HOUSE OF COMMONS

Women and Equalities Committee

Oral evidence: The rights of cohabiting partners, HC 130

Wednesday 22 September 2021

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Watch the meeting

Members present: Caroline Nokes (Chair); Theo Clarke; Elliot Colburn; Kim Johnson; Anne McLaughlin; Kate Osborne.

Questions 1 - 35

Witnesses

I: Professor Anne Barlow, Professor of Family Law and Policy, University of Exeter; Professor Rebecca Probert, Professor of Law, The University of Exeter; Professor Gillian Douglas, Professor of Law and Emeritus Executive Dean, Dickson Poon School of Law, King's College London.

Written evidence from witnesses:

University of Exeter

Dickson Poon School of Law

Examination of witnesses

Witnesses: Professor Anne Barlow, Professor Rebecca Probert and Professor Gillian Douglas.

Chair: Welcome to this afternoon's evidence session of the Women and Equalities Select Committee. This afternoon's session is the first evidence session for our inquiry into the rights of cohabiting partners. Can I welcome our witnesses this afternoon, Professor Anne Barlow from the University of Exeter, Professor Gillian Douglas from King's College London and Professor Rebecca Probert, also from the University of Exeter? Thank you very much for joining us this afternoon. Can I start by asking each of you to introduce yourselves and to very briefly explain your role and expertise in this area?

Professor Barlow: I am Anne Barlow. I am professor of family law and policy here at the University of Exeter. I do a lot of sociolegal research, a lot of which has been focused on cohabitation and marriage over the years. I have conducted a number of projects around attitudes to that and have been part of the academic discussion on how the law should or should not be reformed. I also worked as a practising solicitor in the family law field before becoming an academic.

Professor Douglas: I am now emeritus professor at King's College London. I retired at the end of December from my role as executive dean of the law school there. I have researched and taught family law throughout my career and my main interest has been in the relationship between family law and social change.

I have done a lot of empirical sociolegal work, like Anne, exploring people's experiences of having legal problems and going through the legal system, and a particular focus of that work has been on aspects of relationship breakdown. The work that I present to the Committee in my written evidence is an example of that kind of research. I have a particular interest in the money and financial side of relationship breakdown.

Professor Probert: I am professor of law at the University of Exeter. I am currently a specialist adviser to the Law Commission on its weddings project and co-investigator with Dr Akhtar on a Nuffield funded project examining non-legally binding marriages, which is relevant for the present purposes because in law they are effectively cohabitants. My research has focused on the history of the law relating to marriage and cohabitation, in particular the evolution of the common-law marriage myth, and also the current law, in particular the property rights of cohabitants.

Q1 **Chair:** Going back to Anne Barlow, please, the common-law marriage myth is incredibly prevalent. I just wondered whether that provided one of the key arguments supporting the need for reform.

Professor Barlow: I certainly think so, because the current law is premised upon the assumption that people are very legally rational, if you like, about what they are doing and that both of them are choosing to cohabit for particular reasons, whereas when you take into account the large number of people who actually believe that they have either exactly the same or similar rights to married couples or civil partners anyway, that undermines that whole argument of autonomy: that people are choosing to do this because they do not want the legal protections that marriage and civil partnership currently afford through family law.

Q2 **Chair:** I forgot to say at the beginning that, if at any point any of the witnesses wish to add to something that one of the others said, please just raise your hand. It is easiest to do that physically, and I will spot you and bring you in. Going back to Anne, how realistic do you think it is that the Government could dispel those myths via a communications campaign, by providing people with more information, or do you think that is a hiding to nothing, and that the myth is so prevalent that it would be almost impossible to dispel?

Professor Barlow: It would be incredibly difficult to dispel, because it is so deeply embedded in society. It is not just cohabiting couples who believe this; it is wider society. If you look at the breakdowns of the numbers of people who believe in the myth, then equal numbers of married and unmarried people tend to believe that. Certainly, for those with children it is exactly the same numbers.

Behind that lies the idea that people experience law through different ways, and in some situations cohabiting couples are treated as if they are married. If you are applying for means-tested social security benefits, you are treated as if you are married. In certain areas of law you are treated as if you are married. If you apply for car insurance and you do a Google search and you look at what premium you are likely to have to pay, cohabitating couples are often described as common-law married as a status, and that then just has helped to embed and fuel the myth.

You would have a very difficult task to unpack all of that and explain to people what they experience day to day, both socially in terms of the way they are treated by, say, their children's school and just in wider society, in a meaningful way, where everybody would clearly understand where they stood. They would also wonder why the law was not following what has become the social norms of experiencing cohabitation for varying periods of time before deciding on whether or not to marry or civil partner, or whether you prefer to live your life in that more informal way, yet not appreciating the legal distinctions, which very few people do.

Q3 **Theo Clarke:** My first question is to Professor Barlow. What challenges do cohabitants currently face when pursuing legal remedies following the breakdown of their relationship?

Professor Barlow: On relationship breakdown, first of all, many couples do not realise the situation they are in. There is always an element of

shock to discover that your legal situation is different to how you imagined it. Certainly when I was in practice a long time ago, when I was a young solicitor, literally people were out of the door because they thought I did not know the law well enough. How could I be explaining to them that they did not have any rights when they knew for certain that they absolutely did and that they were treated as if they were married? That element of shock that they have lived their life according to an assumption that is totally false is the first thing they confront.

