HOUSE OF COMMONS

Women and Equalities Committee

Oral evidence: The rights of cohabiting partners, HC 130

Wednesday 5 January 2022

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Watch the meeting

Members present: Caroline Nokes (Chair); Theo Clarke; Kim Johnson.

Questions 123 to 137

Witnesses

I: Professor Jens Scherpe, Professor of Comparative Law, University of Cambridge; Professor Margaret Briggs, Professor of Law, University of Otago; Kate Dowdalls QC, Commissioner, Scottish Law Commission; Dr Kathryn O'Sullivan, Senior Lecturer of Law, School of Law, University of Limerick.

Written evidence from witnesses:

Examination of witnesses

Witnesses: Professor Jens Scherpe, Professor Margaret Briggs, Kate Dowdalls QC and Dr Kathryn O'Sullivan.

Q123 **Chair:** Good afternoon, and welcome to this afternoon's evidence session of the Women and Equalities Select Committee and our inquiry into the rights of cohabiting partners. Can I thank our four witnesses this afternoon, Professor Jens Scherpe, Professor Margaret Briggs, Kate Dowdalls QC and Dr Kathryn O'Sullivan. Can I just check with our witnesses whether you are content that I refer to you by your first names throughout this session? Thank you; I can see lots of nods. Members of the Committee will ask you questions in turn, but I will start. Before we ask a question, we will usually indicate which member of the panel it is that we wish to respond.

Could all witnesses briefly introduce themselves and explain the jurisdiction of their expertise?

***Kate Dowdalls*:** I am the Commissioner to the Scottish Law Commission. I was appointed there in July 2018 to lead the law reform project, looking at aspects of family law. We are currently looking at Scottish law relating to cohabitation. We are in our first phase of that project. That work is nearing conclusion but has not yet been concluded.

My professional background is in practice after being a solicitor for 15 years or so in private practice. I entered the Scottish Bar in 2000. I took silk in 2013 and throughout almost all of the time that I have been in practice, whether as a solicitor or as counsel, I have specialised in family law.

***Professor Scherpe*:** Hello. I am Jens Scherpe, professor of comparative law at the University of Cambridge and director of Cambridge Family Law, which is our family law centre. In that capacity, I cannot claim to speak for any jurisdiction, but my main work is to undertake comparative studies between various jurisdictions. I have done several major ones, including two on cohabitation in particular. One is a bit older and is in German, and we are undertaking one at the moment that spans some 40 jurisdictions across the globe, where we basically compare the responses to the social phenomenon of cohabitation, or de facto, as it is actually better called. I can see the Antipodean nodding.

I have been at Cambridge for the last 15 years, undertaking this kind of comparative work.

***Dr O'Sullivan*:** I am Kathryn O'Sullivan, senior lecturer at the University of Limerick, in Ireland. My main area of research would be family law and property law and then family property law, the piece in the middle. I did my PhD 10 years ago, and that was looking more at marital property law, but in the last year I have spent quite a bit of time focusing in on how

successful our cohabitation law regime has been, because it is something that has not got a lot of attention in Ireland since it came in. That is my area.

***Professor Briggs*:** My name is Margaret Briggs. I am a professor of law at the University of Otago, in New Zealand. I have talked and researched in the area of family property law for a number of years. My particular interest is in the financial consequences of relationship breakdown, and I also have a particular interest in the rights of cohabitants or, as Professor Scherpe has already referred to them, de facto partners, and the consequences for de facto partners on relationship breakdown.

Unlike Kathryn, in New Zealand, because it has a regime that includes de facto partners in the financial benefits of relationship breakdown, it has been well documented. There is a lot of literature, jurisprudence and case law on that in New Zealand. For full disclosure, I am not a practising lawyer; I am just an academic.

Q124 **Chair:** I am not sure there is any such thing as "just an academic".

Jens, can I turn to you first? We have heard a lot of evidence from previous witnesses about the so-called common law marriage myth. I just wanted to ask, on a comparative basis, whether this is a problem in other countries. If so, how is it being overcome?

***Professor Scherpe*:** For starters, a common law myth requires the common law. It is not as commonly found in civil law countries as you might guess, because there it is very much statute-oriented, although ironically in, for example, Croatia we have what we call a reverse common law marriage myth, where people think that they are less protected than they actually are under Croatian law. Generally speaking, it is safe to say that the common law marriage myth is a very specifically English thing for the most part, at least regarding the jurisdictions we have looked at.

