

26 February 2020



Our ref: L/1/11/3C

Dear Consultee

**DISCUSSION PAPER ON COHABITATION  
(DISCUSSION PAPER No 170)**

We invite comments on the above mentioned Discussion Paper which has been published today. The paper is available on our website at <https://scotlawcom.gov.uk/law-reform/consultations/>, together with a news release and a summary.

The Discussion Paper examines the law of cohabitation in sections 25 to 28 of the Family Law (Scotland) Act 2006. These provisions define the term “cohabitant” for the purposes of the 2006 Act, create presumptions of equal shares in certain household goods and in certain money and property, and give former cohabitants limited rights to seek financial provision when the cohabitation ends otherwise than on death (a capital sum or such amount as the court specifies in respect of the financial burden of caring for a child of whom the couple are parents).

The Discussion Paper does not examine section 29 of the 2006 Act, which 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, which includes a review of section 29.

The cohabitation provisions in the 2006 Act have their origins in recommendations made by this Commission in our Report on Family Law of 1992 (Scot Law Com No 135). However the provisions were not drafted in precisely the same terms as the cohabitation provisions in the draft Bill which accompanied our 1992 Report.

Since the 2006 Act came into force, the incidence of cohabitation in Scotland has increased significantly. The last national census in Scotland took place in 2011 and revealed that 16% of families (with or without children) were cohabiting couple families. The Office for National Statistics published a data set for 2016 which showed that there were 268,100 cohabiting families in Scotland (103,600 of which were couples with dependent children). However, there is also anecdotal evidence, at least, that general public awareness of the existence of the cohabitation provisions in the 2006 Act is poor and that there is a common misconception that “common law marriage” exists.

There are various aspects of the cohabitation provisions that have attracted criticism from academics, practitioners and other stakeholders since they came into force. Criticism includes that the definition of a “cohabitant” in section 25 and the language used in sections 26 and 27 is outdated; the purpose of awards for financial provision on breakdown of a cohabiting relationship in section 28 is unclear; the



test for awards is complicated and the remedies available to former cohabitants from the court are limited. In light of these difficulties, the paper seeks consultees' views on the difficulties with the current law and on possible options for reform.

Consultation is critical in all our law reform projects to ensure that the final recommendations contained in our report would, if implemented, result in law which is just, principled, responsive and easy to understand.

We would therefore be grateful to receive your views on any or all of the questions in this Discussion Paper. All views will be fully considered and analysed in the course of reaching our final conclusions. The consultation period ends on **31 May 2020**.

Where possible, we would prefer the electronic submission of comments. You can use the electronic response form for this Discussion Paper on our website at: <https://www.scotlawcom.gov.uk/publications/discussion-papers-and-consultative-memoranda/2010-present/>.

The form has a questionnaire format which allows you to comment (briefly or at length) on any of the paper's questions which interest you. The form can be downloaded and emailed to us at [info@scotlawcom.gov.uk](mailto:info@scotlawcom.gov.uk), as can comments in other electronic formats.

Alternatively, you may prefer to send your comments on the Discussion Paper by using the general comments form to be found on the website "Contact us" page (<http://www.scotlawcom.gov.uk/contact-us/>). As noted above, the consultation process concludes on 31 May 2020, accordingly, we would be grateful if comments were submitted by then.

Please note that information about this Discussion Paper, including copies of responses, may be made available in terms of the Freedom of Information (Scotland) Act 2002. Any confidential response will be dealt with in accordance with the 2002 Act. We may also (i) publish responses on our website (either in full or in some other way such as reformatted or summarised); and (ii) attribute comments and publish a list of respondents' names.

More information on the work of the Commission can be found on our website at <https://www.scotlawcom.gov.uk/>. Finally, should you wish to offer any comments on the way in which we conduct our consultation exercises, we would be pleased to hear from you.

Yours faithfully

MALCOLM McMILLAN  
Chief Executive