In practical terms now, the situation is legally complex for cohabitating couples, and that means you need legal advice. There is no longer any legal aid for legal advice in this sphere, and so you will not really get the advice that you need very easily, unless you can afford to pay for it and often on relationship breakdown, you may be the economically weaker partner and there may not be enough money to go around. There are those sorts of practical issues.

Then if you do get to a lawyer or an adviser who can advise you of your rights, it may depend whether you own the family home jointly or not, whether or not you have made a declaration, as you should have been advised to do, as to how you hold that family home in terms of the shares you each respectively own in it. If there is then a dispute about that, how you sort that out is a matter of property law, not family law, and complex trust law, which is incredibly expensive and beyond the means of most people, so you would probably give up right there once you heard what the legal fees were likely to be to contest that.

Where there are children, there is a family law remedy under schedule 1 of the Children Act, which allows claims to be made for the benefit of the child or the children between the parents who are cohabitants—or indeed any parents; you do not have to be cohabitating to access that remedy—but that is actually quite a well-kept secret. Even lawyers do not seem to know as much about it as they should. That might be one issue, but also there is no provision there for the transfer of assets as between the parents, so it is just for the benefit of the child.

You may be able to stay in a home for a period of time. This is assuming you go to court. You have separate proceedings to the proceedings that are determining whether or not you have an interest in the family home, and although you can apply for a lump sum or, in theory, transfer of property, the sorts of remedies you can get are for the benefit of the child, and that normally now just takes the position of being able to occupy the home for a period of time. That also creates problems. There are tax problems associated with it for both parties. There is a cliff-edge situation when the child reaches 18 for the parent who is living with the child there.

I could go on. There are a whole number of problems, practical and legal, in terms of the way that those available remedies play out in practice for couples that are very commonplace. A lot of people do this and are faced

then with a mountain of complexity, which often they just give up on because they cannot even afford to access the remedies that are available in theory.

Q4 **Theo Clarke:** Professor Douglas, how far are financial and non-financial contributions to the family home recognised when bringing a claim as to ownership?

Professor Douglas: The position in trust law is very sharply different from that which applies on divorce. In trust law it is a matter of ownership and the acquisition of the property in financial terms, so there is really no recognition given to non-financial contributions to the welfare of the family and the other partner. That is the biggest difference, in fact, between a property law remedy and a family law, divorce court jurisdiction.

The ability in the divorce jurisdiction to take account of those non-financial contributions has been absolutely key in improving the position of married women in particular, of course, over the past half century now since the law was changed. It may be worth noting that, prior to the 1970s, divorce law remedies were limited and trust law was used extensively to determine property issues between married couples on divorce. The whole point or a large point of bringing in the discretionary jurisdiction that now applies on divorce was precisely to get away from the shortcomings of trust law.

Q5 **Theo Clarke:** Can I just clarify? You mentioned that there is no recognition given to non-financial contributions of the partner. Could you give some examples to the Committee of what that would be? For example, say the cohabitant was paying household bills and was providing their partner with money every month for a mortgage. Is that the type of thing that would not be included?

Professor Douglas: If it can be shown that the money that is contributed goes towards paying for the acquisition of the home, then it can be taken into account. It could be indirect, in the sense that you pay over money into a joint account and your partner then actually pays the mortgage. That could give you an interest. The difficulty that you can get into there is proving it, and we found in our study that quite a lot of cases can founder because there simply is not the paper trail that would enable you to show that your contribution has actually helped in the acquisition of the property. If you can, then you may be able to establish a claim.

Q6 **Theo Clarke:** Running costs and things like that would not be included if they are paying for things like household bills. Things that are not to do with the acquisition of the property would not be included.

Professor Douglas: The only occasional reference to those has been where the court has accepted that without that help the property owner could not have kept up the payments. It will be difficult to establish that.

Q7 **Theo Clarke:** On average, what are the legal costs being incurred by

cohabitants when bringing claims?

Professor Douglas: I cannot give you a current figure, because the study that I undertook is now over 10 years old. At the time that we did our study, however, the average cost was £4,700, and the range of cost was from barely anything, if someone just got some initial legal advice, right the way up to £23,000, which was the highest cost in our study. The costs rise dramatically if you do go to court. A further complicating factor that adds to cost is that, as Anne explained, the law is complex. We found that solicitors will make more use of barristers for expert advice in these cases, and that will increase the cost again. Once you involved a barrister, the average rose from that £4,700 to over £11,000.

Q8 **Theo Clarke:** Just finally to Professor Probert, how effective is schedule 1 of the Children Act 1989 in protecting the needs of the most vulnerable children of parents who are cohabiting?

Professor Probert: As Anne has already explained, the powers that the courts have under schedule 1 of the Children Act are relatively limited. It really does not address the needs of vulnerable children at all. In terms of the periodical payments, it is largely a top-up for wealthy parents where the Child Maintenance Service does not have jurisdiction, for example if the parent is earning over £3,000 a week. The courts have the power to order top-up payments there, but when it comes to the transfer or settlement of property, most of the case law has involved very wealthy fathers settling property for the benefit of the minority of the child. It simply does not provide a flexible or adequate solution for the vast majority of cohabiting couples and their children.

Q9 **Theo Clarke:** In your view, how could the law better account for the financial costs facing primary caregivers following the separation of cohabiting parents?

Professor Probert: There is the possibility of a carer's allowance under the Children Act, so there can be an element included for the costs that they incur in running a household that includes a child, so running costs of running a car that will be needed just for day-to-day life. The biggest change would be more flexible powers for the property orders.

