

Cohabitation: the financial consequences of relationship breakdown

Response to the Law Commission
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Introduction

This paper is my response to the Law Commission paper on the financial consequences of relationship breakdown of cohabitation.

I set out my details in the appendix. In summary, I have practised as a specialist family law solicitor for 20 years, almost entirely in central London. The primary area of my work has been financial aspects of marriage breakdown, often with an international element. I have recently worked for two years in Sydney, Australia, and I bring my experience to bear in this paper.

I have had some considerable involvement in the reform of cohabitation law, primarily through my connections with the Solicitors Family Law Association and the Lawyers Christian Fellowship. In the mid to late 1990s, when there was considerable debate on the topic, I was a member of the national committee of the SFLA, now known as resolution, and was actively involved in opposing the then reforms which had an understated intention of aligning cohabitation with marriage. As a Christian, I have resolutely supported the status and respect for the institution of marriage and have opposed any reforms that materially detracted. I have been strenuous, for instance, in my opposition to the first to issue principle in Brussels II which encourages early breaks in a marriage rather than marital counselling etc. The reforms in the mid to late 1990s were significantly and actively promoted by members of the same sex community as an opportunity for their relationships to be given equal status as marriage. It was a very sad feature of those vigorous and heated debates that the interests of heterosexual cohabitants were almost ignored and the subtext became in reality the status to be given to same sex community relationships.

I took part in the public debate at the Law Society Hall on cohabitation law reform, being one of the two who lead the debate in supporting the motion, quite conveniently worded for us, that the House did not favour cohabitation law reform which equated with marriage, or similar wording. We won massively. I was also involved in the questionnaire consultation amongst the SFLA membership which, in my opinion, was deliberately slanted towards one outcome and I was responsible for that consultation process not having wider publicity or acceptability.

As stated, the debate at that time was fundamentally flawed because the real parties in need of help, heterosexual cohabitants, were being ignored as the same sex community fought for recognition akin to marriage. Matters have moved on. The civil partnership legislation has been enacted.

Accordingly I am very pleased that the present debate is now back to where it should have been 10 years ago namely the issue within our society of what safeguards and provisions should be made for those vulnerable and prejudiced people who choose not to marry, cannot marry or simply find themselves unmarried, or in the equivalent civil partnership. This is a much more reliable and safer place to have a debate. Moreover I am exceptionally pleased that the Law Commission has identified the issue of 10 years ago namely the concern for the institution of marriage. I respect and applaud the openness of the Law Commission in how they have handled this issue.

I have been very pleased at the wide consultation that took place in advance of publication of their paper. I record that I know Cheryl Morris very well through her previous incarnation at the law society family law committee and I believe she, and her colleagues, had done a very good and thorough job. I wish this had been the position 10 years ago.

I am very pleased that the Law Commission has decided to take a different approach to financial resolution than the position on divorce. Many years before White, when I was publicly critical of several aspects of our marital resolution system, I recorded that I thought the then cohabitation reforms were inadequate because they simply aped the position on divorce which even then was showing its age and unfairnesses. I applaud the Law Commission for the particular approach they

have adopted on this. If the reforms do go further, I'm sure there will be some changes but I believe they are essentially in the right direction.

I am pleased that the Law Commission has limited its paper to those in a sexual or at least romantic relationship. The debate 10 years ago was surrounded by anxieties about sharing relationships other than in the sexual context. This narrowness is important. It is a very different form of relationship.

As I refer in more detail below, I was not convinced about whether there should be an opt in or opt out and understand entirely why the Law Commission has decided to go to consultation on an opt out scheme. This will fundamentally affect practising solicitors and I deal with it.

I am not in this paper going to deal with some issues raised by the Law Commission in their consultation paper, in part because I believe that there are others much better placed to deal with such matters. I do directly limit the matters I am covering where I have the greater concerns and believe I can give the greater input.

I am disappointed that the ambit of the reforms are limited, specifically for instance not covering the fiscal implications of cohabitation, the Social Security implications, an insolvency and other areas of social life. I have indicated that I am pleased that non sexual cohabitation is not included as I believe this would be artificial. I also happen to believe that there are no material disadvantages on children law aspects not being included because the law is now very neutral on the relationship of the parents as adults. However the general limitation, as in the first sentence of this paragraph, is a real disadvantage and will produce inconsistencies, injustice in some instances and some controversy. It also means that as a society we are not reconsidering our view and outlook, in as much as the same is informed by the state and status of the law, but instead we are merely producing a repair package of aid for a narrow situation.

