

# Business and Regulatory Impact Assessment

## Title of Proposal

The Draft Cohabitants (Financial Provision) (Scotland) Bill (“**the Bill**”)

## Purpose and intended effect

### Background

The impetus for the Scottish Law Commission’s (“the SLC”) review of the law of financial provision on breakdown of a cohabiting relationship and this associated Bill came from the responses to the SLC’s consultation on its Tenth Programme of Law Reform in 2018.

Many respondents (including academics, legal practitioners and members of the public) requested that various aspects of family law be reviewed and the law of financial provision on cessation of a cohabiting relationship was the area most often highlighted.

The law of financial provision on cessation of a cohabiting relationship is contained in sections 25 to 29 of the Family Law (Scotland) Act 2006 (“the 2006 Act”). Section 25 defines the term “cohabitant” for the purposes of sections 26 to 29 of the 2006 Act; sections 26 and 27 provide for presumptions and rules of rights of ownership in certain household goods and in money and property; section 28 allows a former cohabitant to apply to the court for an order for financial provision on cessation of their relationship otherwise than on death, and section 29 provides for applications to court by a surviving cohabitant for financial provision where their partner dies intestate. A review of section 29 is not included in our project as this forms part of the law of succession, which is currently under review by the Scottish Government.

Sections 25 to 28 have been criticised over the years by practitioners, academics and others for being out of date, unclear and complicated. The definition of “cohabitant” in section 25 has been criticised for relying on a comparison with spouses (which is considered inappropriate, outdated and demeaning to cohabitants) and the language in sections 26 and 27 has been criticised for being out of date.

In response to our Discussion Paper on Cohabitation, published in February 2020, Professor Norrie (professor of law, University of Strathclyde) commented:

*“The existing definition in s. 25, where the starting point is “marriage” and factors are specified to assist the court in determining how close the cohabiting relationship is to marriage, is conceptually inept. Not only does this demean those whose registered relationship is a civil partnership and no longer (since 2014) the “ideal” against which unregistered couples (of whatever gender mix) are judged, but it presupposes an idealised “marriage” as a relationship that is identical for all participants in that institution.”*

Section 28 has been subject to the most criticism, for the following main reasons: the policy underlying awards for financial provision is unclear or has not been achieved (protection of vulnerable cohabitants and respecting autonomy), the test for making awards for financial

provision is overly complicated; and the one year time limit to make a claim is too short and is inflexible.

The Sheriffs Association commented:

*“There does appear to be a general consensus that the current provisions in section 28 are unclear, complicated and cumbersome and make it difficult to achieve an outcome of fairness to both parties as indicated by the Supreme Court in Gow v Grant (2013 SC (UKSC) 1).”*

The reason for distinguishing, within section 28, between a child of both parties and a child of one party accepted as a child of the family has also been criticised for being hard to justify; and the remedies the court is able to award are viewed as limited. Section 28 has also been criticised by legal practitioners for making it difficult to advise clients on the likely outcome of a claim or how to achieve fair settlement.

Scottish Women’s Aid commented:

*“... [section 28] is cumbersome, confusing, complex, unclear in its interpretation, does not explicitly deal with issues of fairness and reasonableness, including the conduct of the parties toward one another and any child during the cohabitation.”*

Jamie Foulis (Balfour + Manson solicitors) commented:

*“Decision makers have criticised the provision for its lack of guidance on how to determine a claim. Both legal practitioners and decision makers have criticised the limited remedies available to the court in making an award for financial provision.”*

Sheriff Holligan commented:

*“There seems no good reason to limit the remedies to the making of a capital award only. If the overall test is one of fairness and reasonableness, the court should have the flexibility to fashion a remedy or remedies suitable to the particular case.”*

The aim of our recommendations is to modernise, simplify and clarify these aspects of the legislation, and to improve possible outcomes for cohabitants by making available a broader range of remedies when the court makes an award for financial provision.

Our Report on Cohabitation (Scot Law Com No. 261, 2022) (“the Report”) was published on 2 November 2022. It followed a consultation on our Cohabitation Discussion Paper, published on 26 February 2020, which closed on 28 June 2020 (the Discussion Paper reviewed the law as provided for in sections 25 to 28 of the 2006 Act and suggested possible options for reform). The Report was also informed by an extensive informal consultation with legal practitioners, equality organisations, decision makers and others which took place from July 2018 to January 2022, as well as by views expressed in response to an online public attitude survey (see Public Consultation section below), directed to non-lawyers in particular, published in July 2020 for two months (243 responses were received).

## **Objective**

The passage and implementation of this Bill would give effect to the recommendations contained in the Report.

