



# A FAMILY AFFAIR

## The Status of Cohabitation in Namibia and Recommendations for Law Reform



Legal  
Assistance  
Centre  
Research Brief  
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### Introduction

Namibian law currently provides little protection for people who are not married but live together as a couple. Many people have approached the Legal Assistance Centre (LAC) with problems stemming from the law's inadequate coverage of cohabitation.

In response, the LAC conducted research with the aim of making recommendations for potential law reforms in this area. The study included field research in Namibia and an examination of the laws on cohabitation in a range of other countries.



Cohabitation is where **two adults live together in a relationship which resembles a marriage in some key respects**, without being formally married under civil or customary law.



The LAC study report and DVD distributed in 2010



The field research included both opposite-sex and same-sex cohabiting couples, as well as situations where a man or woman was cohabiting with one partner whilst being married to another. The study did not treat persons in customary marriages as cohabiting partners, even though Namibian law does not yet recognise customary marriage for all purposes.

In contrast to marriage, **cohabitation produces no automatic consequences under Namibian common law.** Similarly, most Namibian statutes which are pertinent to family or dependent relationships simply ignore cohabitation.

**There is no legal duty of support between cohabitants either during the relationship or when it ends.** In the eyes of the

law, each partner is responsible for his or her own upkeep. 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.

**The only area in which cohabitation closely resembles marriage concerns children.** This is primarily a result of statutory enactments which have overruled the common law, placing children born outside marriage in the same legal position as children born inside marriage with respect to issues such as maintenance and inheritance.

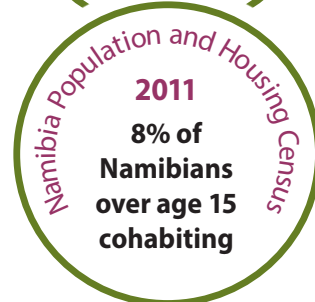
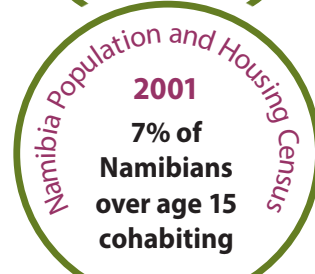
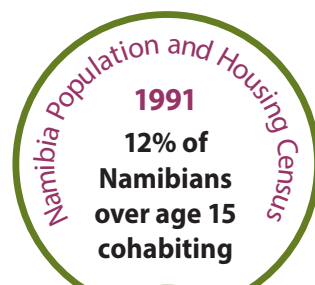
Also, **opposite-sex cohabitants are covered by the provisions of the Combating of Domestic Violence Act in the same way as spouses.**

## Cohabitation in Namibia

Namibia has a low rate of marriage, a large number of children born outside marriage and a significant incidence of cohabitation. The most recent national surveys indicate that 7 to 15% of Namibian adults are in cohabitation relationships.

The *Namibian Demographic and Health Survey 2013*, which was based on a representative national sample, found that about 16% of women and 14% of men between 15 and 49 were “*living together*” with a partner, without being formally married. The figures for living together informally were similar in the corresponding 2006-07 survey, at about 15% of women and 13% of men and in the 2000 survey, at 16% of women and 13% of men. These figures are even more striking if one considers that the 2013 survey found only slightly higher percentages of persons in the same age groups to be married – 18% of women and 15% of men.

The three censuses since Namibian Independence have found a significant proportion of the Namibian population to be living together informally with a partner. The figures indicate that between 7% and 12% of the population over age 15 are cohabiting (compared to about



28% of the population who was married in civil or customary marriage in both 2001 and 2011). The census figures for cohabitation rise if the age range is narrowed; the *2011 Census Fertility Report* analysed the census data and found that about 11% of women between the ages of 20 and 44 were in a cohabitation relationship at the time of the census, while the number of men and women aged 20-24 who were in cohabitation relationships is roughly equal to the number who were married.

Virtually all of the participants in the focus groups convened for the LAC study thought that relationships between unmarried women and men have increased dramatically since Independence, because social disapproval of such relationships has decreased.