Q10 **Anne McLaughlin:** Good afternoon, panel, and thank you so much for your time today. My first question is for Rebecca. I represent a Glasgow constituency. We have slightly different laws in Scotland, but, like England, we have a growing number of people choosing to cohabit. That means that there will be an increase in cohabiting relationships ending with the death of a partner. What are the implications of this for cohabitants under existing inheritance law?

Professor Probert: Under the current intestacy laws, cohabitants are simply not recognised at all. The only possibility would be where the deceased leaves none of the relatives laid down under the intestacy laws and there is the possibility of a discretionary grant being made to them.

However, cohabitants do have the right to claim provision under the Inheritance (Provision for Family and Dependants) Act 1975. There are two ways in which they can do so. First of all, they can show that they are a cohabitant. To do that, they have to show that they have been living with the deceased in the same household immediately before the death of the deceased and for at least two years before that date, living as the husband, wife or civil partner of the deceased.

There are a number of conditions that need to be satisfied there, and a lot of the case law has had to deal with situations where there might have been a temporary separation before the death but where there had been a very long-term relationship leading up to that. A cohabitant who does not satisfy that definition, or in particular the two-year qualifying period, can claim as a dependant, but that requires them to show that the other partner was making a significant contribution to their needs during the relationship. Once they have met that eligibility criteria to apply, they then have to show that the disposition of the deceased's estate, either affected by his will or her will—

Chair: Rebecca, we have a Division bell here, so I will have to suspend the meeting for a period of 15 minutes. Thank you.

Sitting suspended for a Division in the House.

On resuming—

Q11 **Chair:** We are back after the Division. Rebecca was answering the question. Did you finish your answer? Is there anything you would like to add?

Professor Probert: I had not quite finished, so I will just round off. After establishing that they are eligible to apply, they have to show that the division of the deceased's estate affected by the will or the law relating to intestacy is not such as to make reasonable financial provision for them. What is deemed reasonable is judged by reference to age, length of relationship and any contributions made to the welfare of the family. This is one context in which contributions to welfare are taken into account and valued, whereas, as Gillian said, they are not taken into account and valued in the same way when they split up during their lifetime.

The courts have been relatively generous to the surviving cohabitant in this particular context, but it is still a remedy that depends on an application being made to court rather than the automatic rights that arise from intestacy.

Q12 **Kate Osborne:** My question is to Anne, please. In terms of financial consequences with the current inheritance tax regime for surviving cohabitants, should cohabitants be exempt from inheritance tax?

Professor Barlow: I think they should, certainly with regard to the family home, because it does cause, again, terrific practical problems when somebody dies. If the property is jointly owned as joint tenants,

then the right of survivorship applies, so in that case the deceased partner's share would automatically be transferred by law to the survivor, but inheritance tax becomes payable on that, and that might be 50-50. There would be an assumption of 50-50 ownership. Sorry, I am not being very clear.

If they are tenants in common, as it is called, they may own it 40-60, say, 20-80 or whatever they have agreed, and then if the 80% share is being transferred to the 20% owner, they will have to pay inheritance tax on the value of the 80% share, which probably will just be absolutely impossible for them to do. They may have children or other dependants that mean that the property has to be sold and they end up homeless. That is the worst-case scenario: that they really cannot afford to pay it.

There are some provisions where you can pay by instalments, but essentially, if you do not have the ability to pay for various reasons, typically because you have caring responsibilities or maybe you are retired or whatever—there could be a number of reasons your means are limited—that does not really help you very much and you have to sell the property. Then, essentially, if you only have that 20% less the tax, you may not be able to rehouse yourself, depending on where you live and what the value of property is in your area.

Q13 **Kate Osborne:** What disparities exist between bereavement benefit provision for married or civil-partnered couples and cohabitants? That is to Rebecca, please.

Professor Probert: This is something that has been the subject of recent litigation. The Supreme Court in *McLaughlin* held that the current law violated the European Convention on Human Rights in not extending widowed parent's allowance to a cohabitant. The High Court in the more recent *Jackson* case held that, similarly, the limitation of the higher rate payable in the case of a person who is pregnant or entitled to child benefit to a surviving spouse or civil partner was equally a violation of the convention.

I understand that that is now being addressed by the Bereavement Benefits (Remedial) Order 2021, but the order that I have seen does not have a definition of "cohabitant", so it is a little difficult to determine what its effect is going to be. It also has a questionable assumption about the appropriate allocation of benefits where there is potentially more than one claimant.

Q14 **Kate Osborne:** How would the law ensure that everyone is treated fairly in cases where there are multiple claimants from previous relationships? How would that work?

Professor Probert: The question is whether we are talking about multiple claimants from successive relationships or multiple claimants where those relationships are overlapping. You can probably legitimately prioritise the relationship that a person is in at the time of their death if

other relationships have ceased to exist as a matter of fact, but if you have somebody who is dividing their time between different households, sometimes potentially unknown to the individuals in those different households, that becomes more complicated and less fair to decide that just one of them should benefit.

Q15 **Kate Osborne:** The other side of that might be if people are inheriting debt. How far are married couples and civil partners protected from inheriting certain types of debt from their partner? Rebecca, I will give you a break and let Gillian come in, please.