It may be that this was politically the only way to go forward but I think it will have longer term adverse implications if these reforms go through.

The above is by way of introduction. I record that I am materially more sympathetic to a reform of the law now than 10 years ago, for a variety of reasons. However I am still not certain that the reform of the law, as proposed, is needed. I deal with this next. If however a reform is decided to be needed, I hugely congratulate the Law Commission on the excellent work they have undertaken. I have some points to raise but I would not want this to detract from the proposals and the excellent preparation work. The question of priority for me is whether there is a need for reform. This is the opening questions of the consultation to which I now turn.

Is reform necessary?

I remain unconvinced. As a consequence of the excellent work of the Law Commission, and as it is clear that there is a differential with marriage and there is no longer the baggage of the imperatives of the same sex community which now has civil partnerships, I am less anxious if the decision of our country is that there is the necessity for reform. Previously I opposed reform in itself and because of what the reform would be. I now do not have so much concern about the latter.

Nevertheless, the reform will involve substantial changes within our family law system. It may produce some considerable amount of court work, although I happen not to be very convinced by this. Nevertheless if it does produce a considerable amount of court work, I record that the family courts are already very busy with quite scandalous delays in fixing some hearings including final hearings. I can only speak of experience of the PRFD but I understand there are problems elsewhere in the country. It will produce considerable changes to court forms. It will require a very new body of

jurisprudence in the rationale, policy as well detail of the financial outcomes intended by the reforms. It will undoubtedly require more public funding on legal aid. In as far as legal aid will also be needed on the opt out agreements, and perhaps more crucially at this stage than at the litigation stage, the overall legal aid bill will rise. There will be many other wider and longer term implications, costs and otherwise to the family justice resolution system of this reform. Is it justified?

I have read what has been written by the Law Commission about the unsatisfactory state of the present law as it has been adapted, as best as it could, from property law, Equity law and other extraneous areas of the law. I endorse their conclusions. The general law is not good enough although judges have done their best to produce some equitable and just principles. However does this warrant the wholesale reforms and new jurisprudence which the Law Commission paper introduces?

I remain unconvinced about the need for reform.

Many other remedies are available within our law, often at relatively small expense and inconvenience, without the necessity of the huge paraphernalia which the reforms would inevitably involve. Of course it may be the case that some of these remedies are not taken up through lack of education, awareness, power within a relationship or otherwise. Nevertheless, cohabitation contracts in their most general form and deeds of trust in their most specific form are available. Precedents are available on the Web and through all family lawyers through the SFLA precedents. The vast majority of real property purchases are through lawyers so it is not a question of lack of access. Perhaps the formalities of deeds of trust for separate ownership rights should be relaxed but this is minor compared to the dramatic reforms.

Provision can be made through the creation of a will, and notices in respect of pension entitlements, insurance policies and similar. This is in part education and in part responsibility through property ownership.

Cohabitation categories

For cohabitants who are either not working or have very minor material assets, perhaps the tenancy of private or public accommodation, there are sufficient remedies presently available without the present reforms. I believe it is not the general experience that law firms find many clients in this category who are frustrated and dissatisfied with the lack of legal remedies.

There are many cohabitants who are young or relatively young, without children, both invariably working and with relationships which last a number of years. They are mostly educated to some standard and certainly have access to education medium of one form or another which informs on public duties, rights, entitlements etc. Certainly experience of a number of solicitors is that these cases can be quite complicated. Sometimes there is a material level of wealth generated through incomes resulting in a complicated pattern of purchases which seem to have little bearing on who actually contributed what. These can be quite messy to sort out. They are not burdened with child raising issues. I remain unconvinced that these couples and these individuals require, perhaps warrant or deserve, the significant upheaval which these reforms will inevitably bring, in many different ways. They have choices in how they run their relationships and their financial affairs. They are often not individuals where one is dramatically disempowered. I observe as well that the Law Commission itself is unconvinced or at least in doubt whether the reforms should be extended to childless couples. Whilst sympathetic for a number of these couples who are in a fast stage in their lives with busy working lives and often busier social lives and give very little time or thought for property ownership, I am nevertheless unconvinced that the reforms are warranted and justified for these couples alone. In fact, it is my strong suspicion that if the reforms are introduced, it is these couples who will take up by far the greater amount of court time and lawyers involvement.

