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1. I wish to draw the Committee's attention to two pieces of research that I have conducted which shed light on aspects of the issues the Committee is addressing. The first study concerns the types of injustice experienced by some cohabitants arising from property disputes when their relationship breaks down. The second reports on public attitudes to the acceptability of providing legal redress for cohabitants when a partner dies without making a will. Although these studies are some years old, their findings remain pertinent and I believe that they provide clear support both for the need to provide cohabitants with better legal remedies when their relationship comes to an end and for the proposition that there is general public readiness for such law reform.

2. *Injustice arising from property disputes when cohabiting relationships break down*

   2.1. In 2004-07, I led a study funded by the ESRC[1] into the **issues arising when a cohabiting relationship breaks down and the couple are seeking to resolve what is to happen to the property they lived in during the relationship**.

   2.2. Unlike divorcing couples who may take advantage of the discretionary regime of the Matrimonial Causes Act 1973 to divide and share property at the end of a marriage, including through the provision of ongoing financial support in the form of periodical payments, and the sharing of pension rights,[2] cohabitants who separate must use the general rules of property and trust law to determine their entitlement to property acquired during the relationship.[3] If they have children together, they may also use Schedule 1 to the Children Act 1989 to secure financial provision for their children (but not themselves) by way of similar (but more limited) remedies to those provided by the Matrimonial Causes Act.[4]

   2.3. When they reviewed the operation of the law on this issue in 2006 the Law Commission noted criticism by academics and practitioners of 'its unfairness, its uncertainty, its illogicality and, at least for cohabitants with children, its procedural complexity'.[5]

   2.4. The research my colleagues and I undertook sought to provide evidence to determine whether such criticisms were empirically justified. Our study was both

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[1] Douglas, G, Pearce, J and Woodward, H: *A Failure of Trust: Resolving Property Disputes on Cohabitation Breakdown* (2007: Cardiff University and Bristol University).
[2] Matrimonial Causes Act 1973 Part II.
[3] An application to the court will generally be made under the Trusts of Land and Appointment of Trustees Act 1996 s 14.
[4] There is no provision for ongoing periodical payments to an ex-partner, pensions cannot be shared and any property adjustment is limited in duration to the dependency of the children of the relationship.
[5] Law Commission, *Cohabitation: The Financial Consequences of Relationship Breakdown – A Consultation Paper*, Consultation Paper No 179 (2006) para 4.75.

quantitative and qualitative. We undertook a survey of court files in two county courts to identify cases during one calendar year that had been brought to the civil court as a cohabitation property dispute as well as those making use of Schedule 1 to the Children Act. We uncovered only a handful of cases using either jurisdiction,[6] suggesting that most couples either simply go their separate ways or reach an accommodation themselves (with the possible assistance of solicitors, as legal aid was then available to them, or, more rarely, mediators) rather than pursue litigation.

2.5. The second phase of the study was qualitative, to enable us to investigate in depth and detail the range and effect of the problems that separating cohabitants experience in trying to disentangle their property affairs. We spoke to 29 ex-cohabitants (including 5 couples, enabling us to hear both parties' experiences and views of their situation) who had contacted solicitors, mediators and CABx for advice and assistance to resolve their difficulties. We observed court hearings relating to three cases and were able to discuss the proceedings with the parties and their solicitors and barristers. We also interviewed 61 practitioners (41 family solicitors, 10 mediators and 10 conveyancing solicitors) and held two focus groups with District Judges and legal professionals.

2.6. As other studies have demonstrated, **the nature and style of the cohabiting relationships of the participants in our study were very diverse**. Some couples had rejected marriage while others had actively planned for it, but in almost half our sample, one partner had wished to marry but the other had not. The argument that couples always *choose* to cohabit rather than marry (and should thus not be treated as if they are married) was therefore not borne out. The duration of cohabitation prior to breakdown also varied widely, from nine months to 24 years. The average was nine years – similar to the duration of marriages before divorce at that time. The argument that cohabitation is primarily a short-term relationship, often as a trial before marriage and qualitatively different from marriage, was thus also not borne out.