Professor Douglas: In relation to debt, that will have to be deducted from the estate in order to arrive at a net value. This is not an area of specialism for me, so you would probably be better talking to practitioners about that, but I assume that any debt will simply reduce the size of the net estate. I am going to pass the buck to Anne and see if Anne can add anything from her experience.

Professor Barlow: If it is a joint debt, then you are typically jointly and severally liable for that, so it would transfer to become the sole liability of that one person, but otherwise, yes, a debt that belonged to a deceased partner, say, if we are talking about that context, would reduce the estate by the amount of the extent of the debt. Do you mean on death?

Kate Osborne: Yes, on death.

Professor Barlow: Yes, on death.

Q16 **Kate Osborne:** If you are able to answer this, Anne, would any issues arise in relation to debt if cohabitants also became entitled under the intestacy rules?

Professor Barlow: Gillian, you might be better off.

Professor Douglas: It would not make a difference, as far as I would imagine. It is as you have already described, Anne: that intestacy transfers the estate to whoever is the designated beneficiary or beneficiaries. As you say, if anything was joint, it would already have been transferred, as it were, prior to the estate being distributed. What is left is simply deducted. That would be my expectation.

Q17 **Kim Johnson:** Good afternoon, panel. I have two questions for Rebecca on disadvantaged groups. Southall Black Sisters have raised current failures to protect black women, who are disproportionately forced or coerced into religious-only marriages, which make them dependent on discriminatory and often misogynistic religious arbitration forums in the event of a marriage breakdown. This can expose them to risk of serious and escalating abuse. You mentioned earlier that you are working with the Law Commission on the wedding project. How would proposed changes to wedding law improve the status of people in legally unrecognised marriages? Is the type of reform being consulted on in this area sufficient?

Professor Probert: The Law Commission published its consultation paper with provisional proposals for reform last September and received a very large number of consultation responses to that, which were subsequently analysed. In terms of how its proposals would affect the kinds of ceremonies that are currently classified as non-qualifying, there are a number of different elements to it.

The first is simply making it easier to have a legal wedding and harder to fob somebody off with a religious-only wedding. If I could bring in here the research that I have been doing with Dr Akhtar into couples who have had non-legally binding ceremonies, the legal barriers were a key factor for them. Often the religious wedding was taking place quite quickly and it was not practicable to get an appointment to give notice, then have the 28-day notice period and then have a wedding that was both legally and religiously recognised. Many couples would simply have the religious wedding and then the assumption would be that they would have the legal wedding at some point. In some cases, that followed in a few months. In other cases, there was a real sense of drift and that this was something that they were not going to get round to.

One strategy is to make it easier to get legally married and to give couples a sense that the ceremony that the law recognises is the religious ceremony and that they are not being required to have a civil ceremony, which is a real perception at the moment.

The second strategy of the Law Commission's approach is how ceremonies are classified if they do not comply entirely with the requirements of the law. It is not the case under the current law that, if you do not comply with every single requirement of the Marriage Act 1949, your marriage is not recognised. There are three possible outcomes: it could be valid, because the particular formality that you have not complied with is not one that is essential to validity; it could be void where, basically, you have married within the structure of the Marriage Act, but you have knowingly and wilfully failed to comply with a particular specified requirement; or it could be non-qualifying, if the ceremony was entirely outside the framework of the 1949 Act.

The commission's proposals try to move some of the ceremonies that would currently be classified as non-qualifying into the category of at least void, and possibly valid. The reason why a void marriage is a good thing in this particular context is that, when the court makes a decree of nullity, it has exactly the same powers to reallocate assets between the parties as it does when granting a decree of divorce.

These are the provisional proposals. Under the commission's proposals, a marriage would be void if either party had failed to give notice, if the authority to marry had expired, or if either or both knew that the officiant marrying them was not authorised to do so. Essentially, it is trying to protect, as far as possible, those who are genuinely believing that they have gone through a ceremony that would be legally recognised. If you

have given notice and it then turns out that the person who married you was not authorised to do so, you would be validly married in the eyes of the law. That was a long and complicated answer.

Q18 **Kim Johnson:** From your point of view, how big a problem is it is at the moment, in terms of some of these types of marriages?

Professor Probert: That is a very good question. In the Nuffield study, we found a real variety of reasons for having a religious-only marriage. We only found one of our interviewees who was not aware at the time they entered into the nikah that this would not be legally recognised. Everybody else was aware that it did not have the same legal status as a marriage entered into in accordance with the Marriage Act 1949. They described themselves as married, but that was because that was what was meaningful to them. They were very clear that this was not a legal marriage.

Q19 **Kim Johnson:** Who is likely to be disadvantaged by changes to cohabitation? We know that older people choose to cohabit because they want to retain their assets. Are there other groups from your point of view?

Professor Probert: Every time you change the law, there are going to be some people who benefit and some people who do not. The question is where responsibilities should lie at the end of a relationship. If, at the moment, we think that people do not have the remedies that they should have when a relationship comes to an end, that has to be addressed by imposing certain responsibilities on the other partner. I am not sure I would phrase that as somebody being disadvantaged by any potential reform so much as just redressing existing disadvantages.

Q20 **Elliot Colburn:** Thank you, panel. I would like to move on to talking about approaches to reforming the law. Gillian, I will start with you by asking a very broad and open-ended question. What is the simplest and fairest way to reform the law on cohabitation in England and Wales?

