

Research Briefing

3 November 2022

By Catherine Fairbairn

# "Common law marriage" and cohabitation



## Summary

- 1 The myth of "common law marriage"
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- 3 The current law relating to cohabitation
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## Summary

The number of couples choosing to live together (cohabit) in a stable intimate relationship, without getting married or entering a civil partnership, in what some people refer to as “a common law marriage”, increased by 144% between 1996 and 2021.

Although cohabitating couples do have legal protection in some areas, such as under the law relating to domestic abuse, cohabitation gives no general legal status to a couple, unlike marriage and civil partnership from which many legal rights and responsibilities flow. Many people are unaware this is the case.

This briefing provides information about the number of cohabiting couples, how the law applies to them, the Law Commission’s proposals for reform and other calls for reform.

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

## Number of cohabiting couples

The total number of cohabiting couples has increased from around 1.5 million in 1996 to around 3.6 million in 2021, an increase of 144%. In 2021, 22% of couples who lived together were cohabiting rather than married or in a civil partnership. Trends differ between opposite-sex and same-sex cohabiting couples.

## Cohabitation agreements

Some couples have a ‘cohabitation agreement’ which sets out what they want to happen if the relationship ends. Parties are encouraged to take legal advice on the terms and intended effect of any proposed agreement.

## Law Commission proposals for reform

In July 2007, the Law Commission published a report which considered the financial consequences of ending cohabiting relationships. The Commission recommended the introduction of a new statutory scheme of ‘financial relief

on separation'. This would be based on the 'qualifying contributions' each partner made to the relationship, giving rise to certain enduring consequences at the point of separation. 'Qualifying contributions' might be financial or otherwise, such as care for the children of both parties. To be eligible, cohabitating couples would need to have had a child together or to have lived together for a minimum period. Couples would be able to opt out of the scheme through a written agreement.

In March 2008, the Labour Government announced it would be taking no action to implement the Law Commission's recommendations until research on the cost and effectiveness of a similar scheme in Scotland could be studied. In April 2018, the May [Government said it would be considering how to proceed](#) in relation to the proposals, "in the context of any further reforms to the family justice system".

In a separate report published in 2011, the Law Commission recommended some unmarried partners should have the right to inherit after each other's death under the intestacy rules, without having to go to court. This has not been implemented.

## Women and Equalities Committee inquiry

On 4 August 2022, the House of Commons [Women and Equalities Committee published its report on the rights of cohabiting partners](#). It recommended reform of family law "to better protect cohabiting couples and their children from financial hardship in the event of separation". The Committee also considered that law reform should recognise that marriage continues to hold an important social and religious status in England and Wales.

In response, the Government said [existing work on the law of marriage and divorce must conclude before it could consider changes to the law in respect of the rights of cohabitants](#). It rejected the Committee's calls to implement both the 2007 and 2011 Law Commission recommendations at this time.

## Scotland and Northern Ireland

In Scotland, cohabitants may make limited claims against each other either when their relationship breaks down or when a partner dies.

In Northern Ireland, cohabitants have legal protection in some areas, but they have fewer rights and responsibilities than couples who have married or formed a civil partnership.

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# 1 The myth of “common law marriage”

A couple living together in a stable intimate relationship are sometimes 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 and civil partnership from which many legal rights and responsibilities flow.

As shown in research published in 2019, many people consider wrongly that cohabiting couples have a common law marriage:

The first findings from this year’s British Social Attitudes Survey – carried out by The National Centre for Social Research – reveal that 46% of us are under the wrong impression that cohabiting couples form a common law marriage – a figure that remains largely unchanged over the last fourteen years (47% in 2005) despite a significant increase in the number of cohabiting couples. In contrast, only 41% of respondents rightly say cohabiting couples are not in a common law marriage.<sup>1</sup>

In its [2022 report, The rights of cohabiting partners](#), the House of Commons Women and Equalities Committee said the consequences of believing in the common law marriage myth could have profound consequences for cohabiting partners, “many of whom do not realise the reality of their situation until it is too late”.<sup>2</sup> The Committee noted the lack of comprehensive legal protections for cohabitants on relationship breakdown means women, including those from an ethnic minority background and those who have had a religious-only wedding, could suffer relationship-generated disadvantage.<sup>3</sup>

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<sup>1</sup> NatCen, [Almost half of us mistakenly believe that common law marriage exists](#), 22 January 2019 (accessed 19 October 2022). See also, Resolution, [Millions of couples at severe financial risk due to ‘common-law marriage’ myth](#), 27 November 2017 (accessed 19 October 2022)

<sup>2</sup> Women and Equalities Committee, [The rights of cohabiting partners](#) (PDF), 4 August 2022, HC 92, para 24

<sup>3</sup> Women and Equalities Committee, [The rights of cohabiting partners](#) (PDF), 4 August 2022, HC 92, para 32

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## 2

# Number of cohabiting couples

The Office for National Statistics (ONS) has published annual data on the composition of families and households living in the UK since 1996. The total number of cohabiting couples has increased from around 1.5 million in 1996 to around 3.6 million in 2021, an increase of 144%.<sup>4</sup> In 2021, 22% of couples who lived together were cohabiting rather than married or in a civil partnership. Trends differ between opposite-sex and same-sex cohabiting couples and are described in more detail below.

### 2.1

## Opposite-sex cohabiting couples

Between 1996 and 2021 the number of opposite-sex cohabiting couple families more than doubled, from around 1.5 million in 1996 to around 3.4 million in 2021. In 1996, around 10% of all opposite-sex couple families were cohabiting (rather than married) compared with 21% in 2021.

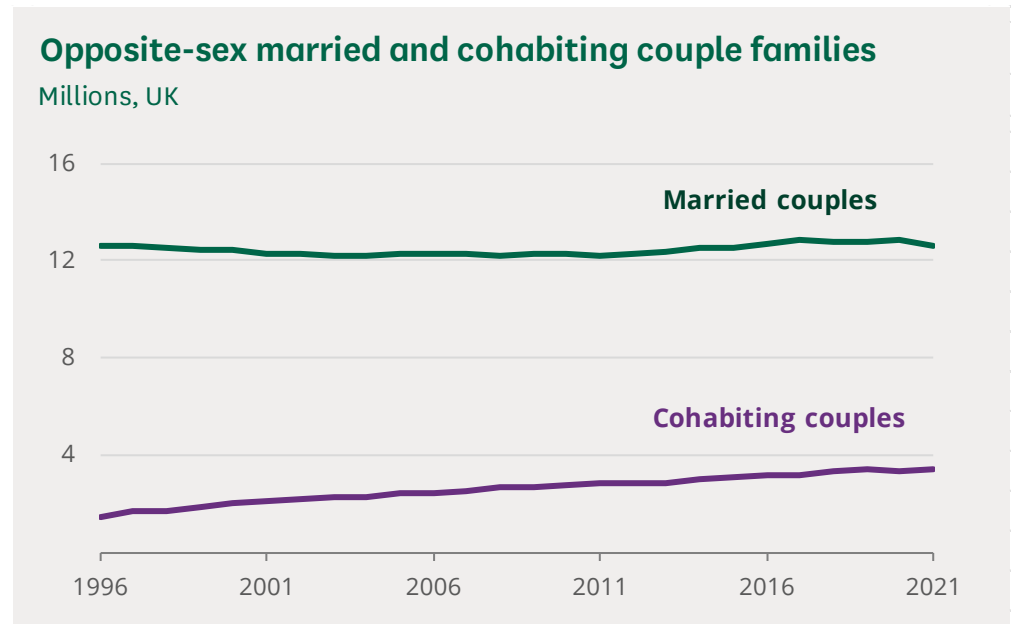
The chart below shows ONS estimates of the number of opposite-sex cohabiting couple families and opposite-sex married couple families living in the UK in each year since 1996. This chart includes all opposite-sex couples living together as a family, whether or not they have children.<sup>5</sup>

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<sup>4</sup> ONS, [Families and Households 2020](#), Table 1

<sup>5</sup> The ONS defines a family as a married, civil partnered or cohabiting couple with or without children, or a lone parent with at least one child. Children may be dependent or non-dependent





Source: ONS, [Families and Households: 2021](#), Table 1

As the chart shows, while the number of opposite-sex cohabiting couple families has grown in this period, the number of opposite-sex married couple families has remained broadly the same. The number of opposite-sex married couples fell from around 12.6 million in 1996 to around 12.2 million in 2004. The number remained at roughly this level until 2011 but has increased since then, reaching around 12.6 million again in 2021. The proportion of such couples of all opposite-sex couple families has fallen in this period by 11 percentage points from around 90% in 1996 to around 79% in 2021.

These estimates are based on a survey sample, which means they come with some statistical uncertainty. While the estimate for the number of married couples shows a dip between 2020 and 2021, the statistical uncertainty means we cannot say with confidence that this reflects a real change. The difference between the 2020 and 2021 figures is not statistically significant.

