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Dear Kate

SCOTTISH LAW COMMISSION REPORT ON COHABITATION

This letter provides the Scottish Government's initial response to the Commission's report 261 on Cohabitation. The Citizen Participation and Public Petitions Committee is currently dealing with Public Petition [PE1973](#) on reviewing the Family Law (Scotland) Act 2006 and providing greater clarity on the division of assets in cases of cohabitating couples who are separating. I am therefore writing to the Convener of the Committee in similar terms.

The report is very thorough, impressive and readable. It provides a sound basis for reforming the law in this area.

The Scottish Government will consider whether or not it would be helpful for the Scottish Government to carry out a consultation on the Commission's recommendations.

Specific points we have noted on the Commission's report are outlined below.

The Commission note, in paragraph 1.3 and in paragraph 3.3, that it would be helpful if the proposed new definition of "cohabitant" applied to section 29 of the 2006 Act, as well as to sections 26 to 28. As the Commission note, you did not generally make recommendations on section 29. The Scottish Government will consider whether any revised definition of cohabitant should extend to section 29.

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On the definition of “cohabitant” generally, the Commission say that “we intend that those who are currently treated as cohabitants for the purposes of the legislation will continue to be so”. The Scottish Government agrees this is an important issue and notes that in paragraph 3.49 the Commission concluded that it did not propose legislative change to introduce a qualifying period for access to claims.

The Commission conclude in paragraph 3.66 that a registration system for cohabitants, whereby legal protections would apply where couples had registered as cohabitants, should not be introduced. The Scottish Government agrees with this conclusion, for a number of reasons:

- It is not clear how a registration system would work when a couple start to cohabit outside of Scotland and then move to Scotland.
- Similarly, it is not clear how a registration system would work for couples who are already cohabiting in Scotland when it is introduced.
- As the Commission note, the most vulnerable, who are most in need of protection, may be unlikely to register their relationships.
- As the Commission also note, there would be a need for de-registration
- A registration system would have costs and may require significant monitoring and communication to ensure accuracy.

The Commission note in a number of places in the report that people may be unaware of their rights when they are cohabiting. The Scottish Government plans to provide more public-facing information about cohabitants’ rights on mygov.scot - <https://www.mygov.scot/>

The Commission note in paragraphs 1.19, 1.20 and 5.56 that points were raised on domestic abuse in responses to the Discussion Paper. We note the recommendation that the legislation should require the courts when determining a claim for financial provision to take account of any behaviour (including abusive behaviour) by either cohabitant that has an effect on the economic position of, or the resources of, the parties or either of the parties. As you know, in relation to financial provision on divorce or dissolution, the court is required to disregard conduct unless it has adversely affected the couple’s financial resources. The Scottish Government appreciates the points made in the report on domestic abuse, including economic abuse, and will consider them carefully as we look further into the Commission’s recommendation in this area.

The Scottish Government notes that the Commission have **not** recommended the introduction of pension sharing orders as a potential remedy when cohabitants separate. As the Commission note in paragraph 1.25, occupational and personal pensions are, with some limited exceptions, reserved to Westminster.

The Scottish Government notes the detailed discussion in Chapter 2 of the report on whether separate regimes should be retained for financial provision on divorce and dissolution and on cessation of cohabitation. We note the conclusion in paragraph 2.38 that “in the absence 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”.

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Public Petition PE 1973 has raised points on the need for greater clarity on the division of assets in cases of cohabitating couples who are separating. The Scottish Government welcomes the work carried out by the Commission to increase clarity and certainty in this area. As you mention in the Business and Regulatory Impact Assessment, the reforms you are proposing “to clarify the test and policy underpinning section 28..... should assist legal practitioners to advise their clients on the likely outcome of a potential claim, thereby making settlement more likely.” Similarly, the recommendation in Chapter 7 that in applying the proposed guiding principles the court must have regard to the terms of any agreement between the cohabitants (with the court having the power to set aside or vary an agreement if it was not fair or reasonable at the time it was entered into) could help increase clarity and certainty.

On the remedies available to the court when dealing with an application for financial provision, we note the proposed introduction of property transfer orders.

Towards the end of Chapter 5, the Commission recommend 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. The Scottish Government agrees this recommendation.

On time limits and couples being able to agree in writing an extension of up to 6 months, it might be helpful for the Scottish Government to publish an example of how the agreement might be set out.

Finally, footnote 36 on page 10 of the Commission’s report notes that “It is not intended any of the Bill provisions will have retrospective effect. Commencement of the Bill provisions is a matter for the Scottish Government..... S5(3) provides that commencement regulations may include transitional, transitory, or saving provision and make different provision for different purposes”.

Following any Bill enacted by Parliament, the Scottish Government would need to consider:

- Work needed to implement the Bill.
- What transitional arrangements may be needed as we move from the current regime for financial provision to the new regime.

Work needed to implement any Bill enacted by Parliament could include:

- Training (as noted in the Business and Regulatory Impact Assessment)
- More public-facing information (as mentioned in paragraph 1.07 of the Report). To help keep costs down, any such public-facing information is likely to be web-based.
- Court rules.
- The Commencement Regulations (including any transitional provision) envisaged by section 5 of the Commission’s draft Bill.



ELENA WHITHAM

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