

Introduction

I am a lecturer in Law at Lancaster University with a research interest in property law, in particular the breakdown of cohabiting relationships. This was also the subject matter of my PhD thesis which examined the inequalities which impact and are replicated by the current approach adopted in this area. My wider research and teaching interests are in property law, equity and trusts, and equality theory and practice.

The following outlines my responses to the questions in the call for evidence.

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

To provide clarity to those seeking to rely on the law, and for practitioners providing advice to their clients, **there ought to be a legal definition of cohabitation**. However, given the context of this call for evidence the more appropriate definition would be specifically in relation to ‘cohabiting partners’. It is essential that any definition is **wide** enough to provide **adequate protection** to those who need it, and that it encapsulates **the diverse range of couples that cohabit**. A **broad and flexible** definition would also ensure that the **context** of such relationships can be given due consideration.

The definition ought to be two-part:

- 1) Are the parties ‘cohabiting partners’?
- 2) Are they in a ‘qualifying relationship’?

Cohabiting Partners

In relation to ‘cohabiting partners’ I would recommend the adoption of one of the following:

“Living together as a couple” - Cohabitation Rights Bill [2019-21], hereafter CRB.

“Cohabitants are two persons who are neither married to each other nor civil partners of each other but are living together as if they were a married couple or civil partners” - Family Law Act S62(1)(a).¹

Qualifying Relationship

There are several key considerations which must be made when determining whether a particular relationship ought to be considered a 'qualifying relationship' such that they are to be afforded protection on relationship breakdown, particularly in relation to the family home.

When considering the eligibility for, and extent of award the following factors which echo those contained in the CRB and Resolution² ought to be taken into consideration:

- i. **Economic advantage** obtained, or **disadvantage** sustained by the parties by virtue of both **financial and non-financial contributions** to family life and the family home.
- ii. The degree of **dependency/interdependency**.
- iii. The **welfare and caring responsibilities** for any relevant children.
- iv. The **income, property, and resources** of the parties.
- v. The **financial needs and obligations** of the parties.
- vi. The **conduct** of the parties where it would be inequitable to disregard it.

The overriding consideration in this context should be fairness. The current approach adopted by the courts does not allow fairness or the wider context of the relationship to be considered. This is the case even where there is the presence of violence, or where the relationship is of a controlling nature, which demonstrates the injustice which can arise where such factors are absent from consideration.³

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

The current approach to the breakdown of unmarried cohabiting couples' relationships is unfit for purpose. It is reliant on trusts of the family home, the most frequently invoked is

¹ A similar definition is also provided in: Inheritance (Provision for Family and Dependants) Act 1975, s1.

² Resolution., *Resolution's response to the Law Commissions consultation on Cohabitation* <<https://resolution.org.uk/response-to-law-commission-consultation-on-cohabitation/>>

³ See for example: *Graham-York v York* [2015] EWCA Civ 72.

the common intention constructive trust (hereafter CICT). This requires the identification of common intention and detrimental reliance.⁴ In practice however this doctrine requires either express communication regarding the parties' interests in the home, or a direct financial contribution to the property – particularly where only one party is the legal owner of the property. The development of the law in relation to jointly owned property has allowed for a wider range of factors to be considered.⁵ However, in practice the determinative factors continue to be financial in nature.

There ought to be legislative guidance on the distribution of property and/or a financial settlement on relationship breakdown. Any legislative protection afforded to cohabiting partners must ensure that the **wide variety of contributions** that go into the formation and continuation of the family and acquiring and maintaining the family home are given due consideration. There is clearly considerable need for the introduction of legislation which allows the courts to adjust property rights on the breakdown of cohabiting relationships which has gone unresolved for a significant period. The definition and eligibility criteria discussed above would assist with this.

Any reform in this area must be underpinned by three key factors. It must:

1. Recognise **non-financial contributions**.
2. Value **'women's work'/'feminine' contributions**.
3. Place **judicial discretion and flexibility** on statutory footing and emphasise the centrality of **fairness** in proceedings.

Were these principles to underpin the development of legislation in this area this would **alleviate the equality issues** outlined in the section below. Further, placing fairness on statutory footing as regards quantification, looking at the relationship in the round, and considering both future need and any prior economic disadvantage/advantage would produce a **more equitable approach** to relationship breakdown. This would be particularly

⁴ *Gissing v Gissing* [1971] AC 886; *Pettitt v Pettitt* [1970] AC 777.

⁵ *Stack v Dowden* [2007] UKHL 17; *Jones v Kernott* [2011] UKSC 53.

useful in **counteracting the injustice** which results from the approach adopted in sole-ownership cases.

The qualifying criteria outlined in the discussion above is just one example of how such principles may translate into practice.