The Bill contains a range of proposals to modernise, simplify and clarify Scots law on financial provision on cessation of a cohabiting relationship otherwise than on death. In general terms, the Bill aims to achieve greater fairness for cohabitants when their relationship ends, by extending the rights and remedies that are available to them, while still respecting their autonomy and freedom to regulate the financial consequences of cessation of cohabitation by agreement. In particular, the Bill does this by –

- modernising the definition of cohabitant, while also making it clear what types of relationships are not included;
- modernising the language in section 27 and clarifying the types of money and property covered by the rule;
- clarifying the policy objective underpinning awards of financial provision in section 28, which is fairness to both parties, with a clearer test for the court to apply (whether the making of an order is justified by any of the guiding principles provided for in the legislation and whether it is reasonable having regard to the resources of the parties), without going as far as establishing a property sharing regime;
- providing a set of guiding principles for the court to apply, supplemented by a list of factors for the court to consider in applying each principle, to assist the court in reaching its decision;
- allowing the court to make an order in respect of the economic burden of caring, after the end of the cohabitation, for a child accepted as a member of the family as well as a child of whom both cohabitants are parents, by amending the definition of a “relevant child”;
- allowing cohabitants access to a wider range of remedies (expanded to include property transfer orders, payments for short term relief of serious financial hardship, caused as a result of the end of the relationship, and incidental and ancillary orders);
- retaining the existing one year time limit (from the date of cessation of cohabitation) for claims, but affording the court discretion to allow late claims on special cause shown, while also providing for a backstop of two years from the date of cessation of cohabitation, beyond which no claim can be made;
- allowing parties to agree an extension of the one year time limit, to eighteen months maximum, to facilitate settlement, subject to certain conditions; and
- requiring the court to have regard to the terms of any agreement between the parties in determining whether to make an order for financial provision and enabling the court to vary or set aside any agreement or term of an agreement relating to financial provision on cessation of cohabitation, where it was not fair and reasonable when entered into.

#### **Rationale for Government intervention**

As noted above, the Bill stems from a project that was included in the SLC’s Tenth Programme of Law Reform. Reform of the law in this area was requested by many respondents to the consultation, including academics, legal practitioners and members of the public.

A modernised and refined law of financial provision for cohabitants, after cessation of their relationship, would contribute to greater legal certainty, fairer outcomes (including a wider range of remedies) and promote the efficient use of resources, thereby making a valuable contribution to a strong sustainable economy. The Bill would make the law easier to understand, advise on and apply and hence more accessible. Improved transparency of the law leads to lower legal costs and greater efficiency in the legal sector.

The Bill would therefore contribute to the overarching purpose of the Scottish Government in terms of the National Performance Framework: ‘to focus on creating a more successful country, with opportunities for all of Scotland to flourish, through increasing wellbeing, and sustainable and inclusive economic growth’.

Left as it is, the law in this area would become further outdated and would continue to draw criticism from practitioners for being difficult to advise on, from decision makers for the lack of guidance as to how to determine claims, and from academics, equality organisations and members of the public for being outdated, unclear and overly complicated and not providing adequate remedies.

The alternative is to introduce reforms to simplify and modernise the law to deal with all of the issues referred to above. That is what the Bill does.

A majority of respondents to our Discussion Paper supported reform of the law: to update and amend the definition of cohabitant, to modernise the language in section 27, to clarify the policy behind and test for awards for financial provision on cessation of a cohabiting relationship, to remove the current discrepancy / distinction in the definition of a child in section 28, to expand the remedies available to the court / cohabitants, to give the court discretion to allow late claims (subject to a test the court would apply), to allow parties to extend, by agreement, the time limit for making a claim, to facilitate negotiations towards settlement subject to conditions, and to allow the court to vary or set aside any agreement (or any term in an agreement) as to financial provision between cohabitants if not fair and reasonable at the time the agreement was entered into.

They were in favour of these particular reforms largely to increase fairness, legal certainty and clarity and to simplify and modernise these aspects of the law.

The majority of respondents were not however in favour of more significant reform which would have treated cohabitants the same way as spouses on divorce or civil partners on dissolution of civil partnership. We are not therefore able to recommend more significant reform which would make all relationships subject to the same regime for financial provision when they end.

## **Consultation**

### ***Within Government***

The Aspects of Family Law project is part of the SLC's Tenth Programme of Law Reform, a five year programme, running from 2018 to 2023 which was discussed with Scottish Government officials before being submitted and approved by the Scottish Government and laid before the Scottish Parliament in February 2018.

Copies of the Cohabitation Discussion Paper and our Report were sent to the family law unit, and the private law unit of the Scottish Government Justice Directorate prior to publication.

