

Title: Intestacy and Family Provision Claims on Death (cohabitants) Lead department or agency: Law Commission Other departments or agencies: Ministry of Justice	Impact Assessment (IA)
	IA No: LAWCOM0013
	Date: 14.12.2011
	Stage: Final
	Source of intervention: Domestic
	Type of measure: Primary legislation
	Contact for enquiries: Joel Wolchover 020 3334 0246

Summary: Intervention and Options

What is the problem under consideration? Why is government intervention necessary?

Those who cohabit do not receive an entitlement if their partner dies intestate (without leaving a valid will), regardless of how long they have cohabited for or whether or not they have children. The current law leaves those in committed relationships which have come to an end due to death in a difficult position, particularly if there are minor children left behind. Research has suggested that around 5,000 people per year are not married to their partner who has died. Changes in public opinion and in household structures require this problem to be considered. Government must intervene because primary legislation is required.

What are the policy objectives and the intended effects?

The policy objectives are:

1. To ensure that the transfer of wealth on death better matches current family structures.
2. To ensure the transfer of wealth is in line with public expectations.
3. To better meet the needs of surviving cohabitants with caring responsibility for the deceased's children.
4. To ensure that the law remains relatively simple to understand and apply by largely lay administrators.

The intended effect is that those cohabitants whose relationships are functionally similar to a marriage or civil partnership enjoy similar legal rights to inherit on the death of a partner as spouse or civil partner.

What policy options have been considered? Please justify preferred option (further details in Evidence Base)

At consultation stage, a wide range of options were considered.

Option 0: Do Nothing.

Option 1: This option would reform the law to give those who meet the definition of cohabitant an entitlement on the intestate death of their partner if they had lived together for at least five years or for two years and had children together (who were living in their household at the date of death). Consequential reform to the legislation for family provision is also contained within this option. This is the preferred option as it meets the policy objectives outlined above without adding great complexity to the law.

Option 2: Reform as for option 1 above – with reduced rights for cohabitants of shorter relationships (two to five years) who did not have children together. This option was not viable as the law would be overly complex.

Will the policy be reviewed? It will not be reviewed. **If applicable, set review date:** N/A

What is the basis for this review? N/A. **If applicable, set sunset clause date:** N/A

Are there arrangements in place that will allow a systematic collection of monitoring information for future policy review?

No

Chair's Sign-off For final proposal stage Impact Assessments:

I have read the Impact Assessment and I am satisfied that (a) it represents a fair and reasonable view of the expected costs, benefits and impact of the policy, and (b) the benefits justify the costs.

Signed by the responsible Chair:

Date:

Summary: Analysis and Evidence

Policy Option 1

Description: This option would reform the law to give those who meet the definition of cohabitant an entitlement on the intestate death of their partner if they had lived together for at least five years or for one year and had children together (who were living in their household at the date of death). Consequential reform to the legislation for family provision is also contained within this option

Price Base Year	PV Base Year	Time Period Years	Net Benefit (Present Value (PV)) (£m)		
			Low:	High:	Best Estimate:

COSTS (£m)	Total Transition (Constant Price) Years		Average Annual (excl. Transition) (Constant Price)	Total Cost (Present Value)
Low				
High				
Best Estimate	n/a		n/a	n/a

Description and scale of key monetised costs by 'main affected groups'

Other key non-monetised costs by 'main affected groups'

Legal practitioners and court system: minor one-off familiarisation costs.

Court system: small increase in family provision claims under the 1975 Act.

BENEFITS (£m)	Total Transition (Constant Price) Years		Average Annual (excl. Transition) (Constant Price)	Total Benefit (Present Value)
Low				
High				
Best Estimate	£0		n/a	n/a

Description and scale of key monetised benefits by 'main affected groups'

Other key non-monetised benefits by 'main affected groups'

Court system: a decrease in 1975 Act claims by cohabitants, leading to a net reduction in claims, which will reduce the pressure on the court system both in terms of court time and resources.

General public: this reform will bring the law closer to current expectations and public opinion. Modernising the law so that it can accommodate modern family structures will increase fairness and faith in the law.

Key assumptions/sensitivities/risks Discount rate (%) 3.5

Assumptions: we assume, in the absence of the relevant data, that the number of claims in the Family Division is the same as the number in the Chancery Division and the number in the county courts is the same as in both Divisions of the High Court combined.

Risks: we may have underestimated the number of 1975 Act claims and the number of people affected by them as we do not have accurate data for all the courts involved or for the number of cases which settle before reaching court.

Direct impact on business (Equivalent Annual) (£m):			In scope of OIOO?	Measure qualifies as
Costs:	Benefits:	Net:	No	N/A

Enforcement, Implementation and Wider Impacts

What is the geographic coverage of the policy/option?			England & Wales		
From what date will the policy be implemented?					
Which organisation(s) will enforce the policy?			Court system		
What is the annual change in enforcement cost (£m)?					
Does enforcement comply with Hampton principles?			Yes		
Does implementation go beyond minimum EU requirements?					
What is the CO ₂ equivalent change in greenhouse gas emissions? (Million tonnes CO ₂ equivalent)			Traded:		Non-traded:
Does the proposal have an impact on competition?			No		
What proportion (%) of Total PV costs/benefits is directly attributable to primary legislation, if applicable?			Costs:		Benefits:
Annual cost (£m) per organisation (excl. Transition) (Constant Price)	Micro	< 20	Small	Medium	Large
Are any of these organisations exempt?					

Specific Impact Tests: Checklist

Set out in the table below where information on any SITs undertaken as part of the analysis of the policy options can be found in the evidence base. For guidance on how to complete each test, double-click on the link for the guidance provided by the relevant department.

Please note this checklist is not intended to list each and every statutory consideration that departments should take into account when deciding which policy option to follow. It is the responsibility of departments to make sure that their duties are complied with.

Does your policy option/proposal have an impact on...?	Impact	Page ref within IA
Statutory equality duties¹	No	16
Economic impacts		
Competition	No	16
Small firms	No	16
Environmental impacts		
Greenhouse gas assessment	No	16
Wider environmental issues	No	16
Social impacts		
Health and well-being	Yes	16
Human rights	No	16
Justice system	Yes	16
Rural proofing	No	16
Sustainable development	No	16

¹ Race, disability and gender impact assessments are statutory requirements for relevant policies. Equality statutory requirements will be expanded 2011, once the Equality Bill comes into force. Statutory equality duties part of the Equality Bill apply to GB only. The Toolkit provides advice on statutory equality duties for public authorities with a remit in Northern Ireland.