Additional Considerations

Minimum Duration

Further, regarding the duration of a 'qualifying relationship', I would recommend following this approach adopted in Scotland in which there is **no minimum duration** (Family Law (Scotland) Act 2006, s28 (FL(S)A hereafter). This allows for a **consideration of context** when applying the law. This acknowledges that cohabitation is often a gradual process making identifying a 'start date' for cohabiting unions difficult to identify even by those engaged in that relationship. If there were to be a minimum duration this would carry with it the following risks:

- A threshold effect under which individuals are aware of the 'cut off' point and choose to leave their relationships prior to this, thus avoiding liability. This would be particularly **problematic for those who are economically, emotionally, or otherwise vulnerable**.
- It risks creating, or echoing the myths associated with common law marriage.

The most suitable alternative would be to allow the longevity of the relationship to form one of the factors which can be considered by the court when making an award. If a minimum period were to be required then the most sensible option would be two with provision for an exception to be made in cases of exceptional hardship.

Opt-in/Opt-out

There is considerable debate as to whether provision for cohabiting couples ought to be opt-in or opt-out. Although an **opt-in** approach values individual autonomy, this would not be available in any real sense for those who are economically, emotionally, or otherwise vulnerable **therefore offering no real protection for those who require it most**. Further, it

also requires couples have an awareness of their lack of rights if they were not to opt-in, and to contemplate the failure of their relationship and act accordingly. The issues with this approach are outlined in more detail below in the discussion of express communication. Thus, an opt-out scheme would be the more appropriate approach to adopt.

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

The **current regime** has historically been and continues to be **rife with inequality**. The CICT has reflected and perpetuated gender inequality and has persistently worked to the **detriment of women**. It continues to **unduly impact women, the economically, emotionally or otherwise vulnerable individuals, and those who undertake those acts traditionally categorised as 'feminine'** such as childcare, domestic contributions, or indirect financial contributions.

There are three core aspects of this regime which have continued to be problematic:

- 1) Expectations in relation to express communication.
- 2) Overreliance on financial contributions.
- 3) Undervaluation of 'women's work'.

The Emphasis on Express Communication

This refers to the expectation that a couple will have expressly discussed, and agreed upon their interest in the property. This is not only required/considered in the context of the acquisition and quantification of interest under a CICT, but also arises in relation to the use of express trusts and cohabitation contracts, and opt-in schemes.

This requires couples to **contemplate the failure of their relationship and plan accordingly**. Treating cohabiting partners as if they were operating in a commercial context and presumes a level of logical thinking and planning for relationship breakdown which is not present when couples acquire property. The notion that a couple will be minded to either expressly discuss their ownership of the property, or in the context of express trusts/cohabitation contracts will express this in signed writing is an **unrealistic expectation**

in the context of a cohabiting relationship. It also **requires couples to have knowledge about their lack of legal protection**, which given the continued belief in some form of common law marriage is inherently flawed. Such an approach also **ignores the centrality of familial trust** in relationship formation which underpins the lack of formal, or informal discussions regarding interest.

This also raises evidential issues. It can be difficult to evidence oral communication, and where couples have had a discussion as to their ownership this also relies on their recollection. On breakdown, particularly where this is not amicable, there is also the risk that any communications will be viewed with malicious hindsight, or in a way which might benefit them. It also, particularly in the context of express trusts, cohabitation contracts, and opt-in schemes poses a **considerable risk of undue pressure/influence being placed on the more vulnerable party** causing them to opt-out of their rights, or to agree to a 'deal' which works against their best interests which may not always be identified. This again **highlights the need for a flexible, context-driven approach, which is broadly applicable, and adjustments are made thereafter.**

Overreliance on Financial Contributions

This refers to the precedence placed on direct financial contributions under the CICT. A situation which is all the more acute in the context of sole-ownership cases in which, where express communication is absent, a direct contribution to the purchase price is not merely preferred but required.

There are several inter-connected issues which arise from the emphasis placed on financial contributions:

- i. It **diminishes the value of 'feminine' contributions** in favour of a money-centric approach which has contributed to the continuation of the **devaluation of 'women's work'**.
- ii. The approach has, and continues to have, a **disproportionate impact on women** as it does not take account of the **context** in which these relationships occur.

- iii. The focus on financial contributions/arrangements is **an ill-fitting reflection of the way in which cohabiting couples view their relationships** with one another and their property, and the realities of money management.

It is essential to note the context in which the law operates, as this has contributed not only to the way in which certain contributions have been valued, but also to the capacity for women to make the contributions required of them under the CICT. The focus on financial contributions has been detrimental to women who have historically been less able to make direct contributions to the home both due to **economic inequality, and societal expectations** relating to traditional gender roles. Though we have seen moves toward gender equality more broadly, the continuation of the gender/motherhood pay gap, occupational segregation, unequal distribution of labour, and the imbalance in the provision of care means that the current law **continues to have a more significant impact on women**, and regardless they will continue to impact any individual who is more economically vulnerable, or who chooses to care for the children and the home.

The development of the law in relation to jointly owned property has allowed for a wider range of factors to be considered, which to an extent alleviates some of these issues.⁶ Lady Hale provides the following guidance in relation to intention which includes:

Why the home was acquired in their joint names; the purpose for which the home was acquired; the nature of the parties' relationship; whether they had children for whom they both had responsibility to provide a home; how the purchase was financed; how the parties arranged their finances; how they discharged the outgoings on the property and their other household expenses.⁷

However, in practice **financial factors remain determinative**. This not only refers to the emphasis placed on financial contributions but is also on the perceptions drawn from how couples organise their finances. This includes the decision to keep separate bank accounts,⁸ despite the increasing frequency with which couples do so.

