

Rights of Women
Response to Law Commission Consultation Paper No. 179
‘Cohabitation: The Financial Consequences of Relationship Breakdown’

Background

Rights of Women is a well established and expanding not-for-profit organisation committed to informing, educating and empowering women on the law and their legal rights. We are a membership organisation, running two national confidential free legal advice telephone services for women.¹ Our activities include giving legal advice, producing publications, organising conferences and training courses and undertaking policy and research work.

General Comments

As an organisation which provides legal advice to women following the breakdown of relationships, we welcome the opportunity to respond to this consultation. Legal rights and remedies following the end of cohabitation are issues that arise frequently in our work with service users. As the Commission notes, the courts currently have no general power to order financial provision unless the couple were married or in a civil partnership. This leaves most former cohabitants to try and establish claims under the general law in relation to trusts or, where there are children, through Schedule 1 of the **Children Act 1989**. It is widely accepted that this situation can produce manifestly unfair results. There is a clear need for reform in this area.

Before addressing the issues raised in the consultation paper, we would like to first raise several general comments.

The importance of marriage?

We are concerned at the consultation paper’s continued reference to the importance and privileged position of marriage. Our concerns are two-fold. Firstly, references to marriage are not consistently accompanied by references to civil partnerships. This is worrying as the rights and duties emanating from civil partnerships are similar to marriage. Therefore the lack of comparative acknowledgement of civil partnerships runs the risk of heterosexism. Secondly, it appears that much of the Commission’s reasoning for not applying the concepts of ancillary relief, as applicable upon the breakdown of marriage, rests on the lack of ‘appropriateness’ of transferring these rights and remedies to cohabitants. This argument appears to be based on the regard or value which consultees are likely to have for marriage. Rights of Women do not believe the historic status accorded to marriage, over cohabitation, should necessarily act to ‘trump’

¹ Sexual Violence and Criminal Law Legal Advice Line: 020 7251 8887 (open Mondays 11am-1pm and Tuesdays 10am-12pm). Legal Advice Line: 020 7251 6577 (open Tuesdays, Wednesdays and Thursday 2–4pm and 7–9pm and Friday 12–2pm).

discussion of the application of ancillary relief principles and practice in the context of cohabitation. Recent developments in family law support our argument. For example, section 41 of the **Family Law Act 1996** which stated that where parties were cohabitants and former cohabitants, in considering the nature of the parties' relationship the court had "to have regard to the fact that they have not given each other the commitment involved in marriage" was repealed by s2(1) of the **Domestic Violence Crime and Victims Act 2004**. Similarly, the **Adoption and Children Act 2002** places cohabiting couples in the same position as married couples or civil partners in terms of their ability to apply for a joint adoption order.

Mediation and domestic violence

We note that in para 7.6 the Law Commission states that it hopes "that the majority of cases could be settled by private negotiation, with the assistance, where appropriate, of mediation or some other method of dispute resolution." We would like to highlight that any encouragement towards such resolution should expressly exclude domestic violence cases².

Accessing Justice – the availability of public funding

Rights of Women has serious concerns about the impact of the Carter report on public funding in family law cases. We know from our service users that the current phenomenon of 'advice deserts' are increasing and there is widespread concern that the Carter reforms will result in a further reduction in the number of solicitors providing advice and representation.

Women are particularly affected by these changes as:

- their lower economic status means that they are less likely to be able to afford to pay for legal advice; and,
- their role as the primary carers can make it difficult for them to travel out of their area to seek legal advice.

The Law Commission should call on the Government to reaffirm its commitment to public funding as the proposed reforms will not be successful if women are not able to take advantage of them.

1. Children and Eligibility under a New Scheme

² There is no legal definition of domestic violence in the law of England and Wales. Rights of Women defines domestic violence as any violence or threat of violence that takes place in or outside the home between family, household members or partners in existing or previous relationships. It can include mental, emotional, financial, physical and sexual violence. This includes harassment, for example, persistent letters, telephone calls, text messages or e-mails, and psychological or mental abuse. Almost all domestic violence is directed by men against women, but it can and does occur in same-sex relationships, and in a small minority of cases, by women against men.

In the majority of relationships women are the primary carers of children; this has a substantial impact on their financial position which lasts throughout their lives.³ We agree that it is important that women with children have financial protection if their relationship breaks down, however, this should not be to the exclusion of women without children. We believe it is fundamentally unfair to restrict the availability of financial provision only to women with children or alternatively to permit *automatic* eligibility on this basis. Making children an eligibility criterion may disadvantage a significant number of women, who cannot or do not want to have children. Eligibility for financial remedies between former couples who have made financial commitments together and have shared financial arrangements should not, therefore, be based on whether or not there are children as such a criterion could have a disproportionate negative impact on same-sex or older opposite –sex couples.

