

# **The Law Commission**

## **Consultation paper no 179**

### **COHABITATION: THE FINANCIAL CONSEQUENCES OF RELATIONSHIP BREAKDOWN**

#### **A RESPONSE FROM THE MISSION AND PUBLIC AFFAIRS COUNCIL OF THE CHURCH OF ENGLAND**

1. The Church of England welcomes the opportunity to respond to the consultation paper on the financial consequences of relationship breakdown published by the Law Commission as part of its duty of keeping the law of England and Wales under review and making proposals for its reform.
2. The Mission & Public Affairs Council of the Church of England is the body responsible for overseeing research and comment on social and political issues on behalf of the Church. The Council comprises a representative group of bishops, clergy and lay people with interest and expertise in the relevant areas, and reports to the General Synod through the Archbishops' Council.

#### **Introduction**

3. The full consultation paper is extremely comprehensive both in terms of the research reflected in the background material and the arguments and number of questions on which it seeks views. However, because we are particularly interested in matters of principle we will concentrate our response on these questions.
4. (Paras 1.19/1.20, Overview 1.2, 1.22, 1.26) We also note the scope and boundaries of the Law Commission's paper and the issues that the Law Commission has said it does not propose to address. However, we would draw attention again at the outset to the views within the Church expressed by the General Synod debate and motion of Feb 2004<sup>1</sup> and illustrated by bishops' speeches in the House of Lords during the passage of the Civil Partnership Act, which also recognise the need for remedies for a wider group of people living together in the same household without being married. We continue to argue that we consider it a matter of urgency that Parliament give consideration in the near future to the issues of

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<sup>1</sup> 'That this Synod

- a) strongly reaffirm that marriage is central to the stability and health of human society and warrants a unique place in the law of this country;
- b) recognises that there are issues of hardship and vulnerability for people whose relationships are not based on marriage which need to be addressed by the creation of new legal rights;

hardship and vulnerability suffered in some cases by blood relatives or those in caring relationships, particularly over property.

5. We are encouraged to see that the Law Commission at several points in the consultation paper emphasises the importance of marriage (for example Para 5.34, Overview Para 2.50). It has always been the teaching of the Church of England that marriage - that is, faithful, committed, loving, permanent and legally sanctioned relationships between a man and a woman - is central to the stability and health of human society. In our view it continues to provide the best context for the raising of children. For that reason it warrants a special position within the social and legislative framework of our society. We remain committed to this principle of marriage and to a unified recognition of its meaning by the law of our country.
6. Moreover, we do believe that this special position for marriage should not simply be symbolic or rhetorical. Since marriage contributes to the common good there is a very strong case for pursuing public policies that promote and encourage marriage. Nevertheless, as was affirmed in a General Synod of February 2004 the Church of England recognises that there are some issues of hardship and vulnerability for people whose relationships are not based on marriage and that these need to be addressed by the creation of new legal rights. The Law Commission report is, therefore, timely.
7. The question for us, in framing our response to the Law Commission's proposals, is how Parliament, working for the common good, can make proper provision for those who face hardship and vulnerability whilst recognising the overarching gift and blessing that the Church believes marriage to be, not only for the couple themselves but also for our communities.
8. The test we would commend in assessing possible solutions is whether they will genuinely correct injustices without at the same time downgrading or creating disincentives to marriage. It is in our view perfectly justified in terms of public policy for marriage to continue to confer particular benefits and privileges not available to those who choose not to commit to an enduring legal relationship, so long as adequate steps are taken to prevent manifest injustice.

## **The case for further education and support for marriage**

9. Recent research on people's attitudes as discussed in the consultation paper highlights the widespread ignorance of the current law and the tenacious grip of the myth of common-law marriage despite the recent campaigns such as the 'Living Together' website run by One Plus One.
10. (Paras 5.12 – 5.16) We agree with the Law Commission that whatever is proposed there is a strong case for further and more proactive education about the law, the differences between cohabitation and marriage, the necessity to make wills and the potential benefits of marriage for those whose relationship exhibits the attributes of life-long commitment, fidelity and love. Ignorance creates vulnerability whatever laws are in place. This might mean considerable public investment to get the message to the people who need to know.
11. (Paras 5.30 – 5.34) We also recognise that in dealing with the negative aspects of relationships as properly addressed in these proposals it is important that the

Government (and indeed Church communities) allocate resources to marriage and relationship education and support. The present disincentives to marriage and to forming long-term, healthy, loving, stable relationships –whether married or not – need to be addressed as well as remedies for those who find themselves in vulnerable situations because of relationship breakdown.

