Written evidence from Family Law in Partnership [HAB0364]

We are delighted that the Women and Equalities Committee has launched this Inquiry into 'The Rights of Cohabiting Partners'. Since the Law Commission published its report on 'Cohabitation: The Financial Consequences of Relationship Breakdown' in July 2007, the number of cohabiting couples has continued to increase and the figure has now reached 3.5m and seems on track to exceed the prediction in the Report of 3.8m by 2031. Also, as the Report predicted, the number of married and civil partnered couples has decreased (from 68% in 2009 to 66.8% in 2019).

As the Committee will be aware, the legal framework that applies on the breakdown of a cohabiting relationship is made up of a complex patchwork of legislation that fails to provide coherent and overarching legal protection. Where legal remedy is available under the Trust of Land and Appointment of Trustees Act 1996 ("ToLaTA"), it is notable that claims are relatively few, and extremely expensive to pursue with little certainty as to outcome. Similarly, for financial provision for children pursuant to Schedule 1 Children Act 1989 ("Schedule 1") the percentage of claimants when compared with the underlying numbers of lone parents also indicates a disparity between those in need and those who are accessing justice.

There is also concern about the provision available pursuant to the Child Maintenance Service (CMS) and it is also welcome that the Department for Work and Pensions has launched a consultation 'Child Maintenance: modernising and improving our service' (replies by 6th August). The responses will provide further important information to this Inquiry.

We hope that our responses to this Inquiry assist the Committee in considering the issues. Should you require any further information or assistance, please do not hesitate to contact Kara Swift, Victoria Nottage, David Allison and James Pirrie of Family Law in Partnership.

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

Yes, there should be a definition of cohabitants being two people who live together as a couple and are not married or civilly partnered. We broadly support the suggestion set out by Resolution in their response to the Law Commission Consultation of a statutory checklist, that would be subject to interpretation by the Court.

It is also of relevance that the Scottish Law Commission's project on 'Aspects of Family Law' published a Discussion Paper on Cohabitation in 2020 and undertook a consultation which ended in May 2020. A Report is expected on this subject in early 2022. One of the issues that was considered in the consultation was the definition of cohabitation in the Family law (Scotland) Act 2006 and this will be worth considering.

Although, in contrast to Scotland, jurisdiction in England and Wales in relation to financial remedies on divorce is already founded on a discretionary approach and therefore it will be expected that any statutory provision adopted by a new England & Wales Cohabitation statute will be interpreted and applied on a case by case basis by our judiciary.

Other jurisdictions include variations of statutory definitions of the term which are also worth considering, for example the wording in the Australian statutes provides an interesting contrast. (See answers below for details in relation to Scotland and Australia).

In the absence of children there should be a short qualifying period of 2 years before an application can be made for relief under any new statute/Cohabitation Act (save in exceptional circumstances where there is significant financial hardship or economic disadvantage).

It is notable that confusion continues concerning the term 'common law marriage'. Contradicting treatment of couples in arenas such as social security benefits (where 'cohabitation' terminates the right to individual benefits but does not give rise to any corresponding rights as against each other in the Family Courts at the end of the relationship) and imposed by third parties such as insurance companies (who assess risk based on the existence of 'common law marriage') add to the confusion. Therefore, consideration should be given to how other areas of the law in England and Wales have already approached the definition of cohabitation including immigration and social security with a view to introducing a definition in the Family law context that aims to provide greater clarity about the concept of Cohabitation.

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

Legislative changes are imperative. Our ToLaTA jurisdiction is expensive, slow, unpredictable and haphazard. The complex and expensive process of litigation can include a requirement to carry out an extensive search for evidence that often needs to be conducted back throughout the relationship, without certainty over outcome. Further, the current system favours the dominant and financially stronger party who are better equipped to participate (and obtain legal advice and support) in the direct negotiations that for many are the only realistic alternative to legal advice and support.

Although we don't address this directly in this response, there are also very serious consequences on the death of a cohabitee, where the surviving cohabitee does not have the benefit of the spousal/ civil partner nil rate band for IHT and the intermittent benefits of spousal CGT transfers.

A legislative framework should be introduced to provide for those who have a relationship generated need following the breakdown of their cohabiting relationship. Thought should also be given to how any new statute would work within the existing framework, in particular the provision for children under Schedule 1 and the CMS.