2. Opt-in and Opt-out Schemes

An ‘opt-in’ system is one way of ensuring that only those cohabiting couples who wish their relationship to be subject to legal rights and remedies upon separation are included in such a scheme. However, such an approach fails to acknowledge:

- Women’s unequal access to legal information and knowledge about the legal options available; and
- Public misunderstanding of the law in relation to cohabitation and marriage. As the British social attitudes survey shows, 59% of cohabitants believe that they have the same rights as married couples after a certain period of time.⁴ The danger of an opt-in system is that people will erroneously believe that they do not *need* to opt-in because their relationship is already protected by the law.

Rights of Women therefore believes that adopting an ‘opt-out’ statutory scheme is the more practical approach as by making protection under the proposed scheme the *de facto* position, couples will receive protection that many already believe that they have.

Rights of Women believes that parties should be free to opt-out of the proposed statutory scheme but are concerned to ensure that the decision to opt-out should be an informed one. The opt-out system must contain real safeguards to ensure that women are aware of their legal rights and the consequences of opting out of the proposed statutory scheme. When couples buy a house together they should receive legal advice on the different ways of owning a property and be advised to seek independent legal advice if there is any possible conflict of interest. A failure

³ See the work of Heather Evelyn Joshi OBE FBA Professor of Economic Demography and Director of the Centre for Longitudinal Studies (CLS) on the economic impact of child rearing on women.

⁴ See www.statistics.gov.uk

to advise either party to seek independent legal advice may found an action in professional negligence against the solicitor concerned. Rights of Women believe that the decision to buy a property with a person and to opt-out of the proposed statutory scheme are analogous and that the decision to opt-out should only be made after the couple have received legal advice and if necessary, been advised to seek independent legal advice. This is particularly important given the number of women who experience domestic violence and whose ability to make an informed decision may be compromised by either fear or duress.⁵

Given the problems that many women have accessing legal advice and the consequences of opting out of the scheme, Rights of Women believes that changes need to be made to the rules on public funding so that publicly funded legal advice on this issue is available to those who are eligible.

Opting-out and grounds for review

Rights of Women believe that an opt-out system must be flexible and provide a mechanism to enable couples to opt back in at any time. It is important to acknowledge that relationships change and develop, and accordingly the parties' intentions with regard to legal regulation may also change and develop.

Rights of Women believes that in certain circumstances the courts should have the power to review the decision to opt-out and the power to grant remedies under the scheme if it is satisfied that it is in the interests of justice to do so.

Situations in which the court should review the opt-out and, if necessary, grant remedies may include (but are not limited to) the following:

- Where the formalities for opting out have not been followed (e.g. decision made without adequate legal advice),
- Where the decision to opt-out of the scheme was not taken by parties giving their full and free consent (e.g. because of domestic violence).
- Where certain supervening events occur which result in a significant change of circumstances, such as the birth of a child (or children) or if a significant financial contribution is made.
- Where the parties have agreed to opt back into the scheme but this agreement (verbal or otherwise) is not acted upon.

3. Definition of Cohabitation

⁵ Although domestic violence is underreported research indicates that:

- it accounts for 16% of all violent crime (Crime in England and Wales 2004/2005 report)
- has more repeat victims than any other crime,
- claims the lives of 2 women a week
- is the largest cause of morbidity worldwide in women aged 19-44,
- will affect 1 in 4 women.

(Information taken from the Home Office's statistics see: <http://www.homeoffice.gov.uk/crime-victims/reducing-crime/domestic-violence/>)

(i) Analogy to Marriage or Civil Partnership

Rights of Women believe that the any legal definition of cohabitation, for the purposes of eligibility under a new scheme, should not contain an analogy to marriage. This is for both conceptual and practical reasons. Conceptually, relationships between cohabiting couples are not marriage or civil partnerships, as the parties may have specific social, ideological or other reasons as to why they have chosen not to enter into marriage or civil partnership. However, by stating this, Rights of Women do not believe that this warrants holding marriage to be of a higher status, or indeed the reference point to which any other type of relationship between couples is compared or defined. We believe that defining eligible cohabittees in such a manner promotes and places inappropriate emphasis on marriage (See the General Comments on page 2 of this response).

