HOUSE OF COMMONS

Women and Equalities Committee

Oral evidence: The rights of cohabiting partners, HC 130

Wednesday 1 December 2021

Ordered by the House of Commons to be published on 1 December 2021.

Watch the meeting

Members present: Caroline Nokes (Chair); Alex Davies-Jones; Jackie Doyle-Price; Kim Johnson; Bell Ribeiro-Addy.

Questions 75 - 102

Witnesses

I: Elizabeth Darlington, Barrister at Parkland Plowden Chambers and member of the Family Law Bar Association, and Michael Horton QC, Queen's Counsel at Coram Chambers and member of the Family Law Bar Association.

II: Harry Benson, Research Director at Marriage Foundation, and Baroness Ruth Deech.

Written evidence from witnesses:

The Family Law Bar Association

Marriage Foundation

Examination of witnesses

Witnesses: Elizabeth Darlington and Michael Horton QC.

Q75 **Chair:** Good afternoon and welcome to this afternoon's session of the Women and Equalities Committee and our inquiry into the rights of cohabiting partners. I welcome both of our witnesses for the first panel this afternoon, Elizabeth Darlington and Michael Horton.

I am going to start straightaway with some questions. Can I turn to you first, Elizabeth? Do you think that within the current system, without having reform of the law around cohabitation, there are remedies that could be put in place for both litigants and practitioners to make the current situation fairer?

Elizabeth Darlington: By way of introduction, I am a barrister at Parkland Plowden Chambers in Leeds and 1GC Family Law in London. I

have written a number of practitioner texts on cohabitation and I am a member of the National Committee of the Family Law Bar Association.

As the Committee is no doubt aware, the current position is that legal remedies are often difficult for cohabiting couples because they fall predominantly within property law. One of the main difficulties is when there are children where there might be a potential claim under schedule 1 of the Children Act. Predominantly, claims are brought in the business and property courts because they are claims based on property law. Claims when there are children are brought under schedule 1 in the family court. At the moment, they are quite distinct, and I think it is important for the Committee to appreciate just how distinct these two jurisdictions are.

On remedies and how the current situation might be altered, because of the history and the weight of the case law that has built up behind the case law in what was the Chancery jurisdiction, now the business and property courts, it is difficult to see how much further that could go. In my view, the courts are doing what they can to stretch things as far as possible. You have no doubt heard about cases such as Stack v. Dowden in which, within the confines of property law, judges are pushing property law to try to do whatever can be done in dealing with cohabitants, but it is necessarily limited by the current structure.

Schedule 1 applications where there are children are brought for the benefit of the child, and at the moment, technically under that legislation there can be a transfer of property for the benefit of the child but case law tells us that that is only in exceptional circumstances. In the case of DN v. UD an order for a transfer was made. Mr Justice Williams made that order and that is pushing the law slightly further in the direction of a broader interpretation of what might be exceptional circumstances, but that decision is under appeal. One way might be to extend that so there can be a transfer of property for children. Another option with schedule 1, and in particular with children, might be to give the courts greater jurisdiction on maintenance for children. At the moment, the courts only have jurisdiction where the income of the paying party is over £156,000 gross per annum. To give the courts jurisdiction might be an option, although at the moment of course that is governed purely by the Child Maintenance Service so there would be some issues to sort out around that. Giving the courts the ability to look at maintenance for children could be another option.

One of the main areas in which I and the FLBA think that there could be an almost immediate improvement to the current situation—because at the moment we have these two distinct jurisdictions which often come up against each other—

Q76 **Chair:** Do they often conflict with each other?

Elizabeth Darlington: Yes. That can be the issue. If you issue a claim under the Trusts of Land and Appointment of Trustees Act for a property, property owned either by one party or jointly, in the county court or

business and property court, and then you have a schedule 1 application, for example where there is a child, in the family court, you can have this competing jurisdictional issue about which court it should be heard in. All that serves ultimately to increase costs and complexity.

The view of the FLBA is that a relatively simple thing would be to give the family court jurisdiction to hear claims under the Trusts of Land and Appointment of Trustees Act because, at the moment, it simply does not have that jurisdiction. This causes problems, particularly in London, because the central family court cannot deal with TOLATA claims. Where there is also schedule 1 application those claims are transferred to outlying courts or up to a High Court judge who has the jurisdiction. This is not a difficulty I have in Leeds, where there are district judges who can sit under both hats so it is not so much of a problem there.