2.7. It is important to pause to note that the diversity of cohabiting relationships can be a function of the operation of the law, as well as personal attitudes and lifestyles. The Committee will no doubt receive evidence concerning couples, usually from the Muslim community, who have undergone religious marriage ceremonies that are not legally recognised because they do not conform to the provisions of the Marriage Act 1949. Even though one or both parties may believe they are validly married, such couples are treated in law as cohabitants, and thus unable to use the financial remedies jurisdiction available to divorcees.[7] We did not have any such couples in this study, but In a different research project I conducted with colleagues at Cardiff University, we found over half of a sample of women making use of a sharia council to obtain a religious divorce had either married abroad or had a non-legally recognised marriage in the UK.[8] These relationships represent a further

[6] Douglas et al, above n 1, p 158.

[7] For a well-known example in the law reports, see *Attorney General v Akhter and Khan and Others* [2020] EWCA Civ 122

dimension to the range of 'cohabitation' arrangements that couples undertake, and while marriage law can be amended to embrace some of these unions,[9] an unknown number will remain outside the law and thus still regarded as simple cohabitations. Couples in such relationships will experience the same kinds of problems regarding their property rights as we found in the ESRC study described here.[10]

2.8. **Very few participants had investigated or had knowledge about their legal position as cohabitants**. Over half assumed they would have some rights but in contrast to other studies, relatively few believed that cohabitation gave them the same rights as marriage (and those who did had little idea of what a married person's rights might be anyway). The lack of interest in the law stemmed from a reluctance to contemplate the ending of the relationship when it was starting, or a view that it would be unromantic or embarrassing to seek to protect their legal position against the other partner. The study did not therefore bear out the suggestion that cohabitants are routinely making (or should be expected to make) informed decisions about their legal situation.

2.9. As noted, this study was focused on property disputes, in effect, the ownership or occupation of the family home. For half the sample, the property had been owned in joint names (in all but one case as joint tenants). **Cohabitants holding as joint tenants did not appear to have appreciated that if the relationship broke down, they would be treated as having half shares regardless of their actual financial contribution**, and conveyancers reported that purchasing cohabitants generally showed little interest in the legal significance of joint tenancy, being more concerned with completing the purchase and the practical details.

2.10. **Cohabitants' disputes concerned**:

- *Acceptance that the property must be divided, but disagreement as to respective shares*
- *Seeking to preserve a home for themselves and/or their children*
- *Finding a practical means of separating into two households*
- *Defending a claim against property held in their sole name*
- *Seeking financial compensation for having made a contribution to the partner's property.*

2.11. Most cases in our sample were handled by family practitioners rather than civil/property solicitors; few dealt with more than a handful each year and this meant that their management of such cases could not become routinised. Many reported that they had to remind themselves of the legal principles and procedures each time. They found that cases were harder to deal with than divorces, and that it

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[8] G Douglas et al, *Social Cohesion and Civil Law: Marriage, Divorce and Religious Courts* Cardiff University, 2011, p 39.

[9] See Law Commission, *Getting Married: A Consultation Paper on Weddings Law* CP No 247 (2020) paras 10.171 – 10.205.

[10] And in relation to intestacy, as discussed below.

was harder to explain the legal position to their clients. They had to wrestle with a trio of difficulties:

- *The complexity of the substantive law*
- *The procedural rules, which were seen as less 'user-friendly' than those applying to divorces*
- *The lack of documentary evidence to support claims of promises to share property, making them hard to substantiate.*

2.12. Practitioners therefore found it harder than in divorce cases to predict a likely outcome of the case and were more likely to seek counsel's opinion, adding to the costs and length of the case. Uncertainty as to outcome meant that risk averse clients (and risk averse lawyers) might give up on a potentially good claim or concede settlement in order to minimise potential costs. A more confident lawyer or a more robust client might call the other's bluff or chance a 'nuisance claim'.

