



**Law
Commission**
Reforming the law

Cohabitation: The Financial Consequences of Relationship Breakdown

Executive Summary

COHABITATION: THE FINANCIAL CONSEQUENCES OF RELATIONSHIP BREAKDOWN

(LAW COM NO 307)

EXECUTIVE SUMMARY

BACKGROUND AND SCOPE OF THE PROJECT

- 1.1 This Report makes recommendations to Parliament on certain aspects of the law relating to cohabitants. It is the product of two years' work by the Law Commission and builds on a Consultation Paper published in May 2006. The Commission was asked to consider this area of the law by the Ministry of Justice, but was not asked to draft a Bill. Any change in the law would require legislation.
- 1.2 This project has examined the financial consequences of the termination of cohabiting relationships by separation or death. Other aspects of the law governing cohabitants such as tax, social security, insolvency, next of kin rights, child support and parental responsibility were excluded from the terms of reference. The project has been concerned only with couples who live together. The Commission was not asked to consider relationships between other home-sharers such as relatives, carers and dependants, and commercial relationships.

THE CURRENT LAW

- 1.3 Research indicates that a majority of cohabitants believe in the "common law marriage myth": the idea that unmarried couples who are living together are, after a certain length of time, treated for all purposes by the law as if they were married. This belief is false. In particular, whereas married couples and civil partners have access to special statutory remedies to deal with the financial consequences of their relationships ending, cohabitants do not.
- 1.4 But it is equally wrong to say that existing law ignores cohabitants altogether. A patchwork of legal rules (property, trusts and contract) applies, sometimes providing cohabitants with interests in their partners' property. However, consultation has confirmed the Commission's provisional view that that law is unsatisfactory. It is complex, uncertain, expensive to rely on and, as it was not designed for family circumstances, often gives rise to outcomes that are unjust.
- 1.5 The inadequacy of the current law extends to the treatment of the children of cohabiting couples. Schedule 1 to the Children Act 1989 gives the courts power to make certain financial orders for the benefit of children, whatever the nature of their parents' relationship. However, the lack of specific statutory remedies between cohabiting parents on separation hampers the effectiveness of those powers, particularly where assets are relatively limited. In order to make full use of limited assets, the courts need power to adjust the adult parties' property

rights. Such power could not be provided even under a reformed Children Act, since that legislation is concerned exclusively with making provision for the benefit of the child.

- 1.6 The result of the current law's inadequacy is hardship for many cohabitants on separation and, as a consequence, their children. This comes at a great personal cost to those involved. And in many cases relationship breakdown may lead to reliance on the State in the form of claims to welfare benefits and social housing.

THE CASE FOR REFORM

- 1.7 Recent results of the British Social Attitudes survey indicate that a substantial majority of people in England and Wales think cohabitants should have access to financial relief on relationship breakdown.
- 1.8 However, some people would say that law reform is unnecessary. They would argue that it would be enough to improve public information and education about the true legal position to enable individuals to make informed choices.
- 1.9 While improved public awareness of the law is essential, evidence suggests that this strategy is not sufficient, by itself, to deal with the hardship that can arise when cohabitants separate. There will always be reasons why cohabitants do not or cannot take steps to protect themselves. In particular, it is often not feasible for a person simply to "get married" as his or her partner may not agree to do so. In such circumstances the only alternatives are to put up with the existing position or to leave the relationship. It is not obviously in the interests of the couple, any children involved or society generally for a family to break up in such circumstances.
- 1.10 Many people think that cohabitants should have access to exactly the same remedies as married couples and civil partners. We do not agree. Although some cohabitants have relationships that many would regard as being similar to those of spouses, there is a broad range of cohabiting relationships, exhibiting different degrees of commitment and interdependence. And cohabitants have not made the distinctive legal and public commitment that marriage entails.
- 1.11 We have therefore devised a scheme entirely distinct from that which applies between spouses on divorce, that would apply specifically to eligible cohabiting couples who separate. We also make recommendations for the consequential reform of existing statutory remedies applicable on the death of a cohabitant under the Inheritance (Provision for Family and Dependents) Act 1975.
- 1.12 Our recommendations offer a workable system to deal with the separation of cohabitants that would be a considerable improvement on the current law. Such a system would help individual cohabitants and their children. It would provide economically vulnerable members of society with the private means to rebuild their lives and to ensure a fairer division of assets on relationship breakdown.

KEY FEATURES OF THE SCHEME

- 1.13 We do not think that all cohabitants should be able to obtain financial relief in the event of separation. We recommend that a remedy should only be available where:

- the couple satisfied certain eligibility requirements;
- the couple had not agreed to disapply the scheme; and
- the applicant had made qualifying contributions to the relationship giving rise to certain enduring consequences at the point of separation.