Q77 **Chair:** Michael, do you have anything to add to that?

Michael Horton: Yes. In 2007, the Law Commission suggested that the family courts have the power to make orders for childcare costs. At the moment, the Child Maintenance Service will deal with general child maintenance unless the non-resident parent is earning more than £3,000 a week. Unless they are in that top-up case, the only thing the court can do by way of payments, regular maintenance orders, is for school fees or if there is a disabled child and the court is dealing with expenses connected with the child's disability. It might be said that there is not much difference in principle between requiring a non-resident parent to pay something towards school fees and paying for childcare costs. The Law Commission proposed this is 2007. It would require an amendment to schedule 1 of the Child Support Act but that would go ahead.

I agree with Elizabeth Darlington that there are ways of making sure that the two competing claims can be dealt with in one court, and it is usually a case of a judge wearing two hats. The judge would be a judge of the county court in the TOLATA claim, a judge of the family court in the schedule 1 claim, and in most places outside London that is in the one building before the one judge and does not cause a problem. There are other ways of giving judges in London that power, and there are statutory instruments that can be done without even amending primary legislation. I was on the Family Procedure Rule Committee for six years and suggested something along those lines but it did not go anywhere.

Chair: Why?

Michael Horton: The Family Procedure Rule Committee always has too much to do and not enough time.

Q78 **Chair:** Okay. Thank you for that. Talking about the Law Commission's 2007 recommendations, we heard from Professor Anne Barlow that cohabitants with children should be treated as if they were married. Does that solve the problem?

Michael Horton: I have read her written and oral evidence. It is part of a broader question and if you don't mind, I can deal with that.

What should the response be? There is the "do nothing" approach, which seems to be the Government's response since the Law Commission's recommendations, but not many people think that is satisfactory. Primarily that is because Elizabeth and I and other family lawyers see people like Mrs Burns in that 1984 case who have been with their partner for many years and have had children who, at the end of the relationship, because their name is not on the title, get nothing. We compare that with someone who had got married along the way and say what is the justification for that different outcome? When was the sliding-doors moment that meant that they did not get married as opposed to getting married? because obviously if they had got married, they would not just be trying to establish a share in the house. That would be taken for granted. They would be looking at what rights they had to future support and sharing pensions that the married comparator would get.

Another thing that is unfashionable, but I will just mention it, is an opt-in system. Most commentators say that it does not protect the people who most need protection but there are some advantages. It seems to me that if a Government are allergic to, or apprehensive about, bringing in an opt-out system, an opt-in system respects people's autonomy, would be brought in with a great deal of fanfare, and would be a way of dispelling the myth of common law marriage. It would be an experiment and I suspect it would be an experiment that would not protect the likes of Mrs Burns because people in those situations would still not opt in.

Family law has often seemed to be saying that family law is just about when things go wrong, and we are there to clear up the mess when relationships break down, whereas an opt-in system could give people rights during their relationship, the right to be recognised by hospitals and other institutions. Lisa Ray was talking about the difficulties that cohabiting partners get in just proving that they are cohabiting to get survivors' benefits under various pension schemes. Opting in to a system would be a way of saying they were a registered partnership, "I don't need to produce my mobile phone bills and bank statements. There is the official bit of paper that does it." However, I think that does not work.

You then have the Law Commission system or treating couples as if they were married if they have children or just treat them as if they were married, which is the full New Zealand response. Most people say the Law Commission report was a balanced report and it recognised that some people do not have a problem with just equating habitation with marriage, but from a practical perspective on treating cohabiting couples as if they were married is this notion that what the family court does in divorce is straightforward and easy to work out, but it is not.

There are two bases upon which family courts deal with assets on divorce. One is the sharing principle and one is the needs principle. Sharing assumes that a marriage is a partnership and on the dissolution of that partnership, you share the assets fairly or equally, but sharing very rarely gets a look-in because most people do not have enough to go round and so needs dominate. Needs is all about what obligations a

person has to their spouse at the end of their relationship and how long should it last.

Family lawyers do not have a clear answer to that, and it depends on who the judge is and on what they think marriage is all about. How do you transpose those principles to people who have not married? People who have not married do not owe any obligations to each other to support each other, so how do you do that? Then you come back to the only thing we have, which is the concept of relationship-generated need, which seems to be the only common consensus that exists for justifying maintenance on divorce. That is pretty much what the Law Commission is saying. The Law Commission is saying if one party retains a benefit as a result of someone's contribution, you adjust for that. If one party suffers a relationship-generated disadvantage, you adjust for that.

