Written evidence from Anne Barlow, Professor of Family Law, University of Exeter [HAB0366]

Introduction

As an academic and former solicitor who has written and conducted socio-legal research on the regulation of adult relationships and previously practised in the field of family law, I am keen to share my views on this important topic based on research evidence and my experience. I have addressed in turn the topics specified in the call and have summarised the main points made.

Summary

- There should be a legal definition of cohabitation. If this includes a minimum qualification period of e.g. 3 years cohabitation, this should only apply to couples without children of the relationship.
- There should be an opt-out (not opt-in) legal framework of presumptive rights and obligations for qualifying cohabiting couples on separation, providing remedies based on family law principles. This will overcome the difficulties of expecting people to be 'legally rational' about their family matters, which research shows is often both emotionally and practically difficult and is greatly impeded by the prevalence of the 'common law marriage myth'.
- Cohabitants with children should be treated as if they were married or civil partnered on separation or death of a partner, unless they have jointly opted out.
- Cohabitants without children, should not immediately have the same rights as married couples or civil partners. However, they should have access to remedies which can meet needs and/or redress relationship-generated economic disadvantage or advantage on separation.
- On death of a 'qualifying' cohabitant who is intestate, a portion of the estate or a statutory sum should automatically be ringfenced for their surviving cohabitant partner, regardless of whether there are children of the relationship, unless they have opted out.
- Existing remedies are not adequate and are more likely to adversely affect cohabitant women than cohabitant men, where non-financial contributions to family life are more likely to be made by women and not compensated at all on relationship breakdown.
- The paucity of remedies for cohabitants on relationship breakdown also affects those who go through a religious marriage ceremony which is not recognised in English and Welsh law. This mainly, but not exclusively, affects the Muslim community where couples may be unaware of the situation, raising further issues about the inadequacies of cohabitation law on separation or death of a partner.
- Other issues such as disparities between married/civil partnered and cohabiting couples regarding pensions (state and private) and bereavement benefits as well as the effects of inheritance tax should also be looked at, where entitlement is being decided case by case, rather than as a matter of policy when challenges are brought by bereaved cohabiting partners.

Key questions for the inquiry are:

- Should there be a legal definition of cohabitation and, if so, what should it be?
- What legislative changes, if any, are needed to better protect the rights of cohabiting partners in the event of death or separation?
- What equalities issues are raised by the lack of legal protection for those in cohabiting relationships?

- Should legal changes be made to better provide for the children of cohabiting partners?
- Should cohabiting partners have the same rights as those who are married or in a civil partnership?
- 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?

1. Definition

In my view, there should be a definition to give qualifying cohabitants a legal status as a recognised family form, (but there must also be the right for couples to opt out of the legal effects). The definition should be kept simple and include living together 'as a couple' in the same household.

I do not think the definition should require 'living as if married' or 'as if civil partnered' as this adds little that is meaningful and may prompt litigation challenges. I suggest the essence of 'living together as a couple' would go on to be proven by further characteristics set out in a checklist to indicate the nature of the relationships to be recognised. Cohabiting relationships do vary and may range across a spectrum from the mutually contingent to the mutually committed. People often have different motivations for not formalising their relationship. Whilst equal civil partnership will be used by those ideologically opposed to marriage, this is according to my research likely to be an absolute maximum of 15 per cent of cohabitants, where others are waiting years to save for 'a proper wedding', or falsely believe they are already protected by a 'common law marriage.'

I would suggest the definition goes on to first divide cohabitants into two qualifying categories to attain legal status and consequent rights, obligations and remedies: those with and those without joint children of the couple as follows -

i) To be a 'qualifying' couple, where there are joint children (whether now minor or adult), this should be automatic on birth of the child or commencement of cohabitation (if later) with no stipulated qualifying period of time.

