HOUSE OF COMMONS

Women and Equalities Committee

Oral evidence: The rights of cohabiting couples, HC 130

Wednesday 2 February 2022

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Watch the meeting

Members present: Caroline Nokes (Chair); Theo Clarke; Elliot Colburn; Philip Davies; Kim Johnson; Kate Osborne and Bell Ribeiro-Addy

Questions 179 - 195

Witnesses

I: Mike Freer MP, Minister for Equalities, Government Equalities Office; Tom Pursglove MP, Minister for Justice, Ministry of Justice and Neal Barcoe, Deputy Director, Family Justice, Ministry of Justice.

II: Professor Nicholas Hopkins, Law Commissioner for Property, Family and Trust Law, Law Commission.

Examination of witness

Witness: Professor Nicholas Hopkins.

Q179 **Chair:** Welcome to the second panel of this afternoon's evidence session of the Women and Equalities Select Committee and our inquiry into the rights of cohabiting couples. The witness is Professor Nicholas Hopkins from the Law Commission. Thank you for coming along this afternoon. I know you will have heard much of the earlier evidence session from Ministers with much reference made to the Law Commission and its review. Why was the Law Commission tasked with reviewing cohabitation laws, and how did it reach the conclusions it did?

Professor Hopkins: I should begin by saying that I was appointed commissioner in 2015, so I was not a commissioner at the time that the cohabitation work was undertaken, though I speak for the Commission on those past projects that fall within my portfolio.

The immediate background to us being asked to look at cohabitation were the parliamentary debates during the passage of the Civil Partnership Bill. The debates in relation to that Bill highlighted the need for fundamental legal reform for those who live together without being married. At the time, marriage was only available for opposite sex couples, and civil partnerships were being introduced only for same sex couples. There was particular concern around the financial hardships suffered by cohabitants and children on the termination of such a relationship. Following those debates, Lord Filkin—then Parliamentary Secretary at the Department for Constitutional Affairs, which had policy responsibility for cohabitation—explained that the Law Commission was considering a project as part of our ninth programme of law reform that was being put together, and that he considered work on this matter would be timely and welcome. We published our ninth programme of law reform in 2005, which included cohabitation as one of the projects.

As with all of our projects, we moved towards preparing a consultation paper for public consultation and that was published in May 2006. The consultation took place over four and a half months and received over 250 responses, with our report being published the following year. Our conclusions were reached through very extensive engagement with stakeholders, both before we published our consultation papers—when provisional proposals and questions were prepared to gather further evidence—and then through taking into account the responses we received for that consultation.

Q180 **Chair:** About the consultation specifically, 250 responses seems like a good number; were efforts made to make sure that responses came in from groups that might be underrepresented in this sort of consultation process? Did you reach out to organisations such as Southall Black Sisters specifically seeking the views of women and people of different ethnicities, and so on?

Professor Hopkins: Yes, there may be more specific information I can give you in written evidence on the groups we heard from. We discussed our thinking with a number of groups before publishing the consultation paper. It was a wide range of groups representing women, academics with a special interest in the area, practitioners and judges with interests in the area. We received consultation responses from groups that represent women, men, LGBT+ people and religious organisations, as well as legal practitioners and academics, so there were a very wide range of responses to the consultation. If you want to know if we heard from or met with specific groups such as Southall Black Sisters, I will be able to confirm that.

Q181 **Chair:** I use them as an example, I am just concerned that you should have heard a range of responses from representative organisations.

Professor Hopkins: I can certainly confirm that we did, from the range of consultees.

Q182 **Chair:** Effort was made to make sure you did?

Professor Hopkins: Yes, our consultations are very proactive periods for us in which we hold meetings and events to encourage engagement.

Q183 **Chair:** We have heard concerns at various stages of this inquiry that cohabitation reform could undermine the institution of marriage. We have just heard from two Ministers, one of whom was quite clear in his view that you could solve the cohabitation problem by making sure that everybody either married or entered into a civil partnership. Did the Law Commission either receive representations about undermining the institution of marriage, or was that a consideration or a concern during the review?