Eligibility requirements

- 1.14 The recommended scheme would apply only to cohabitants who had had a child together or who had lived together for a specified number of years (a “minimum duration requirement”). The Report does not make a specific recommendation as to what the minimum duration requirement should be, but suggests that a period of between two and five years would be appropriate.

Disapplying the scheme

- 1.15 We reject an “opt-in” scheme, which couples would be required to sign up to in order to be able to claim financial remedies on separation. Consultation confirmed our view that an opt-in scheme would not deal effectively with the problems of hardship created by the current law. Vulnerable individuals would be no more likely to protect themselves by registering than they are currently to marry. We are also aware that to introduce an opt-in scheme would effectively create a new status of “registered cohabitant”. This would jeopardise the support of many who have expressed support for reform, but who are concerned to protect the institution of marriage, such as the Mission and Public Affairs Council of the Church of England.
- 1.16 Instead, we recommend that, as a default position, the scheme should be available between all eligible cohabitants. However, we understand the strongly-held view that it is wrong to force cohabitants who have not chosen to marry or form a civil partnership into a particular legal regime against their will. We agree that it is very important to respect the autonomy of couples who wish to determine for themselves the legal consequences of their personal relationships. We therefore recommend that a new scheme should allow couples, subject to necessary protections, to disapply the statute by means of an opt-out agreement, leaving them free to make their own financial arrangements.

Qualifying contributions and their consequences: the basis for remedies

- 1.17 It would not be sufficient for applicants simply to demonstrate that they were eligible for financial relief and that the couple had not made a valid opt-out agreement disapplying the scheme. In order to obtain a remedy, applicants would have to prove that they had made qualifying contributions to the parties’ relationship which had given rise to certain enduring consequences at the point of separation.
- 1.18 The scheme would therefore be very different from that which applies between spouses on divorce. Simply cohabiting, for however long, would not give rise to any presumed entitlement to share in any pool of property. Nor would the scheme grant remedies simply on the basis of a party’s needs following separation, whether by making orders for maintenance or otherwise.

- 1.19 In broad terms, the scheme would seek to ensure that the pluses and minuses of the relationship were fairly shared between the couple. The applicant would have to show that the respondent retained a benefit, or that the applicant had a continuing economic disadvantage, as a result of contributions made to the relationship. The value of any award would depend on the extent of the retained benefit or continuing economic disadvantage. The court would have discretion to grant such financial relief as might be appropriate to deal with these matters, and in doing so would be required to give first consideration to the welfare of any dependent children.
- 1.20 We consider that a scheme based on these principles would provide a sound basis on which to address the hardship and other economic unfairness that can arise when a cohabiting relationship ends. It would respond, more comprehensively than the current law can, to the economic impact of the contributions made by parties to their relationship, and so to needs which arise in consequence. Where there are dependent children, the scheme would enable a remedy to be provided for the benefit of the primary carer, and so better protect those children who share their primary carer's standard of living. By making adequate provision for the adult parties, the scheme would give more leeway to the court than it currently has to apply Schedule 1 to the Children Act 1989 for the benefit of the parties' children.

THE IMPACT OF REFORM ON MARRIAGE

- 1.21 Much of the press comment surrounding the publication of our Consultation Paper focused on the question of whether providing financial relief between cohabitants on separation would undermine the institution of marriage. We consider that the type of reform we are recommending would not harm marriage. Indeed, the argument that it would do so underestimates marriage by suggesting that legal considerations are uppermost in couples' minds when they decide whether to marry. Research evidence indicates that the law is low down the list of reasons why people get married and that those who choose to marry for family, religious, social, cultural or other personal reasons will continue to do so, whether or not financial relief is made available between cohabitants. In any case, marriage would remain legally distinctive because of its different regime of financial relief. Many are concerned that marriage should be promoted and supported. We do not consider that the introduction of our new scheme of financial relief for cohabitants is inconsistent with supporting marriage as an institution. The latter policy objective can be pursued in other ways.
- 1.22 Other countries have already introduced schemes of financial relief for cohabitants. Some Canadian and Australian jurisdictions did so in the 1970s and 1980s. Closer to home, the Scottish Parliament last year introduced new statutory remedies, based on principles similar to those that we are recommending. Recent research has examined the impact of such reform on marriage rates in Australia: analysis of the available data finds no statistical evidence of a relationship between marriage rates and the introduction of remedies between cohabitants.

THE SOCIAL CONTEXT

- 1.23 The 2001 Census recorded over two million cohabiting couples in England and Wales, an increase of 67% from the previous Census. The number of cohabiting

couple households with dependent children doubled from the previous Census, and over 1,250,000 children were dependent on cohabitants. Recent forecasts from the Government Actuary's Department predict that by 2031 there will be 3.8 million cohabiting couples.

