Scottish Law Commission

promoting law reform

(SCOT LAW COM No. 261)

Report on Cohabitation

report

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Report on Cohabitation

Laid before the Scottish Parliament by the Scottish Ministers under section 3(2) of the Law Commissions Act 1965

November 2022

SCOT LAW COM No. 261
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The Scottish Law Commission was set up by section 2 of the Law Commissions Act 1965 (as amended) for the purpose of promoting the reform of the law of Scotland. The Commissioners are:

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SCOTTISH LAW COMMISSION

Item No 5 of our Tenth Programme of Law Reform

Report on Cohabitation

To: Keith Brown MSP, Cabinet Secretary for Justice and Veterans

We have the honour to submit to the Scottish Ministers our Report on Cohabitation.

(Signed) ANN PATON, *Chair*
DAVID BARTOS
GILLIAN BLACK
CATHERINE DOWDALLS
FRANKIE McCARTHY

Charles Garland, *Interim Chief Executive*
31 October 2022

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: Discussion Paper on Cohabitation (Scot Law Com No. 170, 2020), available at: https://www.scotlawcom.gov.uk/files/1115/8270/8061/Aspects_of_Family_Law_-_Discussion_Paper_on_Cohabitation_DP_No_170.pdf

1990 Discussion Paper,
: Discussion Paper on The Effects of Cohabitation in Private Law (Scot Law Com No. 86, 1990), available at: https://www.scotlawcom.gov.uk/files/3412/7892/5856/dp86.pdf

1992 Report,
: Report on Family Law (Scot Law Com No. 135, 1992), available at: https://www.scotlawcom.gov.uk/files/5912/8015/2668/Report%20on%20family%20law%20Report%20135.pdf

1973 Act,
: Prescription and Limitation (Scotland) Act 1973

1975 Act,
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1985 Act,
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2011 Act (BC),
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2014 Act,
: Marriage and Civil Partnership (Scotland) Act 2014

2016 Justice Committee Report,
: Scottish Parliament Justice Committee, *Post-Legislative Scrutiny of the Family Law (Scotland) Act 2006*, SP Paper 963 (Session 4), 17 March 2016, available at: https://archive2021.parliament.scot/S4_JusticeCommittee/Reports/JS042016R06.pdf

ADR,
: Alternative Dispute Resolution

AFLA,
: Advocates' Family Law Association

CEFL,
: Commission on European Family Law: established in 2001; consists of around 26 experts in the field of family law and comparative law from all European Member States and other European countries; produces reports based on particular areas of family law in European jurisdictions; see http://ceflonline.net/country-reports-by-jurisdiction

CEFL principles,
: CEFL Principles of European Family Law regarding the property, maintenance and succession rights of couples in de facto unions: Katharina Boele-Woelki, Frédérique Ferrand, Cristina González-Beilfuss, Maarit Jänterä-Jareborg, Nigel Lowe, Dieter Martiny, Velina Todorova, *Principles of European Family Law Regarding Property, Maintenance and Succession Rights of Couples in de facto Unions* (1st edn, 2019)

The Convention,
: European Convention on Human Rights

FLA,
: Family Law Association

GBA,
: Glasgow Bar Association

Law Society,
: Law Society of Scotland

Policy Memorandum,
: The Scottish Government's Policy Memorandum that accompanied the Family Law (Scotland) Bill, which became the Family Law (Scotland) Act 2006, available at: https://archive2021.parliament.scot/S2_Bills/Family%20Law%20(Scotland)%20Bill/b36s2-introd-pm.pdf

ONS,
: Office for National Statistics

SCTS,
: Scottish Courts and Tribunals Service

SWA,
: Scottish Women's Aid

UKSC,
: United Kingdom Supreme Court

Wasoff, Miles and Mordaunt Report,
: Fran Wasoff, Jo Miles and Enid Mordaunt, “Legal Practitioners’ Perspectives on the Cohabitation Provisions of the Family Law (Scotland) Act 2006” (October 2010), University of Cambridge Faculty of Law Research Paper No. 11/03, available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1736612

Glossary

Books of Council and Session. The Books of Council and Session comprise the Register of Deeds, the Register of Judgments and the Register of Protests. The Registers are maintained by Registers of Scotland. The Register of Deeds contains original documents, most commonly wills, leases and minutes of agreement. Minutes of agreement or contractual arrangements between spouses, civil partners and cohabitants, are commonly registered in the Register of Deeds, for preservation and execution or for execution only.

Civil partnership. Section 1 of the Civil Partnership Act 2004, as amended by section 1 of the Civil Partnership (Scotland) Act 2020, provides that a civil partnership is a relationship between two people of the same or different sexes ("civil partners"): (a) which is formed when they register as civil partners of each other– (i) in England or Wales (under Part 2), (ii) in Scotland (under Part 3), (iii) in Northern Ireland (under Part 4), or (iv) outside the United Kingdom under an Order in Council made under Chapter 1 of Part 5 (registration at British consulates etc. or by armed forces personnel), or (b) which they are treated under Chapter 2 of Part 5 as having formed (at the time determined under that Chapter) by virtue of having registered an overseas relationship. The Civil Partnership (Opposite-sex Couples) Regulations 2019/1458, Part 2, Reg 3 extended civil partnership to opposite sex couples in England and Wales with effect from 2 December 2019. The Marriage (Same-sex Couples) and Civil Partnership (Opposite-sex Couples) (Northern Ireland) Regulations 2019/1514, Part 3, Reg 16(2) extended civil partnership to opposite sex couples in Northern Ireland with effect from 13 January 2020.

Dissolution. Section 117(1) of the Civil Partnership Act 2004 provides that an action for the dissolution of a civil partnership may be brought in the Court of Session or in the sheriff court. Subsection (2) provides that in such an action the court may grant decree if, but only if, it is established that (a) the civil partnership has broken down irretrievably, or (b) an *interim* gender recognition certificate under the Gender Recognition Act 2004 has, after the date of registration of the civil partnership, been issued to either of the civil partners.

Divorce. An "action for divorce" has the meaning assigned to it by section 1(1) of the Divorce (Scotland) Act 1976. Section 1(1) provides that in an action for divorce the court may grant decree of divorce if, but only if, it is established that (a) the marriage has broken down irretrievably, or (b) an *interim* gender recognition certificate under the Gender Recognition Act 2004 has, after the date of the marriage, been issued to either party to the marriage.

Matrimonial / partnership property. Section 10(4) and (4A) of the Family Law (Scotland) Act 1985 define "matrimonial property" and "partnership property", respectively, as all the property belonging to the parties or partners, or either of them, at the relevant date which was acquired by them or him (otherwise than by way of gift or succession from a third party) (a) before the marriage or civil partnership for use by them as a family home or as furniture or plenishings for such home, or (b) during the marriage or civil partnership but before the relevant date.

The relevant date. Section 10(3) of the Family Law (Scotland) Act 1985 provides that, in relation to a claim for financial provision on divorce or dissolution, the "relevant date" means the earlier of the date on which the persons ceased to cohabit or the date of service of the summons in the action for divorce or dissolution of the civil partnership.

Tenth Programme of Law Reform. Scot Law Com No. 250, 2018. Available at: https://www.scotlawcom.gov.uk/files/5615/1922/5058/Tenth_Programme_of_Law_Reform_Scot_Law_Com_No_250.PDF. A five year programme of the Scottish Law Commission, running from 2018 to 2022. It incorporates ongoing work from the previous programme as well as new projects to be undertaken either on a short-term or medium-term basis. The Programme has been approved by the Scottish Ministers and laid before the Scottish Parliament. It was prepared following extensive consultation with the legal profession and other interested parties including members of the public.

Chapter 1 Introduction

Introduction

1.1 In this Report, we recommend a number of important reforms of the law relating to cohabitants' claims on cessation of cohabitation otherwise than on death. Sections 25 to 29 of the Family Law (Scotland) Act 2006 ("the 2006 Act") came in to force in May 2006. Since then, these provisions have been the subject of academic, judicial and practitioner commentary and criticism for, among other things, a test that lacks clarity, an inflexible time limit and limited remedies. The policy objectives of the 2006 Act provisions relating to cohabitants, as set out in the Policy Memorandum,[1] are widely regarded as not having been met.[2] There is broad consensus among commentators and critics that cohabitants are not treated with sufficient fairness on cessation of their relationship, and that greater account should be taken, at the end of the relationship, of contributions made and benefits accrued during the relationship. Our proposed reforms aim to modernise and simplify the legislative provision for cohabitants. We recommend a redefinition of "cohabitant" to better reflect modern couples' living arrangements, a clear set of principles by which claims for financial provision will be decided, a wider range of remedies and a flexible time limit within a framework that respects couples' rights to make their own financial arrangements during and after cohabitation.

1.2 For ease of reference, a copy of sections 25 to 29 of the 2006 Act is attached at Appendix B of this Report. Section 25 explains the meaning of "cohabitant" for the purposes of sections 26 to 29.[3] Sections 26 and 27 respectively create presumptions and rules in relation to cohabitants' rights in certain household goods and certain money and property. Section 28 makes provision for claims for financial provision by former cohabitants within one year of cessation of cohabitation otherwise than by death. Section 29 provides for claims by surviving cohabitants against their deceased cohabitant's intestate estate within six months of death.

Scope of this Report

1.3 We have focused in this Report on reform of sections 25 to 28 of the 2006 Act. Section 29 was not included in our review. At the outset of our Aspects of Family Law project in July 2018, work was already underway by the Scottish Government on possible reform of the law of succession. In February 2019, the Scottish Government published its Consultation on the Law of Succession.[4] The succession rights of bereaved cohabitants on intestacy were

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[1] Policy Memorandum for the Family Law (Scotland) Bill, paras 64 to 66.
[2] See Wasoff, Miles and Mordaunt Report; Fran Wasoff, Jo Miles and Enid Mordaunt, "Legal Practitioners' Perspectives on the Cohabitation Provisions of the Family Law (Scotland) Act 2006" (October 2010), University of Cambridge Faculty of Law Research Paper No. 11/03, available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1736612. See also responses to our consultation on the Tenth Programme of Law Reform in 2018.
[3] Note the changes effected by s 4 of the 2014 Act. See Discussion Paper, para 3.4 for details.
[4] Scottish Government, *Consultation on the Law of Succession*, February 2019, available at: https://www.gov.scot/binaries/content/documents/govscot/publications/consultation-paper/2019/02/consultation-law-succession/documents/consultation-law-succession/consultation-law-succession/govscot%3Adocument/00546296.pdf.

considered as part of that consultation. The Scottish Government published its response to the consultation in May 2020, in which it confirmed that it intended to carry out further research and evidence gathering, after which it would consider whether the issue of intestate reform, including the issue of cohabitants' rights in succession, should be referred to this Commission.[5] The law of succession remains, for the time being, under consideration by the Scottish Government and we therefore do not make any recommendations for reform of the law as currently set out in section 29 of the 2006 Act. In Chapter 3, we make recommendations for reform of the definition of "cohabitant" in section 25, for the purposes of sections 26 to (new) section 28F. It is our current view that it might be helpful if the definition of "cohabitant" that we recommend applied consistently for the purposes of all of sections 26 to 29.

Background

Statistical information: family forms

1.4 The incidence of cohabitation in Scotland and in the United Kingdom as a whole has increased significantly over the last thirty years. According to this Commission's 1990 Discussion Paper on *The Effects of Cohabitation in Private Law* ("the 1990 Discussion Paper"),[6] in 1987 about 2% of households in Scotland were "headed by a cohabitant".[7] The last national census in Scotland, for which there are published results, took place in 2011 and revealed that 16% of families (with or without children) were cohabiting couple families.[8] The Office for National Statistics ("ONS") published a data set for 2020 which estimated that there were 277,000 cohabiting families in Scotland.[9] A further data set published by the ONS reported that the number of cohabiting couples in the UK has increased from around 1.5 million in 1996 to around 3.5 million in 2020, an increase of 135%.[10] The most recent statistics suggest that around one fifth of couples living together in the UK are cohabiting and that the number of cohabiting couples in Scotland increased to around 287,000 in 2021.[11] The results of the 2022 national census in Scotland are expected in 2023.

Statistical information: litigation

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[5] Scottish Government, *Scottish Government Response to Consultation on the Law of Succession*, May 2020, p 3, available at: https://www.gov.scot/binaries/content/documents/govscot/publications/consultation-analysis/2020/05/scottish-government-response-consultation-law-succession/documents/scottish-government-response-consultation-law-succession/scottish-government-response-consultation-law-succession/govscot%3Adocument/scottish-government-response-consultation-law-succession.pdf.

[6] Discussion Paper on The Effects of Cohabitation in Private Law (Scot Law Com No. 86, 1990), available at: https://www.scotlawcom.gov.uk/files/3412/7892/5856/dp86.pdf.

[7] Para 1.3 (information supplied by Central Research Unit, Scottish Office, and derived from the General Household Survey 1987).

[8] National Records of Scotland, *Census 2011: Detailed characteristics on Population and Households in Scotland – Release 3E*, available at: https://www.scotlandscensus.gov.uk/news/census-2011-detailed-characteristics-population-and-households-scotland-release-3e. The most recent census in Scotland took place on 20 March 2022 and results are expected in 2023.

[9] Office for National Statistics, *Families by family type, regions of England and UK constituent countries, 2015 to 2020*, available at: https://www.ons.gov.uk/peoplepopulationandcommunity/birthsdeathsandmarriages/families/datasets/familiesbyfamilytyperegionsofenglandandukconstituentcountries.

[10] ONS, *Families and households: 2020,* Table 1, available at: https://www.ons.gov.uk/peoplepopulationandcommunity/birthsdeathsandmarriages/families/datasets/familiesandhouseholdsfamiliesandhouseholds.

[11] ONS, *Families and Households in the UK: 2021*, 9 March 2022, available at: Families and households in the UK: 2021 - Office for National Statistics (ons.gov.uk).

1.5 As we noted in our Discussion Paper on *Cohabitation* ("the Discussion Paper")[12] the extent of litigation brought under section 28 of the 2006 Act is not easily discovered.[13] What the available statistics do suggest is that relatively few claims under section 28 are litigated. That is perhaps reflective of a lack of public awareness of the legislation,[14] the complexity and inaccessibility of the provisions or both. Anecdotal evidence from practitioners and respondents to the Discussion Paper suggests that most claims are settled, often by agreement to transfer property, an order for which is not available under the existing legislation.

Awareness of the 2006 Act provisions and "common law marriage"

1.6 In our discussions with stakeholders and in responses to the public attitudes survey[15] and Discussion Paper, we have noted a lack of awareness among members of the public of the legal position of cohabitants. We have also heard from practitioners that, not only is there little awareness of the 2006 Act provisions among their clients, but that there is a perception among some cohabitants that they have the same rights to financial provision on breakdown of the relationship as spouses and civil partners, while others think they have no rights at all. Academic research[16] and statistical data confirm that a belief in "common law marriage" exists. The 36th British Social Attitudes Report, published by the National Centre for Social Research on 11 July 2019, reports as follows:

> "BSA 2018 measures the prevalence of belief in the 'common law marriage' myth. Respondents are asked if as far as they know, unmarried couples who live together for some time have a 'common law marriage', which gives them the same legal rights as married couples, with response options ranging from "definitely do" to "definitely do not". Almost half of all participants (47%) believe unmarried couples who live together for some time either "definitely do" or "probably do" have a common law marriage. This represents only a small drop since the question was asked in 2000, when the equivalent figure stood at 56%."[17]

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[12] Discussion Paper on Cohabitation (Scot Law Com No. 170, 2020), available at: https://www.scotlawcom.gov.uk/files/1115/8270/8061/Aspects_of_Family_Law_-_Discussion_Paper_on_Cohabitation_DP_No_170.pdf.

[13] See the Discussion Paper, para 1.15.

[14] See the Discussion Paper, paras 1.21 to 1.29; see also paras 1.6 to 1.7 below. The publication by the Scottish Government of an information booklet when the 2006 Act came into force is noted, available at: https://www.webarchive.org.uk/wayback/archive/3000/https://www.gov.scot/Resource/Doc/113318/0027450.pdf.

[15] See para 1.33.

[16] See Anne Barlow, Simon Duncan, Grace James and Alison Park, "Just a piece of paper? Marriage and cohabitation", in Alison Park, John Curtice, Katarina Thomson, Lindsey Jarvis and Catherine Bromley, *British Social Attitudes: the 18th Report* (2001), ch 2; and Anne Barlow, Simon Duncan, Grace James and Alison Park, *Cohabitation, Marriage and the Law: Social Change and Legal Reform in the 21st Century* (2005), ch 3.

[17] Muslihah Albakri, Suzanne Hill, Nancy Kelley and Nilufer Rahim, "Relationships and gender identity: Public attitudes within the context of legal reform", in John Curtice, Elizabeth Clery, Jane Perry, Miranda Phillips and Nilufer Rahim, *British Social Attitudes: the 36th Report* (2019), p 12, available at: http://www.bsa.natcen.ac.uk/latest-report/british-social-attitudes-36/relationships-and-gender.aspx. The BSA survey's 'common law marriage' myth question was commissioned by Professor Anne Barlow, University of Exeter in 2018 and replicated the wording used in her earlier research with the National Centre for Social Research published in their 2001 and 2008 BSA reports.

1.7 These figures relate to Britain as a whole. Separate data, based upon a small sample (204 people),[18] suggests that the number of people in Scotland who believe that "common law marriage" exists is higher than in Britain as a whole, at 58%. If those figures are to be relied upon as reasonably accurate, there has been no improvement in public awareness since the 2006 Act came into force.[19] It is difficult to understand why these common misconceptions persist. We acknowledge that there is a need for the public to be better informed about the statutory claims available when cohabitation ceases. It will be all the more important following changes to the legislation as a result of our recommendations that a public information campaign is undertaken, to better inform the public as to the availability of remedies on cessation of cohabitation.

Legislative and policy background

1.8 Cohabitants' rights to financial provision on cessation of cohabitation and on intestacy were considered by this Commission in the 1990s. The policy approach then was to recommend the introduction of some limited statutory remedies for separating and bereaved cohabitants, where none had previously existed. The 1992 *Report on Family Law* ("the 1992 Report")[20] noted that the reforms were not intended to undermine marriage, nor to undermine the freedom of those who deliberately chose not to marry but, rather, to ease certain legal difficulties and remedy situations which were widely perceived as unfair.[21]

1.9 The 2006 Act broadly implemented the Commission's recommendations. The Policy Memorandum for the Family Law (Scotland) Bill, which became the 2006 Act ("the Policy Memorandum"), states:

> "The Scottish Ministers aim to provide a clearer statutory basis for recognising when a relationship is a cohabiting relationship; and a set of principles and basic rights to protect vulnerable people either on the breakdown of a relationship, or when a partner dies. The Scottish Ministers do not intend to create a new legal status for cohabitants. It is not the intention that marriage-equivalent legal rights should accrue to cohabiting couples, nor is it the intention to undermine the freedom of those who have deliberately opted out of marriage or of civil partnership. The Scottish Ministers consider it vital to balance the rights of adults to live unfettered by financial obligations towards partners against the need to protect the vulnerable. This is reflected in the detailed provisions – for example, the presumption of equal shares in household goods acquired during the cohabitation is rebuttable."[22]

[18] As compared with a sample of 1,998 people in England. Details provided by the National Centre for Social Research.
[19] Policy Memorandum for the Family Law (Scotland) Bill, para 59.
[20] Report on Family Law (Scot Law Com No. 135, 1992), available at: https://www.scotlawcom.gov.uk/files/5912/8015/2668/Report%20on%20family%20law%20Report%20135.pdf.
[21] Para 16.1.
[22] Para 65.

1.10 Prior to the 2006 Act, cessation of cohabitation was not generally recognised as having legal implications or financial consequences.[23] The only recourse separating cohabitants had for the resolution of disputes over money and property (in the absence of property rights or any contractual arrangement or agreement) was to the common law remedy of unjustified enrichment. While this provided a remedy in some cases,[24] it was inadequate in protecting many cohabitants.[25]

1.11 When our predecessors considered creating rights for cohabitants in the 1990s, and later when the Bill that became the 2006 Act was progressing through the Scottish Parliament, concern focused on the need to strike the correct balance between addressing the legal and economic vulnerabilities of many cohabitants and avoiding the creation of an unwieldy legal framework which would interfere unduly with the private lives of individuals. The special significance of marriage in society was also to be protected, as was the right of those who wished to opt out of marriage to do so. In carrying out our review of the law in this area, we were mindful of these competing interests, but also the significant social and legal changes that have occurred since the 1992 Report. Whereas our predecessors were recommending legal intervention for cohabitants where there was no legislative recourse to financial provision on breakdown of a relationship, we have had to consider whether the resulting legislation (a) is sufficiently clear in terms of its objective; (b) provides effective remedies; and (c) remains appropriate for 21st century family life.

The Discussion Paper

1.12 In our Discussion Paper we considered, by reference to the available jurisprudence and statistical, empirical and anecdotal evidence, how the law as it currently stands affects cohabiting couples. We examined the law in this area in other jurisdictions, explored the ways in which Scots law might be modernised and improved to better meet the needs of cohabitants in the 21st century and posed questions seeking views on the substance of the law relating to financial provision on cessation of cohabitation. We noted that, while cohabitation is not a legal status bringing with it automatic rights and obligations, it is a socially recognised family form, afforded legal recognition for many purposes, some of which will be discussed in the chapters that follow. In light of changing social mores, most couples, whether same or mixed sex and with or without children, who cohabit do so openly and without feeling any need to pretend to others that they are married, as they might have done around the time of this Commission's inquiry into family law in the 1980s and early 1990s. In the questions posed in the Discussion Paper, we explored the extent to which public attitudes have changed and whether, in light of those changes and experience of the operation of the cohabitation provisions in the 2006 Act, improvements could be made and greater rights and protections should be afforded to those who choose to cohabit, within a clearer, more modern framework.

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[23] However, the following statutory rights were available: a claim for wrongful death of a cohabitant under the Damages (Scotland) Act 1976, a right to apply for occupancy rights under the Matrimonial Homes (Family Protection) (Scotland) Act 1981, a right of succession to an assured tenancy under the Housing (Scotland) Act 1988, a right of succession to a Scottish secure tenancy under the Housing (Scotland) Act 2001, and some recognition for certain purposes in social security legislation.

[24] See, for example, *Shilliday v Smith* 1998 SC 725.

[25] See the Discussion Paper, Ch 8.

Our approach

Responses to Discussion Paper

1.13 We recognise that marriage and civil partnership differ from cohabiting relationships. There is no formality or public registration of a cohabiting relationship and no change of legal status on commencement of cohabitation. Cohabitants do not assume rights or obligations automatically upon commencing cohabitation. Many will have deliberately opted not to. On the other hand, many cohabitants are committed to an enduring family life, which may include raising children together, financial interdependence and sharing assets and resources. Sacrifices (whether financial or non-financial) may have been made by one partner to the benefit of the other or the family. There may be economic dependency or support. The function of a cohabiting relationship may therefore be, essentially, the same as or similar to the function of a marriage or civil partnership, albeit the form of the relationship differs. While the autonomy of individuals who enter into informal, unregulated family relationships ought to be protected, a balance must also be struck between that autonomy and recognising and addressing, at the end of the relationship, the economic consequences of contributions and sacrifices made during the relationship. It is also desirable to provide a mechanism for the protection of economically vulnerable cohabitants, where that vulnerability arises from or is compounded by the cohabitation, especially where there are children.

1.14 We were struck by the strength of opinion that the current legislation does not treat cohabitants fairly when their relationships end. Almost half of respondents to the Discussion Paper, referring to the policy intention of providing protection and curing unfairness, raised concerns that the legislation lacked clarity, which some described as "unsatisfactory" and "difficult to defend". Others noted that the overriding principles of fairness and providing access to justice had not been achieved, or that the current provisions make it difficult to achieve an outcome that is fair to both parties.[26] Many urged a test based on fairness and reasonableness, and some commented that the current time limit for claims and the absence of provision relating to agreements could result in unfairness. A note of caution was sounded by a minority of respondents, one of whom commented that "fairness" may be too loose an approach; others were concerned that concepts of fairness and reasonableness on their own could lead to uncertainty, confusion and expense. The weight of opinion, however, supported an underlying approach of fairness and reasonableness, evident on the face of the statute.

1.15 As we discuss in Chapter 2 of this Report, there was not sufficient support from respondents to the Discussion Paper or stakeholders for us to recommend that cohabitants become subject to the same regime for financial provision on cessation of cohabitation as that on divorce and dissolution of civil partnership. Many considered that 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 provision as apply to spouses and civil partners. Others considered that the autonomy of individuals who deliberately choose not to marry or form a civil partnership, possibly to avoid the legal rights and responsibilities that result from those relationships, should be respected.[27] We recognise that those who consider that the time

[26] Identified as the guiding principle in *Gow v Grant* 2013 SC (UKSC) 1, Lord Hope DPSC, at [31]. See para 5.13 for further discussion.
[27] See Ch 2, paras 2.17 to 2.21 for arguments against retaining separate regimes.

has come for cohabitants to be treated in the same way as spouses and civil partners on cessation of their relationships will be disappointed that we have not been able to recommend such a change.

1.16 Some respondents brought to our attention issues relating to contemporaneous claims arising from different relationships. Their concerns focused on how claims for financial provision on divorce and on cessation of cohabitation should be prioritised and the difficulty of identifying the date of commencement of cohabitation, especially where there is an existing marriage or civil partnership. We note that, under the existing statutory schemes, it is possible for contemporaneous claims to be made against person A, arising from cessation of their cohabitation with person B and on divorce or dissolution of their civil partnership with person C; we are unaware of any difficulties currently in that respect, and none has been brought to our attention during the course of this project. As the date of commencement of cohabitation is a question of fact, we do not think that legislative provision can address the concerns mentioned in that regard. One response also suggested that reform of the 1985 Act was needed, in conjunction with reform of financial remedies for cohabitants, in order to address issues relating to claims for financial provision on divorce, where a long cohabitation is followed by a brief marriage. Their concerns related to the possibility that remedies for cohabitants could exceed those for spouses and civil partners and therefore risk disincentivising marriage and civil partnership. As reform of the 1985 Act is outwith the scope of the current project, we have been unable to address these concerns during this project.

1.17 There was consensus that the law should not remain as it currently is. Based on the evidence we have seen and heard and drawing on the experience of other jurisdictions, we have sought, in our recommended reforms, to address the deficiencies, lack of clarity and complexities of the existing legislation identified by stakeholders and respondents. Our recommendations include a bespoke definition of "cohabitant" that does not rely on comparison with marriage and civil partnership; a test for determining claims based on the application of guiding principles and focused on achieving fairness to both parties; a wider range of remedies; introduction of some flexibility in relation to the time limit for claims and provision enabling cohabitants to extend the time limit to facilitate negotiations and settlement; and a mechanism for variation or setting aside of cohabitation agreements in limited circumstances. The combined effect of these recommendations marks a significant improvement in and modernisation of the law relating to claims by cohabitants and, we think, achieves the objective of treating them more fairly when cohabitation ends.

1.18 While the objective of protecting economically vulnerable cohabitants (where the vulnerability arises as a result of or is compounded by the cohabitation) remains of significant importance, so too does the need to recognise and respect the financial and non-financial contributions made by cohabitants during their relationships, and the economic effect of those contributions on each cohabitant, including where there is no economic vulnerability. In particular, the economic effect of sacrifices made in the interests of the cohabitants (or either of them) or any children ought to be recognised and economic benefits derived from contributions made during cohabitation ought to be shared, in a way that is reflective of the efforts made by each of the cohabitants. For reasons explained in the chapters that follow, we do not propose a regime for financial provision on cessation of cohabitation that mirrors that on divorce and dissolution of civil partnership. We are persuaded that a regime that takes fair account of the economic consequences of the relationship, by fairly distributing economic

advantages and compensating economic disadvantages, makes adequate provision for sharing the economic burden of raising children and aims to protect against serious financial hardship caused by the end of the relationship, ought now to be put in place.

Domestic abuse

1.19 In their response to the Discussion Paper, Scottish Women's Aid (SWA) reminded us that domestic abuse, along with other forms of gender-based violence, is a form of gender discrimination. They were concerned to ensure that the effects of domestic abuse, including economic abuse, are not overlooked and that safeguards against the perpetuation of economic abuse are built into any reform of this legislation. They highlighted, in particular, the risk that broadening the range of orders available to cohabitants might disadvantage women and encourage perpetrators of abuse to make spurious claims. They were also concerned that extending the time limit for claims might give perpetrators further opportunity to continue the abuse after the end of the relationship, while on the other hand welcoming the possible extension of the time limit as offering victims a greater opportunity to consider financial claims after dealing with urgent matters, such as finding accommodation, obtaining protective orders and making arrangements for children. They were concerned that enabling the court to have regard to parties' resources in deciding what order, if any, to make might operate to the disadvantage of abused women whose resources were greater than those of the perpetrator.[28] SWA were not alone among respondents to the Discussion Paper in highlighting the difficulties faced by victims of domestic abuse. Other respondents who mentioned the significance of domestic abuse included Engender, who highlighted the gendered inequalities that can arise in a variety of circumstances, including where there is domestic abuse.

1.20 We have been mindful of these concerns in our approach to development of policy and reform of the law in this area. While we acknowledge concerns relating to the risk of spurious claims and dishonest assertions of expenditure, loss or economic disadvantage, we take the view that these are not issues that can or should be addressed by means of statutory provision. Rather, these are matters that can only be addressed by encouraging those involved as advisors and in the court process to stay alert to these risks and employ robust processes for the testing of evidence, adherence to procedure and swift resolution of claims. What we do recommend is that the legislation requires the court to take account of any behaviour[29] by either cohabitant that has an effect on the economic position of or the present and foreseeable resources of the parties, or either of them, when determining a claim for financial provision. Our proposed reforms relating to the time limit for claims should also go some way towards meeting SWA's concerns.

Comparative law

[28] They gave as examples: a situation where the property is in the woman's sole name, she has met all the relevant property and household costs but the perpetrator represents that he has been responsible for these expenses and seeks a transfer of the property; or where the property is registered in the sole name of the perpetrator and, while he claims to have paid all of the household costs and expenses, they were in reality paid from the woman's income or financial assets.

[29] Which will include domestic and economic abuse. We recognise that other forms of behaviour, such as gambling could also have an adverse effect on resources.

1.21 Prior to publication of the Discussion Paper, we undertook comparative research into how financial provision for separating cohabitants is addressed in other jurisdictions. Our research focused on Australia, New Zealand, Canada (primarily Alberta and British Columbia), Ireland and Nordic countries. In the absence of statutory provision in England and Wales, we did not look closely at remedies for former cohabitants in that jurisdiction, though we have considered the work of the Law Commission of England and Wales in 2007,[30] the various private members' bills that have been introduced in the UK Parliament over the years since then[31] and the work of the House of Commons Women and Equalities Committee, *Rights of cohabiting partners* inquiry.[32] We have drawn upon our research findings to assist us when developing our thinking on the recommendations for reform set out in this Report. We are grateful to our colleagues in law reform institutions, academics and practitioners from the jurisdictions considered for their help and support.

1.22 The Commission on European Family Law ("CEFL") has recently published principles relating to *de facto* unions. While the principles are aspirational only, and are not binding on the jurisdictions involved, we have been mindful of the work done by CEFL in reaching consensus as to these principles, which has helped inform our recommendations for reform.[33]

Structure and content of this Report

1.23 We have divided this Report into this Introduction and eight following chapters. There are six Appendices.[34] Chapter 2 discusses why we recommend that the regime for financial provision for cohabitants on cessation of cohabitation should remain separate from that for spouses and civil partners on divorce and dissolution of civil partnership. In Chapter 3, we recommend modernisation of the definition of cohabitant in section 25 of the 2006 Act. The consequences of a definition that does not depend on comparison with spouses and civil partners is discussed, including the need for the legislation to expressly provide that couples within certain family relationships should be excluded. The introduction of a list of features or characteristics to be taken into account in deciding whether the parties are cohabitants is considered and we explain why we do not recommend the introduction of a registration system for cohabitants. Chapter 4 considers sections 26 and 27, which create presumptions and rules in relation to rights in certain household goods, money and property. We recommend some minor changes to section 26, including relocating the definition of "household goods" to the interpretation section, and modernisation of the language used in section 27.

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[30] Law Commission, *Cohabitation: The Financial Consequences of Relationship Breakdown* (2007), No. 307.
[31] See the Discussion Paper, para 1.40.
[32] See House of Commons Women and Equalities Committee Report: the rights of cohabiting partners, published 4 August 2022: https://publications.parliament.uk/pa/cm5803/cmselect/cmwomeq/92/summary.html.
[33] Katharina Boele-Woelki, Frederique Ferrand, Cristina González-Beilfuss, Maarit Jänterä-Jareborg, Nigel Lowe, Dieter Martiny and Velina Todorova, *Principles of European Family Law Regarding Property, Maintenance and Succession Rights of Couples in de facto Unions* (1st edn, 2019). Principles included are that both partners have equal rights and duties; each partner should contribute to the expenses of the household according to his or her ability; partners are free to enter into agreements determining their personal, economic and property relationship (subject to limitations imposed by the other principles), which can be made before and during the *de facto* relationship and after the partners' separation; and that compensation may be available where a contribution (financial or otherwise) has been made to the other partner's property, business or profession or where a contribution made for the benefit of the household was significant or resulted in considerable disadvantage to the contributor in terms of income, property acquisition or profession.
[34] Appendix A contains the draft Cohabitants (Financial Provision) (Scotland) Bill and Explanatory Notes; Appendix B sets out sections 25 to 29 of the 2006 Act in full; Appendix C lists the Advisory Group members; Appendix D lists the respondents to the Discussion Paper; Appendix E provides an overview, including examples, of how the Bill will operate in practice.

1.24 In Chapter 5, the policy underpinning awards of financial provision under section 28 is discussed. We explain our approach to reform of this provision, including why no 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, for the purposes of (what is currently) section 28(2)(b). We recommend a fresh approach to the test for deciding claims, based upon the application of guiding principles, supplemented by factors to be considered by the court in their application, and having regard to parties' resources. We also recommend the introduction of additional remedies for cohabitants. In Chapter 6, the need for change in relation to the time limit for claims is discussed. We explain why we have reached the conclusion that the existing one year limit should be retained, subject to the exercise of judicial discretion to allow late claims on special cause shown.[35] We also explain why parties should have the option, protected by statute, of extending the time limit by agreement, and the circumstances in which they may do so. In Chapter 7, we discuss our recommendations for statutory provision allowing the court to set aside or vary a cohabitation agreement on the basis that it was not fair and reasonable when it was entered into; requiring the court to have regard to the terms of any agreement between cohabitants when applying the guiding principles, and prohibiting the making of any order for financial provision that is inconsistent with the agreement, insofar as not varied or set aside. In Chapter 8, we describe the circumstances that led to inclusion of a discussion of the law relating to unjustified enrichment in the Discussion Paper and why no questions were posed. We discuss respondents' comments on the interaction of claims for financial provision by cohabitants and claims in unjustified enrichment and explain why we make no recommendations for reform of the law in this area at this time. A summary of our recommendations for reform is set out in Chapter 9.[36]

Legislative competence

1.25 In terms of section 29 of the Scotland Act 1998 ("the Scotland Act"), a provision is outside the competence of the Scottish Parliament if, among other things, it relates to reserved matters, as defined in Schedule 5 to that Act. This Report relates to family law in Scotland. As family law is not a reserved matter under the Scotland Act, the recommendations within this Report lie within the legislative competence of the Scottish Parliament. In Chapter 5 of this Report we discuss the remedies available to cohabitants and explain why the current remedies should be extended to include property transfer orders. We also explain why we concluded that extending the remedies to include pension sharing orders was not appropriate for cohabitants. Among the matters considered by us was the question of legislative competence; we noted that occupational and personal pensions are, with limited exceptions, reserved matters, as defined in Part II of Schedule 5 of the Scotland Act.[37] The law of property and the law of obligations are not reserved matters in terms of Schedule 5. Therefore, the recommendations within this Report are within the legislative competence of the Scottish Parliament.

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[35] Provided the late claim is made within a further 12 month period.
[36] It is not intended that any of the Bill provisions will have retrospective effect. Commencement of the Bill provisions is a matter for the Scottish Government. However, s 5 of the Bill provides that it and s 6 (Short title) of the Bill will come into force on the day after Royal Assent. The other provisions will come into force on such day as the Scottish Ministers may by regulations appoint. S 5(3) provides that commencement regulations may include transitional, transitory, or saving provision and make different provision for different purposes.
[37] See para 5.74.

Convention rights

1.26 In terms of section 29 of the Scotland Act, an Act of the Scottish Parliament will not be law insofar as any provision is outside legislative competence. A provision will be outwith competence where it is incompatible with rights under the European Convention on Human Rights ("the Convention"). In a family law context, Articles 8 (right to respect for private and family life, home and correspondence) and 14 (which prohibits discrimination based on sex, race, colour, language, religion, political or other opinions, national or social origin, association with a national minority, property, birth or other status) of the Convention are particularly relevant. Article 9 (which protects freedom of thought, conscience and religion) may also be relevant in the context of reform of the law relating to cohabitation. We have been mindful of the jurisprudence of the European Court of Human Rights, in particular in relation to compliance with Articles 8 and 14,[38] while developing our recommendations for legislative change. Nothing in our recommendations for legislative change is incompatible with rights under the Convention.[39]

Business and Regulatory Impact Assessment (BRIA)

1.27 In line with the Scottish Government's requirements for regulatory impact assessments of proposed legislation, we have prepared a BRIA in relation to our recommendations.[40] It is essential for us to attempt to assess the impact, particularly the economic impact, of any reform proposal that we recommend in this Report.

1.28 We asked consultees for information or data on the economic impact of sections 25 to 28 of the 2006 Act; the potential economic impact of any option for reform discussed in the Discussion Paper (in particular, the impact in terms of tax law of the possibility of extending the remedies available to cohabitants); and the potential economic impact upon the Scottish Courts and Tribunals Service (SCTS) and legal aid budgets of any option for reform, including the possible extension of the time limit for claims and additional remedies.

1.29 The BRIA concludes that the economic impact of the recommendations made in this Report is unlikely to be adverse and will, in some respects, be positive in removing existing uncertainties and lack of clarity in the law. The law would also be modernised to better reflect the lived experience of cohabiting couples and cohabiting couple families, and therefore meet the needs of Scottish society. Simplification and clarification of the law in this area would assist legal practitioners in providing advice to their clients on the likely range of possible outcomes if a claim is made for financial provision (and therefore encourage resolution of disputes). Decision makers will benefit from clearer guidance in terms of the policy objectives underlying the test for making awards. The ability of cohabiting couples to agree extension of the time limit for making claims (as recommended in Chapter 6)[41] to allow them to negotiate, as

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[38] See, for example, *Schalk and Kopf v Austria* (2011) 53 EHRR 20 App No 30141/04 (24 June 2010); *Gas and Dubois v France* (2014) 59 EHHR 22 App No 25951/07 (15 March 2012); *X v Austria* (2013) 57 EHHR 14 App No 19010/07 (19 February 2013); *Burden v UK* [2008] 2 FLR 787 App No 13378/05 (29 April 2008). See also *Jackson v Secretary of State for Work and Pensions* [2020] EWHC 183 (Admin).
[39] See paras 2.28 to 2.30.
[40] This is available online at https://www.scotlawcom.gov.uk/law-reform/law-reform-projects/aspects-of-family-law/.
[41] Recommendation 13.

provided for in the draft Bill,[42] will reduce the number of disputes that reach the courts and the associated costs and time. There will be a consequential reduction in the anxiety and stress experienced by individuals making or defending claims, and their families. There would be initial training and familiarisation costs, principally for legal practitioners and the judiciary, and perhaps also for other professionals in relevant fields. However, these costs would be relatively small and incurred only on first implementation of the proposed legislation.

Acknowledgements

1.30 Responses to the Discussion Paper came from academics, practitioners, sheriffs, the representative bodies of practitioners and the judiciary, equality groups, other non-legal organisations and members of the public. We are grateful to the individuals and organisations that responded to the Discussion Paper. A list of respondents is provided in Appendix D.

1.31 During the consultation period, we held a series of online workshops with legal practitioners (solicitors and counsel) from all over Scotland.[43] We also held a focus group meeting with members of Interfaith Scotland.[44] These meetings helped us to develop our thinking in relation to options for reform. We are grateful to all who participated in these events.

1.32 We established an Advisory Group in March 2019, which met during the project, in person and virtually. In addition, some members provided thoughts on early drafts of the Bill. The advice and assistance of the Advisory Group has been invaluable and we are grateful to members for their contributions. Members of the Advisory Group are listed in Appendix C.[45] No member of this group is to be held to have taken any substantive position on the recommendations for reform discussed in this Report.