Evidence Base (for summary sheets) – Notes

Use this space to set out the relevant references, evidence, analysis and detailed narrative from which you have generated your policy options or proposal. Please fill in **References** section.

References

Include the links to relevant legislation and publications, such as public impact assessment of earlier stages (e.g. Consultation, Final, Enactment) and those of the matching IN or OUTs measures.

No.	Legislation or publication
	Intestacy and Family Provision Claims on Death (2009) Law Commission Consultation Paper No 191
	Intestacy and Family Provision Claims on Death (2011) Law Com No 331 (Analysis of Responses)
	Intestacy and Family Provision Claims on Death (2011) Law Com No 331
	Draft Inheritance (Cohabitants) Bill

+ Add another row

Evidence Base

Ensure that the information in this section provides clear evidence of the information provided in the summary pages of this form (recommended maximum of 30 pages). Complete the **Annual profile of monetised costs and benefits** (transition and recurring) below over the life of the preferred policy (use the spreadsheet attached if the period is longer than 10 years).

The spreadsheet also contains an emission changes table that you will need to fill in if your measure has an impact on greenhouse gas emissions.

Annual profile of monetised costs and benefits* - (£m) constant prices

	Y ₀	Y ₁	Y ₂	Y ₃	Y ₄	Y ₅	Y ₆	Y ₇	Y ₈	Y ₉
Transition costs										
Annual recurring cost										
Total annual costs										
Transition benefits										
Annual recurring benefits										
Total annual benefits										

* For non-monetised benefits please see summary pages and main evidence base section



Microsoft Office
Excel Worksheet

EVIDENCE BASE

1. INTRODUCTION

Background

1. This impact assessment accompanies the Inheritance (Cohabitants) Bill and Intestacy and Family Provision Claims on Death (2011) Law Com No 331.
2. Increasing numbers of people are choosing to live together in intimate and financially interdependent relationships but not to marry or to marry later in life after having started a family. The current law has failed to keep pace with this trend. Recent population figures for England and Wales gave the number of cohabiting couples in 2008 as 2.3 million and projected that it would rise to 3.8 million by 2033.² Research has indicated that by 2010, 7.5 million people were living in cohabiting families, representing around 15% of all those who lived in families.³
3. Where one party to a cohabiting relationship dies, the survivor will be entitled to bring a claim under the Inheritance (Provision for Family and Dependants) Act 1975 (“the 1975 Act”) as a cohabitant of the deceased if during the whole of the period of two years ending immediately before the date when the deceased died he or she was living in the same household as the deceased and as the spouse or civil partner of the deceased.⁴ Such a claim will be for reasonable financial provision but this is intended to reflect the lifestyle enjoyed by the couple and the award will often represent a significant proportion of the total estate and may be similar to the size of an award that a spouse might receive.
4. There is however no automatic entitlement. Under the current law, no matter how long two people have cohabited as if they were husband and wife or civil partners and regardless of whether they have children together, they are not automatically entitled to any of each other’s estate should one of them die intestate (without a valid will).
5. The “intestacy rules” are engaged when a person dies in England and Wales leaving property that is not disposed of by a valid will. The rules determine how such property should be distributed. The rules are largely contained in the Administration of Estates Act 1925 (“AEA 1925”). If a person dies without a will and with no living relatives within prescribed classes, their estate will pass to the Crown as what is called *bona vacantia* (“ownerless goods”). If, as is more often the case, the deceased had living relatives specified in the intestacy rules, the estate will be divided among them according to rules of priority. If the deceased had a spouse (“spouse” is used here to refer to a husband, wife or civil partner) and children or other descendants then the spouse will receive a set amount of the estate, also known as the fixed net sum (currently £250,000). Anything above that sum will be divided between the spouse and children or other descendants. If the deceased left a spouse but no children or other descendants, the spouse will receive a higher fixed net sum (currently £450,000) and anything above that will be shared with the deceased’s parents, if they are alive, or full siblings (or their descendants). If the deceased did not leave a spouse, the estate is distributed amongst other relatives according to a list of priority.
6. The Ministry of Justice, supported by the Better Regulation Executive of the Cabinet Office, asked the Law Commission to look at this area of law as part of its 10th Programme of law reform, where we said that the project would involve a general review of the law of intestacy (the rules governing the inheritance of assets where a person dies without leaving a will which disposes of the entirety of his or her estate). It would also consider the legislation under which family members and dependants may apply to court for reasonable financial provision from the estate of a person who has died. The project began in October 2008. In October 2009, Intestacy and Family Provision Claims on Death (2009) Law Commission Consultation Paper No 191 was published. This outlined the current law and put forward a number of options for reform.
7. More than 120 responses were received during the four month consultation period. An analysis of those responses is available on the Law Commission website (<http://www.lawcom.gov.uk>). In

² Office for National Statistics, *Marital Status population projections, 2008-based*, Statistical Bulletin (24 June 2010) p 4. The figures for cohabitation cover only opposite-sex cohabitation, stated to be due to the difficulties in estimating same-sex cohabitation for reliable results on the current methodology (see Background Note 6 to the Statistical Bulletin). See also B Wilson, “Estimating the cohabiting population” (2009) 136 *Population Trends* 21, 26.

³ Office for National Statistics (2011) 41 *Social Trends (Households and families)* pp 7 to 8.

⁴ Inheritance (Provision for Family and Dependants) Act 1975, ss 1(1A) and (1B).

addition, meetings have been held with key stakeholders throughout the project and Law Commission staff gave presentations about the project to members of the public and legal practitioners.

8. Our recommendations are set out in our final report, *Intestacy and Family Provision Claims on Death* (2011) Law Com No 331. A copy of the draft Inheritance (Cohabitants) Bill is at Appendix B of the report. In the report we explain the basis of those recommendations. This impact assessment measures the impact of the final recommendations.

