# Written evidence from Rights of Women and Southall Black Sisters [HAB0293]

This is a joint response by Rights of Women and Southall Black Sisters.

**About Rights of Women**

Rights of Women is a legal rights organisation which specialises in supporting women who are experiencing – or at risk of experiencing – all forms of Violence Against Women and Girls (VAWG), including domestic and sexual violence. In our approach, we recognise the additional barriers posed by the intersection of gender-based abuse, racism, structural inequality and other forms of discrimination and oppression that impact on women's vulnerability, exclusion and marginalisation.

By offering a range of services – including specialist telephone legal advice lines, legal information and training for professionals – we aim to increase women's understanding of their legal rights and improve their access to justice. We empower women to make informed choices where they come into contact with the criminal, family, employment or immigration and asylum legal systems so they can lives free from violence.

Rights of Women is a registered charity 1147913 and Company Limited by Guarantee.

**Rights of Women's Evidence**

Before answering the specific questions asked in the consultation we would point out that as a women's legal organisation we will confine our responses to law and legal policy issues within our skills

**About Southall Black Sisters**

Founded in 1979, Southall Black Sisters (SBS) is a leading UK based non-governmental organisation (NGO) for BME women. SBS provides advice, advocacy and support services to BME women who represent some of the most marginalised and disadvantaged groups in our society. The bulk of our work is directed at assisting women and children - overwhelmingly survivors of domestic and other forms of gender-related violence - to obtain effective protection and to assert their fundamental human rights. Our advice and casework ranges from dealing with one-off enquiries to undertaking mid to long-term casework, which covers a number of overlapping issues and support needs. Although based in West London, our work has a national and even international reach, and we handle on average 700 new cases and 8-10,000 calls to our helpline every year.

Many women arrive at SBS having experienced abuse and related problems of homelessness, mental illness, poverty and insecure immigration status. Many have also endured a variety of harmful traditional practices based on claims to religious and cultural authenticity. Women's experiences show us that culture and religion are often used to impose and justify control over their bodies, their sexuality, decisions and actions - preventing them from expressing their own free will, including their right to choice in marriage. Women are deliberately isolated, excluded and manipulated regarding information pertaining to their rights so as to maintain their subservience within patriarchal family structures. The restrictions and controls women face can come from their immediate family and relatives, as well as community and religious 'leaders' and 'spokespersons'.

SBS' campaigning work over the years has sought to highlight gaps in state protection and to break taboos in communities in relation to culture and religion; taboos that shape the inferior status that women hold within BME communities through practices such as domestic abuse, forced marriage, polygamy and unregistered religious-only marriages.3 Our aim is to address the multiple forms of harm and oppression to which women are subjected - which are manifestations of widespread gender inequality in South Asian and other BME communities.

The key questions for the inquiry are addressed in turn below.

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

Yes, if new laws are introduced to give cohabitees and former cohabitees rights they do not currently have, then a legal definition of cohabitation is required to indicate when those rights are engaged.

We support legal recognition of cohabitation and an accompanying scheme of financial provision on separation that is similar to provision available for couples who are ending a marriage or civil partnership.

In relation to what the definition should be, we would say the following:

(i) Analogy to marriage or civil partnership

We believe that any legal definition of cohabitation, for the purposes of eligibility under a new scheme, should not contain an analogy to marriage. This is for both conceptual and practical reasons. Conceptually, relationships between cohabiting couples are not marriage or civil partnership and cohabitees may have specific social, ideological or other reasons as to why they have chosen not to enter into marriage or civil partnership. Therefore, it is not appropriate to define them by reference to marriage or civil partnership. However, by stating this, we do not believe that this warrants holding marriage to be of a higher status, or indeed the reference point to which any other type of relationship between couples is compared or defined. We believe that defining eligible cohabitees in such a manner promotes and places inappropriate emphasis on marriage as of higher value.

