



“Common law marriage” and cohabitation

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Author: Catherine Fairbairn

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Generally, although cohabitants do have some legal protection in several areas, they do not have as many rights and responsibilities as married couples, and there is no specific legal status for what is often referred to as a “common law marriage”. Studies have shown that many cohabiting couples are unaware of this fact. The Government has supported and funded two voluntary sector partners to manage a campaign to make cohabitants more aware of their legal status and provide them with practical advice on how they can protect themselves and their families, should they wish to do so.

Some cohabitants enter into a cohabitation agreement and this can act as encouragement for them to consider what they would want to happen if the relationship ends. However, it is unclear how the courts will treat such agreements.

Following consultation, in July 2007 the Law Commission published a report, *Cohabitation: the financial consequences of relationship breakdown*, which made recommendations to Parliament on certain aspects of the law relating to cohabitants. It considered the financial consequences of the ending of cohabiting relationships. The Law Commission recommended the introduction of a new statutory scheme of financial relief on separation based on the contributions made to the relationship by the parties. The scheme would be available to eligible cohabiting couples. Couples who have had a child together or who have lived together for a minimum period would be eligible. Couples would be able to opt out of the scheme by a written agreement to that effect.

In March 2008, the Government announced that it would be taking no action to implement the Law Commission’s recommendations until research on the cost and effectiveness of a similar scheme recently implemented in Scotland could be studied.

In a separate consultation, the Law Commission is currently seeking views on whether certain cohabitants should have an automatic right to inherit part of the estate of a deceased partner who dies without leaving a valid will.

Arguments have been advanced both for and against extending new rights to cohabitants.

Unless specified otherwise, this note deals generally with the law in England and Wales.

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1 What is “common law marriage”?

A man and woman living together in a stable sexual relationship are often referred to as “common law spouses”, but this is incorrect in law in England and Wales. Although cohabitants do have some legal protection in several areas, cohabitation gives no general legal status to a couple, unlike marriage from which many legal rights and duties flow. Studies have shown that many cohabiting couples are unaware of this fact. According to the [Department for Constitutional Affairs](#) (as it was then, now the Ministry of Justice), many cohabitants do not realise that, even though they have lived together for a long time, they do not have the same rights as married couples, and consequently they take no steps to protect themselves.¹

The Government has supported and funded two voluntary sector partners, Advice Services Alliance and One Plus One, to manage the “LivingTogether” campaign. The purpose of the campaign is to make cohabitants more aware of their legal status and provide them with practical advice on how they can protect themselves and their families, should they wish to do so. The campaign was launched on 15th July 2004 and a range of general information is available on the [Advicenow](#) website² and the [Married or not](#) website.³

LivingTogether has produced a [checklist](#) for couples breaking up,⁴ commenting:

It is often only when your relationship ends that you realise you don't have the rights you assumed you would have.⁵

Community Legal Advice has published a leaflet, [Living Together and your Rights if you Separate](#).⁶

2 Number of cohabitants

In its recent consultation paper, [Cohabitation: the financial consequences of relationship breakdown](#), the Law Commission noted the rise in cohabitation and parenthood by cohabitants:

2.5 The 2001 Census records just over two million cohabiting couples in England and Wales an increase of 67% on the figures from the 1991 Census.

2.6 The number of people who live with a partner outside marriage has been increasing significantly since the 1970s. In 1986, 11% of non-married men and 13% of non-married women aged 16-59 in Great Britain were cohabiting. By 2004, the equivalent figures had grown to 24% and 25% respectively. In terms of the overall population (aged 16-59) in Great Britain in 2004, 13% of men and 12% of women were cohabiting.

