestic relationship more explicitly than simply the word "couple". He suggested adding the following proviso to the sub-clause (1) of the definition provisionally proposed, which makes explicit a domestic requirement and expressly excludes relationships that are commercial or incestuous:

> Provided that a person shall not be treated as having lived with the deceased as a couple if that person:-
>
> (a) was living with the deceased pursuant to a commercial arrangement; or
>
> (b) was related to the deceased within the prohibited degrees of marriage relationship; or
>
> (c) was under the age of legal marriage at the date of the deceased's death

4.73 Absence from the joint household was of concern to consultees. The Society of Legal Scholars working group were keen to ensure that the definition would cover cohabitants even if one of them was in long-term care, hospital or worked away from the family home for long periods of time. The Money and Property Committee of the Family Justice Council were also concerned about those who go into nursing homes or hospital particularly in the last stages of their life; they wanted wording included in the definition to ensure that cohabitants in such circumstances would not be excluded. The point was also raised in relation to the requirement that any duration requirement be fulfilled by a continuous period of cohabitation.

4.74 The Family Law Bar Association suggested a statutory checklist such as the one in the equivalent New Zealand legislation; they thought it would be "a useful support". However, the City of Westminster and Holborn Law Society agreed with the decision not to include a list of factors for determining cohabitation. Sidney Ross (barrister) also agreed that a statutory checklist could cause problems.

4.75 Paul Saunders (trust administrator) preferred the term "living together as husband and wife" but understood why there could be objections to it. He sought assurance that "living together as a couple in a joint household" was recognised as a clear definition, as he was concerned about the risk of litigation to test the boundaries of any definition which was not sufficiently clear.

Consultees who disagreed with the definition

4.76 Consultees who disagreed were primarily concerned that the definition would catch people it was not intended to catch. Jonathan Larmour thought that this definition was too wide and would end up covering people such as flatmates, which would not be intended. Sheila Campbell (solicitor) thought that "couple" was too wide a concept as it could apply to pairings which were not intended to be included such as blood relatives. She explored the potential problems a court could face in finding the boundaries of what "living as a couple" meant. However, she concluded by stating:

> I do not see why two people who have lived together all their lives should be excluded simply because they would not in law be allowed to marry.

4.77 The Society of Trust and Estate Practitioners thought that the definition was "much too vague" and would lead to litigation. They thought that the definition should be expanded to make clear who was not included in it; for example, home sharers. Cripps Harries Hall LLP (solicitors) gave a different example of those who, they felt, could inadvertently be caught by the definition – young people, such as students living together at university.

4.78 Christopher Jarman (barrister) opposed intestacy rights for cohabitants generally. Though he thought the definition was "not unreasonable if starting in a vacuum" he disagreed with the purpose of the definition and with rights for cohabitants on intestacy in general. He noted that people within the prohibited degrees who would not be eligible for marriage or civil partnership had not been explicitly excluded.

4.79 Convenient Wills (firm) and Donald Jolly (retired solicitor) both disagreed with the proposed definition. Daniel Matthews and the Royal Bank of Scotland Trust & Estate Group thought there was a risk of abuse and legal challenge, the cost of which could cause delay to administration.

Consultees who provided comments on the definition

4.80 A number of consultees provided comments without expressly agreeing or disagreeing with the proposed definition. Christine Riley (probate registrar) suggested a further condition that the cohabitant was neither married nor civil partnered to anyone else. Anne Thom (solicitor) commented:

> I think there should be a set time during which the cohabitation lasted. Clearly cohabiting at the point of death could have very unfair effects on issue of earlier associations… .

4.81 The Judges of the Chancery Division and of the Family Division of the High Court noted that the 1975 Act shows the practical difficulties a definition of cohabitation can face. They were concerned about how the question of whether an applicant satisfied the definition of cohabitant would be resolved if the person was applying for a grant of representation under the Non-Contentious Probate Rules 1987.

Other issues raised

4.82 The Chancery Bar Association were concerned that administrators may be involved "in judgements of fact which may be highly contentious". They suggested a procedure whereby those who would be entitled but for the cohabitant be notified of the pending distribution. If there were no objections then the administrators would be protected even if a dispute later arose.

NO DURATION REQUIREMENT FOR COHABITANTS WITH CHILDREN

4.83 **We provisionally propose that, if the deceased and a surviving cohabitant are by law the parents of a child born before, during or following their cohabitation:**

(1) **there should be no minimum duration requirement for an entitlement on intestacy for the surviving cohabitant; and**

(2) **the surviving cohabitant should be entitled under the intestacy rules to the same entitlement as a spouse.**

[Consultation Paper paragraphs 4.68 and 8.10]

4.84 Thirty-six consultees responded to this provisional proposal. Seventeen agreed, 14 disagreed and five had mixed views or gave comments without expressly agreeing or disagreeing.

The responses

Consultees who agreed with the provisional proposal

4.85 A number of consultees supported the proposal including Nicola Mitchell, the Institute of Professional Willwriters, Christine Riley (probate registrar), Francesca Quint (barrister), Professor Chris Barton (academic), Jan Six, Andrew East (legal executive), Roland D'Costa (probate registrar), the Association of Muslim Lawyers, the City of Westminster and Holborn Law Society and the Law Reform Committee of the Bar Council.

4.86 The Family Law Bar Association agreed with the proposal and made a number of observations. First, they noted that this would be "a major improvement" on cohabitants' rights on separation. Secondly, they recognised that a spousal entitlement will be particularly appropriate if the child is very young and the responsibility for the child is likely to go on for a length of time. Finally, they further recognised that if the child of the cohabitants was older then it would be likely that the cohabitation had been for a length of time anyway.

4.87 Resolution (organisation) noted that this would be consistent with Lord Lester's Cohabitation Bill, which was introduced into Parliament in December 2008 but did not complete all Parliamentary stages. They noted that under the current law a cohabitant with a child would need to make a claim under the 1975 Act in order to get provision and that for small estates this could have a disproportionate cost. The Association of Her Majesty's District Judges also recognised that the proposal would save cohabitants from having to have recourse to the 1975 Act, saying that it "reduces the need for claims".

4.88 Consultees, including the Association of Her Majesty's District Judges, also recognised that the reform along the lines of the provisional proposal would provide certainty for cohabitants. Chris Thomas thought that this would safeguard the future of the children and surviving cohabitant. He stated that for some people marriage is not the only way to bring up children and this proposal would provide such people with some security.

4.89 Resolution (organisation) thought it was appropriate that the entitlement should be the same for a cohabitant as for a spouse as this matched the approach taken in a number of common law jurisdictions. The Money and Property Committee of the Family Justice Council supported the proposals but argued that the surviving cohabitant would need to show that the definition of cohabitant was satisfied at the date of death. Resolution (organisation) pointed out that when a relationship is ended by death rather than separation it can more readily be assumed that "the relationship is still subsisting and that both parties remain committed to it".

4.90 The Chancery Bar Association supported the proposal in principle, but made the following point:

> If a child is born following the cohabitation it is difficult to see how the cohabitant would satisfy the condition that he or she was living with the deceased immediately before his death unless the child was en ventre sa mere at the date of death. Although we do not consider it a fatal disadvantage to the proposal, we note that the rights which the child would have on intestacy would to an extent be taken away by these proposals.

Consultees who disagreed with the provisional proposal

4.91 Donald Jolly (retired solicitor) and Jonathan Larmour disagreed with the proposal. Mr Larmour felt that "parents" was not properly defined but that if "parent" was defined as "solely a blood relative in a caring or guardian role, or by adoption" then the proposal would be "less bad". However, he thought that the courts were best placed to deal with these issues.

4.92 The main objection to the proposal was that its effect would be to give the cohabitant priority in the division of the estate rather than the child, who would take the whole estate under the current intestacy rules. The Judges of the Chancery Division and of the Family Division of the High Court reasoned that a cohabitant could move on to another relationship but the child would always be the child of the deceased and so should inherit from the deceased. Farrer & Co (solicitors) objected to a child being used as a "golden ticket" and thought that the child or children should benefit when the cohabitation did not fulfil a duration requirement. Sidney Ross (barrister) found it hard to understand why the entitlement would be taken from the child of the deceased to be given to the cohabitant with no other requirements.

4.93 The Norwich and Norfolk Law Society also thought that the child inheriting was a greater priority. They argued that a short cohabitation, even if it resulted in a child, would not "have created the financial and practical dependency that can be a consequence of long term cohabitation". They were concerned about children from previous relationships and did not think that a surviving cohabitant should receive the same entitlement as a surviving spouse, as that would undermine the financial commitment of marriage.

4.94 Sheila Campbell (solicitor) disagreed with the proposal. She noted that people may have multiple cohabitations in their lifetime and have children with more than one cohabitant. She thought that it would become "a lottery" as to who would inherit and that children from previous relationships would not be provided for. She also strongly disagreed with cohabitants having the same entitlement as a spouse when they had a child, as she thought that it would undermine marriage and remove responsibility for the wider family.

4.95 Consultees who disagreed because they thought the children of the deceased should inherit, as well as consultees who put forward other objections to the proposal, saw the 1975 Act as the solution for the surviving cohabitant. The Judges of the Chancery Division and of the Family Division of the High Court, the Royal Bank of Scotland Trust & Estate Group and Farrer & Co (solicitors) were among the consultees who suggested this.

4.96 There was a feeling among some consultees that having a child did not, of itself, indicate the necessary connection between cohabitants to justify an automatic entitlement. Christopher Jarman (barrister), Sidney Ross (barrister) and the Society of Legal Scholars working group raised this. Other consultees did not disagree with cohabitants having an entitlement but did not think it should be automatic. The Yorkshire Law Society and the Society of Trust and Estate Practitioners thought that there should be also be a duration requirement for cohabitants with children to qualify for entitlement on intestacy.

4.97 Consultees also raised a number of practical problems. Convenient Wills (firm) argued that the proposal could cause people to not write a will and therefore fail to make proper provision for the care of their children. They said that one of the important aspects of making a will is the appointment of a guardian for one's children. If this proposal was enacted they thought it might dissuade people from making a will – as the intestacy rules would reflect their testamentary wishes – and the important task of appointing a guardian would not be carried out.

4.98 Sidney Ross (barrister) was concerned about the possibility of inheritance rights being accrued after a very short, casual relationship, stating that our proposal would "afford to the surviving party to a casual amour which happened to result in the birth of a child the same rights as a surviving spouse". Mr Ross suggested that the problem of casual relationships be addressed squarely and asked how similar provisions put forward by the New South Wales Law Commission had worked in practice.

4.99 The question of how the law should deal with underage cohabitants who had children was raised by Christopher Jarman (barrister). Mr Jarman did not think the law should encourage procreation before the age of sexual consent, and so he suggested that a child from such a union should not trigger the cohabitant rights proposed. He commented generally that if cohabitants were to have an entitlement on intestacy, he did not think it should be the same as that of a surviving spouse and should not include the statutory legacy, particularly when the cohabitant's benefit would be at the expense of children of the deceased.

4.100 The Society of Legal Scholars working group questioned whether this would indirectly prejudice those in a same sex relationship or those who choose not to have children. They suggested that a better justification for entitlement may be "that the deceased had left the former partner with certain responsibilities to fulfil", although among the examples given of such responsibilities was "the upbringing of and provision for the children".

Other comments

4.101 Some consultees agreed with the proposal in principle but suggested variations. Richard Wallington (barrister) suggested that cohabitants receive 75% of what a spouse would receive so as to give "some primacy to marriage" and to be politically acceptable. Paul Saunders (trust administrator) thought that having children did not necessarily evince a stable relationship but thought that the proposal was not unreasonable if there were two conditions: that there was no surviving spouse and that the child lived with the cohabitants.

4.102 Giles Harrap (barrister) agreed that where the deceased had a child with the surviving cohabitant there should not be a duration requirement but he did not think that the entitlement should be the same as a surviving spouse would receive. In his experience with cohabitants applying under the 1975 Act he could not recall anyone who was unhappy with an order for less than what a spouse would have received in similar circumstances. He advocated removing the "maintenance limit" in 1975 Act cases so that the judiciary would have discretion in making awards but did not think an award equal to that which a surviving spouse could expect should be the default rule.

4.103 The Law Society suggested that if the cohabitation had not continued for five or more years then the surviving cohabitant should be entitled to the personal chattels and half of the estate and any child or children should be entitled to the other half. The Law Society thought this would protect the child's interest when the cohabitation had not lasted the necessary length of time. Maxwell Hodge (solicitors) thought that the proposal did not adequately take account of children from previous relationships who may lose an entitlement to an inheritance.

CONTINUOUS PERIOD OF COHABITATION

4.104 **We provisionally propose that any duration requirement should be fulfilled only by a continuous period of cohabitation.**

[Consultation Paper paragraphs 4.79 and 8.11]

4.105 Thirty-one consultees responded to this proposal. Twenty-seven consultees agreed with the provisional proposal, two consultees expressly disagreed with it and two consultees gave comments without expressly agreeing or disagreeing.

The responses

Consultees who agreed with the provisional proposal

4.106 A number of consultees agreed with this provisional proposal including Jonathan Larmour, Andrew East (legal executive), Francesca Quint (barrister), the Yorkshire Law Society, the Society of Trust and Estate Practitioners, Roland D'Costa (probate registrar), the Westminster and Holborn Law Society, Cripps Harries Hall LLP (solicitors), Withy King LLP (solicitors), the Money and Property Committee of the Family Justice Council, Farrer & Co (solicitors), LV= (organisation) and the Law Reform Committee of the Bar Council.

4.107 The majority of consultees agreed with the provisional proposal. Giles Harrap (barrister) thought it to be "desirable in the interests of certainty". Christopher Jarman (barrister) objected to cohabitants having an entitlement on intestacy but thought that if they were to have one, then the duration requirement should be made up of continuous cohabitation.

4.108 Some consultees agreed with the proposal but made additional suggestions about the detail of when continuous cohabitation would begin and end. Sidney Ross (barrister) suggested a proviso that time when the parties were below the minimum legal age for marriage could not be counted toward their continuous cohabitation. Sheila Campbell (solicitor) suggested that the continuous duration requirement should continue until immediately before death. The Chancery Bar Association recognised that decisions about when continuous cohabitation had started and finished would be difficult and they were keen to protect administrators from liability when having to make these difficult decisions.

4.109 There were concerns about how cohabitation could be proved. The Royal Bank of Scotland Trust & Estate Group agreed with the provisional proposal, "assuming proof is readily available", but warned that "the complexity and costs around this should not be underestimated". Christine Riley (probate registrar) also noted that continuous cohabitation "will not be easy to establish in every case" and foresaw situations were there could be dispute; however, she agreed with the provisional proposal.

4.110 A number of consultees were concerned about the interplay between this requirement and the practical reality that sometimes people are absent from their household for periods of time but have not broken the relationship with that household or with their partner. Resolution (organisation) hoped that:

> … those who were living apart for reasons of work commitments, imprisonment, ill-health or hospitalisation of one or the other, would still be treated as cohabitants for the purpose of this legislation.

They suggested the framework in Lord Lester's Cohabitation Bill be adopted: if the two parties ceased to live together for two periods which did not amount to more than six months then those periods could be disregarded.

4.111 The Association of Her Majesty's District Judges also did not want a temporary absence to disqualify a potential cohabitant. The Norwich and Norfolk Law Society did not think that one partner should lose intestacy rights in the case of "brief and transient" periods of separation, having in mind periods of absence due to domestic abuse. Similar comments were made by Paul Saunders (trust administrator).

4.112 The Law Society noted that in terms of absences from the household, the family provision legislation had been generously interpreted and endorsed a similar approach being taken here. The Family Law Bar Association recognised that there would be hard cases, such as absence due to domestic violence.

4.113 The Judges of the Chancery Division and of the Family Division of the High Court distinguished between "discontinuous cohabitation" and "temporary separation". They thought that discontinuous cohabitation when the cohabitation was interspersed with other cohabitations or marriages could not be counted. On the other hand they thought that temporary separation, such as one partner being in hospital, had been adequately addressed in cases under the 1975 Act.

4.114 Christopher Jarman (barrister) also wanted to ensure that a more than temporary absence did not permit a cohabitant to obtain an entitlement and thought that the continuous requirement was the way to do this. On the issue of "cliff edge results" – when someone falls just short of acquiring an entitlement – Mr Jarman pointed out that this is no more unjust than a situation in which someone dies while engaged shortly before marriage, and that the answer is to make a will.

Consultees who disagreed with the provisional proposal

4.115 Donald Jolly (retired solicitor) disagreed with the proposal; so did Professor Chris Barton, who raised the issue of absence from the household. He drew the analogy with married couples and said that if one partner was working away, this would not necessarily demonstrate an absence from the relationship, just as a married person's absence from the household does not equate to absence from the marriage.

Consultees who provided comments on the provisional proposal

4.116 Consultees reiterated their concerns about evidence and proving the elements of the cohabitation. The Family Education Trust thought that this, combined with the difficulties in defining cohabitation, would be "fraught with problems". The Institute of Professional Willwriters were concerned that there could be problems defining "continuous" and gave the example of one party storming out after an argument and staying with a friend for a while.

COHABITANTS WHO DO NOT HAVE A CHILD TOGETHER

4.117 **We provisionally propose that, if the deceased and a surviving cohabitant had not had a child together, the surviving cohabitant should be entitled under the intestacy rules to the same entitlement as a spouse, if the cohabitation had continued for at least five years before the death.**

[Consultation Paper paragraphs 4.80 and 8.12]

4.118 Forty consultees responded to this question. Eighteen agreed with the provisional proposal, nine suggested alternative duration requirements, eight disagreed with the proposal and five had mixed views or provided comments without expressing a firm view.

The responses

Consultees who agreed with the provisional proposal

4.119 A number of consultees agreed with the provisional proposal, including: Nicola Mitchell, Jan Six, Francesca Quint (barrister), the Yorkshire Law Society, the Society of Trust and Estate Practitioners, Cripps Harries Hall LLP (solicitors), the Law Society, Maxwell Hodge (solicitors), Paul Saunders (trust administrator), Farrer & Co (solicitors), the Law Reform Committee of the Bar Council and the Institute of Professional Willwriters (who supported this proposal subject to concerns they raised in relation to earlier proposals).

4.120 The Family Law Bar Association thought that after five years a cohabitant should be entitled to the same as a spouse as they would have "demonstrated commitment to the relationship, and an entanglement of financial arrangements, creating a genuine nexus in the event of death". Andrew East (legal executive) noted that any duration requirement is likely to be arbitrary but thought that five years was reasonable.

4.121 Resolution (organisation) supported the proposal as it was in line with the amendments made to Lord Lester's Cohabitation Bill at the Committee stage in the House of Lords. They explained that although they had originally supported a two-year duration requirement, they had predicted that there would be insufficient support for that, and so had accepted a five-year requirement.

4.122 Consultees recognised the connection with the 1975 Act. The Family Law Bar Association noted that children from former relationships would be disinherited and that 1975 Act claims, particularly for adult children, could be difficult. The Chancery Bar Association noted that there may continue to be disputes over when relationships started but that the issues for court applications would be much narrower than if cohabitants continued to have to rely on the 1975 Act. Although they agreed with the proposal, the Royal Bank of Scotland Trust & Estate Group repeated their warning about the potential for costs that could result from allowing cohabitants to receive an entitlement.

4.123 The Money and Property Committee of the Family Justice Council thought that five years was an appropriate requirement for an automatic entitlement, since the duration requirement for a discretionary claim under the 1975 Act is two years. They noted that cohabitants can always opt out by making a will.

Other suggested duration requirements

4.124 A number of consultees suggested alternative duration requirements. Sidney Ross (barrister) thought that there should be a two-year duration requirement regardless of whether the cohabitants had children. Professor Chris Barton (academic) suggested "a flat two years" for all cohabitants to provide a consistent approach which would be in line with public opinion. Roland D'Costa (probate registrar) also suggested a two-year requirement and added that the cohabitants could always make a will.

4.125 Richard Wallington (barrister) thought the proposals were too complicated and suggested an alternative scheme.

> I would have a single qualifying cohabitation period where there are no children of the cohabitation of say three years, which gives the personal chattels and 50% of a spouse's other rights where there are descendants, siblings, descendants of deceased siblings, or parents of the deceased, and otherwise the whole of a spouse's entitlement.

4.126 The Association of Her Majesty's District Judges commented that this was "a matter of policy". They preferred a three-year duration requirement but gave "tentative agreement" on the basis that our proposals in relation to the 1975 Act were also implemented.

4.127 Other consultees advocated a longer cohabitation requirement than the provisional proposal suggested. Christopher Jarman (barrister) gave his views subject to his general overriding objection to the proposals. Mr Jarman thought that a cohabitant should receive no more than a third or a half of the spousal entitlement and that a duration requirement of seven years was preferable. Graham (surname not supplied) thought that the duration requirement should be at least 10 years; the City of Westminster and Holborn Law Society said the same, "in view of the great variation in reasons why cohabitants may have chosen not to get married".

4.128 The Association of Muslim Lawyers did not think that there should be a duration requirement at all but thought that "the couple should accept the consequences of living together which includes the consequences in death". They suggested that a nikah contract (an Islamic marriage certificate) should be adequate evidence of cohabitation for the surviving cohabitant to receive the same entitlement as a spouse and noted that cohabitants could always make a will if they did not accept this.

Consultees who disagreed with the provisional proposal

4.129 Jonathan Larmour and Donald Jolly (retired solicitor) disagreed with the proposal; the Family Education Trust did not see any need for further legislation for cohabitants as they thought the 1975 Act adequate.

4.130 There was concern about disinheriting children of a previous relationship both from consultees who on balance agreed with the proposal and those who disagreed. Sheila Campbell (solicitor) strongly disagreed with the proposal and was concerned that it may not be in accordance with people's wishes, on the basis that some cohabitants with children from a previous relationship may not want their children disinherited. Convenient Wills (firm) made similar comments, as did Anne Thom (solicitor), though Ms Thom only stated disagreement with the entitlement being the same as a spouse, not with there being an entitlement. As a solution, Ms Campbell suggested that a trust could be used to provide housing for the cohabitant, "protecting assets ultimately for the first deceased's children".

4.131 The problems associated with proving cohabitation were repeated as an argument against the proposal. Giles Harrap (barrister) highlighted the number of cases which had come before the courts under the 1975 Act to establish when cohabitation had started; he did not think that personal representatives should have to determine when cohabitation commenced for the purposes of distribution on intestacy. Sheila Campbell (solicitor) was also concerned about the difficulty of proving cohabitation and the potential for "spurious claims".

Other comments

4.132 The Society of Legal Scholars working group received mixed views; one of its members disagreed, another suggested a shorter period, while a third thought that if five years was adopted a graduated scheme would be necessary.

4.133 The Judges of the Chancery Division and of the Family Division of the High Court highlighted the potential difficulty of ascertaining when "such a dynamic and organic thing as a relationship" satisfied the legal definition of cohabitation, especially when events will have happened five years ago and one party is dead. The Association of Contentious Trust and Probate Specialists said that they did not have a view on whether the duration requirement should be two or five years but thought that there would be evidential problems in both cases.

4.134 Jo Miles (academic) commented generally that having a duration requirement is "the most reliable, concrete proxy measure for commitment in these cases". She noted that there would be hard cases wherever the line was drawn in terms of the length of a duration requirement but saw the 1975 Act as the "discretionary regime able to respond to the facts of hard cases".

GRADUATED ENTITLEMENT

4.135 **We provisionally propose that, if the cohabitation had continued for between two and five years before the death, and the couple had not had a child together, the surviving cohabitant should be entitled under the intestacy rules to 50% of the amount which a spouse would have received from the estate.**

[Consultation Paper paragraphs 4.85 and 8.13]

4.136 Thirty-six consultees responded to this proposal. Twenty-one disagreed, of whom 13 disagreed completely, three disagreed with the details of the suggested duration or entitlement and five disagreed and made alternative suggestions. Twelve consultees agreed with the proposal, while three had mixed views or simply provided comments.

The responses

Consultees who disagreed with the provisional proposal

4.137 Consultees who disagreed with the proposal included Donald Jolly (retired solicitor), Convenient Wills (firm), Cripps Harries Hall LLP (solicitors) and the Law Society who, although in support of an entitlement after five years, did not support this provisional proposal.

4.138 The Society of Trust and Estate Practitioners did not disagree with the substance of the proposal but disagreed with the timing. They thought that the definition of cohabitant needed to become more familiar; practitioners and the courts needed to get used to identifying cohabitation before automatic entitlement on intestacy for a shorter period of cohabitation could be considered.

TOO SHORT A DURATION REQUIREMENT

4.139 Two years was thought by some to be too short a duration requirement for receiving an entitlement, even if the amount received was not the full spousal entitlement. Many of those who opposed the proposal did so on the basis that cohabitants of less than five years had not sufficiently cemented their relationship to justify an entitlement on intestacy. The Law Reform Committee of the Bar Council thought it would be wrong for the law to assume that relationships between two and five years were "sufficiently serious and enduring to justify sharing in the estate" as this may not be the case.

4.140 The Judges of the Chancery Division and of the Family Division of the High Court said:

> Even if succession rights are to be conferred by the birth of a child or five years' cohabitation we would consider it wrong to confer reduced rights upon the completion of two years' cohabitation, as a sort of "second prize". Such arrangements are quite likely to be purely transient, neither party acknowledging any commitment, and each party contemplating "moving on". They do not seem comparable in any way with the relationships characterised by the status of being married or in a civil partnership.

The Chancery Bar Association argued that relationships of between two and five years should not qualify for an entitlement as "in general such a relationship does not display sufficient seriousness or commitment".

4.141 In contrast, Giles Harrap (barrister) thought that a two-year minimum requirement could give rise to unnecessary injustice. He was of the opinion that, while the two-year requirement may be appropriate on lifetime separation, it could cause injustice for entitlement on death. Death is often unexpected, it "can and does cut short very committed relationships in dire circumstances and in some cases it is the cutting short that gives rise to hardship". In contrast, a cohabitation of less than two years which ended during both parties' lifetime was, he said, "a spent force".

4.142 A related concern was that such a provision could have wider reaching consequences than those intended. Jonathan Larmour thought that two years was too short a duration requirement and that it could catch the wrong people. He thought the proposal "could easily cause flatmates, lodgers, or friends to be inappropriately considered beneficiaries (very probably at the expense of more relevant but not cohabiting beneficiaries)". The Chancery Bar Association were concerned that people could get caught by this provision who would never have intended to be, such as students at university.

UNNECESSARY COMPLEXITY

4.143 A number of consultees thought the proposals were simply too complicated. Resolution (organisation) thought that this would add "another layer of complexity". Richard Wallington (barrister) agreed and the Money and Property Committee of the Family Justice Council also thought it "added unnecessary complexity". Giles Harrap (barrister) also thought that a graduated scheme would cause "unnecessary difficulties and disputes".

THE 1975 ACT

4.144 Many consultees who disagreed with the proposal thought that the 1975 Act was the appropriate route for cohabitants who did not have children and did not meet the suggested five-year duration requirement to receive a full spousal entitlement. Resolution (organisation), the Chancery Bar Association, the Law Society and the Royal Bank of Scotland Trust & Estate Group all saw the remedy for this category of cohabitants as being a claim under the 1975 Act, not an automatic entitlement on intestacy.

4.145 The Judges of the Chancery Division and of the Family Division of the High Court thought that a 1975 Act claim would be the appropriate mechanism for a party to a short-term cohabitation who needed to "adjust to the changed circumstances" caused by the death. The Money and Property Committee of the Family Justice Council made similar comments, saying that cohabitants of less than five years who did not have children could "fall back on the Inheritance Act".

Consultees who disagreed with the detail of the provisional proposal

4.146 A number of consultees directed their comments to the details of the proposal; in particular the duration requirement and the entitlement proposed.

4.147 Anne Thom (solicitor) suggested that this category of cohabitant should be entitled to 25% of the deceased's estate, to ensure an entitlement for any children of the deceased who were not children of the cohabitant. Maxwell Hodge (solicitors) were also concerned about other beneficiaries; they thought that cohabitants in the circumstances suggested by the provisional proposal should have a minimum entitlement of between 35% and 50% depending on the "family circumstances" of the deceased.

4.148 Christopher Jarman (barrister), subject to his overall disagreement with the proposals for cohabitants, thought that a duration requirement of at least three years instead of two was preferable. He also suggested that any entitlement:

> … should not itself be expressed by reference to a spousal entitlement, but should be half what is provided for a cohabitant after the longer period referred to in paragraph 4.80 [of the Consultation Paper] – which itself should be substantially less that that attainable by marriage.

Alternative suggestions

4.149 Some consultees who disagreed with the provisional proposal made their own suggestions. Sidney Ross (barrister) and Roland D'Costa (probate registrar) suggested a two-year requirement for the cohabitant to receive the same entitlement as a spouse. Professor Chris Barton (academic) also suggested a "flat two years" requirement, "in the hope that that period would resonate with the public".

4.150 Richard Wallington (barrister) suggested a single qualifying cohabitation period of three years when there are no children. He thought that the surviving cohabitant should then be entitled to the personal chattels and 50% of a spousal entitlement if there were other potential beneficiaries and everything where no such beneficiaries exist. Giles Harrap (barrister) questioned the use of duration requirements as a measure of the quality of a relationship and also questioned the choice of 50% as an entitlement. He suggested a two-thirds entitlement for all cohabitants.

Consultees who agreed with the provisional proposal

4.151 Consultees who agreed with the provisional proposal included the Institute of Professional Willwriters, Nicola Mitchell, Francesca Quint (barrister), Farrer & Co (solicitors), the Yorkshire Law Society, Paul Saunders (trust administrator), Jo Miles (academic) and the Association of Her Majesty's District Judges. The latter stated that if provision for cohabitants was thought to be appropriate then they agreed with the proposal. Those who agreed with the provisional proposal tended to state their agreement without giving extensive reasoning.

4.152 Andrew East (legal executive) thought this proposal an appropriate way to recognise long-term cohabitation. The City of Westminster and Holborn Law Society agreed with the proposal although they suggested that a more finely graduated system may be appropriate. The Association of Muslim Lawyers added a caveat to their support, suggesting that the surviving cohabitant should not be entitled to the deceased's personal chattels but should be allowed to choose items up to the value of his or her entitlement.

4.153 The Family Law Bar Association acknowledged that cohabitants who just miss the two-year qualifying period or those who fall just short of the five-year duration requirement to attain a full spousal entitlement could feel arbitrarily cut off. The Association felt that in these cases the 1975 Act could provide a safety net.

Other comments

4.154 Members of the Society of Legal Scholars working group had mixed views on the proposal. One suggestion was that there should be a graduated entitlement. Another member thought that this could cause complications if there were multiple cohabitants.

PERSONAL CHATTELS (FIRST PROVISIONAL PROPOSAL)

4.155 **We provisionally propose that if the deceased and a surviving cohabitant are by law the parents of a child born before, during or following their cohabitation, or the cohabitation had continued for at least five years before the death, the surviving cohabitant should be entitled to the deceased's personal chattels outright.**

[Consultation Paper paragraphs 4.95 and 8.14]

4.156 Sixteen consultees agreed with the provisional proposal and six consultees gave qualified agreement. Seven consultees disagreed with the proposal and one consultee made an alternative suggestion.

The responses

4.157 Some consultees dealt with the proposals relating to cohabitants and personal chattels (see paragraphs 4.95 and 4.96 of the Consultation Paper) together as one issue while others made comments specifically directed at each proposal. Often consultees' comments were subject to their previously expressed opinions about the proposals for cohabitants generally or were additions to the alternative suggestions they had made in relation to earlier proposals.

4.158 The nature of chattels was emphasised by many consultees. For example, Christopher Jarman (barrister) described them as "one of the most potent breeding-grounds for dispute and resentment that there is". Other consultees made similar comments noting that the sentimental value of personal chattels will often far outweigh their monetary value and can raise emotions during the administration of estates.

Consultees who agreed with the provisional proposal

4.159 Consultees in agreement with the proposal included the Institute of Professional Willwriters, Andrew East (legal executive), Francesca Quint (barrister), the Yorkshire Law Society, Anne Thom (solicitor), the Law Society, the Family Law Bar Association, Paul Saunders (trust administrator), Farrer & Co (solicitors), the Law Reform Committee of the Bar Council and Jo Miles (academic).

4.160 Consultees who agreed with the proposal recognised the sensitivities surrounding personal chattels but saw this as a reason to keep things simple. The Money and Property Committee of the Family Justice Council thought the provisional proposal was simple and straightforward, although they acknowledged that the issue "can be very emotional and never cost effective". The Chancery Bar Association thought the proposal could prevent disputes and litigation since often personal chattels are not worth a great deal in monetary terms but "can generate strong feelings in a dispute". They too supported the clear allocation of the personal chattels.

4.161 Resolution (organisation) thought that further clarity was provided by the fact that the proposal was consistent with the spouse analogy. Sidney Ross (barrister) was of the opinion that cohabitants with a right on intestacy ought to have the same right as a surviving spouse to the personal chattels. He looked to the current benefits of the surviving spouse's entitlement to the personal chattels and thought there were similar benefits to this proposal:

> The great virtue of the provision which entitles the surviving spouse to the personal chattels is that it avoids disputes over who owned what and who should have what. In addition it is a sensible rule of convenience because, if the surviving spouse is to continue in occupation of the matrimonial home the expectation would be that the use and enjoyment of the personal chattels … should go with the occupation of the home.

Christine Riley (probate registrar) thought it should be all or nothing: the cohabitant should receive the full spousal entitlement, including the entitlement to personal chattels.

Consultees who gave qualified agreement to the provisional proposal

4.162 Some consultees agreed with the provisional proposal but subject to their previous comments about the cohabitation proposals generally. The Association of Her Majesty's District Judges agreed, subject to their earlier suggestion that the duration requirement for entitlement should be three years; the City of Westminster and Holborn Law Society also agreed, subject to their suggestion that the duration requirement be increased.

4.163 Richard Wallington (barrister) proposed a different qualifying duration requirement but also thought that the surviving cohabitant should get all the personal chattels. He commented that "disputes about chattels are the administration of estates equivalent of a boundary dispute, i.e. strong emotions and costs out of all proportion to the values at stake".

4.164 Christopher Jarman (barrister), subject to his overall view on the proposals relating to cohabitants, said that he would have less objection to personal items used in the joint household passing to the surviving cohabitant. He went on to say that if this meant all the personal chattels then so be it. He noted that any disappointment felt by the deceased's family would be no different than if the deceased had married or left the chattels to the cohabitant in a will.

4.165 Two consultees agreed with the proposal but only in part. The Society of Trust and Estate Practitioners and Maxwell Hodge (solicitors) both thought that a cohabitant who met the five-year duration requirement should be entitled to the personal chattels outright, but did not think that a cohabitant who had a child with the deceased should have an automatic entitlement to the chattels without satisfying a duration requirement. Maxwell Hodge (solicitors) thought that the proposal at paragraph 4.96 of the Consultation Paper – that the survivor of a cohabitation that lasted between two and five years should have a right of appropriation to the value of his or her entitlement – should apply to all cohabitants.

Consultees who disagreed with the provisional proposal

4.166 Consultees who disagreed with the proposal included Jonathan Larmour, Donald Jolly (retired solicitor) and Convenient Wills (firm) who had found that in their experience most cohabitants wanted their personal chattels left to their family. The Family Education Trust said:

> We question the wisdom of this proposal. Personal chattels can have great personal family significance. Therefore we think it best that the distribution of the personal chattels of a deceased person should be determined by members of that person's immediate family or closest relatives.

4.167 The sentimental value of personal chattels was cited by those in favour of the proposal as a reason for simplicity. However, sentimental value was also used as an argument against the proposal. Sheila Campbell (solicitor) used the example of an Olympic medal won by the deceased's grandfather and passed down through the family: she thought that it would be problematic for a cohabitant to receive it instead of the deceased's children. She suggested that inherited personal chattels should devolve to the deceased's children while the cohabitant could be entitled to any personal chattels acquired during the relationship.