Such a definition also causes practical difficulties. We are aware through our work with service users of the widespread misplaced belief in 'common law marriage' noted in the British social attitudes survey (see above). We strongly believe that an additional legal test using the marriage analogy will only compound this problem. We believe that the Government needs to ensure that the myth of common law marriage is dispelled. There needs to be a high profile and wide reaching campaign which gives accurate information on the legal rights that cohabiting couples have. Given the level of mistaken belief in the existence of common law marriage that Rights of Women encounter, both among individual women and those organisations providing advice, support and advocacy, it is clear that current and previous campaigns have not succeeded. We urge the Law Commission to call on the Government to do more to raise awareness of the legal reality of cohabitation and the rights and remedies (or lack thereof) available upon separation.

(ii) Checklist

Rights of Women recognise that checklists are a tool currently used by the family courts when exercising their discretion. However, we remain concerned about the use of a checklist to determine whether cohabitation exists, and in particular how such a list would operate in practice. For example, how much weight would be accorded each criterion, would a certain number of criteria be required, and/or would fulfilling one be able to override another? This latter point is particularly relevant when applied to women with children as compared to women without children.

As we have noted, we welcome the Law Commission's recognition that women with children may be at a particular economic disadvantage; however, we believe that the Commission and any resulting financial relief scheme must recognise that women in general, whether or not they have children, are at an economic disadvantage and are therefore likely to experience financial hardship as a result of their relationship breaking down. This is compounded by the lack of accurate information and access to legal advice, which means that many women are unaware of their legal position and rights.

Rights of Women also has particular concerns about the criteria identified by the Law Commission.

Firstly, how will the criterion that a relationship be “stable” be applied in the context of domestic violence where there may be periods of separation? Women should not be disadvantaged because they have sought protection from domestic violence during the relationship.

Secondly, Rights of Women do not believe that a statutory definition of cohabitation should be defined by reference to an intimate and/or sexual relationship as this is not only difficult to define (would it refer to heterosexual model of sexual activity?) but may also exclude certain groups of people who although living together as a couple, for various reasons, do not have a sexual relationship.

Thirdly, for the reasons explored above, Rights of Women believe that the scheme should not be restricted on the basis of whether or not a couple have children. Whilst we agree that women with children may be economically vulnerable, we do not believe that protection should be afforded to the exclusion of women without children.

Fourthly, we are not convinced that the criterion of being “publicly acknowledged as being spouse-like” is useful. Such a criterion only serves to reinforce the myth of the common law spouse. Further, there may be some cohabiting couples who choose not to publicly acknowledge their relationship. Such a criterion may have the effect of making it harder for people in same-sex relationships or from Black and Minority Ethnic communities to benefit from the protection offered by the proposed statutory scheme.

Finally, the checklist identified by the Law Commission appears to come from the case of **Crake v Supplementary Benefits Commission**.⁶ However, a Social Security Commissioner cast doubt in this definitional approach in **Re J (Income Support: Cohabitation)**.⁷ It is unclear how the definition of cohabitation using the checklist will fit in with case law and statutory definitions of cohabitation that currently exist.

(iii) Duration

Rights of Women do not favour the use of a minimum duration requirement for cohabiting relationships before they are eligible to apply under the scheme. Whilst we note that other jurisdictions tend to use a minimum duration requirement, either explicitly in statute or in case law criteria, we are cautious of such a requirement forming part of a statutory scheme as it may exclude cases

⁶ [1982] 1 All ER 498

⁷ [1995] 1 FLR 660

who miss out by days or months, but that nonetheless require a remedy. A couple may share a household and be financially interdependent within a period of two years. In particular, many of the significant financial commitments, and the start of financial interdependence often begin at the start of cohabitation. In this regard Rights of Women endorses the view of the Scottish Law Commission that a minimum duration requirement is not only otiose but also undesirable, because “relevant events, such as contributions to the purchase or improvement of a home, or the giving up of employment in the interests of the other partner, would often occur at or near the beginning of the cohabitation.”⁸

Rights of Women believes it could be useful to use of the definition of couples in section 144(4) **Adoption and Children Act 2002** which defines couples to include “two people (whether of different sexes or the same-sex) living as partners in an enduring family relationship”.

4. Substantive law

(i) Orders

Rights of Women agree with the Law Commission that the following orders should be made available in a new scheme: periodical payments, secured and unsecured; lump sum payments, including by instalment; property adjustment; property settlement; orders for sale; pension sharing; and interim payments ordered on account pending a full trial or final settlement. We note that these are the same orders which are available in ancillary relief cases.