## **Arguments for and against reform (Part 5)**

12. There will be those who argue that introducing any reform will, of itself, undermine the institution of marriage. Some Anglicans would agree with the arguments summarised in Overview para. 2.45. In particular they would be concerned that any reform, whatever honourable objectives of social justice underpin the reform, would give some legal status to cohabitants. They feel that this in turn would add force to the concept of common-law marriage and might mean some couples would feel that they did not need to marry, thereby undermining the institution of marriage.
13. In addition, some would argue that the State already intervenes in the sphere of family life in a way that would have been inconceivable 50 years ago and that this has reduced the family’s capacity to look after itself and to provide for its members. They would question whether the creation of new laws will solve the current problems of social injustice without creating new problems.
14. However there is also a strong Biblical precedent not only for upholding standards but also for introducing laws to address situations that fall short of biblical ideals. The General Synod motion reflects this tradition of upholding the sanctity and uniqueness of marriage alongside the desire to protect the vulnerable. This response is drafted with this principle in mind: that we recognise the real injustice done to some, which could occur even if there was adequate education. The Mission and Public Affairs Council agrees therefore that there is a need for some reform.

## **Opting in or opting out?**

**12.2 We provisionally reject the view that any new remedies providing financial relief on separation should attach to a new legal status to which cohabiting couples can “opt in” by registration. Do consultees agree?**

15. We agree that the ‘opt-in’ approach is less likely to address situations of real hardship and vulnerability. It is likely that the vulnerable, disorganized, pressurized, naïve or ill-informed would be the very people unlikely to opt in, or be persuaded not to opt in, and so would not benefit from such a change in the law. So, although this approach would preserve the greatest degree of parties’ choice and autonomy, we are not convinced it is the right one.
16. In addition the ‘opt-in’ scheme would be likely to create more confusion by creating what would be in effect yet another contractual, or registered, civil relationship. This would be a three-tier approach to relationships that runs a serious risk of undermining marriage and confusing people about the differences.

**12.3 We provisionally propose that any new statutory scheme providing financial relief on separation should be available only between “eligible cohabitants”,**

**unless the parties have agreed that neither shall apply for those remedies by way of an “opt out agreement”. Do consultees agree?**

17. There does appear to be a clear distinction between creating a new legal status (which we consider would be the effect of an opt-in scheme) and the provision of remedies to deal with social injustice and to protect the vulnerable that flow from de facto relationships.
18. It is our opinion that the ‘opt-out’ option is most likely to be taken up by those who have considerable wealth (who, if married, would wish to use pre-nuptial agreements) rather than the poor with few resources. We agree that, should couples be allowed to opt-out, there would have to be safeguards to make sure that the unscrupulous do not abuse this option and that the court should be able to override an opt-out agreement in a case of manifest injustice.
19. If couples are allowed to ‘opt out’ each person should be given independently, clear advice that explains the new law, so that all parties can make informed and genuine choices.
20. However, we suggest below our preferred approach to offering remedies (para 34), i.e. that a scheme based on *either* having a child *or* the ability to demonstrate substantial injustice, would emphasise its remedial basis and at the same time avoid a false sense of a legal status being conferred by the mere fact of a cohabiting relationship for a particular period of time.

## **Which type of cohabitants?**

### **Cohabitants with children**

**12.4 We consider that, in cases where the couple have children, the current law governing the resolution of cohabitants’ financial and property disputes on separation is uncertain and capable of producing unfair outcomes, and that reform for this category of case is justified. We provisionally propose that new statutory remedies should be devised to deal with such cases. Do consultees agree?**

21. In approaching this question, our theological approach is shaped by the example and teaching of Jesus who stood alongside those who have no voice, particularly children. Therefore we apply the principle of putting children’s best interests first. We recognise that society has a duty to protect children whatever family structure they find themselves in. However, many now accept parenting as a relationship which is not dependent on getting married first. Whilst we support marriage as being the best context for the nurturing of children because we believe it has greater potential for creating a stable, committed and healthy environment for children, we also recognise the importance of more recent legislation that ensures the rights and welfare of children regardless of the relationship of the parents. In becoming parents, people put themselves within the legitimate interest of both state and law. Provision for the main carer will affect the outcomes for the children arising from any relationship breakdown. This means we are sympathetic to reform that addresses the effect of relationship breakdown on children and those who make sacrifices to care for them.