Professor Hopkins: I should begin by explaining what we were asked to do. For all of our projects, we agree specific terms of reference with Government. We were not asked by Government to advise them on whether there should be statutory protection for cohabitees or whether the law should intervene. We were asked, and I quote our terms of reference, "The project will focus on the financial hardships suffered by cohabitants or their children on the termination of the relationship by breakdown or death. It will only consider opposite sex or same sex couples in clearly defined relationships". Because we are a specialist legal body, we tend to focus all of our projects on the legal questions and leave the wider questions of social policy for others to consider. I think it is important I say that by way of introduction. In direct response, yes, we certainly did hear representations of those views in the work that we did, and those views fed into the approach that we took in putting together a scheme to achieve what we were asked in our terms of reference.

Q184 **Chair:** The Law Commission published its proposals in 2007, which seems a phenomenally long time ago, what has changed since then?

Professor Hopkins: Nothing has changed that fundamentally impacts on the recommendations that we put forward. The main things that have changed since then as a matter of law are that civil partnerships have recently been opened up to opposite sex couples, and of course marriage has been opened up to same sex couples. Couples now have a wider choice as to the legally recognised relationship that they can—as worded in our report—"opt into" by making a particular legal commitment. We were clear in our report that an opt-in scheme does not work to protect cohabitants. What is needed is something that operates in the default position, when parties have not taken steps. None of those changes that have taken place affect the fundamental point that if a couple have not opted into marriage or a civil partnership there is no specific legal regime that will protect them on the ending of that relationship, whether that is through separation or death.

Q185 **Elliot Colburn:** I would like to go into more detail about the features of the cohabitation scheme. Could you start by outlining how a proposed scheme would work in practice?

Professor Hopkins: Stop me if there are parts that you do not want me to cover, if your question is directed specifically. You would have to show first of all that you have an eligible cohabitation relationship and that you have not opted out of the scheme. If you show those then you gain access to the scheme. Do you want me to explain those, or go straight on?

Q186 **Elliot Colburn:** That would be helpful, particularly for those watching the proceedings as well. That would be great.

Professor Hopkins: In terms of who is a cohabitant under our scheme, if you are going to have a scheme for cohabitants there is obviously a question of definition. We know if a couple are married, we know if a couple have entered a civil partnership, because there are legal steps they have to follow, that relationship is registered and a record kept by the state. None of that exists if a couple have cohabited, so you have to define cohabitation. The definition that we reached after consultation was that we are concerned with a couple who are living in a joint household; we felt that was a description that captured couples we are concerned with and could be understood as a matter of plain English. Essentially, we are concerned with couples who live together, who could marry or enter a civil partnership but have not done so, or who are unable to marry or enter a civil partnership because one or both of them is already married or in a civil partnership with somebody else. It is that idea of a couple in an intimate relationship, rather than friends and family who are sharing a home, for example. You have to show that you are a cohabitant.

You must then meet further eligibility criteria, which are either that you have children together or, if you do not have children together, that you have been cohabitees for a minimum duration. What that duration would be was not specified but we said it should be between two and five years. We were also keen that couples should be able to opt out of the scheme

in order to protect their autonomy. Provision was made for couples to make their own arrangements by an agreement that was written, signed, and made clear that the couple did not want a legal regime to apply to them. If you are a couple who meet those criteria and you have not opted out, then you obtain access to the scheme that we put forward.

The purpose of the scheme we put forward is that when a couple separate, each of them would take a fair share of the economic pluses and minuses that crystallised at the end of that relationship and arose from decisions they made together as well as the things that they did during the relationship. Importantly, we were giving the courts a family law-based discretion as to what to do, rather than the property rules that apply at the moment which only look at establishing what people own as a matter of property law.

In broad terms, the scheme would require that any continuing disadvantages are shared and any lasting benefits that one party conferred on the other are returned. The court would then have discretion within those parameters to decide what order to make, taking into account specific criteria including the welfare of any children the couple have, which we saw as the main consideration, and then the needs, financial and otherwise, of the parties themselves.

Q187 **Elliot Colburn:** Some have argued that the scheme appears a bit too complex or might be difficult to apply in practice. Is that something that you think is a fair criticism? How would you respond to that?