There are some areas in the United States where there are actual legal rules on that and therefore this belief is reasonably strong. There are also surrounding states where no such rules are in place. We have certainly not found evidence of it being as strong as it is in England and Wales, which probably is also due, as you might have heard previously, to the research of Professor Probert, due to the way this is handled by the media very often and its very frequent references to common law marriage. Even in pseudo-legal text by companies, your common law partner will get benefits. This kind of thing is most unusual, certainly in the other jurisdictions we have looked at.

To give a short answer, it is not as prevalent in other countries. It may have been in Scotland, and Kate may be able to tell us more about that, but in many other common law jurisdictions the myth is actually no longer a myth; it is actually reality. Therefore, there actually are protections in place, and so it is difficult to compare those.

Q125 **Chair:** Staying with you, in light of the comparative family law, is it your view that the Law Commission's 2007 proposals are the best approach for England and Wales?

***Professor Scherpe*:** That depends on what your political priorities are. Comparatively speaking, it would be classified as a weaker protection for cohabitants compared to the much stronger protections you find in other jurisdictions, but that of course was a deliberate choice, because the base choice you have to take when you are intending to legislate on cohabitation is whether you want to keep your distance to marriage, and if so, how much. That was the remit of the Law Commission's work at the time.

It has very much followed what the Law Commission believe to be the Scots' approach to things, and it is therefore based on a well thought-through, solid approach, which of course is now being revised. Should there be the will to approach this, a revision of the Law Commission's proposals would be in order. In terms of an international comparison, it certainly does not stick out in any positive or negative way. It is firmly placed in what we call weaker protection for cohabiting partners.

Q126 **Chair:** If you were to pick a jurisdiction that provided the optimum protections for cohabiting partners, where would it be?

***Professor Scherpe*:** That is the one thing we cannot do in comparative law, because if I tell you the law of Fiji is fantastic, then you would have to concede that you are not Fiji. It really depends on the social and cultural background in which you apply these rules. You basically have a political choice.

In England, where it is a political choice, in many ways it is easier because you are a common law jurisdiction with discretionary remedies for financial consequences, and that actually is not unusual at all, because we have that for marriage. Therefore, having a similar approach to regulation of cohabitation would be much easier for a jurisdiction in England and Wales than, for example, France or Germany, which are very much rule-based, and there is no such discretion. You could factor in the specific circumstances of the cohabitation and in particular the fact that the couple has not made a formal commitment within the remedies.

The one thing we can see is that the definition of the eligibility criteria has a very strong impact on the range of the remedies. It is very difficult to discuss one without the other. That presupposes a decision on what kind of policy one wants to pursue, and this then has to fall into place, both in the terms of eligibility and remedies. I would not say there is an ideal system. If you wanted to have an equation of marriage and cohabitation, then look for New Zealand. If you wanted to have something different, then it depends on how different you would want it and how it would fit into the English legal system.

Q127 **Kim Johnson:** Good afternoon, panel. My first question is to Kate. Can you tell us what prompted Scotland to extend legal rights to cohabitants, please?

***Kate Dowdalls*:** Forgive me if my answer to this question takes rather longer than you might have wanted it to. I have to go back to the work that my predecessors at the Scottish Law Commission did on family law in the early 1980s and 1990s to properly understand how the reforms came about that led to the 2006 Act. At that time, during the 1980s and 1990s, there was a lot of work generally being done in the field of family law, particularly by the Scottish Law Commission. The work on cohabitation took place in the early 1990s. There was a discussion paper published in 1990 and a report published in 1992 that recommended the introduction of statutory remedies for separating cohabitants.

At that time, the commission recognised that there was a wide range of views in relation to whether cohabitants should have remedies and, if so, what remedies they should have. It also recognised that it was not appropriate for there to be the same rights and remedies available to cohabitants as were available at that time to spouses on breakdowns of marriages or deaths. The Scottish Law Commission recommended a limited scheme for financial remedies on the breakdown of cohabitation and also recommended a discretionary provision upon death.

As I have said, quite a lot of work was done in the 1980s and 1990s in family law, and there was a recognition of a need to bring family law up to date. There was work done on jurisdiction, financial provision and child law. After 2000, my understanding is that by that time the Scottish Executive had made some commitments to bring the remaining outstanding areas of family law into life, and they recognised that there was a need to modernise certain areas of family law, the law relating to cohabiting being one of those.