22. We therefore agree that arguments for reform are particularly strong for cohabitants who are the biological parents of, or have parental responsibility for, children.
23. The nurture and upbringing of children is a vitally important role. We support parents who make economic and job-related sacrifices for the sake of bringing up children. These sacrifices can have a lifelong impact and there can be real economic disadvantages for parents who have given up or cut back work in order to care for children. The consequences of parenting can follow parents throughout life in terms of diminished access to work, pensions etc. and we realise that real social injustice and hardship can flow from the consequences of parenting followed by cohabitation breakdown. We are persuaded (for the above reasons) that it is appropriate for the state to invest in the protection of parenting and to provide a safety net for adults as well as remedies for children. We agree that, because of the potential lifelong impact of parenting, remedies should apply even when children of the family have grown up.
24. However it has also to be noted that there are an increasingly significant number of couples where parenting is seen as a joint enterprise with both parents sharing the caring role and, to a certain extent, sharing also the consequences of parenting in terms of economic sacrifice. This might make it less clear-cut for allocating hardship and vulnerability.

**12.41 We invite the views of consultees on whether cohabitants with a child who is not the child by law of both parties ought to be eligible regardless of the length of their relationship, and, if so, in what circumstances.**

25. We are less convinced that it would be appropriate to make any scheme apply if the child in question was not the potential paying party's own child.

### **Cohabitants without children**

**12.5 We invite the views of consultees on whether reform may also be warranted in any cases involving cohabitants without children.**

26. We take the view that if the law is changed to provide remedies for those without children, this is more likely to give substance to the myth of common-law marriage. There is also the heightened risk that increased rights for cohabiting couples without children will further reinforce the trend away from marriage. This would not, in our view, be in the long-term interests of society.
27. We are, therefore, more cautious about extending remedies to cohabitants who do not have children. Nevertheless, it is a strong Christian tradition to care for family members and it is easy to think of situations where one partner may become vulnerable because of wider family caring responsibilities beyond looking after children, such as caring for an elderly dependent or a disabled sibling.
28. We believe, therefore, that some more limited reform may be warranted in cases not involving children. What we suggest is that the Law Commission consider a mixed economy approach where eligibility is automatic when there are children involved but for other cases has to be triggered by manifest injustice. By manifest we mean both obvious and substantial (in a qualitative and quantitative sense). We recognise that the implementation of such an approach would give rise to a

number of quite difficult issues (see below). Nevertheless we believe that, overall, it is the most promising way of balancing the competing public policy objectives.

## **Comparisons with marriage**

### **12.11 We provisionally reject the view that the substantive law governing financial relief between spouses on divorce (Part II of the Matrimonial Causes Act 1973) should be extended to cohabitants on separation. Do consultees agree?**

29. We agree with this approach. The vows contained within the Anglican rite of marriage<sup>2</sup> are based on intent; a promise for the future and on the voluntary consent of both man and woman. Intent and consent are crucial concepts in our understanding of marriage. Matrimonial law in this country reflects that voluntary intention to be committed for life and therefore certain rights and responsibilities in law flow from that mutual understanding that are reflected in the laws governing divorce. However the law surrounding cohabitation has to be shaped very differently. There are not the same general understandings of intent and consent of cohabiting couples along the spectrum of relationships. Therefore, whilst we agree that there are many cohabiting relationships that exhibit many of the characteristics associated with marriage, the solution cannot be simply or automatically to widen the law surrounding marriage to include cohabitants. In this light, we support the proposed principles (economic advantage/disadvantage) upon which the proposed remedies would be based.

### **12.36 We invite the views of consultees on whether any legislative definition of those eligible to apply as cohabitants for financial relief on separation should be expressed by analogy to marriage and civil partnership, or in other terms.**

30. For the same reasons as given above we do not consider that the definitions should be expressed by analogy to marriage (or civil partnerships). It is our understanding that the myth of common-law marriage has been given substance by the use of the term 'living together as if husband and wife' for social benefits and tax credits. In addition, to use the term 'living together as if civil partners' could be even more problematic for the courts given that such legal relationships are new and do not appear to have a set of standard characteristics or cultural expectations which define them in the way marriage has.

## **Eligibility according to criteria versus other definitions such as manifest injustice**

31. We have already begun to address this in paragraphs 17, 19 and 28. We agree that any effective legislation has to cover vulnerable people who have, for all sorts of reason ended up economically disadvantaged.

32. We recognise that this is a messy and unclear area for the law to address. Trying to frame law to allow for a mixed economy is not straightforward.

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<sup>2</sup> And likewise the words prescribed by section 44 of the Marriage Act 1949.