Problem under consideration

9. Under the current law, someone whose partner dies without a will has no automatic entitlement to any part of that person's property, regardless of how long the two have cohabited or whether they have children together. The surviving partner may be able to go to court to claim reasonable financial provision from under the 1975 Act.⁵ The award may be significant and similar to the entitlement of a surviving spouse but it may require expensive and emotionally draining litigation. Our recommendations seek to address the problems caused by the current law by amending the intestacy rules and family provision legislation.

The law causes financial difficulties for cohabitants

10. The lack of provision for cohabitants leaves the surviving partner in a very uncertain position at a vulnerable time. A practical problem is that those who cohabit may be as financially interdependent as parties to a marriage. If one cohabitant dies, the other may be left in a difficult position financially. Parties to a marriage inherit from their spouse automatically if they die without a will, in recognition of the interdependency which exists between parties to a marriage. In the analogous situation which exists when two people are cohabiting as if husband and wife but are not married, neither will inherit anything if the other dies without a will.
11. A cohabitant may be left, after the death of his or her partner, to raise the children of the family. Under the current law, even a cohabitant with children will have no entitlement. The children of the deceased – who may also be the children of the surviving cohabitant – will inherit everything. The surviving cohabitant will have to apply through the courts for reasonable financial provision. Such provision will often be necessary to enable the surviving cohabitant to continue caring for the children of the relationship. Provision may need to be taken from the children and given to the cohabitant. The situation is unfair and contrasts starkly with the position of a party to a marriage when one dies and children are left behind.

There is a negative economic effect on those who cohabit

12. The Social Policy Research Unit of the University of York has carried out extensive research into the financial implications of the death of a partner. The research they carried out focused mainly on the implications of bereavement for married couples. The financial arrangement of those in a cohabiting relationship will often mirror the financial arrangements of married couples. The difficulties identified which are faced by spouses will therefore be exacerbated by the fact that cohabitants in a similar position will have no automatic entitlement to any of the deceased's estate but will have similar outgoings and anxieties. The research described cohabitants who did not realise they had no economic rights as facing "particular economic shocks, and immediate negative financial outcomes".⁶

The law does not reflect public opinion or peoples' expectations

13. The current law fails to meet people's expectations. If a cohabitant dies in old age, having cohabited for a significant period of time or had children with his or her partner, the surviving partner is likely to have an expectation that they will inherit. Research into attitudes about cohabitants has shown that the public supports an entitlement on intestacy. Recent research conducted for the purposes of this project found that between 62% and 93% of respondents supported cohabitants having an entitlement on intestacy; the support varied according to the scenarios put forward.⁷ Other research has shown similar support for cohabitants receiving an entitlement.⁸ The current law does not reflect

⁵ Inheritance (Provision for Family and Dependents) Act 1975, ss 1(1A) and (1B).

⁶ A Corden, M Hirst and K Nice, *Financial Implications of Death of a Partner* (2008) p 85.

⁷ National Centre for Social Research, *Inheritance and the family: attitudes to will-making and intestacy* (2010).

⁸ National Centre for Social Research, *The Law of Intestate Succession: Exploring Attitudes Among Non-Traditional Families – Final Report* (2009)

that public support or address the expectations of those who are cohabiting.

The problem is set to increase

14. The number of people cohabiting is projected to increase. A full description of the scale can be found in the “scale and context” section below. If current trends continue, the problems outlined above will be exacerbated.
15. This problem will be exacerbated if, as indicated by the Government, future 1975 Act applicants will generally no longer be eligible for legal aid.⁹ This will risk depriving some potential applicants of a means to challenge the current intestacy rules. It will therefore be even more important that the intestacy rules operate fairly and in accordance with people’s expectations, as the ability to challenge the provision made by them may be reduced.

Rationale for intervention

16. The Law Commission was asked to review the intestacy rules and the law of family provision by the Ministry of Justice, supported by the Better Regulation Executive of the Cabinet Office.
17. The conventional economic approach to government intervention to resolve a problem is based on efficiency or equity arguments. Government may consider intervening if there are strong enough failures in the way markets operate (for example, monopolies overcharging consumers) or if there are strong enough failures in existing government interventions (for example, waste generated by misdirected rules). In both cases the proposed new intervention itself should avoid creating a further set of disproportionate costs and distortions. The Government may also intervene for reasons of equity (fairness) and redistribution (for example, to reallocate goods and services to the more needy groups in society).
18. Intervention is justified on the grounds of equity and efficiency. Reform of the intestacy and family provision rules concerns transfers between individuals. Those transfers do not match modern family structures or support those closest to the deceased. The current law also makes the transfers of wealth on death inefficient; intervention is needed to ensure that on intestacy, the deceased’s estate is fairly and efficiently distributed and where possible that the estate is kept within the existing family structure.
19. Intervention is necessary sooner rather than later. Recent population figures for England and Wales gave the number of cohabiting couples in 2008 as 2.3 million and projected that it would rise to 3.8 million by 2033.¹⁰ By 2010, 7.5 million people were living in cohabiting families, representing around 15% of all families.¹¹ Not all cohabiting couples are young: in 2008 it was estimated that there were 900,000 cohabitants between the ages of 45 and 65 and that figure is likely to increase.¹² Intervention now to resolve the problems in the current law will ensure that a stable, workable system is in place both to resolve current difficulties and in anticipation of increased cohabitation.
20. Primary legislation is the principal policy lever in this area. The existing primary legislation will need to be amended by Parliament.

Policy objectives

21. The policy objectives are as follows.
 - To ensure that the transfer of wealth on death better matches public expectations and current family structures. Family structures have evolved and the law needs to keep pace with such changes in society. The transfer of wealth on death when the deceased has not made a will should reflect the family structures during life.
 - To ensure transfers on death are efficient. At the moment it is possible for cohabitants to

⁹ Ministry of Justice, *Reform of Legal Aid in England and Wales: the Government Response* (June 2011) para 105(ii), and Annex B para 7 and following. This is subject to the proposed “exception funding scheme”: see further para 128 and following.

¹⁰ Office for National Statistics, *Marital Status population projections, 2008-based*, Statistical Bulletin (24 June 2010) p 4. The figures for cohabitation cover only opposite-sex cohabitation, stated to be due to the difficulties in estimating same-sex cohabitation for reliable results on the current methodology (see Background Note 6 to the Statistical Bulletin). See also B Wilson, “Estimating the cohabiting population” (2009) 136 *Population Trends* 21, 23.