ii) Where there are no such children, I suggest there should be a qualifying period of living as a couple in the same household before financial provision on relationship breakdown or death are triggered. (Our research has shown that public opinion is divided on the question of how long this might be, with people believing periods of between 2 and 5 years give rise to a 'common law marriage'.) In my view, a period of 3 years for matters of relationship breakdown and death might be most appropriate (although 2 years would keep it in line with the current situation on death under the Inheritance Act 1975). For the sake of simplicity, I suggest the period should be the same for both separation and death remedies. Whilst this time period is arbitrary, it gives a couples a reasonable period in which to consider and trial the seriousness of their relationship without automatic legal status. It is also in line with the 2007 Law Commission recommendations. A checklist of factors indicating typical elements of 'living together as a couple' and/or 'living in the same household' could be added to provide a clear indication of the functional test to be met.

iii) If a qualifying period is adopted, consideration should be given to a remedy for redress in exceptional cases within that timeframe, where on relationship breakdown or death, clear relationship-generated economic disadvantage has been suffered or financial advantage gained. This should include a situation where there are no joint children, but there are 'children of the family' (or other dependent relatives), where one partner has looked after the other partner's children/relatives to their own financial detriment and their former partner's financial advantage.

2. Legislative changes protecting rights on separation or death

Separation

There is currently no entitlement to maintenance or transfer of assets for a former cohabiting partner, regardless of the length of relationship or any relationship-generated disadvantage suffered. For those who falsely believe they have rights on separation due to the common law marriage myth, this comes as an enormous shock. The current law can easily cause long term impoverishment of the financially weaker partner on separation, in contrast to the situation on divorce or civil partnership dissolution. Whilst there are remedies for transfer of rented tenancies of the family home on separation (Schedule VII Family Law Act 1996), there is no equivalent in the owner-occupied context, yet many partners will give up a tenancy or their own home to move into their partner's home, leaving them homeless and vulnerable financially on relationship breakdown (or death) if no formal agreement (or will) is made. This is particularly the case for those without children or with now adult children. For them, existing remedies are dependent on trust law[1] and/or provable agreements which evidence any interest they may have in an owner-occupied home shared by cohabitants or indeed other property. Yet typically, the move happens without making any legal adjustments or agreement about the ownership, despite campaigns such as the *Living Together Campaign* which have sought to advise people. However, there is a reluctance to make agreements which are considered 'unromantic', difficult subjects to broach with a partner. People also tend to exhibit an 'optimism bias' whereby they believe their relationship won't break down or that they will be able to agree things amicably if it does. In some couples, one partner is aware of the legal consequences and the other is not. The law then provides a perverse incentive for the wealthier partner not to marry and to keep their partner unaware of their situation, where they want to keep their assets to themselves. These are some of the views indicated by people interviewed as part of our research.[2]

Even where both members of a couple were legally aware of the situation, many reported that despite good intentions, they most often 'hadn't got round' to making agreements and wills. Proving a beneficial interest in the home is complex, confusing and very expensive and time

[1] Constructive trusts are most commonly used but the law is complex and the respective shares difficult to prove. See further *Stack v Dowden* [2007] UKHL 17 and *Jones v Kernott* [2011] UKSC 53. The classic case which exposes the injustice suffered by the long-term, primary carer cohabitant who does not own any share in the family home is *Burns v Burns* [1984] Ch 317 and remains good law.

[2] See further A. Barlow, C. Burgoyne E. Clery & J. Smithson, 'Cohabitation and the law: Myths money and the media', in Park, A. et al, *British social attitudes: the 24th report* ,2008*,* Ashgate: 29 – 52; A. Barlow, A., Duncan, S., James, G., and Park A. *Cohabitation marriage and the law – social change and legal reform in 21st century Britain*, Hart Publishing, 2005; A. Barlow and G. James, 'Regulating marriage and cohabitation in 21st century Britain' [2004] 67(2) MLR 143

consuming for both partners in terms of accessing legal advice or taking such a dispute to court. Legal costs will often exceed the value of any disputed equity in the home. The situation is also very different from the situation of married or civil partnered couples, where fairness and a starting point of (equal) sharing of the home as between the partners is now assumed[3] and where their future needs, income and earning capacity as well as other resources and obligations are weighed into the equation[4] (Part II Matrimonial Causes Act 1973 ; Schedule V Civil Partnership Act 2004). Given how common cohabitation has become as a family form, the lack of family law remedies for cohabiting couples seems inappropriate to the needs particularly of long-term cohabiting couples and those with joint children in the age we live in.