**12.16 We invite the views of consultees on whether awards should only be made where it would be substantially or manifestly unfair not to do so.**

33. Because of the difficulty involved in defining cohabitation and the variety of relationships that could count as such, we believe that there is a strong argument for basing eligibility (other than for those who have children) on manifest or substantial injustice instead of criteria such as minimum duration. We suggest that a scheme based on *either* having a child *or* the ability to demonstrate substantial injustice, would emphasise its remedial basis and at the same time avoid a false sense of a legal status being conferred by the mere fact of a cohabiting relationship for a particular period of time. It would also avoid the difficulties in dealing with cases, which fell short of any duration criterion but where clear injustice would result from a bar on the court granting a remedy. It is for these reasons that we would favour the establishing of manifest (as defined above) injustice as the eligibility test, in place of the proposed minimum duration test, for cohabiting couples without children.
34. We recognise that this in itself presents other problems such as how to define manifest injustice in cases where the parenting criteria did not apply, and whether that definition should include vulnerability from causes other than the existence of the relationship (such as illness for example). We suggest that in order to be treated as relevant under the proposed scheme, vulnerability or any other manifestation of injustice should have arisen **as a result of** the relationship.
35. We are aware of arguments that an approach which does not impose a minimum duration criterion on couples without children may lead to an unsustainable and unrealistic demand for litigation, and that it could give judges more discretion than might be considered desirable. However it may also be that the majority of cases of injustice involve children and that other cases would be in a minority. In any event, we consider that the courts could exercise their case-management powers to sift out unmeritorious cases at an early stage in any proceedings and that it would very quickly become clear to potential litigants and their advisers that only cases where there was real injustice involved would go forward.

## **Remedies on death**

**12.30 We consider that it would be appropriate for there to be some correlation between remedies available to eligible cohabitants on separation and on death. Do consultees agree?**

36. We agree that remedies should reflect an assumption that people intended to provide for each other and intended their relationship to be life-long.
37. We agree that consistency in law creates less confusion and therefore there should be correlation between definitions and eligibility used for remedies upon separation and on death. In the light of what we have already said, we would suggest that remedies should be available for those with children and in cases where one partner could demonstrate manifest injustice arising out of the relationship.

## **Eligibility to apply**

**12.37 We provisionally propose that any legislative definition of those eligible to apply should expressly require that the parties shared a joint household. Do consultees agree?**

38. Yes. We would wish to exclude people ‘living apart together’ from any definition of eligibility. Those permanently living in separate households should not be considered as cohabitants.

**12.38 We provisionally propose that any legislative definition of those eligible to apply should include an express, non-exhaustive checklist of factors to which the court should have regard in determining whether a couple were cohabiting. Do consultees agree?**

39. Yes – particularly as we have argued against using marriage analogies. However we also recognise that a definition just based on sharing a household could also be problematic and courts will need guidance on how to apply this, rather than just on case law. We agree that couples should not necessarily have to satisfy all the criteria to be recognised.

**12.40 We consider that cohabitants who are by law the parents of a child born before, during or following their cohabitation ought to be automatically eligible to apply for remedies under any new scheme on separation. Do consultees agree?**

40. We agree for the reasons set out in paras 21- 24.

**12.42 We invite the views of consultees on:**

**(1) whether parties who do not have a relevant child should have lived together as cohabitants for a specified minimum duration before they are eligible to apply for financial relief on separation (“a minimum duration requirement”);**

**(2) how any such minimum duration requirement should be selected;**

**(3) how long any such minimum duration requirement should be;**

**(4) whether the same period should apply to claims on separation and claims on death under the Inheritance (Provision for Family and Dependents) Act 1975;**

**(5) how any minimum duration requirement should deal with breaks in the continuity of the parties’ cohabitation; and**

**(6) whether there are any circumstances (other than those already considered in relation to cohabitants with children) in which any minimum duration requirement should be waived, and if so what those circumstances should be.**

41. As argued above we are not convinced that an approach based on minimum duration is the best way to help those suffering manifest injustice. Giving any time specification might make people either stay in an intolerable relationship in order to qualify, or to leave before the time criterion did apply to their relationship in order to escape responsibility.

42. In addition, if minimum duration were employed as an eligibility criterion, we consider that this would add weight to the myth that as people live together they accumulate legal rights akin to those that apply to married couples. In that event,

many cohabitants might still find to their cost that their rights were far less extensive than they had imagined.

43. However, if this approach is taken, we would argue that the minimum duration be extended to those who have lived together for at least five years. We believe this would take out those defined as ‘nubile’ cohabitants and would be less likely to reinforce the common-law marriage myth than would a shorter period.

## **Conclusion**

44. In conclusion, we have welcomed the opportunity to respond to the Law Commission’s project on the financial consequences of relationship breakdown. We consider it important to protect the vulnerable and to do so in a way that does not create any fresh disincentives to marriage. We are particularly in favour of solutions that protect children and parenting and that offer remedies to courts to provide some solutions to those who suffer manifest injustice.

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