On separation, 'qualifying cohabitees' should be able to make a claim for the same classes of financial award as are available upon the breakdown of a marriage or dissolution of a civil partnership (broadly i.e. periodical payments, lump sums, property adjustment and pension sharing).

Although the remedies would be the same, the underlying approach of the Court should differ to reflect the different status of cohabitation and marriage and the autonomy of individuals. There would be an expectation that the quantum of awards would be different depending on whether the Court exercises jurisdiction under the MCA 1973/Civil Partnership Act 2004 or any new Cohabitation Act. In addition, it should also be possible for cohabitees to 'opt-out' of any statutory scheme. The aim of the Court on the breakdown of a cohabiting relationship should be limited to addressing relationship generated need and the presumption of equality would not apply.

A hierarchy of claims would need to apply between any new Cohabitation Act and Schedule 1 and it makes sense for Cohabitation Act claims to take precedence.

Therefore, property claims would usually be dealt with under the Cohabitation statute and may not be necessary under Schedule 1.

However, it is also conceivable that there may be circumstances where it is appropriate for a parent to be awarded property provision under Schedule 1 and this jurisdiction should therefore be preserved. In addition, the current limitations on the provision under Schedule 1 should be revisited as there are circumstances when it may be appropriate for property provision to extend beyond a child's minority, and there may be circumstances where an outright transfer of property may be appropriate (although scarce) under Schedule 1.

However in this regard caution should also be exercised. Whilst, it would be possible to seek to extend the "loan of housing" regime of Schedule 1 as a way of meeting the problem and it is relatively easy to think of deserving cases where the 'common law' spouse and parent is able to have financial security after the child's dependency and it seems a reform easily made. We believe caution must be exercised where a legislative code designed to meet one thing (children's needs) is actually being used for the purposes of another (alleviating financial dependency of a cohabitant.

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

There are a number of concerning equalities issues that are raised by the lack of legal protection for those in cohabiting relationships. The urgency for consideration of the law in this area is borne out by the fact that cohabiting relationships are the fastest growing relationship type in the UK and the number has now reached 3.5m. At the same time, the numbers of married couples (where the legal protection is extensive) are diminishing.

The first major issue is poverty. The Family Resources Survey carried out by the Centre for Social Justice found that the disparity in the numbers who are married (and who therefore have the benefit of most protection from the law) between rich and poor white families in the UK is extreme. In the wealthiest fifth of white families by income, 84% are married and a further 12% a cohabiting. In the poorest fifth just 19% are married. Interestingly the number of cohabitees falls by a much less percentage to 9%. There isn't enough meaningful data on smaller ethic groups than white British to extrapolate further. However, this together with the clear evidence that there is an 'education issue' where many still believe that 'common law marriage' exists, brings to bear the clear point that those outside the richest in our society are afforded least legal protection on the breakdown of their relationships.

The second major issue is that the lack of legal protection affects women and mothers more than men. The latest ONS data suggests that there are currently 232,000 men who are stay at home dads. This is just 1.2% of families that have the father as the primary care giver and is a sharp drop in recent years. The gender pay gap and the evidence that has been collected shows that nine out of ten companies pay men more than women and the existence of a gender pay gap of at least 18% continues to play a large part in the decision of parents as to which one shall stay at home or work part-time when children are young. As a result of this inequality parents are faced with the financial reality that it is cheaper for the women to stay at home or reduce hours, thereby reducing her career prospects to take on childcare. Upon separation there may be no legal protection for a woman who has given up her career to look after the children, where she has lived in a property owned by her former cohabitee.

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

CMS

We note that the DWP has launched a consultation on a number of proposed legislative changes aimed at modernising and improving the Child Maintenance Service. This is welcome because as it currently stands the endemic delays and failures in the CMS give rise to real hardship for many children, where there is a real danger that families pass into poverty as lone parents struggle to fill the gap between making the application and receiving funds.

James Pirrie, Director at FLiP will be providing a full response to this consultation and in the meantime, the following points have significant relevance to this inquiry:

The statistics concerning the usage of the Child Maintenance give rise to the following points of concern:

- A reduction in the take up of services (117,000 in January 2018 and 51,000 in December 2020)
- Significant and growing unpaid arrears (A little under 50% within the service paid over 90% of what was due and nearly 30% paid nothing at all). Arrears are now around £400m.

