

Written evidence from Resolution [HAB0238]

Introduction

Resolution is an organisation of 6,500 family lawyers and other family justice professionals in England and Wales, who believe in a constructive, non-confrontational approach to family law matters. Resolution also campaigns for better laws and better support for families and children undergoing family change.

Summary

- Cohabiting couples currently have little legal protection when they separate. A legal framework of rights and responsibilities when couples (not married or civil partnered) who live together split up is needed to provide some legal protection and secure fair outcomes at the time of a couple's separation. Trusting in non-existent "common law" rights and protections can put couples, and their children, at a significant disadvantage if the relationship breaks down or one partner passes away. People face inequality (as well as financial hardship and emotional distress) because the law has failed to keep in step with the reality of how many modern families live their lives.
- Where a couple has an Islamic marriage or some other type of religious marriage which is not recognised in this jurisdiction, there are significant implications upon separation and divorce, because they are not treated as married.
- Resolution considers that there should be a legal definition of cohabitation based on eligibility criteria demonstrating a committed relationship.
- Eligible cohabitants should have a right to apply for certain financial remedies orders if they separate. This right should be automatic unless the couple chooses to 'opt out'. The court should be able to make the same types of orders as they do currently on divorce or dissolution of a civil partnership, but on a very different and more limited basis.
- The legislative framework in Schedule 1 of the Children Act 1989 should also be reviewed to provide a more accessible, flexible and fairer system to properly meet the needs of children of a cohabiting relationship.
- In the event of the death of a cohabiting partner, their partner should have an entitlement of intestacy, subject to conditions.
- Government and Parliamentarians have a responsibility to address the discriminatory impact of our outdated law relating to cohabiting partners and to bring the rights and responsibilities of couples living together who are not married or civil partnered into the 21st century. Resolution's members encounter many individuals, often female, left unprotected by the current law, even after very long relationships during which they raised the children of the relationship. And age has a striking effect on the likelihood that someone will believe that 'common law marriage' exists. Unlike many other countries, we have not changed the law to tackle this situation.
- Resolution members have considerable experience and awareness of the problems created by the vulnerability of cohabitants under current law. We carried out a survey of over 200 members in 2017, asking about their experience of working with people in cohabiting

relationships. 98% of respondents reported having worked with cohabiting couples they were unable to help due to a lack of legal protection. A member survey in 2019 gave similar results.

Should there be a legal definition of cohabitation and, if so, what should it be?

1. Resolution agrees that there should be a legal definition of cohabitation so that cohabitants and other interested parties know whether or not they have legal rights. Cohabitation can mean different things to different couples and does not necessarily demonstrate commitment or mutual dependency.
2. A legal definition needs to make a distinction between cohabitation and marriage and civil partnership (where couples are protected as soon as they marry or enter into a civil partnership), and should include opposite and same sex couples.
3. We envisage that a new cohabitation law would apply to cohabitants who have lived together for a minimum period, or who satisfy other criteria which demonstrate a committed relationship. Schemes in other countries take this approach and it reflects the Law Commission's 2007 Cohabitation: the Financial Consequences of Relationship Breakdown proposals.
4. There are existing definitions used in other areas of our law, such as in social security legislation, from which family case law has drawn non-exhaustive criteria for determining the existence of cohabitation with a new partner post marital separation. Relevant factors might include that the parties were living together in the same household; the living together involved a sharing of daily tasks and duties; there was stability and permanence in the relationship; the financial affairs of the couple were indicative of their relationship; their sexual relationship was admitted and ongoing; and there was sufficient evidence that cohabitation existed in the opinion of a reasonable person with normal perceptions¹.
5. We would favour a definition based on a committed relationship between two adult persons who live together as a couple and either have lived together for a minimum period, demonstrating the stability and permanence of the relationship, or who have a child together; and who are not married to one another or in a registered civil partnership (and who are not within the prohibited degrees of relationship for the purposes of marriage or civil partnership).
6. Where there are no children, cohabitation would be defined by reference to prescribed eligibility criteria requiring the need to demonstrate a certain level of commitment and likely interdependency. Where our existing law recognises rights and responsibilities for those living together, there is usually a minimum period of time required before cohabitation is established. Similar schemes in other countries usually require couples to have lived together for a minimum period of time, generally ranging between two and five years. The Law Commission suggested that a period of two to five years would be appropriate. A period of three to five years would ensure that only those in longer term relationships, where it may be more likely that there is a financial imbalance, would be protected. But there can still be significant unfairness where people have lived together for a shorter period. Resolution recommends a period of two years. This is generally viewed as long enough to demonstrate