There are then the category of cohabitants in, shall we kindly say, middle age and onwards. I am still excluding cohabitants with children. These will be cohabitants who have invariably been in another longer term relationship or a period on their own. One or both may have adult children or perhaps teenagers in their mid teens but not so as to come into the category of cohabitants with children whose sacrifice for children need the help of the court. If neither has material assets, they have no need for a reform law. Often one has materially more assets than the other. I suspect that this category is one of the more difficult in that there are a number of cases where there is material difference in the finances, such as income or pre-existing capital yet the weaker financially may still have brought some capital to the relationship. I have sympathy with this category of cohabitants. Yet they are in mid lives. They have invariably spent time in the workplace. Whilst they may not be financially sophisticated, they will not have the general ignorance of life which may sometimes apply to those cohabiting in their 20s. Moreover, many perhaps having had an unhappy experience of marriage or divorce, are not prepared to enter into marriage even if the other in the relationship might be keen. I am not convinced necessarily that income support is appropriate in these cases but better capital provision law may be. My uncertainty is whether the significant reforms now proposed are the answer. Moreover if the responses to the Law Commission show that the reforms should be limited to couples with children then this category will still be in difficulties.

My uncertainty about this category of cohabitants links directly with my concerns about the provisions of opting out to which I refer below. For the reasons stated above, one or both in these relationships will be generally sophisticated about financial and lifestyle matters. Presuming the opt out provisions are generally along the lines of the Law Commission paper, and presuming a good level of education and information, I believe that the opt outs will occur significantly amongst this category. The one who has had a bad experience of divorce will want to make sure that the law comes nowhere near a second time! Each may want to make sure that their own children of a previous relationship are well looked after, a particular feature of cohabitation of those in their later life. If I am correct that a good number of cohabitants in this category opt out, then perversely these reforms will be irrelevant to them, other than encouraging them to work out what will happen if their relationship breaks down by way of the opt out. Therefore although I have sympathies with the need for reform for this category, I suspect that there will be even bigger issues regarding the opt out alternatively whether they are cohabitation relationships at all. Those who have been badly wounded by a divorce experience may find artificial ways of avoiding the cohabitation law at all.

I have seen the response of Jenny Gracie of the Family Law Partnership of Leatherhead and a member of the Law Society Council. Specifically I have seen her categorisation. I wish to identify myself with her concerns that in fact the number of cohabitants and categories of cohabitants to whom the reforms are most directed are in fact relatively limited.

This is amplified by my experience in Sydney. They have a de facto, cohabitation, law. It is similar to divorce in some ways but very different in other ways. It is dealt with through the civil courts and still has some real problems for this reason. It tends to produce the most incredibly detailed investigation into contributions over many years of a relationship. (A concern I have about the detail of the proposed new scheme where it is contribution based.) Nevertheless very good rights and entitlements are given. I anticipate the Law Commission has investigated the position in Australia, specifically Sydney and Melbourne, and spoken to practitioners in day-to-day practice in leading family law firms. They can speak more reliably than me. Nevertheless my experience was that there were very few cases. In a specialist family law practice of six fee earners, I believe there were perhaps no more than a dozen cases in the 18 months to two years whereas of course there were masses of marital cases. I found this starkly surprising. It was not through lack of information or education. My suspicion is that there were simply not the number of cases which warranted the dispute and litigation. Some cases were same-sex couples which now in England are covered by the civil partnership law. In its own way, the civil partnership law has removed some of the need

for cohabitation law reform. From my experience in England of being consulted infrequently on cohabitation financial issues and my experience in Sydney, I question whether there will be very many cases. The cohabitation cases which may arise are likely to be unrelated to the child care responsibilities and sacrifices and much more likely to be the consequence of random, disorganised and haphazard patterns of real and other property purchases. England does not need the substantial cohabitation reform merely for these cases.

Cohabitation with children

I now turn to cohabitation cases where there are children.