The underlying system for calculating child maintenance needs to be reviewed. At present it is based on metrics that are incapable of discerning capacity to pay and it incorporates too many variables that reduce the scale of an obligation.

We are aware of considerable delays that ensue in the Appeals process and this is of real concern. We are aware of appeals that have taken 3 years to be heard.

CMS and Court Jurisdiction

We are also concerned about the interaction between the CMS and the jurisdiction of the Court. As a result of the current rules, provision under the CMS is given pre-eminence. This gives rise to:

- the court not (generally) making awards for general maintenance needs of a child where the CMS has jurisdiction (unless the CMS has made a maximum award already or the parties agree. Only at this point can the court make orders reflecting the fact that the paying parent earns above £3k pcm).
- by operation of the 12 month rule, after just one year of provision by way of a Court Order, legislation permits either party (who sees advantage to opt out of Court provision) to make a fresh application to the CMS. The consequence is that courts are hamstrung to provide assistance: in cases of complexity, the applicant can often not approach the court for the "top up maintenance" because their case is still caught within the CMS appeals system.

There is now no justification for the pre-eminence given to the CMS now that the administrative system has carried out a volte face in terms of its underlying policy: it no longer aspires to assume all child support cases (as it did in 1993) indeed the policy aspiration is to minimise take up of its services.

Access to Jurisdiction under Schedule 1

The third issue is that the Court's jurisdiction under Schedule 1 is not being accessed by those in need.

- In many cases (see above) it has no jurisdiction to do so: the courts are prohibited from becoming involved to relieve need.

- In some cases there may be ignorance of the law but for many the barriers are too great:
    - Most of what is on offer under Schedule 1 is simply the loan of funding for housing: few will relish the prospect of investing money with lawyer for simply the loan of housing – it makes little economic sense.
    - The cases are complex and uncertain.
- Relate suggested in 2013 that each year over 120,000 UK families with dependent children separate with about half being never-married families[1]. Discussions with the MOJ suggests that a schedule 1 order is relatively rare, running at a consistent rate of around 180 a quarter (or a minute 1.2% of the relevant population).

Limitations of provision under Schedule 1

Where applications are made under Schedule 1, the limitations on the Court's powers gives rise to hardship. The prospect of financial destitution or significant hardship upon termination of provision under Schedule 1, at the end of the child's minority requires serious consideration.

As suggested above, the provision under Schedule 1 should be extended to allow the Court to exercise discretion to make property awards that continue beyond a child's minority and in extremis to make outright property transfers (although with caution in terms of any overlap with any new Cohabitation Act).

Consideration should be given to the way case law has developed to restrict the carer's allowance. In the recent case of CA v DR (Schedule 1; Pension Claim) [2021] EWFC 21, the applicant mother included £40,000 pa in her budget for pension provision. Whilst this was rejected by Mrs Justice Roberts who was compelled to follow the approach of Lord Justice Thorpe in Re P (a child) [2003] EWCA Civ 837 that 'there can be no slack to enable the recipient to fund a pension or an endowment policy or otherwise to put money away for a rainy day', this strict approach has limiting and detrimental impact on the future financial stability of the mother. Introducing discretion in this area whether that be through an extension of the Schedule 1 provision or the new Cohabitation Act/statute, to allow a mother to save during a child's early minority when she is unable to work, may now be appropriate, with the expectation that there is a step-down when the child reaches school age.

Whilst this extended provision would not be appropriate in every or even many cases, the underlying statutory power of the Court should be extended to make it possible for the Court to make discretionary awards in certain circumstances.

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

It is agreed that the range of claims available to those who are married or in a civil partnership should be available to those who have cohabited, however the application of the Court's discretion should be founded on different principles which reflect the different status of marriage and cohabitation. This point is more relevant now that those opposed to marriage are able to enter into a civil partnership and therefore 'opt in' to the legal protections afforded to married couples.

[1] It suggested that this was 1.3% p/a from the 4.7 million married families and a much higher 5.3% of the 1.2 million cohabiting families.

Therefore, the overriding objective should be needs driven with the focus being on redressing any relationship generated disadvantage and finally determining the financial relationship between the former cohabitants. There should be no presumption of equal sharing and there should be an expectation that the former cohabitants will be self-supporting unless they are unable to support themselves due to having the primary child caring responsibilities or it being reasonable in all the circumstances that their earning capacity has been adversely affected by the circumstances of the relationship.