The Bill that eventually became what we now have, which is the Family Law (Scotland) Act 2006, was introduced in the Scottish Parliament in 2005. By this time, the Scottish Executive had done quite a lot of comparative research with other jurisdictions and had acknowledged the need for the recognition of social change, and particularly changes in the way that families were formed and that family types should be recognised. The measures that were proposed were said then to acknowledge current trends and provide safeguarding protection for those who are vulnerable while not bringing cohabitant rights in line with those for spouses and civil partners.

It was also recognised that cohabiting couples by then were not a minority family type and that cohabitation had become very prevalent in Scottish society by that time. The work that had been done by the Scottish Law Commission in the early 1990s was referenced, and much of the statutory provision that we now see in the 2006 Act in relation to cohabitation was based on the work that was done by the Scottish Law Commission and implemented the recommendations that had been made

in the 1992 report. It took a lot of time, but there was a process that led to getting to where we are now.

One thing I would say about the 2006 Act is that it does not just deal with cohabitation. There are only five sections in the Act that deal with the law relating to cohabitation, and in particular financial provision for cessation of cohabitation and upon death. The 2006 Act also made other reform. It abolished the last remaining form of irregular marriage, which was marriage by cohabitation with habit and repute. It reduced separation periods for divorce, and it gave unmarried fathers parental rights and responsibilities. We can see from that that there was a recognition that families had changed and the way that people lived in families and particularly children brought up their children had changed, and there was a need to give some, albeit limited, rights for that. I apologise for the length of that answer.

Q128 **Kim Johnson:** Thank you for your very detailed response to my question, Kate. My next question is to Kathryn and Margaret. Ireland and New Zealand have reformed their laws to provide some protections for cohabitating couples, but can you tell us what impact this has had from an equalities perspective? We have heard from previous witness sessions that black women who have been forced into coercive marriages have been treated disproportionately. What impact, if any, have reforms to provide legal protections for cohabiting partners had in improving the situation for these vulnerable groups?

***Dr O'Sullivan*:** In order to answer that question I will go backwards a little bit and start with the impact it has had for vulnerable cohabitants in general. My research would show that there has actually been very little litigation taken under the Act in the 10 years since it has been introduced. It is not even a question in Ireland of looking at one particular group of vulnerable cohabitants and what impact it had on them, but I would question the impact it actually had in general on cohabitants and on the protection that it affords to vulnerable cohabitants. The reason for that is because, as Professor Scherpe mentioned a few minutes ago, the eligibility criteria for accessing any relief in any scheme is central to the success of the scheme in protecting people.

In Ireland, we have a very restrictive approach to who can apply for relief under a scheme. I will just briefly explain what our criteria are. First of all, you have to be a cohabitant—one of two adults in an intimate and committed relationship—and you then have to tick another box, which is that you have to be a qualified cohabitant; that means that you have to be in the relationship for two years with a dependent child in the relationship or five years if there is no child in the relationship. On top of that, you have to show that you are financially dependent on the other cohabitant as a result of the relationship or the breakdown of it. You have a lot of criteria and boxes you have to tick in order to be able to access the scheme in the first place.

It would seem that, particularly because the financial dependence criterion that is applied, there have not been that many cases taken by vulnerable cohabitants. That means that the actual practical protections provided to a whole swathe of the population who might be vulnerable cohabitants, whether they are from a minority group or otherwise disadvantaged or not, is open to question in an Irish context.

Q129 **Kim Johnson:** Margaret, do you have anything further to add?

***Professor Briggs*:** I would just add to what Kathryn has said. In New Zealand, the laws relating to property rights for married couples, civil union partners and cohabitants, who we call de facto partners, are just the same for all of those groups of people. I do not know that any study has been done on whether anybody from a particularly vulnerable group has benefited from these, but, as Kathryn has said, overall benefit has been achieved by bringing unmarried cohabitants into our relationship property laws.

I will just go back a little and explain how our relationship property laws work, because they may be unfamiliar to some people. Unlike the discretionary regime that operates in your jurisdiction, in New Zealand we have a system of deferred equal sharing of relationship property. That applies across the board to married people, civil partners and de facto partners. De facto partners were brought into that law in 2001. In terms of vulnerability, you could say that unmarried people now have a lot more protections because they are caught by these laws. That is a rights and responsibilities thing. They have these extra protections that the law has given them.

Under our system, to be in a qualifying de facto relationship there is a whole list of criteria, which perhaps I can go into a bit later. The partners have to be 18 years old or older and living together as a couple. There is a list of criteria that need to be satisfied, and the relationship generally needs to be three years or longer. Once you satisfy those criteria, you are through the doors, through the portals, into our Act, which is the Property (Relationships) Act. That pretty automatically gives equal sharing of the relationship property to a partner, whether they be married, a civil union partner or a de facto partner. That is not the discretionary regime that people have talked about previously; it is an equal sharing regime.