Another factor which prevents couples marrying, civil partnering or making cohabitation agreements and wills is the so called '**common law marriage myth**'. Many cohabitants (48%) falsely believe they have the same status as if they were married. Nationally representative research confirms that almost half the England and Wales total population (46%) and over half (55%) of those with children, falsely believe that couples who live together for a period of time have the same legal rights as if they were married.[5] This in my view undermines the claim that most if not all cohabitants are deliberately choosing to avoid the legal protection afforded by marriage and civil partnership. If in fact, they are unaware of the implications of the difference in legal status and its effects on separation and death, until these events happen, they will not be able to make fully informed decisions about their situation, at which point it is usually too late and there is no route back.

Whilst there is at least some protection offered to couples with minor children, this is minimal (as compared with married/cp partners) for the financially weaker partner who is typically also the primary carer on separation under Schedule 1, Children Act 1989. There can be no maintenance for the former partner and no transfer of capital or property as between the partners ordered in such cases. This impacts on the income available and thus the standard of living of the family in which the children are living as well as the former primary carer partner. Although the family home can be made available to the children and their primary carer, it also risks a cliff edge drop in lifestyle once the youngest child reaches 18 and any provisions extended to the primary carer due to the agreed caring work for the children cease. Thus whilst Schedule 1 Children Act 1989 does provide remedies 'for the benefit of the child' and case law has confirmed that this may extend to a carer's allowance for the primary carer who chooses to care, it does not factor in the length of the relationship, the relative needs and resources of the adult partners or the relationship-generated financial disadvantage suffered or advantage gained. This is particularly harsh in long term relationships where the children are now adults. It is also a little known remedy and one for which there is no entitlement to legal aid, compounding the situation further.

All parents are engaged in the difficult joint enterprise of raising children together which involves financial decisions on who gives up work or reduces working hours or undertakes the caring side of family life whilst working. This matters little in intact families, but causes great disparity in outcomes of parents on cohabitation breakdown.

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[3] See *White v White* [2000] UKHL 54*; Miller: McFarlane* [2006] UKHL 24*; Lawrence v Gallagher* [2012] EWCA civ 394.

[4] Part II Matrimonial Causes Act 1973 ; Schedule V Civil Partnership Act 2004.

[5] See press release on British Social Attitudes 2019 findings, NatCen, 2019.

A framework of rights which considers the respective needs and any relationship generated disadvantage of the partners is needed to reflect the emotional and financial interdependence within family relationships. This would enable couples to agree or mediate 'fair' agreements, based on family law principles which reflect the similarities of the financial and non-financial contributions made by couples with children to the joint enterprise of a household, whether married or not.

Death

On death of a cohabiting partner, where no will has been made, I suggest at least some automatic succession of a portion of the estate should be available to the surviving cohabitant. Whilst the Inheritance Act 1975 does allow claims to be made by eligible cohabitant claimants, this often pits a former partner against their own children or their deceased partner's children from a previous relationship, if not their former partner's parents. Such litigation is also expensive and time consuming and prevents the estate being distributed, creating uncertainty and stress for all beneficiaries.

Where there are joint children of the relationship and no other children of the deceased by previous relationships, the position should be the same as if the couple had been married or civil partnered.

Where there are no joint children of the relationship but the relationship is 'qualifying' by duration, yet there are other children or parents of the deceased partner who would otherwise benefit on intestacy, then a portion of the estate should automatically be acquired by the cohabitant. This could be limited to a statutory sum or a fixed portion of the estate or a share equal to that of the surviving parents or child.

3. Equalities issues raised

The current situation does discriminate between those in formal relationships sanctioned by the state and those in informal relationships. However, this is deliberate and within the policy domain of the state. In theory, couples can choose to marry and civil partner if they want legal rights and obligations. Yet perhaps the position is not so simple.

First, those who have been through a ceremony of marriage which is regarded in law as a 'non-marriage' (rather than valid, void or voidable) for non-compliance with statutory formalities (such as holding the marriage somewhere which is not a registered place of worship or approved premises under the Marriage Act 1949), are treated in law as cohabitants. This most often affects Muslim marriages where the custom is to hold marriages in other venues. It is unlikely that such couples are reflected in the 3.4 million who are classified as cohabitants in national statistics but, like common law marriage myth-believers, many are unlikely to each be fully aware of their lack of legal status, rights and remedies.