2.7 The 2001 Census for England and Wales further records that:

- (1) 1,278,455 children were dependent on a cohabiting couple;
- (2) of those, 558,426 children were in cohabiting step-families; and

¹ July 2004 (at 6 January 2010)

² At 6 January 2010

³ At 6 January 2010

⁴ At 6 January 2010

⁵ <http://www.advicenow.org.uk/living-together/breaking-up> (at 8 January 2010)

⁶ January 2009, (at 6 January 2010)

(3) 741,880 cohabiting couples had a dependent child or children;

2.8 The number of children dependent upon a cohabiting couple is reflected in the increasing rate of births outside marriage. In 1970, fewer than 10% of births occurred outside marriage. By 2004, 42% of births were outside marriage. The increase in such births has been accompanied by a similar rise in the proportion of such births in England and Wales that are jointly registered by both parents. In 2004, 76.4% of those registrations were to parents recorded as living at the same address, who may reasonably be assumed to be cohabitants. The proportion of births throughout the United Kingdom that are registered by one parent only has stayed fairly constant, at under 10%.⁷

The Office for National Statistics has produced some more recent estimates relating to cohabitation as part of their *Social Trends* publication. The most recent data was published in December 2009 and includes the following:

- Overall, the number of cohabiting couples in England and Wales is projected to rise by almost two-thirds, from 2.25 million in 2007 to 3.70 million in 2031.
- It is estimated that, in 2007, around 10 per cent of the population aged 16 and over in England and Wales were cohabiting (4.5 million adults) and that the majority of cohabiting adults (72 per cent of men and 74 per cent of women) had never married.
- In the second quarter of 2009 there were around 13 million dependent children living with at least one parent in the UK. Almost 8.3 million dependent children (63 per cent) lived with married parents and around 1.7 million (13 per cent) lived with cohabiting parents. In comparison, 9.6 million children (72 per cent) lived with married parents in the second quarter of 1997 and 1.0 million (8 per cent) lived with cohabiting parents.
- The number of families with dependent children in the UK in the second quarter of 2009 was around 7.6 million. Of these, 4.6 million (61 per cent) were married couple families. Approximately 1.0 million (13 per cent) were cohabiting couple families.⁸

3 The current position

3.1 Property rights

The law

Unmarried couples have no guaranteed rights to ownership of each other's property on relationship breakdown. If a cohabiting couple separate, the courts have no power to override the strict legal ownership of property and divide it as they may do on divorce. The courts may only make orders based on a determination of shares which have been acquired in the property in circumstances where the legal rules of trusts or proprietary estoppel apply. These rules are technical but essentially, the party who has no *legal* interest in the home may be found to have a *beneficial* (or equitable) interest in the property. The apparent intentions of the parties may be relevant in deciding the proportion of the property owned by each party. The length of time the partners have cohabited is not necessarily relevant.

It is open to cohabiting couples to enter into a contract regulating their relationship and in particular their property rights. In addition, if a house or other property is bought jointly, it

⁷ pp28-29 (at 7 January 2010). The consultation paper is discussed in section 6 of this note below

⁸ At 8 January 2010

would be possible to make clear the basis of the joint ownership, and whether the property is owned equally or (say) in 30/70 shares.

The law relating to cohabitants and property rights is widely seen to be uncertain. However, in its discussion paper, *Sharing Homes*, which was published in 2002, the Law Commission concluded that “it is not possible ... to devise a statutory scheme for the ascertainment and quantification of beneficial interests in the shared home which can operate fairly and evenly across the diversity of domestic circumstances which are now to be encountered”.⁹

Recent cases

In a case in 2004, the Court of Appeal held that, where both partners had contributed to the purchase of a property which was registered in only one name, and there was no evidence of discussion between the parties as to the shares in the property each was to have, the appropriate question for the court was what would be a fair share for each, having regard to the whole course of dealing between them. The appropriate time for assessment of the respective shares of the parties (in the absence of an express agreement) was not at the time when the property was acquired, but when it was sold, taking into account various types of contributions made by each of them.¹⁰

In 2007, the House of Lords held that the transfer of a property into the joint names of cohabitants gives rise to a presumption that the property is to be held in equal shares unless the contrary is proved by the party claiming to have other than an equal joint beneficial interest and the facts are unusual.¹¹ Each case will be decided on its own individual facts.

Baroness Hale of Richmond also cautioned about the disproportionate costs which can be involved in resolving property disputes when a relationship breaks down. She set out some of the factors which might be relevant in determining property shares:

Those included: any advice or discussions at the time of the transfer which cast light upon their intentions then; the reasons why the home was acquired in their joint names; the reasons why, if it was the case, the survivor was authorised to give a receipt for the capital moneys; the purpose for which the home was acquired; the nature of the parties' relationship; whether they had children for whom they both had responsibility to provide a home; how the purchase was financed, both initially and subsequently; how the parties arranged their finances, whether separately or together or a bit of both; how they discharged the outgoings on the property and their other household expenses.

