

## Written Evidence from Dr Sharon Thompson, Cardiff University [HAB0342]

### Summary

1. The purpose of this submission is to respond to one key question of the WEC inquiry: What equalities issues are raised by the lack of legal protection for those in cohabiting relationships?
2. This submission will outline why cohabitation agreements do not provide sufficient protection to cohabiting couples. The prevalence of the common law marriage myth means most cohabiting families will not have entered into a cohabitation agreement. Debunking the assumption that unmarried cohabitants can effectively seek their own legal protection – thereby negating the need for additional legal regulation – overlooks many important issues that become apparent on closer inspection.

### Background to the Author of the Submission

3. The author is a Reader in Law at Cardiff University and is author of numerous publications on agreements made in the context of intimate adult relationships. These include the book *Prenuptial Agreements and the Presumption of Free Choice*<sup>1</sup> which was shortlisted for three major book prizes and was cited and applied by the High Court of Australia in *Thorne v Kennedy*.<sup>2</sup> This work was also cited by the Law Commission of England and Wales in its report on marital property agreements.<sup>3</sup> This research is applicable in the context of cohabitation agreements because of the emphasis placed on issues of power and gender equality within families in times of crisis.

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

#### *General*

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<sup>1</sup>S Thompson, *Prenuptial Agreements and the Presumption of Free Choice* (Hart 2015).

<sup>2</sup>[2017] HCA 49. See also S Thompson, 'Thorne v Kennedy: Why Australia's decision on prenups is important for English law' (2018) 48 *Family Law* 415-419.

<sup>3</sup>Law Commission, *Matrimonial Property, Needs and Agreements* (2014) Report no. 343.

4. When a relationship between unmarried cohabitants breaks down, questions of who owns what can lead to intractable disputes. Assets commonly become intermingled over time, as property is bought jointly and financial arrangements over household bills and finances are often not divided clearly or strictly. When couples are married, there is a legal framework that can address some of the messy realities in which couples manage their finances. However, the situation is very different for cohabiting families, where the source of the asset is of primary importance. Taking the example of the family home, if the property is not in the joint names of both parties, it is extremely unlikely that the party whose name is not on the deeds will get any remedy in the event of separation.<sup>4</sup>
5. The hardship this inevitably creates for the party without property is exacerbated by the fact that they might not have known there would be little legal recourse. The ‘common law marriage myth’ – that cohabiting families believe they will be protected by the law because they function in the same way as spouses - is a view still held by a significant proportion of the population.<sup>5</sup>
6. Furthermore, relationship breakdown is not the only instance when questions of property ownership could be problematic. On the death of one of the parties, or in the event of bankruptcy, a party without a legal or equitable interest in the family home could be left in a position of serious financial difficulty.<sup>6</sup>

### ***Cohabitation Agreements***

7. Cohabitation agreements can provide couples with a way of plugging the gaps left by a lack of legal remedies. By signing a contract that determines property ownership in the event of separation, couples can agree to depart from strict principles of property law, and make arrangements that reflect how they wish to manage their family

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<sup>4</sup> *Lloyds Bank v Rosset* [1991] 1 AC 107 (HL).

<sup>5</sup> The work of Anne Barlow and the British Social Attitudes Survey has found that 46% of respondents in 2019 believed cohabiting couples formed a common law marriage: <https://natcen.ac.uk/news-media/press-releases/2019/january/almost-half-of-us-mistakenly-believe-that-common-law-marriage-exists/>.

<sup>6</sup> *Amin v Amin* [2020] EWHC 2675 (Ch); *Capethorn v Harris* [2015] EWCA Civ 955; *Curran v Collins* [2015] EWCA Civ 404; *Dobson v Griffey* [2018] EWCA 1117 (Ch); *Pillmoor v Miah* [2019] EWHC 3696 (Ch).

finances. This can take into account career sacrifices made by one party in order to undertake childcare, which often not only impact one's career progression, but also one's pension. Cohabitation agreements can be reviewed periodically, enabling unexpected changes in circumstance to be taken into account. Furthermore, negotiating a cohabitation agreement can enable couples to reflect upon their expectations within the relationship, such as the contributions and sacrifices (financial and non-financial) that the parties may make for the welfare of the family.<sup>7</sup> There are therefore clear benefits to encouraging cohabitation agreements in England and Wales.