Yes, vulnerable de facto partners are certainly protected by these laws. That was a lot of the talk in 2001, when de facto partners were brought into these laws: that they were, in a sense, vulnerable because their relationships, in many senses, were no different functionally from those people who were married at that time; civil partnerships came in later. The Government of the day just took the policy decision that, functionally, they were the same, so they should be allowed to enjoy the same protections.

Q130 **Kim Johnson:** Thank you so much, Margaret. My last question is to

Kathryn, Kate and Margaret. How were the reforms received when introduced and what are the main criticisms of the current law?

***Kate Dowdalls*:** When the law came into force in May 2006, initially the reforms were broadly welcomed, but there was some concern—I know this from my own experience in practice—about imposing responsibilities on people who had not, in effect, signed up for them. That concern still remains, to some extent, but is not so prevalent as it was then. At the time, greater concerns related to the way that the legislation had been framed and a lack of clarity about what it was intended to achieve.

In terms of criticisms, that lack of clarity was the main criticism, with the provisions viewed as somewhat complicated. We might come on to this later, when we talk about the test for financial provision. The complexity and lack of clarity in the legislation leads to difficulties for practitioners in being able to advise their clients and therefore being able to assist them to negotiate a settlement. Anecdotally at least, settlement is negotiated in cases and people take a pragmatic view, but that was certainly a criticism. I would say that was the main criticism.

The other criticisms that are of significance relate to the tight and inflexible time limit for making claims, where a claim by a cohabitant for financial provision on cessation of cohabitation must be made within 12 months of the date of cessation of the cohabitation. Although we are not discussing, and I do not make any claim to be an expert on, the law of succession, the 2006 Act does provide for applications to be made for financial provision upon death by a bereaved cohabitant. That claim has to be made within six months, and that has come in for particular criticism.

The other criticism in terms of claims during life, rather than death claims, is and always has been the limited remedies, in particular the absence of a remedy that would allow a transfer of property to take place. The only remedy that is available is by way of a cash or capital payment or in relation to the delivery of childcare. These are all things that we are currently reviewing, but at the time, in 2006, and since, I do not think there has been any significant change so far as the criticisms are concerned. The criticisms that were in place then are still there now.

***Dr O'Sullivan*:** When the legislation was introduced in Ireland in 2010, it would have been roundly welcomed. There would have been a lot of support for it and there would have been few, if any, dissenting voices at that time in relation to it. Saying that, I am sure some people who were concerned about it just did not voice it because it was so widely welcomed, because, let us say, in the drafting of it there were organisations, such as the Irish Farmers' Association, that had concerns about what impact it might have on landholdings and things like that, but that was as the legislation was being developed. When it was introduced, it was welcomed across the board. Since then, it has fallen off the agenda in terms of looking at how it is actually being applied in practice.

There have been some niche articles and research produced suggesting that certain little technical aspects of it could be tweaked here and there, or the period of time might be considered a bit long—five years if you do not have a dependent child—and things like that. There are some technical aspects that have been criticised, but the bigger issue with it that has not got much attention but would seem to be the biggest problem that is there with it, which I referred to earlier, is the fact that so few people are actually eligible to pursue a claim because of that financial dependence filter.

Like Professor Briggs, I am not a practitioner either. I am just relying on what they have said and have gone on the record as saying, but they have noted that they would regard it as risky to pursue litigation because there is so little case law there to show how the courts would exercise their discretion in making provision for someone who does meet the eligibility criteria. Because there are so few cases that have gone through the courts, that in turn also means that there is very little shadow of the law for couples to negotiate in if they do not want to pursue litigation. You have a snowballing effect.

Neither going to court nor trying to get a settlement is an attractive prospect for people who otherwise do need protection. It has not got that much attention in an Irish context; as I say, the focus in Ireland has gone in different directions and it has fallen off the radar. It would seem that it is something that should be on the radar, because the protection is there on paper but in practice there is definitely a question mark over it.

***Professor Briggs*:** I would echo some of the comments that Kate made. When de factos were brought into the equal sharing laws in 2001, there was some opposition, and that largely came from groups of the public as well as opposition politicians. It was a fairly tight vote in Parliament to get de factos brought in, and it was along party lines.

