Written evidence from Oxford University [HAB0370]

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

To answer this question it is first necessary to consider what purpose the definition is intended to serve. In this case it is to inform what legal relationship, if any, should exist between two people who have lived together for a certain period of time and have now separated, or one of whom has died.

In approaching this issue I have tried to start with the most fundamental form of relationship between adults (excepting those between parents and adult children), friendship. [1] While I recognise that friendship can take many forms and vary in intensity, its relevance in this context is that, in my view, its termination does not in itself generate any legal obligations between the former friends other than, in cases where deliberate harm has been inflicted, to provide redress for that harm in accordance with the general law, and in cases that satisfy the requirements of the law of restitution, to return property that it would be unjust to allow one party to retain.

But this obligation does not include any duty to compensate for disadvantages undergone by one friend for the sake of the other, because voluntarily undergoing such disadvantages is central to the ethic of friendship. And this would be undermined if such a legal duty existed. HOWEVER, it is different if the friendship contains additional elements. This could be through entering a specific institution (such as marriage or civil partnership) or if, without doing that, it qualifies as 'friendship plus'. This occurs where the friends have, expressly or implicitly, embarked on a kind of 'life plan', or common project, whereby they *have employed their mutual resources (property, financial, effort) for their mutual benefit as a basis for living their lives in the long (usually indefinite) term*.

Note this does not necessarily imply shared ownership of assets, but rather sharing their benefits, and will usually also imply some commitment to care for the well-being of the other party. The importance of this is that if the project fails, not only should there be restitution of any property conferred by one party on the other, but also compensation for a party who has suffered more disadvantage than the other as a result of the failure. This is a result of the principle of justice that if parties jointly set out on a common project, any detriments caused by its failure should be shared. The *extent* to which they should be shared is considered below. It is very important to appreciate that the loss for which compensation relates to the disparity at the *end* of the relationship. It is NOT for any detriment a party might be assumed to have undergone as a result of ENTERING the relationship. This is often taken to be the basis of compensatory awards, but it should not be, for any such assumed losses are far too speculative.

This objective should therefore underpin the definition chosen for the term 'cohabitation'. Many definitions of 'cohabitation' draw express parallels with marriage, such as living together as spouses, or in a marriage-like relationship as in Canada[2] and Scotland.[3] Others make no such explicit connection, but refer to living together 'on a domestic basis', as in Australia[4] or 'living together as a couple', as in New Zealand. The American experience is not helpful, partly because of multiple jurisdictions, but also because of the strong influence of the doctrine of 'common law marriage',[5] and the picture in Europe varies greatly as a result of differing cultural and legal traditions.[6]

[1] John Eekelaar, *Family Law and Personal Life* (1st ed, 2006) ch. 2 and 2d ed (2017) ch, 4.FLPL 1st 50; 2nd 106, from which the position set out here is drawn.

[2] Robert Leckey, 'Cohabitation, Law reform and the Litigants' (2017) 31` *IJLPF* 131, 134. See Elaine Sutherland, 'Unmarried Cohabitation' in Eekelaar & George, *Routledge Handbook of Family Law and Policy* (2d ed, 2021) 71-2.

[3] J. Miles, F. Wasoff and E. Mordaunt, 'Cohabitation: Lessons from North of the Border' (2011) *CFLQ* 302.

[4] B. Fehlberg et al, *Australian Family Law: The Contemporary Context* (2d ed, 2015) 91.

When I put forward the view that the basis for establishing legal obligations in this context should be the existence of a 'life plan' of the kind mentioned above, I observed that it seemed to underlie the concept of a 'couple' in the New Zealand Property Relationships Amendment Act 2001, which does not provide a definition of the term but supplies a number of factors relevant to deciding whether or not it is present. Examining the cases in that jurisdiction, Zhixiong Liao concluded that 'courts tend to attach significant weight to "the degree of mutual commitment to a shared life", ….. in determining whether two people are "living together as a couple", …. (and that) it is arguable that "mutual commitment to a shared life" is at the "core" of the … definition. It is therefore possible to find certainty to a large extent in determining whether a de facto relationship exists in a particular case'.[7]

If the Commission wished to be bold, it might propose a definition of the relevant relationship in the terms mentioned above, that is, one in which the persons have 'employed their mutual resources (property, financial, effort) for their mutual benefit as a basis for living their lives in the long (usually indefinite) term.' Certain factors could be mentioned as indicators that the requirements are satisfied (as in Australia and New Zealand). While living together would be a common and strong indicator that a couple have 'employed their mutual resources (property, financial, effort) for their mutual benefit as a basis for living their lives in the long (usually indefinite) term,' it is not essential (some people 'live apart together)'.

