

REPORT ON COHABITATION EXECUTIVE SUMMARY

Introduction

1. The Scottish Law Commission has published its recommendations for reform of the law on financial provision for cohabitants on cessation of cohabitation¹ in sections 25 to 28 of the Family Law (Scotland) Act 2006. The Commission's recommendations are set out in its Report on Cohabitation (Scot Law Com No. 261, 2022) ("the Report").

2. The draft Bill accompanying the Report extends to six sections, which either amend sections 25 to 28 or insert new provisions into the 2006 Act.

What is the current law on financial provision for cohabitants upon cessation of relationship?

3. The term "cohabitant" is defined in section 25 of the 2006 Act, as modified by section 4 of the Marriage and Civil Partnership (Scotland) Act 2014, as either member of a couple (whether of the same or different sexes) who are (or were) living together as if spouses. In determining whether this definition is met, the court shall have regard to the length of time the couple lived together, the nature of the relationship during that period and the nature and extent of financial arrangements which subsisted during that period.

4. Section 26 creates a rebuttable presumption of equal shares in household goods acquired during the period of cohabitation. "Household goods" do not include money, securities, motor cars, caravans or other road vehicles and domestic animals.

5. Section 27 provides that money derived from any allowance made by either cohabitant for their joint household expenses or similar purposes, or any property acquired out of such money, shall be treated as belonging to each cohabitant in equal shares.

6. Section 28 gives cohabitants the right to apply to the court for an order for financial provision, within one year of the date of cessation of the relationship otherwise than by death. The court can order payment of a capital sum, an order for such amount as is specified in the order in respect of any economic burden of caring for a child of whom the cohabitants are parents and such interim orders as it thinks fit.

Problems with the current law

7. Various criticisms have been levelled at the existing legislation, including that:

¹ Section 29 of the 2006 Act, dealing with financial claims by a surviving cohabitant against their deceased cohabitant's intestate estate, is included in the Scottish Government's review of the law of succession, and therefore no recommendations are made for change to that provision.

- The definition of the term “cohabitant” is vague, inconsistent with that used in other legislation, outdated and not reflective of modern relationships;
- The language used in sections 26 and 27 is in need of modernisation;
- The purpose of the legislation is unclear or has not been met;
- The test in section 28, to be applied by the court when making awards for financial provision, is unclear and overly complicated, resulting in difficulty for solicitors in advising clients on the likely outcome of claims;
- There should be no distinction made, for the purpose of financial provision in respect of the economic burden of child care, between a child of the couple and a child accepted as a child of the family;
- The orders available to the court under section 28 are too limited;
- The time limit for making a claim for financial provision is too short and is inflexible;
- There is no provision for the court to take any agreement between the cohabitants into account in deciding what order, if any, to make, or allowing the court to vary or set aside such agreements in certain circumstances.

Proposed scheme

8. The Commission makes various recommendations for reform of sections 25 to 28 of the 2006 Act to address these criticisms, which are set out fully in the Report and include:

- The definition of “cohabitant” should be modernised, by defining the term by reference to the characteristics of a cohabiting relationship. “Cohabitant” should be defined as one of two persons who are (or were) living together as a couple in an enduring family relationship, are aged 16 or over, are not spouses or civil partners of each other, and are not closely related to each other. Lists setting out which persons are closely related for these purposes are included in a proposed new schedule to the 2006 Act.
- In determining whether two persons are living together as a couple in an enduring family relationship, the court should be required to have regard to all of the circumstances of the relationship. A non-exhaustive list of features for the court to take into account in deciding whether a person is or was a cohabitant is provided in the draft Bill. This list includes the duration of the relationship, the extent to which the persons live (or lived) together in the same residence, the extent to which they are (or were) financially interdependent and whether there is a child of whom the persons are the parents or who is (or was) accepted as a child of their family.