¹ *Kimber v Kimber* [2000] 1 FLR 383.

commitment to the relationship, to minimise the risk of unmeritorious claims and is consistent with existing domestic legislation, for example, a cohabitant of a deceased person may claim provision from his or her estate if they lived together for two years immediately before the death (under the Inheritance (Provision for Family and Dependants) Act 1975).

7. Whilst it can be argued that the requirement of a minimum period is arbitrary and that the level of commitment is not always related to the length of the relationship, the use of less definitive eligibility criteria than the length of cohabitation could cause uncertainty and complex litigation.
8. We consider that cohabitants with children should be within the definition without the need for a minimum cohabitation period or other preconditions. Living together and having a child together indicate commitment to the relationship regardless of how long the couple have lived together. The existence of children also makes it more likely that one partner will have suffered economic disadvantage if s/he is the primary carer.

What legislative changes, if any, are needed to better protect the rights of cohabiting partners in the event of death or separation?

9. Cohabiting couples currently have little legal protection when they separate. It is in fact an anomaly that it is possible for a cohabitant to make a claim for provision on the death of the other which is not available during the life of both on separation.
10. The current application of property law remedies is inappropriate for unmarried families. Not only are the legal arguments that need to be advanced when these relationships break down complicated, but the outcome of such litigation is far from certain and highly case specific. These disputes can be disproportionate in terms of legal costs incurred and can result in unfair outcomes. Although out of court issues resolution processes can help facilitate fairer outcomes, there remains an underlying concern that there is no safety net legislation in place to protect those left vulnerable on relationship breakdown.
11. Under current law, it is possible to live with someone for decades and to have children together, but then simply walk away without the economically stronger party taking any responsibility for a former partner when the relationship breaks down. This can create hardship, particularly in cases where a mother has given up or reduced her work to raise a family.
12. Resolution calls for a legal framework of rights and responsibilities when couples (not married or civil partnered) who live together split up, to provide some legal protection and secure fair outcomes at the time of a couple's separation. There are inherent legal risks in cohabiting, including where a religious marriage is consciously chosen as a form of trial marriage.
13. The law should reflect how people choose to live their lives and provide for all types of families, including unmarried families. Less people are getting married and there is no evidence that the trend towards couples living together will decrease - it remains the fastest growing family type in the UK, making up nearly one in four families.
14. Trusting in non-existent "common law" rights and protections can put couples, and their children, at a significant disadvantage if the relationship breaks down or one partner passes away. Implementation of the Civil Partnerships, Marriages and Deaths (Registration etc) Act

2019 allowing opposite sex couples to form civil partnerships will not solve the underlying problem of many cohabitants still believing they have “common law” rights². It will not on its own reduce harm to people coming out of cohabiting relationships - those affected are unaware of how perilous their position is. Providing an alternative for those who wish to formalise their relationship does not address the much more widespread injustice experienced by those who have not married or civil partnered, for a whole host of possible reasons, leaving them disadvantaged on the breakdown of their relationship.