1.33 In July 2020, we published an online public attitudes survey, which was responded to by 243 members of the public. We sought to discover the extent of public knowledge and awareness of cohabitants' rights; what claims the public thought should be available on separation; whether there should be qualifying criteria to access claims (and if so, what those should be); and whether cohabitants should be able to make the same financial claims as spouses and civil partners when they split up. The survey was published by Survey Monkey and posted on social media accounts (Twitter, LinkedIn, and Facebook). We also sent it to organisations representing a wide cross-section of society, for circulation to their members.[46] The results of the survey are discussed in the chapters that follow. While the survey results are interesting and informative, they can only give a flavour of public views. We are grateful to members of the public who took the time to respond and to the organisations that circulated the survey to their members.

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[42] Appendix A, s 4, which inserts s 28F into the 2006 Act.
[43] Advocates Family Law Association, Highland Faculty, Aberdeen Bar Association, Glasgow Bar Association, the Law Society, Argyll Family Lawyers.
[44] Interfaith is the national interfaith organisation for Scotland. It works to help ensure good relations between the diverse religion and belief communities of Scotland and to share good practice in interfaith dialogue, education, engagement and training nationally and internationally.
[45] Professor Gillian Black was a member of the Advisory Group until taking up her appointment as Commissioner in April 2020.
[46] Engender, the Equality Network, Relationships Scotland, Citizens Advice Scotland, Interfaith Scotland, the Scottish Youth Parliament, Scottish Women's Aid and Shared Parenting Scotland.

1.34 We also acknowledge the assistance we have received from academics and legal practitioners, too numerous to mention individually, from this and other jurisdictions, who have patiently responded to queries and provided us with material that has assisted us in development of policy. Much of their work is referenced in this Report. We are grateful to them all for their support and guidance.

1.35 Finally, we note that the Discussion Paper was published shortly before restrictions were imposed due to the COVID-19 global pandemic. The consultation period was extended, in recognition of the difficulties we and consultees experienced in adapting to new ways of working. Those who engaged with us during the consultation period and beyond did so by way of exchange of correspondence and online discussion and meetings. We are grateful to consultees, stakeholders and Advisory Group members for their interest in the project and for their patience and ingenuity. That so many responded to the Discussion Paper and engaged with us at such a difficult time is eloquent of the need for reform of the law in this area.

Chapter 2 Separate regimes?

Introduction

2.1 In Chapter 2 of the Discussion Paper,[1] we considered whether separate regimes should be retained for financial provision on divorce and dissolution of civil partnership and on cessation of cohabitation. We considered the current law, as contained in the Family Law (Scotland) Act 1985 ("the 1985 Act") relating to financial provision on divorce and dissolution, and the provisions in the Family Law (Scotland) Act 2006 ("the 2006 Act") relating to financial provision on cessation of cohabitation. This Commission's 1992 recommendations and the policy objective of the provisions in the 2006 Act were discussed, along with criticism of the law relating to financial provision on cessation of cohabitation. We also considered the approaches taken in comparative jurisdictions and concluded by seeking views on possible reform.

2.2 In this Chapter, we discuss these issues, examine the responses to the questions posed in Chapter 2 of the Discussion Paper and outline our conclusions.

Current law

Cessation of cohabitation

2.3 Section 28(2) of the 2006 Act[2] provides that, on an application by a cohabitant who has ceased to cohabit otherwise than by reason of death, the court may make an order requiring the other cohabitant ("the defender") to pay a capital sum of an amount specified in the order to the applicant; requiring the defender to pay such amount as may be specified in the order in respect of any economic burden of caring, after the end of the cohabitation, for a child of whom the cohabitants are the parents; and such *interim* order as it thinks fit. The application must be made within one year of the date of cessation of cohabitation.[3] The test for financial provision in section 28(3) to (6) of the 2006 Act provides no guidance to the court as to the basis in principle for deciding what, if any, order should be made. The UK Supreme Court has said that the guiding principle is "fairness", while acknowledging that such language does not appear in the statute.[4]

Divorce and dissolution of civil partnership

2.4 The statutory scheme for financial provision on divorce and dissolution of civil partnership is found in sections 8 to 16 of the 1985 Act.[5] Section 8(1) allows either party to

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[1] Discussion Paper on Cohabitation (Scot Law Com No. 170, 2020), available at: https://www.scotlawcom.gov.uk/files/1115/8270/8061/Aspects_of_Family_Law_-_Discussion_Paper_on_Cohabitation_DP_No_170.pdf.

[2] See Appendix B.

[3] S 28(8); see also discussion in Ch 6. The time limit for claims under s 29 of the 2006 Act is six months.

[4] *Gow v Grant* 2013 SC (UKSC) 1, Lord Hope at paras [31] to [33]; see also the Discussion Paper, para 5.39.

[5] S 17 of the 1985 Act extends the provisions, with some exceptions, to applications for nullity of marriage and civil partnership.

apply to the court for an order or orders for financial provision, being an order for the payment of a capital sum, for the transfer of property, for the making of a periodical allowance, a pension sharing order, certain other orders relating to pensions[6] or an incidental order within the meaning of section 14(2).[7] Section 8(2) provides that (subject to sections 12 to 15) the court shall make such order, if any, as is justified by the principles set out in section 9 and reasonable having regard to the resources of the parties. The principles which the court shall apply in deciding what order for financial provision, if any, to make are set out in section 9(1)(a) to (e). Section 10(1) provides that, in applying the section 9 principles, the net value of matrimonial or partnership property shall be shared fairly when shared equally or in such other proportions as are justified by "special circumstances",[8] and makes provision for the identification[9] and valuation[10] of matrimonial or partnership property, and for apportionment of the value of life policies or similar arrangements and of benefits under a pension arrangement.[11] The factors to be taken into account in applying the section 9 principles are set out in section 11.

2.5 Sections 8 to 16 of the 1985 Act provide a comprehensive framework for financial provision on divorce and dissolution,[12] including the identification, valuation and distribution of the net value of matrimonial or partnership property. A range of orders is available, from which the court may select which, if any, are justified by clearly stated principles.[13] Any order that the court makes must also be reasonable, having regard to the present and foreseeable resources of the parties.[14]

Background

2.6 Our predecessors noted in the 1992 Report that, while there was a strong case for reform[15] to enable certain legal difficulties faced by cohabitants to be overcome, any such reform should be limited, as this was a subject on which there were widely differing views. In particular, there was a respectable view that it would be unwise to impose "marriage-like legal consequences on couples who may have deliberately chosen not to marry."[16] It was not therefore recommended that the statutory regime for cohabitants should mirror the 1985 Act provisions on divorce.[17]

2.7 The Scottish Government reached a similar view, when it explained its approach to the cohabitation provisions in the Bill which became the 2006 Act:

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[6] Ss 8A and 12A to 12B.
[7] S 8(1)(a) to (c).
[8] See s 10(6).
[9] S 10(4) to (4A).
[10] S 10(2) to (3A).
[11] S 10(5).
[12] S 17 applies the provisions to declarator of nullity of marriage and civil partnership.
[13] S 8(2)(a).
[14] Ss 8(2)(b) and 27(1).
[15] In responses to the Discussion Paper on The Effects of Cohabitation in Private Law (Scot Law Com No. 86, 1990), available at: https://www.scotlawcom.gov.uk/files/3412/7892/5856/dp86.pdf.
[16] Report on Family Law (Scot Law Com No. 135, 1992), para 16.1, available at: https://www.scotlawcom.gov.uk/files/5912/8015/2668/Report%20on%20family%20law%20Report%20135.pdf.
[17] In 1992, the 1985 Act did not contain provision for the dissolution of civil partnership, which was not introduced until the 2004 Act came into force.

> "There is a need to strike a reasonable balance between addressing the legal vulnerabilities of many cohabiting couples in Scotland and avoiding the creation of an unwieldy legal framework that interferes unduly with the private lives of individuals. The Scottish Ministers do not believe it would be right to impose comprehensive and strenuous obligations equivalent to those attaching to marriage on individuals who have not deliberately selected them. Moreover, they believe that to regard cohabitation as equivalent to marriage fails to acknowledge the special place of marriage in Scottish society."[18]

2.8 At stage 1 of the Bill process, the Justice Committee noted its concern that the differences between some of the provisions on financial provision on divorce and what was then section 21[19] were not sufficiently clear, nor adequately justified in policy terms.[20] It recommended that the Government consider amending section 21 so that all the orders available under section 8 of the 1985 Act were available, but that the justifications for making the orders were explicitly limited to those in section 9(1)(b) and (c) (namely, economic advantages and disadvantages, and sharing the economic burden of child care). In response, the Scottish Government explained:

> "The Executive does not seek to replicate for cohabitants the full range of claims for financial provision that spouses or civil partners may make against one another on divorce or dissolution …. We are intent on providing safeguards, not a system parallel to marriage/civil partnership or which imitates marriage/civil partnership. …Section 21 provides that the court may award a capital sum which may be paid on a date as specified or in instalments: this is consistent with the intended compensatory nature of the award."[21]

Views on the current law

2.9 Respondents to the Tenth Programme of Law Reform consultation, the Discussion Paper and our public attitudes survey, stakeholders and members of our Advisory Group expressed a range of views on whether there remains justification for retaining different regimes for financial provision on cessation of cohabitation and on divorce or dissolution of civil partnership. Comments included that some couples avoid marriage for ideological reasons such as its patriarchal and religious connotations, and that marriage is no longer elevated in law, given that civil partnership is permitted; therefore increasing cohabitants' rights would not in itself lessen or diminish the "sanctity" of marriage as this has already happened.[22] Some said the question is a public policy one: is the purpose of family law in the area of financial provision for cohabitants to increase protection or protect party autonomy? The fundamental distinction between cohabitation and marriage or civil partnership, which lies in the state recognition and regulation of marriage and civil partnership, was noted. Others

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[18] Policy Memorandum for the Family Law (Scotland) Bill, para 70.
[19] Now s 28.
[20] Justice 1 Committee, Stage 1 Report, 7 July 2005, para 196, available at: https://archive.scottish.parliament.uk/business/committees/justice1/reports-05/j1r05-08-vol01-02.htm#21.
[21] Scottish Government Response to the Justice 1 Committee Stage 1 Report, p 17, available at: https://archive2021.parliament.scot/S2_Justice1Committee/Reports/SEresponseFamilyLawStage1.pdf.
[22] The Civil Partnership (Scotland) Act 2020 extended civil partnership to mixed sex couples, with effect from 1 June 2021.

viewed unmarried couples as unfairly discriminated against, with too few rights compared to married couples or commented that affording cohabitants the same rights would remove freedom of choice. The point was also made that many people are not making a choice at all and simply drift into cohabitation. [23]

Comparative law

2.10 In the Discussion Paper,[24] we considered the law on cohabitants' rights on separation in comparative jurisdictions. We noted a variety of approaches. In most Australian states, qualifying[25] cohabitants' rights are broadly equal to those of parties to a marriage, with some minor exceptions. In New Zealand, qualifying cohabitants participate in the same property sharing regime as on divorce or dissolution of a civil union. In Canada, while cohabitants receive some protection under the doctrine of unjust enrichment, some provinces and territories provide cohabitants with the same property entitlements as married partners, provided certain qualifying criteria are met, some do not and some do on an opt-in basis only.[26] In Ireland, Norway, Sweden and Finland, while cohabitants have some, limited, rights on cessation of cohabitation, these are not equal to the rights of spouses and civil partners on divorce and dissolution. Our research, including positive accounts from colleagues with experience of the law reform process in Australia and New Zealand, led us to conclude that the possibility of a similar approach to that adopted in those jurisdictions should be explored.

Options for reform

Responses to the Discussion Paper

2.11 We asked:

> Q.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?

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[23] Research with young people on attitudes to cohabitation and commitment in the early 2000s revealed that young cohabitants often start the relationship with commitment, while not assuming the relationship would be lifelong; the subsequent accrual of commitments, including property, then caused them to change their views and the level of commitment to grow or lessen: Lynn Jamieson, Michael Anderson, David McCrone, Frank Bechhofer, Robert Stewart and Yaojun Li, "Cohabitation and Commitment: Partnership Plans of Young Men and Women", (2002) Sociological Review 50, pp 354 to 375; reprinted in Diduck, A, *Marriage and Cohabitation: Regulating Intimacy, Affection and Care* (1st edn, 2008).

[24] See paras 2.22 to 2.55.

[25] Qualifying criteria must be met in order to gain access to financial provision. See the Discussion Paper, Ch 3, paras 3.53 to 3.74 for details of qualifying criteria in the comparator jurisdictions considered, including Australia, New Zealand and Canadian provinces.

[26] See the Discussion Paper, paras 2.39 to 2.45. A 2017 law reform review by the Access to Justice and Law Reform Institute of Nova Scotia recommended that *de facto* partners be granted the same property entitlements as married partners. The Nova Scotia Government has since carried out its own consultation in which it agreed with the Institute's recommendation that "common-law partners should be entitled to make a claim for the division of family property on the same basis as married spouses." This means that like married couples, common law partners would generally be entitled to divide family property equally when they separate. Whether that claim should be available in the first two years remained under consideration at that stage. Following consultation, they launched a public attitudes survey, which closed in February 2020. There have been no developments since. See Government of Nova Scotia, Family law property survey (2020), available at: https://novascotia.ca/family-property-law-survey/family-property-law-background.pdf.

2.12 Of the 41 consultees who responded to this question, 19 answered yes, 10 answered no, five were unsure or expressed no firm view and seven declined to answer on the basis that this was a policy issue. Some of the respondents who favoured retention of separate regimes gave detailed reasons for their responses, which will be discussed below; others commented on the need for improvement of the current regime by way of enhanced remedies, a clearer framework, and clarity as to the range of couples included within the scheme. The Law Society, which favoured retention of separate regimes, told us that this was not a unanimous view among its members. Similarly, the FLA, while not offering a view either way, indicated that there had been a divergence of views on this issue and SWA said they had been unable to reach a firm conclusion.[27] Two respondents suggested giving only those with children or in longer relationships access to the same remedies as spouses and civil partners. A group of six academics from the University of Aberdeen (whose primary position was that there should be a single regime[28]) also favoured a differentiated approach, acknowledging the range of cohabiting relationships. Among the respondents who answered no to this question, only seven unequivocally supported having a single regime. Other support came with caveats, including that there should be provision for opting out and that couples should first meet qualifying criteria. Some respondents who had declined to answer, on the basis that this was a policy issue, commented on the complexities surrounding this question.[29]

Views in favour of retaining separate regimes

2.13 Among the academics in favour of retention of separate regimes, Dr Barnes Macfarlane highlighted that a single regime would fail to give due regard to personal autonomy, observing that some people decide not to marry because they do not wish to undertake the particular responsibilities of being a spouse. CEFL, Dr Tobin (an Irish academic) and Dr Hayward (an English academic) highlighted the difference in principle between cohabiting and formal relationships, the need for respect for individual choice, and the availability of formal relationships such as same sex marriage and mixed sex civil partnerships. The difficulty in identifying a start date for cohabitation and the ability to make agreements as to financial arrangements were mentioned, as were the benefits of a separate, evolving regime in which relationships were not viewed through the lens of marriage and civil partnership when determining the consequences of breakdown.

2.14 There was strong support among practitioners and practitioner organisations for retaining separate regimes. Arguments included that: cohabitants choose not to marry or be bound by the rules applicable on marriage / civil partnership; unlike cohabitants, spouses and civil partners have gone through a ceremony, which makes it easy to determine their status and when their relationship commenced; and 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

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[27] Engender (which describes itself as "Scotland's feminist policy and advocacy organisation, working to secure women's political, economic and social equality with men") said they had no view on whether the detail of the legal provisions on divorce and cessation of cohabitation should remain formally separate, but were concerned 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."

[28] There was some dissent within the group, whose response said they erred "toward the same system applying."

[29] Among those was the Faculty of Advocates who commented: "(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."

financial provision as pertain to marriage and civil partnersip. Three firms of solicitors thought that society perceives the relationships (marriage / civil partnership and cohabitation) differently. Another commented that a policy of equivalence might deter people from marrying or entering civil partnerships, or from cohabiting, as people may wish to live together without financial commitments. One firm of solicitors who favoured retaining separate regimes called for the conferral of rights upon cohabitants, not merely the ability to claim. They also called for improved provision for cohabitants, including wider remedies, a view shared by other respondents, including practitioners, academics and members of the public.

2.15 Sheriff Mackie[30] preferred retention of separate regimes on the basis that "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." He commented that the reasons for choosing not to marry or form a civil partnership may include the desire to retain financial autonomy. Suzie Green[31] highlighted the absence of a body of public opinion data indicating support for such a change, and the need for further empirical research, given the potential consequences of reform on the autonomy of cohabitants.

2.16 Among non-lawyer respondents, two were in favour of retaining separate regimes. One observed that the law needs to be updated to reflect changes in society, by providing greater entitlement to (financial) provision and support for cohabitants, and highlighted the need for education on the limited rights of cohabitants. The Equality Network highlighted the need for respect to be given to individual choice, noting that many LGBT+ couples who choose to cohabit do so because they do not want to enter into the institutions of marriage or civil partnership.

Views against retaining separate regimes

2.17 Academics who preferred the introduction of a single regime did so for various reasons. Professor Mair observed that, if the purpose of the law in the area of financial provision on relationship breakdown is primarily protection, it should apply equally, regardless of the form of the relationship, a view shared by Dr Brown and Professor Norrie. Introduction of eligibility criteria and the ability to opt out contractually were considered; the point was made (albeit in different ways) that the law should apply equally to any relationship where there is vulnerability, regardless of its form; and justification for having different regimes was questioned from a human rights perspective. Professor Norrie and Professor Sutherland cautioned against attaching too much weight to arguments that freedom of choice should be preserved. Professor Norrie noted that freedom of choice "demands respect only where the choice is an informed one". Professor Sutherland said:

> "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,

[30] Whose response also reflected the views of three other sheriffs.
[31] A recent law graduate.

just as spouses and civil partners can contract out of the default system of financial provision that applies to them."

2.18 The University of Aberdeen academics raised the issue of public misperception as to the availability to cohabitants of remedies as "common law spouses", and favoured an approach that would bring the law into line with what the public thinks is fair and desirable.[32]

2.19 Three practitioners favoured a single regime.[33] Balfour + Manson recognised the likely benefits of inclusion of cohabitants within the 1985 Act regime, which would assist them and their clients in resolving issues arising from cessation of cohabitation. They were mindful of the choice made by some to avoid the financial consequences of marriage and of the vulnerability of some cohabitants, and on this basis urged the ability to opt out, should a single regime be established. Kirsty Malcolm KC also favoured the inclusion of cohabitants within the regime for spouses and civil partners, with provision for opting out and encouragement of contractual arrangements for those who choose not to submit to the regime:

> "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."

2.20 The two non-lawyers who favoured a single regime referred to changes in society, the prevalence of cohabitation, and the simplicity of a single regime for all. One commented:

> "Since the cohabiting 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, … 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."[34]

2.21 Professor MacQueen commented that separate regimes should be retained "only so far as justified by the differences between cohabitation and other forms of union." His wider view was that cohabitation ought to be recognised as giving the parties a distinct status in law and that, in particular, the financial consequences of breakdown of cohabitation should be made "as similar as possible to those of divorce or dissolution." He recognised, however, the difficulty in identifying the point at which the relationship begins and the need for the law on cohabitation to be nuanced in ways that accept and recognise its lack of formalities on these matters.

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[32] The same point was highlighted by Dr Barnes Macfarlane, albeit she preferred, on balance, retention of separate regimes.
[33] One of whom, Sarah Douglas, simply said that cohabitants who meet qualifying criteria should have the same rights as spouses and civil partners on separation.
[34] Matthew Muir.

Stakeholder meetings

2.22 At the stakeholder events held during the consultation period,[35] we asked practitioners whether the time has come for cohabitants to be included in the scheme for financial provision available on divorce / dissolution of civil partnership. The only matter on which there was consensus was the lack of public awareness of the legislation and available remedies. One group was unanimous about the need for as much consistency as possible in the financial provision regimes for cohabitants, spouses and civil partners, but members had different views on whether to have the same or different regimes. Only one participant in the Law Society groups was in favour of a single regime. Another group was opposed to a single regime, though some were prepared to consider such on an opt-in basis.

Public attitudes survey

2.23 We asked whether cohabitants should be able to make the same financial claims as married couples and civil partners when they split up.[36] Of the 241 respondents who answered the question, 21.16% answered "no", indicating resistance to equality of provision for cohabitants and spouses / civil partners in any circumstances. 19.5% said that cohabitants should always be able to make the same claims; 46.06% said that they should, but only if they had lived together for a certain length of time; and 6.64% said they should if they had a child together.[37]

Focus group

2.24 Although this question was not directly put to them, four members of Interfaith Scotland thought the rights of cohabitants, spouses and civil partners should be the same, although three of those added caveats, mainly to the effect that cohabitants should live together for a defined period in order to qualify for those rights. Four said there should be differences, but that cohabitants should have more rights than at present, with one saying rights should be based on the length of the relationship. While the group generally favoured greater protections for cohabitants the longer they lived together, there was no consensus on this particular issue.

Summary of views and arguments

2.25 There was strong support among respondents to the Discussion Paper for retention of separate regimes. The number of respondents who answered "yes" to Question 1 did not, however, amount to a majority of those who answered the question. A substantial minority favoured a single regime for spouses, civil partners and cohabitants, while others were

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[35] As noted, 71 solicitors and 16 advocates participated in five events which took place between April and June 2020.

[36] Possible responses were: "Yes, always"; "Yes, but only if they have lived together for a certain length of time"; "Yes, but only if they have a child together"; and "No". We also asked what the minimum time period should be before cohabitants can make financial claims, if there should be any time qualification at all. The responses to this question are discussed more fully in Ch 3, paras 3.46 to 3.47.

[37] These two latter responses may be somewhat misleading, however, as there was no facility for respondents to select two responses. 6.64% used the "other" response option to add their own thoughts and comments; these included that cohabitants should be entitled to entering binding financial agreements that will be enforceable by the courts, it should depend not simply on the length but on the nature and character of the relationship, and it should depend on whether a couple has consciously chosen not to formalise their relationship.

equivocal, told us there were mixed views or no firm view within their organisations, or favoured enhanced rights for cohabitants.

2.26 The weight of opinion among practitioners favoured retention of a separate, but improved regime. General dissatisfaction with the 2006 Act provisions, including the challenges of advising clients on making and defending section 28 claims, may account for the desire for legislative change, but the reasons why most practitioners did not favour a single regime are more difficult to identify. Some argued that such reform would have an unwelcome effect on family stability and discourage marriage, while others said that society perceives cohabitation differently to marriage. What is clear is that inclusion of cohabitants within the 1985 Act regime, which is widely regarded as working well, would not provide the solution that practitioners seek. Academics, on the other hand, were more inclined (marginally) to favour a single regime. They considered issues such as the purpose of the law in regulating adult relationships; the appropriateness for cohabitants of the financial provision currently in place for spouses and civil partners; Convention issues; the danger of attaching too much weight to the notion of "choice"; and the significance of the function of the relationship, rather than its form.

2.27 A minority of the stakeholders we met with supported the inclusion of cohabitants within the 1985 Act regime. Members of the focus group were divided on this issue. There was a clear preference among respondents to the public attitudes survey for cohabitants being able to make the same financial claims on separation as spouses and civil partners, albeit a substantial majority would wish to see the imposition of qualifying criteria.

Convention considerations

2.28 We are, of course, mindful of the requirements of section 29 of the Scotland Act 1998, and the need to ensure that proposed legislative changes are not incompatible with the Convention. The Aberdeen University academics' response queried whether Articles 8 and 14 case law supported equal rights for cohabitants and spouses / civil partners; they argued that keeping separate regimes may prioritise one family form over another. We are confident that retention of separate regimes would not be incompatible with Convention rights. Protection of the family in a traditional sense is, in principle, a legitimate reason justifying different treatment;[38] the question of proportionality in the circumstances of a particular case is, however, to be respected. A wide margin is usually allowed to the state under the Convention when it comes to general measures of economic or social strategy: "the court will generally respect the legislature's policy choice unless it is 'manifestly without reasonable foundation."[39]

2.29 The distinction between marriage or civil partnership and other cohabiting relationships was the focus of deliberations in the European Court of Human Rights in *Burden v UK.*[40] The court stated that marriage and civil partnership are set apart from other forms of cohabitation, noting:

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[38] *Karner v Austria* (2004) 38 EHRR 24, App No 40016/98 (24 July 2003) at [40].
[39] *Schalk and Kopf v Austria* (2011) 53 EHRR, App No 30141/04 (24 June 2010) at [97]; *Stec v UK* (2006) 43 EHRR 47, App No 65731/01 (12 April 2006) at [52].
[40] (2006) 42 EHRR 11, App No 13378/05 (29 April 2008). The applicants were sisters who lived together, they complained that the difference in tax treatment on death between them and married couples / civil partners amounted to a violation of their rights under Art 1, Protocol 1, taken with Art 14.

> "Rather than the length or the supportive nature of the relationship, what is determinative is the existence of a public undertaking, carrying with it a body of rights and obligations of a contractual nature."[41]

The observation was made that it is, "within the margin of appreciation for Member States to decide when and to what extent the relationships should be compared for the purposes of Article 14."[42]

2.30 We have concluded that reform in this area of law, whether by extending the existing regime for financial provision on divorce / dissolution to cohabitants or retaining separate regimes while improving the position for cohabitants, would be Convention compatible and therefore within the legislative competence of the Scottish Parliament.

Discussion

2.31 The 2006 Act introduced statutory remedies for cohabitants on separation and death, where none previously existed. It was the policy of the Scottish Government at the time to strike a reasonable balance between addressing the legal vulnerabilities of many cohabitants and avoiding the creation of a statutory regime that interfered unduly with the private lives of individuals. The Scottish Government was also clear that marriage has a special place in society and sought to preserve its distinctive legal status.[43]

2.32 There have, however, been changes in social attitudes and values since the 2006 Act came in to force, such that changes to the law need not necessarily be guided by the same policy objectives. The number of cohabiting couples in Scotland has also increased significantly and continues to grow.[44] Cohabitation as a family form is widely regarded, within and beyond this jurisdiction, as at least worthy of respect equal to that given to marriage and other formal relationships. Writing with reference to the efforts to reform the law relating to cohabitation in England and Wales, the following has been observed:

> "Proposals for cohabitation law reform to date have sought to view and define cohabitation negatively in terms of the fact that it is different and thus inferior to the gold standard that is marriage. Yet, given what we know about the psychological motivations of different styles of cohabitants, should we not now at least consider valuing cohabitation, rather than condemning it, for being the second most stable form of family relationship?"[45]

2.33 One Irish commentator has noted that "[w]hile not rejecting marriage outright, couples increasingly see alternatives or preludes to marriage as both viable and socially acceptable."[46] He quotes an observation (made as long ago as 1999 in relation to Northern Ireland) that:

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[41] At [65].
[42] At p 26, Concurring Opinion of Judge David Thor Bjorgvinsson, O.II1 to O.II7.
[43] Policy Memorandum for the Family Law (Scotland) Bill, para 70.
[44] See Ch 1, para 1.4.
[45] Anne Barlow and Janet Smithson, "Legal assumptions, cohabitants' talk and the rocky road to reform", (2010) 22 CFLQ 328, pp 346 to 347.
[46] Fergus Ryan, "Out of the shadow of the Constitution: civil partnership, cohabitation and the constitutional family", (2012) 48(2) The Irish Jurist 201, p 205.

> "Marriage is no longer the only, or even the preferred life choice for enormous numbers of people … and if our legal system ignores these trends, it risks becoming irrelevant, and worse, providing no protection to people who may be in great need of it."[47]

2.34 The key arguments for and against relationship equality are summarised in a 2009 article:

> "There are good reasons for distinguishing marriage (plus civil unions, civil partnerships or similar institutions) from non-marriage: freedom of choice and association; "one size does not fit all"; the wide variety of relationships makes it inappropriate to equate them to marriage; priority should be given to marriage either for ideological and cultural reasons or because of a sense that the public commitment in marriage makes it a better bet for secure family life. However, there are also good reasons why the law should treat unmarried partners much the same as married couples: their relationships are usually functionally very similar to marriages with similar needs and problems requiring resolution; there are advantages in drawing upon the same body of jurisprudence instead of re-inventing the wheel each time an issue arises; recognising unmarried relationships in financial statutes is unlikely to undermine marriage because the legal issues that arise in each case are usually when the marriage or relationship is in strife or when one of the parties has died; many countries have laws that militate against discrimination on the basis of marital or other status; and definitions of the relevant relationships and a duration requirement as a condition of jurisdiction … can weed out the fringe associations that should be outside a marriage-based regime."[48]

2.35 Similar arguments to those set out above have been made in responses to our Discussion Paper. There is a body of opinion that cohabitants in Scotland should have equivalent remedies on separation to those available to spouses and civil partners on divorce and dissolution. As one respondent to the Tenth Programme consultation pointed out, Scottish people have become accustomed to the idea of legal consequences flowing from non-marital cohabitation. It should also be borne in mind that those entering into relationships, whether marriages, civil partnerships or cohabiting relationships, are not necessarily doing so because of the particular legal consequences that follow:

> "…the legal consequences of different relationships are not the primary motivator behind relationship choices and…the symbolism associated with marriage and civil partnership may be more prominent reasons for formalising."[49]

Conclusion

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[47] Claire Archbold, "Divorce - The View from the North", in Geoffrey Shannon, *The Divorce Act in Practice* (1st edn, 1999), p 50.
[48] Bill Atkin, "The Legal World of Unmarried Couples: Reflections on 'De Facto Relationships' In Recent New Zealand Legislation", (2009) 39 Victoria University of Wellington Review 793, p 794.
[49] Kathy Griffiths, "From 'form' to function and back again: a new conceptual basis for developing frameworks for the legal recognition of adult relationships", (2019) 31(3) CFLQ 227, p 241; see also Joanna Miles and Rebecca Probert, "Civil partnership: ties that (also) bind?", (2019) 31(4) CFLQ 303.

2.36 From a policy perspective, persuasive arguments favouring retention of separate regimes include that individual choice, autonomy, and the plurality of relationships should be respected; the state should be slow to impose obligations on those who have not opted for them; the informality of cohabitation should be recognised; and the difficulty of identifying the start and end of a cohabitation should not be underestimated. Equally compelling arguments have been made in favour of a single regime, including that the function of cohabiting relationships, providing mutual emotional and economic support and as a base for family life, outweighs the significance of the form of the relationship and, if the purpose of family law in this area is to provide protection, the law should be the same for cohabitants and spouses / civil partners.

2.37 A minority of respondents and stakeholders told us that they thought that societal attitudes were largely unchanged since the 2006 Act came into force. The evidence that we have seen is of a substantial body of opinion that perceives cohabitation in much the same way as marriage and civil partnership, and cohabitants as similar to spouses and civil partners, and therefore entitled to more extensive safeguards and protections when their relationships end, than they presently have. What we have not seen, however, is substantial, unequivocal support for equivalence of the rights of spouses, civil partners and cohabitants as to financial provision when their relationships come to an end.

2.38 Including cohabitants within the 1985 Act regime (or creating a new, separate regime with similar provisions) would represent a significant change in both legal and social policy. We have concluded that, in the absence of evidence of clear, unqualified and unequivocal support from a majority of the legal profession, the academic world, equality groups and the general public, it is not possible for us to recommend reform of the law to the extent required to fully align the regimes for financial provision on cessation of cohabitation, divorce and dissolution of civil partnership. We note, however, the strength of feeling of many respondents and stakeholders on this issue and the cogent arguments advanced in support of a single regime. We suspect that attitudes may continue to evolve and that this matter may be reviewed at some point in the future.

2.39 While we do not recommend legislative change to include cohabitants, on cessation of cohabitation otherwise than on death, in the same regime for financial provision as for spouses and civil partners on divorce and dissolution at this time, it is very clear to us that the current legislative provision falls short of that which is considered fair, is widely regarded as unsatisfactory and is in need of substantial overhaul. There is evidence of public support for bringing the law governing cohabitants' rights on cessation of their relationships more in line with that pertaining to spouses and civil partners on divorce and dissolution. The purpose of any scheme for financial provision on cessation of cohabitation has to be clear, as do the reasons why, as some respondents have put it, "one size doesn't fit all". These issues will be explored further in the chapters that follow.

Chapter 3 Definition of cohabitant

3.1 The definition of the term "cohabitant" in section 25 of the Family Law (Scotland) Act 2006 ("the 2006 Act") was discussed in Part 1 of Chapter 3 of the Discussion Paper.[1] The section defines "cohabitant" as a member of a couple who are or were living together as if they were spouses.[2] We examined why the legislation defines the term as it does, considered criticism of the definition from a variety of perspectives, and analysed relevant commentary and case law. We compared the definition with those in other Scottish and wider UK legislation and considered approaches to defining "cohabitant" and "cohabitation"[3] in other jurisdictions. We also considered the case for registration of cohabitation and recognition of multiple party relationships, before setting out our provisional thoughts and seeking views on options for reform.

3.2 In Part 2 we discussed whether people who do not fall within the section 25 definition, such as siblings and others who live together in platonic relationships, should be afforded rights and remedies similar to those available to cohabitants under the 2006 Act. We concluded that these matters were beyond the scope of the current project and therefore posed no questions.

3.3 For the reasons set out in Chapter 1,[4] we are not making recommendations in relation to section 29 of the 2006 Act. The Scottish Government has undertaken to reflect on the definition of cohabitant as part of its review of the law of intestate succession.[5] Pending any changes following completion of that review, the existing definition in section 25(1) and (2) will remain relevant for determining whether a claim may be made by a bereaved cohabitant under section 29. It is our current view that it would be helpful if our proposed new definition applied consistently for the purposes of sections 26 to 29.

Background

Section 25 of the 2006 Act

3.4 Unlike spouses on marriage or civil partners on civil partnership, cohabitants do not acquire a new legal status, from which rights or obligations automatically flow, on commencement of cohabitation. The definition in section 25 merely identifies those individuals who (or whose estates) are subject to the provisions in sections 26 to 29. It is notable that the

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[1] Discussion Paper on Cohabitation (Scot Law Com No. 170, 2020), paras 3.3 to 3.5, available at: https://www.scotlawcom.gov.uk/files/1115/8270/8061/Aspects_of_Family_Law_-_Discussion_Paper_on_Cohabitation_DP_No_170.pdf.

[2] See Appendix B, s 25. Note the definition is modified by virtue of s 4 of the 2014 Act.

[3] And equivalent terms.

[4] At para 1.3.

[5] Scottish Government, *Response to Consultation on the Law of Succession*, May 2020, p 3, available at: https://www.gov.scot/binaries/content/documents/govscot/publications/consultation-analysis/2020/05/scottish-government-response-consultation-law-succession/documents/scottish-government-response-consultation-law-succession/scottish-government-response-consultation-law-succession/govscot%3Adocument/scottish-government-response-consultation-law-succession.pdf.

term "cohabitant" is defined in different ways for different purposes in other Scottish and UK-wide legislation.[6]

Criticism and case law

3.5 The definition of cohabitant in section 25 has been widely criticised as being outdated and not reflective of modern day relationships.[7] Criticisms and observations expressed to us include that it is disrespectful of same sex relationships, vague and inconsistent with definitions in other legislation and that it would be logical to have a more modern definition. We have also noted concerns that the current definition does not take account of couples who live apart together (LATs).[8] The Wasoff, Miles and Mordaunt Report did not find any substantial problems with identifying cohabitation in practice, concluding that "(t)he Act therefore appears in practice to meet the Executive's intention to create safeguards only for those in 'long-standing and enduring relationships.'"[9]

3.6 The question of whether or not a person is a cohabitant within the meaning of section 25 has only rarely been litigated.[10] In *Harley v Robertson*,[11] Sheriff Caldwell observed that the relationship lacked the necessary stability to be characterised as "living together as husband and wife."[12] In *M v I*,[13] the defender accepted that the parties had been living as a family unit, but maintained that this was not "as if husband and wife". Sheriff Kelly, relying on evidence of what he described as a "co-dependent life", held that the parties were cohabiting as if they were husband and wife.[14] In *Gutcher v Butcher*,[15] Sheriff Principal Pyle refused the pursuer's appeal on the basis that, as there had been "no joining at all" of the couple's financial affairs and the pursuer had used her own property address in relation to personal financial matters, the parties were not cohabitants for the purposes of the Act. He noted:

> "One could well imagine a modern married couple keeping separate their financial affairs, but one would expect them to use the matrimonial home as the address of choice no matter that separation."

3.7 In *B v B*,[16] the defender's argument focused on the use of the words "living together" in section 25(1)(a). Sheriff Principal Stephen observed that "… cohabitation and cohabitants are more easily recognised than defined,"[17] and that:

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[6] See the Discussion Paper, paras 3.32 to 3.51.
[7] *Ibid*, paras 3.21 to 3.25.
[8] See paras 3.24 to 3.26.
[9] Fran Wasoff, Jo Miles and Enid Mordaunt, "Legal Practitioners' Perspectives on the Cohabitation Provisions of the Family Law (Scotland) Act 2006" (October 2010), University of Cambridge Faculty of Law Research Paper No. 11/03, pp 124 to 125 (referring to Policy Memorandum for the Family Law (Scotland) Bill, para 67), available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1736612.
[10] For a detailed discussion of the case law, see the Discussion Paper, paras 3.26 to 3.30. The question has tended to arise in relation to disputes as to the date of cessation of cohabitation.
[11] [2011] 12 WLUK 328; 2012 GWD 4-68.
[12] Although he was not asked to decide the point, which was not in dispute.
[13] [2012] 2 WLUK 583; 2012 GWD 11-205.
[14] He relied on the fact of the parties living together as a couple, buying, furnishing and improving a house together, having a child and "intrinsically linked financial arrangements", socialising and holidaying together and "in a myriad of other ways" living a "co-dependent life" (para 23).
[15] [2014] 9 WLUK 514; 2014 GWD 31-610.
[16] [2014] 9 WLUK 169; 2014 GWD 30-593.
[17] Para 27.

> "…undue concentration on the words 'living together' is both wrong in law and inequitable. Strict application of the requirement that cohabitants live together ignores the realities of life. If one cohabitant in a cohabitating *(sic)* relationship requires to work abroad or is sufficiently ill or infirm that he or she requires to reside in a care home or hospital that does not affect the subsistence of that relationship other than the parties cannot be said to be living together under the same roof."[18]

3.8 Therefore, for a couple to meet the current statutory requirement that they are "living together as if husband and wife" and be treated as cohabitants, some element of stability has been required, as well as features of co-dependent lives and some joining of finances. While living together is not on its own sufficient to establish that a couple are cohabitants, nor is it essential that cohabiting couples always live under the same roof, provided the relationship subsists.

Whether to amend

Responses to Discussion Paper

3.9 We asked:

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

3.10 There was strong support for amendment, with one respondent describing the definition as "…one of the least successful aspects of the 2006 Act." The most common reason given was that reference to living together "as if husband and wife" is outdated, unhelpful and demeaning to cohabitants, since cohabitants are not spouses and the relationships should therefore not be equated. The need to read section 25 with section 4 of the Marriage and Civil Partnership (Scotland) Act 2014 ("the 2014 Act")[19] in order to understand the definition was described as recondite and confusing, and the definition therefore as vague, poorly drafted, opaque and lacking clarity. Some respondents remarked that the definition should reflect current societal norms and diversity in cohabiting relationships and the point was made that the definition does not cater well for LATs.[20] The level of support for amendment and the strength of the arguments made by respondents have persuaded us that the definition should be amended.

Alternative definition

Domestic and comparative law

3.11 In considering the optimum definition, we considered how "cohabitant" is defined in other Scottish and UK-wide legislation, and in jurisdictions further afield.[21] While many statutes rely on comparison with spouses and civil partners, others supplement that language, or have eschewed it altogether. Section 29(3) of the Adoption and Children (Scotland) Act 2007 ("the

[18] Para 32.
[19] See Discussion Paper, para 3.4.
[20] See paras 3.24 to 3.26.
[21] See Discussion Paper, paras 3.32 to 3.79.

2007 Act"), for example, defines "relevant couple" for the purpose of an application for adoption as including persons who are living together as if husband and wife or as if civil partners "in an enduring family relationship". The Explanatory Notes to the Act state:

> "The phrase 'enduring family relationship' is used to indicate two people who are in a relationship that is akin to a marriage or civil partnership. The length of a relationship or financial interdependency will be relevant factors in assessing the overall strength of a relationship and the suitability of a couple to adopt."[22]

3.12 Some provisions extending elsewhere in the UK also define "cohabitant" by reference to marriage and civil partnership.[23] In other statutes, "cohabitant", "partner" or equivalent terms are defined by reference to parties being in an "enduring family relationship".[24] That term is not further explained in the legislation in which it appears.

