

## Cohabiting couples finally set for a legal embrace

### ANALYSIS:

THEY ARE the fastest-growing family unit – yet, in the eyes of the law, they are invisible. Latest figures show the number of cohabiting couples has leapt from 31,300 in 1996 to 121,800 in 2006. They now account for one in 12 family units. All indications are that the number is set to keep rising. Among people aged 25, for example, twice as many people cohabit as are married, writes

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It's clear, then, that the way we live is changing rapidly. But our laws have yet to catch up.

Many unmarried couples living together for a long time often assume that they have a degree of legal protection. They don't. Neither the length of a relationship nor the birth of a child results in any legal rights being attributed to cohabiting couples.

Family lawyers regularly report the injustice and financial hardship suffered when the relationships of cohabiting couples break down, sometimes after decades and having had children together.

However, this gap in the law is set to change. The Civil Partnership Bill contains proposals aimed at giving legal protections to cohabitants at the end of a relationship.

Most interest has focused on the Bill's provisions for same-sex civil partnerships, with the debate much more muted on plans for a redress or "safety net" scheme for cohabiting couples.

While it is welcomed by many, there is increasing unease among academics and some family lawyers over the proposed laws. The lack of public debate on the proposals – arguably one of the most significant pieces of social legislation in years – may well see legal liabilities being imposed on a large segment of the population without their realising it.

Others say serious flaws in its wording could unleash a torrent of legal disputes once the Bill becomes law.

The Bill seeks to establish:

- A redress scheme for cohabiting couples (same-sex and opposite sex) who are not married. The scheme may be activated at the end of a relationship, whether by break-up or death.
- It will allow for a "financially dependent" cohabitant to apply to court for redress. The orders that can be sought include a transfer of property, a lump sum, periodic payments and a share in the other person's pension. If the relationship ends through death, the surviving cohabitant can make a claim on the estate.
- In deciding whether to make the order, the court must consider a number of issues. These include the length of the relationship and the level of financial dependence between the couple; the contribution or sacrifice that each has made for the welfare of the other, etc.
- For those who want to opt out of the redress scheme, couples must register a "cohabitant agreement" which regulates the shared financial affairs of the couples. These are valid only if the cohabitants have each received independent legal advice or have received legal advice together and have waived the right to independent legal advice, have signed the agreement, and it complies with the generality of contract law.

While there has been little public debate over the legislation recently, it has been in the pipeline for at least the past decade. In December 2000, the Government requested the Law Reform Commission of Ireland to examine the rights and duties of cohabitants as part of its second major programme of legal reform. Following a consultation document, the commission published a final report in 2006

setting out three main models for policy-makers to consider. These were an “opt in” registration scheme; private contract arrangements; and a redress scheme.

The third option – a presumptive rights redress scheme – is largely what emerged in the Civil Partnership Bill that is currently before the Oireachtas.

The arguments in favour of the current legislation are generally that protections for unmarried couples are long overdue.

“I see it as a positive move because many of the people in need of protection have been in relationships for a very long time and made very big sacrifices,” says Muriel Walls, a family lawyer who was involved in the Law Reform Commission report.

She says the legislation is flexible enough that if a couple want to live together in a “casual, non-legal situation”, they can opt out of the system by drawing up a cohabitants’ agreement.

“The motto is that living with someone is not a legal-free zone – there are consequences to it,” according to Ruth Deech, professor of law at Gresham College in the UK and a vocal critic of legal duties for cohabitants.

“There should be a corner of freedom where couples may escape family law with all its difficulties. Cohabitation is not marriage, now or historically, and people ought to have the freedom to try alternative forms of relationships, not to have one form imposed on them, especially one that treats women as perpetual dependants.”

John Mee, a law professor at UCC, takes a different view. He says there is a need for a safety net scheme – but the current legislation should not be, “people who don’t satisfy this requirement – eg, because they still have a job even though they’ve lost all their savings – will not be helped by the Bill.”

He adds: “The immediate priority should be to get the civil partnership aspect of the Bill right. The well-meaning, but seriously flawed, redress scheme should be scrapped and any immediate reform should be targeted on specific areas such as succession and taxation.”

One of his biggest objections to the legislation is the “arbitrary distinctions” it makes which could exclude people who need protection. This could create a false sense of security for cohabitants who may assume that the new law will protect them and then fail to take steps to safeguard their separate property rights.

The failure of the Bill to address issues such as children’s and parental rights involving children has also been criticised. Geoffrey Shannon, family law specialist, has pointed out that children are “airbrushed” from the proposed laws. While a person could acquire rights as a cohabitant after two years by having a child, no further provision for the child is made in the legislation.

Whatever the outcome of the current Bill before the Oireachtas, change of some kind is inevitable. While Irish society has changed dramatically in recent years, family law has yet to catch up.

## **Cohabiting Couples:**

### **How They Are Recognised In Other Countries**

The proportion of cohabiting couples has increased right across Europe and developed countries in recent decades. However, there is a large diversity over how different countries legally recognise unmarried couples.

Nordic countries such as Denmark, Sweden and Finland have the highest proportion of cohabiting couples across the EU. These countries tend to have a form of registered partnership which a couple

chooses to enter, or an “opt in” system.

In contrast, Ireland is considering a presumptive rights regime, or an “opt out” system. Australia and New Zealand are the closest countries to Ireland’s proposed system in terms of how their cohabiting arrangements operate.

Their schemes are triggered following the death or break-up of a relationship and provide for a dependent partner to access a statutory redress scheme.

Also, in more recent times, Scotland has made provision for a similar automatic system which makes provision for cohabitants under laws passed in 2006.

In one of the first cases to come before the courts in Scotland, a legal secretary was awarded £14,500 to be paid by her former partner and cohabitant. This was as a result of the financial loss and the economic burden experienced by the woman who was the main carer for the couple’s two children.

England, meanwhile, has detailed proposals for a similar regime but has decided to wait and see how the Scottish approach will operate.

Elsewhere across the EU, Portugal and the Netherlands also have significant legislation giving automatic rights to cohabiting couples.