Professor Hopkins: Any new scheme is going to take a while for people to get used to. The scheme we recommended takes into account that cohabiting relationships cover a very wide spectrum and is designed to ensure flexibility in how it applies to those situations. To give a couple of examples: at one end of the spectrum there might be a couple who separate after having lived together in rented accommodation for a few years, shared the cost of living but otherwise kept their financial affairs separate, and do not have children. In those circumstances the outcome of our scheme is probably that no award would be made because there are no ongoing financial disadvantages or ongoing financial benefits that have been received.

If you contrast that with a long relationship where a couple have had children and one of them—usually the woman—has then taken a career break to care for children and adopted primarily a domestic role. If that couple then split up, our scheme would ensure that the woman who had taken on that domestic role received an economic award to reflect the fact that she remained economically disadvantaged at the end the relationship because she had lost her career, for example, and she had not been able to put together savings or investments. The scheme necessarily has to ensure that the right result is reached across a very wide range of relationships.

Q188 **Elliot Colburn:** Speaking of that wide range of relationships, we know

from the evidence we have received that the reason why so many, particularly younger, couples are not opting for civil partnership or marriage is because of the way they view relationships. To give an example, many trans and non-binary people choose not to go down that path because they do not particularly like the language around those ceremonies or fears of misgendering and so on. However, that could also be said to apply for rules around cohabitation. Do you think that there are challenges to define cohabitation in a way that reflects modern relationships?

Professor Hopkins: The definition we give is sufficiently broad that it should not encounter those difficulties. What is significant in that respect is that we deliberately do not adopt a so-called marriage analogy definition: we do not refer to a couple who are living together as if they were married or as if they were in a civil partnership. We were concerned that that marriage analogy would perpetuate misunderstandings of cohabitation and in particular perpetuate misunderstandings of the myth of so-called common law marriage, which is why we chose to do that. We were also concerned that if you are putting together a scheme for a particular type of relationship, that relationship should not be defined by reference to what you are distinguishing it from. I would hope, for example, that trans people who do not want a marriage or civil partnership because they do not feel that that reflects their life would feel satisfied that the Commission's definition of cohabitant is sufficiently broad that it does not raise those issues.

Q189 **Elliot Colburn:** To move on to talk a little bit about remedies, again as a broad overview, could you please explain the relationship between the eligibility criteria and the remedies that are available?

Professor Hopkins: The eligibility criteria essentially operate as a gateway. If you pass through that gateway, then the court can make whatever remedy from the recommended list it considers appropriate. What is appropriate would necessarily be determined by the particular facts of the case. It is in the sense of a binary relationship that you have the gateway criteria, and once you enter through the gate, the court can look at all of the facts of the case and determine what remedy is most appropriate. There is another relationship between them in the sense that if you have a very short relationship as cohabitees, then you are unlikely to meet those gateway criteria in any event. If you live together for a very short period of time, then there are not likely to be ongoing economic benefits or ongoing economic disadvantages that the parties experience.

Q190 **Elliot Colburn:** The final question from me relates to the opt-out agreement that is within the scheme. Could you explain a little bit about the rationale behind the recommendation for a more informal opt-out rather than a cast-iron agreement?

Professor Hopkins: We were trying to achieve a careful balance between on the one hand enabling people to opt out to protect their

personal autonomy and giving them certainty that if they opted out that would be enforced and respected, but also protecting the vulnerable. There could be very rigid criteria as to how an opt-out was entered into—for example, you could require independent legal advice and then make it absolutely cast iron. The Commission was concerned that that would put barriers and costs in the way of people opting out. A different approach was adopted which was not to require legal advice but then to put in place the ability for a court to set the opt-out aside if it would result in manifest unfairness. We thought that was a way to draw the balance. There could be looser criteria to enable people to have an opt-out, and then give leeway for the court to set that opt-out aside if there was manifest disadvantage. There is a relationship between them because if, for example, when an opt-out agreement is challenged it is shown that the parties did in fact have independent legal advice, it would be much harder to show that there was manifest disadvantage involved in the agreement that they entered into.

Q191 **Theo Clarke:** Regarding the further Law Commission review. I am interested to hear how the Law Commission's work on intestacy law and financial remedies for cohabitants following separation is connected and whether the two could be packaged together?