3.13 The Adoption and Children Act 2002 ("the 2002 Act")[25] provides that adoption orders may be made in favour of couples who are not married or in a civil partnership and defines the term "couple" as including: "two people (whether of different sexes or the same sex) living as partners in an enduring family relationship."[26] Unlike its Scottish counterpart,[27] the 2002 Act does not require that couples live together to jointly adopt. It has been said that this definition therefore focuses on the relationship as opposed to the fact of cohabitation.[28] Similarly, section 54(2)(c) of the Human Fertilisation and Embryology Act 2008 ("the 2008 Act")[29] provides that an application for a parental order (to transfer parenthood to the commissioning parents after a child is born through surrogacy) must be made by: "two persons who are living as partners in an enduring family relationship and are not within prohibited degrees of relationship in relation to each other."

3.14 The reference in section 25 of the 2006 Act to parties living as if married is not widely replicated in the comparative jurisdictions considered.[30]

3.15 In Australia, the Family Law Act 1975 (Cth) ("the 1975 Act") provides that a person is in a *de facto* relationship with another person if:

> (a) the persons are not legally married to each other; and
> (b) the persons are not related by family; and
> (c) having regard to all the circumstances of their relationship, they have a relationship as a couple living together on a genuine domestic basis.[31]

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[22] Explanatory Notes to the Adoption and Children (Scotland) Act 2007, para 118, available at: http://www.legislation.gov.uk/asp/2007/4/notes.
[23] An example is s 137(1) of the Social Security Contributions and Benefits Act 1992.
[24] Employment Rights Act 1996, s 57ZE(7)(b); Sexual Offences Act 2003, s 27(5)(b); Human Tissue Act 2004, s 54(8); Adoption and Children Act 2002, s 144(4).
[25] A UK-wide statute extending to Scotland.
[26] S 144(4)(b).
[27] 2007 Act, s 29(3)(c).
[28] Professor Kenneth Norrie, *The Law Relating to Parent and Child in Scotland* (3rd edn, 2013), para 21.29; see also *T v OCC* [2011] 1 FLR 1487.
[29] A UK-wide statute extending to Scotland.
[30] But see the approach in British Columbia, discussed at para 3.18.
[31] S 4AA(1); subs 2 provides a list of factors which may be included when having regard to "all the circumstances".

3.16 In New Zealand, remedies under the Property (Relationships) Act 1976 ("the 1976 Act (New Zealand)") are available to people who are in a "*de facto* relationship", defined as a relationship between two persons (whether a man and a woman, or a man and a man, or a woman and a woman):

(a) who are both aged 18 years or older; and
(b) who live together as a couple; and
(c) who are not married to, or in a civil union with, one another.[32]

3.17 In Ireland, a cohabitant is defined in the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010 ("the 2010 Act") as "one of two adults (whether of the same or the opposite sex) who live together as a couple in an intimate and committed relationship and who are not related to each other within the prohibited degrees of relationship or married to each other or civil partners of each other."[33]

3.18 In British Columbia, remedies under the Family Law Act 2011 ("2011 Act (BC)") are available to people who fall within the category of "spouse", defined as a person who:

(a) is married to another person, or
(b) has lived with another person in a marriage-like relationship, and
    (i) has done so for a continuous period of at least two years, or
    (ii) … has child with the other person…[34]

3.19 In Alberta, the Adult Interdependent Relationships Act, SA 2002 recognises a relationship between two people which meets certain criteria as a "relationship of interdependence". A relationship of interdependence is explained as a relationship outside marriage in which any two persons:

(i) share one another's lives,
(ii) are emotionally committed to one another, and
(iii) function as an economic and domestic unit.[35]

3.20 In Sweden, the Cohabitees Act, SFS 2003:276 applies to "cohabitees" who are defined as "two people who live together on a permanent basis as a couple and who have a joint household."[36] In Finland, the Act on the Dissolution of the Household of Cohabiting Partners

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[32] S 2D(1). The definition is supplemented by a list of factors which the court may have regard to but no finding in respect of any of those matters is to be regarded as necessary and the court is entitled to have regard to such matters, and to attach such weight to any matter, as may seem appropriate to the court in the circumstances of the case (s 2D(3)(a) to (b)).

[33] S 172(1). The relationship shall not cease to be an intimate relationship merely because it is no longer sexual in nature (subs 3). The court is required to take into account all the circumstances of the relationship and a list of factors is provided to assist in determining whether or not two adults are cohabitants. A person who meets the definition is entitled to benefit from the rules on cohabitation contracts contained in the 2010 Act (see Scot Law Com No. 170, 2020, para 7.23), but only a qualified cohabitant may apply for financial redress (s 173(1)).

[34] C 25, s 3.

[35] S 1(1)(f). Parties must be "adult interdependent partners" to qualify for various legal recognitions, which requires that the two adults must live together in a relationship of interdependence for not less than three years or live together with some permanence if there is a child of the relationship by birth or adoption or they must have entered into an agreement to become adult interdependent partners. The term "adult interdependent partners" is applied to any adults, including relatives, who meet this criteria. While some "common law partners" are adult interdependent partners and most adult interdependent partners are common law partners, there could be some adult interdependent partners who are not common law partners (see Scot Law Com No. 170, 2020, para 3.74).

[36] S 1. NB: the Swedish Government has not produced any translation of this Act. An English explanation of the legislation is available via the CEFL website at: http://ceflonline.net/wp-content/uploads/Sweden-IR-Legislation.pdf.

26/2011 applies to "cohabiting partners", defined as "…partners who live in a relationship … in a shared household … for at least five years or who have, or have had, a joint child or joint parental responsibility for a child."[37]

Responses to Discussion Paper

3.21 We asked:

> Q.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?

3.22 Most respondents offered suggestions as to the sort of language that could be used to better define "cohabitant" for the purpose of this legislation. Four respondents argued that the term "cohabitant" should be avoided, as it was outdated or could be misleading if it is not limited to people living together. The terminology of "cohabitant" and whether it should be retained is discussed later in this chapter.[38]

3.23 Of the options for change suggested, "enduring family (or "couple") relationship" was favoured by most respondents who expressed a preference. The formulation "genuine domestic basis" was favoured by a small minority; others expressed concern relating to the lack of precision in that expression and possible difficulties in construing the words used. Some respondents suggested alternative approaches, including a description that reflected characteristics of the relationship, such as intimacy, commitment and emotional or financial interdependence, or an approach similar to that in New Zealand, requiring that the persons "live together as a couple", possibly accompanied by a non-exclusive list of factors to aid interpretation.[39] Respondents also tended to favour use of the word "couple" in the definition. The Senators, while observing that no definition was problem-free, suggested that the definition in section 54(2)(c) of the 2008 Act, which is "two persons who are living as partners in an enduring family relationship and are not within prohibited degrees of relationship in relation to each other" may be appropriate.

Living apart together

If one (or both) of the parties to the relationship is in a legally existing formal relationship with another person, the 2003 Act will not apply (s 4). Government guidance states that "cohabitees" means "two persons who permanently live together, that is to say, more than a short association"; live together "as a couple, that is to say, a relationship where a joint sexual life normally forms part"; or have "a joint household, which means chores and expenses are shared" (Government Offices of Sweden, *Family Law: Information on the rules* (26 August 2013), para 3.2.1, available at: https://www.government.se/information-material/2013/08/family-law/).

[37] S 3. A party who is married shall not be deemed a cohabiting partner. An unofficial translation of the Finnish legislation is available on the CEFL website at: http://ceflonline.net/wp-content/uploads/Finland-IR-Legislation.pdf, and on the Finlex website (an internet service on legal information owned by the Finnish Ministry of Justice) at: http://www.finlex.fi/en/laki/kaannokset/2011/en20110026.pdf.

[38] See paras 3.27 to 3.28.

[39] One sheriff, who advocated the New Zealand approach, suggested that "a key element in the definition was the degree of commitment shown by the parties to each other. Cohabitation need not require that parties live full time with each other, but the relationship must be more than casual."

3.24 No question was posed in the Discussion Paper regarding the availability of remedies to LATs. However, 16 respondents[40] referenced LATs or raised the question of whether the definition should be sufficiently wide to include couples who maintain separate homes or do not always share the same home. Nine of these respondents favoured a definition that included, or did not automatically exclude, such couples. They said that many couples in committed relationships, including married couples and civil partners, maintain separate households and do so for a number of reasons, including work and choice. Respondents who sought the exclusion of LATs cited uncertainty as to whether a person is a cohabitant for the purposes of legislation. These respondents also said that a couple who do not share a home might not be economically interdependent to an extent that would call for financial remedies on relationship breakdown, are likely to have the means to settle their affairs under bespoke financial arrangements or by making wills and that the wider the range of relationships covered, the more difficult it is to devise a range of remedies.

3.25 A majority of members of our Advisory Group favoured not excluding LATs, acknowledging that there are often practical reasons why couples do not or cannot live together. One said that whether LATs meet the definition would arise on a case by case basis and that a list of factors supplementing the definition of "cohabitant" might narrow down those who would. Another noted the different reasons for couples not being co-resident and queried whether it is appropriate to include all of those couples.[41] An informal poll of members of the Family Law Association saw a majority not favouring the availability of financial remedies for LATs.

3.26 We have carefully considered the various ways in which couples order their relationships. We recognise that some couples who do not share a home are economically interdependent. Examples are an older couple, whose family or caring responsibilities preclude them from sharing a single home, where one is economically dependent upon the other or has made financial contributions towards the other's home or lifestyle; or a younger couple who live in distant geographical locations and for reasons relating to business or family commitments cannot share a single home but are raising children together. Other circumstances, such as illness, working abroad or imprisonment may require that a couple do not share a home, even temporarily. The current definition has been interpreted by the Scottish courts so that couples whose relationships exhibit characteristics of marriage, such as co-dependence and stability may be treated as cohabitants, including where they no longer live under the same roof.[42] We intend that those who are currently treated as cohabitants for the purposes of the legislation will continue to be so. The extent to which persons do or did share a residence will be relevant in determining whether they meet the new definition. The changes to the definition of cohabitant that we propose are intended to facilitate the identification of those persons whose relationships are included, by reference to the essential elements of a cohabiting relationship, without the need for comparison with an altogether different form of relationship.

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[40] In responses to other questions posed in the Discussion Paper.
[41] She cited barriers to cohabitation, such as employment, care responsibilities and health issues, as well as those who plan to cohabit but have not yet done so, and others who choose to maintain separate households but are unequivocally a couple.
[42] See cases discussed in paras 3.6 and 3.7.

Terminology

3.27 A very small minority of respondents told us that the term "cohabitant" is outdated and should be replaced by something more modern, such as "partner" or "*de facto*". Professor Barlow, considering possible alternative terminology, commented that "*de facto*" works in other jurisdictions, but that the introduction here of a Latin phrase might cause confusion. A similar point was made by SWA. We agree.

3.28 We have considered whether different terminology, such as "partner", could be used to better and more inclusively describe the members of couples affected by this legislation. We have, however, decided to retain the term "cohabitant". We have done so for a number of reasons, including the familiarity of the word, the absence of any alternative word or phrase that unambiguously captures the range of couples whom it is intended will benefit from these provisions and the small number of calls for the term to be changed.

Summary: alternative definition

3.29 Stakeholders and respondents have told us that the comparison with spouses in the definition of "cohabitant" is no longer appropriate. The characteristic most referred to by respondents as apt to demonstrate whether a couple are cohabitants is endurance, associated with the concept of "family". Therefore, we recommend replacing the current definition with a more modern, bespoke formulation that better encapsulates these characteristics.

3.30 Under our proposed scheme, whether a couple are cohabitants for the purposes of accessing claims for financial provision will depend on the whole facts and circumstances of their relationship, including their living arrangements and degree of financial interdependence.[43] We have concluded that the definition of cohabitant should be reformed and propose that "cohabitant" should be defined as a member of a couple who are or were living together in an enduring family relationship. This definition of cohabitant is sufficiently widely framed to permit the court to consider whether a person is or was a cohabitant on a case by case basis, having regard to their whole circumstances, and provides protection against a claim at the end of a brief or casual relationship where there has been no economic interdependence.

Forbidden degrees

Responses to Discussion Paper

3.31 We asked:

> Q.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?

[43] See paras 3.58 to 3.61 for discussion of a list of features relevant to identifying whether a person is a member of a couple in an enduring family relationship.

3.32 A majority of the respondents who answered this question favoured express provision excluding couples within the forbidden degrees of relationship to each other.[44] The need for clarity was highlighted and several suggested introducing a list specifying which relationships would be excluded.

3.33 Professor Sutherland suggested that the solution might 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". The Faculty of Advocates said that it may be appropriate to exclude persons in "natural" family relationships, but pointed out that the concept of "forbidden degrees" is pertinent to marriage, and cohabitation is not marriage. Their preference was for the legislation to include a list of excluded relationships, such as parent and child and siblings. The Law Society made a similar suggestion, observing that it should not be necessary to exclude relationships within the forbidden degrees, as these "are not formal legal relationships and may be prohibited under criminal law". Dr Barnes Macfarlane commented that (save in relation to incestuous relationships) extending the provisions about forbidden degrees of affinity in marriage to cohabitants seemed illogical and ran the risk of potentially exposing the public to future changes, as the "forbidden degrees" have been and may again be relaxed over time. The Equality Network made the point that this legislation is designed for people in sexual relationships, so those in forbidden degrees should be excluded, and the GBA observed that "societal norms would be supportive of this proposition".

Advisory Group

3.34 Some Advisory Group members questioned what purpose would be served by excluding relationships by affinity and suggested it might be more appropriate to exclude those relationships which are criminal, such as incestuous relationships.

Summary: forbidden degrees

3.35 The term "cohabitant" is currently defined by reference to a person in the formal relationship of marriage; therefore a number of presumptions arise, such as the minimum age of the persons in the relationship. Similarly, it is implicit that cohabitants will not be within the forbidden degrees of relationship to each other, as set out in Schedule 1 of the Marriage (Scotland) Act 1977 ("the 1977 Act"). These presumptions no longer apply when the marriage analogy is departed from. The court will have to reach a determination as to whether a person is a cohabitant within the meaning of the Act by reference to the characteristics that their relationship exhibits. It is therefore necessary for any new definition to make clear what relationships are not included and, in particular that this is not a means by which family members or relatives who share a home may access remedies.

3.36 Our policy position is that couples in relationships that would be incestuous or illegal[45] should not benefit from or be subject to this reformed statutory regime. We therefore

[44] See Marriage (Scotland) Act 1977, s 2 and Schs 1 and 2. There is currently no equivalent provision in the 2006 Act. By implication, people living "as if" spouses are presumed not to be within the forbidden degrees of relationship to each other.
[45] See Criminal Law (Consolidation) Act 1995, ss 1, 2 and 3.

recommend that the legislation should specify which familial relationships should be excluded. We have been guided by the approaches in the 1977 Act and the Civil Partnership Act 2004 in reaching this position.[46] We also agree with respondents that it is not necessary to exclude people in cohabiting relationships who are married to or civil partners of third parties. We note that such people are not currently precluded from accessing remedies under the existing provisions. It is not uncommon for a person who is separated from their spouse or civil partner to live with another partner in a committed relationship, while the marriage or civil partnership subsists. Provided the cohabiting relationship has the characteristics of an "enduring family relationship", and the parties to it are not closely related,[47] there is no reason to exclude them from accessing the rights and remedies available under this reformed legislation.

3.37 We recommend that express provision be made excluding people who are closely related from the definition of "cohabitant". Schedule 1 of the 1977 Act lists "relationships by consanguinity" and "relationships by affinity" that are excluded for the purposes of that legislation. However we think this langage is somewhat old-fashioned and does not accommodate the wide range of modern family forms and relationships. We have in mind, for example, a parent / child relationship where the birth of the child resulted from artificial reproductive technology and the use of donor gametes, such that the former is not technically a consanguine relation. We propose a more modern approach. Our draft Bill therefore provides for two lists, the first of which provides that two persons will be closely related to each other if one is the other's:

Parent[48]
Child
Grandparent
Grandchild
Sibling
Sibling of parent[49]
Child of sibling
Great grandparent
Great grandchild

3.38 The Bill also provides that the relationships listed include those that would have existed but for adoption or the making of a parental order[50] and relationships between a child and their adoptive or former adoptive parents or a child and a person who is their parent by virtue of a

[46] The excluded relationships in our revised provision are the same as those in the 1977 and 2004 Acts, but for the addition of the children and grandchildren of existing, in addition to former, spouses or civil partners (as cohabitants may be married to or civil partners of third parties).
[47] As defined in new section 25(A4), as inserted into the 2006 Act by section 1 of the draft Bill; see paras 3.37 to 3.39.
[48] Reference to a parent includes a woman who is a parent of a child by virtue of the 2008 Act, ss 42 or 43 (the consenting wife or civil partner of a woman pregnant as a result of fertility treatment).
[49] An aunt or uncle, but not an aunt or uncle by virtue only of marriage.
[50] A parental order made in accordance with ss 54 or 54A of the 2008 Act. Where a child is born as a result of a surrogacy arrangement, the surrogate (whether she is genetically related to the child or not) and her spouse or civil partner, if she has one, will be the legal parents of the child upon birth. If the surrogate is not married or in a civil partnership, there will be a second legal parent upon birth if a person has been nominated under the agreed fatherhood or agreed female parenthood conditions, in terms of ss 36 or 43 of the 2008 Act respectively. If the intended father is genetically related to the child, he will acquire legal parenthood if he obtains a declarator of parentage or is named on the birth certificate. On the making of a parental order following an application by the commissioning parents, legal parentage transfers to them.

parental order. However, no other adoptive relationships or relationships that exist by virtue of a parental order will be excluded.[51]

3.39 The second list sets out relationships that are excluded where the younger of the two persons is aged under 21 or has, at any time when aged under 18, lived in the same household as the other person and been treated as a member of that person's family.[52]

Child of spouse / civil partner
Spouse / civil partner of parent
Spouse / civil partner of grand parent
Grandchild of spouse / civil partner[53]

Qualifying period

3.40 When our predecessors grappled with the issue of whether there should be a qualifying period of cohabitation in order to access remedies, they concluded that any period would be arbitrary, and therefore did not recommend the inclusion of such a period in the legislation.[54] The Scottish Ministers were of a similar view.[55] We considered whether, having regard to experience to date,[56] or in the event of introduction of a broader range of remedies, a need has now arisen for the introduction of a qualifying period.

Responses to Discussion Paper

3.41 We asked:

> Q.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?

3.42 Most respondents did not favour the introduction of a qualifying period, though some were prepared to suggest the possible duration of a qualifying period, were we persuaded that one should be introduced. A minority answered yes, were equivocal, offered no clear opinion, or said that the answer was linked to whether the remedies available to cohabitants were extended. CEFL suggested that a qualifying period be introduced for certain remedies, such as maintenance or use of the family home and household goods, but not for others, such as

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[51] Consistent with the approach in the 1977 Act.
[52] Consistent with s 2 of the Criminal Law (Consolidation) (Scotland) Act 1995.
[53] In this list, references to "spouse" and "civil partner" include references to a former spouse or civil partner.
[54] Report on Family Law (Scot Law Com No. 135, 1992), available at: https://www.scotlawcom.gov.uk/files/5912/8015/2668/Report%20on%20family%20law%20Report%20135.pdf, para 16.4.
[55] Policy Memorandum for the Family Law (Scotand) Bill, para 67, states that setting a qualifying time period would be "arbitrary, rigid and unresponsive to individual cases".
[56] Wasoff, Miles and Mordaunt Report at p 125 noted that the absence of a minimum duration requirement for eligibility to bring a claim can be regarded as a success. Justice 1 Committee, Official Report, 8 March 2016 does not mention the absence of a qualifying period.

those "aimed at preventing one party taking (or obtaining) an advantage at the expense of the other." Views as to the length of the qualifying period varied between six months and five years.

3.43 About half of the respondents to Q.5(a) also answered Q.5(b). Most said that any qualifying period should be amended or removed if the couple had children. While the Aberdeen University academics recognised that the existence of children increases the likelihood of financial interdependency and need for financial protection, they were "wary of treating children as markers of commitment and creating a hierarchy of relationships."

3.44 A follow-up question was asked:

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

3.45 The majority view was that there should be no qualifying period. Only a small minority of respondents who held that view said their answer would change if a wider range of remedies was available. We concluded that the availability of more extensive remedies for cohabitants would have no material impact on most respondents' views as to whether a qualifying period should be introduced.

Public attitudes survey

3.46 We took the view that public opinion on this matter would be likely to assist in our deliberations. We therefore asked whether cohabitants should have lived together for a minimum period of time before they can make financial claims when they split up.[57] 181 respondents answered "yes", 35 answered "no" and 25 said they were "not sure". We then asked what the minimum period of time should be. 175 respondents suggested a minimum qualifying period, ranging from 6 months to 25 years.[58] Comments included: it depends if they share a child/children; it depends on other facts and circumstances and how committed the relationship was; it should be tiered/on a sliding scale; and that all such periods are arbitrary.

3.47 We also asked whether respondents knew what rights cohabitants have (to financial claims) when they split up. 64.32% answered "no" or "not sure". What we take from responses to the survey is that most respondents were unclear on what claims were available to cohabitants on separation, but that a majority favoured the imposition of some qualifying criteria in order to make any claim for financial provision. There was no clear answer as to what the criteria should be. The range of views expressed as to the possible duration of a qualifying period of cohabitation supports the proposition that any such period is arbitrary.

Stakeholder meetings and focus group

3.48 Among the solicitors and counsel that we spoke to, only a small minority favoured the imposition of qualifying criteria, such as a qualifying period of cohabitation or having a child.

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[57] Possible responses were – yes, no or not sure.
[58] The most popular were one year, five years and two years.

We asked the focus group participants whether couples who live together and are not married or civil partners should have to do so for a certain period of time in order to qualify as cohabitants. One participant expressed surprise that there was no time qualification. Others suggested that a time qualification would be appropriate, to evidence commitment or intention to commit and for consistency with other legislation,[59] but that the presence of other qualifying factors (such as a joint bank account or having a child) might be sufficient.

Summary: qualifying period

3.49 Only a minority of respondents to the Discussion Paper favoured the introduction of a qualifying period, even if the remedies available to cohabitants were extended. Where there are children of the relationship, there was even less support for a qualifying period. The results of the public attitudes survey showed that, while there was majority support for couples to have lived together for a minimum time period before they could make a claim, there was a wide variance of views as to what that minimum qualifying period should be. There was limited and qualified support for the introduction of a qualifying period among the stakeholder groups and focus group members. Taking all of these responses, suggestions and comments into account, we do not propose legislative change to introduce a qualifying period for access to claims.

List of qualifying features

3.50 The use of lists as an aid to statutory construction is not common in Scots family law but is not unusual in other jurisdictions. In Australia, a non-exhaustive list of circumstances is provided, to which the court shall have regard in determining whether the couple "have a relationship as a couple living together on a genuine domestic basis."[60] A similar approach is taken in New Zealand.[61] In Ireland, the definition of cohabitant as "one of two adults…who live together as a couple in an intimate and committed relationship …"[62] is supplemented by a list of factors for the court to consider.[63] While the lists in these jurisdictions differ, certain factors are, broadly, common to all three.[64] Those are: the duration of the relationship;[65] whether there is (and the degree of) financial dependence or interdependence and any arrangements for financial support[66] or agreement in respect of their finances; and care and support for children.[67]

Responses to Discussion Paper

3.51 We asked:

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[59] Such as in relation to IVF or application for a spouse visa.
[60] 1975 Act, s 4AA(2); see the Discussion Paper, paras 3.108 to 3.110.
[61] 1976 Act (New Zealand), s 2D(2); see the Discussion Paper, paras 3.112 to 3.113.
[62] 2010 Act, s 172(1).
[63] S 172(2); see the Discussion Paper, para 3.111.
[64] Albeit differently worded.
[65] In all three jurisdictions there is a time qualification for access to remedies.
[66] Australia and New Zealand.
[67] In Australia and New Zealand, the reputation and public aspects of the relationship are also included, while in Ireland the degree to which they present themselves to others as a couple is a relevant factor. Our view is that public perception of the relationship will, in some cases, be a relevant circumstance to which the court will wish to have regard, but we do not think that it is necessary to include that circumstance as a factor in any statutory list.

Q.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?

3.52 Respondents were fairly evenly divided on this issue.[68] Most who favoured the introduction of a list either did not give a reason or said a list would improve the definition; would provide clarity; or would be useful, desirable, or helpful in determining whether a certain type of relationship exists. We were told that a list would assist the courts and advisors in identifying those individuals who have access to remedies as cohabitants, and should help the public to identify whether their circumstances are such that they may make a claim or have a claim made against them when their relationships end. The FLA thought a list would be helpful if the definition was changed to "enduring family relationship". Professor MacQueen and Professor Barlow thought a list would provide helpful guidance to the courts and those advising couples. Many commented that consideration of the approaches to lists in other jurisdictions, particularly New Zealand,[69] had assisted them in reaching their conclusion, and commended these approaches. Almost all of those in support of a list agreed that it should not be exhaustive. The importance of flexibility and ensuring that the court's discretion was not fettered was highlighted. It was suggested that a provision permitting that consideration be given to "all the circumstances" or "any relevant factor" should be included.

3.53 The Senators, however, told us that lists were of "little assistance or practical benefit", explaining:

> "…legislative lists of features or characteristics are rarely of assistance in reaching a judicial determination as to whether or not a factual situation exists. …there are canons of statutory construction which can make such lists positively inimical to the process of reasoning in reaching judicial determination …. lists are often superseded by change, often within a short time of enactment … [and] comprehensivity is, in a practical sense, either impossible or impractically lengthy.

3.54 Other respondents told us that a list is unnecessary, provided the definition is sufficiently clear and unambiguous while still permitting the exercise of judicial discretion. Some said a list would over-complicate the legislation, risked being too lengthy or over-prescriptive, becoming a checklist or including vague, nebulous or subjective characteristics. Others commented that it may be difficult to formulate a list sufficiently broadly and comprehensively to cover all situations or argued that a list that includes reference to "all the circumstances" or similar is "pointless", as the court is thereby given wide discretion (which it would have without a list).[70] The risks that judicial discretion might be fettered and of this approach involving the court in an intrusive dissection of an interpersonal relationship, potentially requiring that value judgments be made, were also highlighted.

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[68] 15 of 37 respondents favoured a list of features to supplement the definition. 15 were not in favour; one preferred that these features were understood as part of the determination of awards; and four were ambivalent or held no strong views. SKO told us that views had differed within their group, but ultimately suggested a non-exhaustive list.
[69] 1976 Act (New Zealand), s 2D(2); see the Discussion Paper, para 3.64; see also para 3.50 above.
[70] Dr Barnes Macfarlane, who did not favour the introduction of a list of factors, made the point that such an approach "begs the question as to what value would be added to a definition by including any such list."

3.55 There was no consistency of opinion within the Scottish judiciary and among practitioners, which perhaps suggests that, while a list of factors might be helpful, it would not be essential (provided the definition is sufficiently clear) to enable decision makers and legal practitioners to interpret any revised definition. We note, however, judicial comment on the absence of a "shopping list" in the current definition, from which to conclude that cohabitation had been established.[71]

3.56 Some respondents suggested features and factors for inclusion in a non-exhaustive list, including:

- Degree of financial interdependence / connection;
- Practical and emotional support of children / others;
- Functioning as an economic and domestic unit / domestic arrangements;
- Presence / support / care of children;
- Degree to which present as a couple / reputation as a couple;
- Intimacy / sexual relationship;
- Duration;
- Nature and extent of common residence / sharing owned or rented property;
- Ownership of property / joint assets;
- Degree of mutual commitment to a shared life.

Advisory Group

3.57 Advisory Group members' views were mixed, with comments including that there is a likelihood of identification of cohabitants becoming a tick-box exercise if a list of factors was included in the statutory provision; and that lists provide greater assistance at the stage of deciding whether to make an award than when deciding whether a claim is competent. On the other hand, it was acknowledged that there is a risk of lists emerging in case law as an aid to construction if not provided in the legislation[72] and that a list might aid public awareness.

Summary: list of factors

3.58 Opinion among respondents to the Discussion Paper, the Advisory Group and stakeholders was divided on this issue. However, the approach in jurisdictions where a list is used to supplement a definition was commended by respondents. We also note that the absence of a list to aid construction of the current definition has been highlighted in the authorities.[73] We acknowledge that there is a risk that lists of relevant factors to aid construction of the definition will emerge in authorities if none is provided in the statute.

3.59 We note, however, that section 25 of the 2006 Act does include, in subsection (2), a short list of matters for the court to "have regard to" in determining whether a person is a cohabitant. Those matters are:

(a) The length of the period of living together;

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[71] See *Gutcher v Butcher* [2014] 9 WLUK 514, para 9.
[72] See, for example, the judgment of Sheriff Nigel Morrison KC in *Garrad v Inglis* [2013] 11 WLUK 499, para 9; 2014 GWD 1-17.
[73] *Garrad v Inglis* [2013] 11 WLUK 499, para 9; *Gutcher v Butcher* [2014] 9 WLUK 14, para 9.

(b) The nature of the relationship during that period; and
(c) The nature and extent of any financial arrangements during that period.

Our predecessor, Professor Thomson, described section 25(2) as "intellectually incoherent" as it amounts to a redefinition of cohabitant.[74] We agree and do not recommend that subsection (2) is retained for the purpose of further explaining or enhancing the definition of "cohabitant".[75]

3.60 Despite the lack of consensus on this issue, we have concluded that including a list of matters to which the court must have regard when determining whether a person meets the definition is likely to assist the public, courts and advisors. The list will assist in identifying when a person is or has been "living together as a couple in an enduring family relationship", given the departure from the commonly used and understood (although outdated) concept of living together as if husband and wife. The list of features will also assist in identifying when the cohabiting relationship began and ended.

3.61 The list that we propose is non-exhaustive, with each matter being capable of objective assessment. We recognise that other features of the relationship, capable of assessment on a subjective, case by case basis may also be present. We do not intend that these features ought to be ignored; therefore we recommend that the court must have regard to all the circumstances of the relationship, in addition to the factors on the statutory list, which we propose are:

i. the duration of the relationship;[76]
ii. the extent to which the couple live or lived together in the same residence;
iii. the extent to which the couple are or were financially interdependent; and
iv. whether there is a child of whom the couple are the parents or who is or was accepted by them as a child of the family.

Registration system

3.62 The issue of registration of cohabitation was not considered in the 1990 Discussion Paper[77] or the 1992 Report. However, a system of registration was considered and rejected by the Scottish Government prior to the introduction of the Bill that became the 2006 Act.[78] In the Discussion Paper, we considered the availability of registration systems for cohabitants in other jurisdictions.[79] We sought views on whether such a system should be introduced in Scotland.

Responses to Discussion Paper

3.63 We asked:

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[74] Professor Joe Thomson, *Family Law Reform* (Sweet and Maxwell, 2006) at p 30.
[75] The provision will, however, require to remain in place, for the time being, in relation to the definition for the purpose of s 29 claims; see para 3.3.
[76] While we do not propose that a minimum qualifying period be set, the length of the relationship will be a relevant factor in determining whether the relationship is an "enduring" one.
[77] Discussion Paper on The Effects of Cohabitation in Private Law (Scot Law Com No. 86, 1990), available at: https://www.scotlawcom.gov.uk/files/3412/7892/5856/dp86.pdf.
[78] See the Discussion Paper, para 3.81.
[79] Paras 3.85 to 3.88.

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

3.64 Of the 40 respondents who answered this question, only one unequivocally supported the introduction of a registration system and one other, while acknowledging that such a system could assist cohabitants in proving their relationship, should that be necessary, emphasised that registration should not be required for cohabitants to be considered as such by the court.

3.65 The main reasons given by those who did not favour a registration system were that it would be likely to benefit the well-informed, so that the most vulnerable, who are most in need of protection, would be unlikely to register their relationships, and that lack of awareness would result in underuse or use only by those who would enter into cohabitation agreements. Other comments included that a status of (registered) cohabitant (in addition to spouse and civil partner) would be unnecessarily complicated and that it is difficult to see why couples who eschew marriage and civil partnership would choose to register cohabitation. The need for a system for de-registration was also highlighted, as was the likely cost of a system that would not be well-used.

Summary: registration system

3.66 While the potential benefits of a registration system were acknowledged, we noted the poor uptake of the option of registration where it was available, and concluded that such a system, if introduced in Scotland, may not be well used or provide adequate protection for the most vulnerable cohabitants.[80] A substantial majority of respondents to the Discussion Paper agreed. In the absence of support for the introduction of a system of registration of cohabitation, we make no recommendation for legislative change.

Discussion and recommendations

3.67 There was strong support for reform of the definition of cohabitant for the purposes of sections 26 to 28 of the 2006 Act. Stakeholders and respondents commented that, while the current definition is generally well understood and causes no particular difficulty in practice, it is outdated, unhelpful and demeaning to cohabitants. There was no consensus on what the optimum definition might be.

3.68 Our options were to leave the definition as it is, which would be unlikely to cause any difficulty in practice but would conflict with the weight of opinion in favour of change, or formulate a new definition. On balance, and having regard to the views of stakeholders, our Advisory Group and respondents to the Discussion Paper, we concluded that there is a need for a clearer, more modern and inclusive definition than that currently in section 25.[81] This approach was not without its challenges, however, including finding the form of words that best describes the relationships that the legislation aims to cover and deciding whether to include a list of features or characteristics of a cohabiting relationship to aid interpretation.

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[80] See the Discussion Paper, para 3.100.
[81] As modified by 2014 Act, s 4.

3.69 There are several possible approaches to describing and defining the parties to a cohabiting relationship. While in this and some other jurisdictions the terms "cohabitant" or "cohabitation" are defined by reference to living "as if husband and wife" or "as if spouses", others refer to the parties' relationship, using language such as "enduring family relationship", "a couple living together on a genuine domestic basis", or "living together as a couple".[82]

3.70 We have concluded that "cohabitant" should not be defined by reference to marriage and civil partnership. Cohabitation is quite different in its form, in that there is no formality or record marking the commencement of the relationship. The definition should employ language that more accurately describes the relationship and is sufficiently broad to encompass the wide range of arrangements that couples make for a shared life together. We recommend a new definition that describes, as clearly as possible, which relationships are included, and those that are not.

3.71 We have considered whether the use of the term "cohabitant" is, as suggested by some stakeholders, outdated and should be replaced by a different term, such as "partner" or "*de facto".* We have concluded that it should not. There was no substantial body of opinion in favour of such change. The term "cohabitant" is familiar and well understood. Use of a Latin term, such as "*de facto"*, would not be so well understood. A term such as "partner", while in common modern use and easily understood in this context, could cause confusion, since that term is also used in other contexts, including to describe a business arrangement.

3.72 The definition that we propose is framed in language intended to identify, as clearly and simply as possible, whether someone is a cohabitant. We therefore make the following recommendations:

1. We recommend that the definition of "cohabitant" in section 25 of the 2006 Act is replaced for the purposes of sections 26 to 28F by the following definition:

"Cohabitant" means one of two persons who–

(a) are (or were) living together as a couple in an enduring family relationship,

(b) are aged 16 or over,

(c) are not spouses or civil partners of each other, and

(d) are not closely related (as defined) to each other.[83]

2. We recommend that, in determining whether two persons are (or were) living together as a couple in an enduring family relationship, the court must have regard to all the circumstances of the relationship, including the following matters:

(a) the duration of the relationship,

[82] See paras 3.11 to 3.20.
[83] See paras 3.35 to 3.39.

(b) the extent to which they live (or lived) together in the same residence,

(c) the extent to which they are (or were) financially interdependent,

(d) whether there is a child of whom the persons are the parents or who is (or was) accepted by the persons as a child of the family.

(Draft Bill, section 1(2)(a))

Chapter 4 Sections 26 and 27

4.1 Sections 26 and 27 of the 2006 Act respectively create presumptions and rules in relation to cohabitants' rights in certain household goods and certain money and property. The sections were modelled on the presumptions that apply to spouses and civil partners in sections 25 and 26 of the 1985 Act, with some modifications.

4.2 In Chapter 4 of the Discussion Paper, we examined the policy objective of sections 26 and 27 of the 2006 Act, relevant case law and the legislative approach in other jurisdictions. We explored how the sections operate in practice, and whether the language should be updated or the provisions reformed in any other way.

4.3 In this Chapter, we briefly discuss these issues, examine the responses to the questions posed in Chapter 4 of the Discussion Paper and outline our recommendations for reform.

Background

4.4 In the 1992 Report, our predecessors recommended that a presumption similar to that which exists for spouses in section 25(2) of the 1985 Act, with necessary modifications, should apply to cohabitants.[1] That recommendation was implemented by section 26(2) of the 2006 Act, which creates the presumption that each cohabitant has a right to an equal share in household goods acquired (other than by gift or succession from a third party) during the period of cohabitation. The presumption may be rebutted by proof that the parties contributed to the purchase of the goods in unequal shares.[2]

4.5 Also implementing the recommendations of our predecessors, section 27 provides that, subject to any agreement of the parties to the contrary, each cohabitant has an equal share in money and property derived from any allowance made by either cohabitant for their joint household expenses. Section 27(3) provides that "property" does not include a residence used by the cohabitants as the sole or main residence in which they live (or lived) together.[3]

4.6 Sections 26 and 27 have not been the subject of any significant criticism or academic comment, nor have they been focused upon in litigation, save for a small number of cases where section 26 was referred to by the court in determining an order for financial provision under section 28.

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[1] Report on Family Law (Scot Law Com No. 135, 1992), available at: https://www.scotlawcom.gov.uk/files/5912/8015/2668/Report%20on%20family%20law%20Report%20135.pdf, para 16.10 (proposals 80(a), (b) and (c)).

[2] Appendix B, s 26(3), which provides that the presumption shall be rebuttable. In contrast, the corresponding provision in the 1985 Act, s 25(2), provides that the presumption in s 25(1) shall not be rebutted by reason only that, while the parties were married or in a civil partnership and living together, the goods were purchased by either party alone or by both parties in unequal shares.

[3] While ownership of heritable property is determined by the law of property, the effect of this definition is to exclude a family home which is not heritable property, such as a mobile home, but was purchased from savings from a joint household expenses allowance, as noted by Professor Norrie in K Norrie, *Family Law (Scotland) Act 2006: Text and Commentary* (2006), pp 64 to 65.

Sections 26 and 27 in practice

Responses to Discussion Paper

4.7 We asked:

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

4.8 Only two respondents thought that the sections cause difficulty, commenting that they are difficult for solicitors to advise on and that moveables are often included within section 28 claims without any need to rely on section 26. Some commented that these sections are rarely litigated and others that they provide some protection in the event of dispute. Section 26 in particular was considered by respondents to be an "important protective provision", "useful fall back", and "safety net". Two respondents highlighted that the issue of ownership of goods on the breakdown of cohabitation is often problematic, perhaps demonstrating the benefit of retaining the provisions in order to provide clarity. While one solicitor said that the sections generally reflect peoples' expectations and operate fairly, the Faculty of Advocates and Melrose Porteous said that parties tend to think that if they funded the purchase of an item, they should keep it.

4.9 A small minority of respondents called for the language in section 26 to be updated and one respondent called for the position of cohabitants to be strengthened by removing the possibility of rebutting the presumption of equal rights in household goods acquired during the period of cohabitation.

4.10 Concern was expressed by the Senators that there could be seen to be an overlap between a section 28 claim and the section 26 presumption of equal shares in household goods. However, they noted that, so long as "double counting" is avoided, the section 26 presumption can be useful to impose an onus on a party seeking to assert ownership of such items. It was suggested by one respondent that section 26 should be amended to reflect the language of the stronger presumption that applies to married couples in section 25 of the 1985 Act, which cannot be rebutted by proof that the parties contributed to the purchase of the goods in unequal shares. Another respondent agreed with the point made in the Discussion Paper (with reference to the Wasoff, Miles and Mordaunt Report[4]) that section 27(3) creates an anomaly whereby a family home acquired from savings made from a "housekeeping allowance" cannot be treated as belonging to each cohabitant in equal shares, though it is unclear how often, if ever, this situation has arisen in practice.

Modernisation of language

Responses to Discussion Paper

4.11 We asked:

[4] See Fran Wasoff, Jo Miles and Enid Mordaunt, "Legal Practitioners' Perspectives on the Cohabitation Provisions of the Family Law (Scotland) Act 2006" (October 2010), University of Cambridge Faculty of Law Research Paper No. 11/03, page 23, available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1736612.