In that particular case it was held that the circumstances were unusual, that the couple had kept their financial affairs largely separate and that the defendant had made good her case for a 65 per cent share.

3.2 Housing

The succession rights of cohabitants in relation to privately rented and social housing are explained in two Library standard notes entitled *Succession rights and privately rented housing*¹² and *Succession rights and social housing*.¹³

⁹ Law Commission Report No 278, November 2002, (at 8 January 2010)

¹⁰ *Oxley v Hiscock* [2004] EWCA Civ 546

¹¹ *Stack v Dowden* [2007] UKHL 17

¹² SN/SP/2004

¹³ SN/SP/1998

3.3 Domestic violence

Cohabitants do benefit, in a broadly similar way to married couples, from the protection available under Part IV of the *Family Law Act 1996*, which is designed to deal with domestic violence. The Act allows home-sharers and former home-sharers (including same-sex partners) to apply for non-molestation orders and/or court orders regulating the occupation of the family home. The *Domestic Violence Crime and Victims Act 2004* extended these provisions to allow couples who have never cohabited to apply for non-molestation orders, and to strengthen the position of same-sex partners, particularly with regard to occupation orders. Further information is available in a Library standard note, [Domestic violence](#).¹⁴

3.4 Inheritance

Unmarried partners have no automatic inheritance rights over their partner's assets on death. There are special provisions in the *Law Reform (Succession) Act 1995* allowing certain cohabitants to make a claim against the estate of their partner on his or her death, if no provision (or inadequate provision) has been made for them either by will or by operation of the rules of intestate succession. However, in neither of these cases is the cohabitant treated in exactly the same way as a spouse.

On 29 October 2009, the Law Commission published a consultation paper, [Intestacy and Family Provision Claims on Death](#)¹⁵. This covers a range of issues and one of the areas highlighted for potential reform is whether certain cohabitants should have a place in the intestacy rules,¹⁶ the conditions which have to be met, and how much of the estate they should receive. The Law Commission's proposals in relation to cohabitants are summarised in the [Executive Summary](#):

15. Where a couple live together without getting married or forming a civil partnership and one of them dies, the survivor has no automatic right under the current intestacy rules to inherit any part of his or her partner's estate. This is the case no matter how long they lived together and even if they had children together. It can lead to significant hardship when longstanding cohabitants are bereaved. Many cohabitants do not realise that, if one of them dies without leaving a will, the other will not automatically inherit anything under the intestacy rules.

16. In some circumstances, a surviving cohabitant can go to court to challenge the distribution of a deceased partner's estate under the family provision legislation. But that will often be emotionally and financially draining.

17. We therefore propose to reform the intestacy rules so that, in some circumstances at least, a surviving cohabitant can share in a partner's estate without having to go to court. This would extend the existing legal protection afforded to cohabitants when a relationship is cut short by death (existing legislation recognises the needs of cohabitants when a partner is killed in a fatal accident). It would also bring English law into line with the law in other Commonwealth jurisdictions.

18. While some may find this idea controversial, research indicates that it would match public expectations and attitudes. It would still be open to cohabitants to make a will naming other beneficiaries (subject to the family provision legislation).

19. We ask two key questions: which cohabitants should qualify for inclusion under the rules, and what should they receive? Although we recognise that there is a huge range

¹⁴ SN/HA/3989

¹⁵ Law Commission Consultation Paper No. 191

¹⁶ The intestacy rules specify who should inherit the property of a deceased person who did not leave a valid will

of possible answers, we provisionally propose that couples who have had a child together or lived continuously as a couple for more than five years should have the same rights on intestacy as spouses.

20. We also consider childless relationships of less than five years. We provisionally propose that where a couple have lived together for more than two (but less than five) years up to the date of death, the survivor should be entitled to half of the share of the estate that a surviving spouse would have received. The surviving cohabitant should not be entitled to the deceased's personal chattels in addition to that share, but should be allowed to choose items up to the value of any cash entitlement. We propose that a cohabitant should not receive anything under the intestacy rules if the deceased was still married or in a civil partnership at the time of death, however long the cohabitation.