15. The introduction of legal rights for cohabitants would also help to address the uncertainty, unfairness and hardship that can arise on the termination of a relationship where the couple had a non-qualifying wedding ceremony, or when one of the parties to a non-qualifying ceremony dies intestate.
16. Resolution proposes that cohabitants meeting eligibility criteria indicating a committed relationship would have a right to apply for certain financial remedies orders if they separate. This right would be automatic unless the couple chooses to ‘opt out’.
17. The court would be able to make the same types of orders as they do currently on divorce or dissolution of a civil partnership, but on a very different and more limited basis. This would give flexibility in adjusting property rights and would allow the court to tailor its orders to the cohabitants’ particular circumstances.
18. Under current law, the vast majority of unmarried primary carer parents cannot secure provision for childcare costs from the child’s other parent to enable them to work. Awards might include payments for childcare cost to enable a primary carer parent to work, particularly if no provision is made for ongoing maintenance.
19. We propose that the scheme should apply to existing cohabitant relationships as well as to those which begin after the scheme comes into operation. When considering eligibility to make a claim, the court would assess the entire period of a relationship and not be concerned about whether the relationship started before or after the start date of the scheme. The scheme would not apply to relationships which began and ended before the scheme had come into operation.
20. We consider that cohabitants should be able to apply for maintenance for a limited period to reflect the economic advantages or disadvantages caused by the relationship which could not be accommodated by other types of orders. This would enable a cohabitant to adjust to the loss of financial support before becoming self-supporting. It would mark a difference between marriage or civil partnership and cohabitation and ensure a clean break following the breakdown of a cohabiting relationship.
21. In the event of the death of a cohabiting partner, their partner should have an entitlement of intestacy, subject to conditions. Under the present law, surviving cohabitants have no entitlement on intestacy and must, if they are unable to reach agreement with those who are entitled, bring proceedings for family provision under the Inheritance (Provision for Family and Dependents) Act 1975, with the emotional and financial costs that this involves.

² The research from the British Social Attitudes Survey, published by the National Centre for Social Research and the University of Exeter in January 2019, found that 46 per cent of respondents wrongly thought that ‘common law marriage’ exists, giving cohabiting couples the same rights as married couples. This figure is virtually unchanged in comparison with the same survey back in 2005, which found that 47 per cent of people questioned thought that ‘common law marriage’ exists.

Resolution supports the Law Commission's recommendations set out at Part 8 of their 2011 Intestacy and Family Provision Claims on Death Report, which would be given effect by the draft Inheritance (Cohabitants) Bill annexed to that Report.

22. Cohabitants should also be treated in the same way as married couples and civil partners for tax purposes on death. It is unfair that they are currently treated as unconnected individuals and do not benefit from the same exemptions as married couples and civil partners in relation to Inheritance Tax.

What equalities issues are raised by the lack of legal protection for those in cohabiting relationships?

23. Family life has changed dramatically over the past 50 years. Many cohabit rather than marry, have children outside marriage, and live longer, in a variety of living arrangements. Some people who want to marry cannot marry so they cohabit. People face inequality (as well as financial hardship and emotional distress) because the law has failed to keep in step with these changed realities.
24. Non-discrimination between the roles the parties adopt during a relationship in terms of earning and caring responsibilities and relationship generated disadvantage is a well-established concept in the context of financial remedies on divorce or dissolution of a civil partnership, dating back to the case of *White v White [2000] UKHL 54*, and is widely recognised in divorce settlements. However, for cohabitants, decisions made during the relationship, often about bringing up children or elderly relatives, may mean that the economically weaker party's future financial position has been significantly compromised. The financially vulnerable cohabitant has no ability to pursue a claim for a share of assets in the other person's sole name, unless they can rely on complex trust principles to establish a beneficial interest. It is not possible to make a claim in relation to pensions to compensate one person for not having been able to provide separately for their retirement because they haven't been working. Nor can they make a claim for maintenance save for the upkeep of a child. Even if there are children and it is possible to seek financial provision for their benefit, this provision usually ends when the child reaches 18 or 21. As women still tend to undertake the majority of caring responsibilities in relationships, the lack of effective remedies disproportionately affects them and therefore the present state of the law is arguably discriminatory.
25. Resolution's members encounter many individuals, often female, left unprotected by the current law, even after very long relationships during which they raised the children of the relationship. Of those who responded to member surveys in 2017 and 2019 63% and 67% respectively said that in their experience this is an issue where women lose out more often than men (3% said more men lose out than women, and 25% said it seems roughly even).
26. Age has a striking effect on the likelihood that someone will believe that 'common law marriage' exists. Just 28 per cent of people in the 18 to 24 age group thought it existed, while 39 per cent of people aged over 65 shared the belief. However, 52 per cent of people between 25 and 64 thought 'common law marriage' exists³. This seems to indicate that those people who are most likely to suffer as a result of a misplaced belief in the myth of 'common law marriage' are often precisely those people most likely to be affected by it in the first place. People aged between 25 and 64, people living in households with children