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

4.12 Most respondents told us that the language in these sections should be modernised. Some commented that the language in both provisions is outdated and does not reflect the realities of 21st century cohabiting relationships. Others highlighted the need for clarity, simplicity and accessibility. Two respondents suggested that, in section 26(4), the reference to "household goods" and the language used in the list of excluded assets were outdated and that "any residence in which the cohabitants are (or were) cohabiting for their joint domestic purposes" should be changed to "family home(s)". There were rather more calls for reform of the language in section 27, specifically in relation to "property derived from any allowance made by either cohabitant for joint household expenses." Almost universally, the language of section 27(1)(a) was interpreted as "housekeeping allowance", although that expression does not appear in the section.[5] Respondents described reference to an allowance for joint household expenses as "outdated", "outmoded", "antiquated", "archaic" and "anachronistic". Some respondents suggested replacing the reference to an allowance for joint household expenses with language such as "shared" or "pooled" resources, "investment for joint purposes" or "contributions either party has made to household expenses". Other suggestions were that section 27 should include a presumption of equal division of funds in joint accounts or accounts designated for household expenditure.

4.13 The Faculty of Advocates, while noting that "pooled resources" would be more reflective of modern day money management practices, thought this might be unfair to couples who agree to divide expenses in some other way. Other respondents cautioned against assuming that housekeeping allowances were not routinely used by cohabitants in Scotland. Professor Mair observed that, from what is known of the continuing gender pay gap, the higher proportion of female part-time work and the persistent gendered nature of child care, it is very likely that in many relationships "one party continues to provide for the full or at least a greater share of household expenses". She also noted the need to recognise that these sections were designed precisely to protect against vulnerability and 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.[6] Professor Barlow also expressed concern about the absence of reliable data to test the assumption that housekeeping allowances are not regularly used by Scottish cohabitants. Engender suggested that the provision of an allowance for housekeeping by one cohabitant to the other, while not so termed, is not necessarily uncommon and Professor Miles referred us to social science data on the prevalence of "housekeeping allowance" money management systems.

4.14 Research on the money management practices of cohabitants[7] suggests that cohabitants with dependent children[8] living with them, like married couples with children, are more likely to use a system of money management whereby parties operate "more or less as

[5] Nor in s 26 of the 1985 Act, though the heading to that section uses the language "housekeeping allowance".
[6] SWA expressed similar concerns.
[7] See Carolyn Vogler, Michaela Brockmann and Richard D Wiggins, "Managing money in new heterosexual forms of intimate relationships", The Journal of Socio-Economics, 2008 37(2).
[8] Defined in the reseach as children under the age of 16.

a single economic unit".[9] Most cohabitants without children, however, either partially pooled their income or managed their finances independently. These findings, based on nationally representative samples of adults living in Great Britain, analysed somewhat aged data, so may not be reflective of the current money management practices of Scottish cohabitants.[10] They do, however, broadly align with more recent empirical evidence of cohabitants' money management practices from other European jurisdictions.[11]

4.15 Four respondents suggested that, as sections 26 and 27 largely replicate and were modelled on sections 25 and 26 of the 1985 Act, any change to sections 26 and 27 should, to retain consistency, be reflected in the provisions for spouses and civil partners. The University of Aberdeen group and Dr Alan Brown reasoned that this would provide greater equivalence between spouses and cohabitants in terms of the legal consequences of cessation of the relationship. We note, however, that amendment of the 1985 Act is beyond the scope of this project.

Other suggestions for reform

Responses to Discussion Paper

4.16 We asked:

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

4.17 A small minority of respondents suggested the removal of one or both sections. One respondent suggested that the language of section 27 should be updated such that the rule applies to monies "designated" for household expenditure. We agree. The effect of the section, which we were not asked to change, is to treat certain money and property as belonging to the cohabitants in equal shares. Therefore, some positive act by the cohabitants or either of them, designating the money for household expenditure, is needed, so that it is brought within the reach of the provision.

Discussion and conclusion

4.18 Responses suggest that sections 26 and 27 do not cause any significant difficulty in practice. There were, however, some calls for change. Respondents told us that the language in section 27 would benefit from modernisation. The available research literature and responses from practitioners provide some evidence that only a minority of cohabitants use a "housekeeping allowance" system of money management. This would support the proposition that language which better reflects modern cohabitants' economic arrangements is needed. However, any reform of section 27 must be sufficiently flexible to accommodate the wide range of money management practices that cohabitants adopt.

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[9] The data analysed found that 52% of cohabiting couples with children said that they pooled all of their household income (usually in a joint bank account which is managed jointly, and money taken out as needed). Only 4% of cohabitants with children and 0% of cohabitants without children used a "housekeeping allowance" system, where the man either managed all or most of the money and allocated a "housekeeping allowance" to the woman.

[10] The research findings are based on analysis of data from 1994 and 2002 on money management practices of heterosexual spouses and cohabitants in Great Britain.

[11] See Nicole Hiekel, Aart C Liefbroer and Anne-Rigt Poortman, "Income pooling strategies among cohabiting and married couples: A comparative perspective", Demographic Research, (2014) 30(55), pp 1527 to 1560.

4.19 We have considered the apparent anomaly in section 27(3), identified in the Wasoff Miles and Mordaunt Report.[12] Similar concerns have been raised[13] as to the meaning of section 26 of the 1985 Act, on which section 27 of the 2006 Act was modelled.[14] These relate to the effect of section 26 of the 1985 Act on ownership of heritable property purchased using money derived from any allowance made for joint household purposes; the authors highlight the conflict between the section 26 rule that any property acquired out of such money is co-owned and conflicting evidence in the Land Register of ownership of heritable property so acquired. The same issues arise in relation to heritable property (excluding a sole or main residence) acquired by a cohabitant using money derived from any allowance for joint household expenses, by virtue of section 27 of the 2006 Act. Referring to that section, Professor Norrie noted that ownership of heritable property will be determined from the title deeds rather than from the source from which the purchase price came, but that where the family home is not heritable (for example, a caravan) the effect of section 27(3) is that the caravan belongs to the cohabitant who provided the "housekeeping" allowance.[15] We agree that title to and ownership of heritable property, whatever use is made of it, is a matter for the law of property. There is no mechanism whereby heritable property, whatever its nature, acquired during or in anticipation of cohabitation, is currently susceptible to sharing or ownership contrary to title. We do not propose that that changes. We also agree with Professor Norrie's analysis that a family home that is not heritable property is not subject to the rule in section 27. None of the respondents to the Discussion Paper raised concerns relating to the effect of this provision. However, to place matters beyond doubt, we recommend that where reference is made in section 27 to "property", this does not apply to property acquired that is either heritable property or any family home that is not heritable property.

4.20 We have concluded that there is merit in retaining the limited protections afforded by sections 26 and 27. We do, however, agree that both sections require to be updated and simplified. We therefore propose that section 26 is simplified to the extent that the location of "household goods" relevant for the purpose of the section is clarified as referring to any residence in which the cohabitants cohabit or cohabited and that "household goods" are otherwise defined in the interpretation section of the Bill (new section 28G). We propose reform of section 27 to reflect more accurately the money management systems of modern cohabiting couples, while maintaining protection for those who are economically vulnerable.

4.21 We make the following recommendations:

3. We recommend amending section 26 by clarifying that "relevant household goods" are those located in a residence used by both of the cohabitants and amending the definition of "household goods", such that only those used for the joint domestic purposes of the cohabitants are subject to the presumption.

(Draft Bill, section 2, and section 4 inserting section 28G into the 2006 Act)

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[12] See para 4.10 above.
[13] See George Gretton and Andrew Steven, *Property, Trusts and Succession* (4th edn., 2021), paras 11.4 and 11.15.
[14] Albeit the former does not exclude a "sole or main residence" from the effect of the provision
[15] See Kenneth McK Norrie, *The Family Law (Scotland) Act 2006 Text and Commentary* (2006), pp 64 to 65.

4. We recommend removing section 27 and replacing it with a more modern formulation, which refers to money designated for use to meet, or to be available to meet, household or joint expenditure or for similar purposes, and any property purchased with such money; and introducing a definition of "money" and a revised definition of "property" for the purposes of the section.

(Draft Bill, section 3)

Chapter 5 Section 28

5.1 In Chapter 5 of the Discussion Paper we examined section 28 of the 2006 Act in detail. In Part 1, we discussed the policy objectives of section 28, the test for making an order, relevant case law, approaches to financial provision for cohabitants in comparative jurisdictions and options for reform. In Part 2, we considered the adequacy of the remedies available to former cohabitants under section 28(2) and whether parties' resources should be taken into account by the court in reaching a decision on an application for financial provision.

5.2 In this Chapter we briefly set out the background to the existing approach to claims for financial provision under section 28, noting the underlying policy objectives. We also consider criticism of the legislation in case law and commentary, before examining responses to our Discussion Paper and views expressed to us by stakeholders and in responses to the public attitudes survey. We then discuss the policy objectives of reform of the law in this area, and a new statutory test for the making of orders, including the relevance of resources. The range of orders that should be available on an application for financial provision and the definition of "child" for the purpose of these provisions are then discussed. Finally, we set out our recommendations for reform.

Policy objectives and test

Background

5.3 There is little discussion in the 1992 Report[1] about the test to be applied by the court in reaching its decision. Clause 36 of the Commission Bill provided as follows:

> "(1) Where a cohabitation is terminated otherwise than by death, the court may, on an application by either of the former cohabitants made within one year after the termination, make an order for the payment of a capital sum to the applicant by the other former cohabitant.
>
> (2) The court shall make an award to the applicant in pursuance of an application under subsection (1) above only if it is satisfied:- (a) that the other former cohabitant has derived economic advantage from contributions by the applicant, or that the applicant has suffered economic disadvantage in the interests of the other former cohabitant or their children; and (b) that having regard to all the circumstances of the case it is fair and reasonable to make such an award. …"

However, the Bill at introduction[2] in the Scottish Parliament made no reference to the concept of fairness and reasonableness, nor is it discussed in the Policy Memorandum.[3]

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[1] Report on Family Law (Scot Law Com No. 135, 1992), available at: https://www.scotlawcom.gov.uk/files/5912/8015/2668/Report%20on%20family%20law%20Report%20135.pdf.
[2] S 21 which became s 28.
[3] The offsetting provisions were introduced by amendment number 51. See Official Report of Justice 1 Committee, Stage 2, 23 November 2005, column 2374, available at:

5.4 The policy objective of the cohabitation provisions in the 2006 Act was to "provide a clearer statutory basis for recognising when a relationship is a cohabiting relationship; and a set of principles and basic rights to protect vulnerable people either on the breakdown of a relationship, or when a partner dies."[4] The 2006 Act broadly implemented the recommendations in the 1992 Report, including the recommendation that the principle in section 9(1)(b) of the 1985 Act[5] should be applied to claims for financial provision by cohabitants.[6]

5.5 We are concerned in this Chapter with section 28, which sets out the basis upon which such claims may be made and determined, including the available orders and the time limit for claims. Section 28(2) permits the court, on an application by a cohabitant (the applicant)[7] under section 28(1) to make an order requiring the other cohabitant (the defender) to (a) pay a capital sum, (b) pay such amount as may be specified in respect of the economic burden of caring for a child of whom the cohabitants are parents, and (c) make such *interim* order as it thinks fit.[8]

5.6 Under section 28(3), the court is required to have regard to the following matters in deciding what order, if any, to make:

> (a) whether (and, if so, to what extent) the defender has derived economic advantage from contributions made by the applicant; and
> (b) whether (and, if so, to what extent) the applicant has suffered economic disadvantage in the interests of—
> (i) the defender; or
> (ii) any relevant child.[9]

5.7 Section 28(4) provides that, in considering whether to make an order in terms of section 28(2)(a), the court is also to have regard to the matters in subsections (5) and (6), which we refer to as the "offsetting provisions". The matters mentioned in the offsetting provisions are:

> (5) … the extent to which any economic advantage derived by the defender from contributions made by the applicant is offset by any economic disadvantage suffered by the defender in the interests of (a) the applicant; or (b) any relevant child; and
> (6) … the extent to which any economic disadvantage suffered by the applicant in the interests of (a) the defender; or (b) any relevant child is offset by any

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http://www.parliament.scot/parliamentarybusiness/report.aspx?r=2144&mode=html.

[4] Policy Memorandum for the Family Law (Scotland) Bill, para 65; see discussion of policy background in Ch 1, paras 1.8 to 1.11.

[5] That fair account shall be taken of any economic advantage derived by either party from contributions by the other, and of any economic disadvantage suffered by either person in the interests of the other person or of the family.

[6] 1992 Report, paras 16.18 to 16.23.

[7] Provided the application is made within one year of the date of cessation of cohabitation, as per s 28(8); on the time limit for applications for financial provision see Ch 6.

[8] S 28(7) provides that, in making an order under subs (2)(a) or (b), the court may specify that the amount shall be payable on such date as may be specified or in instalments.

[9] A "relevant child" for the purposes of subss (3)(b)(ii), (5)(b) and (6)(b) is defined in s 28(10) as a child of whom the cohabitants are the parents or a child who is or was accepted by the cohabitants as a child of the family.

economic advantage the applicant has derived from contributions made by the defender.

The offsetting provisions do not apply where an order is sought under section 28(2)(b).[10]

Criticism, case law and comment

5.8 Of all the cohabitation provisions in the 2006 Act, section 28 has been the most criticised. This criticism includes that the policy objectives have not been achieved or are unclear and that there is an absence of adequate guidance as to the principles and factors to be taken into account by the court in deciding how an application for financial provision by a former cohabitant should be determined. The test in subsections (3) to (6) has been criticised for being unclear and overly complicated; the offsetting provisions have been particularly criticised. The requirement that the court consider historic economic advantage and disadvantage in reaching a decision on whether to make an award relating to the future economic burden of caring for any child of the relationship is widely regarded as incoherent.

5.9 These criticisms have also been highlighted in case law and academic commentary. In *Gow v Grant*,[11] Sheriff Mackie noted regret that "… no clear statement of the approach that Parliament intended is immediately discernible from the wording of the provisions."[12] She considered the approaches in previous cases, and concluded that an order for payment under section 28 was "in the nature of compensation". She was fortified in that view by the statement of the then Justice Minister[13] that it was intended that one partner would compensate the other for any net economic disadvantage resulting from the relationship and that that offered fairness to both parties.[14] Sheriff Mackie's decision was later upheld in the UK Supreme Court.[15]

5.10 In *Lindsay v Murphy*,[16] Sheriff Miller questioned "the logic" of the provisions and noted that it was unclear why offsetting is considered for claims under subsection (2)(a) but not subsection (2)(b), commenting:

> "… I share [Sheriff Mackie's] regret that the logic of these provisions is not more readily apparent. It is not clear to me, for instance, why a former cohabitant's economic disadvantage should be offset by any economic advantage they have enjoyed when considering a claim under s.28(2)(a), but not when considering a claim under s.28(2)(b)[17]…There is a further complication, however, in that any award under this subsection may well relate to the future as much, if not more, than to the present or

[10] Payment of such amount as may be specified in respect of the economic burden of caring for a child of whom the cohabitants are parents.
[11] 2010 Fam LR 21. Sheriff Mackie's decision was successfully appealed to the Inner House; that decision was then appealed to the UKSC, where Sheriff Mackie's decision was upheld.
[12] Para [39].
[13] During the stage 3 debate on the Family Law (Scotland) Bill on 15 December 2005, to which she was referred by the agent for the pursuer, available at: https://www.parliament.scot/api/sitecore/CustomMedia/OfficialReport?meetingId=4622.
[14] *Gow v Grant* 2010 Fam LR 21, para 42.
[15] 2013 SC (UKSC) 1; see para 5.13 below.
[16] 2010 Fam LR 156.
[17] Para 62.

past. That remains so notwithstanding that the factors to which the court is to have regard are expressed, rather curiously, solely in the past tense."[18]

5.11 The Wasoff, Miles and Mordaunt Report described the test as "cumbersome" and section 28 was viewed as poorly drafted.[19] By comparison, application of the principle in section 9(1)(b)[20] read with section 11(2)(a) of the 1985 Act was praised for its simplicity.[21] In relation to section 28(2)(b), the Report queried how the factors in the section 28(3) test were relevant to a claim "based on the cost of child care".[22]

5.12 In *Mitchell v Gibson*,[23] Sheriff Principal Dunlop, having set out in some detail the process by which a claim for financial provision under section 28 required to be considered, observed:

> "…This might be thought to be a rather unsatisfactory manner of resolving the competing claims of parties on the cessation of cohabitation but seems to me to be the inevitable consequence of the manner in which Parliament has legislated."[24]

5.13 The UKSC decision in *Gow v Grant*[25] is the leading authority in relation to section 28.[26] The Justices concluded that the principle underpinning section 28(2)(a) was "fairness to both parties".[27] Referring to the principle in section 9(1)(b) of the 1985 Act, which they considered had been adopted into section 28, they concluded that the court must engage in an exercise of correction of imbalances, to be done in a non-technical and practicable way; a common sense approach was advocated, rather than forensic analysis of detailed accounts.

5.14 Since the UKSC decision in *Gow v Grant,* judicial comment has continued to focus on the difficulty of applying section 28, and the lack of proper guidance given to the court as to the amount of any award. In *Whigham v Owen,*[28] Lord Drummond Young, referring to *Gow v Grant,* said:

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[18] Para 66. One respondent to the Discussion Paper described the provision as "a curious backward-looking statutory formulation which differs markedly from the similar provision that applies to parting spouses and civil partners."

[19] Fran Wasoff, Jo Miles and Enid Mordaunt, "Legal Practitioners' Perspectives on the Cohabitation Provisions of the Family Law (Scotland) Act 2006" (October 2010), University of Cambridge Faculty of Law Research Paper No. 11/03, available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1736612, pp 23 to 24 and 30.

[20] On which the test in s 28(3) of the 2006 Act was modelled; see Discussion Paper on Cohabitation (Scot Law Com No. 170, 2020), paras 5.6 to 5.8 and 5.14, available at: https://www.scotlawcom.gov.uk/files/1115/8270/8061/Aspects_of_Family_Law_-_Discussion_Paper_on_Cohabitation_DP_No_170.pdf.

[21] S 9(1)(b) provides that "fair account should be taken of any economic advantage derived by either person from contributions by the other, and of any economic disadvantage suffered by either person in the interests of the other person or of the family" by the court in deciding what order for financial provision to make in actions for divorce or dissolution of civil partnership; s 11(2)(a) sets out the factors that must be taken into account by the court in applying the principles in s 9(1).

[22] P 29.

[23] 2011 Fam LR 53.

[24] Para 10.

[25] 2013 SC (UKSC) 1, upholding the decision of Sheriff Mackie referred to in para 5.9.

[26] The case, which concerned an application for financial provision under s 28(2)(a), is discussed more fully in the Discussion Paper, para 5.39.

[27] Lord Hope DPSC, at paras [31] to [33].

[28] 2013 SLT 483.

> "What seems to be envisaged … is a rough and ready calculation…. It is clear that most judges and sheriffs feel uncomfortable with the notion of a very broad discretion. I am bound to say that I share that unease. I also have difficulty with the notion of fairness in the absence of a proper economic context, but this is perhaps merely an aspect of the breadth of the discretion that the court must exercise."[29]

5.15 In *Smith-Milne v Langler,*[30] Sheriff Principal Pyle commented on the operation of section 28, by reference to the UKSC decision as follows:

> "…section 28 has caused difficulties for family law practitioners in advising their clients what awards the court is likely to make. It seems to me that such uncertainty remains, although the Supreme Court appears to regard that as a necessary consequence of a broad brush approach which is required to give effect to the provisions of s.28 in the context of relationships."[31]

5.16 In *Saunders v Martin,*[32] Sheriff Principal Dunlop, having applied the "rough and ready" approach to quantifying the claim endorsed by the Justices in *Gow v Grant,* commented that the terms of the statute continue to throw up difficulties in analysis.[33] More recently, in *HAT v CW,*[34] Sheriff Holligan, having noted parties' consensus that neither section 28, nor such authorities as there are, give clear guidance as to what the outcome in any given case may be, and having carried out a detailed analysis of section 28 and the guidance given by UKSC in *Gow v Grant,* commented that there is "an element of the rough and ready" in determination of a claim. A similar point was made by Sheriff Principal Pyle, delivering the opinion of the Sheriff Appeal Court in *Duthie v Findlay,*[35] who commented that the emphasis on "fairness" in *Gow v Grant* necessarily means that the sheriff is entitled to take a broad axe approach, allowing a conclusion which was "within the band of reasonable decisions…open to [the sheriff]."[36]

5.17 In its 2016 post-legislative scrutiny of the 2006 Act, the Justice Committee concluded that although the legislation addressed "a gap previously existing in the law that had left some deserving cases without a remedy", the efficacy of section 28 was an issue for further, more detailed consideration by a future Justice Committee and the Scottish Government. The lack of clarity of the test was also identified as problematic.[37]

5.18 The Supreme Court guidance in *Gow v Grant* has not resolved the difficulties encountered in practice and identified in the Wasoff, Miles and Mordaunt Report, as is apparent from the later cases, the conclusions of the Justice Committee in 2016 and views expressed to us by stakeholders and respondents to the Discussion Paper.

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[29] Para 10.
[30] 2013 Fam LR 58.
[31] Para 12.
[32] 2014 Fam LR 86.
[33] Para 30.
[34] [2020] EDIN 37.
[35] [2020] Fam LR 141.
[36] Para 9.
[37] 2016 Justice Committee Report, pp 6 to 11.

Policy objectives of reform

Responses to Discussion Paper

5.19 We asked:

> Q.12. Should the policy underpinning awards for financial provision for former cohabitants, where cohabitation ends otherwise than by death, be:
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> (a) compensation for economic loss sustained during the relationship;
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> (b) relief of need;
>
> (c) sharing of property acquired during the cohabitation;
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> (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?

5.20 Most respondents offered a view or provided helpful observations and thoughts. Some did so by reference to the policy objectives suggested in the question and others made suggestions based on broader principles. Those whose comments were based on the suggested policy objectives told us that, in relation to (a) "compensation for economic loss sustained during the relationship", the absence of a principle whereby cohabitants owe a duty of aliment or support to each other means that compensation for past economic loss offers compensation where none was due before cessation of cohabitation and therefore amounts to a windfall; and that both economic losses and gains should be shared. In relation to (b) "relief of need", some observed that Scots family law does not adopt a needs based approach to financial provision, and limited emphasis is placed on this in the case of divorce or dissolution of civil partnership, so this would not be appropriate for cohabitants; others commented that needs arising from parties' contributions to the relationship should be distinguished from those arising contemporaneously with the relationship;[38] and that consideration of needs should be restricted to relief of hardship following a relationship of dependency and available only in extreme or severely financially difficult situations. In relation to (d), "sharing the future economic burden of child care", respondents said that this policy should not be linked to economic advantage or disadvantage, as it is at present.

5.21 Option (c), "sharing of property acquired during the cohabitation", was favoured by 17 of the 39 respondents to this question.[39] Some respondents noted that a policy of property sharing would bring the system for cohabitants very close to that for spouses and civil partners, which is undesirable, or raised concerns that cohabitants' claims could exceed those available

[38] Such as unemployment or disability.
[39] Of these, seven favoured a single regime for spouses, civil partners and cohabitants. See Ch 2, paras 2.17 to 2.21 for discussion.

for spouses and civil partners.[40] Others commented that this approach could reduce a claim for financial provision on divorce if a couple married after cohabiting, and highlighted the difficulty of identifying the date on which cohabitation begins and ends. We were urged by the Sheriffs' Association to consider where the two regimes sit side by side, and the Senators pointed out that, while property sharing would be clear and easy to apply, it would diminish the distinction between the rights and obligations that flow from marriage as opposed to cohabitation. Dr Hayward said, simply, that the approach should be different to that for spouses and civil partners, and Brodies that the absence of property sharing should be the principal distinction between the two regimes.

5.22 Other suggested policy approaches were: redress of unjustified enrichment, perhaps via property sharing based on economic contributions; redress of economic loss sustained and economic advantage gained in consequence of the relationship; relief of hardship at the cessation of the relationship; and provision for adjustment to loss of support. A focus on economic imbalance, rather than on subjective considerations such as sharing or need was also suggested, as was retention of the current approach, albeit more clearly articulated. Engender raised concerns about minimising economic disadvantage when cohabitation ends. They sought greater clarity and fairness, with principles perhaps in line with those in section 9 of the 1985 Act, but paying closer attention to non-financial contributions, such as child care and care-giving.

Stakeholder meetings

5.23 We asked legal practitioners whether, as the purpose of financial provision for cohabitants is regarded as not being apparent from the statute, the legislation should aim to provide: (i) compensation for economic loss, (ii) distribution of accrued assets, (iii) relief of need, or (iv) something else. Views were mixed. A minority favoured a framework similar to that in the 1985 Act. Overall, practitioners were largely agreed on the need for change, but there was no consensus on the details of any new approach, or the principles upon which it might be based.

The test for financial provision

Responses to Discussion Paper

5.24 We asked:

> Q.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;

[40] See para 5.36.

(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?

5.25 Most respondents who provided a view did so by reference to the factors outlined in the question. Some said that a test based on "fairness" or "justice and equity," was desirable. Others, however, commented that a "fairness" test alone would not address the difficulties with the legislation in relation to clarity and certainty. Among respondents who expressed a preference, there was some support for the test to be based on a combination of all the factors (a) to (d) listed in the question. There were similar levels of support for each of options (a), (b), (c) and (d) (alone or in combination), with option (c), a needs and resources test, attracting the least support. The Sheriffs' Association commented that taking account of parties' resources was unavoidable, from a practical perspective, when quantifying an award and the payer's means to pay.[41] There was also some support, from a small minority of respondents, for the test to be similar to the 1985 Act test for financial provision on divorce and dissolution.

5.26 Few respondents suggested approaches that were not already included in the question. The Morton Fraser response proposed a test aimed at fixing any economic imbalance at the end of a relationship, with a fallback provision which would allow one party to receive support if they would otherwise experience economic hardship. SWA suggested framing the test in terms of whether an award is just and equitable, with reference to parties' vulnerability and conduct, including domestic and economic abuse and Dr Tobin proposed that, once financial dependency has been demonstrated, a test based on justice and equity, akin to that in section 173 of the Irish legislation, would be appropriate.[42]

Resources

Background

5.27 In Part 2 of Chapter 5 of the Discussion Paper, we discussed the absence of any requirement for the court to consider parties' resources when deciding what order, if any, to make under section 28.[43] In the 1992 Report, no recommendation was made as to the question of resources, and what attention, if any, was to be paid to the affordability of an order. The

[41] See paras 5.27 to 5.30 on "resources".
[42] 2010 Act; the test is whether it is just and equitable to make an order, in all the circumstances, having regard to a list of features including the parties' financial circumstances, their needs and obligations, the rights of any spouse or civil partner including former spouses and civil partners, the rights of children, the duration of the relationship, contributions made by looking after the home, the effect of responsibilities assumed during the cohabitation on the earning capacity of each cohabitant, physical or mental disability and conduct, if it would be unjust to disregard it.
[43] See the Discussion Paper, paras 5.75 to 5.78.

Policy Memorandum makes no reference to the question of resources or ability to pay. In the Scottish Parliament, during the Bill process, there was no discussion around allowing or requiring the court to consider the resources of the parties in deciding whether or not to make an order under section 28. In its Stage 1 Report, the Justice Committee asked, comparing section 21 (which became section 28) with section 22 (claims by bereaved cohabitants, which became section 29), that further consideration be given to whether it is appropriate to introduce a limit upon the amount of any award that a court can make on an application by a former cohabitant.[44] The Scottish Government responded that the two provisions can be differentiated in that, in the latter, there are potentially competing claims for the intestate estate, whereas in section 21 (now section 28) there is no competition; rather, "there is simply one person pursuing a compensatory claim against a former cohabitant."[45]

Responses to Discussion Paper

5.28 We asked:

> Q.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?

5.29 All but one of the respondents who answered this question supported this approach. They argued that: this would be consistent with the position in the 1985 Act; it would not be good for the court to be able to make an order which is unenforceable; it would be especially important if the remedies were extended; and that it would be fair and reasonable. However, some caveats were expressed, including that resources should be considered as long as there was some acknowledgement that this did not include non-cohabitation assets and only those obtained during the cohabitation;[46] the extent to which resources impact upon the remedy should be at the Sheriff's discretion; and this should be a cross check on the reasonableness of the award, justified by the other principles, not considered as a factor on its own.

Stakeholder meetings

5.30 In stakeholder meetings, all participants who expressed a view thought that parties' resources should be taken into account.

Discussion

Policy and test

5.31 No single policy approach or test was favoured or suggested by a majority of respondents and stakeholders. There was, however, consensus that the current policy approach was not clear from the legislation, that there was a lack of guidance as to how the court should determine a claim and that the current test is confusing and complicated, thereby risking unfair outcomes.

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[44] Justice 1 Committee, Stage 1 Report, 7 July 2005, para 201, available at: https://archive.parliament.scot/business/committees/justice1/reports-05/j1r05-08-vol01-02.htm#1920.
[45] Scottish Government Response to the Justice 1 Committee Stage 1 Report, August 2005, p 19, available at: https://archive2021.parliament.scot/S2_Justice1Committee/Reports/SEresponseFamilyLawStage1.pdf.
[46] See para 5.35.

5.32 There was limited support for the introduction of a property sharing regime for cohabitants, or for the introduction of any equivalent to the concept of fair sharing of "matrimonial property" as is provided for in the 1985 Act.[47] The importance, in policy terms, of maintaining this distinction between the regimes for financial provision on divorce and dissolution on the one hand, and cessation of cohabitation on the other, was highlighted by a number of respondents. There was also no substantial support for a policy of equalising cohabitants' economic positions at the end of their relationship, but there was a significant level of support for an approach that treats cohabitants fairly on separation, having regard to the facts and circumstances of each case. We have concluded that this distinction between the regimes for financial provision on divorce and dissolution and for separating cohabitants should be retained.

5.33 We note the comments of one respondent to the Discussion Paper, who told us that the greatest advantage of the 1985 Act approach is the default presumption of equal sharing of the net value of matrimonial property, which gives practitioners a "baseline" for advising clients, and that the introduction of a similar "baseline" for cohabitants would be the greatest help to practitioners. While we acknowledge the benefit of the "baseline" in the context of the 1985 Act, we do not propose a similar approach for cohabitants, for whom a presumption of equal sharing of the net value of property is not supported by respondents to the Discussion Paper and stakeholders. In the absence of a presumption of equal sharing of the net value of matrimonial property, there is no "baseline" that could be applied.

5.34 A number of respondents and stakeholders considered that the underlying policy objective should be fairness to both parties,[48] and that this should be expressly made clear. A significant number also suggested that the exercise of deciding what, if any, order shall be made should be approached by the application of a set of guiding principles, supplemented by a list of factors relevant to their application, similar to the approach in the 1985 Act.[49] There was also near unanimous support for parties' resources to be considered by the court in deciding what order, if any, to make.

5.35 We are persuaded of the need for greater certainty and clarity, within a legislative framework that sets out guiding principles, underpinned by a policy of fairness to both parties. We also agree that the current test should be replaced. We propose a two part test for deciding what, if any, order the court will make. The court will consider whether an order for financial provision is justified by one or more of the guiding principles;[50] to assist that exercise, a list of factors relevant to the application by the court of each guiding principle will be provided in the statute.[51] The court must also decide what order, if any, is reasonable, having regard to the resources of the cohabitants.[52] We do not recommend that any distinction is made between resources, as defined, that accrued during the cohabitation and those that did not. The

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[47] Which requires that the net value of matrimonial (or partnership) property is shared equally, or in such other proportions as are justified by special circumstances, 1985 Act, s 10(1).
[48] Many referenced the UKSC decision in *Gow v Grant* 2012 SC (UKSC) 1, paras [31] to [33].
[49] Ss 9 and 11.
[50] See paras 5.37 to 5.49.
[51] See paras 5.50 to 5.57.
[52] We propose that the term "resources" be defined as including present and foreseeable resources, consistent with the equivalent definition in s 27(1) of the 1985 Act.

purpose of considering present and foreseeable resources is to test the reasonableness of the award; the source from which the resource was derived is not relevant to that exercise. If the making of an order is justified by the guiding principles and reasonable having regard to both cohabitants' resources, the court must make the order. Equally, no order may be made unless justified by the principles and reasonable having regard to the parties' resources. This part of the test provides a safeguard against the making of an order that is impossible to comply with or enforce. For example if, having applied the guiding principles, the court considers that an order for transfer of property by the defender to the applicant is justified by one or more of the principles outlined in the legislation and, having regard to the available resources, it is reasonable to make such an order, the order should be made.

5.36 In the context of considering a possible property sharing policy for claims by cohabitants, some respondents expressed concern that the outcome of a claim by a cohabitant could exceed that available had the couple been spouses or civil partners. As we do not propose an approach based on sharing the value of property accrued during the cohabitation, it is unlikely that many cohabitants will do better under this scheme than they would have done had they been married or in civil partnerships. However, our proposed scheme does not exclude the possibility that an award might exceed that available on divorce or dissolution, since each case will be determined on its own facts and circumstances, with fairness as the underlying objective. As our proposed reformed regime for financial provision on cessation of cohabitants is distinct from that on divorce and dissolution, it does not matter if awards under our scheme are greater or lesser than those on divorce and dissolution. Marriage and civil partnership do not automatically render the parties to it deserving of more generous financial provison on divorce and dissolution than that available to cohabitants when their relationships end.

Guiding principles and relevant factors

5.37 While respondents and stakeholders favoured the principled approach to decision making in the 1985 Act, not all of the principles[53] were considered appropriate for cohabitants. There was significant support for the inclusion of the principle of fair distribution of economic disadvantages suffered by a cohabitant in the interests of the other cohabitant or any relevant children, and of economic advantages accrued by one cohabitant as a result of contributions made by the other, if expressed in clear terms. There was also support for the inclusion of a principle of fair sharing of the economic responsibility of child care and of a principle of providing for the short term relief of serious financial hardship brought about by the end of cohabitation. There was limited support for inclusion of a principle of fair sharing of property accrued during the cohabitation. Respondents raised concerns about the practical difficulty of identifying the dates on which cohabitation began and ended and observed that sharing the value of property should be avoided, as this risks bringing the regime for cohabitants too close to that for spouses and civil partners and should be the main distinction between them.[54] We agree. We therefore favour an approach similar to, but not the same as, that in sections 9 and 11 of the 1985 Act, whereby the principles which the court must apply are set out in the statute,

[53] 1985 Act, section 9(1).
[54] See para 5.21.

supplemented by the factors that must be taken into account when applying each of the principles.

Guiding principle (a) - where one cohabitant has (i) derived any economic advantage from the contributions of the other cohabitant, that economic advantage should be fairly distributed between the cohabitants; (ii) suffered economic disadvantage in the interests of the other cohabitant or of a relevant child,[55] the cohabitant should be fairly compensated for that economic disadvantage

5.38 The test in section 28(3) to (6) of the 2006 Act, was regarded as lacking clarity. The purpose of that test is to identify whether either or both cohabitants have derived net economic advantage or suffered net economic disadvantage. No guidance is given, such as application of a principle or principles, to assist the court in deciding what it is to do once net economic advantage or disadvantage has been identified.[56] The court is therefore left to decide what it is to make of each cohabitant's resulting net economic position and what order, if any, to make.

5.39 We recommend that the approach of identifying economic advantages and disadvantages is retained, but that the court is given guidance as to the purpose of that exercise. Options for tackling the issue of how best to achieve a fair outcome between cohabitants, in the absence of a goal of equal sharing of the net value of property, were limited. We considered whether to retain the current approach of identifying each cohabitant's net economic advantage / disadvantage, but imposing an additional requirement for the court to carry out a balancing exercise to achieve equality. We rejected that approach on the basis that it was dangerously close to a property sharing approach, did not adequately cater for the particular circumstances of cohabitants, for whom fairness need not mean equality, and for which, in any event, there was no support. Further, in the absence of a principle that the net value of accrued property must be divided equally or in some other specified proportions, a balancing approach is not appropriate. Where, for example, a cohabitant's claim is dependent upon persuading the court that economic disadvantage has been suffered in the interests of the other cohabitant, all that the court can do, in the absence of a pool of property available for sharing, is make an order that recognises the value of the contribution and resulting disadvantage and compensates the applicant therefor. We also gave careful thought to an approach similar to that in section 9(1)(b) of the 1985 Act, whereby the court is required to "take fair account" of economic advantages and disadvantages. However, that approach was also rejected as, without the detailed framework of the 1985 Act, including the principle of fair sharing of the net value of matrimonial or partnership property, it was considered too vague to be of assistance to the courts, practitioners or cohabitants.

5.40 The aim of our reformed scheme is to achieve overall fairness between the cohabitants. This guiding principle requires that the court fairly distributes economic advantages derived by a cohabitant from the other cohabitant's contributions, and fairly compensates a cohabitant for economic disadvantages suffered in the interests of the other cohabitant or a relevant child. The court is assisted in that exercise by the statutory

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[55] As defined, see paras 5.85 to 5.86 and Rec 9.

[56] Clause 36(2)(b) of the Bill attached to the 1992 Report made provision for consideration of the fairness and reasonableness of any award, having regard to all the circumstances of the case, but this was not included in the 2006 Act.

requirement to have regard to relevant factors. These factors include the requirement that the court has regard to the extent to which there has been a change, over the course of the cohabitation, in the economic circumstances of either or both cohabitants. If there has been such a change, the court must have regard to the extent to which the cohabitant has derived economic advantage from the other's contributions, or has suffered economic disadvantage in the interests of the other or a relevant child.[57] If there is a causal link between an applicant's contributions and the defender's economic advantage, or between economic disadvantage suffered by the applicant and the interests of the defender (or those of a relevant child), principle (a) applies and the court must then make such order as is justified by the principle and reasonable having regard to resources.

5.41 We recognise that there may be cases where fairness would only be achieved if economic advantages and disadvantages were distributed equally, or more or less equally, and others where that would not be fair. In the most straightforward cases, such as where the applicant's claim is based on economic disadvantage suffered in the interests of the defender, the court will require to assess only the applicant's economic circumstances.[58] There may be cases where both parties have derived economic advantages and suffered disadvantages; or where advantages derived from one party's contributions have been counter-balanced by disadvantages suffered in the interests of the other cohabitant or children; or where a comparison of each person's economic position at the end of the relationship is needed to assess what would be fair distribution or compensation. This guiding principle directs the court to achieve an outcome that is fair (to both parties), while leaving the assessment of the nature and amount of any award in each case to the court's discretion.

5.42 In reaching a decision as to the nature and amount of any award, we do not expect the court to routinely engage in a forensic analysis of the couple's financial arrangements and transactions throughout the relationship. There may be cases where their arrangements are such that close analysis of the details is unavoidable if a fair outcome is to be achieved, but we would expect the court, in most cases, to look more broadly at the economic effects of the couple's circumstances, choices and decisions. Leaving much to the discretion of the court means that a broad brush approach will have to be taken to the quantification of many claims. Such is a necessary consequence of a scheme in which there is no baseline, such as equal sharing of accrued assets. The aim of our reforms is to provide a structure, within which there is flexibility, such that the objective of achieving an outcome that is fair to both parties is achieved. Our recommended reforms are directed at providing guidance as to how the policy objectives of the scheme are to be achieved, without unduly fettering the discretion of the court.

5.43 We have expressed part (ii) of this guiding principle in language similar to that in existing section 28(3)(b), in that it requires that economic disadvantage is suffered "in the interests of" the other cohabitant or a relevant child. We would expect the courts to continue to construe the phrase "in the interests of" widely, consistent with the approach in *Gow v Grant*. There, the Justices in the Supreme Court construed the phrase as being directed to the effect

[57] The factors relevant to application of guiding principle (a) are discussed in paras 5.51 and 5.54 to 5.57.
[58] Another such example is where the applicant's claim is based on economic advantage derived by the defender from the applicant's contributions.

of the transaction, rather than the intention with which it was entered into. That being so, incidental benefits to the applicant would not render the principle inapplicable:

> "… provided that disadvantage has been suffered in the interests of the defender to some extent, the door is open to an award of a capital sum even though it may also have been suffered in the interests of the applicant."[59]

Guiding principle (a)(ii) is intended to justify claims by cohabitants, like Mrs Gow, who have suffered economic disadvantage in the interests of the relationship, or of the other cohabitant or both of them. This approach is consistent with the weight of opinion expressed to us in favour of a fair distribution of economic gains and losses, including where non-financial sacrifices and contributions have been made.

5.44 We recognise that it would not be appropriate for all losses and gains accrued during cohabitation to be taken into account when determining a claim. Economic advantage may not have been derived by one partner from the other's contributions during cohabitation, but may have come from some other source, such as inheritance, or may be due solely to market forces, such as the increase in value of property owned before the cohabitation began. Therefore, claims based on economic advantage completely unconnected to contributions made by the applicant will not be justified under part (i) of this guiding principle. Similarly, a cohabitant might suffer economic disadvantage due to unsuccessful, speculative investment on the stock market, or by giving up work, suffering loss of income and pension entitlement, for reasons unconnected with the relationship; the question for the court will be whether the loss amounts to economic disadvantage suffered *in the interests of* the other cohabitant or any relevant child, such that part (ii) of the guiding principle applies. In our scheme there has to be a causal connection between the defender's economic advantage and the applicant's contributions and / or between the applicant's economic disadvantage and the applicant's sacrifices made in the interests of the defender or any relevant child.