Professor Douglas: It is not a simple and straightforward answer, I am afraid, because it depends what you want to achieve. Do you want to achieve a reform that covers every aspect of cohabitation, so, in effect, almost creating a new status of cohabitation, which would have a recognised meaning and understanding wherever it would be relevant, across the board? Do you want to go for piecemeal reform, which addresses particular issues, such as the intestacy question or the separated cohabitants' property question?

There are different ways of dealing with this problem. Simplicity would tend to go with piecemeal reform. You pick off things that are the most pressing first and then you can stand back and see where you get to. That is one thing.

The other side of this is to decide what you are trying to achieve with reform. Do you want to achieve a situation where, in effect, you treat

cohabitation and marriage as exactly the same? Anne has written extensively about functional approaches to relationships and she may have more to say on this. If you say, "In effect, there is far more that marriage and cohabitation have in common than the differences between them and therefore you may as well equate them", that will lead you to one kind of reform. If you want to distinguish between marriage and cohabitation, you will get a different set of reforms. Does that make sense?

Elliot Colburn: It does.

Professor Douglas: To me, those are two prior questions of policy that need to be addressed. Once you have done that, it may become a bit more straightforward. If I give my own view, for me, the two biggest issues that need redress are the position of cohabiting couples when their relationship breaks down and the position on death.

The simplest way of addressing the first of those would be to amend the current regime that applies on divorce, which is the Matrimonial Causes Act 1973, to include cohabitants within the jurisdiction of that regime. You would still need a definition of cohabitants. Anne has touched on the complexity that can arise there, but you could do that.

I can say a bit more if you want me to, perhaps later, about whether it might make sense, while embracing cohabitants within that divorce regime, to still distinguish them in some ways from married couples. For example, if you look at the Law Commission's proposals, they would have required living together for a certain period of time before you could take advantage of the jurisdiction. You would need rules like that, but that would be the simplest.

Similarly with intestacy, the Law Commission recommended including cohabitants within the intestacy rules. It has a draft Bill attached to its report that would enable that to be done. That is in terms of the simplest ways forward for addressing those two problems.

Q21 **Elliot Colburn:** That segues me quite nicely to Rebecca. Why do you think that successive UK Governments have not implemented the 2007 recommendations from the Law Commission?

Professor Probert: There are two answers to that. My view is that the 2007 proposed reforms, while they have a lot of merit, are a slightly complicated way of dealing with the issue.

The second answer is essentially the lack of political will to do it, because of the opposition that proposed reforms attract. This is one of the rare issues that perhaps unites the *Daily Mail* and the *Guardian*, which both seem to oppose reforms to cohabitation—the *Daily Mail* because it sees it as undermining marriage and the *Guardian* because it sees it as undermining the autonomy to cohabit without rights. We see both of those perspectives coming through in the papers. It is quite

understandable why Governments might just think, "We do not want to touch this if it is not going to be sufficiently popular with voters". I do not think that is a good reason for not reforming it when reform is needed, but I can understand why those considerations might apply.

Q22 **Elliot Colburn:** You mentioned the complexity of the 2007 proposals. What aspects of those recommendations would you see as needing revising or updating?

Professor Probert: The Law Commission scheme had three levels of criteria. It had a definition of cohabitation. It then had eligibility requirements, so you could be a cohabitant but not be eligible to apply under its proposed scheme. Then it had grounds for relief, so you could be an eligible cohabitant who was not able to satisfy the grounds for relief.

There were two grounds for relief. One was that the other partner had retained a benefit as a result of contributions that you had made. However, that was very narrowly defined and the types of contributions that would be taken into account were essentially those that Gillian had already described in relation to property law. They would be financial contributions or paying bills if the person paying the mortgage could not otherwise have afforded to do so.

The second ground for relief was economic disadvantage, which was trying to look to the future and redress the unequal consequences of the relationship where one had made sacrifices for the other. Even once a claimant had been able to show that the other had retained a benefit or they had suffered an economic disadvantage, there was then a separate quantification of the appropriate relief, which had to be carried out by reference to what was reasonable and practicable, having regard to a list of discretionary factors. The basic principle was that a retained benefit was to be reversed and economic disadvantage was to be shared, in line with this list of discretionary factors.

It was quite a complicated system and you could quite easily at least get rid of the intermediate eligibility requirements. It seems to me that, if you have grounds for relief, it should not actually matter if you have not satisfied a particular time period. There should possibly also be simplification of the way that it is quantified.

Q23 **Elliot Colburn:** If I can go back to the question of opposition to changes, Anne, I will come to you. How do you feel about extending legal protections to cohabitants in terms of the effects on the institution of marriage?

Professor Barlow: The number of marriages has been declining year on year for a very long period of time, and we have not actually changed the law. I do not really see that a reform would undermine marriage in a situation where marriage is actually already socially undermined, if you like. The way we have decided to partner and parent has changed over

time. People live together. Before, there was a very set thing that you did. You got engaged, you got married, then you had children. That is not how relationships work anymore. They are more fluid and people live together for a period of time, often because they want to have a big wedding and they really value marriage in other ways. Meanwhile, they want to live together. There is no social stigma attached to that. They operate as if they were married or civil partnered in terms of the way they see their relationship, so they are functionally similar.

That does not mean they are not committed to each other during that period or in need of some form of remedy to redress the balance if the relationship breaks down, particularly where there has been a disparity between the non-financial and financial contributions to the relationship. That would typically come if there are children. You have to make a decision about whether you are both going to work full-time, in which case you might share everything equally, but that is not that common.