The main criticisms include one that Kate has already voiced: that freedom of choice should be paramount and that it was not right to force a law that essentially had previously been for married people on to de facto partners who had not chosen to get married. That of course ignores the fact that a lot of people do not choose or otherwise. They just happen to be in that relationship. It really did not deal with that. Some politicians in the Opposition argued that an opt-in scheme for de facto partners would be preferable to the current scheme. The scheme that we operate is a default system that applies to everyone unless they opt out, and not many people opt out. The Parliament of the day decided to go with an opt-out scheme because it thought that an opt-in would not be protecting the vulnerable parties that it was designed to protect in the first place.

There was another general argument that underpinned a lot of the discussion at the time from certain groups, and it was that giving de facto partners equal rights with married partners would undermine marriage in some way and devalue its status. That ignored the fact that, in many

other areas of the law outside of property entitlement, de facto partners were already well recognised in New Zealand law, and they had already pretty much been given equality in many other areas. These 2001 changes that gave de facto partners property rights were really just catching up with a lot of other areas of the law. Those arguments could all be fairly well dealt with.

You asked about criticisms of the laws. Perhaps these are things that can be dealt with in more detail later on. One of them is that, because de facto relationships do not have that absolute clear start date that marriages and civil unions do, there is a lack of clarity about when a de facto relationship begins. That can have a lot of repercussions in cases in which people are arguing about whether they are in a qualifying relationship or the point at which it started. That has repercussions for perhaps what property is caught. They would probably be the main points.

Kim Johnson: Thank you, panel, for your very informative responses.

Q131 **Theo Clarke:** I just wanted to pick up on this issue about legal definition and eligibility. Jens, what types of definition of cohabitants are used in other jurisdictions? I am particularly interested to know what conclusions you think can be drawn for England and Wales.

***Professor Scherpe*:** We have the usual suspects, as I call them. Depending on whether same-sex relationships are acceptable in the jurisdiction in question, the gender of the person matters. There is age, and then living together in various definitions. The strangest one is "as if they were in a married relationship", when the whole point of them being in a cohabitation relationship is that they are not. There are some variations on living together, but it is worth noting that this is relatively easily proved in many jurisdictions, because there is a legal duty to register at your place of living, which of course we do not have in England and Wales.

We have various forms of minimum durations, internationally speaking, usually starting from about two years, but the trend now seems to be not to give very specific dates, precisely for the reasons already outlined: that then a discussion starts on whether the toothpaste migrated on the Tuesday or the Thursday, if you are close to the borderline. We see more definitions, like "a significant relationship lasting for a relevant period of time", and then in the explanatory notes it is said that this will usually be around two years.

We also see, in jurisdictions where there is a very specific stipulation of time periods, that there are hardship clauses that allow, in borderline cases, to waive the particular requirements. We also see very often a requirement of joint children, which in many jurisdictions automatically negates any need for a time limit, which may or may not be sensible, depending on the circumstances, but it is certainly also a criterion.

It must be said that the criteria outlined by Kathryn certainly are restrictive by international comparison. Other jurisdictions are much more lenient when it comes to those.

We generally can see that some kind of intimate couple relationship is usually required, but we also often see lists that have a not necessary nor sufficient character. It is just looking at a list of factors that may give an indication on whether this is a qualifying relationship or not.

A final point is whether concurrent relationships are permitted. That is very different depending on the jurisdiction. It is not uncommon for a cohabitation to start while one of the partners is still married. When implementing cohabitation laws, any legal system needs to answer whether these remedies should also apply in this particular situation, because the need to protect the new relationship may of course arise, particularly, for example, if there is a child, which may or may not be the reason for the end of the marriage, and other criteria. Concurrent relationships are also a factor that is very often seen. In some jurisdictions, it is automatically ruled out that there is a recognition of the cohabitation relationship if there is still an existing marriage or indeed another cohabitation relationship that can lay prior claim.

Q132 **Theo Clarke:** Margaret, in your earlier answers you talked a bit about de facto relationships in New Zealand. I am interested to know how the courts have approached that definition. How useful is the checklist of factors?

***Professor Briggs*:** Almost invariably, when courts are trying to determine whether a de facto relationship exists or the term of that relationship, they fairly thoroughly work their way through the checklist of factors that are included in our legislation, but the legislation itself says that none of the factors is absolutely necessary.

If I could just give you an example of some of the factors that the section in the Act sets out, length of the relationship is one of them, as is the extent to which the parties shared a home. It is not crucial in New Zealand for finding a de facto relationship that the parties actually lived together under the one roof. That is possibly something that is a little unusual. It is also about the degree to which they merged their finances and whether there was a sexual relationship.