2.13. Although the majority of the cohabitants achieved their primary objective in pursuing a legal remedy, over half felt the outcome had been unfair in some way. Many said they had compromised on the outcome to avoid further cost or the stress of court proceedings.

2.14. We identified five basic scenarios where the current law served to produce **significantly unjust outcomes**, and it is important to note that both men and women could lose out in these cases**:**

- *The partner (in practice female), after a long cohabitation in which she had cared for the children, had no right to a share in the home because she had made no financial contribution to its acquisition*[11]
- *A home owned by one partner before the cohabitation was then re-mortgaged and put into joint names as a joint tenancy. This meant that its value was shared equally with no recognition of the partner's prior ownership*
- *One partner had contributed all or most of the finance to purchase a property put in joint names but had failed to protect his or her contribution through an unequal tenancy in common*
- *One party was the sole owner, with no intention of sharing the value of the home with the partner. The partner then left and made an unmeritorious claim on the property which proved costly to defend*
- *One partner had made significant financial contributions to the relationship and to the home owned in the other's sole name but could not obtain any recognition of this due to lack of adequate evidence.*

[11] This scenario is commonly known as the *Burns v Burns* scenario based on a case reported at [1984] Ch 317, CA. It has been argued that given women's greater financial capacity and likelihood of working while bringing up children, the case is outdated, but we found clear examples that this situation can still arise.

2.15. **These findings vindicate the criticisms of the current law identified in the Law Commission's report** and add to the weight of research and commentary since that time which points clearly to the need for reform of the law governing property relations between cohabitants. This position is strengthened by the withdrawal of legal aid from most family proceedings, meaning that it has become harder than ever for separating cohabitants of modest or even comfortable means to secure adequate legal advice and assistance relating to case law which even experienced practitioners can struggle to work with. Although there has been some clarification of the case law by the House of Lords and Supreme Court,[12] it is clear that statutory reform is needed.

2.16. Just after we produced our research report (the findings of which they took into account), the Law Commission published their own final recommendations for a new regime based on a 'principled discretion' to relieve any loss or hardship suffered by a cohabitant as a result of the relationship.[13]

2.17. Such **relationship-generated disadvantage** has become the accepted basis of reform in other jurisdictions including Scotland and Ireland and it provides a suitable rationale for compensating cohabitants while preserving a distinction between them and divorcing couples for whom provision is justified by the marital 'contract' and their 'commitment'.[14] It thus avoids the criticism that changing the law would equate cohabitation with marriage (and civil partnership) and somehow thereby 'devalue' the latter.

2.18. However, it is worth noting that jurisdictions as diverse as Australia and New Zealand on the one hand, and Israel on the other, have produced workable regimes that do *not* make this distinction between marriage/civil partnership and cohabitation (albeit they require qualifying eligibility criteria to be satisfied before the relevant regime can be utilised) without resulting in a consequential diminution of marriage rates or detriment to the moral fabric of their societies.

2.19. While our research team endorsed the idea of providing a discretionary regime for cohabitants, we considered that the details of the Law Commission's scheme were overly-complex and would not avoid the difficulties inherent in producing the evidence necessary to establish a claim. Instead of having to prove an intention to share ownership and a financial contribution made to the acquisition of the property under the current law of trusts, a claimant would have to be able to prove that she or he had suffered a disadvantage caused by the relationship. Scottish case law has shown that this can be a difficult task[15] and the Committee will be aware that the Scottish Law Commission are reviewing the working of their law.[16] It is also important to note that the Law Commission's proposals were put forward

[12] *Stack v Dowden* [2007] UKHL 17; *Jones v Kernott* [2011] UKSC 53.
[13] Law Commission, *Cohabitation: The Financial Consequences of Relationship Breakdown*, LC No 307 (2007).
[14] I have written from a theoretical perspective on this in G Douglas, *Obligation and Commitment in Family Law* (Hart Publishing, 2018) Ch 8.
[15] *Gow v Grant* [2012] UKSC 29.
[16] Scottish Law Commission, *Aspects of Family Law: Discussion Paper on Cohabitation*, DP No 170 (2020).

at a time when legal aid was still available (albeit with low financial eligibility limits) for family litigants. Even if their scheme might be more comprehensible to the lay person than the current rules of Trusts law, it would still be extremely challenging for couples who cannot afford legal advice or representation to make much sense of the system that the Law Commission envisaged, and very difficult for them to negotiate between themselves trying to apply its principles.