Even a quite recent British Social Attitudes survey, published in 2019, shows that people do not see that as the best way to organise family life. They expect one parent, and typically the mother, to do more of the domestic work and childcare.

To come back to your original question, I do not think it would undermine marriage, because marriage is still valued. It is put on a pedestal in the way that people have to build up to it now because it has become this sort of idealised institution. Before, you had to just get married and make the best of it. If it went wrong, there were remedies. Now, if it goes wrong in the short term, while you are still cohabiting, there are no remedies. You would quite likely, if there were children certainly, have suffered the same sorts of disadvantage to that inequality of contributions and your disconnect with the labour market as a result of your relationship—what we call relationship-generated disadvantage in legal speak.

I do not think it will undermine marriage, because marriage is still valued. In fact, it is so much valued that people are delaying doing it until they are older. We need to take account of the realities that people decide to partner and parent in the way that we redress relationship-generated disadvantage now.

Q24 **Elliot Colburn:** Gillian, I will address one of the other opposition arguments to this to you to get your response. There is this argument that cohabitation laws would impose legal obligations on couples who have chosen not to formalise their relationship. What would your response to that be?

Professor Douglas: Yes, they would, in that they would be changing the current law. We have already had expressed the view that this depends on the view you take of what you are trying to achieve. Do you want to encourage people to take responsibility for each other, to care for each other and to recognise that, when relationships come to an end, people

end up in different places and have different opportunities to move on from those relationships?

It seems to me that, at the moment, when we talk about autonomy and the wish to not have those strings attached, we are normally talking about the economically more powerful party in the relationship who does not want this. If I go back to the study that we did, we found that nearly half of our cases involved couples where one party wanted to get married but they could not persuade the other. It is a bit like the non-qualifying marriages that may be a feature of the Muslim community, where one spouse cannot persuade the other to go through the civil legal ceremony or the civil requirements.

We have reached the point where family law should be about recognising care, the obligations that flow from care and interdependence. I do not believe there is any relationship where one party takes all the benefits and the other has all the disadvantages. There is always a mix and those should be shared when the relationship comes to an end. I just do not accept that you can argue that someone who is probably quite a powerful person in the relationship is being done down, if it comes to the end of that relationship, if they are asked to make a contribution to enable their ex to move on.

Q25 **Elliot Colburn:** Anne, did you want to pick up on that point?

Professor Barlow: I wanted to add to that around the autonomy argument. In terms of suggesting that rights could be extended, it would be important to offer couples the ability to opt out of those rights and remedies if they both agreed to do that. That would preserve autonomy, if that is what we want to do, in a way that makes sure that both parties understand the situation.

At the moment there are what we called uneven couples in our research, where there is perhaps a mismatch of knowledge or financial power, or perhaps there is abuse. Those uneven couples will not agree, typically, to marry or to enter agreement or sort things out in a rational way. It is important the law provides at least a safety net of protection to avoid that sort of exploitation, in a presumptive way. If you have that type of relationship, we know it is likely to generate relationship-generated disadvantage, so therefore the law takes steps to protect those economically weaker partners, typically.

On the other hand, if people are sure—maybe an older couple where they both have children from previous relationships—that they do not want that sort of legal obligation imposed on them, they should be able to opt out, providing they get legal advice. That would be absolutely fine and people in that situation are often better able to pay for advice and know then what they are contracting to do. At the moment, it is the other way round. It is the people who know least who are most exposed to exploitation within relationships, which gives a perverse incentive not to marry or civil partner, to avoid those sorts of financial obligations

resulting when relationships break down due to mismatch in the caring responsibilities that have been undertaken, as Gillian has just described. You can address that autonomy argument in that way.

Q26 **Kate Osborne:** I wanted to carry on from the point you are making there. Surely, if there is an opt-out agreement, does that not cause the same problems that you have in relationships where one partner will not get married because maybe they are the partner who is most financially stable or in control of the situation. Does that not just take things back to where they were?

Professor Barlow: It would be a different group of people. People who are wealthier tend to be better able to take advice, to be informed about legal situations, perhaps act in a more legally rational way. At the moment, we are protecting those who have all the wealth, and the other person is not in a position to know that is what is happening or that is what the law does until the end of the relationship, when things go wrong, at which point it is too late for them to redress it.

Obviously, you would need to let people know. You could perhaps have a period of time before those types of rights came into force to give people some opportunity to adjust and to be advised. That way round would protect the most economically vulnerable within our community. That is a policy decision, whether we want to do that. Those were the people that currently would be thrown on to benefit dependency. If you do it the other way round, the partner would have obligations to support them and those sorts of things.

Obviously, we would need to inform people, but I think that the group you would be talking to would be more responsive to taking the right steps than in the current situation, where you have this common-law marriage myth that, in a sense, is preventing people from acting in that legally rational way.

Q27 **Kate Osborne:** I am struggling to understand that, particularly around vulnerable groups, if their partner will not agree to enter into a legal agreement like a marriage, would they agree to enter into this kind of agreement, where they may be more financially liable?

Professor Barlow: It would be the other way around.

Professor Probert: I wanted to come in on the question of what you are actually able to opt out of. This is an issue with pre-nuptial agreements under the current law: that you can opt out of sharing, but you cannot opt out of meeting your former spouse's needs or compensating them for relationship-based disadvantage. An opt-out does not necessarily have to be an entire opt-out, even if the terms of the agreement attempt to leave one partner with nothing.

