[A] Contractual arrangements

1. Does your system of law allow (i) heterosexual couples and (ii) same sex couples who are living together to enter into a contract governing their cohabitation, particularly as respects:-

   • obligations of support or maintenance
   • ownership of property during cohabitation
   • financial claims on the cessation of the cohabitation?

At one time cohabitation contracts would have been unenforceable on grounds of illegality or immorality in the UK as they could be seen to be promoting extra-marital relations; however, as cohabitation of both heterosexual and same sex couples has become increasingly common and accepted, this position is changing. There has been judicial acceptance that cohabitation contracts may be enforceable (see for example, Sutton v Mishcon de Reya [2003] EWHC 3166 (Ch); [2004] FLR 837 and Ackerman v Blackburn (No 1) 2002 SLT 37, para16).

A distinction has been made between cohabitation contracts which govern the financial and property aspects of the relationship and those which seek to govern the sexual aspects of the relationship. The latter would not be enforceable on grounds of public policy while parties may contract on whichever aspects of the former they decide is relevant to them.

No distinction is made in the UK between heterosexual and same sex couples for the purpose of cohabitation contracts.
2. If such contractual arrangements are permitted, is it common for cohabiting couples to conclude a cohabitation contract?

The use of such contractual arrangements does not appear to be widespread. Their use would most likely occur with the purchase of a house or other significant property. It is possible that the recent changes in the law giving cohabiting couples more rights will impact on the use of cohabitation contracts. Some couples may not feel the need to use such contracts if more rights are given from the general law. In Scotland the recent changes to the law create a scheme which couples may contract out of if they wish and it is yet to be seen if it will be common for couples to chose to do this or not.

3. Are there any formal requirements (e.g., signature before witnesses, involvement of a notary) which require to be satisfied before a cohabitation contract is valid?

A cohabitation contract is subject to the normal rules of contract law and there are no specific formal requirements.

[B] Heterosexual couples: non-contractual rules

1. Where a couple are cohabiting does your legal system recognise any mutual duty of aliment or maintenance during the period of cohabitation?

There is no mutual duty of aliment or maintenance during the period of cohabitation in the UK. There is only a mutual of aliment where the couple are married to each other or have gone through a (same-sex) civil partnership ceremony.

2. Are there any particular rules regarding ownership of moveable property such as, for example, household furniture acquired during the time in which the couple are cohabiting?

Scotland

In Scotland there is a rebuttable presumption, created by the Family Law (Scotland) Act 2006, that both cohabitants have an equal share in household goods acquired during the cohabitation (other than by gift or succession). This does not include money, stocks or shares, road vehicles or domestic animals. The 2006 Act also provides that money from an allowance for household expenses should be divided equally between the cohabitants, including any property purchased from this money (but not their sole or main residence). Recourse may still need to be made to the normal rules on unjustified enrichment to resolve disputes.
England, Wales and Northern Ireland
In England, Wales and Northern Ireland the matter is one of general property law. Therefore, the basic position is that the property in question is owned by the party who purchased or acquired it. In some situations certain legal mechanisms may provide a remedy in relation to moveable property on the breakdown of the relationship. These mechanisms include constructive trusts, resulting trusts and proprietary estoppel and rely on the claimant being able to prove, among other things, that there was agreement or common intention for joint ownership and that the claimant acted in reliance on this. The law in this area is complex.

3. If the relationship breaks down and the parties separate, does your legal system enable one of the cohabitants to claim from the other (a) payment of maintenance or (b) payment of a capital sum? If so, are such claims determined on the same principles as would apply were the couple married or do different rules apply?

Scotland
The Family Law (Scotland) Act 2006 allows a cohabitant to make an application to the court within one year of the cessation of the cohabitation for an order relating to financial provision. The court may make an order for the payment to the applicant of a capital sum; an order "in respect of any economic burden of caring, after the end of the cohabitation, for a child of whom the cohabitants are parents"; or such interim order as the court thinks fit. It appears that either a capital sum or periodic payments can be ordered in respect of child care. Where a capital sum is awarded this may be paid in instalments.

The rules governing financial provision on divorce or dissolution of a civil partnership can be found in the Family Law (Scotland) Act 1985. These provisions are more extensive than those relating to the cessation of cohabitation. In all situations regard should be had by the court to the economic advantages and disadvantages of each party as a result of the relationship or as a result of the caring arrangements for a relevant child. However, where the situation is one of divorce or dissolution of a civil partnership there is also a principle that the net value of the matrimonial property should be divided equally between the parties. The court is directed to consider whether either party is likely to suffer financial hardship as a result of the divorce or dissolution (in which case they should be awarded financial provision to relieve them of this hardship for a reasonable period) and whether one party was dependant on the financial support of the other (in which case they should be awarded reasonable financial provision in order to allow them to adjust). There are no equivalent provisions to these relating to cessation of cohabitation. Also the one year time limit for the
application to the court does not apply to former spouses or civil partners, an order may be made for a periodical allowance to be paid to them and there are specific provision relating to pension arrangements.