21. We make a number of other proposals for changing the family provision legislation which would bring the definition and treatment of cohabitants into line with our proposals for reform of the intestacy rules.¹⁷

The consultation period ends on 28 February 2010 and the Law Commission hopes to publish a final report in Autumn 2011. It will then be for Parliament to decide whether to make any change to the law.

3.5 Social Security

For means-tested benefits and tax credits, the unit of claim is the 'family'. In general this includes the claimant and their husband or wife or civil partner, or someone they live with as husband and wife or civil partner.¹⁸ If two people are treated as a couple, the resources of both partners are added together and taken into account when a claim is made.

The rules governing Income Support and income-based Jobseeker's Allowance also recognise that married couples, and civil partners, have a duty to maintain each other. The Department for Work and Pensions may, for example, seek to recover money from a separated spouse or civil partner if their partner claims benefit. These powers are rarely exercised, however. There are no corresponding provisions for unmarried couples, or for same-sex couples not in a civil partnership.

The system of contributory benefits does not recognise unmarried couples, or same-sex couples not in a civil partnership. So, for example, unmarried partners and same-sex couples who have not registered a civil partnership would not be entitled to Bereavement Benefits.^{19 20} A person in receipt of a contributory benefit such as Incapacity Benefit may be

¹⁷ Law Commission, *Intestacy and Family Provision Claims on Death Executive Summary*, (at 7 January 2010)

¹⁸ For further details of the 'living together as husband and wife or Civil Partners' test, see Department for Work and Pensions Technical Guide IS20, *A guide to Income Support*.
http://www.jobcentreplus.gov.uk/JCP/Partners/Allowancesandbenefits/dev_010024.xml.html
(at 8 January 2010)

¹⁹ Someone in receipt of Bereavement Benefits can however lose their entitlement if they start living together as husband and wife with someone of the opposite sex, even if they do not remarry; or start living together with someone of the same sex as Civil Partners, even if they do not register their partnership

²⁰ There is however an exception in Scotland. In Scotland a person may be able to claim bereavement benefits if they were married 'by cohabitation with habit and repute' even if they did not go through a formal wedding ceremony [R(G) 1/71]. This is more than simply living together, as there must have been something about the relationship which meant that it could be inferred that the person and their partner consented to marriage and nothing existed which would have prevented a valid marriage taking place (e.g. either party already being married to someone else) [R(G) 5/83]. In addition, their relationship must have been such that other people generally believed that they married [CSG/7/1995].

able to secure an 'adult dependency increase' for an unmarried partner or for someone they are not in a civil partnership with, but only if the person is maintained by the claimant and is looking after his or her child. Someone in this category does not need to be in any relationship with the claimant, however.

3.6 Pensions

A cohabitant cannot rely upon her former partner's contributions for the purposes of state retirement pensions whereas a woman who is married, or a man or woman who has been married or a civil partner may be able to do so.

For the purposes of means-tested benefits for pensioners, such as Pension Credit, if two people are treated as a couple (living together as husband and wife), the resources of both partners are added together and taken into account when the claim is made.

Otherwise, entitlement of an unmarried partner to pension benefits will depend on the rules of the scheme.²¹ In some cases, for example, the scheme member may have to have nominated their unmarried partner.

3.7 Taxation

Cohabiting couples are treated as unconnected individuals for taxation purposes and as such cannot, for example, benefit from various reliefs and exemptions in the taxation system available for spouses and civil partners.

3.8 Immigration

The legal position of unmarried cohabitants seeking to remain in the UK with their partner largely mirrors that for married couples, as explained in the Library standard note entitled *Immigration: Spouses, Civil Partners and Fiancé(e)s* which is available on the Library intranet.²² The couple must have been "living together in a relationship akin to marriage which has subsisted for two years or more".²³

3.9 Registration of death

The list of persons eligible to register a death does not automatically include a cohabitant. This list is, however, under review: the Government is proposing that it be updated and extended. A White Paper, *Civil Registration: Vital Change* was published on 22 January 2002, following consultation, to set out the Government's proposals for reforming the civil registration service in England and Wales.²⁴ It suggested that the "life partner" of the deceased should be added to the list.²⁵ The timing of this change is uncertain.