The SLC team met with members of both units of the Scottish Government before and at the outset of the cohabitation phase of our project (the Aspects of Family Law Project is being carried out in phases, cohabitation being the first phase and the topic for phase two being decided on after publication of the Report and draft Bill) and has regularly (around every six months) met members of both units throughout each stage of this phase, to keep them informed of our progress and to discuss any issues or concerns that arose. The team has discussed implementation of the project with both units in the last two years.

The team also met and corresponded with members of the Scottish Government's Equality Unit to discuss ways to seek the views of and involve Scottish Equality Groups in the development of our project.

### ***Public Consultation***

The SLC has carried out extensive formal and informal public consultation.

The team established an Advisory Group in May 2019 to advise us throughout the cohabitation phase of our project. Members included legal practitioners from private law firms and from legal practitioner organisations, advocates, a tax specialist from an accountancy firm, a specialist pensions solicitor, a sociologist, members of Equality Groups and legal academics. This Group met three times during the course of the cohabitation phase of our project and various members of the Group also met with the team, or provided written assistance, separately in relation to particular aspects of our project, such as unjustified enrichment, the definition of cohabitant, and the provision allowing for extension of the time limit to make a claim to allow parties to negotiate towards a settlement. We also circulated our draft Bill to a number of the Group's legal practitioners, decision makers and academics for their views. The advice and input from the Group contributed greatly to the development of both the questions in our Discussion Paper and the recommendations in our Report.

To help inform our understanding of the issues and assist drafting of the Discussion Paper, the team carried out informal consultation with members of the judiciary, legal practitioners, academics, and Equality Groups (Interfaith Scotland, Scottish Women's Aid, Engender, the Equality Network, and Shared Parenting Scotland). We met and corresponded with legal practitioners, academics and fellow Commissioners from Law Commissions in other jurisdictions (the Australian Law Reform Commission, the New Zealand Law Commission, the Alberta Law Reform Commission) to discuss the law of financial provision on cessation of cohabitation in these jurisdictions and whether our proposed reforms could be informed by the approach taken elsewhere.

Our consultation paper "Discussion Paper on Cohabitation" was published on 26 February 2020 and circulated to individuals and organisations identified by us as having a potential interest in the topic, including the judiciary, advocates, solicitors, academics, equality organisations, and other organisations (such as the Scottish Legal Aid Board, Citizens Advice Scotland, the Scottish Courts and Tribunal Service, and Relationships Scotland). The Discussion Paper was published on the SLC website and links to it were circulated on social media. It was therefore freely available to the general public online. The consultation period was extended from 12 to 16 weeks given the difficulties associated with the coronavirus pandemic and the consultation generated 45 responses, including from members of the public.

The team carried out a series of online engagement conferences with legal practitioners (private solicitor firms, advocates, solicitor representative bodies and local faculties throughout Scotland) during the consultation period for the Discussion Paper (March – June 2020) to seek views on possible options for reform. We also held an online focus group meeting with members of Interfaith Scotland to seek their views on what rights cohabitants

should have on cessation of their relationship. These events were originally scheduled to take place in person but this was not possible due to the coronavirus restrictions. Prior to these restrictions, the team attended the Central Law Training Scotland (“CLT”) conference in early March 2020, at which Commissioner Kate Dowdalls KC gave a talk to legal practitioners, academics, and other professionals on our project and Discussion Paper.

We published a public attitudes survey in July 2020 seeking the views of non-lawyers in particular, on what rights cohabitants should have when their relationship ends. This was published on the SLC website, and links were attached to updates on the SLC LinkedIn and Twitter accounts as well as on other social media. The team sent the survey to various equality and other organisations with an interest in the topic, to be circulated to their members (including Engender, the Equality Network, Shared Parenting Scotland, Scottish Woman’s Aid, Relationship Scotland, Interfaith, and Citizens Advice Bureau Scotland). Some of these organisations also published the survey on their own social media or newsletters. We received 243 responses during the six week period the survey was open.

### **Business**

Discussion with the Advisory Group helped define the scope of the project, and ongoing engagement with members of the Group throughout the course of the project has helped to refine policy. The Group included individuals from the following businesses and organisations:

- law firms (SKO Family Law Specialists, Balfour + Manson, Mubasher Choudry Family Law Solutions, Melrose & Porteous, Mellicks, Burness Paull);
- accountancy / tax firms (Henderson Loggie);
- legal practitioner representative bodies (Family Law Association, Glasgow Bar Association, Advocates Family Law Association);
- advocates specialising in family law;
- the judiciary (sheriffs from Edinburgh and Glasgow Sheriff Courts);
- legal and sociology academics (Universities of Glasgow, Strathclyde, Edinburgh and Stirling and Napier University);
- equality groups / charities (Interfaith Scotland – a charity promoting engagement between faith & belief communities) and the Equality Network.