The court will go through a whole load of factors. As I said, none of them is absolutely crucial. Ultimately, at the end of the day, the court will have to stand back and just make that judgment, based on the facts before them, of whether they think there is a de facto relationship that comes within the criteria—people over 18, living together as a couple, whatever that might mean. Yes, the factors are a useful checklist, but they are not absolutely determinative in and of themselves.

There is a lot of case law in New Zealand, so it is possibly unlike the Irish experience that we have heard about. There is a great deal of case law

about this, but you have to take it with caution. The precedent value is limited because the cases are also so specific. Everybody's relationship is different; you have to take the precedent value with caution because of that.

Just picking up on what Jens mentioned, we do recognise contemporaneous relationships in New Zealand. There are provisions dealing with that. The Act is premised on the basis of coupledom, but it also recognises that those people may not be monogamous within that relationship. We do not recognise polyamory, although we have just had a Court of Appeal case on that, where the Court of Appeal recognised that within a polyamorous relationship there were in fact three coupledom relationships: A and B, A and C and B and C. We recognise those contemporaneous relationships.

There have not been many cases, and the courts are fairly cautious to recognise the actual existence of contemporaneous relationships, fairly much on the basis that they are not convinced that one person can show the degree or level of commitment to two different relationships that is required to sustain those two different relationships, perhaps in marriage and a de facto relationship, or two de facto relationships at the same time.

Q133 **Theo Clarke:** Jens mentioned this before in one of his answers, but it seems to me that it is quite difficult to determine the start and end point of relationships. Could you tell me what the challenge has been with that specifically in New Zealand?

***Professor Briggs*:** The start date is more contended than the end date in many cases. The difficulty is that, in that checklist of criteria that we use, none of the factors in and of itself is absolutely essential to the finding of a relationship. People will argue different point of view about when their relationship began.

Remember that this is often a retrospective decision that the court has to make many years down the track, after the relationship has begun. You might think that moving in together into one residence is a fairly robust factor towards saying that is when the de facto relationship began, but we have cases where the judges have decided that the people were already in a qualifying de facto relationship before they moved in together.

Generally, we find that the more a person stands to gain or lose by arguing or asserting that a particular date was the start date, the more likely there is going to be a very vehement argument about that. There has been a lot of toing and froing about when a de facto relationship starts.

Q134 **Theo Clarke:** Kathryn, what are the eligibility criteria and how stringently are they enforced? Secondly, do you think that they are proportionate to the remedies available?

***Dr O'Sullivan*:** In terms of how stringently they are enforced, as Professor Scherpe mentioned, in some jurisdictions you have more scope for the courts to apply their own discretion in saying, if it is five years and you have not met the five-year threshold for being together for that period of time, that four years and 11 months or something will do. We do not have any discretion around the timeframe for being a qualified cohabitant, which would be the main black-and-white criterion that is applied in the context of eligibility.

From that side of things, there is no room for manoeuvre, but then there are other aspects of the definition of both cohabitant and qualified cohabitant that are more amenable to interpretation and where a more flexible approach can be taken. In the context of looking at whether a couple were living together as a couple, the courts have been relatively flexible in relation to that. They say that they do not necessarily have to be living in the same house consistently for them to be considered to be living together as a couple, but the reason that they are living apart cannot be related to the relationship; it must be to do with, say, illness, work or something like that. They have been quite flexible in relation to some aspects of the definition, probably because other aspects, like the time limits, are set in stone. Some areas have room for being flexible or whatever, and then in other areas it is less so or it is non-existent; there is no flexibility.

The second part of your question was about whether they were proportionate. That is hard to say, because in some respects a court could take a very generous approach in terms of the remedy that they provide because they have the discretion to make a range of different orders. The orders that they can make under the Irish scheme are set out with a hierarchy. The first thing they can do is make a compensatory maintenance payment or alternatively make a pension adjustment order, and, as a last resort, they can make a property adjustment order. If they feel that the circumstances merited it, they can do any of those three things.

In some respects, if they can make a property adjustment order—there is no limit on what they can do; they are just looking at a list of factors and all the circumstances of the case—you could say that it is appropriate that there are quite stringent requirements to be met, given that the couple are not married. On the other hand, we cannot really say that a generous approach is being taken either, because we do not have the case law. Equally, it would be unfair to look at the cohabitation context in Ireland without being conscious of what happens in a marital breakdown in Ireland. In a marital breakdown, it is not necessarily that we have a particularly generous approach anyway, because, again, it is based on discretion. We do not have any concept or presumption of 50-50 sharing or anything like that.