4.168 Other consultees disagreed with the provisional proposal because they thought that there were other solutions available. The Royal Bank of Scotland Trust & Estate Group thought that the 1975 Act was an appropriate means for cohabitants to claim an interest in a deceased partner's estate; alternatively they could marry or enter into a civil partnership. The Judges of the Chancery Division and of the Family Division of the High Court thought that personal chattels in this situation would be best distributed by agreement or using the 1975 Act which provides "a more sensitive instrument to deal with fraught cases".

Other comments

4.169 Giles Harrap (barrister) suggested that the cohabitant should receive two-thirds of the deceased's personal chattels. On a practical note he thought that the selection of chattels should be conducted by alternating choice, which we take to mean that the cohabitant and any other entitled beneficiaries would each choose a chattel in turn until their entitlement had been satisfied.

PERSONAL CHATTELS (SECOND PROVISIONAL PROPOSAL)

4.170 **We provisionally propose that if the cohabitation had continued for between two and five years before the death, and the couple had not had a child together, the surviving cohabitant should be entitled to exercise a right of appropriation over the deceased's personal chattels, up to the value of his or her entitlement under the intestacy rules.**

[Consultation Paper paragraphs 4.96 and 8.15]

4.171 Thirty-two consultees addressed this question. Sixteen disagreed with the proposal, five of them because they thought that cohabitants should have a greater entitlement to the personal chattels. Eleven agreed with the proposal, two agreed subject to their earlier comments on the proposal generally and three consultees made alternative suggestions or did not have a decisive view either way.

The responses

Consultees who agreed with the provisional proposal

4.172 Consultees who agreed with the provisional proposal included the Institute of Professional Willwriters, Andrew East (legal executive), Francesca Quint (barrister), Anne Thom (solicitor), the Yorkshire Law Society, Cripps Harries Hall LLP (solicitors), the Family Law Bar Association, Farrer & Co (solicitors), the Association of Muslim Lawyers and Maxwell Hodge (solicitors).

4.173 The City of Westminster and Holborn Law Society and the Association of Her Majesty's District Judges agreed with the provisional proposal, subject to their previous comments, in particular on the provisional proposal at paragraph 4.85 of the Consultation Paper that this category of cohabitants should receive an entitlement to 50% of the amount which a spouse would have received.

Consultees who disagreed with the provisional proposal

CONSULTEES WHO DISAGREED WITH THE PROPOSED ENTITLEMENT TO THE PERSONAL CHATTELS

4.174 Consultees who disagreed with the proposal included Jonathan Larmour, Donald Jolly (retired solicitor), the Society of Trust and Estate Practitioners, Convenient Wills (firm) and the Money and Property Committee of the Family Justice Council who thought that it was "an unnecessary complication".

4.175 The Law Society, the Chancery Bar Association and Resolution (organisation) disagreed with this category of cohabitants having an entitlement on intestacy at all and so also disagreed with their receiving the personal chattels. But the Chancery Bar Association did add that if such cohabitants were to be granted rights then they would support this proposal "as being a sensible way of ensuring that cohabitants could keep the deceased's chattels" and "to ward off disputes".

4.176 The Judges of the Chancery Division and of the Family Division of the High Court preferred the chattels to be distributed by agreement between the parties or by court order. However, they thought the proposal could be workable if confined to chattels acquired during the relationship so as to avoid "spiteful appropriation".

4.177 Sheila Campbell (solicitor) objected in particular to inherited personal chattels going to a cohabitant instead of passing to the deceased's family. The Royal Bank of Scotland Trust & Estate Group reiterated their argument that cohabitants should seek remedies through the 1975 Act or should get married or enter into a civil partnership if they want an entitlement on intestacy.

CONSULTEES WHO THOUGHT THAT THE ENTITLEMENT SHOULD BE GREATER

4.178 Some consultees, such as Paul Saunders (trust administrator), disagreed with the proposal because they thought that cohabitants who qualified for an entitlement on intestacy should be entitled to the personal chattels outright. Sidney Ross (barrister) thought that it would avoid disputes over who owned what in the shared home, the value of items and the sentimental attachment felt by other beneficiaries. He was also concerned that using the proposed appropriation method would diminish a cohabitant's entitlement and so lead to more 1975 Act claims.

4.179 Christopher Jarman (barrister) said that the provisional proposal would permit a cohabitant to appropriate items of low monetary value but of great sentimental value to another family member.

4.180 While some thought that a full entitlement was necessary on the basis of practical problems with the proposal, others thought that it was required on principle. Christine Riley (probate registrar) said that cohabitants who satisfied the necessary test should have the full rights of a spouse. She explained:

> In a married relationship the spouse's entitlement to personal chattels and the statutory legacy is not dependant upon the length of the relationship, nor upon having a child. The co-hab is treated here as a second class citizen or poor relation, and after a short time, there will be pressure to raise the entitlement to the same level as a spouse. Why not grasp the nettle and do it now?

Richard Wallington (barrister) also thought that a qualifying cohabitant should receive all the personal chattels.

Other comments

4.181 Two consultees provided other suggestions. Jo Miles (academic) queried whether, for this category of cohabitants, the entitlement to chattels could be limited to furniture, household contents and gifts from the survivor to the deceased. However, she also recognised that this could become too complicated. Giles Harrap (barrister), who favoured a single qualifying cohabitation requirement, thought that cohabitants who met that requirement should be entitled to two thirds of the deceased's personal chattels which should be selected by alternating choice.

COHABITANTS AND OTHER RELATIONSHIPS

4.182 **We provisionally propose that a cohabitant should have no entitlement under the intestacy rules if the deceased left a surviving spouse.**

[Consultation Paper paragraphs 4.107 and 8.16]

Introduction

4.183 Thirty-six consultees responded to this proposal. Twenty-five consultees agreed, for various reasons, that a cohabitant should have no entitlement under the intestacy rules if the deceased left a surviving spouse. Ten consultees were in broad disagreement with this proposal, and gave a range of alternative suggestions. One consultee expressed neither agreement nor disagreement, but made a general comment on this proposal in the context of the rest of the section on cohabitation.

The responses

Consultees who agreed with the provisional proposal

4.184 Twenty-five consultees were in overall agreement with the proposal. However, whilst some were wholeheartedly in favour on grounds of principle, others were swayed more by issues of practicality, and were reassured by the availability to cohabitants of a claim under the 1975 Act.

UPHOLDING THE STATUS CONFERRED BY MARRIAGE

4.185 Some consultees felt that to allow a cohabitant an entitlement under the intestacy rules when the deceased left a surviving spouse would be inconsistent with the usual consequences where one spouse dies intestate, and might therefore undermine the significance of marriage. The Judges of the Chancery Division and of the Family Division of the High Court described marriage as "a publicly acknowledged formal legal relationship with known legal consequences". Sidney Ross (barrister) referred to the "general principle that the incidents of marriage subsist until the marriage is terminated by decree absolute or otherwise". Resolution (organisation) put the point as follows:

> As a matter of principle, it must be right that the intestacy rules should not be an exception to the general rule about the legal consequences of a marriage or civil partnership not ended by divorce or dissolution.

4.186 Christopher Jarman (barrister) went further, arguing that to entitle a cohabitant where there is also a surviving spouse might have a negative impact on the spouses' marriage during the intestate's lifetime. He said that to grant such an entitlement "would do nothing to promote potential reconciliation between spouses whose estrangement might yet prove to be only temporary."

SIMPLICITY AND PRACTICABILITY OF ADMINISTRATION

4.187 Many consultees who were in favour of the proposal felt that it would be administratively expedient to lay down a broad rule preventing cohabitants from inheriting under the intestacy rules where the intestate left a surviving spouse. The Society of Trust and Estate Practitioners emphasised "the need to protect the administration of intestate estates from unnecessary complication" and Giles Harrap (barrister) said that the proposal "provides a simple rule for personal representatives to operate".

4.188 Some consultees expressed concern that the wrong result might be reached in individual cases, but still endorsed the proposal on grounds of administrative ease. The Chancery Bar Association thought that the proposal would "create hard cases", but felt there to be "no practical solution" to this problem. The Money and Property Committee of the Family Justice Council said that the proposal:

> Seems harsh but without this the administrators of an estate would have great difficulty in dealing with the administration and deciding between the claims.

THE OPPORTUNITY FOR COHABITANTS TO BRING A CLAIM UNDER THE 1975 ACT

4.189 Many consultees who agreed with the proposal argued that, where there is a cohabitant and a surviving spouse, it is reasonable to deny an automatic entitlement to the cohabitant because the cohabitant may be able to claim part of the estate under the 1975 Act. Giles Harrap (barrister) thought that "the situation is best addressed under the 1975 Act if necessary". Dr Mary Welstead (academic) said: "Cohabitants already have ample rights to make a claim under the Inheritance Act 1975, and the court is in a far better position to determine need in those cases."

4.190 Other consultees did not endorse the 1975 Act in quite such positive terms, but still saw it as an acceptable default option. Farrer & Co (solicitors) noted that "in any event the co-habitant can apply under the 1975 Act". The Law Reform Committee of the Bar Council said that cases where there is a surviving spouse and a cohabitant "would have to be dealt with as under the current legislation". The Chancery Bar Association expressed reservations, but could "see no alternative to those cases being dealt with as they now are under the 1975 Act".

THE NEED TO ENCOURAGE COHABITANTS TO MAKE A WILL

4.191 Lastly, some consultees thought that those who cohabit with someone who is married would be best protected by encouraging their partners to make a will. The Money and Property Committee of the Family Justice Council said that "the person should really be making a Will in these circumstances". Noting the particularly vulnerable position of some Muslim women who are married only by religious contract, the Association of Muslim Lawyers submitted that:

> The responsibility should be on the parties to take active steps to organise their financial affairs accordingly, i.e. the preparation of a will. The traditionally weaker party should be made aware of the importance of a will and / or the civil registration of the marriage (in general) … .

Consultees who disagreed with the provisional proposal

4.192 The consultees who opposed the proposal highlighted the often complex nature of situations where the intestate leaves a spouse and a cohabitant. As well as giving reasons for their views, many also proposed methods of apportionment for such situations.

THE NATURE OF THE MARRIAGE

4.193 Several consultees were concerned that the proposal did not take sufficient account of the range of circumstances that might have contributed to the subsistence of the marriage. Andrew Cannon questioned what should happen in a situation where the surviving spouse "has refused a divorce, or delayed proceedings". The Family Law Bar Association noted that "'Fossil' marriages are not unknown". The Institute of Professional Willwriters made a similar point:

> We disagree with this proposal because it makes no attempt to recognise the reality of a broken relationship or a relationship which has 'moved on'.

FAIRNESS TO COHABITANTS

4.194 Consultees were also concerned about fairness to cohabitants. Paul Saunders (trust administrator) called the proposal "an unduly harsh proposal which appears to penalise the co-habitee for no clear reason" and suggested that as "the co-habitation may have been ongoing for many years … it would therefore appear to be a potential contravention of the surviving co-habitee's human rights for the deceased's interest in the co-habiting "family" home to pass to the spouse". The Association of Her Majesty's District Judges thought the proposal "comes at the expense of fairness". The Yorkshire Law Society said:

> We believe this would not work. What if the cohabitant had lived with the deceased for say 10 years prior to the death and the deceased had for whatever reason not finalised their divorce?

LOGICAL FIT WITH OTHER PROPOSALS

4.195 Gregory Hill (barrister) thought that because the Consultation Paper suggested a general improvement in the position of cohabitants, it would be logical to extend to them rights on intestacy even where the intestate left a surviving spouse. It seemed to him that:

> If the law is to acknowledge that cohabiting relationships within [Consultation Paper paragraphs] 8.10 – 8.13 are significant enough to justify succession on intestacy, that is so despite the continued "paper" existence of a marriage of one party, if that marriage is no longer of any real significance.

SUGGESTED ALTERNATIVES

4.196 Consultees who disagreed with the proposal suggested a range of amendments to the intestacy rules, which would attempt to balance the needs of the cohabitant and the surviving spouse.

4.197 Gregory Hill (barrister) thought that a spouse should "take in priority to a cohabitant who qualifies under [Consultation Paper paragraphs] 8.10 – 8.13 if, but only if, at the intestate's death he/she was to any extent maintaining or being maintained by that spouse". He added that "a marriage in respect of which a decree nisi has been pronounced should no longer 'count' for this purpose".

4.198 The Institute of Professional Willwriters suggested that where divorce proceedings have been begun and not abandoned, "that should end the entitlement of the surviving spouse". They went on to say that:

> In all other cases … the starting point … should be that the estate is dealt with as if the deceased left more than one cohabitant, with each cohabitant and the surviving spouse taking an equal share, with the share of the cohabitant being limited if need be as a result of there being no children of the deceased.

4.199 Cripps Harries Hill LLP (solicitors) recommended that "spouses should not inherit where there has been a period of non-cohabitation of two years or more". However, where the intestate was leading a "double life" and living with both a cohabitant and a spouse then "provision from the deceased's estate should be divided equally between them".

4.200 Paul Saunders (trust administrator) made the following suggestions:

> Cohabitation less than 2 years – all to spouse
>
> Cohabitation 2-5 years, two-thirds to spouse and one-third to cohabitee
>
> Cohabitation more than 5 years, or there is a child of the co-habitees – half and half.

4.201 Other consultees did not offer specific models, but supported some form of equitable division. The Association of Her Majesty's District Judges favoured "some mechanism of sharing the 'spouse' benefit under the intestacy rules". The Family Law Bar Association suggested "that there should … be an equitable apportionment" between the cohabitant and the surviving spouse.

Other comments

4.202 Convenient Wills (firm) did not express a clear view as to the desirability of the proposal, though it declared that the proposal "clouds an already 'muddy' arrangement further'". It added:

> Is a cohabitee to qualify for any entitlement. On the one hand you are arguing 'Yes, automatically' and then with this proposal you are arguing 'No, if they are already married'.

MORE THAN ONE COHABITANT

4.203 **We invite consultees' views as to the approach to be taken where more than one cohabitant satisfies our proposed conditions for eligibility under the intestacy rules.**

[Consultation Paper paragraphs 4.111 and 8.17]

4.204 There were 31 responses to this provisional proposal, offering a range of views.

The responses

4.205 Three main arguments emerged from the range of responses we received to this provisional proposal. First, that if there was more than one cohabitant eligible under our definition, the class should share the entitlement for one cohabitant equally. Secondly, that the 1975 Act should be the primary remedy in this situation or it should be the fall-back remedy if sharing the entitlement equally left one cohabitant inadequately provided for. Finally, some consultees felt that the potential problem of multiple cohabitants was a further reason cohabitants should not have any entitlement on intestacy. Consultees also gave some other more general comments.

4.206 Consultees thought that this situation was not one which would arise often. For example, Giles Harrap (barrister) commented that in his experience he had never come across a situation when two or more people satisfied the requirement for cohabitation under the 1975 Act in the same case. The Chancery Bar Association and Jo Miles (academic) noted that the requirement of a joint household under our proposed definition would make it difficult for more than one cohabitant to qualify. Other consultees who suggested that this situation would be rare included Resolution (organisation), the Association of Her Majesty's District Judges, the Law Society, Gregory Hill (barrister) and the Law Reform Committee of the Bar Council.

Equal sharing

4.207 The Institute of Professional Willwriters thought that all those who met the criteria to qualify as a cohabitant should share equally the entitlement that a single qualifying cohabitant would have had; the Law Society, the Family Law Bar Association, the Association of Her Majesty's District Judges, Sidney Ross (barrister), Farrer & Co (solicitors), Giles Harrap (barrister), Richard Wallington (barrister) Andrew East (legal executive), the Judges of the Chancery Division and of the Family Division of the High Court and Gregory Hill (barrister) were also of this view.

4.208 One of the reasons why consultees supported equal sharing was that "the rules should be kept as clear and simple as possible for the administrators of the estate" (Resolution (organisation)). Richard Frimston (solicitor) looked to the current law on polygamous marriage and thought that it justified multiple cohabitants sharing the entitlement. He said:

> In the same manner that polygamous marriages are respected under the 1975 Act, multiple cohabitants should be entitled equally (if there is no spouse or civil partner).

4.209 On the other hand, the Chancery Bar Association did not agree that equal sharing was the appropriate solution as they thought that it did not allow for the specific circumstances of the multiple cohabitations to be adequately taken into consideration; for instance, one cohabitant may have been with the deceased for 20 years and the other only five years.

The 1975 Act

4.210 The Chancery Bar Association thought that the cohabitant whose relationship started first should be entitled under the intestacy rules and any other cohabitants should claim under the 1975 Act. They thought that it was "an issue which legislation ought to expressly address". The Law Reform Committee of the Bar Council had similar thoughts, stating that "it would be wise to legislate" for this potential problem. They too thought that the least unfair solution would be for the cohabitant whose relationship with the deceased was the longest to be entitled on intestacy and then for any others to claim under the 1975 Act.

4.211 Other consultees thought that the intestacy rules should not make provision for this but that the 1975 Act could nonetheless operate to address it. Jo Miles (academic) thought that provision in the intestacy rules would make things too difficult for administrators and that these cases should be sorted out by the courts. The Society of Trust and Estate Practitioners said:

> It should not be for a default rule to make provision for this circumstance but for the parties concerned to ask a court to make a judgement based on the evidence and need.

They thought that a claim should be made under the 1975 Act. Roland D'Costa (probate registrar) agreed. He looked to the treatment of polygamous marriages and was concerned that:

> … any right given to more than one cohabitant under the intestacy provisions would place this class in a better position than if either cohabitant was in a polygamous marriage with the deceased.

4.212 A number of consultees who supported equal sharing between multiple cohabitants thought that the 1975 Act could remedy any injustice. They included the Institute of Professional Willwriters, Resolution (organisation), Richard Frimston (solicitor) and Richard Wallington (barrister). However, Sheila Campbell (solicitor) thought that assets should be divided among the deceased's children, "to reduce people calling on the state for assistance".

4.213 Dr Mary Welstead (academic) referred to her earlier comments in which she expressed the view that the 1975 Act was the appropriate forum to deal with entitlement for cohabitants because it allowed the individual circumstances to be considered.

Evidence against an entitlement for cohabitants

4.214 The difficulties which may arise when more than one person satisfied the criteria for eligibility as a cohabitant were used by some consultees to argue against introducing an entitlement for cohabitants. Anne Thom (solicitor) said that the issue "emphasises the problems of giving cohabitants rights". The Family Education Trust were concerned about lengthy legal disputes and stated that:

> The prospect of such an eventuality is in itself sufficient reason for not proceeding with any change in intestacy law.

4.215 Other consultees saw the 1975 Act as the answer for cohabitants generally. Convenient Wills (firm) thought that not recognising automatic rights for cohabitants would permit consideration of the individual case under the 1975 Act, which would address this problem. The Royal Bank of Scotland Trust & Estate Group said that the 1975 Act was sufficient for cohabitants who also had the option of marrying or forming a civil partnership. They thought this showed the evidential difficulty of giving cohabitants an entitlement on intestacy.

Other comments

4.216 Some consultees provided other ideas and comments.

4.217 Three suggested that the definition itself, or the concept of cohabitant/couple, should perhaps exclude the possibility of multiple cohabitations. The Yorkshire Law Society thought the rules should be drafted so that it is only possible to have one cohabitant; they commented "it is not of course legally possible to have more than one spouse so why should a cohabitee be treated any differently?" The City of Westminster and Holborn Law Society were strongly against provision being made for multiple cohabitants. They thought the British concept of a couple was, broadly speaking, exclusive and that the concept of multiple partners was "contrary to English culture". Christopher Jarman (barrister) was of the opinion that English law should not reward "multiple or parallel cohabitation". He said that a person should not count as a cohabitant under the definition of that term if they were party to other relationships which could have also qualified them as a cohabitant.

4.218 Consultees contributing other comments included Francesca Quint (barrister), who said that multiple cohabitants should share the personal chattels rateably. Paul Saunders (trust administrator) suggested that entitlement ought to depend on the duration of the various cohabitations and whether there were children of that cohabitation.

4.219 The Association of Muslim Lawyers recognised that multiple cohabitants may be left in a vulnerable position but suggested that a will should be made. In particular they thought that if there was a religious marriage which resulted in a number of parties being considered cohabitants "the responsibility should be on the parties to take active steps to organise their financial affairs accordingly" and that the weaker party should be made aware of the importance of a will or registration of the marriage.

FAMILY PROVISION: DURATION REQUIREMENT FOR COHABITANTS WHO HAVE HAD CHILDREN TOGETHER

4.220 **We provisionally propose that if the surviving cohabitant and the deceased were by law together the parents of a child, there should be no minimum duration requirement for the survivor to be entitled to apply under section 1(1)(ba) of the Inheritance (Provision for Family and Dependants) Act 1975, provided that the cohabitation was continuing at the date of death.**

[Consultation Paper paragraphs 4.122 and 8.18]

4.221 Thirty-four consultees responded to this question. Twenty-five agreed with the provisional proposal, seven disagreed, one consultee had mixed views and another provided comments without expressing agreement or disagreement.

The responses

Consultees who supported the provisional proposal

4.222 Consultees who agreed with the provisional proposal included Jonathan Larmour, Donald Jolly (retired solicitor), the Association of Her Majesty's District Judges, Francesca Quint (barrister), Sidney Ross (barrister), Anne Thom (solicitor), Giles Harrap (barrister), Richard Wallington (barrister), the Law Society, the Family Law Bar Association, Professor Chris Barton (academic), the Royal Bank of Scotland Trust & Estate Group, Roland D'Costa (probate registrar), Jo Miles (academic), Resolution (organisation), the City of Westminster and Holborn Law Society, Paul Saunders (trust administrator), Davenport Lyons LLP (solicitors), the Law Reform Committee of the Bar Council and the majority of those who contributed to the response of Withy King LLP (solicitors) on this point.

4.223 Given our earlier proposal that this category of cohabitants should have an entitlement on intestacy, maintaining consistency between the 1975 Act and the intestacy rules was cited by the Chancery Bar Association, Andrew East (legal executive) and some members of the Society of Legal Scholars working group in support of this proposal.

4.224 Though our earlier proposal was cited by some as a reason to support this one, others disagreed with this class of cohabitants having an entitlement on intestacy but thought that it was appropriate for them to have a 1975 Act claim without a duration requirement. The Judges of the Chancery Division and of the Family Division of the High Court distinguished between conferring a property right on intestacy – which they did not agree with – and conferring a right to claim – which they did agree with. They thought that giving cohabitants with a child an automatic claim in their own right would avoid the need for the courts to find other ways of providing for such parents, for example by enhancing the award made in a claim by the child so as to enable the surviving parent to care for them. Although they noted that there could be added complication and expense because the surviving parent could not be a litigation friend, they noted that this is currently the case anyway when there is a child of the cohabitation but the two-year duration requirement is met.

4.225 Boodle Hatfield (solicitors) supported this proposal but queried whether it should in fact go further. They thought it could be inequitable to take away the duration requirement only where the cohabitants had a child as this is not the only indicator of stability and interdependence in a relationship. They noted that some couples may not be able to conceive and may actually be undertaking fertility treatment and so thought that perhaps the courts should be able to consider the commitment of cohabitants of less than two years who do not have a child.

Consultees who did not support the provisional proposal

4.226 Dr Mary Welstead (academic) disagreed with the proposal saying:

> Cohabitants have a choice about the status of their relationship. If they choose not to formalise it, the two year rule seems a reasonable approach to treating their relationships in a similar way to spouses or civil partners.

There was concern about the consequences of this for other beneficiaries. Sheila Campbell (solicitor) argued for retention of the duration requirement to prevent unfairness to children of a previous relationship.

4.227 Some consultees did not agree that having a child together, of itself, evinced the relationship qualities necessary to entitle a cohabitant to claim under the 1975 Act with no duration requirement. The Society of Trust and Estate Practitioners and Christopher Jarman (barrister) were of this opinion; the former were not convinced that a cohabitant of less than two years' duration who had a child should be treated any differently to a cohabitant of less than two years' duration who did not have a child. Christopher Jarman (barrister) thought that, if there was to be a financial status attached to cohabitation, then there should be a duration requirement. However, he did suggest that for the purposes of a family provision claim, that requirement could be reduced to six months.

4.228 Two consultees questioned whether this proposal was necessary. Maxwell Hodge (solicitors) noted that the child would already have a claim under the 1975 Act and under our proposals the cohabitant would have an entitlement on intestacy. They questioned whether, in light of those entitlements, this proposal was strictly necessary.

4.229 Wilsons Solicitors LLP thought that this proposal would increase the number of claims by cohabitants and so would increase the number of claims against charitable legacies. They suggested that if a claimant did not meet the requisite two-year duration requirement but had a meritorious claim they would already be covered by section 1(1)(e) of the 1975 Act.

Other comments

4.230 The Yorkshire Law Society had some members who agreed but others who thought that the law already made suitable provision for such cases.

4.231 The Office of the Official Solicitor often represents children in claims brought against an estate by a cohabitant, and commented that this proposal could lead to an increase in such cases.

4.232 Convenient Wills (firm) said that: "An unlimited time frame leads to uncertainty. Beneficiaries of the deceased's estate will forever live in fear of receiving a claim from a cohabitee."

FAMILY PROVISION: DURATION REQUIREMENT FOR COHABITANTS WHO HAVE NOT HAD CHILDREN TOGETHER

4.233 **We invite consultees' views as to whether, where the couple had not had a child together, the current two-year qualifying period for the survivor to be entitled to apply under section 1(1)(ba) of the Inheritance (Provision for Family and Dependants) Act 1975 should be retained.**

[Consultation Paper paragraphs 4.123 and 8.19]

4.234 Thirty-three consultees answered this question. Twenty-seven thought that the qualifying period under section 1(1)(ba) should be retained, four thought it should be removed and one had an alternative suggestion.

The responses

Consultees who considered that the qualifying period should be retained

4.235 The majority of consultees considered that the two-year qualifying period under the 1975 Act should be retained for cohabitants who did not have children together. Consultees who took this view included Jonathan Larmour, Donald Jolly (retired solicitor), Davenport Lyons LLP (solicitors), the Yorkshire Law Society, Resolution (organisation), Sheila Campbell (solicitor), Anne Thom (solicitor), the Norwich and Norfolk Law Society, Dr Mary Welstead (academic), Roland D'Costa (probate registrar), Paul Saunders (trust administrator), Professor Chris Barton (academic), Richard Frimston (solicitor), the City of Westminster and Holborn Law Society, the Law Reform Committee of the Bar Council and the majority of those who contributed to the response of Withy King LLP (solicitors).

4.236 Many consultees supported the reasoning articulated in our Consultation Paper in favour of retaining the current two-year qualifying period. The Office of the Official Solicitor agreed that removing the qualifying period would "inevitably lead to a proliferation of claims that would have little prospect of success and involve disproportionate costs". The Law Society and the Family Law Bar Association made similar comments; the Law Society said that the removal of the qualifying period "could lead to an increase in threats of litigation and as a result delays in the administration of estates". The Chancery Bar Association disagreed; in their experience such claims are brought anyway and so removing the qualifying period would not have this effect. In contrast, they thought that having a qualifying period would in fact lead to disputes about when a relationship began.

4.237 A number of consultees noted that a cohabitant who was being maintained by the deceased would be able to apply as a dependant under the 1975 Act. The Office of the Official Solicitor and Richard Wallington (barrister) both cited this as a reason for retaining the two year duration requirement. The Family Law Bar Association thought that the reforms provisionally proposed in Part 6 of the Consultation Paper (at paragraphs 6.18 and 6.31) would provide a remedy for some applicants who apply as dependants who are excluded under the current law. Christopher Jarman (barrister), Jo Miles (academic) and the Judges of the Chancery Division and of the Family Division of the High Court all stated that they agreed with us that the minimum period of cohabitation should be retained for cohabitants who did not have children together for the reasons outlined in our Consultation Paper at paragraph 4.117.

4.238 A range of various reasons were also cited by consultees in favour of retaining the current qualifying period. Francesca Quint (barrister) thought that if removed it "would risk problems about proving true cohabitation". The previous changes suggested were felt, by Andrew East (legal executive), to justify retaining the qualifying period here. The Royal Bank of Scotland Trust & Estate Group thought that there was no logical reason to change the requirement. Maxwell Hodge (solicitors) recognised that there are people for whom the qualifying period could pose a difficulty but thought that such parties should make a will, stating "we do not believe that any new intestacy law should delude the public into thinking that a Will is no longer necessary".

Consultees who thought that the qualifying period should be removed

4.239 The qualifying period was felt, by the Association of Her Majesty's District Judges and Giles Harrap (barrister) to cause injustice. The example given by Mr Harrap and also by the Chancery Bar Association was that of an engaged cohabiting couple, one of whom dies unexpectedly before the wedding. The injustice was thought to stem from the fact that a relationship may display sufficient seriousness – in this example by a pledge to marry – but the applicant is denied the ability to claim under the 1975 Act as the deceased's cohabitant. In contrast, the Family Law Bar Association identified difficult cases which would be caught in the absence of a qualifying period – for example, a couple who had fallen into living together for a short time while keeping their finances separate – and which justified the retention of the qualifying period.

4.240 The Society of Trust and Estate Practitioners thought that giving cohabitants of less than two years the right to claim under the 1975 Act rather than giving them an automatic right on intestacy "creates the right balance". The fact that a 1975 Act claim allows the courts to take into account a number of factors about the case was cited by the Association of Her Majesty's District Judges and the Society of Trust and Estate Practitioners as a reason why the qualifying period could be removed. Giles Harrap (barrister) commented that the courts should be "left to sort out the meritorious from the unmeritorious".

Other comments

4.241 Sidney Ross (barrister) suggested that the courts be given a discretionary power to waive the minimum qualifying period.

FAMILY PROVISION: THE DEFINITION OF COHABITATION

4.242 **We provisionally propose that, in all cases, in order to qualify for an award under the Inheritance (Provision for Family and Dependants) Act 1975 as a cohabitant the applicant must have been living as a couple in a joint household with the deceased immediately before the death.**

[Consultation Paper paragraphs 4.124 and 8.20]

4.243 Thirty consultees addressed this question. Twenty-seven consultees agreed with the provisional proposal, two consultees disagreed and one consultee commented on the discussion in the Consultation Paper without expressing agreement or disagreement.

The responses

Consultees who agreed with the provisional proposal

4.244 Consultees who agreed with the provisional proposal included Jonathan Larmour, Donald Jolly (retired solicitor), Davenport Lyons LLP (solicitors), the Association of Contentious Trust and Probate Specialists, Andrew East (legal executive), Francesca Quint (barrister), the Woodland Trust (charity), Anne Thom (solicitor), Richard Wallington (barrister), the Royal Bank of Scotland Trust & Estate Group, Roland D'Costa (probate registrar), Sidney Ross (barrister), the City of Westminster and Holborn Law Society, the Law Reform Committee of the Bar Council and the Law Society, who thought that the proposal would bring certainty to the law.

4.245 Many of the consultees who agreed with the provisional proposal did so subject to their comments about the definition of a cohabitant as proposed at paragraph 4.60 of the Consultation Paper or reiterated the concerns they had about the definition which they expressed there.

4.246 The most common concern was how certain periods of absence from the household would be treated under the definition; Paul Saunders (trust administrator), Boodle Hatfield (solicitors), Resolution (organisation), the Association of Her Majesty's District Judges and the Norwich and Norfolk Law Society all expressed such concerns. Examples of absences which consultees thought should not affect an applicant were time in hospital or respite care, and absence to escape violence in the household. The Family Law Bar Association raised a specific concern regarding how an applicant who was forced to leave their partner and the joint household due to the partner's mental illness would be treated. Giles Harrap (barrister) summarised a view popular with consultees: the definition should be explicit in dealing with cases of absence from the household rather than leave the courts to use the "mental gymnastics" currently required to solve the problem.

4.247 The Chancery Bar Association and Christopher Jarman (barrister) both reiterated concerns they had expressed in relation to the definition of cohabitants for the purposes of reform of the intestacy rules; in particular they were concerned that couples within the prohibited degrees of relationship for marriage should not be able to qualify under the definition. The Society of Trust and Estate Practitioners agreed that a period of continuous cohabitation should be necessary to make a 1975 Act claim as a cohabitant. However, they did not necessarily think that the period should be the same as under the intestacy rules.

4.248 Two consultees made other suggestions. Resolution (organisation) queried whether "in the same household" would be clearer wording than "joint household" and Dr Mary Welstead (academic) suggested that the definition of cohabitants should be extended to include couples who live apart, perhaps due to work, but who would nevertheless consider themselves cohabitants.

Consultees who disagreed with the provisional proposal

4.249 Two consultees disagreed with the proposal, but for quite different reasons. Professor Chris Barton (academic) envisaged problems with the continuous cohabitation proposal discussed at paragraph 4.79 of the Consultation Paper. He was concerned about periods of absence from the household and how these would be dealt with. Sheila Campbell (solicitor) was concerned that the law was putting across the message that "any sexual relationship is more important than family ties" since family members who have lived together will not qualify.

Other comments

4.250 Three consultees commented on the discussion of ex-cohabitants which preceded the provisional proposal at paragraphs 4.118 to 4.121 of the Consultation Paper. Jo Miles (academic) agreed that while there is no separation scheme for cohabitants during their lifetime, it does not make sense for an ex-cohabitant to have a claim on a death which follows shortly after the separation. Christopher Jarman (barrister) and the Yorkshire Law Society both commented that a recently separated cohabitant may still be able to apply under the 1975 Act as a dependant.

FAMILY PROVISION: STANDARD OF PROVISION FOR COHABITANTS

4.251 **We provisionally propose that the Inheritance (Provision for Family and Dependants) Act 1975 be amended so that "reasonable financial provision" for a cohabitant is defined as such financial provision as it would be reasonable in all the circumstances of the case for the applicant to receive, whether or not that provision is required for the applicant's maintenance.**

[Consultation Paper paragraphs 4.134 and 8.21]

4.252 Thirty-seven consultees responded to this provisional proposal. Twenty-eight agreed, seven disagreed and two simply voiced their concerns.

The responses

Consultees who agreed with the provisional proposal

4.253 Consultees who agreed with this proposal included Jonathan Larmour, Donald Jolly (retired solicitor), the Royal Bank of Scotland Trust & Estate Group, Paul Saunders (trust administrator), the Law Reform Committee of the Bar Council, the Institute of Professional Willwriters, Professor Chris Barton (academic), Resolution (organisation), Davenport Lyons LLP (solicitors), the City of Westminster and Holborn Law Society, Andrew East (legal executive), Francesca Quint (barrister), the Woodland Trust (charity), Roland D'Costa (probate registrar), Richard Wallington (barrister) and the Society of Legal Scholars working group, members of which broadly supported removing the maintenance standard.

4.254 Some consultees supported the proposal because they thought there were problems with the current law, and some did so on the basis that it reflected the current case law. The Chancery Bar Association described the current law as "an uncomfortable straitjacket" while Richard Dew (barrister) commented that the law is not well understood. The Money and Property Committee of the Family Justice Council said that "the current position is an inconsistency that is unfair". The Society of Trust and Estate Practitioners also thought that there was an inconsistency; they thought that if cohabitants were to be treated as a spouse then the court should be able to make an award on the same basis. On the other hand, the Law Society supported the proposal precisely because it reflected the current law and the Association of Her Majesty's District Judges said the proposal would "give effect to the more "holistic" approach the courts are already taking".

4.255 Consultees had differing views on how the "divorce analogy" should be applied to cohabitants. The Chancery Bar Association did not think that the courts should have regard to this factor. They recognised that as a result cohabitants may not do as well as spouses, but thought that this was acceptable as the courts would be able to go beyond the current maintenance level. Sidney Ross (barrister) said that the "separation analogy" should apply (presumably if a statutory scheme for provision for cohabitants on separation was enacted). However, he had concerns about it, hoping it would not cause:

> … another thirty years of uncertainty bedevilled by attempts to apply criteria which are relevant only when … the available assets are substantially in excess of the parties' income and housing requirements.