## Historical background to cohabitation

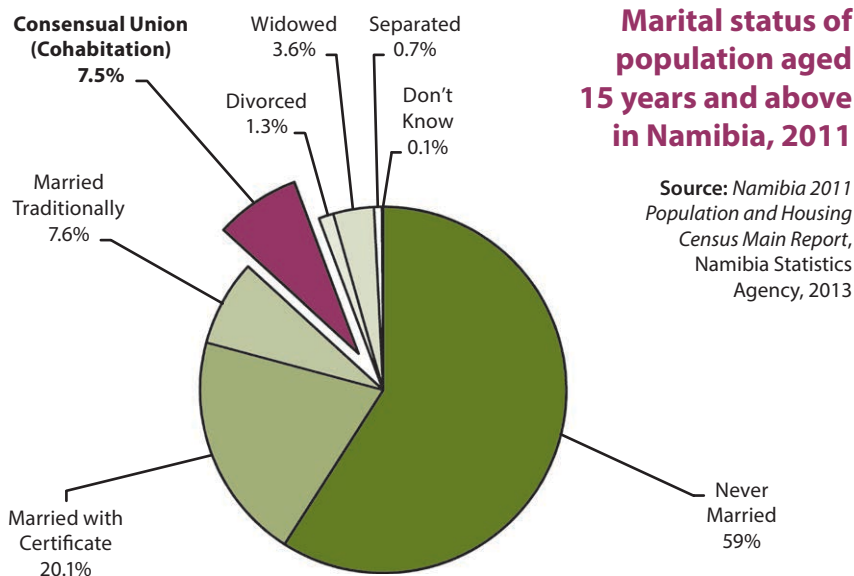
**Contract labour** imposed during the colonial era had the effect of separating husbands and wives, as men from rural areas were recruited to provide labour on farms, in factories and mines and as domestic servants. Male contract workers were not allowed to bring their families along, as the colonial authorities wished to prevent migration into white settlement areas. The long separation of spouses in such situations encouraged informal cohabitation with partners outside the marriage.

**Labour migration continues in the post-independence era for economic reasons.** Economic opportunities are still concentrated in urban areas. As a result, many rural residents – especially men – move to urban areas to search for employment, whilst their families sometime maintain a home base in the rural areas where there is access to communal land.

**Colonial laws against inter-racial marriage and inter-racial sexual relationships** drove such inter-racial relationships underground. This has a persisting influence on the attitudes of some people towards formalising their intimate relationships.

**Common law does not give full recognition to customary unions and Muslim marriages**, preventing some people from receiving recognition of the marriage rites and ceremonies appropriate to their beliefs.

**Cohabitation may be gradually replacing polygamy.** The *Namibia Demographic and Health Survey 2006-07* found that 6% of married women were in a polygamous union, showing a sharp decline from 12% in 2000.





## Reasons couples live together without marrying

- to test the relationship before formalising it
- to save on wedding costs, or to share living expenses while saving up for a wedding
- one partner (often the man) does not want to formalise the union, perhaps to avoid sharing assets or because he cannot afford to pay the traditional bride price
- for women, to avoid the male domination often associated with marriage or to preserve economic or decision-making independence
- to avoid having to seek approval from relatives
- fear of being legally tied to an abusive spouse
- to retain benefits which might otherwise be lost, such as maintenance from a divorce which would end upon remarriage
- reluctance to allow the law to govern private matters
- mistaken belief that living together for a long period produces a “common-law marriage”
- one partner already has a spouse
- ineligibility to marry because of unacceptably close blood relations, absence of required parental consent or partners being of the same sex
- religious beliefs about marriage which are not catered for under civil or customary law
- one or both partners were born outside marriage, and did not experience marriage as a model to be copied.

Monogamous civil marriage is the only form of human pairing which is recognised comprehensively in the eyes of the law, yet the constitutional requirement of respect for all cultures and religions would seem to mandate respect for other kinds of marriage and family.

Furthermore, there are many living arrangements which do not conform to the idea of the traditional ‘nuclear family’ and yet are deserving of respect as valid family structures. These include cohabiting partners and more diverse family groupings, such as single-parent families and families incorporating extended family members.

*“Culturally you need at least two cows to marry. My boyfriend is working and we buy things for the house, but we cannot afford cows.”*

– woman interviewed in Swakopmund

*“There is no future for you - you may still be hoping he will marry you but there is no security.”*

– female focus group participant, Rehoboth

The Namibian Constitution protects “the family” without specifying what “family” means – which allows for legal concepts of family to evolve to fit social realities.

*“Loving partners and parents have the right to live together as a family with their children without being married.”*

– Frans v Paschke and Others,  
High Court of Namibia, 2007



*“The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.”*

– Namibian Constitution, Article 14(3)

# Characteristics of cohabitation

The following discussion of the attributes of cohabitation is based on field research conducted in nine different regions in Namibia during 2002 and 2009. There appears to be no more recent Namibian research on this issue.

## Relationship duration

The duration of the relationships reported by cohabiting respondents during the field research varied from 7 months to 35 years. There is no evidence that marriage occurs after a certain time-period, although many couples stated that they were cohabiting whilst saving up money for a wedding. There is also no indication that cohabitation relationships commonly end after any particular amount of time.