Between 1996 and 2020, the number of opposite-sex cohabiting couple families with dependent children more than doubled, from around 539,000 in 1996 to around 1.2 million in 2021.<sup>6</sup> The proportion of such families as a proportion of all opposite sex families with dependent children in 1996 was around 9% increasing to around 19% in 2021. The number of married couple families with dependent children fell from around 5.2 million in 1996 to around 5.1 million in 2021.

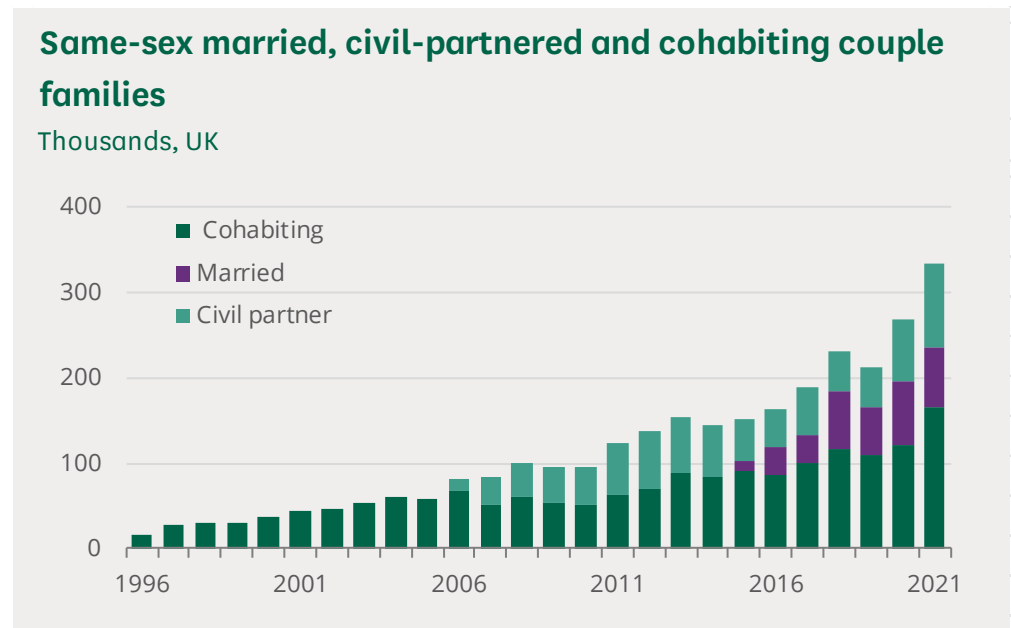
<sup>6</sup> Dependent children are those living with their parent(s) and either aged under 16, or aged 16 to 18 in full-time education (excluding those aged 16 to 18 who have a spouse, partner or child living in the household)

## 2.2

# Same-sex cohabiting couples

Between 1996 and 2021 the number of same-sex cohabiting couple families increased from around 16,000 to 166,000, which is an increase of around 938%.

The chart below shows trends in the number of same-sex couples who were cohabiting, married or in a civil partnership between 1996 and 2021. Estimates of the number of couples in civil partnerships are available from 2006 and estimates of same-sex married couples are available from 2015.



Source: ONS, [Families and Households: 2021](#), Tables 1 and 9

Because ONS estimates of the number of families are based on survey data, estimates of these smaller populations are more uncertain and may vary from one year to the next due to sampling error rather than an actual change in the number of couples. However, there is a clear increase in the number of cohabiting and married same-sex couples, as well as an increase in the total number of same-sex couples living in a family together.

The introduction of civil partnerships and marriage for same-sex couples means the proportion of same-sex couples who cohabit has declined, even though the total number has increased. Around 84% of same-sex couples who were living together in a family were cohabiting in 2006, the first year for which data on civil partnerships is available. By 2015, the first year for which marriage data is available, the proportion had fallen to around 60%. By 2021 around 50% of same-sex couples in families were cohabiting, while the rest were either in marriages or civil partnerships.

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## 3 The current law relating to cohabitation

### 3.1 Children of cohabitants

#### Birth registration

[Gov.UK, Register a birth](#), provides an overview of who can register a birth, and includes information about whose details can be included on the birth certificate.

Section 56 and Schedule 6 of the [Welfare Reform Act 2009](#) were intended to make provision for the joint registration of births, wherever possible, where the parents of a child are not married to each other nor are civil partners of each other. However, these provisions have not been brought into force.

#### Parental responsibility

The legal position relating to parental responsibility when couples are not married nor in a civil partnership is set out in a Commons Library briefing paper, [Children: parental responsibility – how it's gained and lost, and restrictions \(England and Wales\)](#).<sup>7</sup>

#### Child maintenance

Child maintenance is a financial arrangement between the parent a child does not normally live with (the non-resident parent) and the person with whom the child lives and who usually provides day-to-day care for them (the person with care). It covers a child's living costs and is made when the parents have separated or if they have never been in a relationship.<sup>8</sup>

It is not compulsory to have a formal child maintenance arrangement, and not all families want an arrangement. Separated parents can arrange child maintenance themselves (called a 'family-based arrangement'). The Child Maintenance Service (CMS) is for when parents can't agree to a family-based arrangement.

Information on how the CMS calculates child maintenance is available in the Library briefing, [Child maintenance: Calculations, variations and income \(UK\)](#).<sup>9</sup>

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<sup>7</sup> CBP-8760

<sup>8</sup> [Child Maintenance Service: What child maintenance is](#), GOV.UK (accessed 19 October 2022)

<sup>9</sup> CBP-7770

### Claims under Schedule 1

[Schedule 1 of the Children Act 1989](#) gives the family courts power to make financial provisions for a child. In some situations, a parent may need to apply to the court rather than, or in addition to, applying to the CMS. These situations can include:

- The mental or physical disability of the child
- If the non-resident parent's gross weekly income is above £3,000

As with a CMS arrangement, this financial provision is available to all parents, including if they are unmarried and not in a civil partnership.

## 3.2 Domestic abuse

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 abuse. 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 for occupation orders.

The offence of "controlling or coercive behaviour" was introduced in December 2015 by [section 76 of the Serious Crime Act 2015](#). This currently applies to people who are "personally connected", which covers people in "intimate personal relationships" or people who live together and have either been in an intimate personal relationship or are in "the same family".<sup>10</sup> Family is broadly defined and includes (amongst others) spouses, ex-spouses, civil partners, ex-civil partners and people who have a child together.

[Part 1 of the Domestic Abuse Act 2021](#) sets out a new statutory definition of "domestic abuse", which applies to people who are "personally connected to each other". The definition of personally connected includes people who are – or have previously been – in an "intimate personal relationship".<sup>11</sup> The Act also covers a wide range of other domestic abuse issues, including extending the controlling or coercive behaviour offence to cover post-separation abuse involving former couples who no longer live together. Further details are in the following Library briefing papers:

- [Domestic Abuse Bill 2019-21](#):<sup>12</sup>

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<sup>10</sup> Serious Crime Act 2015, s76(2), (6) and (7)

<sup>11</sup> Domestic Abuse Act 2021, s2

<sup>12</sup> CBP-8787

- [Domestic Abuse Bill 2019-21: Progress of the Bill](#).<sup>13</sup>

The Act received Royal Assent on 29 April 2021. Details of which provisions are in force and which have yet to take effect are set out in the Government's [Domestic Abuse Act 2021 commencement schedule](#).<sup>14</sup>

## Fixed-term tenancies

The Secure Tenancies (Victims of Domestic Abuse) Act 2018 was introduced to ensure certain victims of domestic violence would retain a right to a 'lifetime' secure tenancy when fixed-term tenancies became mandatory for English housing authorities under the Housing and Planning Act 2016. Subsequently, the Government announced that it would not introduce mandatory fixed-term local authority tenancies "at this time."<sup>15</sup>

The Government's Social Housing Green Paper, [A new deal for social housing](#), published on 14 August 2018, included a commitment to legislate to put in place similar protections for victims of domestic abuse where local authorities offer **fixed-term tenancies at their discretion**.<sup>16</sup> [Section 79 of the Domestic Abuse Act 2021](#) gives effect to that commitment.

