

## Written evidence from Dr Katherine O'Sullivan [HAB0365]

The Irish experience of cohabitation reform law

I was alerted to the investigation of the Women and Equalities Committee into the rights of cohabiting partners by Dr Andrew Hayward who kindly invited me to submit a brief contribution explaining the Irish experience of cohabitant legislation reform. I hope the below will prove informative to the Committee as it seeks to determine how best the rights of cohabiting partners can be strengthened in England and Wales.

### *Introduction:*

I am a Senior Lecturer at the School of Law, University of Limerick, Ireland specialising in family property law and publishing widely in highly respected national and international journals (see <https://www.ul.ie/research/kathryn-osullivan>). I have recently been investigating the success or otherwise of the Irish cohabitation law regime and, as such, believe I can contribute some insights into the Irish experience for the benefit of the Committee.

### *History and Context for why Ireland Introduced Reform:*

Although marriage typically marked the beginning of a couple's life together in Ireland, between the early-1970s and mid-1990s Irish family life underwent important normative and behavioural change. Cohabitation rates grew significantly, particularly from the mid-1990s, such that by the early 2000s the obvious mismatch in protection for marital and non-marital families was gaining considerable political attention.

While there were various governmental reports published on the issue which did give it some momentum for reform,<sup>1</sup> it is not possible to say definitely why the Irish legislature chose to take up the baton and introduce laws protecting vulnerable cohabitants. Unlike in England and Wales, there was little pressure coming in the form of high profile property disputes between cohabitants nor in the form of sociological research centred on the vulnerability of non-marital couples. It is arguable, however, that the introduction of the reforms was viewed as natural next step in the relatively intensive liberalisation of Irish family law at the time: having long been banned, divorce was introduced through the Family Law Divorce Act 1996; marriage formalities were radically overhauled with the Civil Registration Act 2004 emphasising the legal, as opposed to moral, importance of marriage; following highly effective rights-based and equality-based campaigning from LGBT groups, civil partnership legislation was also being developed from the mid-2000s.

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<sup>1</sup> *Report of the Working Group Examining the Treatment of Married, Cohabiting and One-Parent Families under the Tax and Social Welfare Codes* (Pn 7950, Stationery Office, Dublin 1999); Department of Justice, *Options Paper presented by the Working Group on Domestic Partnership* (Stationary Office, Dublin 2006); Law Reform Commission, *Rights and Duties of Cohabitants* (LRC 82, Dublin 2006)

The need to address the rights of cohabitants perhaps seemed a logical next step in progressing the liberal agenda of the government, representing another symbolically important departure from the (Catholic Church-dominated) past in which non-marital relationships were regarded with some contempt.

However, because the Irish Constitution pledges to 'guard with special care the institution of Marriage, on which the Family is founded, and to protect it against attack', how precisely the needs of such families could be met while simultaneously ensuring constitutional compliance was less than straightforward. It was ultimately concluded that legislative intervention could (and should) be undertaken to address the vulnerabilities of those in de facto relationships subject to the important proviso that married couples could not be treated less favourably than cohabiting couples. As the drafting of then Civil Partnership Bill 2009 was already in train, a decision was made to tack on the developing cohabitation provisions to the pre-existing Bill and ultimately rename the proposed legislation to reflect same.

*Brief Overview of the Scheme:*

With this backdrop, Part 15 of the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010 was introduced seeking to provide a presumptive framework for the recognition of de facto relationships in Ireland. While the Act provides few rights while a relationship subsists, the main thrust of Part 15 is to provide a 'safety net' of protection for vulnerable cohabitants on relationship breakdown, in particular.

Pursuant to section 172(1) of the 2010 Act, a 'cohabitant' is defined as

'one of 2 adults (whether of the same or the opposite sex) who live together as a couple in an intimate and committed relationship and who are not related to each other within the prohibited degrees of relationship or married to each other or civil partners of each other'.

In order to be able to access the financial redress scheme set out under the Act, however, a number of further hurdles must be surmounted. First, it is only so-called 'qualified cohabitants' who are eligible to apply. Section 172(5) defines a 'qualified cohabitant' as '...an adult who was in a relationship of cohabitation with another adult and who, immediately before the time that that relationship ended, whether through death or otherwise, was living with the other adult as a couple for a period –

(a) of 2 years or more, in the case where they are the parents of one or more dependent children, and

(b) of 5 years or more, in any other case.'

These eligibility requirements are strictly enforced and the courts are not empowered with any discretion to depart from them even in cases of extreme hardship. Second, a 'qualified cohabitant' must also prove that he or she 'is financially dependent on the other cohabitant and that the financial dependence arises from the relationship or the ending of the relationship' (section 173(2)) in order to make an application for provision.

Where all of these criteria are met – and presuming that an applicant is not otherwise excluded under the terms of the legislation – a 'qualified cohabitant' may apply for a property adjustment order, compensatory maintenance order or pension adjustment order. Whether an order is made in favour of an eligible applicant is at the discretion of the court with the legislation giving no automatic right to relief. The court

may only make the order concerned 'if satisfied that it is just and equitable to do so'. In this regard, it must consider a non-hierarchical list of factors and take into account all the circumstances of the relationship.