Commissioner Kate Dowdalls KC gave presentations about the team’s work in progress, during the course of the cohabitation phase of the Aspects of Family Law project, particularly within “continuing professional development” programmes (including talks to the Family Law Association, CLT and the Law Society of Scotland). While the audiences were made up mainly of practising lawyers, there were also representatives of business present at these occasions. All such presentations offered excellent opportunities for discussion with business interests. Kate Dowdalls KC also gave evidence at a UK Parliamentary Committee session on the law in this area in Scotland in January 2022 (as part of the Women and Equalities Committee inquiry on the rights of cohabiting partners, which has since published its Report, recommending reform in England and Wales).

### **Options**

#### *Option 1 – Do nothing*

In terms of Option 1, the Bill would not be introduced and the current Scots law on financial provision on cessation of a cohabiting relationship otherwise than on death, would remain. The opportunity would be lost to modernise and make substantive reforms to Scots law in this area and to address the complexity, lack of clarity, inflexible time limit and limited remedies available to cohabitants on separation. Also, the benefits discussed in more detail below would not be realised.

### *Option 2 – Introduce the Bill*

In terms of Option 2, the Bill would be introduced. If implemented, the changes to the law listed under “Objective” above would be brought about resulting in modernisation of the law, increased clarity, certainty, and fairness to cohabitants when their relationship ends. The benefits of Option 2 are discussed below in more detail (see “Benefits”).

#### **Sectors, groups and individuals affected**

- Private individuals either in or contemplating entering into a cohabiting relationship without marrying or forming a civil partnership;
- The children of private individuals in cohabiting relationships;
- Legal professionals – solicitors, advocates, judges and sheriffs;
- Legal professional representative bodies – the Law Society of Scotland, the Family Law Association, the Faculty of Advocates;
- The Scottish Courts and Tribunal Service (SCTS);
- Scottish Legal Aid Board (SLAB).

Generally, for all those mentioned above, Option 1 (do nothing) would not result in any benefits. The law would remain in need of modernisation and continue to be unclear and complicated.

Option 2 (introduce the Bill) on the other hand, would present all these sectors, groups and individuals with the benefits of increased certainty and clarity. The law would also be modernised in order to better meet the needs of Scottish society, which has seen considerable growth in cohabiting relationships over the last 20 to 30 years. Legal practitioners will find it easier to advise their clients on the likely outcome of a claim for financial provision and decision makers will benefit from the extra guidance and clarity in terms of the policy and test for awards for financial provision and from the availability of a broader range of remedies.

The ability of cohabiting couples to extend the time limit for making claims for financial provision on separation from one year to eighteen months, to allow them to negotiate an agreement between them, as provided for in the Bill, if taken up by parties, will likely lead to a reduction in: the number of disputes that reach the courts, the number of court actions raised and resisted to avoid parties missing the time limit, and the associated court costs and court time. This will lead to a reduction in the expense, anxiety and stress that would be caused to individuals involved with such claims, and their families.

The SLC therefore recommends Option 2.

#### **Benefits**

##### *Option 1 - Do nothing*

Option 1 would not produce any benefits, given that the result would be that the law of financial provision on cessation of a cohabiting relationship in Scotland would still be in need of modernisation, clarity and certainty, particularly in view of the continued increase in number of cohabiting relationships. Nor would it assist to address the lack of public awareness of the rights of cohabitants on cessation of their relationship which has been raised with the Commission by many stakeholders throughout the course of this project.

##### *Option 2 - Introduce the Bill*

The Bill if introduced and implemented would bring the following benefits:

*a) Ensuring the law is fit-for-purpose for modern Scottish society*

The Bill brings the law into the 21<sup>st</sup> century (in particular the modernisation of the definition of “cohabitant” and the broader range of remedies which the court may award in claims for financial provision). This is a key benefit in terms of having law that is modern and in touch with today’s society and also clear and accessible to the public and stakeholders.

*b) Clarification of the purpose of and test for awards of financial provision on cessation of cohabiting relationships*

The Bill will make it easier for legal practitioners to advise clients/potential litigants on the likely outcome of a claim for financial provision on separation, as the policy underpinning the provision and the test for making awards will be clearer. Therefore, the time spent by legal advisers, and the resultant costs incurred by individuals will be reduced. It will also make it easier for decision makers to make a determination on a claim for financial provision, as the Bill provides a clearer test, based on clearly set out principles, with more guidance for the court as to the factors to be considered in applying the principles.