5.45 If the court is to make an order that amounts to fair sharing of "economic advantage" derived by one party from contributions by the other or for compensation for "economic disadvantage" suffered by either party in the interests of the other or of a relevant child, the terms "economic advantage", "economic disadvantage" and "contributions" must be clearly defined. We propose retaining the current definition of "economic advantage" as including gains in capital, income and earning capacity and "economic disadvantage" as being construed accordingly. We also propose retaining a definition of "contributions" that includes indirect and non-financial contributions and, in particular, any such contributions made by either party by looking after a relevant child or the couple's sole or main residence;[60] this will allow the court to give due recognition to the value of different types of contributions and sacrifices, including those that are not financial.[61]

Guiding principle (b) – short term relief of serious financial hardship

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[59] 2013 SC (UKSC) 1, Lord Hope of Craighead, DPSC, at [38]. The economic disadvantage suffered by Mrs Gow was the loss to her of the benefit of the increase in value of the house she had sold in order to cohabit with Mr Grant.

[60] Respondents were not critical of these definitions as they currently appear in the 2006 Act.

[61] For an example of how the court might apply this principle and its relevant factors, see Appendix E.

5.46 Many respondents were supportive of introducing this principle, but much of this support came with caveats, including that the hardship should be serious, caused by cessation of the cohabitation, and available on a short term basis only. We agree and have in mind a claim by a cohabitant who was dependent on their former partner for accommodation or financial support and who, on separation, urgently needs to find a place to live and a source of income but does not have sufficient resources to meet their immediate needs, making them likely to suffer serious financial hardship. We have therefore concluded that the legislation should include this guiding principle.

5.47 In making this recommendation, we are not proposing that an alimentary award be available for cohabitants. This would not be appropriate, as cohabitants have no mutual obligation of aliment during their relationship. Nor are we proposing a principle of relief of need in general terms.[62] What we do recommend is limited access to financial provision where there is a need for relief from serious financial hardship caused by the end of the relationship. Primarily, we would expect that this guiding principle would be relied on to justify the making of an order for short term payments sufficient to relieve immediate hardship,[63] or an interim capital payment, or an incidental order permitting short term occupation of a relevant residence and use of its contents. We would not expect that there will be many cases where an order for transfer of property[64] or for payment of a substantial capital sum will be justified by this principle, as the focus of the principle is on short term relief of serious financial hardship.[65]

Guiding principle (c) - fair sharing of economic responsibility for child care

5.48 At present, an order may be made under section 28(2)(b) of the 2006 Act for payment of an amount "in respect of any economic burden of caring, after the end of the cohabitation, for a child of whom the cohabitants are the parents". What we propose is a different approach, whereby the court may make an order for payment of a capital sum, an order for transfer of property or any of a number of incidental orders,[66] if the order is justified, by the guiding principle that the economic responsibility of caring for a relevant child[67] after the cohabitation has ended should be shared fairly. The order need not relate to the cost of child care and could, for example, be made to meet the need to provide for accommodation for the child;[68] the court may therefore make an order for payment of a capital sum or transfer of property, provided the order is justified by the principle and reasonable having regard to parties' resources.

5.49 We have considered whether, as urged by some respondents, the cost of child care services should be shared, by means of an aliment-like award or an order for payment of any such costs. We have concluded that such an approach would not be appropriate. The aim of our proposed scheme is to treat cohabitants fairly when their relationships end by providing a

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[62] For the reasons set out in para 5.20.
[63] This remedy will only be available if justified by this principle. See paras 5.75 and 5.76 below.
[64] There may, however, be circumstances where an order for transfer of movable property, such as a life policy or similar arrangement may be justified by this principle.
[65] See paras 5.71 to 5.79 for discussion of the proposed remedies.
[66] See discussion at paras 5.71 to 5.79 and Rec 8.
[67] For definition of "child" and discussion, see paras 5.85 to 5.86 and Rec 9.
[68] See paras 5.53 to 5.57 and Rec 7 and 14(a) for factors relevant to the application of this principle.

range of orders for financial provision based on the application of guiding principles. Alimentary provision[69] and child maintenance[70] are addressed in other legislation. Review of those provisions is beyond the scope of the current project, and we do not propose any changes that would replicate or conflict with the existing arrangements for aliment or child maintenance. An order for payment at intervals and for no longer than 6 months,[71] could not, however, be made, relying on this principle, as such an order is available only where it would provide short term relief from serious financial hardship likely to be suffered as a result of the cohabitation having ended.[72]

Relevant factors

5.50 We propose supplementing the guiding principles with factors relevant to their application. We have identified factors relevant to the application of each guiding principle, which we set out below.[73] We will then discuss factors that we have identified as relevant to the application of all of the guiding principles.[74]

Relevant factors – guiding principle (a) - where one cohabitant has (i) derived any economic advantage from the contributions of the other *cohabitant, that economic advantage should be fairly distributed between the cohabitants; (ii) suffered economic disadvantage in the interests of the other cohabitant or of a relevant child,[75] the cohabitant should be fairly compensated for that economic disadvantage*

5.51 We acknowledge the need for clear guidance for the courts on what is expected once economic advantage or disadvantage has been identified. To that end, we propose that when the court is considering whether an award is justified by this guiding principle, it must have regard to certain relevant factors, including: (a) the extent to which there has been any change, over the course of the cohabitation, in the economic circumstances of either cohabitant or, if relevant, both cohabitants;[76] and (b) if there has been any such change in a cohabitant's economic circumstances, the extent to which the cohabitant (i) has derived economic advantage from the contributions of the other cohabitant, or (ii) has suffered economic disadvantage in the interests of the other cohabitant or of a relevant child.[77] Once it has been established that there is economic advantage or economic disadvantage, how that will be distributed or compensated to achieve an outcome that is fair to both parties is left to the court's discretion, applying guiding principle (a). We would observe that the courts have had

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[69] 1985 Act, ss 1 to 7.
[70] Child Support Act 1991; Child Support Act 1995; Child Support Pensions and Social Security Act 2000; Child Maintenance and Other Payments Act 2008; Child Support Information Regulations 2008; Child Support (Variations) Regulations 2000; Child Support (Management of Payments and Arrears) Regulations 2009; Child Support Maintenance Calculation Regulations 2012; Child Support Fees Regulations 2014; Child Support (Miscellaneous Amendments) Regulations 2019.
[71] Which we recommend is available in limited circumstances: see paras 5.75 to 5.76.
[72] The court could make orders for financial provision justified by both guiding principles (b) and (c); if there was a likelihood of serious financial hardship that could be relieved in the short term by the making of an order for payments at intervals over no more than 6 months, and payment of capital was justified to fairly share the economic responsibility of child care, the court could make both orders.
[73] Paras 5.51 to 5.53.
[74] Paras 5.54 to 5.57.
[75] Defined as "a person under 16 of whom the cohabitants are parents or who is or was accepted by the cohabitants as a child of the family". See paras 5.85 to 5.86 and Rec 9.
[76] See paras 5.38 to 5.45.
[77] For an example of the application of the principle and relevant factors, see Appendix E.

no difficulty in applying the principle in section 9(1)(b) of the 1985 Act, having regard to section 11(2), which also enables the court to exercise wide discretion to achieve a fair outcome, including in cases where there has been little or no matrimonial property.

Relevant factors – guiding principle (b) – short term relief of serious financial hardship

5.52 Guiding principle (b)[78] is an innovation, intended to provide some safeguards for cohabitants who are likely to suffer serious financial hardship because of cessation of the cohabitation. It is not intended to provide alimentary support or long term financial provision, but rather to provide short term[79] relief from the serious financial hardship, by the making of any of the available orders, on an interim basis if need be. We propose that the factors relevant to the application of the principle include: the age, health and earning capacity of the applicant; the extent to which each cohabitant has been dependent on the other's financial support during the cohabitation; and the cohabitants' needs and resources.

Relevant factors – guiding principle (c) – fair sharing of economic responsibility for childcare

5.53 In relation to guiding principle (c),[80] we note stakeholders' views that the function of cohabitation as a base for family life is no different from that of marriage or civil partnership, and that the same issues in relation to the economic responsibility of child care are present. We therefore propose broadly replicating the list of factors in section 11(3) of the 1985 Act, such that the factors relevant to the application of the principle include: any expenditure or loss of earning capacity caused by the need to care for the child; the need to provide suitable accommodation for the child; the child's age and health; any decree or alimentary arrangement for the child; the availability and cost of suitable child care services; the child's educational, financial and other circumstances; and the cohabitants' needs and resources.

Factors relevant to the application of all of guiding principles (a), (b) and (c)

5.54 When applying the guiding principles, the nature of the inquiry will differ from case to case, but the court's focus is first directed to the factors relevant to the application of each guiding principle. In addition, there are some factors that are relevant to the application of all of the guiding principles. These are: the terms of any agreement between cohabitants; the effect of one cohabitant's behaviour (including abusive behaviour) on the economic position of the other cohabitant; and any other circumstances of the case that are relevant to the inquiry.

5.55 Cohabitants can, and do, enter into agreements on financial provision before, during and after the end of the cohabitation, including opting out of the statutory regime altogether. We therefore recommend that the court must have regard to the terms of any such agreement when applying the guiding principles, and make no order for financial provision inconsistent with the terms of the agreement, in accordance with the ordinary rules of contract,[81] unless the

[78] See paras 5.46 and 5.47.
[79] We recommend, over a period of no more than 6 months.
[80] See paras 5.48 and 5.49.
[81] See Ch 7; para 7.23, Rec 14(a) and (b).

agreement, or any term of it relating to financial provision, is set aside or varied on the basis that it was not fair and reasonable when it was entered into.[82]

5.56 We were reminded, in their responses to the Discussion Paper, by SWA and Engender of the need to take account of the effect of domestic abuse on victims (usually women), including the vulnerability of victims of domestic abuse to sustained abuse following separation. We recognise that other forms of behaviour (such as gambling or dissipating assets), which could adversely affect the resources of parties, should also be taken into account. We have concluded that the behaviour of either cohabitant will be relevant to the application of guiding principle (a) if the behaviour has resulted in either cohabitant deriving economic advantage or suffering economic disadvantage. We have in mind, for example, coercion leading to the handing over of money, resulting in an increase in one cohabitant's capital at the expense of the other; or deliberately preventing one cohabitant from earning a living, resulting in loss of earnings. We recommend that, when applying guiding principle (a), the court must have regard to any form of behaviour that has resulted in either cohabitant deriving economic advantage or suffering economic disadvantage. When applying guiding principles (b) or (c), we recommend that account be taken of behaviour that has had an effect on the resources[83] of either cohabitant. Examples of circumstances where behaviour would be relevant to the application of guiding principle (b) might be where a cohabitant whose partner prevented them from working, so was forced to become economically dependent, is likely to suffer serious financial hardship when the economic support is withdrawn on separation; and in relation to guiding principle (c), where the dissipation of resources by one cohabitant necessitates the other seeking orders for payment of capital or transfer of property so that accommodation can be provided for the couple's children.

5.57 Finally, given the broad discretion that our proposed scheme gives to the court in reaching a decision on the nature and amount of any award, we have included "all the other circumstances of the case" as a matter relevant to the application of each of the guiding principles, and thus to the decision whether an order is justified. The court must take account of the established facts, but the relevance of a fact to the issues before the court and the weight to be attached to it will vary from case to case. The inclusion of this factor will enable the court to take into account such matters as cultural issues and matters specific to the economic circumstances of the cohabitants. We would not, however, expect the court to be routinely drawn in to close examination of the minutiae of cohabitants' daily lives or financial arrangements.

Policy and test: conclusion

5.58 Development of the policy and clarifying the test for awards for financial provision on cessation of cohabitation has been one of the more challenging aspects of our review. While there was no majority view in favour of a particular policy approach or test, leaving the legislation as it is was favoured by no one. We have concluded there is a need for a legislative framework that sets out guiding principles supplemented by factors relevant to their application, underpinned by a policy of fairness to both parties. The guiding principles that we recommend reflect the weight of opinion of respondents to the Discussion Paper and

[82] See Ch 7; para 7.27, Rec 14(c).
[83] Defined as including present and foreseeable resources.

stakeholders and aim to achieve an outcome that is fair to both parties. We recommend that the test for the making of orders for financial provision on cessation of cohabitation is as set out below.

5. We recommend that the court must make such order or orders for financial provision on cessation of cohabitation otherwise than on death as are:

(a) justified by the guiding principles set out in Recommendation 6, and

(b) reasonable having regard to the resources (defined as "present and foreseeable resources") of the cohabitants.

(Draft Bill, section 4, which replaces section 28 (see new section 28(2))

6. We recommend that the court is required to apply the following guiding principles in deciding what order for financial provision, if any, to make:

(a) where one cohabitant has-
(i) derived any economic advantage from the contributions[84] of the other cohabitant, that economic advantage should be fairly distributed between the cohabitants,
(ii) suffered economic disadvantage in the interests of the other cohabitant or of a relevant child,[85] the cohabitant should be fairly compensated for that economic disadvantage.

(b) a cohabitant who seems likely to suffer serious financial hardship as a result of the cohabitation having ended should be awarded such provision as is reasonable to provide for the short term relief of that hardship;

(c) the economic responsibility of caring for a relevant child (as defined), after the end of the relationship, shall be shared fairly between the cohabitants.

(Draft Bill, section 4 inserting section 28B into the 2006 Act)

7. We recommend that the court must have regard to the following relevant factors in applying the above principles:

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[84] Defined as "contributions made during the cohabiting relationship; and includes indirect and non-financial contributions and, in particular, any such contribution made by looking after the family home or caring for the family." In policy terms, this could include providing mutual support or assistance. This is similar to the existing definition in s 28 and it is not an aspect of the provision which has been the subject of criticism. "Economic advantage" is defined as including gains in capital, income and earning capacity; and "economic disadvantage" is to be construed accordingly. This is again similar to the existing definition in s 28, which is not an aspect of the provision which has been the subject of criticism.

[85] As defined, see paras 5.85 to 5.86 and Rec 9.

(1) In applying principle (a) – fair distribution of economic advantage derived by one cohabitant from the contributions of the other and fair compensation for economic disadvantage suffered by one cohabitant in the interests of the other or of a relevant child:

(a) the extent to which there has been any change, over the course of the cohabitation, in the economic circumstances of either cohabitant or, if relevant, both cohabitants

(b) if there has been any such change in a cohabitant's economic circumstances, the extent to which the cohabitant
(i) has derived economic advantage from the contributions of the other cohabitant: or
(ii) suffered economic disadvantage in the interests of the other cohabitant or of a relevant child

(2) In applying principle (b) – short term relief of serious financial hardship:

(a) the age, health and earning capacity of the person who is claiming the financial provision;

(b) the extent to which each cohabitant has been financially dependent on the other during the cohabitation;

(c) the needs and resources of the cohabitants.

(3) In applying principle (c) – fair sharing of economic responsibility for child care:

(a) any expenditure or loss of earning capacity caused by the need to care for the child;

(b) the need to provide suitable accommodation for the child;

(c) the age and health of the child;

(d) any decree or arrangement for aliment of the child;

(e) the availability and cost of suitable child care services;

(f) the educational, financial and other circumstances of the child;

(g) the needs and resources of the cohabitants.

(4) In applying all of the principles, we recommend the court must also have regard to:

(a) the terms of any agreement between cohabitants;[86]

(b) any behaviour by either cohabitant, including behaviour that is abusive of the other cohabitant, which

(i) in the case of guiding principle (a) has resulted in either cohabitant deriving economic advantage or suffering economic disadvantage

(ii) in the case of guiding principles (b) and (c), has had an effect on the resources of either cohabitant; and

(c) all the other circumstances of the case.

(Draft Bill, section 4 inserting section 28C into the 2006 Act)

Remedies

5.59 The remedies currently available to cohabitants under section 28(2) of the 2006 Act are: an order for payment of a capital sum, an order for payment of such amount as may be specified in the order in respect of any economic burden of caring, after the end of the cohabitation, for a child of whom the cohabitants are the parents and such *interim* order as the court thinks fit.[87] The limited nature of the remedies has been the subject of criticism. The Wasoff, Miles and Mordaunt Report concluded in 2010 that the availability of an order for payment of a capital sum as the only tool available to judges is unduly restrictive. In its 2016 post-legislative scrutiny of the 2006 Act, the Justice Committee heard evidence from practitioners that the availability of an order for transfer of property would be useful and would widen the scope for resolving disputes between former cohabitants.[88] Those comments are consistent with the evidence that we have, from stakeholders, that it would improve the position for cohabitants if a wider range of remedies was available.

Responses to Discussion Paper

5.60 We asked:

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

5.61 All but one of the respondents to this question answered "no".[89] Brodies commented that "...the remedies currently available do not reflect the complex practical and financial arrangements that many cohabiting couples have." Professor Norrie said "...I find it particularly telling that it appears that settlements are often broader than what the legislation would

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[86] See also Ch 7, para 7.23 and Rec 14 in relation to agreements between cohabitants.
[87] S 28(7) allows the court to specify that the amount shall be payable on (a) such date as may be specified, and (b) in instalments.
[88] Justice 1 Committee, Official Report, 8 March 2016, columns 22 and 25, available at: https://archive2021.parliament.scot/parliamentarybusiness/report.aspx?r=10418&mode=pdf.
[89] The remaining respondent thought this was a policy matter but indicated that there appears to be no obvious difficulty in principle with extending the range of remedies available.

mandate, suggesting that a broader approach would be acceptable to many ex-cohabitants….". The Faculty of Advocates noted that property is often transferred as part of a settlement between cohabitants and Balfour + Manson said that the absence of a power to make a property transfer order has made negotiation particularly difficult.

5.62 We then asked:

> Q.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?

5.63 A small majority of respondents favoured extending all of the suggested remedies to cohabitants.[90] However, some of these responses were not unequivocal, particularly regarding pension sharing and periodic payments. Respondents' arguments often focused on the positives of having more remedies available as opposed to having these particular remedies. Comments included that having a broader range of remedies would assist with certainty and improve the quality and specificity of the advice that lawyers can give to their clients and that a lack of flexibility in the remedies potentially leads to unfair results. Some respondents took the opportunity to suggest "something else" or add further comments. Suggestions included: orders that are available under section 8 of the 1985 Act; maintenance; incidental orders similar to those available under section 14 of the 1985 Act including, in particular, orders for sale of property, orders permitting occupation of the family home and use of contents and orders for payment of household bills and mortgage payments; and *interim* payments for relief of hardship.

5.64 There was strong and unequivocal support for making property transfer orders available on cessation of cohabitation otherwise than on death.[91] The Senators described the absence of a property transfer order as "the single biggest omission", which had caused "real difficulties in cases where the transfer of title of the family home would be the obvious remedy". A similar sentiment was expressed by the Sheriffs' Association, who said that the lack of an option to grant a property transfer order often results in a second, unnecessary litigation for division and sale of heritable property and commented that the lack of flexibility in the remedies available to the court can lead to unfair results. Other arguments included that: the absence of property transfer orders is disadvantageous to former cohabitants who wish to retain a property for the benefit of children who are settled there; along with an order for payment of a capital sum, property transfer orders are the most commonly applied for orders in divorce /

[90] In addition to orders for payment of a capital sum.
[91] An order for the transfer of heritable or movable property is currently available on application by a bereaved cohabitant under s 29(2)(a)(ii) of the 2006 Act.

dissolution cases; it would be useful in cases where there is a claim but most of the property is one or more heritable property / properties; and other countries permit a transfer of property.

5.65 A significant minority of respondents supported the availability of pension sharing.[92] Others acknowledged that this could be useful in limited circumstances, such as where there were no other resources or other remedies would be insufficient, but noted that there were likely to be practical issues associated with this remedy, including implementation, tax consequences, legislative competence, the need for amendments to legislation relating to pension schemes and the need for anti-avoidance measures. The Senators, while supporting the availability of an extended range of remedies, said that the remedies should be reflective of the type of regime contemplated and that pension sharing could be appropriate if a property sharing regime was introduced.[93] Engender urged active consideration of pension sharing provisions as a means of addressing the inequality that results from the "gendered nature of pensions", pointing out that, because women's lifetime earnings are lower than men's, "access to an adequate standard of living is lesser for women at retirement". A similar point was made by Brodies, who opposed the availability of pension sharing, save where it was necessary to address significant disparity in a lengthy cohabitation, where alternative provision could be insufficient. The point was also made that pension sharing orders often do not provide an immediate financial benefit as the pension will not be payable until the recipient reaches normal retirement age.

5.66 A majority of respondents favoured the availability of periodic payments, in some form. One respondent, who opposed making this remedy available to cohabitants, pointed out that the difference between cohabitation and marriage or civil partnership is that the latter are relationships where parties undertake to care for each other for life, even on the understanding that the relationship might break down.[94] Others commented that such payments were better suited to child care cost situations and that they should be available for a very limited period and only where there is hardship or unfairness, such as inability to make mortgage payments or occupy a property.

5.67 Some respondents suggested that incidental orders, similar to those available under section 14 of the 1985 Act, should be available to cohabitants. They highlighted the practical benefits of providing for incidental orders for the valuation and sale of property, including avoiding the need for a separate action for division and sale. They suggested also that orders relating to interest, security for payment and ancillary orders generally would be helpful.

Stakeholder meetings

5.68 There were mixed views among legal practitioners as to which additional remedies should be available to cohabitants. Property transfer orders were favoured by almost all the legal practitioners. Pension sharing was favoured by a minority of participants, some of whom commented that this remedy should be available if there were no other assets; others highlighted the difficulty of a competing claim by a spouse and noted that the beginning and

[92] Many of whom favoured a single regime for cohabitants, spouses and civil partners.
[93] We do not propose such a regime; see Ch 2.
[94] Professor Norrie, who also questioned what the conceptual basis would be to justify the imposition of an on-going obligation of support on former cohabitants (other than where there are children of the relationship).

end of the cohabitation can be difficult to identify. Maintenance orders were favoured by a minority. Comments included that such orders should be available only exceptionally, only if there is a threshold or qualifying criteria (for access to remedies) or for a short period if there is an imbalance in the relationship. There was some acknowledgement that maintenance might go some way towards redressing imbalance if one cohabitant was financially dependent on the other.

Public attitudes survey

5.69 We asked what cohabitants should be able to claim when they split up. We gave options to choose from, which were:

- A share of the value of assets built up during the relationship, such as savings and investments;
- A share of the value of their partner's pension;
- A share of the value of their partner's house or flat;
- Transfer to them of ownership of their partner's share of their (jointly owned) house or flat;
- Financial support (in addition to any child maintenance / child support);
- Other (please specify).

5.70 89.63% of the respondents were in favour of cohabitants having the right to claim a share of the value of assets built up during the relationship. However, this support did not seem to be reflected quite so clearly in views on particular remedies. 44.81% were in favour of financial support, 34.85% were in favour of the right to claim a share of the value of their partner's house or flat and 30.29% were in favour of transfer of ownership of their partner's share of their (jointly owned) house or flat. 21.99% were in favour of the right to claim a share of the value of their partner's pension and 13.28% specified other options (some in addition to selecting one or more of the options suggested in the question).

Remedies: discussion and conclusion

5.71 There was majority (albeit not always unequivocal) support for extending all three of the remedies suggested in the Discussion Paper to cohabitants. Notably, there was near unanimous support for making property transfer orders available. While there was substantial support for the inclusion of pension sharing and periodic payments, many respondents expressed reservations or added caveats, especially in relation to pension sharing. The legal practitioners we spoke to were also in favour of making property transfer orders available, but there was no real consensus in relation to pension sharing and periodic payments. While the public attitudes survey showed support in general terms for sharing the value of assets accrued during the relationship, this did not appear to be reflected in responses relating to specific remedies, as there was most support for cohabitants being able to claim financial support and transfer of property, and less for pension sharing.

Property transfer

5.72 Given the almost unanimous support for extending remedies by including property transfer orders, we recommend this change. The position with pension sharing and periodic payments is more complicated.[95]

Pension sharing

5.73 We note that, while Australia, New Zealand and Ireland all include pension sharing as a remedy for cohabitants, there is either little evidence in relation to their use (and what evidence there is suggests that these orders are not commonly used)[96] or there is evidence that the orders are far from straightforward to implement.[97] There is evidence that this is also the position in relation to pension sharing on divorce and dissolution of civil partnership in Scotland[98] and in England and Wales.[99] On the other hand, Engender's concern regarding the gendered nature of pensions reminds us of the need to safeguard, where possible, against economic disadvantage, especially in long relationships where there has been economic dependence. We have carefully considered the potential benefits and disadvantages of seeking to include provision for pension sharing orders in our revised scheme. In doing so, we have been mindful of the competing interests and concerns expressed to us.

5.74 We sought advice from experts in relation to the legal, practical and taxation consequences of recommending this change. In summary, the issues that have been identified include: (i) the need to make changes to pensions legislation and the legislative competence issues associated with that;[100] (ii) the need for amendment by pension providers of pension scheme rules; (iii) tax issues, including those relative to lifetime allowances; (iv) potential for

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[95] We are also mindful that empowering the court to make a pension sharing order has legislative competence consequences. Occupational and personal pensions are reserved to the UK Government in terms of the specific reservation, F3 in Part II of Sch 5 of the Scotland Act 1998. This reservation includes the regulation of occupational pension schemes (including public service pension schemes) and personal pension schemes. As such, extending the remedies to include pension sharing orders would require the consent of the UK Government and a Scotland Act order to be made in Westminster.

[96] For Australia see Australian Government, Australian Law Reform Commission, *Review of the Family Law System*, Discussion Paper (DP 86), October 2018, para 3.134, available at: https://www.alrc.gov.au/wp-content/uploads/2019/08/dp86_review_of_the_family_law_system_4.pdf.

[97] In New Zealand, the Law Commission recognised that it is a complex process to value and divide the benefits from a superannuation scheme, and that there is a lack of clarity on the way in which s 31 orders impact on the valuation of a superannuation entitlement (see New Zealand Law Commission, *Review of the Property (Relationships) Act 1976*, Report 143, June 2019, paras 15.30 to 15.32 and 15.42, available at: https://www.lawcom.govt.nz/sites/default/files/projectAvailableFormats/NZLC%20-%20PRA%20Review%20Project%20-%20Final%20Report%20R143.pdf). In Ireland, the need to involve the trustees of the pension fund in proceedings makes pension adjustment orders expensive to obtain, and the contingent nature of the potential benefits may lead some applicants to seek more immediately available types of relief (see Fergus Ryan, *Annotated Legislation: Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010* (2011), pp 297 to 298).

[98] In a review of 200 cases from 1986 to 2014, a pension sharing order was sought in only 7.5% of cases and granted in 5%; see Mair, Mordaunt and Wasoff, "Built to Last: The Family Law (Scotland) Act 1985 – 30 Years of Financial Provision On Divorce" (2016), available at: https://www.nuffieldfoundation.org/wp-content/uploads/2019/11/Research20report1.pdf. While pensions were mentioned in the majority of all minutes of agreement registered in 2010 (57%), they did not tend to form part of the final financial settlement (11%); see Mair, Wasoff and MacKay, "All Settled? A study of legally binding separation agreements and private ordering in Scotland: final report", ch 5, available at: http://eprints.gla.ac.uk/85810/1/85810.pdf. We note, however, some contradictory anecdotal evidence from stakeholders that pension sharing orders under the 1985 Act are frequently sought and granted, or pension sharing is agreed, in this jurisdiction.

[99] A pension order was granted in only 14% of a sample of court file cases from 2014 in which a financial remedy order was granted; see Woodward and Sefton, "Pensions on divorce: an empirical study" (2014), available at https://orca.cardiff.ac.uk/56702/.

[100] Occupational and personal pensions are a reserved matter as defined in schedule 5 of the Scotland Act 1998 and therefore are outwith the legislative competence of the Scottish Parliament, in terms of section 29 of that Act.

conflict between cohabitants and other possible nominees and beneficiaries, including former spouses with existing pension sharing[101] or "earmarking"[102] agreements or orders; (v) complexities if the pension is already in payment, including tax related matters; and (vi) the absence of a trigger, such as the granting of decree of divorce or dissolution, for implementation of a pension sharing order. We have concluded that the absence of a property sharing regime, the difficulty of identifying the date of commencement of cohabitation and the other complexities highlighted by respondents[103] and experts militate against the introduction of pension sharing as a remedy on cessation of cohabitation. We do not, therefore, recommend the introduction of pension sharing as a remedy for cohabitants. Pension entitlement need not, however, be ignored completely when the court is determining a cohabitant's claim for financial provision. Entitlement to accrued pension benefits, or the absence thereof, may be a relevant consideration when the court is applying the economic advantage / disadvantage principle and pension income or a pension lump sum may form part of the resources by reference to which the reasonableness of making an order must be assessed. We see no reason, in appropriate circumstances, why payment should not be awarded on the basis that pension resources will become available on retirement, as a lump sum or income, or both, and for an order to be made for payment of a capital sum in instalments or deferred until a pension lump sum is available.

Payments for relief of serious financial hardship

5.75 We agree with the view expressed by respondents to the Discussion Paper that an order for payments over a limited period of time should be available where there is serious financial hardship brought about by the cessation of the relationship. The order should provide for payments to be made at intervals, over a maximum period of six months, on an *interim* basis if necessary. Availability of these short term payments should be restricted, such that the order may only be made if it is justified by guiding principle (b),[104] and is limited in terms of the duration of the payments. The payments are not intended to replicate periodical allowance or aliment[105] and are not based upon any alimentary obligation or the effect of cessation of any such obligation. Rather, the payments are intended to provide short term relief from serious financial hardship arising directly from the cessation of cohabitation, by enabling the applicant to meet expenses such as the cost of accommodation, child care costs or living expenses over, at most, a six month period.[106]

5.76 While we expect that applications for this order are most likely to be made at an early stage in the proceedings, on an *interim* basis, we also recognise that there may be circumstances in which the likelihood of serious financial hardship does not emerge until the parties have been separated for some time, and their financial circumstances have been fully

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[101] 1985 Act, sections 8(1)(baa), 27(1) and (1A).
[102] 1985 Act, sections 8(1)(ba) and 12A(2) or (3).
[103] See para 5.65.
[104] That is, that it is reasonable for the short term relief of serious financial hardship likely to be suffered by the applicant as a result of the cohabitation having ended. See paras 5.46 and 5.47 above.
[105] And therefore not susceptible to variation in the event of a change of circumstances.
[106] We do not think it is necessary, as urged by some respondents, to follow the approach in the 1985 Act, whereby periodical allowance is available only where an order for payment of a capital sum or property transfer order would be inappropriate or insufficient to satisfy the requirement that the orders are justified by the principles in section 9 or reasonable having regard to resources. The absence from our revised scheme of a principle similar to that in section 9(1)(a) of the 1985 Act, requiring the fair sharing of the net value of matrimonial / partnership property, renders such a provision unnecessary.

assessed. The payment is intended to address an immediate need for relief of serious financial hardship, on a short term basis, whenever the need arises. We do not therefore recommend that the stage at which such an order may be sought is limited or prescribed, nor that an order made on an *interim* basis may be varied with retrospective effect. However, we do recommend that any payment under the order is available for a maximum period of 6 months from the date when the order is made. It will be for parties and their advisors to identify when an order will be sought, taking into account the available information. This provision is intended to provide a short term remedy in limited circumstances, where the likelihood of serious financial hardship can be evidenced; we do not therefore propose a facility for variation of the amount or duration of payments.[107]

Incidental orders

5.77 We have already noted[108] that certain practical benefits flow from making incidental orders available to the court. These orders may be needed to facilitate implementation of orders for payment of a capital sum or for transfer of property, to identify the extent of economic advantage or disadvantage critical to the exercise of the court's discretion, provide security for payments or provide short term accommodation or financial certainty where there is vulnerability. We therefore recommend that incidental orders for valuation and sale of property, regulating occupancy of a relevant residence,[109] use of its contents and liability for outgoings and for the giving of security for financial provision be made available for cohabitants.

Ancillary orders

5.78 Under our revised scheme, orders may be made for payment of a capital sum, transfer of property, short term payments for the relief of serious financial hardship brought about by the end of the relationship and incidental orders. We recognise the need for certain ancillary orders, for the protection of the parties. For example, if compliance with an order for payment of a capital sum by a certain date, or by instalments, becomes impossible due to a material change in the payer's circumstances, the court ought to be able to consider what alternative arrangement for payment could be made, such as varying the date or method of payment. Similarly, if an order is made for transfer of property and a material change in circumstances renders transfer on the due date impossible, there is a need for provision enabling the court to alter the date by which the transfer of property must take place. The rights of third parties, including secured creditors, must also be protected, by including a requirement that consent to transfer of property, if required, must be sought and obtained prior to making the order; that secured creditors must be given the opportunity of being heard where consent to transfer of property is required; and that the rights of third parties shall not be prejudiced by the making of any order, including any incidental order.[110] In addition, provision must be made for variation or recall, by subsequent order on cause shown, of incidental orders.

Conclusion

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[107] Including the backdating of payments or clawback of sums already paid.
[108] At para 5.67.
[109] Defined as a residence which is or was during the cohabitation used by the cohabitants as their main residence.
[110] Similar to the provision in 1985 Act, s 15.

5.79 We have concluded that, in addition to the existing remedy of payment of a capital sum, provision should now be made for property transfer orders and orders for short term payments for the relief of serious financial hardship. These innovations will provide the court, where needed, with a much broader range of remedies, resulting in greater flexibility. They will assist in the resolution of disputes and thereby help to achieve fairer outcomes for cohabitants. If the remedies available to cohabitants are extended in this way, we recommend that certain incidental, ancillary and *interim* orders should also be available.

8. We recommend legislative change to include the following additional remedies when the court makes an order for financial provision on cessation of a cohabiting relationship:

(a) property transfer orders;

(b) payments for the short term relief of serious financial hardship, paid over a maximum period of 6 months from the date of the order;

(c) incidental orders for valuation and sale of property; regulating occupancy of the family home, use of its contents and liability for outgoings pending sale or transfer; and for security for financial provision;

(d) interim orders; and

(e) ancillary orders specifying the date for payment of a capital sum or transfer of property; providing for payment in instalments and for variation of the date or method of payment in the event of a material change in circumstances; requiring that the consent of third parties be given, where necessary, and giving heritable creditors an opportunity to be heard prior to the making of an order for transfer of property.

(Draft Bill, section 4 inserting section 28(3), (4) and (5) & section 28A into the 2006 Act)

Definition of "child"

5.80 In Chapter 5 of the Discussion Paper, we considered why the power of the court under section 28(2)(b) extends to making an order in respect of the economic burden of caring, after the end of the cohabitation, only for a child of whom both cohabitants are parents.[111] The Scottish Government intended to limit section 28(2)(b) in this way. It did not set out to introduce alimentary provision for cohabitants or alter in any way the existing arrangements for determining alimentary provision for children[112] but rather to reflect the principle in section

[111] Otherwise, for the purposes of s 28, a "relevant child" includes a child accepted as a child of the family; see s28(10). The provision in s 28(2)(b) also contrasts with s 9(1)(c) of the 1985 Act which sets out the principle that the costs of bringing up a child of either both or one of the parties so long as the other has accepted the child as a child of their family should be shared fairly between the parties. See also the definition of "child" in s 27 of the 1985 Act.

[112] In terms of the 1985 Act or child maintenance legislation.

9(1)(c) of the 1985 Act.[113] However, this policy has been subject to criticism on the grounds that it is inconsistent with the way children are treated in other legislation, appears arbitrary and may disproportionately adversely affect same sex couples.[114] In 2016, the Justice Committee concluded that the inconsistency of the definition of "child" in section 28(2)(b) with the wider definition in the 1985 Act was unfair.

Responses to Discussion Paper

5.81 We asked:

> Q.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?

5.82 Most respondents thought that no distinction should be made. Many commented that it was important that the court was also given discretion to assess the circumstances of each case, in particular the extent to which the child has been supported during the period of the cohabitation and will be supported after cohabitation by his or her other parent.

Arguments against retaining the distinction

5.83 The main arguments against retaining the distinction were that it can discriminate against same-sex parents, especially women who used a sperm donor rather than a licenced clinic, thereby leaving only one as the legal parent;[115] it is inconsistent with the provisions imposing alimentary obligations on those who have accepted children as children of the family under the 1985 Act,[116] with no clear justification for this; and it is contrary to the general principle of Scots family law that the interests of the child should be given paramount consideration.[117]

Arguments in favour of retaining the distinction

5.84 The main arguments in favour of retaining the distinction included that there is 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 that child as opposed to a child of one party; it would be unfair to impose upon the person who accepted the child as a child of their family an obligation to continue contributing to the child's support throughout their childhood; this should be left to the child maintenance system; and that financial arrangements may already be in place in respect of a child born prior to cohabitation commencing.

Definition of child: discussion and conclusion

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[113] But note the definition of "child" in 1985 Act, s 27; see the Discussion Paper, paras 5.18 to 5.22.
[114] See the Discussion Paper, paras 5.29 to 5.30.
[115] Unless and until the other has formally adopted the child. See the Discussion Paper, para 5.29.
[116] 1985 Act, s 1(1)(d).
[117] Brodies and Professor Sutherland observed that how children come to be part of a family is not relevant to their needs nor to the application of that principle. Jamie Foulis commented that an automatic distinction would not prioritise the interests of the child.

5.85 What section 28(2)(b) provides is a mechanism whereby an order may be made for payment to a former cohabitant of "an amount" in respect of any economic burden of caring, after the end of the cohabitation, for a child of whom the cohabitants are the parents;[118] it does not permit the making of an order for periodic payments for a defined or indefinite period. The only matters to which the court must have regard are those set out in section 28(3), which look to past economic advantage and disadvantage derived or suffered by the parties. An order under section 28(2)(b), like an order made in reliance upon the principle in section 9(1)(c) of the 1985 Act, is an order for financial provision in favour of one of the parties, quite separate from any provision for aliment in relation to children. Looked at in that way, it is difficult to see why any distinction is made between the children of both or of one of the couple, or indeed a child who is not a child of either but has been accepted by both as a child of the family.[119] An alimentary obligation exists if the child is accepted as a child of the family, however the family was formed.[120] We have concluded that this distinction should not be retained.

5.86 We agree that the court should have discretion to assess the particular circumstances in each case before making any award including, in particular, the extent to which a non-parent cohabitant has contributed towards the maintenance or upkeep of the child during the cohabitation and the extent to which the child has been and will be supported, after the cohabitation, by anyone who has an obligation of aliment in terms of section 1 of the 1985 Act. We are mindful of the terms of section 11(3) of the 1985 Act, which prescribes those matters that the court shall have regard to for the purposes of section 9(1)(c) of that Act, and propose following a similar approach when formulating the test for financial provision in respect of the economic burden of child care.[121]

9. We recommend that there should be no distinction between a child of whom the cohabitants are parents and a child accepted by them as a child of the family, for the purpose of assessing financial provision on cessation of cohabitation, including in relation to the future economic burden of child care. We therefore recommend that a "relevant child" for the purposes of these provisions be defined as, a person under 16, of whom the cohabitants are the parents, or who is or was accepted by the cohabitants as a child of the family.

(Draft Bill, section 4 inserting section 28G into the 2006 Act)

[118] Subject to the ability to order payment on a specified date or by instalments under s 28(7).
[119] Such as a niece or grandchild of one or both of them; see *Inglis v Inglis & Matthew* 1987 SCLR 608; *Re A (Child of the Family)* [1998] 1 FLR 347.
[120] 1985 Act, s 1(1)(d).
[121] See para 5.53.

Chapter 6 Time limit for making a claim

6.1 A claim for financial provision under section 28 of the 2006 Act must be made within one year of the date of cessation of cohabitation.[1] There is no discretion to allow late claims. In Chapter 6 of the Discussion Paper[2] we discussed this time limit, criticism of it and relevant case law. We also considered statutory time limits in other areas of Scots law[3] and time limits for claims by cohabitants in comparative jurisdictions.[4] We then sought views on options for reform.

Background

6.2 It was acknowledged in the 1992 Report that any time limit for making a claim for financial provision on cessation of a cohabiting relationship was arbitrary. However, our predecessors considered that a fairly short time limit of one year would discourage stale claims and allow parties to a terminated cohabitation to know where they stood. They considered that one year should allow adequate time for a former cohabitant to take legal advice and for any action to be raised.[5] The Scottish Government followed this recommendation and the time limit of one year was confirmed in section 28(8) of the 2006 Act.

6.3 Since then, in 2010, the Wasoff, Miles and Mordaunt Report noted practitioners' views that the time limit and / or lack of discretion to allow late claims can lead to cases being raised and sisted,[6] instead of being negotiated, in order not to fall foul of the time bar.[7] Later, in its 2016 post-legislative scrutiny of the 2006 Act,[8] the Scottish Parliament's Justice Committee noted that various submissions suggested that the time limit was too short and, in particular, might discriminate against couples who had separated but might yet reconcile.