³ British Social Attitudes Survey published January 2019.

and people who are cohabiting all have high rates of belief in the idea that unmarried couples who live together have the same legal rights as married couples.

27. Where a couple has an Islamic marriage or some other type of religious marriage which is not recognised in this jurisdiction, there are significant implications upon separation and divorce, because they are not treated as married. The couple will be treated as unmarried and in the same way as cohabitants who have little or no legal protection when they separate regardless of the length of the relationship or whether they had children or property together. We doubt that there is high public awareness and knowledge, for example among 'wives' in a weaker economic position than their husbands, about the legal position and understanding of the options in relation to having a recognised marriage or not and the consequences upon separation and divorce.

Should legal changes be made to better provide for the children of cohabiting partners?

28. The Law Commission has been recommending that there should not be discrimination between children of married and non-married partners since 1982⁴.
29. A legal framework of rights and responsibilities when couples who live together split up, taking into account relationship generated disadvantage experienced by one parent as a result of the presence of children, and making some provision for limited 'spousal type' maintenance for that parent, would also benefit the couple's children.
30. Where there are minor children of a cohabiting family it is possible for an application to be made under Schedule 1 of the Children Act 1989 for financial provision for the benefit of the children during their minority. The court can make orders for maintenance, lump sums and the transfer or settlement of property.
31. However, in practice, many children, or parents on behalf of their children, are excluded from the scope of Schedule 1. Applications tend to be the preserve of the very wealthy, where the economically stronger party has an income over £156,000 gross per annum and so is outside of the jurisdiction of the Child Maintenance Service; where it is intended a child will be privately educated and/or where there are substantial assets. Outright transfers of property are extremely rare even in "big money" cases. The needs of children in smaller money cases are rarely addressed. Future needs beyond the end of the child's minority or education are not a consideration.
32. Unlike financial remedies in the matrimonial/civil partnership jurisdiction, the child's welfare is not listed as a factor the court is required to consider, although in the leading case on Schedule 1 claims *Re P (A Child (Financial Provision)) [2003] 2 FLR 865* the court said that the welfare of the child while a minor, although not paramount (as is the case on financial remedies on divorce/dissolution) is a very relevant consideration as one or all the circumstances of the case.
33. Schedule 1 is some 32 years old and was conceived against a background of the bastardy laws, which were only repealed with the Family Law Act 1987. Society and the ways families are formed and live their lives have altered drastically in that time, and it is appropriate that the legislative framework is now reviewed to provide a more accessible, flexible and fairer system to properly meet the needs of children of a cohabiting relationship.

⁴ Family Law: Illegitimacy, Law Com. 118 (1982).

34. An extension of the duration of the orders available (and possibly the range of orders) and the criteria to be considered on an application under Schedule 1, could provide a relatively straightforward legislative safety net for the children of those left most vulnerable on relationship breakdown.

Should cohabiting partners have the same rights as those who are married or in a civil partnership?

