

## **Written evidence from Michael Gouriet [HAB0303]**

I have been practicing family law for more than 25 years and having been a member of Resolution's Cohabitation working group since its inception in 1995, it is dispiriting that during that time despite the Law Commission's clear recommendations for reform in 2007, campaigning by various interest groups, and judicially voiced support for legal reform, no Government (of whichever hue) has had the inclination to address this head on and introduce much needed change to protect the vulnerable and financially disadvantaged (including affected children) on relationship breakdown. The current law is out of step with and does not reflect the society in which we live. I feel strongly that changes need to be made and that there should be a more concerted effort to increase awareness as to the legal position of cohabiting couples and their children.

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

Yes there should be a legal definition to allow for certainty as to when the rules apply. For example:

A cohabiting couple consists of two people (of any sex/gender) both of whom are over 18 years old, who are in a relationship akin to a marriage or civil partnership and are either:

- i) living together with a child in respect of which they are both that child's parents; or
- ii) have lived together for a continuous period of at least 2 years

and:

- i) with an element of financial dependency; and
- ii) have not opted out of the legal implications of their living arrangement by way of signed deed.

Any changes in legislation should apply retrospectively so as to protect those already in cohabiting relationships – unless they choose to opt out.

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

1. Financial provision on death: surviving cohabitants should receive the same protection as married/civil partnership couples in terms of intestacy, automatic benefit for pension and life policies, and exemption from inheritance tax. At present, if one cohabitee died, the other would not inherit their state pension, would not be able to use their partner's inheritance tax allowance to pass on more to their children and would not receive bereavement benefits.

2. On separation: cohabitants should be able to make a claim where they have suffered financial hardship as a result of decisions made during the relationship. They should not have to rely on esoteric trust law in order to claim against the property in which they have lived during the relationship.

3. There should be clear statutory provision to enable parties to understand their rights and entitlements and determine their claims without the need to engage in expensive legal battles with unpredictable outcomes.

4. There should be a concerted national effort to increase awareness as to the legal rights and remedies available on separation so that people are not left unprotected or feel that they must stay in relationships in order to avoid financial hardship.

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

- Being unmarried is not a protected characteristic under the Equality Act 2010 and so to treat unmarried people differently is not discriminatory.
- The financially weaker partner, often the one who has sacrificed their job/earning opportunities for caring responsibilities for example taking care of children or other dependents, is the one most likely to be affected by the gaps in the law;

- In practice, it is often the female partner who is in a position of financial need at the end of a relationship, often due to decisions made during that relationship as to who takes on the caring responsibilities and also as to where the parties live and whose home they move into;
- Children of unmarried parents are given less protection due to the gaps in the law that fail to protect their parents on the breakdown of their relationship or death;
- A lack of awareness/understanding means that people do not know that they need protection – in consequence of which, those who are less educated or less able to seek professional advice are most vulnerable;
- As both the extent and the impact of coercive control within relationships becomes better understood and more well documented, there are increasing concerns that by avoiding marriage one partner can ensure that the other remains more vulnerable on relationship breakdown;
- For those who have entered into religious marriages which do not constitute valid marriages recognised under the Marriage Acts, they are left in the same position as those who choose not to get married even though they regard themselves as married. This cannot be just.
- Younger people are more likely (statistically) to misunderstand their legal rights with regard to their relationship and so require protection.

Issues resulting from the current gaps in the law impact on an enormous number of people – there were 3.5m cohabiting couples in 2020. Despite huge increases in the numbers of people who neither marry nor enter a civil partnership (numbers have increased by 137% between 1996 and 2020, and numbers of same sex cohabiting couples have increased by 650% in the same period), statistics demonstrate that there is no greater awareness as to the implications of this decision.

In January 2019, NTCen published findings from the British Social Attitudes Survey which revealed that 46% of people mistakenly believed in common law spouse (equating the same rights to unmarried couples as married couples). The number increases to 55% for households with children. Most worryingly is that, according to age, the category that is most vulnerable (aged 25 to 64) had the least understanding of the correct position (52% believed in the myth of 'common law marriage').

This fundamental misunderstanding is dangerous because it shows that people are not aware that they need protection; as the law stands the onus is on people to protect themselves. Unfortunately, however, there is so little awareness of the gaps in the law that people are not taking the necessary steps – for example they may not make the requisite nominations of pension or life policies; they may not make a will; they may not enter into a 'living together' agreement.

