

Minister for Community Safety submission of 3 February 2023

PE1973/D: End the use of Sheriffs Discretion when ruling on civil cases and provide clear legal guidance on division of assets

I am grateful to the Clerks of the Committee for writing to my officials on 9 January 2023 following the Committee's consideration of this Petition at the Committee's meeting on 21 December 2022.

The Committee is seeking the Scottish Government's response to the recommendations proposed by the Scottish Law Commission in their Report on Cohabitation and the anticipated timetable for bringing forward legislation in this area.

At this stage, I cannot provide a timetable for bringing forward a Bill in this area. That depends on future decisions and announcements about the Scottish Government's legislative programme.

In Programme for Government 2021/22, the Scottish Government said that "In addition to the introduction of a Moveable Transactions Bill in the first year of the Parliament, the Government is also giving consideration to a longer-term programme of implementation of Scottish Law Commission Reports to be introduced during this Parliament, such as Trusts, Judicial Factors, Contract law, Title Conditions, Cohabitation and Damages for Personal Injury": [A Fairer, Greener Scotland: Programme for Government 2021-22 - gov.scot \(www.gov.scot\)](https://www.gov.scot/publications/programme-for-government-2021-22/pages/100.aspx)

That remains the position.

We very much welcome the work the Commission has carried out on cohabitation. The Scottish Government will consider further 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 their proposed new definition of "cohabitant" applied to section 29 of the Family Law (Scotland) Act 2006, as well as to sections 26 to 28. As the Commission note in their report, they did not generally make recommendations on section 29, which relates to court

applications for financial provision by a surviving cohabitant when the other cohabitant has died without leaving a will. The Scottish Government will consider further whether any revised definition of cohabitant should extend to section 29.

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 also 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 their 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 their Discussion Paper. The Commission have recommended 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. 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: see section 11(7) of the [Family Law \(Scotland\) Act 1985](#). The Scottish Government appreciates the points made 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 notes in paragraph 1.25, occupational and personal pensions are, with some limited exceptions, reserved to Westminster.

The [1985 Act](#) contains provisions on financial provision on divorce and dissolution of a civil partnership. 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".

The petitioner has raised points on the need for greater clarity on the division of assets in cases of cohabitating couples who are separating. The Commission's recommendations in Chapter 5 of their report are intended to increase clarity: the Commission notes in paragraph 5.35 that they "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." Under the Commission's proposals, there would be guiding principles for the courts to follow and relevant factors for the court to have regard to when applying these guiding principles.

In Chapter 7, the Commission recommend that in applying the 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).

In relation to the remedies available to the court when dealing with an application for financial provision, the Commission propose the introduction of property transfer orders and payments, for a maximum of 6 months, for the short-term relief of serious financial hardship.

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.

In Chapter 6, the Commission consider the time limits for making a claim. The time limit for making a claim would generally remain at 1 year. However, the Commission recommend:

- There should be judicial discretion to allow a late claim to proceed “on special cause shown”. [The Commission outline in paragraphs 6.36 to 6.40 of their report that this would mean cause which is special to the particular case. They note that “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.”]
- There should be a maximum period of two years (a “back stop”) from the date of cessation of cohabitation beyond which no claim for financial provision could competently be made by a former cohabitant.
- The parties themselves should be able to agree in writing one extension of up to 6 months of the one year time limit.

The Scottish Government notes that on 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 have to consider:

- Work needed to implement the Bill.
- What transitional arrangements may be needed as we move from the current regime for financial provision for cohabitants on separation 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 published by the Commission).
- 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.

The Scottish Government is committed to giving an initial response to Commission reports within 3 months of them being published. I am therefore also writing today to the Commission, in similar terms.