

**COHABITATION DISCUSSION PAPER
EXECUTIVE SUMMARY**





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Introduction

1. The Scottish Law Commission is an independent statutory body, whose role is to recommend reforms to improve, simplify and update the law of Scotland. The Commission is currently conducting a review of aspects of family law. A Discussion Paper on the law relating to cohabitation was published on 26 February 2020.

2. Cohabitants are couples who live together but who are not married to or in a civil partnership with each other. We are seeking views from all interested parties on the rights of cohabitants to claim financial provision when their relationships break down. Responses to the Discussion Paper should be submitted by 26 May 2020.

3. Details of how to respond are set out on the inside cover of our Discussion Paper and on the Aspects of Family Law project page on the Scottish Law Commission website: <https://www.scotlawcom.gov.uk/law-reform/law-reform-projects/aspects-of-family-law/>

What rights do cohabitants have when cohabitation ends?

4. The current law in this area is in sections 25 to 29 of the Family Law (Scotland) Act 2006. “Cohabitant” is defined as either member of a couple who are (or were) living together as if they were spouses, whether of mixed sex or the same sex.

5. Sections 26 and 27 create presumptions of equal shares in certain household goods and in certain money and property. Section 28 gives former cohabitants limited rights to seek financial provision when the cohabitation ends otherwise than on death. On an application by a former cohabitant, the court can order payment of a capital sum and / or such amount as the court specifies in respect of the financial burden of caring for a child of whom the couple are parents.

6. We do not consider section 29 of the 2006 Act closely in the Discussion Paper. Section 29 allows a surviving cohabitant to apply to the court for financial provision when their partner has died without leaving a will. The Scottish Government is currently reviewing the law of intestate succession, including a review of section 29.

Background to review

7. Sections 25 to 29 of the 2006 Act are largely based on recommendations made by this Commission to the UK Government in 1992. Prior to the 2006 Act, there was no legislative provision for cohabitants when their cohabiting relationships ended. In the absence of any contractual arrangement or rights under property law, former cohabitants had to rely on the common law remedy of unjustified enrichment to resolve financial disputes. For the reasons outlined in Chapter 8 of our Discussion Paper, this remedy was unsatisfactory in the context of cohabiting relationships.

8. It was the Scottish Government's policy when the 2006 Act came into force to provide a statutory basis for recognising when a relationship is a cohabiting relationship, and to provide a set of principles and basic rights for cohabitants where none previously existed (in particular, to protect vulnerable people on the breakdown of a relationship or when a partner dies). It was not the policy to provide former cohabitants with the same legal remedies as married couples or civil partners on divorce or dissolution of civil partnership.

9. It is now fourteen years since the 2006 Act came into force; in that time the incidence of cohabitation in Scotland and the United Kingdom has increased significantly. We have heard from a wide variety of stakeholders (including academics, lawyers, sheriffs and non-lawyers) that the legislation is not working as well as it could and that it would benefit from review.

Problems with the current law

10. The legislation has been criticised for various reasons, including the following:
- The definition of "cohabitant" is vague, inconsistent with that used in other legislation, outdated and not reflective of modern relationships;
 - The language used in sections 26 and 27 is in need of modernisation;
 - The purpose of the legislation is unclear or has not been met;
 - The test the court has to apply in making awards for financial provision is unclear and overly complicated; as a result, lawyers have difficulty advising clients on the likely outcome of claims;
 - There should be no distinction made for the purpose of financial provision, between a child of the couple and a child accepted as a child of the family;
 - The orders available to the court under section 28 are too limited;
 - The time limit for making a claim for financial provision is too short;
 - There is no provision for the court to take any agreement between the cohabitants into account in deciding what order, if any, to make, or allowing the court to vary or set aside such agreements in certain circumstances, and

- The legislation does not specify whether the remedy of unjustified enrichment remains available where a section 28 claim is possible.

11. Our Discussion Paper explores these and other criticisms. This Commission's original recommendations to the UK Government and the policy objectives of the Scottish Government during the passage of the Bill which became the 2006 Act are fully discussed. Relevant case law is considered as is other Scottish and UK legislation that deals with some of the issues that have been highlighted. The current Scots law is compared with the law in relation to cohabitation in other jurisdictions (Australia, Ireland, New Zealand, Canada, Norway, Sweden and Finland). The Discussion Paper considers what possible changes could be made to improve the law for cohabitants in Scotland.