3.10 Birth registration

At present, if the parents were married to each other at the time of the birth or conception, either the mother or father can register the birth on their own and details of both parents will be recorded. The law assumes that the mother's husband is her child's father.

However, the rule by which marriage could be constituted by cohabitation with habit and repute ceased to have effect from 4 May 2006 (as a result section 3 of *The Family Law (Scotland) Act 2006*). For people to continue to benefit from the rule, their marriage by cohabitation with habit and repute must have started before this date.

²¹ See Library Standard Note SN/BT/1208

²² SN/HA/862

²³ *Immigration Rules HC 395 of 1993-94 as amended, para. 295A* (at 8 January 2010)

²⁴ Cm 5355 (at 8 January 2010)

²⁵ para 2.21

If the parents are not married to one another, generally the father's details may be recorded only if both parents (or the court) acknowledge the father's paternity. The father's particulars may be entered in the register in the following circumstances:

- the mother and father go to the register office and sign the birth register together, or
- the mother alone attends the register office and declares that the father is the father of the child and produces to the registrar a statutory declaration made by the father acknowledging his paternity
- the father alone attends the register office and declares that he is the father of the child and produces to the registrar a statutory declaration made by the mother acknowledging the father's paternity or
- at the request of either parent, on production to the registrar by either parent of a parental responsibility agreement or an appropriate court order; the parent who attends must also make a declaration confirming that the agreement or court order is still in force.²⁶

If the father's details are not included in the birth register, it may be possible to re-register at a later date.

Information about registering a birth is included on the [Directgov](#) website.²⁷

Registration of an unmarried father on the child's birth certificate has relevance for parental responsibility.

Provisions in the *Welfare Reform Act 2009* will, when implemented, make joint birth registration a legal requirement for all unmarried parents in a range of circumstances. Information about the new provisions is included in the Government's [Explanatory Notes](#) published with the Act.²⁸

In summary, the Act will increase the ways in which an unmarried father may register jointly with the child's mother. It is intended that either parent will be able to initiate the registration (or re-registration) process to include on the birth record details of the second parent. Much of the detail of the new system will be included in regulations.

There will be a new form of declaration (to take the place of the current requirement for a statutory declaration). The registrar will be able to include a man's details on the birth register where a paternity test carried out by an accredited body shows him to be the father. In addition there will be additional rights and duties for both unmarried mothers and fathers, in order to ensure that unmarried fathers' details are entered on the birth register in as many cases as possible. There will be a procedure for joint birth registration even where the parents do not co-operate with one another.

There will remain some circumstances in which the mother will not be obliged to provide the father's details, in which case sole registration will take place. These will include, for example, cases where the mother does not know the identity of the father (or his whereabouts), or where she fears that her safety, or that of her child, might be put at risk were the father to be contacted.

²⁶ *Births and Deaths Registration Act 1953 Section 10* as amended

²⁷ At 8 January 2010

²⁸ See paragraphs [29-40](#) and [344-399](#). Background information is available in Library research paper, RP09/09 [Welfare Reform Bill: disabled people, child maintenance and birth registration](#)

3.11 Parental responsibility

The legal position relating to parental responsibility for unmarried fathers is explained in the Library standard note entitled *Parental responsibility for unmarried fathers and step-parents*.²⁹

4 Cohabitation agreements

Cohabitants may wish to enter into a cohabitation agreement and this can act as encouragement for them to consider what they would want to happen if the relationship ends. Cohabitation agreements have yet to be fully tested in court and so it is not entirely clear what weight will be given to them. Both parties should take legal advice on the effect of any proposed agreement.

Advicenow have produced a guide, [Living together agreements](#), which includes a template of an agreement.³⁰

5 Same-sex couples

The *Civil Partnership Act 2004* established a new legal relationship for same-sex couples which enables those couples who register as civil partners of each other to access many of the rights and responsibilities to which married couples are entitled.

The *Civil Partnership Act 2004* does not apply to cohabiting heterosexual couples. The Government's stated view is that heterosexual couples already have the option of marriage, and the legal consequences of a civil partnership are very similar.³¹

Information about civil partnerships is available on the Library intranet.