⁶ *Stack v Dowden* [2007] UKHL 17; *Jones v Kernott* [2011] UKSC 53.

⁷ *Stack v Dowden* [2007] UKHL 17 [69].

⁸ *Stack v Dowden* [2007] UKHL 17.

Financial contributions are frequently viewed absent of the wider context of the relationship. That is where an individual is prevented from making equal contributions, though often acknowledged by the judiciary, due to the **lack of ability to consider fairness** within proceedings it has not been a consideration in reaching their conclusions. Thus even if equitable (reflecting the ability for each party to contribute), rather than even, payments were made, **the individual making the lower financial contributions is likely to be considered to have less interest in the property** regardless of any significant contributions to the home/family life, or detriment suffered.

Undervaluation of 'Women's Work'

Not only is women's work devalued by virtue of the emphasis placed on financial contributions, but it is also diminished when considering detrimental reliance under the CICT.

Those acts which are considered to be detrimental have consistently been considered to be "conduct on which the woman could not reasonably have been expected to embark unless she was to have an interest in the house".⁹ Notwithstanding the problematic categorisation and reliance on gender stereotypes identified here what this has meant is that two scenarios tend to arise in practice. The first is where a **woman performs acts which can be considered "the most natural thing in the world for a wife"**¹⁰ and therefore is considered to have **suffered no detriment**. The second involves those cases in which the claimant "did much more than most women would do",¹¹ such as considerable manual labour which would then be considered detrimental reliance.

This distinction relies on the judiciary making normative, stereotypical assumptions about the 'natural' behaviour of women. The fact that **women's behaviour is generally perceived to derive from love and affection rather than the intention to acquire rights** presents an additional hurdle for those claimants. It also fails to recognise that when in a relationship, individuals are much more likely to be motivated by, and act based on, the wellbeing of the family rather than due to their property rights.

⁹ *Grant v Edwards* [1986] Ch 638, 648

¹⁰ *Lloyds Bank v Rosset* [1991] 1 AC 107, 131.

¹¹ *Cooke v Head* [1972] 1 WLR 518, 519; a sentiment also identified in *Eves v Eves* [1975] 1 WLR 1338, 1340.

Religious Marriages

Those who oppose reform in this area frequently rely on arguments which cite the sanctity of marriage, or the notion that couples could choose to marry if they wish to protect their rights. However, notwithstanding the other critiques which can be raised in response to this, what is not considered when raising such arguments is that there are **numerous individuals who are married, having only undergone a religious ceremony who are left without adequate protection**. This can cause negative consequences for both the couple, and any children that may be present. This includes issues regarding obtaining parental responsibility for their children, and significantly reduced financial/proprietary claims on separation.

Consequences of Continued Inaction

Notwithstanding the moral imperatives associated with **providing justice** and an approach to the breakdown which has **equality as a central consideration** there are a number of additional factors which ought to be considered. These include: additional demands on LA housing; health services; court time and expenses; dependence on state benefits; increased pressure on women's refuges and charitable services.

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

The protection afforded to cohabiting couples does not need to be the same as married couples and civil partners but ought to be based on the same principles as divorce and dissolution. That is, the adoption of a **scheme which allows for a consideration of flexibility, and the exercise of judicial discretion**.

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?

Subject to several minor amendments a system which echoes that in Scotland under the FL(S)A, s28 would be satisfactory.¹²

¹² Note this approach was judicial approval in: *Gow v Grant* [2012] UKSC 29.

Under the FL(S)A various factors can be considered when determining the **economic disadvantage suffered** by one party by virtue of their relationship. Of particular importance is the degree of **judicial flexibility** enshrined in the FL(S)A, in relation to both the degree of the monetary award, and the factors which can be considered as contributing to “economic disadvantage”.

Though these relate to the making of a financial settlement order rather than determining the beneficial interest in the property the following criteria could be applied in this context: (i) that the respondent has retained a benefit, or (ii) that the applicant has an economic disadvantage, as a result of qualifying contributions the applicant has made; and (c) having regard to the **discretionary factors**, the court considers that it is **just and equitable** to make an order

The latter category considers factors which are similar to those outlined in the ‘definition’ section above, and again take note of the **importance of context, and the range of contributions to both the home and relationship that an individual may make.**

The minor amendments to this ought to be:

- i. The award should go beyond a capital sum payment;
- ii. There ought to be an explicit reference to fairness;
- iii. The need to raise court proceedings within one year of the cessation of the cohabitation ought to be extended.

I would be happy to discuss any of the points raised above, or any aspect of co-ownership in greater detail and/or provide oral evidence. I should close by saying that, although I am employed by Lancaster University, the views contained in the above letter are my own, and do not represent those of my employer.

July 2021