

## Written evidence from Dr Kathy Griffiths, Cardiff University [HAB0312]

### Background of the author

1. I am a Lecturer at Cardiff University specialising in the legal regulation of adult relationships in England and Wales and Australia.<sup>1</sup> Cohabiting relationships are a key focus of my research. In this submission I will briefly outline my most pertinent research findings in relation to the rights of cohabiting partners. After outlining why there is need for reform, I provide comment on how cohabitation is defined in law, and the salient points that need to be considered in constructing a workable definition moving forward. Following this, I outline the approach taken in Australia towards cohabiting relationships, focusing on the definition adopted by Australian legislation, before providing a brief comment on which rights should attach to cohabiting relationships.

### The need for reform

2. Academics and practitioners alike have called for reform on the rights of cohabiting partners for over 30 years, with much of the debate focusing on the rights of cohabitants on relationship breakdown and death. Cohabitants are the fastest growing type of family relationship in England and Wales, with numbers of such relationships more than doubling between 1996 and 2017.<sup>2</sup> Research suggests that attitudes towards cohabiting relationships have changed. Cohabitation is no longer stigmatised but is seen as a valuable type of relationship.<sup>3</sup> What is worrying is that while social attitudes have changed, the law has not. The law in relation to cohabiting relationships is complex: sometimes cohabitants are treated in the same way as married couples and civil partners, at other times cohabitants will be legally recognised but treated differently than married couples and civil partners, and sometimes cohabitants will not be recognised at all.<sup>4</sup> The lack of legal protection on relationship breakdown is something that many partners are unaware of.<sup>5</sup>

3. My research found that reform in relation to the rights of cohabiting partners in England and Wales is long overdue. The current law in relation to cohabitation is complicated, and the fact that cohabitants are treated differently than married couples and civil partners on death and relationship

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<sup>1</sup> See Kathy Griffiths 'From 'form' to function and back again: a comparative analysis of form-based and function-based recognition of adult relationships in law' (PhD Thesis, Cardiff University, 2017).

<sup>2</sup> Office for National Statistics 'Families and households in the UK: 2017' (Statistical Bulletin, 2017), 4.

<sup>3</sup> For example, research found that in 2006, 66% of people felt 'there is little difference socially between being married and living together'. See Simon Duncan and Miranda Phillips 'New families? Tradition and change in modern relationships' in Alison Park and others (eds) *British Social Attitudes Survey* (24<sup>th</sup> Report, 2008), 5.

<sup>4</sup> See Anne Barlow and others *Cohabitation, Marriage and the Law: Social Change and Legal Reform in the 21<sup>st</sup> Century* (Hart Publishing, 2005), 6.

<sup>5</sup> Recent research suggests that around 46% of people mistakenly believe that cohabitants are treated in law as if they were married. See NatCen 'Almost half of us mistakenly believe that common law marriage exists' (22 January 2019) available from <http://www.natcen.ac.uk/news-media/press-releases/2019/january/almost-half-of-us-mistakenly-believe-that-common-law-marriage-exists/>

breakdown is a particular cause of concern. As the numbers of cohabiting couples increase, the problems with the law become more widespread, which is why it is so important that the Committee looks at how the legal situation could be reformed.

4. Some may suggest that reform of this area is less pressing since the introduction of civil partnership for opposite-sex couples. This is because same-sex and opposite-sex couples now have the option to acquire rights and protections via civil partnership as an alternative to marriage. But my research has found that while opposite-sex civil partnership is a welcome reform, this change will only benefit a small number of cohabitants who are aware of their legal situation and want to have legal recognition and protection for their relationship while avoiding marriage. The reform does little for the many other cohabiting partners who are either unaware of their precarious legal position or have simply not gotten around to marrying or forming a civil partnership.

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

5. I would suggest that there needs to be a legal definition of cohabitation, though what form that definition should take is a key question that requires careful consideration.

6. In England and Wales, there is no universal definition of cohabiting relationships but legal recognition is usually reserved 'for the most marriage-like' relationships.<sup>6</sup> For example, the Rent Act 1977 provides that 'a person who was living with the original tenant as if they were a married couple or civil partners is to be treated as the spouse or civil partner of the original tenant.'<sup>7</sup> There are examples from case law of judges interpreting these statutory definitions of cohabitation, and coming up with a list of factors that may be relevant to determine whether a relationship is marriage- or civil partnership-like. For example, in *Crake v Supplementary Benefits Commission*,<sup>8</sup> the judge identified six 'admirable signposts' to assist the court in its inquiry:

'...whether they are members of the same household ...stability; ... the question of financial support; ...the question of sexual relationship; the question of children; and public acknowledgment.'<sup>9</sup>

Judges in later cases have used similar signposts and have warned against the dangers of a formulaic approach which would require partners to evidence their relationship satisfies all of these criteria.<sup>10</sup>

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<sup>6</sup> Anne Barlow and Grace James 'Regulating marriage and cohabitation in 21<sup>st</sup> century Britain' (2004) 67(2) *Modern Law Review* 143, 145.