6 Law Commission report

The Law Commission's report, [Cohabitation: the financial consequences of relationship breakdown](#), was published on 31 July 2007.³² The Report recommended the introduction of a new scheme of financial remedies for cohabitants on separation. The Law Commission did not consider that cohabitants should be given the same rights as married couples and civil partners in the event of their separation.

The Law Commission proposed the introduction of a scheme of financial relief on separation based on the contributions made to the relationship by the parties (rather than on the respective financial needs of the parties as in divorce). First consideration would be given to any dependent children of the couple. Unlike in cases of divorce, cohabitants would not be expected to meet each other's future needs by means of maintenance payments and there would be no principle that the parties should share their assets equally.³³

Merely moving in with someone would not give rise to any entitlement to a remedy. The scheme would be available to eligible cohabiting couples. Couples who have had a child together or who have lived together for a minimum period would be eligible. The Commission

²⁹ SN/SP/2827

³⁰ At 8 January 2010

³¹ Women and Equality Unit, *Civil Partnership – A framework for the legal recognition of same-sex couples*, June 2003

³² [CM 7182, LAW COM No 307](#), (at 9 January 2009)

³³ Law Commission press release, [New remedies for cohabitants – different from divorce](#), 31 July 2007, (at 8 January 2010)

recommended that the minimum period for couples without children should be set within a range of two to five years.³⁴

Couples would be able to opt out of the scheme by a written agreement to that effect.

The key features of the scheme were summarised in the [Executive Summary](#):

1.13 We do not think that all cohabitants should be able to obtain financial relief in the event of separation. We recommend that a remedy should only be available where:

- the couple satisfied certain eligibility requirements;
- the couple 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.

Eligibility requirements

1.14 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 (a “minimum duration requirement”). The Report does not make a specific recommendation as to what the minimum duration requirement should be, but suggests that a period of between two and five years would be appropriate.

Disapplying the scheme

1.15 We reject an “opt-in” scheme, which couples would be required to sign up to in order to be able to claim financial remedies on separation. Consultation confirmed our view that an opt-in scheme would not deal effectively with the problems of hardship created by the current law. Vulnerable individuals would be no more likely to protect themselves by registering than they are currently to marry. We are also aware that to introduce an opt-in scheme would effectively create a new status of “registered cohabitant”. This would jeopardise the support of many who have expressed support for reform, but who are concerned to protect the institution of marriage, such as the Mission and Public Affairs Council of the Church of England.

1.16 Instead, we recommend that, as a default position, the scheme should be available between all eligible cohabitants. However, we understand the strongly held view that it is wrong to force cohabitants who have not chosen to marry or form a civil partnership into a particular legal regime against their will. We agree that it is very important to respect the autonomy of couples who wish to determine for themselves the legal consequences of their personal relationships. We therefore recommend that a new scheme should allow couples, subject to necessary protections, to disapply the statute by means of an opt-out agreement, leaving them free to make their own financial arrangements.

Qualifying contributions and their consequences: the basis for remedies

1.17 It would not be sufficient for applicants simply to demonstrate that they were eligible for financial relief and that the couple had not made a valid opt-out agreement disapplying the scheme. In order to obtain a remedy, applicants would have to prove that they had made qualifying contributions to the parties’ relationship which had given rise to certain enduring consequences at the point of separation.

³⁴ *Ibid*

1.18 The scheme would therefore be very different from that which applies between spouses on divorce. Simply cohabiting, for however long, would not give rise to any presumed entitlement to share in any pool of property. Nor would the scheme grant remedies simply on the basis of a party's needs following separation, whether by making orders for maintenance or otherwise.

1.19 In broad terms, the scheme would seek to ensure that the pluses and minuses of the relationship were fairly shared between the couple. The applicant would have to show that the respondent retained a benefit, or that the applicant had a continuing economic disadvantage, as a result of contributions made to the relationship. The value of any award would depend on the extent of the retained benefit or continuing economic disadvantage. The court would have discretion to grant such financial relief as might be appropriate to deal with these matters, and in doing so would be required to give first consideration to the welfare of any dependent children.

