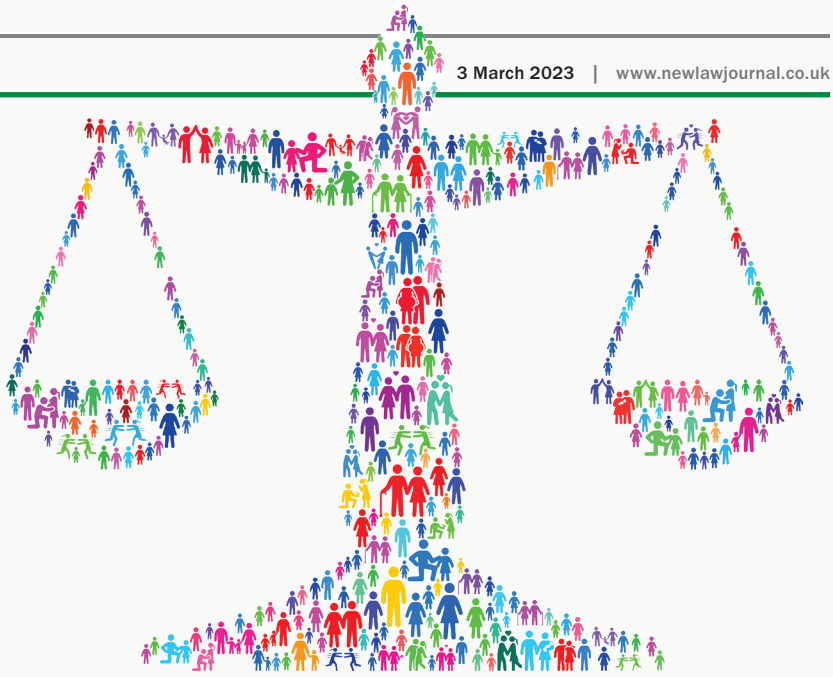
Cohabitation: a call to action

As the number of people living together without marrying continues to rise, the time for an 'opt-out' cohabitation law regime is now, argues Jane Craig



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It took 34 years of tireless campaigning, and a judgment in the Supreme Court, to achieve 'no fault' divorce in England and Wales (*Owens v Owens* [2018] UKSC 41, [2018] All ER (D) 144 (Jul)). When the Divorce, Dissolution and Separation Act 2020 finally came into force on 6 April 2022, to a huge media fanfare, there was a collective sigh of relief among family justice professionals.

The next hurdle to overcome will be to achieve cohabitation law reform, which is similarly long overdue.

The argument on choice

The Family Law Reform Now Network's Cohabitation Reform Conference in January was inspirational. It brought together academics from different jurisdictions, practitioners, and the Scottish Law Commissioner. They shared their research and insights into what works and what doesn't in other countries, why we need reform in this country, and how we might achieve it.

One of the arguments often used by opponents of cohabitation law reform is that people can 'choose to marry' if they want to receive the protections of marriage. We should respect people's autonomy and therefore if there is to be any law reform the regime should be 'opt in'; ie it should be necessary to register the relationship or complete some other formality in order to receive the protection of the legislation.

The reality, for almost half the population in England and Wales, is that people do not make a conscious choice to opt out of the legal consequences of marriage when they decide to live together. The most recent British Social Attitudes Survey Report in 2019 showed that almost half of people in England and Wales (46%) mistakenly believe that unmarried couples who live together have a common law marriage and enjoy the same rights as couples that are legally married—a figure that remains largely unchanged over the past 14 years (the percentage believing this in 2005 was 47%), despite a significant increase in the number of cohabiting couples.

Cohabitants are the fastest growing family type in the UK with some 3.6 million couples living in informal relationships in England and Wales—an increase of 23% over the past decade. In 2021, for the first time, more than half of the children born in England and Wales were born to mothers who were not married or in a civil partnership with their fathers.

Worryingly, the research shows that people are significantly more likely to believe in common law marriage if they have children together: 55% of households with children think that common law marriage exists. As women still undertake more caring duties and are more likely to give up work for a time, or work part-time in lower paid jobs, they will be particularly vulnerable and disadvantaged if their cohabiting relationship breaks down.

'Opt-out' offers protection

Why should it be presumed that people who have chosen to live together have made a negative choice not to marry? Why not attach legal consequences to the positive choice that many people make to live together? Those who want to can exercise an autonomous choice to 'opt out' and have a pre-cohabitation agreement or a cohabitation agreement.

As was pointed out by the Law Commission at the time of its 2007 'Report on the financial consequences of relationship breakdown', and echoed more recently in the November 2022 report 'The rights of cohabiting partners' by the UK Parliament's Women and Equalities Select Committee, an 'opt-in' regime would protect those who need it the least: the better educated, the wealthier and the more economically powerful. The economically weaker parties in relationships, who are more likely to suffer a relationship-generated disadvantage (for the most part, women) need the protection of an 'opt-out' regime.

In its report, the Women and Equalities Committee recommended that the government now implement the 'opt-out' cohabitation law scheme proposed by the Law Commission in its 2007 report.

As chair of the committee, Caroline Nokes said: 'The reality of modern relationships is that many of us choose—for a vast number of reasons—not to get married even when in a committed long-term relationship. This number is ever growing, and it is high time that the government recognised the shift in social norms, which has been taking place for well over 30 years. The law has been left decades behind as far as cohabitation is concerned and this is leaving financially vulnerable individuals in precarious situations upon relationship breakdown or the death of a partner… Deciding not to marry is a valid choice and not one which should be penalised in law…'.

The government rejected the committee's recommendation, saying that exploring cohabitation reform cannot be undertaken until both a review of financial remedies law has been completed and the government's response to the Law Commission's weddings project is released.

Not giving up

The government's position is, in my view, disingenuous. The work under way on the law of weddings reform and divorce finances is not relevant to issues concerning cohabitants, for whom the Law Commission recommended a separate and different regime.

As the number of people cohabiting continues to rise, the current lack of legal remedies will continue to disproportionately disadvantage the economically weaker partner, particularly women with children, or who have had children in their cohabiting relationship.

Just as we never gave up on 'no fault 'divorce, family lawyers will never give up campaigning for cohabitation law reform. The work has been done by the Law Commission in 2007; the framework for achieving fairness and justice is there, ready to be put into law. NLJ

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