The practice on the division of assets, financial provision and things on divorce is not overly generous in an Irish context, and because

cohabitation is seen as being different to marriage and is not equivalent to it, the provision will probably be less. That is a little bit of a convoluted answer, but it is a little hard to say whether the eligibility criteria is proportionate or not, given that we have so little context for what kind of provision would be made for cohabitants, if that makes sense.

***Professor Briggs*:** Perhaps I could add that our Law Commission has recently looked at the Property (Relationships) Act in a whole lot of different ways. In relation to de facto relationships, it is generally happy with the way that things are working. However, it did acknowledge that there was some unclarity around those criteria and that checklist of factors. One of the recommendations that it has is actually borrowed from Scotland, I think; correct me if I am wrong on that. Just to try to make it a bit clearer about whether there is a qualifying de facto relationship, it is recommending that we include in our list of criteria a rebuttable presumption that two people are in a qualifying de facto relationship when they have maintained a common household for at least three years.

I think that may be borrowing from the common household law in Scotland. Is that correct? No. Maybe it is somewhere else. That might actually add to some of the clarity: that people have been living together for three years in that common household. That may get rid of some of the confusion that seems to be out there at the moment in the New Zealand law.

Q135 **Chair:** Kate, what are the advantages and perhaps disadvantages of having different remedies for married and civil partnered couples as opposed to cohabitants?

***Kate Dowdalls*:** That is quite a big question. The obvious advantage of having different remedies and regimes is that that gives proper recognition to the fact that cohabitation is not marriage or civil partnership; it is a different relationship. It also gives proper respect to a couple's autonomy and their right to choose, including to choose not to marry and not to enter into formal relationships, and to make their own arrangements should they wish to do that. It does not impose marriage or civil partnership-like responsibilities on people who have chosen not to marry or to have a civil partnership.

The separate regime that we have for cohabitants does provide some safeguards for people within a regime that is tailored for people in those cohabitating relationships. In summary, the advantage is recognition of a different form of relationship and a preservation of the right to choose that relationship and for that be a meaningful choice.

The disadvantage of having different remedies and rights for cohabitants is, in Scotland at least, a lack of consistency with the regime that is in existence for spouses and civil partners under the Family Law (Scotland) Act 1985, which is widely regarded as working extremely well. There is certainly a body of opinion that cohabitation as a family form carries out

the same function as a marriage or a civil partnership in terms of family life, especially with children. I think it is regarded, in Scotland at least, as as stable a form of relationship as any other. There is a body of opinion that, in those circumstances, the rights and remedies ought to be more closely aligned. That is not an overwhelming body of opinion, but it is a respectable view and a view to which we, in the work that we are doing just now, have had to give respect.

I was interested in hearing what Margaret was saying about the date when relationships begin and end being a difficulty or an issue for the law in New Zealand, and that is something that has been identified as a potential problem in Scotland were we to move to a regime or a system that was more closely aligning the rights and remedies available to cohabitants with those available to spouses and civil partners.

We might struggle to identify when some of the relationships begin and end, and therefore when the pot, if you like, of matrimonial property builds up, because those dates, in terms of the date of commencement of the marriage and the date of cessation or separation for spouses and civil partners, are critical to determining financial provision upon divorce and dissolution in Scotland, in a way that I understand they are not so critical in other jurisdictions. That would certainly be a disadvantage.

I should say that it is of enormous significance in Scotland that contractual arrangements between couples, whether they be spouses, civil partners or cohabitants, are given respect and they are implemented. I understand that is also a difference between the law in Scotland and in other jurisdictions, perhaps particularly England and Wales. A contract will be given effect in Scotland notwithstanding that there is a statutory regime. The 1985 Act for spouses and civil partners provides a very limited exception to that in certain circumstances. It is therefore important that we acknowledge the importance of contractual arrangements and voluntary agreements between couples, particularly cohabitants who, as I have said, have not signed up for the rights and responsibilities that come along with marriage and being civil partners.

Q136 **Kim Johnson:** Panel, we have heard throughout this inquiry about some of the difficulties and the misinformation for cohabitants, but what I would like to find out from you today is what the current law is for cohabitants on death of a partner. I will start with Kathryn.