*c) A broader range of remedies available to cohabitants on separation*

The Bill will allow the court to grant a wider range of remedies when making an award of financial provision on cessation of cohabitation. It was previously limited to, essentially, awarding a capital sum (and what was referred to as an order for payment of an amount in respect of the economic burden of childcare, which was in effect an award of a capital sum for this purpose) and an interim order. The Bill would allow the court, in addition, to make a property transfer order, an order for payment, at intervals and for no longer than 6 months, for the short term relief of serious financial hardship arising from cessation of the cohabitation and interim, ancillary and incidental orders. This will better meet the needs of the applicant making the claim, ensuring that the remedy awarded best meets their particular set of economic circumstances.

*d) Giving the court discretion to allow late claims on special cause shown*

The Bill will enable the court to allow a claim made outwith the one year time limit to proceed, on special cause shown. This introduces greater fairness into the legislation as it introduces flexibility in relation to a time limit that is currently viewed by many as somewhat short, and will give former cohabitants, including vulnerable parties who may be unable to make a claim within the one year time limit due to emotional or practical difficulties, an opportunity to ask the court to allow a claim to proceed, although late.

*e) Allowing parties to extend the time limit for making a claim by agreement, to allow for negotiation and settlement outwith court*

The Bill will allow parties to agree to extend the time limit for making a claim, by a period of six months, if they wish to continue to negotiate to try to reach a settlement. This gives parties greater flexibility and the ability to take control of the situation without having to raise and then sist a court action, simply to avoid missing the time limit. It will have an associated reduction in terms of the cost to the parties and SLAB and pressure on court time and budget.

*f) Introducing a two year backstop, beyond which no late claim may be made*

While the Bill will allow the court to consider a late claim and allow parties to enter into an agreement to negotiate, thus extending the one year time limit to eighteen months, there will be an absolute cut off or backstop period of two years from the date of cessation of cohabitation, beyond which a late claim may not be considered. This will have the benefit of allowing cohabitants some certainty that they can move on with their lives without the prospect of a claim hanging over them indefinitely.

*g) Allowing the court to vary or set aside a term of an agreement between the parties if it was unfair or unreasonable when entered into*



This provision allows the court to set aside or vary a term of an agreement between parties as to financial provision on cessation of cohabitation; there is no such provision in the current legislation. This will enable review of agreements relating to financial provision on cessation of cohabitation (or terms of agreements relating to financial provision) that were not fair and reasonable at the time they were entered into, while preserving the right of couples to make their own contractual arrangements which, provided they were entered into fairly and reasonably, will be given effect.

*h) The Bill achieves a better balance between the rights of cohabitants in claims for financial provision on cessation of their relationships and respect for their autonomy.*

The broad policy objective of our recommendations as implemented in the Bill, is to treat cohabitants more fairly on cessation of cohabitation. It does this by: amending and updating the definition of “cohabitant”; introducing a clearer test for the court to apply in determining claims for financial provision (by providing that an order may only be made if justified by the guiding principles set out in the Bill and if reasonable having regard to the resources of both parties); expanding the remedies available to cohabitants; allowing cohabitants to apply to make a late claim if they are able to show special cause for having failed to make a claim timeously; allowing cohabitants some extra time to reach a negotiated settlement and the chance to avoid the need to go to court; and allowing the court to vary or set aside the terms of any agreement between cohabitants as to financial arrangements on cessation of cohabitation, if it considers them not to be fair and reasonable when the agreement was entered into. These provisions are balanced by recognition of the right of cohabitants to order their own affairs and placing an absolute time limit, of two years after cessation of the relationship, within which a claim for financial provision may be made.

*i) The Bill is broadly supported by stakeholders*

The recommendations in the Report which are implemented in the draft Bill have the broad support of stakeholders and respondents to our Discussion Paper. There was consensus from both that the existing statutory regime was inadequate, confusing, unclear and did not treat cohabitants fairly. In particular, there was consensus that the definition should be modernised, the test for financial provision should be clarified and based on clear principles expressed in statute and that the remedies were inadequate. There was also broad consensus that the rigidity of the time limit required to be addressed, the court should be able to vary or set aside financial agreements between cohabitants, and that parties should be afforded extra time to negotiate a settlement. The Bill contains provisions which implement all of these changes.

