

Cohabitation reform: a bumpy road to nowhere? (First published in the Solicitors' Journal)

Tony Roe provides an overview of the steps taken towards cohabitation reform.

'Slump in younger people marrying sparks calls to protect cohabiting rights,' ran a newspaper headline in *The Guardian* in February. It was a little inaccurate as, in reality, individuals gain no rights on cohabitation.

But what about 'common law marriage?' In 2019, the National Centre for Social Research, working with Professor Anne Barlow, currently University of Exeter Law School's Director of Research and Impact, revealed that 47 per cent of the general population are under the wrong impression that cohabiting couples have a common law marriage which gives them the same legal rights as if they were married. Any legal concept of 'common law marriage' was abolished in England and Wales in 1753 by the Clandestine Marriages Act.

A case for reform

Speaking at a recent conference, Professor Barlow, said: "The reality in the UK is that love, and marriage no longer go together like a horse and carriage." According to the Office for National Statistics, there were around 3.6 million cohabiting couples in the UK in 2021 – up from 1.5 million in 1996. Cohabiting couple families were the fastest growing family type over the last decade.

In its report 'The Rights of Cohabiting Partners' published in August 2022, the House of Commons Women and Equalities Committee found that the current law applicable to cohabitants on relationship breakdown can be costly, complicated and unfair.

'Complex property law and trusts principles often require the financially weaker party – often women – to demonstrate direct financial contributions to the acquisition of the family home, while childcare and other non-financial contributions go largely unrecognised.' As for potential claims for children, the committee was equally disparaging and described Schedule 1 of the Children Act 1989 as 'outdated,' adding that it mostly benefitted the children of wealthy parents and was in need of reform.

In no uncertain terms, the committee recommended the government reform family law to better protect cohabiting couples and their children from financial hardship in the event of separation. It favoured an opt-out cohabitation scheme as proposed by the Law Commission in its 2007 report on the financial consequences of relationship breakdown. The government should make a commitment, the committee said, to publishing draft legislation for pre-legislative scrutiny in the 2023-24 session of parliament.

The Commission's report.

In 2007, the Law Commission did not think that all cohabitants should be able to obtain financial relief in the event of separation. It recommended that a remedy should only be available where the couple satisfied certain eligibility requirements, had not agreed to disapply the scheme, and the applicant had made qualifying contributions to the relationship giving rise to certain enduring consequences at the point of separation. The recommended scheme would apply only to cohabitants who had had a child together or who had lived together for a specified number of years. The report did not make a specific recommendation, suggested between two and five years would be appropriate.

The government rejected the 2022 recommendations of the Women and Equalities Committee. It said that it considered ‘that existing work underway on the law of marriage and divorce, which are directly relevant to issues concerning cohabitants, must conclude before considering any change to the law in respect of the rights of cohabitants on relationship breakdown.’ It is not clear what this relevance is.

Recent developments

On 8 March 2023, Baroness Deech asked the government what progress it had made with its three-year review of the law governing financial provision on divorce since the commitment made by the then Advocate General for Scotland Lord Keen of Elie in his letter dated 16 March 2020 to gather evidence, consult and develop recommendations on this matter.

Lord Bellamy, for the Ministry of Justice said the government was in ‘close consultation’ with the Law Commission, which it considered the most appropriate body to carry out that review. He added that he envisaged that the process would take at least two years.

Cohabitation reform has been well and truly parked. Meanwhile, did the government favour a public awareness campaign to highlight the legal distinctions between getting married, forming a civil partnership, or choosing to live together as cohabiting partners? This was another recommendation from the Women and Equalities Committee. The government did not consider a national campaign was necessary. In the meantime, cohabitants face an unsatisfactory position despite the considerable growth of this type of relationship.

Tony Roe is a family law solicitor, arbitrator, and partner at Dexter Montague LLP
dextermontague.co.uk

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Our key contacts at DMP for further advice and assistance on cohabitation and unmarried family law issues are Stephanie Alderwick and Tony Roe:

stephanie.alderwick@dextermontague.co.uk

tony.roe@dextermontague.co.uk

Telephone 0118 939399.

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