- The presumption of equal shares in certain household goods and the rule relating to certain money and property in sections 26 and 27 should be retained, with some modifications, clarifications and modernisation of the language.
- Section 28 should be amended to provide clearer guidance to the court; a principled approach to the determination of claims for financial provision on cessation of cohabitation is recommended. The proposed new test requires the court to make such orders as are justified on the application of any or all of a set of guiding principles, and reasonable having regard to the resources of the cohabitants.
- The following guiding principles, which the court must apply when deciding an application for financial provision by a cohabitant, should be introduced: economic advantage derived by one cohabitant from the contributions of the other should be fairly distributed between the cohabitants, and economic disadvantage suffered by a cohabitant in the interests of the other cohabitant or of a relevant child should be fairly compensated; where a cohabitant seems likely to suffer serious financial hardship as a result of the cohabitation having ended, such financial provision should be awarded as is reasonable for the short term relief of that hardship; and the economic responsibility of caring for a relevant child (that is, a child of whom the cohabitants are parents, or who has been accepted by them as a child of the family) after the end of the cohabitation should be shared fairly between the cohabitants.
- Assistance in applying the guiding principles should be provided, by inclusion of lists of factors relevant to the application of each principle and a list of factors relevant to the application of all of the guiding principles. Factors relevant to the application of all of the guiding principles include: the terms of any agreement between the cohabitants; whether either cohabitant's behaviour, including abusive behaviour, has resulted in economic advantage or disadvantage or affected the resources of either cohabitant; and all the other circumstances of the case.
- Orders available to the court should be extended to include (in addition to orders for payment of a capital sum) transfer of property orders, orders for payments to be made at intervals, over a maximum period of six months, for the relief of serious financial hardship caused by the cohabitation having ended, and incidental orders. Certain orders ancillary to orders for financial provision should also be available.
- A new provision should be introduced, allowing the court to vary or set aside an agreement or any term of an agreement between cohabitants, which is wholly or partly concerned with financial provision after the end of the cohabitation, if the agreement or the term of the agreement was not fair and reasonable at the time it was entered into. Unless the agreement or term of the agreement, is varied or set aside, no order may be made that is inconsistent with its terms.

- There should be some flexibility in relation to the time limit for making a claim for financial provision. The time limit for making a claim should remain at one year from the date of cessation of cohabitation, but the court should have discretion to accept a late claim on special cause shown within a further one year period. These provisions are subject to a two year absolute deadline, after which the court has no discretion to allow a late application.
- Provision should be introduced allowing cohabitants to agree, in writing, to extend the one year time limit, to enable them to negotiate with a view to settling their claims for financial provision. Where such an agreement is entered into, the time limit for making a claim should be extended to 18 months from the date of cessation of cohabitation, but the two year absolute deadline will continue to apply.

9. Some concerns had also been expressed about the interaction between the cohabitation provisions in the 2006 Act and the common law claim based upon the principle of unjustified enrichment. We carefully considered those concerns, which are fully discussed in the Discussion Paper on Cohabitation (Scot Law Com No 170, 2020). The judgment of the Inner House of the Court of Session in *Pert v McCaffrey*,² confirmed that the common law remedy of unjustified enrichment remains available in addition to, or as an alternative to, the right to make a claim for financial provision. Nothing in the Bill affects the common law, and therefore no amendments to the 2006 Act are required in response to these concerns.

10. These recommended reforms will modernise and improve the statutory scheme for separating cohabitants, by updating the language of the provisions, including the definition of cohabitant; introducing a principled approach to deciding claims for financial provision; and introducing a wider range of remedies. A less rigid approach to the time limit for claims will improve access to justice. The rights of cohabitants to order their own financial affairs is respected, subject to enabling the court to intervene where there is unfairness or unreasonableness. Our recommended reforms, if implemented, will result in a clear, principled and more modern framework for determining claims for financial provision by separating cohabitants, thereby encouraging fairer outcomes, whether by agreement or determined by the court.

² 2020 SC 259.