4.256 The courts' ability to consider various factors in the individual case was cited by some consultees in support of the proposal. The Norwich and Norfolk Law Society wanted the courts to have discretion to consider what was reasonable in the individual case. The Money and Property Committee of the Family Justice Council recognised that there would still be judicial discretion and noted that the courts would still have to take into account the duration of the cohabitation.

4.257 Other points raised included the argument put by Sidney Ross (barrister), that if someone satisfies the definition of cohabitant they are likely to have the same housing and income needs as a spouse and so the same standard of maintenance should apply. On the practical affects of the proposal, Giles Harrap (barrister) noted that, although the court would no longer have the concept of maintenance to guide their decision as to what an award should be, "no more in reality is being asked of the court than is already asked in spousal claims". While Maxwell Hodge (solicitors) cautiously welcomed the proposal, they did have concerns about "fruitless litigation" if the perception of what was reasonable for a surviving cohabitant did not match people's expectations.

Consultees who had concerns with the provisional proposal

4.258 Jo Miles (academic) expressed anxiety about using the concept of "reasonable financial provision" in the abstract when there is no scheme on lifetime separation for cohabitants. Her concern was that it could leave the courts "struggling to work out what the proper basis for and objective of provision in these cases should be". The Association of Contentious Trust and Probate Specialists noted that it would be difficult to find a divorce comparator for cohabitants.

Consultees who disagreed with the provisional proposal

4.259 An argument against the proposal was that the law is currently in "a balanced state" and so does not need reform (Judges of the Chancery Division and of the Family Division of the High Court). Christopher Jarman (barrister) expressed concern that:

> … a change in the wording risks changing the law beyond the accepted position which the courts have reached on the existing wording.

The established case law was cited by the Judges of the Chancery Division and of the Family Division of the High Court as a reason not to interfere. They thought that the current principles are well understood and their application well settled so that proceedings are currently "brought to a conclusion relatively swiftly and relatively economically". They did not agree with our provisional proposal and suggested that reform should come if or when there was wider reform of property rights for cohabitants.

4.260 Some consultees, such as Anne Thom (solicitor), agreed with the current law in principle (that cohabitants should only be entitled to what is necessary for maintenance under the 1975 Act). Dr Mary Welstead (academic) agreed, though she added that maintenance should be for the cohabitant and any children of that relationship. Christopher Jarman (barrister) disagreed in principle with the proposal, stating that the financial consequences of cohabitation should not be equated with those of marriage. Sheila Campbell (solicitor) also disagreed with the proposal, suggesting that if greater provision was to be made it could be provided for in a will.

4.261 The Battersea Dogs and Cats Home (charity) raised the effect that the proposal would have, in their view, on a number of aspects of litigation. First, having experienced a general increase in 1975 Act claims by cohabitants, they were concerned about increasing the possible awards. They highlighted the risk of fraudulent claims given the evidential difficulties they had found in disproving cohabitation in cases brought against the charity. Secondly, they thought that larger potential awards "could make any pre-court settlement less achievable and certainly more expensive" as the stakes would be raised for both parties.

4.262 The Family Law Bar Association had two lines of argument against the proposal. The first was that the proposal was inappropriate as it does not consider the central purpose of the 1975 Act. In their view, the 1975 Act is to provide for need arising out of the deceased's death and to meet moral responsibilities which arise out of the deceased's relationships. They argued that the reason for the level of spousal provision was to remedy an inconsistency between the awards which could be made on divorce and on death. They felt that this provisional proposal would create a contrast between provision for cohabitants on lifetime separation and on death, commenting that even the modest reform for lifetime separation remedies recommended by the Law Commission had "floundered".

4.263 Secondly, they felt that the current law adequately addressed the problem, saying:

> The concept of maintenance is a flexible one and is needs driven, as such therefore the central problem created by the death of one party can be ameliorated by an award limited to maintenance.

They noted that maintenance allowed the courts to provide for a number of needs such as housing. In their opinion, even if the Law Commission's proposals for cohabitants on lifetime separation were adopted, an analogy with lifetime separation would result in a substantially lower award than a needs based award under the current law allows. Rather than remove the maintenance requirement, they suggested that a statutory definition could clarify the case law.

Other comments

4.264 Wilsons Solicitors LLP and the Yorkshire Law Society stated that they agreed with the proposal, but also suggested that to attain this level of provision cohabitants should be required to satisfy a minimum qualifying duration period. Richard Dew (barrister) suggested that the Law Commission should consider the factors to be taken into account under section 3 of the 1975 Act, as in his opinion they are "rather old fashioned" and do not necessarily highlight the most relevant considerations.

PART 5
CHILDREN

CHILDREN, INTESTACY AND FAMILY PROVISION

5.1 **Do consultees think it appropriate to amend the Inheritance (Provision for Family and Dependants) Act 1975 so as to give a greater chance of success to adult children and, if so, how?**

[Consultation Paper paragraphs 5.19 and 8.22]

Introduction

5.2 Forty-two consultees responded to this question. Thirty-one consultees did not think that the 1975 Act should be changed to give adult children a greater chance of success; five consultees thought that the 1975 Act should be amended; two consultees made substantive points but expressed no opinion either way and there were four responses in which opinion was divided.

The responses

Testamentary freedom and "forced heirship"

5.3 Many consultees expressed opposition to strengthening the position of adult children, preferring instead to uphold "testamentary freedom" and resist "forced heirship". For example, the Institute of Professional Willwriters felt that the suggestion was "a step towards forced heirship which we strongly oppose" while Wilsons Solicitors LLP said that it would "depart from the principle of testamentary freedom".

5.4 Some consultees pointed to the very significant change it would involve for the existing structure of the law, as "a move in the direction of compulsory inheritance" (Richard Wallington (barrister)). The Money and Property Committee of the Family Justice Council went further, arguing that reform along those lines would restrict "the ability of a parent to cut out a child" which "goes to the root of basic English law". The Family Law Bar Association summed up this point:

> The adult child who feels that it is unfair and/or unnatural that they have been disinherited may not be catered for. However having regard to the needs driven aspect of the 1975 Act and the absence of forced heirship, the fact of blood relationship alone does not justify inheritance. It would take a major reform of testamentary freedom to incorporate a form of presumption that provision would be made.

Adequacy of the current law

5.5 Sidney Ross (barrister) noted that under the 1975 Act "the case-law has developed incrementally in a sensible fashion" and commented that the current system is based on reasonable provision. A number of consultees, such as Professor Chris Barton, felt that the current law "gets it right on that point". The Chancery Bar Association agreed, stating:

> We consider that the current case law gives adult children a perfectly respectable chance of success which rests squarely on the merits of their claim when all relevant evidence under section 3 of the Act is assessed. Accordingly, we would not support any change in the law which would create an effective imbalance in favour of adult children.

Others in agreement included the Association of Contentious Trust and Probate Specialists, the Institute of Professional Willwriters, World Vision UK (charity), and the Judges of the Chancery Division and of the Family Division of the High Court. The Battersea Dogs and Cats Home (charity) felt that if anything the current law benefitted adult children at the expense of other beneficiaries. Giles Harrap (barrister) expressed concern that "any amendment … would only make a difficult situation worse".

5.6 The Society of Trust and Estate Practitioners took a different approach. They considered that there was no need for change because the tide has turned and there is a current trend for courts to favour claims by adult children, which "may well continue ... and should be allowed to run its course". They felt that this was positive on the basis that it responds to the ill-feeling created by disinheritance, which the Society suggested is on the rise due to more "late second marriages which potentially disinherit the children of what was the long first marriage".

5.7 Wilsons Solicitors LLP raised a concern that if more generous provision was made for children, there would be a risk of "undermining the intestacy rules, which give priority to the surviving spouse". Another concern raised by the Association of Her Majesty's District Judges was that determining what would be reasonable for a child to receive would be difficult. Jo Miles (academic) noted that there is a "lack of agreed basis for provision" and setting legislative criteria for determining claims by adults would be problematic.

Impact on other groups

5.8 A number of consultees were concerned that any change would result in an increase in litigation: Giles Harrap (barrister), the Association of Her Majesty's District Judges and a partner who contributed to the response of Davenport Lyons LLP (solicitors) expressed such concern. Consultees from the charitable sector were particularly worried that they would bear the brunt of an increase in claims and would also risk losing income from legacies in favour of adult children. The extent of this risk was highlighted by Battersea Dogs and Cats Home (charity) who explained that "excess of 85%" of the charity's income comes from legacies and considered that enacting this proposal would "have a direct and immediate detrimental impact on legacy income".

Arguments put forward by consultees in favour of enhancing the claims of adult children

5.9 Andrew East (legal executive) was in favour of removing the maintenance requirement so that adult children would have "as great a chance of success as a surviving spouse". He felt that, despite the difficulties raised in the Consultation Paper, "some effort should be made" to resolve the issue; he suggested that if adult children were "adequately protected" by amendments to the intestacy rules then this would not be as necessary.

5.10 Sheila Campbell (solicitor) supported greater provision for adult children in all cases, partly through the intestacy rules and partly through family provision claims. She considered that where a couple have made wills, if on the first death the children (of one or both) are excluded by the survivor:

> … those excluded children should have an automatic right to claim against the estate of the second to die. Extra weight could be given to the claim if the first to die was terminally ill when the mirror image Wills were prepared (had experience of this). The size of the first estate should also be a factor to be considered.

5.11 Ms Campbell felt that it was not proper to favour minor children in family provision, beyond an allowance for education and maintenance. She also considered that lifetime provision was generally made for younger children, perhaps of a new relationship, rather than older children.

Distinguishing between "deserving" and "undeserving" children

5.12 The Law Reform Committee of the Bar Council used the example in *Gill v RSPCA*[1] of a "devoted daughter" who was "inexplicably" cut out of her parents' wills. They suggested that, if she had had the opportunity to claim under the 1975 Act, the case could have been settled in a fairer, more efficient way for both the daughter and the RSPCA. They advocated change in order to help adult children who:

> … may have devoted themselves to looking after elderly parents and arranged their life to their detriment, often because of express promises, though sometimes under tacit understanding, of eventual inheritance.

5.13 The Yorkshire Law Society articulated a distinction made by some other consultees between "deserving" and "undeserving" adult children:

> Some say no, others yes although query whether an adult child who has not had contact with the deceased should be able to make a claim unless there are very exceptional circumstances. It would not seem appropriate to include children who the deceased had sought to exclude for a particular reason provided those reasons are known and … have been expressed within say two years of death.

Other suggestions for adult children

5.14 Richard Frimston (solicitor) suggested that more weight should be given to a claim by an adult child when it is made against a party who is not a relative of the deceased than if such a claim is made against a spouse or dependant of the deceased.

[1] [2009] EWHC 834 (Ch).

5.15 Dr Mary Welstead (academic) argued that "adult children should be treated more favourably" and suggested the removal of section 3(3) of the 1975 Act, which requires the court to have regard to the manner in which the applicant was being or might expect to be educated or trained. A partner who contributed to the response of Davenport Lyons LLP (solicitors) suggested that for adult children "the 'maintenance' provision is too low and it should be reasonable financial provision".

DISTRIBUTION AMONG CHILDREN AND OTHER DESCENDANTS

5.16 **Would consultees favour any change to the present method of *per stirpes* distribution of intestate estates, and in particular the introduction of *per capita* distribution at each generation?**

[Consultation Paper paragraphs 5.35 and 8.23]

5.17 Thirty-seven consultees addressed this question. Of those, four consultees were in favour of changing to a *per capita* system of distribution, while 30 were in favour of keeping *per stirpes* distribution. Two consultees stated that they were ambivalent about which method was used but put forward arguments which suggested a preference for keeping the current system. One consultee commented on the discussion but had no view on the issue overall.

The responses

Consultees in favour of retaining per stirpes

5.18 Eleven consultees stated that in their experience, or according to their understanding, people who make a will prefer the *per stirpes* method of distribution. Andrew East (legal executive), Donald Jolly (retired solicitor) and Giles Harrap (barrister) reported that in their professional experience the overwhelming majority of people preferred or did not object to the *per stirpes* method; Giles Harrap said that "during 30 years of involvement in litigation following death I have never heard any complaint from a client or opposing litigant about the current rule." Christopher Jarman (barrister) made a similar point in relation to his 30 years in practice and stated:

> This suggests that the number of people who feel that stirpital division would be contrary to the wishes of the deceased ... is likely to be very small relative to those who favour the present system.

5.19 This was echoed by other practitioners. The Society of Trust and Estate Practitioners summed up:

> Experience in practice is that families have a strong preference for *per stirpes* distribution and we see no particular merit in changing ... .

5.20 Christine Riley (probate registrar) commented that "there is evidence from a great many wills that [*per stirpes* distribution] is what testators actually want. … I cannot recall ever having seen provision for sharing on a *per capita* basis in those circumstances". Boodle Hatfield (solicitors) indicated that in their experience "virtually all" clients prefer *per stirpes* and "treat their adult children as separate family units".

5.21 Some consultees noted elements of *per capita* distribution in clients' wills. The Judges of the Chancery Division and of the Family Division of the High Court stated that:

> Capital distributions within generations are not inherently superior in any way to stirpital distributions. Testators use both: capital division for primary gifts and stirpital distributions for substitutionary gifts.

5.22 Gregory Hill (barrister) referred to the situation where two or more children of the person in question have predeceased him or her, considering that "it would be fairly common" for a testator in that position to provide for pecuniary legacies of the same amount to each grandchild, and then divide the residue stirpitally. However, he noted that reflecting this in the intestacy rules would create another "statutory legacy", which would be impractical.

5.23 A number of consultees thought that, since the current law is well understood, there was little reason for change. Richard Wallington (barrister) said: "it may be better to stay with the present arrangement which has been around for a long time, and reasonably well understood, at least by the legal profession". Farrer & Co (solicitors) opposed change on the basis that the current system "is well established and recognised among practitioners …".

5.24 There was a difference of opinion among consultees as to how easy it is for members of the public outside the legal profession to understand *per stirpes* distribution. Paul Saunders (trust administrator) described the current method as having "a particular simplicity that is readily understood". Sheila Campbell (solicitor) also thought that the *per stirpes* method was "easy to understand and implement" once it had been explained, but that *per capita* was "more confusing". Anne Thom (solicitor) explained that in her experience "clients are quite clear in their mind" when they choose a *per stirpes* distribution of their estate. On the other hand, Andrew East (legal executive) thought that "*per stirpes* is not generally understood by the general public and ... *per capita* is much easier to understand".

5.25 Some consultees, while not necessarily feeling strongly about the *per stirpes* system, nevertheless felt that the *per capita* system did not have sufficient advantages to make change worthwhile. The costs of changing a system which is familiar to practitioners were not felt to be warranted. The Institute of Professional Willwriters reasoned that since there were "limited circumstances that it ever becomes an issue" there was no need for change.

5.26 Consultees who took this view felt that "there was not a compelling case" (Society of Legal Scholars working group) or "no real reason" (Richard Dew (barrister)) for change. The Law Society considered that, absent "strong support" for change, "there does not seem to be a strong argument in favour", given that a change would be "likely to have limited effect". The Judges of the Chancery Division and of the Family Division of the High Court thought that there was not enough justification for change and that "change should not occur for change's sake". Title Research (firm) went further and stated that changing the law would "merely replace one potential injustice with another and, in our view, greater injustice".

5.27 It was also recognised by Christine Riley (probate registrar), Christopher Jarman (barrister) and the Society of Trust and Estate Practitioners that there would be a knock-on effect as section 33 of the Wills Act 1837 also provides for *per stirpes* distribution. This would either leave the law of intestacy out of line with the law of wills or would require the Wills Act 1837 to be reformed.

5.28 A number of consultees thought that the current system was fairer than *per capita* distribution; Andrew East (legal executive), the Yorkshire Law Society and the Royal Bank of Scotland Trust & Estate Group all expressed this view. In addition, Donald Jolly (retired solicitor) mentioned that in his experience, testators and beneficiaries would not want their entitlement to be affected by the procreation choices of another branch of the family, which would be the case under *per capita* distribution. The Woodland Trust (charity) agreed, stating that any expectations should "come from the immediate family not remoter family".

5.29 Paul Saunders (trust administrator) and Richard Wallington (barrister) both thought that adopting a *per capita* distribution could lead to delay in the administration of estates if a beneficiary was missing or difficult to find. Title Research (firm) pointed out the problems this could cause for missing beneficiary indemnity insurance, because it would make the risk less easy to quantify.

Consultees in favour of per capita distribution

5.30 Where reasons were given for favouring *per capita* distribution, they centred on "fairness". For example, LV= (organisation) supported reform on the basis that it "would seem to be a fairer approach". Roland D'Costa (probate registrar) echoed this, considering it to be "more equitable". He also felt that it would be clearer.

5.31 Maxwell Hodge (solicitors) commented that "a change from *per stirpes* to *per capita* is long overdue". The response was then split between two groups of solicitors. Those holding "View One" agreed with the system of distribution *per capita* at each generation set out in the Consultation Paper. They felt that the entitlement of the deceased's children should not be changed since they were likely to have had a closer relationship with the deceased and to have been more involved with any care necessary. The group taking "View Two" considered that for true equality all beneficiaries should receive the same amount; a surviving child would receive the same share as a surviving grandchild by a child who had predeceased.

TRUSTS FOR CHILDREN ON INTESTACY

5.32 **We provisionally propose that trustees' power of advancement (pursuant to section 32 of the Trustee Act 1925) should be extended (for the purposes only of the statutory trusts on intestacy) to the whole, rather than one half, of the share of a beneficiary who is not yet absolutely entitled under the statutory trusts.**

[Consultation Paper paragraphs 5.52 and 8.24]

5.33 Thirty-four consultees responded to this question. Of these, 27 were in favour of the proposal, one expressed qualified agreement, and six opposed it. Some consultees, whether or not they felt able to support the proposal as made, argued that it should be extended to apply to all trusts. Responses to this provisional proposal and the accompanying discussion in the Consultation Paper prompted us to ask further questions in a Supplementary Consultation Paper, which was published in May 2011. Responses to that consultation are considered in Part 8 of this Analysis of Consultation Responses.

The responses

Consultees who agreed with the provisional proposal

5.34 Several consultees stated that in their experience, it is standard practice to modify section 32 of the Trustee Act 1925 in this way when wills and trusts are drafted. For instance, Andrew East (legal executive) commented that "this power is commonly extended in virtually every Will that I prepare".

5.35 Consultees also considered that it would be beneficial to enable more capital to be used for a beneficiary's needs while he or she was under 18. The Family Law Bar Association stated that "it is during the minority of the child that funds are often needed for maintenance and education".

5.36 The Office of the Official Solicitor noted that:

> The office has examples of trusts where greater flexibility for the trustee over capital distributions would be for the benefit of the beneficiary and would reduce the costs of administering small statutory trusts for children and others.

5.37 Giles Harrap (barrister) made a comparison with the accepted practice of awarding capitalised maintenance:

> When awards are made to minor children under the 1975 Act they are invariably made on a lump sum basis as capitalised maintenance on the assumption that capital will be used for the minor's maintenance. It is unsatisfactory that the intestacy rules restrict the power of trustees to achieve the same effect if needed.

5.38 It was also argued that it would be helpful to be able to wind up small trusts, thus reducing administrative difficulties and costs. The Office of the Official Solicitor felt that reform "would reduce the costs of administering small statutory trusts"; Boodle Hatfield (solicitors) referred to "countless problems with small-scale trusts which cannot be wound up ... even though it would be prudent to do so".

5.39 The Trust Law Committee agreed that flexibility would be desirable, for example where a surviving spouse has a life interest in a small fund and the trustees wish to bring this to an end. The Committee discussed the possibility of introducing a power, with safeguards, to pay capital to a surviving spouse in such a situation.

5.40 Richard Wallington (barrister) supported the proposed reform as legitimising what "probably happens already, in breach of trust, in the case of small funds". The Royal Bank of Scotland Trust & Estate Group said that trustees need "absolute protection ... from later challenge".

5.41 The Judges of the Chancery and Family Divisions of the High Court noted that trustees who are family members, which frequently happens on intestacy, may be tempted to make advancements which are not strictly for the beneficiary's benefit. They noted that when the modification is made in wills and trusts, there is generally at least one independent trustee who would not benefit from the exercise of the power to buy, say, a cottage for family holidays.

> However, in general the funds to which these restrictions apply under the statutory trusts are small. The restrictions are inconvenient and may deprive the power of real utility. The risks of abuse must simply be acknowledged and borne.

5.42 The Chancery Bar Association and Boodle Hatfield (solicitors), although prepared to support the proposal, stated that they would in fact favour reform extending to all trusts. Christopher Jarman (barrister) made a similar point, arguing that there was no reason to limit the reform to trusts arising on intestacy and that a consistent reform should be made across all trusts.

5.43 Gregory Hill (barrister), however, considered that partial reform was unlikely in practice to result in many anomalies, due to the frequency with which a similar modification is expressly made in wills and trust documents.

5.44 Qualified agreement was expressed by the Yorkshire Law Society, who stated that they were in broad agreement with the proposal but suggested that "perhaps a capital limit should be applied".

Consultees who disagreed with the provisional proposal

5.45 Three consultees felt that they could not support the proposal at all. Anne Thom (solicitor) gave no reasons. The Woodland Trust (charity) and Convenient Wills (firm) expressed concern at a lack of protection for under-18s, which might encourage abuse and fraud. They pointed out that on intestacy the trustees are likely to be family members and therefore not truly independent.

5.46 Three other consultees considered that it would be anomalous to reform section 32 for trusts arising on intestacy and not for other trusts: those created by will, or by a lifetime arrangement. The Institute of Professional Willwriters expressed concern that the partial reform proposed would create an inequity between trusts established on intestacy and those created by a will made without professional advice which did not modify section 32. The trustees of the trust arising on intestacy would have more flexibility to benefit its beneficiaries while they were under 18; so the will trust beneficiaries could be regarded as at a disadvantage.

5.47 The Society for Trust and Estate Practitioners considered that:

> If [section 32] is only amended insofar as it applies to the statutory trusts this will lead to confusion and potential mistakes which will create litigation.

5.48 These two consultees were prepared to support a reform which would remove the one-half limit for all trusts. Paul Saunders (trust administrator) also expressed concern that partial reform would create confusion and that the proposal should not proceed on that ground. But in addition, he felt that an independent trustee should have to be involved in the decision to exercise the power.

Section 32 of the Trustee Act 1925: other issues

5.49 Gregory Hill (barrister) argued that consideration should be given to making retrospective any reform to section 32 for intestacies, subject to considerations arising from the Human Rights Act 1998. He examined concerns that, if the whole of the fund is advanced to a primary beneficiary, that may prejudice default beneficiaries who stand to take if that primary beneficiary never becomes entitled outright. He suggested that, since the interests of those default beneficiaries have by definition been postponed to those of the primary beneficiary, the advantage of increased flexibility in benefiting the primarily beneficiary should outweigh the possibility that less than half of the fund may be left for the default beneficiaries.

Section 31 of the Trustee Act 1925

5.50 Sheila Campbell (solicitor) pointed out that other changes are made to the dispositive powers conferred on trustees by the Trustee Act 1925. In particular, she stated that it is standard to amend section 31 by removing the words "as may in all circumstances be reasonable".

Conditions for absolute entitlement under the statutory trusts

5.51 In the Consultation Paper (paragraphs 5.38 to 5.41) we rejected any change to the current law which makes a beneficiary's entitlement under the statutory trusts contingent on either reaching 18 or forming a marriage or civil partnership under that age. Two consultees commented on this point.

5.52 Sidney Ross (barrister) considered that there was "no plausible case" for change here. Christopher Jarman (barrister) agreed that the age contingency should remain as the legal age of majority, that is, 18. As to marriage or civil partnership under that age, he considered that many people would prefer the fund to pass in full to the original deceased's blood relatives rather than the deceased beneficiary's spouse taking an automatic share (since most deaths under 18 are intestate).

5.53 However, Mr Jarman accepted that a widow or widower in such a situation should have some access to the fund for family provision purposes; and that it would be "impossible to distinguish on any principled basis" between spouses on intestacy depending on whether the marriage or civil partnership took place before or after the beneficiary reached 18.

5.54 These consultees also considered the point raised in the Consultation Paper (paragraph 5.42) as to whether it is satisfactory that, while a beneficiary who is under 18 but married or in a civil partnership can give a valid receipt for payments of income under section 31 of the Trustee Act 1925, the same does not apply to payments of capital under section 32. Sidney Ross (barrister) considered that the same receipt provisions should apply to both. He reasoned that such a beneficiary has already "in a real sense become emancipated from parental control", and drew attention to authority establishing that a testator may enable trustees to accept a receipt from such a beneficiary in similar circumstances.[2] He reasoned that an amendment to the statute with the same effect should be possible.

5.55 However, Christopher Jarman (barrister) argued against change. He noted that in the usual case of an absolute gift in a will, a beneficiary who is under 18 cannot give a good receipt. The beneficiary also cannot take legal title to land in his or her own name, under section 1(6) of the Law of Property Act 1925. Secondly, he was concerned that trustees might come under pressure to make large payments to under-18s. He felt that the power under section 32 to make payments for the beneficiary's benefit is sufficient, particularly as a person with parental responsibility can give a good receipt.

ADOPTION

5.56 **We provisionally propose that a child's contingent interest in the intestate estate of his or her deceased parent should not be lost as a result of adoption, but should continue to be held for him or her on the statutory trusts that arise on intestacy.**

[Consultation Paper paragraphs 5.66 and 8.25]

5.57 Thirty-seven consultees responded to this proposal. Three disagreed with the provisional proposal and two had mixed views; 31 agreed with the provisional proposal and one expressed qualified agreement.

The responses

Consultees who agreed with the provisional proposal

5.58 Simon Evers felt that if the state had "removed natural children from parents and had the children adopted by another" then those children should not lose their contingent interest. Daniel Matthews commented:

> A properly constituted trust should more than adequately detail the wishes of the parent(s) re the child(ren) and should be used as the cornerstone of how to handle the estate in the absence of a will.

[2] Cooper v Thornton (1790) 3 Bro CC 96; Re Denekin (1895) 72 LT 220.

5.59 The Chancery Bar Association commented that the loss of such a contingent interest on adoption is an issue "which family lawyers and Courts often overlook"; while the Society of Trust and Estate Practitioners said: "this is a nasty trap and would never be what a parent would have expected or intended". The Association of Contentious Trust and Probate Specialists thought that this must be a situation which occurred "comparatively rarely" but Boodle Hatfield (solicitors) mentioned that it was an issue they had encountered in practice.

5.60 John Dilger (retired solicitor) considered that:

> It is clearly not in the interest of a child, already suffering from the loss of his or her parent, that the commencement of a new family relationship is accompanied by a forfeiture of any property rights he or she may have in the estate of the deceased parent.

5.61 Sheila Campbell (solicitor) thought that the proposals should go further and suggested:

> … extending the right to estates of anyone who had died before the date of adoption, e.g. parent of deceased parent who died after the deceased where the child would take *per stirpes* or under section 33 of the Wills Act.

Christopher Jarman (barrister) also suggested that the proposal should not "be limited to the children of the intestate". Richard Wallington (barrister) and Sheila Campbell (solicitor) both said that it should be extended to contingent interests under wills.

5.62 Gregory Hill (barrister) agreed with the provisional proposal in relation to adoption within the family but thought that if the child was adopted by "strangers" a clean break was preferable. He expressed a concern that when a child gains a vested interest at age 18 it:

> … could easily both bring otherwise-unknown family history to the child's attention at what would not necessarily be the most opportune time, and also become a source of discord within the family of which the child was a member.

Consultees who disagreed with the provisional proposal

5.63 Davenport Lyons LLP (solicitors) "disagreed very strongly with the suggested change". Their reasons were based on the effect on the new family unit; they thought that "adopted children and blood children should be kept entirely legally separate". The response expressed concern that adopted children would be put in a different position to their new siblings and that such an approach "rakes up the past for all parties". Dr Mary Welstead (academic) thought that the proposal "confuses this severance of a legal relationship with a biological parent".

5.64 Roland D'Costa (probate registrar) was "reluctant to express a firm view on the proposal". He noted that adoption is theoretically the severance of all legal ties and thought that the proposal was retaining a link. He went on to suggest that "the use of powers of advancement may give the adopted child an advantage over other children of the adoptive couple". Mr D'Costa was also concerned about how accretions to the estate would be dealt with.

5.65 Paul Saunders (trust administrator) raised a number of concerns. He was worried that a child with a valuable trust fund might be susceptible to adopters of dubious motivation. The Yorkshire Law Society received mixed views on this proposal. They informed us that some were worried that the proposal could "prejudice the effectiveness of adoption". On the other hand, John Dilger (retired solicitor) commented that he had not yet met prospective adopters who were motivated to adopt by the assets of a child.

5.66 In addition, Mr Saunders expressed concern that the problem did not justify what he considered was the "significant change" proposed. Instead of our proposal, he suggested that the adoption procedures be changed so that:

> … the court be advised of any inheritance rights of the child and the judge required to make an order saving such rights (if they have not vested absolutely in the child), or confirming that they fail/lapse.

5.67 If our proposal was to go ahead, Mr Saunders was of the view that safeguards should be put in place; he suggested that there ought to be a trustee who is independent of the adopters. He went on to suggest that the vesting age should be increased from 18 to 21 or 25 in order to ensure that when the child gains control of his or her interest he or she is sufficiently independent from his or her adopters.

Adoption and its effect on claims under the 1975 Act

5.68 In our Consultation Paper, the idea of amending the 1975 Act so as to entitle a child who had been adopted to bring a claim against the estate of his or her birth parents was rejected. Consultees including Sidney Ross (barrister) and Christopher Jarman (barrister) also opposed this idea. However, Giles Harrap (barrister) thought that in cases of adoption after death children should not be prevented from making a claim as "one and two year-olds cannot always rely on there being someone available to make a claim who is alert to the potential problem of loss of support that may be much needed".

PART 6
OTHER RELATIVES, DEPENDANTS AND BONA VACANTIA

CLAIMS FOR FAMILY PROVISION: CHILDREN OF THE FAMILY

6.1 **We provisionally propose that a person who was treated by the deceased as his or her child should be able to apply for family provision whether or not that treatment was referable to any other relationship to which the deceased was a party.**

[Consultation Paper paragraphs 6.9 and 8.26]

6.2 Forty consultees responded to this provisional proposal. Twenty-six agreed with the provisional proposal, six consultees agreed but had reservations or concerns and eight consultees disagreed.

The responses

Consultees who agreed with the provisional proposal

6.3 A number of consultees stated that they agreed with the provisional proposal for the reasons set out in the Consultation Paper or without giving reasons. They included: Jonathan Larmour, Donald Jolly (retired solicitor), the Institute of Professional Willwriters, Francesca Quint (barrister), the Woodland Trust (charity), the Yorkshire Law Society, Sheila Campbell (solicitor), Anne Thom (solicitor), the Law Society, Professor Chris Barton (academic), Convenient Wills (firm), Royal Bank of Scotland Trust & Estate Group, Withy King LLP (solicitors), Roland D'Costa (probate registrar), the City of Westminster and Holborn Law Society, Richard Wallington (barrister) and Giles Harrap (barrister).

6.4 The Chancery Bar Association supported the provisional proposal and commented:

> This proposal is a clear improvement on the current law and removes the present anomaly, which, whilst uncommon, can be hard to explain to possible claimants when encountered. It may also operate in many cases unjustly because of the absence of the relevant marital or civil partnership relationship.

6.5 Jo Miles (academic) stated: "This would be a welcome development – a child's right to inherit should not depend on the marital or other relationship status of his *de facto* parent." The Society of Legal Scholars working group received "broad support" for the proposal and suggested:

> To do otherwise treats a child of a cohabiting couple less favourably than a child of a married couple. It is also arguable (although not conclusive) that our current law might be in breach of the ECHR Article 8 and Article 14.

6.6 One consultee drew upon his personal experience in supporting the provisional proposal. His parents had not married and therefore, despite living as a family for 33 years, he was unable to make a claim to the estate of his step-father under the 1975 Act as a child of the family.

6.7 Richard Dew (barrister) described the proposal as a sensible extension of the existing law. The Association of Her Majesty's District Judges agreed with the provisional proposal and noted that "child of the family" is a well-known concept. The Norwich and Norfolk Law Society noted that this "harmonized with Schedule One Children Act 1989 and Matrimonial Causes Act 1973 claims which can be made in respect of 'children of the family' who are treated as such whether or not they are biologically children of the relationship". The Money and Property Committee of the Family Justice Council recognised this would include step-children and thought that "it would not open the door too wide" as the reform would simply amend a threshold requirement to a claim under the 1975 Act.

6.8 Sidney Ross (barrister) agreed with the principle that the "determining factor" should be the "strength of the bond" between the deceased and the child in question and not the nature of the relationship between the deceased and any other member of the family unit. He also noted that:

> If the reported and accessible unreported cases are any guide, applications under s 1(1)(d) are by far the smallest group of 1975 Act applications, and the proposed modest liberalisation is unlikely to cause a significant increase in their number.

The Judges of the Chancery Division and of the Family Division of the High Court made a similar comment; they said that "this is not an area well covered by authority" and although they opposed "tinkering" with the 1975 Act in general, they thought this proposal would be "easily accommodated" and that a "compelling case for reform is made out".

Consultees who had concerns with the provisional proposal

6.9 Andrew East (legal executive) supported the aim of the provisional proposal but commented that the definition of who could qualify as a child of the family needed to be "very carefully examined and tightly drawn". Paul Saunders (trust administrator) was also concerned that the definition needed to enable individuals to identify whether or not they fall within it to avoid the costs of a preliminary hearing to determine this question.

6.10 Dr Mary Welstead (academic) also supported the provisional proposal but pointed to potential difficulties with evidence. Boodle Hatfield (solicitors) agreed with the proposal but suggested that it might increase the cost of litigation if the purported "child" is unknown to other family members. They were also concerned about the "danger that several unknown claimants could emerge at once".

6.11 Maxwell Hodge (solicitors) were supportive of the provisional proposal but wanted to see "provision for the Court to take into account any existing maintenance being paid by the other parent against the claim being made against the intestate's estate".

6.12 Christopher Jarman (barrister) was in general agreement with the proposal but was "uncomfortable" with the thought that a child who had never lived with the deceased would potentially become eligible under the proposal. He explained that:

> The focus on the deceased's marriage connotes, to my mind, a child within the deceased's household, and it seems to me that this focus should be retained in any extension to the provision.

He suggested that if such a focus were retained in drafting the extension, unmeritorious claims, which he noted could be disruptive, would be reduced, as would the problems associated with evidence.

6.13 Mr Jarman reflected that, as our provisional proposal would benefit a child looked after by the deceased alone, the expression "child of the family" could "become confusing and some thought might be given to adopting a different expression". He stressed that his support for this proposal did not diminish his opposition to the introduction of intestacy rights for cohabitants. The distinction in his eyes was that a "child has no choice as to the nature in law of the relationship between the adults of the household".

Consultees who disagreed with the provisional proposal

6.14 Wilsons Solicitors LLP stated that "great care would need to be given to defining the deceased's treatment of a person as their child to avoid uncertainty and therefore the additional expense of litigating this point". They also suggested that change is not necessary because any person who immediately before the death of the deceased was being maintained, either wholly or partly, by the deceased can claim as a dependant under section 1(1)(e) of the 1975 Act.

6.15 Davenport Lyons LLP (solicitors) were concerned that this "could extend to stepchildren, foster children and guardians and is far too wide". Title Research (firm) thought that the proposal would "create a grey area" and "encourage speculative claimants and vexatious litigants".