Exclusions might be considered. These would usually reflect a wish to replicate a more marriage-like relationship: for example, exclusion of blood-relatives and confinement to two persons (though no longer restricted to opposite-sex individuals). However, it is my view that the bold approach with few if any exclusions should be taken, for this follows the logic of intervening at all, as explained above. It would cover the 'standard' cases of unmarried cohabitation, and these would be expected to comprise the vast majority of claims made,[8] but also allow claims to be made in wider circumstances, reflecting a perhaps increasing fluidity in personal relationships.[9]

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

I take this as referring not only to the definitional issue just discussed, but primarily to the powers of courts to make financial and property orders. These are already extensive in the case of breakdown of marriage, and, since marriages are (usually) cases of 'friendship plus', they therefore demand compensation on failure in the way described above (note that the approach to compensation should be the one I have described). However, marriage is also an institution, and the nature of the institution can warrant additional legal consequences beyond those relevant to 'friendship plus'. These could include various benefits designed to encourage and support the institution, which remains an important framework in which people seek to realise the benefits of personal relationships and bringing up children, and even an insurance aspect demanding some continuing

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[5] See Homer H. Clark and Sanford N. Katz, *The Law of Domestic Relations in the United States*, 3rd ed. 2021 44-62.

[6] K. Boele-Woelki et al, *Principles of European Family Law Regarding Property, Succession and Maintenance Rights of Couples in de facto Unions*, 2019.

[7] Zhixiong Laio, 'Finding certainty in determining whether a "de facto relationship" exists: an impossible task?' (2015) 21 *Canterbury Law Review* 112.

[8] See Leckey, note 2 above.

[9] So it could cover cases of sibling cohabitation: see the *Burden case* and the Inheritance Tax (Amendment) (Siblings) Bill 2020.

level of support between the parties after breakdown, though not any more the earlier concept of lifelong support.

With regard to compensation for failure of 'friendship plus' outside the framework of marriage or civil partnership, courts should have the same powers as they have in the case of marriage (or civil partnership) breakdown to achieve the objectives of the compensation that is warranted. The length of time the relationship had persisted is clearly important in determining the appropriate remedy. Since the basis of the adjustment is compensatory, the normal principle of expectation that the compensated party should do what is reasonable to mitigate the loss comes into play. How this operates will reflect the age of the parties and the duration of the relationship, and these will in turn affect the length of time any ongoing provision should last. Clearly any unequal impact of the lasting consequences of child care could be an important factor. As I have noted, 'when viewed in this way, the compensation approach begins to look very similar to the "needs plus merger over time" principle favoured by the Law Commission in 2014'.[10] These matters can be dealt with in Guidelines, as is the case of Canada.

In the case of death of one of the individuals, the family provision legislation could be broadened to allow a compensatory claim of the kind mentioned above.

There is a case for introducing the possibility of individuals making an agreed declaration that their relationship is to be treated as one of mutual benefit. This would not be essential in order to establish a compensatory claim (though it would provide useful evidence of the relationship). But there are situations where some such evidence could be essential: for example, to allow individuals to be treated as next-of-kin for medical purposes and perhaps various other benefits. It could also serve as a basis for establishing joint parental responsibility for relevant children (discussed below).

It will be asked whether couples should be able to exclude the application of such remedies, either by making it an 'opt-in' or 'opt-out' system. Jens Scherpe[11] has argued against an opt-in approach on the ground that the stronger party can, by refusing to opt-in, thereby deprive the weaker of potential protection. I agree with this. But he favours an opt-out system, as the weaker party could refuse, thus maintaining the protection. However, the possibility would remain that such a party would be prevailed upon to opt-out, and while this might seem to protect that person's autonomy, since the basis of any award made is compensatory, it is hard to imagine that anyone would agree in advance to forego redress for this disparity unless there was an element of exploitation. My view is therefore that, while the parties will clearly be free to arrange the basis upon which they are exercising their 'common project', and this will influence the nature of any disparity that might arise if it fails, they should not be able to exclude the possibility of seeking redress for that disparity in that event. After all, should an entitled person not wish to pursue a remedy for compensation, they need not apply for it.

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

There is abundant evidence that women suffer greater disadvantage than men on the breakdown of marriage,[12] and there is no reason to believe that the situation is any different in the case of failure of cohabitation.

[10] See note 1 (2017), p. 112.
[11] J. Scherpe, *The Present and Future of European Family Law* (2016) 75-76.
[12] J. Eekelaar, 'The Financial Consequences of Divorce: Law and Reality' (2018) 32 *Australian Journal of Family Law* 28-42.

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

  The major legal issue, I would think, that distinguishes children of unmarried from married partners concerns the legal relationship between those children and their father (assuming he is one of the partners). Such fathers do not have automatic parental responsibility, and the question is whether and if so how such fathers could acquire it. This has been much discussed. It is my view that parental responsibility should be granted to the person or persons who at the time of the child's birth are most likely to be closely involved with the child's upbringing and therefore capable of exercising it. I do not think that the biological link is sufficient in itself to satisfy this. In the case of fathers there needs to be additional evidence of potential involvement with the child and collaboration with the mother in the process. It follows that the current conditions for its acquisition by fathers are defensible, although I would add to them a case where a declaration of mutual benefit, of the kind suggested above, is made. I would also suggest that it should be considered whether the law should be adapted so that where a father who does not have parental responsibility is living a shared life with the mother (in the sense described earlier) and who, without objection by the mother, performs the functions of a parent with parental responsibility, the father should be treated as if he had such responsibility, by analogy with the law of agency and could therefore be legitimately involved, with the mother, in decisions about the child.

- 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?

  These issues have already been covered in the preceding discussion.

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