I fear that if you leave it to discretion there will be a generation of cohabitants who will just have to fight test cases to work out what it is that judges are supposed to do. An analogy says that the Matrimonial Causes Act gives judges no map as to where to go, but a few tools about where possibly to steer and you get the same problem if you treat cohabitants in the same way. It ducks the issue. The Law Commission's report, if you are going to introduce an opt-out system, probably is the best way of doing it. It constrains discretion; it makes it more certain. There is no legal aid and there was supposed to be legal aid, but there is no legal aid in a divorce court. People just have to make the best of what is a very uncertain process and a very difficult, not easy to predict outcome in those courts as well.

Q79 **Chair:** Thank you. Elizabeth, do you have anything to add to that?

Elizabeth Darlington: I do not want to duck the issue but it is really a policy decision. Particularly having regard to the current law and the fact that it is so bound up in traditional principles, it might be felt that to move to adopting an approach where cohabitants are treated the same as married couples would be a step too far. I agree with what Mike said about the Law Commission proposal back in 2007, which seemed extremely sensible, certainly as a framework, if legislation is introduced.

Q80 **Chair:** Do you think that there could or should be any distinction between cohabitants and cohabitants with children?

Elizabeth Darlington: That is certainly one of the areas, not where there are difficulties, but that could be reformed, because it is in that area where throughout the course of a relationship, particularly female partners—I should say not just female partners, of course, the partner with caring responsibilities—can experience the disadvantage brought about by the relationship through looking after the child.

It would certainly make sense to redress some of that unfairness that occurs at the end of particularly a long relationship where, for example, they have lived, effectively, as man and wife, they have two children, the female partner has stayed at home to look after the children and the male partner has gone out to work. At the end of that relationship, on the

basis of the law as it is at the moment, that female partner—unless she has satisfied the current approach, which is predominantly based on financial contribution to the property, not just that, but mainly—would not have anything.

Q81 **Chair:** While the answers to my questions are certainly focused around property at the moment, can I ask about the cheerful subject of death? Do you think there should be changes implemented around providing for somebody after a cohabitant dies, perhaps in the area of inheritance tax?

Michael Horton: I will deal with inheritance tax in a moment, because that is a little bit more of a hot potato. I reread the Law Commission report on this in preparing to come and talk to you, and it struck me how balanced that was.

It is not difficult to see what the law of intestacy is supposed to do. This person did not make a will. Therefore, in general, what would this person, in that situation, want to happen to their property after they died? It is fairly easy to say that if you have been in a cohabiting relationship for a reasonable length of time, you do not have any children and you are not still married to anybody, the law should assume that you intend that to go to your partner.

It gets a bit trickier if you have children, especially if you have children from a different relationship. My instinctive reaction to the report back in 2011 was, "That might cause some difficulty". What is interesting is that they did some public research that Gillian Douglas—one of your earlier witnesses—was involved in. The public response to that was that even where there are children from a previous relationship, a surviving cohabitant who has been in a relationship of a sufficient length should get something as well.

Given that intestacy rules need to be clear and simple to operate, if you are going to do something at all the Law Commission's proposals are the right ones. The alternative is simply to leave a person in that situation to bring a claim under the 1975 Act, and that is unsatisfactory. It leaves them in a real position of difficulty, especially as the more they contribute to a property or their domestic household, the less likely they will be seen as deserving of an award from the court.

My view, having gone back over it, is that the Law Commission proposals are pretty well balanced. They recognised it was divisive but the alternative is simply leaving every single cohabitant—and there are more and more of them who will be in this situation—reliant on finding a lawyer and bringing a 1975 Act claim, which is not straightforward. They are even more obscure, I think, than the work that Elizabeth and I do, which is constructive trust cases, Stack v. Dowden. They are really quite specialist indeed.

Chair: Expensive?

Michael Horton: Yes. They are frontloaded. You have to do your homework, you have to get your ducks in a row and make sure that you

have established that you are living together. You have to ask for information and you may not be entitled to it, which is the other thing, "The car finance agreement was in his name. He has died. Who are you? You're just a stranger. We're not going to talk to you; the Data Protection Act." They have to find someone who is willing to act as an administrator of the estate in those circumstances and who does not have a vested interest in the outcome. There are some real practical difficulties and if they were entitled under intestacy those things would be much easier for them to manage.