6.4 During our pre-consultation discussions, some stakeholders told us that the time limit is not problematic. Others called for it to be extended, or said that the courts should be afforded discretion to allow late claims. Practitioners confirmed that they tend to advise that court actions are raised and then sisted to protect the client's position and allow time to negotiate, but noted that the time limit could have the effect of barring counterclaims if actions were

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[1] Appendix B, s 28(8).
[2] Discussion Paper on Cohabitation (Scot Law Com No. 170, 2020), available at: https://www.scotlawcom.gov.uk/files/1115/8270/8061/Aspects_of_Family_Law_-_Discussion_Paper_on_Cohabitation_DP_No_170.pdf.
[3] Paras 6.17 to 6.22.
[4] Paras 6.23 to 6.31.
[5] Report on Family Law (Scot Law Com No. 135, 1992), para 16.21, available at: https://www.scotlawcom.gov.uk/files/5912/8015/2668/Report%20on%20family%20law%20Report%20135.pdf.
[6] Set aside, pending settlement or further order of court.
[7] Fran Wasoff, Jo Miles and Enid Mordaunt, "Legal Practitioners' Perspectives on the Cohabitation Provisions of the Family Law (Scotland) Act 2006" (October 2010), University of Cambridge Faculty of Law Research Paper No. 11/03, p 127, available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1736612, noting in particular, "unnecessary use of courts, imposing a burden on court administration, and a cost to the parties" and that "it also has the potential for exacerbating conflict between parties."
[8] Scottish Parliament Justice Committee, Post-Legislative Scrutiny of the Family Law (Scotland) Act 2006, SP Paper 963 (Session 4), 17 March 2016, available at: https://archive2021.parliament.scot/S4_JusticeCommittee/Reports/JS042016R06.pdf.

raised close to the deadline.[9] Many responses to the questionnaire that we circulated to solicitors prior to our consultation[10] gave accounts of clients approaching them for advice after the expiry of the time limit; others described the need to raise court actions swiftly to avoid the time bar. Lack of public awareness of the 2006 Act provisions, and of the time limit in particular, was again highlighted. Most respondents favoured extending the time limit.

6.5 The absence of provision for judicial discretion to allow late claims has also been mentioned in the context of considering whether the common law remedy of unjustified enrichment remains available to former cohabitants. The conclusion reached by the authors of a 2017 article that questioned the decision in *Courtney's Executors v Campbell*[11] was that, if there was at least discretion to permit late claims, there would be less need for claims based on unjustified enrichment.[12] Since then a full bench in the Inner House of the Court of Session has confirmed the availability of claims based on unjustified enrichment in addition to claims under section 28.[13]

Law Society of Scotland consultation

6.6 In 2018, the Law Society of Scotland published a consultation on the rights of cohabitants under sections 28 and 29 of the 2006 Act.[14] Views were not sought, specifically, on the time limit for section 28 claims. However, some respondents took the opportunity to express views, which were mixed, as to whether the time limit causes difficulty in practice and, if so, how the problem should be resolved. The resulting report[15] suggested that legislation be introduced providing the court with discretion to accept an application under section 28 after expiry of the one year time limit.

Case law and legislation

6.7 In *Simpson v Downie*,[16] the defender counterclaimed for financial provision under section 28 more than a year after the parties had ceased to cohabit. The pursuer unsuccessfully sought dismissal of the defender's claim on the basis that it was time-barred. In his appeal to the Inner House of the Court of Session, he argued that compliance with the one year time limit was an integral and imperative precondition to a claim under section 28.[17] The Extra Division upheld the appeal:

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[9] For discussion of this issue in the case of *Simpson v Downie* 2013 SLT 178 see paras 6.7 to 6.8.
[10] See the Discussion Paper, paras 1.44 and 6.10.
[11] *Courtney's Executors v Campbell* 2017 SCLR 387 at para [70], in which the availability of a claim based on unjustified enrichment in cases where the remedy under section 28 was not applied for in time and the potential need for reform of the 2006 Act to protect cohabitants was considered.
[12] Gillian Black and Daniel Carr, "Cohabitants' rights in conflict: the Family Law (Scotland) Act 2006 vs unjustified enrichment in Courtney's Executors v Campbell", (2017) 21(1) Edin LR 293.
[13] *Pert v McCaffrey* 2020 SC 259, para [24]. Claims based in unjustified enrichment are subject to the 5 year prescriptive period, in terms of the 1973 Act, s 6 and Sch 1, para 1(b). For fuller discussion of the interaction between claims under the 2006 Act provisions and those based on unjustified enrichment, see Ch 8.
[14] The Law Society of Scotland, "Call for views – rights of cohabitants", November 2018, available at: https://www.lawscot.org.uk/media/363108/18-10-17-rights-of-cohabitants-call-for-views.pdf; see also the Discussion Paper, paras 6.12 and 6.13.
[15] The Law Society of Scotland, "Rights of cohabitants: Family Law (Scotland) Act 2006, sections 28 and 29", March 2019, available at: https://www.lawscot.org.uk/media/361911/rights-of-cohabitants-paper.pdf.
[16] 2013 SLT 178.
[17] The defender argued that s 28(8) comprised only a procedural bar capable of being asserted or waived by the benefited party.

> "[We] have reached the conclusion that the parliamentary intention behind s.28, read as a whole, is that the court's novel jurisdiction to entertain cohabitants' financial claims may be exercised only in respect of applications which are made within the one year time limit laid down in subs.(8). The entitlement conferred by subs.(2) is in our view of a procedural nature, permitting a claimant to seek a discretionary order from the court. A cohabitant has no independent substantive right to financial provision. … in our opinion, it is only compliance with the time limit which validates an application and clothes the court with the necessary jurisdiction. …."[18]

6.8 The Extra Division acknowledged the difficulties that some former cohabitants would face as a consequence of the strict statutory time limit:

> "No doubt a strict statutory regime of this kind may work hardship in some cases, for example when one party delays making a claim until the one-year period is nearly up and the other, taken by surprise, is left with no opportunity to follow suit. On the other hand, Parliament must have envisaged such circumstances when the relevant provisions were enacted, and deliberately elected to make no provision for discretionary relief."[19]

6.9 We have considered other areas of Scots law where there is provision for overriding a time limit for the making of a claim or assertion of rights.[20] We noted that section 19A of the Prescription and Limitation (Scotland) Act 1973 ("the 1973 Act")[21] provides that the court may override the prescriptive period for claims for damages for personal injuries and in certain other classes of actions "if it seems to it equitable to do so"; the Employment Rights Act 1996 provides that an employment tribunal shall not consider a late claim unless it is satisfied that it was not reasonably practicable for the complaint to be presented within the three month time limit or a reasonable period thereafter;[22] the Criminal Justice Act 1988 gives discretionary power to the Scottish Ministers to accept a late application for compensation for miscarriage of justice "if they think it is appropriate in exceptional circumstances to do so";[23] and the Scottish Public Services Ombudsman Act 2002 provides that a complaint may not be heard outwith the 12 month time limit unless the Ombudsman, "is satisfied that there are special circumstances which make it appropriate to consider a complaint outwith that period."[24]

Extension of the time limit

Responses to Discussion Paper

6.10 We asked:

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

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[18] Para [13].
[19] Para [14].
[20] See Discussion Paper, paras 6.17 to 6.22.
[21] S 6 of which sets out when certain rights and obligations prescribe.
[22] S 111(2).
[23] S 133.
[24] S 10.

6.11 Most respondents expressed some dissatisfaction with the current provision. Views were fairly evenly divided as to whether the time limit should be extended or not, with many respondents calling for judicial discretion to allow late claims.[25] Two sheriffs and the Senators thought the time limit should remain as it is and the Sheriffs' Association deferred to practitioner groups[26] on this issue. The Family Law Association commented that the time limit was too short, but that views among members were divided as to whether the solution lay in extending the time limit or giving the court discretion to allow late claims. Both the Law Society and the Faculty of Advocates favoured keeping the time limit as it is, with discretion to allow late claims. The Glasgow Bar Association favoured extension of the time limit. Individual solicitors, counsel and solicitors' firms were fairly evenly divided on this question. Non-lawyers were also broadly equally divided, and rather more academics favoured extending the time limit than keeping it as it is.

6.12 Arguments for extending the time limit were, broadly: a year is insufficient to deal with the emotional and financial fallout of relationship breakdown;[27] where there is a power imbalance in the relationship, the time limit is problematic for the economically weaker party; it can lead to the raising and sisting of actions, barring of counterclaims, discouraging negotiated settlements and preclusion, sometimes intentionally, of a cross-claim; and it is too rigid and produces overly harsh results.

6.13 Most of those who opposed extending the time limit agreed that it had caused problems or led to unfairness, but preferred giving the court discretion to allow late claims. Some commented that a one year time limit, while reasonably short, allows cohabitants to move on with their lives without the prospect of a claim hanging over them. The Senators commented that short time limits generally encourage expedition in decision making and avoid problems of evidence being lost or becoming stale; they too, however, favoured a discretionary power "to allow extension in appropriate cases". While SWA was opposed to extending the time limit on the basis that it could facilitate the continuation of abuse after separation,[28] they thought that extension would offer women experiencing domestic abuse the opportunity to consider a claim once they had dealt with more urgent matters, such as finding accommodation, obtaining protective orders and issues around children.

6.14 We also asked:

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

6.15 Of the respondents who considered that the time limit should be extended and expressed a view, just over half thought it should be extended to two years.[29] Reasons given were that: one year is too short whereas two years, with judicial discretion to extend in exceptional cases, would avoid injustice and respect the balance of rights; two years may

[25] Whether in addition to or instead of an extension.
[26] In particular, the Family Law Association and Advocates Family Law Association.
[27] This could arise where, for example, a former cohabitant, because of domestic abuse or not owning the shared home, would be focusing on finding alternative accommodation, enrolling children in new schools and applying for work or benefits. These urgent matters would take priority over seeking legal advice, so the strict one-year time limit might seem overly restrictive.
[28] For example, by holding the threat of a financial claim over a woman or as a lever to demand contact with children.
[29] Others suggested 18 months to two years, three years, or five years.

avoid actions being lodged simply to avoid expiry of a claim, unnecessary costs to clients, and unnecessary administration for the courts; two years allows for negotiation and litigation if negotiations fail; and, while a five-year limit might be appropriate given the five-year prescriptive period for common law claims for unjustified enrichment, two years is typical in the jurisdictions that have gone furthest in making the financial consequences of cohabitation breakdown equivalent to that for divorce.

Judicial discretion

6.16 We asked:

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

6.17 Most of the respondents who had told us they favoured retaining the existing time limit did not answer this question, referred us to their earlier response or commented that their response depended on the length of the extension of the time limit or the test for the exercise of discretion. Most of those who did respond answered in the affirmative. Respondents who favoured introduction of judicial discretion in addition to extension of the time limit told us that: some flexibility would be beneficial to avoid a hard-line rule (having regard to the emotional and practical complexities of relationship breakdown); arbitrary time limits which cannot be extended can "work hardship" in some cases;[30] there may be genuine reasons why someone cannot raise the action within the standard time scale, such as an abusive relationship or significant ill-health;[31] and attempts to settle by negotiation or by Alternative Dispute Resolution (ADR) may be adversely affected by the absence of discretion.[32]

6.18 We then asked:

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

6.19 An overwhelming majority of respondents said that if the time limit is not extended, there should be judicial discretion to allow late claims.

6.20 There was therefore strong support for the introduction of judicial discretion to allow late claims, whether the current time limit was extended or not. Lack of flexibility and the risk of unfairness or hardship were of greater concern to respondents than the length of the time limit itself. Even the sole respondent opposed to either extending the time limit or permitting discretion to allow late claims suggested that one could "stop the clock" to facilitate agreement, and that "maybe [discretion should be available] in the event of extreme hardship not covered by unjustified enrichment".

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[30] Dr Barnes Macfarlane, referring to *Simpson v Downie* 2013 SLT 178.
[31] Thorntons, referring to the approach in comparative jurisdictions which allow for late claims either in "exceptional circumstances" or in "special circumstances".
[32] Law Society of Scotland (whose primary position was that the one year limit should be retained) and GBA.

Stakeholder meetings

6.21 During the consultation period, we held meetings with stakeholders at which we sought views on whether the time limit for claims should remain as it is and, if not, what the time limit should be. While views were mixed,[33] the majority agreed there was a need for change. Suggestions included removing the time limit altogether; leaving it as it is but raising awareness; introducing judicial discretion to allow late claims; extension (with or without judicial discretion) to 18 months, two years or three years; and a time limit proportionate to the length of the relationship. We also asked stakeholders whether judicial discretion to allow late claims should be introduced. Among those who expressed a view, there was slightly more support for introducing judicial discretion than for extending the time limit.

Discussion: time limit

6.22 We found that, while there was general dissatisfaction with the existing time limit, views were mixed as to whether the solution lay in extending it, introducing judicial discretion to allow late claims or both. Professor Mair perhaps best summed up the prevailing view of respondents in her comment that "[t]he period, but perhaps even more so the firmness of the limit have caused problems". There was no consensus as to the duration of any extended time limit. Comparison with time limits for claims in other jurisdictions would tend to suggest that the one year limit in section 28(8) is somewhat short.[34] That, taken with the absence of provision for judicial discretion to permit late claims, might suggest that the Scottish approach takes something of a hard line.

6.23 We have some sympathy with the arguments for extending the time limit. Particularly persuasive are those highlighting the potential disadvantage that may be suffered by an economically vulnerable party and the difficulty for couples dealing with the practicalities of the breakdown of a relationship, including negotiating settlement of their financial arrangements, while also having to think about whether to raise a claim within a tight timescale. However, any time limit is necessarily arbitrary and there is always a risk that claims will be sought to be made outwith the time limit, often for good reason. We acknowledge the need to safeguard against stale or spurious claims and to give parties a reasonable opportunity, in difficult circumstances, to take advice and submit claims. We are not, however, persuaded that the only, or best, solution is extending the time limit.

6.24 Almost all of the respondents who answered questions 20 and 21 told us that, whether or not the time limit is extended, the court should also be afforded discretion to consider late claims. This suggests that the solution to the issues highlighted in relation to the time limit lies not in extending it, but in introducing some flexibility.

6.25 We have concluded that, in the interests of fairness and flexibility, and given the risk of hardship arising from an arbitrary time limit, any reform should balance access to claims with the need for certainty and the ability of separated cohabitants to move on and make plans

[33] Comments included that: greater awareness of the law would reduce the need for extension of the time limit; there is risk of stale claims if there is too much flexibility; there could be inconsistency with the exercise of judicial discretion.
[34] See the Discussion Paper, paras 6.23 to 6.30.

for the future. We think this will be achieved by retaining the existing time limit and introducing provision for the exercise of judicial discretion to permit late claims in limited circumstances. Accordingly, we make no recommendation for legislative change to the length of the time limit for a claim for financial provision by a former cohabitant whose cohabitation has ended otherwise than on death. However:

10. We recommend legislative change to afford the court discretion to allow late claims, subject to the test and backstop discussed below.

(Draft Bill, section 4 inserting section 28E into the 2006 Act)

The test and backstop

Responses to Discussion Paper

6.26 We asked:

Q.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?

Test

6.27 Responses to Question 22(a) were mixed and a number of different approaches were suggested. About one third of respondents unequivocally favoured an "on cause shown" test; fewer unequivocally favoured an "exceptional circumstances" test. Some respondents suggested enhancements to or modifications of an "exceptional circumstances" test, such as inclusion of a non-exhaustive list of "exceptional circumstances"[35] or alternative language such as "on exceptional cause shown" or "on special cause shown". Other suggestions included a test similar to that in section 19A of the 1973 Act[36] based on equity, a reasonableness test or a test based on the likelihood of hardship if the action did not proceed.

6.28 Arguments for a "cause shown" test included that it: allows maximum flexibility in the court's discretion; can accommodate all factual circumstances that may arise; ensures the principle of fairness is the paramount consideration; allows a party to point to practical and other difficulties in raising a claim,[37] none of which are "exceptional", but should be potential grounds for extending the time limit; would be sufficient to cover delay for tactical and emotional reasons; and is more commonly found within existing legislation and court rules and

[35] Such as engagement in a dispute resolution process, hardship or domestic abuse and incapacity or other serious extenuating circumstances.
[36] S 19A(1) of the 1973 Act provides "(w)here a person would be entitled, but for any of the provisions of section 17, 18, 18A or 18B of this Act, to bring an action, the court may, if it seems to it equitable to do so, allow him to bring the action notwithstanding that provision."
[37] See the Discussion Paper, para 6.26 in relation to New Zealand.

therefore bears greater clarity and understanding.[38] Arguments against this approach included that: there is a risk that lack of awareness of the right to make a claim would amount to "cause shown", which should not be sufficient reason for the exercise of discretion; it may be too widely relied on, making the time limit irrelevant; and that too low a bar provides insufficient certainty as to when one is safe from a claim.

6.29 Arguments for an "exceptional circumstances" test included that: there is a need to avoid late nuisance claims; a restrictive test may be more appropriate for extension of a statutory time limit; and the court is familiar with the concept of "exceptional" or "special circumstances" in the context of relationship breakdown.[39] Arguments against such a test included that it is too high or unduly high, based on each sheriff's subjective interpretation of the word "exceptional", and is "likely to lead to an excessively narrow judicial approach".

6.30 The views of decision makers are particularly persuasive. The Sheriffs' Association said that, if the court was to be afforded discretion, it should be "in exceptional circumstances" or another formulation which makes it clear that something other than simple ignorance of the time limit or oversight is required, as "'cause shown' may be so widely relied upon as to make the time limit irrelevant". Sheriff Mackie also favoured an "exceptional circumstances" test. Similarly, the Senators, while noting that "on cause shown" has some attractions, as it is well understood and able to accommodate all circumstances, considered it prudent to introduce a more restrictive test, such as "on special cause shown" or "in exceptional circumstances". Sheriff Holligan suggested a test requiring the applicant to satisfy the court that the application could not reasonably have been brought within the relevant period and that the applicant will suffer hardship if the application is not permitted; this approach would be consistent with the "special cause shown" test advocated by the Senators, as it would be for the applicant to persuade the court that circumstances peculiar to the case or the parties would require to be shown.

6.31 The Aberdeen University academics asked whether a non-exhaustive list of circumstances that could be taken into account by the court in the exercise of discretion would be helpful. However, none of the decision-makers who responded to this question suggested that such a list would assist in the exercise of discretion.

Backstop

6.32 A majority of respondents to Question 22(b) thought that there should be a backstop beyond which no claim for financial provision could be made. Arguments focused on allowing people to move on in their lives, without the indefinite risk of exposure to a claim. Suggestions

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[38] Law Society of Scotland, who commented that they had conducted research into this issue previously and preferred leaving the time limit at one year and introducing judicial discretion to allow late claims; see The Law Society of Scotland, "Rights of cohabitants: Family Law (Scotland) Act 2006, sections 28 and 29", March 2019, available at: https://www.lawscot.org.uk/media/361911/rights-of-cohabitants-paper.pdf.

[39] The example given was s 10(1) and (6) of the 1985 Act. We note, however, that s 10(6) of the 1985 Act is concerned, not with relationship breakdown as such, but with the distribution of matrimonial / partnership property on divorce / dissolution and provides for departure from the norm of equal sharing of the net value of such property where there exist circumstances special to the particular case; see *Jacques v Jacques* 1997 SC (HL) 20), referred to at para 6.39 below. Other examples in the 1985 Act are ss 3(1)(c)(ii) and 7(2ZA)(b)(ii), relating to the backdating of, respectively, an award of aliment or variation of the amount of aliment payable under an agreement; we have been unable to identify any authorities applying the latter section; see para 6.38 below.

as to the length of the backstop were: three years, because "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"; two years, because anyone can divorce after two years; and that it depends on the time limit (for example, if the time limit is kept at one year the backstop should be two years). Opponents said that, if fairness is the overarching principle driving change, it is hard to argue for a backstop which will prevent a claim and that, if the concept is to cast the net wide, then removing barriers instead of imposing them will have the greatest impact.

Discussion: test and backstop

Test

6.33 There was marginally more support for a "cause shown" test for the exercise of discretion than for an "exceptional circumstances" test. However some respondents, including decision makers, were concerned that this test might be insufficiently rigorous. We have concluded that the test should be sufficiently rigorous to exclude spurious or nuisance claims and late claims brought solely in ignorance of the time limit. We note, however, comments that an "exceptional circumstances" test is too restrictive, particularly when viewed alongside our proposal that the current time limit for claims be retained.

6.34 While a test modelled on that in section 19A of the 1973 Act has some immediate attraction, that test, and decisions made applying it, must be viewed in the context of claims for damages for personal injury, where knowledge of fault and / or injury may arise many years after the index event. In the context of relationship breakdown, different considerations apply. The equity of allowing a late claim by a former cohabitant will doubtless form part of the exercise of discretion, as should the reasons for lateness. Any such claim is likely to arise within a relatively short period following the end of cohabitation, so that considerations such as the risk of stale claims or loss of evidence, which are significant in relation to personal injury claims, are less likely to occur. We have concluded that a test based on section 19A of the 1973 Act would not be appropriate in this context.

6.35 We agree with respondents that a test for the exercise of discretion "in exceptional circumstances" is too restrictive and "on cause shown" not restrictive enough. We tend to agree with respondents who suggested that a test of "on special cause shown" strikes a better balance in the context of an application to allow a late claim for financial provision.

6.36 The meaning of "special cause" is well established. In *Taylor v. Dumbarton Burgh and County Tramway Co. Ltd,* Lord Shaw of Dunfermline observed:

> "…the 'special cause'…must be a cause special to the particular case that is being tried, and not a general cause applicable to the situation of the country at large or to any views with regard to that situation which judges may entertain."[40]

[40] 1918 SC (HL) 96, p 108, in the context of determining whether an action of damages for personal injury before a judge without a jury was justified under s 4 of the Evidence Act 1866.

6.37 That approach to construction of the "special cause" test has been followed since. In *Glennie v Gillies*[41] the Lord Justice-Clerk, Lord Ross, delivering the opinion of the Second Division, stated that the Court noted that special cause must be special to the particular case. In *Heasman v JM Taylor & Partners,*[42] Lord Coulsfield, delivering the opinion of an Extra Division said:

> "…It has been well established for many years that 'special cause' means a cause special to the particular case…there is nothing about the circumstances of this particular case which can be regarded as special or unusual as compared with other actions of damages for personal injury."

6.38 We have considered circumstances where a similar test is applied in the context of Scots family law. Section 3(1)(c)(ii) of the 1985 Act enables the court to backdate an award of aliment to a date prior to the bringing of the action "on special cause shown". The test has been interpreted as requiring "more than the usual refusal to pay".[43] In *Mitchell v Mitchell,*[44] Sheriff Principal Ireland QC said:

> "Whether any particular set of circumstances amounts to special cause is primarily a matter for the judgment of the sheriff…In this case the defender failed to carry out an obligation laid on him by the law, with the result that the pursuer and her mother suffered hardship. If the award is not backdated, the obligation will remain unperformed and the hardship unredressed. Those are in my view circumstances which the sheriff was entitled to treat as special cause for the purposes of section 3(1)(c)(ii)."[45]

6.39 In *Jacques v Jacques*, Lord Clyde considered the words "special circumstances" where they appear in section 10(1) and (6) of the 1985 Act and noted that "[t]he words 'special circumstances' do not have any technical meaning but refer to any circumstances which are special to the case."[46]

6.40 We have concluded that the court, faced with a late application for financial provision by a former cohabitant, should decide whether to exercise discretion to allow the late claim on special cause shown. Mere ignorance of the time limit would not be sufficient for the exercise of discretion. We would expect the court to take account of matters such as the illness of one of the parties or their children, whether there is a history of domestic abuse and other social and economic factors arising from the relationship breakdown which have caused or contributed to the lateness of the claim. However, we are not persuaded that the inclusion within the legislation of a non-exhaustive list of examples of circumstances that might amount to special cause is needed. As we have outlined above, the court has available to it a raft of authorities on the interpretation of "special cause", which can readily be applied when deciding whether to exercise discretion to allow a late claim to proceed.

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[41] 1988 SC 73, p 74, in the context of an application to allow an action for damages for personal injuries to proceed as an ordinary action under the optional procedure in terms of the Rules of Court 1965, rule 118J.
[42] 2002 SC 326, para 4.
[43] *Adamson v Adamson* 1995 SLT (Sh Ct) 45, Sheriff Principal Macguire QC at p 4. A similar approach was taken by Sheriff McLernan in *Buchan v Buchan* 1993 SCLR 158 at p 159.
[44] 1992 SCLR 553.
[45] P 554.
[46] *Jacques v Jacques* 1997 SC (HL) 20, Lord Clyde at p 20.

Backstop

6.41 There was strong support for introducing a backstop period beyond which no claim for financial provision could be made. Respondents' views as to its length ranged from one year to five years, with two or three years from the date of cessation of cohabitation most often suggested. In effect, their suggestion was that the ability to consider a late claim should end one year after expiry of the time limit.

6.42 We aim to balance the need for accessibility to claims with the equally important need for certainty and protection from stale claims. The fact that cessation of cohabitation, unlike separation of spouses or civil partners, brings the relationship to an end without further formality is significant. The absence of a process, such as divorce or dissolution, by which the relationship (and with it any right to claim financial provision) ceases, means that the legislation that creates the right to claim financial provision must also express clearly when that right comes to an end. Parties in an unregistered relationship, with no mechanism for formally bringing it to an end, who are potentially liable to make financial provision for their former partner, must be able to make plans and move on after separation, with certainty as to when the risk of a claim will no longer exist. We therefore recommend that legislation expressly includes provision for a backstop of two years from the date of cessation of cohabitation, beyond which the court may not exercise discretion to entertain a claim for financial provision. We make that recommendation on the basis that the existing one year time limit for claims will remain in place, subject to discretion to allow a late claim on special cause shown.

Accordingly:

11. We recommend that the test for exercise of judicial discretion to allow a late claim to proceed should be "on special cause shown".

(Draft Bill, section 4 inserting section 28E(2) into the 2006 Act)

12. We recommend that there is a maximum period of two years from the date of cessation of cohabitation beyond which no claim for financial provision may competently be made by a former cohabitant.

(Draft Bill, section 4 inserting section 28E(2) into the 2006 Act)

Agreement to extend the time limit

Responses to Discussion Paper

6.43 We asked:

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

6.44 There was strong support for allowing parties to agree extension of the time limit, although some respondents commented that, if the time limit was extended, there would not be much need for this provision.[47]

6.45 Respondents told us that allowing parties to agree extension of the time limit to facilitate settlement would avoid unnecessary litigation or actions being raised and sisted to avoid expiry of the time limit, resulting in savings in legal fees and court time, and would allow for communication and co-operation between parties. Some support for this approach came with caveats, including that: it should be for a maximum period of time to prevent undue delay in case resolution; it should be available only where parties have agreed to engage in a form of ADR;[48] and that the agreement to extend must be formally recorded in writing, fairly entered into and subject to any statutory backstop provision that is introduced. SWA commented that a perpetrator of abuse could manipulate the process using threats and coercion to force a woman to agree an extension;[49] and Thorntons focused on potential abuse of the process, querying whether the reasonableness of the parties in negotiation would become a matter for the Sheriff to rule on in any question as to expenses. We acknowledge that such a result would be undesirable and may adversely affect some parties' willingness to engage in settlement negotiations.

Stakeholders' views

6.46 We asked stakeholders whether parties should be able to agree extension of the time limit to facilitate settlement. A majority of the solicitors that we spoke to were in favour of this proposition. However, none of the AFLA participants were in support of it.[50]

Discussion: agreement to extend the time timit

6.47 The views of solicitors on this issue are particularly compelling, with most supporting a provision that would enable parties to continue negotiation, for a limited period, without facing the need to raise proceedings in order to avoid a time bar. We note that all of the members of the judiciary who responded to this question were in favour of such a provision. They, like the solicitors, acknowledged that it would avoid unnecessary actions being raised and sisted.

6.48 The benefit of this approach, in our view, would be that cohabitants who genuinely wish to resolve their financial claims and reach agreement as to their financial arrangements following separation would be free to do so, without worrying that a court action might be raised

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[47] They also said that 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 they noted was relatively common.

[48] The Faculty of Advocates was supportive of extension by agreement only where parties are engaged in a form of ADR, such as mediation, arbitration or collaboration; and said that any extension should be for a fixed term of no more than six months, on one occasion only, to prevent the process of resolution becoming protracted; we note this would be similar to the provision in s 29A of the 2006 Act, which extended the relevant time limit under ss 28 or 29 to a date 8 weeks after the end of mediation in a relevant cross-border dispute, prior to its repeal in 2020.

[49] They also suggested that an accompanying provision would be needed, requiring the court to overturn any agreement where a vulnerable party has been exploited; where the agreement is unfair or inequitable or would disadvantage one of the parties; or where there is domestic abuse.

[50] Comments from them included that it was difficult to see why parties would want this; parties can raise and then sist an action so it is unnecessary; and that it is a good idea in theory, but unlikely that parties would be able to do it, given their relationship has broken down.

against them, or that they are under pressure to settle within one year of cessation of the relationship.[51] Additional benefits include relieving pressure on the courts, by reducing the number of actions raised and immediately sisted, and saving of legal aid expenditure and private financial resources.

6.49 We acknowledge concerns that such a provision could be open to abuse. Therefore, while we are in favour of its inclusion, given the level of support for it, we also wish to impose some conditions and restrictions on its use.

6.50 We agree that if parties want to agree extension of the time limit to enable them to conclude negotiations, they should be required to enter into a formal written agreement to this effect. The right to extend the time limit for this purpose is limited to six months (in other words 18 months from the date of cessation of cohabitation[52]), and available only where neither party has raised an action for financial provision. The content of the written agreement will be prescribed by statute and must record the date of cessation of cohabitation, that parties have agreed to negotiate and that they agree to extension of the time limit for that purpose.

6.51 We recognise that negotiations might break down at any time during the 18 month period after cessation of cohabitation. Parties who have entered into an agreement to negotiate (and their advisors) must therefore remain alert to the need to raise proceedings before the expiry of the extended period; if they fail to do so, their applications will not proceed unless permitted by the court on special cause shown. An application to allow a late claim must always be made within the absolute backstop period of two years from the date of cessation of cohabitation. Therefore, if negotiations break down, either party may raise proceedings within the extended period (18 months from the date of cessation of cohabitation). If they miss that extended time limit, their application will be late and an application to allow the late claim on special cause shown must be made within six months of the expiry of the extended period, in other words, within two years of the date of cessation of cohabitation.

6.52 We carefully considered whether, in order to make use of this provision, parties should be compelled to engage in negotiations by way of a recognised form of ADR. We concluded that excluding informal negotiation may ignore the reality of most cohabitants' experiences and their preference for resolving financial claims through informal negotiation between their solicitors and at the lowest possible cost. Therefore, we prefer to leave it to parties to choose the means by which their claims are negotiated.

Accordingly:

13. We recommend that the legislation include express provision allowing parties to agree extension of the one year time limit to facilitate settlement, subject to the following conditions:

(a) the extended period shall be for a maximum period of six months;

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[51] See David Johnston, *Prescription and Limitation of Actions* (2nd edn, 2012), para 4.05; see also The White Book Service 2019: Voume 1, in relation to "standstill agreements", which can be used in the commercial context, and in relation to professional negligence claims, to afford parties time to negotiate.
[52] Which we refer to as "the extended period".

(b) agreement to extend the time limit shall be possible on only one occasion, must be in writing and must record: the date the parties ceased cohabiting; that they have agreed to negotiate with a view to reaching agreement on financial provision; and that they agree to the extension of the time limit (to 18 months from the date of cessation of cohabitation).

(Draft Bill, section 4 inserting section 28F into the 2006 Act)

Chapter 7 Cohabitation Agreements

7.1 In Chapter 7 of the Discussion Paper[1] we discussed contractual arrangements between cohabitants, which we referred to as "cohabitation agreements". Such agreements might include matters such as opting out of the 2006 Act regime, provision for ownership of property, ring-fencing assets and division of assets on separation, and might be entered into before cohabitation commences, during the cohabitation or after cohabitation ceases. Couples might also include arrangements for other matters, such as the care of children after cessation of cohabitation, in a cohabitation agreement. We recognise that such arrangements may have a bearing on parties' financial circumstances and plans. We sought views on whether statutory provision should be made permitting the court to have regard to the terms of any agreement between cohabitants as to financial provision on cessation of cohabitation (including an agreement to opt out of the 2006 Act regime) when deciding what order, if any, to make. We also sought views on whether such an agreement, or any of its terms, should be susceptible to variation or setting aside by the court and, if so, on what basis.

7.2 In this Chapter we use the term "cohabitation agreement" to refer to any agreement between cohabitants, including those which include terms concerning financial provision after the end of the cohabitation. We explain the relevance of cohabitation agreements in the context of claims for financial provision. We recommend that the court must have regard to such agreements when applying the principles by which applications for financial provision are determined and must not make an order for financial provision that is inconsistent with the agreement.[2] We also explain the circumstances in which the rights of cohabitants to oust, by agreement, the jurisdiction of the court should be limited.

Background

7.3 Agreements between cohabitants relating to financial arrangements on cessation of cohabitation are subject to the ordinary law of contract, with no exceptions. The treatment of agreements between spouses and civil partners as to financial provision on divorce and dissolution is different. Section 16 of the 1985 Act provides a limited exception to the ordinary law of contract, enabling the court to set aside or vary an agreement, or any term of an agreement, as to financial provision on divorce or dissolution if the agreement was not fair and reasonable at the time it was entered into.[3] The 1985 Act otherwise acknowledges that parties may make their own arrangements, by providing that regard may be had to the terms of any agreement between the parties on ownership or division of property when considering whether special circumstances exist justifying departure from the norm of equal sharing.[4]

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[1] Discussion Paper on Cohabitation (Scot Law Com No. 170, 2020), available at: https://www.scotlawcom.gov.uk/files/1115/8270/8061/Aspects_of_Family_Law_-_Discussion_Paper_on_Cohabitation_DP_No_170.pdf.

[2] See Ch 5, para 5.55 and Rec 7, and para 7.27 and Rec 14(a) and (b).

[3] S 16(1)(b). We are not concerned here with s 16(1)(a), which makes provision for the variation or setting aside of an agreement relating to periodical allowance where the agreement expressly provides therefor, as periodical allowance is not currently available to cohabitants on cessation of cohabitation, and we do not recommend that that position should change.

[4] S 10(1) and (6)(a).

7.4 Section 16 of the 1985 Act applies to agreements made during or prior to marriage or civil partnership[5] and parties are not limited in terms of the model, time scale or content of the agreement.[6] In *Gillon v Gillon,* the principles to be applied in deciding whether to set aside an agreement were confirmed.[7] Those principles are: the agreement should be examined from the point of view of both fairness and reasonableness, taking into account all the circumstances leading up to the execution of the agreement, including the quality of any legal advice; whether there is evidence of some advantage having been taken by one party of the other in the circumstances prevailing at the time of the agreement; the court should not be unduly ready to overturn agreements validly entered into; and the fact it transpired that the agreement had led to unequal or very unequal division of assets does not necessarily give rise to an inference of unfairness or unreasonableness. Circumstances in which an order under section 16 has been made include failure to disclose material information relating to matrimonial property;[8] absence of knowledge (of both spouses) that pension interests could constitute matrimonial property;[9] and coercion and failure to disclose assets and liabilities.[10] In most cases, an order under section 16 is made on the granting of decree of divorce or dissolution of civil partnership;[11] that is, at the same time that any order for financial provision is made under section 8 of the 1985 Act.

7.5 Agreements between spouses, civil partners or cohabitants, which include settlement of financial claims, are usually recorded in a minute of agreement, which may be recorded in the Books of Council and Session. The incidence of use of minutes of agreement by cohabitants to regulate their affairs, including on separation, is unknown. While some are registered, it is likely that many couples prefer to keep the terms of such agreements private, and include a clause for registration only in the event that steps for enforcement require to be taken.[12] Agreements are likely to be superseded when parties marry or form civil partnerships. Academic research suggests an increase in the use of cohabitation agreements following the introduction of the 2006 Act provisions.[13] In the Discussion Paper, we noted that couples were more likely to enter into cohabitation agreements early in their relationship, often to protect assets, rather than to record financial arrangements following cessation of cohabitation.[14]

Policy considerations for the 2006 Act

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[5] *Kibble v Kibble* 2010 SLT (Sh Ct) 5.
[6] *Bradley v Bradley* 2018 SC (SAC) 7 at [19].
[7] *Gillon v Gillon* (No 3) 1995 SLT 678.
[8] *McKay v McKay* 2006 SLT (Sh Ct) 149.
[9] *Watt v Watt* 1994 SLT (Sh Ct) 54.
[10] *McDonald v McDonald* 2009 Fam LR 131.
[11] 1985 Act, s 16(2)(b).
[12] In practice, most agreements relating to financial provision or financial arrangements on cessation of cohabitation (and on divorce or dissolution) contain a clause agreeing to registration in the Books of Council and Session for preservation and execution; where parties prefer to keep the terms of their agreement private, they may opt instead for registration for execution only, in case of default. For a practical discussion of the issues relating to registration of minutes of agreement, see Shona Smith, *To register or not to register,* Fam. L.B. 2022, 177, 1-3.
[13] A 1997 study analysing a sample of 1,042 agreements made by married and cohabiting couples in 1992 found that 7% of agreements were made by cohabiting couples: Frances Wasoff, Ann McGulkin and Lilian Edwards, *Mutual Consent: Written Agreements in Family Law* (1997). A later study analysed 600 minutes of agreement made by heterosexual couples registered in 2010, and found that 15% of those agreements were made by cohabitants: Jane Mair, Frances Wasoff and Kirsteen Mackay, *All Settled? A study of legally binding separation agreements and private ordering in Scotland* (2013).
[14] See paras 7.16 to 7.18.

7.6 A number of respondents to the 1990 Discussion Paper[15] suggested that, if cohabitation were to have legal consequences, cohabitants should be able to opt out of them by agreement. The 1992 Report noted that no such provision was included in the draft Bill accompanying the Report, the reasoning being that cohabitants could agree certain matters in advance, and that "[a] claim for financial provision on the termination of a cohabitation could, like any other pecuniary claim, be renounced in a prior agreement."[16] Our predecessors assumed that the terms of any agreement would be taken into account by the court in an action for financial provision on separation "as part of the circumstances of the case, in deciding what was a fair and reasonable award."[17] That assumption was made on the basis that the legislation would include a test of fairness and reasonableness for the making of awards for financial provision in favour of cohabitants whose cohabitation ceased otherwise than on death.[18]

7.7 The policy intention of the Scottish Government at the time of introduction of the Bill that became the 2006 Act was that, while the court would be able to take account of agreements between cohabitants, it should not be possible for a cohabitant to opt out of the provisions.[19] There is, however, nothing in the Scots law of contract that would prevent a cohabiting couple reaching agreement on their financial arrangements following separation, and thereby avoiding some or all of the relevant 2006 Act provisions. Any contract so made would be susceptible to reduction under the law of contract on grounds of extortion, fraud, facility and circumvention, undue influence and error. The questions for us are whether the legislation should expressly state that the court must always give effect to the terms of such a contract and whether an exception to the general rules of contract law, similar to that provided in section 16 of the 1985 Act, should be available for cohabitants.

Criticism and comments

7.8 Practitioners told us that clients are often advised[20] at an early stage of their cohabitation, such as on purchase of property, to seek advice on entering into a cohabitation agreement. The sheriffs we consulted commented that, if parties are to be encouraged to make their own arrangements and enter into agreements, there ought to be recognition of imbalances within relationships and vulnerable partners should have some protection. Only one practitioner that we spoke to was involved in a case in which the pursuer was seeking to set aside a cohabitation agreement; she commented that the common law grounds for

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[15] Discussion Paper on The Effects of Cohabitation in Private Law (Scot Law Com No. 86, 1990), available at: https://www.scotlawcom.gov.uk/files/3412/7892/5856/dp86.pdf.

[16] Report on Family Law (Scot Law Com No. 135, 1992), para 16.47, available at: https://www.scotlawcom.gov.uk/files/5912/8015/2668/Report%20on%20family%20law%20Report%20135.pdf.

[17] *Ibid.*

[18] See cl 36(2)(b) of the draft Bill annexed to the 1992 Report. The 2006 Act contains no such provision.

[19] See Justice 1 Committee, Official Report, Stage 1, 16 March 2005, available at https://archive2021.parliament.scot/parliamentarybusiness/report.aspx?r=2120&mode=html. We note that no such provision appears in s 28 of the 2008 Act; s 27(2) provides that the presumption in relation to rights in certain money and property is subject to "any agreement" between the cohabitants. We note also that the presumption in s 26 is rebuttable and that s 29(3)(d) permits the court to take account of "any other matter the court considers appropriate" when deciding what order, if any, to make on an application by a bereaved cohabitant, both of which provisions appear sufficiently widely framed to allow the court to consider the terms of an agreement between the parties.