It also goes back to the question of what the scheme is in the first place. If you do not go down the route that Gillian suggested of equating cohabitants and spouses but have something that is much more tailored

to redressing specific disadvantage, it is very difficult to justify an opt-out in that situation, if you are saying that, even though this disadvantage has been suffered, you are able to say that that loss will simply lie where it falls.

Q28 **Chair:** Can I ask a follow-up question? This is probably for either Rebecca or Anne, or possibly both. We talked a bit about marriages that are not legally recognised. Do the current arrangements particularly disadvantage specific groups with protected characteristics? Are they more likely to disadvantage women? Are they more likely to disadvantage people from some ethnic minorities or LGBT people?

Professor Probert: It is clear that the current law is more likely to disadvantage women than men. That is due to a number of reasons. There are continuing disparities in employment. Women, particularly women with young children, are more likely to be in part-time employment than men. There remains a gender pay gap in earnings. Those factors reduce their ability to make the types of contributions to the property that property law values. There have been a number of recent cases where, even though the female partner was working and making a contribution, that financial contribution was deemed too small to count for property—*[Inaudible]*—to make the mortgage payments without her contribution, so yes to women.

In terms of particular religious groups that might be affected, our Nuffield study spoke to 81 individuals who had had a non-legally binding wedding, sometimes as part of a process of getting married, and there seemed to be a clear difference between those of Muslim faith and those of other faiths. The pure, religious-only marriage was far more likely to be a Muslim nikah than any other type of religious marriage.

Q29 **Chair:** Anne, was there anything you wanted to add to that?

Professor Barlow: No, I do not think so, other than to indicate that the current law relating to civil partners and married couples on dissolution or divorce is the same. If there is relationship-generated disadvantage, if you are married or civil partnered, on a relationship breakdown, that is treated in the same way.

It means that, if you are a primary carer within one of those situations and you are then a cohabitant in the more difficult situation we have described, you would be similarly discriminated against to a different-sex couple who divided the childcare and breadwinning in that way. The way the law is currently constructed affects all communities. It disadvantages those who undertake the caring responsibilities and make the non-financial contributions, whatever the nature of those relationships.

Q30 **Elliot Colburn:** I had some questions about opt-out, which I think we have covered. Instead, I would like to ask about the difficulties in the legal definition of cohabitation. Anne, I will start with you here. Perhaps a simple question to open: if we adopted a legal definition of a cohabitant,

what should this be?

Professor Barlow: It depends whether we are having a universal status definition of what a cohabitation relationship is and what a cohabitant is, or whether you are defining it so that it attracts particular legal rights. As far as legal rights go, I think living in the same household is where a lot of the disadvantage can come. You tend to, over time anyway, pool your resources. The individuality of your financial arrangements tends to drift over time away from that very strong individual nature of financial contributions. I would certainly have living in the same household.

I would not like to tie it to marriage or civil partnership. Living as a couple in the same household would probably be the definition that I would be looking at. In order to attract legal rights, I would certainly want any couple with children of that relationship to fall within a qualifying cohabitation relationship that is then given those rights akin to marriage, or however it is decided.

Where there are no children, it is more difficult. As far as couples with children go, I would like to see the sort of regime that Gillian has just described, where you have it akin to marriage. That then leaves what you should do with cohabitants who do not have children. There, a test of financial advantage or disadvantage would be better. A qualification period would probably be a good way to go—three years to give people a bit of leeway to sort out whether the relationship is one that should or should not attract rights and give people a chance to opt out if there is going to be a presumptive scheme.

I would also, in exceptional circumstances, like people to have the ability to apply if they have suffered financial advantage or disadvantage within the first three years. Certainly the Scottish law is set up on that basis. I acknowledge that that can happen straightaway. It is less common, but, if you give up your secure council tenancy and move into your partner's owner-occupied home, you can straightaway lose your ability to house yourself, because you are making yourself intentionally homeless if it all goes wrong, essentially. That is very difficult.

I would see it in that way that you would want to distinguish between different types of cohabitants. Very clearly, I would want to include those with children and have them on the same basis as marriage. Once you have children, I see very little difference in the way that relationship-generated disadvantage actually pans out for a couple.

Q31 **Elliot Colburn:** You mentioned the requirement for a child or a minimum duration period as potential eligibility criteria. You spoke about the benefits of that. Are there any drawbacks that you can see in using either of those as part of any eligibility criteria?

Professor Barlow: With a child, I do not. I really do not see that there is any difference. You are immediately exposing yourself to the sorts of differences that we have already discussed that relationships just

exaggerate financially, in terms of your caring responsibilities not typically being shared equally.

The disadvantage of putting a time limit is that there will be people who suffer disadvantage within those early years, who potentially would be left without a remedy. In some jurisdictions, the court has jurisdiction to include you in a group, even though you are not formally qualified, in exceptional circumstances. I was thinking perhaps that might be a solution, or just to have a financial advantage/disadvantage test for everybody, as Scotland does, where there are not children.

It is different where there are children, or indeed other caring responsibilities. That is where it gets difficult. If you look after your partner's elderly parents for a number of years and have not exploited your own labour market potential, you are left in the same situation as if you had looked after children, very often.

Gillian has written about this. The obligations that one feels echo within cohabitational relationships, in that they mimic marriage in that functional way. You feel morally obliged, even though you are not in any way legally obliged, to take on those roles and responsibilities. You can then suffer disadvantage in that way that perhaps the other partner should be held accountable for redressing.

