

Cohabitation: it's time to take legal reform seriously

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Credit: AI-generated image ([disclaimer](#))

We live our lives differently today. Marriage is no longer the go-to choice for couples. The [marriage rate](#) is now the lowest since records began in 1862 and many couples are instead cohabiting. The unmarried family has become the [fastest-growing family type](#) in the UK.

The [number](#) of cohabitants has grown from around 1.5 million in 1996 to around 3.6 million in 2021, representing an increase of 144%. That amounts to one in five [couples](#) today and that figure is predicted to rise to one in four by 2031.

Despite this trend, it is alarming that cohabiting couples in England and Wales are often left without legal protections when they break up. Take the hypothetical example of Tom and Mary who have cohabited for ten years in a house owned by Tom and have a child together. Unlike their married or civilly partnered counterparts, if they split up, their home and other property would not be divided by the courts based on what is fair, having regard to the financial needs of the parties and contributions to the relationship. While child support would be payable, Mary herself would not be entitled to any maintenance.

Tom and Mary would be largely treated as two unconnected individuals subject to the complexities and costs of property and trusts law instead. If no agreement was reached between the two that ownership of the home was to be shared and Mary had not made financial contributions to its acquisition, she would be left without a remedy. Work in the home and looking after their child would not make a difference in the eyes of the law as it stands.

Of course, couples like Tom and Mary can create wills, purchase property jointly or enter contracts, but in practice many people do not get around to it. Life is messier than that.

The myth of common law marriage

What exacerbates this issue is that many couples believe they do not need to put their legal affairs in order and are already protected as so-called "common law spouses". But this is completely untrue. Merely living together does not create legal entitlements, yet this myth is

widespread and endures.

Research in 2019 showed 46% of the population in England and Wales thought unmarried cohabiting couples have a "common law marriage" with the same [legal rights](#) as spouses.

Academics and practitioners have long called for reform of this area. Graeme Fraser, the chair of Resolution's (an organization of family justice professionals) cohabitation committee [branded](#) the law "unfair", "not fit for purpose" and capable of leaving couples "at significant financial risk". Lawyers frequently have to advise disappointed cohabiting clients that the law cannot provide solutions. The problem is lack of political will.

A comprehensive reform [proposal](#) was produced by the Law Commission in 2007 and later shelved. Last year, the Women and Equalities Committee of the UK parliament released its [report](#) calling for the introduction of remedies for cohabitants who have lived together for a specified period of time or have a child together. But in November 2022 it was [rejected](#) by the government.

Resistance to reform is usually based on [fears of undermining marriage](#), imposing rights on couples that do not want them, or that the scheme might be too difficult to operate. None of these are convincing arguments but they require closer inspection.

Regarding the undermining of marriage, no proposal to reform cohabitation rights in England and Wales has, to date, called for cohabitants to be treated identically to [married people](#). Other countries, including New Zealand and Australia, do indeed treat cohabitants—or "de factos" as they call them—equally once they have lived together for a period of time or have had a child together.

But, in England and Wales, the calls for legal reform are not about collapsing the distinction between cohabiting and married people. Rather, reforming the current system would create a legal safety net for cohabiting couples.

The idea that reform might impose rights on couples who do not want them disregards the meaning of choice in this context. Some couples choose cohabitation because they do not want to marry.

Cohabiting couples who are knowledgeable of the law could opt out of legal protections, thereby exercising and preserving their autonomy. But [research](#) on the common law marriage myth reveals a significant proportion of couples do not feel the need to marry because they believe they already are protected by the law.

The complexity of operating a scheme is another counterargument. Critics may question how we define cohabitants and ask whether the law will inadvertently catch casual relationships or even flatmates.

The answer to this is careful drafting and drawing inspiration from other jurisdictions where cohabitation protections already exist. Both Scotland and the Republic of Ireland have legal frameworks that operate on relatively clear parameters. They tend to be used by couples who were in lengthy, committed relationships with children.

It is naive to think, or indeed romantically hope, that [marriage](#) works for everyone. The time has come for cohabitation reform to be taken seriously and placed back on the political agenda, as advocated by the [Family Law Reform Now Project](#), a group of academics, practicing lawyers and policymakers. Last year, it was revealed that more than half of children in England and Wales are now born to unmarried parents, which makes the need for legal reform all the more imperative.

It is time for society to confront the reality of modern families and offer cohabiting couples the basic [legal protections](#) they deserve.

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