The discretionary scheme and factors to be considered by the courts as proposed by Resolution in their response to the Law Commission's consultation on cohabitation in 2007 is endorsed.

Cohabitants should have the ability to enter into an opt-out agreement in respect of any new Cohabitation law, but not in relation to any provision relating to children.

- **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?**

There are a number of jurisdictions that have sought to provide a legal framework of rights for cohabiting partners and a critical evaluation of these statutes and the experiences of those working within those systems would provide valuable insights for the Committee's Inquiry.

Scotland

The Family Law (Scotland) Act 2006 has been in place in Scotland for 15 years and is currently under review by the Scottish Law Commission. The Commission intend to publish a report in early 2022 and this will provide the Committee with valuable feedback in relation to the way that the Scottish law has been working in practice, which in turn can be used to inform the development of the legal framework for cohabitants in England and Wales. The following is a list of specific points of interest, however more generally it is said that advice concerning the likelihood of success in any given case is extremely difficult because of the breadth of discretion within the current law. Whether this would apply to a discretionary system introduced in England and Wales, where discretion is already at the heart of the approach to financial provision on divorce, is worth bearing in mind.

- The Inquiry asks if a definition of cohabitation should be introduced. The Scottish Consultation document states that the definition of cohabitation under the 2006 Act as 'unmarried couples who live together as if they are husband and wife or same sex couples who live together as if they are civil partners' is said to be out of date. The Court has a wide discretion to determine whether or not a couple can be classed as cohabitants.

- Under the Family Law (Scotland) Act 2006, there is no minimum period of cohabitation required before a claim can be made. This is differs from the approach taken in a number of other jurisdictions, Australia requires 2 years unless the parties have a child together, Ireland requires 2 years if there is a child and 5 years if not and Canada has a minimum period of 3 years or satisfaction of a requirement to 'live together with some permanence' if there is a child of the relationship.

- The availability of awards under the 2006 Act (being only a capital sum (payable as a lump sum or in instalments) and an order requiring a payment in respect of the economic burden of caring for a child of whom the cohabitants are parents,

is said to be too limited. There is no provision for pension sharing orders, property transfers or payments of maintenance (although there is separate child maintenance/child ailment payable where applicable). The court is trying to achieve an outcome which redresses any economic imbalance which might have occurred as a result of the cohabitation.

- The time limit for making a claim (12 months from cessation of cohabitation) is said to be too short.

Australia

A legal framework for those in qualifying cohabiting or 'defacto relationships' was introduced in 2009 and provides rights that are equal to those in a marriage (with minor exceptions). The system which doesn't differentiate on the grounds of marital status, is regarded positively in Australia, described as workable and not requiring reform. The main source of litigation concerns meeting the criteria for a 'defacto relationship' as the approach is a discretionary application of the statutory criteria but this is seen as a necessary part of the operation of the law. Section 4A of the 1975 Act explains the meaning of de facto relationship as follow:

(1) A person is in a de facto relationship with another person if:

(a) the persons are not legally married to each other; and
(b) the persons are not related by family; and
(c) having regard to all the circumstances of their relationship, they have a relationship as a couple living together on a genuine domestic basis.

(2) Those circumstances may include any or all of the following:
(a) the duration of the relationship;
(b) the nature and extent of their common residence;
(c) whether a sexual relationship exists;
(d) the degree of financial dependence or interdependence, and any arrangements for financial support, between them;
(e) the ownership, use and acquisition of their property;
(f) the degree of mutual commitment to a shared life;

The Canadian System is also worth considering, especially with regard to Canadian spousal guidelines which provide discretion within parameters.

Under the Canadian system an award is made to provide transition:

- Where one party earns more than the other,
- They pay a proportion (within a band that is laid down) of the difference
- And this obligation continues for a period referable to the length of the relationship.
- The judiciary will fix where in the band of discretion the award will ultimately sit by reference to prescribed factors.

Closing comments and aspirations for Reform

Properly developed, a new statutory scheme to provide for the consequences of the breakdown of a Cohabiting relationship could

- provide reasonable clarity; and thus
- permit discretion (avoiding the uncertainty and injustice of prescribed outcomes experienced with the CMS) but promote settlement because of the relative clarity of provision;
- Limit the burdens upon the MoJ, in particular if use were made of the successful arbitral and mediation resources of the family law industry;

- provide respite in the complex cases during the period when the child support arrangement is getting on its feet.

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