<sup>7</sup> Rent Act 1977, Sch 1[2] as amended by Civil Partnership (Opposite Sex Couples) Regulations 2019/1458, Sch 3 Part 1 [5]. See too a similar definition under the Inheritance (Provision for Family and Dependents) Act 1975, s1(1A) as amended by Civil Partnership (Opposite Sex Couples) Regulations 2019/1458, Sch 3 Part 1 [3].

<sup>8</sup> [1982] 1 All ER 498.

<sup>9</sup> [1982] 1 All ER 498, 504.

<sup>10</sup> See for example, *Kimber v Kimber* [2000] 1 FLR 383.

7. While at first glance using a definition based on similarities with marriage and civil partnership seems a straightforward approach, on closer inspection it is problematic. The issue with relying on definitions that require a decision-maker to determine whether a couple have lived together 'as if they were married or civil partners' is that there is no universal acceptance of the expected characteristics of these types of relationships. My research suggests that while there is a set legal framework of who may marry whom, it is impossible to pin down a precise definition of the expected functions and characteristics of marriage because these will vary between individuals and will vary over time. In my research I refer to this as the 'ideologies of marriage' and explain that marriage means different things to different people at different times in their lives.<sup>11</sup> The same is likely to be true of civil partnership. What one person may consider to be the hallmarks of a marriage or civil partnership relationship may not match up with the next person's expectations.

8. As marriage and civil partnership are formalised relationships, that is there is a formal record of their existence, it is often irrelevant how that relationship functions for the purpose of triggering legal recognition. As such, any differences of opinion as to how marriages or civil partnerships ought to function are often not important. But in the context of cohabiting relationships, these different views as to the expected functions of marriage and civil partnership are important. If a cohabiting relationship is defined as one which is akin to marriage or civil partnership, as there is no formal record of the existence of the relationship, a decision-maker will need to hear evidence of the relationship's functions to determine whether it is akin to marriage or civil partnership. This could mean that what one decision-maker thinks of as being a 'marriage-like' relationship may differ from another and could lead to complications and unfairness.

9. It is also important to remember that not all cohabiting relationships function in the same way and partners cohabit for many different reasons.<sup>12</sup> Any legislative definition needs to take into account the variety of cohabiting relationships, and while an overly wide definition that could potentially encompass any relationship between two adults who at some time lived together should be avoided, the definition needs to be wide enough to ensure that those relationships that need the law's protection are legally recognised. The experiences of other jurisdictions in defining cohabitation will be invaluable in guiding the Committee's work on creating a suitable legislative definition.

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<sup>11</sup> For more detailed discussion of this point, see Kathy Griffiths 'From 'form' to function and back again: a comparative analysis of form-based and function-based recognition of adult relationships in law' (PhD Thesis, Cardiff University, 2017), 3.4 and 6.1.1.

<sup>12</sup> See Anne Barlow and Janet Smithson 'Legal assumptions, cohabitants' talk and the rocky road to reform' (2010) 22(3) Child and Family Law Quarterly 328.

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

10. My research shows that shows there are lessons to be learnt from Australia's long experience of legally recognising cohabiting relationships, commonly referred to as 'de facto' relationships in that jurisdiction.

11. The first state to legislate to give legal recognition to de facto relationships on relationship breakdown was New South Wales. The original definition of a de facto partner was a 'relationship of living, or having lived as husband and wife on a bona fide domestic basis although not married to each other'.<sup>13</sup> This marriage-like definition was later amended as part of reforms to include same-sex couples as de facto partners in New South Wales, and this definition is one that is used in many different Australian states and territories, as well as forming the basis of the current federal law definition. This approach could form the basis of a legal definition of cohabitation that would be appropriate for England and Wales that moves away from an explicit reliance on considering what 'living as spouses or civil partners' actually means.

12. The Family Law Act 1975 (Cth) defines a de facto relationship as a relationship between two people who are not legally married to each other and are not related by family,

'...and having regard to all the circumstances of their relationship, they have a relationship as a couple living together on a genuine domestic basis'.<sup>14</sup>

This means that it must first be shown that the partners are not married to each other<sup>15</sup> and are not related by family,<sup>16</sup> which helps set limits on which relationships are recognised as de facto relationships, before considering the wider question of whether they are living together as a couple. To assist the decision-maker in determining whether a relationship fulfils this definition, the decision-maker is to consider 'all the circumstances of the relationship', including the following non-exhaustive list of factors:

- a) The duration of the relationship
- b) The nature and extent of common residence
- c) Whether a sexual relationship exists

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<sup>13</sup> De Facto Relationships Act 1984 (NSW), s3(1) (original enactment).

<sup>14</sup> Family Law Act 1975 (Cth), s4AA.

<sup>15</sup> Note that the limitation is that the partners are not married to each other, they could be married to other people as well as be in a legally recognised de facto relationship. De facto partners may also be in more than one de facto relationship at a time: Family Law Act 1975 (Cth), s4AA(5).