***Dr O'Sullivan*:** Prior to the introduction of the 2010 Act, there would have been no scope for a cohabitant to seek provision from the estate of a deceased cohabitant. While that legislation had been in place in England and Wales for a long time, even up to that point, we had no scope for that. The 2010 Act was very important, and it is one of the aspects of it that works better in Ireland, for introducing a system whereby a qualified cohabitant could apply for a discretionary provision from the estate of a deceased cohabitant.

What is really important about this is that, where the relationship continued up to the death of the cohabitant, you do not have to show financial dependence. That criterion, which is so restrictive when a relationship breaks down, does not apply in the context of death. That partly contributes to the fact that a large number of cases that exist under the Act are taken on death, probably because that financial dependence filter is not there.

The only other thing to say about that is that what provision can be made for a cohabitant will depend on whether the deceased was married or not, because we have a very different system of provision on death in Ireland than you do in England and Wales. We do not have any statutory legacy or anything like that applied on intestacy. In Ireland, if a couple are married and do not have any children, the surviving spouse takes the entire estate. If the couple are married and they have children, the surviving spouse takes two-thirds and the children share a third. Those entitlements do not apply to cohabitants. They apply to civil partners in Ireland, same-sex civil partners, but they do not apply to cohabitants.

On intestacy, where there is a will, where a deceased dies in Ireland, they cannot disinherit their spouse because we have a forced heirship scheme, which means that a surviving spouse in Ireland is automatically entitled to a third of the estate where there are children, or half of the estate where there are no children. We have quite robust protections for surviving spouses in Ireland on intestacy, which cohabitants do not benefit from.

When the scheme was introduced to look after or provide some protection for vulnerable cohabitants on death, they said that a provision could be made from the net estate; that is the estate that is left over once any entitlements of the surviving spouse, if there is a surviving spouse, are met. If somebody had not been divorced, maybe because they had not met the time limits for applying for a divorce or maybe they just chose not to get divorced and were in this cohabiting relationship, their surviving spouse will get whatever the proportion or share is that they are entitled to, and any provision for a cohabitant will only come from what is left over. Depending on the context, there may be little or nothing left over, or there could be two-thirds, a third or whatever left over. That is one part of it.

The other aspect is that, even if a married couple had divorced and now one of them is in this cohabiting relationship and that person dies, after a divorce, unless a blocking order is made, a former spouse can still seek provision from their former, now deceased husband or wife's estate. Unless there has been a blocking order made, which would not always be made—it would not be a standard thing for a blocking order to be made—they can make an application in the estate of their former spouse's estate.

Equally, children can make an application, under section 117 of the Succession Act. Where there is a will and they have not got what they feel is proper provision from it, they can make an application. At the same time, you potentially have a qualified cohabitant making an application. You have three different groups of people who can be making an application in relation to the same estate, and we do not have any clear guidance as to how those competing interests would be met, but it was an important aspect that at least some element of protection was introduced for qualified cohabitants, so that they could seek something from the estate of a deceased cohabitant.

Q137 **Kim Johnson:** Thank you so much, Kathryn. It seems like a very drawn-out process, depending on whether they had a deceased partner or not. Thank you for sharing. Margaret, what happens in New Zealand in respect of death of a partner?

***Professor Briggs*:** De facto partners are again treated much the same as spouses and civil union partners under our law in terms of death. Currently, our Property (Relationships) Act deals with relationships that end either on separation or death. Death comes within the Property (Relationships) Act at the moment, and it applies equally, as I said, to all different relationship types. De factos have to have been living with their partner at the time of the partner's death. For marriage and civil partnerships, they can be separated, but because it is a legal institution, they still have rights, but the de facto partner has to be with that partner at the time of death.

The system under the Property (Relationships) Act is a bit odd. There are two options that a surviving partner can choose. It is either option A, which is to take their share of the relationship property, or option B, which is to relinquish their share of the relationship property and instead take whatever is their own, separate property and also take the benefits under the will of the deceased partner, if they were left anything in the deceased partner's will. They have to elect one of those two options.

If you elect option A—that is to take your share of the relationship property—then you do not also get to take under your deceased partner's will. It is an either/or situation. You essentially cannot have your cake and eat it too under the current system.

De facto partners are also covered under our intestacy laws in our Administration Act. They are treated much the same as spouses. There is a statutory formula that applies, depending on whether there are children and other people. It is a formula. I will not go into it.

Chair: Margaret, apologies. Can I stop you there? I am afraid I am going to have to draw the formal meeting to a close so that we are not acting in a way that is inquorate.