Developments in family law over the last two decades support our view that reference to marriage or civil partnership as part of a definition of cohabitation is not only inappropriate but unnecessary. For example, section 41 of the Family Law Act 1996 which stated that where parties were cohabitants and former cohabitants, in considering the nature of the parties' relationship the court had "to have regard to the fact that they have not given each other the commitment involved in marriage" was repealed by s2(1) of the Domestic Violence Crime and Victims Act 2004. Similarly, the Adoption and Children Act 2002 places cohabiting couples in the same position as married couples or civil partners in terms of their ability to apply for a joint adoption order. Section 144(4)(b) Adoption and Children Act 2002 defines a "couple" for the purposes of being able to apply to adopt a child as two people that are married, in a civil partnership or:

*"two people (whether of different sexes or the same sex) living as partners in an enduring family relationship."*

A definition by reference to marriage also causes practical difficulties. We are aware through our work with women that although the belief in 'common law marriage' is decreasing amongst some parts of the population, it is still prevalent. We strongly believe that a legal test using the marriage analogy will only compound this problem. We believe that the Government needs to ensure that the myth of common law marriage is dispelled. There needs to be a high profile and wide-reaching campaign which gives accurate information on the legal rights that cohabiting couples have. We urge the Committee to call on the Government to do more to raise awareness of the legal reality of cohabitation and the rights and remedies (or lack thereof) available upon separation.

(ii) Checklists/eligibility criteria

The Law Commission[1], in their report, considered a checklist by which to measure the eligibility of a couple to apply for financial remedies. Ultimately, they did not endorse this approach but recommended two eligibility criteria – either that the couple have a child or that they have been living together for a minimum length of time to be determined with a recommendation that it be between two and five years.

We recognise that checklists are a common tool in the family courts and also that the legislation in Scotland uses a checklist to consider whether a couple qualify as 'cohabiting'. However, we do not support this approach. We would be concerned about how such a list would operate in practice. For example, how much weight would be accorded to each criterion, would a certain number of criteria be required, and/or would fulfilling one be able to override another? This latter point is particularly relevant when applied to women with children as compared to women without children. A checklist is more appropriate in considering what form of order to make, than in considering eligibility to apply for an order.

We are concerned that a checklist, like the one used in Scotland, may lead to unintentionally excluding some couples who should be able to make claims through misapplication of the checklist. The case of *X v Y* is one example of how a checklist can distract the court from making a fair and balanced decision on whether there was cohabitation[2]. It is not possible to legislate for all of the possible factors that might point to a committed relationship, and it is therefore better to avoid creating such a list which may be misapplied unfairly.

We consider that the concept of a cohabiting couple is well understood and although there will always be grey areas which will be determined based on the individual facts in the case, a simple definition such as the definition within the Adoption and Children Act 2002 will ensure that those who need the protection of legislation are protected.

(iii) Minimum duration criteria

[1] https://www.lawcom.gov.uk/project/cohabitation/

[2] X v Y [Maintenance arrears – cohabitation] [2012] EWCC 1 (Fam) – a case in the which the lower courts had applied guidance which contained a non-exhaustive list of factors from case law inappropriately when they concluded a couple was not cohabiting because "[h]aving found that only two of the eight factors listed in *Kimber v Kimber* were present in this case we conclude that there was no cohabitation…' which the appeal judge concluded was the wrong approach.

The Law Commission recommended a minimum period of cohabitation before eligibility arose for couples without children. We do not favour the use of a minimum duration requirement. While we note that other jurisdictions use a minimum duration requirement, either explicitly in statute or in case law criteria, we are cautious of such a requirement forming part of a statutory scheme. There is no minimum duration requirement in Scotland. A couple may share a household and be financially interdependent within a period of two years. In particular, many of the significant financial commitments, and the start of financial interdependence often begin at the start of cohabitation. We would remind the committee that in the large majority of cases, relationships do not start at the start of the co-habitation, the couple are likely to have been in a relationship for some time and will start making joint financial plans at the point of moving in together.