¹¹ Office for National Statistics (2011) 41 *Social Trends (Households and Families)* pp 7 to 8

¹² Office for National Statistics, *Marital status population projections, 2008 based*, Statistical Bulletin (2010) p 4.

receive an entitlement on intestacy but recourse to litigation is required with the costs and time which such a route entails. Streamlining this process is an objective.

- To update the intestacy rules so that recourse to litigation is minimised. The intestacy rules set the automatic entitlement when someone has died without a will. A cohabitant may need to have recourse to the family provision legislation. If the entitlement on intestacy better accorded with their expectations, there would be less need for recourse to the courts.
- To ensure that any reform is practical and capable of dealing with the predicted increase in cohabitation.

Scale and context

22. The problems faced by cohabitants when one partner dies have been outlined above. If current trends continue and projections are correct, these problems will affect hundreds of thousands of people and within 20 years could potentially affect millions. It is projected that by 2033 the number of cohabiting couples will reach 3.8 million.¹³ Those between the age of 45 and 65 who are cohabiting are projected to more than double between 2008 and 2033, rising from 900,000 to 2.2 million.¹⁴
23. It is possible to estimate how many cohabitants die intestate each year using statistics for the number of intestate deaths each year by different age groups,¹⁵ and multiplying each of these by the proportion of those in each age group who cohabit.¹⁶ This suggests a figure of around 4,000 intestate cohabitant deaths per year. This analysis is limited by the fact that we do not have figures for deaths where no grant of representation is obtained. This method also fails to take account of projected increases in levels of cohabitation. In addition, one survey found that cohabitants are more likely to die intestate,¹⁷ and this approach is therefore likely to underestimate the number actually dying intestate. Other research has suggested that around 5,000 people per year are not married to their partner who has died.¹⁸
24. It has been pointed out that “cohabitation is more prevalent among the young”, and that given the low rate of death in the peak age for cohabitation, “how often a cohabitant is affected by the intestacy rules may not be as high as might first appear”.¹⁹ Nevertheless, the potential impact of the current law is already significant and is set to increase. The number of older cohabitants is projected to quadruple in the next two decades with those aged over 65 rising from 130,000 in 2008 to nearly 600,000 in 2033.²⁰
25. The intestacy and family provision rules impact not only on the surviving cohabitant, but also on other family members. When a cohabitant dies young, leaving a surviving cohabitant and minor children, those children will be directly affected by the problems which their parent faces on the death of their other parent.
26. Claims under the 1975 Act have been increasing in recent years. The family provision legislation is estimated to have given rise to between 1,250 and 1,460 cases in the last four years. There is data for the number of 1975 Act claims issued in the Chancery Division of the High Court in London from 2007 to 2010.²¹ We do not have details of the application numbers in either the Family Division of the High Court or the many county courts across the country. We assume, in the absence of the relevant data, that the number of claims in the Family Division is the same as the number in the Chancery Division and the number in the county courts is the same as in both Divisions of the High Court combined.

¹³ Office for National Statistics, *Marital Status population projections 2008-based, England and Wales*, Statistical Bulletin (2010) p 4. These projections are based on estimated population by legal marital status in the middle of 2008. The figures for cohabitation cover only opposite-sex cohabitation, stated to be due to the difficulties in estimating same-sex cohabitation for reliable results on the current methodology (see Background Note 6 to the Statistical Bulletin). See also B Wilson, “Estimating the cohabiting population” (2009) 136 *Population Trends* 21, 23.

¹⁴ Office for National Statistics, *Statistical bulletin: Marital status population projections, 2008 based* (2010) p 4.

¹⁵ See Intestacy and Family Provision Claims on Death (2011) Law Com No 331, Appendix D table 4.

¹⁶ Office for National Statistics (2003) 33 *Social Trends* p 46 figure 2.9.

¹⁷ National Consumer Council, *Finding the will: a report on will writing behaviour in England and Wales* (2007) p 4.

¹⁸ A Corden, M Hirst and K Nice, *Financial Implications of Death of a Partner* (2008) p 3.

¹⁹ C Williams, G Potter and G Douglas, “Cohabitation and intestacy: public opinion and law reform” [2008] *Child and Family Law Quarterly* 499, 501.

²⁰ Office for National Statistics, *Marital status population projections, 2008 based*, Statistical Bulletin (2010) p 4.

²¹ Ministry of Justice, *Judicial and court statistics 2010 – full report* (2011) p 131 table 5.3.

Table 1: Number of 1975 Act claims issued in the Chancery Division, Family Division and county courts, 2007 to 2010.

Year	Chancery Division	Family Division	County Courts	Total
2010	81	81	162	324
2009	110	110	220	440
2008	80	80	160	320
2007	43	43	86	172
Total	314	314	628	1256

Source: Ministry of Justice, *Judicial and court statistics 2010 – full report* (2011) p 131 table 5.3.

27. Using data provided by the Legal Services Commission, we found that for claims that received legal aid, around 59% settled before a hearing and 14% settled before proceedings were issued.²² If we assume that the same percentage of cases settle before proceedings are issued whether or not legal aid is involved, the total number of disputes from 2007 to 2010 would be closer to 1,460. This is likely to be an underestimate as there will also be claims which have settled before an application has even been made for legal aid which would not be included in this data. The terms of the settlement are likely to be heavily influenced by the parties' perceptions of the likely outcome had the case proceeded to trial.
28. Public opinion regarding cohabitation has evolved over the past few decades. Research into public attitudes to inheritance and cohabitation has found support for cohabitants receiving an entitlement on intestacy.
29. In 2000 the British Social Attitudes Survey found that 93% of respondents supported the proposition that, where a cohabiting relationship (without children) had continued for 10 years and the family home was in the name of the deceased, the surviving cohabitant should have the same rights to remain in the family home as a surviving spouse would have had.²³ In 2006 the British Social Attitudes Survey contained a similar question, save that the period of cohabitation was reduced to two years and the house was said to have been bought in the deceased's name before the relationship began. Despite those differences, 66% of respondents still agreed that the surviving cohabitant "should have the same financial rights regarding his property as she would if she had been married to the man".²⁴
30. A survey carried out at the Universities of Sheffield and Cardiff in 2007 found significant support for the view that a surviving cohabitant should automatically take a share of his or her partner's estate.²⁵ Even where the cohabitation was childless and of only two years' duration, 65% of respondents considered that the survivor should inherit something from the estate, and of those 70% felt that the

²² Based on data for the financial year 2010/2011.