## Household composition

A significant majority of cohabitants interviewed have children with their partners. Many live with children from their own or their partner's previous relationships or marriages. And

most live in a household with extended family members as well as children – a significant number reported living in the household of the parents of one of the partners.

## Reasons for living together

Respondents offered a range of reasons for cohabiting with their partners, with some responses suggesting that the decision to live together informally might be taken more casually than a decision to marry. Many women indicated that the decision to cohabit had been the man's choice. Some were vague, saying that they “fell in love” or “just decided to live together”. For some, the move was essentially a financial decision – hoping to save money by sharing living costs or buying a house together. Some were inspired by employment issues. In many cases, the catalyst was the woman becoming pregnant.



*“I know of a woman who bought a washing machine and a bed together with her boyfriend and then he died. She got nothing.”*

– focus group participant, Keetmanshoop

## Contributions to the household

Approximately half of the cohabiting respondents said that both partners contribute to household expenses. Where both partners are not contributing, the research suggests that the man usually pays the household expenses alone – which results from the fact that women in Namibia are more likely to be unemployed than men, or that men are more likely to have access to cash income while women more often make contributions to the household in the form of labour such as child-rearing, housework or subsistence agriculture.

## If the relationship ends

Many of the cohabiting partners had not discussed what would happen if their relationship ended in separation or death. Many reported that female cohabiting partners are usually the vulnerable ones if the relationship fails, standing to lose out on a fair share of the accumulated assets or even being left with nothing at all. The woman is particularly vulnerable if the couple live in a house that belongs to the man.

*"I lived with him for 9 years and he didn't want me to buy anything to put in his house. He always said, just pay the electricity, food, water bills etc. Then when the relationship broke down I wasn't allowed to take anything with me. We got two kids together, but he married someone else in the end."*

– female focus group participant, Swakopmund

*"I had been living together with my partner for 25 years, but we parted ways in 2008. We have 4 children together ... . We were living with our children in the same household with other children from our previous relationships and some extended family members.*

*I wanted to get married, but my partner only kept on promising to marry me but it never happened. There were no cultural reasons why we could not get married.*

*When we were in the relationship, I did not work. My partner did not want me to work, I had to stay home and look after the family. My partner was the only one working, and he paid for all the household expenses. I contributed by cooking, cleaning and washing and ironing the clothes.*

*We had debts, which my partner paid since he was the only one working. At times my partner did not pay the debts, and for the last 3 years of the relationship he also did not bring his salary so we really suffered during that time.*

*The house was registered in my partner's name. When we started the relationship, we had no livestock. We started farming together. The land we were farming on was communal land. My partner would buy all the livestock because I did not have an income.*

*We had an agreement that every time my partner buys livestock, I would get a share. So say for instance, my partner would buy 20 sheep, I could earmark some of them for myself. If it was 20 I would earmark 5 for myself and leave the remaining 15 for my partner and the children. When the relationship ended my partner refused to give me the livestock that was earmarked for me ... .*

*There was another woman involved, and the relationship became unbearable as my partner would become violent at times. When the relationship ended my partner kept the house and all the furniture. I left the house with nothing."*

– woman interviewed in Windhoek

## When one partner dies

An unmarried partner has no legal claim to any of the property of the deceased partner in the absence of a will. The Communal Land Reform Act makes provision for surviving spouses to remain on communal land which was allocated to the deceased, but is silent on cohabiting partners. Given that some women in Namibian communities suffer 'property-grabbing' upon the death of their husbands, cohabiting partners are likely to be even more vulnerable.



*“I know of a friend of mine who lived together with a man without being married for almost six years and the man died in a car accident. She did not get anything. She lost everything they bought together. The boyfriend’s mother moved into the house and she was chased out of the house, and the mother inherited all the property.”*

– woman interviewed in Khomas Region

## Should the law protect cohabiting partners?

### Should the law intervene?

A large majority of the persons consulted by the LAC were in favour of some sort of legal protection for cohabiting partners. Participants felt strongly that there should be some mechanism for fair distribution of property acquired during the relationship, with more mixed opinions on maintenance. Some legal protection for cohabitation appears to be a Constitutional imperative, to protect equality, dignity and diverse forms of “family”, as well as being mandated by Namibia’s international commitments, particularly under the International Covenant on Civil and Political Rights (ICCPR) and the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW). The law should protect weak and vulnerable members of society from unfair exploitation by others.