### Examples in practice

An obvious example in recent times is Siobhan McLaughlin who had lived with John Adams as a couple for 23 years and they had four children together, who were aged 11, 13, 17 and 19 at the time of his death. Siobhan applied for but was refused the £2,000 lump sum bereavement payment and widowed parent's allowance because they were not married. In that case Lady Hale said this:

'The allowance exists because of the responsibilities of the deceased and the survivor towards their children. Those responsibilities are the same whether or not they are married to or in a civil partnership with one another. The purpose of the allowance is to diminish the financial loss caused to families with children by the death of a parent. That loss is the same whether or not the parents are married to or in a civil partnership with one another.'

The Supreme Court in that case highlighted the extent to which the UK is out of step with EU Member States.

Similarly, in *Jackson & Ors v The Secretary of State for Work and Pensions* [2020] EWHC 183 the High Court held that the rules denying payment of the higher rate of Bereavement Support Payment to unmarried, cohabiting partners with children were incompatible with the ECHR. Mr Jackson had lived with his partner, Natalie, for almost 14 years and had planned to marry when their financial position was sufficiently stable, Natalie tragically died unexpectedly and he was told that he was not entitled to the bereavement support payment. Mr Simpson, in a similar position, joined this claim. Mr Justice Holman stated: 'There is discrimination between persons in a relevantly analogous situation; and that discrimination is on the ground (and indeed the sole ground) of the "other status" of not being married or in a civil partnership. There is discrimination against Mr Jackson and Mr Simpson. There is also discrimination against their respective children on the ground of the children's status of not being the children of parents who were married to each other or in a civil partnership. In the case of children, the

ground of "birth" in Article 14 may also be engaged.' The Judge found that there was no justification for the discrimination.

The Court of Appeal recently confirmed in the case of *Akhter v Khan* [2020] that the Nikah ceremony alone which does not meet the essential formalities required by marriage laws in this country, will not result in a legally valid marriage. As the court declared it an invalid marriage, Ms Akhter could not have any legal recourse following their separation. This case shows the significant implications that currently impact on those unaware that their religious ceremonies do not constitute legal marriages. The Law Commission launched a consultation in relation to Wedding law on 3 September 2020, which continued until 3 December 2020, entitled: *Getting Married: A consultation Paper on Weddings Law*. The consultation paper highlighted the difficulties the current law creates.

### **Position on death**

Under current intestacy laws cohabitants are not automatically protected and must make a (complex and expensive) application to court. Furthermore, a surviving cohabitant's claims are limited to reasonable provision for their own maintenance whereas a spouse or civil partner is entitled to seek such financial provision as it would be reasonable in all the circumstances. Although the Law Commission published its report, *Intestacy and Family Provision Claims on Death*, in December 2011, recommending law reform in this area, no such reform has been introduced.

The position in relation to inheritance tax unfairly prejudices unmarried couples who are left with significant tax bills, and, in consequence of which and in contrast to spouses/civil partners, may be compelled by weight of tax liability to sell their home on the death of their (possibly long term inter-dependent) partner.

### **Inconsistencies**

It is also noteworthy that there is an inconsistency in the law relating to benefits, so that when calculating means tested benefits the financial position of cohabiting couples are taken into account as if they were married, but when it comes to contributory benefits the law does not recognise couples who are not married or in a civil partnership. Similarly, cohabiting couples are not entitled to bereavement benefits. As such, a cohabiting but unmarried couple are considered "couple" enough by the Government to lose their right to child and housing benefits and universal credit, but they would not be considered a couple when it comes to the marriage allowance, which permits a low-earning person to pass on some of their tax-free allowance to their higher-earning spouse, or perks that allow free transfer of assets between married people or civil partners.

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

Children of cohabiting parents are in a worse position than those with married parents if one of their parents were to die – not only will the surviving parent not have the same rights with regard to intestacy, unless specifically nominated they are unlikely to benefit from pension or life insurance provisions. Furthermore as inheritance tax is payable, in contrast to the equivalent married family, children of an unmarried deceased parent will be in a worse financial position than their counterparts with married parents.

Although there is statutory provision for financial claims in relation to children, there is a lack of awareness surrounding such claims, not least because of the emphasis on relying entirely on the Child Maintenance Service, which does not involve capital payments or payments in connection with education. Therefore, although there are legislative protections in place they are not being used effectively, and are limited in scope when it comes to provision of housing (eg rental payments in the multitude of cases where there are insufficient funds for a settlement of property order).

Changes to intestacy laws, inheritance tax and pension provision will improve the situation for children. An overhaul of law in relation to cohabitants would bring about increased awareness which would benefit those children whose parents wrongly believe that they can only make limited claims against their former partner in respect of their children.

Children in this context also includes adult children. The people who are most vulnerable to the law's failure to protect cohabitants are those in long term relationships where the children have reached majority (and so there can be no financial claims made on their behalf) but that as a result of decisions made

during the relationship one parent is substantially worse off financially when the relationship ends (Burns v Burns [1983] EWCA Civ 4 being the paradigm example.) Adult children will be left with one parent who is financially vulnerable, something which that child will have to cope with mentally and factor into their own life decisions.

