Collated responses to

Discussion Paper on Aspects of Family Law: Cohabitation (DP No 170)

Consultation period ended: 30 June 2020

This document contains the text of consultation responses:

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1. Sheriff William Holligan

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Summary of Questions

1. Should the regime for financial provision for cohabitants on cessation of cohabitation otherwise than by death remain separate from that for spouses and civil partners on divorce and dissolution?

(Paragraph 2.66)

Comments on Question 1 This is a policy issue. No comment is offered.

2. Should the definition of cohabitant in section 25 of the 2006 Act be amended?

(Paragraph 3.101)

Comments on Question 2 Yes

3. If consultees think the definition should be amended, should the comparison with spouses be removed in favour of a description of the nature of the relationship, such as "enduring family relationship", "genuine domestic basis", or something else?

(Paragraph 3.101)

Comments on Question 3

Largely for the reasons outlined in the Discussion Paper, the current definition of cohabitant is unhelpful and, arguably, out of date. That said, no definition can ever offer anything more than a general formula: each case will turn upon its own facts. It is suggested that a key element in the definition is the degree of commitment shown by the parties to each other. Cohabitation does not necessarily require parties to live full time with each other but the relationship must be more than casual. The New Zealand approach (paragraph 3.63 – 3.65) – "live together as a couple" plus the non- exclusive list of factors enumerated seems to encompass much of what the inquiry encompasses.

4. If the comparison with spouses is to be removed, should the legislation expressly provide that couples within the forbidden degrees of relationship to each other will be excluded?

(Paragraph 3.101)

Comments on Question 4

If the husband and wife definition is being removed it would seem sensible to exclude couples within the forbidden degrees provided the policy decision has been taken that the legislation should not extend to them.

5. Should a qualifying period of cohabitation be introduced in order to access remedies under the 2006 Act? If so:

   (a) how long should that qualifying period be?

   (b) should the qualifying period be different, or removed altogether, if the parties have children?

(Paragraph 3.101)

Comments on Question 5

It is difficult to see what benefit there is in having a qualifying period. It does not appear to have caused a problem so far. It may be difficult to identify when a relationship which satisfies the statutory definition begins. The length of a qualifying period may also be arbitrary. The

length of a relationship is a factor for the court to consider when granting, or withholding, a remedy.

6. Would the response to Question 5(a) or (b) change if the remedies available to former cohabitants were extended?

(Paragraph 3.101)

Comments on Question 6

No

7. Would the definition of cohabitant be improved by the introduction of a list of features or characteristics to be taken into account in deciding whether the parties are cohabitants?

If so, what features or characteristics should be included?

(Paragraph 3.101)

Comments on Question 7

Yes. See answer to Q3 above.

8. What are consultees' views on the introduction of a registration system for cohabitants?

(Paragraph 3.101)

Comments on Question 8

It is perhaps doubtful whether there would be much uptake on such a proposal but there may be cases where it is a useful facility.

9. Do sections 26 and / or 27 cause any difficulty in practice?

(Paragraph 4.34)

Comments on Question 9

None known.

10. Should the language in sections 26 and / or 27 be modernised?

(Paragraph 4.34)

Comments on Question 10

No observations other than “household goods” does seem an outdated expression.

11. Should sections 26 and / or 27 be modified in some other way?

(Paragraph 4.34)

Comments on Question 11

No observations other than “household goods” does seem an outdated expression.

12. Should the policy underpinning awards for financial provision for former cohabitants, where cohabitation ends otherwise than by death, be:

(a) compensation for economic loss sustained during the relationship;

(b) relief of need:

(c) sharing of property acquired during the cohabitation;

(d) sharing the future economic burden of child care;

(e) a combination of any or all of (a) to (d) above; or

(f) something else?

(Paragraph 5.69)

Comments on Question 12

No comment on what is a policy issue. Whatever the policy it should be stated clearly so that the court is aware what its function is.

13. For the purposes of financial provision for former cohabitants, should any distinction be made between a child of whom the cohabitants are parents and a child who is or was accepted by the cohabitants as a child of the family?

(Paragraph 5.69)

Comments on Question 13

There seems to be no good reason for such a distinction.

14. Should the test for determining what order, if any, the court may make for financial provision on cessation of cohabitation otherwise than by death be based on fairness and reasonableness, having regard to all the circumstances of the case, including a list of relevant factors such as:

(a) the financial and non-financial contributions made by each party to the relationship, including the contribution made by each party to the care of the family and the family home;

(b) the effect of the cohabitation upon the earning capacity of each of the parties;

(c) the parties' respective needs and resources;

(d) relief of financial hardship caused by the cohabitation or the end of the cohabitation;

(e) a combination of any or all of (a) to (d) above; or

(f) something else?

(Paragraph 5.69)

Comments on Question 14

Whatever test is prescribed, it needs to be one which helps practitioners give advice and the court can apply. The present test of economic advantage has given rise to problems. Greater clarity is required allowing for the fact that, ultimately, the matter is one of discretion.

The general principle of fairness and reasonableness would seem consistent with the approach of the Supreme Court in *Grant v Gow.*

Grant v Gow uses a "before and after" model, looking at where the parties were at the start of the relationship and comparing it with where parties were at the end. That does not appear in the statute itself but it is a helpful starting point.

The proposed factors in Q14 use the word “financial” and not “economic “. It is suggested the latter is wider than the former. Statutory guidance as to the components to be taken into account in reaching a conclusion would be helpful given the nature of the issues under consideration. Exactly what the factors should be is a policy decision.

However, perhaps some consideration could be given to including a specific pointer to have regard to pension benefits acquired or foregone; the acquisition of assets during the relationship; and source of funds.

15. Are the remedies available to the court on an application for financial provision by a former cohabitant adequate and sufficient?

(Paragraph 5.92)

Comments on Question 15

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.

16. If not, should the remedies be extended to include:

(a) transfer of property;

(b) pension sharing;

(c) periodic payments for a period after the end of the cohabitation, sufficient to relieve short term financial hardship; or

(d) something else?

(Paragraph 5.92)

Comments on Question 16

I would suggest yes.

17. Should express provision be made requiring or permitting the court to consider the resources of the former cohabitants in deciding what order, if any, to make for financial provision?

(Paragraph 5.92)

Comments on Question 17

Yes although resources are likely to be taken into account in the exercise of the discretion as to the making of an award.

18. Should the one year time limit for making a claim under section 28(2) of the 2006 Act be extended?

(Paragraph 6.35)

Comments on Question 18

No but see below.

19. If the time limit is extended, what should the new time limit be?

(Paragraph 6.35)

Comments on Question 19

N/A

20. If the time limit is extended, should the court be afforded discretion to allow late claims?

(Paragraph 6.35)

Comments on Question 20

N/A

21. If the time limit is not extended, should the court be afforded discretion to allow late claims?

(Paragraph 6.35)

Comments on Question 21

At the moment the court has no power to admit a claim outwith the statutory period. There will be hard cases in which the absence of a remedy works unfairly.

22. If the court is afforded discretion to allow late claims:

    (a) should the test for the exercise of discretion be "on cause shown", "in exceptional circumstances" or something else?

    (b) should there be a maximum period (backstop) beyond which no claim may competently be made?

(Paragraph 6.35)

Comments on Question 22

(a) One possible approach would be for the onus to be placed firmly on the applicant. For example:" An application may be brought outwith the relevant period provided that the applicant satisfies the court that an application could not reasonably have been brought within the relevant period and that the applicant will suffer hardship should the application not be permitted".

(b) If a power to admit claims is introduced without a "long stop" one party could, in theory, be exposed to a claim without limit which is undesirable. Selecting a period is difficult. Either two years from the date of cessation of cohabitation or five years at most.

23. Should express provision be made in the 2006 Act to allow parties to agree extension of the time limit to facilitate settlement?

(Paragraph 6.35)

Comments on Question 23

Whereas it would seem appropriate to avoid unnecessary proceedings, there may be disputes in certain cases at the margins as to whether agreement was reached. A specific procedure requiring the completion of a form signed by or on behalf of parties would overcome the potential problem.

24. Should express statutory provision be made permitting the court to have regard to the terms of any agreement between the parties as to financial provision on cessation of cohabitation (including opting out of the 2006 Act regime) when deciding what order, if any, to make?

(Paragraph 7.39)

Comments on Question 24

There is a difference between having regard to an agreement and giving effect to the agreement. If it is the former, the result may be that the court, in effect, is invited to rewrite or ignore the agreement in whole or in part. In practice, if there is an agreement in existence, as a matter of evidence, the court may "have regard to it" but proceed to make its own order. (There are cases in which an agreement is entirely one sided, benefitting one party more than the other.) If the proposal is that parties may contract out of the Act there would need to be specific provisions to that effect.

25. Should express statutory provision be made allowing the court to set aside, or vary any term of, a cohabitation agreement? If so, should the test for setting aside or variation be:

    (a) that the agreement was not fair or reasonable at the time it was entered into;

    (b) that there has been a material change in the parties' circumstances since the agreement was entered into, or

    (c) another test (and if so what should that test be)?

(Paragraph 7.39)

Comments on Question 25

If there is a power to contract out of the Act, then the court should have a power to set aside the agreement in whole or in part. The proposed formulae seem appropriate.

26. What information or data do consultees have on:

    (a) the economic impact of sections 25-28 of the Family Law (Scotland) Act 2006,

    (b) the potential economic impact of any option for reform discussed in this Discussion Paper (in particular the impact in terms of tax law of the possibility of extending the remedies available to cohabitants on cessation of cohabitation otherwise than by death to include property transfers/pension sharing/maintenance)?

    (c) the potential economic impact upon the SCTS and legal aid budgets of any option for reform discussed in this Discussion Paper, including extension of the time limit for claims and additional remedies?

(Paragraph 9.4)

Comments on Question 26

No comment to make.

General Comments

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2. The Sheriffs' Association

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1. Should the regime for financial provision for cohabitants on cessation of cohabitation otherwise than by death remain separate from that for spouses and civil partners on divorce and dissolution?

(Paragraph 2.66)

Comments on Question 1 No comment as this question raises issues of policy in relation to which it is not appropriate for the Sheriffs' Association to express any view

2. Should the definition of cohabitant in section 25 of the 2006 Act be amended?

(Paragraph 3.101)

Comments on Question 2 It is observed that defining cohabitant in terms of the characteristics of the relationship continues to be generally understood. Similar wording is used in other legislation, for example the Adoption and Children (Scotland) Act 2007 and the Matrimonial Homes (Family Protection) (Scotland) Act 1981. Case law on the current definition of cohabitation demonstrates a fairly

wide judicial interpretation seeking to ascertain whether the expected stability and features of co-dependence exist.

3. If consultees think the definition should be amended, should the comparison with spouses be removed in favour of a description of the nature of the relationship, such as "enduring family relationship", "genuine domestic basis", or something else?

(Paragraph 3.101)

Comments on Question 3

No comment

4. If the comparison with spouses is to be removed, should the legislation expressly provide that couples within the forbidden degrees of relationship to each other will be excluded?

(Paragraph 3.101)

Comments on Question 4

No comment

5. Should a qualifying period of cohabitation be introduced in order to access remedies under the 2006 Act? If so:

   (a) how long should that qualifying period be?

   (b) should the qualifying period be different, or removed altogether, if the parties have children?

(Paragraph 3.101)

Comments on Question 5

Cohabitation by its nature can develop over a period of time and may not have an easily definable fixed date of commencement. Introduction of a qualifying period may result in some cases with substantial dispute as to when cohabitation commenced which could require significant court time in hearing evidence to determine. Many couples who have children together do not cohabit. This would not be a helpful provision in our view.

6. Would the response to Question 5(a) or (b) change if the remedies available to former cohabitants were extended?

(Paragraph 3.101)

Comments on Question 6

The length of the cohabitation is a factor which may well have a bearing on the value of a claim in some cases – particularly if the policy underpinning awards for financial provision where cohabitation ends otherwise than by death is to be under paragraphs 12 (a) and (c) undernoted. However, the requirement for a qualifying period of cohabitation in order to qualify for any claim, would, in our view, lead an increase in litigation about whether a given relationship qualified and may also lead to unfairness in certain cases (eg. where a couple buy a house together and make unequal contributions then separate after a short period of cohabitation.)

7. Would the definition of cohabitant be improved by the introduction of a list of features or characteristics to be taken into account in deciding whether the parties are cohabitants?

If so, what features or characteristics should be included?

(Paragraph 3.101)

Comments on Question 7

It may be difficult to formulate a list of features or characteristics sufficiently broad and comprehensive to cover all situations. A broad definition allows judicial discretion which has regard to the features or characterisitics likely to be included in a statutory list. The current test is now well understood by the legal profession (albeit perhaps less so by the general public).

8. What are consultees' views on the introduction of a registration system for cohabitants?

(Paragraph 3.101)

Comments on Question 8

The concern noted in the consultation paper that the most vulnerable cohabitants, who by definition are most likely to be in need of protection, are least likely to formalise their relationships by registration is an issue that should be carefully considered. The take up for such a scheme is likely to be low – the experience of the low take up of section 4 agreements in relation to parental rights and responsibilities and the disinclination of most couples to sign

minutes of agreement when purchasing a heritable property or for married couples to enter prenuptual agreements is clearly indicative of that behavioural trend.

9. Do sections 26 and / or 27 cause any difficulty in practice?

(Paragraph 4.34)

Comments on Question 9

Sections 26 and 27 have been subject to little judicial scrutiny and reference to these provisions in case law has been incidental.

10. Should the language in sections 26 and / or 27 be modernised?

(Paragraph 4.34)

Comments on Question 10

Yes. Reference to allowance for joint household expenses is old fashioned and outmoded.

11. Should sections 26 and / or 27 be modified in some other way?

(Paragraph 4.34)

Comments on Question 11

No comment.

12. Should the policy underpinning awards for financial provision for former cohabitants, where cohabitation ends otherwise than by death, be:

(a) compensation for economic loss sustained during the relationship;

(b) relief of need:

(c) sharing of property acquired during the cohabitation;

(d) sharing the future economic burden of child care;

(e) a combination of any or all of (a) to (d) above; or

(f) something else?

(Paragraph 5.69)

Comments on Question 12

This is a matter of policy and no view as to the basis for awards of financial provision is offered. 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*.

It is important to consider the wider perspective of where this legislation sits when compared to the Family Law (Scotland) Act 1985. The 1985 Act starts firmly with the principle of fair sharing of property acquired during the marriage. Compensation for economic loss sustained during the relationship and the future burden of child care are often then considered by way of a departure from equal sharing of that property. Stand-alone awards have been made in cases where there is little or no matrimonial property but these have tended to be modest in their nature. The lack of a shared property regime for cohabitants has led to awards in some cases for economic disadvantage being significantly higher than that which a spouse would be likely to awarded on divorce. There should be careful thought about where the two regimes sit side by side and the policy intention of the legislation.

Whilst English family law has considered the needs of the pursuer when assessing awards of financial provision, this forms no part of Scots family law at present. If this were to be introduced as a deliberate policy intention for cohabitants, then careful consideration would also need to be given to amending the Family Law (Scotland) Act 1985 for married couples. This would have a material affect on the methodology currently used to quantify financial provision on the breakdown of either a marriage or cohabitation under existing legislation.

13. For the purposes of financial provision for former cohabitants, should any distinction be made between a child of whom the cohabitants are parents and a child who is or was accepted by the cohabitants as a child of the family?

(Paragraph 5.69)

Comments on Question 13

Yes. There is clearly a difference in terms of the obligation to share the future economic burden of child care for a child of the relationship and any alleged economic loss caused by the need to care for the child of that relationship, as opposed to a child of one of the parties born before the start of that cohabitation.

14. Should the test for determining what order, if any, the court may make for financial provision on cessation of cohabitation otherwise than by death be based on fairness and reasonableness, having regard to all the circumstances of the case, including a list of relevant factors such as:

(a) the financial and non-financial contributions made by each party to the relationship, including the contribution made by each party to the care of the family and the family home;

(b) the effect of the cohabitation upon the earning capacity of each of the parties;

(c) the parties' respective needs and resources;

(d) relief of financial hardship caused by the cohabitation or the end of the cohabitation;

(e) a combination of any or all of (a) to (d) above; or

(f) something else?

(Paragraph 5.69)

Comments on Question 14

No comment as this is a policy issue. However, we refer to answer 12 and the need to carefully consider where this legislation sits when considered alongside the remedies available to spouses on the breakdown of a marriage under the Family Law (Scotland) Act 1985.

The resources of the parties should be taken into account, as from a practical perspective, this is unavoidable when quantifying a capital award and the payee's means to pay it.

15. Are the remedies available to the court on an application for financial provision by a former cohabitant adequate and sufficient?

(Paragraph 5.92)

Comments on Question 15

While this is a matter of policy, there appears to be no obvious difficulty in principle to extending the range of remedies available.

16. If not, should the remedies be extended to include:

(a) transfer of property;

(b) pension sharing;

(c) periodic payments for a period after the end of the cohabitation, sufficient to relieve short term financial hardship; or

(d) something else?

(Paragraph 5.92)

Comments on Question 16

The lack of the option to grant a property transfer order often results in a second court action for division and sale of a heritable property -unnecessary litigation. The lack of flexibility in the remedies available to the court can lead to unfair results.

Equally, the lack of pension sharing option ties the court's hands in cases where the parties have limited resources. However, pension sharing may present practical issues in relation to implementation which would require careful scrutiny.

Subject to those comments, the potential remedies are a matter of policy.

17. Should express provision be made requiring or permitting the court to consider the resources of the former cohabitants in deciding what order, if any, to make for financial provision?

(Paragraph 5.92)

Comments on Question 17

Yes - it is not a good situation for a court order to be made which is plainly unenforceable.

18. Should the one year time limit for making a claim under section 28(2) of the 2006 Act be extended?

(Paragraph 6.35)

Comments on Question 18

Whist any extension is essentially a policy matter, there does not appear to be a significant number of cases where claims are time barred and unfairness results. The FLA and AFLA are perhaps best placed to comment as those advising clients on potential claims.

19. If the time limit is extended, what should the new time limit be?

(Paragraph 6.35)

Comments on Question 19

No comment as precise detail is a policy matter.

20. If the time limit is extended, should the court be afforded discretion to allow late claims?

(Paragraph 6.35)

Comments on Question 20

Some judicial discretion is thought to be desirable.

21. If the time limit is <u>not</u> extended, should the court be afforded discretion to allow late claims?

(Paragraph 6.35)

Comments on Question 21

Some judicial discretion is thought to be desirable.

22. If the court is afforded discretion to allow late claims:

    (a) should the test for the exercise of discretion be "on cause shown", "in exceptional circumstances" or something else?

    (b) should there be a maximum period (backstop) beyond which no claim may competently be made?

(Paragraph 6.35)

Comments on Question 22

Whilst this is a policy issue**,** "cause shown" may be so widely relied upon as to make the time limit irrelevant "in exceptional circumstances" or another formulation which makes it clear that something other than simple ignorance of the time limit or oversight may be advisable.

The issue of a backstop for claims is one of policy but it may be appropriate given our answer to Q23

23. Should express provision be made in the 2006 Act to allow parties to agree extension of the time limit to facilitate settlement?

(Paragraph 6.35)

Comments on Question 23

Yes – this would avoid actions being raised and sisted. It is less of an issue if the 12 month period is extended but is a real issue under the current legislation.

24. Should express statutory provision be made permitting the court to have regard to the terms of any agreement between the parties as to financial provision on cessation of cohabitation (including opting out of the 2006 Act regime) when deciding what order, if any, to make?

(Paragraph 7.39)

Comments on Question 24

While this is very much a matter of policy, it seems reasonable that the court is permitted to have regard to the terms of any agreement, subject to a power to set aside or vary.

25. Should express statutory provision be made allowing the court to set aside, or vary any term of, a cohabitation agreement? If so, should the test for setting aside or variation be:

    (a) that the agreement was not fair or reasonable at the time it was entered into;

    (b) that there has been a material change in the parties' circumstances since the agreement was entered into, or

    (c) another test (and if so what should that test be)?

(Paragraph 7.39)

Comments on Question 25

Whist this is a matter of policy, careful consideration requires to be given to where the legislation would sit when read alongside section 16 of the Family Law (Scotland) Act and case law pertaining thereto.

26. What information or data do consultees have on:

(a) the economic impact of sections 25-28 of the Family Law (Scotland) Act 2006,

(b) the potential economic impact of any option for reform discussed in this Discussion Paper (in particular the impact in terms of tax law of the possibility of extending the remedies available to cohabitants on cessation of cohabitation otherwise than by death to include property transfers/pension sharing/maintenance)?

(c) the potential economic impact upon the SCTS and legal aid budgets of any option for reform discussed in this Discussion Paper, including extension of the time limit for claims and additional remedies?

(Paragraph 9.4)

Comments on Question 26

Reform of the law by extending the basis for application for financial provision, the remedies available or time limits is likely to increase the number of applications in the sheriff court.

General Comments

While the consultation raises many important matters in respect of family relationships, the Association in maintaining its practice of avoiding comment on matters of policy has declined to respond in respect of many of the questions. Individual sheriffs will no doubt be submitting individual responses for consideration.

While the consultation is not specifically considering issues in respect of section 29, the 6 month time bar for claims under section 29 of the 2006 Act is often unrealistically short and should perhaps be extended to 12 months. The courts would also benefit from greater clarity in the provisions as how such claims are to be dealt with. The policy intention of the current legislation is unclear leaving much to unfettered judicial discretion.

3. SCOTTISH LAW AGENTS SOCIETY

Name: Scottish Law Agents Society
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1. Should the regime for financial provision for cohabitants on cessation of cohabitation otherwise than by death remain separate from that for spouses and civil partners on divorce and dissolution?

(Paragraph 2.66)

Comments on Question 1

In our view the regime for spouses and civil partners should remain separate from that pertaining to cohabitants. For both spouses and civil partners that status is entered into through a ceremony and is certificated making it easy to determine whether the parties have such status. Cohabitation by comparison in a factual situation which does not require any ceremony or registration process. There is no certificate to vouch the position. The informality of cohabitation and the variety of situations which it may comprise does not lend itself to the application of the same rules for financial provisions as pertains to spouses and civil partners.

2. Should the definition of cohabitant in section 25 of the 2006 Act be amended?

(Paragraph 3.101)

Comments on Question 2

Yes. The reference to 'living together as if they were husband and wife'[i] is demeaning to cohabitants. There are cohabitants and not spouses so to equate one status with another is nonsensical. The statutory definition does not actual assist in determining what are the

defining characteristics of cohabitation are. We would adopt the comments of Prof Frankie McCarthy, now of course a Commissioner, quoted at 3.21 of the Discussion Paper. We too are concerned that the couple *'living apart together'* where there is not a single common home are not well catered for in the current definition.[ii] This in the experience of our members is a not uncommon situation with older couples who each have their own homes.

3. If consultees think the definition should be amended, should the comparison with spouses be removed in favour of a description of the nature of the relationship, such as "enduring family relationship", "genuine domestic basis", or something else?

(Paragraph 3.101)

Comments on Question 3

Yes. For the reasons noted above.

Our preference would be for 'Enduring family relationship' which contains two essential elements that the relationship is 'enduring' and not merely fleeting or temporary and 'family' which is the kernel of the issue. It however begs the question that 'family' is itself sufficiently flexible to cover contemporary arrangements. Family relationship does not necessarily imply a sexual relationship which is entirely appropriate and the inclusion of children within the family is clearly included but not required. We note the polyamory has been rejected on well founded on policy grounds by the Commission. However 'enduring family relationship' does not appear to require the relationship to be exclusive. For example A lives with X with whom he has a child in Aberdeen. He finds new employment in Grangemouth where lives with Y from Monday to Thursday and by whom he has another child, while continuing to live with X and his family there in Aberdeen Friday to Sunday. If the existence of the other relationship is unknown to X and/or Y that does in our view satisfy the definition of polyamory. Yet each relationship appears to satisfy the requirements of enduring family relationship and each is equally worthy of protection under legislation. This is worthy of further consideration.

'Genuine domestic basis' does not appear to be helpful. 'Genuine' runs the danger of an inquiry as to whether a relationship is genuine or a sham which has the potential to take matters down an inappropriate cul-de-sac of imputing intention. 'Domestic' again does not appear to offer any helpful guidance. A lodger can form part of a domestic arrangement without any relationship and is genuine but does not amount to cohabitation.

4. If the comparison with spouses is to be removed, should the legislation expressly provide that couples within the forbidden degrees of relationship to each other will be excluded?

(Paragraph 3.101)

Comments on Question 4

Yes. The policy implications of not excluding forbidden degrees are not explored in the Discussion Paper but cover similar issues to those discussed in relation to polyamory.

5. Should a qualifying period of cohabitation be introduced in order to access remedies under the 2006 Act? If so:

   (a) how long should that qualifying period be?

   (b) should the qualifying period be different, or removed altogether, if the parties have children?

(Paragraph 3.101)

Comments on Question 5

No qualifying period should be required to access remedies. The period of cohabitation will nevertheless play its role in determination of the quantification of any award.

6. Would the response to Question 5(a) or (b) change if the remedies available to former cohabitants were extended?

(Paragraph 3.101)

Comments on Question 6

No.

7. Would the definition of cohabitant be improved by the introduction of a list of features or characteristics to be taken into account in deciding whether the parties are cohabitants?

   If so, what features or characteristics should be included?

(Paragraph 3.101)

Comments on Question 7

There is a danger that this becomes a checklist which must be fulfilled and which does not necessarily cater for the wide variety of situation comprised within cohabitation.

8. What are consultees' views on the introduction of a registration system for cohabitants?

(Paragraph 3.101)

Comments on Question 8

We are not in favour of a registration system. If such a system were introduce we suspect it would be little used. Marriage and civil partnership are both based on registration systems which confer a status. A third registered cohabitants status by registration would appear to be unnecessarily complicated. The premise is surely that those whose cohabitation comes to an end are worthy of protection by the legal system. Any registration system would deny former cohabitant or some of them access to some or all remedies.

9. Do sections 26 and / or 27 cause any difficulty in practice?

(Paragraph 4.34)

Comments on Question 9

No. They appear to be used infrequently.

10. Should the language in sections 26 and / or 27 be modernised?

(Paragraph 4.34)

Comments on Question 10

Given the absence of problems there seems little benefit in changing the language.

11. Should sections 26 and / or 27 be modified in some other way?

(Paragraph 4.34)

Comments on Question 11

We have no view on other modification. Consideration might be given to their omission.

12. Should the policy underpinning awards for financial provision for former cohabitants, where cohabitation ends otherwise than by death, be:

(a) compensation for economic loss sustained during the relationship;

(b) relief of need:

(c) sharing of property acquired during the cohabitation;

(d) sharing the future economic burden of child care;

(e) a combination of any or all of (a) to (d) above; or

(f) something else?

(Paragraph 5.69)

Comments on Question 12

At present where a relationship comes to an end there is often a need to raise more than one action for a cohabitant. It appears from our members to be fairly standard practice to raise one action under the current legislation and a second for division and sale of the family home where title stands in joint names. This can lead to actions taking place in different sheriff courts as the jurisdiction of the court in such an action will depend on the lex situs of the heritage. This may not be where the parties or one of them is currently resident. This adds a further level of complexity and expense.

A view requires to be taken on whether multiple actions are appropriate or whether all aspects can and should be rolled up into a single action. Division and sale has a predictable outcome in relation to sharing of what for most will be the largest asset available to either of the cohabitants. If the basis on which awards are to be made is relief of need then a single action should be available to permit sale or possibly transfer of the property where in joint names. Our members have as will be understood no experience of transfer orders in such situations and express no concluded view on the appropriateness of such a remedy.

Where title stands in one name alone and the other cohabitant has made a significant capital contribution to that property this can be addressed at present by an action for unjustified enrichment. Looked at from the perspective of remedy, therefore, as this a remedy which is sometimes resorted to then an order to undo that unrichment ought be available within a single action. We note that remedy is concerned with redressing the enrichment and not compensating the economic loss of the other, although in practice they may be intimately associated. We observe that this is not often well understood by the party for whom the claim is made. Conceptually such an action does not sit well within the framework of relief of future need nor with that for compensation of past economic loss. We note that although there was no express discussion of unjustified enrichment in the Commission's Family Law Report used the language of enrichment in its discussion of the introduction of a remedy which is now represented by s28 of the 2006 Act. This is understandable given that it preceded *Shilliday v Smith.* Further we note the decision in *Pert v McCaffrey* and the Commission's view that this clarifies and overrules the decision in *Courtney's Executors v Campbell.* In *Pert* the opinion of

the court is strictly *obiter* as the claim was unsuccessful on other grounds. There is merit therefore in placing the matter beyond any doubt by an express statement in a future statute if unjustified enrichment is to be retained as a remedy. It is not immediately clear to us that retention of unjustified enrichment is required as a 'longstop' provision to prevent hardship if there is an extension of the present time limit in which to bring actions or judicial discretion to extend the time limit. There is a possibility of remedy shopping by former cohabitants seeking to obtain the best settlement for themselves which will lead to delays and increased expense and make the settling of claims altogether more complex.

A further issue which does not appear to be addressed is the need for some sort of consistency of principles for termination *inter vivos* and *mortis causa* i.e. relief of future need v compensation for past services resulting in economic loss. A law which uses different principles in these situation lacks coherence. We note that the courts have interpreted the existing provisions of s29 largely on the basis of future need insofar as coherent principles can be ascertained from the limited case law. We further note the terms of the Commission's Report on Succession (No 215) which proposed a fairly mechanical formulation as a percentage of a spouse/civil partner's entitlement [see para 4.20]. This is based neither on past economic disadvantage or relief of future need.

The principal issue of contention for inter vivos termination is the compensation for past economic loss v relief of future need. There is no principle by which one cohabitant owes a duty of aliment or support to the other during the cohabitation so to compensate for past economic loss offers compensation where none was due before the termination of the cohabitation is a something of a windfall benefit. Relief of future need has more merit in permitting parties a period of adjustment to their future financial situation. It also offers coherence with the interpretation of the current s29 provisions.

The present provisions for making a capital payment do not go far enough to ensure fair sharing of the property acquired during the relationship hence the need to bring actions of division and sale in many cases and unjustified enrichment actions in other cases.

Our preference accordingly is (a) relief of need; (b) sharing of property acquired during the cohabitation; (c) redressing any unjustified enrichment occurring during the relationship, if this is required, and (d) sharing the future economic burden of child care. (c) might be addressed by enhancing (b) to provide criteria in statute for the fair sharing of property based on the economic contributions of the parties rendering (c) redundant.

While cohabitation covers a broad range of arrangements our members consider that at present they find difficulty in advising their clients as to potential outcomes given the lack of clarity of purpose and the extent to which discretion is conferred. Any change to the law which clarifies the law would be welcome.

13. For the purposes of financial provision for former cohabitants, should any distinction be made between a child of whom the cohabitants are parents and a child who is or was accepted by the cohabitants as a child of the family?

(Paragraph 5.69)

Comments on Question 13

We are of the view that an accepted child should be capable of being treated in the same way as children of the relationship. A child accepted as part of the family may be supported by their other natural parent. This ought not necessarily to preclude any claim by or on behalf of that child but any other potential provision ought to be taken into account.

14. Should the test for determining what order, if any, the court may make for financial provision on cessation of cohabitation otherwise than by death be based on fairness and reasonableness, having regard to all the circumstances of the case, including a list of relevant factors such as:

(a) the financial and non-financial contributions made by each party to the relationship, including the contribution made by each party to the care of the family and the family home;

(b) the effect of the cohabitation upon the earning capacity of each of the parties;

(c) the parties' respective needs and resources;

(d) relief of financial hardship caused by the cohabitation or the end of the cohabitation;

(e) a combination of any or all of (a) to (d) above; or

(f) something else?

(Paragraph 5.69)

Comments on Question 14

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15. Are the remedies available to the court on an application for financial provision by a former cohabitant adequate and sufficient?

(Paragraph 5.92)

Comments on Question 15

No. See our answer to Q12.

16. If not, should the remedies be extended to include:

(a) transfer of property;

(b) pension sharing;

(c) periodic payments for a period after the end of the cohabitation, sufficient to relieve short term financial hardship; or

(d) something else?

(Paragraph 5.92)

Comments on Question 16

We agree with (a) and (c). With regard to orders in relation to pensions there may be issues in relation to pension schemes whereby spouses and cohabitants are treated differently which require amendments to legislation regarding pension schemes which may involve questions of legislative competence.

17. Should express provision be made requiring or permitting the court to consider the resources of the former cohabitants in deciding what order, if any, to make for financial provision?

(Paragraph 5.92)

Comments on Question 17

Yes.

18. Should the one year time limit for making a claim under section 28(2) of the 2006 Act be extended?

(Paragraph 6.35)

Comments on Question 18

The existence of a time limit is useful to bring matters to a timely conclusion. If the principle by which awards are made is future needs based then delay suggests that the necessity of making an award is, at best, reduced. On the other hand there may be instances of hardship resulting from a rigid application of the time limit for example where there has been agreement to sell the family house (but no more) which either does not sell or one party withdraws their agreement to sell.

This answer is bound up with the issues in Q19 to Q23. Our preference would be to extend the period to two years which ought to allow ample time to make claims or to attempt to negotiate a settlement. Nonetheless we consider that discretion to permit late claims where there are truly exceptional grounds for an extension.

19. If the time limit is extended, what should the new time limit be?

(Paragraph 6.35)

Comments on Question 19

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20. If the time limit is extended, should the court be afforded discretion to allow late claims?

(Paragraph 6.35)

Comments on Question 20

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21. If the time limit is <u>not</u> extended, should the court be afforded discretion to allow late claims?

(Paragraph 6.35)

Comments on Question 21

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22. If the court is afforded discretion to allow late claims:

(a) should the test for the exercise of discretion be “on cause shown”, “in exceptional circumstances” or something else?

(b) should there be a maximum period (backstop) beyond which no claim may competently be made?

(Paragraph 6.35)

Comments on Question 22

Not being aware of the right to make a claim might be deemed to be cause shown. We do not consider this is adequate grounds and for that reason would be wary of permitting extension on such grounds. However there may be some situations which are truly exceptional and merit extension

23. Should express provision be made in the 2006 Act to allow parties to agree extension of the time limit to facilitate settlement?

(Paragraph 6.35)

Comments on Question 23

Yes.

24. Should express statutory provision be made permitting the court to have regard to the terms of any agreement between the parties as to financial provision on cessation of cohabitation (including opting out of the 2006 Act regime) when deciding what order, if any, to make?

(Paragraph 7.39)

Comments on Question 24

We have no view on this matter.

25. Should express statutory provision be made allowing the court to set aside, or vary any term of, a cohabitation agreement? If so, should the test for setting aside or variation be:

(a) that the agreement was not fair or reasonable at the time it was entered into;

(b) that there has been a material change in the parties' circumstances since the agreement was entered into, or

(c) another test (and if so what should that test be)?

(Paragraph 7.39)

Comments on Question 25

The extent to which cohabitation agreements are used is not clear to us. It is not clear there is any requirement for power to the courts to set aside any such agreement. It would be a contract and the usual grounds on which a contract might be reduced are available particularly undue influence.

26. What information or data do consultees have on:

(a) the economic impact of sections 25-28 of the Family Law (Scotland) Act 2006,

(b) the potential economic impact of any option for reform discussed in this Discussion Paper (in particular the impact in terms of tax law of the possibility of extending the remedies available to cohabitants on cessation of cohabitation otherwise than by death to include property transfers/pension sharing/maintenance)?

(c) the potential economic impact upon the SCTS and legal aid budgets of any option for reform discussed in this Discussion Paper, including extension of the time limit for claims and additional remedies?

(Paragraph 9.4)

Comments on Question 26

We have no information or data.

General Comments

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4. COMMISSION ON EUROPEAN FAMILY LAW (CEFL)

Name: Professor Nigel Lowe QC (Hon), on behalf of the Organising Committee of the Commission on European Family Law (CEFL)

Organisation:

The Organising Committee of the Commission on European Family Law (CEFL)

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1. Should the regime for financial provision for cohabitants on cessation of cohabitation otherwise than by death remain separate from that for spouses and civil partners on divorce and dissolution?

(Paragraph 2.66)

Comments on Question 1

Although the CEFL is in favour of extending protection for 'cohabitants', we think that the regime for financial provision on the termination of the relationship otherwise than by death should remain separate from that of spouses and civil partners on divorce and dissolution. There remains a key distinction between cohabitation on the one hand, and marriage and civil partnership on the other, in that the latter results from a clear and identifiable joint decision (for whatever reason) to enter into a formal relationship from the moment of the ceremony. It represents a deliberate choice to change status. Moreover, the starting point of this new status is absolutely clear. There is therefore every justification for imposing rights and duties and therefore remedies, including financial ones, immediately following the ceremony. Cohabitation, on the other hand, has no such clear starting point and only becomes more than a fleeting or casual relationship after a period of time, when the relationship can be said to be 'enduring'. This can only be judged in retrospect. By its very nature cohabitation is informal at the beginning and at this stage it is seldom likely that the parties will consider that they have entered into a legal relationship with long-term consequences, nor, in our view, should they be treated as having done so. In short, the two types of relationships, the formal and the

informal, are different in principle and this should be reflected by having separate regimes. We would argue that there is less justification for having a single regime, given the expanded availability of formal relationships, viz same-sex marriage and heterosexual civil partnerships.

Those few people who want to provide for rights and obligations upon cohabitation but who eschew formal relationships can make cohabitation agreements. This seems preferable to providing for opt-outs wich are notorious for their lack of take-up.

If there is to be a single regime for financial provision upon separation, it would be difficult to see why there should not one be upon death. We realize this is outside the Commission's remit, but nevertheless feel that such implications need to be taken on board.

Clearly, the above comments would have to be tempered were registration of cohabitation to be introduced. That would transform an informal relationship into a formal one and thereafter there would seem to be little difference in principle to civil partnerships. See further our answer to Q 8.

2. Should the definition of cohabitant in section 25 of the 2006 Act be amended?

(Paragraph 3.101)

Comments on Question 2

Yes, we do think that s 25 of the 2006 Act should be amended. In the first place we would argue that 'cohabitation' is itself a dated and old-fashioned concept and, of necessity therefore, the term 'cohabitant' should be abandoned in favour of the more modern idea of 'partner'. Secondly, we do not think it is right to define a 'partner for these purposes by reference to living with another as if husband and wife or as civil partners. They are not. They have chosen for whatever reason *not* to so formalise their relationship. The description of the relationship that we favour (see Principle 5:1) is of couples living together in an enduring relationship. It is the 'enduring' part of the relationship that is of critical importance and provides evidence of commitment upon which rights and obligations may be based.

So we would re-word s 25 (1) simply as follows

'In sections….'partner' means either member of a couple who are (or were) living in an enduring relationship.'

There is no need to specify the partners' gender but if it is felt desirable to do so, it could be done as follows:

'In sections …. Partner means either member of a couple (irrespective of gender) who are or (were) living together in an enduring relationship.'

3. If consultees think the definition should be amended, should the comparison with spouses be removed in favour of a description of the nature of the relationship, such as "enduring family relationship", "genuine domestic basis", or something else?

(Paragraph 3.101)

Comments on Question 3

See our answer to Q 2 above.

4. If the comparison with spouses is to be removed, should the legislation expressly provide that couples within the forbidden degrees of relationship to each other will be excluded?

(Paragraph 3.101)

Comments on Question 4

Principle 5:2 of the CEFL's expressly excludes persons who were married to or civil partnership with each other. If registered cohabitation were to be introduced (which we would not recommend – see our answer to Q 8) we would exclude them as well on the basis that registration is another form of formal relationship.

On the other hand, the CEFL Principles do apply if one or both of the partners were married to or in civil partnership with a third person (Principle 5:3) and we would put partners to a registered cohabitation in the same bracket.

The CEFL Principles are silent about excluding those couples within forbidden degrees of relationship with each other but we would acknowledge that unless such relationships are excluded they would fall within our definition of qualifying couples.

In terms of economic protection etc there is no reason to exclude such relationships but in more general policy terms, eg incest and eugenic considerations, there does seem to be case for excluding such relationships. Moreover, such exclusion would be line with other existing legislation.,

5. Should a qualifying period of cohabitation be introduced in order to access remedies under the 2006 Act? If so:

   (a) how long should that qualifying period be?

   (b) should the qualifying period be different, or removed altogether, if the parties have children?

(Paragraph 3.101)

Comments on Question 5

The CEFL is committed to the view that for some remedies there should be additional criteria to be a 'qualifying' couple – be it the presence of a common child and/or the length of the relationship. These criteria vary according to the remedy/protection involved, see in particular Principle 5:18 (use of the family home and household goods -– the enduring relationship must be at least five years duration or there is a common child who is either minor or is dependent upon them) and Principle 5:20 (maintenance – the enduring relationship must be at least five years duration or there is a common child)).

But there are no additional criteria for compensation for contribution to property etc (Principle 5: 16) or for contribution to the household (Principle 5:17) because the legal ground is basically aimed at preventing one party taking (or obtaining) an advantage at the expense of the other.

6. Would the response to Question 5(a) or (b) change if the remedies available to former cohabitants were extended?

(Paragraph 3.101)

Comments on Question 6

See above

7. Would the definition of cohabitant be improved by the introduction of a list of features or characteristics to be taken into account in deciding whether the parties are cohabitants?

   If so, what features or characteristics should be included?

(Paragraph 3.101)

Comments on Question 7

We would not be inclined to introduce a list of characteristics in determining whether parties are cohabitants (''partners' in our terms). There will be arguments as to what such characteristics should be, potential litigation on those that are selected and in any event liable to be open-ended and which demand a subjective adjudication.

8. What are consultees' views on the introduction of a registration system for cohabitants?

(Paragraph 3.101)

Comments on Question 8

Although a registration system for cohabitants would solve the problem of proving both the existence and the start of the relationship, we would not recommend its introduction for the following reasons:

1. It would not solve/address the problem of those living in non-formalised relationships. Many enduring relationships are a consequence of one partner (often the one in the stronger bargaining position) refusing any form of formalisation. In any event, lack of public awareness of legal protection (particularly that newly introduced)_is notorious and those that most need protection are likely to be the very people who would not register. That being the case, given the continuing need to legislate for couples living in non-formalised relationships, the resulting law would be complicated: marriage, civil partnerships, registered cohabitation and couples living in non-formalised relationships.

2. It seems difficult in principle to see a distinction between civil partnerships (save for the ceremonial part) and registered cohabitation. In what way would or should the consequence differ?

3. If couples eschew marriage and civil partnership, why would they choose to register?

4. There would need to be a system for de-registration, further adding to the costs and in any event would it be a condition when applying for a remedy that the cohabitation has been de-registered?

However, that said, a possible role for registered relationships would be to cover relationships (eg platonic) or multi-partnerships that would otherwise fall outside the scope of the main legislation. But that, in turn, would raise the question of what the qualifying criteria ought to be.

Protection for those living in the above-mentioned relationships could be provided by agreements which the State could promote but the take-up is likely to be low

9. Do sections 26 and / or 27 cause any difficulty in practice?

(Paragraph 4.34)

Comments on Question 9

No comment.

10. Should the language in sections 26 and / or 27 be modernised?

(Paragraph 4.34)

Comments on Question 10
No comment.

11. Should sections 26 and / or 27 be modified in some other way?

(Paragraph 4.34)

Comments on Question 11
TheCEFL would like to draw attention to its Principle on the presumption of joint ownership, namely:j
Principle 5:12 Presumption of joint ownership (1) Property acquired during the *de facto* union for the partners' joint use should be presumed to be jointly owned unless otherwise proved. (2) Principle 5:12(1) does not apply to property acquired by gift or inheritance.

12. Should the policy underpinning awards for financial provision for former cohabitants, where cohabitation ends otherwise than by death, be:

    (a) compensation for economic loss sustained during the relationship;

    (b) relief of need:

    (c) sharing of property acquired during the cohabitation;

    (d) sharing the future economic burden of child care;

    (e) a combination of any or all of (a) to (d) above; or

    (f) something else?

(Paragraph 5.69)

Comments on Question 12

See the response to Q 14.

13. For the purposes of financial provision for former cohabitants, should any distinction be made between a child of whom the cohabitants are parents and a child who is or was accepted by the cohabitants as a child of the family?

(Paragraph 5.69)

Comments on Question 13

In terms of assessing financial provision, in general no distinction should be made between a couple's common children and those who have become 'children of the family' . In terms of *liability* to meet a partner's needs etc, however, a distinction can be made inasmuch as it might be reasonable to take into account, in the case of 'chidren of the family',the liability of the birth parents to support that child..

14. Should the test for determining what order, if any, the court may make for financial provision on cessation of cohabitation otherwise than by death be based on fairness and reasonableness, having regard to all the circumstances of the case, including a list of relevant factors such as:

(a) the financial and non-financial contributions made by each party to the relationship, including the contribution made by each party to the care of the family and the family home;

(b) the effect of the cohabitation upon the earning capacity of each of the parties;

(c) the parties' respective needs and resources;

(d) relief of financial hardship caused by the cohabitation or the end of the cohabitation;

(e) a combination of any or all of (a) to (d) above; or

(f) something else?

(Paragraph 5.69)

Comments on Question 14

The CEFL would like to draw attention to its Principles on Compensation, which it feels strikes the right balance, namely:

Principle 5:16 Compensation for contribution to the property, business or profession of the other partner

(1) A right of compensation arises where one partner has contributed financially or otherwise to the other partner's property, business or profession.

(2) The calculation of the compensation should take into account any resulting increase or decrease in the value of the property or the extent of the contribution to the business or profession.

(3) The compensation should be paid in money, unless the partners agree otherwise.

Principle 5:17 Compensation for contributions to the household

(1) A partner who has contributed financially or otherwise for the benefit of the household is entitled to compensation if

(a) the contribution was significant in comparison with the other partner's contribution, or

(b) the contribution resulted in a considerable disadvantage to him or her in terms of income, property acquisition or profession.

(2) The compensation should be paid in money, unless the partners agree otherwise.

Principle 5:18 Family home and household goods

(1) The partners may agree on the continued use or the allocation of the family home and household goods by one of them.

(2) If there is no agreement, and if the partners have been in an enduring relationship for at least five years or have a common child, who is either minor or is dependent upon them, the competent authority has the power, in the interests of the family, to grant one of the partners the continued use of the family home and household goods.

15. Are the remedies available to the court on an application for financial provision by a former cohabitant adequate and sufficient?

(Paragraph 5.92)

Comments on Question 15

No comment.

16. If not, should the remedies be extended to include:

(a) transfer of property;

(b) pension sharing;

(c) periodic payments for a period after the end of the cohabitation, sufficient to relieve short term financial hardship; or

(d) something else?

(Paragraph 5.92)

Comments on Question 16

The CEFL espouses the principle of self-sufficiency (see Principle 5:19) but nevertheless thinks that provision should be made for maintenance. Hence Principle 5:20 provides:

> (1) Where the partners have been in an enduring relationship for at least five years or have a common child, the partner who has insufficient resources to meet his or her needs has a claim of maintenance against the other partner provided that he or she is able to satisfy those needs.
>
> (2) In determining a claim for maintenance, account should be taken in particular of factors such as:
>
> (a) the care of children;
>
> (b) the division of duties during the *de facto* union;
>
> (c) the partners' age, health and employment ability;
>
> (d) the duration of the *de facto* union; and
>
> (e) any marriage, registered partnership or other *de facto* unions.

17. Should express provision be made requiring or permitting the court to consider the resources of the former cohabitants in deciding what order, if any, to make for financial provision?

(Paragraph 5.92)

Comments on Question 17

No comment.

18. Should the one year time limit for making a claim under section 28(2) of the 2006 Act be extended?

(Paragraph 6.35)

Comments on Question 18

No comment.

19. If the time limit is extended, what should the new time limit be?

(Paragraph 6.35)

Comments on Question 19

No comment.

20. If the time limit is extended, should the court be afforded discretion to allow late claims?

(Paragraph 6.35)

Comments on Question 20

No comment.

21. If the time limit is not extended, should the court be afforded discretion to allow late claims?

(Paragraph 6.35)

Comments on Question 21

No comment.

22. If the court is afforded discretion to allow late claims:

    (a) should the test for the exercise of discretion be "on cause shown", "in exceptional circumstances" or something else?

    (b) should there be a maximum period (backstop) beyond which no claim may competently be made?

(Paragraph 6.35)

Comments on Question 22

No comment.

23. Should express provision be made in the 2006 Act to allow parties to agree extension of the time limit to facilitate settlement?

(Paragraph 6.35)

Comments on Question 23

No comment.

24. Should express statutory provision be made permitting the court to have regard to the terms of any agreement between the parties as to financial provision on cessation of cohabitation (including opting out of the 2006 Act regime) when deciding what order, if any, to make?

(Paragraph 7.39)

Comments on Question 24

No comment.

25. Should express statutory provision be made allowing the court to set aside, or vary any term of, a cohabitation agreement? If so, should the test for setting aside or variation be:

(a) that the agreement was not fair or reasonable at the time it was entered into;

(b) that there has been a material change in the parties' circumstances since the agreement was entered into, or

(c) another test (and if so what should that test be)?

(Paragraph 7.39)

Comments on Question 25
The CEFL believes that a court should have the power to scrutinse a cohabitation agreement. Hence, Principle 5:9 provides
(1) The competent authority has the power to scrutinise the agreement. (2) The competent authority may set aside or adjust the agreement on the grounds of (a) general contract law or (b) serious injustice having regard to the contents of the agreement and the circumstances when it was concluded or those subsequently arising.

26. What information or data do consultees have on:

(a) the economic impact of sections 25-28 of the Family Law (Scotland) Act 2006,

(b) the potential economic impact of any option for reform discussed in this Discussion Paper (in particular the impact in terms of tax law of the possibility of extending the remedies available to cohabitants on cessation of cohabitation otherwise than by death to include property transfers/pension sharing/maintenance)?

(c) the potential economic impact upon the SCTS and legal aid budgets of any option for reform discussed in this Discussion Paper, including extension of the time limit for claims and additional remedies?

(Paragraph 9.4)

Comments on Question 26

No comment.

General Comments

The CEFL would like to draw attention to its Principles governing General Rights and Duties *during* the *de facto* union which in its opinion establish essential and mandatory standards for these type of relationships, namely::

Principle 5:4 Equality of the partners
Both partners have equal rights and duties.

Principle 5:5 Contribution to the expenses of the household
Each partner should contribute to the expenses of the household according to his or her ability.

Principle 5:6 Protection of the family home and household goods

(1) Where the partners to the *de facto* union have been in an enduring relationship for at least five years or have a common child, who is either minor or is dependent upon them:

(a) any act of disposal of rights to the family home or household goods requires the consent of both partners; but

(b) any such act of disposal by one partner without the consent of the other is valid if the latter ratifies it.

(2) If one partner refuses or is unable to give consent, the other may request authorisation by the competent authority.

(3) Any act of disposal in breach of the preceding paragraphs may be annulled by the competent authority upon the application of the non-consenting partner.

5. Joanna Miles, University of Cambridge

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1. Should the regime for financial provision for cohabitants on cessation of cohabitation otherwise than by death remain separate from that for spouses and civil partners on divorce and dissolution?

(Paragraph 2.66)

Comments on Question 1

I think this is very much a policy question for the Scottish people, but it's a decision that should be made with an eye to evidence, and bearing in mind what the provision for spouses/CP actually is. There are two conflated questions here: (1) should the provision for spouses, CPs and cohabitants be – as a matter of principle – the same, whatever that provision is, and (2) whether the provision currently made by the law for spouses/CPs on divorce is normatively and functionally appropriate for cohabs in the Scottish context. So, for example, one might say yes to (1) as a matter of principle, but then baulk at the idea of extending an equal sharing principle to cohabs, if it were clear from the social science data that cohabs are less likely to pool resources during relationships and/or if it were felt normatively that equal sharing (with its expropriatory force, regardless of need or loss arising from the rshp) was inappropriate for non-formalised relationships. Since you are presumably not planning to change the law as it is for spouses on divorce, you do need to face down question (2) specifically.

2. Should the definition of cohabitant in section 25 of the 2006 Act be amended?

(Paragraph 3.101)

Comments on Question 2

Yes – see discussion in general comments below.

3. If consultees think the definition should be amended, should the comparison with spouses be removed in favour of a description of the nature of the relationship, such as “enduring family relationship”, “genuine domestic basis”, or something else?

(Paragraph 3.101)

Comments on Question 3

Yes, lose the marriage/CP analogy, in favour of a term such as "couple" - I don't know what "genuine domestic basis" is supposed to mean. "Enduring fam rship", meanwhile, has Scots/UK precedents that it would be as well to build on. I would not recommend, however, a definition that allowed for couples to be eligible where they do not share a household - see my comments below on the LATs concept.

4. If the comparison with spouses is to be removed, should the legislation expressly provide that couples within the forbidden degrees of relationship to each other will be excluded?

(Paragraph 3.101)

Comments on Question 4

This is in part a social policy question, but I think the easy answer is yes, exclude those within the forbidden degrees of rship, because the wider the range of rships covered, the less clear it is that the same scheme of financial remedies is appropriate for them all. See my general comments below.

5. Should a qualifying period of cohabitation be introduced in order to access remedies under the 2006 Act? If so:

   (a) how long should that qualifying period be?

   (b) should the qualifying period be different, or removed altogether, if the parties have children?

(Paragraph 3.101)

Comments on Question 5

I think this relates in part to the substance of the remedies themselves. The current position is based on the view that the substantive grounds for relief are "self-limiting" –i.e. if you've incurred no ED etc, then you won't get a remedy anyway, so we don't need – in advance – to limit access with additional eligibility requirements, not least since someone might have incurred ED very early in a rship and would then be excluded, rather arbitrarily, from getting a remedy (certainly if there were no discretion to waive the requirement in individual cases).

Having a qualifying period will inevitably create litigation (or nuisance claims that have to be bought-off) where the case is on the cusp and the duration is really not clear – at that point, identifying the precise start and end dates becomes critical, and particularly difficult where the thing that we are seeking to identify is itself somewhat amorphous in nature (because defined functionally rather by reference to a clear-cut formal event akin to marriage or CP formation). So that's an extra hassle that I think the Commission / Eric Clive was originally keen to avoid, and Joe Thompson was always very strong on the virtue of the self-limiting nature of the remedies.

So my remarks thus far hinge largely on the retention of the current remedies, or something very like them. (The English Law Com did recommend a MDR/child requirement, even for a not dissimilar scheme of remedies, but I think other local factors dictated that). The issue will particularly arise if you change your financial remedies – in particular, the substantive basis on which they are granted – in a way that makes them more legally intensive, particularly if you move towards anything that looks expropriatory, i.e. any sort of sharing principle that automatically entitles the claimant to £*x* / *x*% of *y*, regardless of need/ED etc. If there were any drift in that direction, I would strongly encourage you to consider adding some additional eligibility requirements, and the MDR or children approach is internationally common place, an approach also selected by the English Law Com (even for its more modest scheme). The role of the eligibility requirements here is to serve a normative function in (however roughly) sieving out those relationships that are not felt to have been sufficiently "committed" / "deserving" (choose adjective here!) to merit that legally more intensive outcome, especially the closer that outcome is (and the reasoning on which it was based) to what would have happened in case of divorce.

6. Would the response to Question 5(a) or (b) change if the remedies available to former cohabitants were extended?

(Paragraph 3.101)

Comments on Question 6

See above: in short, the more legally intensive/intrusive your remedies, the greater the case for a MDR/children requirement.

7. Would the definition of cohabitant be improved by the introduction of a list of features or characteristics to be taken into account in deciding whether the parties are cohabitants?

If so, what features or characteristics should be included?

(Paragraph 3.101)

Comments on Question 7

I'm ambivalent about this. As you know, Aus/NZ legislation have particularly long checklists of factors which are, for good measure, then described as being non-exhaustive and non-essential! This is not a recipe for certainty, but one can understand why – in this "how to define an elephant" context – such checklists are thought to be helpful to give a sense of the sort of rships that are contemplated. But I think it is worth asking whether, once you've specified that you're looking for "couples" of unrelated (not forbidden degrees) pairs, checklists really add that much to the inquiry, or just risk over-complicating matters and potentially generating unfair outcomes – e.g. a public recognition factor that will tend to operate adversely to some (esp older) gay/lesbian couples who are not "out" – the fact that they are not "out" has no bearing on the economic dependencies that justify the availability and grant of remedies.

8. What are consultees' views on the introduction of a registration system for cohabitants?

(Paragraph 3.101)

Comments on Question 8

There is really no point in this. Not least because registration of rships only makes sense where both couples stand to benefit from it – e.g. because will acquire a tax break by doing so. Where the only "gain" will be access to a financial remedy that will benefit one and cost the other, and since it will generally be obvious who the likely claimant will be, the other party has zero incentive to register. And international comparisons make clear any take-up would be exceedingly low, so really no case on cost-benefit basis.

9. Do sections 26 and / or 27 cause any difficulty in practice?

(Paragraph 4.34)

Comments on Question 9

I am unable to comment beyond the Wasoff/Miles/Mordaunt (WMM) findings.

10. Should the language in sections 26 and / or 27 be modernised?

(Paragraph 4.34)

Comments on Question 10

My difficulty with this question is that it is not simply a matter of modernising the language – you need to take a view on whether any provision of akin to s 27 is suitable in the contemporary context (whether for spouses, frankly, or cohabs), bearing in mind in particular social science data regarding the prevalence of "housekeeping allowance" money management systems. Vogler's research suggests that these are increasingly uncommon, particularly amongst younger couples. I can imagine that s 26 provides a useful fallback position for dealing with household goods, but would be interested to know how many couples actually rely on it rather than wrangle over who actually bought what. In the scheme of things, household goods (whilist of practical value, and particularly important in lower-value cases) will generally be the least valuable assets at stake.

11. Should sections 26 and / or 27 be modified in some other way?

(Paragraph 4.34)

Comments on Question 11

See last comment.

12. Should the policy underpinning awards for financial provision for former cohabitants, where cohabitation ends otherwise than by death, be:

(a) compensation for economic loss sustained during the relationship;

(b) relief of need:

(c) sharing of property acquired during the cohabitation;

(d) sharing the future economic burden of child care;

(e) a combination of any or all of (a) to (d) above; or

(f) something else?

(Paragraph 5.69)

Comments on Question 12

For my detailed comments on ch 5, see below. In response to these specific qu:

Which of these is right depends on the normative position that Scots law wants to take on cohabiting rships, and would also properly depend on tbe best social science data regarding the comparability of cohabiting rships with spousal ones.

- Of the list above, (a) and (d) are uncontroversial, I should have thought: the bare minimum is that the economically stronger party should have to share with the other party economic burdens created by the rship that are ongoing at the point of rship breakdown, eg re reduced earning capacity, pension savings, ongoing burdens associated with caring responsibilities etc.
- "Need" is far more problematic – or at least raises questions that you have not addressed in ch 5 re the scope of "needs" for which a former cohab might properly be held responsible following rship breakdown – cf the work of the English Law Com on this, and discussion in the English context (and Canada, and see also Ira Ellman's work) about arguable differences here between needs arising from the parties' contributions to the rship (note here the common overlap with ED claims) and needs not so arising, but merely (at best) contemporaneous with the rship (e.g arising from unemployment, disability etc). It is not immediately obvious that a former spouse (never mind a former cohab) should be held at all responsible to cover the latter type of need – you need to unpack "need" carefully, therefore. Indeed, I recall that the Scot Law Com did some of this unpacking in its work in the 1980s, prior to the 1985 Act.
- As to (c) – this is the strongest of the principles in the 1985 Act, as it is expropriatory of the property owner's assets purely by virtue of the existence (and now ending) of a specified type of rship. Arguably, that is easier to justify in the spousal context as the parties there had entered into a clear formal legal commitment to each other from which such a "partnership deal" might properly be held, as a result, to flow – without more. Cohabs have made not such commitment, and may (certainly one of them may) deliberately have eschewed marriage precisely in order to avoid such sharing, in which case the facility to opt-out may or may not be regarded as sufficient protection. Conversely, however, equal sharing might be understood as a convenient, "no fuss" proxy for needs/compensation principles, avoiding the need to spend ages trying to quantify the latter (see also the sort of formulaic approaches recently considered by the Eng Law Com). So it then depends on how broad brush you are prepared to be. And you would then also need to consider whether, if sharing were applicable to cohabs, it should be possible for a cohab agreement to exclude that principle but not principles of need/comp, in order to ensure a safety net for those for whom sharing would not constitute a windfall, ie a remedy unwarranted on those self-limiting grounds.
- I think until those questions are answered, thinking about combinations of them – the proper rship between them – is difficult, but you are aware of my published thoughts on this.

13. For the purposes of financial provision for former cohabitants, should any distinction be made between a child of whom the cohabitants are parents and a child who is or was accepted by the cohabitants as a child of the family?

(Paragraph 5.69)

Comments on Question 13

Arguably yes in the absence of the commitment of marriage – but if step-children are to be included in scope, inclusion of something like s 25(4) MCA 1973 in any relevant checklist would seem sensible (albeit that that is concerned with provision for the child him or herself)

14. Should the test for determining what order, if any, the court may make for financial provision on cessation of cohabitation otherwise than by death be based on fairness and reasonableness, having regard to all the circumstances of the case, including a list of relevant factors such as:

(a) the financial and non-financial contributions made by each party to the relationship, including the contribution made by each party to the care of the family and the family home;

(b) the effect of the cohabitation upon the earning capacity of each of the parties;

(c) the parties' respective needs and resources;

(d) relief of financial hardship caused by the cohabitation or the end of the cohabitation;

(e) a combination of any or all of (a) to (d) above; or

(f) something else?

(Paragraph 5.69)

Comments on Question 14

See my comments below on why I am concerned by proposals that essentially just create a wide discretion. As to this checklist in particular, it would be very problematic as it points in several different directions whilst giving no clear steer as to which principles are supposed to govern the exercise of the discretion – so you'd be putting yourself in a situation like English law pre-*Miller, McFarlane*. For example:

- Does (a) imply a sharing principle on the basis that you'd want to value such contirbutions equally (see English law to demonstrate way)?

- Does (b) imply an ED principle? If so, how does it relate to the sharing principle implicit in (a)?
- Does (c) imply that needs should be met – or not, given (d), which might imply only hardship (i.e. quite extreme need) should be met?
- And so on.

This is very like English law for financial remedies on divorce, but worse (pre any case law to shape it), and as you will be aware, there is widespread dissatisfaction with the operation of that law (save, in particular, in the higher family judiciary and parts of the Bar)

15. Are the remedies available to the court on an application for financial provision by a former cohabitant adequate and sufficient?

(Paragraph 5.92)

Comments on Question 15

No, for all the reasons explored in WMM

16. If not, should the remedies be extended to include:

(a) transfer of property;

(b) pension sharing;

(c) periodic payments for a period after the end of the cohabitation, sufficient to relieve short term financial hardship; or

(d) something else?

(Paragraph 5.92)

Comments on Question 16

Yes to all of (a) to (c). Worth also adding (in so far as this makes sense in Scots law) something equivalent to English law's property settlement orders, particularly in so far as they permit occupation of the home by one party with kids pending sale at latter date at which point capital value shared between parties on whatever basis is justified by the principles. These orders seem rarely to be used in practice in divorce cases in England – clear preference for outright transfer of the home to one, or sale of the home and division of net proceeds on sale on appropriate % - but handy to have in the toolkit for some cases. See generally WMM from p 129.

17. Should express provision be made requiring or permitting the court to consider the resources of the former cohabitants in deciding what order, if any, to make for financial provision?

(Paragraph 5.92)

Comments on Question 17

Yes! Nonsensical not to. This is not a claim in tort/delict against a defendant backed by a deep-pockets insurance company – it's a reckoning at the end of a rship that needs to be fair to both parties and cannot simply shift ED from one party to the other, come what may.

18. Should the one year time limit for making a claim under section 28(2) of the 2006 Act be extended?

(Paragraph 6.35)

Comments on Question 18

Yes. On this, I remain of the view we expressed in 2010:

"While a time limit is clearly necessary in order to enable couples to put past relationships behind them, the one-year limit does seem rather short in practice.[138] *It might also be thought curious, for a set of provisions which otherwise have quite a discretionary approach and do not fix a minimum duration requirement for eligibility to apply, that no discretion should be afforded on this point. We would therefore suggest that either the time limit should be generally extended (say, to two years*[139]*) and/or the courts should be empowered by statute to extend time in individual cases where the circumstances (exceptionally?) warrant such extension, given the respective interests of pursuer and defender."* (WMM, p 127)

19. If the time limit is extended, what should the new time limit be?

(Paragraph 6.35)

Comments on Question 19

Two years!

20. If the time limit is extended, should the court be afforded discretion to allow late claims?

(Paragraph 6.35)

Comments on Question 20

Arguably yes

21. If the time limit is not extended, should the court be afforded discretion to allow late claims?

(Paragraph 6.35)

Comments on Question 21

Emphatically yes!

22. If the court is afforded discretion to allow late claims:

(a) should the test for the exercise of discretion be "on cause shown", "in exceptional circumstances" or something else?

(b) should there be a maximum period (backstop) beyond which no claim may competently be made?

(Paragraph 6.35)

Comments on Question 22

I think I prefer "on cause shown" – "in excep circs" may be too restrictive, though I see the need to avoid late nuisance claims

On backstop, I can see the case for this, as one way of creating certainty, which might be thought particularly important for cohabs. (Cf the lack of any time limit for claim on divorce in English law- only remarriage extinguishes claims. See *Wyatt v Vince* [2015] UKSC 14.) I think the answer in part depends on how strict the test at (a) is – the looser the test there, the greater the case for a backstop. The question is whether we can imagine claims being appropriately brought after, say, 5 yrs… What about a pursuer who was disabled by mental illness throughout the relevant period? Cf MCA 1973, s 13(4) for an analogy in a rather different context.

You may also find it helpful to read Law Com No 307 generally from 4.147, but particularly 4.152 on extension.

23. Should express provision be made in the 2006 Act to allow parties to agree extension of the time limit to facilitate settlement?

(Paragraph 6.35)

Comments on Question 23

No strong views, but sure, why not?

24. Should express statutory provision be made permitting the court to have regard to the terms of any agreement between the parties as to financial provision on cessation of cohabitation (including opting out of the 2006 Act regime) when deciding what order, if any, to make?

(Paragraph 7.39)

Comments on Question 24

Yes, but see my point on para 7.36 in my general comments below: you first need to give the court jurisdiction to intervene and exercise discretion despite the existence of the agreement. That is what the English *Hyman* principle permits and there is no equivalent in Scots law, even for spouses.

25. Should express statutory provision be made allowing the court to set aside, or vary any term of, a cohabitation agreement? If so, should the test for setting aside or variation be:

(a) that the agreement was not fair or reasonable at the time it was entered into;

(b) that there has been a material change in the parties' circumstances since the agreement was entered into, or

(c) another test (and if so what should that test be)?

(Paragraph 7.39)

Comments on Question 25

Yes, it would be desirable to have such a jurisdiction, but I think that for the time being your ability to recommend and certainly to implement (b) is entirely fettered by the lack of equivalent between spouses on divorce. Since cohabs did not opt in to any legal rship in the first place, unlike spouses, they should have *more* (or certainly equal) not *less* right than sposues have to limit the application of financial remedies in their case.

So you need to look at this as part of a more fundamental review of agreements in both matrimonial and cohab cases, but for the time being you should introduce for cohabs the equivalent of s 16.

26. What information or data do consultees have on:

(a) the economic impact of sections 25-28 of the Family Law (Scotland) Act 2006,

(b) the potential economic impact of any option for reform discussed in this Discussion Paper (in particular the impact in terms of tax law of the possibility of extending the remedies available to cohabitants on cessation of cohabitation otherwise than by death to include property transfers/pension sharing/maintenance)?

(c) the potential economic impact upon the SCTS and legal aid budgets of any option for reform discussed in this Discussion Paper, including extension of the time limit for claims and additional remedies?

(Paragraph 9.4)

Comments on Question 26

No comment, beyond what you may be able to discern from the findings in WMM

General Comments

Congrats on an excellent paper, which is well supported by a lot of comparative law work. While the CV19 situation clearly rules out any possibility of my coming up to discuss with you in person, I'd be glad to talk remotely if that would be helpful.

On reading your paper, I made a number of marginal comments to myself, some of which at least I thought might be useful to you, so in addition to answering your formal questions above, I provide those further comments here, some of which serve as elaboration of the reasoning for some of my responses above. I shall wherever possible relate them to specific para nos that prompted the thought.

Chapter 1

1.24: I would have thought that the only recently repealed common law forms of marriage in Scots law must have helped fuel myth in Scotland, not least given all the introduction of financial remedies in 2006.

1.29: Good luck with any efforts to educate the public on this, certainly with a view to effecting rational behavioural change! Experience in England & Wales has been poor – see Barlow and Smithson work on this, evaluating the impact of the AdviceNow work in the mid 2000s. Repeated BSA surveys show that the myth in England & W remains strong, albeit slightly waning – but such movement as there is tends only to be in inflating the "not sure" responses, rather than moving people positively to the "there's no such thing as common law marriage / cohab doesn't give same rights as marriage" category.

1.33: What is your evidence-base for the assertion mid-para that cohabs are as likely as spouses and CPs to pool etc? I was surprised to see no supporting footnote for this sentence. We know from empirical data here (may be UK or GB data – I can't check) that while cohab *parents* behave like spouses when it comes to money management practices, that is *not* the case for childless cohabs, who operate more independently than spouses. See work of Carolyn Vogler, in particular, and chapters in Miles/Probert (eds), *Sharing Lives, Dividing Assets* (Hart).

Chapter 2

2.15 last quoted para: I remember Joe Thompson being really scathing about the very poor drafting of s 28 – it really is a horrid jumble of (uncomprehensive) stuff, compared with the elegance of the equivalent 1985 Act provisions

2.19 – first bullet: I think this statement could be more nuanced – people don't "opt out" of marriage by not marrying – they don't *opt <u>into</u>* it. More generally on the question of choice and the ambit of its in Scots law, I think it is important to put this in the context of the very strong protection for marital agreements in Scots law by the 1985 Act – i.e. can be challenged only on basis of circs at time of the agreement's being made, and not in light of subsequently changing circs. This is by far one of the strongest, if not the strongest, protections of marital automony globally.

Third bullet: the policy objective could perfectly well be to do both, in an appropriate balance – and that is then the nub of the matter: how much protection, how much scope to opt out?

Chapter 3

3.5: yes, absolutely – the current definition is a mess, and query the need (especially now) for any analogising with marriage or CP in the definition of cohab. There are cleaner, more modern, less problematic approaches available.

3.9: Joe Thompson was again very critical of this one, not least because some of what's in s 25(2) looks more apt as a factor bearing on the exercise of a discretion to grant relief, rather than an aspect of eligibility, some of it just unhelpful – what is meant by "the nature of their relationship"? It's totally opaque. The "six signposts" idea, or the much longer checklists used in Aus/NZ law are perhaps more helpful, allied to a "living together as a couple" concept (rather than a marriage analogy). I would just note here tha the "public acceptance as a couple" signpost has proved problematic for some (especially older) gay/lesbian couples who, for

personal and/or cultural reasons, just feel that they cannot be “out”. That should not disqualify them.

3.23, first bullet: I would seriously question whether you want to extend the reach of any revised legislation to cover LATs. One thing about some of the broader relationships covered in some Aus states/territories is that one reaches a point at which uncertainty about whether I’m in one of these relationshps at all becomes too high, and so my ability to take advantage of any opt-out / possibility to reach agreement modifying provision is taken away, as I’m not aware of the need to take that step. That risk is acute when I might be in such a relationship with someone with whom I don’t even live. If a couple are not “living together” in a shared household (which can involve absences elsewhere, eg during the working week), query also the extent of economic inter-dependence between them that might call for financial remedies in case of relationship breakdown – e.g. by definition, each has a separate home already… As the Law Com for E&W discovered in its Sharing Homes project (and this goes even more so to the second Part of this chapter), the wider the range of rships covered, the harder it is to devise a scheme of remedies appropriate to that entire group. Given Scots family lawyers’ preference for less discretion, you don’t have the ready “solution” to that problem of just creating a very discretionary regime in which outcomes can be very tailor-made – but that’s just not appropriate where access to lawyers, never mind courts, is uncertain.

Second bullet: the easy fix here is surely to remove the language of “husband and wife” – but even better to abandon the marriage/CP analogy entirely

Third bullet: I’m not sure what “logic” has to offer here, or what is meant by “modern” – but you will certainly want a definition/set of eligibility criteria that are readily understood (allowing for some grey area, inevitably) and suited to contemporary circumstances, bearing in mind that marriage/CP themselves already encompass a wide range of rships (and always have done – cf the implicit suggestion you make at the top of p 62, in para 3.94, that spouses are homogenous).

3.35: The AC(S)A definition seems curiously cumbersome, especially compared with its English counterpart. The latter defines “couple” to be other spouses, CPs *or* two people (not in prohibited degrees of rship – i.e. persons who cannot inter-marry as they are relations) who are living as partners in an enduring fam rship. To require cohabs to be living as if H&W *and* in an enduring fam rship seems to be double-defining. Easier simply to be clear cannot be within prohibited degrees, if that is the intention? The explan note quoted at 3.36, however, seems simply to indicate that this is tautologous. So please don’t use that approach! “Couple” really is the best starting point. But I’m very surprised, in this connection, by the decision in *K v SS WP,* described at para 3.45…!

3.80 et seq: agreed you definitely don’t want to go down this route, whether optional or compulsory. The latter would clearly not provide the protection required, and the former would be exercised by tiny numbers. But note, at 3.88, that NZ already has civil union for everyone,

so really no need for registration of cohab in that context (bearing in mind also that the remedies are near-identical across the board!)

3.96: note that Ireland is internationally very unusual (unique?) in requiring even cohabs with children *also* to satisfy a minimum duration requirement, albeit one shorter than that for childless cohabs. I suspect that this was a necessary concession given constitutional protection of marriage in Ireland.

3.103: of course the other issue here, readily overlooked, is the problem of the imaginary third Burden sister – why on earth would we only recognise a pair but not a trio (or more) of platonic, inter-dependent, co-residents, whether related or not?

3.123: I agree entirely with your conclusion not to advance this. See the English Law Com's *Sharing Homes* project for cautionary tale on trying to cover too wide a range of rships in one scheme. It doesn't work. For very useful discussion of this, see Lorna Fox's response to that work, on what she calls the broad/shallow or narrow/deep issue – i.e. if you have a broad range of rships covered, you can only have a shallow scheme of remedies (as otherwise it's far too intensive for some of the rships covered).

Chapter 5

If I may say so, I fear this chapter is the (relatively) weak link in your consultation paper. I would have liked to see rather more discussion of the normative suitability (or otherwise) of particular substantive principles for financial provision between separating cohabs, of the sort that the 1992 Report did in deciding which of the 1985 principles to co-opt. The core question here, surely, is to review the continued appropriateness of the 1992 Report's conclusion that ED/EA/child care burden type principles are apt for cohabs, but the "fair" (aka equal) sharing principle and principles (d) and (e) from the 1985 Act are not.

5.7: It is striking that the 1992 Report noted the problem of one party (usually, of course, women) giving up "good pensionable careers" in order to raise children, yet that there should be no pension sharing remedy available in cohab cases. Pension sharing is a particularly important tool given the extraordinary difficulty of valuing pension assets properly where it is sought, instead of sharing the pension asset, to seek to "offset" its value in other parts of the award to the applicant (as to which, see the recent work of the English Pension Advisory Group, of which I am a member: www.nuffieldfoundation.org/project/pensions-on-divorce-interdisciplinary-working-group)

5.11: I would question the assumption that the advent of the CSA 1991 removed any role for the "economic burden of caring for children" principle – certainly the current iteration of the CSA formula does not pretend to contribute to anything other than the child's own aliment, and not all the other knock-on economic effects of having to care for children, an activity that commonly displaces economic activity on the part of the carer. So I agree with your footnote 134 on p 101.

5.30: I don't understand (or am very surprised by) the end of this para – could a parental order not be obtained in the case described in Scotland? It certainly could in E&W.

5.33: It seems odd to me to construe the (or even a key) policy objective of this legislation as being to recognise commitment to a relationship when, by definition, the legislation has effect only at the point of the relationship's ending *inter vivos* and (quite properly –save perhaps in the most egregious cases) without any inquiry into responsibility for its demise. Surely the objective needs to be cast more in terms of an understanding of the economic significance of the rship and its ending: e.g. as being to ensure that the economic disadvantage arising from the rship and only fully exposed on separation is appropriately shared between the parties; to ensure that needs arising from the rship and/or arising on its ending are appropriately met; etc.

5.36: I think Sheriff Miller is spot on here in her/his criticism of s 28, and so I agree with your remark at the end of 5.63.

5.46: Please be aware that the idea that there should be a starting point of equality is very controversial in Australian family law academic circles, Belinda Fehlberg (amongst others) being particularly concerned, on the basis that in lower-value / "everyday" cases, especially where there is a disparity of earning capacity caused by parties' contributions to to the rship (esp one that one will continue post-separation as childcare responsibilities continue), equal sharing of existing resources may commonly leave women under-provided for, whereas a more needs-oriented approach helps avoid this by focusing attention on the differential economic impact of the rship on the parties. I don't have the material to hand (it's stuck in college!), but I think her article with Lisa Sarmas in the special issue of the AJFL that she and I co-edited in 2018 addresses this.

5.61: I am surprised by your conclusion that a "justice and equity" test guided only by a statutory checklist "might be clearer and more straightforward" (and your related remark at 5.68 that such principles are "readily understood"). The problem with "justice and equity" is that, as with "fairness" and "common sense", these concepts are meaningless and certainly practically inoperable absent some criteria/principles by which those concepts are to be evaluated. We can all get behind the premise, but with *very* different views about what it actually means – and those differences are, crucially, frequently gendered: see Barlow, Hunter et al findings on the operation of such concepts in the context of mediaion, in their *Mapping Paths to Family Justice* project: see https://www.palgrave.com/gp/book/9781137554048, esp ch 9. Hence Lord Nicholls' remark in *Miller, McFarlane* [2006] UKHL 24 that "fairness, like beauty, lies in the eye of the beholder" – *hence* the need for our 3 principles of need, compensation and equal sharing. Or as Australian judge Richard Chisholm, writing extra-judicially, has vividly put it (speaking in relation to the 1975 Act there):

> [The family judge is like] a bus driver who is given a large number of instructions about how to drive the bus, and the authority to do various actions such as turning left or right. There is also the occasional advice or correction offered by three senior drivers. The one piece of information which he or she is not given is where to take the

bus. All he or she is told is that the driver is required to drive to a reasonable destination.

I am especially surprised to see Scottish lawyers taking this view, not least given the deep disquiet around s 29 of the 2006 Act. This all goes to the central problem in family law (and elsewhere) of the choice between more and less rule-based or discretion-based systems – on which see my chapter in Palmer et al (eds), *Law and Policy in Modern Family Finance* (Intersentia, 2017: https://intersentia.com/en/modern-family-finances.html)

Lastly, can I just caution you re using Nordic jurisdicitons as comparators here: until such time as we all live in a Scandinavian social welfare nirvana, they are not safe comparisons – thanks to eye-watering tax rates, individual needs are very well catered for by public funds, there is excellent, state-funded child care etc etc which make more limited financial remedies (on divorce, as well as between cohabs), far more viable. This takes us into far more fundamental policy questions that, to the extent that they involve crucial matters outwith the Scottish Parliament's competence (on social security etc?), cannot be tackled locally. On this theme of allocation of responsibility for economic impact of rship breakdown between public and private spheres, see my chapter in Bridgeman et al (eds): https://www.abebooks.co.uk/9781409402008/Regulating-Family-Responsibilities-Bridgeman-Jo-1409402002/plp

Ch 5 Part 2

5.74: I'm confused by your inclusion of this quotation as it is not dealing with the "toolkit" question (i.e. what can the court *do*) but rather with the substantive basis on which the court does whatever it does (i.e. what you've been addressing in Part 1).

5.76: yes, our report ventilates lots of reasons why the limitation to a capital sum only is so damaging, not least when it requires the sale of an income-generating asset, thereby causing additional economic damage.

5.86: Nordic exceptionalism again – lack of maintenance claims (in law or in practice) is entirely explained by the different social pact there, and the understanding that the state looks after individuals' needs (and does so at a decent level, thanks to high taxation).

5.89: yes, it is essential to separate consideration of (1) the toolkit – the subject of this Part – no sensible practical or normative reason, in my view, to limit it from (2) the priniciples under which the courts decide how to deploy those tools in a given case. Vital not to confuse/conflate these.