- 1.24 The fact that more people are cohabiting and that more are forecast to do so in future is not in itself a reason for law reform. But if it is accepted that the current law is inadequate and gives rise to unwelcome consequences, the fact that these consequences potentially affect a significant and increasing proportion of the population is highly relevant.

EXAMPLES

- 1.25 There follow two examples to give some indication of how our recommended scheme would operate. Example 1 is a case where a claim for financial relief would be extremely unlikely to succeed. Example 2 is a case where a remedy is likely to be obtained, and where as a result the applicant would be in a significantly better position than under the current law.
- 1.26 While our recommended scheme would allow claims to be made on separation, and confer jurisdiction on the court to make orders for financial relief, we would expect that most claims would be resolved by the parties without recourse to the court. However, for the purpose of explaining how our scheme would operate, we assume that attempts to resolve the parties' dispute privately have not been successful and that the court would therefore have to deal with the claim that has been made.

Example 1

A and B, who are both in their twenties, have been living together for two years in accommodation rented from a private landlord. They have both worked full-time throughout the relationship and have kept their finances separate. They have shared all outgoings related to the household equally. They are now separating.

- 1.27 This case would be highly unlikely to engage the scheme, for the following reasons:
- Depending on the length of the minimum duration requirement settled on by Parliament, the parties may simply be ineligible to claim at all.
 - If the scheme did apply, neither party would have a claim merely as a result of having lived together. A remedy would only be available if either party had made qualifying contributions giving rise to a retained benefit or economic disadvantage.
- 1.28 On these facts, it is very unlikely that either party would have a claim, because on separation neither is left with a retained benefit or a continuing economic disadvantage as a result of their contributions to the relationship. Neither has retained any benefit in the property, as it is rented, and the relationship has been economically neutral for each of them in terms of their earnings and earning capacity.

- 1.29 The same analysis would apply if the couple had been living in property bought by A before the relationship began and where A had paid the mortgage throughout without any assistance from B. The fact that only A would leave the relationship owning a property would not, in itself, provide any basis for a claim under the scheme.
- 1.30 The position would, however, be different if B had contributed to A's mortgage payments or made a capital contribution to A's property. In those circumstances, A, as the legal owner of the property, would have a retained benefit which, provided the eligibility requirements were satisfied, would form the basis of a claim by B.

Example 2

C and D, both in their thirties, had been living together for three years in C's house when they started a family. C's salary was sufficient to support the family and, as they both wanted the baby (E) to be looked after by D at home, they agreed that D should not return to work after E was born. Their relationship has now foundered and they are separating. E, now aged two, is going to live with D.

1.31 Under the current law:

- It is very unlikely that D can establish any share in the family home, and C has no obligation to provide for D.
- The couple share the obligation of meeting the basic cost of caring for E, in C's case by means of child support payments.
- Depending on the resources available, it is unlikely in practice that an order could be made under the Children Act 1989 to provide housing for E while dependent.

Most of the economic impact of D's contribution in giving up work to care for E, in terms of future earnings loss, pension loss and career disadvantage, falls solely on D's shoulders. This in turn can lead to hardship for E, who is closely affected by D's financial circumstances.

1.32 Under our recommended scheme:

- C and D would be eligible to apply for relief because they had cohabited and had had a child together.
- C would be required to share the economic disadvantage caused by D's contributions.
- C's existing obligation to pay child support would be unaffected.
- The court would be more likely to be able to exercise its powers under the Children Act 1989 to make provision for the benefit of E.

1.33 The scheme would not enable D to make any claim just because D had been living with C, nor could D make a claim for past earnings losses during the

relationship. D's claim would be based upon the continuing economic impact of having given up work to look after E and the need to care for E after the separation. D would be required to minimise the losses so far as reasonably practicable. If that meant D needed paid child-care while at work, C could be required to share the costs of that child-care, if in a position to do so.

- 1.34 The scheme would not require C to make maintenance payments for D. It would require C to share D's disadvantage. The court would make a capital award, if necessary payable by instalments, to meet D's claim. In deciding the form of the award, it would give first consideration to E's welfare and, so far as practical, would seek to assist with D's and E's housing needs. The court would consider D's claim alongside providing for E under the Children Act 1989.

Opting out

- 1.35 Even if they were eligible, in both Examples 1 and 2, the parties would be able to make a written opt-out agreement disapplying the scheme and so be free to make their own financial arrangements. The scheme would not apply unless enforcement of that agreement would be manifestly unfair, given the circumstances when the agreement was made or any unforeseen change of circumstance which had arisen since then.