6.16 The Society of Trust and Estate Practitioners described our provisional proposal as a "potential minefield". Their principal concern was that those who assist young people to get a start in life, such as voluntary workers in youth organisations or those who sponsor the education of a child in a developing country, might be deterred from doing so by the fear of a claim against their estate, whether or not that is meritorious. They thought it would be unfair to expose people to the risk of "jeopardising their own children's position by such acts of kindness". They suggested that if there is reform the statute should continue to refer to the deceased's marriage but could also refer to cohabitation.

6.17 Cripps Harries Hall LLP (solicitors) and the Family Law Bar Association also supported an extension of the category of children of the family to those treated as such in relation to a cohabitation. But both consultees opposed any further extension of the category. The Family Law Bar Association thought that in such circumstances people ought to make provision by way of a will. They explained their reasoning as follows:

> Assisting an elderly neighbour (because they are that) should not of itself justify an application under the 1975 Act. A vulnerable older person might not be able to gainsay an argument that they had treated the claimant as a child. There would be a real risk there would be a number of unmeritorious applicants.

6.18 A number of charities responded to the consultation, many writing in similar terms. Their concern was that any expansion of the categories of potential applicants under the 1975 Act would be likely to work to the detriment of charities by increasing the number of claims which they may need to defend and restricting testamentary freedom. The Roy Castle Lung Cancer Foundation (charity) and World Vision UK (charity) both made such comments. However, one charity consultee (the Woodland Trust) supported the provisional proposal.

CLAIMS FOR FAMILY PROVISION: DEPENDANTS

Assumption of responsibility

6.19 **We provisionally propose that an assumption of responsibility by the deceased should not be a threshold requirement for an applicant to qualify to apply for family provision as a dependant under section 1(1)(e) of the Inheritance (Provision for Family and Dependants) Act 1975, but should be regarded on an equal footing with other factors.**

[Consultation Paper paragraphs 6.18 and 8.27]

6.20 Thirty-three consultees addressed this provisional proposal. Of those consultees, 24 agreed with our provisional proposal and five disagreed with it. Two consultees agreed that reform was necessary but suggested their own alternatives. Two consultees expressed mixed views.

The responses

Consultees who supported the provisional proposal

6.21 A number of consultees stated their agreement without further comment including, Donald Jolly (retired solicitor), the Institute of Professional Willwriters, Andrew East (legal executive), Francesca Quint (barrister), the Woodland Trust (charity), the Society of Trust and Estate Practitioners, the Law Society, Professor Chris Barton, the Royal Bank of Scotland Trust & Estate Group, Withy King LLP (solicitors), Roland D'Costa (probate registrar), Jo Miles (academic), the City of Westminster and Holborn Law Society, Paul Saunders (trust administrator), Richard Wallington (barrister) and the Law Reform Committee of the Bar Council.

6.22 The Chancery Bar Association supported the proposal and considered the current law to impose "unnecessary complication" on proceedings.

6.23 Richard Dew (barrister) commented that "it is actually doubtful whether this requirement would be upheld in future". The Family Law Bar Association supported the proposal and commented that at Court of Appeal level "it is arguable that s 3(4) does not form part of the initial test for qualification". The Society of Legal Scholars working group reported "broad agreement" with the provisional proposal and noted that it would "remove problems that have been created by the courts in the interpretation of current legislation". Giles Harrap (barrister) agreed, explaining that the proposed reform would "overcome the unnecessary injustice" of the current interpretation and "avoids the complicated reasoning required by the Court of Appeal to remedy that injustice". He went on to advocate "legislative intervention" as he thought that this proposal was "what parliament intended – on any sensible reading of the Act".

6.24 The Association of Her Majesty's District Judges thought that the proposed reform was "unlikely to add significantly to the number of 1975 Act claims". The Judges of the Chancery Division and of the Family Division of the High Court considered that this would be a worthwhile reform.

6.25 Sheila Campbell (solicitor) agreed with the provisional proposal "on the whole" but felt that "maintenance should have some degree of permanence and continuance". She provided two examples where she thought someone ought not to have a successful claim. First, if the deceased paid off someone's debts "with the intention that the person should now be able to support him or herself, that person should never be able to apply for maintenance". Secondly, if a claimant had received gifts of "surplus income under normal expenditure out of income" he or she should not be able to make a successful claim.

Alternative suggestions for reform

6.26 Dr Mary Welstead (academic) suggested removing the reference to the assumption of responsibility altogether. She thought it was unnecessary as "the factors outlined in s 3(1) more than cover every relevant eventuality".

6.27 Sidney Ross (barrister) gave a detailed examination of the case law on the subject. He commented that:

> All that is required is for judges and lawyers to cease using the phrase "threshold requirements" or any equivalent phrase in relation to any provision of the 1975 Act other than the provisions of s 1.

Mr Ross considered that the endorsement of the "assumption of responsibility" criterion in *Baynes v Hedger*[1] "was perpetuated by the agreement on the part of counsel for the Defendant" that it was "an essential ingredient". As a general point he suggested that "it is necessary to focus primarily on the statutory provision rather than on the judicial and academic glosses which have been applied to it".

[1] [2008] EWHC 1587 (Ch), [2008] 2 FLR 1805; [2009] EWCA Civ 374, [2009] 2 FCR 183.

Consultees who disagreed with the provisional proposal

6.28 Jonathan Larmour and Daniel Matthews both disagreed with this provisional proposal. Daniel Matthews thought that the law should remain as it currently stands. Jonathan Larmour commented that "the actions of the deceased before their death can be considered to show their intentions". Davenport Lyons LLP (solicitors) and Anne Thom (solicitor) also disagreed with the proposal.

6.29 In the Consultation Paper, paragraph 6.13, the case of *Bouette v Rose*[2] was cited as part of a criticism of the operation of the current law. However, Christopher Jarman (barrister) took the view that the case should not be relied on as he thought it "would be an instance of a hard case making for bad law". He was concerned that the proposal to regard assumption of responsibility as a factor for consideration but not a threshold requirement would "encourage litigation even in the face of an express disavowal of responsibility" and noted the possible "expense to the deceased's intended dispositions" that this would cause. Mr Jarman was also concerned that reform could constrain "people's generosity in their lifetimes for fear that their estates might be burdened with claims under the extended provision".

Balancing contributions: dependency and mutual dependency

6.30 **We provisionally propose that it should no longer be a prerequisite to the success of a claim under the Inheritance (Provision for Family and Dependants) Act 1975 brought by a dependant that the deceased contributed substantially more to the parties' relationship than did the claimant.**

[Consultation Paper paragraphs 6.31 and 8.28]

6.31 Thirty-two consultees responded to this provisional proposal. Of those, 27 agreed with our provisional proposal; one consultee agreed in substance though not with our proposal as framed and four consultees disagreed.

The responses

6.32 Fourteen consultees stated their agreement with the provisional proposal without making any further comments. These included Jonathan Larmour, Donald Jolly (retired solicitor), the Institute of Professional Willwriters, Andrew East (legal executive), Francesca Quint (barrister), the Woodland Trust (charity), Anne Thom (solicitor), the Law Society, Professor Chris Barton (academic), Roland D'Costa (probate registrar), Jo Miles (academic), the City of Westminster and Holborn Law Society and the Law Reform Committee of the Bar Council. The Yorkshire Law Society opposed the proposal without further explanation and Daniel Matthews thought the law should remain the same without making any further comments.

[2] [2000] 1 FLR 363.

Consultees who agreed with the provisional proposal

6.33 A number of consultees supported the proposed reform as an alternative to the current law, with which they expressed dissatisfaction. The Chancery Bar Association said:

> … the present "balance sheet" approach in terms of contributions is often a difficult, emotionally draining and cost-wasting task.

The Association of Her Majesty's District Judges agreed with the proposal and commented that the current law is uncertain and costly, particularly due to the uncertainty over what is meant by "substantially".

6.34 Richard Dew (barrister) noted that:

> The existing provisions work very badly in cases of "mutual dependency" despite the fact that the survivor is often left much worse off as a result of the death.

The Society of Legal Scholars working group expressed "broad agreement" with the proposal and thought it would "remove problems that have been created by the courts". Giles Harrap (barrister) thought that the courts had "gone astray" here. He commented that "those who help each other for love are not doing it for valuable consideration" and argued that it would be best to move away from the current test.

6.35 The Norwich and Norfolk Law Society thought that retaining the current law "could cause injustice in certain cases". They went on to state that it would be:

> …within the courts' discretion to exclude unmeritorious claims based on a one-sided relationship if in the circumstances that was merited. We did not feel that there should be a universal rule.

The Family Law Bar Association thought that there had been "some excessively strained constructions in the past to secure access for a meritorious claimant". The Judges of the Chancery Division and of the Family Division of the High Court thought that "the language of s 1(3) is amongst the most unsatisfactory in the 1975 Act"; they agreed that reform was necessary.

Recognition of mutual dependency

6.36 The Society of Trust and Estate Practitioners agreed with our proposal on the basis that "more people need to live together to-day in a situation of mutual dependence just to make ends meet and enjoy a reasonable standard of living". They noted that "death itself may create a dependency and a financial need which was not there before death". In the light of this they considered that it made "no sense that it is not possible for either to claim against the other's estate".

6.37 The Family Law Bar Association also commented on modern relationships, noting that they "will often involve two working partners". Dr Mary Welstead (academic) observed that "many adults living together, particularly in sanguineal relationship, support each other mutually". The Royal Bank of Scotland Trust & Estate Group noted that this is "a complex area" but agreed with the provisional proposal.

Other comments

6.38 Richard Wallington (barrister) thought that an assessment of the contributions made by the deceased and the claimant was "fairly obviously something which should be a factor weighed in the exercise of the discretion" and not a threshold to a claim. Similarly, Paul Saunders (trust administrator) thought that mutual dependency "should be considered a significant factor in deciding on the success and level of award made to a claimant".

6.39 The Judges of the Chancery Division and of the Family Division of the High Court suggested that:

> The claimant must immediately before the death be a party to a relationship with the deceased that was not commercial and within which the claimant was substantially dependent upon the deceased … which substantial dependence reasonably continues notwithstanding the death.

They reiterated that the "fundamental philosophy of the Act" should not change, namely that awards should "meet need, not give a reward to recognise service".

6.40 Sidney Ross (barrister) did not agree with the way in which the provisional proposal was expressed. He analysed the cases and concluded that there is only a requirement that the deceased contributed more, not substantially more, to the parties' relationship than the claimant. Although he did not support the proposed reform as framed, he did suggest his own redrafting to amend sections 1(3) and 3(4) of the 1975 Act; the amendment to the latter would make clear that mutual dependency was a means by which factors relevant to "the assessment of the nature and strength of the relationship" could be identified, rather than a threshold requirement.

Consultees who disagreed with the provisional proposal

6.41 Sheila Campbell (solicitor) disagreed with the proposal, arguing that claims from people who "have agreed to live together and share expenses" should be discouraged. She thought that – given that the courts have "taken a generous view in exceptional cases" – it is better to leave the law as it is. Ms Campbell further stated that:

> It may be that the applicant is dependent on the continuance of the relationship but the applicant is still better off not worse off because of the relationship. The law should be encouraging saving rather than dependency claims where the incentive is to spend savings so that a claim can be made.

6.42 Christopher Jarman (barrister) was concerned about the delay and cost to which estates would be exposed if the scope for claimants to pass the threshold test was widened. He expressed concern that the knock-on effect could be to force estates to compromise claims, possibly even in unmeritorious cases, just "to allow the administration to be brought to an end without incurring further delay and possibly irrecoverable cost". Mr Jarman was concerned about opening up the Act to "enhanced redundancy provision for domestic employees who prove incapable of securing employment elsewhere". On the other hand, Dr Mary Welstead (academic) thought that section 1(1) of the 1975 Act would enable the courts "to rule out any unreasonable claim" and the Chancery Bar Association also suggested that other provisions in the Act would "prevent an increase in unmeritorious claims".

CLAIMS FOR FAMILY PROVISION: OTHER RELATIVES

6.43 **We invite consultees' views as to whether the categories of applicant for family provision should be further widened to include other relatives, such as parents, descendants other than children, siblings, nephews and nieces, and so on.**

[Consultation Paper paragraphs 6.36 and 8.29]

6.44 Forty-seven consultees commented on this question: 33 thought that the categories of applicant for family provision should not be widened; two thought the category should be widened; one consultee expressed a mixture of views; nine consultees thought the categories should be widened to certain relatives (mostly parents) and two consultees simply provided comments.

The responses

Consultees who thought that the categories should be widened

6.45 Jonathan Larmour thought that the category should be extended to the relatives listed as examples in the consultation question but gave no further explanation. Professor Chris Barton thought that "on the consistency basis" with the Fatal Accidents Act 1976, that the "wider approach" was to be recommended. Withy King LLP (solicitors) reported that "views were relatively evenly split" among those who contributed to the firm's response.

6.46 Two consultees gave their views without overtly supporting or opposing a widening of the categories. Jo Miles (academic) considered the underlying principles involved; in particular, the needs-based "concept of family solidarity". Richard Frimston (solicitor) stated that:

> Consideration should be given to widening the class of applicants in the absence of spouses and dependants, to those who have themselves supported or maintained the deceased, and thus to whom the deceased owed an obligation to recognise their historic support and maintenance.

6.47 A number of consultees thought that the category should be extended to some of the relatives mentioned, particularly parents and/or siblings, but not to others.

6.48 Donald Jolly (retired solicitor) and Roland D'Costa (probate registrar) supported widening the category in question to include parents. Dr Mary Welstead (academic) suggested that it would be better to "allow siblings and parents to apply under a specific category rather than leave them to the vagaries of s1(1)(e)".

6.49 Anne Thom (solicitor) was concerned about "problems encountered by the elderly" and thought that parents should be included. Francesca Quint (barrister) also thought that parents should be included and explained that:

> Given our ageing population and the fact that people can run out of money, and often look to their children for support, I would be in favour of including parents as potential claimants but not the other close relatives. This should not be a frequent occurrence.

6.50 Giles Harrap (barrister) noted the "increasing numbers of elderly people" and that this group "may be adversely affected and left vulnerable if deprived by death of their children". He commented that a change to the definition of dependency may help other classes of claimant but thought that it still "might not be easy for a parent to prove". He explained that it could assist "those for whom society is having great difficulty making provision". Mr Harrap did not think that there would be an increase in litigation, stating that "at least there would not be a contest over the preliminary question of whether a parent is a new style dependant or not and the claims that are made are likely to be meritorious and quickly settled".

6.51 Some consultees made comments conditional on other proposals in our Consultation Paper being taken forward. Sheila Campbell (solicitor) suggested that, if parents and siblings were no longer entitled to share a large estate with the deceased's surviving spouse as provisionally proposed at paragraph 3.36 of the Consultation Paper, the category of applicants under the 1975 Act should be widened. She supported parents being added as a category of their own. Cripps Harries Hall LLP (solicitors) thought that if cohabitants gained the rights to inherit on intestacy suggested in Part 4 of the Consultation Paper, "the rights of those who would otherwise inherit under intestacy are removed" and the category of those eligible to claim under the 1975 Act ought to be widened to parents and siblings.

6.52 The Centre for Child and Family Law Reform submitted that cohabiting siblings ought to be included as a category under the 1975 Act. They gave examples of the potential unfairness which could arise under the current law and suggested there would not be an increase in litigation if such reform was enacted for two reasons: a surviving cohabiting sibling may often be the sole or main beneficiary and he or she would also need to meet a "minimum period of cohabitation", which would be the same as that which the Law Commission provisionally proposed for cohabitants generally. They concluded that "there is no fundamental difference between a surviving cohabitant … to claim financial provision and the right of a surviving cohabitant sibling to do so".

Consultees who did not think that the categories should be widened

6.53 A number of consultees did not think the categories of applicant for family provision should be widened, including; the Institute of Professional Willwriters, Andrew East (legal executive), Richard Dew (barrister), the Yorkshire Law Society, the Society of Legal Scholars working group, the Royal National Mission to Deep Sea Fishermen (charity), the Institute of Legacy Management, the Family Law Bar Association, the Royal Bank of Scotland Trust & Estate Group, Maxwell Hodge (solicitors), the Association of Contentious Trust and Probate Specialists, the City of Westminster and Holborn Law Society, the Money and Property Committee of the Family Justice Council, Paul Saunders (trust administrator) and the Law Reform Committee of the Bar Council.

6.54 A number of consultees were concerned that such an extension would lead to an increase in litigation. Richard Wallington (barrister) commented that "widening categories of applicant for family provision is likely to increase litigation and thus cause delay and additional expenditure to administer the estate". The Law Society expressed similar concerns. The Office of the Official Solicitor thought it would be "contrary to the aim of the review" as it would increase the number of claims. Boodle Hatfield (solicitors) noted that such an increase could be see both generally and in relation to individual estates, suggesting that a single estate could end up with "two or three people claiming provision". The Woodland Trust (charity) were concerned that there could be "administrative problems in location and identification".

6.55 Davenport Lyons LLP (solicitors) had two solicitors who thought that reform was "unnecessary" and ran the risk of the 1975 Act turning into a "second tier forced heirship" and taking away from "the freedom of an individual to leave his or her estate as they wish". The Battersea Dogs and Cats Home (charity) were also concerned about forced heirship being introduced "via the back door". They strongly objected, and were worried that it "would lead to an avalanche of 1975 Act claims in instances where legacies have been left to charities". In their view:

> … the 1975 Act was intended to be a safety net, to enable the Courts to intervene, on a very limited basis, to prevent real hardship as a result of inadequate provision for vulnerable or otherwise dependant claimants.

6.56 The People's Dispensary for Sick Animals (charity) thought that an extension of the categories would "work to the detriment of charities" they also thought that it would "dilute the testator's freedom of testamentary disposition" and cause an increase in litigation with the costs which such an increase would carry. The Judges of the Chancery Division and of the Family Division of the High Court agreed that "there should be no further encroachment upon the principle of the freedom of testamentary disposition" and expressed concern that the court would be left without "some readily referable standard" for guidance, if the categories of applicant were widened.

6.57 Although Christine Riley (probate registrar) had "no strong views" on the issue, she thought the current law was "fair" and had not seen it "cause difficulties or hardship". LV= (organisation) thought that there was a lack of evidence to show that this proposed reform was necessary. Convenient Wills (firm) did not see any benefit in widening the categories. They suggested that provision should be made in a will if other members of the family "were a concern to the deceased".

6.58 The Chancery Bar Association were worried that there could be more claims "which would prove harder to settle, and more costly to fight". They, along with the Association of Her Majesty's District Judges, Wilsons Solicitors LLP and Jo Miles (academic), thought that section 1(1)(e) of the 1975 Act was sufficient to deal with meritorious claims outside the stated relationships.

6.59 Sidney Ross (barrister) provided a helpful overview of the situation in other jurisdictions and concluded that:

> … since, in the relatively few jurisdictions which permit applications by a wider range of relatives than are eligible under the 1975 Act, the applicant has in all but one case to satisfy the maintenance condition, there is no argument for explicitly widening the scope of the Act to include blood relatives other than children.

6.60 The Society of Trust and Estate Practitioners considered the relevance of our proposals, in relation to a claim under section 1(1)(e) of the 1975 Act as a dependant, that an assumption of responsibility by the deceased should no longer a threshold and that it should not be a prerequisite for the deceased to have contributed substantially more than the claimant. They felt that given those proposals, there would be no need to widen the categories of applicants. Christopher Jarman (barrister) suggested that if such relatives retained their rights on intestacy when there is a surviving spouse and no issue (contrary to our proposal) there would be no need for the categories of the 1975 Act to be widened. He thought that retaining the current law in relation to intestacy rights and family provision would be "the lesser of two evils".

PARENTS AND SIBLINGS

6.61 **We ask consultees whether the current preference in the intestacy rules for parents over siblings should be retained.**

[Consultation Paper paragraphs 6.46 and 8.30]

6.62 There were 40 responses to this question. Of those 40 consultees, 12 thought that the current preference should be changed. Some wanted the preference reversed and others preferred the entitlement to be shared between parents and siblings. There were three consultees who had mixed views. Twenty-six consultees wanted the current preference for parents to be retained.

The responses

Change the current preference for parents over siblings

6.63 The Association of Her Majesty's District Judges said: "No. It makes little sense", which suggests a view that the current preference should not be retained. The Woodland Trust (charity) suggested that although it is appropriate for the parents to inherit, perhaps siblings should take preference as "the usual assumption if a will had been prepared would be that assets are handed to the younger generation not the older."

6.64 A number of consultees thought that parents and siblings should be on an equal footing. Cripps Harries Hall LLP (solicitors) recognised that parents were more likely to have contributed to the child's wealth and may have greater needs if they are elderly, but they still favoured change. They thought that most clients who make wills "believe that assets should pass down the generations rather than up" and that it would ease administration as the assets would only be administered once rather than twice (the second time being on the parents' death). They favoured a 50/50 split between surviving parents and siblings.

6.65 Professor Chris Barton (academic) thought that sharing between parents and siblings would "assuage the sense of injustice currently likely to be felt by the siblings and their descendants". Maxwell Hodge (solicitors) suggested distributing the estate between parents and surviving siblings would be fair as it would deal with "fractured family relationships". Paul Saunders (trust administrator) looked at the origins of the Administration of Estates Act 1925 before the introduction of the welfare state when there was "an expectation that children would provide for their ageing parents". He thought that the existence of the welfare state removed the need for this provision and so parents and siblings should share equally.

6.66 Three consultees thought the position should be reversed with siblings taking in preference to parents. This was the opinion of Andrew East (legal executive). The Institute of Professional Willwriters suggested that the preference should be changed to prefer siblings in order to "reflect the realty of today's world". They explained that most testators prefer siblings for two reasons. The first is that "most parents are financially stable" and so siblings will benefit more from the inheritance; and secondly, inheritance tax will be incurred and the funds could be liable for use in paying for care for parents "which would otherwise have been paid by Local Authorities". Richard Frimston (solicitor) thought that preference should be given not only to siblings but also to half siblings for three reasons. He thought that it would stop estranged parents inheriting, "solve some taxation issues" and simplify things "in the case of multiple family tragedies".

6.67 Dr Jeremy Moore alerted us to a problem occurring where both parents survive the deceased, and one of them has been estranged from the family. He explained that, because the estate is shared equally between the two surviving parents, the estranged parent could be entitled to a deceased child's estate even though he or she may have had limited or no contact with that child. Dr Moore was keen to find a solution to this problem and to raise awareness of the benefits of writing a will.

Retain the current preference

6.68 The majority of consultees were in favour of retaining the current preference for parents, including Donald Jolly (retired solicitor), Francesca Quint (barrister), Anne Thom (solicitor), LV= (organisation), the Family Law Bar Association, Dr Mary Welstead (academic), Helen Whitby (probate registrar), Roland D'Costa (probate registrar), the Judges of the Chancery Division and of the Family Division of the High Court and Boodle Hatfield (solicitors).

6.69 Some consultees in favour of change cited the adverse tax implications of transferring to parents; however, Davenport Lyons LLP (solicitors) thought that the current law should be retained. In contrast to some practitioners, they found that "siblings are rarely mentioned in Wills even when the adverse tax consequences are explained to clients". Title Research (firm) had "not found any widespread surprise at, let alone opposition to, the concept among the great many families which we have researched".

6.70 The Chancery Bar Association also noted the potential tax incentive to have the property transferred to siblings, rather than pay inheritance tax on the transfer to the parents and then again on the parents' death when the assets pass back down to the children and other direct descendants. However, the Association explained that a deed of variation could be executed over the property in favour of the deceased's siblings and this would avoid double taxation. The Association thought that the preference for parents should be retained as they are likely to have a greater claim on the estate as they may be "beyond working age and in retirement and on limited means". Christopher Jarman (barrister) was also swayed by the fact that the parents could redirect the inheritance to siblings if they so desired, without negative tax implications. Farrer & Co (solicitors) made similar comments.

6.71 A number of consultees did not think there was a strong enough argument for change. The Law Society saw no evidence to justify changing the preference and so recommended maintaining the status quo. The City of Westminster and Holborn Law Society also thought that the case for change was not substantial enough. Gregory Hill (barrister) noted that although this was "largely an arbitrary choice" there was no reason to change the rule.

6.72 Sidney Ross (barrister) could see "no compelling argument for change". He commented that there "is no principled argument for favouring either class over the other". He suggested that the Nuffield survey (discussed at paragraph 1.44 of the Consultation Paper) could be useful; even so he thought that either way there would always be hard cases and since there was no compelling argument for change the current law should be retained. Richard Wallington (barrister) thought that the current law should be retained but commented that "this may be another case where public attitudes may be more important that those of lawyers". Royal Bank of Scotland Trust & Estate Group "anticipated the parents having a higher moral claim" but thought it was "not something that can be answered other than on moral grounds".

6.73 The Society of Legal Scholars working group pointed out that if the preference for parents is retained there is at least a possibility that the siblings will inherit at a later stage (on the death of the parent), but the same could not be said if the position was reversed. They too thought that there was not enough reason for change. Giles Harrap (barrister) noted the simplicity of the current law and thought that a change was "not likely to promote a more just outcome".

6.74 The Society of Trust and Estate Practitioners argued against change, suggesting that the parent was likely to have greater needs and so the deceased would have been more likely to have wanted the parent to benefit. Sheila Campbell (solicitor) thought that parents would be more likely to be in need – if they were not, then they could make a deed of variation in favour of the siblings. The Association of Contentious Trust and Probate Specialists noted that testators are more likely to feel a sense of obligation to their parents rather than their siblings. The Law Reform Committee of the Bar Council recognised that there would be "difficult cases where this produced unfairness" but preferred the current law.

Mixed views

6.75 The Yorkshire Law Society offered mixed views, as did Convenient Wills (firm) and Withy King LLP (solicitors). Convenient Wills (firm) noted that they often recommend gifts to siblings for "inheritance tax planning" reasons and "long term care protection" but the public seem to prefer parents.

FULL SIBLINGS AND HALF SIBLINGS

6.76 **Would consultees favour reform to the intestacy rules (and consequential amendments to the Non-Contentious Probate Rules) so that no distinction is drawn between full and half siblings?**

[Consultation Paper paragraphs 6.54 and 8.31]

6.77 Thirty-six consultees responded to this question. Sixteen disagreed and thought the distinction between half and full siblings should remain, 13 were in favour of reform which removed the distinction and seven provided substantive comments but did not express a preference or suggested alternative solutions.

The responses

6.78 A number of consultees did not favour the reform suggested. They included: Donald Jolly (retired solicitor), the Woodland Trust (charity), Sheila Campbell (solicitor), Anne Thom (solicitor), the Family Law Bar Association, Dr Mary Welstead (academic), Maxwell Hodge (solicitors) and Helen Whitby (probate registrar). The Yorkshire Law Society thought that, although it "may appear unjust", the law should remain the same and the Royal Bank of Scotland Trust & Estate Group thought that the current position should be retained from "a moral position". Title Research (firm) did not want the distinction removed as they thought it would lead to uncertainty and require more research to be done into family history.

6.79 Consultees in favour of reform included Christine Riley (probate registrar), Andrew East (legal executive) and Professor Chris Barton (academic). Both Sidney Ross (barrister) and Giles Harrap (barrister) found some of the arguments in the Consultation Paper particularly persuasive and thought that the distinction should be removed.

6.80 A number of consultees were split on the issue, for example, Davenport Lyons LLP (solicitors) and Withy King LLP (solicitors). The Chancery Bar Association were undecided and thought that the Nuffield survey (discussed at paragraph 1.44 of the Consultation Paper) would be useful but did comment that it would be easier for administration if the distinction remained in favour of full siblings. The Law Society suggested that it would be easier to retain the current law but said that removing the distinction "would not cause significant disruption to the operation of the intestacy rules". They concluded that the opinion of members of the public should have "considerable weight". The Probate Service did not comment on whether they thought reform was desirable but did note that it would have implications for them; for example, there might be an increase in multiple applications for a grant of representation and possibly an increase in the use of caveat procedures (a procedure for objecting to a grant being issued).

The effect of the distinction depends on individual circumstances

6.81 The main argument against removing the distinction was that the position of half siblings within a family varies according to individual circumstances and so removing the distinction may not produce the most appropriate outcome in some cases. Daniel Matthews was one of the consultees who thought that the "array of variables" relating to the relationships between half siblings and full siblings meant that the law should remain the same. Boodle Hatfield (solicitors) noted that some half siblings might not know each other very well or might live in different households, and that there might be a large age gap between them. Given these possibilities, they did not think that there should be a change to the current rules.

6.82 The Society of Legal Scholars working group demonstrated with an example how the closeness which is felt with half siblings may well "depend more on whether they have been brought up together in the same household than their blood relationship". They felt that removing the distinction "might not necessarily come any closer to reflecting likely wishes than the current distinction".

6.83 Christopher Jarman (barrister) expressed concern that there would be "plenty of cases" of half siblings who were not sufficiently close to justify this reform. He gave the example of estranged parents who go on to have more children with new partners. He thought that where there were half siblings in a family who want to benefit one another on death, the answer was to make a will. The Law Reform Committee of the Bar Council thought that families with half siblings often fall into two categories: families in which half siblings are regarded as full siblings and families where half siblings regard themselves as being unrelated. They thought that there was sense in the presumption that one is closer to one's full siblings than half siblings and that things should be left as they are.

Need to recognise modern family relationships

6.84 Many of those in favour of removing the distinction mentioned the need to recognise modern family units. There was a view that there has been an increase in the number of families with half siblings and that public attitudes have moved towards recognising half siblings in the same way as full siblings. Francesca Quint (barrister) commented that "such a distinction can be invidious" in the context of modern families. Roland D'Costa (probate registrar) also noted that the "distinction has become blurred" and supported reform as he thought that "many families will have full and half siblings living in the same household".

6.85 The Society of Trust and Estate Practitioners considered some of the arguments already mentioned. They also noted that quite a small number of estates would be affected by the provision. They decided "on balance" that to "reflect modern experience" the distinction should be removed.

6.86 Richard Wallington (barrister) thought that:

> Modern social change probably means that more people have half siblings than was previously the case, and in many cases will have been brought up along with half siblings.

He recognised that the closeness of the relationship between half siblings will vary according to individual circumstances – a point made by some consultees who opposed reform – but he thought that the intestacy rules should not distinguish between the two. Gregory Hill (barrister) also recognised that there could be cases in which a half sibling did not have a relationship with the family member from whom he or she would inherit. He gave an example of a non-custodial parent who loses touch or emigrates and has more children. However, he concluded that such cases are "a risk which will have to be accepted".

6.87 The City of Westminster and Holborn Law Society observed that people often refer to half siblings simply as their brother or sister without the "half"; they thought this showed that "the half-blood aspect is usually regarded as unimportant". They thought another indicator of the public's attitude was that "in the construction of a will or other instrument a reference to a sibling is normally taken to include a half sibling". Paul Saunders (trust administrator) thought that an increase in second marriages, and in cohabitation while there is a marriage subsisting, meant that there would be an increase in children who would be affected. He thought that it would be unfair for them to have to make a 1975 Act claim as it would "be a retrograde step which might serve to create division within the family and give rise to significant legal costs".

6.88 Jo Miles (academic) approached the issue from another angle, arguing that although family breakdown may be new, "reconstituted families are not". She explained that, for example, widowers whose wives died in childbirth may have remarried, and so half siblings are not new. She supported removing the distinction.

Other comments

6.89 Jonathan Larmour was not in favour of reform but thought that if reform were to go ahead, half siblings should receive half what a full sibling would receive. Richard Frimston (solicitor) also suggested that half siblings should receive half the amount of full siblings as he thought this would "recognise that they may inherit from their non related other parent". Christopher Jarman (barrister) thought that this "judgement of Solomon" would not avoid the problems which removing the distinction would create in some cases and "should not be seen as a compromise solution".

OTHER RELATIVES

6.90 **We invite consultees' views as to whether there should be a presumption that administrators may distribute to known beneficiaries without reserving a portion of the estate for the costs of tracing missing beneficiaries.**

[Consultation Paper paragraphs 6.62 and 8.32]

6.91 Forty-three consultees responded to this question. Seventeen consultees said that there should be a presumption along these lines, 14 disagreed and 12 offered alternative suggestions or provided comments without expressly agreeing or disagreeing.

The responses

Consultees who were against the introduction of a presumption

6.92 Richard Dew (barrister) did not support the introduction of a such a presumption; he explained that:

> In fact the current system works well. Applications to court are easy and not especially expensive and the insurance available is generally satisfactory. It is doubtful that this proposal would work better and it could well prove to be very unfair.

The Chancery Bar Association also disagreed with the idea of a presumption on the basis that the current court procedure "works well and subjects personal representatives to rigorous checks to ensure they really have carried out all necessary searches" and is flexible enough to deal with "clear cases" on paper. The Association also noted administrators' ability to take out missing beneficiary insurance and stated that "if the presumption was limited to personal representatives locating identified beneficiaries we would be more supportive". The City of Westminster and Holborn Law Society thought there was "a strong case" for retaining the need for court directions.

6.93 A number of consultees were worried such a presumption might encourage or facilitate fraud. Title Research (firm) thought it was "a recipe for disaster" which "would encourage fraud, wishful thinking and complacency in Administrators". They commented that when an administrator was also an heir he or she would be further conflicted. Anne Thom (solicitor) expressed concern that "there would be a temptation for the members of the family who were about to suppress knowledge of other beneficiaries", an incentive which the City of Westminster and Holborn Law Society also recognised. The Woodland Trust (charity) thought that the presumption would "make a mockery of the intestacy rules and increase dishonesty for personal gain"; a fear the Law Society also raised.

6.94 Title Research (firm) explained that the chances of successfully finding an heir were "greater than ever" and so described this proposal as a "completely unnecessary and retrograde step". Paul Saunders (trust administrator) thought that without "greater safeguards" the proposal could not be supported. He suggested that a personal representative should have to make the appropriate enquiries and obtain missing beneficiary insurance. Dr Mary Welstead (academic) thought there should not be a "rigid rule" but that administrators should be left with "some discretion".

6.95 Hoopers (firm) provided a number of reasons why they disagreed with the idea of a statutory presumption. They thought that it was not a widespread problem and that beneficiaries might become much less willing to assist in finding missing beneficiaries; they noted that it is a duty of administrators to distribute to entitled beneficiaries and that insurance is "a reasonable expense of administration that can be borne by the estate". They thought insurance was "a very fair solution" which provided a "practical answer to the problem" and took up only "a very small proportion of the net estate". Richard Frimston (solicitor) said that the problem was a practical one "to be solved with practical rather than legal solutions" as the obligation on a personal representative to trace missing beneficiaries could not be removed.

6.96 Sidney Ross (barrister) commented that "insurers are becoming more risk-averse and less willing to write missing beneficiary insurance"; he also noted that "courts are becoming less willing to make Benjamin orders" (which permit distribution of the estate on the basis that a particular beneficiary is presumed to have predeceased). Despite these problems, he thought that the presumption would be "of limited utility" since it would only be applicable when the number of missing beneficiaries was known. Christopher Jarman (barrister) distinguished between the problem of locating the issue of a known beneficiary who has died and identifying "how many basic shares the estate falls to be divided in the first place". He took the view that the presumption might be appropriate in some cases but would be less so in others. He thought that administrators should make a good case to the court, having completed their enquiries, before being able to distribute where there are missing beneficiaries.

6.97 Other consultees who disagreed with the idea of a presumption were Davenport Lyons LLP (solicitors) and Title Research (firm). The Society of Trust and Estate Practitioners considered that there was a risk that administrators would not make proper enquiries if they were able to distribute the estate without identifying and locating all of the beneficiaries. They also pointed out that it might not be the beneficiaries' fault that they are missing.

Consultees who were in favour of the introduction of a presumption

6.98 A number of consultees thought that there should be a presumption that administrators can distribute without reserving a portion of the estate for the cost of tracing missing beneficiaries. They included Jonathan Larmour, Christine Riley (probate registrar), the Society of Legal Scholars working group, the Royal National Mission to Deep Sea Fishermen (charity), Richard Wallington (barrister) and Jo Miles (academic); the latter, although stating that she had "no strong view", was "inclined to agree to such a presumption". The Office of the Official Solicitor, which has "many cases where this is an issue", described this as a "sensible reform".

