Time's up for our outdated cohabitation laws

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The government has a responsibility to address the discriminatory impact of the law relating to cohabitants

This year marks 100 years since (some) women were finally given the right to vote, with the passage of the Representation of the People Act 1918. The years since the first ballots were cast by women on 14 December 1918 have seen unprecedented social and legal change, which on the whole has led to greater equality between the sexes. In terms of family law, the position of women was improved with the 1923 Matrimonial Causes Act which created equality in divorce for the first time when the requirement for women to prove "aggravated adultery" (ie evidence of an aggravating factor such as bigamy or incest) was removed. In 1937 a further Matrimonial Causes Act extended the grounds for divorce beyond adultery for the first time by adding two years' desertion, cruelty and insanity – making it easier for many women to leave abusive husbands and possible for women to remarry where they had been abandoned. Social change led to the Church Commission recommending in 1966 that divorce should be allowed when a marriage had broken down, which laid the basis for the ground-breaking 1969 Divorce Reform Act, introducing the concept of "irretrievable breakdown". The Matrimonial Causes Act 1973 consolidated the earlier legislation on divorce and financial remedies, setting them out in a single statute. In 2004 the Civil Partnerships Act allowed same-sex couples to register their relationship and have access to the same financial remedies on dissolution as married couples on divorce, and the Marriage (Same Sex Couples) Act 2013 has finally allowed same-sex couples to marry.

But the recent case of *Owens v Owens* [2018] UKSC 41 has highlighted that the underlying law in relation to divorce hasn't been significantly reformed in 50 years. Hopefully the silver lining to the horrible injustice experienced by Tini Owens it is that there now appears to be real momentum behind the case for no-fault divorce. Mrs Owens's case was unusual because in the vast majority of divorces and dissolutions it is possible to agree the content of a behaviour petition, opening the door to a host of legal rights and remedies that do not discriminate between the roles that the parties have taken during their marriage and placing equal value on financial and non-financial caring contributions within the relationship.

The same cannot be said for those who do not marry or enter a civil partnership. For cohabitees our legal system still allows the more economically powerful party in a relationship to simply walk away after what may be many years together. Decisions made during the relationship, often about bringing up children or elderly relatives, may mean that the economically weaker party's future financial position has been significantly compromised. The financially vulnerable cohabitee has no ability to pursue a claim for a share of assets in the other person's sole name, unless they can rely on complex trust principles to establish a beneficial interest. It is not possible to make a claim in relation to pensions to compensate one person for not having been able to provide separately for their retirement because they haven't been working. Nor can they make a claim for maintenance save for the upkeep of a child. Even if there are children and it is possible to seek financial provision for their benefit, this provision usually ends when the child reaches 18 or 21. As women still tend to undertake the majority of caring responsibilities in relationships, the lack of effective remedies disproportionately affects them and therefore the present state of the law is arguably discriminatory.

Last year ONS figures showed that the number of cohabiting couples had more than doubled between 1996 and 2017 to 3.3 million, and that it is the fastest-growing family type. Shortly after those figures were released readers will recall that Resolution undertook a national poll showing that two-thirds of people in cohabiting relationships were unaware that there is no such thing as a common law marriage in England & Wales. Furthermore, 79% of the general public agreed there is a need to provide greater legal protection for unmarried couples upon separation, and 84% considered that the government should take steps to ensure unmarried cohabitants are aware they do not have same legal protection as married couples.

We are lagging behind our neighbours in Scotland and Ireland who have introduced legal remedies for couples living together since we entered the new millennium. In fact, over half of EU countries have adopted laws on cohabitation, as have Australia and Canada.

Opponents of reform in this area have suggested that giving cohabitants additional remedies when a relationship breaks down undermines civil liberties by imposing a *de facto* marriage on them, and even that the case for reform reinforces negative stereotypes of women as victims. However, this assumes that a cohabiting relationship is the free choice of both parties. During my practice I have seen that this is sometimes not the case, with the economically stronger partner refusing to marry. More often than not though, the relationship simply evolves gradually from one that may have been quite separate economically in the beginning to one which is wholly interdependent with the passage of time, and often with the arrival of children. Some couples may have consciously chosen not to marry because of ideological opposition to the patriarchal origins of the institution of marriage, as with Rebecca Steinfeld and Charles Keidan, but does that mean they should be forced to suffer, ironically, the consequences of reliance on an outdated and discriminatory legal system in the event that their relationship breaks down?