²³ A Barlow, S Duncan, G James and A Park, "Just a piece of paper? Marriage and cohabitation" in A Park, J Curtice, K Thomson, L Jarvis and C Bromley (eds), *British Social Attitudes: Public policy, social ties: The 18th Report* (2001) pp 48 to 50.

²⁴ A Barlow, C Burgoyne, E Clery and J Smithson, "Cohabitation and the law: myths, money and the media" in A Park, J Curtice, K Thomson, M Phillips, M Johnson and E Clery (eds), *British Social Attitudes: The 24th Report* (2008) p 46.

²⁵ C Williams, G Potter and G Douglas, "Cohabitation and intestacy: public opinion and law reform" [2008] *Child and Family Law Quarterly* 499. The survey used a total sample of 3,123 respondents, obtained by requiring students to find a small number of respondents each. While not a randomly generated sample, this methodology is a good way of generating enough responses to give a reasonably representative view of public opinion.

share should be at least one half.²⁶

31. Research carried out by the National Centre for Social Research in 2010 showed support for cohabitants receiving an entitlement on intestacy.²⁷ The study had both quantitative and qualitative elements. In the quantitative survey, support for cohabitants receiving half or more of their partner's estate on intestacy was strong, ranging from 62% of respondents to 93%, depending on the factual situation presented. The qualitative element of the study highlighted that the duration of the relationship and the presence of children were both factors which influenced support for cohabitants receiving an entitlement on intestacy. The study concluded that "the overall result and one of the strongest messages emerging from the study, was that there is very considerable support for extending the intestacy laws to include cohabitants in some way".²⁸

Stakeholders

32. The following stakeholders will be affected by these reforms.
- Qualifying cohabitants.
 - Children of qualifying cohabitants.
 - Those who would inherit under the current law.
 - Personal representatives.
 - The court system, judiciary, Probate Service, the Treasury Solicitor and Legal Services Commission.
 - Legal advisors and representatives.

Options considered

33. At consultation stage, a number of options were considered to address this problem, including doing nothing.²⁹ In addition to the option that we are taking forward, we proposed a reduced entitlement on the intestate death of a partner for cohabitants who did not have children together and had lived together for more than two years (but less than the five years required for a full entitlement). In this impact assessment this provisional proposal is referred to as Option 2.
34. Key stakeholders responded to that consultation including bodies representing the judiciary and the legal profession, individual members of the Probate Service and legal profession, members of the public and academics. It is with the benefit of stakeholders' opinions that we put forward our preferred option, which is reform in favour of certain cohabitants. A full explanation of our decisions can be found in the final report³⁰ and consultees' opinions can be viewed in the analysis of responses.³¹ Option 2 was not widely supported on consultation as the benefits it would have brought were felt to be outweighed by the complexity that it would have introduced into the law in this area.
35. Although one solution would be to encourage people to make wills where the intestacy rules do not effect a distribution of their estate that is in line with their wishes, previous attempts to encourage will writing have proved unsuccessful. Research has shown that most cohabitants have failed to make or change wills in response to their cohabitation. The 2006 British Social Attitudes Survey found that only 12% of cohabitants had done so.³² Other research suggests that only around 17% of

²⁶ C Williams, G Potter and G Douglas, "Cohabitation and intestacy: public opinion and law reform" [2008] *Child and Family Law Quarterly* 499, 509 to 512. Note also the recent quantitative survey carried out in Scotland (though in the different context of Scottish law): Scottish Executive Social Research, *Attitudes Towards Succession Law: Findings of a Scottish Omnibus Survey* (2005). 81% of respondents agreed that a surviving cohabitant should be entitled to claim a share of an estate where the deceased had left a will leaving everything to charity or a spouse. Three-quarters of those agreeing felt in each case that the entitlement should be to a fixed share.

²⁷ National Centre for Social Research, *Inheritance and the family: attitudes to will-making and intestacy* (2010).

²⁸ National Centre for Social Research, *Inheritance and the family: attitudes to will-making and intestacy* (2010), p 84.

²⁹ Intestacy and Family Provision Claims on Death (2009) Law Commission Consultation Paper No 191.

³⁰ Intestacy and Family Provision Claims on Death (2011) Law Com No 331.

³¹ Analysis of responses available on the intestacy and family provision project page of the Law Commission's website: <http://www.lawcom.gov.uk>.

³² A Barlow, C Burgoyne, E Clery and J Smithson, "Cohabitation and the law: myths, money and the media" in *British Social Attitudes: The 24th Report* (2008) p 43. This is a very small increase from the 2000 survey which

cohabitants have made a will, in comparison with 45% of married people.³³ Encouraging will writing is beyond the scope of this project but would not, on present evidence, be sufficient to address the problem identified.

36. Another option would be to encourage cohabitants to marry. The current and projected statistics for the number of cohabitants shows that many people still choose to cohabit rather than marry. There are a range of reasons why this might be the case but the practical consequences are the same; people are choosing to cohabit rather than marry, and the law has not kept pace with that trend. In any event, policy options to encourage marriage fall outside the scope of the project, which was agreed with Government and limited to a review of the intestacy rules and the family provision legislation.

2. Costs and benefits

37. This impact assessment identifies impacts on individuals, groups and businesses in the UK, with the aim of understanding what the overall impact to society might be from implementing these options. The costs and benefits of each option are compared to the do nothing option. Impact assessments place a strong emphasis on valuing the costs and benefits in monetary terms (including estimating the value of goods and services that are not traded). However there are important aspects that cannot sensibly be monetised. These might include how the proposal impacts differently on particular groups of society or changes in equity and fairness, either positive or negative.

Description of option 0: Do nothing

38. This option would leave the intestacy and family provision rules for cohabitants in their current state. The problems we have identified would continue to exist. The current law is described below.

Entitlement on intestacy

39. The distribution of an intestate estate varies according to the relatives left behind and the size of the estate.
40. If someone dies while they are cohabiting with another person, the person with whom they are cohabiting will have no automatic entitlement to the deceased's estate. This is the case regardless of how long the couple have been cohabiting or whether or not they have children together.