Our hands are tied on child support. The position is utterly unacceptable. The CSA is a failure, of its own admission. It failed to look after those at the lower end of society who needed it most. It allowed the more unwilling parents to escape their obligations whilst easily penalising those who would have paid anyway. The future of the Agency is uncertain. However it does seem unlikely that the government will again allow child support to be available for the court. Perversely, this removes a fundamental area of need for a fairer and just law for cohabitants. Given that the statistics indicate that cohabitation relationships break down more frequently and earlier than marriage, including like for like where there are children, then this is an area of substantial need for many in our society. It is an area which is dramatically affecting the financial well-being of children who have no say in the status of the relationship of their parents and whether they choose to take up options available for financial contracts and similar. I suspect that if child support came within the ambit of the Law Commission reforms, this would at a stroke change the perspective of those of us who are uncertain about the need for reforms. But in a similar fashion, if it becomes clear that child support will remain outside the ambit of the court based justice system, as I believe to be the case, it removes one crucial area of need for help.

Capital provision may be important, and is sometimes a fundamental, for the accommodation of the child and other provision. Income support may be important for the primary carer. But neither can compare with the specific child support, day by day, week by week, year by year, at a realistic level and reliably paid with good enforcement measures. This need for provision stands head and shoulders above every other financial consequence of relationship breakdown on cohabitation. Yet it is unavailable to the courts and to this reform process. Unless there can be some satisfactory dovetailing between child support and the other reform process then there will always be an unsatisfactory element about the latter. The cohabitation reform will produce a major upheaval and colossal debate within Parliament. In its final report, if it proceeds with the reform, the Law Commission should make it abundantly clear that child support, income provision, must be part of the jurisprudential package, conceptually dovetailing with the other provision. In this way, the Law Commission will really have served the cohabitation community and particularly the children, the very many children, within that community. If this is not possible, I fear it is a further and substantial detract from the need for dramatic reforms.

As to the other financial provision for cohabitants with children, I record here that statistics show that a good number subsequently marry. It may be that these numbers are falling and the statistics are invariably quite historic because of the catch up element but this category of cohabitants do not need the reforms.

The reforms anticipate similar provision as on divorce, therefore including spousal maintenance often known as alimony. I make a few remarks on this. Outside some middle-class cases with a reasonable level of income especially where one party has not worked because of child raising responsibilities, alimony orders are relatively rare. They may be short term either because the recipient remarries, cohabits or becomes self-sufficient as the 1984 legislation intended. They may be relatively

low or non-existent because available income is being taken up with child support. They may be relatively low or non-existent because most spare income levels supporting two households are relatively low. There are many reasons which excellent recent research has explored. I do not say that these powers should not be available if the reforms go through but I do record that the reality is that there is likely to be very few of these orders, if the experience on divorce is indicative. It does however go to whether the reforms are warranted and justified. Outside the relatively well-to-do middle class cohabitants, I suspect very few cohabitation maintenance orders will be made. These reforms should not be introduced to protect the relatively well-to-do middle classes!

Capital provision is needed in some of these cohabitation cases with children. Classically it is to provide for the accommodation needs of the child during minority and the prejudice to the primary carer parent. In as far as this prejudice often continues beyond the child's minority, the primary carer parent as cohabitant deserves more than a short-term occupation interest.

However schedule 1 of the Children Act does exist. It may not be used very often. There may be a number of very good reasons. Procedure outside the conventional family courts procedure. Perhaps limited powers and jurisdiction. Inability to look at wider issues. Perhaps it should be freestanding, outside the Children Act. Nevertheless it is there and specifically covers many of the areas of need in these cohabitation cases with children. I believe that a remodelling of schedule 1 might cover many of these particular problems. It should definitely be brought within the Family Proceedings Rules and procedure. I think it should be widened. I doubt this would cause any material controversy.

Therefore in this analysis, I suspect that the primary need is capital rearrangement in those cases where there are children of the cohabitation either natural or accepted and where the primary carer has prejudiced her financial arrangements and affairs either because of the relationship or more often because of the child. It is this category where a number of the hard cases before the courts have arisen. I am sympathetic to such parties. English society and public policy should be wholly supportive of child caring including those who make self sacrifices in doing so. The other cohabitant should not therefore be able to benefit from such self-sacrifice by the other.

I suspect as well that these are more often going to be the categories where there will not be agreements to opt out. The primary carer, often the mother, perhaps bringing children into the relationship, is probably going to be the least empowered to insist on a cohabitation contract, a deed of trust or other financial documentation. Yet the vast majority are going to be in a network of information, whether other mothers, magazines directed to mothers or women generally, schools and public health locations and similar where an education and information campaign can work.