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

The rights need not be the same but they should offer protection to those left financially vulnerable on the breakdown of relationship, and they should be clear, easy to apply and readily available. There is too much uncertainty, confusion and misunderstanding in this area and it is the most vulnerable who suffer the consequences.

### **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?**

Yes there are many examples of countries which offer better legal protection for cohabiting couples. Many countries have enforceable cohabiting agreements, which allow/encourage parties to make decisions as to what should happen when the relationship terminates. The difficulty with this arrangement is that it relies on the parties to protect themselves and also assumes an understanding of their position without such an agreement, which we know in England and Wales is lacking.

We have undertaken some limited research in relation to other jurisdictions and summarise our findings as follows but with the caveat that we have not sought legal advice as to the accuracy of the observations and commentary below from experts qualified in those jurisdictions.

Both Ireland and Scotland offer some protection. Irish couples who have lived together for a period of 5 years (or a period of 2 years where they have children together) can apply to the court to show they are a 'qualifying cohabitant' meaning that they are in an intimate relationship; financially dependent on the other. Also the court must be satisfied that it is just and equal to make an order. If successful, a 'qualifying cohabitant' may receive maintenance, an order in respect of property, a share in their partner's pension, and provision from their deceased partner's estate. There is scope within the legislation for opting out.

In Scotland, the Family Law (Scotland) Act allows cohabitants to make claims in respect of money, property and household goods. Furthermore, one former cohabitant can be entitled to payment from the other if they can show that they have suffered a net economic disadvantage at the end of the relationship. A former cohabitant can also make a claim for payment in respect of the economic burden of caring for a child of whom the cohabitants are the parents.

In Finland, there are several statutes that recognise cohabitation as a significant legal relationship in public law. The Act on the Dissolution of the Household of Cohabiting Partners refers to partners who live in a relationship in a shared household and who have lived in that shared household for at least five years or who have, or have had, a joint child or joint parental responsibility for a child. However, a person who is married is not considered a cohabiting partner. A cohabiting partner is entitled to compensation if they have made contributions to the household and if a division based solely on ownership, would result in one partner's unjust enrichment at the expense of the other. The cohabiting partner can also apply to the District Court to appoint an estate distributor to separate the property in accordance with the provisions governing the distribution of an inheritance. Parties can agree to a separation deed.

In Greece, cohabitation law is regulated by the law in relation to cohabitation agreements. Cohabiting couples have the same succession rights as married couples when one person dies.

In Italy, cohabitants have some of the same rights as married couples, for example the right to medical information and the right of surviving cohabitant to remain in the home after the death of cohabitant partner. Again, there are enforceable contracts in relation to ownership of property between couples; the deed must be executed before a public notary or lawyer and recorded in the relevant register. Although the contract can be terminated, if, on termination of the contract, one of the parties is destitute, the court

may order the other party to provide financial support for an amount of time that relate to the time spent cohabiting.

In Sweden, cohabitants' rights are regulated by the Cohabitation Act 2003. Any claim for division must be in respect of the home and household goods acquired for common use, and made within a year after the breakdown. If the home was obtained before they began to cohabit the non –owner party may be able stay in the home after separation and, in some limited circumstances (only applying to rented homes and tenanted homes), to take over a home. Parties can opt out of the implications of Cohabitation Act.

In Israel, Common law marriages are recognised both by legislation and case law. Legislation generally confers social and economic benefits regarding pensions, retirement funds, and protected tenant's rights. The Succession Law 1965 extends to either surviving common law spouse the same right to inherit from their partner as a legally married spouse.

In Chile, under the new Law 20,830 on Domestic Partnerships, unmarried couples can enter into a Domestic Partnership Agreement under which the same regulations on the separation of assets of a marital union apply, in the event of a separation.

In Australia, de facto couples are in a position where they may be treated in an almost identical way to spouses under the law, including the same treatment on relationship breakdown (see Family Law Amendment (De Facto Financial Matters and Other Measures) Act). Parties are able to reach their own financial (ie living together) agreements and so retain autonomy as to the implications of their relationship if they choose to exercise it, effectively meaning that they can 'opt out' of the legislative provisions.

In New Zealand, the Property (Relationships) Act applies to govern the property rights of couples in de facto relationships (except those that ended before 1 February 2002) of three years duration or longer (shorter if there is a child of the relationship), in the same way as if they were married or in a civil union.

Canada recognises the concept of common law relationships where a couple have lived together continuously for a year or more (and the various provinces and territories are responsible for laws setting out rules for division of property when couples separate). Cohabitation agreements are also recognised.

**July 2021**