1.20 We consider that a scheme based on these principles would provide a sound basis on which to address the hardship and other economic unfairness that can arise when a cohabiting relationship ends. It would respond, more comprehensively than the current law can, to the economic impact of the contributions made by parties to their relationship, and so to needs which arise in consequence. Where there are dependent children, the scheme would enable a remedy to be provided for the benefit of the primary carer, and so better protect those children who share their primary carer's standard of living. By making adequate provision for the adult parties, the scheme would give more leeway to the court than it currently has to apply Schedule 1 to the Children Act 1989 for the benefit of the parties' children.³⁵

Stuart Bridge, the Commissioner leading the project, said:

The scheme we are recommending, in the light of consultation, is distinct from that which applies between spouses on divorce. It would not apply to all cohabitants and where it did apply would only give rise to remedies relating to contributions made to the relationship. We do not accept the argument that such reform would undermine marriage. We consider that our scheme strikes the right balance between the need to alleviate hardship and the need to protect couples' freedom of choice.³⁶

7 Government response to Law Commission report

On 6 March 2008, Bridget Prentice, Parliamentary Under-Secretary of State for Justice, announced the Government's response to the Law Commission's report, in a written ministerial statement. She said that the Government would be taking no action to implement the Law Commission's recommendations until research on the cost and effectiveness of the scheme recently implemented in Scotland could be studied:

Today we are announcing the Government's response to the Law Commission's paper on Cohabitation: The Financial Consequences of Relationship Breakdown.

The Law Commission published their very thorough and high quality report on 31 July 2007. It makes recommendations to Government on certain aspects of the law relating to cohabitants. It considers the financial consequences of cohabiting relationships ending either by separation or death. It follows two years of work by the Law Commission.

³⁵ at 8 January 2010

³⁶ Law Commission press release, [New remedies for cohabitants – different from divorce](#), 31 July 2007, (at 8 January 2010)

The report has been carefully considered and the Government have decided it wishes to seek research findings on the Family Law (Scotland) Act 2006, which came into effect last year. This Act has provisions which are similar in many respects to those which the Commission recommends.

The Scottish Executive intend to undertake research to discover the cost of such a scheme and its efficacy in resolving the issues faced by cohabitants when their relationships end.

The Government propose to await the outcome of this research and extrapolate from it the likely cost to this jurisdiction of bringing into effect the scheme proposed by the Law Commission and the likely benefits it will bring. For the time being, therefore, the Government will take no further action.

The decision has been reached because of the need for Government to obtain accurate estimates of the financial impact of any new legislation and the likelihood that we can obtain a view of financial impact by drawing on the Scottish experience of similar law reform.³⁷

On 20 March 2008, a written reply to a Lords Parliamentary question considered the issue of whether further legislation dealing specifically with cohabitants is required:

Lord Lester of Herne Hill asked Her Majesty's Government:

Whether unmarried cohabiting opposite-sex couples need legislative protection; and

Whether the law that currently applies to resolve property disputes between unmarried cohabiting couples is sufficiently clear and uncomplicated and produces fair outcomes for cohabitants and their children; and

Whether they will introduce legislation to give effect to the recommendations of the Law Commission for England and Wales in its report *Cohabitation: The Financial Consequences of Relationship Breakdown* to provide a scheme of financial remedies that would lead to fairer outcomes on separation of cohabitants and their families.

The Parliamentary Under-Secretary of State, Ministry of Justice (Lord Hunt of Kings Heath): Cohabiting couples do have fewer legal rights than their married counterparts, but that is not to say that they have none. In relation to domestic violence, cohabiting couples have the same rights to protection as married couples.

Financial disputes over maintenance payments for children are governed by the Child Support Agency and by legislation specifically designed to cater for their needs. Neither differentiates between cohabitants and married parents.

The question of whether further legislation dealing specifically with cohabitants is required is a finely balanced one. It was precisely because of the Government's concern that cohabitants might be inadequately protected that the question of whether they should have specific rights was referred to the Law Commission.

Following the Law Commission's report, the Government have decided to consider research on the impact of the Family Law (Scotland) Act 2006 which contains provisions that are similar in many respects to those which the Law Commission recommends before deciding whether to implement the Law Commission's proposals. In particular, the Government wish to consider the likely cost and benefit to this

³⁷ HC Deb 6 March 2008 c122WS

jurisdiction of bringing into effect the scheme proposed by the Law Commission, and to see how well the scheme meets the needs of vulnerable individuals.