In any event, this view is completely at odds with the findings of Resolution's survey, with its verification of the persistence of the common law marriage myth, demonstrating that people believe that living together, particularly where there are children or after a certain period of time, creates rights and responsibilities.

This view is also inconsistent with the approach taken by the family court in financial remedy proceedings within divorce, which recognises the interdependence cohabitation brings by "adding on" periods of pre-marital/civil partnership cohabitation when determining the length of the relationship for the purpose of financial remedies, a fact that can significantly alter the distribution of income and capital. I am certainly not advocating this, but if we follow the rationale that couples consciously choose to opt in or out of the economic consequences of marriage or civil partnership, then any period of cohabitation should not be a relevant consideration when determining rights and responsibilities on breakdown of the marriage or civil partnership.

There are now a number of different possible models for reform operating worldwide that we can draw inspiration from when devising our own system: the Scottish approach of economic advantage and disadvantage, or the broader, more discretionary needs-based approach of the Republic of Ireland for starters. Resolution's *Manifesto for Family Law* calls for "at least basic rights for couples who live together if they separate", giving cohabitants – who meet eligibility criteria demonstrating a committed relationship – the right (albeit on a limited basis) to apply for similar financial orders to that which are available on divorce. This would be with the ability to "opt out" of the scheme by making express alternative provision – thus answering the individual autonomy arguments of some opponents of reform. It is not an excuse to continue to do nothing and point to the relatively small number of cases that have been brought in Scotland and Ireland under the new legislation – that simply demonstrates the work that needs to be done to promote the existence of any new scheme when it is introduced. In any event it may be that the simple existence of the new legislation may encourage couples to make better provision for one another on separation.

Reform of the law in England & Wales is advocated by Caroline Lucas MP, who proposed an Early Day Motion in Parliament last November that was signed by a number of MPs, and Sophie Walker, leader of the Women's Equality Party, who says the party's mission is:

> "to take aim at the structural barriers to women's equality, to work with other political parties to adopt our policies, and to steal their votes until they do. Women are more likely to be worse off financially than men, because the sectors women are socialised to work in are undervalued, and because we still do the bulk of unpaid care for children, parents and disabled relatives. That means women are almost always financially vulnerable in relationship breakdowns unless they are protected by the law. It is ridiculous in 2018 that marriage is still so prized by the Westminster government that it has not enacted legal protections for cohabiting couples. That is why WE campaigned in our 2017 manifesto to enact those protections for cohabiting couples who have children or have been together for more than two years, including access to mediation, advice and support. This would include protecting those married under religious law without having been married in a civil ceremony."

The Supreme Court has recently delivered its judgment in the *Steinfeld and Keidan* case, declaring that not making civil partnerships available to opposite-sex (or "different-sex" in the language of Lady Hale *et al*) couples is incompatible with the ECHR. Criticising the government's failure to act, the court specifically referred to the "serious fiscal disadvantage" a couple may suffer if one of them dies before the relationship is formalised. The same can be said if the relationship were to break down. We are still waiting for the government's response to *Steinfeld and Keidan*. It has been suggested they may decide to abolish civil partnerships altogether. However, even if civil partnerships are made available to all, thus providing an alternative for those who wish to formalise their relationship, it will do nothing to address the much more widespread injustice experienced by those who have not married or entered into a civil partnership, for a whole host of possible reasons, leaving them disadvantaged on the breakdown of their relationship.

Hopefully, with the passage of time and with greater uptake of shared parenting and shared caring responsibilities more generally, the economic impact of decisions made together may be shared if their relationship then breaks down. However, until we reach that point, the government has a responsibility to address the discriminatory impact of our outdated law relating to cohabitants and bring the rights and responsibilities of unmarried couples squarely into the 21st century.

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