**England and Wales**

In England, Wales and Northern Ireland cohabitants can only claim against their former partners for the maintenance of a child of the relationship.

Maintenance payments can be sought from the Child Support Agency under the Child Support Act 1991, which applies to England and Wales (as well as to Scotland), or from the Child Support Commissioners under the Child Support (Northern Ireland) Order 1991.

In England and Wales, the Children Act 1989 applies to all parents regardless of the nature of their relationship. This Act allows the court to make an order for the payment of a lump sum, property transfers and settlements. The court is given a number of factors to consider in the making of such orders, including the resources of each parent, the financial needs of the parents and the financial needs of the child. The equivalent provisions for Northern Ireland are contained in the Children (Northern Ireland) Order 1995.

4. Where the house in which the parties live together is either owned or tenanted by one of the parties, does your legal system give the other party any right to continue to occupy the house when the relationship breaks down?

**Scotland**

Under the Matrimonial Homes (Family Protection) (Scotland) Act 1981 a "non-entitled" partner – that is to say a cohabitant whose partner has the sole right of ownership or tenancy of the house in which the parties are living - may apply to the court for occupancy rights in relation to the house. These rights are not as extensive as those given to spouses, for example the non-entitled partner is not protected from dealings between the entitled partner and third parties, such as a sale of the house. The occupancy rights, which may be granted to the applicant, give a right to live in the house for an initial period not exceeding six months, which may then be extended for further six month periods. Further, the provisions of the Act which allow the court to transfer the tenancy of the home in question to a non-entitled spouse, have now been extended to cover cohabitants as well as spouses.

**England and Wales**

The position in England and Wales is governed by the Family Law Act 1996. Under Part IV of this Act the court may make an occupation order in relation to cohabitants. This is
normally used in cases of domestic violence but is not restricted to these cases. Where the 
claimant is entitled (as owner or tenant) to occupy the property this order may be of unlimited 
duration, but where the claimant is not entitled to occupy the property the order may only be 
for six months which may be extended once for a further six months. The court must have 
regard to a number of factors in considering whether to make such an order. Greater 
occupancy rights may be obtained under the law relating to the maintenance of children. 
The court is also able to make orders for the transfer of tenancies to cohabitants under the 

Northern Ireland
In Northern Ireland the Family Homes and Domestic Violence (Northern Ireland) Order 1998 
applies. This allows cohabitants or former cohabitants to apply to the court for an 
occupation order. Where the applicant has no existing right to occupy, this order may be for 
an initial period of up to twelve months and may be extended for further periods not 
exceeding twelve months. Where the applicant does have a right to occupy the order may 
be made for a specified period, until the occurrence of a specified event or until further order. 
The court is given a number of factors to consider in the making of an order, including the 
housing needs and resources of the parties, the length of the cohabitation period and 
whether there are children who are children of both parties or children of whom both parties 
have shared parental responsibility. This order also allows for the transfer of tenancies to 
cohabitants.

5. Where the cohabitation comes to an end by reason of the death of one of the 
cohabitants, what rights, if any, in the estate of the deceased cohabitant does your 
legal system give to the surviving cohabitant?

Scotland
Under the Family Law (Scotland) Act 2006 the surviving cohabitant may apply to the court 
within six months of the death of the partner for payment of a capital sum out of the estate or 
for the transfer of property. Legal rights of a surviving spouse or civil partner take precedent 
over such an award and the award cannot be in excess of what the party would have 
received had she or he been the surviving spouse or civil partner of the deceased. In 
considering such an application the court is to have regard to whatever matters it considers 
appropriate, in particular the size of the deceased's net estate, any other benefit the 
applicant has received in consequence of the death and the nature and extent of other rights 
or claims on the estate.

England, Wales and Northern Ireland
In England, Wales and Northern Ireland there are also instances where a cohabitant may make a claim on the deceased partner's estate. Under the Inheritance (Provision for Family and Dependents) Act 1975 a cohabitant in England and Wales may make a claim as a dependant or cohabitant for "reasonable financial provision" from the deceased's estate where the rules of intestacy or the will (if there was one) has not provided this. If the claim is as a cohabitant the court will have regard to the length of the cohabitation period. The court will generally look at such things as the size of the estate, the financial resources of all those concerned (including other beneficiaries), any obligations or responsibilities of the deceased and the conduct of parties. A similar scheme applies in Northern Ireland under the Inheritance (Provision for Family and Dependents) (Northern Ireland) Order 1979.

6. **Does a cohabitant have any title to sue for damages in the event that his or her partner is killed through the fault or negligence of a third party?**

In all of the legal systems in the UK a cohabitant is given title to sue for damages in respect of the death of their partner. This does not differ from if they were the spouse or civil partner of the deceased. The relevant legislation in England and Wales is the Fatal Accidents Act 1976, in Scotland the Damages (Scotland) Act 1976 and in Northern Ireland the Fatal Accidents (Northern Ireland) Order 1977.