Brodies LLP, in its response to our Discussion Paper:

*“Significant reform of the law on financial provision for cohabitants is necessary. The existing legislation is insufficient and not fit for purpose in a world which has changed dramatically since the 2006 Act came into force. A large proportion of adults in Scotland are in enduring family relationships but, for a variety of reasons, do not enter into marriage or civil partnership. In our view, those individuals ought not to be precluded from seeking adequate financial provision on the cessation of cohabitation because they have exercised their choice not to formalise their relationship or have been unable to do so. The law ought to recognise the diversity and variety of families and family units in Scotland and provide adequate protections for those individuals when their cohabiting relationships end.”*

The Glasgow Bar Association:

*“The Scottish Government, in modernising this inadequate legislation, will be seen to be forward thinking, meeting the needs of modern families and removing barriers to fairness and reasonableness.”*

The Faculty of Advocates:

*“The Faculty of Advocates is grateful to the Scottish Law Commission for including in its Tenth Programme the vexed issue of statutory financial rights for cohabitants. We agree that the provisions in the Family Law (Scotland) Act 2006 are in need of reform. They are at present over-complex and unclear.”*

University of Aberdeen academics:

*“We consider it to be an appropriate time to review the law of cohabitation and, in particular, the legislative provisions relating to cohabitation in the Family Law (Scotland) Act 2006. There have been significant changes in society over the past fourteen years and it is important to take account of these in considering reforms to the law.”*

Balfour + Manson solicitors:

*“The provisions introduced by the Family Law Act 2006 have brought great uncertainty for clients and we would hope that any review could provide the certainty and clarity needed to ensure that there is a clear framework to be followed to allow the majority of separations to be resolved by agreement without the expense of litigation. Our main concern is for matters to be as clear as possible from the outset to avoid detailed discussions between solicitors and litigation all at great emotional and financial cost to our clients.”*

## **Costs**

### *Option 1*

As Option 1 is to do nothing, there would be no additional costs or savings associated with this option. Given the need for change outlined by the chosen Option 2 however, the lack of additional costs imposed by Option 1 would not add any positive value.

Doing nothing would also have a continuing impact on court budget of those claims that are raised, then immediately sisted, to avoid missing the one year time limit (see option 2 below).

### *Option 2*

Option 2 is to introduce the Bill.

**Training costs** - An initial training and familiarisation cost, principally for solicitors and counsel but perhaps also for other professionals in the relevant fields, would be likely. The costs would be small, and would be incurred only on first implementation. Any such costs would be quickly offset by the savings made under the Bill.

Generally, familiarisation costs of any change in the law will be incurred by those providing the training within the solicitors' firms. Professional Support Lawyers could, for example, prepare a seminar which will explain the reforms to fee-earners. Arrangements may be made, by firms or individual practitioners, for attendance at seminars provided by organisations, such as CLT and the Law Society, on a commercial basis. However, the provision of such training is typically already provided for within a firm's budget. It is probable that a proportion of the fee that a lawyer charges represents the cost of maintaining the fee-earner's current legal knowledge. For the fee-earners, there is a requirement that 20 hours of Continuing Professional Development is completed throughout the year so the additional time taken by familiarisation will count towards this figure. It is therefore unlikely that initial training on this Bill would represent a significant additional cost to law firms. There may also be additional costs incurred by specialists in family law (particularly those accredited by the Law Society) to ensure their specialist knowledge is up to date and complete and meets the requirements for accreditation. Otherwise it is anticipated that solicitors and counsel will

familiarise themselves with changes in the law in their own time, and perhaps also on a case by case basis.

It is possible that some initial training might also be provided to the judiciary. We understand that the average daily cost (as opposed to cost per head) of providing training to the judiciary by the Judicial Institute at its premises is £2,372 (an online training event would be closer to £500). Training on the Bill would comprise, it is anticipated, a “one off” session of no more than one hour in a half day’s training on assorted issues.

**Reduction in litigation and in barriers to settlement** - our proposal to introduce a legislative provision allowing cohabitants to agree extension of the time limit to facilitate settlement will reduce the need for parties to raise a claim simply to avoid missing the one year time limit, and then having to wait to allow negotiations to continue. This would have the advantage of parties avoiding the associated expenses, including court fees, of raising a claim just to avoid missing the time limit and it would also avoid taking up court time and reduce the burden of costs on the SCTS (including administration time) with actions that are unlikely to proceed.

This proposal will therefore reduce barriers to settlement. As one respondent to our Discussion Paper, the Glasgow Bar Association, commented:

*“The current legislation is causing barriers to settlement and inequality of settlement. As with any financial settlement, there are always legal and financial implications but that leaves parties to make an informed choice about the remedies available to them. Extending the legislation to make the remedies more accessible will inevitably mean the potential for more litigation, but SCTS is there to serve, not to place impediments in the way. Extending remedies will also require associated guidance from the Scottish Legal [Aid] Board but there is already a baseline knowledge of remedies and clawback provisions in place for marriages that are transferrable to this scenario. The Scottish Government, in modernising this inadequate legislation, will be seen to be forward thinking, meeting the needs of modern families and removing barriers to fairness and reasonableness”*