2.20. If the Committee do therefore conclude that a discretionary regime is required – and the available research, including that outlined in this submission, overwhelmingly makes the case for this clear – I would urge that it should not simply be assumed that the Law Commission's scheme should be lifted off the shelf and enacted. Before such a conclusion is reached, **very careful consideration should be given to whether it would not be more sensible simply to adopt the divorce regime, with eligibility requirements (e.g. two years' cohabitation or the birth of a child to the parties), rather than to create another jurisdiction with more complex criteria and more limited powers than on divorce**. Our current financial remedies regime for divorcing couples is sufficiently flexible to cater for the diversity of cohabiting relationships that have been noted above. Indeed, the case law on divorce demonstrates that there is just as much diversity amongst married/civilly partnered couples as one can find amongst cohabitants – whether in relation to the duration of the relationship, the presence or absence of children, the expectations of the couple, the life events they experience, or their beliefs and motivations for getting married in the first place.

2.21. If, however, the Committee do not consider that extending the same financial remedies jurisdiction to cohabitants would be politically acceptable, then the Law Commission's proposals must be radically simplified so that litigants in person can understand and apply its rules to their circumstances, whether they are negotiating between themselves or taking their case to court.[17]

3. *Legal redress for cohabitants when a partner dies intestate*

3.1. The second study which I bring to the Committee's attention was conducted in 2010-11 by myself and Hilary Woodward at Cardiff University with the National Centre for Social Research ('NatCen').[18] This research was funded by the Nuffield

[17] I accept that the divorce jurisdiction is not, itself, that simple to understand, and it is also important to note that only one-third of divorcing couples make use of it for financial remedies, but there is much more guidance available to divorcing couples about the law (see, for example, Family Justice Council, *Sorting out Finances on Divorce* (https://www.judiciary.uk/wp-content/uploads/2016/04/fjc-sorting-out-financial-needs-april-16-final-revised-nov17.pdf 2016), there is vast experience and familiarity with it amongst practitioners and mediators and the breadth of the family court's discretion in exercising its jurisdiction enables the court to 'do justice' and reach a fair outcome in those cases that do come before it.

Foundation and was intended to inform the work of the Law Commission on reform of the law on intestacy and family provision.[19] The aim of the study was to provide robust evidence of social attitudes to inheritance**,** both when a will is made and when a person dies intestate. We also explored how people's attitudes vary towards different family members, including cohabitants, as potential beneficiaries of an estate.

3.2. When a person dies without making a will, the intestacy rules determine in order of priority which family relatives may inherit.[20] Where there is no surviving spouse or civil partner, children of the deceased will inherit; if there are no children, any surviving parents, siblings or more remote blood relatives will do so. **Cohabitants are not included in the intestacy rules.** Only around a third of the UK adult population has made a will and doing so is associated with advancing age. Younger cohabitants, including those with dependent children, are therefore more likely to be excluded from the distribution of the estate should their partner die. While any children of the relationship will be the beneficiaries, if they are minors, the legal arrangements necessary to enable them (and the surviving parent) to be financially supported are complex and expensive, involving trusts and estates rules requiring expert handling.