In conclusion, I believe that the vast majority of cohabitation cases and couples do not warrant, justify, perhaps need or perhaps will take up the substantial reforms now proposed by the Law Commission, however reasonable and fair and well constructed those reforms may be. In my experience as a solicitor in London and Sydney, in my personal experience and my involvement in organisations connected with family life, I do not believe that these reforms are needed and warranted by the cohabitation community, specifically cannot be justified by the colossal changes that would occur in the law and the resolution process.

Nevertheless I consider there is a small category of cohabitants, primarily the primary carers of children, who do suffer injustice and unfairness on the break-up of a relationship. Some other legal remedies are available but not wholly adequate. I believe our society should be supporting such people because of the sacrifices and commitments they make in the caring and raising of children, sometimes to their own prejudice in their own careers and finances. I am still not certain that this alone justifies the reforms. However I openly state that I could understand it if Parliament and public debate decided that it was justified for this category. This would be especially the case if no other narrower reform could be found.

My anxiety is that in giving a forum for justice and fairness for this small and deserving category, access to the law will become available to very many more who have separate remedies and opportunities. I do worry this will clog up the courts or at least create a good number of other family law cases. It will mean the legal aid budget will be stretched even further, unless the unlikely event occurs of more funds being available. I worry that the new law would more often, certainly as far as legal and court time resources are concerned, be used by middle-class and/or young couples who have haphazardly mingled their finances. I believe that without a comprehensive inclusion of child support, the reform process for cohabitants of other financial provision will be inadequate just as there are existing problems on divorce settlements where child support is not available for consideration.

I perceive the Law Commission having had the same dilemma as it is considered this issue. It has decided that it is warranted. Whilst I have decidedly softened my views over this past decade, I am still not convinced. I would like instead to try to find a way to help this narrow category. This might be through an extension of what is now schedule 1 of the Children Act or similar.

I do not therefore say categorically that the reforms are not justified or warranted. However I believe they are only warranted for a very narrow category of deserving and needy claimants and by opening up this opportunity, the new law would permit a dramatic number of other claimants and other costs and implications. I therefore remain unconvinced on balance of the need for the wholesale reform as proposed.

Opt out provisions

I turn now to some of the detail of the proposals on the basis that the reforms go through. I unashamedly concentrate on the opt out provisions as I believe I can give good input as a solicitor.

English family law has a very odd relationship with agreements. It wishes to encourage as much as possible in the context of child arrangements. It encourages negotiation and settlements. It supports forms of ADR. It likes private ordering. It prefers the courts not to be used as a first resource. Certain judges and many practitioners are keen on Pre-marriage agreements.

Yet consistently some of the higher judiciary have constantly refused any opportunities at agreements getting anywhere close to being binding. Many pronouncements emphasise that ultimately it is the court which should take the final decision. Solicitors negotiations towards a settlement have been described as merely helping the court take the final decision about outcome. Agreements reached after legal advice and disclosure but with a subsequent change of circumstances are sometimes totally ignored including with no costs or other implications. I need say no more here. The reality is that England is unlikely to change unless probably forced to do so by European and other international pressures.

It therefore seems somewhat odd that a couple should be able to enter into an arrangement whereby they are entirely able to opt out of a system of family law designed to produce fairness and justice. It is not available to those who are married. This seems discriminatory, a point which will undoubtedly be raised in Parliament.

I make these points but at a personal level, I do support the opportunity in appropriate circumstances for agreements to bind the family courts. I therefore support the opt out opportunity under the reforms. It is the detail on which I wish to comment.

Australia has relatively recently introduced a law of binding financial agreements. These cover separation agreements and Pre-marriage agreements. There is considerable detail. It must have

specialist legal advice on each side, disclosure, and lack of duress and similar. I recommend strongly that this law is considered if the Law Commission takes this further. I found it worked very well in many cases.

The opt out scheme must have legal representation for both parties. Sadly there is an issue within our profession that there are still a good number of solicitors who dabble in family law without any degree of expertise. In the boldness of this new scheme, I recommend the Law Commission requires that only solicitors on the SFLA accreditation panel or the law society advanced panel should be able to sign off on such arrangements. There are very many, thousands, in these schemes so there will be no issue about access to justice or representation. However without it, I worry considerably about the advice given to those who might otherwise be bullied or cajoled into signing. I believe specialist legal advice is a fundamental.