Q82 **Chair:** Thank you. Inheritance tax?

Michael Horton: The canard about this is: if two sisters share a property jointly and one of them dies, why should they have to pay an inheritance tax? There is a political decision to make about inheritance tax, full stop. Spouses and civil partners do get some preferential treatment across the tax situation.

I think there is an argument for saying that if you are going to have this—I know it is a horrible phrase and I get it wrong every time—resident nil rate band whereby you can have a bigger part of your estate that is exempt from inheritance tax that you are passing to your child, why should you not be able to have something like that if you are passing it to your cohabitant? Otherwise, a cohabitant has to pay inheritance tax. If the house is over £325,000 and there are no liquid assets in the estate, they have to sell the house to pay the inheritance tax. Then, potentially, when they die, they are faced with paying inheritance tax again. The state has already had a chunk of that money once and it may end up getting a second bite. There are some things that could be done, even if they do not equate spouses and cohabitants, just to make it a little bit less oppressive in those circumstances.

Q83 **Kim Johnson:** Good afternoon, Elizabeth and Michael. I have a couple of questions on legal definition. We have heard from previous evidence sessions that a legal definition of cohabitation should avoid an analogy of marriage and civil partnership. How practical is this? I will start with Michael.

Michael Horton: There are two schools of thought on this. The first school of thought is that the existing definition has been there for yonks, it works, and people know how to apply it. I will give you an example. Section 62(1) of the Family Law Act, which is the Act dealing with domestic violence injunctions, defines cohabitants as a couple who are not married or civil partners who live together "as if they were a married partner or civil partners".

Now, if someone went to court and said, "I need an injunction. My partner has been treating me appallingly and used violence against me," and that person came along and said, "Yes, that is all true. You can't make an injunction because although we've been together for 10 years, we are ideologically opposed to marriage and we can't be living together

as though we were a married couple", I think the judge would laugh that out of court. It is similar in the Inheritance Act context as well.

There is an argument for saying that although the law at the moment says this, it does not actually mean anything, and if you change the law you potentially invite people to test, "What was this change intended to do? Why has it been changed?" Against that, given that we do not pay much attention to the word "married" in that phrase at the moment, getting rid of it will not make much difference. I think that is the value judgment to be made.

Q84 **Kim Johnson:** Do you have anything else to add, Elizabeth?

Elizabeth Darlington: Yes. The FLBA believes that a definition in the terms, "living together as a married couple or civil partners", would be the way to go because it is generally understood and it is used in other legislation. I understand that there are some objections to the use and the comparison of the position in respect of cohabitants with a married couple, which is understandable. However, as I say, the view is that to make it understandable and consistent with legislation in other areas, that expression is sensible.

Q85 **Kim Johnson:** What are the practical challenges in determining when a cohabiting relationship begins and ends?

Elizabeth Darlington: Like any definition, it is a matter of evidence, so there would need to be consideration given to that. It might be thought that it is easier to establish when a relationship ends because lawyers are used to determining, with marriage, when parties separate. There are often some issues around that, but I would have thought that in evidential terms, that would be relatively easy to establish. When someone moves out of a property, for example.

It is more difficult with when it began because often, as we know, couples move in together over time. It is more difficult to pinpoint an exact time. One way to approach that would be to establish when they moved physically into the property together. Again, that should be capable of being established by evidence.

Michael Horton: Decision-makers, whether they are judges or social security decision-makers, have to grapple with that at the moment, and they seem to be doing okay with it, broadly speaking. There will be some difficult cases and there will be some hard cases. If you have a rule that says, "Only cohabitants with two years' cohabitation qualify", on some occasions someone will fall the wrong side of that line. You need a clear definition and a clear rule. That is the way it will go, I am afraid.

Q86 **Kim Johnson:** You recommended that any new law should follow as closely as possible existing rules on limitation periods in which a litigant can bring a claim. What do you mean by this and why is it so important?

Michael Horton: It is all bound up with the idea that if a new cohabitation law comes in, like the Law Commission proposed, like Lord Marks's Bill suggests, that is dealing with the territory. You do not get to

have your Cohabitation Rights Bill claim and your TOLATA claim. Certainly, when I went back and read what the Law Commission said about it, I think they were clear that you are in this system, you have to use that and if you do not do it in time then your claims under both have gone.