Chapter 6

I'm surprised to see no discussion of the WMM findings on the time limit: see from page 115 and from page 126. One of its worst features is requiring parties to press ahead with claims very "fresh" on the back of the rship breakdown in a way that may make attempts to settle out of court more difficult. Yes, an action can be raised and sisted just to preserve it and withdrawn later, but that's not a good look – it potentially exacerbates or creates conflict where none or

less existed, hampering settlement, and unnecessarily increases demands on court time (as we remarked at p 123). The examples given at 6.6 are compelling. See also on this Law Com No 307 at 4.154, which may have Scottish analogiues.

6.32: I agree with much of your analysis here and at 6.33, though would say only of the end of para 6.33 that our experience of public education in England has not been encouraging!

Chapter 7

7.3: I think it's useful here to pause and reflect on the Executive's apparent confusion on the matter of opt-out agreements from the 2006 Act – see WMM p 34 (cf the passages that you disucss at 7.12-7.14). There clearly is a right to waive pecuniary claims under the 2006 Act under the general law of Scotland, but it would be useful to clarify that in revised legislation, subject to whatever additional requirements/limitations on that right are created. I think it's also essential to acknowledge a fundamental difference between English and Scots law here, namely that under the former the *Hyman* principle still dictates that spouses cannot by agreement oust the jurisdiction of the matrimonial court. I understand that Scots law has never had such a principle, and that s 16 of the 1985 therefore makes only a very limited inroad into the right of Scottish spouses to regulate their own matters by agreement – very much more limited than equivalent English law, even allowing for *Radmacher* etc.

7.14. I think you have overlooked: this statement made by the Executive during the passage of the Act that "it does not intend that a cohabiting couple could unilaterally [sic][71] opt out of these particular provisions of the Bill" (Written submission from the Scottish Executive, 19 April 2005, 18th Meeting of Justice 1 Committee). See WMM p 34.

7.20 et seq. In embarking on this comparative law survey, it is essential to appreciate that these jurisdictions clearly have a far more paternalistic / protective policy position on agreements than Scots law, and that it would be impossible for you to recommend greater limitations on cohabs' freedom to reach agreement than is currently available to spouses.

7.33: cohabs can also use MoA – Mair et al found examples in their recent study

7.35: yes, but for the time being such review could only be on grounds afforded by the general law.

7.36, last sentence: yes, but you first need to give the court jurisdiction to intervene and exercise discretion despite the existence of the agreement. That is what the English *Hyman* principle permits and there is no equivalent in Scots law, even for spouses- save the very limited s 16.

Chapter 8

You asked no questions in relation to this chapter but I have some observations based on my experience of handling the equivalent point during my time at the Law Com on our cohab project. I instinctively agree with the conculsion in *Pert v McCaffrey.* One thought that arises at para 8.3 is that this same issue must surely arise in connection with the 1985 Act – is there any statutory provision or case law that confirms that, in that context, claims under the

Act necessarily trump all general law rights/claims? Your discussion of the doctrine of subsidiarity from 8.28 does not appear, however, itself to be dealing with the (closely related) problem that I have in mind – namely, that the statutory family law claim must trump the general law claim, and that this would have important consequences, for example, where one party has a claim in unjust enrichment while the other has a claim under the legislation based on economic disadvantage: the existence of the latter claim – albeit potentially counter-balanced to some extent by what could (and in my view, should) be presented as an EA claim under the legislation – must mean that the existence of that ED claim must require that the case be dealt with under the Act, so that there can be no question of the other party getting to unravel (or even entirely reverse) the (full) benefit of the ED claim by asserting a claim in unjust enrichment.

It was this sort of question that we addressed – in relation to the equivalent general English law interaction problem (which relates to property/trusts/estoppel claims) – at the Law Com, from 4.132 of Law Com No 307. You may possibly find it helpful reading.

I agree entirely at 8.33 that cases that do not fall within the family law legislation must still have resort to the general law – but in relation to those cases that are out of time for the statutory remedy, see Law Com No 307 at 4.154 (3).

To the extent of these comments, at least, I therefore disagree with your conclusion at 8.60 – but that is because I think I'm focussed on a subtly different problem from the one you explore in chapter 8, which I think you need to address.

6. Fraser Kerr

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1. Should the regime for financial provision for cohabitants on cessation of cohabitation otherwise than by death remain separate from that for spouses and civil partners on divorce and dissolution?

(Paragraph 2.66)

Comments on Question 1

I believe that there should be a separation and distinction between the financial provision for cohabitants on cessation of cohabitation otherwise than by death and that this should be separate from that for spouses and civil partners on divorce and dissolution however, I believe that it needs to be improved with more entitlement to provision and support for those who do cohabit. I think an important part of this is also an educational piece around trying to make it as accessible and friendly for people cohabiting to understand the limitations of their rights. An awareness of this would, I believe, encourage more people to participate in changing this. I also believe that society has changed incomprehensibly in terms of the structure and societal norms and that this needs to be reflected in an updated changing of legislation.

2. Should the definition of cohabitant in section 25 of the 2006 Act be amended?

(Paragraph 3.101)

Comments on Question 2

I think that is straightforward and tries to encompass all – as it should. I think in an atemptto expand on this such as with the points noted below, “enduring family relationship”, “genuine domestic basis” could potentially have a detrimental impact and narrow the scope of those who would genuinely meet the criteria otherwise and do cohabit on a real partner level.

3. If consultees think the definition should be amended, should the comparison with spouses be removed in favour of a description of the nature of the relationship, such as “enduring family relationship”, “genuine domestic basis”, or something else?

(Paragraph 3.101)

Comments on Question 3

«InsertTextHere»

4. If the comparison with spouses is to be removed, should the legislation expressly provide that couples within the forbidden degrees of relationship to each other will be excluded?

(Paragraph 3.101)

Comments on Question 4

I think the comparison with spouses is a logical comparison to make as it is something that everyone can understand / relate to and as I mentioned is far reaching and I think that is important.

5. Should a qualifying period of cohabitation be introduced in order to access remedies under the 2006 Act? If so:

   (a) how long should that qualifying period be?

   (b) should the qualifying period be different, or removed altogether, if the parties have children?

(Paragraph 3.101)

Comments on Question 5

I think that there would have to be a qualifying period to avoid abuse or potentially misuse of any cohabitation rights being introduced. Period of 18 months – 24 months I believe is a good indicatior of commitment to one another. However, I feel that from any time where the address would be considered clearly evident to be their primary and main residence.

Introduction of children certainly does complicate the matter and I believe that the rights of partners cohabiting when there are children involved should be increased

6. Would the response to Question 5(a) or (b) change if the remedies available to former cohabitants were extended?

(Paragraph 3.101)

Comments on Question 6

No

7. Would the definition of cohabitant be improved by the introduction of a list of features or characteristics to be taken into account in deciding whether the parties are cohabitants?

If so, what features or characteristics should be included?

(Paragraph 3.101)

Comments on Question 7

I think on a case by case basis it would be hard to disprove that people were cohabiting and again, this would avoid the potential abuse of any changes. With regards to definitive charachteristics I think it should be around the commitment that they have demonstrated to one another throughout cohabitation and the definition detailed in the Act does cover this. It is clear those who are living in a comparable manner to a couple who is married.

8. What are consultees' views on the introduction of a registration system for cohabitants?

(Paragraph 3.101)

Comments on Question 8

I think it would be potentially barring to people in terms of those who would regiseter for such a system. Looking at it from a socio – economic point of view I believe that it should be all encompassing and try to be inclusive as possible and I think that uptake would be seriously

hindered by an opt in type situation, potentially disadvantaging those who need these changes the most.

I do however, appreciate that an opt in system would be beneficial from an operational standpoint of assessing those who meet co habitation criteria as they themselves would have had to discuss and agree with the status being applicable to them, but again, I do just feel that ti could potentially mean that a key demographic would be disadvantaged from this introduction.

9. Do sections 26 and / or 27 cause any difficulty in practice?

(Paragraph 4.34)

Comments on Question 9

I can see why it is difficult agreeing with the points raised by the MSP's in the section, however, fundamentally I think that it is potentially focussing on the smaller aspect of it which can become bitter where two parties can be embroiled in a discussion which can break down and be argumentative over smaller matters such as household goods, but my interpretation is that the review is focussed much more on trying to ensure a much broader level of fairness and security for those who choose to cohabit so I do think that the sections 26 & 27 cause difficulty in practice, however, I also don't know how that would be simplified or remedied.

10. Should the language in sections 26 and / or 27 be modernised?

(Paragraph 4.34)

Comments on Question 10

I think that wherever possible the language should be as simple and modern as possible in the interest of it being accessible.

11. Should sections 26 and / or 27 be modified in some other way?

(Paragraph 4.34)

Comments on Question 11

«InsertTextHere»

12. Should the policy underpinning awards for financial provision for former cohabitants, where cohabitation ends otherwise than by death, be:

(a) compensation for economic loss sustained during the relationship;

(b) relief of need:

(c) sharing of property acquired during the cohabitation;

(d) sharing the future economic burden of child care;

(e) a combination of any or all of (a) to (d) above; or

(f) something else?

(Paragraph 5.69)

Comments on Question 12

E

13. For the purposes of financial provision for former cohabitants, should any distinction be made between a child of whom the cohabitants are parents and a child who is or was accepted by the cohabitants as a child of the family?

(Paragraph 5.69)

Comments on Question 13

I think that ultimately yes because the rights of someone who was cohabiting to see that child would not be the same and they would not have the same privileges afforded to them. I believe that where the child of whom the cohabitants are both parents the provision should be more onerous and definitive where as in the other situation cited, it is much harder to define that relationship and it may need more of an individual approach. It would be interesting to see what the difference was in terms of the numbers who fall into each category.

14. Should the test for determining what order, if any, the court may make for financial provision on cessation of cohabitation otherwise than by death be based on fairness and reasonableness, having regard to all the circumstances of the case, including a list of relevant factors such as:

(a) the financial and non-financial contributions made by each party to the relationship, including the contribution made by each party to the care of the family and the family home;

(b) the effect of the cohabitation upon the earning capacity of each of the parties;

(c) the parties' respective needs and resources;

(d) relief of financial hardship caused by the cohabitation or the end of the cohabitation;

(e) a combination of any or all of (a) to (d) above; or

(f) something else?

(Paragraph 5.69)

Comments on Question 14

E

15. Are the remedies available to the court on an application for financial provision by a former cohabitant adequate and sufficient?

(Paragraph 5.92)

Comments on Question 15

No

16. If not, should the remedies be extended to include:

(a) transfer of property;

(b) pension sharing;

(c) periodic payments for a period after the end of the cohabitation, sufficient to relieve short term financial hardship; or

(d) something else?

(Paragraph 5.92)

Comments on Question 16

I certainly think C as a minimum with other measures being potentially considered given the extent of the relationship and overall impact of cohabitation.

17. Should express provision be made requiring or permitting the court to consider the resources of the former cohabitants in deciding what order, if any, to make for financial provision?

(Paragraph 5.92)

Comments on Question 17

Yes

18. Should the one year time limit for making a claim under section 28(2) of the 2006 Act be extended?

(Paragraph 6.35)

Comments on Question 18

No – I think that this is sufficient and it is this period where that would be most needed I would of thought in the intial transition. I don't think that the current time limit is in any way a barrier to those who would need it.

19. If the time limit is extended, what should the new time limit be?

(Paragraph 6.35)

Comments on Question 19

«InsertTextHere»

20. If the time limit is extended, should the court be afforded discretion to allow late claims?

(Paragraph 6.35)

Comments on Question 20

«InsertTextHere»

21. If the time limit is not extended, should the court be afforded discretion to allow late claims?

(Paragraph 6.35)

Comments on Question 21

Under circumstances yes – throughout this response I have tried to express that there should be guidelines on considerations and exemptions that need to be taken into consideration.

22. If the court is afforded discretion to allow late claims:

(a) should the test for the exercise of discretion be “on cause shown”, “in exceptional circumstances” or something else?

(b) should there be a maximum period (backstop) beyond which no claim may competently be made?

(Paragraph 6.35)

Comments on Question 22

A) In exceptional circumstances
B) I think this would be pragmatic to avoid those looking to take advantage and backdate when they are not necessary / required / relevant

23. Should express provision be made in the 2006 Act to allow parties to agree extension of the time limit to facilitate settlement?

(Paragraph 6.35)

Comments on Question 23

Yes

24. Should express statutory provision be made permitting the court to have regard to the terms of any agreement between the parties as to financial provision on cessation of cohabitation (including opting out of the 2006 Act regime) when deciding what order, if any, to make?

(Paragraph 7.39)

Comments on Question 24

«InsertTextHere»

25. Should express statutory provision be made allowing the court to set aside, or vary any term of, a cohabitation agreement? If so, should the test for setting aside or variation be:

(a) that the agreement was not fair or reasonable at the time it was entered into;

(b) that there has been a material change in the parties' circumstances since the agreement was entered into, or

(c) another test (and if so what should that test be)?

(Paragraph 7.39)

Comments on Question 25

Yes B)

26. What information or data do consultees have on:

(a) the economic impact of sections 25-28 of the Family Law (Scotland) Act 2006,

(b) the potential economic impact of any option for reform discussed in this Discussion Paper (in particular the impact in terms of tax law of the possibility of extending the remedies available to cohabitants on cessation of cohabitation otherwise than by death to include property transfers/pension sharing/maintenance)?

(c) the potential economic impact upon the SCTS and legal aid budgets of any option for reform discussed in this Discussion Paper, including extension of the time limit for claims and additional remedies?

(Paragraph 9.4)

Comments on Question 26

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General Comments

«InsertTextHere»

7. Scottish Courts and Tribunal Service

By email to:
10 June 2020

info@scotlawcom.gov.uk

Development and Innovation Directorate
Legislation Implementation Team
Broomhouse Drive
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EH11 3XD
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Our Ref:

Your Ref:

Dear Sir/Madam

Scottish Law Commission – Aspects of Family Law

Discussion Paper on Cohabitation (No.170)

I refer to the above paper to which I respond on behalf of the Scottish Courts and Tribunals Service (the SCTS). The response is submitted by the SCTS acting in its role to provide efficient and effective administration to the courts and does not include the views of the Judiciary.

The SCTS cannot comment on the majority of the questions posed in the paper as these do not directly affect the SCTS and are ultimately matters of policy. However, we do provide comment on question 26(c) (Chapter 9 – Impact assessment) on the reform proposals to sections 25 to 28 of the Family Law (Scotland) Act 2006 (the 2006 Act) that may be recommended.

As the paper sets out, the provisions in the 2006 Act are under-used (para 9.3); however, if the provisions are extended with the potential to increase recourse to the courts this may impact on the SCTS in relation to:

- court time and relative court programming;
- associated staff and accommodation resources; and
- costs involved in relevant IT changes;

Potential costs may also be affected by such matters as changes to the prescribed timescale within which actions currently require to be raised or by proposals to allow such timescales to be extended by the courts or parties themselves, by agreement. Whether there is an increase in recourse to the courts may be dependent on how reforms are brought to the attention of those persons who may wish to invoke them.

The SCTS would welcome the opportunity to be kept informed of the progress of the final reform proposals which may follow on from the discussion paper. This will enable the SCTS to fully consider the impact of those finalised proposals in order to provide a proper assessment of the potential costs as part of any financial memorandum or other relevant impact assessment.

If you need any further information, please let me know.

Yours faithfully

Mark Kubeczka

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Legislation Implementation Team

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8. Professor Kenneth McK. Norrie

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1. Should the regime for financial provision for cohabitants on cessation of cohabitation otherwise than by death remain separate from that for spouses and civil partners on divorce and dissolution?

(Paragraph 2.66)

Comments on Question 1

I am not persuaded that in the modern world there remains much justification for keeping the two regimes of marriage/civil partnership and cohabitation separate. The difference between the two types of relationship no longer lies in their moral or social acceptability, nor even how the relationships are conceptualised: it is a practical difference arising from registration. Marriage/civil partnership has been registered with the state, and cohabitation has not. Registration makes certain things easier, most notably proof of the existence of the relationship, and certain things more difficult, most notably the legal "deregistration" which by definition is not needed with cohabitation. Yet both types of relationship create family life (both in social and ECHR terms), both suffer the stresses and garner the benefits of emotional, and usually financial, interdependency. On the breakdown of the relationship the practical issues facing the couple, and the economic vulnerabilities of both, are often the same – and the different issues facing different couples are traced not to the fact or otherwise of registration but to the particular circumstances in which individual couples find themselves. If the law is to reflect this reality then the same mechanisms ought to be available to the law as it attempts to deal with the financial disentangling of any couple's economic resources.

The traditional arguments against treating registered and unregistered couples the same are, in my view, weak. It is sometimes argued, for example, that the registered couple have made a public declaration of their intention to lead the rest of their lives together, and have given a

public undertaking to support each other for life, while the unregistered couple have not. This is true, of course, but the difference is more apparent than real since these commitments are aspirations only and are not legally binding. There is no law requiring the registered couple to live together, or to maintain their love for each other and, since the introduction of divorce over 450 years ago, the declaration of life-long commitment has been of no legal effect but is simply a statement of present intent.

Another common argument against treating registered couples differently from unregistered couples is the need to preserve freedom of choice. We must, it is argued, allow couples to avoid the financial consequences of their relationship if this is what they wish to do. But again this argument is weaker than it sounds, for a number of reasons. First, freedom of choice demands respect only when the choice is an informed one. Yet few couples who either register or do not register their relationship are doing so with anything more than a very rudimentary understanding of the legal consequences of their choice. Even couples who marry are likely to have knowledge of little more than that if they separate they will need to go to the divorce court: the intricacies of the Family Law (Scotland) Act 1985 are not within the ken of most of the population of Scotland. Secondly, freedom of choice has moral or ethical force only when the couple have equal or at least analogous bargaining power. But relationships are seldom aligned in terms of power (economic, emotional, physical). There is inevitably a disparity, especially with mixed-sex couples: the current regime in Scotland means that the interests of the economically weaker member of a couple generally lies in registration while the interests of the economically stronger generally lies in avoiding registration. Thirdly and following on from this, the freedom of choice argument is predicated on the assumption that both parties choose the same thing: it has no purchase for a couple where one is keen to avoid registration and the other dreams of walking down the aisle. Fourthly, there are some legal consequences that are more important than any individual's freedom of choice: some which, in other words, it would be wrong to allow the couple (however fully informed) to opt out of. Perhaps the most obvious is the legal remedies for domestic violence, but another example would be the rule that, in cases of dispute on any matter relating to the upbringing of any child of the relationship, the matter should be resolved by reference to the child's welfare. The question becomes, therefore, whether the court's power of financial readjustment falls into the category of issues that the law ought not to allow a couple to opt out of. The answer to that question depends upon the very purpose to be achieved by the court's exercise of its power of financial readjustment. If it is primarily protective then escape should not be possible. If it is "fairness", then the power to opt out should be available only as an exercise of autonomy, done in full knowledge. That many, if not most, individuals who enter personal relationships will not be making choices on that basis suggests that the better way of ensuring autonomy is to allow the law of contract to govern the opting out of financial readjustment, rather than the law requiring the opting in (through registration) of full financial readjustment powers in the court.

For all these reasons, my answer to this question is no.

2. Should the definition of cohabitant in section 25 of the 2006 Act be amended?

(Paragraph 3.101)

Comments on Question 2

Statutory law should be clear and accessible, and understandable to a reasonably intelligent reader lacking in the advantages of a legal training. Section 25 of the 2006 Act, which can only be understood by reading also s. 4 of the Marriage and Civil Partnership (Scotland) Act 2014, fails that test and is, instead, recondite. That alone suggests that amendment and simplification is called for, even if it is true that the definition has not in fact led to serious practical problems for the courts.

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. In truth, even married couples today lead their lives so differently, individually and distinctly that the very notion of an "ideal" to be the shibboleth to legal recognition is fatally flawed. Marriage is not the settled, monolithic, homogenised relationship that it is presented as. The *essence* of one couple's relationship might be very different from the essence of another. One couple may define themselves in terms of the joint enterprise of bringing up children, another in terms of joint property ownership, another in terms of their emotional interdependency, another in terms of their mutual respect of each other's independence (financially and socially); one couple may define their relationship in terms of complementarity (the traditional justification for restricting marriage to opposite-sex couples), while another may value their relationship because of the very identity of life-aspirations, world-view, and even gender. One couple may see their relationship in terms of its integration into a wider family grouping; the essence for another couple may be escape from origins and family background. I believe that defining unregistered relationships that are worthy of the law's recognition by seeking a similarity to an idealised image of "marriage" has long outlasted its usefulness.

So my answer here is yes.

3. If consultees think the definition should be amended, should the comparison with spouses be removed in favour of a description of the nature of the relationship, such as "enduring family relationship", "genuine domestic basis", or something else?

(Paragraph 3.101)

Comments on Question 3

The question is best answered by first addressing the question of why any particular relationship is worth giving legal recognition to. Stability of personal relationships being a social good, and therefore suitable for the law's encouragement, I tend to favour formulae that focus on stability (rather than interdependence, or the undertaking of mutual obligations, which are socially neutral). We should seek, in this area, to avoid getting bogged down in terminology, but it seems to me that a phrase such as "leading lives together in an enduring family relationship" captures the essence of what the law is (or ought to be) trying to achieve.

This formulation is derived from, but is slightly differently from, the unsatisfactory one contained in the Adoption and Children (Scotland) Act 2007. That talks of "*living together* in an enduring family relationship" (though it is worth noting that the English equivalent does not include the words "living together"). With more and more stable couples maintaining separate households (particularly older couples who enter relationships after long-term marriages have ended by death), it seems to me that a requirement for "living together" as part of the definition of "cohabitant" (which of course etymologically *means* living together) should no longer be part of the law. It is a paradox that married couples are not required to live together while unregistered couples seeking to show their similarity to married couples are so required. The Discussion Paper suggests that the phrase "living together" is open to an interpretation that includes living apart. Perhaps. But law reform should not leave such definitional matters to be sorted out by the courts. In any case, the 2006 Act is not the sole source of cohabitation law and other statutes (notably the Matrimonial Homes (Family Protection) (Scotland) Act 1981) are worded differently and unlikely to be able to accommodate couples living apart. I think it would be highly unfortunate if the revision of s. 25 made it more likely that a person could be found to be a cohabitant for the purposes of the 2006 Act but not a cohabitant for the purposes of the 1981 Act (this could be avoided by a provision to the effect that all references in legislation to cohabiting couples, however expressed, are to be read to mean couples "leading their lives together in an enduring family relationship"). Whether or not the couple share an address may well be one factor, but should never be conclusive, of whether that couple meet the definition of cohabitants.

4. If the comparison with spouses is to be removed, should the legislation expressly provide that couples within the forbidden degrees of relationship to each other will be excluded?

(Paragraph 3.101)

Comments on Question 4

This issue really is a policy one of whether non-conjugal couples (as those within the forbidden degrees are assumed to be) ought to be able to access the remedies involved. It would, I think, change the nature of the present project to extend the availability of these remedies beyond conjugal couples; given the reasons why legal consequences flow from recognised relationships I would not support such an extension. So the new legislation ought to exclude those within the forbidden degrees of relationship. But I would not favour achieving that result

by following the Irish approach of excluding from the definition couples who would be unable to marry/CP for being within the forbidden degrees. Given that a couple may cohabit even while unable to marry/CP for other reasons (typically because one or both are married to other people), an exclusion on the ground of inability to marry/CP would be too restrictive. If couples like siblings are to be excluded, then they should be excluded on their own merits: i.e. by a list of relationships that are ineligible, including of course relationships between more than two individuals.

5. Should a qualifying period of cohabitation be introduced in order to access remedies under the 2006 Act? If so:

   (a) how long should that qualifying period be?

   (b) should the qualifying period be different, or removed altogether, if the parties have children?

(Paragraph 3.101)

Comments on Question 5

No. I consider the SG's 2006 Policy Memorandum to be entirely correct to suggest that more would be lost than gained in having a time limit specified and, while recognising that some UK legislation already requires a certain length of cohabitation, this is unnecessary for the remedies contained in the 2006 Act since the court can instead take length into account in determining a fair outcome.

6. Would the response to Question 5(a) or (b) change if the remedies available to former cohabitants were extended?

(Paragraph 3.101)

Comments on Question 6

Yes. If the law gave cohabitants the same remedies as spouses then it could be argued that these increased remedies need to be "earned", either by the public declaration of sharing that marriage/CP involves, or by sustaining the relationship for a specified period of time, or (though I am less convinced) by having a child together. ("Having a child" may – or may not – cover a multitude of events in the modern world). Any specification of a qualifying period would create dispute about when the cohabitation commences, but that may be unavoidable: the new legislation could specify the factors that the court should take into account in

determining date of commencement, such as the date the parties moved in together, or became joint owners of property.

But I should like to propose a staged approach. If cohabitants were to have the same remedies on separation as spouses, then I believe the equivalence in value of these remedies ought to be achieved progressively. I suggest a structure like this (the details are given as an example only):

> If a cohabitation has lasted for less than a year then the remedy might be valued at, say, 20% of what a divorcing spouse could claim under the 1985 Act.
>
> With a cohabitation of between 1 and 2 years the remedy might be 40% of what would be available under the 1985 Act.
>
> A cohabitation of between 2 and 3 years would permit a claim worth 60% of that available to spouses.
>
> 3-4 years 80%.
>
> After 4 years the remedy would be identical in value to that of a divorcing spouse.

Variations on this theme might award nothing before a cohabitation has lasted a year, with the result that 100% equivalence is achieved only after five years; or the progression could be in blocks of 10%, so that it takes ten years to achieve equivalency.

An approach such as this recognises that the longer a relationship has lasted the more rational expectations are of sharing; at the same time it avoids the complexities of a separate regime of remedies and valuations because it taps into the long-established remedies under the 1985 Act.

7. Would the definition of cohabitant be improved by the introduction of a list of features or characteristics to be taken into account in deciding whether the parties are cohabitants?

   If so, what features or characteristics should be included?

(Paragraph 3.101)

Comments on Question 7

I have no very strong views on this matter, other than to warn against any single factor being identified as crucial. I find *K v Secretary of State for Work and Pensions* 2017 SC 176 to be a particularly important decision because it indicated that in determining whether a couple were living together as a married couple no factor – even in that case, a sexual relationship – was essential. (In that case, however, the couple would appear to have been "conjugal" – it

is by no means unknown for a marriage to survive the discovery that one of the parties thereto is gay, or indeed any other reason why sexual activity between the partners had ceased. And it ought not to be out of the question that when two people, a gay man and a straight woman, for example, decide to set up home together in the expectation of no sexual activity between them, they can nevertheless be within the definition of "cohabitant" – just as two elderly people who feel no need for any sexual element to their relationship can be validly married).

8. What are consultees' views on the introduction of a registration system for cohabitants?

(Paragraph 3.101)

Comments on Question 8

I find the idea of a registration system for cohabitants to be something of a red-herring, made all the more irrelevant by the opening of civil partnership to all couples irrespective of gender-mix. It seems to me that the existing distinction made by the law is between registered relationships (marriage and civil partnership) and unregistered relationships (called "cohabitation"). The point of the 2006 Act was to provide remedies to those who, for whatever reason, had not registered their relationship with the state. So if we were to introduce a system of registered cohabitation, it may address the issue of whether some couples come within a legal definition but it would recreate the pre-2006 question of what to do with cohabitants who, for whatever reason, have not registered their relationship with the state. It also raises a number of additional questions: (i) Is the structure to be a three-fold instead of two-fold system, with marriage/CP at the top, then registered cohabitants, then unregistered cohabitants, each with different consequences and different specified remedies? (ii) Are the remedies for registered cohabitants to be the same as for unregistered cohabitants, or for other registered (ie married/CP) couples? (iii) Given that a person may be presently married/CP to one person but cohabit with another person (and subject to two sets of remedies) would it be possible to exclude the registration of two cohabitations? (iv) If a person may cohabit with two others (registered) why may they not marry/CP with two others?

I consider it much more straight-forward, and conceptually apt, to analyse the legal regulation of adult intimate relationships as following one of only two sorts: registered and unregistered, with full consequences flowing from registration and a different (either more limited or less valuable) set of consequences flowing from the relationship that is not registered. To add a category between these two seems to me to add more complexities than are justified by any potential gain in terms of establishing the definition.

9. Do sections 26 and / or 27 cause any difficulty in practice?

(Paragraph 4.34)

Comments on Question 9

No comment.

10. Should the language in sections 26 and / or 27 be modernised?

(Paragraph 4.34)

Comments on Question 10

No comment.

11. Should sections 26 and / or 27 be modified in some other way?

(Paragraph 4.34)

Comments on Question 11

No comment.

12. Should the policy underpinning awards for financial provision for former cohabitants, where cohabitation ends otherwise than by death, be:

(a) compensation for economic loss sustained during the relationship;

(b) relief of need:

(c) sharing of property acquired during the cohabitation;

(d) sharing the future economic burden of child care;

(e) a combination of any or all of (a) to (d) above; or

(f) something else?

(Paragraph 5.69)

Comments on Question 12

I do NOT support any move to make the justification for financial readjustment at the end of a cohabitation one based on “need” or “dependency”. These are not easily delineated concepts

and I struggle with the idea that the law should deal with less wealthy couples while we can leave the wealthy to their own devices. To focus on need or dependency is really a mechanism whereby the law seeks to save the public purse from having to pick up the tab for indigence. Our law should seek to be more expansive and more inclusive than that.

Sharing of property acquired during cohabitation: this brings the system very close to that applicable to married/CP couples. If this is to be the criterion (or one of them) then all the more justification for amalgamating the two regimes of registered and unregistered relationships into one.

Compensation for economic loss: that is less comprehensive that sharing economic gains. It seems to me that economic gains are sometimes made through opportunities created by being in a relationship even if the other party to that relationship suffers no loss – for example a man who is able to pursue a career because his partner takes on the role of looking after his children. I prefer to see cohabitation, like marriage/CP, in terms of partnership, in which both losses and gains are shared.

In sum, it seems to me that the policy to underpin financial provision for cohabitants should be that applicable to marriage/CP, except where that is not suitable (for example continuing obligation of support under s. 9(1)(d)).

13. For the purposes of financial provision for former cohabitants, should any distinction be made between a child of whom the cohabitants are parents and a child who is or was accepted by the cohabitants as a child of the family?

(Paragraph 5.69)

Comments on Question 13

Though the existence of two different definitions of "child" within the 2006 Act appears anomalous, there always was a logic to the distinction and the main consideration which I recall the MSPs in 2005 as they discussed the Bill that became the 2006 Act being concerned about the following scenario. A man meets and falls in love with a woman, who is already the mother of an 8 year old child. He moves in with the woman and her child and helps support the family for three years until the couple separate. The child is now 11. Should the man have an on-going obligation to contribute to the upkeep of the child that was never his, solely on the basis that he did so (perfectly willingly) while he lived with the mother? It was felt in 2005-6 that the answer ought to be a resounding no. If the child were his (in any legal sense) there is no justification in making him any less liable to contribute to its support than if he had been married to the mother. But if the child is NOT his, the obligation of support does not come from his parenthood and must therefore be traced to some other source. So the question is: does the fact that a man (I use the typical scenario as an example) has lived with and accepted a child as a member of his family impose upon him an obligation of continuing support once the family has ceased to exist? Is "acceptance" sufficient to impose an obligation to support

throughout childhood a child other than one's own? If he married the mother then that would indeed be sufficient, but I am not convinced that simply moving in with a mother and child is any acceptance of a long-term obligation to assist in the upkeep of the child. My discomfort would grow the younger the child is (and the longer, therefore, the obligation of support) and the shorter the period of cohabitation (and acceptance).

Acceptance, it seems to me, is too blunt. "Fairness", as a test, may be too loose, though that might be tightened by listing factors that go towards fairness, such as length of relationship in comparison to length of on-going obligation.

But at the end of the day I think that a distinction ought to continue to be made between a person's obligations to contribute to the upkeep of their own child and their obligations to continue to the upkeep of someone else's child once their primary relationship with that other person has ceased.

14. Should the test for determining what order, if any, the court may make for financial provision on cessation of cohabitation otherwise than by death be based on fairness and reasonableness, having regard to all the circumstances of the case, including a list of relevant factors such as:

(a) the financial and non-financial contributions made by each party to the relationship, including the contribution made by each party to the care of the family and the family home;

(b) the effect of the cohabitation upon the earning capacity of each of the parties;

(c) the parties' respective needs and resources;

(d) relief of financial hardship caused by the cohabitation or the end of the cohabitation;

(e) a combination of any or all of (a) to (d) above; or

(f) something else?

(Paragraph 5.69)

Comments on Question 14

On the assumption that the remedies are to remain different from those available to married/CP partners, then it would not be difficult to express the test much more straight-forwardly (and accessibly) than the 2006 Act does. The policy objective then was to set out a broad-brush test that left much discretion to the sheriff in designing a remedy that was appropriate in the particular case. But the balancing approach ultimately adopted (as the Bill

was amended during its parliamentary passage) served only to muddy the water. A test such as an order that is "fair and reasonable in all the circumstances of the case" would, I think, be sufficient to meet the needs of the case.

15. Are the remedies available to the court on an application for financial provision by a former cohabitant adequate and sufficient?

(Paragraph 5.92)

Comments on Question 15

It is widely recognised amongst practitioners that the present remedies are neither adequate nor sufficient. I find it particularly telling that it appears that settlements are often broader than what the legislation would mandate, suggesting that a broader approach would be acceptable to many ex-cohabitants. In my view the correct approach to law reform in this area is to start with the remedies available to divorcing married/CP couples and to interrogate whether there is any good reason to withhold them from separating cohabiting couples (see further my answer to Q 16 below).

16. If not, should the remedies be extended to include:

(a) transfer of property;

(b) pension sharing;

(c) periodic payments for a period after the end of the cohabitation, sufficient to relieve short term financial hardship; or

(d) something else?

(Paragraph 5.92)

Comments on Question 16

Other countries permit a transfer of property and though often this is in line with a much closer similarity between remedies at the end of marriage/civil partnership and cohabitation, it does suggest that there are little if any practical problems with doing so. I would support extending the available remedies to include a property transfer order, and also a pension sharing order. I am far less persuaded, however, of the merits of permitting periodical allowances. For here I do think that a difference with marriage/CP is justified. (In truth, I am not particularly keen on periodical allowances for anyone). Marriage/CP is a relationship in which the parties undertake to care for each other for life – even in the understanding that the relationship might

break down. I see that undertaking as the justification for making enforceable the obligation of support, which in the guise of an order for periodical allowance, survives the end of a marriage/CP. But with cohabitants there is no such undertaking: parties assume they will support each other for as long as their relationship lasts, but no longer. So a different conceptual basis would require to be found to justify the court imposing an on-going obligation of support. This might be found in something akin to s. 9(1)(c) of the 1985 Act: fair sharing of the economic burden of bringing up a child of whom they are both parents. But beyond that I see no such justification. Lots of people in our society face serious financial hardship and I simply do not see why this should be mitigated by the person one used to live with. And if such an order were made, there would need a discussion of whether it would need to be brought to an end when a new cohabitation commences: this is not easy and there are arguments both ways.

17. Should express provision be made requiring or permitting the court to consider the resources of the former cohabitants in deciding what order, if any, to make for financial provision?

(Paragraph 5.92)

Comments on Question 17

No comment.

18. Should the one year time limit for making a claim under section 28(2) of the 2006 Act be extended?

(Paragraph 6.35)

Comments on Question 18

Breakdown of relationships are seldom clean. They nearly always cause emotional trauma and frequently create practical difficulties (finding new accommodation, resettling children). So it is no surprise that seeking financial readjustment is not top of the agenda for separated parties – particularly perhaps the economically weaker of the pair. I do not find it implausible that a perfectly sensible person seeks to get her life back on an even keel, that she is unaware of any potential claim until, perhaps, a friend suggests it long after the actual separation. If practitioners tell us that they have experienced cases where they have been consulted too late to make a claim, then I see this as a flaw in the law that can readily (and ought to) be addressed.

But the counter-vailing consideration is also good. Any potential claim might act as a sort of Sword of Damocles hanging over the economically stronger, who has an equal interest in

being able to restart their life as a single person without the other, within a reasonable period of time. As the 1992 SLC Report said, any period is essentially arbitrary and I find it difficult to specify any appropriate period between one year (which I consider too short) and three years (which I consider on the outer limits of acceptability, and perhaps beyond). So a discretionary power on the court to allow claims after the existing one year limit seems to be the way forward.

19. If the time limit is extended, what should the new time limit be?

(Paragraph 6.35)

Comments on Question 19

See my answer to Q18 above.

20. If the time limit is extended, should the court be afforded discretion to allow late claims?

(Paragraph 6.35)

Comments on Question 20

No comment.

21. If the time limit is <u>not</u> extended, should the court be afforded discretion to allow late claims?

(Paragraph 6.35)

Comments on Question 21

Yes.

22. If the court is afforded discretion to allow late claims:

    (a) should the test for the exercise of discretion be "on cause shown", "in exceptional circumstances" or something else?

    (b) should there be a maximum period (backstop) beyond which no claim may competently be made?

(Paragraph 6.35)

Comments on Question 22

(a) If a discretionary power is to be granted, there should be some limit on when it can be exercised, some test to be satisfied, but I should prefer that test to be as wide as possible. I am not keen on formulae that create formidable hurdles or which leave too much discretion to the judge, such as "on cause shown", or "in exceptional circumstances", or "where it was not reasonably practical to do so within time": these run the risk of taking away what the rule seems to promise. I should prefer a broader test allowing the court to hear claims after the year, "where it is reasonable, in all the circumstances of the case, to allow the action to proceed".

(b) If a backstop were considered necessary, I think it should be three years. By then the economically weaker should have had plenty time to get their life back on an even keel, and it is a short enough period that the other party does not feel they have a financial threat hanging over them indefinitely.

23. Should express provision be made in the 2006 Act to allow parties to agree extension of the time limit to facilitate settlement?

(Paragraph 6.35)

Comments on Question 23

Yes.

24. Should express statutory provision be made permitting the court to have regard to the terms of any agreement between the parties as to financial provision on cessation of cohabitation (including opting out of the 2006 Act regime) when deciding what order, if any, to make?

(Paragraph 7.39)

Comments on Question 24

I see no reason for the rule to be different from married couples/civil partners.

25. Should express statutory provision be made allowing the court to set aside, or vary any term of, a cohabitation agreement? If so, should the test for setting aside or variation be:

(a) that the agreement was not fair or reasonable at the time it was entered into;

(b) that there has been a material change in the parties' circumstances since the agreement was entered into, or

(c) another test (and if so what should that test be)?

(Paragraph 7.39)

Comments on Question 25

While, as the Discussion Paper points out, there are differences between the overall structures for dealing with financial claims between separating spouses and separating cohabitants, it seems to me that the scope for unfairness in agreements is the same in both situations. The circumstances in which the court has set aside spousal agreements have tended to involve things like one party seeking to hide assets from the other's knowledge, pressurising the other to enter the agreement, or one party failing to obtain independent legal advice. Each of these situations could equally arise with cohabitants, and in my view enforcing agreements between cohabitants in such circumstances would be equally unfair as enforcing them for spouses. The model of s. 16 of the 1985 Act ought to be followed and the court should be granted the power to set aside a cohabitation agreement on exactly the same basis as it can set aside a marital agreement.

26. What information or data do consultees have on:

(a) the economic impact of sections 25-28 of the Family Law (Scotland) Act 2006,

(b) the potential economic impact of any option for reform discussed in this Discussion Paper (in particular the impact in terms of tax law of the possibility of extending the remedies available to cohabitants on cessation of cohabitation otherwise than by death to include property transfers/pension sharing/maintenance)?

(c) the potential economic impact upon the SCTS and legal aid budgets of any option for reform discussed in this Discussion Paper, including extension of the time limit for claims and additional remedies?

(Paragraph 9.4)

Comments on Question 26

No comment.

General Comments

9. Richard Sinclair

My main concerns are with respect to access to my daughters after a split with my partner. However, those concerns have been expressed to the Scottish Government Consultation for Children (Scotland) Bill. The following account is my personal case study for the split of assets after a split, for your consideration.

I was not comfortable about us getting married, as we had both had failed marriages previously. In order to show my commitment to my partner and give her a degree of financial security for her and our two girls, I put her name on the title deeds of the house. In the event of my sudden and unexpected death the remaining share of the house would automatically transfer to my partner. By transferring in this way I would greatly reduce the inheritance tax due on my estate (if it was left through a will all sums in excess of £325,000 would be taxed at 40%). That was my thinking behind it, although I did not get professional advice. As we were cohabiting the house would not automatically be transferred to my partner, as it would if we had been married. My other assets amount to in excess of the tax threshold therefore the value of the house would be subject to inheritance tax. I calculated that with a house value of £400,000, the inheritance tax saving would be £160,000. This is a large figure and may have resulted in the house and family home being sold, merely to pay for the inheritance tax bill. As I mentioned earlier, this was considered by myself rather than seeking professional advice. Subsequently, I now believe that only half the value would be exempt from tax, but this is still £80,000 which would remain in my estate to help support my partner and the girls. To demonstrate just how selfless my position was, if my partner passed away, I would likely be required to pay up to £80,000 in inheritance tax for a house that I had paid for exclusively and outright. That cannot possibly be fair. The scenario only resulted as we did not benefit from being a married couple, so I improvised with the intention of protecting my children and partner.

The house was certainly not put into my partner's name as a gift to allow her to fleece me for half its value less than 4 years later! This was done purely for the benefit of my partner and my two girls in the circumstances as outlined above. I would in no way gain if it was implemented, as I would dead! By all accounts the law considers that I gifted half the house to my partner. I was mortgage free in 1996 and met my partner in 2009 so surely she should not be entitled to what is in effect, 2 decades of my hard work. She sold her flat and kept all the proceeds.

I believe the following to be a more reasonable method of calculating

Cost of selling my Edinburgh home and moving to new home (estate agent fees, solicitors, stamp duty, removal and storage costs, temporary accommodation)

£26953

Purchase Price of new home

£370000

Repairs and renovation works

£62323

Total cost of £459276 which was paid exclusively by me. My partner's contribution financially £0

For the sale of the house I think we would achieve around £420000 at the very best but more likely £400000 (less estate agents and solicitor's fees £8000?)

The usual procedure for a couple purchasing a house is that the house is purchased in joint names with a joint mortgage. Therefore, if for example at the time of purchase the house was worth £400,000 the mortgage would be £ 400,000. In effect the bank owns the property and the couple's equity is £0.

For example, one partner would go out to work and pay the mortgage repayments and household bills and the other partner would run the house and care for the children. After 5 years' value of the house maybe say £420,000 and the outstanding mortgage might be £380,000 (assuming a capital repayment mortgage and not interest only) so the couple's equity in the property would be £420,000-£380,000 = £40,000.

If the couple split after 5 years, the equity in the house would be split so £20,000 each. The side that kept the house would pay the other party £20,000. The bank still owns £380,000 of the property with 20 years of the 2-year mortgage remaining.

In our situation I was the bank so the mortgage was not required. I paid the full purchase cost. Thereafter I paid all the household bills while my partner cared for the children. Putting her name on the deeds should not entitle her to half the value of the house. The equivalent of the reduction in the capital of a mortgage if we had taken one out (Very approx. 400,000/25years = 16,000 x 3years = £48,000) In reality with a capital repayment mortgage, far less would be paid off in the early years, with the majority paid off in the final few years of the 25-year term. So after 3 years the outstanding mortgage would be £400,000-£48,000=£352,000)

If the house is now worth £420,000 I would argue that she is entitled to £420,000-£352,000= £68,000 which would be the equity in the house.

Half of that figure would be £34,000 and that should be her share and that is giving her the benefit of the figures. If you consider that I spent £60,000 on the upgrade and repairs of the house, then the actual profit on the house would be £68,000-60,000= £8000.

Obviously the figures are not exact but they are close enough to demonstrate my argument.

If my partner had considered that the house was a joint asset, then why did she happily take income from her flat in Edinburgh for over 4 years and keep it for herself to pay that mortgage off. She did not contribute a penny to the repairs and expected me to sell cash ISAs and shares to fund the repairs. She also profited exclusively from the sale of her Edinburgh flat and kept that monies in the bank for 18 months and continued to let me pay all household expenses.

The financial settlement should be the increase in joint assets for the duration of the relationship split equally. Then an appropriate adjustment for my partner for giving up work and looking after the girls. Please be aware partner was very much in favour of having children as was I. Her preference was to stay at home and I agreed to support her. I would have been just as happy if she had wished to return to work and actually encouraged her to do over the final two years of our relationship when my job was at high risk.

Anyway, I hope my story and suggested solution will be considered during your consultation. I would be happy to provide more feedback if you require further details.

Good luck

Regard

Richard Sinclair

10. Faculty of Advocates

FACULTY OF ADVOCATES

Response from the Faculty of Advocates to
Scottish Law Commission Discussion Paper on Cohabitation

Introduction

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. We are therefore pleased to be able to respond to the discussion paper. We should however point out that a number of the issues raised involve matters of social policy, where there are conflicting views. The Faculty itself does not hold any particular position on policy. Our comments are principally directed towards the efficacy of the law and the practical issues which arise in the context of the Discussion Paper.

Response to questions

<u>Distinction between financial provision for cohabitants and spouses/civil partners</u>

1. **Should the regime for financial provision for cohabitants on cessation of cohabitation otherwise than by death remain separate from that for spouses and civil partners on divorce and dissolution?**

   Whether there should be a distinction between marriage or civil partnership and cohabitation in relation to the consequences of breakdown is a matter of policy. The Faculty recognises that the responses to many of the questions posed will depend on the policy adopted.

   We note that when the 2006 Act was passed there were considered to be policy reasons for differentiating between an intended lifelong exclusive union and an informal *de facto*

union. For the reasons explained above we have confined our comments on reforming the law to practical legal issues, based on our experience of advising and litigating in relation to the cohabitation provisions of this Act.

If parties do not choose to marry or enter into a civil partnership, then they choose not to undertake the financial commitments of such a formal union and, it may be said, should not find themselves bound by, or be able to benefit on breakdown of their relationship from, the financial constraints that would follow from marriage or civil partnership.

On the other hand we acknowledge that some cohabiting relationships are of considerable length and involve significant commitment, and it can appear unfair in those cases to deny similar financial benefits on breakdown to those enjoyed by a spouse or civil partner.

We recognise that financial consequences may flow from informal *de facto* unions of whatever length, and fairness requires the possibility of redress and measures for protection of those who may be left at an economic disadvantage on breakdown of cohabitation.

A balance may require to be struck between maintaining the value of marriage and civil partnership as key units in Scottish society and the autonomy of those who do not choose to marry on the one hand and fair treatment of separating cohabitants, including protection of the vulnerable, on the other.

We also draw attention to the existence of multiple contemporaneous relationships. A person who is still married or a person still in a civil partnership may cohabit in the context of a new relationship. If that person is to be subject to claims from a spouse or civil partner and a cohabitant, that may give rise to complexity and a need to prioritise between the two claims. It may be considered unfair for the claim of a spouse to be reduced by reference to the need to provide for a cohabitant. There may equally be concerns about a person claiming financial provision from a spouse and at the same time from a cohabitant. This issue is not addressed in the Discussion Paper and should, in our view, be considered. The problems arising from contemporaneous marriage and cohabitation may be avoided to some degree by recognition of different purposes for the two sets of provisions.

Definition of cohabitant

2. Should the definition of cohabitant in section 25 of the 2006 Act be amended?

We acknowledge that the current definition is familiar and has caused no particular difficulty in practice, but in our opinion a change is required. The definition should have been amended when the Marriage and Civil Partnership (Scotland) Act 2014 was passed. It is no longer appropriate to refer, as section 25(1)(a) does, to "a man and a woman who are (or were) living together as if they were husband and wife". The spouses may be of the same sex.

More fundamentally we recognise the incoherence of a definition of cohabitants as persons who are living together "as if" husband and wife or civil partners, when they are not spouses or civil partners. This becomes particularly contradictory if the policy of the legislation is to distinguish between financial remedies on breakdown of a marriage and those available to cohabitants on the ending of their relationship. We note that definitions of "cohabitant" have now been attempted in other jurisdictions. We are persuaded of the desirability of an amended definition.

3. If consultees think the definition should be amended, should the comparison with spouses be removed in favour of a description of the nature of the relationship, such as "enduring family relationship", "genuine domestic basis", or something else?

A difficulty of trying to define "cohabitant" is that the term covers a wide variety of *de facto* relationships. These may vary in length. There may, or may not, be children involved. In some cases there may not be a sexual relationship. Some committed couples live apart for reasons of work, or choice. There may be multiple other factors. The definition therefore needs to encompass the breadth of relationships involved, while excluding relationships it is not intended to cover, such as sibling relationships and flatmates. We do however note that if there is a wide definition of cohabitant then there will be a need for flexibility in the financial provision available, to reflect the variety of circumstances covered.

The key elements for present purposes are that the couple have been living as partners in an intimate and committed relationship characterised by emotional and financial interdependence and they are not married or civil partners.

We would favour a broad general definition based on these key elements. We do not consider that a supplementary list of factors would assist. A list risks being too prescriptive. If it is broadened by a reference to the need to consider "all the circumstances" then it is likely to be pointless. The central focus is whether the relationship is such that there is an entitlement to seek redress. We consider this is best captured by a broad definition, particularly if there is flexibility in relation to the financial provision that may be awarded.

4. **If the comparison with spouses is to be removed, should the legislation expressly provide that couples within the forbidden degrees of relationship to each other will be excluded?**

On the one hand it may be appropriate to exclude from the legislation persons who are in 'natural' family relationships, which are of a different nature to cohabitation. A family relationship such as that between parent and child, or between siblings, will continue regardless of ceasing to live together. On the other hand 'forbidden degrees of relationship' are a concept pertinent to marriage, and this is not marriage. If certain relationships are to be excluded then it may be preferable to give a list of excluded relationships, which may include, for example, parent and child, grandparent and grandchild, and siblings.

5. **Should a qualifying period of cohabitation be introduced in order to access remedies under the 2006 Act? If so:**
    - **(a) how long should that qualifying period be?**
    - **(b) should the qualifying period be different, or removed altogether, if the parties have children?**

A qualifying period would introduce a 'bright line' provision that would make the legislation easier to apply, but is likely to introduce injustice in borderline cases. One of the issues in the current legislation is the restriction of the period for application for financial provision to one year after cessation of cohabitation. There are good arguments to mitigate the severity of that provision. It would be unfortunate to introduce another provision capable of restricting the availability of financial provision in potentially deserving cases.

It would be more straightforward to justify a definite qualifying period if the proposed benefit on separation were tightly defined and available as of right, but if financial provision is to be awarded by reference to the merits of the individual case, this sits uneasily with a restriction based on a qualifying period of cohabitation. In our experience contributions may be made in anticipation of commencement of a relationship, for example payment towards a home. While that could be covered by the law of unjust enrichment, it would be more difficult to provide compensation for sacrifices, such as giving up a secure job, in the interests of a relationship, which could then fail at an early stage. Also, relationships vary in nature and intensity, not just longevity. That argues in favour of a qualitative, rather than a quantitative test.

If however the Commission is persuaded to introduce a qualifying period, then we would favour a short period of perhaps one year, but no more than two years. We would support the removal of any qualifying period in cases where the parties have children. That is because a party may have made sacrifices in the interests of that child, such as giving up full-time work. There may be a need to cover child care costs or to provide a home for a dependent child.

6. **Would the response to Question 5(a) or (b) change if the remedies available to former cohabitants were extended?**

No.

7. **Would the definition of cohabitant be improved by the introduction of a list of features or characteristics to be taken into account in deciding whether the parties are cohabitants? If so, what features or characteristics should be included?**

No, see above.

8. **What are consultees' views on the introduction of a registration system for cohabitants?**

We do not support the establishment of a register of cohabitants. We would be concerned that this would defeat the object of providing financial provision for unmarried cohabitants generally by limiting the benefits of the legislation to the few who decide not to marry, but to put their cohabitation on a formal footing by

registration. The benefits of financial provision should be available to all those in *de facto* unions.

Sections 26 and 27

9. Do sections 26 and / or 27 cause any difficulty in practice?

In our experience these sections are only occasionally resorted to. We have some limited experience of claims for declarator of ownership, and for delivery of goods. Parties tend to think that if they funded the purchase of an item they should keep it. On the other hand, the provision is potentially useful as a "fall-back" for determination of a dispute about household goods.

10. Should the language in sections 26 and / or 27 be modernised?

We would question the present relevance of section 27. It is drafted to reflect an assumption of a "housekeeping allowance" which is more appropriate to a past era. It reflects section 26 of the Family Law (Scotland) Act 1985, which was included to reverse the effect of *Preston v Preston* 1950 SC 253, where a wife was held to have no interest in an allowance remitted by her husband for her support, but which she had not actually used. If it is to be retained then it would be more appropriate to refer to "pooled resources", but that might be unfair to those couples who agree to divide expenses in some other way, such as where each takes separate responsibility for an area of expenditure. In our experience these issues are in any event generally absorbed into a substantive claim under section 28.

11. Should sections 26 and / or 27 be modified in some other way?

Whether these sections continue to have any utility depends on other elements of the proposed reform. If the principal claim for financial provision is capable of addressing the issues that could potentially be raised under the existing provisions of sections 26 and 27, there may be no point in retaining these as separate provisions.

Section 28

12. Should the policy underpinning awards for financial provision for former cohabitants, where cohabitation ends otherwise than by death, be:

(a) compensation for economic loss sustained during the relationship;

(b) relief of need:

(c) sharing of property acquired during the cohabitation;

(d) sharing the future economic burden of child care;

(e) a combination of any or all of (a) to (d) above; or

(f) something else?

How this question is answered depends on the policy adopted in relation to financial provision for cohabitants. We are not therefore in a position to respond, without trespassing into matters of policy. The policy objectives of the existing section 28 are unclear. Complex and convoluted drafting make it difficult to discern what the policy objectives might be. As a matter of principle, we agree that there need to be clear policy objectives and a scheme for awards that accurately reflects the policy intentions.

We do however observe that if the policy adopted is to make financial provision at the end of a cohabiting relationship equivalent to financial provision on divorce or dissolution then it may be necessary to revisit the terms of the Family Law (Scotland) Act 1985. At present, spouses and civil partners will share the net value of property acquired between marriage and separation (or earlier commencement of proceedings). They do not share the net value of property acquired before marriage, although that may be susceptible to a claim under section 9(1)(b).

If an unmarried couple, on separation, share the net value of property acquired during cohabitation a claim may exceed the claim available were they to marry. We are familiar with cases where a couple decide to marry after a long cohabitation, and then separate shortly after marriage. It would appear somewhat strange if marriage reduced a claim for financial provision.

If sharing of property acquired during the cohabitation is to be adopted then it will be important that couples can enter into agreements allowing them to opt out. This would cover the position of, for example, an older person who wishes to protect the position of children of earlier relationships, bearing in mind that assets owned before cohabitation may be used to fund assets acquired during cohabitation. The question of pre-cohabitation agreements is not however without difficulty, as we explain below.

The Faculty acknowledges that sharing the future economic burden of child care, over and above alimentary provision for a child, may be considered a reasonable policy objective in its own right. This should not be linked (as it is now) to economic advantage or disadvantage to one of the cohabitants.

We also see the argument for some provision for relief of need, but given the limited emphasis on relief of need in financial provision on divorce or dissolution, this should not be more generous than for former spouses or civil partners. It might be restricted to relief of hardship following a relationship of dependency. In this event a maximum period of support might be inappropriate.

13. For the purposes of financial provision for former cohabitants, should any distinction be made between a child of whom the cohabitants are parents and a child who is or was accepted by the cohabitants as a child of the family?

The issue here is whether to include children who are not children of the parties but are accepted as children of the "family" as relevant to a claim for the cohabitant. Such children will be eligible for both child support from a parent and aliment under section 1 of the Family Law (Scotland) Act 1985 from the cohabitant who is not the parent. It would not be logical to exclude them from consideration when considering financial provision for the cohabitant parent. If the child has been accepted by the cohabitants as a child of the family, that child should be considered when determining an award of financial provision based on the burden of childcare.

On the other hand, the scope to draw a distinction which presently exists in cases where the child's other parent is providing support to the child should remain, as the burden of child care will be reduced by the availability of support from that source.

14. Should the test for determining what order, if any, the court may make for financial provision on cessation of cohabitation otherwise than by death be based on fairness and reasonableness, having regard to all the circumstances of the case, including a list of relevant factors such as:

(a) the financial and non-financial contributions made by each party to the relationship, including the contribution made by each party to the care of the family and the family home;

(b) the effect of the cohabitation upon the earning capacity of each of the parties;

(c) the parties' respective needs and resources;
(d) relief of financial hardship caused by the cohabitation or the end of the cohabitation;
(e) a combination of any or all of (a) to (d) above; or
(f) something else?

An overriding criteria of "fairness and reasonableness" would be imprecise. It would lead to uncertainty when offering advice and could lead to a wide variation in decisions. It could lead to financial provision for cohabitants being more generous than financial provision for spouses or civil partners, where there are less flexible principles for financial provision. If this change is made then financial provision on divorce or dissolution would probably require to be revisited.

There is an argument for retaining a principled approach to financial provision for cohabitants that is similar to, but less extensive than, the provision to be made on divorce or dissolution.

Remedies and resources

15. Are the remedies available to the court on an application for financial provision by a former cohabitant adequate and sufficient?

No. It is our experience in practice that property is regularly transferred as part of a settlement between cohabitants. It would be helpful for the court to have the power to make a property transfer order as part of financial provision.

There have been cases where the court seeks to make provision for future income needs, based on the burden of child care, by way of estimating what they may amount to and ordering a capital sum (as in *M v S* 2008 SLT 871). It would be far more sensible to cover the burden of child care in such cases by a periodical allowance, which could be varied on a material change in circumstances.

If the scope of financial provision is extended to cover need more generally, then it is logical to allow the court to order periodical payments, which should be subject to variation on a material change in circumstances.

Pension-sharing may also be a helpful option in cases where there is no available capital, or income is to be derived from a pension.

We see no reason to limit the orders the court may make. In the context of divorce, incidental orders are generally helpful in allowing matters to be litigated in one action, rather than requiring multiple cases. This applies in particular to sale, where an order for sale in the context of the cohabitant's claim would remove the potential requirement for a separate action of division and sale. Incidental orders for valuation of property would be useful, as would orders relating to interest, security for payment and ancillary orders generally. Occupancy rights and regulation of liabilities are generally covered by the Matrimonial Homes (Family Protection) (Scotland) Act 1981.

16. **If not, should the remedies be extended to include:**
    (a) transfer of property;
    (b) pension sharing;
    (c) periodic payments for a period after the end of the cohabitation, sufficient to relieve short term financial hardship; or
    (d) something else?

Yes, remedies should be extended. Please see our answer to question 15 above.

17. **Should express provision be made requiring or permitting the court to consider the resources of the former cohabitants in deciding what order, if any, to make for financial provision?**

In our experience courts are generally pragmatic about the awards they make and do not order payment that cannot be made, but express provision requiring consideration of resources would be welcome. This will be particularly necessary if remedies are to be extended. Choosing a remedy will involve the court in considering how an award might best be made, which will require an examination of the available resources.

<u>Time limit</u>

18. **Should the one year time limit for making a claim under section 28(2) of the 2006 Act be extended?**

The present provision which prevents claims being made more than a year after separation requires to be amended. It results in unfairness where there is an ignorance of the law, or one cohabitant delays to the last minute with the intention, or the result, that a cross-claim is precluded. On the other hand we do favour a fairly short time limit for claims, to allow cohabitants to move on with their lives without the prospect of a claim hanging over them.

On balance we would support retention of the one year limit, with a discretion entrusted to the court to extend the limit in appropriate cases.

19. If the time limit is extended, what should the new time limit be?

We would support a one year time limit. If the time limit is to be extended then we do not consider that it should be extended beyond two years.

20. If the time limit is extended, should the court be afforded discretion to allow late claims?

We consider that extension of the limit to two years, or discretion to extend the one year time limit, are alternatives. If the limit is extended generally then we would not support discretion to extend in a particular case, although this is not our primary position (see above).

21. If the time limit is not extended, should the court be afforded discretion to allow late claims?

Yes, we do consider that there should be a discretion to allow late claims made beyond a one year time limit.

22. If the court is afforded discretion to allow late claims:

(a) should the test for the exercise of discretion be "on cause shown", "in exceptional circumstances" or something else?

(b) should there be a maximum period (backstop) beyond which no claim may competently be made?

"On cause shown" is a relatively low test for allowance of late claims. We see merit in adopting the test in section 19A of the Prescription and Limitation (Scotland) Act 1973.

This would give power to the court to allow a late claim "if it seems equitable to do so". The test in section 19A is more stringent than "cause shown" and there is an established case law, albeit in a different context, to offer some guidance.

If a test at the lower end of the scale is employed then in our opinion it would require to be accompanied by a backstop, to allow parties to proceed with confidence that there would be no further prospect of a claim. We consider that the backstop should be two years, but in any event should not be longer than three years.

23. Should express provision be made in the 2006 Act to allow parties to agree extension of the time limit to facilitate settlement?

We appreciate that commencing an action and then sisting results in expense and exacerbation of tension, but this has to be balanced against the need for certainty within a reasonable period, and to avoid situations in which a party seeking to delay is not acting in good faith.

Section 29A already extends the time limit where there is a cross-border mediation in progress, although we know of no case where that measure has been applied. There is however already included in the legislation a provision for extension when there is realistic scope for settlement. We would support extension where there is engagement in alternative dispute resolution, whether mediation, arbitration or collaboration.

We are less enthusiastic about agreement to delay, where the parties are not actively engaged in a process designed to bring about resolution of their dispute. On balance we would prefer that delay in these circumstances is left as a factor for the court in deciding whether to allow a discretionary extension of the time limit.

If the Commission is nevertheless minded to allow an extension we propose that this should be for a fixed term of no more than six months, on one occasion only, to prevent the process of resolution becoming protracted.

<u>Cohabitation agreements</u>

24. Should express statutory provision be made permitting the court to have regard to the terms of any agreement between the parties as to financial provision on

cessation of cohabitation (including opting out of the 2006 Act regime) when deciding what order, if any, to make?

It would be consistent with Scots law generally to respect and enforce agreements. Cohabitation agreements are, to our knowledge, already a feature of family law. There could be an unacceptable discrepancy between the position of spouses and civil partners on the one hand and cohabitants on the other if the former could enter into a binding agreement relating to financial provision on divorce, whereas the latter could not make a binding agreement on financial provision arising from cohabitation.

On the other hand we are bound to acknowledge the unsatisfactory nature of the current law in relation to setting aside of agreements on financial provision, as explained below.

25. Should express statutory provision be made allowing the court to set aside, or vary any term of, a cohabitation agreement? If so, should the test for setting aside or variation be:

(a) that the agreement was not fair or reasonable at the time it was entered into;
(b) that there has been a material change in the parties' circumstances since the agreement was entered into, or
(c) another test (and if so what should that test be)?

Further thought needs to be given to the concept of a "cohabitation agreement". Does this include a "stand alone" agreement over a particular item of property, such as when a couple buy a house together? Or is this to be an agreement regulating financial matters during a relationship, or an agreement on financial provision should the parties separate, or all of these?

Using the model of section 16 of the Family Law (Scotland) Act 1985 in relation to setting aside or varying an agreement illustrates the problem. The section operates well in relation to "separation agreements". It has however been held to be relevant to pre-nuptial agreements (*Kibble v Kibble* 2010 SLT (Sh Ct) 5), where its application is much more difficult. A test of fairness and reasonableness at the time a pre-nuptial or pre-cohabitation agreement was entered into may have limited relevance at the time it comes to be implemented. Parties' circumstances may by then have moved on, potentially very considerably. This may be particularly the case in a cohabitation where the quality of

the relationship may have changed over time. There may, for example, be a child for whom no provision has been made, or dependency, or other material change in financial circumstances.

How such a provision might apply to an agreement relating to financial provision at the conclusion of a cohabitation will depend on the policy and precise terms of the legislation governing any award. A pre-nuptial agreement may, for example, exclude certain property from sharing, and is at least comprehensible in that context. Without clear principles for financial provision on breakdown of cohabitation, it is difficult to comment on how legislation might be framed that would support legitimate and fair cohabitation contracts, but allow the court to set aside those which were for some reason considered unacceptable.

On one view this could be left to the ordinary law of contract. If it were possible to set aside an agreement on a material change in circumstances that would open the possibility of setting aside in almost all cases, as there can be few relationships where there is no such change over time. That would reduce the effectiveness of agreements. We would prefer to encourage robust drafting in the first place. We do however appreciate that this would involve acceptance that vulnerable cohabitants might not be protected. The balance is, of course, a matter of policy.

Impact assessment

26. What information or data do consultees have on:

(a) the economic impact of sections 25-28 of the Family Law (Scotland) Act 2006,

(b) the potential economic impact of any option for reform discussed in this Discussion Paper (in particular the impact in terms of tax law of the possibility of extending the remedies available to cohabitants on cessation of cohabitation otherwise than by death to include property transfers/pension sharing/maintenance)?

(c) the potential economic impact upon the SCTS and legal aid budgets of any option for reform discussed in this Discussion Paper, including extension of the time limit for claims and additional remedies?

We are not in a position to provide detailed assistance in relation to an impact assessment. 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.

11. Centre for Scots Law at the School of Law, University of Aberdeen

Response to *Aspects of Family Law Discussion Paper on Cohabitation* (Scottish Law Commission, DP No 170)

This response has been written by a working group of the Centre for Scots Law at the University of Aberdeen. The working group consists of Dr Ilona Cairns, Dr Thomas Green, Dr Alisdair MacPherson, Prof Margaret Ross, Dr Susan Stokeld and Dr Euan West.

General

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.

In the context of reform in this area, it is important to have in mind one of the law's crucial purposes: to protect people and their interests and to provide appropriate remedies. The current law regarding cohabitation was introduced to provide financial protection for cohabitants and to avoid such individuals suffering financial insecurity. Of course, it is true that if the rights of cohabitants are enhanced, this will inevitably lead to obligations being imposed upon others, and reformers should be mindful of this. However, the policy objective of protection for cohabitants may be considered to take priority, at least in certain respects. In addition, if changes are made to the law and parties enter into a relationship that qualifies for cohabitants' rights, then it may be said that they are impliedly agreeing to be subject to the obligations that may be imposed under the regime.

It is important, however, that the relevant law (including at the time of reform) should be widely publicised in order to inform the public of the changes and to make sure that parties are aware of the implications and potential consequences of their actions in the context of personal relationships. The level of misunderstanding in this respect regarding the current law, as referred to in the Discussion Paper, is deeply concerning, and it would be helpful if this could be addressed now (albeit that we understand this is not the role of the Scottish Law Commission). In terms of future changes, we wonder if some consideration should be given as to whether parties could be informed of the possibility that by entering into a cohabiting relationship this may give rise to significant legal consequences when they, for example, purchase or lease a home together.

As will be noted below, we are generally supportive of the approach taken by the Scottish Law Commission in seeking reform of the law of cohabitation and we would be happy to engage further as the project progresses. However, some members of the group were less convinced by the arguments for assimilating the rights of cohabitants to those of spouses and civil partners (CPs) on divorce or dissolution, and we hope that these concerns are reflected in our comments below. One of the chief concerns in this regard is the formal manner in which the status of marriage or civil partnership (CP) is constituted compared with the informal

manner in which a cohabitation relationship is constituted. Formalities serve, *inter alia*, a valuable cautionary function and aid legal clarity by drawing a bright line between qualifying and non-qualifying relationships. Thus, in spite of the *de facto* resemblance of many cohabitation and marital/CP relationships in point of the pooling of resources, mutual reliance, economic advantages and disadvantages, etc., the fact remains that formalised relationships are, by definition, subject to certain constitutive protections which are lacking in the context of non-formalised relationships, which goes some way towards justifying the more onerous financial provision obligations associated with marriage/CP. Of course, many of the arguments concerning the need for protection against financial hardship and economic disadvantage carry as much normative weight as regards cohabitants as they do in relation to spouses/CPs, but the financial provision obligations imposed on spouses/CPs go beyond those particular protective aims and so should arguably be imposed sparingly. It is also possible that to impose the same financial consequences on married couples/CPs and cohabitants would run counter to the law's increasing emphasis on the diversity of adult relationships, as evidenced, e.g., by the recognition of same-sex marriage. On a related note, it might be argued that the increasingly broad range of options open to a couple wishing to formalise their relationship reduces, rather than increases, the necessity of enhancing cohabitants' rights. Again, however, it should be emphasised that these arguments reflect a minority view.

1. Should the regime for financial provision for cohabitants on cessation of cohabitation otherwise than by death remain separate from that for spouses and civil partners on divorce and dissolution?

(Paragraph 2.66)

We consider there to be a strong argument in favour of a combined regime; however, there will need to be particular rules to take account of the fact that cohabitating relationships differ from marriage and CP in some respects (see our answers to questions below for further details). For example, the absence of formality marking the commencement of a cohabiting relationship, compared to both marriage and CP, means that it is more difficult to define a qualifying cohabiting relationship and to determine when it commences. The lack of a clear moment when a qualifying cohabitation relationship begins (in some cases) may lead to difficulties with determining exactly when the joining of property occurs for the purposes of property division/sharing.

Likewise, the relative absence of formality at the end of a cohabiting relationship, compared to marriage and CP, may justify a different approach regarding when an application for provision requires to be made. Spouses and CPs will, therefore, still have certain advantages in terms of legal consequences.

The precise relationship between cohabitation and marriage (and CP) is a very difficult and wide-ranging issue with many policy factors involved. It also impacts upon the remaining questions below. We do note, however, that the justification for treating cohabitation differently from marriage may be weaker than in 2006 due to a number of societal developments including the increase in the number of people cohabiting (despite the availability of other options to formalise relationships). Furthermore, there is a widespread misconception amongst the public that long-term cohabiting relationships give rise to legal consequences approximating marriage. If this is considered to reflect what the public considers to be a fair and desirable outcome it supports bringing cohabitation more into line with marriage and CP.

Of course, some couples have deliberately avoided committing to the formalities of marriage or a CP while others have simply fallen into cohabitation. Cohabitation therefore covers a range of different relationships

meaning that an alternative regime to marriage/CP could be appropriate but, as noted above, we err towards the same system applying. This is supported by the general rationale of protecting cohabiting parties, which might be especially applicable in scenarios where e.g. one member of a couple wished to marry and the other one did not or when one or both of the parties mistakenly assume that they are protected as a consequence of their cohabiting relationship. It could be possible to contract out of (some or all of) the default consequences of a qualifying cohabiting relationship, if the couple did not wish to be bound by them, but the notion of protection is important in this context too (this issue is discussed further below at question 24).

If the same regime applies to cohabitants and married couples/CPs, we think consideration should be given to the relationship between a cohabitant's rights to financial provision and any concurrent financial rights arising from an existing marriage/CP, (specifically on the issue of whether the marriage would be prioritised over the cohabitation in terms of financial provision.). Situations where a cohabitation relationship begins when there is a pre-existing marriage/divorce pending will not be uncommon, and we think that some legislative steer would be helpful to give guidance to the courts as to how to deal with any competing claims (although we would caution against any strict rule e.g. a requirement for the prior subsisting marriage/CP to have ended before cohabitation rights arise). We note that at the present time the claims of a surviving spouse or CP in relation to a deceased's intestate estate are met before any claim arising from the cohabitant of the deceased is met per Family Law (Scotland) Act 2006, s 29(2) and (10). i.e. a surviving cohabitant can only claim from the deceased's "net intestate estate", and as such, if the deceased was also party to a marriage or CP, the claims of the surviving spouse or civil partner are met first, thus leaving a net intestate estate, from which the surviving cohabitant's claims can then be met. So, the law as it stands already provides: (i) a person may be a party to a marriage/CP on the one part and a party to a cohabiting couple; (ii) the marriage/CP ranks above the cohabitation. Depending on the extent to which cohabitation is more fully defined, and the extent to which financial provision for cohabitants is to be augmented, the principle of simultaneous marriage/CP on the one hand, and cohabitation on the other, and the principle of ranking may need to be reviewed/more clearly defined, including in the context of the cohabitation ending otherwise than by death. The Commission ought to consider the extent to which prior subsisting marriage or civil partnership will have a bearing on the determination of the commencement date of a cohabitation for the purposes of financial provision.

A final point is that it is important to consider human rights issues (especially ECHR Arts 8 and 14) when thinking about the law that should apply to cohabitation and the justification for maintaining different systems. It may be simpler to meet human rights obligations by bringing marriage/CP and cohabitation closer together. Keeping separate regimes arguably prioritises one family form over another and the appropriateness of this can be questioned in light of the societal changes referred to above. In reforming the law in this area, the Commission should consider the extent to which Arts 8 and 14 case law supports equal rights for cohabitants and spouses/CPs, and also the broader consequences of having a joint regime.

2. Should the definition of cohabitant in section 25 of the 2006 Act be amended?

(Paragraph 3.101)

Yes. Although (as the Discussion Paper explains) the definition has not caused many difficulties in practice we are of the view that the definition is confusing and outdated.

On the issue of whether the term "cohabitant" should be completely replaced with an alternative (e.g. de facto couple), we think that consideration should be given (a) to the fact that the term is widely understood by the general public (although the legal consequences of cohabiting do not appear to be) and (b) to whether there is some inherent value in retaining a term that is currently used and understood beyond legal circles.

3. If consultees think the definition should be amended, should the comparison with spouses be removed in favour of a description of the nature of the relationship, such as "enduring family relationship", "genuine domestic basis", or something else?

(Paragraph 3.101)

We note that other jurisdictions examined in the Discussion Paper tend to avoid using the terminology of "husband and wife" and avoid comparisons with spouses when defining cohabitants (or equivalent) in legislation.

Identifying a suitable definition is obviously a critical issue but is very difficult. We are of the view that the definition should reflect the policy objective of the law if possible. Perhaps it could refer to "two individuals in a committed and inter-dependent relationship" or "intimate partners in a committed and inter-dependent relationship." We think there may be some merit in referring to "a couple" or "intimate partners" in the definition and/or expressly excluding family members to reach the meaning sought. We note that the term "intimate partners" appears in domestic abuse legislation and the courts are therefore likely to be familiar with the concept (although some may argue that it is ambiguous).

There is also an argument in favour of using the terminology of "de facto couple" and "de facto relationship" (as in Australia) or some equivalent to this. In part, this is because the term "cohabitant" itself may become misleading if it is not to be limited to people living together. For this same reason, we are sceptical about the term "genuine domestic basis" as the word "domestic" perhaps implies that the couple should be living together. We are also of the view that the word "enduring" in "enduring family relationship" would imply that the relationship must be long-standing in order to qualify.

We do have some disappointment that the Scottish Law Commission is not considering rights and obligations in "platonic" relationships involving some element of inter-dependency, such as between family members. This is something that could be considered in the future, albeit that there may be some broader issues regarding the imposition of obligations in this area.

4. If the comparison with spouses is to be removed, should the legislation expressly provide that couples within the forbidden degrees of relationship to each other will be excluded?

(Paragraph 3.101)

We are unsure as to whether this is necessary but for the sake of certainty it is not harmful to include it. Indeed, depending on the definition, the absence of an express provision could implicitly extend protection to other family members. There should be equivalence with marriage on this point.

5. Should a qualifying period of cohabitation be introduced in order to access remedies under the 2006 Act? If so:

(a) how long should that qualifying period be?

(b) should the qualifying period be different, or removed altogether, if the parties have children?

(Paragraph 3.101)

If the rights of cohabitants are to be expanded, we see some merit in introducing a required time period in order to access remedies under the 2006 Act. We think that extension of cohabitants' rights gives rise to a stronger argument for a qualifying period and note that many of the jurisdictions referred to in the Discussion Paper have qualifying periods in the region of 2 or 3 years.

However, we think that there is a need for some flexibility in this area and also a recognition that, as with marriage, a qualifying cohabiting relationship could be very short.

Perhaps a suitable approach would be to introduce a rebuttable presumption that after a certain period of cohabitation (3 years may be suitable) parties are deemed to be in a qualifying relationship but that parties who have cohabited for a shorter period of time can still qualify on cause shown. There could be statutory guidance (perhaps including a list of factors) to assist a court determining the existence of a qualifying relationship if the relationship is less than 3 years or if there has been a break in the relationship during the three- year period. One of these factors could be the existence of children of the relationship or, alternatively, there could be a separate rebuttable presumption that the parties are in a qualifying relationship if the parties have a child/children. While we are wary of treating children as markers of commitment and creating a hierarchy of relationships, we recognise that the existence of children increases the likelihood of financial interdependency and that the need for financial protection may be greater if one partner has made career/income sacrifices to raise a child/children.

Some members of the group took the view that the extension of rights gives rise to an argument for a strict qualifying period and we can all see some merit in the certainty of a strict qualifying period for certain marriage equivalent rights. We would also encourage the Commission to consider any unintended consequences that may arise from introducing a qualifying period. Contrast the following possible approaches: (1) cohabitants enjoy marriage-equivalent rights, but a strict minimum period of cohabitation of three years is necessary for two parties to qualify as cohabitants as regards *some* of those marriage-equivalent rights, for instance an equivalent to the right to fair division of the net value of the "matrimonial/partnership" property; or (2) cohabitants enjoy marriage-equivalent rights, but a strict minimum period of cohabitation of three years is necessary for two parties to qualify as cohabitants for the purposes of *any* right to financial provision. The latter strict approach may have the unintended consequence of depriving cohabitants of rights that they would have enjoyed under the old regime (i.e. the current law), where the relationship of "cohabitation" was more loosely defined. For instance, if P and D have cohabited for a mere two years, they would, under approach (2), be deprived entirely of any statutory financial provision remedies, whereas under the current law, P and D would still have the opportunity to claim under section 28 of the 2006 Act. Approach (1) is arguably more nuanced because it would define a qualifying cohabitation relationship more strictly but only for the purposes of certain rights. In short, if a minimum period of cohabitation is introduced, that minimum period should perhaps not always apply.

6. Would the response to Question 5(a) or (b) change if the remedies available to former cohabitants were extended?

(Paragraph 3.101)

Yes, as noted above, if more protection is to be made available to former cohabitants (akin to marriage/CP) then there is a stronger argument for a required time period of cohabitation/the relationship. But this limit should not be so arbitrary as to exclude all other relationships that have lasted for a shorter period.

If cohabitation is to be treated more like marriage, with default rules to apply regarding provision at the end of the relationship, there is a need to consider how and why exceptions to the rule are to be made available for cohabitants. Flexibility could be achieved by allowing a range of factors involving the relationship to be taken account of as "special circumstances" (see, e.g., the sorts of circumstance mentioned in Family Law (Scotland) Act 1985, s 10(1) and (6)) in determining the precise remedies to be given.

7. Would the definition of cohabitant be improved by the introduction of a list of features or characteristics to be taken into account in deciding whether the parties are cohabitants? If so, what features or characteristics should be included?

(Paragraph 3.101)

It may be useful to have a list of factors, as in other jurisdictions, but the list should be non-exhaustive and it ought to be made clear that no one or more factor(s) is determinative. That said, there may be an argument for placing greater weight on the degree of financial interdependence between the parties (assuming that the principal policy objective of the reformed regime is to correct financial imbalance/inequity, arising from interdependency, at the end of the relationship).

The definition could also expressly exclude e.g. platonic relationships. If rebuttable presumptions were introduced (as suggested above) consideration would of course need to be given as to how these would interact with a list of factors.

One factor that may be particularly important to include is whether the couple share a household; however, this should still only be an indicative factor and not determinative of there being, or not being, a qualifying relationship. The definition should not be limited to couples living together – we recognise there are cohabitants who do not live together but nevertheless deserve to be entitled to remedies under the legislation due to their particular circumstances and the nature of their relationship.

Although we appreciate that a list of factors would be non-exhaustive and non-determinative, the selection of factors is still symbolically significant insofar as it may indicate how the state views particular relationships and the features that characterise certain relationships. Including the existence of a sexual relationship, for example, clearly signals that the state deems sexual intimacy as a marker of commitment and as worthy of protection (and this is not altogether uncontroversial).

8. What are consultees' views on the introduction of a registration system for cohabitants?

(Paragraph 3.101)

We do not consider this to be a useful idea due to the issues mentioned in the Discussion Paper, including the incurring of expense without sufficient advantage. Making this change would bring cohabiting

relationships closer to civil partnerships in terms of form. As such, a change along these lines would need to be considered in light of impending changes to civil partnerships (and see the Civil Partnership (Scotland) Bill in this regard).