A minimum period of cohabitation will always be an arbitrarily drawn line that creates unfairness for those just short of it but who may be in exactly the same circumstances as those on the other side of the line. Some examples of couples who would be unfairly treated by the artificial distinction of a minimum time period are:

- a victim of economic abuse who has been forced to take debt out in their name for the benefit of the abuser or forced to transfer property into the abuser's name could easily end up in this situation within the first two years of co-habitation
- a victims of coercive control who has been forced to leave her job or been prevented from pursuing education/training by her abuser may easily have experienced this abuse within two years of co-habitation
- a couple who had undergone a religious marriage which is not recognised in the U.K and started co-habiting after the ceremony and who have no children but whose commitments to each other within two years of their marriage should clearly entitle them to the same rights as those who are married or in a civil partnership

It is also conceivable that perpetrators of domestic abuse will use this approach to their advantage by economically abusing women during a period of cohabitation and separating shortly before the minimum time period to prevent the survivor from acquiring the right to make a claim.

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

Significant legislative changes would be required to protect the rights of cohabiting couples in the event of either death or separation.

We would not endorse an approach that simply attempted to amend the currently available financial options on separation (under the Trusts of Land and Appointment of Trustees Act 1996 (TOLATA) and Schedule 1 of the Children Act 1989). These options are costly, under used and often lead to unfair outcomes for cohabiting couples because they were not designed to meet their particular circumstances. We suggest financial issues on separation would be best dealt with in one piece of legislation that encompasses all of the issues that may arise.

**Separation**

Current financial options for cohabitees on separation are extremely limited and are not designed to meet their specific circumstances. There is no family law provision to resolve property and financial disputes specifically designed for cohabitees. Cohabitees who own property may be able to pursue a claim against the other cohabitee under the Trusts of Land and Appointment of Trustees Act 1996 (TOLATA). The case law that has developed in relation to cohabitees pursuing claims under TOLATA is complicated and confusing because it is based on the law in relation to trusts. For this reason, many family lawyers choose not to practice TOLATA disputes and it has become a very specialised area of law. Furthermore, the law is not designed to meet the circumstances of cohabitees and can often result in unfair outcomes.

One of the most common examples we hear on Rights of Women's advice lines is when the caller's partner owns the house in his sole name. She may have contributed in many ways over a number of years, for example by paying bills, council tax, all household expenses other than the mortgage or paying into a joint account which is used to pay the mortgage and bills. She may have made sacrifices to enable her partner to earn and progress his career, in particular, by raising the couple's children. However, unless she paid directly into the mortgage or the deposit to the house, her contributions will count for nothing and it is unlikely that she will be able to establish a trust to assert a beneficial claim to the house. Even if she has made mortgage payments or part/all of the deposit, the prohibitive costs and complexity of a claim is likely to leave her with no option but to endure the financial hardship that arises from the separation. Conversely, a married women will have all of her contributions (including non-financial contributions) considered when deciding which orders to make on divorce. The needs of the parties and any children are the primary concern of the court, rather than who paid the mortgage or the deposit.

The second legal option in relation to finances for cohabitees only arises if there are children from the relationship, in which case, they may be able to make an application for financial provision for the children under Schedule 1 of the Children Act 1989. This legislation is under-used but still does not reflect the circumstances of cohabitees as it is designed to provide financial support for the children, not the parent, so does not provide the type of legal rights many women require and some falsely believe they already have. For example, orders which allow them to remain in the home with the children will be time limited and she will have no security once the children have completed full time education. There is also no option for a cohabitee to apply for the equivalence of spousal maintenance, even if the relationship was in every way the same as a married couple apart from the fact that they did not marry.

These options are particularly difficult for victims of domestic abuse because the system is designed to encourage couples to resolve disputes amicably and deter them from approaching the court. Many cohabitees agree financial arrangements on separation that are fair in the circumstances, despite their being no legal impetus for the financially stronger party to agree to anything. However, generally, perpetrators of abuse are not motivated to resolve disputes amicably or fairly and the fact that there is no legal mechanism to force them to do so leaves victims of abuse at a particular disadvantage. The lack of access to remedies in the formal legal system has a disproportionate impact on some Black and minoritised ethnic women who live in culturally conservative religious communities, and are consequently vulnerable to the discriminatory processes of religious arbitration forums.