I suppose what the author of that bit of our evidence was saying—it was not me—was why should cohabitants be worse off? It may just be that the trade-off is that you get better remedies, but you have to use them in a shorter period of time, as opposed to relying on the general law. There is an argument for saying there is no limitation period at all for a TOLATA claim. If you have a property right, just because you do not claim it, it does not go away. The longer you go about claiming it the less likely a judge will believe you that it is there, but there is no limitation period between co-owners if that is established.

I think our concern was why should a cohabitant be worse off having to use a statutory remedy than they are under the existing law? The argument against that is that everyone needs to know with certainty where they are, and if there is a new statutory remedy people should use it and use it within a particular timeframe.

Elizabeth Darlington: As Michael said, there is no real time limit at the moment because they are limited to property law. If you have an interest in a property, you have an interest in a property and you can realise that at any time. If there was to be a statute implemented, as is the case with most statutory frameworks there would be a limitation period. For example, personal injury claims are usually three years, six years for claims in contract and tort, and so on. Under the Inheritance Act, the time limit is very tight. You have only six months from the grant of probate. There is a very tight time limit on that one.

It has been suggested that a time limit of whatever period would be sensible and would lead to certainty. That is perhaps the main concern, that we have certainty around this area. That would be in line with other areas of the legislation.

Q87 **Alex Davies-Jones:** Thank you to the witnesses for joining us this afternoon. It has been very interesting. Can I push you, following on from my colleague Kim Johnson's questions, on the definition? We have focused a lot today on romantic, sexual relationships of cohabiting partners but, as we know, there are lots of cohabiting relationships where there isn't a romantic link. It could be siblings or friends, for example. To push you on the whole, using marriage and civil partnership as an analogy or as a helpful definition when it comes to these cases, does that impact those types of cohabiting relationships where there isn't a romantic link? Is that a concern of yours?

Michael Horton: I think that most definitions—certainly the Australian one and I think Lord Marks's Bill—exclude people who would not be able to get married because they were in a prohibited degree of relationship, so siblings would be out. I think then the question is: to what extent do

you want to interfere with whatever arrangements purely platonic friends have got? This is not about that. This is generally about what we can objectively see as different from cohabiting relationships as opposed to two friends who might be living together. I think if you had a case like that now that a decision-maker would be able to distinguish between two friends who were living together sharing accommodation on that basis and a genuine cohabiting relationship.

Q88 **Alex Davies-Jones:** Thank you. On the minimum duration period that I know, Michael, you have touched on, we have had conflicting evidence to the Committee about whether or not cohabitants should satisfy a minimum duration period of cohabitation. Do you want to expand on your view on this?

Michael Horton: I think Elizabeth is going to deal with that.

Elizabeth Darlington: The Law Commission proposed two years. I think Lord Marks's Bill proposes three years. No, sorry, the Law Commission said two to five years, but I think with a general view that it should be two years. It makes sense to me that a period of two years, possibly three, would ensure that there was a committed relationship. It would be easy to apply. It is consistent with the two-year period in the Inheritance Act, so it would lead to consistency and clarity there as well. I support the idea of two years, possibly three.

Q89 **Alex Davies-Jones:** How feasible would it be to suggest that in some court cases there could be a dispensation on this requirement?

Elizabeth Darlington: As I have said, I think that the need is for certainty. I am not sure that if a court had discretion to dispense with it there is an argument sufficiently made out for that. It would lead to further litigation around that and so I think the two-year limit would work.

Q90 **Alex Davies-Jones:** Do you have anything to add, Michael?

Michael Horton: I agree. I think the difficulty is if you have a dispensing power everyone will come along and say, "Well, my case is exceptional", and you get a flood of people just wanting to dispense with the minimum requirement. If a message goes out, if you do this, and say if you live together with someone for two years that is when you have some rights, either on death or on separation; if you have kids with them you have rights from however long your relationship is; it is nice and clear. It will let people make decisions about that, as far as they can.

I recognise Anne Barlow's point about the person who gives up, say, a public-sector-housing secure tenancy and moves in and it folds within two years. That might just be a hard case. I think that there is also value in having some integrity in the system, having it consistent and clear to understand. The danger is that if you try to do justice in every case you just have a flood of, "Please dispense with the two-year period in my case because I am special".