(ii) Discretion

Rights of Women believe that whilst it is important to have clarity and certainty in any scheme for financial relief following cohabitation separation, flexibility is crucial to ensure that individual circumstances can be considered on a case by case basis. In line with financial relief following the end of a marriage and civil partnership, Rights of Women believe that every case of cohabitation separation will need to be examined on its merits, as every woman’s circumstances will be unique to her. Rights of Women agrees with the Law Commission’s rejection of a scheme of fixed rules for a cohabitation separation scheme. We agree with the Commission’s provisional proposal that the courts should exercise a discretion structured by principles which determine the basis on which relief, if any, is to be granted on separation.

(iii) Principles Underpinning Financial Relief on Separation

Rights of Women are not convinced by the Law Commission’s preferred principles of economic advantage and economic disadvantage. This approach focuses on the parties’ contributions, as can be identified economically, at the point of separation. The Commission notes that the advantages of this approach

⁸ As cited in the Law Commission (England and Wales) Overview Paper, paragraph 3.132.

include not having to identify and ascribe positive value to each and every contribution made by the parties during the relationship and bring them all into account; to only have to consider whether the respondent had retained some relevant economic benefit at the end of the relationship which they had been enabled to acquire in part as a result of contributions made by the applicant; and to limit the scope of retrospective inquiries into the relationship.

Rights of Women do agree that claims should not be permitted in relation to housekeeping money provided and spent during the relationship or rent-free accommodation provided during the relationship.⁹ However, we are not convinced that the principles of economic advantage and disadvantage alone should govern financial relief following separation of cohabitants.

Firstly, we are not convinced by the Commission's arguments with regard to the rejection of the application of the principles of ancillary or financial relief in cases of cohabitation. Our comments in this regard are outlined above. Further, we note the consultation paper's reference to the diversity of cohabiting relationships as compared to marriage. We do not believe this is a strong enough reason for not applying the family law principles which currently govern the orders that are proposed as being made available under a cohabitation scheme. Similar to cohabitation, marriages are also not homogenous. Provided that a cohabitation scheme worked on the basis of allowing individuals to "opt-out" of legal regulation couples who objected to such regulation could exclude themselves from it. Rights of Women do not believe that the use of the section 25 criteria to separating cohabiting couples would undermine marriage, which would continue to have a particular religious, cultural and social meaning. Indeed, many other legal protections have been extended beyond marriage and to cohabiting relationships, such as seeking injunctions, matters in relation to children and certain property rights upon the death of one partner.

Secondly, it seems incongruous to make the orders which are available in ancillary relief, also available in cohabitation cases, but to regulate this availability using a different set of principles to those currently used in family law. We believe that if the same orders are being made available then these should be with reference to the same factors, namely those set out in section 25 **Matrimonial Causes Act 1973**. In particular, Rights of Women strongly believes that any cohabitation separation scheme must, like ancillary relief and financial relief, recognise non-financial contributions, given the role and position of women in society. It is important that lower financial contributions such as paying bills, rent and home improvements are referable as many women are either not in a financial position to make significant contributions to the purchase price of a

⁹ In this regard, we urge the Commission to ensure that the idea of a "free-rent" baseline is not used in any scheme to determine the contributions (or deductions from such) of a cohabitee who is a homemaker or who has taken on dependent caring responsibilities in the home. Although such a baseline was included in Australian jurisdictions, it has since been abandoned, see *H v G* (2005) 34 Fam LR 35; DFC 95-325; [2005] SASC 344

property, or, because of socially prescribed roles, simply do not do so. Whilst it is important to recognise women's role in raising a family, it is just as important to ensure that protection is afforded to women who are homemakers, where there are no children and understand the impact this has on them economically. It is vital that these issues are taken into consideration as they are some of the reasons for failure of the **Trusts of Land and Appointment of Trustees Act 1996** (TOLATA) to adequately deal with the division of assets on relationship breakdown in the case of cohabiting couples.

Thirdly, Rights of Women believe that the creation of new principles, particularly those of economic advantage and disadvantage, are complex even at this preliminary stage, and are likely to prove even more so in practice.

(iv) 'Clean Break' and Childcare

Rights of Women believe that the 'clean break' principle should operate in the same manner as in ancillary and financial relief, namely that it is only appropriate where women and children are adequately provided for or where children are no longer dependent. The issue of financial responsibility for children is not straightforward. With the CSA in its current state of disarray, it is difficult to know how and when any new system will have an impact on women.