9. Do sections 26 and / or 27 cause any difficulty in practice?

(Paragraph 4.34)

As academic lawyers, we do not have direct knowledge of difficulties in practice and we defer to the views of practitioners in this area.

10. Should the language in sections 26 and / or 27 be modernised?

(Paragraph 4.34)

Yes, we think the language in the sections should be modernised. In particular, the references to "any allowance" for "household expenses" could be usefully updated (unless there is evidence to suggest that household/housekeeping allowances are still used to any significant extent). The same applies to s 26 of the Family Law (Scotland) Act 1985. The Commission may wish to consider if there is a gendered dimension here as women are (presumably) more likely to be recipients of so-called "housekeeping allowances".

If cohabitation is to approximate marriage or civil partnership more closely (as far as legal consequences at the end of the relationship are concerned), it may be desirable to further align the wording in s 27 of the 2006 Act with s 26 of the 1985 Act, so that the provision in the 1985 Act is also modernised. (We note too that the residence where the parties live together is expressly excluded by s 27(3) of the 2006 Act but is not referred to in s 26 of the 1985 Act.)

11. Should sections 26 and / or 27 be modified in some other way?

(Paragraph 4.34)

No.

12. Should the policy underpinning awards for financial provision for former cohabitants, where cohabitation ends otherwise than by death, be:

(a) compensation for economic loss sustained during the relationship;

(b) relief of need:

(c) sharing of property acquired during the cohabitation;

(d) sharing the future economic burden of child care;

(e) a combination of any or all of (a) to (d) above; or

(f) something else?

(Paragraph 5.69)

The answer below is provided on the assumption that cohabitants would not be granted full marriage/CP equivalent rights. If cohabitants were to be given marriage/CP equivalent financial rights, there would be a strong argument for the policy underpinning those rights to mirror that of the 1985 Act i.e. equal sharing/facilitation of a clean break (otherwise there would be different policy underpinnings for an identical regime – the logic of this could be questioned.) The mirroring of the 1985 Act would consist not only of the same principles and policies applying but of those principles and policies being arranged in a hierarchy, and of certain principles corresponding to certain orders, etc.

On the assumption, then, that a different regime would apply, all of the policies listed above are, or will be, relevant to some extent – one of them alone would be insufficient. The necessity of (d) in light of the Child Support Act 1991 and alimentary provision needs to be considered. Perhaps (a) could be re-phrased slightly to read "compensation for economic loss sustained during or in the interests of the relationship" or "correcting economic loss sustained during or in the interests of the relationship." If the sole policy underpinning were (b) relief of need, this may exclude wealthier applicants.

Again, if cohabitants' rights are enhanced but not completely assimilated to those of married couples/CPs, some attention should be given to what might be included within each of the policies underpinning this reform and whether there is to be any form of hierarchy. Although all of these policies are relevant, it seems to us that correcting financial loss or economic imbalance sustained during or in the interests of the relationship is the primary objective of the planned reform and the policy that comes through most strongly in the Discussion Paper. If this primary objective is adequately met, then the other policy objectives would, in some cases at least, also be achieved e.g. relief of need/sharing the economic burden of childcare.

13. For the purposes of financial provision for former cohabitants, should any distinction be made between a child of whom the cohabitants are parents and a child who is or was accepted by the cohabitants as a child of the family?

(Paragraph 5.69)

No. We agree with the arguments in the Discussion Paper regarding this matter. We are particularly concerned with how the current distinction negatively affects same-sex parents and wonder if it is subject to challenge on human rights grounds. Removing the distinction is also better aligned with policies in this area.

14. Should the test for determining what order, if any, the court may make for financial provision on cessation of cohabitation otherwise than by death be based on fairness and reasonableness, having regard to all the circumstances of the case, including a list of relevant factors such as:

(a) the financial and non-financial contributions made by each party to the relationship, including the contribution made by each party to the care of the family and the family home;

(b) the effect of the cohabitation upon the earning capacity of each of the parties;

(c) the parties' respective needs and resources;

(d) relief of financial hardship caused by the cohabitation or the end of the cohabitation;

(e) a combination of any or all of (a) to (d) above; or

(f) something else?

(Paragraph 5.69)

As indicated above, our preference is that the regime that applies to spouses/CPs is extended to cohabitants. If there is not support for this, however, then we strongly support the amendment of s 28. The test of "fairness" set out in *Gow v Grant* is insufficient and vague and subsequent case law indicates that there is a clear need for guiding principles/applicable factors. Clear guiding principles would reduce the scope for judicial discretion, offer considerably more certainty and possibly ensure that the s 28 provisions are used more frequently. We note that many of the jurisdictions referred to in the Discussion Paper use a list of relevant (not prescriptive) factors and we think this is a sensible approach.

15. Are the remedies available to the court on an application for financial provision by a former cohabitant adequate and sufficient?

(Paragraph 5.92)

No. As noted above, we are in favour of extending cohabitants' rights and see extension of the current remedies as an inevitable part of this. The current remedies are widely regarded as inadequate and insufficient.

16. If not, should the remedies be extended to include:

(a) transfer of property;

(b) pension sharing;

(c) periodic payments for a period after the end of the cohabitation, sufficient to relieve short term financial hardship; or

(d) something else?

(Paragraph 5.92)

We would like the court to have the same remedies available as under s 8 of the 1985 Act. In other words, we would like the court to have as broad a range of orders available to them as possible. If there is not support for such a significant change then, at a minimum, we think that the court should have the remedy of a property transfer order available to it as, along with capital sum payments, these are the most commonly applied for orders in divorce/dissolution cases. PTOs may be especially useful to cohabitants who wish to remain in the family home with children of the relationship and ensure stability. Extending the range of orders available to the court will assist with certainty and improve the quality/specificity of the advice that lawyers can give to their clients. This is likely to have a positive knock-on effect in terms of the numbers of individuals who use the regime.

We also agree that the court should be able to consider the resources available to the parties when making an award/s.

If explicit provision is made for the payment of periodical allowances, the Commission may wish to consider whether to include a proviso that a capital sum payment/property transfer order is preferable to a periodical allowance (similar to that under s 13(2) of the 1985 Act). The appropriateness of such a provision in the context of s 28(2)(b) (or the equivalent new provision) requires consideration as periodical allowances are generally, but not exclusively, more suited to childcare situations. We note that s 28(2)(b) does not explicitly refer to periodical allowances and that this has caused some confusion and attracted academic commentary.

17. Should express provision be made requiring or permitting the court to consider the resources of the former cohabitants in deciding what order, if any, to make for financial provision?

(Paragraph 5.92)

Yes. As noted above, we are in support of adding such a provision. It seems logical to include it, especially if the range of remedies is expanded. We note that other jurisdictions seem to make express provision for this.

18. Should the one-year time limit for making a claim under section 28(2) of the 2006 Act be extended?

(Paragraph 6.35)

We consider it necessary to strike a balance between ensuring protection is available to those who need it and ensuring that parties are able to move on with their lives, and take the view that the current one-year time limit does not strike an appropriate balance (especially in light of the lack of public awareness of the time limit). We also think that extending the time limit is compatible with the extension of rights and protection to cohabitants (if this route is taken) and note that there may be a stronger argument for a lengthier time limit for cohabitation claims (as compared with other legal claims) due to the emotional trauma of relationship breakdown and the potential for hostility/complications if the couple have children. We take the view that the current limit produces overly harsh results, and were particularly convinced by the argument in the Discussion Paper that the time limit may be especially problematic where there is a power imbalance in the relationship/domestic abuse.

19. If the time limit is extended, what should the new time limit be?

(Paragraph 6.35)

We would suggest a new time limit in the region of 18 months to two years but with discretion to allow late claims. We note that many of the jurisdictions referred to in the Discussion Paper have a time limit in the region of 2 years.

20. If the time limit is extended, should the court be afforded discretion to allow late claims?

(Paragraph 6.35)

Yes. We still think that it is sensible to avoid a hard-line rule in this context (due to the emotional and practical complexities of relationship breakdown) and that some flexibility would be beneficial.

21. If the time limit is not extended, should the court be afforded discretion to allow late claims?

(Paragraph 6.35)

Yes. Indeed, if the time limit is not extended, it is even more important to allow discretion for late claims (for the reasons outlined in above answers) to avoid overly harsh results.

22. If the court is afforded discretion to allow late claims:

(a) should the test for the exercise of discretion be "on cause shown", "in exceptional circumstances" or something else?

(b) should there be a maximum period (backstop) beyond which no claim may competently be made?

(Paragraph 6.35)

We think that the court is most likely to be familiar with the concept of "exceptional" or "special circumstances" in the context of relationship breakdown (e.g. 10(6) of the 1985 Act) and would suggest that a non-exhaustive list of 'exceptional circumstances' could be provided for when, for example: --

- "the persons are engaged in "(a) family dispute resolution with a family dispute resolution professional, or (b) a prescribed process." (as in British Columbia)
- where 'hardship would be caused to the party or a child if leave were not granted' (Australia)
- where there is evidence of domestic abuse (to be established on civil standard of proof)

Although we are generally in favour of flexibility, we think that a backstop would help to allay concerns about any extension making it difficult for cohabitants to move on and may therefore be beneficial. We would suggest a backstop of three years if the time period is extended to two years or, alternatively, one year beyond the legislative time limit (e.g. if the time limit is kept at one year the backstop should be two years).

23. Should express provision be made in the 2006 Act to allow parties to agree extension of the time limit to facilitate settlement?

(Paragraph 6.35)

Yes. We note that the Discussion Paper does not state whether such express statutory provision would be instead of, or in addition to, any extension to the time limit – we assume the latter but would stress nonetheless that we do not think that express provision should be considered as an alternative to a general extension. The Commission may wish to consider how express provision to allow parties to extend the time period would interact with any backstop period if this were introduced (e.g. would parties be able to contract out of the backstop period?), and would suggest that the Commission perhaps look to the law of prescription on this point (we are mindful of the changes that are being introduced in this area re: contracting out of prescription).

On a separate note, we consider that there may be value in an express statutory provision that cohabitants' rights in statute are without prejudice to any rights at common law (e.g. unjustified enrichment). At the same time, this need may to a large extent have been obviated by the decision in *Pert v McCaffrey* [2020] CSIH 5, 2020 SLT 225. Furthermore, expressly providing in a statute that cohabitants' statutory rights are without prejudice to any rights that they might enjoy at common law under, say, unjustified enrichment may have unintended consequences. For instance, such a statutory provision might be taken to suggest that a remedy under unjustified enrichment is always subsidiary to a remedy under statute in the absence of an express statutory provision to the contrary. Although such an argument would not necessarily be a strong one – statutes, unlike cases, set down fact-specific rules rather than principles and so a statutory provision specifically concerned with subsidiarity in the context of cohabitants' rights should not have a bearing on the doctrine of subsidiarity outside that context – it should be borne in mind that including a statutory provision of the sort just mentioned might lend some (albeit specious) credibility to that argument.

24. Should express statutory provision be made permitting the court to have regard to the terms of any agreement between the parties as to financial provision on cessation of cohabitation (including opting out of the 2006 Act regime) when deciding what order, if any, to make?

(Paragraph 7.39)

Yes. We think that the regime for cohabitants should be brought more closely in line with that for spouses and civil partners and therefore consider that the court should have similar powers as they have under section 16 of the 1985 Act (that similar principles should apply). We would stress, however, that there is a need to ensure public awareness of such agreements (which are likely to become more common if rights are extended).

25. Should express statutory provision be made allowing the court to set aside, or vary any term of, a cohabitation agreement? If so, should the test for setting aside or variation be:

(a) that the agreement was not fair or reasonable at the time it was entered into;

(b) that there has been a material change in the parties' circumstances since the agreement was entered into, or

(c) another test (and if so what should that test be)?

(Paragraph 7.39)

Yes. Such provision is essential to ensure that vulnerable parties are protected and that the court has the authority to take any power imbalances between the parties into account. We also take the view that express statutory provision for cohabitation agreements would strengthen the case for extension of the time limit (in order to ensure adequate time for the potential review of such agreements and fairness to vulnerable parties). We note that many of the jurisdictions referred to in the Discussion Paper have statutory provision along these lines and that several do not simply have one test for setting aside or variation. A test could combine both (a) and (b) above. We are concerned that applying (a) alone would mean overlooking (perhaps unforeseen) changes incurred during the relationship that render one party particularly vulnerable (if agreements are made prior to the cohabitation beginning, as they often are). In other words, any provision

should be drafted to allow the court to consider as wide a time period as possible and should reflect the fact that cohabitants may enter into agreements prior to cohabitation.

Consideration should also be given as to whether the same test will apply to both pre-cohabitation agreements and agreements made on relationship breakdown.

26. What information or data do consultees have on:

(a) the economic impact of sections 25-28 of the Family Law (Scotland) Act 2006,

(b) the potential economic impact of any option for reform discussed in this Discussion Paper (in particular the impact in terms of tax law of the possibility of extending the remedies available to cohabitants on cessation of cohabitation otherwise than by death to include property transfers/pension sharing/maintenance)?

(c) the potential economic impact upon the SCTS and legal aid budgets of any option for reform discussed in this Discussion Paper, including extension of the time limit for claims and additional remedies?

(Paragraph 9.4)

We do not have any further information or data to bring to the Commission's attention.

12. Dr Brian Tobin, National University of Ireland, Galway

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1. Should the regime for financial provision for cohabitants on cessation of cohabitation otherwise than by death remain separate from that for spouses and civil partners on divorce and dissolution?

(Paragraph 2.66)

Comments on Question 1

Yes, absolutely. A significant increase in the numbers of couples cohabiting is not indicative of an equivalent increase in the number of couples who wish to acquire greater rights and responsibilities in relation to one another – in fact, it is most likely quite the opposite. Couples are cohabiting more (and perhaps marrying less) because we live in a society that places increasing emphasis on respecting *individual choice*.

While it is noted in the Discussion Paper that "a range of views has been expressed to us by respondents to the Tenth Programme consultation, stakeholders, and Advisory Group members as to whether there is a justification for retaining different regimes for financial provision on cessation of cohabitation and on divorce or dissolution" it appears that none of the 49 respondents were members of the public experiencing legal difficulties as a result of their status as *cohabitants*,[1] and stakeholders' views, which may incorporate their own vested interests in law reform, should not necessarily be equated with the views of cohabiting couples.

The words of Professor Mee seem particularly apt:

[1] https://www.scotlawcom.gov.uk/law-reform/tenth-programme-of-law-reform-consultation/respondents-to-the-scottish-law-commissions-consultation-on-topics-for-inclusion-in-its-tenth-programme-of-law-reform/

"prior to attempting to develop a new scheme for cohabitants, it would be highly desirable to commission ***empirical research on the social phenomenon of cohabitation****, rather than attempting to shape a legislative scheme on the basis of guess-work as to the reality of cohabitants' lives."* (Emphasis added).[2]

Further, with the extension of civil partnership to opposite-sex couples, there is an alternative to marriage for those who do not want to marry for ideological reasons, etc, but want to register their relationship and obtain State-sanctioned rights/responsibilities in relation to each other, so perhaps an even greater argument can be made for avoiding any undue interference with a fundamental attribute of cohabitation, 'the freedom of living according to one's own criteria".[3] Cohabitation is, after all, synonymous with "an individualistic outlook on intimate relations".[4]

Finally, although there was an increase in cohabiting family units in Scotland since 2011 (16% of all families in 2011) and beyond, the incidence of cohabitation does not suggest that Scotland is at a stage where cohabitation and marriage are virtually interchangeable, therefore maintaining separate regimes for financial provision on cessation of cohabitation and divorce or dissolution continues to be appropriate.[5]

2. Should the definition of cohabitant in section 25 of the 2006 Act be amended?

(Paragraph 3.101)

Comments on Question 2

Yes.

3. If consultees think the definition should be amended, should the comparison with spouses be removed in favour of a description of the nature of the relationship, such as "enduring family relationship", "genuine domestic basis", or something else?

(Paragraph 3.101)

Comments on Question 3

[2] J. Mee, "A Critique of the Cohabitation Provisions of the Civil Partnership Bill 2009", 12 (4) *Irish Journal of Family Law* 83, at 90.
[3] H.E. Horster, "Does Portugal need to Legislate on *de facto* Unions?" 13 (3) *International Journal of Law, Policy and the Family* 274
[4] J. Lewis, "Debates and Issues regarding Marriage and Cohabitation in the British and American Literature" 15 (1) *International Journal of Law, Policy and the Family* 159
[5] See the four stages of cohabitation discussed in K. Kiernan, "The Rise of Cohabitation and Childbearing outside Marriage in Western Europe" 15 (1) *International Journal of Law, Policy and the Family* 1, at 3

I would suggest the following definition:

"two persons living together as partners in an enduring family relatonship who are not related to each other within the prohibited degrees of relationship or married to each other or civil partners of each other."

The essence of cohabitation is to *live together as a couple* and while there may be some couples in a situation analogous to that in *T and Anor v CC* [2010] EWHC 964 (Fam), a public information campaign regarding cohabitation and the law could make the small number of people in relationships of such complexity aware of their ability to avail themselves 'of the protections available under bespoke contractual arrangements or by making wills', to use some of the language contained on page 63. Persons who can afford to live apart but maintain an "enduring family relationship" are also likely to have the (limited) financial means necessary to avail of legal advice to settle their affairs.

4. If the comparison with spouses is to be removed, should the legislation expressly provide that couples within the forbidden degrees of relationship to each other will be excluded?

(Paragraph 3.101)

Comments on Question 4

Yes.

5. Should a qualifying period of cohabitation be introduced in order to access remedies under the 2006 Act? If so:

   (a) how long should that qualifying period be?

   (b) should the qualifying period be different, or removed altogether, if the parties have children?

(Paragraph 3.101)

Comments on Question 5

The law should not concern itself with insignificant periods of childless cohabitation. I have engaged in research projects that went on for longer and required more commitment than many contemporary cohabiting relationships.

(a) A qualifying period of 5 years should be set for childless cohabitants, and;

(b) A qualifying period should not apply if the parties have children of the relationship / accepted as children of the relationship.

6. Would the response to Question 5(a) or (b) change if the remedies available to former cohabitants were extended?

(Paragraph 3.101)

Comments on Question 6

I made the above recommendations regarding a qualifying period on the basis that the range of remedies is most likely going to be extended.

7. Would the definition of cohabitant be improved by the introduction of a list of features or characteristics to be taken into account in deciding whether the parties are cohabitants?

If so, what features or characteristics should be included?

(Paragraph 3.101)

Comments on Question 7

I would not favour the introduction of a list of features for the courts to take into account in deciding whether the parties are cohabitants. I believe the Irish approach contains too many such features and is too complex an approach.

I note from the Wasoff, Miles and Mordaunt Report in 2010 that, in practice, it has not proved difficult to identify "cohabitation", and the Discussion Paper states that the question of whether or not a couple are cohabitants within the meaning of section 25 has only rarely been litigated. Therefore, I do not believe that the introduction of a complex list of features is at all necessary.

8. What are consultees' views on the introduction of a registration system for cohabitants?

(Paragraph 3.101)

Comments on Question 8

No. I believe that a registration system simply would not be availed of by most cohabitants.

9. Do sections 26 and / or 27 cause any difficulty in practice?

(Paragraph 4.34)

Comments on Question 9

N/A

10. Should the language in sections 26 and / or 27 be modernised?

(Paragraph 4.34)

Comments on Question 10

N/A

11. Should sections 26 and / or 27 be modified in some other way?

(Paragraph 4.34)

Comments on Question 11

N/A

12. Should the policy underpinning awards for financial provision for former cohabitants, where cohabitation ends otherwise than by death, be:

(a) compensation for economic loss sustained during the relationship;

(b) relief of need:

(c) sharing of property acquired during the cohabitation;

(d) sharing the future economic burden of child care;

(e) a combination of any or all of (a) to (d) above; or

(f) something else?

(Paragraph 5.69)

Comments on Question 12

I firmly believe that the policy objective in this area should be to achieve an equitable balance between respecting the autonomy associated with unregistered private relationships while ensuring that cohabiting relationships "in respect of which economic dependency existed and have resulted in some form of vulnerability on termination of the relationship, are protected."[6]

Therefore, I believe that the legislation should require that a qualified cohabitant is financially dependent/economically vulnerable upon termination of the cohabiting relationship before s/he can seek to initiate a claim under the legislation.[7] Although it is noted at pp.98-99 of the Discussion Paper that adopting this aspect of the Irish model "would be unlikely to improve the position for cohabitants in Scotland", to an extent I disagree because once financial dependence is proven in Ireland there is the potential to access to a wider range of remedies than that which is currently available to claimants in Scotland.

The policy should be centred on a needs-based system; however, the relief of need can involve a policy incorporating a combination of a-d above. As Joanna Miles points out, "a needs-based system operates only on however much *property and income* is required to meet the need, leaving any surplus to its owner" (Emphasis added).[8]

13. For the purposes of financial provision for former cohabitants, should any distinction be made between a child of whom the cohabitants are parents and a child who is or was accepted by the cohabitants as a child of the family?

(Paragraph 5.69)

Comments on Question 13

No.

14. Should the test for determining what order, if any, the court may make for financial provision on cessation of cohabitation otherwise than by death be based on fairness and reasonableness, having regard to all the circumstances of the case, including a list of relevant factors such as:

[6] Law Reform Commission of Ireland, *Report on the Rights and Duties of Cohabitants* (LRC 82-2006), p.3
[7] See generally B. Tobin, "The Regulation of Cohabitation in Ireland: Achieving Equilbrium between Protection and Paternalism?" 35 (3) Journal of Social Welfare and Family Law 279
[8] J. Miles, "Financial Provision and Property Division on Relationship Breakdown: A Theoretical Analysis of the New Zealand Legislation", (2004) 21(2) New Zealand Universities Law Review 285

(a) the financial and non-financial contributions made by each party to the relationship, including the contribution made by each party to the care of the family and the family home;

(b) the effect of the cohabitation upon the earning capacity of each of the parties;

(c) the parties' respective needs and resources;

(d) relief of financial hardship caused by the cohabitation or the end of the cohabitation;

(e) a combination of any or all of (a) to (d) above; or

(f) something else?

(Paragraph 5.69)

Comments on Question 14

Yes. *Once financial dependency has been demonstrated*, I would favour the court having recourse to a test akin to that contained in s. 173 of the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010 in Ireland. The court can grant relief where it is 'just and equitable' to do so and may have regard to numerous factors virtually identical to those listed above when deciding the level of the award.

I agree with the assertion made on p.99 of the Discussion Paper that "an approach similar to that adopted in [Ireland] whereby the court must decide, on the basis of justice and equity and having regard to a number of factors set out in the legislation, what order, if any, to make might be clearer and more straightforward" for Scotland.

15. Are the remedies available to the court on an application for financial provision by a former cohabitant adequate and sufficient?

(Paragraph 5.92)

Comments on Question 15

Not entirely.

16. If not, should the remedies be extended to include:

(a) transfer of property;

(b) pension sharing;

(c) periodic payments for a period after the end of the cohabitation, sufficient to relieve short term financial hardship; or

(d) something else?

(Paragraph 5.92)

Comments on Question 16

a and c. However, these should only be resorted to if the payment of a capital sum to settle the claim is not an option due to the defender's resources – a Scottish court should only have recourse to remedies (a) and (c) where proper provision cannot be made via a capital sum.

17. Should express provision be made requiring or permitting the court to consider the resources of the former cohabitants in deciding what order, if any, to make for financial provision?

(Paragraph 5.92)

Comments on Question 17

Yes.

18. Should the one year time limit for making a claim under section 28(2) of the 2006 Act be extended?

(Paragraph 6.35)

Comments on Question 18

No.

19. If the time limit is extended, what should the new time limit be?

(Paragraph 6.35)

Comments on Question 19

N/A

20. If the time limit is extended, should the court be afforded discretion to allow late claims?

(Paragraph 6.35)

Comments on Question 20

N/A

21. If the time limit is not extended, should the court be afforded discretion to allow late claims?

(Paragraph 6.35)

Comments on Question 21

Yes – in Ireland, the time limit for making a claim is 2 years.

However, because s.195 of the 2010 Act provides that 'proceedings shall, *save in exceptional circumstances*, be instituted within 2 years of the time that the relationship between the cohabitants ends...' it has been held by the High Court that an extension of the time limit is permissible "in exceptional circumstances". See ***MW v. DC*** **[2017] IECA 255 (Court of Appeal (civil), Finlay Geoghegan J, 2 October 2017)**.

The courts in Scotland should be afforded a similar discretion (albeit perhaps a more clearly worded one than that contained in the Irish statute).

22. If the court is afforded discretion to allow late claims:

(a) should the test for the exercise of discretion be "on cause shown", "in exceptional circumstances" or something else?

(b) should there be a maximum period (backstop) beyond which no claim may competently be made?

(Paragraph 6.35)

Comments on Question 22

Please see answer to (21) above.

23. Should express provision be made in the 2006 Act to allow parties to agree extension of the time limit to facilitate settlement?

(Paragraph 6.35)

Comments on Question 23

Yes. I agree with the views expressed on pp.117-118 of the Discussion Paper because mediation or arbitration may be preferable to court action.

24. Should express statutory provision be made permitting the court to have regard to the terms of any agreement between the parties as to financial provision on cessation of cohabitation (including opting out of the 2006 Act regime) when deciding what order, if any, to make?

(Paragraph 7.39)

Comments on Question 24

Yes, a provision similar to s.202 of the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010 in Ireland would respect the need for cohabitants to be able to choose to avoid financial obligations in relation to each other upon cessation of the relationship. However, to ensure that the agreement is fairly entered into by *both* parties, each cohabitant should be required to seek *independent* legal advice.

25. Should express statutory provision be made allowing the court to set aside, or vary any term of, a cohabitation agreement? If so, should the test for setting aside or variation be:

(a) that the agreement was not fair or reasonable at the time it was entered into;

(b) that there has been a material change in the parties' circumstances since the agreement was entered into, or

(c) another test (and if so what should that test be)?

(Paragraph 7.39)

Comments on Question 25

Yes, a provision similar to s.203 of the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010 in Ireland would enable a court to set aside a cohabitants' agreement "in exceptional circumstances, where its enforceability would cause serious injustice." This type of wording should cover (a) and (b) above.

26. What information or data do consultees have on:

(a) the economic impact of sections 25-28 of the Family Law (Scotland) Act 2006,

(b) the potential economic impact of any option for reform discussed in this Discussion Paper (in particular the impact in terms of tax law of the possibility of extending the remedies available to cohabitants on cessation of cohabitation otherwise than by death to include property transfers/pension sharing/maintenance)?

(c) the potential economic impact upon the SCTS and legal aid budgets of any option for reform discussed in this Discussion Paper, including extension of the time limit for claims and additional remedies?

(Paragraph 9.4)

Comments on Question 26

N/A

General Comments

I found the Discussion Paper an interesting read, thoroughly researched and informative, and very clear and accessible for lawyers and non-lawyers alike.

It is most interesting that the "common law marriage" myth prevails in Scotland and that there is insufficient public awareness of cohabitants' rights. This is identical to the situation in Ireland – indeed, when the Irish cohabitation regime was first being mooted by our policy-makers, I suggested that a nationwide information campaign to inform cohabitants of the scheme and the need to opt out of it if they wish to avoid being governed by it would be essential if the scheme ultimately became part of Irish law (which it did).[9]

However, there was no such campaign and thus the situation in Ireland is similar to Scotland such that a redress scheme for cohabitants exists, but public knowledge of the scheme is

[9] B. Tobin, "Relationship Recognition for Same-Sex Couples in Ireland: The Proposed Models Critiqued" (2008) 11 (1) Irish Journal of Family Law

limited and the “common law marriage” myth remains. I would therefore reiterate the importance of a public information campaign in Scotland and the need to dispel the “common law marriage” myth that prevails among members of the public throughout the British Isles!

13. Balfour + Manson

SCOTTISH LAW COMMISSION

RESPONSE ON BEHALF OF

THE FAMILY LAW TEAM AT BALFOUR+MANSON LLP

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The Family Law Team at Balfour+Manson is a team of experienced specialist family law solicitors based in Edinburgh and Aberdeen. The team works exclusively in the field of Family Law and has accordingly had significant experience in dealing with the financial affairs of cohabitants on their separation following upon the introduction of the Family Law (Scotland) Act 2006.

As a team we are grateful for the opportunity of being able to respond to the discussion paper. We are however conscious that there are aspects of the discussion paper which relate to policy rather than the practical issues which face our clients on a day to day basis. In answering the following questions, we seek only to address those practical issues which we encounter on a daily basis. 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.

1. Should the regime for financial provision for cohabitants on cessation of cohabitation otherwise than by death remain separate from that for spouses and civil partners on divorce and dissolution?

There is a policy consideration underlying the question, namely should there be a distinction between financial provision following on from the breakdown of a marriage/civil partnership and cohabitation.

As practitioners we see an attraction, subject to our comments below, in the financial provision for cohabitants on cessation of cohabitation otherwise than by death, being the same as for spouses and civil partners on divorce and dissolution.

The regime for financial provision on the breakdown of marriage or civil partnership is well tested. It provides certainty and clarity the absence of which has caused so many challenges in relation to resolving financial issues following on from the breakdown of cohabitation. As practitioners we wish to assist our clients in resolving the financial issues on their separation by way of agreement. It is possible to do that where the law is well developed and clear in the

vast majority of areas. That would in our view be achieved by adopting the provisions within the Family Law (Scotland) Act 1985 for cohabitants.
We do however acknowledge that there are those who choose to enter in to cohabiting relationship rather than marriage to avoid the financial consequences of marriage. Accordingly, we believe that if the regime for financial provision is to be the same that there should be an ability for cohabitants to opt out of the regime. An opt out rather than opt in provision would in our view provide protection to the more vulnerable in cohabitation arrangements.

2. Should the definition of cohabitant in section 25 of the 2006 Act be amended?

We are not aware that there has been any significant difficulty with the present definition. That having been said we do think that it would be appropriate to amend the definition to reflect the developments which have taken place since the 2006 Act has come in to force and would suggest a revision to living together "as spouses or civil partners".

3. If consultees think the definition should be amended, should the comparison with spouses be removed in favour of a description of the nature of the relationship, such as "enduring family relationship", "genuine domestic basis", or something else?

In the event that the definition is amended we do not believe that it would be helpful to remove the comparison with spouses in favour of the nature of the relationship such as an enduring family relationship. On behalf of our clients we wish the law to be as clear as possible and definitions such as "enduring family relationship" or "genuine domestic basis" could in our view potentially lead to issues in relation to interpretation.

4. If the comparison with spouses is to be removed, should the legislation expressly provide that couples within the forbidden degrees of relationship to each other will be excluded?

We do not feel that this is necessary but if there is to be any provision inserted it should be expressed in clear and unambiguous language.

5. Should a qualifying period of cohabitation be introduced in order to access remedies under the 2006 Act? If so:

We believe that on balance it would be sensible for a qualifying period to be introduced provided that there is an ability to allow a claim on a shorter period of cohabitation in exceptional circumstances.

(a) how long should that qualifying period be?

On balance we would favour one year. We could however see the justification for it being as short as six months.

(b) should the qualifying period be different, or removed altogether, if the parties have children?

We believe that in the circumstances the qualifying period should be removed altogether.

6. Would the response to Question 5(a) or (b) change if the remedies available to former cohabitants were extended?

No

7. Would the definition of cohabitant be improved by the introduction of a list of features or characteristics to be taken into account in deciding whether the parties are cohabitants? If so, what features or characteristics should be included?

We do not think that this is necessary.

8. What are consultees' views on the introduction of a registration system for cohabitants?

We do not favour the introduction of a registration system as we foresee a situation where the more vulnerable cohabitees could be left unprotected where they have been ignorant of the need to register or where their partner has actively discouraged it.

9. Do sections 26 and / or 27 cause any difficulty in practice?

We have not found that either Section 26 or 27 causes any real difficulty in practice. Our primary position is that it would be of assistance if the law in relation to breakdown of cohabitation reflected the law in relation to the breakdown of marriage and civil partnership which would avoid the need to consider Sections 26 or 27.

10. Should the language in sections 26 and / or 27 be modernised?

The purpose of Section 27 appears to us to be rather antiquated. It refers to a housekeeping allowance in an age where for the vast majority of clients we deal with the reality is that one or other has access to a card or a credit card. What is perhaps more common is where couples have placed money in to an account to be used for joint purposes such as a holiday. Accordingly, if the section is to be retained then it would seem sensible to re-draft this section to reflect the fact that it relates to investment which the couple intended to use for some joint purpose whether that be day to day living or a special event.

11. Should sections 26 and / or 27 be modified in some other way?

We believe that the sections should be removed and that the regime for financial provision on breakdown of cohabitation should be the same as on divorce or dissolution of civil partnership.

12. Should the policy underpinning awards for financial provision for former cohabitants, where cohabitation ends otherwise than by death, be:

(a) compensation for economic loss sustained during the relationship;
(b) relief of need:
(c) sharing of property acquired during the cohabitation;
(d) sharing the future economic burden of child care;
(e) a combination of any or all of (a) to (d) above; or
(f) something else?

As discussed above our position is that there should be clarity and certainty for cohabitees when they separate. The suggestions listed at points (a) to (e) all in our view provide scope for uncertainty and debate. Our view is that even if the arrangements for financial provision for cohabitants do not mirror those of married couples or those in civil partnerships that it would be preferable for there to be a scheme which provides a clear and certain framework for entitlement.

We would be particularly concerned at the reference to relief of need. It has not been possible in the context of a divorce to justify financial provision in Scotland on the basis of need. To introduce that provision for cohabitants would, in our view, be problematic.

We would also be concerned about the sharing of property acquired during the cohabitation. For married couples, property acquired during the course of the marriage with funds built up outwith the marriage, leads to the potential to seek an unequal distribution on the basis of special circumstances. There is at present no such provision in the law of cohabitation. Considering recent experiences within the team in dealing with cohabitants on separation, it is considered that it would cause difficulties if such a provision were to be introduced to include the restructuring of a company during the period of cohabitation and the use of an inheritance to purchase a property during a short cohabitation.

13. For the purposes of financial provision for former cohabitants, should any distinction be made between a child of whom the cohabitants are parents and a child who is or was accepted by the cohabitants as a child of the family?

A child accepted as a child of the family is already entitled to aliment and child support from the cohabitant who is not their parent. In the circumstances we believe that a distinction should not be made between a child of whom the cohabitants are parents and a child who is or was accepted by the cohabitants as a child of the family. We do however believe that it is important that discretion is given to a court to assess the specific circumstances of a case and in particular the extent to which that child has been supported during the period of the cohabitation and will be supported after cohabitation by another parent.

14. Should the test for determining what order, if any, the court may make for financial provision on cessation of cohabitation otherwise than by death be based

on fairness and reasonableness, having regard to all the circumstances of the case, including a list of relevant factors such as:

(a) the financial and non-financial contributions made by each party to the relationship, including the contribution made by each party to the care of the family and the family home;
(b) the effect of the cohabitation upon the earning capacity of each of the parties;
(c) the parties' respective needs and resources;
(d) relief of financial hardship caused by the cohabitation or the end of the cohabitation;
(e) a combination of any or all of (a) to (d) above; or
(f) something else?

We believe that the law in this area should be clear and unambiguous. The concept of fairness and reasonableness inevitably leads to a range of views on reasonable outcome and if introduced would in our view lead to uncertainty, confusion and expense.

15. Are the remedies available to the court on an application for financial provision by a former cohabitant adequate and sufficient?

No

In our experience the lack of remedies available to the court has proved problematic. In particular, the lack of a power to make a property transfer order has made the negotiation of cases particularly difficult. In general, we would wish to see the full range of orders which a court can be made in an action of divorce or dissolution.

16. If not, should the remedies be extended to include:

(a) transfer of property;
Yes
(b) pension sharing;
Yes
(c) periodic payments for a period after the end of the cohabitation, sufficient to relieve short term financial hardship; or
Yes
(d) something else?
Ideally we would also like to have the availability of Incidental Orders

17. Should express provision be made requiring or permitting the court to consider the resources of the former cohabitants in deciding what order, if any, to make for financial provision?

It seems sensible that a provision should be inserted requiring the court to consider the resources of former cohabitants in deciding what order if any to make.

18. Should the one year time limit for making a claim under section 28(2) of the 2006 Act be extended?

Our experience has been that on occasion the time limit under Section 28(2) of the Act has led to great unfairness. In our experience it is frequently the case that cohabitants separating do not contact a solicitor until some time after the cohabitation. On occasion that has meant that by the time a solicitor has been contacted that the potential claim has been time barred.

On balance as a team we would be supportive of keeping the existing time limit but providing discretion to the court in exceptional circumstances to allow a claim after that date.

19. If the time limit is extended, what should the new time limit be?

Retain existing time limit of one year without extension but discretion to allow late claims and ability to agree extensions.

20. If the time limit is extended, should the court be afforded discretion to allow late claims?

We are not supportive of the time limit being extended. In the event that it is we do still feel that the court should be awarded discretion in exceptional circumstances.

21. If the time limit is not extended, should the court be afforded discretion to allow late claims?

Yes

22. If the court is afforded discretion to allow late claims:

(a) should the test for the exercise of discretion be "on cause shown", "in exceptional circumstances" or something else?

"In exceptional circumstances"

(b) should there be a maximum period (backstop) beyond which no claim may competently be made?

We understand the necessity for individuals having certainty in their lives particularly in respect of their financial affairs. That having been said provided the test is "in exceptional circumstances" we do not believe that there would be a need for a backstop.

23. Should express provision be made in the 2006 Act to allow parties to agree extension of the time limit to facilitate settlement?

We strongly believe that this would provide considerable assistance in practice. We would anticipate parties being able to agree this without recourse to the court, with the agreement being formulated between the parties or their agents in writing. We regularly require to raise an action to protect the client's position. The drafting and intimation of such action can be hurtful and can be damaging to the negotiation process. The ability to enter in to an agreement to extend the time period to facilitate settlement would be most welcome.

24. Should express statutory provision be made permitting the court to have regard to the terms of any agreement between the parties as to financial provision on cessation of cohabitation (including opting out of the 2006 Act regime) when deciding what order, if any, to make?

It has been common practice for some time for couples to enter in to cohabitation agreements either prior to or following upon the start of their cohabitation. Accordingly, in our view it would be helpful if there was express provision to be made permitting the court to have regard to the terms of any agreement between the parties.

25. Should express statutory provision be made allowing the court to set aside, or vary any term of, a cohabitation agreement? If so, should the test for setting aside or variation be:

(a) that the agreement was not fair or reasonable at the time it was entered into;
(b) that there has been a material change in the parties' circumstances since the agreement was entered into, or
(c) another test (and if so what should that test be)?

We have as a team found this question to be difficult. Unlike agreements entered in to in contemplation of marriage or following upon marriage there are a range of agreements entered into in respect of cohabitation. We in general feel that it is important that individuals are able to contract to regulate their affairs but that cohabitation agreements pose certain challenges which are not necessarily present in pre and post nuptial agreements.

Most commonly a couple may enter into an agreement at the outset of their relationship to regulate the position in relation to buying their first property together. That agreement may be inappropriate by the time they actually separate due to changes in their circumstances, even though it may have been fair and reasonable at the time it was entered into.

26. What information or data do consultees have on:
(a) the economic impact of sections 25-28 of the Family Law (Scotland) Act 2006,
(b) the potential economic impact of any option for reform discussed in this Discussion Paper (in particular the impact in terms of tax law of the possibility of extending the remedies available to cohabitants on cessation of cohabitation otherwise than by death to include property transfers/pension sharing/maintenance)?

(c) the potential economic impact upon the SCTS and legal aid budgets of any option for reform discussed in this Discussion Paper, including extension of the time limit for claims and additional remedies?

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1. Should the regime for financial provision for cohabitants on cessation of cohabitation otherwise than by death remain separate from that for spouses and civil partners on divorce and dissolution?

(Paragraph 2.66)

Comments on Question 1

An argument could be made that one financial provision regime for all committed adult relationships might be introduced at this time. That way, the law would dignify enduring public perceptions that committed cohabitants acquire the protections of "common law" spouses. If so, whether or not the parties are, or at some point become, married/civil partners could form one (still important) factor to which the court would have regard in determining how best to dispose of adult claims. For example, a couple might cohabit for 20 years and then marry. If that couple divorce one year later, then the court would be better placed to take account of the entire period of that continuing relationship in a "one regime" system. However, this would leave enormous, and perhaps unwelcome, discretion to Scottish courts. Also, it might result in causing precisely what the current reform process is seeking to remedy: continuing unpredictability of outcome when cohabitant claims are made. Further, a "one size fits all" approach could generate new uncertainty of outcome in financial provision determinations on divorce/dissolution, which is undesirable.

Accordingly, **yes**, I think that there should continue to be separate regimes governing financial provision on separation for spouses/civil partners on one hand and, on the other, cohabitants. On balance, it seems too large a legal leap to make from the current position of two separate regimes (which are different in key respects) to one. Crucially, moving to one regime would also fail to give due regard to personal autonomy: some people decide not to get married because they do not wish to undertake the particular responsibilities of being a spouse.

Certainly, the time is ripe for updating the cohabitation provisions in Scotland for all of the reasons cogently set out in the current Discussion Paper. However, increasing public awareness must also, it is submitted, be considered **essential** in order to ensure widespread understanding of the legal obligations created when people enter into the different forms of committed adult relationships.

2. Should the definition of cohabitant in section 25 of the 2006 Act be amended?

(Paragraph 3.101)

Comments on Question 2

Yes. Cohabitation is a prevalent form of adult relationship requiring – and deserving – its own definition in contemporary Scots Law without reference to marriage or civil partnership. Stand-alone definitions of cohabitation have already (as the Discussion Paper narrates) been debated/introduced in other jurisdictions.

It is also worth noting that cohabitants may still be married, but separated and awaiting finalisation of a divorce, when they begin living with their new partner. Thus, both practically and conceptually, defining cohabitants with reference to spouses/civil partners is confusing, arguably diminishing the value of both types of relationship.

However, if the current definition **is** to be retained in some form, then it would require amendment, in particular, in two key respects. First, section 25(1)(a) refers to cohabitants as those who are/were "living together as husband and wife". This definition fails to take account of spouses and cohabitants in same sex relationships. Secondly, the reference to civil partners being "two persons of the same sex" in section 25(1)(b) would also require updating once (as anticipated) the Civil Partnerships (Scotland) Bill becomes law and enables heterosexual couples to enter into civil partnerships.

3. If consultees think the definition should be amended, should the comparison with spouses be removed in favour of a description of the nature of the relationship, such as "enduring family relationship", "genuine domestic basis", or something else?

(Paragraph 3.101)

Comments on Question 3

Despite the commonality of cohabitation, few would deny that creating a legal definition that encompasses the wide and diverse range such relationships is challenging.

It is submitted that, rather than seeking to draft exclusionary/threshold provisions as to, e.g., duration, presence of children or other factors, a statutory definition should instead focus on generally accepted characteristics of intimate partner cohabitation. This would leave wide discretion to the court in determining such cases which is I think, given the diversity of such relationships, the preferable approach.

Terms such as "dependence", "intimacy" and/or "enduring family relationship" would seem most appropriate. The term "enduring family relationship" is already embedded in Scottish Family legislation (see section 29(3) of the Adoption and Children (Scotland) Act 2007, albeit with a reference to marriage/civil partnership in that Act).

Note: is the issue of polyamorous relationships to be addressed in the new legislative provisions? If cohabitants are no longer to be defined with reference to spouses/civil partners, then one legal policy consideration is whether claims are to be restricted to two-party intimate cohabiting relationships.

4. If the comparison with spouses is to be removed, should the legislation expressly provide that couples within the forbidden degrees of relationship to each other will be excluded?

(Paragraph 3.101)

Comments on Question 4

Other than incestuous relationships, no. Some of the provisions about "forbidden degrees" of affinity in marriage are of ancient origin and seem fairly arbitrary to contemporary understandings of relationships. Extending those provisions to apply to cohabitants does not seem logical.

Further, the affinity forbidden degrees of marital relationship have been relaxed, again rather arbitrarily, over time – with the most recent amendments to relax being made by the Family Law (Scotland) Act 2006, section 1. Future amendments may well take place. To subject the public to a potentially changing landscape in which, e.g., the first 10 years of their cohabitation is deemed "forbidden" whereas the last 10 years might be deemed "permitted" adds unnecessary complexity to this area of law.

5. Should a qualifying period of cohabitation be introduced in order to access remedies under the 2006 Act? If so:

(a) how long should that qualifying period be?

(b) should the qualifying period be different, or removed altogether, if the parties have children?

(Paragraph 3.101)

Comments on Question 5

I would not support introducing a qualifying period. It is submitted that notions of fairness and justice/equity should be the underlying drive in creating provisions for cohabitants. It is possible that introducing a qualifying period – which, as with any such provision, would refer to an arbitrary period of time - will result in injustice for some.

While the duration of the parties' relationship would doubtless be a factor relevant in many cohabitation financial provision cases, it is only one factor. It seems unreasonable that one factor alone should become a barrier to an individual seeking a remedy.

6. Would the response to Question 5(a) or (b) change if the remedies available to former cohabitants were extended?

(Paragraph 3.101)

Comments on Question 6

No.

7. Would the definition of cohabitant be improved by the introduction of a list of features or characteristics to be taken into account in deciding whether the parties are cohabitants?

If so, what features or characteristics should be included?

(Paragraph 3.101)

Comments on Question 7

No. However, if a list of factors **is** to be introduced, I think that it would be important that any such list is stated to be non-hierarchal and non-exhaustive. This perhaps begs the question as to what value would be added to a definition by including any such list.

I would be more supportive of a list being introduced at the next stage of the court's deliberations, i.e., when the court moves on to consider what sort of financial provision should

then be made for cohabitants. Such a (non-exhaustive/non-hierarchal) list might then prove useful.

8. What are consultees' views on the introduction of a registration system for cohabitants?

(Paragraph 3.101)

Comments on Question 8

I would not support imposing a system of registration at this time.

Such a step would I think represent a significant interference with personal liberty. It would also be an approach likely to give rise to injustice in respect of relationships that progress over time from more casual into more committed relationships.

9. Do sections 26 and / or 27 cause any difficulty in practice?

(Paragraph 4.34)

Comments on Question 9

As I understand it, these sections are relatively little used in practice. Also, the notion of a housekeeping "allowance" as set out in section 27(1) and replicated from section 26 of the Family Law (Scotland) Act 1985, appears rather antiquated in contemporary life. See answer to Q10 below.

10. Should the language in sections 26 and / or 27 be modernised?

(Paragraph 4.34)

Comments on Question 10

Yes. See above. The recognition that cohabitants are likely to use and require access to shared resources is an important one, and so these are protections that statute should, I believe, preserve. But I agree: section 27 in particular would benefit from updating. A term such as "shared resources" would now be more in keeping with contemporary life.

11. Should sections 26 and / or 27 be modified in some other way?

(Paragraph 4.34)

Comments on Question 11

Not unless something better is proposed. While section 26 might be expressed more succinctly, it is an important protective provision generally and one which seems to have caused few issues in practice to date with regard either to spouses/civil partners or to cohabitants.

12. Should the policy underpinning awards for financial provision for former cohabitants, where cohabitation ends otherwise than by death, be:

    (a) compensation for economic loss sustained during the relationship;

    (b) relief of need:

    (c) sharing of property acquired during the cohabitation;

    (d) sharing the future economic burden of childcare;

    (e) a combination of any or all of (a) to (d) above; or

    (f) something else?

(Paragraph 5.69)

Comments on Question 12

I think the underpinning policy should be a combination of (a), (c) and (d), always in line with an underlying approach that seeks to ensure reasonableness and fairness in outcome. I do appreciate that these are rather opaque terms. An alternative would be to introduce a similar "safety net" as is currently found in section 8(2) of the Family Law (Scotland) Act 1985, namely that any financial provision made for a cohabitant should be (i) justified by, e.g., (a), (c) and (d) above and (ii) "reasonable having regard to the resources of the parties."

If reference is to be made to "need", I would be supportive of using the phrase "needs **and resources**", as has been used to good effect in divorce/dissolution provisions. This would seem more equitable for both parties.

A final point: I wonder whether it might be time to replace the term "economic burden of childcare" in Family Law legislation, which arguably has negative connotations, with something a little more neutral like "economic responsibility for childcare" ?

13. For the purposes of financial provision for former cohabitants, should any distinction be made between a child of whom the cohabitants are parents and a child who is or was accepted by the cohabitants as a child of the family?

(Paragraph 5.69)

Comments on Question 13

No, I would not support such a distinction. While the court should retain discretion as to the amount of any award made having regard to all of the circumstances of the case, any child accepted into the family should – throughout childhood – fall within the general ambit of childcare financial provision made when cohabitants separate.

14. Should the test for determining what order, if any, the court may make for financial provision on cessation of cohabitation otherwise than by death be based on fairness and reasonableness, having regard to all the circumstances of the case, including a list of relevant factors such as:

(a) the financial and non-financial contributions made by each party to the relationship, including the contribution made by each party to the care of the family and the family home;

(b) the effect of the cohabitation upon the earning capacity of each of the parties;

(c) the parties' respective needs and resources;

(d) relief of financial hardship caused by the cohabitation or the end of the cohabitation;

(e) a combination of any or all of (a) to (d) above; or

(f) something else?

(Paragraph 5.69)

Comments on Question 14

All of the above: (a) – (d). Consideration should be given to making specific reference to future economic responsibilities of childcare an additional factor.

15. Are the remedies available to the court on an application for financial provision by a former cohabitant adequate and sufficient?

(Paragraph 5.92)

Comments on Question 15

No. The orders the court can currently make for financial provision when cohabitants make claims are too restrictive. Most significantly, the court's inability to make an order for the transfer heritable property is problematic. This should be remedied in the updated legislation by providing the court with the discretion to make a property transfer order when justified by the circumstances of the case.

Consideration should also be given as to whether the court can should be empowered to make an order relating to pensions, such as pension-sharing.

It is also submitted that courts should also be given the power to grant incidental orders, as they can when spouses/civil partners separate.

16. If not, should the remedies be extended to include:

(a) transfer of property;

(b) pension sharing;

(c) periodic payments for a period after the end of the cohabitation, sufficient to relieve short term financial hardship; or

(d) something else?

(Paragraph 5.92)

Comments on Question 16

Yes to (a) – (c). See rationale above in answer to Q15. Please also see my answer to Q1 about the critical need to raise public awareness about the legal responsibilities incumbent upon entering into committed adult relationships.

17. Should express provision be made requiring or permitting the court to consider the resources of the former cohabitants in deciding what order, if any, to make for financial provision?

(Paragraph 5.92)

Comments on Question 17

Yes. See answer to Q12 above, and reference there to section 8(2) of the Family Law (Scotland) Act 1985.

18. Should the one-year time limit for making a claim under section 28(2) of the 2006 Act be extended?

(Paragraph 6.35)

Comments on Question 18

Yes. This is one of the most problematic aspects of the current legislation providing for cohabitants. While I would not generally be supportive of a time-limit greater than a maximum of two years, I also think it is important that the court is given the discretion to extend any time-limit where the circumstances of the case clearly merit it – but not beyond an absolute maximum of three years.

19. If the time limit is extended, what should the new time limit be?

(Paragraph 6.35)

Comments on Question 19

See answer to Q18 above. The current one-year time-limit is too short. A two-year time-limit, with a discretionary power given to the court to extend this period in exceptional cases, would I think avoid injustice and respect the balance of rights for both parties.

20. If the time limit is extended, should the court be afforded discretion to allow late claims?

(Paragraph 6.35)

Comments on Question 20

Yes. I would be strongly supportive of this. Well known case law on the current provisions (all addressed in the Discussion Paper) has demonstrated that an arbitrary time-limit which cannot be extended can "work hardship", as the Inner House recently termed it, in some cases.

21. If the time limit is <u>not</u> extended, should the court be afforded discretion to allow late claims?

(Paragraph 6.35)

Comments on Question 21

Yes, absolutely.

22. If the court is afforded discretion to allow late claims:

    (a) should the test for the exercise of discretion be "on cause shown", "in exceptional circumstances" or something else?

    (b) should there be a maximum period (backstop) beyond which no claim may competently be made?

(Paragraph 6.35)

Comments on Question 22

I did wonder whether "on cause shown" would simply be too low a statutory test. However, I believe that balancing the terminology that frames the test should depend on the time-limit ultimately imposed.

If the **current** one-year time-limit is retained, then I think later claims should be permitted "on cause shown" for a further period of up to three years after the end of the relationship.

If the current time-limit is extended to **two years**, then I would be supportive of a higher threshold test for the final year of the claim period, with that test making reference to "exceptional circumstances".

I would be supportive of a backstop imposing a maximum period of **three** years post-separation during which a claim may be made. To allow claims generally to be made indefinitely upon former cohabitants would be, I think, unjust.

23. Should express provision be made in the 2006 Act to allow parties to agree extension of the time limit to facilitate settlement?

(Paragraph 6.35)

Comments on Question 23

This "fixed timescale" question raises, on the one hand, concerns about the stress and expense of avoidable litigation (begun then immediately sisted only to avoid time-bar) and, on the other, a party using delaying tactics in order to frustrate a timeous claim being made.

Parties in negotiation should be permitted to mutually "stop the clock ticking" where they have agreed to participate in a form of ADR. It is submitted, however, that this should only be permitted up to a maximum of, e.g., 12 months to prevent undue delay in case resolution.

The legislation might also explicitly direct the court to have regard to, e.g., "ongoing settlement negotiations" or "delay caused by one party" in its considerations about whether any extension of the time-limit is warranted.

24. Should express statutory provision be made permitting the court to have regard to the terms of any agreement between the parties as to financial provision on cessation of cohabitation (including opting out of the 2006 Act regime) when deciding what order, if any, to make?

(Paragraph 7.39)

Comments on Question 24

Cohabitation agreements (whether drawn up between parties or through solicitors) seem to be, anecdotally at least, a well-established part of contemporary Scottish family life.

Couples cannot be prevented from drawing up such agreements, so the question becomes whether or not, and if so to what extent, the law will give effect to such agreements. This in turn raises many further questions, e.g., what if one party was vulnerable or uninformed when he or signed the agreement? What if parties' circumstances have changed considerably since signing, so that what once seemed reasonable would now give rise to an unfair outcome?

One approach would for the law to give no effect to any such agreement. At the other end of the spectrum, the law could endorse entirely all such agreements, allowing parties effectively to "contract out" out of any statutory cohabitation provisions in force. Neither of these approaches seems just.

Section 16(1) of the Family Law (Scotland) Act 1985 (which is concerned with divorce/dissolution) offers one solution, namely is that the court "may make an order setting aside or varying… the agreement or any term of it". A similar power should be given to the court when determining cases about financial provision for cohabitants. Also, rather than approach the issue in the negative, reference might be made in statute to the court's power to endorse agreements that are not unreasonable or unfair at the time the parties separate.

It would also be most prudent for the legislation to make a distinction between, on the one hand, agreements drawn up by couples at the **start** of their relationship (i.e. a "cohabitation

pre-nup") or during it and, on the other, those agreements that may be negotiated **after** a relationship has ended. In the case of the latter, a test along the lines of section 16(1) would seem appropriate.

However, I do not believe that the test set out in section 16(1)(b) of the 1985 Act, focusing on whether the agreement, or any term of it, was "**was not** fair and reasonable at the time it was entered into" is the correctly worded test to impose in respect of an agreement drawn up at the **start** of the parties' relationship. It is submitted that, in this case, the use of the past tense is unhelpful, and the focus on the time at which the agreement was signed (which may have been decades previously) is unduly restrictive. The court's discretion in this scenario should be wider, enabling the court to set aside any cohabitation agreement (or term of an agreement) that, given a material changes in financial circumstances throughout the duration of the relationship, "**is not** fair and reasonable". In making this determination, the court should be able to consider both (i) the parties' needs and resources and (ii) all of the circumstances of the case.

I do not believe that this is a matter that should be left to the law of contract to resolve.

25. Should express statutory provision be made allowing the court to set aside, or vary any term of, a cohabitation agreement? If so, should the test for setting aside or variation be:

    (a) that the agreement was not fair or reasonable at the time it was entered into;

    (b) that there has been a material change in the parties' circumstances since the agreement was entered into, or

    (c) another test (and if so, what should that test be)?

(Paragraph 7.39)

Comments on Question 25

Yes. See my answer to Q24 above. I would support (c), another test, as outlined in my answer above but which endorses the notion of giving due regard to changes in circumstances.

26. What information or data do consultees have on:

    (a) the economic impact of sections 25-28 of the Family Law (Scotland) Act 2006,

    (b) the potential economic impact of any option for reform discussed in this Discussion Paper (in particular the impact in terms of tax law of the possibility of extending the remedies available to cohabitants on cessation of cohabitation

otherwise than by death to include property transfers/pension sharing/maintenance)?

(c) the potential economic impact upon the SCTS and legal aid budgets of any option for reform discussed in this Discussion Paper, including extension of the time limit for claims and additional remedies?

(Paragraph 9.4)

Comments on Question 26

None.

General Comments

I thought the Discussion Paper was timely and comprehensive, narrating the complex issues surrounding cohabitation provision in an informative and accessible manner.

15. Kathryn Wilson, Melrose & Porteous, Solicitors

RESPONSE FORM

DISCUSSION PAPER ON COHABITATION

We hope that by using this form it will be easier for you to respond to the questions set out in the Discussion Paper. Respondents who wish to address only some of the questions may do so. The form reproduces the questions as summarised at the end of the paper and allows you to enter comments in a box after each one. At the end of the form, there is also space for any general comments you may have.

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 re-formatted or summarised); and (ii) attribute comments and publish a list of respondents' names.

In order to access any box for comments, press the shortcut key F11 and it will take you to the next box you wish to enter text into. If you are responding to/ commenting on only a few of the questions, continue using F11 until you arrive at the box you wish to access. To return to a previous box press Ctrl+Page Up or press Ctrl+Home to return to the beginning of the form.

Please save the completed response form to your own system as a Word document and send it as an email attachment to info@scotlawcom.gov.uk. Comments not on the response form may be submitted via said email address or by using the general comments form on our website. If you prefer you can send comments by post to the Scottish Law Commission, 140 Causewayside, Edinburgh EH9 1PR.

Name: KATHRYN WILSON
MELROSE AND PORTEOUS SOLICITORS
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1. Should the regime for financial provision for cohabitants on cessation of cohabitation otherwise than by death remain separate from that for spouses and civil partners on divorce and dissolution?

(Paragraph 2.66)

Comments on Question 1

Should be different .Many parties deliberately choose to cohabit rather than marry for their own reasons and should not be bound by the regime particularly prepared for marriage

2. Should the definition of cohabitant in section 25 of the 2006 Act be amended?

(Paragraph 3.101)

Comments on Question 2

Yes

3. If consultees think the definition should be amended, should the comparison with spouses be removed in favour of a description of the nature of the relationship, such as "enduring family relationship", "genuine domestic basis", or something else?

(Paragraph 3.101)

Comments on Question 3

Yes enduring family relationship as a more relevant definition

4. If the comparison with spouses is to be removed, should the legislation expressly provide that couples within the forbidden degrees of relationship to each other will be excluded?

(Paragraph 3.101)

Comments on Question 4

5. Should a qualifying period of cohabitation be introduced in order to access remedies under the 2006 Act? If so:

(a) how long should that qualifying period be?

(b) should the qualifying period be different, or removed altogether, if the parties have children?

(Paragraph 3.101)

Comments on Question 5

Initially in favour of a 2 year period but unsure if that necessary if parties can prove cohabiting subject to amended and up to date criteria

6. Would the response to Question 5(a) or (b) change if the remedies available to former cohabitants were extended?

(Paragraph 3.101)

Comments on Question 6

No as feel that it would still exclude vulnerable parties unless a very short qualifying period

7. Would the definition of cohabitant be improved by the introduction of a list of features or characteristics to be taken into account in deciding whether the parties are cohabitants?

If so, what features or characteristics should be included?

(Paragraph 3.101)

Comments on Question 7

Yes

Financial interdependence -degree of

Intimate relationship

Function as economic and domestic

unit Care and support of children

Degree to which present themselves to others as a couple

8. What are consultees' views on the introduction of a registration system for cohabitants?

(Paragraph 3.101)

Comments on Question 8

On the face of it good idea but suspect that it would be the same parties who obtain cohab agreements who would register and would mean the most vulnerable miss out

9. Do sections 26 and / or 27 cause any difficulty in practice?

(Paragraph 4.34)

Comments on Question 9

A lot of cohabiting couples seem to think that if they buy something with their money it is theirs Perhaps more publicity re this section

10. Should the language in sections 26 and / or 27 be modernised?

(Paragraph 4.34)

Comments on Question 10

See above and the definition akin to housekeeping is somewhat archaic in this day and age

11. Should sections 26 and / or 27 be modified in some other way?

(Paragraph 4.34)

Comments on Question 11

12. Should the policy underpinning awards for financial provision for former cohabitants, where cohabitation ends otherwise than by death, be:

    (a) compensation for economic loss sustained during the relationship;

    (b) relief of need:

(c) sharing of property acquired during the cohabitation;

(d) sharing the future economic burden of childcare;

(e) a combination of any or all of (a) to (d) above; or

(f) something else?

(Paragraph 5.69)

Comments on Question 12

Should be combination of all 4

13. For the purposes of financial provision for former cohabitants, should any distinction be made between a child of whom the cohabitants are parents and a child who is or was accepted by the cohabitants as a child of the family?

(Paragraph 5.69)

Comments on Question 13

Should be no difference but perhaps some publicity to ensure people aware of this

14. Should the test for determining what order, if any, the court may make for financial provision on cessation of cohabitation otherwise than by death be based on fairness and reasonableness, having regard to all the circumstances of the case, including a list of relevant factors such as:

(a) the financial and non-financial contributions made by each party to the relationship, including the contribution made by each party to the care of the family and the family home;

(b) the effect of the cohabitation upon the earning capacity of each of the parties;

(c) the parties' respective needs and resources;

(d) relief of financial hardship caused by the cohabitation or the end of the cohabitation;

(e) a combination of any or all of (a) to (d) above; or

(f) something else?

(Paragraph 5.69)

Comments on Question 14

A combination depending on the particular circumstances any needs and resources should take account of any other potential claims ie from a wife or civil partner

15. Are the remedies available to the court on an application for financial provision by a former cohabitant adequate and sufficient?

(Paragraph 5.92)

Comments on Question 15

No need to be extended

16. If not, should the remedies be extended to include:

    (a) transfer of property;

    (b) pension sharing;

    (c) periodic payments for a period after the end of the cohabitation, sufficient to relieve short term financial hardship; or

    (d) something else?

(Paragraph 5.92)

Comments on Question 16

Definitely should be (a) (b) and (c) as would allow parties to know what they are facing on termination and ensure cohabitation assets can all be dealt with

17. Should express provision be made requiring or permitting the court to consider the resources of the former cohabitants in deciding what order, if any, to make for financial provision?

(Paragraph 5.92)

Comments on Question 17

As long as there was some acknowledgement that this did not include non cohabitation assets and only those obtained during the cohabitation.

18. Should the one-year time limit for making a claim under section 28(2) of the 2006 Act be extended?

(Paragraph 6.35)

Comments on Question 18

No

19. If the time limit is extended, what should the new time limit be?

(Paragraph 6.35)

Comments on Question 19

20. If the time limit is extended, should the court be afforded discretion to allow late claims?

(Paragraph 6.35)

Comments on Question 20

21. If the time limit is not extended, should the court be afforded discretion to allow late claims?

(Paragraph 6.35)

Comments on Question 21

Not late claims as such but if parties are in negotiations there should be provision to stop the clock to allow agreement to be reached for say a 3 month period

maybe a particular rule that in the event of extreme hardship not covered by unjustified enrichment claim that could make a late claim

22. If the court is afforded discretion to allow late claims:

    (a) should the test for the exercise of discretion be "on cause shown", "in exceptional circumstances" or something else?

    (b) should there be a maximum period (backstop) beyond which no claim may competently be made?

(Paragraph 6.35)

Comments on Question 22

In exceptional circumstances in event of extreme hardship ,as defined

23. Should express provision be made in the 2006 Act to allow parties to agree extension of the time limit to facilitate settlement?

(Paragraph 6.35)

Comments on Question 23

Yes see Comment 21

24. Should express statutory provision be made permitting the court to have regard to the terms of any agreement between the parties as to financial provision on cessation of cohabitation (including opting out of the 2006 Act regime) when deciding what order, if any, to make?

(Paragraph 7.39)

Comments on Question 24

Yes it is important that if parties wish to contract and have both taken legal advice they can contract out of the provisions and decide what will happen in the event of the separation

however such provisions should include what happens if there is a change of circumstances eg children and if the relationship is a lengthy one .

25. Should express statutory provision be made allowing the court to set aside, or vary any term of, a cohabitation agreement? If so, should the test for setting aside or variation be:

(a) that the agreement was not fair or reasonable at the time it was entered into;

(b) that there has been a material change in the parties' circumstances since the agreement was entered into, or

(c) another test (and if so, what should that test be)?

(Paragraph 7.39)

Comments on Question 25

See above suspect a material change should lead to an updating by the court or by the parties perhaps restricted to specific events eg birth of children, longevity of relationship

26. What information or data do consultees have on:

(a) the economic impact of sections 25-28 of the Family Law (Scotland) Act 2006,

(b) the potential economic impact of any option for reform discussed in this Discussion Paper (in particular the impact in terms of tax law of the possibility of extending the remedies available to cohabitants on cessation of cohabitation otherwise than by death to include property transfers/pension sharing/maintenance)?

(c) the potential economic impact upon the SCTS and legal aid budgets of any option for reform discussed in this Discussion Paper, including extension of the time limit for claims and additional remedies?

(Paragraph 9.4)

Comments on Question 26

Papers from advisory panel re (a)

General Comments

16. Aberdein Considine, Solicitors

Name: Family Law Team
Organisation: Aberdein Considine
Address: 5-9 Bon Accord Crescent, Aberdeen, AB11 6DN
Email address: tmain@acandco.com

1. Should the regime for financial provision for cohabitants on cessation of cohabitation otherwise than by death remain separate from that for spouses and civil partners on divorce and dissolution?

(Paragraph 2.66)

Comments on Question 1 Yes, we believe it is essential that it remains separate. Any new regime for cohabitants requires to be well publicised and have key markers in statutory guidance to avoid, as far as possible, accidental implications but this requires to be different from that available for spouses and civil partners.

2. Should the definition of cohabitant in section 25 of the 2006 Act be amended?

(Paragraph 3.101)

Comments on Question 2 Yes, it requires to reflect current societal norms. It is our opinion that a list of factors the Courts would find compelling would be useful albeit it is accepted the list could not be exhaustive.

3. If consultees think the definition should be amended, should the comparison with spouses be removed in favour of a description of the nature of the relationship, such as "enduring family relationship", "genuine domestic basis", or something else?

(Paragraph 3.101)

Comments on Question 3

Difficult to define precisely but the relationship should involve commitment, intimacy and financial connection.

4. If the comparison with spouses is to be removed, should the legislation expressly provide that couples within the forbidden degrees of relationship to each other will be excluded?

(Paragraph 3.101)

Comments on Question 4

Yes

5. Should a qualifying period of cohabitation be introduced in order to access remedies under the 2006 Act? If so:

   (a) how long should that qualifying period be?

   (b) should the qualifying period be different, or removed altogether, if the parties have children?

(Paragraph 3.101)

Comments on Question 5

No qualifying period – would be too arbitrary.

6. Would the response to Question 5(a) or (b) change if the remedies available to former cohabitants were extended?

(Paragraph 3.101)

Comments on Question 6

No.

7. Would the definition of cohabitant be improved by the introduction of a list of features or characteristics to be taken into account in deciding whether the parties are cohabitants?

If so, what features or characteristics should be included?

(Paragraph 3.101)

Comments on Question 7

Yes.

Although not an exhaustive list, potential characteristics could be commitment, intimacy and financial connection.

8. What are consultees' views on the introduction of a registration system for cohabitants?

(Paragraph 3.101)

Comments on Question 8

A registration system would not work for the majority of people due to lack of awareness. It is likely that the users of the system would be the same people that would proactively enter a cohabitation agreement now. We would also have concerns about backdating a cohabitation registration to the date parties first moved in together, as the intentions then may have been vastly different. Revocation of this registration would also require to be considered and whether registration and revocation could be carried out unilaterally or require both parties.

9. Do sections 26 and / or 27 cause any difficulty in practice?

(Paragraph 4.34)

Comments on Question 9

Generally not - most people take a pragmatic approach.

10. Should the language in sections 26 and / or 27 be modernised?

(Paragraph 4.34)

Comments on Question 10

Yes - the language is outdated and could be modernised.

11. Should sections 26 and / or 27 be modified in some other way?

(Paragraph 4.34)

Comments on Question 11

Not essential

12. Should the policy underpinning awards for financial provision for former cohabitants, where cohabitation ends otherwise than by death, be:

(a) compensation for economic loss sustained during the relationship;

(b) relief of need:

(c) sharing of property acquired during the cohabitation;

(d) sharing the future economic burden of child care;

(e) a combination of any or all of (a) to (d) above; or

(f) something else?

(Paragraph 5.69)

Comments on Question 12

Yes to (a)

Potentially to (b) but only very short term

Yes to (c), although not to the same extent as a married couple

Yes to (d) but care must be taken not to put a cohabitant in a better position than a spouse.

We all feel strongly that economic burden of child care needs to be addressed as part of wider legislative change, potentially involving amendment to the 1985 and 1991 Acts in relation to child care costs, educational costs, extra-curricular activities and the like.

13. For the purposes of financial provision for former cohabitants, should any distinction be made between a child of whom the cohabitants are parents and a child who is or was accepted by the cohabitants as a child of the family?

(Paragraph 5.69)

Comments on Question 13

No.

14. Should the test for determining what order, if any, the court may make for financial provision on cessation of cohabitation otherwise than by death be based on fairness and reasonableness, having regard to all the circumstances of the case, including a list of relevant factors such as:

(a) the financial and non-financial contributions made by each party to the relationship, including the contribution made by each party to the care of the family and the family home;

(b) the effect of the cohabitation upon the earning capacity of each of the parties;

(c) the parties' respective needs and resources;

(d) relief of financial hardship caused by the cohabitation or the end of the cohabitation;

(e) a combination of any or all of (a) to (d) above; or

(f) something else?

(Paragraph 5.69)

Comments on Question 14

Yes but (c) should only be considered when looking at ability to pay - a cohabitant should not be precluded from making a claim because they are already wealthy, for instance.

15. Are the remedies available to the court on an application for financial provision by a former cohabitant adequate and sufficient?

(Paragraph 5.92)

Comments on Question 15

No

16. If not, should the remedies be extended to include:

(a) transfer of property;

(b) pension sharing;

(c) periodic payments for a period after the end of the cohabitation, sufficient to relieve short term financial hardship; or

(d) something else?

(Paragraph 5.92)

Comments on Question 16

Yes to transfer of property. This is something we all felt strongly about.

Yes to pension sharing – could be useful to remedy economic disadvantage where other resources are not available.

Periodic payments – for a very limited period and only where hardship/unfairness, such as to cover mortgage payments where one person is unable to occupy a property.

17. Should express provision be made requiring or permitting the court to consider the resources of the former cohabitants in deciding what order, if any, to make for financial provision?

(Paragraph 5.92)

Comments on Question 17

Yes

18. Should the one year time limit for making a claim under section 28(2) of the 2006 Act be extended?

(Paragraph 6.35)

Comments on Question 18

No, but a counterclaim should be allowed within around 3 months from the date of raising of the action to prevent tactical intimation. There should also be provision for parties to jointly agree to extend the time limit if they are attending mediation, are negotiating etc with a maximum extension period of around 6 months.

19. If the time limit is extended, what should the new time limit be?

(Paragraph 6.35)

Comments on Question 19

N/A

20. If the time limit is extended, should the court be afforded discretion to allow late claims?

(Paragraph 6.35)

Comments on Question 20

N/A

21. If the time limit is <u>not</u> extended, should the court be afforded discretion to allow late claims?

(Paragraph 6.35)

Comments on Question 21

Yes

22. If the court is afforded discretion to allow late claims:

(a) should the test for the exercise of discretion be "on cause shown", "in exceptional circumstances" or something else?

(b) should there be a maximum period (backstop) beyond which no claim may competently be made?

(Paragraph 6.35)

Comments on Question 22

The Court should be able to allow late claims on cause shown for a maximum 6 months i.e. 1.5 years from date of separation

23. Should express provision be made in the 2006 Act to allow parties to agree extension of the time limit to facilitate settlement?

(Paragraph 6.35)

Comments on Question 23

Yes, parties could jointly agree a 6 month maximum extension.

24. Should express statutory provision be made permitting the court to have regard to the terms of any agreement between the parties as to financial provision on cessation of cohabitation (including opting out of the 2006 Act regime) when deciding what order, if any, to make?

(Paragraph 7.39)

Comments on Question 24

Yes, although parties often enter into such agreements before having children and the economic burden of caring for a child may therefore need to be considered separately.

25. Should express statutory provision be made allowing the court to set aside, or vary any term of, a cohabitation agreement? If so, should the test for setting aside or variation be:

(a) that the agreement was not fair or reasonable at the time it was entered into;

(b) that there has been a material change in the parties' circumstances since the agreement was entered into, or

(c) another test (and if so what should that test be)?

(Paragraph 7.39)

Comments on Question 25

Only in relation to economic burden of caring for children

26. What information or data do consultees have on:

(a) the economic impact of sections 25-28 of the Family Law (Scotland) Act 2006,

(b) the potential economic impact of any option for reform discussed in this Discussion Paper (in particular the impact in terms of tax law of the possibility of extending the remedies available to cohabitants on cessation of cohabitation otherwise than by death to include property transfers/pension sharing/maintenance)?

(c) the potential economic impact upon the SCTS and legal aid budgets of any option for reform discussed in this Discussion Paper, including extension of the time limit for claims and additional remedies?

(Paragraph 9.4)

Comments on Question 26

General Comments

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17. Kathryn Truss, Rutherford Sheridan Solicitors

Name:
Organisation:
Address:
Email address:

1. Should the regime for financial provision for cohabitants on cessation of cohabitation otherwise than by death remain separate from that for spouses and civil partners on divorce and dissolution?

(Paragraph 2.66)

Comments on Question 1 Yes

2. Should the definition of cohabitant in section 25 of the 2006 Act be amended?

(Paragraph 3.101)

Comments on Question 2 Yes – more specifically defined to qualify such as having a child or for a minimum period say 2 years – but there could be sheriff discretion in other circumstances

3. If consultees think the definition should be amended, should the comparison with spouses be removed in favour of a description of the nature of the relationship, such as "enduring family relationship", "genuine domestic basis", or something else?

(Paragraph 3.101)

Comments on Question 3

Yes, an enduring relationship – to move away from the idea that marriage is the 'ideal' option as some people for a variety for reasons do not want to or do not choose to get married or it may be one party in the relationship does not want to get married.

4. If the comparison with spouses is to be removed, should the legislation expressly provide that couples within the forbidden degrees of relationship to each other will be excluded?

(Paragraph 3.101)

Comments on Question 4

Yes

5. Should a qualifying period of cohabitation be introduced in order to access remedies under the 2006 Act? If so:

   (a) how long should that qualifying period be?

   (b) should the qualifying period be different, or removed altogether, if the parties have children?

(Paragraph 3.101)

Comments on Question 5

Yes 2 years I think would be sensible and yes removed if there is a child.

6. Would the response to Question 5(a) or (b) change if the remedies available to former cohabitants were extended?

(Paragraph 3.101)

Comments on Question 6

No, I think they should be extended in any event

7. Would the definition of cohabitant be improved by the introduction of a list of features or characteristics to be taken into account in deciding whether the parties are cohabitants?

If so, what features or characteristics should be included?

(Paragraph 3.101)

Comments on Question 7

No, I think it's clear if it is an enduring relationship for over 2 years or if there is a child. However, there can be sheriff discretion also.

8. What are consultees' views on the introduction of a registration system for cohabitants?

(Paragraph 3.101)

Comments on Question 8

In reality it is unlikely to work, some people are just simply not interested nor want to formalise a relationship in this way (again one party may want to while the other will not). It would have to be very well advertised. Lots of cohabitating couples end up naturally staying together for long periods of time without any thought.

9. Do sections 26 and / or 27 cause any difficulty in practice?

(Paragraph 4.34)

Comments on Question 9

Very difficult to advise

10. Should the language in sections 26 and / or 27 be modernised?

(Paragraph 4.34)

Comments on Question 10

Yes. There is not lot of clarity.

11. Should sections 26 and / or 27 be modified in some other way?

(Paragraph 4.34)

Comments on Question 11

12. Should the policy underpinning awards for financial provision for former cohabitants, where cohabitation ends otherwise than by death, be:

(a) compensation for economic loss sustained during the relationship;

(b) relief of need:

(c) sharing of property acquired during the cohabitation;

(d) sharing the future economic burden of childcare;

(e) a combination of any or all (a) to (d) above; or

(f) something else?

(Paragraph 5.69)

Comments on Question 12

Think it should be based off the 1995 principles. Sharing property that was acquired during the period and also compensation for economic advantage/ disadvantage. Economic burden for a child.

13. For the purposes of financial provision for former cohabitants, should any distinction be made between a child of whom the cohabitants are parents and a child who is or was accepted by the cohabitants as a child of the family?

(Paragraph 5.69)

Comments on Question 13

I think it can be discretionary especially if it is a child between one cohabitant and a previous partner and this child is already receiving maintenance from their biological father. It would depend on the length of the relationship the level of care etc.

14. Should the test for determining what order, if any, the court may make for financial provision on cessation of cohabitation otherwise than by death be based on fairness and reasonableness, having regard to all the circumstances of the case, including a list of relevant factors such as:

(a) the financial and non-financial contributions made by each party to the relationship, including the contribution made by each party to the care of the family and the family home;

(b) the effect of the cohabitation upon the earning capacity of each of the parties;

(c) the parties' respective needs and resources;

(d) relief of financial hardship caused by the cohabitation or the end of the cohabitation;

(e) a combination of any or all of (a) to (d) above; or

(f) something else?

(Paragraph 5.69)

Comments on Question 14

«InsertTextHere»

15. Are the remedies available to the court on an application for financial provision by a former cohabitant adequate and sufficient?

(Paragraph 5.92)

Comments on Question 15

No, they should be extended – such as property transfer and pension share – all remedies will have to be available as there would not any justifiable reason to exclude one and not the other.

16. If not, should the remedies be extended to include:

(a) transfer of property;

(b) pension sharing;

(c) periodic payments for a period after the end of the cohabitation, sufficient to relieve short term financial hardship; or

(d) something else?

(Paragraph 5.92)

Comments on Question 16

Yes, transfer of property and pension sharing or capital sum – periodic payments or aliment style could cause more of a difficulty – must be a time limit on this.

17. Should express provision be made requiring or permitting the court to consider the resources of the former cohabitants in deciding what order, if any, to make for financial provision?

(Paragraph 5.92)

Comments on Question 17

Yes, very much like spouses - if they meet the criteria

18. Should the one year time limit for making a claim under section 28(2) of the 2006 Act be extended?

(Paragraph 6.35)

Comments on Question 18

Yes possibly 3-5 years, it's not long enough at present. I do think 3 years is sufficient however.

19. If the time limit is extended, what should the new time limit be?

(Paragraph 6.35)

Comments on Question 19

As above

20. If the time limit is extended, should the court be afforded discretion to allow late claims?

(Paragraph 6.35)

Comments on Question 20

It would depend how long was extended – possibly in exceptional circumstances

21. If the time limit is not extended, should the court be afforded discretion to allow late claims?

(Paragraph 6.35)

Comments on Question 21

Yes, this is very important

22. If the court is afforded discretion to allow late claims:

    (a) should the test for the exercise of discretion be "on cause shown", "in exceptional circumstances" or something else?

    (b) should there be a maximum period (backstop) beyond which no claim may competently be made?

(Paragraph 6.35)

Comments on Question 22

On cause shown – some people can delay tactically and some for emotional reasons

23. Should express provision be made in the 2006 Act to allow parties to agree extension of the time limit to facilitate settlement?

(Paragraph 6.35)

Comments on Question 23

Yes, if negotiation still ongoing it could be helpful – especially if its in the interest of a child. As long as both parties agree.

24. Should express statutory provision be made permitting the court to have regard to the terms of any agreement between the parties as to financial provision on cessation of cohabitation (including opting out of the 2006 Act regime) when deciding what order, if any, to make?