Issues for consideration

12. The Discussion Paper is divided into 10 chapters. Following the introductory chapter, the issues that have been raised with us are fully discussed in Chapters 2 to 9; questions are posed at the end of each of these chapters. In Chapter 10 we list all of the 26 questions.

13. The main issues considered in Chapters 2 to 9 are summarised below:

Chapter 2

14. In Chapter 2 we consider whether separate regimes should be retained for financial provision on breakdown of a cohabiting relationship, and on divorce or dissolution of civil partnership. We compare the remedies available to former cohabitants with those available to spouses and civil partners. We also consider the regimes for financial provision on breakdown of cohabiting relationships in other jurisdictions. We note that former cohabitants are treated in broadly the same way as divorcing spouses in Australia, New Zealand and some provinces and states in Canada; in Ireland, Sweden and Finland, cohabitants have more limited rights and in Norway, rights are more limited still.

15. Having discussed the approaches here and abroad, we then seek views from respondents on whether the Scottish regime for financial provision for cohabitants on breakdown of their relationship should remain separate from that for spouses and civil partners on divorce and dissolution.

Chapter 3

16. In Chapter 3 we consider who benefits from the provisions in sections 25 to 28 of the 2006 Act, having regard to the definition of "cohabitant" in section 25, as modified by section 4 of the Marriage and Civil Partnership (Scotland) Act 2014. We discuss whether defining the term by reference to spouses is appropriate and consider how the term and equivalent terms are defined in other legislation in Scotland, the UK and in the comparative jurisdictions examined. Other possible approaches to defining a cohabiting relationship are considered, including defining cohabitants by reference to whether theirs is an "enduring family relationship" (as in the Human Fertilisation and Embryology Act 2008), or whether they live together on a "genuine domestic basis" (as in the Australian Family Law Act 1975).

17. We ask whether the Scottish definition of "cohabitant" should be amended; whether a qualifying period of cohabitation should be introduced (in particular if former cohabitants were

able to access a wider range of remedies); and whether the definition would be improved by introducing a list of features or characteristics that the court could take into account in reaching a decision on whether a couple were cohabitants. We also invite views from respondents on the benefits of introduction of a registration system for cohabitants in Scotland.

18. In this chapter we also discuss the issues affecting people who live in other family forms, such as multiple partner relationships and, in Part 2, platonic relationships (such as siblings who share a home), and explain why these matters are outwith the scope of this project.

Chapter 4

19. In Chapter 4 we consider sections 26 and 27 of the 2006 Act, which provide certain rights to cohabitants relating to household goods and other money and property. The language used in these provisions has been criticised for being outdated (for example, section 27 refers to an “allowance” being paid by one party to the other). We ask whether there is a need for modernisation or any other modification of these provisions.

Chapter 5

20. In this chapter, we consider the purpose or policy objective of section 28 of the 2006 Act, which allows cohabitants to seek financial provision from their former partner. In Part 1, we consider the test the court has to apply in deciding whether or not to make an order for financial provision; in Part 2 we discuss the remedies that are available under section 28(2).

21. Section 28 has probably been subject to the most criticism by stakeholders. It has been criticised for a lack of clear policy objective, for having an unclear and complicated test, and for the limited number of remedies available to the court. We consider this criticism and relevant case law. We explore approaches taken in other jurisdictions to discover how the Scottish approach might be improved.

22. We seek views from respondents on what they consider the policy objective of financial provision for former cohabitants should be. Possibilities discussed include compensation for economic loss suffered as a result of the relationship or the ending of the relationship; relief of need; sharing of property acquired during the relationship; sharing the future burden of childcare; or a combination of these. We also ask whether, for the purposes of financial provision for former cohabitants, there should be any distinction made between a child of whom the cohabitants are parents and a child accepted by the cohabitants as a child of the family.

23. We are interested in respondents’ views on whether the test for financial provision on cessation of cohabitation should be based on fairness and reasonableness, having regard to all of the circumstances of the case, perhaps by reference to a list of factors that might include the financial and non-financial contributions made by each party to the relationship, the effect of the cohabitation on the earning capacity of the parties and parties’ needs and resources.