Professor Hopkins: When we looked at cohabitation, our consultation paper discussed intestacy and financial provision under the 1975 Act. It was concluded that no recommendations in relation to intestacy would be made. This was because of concerns that there were particular issues around how a cohabitee and a spouse could be prioritised, for example, if the individual was still formally married, and questions about the extent of the entitlement might arise. In relation to financial provision, recommendations were made to essentially bring the current regime in line with our general recommendations for relief in the event of a lifetime separation. We recommended that the current two-year minimum cohabitation period required under the 1975 Act to make an application would not apply if the couple had children together.

We returned to those issues when intestacy and family provision was reviewed more generally. Looking at the issues in that context, we did make recommendations for intestacy. It was recommended that a cohabitant should be able to benefit on an intestacy to the same extent as a spouse as long as the deceased did not have a spouse, and if the relationship had continued for, I believe, five years or two years with children. In relation to the 1975 Act, it was concluded that the two-year period under the current law should be removed where a couple have children and the measure of the award should be in line with what the courts already provide under the 1975 Act rather than incorporating the recommendations made in the cohabitation report.

Notably when we published our report on intestacy and family provision, two separate Bills were published: one Bill that dealt with all the issues except for cohabitation and a second Bill that dealt with the cohabitation

issues. This was because we realised that those issues might be tied up in a wider debate around cohabitation reform. The recommendations in all other respects have been implemented but the recommendations in relation to cohabitation have not been. Certainly in some of the most recent statements, Government has made a link between making provisions for cohabitants for a lifetime separation and making provision for them in the event of intestacy or under the family provision legislation.

Q192 **Theo Clarke:** How far can your work on weddings assist cohabitants? I am particularly interested in those in religious-only marriages?

Professor Hopkins: The issue of religious-only marriages was something the Commission was aware of at the time of our cohabitation report, and we acknowledged in that report that people in religious-only weddings would benefit from the scheme we put forward. We are, as you say, now looking at weddings reform and the whole legal process of getting married, from preliminaries through to the registration. Public consultation on that closed in January 2021 and the report should be published in July this year. I am the commissioner who is leading that review.

It is clear that the issue of religious-only weddings has become more significant in the intervening 15 years; more research has been conducted and we have heard a lot about religious-only weddings in the course of the work we are currently doing. We look at the issue in two different ways: first, the provisionally proposed scheme for weddings law would make it much easier for a couple to have a religious wedding that is also legally recognised. I can go into that, if you would like me to, but I suspect the interest lies more in the second way we consider religious-only weddings, which is our discussion of the impact on the validity of a marriage if the legal formalities are not considered.

Currently, if a wedding does not comply with all of the formal requirements, that may affect its validity. The marriage can be void or the ceremony can be classed as non-qualifying. This is a hugely significant distinction. If certain requirements are not complied with, then the marriage is void, but if the court is granting a decree of nullity, the court can make an order for financial provision applying the same statutory regime that applies when couples divorce. A void marriage means there is still access to the divorce regime, in effect. If all, or virtually all, of the requirements are not complied with, the ceremony is considered to be non-qualifying. If that is the case, the court cannot make an order using the divorce legislation and, as far as the law is concerned, that couple are treated the same way as cohabitants even though they would not describe themselves as cohabitants because in the eyes of their religion they are a married couple. That is the current position.

Under the provisional proposals put forward in our consultation paper, more religious weddings would be valid even if not all of the legal

requirements have been complied with. For example, if a couple give notice that they are going to get married—so they go through the legal preliminaries—and if that wedding is conducted in the presence of an officiant who at least one of the couple believes can solemnise a legally recognised wedding, then that wedding would be valid. That is one change. Even if the wedding is not valid, our provisional proposals would make it more likely that the wedding was void rather than non-qualifying, so we have narrowed down the circumstances in which that couple would be treated as cohabitees and the divorce remedies are not available. If the couple have not given notice but they get married in front of an officiant who at least one of them believes is able to solemnise a legal wedding, that marriage would be void rather than non-qualifying. It is only going to be non-qualifying if they have not given notice and neither of the couple believes that the party officiating is able to solemnise a legally binding wedding, or if they do not consent to getting married or do not consent to getting married other than for religious rather than legal purposes. We have really narrowed down the circumstances in which a couple who have a religious-only wedding would be treated in law as cohabitants.