3.3. Cohabitants are, however, eligible to seek 'reasonable financial provision' under the discretionary jurisdiction of the courts provided by the Inheritance (Provision for Family and Dependants) Act 1975. This Act specifies who may apply for provision. The list of eligible applicants includes spouses and ex-spouses, children (including adult children) of the deceased, and cohabitants who have lived together with the deceased for two years preceding the death. It is interesting to note that cohabitants were added to the list of claimants in 1995,[21] without any controversy regarding the possible 'undermining of marriage' that this expansion of protection to them might cause. This may have been because some cohabitants could in fact already apply for support under a general catch-all provision in the legislation which allows a claim to be made where the applicant can show they were being 'maintained' by the deceased immediately before the death. In addition, when cohabitants were added to the list, they were not classed as having a claim equivalent to that of a spouse. Instead, for all claimants other than spouses (or now, civil partners), provision is limited to that which would be reasonable in all the circumstances for the applicant to receive, 'for his or her maintenance'.

3.4. As long ago as 1989, when the Law Commission previously reviewed the law of intestacy, it found that there was strong public support for the inclusion of cohabitants in the list of eligible beneficiaries, with 83% of respondents favouring a cohabitant receiving a share of the estate where they had lived with the deceased for more than ten years.[22] At that time, the Law Commission considered that it

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[18] A Humphrey et al, *Inheritance and the family: attitudes to will-making and intestacy*.

[19] Law Commission, *Intestacy and family provision claims on death,* Consultation Paper CP No 191 (2009) and Report No 331 Cm 1674 (2011).

[20] Administration of Estates Act 1925 s 46.

[21] By the Law Reform (Succession) Act 1995 s 2.

would be too complicated to change the law to include them, but it did recommend adding them to the list of claimants under the family provision legislation, which, as noted, was done in 1995.

3.5. In our study, we collected data from 1,556 respondents taking part in NatCen's then regular Omnibus Survey and followed this up with 30 in-depth interviews. The main element of the survey involved presenting respondents with a series of differing scenarios where someone had died intestate and asking them to say how they thought the deceased's estate should be distributed, out of a selection of competing interests. Amongst these scenarios were several relating to cohabitation, testing whether respondents' views changed according to the length of the cohabitation (two years, five years and 10 years) and the presence of children (in one scenario after a 25 year relationship with the children aged over 18, and in the other after less than two years, but with a baby).

3.6. The level of support for cohabitants receiving something from the estate was consistently lower than support for spouses but was nonetheless the prevalent view, strongly influenced however by the length of the relationship:

- *Support for the cohabiting partner receiving <u>at least half</u> of the estate was found across all scenarios, ranging from 62% in favour where the couple had lived together for under two years but had a baby, to 93% where the couple had cohabited for 10 years without children.*
- *Support for cohabitants increased with duration of the relationship: 49% favoured giving all of the estate or priority to the cohabitant from a two-year relationship, 64% from a five-year relationship and 74% from a ten-year relationship*
- *Cohabitants were consistently ranked higher than surviving parents in order of priority to inherit from the deceased's estate*
- *The lowest support for a cohabitant receiving <u>at least something</u> from the estate (rather than being completely excluded, as under the current law) was 85% where there was a short cohabitation with a baby.*
- *The lower proportion where the couple had children reflected a general finding across the study that, in contrast to the Law Commission's provisional recommendation that all property should vest in a surviving spouse, respondents wanted to see the children of a deceased person 'recognised' in the division of the estate.*[23]

3.7. In our follow-up interviews, we were able to explore these findings in more depth. **Participants were alive to the need to show that a cohabiting relationship had an appropriate level of commitment and inter-dependency to justify the inclusion of the partner in the distribution of the estate**. Many used the duration of the relationship as the best proxy for this, although they varied widely in the length of

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[22] Law Commission, *Distribution on Intestacy* Report No 187 (1989) App C, Table 13.

[23] This was so, even though the intestacy rules result in the bulk of most estates going entirely to the surviving spouse because the 'statutory legacy' of £250,000 to the spouse means there is generally nothing left over to go to the children.

time they would require – from two years to 20 years. Others suggested that owning a home together or having a joint savings account might suffice, and others saw having children together as the key factor.