6.99 Viju Chhagan (solicitor) argued that the cost of tracing a missing beneficiary should come out of the missing beneficiary's share but did not think that administrators should simply distribute between known beneficiaries. Donald Jolly (retired solicitor) thought that this was appropriate where the "existence but not the whereabouts of a potential beneficiary is known". Francesca Quint (barrister) thought that this would be useful if "reasonable steps to identify and trace the missing relatives had been taken and a suitable advertisement published".

6.100 The Roy Castle Lung Cancer Foundation (charity) supported the introduction of such a presumption and thought that it would "operate in favour of charity beneficiaries". The People's Dispensary for Sick Animals (charity) thought that it was "unfair for the burden to fall on other beneficiaries", sentiments which were echoed by the Institute of Legacy Management and World Vision UK (charity).

6.101 Finders (firm) suggested that "more widespread use of contingency fee arrangements" could provide an "efficient and equitable" solution. They supported the introduction of a presumption, stating it was in line with "established case law" citing *Re Whitaker*,[3] *Re Phillips*[4] and *In the Estate of Cara Prunella Clough-Taylor*.[5]

6.102 Andrew East (legal executive) described missing beneficiaries as "a very difficult problem encountered in a number of estates at the present time". He commented on the usefulness of insurance in these situations but thought that a presumption along the lines considered in the Consultation Paper would also assist with the problem. The Law Reform Committee of the Bar Council also acknowledged the usefulness of insurance and reiterated that administrators can apply for a court order. They saw the problem as the fact that often a beneficiary is known but proves "very difficult to find". They commented that this difficulty is "no fault of the other beneficiaries" and it "may not have been foreseen by the testator". The suggested presumption would "solve what is quite a practical problem" and would "equate with the law and practice relating to specific legacies", where any exceptional costs are paid by the legatee, though normal costs fall on the estate.

[3] [1911] 1 Ch 214.

[4] [1938] 4 All ER 483.

[5] [2002] EWHC 2460 (Ch).

Other comments and alternative suggestions

ALTERNATIVE SUGGESTIONS

6.103 Sheila Campbell (solicitor) agreed with the introduction of a presumption but thought that there should be both "statutory advertisement and an advertisement for missing beneficiaries in say a national newspaper". She added that if a missing beneficiary is found and it is discovered that another beneficiary withheld information about them, then the missing beneficiary should have a claim against that beneficiary for the cost of tracing. Ms Campbell also suggested that the Law Society should run a website with details of estates with missing beneficiaries, to increase the chances of finding them. To ease the administration of small estates Ms Campbell suggested that the Treasury Solicitor could make an application every few months and join together any small estates which need an order from the court due to a missing beneficiary.

6.104 The Institute of Professional Willwriters suggested administrators could administer as though the beneficiary was predeceased if the "s 27 notices" had been placed in the London Gazette and a newspaper in the beneficiary's last known location, and the administrators had waited two months for a response.

6.105 The Yorkshire Law Society and the Judges of the Chancery Division and of the Family Division of the High Court suggested a waiting period of 12 months after which administrators could rely on the presumption. The Judges thought that the shares of untraced beneficiaries should be "treated as one fund bearing the costs of further investigation". They added that administrators should be protected when they distribute the retained fund if "they act in accordance with the opinion of Chancery Counsel of not less than seven years standing".

6.106 The Society of Trust and Estate Practitioners thought that compulsory insurance was the solution as the relevant enquiries would have to be made to obtain insurance which would protect missing beneficiaries. Anglia Research (genealogists) said that there was no "one size fits all" solution and so thought that increasing the "latitude and discretion" of personal representatives might assist them in the administration of individual estates.

6.107 The Law Society thought that the cost of tracing a missing beneficiary should be paid out of the entire estate, but that if a beneficiary could not be reasonably traced then further costs should come out of the missing beneficiary's share. They acknowledged that drawing the line on what was reasonable would be difficult and thought that "distribution on the basis that the missing beneficiary predeceased should continue to require authorisation from court"; they suggested that this might be done on paper, without the need for a hearing.

6.108 Making an application on paper was something Gregory Hill (barrister) also suggested. He thought the answer was to make court applications as simple and inexpensive as possible; it would protect the administrator if a beneficiary later came forward; at the same time it would ensure that the administrator had made the necessary enquiries and was not being deceptive, particularly when they stood to inherit as well.

6.109 Roland D'Costa (probate registrar) was happy with the introduction of a presumption but said that a "welcome development would be a combination of insurance and advertisement … in advance of applying the presumption". He was concerned that the Probate Service should be able to provide clear guidance for administrators.

GENERAL COMMENTS

6.110 The Association of Her Majesty's District Judges thought that a statutory presumption would reduce the number of applications to the court, but commented that the issue is not a common problem.

6.111 The Royal Bank of Scotland Trust & Estate Group were pleased that the courts had expressed approval of the practice of administrators taking out missing beneficiary insurance.

Other issues raised

6.112 Sidney Ross (barrister) favoured:

> … restricting the classes of entitled relative by limiting the number of generations who can inherit to grandchildren (as lineal descendants) and great-nephews and -nieces (as collaterals).

He thought that the Law Commission should look at the statistics, and that if the number of estates left intestate where more distant relatives inherit was small then we ought to consider limiting the reach of the intestacy rules further, for example excluding great nephews and great nieces.

6.113 The Consultation Paper did not propose either widening or narrowing the classes of those relatives entitled to inherit on intestacy; nor did we ask a formal consultation question about this issue. Nevertheless, two consultees (including Helen Whitby (probate registrar)) suggested that the law in England and Wales should be amended to match the Scottish intestacy rules, which permits second cousins of the deceased to inherit if there are no closer relatives surviving. We use the term "second cousins" to refer to persons who share a common great-grandparent.

6.114 One consultee drew upon his personal circumstances to illustrate his reasons for reform in this area:

> My second cousin was the only child of the marriage of two only children. Our paternal grandfathers were brothers. As the singleton child of two singleton children her closest relatives could not be nearer than second cousins of whom there are six extant. The family connection was nevertheless strong and she attended family events just as closer cousins would. We corresponded regularly, latterly almost daily and on news of her sudden death it was expected that I would deal with the estate and that the second cousins would automatically inherit in the event of no will being found.

UNMARRIED FATHERS

6.115 **We would like to hear the views of consultees, in particular those involved in the administration of estates, about any practical problems which might arise as a result of a reform of section 18(2) of the Family Law Reform Act 1987.**

[Consultation Paper paragraphs 6.68 and 8.33]

Introduction

6.116 Section 18(2) of the Family Law Reform Act 1987 sets out a rebuttable presumption that the father of a child born outside of marriage has predeceased the child. The rule is intended to ease the burden of administrators in tracing unmarried fathers. There is an evidential burden on a person claiming to be the father of the deceased. The rule puts unmarried fathers in a different position from married fathers, married mothers and unmarried mothers.

6.117 The Consultation Paper suggested that the presumption might be amended or removed altogether and sought views on this suggestion. Nineteen consultees responded to this question with a range of opinions and views.

The responses

6.118 A number of consultees thought that reform was necessary. Some thought it would not cause any problems, such as Andrew East (legal executive), while others such as Paul Saunders (trust administrator) recognised that there could be problems but thought reform was justified anyway. Mr Saunders suggested there could be a "long-stop period" to minimise delay to the distribution of the estate and perhaps scientific methods could be used if there was dispute over paternity.

6.119 Richard Frimston (solicitor) commented that if siblings benefitted before parents on intestacy – as he suggested in relation to the provisional proposal at paragraph 6.46 of the Consultation Paper – this would be less of an issue. That said, he thought "the presumption of the death of the father seems no longer to be warranted". Professor Chris Barton (academic) argued that the current law is not compatible with Articles 8 and 14 of the European Convention on Human Rights and Fundamental Freedoms. He thought that "parity with the maternal counterpart and the 'married father' is essential in 2010".

6.120 Consultees pointed out a number of practical problems which could arise if section 18(2) of the Family Law Reform Act 1987 was reformed. Donald Jolly (retired solicitor) thought that reform could cause "an inordinate increase in costs and place a greater liability on personal representatives". Sheila Campbell (solicitor) was also "concerned there would be increased administrative burden and a danger of claims against administrators resulting from any reform". The Chancery Bar Association were "particularly concerned with the increase in the costs of administration in a small number of estates and the risk of maladministration caused by any reform".

6.121 The Chancery Bar Association had no practical problems to report with the current law and no comment on Human Rights Act 1998 implications; they thought that there was "no convincing case" for reform. Richard Dew (barrister) told us that he had never seen the issue in practice and concluded it "can't often arise" and so wondered whether any change was necessary; similarly Anne Thom (solicitor) stated that she had not encountered any problems with the current law.

6.122 The Society of Trust and Estate Practitioners thought that there was "sound sense" in treating unmarried fathers differently to married fathers when administering an estate on intestacy. They supported the distinction under the current law and explained:

> If the parents' relationship was not a loving and supportive one but rather the father was unknown or abusive or the child was the result of rape then it is possible that such a father would not be named on the birth certificate. To increase the pressure on administrators on the child's death to trace such a father before distributing the estate would be invidious.

6.123 The Law Society noted the practical problems in tracing an unmarried father and the risk of "exposing personal representatives to increased liability for wrongful distribution". They thought that the requirement to prove paternity should be retained and pointed out that an unmarried father's entitlement under the intestacy rules is the same as a married father's: "this presumption does not prevent an unmarried father [from claiming] a right to inherit under the estate but instead places a requirement to prove paternity".

6.124 Roland D'Costa (probate registrar) pointed out problems which would occur in administration without the presumption. An unmarried father would be entitled to a grant. If it was not possible to find him or to show evidence he was no longer alive then it might be necessary to apply to the court for a discretionary grant with the associated cost and delay for the estate; there might then need to be further court applications for distribution. Richard Wallington (barrister) also pointed out that there could be an increase in applications to the court for permission to distribute, as unmarried fathers could be difficult to trace.

6.125 Christopher Jarman (barrister) stated that:

> Any change which increased the extent of the enquiries that fell to be made by personal representatives, irrespective of whether they had reason to believe there might be a "black sheep" to be uncovered, must be undesirable.

Other consultees who did not think the current presumption should change were Davenport Lyons LLP (solicitor), Gregory Hill (barrister) and the Royal Bank of Scotland Trust & Estate Group.

6.126 Withy King LLP (solicitors) received mixed views from those who contributed to their response. Some argued that unmarried fathers should have equality with unmarried mothers, while others were concerned about the burden on administrators.

PART 7
THE ADMINISTRATION OF ESTATES

SMALL ESTATES

7.1 **We provisionally propose that the value of assets that can be administered without the need for a grant of representation be reviewed with a view to its being raised.**

[Consultation Paper paragraphs 7.8 and 8.34]

7.2 Forty-three consultees responded to this provisional proposal. Twenty-six agreed that there ought to be a review of the value of assets that can be administered without the need for a grant of representation; many of these consultees thought that the current limit ought to be raised. Fourteen consultees expressed concerns about the effect an increase in the value could have. Three consultees made alternative suggestions or provided comments without expressly agreeing or disagreeing.

The responses

Consultees who agreed with the provisional proposal

7.3 Consultees who agreed with the provisional proposal included Francesca Quint (barrister), the Association of Her Majesty's District Judges, the Society of Legal Scholars working group, the Law Reform Committee of the Bar Council, Anne Thom (solicitor), Richard Wallington (barrister), Gregory Hill (barrister), Boodle Hatfield (solicitors), Withy King LLP (solicitors), the City of Westminster and Holborn Law Society and the Law Society who thought that an increase would be "cost effective and convenient".

7.4 Based on personal experience, John Steer thought that the limit should be raised or that there should be a mechanism to allow close family to access money held in bank accounts. He thought that the current requirement to obtain a grant was "an expensive cost for small estates". The Association of Financial Mutuals pointed out that the current limit can leave a surviving spouse with insufficient funds to maintain his or her standard of living – or even meet the cost of the funeral – until a grant is obtained if he or she has no savings and no means of income.

7.5 In addition to a review of the value of assets which can be administered without a grant, the Institute of Professional Willwriters called for consistency in the way in which asset holders such as banks and building societies deal with small estates. They explained that many organisations release funds in excess of the statutory small estates limit. Although the Institute recognised that this could be helpful, they thought that it was confusing for administrators and that some consistency would be desirable.

7.6 The Chancery Bar Association welcomed both a review and the possibility that the current limit might be increased. They noted that there was a balance to be struck between facilitating "the administration of estates in a cost effective way" and protecting the rights of beneficiaries, for example from the risk of fraud. Giles Harrap (barrister) thought that a review would be sensible. He said that an increase in line with inflation should not cause trouble.

7.7 Some consultees suggested periodic reviews to bring the limit up to date. Sidney Ross (barrister) suggested reviewing this limit concurrently with the statutory legacy. He suggested that the review could be by reference to the consumer prices index ("CPI"). Christine Riley (probate registrar) suggested that it could be updated in line with the retail prices index ("RPI") rather than house prices. She also suggested that reviews may not need to be as frequent as every five years.

DISCUSSIONS ABOUT WHAT THE LIMIT SHOULD BE RAISED TO

7.8 Roland D'Costa (probate registrar) suggested that a realistic figure would be between £20,000 and £25,000 and that there should be a mechanism to increase this at regular intervals, possibly every five or 10 years. The Association of Financial Mutuals found that people who are beneficiaries of estates of lower value "are frustrated more by the restrictions of probate limits than the law surrounding intestacy". They suggested a limit of £20,000 to provide "future-proofing" since the reviews had so far been irregular.

7.9 Andrew East (legal executive) suggested raising the limit to £15,000; this figure was also suggested by Sheila Campbell (solicitor). Paul Saunders (trust administrator), the Law Society, Cripps Harries Hall LLP (solicitors) and the Society of Trust and Estate Practitioners supported a more modest increase to £10,000. The Society of Trust and Estate Practitioners were concerned about attempts to recover the estate without properly accounting for it and so thought that for larger sums the process of obtaining a grant was a useful safeguard. Cripps Harries Hall LLP commented that "obtaining a grant is not normally a major difficulty and it is often cheaper and quicker to do so rather than to complete a number of statutory declarations for different assets".

POSSIBLE SAFEGUARDS

7.10 Sheila Campbell (solicitor) suggested that if the limit was raised, there ought to be certain safeguards put in place. She suggested a requirement that the person receiving the funds make a statutory declaration that they are not aware of a will and that they do not intend to apply for a grant. Further to that, she suggested that if money is paid to the wrong person or without those safeguards being adhered to, then the organisation which has wrongly paid out should pay the sum to the correct person and compensate them. The Royal Bank of Scotland Trust & Estate Group agreed with the provisional proposal subject to "adequate protection afforded to asset holders and personal representatives against third parties obtaining funds without a grant and subsequent action by disappointed true heirs".

7.11 Paul Saunders (trust administrator) noted that there are only certain types of asset to which the limit applies and which can be administered under the Administration of Estates (Small Payments) Act 1965. If assets are released which are not specified in the Act or are over the value limit, then the institution that released them is open to a claim from a beneficiary who has not received his or her entitlement or to a claim from HM Revenue & Customs for any inheritance tax which should have been paid. Mr Saunders suggested a system similar to that which operates in Jersey, where there is a requirement that a statutory indemnity be given by anyone who applies for the release of assets under the small estates regime. The indemnity should be in a prescribed form and include an assurance that no inheritance tax is due on the asset before it is released and that the applicant will take responsibility for paying the deceased's debts.

Consultees who disagreed with the provisional proposal

7.12 The primary concern of those consultees who disagreed with this provisional proposal was the possibility of fraud. Some also emphasised the benefits and importance of having a grant of representation when administering an estate.

INCREASING THE POSSIBILITY OF FRAUD

7.13 The possibility that this proposal could increase the incidence of fraud in the administration of estates was of particular concern to charities because, as the People's Dispensary for Sick Animals (charity) explained:

> Charities and other beneficiaries may be named as beneficiaries without their knowledge, and sometimes only learn of their benefactors' generosity when a grant of probate is issued.

Charities were concerned that if there were fewer grants of representation, their chances of knowing about and pursuing legacies would be reduced and the chances of administrators ignoring legacies to charities would be increased.

7.14 The Battersea Dogs and Cats Home (charity) outlined the problem of probate fraud and the protection which the requirement of a grant of representation can provide.

> Probate fraud is already wide-spread. It is already comparatively easy to commit, as most beneficiaries are unaware of the deceased's assets and liabilities and their entitlement. The requirement to obtain a grant, involving as it does the need to swear an oath and file an IHT return, provides at least a limited disincentive to any one thinking of defrauding an estate.

7.15 Other consultees who mentioned the risk of funds being released to those who were not entitled to them included: Davenport Lyons LLP (solicitors), Cancer Research UK (charity), the Woodland Trust (charity), the Roy Castle Lung Cancer Foundation (charity), Viju Chhagan (solicitor), the Royal National Mission to Deep Sea Fishermen (charity), the Chancery Bar Association, Sheila Campbell (solicitor), the Institute of Legacy Management, World Vision UK (charity), Wilson's Solicitors LLP, the Society of Trust and Estate Practitioners, the Law Society and Title Research (firm). Many of the charities who responded also suggested that all wills should be registered.

IMPORTANCE OF A GRANT OF REPRESENTATION

7.16 Battersea Dogs and Cats Home (charity) considered that the issue of a grant of representation "provides a useful time limit on which beneficiaries, such as charities, can monitor the progress of the estate". They went on to point out that it is important in establishing the time frame for bringing claims against the estate. On the other hand, Giles Harrap (barrister) reported that he knew of no case where the power to make small payments without a grant had caused difficulty when seeking relief under the 1975 Act.

7.17 Christopher Jarman (barrister) was concerned about any proposals which would reduce the number of estates for which a grant of representation was made. He saw the public record that a grant of representation provides as a benefit in itself. It gives an account of who administered the estate and whether the estate was testate or intestate. The public record also enables anyone with a potential claim against the estate to find out whom he or she must contact. In the absence of a system where those details could be registered for small estates, he was not comfortable with the provisional proposal.

7.18 Title Research (firm) thought that the proportion of estates for which a grant of representation is required should increase rather than decrease, and that having a grant of representation and professional assistance in administering an estate is the best way to supervise administration and ensure distribution is correct.

OTHER COMMENTS

7.19 The Society of Trust and Estate Practitioners indicated that some banks and other financial institutions will release up to £20,000 with only an undertaking by those who are applying for the funds to be released. It may have been with such procedures in mind that Richard Dew (barrister) questioned whether the issue would be affected more by the procedures of particular organisations – such as banks – than by legislation. The Yorkshire Law Society made similar comments and went on to say that a review sounded sensible.

7.20 The Probate Service commented that if the value of assets which could be administered without a grant was raised then the number of applications for grants received by the Probate Service would be reduced.

7.21 Battersea Dogs and Cats Home (charity) raised concerns about the regulation of will writing and associated services:

> We are concerned by the impact new service providers in this field (particularly Will writers and estate service providers) are having because of the limited degree to which they are regulated.

APPROPRIATION AND SELF-DEALING

7.22 **We invite consultees' views as to whether the application of the self-dealing rule to administrators of intestate estates should be modified so that an appropriation should not be voidable by reason of the rule if it was at fair value.**

[Consultation Paper paragraphs 7.19 and 8.35]

7.23 Thirty-two consultees provided their views on the issue. Nineteen thought the self-dealing rule should be modified as suggested; 11 did not think it should be modified. Two consultees provided comments without stating a preference. A number of consultees referred in their responses, as we did in the Consultation Paper, to the leading case of *Kane v Radley-Kane*.[1]

The responses

Consultees who were in favour of modifying the self-dealing rule

7.24 Consultees who agreed with modifying the self-dealing rule included Andrew East (legal executive), Francesca Quint (barrister), the Yorkshire Law Society, Sheila Campbell (solicitor), the Society of Legal Scholars working group, Anne Thom (solicitor), Gregory Hill (barrister), the Chancery Bar Association, Davenport Lyons LLP (solicitors), Dr Mary Welstead (academic), Boodle Hatfield (solicitors) and the Law Reform Committee of the Bar Council.

7.25 A variety of arguments were made in favour of modifying the self-dealing rule such that an appropriation by an administrator would not be voidable by reason of the rule if it was at fair value. Consultees often outlined both arguments for and against the suggestion before concluding either way. The arguments in favour are outlined below.

THE ADMINISTRATOR ALREADY HAS A CONFLICT

7.26 The administrator in this situation, by the very nature of his or her role, was recognised as being conflicted, being both a beneficiary of the estate and having to administer it. The Chancery Bar Association argued as follows:

> We do not consider that there is any basis for retaining the self-dealing rule [in relation to appropriations]. That rule exists to ensure that trustees do not place themselves in [a] position where their interest and duty conflict. An administrator has such a conflict by the very nature of the right to administer. The fair-dealing rule is therefore the only appropriate rule in the circumstances.

7.27 A similar point was made by the City of Westminster and Holborn Law Society, who said that "it is not realistic to require that an administrator who is sole beneficiary of an intestate estate should be obliged to regard himself as a trustee". The Trust Law Committee recognised that the administrator has been placed in the position of conflict rather than placing themselves in such a position. However, unlike other consultees, they did not see this as justification for reform.

INJUSTICE

7.28 Both Richard Dew (barrister) and the City of Westminster and Holborn Law Society recognised that the current operation of the self-dealing rule in this situation could cause injustice. Richard Dew (barrister) commented that:

[1] [1999] Ch 274

> It is not wholly clear that *Radley-Kane* is correct. Assuming that it is it is a real nuisance and can cause serious injustice, particularly where the estate is low value and then for some reason rises significantly. I strongly support this proposal.

7.29 Cripps Harries Hall LLP (solicitors) noted that often the personal representative is unaware of the self-dealing rule. They suggested that "there would need to be a method to ascertain the fair value", to ensure that amending the self-dealing rule would not create further injustice.

UNREALISTIC TO EXPECT PERSONAL REPRESENTATIVES TO GET COURT APPROVAL

7.30 Consultees who opposed the proposed amendment cited the ability of an administrator to get court approval for a self-dealing transaction as a reason for retaining the self-dealing rule in this context. However, Richard Wallington (barrister) pointed out that:

> The surviving spouse ... will normally get the grant of letters of administration as that is what is provided in the non-contentious probate rules, and it is not practical politics to expect such persons in most cases to go to court to get approval of appropriations.

Consultees who were opposed to modifying the self-dealing rule

7.31 A number of arguments were put forward against reforming the self-dealing rule.

SUPPORT FOR THE CURRENT OPERATION OF THE SELF-DEALING RULE

7.32 The Society of Trust and Estate Practitioners echoed the text of the Consultation Paper, which acknowledged that although the rule can operate harshly, "it has the benefit of clarity and discourages behaviour by the personal representatives that may prejudice other beneficiaries". The Society of Trust and Estate Practitioners commented that "these seem eminently good reasons for retaining the current rule". They also felt that "the facts of *Kane v Radley-Kane* illustrate acutely the need to retain the rule".

7.33 The Law Society pointed out that the rule was well established and prevented personal representatives from acting unfairly towards other beneficiaries. The Family Law Bar Association focused on the position of other beneficiaries:

> The role of the Administrator is often perceived by other members of the estranged family as an opportunity to derive a benefit, or at least an advantage. The rule against self-dealing is a valuable method of reassurance, to those who see themselves as otherwise powerless.

7.34 The Trust Law Committee said that:

> In less plain cases, where there is a real question as to the justification for the appropriation ... the self-dealing rule is the only true safeguard for disadvantaged beneficiaries.

REFORM WOULD REMOVE THE BENCHMARK FOR DECISION-MAKING

7.35 The Trust Law Committee wrote about the working group they had established to examine this rule for all trusts, which reported in 2005. That working group decided against recommending reform of the self-dealing rule:

> The principal reason was that the fair-dealing rule already involves an exercise of judgment in at least two respects, first when deciding whether the rule applies, and second when deciding on the consequences of the rule applying to the particular facts of the case; in those circumstances the certainty of the self-dealing rule (at what may be seen as the extreme end of the spectrum of conflict) operates to provide valuable guidance as to the exercise of judicial judgment in less extreme circumstances. The removal of the self-dealing rule risks lowering the standard applied at other parts of the spectrum.

EXISTING EXCEPTIONS OR WORKAROUNDS ARE SUFFICIENT

7.36 A number of consultees thought that the current law provided sufficient opportunity for honest administrators to avoid the potential harshness of the self-dealing rule. Roland D'Costa (probate registrar) and the Judges of the Chancery Division and of the Family Division of the High Court cited this as a reason to retain the current law. The Law Society commented:

> The Society recognises that there are already exceptions to the self-dealing rule, including our preferred option of obtaining consent from all beneficiaries … . There is also the option to seek an exemption from the rule through a court order.

7.37 The Trust Law Committee pointed to the Civil Procedure Rules, Practice Direction 64A, para 1A.1, implemented in October 2009 to allow straightforward trust matters to be dealt with by an application "on the papers" without the need for a hearing, as recommended in their working group's 2005 report.

REFORM LIKELY TO CAUSE MORE DIFFICULTIES

7.38 Richard Frimston (solicitor) felt that the application of the rule against self-dealing in this context "has merit" and that "any relaxation is likely to cause more difficulties than it solves". This was also a concern voiced by some of the consultees who were nevertheless in favour of amendment to the rule; they felt that reform would be difficult to implement, or would not represent a significant improvement in practice. The Institute of Professional Willwriters said:

> While accepting the principle of the proposal, we are not sure whether it will make anybody's life easier.

They considered that appropriations frequently happen anyway and that "it only becomes an issue in contentious estates", where the beneficiaries would contest the administrator's assertion of fair value in any case.

7.39 Sidney Ross (barrister) agreed in principle, but had "strong doubts whether it is achievable in practice":

> … such a modification … is unlikely to solve the problems which the rule presently creates and might well … complicate any litigation in which it arose.

He identified various issues: as well as the burden of proof and any presumptions applicable, he asked whether it would be "fatal to the validity of the transaction if the PR [personal representative] was not consciously exercising (or attempting to exercise) the statutory power".

7.40 The Royal Bank of Scotland Trust & Estate Group considered that "this may not be of use to the 'lay personal representative' who would [know] nothing of this rule or how to achieve a 'fair value' process". Further difficulties with "fair value" were pointed out by the Institute of Professional Willwriters who considered that administrators and beneficiaries would still litigate as to what a "fair value" was.

7.41 Paul Saunders (trust administrator) said that:

> ... consideration should also be given to the situation that arose in *Lloyds Bank plc v Duker*,[2] where the appropriation of assets *pro rata* amongst the beneficiaries resulted in one of them obtaining a majority interest, whereas before the appropriation he had merely a large minority interest. The appropriation thereby gave effective control to the beneficiary. Whilst, in *Duker*, the assets were shares in a company, the same effect would arise if looking at control of the family home or other form of asset.

RISK OF FRAUDULENT ADMINISTRATION

7.42 The Woodland Trust (charity) felt that "this would be a backward step and open up more Estates to fraudulent administration".

DISAPPLICATION SHOULD BE AN INFORMED CHOICE

7.43 We noted in the consultation paper that the self-dealing rule is often excluded in wills. Cripps Harries Hall LLP (solicitors) noted in their response that "clients are happy to exclude [the self-dealing rule] in professionally drawn Wills". However, Sidney Ross (barrister) and the Society of Trust and Estate Practitioners felt that it was not valid to argue from the usage in wills to a default rule on intestacy:

> The rule is often modified in Wills but this is as a result of discussion with the testator and it should not be the case that in default provisions difficult assets to value may be appropriated easily just to make the administration simpler without the consequences of this approach having been explained to the deceased.

Christopher Jarman (barrister) pointed out that although the rule is commonly disapplied in wills and express trusts, it is usual to make this subject to the involvement of "a disinterested co-trustee".

[2] [1987] 3 All ER 193.

ILLOGICAL TO REFORM THE SELF-DEALING RULE ONLY FOR INTESTACY

7.44 Christopher Jarman (barrister) saw "an arguable case" for enabling appropriation at a fair value with a second administrator, but commented:

> ... what is the logic for not modifying the rule for trusts (express or constructive), and testate estates (or indeed company directorships), more generally? Such a relaxation of such an important fiduciary principle seems to require more fundamental consideration than something focused purely on intestacy.

Similarly, the Society of Trust and Estate Practitioners said that they "would be against creating an exception to the rule for intestacy only".

AN ALTERNATIVE SOLUTION – MORE INFORMATION FOR ADMINISTRATORS

7.45 Christopher Jarman suggested that, as the problem would usually arise in the context of self-administered estates:

> Rather than a change in the law, it seems to me that the point could be better tackled by an addition to the quite helpful information that probate registries provide to personal applicants – with an encouragement to take advice on the matter if unsure how to deal with it in the particular circumstances.

Consultees who suggested restrictions or safeguards

7.46 A number of consultees who were in favour of the sort of reform discussed in the Consultation Paper suggested restrictions to any amendment of the rule. Other consultees opposed any reform but thought that, if it were to go ahead, certain safeguards were needed.

7.47 The Chancery Bar Association were keen to ensure that the relaxation was made only for appropriations from the estate and not for purchases from the estate which they felt should be safeguarded as usual.

7.48 The Trust Law Committee felt that reform could only be justified if there was a second administrator.

7.49 Consultees noted the importance of the burden of proof. The Trust Law Committee and the Chancery Bar Association both favoured its resting with the administrator, to show that the appropriation was at fair value. Sidney Ross (barrister) simply noted this issue as something which would need to be resolved. He also asked whether any (rebuttable) presumptions would apply, for example that the appropriation was fair "if the valuation were carried out by a valuer who was a member of a specified professional body, with demonstrated expertise in valuing the type of asset in question".

Consultees who made other suggestions

RIGHT TO APPROPRIATE THE MATRIMONIAL HOME – BY A SOLE ADMINISTRATOR

7.50 Sidney Ross (barrister) felt that there should be reform to the provisions under the Intestates' Estates Act 1952 that permit a surviving spouse to acquire the former matrimonial home:

> The Intestates' Estates Act recognised the desirability of enabling the spouse to remain in possession or occupation of the matrimonial home and it seems anomalous that the spouse's right to require that appropriation to be made should depend on the existence of circumstances (i.e. a minority or a life interest) which require the appointment of a second administrator.

COHABITANTS

7.51 More than one consultee pointed out that consideration would need to be given to permitting cohabitants to appropriate the family home and to "self-deal", if the reforms discussed in Part 4 of the Consultation Paper were enacted.

SURVIVORSHIP PROVISIONS IN THE INTESTACY RULES (FIRST PROVISIONAL PROPOSAL)

7.52 **We provisionally propose that, if any beneficiary who would be entitled to take on intestacy survives the deceased but dies before the end of the period of 28 days beginning with the deceased's date of death, that beneficiary shall be treated as though he or she had not survived the deceased.**

[Consultation Paper paragraphs 7.30 and 8.36]

7.53 Thirty-one consultees responded to this provisional proposal. Twenty-four agreed with it, four opposed it and one consultee advocated removing the survivorship provision for spouses but imposing it for other beneficiaries.

The responses

7.54 Consultees often simply agreed with the proposal or characterised it as "sensible". Some stated, as a further reason in its favour, that such survivorship provisions are often included in wills. Others, such as Richard Dew (barrister) thought that survivorship provisions were used less in modern wills. Paul Saunders (trust administrator), who disagreed with the proposal, described such provisions as "rare".

7.55 Consultees in agreement included: the Institute of Professional Willwriters, Davenport Lyons LLP (solicitors), Christine Riley (probate registrar), the Chancery Bar Association, Andrew East (legal executive), the Association of Her Majesty's District Judges, Francesca Quint (barrister), the Woodland Trust (charity), the Yorkshire Law Society, Sidney Ross (barrister), the Society of Legal Scholars working group, Cripps Harries Hall LLP (solicitors), Richard Wallington (barrister), the Law Society, Gregory Hill (barrister), the Royal Bank of Scotland Trust & Estate Group, Dr Mary Welstead (academic), Withy King LLP (solicitors), Donald Jolly (retired solicitor), the City of Westminster and Holborn Law Society, the Law Reform Committee of the Bar Council, and the Judges of the Chancery Division and of the Family Division of the High Court.

7.56 Roland D'Costa (probate registrar) agreed with the proposal and explained that the effect would be that the surviving issue of the non-surviving beneficiary would take their parents' share. Christopher Jarman (barrister) also supported the proposal and saw no problem with the period of 28 days as "it will be most unusual for steps to have been taken that soon to vest estate assets in a beneficiary".

7.57 Paul Saunders (trust administrator) disagreed with an extension of the survivorship requirement. He questioned whether the requirement should be retained at all but thought that if it was retained then the provisions should be extended to cohabitants if they were to inherit on intestacy in certain circumstances, as provisionally proposed in Part 4 of the Consultation Paper. Title Research (firm) did not think there were distinct benefits from extending the requirement to all beneficiaries, particularly if there were exceptions when it would not apply. They had in mind the provisional proposal that it should not apply if the estate would otherwise be *bona vacantia*, as provisionally proposed at paragraph 7.31 of the Consultation Paper.

7.58 Robin Lecoutre (solicitor) warned of the potential for this provisional proposal to "produce a 28 day limbo period". He suggested that if the survivorship requirement was extended to all beneficiaries, professional advisors may not want to start work on the administration of the estate within that period. He explained there would be a risk that the professional could not charge the estate for his or her work if the person who intended to administer the estate dies and is deemed not to have had authority to instruct the professional. Mr Lecoutre highlighted the difficulties which an administrator could face if – as a result of this – he or she was unable to get professional help in the time after the death. He discussed the differing positions of a spouse, who is likely to have lived with the deceased and have easy access to the relevant documents, and that of other beneficiaries, who may live far away or be estranged from the deceased.

7.59 The Society of Trust and Estate Practitioners thought that removing the survivorship period for spouses should be considered and suggested that will drafters now often omit a survivorship clause because changes in the inheritance tax legislation mean that less tax may be payable without one. On the basis that there are no similar disadvantages for other beneficiaries, they supported a survivorship period of 28 days for other beneficiaries. Sheila Campbell (solicitor) and Robin Lecoutre (solicitor) also mentioned the inheritance tax consequences of the proposal and the current survivorship rules for spouses. Sheila Campbell (solicitor) suggested that the 28-day survivorship period should only apply where the beneficiaries are the same under both estates.

SURVIVORSHIP PROVISIONS IN THE INTESTACY RULES (SECOND PROVISIONAL PROPOSAL)

7.60 **We provisionally propose that no survivorship provision should apply where the effect of treating the beneficiary as though he or she had not survived the deceased would be that the estate passes as *bona vacantia*.**

[Consultation Paper paragraphs 7.31 and 8.37]

7.61 Twenty-nine consultees responded to this provisional proposal. Twenty-eight agreed with the proposal and one disagreed with it.

7.62 Consultees who agreed with this proposal included Donald Jolly (retired solicitor), Christine Riley (probate registrar), Davenport Lyons LLP (solicitors), the Institute of Professional Willwriters, Andrew East (legal executive), Richard Dew (barrister), the Association of Her Majesty's District Judges, Francesca Quint (barrister), the Woodland Trust (charity), the Yorkshire Law Society, Sheila Campbell (solicitor), the Society of Legal Scholars working group, Sidney Ross (barrister), the Society of Trust and Estate Practitioners, Cripps Harries Hall LLP (solicitors), Richard Wallington (barrister), the Law Society, Gregory Hill (barrister), the Royal Bank of Scotland Trust & Estate Group, Dr Mary Welstead (academic), Withy King LLP (solicitors), Roland D'Costa (probate registrar), the City of Westminster and Holborn Law Society and the Law Reform Committee of the Bar Council.