If the deceased leaves a spouse and a surviving cohabitant

41. If the deceased is still married but is cohabiting with a new partner, the spouse will have an automatic entitlement on intestacy. The precise entitlement of a surviving spouse on intestacy is the subject of separate recommendations by the Law Commission.³⁴

If the deceased does not leave a spouse but leaves a surviving cohabitant and children

42. The deceased's estate will pass according to the order of priority in the intestacy rules.³⁵ The surviving cohabitant does not have any automatic entitlement under these rules. If the deceased has children or other descendants, they will take the whole estate, with the surviving cohabitant receiving no interest in it even if he or she is the other parent or the primary carer of those children.

If the deceased does not leave a spouse or children but leaves a surviving cohabitant

43. If the deceased leaves a surviving cohabitant but does not leave either a surviving spouse or any children or other descendants, the estate will pass to the next entitled relative according to the intestacy rules, starting with the deceased's parents. If the deceased has no relatives who are entitled, the estate will pass to the Crown as *bona vacantia* ("ownerless goods"), despite the deceased having left a surviving cohabitant.

found that only 10% had done so: A Barlow, S Duncan, G James and A Park, "Just a piece of paper? Marriage and cohabitation" in A Park, J Curtice, K Thomson, L Jarvis and C Bromley (eds), *British Social Attitudes: Public policy, social ties: The 18th Report* (2001) p 45.

³³ National Consumer Council, *Finding the will: a report on will writing behaviour in England and Wales* (2007) p 4.

³⁴ Intestacy and Family Provision Claims on Death (2011) Law Com No 331, Part 2.

³⁵ See above, paras 1.41 to 1.58, for a summary of these rules.

Family provision

44. Certain categories of people can make a legal claim on the deceased's estate if they have not been reasonably provided for either by the deceased's will or the intestacy rules, whichever applies.
45. One such category of people is cohabitants.³⁶ A cohabitant can make a claim if he or she satisfies the definition of a cohabitant in the 1975 Act and has met the conditions of the definition for the whole period of two years ending immediately before the deceased's death. If it is found that reasonable financial provision was not made for the surviving cohabitant, he or she will only be entitled to maintenance from the estate under the 1975 Act.³⁷ This differs from the level of provision which the court can award to a surviving spouse who applies. However, maintenance for cohabitants has been generously interpreted. This goes some way towards remedying the disparity between the provision which can be made for a spouse and that which can be made for a cohabitant.
46. When a family provision claim is made, the applicant claims against the deceased's estate. If the applicant's claim is successful, the provision made for him or her is taken from the estate, reducing the entitlement for other beneficiaries either under the will or under the intestacy rules. It can often seem inappropriate that a cohabitant must make a family provision claim against the estate, as they will be suing the family of the deceased or often their own children, in order to obtain provision which ought reasonably to have been made for them.
47. An example of the operation of the current law illustrates the problems and inefficiencies. If a person who has died intestate was not married but had been cohabiting with the applicant for more than two years before the death and had children with the applicant, the deceased's children will inherit. A cohabitant, particularly one who had children with the deceased, will have been financially interdependent or perhaps even wholly financially dependent on the deceased. The surviving cohabitant will have no automatic entitlement. If he or she applies to the court for financial provision – perhaps in order to assist with caring for any minor children – that provision will have to be taken from the entitlement of the children. The applicant effectively has to make a claim against his or her own children. In many cases, without such a claim, the cohabitant would face financial difficulties that could affect the level of care they are able to provide for the children. In comparison, a spouse in this situation will automatically have an entitlement and will not be required to bring a claim against the children.

Costs and benefits of option 0: Do nothing

Costs of option 0

48. Cohabitants will have no entitlement under the intestacy rules to the estate of their partner after a bereavement. Despite in many cases having a financial and emotional relationship equivalent to marriage, cohabitants will be left without an entitlement on intestacy. The law will fail to meet the expectations of those who are in a committed relationship and leave them in a difficult financial position at a time when they are dealing with bereavement.
49. Cohabitants will continue to be required to have recourse to the courts for a remedy, using the 1975 Act. This requires resort to lawyers and takes up court time and resources as well as carrying an emotional cost for all involved. This will continue so long as cohabitants are not properly provided for. This is a cost to the justice system. There is also a cost to individuals in bringing such claims and also to the estate (ultimately borne by other beneficiaries) in defending them.
50. Any costs associated with the current law are likely to increase in the future. The number of people cohabiting is projected to increase; in particular the number of older cohabitants is anticipated to increase. An increase in the number of people affected by the problems associated with the current law will increase the overall cost of doing nothing. This assumes that current will writing behaviour will remain unchanged.

Benefits of option 0

51. The costs of reform will not be incurred but the benefits will not be realised either.
52. Because the do-nothing option is compared against itself its costs and benefits are necessarily zero, as is its Net Present Value (NPV).

³⁶ Inheritance (Provision for Family and Dependents) Act 1975, ss 1(1A) and (1B).

³⁷ Inheritance (Provision for Family and Dependents) Act 1975, s 1(2)(b).

Description of option 1: Reform for cohabitants

Resolving the problems with the current law

An entitlement on intestacy

53. The proposed solution to the current problems identified above is to give certain cohabitants an automatic entitlement on intestacy. The proposed entitlement is analogous to that which a spouse receives but with certain conditions for entitlement and other safeguards in place.

Addressing potential difficulties with reform

Identifying a cohabitant

54. A problem in giving cohabitants an entitlement on intestacy is how a cohabitant is identified. An established body of case law has developed under the definition which is used in the 1975 Act: living together in the same household as spouses. This Act is applied by the courts when someone wishes to challenge the provision made for them either by a will or on intestacy. Outside of court, similar definitions are regularly applied with relative ease. For example, in determining whether an applicant is eligible for benefits, a decision on whether the applicant qualifies as a cohabitant may have to be made. These are longstanding procedures which do not seem to have caused problems in practice. To identify a cohabitant for the purpose of an entitlement on intestacy the established definition used in the 1975 Act will be used.