## 3.3 Housing

The succession rights of cohabitants in relation to privately rented and social housing are explained in two Commons Library briefing papers entitled:

- [Succession rights and privately rented housing](#)<sup>17</sup>
- [Succession rights and social housing \(England\)](#).<sup>18</sup>

## 3.4 Immigration

The legal position of non-British/Irish unmarried cohabitants seeking to enter or remain in the UK with their British/settled partner largely mirrors that for married couples, as set out in the ['Family in the UK'](#) section of the GOV.UK website. To be eligible for permission to remain in the UK as an unmarried partner of a British/settled person, the couple must generally have been

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<sup>13</sup> CBP-8959

<sup>14</sup> [Domestic Abuse Act 2021 commencement schedule - GOV.UK \(www.gov.uk\)](#), updated 30 August 2022

<sup>15</sup> Ministry of Housing, Communities and Local Government, [A new deal for social housing](#), Cm 9671, 14 August 2018, paras 183-186

<sup>16</sup> As above, para 188

<sup>17</sup> SN/SP/2004, 6 March 2009

<sup>18</sup> SN/SP/1998, 2 September 2018

“living together...in a relationship akin to a marriage or civil partnership for at least two years prior to the date of application”.<sup>19</sup>

## 3.5

# Inheritance

## No automatic right to inherit partner’s estate

When a couple live together, without getting married or forming a civil partnership, and one of them dies without leaving a will, the survivor has no automatic right under the intestacy rules to inherit any part of their partner’s estate.<sup>20</sup> This is the case no matter how long they lived together and even if they had children together.<sup>21</sup>

It is sometimes possible, under family provision legislation, for a surviving cohabitant to make a claim at court against the estate of their partner,<sup>22</sup> if no provision (or inadequate provision) has been made for them either by will or by operation of the intestacy rules. However, a cohabitant is not treated in the same way as a spouse. A surviving spouse or civil partner is entitled to seek whatever financial provision it would be reasonable for them to receive, whether or not that provision is required for maintenance. A cohabitant may only seek reasonable provision for their own maintenance.<sup>23</sup>

## Law Commission proposal to extend inheritance rights for some cohabitants

On 29 October 2009, the Law Commission published a [consultation paper, Intestacy and Family Provision Claims on Death](#) (PDF).<sup>24</sup> One of the areas highlighted for potential reform was whether some cohabitants should have a place in the intestacy rules, the conditions which would have to be met, and how much of the estate they should receive.

In December 2011, the Law Commission published its [final report, Intestacy and Family Provision Claims on Death](#) (PDF),<sup>25</sup> which included two draft bills, one of which was the draft Inheritance (Cohabitants) Bill. This contained

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<sup>19</sup> [Immigration Rules \(HC 395 of 1993-4 as amended\)](#), Para 6.2; Appendix FM para GEN.1.2

<sup>20</sup> The intestacy rules specify who should inherit the property of a deceased person who did not leave a valid will

<sup>21</sup> Law Commission, [Intestacy and Family Provision Claims on Death Executive Summary](#), Consultation Paper No 191 (Summary) (PDF), 29 October 2009, paragraph 15

<sup>22</sup> In this context, a cohabitant means a person who lived in the same household as the deceased, as if they were the spouse or civil partner of the deceased, for a period of two years ending immediately before the date when the deceased died; [Inheritance \(Provision for Family and Dependants\) Act 1975 section 1\(1A\)](#)

<sup>23</sup> [Inheritance \(Provision for Family and Dependants\) Act 1975](#)

<sup>24</sup> Law Commission Consultation Paper No 191, [Intestacy and Family Provision Claims on Death](#) (PDF), October 2009

<sup>25</sup> Law Commission Report No 331, [Intestacy and Family Provision Claims on Death](#) (PDF), December 2011

provisions intended to give “qualifying cohabitants”, who had lived together for five years ending immediately before the deceased’s death, the right to inherit on each other’s death under the intestacy rules, without having to go to court. Where the couple had a child together, this entitlement would accrue after two years’ cohabitation, provided the child was living with the couple when the deceased died.

The Law Commission acknowledged that views differed on how far the law should provide for cohabitants. However, it considered that the question of whether a cohabitant should inherit on their partner’s death was very different from the treatment of cohabitants on separation. It proposed reform only where the deceased was not married or in a civil partnership.<sup>26</sup>

The Law Commission also recommended a surviving cohabitant who had a child with the deceased should be able to make a family provision claim even if the relationship had lasted for a shorter period than two years.

The Law Commission said its recommendations “reflect the growing prevalence and public acceptance of cohabitation” and that they would also bring English law into line with the law in other Commonwealth jurisdictions. Cohabitants would still be able to make a will naming other beneficiaries (subject to making reasonable provision for those family members and dependants protected by existing family provision legislation).<sup>27</sup>

### Government response

In 2013, the Coalition Government announced that it had decided that the Law Commission's recommendations regarding rights for cohabitants upon intestacy would not be implemented during that Parliament.<sup>28</sup>

In 2022, the Government rejected the Women and Equalities Committee’s call for the immediate implementation of the Law Commission’s 2011 recommendations concerning intestacy and family provision claims for cohabitants.<sup>29</sup> It said reform would need to be considered as part of the wider approach to reform of the law on cohabitation rights, so that a consistent approach is taken. The Government also said it would take a cautious approach in this area and would want to consult ahead of pursuing any reforms.<sup>30</sup>

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<sup>26</sup> Law Commission, [Intestacy and Family Provision Claims on Death Executive Summary](#) (PDF), Law Com Report 331 (Summary), 14 December 2011, paras 30-31

<sup>27</sup> As above, paragraph 33

<sup>28</sup> [HC Deb 21 March 2013 cc59-60WS](#)

<sup>29</sup> Women and Equalities Committee, [The rights of cohabiting partners](#), (PDF), 4 August 2022, HC 92, para 73

<sup>30</sup> Women and Equalities Committee, [The rights of cohabiting partners: Government response to the Committee’s Second Report](#), (PDF), 1 November 2022, HC 766, p v. Section 6.1 of this briefing paper provides further information about the Women and Equalities Committee’s recommendations and the Government’s response.

## 3.6

# Pensions

## State pensions

A cohabitant cannot rely upon their former partner's contributions for the purposes of State Pensions. Under State Pension rules for people who reached State Pension age before 6 April 2016, a person who was or had been married or in a civil partnership, could claim a basic State Pension (BSP) on the basis of their (former) spouse or civil partner's contributions.<sup>31</sup> These rules were removed (with some transitional protection) for people reaching State Pension age from 6 April 2016, when the new State Pension was introduced.<sup>32</sup> The rationale was that the new State Pension has been designed for people to qualify on the basis of their own NI record.<sup>33</sup> For more detail, see Commons Library briefing paper, CBP 7414 [The new State Pension – transitional issues](#) (Feb 2019), section 3.2.

For means-tested benefits, such as Pension Credit, if two people are treated as a couple, the resources of both are added together and will be considered in assessing entitlement. Two cohabitants are treated as a couple if they are considered to live together and share their lives in the same way as if they were married or civil partners.<sup>34</sup> They are still treated as a couple during periods temporarily living apart. If a temporary separation becomes permanent, they can apply for Pension Credit separately.<sup>35</sup>

## Occupational pensions

Legislation allows pension schemes to provide a survivor pension to someone who was financially dependent on a scheme member but may not have been married or a civil partner.<sup>36</sup>

Further information is covered in the Commons Briefing paper [Occupational pensions: survivors' benefits for cohabitants](#).<sup>37</sup>

## Discretion to pay survivor benefits

If and how a pension is provided will depend on the rules of an individual scheme. Trustees, who are responsible for the governance of trust-based pension schemes, often have discretion to provide survivor benefits. In 2019, according to data from the ONS, 2% of private-sector defined benefit

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<sup>31</sup> DWP, [State Pension entitlements derived from a current or former spouse's or civil partner's national insurance contributions](#) (March 2013) - [Annex A](#); Pension Service, [A detailed guide to State Pensions for advisers and others](#), NP46, August 2009, p44-54

<sup>32</sup> [Pensions Act 2014](#), s1(2), 11 and 12

<sup>33</sup> [Pensions Act 2014](#), s1(2), 11 and 12

<sup>34</sup> Pension Service, [A detailed guide to Pension Credit for advisers and others](#), PC10S, April 2018, [People living together as if they were married](#)

<sup>35</sup> As above, [People living apart from their partner](#)

<sup>36</sup> [Finance Act 2004](#), part 4

<sup>37</sup> CBP-6348



schemes provided a pension to people other than a spouse, civil partner or dependant as a right, while a further 84% allowed this to be provided on a discretionary basis.<sup>38</sup>

In its [July 2022 report on the rights of cohabiting partners](#), the Women and Equalities Committee said it was “concerned that many cohabitants rely on trustee’s discretion to access their deceased partner’s pension”.<sup>39</sup> It recommended the Government should “publish clear guidelines on how pension schemes should treat surviving cohabiting partners, including what those partners are entitled to, and what evidence they will need to access survivor’s pensions”.<sup>40</sup>

### Reforms to public sector schemes and legal challenges

Until the mid-2000s, unlike many private sector schemes, public sector schemes did not provide survivor benefits for unmarried partners and trustees were not able to exercise the discretion to do so.<sup>41</sup> Changes in lifestyles led to pressure for schemes to be modernised. In 1998, the Labour Government said it would extend eligibility to survivors’ pensions to unmarried partners if members were prepared to meet the additional costs.<sup>42</sup>

Subsequent reforms to all the main public service pension schemes included improvements to survivors’ benefits, such as the introduction of pension for unmarried partners and allowing pensions to be paid for life rather than removed on remarriage or cohabitation.<sup>43</sup> These improvements were generally not made retrospective – scheme members either had to have service contributing to a pension after the date of the reform or to opt to become a member of the updated scheme.