**Other impact on volume of litigation** – there is the potential that increasing the remedies available to cohabitants may encourage claims, although clarification of the test for making awards for financial provision, may also result in a reduction in litigation. However we were told by respondents to the Discussion Paper that many more claims would settle, were a wider range of orders (in particular, property transfer orders) available:

As another respondent to the Discussion Paper, the Faculty of Advocates pointed out:

*“We would anticipate that reform will encourage claims. At present the difficulty of comprehending and applying the provisions means they are not as well used as they should be. On the other hand clarity should result in such claims as there are being easier to settle.”*

Balfour + Manson, solicitors, commented:

*“Our main concern is for matters to be as clear as possible from the outset to avoid detailed discussions between solicitors and litigation all at great emotional and financial cost to our clients.”*

### **Scottish Firms Impact Test**

No Scottish Firms Impact Test was carried out.

The aim of the Bill is principally to modernise and provide clarification and legal certainty in the law of financial provision for cohabitants on cessation of their relationship otherwise than on death. The law in this area was highlighted as an area of the law in need of reform by legal and non-legal stakeholders in response to our consultation on the SLC's Tenth Programme of Law Reform. We anticipate that the Bill would be beneficial to relevant professionals and individuals alike.

### **Competition Assessment**

It is not anticipated that the Bill will have an impact on competition within Scotland. The recommendations reflected in the Bill do not create a competitive advantage for any particular sector or individual; they simply offer the benefits outlined above, for professionals and individuals alike.

As discussed above, the legal sector and other relevant professionals would be positively affected by the Bill. We do not anticipate an impact upon any other particular markets or products.

The Bill would not result in any restrictions on competition in the legal services market or in other relevant professional markets. The number and range of suppliers would not be affected, nor would the ability of suppliers to compete be limited. We do not consider that the proposal would reduce incentive to compete vigorously.

### **Test run of business forms**

The Bill does not introduce any new business forms.

### **Legal Aid Impact Test**

The introduction of the provision which allows parties to extend the time limit for making a claim, to allow for negotiation, should reduce the number of applications being made for financial provision and then immediately sisted simply to avoid missing the one year time limit for making a claim, with the associated waste of court time and resources that comes with this.

This provision will increase the likelihood of parties being able to negotiate a settlement out of court, with a consequent saving of legal aid expenditure and private financial resources for the parties concerned.

Widening the remedies available for financial provision on cessation of cohabitation may increase the number of applications made to court. However we were told by respondents to the Discussion Paper that (a) many more claims would settle (many without the need for litigation), were a wider range of orders (in particular, property transfer orders) available, and (b) the availability of property transfer would avoid the need for a separate action for division and sale of property in those cases where a couple jointly own property and are unable to settle their claims without resorting to litigation.

Widening the remedies will also be balanced by the provision which allows parties to extend the time limit for further negotiation towards settlement. It is also likely to be balanced by the increase in clarity and certainty in the law in terms of the test the court is to apply in determining claims, as it will assist legal practitioners advise clients on the likelihood of a successful claim.

Currently civil legal aid is available for raising and defending civil actions, including section 28 claims, subject to financial eligibility and satisfaction of a “probable cause” test.

Accordingly, implementation of the Bill, which is not likely to cause a significant increase in the number of disputes resulting in court actions for the reasons noted, is not expected to have any adverse impact on legal aid.

The Access to Justice Team have confirmed that they are content that the Bill would not have a significant impact on either the legal aid scheme or the legal aid fund.

Thorntons solicitors in its response to our Discussion Paper comment as follows:

*“We do not envisage these changes having a significant impact on the legal aid budget. If there were to be a recovery in any of these cases, the sums recovered would need to go back to SLAB in any event. Further, we do not envisage that the number of cases which require to be litigated on being so high as to have an impact on the court service.”*

### **Enforcement, sanctions and monitoring**

The Bill does not require public enforcement, imposes no sanctions and as such there is no need to monitor compliance. As previously noted, the Bill clarifies, increases the certainty of and modernises the law of financial provision on cessation of a cohabiting relationship otherwise than by death. Further, the Bill provisions are default only and parties are therefore free to contract otherwise than as provided for. Ultimately, any disputes concerning the provisions of the Bill would be resolved by litigation or during any other dispute resolution process between the affected parties in relation to their own particular sets of circumstances.

### **Implementation and delivery plan**

If passed by the Scottish Parliament, sections 5 and 6 will come into force on the day after Royal Assent and the other provisions will come into force on the day or days appointed by the Scottish Ministers by regulations, as advised by Scottish Government officials.