(Paragraph 7.39)

Comments on Question 24

Yes

25. Should express statutory provision be made allowing the court to set aside, or vary any term of, a cohabitation agreement? If so, should the test for setting aside or variation be:

(a) that the agreement was not fair or reasonable at the time it was entered into;

(b) that there has been a material change in the parties' circumstances since the agreement was entered into, or

(c) another test (and if so what should that test be)?

(Paragraph 7.39)

Comments on Question 25

Yes, if it was not fair and reasonable at the time it was entered in to and if there has been a material change – such as if the agreement does not account for an event that has now occurred.

26. What information or data do consultees have on:

(a) the economic impact of sections 25-28 of the Family Law (Scotland) Act 2006,

(b) the potential economic impact of any option for reform discussed in this Discussion Paper (in particular the impact in terms of tax law of the possibility of extending the remedies available to cohabitants on cessation of cohabitation otherwise than by death to include property transfers/pension sharing/maintenance)?

(c) the potential economic impact upon the SCTS and legal aid budgets of any option for reform discussed in this Discussion Paper, including extension of the time limit for claims and additional remedies?

(Paragraph 9.4)

Comments on Question 26

General Comments

18. Equality Network

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1. Should the regime for financial provision for cohabitants on cessation of cohabitation otherwise than by death remain separate from that for spouses and civil partners on divorce and dissolution?

(Paragraph 2.66)

Comments on Question 1

We are aware that many LGBTI couples who choose to cohabit but not enter a civil partnership or marriage do so mindfully and as a choice. This can be for many reasons but ultimately comes down to them not wishing to enter these instiutions and therefore the regulations which they include. Thus, we would want the financial provisions to be kept separate out of respect for those who have chosen to not be included in those provisions through marriage or civil partnership.

2. Should the definition of cohabitant in section 25 of the 2006 Act be amended?

(Paragraph 3.101)

Comments on Question 2

Yes. Currently the definition of cohabitants refers to either ‘a man and woman who are (or were) living together as if they were husband and wife’ and ‘two persons of the same sex who are (or were) living together as if they were civil partners’.

Since this legislation was written equal marriage has been made legal meaning that it is not only mixed-sex couples who can enter marriage. In addition, civil partnership for mixed-sex couples is in the process of being legalised. This means that it is inapropriate for the references to marriage and civil partnership to be gendered in the way they currently are.

3. If consultees think the definition should be amended, should the comparison with spouses be removed in favour of a description of the nature of the relationship, such as “enduring family relationship”, “genuine domestic basis”, or something else?

(Paragraph 3.101)

Comments on Question 3

We would support the term ‘enduring family relationship’ over ‘genuine domestic basis’ as the former implies a more meaningful, lasting attitude for each member of the couple towards each other. This also moves away from attitudes of comparing marriages/civil partnerships to cohabitation which we would support for the reasons outlined in the first question – that these couples have made a conscious decision to not enter those insititutons, so determining their status by the precedent set by these insitiutions is unnecessary and not always appropriate.

4. If the comparison with spouses is to be removed, should the legislation expressly provide that couples within the forbidden degrees of relationship to each other will be excluded?

(Paragraph 3.101)

Comments on Question 4

Yes as this legislation is designed for those in relationships which may be sexual.

5. Should a qualifying period of cohabitation be introduced in order to access remedies under the 2006 Act? If so:

   (a) how long should that qualifying period be?

   (b) should the qualifying period be different, or removed altogether, if the parties have children?

(Paragraph 3.101)

Comments on Question 5

We would not support a qualifying period of cohabitation and would instead support decisisons being made based on the individual cases and circumstances. Were a qualifying period to be introduced we would support it being removed if the couple have children, as these circumstances require individual attention.

6. Would the response to Question 5(a) or (b) change if the remedies available to former cohabitants were extended?

(Paragraph 3.101)

Comments on Question 6

No.

7. Would the definition of cohabitant be improved by the introduction of a list of features or characteristics to be taken into account in deciding whether the parties are cohabitants?

If so, what features or characteristics should be included?

(Paragraph 3.101)

Comments on Question 7

Yes, we would support introducing a list of features or characteristics to take into account when deciding whether the partners are cohabitants.

8. What are consultees' views on the introduction of a registration system for cohabitants?

(Paragraph 3.101)

Comments on Question 8

We would oppose the introduction of a registration system for cohabitants. This is because we feel it moves too closely to marriage and civil partnership, which these couples have chosen to avoid. We also feel that formalising cohabitant status would exclude those who are currently most vulnerable including those who do not understand the system or, for many reasons including being in controlling abusive relationships, are unable to access these registration

systems. Also, as the paper states, there is an issue if those cohabiting were in undissolved marriages or civil partnerships with someone else.

9. Do sections 26 and / or 27 cause any difficulty in practice?

(Paragraph 4.34)

Comments on Question 9

N/A

10. Should the language in sections 26 and / or 27 be modernised?

(Paragraph 4.34)

Comments on Question 10

N/A

11. Should sections 26 and / or 27 be modified in some other way?

(Paragraph 4.34)

Comments on Question 11

N/A

12. Should the policy underpinning awards for financial provision for former cohabitants, where cohabitation ends otherwise than by death, be:

    (a) compensation for economic loss sustained during the relationship;

    (b) relief of need:

    (c) sharing of property acquired during the cohabitation;

    (d) sharing the future economic burden of child care;

    (e) a combination of any or all of (a) to (d) above; or

(f) something else?

(Paragraph 5.69)

Comments on Question 12

(E) We would suggest a combination of all of the above based on the discretion of those overseeing the case based on the circumstances of each couple. Every case will be different, have different circumstances, and different nuances therefore we feel it would be appropriate for any of these measures to be available if necessary.

13. For the purposes of financial provision for former cohabitants, should any distinction be made between a child of whom the cohabitants are parents and a child who is or was accepted by the cohabitants as a child of the family?

(Paragraph 5.69)

Comments on Question 13

No we believe they should be treated equally. This is in consideration of the fact that in cases where same-sex female couples conceive through a 'DIY' IVF process only one of them may be classified as the mother legally. Therefore, unless both a child of whom the two cohabitants are legally the parents, and a child who has been accepted by the cohabitants as a child of the family are included all rights to access to the child could fall on one parent.

14. Should the test for determining what order, if any, the court may make for financial provision on cessation of cohabitation otherwise than by death be based on fairness and reasonableness, having regard to all the circumstances of the case, including a list of relevant factors such as:

(a) the financial and non-financial contributions made by each party to the relationship, including the contribution made by each party to the care of the family and the family home;

(b) the effect of the cohabitation upon the earning capacity of each of the parties;

(c) the parties' respective needs and resources;

(d) relief of financial hardship caused by the cohabitation or the end of the cohabitation;

(e) a combination of any or all of (a) to (d) above; or

(f) something else?

(Paragraph 5.69)

Comments on Question 14

We would suggest (e), a combination of all of the above, based on the discretion of those overseeing the case based on the circumstances of each couple. Every case will be different, have different circumstances and different nuances therefore we feel it would be appropriate for any of these determinations to be available if necessary.

15. Are the remedies available to the court on an application for financial provision by a former cohabitant adequate and sufficient?

(Paragraph 5.92)

Comments on Question 15

N/A

16. If not, should the remedies be extended to include:

(a) transfer of property;

(b) pension sharing;

(c) periodic payments for a period after the end of the cohabitation, sufficient to relieve short term financial hardship; or

(d) something else?

(Paragraph 5.92)

Comments on Question 16

N/A

17. Should express provision be made requiring or permitting the court to consider the resources of the former cohabitants in deciding what order, if any, to make for financial provision?

(Paragraph 5.92)

Comments on Question 17

N/A

18. Should the one year time limit for making a claim under section 28(2) of the 2006 Act be extended?

(Paragraph 6.35)

Comments on Question 18

We are unsure about how it should be extended but are concerned that one year may be too short a period for people are not well aware of their legal rights.

19. If the time limit is extended, what should the new time limit be?

(Paragraph 6.35)

Comments on Question 19

N/A

20. If the time limit is extended, should the court be afforded discretion to allow late claims?

(Paragraph 6.35)

Comments on Question 20

N/A

21. If the time limit is not extended, should the court be afforded discretion to allow late claims?

(Paragraph 6.35)

Comments on Question 21

N/A

22. If the court is afforded discretion to allow late claims:

(a) should the test for the exercise of discretion be "on cause shown", "in exceptional circumstances" or something else?

(b) should there be a maximum period (backstop) beyond which no claim may competently be made?

(Paragraph 6.35)

Comments on Question 22

N/A

23. Should express provision be made in the 2006 Act to allow parties to agree extension of the time limit to facilitate settlement?

(Paragraph 6.35)

Comments on Question 23

Yes as this allows for communication and cooperation between the partners which can only be a good thing.

24. Should express statutory provision be made permitting the court to have regard to the terms of any agreement between the parties as to financial provision on cessation of cohabitation (including opting out of the 2006 Act regime) when deciding what order, if any, to make?

(Paragraph 7.39)

Comments on Question 24

Yes but the court should not be bound by any agreement so as to be free to use its own judgement.

25. Should express statutory provision be made allowing the court to set aside, or vary any term of, a cohabitation agreement? If so, should the test for setting aside or variation be:

(a) that the agreement was not fair or reasonable at the time it was entered into;

(b) that there has been a material change in the parties' circumstances since the agreement was entered into, or

(c) another test (and if so what should that test be)?

(Paragraph 7.39)

Comments on Question 25

Yes we believe both (a) and (b) would be reasonable. This ensures there is no influence from abusive relationships on the terms of the end of cohabitation. It would also ensure that circumstances which would have changed the original terms of reference, had they been aware of them at the time of agreement, are accounted for.

26. What information or data do consultees have on:

(a) the economic impact of sections 25-28 of the Family Law (Scotland) Act 2006,

(b) the potential economic impact of any option for reform discussed in this Discussion Paper (in particular the impact in terms of tax law of the possibility of extending the remedies available to cohabitants on cessation of cohabitation otherwise than by death to include property transfers/pension sharing/maintenance)?

(c) the potential economic impact upon the SCTS and legal aid budgets of any option for reform discussed in this Discussion Paper, including extension of the time limit for claims and additional remedies?

(Paragraph 9.4)

Comments on Question 26

We do not have any information pertaining to this.

General Comments

We would like to state how pleased we are about the open communication and engagement from the Scottish Law Commission surrounding the previous feedback we have given relating to this cohabaitation law review.

19. Thorntons Solicitors

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1. Should the regime for financial provision for cohabitants on cessation of cohabitation otherwise than by death remain separate from that for spouses and civil partners on divorce and dissolution?

(Paragraph 2.66)

Comments on Question 1

Yes. Although we recognise that there are many long standing cohabiting relationships which show a degree of commitment akin to that of marriage, we feel that the regimes should remain separate. Many cohabiting couples prefer not to register their relationship, and like that it is less formal than marriage and does not carry with it the same financial ties as marriage. Accordingly, we do not think the same rights and obligations should be in place for cohabitants.

We also consider that there is a perceived difference within our society as to cohabitation and marriage. They are different things and the public recognises this. Those who choose to cohabit often do so as an intentional choice, i.e. they do not wish to marry.

If the two regimes were combined into one regime then there would be significant work to be done to raise public awareness of the issue.

2. Should the definition of cohabitant in section 25 of the 2006 Act be amended?

(Paragraph 3.101)

Comments on Question 2

The current definition is too vague and should be amended.

3. If consultees think the definition should be amended, should the comparison with spouses be removed in favour of a description of the nature of the relationship, such as "enduring family relationship", "genuine domestic basis", or something else?

(Paragraph 3.101)

Comments on Question 3

It may be helpful to have a list of relevant criteria to consider, as in the Australian example. We think that 'genuine domestic basis' is preferable to 'enduring family relationship' as we note that in terms of economic disadvantage/ advantage a cohabitation does not need to be particularly long to create inequity. Much of the financial investment in purchasing property, for example, may be relatively early on in a cohabiting relationship. The word "family" may cause some confusion as it has a connotation of children, and a couple do not need to have children to be cohabitants.

4. If the comparison with spouses is to be removed, should the legislation expressly provide that couples within the forbidden degrees of relationship to each other will be excluded?

(Paragraph 3.101)

Comments on Question 4

We cannot see a reason why there would be a difficulty with this propostion. Generally, the clearer the legislation, the better.

5. Should a qualifying period of cohabitation be introduced in order to access remedies under the 2006 Act? If so:

(a) how long should that qualifying period be?

(b) should the qualifying period be different, or removed altogether, if the parties have children?

(Paragraph 3.101)

Comments on Question 5

We are not in favour of a qualifying period being introduced. There can still be significant economic disadvantage to one party early on in a cohabiting relationship. If a qualifying period is to be introduced then we think this should be removed altogether if there are children of the relationship.

6. Would the response to Question 5(a) or (b) change if the remedies available to former cohabitants were extended?

(Paragraph 3.101)

Comments on Question 6

No.

7. Would the definition of cohabitant be improved by the introduction of a list of features or characteristics to be taken into account in deciding whether the parties are cohabitants?

If so, what features or characteristics should be included?

(Paragraph 3.101)

Comments on Question 7

Yes - a list of features could be useful. If a list is to be included, we think the following features could be considered:-

-duration, nature and extent of common residence, whether a sexual relationship exists, the degree of financial interdependence or dependence, features of a relationship such as socialising, eating together, possible ownership of property and degree of mutual commitment to a shared life.

This list should not be exhaustive and the court should be able to take into account other factors which might be indicative of the type of relationship between the parties. Each

consideration should not be a criteria which must be met in order for the parties to be regarded as cohabitants.

8. What are consultees' views on the introduction of a registration system for cohabitants?

(Paragraph 3.101)

Comments on Question 8

We do not think this is a good idea. We think it is too formal and think that those who choose to cohabit rather than marry/ enter into a civil partnership may be put off cohabiting. Our concern would be that many cohabitants simply would not register, then they would not have the protection which is intended by the registration scheme.

There would need to be high level of public awareness about a registration scheme. Even then, it is unlikely to provide all cohabitants with protection for the reasons given above.

9. Do sections 26 and / or 27 cause any difficulty in practice?

(Paragraph 4.34)

Comments on Question 9

We do not think theses sections cause any great difficulties in practice.

10. Should the language in sections 26 and / or 27 be modernised?

(Paragraph 4.34)

Comments on Question 10

Yes. Although we do not think sections 26 and or 27 cause any significant difficulties in practice, the wording in section 27 is probably in need of modernisation. It could be amended to make reference to contributions either party has made to household expenses. Many cohabitants have an arrangement where one will pay a contribution towards the house/mortgage etc, by paying £X per month to the other cohabitant. We are of the view that is more common in practice, rather than one party giving the other an allowance.

11. Should sections 26 and / or 27 be modified in some other way?

(Paragraph 4.34)

Comments on Question 11

No other suggestions.

12. Should the policy underpinning awards for financial provision for former cohabitants, where cohabitation ends otherwise than by death, be:

    (a) compensation for economic loss sustained during the relationship;

    (b) relief of need:

    (c) sharing of property acquired during the cohabitation;

    (d) sharing the future economic burden of child care;

    (e) a combination of any or all of (a) to (d) above; or

    (f) something else?

(Paragraph 5.69)

Comments on Question 12

The policy underpinning awards for financial provision for former cohabitants, where cohabitation ends otherwise than by death, should be a combination of:-

(a) Compensation for economic loss sustained during the relationship –YES.
(b) Relief of need – Possibly.
(c) Sharing of property acquired during the cohabitation – NO. This could be problematic. We would need a "start date" for cohabitation.
(d) Sharing the future burden of child care –YES.

There is a concern that by including all of (a), (b), (c) and (d) this may take us very close to the position for married couples separating. We still think there should be a clear distinction between the two systems. If relief of need (b) was to be included we think this should only cover fairly extreme sitautions, where the need has arisen solely due to way the cohabitants have managed their finances.

13. For the purposes of financial provision for former cohabitants, should any distinction be made between a child of whom the cohabitants are parents and a child who is or was accepted by the cohabitants as a child of the family?

(Paragraph 5.69)

Comments on Question 13

For the purposes of financial provision for former cohabitants, we think, on balance, that distinction should be made between a child of whom the cohabitants are parents and a child who is or was accepted by the cohabitants as a child of the family. The child maintenance system should remedy the position so far as the "non-resident parent" is concerned.

14. Should the test for determining what order, if any, the court may make for financial provision on cessation of cohabitation otherwise than by death be based on fairness and reasonableness, having regard to all the circumstances of the case, including a list of relevant factors such as:

(a) the financial and non-financial contributions made by each party to the relationship, including the contribution made by each party to the care of the family and the family home;

(b) the effect of the cohabitation upon the earning capacity of each of the parties;

(c) the parties' respective needs and resources;

(d) relief of financial hardship caused by the cohabitation or the end of the cohabitation;

(e) a combination of any or all of (a) to (d) above; or

(f) something else?

(Paragraph 5.69)

Comments on Question 14

Yes, the test for determining what order, if any, the court should make for financial provision on cessation of cohabitation otherwise than by death should be based on fairness and reasonableness, having regard to all the circumstances of the case, including a list of relevant factors such as:-

(a) The financial and non-financial contributions made by each party to the relationship, including the contribution made by each party to the care of the family and the family home - YES.
(b) The effect of the cohabitation upon the earning capacity of each of the parties - YES.
(c) The parties' respective needs and resources - POSSIBLY.
(d) Relief of financial hardship caused by the cohabitation or the end of the cohabitation - POSSIBLY.

Again, we have a concern that by including all of (a), (b),(c) and (d) that this may bring the position too close to the position for married couples separating.

Although we can see an argument for reference to needs and resources (c), this may result in some who have a perfectly good claim under the current law not being able to claim due to the current resources of their former cohabitant. That would seem to be unfair. It may be that a wider range of remedies, such as including transfer of property, and/or greater use of payment of a capital sum by instalments, would assist, rather than including reference to the parties' respective needs and resources.

If (d) was included then we think it should only cover extreme cases.

15. Are the remedies available to the court on an application for financial provision by a former cohabitant adequate and sufficient?

(Paragraph 5.92)

Comments on Question 15

The remedies available to the court on an application for financial provision by a former cohabitant are not adequate and sufficient. This is a significant difficulty faced in practice.

16. If not, should the remedies be extended to include:

(a) transfer of property;

(b) pension sharing;

(c) periodic payments for a period after the end of the cohabitation, sufficient to relieve short term financial hardship; or

(d) something else?

(Paragraph 5.92)

Comments on Question 16

The remedies should be extended to include:-

(a) Transfer of property – YES. This would be useful in cases where there is a claim but most of the property is one or more heritable property/properties. Quite often the net disadvantage is arrived at due to a contribution or contributions that one party has made to the home where

the parties are cohabiting. It is therefore an odd position that the court cannot order a transfer of that property to the party that has contributed.
(b) Pension Sharing – NO. We have a divided opinion on this. Although it might be useful in cases where there is no other property, there would be huge practical issues.
(c) Periodic payments for a period after the end of the cohabitation, sufficient to relieve short term hardship – Possibly, but only "to relieve short term hardship", which would need to be proved.

If the range of remedies is to be extended then work should be done to raise public awareness about this.

17. Should express provision be made requiring or permitting the court to consider the resources of the former cohabitants in deciding what order, if any, to make for financial provision?

(Paragraph 5.92)

Comments on Question 17

There may be some benefit in there being express provision requiring or permitting the court to consider the resources of the former cohabitants in deciding what order, if any, to make for financial provision.

18. Should the one year time limit for making a claim under section 28(2) of the 2006 Act be extended?

(Paragraph 6.35)

Comments on Question 18

Yes, on balance, we think the one year time limit for making a claim under section 28(2) of the 2006 Act should be extended. One year is not very long for couples who have separated to sort out their financial matters. This often results in solicitors having to lodge court actions close to the one year point, simply to avoid the expiry of a claim.

19. If the time limit is extended, what should the new time limit be?

(Paragraph 6.35)

Comments on Question 19

A two year time limit may be more appropriate. This may lead to less solicitors having to lodge court actions simply to avoid the expiry of a claim. This would avoid unnecessary costs to clients, and unnecessary administration for courts. It would give parties more time, following separation, to sort out the financial matters between them.

20. If the time limit is extended, should the court be afforded discretion to allow late claims?

(Paragraph 6.35)

Comments on Question 20

Yes. The comparative countries referred to in the Consultation document, with the exception of Sweden, all allow for late claims either in "exceptional circumstances" or in "special circumstances". There may be genuine reasons why someone has not raised the action within the standard time scale. For example, where the relationship has been abusive or one party suffers ill-health which has affected their ability to lodge their claim within a specific time frame. We are of the view that a lack of knowledge of the time limit by itself should not be a sufficient reason for the court to allow a late claim. Only where this lack of knowledge was as a result of something else e.g. someone being physically/mentally unwell or dealing with the repercussions of domestic abuse, might it be considered a sufficient reason.

21. If the time limit is <u>not</u> extended, should the court be afforded discretion to allow late claims?

(Paragraph 6.35)

Comments on Question 21

Yes. The comments in answer 20 are relevant here.The courts being afforded discretion to allow late claims would be even more important if the time limit was not extended.

22. If the court is afforded discretion to allow late claims:

    (a) should the test for the exercise of discretion be "on cause shown", "in exceptional circumstances" or something else?

    (b) should there be a maximum period (backstop) beyond which no claim may competently be made?

(Paragraph 6.35)

Comments on Question 22

(a) There is agreement that the test requires to be high. Allowing a late claim (whether the time limit is increased beyond one year or not) should not be seen as the norm, or something that claimants should expect as a matter of course. Opinion is divided on what the relevant test ought to be. Some are of the view that the test should be "in exceptional circumstances". The test of "exceptional circumstances" on reading alone sets a higher test than "on cause shown". However, others feel that "exceptional" may introduce an unduly high test, depending on each Sheriff's subjective interpretation of the word "exceptional" and that a Sheriff should be able to exercise their discretion reasonably under the test of "on cause shown".

(b) There should be a maximum backstop period to allow for certainty to ex-cohabitants and to allow them to move on with their lives. For spouses and civil partners, the potential to bring a claim is ended by divorce but there is no such mechanism for cohabitants and therefore there must be a maximum period beyond which no claim can competently be made. If the time limit was to be extended to twoyears (as per answer 19) we would support that the court's discretion be exercisable for a period of one year following the expiration of the two years, meaning that the period in which a claim could be brought could be up to three years from the date of separation. If the time limit was not extended then we think a backstop would still be sensible – either one or two years.

23. Should express provision be made in the 2006 Act to allow parties to agree extension of the time limit to facilitate settlement?

(Paragraph 6.35)

Comments on Question 23

There should not be express provision in the Act to allow parties to agree to extend the time limit. This could be used by parties to drag out negotiations for potentially years and goes against the principal of the Act that these matters should be dealt with promptly following the break up of a relationship, allowing both parties finality and certainty within a reasonable period. In a relationship where there has been an imbalance of power, the stronger party may be able to pressure the other party into continuing matters.

Consideration would also need to be given to the issue of expenses in a court action. If one party wanted to continue negotiating, and the other did not, would the first party use that as a reason to seek expenses in any subsequent court action? The issue of negotiations and the reasonableness of the parties in negotiation would then be a matter for the Sheriff to rule on.

24. Should express statutory provision be made permitting the court to have regard to the terms of any agreement between the parties as to financial provision on cessation of cohabitation (including opting out of the 2006 Act regime) when deciding what order, if any, to make?

(Paragraph 7.39)

Comments on Question 24

Yes.

25. Should express statutory provision be made allowing the court to set aside, or vary any term of, a cohabitation agreement? If so, should the test for setting aside or variation be:

(a) that the agreement was not fair or reasonable at the time it was entered into;

(b) that there has been a material change in the parties' circumstances since the agreement was entered into, or

(c) another test (and if so what should that test be)?

(Paragraph 7.39)

Comments on Question 25

Yes, we would support the introduction of express statutory provision to allow the court to set aside, or vary any term of a cohabitation agreement. We are of the view that in order to protect parties' autonomy as far as possible, the test would have to be a high one, as it is for spouses and civil partners. The test set out in (a) above would seem most appropriate. If (b) was to be the test for cohabitants, this would be further reaching than the current grounds for setting aside agreements between spouses and civil partners which is restricted to (a). For this reason, we do not think that (b) is the appropriate test.

26. What information or data do consultees have on:

(a) the economic impact of sections 25-28 of the Family Law (Scotland) Act 2006,

(b) the potential economic impact of any option for reform discussed in this Discussion Paper (in particular the impact in terms of tax law of the possibility of extending the remedies available to cohabitants on cessation of cohabitation otherwise than by death to include property transfers/pension sharing/maintenance)?

(c) the potential economic impact upon the SCTS and legal aid budgets of any option for reform discussed in this Discussion Paper, including extension of the time limit for claims and additional remedies?

(Paragraph 9.4)

Comments on Question 26

We do not have data available to us to fully answer this question.

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.

General Comments

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1. Should the regime for financial provision for cohabitants on cessation of cohabitation otherwise than by death remain separate from that for spouses and civil partners on divorce and dissolution?

(Paragraph 2.66)

Comments on Question 1

The answer to this question is a matter of policy.

As is explored in the Discussion Paper, and has been extensively debated in academic and policy literature, there will always be arguments for and against; often presented in terms of equality and protection on the one hand and difference and autonomy on the other. I would argue that these distinctions tend to distract attention from the key question – what is the purpose of family law in regulating adult relationships? There are of course also different possible answers to that question but, by asking it, focus shifts from the more personal and contentious arguments around the 'special' nature of marriage and the dominance of individual choice and the likelihood is increased of consensus around policy. If, as I would argue, the primary purpose of family law in this area is protection, the law should apply equally to any relationship where there is vulnerability, regardless of the particular form of that relationship.

Statistical evidence is used to indicate a closing of the gap between marriage and cohabitation. There is considerable data from qualitative and social attitudes research which point towards a blurring of the distinction in the behaviour and attitudes of parties in different forms of

relationship. This all points towards increasingly weaker reasons in favour of a distinction and in favour of a single regime.

In considering whether there has been a shift – since 1980s/90s when this question was last considered by the Commission – the focus has tended to be principally on how cohabitation has changed. Much less attention is paid to how marriage has changed but that is equally important. There is little evidence of substantial difference between the ongoing relationship of couples who are married as opposed to those who are cohabiting. What distinguishes them is that the former have gone through a wedding ceremony whereas the latter have not. As weddings become more and more dislocated from the relationship itself – which is clearly evidenced, for example, in the tendency of couples to delay their wedding until long after the beginning of their settled and committed relationship – marriage becomes much less reliable as a signifier of any particular type of relationship. That is another important consideration in favour of a single regime.

For all of these reasons, my answer to this question would be in favour of a single regime.

2. Should the definition of cohabitant in section 25 of the 2006 Act be amended?

(Paragraph 3.101)

Comments on Question 2

Yes. Defining cohabitation is always going to be a difficult task but, even accepting that no definition wil be perfect, section 25 is poorly drafted with no clear connection between the subsections and that alone justifies some level of amendment.

3. If consultees think the definition should be amended, should the comparison with spouses be removed in favour of a description of the nature of the relationship, such as "enduring family relationship", "genuine domestic basis", or something else?

(Paragraph 3.101)

Comments on Question 3

The comparison with spouses shoud be removed because it is relatively meaningless. In Scots law, there are almost no legal consequences of marriage and very few obligations. What does it mean to be living as husband and wife or as spouses? With the existence of civil partnership and its extension to different sex couples, the definition arguably makes even less sense.

As I said in answer to Question 2, no definition will be perfect but an 'enduring' or 'committed' family relationship is probably the closest to a general public understanding of what is meant.

4. If the comparison with spouses is to be removed, should the legislation expressly provide that couples within the forbidden degrees of relationship to each other will be excluded?

(Paragraph 3.101)

Comments on Question 4

I think the answer to this question requires a step back to a preliminary question which was addressed in the previous SLC and Government discussion of cohabitiaton but not expressly in this Discussion Paper. Is cohabitation a 'status' – ike marriage or civil partnership – or is it simply intended to provide a regulatory framework for property and finance on relationship breakdown? If the latter, then arguably it is the practical, day to day nature of the relationship which is relevant rather than the personal charasteristics of the parties to it.

If this question is to be asked, then why not other questions relating to capacity: what of couples where one or both parties are aready married/in a CP/cohabiting? What of age or mental capacity? The first of these scenarios – ie that of multiple contemporaneous relationships – has significant practical implications for property and financial provision which seem highly relevant.

There is a policy decision to be made as to whether siblings/other family relationships are to be excluded from whatever regulatory framework is provided to cohabitants – ie the *Burden* situation. If it is intended to exclude these other familial relationships – which do not fit the sexual couple model - then that should be made clear. It is not necessarily, however, the same as the current 'prohibited degress of relationship'.

My short answer to this question is no but I think the broader questions need to be asked first.

5. Should a qualifying period of cohabitation be introduced in order to access remedies under the 2006 Act? If so:

   (a) how long should that qualifying period be?

   (b) should the qualifying period be different, or removed altogether, if the parties have children?

(Paragraph 3.101)

Comments on Question 5

No.

Once again, I think this question depends on a clearer preliminary decision about the fundamental purpose of regulation of cohabitation. If it is about addressing property and financial disadvantage etc, then access to the remedies is self-limiting to an extent. Short relationships are less likely to result in significant financial implications but, even if they do, that is what matters and not the period of time.

6. Would the response to Question 5(a) or (b) change if the remedies available to former cohabitants were extended?

(Paragraph 3.101)

Comments on Question 6

No. As with marriage/divorce, the particular circumstances of the relationship can be taken into account as factors in making an award.

7. Would the definition of cohabitant be improved by the introduction of a list of features or characteristics to be taken into account in deciding whether the parties are cohabitants?

If so, what features or characteristics should be included?

(Paragraph 3.101)

Comments on Question 7

I do not have strong views on this question. Comparative examples suggest that many jurisdictions include a list of criteria/factors and, in the relatively small number of reported judgments where the nature of the relationship has been considered, there is often reference to criteria. That might tend to suggest that a list is helpful. It should be clear however that these are not requirements and that any list is not exhaustive.

8. What are consultees' views on the introduction of a registration system for cohabitants?

(Paragraph 3.101)

Comments on Question 8

While the certainty of registration makes it superficially attractive, it still leaves the main problem of truly informal relationships. I am therefore not in favour of registration.

It will be interesting to see the longer term popularity of civil partnership. If there is in fact demand for a registered relationship, which is not marriage, I would be in favour of a fuller review of these three legal relationships – marriage, civil partnership and cohabitation – with a view to creating greater choice.

9. Do sections 26 and / or 27 cause any difficulty in practice?

(Paragraph 4.34)

Comments on Question 9

That is a question for legal practitioners. They certainly do not appear to give rise to any difficulty in practice to the extent that they are rarely if ever mentioned in litigation.

10. Should the language in sections 26 and / or 27 be modernised?

(Paragraph 4.34)

Comments on Question 10

That question is presumably based on the notion that it is no longer common – or it strikes us as old-fashioned and outdated – for one party to provide the other with a housekeeping allowance. In Scotland, however, we have very little evidence against which to test that assumption. From what we know of the continuing gender pay gap, the higher proportion of female part time work and the persistent gendered nature of childcare, it is very liktely that in many relationships one party continues to provide for the full or at least a greater share of household expenses It should be borne in mind, that these sections were designed precisely to protect against vulnerability.If both contribute to joint domestic costs, then the protection is no longer so evidently needed.

One scenario where this type of provision may be of benefit is in the context of domestic abuse where coercive control may include control of finances. Even if there is little evidence of these sections being used in practice, they may provide some limited legal security in domestic assets/housekeeping allowance which would otherwise be lacking.

11. Should sections 26 and / or 27 be modified in some other way?

(Paragraph 4.34)

Comments on Question 11

I am not convinced there is any pressing need to modify these provisions. Any proposed reform should equally be considered in the context of marriage and civil partnership.

12. Should the policy underpinning awards for financial provision for former cohabitants, where cohabitation ends otherwise than by death, be:

    (a) compensation for economic loss sustained during the relationship;

    (b) relief of need:

    (c) sharing of property acquired during the cohabitation;

    (d) sharing the future economic burden of child care;

    (e) a combination of any or all of (a) to (d) above; or

    (f) something else?

(Paragraph 5.69)

Comments on Question 12

This is an important question of policy. Before it can be answered, however, we need to decide the answer to Question 1 (ie separate or same regimes). If, as I have suggested, marriage/ CP and cohabitation should be subject to the same regime, and if there is no intention to review the 1985 Act, then the underpinning policy should be the same as applies on divorce/dissolution.

From that starting point, however, it would be necessary to work through each element of the 1985 Act framework to identify how ss8-16 might apply in the context of cohabitationin order to minimise unanticipated consequences.

13. For the purposes of financial provision for former cohabitants, should any distinction be made between a child of whom the cohabitants are parents and a child who is or was accepted by the cohabitants as a child of the family?

(Paragraph 5.69)

Comments on Question 13

The definition of child to include an 'accepted' child is used widely in Scots family law and there is no clear justification for any distinction in the context of cohabitation,

14. Should the test for determining what order, if any, the court may make for financial provision on cessation of cohabitation otherwise than by death be based on fairness and reasonableness, having regard to all the circumstances of the case, including a list of relevant factors such as:

(a) the financial and non-financial contributions made by each party to the relationship, including the contribution made by each party to the care of the family and the family home;

(b) the effect of the cohabitation upon the earning capacity of each of the parties;

(c) the parties' respective needs and resources;

(d) relief of financial hardship caused by the cohabitation or the end of the cohabitation;

(e) a combination of any or all of (a) to (d) above; or

(f) something else?

(Paragraph 5.69)

Comments on Question 14

If, as I have argued in Question 1, the same regime should be applied to cohabitation as to marriage/CP, then the many factors set out in ss10 and 11 of the 1985 Act should be applied. As in my response to Question 12, however, detailed consideration of each of these in the specific context of cohabitation would be required in order to test their appropriateness and effectiveness and to minimise unintended consequences.

15. Are the remedies available to the court on an application for financial provision by a former cohabitant adequate and sufficient?

(Paragraph 5.92)

Comments on Question 15

No. Section 28 is very unclear as to remedies but it appears only to provide for a capital sum payment.

16. If not, should the remedies be extended to include:

(a) transfer of property;

(b) pension sharing;

(c) periodic payments for a period after the end of the cohabitation, sufficient to relieve short term financial hardship; or

(d) something else?

(Paragraph 5.92)

Comments on Question 16

Section 8 of the 1985 Act provides a wide range of remedies which work well in the context of divorce. A similar range should be provided in respect of cohabitation.

17. Should express provision be made requiring or permitting the court to consider the resources of the former cohabitants in deciding what order, if any, to make for financial provision?

(Paragraph 5.92)

Comments on Question 17

Yes.

18. Should the one year time limit for making a claim under section 28(2) of the 2006 Act be extended?

(Paragraph 6.35)

Comments on Question 18

The time limit was highlighted ias one of the key problems in the early research undertaken by Miles, Wasoff and Mordaunt and that finding has been fully confirmed by subsequent litigation. The period but perhaps even more so the firmness of the limit have caused problems.

19. If the time limit is extended, what should the new time limit be?

(Paragraph 6.35)

Comments on Question 19

I think this question requires consideration of the purpose of any limit. If it is to provide 'closure' then it needs to be relatively short but, if it is to facilitate settlement and avoid unnecessary litigation, then it may need to be longer. It may be worth bearing in mind that the vast majority of divorces in Scotland proceed on the basis of two years' non-cohabitation and, anecdotally, sollicitors have said that is a reasonable time to 'sort out' the consequnces of the relationship breakdown. A similar period may be appropriate for cohabitation claims.

20. If the time limit is extended, should the court be afforded discretion to allow late claims?

(Paragraph 6.35)

As in my answer to Question 18, the inflexibility of the time limit does seem to have given rise to difficulties and is one of the litigated issues. Some limited discretion may help to reduce unfairness and make the issue less contentious.

21. If the time limit is <u>not</u> extended, should the court be afforded discretion to allow late claims?

(Paragraph 6.35)

Comments on Question 21

Yes.

22. If the court is afforded discretion to allow late claims:

    (a) should the test for the exercise of discretion be "on cause shown", "in exceptional circumstances" or something else?

    (b) should there be a maximum period (backstop) beyond which no claim may competently be made?

(Paragraph 6.35)

Comments on Question 22

I do not have strong views on this question which I think will be better answered by legal practitioners.

23. Should express provision be made in the 2006 Act to allow parties to agree extension of the time limit to facilitate settlement?

(Paragraph 6.35)

Comments on Question 23

Yes

24. Should express statutory provision be made permitting the court to have regard to the terms of any agreement between the parties as to financial provision on cessation of cohabitation (including opting out of the 2006 Act regime) when deciding what order, if any, to make?

(Paragraph 7.39)

Comments on Question 24

The principle of autonomy and a preference for private ordering is long established and respected in Scots family law, It is likely that this is already happening in practice and it would be reasonable to make express statutory provision.

While private ordering and the flexibility of agreement-making in Scotland is generally to be welcomed, there are concerns that the law in this area has not been subject to any widespread consideration or review. In relation to marriage. Further research into the use of cohabitation agreements shoud take place together with a wider review of the law relating to marriage and relationship agreements.

25. Should express statutory provision be made allowing the court to set aside, or vary any term of, a cohabitation agreement? If so, should the test for setting aside or variation be:

    (a) that the agreement was not fair or reasonable at the time it was entered into;

    (b) that there has been a material change in the parties' circumstances since the agreement was entered into, or

    (c) another test (and if so what should that test be)?

(Paragraph 7.39)

Comments on Question 25

I think this is a question which should be set within the context of a wider review of nuptial and cohabitation contracts. While the use of separation contracts – minutes of agreement – is well established and a real benefit of the Scottish family law system, there are concerns about the limited scope for review and the extent to which an undifferentiated approach to ante-nuptial, post-nuptial and separation agreements may cause unfairness, particularly to women.

26. What information or data do consultees have on:

(a) the economic impact of sections 25-28 of the Family Law (Scotland) Act 2006,

(b) the potential economic impact of any option for reform discussed in this Discussion Paper (in particular the impact in terms of tax law of the possibility of extending the remedies available to cohabitants on cessation of cohabitation otherwise than by death to include property transfers/pension sharing/maintenance)?

(c) the potential economic impact upon the SCTS and legal aid budgets of any option for reform discussed in this Discussion Paper, including extension of the time limit for claims and additional remedies?

(Paragraph 9.4)

Comments on Question 26

I do not have any further information or data on these issues. It is a particular concern that there is la dearth of detailed and up to date research into many areas of Scots family law and practice.

General Comments

This is an extensive and interesting Discussion Paper which highlights the need for, but at the same time the difficulties inherent in, reform of the law relating to adult relationships.

21. Shared Parenting Scotland

Name: «Ian Maxwell»
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1. Should the regime for financial provision for cohabitants on cessation of cohabitation otherwise than by death remain separate from that for spouses and civil partners on divorce and dissolution?

(Paragraph 2.66)

Comments on Question 1 «For simplicity and given the increase in cohabitation, the financial provision should be the same for cohabitants, spouses and civil partners»

2. Should the definition of cohabitant in section 25 of the 2006 Act be amended?

(Paragraph 3.101)

Comments on Question 2 «Yes it should be updated to reflect law changes since then relating to different relationship forms. The word subsisted should be replaced by a more understandable term. »

3. If consultees think the definition should be amended, should the comparison with spouses be removed in favour of a description of the nature of the relationship, such as "enduring family relationship", "genuine domestic basis", or something else?

(Paragraph 3.101)

Comments on Question 3

«Retain comparison with spouses»

4. If the comparison with spouses is to be removed, should the legislation expressly provide that couples within the forbidden degrees of relationship to each other will be excluded?

(Paragraph 3.101)

Comments on Question 4

«InsertTextHere»

5. Should a qualifying period of cohabitation be introduced in order to access remedies under the 2006 Act? If so:

   (a) how long should that qualifying period be?

   (b) should the qualifying period be different, or removed altogether, if the parties have children?

(Paragraph 3.101)

Comments on Question 5

«No comment about the length of qualifying period. If there are any children then the presence of children should be a factor in qualifying for cohabitation.»

6. Would the response to Question 5(a) or (b) change if the remedies available to former cohabitants were extended?

(Paragraph 3.101)

Comments on Question 6

«InsertTextHere»

7. Would the definition of cohabitant be improved by the introduction of a list of features or characteristics to be taken into account in deciding whether the parties are cohabitants?

If so, what features or characteristics should be included?

(Paragraph 3.101)

Comments on Question 7

«A list would be desirable.»

8. What are consultees' views on the introduction of a registration system for cohabitants?

(Paragraph 3.101)

Comments on Question 8

«No, as this would add complication by creating yet another class of people, given that not everybody will register.»

9. Do sections 26 and / or 27 cause any difficulty in practice?

(Paragraph 4.34)

Comments on Question 9

«InsertTextHere»

10. Should the language in sections 26 and / or 27 be modernised?

(Paragraph 4.34)

Comments on Question 10

«InsertTextHere»

11. Should sections 26 and / or 27 be modified in some other way?

(Paragraph 4.34)

Comments on Question 11

«InsertTextHere»

12. Should the policy underpinning awards for financial provision for former cohabitants, where cohabitation ends otherwise than by death, be:

(a) compensation for economic loss sustained during the relationship;

(b) relief of need:

(c) sharing of property acquired during the cohabitation;

(d) sharing the future economic burden of child care;

(e) a combination of any or all of (a) to (d) above; or

(f) something else?

(Paragraph 5.69)

Comments on Question 12

«In relation to point (d) the economic burden of child care is already covered by Child Support legislation which applies to the biological parents without regard to their relationship status. Removing this provision will simplify the legislation without any potential for loss.»

13. For the purposes of financial provision for former cohabitants, should any distinction be made between a child of whom the cohabitants are parents and a child who is or was accepted by the cohabitants as a child of the family?

(Paragraph 5.69)

Comments on Question 13

«As in the previous question we would suggest leaving this to Child Support legislation, which would apply to the biological parents rather than any non-biologicl parent who has accepted a child into his or her family.»

14. Should the test for determining what order, if any, the court may make for financial provision on cessation of cohabitation otherwise than by death be based on fairness and reasonableness, having regard to all the circumstances of the case, including a list of relevant factors such as:

(a) the financial and non-financial contributions made by each party to the relationship, including the contribution made by each party to the care of the family and the family home;

(b) the effect of the cohabitation upon the earning capacity of each of the parties;

(c) the parties' respective needs and resources;

(d) relief of financial hardship caused by the cohabitation or the end of the cohabitation;

(e) a combination of any or all of (a) to (d) above; or

(f) something else?

(Paragraph 5.69)

Comments on Question 14

«Option (e)»

15. Are the remedies available to the court on an application for financial provision by a former cohabitant adequate and sufficient?

(Paragraph 5.92)

Comments on Question 15

«InsertTextHere»

16. If not, should the remedies be extended to include:

(a) transfer of property;

(b) pension sharing;

(c) periodic payments for a period after the end of the cohabitation, sufficient to relieve short term financial hardship; or

(d) something else?

(Paragraph 5.92)

Comments on Question 16

«InsertTextHere»

17. Should express provision be made requiring or permitting the court to consider the resources of the former cohabitants in deciding what order, if any, to make for financial provision?

(Paragraph 5.92)

Comments on Question 17

«InsertTextHere»

18. Should the one year time limit for making a claim under section 28(2) of the 2006 Act be extended?

(Paragraph 6.35)

Comments on Question 18

«Retain the limit but allow the court to consider late applications on cause shown, if that isn't alreadty possible.»

19. If the time limit is extended, what should the new time limit be?

(Paragraph 6.35)

Comments on Question 19

«InsertTextHere»

20. If the time limit is extended, should the court be afforded discretion to allow late claims?

(Paragraph 6.35)

Comments on Question 20

«InsertTextHere»

21. If the time limit is not extended, should the court be afforded discretion to allow late claims?

(Paragraph 6.35)

Comments on Question 21

«Yes»

22. If the court is afforded discretion to allow late claims:

    (a) should the test for the exercise of discretion be “on cause shown”, “in exceptional circumstances” or something else?

    (b) should there be a maximum period (backstop) beyond which no claim may competently be made?

(Paragraph 6.35)

Comments on Question 22

«(a)»

23. Should express provision be made in the 2006 Act to allow parties to agree extension of the time limit to facilitate settlement?

(Paragraph 6.35)

Comments on Question 23

«InsertTextHere»

24. Should express statutory provision be made permitting the court to have regard to the terms of any agreement between the parties as to financial provision on cessation of cohabitation (including opting out of the 2006 Act regime) when deciding what order, if any, to make?

(Paragraph 7.39)

Comments on Question 24

«InsertTextHere»

25. Should express statutory provision be made allowing the court to set aside, or vary any term of, a cohabitation agreement? If so, should the test for setting aside or variation be:

(a) that the agreement was not fair or reasonable at the time it was entered into;

(b) that there has been a material change in the parties' circumstances since the agreement was entered into, or

(c) another test (and if so what should that test be)?

(Paragraph 7.39)

Comments on Question 25

«(a) and (b)»

26. What information or data do consultees have on:

(a) the economic impact of sections 25-28 of the Family Law (Scotland) Act 2006,

(b) the potential economic impact of any option for reform discussed in this Discussion Paper (in particular the impact in terms of tax law of the possibility of extending the remedies available to cohabitants on cessation of cohabitation otherwise than by death to include property transfers/pension sharing/maintenance)?

(c) the potential economic impact upon the SCTS and legal aid budgets of any option for reform discussed in this Discussion Paper, including extension of the time limit for claims and additional remedies?

(Paragraph 9.4)

Comments on Question 26

«InsertTextHere»

General Comments

«Our comments are limited to matters which affect cohabitants with children. As noted during the 2016 Justice Committee discussion, the lack of published judgements on this issue make it difficult to understand how such cases are actually being treated by the court. All judgements in these and other family cases should be published in the inetests iof transparency, even if this publication is in an anonymised form. »

22. Matthew Muir

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1. Should the regime for financial provision for cohabitants on cessation of cohabitation otherwise than by death remain separate from that for spouses and civil partners on divorce and dissolution?

(Paragraph 2.66)

Comments on Question 1

No.

Given the prevalence the prevalence of cohabitation and shift in societal attitude to what constitutes a family, it seems fair that couples who are cohabiting should have protections that match those of couples who are married, when cessation of cohabitation occurs. This should apply to cohabitants who demonstrate a degree of financial interdependency and/or participation in life decisions of either party.

Cohabitants should receive these protections by default. This would put such couples in a de facto position of protection if cessation of cohabitation occurs. It would also mitigate the risk of either party unexpectedly discovering the downsides of current legislation/law when it is too late, as the discussion paper suggests is the current situation, and protect the economically vulnerable.

I strongly believe that the law in the current form does not adequately protect cohabitants (or former cohabitants) when cessation occurs. Since the cohabitating public already appear to believe (according to the discussion paper) that they enjoy similar protections as married

couples in relation to cessation of their relationship for causes other than death, I believe that the law should be updated to reflect this. The fact that the existing legislation doesn't already reflect this is of much greater concern (from the perspective of a cohabitant) than the threat of "undue interference with the private lives of individuals" - as Scottish Ministers previously suggested in the Policy Memorandum.

2. Should the definition of cohabitant in section 25 of the 2006 Act be amended?

(Paragraph 3.101)

Comments on Question 2

Yes.

The definition of cohabitant is antiquated and does not reflect contemporary societal views on interpersonal relationships. I agree with CEFL, in that the term 'partners' is more fitting.

My own definition of cohabitation is closely aligned to that of New Zealand's 1976 Act. I also agree with the Act's matters which define whether two persons living together should be considered a couple, bar the last: "the reputation and public aspects of the relationship".

3. If consultees think the definition should be amended, should the comparison with spouses be removed in favour of a description of the nature of the relationship, such as "enduring family relationship", "genuine domestic basis", or something else?

(Paragraph 3.101)

Comments on Question 3

Yes.

Comparisons to spouses are outdated and do not describe many modern relationships.

"Genuine domestic basis" seems more fitting.

4. If the comparison with spouses is to be removed, should the legislation expressly provide that couples within the forbidden degrees of relationship to each other will be excluded?

(Paragraph 3.101)

Comments on Question 4

Yes. I feel that it is still appropriate to expressly exclude couples within the forbidden degrees of relationship to each other.

5. Should a qualifying period of cohabitation be introduced in order to access remedies under the 2006 Act? If so:

   (a) how long should that qualifying period be?

   (b) should the qualifying period be different, or removed altogether, if the parties have children?

(Paragraph 3.101)

Comments on Question 5

A qualifying period of cohabitation should not be introduced.

Cohabitants should be required to demonstrate pooling of resources or financial interdependency instead. A demonstration of the sharing of responsibilities (domestic, parental or otherwise) or participation in life choices by both parties should also be considered.

It may be that the duration of the relationship is taken into consideration when referring to the above, but it should not constitute a period of qualification after which protections are granted.

6. Would the response to Question 5(a) or (b) change if the remedies available to former cohabitants were extended?

(Paragraph 3.101)

Comments on Question 6

No.

7. Would the definition of cohabitant be improved by the introduction of a list of features or characteristics to be taken into account in deciding whether the parties are cohabitants?

If so, what features or characteristics should be included?

(Paragraph 3.101)

Comments on Question 7

Yes.

- Financial commitments and/or interdependency
- Sharing of property (either rented or owned)
- Presence of children or dependents
- Duration of relationship
- Evidence of sharing of life choices/plans
- Whether the parties have formally declared themselves as a partnership (i.e. through registration)

8. What are consultees 'views on the introduction of a registration system for cohabitants?

(Paragraph 3.101)

Comments on Question 8

A registration system should be introduced on the grounds that it *could* assist cohabitants (partners) in proving their relationship, should that be necessary. Registration ***shouldn't*** be mandatory for the court to consider them as such.

I agree with some of the points made in the paper that suggest this would be detrimental to some of the most economically vulnerable members of society since only the most well-informed would take advantage of it. As a result, I believe that statutory protection would provide the most protection and fairness.

9. Do sections 26 and / or 27 cause any difficulty in practice?

(Paragraph 4.34)

Comments on Question 9

«InsertTextHere»

10. Should the language in sections 26 and / or 27 be modernised?

(Paragraph 4.34)

Comments on Question 10

«InsertTextHere»

11. Should sections 26 and / or 27 be modified in some other way?

(Paragraph 4.34)

Comments on Question 11

«InsertTextHere»

12. Should the policy underpinning awards for financial provision for former cohabitants, where cohabitation ends otherwise than by death, be:

    (a) compensation for economic loss sustained during the relationship;

    (b) relief of need:

    (c) sharing of property acquired during the cohabitation;

    (d) sharing the future economic burden of child care;

    (e) a combination of any or all of (a) to (d) above; or

    (f) something else?

(Paragraph 5.69)

Comments on Question 12

Given the points raised in the discussion section of chapter 5, I believe that all of the suggestions a - d should be available as awards for financial provision.

13. For the purposes of financial provision for former cohabitants, should any distinction be made between a child of whom the cohabitants are parents and a child who is or was accepted by the cohabitants as a child of the family?

(Paragraph 5.69)

Comments on Question 13

No. This ensures fairness for all situations in which cohabitants may have custody of a child.

14. Should the test for determining what order, if any, the court may make for financial provision on cessation of cohabitation otherwise than by death be based on fairness and reasonableness, having regard to all the circumstances of the case, including a list of relevant factors such as:

(a) the financial and non-financial contributions made by each party to the relationship, including the contribution made by each party to the care of the family and the family home;

(b) the effect of the cohabitation upon the earning capacity of each of the parties;

(c) the parties 'respective needs and resources;

(d) relief of financial hardship caused by the cohabitation or the end of the cohabitation;

(e) a combination of any or all of (a) to (d) above; or

(f) something else?

(Paragraph 5.69)

Comments on Question 14

I believe that all of the suggestions a-d should be included in such a test.

15. Are the remedies available to the court on an application for financial provision by a former cohabitant adequate and sufficient?

(Paragraph 5.92)

Comments on Question 15

«InsertTextHere»

16. If not, should the remedies be extended to include:

(a) transfer of property;

(b) pension sharing;

(c) periodic payments for a period after the end of the cohabitation, sufficient to relieve short term financial hardship; or

(d) something else?

(Paragraph 5.92)

Comments on Question 16

«InsertTextHere»

17. Should express provision be made requiring or permitting the court to consider the resources of the former cohabitants in deciding what order, if any, to make for financial provision?

(Paragraph 5.92)

Comments on Question 17

«InsertTextHere»

18. Should the one year time limit for making a claim under section 28(2) of the 2006 Act be extended?

(Paragraph 6.35)

Comments on Question 18

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19. If the time limit is extended, what should the new time limit be?

(Paragraph 6.35)

Comments on Question 19

«InsertTextHere»

20. If the time limit is extended, should the court be afforded discretion to allow late claims?

(Paragraph 6.35)

Comments on Question 20

«InsertTextHere»

21. If the time limit is not extended, should the court be afforded discretion to allow late claims?

(Paragraph 6.35)

Comments on Question 21

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22. If the court is afforded discretion to allow late claims:

    (a) should the test for the exercise of discretion be “on cause shown”, “in exceptional circumstances” or something else?

    (b) should there be a maximum period (backstop) beyond which no claim may competently be made?

(Paragraph 6.35)

Comments on Question 22

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23. Should express provision be made in the 2006 Act to allow parties to agree extension of the time limit to facilitate settlement?

(Paragraph 6.35)

Comments on Question 23

«InsertTextHere»

24. Should express statutory provision be made permitting the court to have regard to the terms of any agreement between the parties as to financial provision on cessation of cohabitation (including opting out of the 2006 Act regime) when deciding what order, if any, to make?

(Paragraph 7.39)

Comments on Question 24

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25. Should express statutory provision be made allowing the court to set aside, or vary any term of, a cohabitation agreement? If so, should the test for setting aside or variation be:

    (a) that the agreement was not fair or reasonable at the time it was entered into;

    (b) that there has been a material change in the parties 'circumstances since the agreement was entered into, or

    (c) another test (and if so what should that test be)?

(Paragraph 7.39)

Comments on Question 25

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26. What information or data do consultees have on:

(a) the economic impact of sections 25-28 of the Family Law (Scotland) Act 2006,

(b) the potential economic impact of any option for reform discussed in this Discussion Paper (in particular the impact in terms of tax law of the possibility of extending the remedies available to cohabitants on cessation of cohabitation otherwise than by death to include property transfers/pension sharing/maintenance)?

(c) the potential economic impact upon the SCTS and legal aid budgets of any option for reform discussed in this Discussion Paper, including extension of the time limit for claims and additional remedies?

(Paragraph 9.4)

Comments on Question 26

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General Comments

«InsertTextHere»

23. Melanie Barber, Advocate

1. Should the regime for financial provision for cohabitants on cessation of cohabitation otherwise than by death remain separate from that for spouses and civil partners on divorce and dissolution?

(Paragraph 2.66)

Comments on Question 1

I think that social policy needs to be considered in answering this question. I do note however that there has been an increase in the number of couples who choose to cohabit, and this type of relationship appears to be a growing choice for adults. I would submit that the law needs to be responsive to such change in society. I consider that legal rights should exist to ensure that cohabitating families are given similar protections to other enduring family relationships. I would submit that these rights should ensure that economically vulnerable partners, and children, are given suitable and similar protection to that of spouses/civil partners and their families.

2. Should the definition of cohabitant in section 25 of the 2006 Act be amended?

(Paragraph 3.101)

Comments on Question 2

Yes

3. If consultees think the definition should be amended, should the comparison with spouses be removed in favour of a description of the nature of the relationship, such as "enduring family relationship", "genuine domestic basis", or something else?

(Paragraph 3.101)

Comments on Question 3

I believe that a definition such as "enduring family relationship", would be capable of encompassing a wide range of cohabitating relationships.

4. If the comparison with spouses is to be removed, should the legislation expressly provide that couples within the forbidden degrees of relationship to each other will be excluded?

(Paragraph 3.101)

Comments on Question 4

Yes

5. Should a qualifying period of cohabitation be introduced in order to access remedies under the 2006 Act? If so:

   (a) how long should that qualifying period be?

   (b) should the qualifying period be different, or removed altogether, if the parties have children?

(Paragraph 3.101)

Comments on Question 5

If rights are provided to cohabiting couples similar to the rights to spouses /civil partners, I believe that a qualifying period such as used in New Zealand or Australia would be appropriate. I would suggest two years as a suitable period.

I do not believe that there should be a qualifying period where there is a child of the parties.

6. Would the response to Question 5(a) or (b) change if the remedies available to former cohabitants were extended?

(Paragraph 3.101)

Comments on Question 6

See answer to 5.

7. Would the definition of cohabitant be improved by the introduction of a list of features or characteristics to be taken into account in deciding whether the parties are cohabitants?

   If so, what features or characteristics should be included?

(Paragraph 3.101)

8. What are consultees' views on the introduction of a registration system for cohabitants?

(Paragraph 3.101)

Comments on Question 8

I would not support such a system.

9. Do sections 26 and / or 27 cause any difficulty in practice?

(Paragraph 4.34)

Comments on Question 9

No

10. Should the language in sections 26 and / or 27 be modernised?

(Paragraph 4.34)

Comments on Question 10

Yes

11. Should sections 26 and / or 27 be modified in some other way?

(Paragraph 4.34)

Comments on Question 11

I have no strong views on these sections.

12. Should the policy underpinning awards for financial provision for former cohabitants, where cohabitation ends otherwise than by death, be:

    (a) compensation for economic loss sustained during the relationship;

    (b) relief of need:

    (c) sharing of property acquired during the cohabitation;

    (d) sharing the future economic burden of child care;

(e) a combination of any or all of (a) to (d) above; or

(f) something else?

(Paragraph 5.69)

Comments on Question 12

I consider that the policy underpinning financial awards to cohabitants should seek to provide similar protection to cohabitating couples as it provides to spouses/civil partners, this is particularly so when couples have cohabitated for a number of years, raised children, built property together, and perhaps one of the parties has lost career opportunities/restricted a career in order to raise children/assist in building the other partner's business.

I consider that these awards should be a combination of the financial provisions suggested in a-d.

13. For the purposes of financial provision for former cohabitants, should any distinction be made between a child of whom the cohabitants are parents and a child who is or was accepted by the cohabitants as a child of the family?

(Paragraph 5.69)

Comments on Question 13

I think that where a child has been accepted as part of that family, that child should generally be treated as a child of the cohabitants. However, the answer to this question is more complicated, for example where "a child of the family", may be receiving support from a different biological parent as well, financial considerations would need to be had to that type of situation.

14. Should the test for determining what order, if any, the court may make for financial provision on cessation of cohabitation otherwise than by death be based on fairness and reasonableness, having regard to all the circumstances of the case, including a list of relevant factors such as:

(a) the financial and non-financial contributions made by each party to the relationship, including the contribution made by each party to the care of the family and the family home;

(b) the effect of the cohabitation upon the earning capacity of each of the parties;

(c) the parties' respective needs and resources;

(d) relief of financial hardship caused by the cohabitation or the end of the cohabitation;

(e) a combination of any or all of (a) to (d) above; or

(f) something else?

(Paragraph 5.69)

Comments on Question 14

I note throughout the paper that it appears that the law regulating financial provision on the breakdown of marriage/civil partnership is generally seen as working well. As noted in my answer to question 12, I consider that cohabitating relationships can involve considerable personal and financial commitment by parties. I would suggest that similar powers to those set out for spouses/ civil partners should be considered in determining financial provision.

15. Are the remedies available to the court on an application for financial provision by a former cohabitant adequate and sufficient?

(Paragraph 5.92)

Comments on Question 15

No.

16. If not, should the remedies be extended to include:

(a) transfer of property;

(b) pension sharing;

(c) periodic payments for a period after the end of the cohabitation, sufficient to relieve short term financial hardship; or

(d) something else?

(Paragraph 5.92)

Comments on Question 16

Yes, I would suggest that they should be extended to include the options set out above.

17. Should express provision be made requiring or permitting the court to consider the resources of the former cohabitants in deciding what order, if any, to make for financial provision?

(Paragraph 5.92)

Comments on Question 17

Yes.

18. Should the one year time limit for making a claim under section 28(2) of the 2006 Act be extended?

(Paragraph 6.35)

Comments on Question 18

Yes, I would suggest extending it to 2 years, together with providing the court with a statutory provision to allow the time limit to be extended on cause shown.

19. If the time limit is extended, what should the new time limit be?

(Paragraph 6.35)

Comments on Question 19

2 years.

20. If the time limit is extended, should the court be afforded discretion to allow late claims?

(Paragraph 6.35)

Comments on Question 20

Yes.

21. If the time limit is <u>not</u> extended, should the court be afforded discretion to allow late claims?

(Paragraph 6.35)

Comments on Question 21

Yes.

22. If the court is afforded discretion to allow late claims:

(a) should the test for the exercise of discretion be "on cause shown", "in exceptional circumstances" or something else?

(b) should there be a maximum period (backstop) beyond which no claim may competently be made?

(Paragraph 6.35)

Comments on Question 22

I would suggest that the test should be "on cause shown". Yes there should be a maximum period, I would suggest the short prescriptive period, 5 years.

23. Should express provision be made in the 2006 Act to allow parties to agree extension of the time limit to facilitate settlement?

(Paragraph 6.35)

Comments on Question 23

Yes, however any such extension should not be open ended, and should be for a limited period.

24. Should express statutory provision be made permitting the court to have regard to the terms of any agreement between the parties as to financial provision on cessation of cohabitation (including opting out of the 2006 Act regime) when deciding what order, if any, to make?

(Paragraph 7.39)

Comments on Question 24

Yes.

25. Should express statutory provision be made allowing the court to set aside, or vary any term of, a cohabitation agreement? If so, should the test for setting aside or variation be:

(a) that the agreement was not fair or reasonable at the time it was entered into;

(b) that there has been a material change in the parties' circumstances since the agreement was entered into, or

(c) another test (and if so what should that test be)?

(Paragraph 7.39)

Comments on Question 25

Yes, there should be express statutory provision allowing the court to set aside or vary and agreement.

Yes, to the second part of the question. I would suggest the test should allow for both (a) and (b) factors, depending on the circumstances before the court.

26. What information or data do consultees have on:

(a) the economic impact of sections 25-28 of the Family Law (Scotland) Act 2006,

(b) the potential economic impact of any option for reform discussed in this Discussion Paper (in particular the impact in terms of tax law of the possibility of extending the remedies available to cohabitants on cessation of cohabitation otherwise than by death to include property transfers/pension sharing/maintenance)?

(c) the potential economic impact upon the SCTS and legal aid budgets of any option for reform discussed in this Discussion Paper, including extension of the time limit for claims and additional remedies?

(Paragraph 9.4)

Comments on Question 26

I do not hold such information.

General Comments

«InsertTextHere»

24. Brodies Solicitors

RESPONSE FORM

DISCUSSION PAPER ON COHABITATION

We hope that by using this form it will be easier for you to respond to the questions set out in the Discussion Paper. Respondents who wish to address only some of the questions may do so. The form reproduces the questions as summarised at the end of the paper and allows you to enter comments in a box after each one. At the end of the form, there is also space for any general comments you may have.

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 re-formatted or summarised); and (ii) attribute comments and publish a list of respondents' names.

In order to access any box for comments, press the shortcut key F11 and it will take you to the next box you wish to enter text into. If you are responding to / commenting on only a few of the questions, continue using F11 until you arrive at the box you wish to access. To return to a previous box press Ctrl+Page Up or press Ctrl+Home to return to the beginning of the form.

Please save the completed response form to your own system as a Word document and send it as an email attachment to info@scotlawcom.gov.uk. Comments not on the response form may be submitted via said email address or by using the general comments form on our website. If you prefer you can send comments by post to the Scottish Law Commission, 140 Causewayside, Edinburgh EH9 1PR.

Name: Family Law Team
Organisation: Brodies LLP
Address: 15 Atholl Crescent, Edinburgh, EH3 8HA
Email address: Contact Zoe Wray (zoe.wray@brodies.com)

Summary of Questions

1. Should the regime for financial provision for cohabitants on cessation of cohabitation otherwise than by death remain separate from that for spouses and civil partners on divorce and dissolution?

(Paragraph 2.66)

Comments on Question 1

We consider that there should be a separate regime for cohabiting couples, distinct from that which applies to married couples and civil partners on divorce/dissolution. Despite the increasing prevalence of cohabitation in society, we are of the view that marriage and cohabitation remain very different concepts and that requires to be recognised in the legal frameworks which apply to each situation.

We consider that there will be a significant number of cohabitants who have made a conscious choice, for a variety of reasons, not to enter into a formal legal relationship such as marriage or civil partnership. Those individuals must be able to retain that choice; however, the law must provide sufficient remedies to enable them to access financial provision at the end of an enduring relationship. There will also be those in society who are unable to formalise their cohabiting relationships. The reforms must not have the effect of discriminating against these individuals.

We believe that the principles which underpin the Family Law (Scotland) Act 1985 (the "1985 Act") should be used to inform the approach to legislative reform for cohabitants. The 1985 Act framework is effective, clear and generally produces fair results. In our view that is what a revised regime for financial provision for cohabitants should strive to be. That said, we do not consider that the regime for cohabitants should mirror financial provision on divorce/dissolution, nor are we in favour of extending some or all of the 1985 Act's provisions to apply directly to cohabitants on cessation of cohabitation. A separate regime which can address the broad range of cohabiting relationships is necessary, rather than a "one size fits all" approach.

We consider that the relevant provisions of the 2006 Act should be replaced by a clear framework which provides enhanced remedies for financial provision for cohabitants. The legislation should confer rights on cohabitants, rather than simply an ability to make a financial claim on cessation of cohabitation.

We debated at length whether the legislation could, and should, have an overarching principle and also what an enhanced legal framework might look like. We reached the view that the answer to the former was in the affirmative. In our view, the overarching principle of the

legislation should be to allow the court to make reasonable adjustments to address imbalances which arise from the cessation of cohabitation. This principle would be comprised of three strands:

(i) To provide compensation for disadvantage suffered by and advantaged conferred on either or both parties on the cessation of cohabitation;
(ii) To distribute the ongoing burden of childcare reasonably and fairly; and
(iii) To provide relief of serious financial hardship.

In order to achieve these aims, we consider that the legislation should contain specific provisions which are aligned with s9(1)(b) to (e) of the 1985 Act. We discuss these in further detail in our response to Question 12 below.

2. Should the definition of cohabitant in section 25 of the 2006 Act be amended?

(Paragraph 3.101)

Comments on Question 2

We consider that the definition of cohabitant should be amended. It should reflect the diversity that is increasingly evident in cohabiting relationships. We consider that gender neutral language should be used, such as the definition used in the Human Fertilisation and Embryology Act 2008 referring to "persons" and "partners", or the Swedish definition:

"….two people who live together on a permanent basis as a couple and who have a joint household."

3. If consultees think the definition should be amended, should the comparison with spouses be removed in favour of a description of the nature of the relationship, such as “enduring family relationship”, “genuine domestic basis”, or something else?

(Paragraph 3.101)

Comments on Question 3

We consider the comparison with spouses should be removed. In our view "enduring family relationship" would be more appropriate.

The definition could refer to a list of factors or characteristics against which a cohabiting relationship would be assessed. If some or all of these factors were present in a couple's relationship, then they could be deemed to be cohabitants and would be able to access the regime for financial provision in the event of their cohabitation coming to an end. However, it could be open to couples who did not meet these particular criteria to demonstrate the

permanent or enduring nature of their relationship by other means, which would in turn enable them to seek financial provision.

4. If the comparison with spouses is to be removed, should the legislation expressly provide that couples within the forbidden degrees of relationship to each other will be excluded?

(Paragraph 3.101)

Comments on Question 4

Yes

5. Should a qualifying period of cohabitation be introduced in order to access remedies under the 2006 Act? If so:

   (a) how long should that qualifying period be?

   (b) should the qualifying period be different, or removed altogether, if the parties have children?

(Paragraph 3.101)

Comments on Question 5

(a) Overall, we are opposed to a qualifying period being introduced for cohabitants in order to access remedies under the 2006 Act (in its current form). We consider that a qualifying period is, in general, arbitrary and would lead to unfairness. The seriousness or significance of a cohabiting relationship can rarely be measured solely by its duration. There may be events which occur early in a cohabiting relationship which have significant financial consequences, for example investment in a property or one party giving up work to care for a child. The law ought to be able to address manifest unfairness to one or both parties in the event that the relationship breaks down, including in cases where the period of cohabitation was comparatively short. Our preference would be for a clearer definition of "cohabitant" as described in our answer to Q3 above, where eligibility to access remedies is assessed on that basis.

In the event that there is to be reform of the 2006 Act which includes a qualifying period, we consider it should be of short duration e.g. 12 months.

(b) We do not consider that there being children of cohabiting relationship should, in and of itself, merit the reduction or removal of any qualifying period. However, we

consider that certain financial remedies should be available to parent cohabitants irrespective of the length of the cohabitation period (see response to Q6 below).

6. Would the response to Question 5(a) or (b) change if the remedies available to former cohabitants were extended?

(Paragraph 3.101)

Comments on Question 6

We are in favour of the availability of enhanced remedies for former cohabitants, some of which we consider should require some form of qualifying period or none at all, depending upon the remedy and circumstances.

For example, we consider that the option to seek a property transfer order should be available to all cohabitants on separation. If accessing this remedy was subject to a qualifying period, we consider this could be dispensed with where the property is a family home and the effect of making the property transfer order would be to preserve the family home for the benefit of a child or children. Similarly, if there were to be the option for cohabitants to seek an alimentary award or to seek provision to address the future burden of childcare, we consider that should have a very short or no qualifying period. The making of any such order would, however, require to be subject to an assessment of needs and resources in a similar way to married couples or civil partners.

We formed the view that, in general, pension sharing should not be available to former cohabitants. We considered that it might be appropriate in some cases, subject to a qualifying period. There was a concern that this could lead to unfairness. However, we suspect that the cohabitants most likely to seek pension sharing provision are those in cohabiting relationships of longer duration and/or older cohabitants for whom pension provision is more likely to be an important issue. Therefore, the impact of a qualifying period may not be significant.

7. Would the definition of cohabitant be improved by the introduction of a list of features or characteristics to be taken into account in deciding whether the parties are cohabitants?

If so, what features or characteristics should be included?

(Paragraph 3.101)

Comments on Question 7

We consider that having a list of features or characteristics would be helpful in determining whether a couple can be deemed to be cohabitants for the purpose of the legislation.

In reaching this conclusion, we considered the approach taken in other jurisdictions, such as Ireland, Australia and New Zealand. The factors which we consider should be taken into account are:

- duration of the relationship;
- nature and extent of common residence;
- intimacy in the relationship, and whether or not a sexual relationship exists;
- integration of finances, degree of financial dependence or interdependence and any arrangements for financial support;
- commonly owned property/assets, the manner of ownership, use and acquisition of property;
- care and support of any dependent children, including whether either of the parties supports and/or cares for the child(ren) of the other party;
- degree of mutual commitment to a shared life; and
- reputation and public aspects of the relationship, including how others regard the nature of their relationship.

We do not suggest that this ought to be an exhaustive list, nor that all or a majority of these characteristics must be present in order to meet the threshold. Rather, that the court should continue to have discretion in deciding whether a particular relationship meets the definition of a cohabiting relationship for the purposes of accessing financial provision, with the above features providing guidance or a framework to assist in the decision making process.

8. What are consultees' views on the introduction of a registration system for cohabitants?

(Paragraph 3.101)

Comments on Question 8

Our view is that a registration system would be problematic, potentially discriminatory and should not be introduced. We have significant concerns that a registration system could act as a barrier to many individuals who could be most in need of protection and access to financial remedies in the event of a relationship breakdown. Vulnerable members of society, such as those with learning difficulties, may be capable of participating in a cohabiting relationship, including having children and operating some joint finances. However, they may not have the capacity to fully understand the implications of entering into a formal legal relationship, the process of registering their cohabitation, or the consequences of doing so.

There are many other reasons why cohabitants may not be willing or able to register their relationship. For example, some couples (particularly same sex couples) may wish to be discreet about their relationship. Others, such as domestic abuse victims, may be too scared to register their relationship or be prevented from doing so. If the introduction of a registration

system resulted in cohabiting couples who were "unregistered" (for whatever reason) having no access to financial provision at the end of their relationship, that would be entirely unsatisfactory.

Separately, we are unclear about how well a registration system would be used, based on the experiences of other countries (referred to in the Discussion Paper at paragraph 3.100). Consideration was given to the previous discussion and rejection of a registration system when the 2006 Act was being debated (paragraph 3.81). It was felt that these points were valid and still applicable.

There was a dissenting view in the team in favour of a statutory regime, under which couples who registered their cohabiting relationship would qualify for the same or similar rights and remedies as married couples and civil partners. It was suggested that such a regime should include a requirement for both parties to be legally advised prior to registration. Further, it was considered that a registration system would aid in recognising the significance of cohabiting relationships, albeit it would require considerable commitment on the part of the Scottish Government to raise public awareness and understanding of the system and to make funding available to facilitate access to legal advice if that was mandatory.

It was suggested that cohabitants could use a cohabitation agreement to subscribe to the same level of financial provision available to spouses and civil partners under the 1985 Act – essentially a quasi-registration system. However, we consider that very few couples are likely to use a cohabitation agreement to create financial obligations in this way, particularly when the agreement could not also give them many of the other benefits or the status associated with being married or civil partners. It may be that the extension of civil partnerships to heterosexual couples will provide a better solution for those who do not want to be married but wish to formalise their relationship and acquire equivalent rights, obligations and status.

9. Do sections 26 and / or 27 cause any difficulty in practice?

(Paragraph 4.34)

Comments on Question 9

In our view, sections 26 and 27 of the Family Law (Scotland) Act 2006 cause little difficulty in practice. There can be dispute over whether items are covered under the statutory provisions or whether they should be excluded, but that is to be expected and usually resolvable without much difficulty.

We agree with the point raised in the consultation paper (with reference to the research of Wasoff, Miles and Mordaunt) that the statutory provisions create an anomaly that a family home acquired from savings made from a "housekeeping allowance" cannot be subject to the statutory presumption, though it is unclear how often – if ever – this situation has arisen in practice. It may be that the concept of "housekeeping allowance" itself is outdated and more

appropriate provisions relating to the acquisition of property can be included as part of the reforms.

10. Should the language in sections 26 and / or 27 be modernised?

(Paragraph 4.34)

Comments on Question 10

We agree with the preliminary view of the Scottish Law Commission that the language of section 27 should be modernised, given that the concept of "housekeeping allowance" is archaic. The language should be changed to better reflect the economic arrangements of modern couples, which acknowledges their respective contributions to household expenses. It could refer to a presumption of equal division of (i) property contained within the jointly occupied home and (ii) funds contained within joint accounts or accounts designated for household expenditure.

11. Should sections 26 and / or 27 be modified in some other way?

(Paragraph 4.34)

Comments on Question 11

We do not consider that these sections require to be modified beyond the extent discussed in our responses to Q9 and 10 above.

12. Should the policy underpinning awards for financial provision for former cohabitants, where cohabitation ends otherwise than by death, be:

(a) compensation for economic loss sustained during the relationship;

(b) relief of need:

(c) sharing of property acquired during the cohabitation;

(d) sharing the future economic burden of child care;

(e) a combination of any or all of (a) to (d) above; or

(f) something else?

(Paragraph 5.69)

Comments on Question 12

In our view, the current provisions relating to economic advantage and disadvantage are inadequate and problematic in practice, making the task of advising clients very difficult. We believe that a more straightforward approach should be taken, and one which broadly adopts the principles underpinning the 1985 Act.

We consider that the policy should encompass the three objectives set out in our response to Question 1, namely:

(i) To provide compensation for disadvantage suffered by and advantaged conferred on either or both parties on the cessation of cohabitation;
(ii) To distribute the ongoing burden of childcare reasonably and fairly; and
(iii) To provide relief of serious financial hardship.

This would be achieved by applying principles broadly similar to those found in s9(1)(b) to (e) of the 1985 Act. We have some reservations about a s9(1)(d) type award being available to cohabitants but consider this should be available in cases where there has been significant financial dependence during the cohabitation.

In relation to the factors (a) to (e) mentioned above, we consider that (a) alone would be insufficient, on the basis that financial provision for cohabitants requires to deal with more than just compensation for economic loss.

We consider that relief of need could, in limited circumstances, be available to cohabitants who had dependent children or where there had been clear and significant economic loss to one party which could not otherwise be addressed. There is however a general concern that providing for relief of need could have the potential to give cohabiting couples the ability to make claims of wider scope than those available to married couples and civil partners. Also, unlike in England where there is a body of case law which analyses "need", we do not have anything similar in Scotland. Introducing "relief of need" as a concept in relation to cohabitants would be swimming against the tide of our divorce laws. We do not consider that would be a desirable consequence of a reformed cohabitants' rights regime.

We are opposed to fair sharing of property acquired during the course of cohabitation. In our view that should be the principal distinction between the two regimes. Cohabitants would retain any property acquired by them individually during the period of cohabitation. Overall, we consider that the underpinning rationale should be to provide a clear, pragmatic regime for financial provision for cohabitants but one which offers lesser protections and remedies than to those available to married couples/civil partners.

13. For the purposes of financial provision for former cohabitants, should any distinction be made between a child of whom the cohabitants are parents and a child who is or was accepted by the cohabitants as a child of the family?

(Paragraph 5.69)

Comments on Question 13

We consider that the legislation should not have the effect of disadvantaging children based on the structure or composition of the family unit(s) to which they belong.

We agree that the current distinction causes a particular issue for same sex couples, especially women who have used a sperm donor rather than a licenced clinic, thereby leaving only one of the women as the "parent" unless the other has formally adopted the child. A child in those circumstances would not be a child of whom the cohabitants are parents, and accordingly the distinction could adversely affect those families. That requires to be addressed. Although these cases are not the norm, increasing numbers of same sex couples are choosing to become parents in this way or are entering into cohabiting relationships where one or other of the parties has a child or children from a previous heterosexual relationship.

Accordingly, we consider that there should be no distinction made between children of whom the cohabitants are parents, and those who are (or were) accepted by the cohabitants as a child of the family. The ability to seek an award to address future economic burden of childcare should apply in either case. That ought to be the starting point. The circumstances of a particular case could be considered, including to what extent (if any) the burden would be shared with a third party (e.g. the child's other biological parent).

14. Should the test for determining what order, if any, the court may make for financial provision on cessation of cohabitation otherwise than by death be based on fairness and reasonableness, having regard to all the circumstances of the case, including a list of relevant factors such as:

(a) the financial and non-financial contributions made by each party to the relationship, including the contribution made by each party to the care of the family and the family home;

(b) the effect of the cohabitation upon the earning capacity of each of the parties;

(c) the parties' respective needs and resources;

(d) relief of financial hardship caused by the cohabitation or the end of the cohabitation;

(e) a combination of any or all of (a) to (d) above; or

(f) something else?

(Paragraph 5.69)

Comments on Question 14

As outlined in our response to Q12, we consider that the test should be based around principles of fairness, akin to the provisions of the 1985 Act, having regard to the circumstances of the case and taking account of some of the factors above.

In relation to (a) and (b) there will be many cohabiting relationships which still follow the traditional model of one partner being the main or principal earner and the other making mostly non-financial contributions during the relationship. In order to adequately protect and provide for the cohabitant and any dependent children, both types of contributions require to be taken into account. Many women in cohabiting relationships are disadvantaged by giving up work to care for children in the same way as married women.

Concern was expressed that factors (b) and (d) above were not appropriate considerations for financial provision for cohabitants, particularly if they had the effect of providing enhanced rights to cohabitants beyond those which were currently available to spouses or civil partners. There was also some concern that including the wording suggested above would effectively bring a regime for financial provision for cohabitants so close to the 1985 Act provisions that it would make it unnecessary to distinguish between the two.

However, we remain of the view that a distinction could and should be made. All married couples and civil partners have access to financial provision under the 1985 Act simply by virtue of being married. That is linked to the fact that marriage and civil partnership have a clear commencement date, and a clear end point (divorce/dissolution) which brings an end the corresponding rights and obligations. Cohabitants would not automatically be eligible to seek financial provision simply because they lived together. They would have to establish their cohabitation by reference to the factors which we say ought to supplement the definition in the legislation, and there would be the ability for the court to have regard to the circumstances of a particular cohabiting relationship to determine the extent of financial provision available.

15. Are the remedies available to the court on an application for financial provision by a former cohabitant adequate and sufficient?