The requirement for scheme members to have service after a particular date, was [subject to an unsuccessful legal challenge](#). The claimant, Catherine Harvey, was the unmarried partner of a deceased member of the Local Government Pension Scheme who had left service before 1 April 2008, the date from which he needed to have been in employment for her to be eligible. Ms Harvey contended the refusal to pay her a pension amounted to unlawful discrimination and a breach of her human rights. However, the High Court found in favour of the Government. It considered the central and core justification was that spouses and cohabitants of scheme members are entitled to a pension because it was costed into the relevant schemes and

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<sup>38</sup> ONS, [Occupational pension schemes in the UK \(table 15\)](#), 21 January 2021

<sup>39</sup> Women and Equalities Committee, [The rights of cohabiting partners](#), 19 July 2022, HC 92 2022-23, para 73

<sup>40</sup> Women and Equalities Committee, [The rights of cohabiting partners](#), 19 July 2022, HC 92 2022-23, para 73

<sup>41</sup> Department of Social Security, *A new contract for welfare: partnership in pensions*, December 1998, Cm 4179, chapter 8

<sup>42</sup> Department of Social Security, *A new contract for welfare: partnership in pensions*, December 1998, Cm 4179, chapter 8

<sup>43</sup> Pension Policy Institute, *An assessment of the Government’s reforms to public sector pensions*, October 2008, p3

paid for.<sup>44</sup> Where a member left before April 2008 the member had not paid for a cohabitee to receive a benefit, nor was it otherwise costed into the scheme.<sup>45</sup>

When pensions for unmarried partners were introduced, most public service schemes required a nomination to have been made for entitlement. This requirement was removed after a successful legal challenge.<sup>46</sup> In February 2017, on an application by Denise Brewster for judicial review relating to the local government scheme in Northern Ireland, the Supreme Court held the nomination requirement should be disapplied and that she should be entitled to a survivor's pension under the scheme.<sup>47</sup>

In July 2019, the Court of Appeal held that it was unlawful for the Armed Forces Compensation Scheme Order to require that, in order to be eligible for survivors' benefits, there must have been nothing that prevented a cohabiting partner and the deceased from marrying.<sup>48</sup> The claimant's marriage at the time to an estranged spouse had rendered her ineligible. The Court determined that the rule amounted to unlawful discrimination which was not justified or proportionate in that case.<sup>49</sup> The Ministry of Defence was "considering the merits of an appeal to the Supreme Court, and the read over of the judgment."<sup>50</sup> However, in 2020, it said the Court of Appeal judgment stated that the judgment only applied to the Langford case. The Government said following legal advice, it had no plans to amend the Armed Forces Pension Scheme or Armed Forces Compensation Scheme rules.<sup>51</sup>

## 3.7 Property rights

Unmarried couples have no automatic 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 to divide it as they may do on divorce or dissolution of a civil partnership.

If a couple cannot agree on their respective shares, it is possible to ask the court to determine an interest in property.<sup>52</sup> Each case is decided on its own facts. The court may only make orders based on a determination of shares which have been acquired in the property in circumstances where the legal

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<sup>44</sup> *R v Catherine Harvey and London Borough of Haringey and Secretary of State for Housing, Communities and Local Government* [2018] EWHC 2871

<sup>45</sup> Local Government Pension Scheme, *LGPC Update* (PDF) 11 December 2018

<sup>46</sup> For example, *The Teachers' Pensions etc. (Amendment) Regulations 2019 (Statutory Instrument 2019/1134)*

<sup>47</sup> *Brewster, Re Application for Judicial Review (Northern Ireland)* [2017] UKSC 8

<sup>48</sup> *Armed Forces and Reserve Forces (Compensation Scheme) Order 2011, article 30(c)*

<sup>49</sup> *Langford v Secretary of State for Defence* [2019] ECWA Civ 1271

<sup>50</sup> *AFPS Annual Report 2018-19* (PDF), HC 2403, July 2019, para 4.10

<sup>51</sup> *AFPS Annual Report 2019-20* (PDF), HC 952, November 2020, p16

<sup>52</sup> Under the *Trusts of Land and Appointment of Trustees Act 1996*

rules of trusts or proprietary estoppel apply. These rules are technical but, essentially, one party may be found to have a beneficial (or equitable) interest in the property even where the property is in the sole name of the other party; or to have a greater share than the other party where the property is held in joint names.

The Women and Equalities Committee's 2022 report includes further information on what might be considered when an application to the court is made under the Trusts of Land and Appointment of Trustees Act 1996:

Where there is a dispute over ownership or occupation of the family home, an application to the court can be made under the Trusts of Land and Appointment of Trustees Act (TOLATA) 1996.<sup>53</sup> For homes that are held by both parties as legal co-owners, the starting point will be that the beneficial ownership mirrors the legal title. Parties will be presumed to share that property equally. Where the home is placed at law in the name of one party alone, the non-legal owner must establish a beneficial interest in that property by way of a trust. The most frequently invoked trust in this context is the common intention constructive trust (CICT). To acquire an interest the claimant must show:

a) a common intention that the beneficial ownership of the property was to be shared, which was relied upon by the claimant to their detriment; or

b) evidence of a direct financial contribution to the acquisition of the property, enabling the court to infer the presence of said common intention.<sup>54</sup>

Financial contributions to the purchase price, deposit, mortgage repayments and improvements to the property, provided they are significant, will enable a court to infer a common intention. For the purposes of acquiring a beneficial interest in property owned at law by another, non-financial contributions, such as work in the home or childcare responsibilities are not recognised.<sup>55</sup>

The Government has acknowledged that, without written evidence, cohabitants can face difficulties when trying to prove a common intention in relation to ownership of the family home.<sup>56</sup>

## Court cases

Several court cases have considered the property rights of cohabitants.<sup>57</sup> The following summarises two of the leading cases.

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<sup>53</sup> Footnote to quoted text: "While cohabitants do not have statutory home rights like spouses or civil partners, they can apply for an occupation order under the Family Law Act 1996 to secure their occupation of the home".

<sup>54</sup> Footnote to quoted text: "Qq142-43 [Neal Barcoe]"

<sup>55</sup> Women and Equalities Committee, [The rights of cohabiting partners](#), (PDF), 4 August 2022, HC 92, Box 1, p7

<sup>56</sup> Women and Equalities Committee, [The rights of cohabiting partners](#), (PDF), 4 August 2022, HC 92, para 10

<sup>57</sup> For example, [Oxley v Hiscock](#) [2004] EWCA Civ 546, [Stack v Dowden](#) [2007] UKHL 17, [Jones v Kernott](#) [2011] UKSC 53

### *Stack v Dowden*

In a 2007 case, the Appellate (Judicial) Committee of the House of Lords<sup>58</sup> considered the respective interests of an unmarried couple in a property which had been their family home and was registered in their joint names.<sup>59</sup> The Court ruled, where a property is registered in joint names in the domestic context, and there is no express declaration setting out the respective beneficial shares of the registered owners, there is a presumption that the beneficial interest in it will be held in equal shares, unless a contrary intention can be shown. If either party claims a different share of the value, they must prove their entitlement. It would be necessary to look at all the relevant circumstances to ascertain the parties' shared intentions "actual, inferred or imputed, with respect to the property in the light of their whole course of conduct in relation to it".<sup>60</sup> Baroness Hale of Richmond said "each case will turn on its own facts" and that "many more factors than financial contributions may be relevant to divining the parties' true intentions", giving examples of what might be taken into account. She added:

In the cohabitation context, mercenary considerations may be more to the fore than they would be in marriage, but it should not be assumed that they always take pride of place over natural love and affection.<sup>61</sup>

Baroness Hale also said parties' intentions might change over time.<sup>62</sup>

The House of Lords held, on the facts, that the case in question was one of those very unusual cases where the presumption of beneficial equal shares could be rebutted and the common intention of the parties was not to share equally. The couple had kept their financial affairs largely separate. The Court determined that the sale proceeds should be divided 35/65 between the parties.<sup>63</sup>

In the same case Lord Walker of Gestingthorpe said there was "a good deal of uncertainty and the possibility of high litigation costs".<sup>64</sup> Baroness Hale of Richmond also cautioned about the costs of pursuing legal action:

In family disputes, strong feelings are aroused when couples split up. These often lead the parties, honestly but mistakenly, to reinterpret the past in self-exculpatory or vengeful terms. They also lead people to spend far more on the legal battle than is warranted by the sums actually at stake. A full examination of the facts is likely to involve disproportionate costs. In joint

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<sup>58</sup> The final appeal court at that time, now the Supreme Court

<sup>59</sup> *Stack v Dowden* [2007] UKHL 17

<sup>60</sup> *Stack v Dowden* [2007] UKHL 17, paragraph 60 (Baroness Hale of Richmond)

<sup>61</sup> As above, paragraph 69 (Baroness Hale)

<sup>62</sup> As above, paragraph 70 (Baroness Hale)

<sup>63</sup> The Law Commission provides further information about this case and other case law in its report, [Cohabitation: the financial consequences of relationship breakdown](#) (PDF), LAW COM No 307, Cm 7182, 31 July 2007 – see particularly Part 2 and Appendix A

<sup>64</sup> *Stack v Dowden* [2007] UKHL 17, paragraph 27

names cases it is also unlikely to lead to a different result unless the facts are very unusual.<sup>65</sup>

### *Jones v Kernott*

In 2011, in another case, Lord Walker and Baroness Hale summarised the principles which apply where a family home is bought in the joint names of a cohabiting couple who are both responsible for any mortgage, but without any express declaration of their beneficial interests. They confirmed that each case would turn on its own facts: “financial contributions are relevant but there are many other factors which may enable the court to decide what shares were either intended... or fair...”.<sup>66</sup> They also said there is a different starting point where the family home is put into the name of one party only:

This case is not concerned with a family home which is put into the name of one party only. The starting point is different. The first issue is whether it was intended that the other party have any beneficial interest in the property at all. If he does, the second issue is what that interest is. There is no presumption of joint beneficial ownership. But their common intention has once again to be deduced objectively from their conduct. If the evidence shows a common intention to share beneficial ownership but does not show what shares were intended, the court will have to proceed as ...above.<sup>67</sup>

## Specifying shares

If a house or other property is bought jointly, a cohabiting couple may set out the basis of the joint ownership, and whether the property is owned equally or in unequal shares.

## 3.8

## Social security

For means-tested benefits (including Universal Credit) and tax credits, the unit of claim is the “family”. This includes the claimant and their husband, wife or civil partner, or someone they live with **as if they were** husband, wife, or civil partner, together with any dependent children.<sup>68</sup> If two people who are not married or in a civil partnership are treated as a couple, the needs and resources of both partners are taken into account for the benefit claim.

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 (DWP) may, for example, seek to recover money from a separated spouse or civil partner if their partner claims benefit. These powers are however rarely

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<sup>65</sup> *Stack v Dowden* [2007] UKHL 17, paragraph 68

<sup>66</sup> *Jones v Kernott* [2011] UKSC 53, paragraph 51

<sup>67</sup> As above, paragraph 52

<sup>68</sup> For further details of the “Living Together as a Married Couple” test, see [Chapter 11 of the DWP Decision Maker’s Guide](#) (PDF)

exercised. There are no corresponding provisions for couples who are not married or in a civil partnership.

Contributory benefits – eligibility for which depends in part on a National Insurance contribution record – have never recognised couples who are not married or in a civil partnership. In response to successful legal challenges, however, the Government will introduce legislation to extend contributory bereavement benefits to cohabitants with dependent children.

## Bereavement benefits and unmarried partners

Bereavement benefits provide additional support to people of working age on the death of their husband, wife, or civil partner. Bereavement benefits have been reformed twice in the past 20 years. A new system – comprising the Bereavement Payment, the Bereavement Allowance, and Widowed Parent's Allowance (WPA) – replaced the former system of widows' benefits for new claims from April 2001. The three bereavement benefits were in turn replaced by a new benefit – [Bereavement Support Payment](#) (BSP) – for people bereaved from April 2017. BSP comprises a lump-sum plus monthly payments for up to 18 months, the rates for both being higher for claimants with dependent children.

Partners who are not married or in a civil partnership have never been entitled to bereavement benefits.<sup>69</sup> Someone in receipt of certain bereavement benefits (Widowed Parent's Allowance or Bereavement Allowance) could however lose their entitlement if they started living together with another person as if they were husband and wife, even if they did not remarry; or started living together with someone as though civil partners, even if they did not register their partnership.<sup>70</sup>

### Calls to extend bereavement benefits

Successive governments resisted calls to extend bereavement benefits to unmarried partners on the grounds that a founding principle of the National Insurance system was that all rights to benefit derived from another person's contributions were based on the concept of legal marriage (subsequently extended to include civil partnerships). Practical considerations were also cited, such as the difficulty of ascertaining the nature and depth of the relationship, and the possibility of conflicting claims

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<sup>69</sup> There was, however, an exception in Scotland where a person could claim bereavement benefits if they were married "by cohabitation with habit and repute" even if they had not had a wedding ceremony [Social Security Commissioner's decision R(G) 1/71]. Marriage by cohabitation with habit and repute was abolished from 4 May 2006, by 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. For further details see [DWP Decision Maker's Guide Volume 3, Chapter 10: Evidence of age, marriage and death](#), paras 10209-10229.

<sup>70</sup> These rules continue to apply to people bereaved before April 2017 still receiving Widowed Parent's Allowance

(eg where the spouse was separated when they died, leaving both a surviving unmarried partner and a legal spouse).<sup>71</sup>

Despite representations from the Social Security Advisory Committee, the House of Commons Work and Pensions Committee, and bereavement charities, when it introduced the Bereavement Support Payment (BSP) the Coalition Government said it had no plans to extend the benefit to unmarried partners.<sup>72</sup> Subsequent Conservative governments reaffirmed this position. Remarriage or repartnering following bereavement does not however disqualify a person from receiving BSP, as it is intended as help with the additional costs of bereavement, rather than serving as replacement for the deceased spouse or civil partner's earnings. For practical purposes though, this will have a limited impact since BSP is only payable for up to 18 months.

In January 2020, the DWP published an analysis of the estimated cost of extending BSP to cohabiting survivors, and of the numbers who might be affected. It estimated if BSP was extended to cohabiting survivors **with or without children**, an additional 15,000 claimants per year would be entitled to the support, at an annual additional cost of £50 million. This compared to the DWP's estimate of entitlement rates under the existing rules of 55,000 claimants per year at an annual cost of around £180 million. The estimated annual cost of extending BSP **only to cohabiting partners with dependent children** was £15 million a year.<sup>73</sup>

### Legal challenges

In a judgment of 30 August 2018,<sup>74</sup> by a majority of four to one, the Supreme Court ruled that a refusal to pay Widowed Parent's Allowance to a woman who was not married to her deceased partner was incompatible with Article 14 of the European Convention on Human Rights (ECHR), together with the right to respect for family life under Article 8. The Court held that Widowed Parent's Allowance was targeted at the needs and well-being of children, and the differential treatment of children according to their parents' marital status could not be justified.<sup>75</sup>

The judgment only concerned Widowed Parent's Allowance; the Supreme Court did not consider the Bereavement Support Payment rules. Organisations representing bereaved families argued BSP should be available to people who were unmarried, describing the situation as "blatant discrimination."<sup>76</sup> The previous Work and Pensions Committee also

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<sup>71</sup> See section 7.3 of Commons Library briefing CBP-7887, [Bereavement Support Payment](#)

<sup>72</sup> As above

<sup>73</sup> DWP, [Bereavement Support Payment, forecasts for April 2020 to March 2025: Ad hoc release of Bereavement Support Payment statistics on the effect of extending eligibility to cohabitants](#)

<sup>74</sup> [McLaughlin, Re Judicial Review \(Northern Ireland\) \[2018\] UKSC 48](#)

<sup>75</sup> See also Carla Clarke, '[Bereavement and children: unequal no more?](#)', Welfare Rights Bulletin 266, October 2018

<sup>76</sup> '[Bereaved families denied benefit despite supreme court ruling](#),' Guardian, 15 June 2019



recommended that BSP be extended to bereaved parents who were not married, arguing that the policy unjustly penalised innocent children.<sup>77</sup>

Following the Supreme Court case, the Child Poverty Action Group (CPAG) launched a judicial review of the BSP rules as they applied to unmarried parents, on behalf of two bereaved families (the *Jackson & Others* case). CPAG argued that the Supreme Court's decision in *McLaughlin* should apply to BSP as well as to Widowed Parent's Allowance. The DWP, however, argued that BSP was a different type of benefit to WPA – to help with the costs of bereavement incurred by the surviving parent, rather than a benefit 'for' children – and as such the Supreme Court's reasoning in *McLaughlin* should not apply.

