

A Family Affair – The Status of Cohabitation in Namibia

The **Legal Assistance Centre** is pleased to announce the release of the report *A Family Affair –The Status of Cohabitation in Namibia*, which has been handed over to the Law Reform and Development Commission in the hope that it will provide the basis for law reform on this topic.



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BACKGROUND

The law currently provides little protection for cohabiting couples in Namibia. However cohabitation is common as recent national surveys indicate that 7-15% of Namibian adults are in cohabitation relationships. This is likely to be an under-estimate of the true figures as many people may not report that they are cohabiting due to the stigma that may be attached to these relationships.

Even though cohabiting relationships are common in Namibia, few people are aware of the limited protections available under the law. For example:

- There is **no legal duty of support between cohabitants** either during the relationship or when it ends.
- **Cohabiting partners have no clear right to share assets which are in the name of one partner only when the relationship comes to an end, even if both partners made**

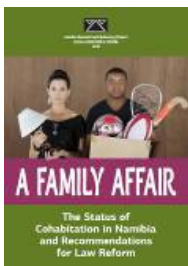
contributions towards the assets. This often works against women, as a couple's valuable assets like cars or houses are often put in the name of the male partner.

- The cohabiting partner has **no right to occupy a common home which is individually owned or leased by the other partner**, and cohabiting partners have **no rights in respect of private land or communal land which is held in the name of the partner.**

A cohabiting relationship does already resemble marriages in two areas:

- A cohabiting partner **can be protected from domestic violence** in the same way as a married person.
- **Children born outside of marriage are treated in the same way as children born inside of marriage.** This includes protections for maintenance and inheritance.

RESEARCH FINDINGS



The purpose of the study *A Family Affair –The Status of Cohabitation in Namibia* was to assess the status of cohabitation in Namibia, to gauge public opinion on the need for law reform and to make recommendations for legislative change.

Data was collected through 61 individual interviews with cohabitants and key informants and 10 focus group discussions. The data was collected in 2002 and in 2009, with the second round of field research being conducted in cooperation with the Law Reform and Development Commission. The report also gives examples of how different laws across the world address the issue of cohabitation.

Some of the key findings of the research were:

- The duration of cohabitation relationships reported during the field research ranged from **7 months to 35 years.**
- Some of the **reasons** why couples live together informally rather than marrying are because they **cannot afford the expenses associated with marriage** (including an elaborate wedding or the expected *lobola*), or because one partner (usually the man) is **unwilling to marry**, or is **already married** to someone else.
- Many of the respondents indicated that there is a **power imbalance** in the cohabiting relationships with the male partner having greater control over assets.
- About half of the cohabiting partners interviewed reported that they **share household expenses** with the other partner; in the other relationships it was most commonly the man who paid household expenses.
- Women are often the vulnerable partner in cohabiting relationships because **key assets are placed in the man's name** or because they make non-monetary contributions such as child care.
- Many cohabiting **partners have not discussed what would happen if their relationship ends in separation or death.**
- The **question of how a man with multiple female partners divides his resources between these partners was met with mixed responses**, with some saying that the male partner will support both households, whilst there were wives who felt that their husbands had abandoned them emotionally and financially for the newer cohabiting partner.

Although there are a few existing legal mechanisms that can be invoked by cohabiting couples, **the current laws are not designed to cater for cohabiting couples and are inadequate to produce fair outcomes in most cohabitation situations.** Furthermore, the current laws are inconsistent, with some statutes including cohabiting partners in their definitions of “dependent” (such as the Government Service Pension Act) while other statutes currently exclude cohabitants (such as the Motor Vehicle Accidents Fund Act).

The research assessed public opinion on the need for law reforms. **A strong majority of persons consulted were in favour of improved legal protection for cohabiting partners.** Participants felt particularly strongly that there should be some mechanism for fair division of property, with more mixed opinions on duties of maintenance after a cohabitation relationship ends.

The need for legal protections is supported by **the Namibian Constitution** which protects the family, prohibits discrimination on the basis of sex and social status, and provides for the right to dignity. Court cases in Namibia and South Africa show that all these rights are relevant to cohabitation. **International law also recognises and protects the myriad varieties of families that exist in practice,** including families in the form of unmarried cohabiting couples. Comments and recommendations interpreting the International Covenant on Civil and Political Rights, and the Convention on the Elimination of All Forms of Discrimination Against Women, have explicitly stated that the protections for the family in these conventions apply to cohabitation relationships.

KEY DEBATES

Some people say that the law should not assign any consequences to cohabitation because of the need to respect a couple’s choice not to marry. However in a society marked by gender inequality, the idea of choice operates differently for women and men – with women often being in a weaker bargaining position than men because they are economically weaker and more vulnerable to domestic violence. Choice is also problematic because many cohabiting partners realise only after the relationship ends that the law gives them no protection. Furthermore, it is appropriate for the law to look at the social functions of cohabiting relationships, where couples generally pool their labour and resources, and regulate accordingly.