7.63 Anne Thom (solicitor) disagreed with the proposal.

7.64 Consultees who provided reasons for their agreement – such as Christopher Jarman (barrister) – supported the argument made in the Consultation Paper that it was preferable for a beneficiary's family to inherit the estate than for it to pass *bona vacantia* due to the operation of the survivorship rule. Paul Saunders (trust administrator) suggested the survivorship period be excluded, linking to his disagreement with the provisional proposal at paragraph 7.30 of the Consultation Paper. However, he thought that if a survivorship rule were introduced, it should not apply if the effect is that the estate passes *bona vacantia*.

7.65 The Chancery Bar Association and the Judges of the Chancery Division and of the Family Division of the High Court agreed with the arguments made in the Consultation Paper.

DOMICILE (FIRST PROVISIONAL PROPOSAL)

7.66 **We provisionally propose that it should not be a precondition to an application under the Inheritance (Provision for Family and Dependants) Act 1975 that the deceased died domiciled in England and Wales.**

[Consultation Paper paragraphs 7.53 and 8.38]

7.67 Thirty-three consultees responded to this provisional proposal. Twenty-four supported the removal of the domicile precondition under the 1975 Act, seven disagreed with the proposal and two consultees provided comments without agreeing or disagreeing.

The responses

Consultees who supported removing the domicile precondition

7.68 Consultees who agreed with the provisional proposal included Donald Jolly (retired solicitor), the Institute of Professional Willwriters, Andrew East (legal executive), the Association of Her Majesty's District Judges, Richard Frimston (barrister), Anne Thom (solicitor), Dr Mary Welstead (academic), Roland D'Costa (probate registrar), Boodle Hatfield (solicitors), Withy King LLP (solicitors), the Money and Property Committee of the Family Justice Council, Paul Saunders (trust administrator), Stephen Cretney (academic), the Yorkshire Law Society, the City of Westminster and Holborn Law Society and the Law Reform Committee of the Bar Council.

7.69 Some consultees expressed their agreement with the provisional proposal in terms of a preference for an alternative precondition to limit the jurisdiction to hear claims for family provision under the 1975 Act. The arguments put forward in favour of reform are outlined below.

COST

7.70 The Law Society noted that "there are significant costs associated with arguing where a person was domiciled and the arguments are usually finely balanced". In the same vein, the Family Law Bar Association commented that "the process of determining domicile and the need for every biographical detail to be included is prohibitively expensive". The Chancery Bar Association referred to current cases as showing that "the court's time and the parties' money have been taken up with that issue, even though there were ample assets to meet a fair claim, and a clear connection with England and Wales".

INJUSTICE

7.71 Giles Harrap (barrister) argued that "the current restriction is causing serious difficulty and unacceptable injustice", referring to the possibility that a non-domiciled person may "spend many years in England and Wales and develop strong relationships in this country".

7.72 The Family Law Bar Association's comments similarly focused on the possibility that the deceased may have lived here for many years and developed "family relationships, giving rise to a moral obligation". The Society of Trust and Estate Practitioners also referred to the possibility that a non-domiciled person "may have a strong connection with England & Wales" and argued that, given increasing cross-border movements of people:

> To simply exclude the benefits of domestic succession law to those affected by a failure to make reasonable financial provision by the deceased in cases where there are assets to which domestic succession law applies is harsh.

7.73 The Chancery Bar Association felt that it was inappropriate for "a matter so elusive as the English concept of domicile" to be a "complete defence to an otherwise perfectly reasonable claim", referring to the "legitimate expectation" that the English courts would have jurisdiction where the deceased and the claimant have lived here "for a long period of time".

7.74 Mishcon de Reya (solicitors) thought there was potential unfairness under the current law. They provided an example from their professional experience of how this unfairness could operate. They commented that:

> In particular, we feel that it is unfair that individuals who have been resident in England and Wales for many years, and who may even have become deemed domiciled for inheritance tax purposes, can avoid the terms of the 1975 Act simply by carefully retaining their foreign domicile of origin.

Consultees who favoured retaining the domicile precondition

7.75 A minority of consultees preferred the retention of the current domicile precondition without amendment. They included Daniel Matthews and the Woodland Trust (charity).

7.76 Davenport Lyons LLP (solicitors) were concerned that to abolish the domicile precondition would result in claims being brought in multiple jurisdictions. They thought that this would delay the distribution of some estates for many years. Other arguments against reform included the general complication of administration, about which Sheila Campbell (solicitor) was concerned.

7.77 Some consultees pointed out the deficiencies of the alternatives. The Society of Legal Scholars working group expressed satisfaction with the current law, stating that it provided "for the most part an adequate test". If the matter had to be addressed, they stated their preference in relation to the question at paragraph 7.54 of the Consultation Paper, discussed below.

7.78 Sidney Ross (barrister) disagreed with the provisional proposal. He was critical of the options which could replace the domicile precondition and so opposed reform. His criticisms will be considered below in relation to the broader question at paragraph 7.54 of the Consultation Paper. In response to arguments about the precondition allowing people a means of avoiding family provision claims, Mr Ross said:

> In my view it is fanciful to suppose that people are going to acquire domiciles of choice outside the jurisdiction for the purpose of defeating family provision claims in sufficient numbers to justify reform of the law on that ground.

Other comments

7.79 Cripps Harries Hall LLP (solicitors) drew attention to the fact that:

> The rules relating to divorce already allow claims to be brought in the UK where one of the parties is UK domiciled or habitually resident for more than 6 months, or if no other EC country has jurisdiction.

7.80 Richard Wallington (barrister) drew attention to the European Commission's proposed Regulation on jurisdiction, applicable law, recognition and enforcement of decisions and authentic instruments in matters of succession and the creation of a European Certificate of Succession (known as "Brussels IV"),[3] and the effect which the UK signing up to it could have on this area of law. Jo Miles (academic) also mentioned this. The Judges of the Chancery Division and of the Family Division of the High Court thought that:

> In light of the likely form of the draft Regulation (whether the UK participates or not) adherence to the concept of domicile seems inappropriate.

DOMICILE (SECOND PROVISIONAL PROPOSAL)

7.81 **We ask consultees whether it should be a precondition to an application under the Inheritance (Provision for Family and Dependants) Act 1975 that the deceased died habitually resident in England and Wales, or whether an application for family provision should be possible in any case where there is property comprised in the estate that is governed by English succession law. We also invite views on whether there should be any other requirement limiting the circumstances in which an application for family provision may be made.**

[Consultation Paper paragraphs 7.54 and 8.39]

7.82 Thirty-eight consultees responded to this question and made a range of suggestions which are discussed below.

[3] COM(2009)154 final.

The responses

Habitual residence as sole basis of jurisdiction

7.83 Simply replacing the domicile precondition with a precondition of habitual residence attracted little support from consultees. It was favoured by the Money and Property Committee of the Family Justice Council and Roland D'Costa (probate registrar) "particularly where the bulk of the estate is in England and Wales". The Yorkshire Law Society also suggested the deceased's habitual residence as a precondition for a claim under the 1975 Act, although they also suggested that perhaps the claimant should be domiciled or habitually resident in the UK. However, Davenport Lyons LLP (solicitors) thought that habitual residence as the sole pre-condition to claim under the 1975 Act would "throw up even more cases than the domicile rule".

English succession law applicable to (part of) the estate

7.84 The suggestion in the Consultation Paper that the application of English succession law to part of the estate should be the sole criterion for jurisdiction attracted support from consultees.

7.85 It was favoured by the Society of Trust and Estate Practitioners, the Law Society and Boodle Hatfield (solicitors) in preference to a test based on habitual residence. The Institute of Professional Willwriters also supported it, as did the Association of Her Majesty's District Judges who commented that it "makes sense".

7.86 The City of Westminster and Holborn Law Society also supported the suggestion, taking the view that "English succession law is properly regarded as the rules of testate and intestate succession as adjusted by the discretionary rules of family provision". They expressly supported it even where the deceased was neither domiciled nor habitually resident here, noting that the deceased may nevertheless have left a dependant here. In a similar vein, Richard Frimston (solicitor) supported this view on the basis that the 1975 Act should apply to property governed by the succession law of England and Wales. He cited the New South Wales case of *Taylor v Farrugia*[4] as "an example of balancing property outside the jurisdiction with property within the jurisdiction".

7.87 Andrew East (legal executive) favoured this option. He noted that under the European Commission's proposed "Brussels IV" Regulation on jurisdiction, applicable law, recognition and enforcement of decisions and authentic instruments in matters of succession, a person domiciled abroad could in some circumstances choose for English succession law to apply to the administration of his or her estate.[5] He suggested that in these circumstances, a family provision claim against the estate should be possible. Similarly, Richard Wallington (barrister) supported this option in particular because of the impact of Brussels IV, if the UK opted in.

7.88 Richard Dew (barrister) preferred English succession law as a precondition and thought that habitual residence was "probably no better" than domicile.

[4] [2005] NSWSC 801.

[5] COM(2009)154 final.

7.89 Other consultees who favoured this test were Donald Jolly (retired solicitor) and Dr Stephen Cretney (academic), who tentatively suggested that the leave of the court should be required to act as a "filter to exclude cases where there is really no substantial connection with England and Wales". Dr Mary Welstead (academic) supported this option, particularly on the basis that "many people do not understand the meaning of habitual residence (or domicile)".

ORDERS RESTRICTED TO PARTICULAR ASSETS

7.90 The Judges of the Chancery Division and of the Family Division of the High Court also supported making the 1975 Act available to claimants "wherever English law governs the succession to the estate (or part of it)". They added, however, that "an order could be made in relation to that estate or that part".

7.91 Paul Saunders (trust administrator) supported the adoption of the English succession law basis for jurisdiction but qualified this by also suggesting that the 1975 Act would only apply to "those assets of an estate which are subject to English Succession Law". Assets passing under a foreign law should, he considered, be excluded from any order under the 1975 Act although still taken into account by the court when considering the overall distribution of the estate.

Alternative bases of jurisdiction: English succession law and habitual residence

7.92 The Chancery Bar Association, while acknowledging the attraction of habitual residence, considered that this might leave claims "disappearing between a gap in the floorboards" where the deceased had been domiciled and held assets in this jurisdiction. They therefore preferred English succession law as the basic test, but suggested that habitual residence should be an alternative condition, "in order to overcome the period before any EU changes, or in case the EU does not impose an EU-wide habitual residence condition".

7.93 The Family Law Bar Association suggested "a combination of habitual presence and the existence of property in this jurisdiction".

Alternative bases of jurisdiction: domicile and habitual residence

7.94 Giles Harrap (barrister) and Christopher Jarman (barrister) favoured using domicile and habitual residence as alternative bases of jurisdiction. He reasoned that substituting habitual residence for domicile could create a "reverse injustice" where the deceased was residing elsewhere at the time of death.

7.95 Christopher Jarman (barrister) cited the possibility that adopting English succession law as the basis of jurisdiction, rather than the deceased's domicile, could increase the problem of "multiple (and potentially conflicting) proceedings". He considered that habitual residence as an alternative connecting factor "would avoid the difficulty ... that ... a person might have an habitual residence in two countries or for that matter none…".

7.96 Francesca Quint (barrister) commented that she favoured limiting claims "to those either domiciled or resident in the jurisdiction and to property within the jurisdiction or control of the court".

"DEEMED DOMICILE"

7.97 Two consultees favoured introducing a concept of deemed domicile in addition to domicile.

7.98 Sidney Ross (barrister) suggested that a person should be treated as domiciled in the UK if he or she had "lived here" for not less than seven of the 10 years immediately preceding the date of death. He considered that this would "satisfy a test of the deceased's real and substantial connexion with the country of his deemed domicile". He did not consider that domicile should be rejected as the basis for jurisdiction as he felt it was "fanciful to suppose" that people would deliberately change their domiciles to avoid family provision claims. He felt that nothing would be gained by substituting habitual residence.

7.99 Robin Lecoutre (solicitor) also favoured deemed domicile but considered that the jurisdiction should be restricted to assets in England and Wales to prevent difficulties of enforcement in foreign countries.

7.100 Mishcon de Reya (solicitors) suggested that a 1975 Act claim should be capable of being brought against those who died domiciled or deemed to be domiciled in England or Wales. They suggested in the alternative that the person's status for tax purposes could be used.

Other suggested filters

7.101 John Franks was concerned about the possibility of multiple jurisdiction claims and felt that it would be necessary to consider what the rights of foreign claimants were in other jurisdictions and whether those rights should be brought into account for a claim here or be waived before such a claim was made.

7.102 Although they thought domicile was an "adequate test", if the issue had to be addressed the Society of Legal Scholars working group preferred a test of the "appropriate law", comprising first domicile and secondly whether there is property within the jurisdiction.

7.103 A restriction to "assets in England or Wales" was supported by Robin Lecoutre (solicitor), in conjunction with a "deemed domicile" provision.

7.104 The Office of the Official Solicitor considered that there should be no domicile or habitual residence precondition but that "the jurisdiction requirements should relate to the value of the assets in the estate" coupled with a requirement that the property subject to the claim must be "within the jurisdiction of the English courts."

JOINT TENANCIES

The six-month time limit

7.105 **We ask consultees whether the court should have discretion in an appropriate case to exercise its powers under section 9 of the Inheritance (Provision for Family and Dependants) Act 1975 even where the application for family provision was brought more than six months after the grant of representation.**

[Consultation Paper paragraphs 7.60 and 8.40]

7.106 Thirty-two consultees commented on this question. Twenty-four supported including a discretion to bring in joint property notwithstanding the application being brought more than six months after the death. A further consultee supported reform subject to conditions. Other consultees opposed the reform, or suggested alternatives.

The responses

Consultees who supported reform

7.107 Consultees who thought that the court should have the discretion described included Andrew East (legal executive), Francesca Quint (barrister), Anne Thom (solicitor), Cripps Harries Hall LLP (solicitors), Richard Wallington (barrister), the Family Law Bar Association, Dr Mary Welstead (academic), Paul Saunders (trust administrator) and the Law Reform Committee of the Bar Council. The arguments put forward in favour of reform are discussed below.

AN UNJUSTIFIED PROCEDURAL TRAP

7.108 Many consultees considered that it was unfair for beneficiaries with an otherwise strong claim to be denied access to a major estate asset. Giles Harrap (barrister) instanced a case where children claimed against their father's estate, the main asset being the family home owned jointly with another, and the claim was issued three days out of time. The Law Society commented that "the present legislation can work unfairly to prevent individuals, who are unaware of the six month mandatory time period, from making a claim". The Office of the Official Solicitor said that:

> This requirement can lead to inequitable results in that the deceased's principal asset could be well beyond the reach of a claimant by virtue of the operation of this rule. Just as the Court has discretion to hear a claim ... it should also be within the discretion of the Court to exercise those powers out of time to avoid inequitable results arising from the rule's rigid application.

7.109 The Society of Trust and Estate Practitioners echoed the wording of the Consultation Paper, stating that "it is not sensible to include arbitrary traps within our law". Similar comments were provided by Davenport Lyons LLP (solicitors) and the Money and Property Committee of the Family Justice Council.

7.110 Other responses indicated consultees' doubts as to whether the provision currently fulfils any useful purpose. Both the City of Westminster and Holborn Law Society and the Institute of Professional Willwriters made such comments. The Institute of Professional Willwriters said:

> We are not clear what the "good reasons" were for the time limit to apply to joint tenancies. On the face of it, it seems to serve no useful effect.

7.111 The Law Society alluded to the position of the surviving joint tenant and took the view that "the operation of the legislation to date suggests that the risk to a joint tenant(s) of uncertainty as to their rights is more apparent than real". Richard Dew (barrister) brought these two points together, characterising the section 9 restriction as "a very silly restriction on the court's powers [which] causes injustice". Giles Harrap (barrister) commented that:

> The only people who like this provision are sophisticated and canny solicitors (and their Defendant clients) who talk these claims out.

SECTION 9 IS CURRENTLY ANOMALOUS IN COMPARISON WITH SECTION 4

7.112 The Chancery Bar Association felt that the discrepancy between section 4 of the 1975 Act (which sets a six-month time limit for bringing claims but permits the court to hear claims issued after that deadline) and section 9 was "anomalous":

> Extending the Court's powers under s 9 of the Act seems to us to be an appropriate and proportionate way of dealing with this anomaly.

The City of Westminster and Holborn Law Society could see "no reason in principle why a claim in respect of the deceased's severable share in jointly owned property ... should be treated differently in this respect from claims against the estate".

7.113 Roland D'Costa (probate registrar) felt that reform would be consistent with section 20 of the Administration of Justice Act 1982, which deals with the rectification of wills. An application for an order of rectification may not be made after the end of the period of six months from the date on which representation is taken out unless the court gives permission.

IMPACT ON PRE-ACTION PROCEDURE

7.114 Consultees agreed that the current law may encourage people to issue claims within the six-month time limit when they could have continued negotiating and possibly settled without involving the courts or incurring the costs of issuing the claim. Giles Harrap (barrister) noted that:

> The situation is all the more unsatisfactory now that compliance with pre-action protocols is very much expected and the Court Service demand high issue fees. Defence agreement to extend time is sometimes rightly accepted to save costs – but this horror always lurks in the background.

Boodle Hatfield (solicitors) commented that the reform "would be in line with the CPR [Civil Procedure Rules] as long as circumstances merit applications being made".

IMPACT ON CHARITIES

7.115 Wilson's Solicitors considered that this would be favourable for charities because it would enable the court to take into account all assets, and therefore possibly "reduce the amount of the claim borne by beneficiaries named in the deceased's Will, including charitable beneficiaries".

EUROPEAN DEVELOPMENTS

7.116 Richard Frimston (solicitor) felt that "it may be difficult to ascertain whether a grant has been obtained in another jurisdiction and discretion for the courts will be required". He linked this particularly to the European Commission's proposed "Brussels IV" Regulation on jurisdiction, applicable law, recognition and enforcement of decisions and authentic instruments in matters of succession.[6] He argued that the 1975 Act will need to be amended to define "grant" to include the issuing of a European Certificate of Succession, as proposed under Brussels IV, but suggested that the time limit could then be 12 months rather than six.

RESERVATIONS

7.117 The Judges of the Chancery Division and of the Family Division of the High Court were in favour of the proposal but considered that:

> The Court should have power to extend the time if on the same occasion it is exercising its power to extend time to bring a claim under s 4 of the 1975 Act. It is undesirable to ... enable a clamant, part way through an existing claim, to extend the claim beyond the net estate (strictly so called).

Consultees who opposed reform

7.118 Sheila Campbell (solicitor) said that she did not want to "complicate the administration of estates" and preferred the current law. Other arguments against reform are outlined below.

PROTECTION OF THE SURVIVING JOINT TENANT

7.119 The main reason put forward for keeping the strict time limit on section 9 property was that it protects the person who would otherwise take that property by survivorship. Sidney Ross (barrister) opposed any reform to section 9:

> It is my view that the occupant [of a jointly owned property] should know within a reasonable time whether or not the security of his or her occupation is under threat, and that that consideration should take precedence over any desire to ameliorate the position of the unwary or poorly advised potential claimant.

7.120 Christopher Jarman (barrister) was also concerned about certainty for joint tenants.

> Even the existing law is capable of dragging them into litigation a good many years after the death, to the extent that it must be questioned whether this exposure infringes their human rights.

The Woodland Trust (charity) added that six months was a realistic period in which a potential claimant could bring a claim.

[6] COM(2009)154 final.

IMPACT ON ASSET HOLDERS

7.121 The Royal Bank of Scotland Trust & Estate Group expressed concerns about the repercussions for asset holders.

> The law on joint property is well honed and legislation such as s 3(4) Administration of Estates Act 1925 would need revisiting. Deciding which cases are appropriate to review and/or constructing a different time period for a claim would not be a simple task.

Other reform proposals

7.122 Some consultees suggested alternative reforms. Donald Jolly (retired solicitor) suggested that section 9 "should remain unchanged except that the required period after the grant should be increased".

7.123 Christopher Jarman (barrister) suggested that for joint property the limitation period should be measured from the date of death not from when a grant was taken out. He pointed out the difference between joint tenancy property and the free estate: the personal representatives in principle cannot access the free estate without a grant, whereas the surviving joint tenant "can deal with the property concerned ... from the date of the death". From this he argued that the time limit should be measured from the date of the death, not the date of grant. He suggested a process by which this could be achieved.

Valuing the share

7.124 **We provisionally propose that the value of assets for the purposes of sections 8 and 9 of the Inheritance (Provision for Family and Dependants) Act 1975 should be their value at the date of the application, not at the date of death.**

[Consultation Paper paragraphs 7.65 and 8.41]

Introduction

7.125 Thirty-two consultees responded to this proposal. Eighteen consultees were in broad agreement. Of these, two suggested slight variations on the proposal. Seven consultees agreed that the relevant date for valuation should not be the date of death, but variously suggested that a preferable valuation date would be the date of the hearing of the family provision application, or that the valuation date should be left to the court's discretion, or that section 8 should not be reformed in the same way as section 9. One consultee disagreed with the proposal on the basis that the current law was satisfactory. Six consultees either had no comments to make on the proposal or did not express a firm view on it.

The responses

Consultees who were in favour of the provisional proposal

7.126 Consultees in favour of reform included: Donald Jolly (retired solicitor), the Institute of Professional Willwriters, Davenport Lyons LLP (solicitors), Andrew East (legal executive), Francesca Quint (barrister), Anne Thom (solicitor), Richard Wallington (barrister), the Law Society, Dr Mary Welstead (academic), Roland D'Costa (probate registrar), the City of Westminster and Holborn Law Society, and the Law Reform Committee of the Bar Council.

7.127 Most of the consultees who agreed with the proposal did not give reasons. However, the general reason given by those who did engage in substantive discussion was that valuation at the date of death was, as the Association of Her Majesty's District Judges put it, "problematical". Richard Dew (barrister) said that "it makes little sense to apply the value at the date of death". Cripps Harries Hall LLP (solicitors) found the date of death unsuitable due to the possibility of fluctuations in the value of the property following that date. They favoured the date of application as "claims should be based on current circumstances", adding that:

> There is no benefit in deciding the division of assets based on either a high value that cannot be realised or a low value which it is no longer equitable to use.

7.128 The Society of Trust and Estate Practitioners, endorsed the proposal but also saw a need to address the practical problem which might arise where assets had gained in value through the effort or investment of the surviving joint tenants.

Consultees who offered variations on the provisional proposal but were in broad agreement with it

INHERITANCE TAX

7.129 The Chancery Bar Association supported the proposal, but with a proviso that, for the purposes of section 9, any inheritance tax payable by the other joint owners on the deceased's severable share of the property should automatically be taken into account. This would involve amending the current section 9(2), whereby the court is directed to have regard to any inheritance tax payable.

A TIMING REQUIREMENT

7.130 Sheila Campbell (solicitor) noted the practical difficulties that can arise from revaluation of the deceased's assets at a later stage than the date of death. She said that revaluation can be costly, particularly if there are complex assets such as shares in a family business. She therefore suggested a compromise: that revaluation should be permitted only if the grant of representation was issued more than one year after the death.

ARGUMENTS MADE IN FAVOUR OF VALUATION DATES OTHER THAN THE DATE OF DEATH

Valuation at the date of the hearing

7.131 Six consultees thought that valuation should take place at the date of the hearing of the family provision claim, rather than at the date of the application. The main reason given for this was that it would be fairer and more accurate than the date of application. Paul Saunders (trust administrator) felt that:

> The setting of a value as close to the date of the order as possible will help ensure that it has the effect the court intended.

The Judges of the Chancery Division and of the Family Division of the High Court made a similar point:

> As a matter of principle where the court is making reasonable financial provision out of an estate for a claimant it should deal … with matters as they are at the date of the hearing.

7.132 Another reason given in favour of the date of the hearing was that it would make for consistency with the rest of the 1975 Act, particularly section 3(5). Giles Harrap (barrister) said that the "whole scheme of the 1975 Act is to take into account facts known to the court at the date of the hearing". The Family Law Bar Association also cited "consistency" as a reason for preferring the date of the hearing. The Judges of the Chancery Division and of the Family Division of the High Court said that the 1975 Act generally requires the court to consider issues as they are at the time of the hearing.

Different treatment for section 9 than for section 8

7.133 Along with a few other consultees, Sidney Ross (barrister) also agreed that the relevant date for valuation under section 9 should be the date of the hearing and not the date of the death. However, he felt that the correct date for valuation under section 8 was the date of death. This was for two reasons: first, for the purposes of section 8, property is treated net of inheritance tax payable by the donee, which is calculated by reference to the value of the property at the date of death. Secondly, it would be unjust for the donee of a statutory nomination or *donatio mortis causa* to be liable to restore to the estate more than he or she actually received (this being the value of the property after deduction of any inheritance tax that was actually paid). It would be particularly unjust because, under section 10(3) of the 1975 Act, the donee of a sum of money paid by the deceased with the intention of defeating an application for family provision is not liable to restore to the estate any more than he or she actually received.

7.134 Mr Ross concluded by asking whether section 8 is actually necessary. He said that it was not clear from the Law Commission work which preceded the enactment of the 1975 Act why these two types of property were singled out for special treatment. He noted that *donationes mortis causa* are very rare and that there is no reported case in which section 8(2) was in issue.

Valuation according to the court's discretion

7.135 Christopher Jarman (barrister) made a number of detailed comments about the proposal. He felt that the date of death was inappropriate as a valuation date, as it could cause injustice either to the claimant (if the assets had grown considerably in value since the date of the death) or to the surviving joint tenant or tenants (if the property's value had fallen since the death). However, Mr Jarman did not favour the date of application either. He questioned the need for any specific date of valuation at all. He felt that in its discretion, the court should be able to take into account a range of matters, including liabilities existing at the death and "if appropriate, any that may have crystallised between the death and the hearing". Mr Jarman added:

> A general discretion is preferable to an attempt to prescribe exhaustively how individual factors of this type are to be weighed.

Consultees who were not in favour of the provisional proposal

7.136 Only Title Research (firm), expressed a specific preference for the current law to remain as it was. They did not believe that a change would be beneficial, and felt that the provisional proposal would:

> License and encourage Administrators to gamble on values rising (or perhaps falling, so as to avoid [inheritance tax]) and to delay the administration process.

Mixed, neutral and other comments

7.137 Two consultees expressed mixed views on the provisional proposal. The Yorkshire Law Society generally agreed that reform was necessary, but added that some of its members favoured the date of the application, and others the date of determination of the claim. Withy King LLP (solicitors) said that the views of those who contributed to the firm's response were fairly evenly split.

7.138 The Royal Bank of Scotland Trust & Estate Group said that the proposal was "attractive in principle", but also said that it might be problematic as there might be "unintended consequences for the surviving joint owner or any asset holder". They added that:

> Any right of any action must be against the joint owner – not the institution that might hold the joint account/asset given the passing by survivorship rules.

7.139 Three consultees – the Woodland Trust (charity), Gregory Hill (barrister) and Convenient Wills (firm) – responded to the provisional proposal only to say that they had no comments to make.

FAMILY PROVISION CLAIMS AND GRANTS OF REPRESENTATION

7.140 **We invite consultees' views on whether reform to enable an application for family provision to be issued in the absence of a grant of representation would be necessary or desirable.**

[Consultation Paper paragraphs 7.70 and 8.42]

Introduction

7.141 Thirty-two consultees responded to this question. Seventeen consultees were in favour of reform of some kind and a number of different reform options were suggested. Six consultees opposed reform. Nine consultees made mixed, neutral or other comments that did not indicate a clear preference for or against reform. Many of the consultees who ultimately supported reform showed a strong awareness of the potential problems that might arise.

The responses

Consultees who were in favour of reform

7.142 Two consultees – Donald Jolly (retired solicitor) and Anne Thom (solicitor) – supported reform but did not indicate their reasoning. Many other consultees offered detailed reasons for their views and were in broad agreement about the problems presented by the current law. These arguments are set out below.

OBSTRUCTION OR DELAY BY THOSE ENTITLED TO A GRANT

7.143 A number of consultees felt that there are circumstances where an applicant for family provision may be prejudiced by the inactivity of those who are entitled to a grant. The Association of Her Majesty's District Judges said that "others involved may, for their own motives and self-interest, deliberately delay in applying for a grant." The Law Society also noted the risk of "delaying tactics". Richard Wallington (barrister) thought that reform could "provide a useful remedy where those who are entitled to a grant filibuster a potential inheritance claim by refraining from obtaining a grant".

7.144 The Chancery Bar Association felt that there was a need to distinguish between cases where delay has been caused by "mere inactivity" on the part of those entitled to the grant, and "cases where there is a genuine dispute as to the relative entitlements to the Deceased's estate". In the former situation, "an applicant should be able to bring a claim without the permission of the court or satisfying any further conditions". In the latter scenario, the permission of the court should be required.

THE CLAIMANT'S NEEDS

7.145 Consultees in favour of reform also highlighted the situation of claimants who are in financial need but cannot bring a family provision claim in the absence of a grant. The Association of Her Majesty's District Judges said that reform would be "desirable especially where there is need". Francesca Quint (barrister) made the same point, and the Yorkshire Law Society expressed similar concerns about claimants who were financially dependent on the deceased.

JOINTLY HELD PROPERTY

7.146 The Society of Trust and Estate Practitioners and the Office of the Official Solicitor said that a procedure for bringing an application before a grant would be particularly helpful in cases where the deceased's principal assets were jointly-held property.

INADEQUACY OF THE CURRENT LAW

7.147 Several consultees noted, as we did in the Consultation Paper, that there are currently procedures available to family provision claimants where there has been no grant of representation. If the applicant for family provision is among those entitled to take a grant, he or she may be able to use the citation procedure to require any person with a prior right to a grant to either take a grant or allow themselves to be passed over. Claimants who are not so entitled can apply to the court under section 116 of the Senior Courts Act 1981 for a limited grant, whereby the court may appoint as administrator someone other than the person who would otherwise be entitled to the grant. However, it would appear that this power is in fact only exercised by the Family Division of the High Court. A more limited grant *ad litem* (pending suit) can be obtained by order of the court under section 117 of the Senior Courts Act 1981.

7.148 Some consultees expressed concern that the current law penalises claimants who are not sufficiently well-advised to take advantage of these procedures. In relation to section 116, Giles Harrap (barrister) felt that:

> It is not satisfactory (and arguably is contrary to a Claimant's human rights) for there to be an arbitrary barrier to the right of access to the court and as unsatisfactory that it is only lawyers in a few specialist chambers and firms who know of ways to get round the problem… .

REGULARISING WHAT ALREADY OCCURS

7.149 Some consultees suggested that reform might be useful to recognise the reality that claimants can already sometimes avoid the requirement for a grant. Roland D'Costa (probate registrar) said that reform would "regularise what already happens", as:

> In several instances the probate registry is presented with family provision orders made before the application for the grant of representation. Sometimes this is coupled with a discretionary order appointing administrators under s 116 of the Senior Courts Act.

7.150 Giles Harrap noted that at least one claim in which he was involved did proceed to a conclusion without a grant being made.[7]

Consultees who were opposed to reform

DIFFICULTY OF PROCEEDING TO A FULL HEARING BEFORE ADMINISTRATION OF THE ESTATE

7.151 Several consultees felt that it would be difficult to proceed to a full family provision hearing prior to a grant of representation being made. This was an argument we considered in paragraph 7.69 of the Consultation Paper, which Sidney Ross (barrister) cited in support of his view that reform should not be undertaken. Richard Frimston (solicitor) said that he had difficulty envisaging how a 1975 Act claim could proceed unless the entitlement of each of the parties is known.

[7] *Dawkins v Judd* [1986] 2 FLR 360.

7.152 Christopher Jarman (barrister) drew a distinction between the mere initiation of a family provision claim in the absence of a grant of representation, and allowing a claim to proceed to resolution without a grant – the problem with the latter being that:

> It might be far from clear what other beneficiaries' needs should be taken into account in determining the claim; correspondingly, it might still be unclear what other assets or liabilities there were in the estate or what inheritance tax was payable in respect of them.

7.153 The Office of the Official Solicitor felt that "from civil litigation's perspective", there would be "a number of practical problems" if claims for family provision were allowed to proceed in the absence of a grant. For example, the court would not be provided with the "essential information" of "all the details of the assets and liabilities of the estate". In addition, the Office had a particular concern that personal representatives should be appointed at an early stage: the Official Solicitor's Civil Litigation Division represents minors and other protected persons in litigation, including 1975 Act claims. In an appropriate case, the Official Solicitor will look to the personal representatives to provide an indemnity that any costs incurred by his department will be met from the estate.

7.154 The Judges of the Chancery Division and of the Family Division of the High Court reasoned that a grant should be acquired before any family provision claim, as the grant establishes the existence and terms of the will and "imposes the obligation to ascertain debts and gather in assets".

AVAILABILITY OF SOLUTIONS UNDER THE CURRENT LAW

7.155 Some consultees felt that the current law already deals adequately with the issue of delay by those who are entitled to a grant of representation. Paul Saunders (trust administrator) noted that "there is already a procedure for forcing the application for a grant". The Royal Bank of Scotland Trust & Estate Group said that reform seemed unnecessary as:

> Citation rules exist to expedite a grant of probate and on intestacy a district judge would allow an *ad colligenda* grant to issue to enable a personal representative, passing over the reluctant putative administrator, to be appointed to facilitate the issuing and serving of a claim.

Consultees who offered other options for reform

7.156 A significant number of consultees who favoured reform to enable an application for family provision to be brought in the absence of a grant thought that any such reform should also limit the extent to which the case could proceed without some form of representation.

AMENDING THE CITATION PROCEDURE

7.157 Some consultees, including Paul Saunders (trust administrator), suggested amending the citation procedure. This would potentially open up the citation procedure to anyone who could show that they had a valid claim for family provision. Christopher Jarman (barrister) put this forward as an option in cases where "the deceased is known to have left a will on the basis of which the parties are proceeding informally". In such cases:

> A partial solution to the problem might be to entitle a prospective family provision claimant to cite the executors to take a grant, failing which that party should be entitled to apply for the appointment of an administrator to collect the estate.

WIDENING THE JURISDICTION TO MAKE GRANTS OF REPRESENTATION

7.158 Giles Harrap (barrister) and the City of Westminster and Holborn Law Society mentioned what the latter called the "anomaly" – that the Family Division and the Chancery Division of the High Court can hear family provision claims but only the Family Division can order a limited grant under section 116 of the Senior Courts Act 1981. The City of Westminster and Holborn Law Society suggested that "the time may have come to review this odd arrangement".

A NEW PROCEDURE WITHIN THE 1975 ACT OR A PRACTICE DIRECTION

7.159 Giles Harrap (barrister) suggested that:

> It should be possible to issue without a grant in accordance with rules of court that in the ordinary case still require a grant to be exhibited but permit an applicant as an alternative, on proper grounds being given in a witness statement, to apply for directions as to the representation of the estate.

7.160 Andrew East (legal executive) was in favour of reform "strictly subject to a practice direction that the applicant obtains directions from the Court as to representation of the estate".

Consultees who offered mixed, neutral or other comments

7.161 Several consultees discussed arguments for and against reform but did not express a clear preference. For example, Davenport Lyons LLP (solicitors) reported that views differed amongst those who contributed to the firm's response. Mishcon de Reya (solicitors) thought that intentional delay by personal representatives might be a problem but did not specifically support reform. Three consultees had no comments to make on the question.

7.162 Richard Dew (barrister) suggested that the Law Commission take this opportunity to clarify whether a foreign grant is sufficient to constitute representation of the estate for the purposes of the 1975 Act. The Family Law Bar Association (organisation) made the same request in relation to limited grants, which restrict the personal representatives' powers to administer the estate.