The powers available to the courts and the decision-making process the courts use when deciding which financial orders to make on divorce or dissolution centre around fairness and the financial needs of the family (including any children). There is no reason why the same should not apply to cohabiting couples going through separation. Therefore, the orders available to separating cohabitees should mirror those available to couples who are married or in civil partnerships. The factors the courts should consider when deciding which orders to make should, again, be similar to the factors the courts must consider upon divorce and dissolution of civil partnership. This approach should enable a clearer and more streamlined approach than a completely different regime for cohabiting couples.

One aspect of the law which is currently lacking in relation to divorce and dissolution and would merit further consideration here is the impact of economic abuse and including this as a factor when deciding which orders to make. The charity Surviving Economic Abuse provides detailed explanations on what economic abuse looks like[3] and has produced several research reports[4]. Rights of Women and Southall Black Sisters often hear from survivors who are in debt, or whose finances, wealth and access to economic resources have been restricted as a result of economic abuse. This can often continue after separation, for example by continuing to withhold money, incur debt in the survivor's name, refusing to comply with court orders, unjustifiably disrupting the sale of a property, putting conditions on the provision of child maintenance such as allowing him unfettered access to the survivor's home. Rights of Women suggests that domestic abuse, including coercive and controlling behaviour and economic abuse should be a specific factor to be considered when deciding which orders to make upon separation.

**Unrecognised religious-only marriages**

One of the reasons why it is essential to provide rights to cohabitees is that the law would then provide better protection for women who have religious marriages that are not recognised in the UK. As their marriages are not recognised, these couples are left in exactly the same position in terms of legal rights and options as cohabiting couples. Southall Black Sisters submitted a response to the Law Commission's Consultation on Weddings Law earlier this year[5]. In Part One of this response Southall Black Sisters provides comprehensive explanations of the deep injustices faced by women who are abused, deceived or coerced into having a religious marriage only. We draw the Committee's attention in particular to the case studies in the appendix to the response which are stark but familiar examples of the precarious position women who have undergone religious marriages only are left in once they separate. As noted in this consultation response, failure to provide protection to these women "*makes women dependent on profoundly discriminatory and misogynistic religious arbitration forums for a resolution in the event of a marriage breakdown, even though such forums are highly gender discriminatory, work against women's rights and expose them to the risk of serious and escalating abuse*".

Southall Black Sisters' recommendations in this consultation response are specific to the issue the Law Commission was consulting upon, which is weddings. Therefore, the

[3] https://survivingeconomicabuse.org/what-is-economic-abuse/

[4] https://survivingeconomicabuse.org/about-us/our-research-and-evaluations/

[5] Response by Southall Black Sisters to the Law Commission Consultation Paper on Weddings Law, 4 January 2021

response does not contain any recommendations on the law relating to cohabitation. Given the narrow terms of reference for the Law Commission's project on Weddings, it is unlikely that it will recommend that women who are coerced into having a religious only marriage should be afforded a remedy in the family courts if their marriage breaks up . SBS have also recommended that civil registration should be made mandatory for all types of weddings and marriages but this is also unlikely to be taken forward. In the absence of such recommendations, the rights of cohabitees takes on even greater significance.

Rights of Women and Southall Black Sisters are clear that increasing the rights of all cohabiting couples would address the gaps in the law for those who have been coerced into a religious only marriage, and go further to protect all women from Black and minoritised communities no matter how and why they cohabit.

**Death**

Amendments to legislation in the event of death such as the Inheritance (Provision for Family and Dependants) Act 1975 and the Inheritance and Trustees' Powers Act 2014 are required so that:

- the definition of cohabiting couples is the same as that which has been suggested in response to question 1 above and;
- the provisions on intestacy, division of the estate, approach to claims under the Inheritance Act 1975 etc. are the same for cohabiting, married and civil partnership couples.

Provisions in relation to tax, pensions and benefits available to widows and widowers should equally be available to surviving cohabitees.

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

Women with children are at a particular economic disadvantage in society; however, we believe that any financial relief scheme must recognise that women in general, whether or not they have children, are at an economic disadvantage and are therefore likely to experience financial hardship as a result of their relationship breaking down. This is compounded by a lack of accurate information and access to legal advice, which means that many women are unaware of their legal position and rights.