[Note also: Where a relationship ends in the death of one of the cohabitants, an approach largely comparable to that available to unmarried cohabitants in England and Wales pursuant to the Inheritance (Provision for Family and Dependents) Act 1975 is applied. Thus, a 'qualified cohabitant' has the right under section 194 to apply to the court to seek provision from the net estate of the deceased cohabitant whether he or she died testate or intestate. If the relationship continued to the date of death, it is not necessary for the applicant to demonstrate financial dependence. However, if the relationship ended within two years of the deceased's death, the financial dependence filter is again applied. Beyond this time frame, applications are barred].

#### *Effectiveness of the Legislation:*

Given the specific constitutional context in Ireland – and the need to ensure that any cohabitant legislation was not perceived as a threat to marriage – the Law Reform Commission of Ireland and the legislature took a very conservative approach to the drafting of the cohabitation regime. In particular, a narrow view of who ought to be eligible to apply was adopted with the 'needs of *particularly* vulnerable persons' emphasised.<sup>2</sup> In this context, stringent eligibility criteria were set out in the legislation with the inclusion of the 'financial dependence' requirement particularly powerful in filtering out many, otherwise potentially deserving, claimants.

As a result, there have been few reported cases, especially on relationship breakdown, in the decade since the introduction of the 2010 Act.<sup>3</sup> This has created two further challenges: first, it means there is a lack of clarity regarding the likelihood, or otherwise, of succeeding in any claim ensuring, in turn, that even less cases will be taken;<sup>4</sup> second, there is little shadow of the law for cohabitants to bargain in if they chose not to pursue litigation.

Therefore, while the introduction of Part 15 of the 2010 Act was undoubtedly of symbolic importance in recognising the rights and duties of cohabiting couples, it is certainly questionable how effective the legislation has actually been in providing meaningful protection for vulnerable cohabitants on relationship breakdown, in particular.

#### *Lessons for England and Wales:*

It goes without saying that any protection is better than no protection. However, I believe the Irish experience presents a cautionary tale in how overly restrictive eligibility requirements can prove counter-productive and actually ensure that those parties targeted by the legislation, although eligible to pursue litigation, can still end up with little protection. While the efforts of the Irish legislature to protect and focus specifically on the most vulnerable cohabitants was understandable, unless such cohabitants have either a) a legitimate and effective means of accessing justice or b) can engage in private bargaining in the shadow

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<sup>2</sup> Law Reform Commission, *Rights and Duties of Cohabitants* (LRC 82, Dublin 2006) para. 1.24 (emphasis added). Note Dermot Ahern, Minister for Justice and Law Reform, Dáil Debate 01.07.2010 (vol. 714, col. 353) also who explained the legislation was aimed at benefitting cohabitants who could show 'extreme financial difficulty'.

<sup>3</sup> A search within the judgment texts of the Courts Service of Ireland website for the term 'qualified cohabitant' yields just 5 results, 3 of which related to cases taken on the death of one of the cohabitants. See < <https://www.courts.ie/judgments> > accessed 24.06.2021. An equivalent search on Westlaw.ie yields the same results. That the majority of reported cases to date deal with succession applications where the relationship continued up to the death may be partly attributable to the fact that such applications do not need to show 'financial dependence'.

<sup>4</sup> Note, Legal Aid may be available for such litigation in limited circumstances in Ireland, however the system is over-burdened with long delays reported. In the absence of such aid, litigation is seen as highly risky given the lack of precedent.

of the law – benefitting from precedents set in cases which are taken by those, perhaps, more financially capable of pursuing same – there is arguably little meaningful protection ultimately provided.

Learning from the Irish experience, it might be the case that a somewhat less restrictive approach could be adopted in England and Wales which would go some way towards ameliorating the weaknesses which we have witnessed on this side of the Irish Sea. There is wide spectrum of approaches towards establishing eligibility criteria under a cohabitation regime, from the highly restrictive approach adopted in Ireland to the much more liberal approach adopted in jurisdictions like Canada (where cohabitants are equated to married couples after a certain period). It is not for me to suggest where any future reform of the law in England and Wales should fall on that spectrum. However, while it may be more politically palatable to restrict eligibility to a narrow definition of the ‘most deserving’ cases, a slightly broader approach may actually ensure that those former cases, in particular, ultimately benefit from more effective protection. Moreover, such an approach does not mean that any floodgates will be opened. After all, any provision made under a discretion-based regime, even for those who are eligible to apply, will remain for the court to decide and any unmeritorious cases may be dealt with accordingly. The core benefit of such an approach would, however, be that where more cohabitants are deemed eligible to apply, there will be greater opportunity for the courts to consider core provisions of any legislative regime and provide important precedents to guide the future application of the legislation both in litigated cases and in private bargaining.

I hope that this overview proves of interest to the Committee and I wish you all the best with the investigation. I am at your disposal for any further enquiries you may have on the Irish experience.

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