24. We seek views on whether the remedies currently available to former cohabitants are adequate, or whether they should be extended, perhaps to include orders for transfer of property, pension sharing, short term periodic payments following the end of the relationship

to relieve financial hardship, or something else. Finally we ask if the court should be allowed or required to take the financial resources of the parties into account before deciding what order, if any, to make.

Chapter 6

25. The one year time limit, in section 28(8), for making a claim for financial provision on breakdown of a cohabiting relationship has been criticised by many stakeholders for being too short. Solicitors have told us that they are often instructed too late for their clients to make a claim. In Chapter 1 we discuss the lack of public awareness of the cohabitation provisions in the 2006 Act. In Chapter 6, we consider whether this lack of awareness serves to exacerbate what might be seen as a tight time scale within which to make a claim.

26. We discuss relevant case law and consider time limits in other Scottish legislation. We also examine the time limits for claims by former cohabitants in other jurisdictions and consider whether the Scottish courts should have discretion to allow late claims. Allowing parties to agree an extension of the time limit to help them to reach agreement out of court, without prejudicing their right to make a claim under section 28, is also considered and discussed.

27. We are interested in respondents' views on these issues. If respondents consider that the one year time limit is too short, we ask what the time limit should be. If respondents think that the court should be given discretion to allow late claims, we ask whether this discretion should be exercised on "cause shown", "in exceptional circumstances" or something else. We are interested, too, in respondents' views on the suggestion that parties be permitted to agree extension of the time limit, without prejudicing their right to make a claim under section 28.

Chapter 7

28. This chapter is concerned with cohabitation agreements (contractual arrangements between cohabitants which may govern their financial arrangements, including the division of property and assets, in the event that the relationship ends). We discuss the absence from the 2006 Act of any provision in relation to such agreements and compare this with sections 10 and 16 of the Family Law (Scotland) Act 1985, which make provision relating to agreements between spouses and civil partners. We also discuss how the comparative jurisdictions examined deal with agreements between cohabiting couples.

29. We ask whether, in deciding what order, if any, to make under section 28, the court should be able to look at the terms of any agreement between the parties (as in section 10(6)(a) of the 1985 Act) and whether it would be helpful to have a provision similar to section 16 of the 1985 Act, allowing the court to vary or set aside agreements in certain circumstances.

Chapter 8

30. Prior to introduction of the cohabitation provisions in the 2006 Act the only legal remedy available to cohabitants when their relationship broke down, in the absence of property rights or a contractual arrangement, was the common law remedy of unjustified enrichment. A person can be unjustifiably enriched at another's expense in the context of cohabitation if, for example, they have benefitted from money invested in their property by their former partner in

contemplation of them living together in that property but the relationship ends without the investment being repaid.

31. In this chapter we consider the availability of the remedy of unjustified enrichment remains available to a former cohabitant when, either, a claim under section 28 has not been pursued or it has been unsuccessful. We discuss the law relating to unjustified enrichment and the principle of subsidiarity before considering the recent decision in *Pert v McCaffrey* [2020] CSIH, in which the Inner House of the Court of Session disagreed with the decision in *Courtney's Executors v Campbell* 2016 S.C.L.R 387 that the remedy of unjustified enrichment was not available when a claim under section 28 had not been pursued.

32. No questions are posed in this chapter, though we would welcome consultees' views on the issues discussed.

Chapter 9

33. In this chapter we ask for any information that respondents might have on the economic impact of sections 25 to 28 of the 2006 Act and of the possible economic impact of any of the options for reform discussed in the Discussion Paper. In particular, we are interested in information on any impact in terms of tax law on the possibility of extending the remedies available to former cohabitants to include orders for property transfer, pension sharing or maintenance. We are also interested in the possible impact on the Scottish Courts and Tribunals Service and legal aid budgets of any options for reform (such as any extension of the time limit for making a claim under section 28, and providing cohabitants with additional remedies).

Chapter 10

34. As noted above, Chapter 10 lists all the questions in the earlier chapters. Respondents are invited to answer any or all of these questions and to provide us with any other views or information which they consider relevant to our project. If respondents have any queries, please contact the Aspects of Family Law project manager in the first instance at lorraine.stirling@scotlawcom.gov.uk.