As mentioned above, the lack of recognition for certain religious marriages leaves many women from specific cultural backgrounds who are primarily from Black and minoritised communities without any legal protection despite them being married and being treated as being married by society and many institutions such as the Department for Work and Pensions (DWP). The fact that cohabitees have no rights is used as a tool to control and disempower Black and minoritised women who are forced or coerced into religious only marriages. Protection for cohabiting couples would provide a safety net for these women.

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

We do not believe the law currently provides sufficient support for the children of cohabiting partners. The Child Maintenance Service is not fit for purpose, no matter what the status of the child's parents, and Schedule 1 of the Children Act 1989 is costly to pursue and underused. The law is also confusing for anyone representing themselves. We have not set out in detail the problems with the Child Maintenance Service or Schedule 1 of the Children Act 1989 as these are not specific to cohabiting / formerly cohabiting parents and are beyond the scope of this inquiry.

However, children of cohabiting partners are in no more need of legal changes to ensure better financial provision than those with parents who have never cohabited, or those who have married. Legal changes to the financial options available for cohabitees should not be available only to the children of those couples but to the cohabitees themselves, with children being one of the factors the court should consider when determining what type of order to make, as is the case with financial arrangements on divorce.

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

Yes, we believe that the same financial orders should be available to couples on relationship breakdown as are available to couples going through divorce or dissolution of a civil partnership. It would be unfair for a couple who have been cohabiting for 30 years, raised children together and planned their financial lives together to not be able to access the same types of orders as another couple in the same position where the only difference is that one is married and the other is not. This is particularly the case given there is still a belief in the myth of the 'common law' marriage. We do not believe there should be legal distinctions drawn between these couple where one is able to access legal remedies and the other is not.

We would support a checklist of factors to be considered when the court determines what type of order to make akin to the factors in section 25 of the Matrimonial Causes Act 1973. This includes factors such as the length of the marriage and contribution to the marriage which would be equivalent to considering the length of cohabitation and contributions. We believe that it would be possible to design a scheme that would ensure couples who are not intended to be caught by the provisions are extremely unlikely to pursue any application while providing the flexibility to account for the varying types of cohabiting couples and circumstances under which they live.

We believe that parties should be free to opt-out of the proposed scheme for cohabitees as suggested by the Law Commission in 2007 to ensure those who truly do not wish to be included in the scheme have that option. However, it is important to ensure that the decision to opt-out should be an informed one. The opt-out system must contain real safeguards to ensure that women are aware of their legal rights and the consequences of opting out of the proposed statutory scheme, and to protect women experiencing domestic abuse who may be coerced into opting-out. When couples buy a house together each party receive legal advice on the different ways of owning a property and be advised to seek independent legal advice if there is any possible conflict of interest. A failure to advise either party to seek independent legal advice may found an action in professional negligence against the solicitor concerned. Conveyancing solicitors must be alert to potential abuse, in particular in cases where a property is being purchased in one cohabitees name only. We believe that the decision to opt-out should only be made after the cohabitees have received legal advice.

Given the problems that many women have accessing legal advice and the consequences of opting out of the scheme, we believe that changes need to be made to the rules on public funding so that publicly funded legal advice on this issue is available to those who are eligible.

The opt-out system must be flexible and provide a mechanism to enable couples to opt back in at any time. It is important to acknowledge that relationships change and develop, and accordingly the parties' intentions with regard to legal regulation may also change and develop. We believe that in certain circumstances the courts should have the power to review the decision to opt-out and the power to grant remedies under the scheme if it is satisfied that it is in the interests of justice to do so. Situations in which the court should review the opt-out and, if necessary, grant remedies may include (but are not limited to) the following:

- where the formalities for opting out have not been followed (e.g. decision made without adequate legal advice)
- where the decision to opt-out of the scheme was not taken by parties giving their full and free consent (e.g. where there was domestic abuse)
- where certain supervening events occur which result in a significant change of circumstances, such as the birth of a child (or children) or if a significant financial contribution is made
- where the parties have agreed to opt back into the scheme but this agreement (verbal or otherwise) is not acted upon

**6. 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?**

Our expertise is specific to the laws of England and Wales and we do not have sufficient insight into practice in other jurisdictions to answer this question.

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