<sup>16</sup> Family Law Act 1975 (Cth), s4AA(6).

- d) The degree of financial dependence or interdependence and any arrangements for financial support between them
- e) The ownership, use and acquisition of property
- f) The degree of mutual commitment to a shared life
- g) Whether the relationship is or was registered under a prescribed under a law of a state or territory<sup>17</sup>
- h) The care and support of children
- i) The reputation and public aspects of the relationship.

This list of factors derives from judges' considerations in case law when deciding whether a relationship could be characterised as a de facto relationship and has some similarities with the approach taken by judges in England and Wales.

13. One thing that is noteworthy about the Australian approach is the flexibility offered by the legislation to consider all the individual circumstances of a relationship when deciding if it 'crosses the invisible line'<sup>18</sup> to become a de facto relationship. The statute makes it clear that the decision-maker need not make any 'particular finding in relation to any' of the listed factors to determine that a de facto relationship exists or has existed.<sup>19</sup> My analysis of case law suggested that while judges tend to consider each of the listed factors in turn, they do not require de facto relationships to satisfy each factor and are willing to consider other factors not listed in the statute. No one particular factor is deemed determinative. This flexibility is commendable considering the diversity of cohabiting relationships that may need the law's protection.

14. The Australian framework also provides for an opt-out provision, allowing those couples who do not wish to be in legally recognised de facto relationships to opt-out of the legal framework that applies on relationship breakdown and make their own arrangements instead. For these agreements to be valid, safeguards have been built into statute, and both parties must obtain independent legal advice to ensure they understand the effect of, as well as the advantages and disadvantages of forming such an agreement.<sup>20</sup> The benefit of this is that those couples who are aware of their legal position can take steps to exempt themselves from the legal provision, but those couples who are not aware of their legal position, as well as those who want that legal protection, will be subject to the provision on relationship breakdown.

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<sup>17</sup> Many Australian jurisdictions have introduced registration schemes for partners to de facto relationships, which are available for both same- and opposite-sex couples, akin to civil partnership in England and Wales.

<sup>18</sup> As it was described by Pascoe CFM in *Keaton v Aldridge* [2009] FMCAfam 92, [112].

<sup>19</sup> Family Law Act 1975 (Cth), s4AA(3).

<sup>20</sup> Family Law Act 1975 (Cth), s90UJ.

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

15. While there are diverging views on what level of legal recognition cohabitants should have, I would argue that the most straightforward approach is to treat cohabiting partners in the same way as spouses and civil partners. I have not come across a convincing rationale as to why cohabitants should continue to be treated in an inferior way to spouses and civil partners, particularly on relationship breakdown or death.<sup>21</sup> Research suggests that many people already believe that cohabitants are already treated in the same way as spouses or civil partners by law, social attitudes have changed, and research suggests many believe that cohabitants should be treated in the same way as spouses or civil partners by the law.<sup>22</sup> Treating cohabitants differently than spouses and civil partners is a continuation of the current complicated laws surrounding cohabitants, and attaching the same legal consequences to these different types of relationship has the merit of simplicity.

16. It should be stressed that any cohabitation law reform needs to include an effective opt-out provision to enable those partners who do not wish for their relationships to be legally recognised to opt-out of the legal framework.<sup>23</sup>

### **Conclusion**

17. Reforming the law on the rights of cohabiting partners is a pressing issue within family law and so the Committee's inquiry is most welcome. There is an abundance of academic research on this issue and the majority calls for reform. Social attitudes have changed as evidenced by the growing numbers of partners cohabiting without formalising their relationships and it is time that the law kept up with society. A new approach is needed towards the way these relationships are recognised by the law to ensure greater protection for these valued relationships.

For further information, please see:

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<sup>21</sup> See Kathy Griffiths 'From 'form' to function and back again: a new conceptual basis for developing frameworks for the legal recognition of adult relationships' (2019) 31(3) *Child and Family Law Quarterly* 227-248, 232-4.

<sup>22</sup> See for example, Anne Barlow and others 'Just a Piece of Paper? Marriage and Cohabitation' in Alison Park and others (eds) *British Social Attitudes: Public Policy, Social Ties* (18<sup>th</sup> Report, 2001) 48: 61% believed that a cohabitant should have the same rights as a spouse to financial support on relationship breakdown, and 93% felt a cohabitant should have inheritance rights over the family home.

<sup>23</sup> This point has been made in the research and the Law Commission also proposed that there should be an opt-out provision: Law Commission *Cohabitation: The Financial Consequences of Relationship Breakdown* (No 307, 2007), Part 5.

Kathy Griffiths 'From 'form' to function and back again: a new conceptual basis for developing frameworks for the legal recognition of adult relationships' (2019) 31(3) Child and Family Law Quarterly 277-248

Kathy Griffiths 'From 'form' to function and back again: a comparative analysis of form-based and function-based recognition of adult relationships in law' (PhD Thesis, Cardiff University, 2017)

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