(Paragraph 5.92)

Comments on Question 15

The current remedies available to the court are not adequate or sufficient. It is unsatisfactory that the only option available to the court is to make an order for payment of a capital sum, which can be problematic for both parties in some cases. Further, the remedies currently

available do not reflect the complex practical and financial arrangements that many cohabiting couples have. Additional remedies are required in order that adequate financial provision can be made for cohabitants upon cessation of cohabitation, particularly where there is a lengthy financial dependence or interdependence and/or where the cohabitants have children together (or have accepted children as part of the family).

16. If not, should the remedies be extended to include:

(a) transfer of property;

(b) pension sharing;

(c) periodic payments for a period after the end of the cohabitation, sufficient to relieve short term financial hardship; or

(d) something else?

(Paragraph 5.92)

Comments on Question 16

We are in no doubt that a mechanism for transfer of property is necessary and should be available in all circumstances. The absence of this remedy at present is particularly disadvantageous to former cohabitants who wish to retain a property for the benefit of children who are settled there.

We are opposed to pension sharing being available to former cohabitants, other than in limited circumstances where a pension sharing order is necessary to address a significant disparity in a lengthy cohabitation where alternative provision would be insufficient.

We consider that, in some circumstances, it would be desirable for cohabitants to have the ability to seek periodic payments for a limited, fixed period following the cessation of cohabitation for the purposes of relieving short-term financial hardship. In our view, this ought to be reserved for exceptional cases where there had been significant financial hardship caused to one of the cohabitants which could not be addressed otherwise. For example, when one party had no access to independent income following cessation of cohabitation which was the result of a sustained period of financial dependence on the other party during the relationship.

17. Should express provision be made requiring or permitting the court to consider the resources of the former cohabitants in deciding what order, if any, to make for financial provision?

(Paragraph 5.92)

Comments on Question 17

We consider that the court ought to be able to have regard to the needs and resources of both parties in deciding what order, if any, to make. That would certainly be necessary if a wider range of remedies were available to former cohabitants. We consider that the making of any order for financial provision between cohabitants requires an assessment of resources, if it is to be fair and reasonable. In our view it would undermine the effectiveness of any framework for financial provision if the court was unable to take resources into account.

18. Should the one year time limit for making a claim under section 28(2) of the 2006 Act be extended?

(Paragraph 6.35)

Comments on Question 18

We consider that the current time limit, although relatively short, is sufficient and does not require to be extended. There must be a cut-off point, beyond which claims cannot be made other than in exceptional circumstances. For the vast majority of cohabiting relationships, it will be clear well within a year of cessation of cohabitation whether or not there is a need for financial provision.

We are opposed to any significant extension or removal of the existing time limit. To do so would prolong uncertainty for any former cohabitant against whom a claim might be made, leaving them unable to make certain plans and decisions for the future without clarity about what their potential exposure to a claim may be. In our experience the problem is not that the time limit is too short, but rather that people are unaware of it. We suggest that raising awareness of the existing time limit would be preferable to extending it.

It was suggested that increasing the time limit would reduce the number of cases which are raised solely to avoid the time bar and are subsequently resolved by agreement, thereby relieving pressure on the courts and reducing legal expenditure. We suspect, however, in practice the number of actions raised solely to avoid time bar would be unlikely to decrease significantly if the time limit was extended.

19. If the time limit is extended, what should the new time limit be?

(Paragraph 6.35)

Comments on Question 19

If it were to be extended at all, we consider that two years should be the maximum time limit. This is consistent with the time limit in Ireland, Australia and Canada.

The time limit could perhaps remain as one year with there being an ability to extend this on application of either or both parties where there is exceptional cause shown – see further in our response to Question 22.

20. If the time limit is extended, should the court be afforded discretion to allow late claims?

(Paragraph 6.35)

Comments on Question 20

We consider that wide discretion to allow late claims would be problematic. The existence of a fixed time limit provides clarity and certainty for cohabitants and advisors which would be removed or undermined if Sheriffs/Judges had broad discretion to allow late claims. Very different views could be taken about what constituted a reasonable basis for allowing a late claim, and this could lead to unfairness. Any discretion to allow late claims should only be in exceptional circumstances, such as incapacity.

21. If the time limit is <u>not</u> extended, should the court be afforded discretion to allow late claims?

(Paragraph 6.35)

Comments on Question 21

We consider that duration of the time limit is not the material issue in deciding whether or not there should be discretion to allow late claims. In our view, the focus should be on the scope of the judicial discretion permitted. There are some limited circumstances in which discretion to allow late claims may be appropriate, and even desirable. These are noted in our responses to Questions 20 and 22. We are concerned that the introduction of further judicial discretion beyond that could exacerbate existing difficulties with the current regime.

22. If the court is afforded discretion to allow late claims:

    (a) should the test for the exercise of discretion be “on cause shown”, “in exceptional circumstances” or something else?

(b) should there be a maximum period (backstop) beyond which no claim may competently be made?

(Paragraph 6.35)

Comments on Question 22

(a) We consider that discretion to allow late claims should only be "in exceptional circumstances" such as incapacity or other serious extenuating circumstances which prevent either party from raising proceedings in time.

(b) As stated above we consider that a backstop is necessary, beyond which no claim could be considered in any circumstances. There requires to be a clear end point. In our view the discretion to allow a late claim should only be afforded up to 12 months beyond the expiry of the existing time limit.

23. Should express provision be made in the 2006 Act to allow parties to agree extension of the time limit to facilitate settlement?

(Paragraph 6.35)

Comments on Question 23

We consider that it may be helpful if parties could formally agree an extension of the time limit, and that any such agreement would be recognised by the court provided it had been formally recorded in writing and otherwise fairly entered into. This would address the situation where parties take advice at the eleventh hour and an action requires to be raise in haste, only for agreement to be reached fairly shortly thereafter.

24. Should express statutory provision be made permitting the court to have regard to the terms of any agreement between the parties as to financial provision on cessation of cohabitation (including opting out of the 2006 Act regime) when deciding what order, if any, to make?

(Paragraph 7.39)

Comments on Question 24

We consider that provision should be made allowing the court to take into account any terms of a cohabitation agreement regarding financial provision, much in a similar way as is provided for in section 16 of the 1985 Act for agreements between married couples and civil partners. Cohabitation agreements are being used more widely and it would be helpful if clients could

be assured that these will be taken into account by the court provided they are fairly entered into.

As noted in our response to Question 8 above, cohabitation agreements can already be used to regulate financial arrangements between cohabitants, however the current legislation makes no reference to this. Any new legislation could make specific provision confirming that parties may make alternative arrangements by entering into a formal agreement, and that the court would have regard to the terms of any such agreement provided it was fairly entered into. Including this in the legislation could help to raise awareness among members of the public about the ability to enter into a cohabitation agreement, thereby potentially reducing the number of former cohabitants who require to resort to litigation to resolve financial matters between them.

We are conscious that cohabiting couples could use a cohabitation agreement to provide for more extensive or lesser remedies than are available under the current legislation however we do not see this as problematic, provided necessary safeguards are in place – see response to Question 25 below.

25. Should express statutory provision be made allowing the court to set aside, or vary any term of, a cohabitation agreement? If so, should the test for setting aside or variation be:

    (a) that the agreement was not fair or reasonable at the time it was entered into;

    (b) that there has been a material change in the parties' circumstances since the agreement was entered into, or

    (c) another test (and if so what should that test be)?

(Paragraph 7.39)

Comments on Question 25

We consider that provision should be made for setting aside or varying a cohabitation agreement (or part of it) if it was not fair and reasonable at the time it was entered into. It was suggested that a narrower approach should be adopted, similar to the position in Ireland where the court may vary or set aside any term of a cohabitation agreement in exceptional circumstances, where its enforceability would cause serious injustice. We do not consider the approach requires to be so restrictive and could simply be aligned with the corresponding provisions of the 1985 Act.

26. What information or data do consultees have on:

(a) the economic impact of sections 25-28 of the Family Law (Scotland) Act 2006,

(b) the potential economic impact of any option for reform discussed in this Discussion Paper (in particular the impact in terms of tax law of the possibility of extending the remedies available to cohabitants on cessation of cohabitation otherwise than by death to include property transfers/pension sharing/maintenance)?

(c) the potential economic impact upon the SCTS and legal aid budgets of any option for reform discussed in this Discussion Paper, including extension of the time limit for claims and additional remedies?

(Paragraph 9.4)

Comments on Question 26

None

General Comments

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.

We believe that the principles which underpin the 1985 Act should be used to inform the approach to legislative reform for cohabitants. That framework is effective, clear and generally produces fair results. That said, we do not consider that the regime for cohabitants should mirror financial provision divorce/dissolution, nor should it automatically offer the same rights and protections to every couple who cohabits in the manner as is afforded to married people and civil partners. The concept of marriage and cohabitation are distinct and the regimes for financial provision should also remain separate.

The test to determine who can access the regime must be clearer, and the remedies available to those individuals should be extended. Given the extent to which cohabiting relationships can vary in nature, there must be scope for the circumstances of each case to be taken into account.

We accept that our suggestions would represent a significant change in the law and would have wider implications for society, but we do not believe that should be a barrier to reform. In recent years, legislative reform has given recognition and new rights and obligations to other groups in society such unmarried fathers and those in same sex relationships. It is necessary that the regime for financial provision for cohabitants reflects recognises the prevalence of cohabitation in our society.

We considered an opt-in or registration system but have concluded that such a regime is not the best solution at the current time. An opt in system could indirectly discriminate against vulnerable people, particularly if there were no remedies available to those who did not register their cohabiting relationship – for whatever reason. Moving to what would essentially be a two-tier system for cohabitants, where a full regime of financial provision was available to "opted in" cohabitants and little or no remedies available to others is not, in our view, desirable. Instead there should be an adequate regime which covers the range of situations which can fall under the definition of "cohabiting relationship".

Further and concerted efforts should be made to raise awareness of the rights available to cohabitants and other features of the legislation, including any statutory time limits and the ability to enter into cohabitation agreements.

25. FLA (Family Law Association)

Response on behalf of Family Law Association – Scottish Law Commission Discussion Paper (Cohabitation)

The membership of the Family Law Association (FLA) is made up primarily of solicitors in private practice who specialise exclusively in family law or devote a significant portion of their working time to undertaking family law work. The membership is diverse and includes solicitors in large, medium and small firms spread throughout the country in both urban and rural locations. There are often diverging opinions about law reform issues. In this response the FLA is trying to reflect broadly the views of the membership and in areas where there are marked differences of opinion this is reflected in the response. Individual FLA members have been encouraged by the FLA to submit their own individual responses as well.

1.Should the regime for financial provision for cohabitants on cessation of cohabitation otherwise than by death remain separate from that for spouses and civil partners on divorce and dissolution?

There is a divergence of opinion on this question. There are a number of members who feel that it would make greater sense to have one legal framework that deals with the rights, obligations and remedies on breakdown for all types of personal relationship – cohabitation, marriage and civil partnership. Many envisage such a regime may look similar to those jurisdictions where there is a legally recognised civil formalisation of the marriage and then couple are free to have separate religious or other celebrations. The only way to create legally binding married relationship is to formalise under civil law. The respondents taking this view felt that largely the issues covered by the subsequent questions in the paper would be redundant if this approach was taken.

Other respondents felt that there should be separate regimes and that cohabitation should be treated differently to marriage. It was felt by many respondents that the public policy issues around adopting a single regime for all personal relationships would be problematic and there is unlikely to be the political appetite for law reform of that sort.

2. Should the definition of cohabitant in section 25 of the 2006 Act be amended?

Reference to being like married couple gives a flavour of what is meant. Focus should be on character of relationship – factors like duration, presence of children, financial arrangements help focus issue. Not really aware of this being a “live” issue. Very few cases where defence is run on basis relationship was not cohabitation within meaning of Act.

3. If consultees think the definition should be amended, should the comparison with spouses be removed in favour of a description of the nature of the relationship, such as “enduring family relationship”, “genuine domestic basis”, or something else?

It is important that any amendment does not create further uncertainty. If a phrase like “enduring family relationship” is used it is likely further guidance or a non-exhaustive checklist would be needed to identify what factors are relevant – arguably an enduring family relationship could include siblings. An expression like “commitment to a joint life” was suggested. This it was felt captures the essence of cohabitation and

would also not exclude couples who are in a relationship but maintain separate houses or where one spends lengthy periods working away from the family home.

4. If the comparison with spouses is to be removed, should the legislation expressly provide that couples within the forbidden degrees of relationship to each other will be excluded?

Yes. Extending framework to cover siblings sharing a house for instance would involve far wider implications than existing legislation is really designed to cover.

5. Should a qualifying period of cohabitation be introduced in order to access remedies under the 2006 Act? If so: (a) how long should that qualifying period be? (b) should the qualifying period be different, or removed altogether, if the parties have children?

There were differing views on this from members. It was felt that a qualifying period could avoid potential unfairness where a claim is pursued after a short relationship. However, it is recognised that any qualifying period is arbitrary. It would be difficult to establish a start date where there is no formal registration process. The existing position with no minimum duration means that cases can be assessed looking at character of relationship as a whole. The issue of shorter relationships and perceived financial fairness could be looked at under the remedies available – duration of cohabitation might be a factor in increasing/decreasing award taking account of overall fairness of making an award.

6. Would the response to Question 5(a) or (b) change if the remedies available to former cohabitants were extended?

No.

7. Would the definition of cohabitant be improved by the introduction of a list of features or characteristics to be taken into account in deciding whether the parties are cohabitants? If so, what features or characteristics should be included?

If the definition was changed to refer to some sort of enduring family relationship, then factors would be helpful. The factors could be length of relationship, whether there are children, nature of domestic arrangements, social factors like whether couple socialise together, share meals and household tasks, what financial arrangements the couple has in place, whether they each retain their own separate houses, any degree of financial dependence on each other, whether it is a sexual relationship. It would be important that the list is non-exhaustive so a catch all like “any relevant factor” would be included too.

8. What are consultees’ views on the introduction of a registration system for cohabitants?

Some FLA members can see merit in making the imposition of legal obligations involve some sort of proactive step/decision by the parties but if that is introduced it begs the question whether in fact there should simply be one legally recognised family relationship which has legal consequences – thus doing away with marriage and civil partnership and cohabitation as separate concepts. It is unlikely there would not be the political will to do this. The risk then would be that much needed reform of the 2006 Act would not proceed while this larger issue is debated. Most members felt that there ought not to be a system of registration. In particular this could deprive someone of remedies if the other partner (potentially the one with the economic interest to avoid a claim) refuses to register the relationship.

9. Do sections 26 and / or 27 cause any difficulty in practice?

We have not encountered any difficulty with these sections in practice.

10. Should the language in sections 26 and / or 27 be modernised?

Wording could be modernised to reflect modern societal norms.

11. Should sections 26 and / or 27 be modified in some other way?

No

12. Should the policy underpinning awards for financial provision for former cohabitants, where cohabitation ends otherwise than by death, be:

(a) compensation for economic loss sustained during the

relationship;

(b) relief of need:

(c) sharing of property acquired during the cohabitation;

(d) sharing the future economic burden of child care;

(e) a combination of any or all of (a) to (d) above; or

(f) something else?

Some members felt that the adoption of the single legal regime for all types of relationship would solve the problem and provide remedies in all cases. Most members consider that a combination of (a), (b) and (d) would achieve the best result and would achieve a fair outcome. There should be recognition that for some cohabitants there is often a real need for a remedy akin to aliment due to the extent of financial dependence. Insofar as sharing property acquired during cohabitation goes this is more problematic. When dealing with matrimonial property there is a clear start and end point and a clear definition of what within that period is matrimonial property. It is not so clear cut in cohabitation (unless the registration model is adopted). Arguably a claim under (a) should balance out any unfairness in relation to wealth acquired during a relationship and if the couple jointly owns an item like the family home anyway then remedies already exist to deal with that asset fairly.

13. For the purposes of financial provision for former cohabitants, should any distinction be made between a child of whom the cohabitants are parents and a child who is or was accepted by the cohabitants as a child of the family?

No

14. Should the test for determining what order, if any, the court may make for financial provision on cessation of cohabitation otherwise than by death be based on fairness and reasonableness, having regard to all the circumstances of the case, including a list of relevant factors such as:

(a) the financial and non-financial contributions made by each party to the relationship, including the contribution made by each party to the care of the family and the family home;

(b) the effect of the cohabitation upon the earning capacity of each of the parties;

(c) the parties' respective needs and resources;

(d) relief of financial hardship caused by the cohabitation or the end of the cohabitation;

(e) a combination of any or all of (a) to (d) above; or

(f) something else?

Members felt that it is important to note that this ought not to be a property sharing regime but rather a regime based on achieving fairness. Members consider that the financial provision to be made should be based in fairness and reasonableness with regard to a combination of factors (a) to (d) above.

15. Are the remedies available to the court on an application for financial provision by a former cohabitant adequate and sufficient?

No.

16. If not, should the remedies be extended to include: (a) transfer of property; (b) pension sharing; (c) periodic payments for a period after the end of the cohabitation, sufficient to relieve short term financial hardship; or (d) something else?

Members consider that the remedies should be extended to transfer of property (where cases are settled out of court it is often by way of a transfer of property). Where there is a financial dependence and hardship there should be scope for a periodic payment akin to aliment for a period of time. It was felt that there may be practical problems in allowing pension sharing but that it could potentially be a remedy if there were no other resources and no other means of making a fair financial settlement. Most members felt that any award under (c) should only be made or a short period and to relieve any short-term hardship.

17. Should express provision be made requiring or permitting the court to consider the resources of the former cohabitants in deciding what order, if any, to make for financial provision?

Yes

18. Should the one-year time limit for making a claim under section 28(2) of the 2006 Act be extended?

There is consensus that the current one-year time limit is too short and ought to be amended. It is important to give parties certainty about when claims can be made. Broadly opinion was divided between keeping the time limit at one year but allowing extension on cause shown or extending it to a maximum of two years.

19. If the time limit is extended, what should the new time limit be?

See previous answer.

20. If the time limit is extended, should the court be afforded discretion to allow late claims?

Yes

21. If the time limit is not extended, should the court be afforded discretion to allow late claims?

Yes.

22. If the court is afforded discretion to allow late claims:

(a) should the test for the exercise of discretion be "on cause shown",

"in exceptional circumstances" or something else?

Most felt the test should be on cause shown' and it should be clear in the wording that it must be fair and reasonable to allow late claim.

(b) should there be a maximum period (backstop) beyond which no claim may competently be made?

Yes- 5 years.

23. Should express provision be made in the 2006 Act to allow parties to agree extension of the time limit to facilitate settlement?

Yes, as long as it is clear that agreement to extend must be in writing and it should be subject to the statutory backstop for late claims.

24. Should express statutory provision be made permitting the court to have regard to the terms of any agreement between the parties as to financial provision on cessation of cohabitation (including opting out of the 2006 Act regime) when deciding what order, if any, to make?

Yes – most members feel that being able to do something akin to a pre-nuptial agreement in cohabitation would be of benefit.

25. Should express statutory provision be made allowing the court to set aside, or vary any term of, a cohabitation agreement? If so, should the test for setting aside or variation

be:

(a) that the agreement was not fair or reasonable at the time it was entered into;

(b) that there has been a material change in the parties' circumstances since the agreement was entered into, or

(c) another test (and if so what should that test be)?

There was a divergence of views on what would be the best test. It was agreed that some sort of setting aside provision would make sense. Many members felt that the test (a) would be workable. It is on the same lines as the test in the 1985 Act so thee would be certainty in using it and would put cohabitation agreements on the same footing a pre and post nuptial agreements. Others felt that it may be harder to assess the circumstances at the time the agreement was made and that a material change of circumstances test might be better. There was also a suggestion that a hybrid test of (a) and (b) would work well in the circumstances of a cohabitation.

26. What information or data do consultees have on:

(a) the economic impact of sections 25-28 of the Family Law (Scotland) Act 2006,

(b) the potential economic impact of any option for reform discussed in this Discussion Paper (in particular the impact in terms of tax law of the possibility of extending the remedies available to cohabitants on cessation of cohabitation otherwise than by death to include property transfers/pension sharing/maintenance)?

No information on this.

Submitted on behalf of Family Law Association 30 June 2020.

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1. Should the regime for financial provision for cohabitants on cessation of cohabitation otherwise than by death remain separate from that for spouses and civil partners on divorce and dissolution?

(Paragraph 2.66)

Comments on Question 1

On balance, I think that it is appropriate for there to continue to be separate regimes. While I think that some of the justifications for this are less strong than they seem to have been at the time of the 2006 Act, I think that to blend two in to one does not recognise sufficiently that there are individuals who have made the conscious decision to cohabit rather than marry because it suits their own individual circumstances.

I also think that the nature of cohabitation means that a regime based upon property sharing would be less straightforward than in the case of marriage. Presumably it would be the value of property built up between the date on which the parties began cohabiting and when they separated which would be shared, but this could result in factual disputes as to when the parties began cohabiting. In a case where there had been a long cohabitation between the parties, this would be a difficult factual dispute to resolve in the sense that it would depend upon evidence about things that occurred several years before.

The greatest frustration and difficulty which I encounter as a practitioner with the current regime is how little guidance it provides as to what outcome a party can expect from a court. It is very difficult to give a client a clear indication of what value a court is likely to place upon their claim under s28. In my opinion, it is not satisfactory that the legislation which was intended to provide a remedy to cure unfairness which there was previously does not provide real clarity to the individuals who it is designed to assist about the circumstances in which the law will provide them with a remedy and to what extent they can realistically expect it to do so. In my view this is the issue that it is most important for any change to the law to address

I do wonder whether there is a place for a court being able to take into account what a spouse would receive were the couple married and separating (similar to what there is with section 29 at present) and the amount that a cohabitant can claim being capped at the amount which a spouse would be entitled to (although I appreciate that the evidential difficulties to do with establishing when the cohabitation began would arise in that instance too) or something of that ilk. I think that that may assist practitioners in advising clients as to what a realistic outcome may be and allow regard to be had by the courts to cases under the 1985 Act in determining outcomes. That might help to make things a little more predictable and also limit the risk of people being exposed to liabilities which were unintended or unanticipated.

2. Should the definition of cohabitant in section 25 of the 2006 Act be amended?

(Paragraph 3.101)

Comments on Question 2

Personally I think that the concerns about the definition of cohabitant do not cause difficulties in practice. Referring to “spouses or civil partners” would perhaps be more apt though..

3. If consultees think the definition should be amended, should the comparison with spouses be removed in favour of a description of the nature of the relationship, such as “enduring family relationship”, “genuine domestic basis”, or something else?

(Paragraph 3.101)

Comments on Question 3

If a more substantive change is deemed to be justified, then I don’t think the reference to living as if husband and wife is the best fit and I am not sure that it reflects what happens in practice either. In practice, I think that people see themselves as “cohabiting” before they necessarily tick all the boxes of living together “as husband and wife”. There may be a view that it would

be tidier to amend it for that reason, albeit I don't think that the definition causes difficulties in practice.

I also think that it is valid to bear in mind that a couple may not be living under the one roof, but may otherwise have a relationship of the quality that would be considered to make them to be living as if spouses, and I do not think that any definition should automatically and arbitrarily exclude them.

I wonder whether "living [together?] as a couple" works. Admittedly that is vague, but it seems to me that any definition in relation to this will be. That would bring people in to the region of parties who could claim a remedy earlier than in the current regime, but if it is about remedying unfairness then I don't see a problem with that. A lot of the situations which I have encountered where an economic advantages/disadvantages arises come from an early stage in the cohabitation like when the couple purchase their first property together and a definition that caught people earlier in their relationship might help address unfairness that could arise from this. I would be concerned if any alternative definition made it harder for people in that situation to seek a remedy if, for example, the relationship broke down soon after the property purchase.

4. If the comparison with spouses is to be removed, should the legislation expressly provide that couples within the forbidden degrees of relationship to each other will be excluded?

(Paragraph 3.101)

Comments on Question 4

I do not have a particularly strong view on this.

If there is to be such a prohibition, then the legislation should spell out exactly what relationships will not give rise to a claim, as in s58 of the Human Fertilisation and Embryology Act 2008 for example.

5. Should a qualifying period of cohabitation be introduced in order to access remedies under the 2006 Act? If so:

   (a) how long should that qualifying period be?

   (b) should the qualifying period be different, or removed altogether, if the parties have children?

(Paragraph 3.101)

Comments on Question 5

I don't think that a qualifying period is a good idea unless it is one of a number of different ways in which people can qualify as being cohabitants. For example, if they have been living together for a fixed period then they would be automatically treated as cohabiting, but there would be other ways in which they could meet the criteria to be able to access remedies following the breakdown of the relationship.

I would not want a qualifying period to operate so that a cohabitee would be precluded from making a claim completely if the relationship had not lasted for a particular period. I don't think a qualifying period is necessary and it might fail to recognise that unfairness can arise at any early stage of the relationship. Any qualifying period would be arbitrary but if there is to be one then I don't think that it should be greater than six months.

6. Would the response to Question 5(a) or (b) change if the remedies available to former cohabitants were extended?

(Paragraph 3.101)

Comments on Question 6

No

7. Would the definition of cohabitant be improved by the introduction of a list of features or characteristics to be taken into account in deciding whether the parties are cohabitants?

If so, what features or characteristics should be included?

(Paragraph 3.101)

Comments on Question 7

If a definition of cohabitant remains the same or is broadened along the lines of what was mentioned in response to question 3 then I don't think that a list of characteristics would be necessary. If they were being used then I think that it should be a non-exhaustive list and the criteria used in new Zealand (which are mentioned at para 3.64 of the Discussion paper) seem to be helpful to me. I think that any list should be detailed non-exhaustive

8. What are consultees' views on the introduction of a registration system for cohabitants?

(Paragraph 3.101)

Comments on Question 8

I don't think that a registration system would practically address the issues which have led to this present reform. It wouldn't concern me to have one, but I don't think that it would be likely to make a great deal of practical difference.

9. Do sections 26 and / or 27 cause any difficulty in practice?

(Paragraph 4.34)

Comments on Question 9

I don't have a difficulty with Sections 26 and 27 as things stand and I have never encountered them causing a difficulty in practice.

10. Should the language in sections 26 and / or 27 be modernised?

(Paragraph 4.34)

Comments on Question 10

I think contributions to household expenditure would probably be a more accurate and modern way of defining what it is that is being dealt with in section 27. I don't think the concept of allowances for household expenses reflects how most people manage their household expenditure nowadays.

Generally speaking I think that the way that these sections operate, subject to what has been said about s27, probably reflect people's expectations, address most of the unfairness that could otherwise arise in connection with household contents and "allowance", and allow issues to be dealt with in a fairly straightforward fashion and often between parties.

11. Should sections 26 and / or 27 be modified in some other way?

(Paragraph 4.34)

Comments on Question 11

I would not suggest any further amendment.

12. Should the policy underpinning awards for financial provision for former cohabitants, where cohabitation ends otherwise than by death, be:

(a) compensation for economic loss sustained during the relationship;

(b) relief of need:

(c) sharing of property acquired during the cohabitation;

(d) sharing the future economic burden of child care;

(e) a combination of any or all of (a) to (d) above; or

(f) something else?

(Paragraph 5.69)

Comments on Question 12

Whatever factors are taken into account, what is of most importance from the point of view of a practitioner is that clearer guidance is provided as to what the level of remedy available is likely to be.

While I think the clear articulation of underpinning principles in the 1985 Act helps, I think the greatest advantage that that regime has over the 2006 Act for practitioners is the default presumption in favour of equal sharing of the value of matrimonial property, which gives practitioners a sort of baseline for advising clients. I think that the introduction of a similar clear "baseline" for cohabitants would be the greatest help to practitioners. What the would be depends upon what it is that the law in this area is trying to achieve. If it is about property sharing, then something similar to the 1985 Act may well be appropriate. If it is to be more restricted and to be, for example, about addressing those situations where it would create unfairness not to have a remedy then it would be helpful for the legislation or accompanying Guidance Notes to provide clearer guidance, perhaps in the form of a non-exhaustive list of examples, of the type of situations where such a remedy might be justified and how it may be quantified in those circumstances.

Of the factors listed, I have reservations about property sharing for the reasons outlined in the response to question 1. Of the factors listed, I would be inclined to suggest a combination of 12(a) and (d). I would be attracted by something similar to (b), but I do not think that the "relief of need" is clear or tight enough given that the couple may have made the conscious decision that they do not want to be financially obliged to each other in a way that spouses are. "Need" is very broad and potentially imposes a greater and wider obligation of aliment than what is owed by spouses. It may be that a higher threshold such as hardship, as opposed to need, would be more appropriate but I do think that it is correct that the court has some discretion to provide a remedy for somebody who will be left in severely difficult financial circumstances as

a result of the breakdown of a relationship, notwithstanding that there might not have been economic advantage/disadvantage in a way that we understand it.

13. For the purposes of financial provision for former cohabitants, should any distinction be made between a child of whom the cohabitants are parents and a child who is or was accepted by the cohabitants as a child of the family?

(Paragraph 5.69)

Comments on Question 13

Personally, I don't think there should be an automatic distinction between a child of the cohabitants and a child who they have both accepted as a child of the family. I do consider that factors such as the obligation that another " natural" parent would have to the child and, perhaps, the extent to which there was going to be ongoing involvement in the child's life and the involvement of any new partner ought to be things that could be taken in to account in assessing what remedy is appropriate to address the ongoing burden of caring for that child. However, if a child has been accepted as a child of the family then it is primarily responsibilities to the child (and not the partner) that the person has taken on. Where that has been done, I don't think that it is correct that the fact that they are not the child's natural parent should automatically mean that they won't have to assist the other parent with the costs of caring for that child when the relationship breaks down. In my view, an automatic distinction would not prioritise the interests of the child.

14. Should the test for determining what order, if any, the court may make for financial provision on cessation of cohabitation otherwise than by death be based on fairness and reasonableness, having regard to all the circumstances of the case, including a list of relevant factors such as:

(a) the financial and non-financial contributions made by each party to the relationship, including the contribution made by each party to the care of the family and the family home;

(b) the effect of the cohabitation upon the earning capacity of each of the parties;

(c) the parties' respective needs and resources;

(d) relief of financial hardship caused by the cohabitation or the end of the cohabitation;

(e) a combination of any or all of (a) to (d) above; or

(f) something else?

(Paragraph 5.69)

Comments on Question 14

Subject to what I have said in my responses to questions 1 and 12, I would not have a difficulty with all of these being taken in to account. I think it is appropriate that resources have to be taken in to account, and a greater range of remedies should assist in preventing this causing unfairness I would hope.

However, I do not think that these factors alone assist in providing the clarity that I believe that the law in this area needs.

15. Are the remedies available to the court on an application for financial provision by a former cohabitant adequate and sufficient?

(Paragraph 5.92)

Comments on Question 15

No

16. If not, should the remedies be extended to include:

(a) transfer of property;

(b) pension sharing;

(c) periodic payments for a period after the end of the cohabitation, sufficient to relieve short term financial hardship; or

(d) something else?

(Paragraph 5.92)

Comments on Question 16

In my view, orders for sale or property transfers would be sensible as would periodic payments. If pension sharing would assist parties in achieving a solution then I don't see a legal problem with that remedy being available. I am aware that there are potential tax consequences or difficulties caused by this, but I do not comment on them and have given my view based upon

my experience as a legal advisor to clients who have sought representation following the breakdown of their cohabitation.

17. Should express provision be made requiring or permitting the court to consider the resources of the former cohabitants in deciding what order, if any, to make for financial provision?

(Paragraph 5.92)

Comments on Question 17

I think that resources should be taken in to account andit should be at the Sheriff's discretion the extent to which it impacts upon the remedy made.

18. Should the one year time limit for making a claim under section 28(2) of the 2006 Act be extended?

(Paragraph 6.35)

Comments on Question 18

I have less concerns that many do regarding the existing time limits. I think that if proceedings are raised it is usually as a protective measure and my experience has been that they are often sisted/ not progressed while negotiations are undertaken. When that is the case, the additional cost incurred is not huge. I don't see a difficulty with extending the period, to, say 18 months or 2 years and I think that would be a fair balance between the concern about the unfairness that the present time limit causes and the equally valid concern about cold claims resurfacing, particularly in circumstances where the relationship may not have been particularly long.

19. If the time limit is extended, what should the new time limit be?

(Paragraph 6.35)

Comments on Question 19

I don't think an increase is necessary, provided that there is discretion to allow late claims. However, if there is to be an increase I do not think that it should be greater than 2 years.

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20. If the time limit is extended, should the court be afforded discretion to allow late claims?

(Paragraph 6.35)

Comments on Question 20

Yes. I think that an ability on the part of the Sheriff to allow late claims at their discretion would address many of the concerns surrounding unfairness relating to the time limit.

21. If the time limit is not extended, should the court be afforded discretion to allow late claims?

(Paragraph 6.35)

Comments on Question 21

yes

22. If the court is afforded discretion to allow late claims:

(a) should the test for the exercise of discretion be "on cause shown", "in exceptional circumstances" or something else?

(b) should there be a maximum period (backstop) beyond which no claim may competently be made?

(Paragraph 6.35)

Comments on Question 22

I do not think that there should be too low a bar, as that would not provide sufficient certainty as to when one is "safe" from claims. I think "cause shown" is too low a bar for that reason. I think perhaps allowing late claims where "equitable to do so", or something equivalent, would be a good fit. It would allow use to be made of existing case law under the Presciption and Limitation (Scotland) Act, which seems to provide practitioners, clients and courts with sufficient clarity and certainty and work reasonably well.

I don't think that there should be a maximum period within which the court would have discretion to allow a claim, but I think the period that has elapsed since the breakdown of the relationship should be a factor which the court is entitled to take in to account when considering whether to exercise discretion to allow a late claim.

23. Should express provision be made in the 2006 Act to allow parties to agree extension of the time limit to facilitate settlement?

(Paragraph 6.35)

Comments on Question 23

Yes, I think that parties should be able to agree extension of the time limit. That would seem to me to be perfectly sensible and I cannot see a downside.

It should be possible to do this in writing between parties/ their agents.

24. Should express statutory provision be made permitting the court to have regard to the terms of any agreement between the parties as to financial provision on cessation of cohabitation (including opting out of the 2006 Act regime) when deciding what order, if any, to make?

(Paragraph 7.39)

Comments on Question 24

I think that the court should have express statutory power to consider an agreement between the parties but I also consider that there should be an ability to vary or set that aside. I am mainly of this view because a lot of the situations in which agreements are entered in to appear to be where there is a financial disparity between the parties and, for example, one who has been given money by a parent and therefore comes from a wealthier background is looking to protect their investment in a property.

25. Should express statutory provision be made allowing the court to set aside, or vary any term of, a cohabitation agreement? If so, should the test for setting aside or variation be:

(a) that the agreement was not fair or reasonable at the time it was entered into;

(b) that there has been a material change in the parties' circumstances since the agreement was entered into, or

(c) another test (and if so what should that test be)?

(Paragraph 7.39)

Comments on Question 25

See answer to question 24.

If a regime that is the same or similar to that which applies to financial provision on divorce on the basis that parties can contract out of it, then I think that the agreement should only be capable of being set aside in very limited circumstances. I think the test of it being unfair at the time it was entered into would be appropriate, with there also being discretion to disregard or afford limited weight to it where there has been a material change in the circumstances of one or both of the parties relating to the care or welfare of a child only. I do think that there should be discretion to prevent a child being left worse off as a result of the terms of an Agreement executed before they were born or their circumstances were reasonably foreseeable.

As an alternative, the test used in New Zealand of the Agreement being set aside if it would cause "serious injustice" would also seem to me to have the potential to provide certainty in most cases, while offering protection against manifest unfairness.

If the regimes are to remain separate then I think that it may be appropriate for agreements to be afforded limited weight in broader circumstances, to reflect the fact that parties may enter into "cohabitation" agreements in a variety of circumstances with a fairly narrow focus eg on buying their first property.

26. What information or data do consultees have on:

(a) the economic impact of sections 25-28 of the Family Law (Scotland) Act 2006,

(b) the potential economic impact of any option for reform discussed in this Discussion Paper (in particular the impact in terms of tax law of the possibility of extending the remedies available to cohabitants on cessation of cohabitation otherwise than by death to include property transfers/pension sharing/maintenance)?

(c) the potential economic impact upon the SCTS and legal aid budgets of any option for reform discussed in this Discussion Paper, including extension of the time limit for claims and additional remedies?

(Paragraph 9.4)

Comments on Question 26

No information held

General Comments

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27. Scottish Women's Aid

Name: SCOTTISH WOMEN'S AID
Organisation: SCOTTISH WOMEN'S AID
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Introduction

Scottish Women's Aid (SWA) is the lead organisation in Scotland working to end domestic abuse and plays a vital role in campaigning and lobbying for effective responses to domestic abuse. We provide advice, information, training and publications to our 36 member groups and to a wide variety of stakeholders. Our members are local Women's Aid groups, which provide specialist services, including refuge accommodation, information and support to women, children and young people.

Domestic abuse, along with other forms of gender-based violence, is a form of gender discrimination and *"one of the fundamental social, political and economic means by which the subordinate position of women with respect to men and their stereotyped roles are perpetuated*."[10] Domestic abuse affects enjoyment of a range of human rights, including the rights to life, to security of the person, to health, to the equal protection of the law, and the right to a remedy. In some circumstances, domestic abuse may amount to torture or cruel, inhuman or degrading treatment. Governments have the obligation to act protect everyone within their jurisdiction from domestic abuse and other forms of gender-based violence committed by individuals. Governments are required to exercise due diligence to prevent, punish, investigate and redress the harm caused.[11] In all actions concerning children, governments are required to make the best interests of the child a primary consideration[12].

The Discussion Paper focusses on sections 25- 28 of the Family Law (Scotland) Act 2006 which created certain rights for cohabitants: the definition of cohabitant in section 25; the operation of presumptions of equal shares in household property and money in sections 26 and 27; and section 28 providing an opportunity to apply to the court for a financial provision, including support for children on cessation of cohabitation.

Our response focusses on the very specific issues for women, children and young people experiencing domestic abuse that already exist in enforcing their rights under these sections,

[10] 1 UN Committee on the Elimination of Discrimination Against Women (CEDAW), General Recommendation 35 on Violence Against Women, para 10, https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CEDAW/C/GC/35&La ng=en
[11] 2 CEDAW, General Recommendation 35
[12] 3 UN Convention on the Rights of the Child, Article 3, https://www.ohchr.org/EN/ProfessionalInterest/Pages/CRC.aspx

the deficiencies in these provisions as they apply to them and, given the possible unforeseen consequences that may arise when changing definitions, the matters that must be taken into account and incorporated.

We note that, despite the fact that the Family Law (Scotland) Act 2006 has been in force for almost 14 years, there are still misconceptions around the nature and extent of rights. In relation to domestic abuse, there are a number of reasons why women may not be using these provisions, including the fact that they are unaware of their rights under sections 26, 27 and 28 in particular.

- If they have left their abusive partner or have succeeded in having him removed from the home, their immediate thoughts over the next 12 months before the deadline for making a section 28 financial claim expires will likely be devoted to more immediate and urgent legal issues such as civil proceedings to obtain a protective order post-separation, an action to pursue or defend actions around Parental Responsibilities and Rights (PRRs) , contact and residence; issues around tenancy transfer or ownership or protecting their rights to stay in a property, preventing a sale or seeking to have the property sold
- Women may have to find alternative, emergency accommodation at short notice then a more permanent accommodation which takes time, effort and resources
- If there are children involved, there will be additional concerns if the children have had to leave school and move elsewhere
- Where there are criminal proceedings against the abuser, there will be the additional stress and uncertainty around those proceedings
- Throughout all this, the woman may be experiencing ongoing harassment and abuse from the perpetrator because she has left the relationship

Neither SWA, nor, to our knowledge, our network of local Women's Aid groups, are aware of women having sought advice around either enforcing their section 26 and 27 rights or making a section 28 claim. However, we are certainly aware of a case where the abuser has, after the woman ended the relationship, used the provisions of section 28 to bring an action against the woman for payment of a substantial capital sum in excess of £100, 000.

These actions, are a form of economic abuse[13] , which in the context of domestic abuse "…*is designed to reinforce or create economic instability. In this way it limits women's choices and ability to access safety. Lack of access to economic resources can result in women staying with abusive men for longer and experiencing more harm as a result."* Up to 90% of domestic abuse survivors cite having experienced economic or financial abuse by their intimate partner[14].

Economic abuse is recognised in the new Domestic Abuse (Scotland) Act 2018, and, therefore, this behaviour can attract criminal penalties. However, it remains a lesser known form of domestic abuse and often goes unidentified despite its serious and long-lasting consequences for the survivor. As it stands, section 28 does not recognise economic abuse and facilitates perpetrators of domestic abuse in maliciously raising actions, either to coerce the woman into

[13] T*he Domestic Abuse Report 2019: The Economics of Abuse*https://www.womensaid.org.uk/research-and-publications/the-domestic-abuse-report/

[14] What's yours is mine: The different forms of economic abuse and its impact on women and children experiencing domestic abuse http://www.refuge.org.uk/files/Whats-yours-is-mine-Full-Report.pdf

returning to the abuser, or in the knowledge that in defending the action, the woman will be obliged to incur substantial legal costs, and further, often serious economic disadvantage to her and her children, a clear continutation of the abuse.

There is a clear need for specific reform of these sections to protect women experiencing domestic abuse. We will discuss this further under the specific questions below but a summary of our position is as follows:

- **Section 25**
    - the definition of definition of “cohabitant” is inconsistent and not in line with that across numerous other pieces of legislation which are important because of the protection they give women children and young people experiencing domestic abuse;
    - We do not support the introduction of a registration system for cohabitants

- **Sections 26 and 27**
    - the presumption of “equal shares” in household good, money and property in these sections does not result in equality in practice for women experiencing domestic abuse

- **Section 28**
    - we agree that it 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.
    - Any “list of relevant factors” that should be taken into consideration by the court should appropriately consider women’s economic disadvantage, and domestic abuse, but subject to the caveat we discuss.
    - There is no explicit provision for the vulnerability of the parties or the conduct towards one another that would explicitly allow domestic abuse and coercive control to be considered by the court to both prevent malicious claims by perpetrators and support claims by women experiencing economic abuse. This must be incorporated into any revised section
    - The definition of child is not consistent with that in other legislation
    - Extending the time limit for making a claim has pros and cons for women and children experiencing domestic abuse
    - Overall, the operation of any revised section would also benefit from Guidance or a statement of guiding principles around factors that must be taken into account,
    - We do not consider that cohabitation agreements should be either promoted or recommended as a routine mechanism for regulating use of the section 28 claims for financial provision
    - We also consider that a claim of unjust enrichment should be available to counter a claim made under section 28.
    - We recommend that both an Equalities and Human Rights Impact Assessment and a Child Welfare Rights Impact Assessment be carried out in relation to any proposals subsequently put forward

1. Should the regime for financial provision for cohabitants on cessation of cohabitation otherwise than by death remain separate from that for spouses and civil partners on divorce and dissolution?

(Paragraph 2.66)

Comments on Question 1

The consultation compares the financial provision for spouses and civil partners on divorce or dissolution under the Family Law (Scotland) Act 1985 where either party to apply to the court for an order for the payment of a capital sum, for the transfer of property, the making of a periodical allowance, a pension sharing order, certain other orders relating to pensions or otherwise with section 28 of the 2006 Act. This allows for a capital sum, a sum for the "economic burden of caring for a child of whom the cohabitants are parents, 8 or an incidental order within the meaning of section 14(2) of the 1985 Act.
The 2010 report from the CRFC noted that *"…the (2006) Act does not set out to afford to cohabitants the same rights and protections in this field as divorce and succession law afford to spouses and civil partners, but instead aims to create a middle way between the protection afforded to spouses and civil partners and no protection at all*[15]*"* In 2006, Ministers sought to provide safeguards, not a parallel system.

We note the comment in paragraph 2.18 that *"…many respondents to the SLC Tenth Programme consultation preceeding this Discussion Paper questioned the justification and rationale of maintaining separate regimes*" for financial provision on cessation of cohabitation that for spouses and civil partners on divorce and dissolution.

In relation to introducing further legal intervention, the consultation is correct to note, at paragraph 1.32 that the recommendations in the 1992 Report are now 28 years out of date, during which time, the 2006 Act was passed. Additionally, as noted in paragraph 1.33, cohabiting parties may be doing so because they wish to retain autonomy and do not wish the symbolism of a marriage and that many people will have chosen to do this because there is no formality of registration of the relationship, no religious connotations or considerations needed to begin or end cohabitation, unlike marriage and there are no automatic rights and obligations that arise for cohabitants when this begins, again, unlike marriage. However, this is not to say that cohabiting relationships are any less stable, committed, have a less enduring family life or financial commitment, engagement and sacrifice.

The issue, as the consultation states, is the extent to which Government should impose marriage-like rights and obligations on cohabiting couples who have deliberately chosen not to marry and the need to strike a balance between protecting cohabiting ouples in Scotland while avoiding creating a framework that interferes.

We are unable to come to any firm conclusion on the nature of the regime that should be in place on the cessation of cohabitation and whether the law as regards cohabitants and spouses

[15] Report on Legal Practitioners' Perspectives on the Cohabitation Provisions of the Family Law (Scotland) Act 2006, October 2010 by Fran Wasoff (Centre for Research on Families and Relationships, the University of Edinburgh), Jo Miles, (Trinity College, University of Cambridge), Enid Mordaunt, (Centre of Research on Families and Relationships, the University of Edinburgh), available at: http://www.crfr.ac.uk/assets/Cohabitation-finalreport.pdf

should move closer together, particularly in relation to financial provision on cessation and whether this should more mirror the provisions of the Family Law Act 1985. However, the important issue for SWA is the impact of imposing legal obligations that could be used against women who have experienced domestic abuse, as opposed to supporting and protecting them and this must be a serious consideration.

While a regime that would provide the opportunity to have financial support for children of the relationship is attractive, we know from those actions already where women are attempting to seek financial provision and division of assets on divorce, that perpetrators are very able to conceal assets and information on these assets , and this is likely to be replicated in any actions raised by women to seeking financial orders, splitting of pensions, etc on cessation of cohabition.

Formalisation of financial support for children of the relationship could be exploited by perpetrators and made contingent upon the woman agreeing to post-separation child contact when this is unsafe for the children and woman.

The biggest concern, however, is that perpetrators would use, or threaten to use, any automatic rights to seek financial provision on cessation of cohabitation against women themselves, as we are seeing currently, as a way to continue the abuse or prevent women from leaving. The spectre of a long and drawn-out legal action by a perpetrator seeking to destroy the woman's future financial independence and security and the legal costs of defending such an action would be an added burden to women.

2.Should the definition of cohabitant in section 25 of the 2006 Act be amended?

(Paragraph 3.101)

Comments on Question 2

The Justice Committee in their 2016 post-legislative consideration of the 2006 Act noted that evidence given to them suggested that the definition of "*cohabitant was vague and/or circular*; *the need for a firmer definition (which might include a minimum qualifying period) against the need for flexibility to accommodate the wide range of relationships and circumstances that exist in reality; that the definition was not consistent with definitions of the same term in other legislation*." They went onto conclude "*Overall, we were left with the impression that the definition is not perfect but appears not to have created significant problems in practice. Any future Scottish Government review of the law on cohabitation (or of adult relationships in general) should certainly take the opportunity to consider whether the definition provided in the 2006 Act is optimum."*

As paragraph 3.23 notes, the "…*definition does not take account of couples "living apart together" (ie couples in committed relationships who do not share a single common home; and is inconsistent with that in other legislation.* "

We note the comments in paragraph 3.5 that section 25 of the 2006 Act appears to have been modified by section 4 of the Marriage and Civil Partnership (Scotland) Act 2014, defining "cohabitant" by reference to persons living together as if they were spouses, whether same or mixed sex, but not as civil partners and agree that this requires clarification.

The definition of cohabitant under section 25 applying to sections 26 to 29
(1) In sections 26 to 29, "cohabitant" means either member of a couple consisting of—
(a) a man and a woman who are (or were) living together as if they were husband and wife; or
(b) two persons of the same sex who are (or were) living together as if they were civil partners.
(2) In determining for the purposes of any of sections 26 to 29 whether a person ("A") is a cohabitant of another person ("B"), the court shall have regard to—
(a) the length of the period during which A and B have been living together (or lived together);
(b) the nature of their relationship during that period; and
(c) the nature and extent of any financial arrangements subsisting, or which subsisted, during that period.

The definition of "cohabitant" is inconsistent and is different across numerous pieces of legislation (such as the Domestic Abuse (Scotland) Act 2018; Domestic Abuse (Scotland) Act 2011; Matrimonial Homes (Family Protection) (Scotland) Act 1981 and Housing (Scotland) Acts, 2001, 2006 and 2010, respectively) which are important because of the protection they give women, children and young people experiencing domestic abuse**. The legislation we refer to is listed in Appendix One at the end of this paper**

Therefore, any reform to the definition in the 2006 Act must be considered for its potential to influence the change of definition in other relevant legislation is definition cannot disadvantage them, dilute their existing rights, prevent them from accessing any existing protections under legislation or prevent them from taking action against a perpetrator with whom they are living.

Within this consideration, we would advise that given the demographic change and increase in numbers of women owning their own home in their name or having sole tenancies, this is particularly relevant where any change would potentially tinker with the definition of cohabitant in the Matrimonial Homes (Family Protection) (Scotland) Act 1981, as this would endanger women, undermine their rights and make it much harder, financially and legally, to remover an abuser from the woman's home.

The consultation also refers to the CEFL principles that reject the term "cohabitation" as being "outdated and old-fashioned",using instead the term "de facto" union but that term is likely to cause more confusion and we do not see merit in using it in the Act.

3. If consultees think the definition should be amended, should the comparison with spouses be removed in favour of a description of the nature of the relationship, such as "enduring family relationship", "genuine domestic basis", or something else?

(Paragraph 3.101)

Comments on Question 3

Firstly, since both the Domestic Abuse (Scotland) Act 2018 and The Abusive Behaviour and Sexual Harm (Scotland) Act 2016 both define partners and ex-partners as (a)spouses or civil partners of each other,(b)living together as if spouses of each other, or (c)in an intimate personal relationship with each other we would not support the removal of the term "spouse" unless it

was clear that there would be no unforeseen consequences to the operation of these pieces of legislation.

The consultation notes that the Commission considered the definition of cohabitant in 2009 and suggested a two stage process to establish surviving cohabitants' rights on death was recommended. Various factors appear to have been suggested. Paragraph 3.30 notes that case law suggests "*some element of stability is required as well as features of co-dependent lives (such as a couple having some degree of linked finances, socialising and holidaying together). While living together is not on its own sufficient to establish that a couple are cohabitants, it is also not necessarily required (given modern relationships, including marriages, can involve couples living apart together). "… public recognition of the parties as a couple is important."*

We are unable to comment on a final definition but would say that it is not clear how an "*enduring family relationship*",would be interpreted in relation to claims under the Act since the terminology is drawn from the Adoption and Children (Scotland) Act 2007 and is used for the quite different purpose of child adoption as opposed to financial provision. We also note in paragraph 3.37 that *Professor Kenneth Norrie is of the opinion that the words "enduring family relationship" add little of substance to the requirement of living together as if husband and wife or civil partners, apart from to emphasise the need for stability."*

We also note, from paragraphs 3.53- 3.56, the difficulties caused by the use of the expression "*genuine domestic basis*" in section 4AA of the Australian Family Law Act 1975 and this would be best avoided.

4. **If the comparison with spouses is to be removed, should the legislation expressly provide that couples within the forbidden degrees of relationship to each other will be excluded?**

(Paragraph 3.101)

Comments on Question 4 -No comment

5. Should a qualifying period of cohabitation be introduced in order to access remedies under the 2006 Act? If so:

(a) how long should that qualifying period be?

(b)should the qualifying period be different, or removed altogether, if the parties have children?

(**Paragraph 3.101)**

Comments on Question 5

No- There should be no qualifying period as this would be entirely arbitrary, judging from the requirements in other jurisdictions, which appears to specifiy qualifying periods ranging from six months to five years, with no clarity as to how and why the figure was set and whether, in practice, it made the process simpler and clearer for applicants and the courts.

Paragraph 3.25 also observes that stakeholders commented that the absence of a qualifying period had not been an issue in practice.

Where children are concerned, the matter should be that the sections operate for the benefit and financial protection of children as opposed to children being used as a yardstick to measure whether or not the relationship is established.

6.Would the response to Question 5(a) or (b) change if the remedies available to former cohabitants were extended?

(Paragraph 3.101)

Comments on Question 6 - No comment

7. Would the definition of cohabitant be improved by the introduction of a list of features characteristics to be taken into account in deciding whether the parties are cohabitants? If so, what features or characteristics should be included?

(Paragraph 3.101)

Comments on Question 7

We would also refer to our comment on question 3 above. The problem with a list of characteristics is that they can be vague, nebulous and as stated in paragraph 3.60**,** "rather subjective."

The consultation notes that the Commission considered the definition of cohabitant in 2009 and suggested a two stage process to establish surviving cohabitants' rights on death was recommended and other factor appear to have been suggested.

However, judging by judicial interpretation of the lengthy lists of characteristics used in several other jurisdictions, long lists on the face of legislation are not helpful. Perhaps the best approach would be for the judiciary or the Scottish Government to issue guidance on how the courts interpret section 25, including case law.

8. What are consultees' views on the introduction of a registration system for cohabitants?

(Paragraph 3.101)

Comments on Question 8

We do not support any such system, noting that the consultation also records that those jurisdictions with this system record low uptake, and agree with the comments in paragraph 3.60 that **"** *, cohabitation by its very nature is an informal arrangement and those who enter into it will often do so quite deliberately to avoid formality. There is also a concern that the most vulnerable cohabitants, who by definition are most likely to be in need of protection, are least likely to formalise their relationships by way of registration. That may be due to factors such as lack of awareness or power imbalances within the relationship."*

We also note that this was rejected in the 2006 Act since it was felt that the system would be *"…costly, cumbersome and inappropriate as a mechanism for the delivery of a policy intention that focuses on protecting the vulnerable on the termination of a relationship rather than on the existence of the relationship itself. It would be unlikely to result in all cohabiting couples registering their relationship, leaving a significant number of cohabiting couples and their children without sufficient legal protection. A significant additional complication would be where one party – or even both parties - to a cohabiting relationship had not dissolved marriages to previous partners. That situation could not easily be reconciled with a system of formal registration*." .

9. Do sections 26 and / or 27 cause any difficulty in practice?

(Paragraph 4.34)

Comments on Question 9

As stated above, we are not aware of women having made claims under these sections or having used them in relation to splitting of assets when the relationship ended. However, the presumption of "equal shares" does not result in equality in practice for women experiencing domestic abuse since by the nature of economic abuse, their resources will have been disproportionately used by the perpetrator for his own purposes or to meet the household expenses, while perpetrator has not used his own resources, income, savings, etc to do so.

There is also the issue of "prior resources", such as savings, that were introduced into the relationship, as opposed to being amassed during this period being included in the "pot". women will be disadvantaged if such resources were pooled and brought into some consideration of equal shares when the reality is that these were not joint resources.

10. Should the language in sections 26 and / or 27 be modernised?

(Paragraph 4.34)

Comments on Question 10 Yes- it is outdated

11. Should sections 26 and / or 27 be modified in some other way?

(Paragraph 4.34)

Comments on Question 11

There is a potential issue around evidence for women experiencing domestic abuse in relation to any "test" to determine which of the parties "shouldered the burden" of household expenses, etc.

Perpetrators may have paid these in their name but using women's money and income, so while the position appears that the perpetrator has unequally been responsible for household

expenses and therefore, on the face of it, should be recompensed equally, the reality is that he has not. This test would therefore not be appropriate.

12. Should the policy underpinning awards for financial provision for former cohabitants, where cohabitation ends otherwise than by death, be:

(a) compensation for economic loss sustained during the relationship;
(b) relief of need:
(c) sharing of property acquired during the cohabitation;
(d) sharing the future economic burden of child care;
(e) a combination of any or all of (a) to (d) above; or
(f) something else?

(Paragraph 5.69)

Comments on Question 12

As a general point, it is positive that women who have been in cohabiting relationships and who have been disadvantaged through sacrificing careers and employment/income opportunities to undertake all or most of childcare responsibilities, including related costs and/or support a partner's career, education, business development, etc are able to make a claim for financial provision.

We note Engender's comment at paragraph 5.31 and agree that the provision should take account of the the economic and social burden of being a primary carer, given that this economic and social role has a disproportionate impact on women .

However, section 28 is cumbersome, confusing, complex, unclear in its interpretation, certainly to non-lawyers and 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. It is not clear whether it is considering past, present and/or future disadvantage to one party or the need of contributions from the other

The definition of child is not consistent with that in other legislation and we note the comments in paragraphs 5.28 and 5.29 that there is a difference in approach between the 2006 Act and the Family Law (Scotland) Act 1985: the definition of children in the 2006 Act is narrower, the purpose of the award is not stated and there is no checklist of factors to be considered.

Given the Scottish Government's commitment to advancing the rights of children and the work around incorporation of the UNCRC, further work is needed to consider definitions, the position of children in relation to financial awards for a child's future care and the "caring " responsibilities.

It is not clear how an award would be assessed in relation to being both "compensation" for time and costs devoted to childcare during the period of cohabitation, and for future time and costs, and how this interacts with legislation elsewhere around financial obligations for child support.

13. For the purposes of financial provision for former cohabitants, should any distinction be made between a child of whom the cohabitants are parents and a child who is or was accepted by the cohabitants as a child of the family?

(Paragraph 5.69)

Comments on Question 13

No- all children of the relationship should be protected. Any subsequent Report on the findings from this exercise and recommendations must include both an Equalities and Human Rights Impact Assessment and a Child Welfare Rights Impact Assessment on the position of, and implications for, children in any reform.

14. Should the test for determining what order, if any, the court may make for financial provision on cessation of cohabitation otherwise than by death be based on fairness and reasonableness, having regard to all the circumstances of the case, including a list of relevant factors such as:

(a) the financial and non-financial contributions made by each party to the relationship, including the contribution made by each party to the care of the family and the family home;
(b) the effect of the cohabitation upon the earning capacity of each of the parties;
(c) the parties' respective needs and resources;
(d) relief of financial hardship caused by the cohabitation or the end of the cohabitation;
(e) a combination of any or all of (a) to (d) above; or
(f) something else?

(**Paragraph 5.69)**

Comments on Question 14

In relation to the extent of litigation brought under section 28, the consultation paper itself admits as paragraph 1.15 that this is not easily discovered and goes on to say that the Scottish civil justice statistics available and analysed "… *do suggest that relatively few claims under section 28 are litigated"*, suggesting that this might be due to a lack of public awareness of the legislation, or the complexity and inaccessibility of the provisions. However, there is also the unexplored option that the provisions are under used because claims are not litigated.

An award that will essentially restore her financial position and make some redress toward the financial abuse perpetrated against her and her children will go some way toward supporting women and restore their agency.

However, the drawback to this is that since the courts are able to make substantial financial awards that have long-term financial implications for the parties, an award against a woman in terms of a spurious s28 claim made by a perpetrator will diminish her opportunities to rebuild her own and her children's lives after the abuse and will continue to tie her to the perpetrator

for life. As mentioned abive, in relation to domestic abuse, with reference to paragraph 5.75, section 28 leaves women open to spurious claims as a manifestation of economic abuse

We would call for a redraft of the section and agree with the conclusions in paragraph 5.62 and note 5.65.

We agree with paragraphs 5.32 and 5.34 that the section when redrawn would also benefit from Guidance or a statement of guiding principles around factors that must be taken into account, such as domestic abuse, noting that "evidence" of the existence of such abuse will not solely revolve around reports to the police, prosecution or conviction

We note that there is discussion around a "list of relevant factors" that should be taken into consideration by the court but our support for this depends on what these "factors" are, how they are worded, how they appropriately consider women's economic disadvantage, and domestic abuse.

We are not confident that the list set out in the question above would allow the court to effectively scrutinise the assets of perpetrators and the nature of abuse and behaviour of the perpetrator may allow them to conceal assets, misrepresent their own and the woman's financial position and to conceal assets, with specific reference to the following:

- Although the Scottish Government intended section 28 to protect those who are financially vulnerable (paragraph 5.16), we note and echo the Justice Committee's concern (paragraph 5.14) that there is no requirement of consideration of the "vulnerability" of the parties. There is no meaningful test within the section to identify and protect "economically vulnerable cohabitants" and therefore to identify women experiencing domestic abuse both when they are making claims against perpetrators or, crucially, when perpetrators are making vexatious and malicious claims against women as a further continuation of the abuse. "Vulnerability" could relate to domestic abuse or a protected characteristic under the Equality Act 2010 and this factor has not been explored in the Discussion Paper and, indeed, does not seem to be an explicit consideration in other jurisdictions.

- The issue with former cohabitants seeking award for financial provision under section 28 is how this process operates in relation to women experiencing domestic abuse and the potential it presents for perpetrators to carry out further and sustained economic abuse. The section therefore needs revisiting in terms of the operation of the Domestic Abuse (Scotland) Act 2018 and the wider and more finessed understanding of the dynamics of domestic abuse that has developed since 2006, particularly coercive control and how that is perpetrated through economic and financial abuse against women, children and young people.

- The conduct of the parties toward one another must be a mandatory consideration in any test and consideration of this cannot be left to judicial discretion- see paragraph 5.47. A test based on which of the parties participated most in the "management of the household and carrying out of household" . as mentioned in paragraph 5.51, could actually operate against women experiencing domestic abuse since the operation of coercive control involves the perpetrator controlling every aspect of the woman's life. Therefore abusers would be able to argue that they had taken on this

responsibility when in fact, it was exclusionary behaviour designed to deny women access to money, resources and information.

- In relation to any test, with a "fairness test" the question is how this would be framed and also interpreted, particularly toward women and children experiencing domestic abuse, given that the courts' identification and understanding of domestic abuse is not fully developed and women's legal representatives will require to be fully conversant with such matters in order to ensure that a claim is made and properly framed.

- " Fairness, reasonableness and having regard to all the circumstances of the case" should include whether or not domestic abuse is alleged and this should be a defence for a women against a perpetrator making a spurious and vexatious claim against his former partner for the sole purpose of continuing the abuse and occasioning financial hardship

- The test could also be framed in terms of whether an award would be "just and equitable" as it would be inequitable if this resulted in women being penalised through the courts making awards in favour of perpetrators due to a lack of understanding of the reality of the claim; therefore, any such test will require guidance and explicit discussions and reference to domestic abuse. We also note paragraph 5.46 and the question of the presumption of "equality" between the parties and that this starting point might disadvantage women, particularly where resources have not been pooled and perpetrators have kept their own and/or used women's or the parties have not, in fact, agreed that they would financially support one another during the relationship.

- We have noted above that it is not clear whether section 28 award is considering past, present and/or future disadvantage to one party or the need of contributions from the other. This could be an issue in cases involving domestic abuse where the perpetrator, in mitigation of any future financial award against him, particularly in relation to a child, "offers" or "undertakes" to provide support for the child while in reality having done nothing whatsoever to provide for the child's upkeep and welfare during the relationship, their behaviour having, in fact, actually acted to the contrary disadvantage of the child, their welfare and best interests.

15. Are the remedies available to the court on an application for financial provision by a former cohabitant adequate and sufficient? (Paragraph 5.92)

16. If not, should the remedies be extended to include:
(a) transfer of property;
(b) pension sharing;
(c) periodic payments for a period after the end of the cohabitation, sufficient to relieve short term financial hardship; or
(d) something else?

(Paragraph 5.92)

Comments on Question 15 and 16

With reference to paragraphs 5.76 and 5.78, an order to transfer property may disadvantage women and encourage perpetrators to make spurious claims. – it is possible that the property is in the woman's sole name and she has been responsible for meeting all the relevant costs relating to the property , and other "household costs" but the perpetrator represents that it has been himself responsible for these expenses and seeks a transfer of the property.

Similarly, the property could be registered in the sole name of the perpetrator and while he claims that he had paid all the household costs and expenses, these have, in reality, been paid from the woman's income or financial assets.

Such claims could also be made against women's pension schemes and we would object to this for similar reasons.

The position of children is an important consideration in relation to property issues and any reform of the section should consider provisions protecting children and their right to a home, similar to the provisions in the Matrimonial Homes legislation.

17. Should express provision be made requiring or permitting the court to consider the resources of the former cohabitants in deciding what order, if any, to make for financial provision?

(Paragraph 5.92)

Comments on Question 17

We are not sure how this would operate in practice, particularly where women bought their own existing savings, etc into relationship and would not want this to operate to the disadvantage of women experiencing domestic abuse whose resources were greater than that of the perpetrator**.**

18. Should the one year time limit for making a claim under section 28(2) of the 2006 Act be extended?

(Paragraph 6.35)

Comments on Question 18

We are not, on balance able to support this proposal. There are pros and cons to extending the time limit:on the one hand, as discussed in paragraph 6.6, extending the limit would offer women experiencing domestic abuse the opportunity to consider a claim against the abuser once she had dealt with the more immediate and urgent matters of accommodation, protective orders, issues around childen, etc, and could give her the opportunity for redress against the perpetrator for economic abuse she suffered.

However, the negative side is that an extention would also facilitate the perpetrator being able to essentially continue the abuse for several years after the woman had left: the perpetrator

could hold the threat of a making a claim over the woman to prevent her leaving, reporting to the police, or as a lever to demand child contact or residence.

Women would have several years of worry not knowing whether or not she would be forced to defend a claim for a substantial sum of money and the potential diminuation of her assets in defending an action or if an award is made, and the implications of both of these. This would delay women and children's recovery from the abuse and only serve to prolong the trauma experienced by them.

It would therefore be imperative that one of the considerations for the court in considering a claim is the vulnerabilities of the the pursuer; whether one of the parties is or was subject to allegations of domestic abuse and that the claim was being made for recompence of money taken from, or denied women as consequence of the abuse.

There is a suggestion that the test should be whether it would be appropriate to allow a late claim but it is not clear what would be considered "appropriate", particularly where domestic abuse is an issue and may not be picked up by the court. We would refer to our comments above in relation to the time limit as these are relevant when considering late claims

The Discussion Paper explores whether it should be open to the parties themselves to agree an extension, in paragraphs 6.9 and 6.34 but this process is open to misuse due to domestic abuse and the perpetrator coercing women into agreeing that he should be able to make a late crime.

A further comment is that there should be no referral to mediation in the event of a late claim- the use of mediation in domestic abuse is not recommended and the process could be manipulated by perpetrators to the disadvantage of the women.

Overall, we would suggest that a better option is improved publicity around cohabitants' rights. The Act has been in place since 2006 and it is perplexing that these provisions are not better known. Therefore, the Scottish Government and the legal profession should work to raise and improve awareness of these provisions for cohabiting couples.

19. **If the time limit is extended, what should the new time limit be?**

(Paragraph 6.35)

Comments on Question 19 See answer to Question 18

20. If the time limit is extended, should the court be afforded discretion to allow late claims?

(Paragraph 6.35)

Comments on Question 20

We would reiterate our response to Question 18. The court would have to carefully consider the reasoning behind the claim and whether it was vexatious and malicious and there must be a test to identify late claims that are spurious, unjust and unfair. Again, there is a suggestion

that there should be a test the court can apply to consider whether it would be appropriate to allow a late claim but it is not clear what would be considered "appropriate", particularly where domestic abuse is an issue and may not be picked up by the court.

Given that the court would have discretion whether to allow a late claim, and an understanding of domestic abuse is needed,it is important that there is solid test that explicitly requires the court to look behind the circumstances of a late claim.

21. If the time limit is <u>not</u> extended, should the court be afforded discretion to allow late claims?

(Paragraph 6.35)

Comments on Question 21

See our response to Questions 18 and 20 above

22. If the court is afforded discretion to allow late claims:

(a) should the test for the exercise of discretion be "on cause shown", "in exceptional circumstances" or something else?
(b) should there be a maximum period (backstop) beyond which no claim may competently be made?

(Paragraph 6.35)

Comments on Question 22- See our comments in response to Questions 21, 20 and 18 aove

23. Should express provision be made in the 2006 Act to allow parties to agree extension of the time limit to facilitate settlement?

(Paragraph 6.35)

Comments on Question 23

We have concerns that the perpetrator could manipulate the process using threats and coercion to force the woman into agreeing the extention of the time limit. If any such provision is introduced, there must be an accompanying provision to the effect that the court must overturn any such agreement where a vulnerable party has been exploited, the agreement is not fair on inequitable, would disadvantage one of the parties or domestic abuse is an issue.

24. Should express statutory provision be made permitting the court to have regard to the terms of any agreement between the parties as to financial provision on cessation of cohabitation (including opting out of the 2006 Act regime) when deciding what order, if any, to make?

(Paragraph 7.39)

Comments on Question 24

We do not consider that cohabitation agreements should be either promoted or recommended as a routine mechanism for regulating use of the section 28 claims for financial provision.

The dynamics of coercive control are such that agreements of this type are open to misuse by perpetrators who would be able to force women into signing agreements that waived women's rights to moveable and heritable property and her right to make claim under s.28.

Moreover, they could also operate to have the woman "voluntarily" sign over to the perpetrator all or specific items from either or both of the woman's personal assets or the joint, moveable assets and money, and could contain an "advance agreement" on any financial settlement under s 28 that the woman would make to the perpetrator on cessation of the cohabitation.

As stated in paragraph 7.16, women could be coerced into agreements of this sort which could also be "held over her" as a threat to prevent her leaving or disclosing the abuse.

25. Should express statutory provision be made allowing the court to set aside, or vary any term of, a cohabitation agreement? If so, should the test for setting aside or variation be:

(a) that the agreement was not fair or reasonable at the time it was entered into;
(b) that there has been a material change in the parties' circumstances since the agreement was entered into, or
(c) another test (and if so what should that test be)?

(Paragraph 7.39)

Comments on Question 25

Yes- as stated above, women experiencing domestic abuse would require specific protection to ensure that the court could challenge the fairness and reasonableness of the agreement, the circumstances under which it was entered into, the content and then set aside the contract.

The court must be able to consider that the agreement was entered into not only as a consequence of domestic abuse but also fraud, deception and capacity issues, as discussed at paragraph 7.36, such as taking advantage of a woman's learning disability or language barrier.

We would agree with paragraph 7.25 that even if the woman had obtained independent legal advice and the agreement was duly witnessed, the court must be able to still set it aside on the grounds of serious injustice.

We also consider that a claim of unjust enrichment should be available to counter a claim made under section 28.

26. What information or data do consultees have on:

(a) the economic impact of sections 25-28 of the Family Law (Scotland) Act 2006,

(b) the potential economic impact of any option for reform discussed in this Discussion Paper (in particular the impact in terms of tax law of the possibility of extending the remedies available to cohabitants on cessation of cohabitation otherwise than by death to include property transfers/pension sharing/maintenance)?

(c) the potential economic impact upon the SCTS and legal aid budgets of any option for reform discussed in this Discussion Paper, including extension of the time limit for claims and additional remedies?

(Paragraph 9.4)

Comments on Question 26

Although this Chapter indicates that the Report following this Discussion Paper will be accompanied by a Business Regulatory Impact Assessment, there is no mention that an Equalities and Human Rights Impact Assessment or a Child Welfare Rights Impact Assessment will also be carried out. Given the potential impact on women and children of any reforms proposed by the subsequent Report, particularly the suggestion that they could result in an increase in the use of mediation, we consider that the proposals should be accompanied by both of these additional Assessments

General Comments We look forward to the Report and would be happy to assist the Commission further with their work on these important issues

Appendix 1- List of definitions of "cohabitant" within leglisation relevant to domestic abuse

- **Domestic Abuse (Scotland) Act 2018-** the offence under s.1 of the Act and the aggravator under the **The Abusive Behaviour and Sexual Harm (Scotland) Act 2016** both define partners and ex-partners as *(a)spouses or civil partners of each other,(b)living together as if spouses . of each other, or (c)in an intimate personal relationship with each other*
- ***Domestic Abuse (Scotland) Act 2011-*** 3(2)(c) " *living with the applicant as if they were husband and wife or civil partners, or (d)in an intimate personal relationship with the applicant."*
- **Matrimonial Homes (Family Protection) (Scotland) Act 1981**
  - **section 18** – for the purposes of setting out the rights of cohabiting parties to apply for occupancy rights, this definies cohabitants at 18(1*) as a man and a woman living with each other as if they were man and wife or two persons of the same sex are living together as if they were civil partners.* Subsection (2) gives further matters that the court must take into account in determining whether the parties were cohabiting, including (*a)the time for which it appears they have been living together; and (b)whether there is any child (i)of whom they are the parents; or (ii)who they have treated as a child of theirs.* Crucially, this section also extends cohabitants' rights to sections sections 2,3,4,5 and 13, which includes the right to

apply for an Exclusion Orders under the Act and other rights otherwise available to spouses

- **Section 18A**- Section 31 of the Family Law (Scotland) Act 2006 amended section 18 by incorporating section 18A and the concept of "domestic interdicts" which applies to unmarried cohabitants, either opposite-sex or same-sex, having much the same effect in relation to cohabitants as matrimonial interdicts have for married couples with similar scope. It can be applied for by persons living with another persons ".. as if they were husband or wife or civil partners and may prevent abusive behaviour against an adult or "…*any child in the permanent or temporary care of the pursuer…" in addition to preventing the abuser* from remaining in or entering the family home, the pursuer's place of work or any other residence occupied by them or *"…any school attended by a child in the permanent or temporary care of the pursuer."*
- The family home is defined as being for a "… child of the pursuer and the defender" further specified as including "…*any child or grandchild of the pursuer or the defender, and any person who has been brought up or treated by the pursuer or the defender as if the person were a child of the pursuer or, as the case may be, the defender, whatever the age of such a child, grandchild or person."*

Housing Scotland Act 2001- Section 31;Section 108;Schedule 2, Part 1, para 5;Schedule 2 , Part 1;Schedule 3, para 2- *A person living with that person as husband and wife or in a relationship which has the characteristics of the relationship between civil partners]*

- **Housing (Scotland) Act 2006 -Section 128-** - *a "couple" means two persons who, are married or are civil partners, or live together as husband and wife or, where they are of the same sex,in an equivalent relationship,includes stepchildren , a person brought up or treated by another person as if the person were thatother person's child (including any person placed with that other person,or with that other person's family, under section 26(1)(a) of the Children(Scotland) Act 1995 (c. 36)) is to be treated as that other person's child.*
- **Housing Scotland Act 2010-** *any person living with such a qualifying tenant as if they were the tenant's spouse or civil partner,*

28. Morton Fraser (3 Solicitors – not a Firm response)

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1. Should the regime for financial provision for cohabitants on cessation of cohabitation otherwise than by death remain separate from that for spouses and civil partners on divorce and dissolution?

(Paragraph 2.66)

Comments on Question 1

Yes, cohabitation and marriage regimes should remain entirely separate, for a number of reasons.

First, there is a very clear public perception that in marriage, a couple are making a public commitment to each other which gives rise to legal and other obligations. There is no such general understanding with cohabitation, and it seems very unlikely that even if there were a change to the law, there would be any understanding of this other than by family lawyers and academics.

Second, in attributing the same regime on separation to cohabitation as to marriage, the state would be not just giving "rights" but also imposing responsibilities on those who have not sought them. Why should marital responsibilities be imposed on those couples who may have specifically chosen not to marry or enter into a civil partnership?

Third, although we are not academics and so do not have studies/statistics to quote, it seems to us that the use of cohabitation is very different (in many, but not all, cases) to that of marriage. Cohabitation is often used as a "trial" period before marriage, or for couples where it makes financial sense to move in together, than than being (as marriage is) a public commitment to each other for the rest of their lives. There have been earlier studies which have shown that the average cohabitation is fairly short, ending in either marriage or separation. What studies have the SLC taken into account as to how cohabitation is currently used in Scotland (or the UK generally)? That data would be relevant to this process. In the absence of contrary evidence, our instinct would be that cohabitation remains, in a large number of cases, a quite different form of relationship to marriage.

Fourth (although again we are not academics) most earlier studies which we have seen indicate that cohabiting relationships are considerably more likely to end than marriages. There is an interesting theory (cited by the Marriage Foundation, among others) that a major factor in relationship success is whether a positive decision is made to commit to the relationship, rather than "sliding" into the relationship. In marriage, the positive decision/commitment is clear; in cohabitations, less so. Again, what studies have the SLC taken into account in considering the breakdown rate of cohabitations compared to marriage? If it is the case that marriages are more likely to be a stable form of relationship than cohabitations, there is at least a policy decision to consider as to whether increasing protections for cohabitants would actually have an overall negative effect on family stability. Would it push more couples towards a "sliding" decision into cohabitation, rather than the commitment of marriage? If cohabitation provisions remain lesser than marriage, would it result in the financially weaker party having a weaker set of legal protections?

2. Should the definition of cohabitant in section 25 of the 2006 Act be amended?

(Paragraph 3.101)

Comments on Question 2

The wording for the definition of "cohabitant" is clumsy - but we think nevertheless everyone knows what it means. We'd be reluctant to change it for something which might actually be more confusing.

3. If consultees think the definition should be amended, should the comparison with spouses be removed in favour of a description of the nature of the relationship, such as “enduring family relationship”, “genuine domestic basis”, or something else?

(Paragraph 3.101)

Comments on Question 3

n/a

4. If the comparison with spouses is to be removed, should the legislation expressly provide that couples within the forbidden degrees of relationship to each other will be excluded?

(Paragraph 3.101)

Comments on Question 4

Yes.

5. Should a qualifying period of cohabitation be introduced in order to access remedies under the 2006 Act? If so:

   (a) how long should that qualifying period be?

   (b) should the qualifying period be different, or removed altogether, if the parties have children?

(Paragraph 3.101)

Comments on Question 5

We don't think this is necessary, but this is based on our answers to Q12, 14, 15 etc below.

If much more extensive revision to the 2006 Act is proposed, then yes, a qualifying period may be necessary to access additional provision.

6. Would the response to Question 5(a) or (b) change if the remedies available to former cohabitants were extended?

(Paragraph 3.101)

Comments on Question 6

Yes. See answer to Q5.

7. Would the definition of cohabitant be improved by the introduction of a list of features or characteristics to be taken into account in deciding whether the parties are cohabitants?

If so, what features or characteristics should be included?

(Paragraph 3.101)

Comments on Question 7

Possibly, but (unless it is intended to expand the definition to couples who are not actually living together) the current definition works okay.

8. What are consultees' views on the introduction of a registration system for cohabitants?

(Paragraph 3.101)

Comments on Question 8

We think this would be a waste of time, effort and expense. There is a real risk that hardly anyone would use it. Those who might use it are the ones who already put in place cohabitation agreements and regulate their affairs.

9. Do sections 26 and / or 27 cause any difficulty in practice?

(Paragraph 4.34)

Comments on Question 9

As family lawyers, we have rarely or never used these sections in cohabitation cases in practice.

10. Should the language in sections 26 and / or 27 be modernised?

(Paragraph 4.34)

Comments on Question 10

We don't see that this would make any difference in practice?

11. Should sections 26 and / or 27 be modified in some other way?

(Paragraph 4.34)

Comments on Question 11

See answer to Q10

12. Should the policy underpinning awards for financial provision for former cohabitants, where cohabitation ends otherwise than by death, be:

(a) compensation for economic loss sustained during the relationship;

(b) relief of need:

(c) sharing of property acquired during the cohabitation;

(d) sharing the future economic burden of child care;

(e) a combination of any or all of (a) to (d) above; or

(f) something else?

(Paragraph 5.69)

Comments on Question 12

The policy underpinning financial provision for former cohabitants should remain limited to fixing an economic imbalance at the end of the relationship. Anything further moves to a position closer to remedies on marriage - for the reasons set out in Q1, we don't consider that to be best.

One option, however, would be to have a fallback provision to allow support if one partner would otherwise suffer severe hardship caused by the termination of the relationship.

In terms of how this is phrased, the interpretation of the current statutory wording by the SCt in Gow v Grant has caused considerable confusion and lack of clarity among family law practitioners. It is difficult to advise clients as to reasonable parameters for settlement. We struggle to see how that can be fixed.

13. For the purposes of financial provision for former cohabitants, should any distinction be made between a child of whom the cohabitants are parents and a child who is or was accepted by the cohabitants as a child of the family?