Conditions to qualify as a cohabitant

55. In addition to satisfying the definition of a cohabitant, other requirements are recommended before a cohabitant should have an entitlement on intestacy. The first requirement is of duration. The deceased and the surviving cohabitant must have been cohabiting (in accordance with the definition proposed) for at least five years before the death. This five-year cohabitation period must have been continuous and must have lasted until the death. The alternative to the five-year duration requirement is that the deceased and the surviving cohabitant are the parents of a child who was born alive and is living in the same household as the parents at the date of death, and that they have been cohabiting continuously for at least two years immediately before the death.
56. In addition to these requirements, if the deceased has left a surviving spouse, a cohabitant will not have an automatic entitlement on intestacy, regardless of how long the cohabitation has lasted or whether they have children together. The surviving spouse's automatic entitlement on intestacy will always take priority, but the surviving cohabitant may still have recourse to the courts to make a claim under the 1975 Act.

The level of entitlement for a qualifying cohabitant

57. A surviving cohabitant who has satisfied the applicable requirements outlined above will be entitled under the intestacy rules to the same entitlement that a spouse would receive. The entitlement of a surviving spouse is currently the subject of separate recommendations for reform.³⁸ The entitlement of a qualifying cohabitant under the intestacy rules should match that of a spouse. A person who falls short of the definition or of the requirements will not have an entitlement under the intestacy rules. They may still be eligible to make a claim under the 1975 Act but our reforms do not give them an entitlement on intestacy.

Consequential reform

58. If an applicant under the 1975 Act satisfies the definition of a cohabitant and the cohabitants had a child together, there would be no minimum duration for which they would need to have cohabited in order to be eligible to apply for family provision under the 1975 Act. This would remove the current duration requirement of two years in cases where the deceased and the surviving cohabitant had a child together and were cohabiting at the date of death.

Costs and benefits option 1: Reform for cohabitants

59. The main effect of these reforms cannot adequately be summed up as incurring either a cost or a benefit. In fact what is suggested is likely to result in a transfer within the system. The ancillary costs and benefits are described below but first consideration is given to the transfers.

³⁸ Intestacy and Family Provision Claims on Death (2011) Law Com No 331, Part 2.

Transfers

60. Option 1 primarily concerns reform within a system framed by the intestacy rules, which are long-established. The primary effect of reforming the intestacy rules and the consequential reform to the 1975 Act is a transfer of wealth within the system. While some who currently benefit will no longer do so, others who currently do not benefit will do so in future. The size of the overall estate which the deceased leaves will not be affected by these reforms. The transfer suggested would provide automatically for a category of people who currently must apply for provision through the courts. These transfers of wealth may be from those who are in a more stable financial position to those who are not. However, this will not necessarily be the case.
61. Reform of the intestacy rules will reverse the burden of challenging provision on death where there is a qualifying cohabitant. Under the current law, a cohabitant cannot inherit on the intestate death of their partner, so the onus is on him or her to challenge that using the 1975 Act. If cohabitants are given an automatic entitlement on intestacy, other beneficiaries who would have inherited but for the cohabitant will be left without provision or with less provision, and the onus will be on them to bring a claim using the 1975 Act if they feel this is unfair. In many cases it is the children of the deceased who will see their entitlement reduced or extinguished. This represents a transfer of wealth from the children of the deceased to the deceased's long-term partner. In many cases, the partner will also be the parent of the children and will use the assets inherited from the estate to maintain the children, particularly if they are young. That will not always be the case, particularly where the children are adult and are not the children of the surviving cohabitant. The net result is that those who wish to have recourse to the 1975 Act will be different – fewer cohabitants will need to litigate but perhaps other beneficiaries may decide to instead.
62. The anticipated result is that there ought to be fewer 1975 Act claims. Cohabitants under the current law have no other means of obtaining financial provision other than the 1975 Act. If this category of applicants are included in the intestacy rules it will reduce the number of claimants. Although other beneficiaries might make 1975 Act claims, including the children of the deceased, their claims are unlikely to succeed unless they were dependent on the deceased, and many will be advised not to commence claims. The net effect is anticipated to be a change in who applies under the 1975 Act and an overall reduction in claims.
63. In addition to the economic rationale for changing the transfers on intestacy, there are substantive reasons of principle for doing so which cannot be summed up by figures. Keeping the estate of a deceased person within the hands of those closest to and most dependent on the deceased is a strong argument in favour of this reform. Leaving cohabitants without an automatic entitlement may leave them financially vulnerable but it also fails to recognise the intimacy and the interdependence of their relationship with the deceased and the impact of the bereavement. For further discussion, please see Part 8 of the final report.³⁹

Transitional costs

64. Transitional costs of the reform include the following.
- The cost to the Probate Service to update staff and publicity/information materials.
 - Training cost to the legal profession to update staff about our reform is minimal. We assume that training practitioners on our reform is budgeted for in legal professionals' time, through continuing professional development or in-house training costs.
 - The cost of training for the judiciary which will be £0. It is assumed that the recommendations could be included in the family newsletter at no additional cost. It is not anticipated that any other training by the Judicial College (formerly the Judicial Studies Board) will be required.

Ongoing costs

65. The main impact of this reform is a transfer of entitlement. This has been described above. One potential cost of the reforms is that there could be fewer estates which pass to the Crown as *bona vacantia* ("ownerless goods") because there is no living relative who is entitled under the intestacy rules. This cost is perhaps less than first appears. Under the current law if the estate passes to the Crown as *bona vacantia* but there is a surviving cohabitant, the cohabitant can still make a claim for provision out of the *bona vacantia* estate. Giving the cohabitant in this situation a direct entitlement

³⁹ Intestacy and Family Provision Claims on Death (2011) Law Com No 331.

on intestacy rather than having the estate pass as *bona vacantia* is therefore unlikely to have a real cost.

66. A slight widening of the category of applicants who are eligible to apply for family provision under the 1975 Act – cohabitants who had a child with the deceased but did not live together for at least two years – may have an impact on the court system. There is no data available on the total number of claims made for family provision every year, but given that we estimate that the family provision legislation has given rise to between 1,250 and 1,460 cases in the last four years, the increase is likely to be fairly small.⁴⁰ It is also likely to be more than offset by a reduction in claims for family provision by those cohabitants who will qualify for automatic entitlement on intestacy.