### Will legal protection for cohabitation undermine marriage?

That would be highly unlikely. The rate of marriage in Namibia is already low because of economic considerations. Providing some legal protection to cohabitation is essentially responding to a situation which already exists. Legal protection for cohabitants need not make cohabitation equivalent to marriage, so it is entirely possible to protect cohabitants while ensuring that marriage will continue to have a special status in society.

### Will legal protection for cohabitation be contrary to tradition or religion?

Cohabitation is present in all regions of Namibia. Cultural or religious disapproval does not justify denying recognition and protection to the significant numbers of people who live in this type of family arrangement. The recognition of cohabiting relationships will in no way prevent couples from choosing to marry according to their religious beliefs. If religious leaders are concerned that the number of people marrying may be reduced, the logical response would be for churches to strengthen their teachings about the importance of marriage rather than blocking alternatives.

### What about situations where one partner is married to someone else?

Some countries give protection to cohabitation only in situations where neither partner is already married. However, in Namibia, historical and economic factors (such as pre- and post-independence labour migration), combined with customary acceptance of polygamy in many Namibian communities, mean that there are many concurrent relationships. Failure to give any protection to such relationships would simply leave the women and children in such arrangements more vulnerable. Protections for cohabiting partners can be combined with safeguards to ensure that spouses are not unfairly disadvantaged.



# Possible approaches to legal protection

## Two basic approaches

There are essentially two different routes to legal protection:

- (1) some form of **automatic protection** which applies to all couples who fulfil certain criteria set by law for “cohabitation” (such as living together for a certain time period); and
- (2) some form of **agreement between the parties**, manifested by registration of the relationship or by a contract, which provides each partner with certain protections.



These two basic approaches can be used separately or in combination, such as by providing a minimal degree of automatic protection and making a higher level of protection available if the couple make an agreement.

## Pros and cons of automatic protection

Some critics of automatic protection say that it unfairly reduces people’s autonomy and freedom to contract. Others argue against automatic protection on the grounds that the “private sphere” of relationships should be protected from government interference. However, the idea of choice is problematic since both partners may not have the same degree of choice in societies marked by gender inequality. Furthermore, the entire field of family law already infringes upon the “private sphere” in order to protect vulnerable persons against unfairness.

## Pros and cons of registration

Many people are critical of a formal system requiring registration, on the grounds that such a system would be unlikely to protect those who most need it – usually women. If a system of formal registration were implemented in Namibia, perhaps some cohabitants would utilise it, but a cohabitant who can convince her partner to register is a person who already has some degree of power in the relationship and is therefore less vulnerable than those who would not be aided by such a system. However, the concept of registration was very popular among the interviewees because many wanted a “paper” as tangible evidence of the relationship, to give it more legitimacy.

## Opting out and opting in

Some legal schemes provide automatic protections, but allow couples to make an agreement to ‘opt out’ of this system if they choose. Other legal schemes provide protection only to couples who ‘opt in’ to the system, such as by registering the relationship or making a cohabitation agreement. Both of these approaches preserve freedom of contract, which is especially relevant to parties who are of equal bargaining power and have freely chosen not to marry. However, where the partners do not enjoy equal bargaining power, the stronger partner may intimidate the weaker partner into refusing legal protection if opting out is possible – especially in a country like Namibia where domestic violence is rife.



**“Recognition and legal coverage of domestic partnerships should not be dependent on any formalities (such as registration or a written contract of partnership). Such formalities are unrealistic ... where many people are illiterate, have little knowledge of the law and even less access to it. There is also the issue of unequal power relationships between men and women, which means that women may not be able to insist on registration ... . The situation can be likened to that of labour law where the freedom to contract has been curtailed by the imposition of rules that regulate fairness in the employment relationship. This is based on the recognition of an unequal power relationship between employees and employers in most situations.”**

– Beth Goldblatt, “Cohabitation and Gender in the South African Context – Implications for Law Reform”, Johannesburg: Centre for Applied Legal Studies (CALS), University of the Witwatersrand, 2001

The Committee which monitors the Convention on the Elimination of Discrimination against Women (CEDAW) made the following comments on cohabitation in its recent review of the situation in Namibia. It referred to informal cohabitation as “de facto unions”, which means a union in fact rather than in law.

***“The Committee ... notes that women in de facto unions regularly face economic hardship upon the dissolution of their relationships.”***

***“The Committee ... calls upon the State party to protect the rights of women in de facto unions ...”***

Committee on the Elimination of Discrimination against Women,  
Concluding observations on the combined fourth and fifth periodic  
reports of Namibia (CEDAW /C/NAM/CO/4-5), 24 July 2015



## Recommendations

The LAC recommends a **hybrid system** which combines a **basic level of automatic protection supplemented by a registration system which gives cohabiting couples a significant degree of free choice on how to organise their relationships**. Other countries have adopted similar hybrid systems. For example, the Domestic Partnerships Bill in South Africa proposes a two-tier system, with one set of rules for registered domestic partnerships and another set of automatic protections for unregistered domestic partnerships.