(Paragraph 5.69)

Comments on Question 13

14. Should the test for determining what order, if any, the court may make for financial provision on cessation of cohabitation otherwise than by death be based on fairness and reasonableness, having regard to all the circumstances of the case, including a list of relevant factors such as:

(a) the financial and non-financial contributions made by each party to the relationship, including the contribution made by each party to the care of the family and the family home;

(b) the effect of the cohabitation upon the earning capacity of each of the parties;

(c) the parties' respective needs and resources;

(d) relief of financial hardship caused by the cohabitation or the end of the cohabitation;

(e) a combination of any or all of (a) to (d) above; or

(f) something else?

(Paragraph 5.69)

Comments on Question 14

See answer to Q12

15. Are the remedies available to the court on an application for financial provision by a former cohabitant adequate and sufficient?

(Paragraph 5.92)

Comments on Question 15

No.

16. If not, should the remedies be extended to include:

(a) transfer of property;

(b) pension sharing;

(c) periodic payments for a period after the end of the cohabitation, sufficient to relieve short term financial hardship; or

(d) something else?

(Paragraph 5.92)

Comments on Question 16

The remedies should be extended to include transfer of property, but not pension sharing or periodical payments.

17. Should express provision be made requiring or permitting the court to consider the resources of the former cohabitants in deciding what order, if any, to make for financial provision?

(Paragraph 5.92)

Comments on Question 17

Yes.

18. Should the one year time limit for making a claim under section 28(2) of the 2006 Act be extended?

(Paragraph 6.35)

Comments on Question 18

Yes

19. If the time limit is extended, what should the new time limit be?

(Paragraph 6.35)

Comments on Question 19

We would suggest two years from the end of the relationship would be reasonable. It would provide a longer time period for claimants to get legal advice, while also providing "closure" on potential claims.

20. If the time limit is extended, should the court be afforded discretion to allow late claims?

(Paragraph 6.35)

Comments on Question 20

We don't think this would be necessary if the time limit is extended to two years? Although perhaps an exceptional discretion could be allowed. That would need to be balanced against the need for an end point for potential claims.

21. If the time limit is not extended, should the court be afforded discretion to allow late claims?

(Paragraph 6.35)

Comments on Question 21

Yes.

22. If the court is afforded discretion to allow late claims:

    (a) should the test for the exercise of discretion be “on cause shown”, “in exceptional circumstances” or something else?

    (b) should there be a maximum period (backstop) beyond which no claim may competently be made?

(Paragraph 6.35)

Comments on Question 22

"on cause shown", with perhaps a maximum period of 2-3 years as a backstop.

23. Should express provision be made in the 2006 Act to allow parties to agree extension of the time limit to facilitate settlement?

(Paragraph 6.35)

Comments on Question 23

If the time limit is extended, we don't see as much need for this? Although if a cost-effective and simple means of preserving a claim could be put in place, it would prevent the need for actions to be raised only to be sisted, which is relatively common.

24. Should express statutory provision be made permitting the court to have regard to the terms of any agreement between the parties as to financial provision on cessation of cohabitation (including opting out of the 2006 Act regime) when deciding what order, if any, to make?

(Paragraph 7.39)

Comments on Question 24

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25. Should express statutory provision be made allowing the court to set aside, or vary any term of, a cohabitation agreement? If so, should the test for setting aside or variation be:

    (a) that the agreement was not fair or reasonable at the time it was entered into;

    (b) that there has been a material change in the parties' circumstances since the agreement was entered into, or

    (c) another test (and if so what should that test be)?

(Paragraph 7.39)

Comments on Question 25

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26. What information or data do consultees have on:

    (a) the economic impact of sections 25-28 of the Family Law (Scotland) Act 2006,

    (b) the potential economic impact of any option for reform discussed in this Discussion Paper (in particular the impact in terms of tax law of the possibility of

extending the remedies available to cohabitants on cessation of cohabitation otherwise than by death to include property transfers/pension sharing/maintenance)?

(c) the potential economic impact upon the SCTS and legal aid budgets of any option for reform discussed in this Discussion Paper, including extension of the time limit for claims and additional remedies?

(Paragraph 9.4)

Comments on Question 26

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General Comments

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1. Should the regime for financial provision for cohabitants on cessation of cohabitation otherwise than by death remain separate from that for spouses and civil partners on divorce and dissolution?

(Paragraph 2.66)

Comments on Question 1

The short answer to this question is no.

To expand slightly, the regime enacted in the Family Law (Scotland) Act 2006 is premised upon the policy that the distinctions (of form rather than function) between the relationships of marriage and cohabitation justify the existence of entirely separate regimes for financial provision upon the breakdown of those relationships.

In my view, whether these separate regimes should continue is this the fundamental question at the heart of this Discussion Paper, and indeed represents the fundamental issue with the current regime for financial provision on cohabitation.

The Discussion Paper itself notes that: 'the Scottish Ministers were also clear that marriage has a special place in society and they wanted to preserve its distinctive legal status.' (Para 2.56) Without wishing to question whether there was any justification for that policy distinction

at the time it was made, I suggest that it offers very little justification the continuation of different regimes for the two relationships.

There are two main reasons to support this suggestion, one of which is practical and one of which is normative.

The practical reason is that the current legal regime for financial provision on breakdown of cohabitation is not achieving the objectives that it was designed to achieve. It is poorly understood by the public and it is not being utilised by individuals who are able to access its protections. Without wishing to sound glib, there would not be a reform project regarding a set of legal rules that have been in force for less than 15 years if they were working as had been hoped at the time of their creation.

On the other hand, the regime for financial provision on divorce is seen by a range of stakeholders as effective and functioning well, it is seen as fair and principled (see e.g. Jane Mair, Enid Mordaunt and Fran Wasoff, 'Built to Last: The Family Law (Scotland) Act 1985 – 30 Years of Financial Provision on Divorce' (2016)).

Therefore, in Scots family law we already have a system for financial provision upon the breakdown of relationships that works; we should extend access to that system to cohabitants, instead of trying to design an alternative system to perform the same essential task.

The normative reason is that whatever the formal differences between marriage and cohabitation, the relationships perform the same essential functions within society. As the Discussion Paper notes, there is now extensive academic literature regarding these issues. Therefore, if legal regulation of the financial consequences of those functions is deemed to be appropriate, it is unclear why the form of the relationship should justify a difference in how those consequences are addressed and ameliorated.

In any event, if this issue (that cohabitation is a non-formalised relationship) is considered to be significant within the regime of financial provision, it can be addressed the criteria for eligibility of cohabitants to the regime of financial provision, rather than through the existence of a separate regime.

2. Should the definition of cohabitant in section 25 of the 2006 Act be amended?

(Paragraph 3.101)

Comments on Question 2

The short answer to this question is yes.

The definition of 'cohabitant' in section 25, a member of a couple, 'living together as if they were husband and wife' or 'living together as if they were civil partners' defines cohabitation

by reference to its formalised equivalents (either marriage or civil partnerships), there are two fundamental problems with this.

Firstly, the definition involves a presupposition that married couples (or indeed couples in civil partnerships) live in a certain way that relationships can be compared against. This seems to me to involve a fundamental mischaracterisation of what the statuses of marriage and civil partnership involve. As a result of a series of legal reforms over the course of the 19th and 20th centuries, the law provides relatively few rights and obligations to married couples and it certainly provides no definition of the content of the relationship. As Lord Millett commented (of English law) in *Ghaidan v Godin-Mendoza* [2004] 2 AC 557 marriage, 'need not be loving, sexual, stable, faithful, long-lasting or contented.' (at 588) Therefore, the only factor that can be said to apply to all married couples is the status of their relationship as a marriage, which cohabitants clearly do not have.

Secondly, as the Discussion Paper acknowledges, the comparison withing the definition with formalised relationships is 'unhelpful' (Para 3.94), because it involves a comparison between an unregistered relationship and a registered relationship. The basis upon which this comparison is to be made seems problematic – by its nature those in relationships of cohabitation have not taken the step that result in those relationships becoming marriages.

As well as that, the second part of the section 25 definition, found in s.25 (2), which sets out the factors that 'the court shall have regard to' should also be amended, because as written the relationship between s.25 (1) and s.25 (2) is unclear and moreover, the relative weight to be given to the various factors set out in s.25 (2) (a), (b) and (c) is also unclear.

3. If consultees think the definition should be amended, should the comparison with spouses be removed in favour of a description of the nature of the relationship, such as "enduring family relationship", "genuine domestic basis", or something else?

(Paragraph 3.101)

Comments on Question 3

As said above, I would be in favour of removing the comparison with spouses and civil partners from the definition.

I will presume (based upon Paras. 3.103-3.123 of the Discussion Paper) for the purposes of this question that the definition of 'cohabitation' will continue to involve a distinction based upon the existence of a conjugal or sexual relationship and will not seek to involve other relationships of interdependence and care.

The phrase 'enduring family relationship' is used in the context of applications for 'parental orders' in cases of surrogacy (s.54 (2) (c) Human Fertilisation and Embryology Act 2008). This phrase has not been free from problems as a definition, see e.g. *Re F (Children) (Thai*

Surrogacy: Enduring Family Relationship) [2016] EWHC 1594 (Fam). Briefly put it is far from clear what is meant by 'enduring' and the basis upon which such judgements would be made is inevitably discretionary.

Similarly, 'genuine domestic basis' suffers from the issue of the 'genuineness' of the relationship requiring to be determined by the judge; it is not a definition that holds much appeal to me.

With that said, I am not convinced that is the language of the definition that is important (whether 'enduring family relationship', 'genuine domestic basis' or indeed something else), because each of these are terms that involve significant judicial discretion. Rather I think it is the guidance about the functions and features of the relationship (either within the statutory definition of judicial decisions) that is crucial to any definition of 'cohabitation'.

4. If the comparison with spouses is to be removed, should the legislation expressly provide that couples within the forbidden degrees of relationship to each other will be excluded?

(Paragraph 3.101)

Comments on Question 4

Given the prohibitions on such relationships in marriage, and in the context of the regime for medically assisted reproduction under the Human Fertilisation and Embryology Act 2008, I can certainly see the logic of such a prohibition in the context of cohabitation.

Having said that, personally, I am not sure what the continued function of the forbidden degrees of relationship are in 21st century family law, but I appreciate that this view is outside the scope of this consultation.

5. Should a qualifying period of cohabitation be introduced in order to access remedies under the 2006 Act? If so:

   (a) how long should that qualifying period be?

   (b) should the qualifying period be different, or removed altogether, if the parties have children?

(Paragraph 3.101)

Comments on Question 5

To a large extent, I think that answer to this question depends upon the overarching policy decision regarding whether the separate regime of financial provision for cohabitants is retained.

If it is to be retained (which is not the option that I would favour), then I do not particularly see the purpose of introducing a qualifying period.

6. Would the response to Question 5(a) or (b) change if the remedies available to former cohabitants were extended?

(Paragraph 3.101)

Comments on Question 6

If cohabitants are to be brought within the regime of financial provision on divorce, then I can see the argument for the introduction of a qualifying period (as exists in other jurisdictions, e.g. New Zealand).

I am quite agnostic about whether such a period should be introduced in that circumstance, if it is introduced what length it should be (ultimately any decision on length is almost entirely arbitrary) and if there should be any distinction between couples with and without children.

The reason for my agnosticism is that, I think it is worth being cognisant of the fact that regardless of whether a qualifying period is introduced, the length of the relationship is still a crucial factor in the outcome of financial provision.

The nature of virtually any regime for financial provision (whether one based upon shared property, compensation, redistribution, etc.) is that there will generally be greater awards made in longer relationships, because the parties have developed greater interdependence over the course of that relationship and the nature of the award will reflect that.

Therefore, in spite of how much energy has been devoted to it, this question has always struck me as something of a red herring.

7. Would the definition of cohabitant be improved by the introduction of a list of features or characteristics to be taken into account in deciding whether the parties are cohabitants?

If so, what features or characteristics should be included?

(Paragraph 3.101)

Comments on Question 7

The definition already includes a list of factors in s.25 (2), so I presume that this question means a list of more specific features than those listed in those subsections.

The obvious advantage that such a list would provide is clarity, but this would (naturally) come at with the associated disadvantage of reducing discretion. My view is that which of those is preferred is a policy judgement.

Moreover, there have already been various lists of factors developed and used within the case law; clearly, this could be put on a statutory footing, but my question would be to what end. Is the law reform seeking to limit the potential for judicial discretion in determining cohabitation? If so, that could be achieved much more simply by accepting that a much wider pool of couples have access to the legal regime for financial provision on cohabitation.

To some extent, this reflects my comments in the previous answer; the focus on the definition of cohabitant has always struck me as misguided.

It is my view that a wide and permissive definition would not lead to the problems that many seem to believe, because the substantive rules on financial provision would clearly distinguish between the type and scale of awards available to different couples on the basis of consideration of the sorts of factors that are now being used to provide a definition of the relationship.

In other words, I would prefer to see these issue understood as part of the determination of awards, rather than important to defining and limiting who has access to the legal regime.

8. What are consultees' views on the introduction of a registration system for cohabitants?

(Paragraph 3.101)

Comments on Question 8

I am not in favour of such a registration system

Indeed, I do not particularly understand the point of trying to register cohabitation, which is, by its nature, an unregistered relationship.

This simply seems to me to be an unnecessary complication.

9. Do sections 26 and / or 27 cause any difficulty in practice?

(Paragraph 4.34)

Comments on Question 9

I am not qualified to offer any opinions on this question.

10. Should the language in sections 26 and / or 27 be modernised?

(Paragraph 4.34)

Comments on Question 10

Yes, if it is accepted that the substance of the section should be retained, then I agree with the Discussion Paper's view, that: 'section 27 should now be updated, as the concept of one person in a couple paying the other an allowance for joint housekeeping expenses appears somewhat anachronistic for 21st Century relationships.' (Para 4.33)

11. Should sections 26 and / or 27 be modified in some other way?

(Paragraph 4.34)

Comments on Question 11

My view is that section 26 should be amended to reflect the language of the equivalent (stronger) presumption that applies to married couples in s.25 Family Law (Scotland) Act 1985.

The reasons for this are the same as those I expressed in answer to the Question 1 in relation to providing greater equivalence between married couples and cohabiting couples.

Given its lack of use and its anachronism, I think that there is a fairly strong argument for removing section 27 from the legislative regime (as would also apply to the equivalent provision for spouses in s.26 Family Law (Scotland) Act 1985.

However, if it is not being removed, then as well as any 'modernisation', I think that the effects of the provision should be the same as the equivalent for married couples.

12. Should the policy underpinning awards for financial provision for former cohabitants, where cohabitation ends otherwise than by death, be:

    (a) compensation for economic loss sustained during the relationship;

    (b) relief of need:

(c) sharing of property acquired during the cohabitation;

(d) sharing the future economic burden of child care;

(e) a combination of any or all of (a) to (d) above; or

(f) something else?

(Paragraph 5.69)

Comments on Question 12

Given my answer to Question 1 above, my basic view here is that the regime should be based upon the same policy as that which underpins s.8-17 Family Law (Scotland) Act 1985, given that I would favour a simplified system where the same rules for financial provision applied to cohabitants as applied to married couples.

However, if the ultimate reform intends to retain a separate regime of financial provisions for cohabitants, that does not actually change my answer to this question, because the law should still seek to give effect to the same policy objectives for cohabitants as married couples given the functional equivalence between those relationships mentioned earlier.

13. For the purposes of financial provision for former cohabitants, should any distinction be made between a child of whom the cohabitants are parents and a child who is or was accepted by the cohabitants as a child of the family?

(Paragraph 5.69)

Comments on Question 13

No.

My view is that the current distinction between such children is not justifiable.

Either of the approaches found in s.9 (1) (c) of the Family Law (Scotland) Act 1985 for marriage ('child of the marriage') and civil partnership ('child…accepted by both partners as a child of the family) could easily be applied to cohabiting couples.

14. Should the test for determining what order, if any, the court may make for financial provision on cessation of cohabitation otherwise than by death be based on fairness and reasonableness, having regard to all the circumstances of the case, including a list of relevant factors such as:

(a) the financial and non-financial contributions made by each party to the relationship, including the contribution made by each party to the care of the family and the family home;

(b) the effect of the cohabitation upon the earning capacity of each of the parties;

(c) the parties' respective needs and resources;

(d) relief of financial hardship caused by the cohabitation or the end of the cohabitation;

(e) a combination of any or all of (a) to (d) above; or

(f) something else?

(Paragraph 5.69)

Comments on Question 14

Without wishing to repeat myself unnecessarily, given my previous answers, I would favour cohabiting couples being subject to the principles for determining awards set out in section 9 (1) of the Family Law (Scotland) Act 1985.

15. Are the remedies available to the court on an application for financial provision by a former cohabitant adequate and sufficient?

(Paragraph 5.92)

Comments on Question 15

No.

As the Discussion Paper itself notes: 'the rationale for limiting the orders the court can make for former cohabitants now seems harder to justify.' (Para 5.89)

16. If not, should the remedies be extended to include:

(a) transfer of property;

(b) pension sharing;

(c) periodic payments for a period after the end of the cohabitation, sufficient to relieve short term financial hardship; or

(d) something else?

(Paragraph 5.92)

Comments on Question 16

Given my previous answers regarding having one system of financial provisions, it is self-evident that I would favour the court having access to the full range of options available under section 8 of the Family Law (Scotland) Act 1985 for cohabiting couples.

Indeed, I argue that even if a separate system for cohabitants is retained, it is difficult to see why the type of award(s) that are available should be restricted, given that the nature of separate systems would likely be that the awards themselves would be lesser than those available to divorcing couples.

17. Should express provision be made requiring or permitting the court to consider the resources of the former cohabitants in deciding what order, if any, to make for financial provision?

(Paragraph 5.92)

Comments on Question 17

Yes.

Even if the separate regime is to be retained, for the same reasons as my previous answer, it is difficult to understand why an equivalent provision does not exist for cohabiting couples. Indeed, the Discussion Paper notes that this, 'would be welcomed by most stakeholders' (Para 5.91)

18. Should the one year time limit for making a claim under section 28(2) of the 2006 Act be extended?

(Paragraph 6.35)

Comments on Question 18

Yes.

19. If the time limit is extended, what should the new time limit be?

(Paragraph 6.35)

Comments on Question 19

In general, I am in favour of a longer time limit.

The 'prescriptive period' in section 6 of the Prescription and Limitation (Scotland) Act 1973 is five years; I would have no objection to this time limit being applied to claims after the breakdown of cohabitation.

20. If the time limit is extended, should the court be afforded discretion to allow late claims?

(Paragraph 6.35)

Comments on Question 20

Yes.

There is the potential for unnecessary inequitable outcomes in some factual circumstances if the system has no discretion to allow late claims.

21. If the time limit is not extended, should the court be afforded discretion to allow late claims?

(Paragraph 6.35)

Comments on Question 21

Yes.

Clearly, the shorter the time limit (and the current one-year time limit is comparatively very short), the stronger the arguments in favour of some discretion for allowing late claims.

22. If the court is afforded discretion to allow late claims:

    (a) should the test for the exercise of discretion be "on cause shown", "in exceptional circumstances" or something else?

    (b) should there be a maximum period (backstop) beyond which no claim may competently be made?

(Paragraph 6.35)

Comments on Question 22

(a) I am agnostic on the precise language used in any test for allowing late claims.

With that said, to my mind, it may be useful to adopt an existing test from another statutory context (e.g. those set out in the Discussion Paper at Paras. 6.18-6.21), as there would be a body of existing decisions for the judiciary to draw upon when determining whether to exercise their discretion in future case.

(b) On the issue of a 'backstop' period – I think that this largely depends upon the earlier decision regarding the length of the time limit and the availability of discretion. In general, I am in favour of maximising the availability of claims for former cohabitants.

23. Should express provision be made in the 2006 Act to allow parties to agree extension of the time limit to facilitate settlement?

(Paragraph 6.35)

Comments on Question 23

Yes, this proposal appears to me to be entirely sensible, for the reasons set out in the Discussion Paper at Para 6.34.

24. Should express statutory provision be made permitting the court to have regard to the terms of any agreement between the parties as to financial provision on cessation of cohabitation (including opting out of the 2006 Act regime) when deciding what order, if any, to make?

(Paragraph 7.39)

Comments on Question 24

This is another question where my answer reflects my answer to Question 1 above.

If cohabiting couples were brought within the regime of financial provision on divorce, then clearly those couples would also be brought within the rules regarding agreements in sections 10 and 16 of the Family Law (Scotland) Act 1985.

As well as that, if a separate system of financial provision for cohabitants is retained, my view is that equivalent provisions regarding agreements should be include for cohabitants.

This reflects my views set out above regarding the equivalent functions of the relationships and therefore the equivalence of policy objectives that should underpin any separate regime of financial provision for cohabitants.

25. Should express statutory provision be made allowing the court to set aside, or vary any term of, a cohabitation agreement? If so, should the test for setting aside or variation be:

    (a) that the agreement was not fair or reasonable at the time it was entered into;

    (b) that there has been a material change in the parties' circumstances since the agreement was entered into, or

    (c) another test (and if so what should that test be)?

(Paragraph 7.39)

Comments on Question 25

Yes.

See the reasons expressed in my answer to Question 24.

26. What information or data do consultees have on:

    (a) the economic impact of sections 25-28 of the Family Law (Scotland) Act 2006,

    (b) the potential economic impact of any option for reform discussed in this Discussion Paper (in particular the impact in terms of tax law of the possibility of extending the remedies available to cohabitants on cessation of cohabitation otherwise than by death to include property transfers/pension sharing/maintenance)?

    (c) the potential economic impact upon the SCTS and legal aid budgets of any option for reform discussed in this Discussion Paper, including extension of the time limit for claims and additional remedies?

(Paragraph 9.4)

Comments on Question 26

I am not in a position to provide any information in relation to this question.

General Comments

Very briefly, to restate a point that I made in my answer to Question 1; in my opinion the fundamental question of this Discussion Paper is whether there should continue to be separate regimes for financial provision upon relationship breakdown between cohabiting couples and married couples.

This is the central policy question of reforming the law in this area and to a greater or less extent all of the other issues considered in this Discussion Paper flow from that central decision.

My view, as expressed above, is that separate regimes should not continue and that cohabiting couples should be subject to the regime for financial provision on divorce set out in the Family Law (Scotland) Act 1985.

I appreciate that this may appear to some to be a radical approach to reform, but I believe that it actually represents a simple reform which replaces a set of legal rules that are not fit for purpose with a set of legal rules that are.

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1. Should the regime for financial provision for cohabitants on cessation of cohabitation otherwise than by death remain separate from that for spouses and civil partners on divorce and dissolution?

(Paragraph 2.66)

Comments on Question 1 Whether the regimes should be distinct is a matter of public policy which should be properly debated, rather than relying on social policy developed decades ago and/or relying on current levels of awareness in the population. For reasons of personal autonomy, it may be argued that the state should be slow to impose financial responsibilities on individuals without their active consent to that process. However, even if it is felt that the regimes should remain distinct, it is our view that for reasons of social justice and broad principles of equity that the available remedies and their purposes should be expanded and that steps should be taken to extend and clarify the couples who fall within the scope of the regime.

2. Should the definition of cohabitant in section 25 of the 2006 Act be amended?

(Paragraph 3.101)

Comments on Question 2

Yes.

The more onerous the responsibilities being imposed by the reformed regime, the more important clarity becomes.

3. If consultees think the definition should be amended, should the comparison with spouses be removed in favour of a description of the nature of the relationship, such as "enduring family relationship", "genuine domestic basis", or something else?

(Paragraph 3.101)

Comments on Question 3

The comparison to married couples should be replaced if there is to be a distinct regime for the unmarried/those not in a civil partnership.

We agree that the definition should be amended in favour of a description of the nature of the relationship.

Views differed on the benefits of a more or less prescriptive definition. One option was to make reference to living in an intimate couple relationship with emotional and financial interdependence.

Another option was to favour a less prescriptive definition which focuses on parties who are living in an intimate couple relationship.

It should be noted that, as is the case with the current definition, neither of our possible defintions require full-time, exclusive cohabitation (though we would expect that to be present in the majority of cases where remedies were successfully accessed). In our general comments response we note that we consider that thought could usefully be given to what we call the people who may find themselves within the ambit of the legislation, as the word 'cohabitant' may be unhelpful and/or misleading.

The existing definition in the 2006 Act does not expressly require there to be any exclusivity in the cohabiting relationship. We would not be supportive of any such requirement being introduced. Clarity of thought and a policy decision could usefully be made as to whether those in polyamorous relationships and/or those who are in non-exclusive relationships with a clandestine element should fall within the definition of those who could potentially access remedies. It may be thought that the appropriate course is to have a broad general definition that could encompass both of these categories of relationship. That is obviously distinct from the availability (or not) of remedies for such applicants.

4. If the comparison with spouses is to be removed, should the legislation expressly provide that couples within the forbidden degrees of relationship to each other will be excluded?

(Paragraph 3.101)

Comments on Question 4

It might be useful to exclude specific relationships which are outwith the scope of this legislation.

5. Should a qualifying period of cohabitation be introduced in order to access remedies under the 2006 Act? If so:

   (a) how long should that qualifying period be?

   (b) should the qualifying period be different, or removed altogether, if the parties have children?

(Paragraph 3.101)

Comments on Question 5

No.

The introduction of a qualifying period could cause unfairness in borderline cases which nonetheless fall within the policy aim of the legislative framework.

If a qualifying period is introduced and whatever the definition to be able to access remedies under the legislation, where the parties have a child together then any minimum period should be waived.

6. Would the response to Question 5(a) or (b) change if the remedies available to former cohabitants were extended?

(Paragraph 3.101)

Comments on Question 6

No

7. Would the definition of cohabitant be improved by the introduction of a list of features or characteristics to be taken into account in deciding whether the parties are cohabitants?

If so, what features or characteristics should be included?

(Paragraph 3.101)

Comments on Question 7

It needs to be underscored that simply because someone falls within the category of 'cohabitant' (our earlier comments about whether this is a helpful term refer) does not mean that the court would regard it as appropriate to make orders in their favour. There will be couples who are undoubtedly in a relevant relationship in terms of the legislation (however the definition is framed), but where it may be thought, for example, that the level of dependence/degree of dis/advantage or the circumstaces of the relationship are not such to justify orders being made.

There is one view that because cohabitants are such a diverse group, any list is likely to be very long and even then unlikely to catch them all. Accordingly, if any such list is to be included it ought to be clearly defined as illustrative only.

The alternative view, is that a non-exhaustive list of features or characteristics of the parties relationship with each other may be helpful in allowing parties and the courts to identify those relationships which are such that the court should be able to go on to consider whether remedies under the legislation should be capable of being accessed. Those favouring a non-exhaustive list of factors suggest that consideration of certain factors would assist in identifying those relationships where it would be appropriate that the court could go on to look at whether a legal remedy should be accessible:

- The nature and extent of the parties' financial coexistence;
- Whether the parties were living together and, if so, to what extent;
- The extent to which the parties regarded themselves as a couple;
- The extent to which the parties were viewed by others as a couple;
- The nature and extent of the practical and emotional support given by the parties to each other and third parties (which would include children of the relationship and children accepted as children of the relationship);

8. What are consultees' views on the introduction of a registration system for cohabitants?

(Paragraph 3.101)

Comments on Question 8

We would not be in favour of a registration system. It is likely to be of use only to that small minority of well-informed members of the public who are diligent about taking steps to plan for their financial future. Such people are already able to enter into contracts regulating their financial arrangements.

A register is unlikely to be an effective mechanism to protect the vulnerable, those unaware of their rights/responsibilities (or lack of) and those in relationships with power imbalances. It may in fact prejudice precisely the people the legislation is designed to help if inferences are drawn from non-registration.

9. Do sections 26 and / or 27 cause any difficulty in practice?

(Paragraph 4.34)

Comments on Question 9

They are little used in practice. They cause occaisional confusion but no substantive difficulty. They are potentially a useful safety net.

10. Should the language in sections 26 and / or 27 be modernised?

(Paragraph 4.34)

Comments on Question 10

Yes: the reference to housekeeping allowance is outdated.

11. Should sections 26 and / or 27 be modified in some other way?

(Paragraph 4.34)

Comments on Question 11

It might be that these provisions become redundant, depending on the terms of the other changes to the regime.

12. Should the policy underpinning awards for financial provision for former cohabitants, where cohabitation ends otherwise than by death, be:

(a) compensation for economic loss sustained during the relationship;

(b) relief of need:

(c) sharing of property acquired during the cohabitation;

(d) sharing the future economic burden of child care;

(e) a combination of any or all of (a) to (d) above; or

(f) something else?

(Paragraph 5.69)

Comments on Question 12

The policy aims should be expressed more clearly than at present. This may require public discourse about wider social understanding of and aspirations for this type of scheme. That would facilitate clearer expression of the policy.

In the meantime, the aims should be

1. A more clearly expressed intention to redress any dependence, economic loss sustained and any economic advantage gained in consequence of the relationship.
2. Relief of hardship at the cessation of the relationship (not necessarily hardship caused by the relationship).
3. Adjustment to loss of support - this could perhaps be available when one of the couple has been financially dependent on the other, effectively a period of adjustment. Scotland does not have a system of "need" based awards as in England and such an approach would sit uncomfortably in our wider family law structure.
4. The economic burden of childcare ought to be shared fairly between the parents. This could be a standalone policy objective, irrespective of economonic dis/advantage. If, for instance, such a provision were used to impose equal payment of nursery fees that could potentially put a cohabitant in a better position than a spouse and requires to be thought through carefully.

13. For the purposes of financial provision for former cohabitants, should any distinction be made between a child of whom the cohabitants are parents and a child who is or was accepted by the cohabitants as a child of the family?

(Paragraph 5.69)

Comments on Question 13

Logically, such children should be included but account should be taken of support being provided by any other parent.

14. Should the test for determining what order, if any, the court may make for financial provision on cessation of cohabitation otherwise than by death be based on fairness and reasonableness, having regard to all the circumstances of the case, including a list of relevant factors such as:

(a) the financial and non-financial contributions made by each party to the relationship, including the contribution made by each party to the care of the family and the family home;

(b) the effect of the cohabitation upon the earning capacity of each of the parties;

(c) the parties' respective needs and resources;

(d) relief of financial hardship caused by the cohabitation or the end of the cohabitation;

(e) a combination of any or all of (a) to (d) above; or

(f) something else?

(Paragraph 5.69)

Comments on Question 14

(a) and (b) are useful considerations but as a test they would shift the regime from limited provision (redress/compensaton/relief) to a much wider discretion. If that were favoured then it ought to happen in the context of a wider review of family law policy as a whole.

(c) should only be relevant as a cross check on the reasonableness of the award justified by the other principles, not as a factor on its own.

(d) should be a factor – see above.

15. Are the remedies available to the court on an application for financial provision by a former cohabitant adequate and sufficient?

(Paragraph 5.92)

Comments on Question 15

No.

16. If not, should the remedies be extended to include:

(a) transfer of property;

(b) pension sharing;

(c) periodic payments for a period after the end of the cohabitation, sufficient to relieve short term financial hardship; or

(d) something else?

(Paragraph 5.92)

Comments on Question 16

Property transfer order should be an available remedy, as should orders for sale of property.

Interim payments for relief of financial hardship should be available, subject to the parties' needs, resources, earning capacity and circumstances and eqivalent provision to the interim orders that can be made in the 1981 Act (insofar as they are not already available)

Periodical payments would be a useful remedy (for instance in relation to childcare costs).

Orders regulating payment of household bills and mortgages (per s.14 of the 1985 Act) could be functionally useful.

Pension sharing would be a useful available remedy but would require stringent anti-avoidance measures from tax and regulatory perspectives.

17. Should express provision be made requiring or permitting the court to consider the resources of the former cohabitants in deciding what order, if any, to make for financial provision?

(Paragraph 5.92)

Comments on Question 17

Yes - as a cross check on the reasonableness of the award justified by the other principles, not as a factor on its own.

18. Should the one year time limit for making a claim under section 28(2) of the 2006 Act be extended?

(Paragraph 6.35)

Comments on Question 18

Yes.

19. If the time limit is extended, what should the new time limit be?

(Paragraph 6.35)

Comments on Question 19

2 years.

20. If the time limit is extended, should the court be afforded discretion to allow late claims?

(Paragraph 6.35)

Comments on Question 20

Only on exceptional cause shown.

21. If the time limit is not extended, should the court be afforded discretion to allow late claims?

(Paragraph 6.35)

Comments on Question 21

Yes, on cause shown.

22. If the court is afforded discretion to allow late claims:

    (a) should the test for the exercise of discretion be “on cause shown”, “in exceptional circumstances” or something else?

(b) should there be a maximum period (backstop) beyond which no claim may competently be made?

(Paragraph 6.35)

Comments on Question 22

(a) "in exceptional circumstances" or "on exceptional cause shown" or possibly borrowing from the law of prescription with reference to equity.
(b) Yes – a maximum of three years

23. Should express provision be made in the 2006 Act to allow parties to agree extension of the time limit to facilitate settlement?

(Paragraph 6.35)

Comments on Question 23

Yes but for a specific, limited time and not repeatedly.

24. Should express statutory provision be made permitting the court to have regard to the terms of any agreement between the parties as to financial provision on cessation of cohabitation (including opting out of the 2006 Act regime) when deciding what order, if any, to make?

(Paragraph 7.39)

Comments on Question 24

Yes. Freedom of contract and principles of personal autonomy would support such an approach.

25. Should express statutory provision be made allowing the court to set aside, or vary any term of, a cohabitation agreement? If so, should the test for setting aside or variation be:

(a) that the agreement was not fair or reasonable at the time it was entered into;

(b) that there has been a material change in the parties' circumstances since the agreement was entered into, or

(c) another test (and if so what should that test be)?

(Paragraph 7.39)

Comments on Question 25

This is a complex question. There is no accepted understanding of the term “cohabitation agreement”. The content of contracts under this label varies widely, some covering very limited circusmtances (typically at the purchase of a house) and some seeking to predict all forms of claim and oust the jurisdiction of the court. The law of contract already offers some protection. Fairness and reasonableness will evolve over time.

Set aside on material change of circumstances would give remedies that are not available to married (divorcing) couples/empartnered (dissolving) couples. It would render all contracts susceptible to challenge, increasing acrimony, cost and litigation. Some limited provision might assist in protecting the vulnerable e.g. if relief of hardship were to be a remedy in the new scheme then it ought not to be possible to oust the jurisdiction of the court in this respect.

26. What information or data do consultees have on:

(a) the economic impact of sections 25-28 of the Family Law (Scotland) Act 2006,

(b) the potential economic impact of any option for reform discussed in this Discussion Paper (in particular the impact in terms of tax law of the possibility of extending the remedies available to cohabitants on cessation of cohabitation otherwise than by death to include property transfers/pension sharing/maintenance)?

(c) the potential economic impact upon the SCTS and legal aid budgets of any option for reform discussed in this Discussion Paper, including extension of the time limit for claims and additional remedies?

(Paragraph 9.4)

Comments on Question 26

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General Comments

Consideration could usefully be given to thinking about whether it is helpful to refer to those accessing the remedies in the legislation as ‘cohabitants’. We think not.

Consideration needs to be given to the possibility of individuals facing multiple claims at the same time. There is no requirement for any exclusivity in the existing definition, nor would we

advocate for a move to any such requirement. The 2006 Act provides for the possibility of a person being in more than one state at the same time- for example someone who remains married whilst cohabiting (for the purposes of the existing definition) and, in consequence there is the possibility of such individuals being subject to more than one claim at the same time. There are also those who are potentially subject to more than one claim at the same time as a result of sequential relationships- for example someone who went from cohabitation to marriage, or who had sequential cohabitations.

If a person is subject to multiple claims there will be a need to prioritise between the claims and it may be thought helpful for that to be a matter that is more appropriately a policy decision, rather than being a matter left for judicial discretion.

Couples who have been in a long cohabitation may then marry and separate not long afterwards. Consideration should be given to how these claims ought to be addressed to avoid the perverse situation where marriage has the effect of reducing a claim.

31. Sarah Douglas, Solicitor (Stevenson Kennedy)

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1. Should the regime for financial provision for cohabitants on cessation of cohabitation otherwise than by death remain separate from that for spouses and civil partners on divorce and dissolution?

(Paragraph 2.66)

Comments on Question 1

No. I think we should allow separating cohabitants (once they meed appropriate criteria) the same rights and remedies as separating spouses.

2. Should the definition of cohabitant in section 25 of the 2006 Act be amended?

(Paragraph 3.101)

Comments on Question 2

«InsertTextHere»

3. If consultees think the definition should be amended, should the comparison with spouses be removed in favour of a description of the nature of the relationship, such as "enduring family relationship", "genuine domestic basis", or something else?

(Paragraph 3.101)

Comments on Question 3

«InsertTextHere»

4. If the comparison with spouses is to be removed, should the legislation expressly provide that couples within the forbidden degrees of relationship to each other will be excluded?

(Paragraph 3.101)

Comments on Question 4

Okay. Yes.

5. Should a qualifying period of cohabitation be introduced in order to access remedies under the 2006 Act? If so:

   (a) how long should that qualifying period be?

   (b) should the qualifying period be different, or removed altogether, if the parties have children?

(Paragraph 3.101)

Comments on Question 5

(a) No qualifying period but working on assumption that dat of marriage is equated to date of commencement of cohabitation and date of separation of cohabitants is equated to relevant date in respect of marriage and therefore financial claims take those two dates into account, including the pre marriage acquisition of marital / cohab home.
(b) If the above applies then unnecessary to answer this question but if a qualifying period is thought necessary by parliament then my view would indeed be to remove the qualifying period if there there are *biological* children of the relationship.

6. Would the response to Question 5(a) or (b) change if the remedies available to former cohabitants were extended?

(Paragraph 3.101)

Comments on Question 6

My response to Q5 is on the (presumptuous!) assumption that my proposal in Q1 is implemented.

7. Would the definition of cohabitant be improved by the introduction of a list of features or characteristics to be taken into account in deciding whether the parties are cohabitants?

If so, what features or characteristics should be included?

(Paragraph 3.101)

Comments on Question 7

Continue to leave to the courts to work with the dfn already contained in the 2006 Act

8. What are consultees' views on the introduction of a registration system for cohabitants?

(Paragraph 3.101)

Comments on Question 8

I imagine there would be so many people who would ignore this or be ignorant of a register or ignorant of the benefits of registering… Presumably it would need both cohabitants to register. I suspect very low uptake. If it was obligatory to register then that would be an invasion of privacy so that would never be agreed to. It wouldn't solve the problem of all the people who don't register for whatever reason. I wouldn't want to go back to the unjustified enrichment regime for those people. I don't think a register is a bad idea; I just don't think it would fix *everything*.

9. Do sections 26 and / or 27 cause any difficulty in practice?

(Paragraph 4.34)

Comments on Question 9

«InsertTextHere»

10. Should the language in sections 26 and / or 27 be modernised?

(Paragraph 4.34)

Comments on Question 10

«InsertTextHere»

11. Should sections 26 and / or 27 be modified in some other way?

(Paragraph 4.34)

Comments on Question 11

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12. Should the policy underpinning awards for financial provision for former cohabitants, where cohabitation ends otherwise than by death, be:

(a) compensation for economic loss sustained during the relationship;

(b) relief of need:

(c) sharing of property acquired during the cohabitation;

(d) sharing the future economic burden of child care;

(e) a combination of any or all of (a) to (d) above; or

(f) something else?

(Paragraph 5.69)

Comments on Question 12

Equate with divorce provisions

13. For the purposes of financial provision for former cohabitants, should any distinction be made between a child of whom the cohabitants are parents and a child who is or was accepted by the cohabitants as a child of the family?

(Paragraph 5.69)

Comments on Question 13

Yes. The biological mother or father should remain legally responsible for their child. A step parent shouldn't be prejudiced in the future just because he / she has been kind, financially and emotionally supportive of his/her partner's other children. It might put him/her off.

14. Should the test for determining what order, if any, the court may make for financial provision on cessation of cohabitation otherwise than by death be based on fairness and reasonableness, having regard to all the circumstances of the case, including a list of relevant factors such as:

(a) the financial and non-financial contributions made by each party to the relationship, including the contribution made by each party to the care of the family and the family home;

(b) the effect of the cohabitation upon the earning capacity of each of the parties;

(c) the parties' respective needs and resources;

(d) relief of financial hardship caused by the cohabitation or the end of the cohabitation;

(e) a combination of any or all of (a) to (d) above; or

(f) something else?

(Paragraph 5.69)

Comments on Question 14

Equate to the divorce provisions

15. Are the remedies available to the court on an application for financial provision by a former cohabitant adequate and sufficient?

(Paragraph 5.92)

Comments on Question 15

No. I would prefer that they were brought into line with the divorce provisions

16. If not, should the remedies be extended to include:

(a) transfer of property;

(b) pension sharing;

(c) periodic payments for a period after the end of the cohabitation, sufficient to relieve short term financial hardship; or

(d) something else?

(Paragraph 5.92)

Comments on Question 16

Yes, yes, yes. Equate with divorce provisions

17. Should express provision be made requiring or permitting the court to consider the resources of the former cohabitants in deciding what order, if any, to make for financial provision?

(Paragraph 5.92)

Comments on Question 17

Yes, equate with divorce provisions

18. Should the one year time limit for making a claim under section 28(2) of the 2006 Act be extended?

(Paragraph 6.35)

Comments on Question 18

yes

19. If the time limit is extended, what should the new time limit be?

(Paragraph 6.35)

Comments on Question 19

2 years.

20. If the time limit is extended, should the court be afforded discretion to allow late claims?

(Paragraph 6.35)

Comments on Question 20

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21. If the time limit is not extended, should the court be afforded discretion to allow late claims?

(Paragraph 6.35)

Comments on Question 21

«InsertTextHere»

22. If the court is afforded discretion to allow late claims:

    (a) should the test for the exercise of discretion be “on cause shown”, “in exceptional circumstances” or something else?

    (b) should there be a maximum period (backstop) beyond which no claim may competently be made?

(Paragraph 6.35)

Comments on Question 22

«InsertTextHere»

23. Should express provision be made in the 2006 Act to allow parties to agree extension of the time limit to facilitate settlement?

(Paragraph 6.35)

Comments on Question 23

Yes. Absolutely. Formalise it by requiring a joint minute to be signed by the parties themselves, not just the agents on their behalf.

24. Should express statutory provision be made permitting the court to have regard to the terms of any agreement between the parties as to financial provision on cessation of cohabitation (including opting out of the 2006 Act regime) when deciding what order, if any, to make?

(Paragraph 7.39)

Comments on Question 24

Yes, subject to the same checks and balances provided in the divorce legislation and associated caselaw.

25. Should express statutory provision be made allowing the court to set aside, or vary any term of, a cohabitation agreement? If so, should the test for setting aside or variation be:

(a) that the agreement was not fair or reasonable at the time it was entered into;

(b) that there has been a material change in the parties' circumstances since the agreement was entered into, or

(c) another test (and if so what should that test be)?

(Paragraph 7.39)

Comments on Question 25

(a) & (b) Yes, in line with divorce legislation

26. What information or data do consultees have on:

(a) the economic impact of sections 25-28 of the Family Law (Scotland) Act 2006,

(b) the potential economic impact of any option for reform discussed in this Discussion Paper (in particular the impact in terms of tax law of the possibility of extending the remedies available to cohabitants on cessation of cohabitation

otherwise than by death to include property transfers/pension sharing/maintenance)?

(c) the potential economic impact upon the SCTS and legal aid budgets of any option for reform discussed in this Discussion Paper, including extension of the time limit for claims and additional remedies?

(Paragraph 9.4)

Comments on Question 26

«InsertTextHere»

General Comments

In respect of the question raised by the Law faculty about competing claims between divorcing spouse and separating cohabitant – this can largely be accommodated by reference to the date of marriage / date of cohab and date of separation in terms of working out assets accrued during the 'marriage' / 'cohabitation'. Perhaps there will be some areas of overlap that I haven't thought about in which case it would be useful to thrash those out. The courts will have discretion but will need some guidance / something to work with in the legislation.

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1. Should the regime for financial provision for cohabitants on cessation of cohabitation otherwise than by death remain separate from that for spouses and civil partners on divorce and dissolution?

(Paragraph 2.66)

Comments on Question 1

Yes. There should be two separate regimes in order to recognise a plurality of relationship types.

Western jurisdictions have moved away from family policy firmly rooted in marriage or the promotion of that institution – we are now looking at family recognition *beyond* marriage. Not only are we seeing registered partnerships being introduced as alternatives to marriage,[16] progressive jurisdictions are also producing cohabitation provisions that may treat cohabitants in the same manner as spouses or operate as limited, low-level safety nets upon relationship breakdown.

Research reveals that the lived experiences of couples and the fluctuating nature of commitment over time within an interpersonal relationship necessitates a variety of legal

[16] For comparative survey see JM Scherpe and A Hayward, *The Future of Registered Partnerships – Family Recognition beyond Marriage?* (Intersentia, 2017).

responses.[17] Indeed, some couples may wish to marry or register a civil partnership whereas others may wish to cohabit. Crucially, in order to recognise and better protect that plurality of relationship types both the options available to couples in terms of formalisation/non-formalisation and their legal consequences must be substantively different. If they were not and the same regime operates for all couples upon cessation, divorce and dissolution, the law sends a message that channels couples towards marriage or suggests retrospectively that cohabiting relationships should be treated as marriage-like.[18] Those extensive consequences may be desired (or erroneously assumed) by some cohabiting couples, but certainly, not all of them.

Cohabitation is a different relationship type to marriage/civil partnership - that observation in no way diminishes the value of that relationship for the couple concerned or suggests inferioty to marriage or civil partnership. Indeed, cohabitation can be highly variable. Some relationships may be short, demonstrate limited commitment and involve minimal economic pooling. Other relationships may be marriage in all but name. In many ways that flexibility is the perceived virtue of cohabitation; it is couple-led as opposed to being grounded in societal expectations and subject to the State-imposed fixed-term contract that is marriage. Thus, although applying strong legal protections to all couples in a single regime may seem sensible and pragmatic in terms of administration, it overlooks the fact that such regime was originally created with spouses in mind and would be applied to a relationship that for many couples was never intended to be marriage or marriage-like. Put differently, it homogenises relationships and ignores distinctive qualities and expressions of interpersonal relationships.

If equivalence was pursued but more extensive eligibility criteria or qualifications were imposed on cohabitants than spouses such attempts at differentiation could look artificial. For example, consider the imposition of a time duration for cohabitants. Whereas spouses and civil partners have entitlement to property allocation through the act of formalisation, cohabitants would have to wait two or three years before they become 'entitled'. Here, the passage of time becomes a proxy for commitment or the trigger for entitlements in lieu of formalisation. It problematically suggests that, unlike marriage or civil partnership, cohabitation is an inchoate relationship that must mature through the passage of time.

Alternatively, you could dispense with a time period and instead impose the same financial regime for provision to all couples but modify some of the provisions in terms of how they are applied to cohabitants. Which provisions do you redact and does that process of selection not reveal hierarchies emerging? A similar strategy was present in Lord Lester's Cohabitation Bill that took the English and Welsh Matrimonial Causes Act 1973 applicable to spouses as a blueprint and removed from cohabitants any concepts felt to be more appropriate for spouses (such as the application of the sharing principle).[19] Whilst the Bill did not proceed further, the

[17] A Barlow and J Smithson, 'Legal assumptions, cohabitants' talk and the rocky road to reform' [2010] 22(3) Child and Family Law Quarterly 328 at 346 and A Hayward, 'The Steinfeld Effect: Equal Civil Partnerships and the Construction of the Cohabitant' [2019] 31(4) *Child and Family Law Quarterly* 283 at 301.
[18] C Schneider, 'The Channelling Function in Family Law' (1992) 20 Hofstra L. Rev. 495.
[19] See R. Probert, 'The Cohabitation Bill' [2009] 39 *Family Law* 150 and G. Morris, 'The Cohabitation Bill' [2009] 39 *Family Law* 627.

strategy adopted of redacting inappropriate concepts evidences the danger making value judgements as to the types of provisions cohabitants 'deserve'.

Counter Arguments to Need for Two Separate Regimes

Although this response supports the retention of two separate regimes, the counter-arguments to that position should also be analysed:

- **Comparative Family Law Perspectives** - The fact that legal equivalence between marriage and de facto relationships in Australia and New Zealand has been achieved in other jurisdictions may not be of much relevance to Scotland. Indeed it can be explained on the basis that limited cohabitation protections had already been available in those jurisdictions for some time and thus equalisation was a natural progression or amplification of existing legal entitlements.
- **Unified Jurisprudence** – One argument is that a single body of rules can be developed rather than two separate regimes. There are multiple difficulties with this approach. First, principles devised in the context of a mixed-sex marriage would be applied to cohabitants and thus awards to cohabitants could be diminished because they do not replicate marital standards or socially constructed expectations of what marriages entail. Second, as the author has argued elsewhere, the strategy might result in 'the transmission of a message that only certain relationships performed in a particular manner and in conformity with a particular relationship ideal are worthy of the protections and benefits of family law'.[20] This issue could be particularly pronounced in the relationships of LGBT couples who may have rejected both marriage and civil partnership as something they are ideologically opposed to or consider to be 'assimilationist'.
- **Alignment with Public Perceptions** – The argument here would be that equalisation could give couples what they already erroneously believe they are entitled to owing to the common law marriage myth. Proceeding with law reform on this basis is not a particularly convincing strategy – the law should not merely align with the public's misconceptions. Instead greater attempts at public awareness should be pursued.
- **Rationale for Intervention** – If a time period or relationship definition is included this could ensure that the regime is targeted to meritorious cohabitants – thus a unified regime for all couples could work in practice. This argument is again problematic, based on points made above in relation to emulating qualities associated with marriage. If the rationale is protecting one party from the financial consequences of breakdown, an arbitrary time period can deny deserving claims. Indeed, economic imbalances may happen early on in a relationship (potentially associated with purchasing a property together) and thus a cohabitation duration requirement may bar meritorious claims if a relationship breaks up before it is satisfied.

Ultimately, if defined clearly and with an explicit, well-understood rationale for relief, retaining a *separate* regime for cohabitants has clear benefits. It would be distinct and thus capable of evolving in a manner different to formalised statuses like marriage and civil partnership. It would respect the choice of some couples who have chosen not to formalise and may find it

[20] A. Hayward, 'The Steinfeld Effect: Equal Civil Partnerships and the Construction of the Cohabitant' [2019] 31(4) CFLQ 283, 301

inappropriate to apply, albeit retrospectively, marriage-based standards. It would avoid the need for mimicry of marriage/civil partnership by couples or viewing cohabiting relationships through that particular lens when determining the legal consequences of relationship breakdown.

2. Should the definition of cohabitant in section 25 of the 2006 Act be amended?

(Paragraph 3.101)

Comments on Question 2

Yes. See below.

3. If consultees think the definition should be amended, should the comparison with spouses be removed in favour of a description of the nature of the relationship, such as "enduring family relationship", "genuine domestic basis", or something else?

(Paragraph 3.101)

Comments on Question 3

The definition of cohabitant in section 25 is marriage-centric and should be amended so that reference to spouse is omitted. It is an inappropriate lens for considering interpersonal relationships, especially ones that were not intended to be viewed as marital in the first place and perhaps would not wish to be viewed as marital following breakdown. Its presence can be criticised for the reasons listed above in relation to Question 1:

- it creates a link to marriage thereby undermining the fact that the FL(S)A is a separate regime based on distinct legal rules and consequences.
- it implicitly reinforces marriage as the sole reference point, desired status or gold standard. This is in spite of the fact that the marriage rate is in decline and Scotland attaches legal consequences to other relationships.
- it may facilitate misunderstandings as to the level of legal protections enjoyed by cohabitants and even fuel the common law marriage myth.
- it is opaque and uses spouse as a shorthand descriptor. Rather than trying to explicitly detail eligibility for the regime, spouse is used as a shortcut (problematically absorbing into the definitional analysis all the preconceptions associated with marriage).

That said it should be noted that to fully exclude the influence of marriage and marital norms from the interpretation of cohabitation legislation will be difficult. Family judges will often have marriage in their minds when interpreting such provisions in light of years of determining matrimonial cases. Indeed, other jurisdictions such as France have seen what has been

termed ‘matrimonialisation’ whereby regimes created so as to be distinct from marriage such as the *pacte civil de solidarité* have been interpreted in a manner that aligns it more closely to marriage.[21] But, as noted from the outset, an important step to limit the influence of marriage would be to simply remove *direct* reference to spouse in section 25.

Alternative Description

There are multiple ways to capture the meaning of cohabitant and, of course, with any given formulation certain relationships may more readily be captured than others. In agreement with the English Law Commission the ‘enduring family relationship’ borrowed from the adoption context presents difficulties because it was conceived as a means to allow a greater number of couples to adopt. In the Scottish context it may seem slightly strange owing to the fact that there is currently no minimum period of cohabitation before a claim thus *enduring* relationships are not necessarily needed (but naturally relationships that are enduring are more likely to get relief).

‘Genuine domestic basis’ borrowed from the Australian Family Law Act 1975, s 4AA might be a helpful starting point but that inquiry also requires the court to explore whether the parties are a ‘couple’, whether they are ‘living together’ and all the circumstances of the case (assisted by the list of factors in s 4AA(2)). It is arguably asking too many questions, lacks precision and has been criticised for being too intrusive.

The issue ultimately becomes whether the definition should be ‘relationship-based’ and/or ‘location-based’, potentially combined with an additional time criterion e.g. ‘enduring’ / ‘shared lives’. The former could involve, for example, cohabitants simply defined as ‘two persons living together as a couple’, which then can be further expanded by reference to a list of exclusions or definitional criteria in s.25(2). Essentially, the search is not geographically focused but instead looking at the relational aspects of the relationship.

The location-based approach may mention ‘in a joint household’ as favoured by the English Law Commission e.g. ‘living together as a couple in a joint household’. This reference to households presents problems for couples living apart together or relationships where the parties have multiple homes. If a relationship-based approach was favoured but a ‘household’ viewed as an important consideration, section 25(1) could omit reference to ‘in a joint household’ and instead reference could be made to household as a factor in s.25(2) (potentially noting that the absence of a joint household will not prevent the finding of a cohabiting relationship).

I would argue in favour of a relationship-based approach so as to encompass a broader range of relationships.

[21] See H. Fulchiron, ‘Le mariage est-il soluble dans le partenariat (et réciproquement)?’ in Mélanges Jean Hauser (LexisNexis/Dalloz, 2012) 125, L Francoz Terminal, ‘From same-sex couples to same-sex families? Current French legal issues’ [2009] CFLQ 485 and L Francoz Terminal, ‘Registered Partnership in France’ in JM Scherpe and A Hayward (eds), *The Future of Registered Partnerships – Family Recognition beyond Marriage?* (Intersentia, 2017).

4. If the comparison with spouses is to be removed, should the legislation expressly provide that couples within the forbidden degrees of relationship to each other will be excluded?

(Paragraph 3.101)

Comments on Question 4

Yes. Individuals within the prohibited/forbidden degrees of relationship should be excluded from the Scottish cohabitation regime. This would provide clarity and ensure that focus remains on cohabiting couples. In order to achieve this one method would be to negatively define cohabitant. For example the Australian Family Law Act 1975, section 4AA negatively defines a *de facto* relationship. Such a relationship would exist provided that '(a) the persons are not legally married to each other; and (b) the persons are not related by family…'. This would be a relatively simple legislative change.

In agreement with the conclusions of the Discussion Paper, forbidden degree relationships should be excluded for a variety of reasons informed by insights from comparative family law:

- If the focus is on economic imbalance/protecting an economically vulnerable party, such issues would readily arise in an interpersonal relationship where pooling of assets is more likely to happen. Siblings, for example, might not arrange finances in that way. Indeed, in the discussions leading to the Swedish Cohabitation Act 2003 (Sambolagen 2003:376) siblings were excluded because it was felt their approach to intertwining assets was fundamentally different to that adopted by intimate cohabiting couples. As a result they were not to be brought within that Act.
- Whilst there is a case for stronger protection of siblings, this issue generates different policy implications to that experienced by cohabitants and these may not be best dealt with in a system based on default application like the FL(S)A. An alternative approach would be an opt-in system and some jurisdictions permit siblings or family members to register civil partnerships (see below response to Question 8). The Belgian *cohabitation légale* regime, for example, permits siblings or a parent and child to form a partnership. Whilst such regime is popular, it has been criticised as lacking teeth in terms of the level of legal protections available and encounters problems because where there are three siblings, only two of them can register the relationship.[22]
- The hardship experienced by siblings may be better dealt with through amendments to social security and taxation legislation rather than by access to a couple-based financial regime. Lord Lexden has proposed this for England and Wales via the Inheritance Tax Act 1984 (Amendment) (Siblings) Bill [HL] 2019-21 currently being considered by the Westminster Parliament.

[22] See Belgium's *cohabitation légale* discussed in G. Willems, 'Registered Partnerships in Belgium' in J.M. Scherpe and A. Hayward, *The Future of Registered Partnerships - Family Recognition Beyond Marriage?* (Intersentia, 2017) 382,

Therefore, and for the sake of clarity and precision in the legislation, explicit exclusion of forbidden relationships should be included in the amended definition of cohabitant.

5. Should a qualifying period of cohabitation be introduced in order to access remedies under the 2006 Act? If so:

   (a) how long should that qualifying period be?

   (b) should the qualifying period be different, or removed altogether, if the parties have children?

(Paragraph 3.101)

Comments on Question 5

No. Inclusion of a qualifying period necessitates a judgement as to when a cohabiting relationship is transformed into something capable of being acknowledged by the law. Thus, fixing a period involves a somewhat artificial search for that moment in time and is an exercise capable of producing arbitrary results.

The experience of England and Wales in relation to the Law Commission's 2007 Cohabitation Report and Private Members Bills introduced by Lord Lester and Lord Marks indicates that such periods can also become politicised and potentially a means of stalling the progression of a Bill in Parliament.[23] Time periods are often mechanism for weeding out claims by non-meritorious applicants. Problematically their use fails to take into account the fact that, although greater economic pooling is more likely to occur as the relationship progresses, economic vulnerability can materialise early on in a relationship and there must be potential to combat that eventuality.

The absence of a qualifying period can actually be viewed as a virtue in light of the fact that the Scottish experience has not seen a flood of flimsy applications or applications following a very short period of cohabitation. The Mordaunt, Miles and Wasoff study confirms that claim with 73% of respondants' cases involving cohabitation over six years and very few relationships under two years.[24] These findings may suggest that including a qualifying period of say two years would not be problematic as cases generally involve lengthy cohabitations thereby readily satisfying that hurdle. Thus including such a period would serve no real purpose and may even create a unnecessary focus for litigation. Indeed if a time period was created, would there need to be a discretion to dispense for 'hard' cases?

[23] See R Deech, 'Cohabitation' [2010] *Family Law* 39 and attempts to increase the qualifying period in Lord Lester's Cohabitation Bill from 2 years, to five years to potentially 10 years.
[24] See F Wasoff, J Miles and E Mordaunt, *Legal Practitioners' Perspectives on the Cohabitation Provisions of the Family Law (Scotland) Act 2006* (2009-2010).

The presence of children should not operate as a qualifying criterion to access remedies. It can be questioned, drawing upon the approach adopted by the English Law Commission, why presence of a child produced automatic eligibility under their proposal whereas childless couples or step-child families had to rely on a time duration. Practitioners based in Scotland are much better placed to advise on Scots child law but, from an English perspective, children of cohabiting couples can be protected in a variety of different ways and their presence do not need to form part of the eligibility criteria to bring a cohabitation claim. Protection of the financial position of children can be dealt with through Schedule 1 of the Children Act 1989 (which applies to both cohabitants and spouses/civil partners) or, if England introduces cohabitation reform, considered as part of the process of adjudicating a claim. In the reform process in England and Wales, time durations and child requirements were largely mechanisms or proxies to gauge commitment and used politically (and sensibly given the context) by the Law Commission to differentiate their proposals from what spouses or civil partners were entitled to upon divorce or dissolution. I would argue that the time to have that debate has passed for Scotland.

6. Would the response to Question 5(a) or (b) change if the remedies available to former cohabitants were extended?

(Paragraph 3.101)

Comments on Question 6

No. See above. Even strengthening the range of remedies available would not change this response because such change would not equalise the position of cohabitants with spouses or alter the differing rationales for intervention. The regimes are separate.

7. Would the definition of cohabitant be improved by the introduction of a list of features or characteristics to be taken into account in deciding whether the parties are cohabitants?

If so, what features or characteristics should be included?

(Paragraph 3.101)

Comments on Question 7

The question here is whether such a list of features *matters*. I will defer to Scottish practitioners and academics here but *if* the main issue is not the actual definition of cohabitation in section 25 but instead how section 28 operates, introducing a list of features may be missing the point.

Comparative family law experience, especially that of the Australian de facto regime, reveals that lists of features or checklists are by their very nature problematic for a variety of reasons:

- As with any functionality-type exercise, the court is involved in an intrusive dissection of an interpersonal relationship that can involve sensitive or personal information being adduced. In Australia correspondence such as private letters, emails and text messages are scrutinised by judges with a view to determining whether a de facto relationship exists and this process may be distressing for some individuals.
- The list of functions selected reveal hierarchies and preferences as to interpersonal relationships in terms of how they should be performed. In particular, the presence of a sexual relationship can be a particularly problematic factor to include in these lists and clearly is based on interpersonal relationships being conceptualised as primilarly conjugal unions.
- Lists are often conceived and interpreted with marriage in mind and with couples needing to emulate marital norms. Cohabiting relationships may not be organised in a manner that maps onto the list of factors described.
- An extensive analysis of whether a cohabiting relationship exists often goes to the credibility of the applicants and is reliant on witness testimony that may over-complicate issues and lengthen the time spent on litigation.
- It is often the case that the more functions satisfied, the greater the likelihood of (generous) relief. This is in spite of checklists being worded so as to avoid that eventuality i.e. explicitly stating that the absence of a factor will not preclude a particular finding.
- The purpose of the list of factors must be clear. It can also be questioned what the court is searching for in this exercise – are the checklists used merely as a means of satisfying the eligibility criterion or do they also have a bearing on the adjudicative process of the claim itself and the awarding of a potential remedy? If a more developed checklist of factors was included in the Scottish reform, its function must be a clearly stated. A separate overall rationale for invention must also be clearly stated too and such rationale should not be pieced together from the list of factors (as was the case with the English Lord Lester Bill).
- Factors can be incredibly vague or require value judgements to be made. Lord Lester of Herne Hill's Cohabitation Bill included a factor whereby a judge considered the 'nature of the commitment between the parties'. Similarly, the Australian regime has the rather ambiguous 'degree of mutual commitment to a shared life'.

If it is felt that an expanded list of factors would be beneficial in Scotland, such a list might best be focused on, or prioritise, objectively verifiable considerations that can be backed up by documented evidence (bank account records, property transfers, official documents etc). This has been valuable in Australia where it has been noted that 'the gist of the inquiry is the degree to which parties have merged their lives into one'. Looking for signs of merging of lives that can be backed up by evidence would be better than recourse to overly subjective and vague considerations of commitment, mutual interdependence, intimacy etc. This could be achieved relatively easily in Scotland by slightly expanding the detail in the section 25(2) factors.

8. What are consultees' views on the introduction of a registration system for cohabitants?

(Paragraph 3.101)

Comments on Question 8

A registration system for cohabitants is unlikely to be particularly useful in Scotland for a variety of reasons. The term 'registered cohabitation' also needs exploration as it can mean a multiple things.

In one sense Scotland already has a system of registration available to cohabitants – civil partnership. With that regime likely to now be extended to mixed-sex couples, there is a well-established regime for non-marital couples wishing to formalise their relationships through registration. This regime should not be conceptualised as a mechanism to protect cohabitants, particularly in light of the existence of FL(S)A (an element that problematically does not apply to England and Wales that does not possess any cohabitation regime applicable upon relationship breakdown).

As I have argued elsewhere, albeit in relation to the English context,[25] key issues emerge when conceptualising registered partnerships as a means to protect cohabiting couples:

- Civil partnership will only be attractive to certain types of couples; namely those that are, at a generalised level, legally aware, legally rational, financially stable, strongly committed and quasi-marital. The experience of England has shown that whilst mixed-sex couples want legal protections obtained through civil partnerships, another motivation has been symbolism i.e. obtaining a publicly recognised status.
- Promotion of registration as a means of formalisation homogenises cohabitants and fails to recognise diversity of relationship forms. A registered partnership regime will not assist potentially vulnerable cohabitants in Scotland believing themselves to be protected by the law (i.e. by virtue of the common law marriage myth).
- The Civil Partnership Act 2004 framework cannot be modified or personalised like the French PACS (and even that regime has been interpreted so as to bring it more in line with marriage). The rights you get are virtually identical to marriage. It is thus not a creative form of 'registered cohabitation'.

The above observations are not criticisms of the desire of certain couples to register a mixed-sex civil partnership and I have supported both the English and Scottish efforts in extending the regime to such couples. It merely is highlighting the fact that civil partnerships are attractive only to a particular demographic of couples and should not be viewed as a general mechanism to protect cohabitants.

A different mechanism, again based on registration, would be 'registered cohabitation' like the regimes in Nova Scotia and Manitoba. These are in some ways very similar to civil partnerships in Scotland in light of the extent of rights conferred but are arguably much more

[25] A. Hayward, 'The Steinfeld Effect: Equal Civil Partnerships and the Construction of the Cohabitant' [2019] 31(4) CFLQ 283

administrative in terms of how they are created, celebrated and terminated. Unlike the position in Scotland a key distinguishing feature is that in jurisdictions where they operate they often have the effect of speeding up access to common law protections that would kick in automatically through the act of cohabiting for three years or more.

Introducing such a regime would not be practical in Scotland for a variety of reasons. It would create the following administratively complex and tiered system of adult relationships:

Mixed / Same-Sex Marriage

Mixed / Same-Sex Civil Partnership

Mixed / Same-Sex Registered Cohabitation

FL(S)A Claim

Unjustified Enrichment (?)

Adopting the models used in Manitoba and Nova Scotia, permitting registered cohabitation in Scotland would largely duplicate the role performed by civil partnerships owing to the extent of rights conferred. Where couples in Scotland have an ideological objection to the institution of marriage or its ceremonial rites, it would be better if they can enter civil partnerships (in a very administrative manner, if desired) or cohabit and potentially claim under the FL(S)A regime. Moreover, registered cohabitation is not widely used and is likely to present private international law issues in light of it straddling a 'status' and a private yet officially recognised agreement.

A variation of this would be for the registered cohabitation regime to permit couples to sculpt a legal arrangement that would offer something *different* to that available under marriage or civil partnership. This would be more in tune with the French PACS that assumes the role of the Scottish civil partnership in France. There are certainly strong arguments in favour of permitting couples to devise a partnership regime for their joint lives but if introduced in Scotland today it would be administratively complex, cause unnecessary confusion, and would potentially operate not very effectively alongside another registered partnership regime.

Thus, in light of the unique context of Scotland, relationship plurality would be better recognised through a blend of formalised and non-formalised options, with the latter strengthened through the proposed amendments made to the FL(S)A.

9. Do sections 26 and / or 27 cause any difficulty in practice?

(Paragraph 4.34)

Comments on Question 9

No comment. I believe that the section 27 housekeeping allowance is not used in practice but will defer to Scottish practitioners and academics here.

10. Should the language in sections 26 and / or 27 be modernised?

(Paragraph 4.34)

Comments on Question 10

No comment.

11. Should sections 26 and / or 27 be modified in some other way?

(Paragraph 4.34)

Comments on Question 11

No comment.

12. Should the policy underpinning awards for financial provision for former cohabitants, where cohabitation ends otherwise than by death, be:

    (a) compensation for economic loss sustained during the relationship;

    (b) relief of need:

    (c) sharing of property acquired during the cohabitation;

    (d) sharing the future economic burden of child care;

    (e) a combination of any or all of (a) to (d) above; or

    (f) something else?

(Paragraph 5.69)

Comments on Question 12

The approach to be taken should be one that differs from that used by spouses and civil partners. Without statutory reference to reasonableness or fairness used in the context of spouses, the policy underpinning the Scottish approach to cohabitants is unclear. A focus on economic imbalance might be preferable to one that uses potentially more subjective considerations such as sharing or need (particularly future need).

13. For the purposes of financial provision for former cohabitants, should any distinction be made between a child of whom the cohabitants are parents and a child who is or was accepted by the cohabitants as a child of the family?

(Paragraph 5.69)

Comments on Question 13

No comment.

14. Should the test for determining what order, if any, the court may make for financial provision on cessation of cohabitation otherwise than by death be based on fairness and reasonableness, having regard to all the circumstances of the case, including a list of relevant factors such as:

(a) the financial and non-financial contributions made by each party to the relationship, including the contribution made by each party to the care of the family and the family home;

(b) the effect of the cohabitation upon the earning capacity of each of the parties;

(c) the parties' respective needs and resources;

(d) relief of financial hardship caused by the cohabitation or the end of the cohabitation;

(e) a combination of any or all of (a) to (d) above; or

(f) something else?

(Paragraph 5.69)

Comments on Question 14

No comment

15. Are the remedies available to the court on an application for financial provision by a former cohabitant adequate and sufficient?

(Paragraph 5.92)

Comments on Question 15

No.

16. If not, should the remedies be extended to include:

(a) transfer of property;

(b) pension sharing;

(c) periodic payments for a period after the end of the cohabitation, sufficient to relieve short term financial hardship; or

(d) something else?

(Paragraph 5.92)

Comments on Question 16

Transfer of property should be included so as to avoid a joint owner having to use a separate court action to obtain an order for sale.

Simplicity would suggest that periodic payments remain excluded (as proposed (to an extent) by the English Law Commission in their 2007 Report). It would differentiate the regime from that applicable to spouses and civil partners. Such payment may also be particularly difficult to regulate and apply in practice.

17. Should express provision be made requiring or permitting the court to consider the resources of the former cohabitants in deciding what order, if any, to make for financial provision?

(Paragraph 5.92)

Comments on Question 17

No comment.

18. Should the one year time limit for making a claim under section 28(2) of the 2006 Act be extended?

(Paragraph 6.35)

Comments on Question 18

Yes.

19. If the time limit is extended, what should the new time limit be?

(Paragraph 6.35)

Comments on Question 19

The current time period is too short. It should be increased to two years so as to allow initial negotiation and litigation as a possibility if such negotiations fail. It is unfair (as with any arbitrary time period) and fails to appreciate the intense emotions that often arise following relationship breakdown which may impact decision-making. It is particularly unfair when it is noted that no similar time period applies to spouses and there is no discretion to dispense with the one year period. Also two years is not an unnecessarily long period of time and thus its use would not undermine the clear policy need of tackling stale claims.

20. If the time limit is extended, should the court be afforded discretion to allow late claims?

(Paragraph 6.35)

Comments on Question 20

Yes. This would be a sensible modification but would need to be subject to a test, potentially based on the risk of hardship to a particular party. In Australia, for example, there is a limit of two years within which an application can be brought by a *de facto* but section 44(6) of the relevant Act provides that a court may grant leave to apply after that period if 'hardship would be caused to the party or a child if leave were not granted'. Guidance would be needed as to the meaning of hardship and the test could be subject to a modifier such as 'severe' / 'significant' hardship. The Australian position also draws a distinction dependant on the type of claim too which may be relevant.

21. If the time limit is <u>not</u> extended, should the court be afforded discretion to allow late claims?

(Paragraph 6.35)

Comments on Question 21

Yes. But my preference would be to extend the standard application period to two years

22. If the court is afforded discretion to allow late claims:

    (a) should the test for the exercise of discretion be "on cause shown", "in exceptional circumstances" or something else?

    (b) should there be a maximum period (backstop) beyond which no claim may competently be made?

(Paragraph 6.35)

Comments on Question 22

See above response to Question 20.

23. Should express provision be made in the 2006 Act to allow parties to agree extension of the time limit to facilitate settlement?

(Paragraph 6.35)

Comments on Question 23

Yes. This would be a logical provision that could facilitate private settlement and agreement. It also makes sense financially.

24. Should express statutory provision be made permitting the court to have regard to the terms of any agreement between the parties as to financial provision on cessation of cohabitation (including opting out of the 2006 Act regime) when deciding what order, if any, to make?

(Paragraph 7.39)

Comments on Question 24

Yes.

25. Should express statutory provision be made allowing the court to set aside, or vary any term of, a cohabitation agreement? If so, should the test for setting aside or variation be:

(a) that the agreement was not fair or reasonable at the time it was entered into;

(b) that there has been a material change in the parties' circumstances since the agreement was entered into, or

(c) another test (and if so what should that test be)?

(Paragraph 7.39)

Comments on Question 25

No comment.

26. What information or data do consultees have on:

(a) the economic impact of sections 25-28 of the Family Law (Scotland) Act 2006,

(b) the potential economic impact of any option for reform discussed in this Discussion Paper (in particular the impact in terms of tax law of the possibility of extending the remedies available to cohabitants on cessation of cohabitation otherwise than by death to include property transfers/pension sharing/maintenance)?

(c) the potential economic impact upon the SCTS and legal aid budgets of any option for reform discussed in this Discussion Paper, including extension of the time limit for claims and additional remedies?

(Paragraph 9.4)

Comments on Question 26

No comment.

General Comments

No further substantive comments. Congratulations to the team on putting together this Discussion Paper – the level of comparative research into this important issue is particularly impressive.

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1. Should the regime for financial provision for cohabitants on cessation of cohabitation otherwise than by death remain separate from that for spouses and civil partners on divorce and dissolution?

(Paragraph 2.66)

Comments on Question 1

No, where there are (or have been) children of the relationship. Here I would suggest the policy considerations are the same as for marriage breakdown and I suggest they should be treated in the same way as spouses. Recent British Social Attitudes Survey data (2019) indicates that a 'common law marriage' myth belief is particularly prevalent among those with children, providing a false sense of security to cohabitants with children that the law will treat them as if they were marriage,

On balance, yes, where there are no children of the relationship and the relationship is of a relatively short duration. Here remedies where there is financial advantage/ disadvantage seem appropriate.

However, the difference between the two regimes in terms of the remedies available following long duration cohabitation relationships should be able to approach the outcomes for similar couples following divorce. Overtime, financial interdependency in such relationships often increases. Proof of financial advantage and disadvantage

becomes difficult and expensive to evidence. One solution may be to join cohabitants without children to the matrimonial/cp regime after a period of time e.g. 5 years.

2. Should the definition of cohabitant in section 25 of the 2006 Act be amended?

(Paragraph 3.101)

Comments on Question 2

De Facto works in other jurisdicitons – Australia and New Zealand. Introduction of a Latin phrase here where it is not so well understood may cause confusion.

A more modern definition may be 'living together as a couple.' This would avoid discussing the sexual orientation of couples or the 'husband and wife' terminology. Depending on what is intended, adding, 'in the same household' would exclude 'living apart together' or romantic couples who do not share accommodation and who would not typically be so financially intertwined or interdependent. Given the decision and obserbations in (*BvB* [2014] 9 WLUK 169; 2014 GWD 30-593) cited in the Discussion Paper, 'living together' may need to be defined to exclude temporary absences or perhaps 'household' could be defined to include care home or working abroad situations by one partner where their relationship is still ongoing.

At the present time there is no minimum duration of the relationship necessary to access the current remedies. If parity for those with children and those living together for e.g. 5 years

3. If consultees think the definition should be amended, should the comparison with spouses be removed in favour of a description of the nature of the relationship, such as "enduring family relationship", "genuine domestic basis", or something else?

(Paragraph 3.101)

Comments on Question 3

Yes. Remove the comparson with spouses.

Suggest 'enduring couple relationship' would work. I do not like the phrase 'genuine domestic basis' which could bring to mind cleaning and domestic help as the basis envisaged?

4. If the comparison with spouses is to be removed, should the legislation expressly provide that couples within the forbidden degrees of relationship to each other will be excluded?

(Paragraph 3.101)

Comments on Question 4

Yes. That would seem to be appropriate if that is the public policy decision for marriage/CP.

5. Should a qualifying period of cohabitation be introduced in order to access remedies under the 2006 Act? If so:

   (a) how long should that qualifying period be?

   (b) should the qualifying period be different, or removed altogether, if the parties have children?

(Paragraph 3.101)

Comments on Question 5

a) If the remedies are to achieve parity with marriage, I suggest 5 years for those without children. If based on financial advantage/disadvantage linked to the relationship, no qualify period.
b) Yes. Definitely. In essence, the same interdependencies and caring responsibilities as found in marriage exist and couples typically arrange their work and caring around the children as married couples do. I see no reason to discriminate against this group.Should a couple have children who are adults, they should fall within the same group as married couples and not lose remedies because the children are over 18 as long lasting cohabitaitons of this nature would increasingly have the same considerations and financial consequences as marriages over time.

6. Would the response to Question 5(a) or (b) change if the remedies available to former cohabitants were extended?

(Paragraph 3.101)

Comments on Question 6

a) Yes as indicated – if extended 5 years, otherwise no qualifying period as financial advantage or disadvantage can occur from the outset.
b) NO. Those with children face the same issues as married couples with children.

7. Would the definition of cohabitant be improved by the introduction of a list of features or characteristics to be taken into account in deciding whether the parties are cohabitants?

If so, what features or characteristics should be included?

(Paragraph 3.101)

Comments on Question 7

This would be helpful guidance to the courts and those advising couples.

Presence of children; Length of the relationship; One partner taking on caring for the other partner's children/elderly parents; jointly held assets/bank accounts (although not definitive as research shows people operate sole bank accounts jointly); financial or other interdependence on each other/evidence of commitment or family solidarity (e.g. during ill health/difficulties) /intention to marry/cp.

8. What are consultees' views on the introduction of a registration system for cohabitants?

(Paragraph 3.101)

Comments on Question 8

This could be an additional category (like the French Pacs) but should not replace a safety net remedy. To be straightforward, it would involve bothe members of a couple registering as is currently the case for those who wish to marry or CP. Yet research (e.g. Barlow & Smithson, 2010) shows that many cohabiting couples are 'uneven' where one wants to marry and the other does not and this provides the potential for exploitation of one partner by the other, knowing they will stay with them yet have no remedy on relationship breakdown. The power dynamics in couple relationships are often uneven and the law should provide a protective (financial) remedy for more vulnerable family members who suffer relationship-generated disadvantage regardless of whether their relationship is registerd.

9. Do sections 26 and / or 27 cause any difficulty in practice?

(Paragraph 4.34)

Comments on Question 9

I am not a practising lawyer and do not feel qualified to comment.

10. Should the language in sections 26 and / or 27 be modernised?

(Paragraph 4.34)

Comments on Question 10

Yes. In 26(4) 'family home or homes' rather than 'any residence ….cohabiting for their joint domestic purposes'.

The list of excluded assets sounds dated but is probably still fit for purpose. You might need to go beyond 'road vehicle' and e.g. add 'drone' to (c) !

The idea of a housekeeping 'allowance' seems anachronistic, but may still be important in some relationships? I am not convinced that is necessary to express it in that way. It is likely to be small sums involved. Perhaps something like 'any sums of money provided by one partner to the other for joint household expense or any property acquired from it, belongs to them both in equal shares'

11. Should sections 26 and / or 27 be modified in some other way?

(Paragraph 4.34)

Comments on Question 11

Modernisation is needed to the language but those issues may still arise in a dispute.

12. Should the policy underpinning awards for financial provision for former cohabitants, where cohabitation ends otherwise than by death, be:

    (a) compensation for economic loss sustained during the relationship;

    (b) relief of need:

    (c) sharing of property acquired during the cohabitation;

    (d) sharing the future economic burden of child care;

    (e) a combination of any or all of (a) to (d) above; or

    (f) something else?

(Paragraph 5.69)

Comments on Question 12

e)

For those without children in short relationships a) For long term relationships without children a) + b) + c). For those with children a combination fo a-d as for spouses.

13. For the purposes of financial provision for former cohabitants, should any distinction be made between a child of whom the cohabitants are parents and a child who is or was accepted by the cohabitants as a child of the family?

(Paragraph 5.69)

Comments on Question 13

I would follow the practice on divorce.

14. Should the test for determining what order, if any, the court may make for financial provision on cessation of cohabitation otherwise than by death be based on fairness and reasonableness, having regard to all the circumstances of the case, including a list of relevant factors such as:

(a) the financial and non-financial contributions made by each party to the relationship, including the contribution made by each party to the care of the family and the family home;

(b) the effect of the cohabitation upon the earning capacity of each of the parties;

(c) the parties' respective needs and resources;

(d) relief of financial hardship caused by the cohabitation or the end of the cohabitation;

(e) a combination of any or all of (a) to (d) above; or

(f) something else?

(Paragraph 5.69)

Comments on Question 14

Yes - e) A combination would be fairest for those where there are children of the relationship.