We were urged to consider going further and we were asked to consider providing that any religiously recognised wedding would at the very least result in a void marriage rather than a non-qualifying one. In our consultation paper we have not provisionally proposed adopting that approach because all of the difficulties that have been raised with us in relation to religious-only weddings can also arise where people have had some ceremony other than a religious one, but a ceremony that is not legally recognised—for example, a couple who have a humanist wedding ceremony and do not also have a civil ceremony, or a couple who have a ceremony conducted by an independent celebrant who does not represent a religious or non-religious organisation but provides a ceremony for them—or indeed they can arise in relation to a couple who cohabit without having any type of ceremony at all. Our view is that there comes a point where it is wrong to focus on the ceremony. We cannot solve all these problems by looking at the ceremony; we have to look at the relationship. There comes a point where the answer is not to impose a status on the ceremony, but where the answer is to have cohabitation reform that would ensure that all of those parties—whether they have cohabited, had a religious wedding or had some other non-legally recognised wedding—are protected.

Q193 **Chair:** To what extent do you think these proposals would help victims of domestic abuse or those who were in some sort of coercive control relationship being forced into marriage?

Professor Hopkins: A distinction has to be drawn. If you are forced into a religious-only marriage, that still counts as a forced marriage under English law, so remedies are available. The issues arise more where somebody has not been forced into marriage but has been pressurised into having a religious-only wedding rather than one that is legally

recognised. If both of the couple know that the ceremony they are having is not legally recognised—even if one is not happy about that—and if notice has not been given, that would still be a non-qualifying ceremony and the couple would still be treated as cohabitees. The provisional proposals put forward in our weddings project are not therefore going to help in that situation. The reason for that is essentially that that same scenario could arise in a relationship between people who are only cohabitants. Research has shown that there are many relationships between cohabitants that are uneven—for example, where one of the parties wants a legally recognised relationship and wants to get married but the other party does not. It is very difficult to separate those and say that because one couple had a ceremony which is recognised by a religion and the other has not, you help one and not the other.

Q194 **Chair:** I am now going to try and ask that question in a completely different way, and I hope this makes sense. What protections are there for a couple where one individual is under coercive control? Under these proposals, if they are cohabiting and let us say for argument's sake that the woman is being coercively controlled by the partner, so she finds herself effectively in a cohabitation relationship with no escape, could the partner—the domestic abuser, the coercive controlling partner—accrue rights over her property despite her not wanting to be there? Are there protections for her in this system?

Professor Hopkins: I am not sure what you mean by the coercive and controlling partner securing rights over her property in that case. If we are looking at the law of cohabitation, the law of weddings, in those circumstances if the couple have been through a ceremony which is non-qualifying, they are treated purely as cohabitants. As the law stands, if the parties then separate there is no remedy available other than an application to property law of trusts. That is the reason why we say in our weddings consultation paper that cohabitation reform is needed to deal with that sort of situation. We do not think it can be dealt with through looking at weddings law that is concerned only with the validity of a ceremony.

Q195 **Chair:** Under the Law Commission's proposals for cohabitation, suppose that neither party ops out and they find themselves cohabiting. One party has property, the other does not but will not get out of their property because they are the coercive controller. You could end up with the scenario where somebody could just move in on you and control you coercively, we reform cohabitation and they get rights over the property.

Professor Hopkins: Our recommendations for cohabitation would solve that issue because when the relationship then broke down, if that is the scenario that we are dealing with, and if one party has an ongoing economic benefit, or the other party has an ongoing economic detriment, the court can grant a remedy to correct that. For example, if the woman in that scenario has essentially been pressurised into undertaking a domestic role for the course of the relationship, at the end of that relationship she is probably left with an ongoing economic detriment

because she has not been able to accrue savings or investments and has not been able to build a career. In that scenario, the scheme we put forward would enable the court to provide a remedy.

Chair: Does any other member of the Committee have any further questions? No. Thank you very much for your evidence, Professor Hopkins, it is much appreciated. I shall draw the meeting to a close.