Ongoing benefits

67. If wealth is kept within the family unit of which the deceased was a part when he or she died, those who were closest to the deceased and whose finances were most entwined with theirs will not be left in need. The economic position of a surviving cohabitant will be more secure. Ensuring wealth is kept within the existing family structure will particularly benefit families in which one parent has died leaving minor children with the other parent.
68. Research has found that the perception of being financially worse off increased the chances of bereaved women reporting symptoms of anxiety and depression.⁴¹ Not only will this reform change the position of surviving cohabitants substantively, it will also change their perception of their position, which in turn could reduce the stress and anxiety felt after death.
69. Providing an automatic entitlement should cause a net reduction in court costs. Cohabitants will be less likely to have recourse to the courts. Although other beneficiaries may wish to challenge either the person's status as a cohabitant or the claim that reasonable provision had not been made for him or her, it is anticipated that over the course of 10 years the net effect is that the number of claims is likely to reduce.
70. A net reduction in 1975 Act claims will reduce the pressure on the court system both in terms of court time and resources. Unfortunately, the figures for the number of recorded cases and the current data on the length and cost of civil cases are not suitably reliable to permit exact costing of this saving. However, using data provided by the Legal Services Commission to give an idea of the costs, we found that the average cost to the Legal Services Commission per case was around £3,000.⁴²
71. Reducing the number of claims is increasingly important given that the Government has indicated that 1975 Act applicants will generally no longer be eligible for legal aid.⁴³ In the financial year 2010/11, the Legal Services Commission had 345 applications for legal aid for 1975 Act disputes. If legal aid was no longer available in such cases, those applicants would potentially be left without any means of obtaining financial provision.
72. This reform will bring the law closer to current expectations and public opinion. Modernising the law so that it can accommodate modern family structures increases fairness and faith in the law. These reforms will be beneficial in terms of keeping the law up to date and capable of coping with social change. The reforms meet the expectations of both the deceased and those who feel entitled under the current law but are not provided for.

Risks

73. It is likely that we have underestimated the number of 1975 Act claims and the number of people affected by them as we do not have accurate data for all the courts involved or for the number of cases which settle before reaching court.

Direct costs and benefits to business calculations

74. The primary impact on business will be on legal professionals. The cost of familiarising such professionals with our reforms will be absorbed by the normal training costs associated with keeping

⁴⁰ See paras 26 to 27 above.

⁴¹ A Corden, M Hirst and K Nice, *Financial Implications of Death of a Partner: summary* (2009) p 3.

⁴² Data is based on information for the financial year 2010/2011.

⁴³ Ministry of Justice, *Reform of Legal Aid in England and Wales: the Government Response* (June 2011) para 105(ii), and Annex B para 7 and following. This is subject to further proposals for a "exceptional funding scheme": see further para 128 and following.

abreast of change.

3. Specific impact tests

Equality impact assessment

75. The equality impact assessment initial screening questions have been considered. There is potentially a positive impact on women as they have a longer life expectancy than men and are more likely to be bereaved. They are therefore more likely to benefit from the proposed reforms than will men. This is a result of life expectancy and not as a result of any of the reforms proposed. The screening questions did not indicate the need for a full impact assessment as there is no negative impact on any group suggested as a result of the proposed reform.

Competition assessment

76. The proposed reforms are not expected to affect the balance of activities offered by firms – and will therefore have no impact on competition.

Small firms

77. These reforms will not disproportionately impact small firms. Small firms associated with this area are solicitors who advise and assist personal representatives with the administration of estates and those who provide will-writing services. We do not anticipate that these reforms will change will writing behaviour, so such firms should not be affected. Any publicity surrounding these recommendations may have a positive effect, prompting people to make a will.

Greenhouse gas effect

78. The proposed reforms are not considered to have wider environmental effects. The reforms will not affect emissions levels.

Wider environmental

79. The proposed reforms are not considered to have any wider environmental effects. The reforms concern transfers of wealth; any current environmental impact will not be affected by reform of these transfers.

Health and well-being

80. Having considered the screening questions indicated in the health impact assessment it will not be necessary to carry out a full health impact assessment. Any effects arising from the proposed reform are expected to be generally positive and of a very small magnitude.

Justice impact test

81. The impact on the justice system has been considered throughout the cost benefit section of this impact assessment.

Human rights

82. The human rights implications of the reforms have been considered throughout the impact assessment. The reforms are thought to be compliant with the Human Rights Act 1998.

Rural proofing

83. The proposed reforms are not expected to have a disproportionate impact on the rural community as they are generally applicable.

Sustainable development

84. The impact of the reform will fall on future generations as it will affect the rules for inheritance. However, this impact is not in the context of sustainable development.

Annexes

Annex 1 should be used to set out the Post Implementation Review Plan as detailed below. Further annexes may be added where the Specific Impact Tests yield information relevant to an overall understanding of policy options.

Annex 1: Post Implementation Review (PIR) Plan

A PIR should be undertaken, usually three to five years after implementation of the policy, but exceptionally a longer period may be more appropriate. If the policy is subject to a sunset clause, the review should be carried out sufficiently early that any renewal or amendment to legislation can be enacted before the expiry date. A PIR should examine the extent to which the implemented regulations have achieved their objectives, assess their costs and benefits and identify whether they are having any unintended consequences. Please set out the PIR Plan as detailed below. If there is no plan to do a PIR please provide reasons below.

Basis of the review: [The basis of the review could be statutory (forming part of the legislation), i.e. a sunset clause or a duty to review , or there could be a political commitment to review (PIR)];
Review objective: [Is it intended as a proportionate check that regulation is operating as expected to tackle the problem of concern?; or as a wider exploration of the policy approach taken?; or as a link from policy objective to outcome?]
Review approach and rationale: [e.g. describe here the review approach (in-depth evaluation, scope review of monitoring data, scan of stakeholder views, etc.) and the rationale that made choosing such an approach]
Baseline: [The current (baseline) position against which the change introduced by the legislation can be measured]
Success criteria: [Criteria showing achievement of the policy objectives as set out in the final impact assessment; criteria for modifying or replacing the policy if it does not achieve its objectives]
Monitoring information arrangements: [Provide further details of the planned/existing arrangements in place that will allow a systematic collection systematic collection of monitoring information for future policy review]
Reasons for not planning a review: The Law Commission does not implement policy but provides law reform recommendations acting on behalf of a lead department.