Although **some people may object to giving any legal recognition to cohabitation on religious grounds,** such arguments should not be allowed to be the guiding influence on policy on this issue. **Because Namibia is a secular state, a Christian preference for marriage is not a valid reason for refusing to give legal protection to cohabitation.** Some worry that legal recognition of cohabitation may threaten the continuation of the institution of marriage. However, the rate of marriage is already very low in Namibia at a time when the law affords virtually no protection to cohabitation. A law on cohabitation would also not prevent churches from strengthening their teachings about the importance of marriage to their congregations.

Many countries give legal protection to cohabiting couples regardless of sexual orientation, and the Legal Assistance Centre believes that this should be done in Namibia in light of our

constitutional and international obligations against discrimination. However, the recommendations proposed could also be applied only to opposite-sex partnerships.

RECOMMENDATIONS

The report concludes with a draft bill on cohabitation that is based on a two-step approach:

- (1) a **basic level of automatic protection for cohabiting couples** who satisfy certain criteria; and
- (2) **optional registration of the relationship** which can be accompanied by a cohabitation agreement between the parties if they choose.

Automatic protection

We propose that automatic protections should apply to

- (a) couples **who have lived together for at least 2 years** (unless they can show that their relationship should not be treated as a domestic partnership);
- (b) **couples who have lived together for a shorter time period but fulfil specified criteria**; and
- (c) **any persons who have registered their relationship as a domestic partnership.**

We propose **three main components of automatic protection:**

- (a) We propose a **mutual duty of support** during the relationship, which would for example enable cohabiting partners to claim loss of support if the partner was killed. We also propose a limited right to maintenance after the relationship ends, only where necessary to compensate for some economic disadvantage suffered by one partner as a result of the relationship.
- (b) We propose a **right to equitable division of property if the relationship ends**, with the overall increases in the couple's assets during the relationship being divided on the basis of each partner's contributions (including contributions in the form of household labour or childcare) or divided equally if the respective contributions cannot be proved. **If one of the cohabiting partners has a spouse**, the division of assets must come only out of the married partner's separate property (if the marriage is out of community of property), or out of the married partner's half share of the joint estate (if the marriage is in community of property) to ensure fairness between all the parties.
- (c) Where the partnership is terminated by death, **the cohabiting partner should have a right to be considered for a fair share of the deceased's estate**, considering all the circumstances (such as whether the deceased also had a spouse).

Optional registration

We propose supplementing automatic protection with **a system which allows couples to register their cohabitation relationship if they wish.** Couples who register would receive a **certificate of registration** which would facilitate proof of the relationship. The couple could also register an **optional contract** between themselves at the same time (or later) if they wish. Agreements between cohabiting couples could be encouraged with a simple template for a contract, accompanied by accessible educational material on what issues should be considered. This could be accompanied by a popularisation campaign encouraging cohabiting couples to make contracts and wills. **Couples who register their relationships would not have to follow any official procedures to end the relationship, but they could register the relationship's end and receive a certificate of termination**, again to facilitate proof of the end of the relationship.

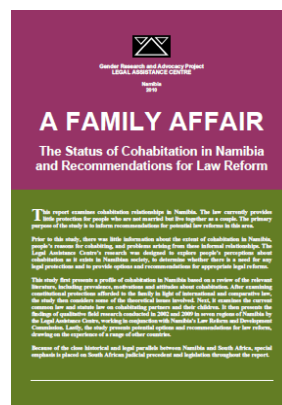
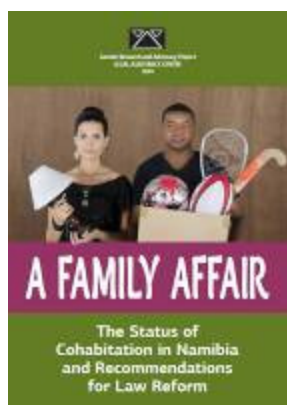
Joint responsibility for children

Few law reforms are needed in respect of cohabiting partners and their children since the treatment of children born inside and outside marriage has already been harmonised by the Children's Status Act. However, we suggest an amendment to the Children's Status Act to **make it possible for cohabiting parents to be joint custodians and equal guardians of their children while they are cohabiting** – since it currently allows only one unmarried parent to act as custodian and guardian, no matter what the circumstances. We also propose that registered partners should be able to adopt children jointly, if approved by a social worker as being suitable adoptive parents.

Resolving disputes

We suggest that couples with assets below a set amount should approach the magistrate's court to resolve disputes, while those with greater assets (who are more likely to have complex financial affairs) should approach the High Court. This would be similar to the split of jurisdiction between magistrates' courts and the Master of the High Court in the administration of deceased estates.

The report is available free of charge on the LAC website www.lac.org.na. Hard copies can be obtained from the Legal Assistance Centre for N\$50 for individuals, and one free copy for interested government ministries and non-governmental organisations. An extended version of the report is available on CD or on the website. The extended version contains more technical legal detail and is targeted at legal practitioners and academics.



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