Q32 **Elliot Colburn:** In terms of disagreements, how could a legal definition of cohabitation prevent cohabitants contesting the nature of their relationship—for example, the date that a relationship began, or whether it was purely sexual and/or romantic in nature? Would a definition be prohibitive in those circumstances, or would it actually help?

Professor Barlow: If you have a joint household, that is something that you can normally prove in some way or another, be that utility bills, address for your bank, library membership or whatever, if there are still libraries to join locally or whatever. I do not think it is beyond the realms of possibility. I do not think that is too difficult to prove. In other jurisdictions, I do not see vast amounts of litigation over that.

There might be the odd situation, but in the vast majority of cases it would be fairly easy to prove conclusively when cohabitation began. Yes, it could be a problem in theory, but I do not see it as a practical problem that should stand in the way of reform, personally. I do not know what others think.

Q33 **Elliot Colburn:** I was going to come on to Rebecca on this. Do you envisage any unintended consequences as a result of a legal definition of cohabitation, so certain relationships or certain categories of people being excluded from that definition, for example.

Professor Probert: It is difficult, because people will sometimes behave strategically. There is a case under the Inheritance (Provision for Family and Dependants) Act where the deceased believed that, after two years,

he would be in a common-law marriage and so he asked his partner to move out, so he would not be liable for her.

There is evidence for New Zealand of similar cliff-edge endings of relationships. They were coming up to I think it was the three years that would qualify them to be treated in the same way as spouses, and a number of relationships were breaking up at that point, as people had to make the decisions of whether they wanted to carry on with something that would potentially impose certain responsibilities on them.

Like Anne said, that is not an insuperable problem, because you hope that not everybody is going to behave in that way and you can mitigate it by allowing claims where that time period has not been satisfied. As I said, the eligibility criteria were a problem with the Law Commission's scheme, which otherwise has quite a lot to commend it. If you can show a particular ground for relief, the time period itself should not matter. The time period matters much more if you are qualifying to be treated in exactly the same way as a spouse, where that might not be appropriate the day after you have moved in together.

Q34 **Chair:** Do any of the witnesses have anything that you would like to contribute that you feel you have not been asked about this afternoon?

Professor Douglas: It is just to reiterate a point I made in my written evidence. Whatever scheme is arrived at, assuming that reform were to take place, it has to take account of the fact that most people cannot get legal aid for family disputes anymore and most people do not have the money to pay lawyers' fees. Whatever scheme is arrived at has to be simple enough for couples to understand and to be able to work with.

Going back to the study that we did, we found that, where couples were not arguing over ownership but arguing over the practicalities, it was easier for them to mediate and to negotiate. I would be looking for a scheme that focuses on the practicalities of how the parties are to separate themselves and look after themselves and their children for the future, in terms that they can understand and negotiate over in a mediation setting, if necessary.

I am afraid I have considerable reservations about using a Law Commission-type scheme, which is full of difficult concepts and complexities that would be very hard for laypeople to get their heads round. I would be very cautious about even a modified Law Commission scheme, without being very clear about how it would work for couples who are not engaging legal assistance.

Q35 **Chair:** Can I ask one follow-up question? There was the Law Commission review of 2007. Did any of you have any comment you would like to make on how patterns of relationships have changed in the intervening 14 years? I am conscious that that is now a very long time ago. Is there a case in itself for that to be updated?

Professor Douglas: I do not have the evidence but I think that since that time the length of cohabitation will have grown. I think the fastest growing groups of cohabitants are among the most elderly in the population. Therefore, what might 15 or 20 years ago have been thought of as a short-term or reasonably short-term interlude before people move into marriage is changing. If the research were done, I think we would see that cohabitation is lasting longer than a few years ago.

Professor Barlow: The common-law marriage myth research question was repeated in the 2019 British Social Attitudes survey. While it was showing a small decrease in the number of people believing in common-law marriage, it is still there. It is still very embedded in society, even though we had the Living Together Campaign that sought to advise people. There has been publicity around the Law Commission's proposals and lots of things in the press from time to time.

While the percentage of younger people is lower, the number who do not know what their rights are is quite large in that younger age group. It depends how that pans out over time as to whether they become more legally rational and do what they need to do to safeguard their position, or not, or at least discuss it, or whether they drift, as the slightly older age groups who have children do, into believing they have the same rights as if they were married because that is now socially acceptable. That is one point.

I also read something just recently that has not yet been published, but it was research by a psychologist about the way people share money in relationships. That seemed to indicate that partial pooling is very common and it is equally common in marriage and cohabiting relationships. There is not this great distinction between the way people pool or do not pool money as had been shown in research a very long time ago. That has been decreasing and, in fact, married couples keep some of their finances separate anyway, and cohabitants mirror that quite commonly still. That might be another issue to take into account.

Professor Probert: The only thing I was going to add is that a lot of myths about marriage need to be addressed. I was looking at an article dispelling the common-law marriage myth in a newspaper and it said correctly that common-law marriage did not exist, but if you were married everything was shared 50/50 from day one. You can quite understand why people might be wary of marrying if they think that all their assets immediately go into a pot to be shared.

Chair: Can I thank our witnesses for their contributions this afternoon? If there is anything you wanted to add in writing that you feel we have not covered, please feel free to do so. That brings this afternoon's meeting to a close.