On 7 February 2020, the High Court held that the rules denying payment of the higher rate of BSP to unmarried, cohabiting partners with children were incompatible with the ECHR.<sup>78</sup> Rejecting the DWP's argument that the higher rate BSP was not 'for' children, Mr Justice Holman said that there was "manifestly no reasonable justification whatsoever" for giving the higher rate BSP to families based on marriage or civil partnership, while denying it to those based on cohabitation.

The Government did not contest either judgment. In neither case did the court say what should be done, but instead they both issued a '[declaration of incompatibility](#)' (PDF) with the EHRC under the Human Rights Act 1998, leaving it to the Government and Parliament to decide whether and how legislation should be changed. The DWP said it would lay before Parliament a [Remedial Order](#) to remove the incompatibilities from the legislation governing WPA and BSP by extending these benefits to cohabitants with children.

The [first draft of the Remedial Order](#) was laid before Parliament on 15 July 2021 and the [Joint Committee on Human Rights \(JCHR\) published its report](#) on it on 12 November 2021. The Committee broadly welcomed the proposals, which it said addressed the identified incompatibilities with human rights law, with one exception. It called on the Government to amend the order so that pregnant cohabiting partners would be treated the same as pregnant spouses and civil partners for WPA purposes. The Committee also recommended, amongst other things, that payments of WPA or BSP should be split where more than one person was eligible for them, allowing payments to be backdated as far as 9 February 2016 (rather than 30 August 2018). It also suggested the DWP conduct an "effective publicity campaign" to ensure

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<sup>77</sup> Work and Pensions Committee, [Bereavement Support Payment](#), (PDF) HC 85 2019-20

<sup>78</sup> [Jackson & Ors v The Secretary of State for Work And Pensions \[2020\] EWHC 183 \(Admin\)](#); see also [Bereavement Support Payment: High Court rules in favour of bereaved parents who were cohabiting and their children](#), CPAG press release, 7 February 2020; and [Bereavement benefit rules discriminatory and incompatible with ECHR rights, rules High Court](#), Garden Court Chambers press release, 7 February 2020



people who become eligible for benefits following the changes are aware of them.<sup>79</sup>

On 11 October 2022, the DWP laid before Parliament an amended draft of the Remedial Order, together with an explanatory memorandum and its response to the JCHR report.<sup>80</sup> The Government accepted the Committee's recommendations that pregnant cohabiting partners should be treated the same as pregnant spouses and civil partners, and that retrospective payments of WPA and BSP should be treated as capital for means-tested benefits and disregarded for 12 months and not count towards the benefit cap.

The Government did not, however, accept the Committees' recommendations to allow backdating to February 2016, and to enable payments to be split where more than one person was eligible for them.

Under the [Remedial Order procedure](#), the JCHR must, within a 60-day period starting from 11 October 2022, produce a further report on whether the revised draft Order should be approved. Both Houses must then approve the Remedial Order for it to become law.

On 20 October 2022, the [JCHR launched a call for evidence](#) from interested groups and individuals on the draft Bereavement Benefits (Remedial) Order 2022. The Committee is seeking views on, among other things, whether the draft Order addresses the incompatibility identified by the courts, and whether there are any other reasons why it should not recommend that the Order be approved. The deadline for submissions is 11 November 2022.

### **Unmarried partners without dependent children**

The Remedial Order will only extend bereavement benefits to cohabiting partners with dependent children. Cohabiting partners without dependent children will remain ineligible for the Bereavement Support Payment.

In its report on the first draft of the Remedial Order, the JCHR said it considered there was a "real risk the legislation governing BSP will remain incompatible with Article 14 ECHR, as read with Article 8 and Article 1 of the First Protocol, as it continues to discriminate between partners without children who are and are not in legal unions."<sup>81</sup>

In its response, the DWP noted the Committee's view on the risks, but observed that the Committee had not made any recommendation for changes to the Remedial Order regarding people without children. It added: "No such

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<sup>79</sup> [Proposal for a draft Bereavement Benefits \(Remedial\) Order 2021: discrimination against cohabiting partners](#), HC 594 2021-22

<sup>80</sup> DWP, [Policy paper: The Bereavement Benefits \(Remedial\) Order 2022: Explanatory memorandum](#)

<sup>81</sup> [Proposal for a draft Bereavement Benefits \(Remedial\) Order 2021: discrimination against cohabiting partners](#), HC 594 2021-22, para 77

changes are made and the Government does not believe that any such changes would be appropriate."<sup>82</sup>

### Further information

The Child Poverty Action Group's website has information on the legal challenges to the bereavement benefit rules and on subsequent developments.<sup>83</sup> The Childhood Bereavement Network, which has been [campaigning on the issue of unmarried cohabiting partners and bereavement benefits](#), also has information on its website on what the developments mean for families.<sup>84</sup>

On 25 October 2022, the Childhood Bereavement Network wrote to the DWP [seeking clarification on various points about the final draft Remedial Order \(PDF\)](#).

## 3.9

## 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.

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<sup>82</sup> [Government response to representations made on proposals for a draft Bereavement Benefits \(Remedial\) Order 2021, including the eighth report from the Joint Committee on Human Rights, Session 2021-22 \(HC 594, HL 91\)](#), updated 14 October 2022, para 16.1

<sup>83</sup> See [Bereavement Support Payments for unmarried parents](#) (accessed on 3 November 2022)

<sup>84</sup> See [Cohabiting parents and bereavement benefits](#), (accessed on 3 November 2022); and [How do the recent court cases about widowed parents and bereavement benefits affect me?](#) (PDF, 24 August 2022)

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## 4 Cohabitation agreements

Cohabitants may enter into a cohabitation agreement, and this can act as encouragement for them to consider what they want to happen if the relationship ends.

Advicenow has published, [How to make a living together agreement](#).<sup>85</sup> This comments on whether a living together agreement would be legally binding:

Living together agreements have a slightly odd status in law. They aren't binding unless you write them as a formal legal deed, but the court will usually follow them as long as what you agreed is fair, and you were both honest about your finances when you made the agreement. A court is even more likely to uphold the agreement if you both had some independent legal advice, separately, about what you were doing before signing the agreement.

If you want to ensure it is binding, you can make it in the form of a deed. It is advisable to do this if you want to make sure that the agreement about the ownership of the home is binding, for instance, or if one of you is promising to pay something to the other. We advise you to each **take independent legal advice** if you are going to make the agreement in deed form. ...<sup>86</sup>

Further information is available from the Law Society, [Moving in together: getting a cohabitation agreement](#).<sup>87</sup>

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<sup>85</sup> Advicenow, [How to make a living together agreement](#), December 2021

<sup>86</sup> As above, section 4

<sup>87</sup> Law Society, [Moving in together: getting a cohabitation agreement](#) (accessed 19 October 2022)

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## 5 Law Commission report

### 5.1 New statutory scheme recommended

In July 2007, following consultation, the Law Commission published a report, [Cohabitation: the financial consequences of relationship breakdown](#) (PDF).<sup>88</sup> 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. Instead, the Report recommended the introduction of a new scheme of financial relief on separation based on the contributions made to the relationship by the parties. First consideration would be given to the welfare of 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.<sup>89</sup>

Moving in with someone, by itself, would not automatically give rise to any entitlement to a remedy. The scheme would be available only to eligible cohabiting couples who are neither married to each other nor civil partners. Couples who have had a child together or who have lived together as a couple in a joint household for a minimum period would be eligible. The Law Commission recommended the minimum period for couples without children should be set within a range of two to five years.<sup>90</sup>

Couples would be able to opt out of the scheme through a written agreement. The scheme would then not apply unless enforcement of that agreement would be manifestly unfair, given the circumstances when the agreement was made or any unforeseen change of circumstance which had arisen since then.<sup>91</sup>

The [key features of the scheme were summarised](#) (PDF) in the Executive Summary.<sup>92</sup> This sets out how financial relief for cohabitants on separation would differ from the provision available on divorce:

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

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<sup>88</sup> Law Commission, [Cohabitation: the financial consequences of relationship breakdown](#) (PDF), Cm 7182, Law Com No 307, 31 July 2007

<sup>89</sup> Law Commission press release, New remedies for cohabitants – different from divorce, 31 July 2007

<sup>90</sup> As above

<sup>91</sup> Law Commission, [Cohabitation: The Financial Consequences of Relationship Breakdown Executive Summary](#) (PDF), Law Com No 307 (Summary), 31 July 2007, para 1.35

<sup>92</sup> Law Commission, [Cohabitation: The Financial Consequences of Relationship Breakdown Executive Summary](#) (PDF), Law Com No 307 (Summary), 31 July 2007

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.

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.<sup>93</sup>

The Law Commission said the proposed scheme aimed to be fair to both parties:

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.