Q91 **Chair:** On the whole dispelling of the common-law marriage myth, to

have a fixed period, "After two years you will have rights", could very effectively deal with that, couldn't it?

Michael Horton: Again, if the message that goes out—if this ever happens—is clear it will be easier to dispel the existing myth.

Q92 **Jackie Doyle-Price:** Thank you. My question neatly follows on from that. We are focusing very much on rights for cohabitees when things go wrong. Equally, people will make a decision to live as cohabitees for a belief system and so on, and obviously things can change. If we are looking at establishing a pattern of rights that accrue, there still does need to be an ability to opt out of any legal reparations, bearing in mind that we are establishing it. I would like to probe your views on the degree to which you could have a very strong opt-out system or scales of it, recognising that there are obligations to the partners here as well as any belief system on the present relationship. Perhaps I could start with you, Michael.

Michael Horton: I was responsible for the opt-out part of our response. I look at it as someone who is dealing quite often with prenuptial agreements and postnuptial agreements in most cases. There the law saws that you can make a prenup, you can make an agreement, but it will not be binding unless the court accepts that it is fair. Some people say that is the worst of both worlds because you pretend that you will give weight to it but actually you have to have a court look into the minutiae as to whether that is fair.

Any system of opt-out has to have the ability to challenge the opt-out if you say you were tricked or misled or bullied into signing the agreement. That is true of any system and even jurisdictions that have strong opt-out clauses on prenups have the ability to challenge the way it was made.

The Law Commission said we do not want any formality involved in this and so, if you have an opt-out clause, you should be able to say that it is manifestly unfair to be able to opt out. My view is that, a bit like the dispensing power, you will have lots of challenges and lots of people saying it is manifestly unfair and that, in a way, spoils or prevents the benefit of having an opt-out system. The stronger the opt-out system the more certain the outcome is, even if that means that someone may have taken unfair advantage as a result of that.

If you have an opt-out at the beginning of a relationship, it is a clear message that says that you have to look out for your own economic livelihood and your own interests because, if you do something that benefits your partner, you are not going to get anything back unless you persuade them to tear up the opt-out agreement.

Q93 **Jackie Doyle-Price:** Moving on from that, can I infer that the less strong the opt-out system is the less likely it is to deliver any material benefit?

Michael Horton: I think so. It is interesting, Lord Marks's Bill has the same test. The court can override an opt-out if it is manifestly unfair, but he would have lawyered agreements and they are valid in the first place.

The Law Commission had a compromise on that. It said that you do not need to have lawyers involved. It can still be a valid opt-out, but you could have this safety net dealing with that.

Other jurisdictions have two types of opt-out. I think one of them was referred to by the Law Commission. You can have a basic opt-out, non-lawyered, just the parties themselves, which can be overridden by a court. Then you have a much more formal agreement where parties have had advice, the lawyers certify on the document, "Yes, we have advised this person. They know what they are doing" and they sign it, and that is a cast iron opt-out and that may be the way to do it. People who have not had any representation or advice can opt out, but they can have the ability to say, "I should be allowed to dispense with my opt-out". If you go the whole hog and you have a lawyered agreement, why should it not be upheld?

Q94 **Jackie Doyle-Price:** Would you be confident in the courts being able to take a view about fairness with a more limited opt-out?

Michael Horton: We do it all the time with prenups, so yes.

Q95 **Jackie Doyle-Price:** Would that also deal with imbalances in relationship power imbalance?

Michael Horton: Yes. It is quite hard. When most people enter into a prenup or other relationship agreement they make sure that there are lawyers on both sides. Lawyers cannot always spot that. It could be quite possible for someone to be bullied into an agreement and their lawyer not know about it because they may be concealing it from their lawyer. You hope that the lawyer would be able to do that. You can argue that now but even if I had legal advice and my partner said, "Unless you sign, the wedding is off and I don't care" and all the rest of it, those sorts of arguments happen now and they will no doubt happen if we do not have an opt-out system and the courts have to address them.

Q96 **Jackie Doyle-Price:** Thank you. Elizabeth?

Elizabeth Darlington: I think there should be an opt-out system particularly for older couples who might have been married or in a relationship before and have significant capital assets. I think that they tend to be the people who would seek legal advice about opting out from this in any event rather than younger couples who just merrily enter into a relationship, have children, without thinking about it too much. Therefore, I think that there should be an opt-out system and it might be beneficial.