The Government have funded the “Living Together” campaign to raise public awareness about the legal status of cohabitation. It aims to make people more aware of the differences in the rights and responsibilities applying to married and unmarried relationships, and to provide cohabitants with practical advice on how they can protect themselves and their families, should they wish to do so. Pending the outcome of research, the Government will continue to support this campaign.³⁸

8 Scotland

Under the *Family Law (Scotland) Act 2006*, which came into force in May 2006, cohabitants (from opposite and same sex couples) may make limited claims against each other in the event of their relationship terminating or on the death of one of the couple. However, couples living together do not have the same rights as married couples and civil partners. In May 2006, the Scottish Executive produced a leaflet entitled *Family Matters: Living Together in Scotland* which explains the law on cohabitation and the rights introduced by the 2006 Act.³⁹ This includes the following:

Common law marriage

It is a common misunderstanding that a couple will have established a “common law marriage” after living together for a period of time. This is not the case. Common law marriage does not exist in Scotland. Even if you have lived with your partner for many years, you do not have the same rights in law as a married person does. There was a type of irregular marriage called “marriage by cohabitation with habit and repute” which could apply to couples who had lived together and were thought to be married. This was rarely used in practice and, except for very particular circumstances, was abolished by the 2006 Act.⁴⁰

Cohabitants’ rights

The 2006 Act has introduced a set of basic rights to protect cohabitants, either when their relationship breaks down, or when a partner dies. But the law is very clear: couples living together do not have the same rights as married couples and civil partners. It is very important that you understand this when deciding whether to move in with your partner or to make a formal commitment.⁴¹

9 Other developments

9.1 Cohabitation Bill [HL] 2008-09

On 11 December 2008, the *Cohabitation Bill [HL]* was introduced in the House of Lords as a Private Member’s Bill by the Liberal Democrat peer, Lord Lester of Herne Hill.⁴² It had its second reading on 13 March 2009, and one day of committee stage on 30 April 2009, in the House of Lords but did not progress any further. The Bill intended to establish a framework of rights and responsibilities for cohabitants on separation or death and for life insurance purposes. Information about the Bill is available on the public bill page of the [Parliamentary website](#).

³⁸ HL Deb 20 March 2008 cc58-9WA

³⁹ At 8 January 2010

⁴⁰ [Section 3 deals with the abolition of marriage by cohabitation with habit and repute]

⁴¹ p2

⁴² HL Bill 8 of 2008-09

9.2 Cohabitation (No 2) Bill 2008-09

On 25 March 2009, Mary Creagh (Labour) sought leave, under the Ten Minute Rule motion, to introduce the *Cohabitation (No 2) Bill*.⁴³ Mary Creagh referred to the Bill as the bill introduced by Lord Lester of Herne Hill in the House of Lords.

The Bill did not make any further progress.

9.3 Gresham College lecture by Baroness Deech

On 17 November 2009, the crossbench peer, Baroness Deech delivered a Gresham College lecture, *Cohabitation and the law*, in which she argued against giving new rights to cohabitants:

The message is one of freedom of choice and respect for rights. Why should we make them pay when young educated people live together, or when a young woman with a good career is deserted by the young man whom she had hoped would marry her but instead demands money from her? What are the expectations of cohabitants? Whatever they are, they know that they are not married, and they have chosen to avoid the married state. There is nothing to stop them marrying, for divorce is easily enough obtained if one is already married. If they are dissatisfied with their legal lot, why not marry in order to obtain marital rights? And if they are dismissive of marriage as a mere piece of paper, or an unnecessary legal bond, then why so keen to turn to the court for compensation in reliance on the law when the free union ends? Couples may be trying out their relationship before taking the step of marriage, and we should not impose the penalties of a failed marriage on those who were experimenting in order to avoid this outcome. There should be a corner of freedom where couples may escape family law with all its difficulties. Cohabitation is not marriage, now or historically, and people ought to have the freedom to try alternative forms of relationship, not to have one form imposed on them, especially one that treats women as perpetual dependants.⁴⁴

⁴³ HC Deb 25 March 2009 cc309-11

⁴⁴ Baroness Deech of Cumnor, *Cohabitation and the Law*, Gresham College, 8 January 2010.