Ultimately, adequate financial provision for children on separation needs to be looked at alongside proposed changes to child support legislation to ensure that women with children do not miss out on both counts. It is also difficult to state whether child support contributions should count towards housing and income needs until the new child maintenance scheme is clarified. If such contributions are to be dealt with separately from the issue of child maintenance then we would suggest that its inclusion in a cohabitation separation scheme be similar to the way it is dealt with in ancillary and financial relief.

In this regard, we know from our service users that there is a clear need for women in general, and family lawyers in particular, to be made more aware of the existing legal remedies that are available under Schedule 1 of the **Children Act 1989** which permits applications for support for children. Rights of Women believe that the Government should increase awareness of this legal remedy irrespective of whether a cohabitation scheme is implemented (although where such a scheme is established, any surrounding publicity should include raising awareness about additional remedies).

(v) Misconduct

Whilst we acknowledge the Commission's reluctance to bring 'fault' into any scheme by excluding misconduct, Rights of Women believe it is important to recognise the impact domestic violence has on women during a relationship and following relationship breakdown. Recent ancillary relief case law from the House of Lords has recognised the detrimental impact that domestic violence can have on earning capacity. Rights of Women commends this approach and believes

that in addition to looking at the physical effects of domestic violence, its physiological impact also should be taken into consideration, particularly if there are allegations of financial control and/or abuse, which could leave a woman at an additional economic disadvantage. In this regard, we believe that recent and future developments in this direction from ancillary relief case law should be applicable to cases under a new cohabitation separation scheme.

5. Relationship between a New Scheme and General Law

Rights of Women is concerned as to how any new cohabitation separation scheme would interact with current legal remedies available to women, particularly in relation to property under the TOLATA. For example, will it be possible to establish a share of equity under TOLATA and to seek orders in relation to pension, maintenance etc, under a new scheme? Alternatively, will it be a case of making an application under only one scheme?

Whilst we recognise the Law Commission's point that it "is difficult to envisage situations in which eligible applicants would fail to obtain relief under the scheme but would have a successful argument for a share in the respondent's property under the general law" we are not entirely convinced that this is a reason to deny access to an additional remedy. Indeed, if the bars to eligibility as outlined in the consultation paper (and not necessarily endorsed by Rights of Women) are operationalised under a new scheme, then should failure to meet these criteria, bar seeking a remedy under another separate area of general law?

In addition, we know from our service users that there is a general lack of awareness about the current remedies available under TOLATA. It is vital that women are informed about their legal rights and remedies. It is therefore important that the Law Commission recommends that any new cohabitation scheme is accompanied by a wide-reaching accessible publicity campaign highlighting all the legal remedies which are available upon the breakdown of a cohabiting relationship.

6. Remedies upon Death

Under the current **Inheritance (Provision for Family and Dependants) Act 1975** a cohabitant may be able to make a claim where their cohabiting partner dies, although this Act has a specific defining of cohabitation, including a duration requirement, and claims are subject to a time limit. This Act has its own definition of cohabitation which includes a duration requirement. However, there needs to be more awareness about the applicability of this Act and the time constraints for making a claim.

Rights of Women agree with the Commission that "it is important to ensure that, as far as possible, there is consistency between the remedies that we are provisionally proposing on separation, and the family provision regime contained in the 1975 Act. If a new scheme on separation were introduced, remedies for cohabitants on death should reflect the nature and basis of remedies on

separation so that, together, they provide a consistent and principled response to the problems faced on the termination of a cohabiting relationship” [para 5.15, Overview].

Rights of Women believe that cohabitants should be included within the fixed rules for intestacy. We do appreciate the Law Commission’s assertion that this may be difficult as it would involve assigning a priority in the current order of relatives under the fixed rule. However, if cohabitants will be entitled to seek the same remedies upon separation as for marriage (as outlined in the consultation paper by the Commission) we are not convinced that they should be placed in a worse position where a partner dies. We would argue that a cohabitant should be placed at the equivalent priority level as a spouse or civil partner. Women are often vulnerable, particularly economically, when a partner dies particularly if they have taken caring role and have not worked (or worked part-time or for short periods) and/or not paid into a pension. We know from our service users that this seriously disadvantages older women who find themselves without financial remedies following the death of a partner. This change to the fixed rules would have to use the same cohabitation definition as used in a new cohabitation scheme.

Conclusion

Rights of Women urge the Law Commission to seriously consider the issues outlined above.

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