3.8. The Law Commission used our findings in producing their final report in 2011.[24] They recommended that qualifying cohabitants should be entitled to benefit from the estate of a deceased under the intestacy rules but because they considered that doing so might prove 'divisive and contentious' they presented their proposals as a separate draft Bill appended to their report. The Committee will be aware that while the Law Commission's other reform proposals (including some based on other findings in our research) were duly enacted in the Inheritance and Trustees' Powers Act 2014, the government indicated that it would not take forward their proposals for cohabitants. However, these have been included in two Private Members' Bills introduced by the late Lord Lester of Herne Hill (the Inheritance (Cohabitants) Bill) and Lord Marks of Henley on Thames (the Cohabitation Rights Bill).

3.9. Adding cohabitants to the list of those eligible to inherit under an intestacy would recognise that the relationship was ongoing at the time of the death and that the cohabiting partner was thus a member of the deceased's family. It would obviate the need for a cohabitant to take legal action under the Inheritance Act and thus save money which would simply reduce the value of the estate. It would reflect the fact that not everyone makes a will even though death can occur through tragic accidents at any time. Other family members, such as parents or an adult child from the deceased's former relationship, could still make a claim themselves under the Inheritance Act if they wished to challenge the outcome of the intestacy distribution and cast doubt on the position of the cohabitant, but the onus would be on them to do so rather than on the cohabitant to prove their need for support.

4. Conclusions

4.1. The two studies described here add to the considerable evidence confirming the need and justification for reform of the law governing cohabiting relationships.

4.2. **Our work on property disputes on cohabitation breakdown demonstrates the hardship and unfairness that can result from the operation of the current law**, based on complex trusts concepts and principles that even legal practitioners can find challenging to deal with. Trusts law cannot take account of the contributions made and the gains and losses incurred, over the course of an inter-dependent relationship. It was not conceived to deal with such issues and the limitations of case law have prevented the courts from expanding it to a properly 'equitable' regime. The argument that couples choose to cohabit and that they could make proper arrangements for how they hold and share property and support each other if they wish does not reflect the social reality of how people live their lives, how

[24] Law Commission (2011), above n 15, Ch 8, especially paras 8.40-8.41.

their circumstances change as life events occur and how even best-laid plans can go awry.

4.3. In the case of intestacy, a common argument for not including cohabitants within the categories of those eligible to inherit under an intestacy is similarly that they have chosen not to marry or form a civil partnership and, linked to this, that it is very easy to make a will to ensure that a cohabitant will inherit should their partner die. But the same rejoinder based on social reality applies. Extending the intestacy rules to cohabitants, who are suitably 'qualified' by reason of the duration of their relationship with the deceased or the birth of a child to the couple, is the most efficient, effective and appropriate way of handling the issue. **Our study, based on a representative sample of the population of England and Wales, shows that there is strong public support for expanding the law in this way.**

4.4. The two studies discussed here are over a decade old. Since they were undertaken, the number of cohabitants (both heterosexual and same sex) has grown, from around 2.9 million in 2011 to 3.5 million in 2020,[25] while the law has remained unchanged. Cohabitation is very widely tolerated in society today, as evidenced by the public acceptance of the current Prime Minister's cohabitation in 10 Downing Street with his then partner prior to their recent marriage. It is hard to see why the manifest injustices experienced by cohabitants who find themselves subject to outdated laws should continue.

4.5. It is to be hoped that the Committee will produce robust recommendations for the reform which is so long overdue. **In considering the shape of such reform, I would urge the Committee not to accept too readily the proposition that cohabitants should *not* be treated by the law as if they were married.** So long as they are able to opt-out of the default position should they so choose, by way of a cohabitation contract in the case of property and financial arrangements, and a will in relation to inheritance, no injustice is done to any cohabitant by being subject to the same regime as applies to divorced/civilly partnered couples because both divorce law and inheritance law are sufficiently flexible to deliver a fair outcome whatever the factual circumstances on an individual case.

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[25] ONS, *Families and Households 2020* (2021) Table 1, 'Families by family type and presence of children' https://www.ons.gov.uk/peoplepopulationandcommunity/birthsdeathsandmarriages/families/datasets/familiesandhouseholdsfamiliesandhouseholds.