Second, I suggest the law should reflect the needs of society and given the increasing number of couples and children living in cohabiting families – the fastest growing family form[6] and the prevalence of the common law marriage myth which leaves people falsely assured of a marriage-like position, the current law discriminates against those who make non-financial contributions to cohabitation relationships and against their children, where they remain living post-separation with the primary carer parent who is financially weaker and unsupported by their former partner.

[6] ONS, Families and Households in the UK: 2018.

Third, alongside this, we know all parents in intact families are engaged in the difficult joint enterprise of raising children together which involves financial decisions on who gives up or reduces working hours or undertakes the primary care role alongside full time work. Few couples share this all equally. Given most primary carers and those taking the major responsibility for the running of the home are still women (see e.g. NatCen, BSA, 2012), a fact which has been underlined during the Covid lockdowns, and given mothers (rather than fathers) tend to reduce paid working hours and take paid work to fit around children's needs when they are younger whereas fathers with young children tend to increase their paid work[7], there is a clear indirect discrimination and equality issue for cohabitant primary carers (and most typically women) on relationship breakdown, where women contribute greater non-financial contributions, yet these are completely ignored, with only financial contributions and resources considered relevant. Furthermore, this is in complete contrast to marriage and civil partnership (which are functionally similar where there are children). In particular, the law leaves the financially weaker primary carer in 'uneven couples' where one wants to marry or civil partner and the other does not, or one has far greater financial or other power or where the relationship is abusive largely unprotected by family law remedies relating to their financial situation on separation.

Where cohabiting couples have children together, there seems to be little reason to treat them differently to married or civil partners with children and indeed the current approach can impact negatively on children of cohabitants on separation and on death, places them in a better position than children of intact married parents, who will not typically inherit on death and intestacy or a parent unless their other parent has also died.

4. **Legal changes to better provide for children of cohabiting parents**.

I can see no reason to provide differently for children of cohabiting parents than those who are married. Parents' choice to cohabit should not impact adversely on their children on separation or death. Perhaps a children's rights perspective on the situation should be considered to ensure indirect discrimination is not occurring. At the present time, the Schedule 1 Children Act remedies can only be made for the benefit of the child and would seem to be interpreted less generously than in the married context.

5. Should cohabiting partners have the same rights as those who are married or civil partners?

Subject to a couple not having opted out-

Where there are children of the relationship, yes, I think they should as it would reflect the functional similarity between all relationships with children in a household. So in my view cohabiting parents should have the same rights as if they were married or civil partnered.

Where there are no children, whilst there should be some remedies available, the issue is less clear cut, in my view. There are arguments either way, given the lack of a contractual commitment. Given that interdependence and potential relationship-generated disadvantage tends to increase over time, I think there is an argument in favour of absolute equality with

[7] ONS, Families and the Labour Market, UK: 2019; IFS Press Release, 12 March, 2021.

marriage and civil partnership after 10 years (where the median length of marriage on divorce is 12 years). Between 3 years and 10 years, I suggest a system based on reasonable needs and/or redress of any financial disadvantage or financial advantage suffered by one partner would be more appropriate.

If possible, the issue of maintenance and financial provision for married/civil partnered and unmarried couples should be looked at as a whole to avoid inconsistencies and anomalies. Why should a married couple without children, where their individual financial autonomy remains intact make claim for a share of capital assets on relationship breakdown after a short marriage but not a longstanding cohabitant with adult children?

6. Other good examples

Australia and New Zealand have largely adopted the simple approach of equating qualifying cohabitants with married couples. This presumptive approach avoids discrimination and in essence is regulating all longer term couple relationships and those with children as a matter of family law, using family law principles.

7. Other issues

Pension (state and private) entitlement and entitlement to bereavement benefits should also be considered and brought into line with married and civil partnership couples for qualifying cohabitants. The issue of a family home inheritance tax exemption between cohabiting partners should also be addressed as this causes hardship on death of a partner.

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