### **Post-implementation review**

In accordance with section 3(1) of the Law Commissions Act 1965, the SLC has a duty to “keep under review” the laws with which it is concerned, and will endeavour to stay informed of the Bill’s reception by the legal profession and wider business community. We anticipate that a review of the legislation by the Scottish Ministers would be appropriate 10 years from the date on which it is brought into effect.

### **Summary and recommendation**

#### *Dismiss Option 1*

Option 1 is maintaining the *status quo*. Although this would have no additional cost, it would bring no improvements.

#### *Recommend Option 2*

Option 2 is implementing the Bill. This would improve the Scots law of financial provision on cessation of a cohabiting relationship otherwise than by death, by modernising, clarifying

and simplifying it. It will also give former cohabitants a greater range of remedies on separation and the ability to seek to extend the time limit for making claims to allow for settlement outwith the courts.

**Summary costs and benefits table**

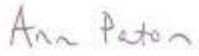
Option	Total benefit per annum: - economic, environmental, social	Total cost per annum: - economic, environmental, social - policy and administrative
1	No benefits	<p>There would be no direct cost in choosing Option 1 as Option 1 represents the status quo.</p> <p>The costs currently being incurred would not, however, be avoided or mitigated.</p>
2	<p>Option 2 would bring a variety of benefits including:</p> <ul style="list-style-type: none"> <li>(i) increased certainty, clarity, and accessibility to users, and</li> <li>(ii) modernisation and simplification of the law.</li> </ul> <p>Implementing the Bill –</p> <ul style="list-style-type: none"> <li>a) modernises the law by updating the definition of “cohabitant”, and the language used in the legislation;</li> <li>b) clarifies the test for determining applications for financial provision – including requiring the court to consider if an award is reasonable having regard to parties’ resources;</li> <li>c) provides a principled approach for the court to apply in determining claims for financial provision;</li> <li>d) provides a wider range of remedies that the court can award to better suit the circumstances of parties;</li> <li>e) allows late claims to be made, subject to an absolute time limit, if there is special cause shown (such as the effect of illness on ability to claim);</li> <li>f) allows parties to agree to extend the deadline for making a claim by 6 months to help facilitate settlement;</li> <li>g) The Bill is broadly supported by stakeholders.</li> </ul> <p>The increased clarity and certainty which Option 2 would bring to the legislation would result in savings in terms of the costs private individuals incur in instructing legal advisers,</p>	<p>Extending the remedies available to cohabitants, in theory, may encourage claims. However, we were told by respondents to the Discussion Paper that:</p> <ul style="list-style-type: none"> <li>(a) many more claims would settle (often without the need for litigation), were a wider range of orders (in particular, property transfer) available, and</li> <li>(b) the availability of property transfer would avoid the need for a separate action for division and sale of property, in those cases where a couple jointly own property and are unable to settle their claims without resorting to litigation.</li> </ul> <p>The risk of increased litigation is likely to be balanced by the reforms we are making to clarify the test and policy underpinning section 28, which should assist legal practitioners to advise their clients on the likely outcome of a potential claim, thereby making settlement more likely.</p> <p>Affording the court discretion to allow late claims on special cause shown may have an impact on SCTS, as it may mean claims which would have been time barred are allowed to proceed. However the test is set reasonably high, ensuring ignorance of the time limit would not suffice. This, and the fact the right to seek to make a late claim is limited to 12 months beyond the one year time limit, means</p>

	<p>given the clarity of advice that advisors will be able to give at an early stage, especially in relation to settlement.</p> <p>The provision allowing parties to agree to extend the time limit for making a claim in order to negotiate a settlement, will reduce court costs and time dealing with actions raised and resisted just to avoid missing the one year time limit.</p>	<p>a significant increase in applications under section 28 is unlikely.</p> <p>Requiring the court to have regard to agreements between cohabitants, means parties who have made their own arrangements will be unlikely to litigate; so should have no material impact on SCTS or court resources.</p> <p>Allowing the court to vary or set aside an agreement, or term of agreement, as to financial provision on cessation of cohabitation if it was not fair and reasonable when entered into, may result in such applications being made. However, the provision requires that any such order is made at the same time as determination of a claim under section 28, so may not have a material impact on numbers of litigations or SCTS resources.</p> <p>Training costs would be incurred by law firms and the judiciary in relation to the changes the Bill would make to the 2006 Act. These would be modest and incurred only on first implementation.</p>
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**Declaration and publication**

I have read the Business and Regulatory Impact Assessment and I am satisfied that (a) it represents a fair and reasonable view of the expected costs, benefits and impact of the policy, and (b) that the benefits justify the costs. I am satisfied that business impact has been assessed with the support of businesses in Scotland.

**Signed:**



**Lady Paton, Chair, Scottish Law Commission**

**2 November 2022**