7. **In so far as your legal system does give rights to a cohabitant, does it also define what is necessary for the relationship to be treated as a "cohabitation"? Are different definitions of "cohabitation" used, depending on the right which is claimed? What factors are taken into account in the definition(s)?**

Definitions in the UK draw analogies with marriage and civil partnership, although the precise wording varies. The concept of this analogy involves a couple living together and having a relationship displaying the same characteristics as marriage or civil partnership, such as sexual relations, emotional commitment, shared finances, social acceptance as a couple and stability. The definitions do not tend to stipulate a minimum time period during which the couple must have cohabited, although the period of cohabitation may be a factor considered by the court in assessing the relationship on question.

The following definition of "cohabitant" is provided in Scots law in the Family Law (Scotland) Act 2006 for the main provisions relating to cohabitants:

"…either member of a couple consisting of –

(a) a man and a woman who are (or were) living together as if they were husband and wife; or
(b) two persons of the same sex who are (or were) living together as if they were civil partners.

And the following factors are taken into account:

“(a) the length of the period during which A and B have been living together (or lived together);
(b) the nature of their relationship during that period; and
(c) the nature and extent of any financial arrangements subsisting, or which subsisted, during that period.”

In the Matrimonial Homes (Family Protection) (Scotland) Act 1981 the court is directed to have regard to:

“(a) the time for which it appears they have been living together; and
(b) whether there is any child—
   (i) of whom they are parents; or
   (ii) who they have treated as a child of theirs.”

In England and Wales the Family Law Act 1996 provides the following definition:

"...'cohabitants' are two persons who are neither married to each other nor civil partners of each other but are living together as husband and wife or civil partners..."

The Inheritance (Provision for Family and Dependants) Act 1975 requires that the cohabitants were living together for two years prior to the death of the deceased.

In Northern Ireland the legislation also uses the analogy of marriage or civil partnership. The Family Homes and Domestic Violence (Northern Ireland) Order 1998 has the additional requirement that:

"...Where the court is required to consider the nature of the parties' relationship, it is to have regard to the fact that the parties have not given each other the commitment involved in marriage."

[C] Homosexual couples: non-contractual rules
1. In your country are couples of the same sex able to enter into a relationship which, following registration or some other public ceremony, will be legally recognised by the State?

In the UK same sex couples may register their partnership and have it legally recognised under the Civil Partnership Act 2004. In order to do this they must sign the civil partnership document in the presence of a civil partnership registrar, each other and two witnesses.

2. If so, what are the principal ways in which the rules governing the patrimonial aspects of that relationship differ from those applying in (heterosexual) marriage?

While civil partnership is technically not seen as same sex marriage, but rather as a separate type of personal adult relationship, the legal consequences in the areas of property and succession are the same as apply to marriage. Therefore the same duty of aliment applies, the same occupancy rights are given to civil partners as to married couples, the succession provisions have been amended to put civil partners in the same position as spouses and the same rules regarding financial provision apply on dissolution of the civil partnership as apply on divorce.

3. In the event that a same sex couple either cannot enter into a legally recognised relationship or have chosen not to do so, does their cohabitation give rise to the same rights and obligations which would result from cohabitation of a man and a woman? If not, what are the principal differences?

In Scotland, the provisions which have been discussed relating to cohabitants cover both heterosexual and same-sex couples. This was brought about by the Family Law (Scotland) Act 2006. While there is less legislation governing the relationship between cohabitants in Northern Ireland and England and Wales the position is the same, namely that the provisions relate to heterosexual and same-sex couples alike.

[D] Miscellaneous

1. Are there any proposals for reform of the law relating to cohabiting couples (homosexual and heterosexual)?

The Law Commission of England and Wales has recently published a Consultation Paper on the financial consequences of the cessation of cohabitation which proposes a new scheme. The proposed rules would not be obligatory, since couples could agree to opt out of the scheme. Only certain cohabitants would be affected. Thus cohabitants with a child would be covered and it is suggested that if the couple do not have a child another criterion should
apply, such as a minimum requirement for the duration of the cohabitation. On separation it is proposed that a claim could be made to the court which could make a wide range of orders, although it is suggested that the "clean break principle" should apply so lump sums would be preferred to periodical payments. The Law Commission proposes that the court should be given a discretion based on the principles of the economic advantage conferred and economic disadvantage sustained by each party as a result of the relationship. The court would also be given factors to consider in deciding whether to make an order, such as the available resources and financial obligations of the respondent.

The Northern Ireland Office of Law Reform is awaiting the results from the Law Commission project in this area.

2. What points would you wish to discuss in greater detail?

3. What subject do you suggest for the next meeting?