8. In recent years, there has been a shift towards private ordering in intimate family contexts, which aligns with a desire to provide couples with greater choice. Provided it is properly executed, cohabitation agreements are legally binding, and the autonomy this provides couples with has been emphasised in recent Parliamentary debates on the subject of cohabitants' rights.
9. However, this emphasis on autonomy and choice should not distract from the need for wider reform of cohabitants' rights. In Parliamentary debates on the matter, some have expressed concern that autonomic rights to unmarried cohabitants would undermine the autonomy currently enjoyed by such couples. Baroness Deech, for example, has argued that:

‘We should observe the human rights of privacy and respect for family life, which are interfered with by the [Cohabitation Rights] Bill. Private adult choices should be respected’.<sup>8</sup>

There are three reasons why this argument is flawed.

10. The first relates to the common law marriage myth noted above. The overwhelming evidence that a significant proportion of cohabiting couples are not aware of their legal rights means that it is not accurate for Baroness Deech to argue that legal regulation would go against the private choices of individuals, for in many cases such choices were not made in the first place.

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<sup>7</sup> E Kingdom, ‘Cohabitation Contracts and the Democratization of Personal Relations’ (2000) 8 *Feminist Legal Studies* 5.

<sup>8</sup> HL Deb [HL] Cohabitation Rights Bill vol 796, col 1265 (15 March 2019).

11. The second reason is that existing reform proposals, such as those put forward by the Law Commission in 2007<sup>9</sup> maintain party autonomy by facilitating the opting out of any automatic protection that reform would provide.
12. The third reason is that the exercise of private choice through cohabitation agreements is not a panacea for addressing the problems left in this area. The course of family life can create dependency in a way that may not be anticipated by the terms of a cohabitation agreement, if that agreement is not reviewed periodically. While matters sometimes work out as planned in the cohabitation agreement, this should not detract from the fact that commonly, particularly in longer relationships, matters do change.

***Reforming the rights of cohabiting partners could change the nature of cohabitation agreements***

13. Changing the legal regulation of cohabitation would change the nature of cohabitation agreements too. As noted above, cohabitation agreements can currently provide a means of acquiring remedies – in other words, couples can contract *into* the sharing of property to reflect their shared contributions to the relationship. However, the purpose of the agreement changes when couples are opting out of a new law of cohabitants' rights. Put simply, if the legal status of unmarried cohabitants changes, this could lead to a shift in emphasis for cohabitation agreements, from a form of party protection to a form of asset protection. This would make such agreements more analogous to prenuptial agreements than to cohabitation agreements as they currently operate.
14. It is important to be aware of the equalities issues this could raise. My research on prenuptial agreements found that such agreements are typically used to protect wealth, and this almost always means there is not a level playing field between the parties.<sup>10</sup> Power imbalances on gendered lines are endemic. Requiring lawyers to make adjustments for their clients does not always ensure fairness. It creates a situation

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<sup>9</sup> Law Commission, *Cohabitation: The Financial Consequences of Relationship Breakdown* (2007) Report no. 307.

<sup>10</sup> S Thompson, *Prenuptial Agreements and the Presumption of Free Choice* (Hart 2015); S Thompson, 'Feminist Relational Contract Theory: A New Model for Family Property Agreements' (2018) 45(4) *Journal of Law and Society* 617.

where fairness depends on the knowledge, expertise and insight of individual lawyers. An awareness of this context *before* cohabitation reform is introduced could mean the potential unfairness stemming from cohabitation agreements, or indeed any type of agreement ‘opting out’ of the remedies provided by a new law could be addressed. If such agreements become framed simply as ‘opting out’ of protection on relationship breakdown, this could, in theory, obfuscate the advantages periodically reviewed cohabitation agreements can currently bring. Signing one agreement when parties move in together that opts out of protection could mean that if and when the relationship changes over time, the changing needs of the parties are not reflected in the original agreement.

### **Concluding remarks**

15. The rights of unmarried cohabitants is in urgent need of reform. Cohabitation agreements currently enable couples to seek some legal protection under the law of contract, but only if the parties are aware of what their rights are. Research has shown that for a significant proportion of the population, this is not the case. However, it is important to be aware of the numerous consequences stemming from reform of cohabitants’ rights, some of which are not immediately apparent. One such consequence is how reform could change the purpose of cohabitation agreements to a means of *preventing* sharing of property rather than a means of facilitating it. This could potentially create inequality and unfairness for the less wealthy party, particularly if she has made career sacrifices for the benefit of the family. This is shown in my research on prenuptial agreements in the context of marriage, whereby agreements regulating the division of property in the event of relationship breakdown tend to favour the wealthier party.
16. Cohabitation agreements are currently legally binding. However, the way in which these agreements are given effect should be reviewed in light of reform, to ensure power imbalances that could operate in favour of the wealthier party do not reinforce inequalities that result from caring responsibilities.

***July 2021***