PENSION SHARING

7.163 **Would consultees favour reform of the Inheritance (Provision for Family and Dependants) Act 1975 to the effect that benefits from a pension fund, whether lump sums or periodical payments, could be the subject of family provision orders made by the court?**

[Consultation Paper paragraphs 7.82 and 8.43]

7.164 **Do consultees foresee that legal or practical difficulties would result if benefits from a pension fund could be the subject of family provision orders and, if so, what they might be?**

[Consultation Paper paragraphs 7.83 and 8.44]

7.165 A total of 34 consultees responded to one or both of these questions. Of those, 18 were in favour of a reform to the effect that the benefits from a pension fund could be the subject of family provision orders. Nine consultees were opposed; four offered varying views and six expressed no opinion.

The responses

Consultees who were in favour of reform

7.166 Consultees in favour of reform included the Chancery Bar Association, the Family Law Bar Association, the Law Society, the Society of Trust and Estate Practitioners, the Association of Her Majesty's District Judges, the Institute of Professional Willwriters, Simon Evers, the Yorkshire Law Society, Giles Harrap (barrister), Francesca Quint (barrister), Richard Frimston (barrister) and the Royal Bank of Scotland Trust & Estate Group and Richard Dew (barrister), who commented "there is much sense to this".

INSUFFICIENT ASSETS IN NET ESTATE

7.167 Consultees including the Chancery Bar Association, the Institute of Professional Willwriters, and the Society of Trust and Estate Practitioners suggested that recourse to pensions was needed to ensure there were sufficient assets in the net estate to make reasonable financial provision for claimants.

7.168 The Chancery Bar Association remarked that "we are aware of cases where the only significant funds available on death are the benefits from the deceased's pension funds", but gave no further details. Mary Anderson explained some of the problems she had encountered in the operation of this area of law.

DISCRIMINATION BETWEEN TYPES OF PENSION

7.169 Giles Harrap (barrister) raised the point that certain pension funds can be accessed presently under section 2(1)(f) of the 1975 Act, but that the terms of the section limit such pensions to those held by a party to a marriage or civil partnership. Giles Harrap (barrister) argued that leaving pension funds to a variation of a nuptial settlement under the principles established in the case of *Brooks v Brooks*,[8] "is seriously unsatisfactory and must be remedied".

[8] [1996] AC 375.

HASTY PAYMENTS TO THE "WRONG" BENEFICIARY

7.170 Payment by pension trustees of death benefits to the "wrong" person was not a major reason cited in favour of reform, though it was mentioned by some consultees. Giles Harrap (barrister) mentioned a case in which he had been involved where the payment was to be made to the deceased's mistress, leaving his widow in financial need. The Family Law Bar Association remarked that:

> A real problem [is that] the trustees appear to feel it necessary to exercise their discretion speedily after death. It may be the nomination is out of date, or they do not have the up to date family configuration in mind.

Consultees who were opposed to reform

7.171 Consultees opposed to reform included the Association of Pensions Lawyers, the Investment and Life Assurance Group, LV= (organisation), Sheila Campbell (solicitor), Maxwell Hodge (solicitors), Sidney Ross (barrister), Donald Jolly (retired solicitor) and Paul Saunders (trust administrator).

THE SCALE OF THE PROBLEM

7.172 Some consultees did not think that this situation was a particular problem in practice. Maxwell Hodge (solicitors) remarked that:

> We have rarely heard of problems with the trustees of pension schemes, therefore we agree that it would not be appropriate to meddle with such schemes.

7.173 Sidney Ross (barrister) echoed this concern, saying:

> … I would question whether the frequency of occasions on which a man effectively disinherits his widow or some other close family member by nominating someone else as the recipient of his pension benefits is such as to justify amending the law in this way.

7.174 LV= (organisation) and the Investment and Life Assurance Group concurred; their responses stated that:

> … the efforts taken by pension administrators already go a long way towards achieving the outcome the Law Commission wishes. In most cases looking at the same facts we suspect that the courts will come to much the same decision as the scheme administrators would have done.
>
> Our experience is that where pension administrators (trustees) have discretion in the payment of benefits on the death of a member they take their responsibilities very seriously. Administrators do seek details of any spouse or civil partner of the deceased and try to discover who was financially dependent on them. While they consider any "letter of wishes" … they are not bound by them [and] they would not follow the letter of wishes if their investigations uncovered somebody else who they believe had a greater need and entitlement to the pension benefit… .

LV= (organisation) added:

> We are not aware of any evidence to show that scheme administrators have not in the vast majority of cases exercised their discretion in a fair and equitable fashion.

COMPLEXITY

7.175 Both LV= (organisation) and the Investment and Life Assurance Group were concerned that any reform would introduce "complexity" into the administration of pensions, and that the resulting uncertainty could have adverse consequences for the uptake of pensions.

THE SCOPE OF REFORM

7.176 Consultees were uncertain about how to define the scope of any reform. The Institute of Professional Willwriters asked whether the Law Commission was "suggesting that this opportunity be afforded only to pension funds – or to any assets held in a trust fund created by or on behalf of the deceased?".

7.177 Christopher Jarman (barrister) was in favour of including life insurance payouts under the 1975 Act, but only in the limited circumstance where they were "provided by the deceased's employer but outside the context of a pension scheme as such". However, he also argued:

> If on the other hand the question is directed to life assurance provision made by the deceased himself, and perhaps placed into trust or otherwise assigned to another party or parties, this should only be brought into account if and to the extent that the disposition in question falls foul of section 10 of the 1975 Act.

OTHER AVENUES

7.178 Donald Jolly (retired solicitor) felt that the "courts' power to take the funds into account is … sufficient in itself without having power to make an order in respect of the funds". Paul Saunders (trust administrator) expressed a similar view.

7.179 Sidney Ross (barrister) noted that often the person nominated "will be a family member or other person, such as a dependant, who would have a good claim under the 1975 Act if he or she did not stand to receive the benefits so nominated".

7.180 Both LV= (organisation) and the Investment and Life Assurance Group noted that there are ways to challenge decisions by a scheme administrator. The Investment and Life Assurance Group said:

> If a spouse or dependant believes that the decision taken by the scheme administrator to pay some or all of the benefits is perverse, they may challenge it. They may also elect to take the matter to the Pensions Ombudsman to seek redress.

THE SIZE AND NATURE OF PENSION FUNDS

7.181 The Investment and Life Assurance Group remarked that "it should also be noted that while there are some large pension funds the vast majority are small". The Association of Pension Lawyers commented that:

> … it has been clear that pension scheme benefits are a part of someone's pay.
>
> In this light, the terms and structure of a pension scheme's death benefits could be said to be part of the employer's remuneration policy. We do not consider this to be something which it is appropriate for the court to have the power to override.

INAPPROPRIATE COMPARISON WITH ANCILLARY RELIEF

7.182 The response of the Association of Pension Lawyers provided a detailed analysis of the merits of including various types of pension funds within the net estate under the 1975 Act. As regards the main type of pension under consideration, the Association commented that:

> … we do not consider that [giving the court access to such funds] would be appropriate.
>
> The main reason for this relates to the distinction between this type of benefit and that which is commonly the subject of ancillary relief.
>
> Ancillary relief under a pension sharing order commonly divides the pension payable to a member so that some of it is then payable to the former spouse instead. This reflects a sensible policy: broadly, that the former spouse should not lose the benefit of something that was previously available to provide support for him or her as party of the joint finances of a marriage.
>
> A typical discretionary pensions benefit is very different. It would commonly be a lump sum death benefit, payable to person(s) chosen by the trustees from a large range of potential beneficiaries. Trustees will consider various factors before paying a benefit in a particular way … .
>
> These factors may be similar to those that a court would consider in relation to a family provision order. However, we suggest that, in many cases, trustees are better positioned to give proper consideration to relevant factors around who to pay the benefit to than a court might be, due to, for example, knowledge of the workforce… .
>
> Accordingly, the fact that this type of benefit does not fall within the scope of a family provision order does not mean that the appropriate factors are not already being taken into account.

Consultees who highlighted practical issues that might result from reform

7.183 Consultees both in favour of and opposed to reform highlighted a number of practical issues that might result from reform.

DELAY

7.184 LV= (organisation) and the Investment and Life Assurance Group were worried about the delay which could be caused. Sidney Ross (barrister) also noted that:

> A great attraction of pension fund arrangements is that there is a sum of money available to the deceased's dependants shortly after death, when it is most needed, without the delay involved in obtaining a grant of probate or letters of administration. It is overwhelmingly likely if such legislation is brought in, pension fund trustees will as a matter of course decline to release any funds until, at the earliest, the time expired for bringing a 1975 Act claim, thereby depriving the dependants of an important benefit of the pension provision.

These concerns were shared by the Association of Pension Lawyers who commented that reform could "materially delay the timescale … which in turn could cause material financial hardship". Paul Saunders (trust administrator) made similar comments about the hardship which could be caused by delay in releasing pension benefits to survivors.

7.185 However, Christopher Jarman (barrister) thought that such problems could be solved by providing that:

> … administrators … should remain free to get on and discharge their obligations, and discretionary functions, without having to take account of the possibility of any family provision claim other than one that has actually been initiated against them.
>
> It is even arguable that discretions under the pension scheme should remain exercisable, and sums payable, after proceedings have been commenced … so long as the recipients of the benefits so payable … are made parties to the proceedings and the scheme administrators/trustees correspondingly exonerated.

7.186 Cripps Harries Hall LLP (solicitors) took a slightly different line as regards the speed of payment, remarking that "benefits from a pension fund are often distributed quickly after death and may no longer be available for redistribution under a family provision order".

OVERRIDING THE DECEASED'S WISHES

7.187 Sidney Ross (barrister) felt that giving the courts access to pension funds under the 1975 Act would "be a disincentive to the making of pension provision. What, one might ask, is the point of making such provision if the court is free to dismantle it?".

7.188 The Society of Trust and Estate Practitioners were concerned that "the main issue would be that for good or ill the deceased may have signed a letter of wishes and might have intended thereby to deprive someone from inheriting from his estate who would be an eligible applicant under the 1975 Act".

TAXATION

7.189 A number of consultees, including Richard Frimston (barrister), Cripps Harries Hall LLP (solicitors), LV= (organisation), the Investment and Life Assurance Group, and the Royal Bank of Scotland Trust & Estate Group expressed concerns that reform could lead to taxation problems.

LACK OF PRECEDENT

7.190 Sidney Ross (barrister) considered that there would be:

> … a long period of judicial debate before any consistent treatment of pension sharing provision emerges, and a series of unrealistic claims in family provision cases, influenced by the pension sharing orders made in "big money" matrimonial cases. "Big money" family provision claims scarcely exist.

WAYS OF OVERCOMING POTENTIAL PROBLEMS

7.191 A number of consultees suggested ways of overcoming any potential practical problems that might arise from reform.

7.192 The Chancery Law Bar Association did "not think that any problems would arise … [if] there were proper safeguards in place". The proper safeguard they had in mind was a limitation that pension funds should only be accessible where there are insufficient assets in the estate otherwise to make reasonable financial provision for claimants under the 1975 Act.

7.193 Andrew East (legal executive) remarked that "given that there is now an established procedure for splitting pensions on divorce, I cannot see any sound or persuasive arguments against reform".

PART 8
SUPPLEMENTARY CONSULTATION: SECTIONS 31 AND 32 OF THE TRUSTEE ACT 1925

SECTION 32: THE RESTRICTION TO ONE-HALF OF A BENEFICIARY'S SHARE

8.1 **We provisionally propose that the power contained in section 32 of the Trustee Act 1925 to pay or apply capital to or for the benefit of a trust beneficiary should be extended, for the purposes of all trusts however established, to the whole, rather than one-half, of the beneficiary's share in the trust fund.**

[Supplementary Consultation Paper paragraphs 3.26 and 4.3]

Introduction

8.2 This proposal attracted 21 responses; 18 consultees fully agreed. Two consultees qualified their agreement, for different reasons. One consultee opposed reform.

The responses

Consultees who agreed with the provisional proposal

8.3 The reform provisionally proposed in our Consultation Paper was limited to trusts arising on intestacy. Consultees who mentioned the point approved of the reform being extended in the revised proposal to all trusts. They cited the advantages in treating all trusts consistently, thus avoiding "unnecessary complications and distinctions" (Edward Nugee QC (barrister)).

8.4 The Judges of the Chancery Division of the High Court felt that partial reform could have caused confusion and would have drawn unjustifiable distinctions between trusts arising on intestacy and trusts created by will, particularly given that both could apply to the same estate in a case of partial intestacy. Other consultees agreed, pointing out that some will trusts, in particular, are created without legal advice and might not expressly make the usual modification to section 32. The Institute of Professional Willwriters felt that the revised proposal would "remove the potential for inequity" between a beneficiary of a will trust and a beneficiary of the statutory trusts on intestacy.

8.5 Many consultees stated that, as a matter of course, when drafting trusts and wills they include an express modification of section 32 to the same effect as the provisional proposal; and have done for some years. They argued that the statutory provisions should be updated to reflect that practice. For example, Andrew East (legal executive) referred to the modification being made in "almost all of the trusts and wills that I prepare"; and the Law Society stated that such a modification is made in "almost all professionally drafted trusts and will trusts".

8.6 Withers LLP (solicitors), who noted that they edit two books of standard precedents entitled *Practical Trust Precedents* and *Practical Will Precedents*, commented that "for many years it has been standard practice" to make this modification in professionally drafted wills and trust documents. They questioned whether it is satisfactory for those who are not professionally advised to rely on statutory provisions which do not reflect standard practice. This point was reflected in other responses.

8.7 Consultees also noted the advantages of extending the power of advancement for increased flexibility, which the Law Reform Committee of the Bar Council referred to as "essential". The Royal Bank of Scotland Trust & Estate Group considered it desirable to enable complete distribution in limited value cases. Withers LLP (solicitors) also pointed in particular to smaller trusts wishing "to use this power effectively for the advancement of beneficiaries". The City of Westminster and Holborn Law Society gave the example of providing funds to pay higher education costs for a beneficiary, stating that "it is wrong to retain a rule that may on occasion prevent capital being used when it is most needed".

8.8 Michael Waterworth (barrister) felt that the restriction is "potentially damaging for beneficiaries", pointing out the advantages of flexibility in modern times:

> The s 32 power is a broad and extremely useful tool for trustees who must now cope with economic, social and fiscal conditions which are radically different from those which prevailed in the nineteenth century through to the mid-1920s. The absence of a broad and flexible power is restrictive and the inclusion of such a power ought to be encouraged in all trusts however established.

However, like other consultees, he emphasised that settlors should remain free to express a more restrictive contrary intention pursuant to section 69(2) of the Trustee Act 1925.

8.9 The Law Society stated that calculating whether the half share limit has been reached "is often a difficult practical problem", and considered that the reform would be advantageous in enabling trustees to wind up small trusts with relatively high administrative costs. The Judges of the Chancery Division of the High Court argued that the one-half limit should not be replaced with a capital limit, considering that "such a provision would unnecessarily complicate the administration" and would be likely to "perpetuate difficulties and resentments about the value at which the advance has to be brought into account". They referred to observations made by Goulding J in *Re Marquess of Abergavenny's Estate Act Trusts*[1] concerning accounting problems arising where a power of appointment or advancement is limited by a maximum and exercisable over a fluctuating fund.

[1] [1964] Ch 303.

8.10 The Judges of the Chancery Division of the High Court considered that the current law could be "a trap for the unwary". Michael Waterworth (barrister) made a similar point, considering that "careless (or ignorant) trustees exercise their powers without regard to the statutory limitation inappropriately but in good faith". Edward Nugee QC (barrister), however, was not convinced that such inadvertent breaches of trust are a significant problem. He suggested that trustees could be expected to note from the trust instrument the contingency on the beneficiary's entitlement, and to seek legal advice before making an advancement in excess of one-half.

THE DISADVANTAGES OF REFORM

8.11 Consultees who supported the reform discussed the possibility that it could increase abuse or fraud. Edward Nugee QC (barrister) commented:

> I agree that the advantages of increased flexibility outweigh the risks of increasing abuse or fraud. Trust your trustees. There are plenty of opportunities for fraud if the trustees are so inclined.

8.12 Mr Nugee identified the greatest risk as being that the trustees would pay out money without giving proper thought to the means of the beneficiary's parents and to the interests of the beneficiary in remainder. However, he still supported the proposal: "trust your trustees, even if they are administrators not expressly chosen by the settlor".

8.13 Sidney Ross (barrister) did not feel that administrators should be treated differently on the basis that they had not been selected as trustworthy, given that such selection is not a guarantee against dishonesty. He felt that the majority of trustees are conscientious and should be given flexibility in making capital payments, and that it would be wrong to keep that flexibility from them "because of the risk of abuse by a relatively small minority".

8.14 The Judges of the Chancery Division of the High Court agreed that "dishonest trustees will not be deterred by the current limit and so will not be influenced by its removal either." Similarly, the Law Reform Committee of the Bar Council stated that "in our experience, financial abuse occurs because of the character of the trustee, not the legal limits on his/her powers".

8.15 The Law Society considered that:

> Although there is always the risk that one or two rogue trustees may act dishonestly or in a less than prudent fashion, i.e. by making cavalier advances of the whole fund; on balance this risk is small and there are numerous duties placed on trustees to act in the best interests of all the beneficiaries and make decisions based on full and proper consideration.

8.16 Consultees also discussed the possibility that a remainder beneficiary would be denied any benefit under the trust if the whole of the fund was advanced under the section 32 power to a beneficiary who then died before becoming absolutely entitled. At present, if section 32 applies without modification, the remainder beneficiary must receive at least half of the fund.

8.17 The Society of Trust and Estate Practitioners also gave the example of a class gift. If there is a trust for all the children of X who attain 25, and the trustees advance the whole trust fund to X's current three children, then any future children of X will receive nothing. But they felt that neither case called for the retention of the restriction, pointing out that "trustees will still have to balance the interests of the beneficiaries", including having in mind the possibility of a class increasing.

> They might after considering the matter and taking into account the position of possible future beneficiaries in the way required in *Re Pauling's Settlement*[2] form the view that the advance was appropriate; and there might be further relevant factors. For example, the settlor might ... be prepared to make separate provision for future born children or there might be other trusts under which the children could be preferred.

8.18 Other consultees also assessed the potential downsides of reform in the light of this existing requirement for the trustees to consider all beneficiaries' interests. The Royal Bank of Scotland Trust & Estate Group considered that this is "key in considering any amendment", mentioning the practice of settlors leaving letters of wishes which may inform later decisions and advocating increased use of such letters. While they mentioned issues such as trustees coming under pressure from beneficiaries to break up trusts for short-term advantage when a longer-term view might be more appropriate, it was still considered overall that the reform should be made.

8.19 Donald Jolly (retired solicitor) mentioned the possibility that removing the limit could affect the payment of means-tested state benefits to beneficiaries who are disabled. While testators may take advantage of section 69(2) of the Trustee Act 1925 to provide for limitations, someone who dies intestate does not take up that opportunity. However, he noted the typically smaller size of intestate estates, and considered that this would only be an issue for a very few.

Consultees who did not agree with the provisional proposal, or qualified their agreement

8.20 The Woodland Trust (charity) opposed the reform:

> ... due to the potential loss and while a trustee has an obligation to all beneficiaries it has to be said that some trustees do not understand their position which is a separate issue to intentional abuse and fraud.

8.21 Paul Saunders (trust administrator) was prepared to support the provisional proposal, but preferred to limit the power under section 32 to £25,000 or one-half of the beneficiary's prospective share, whichever is the higher. He felt that this would be beneficial in that it would preserve some of a larger inheritance until the beneficiary reached the appropriate age. He also felt that the widespread practice of modifying section 32 to remove the restriction, or ignorance of it, does not justify its removal from the statute.

[2] [1964] Ch 303.

8.22 The Judges of the Chancery Division of the High Court mentioned potential inheritance tax implications of extending the section 32 power, citing *Barclays Bank Trust Co Ltd v HMRC*.[3] They suggested that section 89(3) of the Inheritance Tax Act 1984 should apply to section 32 as amended, noting that, if this was not done, a trust drafter might not appreciate the far-reaching tax effects.

8.23 The Trust Law Committee also cited this case, but commented that although it is of some relevance, it should not detract from the general principle of the proposal to widen section 32.

Other possible amendments to section 32

8.24 The Society of Trust and Estate Practitioners commented that:

> It would be helpful if the statutory wording could be amended to make it clear that an advance of assets in specie as well as of cash can be made in exercise of the power.

They noted that the courts currently permit the asset itself to be advanced in order to avoid the circuity of action which would result if cash were advanced to the beneficiary to enable him to purchase assets from the trust: *Re Collard's Will Trusts*.[4]

8.25 Withers LLP made the same point, arguing that "the opportunity should be taken ... to make it clear that this power can be exercised in relation to other types of asset representing capital." We have adopted this suggestion in our final recommendations.

8.26 Consultees who mentioned the point agreed with us that section 32 should not be amended to dispense with the requirement of consent from a beneficiary with a prior interest, or to give the trustees power to pay capital to a beneficiary only entitled to income.

8.27 The Trust Law Committee considered the fact that section 32 does not currently include power to pay to a parent or guardian where a beneficiary is under age, and considered this to be correct so far as the statute is concerned (although such a power is frequently included in an express trust or will).

Conclusion

8.28 This proposal was strongly supported on consultation. A minority of consultees expressed concern that abuse or fraud would be facilitated. However, the majority considered that in the light of existing safeguards this risk was outweighed by the benefits of increased flexibility for beneficiaries and consistency across all trusts.

[3] [2011] EWCA Civ 810, [2011] BTC 375.

[4] [1961] Ch 293.

SECTION 31: LIMITATION TO A PROPORTIONATE PART OF THE INCOME

8.29 **We provisionally propose that the second part of the proviso to section 31(1) (the requirement that trustees should only pay a proportionate part of the income where they have notice that the income of another fund is applicable for the same purposes) should be removed.**

[Supplementary Consultation Paper paragraphs 3.34 and 4.4]

Introduction

8.30 Of the 21 consultees who responded to this paper, 20 expressly supported this proposal, while the Woodland Trust (charity) stated that they did not object to it. Many of those in support also favoured further reforms to section 31, which are discussed at paragraph 8.41 and following below.

The responses

8.31 Many consultees argued that the current law is too rigid and unduly onerous. The Society of Trust and Estate Practitioners and the Law Society considered the exercise required by the provision to be complex, an administrative burden and potentially costly. Withers LLP (solicitors) suggested that "it may not be easy or indeed possible for trustees to find out exactly what the beneficiary's position is in relation to other funds or to negotiate with the trustees of those other funds". Farrer & Co (solicitors) argued that:

> It is not practicable for trustees to share information about income distributions on a day to day basis. ... The current provision is too inflexible, and especially where trust funds are of a significant value (and contain a variety of instruments) places an impractical limit upon trustees' decisions.

8.32 The Royal Bank of Scotland Trust & Estate Group reasoned that such situations are likely to arise more rarely in relation to wills if contingent interests become less popular in will drafting, that and on intestacy they arise in relation to typically smaller sums of money. On that basis they felt that the restriction is an inappropriate complication, requiring enquiries which are "potentially wide-ranging [and] maybe fruitless and costly". They suggested that it would be more appropriate for settlors (or their advisers) to introduce such special arrangements as and when required. Michael Waterworth (barrister) agreed, and stated that a case in which the settlor wished to include an express requirement for the trustees to have regard to other available income would be "unusual". He thought that even if such express provision were to be made, it would not be by reference to a proportionate part of the income; that would be too restrictive.

8.33 Consultees considered that the restriction no longer serves "any useful practical purpose" (Richard Wallington (barrister)). The Judges of the Chancery Division of the High Court suggested that a "two-fund" situation was "common only in the days of the traditional marriage settlement", and that it is not found nowadays. They considered that the provision unnecessarily complicates modern trust administration.

8.34 The Institute of Professional Willwriters stated:

> This provision ... serves no useful purpose. Many of our members take the view that if a payment needs to be made for the benefit of a beneficiary – then it should. Rules on how and where that payment comes from are an unnecessary burden.

8.35 Withers LLP (solicitors) agreed that there may be reasons why one fund should be used rather than another, suggesting investment, tax or other reasons. They stated that "maintenance of beneficiaries is an issue in relation to which the trustees should be given as much flexibility as possible without having to incur the costs of seeking a court order".

8.36 Consultees also reasoned that the general law on trustees' duties is sufficient and that a specific duty is therefore not required. Andrew East (legal executive) considered that "a trustee's general duties to act in the best interests of the beneficiaries and take all circumstances into account more than adequately covers this point"

8.37 Several consultees instanced their own or general practice in removing this requirement for wills and lifetime trusts. Edward Nugee QC (barrister), for example, described it as his "standard practice" (along with other amendments to section 31); the Institute of Professional Willwriters stated that it is "typically removed from professionally drafted wills"; and the Society of Trust and Estate Practitioners said that this is "very common practice".

8.38 Donald Jolly (retired solicitor) suggested that if this requirement in the second part of the proviso were removed, then the concluding words of the first part of the proviso (which direct the trustees "in particular to what other income, if any, is applicable for those purposes") should also be removed, even if the whole of the first part of the proviso was not deleted.

Conclusion

8.39 This provisional proposal was almost unanimously supported on consultation. Consultees considered that the proposed reform would remove an unnecessarily onerous requirement which serves no useful purpose for modern trust administration.

SECTION 31: THE FIRST PART OF THE PROVISO TO SECTION 31(1)

8.40 **We ask consultees whether further changes should be made to the power to pay or apply income for a beneficiary's maintenance, education or benefit contained in section 31(1) of the Trustee Act 1925, and in particular whether it would be beneficial to make one or both of the following amendments:**

(1) **delete the first part of the proviso to section 31(1);**

(2) **redraft section 31(1)(i) so as to remove the words "as may, in all the circumstances, be reasonable" and substitute an unfettered discretion.**

[Supplementary Consultation Paper paragraphs 3.40 and 4.5]

(1) The first part of the proviso to section 31(1)

Introduction

8.41 There were 21 responses to this part of the question. Fourteen consultees considered that the first part of the proviso should be deleted, and one that this would be an acceptable alternative to more fundamental changes. One consultee expressed a neutral view, and five preferred to retain the first part of the proviso.

The responses

CONSULTEES WHO THOUGHT THAT THE FIRST PART OF THE PROVISO TO SECTION 31(1) SHOULD BE DELETED

8.42 Consultees indicated that it is general practice to remove the whole of the proviso to section 31(1). For example, Boodle Hatfield (solicitors) stated that all of the amendments to section 31(1) on which consultation questions were asked are "routinely made in our standard trust and Will precedents".

8.43 Consultees argued that the proviso is superfluous. Andrew East (legal executive) stated:

> I remain convinced ... that the trustees' overriding duty to act for the benefit of the beneficiary in the light of all those circumstances is sufficient ... .

8.44 Similarly, Sidney Ross (barrister) considered that "it would be surprising if a trustee failed to have regard to the beneficiary's age, requirements and other financial resources". He doubted whether a trustee who did not know that he should consider such matters would look them up in the statute. The Society of Trust and Estate Practitioners stated:

> We agree ... that the circumstances specified in the first part of the proviso would in any case be in the mind of a trustee who was considering exercising the power. We do not think that the words add much, if anything, to the consideration of the issues given by trustees to the distribution of income and the words are unlikely to be of any great assistance to trustees.

8.45 Edward Nugee QC (barrister) said:

> I can see that it may be considered reasonable to erect some signposts to guide the trustees in the exercise of their discretion. This practice has been adopted in a few statutes ... . No doubt one could list a number of factors to which trustees should have regard in exercising their s 31(1)(i) discretion; but I do not think it would be appropriate to do so. Inter vivos discretionary trusts are nowadays common, and I do not recall seeing signposts to trustees directing them to have any particular circumstances in mind when exercising their discretions. The general principles governing the exercise of trustees' discretions are well known and little more than common sense. If trustees exercise their discretion in an obviously unreasonable way, they may be liable whether there is an express objective test, as in the present s 31(1)(i), or not.

8.46 Other consultees also doubted whether trustees would actually obtain guidance from the statute, even if they consulted it. Withers LLP (solicitors) pointed out that the relevant factors are not limited to those set out in the proviso. Michael Waterworth (barrister) thought that the words are not only superfluous but also hinder understanding:

> Although they might provide a form of guidance to trustees, advisers and the court it seems to me that comprehension of the power is not assisted by retention of the first part of the proviso ...

8.47 Farrer & Co (solicitors) and the Law Reform Committee of the Bar Council suggested that the whole of the proviso should be deleted in order to improve the flexibility of section 31(1).

8.48 The Institute of Professional Willwriters' preferred option was to remove section 31 from statute altogether, "given the propensity for most, if not all, of the provisions of section 31 ... to be removed from trust[s] created by a Will". They argued that all but a minority of testators want to give trustees "the widest possible powers to start with". If this was not accepted, they would support the deletion of the first part of the proviso.

CONSULTEES WHO THOUGHT THAT THE FIRST PART OF THE PROVISO TO SECTION 31(1) SHOULD BE RETAINED

8.49 Chief Master Winegarten considered that the first part of the proviso is "useful as guidance". The Trust Law Committee felt that it is appropriate for a statutory power "to expressly indicate factors to which trustees should have regard when exercising the power".

8.50 The Judges of the Chancery Division of the High Court, while expressing themselves as neutral on the point, considered that it may be advantageous for trustees "to be given an express statutory list of the matters to which they should have regard in the exercise of their discretion". They also suggested that "there is a risk that lay trustees will think that an unfettered discretion is entirely unfettered".

8.51 Richard Wallington (barrister) stated that "the first part of the proviso ... could remain as guidance", although he noted that "it is usual professional practice to treat the entire proviso as omitted".

8.52 The Royal Bank of Scotland Trust & Estate Group acknowledged that the first part of the proviso duplicates the existing law. However, they did not feel that this was a reason to delete it.

Conclusion

8.53 The majority of consultees supported deleting the first part of the proviso to section 31(1) on the basis that this is general practice in will and trust drafting and that the words are unnecessary and do not provide useful guidance to trustees. A minority preferred to keep these words as a statutory list of factors to which trustees should have regard in exercising the power conferred by the provision.

(2) The substitution of an unfettered discretion in section 31(1)(i)

Introduction

8.54 Of the 21 consultees, 17 supported the substitution of an unfettered discretion. The Institute of Professional Willwriters considered that this would be an acceptable alternative to more fundamental changes; see paragraph 8.48 above. One consultee expressed a neutral view, and two preferred to keep the current wording.

The responses

CONSULTEES WHO SUPPORTED REDRAFTING SECTION 31(1)(I) AS SUGGESTED

8.55 Consultees again pointed out that such a change would reflect standard practice. The Society of Trust and Estate Practitioners confirmed that the Society's Standard Conditions – unlike other precedents – do not currently make this change, but stated that:

> Going forward ... and looking at a proposed legislative change which will no doubt apply for many years into the future, the substitution of an unfettered discretion is desirable.

8.56 Withers LLP supported the reform as consistent with their recommendations in *Practical Trust Precedents* and *Practical Will Precedents*, explaining:

> We feel that the current statutory wording puts the trustees in an unsatisfactory position as it leaves their actions open to challenge on the basis of an objective test even where they have acted honestly and in good faith. In our experience although settlors and testators often wish to give non-binding guidance ... they are generally happy for trustees to have flexible powers so that they can adapt to changing circumstances.

8.57 Andrew East (legal executive) made a similar point, expressing concern that "the objective test introduced by Section 31(1) may lead to unintended consequences and could hamper and fetter trustees exercising their discretions". The Trust Law Committee commented:

> While this would favour Trustees rather than beneficiaries, we suspect that such an amendment might help to reduce the scope for what may in practice turn out to be somewhat fruitless disputes with regard to the exercise by trustees of their power.

8.58 Sidney Ross (barrister) considered that while the "expressed statutory requirement of reasonableness merely articulates what is to be expected of the trustee in any event", in modern times it may be perceived as an objective test which does not match the general law.

> "Reasonableness" in this context may have been a concept more easily grasped in an age when the majority of trustees were professionals and had a more homogenous view of what was reasonable. "Reasonableness" may have been the consensus view of ... "the trustee in the City taxi-cab". There was thus very little difference in practice between what might have been thought objectively reasonable and what the average trustee might have considered subjectively reasonable. Now that statutory trusts on intestacy fall to be administered by a great variety of people of very different temperaments and attainments, the gulf between those two perceptions of reasonableness is far wider. In an ever increasingly litigious age it seems to me that the concern expressed in [paragraph] 3.37 is well founded.

8.59 Richard Wallington (barrister) made a similar suggestion, stating that "this change would not alter the position very much, but it would result in what is more realistic wording from a practical point of view".

8.60 The Royal Bank of Scotland Trust & Estate Group noted that substituting a discretion which is unfettered on the face of the statute would "create a level playing field with s32".

8.61 Consultees also pointed out that trustees will still have to abide by the general law on trustees' duties. Edward Nugee QC (barrister) commented:

> If trustees exercise their discretion in an obviously unreasonable way, they may be liable whether there is an express objective test, as in the present s 31(1)(i), or not.

8.62 Similarly, the Society of Trust and Estate Practitioners commented that "trustees will still be exercising a fiduciary power and beneficiaries will have redress if the power is exercised improperly"; and the Association of Corporate Trustees noted that "trustees must have regard to all relevant circumstances".

8.63 Sidney Ross (barrister) considered that most trustees do, or should, act reasonably in any case:

> ... does one really envisage a trustee as setting out deliberately to act in an unreasonable manner? It seems hard to imagine a situation in which the trustee does not believe himself to be acting reasonably, other than one in which he is infected by spite or malice – in which case no statutory language will induce him to act properly.

8.64 The City of Westminster and Holborn Law Society stated that "the shorter the section the simpler it will be for the trustees to apply it".

CONSULTEES WHO DID NOT SUPPORT REDRAFTING SECTION 31(1)(I) AS SUGGESTED

8.65 The Law Reform Committee of the Bar Council and Farrer & Co (solicitors) both answered no to this part of the question. They both considered the stricter requirement of objective reasonableness to be desirable. The Law Reform Committee of the Bar Council considered that the amendment is not commonly made, although Farrer & Co stated that it is.

8.66 The Committee expressed concern that removing the requirement to act reasonably and moving to a "laxer discretion" would carry the implication that acting unreasonably is permitted. Farrer & Co considered it important that where the trust arises by operation of law or by a homemade instrument the trustees are subject to an objective standard of reasonableness.

Conclusion

8.67 A strong majority of consultees preferred to redraft section 31(1)(i) as suggested. They were concerned that trustees should have a flexible discretion which is not fettered by a perception that the statutory wording imposes requirements additional to those of the general law on the exercise of trustees' powers. A minority of consultees preferred an objective standard of reasonableness.

Other amendments to section 31

8.68 Richard Wallington (barrister) argued that no further amendments should be made to section 31, on the basis that this would risk disturbing the long-established interpretation of the section and would be unnecessary in view of the fact that settlors can modify the application of the section where necessary and appropriate. The Law Society suggested that a fundamental review of section 31 might be suitable for a future project.

8.69 The Law Society noted that section 31(1)(i) states that while the beneficiary is under 18, "the trustees may ... pay to his parent or guardian, if any, or otherwise pay for or towards his maintenance, education or benefit ...". They expressed concern about the use of the word "otherwise" in the provision on the basis that there is no direct connection between the payment to the parent or guardian and that payment being used for the maintenance, education or benefit of the infant.

8.70 We do not consider that the provision is unclear as it stands. A payment, whether or not made to the beneficiary's parent or guardian, must be made for or towards the beneficiary's maintenance, education or benefit.

8.71 The Trust Law Committee suggested that the use of the word "infant", for a beneficiary who is under 18, and "infancy", for the period up to the beneficiary's 18th birthday, should be reviewed. As we are not aware that this causes confusion in practice we have decided not to undertake such updating as part of this project.