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.<sup>94</sup>

The late Stuart Bridge, the then Commissioner leading the project, said the scheme would not undermine marriage, adding:

We consider that our scheme strikes the right balance between the need to alleviate hardship and the need to protect couples' freedom of choice.<sup>95</sup>

Further information, with links to associated documents, is available on the [Law Commission webpage, Cohabitation](#).<sup>96</sup>

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<sup>93</sup> As above, paragraphs 1.17-18

<sup>94</sup> As above, paragraphs 1.19-20

<sup>95</sup> Law Commission press release, New remedies for cohabitants – different from divorce, 31 July 2007

<sup>96</sup> Accessed 19 October 2022

## 5.2

# Government response

## Labour Government

On 6 March 2008, Bridget Prentice, who was then a junior Justice Minister, announced no action would be taken to implement the Law Commission's recommendations until research on the cost and effectiveness of the scheme recently implemented in Scotland could be considered.<sup>97</sup>

## Coalition Government

On 6 September 2011, Jonathan Djanogly, then a junior Justice Minister, announced that, having carefully considered the Law Commission's recommendations, together with the outcomes of research on the Family Law (Scotland) Act 2006, the then Government did not intend to reform the law relating to cohabitation at that time:

The findings of the research into the Scottish legislation do not provide us with a sufficient basis for a change in the law. Furthermore, the family justice system is in a transitional period, with major reforms already on the horizon. We do not therefore intend to take forward the Law Commission's recommendations for reform of cohabitation law in this parliamentary term.<sup>98</sup>

## Conservative Government

In April 2018,<sup>99</sup> and again in November 2018,<sup>100</sup> Lucy Frazer, who was then junior Justice Minister, said the Government would consider how to proceed in relation to proposals made by the Law Commission in the context of any further reforms to the family justice system.

In its [2022 report, \*The rights of cohabiting partners\*](#), the House of Commons Women and Equalities Committee said:

When we spoke to Tom Pursglove MP, former Minister for Justice, he would not commit the Government to cohabitation law reform. However, he told us that he would be "very willing" to engage with the Law Commission about its recommendations and explore whether they are still appropriate and fit for purpose.<sup>101</sup>

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<sup>97</sup> [HC Deb 6 March 2008 c122WS](#)

<sup>98</sup> [HC Deb 6 September 2011 cc15-16WS](#)

<sup>99</sup> [PQ 138023 \[on Cohabitation\], 30 April 2018](#)

<sup>100</sup> [PQ 195548 \[on Cohabitation\], 29 November 2018](#)

<sup>101</sup> Women and Equalities Committee, [The rights of cohabiting partners](#), (PDF), 4 August 2022, HC 92, para 51

In its response to that 2022 report, the Government said the law relating to the relationship breakdown of cohabiting couples could not be considered outside the context of any wider reform to the law of marriage.<sup>102</sup>

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<sup>102</sup> Women and Equalities Committee, [The rights of cohabiting partners: Government response to the Committee's Second Report](#), (PDF), 1 November 2022, HC 766, p iv. Further information about the Government's response to the Women and Equalities Committee is set out in the next section of this briefing paper

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## 6 Calls for reform

For a number of years, calls have been made from both within and outside of Parliament for reform of the law relating to cohabitation. Some examples are set out below.

### 6.1 Women and Equalities Committee inquiry

In April 2021, the House of Commons [Women and Equalities Committee launched an inquiry](#) into the rights of cohabiting partners.<sup>103</sup>

On 4 August 2022, the Committee published its report, [The rights of cohabiting partners](#).<sup>104</sup> As well as setting out recommendations for reform, the report includes information about cohabitation law reform in other jurisdictions.<sup>105</sup> It also details concerns raised about reforming the law in England and Wales including the risk of undermining marriage; gender stereotyping that portrays the woman in a relationship as disadvantaged; and the need to preserve the autonomy of couples.<sup>106</sup>

On 1 November 2022, the Committee published a further report, which sets out the [Government's response](#) (PDF).<sup>107</sup>

### Recommendations for reform and Government response

#### Public awareness campaign

The Committee recommended the Government should launch a public awareness campaign to highlight the legal distinctions between getting married, forming a civil partnership and living together as cohabiting partners.<sup>108</sup>

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<sup>103</sup> [Inquiry launched into the rights of cohabiting partners, the fastest growing family type in England and Wales - Committees - UK Parliament](#), 28 April 2021 (accessed 19 October 2022)

<sup>104</sup> Women and Equalities Committee, [The rights of cohabiting partners](#), (PDF), 4 August 2022, HC 92

<sup>105</sup> As above, paras 34-37

<sup>106</sup> As above, paras 40-47

<sup>107</sup> Women and Equalities Committee, [The rights of cohabiting partners: Government response to the Committee's Second Report](#), (PDF), 1 November 2022, HC 766

<sup>108</sup> Women and Equalities Committee, [The rights of cohabiting partners](#), (PDF), 4 August 2022, HC 92, para 24



The Government partially accepted this recommendation.<sup>109</sup> It agreed that it is concerning that so many people believe erroneously that there is such a thing as a 'common law marriage'. However, noting the Department for Education's existing statutory guidance on relationships education which covers this issue, the Government said it did not consider a national campaign necessary. The Government committed to take further action to consider the best ways to raise awareness within the context of existing frameworks.<sup>110</sup>

### Targeted information campaign

The Committee further recommended the Government should undertake a targeted information campaign aimed at women in religious communities where religious-only marriages are commonplace, highlighting the risks of not having a ceremony which meets legal formalities.<sup>111</sup> This type of campaign, it said, would need to consider the Law Commission's recommendations for weddings law reform.<sup>112</sup>

The Government partially accepted this recommendation. It said the recent Law Commission report on weddings law included recommendations to ensure that fewer weddings conducted according to religious rites result in a marriage that the law does not recognise. The Government said it would consider all 57 Law Commission recommendations fully and would publish a response to the weddings law report "in due course". The Government added it would "consider the question as to whether it is premature to carry out a targeted information campaign before a decision is made on what marriage law reform, if any, will be pursued."<sup>113</sup>

### On breakdown of the relationship

The Committee recommended reform of family law "to better protect cohabiting couples and their children from financial hardship in the event of separation" while recognising the status of marriage:

The law should fully recognise the social reality of modern families and protect people regardless of whether they are married, in a civil partnership, or in long-term cohabiting relationships. However, law reform should recognise that marriage continues to hold an important social and religious status in England and Wales.<sup>114</sup>

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<sup>109</sup> Women and Equalities Committee, [The rights of cohabiting partners: Government response to the Committee's Second Report](#), (PDF), 1 November 2022, HC 766, p iii

<sup>110</sup> As above

<sup>111</sup> Women and Equalities Committee, [The rights of cohabiting partners](#), (PDF), 4 August 2022, HC 92, para 32

<sup>112</sup> [Weddings | Law Commission](#) provides further information (accessed 19 October 2022)

<sup>113</sup> Women and Equalities Committee, [The rights of cohabiting partners: Government response to the Committee's Second Report](#), (PDF), 1 November 2022, HC 766, pp iii-iv

<sup>114</sup> Women and Equalities Committee, [The rights of cohabiting partners](#), (PDF), 4 August 2022, HC 92, paras 63-64

The Committee recommended the introduction of an opt-out cohabitation scheme as proposed by the Law Commission in its 2007 report.<sup>115</sup> It considered this to be “a pragmatic approach for reforming cohabitation law”:

The Law Commission’s proposed approach has the potential to:

- protect eligible cohabitants who are economically vulnerable;
- preserve individual autonomy;
- maintain a distinction with marriage and civil partnership; and
- provide certainty about who qualifies as a cohabitant.<sup>116</sup>

The Committee further recommended the Government should make a commitment to publishing draft legislation for pre-legislative scrutiny in the 2023–24 Session of Parliament and that, in the meantime, the Ministry of Justice should commission a refresh review of the Law Commission’s 2007 proposals to see if they need updating.<sup>117</sup>

The Government rejected this recommendation saying ongoing work on the law of marriage and divorce, which was directly relevant to issues concerning cohabitants, must conclude before consideration of any change to the law in respect of the rights of cohabitants on relationship breakdown. The Government stated it could not commit to publishing draft legislation for pre-legislative scrutiny in the 2023–24 session of Parliament.