15. Are the remedies available to the court on an application for financial provision by a former cohabitant adequate and sufficient?

(Paragraph 5.92)

Comments on Question 15

A bigger range of remedies would be appropriate as on divorce.

16. If not, should the remedies be extended to include:

(a) transfer of property;

(b) pension sharing;

(c) periodic payments for a period after the end of the cohabitation, sufficient to relieve short term financial hardship; or

(d) something else?

(Paragraph 5.92)

Comments on Question 16

a) –c) for those with children and/or long term relationships.

17. Should express provision be made requiring or permitting the court to consider the resources of the former cohabitants in deciding what order, if any, to make for financial provision?

(Paragraph 5.92)

Comments on Question 17

Yes. Permitting the court.

18. Should the one year time limit for making a claim under section 28(2) of the 2006 Act be extended?

(Paragraph 6.35)

Comments on Question 18

2 years maximum to provide some certainty and closure.

19. If the time limit is extended, what should the new time limit be?

(Paragraph 6.35)

Comments on Question 19

2 years.

20. If the time limit is extended, should the court be afforded discretion to allow late claims?

(Paragraph 6.35)

Comments on Question 20

«InsertTextHere»

21. If the time limit is not extended, should the court be afforded discretion to allow late claims?

(Paragraph 6.35)

Comments on Question 21

Yes.

22. If the court is afforded discretion to allow late claims:

    (a) should the test for the exercise of discretion be “on cause shown”, “in exceptional circumstances” or something else?

    (b) should there be a maximum period (backstop) beyond which no claim may competently be made?

(Paragraph 6.35)

Comments on Question 22

a) Cause shown rather than exceptional and b) 3 years perhaps.

23. Should express provision be made in the 2006 Act to allow parties to agree extension of the time limit to facilitate settlement?

(Paragraph 6.35)

Comments on Question 23

Yes. That would seem appropriate but could facilitate game-playing betweent the parties?

24. Should express statutory provision be made permitting the court to have regard to the terms of any agreement between the parties as to financial provision on cessation of cohabitation (including opting out of the 2006 Act regime) when deciding what order, if any, to make?

(Paragraph 7.39)

Comments on Question 24

Yes.

25. Should express statutory provision be made allowing the court to set aside, or vary any term of, a cohabitation agreement? If so, should the test for setting aside or variation be:

(a) that the agreement was not fair or reasonable at the time it was entered into;

(b) that there has been a material change in the parties' circumstances since the agreement was entered into, or

(c) another test (and if so what should that test be)?

(Paragraph 7.39)

Comments on Question 25

a) and b) seem the obvious ones.

26. What information or data do consultees have on:

(a) the economic impact of sections 25-28 of the Family Law (Scotland) Act 2006,

(b) the potential economic impact of any option for reform discussed in this Discussion Paper (in particular the impact in terms of tax law of the possibility of extending the remedies available to cohabitants on cessation of cohabitation otherwise than by death to include property transfers/pension sharing/maintenance)?

(c) the potential economic impact upon the SCTS and legal aid budgets of any option for reform discussed in this Discussion Paper, including extension of the time limit for claims and additional remedies?

(Paragraph 9.4)

Comments on Question 26

I am not qualified to comment.

General Comments

The Discussion Paper was of great interest and holds valuable insights into how important it is to review law in this field.

34. Senators of the College of Justice

Name: Senators of the College of Justice
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1. Should the regime for financial provision for cohabitants on cessation of cohabitation otherwise than by death remain separate from that for spouses and civil partners on divorce and dissolution?

(Paragraph 2.66)

Comments on Question 1 The question is plainly heavily policy biased and therefore we are loathe to express views. The judiciary's interest is restricted to a desire for a clear system of rules for decision making about all family forms that are regulated by law.

2. Should the definition of cohabitant in section 25 of the 2006 Act be amended?

(Paragraph 3.101)

Comments on Question 2 Again the question has, in our view, a considerable element of policy overlay and for that reason we confine our answer to areas of practical relevance to the operation of the law. Subject to that caveat we have not experienced any particular difficulty in construction by the court.

3. If consultees think the definition should be amended, should the comparison with spouses be removed in favour of a description of the nature of the relationship, such as “enduring family relationship”, “genuine domestic basis”, or something else?

(Paragraph 3.101)

Comments on Question 3

We are not expressing a view for or against amendment. Subject to that, while none of the suggested alternatives is problem free, a definition that does not presuppose that cohabitants will mimic a spousal relationship may be worthy of consideration.The definition in the Human Fertilisation and Embryology Act 2008, section 52(2)(c) of " two persons who are living together as partners in an enduring family relationship and are not within prohibited degrees of relationship in relation to each other " is a modern enunciation that may be considered appropriate. On one view it connotes a degree of permanence that is not essential under the current definition. Whatever form of words may ultimately be selected, evidence will usually be required to establish the position if the relevant de facto relationship is disputed.»

4. If the comparison with spouses is to be removed, should the legislation expressly provide that couples within the forbidden degrees of relationship to each other will be excluded?

(Paragraph 3.101)

Comments on Question 4

«We answer this question in the affirmative.»

5. Should a qualifying period of cohabitation be introduced in order to access remedies under the 2006 Act? If so:

   (a) how long should that qualifying period be?

   (b) should the qualifying period be different, or removed altogether, if the parties have children?

(Paragraph 3.101)

Comments on Question 5

«(a) In our view there should be no introduction of a qualifying period. Such a provison would represent an arbitrary rule. In our experience there is no inevitable correlation between the

period of cohabitation and its stability or the existence of finanical dependence or interdependence.

((b) Not applicable in light of the foregoing answer»

6. Would the response to Question 5(a) or (b) change if the remedies available to former cohabitants were extended?

(Paragraph 3.101)

Comments on Question 6

«Again this seems to fall squarely within the area of policy. If the policy intention is to afford financial provision to cohabitants that is more akin to that enjoyed by spouses, i.e. to introduce a common property regime to mirror the matrimonial property regime, it may be considered appropriate to restrict that to those who have cohabited for a certain minimum period. That said, if the idea is to share the couple's property insofar as acquired during the period of cohabitation that regime could equally be applied by identifying the commencement and cessation of cohabitation, just as occurs with financial provision on divorce cases and so a minimum period would be unecessary. The issue of whether to choose such a regime is a social policy and ultimately a political question. »

7. Would the definition of cohabitant be improved by the introduction of a list of features or characteristics to be taken into account in deciding whether the parties are cohabitants?

If so, what features or characteristics should be included?

(Paragraph 3.101)

Comments on Question 7

«Following on from our Answer to Q 3 above, we are, of the view that this question falls to be answered in the negative. We consider, on the basis of experience, that legislative lists of features or characteristics are rarely of assistance in reaching a judicial determination as to whether or not a factual situation exists. First, there are canons of statutory construction which can make such lists positively inimical to the process of reasoning in reaching judicial determination. Second, lists are often superseded by change, often within a short time of enactment. Third, comprehensivity is, in a practical sense, either impossible or impractically lengthy. In our view such lists are of little assistance or practical benefit.»

8. What are consultees' views on the introduction of a registration system for cohabitants?

(Paragraph 3.101)

Comments on Question 8

«This is another policy matter. However, we note that, as the Discussion Paper identifies (at para 3.83) a system of registration is likely to benefit primarily the already well informed. It seems to us to be important that any regime of financial provision for cohabitants should be equally available to all. »

9. Do sections 26 and / or 27 cause any difficulty in practice?

(Paragraph 4.34)

Comments on Question 9

«In our experiencee, while these provisions have not caused any significant difficuties they are rarely if ever ever prayed in aid by a litigant. There could be seen to be an overlap between a section 28 claim and the section 26 presumption. However, so long as double counting is avoided the presumption in section 26 can be useful to impose an onus on a party seeking to assert ownership of such items. Section 27 does appear to relate to an outmoded concept of " housekeeping expenses" and it is accordingly unsurprising that its terms have not given rise to judicial scrutiny. We have no experience of it being ulitised.»

10. Should the language in sections 26 and / or 27 be modernised?

(Paragraph 4.34)

Comments on Question 10

«We see no need for any change to section 26. While financial dependence remains a feature of many family relationships, we consider that section 27 could be replaced with a more contemporary provision that relfects financial and non financial contributions. »

11. Should sections 26 and / or 27 be modified in some other way?

(Paragraph 4.34)

Comments on Question 11

«We have nothing to add to the comments above on these provisions.»

12. Should the policy underpinning awards for financial provision for former cohabitants, where cohabitation ends otherwise than by death, be:

(a) compensation for economic loss sustained during the relationship;

(b) relief of need:

(c) sharing of property acquired during the cohabitation;

(d) sharing the future economic burden of child care;

(e) a combination of any or all of (a) to (d) above; or

(f) something else?

(Paragraph 5.69)

Comments on Question 12

This question is at the heart of the policy issues on which it would be inappropriate for us to comment. What we can emphasise is the need for a clear and effective system. In our experience, the current provisions, based as they are on a supposed correction of imbalances, do not provide a set of rules that provides certainty or consistency. A regime that shared property acquired during the period of cohabitation would be clear and easier to apply, but would diminish the distinction between the rights and obligations that flow from marriage as opposed to cohabitation. A principled approach works best, but the policy behind the principle is not a matter for the judiciary. In our experience, the current regime creates problems for practiioners in providing clear advice as to likely outcome. »

13. For the purposes of financial provision for former cohabitants, should any distinction be made between a child of whom the cohabitants are parents and a child who is or was accepted by the cohabitants as a child of the family?

(Paragraph 5.69)

Comments on Question 13

«We answer this question in the negative. Such a distinction would not sit well with long standing provisions imposing alimentary obligations on those who have accepted children and as children of a family, such as under the Family Law (Scotland) Act 1985. »

14. Should the test for determining what order, if any, the court may make for financial provision on cessation of cohabitation otherwise than by death be based on fairness and reasonableness, having regard to all the circumstances of the case, including a list of relevant factors such as:

(a) the financial and non-financial contributions made by each party to the relationship, including the contribution made by each party to the care of the family and the family home;

(b) the effect of the cohabitation upon the earning capacity of each of the parties;

(c) the parties' respective needs and resources;

(d) relief of financial hardship caused by the cohabitation or the end of the cohabitation;

(e) a combination of any or all of (a) to (d) above; or

(f) something else?

(Paragraph 5.69)

Comments on Question 14

An alteration of the current test to something as general as " fariness and reasonableness" would do nothing to address the lack of consistency in decision making that is the product of the current regime, whether or not such a general provison was subject to a list of factors, exhaustive or otherwise. »

15. Are the remedies available to the court on an application for financial provision by a former cohabitant adequate and sufficient?

(Paragraph 5.92)

Comments on Question 15

There are a number of practical difficulties with the restricted remedies permitted by the current provisions. The absence of a property transfer order is the single biggest omission and has caused real difficulties in cases where transfer of title of the family home would be the obvious remedy. Of course, some of the orders available to the court in financial provision on divorce cases are reflective of the matrimonial property regime and whether they should all be available in a cohabitation case is a question of policy. For example, pension sharing orders may be said to flow naturally from a regime that specifically includes the proprotion of value of a person's pension acquired during the period of a marriage as matrimonial property. There is

to some extent a relationship between the issue of what type of regime is being implemented and the available remedies. »

16. If not, should the remedies be extended to include:

(a) transfer of property;

(b) pension sharing;

(c) periodic payments for a period after the end of the cohabitation, sufficient to relieve short term financial hardship; or

(d) something else?

(Paragraph 5.92)

Comments on Question 16

«As indicated above, the restricted remedies available under the current provisions have caused difficuties. However, whether the full range of reemdies listed sould be available depends partly on whether the regime being introduced is intended to be similar to that available to married couples. »

17. Should express provision be made requiring or permitting the court to consider the resources of the former cohabitants in deciding what order, if any, to make for financial provision?

(Paragraph 5.92)

Comments on Question 17

«We answer the question in the affirmative, this appearing to accord with common sense.»

18. Should the one year time limit for making a claim under section 28(2) of the 2006 Act be extended?

(Paragraph 6.35)

Comments on Question 18

«Time limits of relatively short duration have many practical attractions. They encourage expedition in decision making and avoid problems of evidence being lost or becoming stale. On balance we would prefer the retention of the one year time limit, but with the proviso that a discretionary power be given to the court to allow extension in appropriate cases. »

19. If the time limit is extended, what should the new time limit be?

(Paragraph 6.35)

Comments on Question 19

We have no view, the matter is one of policy. We would however re-state our view expressed in the preceeding answer if a new time limit is being considered.»

20. If the time limit is extended, should the court be afforded discretion to allow late claims?

(Paragraph 6.35)

Comments on Question 20

«ISee our answer to question 18.»

21. If the time limit is <u>not</u> extended, should the court be afforded discretion to allow late claims?

(Paragraph 6.35)

Comments on Question 21

«ISee our answer to question 18.»

22. If the court is afforded discretion to allow late claims:

    (a) should the test for the exercise of discretion be “on cause shown”, “in exceptional circumstances” or something else?

    (b) should there be a maximum period (backstop) beyond which no claim may competently be made?

(Paragraph 6.35)

Comments on Question 22

«(a) we consider the "on cause shown" test has some attractions. It is flexible, well understood by the court and can accommodate all factual circumstances that may arise. However, to avoid extensive resort to such a provision on scant casue, it may be prudent to introduce a more restrictive " special cause shown" or " exceptional circumstances " test which may be more appropriate for extension of a statuotry time limit,

(b) There is some attraction to this option. If it were implemented the period for the backstop would be a matter of policy on which we express no view.»

23. Should express provision be made in the 2006 Act to allow parties to agree extension of the time limit to facilitate settlement?

(Paragraph 6.35)

Comments on Question 23

«In our view, yes. A provision of this nature could avoid actions having to be raised purely in order to avoid the expiry of a time limit. Agreed extension (in writing) would have consequent savings in expenditure and court time.»

24. Should express statutory provision be made permitting the court to have regard to the terms of any agreement between the parties as to financial provision on cessation of cohabitation (including opting out of the 2006 Act regime) when deciding what order, if any, to make?

(Paragraph 7.39)

Comments on Question 24

«This is a diffcult area and one which may erode further the ability of those who seek to contract out of statutory financial provision regimes to do so. Adults of sound mind are normally free to contract as they wish. That freedom is restricted in financial provision on divorce cases if the contract was unfair and unreasonable at the time it was entered into (1985 Act section 16). A provision that directs the court only " to have regard to" such a contract would result in real uncertainty as to the status of such a contract. »

25. Should express statutory provision be made allowing the court to set aside, or vary any term of, a cohabitation agreement? If so, should the test for setting aside or variation be:

(a) that the agreement was not fair or reasonable at the time it was entered into;

(b) that there has been a material change in the parties' circumstances since the agreement was entered into, or

(c) another test (and if so what should that test be)?

(Paragraph 7.39)

Comments on Question 25

« For the reasons given in the previous answer, we consider that a test that mirrors (a) (ie the section 16,1985 Act test) would be appropriate were such a power to be introduced.»

26. What information or data do consultees have on:

(a) the economic impact of sections 25-28 of the Family Law (Scotland) Act 2006,

(b) the potential economic impact of any option for reform discussed in this Discussion Paper (in particular the impact in terms of tax law of the possibility of extending the remedies available to cohabitants on cessation of cohabitation otherwise than by death to include property transfers/pension sharing/maintenance)?

(c) the potential economic impact upon the SCTS and legal aid budgets of any option for reform discussed in this Discussion Paper, including extension of the time limit for claims and additional remedies?

(Paragraph 9.4)

Comments on Question 26

We have nothing to say in relation to this question.

»

General Comments

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35. Professor Elaine Sutherland, University of Stirling

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1. Should the regime for financial provision for cohabitants on cessation of cohabitation otherwise than by death remain separate from that for spouses and civil partners on divorce and dissolution?

(Paragraph 2.66)

Comments on Question 1

No.

The answer to this question will determine what, if any, reform of the law on cohabitants is recommended by the Commission and, essentially, it has three options. First, it could recommend "no change", leaving the law in this area as it is. Given that there are well-recognised shortcomings in the current legislation and its operation, that would not be the best way to proceed.

The second option is to retain separate regimes, one for spouses and civil partners, and another for cohabitants. That would give couples a choice in terms of their intimate relationships since there would be different legal consequences during the relationship and in the event that the relationship broke down. However, there is a danger in attaching too much weight to the notion of "choice" in this context. While some individuals or couples make an informed decision to avoid marriage and/or its legal consequences, many others are ignorant of, or misinformed about, these consequences. Yet others simply give no thought to the legal implications of how they organise their lives. The ignorant and misinformed cannot be said to be making a meaningful choice and they are poorly placed to

protect themselves, by means of contract or otherwise, in advance of relationship breakdown.

At present, the law gives parting cohabitants some protection, but less than the comprehensive package provided to spouses and civil partners. Were separate regimes to be retained, the adverse impact on the economically disadvantaged cohabitant could be reduced by increasing the legal protection offered, while stopping short of creating a system of relationship equality. In short, the second option would amount to a compromise that corrected the acknowledged defects in the existing legislation and expanded the protection provided to cohabitants. That would be better than doing nothing, but it would still leave cohabitants less protected than spouses and civil partners.

The third option – and that supported in this response – is to provide qualifying cohabitants with the same legal protection as is currently available to spouses and civil partners under the Family Law (Scotland) Act 1985. The comprehensive package provided by 1985 Act is well-established and widely acknowledged as operating well. It might be objected that such an approach would, effectively, deny individuals a choice in terms of how they organise their intimate relationships since the consequences would be the same whether they married, registered a civil partnership or simply cohabited. As we have seen, it is illusory to suggest that all – or even the majority of – couples are currently making a meaningful choice. However, there will be some who are making an informed decision to avoid the legal consequences of marriage and their autonomy could be respected by permitting them to contract out of the default system, just as spouses and civil partners can contract out of the default system of financial provision that applies to them. (*See further, Elaine E Sutherland, "From 'Bidie-In' to 'Cohabitant' in Scotland: The Perils of Legislative Compromise"* (2013) 27 Int. J. L. Pol'y & the Fam. 143.)

In the event that the Commission recommends the third option – the creation of relationship equality – it would not be necessary to address many of the questions asked in the Discussion Paper. However, the Commission would have to decide how its recommendation should be implemented. In this, there are again three options. First, the 1985 Act could be amended, making it applicable to qualifying cohabitants. Secondly, the 2006 Act could be amended to replicate, for cohabitants, the 1985 Act provisions. Finally, a fresh statute on cohabitation could be drafted, again replicating the 1985 Act provisions.

The Discussion Paper, quite deliberately, does not address the legal consequences of cohabitation ending by the death of one or both of the parties since that issue was (and still is) being examined by the Scottish Government. It now appears that the matter may be referred to the Commission. (See, Scottish Government, *Response to Consultation on the Law of Succession* (Edinburgh: Scottish Government, 2020), p 4: "Once we have the benefit of completing further research and evidence gathering, we will consider whether the issue of intestate reform, including the issue of cohabitants rights in succession, should be referred to the Scottish Law Commission.") Were that to happen, there would be a benefit in ensuring consistency between the law reform proposals dealing with cohabitation breakdown and those addressing succession. If that leads the Commission down the path of drafting a comprehensive statute, it might find the draft Uniform Economic Rights of Unmarried Cohabitants Act produced by the (US) Uniform Law Commission a helpful resource.

2. Should the definition of cohabitant in section 25 of the 2006 Act be amended?

(Paragraph 3.101)

Comments on Question 2

Yes.

The definition of cohabitant in section 25(1) of the 2006 Act has been modified by the Marriage and Civil Partnership (Scotland) Act 2014, s 4, but the latter statute did not actually amend the former. It is undesirable that what is provided in a statute, on its face, is not what it actually means, not least because that makes the law less accessible to non-lawyers. That alone would be reason enough to amend the definition but, as the Commission points out in its Discussion Paper, at paras 3.21-3.25, there are other cogent reasons to amend the definition.

3. If consultees think the definition should be amended, should the comparison with spouses be removed in favour of a description of the nature of the relationship, such as "enduring family relationship", "genuine domestic basis", or something else?

(Paragraph 3.101)

Comments on Question 3

It is desirable that the comparison with spouses should be removed, not least because how marriages operate varies. However, finding an appropriate description of non-formalised relationships is challenging and it is very much easier to reject those found elsewhere than it is to arrive at one that is wholly satisfactory.

Any reference to the parties "living together" risks excluding couples who are living apart together and combining "living together" with the words "on a genuine domestic basis" poses more questions than it answers. Similarly, the reference in the Irish legislation to parties who "live together as a couple in an intimate and committed relationship" is unattractive in so far as what amounts to "commitment" is ambiguous and the description raises, unnecessarily, the sexual dimension of the relationship. Borrowing the term "enduring family relationship" from the Adoption and Children (Scotland) Act 2007 might lead to over-emphasis of the duration of the cohabitation.

4. If the comparison with spouses is to be removed, should the legislation expressly provide that couples within the forbidden degrees of relationship to each other will be excluded?

(Paragraph 3.101)

Comments on Question 4

This is a challenging issue.

If cohabitation is to attract marriage-like legal consequences, whether the whole package or only some of it, then it is arguable that "cohabitant" should be defined in such a way as to exclude those who could not marry. On that basis, couples who are within the forbidden degrees would be excluded and that is the approach taken in some other jurisdictions where the definition of cohabitant (or its equivalent) makes express reference to concepts akin to the forbidden degrees. See, for example, Australia ("not related by family": Family Law Act 1975, s 4AA(1)(b)) and Ireland ("not related to each other within the prohibited degrees": Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010, s 172(1)).

However, there is value in the law being consistent and excluding those who could not marry from the definition of cohabitant has further implications since any person who is already married or in a civil partnership cannot marry. It is worth noting that the jurisdictions used for comparison in the paragraph above take different views on that issue, with Ireland excluding married persons from the definition of cohabitant, albeit not absolutely (Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010, s 172(6)), while Australia has no such exclusion.

At present, in Scotland, those in existing marriages and civil partnerships are not excluded from the definition of cohabitant – and for good reason. Take, for example, A and B who married 25 years ago. They lived together for a year, then parted but never divorced. A then began living with C and they have lived together for the last 24 years. It would be inequitable to exclude A and C from the regime provided for cohabitants if their relationship now breaks down. Thus, it is submitted that it should remain the case that spouses and civil partners should not be excluded from the definition of cohabitant.

If Scots law is to be consistent, that suggests that couples within the forbidden degrees of relationship to each other should not be excluded from the definition of cohabitant. Yet the effect of that approach would be that the protection offered by the legislation would be extended to couples who had been living in an incestuous relationship. It is at least open to question whether the legal system should accommodate relationships that are criminal in nature.

A solution here would be to distinguish prohibitions on marriage that are immutable (forbidden degrees) from those that are labile (marital status), excluding the former from the definition of cohabitant, while including the latter.

5. Should a qualifying period of cohabitation be introduced in order to access remedies under the 2006 Act? If so:

   (a) how long should that qualifying period be?

(b) should the qualifying period be different, or removed altogether, if the parties have children?

(Paragraph 3.101)

Comments on Question 5

No.

As the Commission noted, back in 1992, qualifying periods are inherently arbitrary and there is the danger that a party who is deserving of a remedy will miss whatever qualifying period is set by a narrow margin. The difficulty with qualifying periods is illustrated by the fact that jurisdictions that have them often provide for discretionary deviation (see, for example, New Zealand). The duration of the relationship is, of course, a relevant consideration and that could be addressed, as it is at present, by its inclusion in any non-exclusive list of factors relevant to determining whether a relationship qualifies under the statute (please see response to Question 7).

6. Would the response to Question 5(a) or (b) change if the remedies available to former cohabitants were extended?

(Paragraph 3.101)

Comments on Question 6

No.

The available remedies do not alter the inherently arbitrary nature of a qualifying period of cohabitation.

7. Would the definition of cohabitant be improved by the introduction of a list of features or characteristics to be taken into account in deciding whether the parties are cohabitants?

If so, what features or characteristics should be included?

(Paragraph 3.101)

Comments on Question 7

Yes.

It would be helpful to have a list of features or characteristics to be taken into account in deciding whether the parties are cohabitants, provided that the features are clearly stated to be *non-exclusive* and that emphasis is placed, as it is in legislation elsewhere, on all the

circumstances of the relationship. The lists found in the legislation in Australia and New Zealand and discussed by the Commission at paras 3.58 and 3.64, respectively, provide useful models. The Commission might also look at the more extensive list produced by the American Law Institute in its model statute (American Law Institute, *Principles of the Law of Family Dissolution: Analysis and Recommendations* (Newark, N.J.: Matthew Bender/LexisNexis, 2002), § 6.03).

8. What are consultees' views on the introduction of a registration system for cohabitants?

(Paragraph 3.101)

Comments on Question 8

A registration system for cohabitants should not be introduced.

Couples currently have the opportunity to formalise their relationship by marrying and, soon, the option of registering a civil partnership will be available to mixed sex, as well as same sex, couples (at the time of writing, the Civil Partnership (Scotland) Bill has passed in the Scottish parliament and awaits the Royal Assent). Attaching legal consequences to simple cohabitation is designed to protect people who, for whatever reason, have not formalised their relationship. Were registration of cohabitation be introduced, there might be the implication that couples who failed to register where evincing a lesser degree of commitment than those who did. Depending on the features or characteristics to be taken into account in deciding whether the parties are cohabitants, there is the danger that failure to register might be interpreted in such a way as to deny a couple recognition as cohabitants.

9. Do sections 26 and / or 27 cause any difficulty in practice?

(Paragraph 4.34)

Comments on Question 9

Anecdotal evidence (arguably, no evidence at all) and the dearth of litigation involving these provisions suggest that they are not causing any difficulty in practice.

10. Should the language in sections 26 and / or 27 be modernised?

(Paragraph 4.34)

Comments on Question 10

The general position take in this response is that cohabitants should be treated by the legal system in the same way as spouses and civil partners (including having the same right to contract out of the default rules).

Sections 26 and 27 of the Family Law (Scotland) Act 2006 Act replicate, as closely as possible, the terms of the Family Law (Scotland) Act 1985, ss 25 and 26, respectively. As the Discussion Paper points out, at para 4.33, in so far as it is somewhat anachronistic, in the 21st Century, to refer to payment of an allowance for joint household expenses, the 2006 Act, s 27, would benefit from modernisation. However, any change should go hand in hand with amendment to the 1985 Act, s 26.

11. Should sections 26 and / or 27 be modified in some other way?

(Paragraph 4.34)

Comments on Question 11

Nothing comes to mind.

12. Should the policy underpinning awards for financial provision for former cohabitants, where cohabitation ends otherwise than by death, be:

(a) compensation for economic loss sustained during the relationship;

(b) relief of need:

(c) sharing of property acquired during the cohabitation;

(d) sharing the future economic burden of child care;

(e) a combination of any or all of (a) to (d) above; or

(f) something else?

(Paragraph 5.69)

Comments on Question 12

One shortcoming of the 2006 Act provisions on cohabitants is the lack of any clear policy objective. Unlike the comprehensive package applying on divorce and civil partnership dissolution under the Family Law (Scotland) Act 1985, the 2006 Act does not provide the courts with guidance on what they should be seeking to achieve in making an award to a former cohabitant on relationship breakdown.

If the Commission decides to follow the path favoured in this response, recommending that the provisions of the Family Law (Scotland) Act 1985 should apply to qualifying cohabitants, then a clear policy objective would be provided. Failing that, then separate legislation for cohabitants should proceed on the basis of option (e), above, combining all of (a) to (d).

13. For the purposes of financial provision for former cohabitants, should any distinction be made between a child of whom the cohabitants are parents and a child who is or was accepted by the cohabitants as a child of the family?

(Paragraph 5.69)

Comments on Question 13

No.

It is a general principle of Scots law that the welfare of the child is the paramount consideration. How children come to be part of a family is not relevant to their needs and it is not relevant to the application of that principle. Thus, all children involved should be included in the court's consideration of any award, a position consistent with the parallel provisions in the 1985 Act.

14. Should the test for determining what order, if any, the court may make for financial provision on cessation of cohabitation otherwise than by death be based on fairness and reasonableness, having regard to all the circumstances of the case, including a list of relevant factors such as:

(a) the financial and non-financial contributions made by each party to the relationship, including the contribution made by each party to the care of the family and the family home;

(b) the effect of the cohabitation upon the earning capacity of each of the parties;

(c) the parties' respective needs and resources;

(d) relief of financial hardship caused by the cohabitation or the end of the cohabitation;

(e) a combination of any or all of (a) to (d) above; or

(f) something else?

(Paragraph 5.69)

Comments on Question 14

The test should replicate that applied to spouses and civil partners under the Family Law (Scotland) Act 1985.

15. Are the remedies available to the court on an application for financial provision by a former cohabitant adequate and sufficient?

(Paragraph 5.92)

Comments on Question 15

No.

As the Commission highlights in the Discussion Paper, at paras 5.76-5.78, a wide range of commentators have noted the inadequacy of the available remedies.

16. If not, should the remedies be extended to include:

(a) transfer of property;

(b) pension sharing;

(c) periodic payments for a period after the end of the cohabitation, sufficient to relieve short term financial hardship; or

(d) something else?

(Paragraph 5.92)

Comments on Question 16

Option (d).

Again, all of the remedies available to spouses and civil partners under the Family Law (Scotland) Act 1985 should be available to the court in making an award to a parting cohabitant.

17. Should express provision be made requiring or permitting the court to consider the resources of the former cohabitants in deciding what order, if any, to make for financial provision?

(Paragraph 5.92)

Comments on Question 17

Yes.

Again, this would be consistent with the provisions of the Family Law (Scotland) Act 1985 (see particularly, s 8(2)).

18. Should the one year time limit for making a claim under section 28(2) of the 2006 Act be extended?

(Paragraph 6.35)

Comments on Question 18

Yes.

The one year time limit is designed ensure that parting cohabitants know where they stand and can move on with their lives. However, it takes no account of the emotional fallout of relationship breakdown or of the widespread ignorance of the law and can lead to a range of problems including deserving cohabitants losing out on a remedy; the raising and sisting of actions; barring of counterclaims; and discouraging negotiated settlements.

19. If the time limit is extended, what should the new time limit be?

(Paragraph 6.35)

Comments on Question 19

Three, which failing, two years.

20. If the time limit is extended, should the court be afforded discretion to allow late claims?

(Paragraph 6.35)

Comments on Question 20

Yes.

It is always possible that a case will present itself where there is a good reason why the claim was not raised within the time limit and it makes sense to give the court discretion to allow late claims.

21. If the time limit is not extended, should the court be afforded discretion to allow late claims?

(Paragraph 6.35)

Comments on Question 21

Yes.

The shorter the time limit, the more there is reason to afford the court discretion to allow late claims.

22. If the court is afforded discretion to allow late claims:

(a) should the test for the exercise of discretion be "on cause shown", "in exceptional circumstances" or something else?

(b) should there be a maximum period (backstop) beyond which no claim may competently be made?

(Paragraph 6.35)

Comments on Question 22

(a) In order to allow maximum flexibility in the operation of the court's discretion to allow late claims, it would be better to have the lower test "on cause shown" rather than requiring the claimant to demonstrate "exceptional circumstances".

(b) Since permitting late claims would be discretionary, there is no need to have a backstop since the full implications of a late claim could be put to the court.

23. Should express provision be made in the 2006 Act to allow parties to agree extension of the time limit to facilitate settlement?

(Paragraph 6.35)

Comments on Question 23

Yes, for the reasons set out by the Commission in the Discussion Paper at para 6.34.

24. Should express statutory provision be made permitting the court to have regard to the terms of any agreement between the parties as to financial provision on cessation of cohabitation (including opting out of the 2006 Act regime) when deciding what order, if any, to make?

(Paragraph 7.39)

Comments on Question 24

Yes.

As was noted in response to Question 1, the autonomy of individuals who make an informed decision to avoid marriage and its consequences can be respected by permitting them to contract out of the default rules applying on relationship breakdown. It makes sense to have express provision to permit – and, indeed, to require – the court to have regard to any such agreement when deciding what order, if any, to make.

25. Should express statutory provision be made allowing the court to set aside, or vary any term of, a cohabitation agreement? If so, should the test for setting aside or variation be:

(a) that the agreement was not fair or reasonable at the time it was entered into;

(b) that there has been a material change in the parties' circumstances since the agreement was entered into, or

(c) another test (and if so what should that test be)?

(Paragraph 7.39)

Comments on Question 25

Yes.

Given that the position taken here is one supporting parity between cohabitants, spouses and civil partners, then option (a), above is the obvious choice, being that set out in the Family Law (Scotland) Act 1995, s 16.

26. What information or data do consultees have on:

(a) the economic impact of sections 25-28 of the Family Law (Scotland) Act 2006,

(b) the potential economic impact of any option for reform discussed in this Discussion Paper (in particular the impact in terms of tax law of the possibility of extending the remedies available to cohabitants on cessation of cohabitation

otherwise than by death to include property transfers/pension sharing/maintenance)?

(c) the potential economic impact upon the SCTS and legal aid budgets of any option for reform discussed in this Discussion Paper, including extension of the time limit for claims and additional remedies?

(Paragraph 9.4)

Comments on Question 26

I have no information or data on these issues.

General Comments

The examination by the Commission of this topic is welcomed.

36. Glasgow Bar Association

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1. Should the regime for financial provision for cohabitants on cessation of cohabitation otherwise than by death remain separate from that for spouses and civil partners on divorce and dissolution?

(Paragraph 2.66)

Comments on Question 1 Yes, but there will be some crossover principles. There are very good personal reasons why people choose their status in relationships and the law must reflect this.

2. Should the definition of cohabitant in section 25 of the 2006 Act be amended?

(Paragraph 3.101)

Comments on Question 2 While one size does not fit all, if the aim is to make provision for as many cohabitants as possible, there will be merits in widening the definition. Making reference to marriage and civil partnerships does not seem forward thinking.

3. If consultees think the definition should be amended, should the comparison with spouses be removed in favour of a description of the nature of the relationship, such as "enduring family relationship", "genuine domestic basis", or something else?

(Paragraph 3.101)

Comments on Question 3

Yes**,** something along the lines of domestic relationship may be a broader definition.

4. If the comparison with spouses is to be removed, should the legislation expressly provide that couples within the forbidden degrees of relationship to each other will be excluded?

(Paragraph 3.101)

Comments on Question 4

Societal norms would be supportive of this proposition.

5. Should a qualifying period of cohabitation be introduced in order to access remedies under the 2006 Act? If so:

   (a) how long should that qualifying period be?

   (b) should the qualifying period be different, or removed altogether, if the parties have children?

(Paragraph 3.101)

Comments on Question 5

We would be opposed to the imposition of a qualifying period. Each case will arise on it's own merits, facts and circumstances and the overarching principles should be fairness and promoting access to justice.

6. Would the response to Question 5(a) or (b) change if the remedies available to former cohabitants were extended?

(Paragraph 3.101)

Comments on Question 6

We would welcome the Courts having the ability to extend a time bar case in cohabitation claims, as they do in reparation claims.

7. Would the definition of cohabitant be improved by the introduction of a list of features or characteristics to be taken into account in deciding whether the parties are cohabitants?

If so, what features or characteristics should be included?

(Paragraph 3.101)

Comments on Question 7

A list of features should not preclude a case proceeding, which always should be heard on it's own facts and circumstances. Illustrative characteristics may preclude cases. We do not want this to be prescriptive. Judicial knowledge is such that this would be implemented as guidance, but any publicity campaign for the public, in raising their awareness, would have to ensure that it is a guidance and not definitive features. Current issues regarding public knowledge and perceptions should inform how this information campaign could better inform the public.

8. What are consultees' views on the introduction of a registration system for cohabitants?

(Paragraph 3.101)

Comments on Question 8

The public resources in proceeding with this would seem disproportionate to the gain. We anticipate there will be a lack of public knowledge and engagement.

9. Do sections 26 and / or 27 cause any difficulty in practice?

(Paragraph 4.34)

Comments on Question 9

Not to our knowledge.

10. Should the language in sections 26 and / or 27 be modernised?

(Paragraph 4.34)

Comments on Question 10

Yes, “housekeeping allowance” has traditional marriage values and connotations.

11. Should sections 26 and / or 27 be modified in some other way?

(Paragraph 4.34)

Comments on Question 11

We have no additional modifications to propose.

12. Should the policy underpinning awards for financial provision for former cohabitants, where cohabitation ends otherwise than by death, be:

    (a) compensation for economic loss sustained during the relationship;

    (b) relief of need:

    (c) sharing of property acquired during the cohabitation;

    (d) sharing the future economic burden of child care;

    (e) a combination of any or all of (a) to (d) above; or

    (f) something else?

(Paragraph 5.69)

Comments on Question 12

A fairness argument lends itself to the conclusion that a combination of factors (a) to (d) should be adopted.

13. For the purposes of financial provision for former cohabitants, should any distinction be made between a child of whom the cohabitants are parents and a child who is or was accepted by the cohabitants as a child of the family?

(Paragraph 5.69)

Comments on Question 13

No. However, we recognise the legislation in relation to child maintenance by a natural father and submit that such a provision is a factor to be taken into consideration.

14. Should the test for determining what order, if any, the court may make for financial provision on cessation of cohabitation otherwise than by death be based on fairness and reasonableness, having regard to all the circumstances of the case, including a list of relevant factors such as:

(a) the financial and non-financial contributions made by each party to the relationship, including the contribution made by each party to the care of the family and the family home;

(b) the effect of the cohabitation upon the earning capacity of each of the parties;

(c) the parties' respective needs and resources;

(d) relief of financial hardship caused by the cohabitation or the end of the cohabitation;

(e) a combination of any or all of (a) to (d) above; or

(f) something else?

(Paragraph 5.69)

Comments on Question 14

We support the consideration of a combination of all of the factors (a) to (d) if the paramount principles are to focus on fairness and reasonableness.

15. Are the remedies available to the court on an application for financial provision by a former cohabitant adequate and sufficient?

(Paragraph 5.92)

Comments on Question 15

No. The current obstacle initially is time, (12 month barrier from date of separation), thereafter the current provisions are limiting assessment to economic advantage and disadvantage

which are very challenging to quantify and ultimately, the relief of a cash settlement may not be adequate or sufficient to truly reflect a fair and reasonable sharing.

16. If not, should the remedies be extended to include:

(a) transfer of property;

(b) pension sharing;

(c) periodic payments for a period after the end of the cohabitation, sufficient to relieve short term financial hardship; or

(d) something else?

(Paragraph 5.92)

Comments on Question 16

Yes, all of the above (a) to (c).

17. Should express provision be made requiring or permitting the court to consider the resources of the former cohabitants in deciding what order, if any, to make for financial provision?

(Paragraph 5.92)

Comments on Question 17

Yes, this would produce a result which reflects fairness and reasonableness in relation to the issue.

18. Should the one year time limit for making a claim under section 28(2) of the 2006 Act be extended?

(Paragraph 6.35)

Comments on Question 18

Yes. The current legislation, without a provision to allow the exercise of judicial discretion for relief of this time limit is a barrier to settlement of claims and ultimately applies pressure to litigate. We acknowledge the equivalent principle of a clean break between parties to a

marriage and believe that it is in no-one's interest to delay unreasonably. Allowing judicial discretion to waive a time limit based on facts and circumstances will always be a safety net for the minority.

19. If the time limit is extended, what should the new time limit be?

(Paragraph 6.35)

Comments on Question 19

We would support the extension of the time limit, proposing a two year limit is provided for. This gives sufficient time for vouching, negotiations and extra-judicial settlement, while supporting a clean break deadline that is more workable, realistic and achieves fairness.

20. If the time limit is extended, should the court be afforded discretion to allow late claims?

(Paragraph 6.35)

Comments on Question 20

Yes, for the reasons previously stated, we would welcome the provision of judicial discretion to allow late claims.

21. If the time limit is <u>not</u> extended, should the court be afforded discretion to allow late claims?

(Paragraph 6.35)

Comments on Question 21

Yes, primarily because this promotes fairness.

22. If the court is afforded discretion to allow late claims:

    (a) should the test for the exercise of discretion be "on cause shown", "in exceptional circumstances" or something else?

    (b) should there be a maximum period (backstop) beyond which no claim may competently be made?

(Paragraph 6.35)

Comments on Question 22

On cause shown would ensure that the principle of fairness is the paramount consideration. If this is the overarching principle driving legislative change, then it is hard to argue for a backstop, which will prevent a claim. There will inevitably be cases on the fringe of a spectrum but if the concept is to cast the net wide, then removing barriers instead of imposing them will have the greatest impact.

23. Should express provision be made in the 2006 Act to allow parties to agree extension of the time limit to facilitate settlement?

(Paragraph 6.35)

Comments on Question 23

Yes, this would be a useful tool for negotiations, allowing extra time by mutual agreement.

24. Should express statutory provision be made permitting the court to have regard to the terms of any agreement between the parties as to financial provision on cessation of cohabitation (including opting out of the 2006 Act regime) when deciding what order, if any, to make?

(Paragraph 7.39)

Comments on Question 24

We would submit that this is another useful tool, but should not be considered in isolation. Each case considered on it's own facts and circumstances will always give the most equitable solution.

25. Should express statutory provision be made allowing the court to set aside, or vary any term of, a cohabitation agreement? If so, should the test for setting aside or variation be:

    (a) that the agreement was not fair or reasonable at the time it was entered into;

    (b) that there has been a material change in the parties' circumstances since the agreement was entered into, or

    (c) another test (and if so what should that test be)?

(Paragraph 7.39)

Comments on Question 25

Consideration of both (a) and (b) would allow the widest judicial discretion and is likely to produce the most equitable outcome..

26. What information or data do consultees have on:

(a) the economic impact of sections 25-28 of the Family Law (Scotland) Act 2006,

(b) the potential economic impact of any option for reform discussed in this Discussion Paper (in particular the impact in terms of tax law of the possibility of extending the remedies available to cohabitants on cessation of cohabitation otherwise than by death to include property transfers/pension sharing/maintenance)?

(c) the potential economic impact upon the SCTS and legal aid budgets of any option for reform discussed in this Discussion Paper, including extension of the time limit for claims and additional remedies?

(Paragraph 9.4)

Comments on Question 26

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 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.

General Comments

The Glasgow Bar Association is the independent voice of the legal profession in the west of Scotland. The Association is there to promote, represent and protect the rights and interests of it's members in the practice of law. In addition, our objects are to promote access to legal services and to justice; to consider and, if necessary, formulate proposals and initiate action for law reform; to consider and monitor proposals made by other bodies for law reform and draft legislation and to make comments, recommendations and representations thereanent to the appropriate quarters. We welcome the opportunity to participate in this discussion. We have already facilitated a remote workshop between the Commissioner and our members. Opinions are varied and strongly held but there is a consensus that this legislation is not fit for purpose and the modernisation of this will serve the people of Scotland far better.

37. Kirsty Malcolm, Advocate

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1. Should the regime for financial provision for cohabitants on cessation of cohabitation otherwise than by death remain separate from that for spouses and civil partners on divorce and dissolution?

(Paragraph 2.66)

Comments on Question 1

Broadly speaking the answer would be no, but subject to a few caveats

There can be no doubt that the current legislative regime lacks from a clear policy objective, such that where it intended to bring certainty and clarity to the remedies available to couples living as cohabitants, it has achieved precisely the opposite. There is no need to rehearse the problems the existing regime has, that has been fully considered within this consultation. After a great deal of questioning and debate I now believe we are at a stage where, in the 21st Century, where cohabitation is a chosen form of relationship, that that should be given proper recognition within the law. That would mean extending the remedies available, and improving the accessibility to those; in other words losing cumbersome tests which are difficult to apply, and interpret. Aligning the regimes for financial provison between those for cohabitants, and those for spouses/civil partners when the realtionships come to an end would introduce clarity, and simplicity. It would give proper recognition to cohabitation as a form of relationship, which can create financial dependence, incur sacrifices, accumulate property and wealth as a consequence of both parties contributions financial or non-financial, which the current regime

attempts to do but fails to do. Two adults working in partnership for their benefit as a couple, or as a family, should be able to share those benefits as intended, without the risk of their respective contributions being unpicked or dismissed as irrelevant many years later.

I don not believe that undermines the institution of marriage, or its alleged place in Scottish society. That position has changed over recent months in any event with the advent of opposite sex civil partnerships. In a fair a just society, which presumably Scotland strives to be, we should not consider one form of committed adult relationship as lesser than another. If that relationship provides as good a base for family life as marriage or civil partnership it should be afforded similar recognition, rights and protections. The quote at para 2.36 of the Discussion Paper, from New Zealand sums that up.

If an approach is adopted which allows for the regimes to be the same/similar, then in order to maintain the balance with individuals desire for autonomy, and non-regulation of their relationship, that can be resolved by the provision of an opt-out, with the encouragement of contractual arrangments instead.

People actively choose to cohabit, for whatever reasons, but the majority have relationships which are as enduring, committed, financially intertwined etc as any marriage or civil partnership, and they should be afforded the same protections and remedies in law, as they would be if they had undergone a formal ceremony to recognise their relationship, unless they choose not to avail themselves of such.

The notion that giving recognition to cohabitants in this way, such that they would have a status in law, could cause problems and fails to recognise they are often still married, or in other relationships with financial obligations, is false in my view. I do not consider this an omission by the SLC research. A married cohabitant's financial commitments after the relevant date and prior to divorce would extend only to alimentary provision, which is assessed with reference to needs and resources. If there was a former cohabitant making a similar claim, that would be factored in. The assets to be shared in terms of financial provision are accrued to a certain point in time, which presumably as a matter of fact has to be before the cohabitation starts. Any legislation for cohabitants could address any perceived injsutices, as is done in section 29 where a surviving spouse retains priority, if that was considered necessary. If the logic which is applied to the definition of "matrimonial property" in the 1985 Act is applied to property accrued/acquired during a cohabitation, then I do not consider this is really an issue.

2. Should the definition of cohabitant in section 25 of the 2006 Act be amended?

(Paragraph 3.101)

Comments on Question 2

Yes – the comparison with marriage/civil partnership is slightly false.

3. If consultees think the definition should be amended, should the comparison with spouses be removed in favour of a description of the nature of the relationship, such as "enduring family relationship", "genuine domestic basis", or something else?

(Paragraph 3.101)

Comments on Question 3

A description of the relationship which can be factually assessed, and objectively so, would be needed.

4. If the comparison with spouses is to be removed, should the legislation expressly provide that couples within the forbidden degrees of relationship to each other will be excluded?

(Paragraph 3.101)

Comments on Question 4

5. Should a qualifying period of cohabitation be introduced in order to access remedies under the 2006 Act? If so:

   (a) how long should that qualifying period be?

   (b) should the qualifying period be different, or removed altogether, if the parties have children?

(Paragraph 3.101)

Comments on Question 5

If the 2006 Act as is remains there should be no qualifying period. That would be the case even if new legislation aligned with provisions for spouses on divorce. The view previously that this would be self limiting, because the nature of claims possible would be restricted by the length and nature of the relationship has been proved correct. There is no need to change this especially if the nature of the financial provision available is discretionary, or ultimately determined with reference to discretionary principles.

6. Would the response to Question 5(a) or (b) change if the remedies available to former cohabitants were extended?

(Paragraph 3.101)

Comments on Question 6

NO – subject perhaps to the availability of an element of discretion in making an award of financial provision.

7. Would the definition of cohabitant be improved by the introduction of a list of features or characteristics to be taken into account in deciding whether the parties are cohabitants?

If so, what features or characteristics should be included?

(Paragraph 3.101)

Comments on Question 7

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8. What are consultees' views on the introduction of a registration system for cohabitants?

(Paragraph 3.101)

Comments on Question 8

Not appropriate nor practical.

9. Do sections 26 and / or 27 cause any difficulty in practice?

(Paragraph 4.34)

Comments on Question 9

Only in so far as people fail to utilise them in an appropriate way, tending to bundle claims to moveables within s.28, but that approach is improving in practice.

10. Should the language in sections 26 and / or 27 be modernised?

(Paragraph 4.34)

Comments on Question 10

Yes – housekeeping allowance has sexist overtones and old fashioned.

11. Should sections 26 and / or 27 be modified in some other way?

(Paragraph 4.34)

Comments on Question 11

Possibly – if a complete overhaul is not undertaken of provision for cohabitants, it would be better to make these more relevant, particularly s.27.

12. Should the policy underpinning awards for financial provision for former cohabitants, where cohabitation ends otherwise than by death, be:

    (a) compensation for economic loss sustained during the relationship;

    (b) relief of need:

    (c) sharing of property acquired during the cohabitation;

    (d) sharing the future economic burden of child care;

    (e) a combination of any or all of (a) to (d) above; or

    (f) something else?

(Paragraph 5.69)

Comments on Question 12

(e) – a combination of (a) to (d), but if sharing property acquired during the cohabitation, there should be scope to depart from equal sharing as there is in marriage, and more focus on the contributions, and how they balance between financial and non-financial. Such that a situation where one party has given up their career to care for children and run the home allowing other to earn and pursue their career, is easily treated differently from a situation where one party has simply enjoyed a life of being taken care of at the other's expense.

13. For the purposes of financial provision for former cohabitants, should any distinction be made between a child of whom the cohabitants are parents and a child who is or was accepted by the cohabitants as a child of the family?

(Paragraph 5.69)

Comments on Question 13

«InsertTextHere»

14. Should the test for determining what order, if any, the court may make for financial provision on cessation of cohabitation otherwise than by death be based on fairness and reasonableness, having regard to all the circumstances of the case, including a list of relevant factors such as:

(a) the financial and non-financial contributions made by each party to the relationship, including the contribution made by each party to the care of the family and the family home;

(b) the effect of the cohabitation upon the earning capacity of each of the parties;

(c) the parties' respective needs and resources;

(d) relief of financial hardship caused by the cohabitation or the end of the cohabitation;

(e) a combination of any or all of (a) to (d) above; or

(f) something else?

(Paragraph 5.69)

Comments on Question 14

Combination of the above, with final discretion on whether to make an award with court still. Factors to influence the exercise of that discretion should be identified as guidance.

15. Are the remedies available to the court on an application for financial provision by a former cohabitant adequate and sufficient?

(Paragraph 5.92)

Comments on Question 15

NO

16. If not, should the remedies be extended to include:

(a) transfer of property;

(b) pension sharing;

(c) periodic payments for a period after the end of the cohabitation, sufficient to relieve short term financial hardship; or

(d) something else?

(Paragraph 5.92)

Comments on Question 16

All of the above (a) to (c)

17. Should express provision be made requiring or permitting the court to consider the resources of the former cohabitants in deciding what order, if any, to make for financial provision?

(Paragraph 5.92)

Comments on Question 17

Yes – to avoid any doubt. This is particularly important if retain current framework.

18. Should the one year time limit for making a claim under section 28(2) of the 2006 Act be extended?

(Paragraph 6.35)

Comments on Question 18

No – but allow late claims on discretionary basis, with suitably high test.

19. If the time limit is extended, what should the new time limit be?

(Paragraph 6.35)

Comments on Question 19

«InsertTextHere»

20. If the time limit is extended, should the court be afforded discretion to allow late claims?

(Paragraph 6.35)

Comments on Question 20

«InsertTextHere»

21. If the time limit is not extended, should the court be afforded discretion to allow late claims?

(Paragraph 6.35)

Comments on Question 21

Yes as above, with strict/high test.

22. If the court is afforded discretion to allow late claims:

(a) should the test for the exercise of discretion be “on cause shown”, “in exceptional circumstances” or something else?

(b) should there be a maximum period (backstop) beyond which no claim may competently be made?

(Paragraph 6.35)

Comments on Question 22

I would favour something higher than on cause shown, as that is to low a test. Exceptional circumstances is perhaps too high, or likely to be interpreted strictly. Perhaps a test based on showing real prejudice if not allowed to claim.

If late claims allowed there should be a backstop; people have to be allowed to move on in their lives. Anyone can divorce after two years to conclude financial obligations of marriage, so 2 years would seem appropriate.

23. Should express provision be made in the 2006 Act to allow parties to agree extension of the time limit to facilitate settlement?

(Paragraph 6.35)

Comments on Question 23

Not in favour but if was included the express agreement would need to be in writing.

24. Should express statutory provision be made permitting the court to have regard to the terms of any agreement between the parties as to financial provision on cessation of cohabitation (including opting out of the 2006 Act regime) when deciding what order, if any, to make?

(Paragraph 7.39)

Comments on Question 24

If there is an agreement opting out, that would presumably remove jurisdiction from the court under 2006 act. If parties have decided that is their approach then they should be allowed to stand by that subject to normal principles of reduction. No

25. Should express statutory provision be made allowing the court to set aside, or vary any term of, a cohabitation agreement? If so, should the test for setting aside or variation be:

    (a) that the agreement was not fair or reasonable at the time it was entered into;

    (b) that there has been a material change in the parties' circumstances since the agreement was entered into, or

    (c) another test (and if so what should that test be)?

(Paragraph 7.39)

Comments on Question 25

It could be helpful tohave a set aside provision, and if so the test that there has been a material change in circumstances would be appropriate.

26. What information or data do consultees have on:

(a) the economic impact of sections 25-28 of the Family Law (Scotland) Act 2006,

(b) the potential economic impact of any option for reform discussed in this Discussion Paper (in particular the impact in terms of tax law of the possibility of extending the remedies available to cohabitants on cessation of cohabitation otherwise than by death to include property transfers/pension sharing/maintenance)?

(c) the potential economic impact upon the SCTS and legal aid budgets of any option for reform discussed in this Discussion Paper, including extension of the time limit for claims and additional remedies?

(Paragraph 9.4)

Comments on Question 26

General Comments

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38. Professor Hector MacQueen, University of Edinburgh

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1. Should the regime for financial provision for cohabitants on cessation of cohabitation otherwise than by death remain separate from that for spouses and civil partners on divorce and dissolution?

(Paragraph 2.66)

Comments on Question 1

Yes, but only so far as justified by the differences between cohabitation and the other forms of union.

2. Should the definition of cohabitant in section 25 of the 2006 Act be amended?

(Paragraph 3.101)

Comments on Question 2

Yes.

3. If consultees think the definition should be amended, should the comparison with spouses be removed in favour of a description of the nature of the relationship, such as "enduring family relationship", "genuine domestic basis", or something else?

(Paragraph 3.101)

Comments on Question 3

Yes; I would suggest "committed and interdependent relationship" as the general description, along with a direction to consider this in the light all relevant facts and circumstances and a non-exclusive list of factors that may or may not be so taken into account in assessing whether or not there is such a relationship in the particular case.

4. If the comparison with spouses is to be removed, should the legislation expressly provide that couples within the forbidden degrees of relationship to each other will be excluded?

(Paragraph 3.101)

Comments on Question 4

No opinion.

5. Should a qualifying period of cohabitation be introduced in order to access remedies under the 2006 Act? If so:

   (a) how long should that qualifying period be?

   (b) should the qualifying period be different, or removed altogether, if the parties have children?

(Paragraph 3.101)

Comments on Question 5

No, it would introduce a formality inevitably productive of disputes and hard cases; but if a qualifying period is introduced, then it should be removed altogether if the parties have children.

6. Would the response to Question 5(a) or (b) change if the remedies available to former cohabitants were extended?

(Paragraph 3.101)

Comments on Question 6

No.

7. Would the definition of cohabitant be improved by the introduction of a list of features or characteristics to be taken into account in deciding whether the parties are cohabitants?

If so, what features or characteristics should be included?

(Paragraph 3.101)

Comments on Question 7

It would help advisers and courts but should be non-exclusive, with the presence or absence of any particular feature or characteristic on the list not to be decisive in itself. Relevant facts and circumstances include the duration of the relationship; residential, financial and property arrangements; the birth and care of children for and by the couple; and the reputation and public aspects of the relationship.

8. What are consultees' views on the introduction of a registration system for cohabitants?

(Paragraph 3.101)

Comments on Question 8

Negative, because unlikely to have the desired effects or to achieve needed protection of dependent cohabitants and children of the relationship.

9. Do sections 26 and / or 27 cause any difficulty in practice?

(Paragraph 4.34)

Comments on Question 9

No comment.

10. Should the language in sections 26 and / or 27 be modernised?

(Paragraph 4.34)

Comments on Question 10

Yes

11. Should sections 26 and / or 27 be modified in some other way?

(Paragraph 4.34)

Comments on Question 11

No comment.

12. Should the policy underpinning awards for financial provision for former cohabitants, where cohabitation ends otherwise than by death, be:

(a) compensation for economic loss sustained during the relationship;

(b) relief of need:

(c) sharing of property acquired during the cohabitation;

(d) sharing the future economic burden of child care;

(e) a combination of any or all of (a) to (d) above; or

(f) something else?

(Paragraph 5.69)

Comments on Question 12

(e)

13. For the purposes of financial provision for former cohabitants, should any distinction be made between a child of whom the cohabitants are parents and a child who is or was accepted by the cohabitants as a child of the family?

(Paragraph 5.69)

Comments on Question 13

No.

14. Should the test for determining what order, if any, the court may make for financial provision on cessation of cohabitation otherwise than by death be based on fairness and reasonableness, having regard to all the circumstances of the case, including a list of relevant factors such as:

(a) the financial and non-financial contributions made by each party to the relationship, including the contribution made by each party to the care of the family and the family home;

(b) the effect of the cohabitation upon the earning capacity of each of the parties;

(c) the parties' respective needs and resources;

(d) relief of financial hardship caused by the cohabitation or the end of the cohabitation;

(e) a combination of any or all of (a) to (d) above; or

(f) something else?

(Paragraph 5.69)

Comments on Question 14

(e). I favour equiparating as much as possible the financial consequences of cohabitation breakdown with those of divorce. A major advantage of this approach is that the cohabitation jurisprudence (and advice) could then draw upon its now well developed divorce equivalent.

15. Are the remedies available to the court on an application for financial provision by a former cohabitant adequate and sufficient?

(Paragraph 5.92)

Comments on Question 15

No

16. If not, should the remedies be extended to include:

(a) transfer of property;

(b) pension sharing;

(c) periodic payments for a period after the end of the cohabitation, sufficient to relieve short term financial hardship; or

(d) something else?

(Paragraph 5.92)

Comments on Question 16

(a), (b) and (c).

17. Should express provision be made requiring or permitting the court to consider the resources of the former cohabitants in deciding what order, if any, to make for financial provision?

(Paragraph 5.92)

Comments on Question 17

Yes.

18. Should the one year time limit for making a claim under section 28(2) of the 2006 Act be extended?

(Paragraph 6.35)

Comments on Question 18

Yes

19. If the time limit is extended, what should the new time limit be?

(Paragraph 6.35)

Comments on Question 19

Five years from the date of breakdown; or two years from that date with a discretion to allow late claims, and five years as the backstop.

I was somewhat surprised to see that the Advisory Group generally agreed that extending the time limit to three years would be too long because "[it] would not allow cohabitants to move on with their lives". I wondered what the evidence for that belief might be. My own instinct before reading the DP was that a five-year time limit might be appropriate. That was because the alternative common law claim for unjustified enrichment has a five-year prescriptive period, and a roughly equivalent time limit for the statutory claim would help reduce resort to the common law one; indeed, might justify abolishing such resort altogether.

Having read the DP I see that two years is a typical period in the jurisdictions that have gone furthest in making the financial consequences of cohabitation breakdown equivalent to that for divorce, and that this does not seem to lead to problems in those jurisdictions like those we in Scotland have with a one-year limit. I would therefore accept a two-year limit as a reasonable choice. But it is too short to justify abolishing the ex-cohabitant's right to claim for the other party's unjustified enrichment, particularly where the time limit expired without a claim having been made under the statute.

All this said, I would still say that the best overall solution would be to have a statutory scheme which displaced the common law enrichment claim altogether, and did so expressly. If after *Pert v McCaffrey* the position is that a party may bring *both* a statutory and a common law claim, the potential for difficulty and confusion for advisers and courts seems to me to be high. It may be that the best way to do this is to introduce a two-year time limit for a statutory claim along with the possibility of a judicial discretion to allow a late claim. I think such a scheme would justify abolishing the ex-cohabitant's right to make any claim in unjustified enrichment, whether alongside a statutory claim or after the time limit for the statutory claim had expired.

20. If the time limit is extended, should the court be afforded discretion to allow late claims?

(Paragraph 6.35)

Comments on Question 20

Yes.

21. If the time limit is <u>not</u> extended, should the court be afforded discretion to allow late claims?

(Paragraph 6.35)

Comments on Question 21

Yes

22. If the court is afforded discretion to allow late claims:

    (a) should the test for the exercise of discretion be "on cause shown", "in exceptional circumstances" or something else?

    (b) should there be a maximum period (backstop) beyond which no claim may competently be made?

(Paragraph 6.35)

Comments on Question 22

(a) Yes, "on cause shown" or equivalent. Of the bases for such a discretion mentioned in the DP, "exceptional hardship" seems too limited (and indeed in such cases surely it is most likely that the claim will be raised timeously) and "exceptional circumstances" will, I think, lead to an excessively narrow judicial approach. "Cause shown" would allow a party to point to practical and other difficulties in raising the claim such as were apparent in *Courtney's Executors v Campbell*, or to the emotional difficulties in engaging in property division negotiations mentioned in the discussion of New Zealand at para 6.26 of the DP. None of these are obviously "exceptional", I would suggest, but should in my view be potential grounds for extending the time limit.

Finally, I would suggest that an ex-cohabitant's hardship arising after but not as a direct result of the ending of the cohabitation should not be a cause for extending the time limit (compare the fifth principle of the law on financial provision on divorce).

(b) Yes, five years (to match roughly the prescriptive period for unjustified enrichment)

23. Should express provision be made in the 2006 Act to allow parties to agree extension of the time limit to facilitate settlement?

(Paragraph 6.35)

Comments on Question 23

Yes

24. Should express statutory provision be made permitting the court to have regard to the terms of any agreement between the parties as to financial provision on cessation of cohabitation (including opting out of the 2006 Act regime) when deciding what order, if any, to make?

(Paragraph 7.39)

Comments on Question 24

Yes

25. Should express statutory provision be made allowing the court to set aside, or vary any term of, a cohabitation agreement? If so, should the test for setting aside or variation be:

(a) that the agreement was not fair or reasonable at the time it was entered into;

(b) that there has been a material change in the parties' circumstances since the agreement was entered into, or

(c) another test (and if so what should that test be)?

(Paragraph 7.39)

Comments on Question 25

(a) Fairness and reasonableness at time of entry into agreement; and (b) material change in circumstances since the agreement was entered.

It should be the case with cohabitants as it is with spouses and civil partners that they are able to make their own contractual arrangements about the consequences of breakdown, whether before or after that event occurs, and that the courts take such arrangements into full account in making orders for financial provision. Such contracts would be governed by the law of contract, and so be subject to invalidity for duress, fraud, facility and circumvention, undue influence, error and misrepresentation in the usual way. The amended Unfair Contract Terms Act 1977 does not apply, however, since neither party is acting in the course of a business in entering the contract. Therefore the court should be empowered to set aside or vary the cohabitation breakdown agreement or any term thereof which was not fair and reasonable at the time the parties entered it, in the same fashion as the power to set aside agreements about financial provision on divorce (Family Law (Scotland) Act 1985 s 16 as amended).

The received wisdom in the present Scots law of contract is that while material changes of circumstance may affect the formation of a contract (see Scot Law Com No 252, 2018, chapter 6), once a contract has been concluded only changes of circumstance making the contract's performance impossible, illegal or something radically different from what the parties originally contemplated can be taken into account; and that only to determine that the

contract is frustrated and no longer enforceable. While the court may be able to remedy any enrichment of a party arising from this unenforceability, it has no other power to effect equitable adjustment of the contract to meet the new circumstances, and this is even more so where the change of circumstances does not frustrate the contract (see *Lloyds TSB Foundation for Scotland v Lloyds Banking Group Plc* [2013] UKSC 3, 2013 SC (UKSC) 13, paras 44-7 per Lord Hope of Craighead).

Lord Hope's comments are obiter, and the above received wisdom can be challenged (see MacQueen 'The Covid-19 pandemic, contracts and change of circumstance: still room for equitable adjustment?' Edinburgh Private Law Blog, 24 June 2020, accessible at www.blogs.law.ed.ac.uk/private-law/2020/06/24/the-covid-19-pandemic-contracts-and-change-of-circumstance-still-room-forequitable-adjustment/). But it would seem sensible to ensure that if "material change of circumstance" is to be taken into account in assessing the enforceability and adjustability of cohabitation agreements (as I think it should) to make it an express provision of the proposed legislation. In Scot Law Com No 252 it was suggested with regard to formation of contract that "material" be replaced with "fundamental" as the adjective describing the relevant change of circumstance; but I am inclined to think that "material" is more appropriate in the context of regulating cohabitation breakdown agreements.

I note that in other jurisdictions the cohabitation agreement must be in writing signed by both parties, with each receiving independent legal advice, to have any effect. While this may impose costs on the parties, it does mean that any less formal agreement is merely one of the factors for the court to consider in making its orders and can be wholly disregarded if appropriate. My observation is that cohabitants who are acquiring residential property together do often enter formal agreements about breakdown and its consequences as one of the conditions for obtaining loan finance, so the suggested requirement of writing and independent legal advice may already be being met in more cases than the DP suggests.

It might also be helpful for legislation to make clear that cohabitation agreements and in particular cohabitation breakdown agreements are not any longer contrary to public policy (if they ever were).

26. What information or data do consultees have on:

(a) the economic impact of sections 25-28 of the Family Law (Scotland) Act 2006,

(b) the potential economic impact of any option for reform discussed in this Discussion Paper (in particular the impact in terms of tax law of the possibility of extending the remedies available to cohabitants on cessation of cohabitation otherwise than by death to include property transfers/pension sharing/maintenance)?

(c) the potential economic impact upon the SCTS and legal aid budgets of any option for reform discussed in this Discussion Paper, including extension of the time limit for claims and additional remedies?

(Paragraph 9.4)

Comments on Question 26

Not able to comment on these matters.

General Comments

The general view I have taken for some time is that cohabitation ought to be recognised as giving the parties a distinct status in law. In particular the financial consequences of a cohabitation's breakdown should be made as similar as possible to those of divorce or dissolution. There is no evidence to support the proposition that recognising cohabitation in this way would undermine marriage, and the burden should be upon those who argue the contrary to show it if they can.

There may be other reasons to differentiate the two in terms of their legal consequences but these must be articulated clearly in each instance where differentiation is maintained or introduced. The major difficulties seem to me to be in identifying the points at which the relationship as such begins and ends, and the law on cohabitation needs to be nuanced in ways that accept and recognise its lack of formalities on these matters. This may justify some differences from the law on marriage and civil partnership. For this reason too, I am against any shift making the status of cohabitant dependent upon registration or upon having lived together for a given period of time.

Achieving the status must depend upon the relevant facts and circumstances of a relationship. I agree that an approach to this question based upon an analogy with marriage is unhelpful, almost self-contradictory, and I don't think introducing an analogy with civil partnership would be useful either. I would favour rather something along the lines of the Australian, Irish and New Zealand approaches (although I hope we can avoid calling the relationship *de facto*; all human relationships are *de facto*!). The legislation should start by excluding couples who are married or in a civil partnership; and then recognise couples who can be seen from consideration of all the relevant facts and circumstances to be in a committed and interdependent relationship. The relevant facts and circumstances will generally include the duration of the relationship; the parties' residential, financial and property arrangements; the birth and care of children for and by the couple; and the reputation and public aspects of the relationship. But none of these factors should be essential or decisive in finding for or against the existence of cohabitation.

I accept that the reliance above on the concept of "couple" means that for the moment at least relationships of three or more persons should be excluded. There are questions of public

policy here reaching beyond cohabitation to marriage and civil partnership, while there is no evidence of any major social issue or demand for such a reform. On the other hand, the question of the "non-intimate" relationship which is nevertheless interdependent and mutually committed strikes me as one which it will be difficult to exclude save by very specific definition; and it is not clear to me why such exclusion is thought to be necessary. The difficulties referred to in para 3.123 of the DP – taxation, housing and social security benefits – surely also arise with "intimate" cohabitants as well. In any event, the public law tail should perhaps follow the private law dog here.

Finally, the point I would wish to stress above all in this response is that the scheme which emerges from this law reform process should be such as to make it reasonable to abolish resort to claims in unjustified enrichment. These arose in the first place because cohabitants had no other worthwhile remedy; they have continued as a result of the inadequacies of the regime created in 2006. But unjustified enrichment also provides an inadequate response to the issues arising from cohabitation breakdown, especially where the cohabitation relationship has been of any length. It would be better to design a statutory scheme tailored so that reliance on unjustified enrichment was no longer necessary, even as a desperate last resort.

40. Sheriff Andrew Mackie

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Sheriff Andrew Mackie

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SCTS

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1. Should the regime for financial provision for cohabitants on cessation of cohabitation otherwise than by death remain separate from that for spouses and civil partners on divorce and dissolution?

(Paragraph 2.66)

Comments on Question 1

Yes it should in my view – spouses and civil partners have opted to enter into marriages/civil partnerships and should be taken to know the legal and financial consequences of same – cohabitants may have elected not to enter into marraiges or civil partnerships for many reasons but these may well include a desire on the part of each to retain financial autonomy.

2. Should the definition of cohabitant in section 25 of the 2006 Act be amended?

(Paragraph 3.101)

Comments on Question

Yes it should in my view – I consider the comparison with spouses to be unhelphul, particularly if the regime for financial provision for cohabitants referred to in question 1 is to remain

separate from that of spouses and civil partners. My preference would be for a definition which clearly identifies those individuals for whom this regime should be available.

3. If consultees think the definition should be amended, should the comparison with spouses be removed in favour of a description of the nature of the relationship, such as "enduring family relationship", "genuine domestic basis", or something else?

(Paragraph 3.101)

Comments on Question 3

Yes it should be removed in my view – it should be replaced with a definition which focuses on the nature of a committed relationship – the words "enduring family relationship" are helpful – as are other terms reflecting stability and interdependence, in respect of which joint financial arrangements would be only one aspect.

4. If the comparison with spouses is to be removed, should the legislation expressly provide that couples within the forbidden degrees of relationship to each other will be excluded?

(Paragraph 3.101)

Comments on Question 4

Yes it should in my view – any significant change of that nature should be a matter for a separate consultation and careful consideration would require to be given to the policy intentions of including such individuals within the definition of cohabitants for these purposes.

5. Should a qualifying period of cohabitation be introduced in order to access remedies under the 2006 Act? If so:

   (a) how long should that qualifying period be?

   (b) should the qualifying period be different, or removed altogether, if the parties have children?

(Paragraph 3.101)

Comments on Question 5

No I don't consider a QP would be helpful. I think a QP would be likely to operate to exclude a number of individuals from eligibility for FP who might otherwise have been found to be

entitled to FP in their particular circumstances – I am thinking of parties who make financial arrangements on the basis of their joint intentions and then the cohabitation breaks down within a relatively short period of time – this would have the potential to give rise to unfairness and may also lead to an increase in the volume of litigation in the event of there being provision for exceptions to the QP in certain cases.

6. Would the response to Question 5(a) or (b) change if the remedies available to former cohabitants were extended?

(Paragraph 3.101)

Comments on Question 6

no

7. Would the definition of cohabitant be improved by the introduction of a list of features or characteristics to be taken into account in deciding whether the parties are cohabitants?

If so, what features or characteristics should be included?

(Paragraph 3.101)

Comments on Question 7

Yes in my view it would, although no list should be considered to be exhaustive – I think the list set out in para 3.64 of the Discussion Paper is a helpful one.

8. What are consultees' views on the introduction of a registration system for cohabitants?

(Paragraph 3.101)

Comments on Question 8

I don't consider it would be helpful and consider it likely to be little used. It is in my view doubtful as to whether the most vulnerable cohabitants would have the power to persuade their partner that registration would be appropriate.

9. Do sections 26 and / or 27 cause any difficulty in practice?

(Paragraph 4.34)

Comments on Question 9

In my experience they have caused little difficulty in litigation terms but I understand practitioners may find it difficult to advise parties on the likely outcomes of litigation.

10. Should the language in sections 26 and / or 27 be modernised?

(Paragraph 4.34)

Comments on Question 10

Yes it should in my view to more accurately reflect the realities of 21st century cohabitation.

11. Should sections 26 and / or 27 be modified in some other way?

(Paragraph 4.34)

Comments on Question 11

No

12. Should the policy underpinning awards for financial provision for former cohabitants, where cohabitation ends otherwise than by death, be:

    (a) compensation for economic loss sustained during the relationship;

    (b) relief of need:

    (c) sharing of property acquired during the cohabitation;

    (d) sharing the future economic burden of child care;

    (e) a combination of any or all of (a) to (d) above; or

    (f) something else?

(Paragraph 5.69)

Comments on Question 12

A combination of a, c and d in appropriate cases as well as consideration being given to whether financial hardship will be/has been caused to either party.

13. For the purposes of financial provision for former cohabitants, should any distinction be made between a child of whom the cohabitants are parents and a child who is or was accepted by the cohabitants as a child of the family?

(Paragraph 5.69)

Comments on Question 13

I consider it should partly because other financial arrangements may already be in place in respect of a child born prio to cohabitation commencing.

14. Should the test for determining what order, if any, the court may make for financial provision on cessation of cohabitation otherwise than by death be based on fairness and reasonableness, having regard to all the circumstances of the case, including a list of relevant factors such as:

(a) the financial and non-financial contributions made by each party to the relationship, including the contribution made by each party to the care of the family and the family home;

(b) the effect of the cohabitation upon the earning capacity of each of the parties;

(c) the parties' respective needs and resources;

(d) relief of financial hardship caused by the cohabitation or the end of the cohabitation;

(e) a combination of any or all of (a) to (d) above; or

(f) something else?

(Paragraph 5.69)

Comments on Question 14

Yes it should in my view and the list of relevant factors should be a non exhaustive list but should include a-d above.

15. Are the remedies available to the court on an application for financial provision by a former cohabitant adequate and sufficient?

(Paragraph 5.92)

Comments on Question 15

No, in my view they are not. The remedies available should be extended. In cases where assets are limited the court should have greater flexibility to make orders based on the principles of fairness and reasonableness.

16. If not, should the remedies be extended to include:

(a) transfer of property;

(b) pension sharing;

(c) periodic payments for a period after the end of the cohabitation, sufficient to relieve short term financial hardship; or

(d) something else?

(Paragraph 5.92)

Comments on Question 16

Yes, the remedies in paras a – c would be helpful.

17. Should express provision be made requiring or permitting the court to consider the resources of the former cohabitants in deciding what order, if any, to make for financial provision?

(Paragraph 5.92)

Comments on Question 17

Yes in my view that would be essential to making any order taking account of enforceability.

18. Should the one year time limit for making a claim under section 28(2) of the 2006 Act be extended?

(Paragraph 6.35)

Comments on Question 18

No in my view it should not be extended. It is important that parties have certainty in respect of their financial affairs and there should be a cut off point beyond which they can safely rely on actions being time barred.

19. If the time limit is extended, what should the new time limit be?

(Paragraph 6.35)

Comments on Question 19

N/A

20. If the time limit is extended, should the court be afforded discretion to allow late claims?

(Paragraph 6.35)

Comments on Question 20

N/A

21. If the time limit is not extended, should the court be afforded discretion to allow late claims?

(Paragraph 6.35)

Comments on Question 21

Yes but in my view the test should be one of exceptional circumstances as it is desirable that parties have certainty at some point in respect of their financial and property affairs following the breakdown of relationships.

22. If the court is afforded discretion to allow late claims:

    (a) should the test for the exercise of discretion be “on cause shown”, “in exceptional circumstances” or something else?

(b) should there be a maximum period (backstop) beyond which no claim may competently be made?

(Paragraph 6.35)

Comments on Question 22

In my view the test should be exceptional circumstances and a back stop provision of say 18 months might be helpful to parties.

23. Should express provision be made in the 2006 Act to allow parties to agree extension of the time limit to facilitate settlement?

(Paragraph 6.35)

Comments on Question 23

Yes this would prevent unnecessary litigation.

24. Should express statutory provision be made permitting the court to have regard to the terms of any agreement between the parties as to financial provision on cessation of cohabitation (including opting out of the 2006 Act regime) when deciding what order, if any, to make?

(Paragraph 7.39)

Comments on Question 24

Yes in my view it should.

25. Should express statutory provision be made allowing the court to set aside, or vary any term of, a cohabitation agreement? If so, should the test for setting aside or variation be:

(a) that the agreement was not fair or reasonable at the time it was entered into;

(b) that there has been a material change in the parties' circumstances since the agreement was entered into, or

(c) another test (and if so what should that test be)?

(Paragraph 7.39)

Comments on Question 25

Yes in my view it should have such a power – and the test should be as outlined in part a.

26. What information or data do consultees have on:

(a) the economic impact of sections 25-28 of the Family Law (Scotland) Act 2006,

(b) the potential economic impact of any option for reform discussed in this Discussion Paper (in particular the impact in terms of tax law of the possibility of extending the remedies available to cohabitants on cessation of cohabitation otherwise than by death to include property transfers/pension sharing/maintenance)?

(c) the potential economic impact upon the SCTS and legal aid budgets of any option for reform discussed in this Discussion Paper, including extension of the time limit for claims and additional remedies?

(Paragraph 9.4)

Comments on Question 26

No comment

General Comments

41. Law Society of Scotland

Consultation Response

Aspects of Family Law: A Discussion Paper on Cohabitation

17 July 2020

Introduction

The Law Society of Scotland is the professional body for over 11,000 Scottish solicitors. With our overarching objective of leading legal excellence, we strive to excel and to be a world-class professional body, understanding and serving the needs of our members and the public. We set and uphold standards to ensure the provision of excellent legal services and ensure the public can have confidence in Scotland's solicitor profession.

We have a statutory duty to work in the public interest, a duty which we are strongly committed to achieving through our work to promote a strong, varied and effective solicitor profession working in the interests of the public and protecting and promoting the rule of law. We seek to influence the creation of a fairer and more just society through our active engagement with the Scottish and United Kingdom Governments, Parliaments, wider stakeholders and our membership.

Our Child and Family Law committee and our Trusts and Succession committee welcome the opportunity to consider and respond to the Scottish Law Commission consultation, *Aspects of Family Law: Discussion Paper on Cohabitation*. We have previously considered issues around cohabitation and, in particular, the need for reform of sections 28 and 29 of the Family Law (Scotland) Act 2006[26]. Our report on these issues in 2019 highlighted the challenges around the application of the time periods specified in this legislation, with 76% of practitioners responding to our engagement survey on the operation of these sections highlighting this as an issue. We have included our report on these issues with this response.

1. General comments

Our approach to policy issues is directed by our statutory aims under the Solicitors (Scotland) Act 1980, namely to represent the interests of the solicitors' profession in Scotland and the interests of the public in relation to that profession, and by the regulatory objectives of the Legal Services (Scotland) Act 2010, namely:

- supporting the constitutional principle of the rule of law and the interests of justice
- protecting and promoting the interests of consumers and the public interest generally
- promoting access to justice and competition in the provision of legal services
- promoting an independent, strong, varied and effective legal profession
- encouraging equal opportunities within the legal profession
- and promoting and maintaining adherence to professional principles

Considering issues around cohabitation engages these objectives, as it is important that the law around the status of these relationships is clear and comprehensible and that there is access to

[26] https://www.lawscot.org.uk/media/361911/rights-of-cohabitants-paper.pdf

justice for people to have their rights determined fairly and effectively. The challenges resulting from time periods under the 2006 Act are an obvious obstacle to access to justice

There has been wider reform around the legal framework for relationships in recent years, including, most recently, the introduction of civil partnerships for same sex couples with the enactment of the Civil Partnership (Scotland) Act 2020. Issues around the legal protections for cohabiting couples, however, remain, particularly as cohabitation an increasingly prevalent way in which people live. As the consultation paper observes, the number of cohabiting couples is significant, at around 16% of families (with or without children) in Scotland in 2011, and the number of cohabiting couples is increasing, for instance, by 29.7% across the UK between 2005 and 2015. The legal differences between cohabitants and either spouses or civil partners are significant.

2. Questions

1. Should the regime for financial provision for cohabitants on cessation of cohabitation otherwise than by death remain separate from that for spouses and civil partners on divorce and dissolution?

This question is central to the issues considered in the discussion paper, and our response to this determines to some degree our responses to the following questions. Though our committee is not unanimous in this view, and many of our members will also have varying attitudes towards reform in this area, we do not believe that there should be equivalence between cohabitants, civil partners and spouses in financial provision on divorce or dissolution of relationship. This may create situations of hardship for cohabitants, particularly those who are unaware of the financial consequences. We believe that reform could be directed to lessen hardship in such situations as the preferred approach.