I have been involved in cases, for example, where female partners have come into a cohabiting relationship having got the former matrimonial home from a marriage, then got together with a new cohabitee. That cohabitee might do bits around the house. The female partner might not necessarily want that and then, before she knows it, there is an argument that there is a claim to that property. In a way an opt-out would protect people in that kind of position.

Q97 **Jackie Doyle-Price:** It all gets very messy, doesn't it? I am really interested in this issue about power imbalances and, again, it comes back to something that you said, Michael. There is always going to be a way for a dominant partner to make sure that they have the upper hand in any arrangement. In fact, going a bit further, some partners will deliberately choose not to formalise their partnership precisely to enable them to do that. To what extent do you think an opt-out system can alter those power imbalances, Elizabeth?

Elizabeth Darlington: That is a good question. It involves all kinds of issues about coercive control and it is very tricky. I think a legal framework, the implementation of a cohabitation Act with an opt-out, would best deal with these kinds of situations because it would bring clarity and certainty and people could seek advice. That would greatly assist, compared with the situation at the moment where there is very little clarity in the law.

Q98 **Jackie Doyle-Price:** I wonder whether the very existence of a more recognised system would normalise it, just by virtue of spreading understanding about the issues involved for cohabitees, and everybody would become a lot better at understanding how they protect themselves and what is reasonable behaviour. Do you think a lot could be gained from that? I suppose, especially when we relate it to the whole issue around prenups, which when they first started to emerge were very much seen as someone trying to protect their own interest and now they have become very normalised—it is quite natural for people to think about that. In these days of complex financial relationships, it is something we need to encourage people to be a lot less embarrassed thinking about.

Michael Horton: I think I agree on that. Especially if you have suffered a relationship breakdown and you have had a messy legal battle, you will want to do a relationship agreement, an opt-out agreement, to hang on to what you managed to salvage from your earlier relationship breakdown.

Going back to your question, I do not think we will be able to eliminate power imbalances. All you can do is have a system that is aware of them. If you have a system that says, "These rights will be given to cohabitants, but you can opt out of them, even if your opt-out is cast iron, if you say for it to be cast iron it has to be done through a lawyer on legal advice on both sides". That is a safeguard. It will catch some but not all cases of coercion or bullying or trickery or misleading behaviour.

It would still be open, as it is now, for someone to say, "Even though I had a lawyer and even though they gave me advice about this, I still was under unfair pressure to sign it and you should absolve me of my deal". That is the way that the law works for prenups, and I do not see why it should be any different for pre-cohabs or opt-out agreements.

Jackie Doyle-Price: Do you have anything to add?

Elizabeth Darlington: No.

Q99 **Chair:** I will ask something that was triggered by something Elizabeth said. I think we all recognise that in many instances people drift into cohabitation. There is no set start date necessarily. It is very hard to identify. We also know it is the fastest growing type of household. Elizabeth made a comment on older couples. In seeking to clarify this, do you think that there is a particular group, a particular protected characteristic? I am not going to say we are necessarily seeking to protect, but we know it is particularly vulnerable. Is it older people? Is it women? If we are looking at the whole cohabitation situation, who is the most disadvantaged and, therefore, who do we most need to help?

Elizabeth Darlington: In my experience, it is mainly women, but it is also men. I do not think that should be overlooked at all, because it works both ways. As I said, in some cases it is the female partner who has the capital assets who might need protection. That is my experience. It is mainly women.

Q100 **Chair:** You have been very careful in your evidence—I have noticed twice—not to say women.

Elizabeth Darlington: Yes. That is because it does apply to men too.

Q101 **Chair:** Absolutely, it can apply to both. I just wondered from your experience if it is predominantly women that are disadvantaged.

Elizabeth Darlington: Yes.

Michael Horton: It was Mrs Burns who was left in the lurch, not Mr Burns, and I think in the generality of cases it will be. The law that the Law Commission wanted to implement, or its proposals, was very much protecting women who are in relationships that break down and are left with no remedy at all. Most family lawyers see that as unfair and they want to do something about it.

Q102 **Chair:** Thank you. Was there anything either of you wanted to add that you feel we have not asked you about?

Michael Horton: I do not think so.

Chair: Thank you very much. I thank our first panel for their evidence. Our second panel is not scheduled until 3.15 pm, so I will suspend the meeting for 15 minutes.

Sitting suspended.