There should be disclosure of material financial circumstances. This is merely the Edgar series of cases. Again, this is fundamental.

It should be clear that the normal provisions of lack of mistake, duress, misrepresentation, fraud etc apply.

The provisions regarding Pre-marriage agreements for instance a period of time before the commencement before the wedding does not here apply, particularly as the commencement of cohabitation relationships tends to be a moving and gradual event rather than a specific date.

A major concern for me is what would happen on the opt out applying. Given that I agree with the Law Commission that the present law is an unattractive proposition, it scares me that couples may opt out of the relatively sensible reform proposals and into the nothingness which is the existing law. The whole point of this exercise is that the courts should no longer have to engage in the fictions and artificiality which the present law sometimes is, especially the injustice and unfairness which can arise. I do not believe it should be an option to opt out and then allow the present law to provide. I believe strongly that the opt out should be on the basis of opting in to some other scheme or arrangement which can be enforced by the courts, often or perhaps only on a contractual basis rather than other forms of discretion. This works in a number of jurisdictions which has community of property as the default. An agreement to opt out alone should be insufficient unless there is an opting to some other regime.

What of course will occur is that various models and precedents will appear. Couples opting out will therefore opt in to one of these models. Discussion and debate about these models will naturally and actively occur within the profession and wider. Some may be very attractive to categories of cohabitants who have together turned their back on marriage and perhaps turn their back at the same time on the courts and specifically the discretionary regime. The Law Commission should have no anxieties about alternative models. Equally the Law Commission should not allow the opt out to occur unless there is an opt in to another, non discretionary, regime. I regard this as crucial and fundamental.

If the opt out agreement did not comply with the qualifying criteria, the parties would then be part of the law regarding financial relief on separation on cohabitation and the fact of the agreement would be an aspect for consideration in that exercise. It would be equivalent to section 25(1).

It is only a very harsh society which does not allow for some review. However the more opportunity for review, the greater becomes the case law, and the litigation and the lesser respect given to the opt out procedure. I am aware of the various cases in which opportunity is given to apply to set aside a consent order. I think this is of the same order. It would therefore cover joint mistakes, perhaps bad legal advice, perhaps supervening circumstances along Barder lines and similar. Specifically, I do

not think the birth of children should be a supervening event. Mistake perhaps! I think as much as possible the existing reforms should bolt onto existing case law and trends. Opportunities for review should be very limited as part of the public policy on finality of litigation. It is very similar. It should follow that law. It should not be wider. The same public policy applies.

For the avoidance of any doubt, and I am amazed that there is still any, cohabitation contracts and other written documents which deal with property or other financial aspects of a sexual relationship are not contrary to public policy. Indeed, failure of cohabitants to enter into such arrangements is absolutely against public policy! It should meet with condemnation as irresponsible relationships!

Procedure

The reforms must be part of family procedure rather than the civil procedure. As all or the majority of cohabitation issues are presently part of civil procedure, and most family lawyers get scared by the things that we do not know or regularly deal with, I believe this has been a significant factor in cohabitation claims not being advanced through the courts. By coming immediately within the family procedure, it will make it much easier for claims to be brought.

I agree it should be within the county court or the High Court, with transfers in accordance with the similar provisions for divorce.

On balance I do support a requirement for claims to be brought within a period. In the uncertainty and vagueness of cohabitation, people must know when they are free fully to move on with their lives. I have wondered about extending it beyond 12 months but I have an anxiety that some cohabitation relationships may have several ends! The sooner everyone knows whether claims will be brought, the quicker they can be resolved. I support a 12 month requirement but I anticipate a lot of case law on when relationships have come to an end.

This should be extended to 12 months from the birth of a child where one party was pregnant at the end of the cohabitation relationship. This must be right and fair.

Just as it is harsh in a society not to have a review, there are exceptional circumstances and so there should be a very narrow discretion to extend. I urge the Law Commission to make this as narrow and restricted as possible.

The proposed new law of financial relief on separation

I am not covering this in any detail. There are many individuals and organisations able to give better consideration and response. I do not want to detract from the matters already dealt with which are of more primary concern to me. I therefore make just a few remarks.

I have spent some time considering whether there should be an opt in scheme with a default that unless the parties opt in, they either have no remedies or have the general law. Having expressed the view that on balance I remain unconvinced about the need for reform, I have come to the conclusion that if Parliament and society decides that there is such a need, then the system proposed by the Law Commission whereby parties must specifically opt out is the right one.