The Government also said it could not fully re-consider the Law Commission’s 2007 recommendations before a review on financial provision for divorce had reached its conclusions and made its recommendations, adding:

This is because any new legal rights and obligations afforded to cohabitants would necessarily need to be considered against a baseline of rights afforded to married parties or civil partners on divorce or dissolution”.<sup>118</sup>

The Government reiterated that it was currently considering the Law Commission’s recommendations for reforms to modernise marriage law. It said the law relating to the relationship breakdown of cohabiting couples could not be considered outside the context of any wider reform to the law of marriage.<sup>119</sup>

In addition, the Government noted the Law Commission’s recommendations were now 15 years’ old, and considered they could not be implemented without a review of the 2007 report, nor without a fresh consultation, taking

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<sup>115</sup> See section 5 of this briefing paper

<sup>116</sup> Women and Equalities Committee, [The rights of cohabiting partners](#), (PDF), 4 August 2022, HC 92, para 63

<sup>117</sup> As above, para 64

<sup>118</sup> Women and Equalities Committee, [The rights of cohabiting partners: Government response to the Committee’s Second Report](#), (PDF), 1 November 2022, HC 766, p iv

<sup>119</sup> As above

into account changes that had been made in the meantime or that might be made in the future:

The Government believes that any future review or fresh consultation of the 2007 proposals would need to take into account any changes which may be made to the law on marriage and the law of financial provision on divorce. A future review and consultation would also need to take into account the fact that civil partnerships are now available for both opposite-sex and same-sex couples, allowing couples who do not wish to marry to enter into a legally recognised relationship which provides the same legal rights and responsibilities as marriage.<sup>120</sup>

### On death of a partner

- The Women and Equalities Committee called for the immediate implementation of the Law Commission's 2011 recommendations concerning intestacy and family provision claims for cohabitants.<sup>121</sup> The Government rejected this recommendation saying reform would need to be considered as part of the wider approach to reform of the law on cohabitation rights, so that a consistent approach is taken. The Government said it would take a cautious approach in this area and would want to consult ahead of pursuing any reforms. It noted that a cohabitant could make provision for their partner in their will and that the law already enabled cohabitants to make family provision claims.<sup>122</sup>
- The Committee also expressed concern that many cohabitants rely on trustees' discretion to access their deceased partner's pension, "often after being asked to supply disproportionate amounts of evidence compared to married or civil partnered claimants". It recommended the Government should immediately publish guidelines on how pension schemes should treat surviving cohabiting partners, including what those partners are entitled to, and what evidence they will need to access survivor's pensions.<sup>123</sup> The Government accepted this recommendation in principle and said it would consider "whether non-legislative broad guidance would be appropriate, having assessed the matter with the Pensions Regulator and key stakeholders first".<sup>124</sup>
- The Committee recommended that the Government should immediately review the inheritance tax regime, so it is the same for cohabiting partners as it currently is for married couples and civil partners.<sup>125</sup> HM Treasury rejected this recommendation. It said the inheritance tax

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<sup>120</sup> As above, pp iv-v

<sup>121</sup> Women and Equalities Committee, [The rights of cohabiting partners](#), (PDF), 4 August 2022, HC 92, para 73

<sup>122</sup> Women and Equalities Committee, [The rights of cohabiting partners: Government response to the Committee's Second Report](#), (PDF), 1 November 2022, HC 766, p v

<sup>123</sup> Women and Equalities Committee, [The rights of cohabiting partners](#), (PDF), 4 August 2022, HC 92, para 73

<sup>124</sup> Women and Equalities Committee, [The rights of cohabiting partners: Government response to the Committee's Second Report](#), (PDF), 1 November 2022, HC 766, p v

<sup>125</sup> Women and Equalities Committee, [The rights of cohabiting partners](#), (PDF), 4 August 2022, HC 92, para 73

treatment of married couples and civil partners “reflects their unique legal relationship” but it would keep inheritance tax, including the issue of cohabitation, under review.<sup>126</sup>

## 6.2 Early Day Motion

On 22 November 2017, Caroline Lucas (Green Party) tabled an EDM, [Legal rights for cohabittees who separate](#):

That this House notes that there are currently more than six million people in the UK who live together without being married or in a civil partnership, and that such cohabittees are the fastest growing family type; is concerned that, in England and Wales, such cohabittees have little or no legal protection or ability to access support if their relationship breaks down and they separate; further notes that countries such as Australia, Canada and Scotland legally recognise cohabitation relationships and provide legal protection; notes that Resolution's Cohabitation Awareness Week takes place from 27 November to 1 December 2017 to help counter the widely held belief that cohabittees are protected under so-called common law marriage, and highlight the benefits of cohabitation, separation and living together agreements; and calls on the Government to act upon Resolution's proposal that cohabittees meeting eligibility criteria indicating a committed relationship have a legal right to apply to the courts for certain financial orders if they separate.<sup>127</sup>

The EDM gained 27 signatures.

## 6.3 Private Members' Bills

Private Members' Bills intended to establish a framework of rights for cohabitants on separation and/or death have been introduced on several occasions and in both Houses. None of these bills completed their passage through Parliament.

For example, in the 2008-09 Parliamentary session, the late Lord Lester of Herne Hill (Liberal Democrat), introduced the [Cohabitation Bill \[HL\] 2008-09](#),<sup>128</sup> and Mary Creagh (Labour) sought leave, under a Ten Minute Rule motion, to introduce the [Cohabitation \(No 2\) Bill](#).<sup>129</sup>

Lord Marks of Henley-on-Thames (Liberal Democrat) has introduced a Cohabitation Rights Bill [HL] in a number of Parliamentary sessions, most recently the [Cohabitation Rights Bill \[HL\] 2019-21](#), which was introduced on

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<sup>126</sup> Women and Equalities Committee, [The rights of cohabiting partners: Government response to the Committee's Second Report](#), (PDF), 1 November 2022, HC 766, p vi

<sup>127</sup> EDM 582 of 2017-19

<sup>128</sup> HL Bill 8 of 2008-09

<sup>129</sup> [HC Deb 25 March 2009 cc309-11](#)

6 February 2020.<sup>130</sup> A previous, similar bill had its second reading on 15 March 2019.<sup>131</sup> The Bill did not make any further progress. A [House of Lords Library briefing](#), prepared in advance of Second Reading, provides information about this bill.<sup>132</sup>

## 6.4 Resolution campaign

Resolution, a membership organisation for family law professionals,<sup>133</sup> “is campaigning for cohabiting couples to have at least basic rights on relationship breakdown or death of their partner and is also working to raise awareness so cohabiting couples can take measures to protect themselves”.<sup>134</sup>

## 6.5 Opposition to proposals: Baroness Deech

The crossbench peer, Baroness Deech, has expressed opposition to proposals to reform the law relating to cohabitation. In November 2009, Baroness Deech delivered a Gresham College lecture, [Cohabitation and the law](#), in which she argued against giving new rights to cohabitants.<sup>135</sup> In House of Lords debate in March 2019, Baroness Deech said people who choose to cohabit might wish to be “left alone” by the law:

If people will not marry and not enter into a partnership, clearly they wish to be left alone by the law and not boxed into a corner.

... Cohabitation is growing in popularity, maybe because it avoids the heavy financial penalties of a failed marriage and divorce. ... It is often said that cohabitants are as committed to each other as married people and that that justifies similar legal treatment, but “commitment” is not the word. Commitment lasts as long as it lasts. What couples need and respect is the express assumption of responsibility, and studies have shown that drifting into a relationship does not mean the same to the partners, especially the men, as the deliberate assumption of responsibility for each other.<sup>136</sup>

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<sup>130</sup> HL Bill 97 of 2019-21

<sup>131</sup> HL Bill 34 of 2017-19, [HL Deb 15 March 2019 cc1258-76](#)

<sup>132</sup> LLN-2019-0030

<sup>133</sup> [About Resolution | Resolution](#) (accessed 26 October 2022)

<sup>134</sup> Resolution, [Cohabitation](#) (accessed 19 October 2022)

<sup>135</sup> Baroness Deech of Cumnor, [Cohabitation and the Law](#), Gresham College (accessed 27 April 2021)

<sup>136</sup> [HL Deb 15 March 2019 c1263](#)

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## 7 Scotland and Northern Ireland

### 7.1 Scotland

Under the [Family Law \(Scotland\) Act 2006](#), which came into force in May 2006, cohabitants (opposite-sex and same-sex couples) may make limited claims against each other in the event of their relationship terminating or on the death of one cohabitant. However, couples living together do not have the same rights as married couples and civil partners.

Citizens Advice Scotland provides further information:

- [Living together and opposite-sex marriage: legal differences](#);
- [Living together and same-sex marriage: legal differences](#).<sup>137</sup>

### 7.2 Northern Ireland

The NI Direct website provides information about the status and rights of people who live together:

Most people think that after they've been living with their partner for a couple of years, they become 'common law husband and wife' with the same rights as married couples. This is not the case. There is no such thing as 'common law marriage'.

In fact, couples who live together, also called co-habitants, have hardly any of the same rights as married couples or civil partners.

Legal and financial problems can arise if you decide to separate, or if one of you dies.

While you do have legal protection in some areas, you should take steps to protect yourself and your partner.

Speak to a solicitor and get legal advice. You should also make sure that both you and your partner make a will.<sup>138</sup>

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<sup>137</sup> Links accessed 19 October 2022

<sup>138</sup> NI Direct, [Find out your rights](#) (accessed 19 October 2022)

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