8.72 Edward Nugee QC mentioned problems associated with the rules of apportionment. In particular income accrued before the date when the beneficiary attains 18, but received by the trustees after that date, cannot be applied for the benefit of the beneficiary under the section 31 power. He acknowledged that "if the apportionment rules are abolished the difficulty will disappear".

8.73 The Law Commission has made recommendations to remove the relevant apportionment rules: see Capital and Income in Trusts: Classification and Apportionment (2009) Law Com No 315.

8.74 The Law Reform Committee of the Bar Council considered that accumulated income should be added to capital and become available for the benefit of all beneficiaries. They considered that opening a fresh bank account for each child and paying unused income into it is an unnecessary administrative burden which increases costs and restricts investment powers. The same point was raised by the Judges of the Chancery Division of the High Court. This would be a fundamental change to trustees' powers under the statute, enabling them to use income from one beneficiary's share to benefit another, and would be beyond the scope of this project; another consultee, Edward Nugee QC (barrister), considered that such an amendment "is not suitable for general use".

8.75 The Law Reform Committee of the Bar Council suggested that the age at which trustees lose the power to pay or apply income at their discretion, and beneficiaries become entitled to income as of right, should be increased from 18 to 21. They noted that accumulation is now unrestricted for private trusts pursuant to section 13 of the Perpetuities and Accumulations Act 2009. However, again, this would be a fundamental change to the statute, particularly as this could have adverse inheritance tax consequences. Edward Nugee QC (barrister) noted that settlors are free to stipulate an age greater than 18 if they wish to do so. The Judges of the Chancery Division of the High Court stated that they had not encountered any circumstances suggesting a demand for such an amendment.

Converting a vested interest in income into a contingent interest

8.76 The Supplementary Consultation Paper mentioned (at paragraphs 3.42 and 3.43) the logical oddity that section 31(2)(i) converts a beneficiary's vested interest in income into a contingent interest, so that the accumulations are added to capital rather than passing with the beneficiary's estate. We concluded that there was no need to make a change on this point.

8.77 Farrer & Co (solicitors) suggested that this causes a problem for inheritance tax purposes, in relation to immediate post-death interests. However, the Judges of the Chancery Division of the High Court reported that they were not aware of circumstances suggesting a demand for change here, and observed that "it is probably less common now for a beneficiary to fail to attain a vested interest than when these provisions were first drafted". Edward Nugee QC (barrister) commented:

> I don't think this is really an oddity in practice, because if a beneficiary with a vested [interest in] income dies before satisfying the contingency ... he or she is not going to need the income anyway. The oddity is purely logical: the practical result is sensible.

8.78 We therefore do not think that any change is required on this point.

TRANSITIONAL ISSUES

8.79 **We provisionally propose that the reforms to sections 31 and 32 of the Trustee Act 1925 should apply (subject to section 69(2) of the Trustee Act 1925) in relation to interests arising under instruments which take effect after the commencement of the implementing legislation. This includes:**

(1) **interests arising under wills that take effect on the death of the testator after commencement; and**

(2) **interests arising by the exercise, after commencement, of general powers of appointment, special powers of appointment and powers of advancement contained in instruments which had already taken effect before commencement.**

[Supplementary Consultation Paper paragraphs 3.68 and 4.6]

Introduction

8.80 This proposal was generally well-supported. Sixteen consultees agreed with all parts of the proposal. Two others supported it but felt that it should also apply to existing trusts, or that they should be able to opt in. The members of another organisation who responded were divided between those two views.

8.81 Two other consultees agreed with all but one aspect of the proposal One consultee felt that in the case of will trusts the reform should only be effective where the will had been executed after commencement and not for all deaths after commencement. Another would exclude trusts created from powers which existed prior to commencement.

New trusts established by those beneficially entitled

8.82 No consultees objected to our proposal insofar as it would apply the reform to new trusts established after commencement by someone who is beneficially entitled to the relevant assets, either under the intestacy rules (where the death occurred after commencement) or in lifetime.

8.83 We also proposed that the reforms should apply to all will trusts established on death after commencement. Donald Jolly (retired solicitor) objected to that proposal to the extent that it would apply where the will (or codicil) was executed before commencement. He considered that this would affect testators' intentions and rights in the same way as the Family Law Reform Act 1969 (which reduced from 21 to 18 the date at which a beneficiary would be entitled to income).

8.84 Mr Jolly felt that "a very significant number of testators" would have made "an informed and conscious decision" about sections 31 and 32, particularly if the will was older and predated the modern advice to modify the application of section 32. He stated that in his experience, many testators had been satisfied with the provisions as they stood and did not wish their trustees (often family members) to be able to expend the whole of the capital in addition to the income. This might be because, for example, the testator wished to guarantee that the beneficiary would receive at least one-half of the sum on the intended date

8.85 Mr Jolly also noted that many testators might not have the opportunity to update their wills if they disagreed with the change, for example because they were not aware of it or lacked testamentary capacity. Finally he suggested that it would be difficult to make the amendments without adversely affecting testators' specific modifications to the provisions.

8.86 No other consultees expressed dissatisfaction on this point; many discussed the point and concluded that the proposal was correct. The Trust Law Committee, for instance, considered that:

> On the basis that these are discretionary powers, and only need to be exercised to the extent that trustees consider appropriate, we agree that this should not give rise to difficulties.

The Society of Trust and Estate Practitioners put forward a similar view, citing the advantage of applying the same rules to both testate and intestate estates.

8.87 Withers LLP (solicitors) came to the same conclusion, reasoning that "those who have written a will without considering the effect of these provisions and whether they should be extended or not should not be in a worse position" than those who die intestate. They considered that "the majority of testators have either executed wills in which these provisions have been extended or have not considered the matter". They supported a pragmatic approach which would not allow the possibility that a small minority of testators have relied on the current law to overrule the strong case made for consistent reform.

8.88 Consultees such as Edward Nugee QC (barrister) also supported the argument made in the Supplementary Consultation Paper (paragraph 3.49) that there is a distinction between the current proposal and the considerations surrounding implementation of the Family Law Reform Act 1969.

8.89 We have concluded that we should adhere to our original view that the reforms should apply to all will trusts where the testator died after commencement, subject to amendment or exclusion of the relevant power by the terms of the will (section 69(2) of the Trustee Act 1925). We consider that it would be clearer and simpler to treat all trusts established on death in the same way, rather than requiring a distinction to be made between trusts established on intestacy and those created by will depending on whether the deceased died intestate.

Existing trusts

8.90 Paul Saunders (trust administrator) argued that existing trusts should be able to opt in, in writing, within two years of commencement. In particular he felt that this would benefit low value trusts where the trustees wish to distribute the whole of the fund and wind up the trust to save administration costs. He considered that this would be in accordance with the wishes of the settlor.

8.91 The City of Westminster and Holborn Law Society considered that the reform should simply apply to all trusts, including existing trusts, rather than making this dependent on an opt in. They discussed the application of article 1 of the First Protocol to the European Convention of Human Rights in this regard. While they considered that this article probably is engaged, they took the view that applying the reform to all trusts would "strike a fair balance between the demands of the general interest and those of the person 'deprived'". They felt that the default beneficiary could not be said to be truly deprived given that he is not primarily intended to take, and will never be entitled unless the primary beneficiary dies before satisfying the contingency.

8.92 The Society also considered whether applying the reform to all trusts would be contrary to the settlor's intention. They considered that this would not be the case in relation to will trusts, on the basis that most testators do not consider the point. Finally, they preferred on the grounds of simplicity an approach which would apply only one regime to all trusts, rather than one to existing trusts and one to subsequent trusts.

8.93 Some members of the Association of Corporate Trustees endorsed the idea that the reforms should apply "to any exercise of trustees' powers after the commencement date", in particular because they give trustees discretionary powers rather than requiring – or preventing – a particular action.

8.94 Other consultees, however, noted with approval the fact that the proposal would not affect existing trust arrangements except by the exercise of a power of appointment or advancement after commencement. Andrew East (legal executive), for example, stated that this would be "impractical". The Judges of the Chancery Division of the High Court considered that:

> There could be human rights questions of deprivation of existing property rights, and settlors could justifiably say that this was not the basis on which they had settled the funds.

8.95 We appreciate consultees' concerns that for many existing trusts, the application of these reforms could add helpful flexibility; and that often the settlor has simply not considered the point. However in view of the contrary views expressed by other consultees and our own concerns about empowering encroachment on existing rights where the trustees have no power to make an appropriate variation, we have decided not to extend the recommendation to existing trusts.

Post-commencement exercise of pre-existing powers

8.96 The Royal Bank of Scotland Trust & Estate Group argued that the reform should not apply to trust provisions effected by the exercise of powers which existed before commencement due to capital gains tax concerns.

8.97 Other consultees, however, expressed particular enthusiasm for the inclusion of trust provisions established by the exercise of pre-commencement powers. For example, Richard Wallington (barrister) thought that the amendments "would have a negligible risk of depriving anyone of accrued rights", because it is so common for it to be possible to make those changes under express powers anyway. Therefore he thought that "it would only be sensible" to have these transitional provisions. Withers LLP (solicitors) discussed the point and came to a similar conclusion, favouring the added flexibility.

8.98 Edward Nugee QC (barrister) noted that most powers of appointment are wide enough to enable this modification to be made expressly, and it usually is so made. He considered the proposal to be an acceptable application of the general principle of bringing the law into line with the established practice given in standard precedents.

8.99 The Society of Trust and Estate Practitioners noted that when a power is exercised, it may result in the creation of a separate settlement, or simply vary the terms of the original trust. They considered that in either case, the new provisions should apply.

8.100 The Law Society also supported the proposal to apply the reforms when an existing power is exercised, and considered that all such powers should be included. They suggested that the word "contained" might exclude statutory powers, such as the power under section 32 of the Trustee Act 1925, and that the proposal should be implemented in terms which would include such powers. They also suggested that there should be clarification as to whether, if a pre-existing power has been exercised, a power of advancement which had previously been exhausted will be revived.

PART 9
QUANTIFYING IMPACT

9.1 This Part of the Analysis of Consultation Responses relates to the requests for information and comments made in Appendix A of the Consultation Paper.

COSTS OF ADMINISTERING INTESTATE ESTATES

9.2 **We would welcome information and comments from consultees that would help us to assess the costs of administering intestate estates and particular issues which may add to costs and delay.**

[Consultation Paper paragraphs A.7 and 8.45]

Introduction

9.3 Nine consultees provided information or comments in relation to the cost of administering intestate estates.

The responses

9.4 Many consultees offered general comments regarding the costs associated with the administration of an intestate estate. Richard Frimston (solicitor) said:

> The usual problem is that of identifying and locating the beneficiaries entitled. A deceased spinster may have had a child. Proving a negative is not possible so that a perfect solution is never possible. Insurance and indemnities are often required. Clients are encouraged to make wills to ensure a more certain and cheaper administration.

Withy King LLP (solicitors) and the Law Society provided comments of a similar nature. The latter said:

> Tracing beneficiaries, and the nature of assets, are two significant elements of administering an estate that may add to costs and delay.

The Royal Bank of Scotland Trust & Estate Group said:

> Administering intestate estates is usually a more costly exercise as extracting letters of administration often entails more paperwork (renunciation papers, clearing off possible administrators who do not wish to act, tracing such parties, creating family trees etc) than a simple grant application.

The Woodland Trust (charity) commented:

> While the Charity does not have any benefit under the intestacy law or the provisional proposals, it does have experience in encouraging the public to make Wills to ensure their wishes are carried out after death. The Charity is aware of the lack of understanding of the public and the many assumptions that are made, usually incorrect assumptions.

9.5 Andrew East (legal executive) argued against any reform of the use of trusts which would be based solely on grounds of cost:

> … while there is an argument … that trusts are unnecessarily expensive, in my experience trusts can be administered efficiently and at reasonable cost and therefore I would not favour any reform which removes the use of trusts in intestacy purely on cost grounds. For reasons which I have referred to above I think that, particularly in providing for the competing needs of surviving spouses and children … the use of trusts is extremely helpful and useful.

9.6 In a detailed response, Sheila Campbell (solicitor) argued:

> In recent years the most costly change for smaller estates has been removing the right to express the size of the estate in bands, e.g. not more than £100,000. Now the requirement is to express the estate to the nearest £1,000. Under the old system the administrator could give approximate value and where it was clear the estate was within a particular band, an oath could be completed straight away and a grant application sent off by solicitors on the same day. The change has meant that exact details have to obtained for all assets and with slower and slower responses from financial institutions a smaller estate may now have to wait 3 or 4 months before an application can be made. Any delay causes extra stress for the bereaved.

9.7 Donald Jolly (retired solicitor) and Christine Riley (probate registrar) referred to our provisional proposals in relation to cohabitants when offering their comments on the costs of administering intestate estates. The former said:

> In my opinion increased litigation, and therefore increased costs and delays, would ensue in both the short and long term, if cohabitants were to be given a statutory entitlement to participate in the distribution on intestacy.

COSTS OF ADMINISTERING LIFE INTERESTS AND TRUSTS

9.8 **We would welcome information and comments from consultees about the costs of administering life interests and trusts for under 18s that arise on intestacy.**

[Consultation Paper paragraphs A.26 and 8.46]

Introduction

9.9 Ten consultees provided information and comments in relation to the costs of administering life estates and trusts for under 18s that arise on intestacy.

The responses

9.10 Richard Frimston (solicitor) said that, in his experience, the costs of trusts for under 18s were not usually considered problematic:

> The costs of under 18 trusts are not usually an issue. A parent or guardian can be appointed as trustee. In circumstances, when a parent is not appropriate, then the costs of running the trust are probably appropriate to protect the child.

In contrast, Anne Thom (solicitor) said:

> Administering life interests and trusts for under 18s are expensive. Possibly advice from professionals can keep the costs down slightly.

9.11 The Society of Trust and Estate Practitioners said:

> The cost of administering life interest trusts is less than for the administration of bereaved minor trusts or relevant property trusts since the person enjoying the life interest can usually receive the income arising (if any) by direct mandate and show that income on their own personal tax return by agreement with HMRC. This reduces the cost of administration … .

9.12 The Law Society commented:

> The costs of administering a small trust are usually disproportionate to the size of the estate. The administration of a trust is linked to tax problems, especially in relation to income tax.

9.13 Roland D'Costa (probate registrar) said:

> There are anecdotal reports from staff in the probate registries of difficulties experienced by personal applicant administrators who seek advice because they are unable to deal with issues of life and minority interest. It is not the role of the probate registry to deal with these problems apart from advising the administrator to seek professional help … . Professional advice increases the cost to the estate. Additionally the delay in administering the estate may result in further costs if an interested party applies to the probate registrar for an order to compel the administrator to file an inventory and account for the administration of the estate (Non-Contentious Probate Rules 1987 r. 61(2)).

9.14 Paul Saunders (trust administrator) approached the issue from a different angle:

> The question should not only take account of the costs incurred in the administration of such interests, but also the effect of removing the trusts.

> … I believe that statutory trusts should continue to apply to a minor's interest. However, I would advocate that the vesting age be increased to, say, age 21 or 25, so that the child neither receives a substantial benefit at an age when they will not recognise that it is the seed-corn of their future, nor when it will adversely affect their right to claim benefits and/or grants under the welfare state.

LEVELS OF LITIGATION UNDER THE 1975 ACT

9.15 **We would welcome information and comments from consultees about the likely effect of our provisional proposals on levels of litigation under the Inheritance (Provision for Family and Dependants) Act 1975 and any potential increase in other types of claim.**

[Consultation Paper paragraphs A.43 and 8.47]

Introduction

9.16 Sixteen consultees responded to this request for information and comments. The majority of responses focused on whether litigation under the 1975 Act would increase or decrease as a result of the implementation of our provisional proposals into law. Our provisional proposals in relation to cohabitants were often referred to by consultees.

The responses

9.17 Seven consultees thought that claims under the 1975 Act would increase as a result of our provisional proposals. They included Richard Frimston (solicitor), the Law Society, Withy King LLP (solicitors), the Royal Bank of Scotland Trust & Estate Group, Sheila Campbell (solicitor), Dr Mary Welstead (academic) and the Battersea Dogs and Cats Home (charity). The latter said:

> We believe that the effect of the proposals would lead to a dramatic proliferation of 1975 Act claims, particularly where estates have been left to charity. The charity legacy market was worth in the range of £2bn in 2008/9 and for many charities, including our own, legacies accounts for the majority of their income each year. The impact of an increase in the number of 1975 Act claims would be felt by charities immediately in terms of substantially increased legal costs and reduced legacy income.

9.18 However, the same number of consultees took the opposite view, arguing that claims under the 1975 would decrease as a result of our provisional proposals, often on the basis that giving cohabitants an automatic entitlement on intestacy would reduce the need for a 1975 Act claim. For example, Giles Harrap (barrister) said:

> On balance I would expect a reduction in litigation under the 1975 Act … the proposed automatic provision for cohabitants on intestacy would have the most marked effect of the proposals.

Similarly, Christine Riley (probate registrar) said:

> I have already said that I think there will be considerable scope for dispute about the nature and duration of cohabitation, which may result in more contentious proceedings in Chancery, (which would need to be weighed against fewer applications under the 1975 Act).

In a comprehensive response, Sidney Ross (barrister) also argued that litigation under the 1975 Act would fall as a result of our proposals; and he disagreed that the nature of the cohabitation would be an issue frequently disputed:

> I believe that, on balance, the proposed reforms to the law of intestacy will result in a decrease in the number of family provision claims. In the first place, the experience of claims by cohabitants under the 1975 Act has shown that disputes about the status of the claimant are fairly rare and such disputes as there have been were mainly concerned with whether the minimum duration requirement has been met, rather than the less tractable problem of the nature of the relationship.

9.19 Andrew East (legal executive), the Association of Her Majesty's District Judges and the Yorkshire Law Society also thought that the number of 1975 Act claims would decrease.

9.20 In contrast, Donald Jolly (retired solicitor) and Richard Dew (barrister) thought that the implementation of our provisional proposals would have no effect on levels of litigation under the 1975 Act. The latter said:

> I expect these proposals would probably not increase litigation but I doubt they would reduce it either.

9.21 Consultees' responses generally focused on the relationship between 1975 Act claims and our provisional proposals in respect of cohabitants; very few mentioned other types of claim. However, the Association of Her Majesty's District Judges did say:

> Subject to what we have said about cohabitants, we consider your proposals are likely to result in less litigation. If our comments are not taken on board, there may, for example, be an increase in applications pursuant to Schedule 1 to the Children Act 1989.

COSTS OF LITIGATION UNDER THE 1975 ACT

9.22 **We would welcome information and comments from consultees about the costs of litigation under the Inheritance (Provision for Family and Dependants) Act 1975.**

[Consultation Paper paragraphs A.47 and 8.48]

Introduction

9.23 Nine consultees responded to this request for information and comments. Almost all of these consultees voiced considerable grievances over costs of litigation under the 1975 Act.

The responses

9.24 Of the nine consultees who responded, seven made clear their view that costs of litigation under the 1975 Act were disproportionately high or otherwise expensive. The remaining two consultees also felt that costs were high, but provided less detailed reasoning.

9.25 Richard Dew (barrister) said:

> The costs of claims (all claims but including 1975 Act claims) are very high. Frequently in 1975 Act claims the cost, if taken to trial, swamp the estate let alone the amount at stake. And the larger the estate the more that is spent so even large estates are badly affected.

Richard Frimston (solicitor) was also of this opinion:

> Costs under the 1975 Act are prohibitive. Consideration should be given to removing the PRs [personal representatives] as parties to the claim. The cost of the PRs being represented is an unnecessary additional expense. Although mediation is encouraged, it is not unusual for one party to the litigation to prefer to see the estate reduced by legal costs rather than the other party inherit. The courts should be encouraged to make costs orders against unreasonable parties more often than they do. This might encourage mediation.

Boodle Hatfield (solicitors) recommended reform to the costs regime:

> Our view is that the costs regime needs revision – see Jackson final report on costs … . The report recommended that the amount of costs deductible from an estate should be set at a proportionate level early in the litigation (determined by reference to the size of the trust fund/estate and the complexity of the issues) and a judge would then determine which party pays the balance … . Currently executors (remaining neutral) will get all their costs from the estate and potentially winning party's costs can come from the estate.

The Association of Her Majesty's District Judges commented:

> We have no precise figures but our impression is that they are disproportionately costly, often substantially depleting the size of an estate.

The Yorkshire Law Society said:

> Litigation is expensive, particularly in Inheritance Act claims where it is not unusual to be dealing with four different parties.

The Law Society said:

> There are significant costs associated with litigating under the Inheritance (Provision for Family and Dependants) Act 1975. It is believed that as estates suffer grave losses from the costs of proceedings, applicants should be encouraged, where appropriate, to settle before proceedings commence.

IMPACT ON PRACTITIONERS AND CLIENTS

9.26 **We would welcome information and comments from consultees on the potential impact on practitioners and their clients of the implementation of new legislation in this area.**

[Consultation Paper paragraphs A.49 and 8.49]

Introduction

9.27 Twelve consultees responded to this request for information. Responses fell into three categories: positive impact on practitioners and their clients; negative impact; and impact which would be neutral in its effect.

The responses

9.28 Two consultees felt that the implementation of our provisional proposals would have a positive impact on practitioners and their clients. Andrew East's (legal executive) response focused on the potential impact on clients:

> I think that on the whole the proposals are welcome, however for my own part I would still stress to clients that a will is preferable, for many practical reasons, to intestacy and also would ensure that property will pass to the beneficiaries that they require and that it will be administered by the people that they have confidence in. There may inevitably be an effect in that more people will decide that they don't need to make a will if the intestacy provisions look more like what they expect them to be in modern circumstances.

Donald Jolly (retired solicitor) said, in relation to the potential impact on practitioners:

> Subject of course to my other responses, I consider that the reforms provisionally proposed will have a positive impact in terms of less time being spent in the administration and equitable distribution of estates on intestacy.

9.29 Five consultees thought that our provisional proposals would have a negative impact on practitioners and their clients. Christine Riley (probate registrar) said:

> I assume that co-habs would become one of the classes of person entitled to take a grant. Their title could not, however, be evidenced easily. Unlike a spouse or child of the deceased, they have no marriage certificate or birth certificate to prove their relationship with the deceased. How would such persons establish their entitlement? Even if the co-hab does not take the grant, whoever administers the estate will be faced with the same question – how to satisfy themselves that such a relationship existed or qualifies.

The Yorkshire Law Society commented:

> There is a risk that our work load and fees may reduce. There is also likely to be a confusion for a period of implementation. Clear training would be needed.

9.30 The Society of Trust and Estate Practitioners felt that "considerable expense" would be involved in (among other things): achieving an understanding of the new rules; updating the information prepared for clients on the intestacy rules and for claims under the 1975 Act; and purchasing books and amending precedents.

9.31 In relation to the potential impact on clients, the response of Convenient Wills (firm) stated:

> Rather than incentivising people to make a will, increasing numbers will assume the intestacy rules will meet their needs, and they may not bother to make a will.
>
> The intestacy rules should be regarded as a "backstop" will and not try to be a solution in all circumstances. The aim is to protect the immediate family, with certainty. Unlimited time frames, automatic inheritance rights after set periods of time, differing levels of inheritance depending upon cohabitation periods, make the explanation to potential clients even more confusing and will add to the costs of estate administration.

9.32 Five consultees felt that any costs faced by practitioners would be absorbed by normal training requirements or would not be particularly burdensome. Sheila Campbell (solicitor) said:

> The majority of costs will be part of the normal training and updating required to keep professional qualifications.
>
> The real cost will be informing the public if there are major changes and in particular letting the public know that children and other family members are going to lose out to cohabitants.

The Royal Bank of Scotland Trust & Estate Group said:

> This would be absorbed within budget as most corporate administrators act under a fixed estate value related tariff.

The Law Society commented:

> The Law Society does not believe that legislative amendments resulting from the proposed changes would place a significant burden on solicitors.

IMPACT ON COHABITANTS

9.33 **We would welcome information and comments from consultees on the impacts of intestacy on cohabitants and the potential impact of our provisional proposals on cohabitants and others.**

[Consultation Paper paragraphs A.58 and 8.50]

Introduction

9.34 Thirteen consultees responded to this request for information and comments on the impact of intestacy – and of our provisional proposals – on cohabitants. While many consultees focused upon the impact of our provisional proposals on cohabitants, some took the request for information as a further opportunity to comment on the substance of the policy.

The responses

9.35 The Royal Bank of Scotland Trust & Estate Group said:

> It is possible that this legislation may assist cohabitants. It is tempting to add that the cost of education around will making or, indeed, the fallacies around inheritance among the unmarried might be equally or more effective. The simple cost of a will seems a very easy answer.

9.36 Roland D'Costa (probate registrar) commented:

> The proposal at [Consultation Paper paragraph] 8.18 denies the cohabitant any entitlement where there is a surviving spouse. The effect of this may be that cohabitants in this situation may enter caveats against the grant of administration to establish a negotiating position. This may be a spurious act but it will result in delay and has potential for added costs.

9.37 Convenient Wills (firm) said:

> The proposals, in my opinion, do not solve the problem of intestate cohabitees. In my opinion they actually make the situation worse, for many will now need to rethink their present arrangements.
>
> I suspect a number of my clients will evict their cohabitee for fear they will inherit automatically a sizeable share of their estate. Is that the desired result?

9.38 The Society of Trust and Estate Practitioners thought that:

> By widening the entitlement under the intestacy rules to include cohabitants the proposals will undoubtedly make some people who dislike bureaucracy grateful as they will confirm there is no need to make a will and put your affairs in order yet achieve what you incorrectly thought might be the case with regard to the devolution of your estate on death. In such cases the cohabitant is saved the need to litigate.

9.39 Sidney Ross (barrister) said:

> I believe that the proposals [at paragraphs 4.95, 4.96 of the Consultation Paper] relating to the cohabitant's entitlement to personal chattels will involve litigation costs out of all proportion to the value of the chattels, and will also involve expense to the cohabitant in replacing chattels which do not pass or are not appropriated to him or her under the intestacy. That is why I have suggested that the eligible cohabitant should have the same rights to the personal chattels as the surviving spouse has at present.

9.40 The Yorkshire Law Society commented:

> At the moment cohabitees are adversely affected in intestacy situations but they do have protection via an Inheritance Act claim. Perhaps it would be inappropriate for them to have any automatic rights before five years of cohabitation and in any event those rights should not equal those of a spouse.

9.41 Andrew East (legal executive) said:

> I think at the present time most co-habitants are unaware of their lack of rights under the intestacy provisions but I am sure that if there was more awareness of this then more wills would be written. This may have an effect of increasing the number of people who don't feel that they need to make wills, but hopefully for the reasons outlined above people can be persuaded that this is not the case. Generally speaking co-habitants would be better protected and that cannot be a bad thing.

9.42 Donald Jolly (retired solicitor) said:

> I feel that there will be many more "hard cases" than currently. These will arise in correctly identifying those claiming entitlement where, it seems, in many cases of conflicting claims, unassailable proof may not be easily, if at all, available. The best interests of cohabitants are, in my opinion, best served by reliance on the provisions of the 1975 Act as at present obtains.

9.43 The Jubilee Centre (organisation) undertook an analysis of data available from the British Household Panel Survey with regards to cohabitation. In their detailed response, they concluded:

> The purpose of the proposed legislation is to "Provide certain protections [in the event of death or separation] for persons who live together as a couple or have lived together as a couple; and for connected purposes." As it currently stands, comparatively few cohabiting couples will be helped, since the minimum period of cohabitation is set in the range of two to five years; almost half of all cohabitations end before two years, and more than three-quarters before five years. A large proportion of these end in marriage, which already has its own legal protections.

> Perhaps of more concern is the strong possibility that by providing such protections for a minority – and therefore incentivising cohabitation for many who would either have married or not lived together – the Law Commission will disadvantage a much larger number of people, resulting in increased cost to the taxpayer.

IMPACT ON PARTICULAR GROUPS

9.44 **We would welcome information and comments from consultees on the impacts of the current law and of our provisional proposals on particular groups. In particular, we are interested in comments on whether our provisional proposals will have any adverse or positive impact on the pursuit of equality in the areas of: age, gender, disability, race, religion or belief, sexual orientation or caring responsibilities.**

[Consultation Paper paragraphs A.62 and 8.51]

Introduction

9.45 Ten consultees provided information and comments relating to the impact of the current law and of our provisional proposals on particular groups.

The responses

9.46 Three consultees stated that there would be no impact on particular groups. Andrew East (legal executive) said:

> Other than co-habitants … I cannot see any adverse or positive impact on the pursuit of equality in these proposals.

9.47 Donald Jolly (retired solicitor) argued that the provisional proposals made in relation to cohabitants would discourage marriage:

> I believe, without any doubt, that abandonment of the requirement for marriage (or civil partnership) in cases of intestacy would, in the event of the provisional proposal being adopted, send out the wrong signal. It will discourage marriage which, in the main, has a sound family cohesive over the last two hundred years or so and is still the bedrock of our society.

9.48 The Yorkshire Law Society felt that any reform in this area should prioritise the interests of children from previous relationships:

> Any change in the law should seek to protect the interests of children to previous relationships, perhaps it is they who need the easiest rights to bring an action as a non-dependent child. Currently it is all too easy for a person in a second marriage to die intestate and accidentally leave everything to the new spouse thus excluding earlier children.

9.49 Sheila Campbell (solicitor) argued that:

> The narrowing of responsibility by excluding many children (including adult children) siblings and parents (including vulnerable elderly people or handicapped siblings) could put an additional burden on the state. The law should not be pushing people to take less responsibility for their wider family.

9.50 In their responses two consultees focused on age. The Law Society said:

> The Law Society is not aware of any groups that would be unfairly impacted by changes to the current law. However … consideration needs to be given to older people who are in a cohabiting relationship.

Convenient Wills (firm) commented:

> Many cohabitees are elderly. They cohabit for love, security and friendship. They do not intend that their cohabitee should benefit from their estate in the event of their death. Your proposals will stop many widowers and widows cohabiting, for fear their estate will go to the cohabitee's.

However, Dr Mary Welstead (academic) took a different view (although her response did not relate specifically to age), arguing that such cohabitants may well intend the other party to benefit from their estate on death:

> I return to my concern about consanguineal couples who are not being included in the Law Commission's work on intestacy. I believe that might eventually be in breach of human rights legislation if the dissenting judgments in *Burden v UK* (App no 13378/05), (2008) 47 EHRR 38 are ultimately accepted in any future application to the ECHR.

9.51 Ahmad Thomson (barrister) provided a detailed response in relation to the impact of the provisional proposals on minority faith communities. In his response he said:

> As regards Muslim couples who have only been married in accordance with the Shari'a in England and Wales (and where the nikah has not been registered) English law regards them as cohabitants.
>
> … The proposed changes as regards cohabitants will therefore provide some recourse to such couples … .

> … A potential area of difficulty is where a Muslim man has more than one wife (and children) whom he has married in accordance with the Shari'a. If the Shari'a is applied, when he dies, all his wives and respective children will receive the shares to which they are entitled. Even with the proposed changes, the Intestacy Rules may only recognise one wife and her children – even where all the marriages have subsisted for between two and five years, and even where everyone shares one matrimonial home – or where each wife has her own residence, with the husband spending time with each family as equally as possible.

Similarly, His Honour Judge Mithani QC and Taha Dharsi suggested the possibility of a statutory will form enabling Muslims very simply to dispose of their property according to Islamic law.

OTHER POTENTIAL IMPACTS

9.52 **We would welcome information and comments from consultees on any other potential impacts of reform of (or failure to reform) the law of intestacy and family provision that we have not discussed.**

[Consultation Paper paragraphs A.64 and 8.52]

Introduction

9.53 In response to our invitation, 10 consultees offered comments on potential impact of reform or failure to reform the law of intestacy and family provision that had not been discussed in the Consultation Paper.

The responses

9.54 The Battersea Dogs and Cats Home (charity) said:

> We believe the proposals … , if enacted, would create a far more hostile environment in respect of charitable giving through legacies. We believe far more claims under the 1975 Act would be made and that far more charitable legacies would be successfully contested. Given the importance of the UK charity legacy sector to the health of the third sector as a whole, we believe the proposals would have an adverse effect on the contribution the third sector can make to this country in the future.

9.55 The Institute of Fundraising (charity) were also concerned about the impact of the provisional proposals on the charity sector:

> It is clearly intended that once revised, the intestacy rules will more closely match the wishes of the deceased (particularly those of co-habiting couples). This could lead to a more widely prevailing view that it is not necessary to make a will, again resulting in a reduction in the number of individuals who leave a legacy to charity.

9.56 Sidney Ross (barrister) provided a list of matters not discussed in the Consultation Paper, including: a preferred option for sharing between spouse and children based on the statutory legacy with interest plus the capitalised value of a life interest in the half the residue; an amendment to the Non-Contentious Probate Rules 1987, rule 22 to give priority to eligible cohabitants over other classes of beneficiary; an amendment to the 1975 Act to give the court a discretion to dispense with the two-year minimum cohabitation requirement; an amendment to section 47(1)(ii) of the Administration of Estates Act 1925; an amendment to the Intestates' Estates Act 1952 to give surviving eligible cohabitants the right to require appropriation of the family home; and whether section 8 of the 1975 Act serves any useful purpose in its present form.

9.57 Convenient Wills (firm) said:

> Education of the public is the priority. People should be made aware of the need to make a will: Probate offices, Doctors, Divorce Solicitors, even Midwives can promote wills.

Similarly, the Royal Bank of Scotland Trust & Estate Group commented:

> The making of a will or opting into a legalised relationship would largely solve the problems these proposals seek to address. Creating legislation for those unwilling to opt into any earlier, formal means of rectifying the position (ie by making a will or creating a legalised relationship) seems novel.

9.58 Richard Frimston (solicitor) made reference to the proposed Brussels IV Regulation on succession and stated:

> … there does not appear to be any reason why the testator and his family should not be able to conclude a succession agreement during the lifetime of the testator, which should have similar force to that of a prenuptial agreement. With safeguards, it could be presumed to be binding on the parties and might go some way to reduce litigation and attendant legal costs.

9.59 Christine Riley (probate registrar) requested that the Law Commission consider the position of second cousins in terms of whether such persons should receive an entitlement on intestacy.

9.60 Dr Mary Welstead (academic) said:

> The Inheritance Act requires a major overhaul. In its present form it is convoluted and repetitive. In particular, ss 1, 3 could be considerably simplified. More specific ways of simplifying it must be considered if and when the Law Commission's proposals are accepted.
>
> … Very few people have any understanding of Bona Vacantia. It is important that information is more broadly available.

Similarly, in relation to *bona vacantia*, Donald Jolly (retired solicitor) said:

> In conclusion I have to say that the widely held misconceptions concerning *bona vacantia* (6.78) has been the moving factor which has lead, in innumerable cases, to my having been instructed to draw up a Will. I am pleased to note your decision not to make any provisional proposal to change the rules in this area.

The Institute of Fundraising (charity) also made reference to *bona vacantia*:

> It has been suggested that where no relatives are entitled, the money should go to charity. The consultation states that there are difficulties with this, since there are many charities and it would not be possible to determine the appropriate charity. The Institute believes that the difficulties referred to are not insurmountable and that serious consideration should be given to making an amendment which would include this as a possibility.

9.61 Withy King LLP (solicitors) suggested:

> 1. Make it mandatory that people who buy a house have to make a will.
>
> 2. Make it mandatory that people who marry have to have a will.

9.62 Roland D'Costa (probate registrar) said:

> If the habitual residence basis is adopted as a qualification for an application under the Inheritance (Provision for Family and Dependants) Act 1975 [as discussed at paragraphs 7.44 to 7.47 of the Consultation Paper] this will impact on the entitlement to representation of a person who died domiciled outside England and Wales. Non-Contentious Probate Rule 30 which deals exclusively with entitlement to a grant of a person who dies domiciled outside England and Wales would also have to take into account habitual residence as a factor to constitute a personal representative of the deceased.