[20] By solicitors and financial advisors.

reduction of a contract were difficult to apply in the circumstances and, as such, she would welcome a provision similar to that in section 16 of the 1985 Act.

7.9 Advisory Group members' experiences of cohabitation agreements varied. One solicitor had advised some clients wishing to enter into cohabitation agreements, but not a separated cohabitant who had already done so. Another, who said that wealthy clients often fund deposits for their adult children who are buying a home with their partner, thought it was usually the cohabitants' parents who insist on a cohabitation agreement to ensure that the funds are ring-fenced and another suspected that agreements are entered into purely to protect property and specific assets, as opposed to any other contributions stemming from the relationship. One member, a solicitor, encouraged cohabitants to treat their agreements as "living documents", to be reviewed and revised as circumstances change, but observed that few returned to do so.

Comparative law

7.10 We have given careful consideration to whether approaches in comparative jurisdictions might assist us in formulating rules relating to cohabitation agreements, including the extent, if any, to which they may be considered by the court when determining a claim for financial provision and whether there should be provision for them to be set aside or varied.[21] In jurisdictions where cohabitants are treated in a similar way to spouses on separation, the basis upon which agreements are recognised and enforced is the same, regardless of the form of the relationship.[22] In those jurisdictions, and in Ireland and Sweden, agreements between cohabitants are not recognised unless they meet certain procedural requirements imposed by statute.

7.11 In Australia, financial agreements between *de facto* couples may be set aside if they were obtained by fraud; are void, voidable or unenforceable; where circumstances have arisen since the agreement was entered into which make it impracticable for it to be carried out, in whole or in part; or there has been a change in circumstances relating to the care, welfare and development of a child of the relationship, as a result of which the child or the applicant will suffer hardship if the agreement is not set aside.[23] In New Zealand, the court may set aside an agreement if, "having regard to all the circumstances, it is satisfied that giving effect to the agreement would cause serious injustice."[24] In British Columbia, agreements between "spouses"[25] may be set aside or replaced by the court, in whole or in part, if a spouse: failed to disclose significant property or debts, or other information relevant to the agreement; took improper advantage of the other spouse's vulnerability, including their ignorance, need or distress; did not understand the nature or consequences of the agreement; or there are other circumstances that would, under the common law, cause all or part of a contract to be voidable.[26] The agreement may also be set aside or replaced where the court finds the

[21] We have not considered the law of contract in the jurisdictions considered, and note that some make statutory provision for reduction of contractual arrangements, similar to the ordinary rules of contract under Scots law.
[22] See the Discussion Paper, paras 7.20 to 7.22 and 7.24 to 7.29.
[23] 1975 Act, s 90UM; see *Thorne v Kennedy* [2017] HCA 49 (8 November 2017).
[24] 1976 Act (New Zealand), s 21J(1).
[25] The definition of which includes people who have lived in a "marriage like" relationship for at least two years; see the Discussion Paper, para 3.70.
[26] 2011 Act (BC), s 93(3).

substance thereof to be "significantly unfair".[27] In Nordic countries, an agreement between cohabitants may be modified or set aside, in whole or in part, "if it would be unreasonable or contrary to honest dealing to enforce it. In coming to a decision regard will be had to the relations between the parties when the agreement was entered into, the content of the agreement and any subsequent change of circumstances."[28]

Responses to Discussion Paper

7.12 We asked:

> Q.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?

7.13 Only one respondent answered "no" to this question, noting that she favoured an opt-out option, which would remove jurisdiction from the court, and that parties who took that approach should "be allowed to stand by that subject to normal principles of reduction." The Faculty of Advocates commented that it would be consistent with Scots law generally to respect and enforce agreements and that there could be an "unacceptable discrepancy" between the respective positions of spouses / civil partners and cohabitants if the former could make a binding agreement relating to financial provision on cessation of their relationships and the latter could not. Professor Mair commented that the principle of autonomy and "a preference for private ordering" are long established and respected in Scots family law.[29] Brodies told us that it would be "helpful if clients could be assured that [agreements] will be taken into account by the court, provided they are fairly entered into." Our attention was drawn to the Irish legislation, which respects the need for cohabitants to be able to choose to avoid financial obligations in relation to each other on cessation of their relationship.[30] One respondent queried whether the law will give effect to cohabitation agreements, adding that this was a matter that should not be left to the law of contract to resolve. Several respondents said that the provisions for cohabitants should be similar to those for spouses and civil partners. Others commented that the court should retain the ability to exercise discretion, despite the existence of an agreement, and that each case should be decided on its own facts and circumstances. The difference between "having regard to" and "giving effect to" an agreement was noted. The Senators highlighted the risk of erosion of the ability of those who seek to contract out of statutory financial provision regimes to do so and the potential for "real uncertainty" as to the status of the contract if there was provision for the court to only "have regard to" agreements. Concern was also expressed that the use of agreements should not allow one party to gain material advantage and that there is a need to raise public awareness

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[27] S 93(5); on consideration of: (a) the length of time that has passed since the agreement was made, (b) the intention of the spouses, in making the agreement, to achieve certainty, and (c) the degree to which the spouses relied on the terms of the agreement. The court retains discretion to refuse to set an agreement aside, even if it was unfairly reached, if the result would not be substantially different from that which is contained in the agreement.
[28] John Asland, Margareta Brattstrom, Goran Lind, Ingrid Lund-Andersen, Anna Singer and Tone Sverdrup, *Nordic Cohabitation Law* (2015), pp 156 to 157.
[29] See *Thomson v Thomson* 1982 SC 344; *Elder v Elder* 1985 SLT 471.
[30] 2010 Act, s 202.

of the rights and remedies available to cohabitants, including the ability to regulate their arrangements by agreement.

7.14 We also asked:

> Q.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 varying 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)?

7.15 Many of the responses to question 24 had addressed or alluded to this issue. The following paragraphs therefore refer to responses to both questions.

7.16 There was strong support for giving the court power to vary or set aside the terms of a cohabitation agreement in certain circumstances. However, some responses were equivocal. The Faculty of Advocates acknowledged the difficulty of balancing the effectiveness of agreements with the protection of vulnerable cohabitants; they were concerned that a "fairness and reasonableness" test may have limited relevance in relation to a pre-cohabitation contract by the time it comes to be implemented, as financial circumstances may have materially changed over time. They urged that further thought be given to the concept of a "cohabitation agreement", in particular whether this would include a "stand alone" agreement relating to a particular asset, an agreement regulating financial matters during the relationship or financial provision on separation, or all of these.[31] They commented that, on one view, this should be left to the law of contract. Balfour + Manson and SKO both observed that, as cohabitation agreements vary, this is a complex issue. The absence of a remedy for spouses and civil partners based on a change of circumstances was also highlighted by respondents.

7.17 Among those who favoured introduction of provision to vary or set aside an agreement, there was more support for a test based on option (a)[32] than option (b).[33] Option (c) invited consultees to suggest "another test". A significant minority of respondents was in favour of the introduction of a test incorporating both options (a) and (b). Language similar to that in the Irish provision and in the CEFL principles, incorporating a "serious injustice" test, was also suggested.[34] The wide range of circumstances in which cohabitation agreements are entered

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[31] See para 7.25.
[32] Based on s 16 of the 1985 Act, focusing on whether the agreement was fair and reasonable at the time it was entered into.
[33] Whether there has been a material change in the parties' circumstances since the agreement was entered into.
[34] S202 of the 2010 Act provides "[t]he court may vary or set aside a cohabitants' agreement in exceptional circumstances, where its enforceability would cause serious injustice"; CEFL principle 5.9 provides that the competent authority may set aside or adjust the agreement on the grounds of general contract law or "serious injustice having regard to the contents of the agreement and the circumstances when it was concluded or those subsequently arising."

into was highlighted. Those circumstances can result in agreements that are narrowly focused (such as the regulation of matters at the time of purchase of a first home together). The point was made that the power to set aside a cohabitation agreement on the basis of a material change of circumstances would render most contracts susceptible to challenge, and that setting aside or variation on such a basis is not available on divorce and dissolution.

7.18 Although responses to question 25 were mixed, respondents were, overall, anxious to avoid giving cohabitants greater scope to seek variation or setting aside of agreements than is currently available to spouses and civil partners, favouring instead either restriction of cohabitants' remedies in this respect to those available in terms of section 16 of the 1985 Act, or urging review of the law as it affects both spouses / civil partners and cohabitants.[35] The point was also made that the law of contract already offers some protection.

Discussion

7.19 The need to raise awareness of the remedies available to former cohabitants has been highlighted by respondents and stakeholders, and discussed throughout this Report. Concerns in this regard were also raised by respondents to the questions discussed in this Chapter. We acknowledge the risk that lack of awareness of the statutory provisions may lead individuals to assume that certain rights and obligations are automatically acquired and imposed on cohabitation, or that the absence of formality in establishing the relationship means that no rights arise at all. In either case, it is unlikely that a cohabitation agreement will be entered into.

7.20 It is important to bear in mind that cohabitants, unlike spouses and civil partners, have not signed up for the legal consequences that come with entering into a relationship that carries with it a change of legal status and a raft of rights and obligations. It is therefore all the more important to preserve the rights of cohabitants to order their own affairs and, if they wish, avoid the legal consequences, and protections, of a statutory regime. However, respecting contractual freedom has to be balanced against the need to protect the unaware or vulnerable cohabitant, who may be taken advantage of, for example, by being persuaded to enter into an agreement that is contrary to their interests. We recognise that there is, at least, a risk that leaving the law as it is, relying solely on the law of contract with no provision for review of agreements between cohabitants under any circumstances, could result in injustice or unfairness and may fail to protect the most vulnerable cohabitants, including those, usually women, who have been subjected to abuse. It is not difficult to imagine circumstances in which an agreement between cohabitants could be regarded as resulting in unfairness, while not being susceptible to reduction under the law of contract.

7.21 When we asked question 24, we had in mind a provision similar to that in section 10(6) of the 1985 Act,[36] which includes, in paragraph (a), "the terms of any agreement between the

[35] Some respondents urged consideration of a wider review of agreements, acknowledging that extending provision to cohabitants similar to that in s 16 of the 1985 Act would achieve consistency, and that there may also be an opportunity to consider whether that provision should be extended to situations where there has been a material change in circumstances. Such a review is beyond the scope of the current project.

[36] A non exhaustive list of "special circumstances" that may justify departure from the norm of equal sharing of the net value of matrimonial / partnership property.

persons on the ownership or division of any of the matrimonial or partnership property."[37] We recognise that the present context is different from that under the 1985 Act, as the net value of property acquired by the cohabitants during the relationship will not be susceptible to sharing. We have concluded that the court should be constrained in the exercise of its discretion, so that effect will be given to cohabitants' contractual arrangements, insofar as those arrangements relate to financial provision on cessation of their relationship, save in the limited circumstances set out below.[38] There is significant support among respondents for this approach, which does no more than reflect the ordinary rules of contract law,[39] provided the court is also afforded discretion to vary or set aside the agreement in limited circumstances.

7.22 We have noted that some cohabitation agreements include terms that are not directly related to financial provision, such as in relation to child care or child maintenance. We recognise that such arrangements are likely to have a bearing on the couple's financial circumstances, including their resources, and that the terms of a cohabitation agreement that do relate to financial matters are likely to have been agreed with these arrangements in mind. Therefore, there will be cases where the whole terms of a cohabitation agreement could be relevant when the court is considering whether an order is justified, applying the guiding principles. We have therefore concluded that the court, in applying any of the guiding principles, should have regard to the terms of any agreement between the parties. The court could not, however, give effect to certain agreed arrangements, such as alimentary provision for children, as no such order is available under our revised scheme.

7.23 The effect of our proposed scheme will be to ensure that the court will take account of (have regard to) the terms of any agreement between the couple when applying the principles under which an application for financial provision will be determined. The court may not make any order for financial provision that is inconsistent with the agreement, unless the agreement, or any of its terms concerned with financial provision at the end of the cohabitation, is varied or set aside. Therefore if a couple agree to transfer ownership of their jointly owned family home to one of them in satisfaction of the principle of fair sharing of the economic responsibility of child care, the court would not be permitted to make an order for financial provision inconsistent with that agreement (provided the agreement is not reduced under the ordinary law of contract, or set aside or varied under our proposed statutory provision); the court could not, for example, make an order for sale of the property. On the other hand, in some circumstances, it will be possible for the court to give effect to the terms of a cohabitation agreement; for example, if the agreement provides that a joint property shall be transferred to one of the cohabitants, the court could make a property transfer order.

7.24 We have considered whether, as in some of the comparator jurisdictions considered,[40] there ought to be a requirement for certain formalities to be observed in the formation of a

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[37] Note that in *Jacques v Jacques* 1997 SC (HL) 20, the House of Lords held that there was nothing in s 10 which required an unequal division whenever special circumstances were found to exist so that it was not enough "simply to identify some special circumstances in order to depart from an equal division, an unequal division having to be justified by those circumstances."

[38] See para 7.27 (where the agreement was not fair and reasonable when entered into).

[39] Which are not affected by our reforms, except to the extent expressly provided: Bennion Statutory Interpretation 7th edn, p 655, citing Lord Browne-Wilkinson in *R v Secretary of State for the Home Department, ex p Peirson* [1998] AC 539 at p 573.

[40] See paras 7.10 to 7.11.

cohabitation agreement. We do not recommend the introduction of similar requirements for Scottish cohabitants, preferring to leave that to the ordinary law of contract.

7.25 A minority of respondents mentioned the unsatisfactory nature of the law in relation to section 16 of the 1985 Act. These concerns, we understand, relate to the equivalence of treatment of agreements reached before and during marriage and civil partnership and those reached after separation.[41] We have noted these concerns and have considered whether a differentiated approach to applications to vary or set aside cohabitation agreements should be adopted, recognising the various stages at which cohabitants may wish to avail themselves of the protections of a contractual arrangement. On balance, we have concluded that an undifferentiated approach is unavoidable. We recognise that a couple's financial circumstances at the time of making an agreement may have changed significantly by the time they separate; that is so for most relationships. However, it ought not to be assumed that cohabitants are unwilling or unable to review their contractual arrangements as their relationships progress, and to make changes as circumstances alter. A differentiated approach to the possible setting aside or variation of cohabitation agreements, based on the stage at which the agreement was entered into or the focus of the agreement,[42] would risk diminishing parties' rights to contract freely and with confidence that their contractual arrangements will be respected. While there is a risk of prejudice to vulnerable parties, that risk is minimised, we think, by the wider reforms that we propose, including a principles-based approach to deciding claims and the ability to seek the setting aside of a cohabitation agreement or variation of any of its terms in the event that it was unfair or unreasonable at the time it was entered into.

7.26 Some respondents were supportive of a provision enabling the court to set aside or vary the terms of a cohabitation agreement on the basis of a change of circumstances. The absence of an equivalent provision in the 1985 Act, the likelihood that such a provision could result in challenges to agreements in almost every case and the importance of preserving contractual freedom lead us to the conclusion that no such provision should be introduced.

7.27 We have concluded that, in limited circumstances, cohabitants should not be able to oust the jurisdiction of the court. We therefore recommend the introduction of statutory provision for variation or setting aside of agreements between cohabitants as to financial provision after the end of the cohabitation. We recommend that an order for variation or setting aside of such an agreement must be made by the court at the same time as determination of an application for financial provision[43] and that the test for making an order should be that the agreement was not fair and reasonable at the time it was entered into. We also recommend inclusion of express provision that the court may not make an order for financial provision that is inconsistent with any term of an agreement between cohabitants (provided the agreement or term of the agreement is not varied or set aside).

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[41] See *Kibble v Kibble* 2010 SLT (Sh Ct) 5.
[42] Such as preservation of a parental contribution towards the purchase of a first home, or protection of an asset owned prior to cohabitation.
[43] This is similar to the position in s 16(2) of the 1985 Act, which limits the making of orders to set aside or vary agreements between spouses or civil partners to any time after the granting of decree of divorce or dissolution of civil partnership.

14. We recommend legislative change to provide that:

(a) in applying the guiding principles by which an application for financial provision by a former cohabitant otherwise than on death will be decided, the court must have regard to the terms of any agreement between the cohabitants (whether entered into before, during or after the end of the cohabitation);

(Draft Bill, section 4 inserting section 28C(4)(a) into the 2006 Act)

(b) The court must not make an order for financial provision that is inconsistent with any term of an agreement to which it must have regard, in applying the guiding principles by which an application for financial provision by a former cohabitant will be decided, unless the agreement, or the term of the agreement, is varied or set aside.[44]

(Draft Bill, section 4 inserting section 28C(5) and (6) into the 2006 Act)

(c) the court may make an order setting aside or varying any agreement or term of an agreement (whether entered into before, during or after the end of the cohabitation) which is concerned with financial provision after the end of the cohabitation if the agreement or term of agreement was not fair and reasonable at the time it was entered into; and

(d) an order setting aside or varying such an agreement or any term of such an agreement may be made only on determination of a claim for financial provision after the end of the cohabitation.

(Draft Bill, section 4 inserting section 28D into the 2006 Act)

[44] See also Ch 5, para 5.55.

Chapter 8 Unjustified Enrichment

8.1 In Chapter 8 of the Discussion Paper,[1] we discussed the availability of a common law claim in unjustified enrichment as an alternative or in addition to a claim for financial provision under section 28 of the 2006 Act. We noted that the concept of unjustified enrichment has been summarised as follows:

> "A person may be said to be unjustifiably enriched at another's expense when he has become owner of the other's money or property or has used that property or otherwise benefited from his actings or expenditure in circumstances which the law regards as actionably unjust, and so as requiring the enrichment to be reversed."[2]

8.2 The availability to former cohabitants of a claim based in unjustified enrichment had been the subject of litigation and academic discussion[3] for some time prior to publication of the Discussion Paper. Stakeholders, including respondents to the tenth programme consultation, had urged that we give consideration to the introduction of express statutory provision to clarify the law in this area.

8.3 Uncertainty on this issue had arisen, primarily, because of the decision in the case of *Courtney's Executors v Campbell ("Courtney's Executors")*,[4] in which Lord Beckett concluded that where a claim under section 28 had not been pursued and there were no special and strong circumstances justifying the alternative remedy of a claim based on unjustified enrichment, the alternative remedy was not available.[5]

8.4 Shortly before publication of the Discussion Paper, a full bench in the Inner House of the Court of Session, in the case of *Pert v McCaffrey,*[6] disagreed with the decision in *Courtney's Executors*. The issue for the Inner House was whether and to what extent the principle that recompense can normally only be pursued once all ordinary remedies have been exhausted applies to claims for redress based on unjustified enrichment, when a former cohabitant has not made an application for financial provision under section 28. The appeal was refused, not because of the availability of a remedy under section 28, but because the pursuer had available to her a remedy under contract law. She could, the court said, have sought specific implement of the agreement between her and the defender, or sought damages for breach of contract. The Court, however, took the opportunity to consider the availability of a common law remedy where a claim under section 28 is available. Lord President Carloway, with whom the other judges agreed, stated:

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[1] Discussion Paper on Cohabitation (Scot Law Com No. 170, 2020), available at: https://www.scotlawcom.gov.uk/files/1115/8270/8061/Aspects_of_Family_Law_-_Discussion_Paper_on_Cohabitation_DP_No_170.pdf.
[2] W M Gloag and R C Henderson, *The Law of Scotland* (14th edn, 2017), para 24.01.
[3] See the Discussion Paper, paras 8.31 to 8.35 and 8.44 to 8.51.
[4] 2017 SCLR 387; see the Discussion Paper, paras 8.38 to 8.39.
[5] Para [70].
[6] 2020 SC 259; see the Discussion Paper, paras 8.40 to 8.43.

…section 28 is not a remedy which is alternative to an action for recompense but one which is additional to any common law remedy otherwise available. The failure to exercise the right to make an application under section 28 timeously does not bar the use of such remedies. In this respect, the court must disagree with [*Courtney's Executors*]."[7]

8.5 Lord Brodie, referring to *Dollar Land (Cumbernauld) v CIN Properties*,[8] said:

"…claims for reversal of unjustified enrichment could be said to be common law remedies subject to an equitable defence. In a given case that equitable defence might … be to the effect that an alternative remedy was available but not resorted to, but that is different from saying that no claim for reversal of unjustified enrichment can ever be made if there is or was an alternative way of proceeding."[9]

8.6 We concluded in the Discussion Paper that in light of the decision in *Pert v McCaffrey*, there was no need for legislative provision clarifying whether the common law remedy is available in addition or as an alternative to the right to make a claim under section 28. However, we included a chapter[10] devoted to discussion of the issues highlighted in the above cases. We provided an overview of the Scots law of unjustified enrichment and how it has developed. We discussed both the context in which this Commission considered the availability of claims under the principle of unjustified enrichment in the 1992[11] and 1999 Reports,[12] and the doctrine of subsidiarity. The interaction of the common law remedy of unjustified enrichment with the statutory remedy under section 28 was also considered. The case law was then analysed before we summarised the issues in relation to cohabitation and unjustified enrichment raised in responses to the Law Society's 2018 consultation on the Rights of Cohabitants,[13] the Commission's Tenth Programme consultation and by stakeholders during informal consultation while preparing our Discussion Paper. We did not pose any questions, but indicated that the conclusion we had reached was subject to any comments that respondents might wish to make.[14] Some respondents did indeed express views on the matter, which are summarised below.

Responses to Discussion Paper

8.7 Seven respondents made comments in response to Chapter 8. Four expressed the view that whether unjustified enrichment is retained as a remedy for cohabitants should be placed beyond doubt in express statutory provision. There was no consensus on whether the remedy should be expressly excluded or expressly permitted. Of those who considered that

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[7] *Pert v McCaffrey* [2020] CSIH 5, para [24].
[8] 1998 SC (HL) 90; see the Discussion Paper, paras 8.16 to 8.17.
[9] Para [39].
[10] Ch 8.
[11] Report on Family Law (Scot Law Com No. 135, 1992), available at: https://www.scotlawcom.gov.uk/files/5912/8015/2668/Report%20on%20family%20law%20Report%20135.pdf.
[12] Report on Unjustified Enrichment, Error of Law and Public Authority Receipts and Disbursements (Scot Law Com No. 169, 1999), available at: https://www.scotlawcom.gov.uk/files/5712/7989/6662/rep169.pdf.
[13] See the Discussion Paper, paras 8.3 and 8.53. In November 2018, the Law Society published its consultation, "Call for views: Rights of Cohabitants", seeking views on various matters, including whether the common law claim of unjustified enrichment should be available where the one-year time limit in s 28 of the 2006 Act had been missed. A majority of respondents agreed that it should be available in the circumstances described. Some of the responses were conditional. The Law Society's Report, published in March 2019, recommended that s 28 be amended to allow the court to accept an application made after the one-year time limit "on cause shown". The consultation is available at: https://www.lawscot.org.uk/media/361911/rights-of-cohabitants-paper.pdf.
[14] See the Discussion Paper, paras 8.59 to 8.60.

the availability or otherwise of an unjustified enrichment claim should be placed on a statutory footing, two commented that the remedy should be available in addition to section 28; one considered that the statutory scheme should displace the common law remedy altogether; and one noted that the benefit of retaining the remedy where the statutory time limit is extended was not clear to them. Of the remaining respondents, one said it should be available as a "fall back regime" for couples who do not meet the criteria for a qualifying cohabitant in terms of section 25 of the 2006 Act; another said that it should be available "to counter a claim under section 28"; and a third said that a common law remedy should be available, but not in those cases that are out of time for the statutory claim, and the statutory claim must always trump the common law claim.

8.8 The University of Aberdeen academics commented 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)," albeit they acknowledged that the need for such provision may have been obviated by the decision in *Pert v McCaffrey* and that "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." In a joint response, Dr Reid and Dr Campbell described unjustified enrichment as "an important tool to rebalance financial inequality between the parties in a way that the statutory regime may not," and observed 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, they said, would place the decision in *Pert v McCaffrey* on a statutory footing and remove current uncertainty.

8.9 In his response, Professor MacQueen considered that "the best overall solution would be to have a statutory scheme which displaced the common law enrichment claim altogether, and did so expressly." He stressed that "[i]t 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." SLAS also favoured abolition of the remedy for cohabitants, commenting that "[i]t is not immediately clear…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."[15]

Stakeholders' views

8.10 The views expressed to us by sheriffs, academics, practitioners and members of the Advisory Group were also mixed. Some thought that unjustified enrichment should not be available as an alternative remedy for cohabitants. Others tended to favour retention of the remedy, protected by statutory provision. The view was widely held that if the statute is drafted well enough and all remedies were covered, a common law claim would not be necessary. The point was also made that the issues surrounding unjustified enrichment are linked to the time limit, as individuals would be totally locked out of any claim if they did not have an alternative. Some Advisory Group members thought that extending the time limit for claims

[15] They also commented that 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.

under section 28 might, therefore, be the simplest way of addressing the issue, while introduction of judicial discretion to allow late claims was also considered a possible solution. Others favoured leaving matters to be determined under the common law.

Discussion and conclusion

8.11 The majority of respondents who commented on the issues raised in Chapter 8 of the Discussion Paper considered that there would be merit in clarifying in statute whether the common law claim of unjustified enrichment would remain available to former cohabitants. However, as with the stakeholders we spoke to, there was no consensus as to whether the solution lay in expressly excluding cohabitants from seeking the common law remedy or introducing express statutory provision permitting pursuit of a statutory remedy without prejudice to any right to make a claim in unjustified enrichment. We noted in the Discussion Paper that the ordinary rule on statutory interpretation is that legislation "excludes common law only where it does so expressly or by necessary implication."[16] Therefore, there would be a need to make express statutory provision only if the common law remedy was to become unavailable to cohabitants; otherwise, the statutory remedy and common law remedy remain available to cohabitants, subject to the subsidiarity rule.

8.12 We share the concern expressed in the response submitted by the University of Aberdeen academics that the introduction of express statutory provision may have unintended consequences. They noted that "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… 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…". Another respondent, Professor Miles, asked whether there was any provision or authority that confirmed that claims by spouses and civil partners under the 1985 Act "necessarily trump all general law rights/claims". There is no such authority or provision.

8.13 Cohabitants are not in a special category, subject to rules that are different to those applying to the general population, save in relation to their rights under the 2006 Act. For them to be expressly excluded by statute from exercising a right to make a claim under the common law, such as a claim in unjustified enrichment, would require close consideration of the availability of any such claim to other categories of individual, and the circumstances in which such exclusion would apply. That would require careful analysis of the whole of the law relating to unjustified enrichment, including the rules on subsidiarity, which is beyond the scope of the present project. We therefore have no recommendations for legislative change in this area at this time.

8.14 We do note, however, that the inflexibility of the time limit in section 28(8) of the 2006 Act[17] has repeatedly been mentioned in the context of considering the availability of the common law remedy. Although views on a possible solution were mixed, and the decision in *Pert v McCaffrey* provides an answer to the question of whether the remedy of unjustified enrichment remains available to cohabitants, at least in some circumstances, there may yet

[16] See the Discussion Paper, para 8.51 (and passage in Bennion referenced therein).
[17] See Ch 6.

be some for whom the common law claim will not provide a solution. In Chapter 6 of this Report, we recommend giving the court discretion to permit late claims.[18] As such, it may be that there will be less need, if our recommendations are implemented, for recourse to unjustified enrichment claims.

[18] Recommenations 10, 11 and 12.

Chapter 9 Summary of Recommendations

1. We recommend that the definition of "cohabitant" in section 25 of the 2006 Act is replaced for the purposes of sections 26 to 28F by the following definition:

   "Cohabitant" means one of two persons who–

   (a) are (or were) living together as a couple in an enduring family relationship,

   (b) are aged 16 or over,

   (c) are not spouses or civil partners of each other, and

   (d) are not closely related (as defined) to each other.

2. We recommend that, in determining whether two persons are (or were) living together as a couple in an enduring family relationship, the court must have regard to all the circumstances of the relationship, including the following matters:

   (a) the duration of the relationship,

   (b) the extent to which they live (or lived) together in the same residence,

   (c) the extent to which they are (or were) financially interdependent,

   (d) whether there is a child of whom the persons are the parents or who is (or was) accepted by the persons as a child of the family.

   (Draft Bill, section 1(2)(a))

3. We recommend amending section 26 by clarifying that "relevant household goods" are those located in a residence used by both of the cohabitants and amending the definition of "household goods", such that only those used for the joint domestic purposes of the cohabitants are subject to the presumption.

   (Draft Bill, section 2 and section 4 inserting section 28G into the 2006 Act)

4. We recommend removing section 27 and replacing it with a more modern formulation, which refers to money designated for use to meet, or to be available to meet, household or joint expenditure or for similar purposes, and any property purchased with such money; and introducing a definition of "money" and a revised definition of "property" for the purposes of the section.

   (Draft Bill, section 3)

5. We recommend that the court must make such order or orders for financial provision on cessation of cohabitation otherwise than on death as are:

   (a) justified by the guiding principles set out in Recommendation 6, and

(b) reasonable having regard to the resources (defined as "present and foreseeable resources") of the cohabitants.

(Draft Bill, section 4, which replaces section 28 (see new section 28(2))

6. We recommend that the court is required to apply the following guiding principles in deciding what order for financial provision, if any, to make:

(a) where one cohabitant has-

(i) derived any economic advantage from the contributions of the other cohabitant, that economic advantage should be fairly distributed between the cohabitants,

(ii) suffered economic disadvantage in the interests of the other cohabitant or of a relevant child, the cohabitant should be fairly compensated for that economic disadvantage.

(b) a cohabitant who seems likely to suffer serious financial hardship as a result of the cohabitation having ended should be awarded such provision as is reasonable to provide for the short term relief of that hardship;

(c) the economic responsibility of caring for a relevant child (as defined), after the end of the relationship, shall be shared fairly between the cohabitants.

(Draft Bill, section 4 inserting section 28B)

7. We recommend that the court must have regard to the following relevant factors in applying the above principles:

(1) In applying principle (a) – fair distribution of economic advantage derived by one cohabitant from the contributions of the other and fair compensation for economic disadvantage suffered by one cohabitant in the interests of the other or of a relevant child:
    (a) the extent to which there has been any change, over the course of the cohabitation, in the economic circumstances of either cohabitant or, if relevant, both cohabitants,
    (b) if there has been any such change in a cohabitant's economic circumstances, the extent to which the cohabitant
        (i) has derived economic advantage from the contributions of the other cohabitant, or
        (ii) suffered economic disadvantage in the interests of the other cohabitant or of a relevant child.

(2) In applying principle (b) – short term relief of serious financial hardship:

    (a) the age, health and earning capacity of the person who is claiming the financial provision,

(b) the extent to which each cohabitant has been financially dependent on the other during the cohabitation,
(c) the needs and resources of the cohabitants.

(3) In applying principle (c) – fair sharing of economic responsibility for child care:
(a) any expenditure or loss of earning capacity caused by the need to care for the child,
(b) the need to provide suitable accommodation for the child,
(c) the age and health of the child,
(d) any decree or arrangement for aliment of the child,
(e) the availability and cost of suitable child care services,
(f) the educational, financial and other circumstances of the child,
(g) the needs and resources of the cohabitants.

(4) In applying all of the principles, we recommend the court must also have regard to:
(a) the terms of any agreement between cohabitants,[1]
(b) any behaviour by either cohabitant, including behaviour that is abusive of the other cohabitant, which
(i) in the case of guiding principle (a) has resulted in either cohabitant deriving economic advantage or suffering economic disadvantage,
(ii) in the case of guiding principles (b) and (c), has had an effect on the resources of either cohabitant; and
(c) all the other circumstances of the case.

(Draft Bill, section 4 inserting 28C)

8. We recommend legislative change to include the following additional remedies when the court makes an order for financial provision on cessation of a cohabiting relationship:

(a) property transfer orders;

(b) payments for the short term relief of serious financial hardship, paid over a maximum period of 6 months from the date of the order;

(c) incidental orders for valuation and sale of property; regulating occupancy of the family home, use of its contents and liability for outgoings pending sale or transfer; and for security for financial provision;

(d) interim orders, and

(e) ancillary orders specifying the date for payment of a capital sum or transfer of property; providing for payment in instalments and for variation of the date

[1] See also recommendation 14(a) and (b).

or method of payment in the event of a material change in circumstances; requiring that the consent of third parties be given, where necessary; and giving heritable creditors an opportunity to be heard prior to the making of an order for transfer of property.

(Draft Bill, section 4 inserting section 28(3), (4) and (5) and section 28A)

9. We recommend that there should be no distinction between a child of whom the cohabitants are parents and a child accepted by them as a child of the family, for the purpose of assessing financial provision on cessation of cohabitation, including in relation to the future economic burden of child care. We therefore recommend that a "relevant child" for the purposes of these provisions be defined as, a person under 16, of whom the cohabitants are the parents, or who is or was accepted by the cohabitants as a child of the family.

(Draft Bill, section 4 inserting section 28G)

10. We recommend legislative change to afford the court discretion to allow late claims, subject to the test and backstop discussed below.

(Draft Bill, section 4 inserting section 28E)

11. We recommend that the test for exercise of judicial discretion to allow a late claim to proceed should be "on special cause shown".

(Draft Bill, section 4 inserting section 28E(2))

12. We recommend that there is a maximum period of two years from the date of cessation of cohabitation beyond which no claim for financial provision may competently be made by a former cohabitant.

(Draft Bill, section 4 inserting section 28E(2))

13. We recommend that the legislation include express provision allowing parties to agree extension of the one year time limit to facilitate settlement, subject to the following conditions:

(a) the extended period shall be for a maximum period of six months;

(b) agreement to extend the time limit shall be possible on only one occasion, must be in writing and must record: the date the parties ceased cohabiting; that they have agreed to negotiate with a view to reaching agreement on financial provision; and that they agree to the extension of the time limit (to 18 months from the date of cessation of cohabitation).

(Draft Bill, section 4 inserting section 28F)

14. We recommend legislative change to provide that:

(a) in applying the guiding principles by which an application for financial provision by a former cohabitant otherwise than on death will be decided, the court must have

regard to the terms of any agreement between the cohabitants (whether entered into before, during or after the end of the cohabitation);[2]

(Draft Bill, section 4 inserting section 28C(4)(a))

(b) The court must not make an order for financial provision that is inconsistent with any term of an agreement to which it must have regard, in applying the guiding principles by which an application for financial provision by a former cohabitant will be decided, unless the agreement, or the term of the agreement, is varied or set aside.

(Draft Bill, section 4 inserting section 28C(5) and (6) into the 2006 Act)

(c) the court may make an order setting aside or varying any agreement or term of an agreement (whether entered into before, during or after the end of the cohabitation) which is concerned with financial provision after the end of the cohabitation if the agreement or term of agreement was not fair and reasonable at the time it was entered into; and

(d) an order setting aside or varying such an agreement or any term of such an agreement may be made only on determination of a claim for financial provision after the end of the cohabitation.

(Draft Bill, section 4 inserting section 28D)

[2] See also Ch 5, para 5.55 and Rec 7.

APPENDICES

Appendix A

Cohabitants (Financial Provision) (Scotland) Bill

[PRE-INTRODUCTION]

An Act of the Scottish Parliament to make provision about the respective rights of cohabitants to household goods and other property and about orders for financial provision where the cohabitation ends otherwise than by death; and for connected purposes.

1 Meaning of "cohabitant"

(1) The Family Law (Scotland) Act 2006 is amended as follows.

(2) In section 25 (meaning of "cohabitant")—

(a) before subsection (1), insert—

"(A1) In sections 26 to 28F, "cohabitant" means one of two persons who—

(a) are (or were) living together as a couple in an enduring family relationship,

(b) are aged 16 or over,

(c) are not spouses or civil partners of each other, and

(d) are not closely related to each other.

(A2) In determining for the purposes of any of sections 26 to 28F whether two persons are (or were) living together as a couple in an enduring family relationship, the court must have regard to all the circumstances of the relationship, including the matters mentioned in subsection (A3).

(A3) The matters referred to in subsection (A2) are—

(a) the duration of the relationship,

(b) the extent to which the persons live (or lived) together in the same residence,

(c) the extent to which the persons are (or were) financially interdependent,

(d) whether there is a child of whom the persons are the parents or who is (or was) accepted by the persons as a child of the family.

SP Bill X

(A4) For the purposes of subsection (A1)(d), two persons are closely related to each other if—

(a) one is related to the other in a degree specified in the list in paragraph 1 of schedule A1, or

(b) one is related to the other in a degree specified in the list in paragraph 2 of schedule A1 and the younger of the two persons—

(i) is aged under 21, or

(ii) has, at any time when aged under 18, lived in the same household as the other person and been treated as a member of the other person's family.

(A5) For the purposes of this section and schedule A1, a person is another person's sibling if they have one or both parents in common.

(A6) This section and schedule A1 have effect as if the relationships listed in paragraph 1 of the schedule included relationships—

(a) that would exist but for—

(i) adoption,

(ii) a parental order made in accordance with section 54 or 54A of the Human Fertilisation and Embryology Act 2008 ("a parental order"),

(b) between a child and—

(i) the child's adoptive, or former adoptive, parents,

(ii) a person who is the child's parent by virtue of a parental order.

(A7) This section and schedule A1 have effect as if any reference in the schedule to a parent within any of the degrees of relationship specified included a woman who is a parent of a child by virtue of section 42 or 43 of the Human Fertilisation and Embryology Act 2008.",

(b) in subsection (1), for "sections 26 to 29" substitute "section 29",

(c) in subsection (2), for "any of sections 26 to 29" substitute "section 29",

(d) in subsection (3)—

(i) for "subsection" substitute "subsections (A2) and",

(ii) for "section 28" substitute ", sections 28 to 28D".

(3) Before schedule 1 insert—

"SCHEDULE A1

Introduced by section 25

DEGREES OF RELATIONSHIP

1 This is the list referred to in section 25(A4)(a)—

Parent

Child

Grandparent

Grandchild

Sibling

Sibling of parent

Child of sibling

Great-grandparent

Great-grandchild

2 This is the list referred to in section 25(A4)(b)—

Child of spouse

Child of civil partner

Spouse of parent

Civil partner of parent

Spouse of grandparent

Civil partner of grandparent

Grandchild of spouse

Grandchild of civil partner

3 In the list in paragraph 2—

"spouse" includes a former spouse,

"civil partner" includes a former civil partner.".

NOTE

Section 1 implements recommendations 1 and 2 of the Scottish Law Commission Report on Cohabitation (Scot Law Com No. 261, 2022) ("the Report"). Section 1(2)(a) inserts new subsections (A1) to (A7) into section 25. Section 25 defines "cohabitant" for the purposes of sections 26 to 29 of the Family Law (Scotland) Act ("the 2006 Act").

Subsection (A1) provides a new definition of the term "cohabitant" for the purposes of sections 26, 27 and new sections 28 to 28F. It removes the comparison with spouses and civil partners from the definition, for the reasons discussed in paragraphs 3.10 to 3.30 of the Report (which include that the comparison is outdated, unhelpful and demeaning to cohabitants). It provides that, for the purposes of sections 26 to 28F, a cohabitant is 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. The phrase "enduring family relationship" captures the notion that the relationship is or was not fleeting or casual and that the couple have or had some degree of commitment to each other; "living together "as a couple"" excludes relationships between friends or flatmates. The term "couple" is used in other Scottish and UK legislation to refer to "two persons who are living together as if husband and wife [or civil partners] in an enduring family relationship" (section 29(3) of the Adoption and Children (Scotland) Act 2007) and as including "two people … living as partners in an enduring family relationship" (section 144(4)(b) of the Adoption and Children Act 2002).

New subsection (A2) provides that the court must have regard to all the circumstances of the relationship in determining, for the purpose of sections 26 to 28F, whether two persons are (or were) living together as a couple in an enduring family relationship, including those matters listed in subsection (A3). Those matters are: 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 they are parents of a child, or have accepted a child as a child of the family. The list will aid the court in establishing if the couple are (or were) living together in an enduring family relationship and will assist members of the public to determine if their relationship is covered by the definition. Subsection (A2) is worded in such a way as to provide that the list set out in subsection (A3) is not restrictive and is non-exhaustive. The reasons for including this list of features are explained further in paras 3.60 and 3.61 of the Report.

Given the definition of "cohabitant" does not rely on a comparison with spouses and civil partners, it is necessary to exclude certain categories of relationship from the regime for cohabitants. Persons who are closely related to each other, such that the relationship would be incestuous or illegal should not benefit from this reformed statutory regime. Subsection (A4) provides that two persons are closely related to each other if one is related to the other in a degree specified in the list in paragraph 1 of new schedule A1 (such as aunt, uncle, grandparent or sibling), or if one is related to the other in a degree specified in the list in paragraph 2 of schedule A1 (such as the child or grandchild of a spouse or civil partner), where the younger is under 21 years or has at any time when under 18 years, lived in the same household as the other person and been treated as member of the other person's family.