### Basic automatic protection

Applying some automatic protection is the best way to protect vulnerable partners who may be in a weak negotiating position, or those who may remain unaware of the need to register such relationships even after a law reform allows for this possibility. We do not recommend an ‘opt-out’ provision for basic automatic protections – after all, if *both* cohabiting partners do not want to take advantage of the legal protections available to them, they can escape coverage merely by declining to take any steps to access such protection.

## Basic automatic protection

Automatic protections should apply to:

- persons over age 18 who have lived together as a couple for **at least 2 years** (unless they can show that their relationship should not be treated as a domestic partnership);
- persons over age 18 who have lived together as a couple for a **shorter time period but warrant treatment as a domestic relationship** in light of specified criteria; and
- persons who have **registered their relationship as a domestic partnership**.

The automatic protection should include:

- a **mutual duty of support** which would open up some limited possibilities for maintenance after the relationship ends (where one partner suffered economic disadvantage because of the relationship) and give cohabiting partners the possibility of claiming against third parties for loss of support in cases of accident or illness of one partner;
- when the relationship ends: a **right to equitable division of property** taking into account each party's respective contributions to the assets, including both direct cash contributions and indirect contributions such as housework and child care;
- when the partnership is terminated by death: a **right to maintenance from the deceased estate**, and a **right to be considered for an equitable share of the estate** via intestate succession, taking into account the respective contributions of the cohabiting partners to the assets and the interest of any other heirs of the deceased (including any surviving spouse or spouses).



## Supplementary registration of relationships

The LAC recommends supplementing automatic protection with a system which allows couples to register the existence of their relationship and, if they wish, to make an agreement stating how they will deal with issues such as the sharing of household expenses and inheritance. The termination of a cohabitation relationship could also be officially recorded, if couples wish to take this step. Otherwise, if there were a dispute, a court would simply look at factual evidence to determine whether or not the parties were cohabiting.

## Supplementary registration of cohabitation relationships

- Allow cohabiting couples over age 18 to register the existence of their relationship and obtain a **certificate of registration** if they wish, to facilitate proof that the relationship exists.
- Allow cohabiting couples to **register a more detailed agreement** between themselves if they wish, and encourage this with a simple template accompanied by accessible educational material on what issues should be considered. Encourage cohabiting couples to make written wills, to protect each other's rights.
- Provide for **termination of registered relationships without official intervention upon the death of one partner or when one partner ceases to fulfil one of the requirements for registration** – such as by abandoning the relationship or ceasing to occupy a mutual residence. Allow both partners to act together to register termination of the relationship and get a **certificate of termination** to prove that the cohabitation has ended, if they wish.
- Allow cohabiting parents to **agree to exercise joint custody and equal guardianship over their children for the duration of their cohabitation**, and to have this agreement made into a court order by a children's court if the court is of the opinion that it will be in the best interests of the child.

## Enforcing cohabitation rights

The LAC recommends that aggrieved partners should be able to approach the courts for appropriate financial redress, regardless of whether the partnership was registered or officially terminated. Jurisdiction should depend on the amount of assets involved (as in the case of deceased estates) – with small claims being decided by community courts or magistrates' courts, and larger ones by the High Court. A court considering cohabitation claims should have the power to depart from the provisions of an agreement between the partners if necessary, to take into account changed circumstances or to prevent manifest unfairness.



## Protecting the rights of spouses

To ensure that the rights of any spouse of a cohabiting partner are fully protected, the LAC recommends that the division of assets between cohabiting partners 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 of community of property). However, the court should also be given the power to make an appropriate adjustment in the case of a marriage which has ceased to exist in all but name. For instance, where the spouses have lived completely separately and operated their finances independently for a substantial period of time, the court may deem that a marital property regime involving community of property or accrual between the spouses shall be considered to have terminated upon a date identified by the court. The court would then have the power to divide assets acquired after that date without reference to the marital property regime if this would be fair to all parties concerned.



## Same-sex versus opposite-sex partnerships

The LAC recommends giving legal protection to cohabiting couples regardless of sexual orientation, to fulfil Namibia's constitutional and international obligations against discrimination. However, should this not be politically tenable at this stage, the recommendations proposed could in theory be applied only to opposite-sex partnerships.



*“This new cohabitation law needs to be done very quickly. We women are suffering.”*

– focus group participant, Keetmanshoop

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