This would avoid provide greatest fidelity to the intention of the parties in a relationship and avoid some of the challenges around creating equivalence between different formal types of relationship. A cohabiting relationship may have, for instance, one or both individuals still married or in a civil partnership; a policy of equivalence would generate equal and competing claims for financial provision from cohabitant and either spouse or civil partner that would need to be resolved; even with more limited reform, the issue of multiple contemporaneous relationships, not addressed in the discussion paper, should be considered.

A policy of equivalence might deter individuals in two ways, first, from entering into civil partnership or marriage, if financial provisions on termination of the relationship are the same. Second, from entering into a cohabiting relationship, as many individuals may wish to live together without financial commitment.

2. Should the definition of cohabitant in section 25 of the 2006 Act be amended?

We believe that the definition of cohabitation under the 2006 Act needs to be amended, particularly because of the legislative changes around marriage and civil partnership and broadly agree with the reasons articulated in the discussion paper. We note that any change from the current statutory definition under the 2006 Act may need age qualification, to ensure that no child can be considered as entering into a relationship of emotional or financial interdependence.

3. If consultees think the definition should be amended, should the comparison with spouses be removed in favour of a description of the nature of the relationship, such as "enduring family relationship", "genuine domestic basis", or something else?

We believe that the definition used in Australia, New Zealand and by the European Commission on Family Law, namely a '*de facto* relationship' may be the best option. There may be confusion around what the 'genuine domestic basis' for a relationship may involve and an 'enduring family relationship' might overstress the duration of a relationship. We do not believe that a list of factors that might help to define what might constitute a relationship of this type would assist. A list of factors might quickly become outdated and, if drawn too wide, might include types of relationship, such as polyamory, that may not be intended.

4. If the comparison with spouses is to be removed, should the legislation expressly provide that couples within the forbidden degrees of relationship to each other will be excluded?

As forbidden degrees of relationship are not formal legal relationships, and may be prohibited under criminal law, we do not believe that it would be necessary to exclude these. If the comparison with spouses is to be removed, however, there may be benefit in specifying, for instance, the types of familial relationship to be excluded, such as between parent and child, grandparent and child, siblings etc.

5. Should a qualifying period of cohabitation be introduced in order to access remedies under the 2006 Act? If so: (a) how long should that qualifying period be? (b) should the qualifying period be different, or removed altogether, if the parties have children?

We do not believe that a qualifying period should be introduced. The introduction of such a period may exclude some individuals from the discretionary remedies currently available and create unjust outcomes in individual cases. As noted above, we have already highlighted concerns around the impact of fixed time limits such as the time periods under sections 28 and 29 of the 2006 Act, and believe that these should be reformed.

6. Would the response to Question 5(a) or (b) change if the remedies available to former cohabitants were extended?

No.

7. Would the definition of cohabitant be improved by the introduction of a list of features or characteristics to be taken into account in deciding whether the parties are cohabitants? If so, what features or characteristics should be included?

As above, we do not believe that a list of features and characteristics would assist. These factors may quickly become outdated. The court already has discretion to consider the facts when remedies sought, and we believe that this provides the most flexible approach.

8. What are consultees' views on the introduction of a registration system for cohabitants?

We do not support the introduction of a register. Such a change may have unintended consequences, such as deterring individuals from entering into a civil partnership or marriage or, where remedies were sought, a failure to register might be considered evidence around the level of commitment, potentially denying people access to remedies that would otherwise be within the discretion of the court, considering the individual facts.

9. Do sections 26 and / or 27 cause any difficulty in practice?

No.

10. Should the language in sections 26 and / or 27 be modernised?

As the discussion paper notes, modernisation of terminology may be helpful. As the terms of the 2006 Act broadly follow those in the Family Law (Scotland) Act 1985, we believe that any amendment made should look to retain consistency between both sets of provisions.

11. Should sections 26 and / or 27 be modified in some other way?

We do not have any additional proposals for reform.

12. Should the policy underpinning awards for financial provision for former cohabitants, where cohabitation ends otherwise than by death, be: (a) compensation for economic loss sustained during the relationship; (b) relief of need: (c) sharing of property acquired during the cohabitation; (d) sharing the future economic burden of child care; (e) a combination of any or all of (a) to (d) above; or (f) something else?

The 2006 Act does not currently provide clear policy direction on the outcomes for financial provision and we believe that reform in this area would be helpful. A clear articulation of the intended policy objectives would help in the structuring of awards and provide greater certainty to parties looking to resolve their affairs.

There are potential risks in any reform, and reform of the 1985 Act should be considered in conjunction with reform around financial remedies for cohabitants. There is a risk that reform would disincentivise civil partnership or marriage or provide financial remedies to former cohabitants that might exceed those for former civil partners or spouses, for instance, in situations where a long cohabitation was followed by a short marriage or civil partnership.

Depending on the range of factors to be included within the scope of financial provision, there may be opportunity for parties to enter into cohabitation agreements to specify the financial outcomes desired on termination of the cohabitation, though there may be practical challenges around the formation and enforceability of such agreements.

At present we have financial awards taking into account (net) economic advantage derived by a cohabitant from the contributions of the other and (net) economic disadvantage incurred in the interest of the other or the family. We believe that the challenge is the lack of clarity around this expression, that we should retain this principle, though with clearer articulation of this in legislation.

13. For the purposes of financial provision for former cohabitants, should any distinction be made between a child of whom the cohabitants are parents and a child who is or was accepted by the cohabitants as a child of the family?

It is crucial that there is adequate financial provision for the future economic burden of childcare, whether for the child of the cohabitants, or for the child accepted by the cohabitants as a child of the family. For the latter, though, where financial provision is being made by another parent, then this reduction in the economic burden of childcare should be reflected in the financial provision between cohabitants as currently.

14. Should the test for determining what order, if any, the court may make for financial provision on cessation of cohabitation otherwise than by death be based on fairness and reasonableness, having regard to all the circumstances of the case, including a list of relevant factors such as: (a) the financial and non-financial contributions made by each party to the relationship, including the contribution made by each party to the care of the family and the family home; (b) the effect of the cohabitation upon the earning capacity of each of the parties; (c) the parties' respective needs and resources; (d) relief of financial hardship caused by the cohabitation or the end of the cohabitation; (e) a combination of any or all of (a) to (d) above; or (f) something else?

Greater clarity around the constituent elements of any order may be helpful, though some caution around the overall scope of such provision may be required to avoid creating broader financial remedies than for civil partnership or marriage. As with other reform, it is important that this should be undertaken in conjunction with revision to the 1985 Act. Also, as suggested above, the ability for cohabitants to opt out from all or some elements financial provision may be required.

15. Are the remedies available to the court on an application for financial provision by a former cohabitant adequate and sufficient?

As suggested by the discussion paper, we believe that the current remedies available are not sufficient. We believe that the court should not be limited in the orders that can be made, but should have a wide range of possible orders available depending on the circumstances of the individual case.

16. If not, should the remedies be extended to include: (a) transfer of property; (b) pension sharing; (c) periodic payments for a period after the end of the cohabitation, sufficient to relieve short term financial hardship; or (d) something else?

We believe that the remedies should be extended to include each of these elements. While the available award may be lower as a result of these measures, there should be full discretion to the court as to how this remedy should be met. In practice, property is often transferred between cohabitants as part of a settlement. As a result, allowing courts the power to order the transfer of property would be a useful step and would facilitate settlement as a result.

17. Should express provision be made requiring or permitting the court to consider the resources of the former cohabitants in deciding what order, if any, to make for financial provision?

Yes. As these resources are considered under the 1985 Act for former civil partners or spouses, there would be consistency to do so. There is no point in making orders unless they can be obtempered.

18. Should the one year time limit for making a claim under section 28(2) of the 2006 Act be extended?

There may be potential for the consideration of extending time periods in which claims can be brought. Though the one year time period does prompt early court action, and affords parties the opportunity to move on from the dissolution of a relationship, we believe that the current position can create unjust outcomes. Our paper on reform of sections 28 and 29 of the 2006 Act, included with this response, provides more detail on our basis for this approach.

There is currently no discretion for the court to consider claims beyond the one year period. This may impact on attempts by parties to resolve by mediation, negotiation or collaboration. Parties may be unaware of their rights, suffering the emotional impact of the relationship breakdown, or attempting to resume their relationship (and, more generally, establishing the date of separation can be a practical challenge).

Having conducted research in this area, we previously proposed that the time limit remain at one year, but that the court would have the discretion to consider cases beyond that time limit ‘on cause shown’ or ‘on special cause shown’. Further to our earlier work and having considered matters further, we suggest that ‘on cause shown’ may be a preferable basis as this is more

commonly found within existing legislation and court rules and therefore bears greater clarity and understanding.

Our earlier paper also provides commentary and recommendations in relation to the availability of a claim of unjustified enrichment in circumstances in which a remedy was available under section 28 of the 2006 Act but has since expired. We welcome the court's recent decision in the case of *Pert* v *McCaffrey*[27]. However, we note that not all matters addressed in Lord Beckett's decision in the case of *Courtney's Executors v. Campbell*[28] were fully resolved in *Pert* and legislation on the matter would be welcome.

19. If the time limit is extended, what should the new time limit be?

We refer to our response to question 18.

20. If the time limit is extended, should the court be afforded discretion to allow late claims?

We refer to our response to question 18.

21. If the time limit is not extended, should the court be afforded discretion to allow late claims?

We refer to our response to question 18.

22. If the court is afforded discretion to allow late claims: (a) should the test for the exercise of discretion be "on cause shown", "in exceptional circumstances" or something else? (b) should there be a maximum period (backstop) beyond which no

[27] [2020] CSIH 5
[28] Jan Claire Igoe, Dominic Vincent Macari as executors nominate of the late Robert Nisbet Courtney v Yvonne Campbell [2016] CSOH 136

claim may competently be made?

We refer to our response to question 18.

23. Should express provision be made in the 2006 Act to allow parties to agree extension of the time limit to facilitate settlement?

No.

24. Should express statutory provision be made permitting the court to have regard to the terms of any agreement between the parties as to financial provision on cessation of cohabitation (including opting out of the 2006 Act regime) when deciding what order, if any, to make?

The treatment of agreement between parties around financial provision on the termination of a relationship may benefit from wider consideration, not solely for cohabitants but also for civil partners and spouses. Agreements are made currently by cohabitants, for instance, around the treatment of the purchase of property, and it is right that courts should have regard to the terms of these agreements.

25. Should express statutory provision be made allowing the court to set aside, or vary any term of, a cohabitation agreement? If so, should the test for setting aside or variation be: (a) that the agreement was not fair or reasonable at the time it was entered into; (b) that there has been a material change in the parties' circumstances since the agreement was entered into, or (c) another test (and if so what should that test be)?

Ensuring fidelity to the express wishes of individuals in a relationship and adequate protection for possible power imbalance entering into agreements can be challenging. Provisions exist under section 16 of the 1985 Act for the setting aside or variation of any agreement on financial provision on divorce or dissolution of civil partnership, and extending similar provision to agreements made by cohabitants around financial provision in equivalent circumstances would be consistent with this approach. There may be the opportunity to consider whether this approach should be extended to situations in which there has been a material change in the parties' circumstances since the agreement entered into, and not solely for cohabitants, as this may well have occurred in relationships over time.

26. What information or data do consultees have on: (a) the economic impact of sections 25-28 of the Family Law (Scotland) Act 2006, (b) the potential economic impact of any option for reform discussed in this Discussion Paper (in particular the impact in terms of tax law of the possibility of extending the remedies available to cohabitants on cessation of cohabitation otherwise than by death to include property transfers/pension sharing/maintenance)? (c) the potential economic impact upon the SCTS and legal aid budgets of any option for reform discussed in this Discussion Paper, including extension of the time limit for claims and additional remedies?

We highlight a particular issue around equality impact, around the status of parties who have entered into Islamic marriage on the basis of a nikah, but do not then satisfy the requirements of formal marriage or civil partnership. Such parties would presumably be treated as cohabitants. Were they to be able to petition for nullity, then they would have access to full financial provision under the Family Law (Scotland) Act 1985 (see section 17). We believe that further engagement around these particular issues would be beneficial.

42. Engender

Engender response to the Scottish Law Commission Aspects of Family Law Discussion Paper on Cohabitation

August 2020

INTRODUCTION

Engender is Scotland's feminist policy and advocacy organisation, working to secure women's political, economic and social equality with men. Our aspiration is for a Scotland where women and men have equal access to rights, resources, decision-making and safety.

We welcome this opportunity to comment on the Scottish Law Commission Aspects of Family Law Discussion Paper on Cohabitation following early engagement with the Commission's research in 2018. Our view is that proposals to reform the law on cohabitation must take into account gendered inequalities including women's lesser access to resources, greater likelihood of poverty, the impact of care and motherhood on women's lifetime earnings, domestic abuse and restrictions to women's equal access to the legal system.

While modest protections for separating or bereaved cohabitants were introduced with the Family Law (Scotland) Act 2006, these have proven to be rarely used in the years following. We would wish to see greater access to asset sharing, the possibility of ongoing awards and an approach rooted in principles similar to divorce provisions in Scots law, where the facts of the relationship demonstrate significant contributions, where both financial and other forms of contribution are equally valued.

CONSULTATION QUESTIONS

We have elected to approach the consultation broadly by responding to key chapter themes rather than to provide answers to all 26 questions in order to focus on our key concerns.

1. Access to legal protections for married and cohabiting couples

We have no view on whether the detail of legal provisions on divorce and cessation of cohabitation should remain formally separate. Our concern is that women have access to a regime that best protects the realisation of their rights and protects them from disadvantage based on gendered hierarchies or the state's preference of a particular form of relationship.

We recognise that Scotland's existing cohabitation regime attempts to redress dramatic inequalities on separation while respecting "the autonomy of cohabitants who have (apparently) chosen to live "unfettered" from financial obligations."[29] Thus, the existing regime assumes equal informed willingness to conduct a relationship outside of the legal regime applied to married couples. Marriage has of course evolved significantly over the years, but for many people, and particularly for women, it still can be seen as a system rooted in patriarchal and outdated ideals or closely bound up in religious or solemnised processes. While many traditional elements in some marriage ceremonies, such as being given away, may be dispensed with, for those with sincerely felt ideological opposition to entering a marriage the law currently offers no system of formal recognition, something due to change with the introduction of opposite sex civil partnerships.

In that context, we have previously noted that enabling different forms of commitment to be made which provide substantively the same rights and legal protections is a marker of a diverse and pluralistic society which respects these views.[30]

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[29] Garland, F (2015) Gender imbalances, economic vulnerability and cohabitation: evaluating the gendered impact of Section 28 of the Family Law (Scotland) Act 2006, Edinburgh Law Review 19(3), pp.311-332, p.315.
[30] Engender (2020) Engender submission of evidence to the Equalities and Human Rights Committee inquiry on the Civil Partnership (Scotland) Bill. Available at: https://www.engender.org.uk/content/publications/Engender-submission-of-evidence-to-the-Equalities-and-Human-Rights-Committee-inquiry-on-the-Civil-Partnership-Scotland-Bill.pdf

With 17.6% of families in Scotland headed by a cohabiting couple[31] and numbers opting against marriage consistently increasing, it must be acknowledged that cohabitants are not a homogenous group with singular choices and experiences. While it has been suggested that the absence of regulation is an effort in state neutrality, holding to the concept of a clean break when cohabitants separate is clearly not neutral, and further concentrates power and assets with the partner who likely has the strongest attachment to the labour market going forward and who is likely not providing care. In short, power and economic resource is allowed to be concentrated during and then after the relationship comes to an end.[32]

Some advocates for a deregulated approach, such as the academic, lawyer, bioethicist and crossbench peer Baroness Ruth Deech, suggest that regulation of cohabitation overrides individual autonomy and therefore undermines gender equality, claiming that "women do not need and ought not to require to be kept by men after their relationship has come to an end".[33] However, this position is also a blanket one which privileges some women over others by suggesting that all women have access to the same resources and does not recognise that circumstances change.

While clearly an assumption of male-breadwinner female-care division in families is outdated, the current reality remains far more complex. Women are still more likely to provide unpaid care, to give up work to provide care,[34] to work part-time and Scotland's overall gender pay gap is stubbornly persistent at 13.3%,[35] the result of a complex combination of factors such as women's greater likelihood of working part-time in lower paid roles, occupational segregation which funnels women into lower paid and undervalued jobs, sexual harassment and workplace discrimination and the provision of care. There is clear evidence that the earnings divide becomes more acute with

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[31] ONS (2020) Families and households in the UK: 2019. Available at: https://www.ons.gov.uk/peoplepopulationandcommunity/birthsdeathsandmarriages/families/bulletins/familiesandhouseholds/2019#things-you-need-to-know-about-this-release

[32] Sutherland, E.E. (2013) From 'bidie-in' to 'cohabitant' in Scotland: the perils of legislative compromise., International journal of law, policy and the family, 27(2), pp.143-175.

[33] Deech, R (2009) Couples don't need the law to tell them how to live together. Available at: https://www.theguardian.com/commentisfree/2009/nov/22/ruth-deech-marriage-cohabitation-children

[34] Engender (2020) Gender and Unpaid Work: The Impact of Covid-19 on Women's Unpaid Caring Roles. Available at: https://www.engender.org.uk/content/publications/1594974358_Gender--unpaid-work---the-impact-of-Covid-19-on-womens-caring-roles.pdf

[35] Close the Gap (2020) Working Paper 21: Gender Pay Gap Statistics. Available at: https://www.closethegap.org.uk/content/resources/Working-Paper-21-Gender-Pay-Gap-statistics-2019.pdf

motherhood[36] but also with age even where women do not have children[37] and that income disparity persists into retirement with pension inequality.[38]

Commentators have noted that purchasing property in 2020 usually necessitates two incomes and a pooling of resources even if solely for that purpose.[39] Going in further, state-sourced income from social security via Universal Credit actually demands a pooling of resources irrespective of whether a couple is married, with a single household payment that combines eligibility and award to be managed singularly.[40]

Resources may also become entangled as a result of domestic abuse due to forced or coerced pregnancy, financial abuse or violence which may have long term social, psychological and financial consequences for victim-survivors.

Analysis of Canadian cases showed that separating opposite sex cohabitants demonstrated highly gendered roles and contributions.[41] No cases found by the researchers involved a male primary caregiver. While 'breadwinning' was less uniformly male it was still predominantly so, while childcare and domestic work was overwhelmingly carried out by women. Where families had relocated, the research showed that it was women whose careers had suffered.

These findings show that cohabitation, at least where disputes over resources arise, reflects traditional gendered patterns in much the same way as marriage or least that the formalisation of the relationship is not of itself determinative in how contributions will be split. And while the evidence suggests that some cohabiting couples adopt or fall

[36] Grimshaw, D, and Rubery, J (2015) The motherhood pay gap: A review of the issues, theory and international evidence. Available at: https://eige.europa.eu/resources/wcms_371804.pdf
[37] TUC and IPPR (2016) The Motherhood Pay Penalty. Available at: https://www.tuc.org.uk/sites/default/files/MotherhoodPayPenalty.pdf
[38] Prospect What is the gender pension gap? Available at: https://prospect.org.uk/article/what-is-the-gender-pension-gap/
[39] Bottomley, A (2006) From Mrs. Burns to Mrs. Oxley: Do Co-habiting Women (Still) Need Marriage Law? Available at: https://core.ac.uk/download/pdf/90077.pdf
[40] Engender (2016) Gender Matters in Social Security: Individual Payments of Universal Credit. Available at: https://www.engender.org.uk/content/publications/Gender-matters-in-social-security---individual-payments-of-universal-credit.pdf
[41] Leckey, R (2018) Cohabitation, Female Sacrifice, and Judge-Made Law. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3202477

into more traditional gendered roles, elsewhere married couples are individualising, such as through maintaining separate bank accounts.[42]
In practice therefore, it seems that cohabitants and married couples do not behave in substantially different ways and combine their resources, labours and responsibilities irrespective of how they might have conceived of their relationship initially. Holding couples to a presumed active decision to opt out of state protection serves only to privilege the party with more power and assets. In other situations, the law no longer differentiates - the Adoption and Children Act 2002 places cohabiting couples in the same position as married couples or civil partners in terms of their ability to apply for a joint adoption order.

Economic transfers on separation are imperfect but can therefore (at least in theory) attempt to rebalance the financial gains and losses from being in a relationship. These gains and losses remain overwhelmingly gendered[43] and many will impact more acutely over the life course. It is clear that there is a difference, as acknowledged in the discussion paper, between couples at different life stages: "A couple who begin to cohabit when they are young and impecunious students, for example, may go on to have children, buy property and develop careers or business interests."[44] Of course, this is equally true with married couples and yet the law and society maintains distinctions based on an apparent intention at the start of the relationship.

While divorcing spouses may access an asset scheme based on five principles, Section 28 only provides two weaker principles based on "compensatory ideas."[45] The distinction between (at best) "fair compensation"[46] for separating cohabitants and "fairness" for divorcing couples is particularly difficult to defend once the state has determined that at least some protection is necessary with the introduction of s.28.

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[42] Bottomley, A (2006) From Mrs. Burns to Mrs. Oxley: Do Co-habiting Women (Still) Need Marriage Law? Available at: https://core.ac.uk/download/pdf/90077.pdf
[43] Garland, F (2015) Gender imbalances, economic vulnerability and cohabitation: evaluating the gendered impact of Section 28 of the Family Law (Scotland) Act 2006, Edinburgh Law Review, 19(3), pp.311-332, p.331.
[44] Scottish Law Commission (2020) Aspects of Family Law: Discussion Paper on Cohabitation. Available at: https://www.scotlawcom.gov.uk/files/1115/8270/8061/Aspects_of_Family_Law_-_Discussion_Paper_on_Cohabitation_DP_No_170.pdf at 7.36
[45] Miles, J (2012) Cohabitation: Lessons for the South from North of the Border? The Cambridge Law Journal, 71(3), pp.492-495.
[46] Post *Gow v. Grant.*

The desire to restrict protections to marriage in all but the most egregious of dissolutions is inseparable from traditional social control and a maintenance of a hierarchy of relationships. While it may be true that state regulation of cohabitation devalues an individual choice to avoid its intervention, it can also be argued that an absence of regulation reflects a devaluation of personal choice in order to maintain the state's preference toward marriage.

No form of relationship is an easy shorthand for the degree of comingling and interdependence. Assumptions that cohabitants actively want to avoid the regime of marriage, and remain committed to this view throughout their relationship, clearly does not apply in every case. This is especially clear given the proportion of people who express some surprise that they are not protected by the law when their relationship ends.[47] It is also important to remember that decisions about marriage are not made in a vacuum so active choice is even less easily assumed, whether one partner wants to be married and the other doesn't, or whether both choose to prioritise other financial investments over a wedding.

While a protective mechanism for cohabitants cannot account for all gendered inequalities men and women exiting opposite sex relationship experience, there is a clear duty to account for inequalities that arise directly from choices made in the context of the relationship. When opposite sex couples with children separate "one partner leaves with his earning capacity intact while the other's earning capacity is not only hindered for as long as the children continue to live with her, but is impaired in the long term."[48]

As noted during the Australian consultation treating marriage and cohabitants equally "does not remove people's choice; it protects the vulnerable party in an economic and emotional relationship... economic interdependence and dependence happens and should be recognised."[49]

2. The definition of cohabitant

[47] Scottish Law Commission (2020) Aspects of Family Law: Discussion Paper on Cohabitation. Available at : https://www.scotlawcom.gov.uk/files/1115/8270/8061/Aspects_of_Family_Law_-_Discussion_Paper_on_Cohabitation_DP_No_170.pdf

[48] Parkinson, P (1995) The property rights of cohabitees - is statutory reform the answer?, in A Bainham and D Pearl (eds), Frontiers of Family Law, 2nd edn (1995) 301 at 314.

[49] Senate Standing Committee on Legal and Constitutional Affairs (Australia) (2008) para 3.50.

Engender would support amending the definition of cohabitant. We are persuaded that definition of cohabitants by reference to marriage is outdated and increasingly open to conflict, given the evolving and increasingly individualised ways in which married couples define their relationship.[50] We are also persuaded that removing the reference to marriage would reduce the public's perception that marriage by habitation and repute or some other vague idea of 'common law marriage' remains operable in Scotland and that the removal would positively undermine a hierarchy in terms of relationships appropriate in a modern Scotland.

With the introduction of opposite sex civil partnerships and with same sex marriages now common, the idea of a single model of organising relationships and the resulting burdens and roles within them is increasingly difficult to state definitively. Married couples no longer necessarily share finances or even live together while cohabiting couples commonly do so. We would therefore urge a definition that is not overly reliant on a checklist of criteria, believing that a flexible approach would offer more protection in difficult and contested cases.[51] In particular we would be concerned that an undue degree of focus on financial arrangements would belie the complexity and nuances of modern relationships – joint finances may conceal gendered and abusive controls over access to funds while an absence of formalised arrangements does not mean a couple are not cohabiting nor reliant upon one another, particularly with increasingly digitalised finance products.[52] A court should therefore have a view to the whole facts of the particular relationship when determining its character.

We would not support a definition however that hinges solely on the provision of care or childcare as a contribution. While it is important that women with children are protected – and indeed that protection extends beyond the child's 16th birthday and to other family members to whom women are more likely to give up work to care for and who are excluded by the current law – this could exclude other child-free or childless women who have made financial or domestic contributions in other ways.

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[50] McCarthy, F (2014) Defining cohabitation, Scots Law Times, 31, pp.143-145.
[51] Garland, F (2015) Gender imbalances, economic vulnerability and cohabitation: evaluating the gendered impact of Section 28 of the Family Law (Scotland) Act 2006, Edinburgh Law Review, 19(3), pp.311-332.
[52] Leckey, R (2018) Cohabitation, Female Sacrifice, and Judge-Made Law. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3202477

The consultation paper and earlier research from 2010 suggest that in practice courts have heard very few short-term cohabitation disputes, because the facts of the relationships essentially rule them out of disputes over contributions.[53] Similarly, an absence of a minimum duration does not appear to have provoked a rush of cases from couples with minimal financial ties.[54]

Additionally, considerable advantage and disadvantage could conceivably occur in a very short space of time while other couples may be together for decades without making significant contributions to one another's finances or lifestyles. It is impossible to develop a scheme with an arbitrary cut off that will be effective in every circumstance. We do not think that a minimum duration is necessary and may in fact reduce the effectiveness of a separation scheme. Couples who have maintained their financial independence or otherwise separated their life are already falling beyond the scope of the Family Law (Scotland) Act because of their circumstances.

It therefore seems to us proportionate to maintain the existing assumption that couples can utilise an asset sharing provision in any circumstance where one party is likely to be worse off than the other after entering into and because of choices made during the relationship. The central point is how couples view the pooling, and on what basis each made a contribution to the relationship and family[55] and, crucially, the degree to which resources were pooled by the end of the relationship should be decisive rather than a vague intention at the start of the relationship. This would ameliorate some of the difficulties that are inevitable in establishing the date a cohabitation began[56] in favour of focusing on a point of comingling of contribution, for example, when a child was born, the date of a big purchase (home) or the creation of a new business.
We would not support the requirement to register as a condition of accessing protection. Registration is likely to replicate at least to some degree the difficulties of accessing protection that is seen with limiting it to marriage. Protection for cohabitants should be about preventing serious unfairness and hardship. An opt in system would do nothing to address public assumptions that the law is already protecting them. However

[53] Wasoff, F, Miles, J, and Mordaunt, E (2010) Legal Practitioners' Perspectives on the Cohabitation Provisions of the Family Law (Scotland) Act 2006. Available at: http://www.crfr.ac.uk/assets/Cohabitation-final-report.pdf
[54] Ibid.
[55] Bottomley, A (2006) From Mrs. Burns to Mrs. Oxley: Do Co-habiting Women (Still) Need Marriage Law? Available at: https://core.ac.uk/download/pdf/90077.pdf
[56] Guthrie, T, and Hiram, H (2007) Property and Cohabitation: Understanding the Family Law (Scotland) Act 2006, Edinburgh Law Review, 11(2), pp.208-229.

an opt out system also has the potential to deny basic protection to women who do not predict the future disentanglement of their relationship will take place in a different power dynamic to that at the start of their relationship let alone those who experience domestic abuse perpetrated by their partner or ex-partner.

If an opt out of the asset sharing regime or an opt out via cohabitation agreement is permitted, there must be a requirement to ensure legal advice for both partners before the agreement is signed and the court should maintain powers of discretionary challenge in cases of manifest unfairness or domestic abuse.

3. Reforming sections 26 and 27

Engender has no expertise on the operation of sections 26 and 27 in practice.

However, we agree with the Commission's suggestion that the language in the sections is increasingly outdated and has the potential to restrict its effectiveness – e.g. "housekeeping allowance". The pattern of one partner paying an allowance to the other for housekeeping may not be so accurately described, even where there is a cash transfer from a partner working outside the home to the other working within the home. A form of words that recognises the equal value of different forms of contribution and the pooling of these would further entrench the social and economic value of reproductive labour, including domestic labour.

4. Awards for financial provision for former cohabitants, where cohabitation ends otherwise than by death (section 28.)

Engender supports strengthening the principles which govern s.28 awards and cohabitation cessation. Section 28 of the Family Law (Scotland) Act absorbs the principle of 'clean break', which is not accurate where children or economic ventures remain entangled after separation, nor does it reflect the ongoing economic impacts of time taken out of the labour market.

Section 28 allows the court to make an order "in respect of the economic burden of caring for a child" of the former cohabitants but this is not the same as a principle governing the sharing of the economic costs and burdens as is provided for in section 9(1)(b) of the Act in respect of divorcing couples. Unlike s.9, s.28 is backwards looking

and makes no attempt to equalise the disparity in ongoing costs borne as a result of providing childcare. Men are typically more able to leave the relationship with their earning potential unimpacted while women's economic and social costs are higher because of their social roles as caregivers, continuing to provide the majority of primary care for children and disabled and older people. Even where both parents work fulltime, childcare and domestic work is not distributed fairly,[57] a trend that continues post-separation, as nine in ten lone parents are women.[58]

The principles governing asset sharing on divorce include the fair sharing of the economic burden of caring. Section 28 merely allows the court to make an order "in respect of the economic burden of caring for a child" of the former cohabitants but this is not the same as a principle governing the sharing of the economic costs and burdens as is provided for in section 9. Although the Scottish Law Commission did suggest a principle of fair compensation prior to drafting, this was not included in the text of s.28 and has only been broadened in that direction by interpretation following the decision in *Gow v Grant*.

Narrowly construed, s.28 focuses on quantifying the precise economics at play and 'correction' by a one-off sum (that may be payable in instalments but is not an ongoing or lifetime award.) Both (2)(a) and (2)(b) reduce caregiving to an economic and quantifiable cost of childcare, resulting in small awards that ignore the long-term costs of childcare for women throughout their whole lives, as well as other forms of care and domestic work.[59] This makes it difficult where domestic contributions and care contributions have reduced women's lifetime earning potential in such a way that is difficult to quantify on an individual level.[60] The broader reading of s.28's causal requirement "in the interests of the defender" following *Gow v. Grant*[61] allows for a weaker focus on balancing blunt costs and earnings and more comparison of the parties'

[57] Scottish Government (2019) Centre for Time Use Research Time Use Survey 2014-15: Results for Scotland, Scottish Government. Available at: https://www.gov.scot/publications/centre-time-useresearch-time-use-survey-2014-15-results-scotland/pages/5/

[58] NHS Health Scotland (2016) Lone parents in Scotland, Great Britain and the UK: health, employment and social security. Available at: https://www.scotpho.org.uk/media/1157/scotpho161123-lone-parents-scotland-gb-uk.pdf

[59] Garland, F (2015) Gender imbalances, economic vulnerability and cohabitation: evaluating the gendered impact of Section 28 of the Family Law (Scotland) Act 2006, Edinburgh Law Review, 19(3), pp.311-332.331.

[60] Ibid., p.324

[61] [2012] UKSC 29.

financial positions, in theory making it easier for a partner who has made more domestic contributions to the relationship which are harder to quantify.

While section 28 has been criticised for being "cumbersome" section 9(1)(b) has been noted positively for its simplicity.[62] As noted in our response above, it is difficult to rationalise such a distinction in treatment between separating married couples and cohabitants who are otherwise in manifestly the same position unless from the perspective of a policy decision to privilege the institution of marriage.

However, neither economic advantage nor fair compensation is as broad as the "fairness" principle that governs asset sharing on divorce in s.9(1)(b) and the narrower protection afforded to cohabitants rests on assumptions that this state of being "unfettered" from financial obligations is the positive choice of the couple. S.28 cannot address prospective losses, imbalances and unfairness in the way s.9 does.[63]

Although s.28(2)(a) addresses (narrowly) economic imbalances of the past, s.28(2)(b) may provide more protection in allowing the court to make an order in respect of post-separation care of children under 16 and more awards appear to have been made on (b) over (a).[64] The fact that courts are more willing to recognise the costs directly associated with children serves to further reduce women to the role of mother without her own life and aspirations.

However, when children are over the age of 16, this section is of little protection, likely to disadvantage older women who may have been providing care for longer, had different attachment to the labour market etc. Additionally Fae Garland notes that "section 28(2)(b) awards have been overly modest" and focused on immediate costs such as childcare.[65] However younger women or women in shorter cohabitating relationships will also be disadvantaged by the need to prove economic disadvantage under s.28(2)(a) as opposed to women who have made longer career sacrifices, while

[62] Wasoff, F, Miles, J, and Mordaunt, E (2010) Legal Practitioners' Perspectives on the Cohabitation Provisions of the Family Law (Scotland) Act 2006. Available at: http://www.crfr.ac.uk/assets/Cohabitation-final-report.pdf
[63] Garland, F (2015) Gender imbalances, economic vulnerability and cohabitation: evaluating the gendered impact of Section 28 of the Family Law (Scotland) Act 2006, Edinburgh Law Review, 19(3), pp.311-332, p.324.
[64] Sutherland, E.E. (2013) From 'bidie-in'to 'cohabitant'in Scotland: the perils of legislative compromise., International journal of law, policy and the family, 27(2), pp.143-175.
[65] Garland, F (2015) Gender imbalances, economic vulnerability and cohabitation: evaluating the gendered impact of Section 28 of the Family Law (Scotland) Act 2006, Edinburgh Law Review, 19(3), pp.311-332.

not necessarily meaning that their career will not suffer as their children still require care.

On the basis of the evidence as to women's material circumstances that are a product of and a contributor to inequality, Engender believes that fairness, equality and compensation for advantage gained must be key elements of the policy rational for cohabitation protection. Our primary concern is therefore the effectiveness of s.28 in minimising financial disadvantage where cohabitation ends.

A clean break approach, as seen in *Jamieson*,[66] has the potential to bake in long term economic disadvantage – the court found that Ms Jamieson had received economic support for a 'homemaking role' during the relationship which balanced out her lack of assets and employment prospects going forward to her long-term detriment. In essence, one partner's ability to move on will be much stronger than one who has given up paid work to provide care and domestic work. [67]

Interpreting and reinterpreting s.28 does not address the fundamental problem of its short term and overly mathematical outlook. Garland also suggests that without periodic payments, courts will inevitably have to speculate about a primary caregiver's future childcare needs and costs regardless of how broad they interpret s.28. She also argues that the inability to accurately predict is, based on cases so far, likely to result in their underestimating rather than overestimating, benefitting largely men, who are also more likely to have avoided career losses and be able to make the "clean break."[68] Periodic awards also have the benefit of being amendable where circumstances develop.

As stated in our response above, we see little practical reason to differentiate between the principles that underpin asset sharing on divorce and those that underpin separation of cohabitants where the facts of the relationship are otherwise substantively the same. We therefore would support entrenching the broader approach developed by courts within the legislation and further strengthening it to include a fairness principle that

[66] *Jamieson v Rodhouse* 2009 FLR 34.
[67] Garland, F (2015) Gender imbalances, economic vulnerability and cohabitation: evaluating the gendered impact of Section 28 of the Family Law (Scotland) Act 2006, Edinburgh Law Review, 19(3), pp.311-332.
[68] Ibid.

allows for longer term advantages to be addressed where the facts of the relationship merit such an approach.

With this in mind, section 28 must be clear that there is no hierarchy between types of contribution as seen with the comparable New Zealand law, which notes that care, childcare and domestic work is no lesser in value than earning of income or the acquisition of property. Similarly, the New Zealand law recognises that a straight split of property or assets already accumulated may not be enough to compensate for the ongoing inequality in economic and social capital which can affect future earning capital.[69] This requires principles underpinning the sharing of assets to have minds to the principles of equality and fairness.

While some couples will clearly opt for cohabitation because they do not want to intermingle their lives, the reality of this position in practice will depend on the facts of the case. While discretion as to whether assets have been combined in an unfair way has the potential to offer greater protection and flexibility, responding to the needs of particular couples, we also recognise that this may provide less predictability for couples keen to avoid or unable to access courts.[70] We would argue that this lack of predictability already exists in the current section 28, and can be compensated for through a more prescriptive approach to asset sharing.

Additionally, it should be clear in any replacement to section 28 that it is at least open to the court to consider future and ongoing losses when a couple separates. This will clearly be contingent on the levels of entwinement that are at issue in each case.

The downside of this approach is clearly the costs necessary to go to court. A more prescriptive approach may in fact encourage parties to settle fairly as expectations and rights are clearer. Advice could be more clearly given that encourages couples to avoid court while enabling review or challenge where assets are divided unfairly.

While Scotland is comparatively progressive in terms of having a cohabitation regime which pays any attention to 'global accounting' and valuing wider contributions at

[69] Law Commission of New Zealand (2017) Dividing relationship property – time for change? Available at: https://www.lawcom.govt.nz/sites/default/files/publicationAttachments/PRA%20Issues%20Paper%20IP41.pdf
[70] Kelly, R (2013) Calculating the cost of cohabitation: a consideration of Gow v Grant (Scotland) [2012] UKSC 295.

dissolution, it is worth noting that this creates a substantial evidence burden and is complex and unclear.[71] The lack of clarity in section 28 coupled with the one year time limit is likely to play a part in the small number of cases to date as well as further benefitting the party with greater resources and access to legal advice.

The extent of the lack of clarity undermines the very protection to vulnerable parties the introduction of the regime intended to provide. There is a further need to examine vulnerability – the regime was developed principally to address financial vulnerability,[72] which we do not consider it to be doing adequately. But legal vulnerability – access to advice, access to courts – is also gendered, and women's physical vulnerability, whether in terms of abuse or access to security in terms of property, is not addressed by the existing regime. Pension and property transfers would be one way to address the latter while a more interventionist approach in the legislation, such allowing for ongoing orders, addressing time bars and review of agreements (post- or pre-separation) would go some way to addressing the former.

5. Adequate and sufficient remedies

The remedies available under section 28 are limited when compared to those available on divorce or dissolution in terms of the 1985 Act. Courts have limited the awards possible to capital sums despite this not being the only interpretation open to them.[73]

As noted elsewhere in this response, the exclusion of property transfers means that separating cohabitants with children have less protection with regards to the family home. Women's lesser access to legal advice is relevant here, as where parties cannot come to an agreement on what to do with property, the party with access to legal advice will more likely be privileged.[74] The exclusion of property transfer seems to have been

[71] Rodgers, N (2012) Should Have Put a Ring on It; A Comparative Analysis of the Law of Cohabitation on Ireland, Scotland and England and Wales, Hibernian LJ, 11, p.122.
[72] Guthrie, T, and Hiram, H (2007) Property and Cohabitation: Understanding the Family Law (Scotland) Act 2006, Edinburgh Law Review, 11(2), pp.208-229.
[73] Sutherland, E.E. (2013) From 'bidie-in'to 'cohabitant' in Scotland: the perils of legislative compromise, International journal of law, policy and the family, 27(2), pp.143-175.
[74] Wasoff, F, Miles, J, and Mordaunt, E (2010) Legal Practitioners' Perspectives on the Cohabitation Provisions of the Family Law (Scotland) Act 2006. Available at: http://www.crfr.ac.uk/assets/Cohabitation-final-report.pdf

considered on the basis that cohabitants should not benefit from a principle of fairness,[75] a position we consider to be unjustified.

We would also draw attention to the highly gendered nature of pensions. With women's lifetime earnings lower than men's, especially but not only women with children, access to an adequate standard of living is lesser for women at retirement. Pension sharing provisions should be actively considered to address this inequality.

6. Extending the one year time limit for making a claim under section 28(2)

It is clear that one year is exceptionally narrow and there is evidence that uncooperative parties may use it to pressure an ex-partner into decisions that may not be in their best interests. The ability to 'run out the clock' will likely be to the detriment of the party with lower resources and who is seeking a claim against the other. Discretion to allow late claims should be included but additional to a full extension of the limit.

7. Freedom of contract

Engender has no view on the use of cohabitation agreements where their use does not allow one party to gain material advantage. If they are to be used, both parties should be required to get independent legal advice and the court must maintain a discretionary power to vary or set aside in part or in full. We support the use of both tests put forward by the commission – "that the agreement was not fair or reasonable at the time it was entered into" and/ or "that there has been a material change in the parties' circumstances since the agreement was entered into." Material change should clearly include children born during the period of cohabitation and the purchase of property or other significant investments.

We note the extremely low (6%) levels of couples who have made written agreements on ownership sharing when purchasing property either individually or jointly.

Cohabitation agreements should not be encouraged as capable of being used as a means of avoiding the overarching principle of fair sharing. Asset sharing provisions on divorce at least to some extent recognise that circumstances change before and over the course

[75] Ibid.

of a marriage. Cohabitants are not afforded the same degree of protection and while use of a cohabitation agreement may protect in some circumstances, their drafting may also lead to clear unfairness where the circumstances change significantly over the course of the relationship.

CONCLUSION

Engender's primary interest is in ensuring that women are not disadvantaged by cohabitation. A system which presumed that equitable asset sharing, or independence of finances did not have long term consequence would not reflect the available evidence. Women remain financially disadvantaged by the social roles of mother and caregiver while fathers are socially and economically rewarded, however the extent of the benefit cannot easily be foreseen when decisions about relationships are entered into.

At the same time, we recognise that cohabitation is a positive choice for many women who may wish to avoid marriage due to its historic patriarchal associations or for whom marriage is no longer a social necessity. Some may wish to avoid financial consequences and deliberately avoid the legal consequences of marriage. However, we do not believe that this intention can be assumed by the form that a relationship takes. We do not believe that creating a protective arrangement for asset sharing on dissolution of a cohabiting relationship will necessarily bring into its ambit couples who have kept their finances and responsibilities separate or who have only been together a short time.

We therefore suggest that any reform to the law be focused on the circumstances of the relationship and the ongoing intentions, responsibilities and practical finances of the parties throughout, with the aim of responding to advantages and disadvantages from the perspective of a fairness principle that allows for ongoing circumstances to be considered, in the same way that s.9 of the Family Law (Scotland) Act treats divorcing couples.

We believe that a more prescriptive approach to asset sharing, like that contained in s.9, may compensate for a more flexible definition of cohabitants eligible for its protection.

We have also indicated support for a broader range of remedies and increasing the time limit for bringing a claim.

FOR FURTHER INFORMATION

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ABOUT US

Engender is a membership organisation working on feminist agendas in Scotland and Europe, to increase women's power and influence and to make visible the impact of sexism on women, men and society. We provide support to individuals, organisations and institutions who seek to achieve gender equality and justice.

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1. Should the regime for financial provision for cohabitants on cessation of cohabitation otherwise than by death remain separate from that for spouses and civil partners on divorce and dissolution?

(Paragraph 2.66)

Comments on Question 1

Various policy justifications have been given by the Scottish Government for keeping the regime for financial provision for cohabitants on cessation of cohabitation distinct from that for spouses and civil partners on divorce and dissolution, namely:

- A. preserving the 'distinctive legal status' of marriage and its 'special place' in society[76];
- B. reflecting 'the reality of family life in Scotland today';[77] and
- C. balancing 'the rights of adults to live unfettered by financial obligations towards partners against the need to protect the vulnerable.'[78]

However, it may be that in the current social climate these justifications are harder to maintain:

[76] SP Bill 36-PM Family Law (Scotland) Bill [policy memorandum] Session 2 2005, para 71.
[77] Ibid., para 4.
[78] Ibid., para 65.

A. While marriage does still empirically appear to play a special role in society and is seen by the vast majority as more than a 'piece of paper',[79] Scottish Ministers have not explained why affording cohabitants more financial rights would necessarily weaken the institution of marriage, especially since empirically, people rarely seem to get married for financial reasons.[80] Moreover, cohabitants already have the same rights as spouses when it comes to damages for the wrongful death of a partner and occupancy rights under the Matrimonial Homes (Family Protection) (Scotland) Act 1981.
B. Furthermore, a large body of empirical evidence suggests that long-term cohabiting relationships and cohabitants with children share many of the qualities as spouses.[81] The functional similarity of marriage and cohabitation has been judicially endorsed on multiple occasions.[82] One might argue that extending spousal-like rights to long-term relationships and those with children better reflects social reality.

The common law marriage myth is also pertinent in regards to understanding the 'reality' of cohabitation.

According to a 2000 Scottish Social Attitudes Survey, 58% of respondents agreed with the proposition: 'As far as you know, do unmarried couples who live together for some time have a 'common law marriage' which gives them the same legal rights as married couples?' This percentage declined to 51% in 2004.[83]

There is no subsequent data to indicate whether or not this misconception still persists after the coming into force of the 2006 Act. However, Scottish Social Attitude Survey data does seem to indicate a trend of Scots becoming increasingly aware of their rights. 'Respondents in 2004 were more likely (65%) than in 2000 (53%) to think that marriage provides greater financial security than cohabitation.'[84]

Interestingly, across Britain as a whole, belief in this myth is almost as widespread as it was 20 years ago. British Social Attitudes Surveys have revealed that almost half (47%) of Brits in 2018 believed common law marriage 'definitely' or 'probably' exists and this belief has hardly diminished in the last two decades.[85] Furthermore, cohabitants were just as likely to believe this myth as those who were married or in a civil partnership.[86] It is necessary to acquire more up-to-date public opinion data to draw clear conclusions about the level of misconception in

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[79] A. Barlow, *et al.*, 'Cohabitation and the law: myths, money and the media', in A. Park *et al.* (ed.). *British Social Attitudes Survey, The 24th Report, National Centre for Social Research* (London, 2008), 29-52 at 34.
[80] Law Commission, *Cohabitation: The Financial Consequences of Relationship Breakdown* (Law Com No 307, 2007) para 2.43.
[81] See S. Duncan *et al.*, 'Why Don't They Marry? Cohabitation, Commitment and DIY Marriage', (2005) *Child and Family Law Quarterly*, 17(3), 383-398 at 389; S. Brown & A. Booth, 'Cohabitation versus marriage: a comparison of relationship quality', (1996) *Journal of Marriage and Family*, 58(3), 668-678 at 677; Z. Wu, 'The Stability of Cohabitation Relationships: The Role of Children', (1995) *Journal of Marriage and Family*, 57(3), 231-236 at 231.
[82] See *Ghaidan v Godin-Mendoza* [2004] 2 AC 557; *Smith v Lancashire Teaching Hospitals NHS Foundation Trust* [2017] EWCA Civ 1916.
[83] Scottish Executive Social Research, *Scottish Social Attitudes Survey 2004: Family Module Report* (2004), 42.
[84] Ibid.
[85] The National Centre for Social Research, *British Social Attitudes 36* (2019), 113.
[86] Ibid., 123.

Scotland regarding cohabitants' rights. However, if many cohabitants still believe and arrange their affairs as though they have the same financial protection as spouses, this could leave many individuals inadequately protected on cessation of cohabitation.

C. It is nonetheless submitted that, given there is not currently a body of public opinion data to indicate support for treating cohabitants and spouses in the same manner upon divorce and dissolution, caution should be exerted before reforming the law in this manner. People cohabit for a wide variety of reasons, including the desire to avoid the legal consequences of marriage.[87] Given Scottish Ministers have articulated the desire to allow cohabitants to live 'unfettered' by unwanted financial obligations, further empirical research is necessary before enacting such reform, given the potential consequences such a substantive change could have for the autonomy of many cohabitants in Scotland.

2. Should the definition of cohabitant in section 25 of the 2006 Act be amended?

(Paragraph 3.101)

Comments on Question 2

«InsertTextHere»

3. If consultees think the definition should be amended, should the comparison with spouses be removed in favour of a description of the nature of the relationship, such as "enduring family relationship", "genuine domestic basis", or something else?

(Paragraph 3.101)

Comments on Question 3

«InsertTextHere»

4. If the comparison with spouses is to be removed, should the legislation expressly provide that couples within the forbidden degrees of relationship to each other will be excluded?

(Paragraph 3.101)

[87] S. Duncan *et al.*, 'Why Don't They Marry? Cohabitation, Commitment and DIY Marriage', (2005) *Child and Family Law Quarterly*, 17(3), 383-398 at 397.

Comments on Question 4

«InsertTextHere»

5. Should a qualifying period of cohabitation be introduced in order to access remedies under the 2006 Act? If so:

   (a) how long should that qualifying period be?

   (b) should the qualifying period be different, or removed altogether, if the parties have children?

(Paragraph 3.101)

Comments on Question 5

a. The question of setting a qualifying period for cohabitation is fraught with difficulty. The Law Commission of England and Wales has accepted setting such a qualifying period is inherently arbitrary and may leave some claimants ineligible by a matter of weeks.[88] It is potentially helpful to note that other Commonwealth jurisdictions that have equated certain property rights of cohabitants and spouses have set the qualifying period at two or three years.[89] Anecdotally, legal practitioners have reported that very few individuals who cohabit for fewer than two years make a claim under the 2006 Act,[90] suggesting few people would be prejudiced by setting the qualifying period at the two-year mark. However, particularly if deciding to set a longer qualifying period, it may be prudent to consider maintaining some form of discretionary award so as to protect those cohabitants who may be unduly prejudiced by such a scheme. For example, in New Zealand succession law, where a cohabitant fails to meet the qualifying period of three years he may still succeed on intestacy 'if there is a child of the relationship' or he 'has made a substantial contribution to the relationship', and the court is satisfied that this lack of entitlement 'would result in serious injustice to the partner.'[91]

   Another concern voiced by Scottish Ministers in the policy memorandum to the 2006 Actwasthat a qualifying period could create problems of proof and distort behaviour.[92] However, the law Commission of England and Wales has noted that anecdotally, using two years as a qualifying period for cohabitants' claims under the Inheritance (Provision for Family and Dependants) Act 1975 has not appeared to cause major problems in practice.[93]

[88] Law Commission, *Intestacy and family Provision Claims on Death* (Consultation Paper No 191, 2009) para 4.74.
[89] See New South Wales Legislation: Wills, Probate and Administration Act 1898, s 61B(3A); See also New Zealand Legislation: Administration Act 1969, s 77 and Property (Relationships) Act 1976, s 2E.
[90] F. Wasoff *et al.*, *Legal Practitioners' Perspectives on the Cohabitation Provisions of the Family Law (Scotland) Act 2006* (2010), 57.
[91] Scottish Law Commission, *Discussion Paper on Succession* (2007), 141; See Administration Act 1969, s77B.
[92] SP Bill 36-PM Family Law (Scotland) Bill [policy memorandum] Session 2 2005, para 67.
[93] Law Commission, *Intestacy and family Provision Claims on Death* (Consultation Paper No 191, 2009) para 4.75.

Moreover, they argued that a qualifying period would introduce an element of certainty into the legislation.[94] This is particularly important, given that the Scottish Ministers have also highlighted that need to introduce 'greater certainty, fairness and clarity' into the law when it comes to the property rights of cohabitants.[95]

b. There is little empirical data in Scotland on this question. However, in 2007 a survey was conducted of 102 legally aware cohabitants from across England and Wales, almost all of whom had been cohabiting for 6 years or more.[96] The interview responses showed that the significant majority believed cohabitants and spouses should have the same rights in certain circumstances:
'Almost all respondents (90%) felt that cohabitants should have the same rights as married couples where they had a child together.
Almost as many respondents (85%) felt that cohabitants whether or not they have children, should have the same rights as married couples but not as soon as they start living together. There was no consensus on how long a couple should live together before being treated similarly to a married couple. Most (76%) felt that these rights should be immediate if the couple had a child together.'[97]

The 2007 study had a relatively small, non-randomised sample of respondents that were based in England and Wales rather than Scotland, and as such, the significance of its findings should not be overstated. Nevertheless, the results showed support for immediately extending marriage-like rights to cohabitants where there is a child of the relationship and also where the couple have been living together for some time. In Scotland, just as in England and Wales, cohabitation is becoming increasingly popular and cohabiting families make up virtually the same proportion of the population in both jurisdictions.[98] In light of these similarities, it is very possible Scottish cohabitants share these views. Nonetheless, public opinion data on a larger scale ought to be acquired to determine whether these findings resonate with the views of the Scottish public.

6. Would the response to Question 5(a) or (b) change if the remedies available to former cohabitants were extended?

(Paragraph 3.101)

[94] Ibid., 4.76.
[95] SP Bill 36-PM Family Law (Scotland) Bill [policy memorandum] Session 2 2005, para 64.
[96] A. Barlow *et al.*, *The Living Together Campaign: an investigation of its impact on legally aware cohabitants, Ministry of Justice Research Report* (Ministry of Justice Research Series 5/07, 2007), 6.
[97] Ibid., 7.
[98] Office for National Statistics, 'Families and households in the UK: 2019' (ons.gov.uk, 15 November 2019) <https://www.ons.gov.uk/peoplepopulationandcommunity/birthsdeathsandmarriages/families/bulletins/familiesandhouseholds/2019> accessed 27 February 2020

Comments on Question 6

«InsertTextHere»

7. Would the definition of cohabitant be improved by the introduction of a list of features or characteristics to be taken into account in deciding whether the parties are cohabitants?

If so, what features or characteristics should be included?

(Paragraph 3.101)

Comments on Question 7

«InsertTextHere»

8. What are consultees' views on the introduction of a registration system for cohabitants?

(Paragraph 3.101)

Comments on Question 8

Introducing a registration system for cohabitants as an alternative to a statutory award on cessation of cohabitation may leave cohabitants exposed as a result of their own passivity. The aforementioned 2007 study of cohabitants in England and Wales also examined the impact of an internet-based public information campaign about cohabitation rights on cohabitants' behaviour.[99] Researchers 'found that many of those who had accessed the website found the information there helpful' and that over one third consequently intended to take some sort of action.[100] A minority (18% of respondents) felt that they did not need to take any action.[101] However, few had actually done so: 35% 'hadn't yet got around to it', and just under a third of respondents had encountered a barrier which was preventing them from taking action. These barriers included: concern their partner would not agree; the cost of legal advice; and the potential problems action may cause between them and their partner.[102] This suggests that even if cohabitants wish to take action to arrange their financial affairs as a couple, few, if any, actually will. The survey also indicates that raising awareness of cohabitation rights while retaining the status quo is not an appropriate means of addressing the legal vulnerability

[99] A. Barlow *et al.*, *The Living Together Campaign: an investigation of its impact on legally aware cohabitants, Ministry of Justice Research Report* (Ministry of Justice Research Series 5/07, 2007), 5.
[100] Law Commission, *Cohabitation: The Financial Consequences of Relationship Breakdown* (Law Com No 307, 2007) para 2.51.
[101] A. Barlow *et al.*, *The Living Together Campaign: an investigation of its impact on legally aware cohabitants, Ministry of Justice Research Report* (Ministry of Justice Research Series 5/07, 2007), 6.
[102] Ibid., 7.

of cohabitants. This passivity among cohabitants is also demonstrated in the 2006 British Social Attitudes Survey which revealed that only 12% of cohabitants had changed their will in response to their cohabitation.[103] It may therefore be unrealistic to expect a significant number of cohabitants to take advantage of such a registration system and make adequate arrangements to protect themselves financially.

9. Do sections 26 and / or 27 cause any difficulty in practice?

(Paragraph 4.34)

Comments on Question 9

«InsertTextHere»

10. Should the language in sections 26 and / or 27 be modernised?

(Paragraph 4.34)

Comments on Question 10

«InsertTextHere»

11. Should sections 26 and / or 27 be modified in some other way?

(Paragraph 4.34)

Comments on Question 11

«InsertTextHere»

12. Should the policy underpinning awards for financial provision for former cohabitants, where cohabitation ends otherwise than by death, be:

    (a) compensation for economic loss sustained during the relationship;

[103] A. Barlow, *et al.*, 'Cohabitation and the law: myths, money and the media', in A. Park *et al.* (ed.). *British Social Attitudes Survey, The 24th Report, National Centre for Social Research* (London, 2008), 29-52 at 43.

(b) relief of need:

(c) sharing of property acquired during the cohabitation;

(d) sharing the future economic burden of child care;

(e) a combination of any or all of (a) to (d) above; or

(f) something else?

(Paragraph 5.69)

Comments on Question 12

«InsertTextHere»

13. For the purposes of financial provision for former cohabitants, should any distinction be made between a child of whom the cohabitants are parents and a child who is or was accepted by the cohabitants as a child of the family?

(Paragraph 5.69)

Comments on Question 13

«InsertTextHere»

14. Should the test for determining what order, if any, the court may make for financial provision on cessation of cohabitation otherwise than by death be based on fairness and reasonableness, having regard to all the circumstances of the case, including a list of relevant factors such as:

(a) the financial and non-financial contributions made by each party to the relationship, including the contribution made by each party to the care of the family and the family home;

(b) the effect of the cohabitation upon the earning capacity of each of the parties;

(c) the parties' respective needs and resources;

(d) relief of financial hardship caused by the cohabitation or the end of the cohabitation;

(e) a combination of any or all of (a) to (d) above; or

(f) something else?

(Paragraph 5.69)

Comments on Question 14

«InsertTextHere»

15. Are the remedies available to the court on an application for financial provision by a former cohabitant adequate and sufficient?

(Paragraph 5.92)

Comments on Question 15

«InsertTextHere»

16. If not, should the remedies be extended to include:

(a) transfer of property;

(b) pension sharing;

(c) periodic payments for a period after the end of the cohabitation, sufficient to relieve short term financial hardship; or

(d) something else?

(Paragraph 5.92)

Comments on Question 16

«InsertTextHere»

17. Should express provision be made requiring or permitting the court to consider the resources of the former cohabitants in deciding what order, if any, to make for financial provision?

(Paragraph 5.92)

Comments on Question 17

«InsertTextHere»

18. Should the one year time limit for making a claim under section 28(2) of the 2006 Act be extended?

(Paragraph 6.35)

Comments on Question 18

«InsertTextHere»

19. If the time limit is extended, what should the new time limit be?

(Paragraph 6.35)

Comments on Question 19

«InsertTextHere»

20. If the time limit is extended, should the court be afforded discretion to allow late claims?

(Paragraph 6.35)

Comments on Question 20

«InsertTextHere»

21. If the time limit is <u>not</u> extended, should the court be afforded discretion to allow late claims?

(Paragraph 6.35)

Comments on Question 21

«InsertTextHere»

22. If the court is afforded discretion to allow late claims:

(a) should the test for the exercise of discretion be "on cause shown", "in exceptional circumstances" or something else?

(b) should there be a maximum period (backstop) beyond which no claim may competently be made?

(Paragraph 6.35)

Comments on Question 22

«InsertTextHere»

23. Should express provision be made in the 2006 Act to allow parties to agree extension of the time limit to facilitate settlement?

(Paragraph 6.35)

Comments on Question 23

«InsertTextHere»

24. Should express statutory provision be made permitting the court to have regard to the terms of any agreement between the parties as to financial provision on cessation of cohabitation (including opting out of the 2006 Act regime) when deciding what order, if any, to make?

(Paragraph 7.39)

Comments on Question 24

«InsertTextHere»

25. Should express statutory provision be made allowing the court to set aside, or vary any term of, a cohabitation agreement? If so, should the test for setting aside or variation be:

(a) that the agreement was not fair or reasonable at the time it was entered into;

(b) that there has been a material change in the parties' circumstances since the agreement was entered into, or

(c) another test (and if so what should that test be)?

(Paragraph 7.39)

Comments on Question 25

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26. What information or data do consultees have on:

(a) the economic impact of sections 25-28 of the Family Law (Scotland) Act 2006,

(b) the potential economic impact of any option for reform discussed in this Discussion Paper (in particular the impact in terms of tax law of the possibility of extending the remedies available to cohabitants on cessation of cohabitation otherwise than by death to include property transfers/pension sharing/maintenance)?

(c) the potential economic impact upon the SCTS and legal aid budgets of any option for reform discussed in this Discussion Paper, including extension of the time limit for claims and additional remedies?

(Paragraph 9.4)

Comments on Question 26

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General Comments

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44. Dr Dot Reid and Dr Mat Campbell, University of Glasgow

Response to Ch. 8 of Discussion Paper on Cohabitation: Subsidiarity of Unjustified Enrichment

Dr Mat Campbell and Dr Dot Reid
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This response to the Discussion Paper concerns only the subject matter of chapter 8, in which the Commission invites comments on the relationship between a statutory provision for cohabitants and the law of unjustified enrichment (para 8.3).

General Comments

Currently there are two possible routes to making a claim for cohabitants at the end of their relationship: a discretionary award under section 28 of the Family Law (Scotland) Act, 2006; and a potential claim for unjustified enrichment (*Shilliday v Smith* 1998). As the DP points out, public knowledge of any statutory right is already poor. This is likely to be compounded in relation to a claim for unjustified enrichment, which is a source of confusion even to legal professionals. Above all, any remedy available on the break-up of a cohabiting relationship needs to be clear and unambiguous, which presents a challenge for policymakers and for the government. We conclude below that the concept of "subsidiarity" is mistaken in this (or perhaps any) context and recommend that the law should not diminish any route currently open to cohabitants who qualify for compensation (whatever the qualifying conditions are in the future). Rather, any future change in the law should make explicit that both statutory and common law remedies remain available and are not mutually exclusive.

Unlike marriage, for which there is a comprehensive legal regime, cohabiting couples fall into many different categories as the DP fully recognises. A person is either married or not married, and once they have taken that step the law creates rules, should the relationship break down, which apply to all married couples. Cohabitation, on the other hand, is much more varied: there is no clean line for entering or for leaving a cohabiting relationship. It is conceivable that a couple may not meet the statutory requirements for cohabitation, and yet they may have lived together and one may have made a significantly greater financial contribution than the other (e.g. in a very short relationship). Again for marriage, the overriding policy goal is to achieve equal sharing of resources; but it is not clear that this is the goal where cohabitation is concerned: the vulnerability of one party appears to be salient.[104] Depending on the outcome of the consultation and any future legislation, unjustified enrichment remains an important tool to rebalance financial inequality between the parties in a way that the statutory regime may not.

Completing *Pert v McCaffrey's* move

[104] See consultation response by Reid for a fuller discussion of the policy goals

Since the Commission is open to the possibility of reformulating section 28 of the Family Law (Scotland) Act 2006, it may make sense to complete the move started by the Inner House in *Pert v McCaffrey*.[105] Creating a coherent approach to enrichment for cohabitants could be a model approach for other apparently grey areas in the subsidiarity debate.

Much about the *Pert* decision is unsatisfactory. For example, neither the pursuer's advisors nor the bench appear to have considered that the contract taken by the bench to have been averred[106] may not have been subject to a five year prescription period, but a twenty year one.[107] This could have had a significant effect on the court's decision. More relevantly for present purposes, the key passage in the leading opinion on the effect of the expiry of the one year time period for claims under section 28 contains two contradictory propositions. The first is the assumption that other redress has been or can still be obtained. The second is the presupposition that section 28 is the only route to a remedy. Despite the suggestion in the opinion itself ("[p]ut another way"), these are contradictory propositions. The result is that the decision contains no argumentatively valid reasoning for the conclusion reached, *viz*, that expiry of the one year period in section 28 will not bar an unjustified enrichment claim.[108]

Despite these and other problems,[109] in our view the mere unavailability of a statutory route to redress should not bar an unjustified enrichment claim.

However, the so-called subsidiarity of unjustified enrichment goes further than that. It extends to bar unjustified enrichment claims because of the continued availability of statutory redress. The effect of the authorities is that, absent "special and strong circumstances", which no pursuer has ever established, all unjustified enrichment claims are "subsidiary", in that they are unavailable (i) where statutory routes of redress were available to a pursuer, but are now barred (a problem dealt with in the present context by the decision in *Pert*); and (ii) where statutory routes of redress are concurrently available to a pursuer.[110] A pursuer may wish to claim in unjustified enrichment whilst a section 28 claim remains available, perhaps pleading both. For example, the assessment of quantum under section 28 is discretionary, and subject to considerations which might see it reduced. Redress in the amount by which a defender is (proved to be) enriched is as-of-right in unjustified enrichment (there is no equitable discretion

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[105] [2020] CSIH 5, 2020 SC 259.
[106] see *Pert* at [25].
[107] Prescription and Limitation (Scotland) Act 1973, s 8; and *Pert* at [25]: agreement to the effect that 'in the event of the breakdown of the relationship, the defender would convey his share to the pursuer'.
[108] *Pert* at [24]: 'it must be assumed that the ordinary legal remedies open to the parties […] have been, or can be, exercised. Put another way, the court must presuppose that the pursuer cannot obtain payment from the defender other than by utilising […] the 2006 Act '.
[109] see M Campbell, 'Unjustified Enrichment and Statute: *Pert v McCaffrey*' (2020) 24(3) *Edinburgh Law Review*, forthcoming (pre-proof copy attached).
[110] *Transco Plc v Glasgow City Council* [2005] CSOH 76, 2005 SLT 958 esp [18]-[19] (Lord Hodge): open statutory action under the Court of Session Act 1988, s 45; *Courtney's Executors v Campbell* [2016] CSOH 136, 2017 SCLR 387 esp [52]-[54], [56], [58], [60] (Lord Beckett): time-barred statutory action under the Family Law (Scotland) Act 2006, s 28; overruled only in relation to the 2006 Act in *Pert* [25] ('In this respect').

to refuse relief where the conditions of enrichment liability are satisfied[111]). A pursuer should not have to risk lower recovery under the statute than she would see in unjustified enrichment simply because the authorities currently suggest that she should claim under section 28 'first', and potentially succeed in obtaining a general capital sum taking account – but not reflecting the true value – of specific enrichments conferred during cohabitation.

We are of the view that any future legislation should explicitly provide that a cohabitant who seeks an order under section 28 should not be prevented from seeking any other redress to which she may be entitled (subject to a rule against double recovery). This would place the decision in *Pert* on a statutory footing, and remove the current uncertainty, by providing that the expiry of the time limit under section 28 (whether or not it remains at one year) does not affect the availability of any other redress to which a cohabitant may be able to establish an entitlement. It may also be prudent to provide that an order under section 28 may be sought *alongside* any other redress, statutory or otherwise (subject to a rule against double recovery).

The same provisions should probably also be made in relation to section 29 of the 2006 Act.

Other references

M Campbell, 'Doubting the Subsidiarity of Unjust Enrichment' (draft journal article, 2020), on file with author and available on request.
M Campbell, 'Subsidiarity in Private Law?' (2020) 24 *Edinburgh Law Review* 1.
M Campbell, 'The Subsidiarity of Unjust Enrichment: Anglo-Franco-Scots Perspectives' (PhD Thesis, Edinburgh, 2019) https://era.ed.ac.uk/handle/1842/35761.

[111] M Campbell, 'Equity Flailing? Against Ad Hocery in Unjustified Enrichment' (2018) 22 *Edinburgh Law Review* 393.

45. Dr Dot Reid, University of Glasgow

Response to Discussion Paper on Cohabitation
Dot Reid

The Commission is to be commended for the detail included in this Discussion Paper (DP), the range of evidence considered and the depth of discussion entered into. It does not shy away from the difficulties inherent in attempting to create a set of legal rules where personal relationships are concerned, particularly given the very wide range of relationships that could be designated "cohabitation".

My conclusion after considering the issues raised by the DP is that one size cannot fit all for cohabitants, contrary to the way in which the legal regime for marriage applies to all married couples. The variety of circumstances in which couples cohabit is so broad that distinctions need to be made when considering whether or not to impose legal consequences on their relationship. And those distinctions need to be based on overarching principles and policy goals. I have, therefore, attempted to make some of those distinctions prior to answering the specific DP questions and I hope this will be helpful in the next stages of reform.

Policy goals

The key issue in creating a cohabitation regime is to be able to identify clearly what the overarching policy goals are and what the law is aiming to achieve. I think these are not entirely clear in the DP. There is a tension between a regime based on the principle of ***equality*** between cohabitants (which is the overriding principle in the marriage regime) and that of ***protection of a vulnerable partner***. That tension hinders creation of a consistent legal framework that could attract the support of public and policymakers and tends to muddy the waters.

It is clear that in previous attempts at reform the aim was to find a balance between the competing aims of protecting those who were economically vulnerable versus interference with private lives; also protecting the institution of marriage versus the rights of those who wished to opt out of it (paras1.31-1.32). At the time of the 2006 Act the Scottish Parliament specifically did not want to apply the equivalent of a marriage regime to cohabitants but instead wanted to provide "safeguards" (para 2.16) i.e. the overriding principle was ***protection*** and not ***equality***. However, the DP recognises that society has changed since 2006 and continues to change: the number of cohabiting couples continues to grow; cohabitation is socially and legally accepted as a family unit (see paras 1.9, 1.12-1.14); and around 39% of cohabiting couples in Scotland have children together (para 1.13). It has been called "the second most stable form of family relationship"(Barlow & Smithson). Given those social changes the DP rightly asks the question whether or not different policy objectives should be applied (2.56) and whether cohabitation should be "regarded as valuable … as a base for family life". In my view the answer to those

questions is yes for certain categories of cohabitant and that it is now appropriate to apply the principle of equal sharing akin to the marriage regime.

Equality v Protection

The DP recognises that for many couples cohabitation represents a long-term commitment, an "enduring family relationship" and is no less stable than marriage for want of a public ceremony. In addition, many of these couples are likely to be unaware that they have few legal rights when the relationship ends either in life or in death. The DP provides plenty of evidence that public awareness of the legal consequences of cohabitation is poor (paras 1.22-1.24). There is therefore a dual difficulty facing any attempt to create a legal regime for cohabitants: on the one hand couples in enduring relationships may not know that they currently do not have rights equivalent to a spouse; but on the other hand it cannot be presumed that all cohabiting couples want or intend their relationship to have those consequences, or that the law should make that assumption/ presumption. Indeed, they may have chosen not to enter into marriage or civil partnership precisely in order to avoid legal consequences.

The dilemma may be eased by requiring that there should be some public sign of the couple's commitment, such that would attract legal consequences. Where that public sign exists there is a strong case that the principle of ***equality*** should be applied. For those who do not want to have a public ceremony, either through marriage or civil partnership (including shortly for heterosexual couples) the easiest and clearest way to provide this public sign is by allowing couples to register (see further in questions below). I have referred to this group as Category A couples.

The more difficult question is where there has been no public sign of commitment, and yet cohabiting couples evidence a long-term committed relationship and it appears from the available evidence that 39% of them parent together (para 1.13). Is it too much legal interference to presume a principle of equality when a couple may not want legal consequences to flow from their private relationship? The DP proposes that for couples with children (para 1.33) there is a need to protect an economically vulnerable partner. In my view, there is a strong argument for a presumption of ***equality*** where the couple are parents. The birth of a child already brings with it legal consequences for both parents, including financial consequences. And it is a cornerstone of the marriage regime that sacrifices made by one parent for the sake of childcare, including potential loss of income, are recognised to be as valuable a contribution to a marriage as the other spouse's earnings. Hence the divorce regime applies a presumption of equality which acknowledges the contributions of both spouses. These considerations are equally present for cohabiting parents, and the birth of a child could be viewed as the "public sign" required in order to apply the equality principle or as a visible sign of commitment between the partners. I would therefore include cohabitants with children in Category A couples.

The most difficult situation is where one partner would want public recognition of the relationship e.g. by registration, and the other does not. Can an equality principle be applied in those

circumstances? I think probably not. However, it is in these circumstances that ***protection*** becomes the overriding principle, and in fact most of the DP focuses on enumerating the circumstances which would trigger legal protection. There is more discussion below of the criteria by which these couples, whom I refer to as Category B couples, should qualify for legal protection. However, my responses below apply only to this subset of cohabitants where equality cannot reasonably be applied i.e. those who

- Have not registered their relationship even if one party wants to
- Are not parents
- Had a relationship which "qualifies" as a stable relationship (based on whatever qualifying criteria are proposed)
- Where one party has been either advantaged or disadvantaged during the relationship

Summary: Categories of Cohabiting Relationships

As stated above, I do not think that one size will fit all and that some basic distinctions need to be made in the rules governing cohabitation. I have found it helpful to think in terms of categories separately in relation to overarching principles and what any change in the law ought to aim for. It seems to me that there are 3 different categories of cohabiting relationship which should be treated separately and require different treatment in law:

Category A: Cohabiting couples who register or have children

These relationships are the most akin to a marriage relationship, characterised by voluntariness, intention, and a long-term commitment or in words of DP those committed to an "enduring family life", including sharing resources and raising children 1.33. The overarching principle for this category should arguably be **equality** – equal sharing of resources – and I would suggest that two criteria that could be applied. Either:
(ii) a public sign of commitment via registration or a cohabitation agreement
(ii) the couple has one or more children together

In my view couples in Cat A should not be financially disadvantaged by their choice to cohabit rather than to marry or enter into a civil partnership. They would perhaps also be the most likely to opt in to a system of registration to affirm their commitment without a public ceremony.
(In succession terms, Cat A cohabitants should be treated like spouses and civil partners, taking the majority share of an estate in most cases).

Category B: Cohabiting couples who neither register nor have children

These couples are in a different position if they have not opted into a civil partnership, a registration system or a cohabitation agreement: couples who are *de facto* cohabiting on a permanent or semi-permanent basis, but who may not opt into a registration system for a variety of reasons e.g. they may not know about it; the couple may not agree about registration.

It may well be that both partners do not want to formalise their relationship and this should be respected. However, it is more likely that no deliberate choice has been made, and highly likely that most cohabitants are not aware that current legal protections are extremely limited. The most problematic scenario is where only one partner does not want to formalise the relationship, thereby potentially disadvantaging the other.
The DP refers often to the "vulnerability" of one partner, and the need for protection where one partner has been disadvantaged or where the couple has children. It seems to me that the overarching principle for Category B couples is one of **protection and addressing disadvantage,** rather than an attempt to apply a principle of equality (I would make an exception where the couple have children, which would place them in Category A under this proposed scheme). In fact, this is what the current law seeks to do by providing a discretionary regime that allows the courts to take into account a number of factors, most of which involve an assessment of advantage or disadvantage taking into account all of the couple's circumstances. It is also where the law of unjustified enrichment may come into play, allowing a rebalancing of financial advantage/ disadvantage (separate paper submitted). For Category B couples, the protective regime suggested by the DP would be appropriate.

Category C: Casual cohabiting relationships

This would include couples who are *de facto* cohabiting where there are fewer indications of the relationship being long-term e.g. young people who share a flat together for a year.
These relationships, it seems to me, should not trigger any legal regime. In short-term or casual relationships it is possible that one party will be financially advantaged by the other, and the law of unjustified enrichment could still be the fall back regime if that advantage is quantifiable and "unjustified". They would be excluded from any statutory regime by not meeting the criteria for a qualifying cohabiting couple.

For shorthand, I have referred to these categories in answering the specific DP questions below.

Succession Implications

It is unfortunate that the Commission has decided not to consider the succession implications of cohabitation. Succession reform is ongoing but currently stalled and it is highly unlikely that the Scottish Government will make any proposals on cohabitation until reform of the law for cohabitants is complete. It would, therefore, have been a helpful guide for succession reform to set out the Commission's view. However, almost certainly succession consequences will follow any conclusions reached in this process.

DP Questions

1. Should the regime for financial provision for cohabitants on cessation of cohabitation otherwise than by death remain separate from that for spouses and civil partners on divorce and dissolution?

(Paragraph 2.66)

For Cat A couples (i.e. those who have either registered or are parents together) the cohabitation regime should be equivalent to marriage or civil partnership. As argued above, in my view the presumption of equal sharing should apply, driven by the policy goal of ***equality***. An adaptation of the marriage regime would be appropriate, with exceptions that would rebut the presumption of equal sharing and it may be that the exceptions are more extensive than for married couples.
Above all it should be clear and certain so that cohabitants (and their solicitors) are better able to gauge what they might be entitled to at the end of the relationship. One of the greatest advantages of proposing this kind of certainty and clarity would be to avoid having to rely on the discretion of the courts. I agree that cohabitants should be able to opt out or limit the regime by agreement (para 2.64). If there was a clear statutory regime, it would also be easier to opt in to it by agreement (as well as by registration).

For Cat B couples a different regime is required. Most of the subsequent questions relate to Category B couples (who have neither registered nor have children).

2. Should the definition of cohabitant in section 25 of the 2006 Act be amended?

(Paragraph 3.101)

Yes. It is one of the least successful aspects of the 2006 Act.

3. If consultees think the definition should be amended, should the comparison with spouses be removed in favour of a description of the nature of the relationship, such as "enduring family relationship", "genuine domestic basis", or something else?

(Paragraph 3.101)

It is important to find wording that recognises that cohabitation is different from marriage, even though it shares some characteristics of a marriage. Enduring family relationship works for most circumstances, but I think is not enough. Brothers and sisters have an enduring family relationship, and may live together, but I don't think that's what most people think of as cohabitation. It seems to me that the main distinguishing characteristic of cohabitation is that it is not a platonic relationship but is an intimate/sexual relationship – this is not articulated, but perhaps it should be. Perhaps "living together as if they were husband and wife" is merely a legal circumlocution for a relationship that is both intimate and committed. Perhaps "an enduring and intimate relationship" would be enough to distinguish from other cohabiting family members

or friends. Or alternatively “living as a couple within an enduring family relationship” contains the necessary implications.
Either of these definitions would by implication exclude

- Platonic friendships
- Family members who live together
- People who are still married and having a relationship with someone outside of the marriage (even if they stayed in the same home for some of the time the “enduring” part of the definition is not met if they remain in a relationship with a spouse). However, it would include people who are still married but whose marriage is functionally at an end and who have chosen to enter into an enduring relationship with a new partner. I think this needs to be taken into account as it appears not uncommon for Scottish people whose marriage has functionally ended not to divorce and to enter into a new cohabiting relationship which may even last longer than the marriage. This is also a problem for succession law, which is likely to mirror the conclusions reached in this reform process.

4. If the comparison with spouses is to be removed, should the legislation expressly provide that couples within the forbidden degrees of relationship to each other will be excluded?

(Paragraph 3.101)

Yes

5. Should a qualifying period of cohabitation be introduced in order to access remedies under the 2006 Act? If so: (a) how long should that qualifying period be? (b) should the qualifying period be different, or removed altogether, if the parties have children? (Paragraph 3.101)

Yes, I think it would be helpful to have a qualifying period, which would go to the “enduring” part of the suggested definition in 3 above. In respect of Category B cohabitants in my view a year should be the minimum period that would entitle someone to a financial claim on the other. Cohabitants who are also parents together would not be subject to this qualification, like other Category A couples.

8. What are consultees’ views on the introduction of a registration system for cohabitants? (Paragraph 3.101)

See above, in my view registration is an obvious solution to allow cohabitants to have a degree of certainty about their commitment and the legal entitlements it confers – a voluntary (and public) acknowledgement of their relationship. Should the relationship subsequently break down, an equal sharing regime akin to the divorce regime would be entirely appropriate (and rights equivalent to a spouse or civil partner on death). There needs to be a mechanism with legal consequences which couples can use to give public acknowledgement to their commitment. There will shortly be a civil partnership option (Civil Partnership (Scot) Act 2020

which received Royal Assent on 28 July 2020), but although less formal than a marriage ceremony it still has state involvement which may be unattractive for some cohabiting couples. A simple means of registration would open up the equivalent of spousal rights on separation or on death. It is a clear indication of a couple's public commitment should they want to do so without any other public ceremony. It would also be possible to make a template cohabitation agreement publicly available, but in my view this is more complex, likely to involve lawyers (and more costs) and likely to have a lower uptake.

Opting in to either civil partnership or registration would allay fears of interfering with personal autonomy because both indicate the consent of the couple to a public recognition of their relationship, with accompanying legal rights and obligations.

If this option was adopted, it would be important to make the public aware of it through as many channels as possible e.g. libraries, information being sent automatically on the birth of a child etc.

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[i] And the reference to civil partners

[ii] Para 3.23