Subsection (A6) provides that the categories of excluded relationship extend to the following: relationships which would have existed but for adoption or but for a parental order made in accordance with sections 54 or 54A of the Human Fertilisation and Embryology Act 2008, as well as relationships between a child and their adoptive or former adoptive parents; and between a child and a person who becomes a parent as a result of a parental order. Subsection (A7) also excludes a relationship between a parent and a child where the parent is a woman who became their parent by virtue of sections 42 or 43 of the 2008 Act (the consenting wife or civil partner of a woman who became pregnant as a result of fertility treatment).

The need to exclude the various categories of relationships is discussed in paragraphs 3.35 to 3.39 of the Report. The definition does not exclude people in cohabiting relationships who are married to or civil partners of third parties.

Section 1(2)(b) and (c) make consequential changes to section 25(1) and (2) of the 2006 Act to make it clear that the existing definition of "cohabitant" continues to apply for the purpose of section 29 (application to court by survivor for provision on intestacy). See paragraph 3.3 of the Report.

2 Rights in certain household goods

(1) The Family Law (Scotland) Act 2006 is amended as follows.

(2) In section 26—

(a) in subsection (1), at the end, insert "in any residence in which the cohabitants are (or were) cohabiting ("relevant household goods")",

(b) in subsection (2), after "equal share in" insert "relevant",

(c) leave out subsection (4).

NOTE

Section 2 implements recommendation 3. It makes a number of consequential amendments to section 26 of the 2006 Act (which provides a rebuttable presumption in relation to cohabitants' rights in certain household goods), including removing subsection (4) which defines "household goods". The definition has been moved to the interpretation section (section 28G), as the term is also used in section 4 which inserts new section 28 into the 2006 Act. Section 2(2) also amends section 26(1) of the 2006 Act by adding clarification that the presumption in subsection (2) applies only to household goods (described as "relevant household goods") in any residence in which the cohabitants are (or were) cohabiting.

3 Rights in certain money and property

(1) The Family Law (Scotland) Act 2006 is amended as follows.

(2) For section 27, substitute—

"27 Rights in certain money and property

(1) Subsection (2) applies where a question arises (whether during or after the cohabitation) as to the respective rights of cohabitants to—

(a) any money that was designated for use—

(i) to meet, or to be available to meet, household or joint expenditure, or

(ii) for similar purposes,

(b) any property purchased with such money.

(2) Subject to any agreement between the cohabitants to the contrary, the money or property is to be treated as belonging to the cohabitants in equal shares.

(3) In this section—

"money" includes money held in cash or invested jointly or separately by the cohabitants or either of them,

"property" does not include—

(a) a relevant residence,

(b) any heritable property.".

NOTE

Section 3 implements recommendation 4 of the Report. Section 27 of the 2006 Act creates a rule in relation to the treatment of certain money and property and cohabitants' rights thereto, subject to any agreement to the contrary.

Section 3(2) substitutes a new section 27 into the 2006 Act which uses more modern language than the existing provision (see Chapter 4 of the Report). The substituted section 27 provides that, subject to any agreement between cohabitants to the contrary, money designated for use to meet, or to be available to meet, household or joint expenditure or for similar purposes, and any property purchased with such money, is to be treated as belonging to the cohabitants in equal shares. Subsection (3) defines what is meant by "money" and "property" for the purposes of the section.

4 Financial provision

(1) The Family Law (Scotland) Act 2006 is amended as follows.

(2) For section 28, substitute—

"28 Orders for financial provision where cohabitation ends otherwise than by death

(1) Subsection (2) applies where cohabitants cease to cohabit otherwise than by reason of the death of one (or both) of them.

(2) On the application of either cohabitant, the appropriate court must make such of the orders, if any, mentioned in subsection (3) as are—

(a) justified on the application of the principles set out in section 28B(1) , and

(b) reasonable having regard to the resources of each of the cohabitants.

(3) The orders are—

(a) an order for payment of a capital sum, of an amount specified in the order, by one of the cohabitants to the other,

(b) an order for one of the cohabitants to make payments to the other over a period of no more than 6 months, of the amounts and at the intervals specified in the order,

(c) an order for the transfer of property by one of the cohabitants to the other,

(d) an incidental order mentioned in subsection (4).

(4) The incidental orders are—

(a) an order for the valuation of property,

(b) an order for the sale of property,

(c) an order in respect of a relevant residence regulating, for the period beginning with the date of the order and ending on the date on which the relevant residence is sold or transferred in accordance with an order under paragraph (b) or subsection (3)(c)—

(i) the occupation of that residence,

(ii) the use of furniture or household goods within that residence,

(iii) liability for outgoings in respect of that residence or furniture or goods within it,

(d) an order that security must be given for any financial provision.

(5) The court may, at any time after an application has been made under subsection (2), make such interim order as it thinks fit.

NOTE

This section implements recommendations 5 and 8 of the Report.

Section 4 of the Bill inserts a new section 28 into the 2006 Act which sets out a new test for the making of orders for financial provision on an application by a cohabitant, where cohabitation ends otherwise than on death, and extends the range of orders available to the court.

New section 28(2) provides that on an application by a cohabitant, the court must make such of the orders specified in subsection (3), as are justified by the principles in new section 28B and reasonable having regard to the parties' resources (recommendation 5). "Resources" is defined in new section 28G as including present and reasonably foreseeable resources.

Section 28 currently allows the court to make an order for payment of a capital sum, for payment of an amount in relation to the economic burden of caring for a relevant child after the relationship has ended, and any interim order it thinks fit. New section 28(3), which implements recommendation 8, extends the orders which the court may make, to include a property transfer order, an order for payment (of the amounts and at the intervals specified in the order) by one cohabitant to the other over a maximum period of 6 months (this order may only be made if the court considers it likely that the applicant will suffer serious financial hardship caused by the end of the cohabitation), and the incidental orders listed in subsection (4).

New section 28(4) allows the court to make the following incidental orders: for the valuation of property; for the sale of property; regulating the occupation, use of furniture or household goods in and liability for outgoings in respect of a relevant residence (defined in new section 28G as a residence which is or was during the cohabitation used by the cohabitants as their sole or main residence) or furniture or goods within it; and that security must be given for any financial provision.

28A Orders for financial provision: further provision

(1) In making an order under section 28(3)(a), the court may specify that the amount is payable—

(a) on the date specified in the order,

(b) in instalments.

(2) Where an order has been made under section 28(3)(a) or (c), the court may, on the application of either cohabitant following a material change of circumstances, vary—

(a) the date of—

(i) payment of the capital sum,

(ii) the transfer of property,

(b) the method of payment of the capital sum.

(3) An order under section 28(3)(b) may be made only where—

(a) the court considers that the applicant seems likely to suffer serious financial hardship as a result of the cohabitation having ended, and

(b) the order is justified on the application of the principle set out in section 28B(1)(b).

(4) The court must not make an order under section 28(3)(c) for the transfer of property—

(a) if the consent of a third party which is necessary under any obligation, enactment or rule of law has not been obtained,

(b) where the property is subject to security, without the consent of the creditor, unless the creditor has been given an opportunity of being heard by the court.

(5) An incidental order mentioned in section 28(4)—

(a) may be made on, before, or after an order is made under section 28(3)(a), (b), or (c),

(b) may be varied or recalled by subsequent order on cause shown,

(c) must not prejudice the rights of any third party which existed immediately before the making of the order.

(6) In this section and in section 28, "property" does not include the tenancy of a relevant residence.

NOTE

New section 28A makes further provision relating to orders for financial provision, including providing in subsection (1) for specification of the date on which a capital sum is payable and that such a sum may be paid by instalments; in subsection (2) for variation, on a material change of circumstances, of the date or method of payment of a capital sum or the date of transfer of property; in subsection (3) that an order for payment (of amounts and at the intervals specified in the order) for a maximum period of 6 months by one cohabitant to the other may only be made where the court considers the applicant is likely to suffer serious financial hardship as a result of the end of cohabitation and that payment would provide at least short term relief from that hardship and only where justified by the principle in new section 28B(1)(b); in subsection (4) that an order for transfer of property must not be made without necessary consents having been given; and in subsection (5) that the incidental orders mentioned in section 28(4) may be made on, before or after an order is made for payment of a capital sum, for payments for the relief of serious financial hardship or for transfer of property; and that incidental orders may be varied or recalled by subsequent order on cause shown and must not prejudice the rights of third parties (such as secured creditors or a spouse with occupancy rights in a property in respect of which an order for sale or transfer is sought).

See Chapter 5 of the Report for a full discussion of these provisions.

28B Financial provision: guiding principles

(1) In deciding what, if any, order for financial provision to make, the court must apply the following principles—

(a) where one cohabitant has—

(i) derived any economic advantage from the contributions of the other cohabitant, that economic advantage should be fairly distributed between the cohabitants,

(ii) suffered economic disadvantage in the interests of the other cohabitant or of a relevant child, the cohabitant should be fairly compensated for that economic disadvantage,

(b) a cohabitant who seems likely to suffer serious financial hardship as a result of the cohabitation having ended should be awarded such financial provision as is reasonable for the short term relief of that hardship,

(c) the economic responsibility of caring for a relevant child after the end of the cohabitation should be shared fairly between the cohabitants.

(2) In this section and section 28C—

"contributions" includes indirect and non-financial contributions and, in particular, any such contributions made by looking after a relevant child or a relevant residence,

"economic advantage" includes gains in—

(a) capital,

(b) income, and

(c) earning capacity,

and "economic disadvantage" is to be construed accordingly.

Section 4 also inserts new section 28B into the 2006 Act, which implements recommendation 6. The current section 28 has been criticised for the lack of clarity of its purpose and for the absence of guidance to the court as to what principles have to be applied in reaching a determination as to what, if any, order for financial provision to make. New section 28B sets out guiding principles, which the court must apply, when deciding what order for financial provision, if any, to make.

The first guiding principle requires the court to fairly distribute between the cohabitants any economic advantage derived by one cohabitant from the contributions of the other, and to fairly compensate a cohabitant who has suffered economic disadvantage in the interests of the other cohabitant or of a relevant child. The definitions of the terms "economic advantage", "economic disadvantage", and "contributions" are in section 28B(2). The second guiding principle requires the court to make such award of financial provision as is reasonable for the short term relief of serious financial hardship where a cohabitant seems likely to suffer such hardship as a result of the cohabitation having ended. The third guiding principle is that the economic responsibility of caring for a relevant child after the cohabitation has ended should be shared fairly between the cohabitants. To assist the court further, factors relevant to the application of each of these guiding principles are set out in new section 28C, which implements recommendation 7.

Section 28(2)(b) of the 2006 Act currently allows the court to make an order requiring the defender to pay such amount as may be specified in the order, in respect of any economic burden of caring, after the end of the cohabitation, for a child *of whom the cohabitants are the parents.* The Bill does not replicate that provision. Instead new section 28B(1)(c) requires the court, when determining what, if any, of the orders to make, to apply the principle that there should be fair sharing of the economic responsibility for caring for *a relevant child* after the relationship has ended. This is more properly provided for as a principle to be applied in deciding what type of order to make, as opposed to a type of order itself. (See paragraph 5.48 of the Report.)

The definition of "relevant child" in new section 28G is "a person under 16 years of age who is or was accepted by the cohabitants as a child of the family", as well as a child of whom the cohabitants are parents (this implements recommendation 9). An order under current section 28(2)(b) may be made only in respect of a child of whom both cohabitants are parents, (for all other purposes in section 28, a "child" is relevant, whether the child is a child of whom both cohabitants are parents or was accepted by them as a child of the family - section 28(10)). The effect of this change is that a court will be able to make an order for financial provision for the fair sharing of the economic responsibility of caring for a child of whom the cohabitants are parents or who has been accepted by them as a child of the family. Removing the differentiation is consistent with the provisions imposing alimentary obligations on those who have accepted children as children of the family under section 1(1)(d) of the Family (Scotland) Act 1985.

28C Financial provision: relevant factors

(1) In applying the principle set out in section 28B(1)(a), the court must have regard to—

(a) the extent to which there has been any change, over the course of the cohabitation, in the economic circumstances of either cohabitant or, if relevant, both cohabitants,

(b) if there has been any such change in a cohabitant's economic circumstances, the extent to which the cohabitant—

(i) has derived economic advantage from the contributions of the other cohabitant, or

(ii) suffered economic disadvantage in the interests of the other cohabitant or of a relevant child,

(c) the matters listed in subsection (4).

(2) In applying the principle set out in section 28B(1)(b), the court must have regard to—

(a) the age, health and earning capacity of the cohabitant who is claiming the financial provision,

(b) the extent to which each cohabitant has been dependent on the financial support of the other cohabitant during the cohabitation,

(c) the needs and resources of each cohabitant,

(d) the matters listed in subsection (4).

(3) In applying the principle set out in section 28B(1)(c), the court must have regard to—

(a) any expenditure or loss of earning capacity caused by the need to care for the child,

(b) the need to provide suitable accommodation for the child,

(c) the age and health of the child,

(d) any decree or arrangement for aliment or maintenance for the child,

(e) the availability and cost of suitable child care services,

(f) the educational, financial and other circumstances of the child,

(g) the needs and resources of each cohabitant,

(h) the matters listed in subsection (4).

(4) The matters referred to in subsections (1)(c), (2)(d) and (3)(h) are—

(a) the terms of any agreement between the cohabitants (whether entered into before, during or after the end of the cohabitation),

(b) any behaviour by either cohabitant, including behaviour by one cohabitant which is abusive of the other cohabitant, which—

(i) in the case of subsection (1)(c), has resulted in either cohabitant deriving economic advantage or suffering economic disadvantage,

(ii) in the case of subsection (2)(d) or (3)(h), has had an effect on the resources of either cohabitant,

(c) all the other circumstances of the case.

(5) Where the cohabitants have entered into an agreement to which regard is to be had under subsection (4)(a), the court must not make an order under section 28 which is inconsistent with any term of the agreement, unless that term is set aside by an order made under section 28D.

(6) Where an agreement is varied by an order made under section 28D(2), reference in subsection (5) to a term of the agreement is to the term as varied.

NOTE

Section 4 inserts new section 28C which implements recommendation 7. To assist the court further, new section 28C sets out factors relevant to the application by the court of the three guiding principles in section 28B(1). Factors relevant to the application of all three principles (subsection (4)) are; the terms of any agreement between the parties, whether entered into before, during or after the end of the cohabitation (implementing recommendation 14(a)); any behaviour, which could include domestic or economic abuse, of one cohabitant which (in relation to guiding principle 28B(1)(a)) has resulted in either cohabitant deriving economic advantage or suffering economic disadvantage or (in relation to guiding principle 28B(1)(b) or (c)) has had an effect on the resources of either cohabitant; and all the other circumstances of the case (implementing recommendation 7). (See paragraphs 5.54 to 5.57 of the Report).

Subections (5) and (6) provide that where the court must, in terms of subs (4)(a) have regard to an agreement between the cohabitants, it must not make an order for financial provision under section 28 which is inconsistent with any term of that agreement, unless the agreement or that term is set aside or varied by order made under section 28D.

In addition, when applying guiding principle (1)(a) (fair distribution of economic advantage and fair compensation for economic disadvantage), the court must have regard to the extent to which there has been any change, over the course of the cohabitation, in the economic circumstances of either cohabitant or, if relevant, both cohabitants, and if there has been any such change, the extent to which the cohabitant has derived economic advantage from the contributions of the other or has suffered economic disadvantage in the interests of the other, or of a relevant child.

In applying guiding principle (1)(b) (short term relief of serious financial hardship as a result of the cohabitation having ended), the court must have regard to the age, health, earning capacity and needs of the person claiming financial provision, the extent of financial dependence of each cohabitant on the other and the cohabitants' needs and resources. In applying principle (1)(c) (fair sharing of the economic burden of childcare), the court must have regard to any expenditure or loss of earning capacity caused by the need to care for the child, the need to provide suitable accommodation for the child, the child's age and health, any decree or arrangement for aliment for the child, the availability and cost of suitable child care services, the educational, financial or other circumstances of the child, and the needs and resources of each cohabitant.

For fuller discussion of the guiding principles and the factors relevant to their application, see Report paras 5.37 to 5.57.

28D Variation or setting aside of financial agreements

(1) This section applies where—

(a) a cohabitant makes an application under section 28(2), and

(b) the cohabitants have entered into an agreement (whether before, during or after the end of the cohabitation) which is wholly or partly concerned with financial provision after the end of the cohabitation.

(2) On determining the application, the court may make an order setting aside or varying—

(a) an agreement which is wholly concerned with financial provision after the end of the cohabitation if it was not fair and reasonable at the time it was entered into,

(b) any term of an agreement which is concerned with financial provision after the end of the cohabitation if the term was not fair and reasonable at the time the agreement was entered into.

NOTE

Section 4 also inserts new section 28D into the 2006 Act, which implements recommendation 14(c) and (d). Section 28D(1) provides that the section applies only where a section 28(2) application has been made and where parties have entered into an agreement which is wholly or partly concerned with financial provision after the end of cohabitation. Other agreements or terms of agreements between parties, for example in relation to the care of children, are not relevant for the purposes of this provision.

The provision gives the court the power, when determining an application for financial provision under section 28(2), to vary or set aside any agreement or any term of an agreement between former cohabitants which is wholly or partly concerned with financial provision after the end of cohabitation, if the agreement or term of the agreement was not fair and reasonable at the time it was entered into (section 28D(2)).

As noted in Chapter 7 of the Report, such an agreement may be entered into by the couple before, during or after cessation of their relationship and may deal with a single asset or the entirety of the couple's financial arrangements on separation.

28E Time limit for application to court

(1) Subject to subsection (2) and section 28F, an application under section 28(2) must be made within the period of one year beginning on the day on which the cohabitation ends.

(2) The court may, on special cause shown, allow an application under section 28(2) to proceed if the application is made within the period of one year beginning on the day after the expiry of the period mentioned in subsection (1).

NOTE

This provision implements recommendations 10, 11 and 12.

The inflexibility of the time limit for making a section 28 claim has been the subject of criticism since the 2006 Act was enacted. To meet the need for certainty and greater flexibility in relation to the time limit, new section 28E(1) maintains the one year time limit from the date of cessation of cohabitation for making an application under section 28(2), subject to the provisions in section 28E(2) and section 28F. Section 28E(2) gives the court discretion to allow a late claim to proceed, on special cause shown, provided the claim is made within the period of two years from the date of cessation of cohabitation. This two year deadline, or backstop, further strengthens the balance between the need for flexibility in the time limit, particularly important where there is vulnerability, and the need for certainty, thereby allowing parties to move on with their lives. The two year deadline also applies where parties have entered into an agreement to negotiate in accordance with section 28F. The "special cause shown" test is discussed in paragraphs 6.33 to 6.40 of the Report.

28F Agreement to negotiate

(1) If the cohabitants enter into an agreement to negotiate in accordance with this section—

(a) the period specified in section 28E(1) is extended to 18 months beginning on the day on which the cohabitation ends ("the extended period"),

(b) the period specified in section 28E(2) is reduced to 6 months beginning on the day after the expiry of the extended period.

(2) An agreement to negotiate must—

(a) be in writing,

(b) confirm the date on which the cohabitation ended,

(c) confirm that the cohabitants agree—

(i) to negotiate with each other with a view to reaching an agreement on financial provision after the end of the cohabitation, and

(ii) to the extension of the time period specified in section 28E(1).

(3) The cohabitants may enter into an agreement to negotiate—

(a) at any time which is—

(i) within the period of one year beginning on the day on which the cohabitation ends, and

(ii) before an application is made under section 28(2),

(b) on only one occasion.

NOTE

Section 4 also inserts new section 28F into the 2006 Act, which implements recommendation 13. Section 28F gives cohabitants the right to agree to extend the one year time limit for making a claim for financial provision (in section 28E(1)) by six months (that is, to 18 months after the date on which cohabitation ended) to facilitate a negotiated settlement. This recognises that, for parties who wish to negotiate settlement, 12 months may be insufficient and obviates the need for parties to raise and sist an action to avoid missing the 12 month time limit.

Subsection (2) provides that the cohabitants must agree, in writing, to negotiate, and that the agreement confirms the date on which the cohabitation ended (as this is key to determining the end date of the extended period) and that they agree to extend the time limit to allow for negotiation with a view to reaching agreement on financial provision.

Subsection (3) imposes some further conditions on the exercise of this right. The conditions are that an agreement to negotiate must be entered into within one year of the date when the cohabitation ended, prior to any application for financial provision under section 28(2) and that this right may only be exercised once.

The effect of this provision is to facilitate negotiated settlement between cohabitants by allowing a 6 month period beyond the time limit for applications, during which, if negotiations fail, either cohabitant may apply under section 28(2) for an order for financial provision without the need to rely on the court's discretion under section 28E(2). On the expiry of the 6 month extended period (ie 18 months after the end of the cohabitation), any application could only proceed if allowed late on special cause shown, subject to the absolute deadline of two years from the end of the cohabitation under section 28E(2).

28G Interpretation of sections 26 to 28F

(1) In this section and sections 26 to 28F—

"appropriate court" means the court which would have jurisdiction to hear, in relation to the cohabitants, an action—

(a) of divorce if they were married to each other,

(b) for the dissolution of the civil partnership if they were civil partners of each other,

"cohabitant" has the meaning given in section 25(A1), and "cohabitation" is to be construed accordingly,

"household goods" means any goods (including decorative or ornamental goods) kept or used at any time during the cohabitation for the joint domestic purposes of the cohabitants, but does not include—

(a) money,

(b) securities,

(c) any motor car, caravan, or other road vehicle, or

(d) any domestic animal,

"needs" includes present and reasonably foreseeable needs,

"relevant child" means a person under 16 years of age—

(a) of whom the cohabitants are the parents, or

(b) who is (or was) accepted by the cohabitants as a child of the family.

"relevant residence" means a residence which is or was during the cohabitation used by the cohabitants as their sole or main residence,

"resources" includes present and reasonably foreseeable resources,

"serious financial hardship" includes hardship arising in whole or in part from the economic responsibility of caring for a relevant child after the cohabitation has ended.

(2) In section 28C(4)(b), sections 2(2) to (6) and 3 of the Domestic Abuse (Protection) (Scotland) Act 2021 apply for the purposes of determining whether behaviour by one cohabitant is abusive of the other cohabitant as they apply for the purposes of determining, under Part 1 of that Act, whether behaviour by person A is abusive of person B.".

5 Commencement

(1) This section and section 6 come into force on the day after Royal Assent.

(2) The other provisions of this Act come into force on such day as the Scottish Ministers may by regulations appoint.

(3) Regulations under subsection (2) may—

(a) include transitional, transitory, or saving provision,

(b) make different provision for different purposes.

6 Short title

The short title of this Act is the Cohabitants (Financial Provision) (Scotland) Act 2022.

Appendix B

Sections 25–29 of the Family Law (Scotland) Act 2006

This Appendix contains relevant extracts from the Family Law (Scotland) Act 2006. The Scottish Law Commission is grateful to Westlaw UK for granting permission enabling the extracts to be reproduced and re-used in this way. (Material downloaded from Westlaw UK on 14 October 2022.)

25 Meaning of "cohabitant" in 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.

(3) In subsection (2) and section 28, *"court"* means Court of Session or sheriff.

26 Rights in certain household goods

(1) Subsection (2) applies where any question arises (whether during or after the cohabitation) as to the respective rights of ownership of cohabitants in any household goods.

(2) It shall be presumed that each cohabitant has a right to an equal share in household goods acquired (other than by gift or succession from a third party) during the period of cohabitation.

(3) The presumption in subsection (2) shall be rebuttable.

(4) In this section, *"household goods"* means any goods (including decorative or ornamental goods) kept or used at any time during the cohabitation in any residence in which the cohabitants are (or were) cohabiting for their joint domestic purposes; but does not include—

(a) money;

(b) securities;

(c) any motor car, caravan or other road vehicle; or

(d) any domestic animal.

27 Rights in certain money and property

(1) Subsection (2) applies where, in relation to cohabitants, any question arises (whether during or after the cohabitation) as to the right of a cohabitant to—

(a) money derived from any allowance made by either cohabitant for their joint household expenses or for similar purposes; or

(b) any property acquired out of such money.

(2) Subject to any agreement between the cohabitants to the contrary, the money or property shall be treated as belonging to each cohabitant in equal shares.

(3) In this section *"property"* does not include a residence used by the cohabitants as the sole or main residence in which they live (or lived) together.

28 Financial provision where cohabitation ends otherwise than by death

(1) Subsection (2) applies where cohabitants cease to cohabit otherwise than by reason of the death of one (or both) of them.

(2) On the application of a cohabitant (the "applicant"), the appropriate court may, after having regard to the matters mentioned in subsection (3)—

(a) make an order requiring the other cohabitant (the "defender") to pay a capital sum of an amount specified in the order to the applicant;

(b) make an order requiring the defender to pay such amount as may be specified in the order in respect of any economic burden of caring, after the end of the cohabitation, for a child of whom the

cohabitants are the parents;
(c) make such interim order as it thinks fit.
(3) Those matters are—
(a) whether (and, if so, to what extent) the defender has derived economic advantage from contributions made by the applicant; and
(b) whether (and, if so, to what extent) the applicant has suffered economic disadvantage in the interests of—
(i) the defender; or
(ii) any relevant child.
(4) In considering whether to make an order under subsection (2)(a), the appropriate court shall have regard to the matters mentioned in subsections (5) and (6).
(5) The first matter is the extent to which any economic advantage derived by the defender from contributions made by the applicant is offset by any economic disadvantage suffered by the defender in the interests of—
(a) the applicant; or
(b) any relevant child.
(6) The second matter is the extent to which any economic disadvantage suffered by the applicant in the interests of—
(a) the defender; or
(b) any relevant child,
is offset by any economic advantage the applicant has derived from contributions made by the defender.
(7) In making an order under paragraph (a) or (b) of subsection (2), the appropriate court may specify that the amount shall be payable—
(a) on such date as may be specified;
(b) in instalments.
(8) [Subject to section 29A, any][1] application under this section shall be made not later than one year after the day on which the cohabitants cease to cohabit.
(9) In this section—
"appropriate court" means—
(a) where the cohabitants are a man and a woman, the court which would have jurisdiction to hear an action of divorce in relation to them if they were married to each other;
(b) where the cohabitants are of the same sex, the court which would have jurisdiction to hear an action for the dissolution of the civil partnership if they were civil partners of each other;
"child" means a person under 16 years of age;
"contributions" includes indirect and non-financial contributions (and, in particular, any such contribution made by looking after any relevant child or any house in which they cohabited); and
"economic advantage" includes gains in—
(a) capital;
(b) income; and
(c) earning capacity;
and *"economic disadvantage"* shall be construed accordingly.
(10) For the purposes of this section, a child is "relevant" if the child is—
(a) a child of whom the cohabitants are the parents;
(b) a child who is or was accepted by the cohabitants as a child of the family.

29 Application to court by survivor for provision on intestacy
(1) This section applies where—
(a) a cohabitant (the "deceased") dies intestate; and
(b) immediately before the death the deceased was—
(i) domiciled in Scotland; and
(ii) cohabiting with another cohabitant (the "survivor").
(2) Subject to subsection (4), on the application of the survivor, the court may—
(a) after having regard to the matters mentioned in subsection (3), make an order—
(i) for payment to the survivor out of the deceased's net intestate estate of a capital sum of such amount as may be specified in the order;
(ii) for transfer to the survivor of such property (whether heritable or moveable) from that estate as may be so specified;
(b) make such interim order as it thinks fit.
(3) Those matters are—

(a) the size and nature of the deceased's net intestate estate;
(b) any benefit received, or to be received, by the survivor—
(i) on, or in consequence of, the deceased's death; and
(ii) from somewhere other than the deceased's net intestate estate;
(c) the nature and extent of any other rights against, or claims on, the deceased's net intestate estate; and
(d) any other matter the court considers appropriate.
(4) An order or interim order under subsection (2) shall not have the effect of awarding to the survivor an amount which would exceed the amount to which the survivor would have been entitled had the survivor been the spouse or civil partner of the deceased.
(5) An application under this section may be made to—
(a) the Court of Session;
(b) a sheriff in the sheriffdom in which the deceased was habitually resident at the date of death;
(c) if at the date of death it is uncertain in which sheriffdom the deceased was habitually resident, the sheriff at Edinburgh.
(6) [Subject to section 29A, any][1] application under this section shall be made before the expiry of the period of 6 months beginning with the day on which the deceased died.
(7) In making an order under paragraph (a)(i) of subsection (2), the court may specify that the capital sum shall be payable—
(a) on such date as may be specified;
(b) in instalments.
(8) In making an order under paragraph (a)(ii) of subsection (2), the court may specify that the transfer shall be effective on such date as may be specified.
(9) If the court makes an order in accordance with subsection (7), it may, on an application by any party having an interest, vary the date or method of payment of the capital sum.
(10) In this section—
"intestate" shall be construed in accordance with section 36(1) of the Succession (Scotland) Act 1964 (c.41);
"legal rights" has the meaning given by section 36(1) of the Succession (Scotland) Act 1964 (c.41);
"net intestate estate" means so much of the intestate estate as remains after provision for the satisfaction of—
(a) inheritance tax;
(b) other liabilities of the estate having priority over legal rights and the prior rights of a surviving spouse or surviving civil partner; and
(c) the legal rights, and the prior rights, of any surviving spouse or surviving civil partner; and
"prior rights" has the meaning given by section 36(1) of the Succession (Scotland) Act 1964 (c.41).

Appendix C

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Appendix D

Respondents to consultation

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Sheriffs' Association	
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Scottish Law Agents Society	
Scottish Women's Aid	
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Appendix E: Overview

1. In this Appendix, we explain how our recommended reforms to sections 25 to 28 of the Family Law (Scotland) Act 2006 (the 2006 Act)[1] will operate in practice. We have recommended reform of various aspects of the scheme currently in place whereby the courts may make orders for financial provision on an application by a cohabitant when their relationship ends. The most significant recommendations made in this Report[2] are for amendment of the definition of "cohabitant" in section 25[3] and of the test and remedies for financial provision on cessation of a cohabiting relationship in section 28.[4]

2. Some respondents to the Discussion Paper observed that, because someone falls within the category of "cohabitant", it will not necessarily follow that they will be entitled to financial provision. We agree. The applicant must meet the definition of cohabitant and also, in order for an application for financial provision to succeed, satisfy the court that an order is justified, based on guiding principles, and reasonable having regard to the parties' present and foreseeable resources. In this Appendix we explain how our recommendations for reform of these aspects of the legislative scheme interact. We also provide some examples, which we hope are useful illustrations of the way in which we expect the reformed scheme to work as a whole.

Identifying a "cohabitant"

3. In Chapter 3, we set out our recommendations for reform of section 25 of the 2006 Act. The 2006 Act does not give a person who meets the definition of "cohabitant" in section 25 a formal legal status. Nor does the legislation give a person who meets the definition any automatic rights or entitlements to financial provision on cessation of cohabitation. Our proposals for reform would not change this position.

4. We recommend a departure from the current approach to defining a "cohabitant", by removing the comparison with spouses and civil partners from the definition in section 25 and substituting a new definition. Our recommended new definition provides that a cohabitant is one of two persons who are or were living together as a couple in an enduring family relationship.[5] Guidance is provided in relation to determining whether an "enduring family relationship" exists, or existed; subsection (A2) requires the court to have regard to all the circumstances of the relationship, including the non-exhaustive list of matters set out in subsection (A3).

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[1] Our recommendations are set out in full in Ch 9.
[2] Other recommendations for reform relate to the improvement of the language in sections 26 and 27, extending the range of orders that the court may make, the time limit for claims (including the introduction of a provision permitting agreement to extend the time limit to facilitate negotiations) and the treatment of cohabitation agreements.
[3] See Ch 3.
[4] See Ch 5.
[5] Who are aged 16 or over, not spouses or civil partners of each other, and are not closely related to each other, within the meaning in section 25 (A4) to (A7), and Schedule A1.

5. The inclusion of the list in subsection (A3), makes clear which relationships are included (in other words, that amount to "an enduring family relationship") and those that are not, such as very brief or casual relationships or where the couple are completely financially independent of each other or never share or shared a residence. If a person meets the proposed new definition of cohabitant, their claim for financial provision may proceed (meeting the definition alone does not bring with it any entitlement to financial provision). If the court decides that the applicant is not a cohabitant for the purposes of this legislation, the claim for financial provision will be dismissed.

The test for financial provision

6. In Chapter 5, we set out our recommendations for reform of the test by which applications for financial provision on cessation of cohabitation are determined. We recommend a new test based on the application of guiding principles and taking account of resources. We recommend that, in reaching a decision on a claim for financial provision, the court must apply the test set out in section 28(2) (of the Bill), which requires application of the principles in new section 28B, supplemented by the factors relevant to their application in new section 28C, and consideration of the parties' present and foreseeable resources. The court must then make such order as is justified on the application of the guiding principles and reasonable having regard to the parties' resources.

7. The guiding principles are set out in new section 28B and are that:

a) where one cohabitant has-
   (i) derived any economic advantage from the contributions of the other cohabitant, that economic advantage should be fairly distributed,
   (ii) suffered any economic disadvantage in the interests of the other cohabitant or of a relevant child, that economic disadvantage should be fairly compensated for;
b) a cohabitant who seems likely to suffer serious financial hardship as a result of the cohabitation having ended should be awarded such financial provision as is reasonable for the short term relief of that hardship; and
c) the economic responsibility of caring for a relevant child[6] after the end of the cohabitation should be shared fairly between the cohabitants.

8. The factors relevant to the application of each guiding principle are set out in section 28C(1), (2) and (3). In addition, factors relevant to the application of all of the guiding principles, including "all the other circumstances of the case" are set out in section 28C(4).

9. Both parts of the section 28(2) test must be satisfied for the court to make an order. Therefore, if the court is not satisfied that an order is justified on the application of any of the principles relied on, no order may be made, regardless of the extent of the parties' resources. Conversely, if an order is justified on the application of a principle but there are no resources from which to implement the order, no order may be made.

[6] That is, a child of whom the cohabitants are parents or who was accepted by the cohabitants as a child of the family.

10. If both parts of the test are satisfied, the court must decide what order, if any, to make. Currently, an order for payment of a capital sum; an order for payment of such amount as is specified in respect of any economic burden of caring, after the end of the cohabitation, for a child of whom the cohabitants are parents; and interim orders are available.[7] We recommend a different approach to orders relating to the economic burden of child care.[8] We also recommend the introduction of orders for payments (over a period not exceeding 6 months) for the short term relief of serious financial hardship;[9] orders for transfer of property;[10] and various incidental orders.[11]

11. We set out below two possible scenarios in which the question of whether a couple were cohabitants or not, in terms of our proposed new definition, is disputed and how the court should approach determination of the dispute. Using one of those examples, we then explain how a claim for financial provision should be approached under our reformed scheme. Finally, we explain how we expect incidental and ancillary orders will be used in practice.

Examples

Meeting the definition of Cohabitant

i. Jo and Alex lived together for 5 years in a flat owned by Jo and have one child. Alex gave up employment to look after the child, and was financially dependent on Jo. When Alex makes a claim for financial provision under section 28, Jo defends the action, arguing that they were not "living as a couple in an enduring family relationship". We would anticipate that Jo's defence would not be likely to succeed. The whole circumstances of the case, including the presence of all of the matters on the section 28(A3) list, would tend to support Alex's contention that they were living in an enduring family relationship, so are cohabitants for the purposes of the legislation. Once it is established that the couple were cohabiting, Alex's claim can then be considered by the court.

ii. Chris and Don have been in a relationship for one year and decide to live together. Chris buys a property and Don contributes £20,000 towards the deposit in contemplation of them moving in to the property and living there together. Chris then ends the relationship. Don makes a claim under section 28, seeking to recover the £20,000 deposit. Chris argues that they were not cohabitants because they were not in an "enduring family relationship", relying on the absence of features on the list in section 28(A4); the relationship only lasted for one year, so was not of significant duration; they never lived together in the same residence; they were not financially interdependent and they have no children. While, in this scenario, there is a clear economic basis for the claim, it is likely that Chris's defence would

[7] Family Law (Scotland) Act 2006, s 28(2).
[8] See Ch 5, para 5.48; our approach is that the guiding principles in section 28B shall include the principle that the economic responsibility of child care after the end of the cohabitation shall be shared fairly; any of the orders in section 28(3)(a) and (c), incidental orders in terms of section 28(4) and interim orders may be made, if justified by the principle and reasonable having regard to resources.
[9] Section 28(3)(b) and new section 28A(3); this order will only be available if justified by principle in section 28B(1)(b).
[10] Section 28(3)(c).
[11] Section 28(4).

succeed and the action would be dismissed. Don would then be forced to pursue a different remedy, such as unjustified enrichment, to recover the £20,000 deposit.[12]

Orders for financial provision

12. Using the above example of Jo and Alex: having established that they were cohabitants, Alex seeks an order for transfer of Jo's flat, relying on the guiding principles in section 28B(1)(a)(ii) and (c) and an order for payments over a period of six months, relying on the guiding principle in section 28B(1)(b). After proof, it is established that: Alex suffered loss of earnings and earning capacity as a result of giving up work to care for their child and take responsibility for looking after the family home; Jo's flat is subject to a substantial secured loan, such that there is no equity in the property; Alex is not financially eligible for a mortgage; and Jo's only other resource is income. Alex argues that an order for transfer of property is justified, relying on guiding principle 28B(1)(a)(ii), having regard to the changes in Alex's economic circumstances during the relationship (loss of earnings and earning capacity), which amount to economic disadvantage suffered wholly in the interests of Jo and the child (section 28C(1)(a) and (b)(ii)). Alex also argues that the economic burden of child care should be shared fairly, including the need to provide accommodation for the child, and that the order for transfer of property is justified on the application of guiding principle 28B(1)(c), having regard to the factors in section 28C(3)(a), (b), (g) and (4)(c). While an order for transfer of property is likely to be justified on application of the section 28B(1)(a) and (c) principles, it is not likely that the court would consider it reasonable for the order to be made, given the lack of resources (of either party) available to implement transfer of the property to Alex. However, Alex also relies on guiding principle 28B(1)(b), having regard to all of the factors in section 28C(2), including subs (4)(c), and is able to successfully argue that an order for payments over a six month period, for the short term relief of serious financial hardship brought about by the end of the cohabitation, is justified on the basis that such payments are needed for the purpose of quickly securing alternative accommodation, including for their child. Provided the court is satisfied that such an order is reasonable having regard to the parties' resources (including Jo's income) it must make the order; the amount of the payments would be a matter for the court to assess, having regard to the the facts of the case and the extent of the parties' present and reasonably foreseeable resources.

Incidental and ancillary orders – examples.

13. Some examples may also aid understanding of how the incidental orders in section 28(4) and orders ancillary to the orders mentioned in section 28(3)[13] may be used in practice:

i. Where heritable property used as a family home is owned by one of the cohabitants, the other will have no automatic right of occupancy.[14] In the example

[12] See Ch 8 for discussion of the common law remedy of unjustified enrichment.
[13] Section 28A.
[14] Spouses (Matrimonial Homes (Family Protection) (Scotland) 1981 Act, s 1) and civil partners (Civil Partnership Act 2004, s 101) automatically enjoy occupancy rights in the matrimonial or family home, whichever of them is owner or tenant. Cohabitants have no such occupancy rights, unless they own or rent the property, jointly or solely, or an order is made under section 18 of the 1981 Act, granting the applicant occupancy right for a period of up to six months (which may be extended by no more than six months on application).

above Alex could apply for an incidental order for occupation of the property and use the contents pending determination of the claim and ask the court to regulate liability for outgoings, such as council tax etc., such that Jo would meet those costs.[15] In our scheme, interim orders[16] and incidental orders[17] may be made at an early stage in the process; these would fall on dismissal of Alex's action (or on transfer of the property, were Alex to succeed) or on Alex leaving the property.[18]

ii. If there is doubt as to the ability or willingness of the defender to pay any capital sum awarded by the court, an incidental order for security to be given for payment of the sum due may be made.[19] The order may be made before, on or after the making of an order for financial provision.[20] If an order is made for payment of a capital sum or transfer of property by a specified date, the defender may apply, on a material change of circumstances, for an ancillary order varying the date or method of payment or the date of transfer of property.[21]

[15] Section 28(4)(c).
[16] Section 28(5).
[17] Section 28A(5)(a).
[18] The equivalent order for under section 14(2) of the 1985 Act can only be made on the granting of decree of divorce or dissolution, at which time the non-entitled party's occupancy rights fall away; 1985 Act, s 14(3).
[19] Section 28(4)(d).
[20] Section 28A(5)(a).
[21] Section 28A(2).

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