Having expressed the view that those most in need of a new cohabitation law are going to be those with children, I am not convinced that the law should be extended to those without children, of whatever form, during the relationship. I prefer to encourage cohabitation couples to enter into their own relationship arrangements. These reforms will gather incredible publicity and exposure as they

go through Parliament. Having considered the matter carefully, I think that there makes a lot of sense in limiting it to cohabitation relationships with children, widely defined. The law can subsequently include childless cohabitation relationships. It cannot subsequently exclude them, in reality. It will encourage the making of financial arrangements more explicit for these couples. I believe this is a reasonable and fair public policy and approach. With sympathy therefore to some of the mid life cohabitation couples referred to above, I have come to the view that initially it should be limited to cohabitation relationships with children.

I endorse absolutely the rejection of borrowing the substantive law on divorce, viz MCA. It is old, creaking, effectively replaced by judicial pronouncements and not the proper model for fairness and justice on the ending of a committed relationship in the early part of the 21st century.

I endorse the importance of clean breaks in cohabitation relationship break-up as on divorce.

Other than these remarks, I do not propose to comment further on the detail of the proposed new scheme nor on remedies on death.

Conclusion

I again congratulate the Law Commission on their excellent work. I wish this had happened 10 years ago. I am very glad there has been this consultation period. This paper is personal and I have deliberately not looked at the responses of some campaigning organisations with which previously I had been involved. I have wanted this to be my personal response based on my experience primarily as a solicitor in two jurisdictions and a part-time family court judge and mediator.

On my analysis, there is in fact only a very small category of claimants who warrant and justify these reforms, with all of the implications and consequences that they will inevitably entail. I am unconvinced that for this very small category, justice and fairness cannot be provided in other ways. The vast majority of cohabitation relationships either do not require these reforms, do not warrant them alternatively can provide in other ways either themselves or through some minor changes in other areas of law.

If the reforms are introduced, the opt out provisions will be significantly used and will become the subject of much consideration by the legal profession. The safeguards must be there but the requirements must be rigid for the protection of the vulnerable. Nevertheless having entered into an opt out, there should be no possibility of such couples then being exposed to the present unsatisfactory law and they should be required to opt into their own contractual system, probably in the models which will come into existence through this process.

I commend my paper to the Law Commission for their consideration.

David Hodson
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Appendix

Details of the author

David Hodson is a family law dispute resolution specialist. He is a English solicitor (1978 and accredited 1996), mediator (1997), family arbitrator (2002), Deputy District Judge at the Principal Registry of the Family Division, London (1995) and an Australian (NSW) solicitor (2003) and mediator.

For 10 years he worked in two large City law firms specialising in so-called big money divorces and international family law work, being head of the family law department in each. He was joint founder in 1995 of probably the world's first metropolitan practice to combine family lawyers, mediators and counsellors and with an emphasis on a conciliatory and holistic approach. It was subsequently copied in many practices across the world. In 2003 he moved to work in Sydney, qualifying as an Australian solicitor and mediator and working for a top international family law practice for two years. He now undertakes a mixture of family law work, as a solicitor, as a mediator primarily in directive and complex mediations, as a part-time family court judge in London, as a consultant to other law firms, as a lecturer and writer on family law matters and similar initiatives.

He is past chairman of the Solicitors Family Law Association's Financial Provision Reform Committee, Training Committee and Good Practice Committee and a member of its International Committee. He is a member of the Law Society's Family Law Protocol Committee. He is a member of the President's International Committee. He is past vice chair of the UK College of Family Mediators, the umbrella organisation for family mediation. He is a member of the Chartered Institute of Arbitrators. He is co-author of "Divorce Reform: a Guide for Lawyers and Mediators", "The Business of Family Law" "Guide to International Family Law" and consulting editor of "Family Law in Europe". He is a SFLA Accredited Specialist (with portfolios in Substantial Assets and International Cases), a Fellow of the International Academy of Matrimonial Lawyers, a past trustee of Marriage Resource and member of the Family Law Section of the Law Council of Australia.

He has written and spoken extensively on family law including many conferences abroad. Some papers and articles can be found at his web site below.

He is practising in London and Surrey, England and Sydney, Australia.

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