35. Marriage has always had a special status in society. Cohabitants have not made the public commitment of marriage, which is known and understood in a way that the lack of rights and responsibilities acquired by cohabitants is not. But this does not mean that they are not in a committed relationship or that the law should not recognise committed cohabitant relationships. The numbers of those cohabiting, many with dependent children, continues to rise. The law should reflect the society we live in and protect the vulnerable, not leave them vulnerable. As discussed at paragraph 14 above, the availability of civil partnerships does not solve the underlying problem of many cohabitants still believing they have “common law” rights. While greater education and awareness should reduce this underlying problem, this needs to be in tandem with the improvement of cohabitation remedies to resolve the mischief created by a deliberate avoidance of the commitment of marriage by those (often men with awareness of the imbalances created by the current law) who deliberately avoid marriage or civil partnership to avoid financial responsibility towards their former partner (often women with dependent children).
36. We envisage that the court would be able to make all the types of financial remedies orders currently available to married couples on divorce, but on a very different and more limited basis. To mark a difference between marriage and cohabitation, and to allow finality there could be a presumption in that each party should, as far as possible, be self-supporting. There is no evidence from other jurisdictions that the introduction or improvement of rights for the population of cohabiting partners is to the detriment of marriage and those wishing to marry.

Are there examples of good practice in relation to the rights of cohabiting partners in the UK or internationally that the Government should seek emulate in England and Wales?

37. England and Wales lag behind the majority of the rest of the world in terms of not having introduced rights for cohabiting partners on relationship breakdown. There are numerous examples of legal frameworks adopted in other countries including Ireland, much of the rest of Europe, Australia, New Zealand, Canada, and Latin America.
38. A new law should provide clarity, be fit for purpose and useful i.e. it must help people in this jurisdiction. In considering the schemes available in other jurisdictions, it will be important to have in mind the wider context of varying societal make up and issues, social security systems and approaches to wider family law. We would caution against simply replicating the law of another jurisdiction, even if it is within the United Kingdom. Evidence about the nature of cohabitation in England and Wales, its diversity, and its similarity or not to marriage is important for policymakers when considering what laws are appropriate to impose by default to cohabiting couples⁵.

⁵ Joanna Miles, Unmarried cohabitation in a European perspective, Page 87 European Family Law Volume III.

39. In our view, rights should be automatic unless the couple chooses to 'opt out' in order to provide the required safety net legislation. Australia provides a simple and clear example of an 'opt out' system. Introduced in 2009, de facto law has enabled the federal courts in Australia to bypass a convoluted property law regime with similarities to the current application of property law remedies in England and Wales. Regardless of marital status or gender, all couples have been treated substantially the same in relation to property entitlements and entitlements to maintenance. Australia has a very workable system and there was no objection to its introduction.
40. In Ontario, there has been legislation providing opposite sex cohabiting couples with support rights identical to spousal maintenance for married spouses for approximately 40 years, which has never created any particular controversy. While unfortunately, there has not been the political impetus to change the law to provide more property rights for non-married couples, this does nevertheless provide a route for compensatory support. While this is an example of one means of addressing inequality, we do not anticipate that any sort of substantive maintenance claim of this type for cohabitants is likely to have public support nor has it featured in the reform proposals and draft bills proposed for England and Wales since the Law Commission Report in 2007.
41. In Scotland, since the introduction of the Family Law Act 2006, a former cohabitant can make a claim against their former partner for a capital lump sum, but no provision is available for property transfers, for ongoing maintenance or support or for any form of pension sharing. This is an entirely discretionary remedy and is based on the extent to which a party has derived an economic advantage from the relationship and the extent to which the applicant has suffered an economic disadvantage, either in the interest of their partner or in the interest of any child of the relationship. The claim, must, however, be made within one year of the separation ending which is not discretionary at all. Scotland's Law Commission is looking at the operation of cohabitation law in detail at the moment, and in particular the limitations of the current law in terms of the time limits and the claims only being limited to lump sums.
42. In seeking to emulate other countries such as Australia and Canada, the Government should note that introduction of new legislation can cause relatively little or no controversy at all. Additionally, although Scots lawyers have found it difficult to apply discretion under their cohabitation laws, this seems largely due to their inexperience with this approach because their financial remedies on divorce are largely formulaic. A discretionary process should fare better in England and Wales because our financial remedies on divorce already operate using a discretionary basis, if coupled with access to a wider menu of options in terms of remedies, which is well established, capable of being applied in practice, and would lead to fairer outcomes. The discretion to be applied, however, based on our proposed reforms, would be restricted to claims for compensation, rather than based on needs or sharing available on divorce.

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