



Scottish Law Commission
promoting law reform

| (DISCUSSION PAPER No170)

Aspects of Family Law Discussion Paper on Cohabitation

discussion
paper



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February 2020

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The Commission would be grateful if comments on this Discussion Paper were submitted by 31 May 2020.

Please ensure that, prior to submitting your comments, you read notes 1-2 on the facing page. Respondents who wish to address only some of the questions and proposals in the Discussion Paper may do so. All non-electronic correspondence should be addressed to:

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Abbreviations

General

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,
Family Law Act 1975 (Cth) – Australia

1976 Act,
Divorce (Scotland) Act 1976

1976 Act (New Zealand),
Property (Relationships) Act 1976 – New Zealand

1981 Act,
Matrimonial Homes (Family Protection) (Scotland) Act 1981

1985 Act,
Family Law (Scotland) Act 1985

1991 Act,
Household Community Act 1991 – Norway

2002 Act,
Freedom of Information (Scotland) Act 2002

2002 Adoption Act,
Adoption and Children Act 2002

2002 Act (SA),
Adult Interdependent Relationships Act, SA 2002 - Alberta

2003 Act,
Cohabitees Act, SFS 2003:276 – Sweden

- 2004 Act,
Civil Partnership Act 2004
- 2006 Act,
Family Law (Scotland) Act 2006
- 2007 Act,
Adoption and Children (Scotland) Act 2007
- 2008 Act (Australia),
Family Law Amendment (De Facto Financial Matters and Other Measures) Act 2008
(Cth) – Australia
- 2008 Act,
Human Fertilisation and Embryology Act 2008
- 2010 Act,
Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010 – Ireland
- 2011 Act (BC),
Family Law Act 2011 – British Columbia, Canada
- 2011 Act (Finland),
Act on the Dissolution of the Household of Cohabiting Partners 26/2011 – Finland
- 2009 Report,
Report on Succession (Scot Law Com No 215, 2009) available at:
<https://www.scotlawcom.gov.uk/files/7112/7989/7451/rep215.pdf>
- 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:
http://www.parliament.scot/S4_JusticeCommittee/Reports/JS042016R06.pdf
- The Bill,
Family Law (Scotland) Bill, introduced 2005, which became the Family Law
(Scotland) Act 2006
- ALRC,
Australian Law Reform Commission
- ALRI,
Alberta Law Reform Institute
- ALRI 2017 Report,
Alberta Law Reform Institute, *Property Division: Common Law Couples and Adult
Interdependent Partners*, Report for Discussion 30 (September 2017) available at:
<https://www.alri.ualberta.ca/images/stories/docs/RFD30>

- ALRI 2018 Report,
Alberta Law Reform Institute, *Property Division: Common Law Couples and Adult Interdependent Partners*, Final Report 112 (June 2018) available at:
<https://www.alri.ualberta.ca/images/stories/docs/FR112.pdf>
- BCLI,
British Columbia Law Institute
- 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
- ECtHR,
European Court of Human Rights
- LRC,
Law Reform Commission of Ireland
- 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://www.parliament.scot/S2_Bills/Family%20Law%20\(Scotland\)%20Bill/b36s2-introd-pm.pdf](https://www.parliament.scot/S2_Bills/Family%20Law%20(Scotland)%20Bill/b36s2-introd-pm.pdf)
- Clive on Husband and Wife,
Eric M Clive, *The Law of Husband and Wife in Scotland*, (4th edition, W Green 1997)
- The NZ Commission,
Law Commission of New Zealand
- NZ Issues Paper,
Law Commission, "Dividing Relationship Property – time for change?" Issues Paper 41 (October 2017, Wellington, New Zealand) available at:
<https://www.lawcom.govt.nz/sites/default/files/projectAvailableFormats/PRA%20Issues%20Paper%20FINAL.pdf>

NZ Report,

Law Commission, "Review of the Property (Relationships) Act 1976" Report 143 (June 2019, Wellington, New Zealand) available at:

<https://www.lawcom.govt.nz/sites/default/files/projectAvailableFormats/NZLC%20-%20PRA%20Review%20Project%20-%20Final%20Report%20R143.pdf>

SCTS,

Scottish Courts and Tribunal Service

UKSC,

United Kingdom Supreme Court

Wasoff, Miles and Mordaunt Report,

Report on Legal Practitioners' Perspectives on the Cohabitation Provisions of the Family Law (Scotland) Act 2006, October 2010 by Fran Wasoff (Centre for Research on Families and Relationships, the University of Edinburgh), Jo Miles, (Trinity College, University of Cambridge), Enid Mordaunt, (Centre of Research on Families and Relationships, the University of Edinburgh), available at:

<http://www.cfr.ac.uk/assets/Cohabitation-final-report.pdf>

Glossary

Civil partnership. Section 1 of the Civil Partnership Act 2004 provides that a civil partnership is a relationship between two people (in Scotland, of the same sex) (“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. The Civil Partnership (Scotland) Bill, introduced in the Scottish Parliament on 30 September 2019, proposes similar extension in Scotland.

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 in accordance with the following provisions of the 1976 Act that (a) the marriage has broken down irretrievably or (b) subject to subsection (3B) 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.

Irish Constitution. Ireland’s Constitution of 1937.

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 furnishings 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](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

Background

1.1 Under the Law Commissions Act 1965 our duty is:

“...to take and keep under review all the law with which [we] are ... concerned with a view to its systematic development and reform, including in particular the codification of such law, the elimination of anomalies, the repeal of obsolete and unnecessary enactments, the reduction of the number of separate enactments and generally the simplification and modernisation of the law ...”¹

1.2 Family law is an area with which we are concerned. This Discussion Paper explains the background against which we have decided to review Aspects of Family Law as part of the Tenth Programme of Law Reform, published in 2018.² It also explains our approach to the project and the matters upon which we seek views during this first phase.

1.3 This Commission has a long history of engagement in family law reform projects and last published a Report on Family Law in 1992 (“the 1992 Report”).³ The aim of the report was to:

“draw together the many statutory provisions on family law, along with those few family law rules which still depend on the common law, into one single family law statute for Scotland.”⁴

1.4 While a comprehensive code on family law was not achieved, many of the recommendations set out in the 1992 Report were taken forward, resulting in legislation that has since been applied by Scottish family lawyers and decision makers.⁵

1.5 Over the past thirty years or so, there has been legislative change in areas such as divorce, adoption and permanence, parental rights and responsibilities, child protection, domestic abuse and cohabitants’ rights. Same sex relationships have been recognised by the introduction of same sex marriage⁶ and civil partnership.⁷ The rights of transgender people are now protected⁸ and the legislation regulating surrogacy as a means of building a family is

¹ Law Commissions Act 1965, s 3(1).

² Scottish Law Commission, Tenth Programme of Law Reform, Scot Law Com No 250, 2018.

³ Scot Law Com No 135, 1992.

⁴ Para 1.1.

⁵ Note, in particular the Children (Scotland) Act 1995 and the Family Law (Scotland) Act 2006.

⁶ Marriage and Civil Partnership (Scotland) Act 2014.

⁷ Civil Partnership Act 2004. The Civil Partnership (Scotland) Bill was introduced in the Scottish Parliament on 30 September 2019 which legislates to open up civil partnerships to mixed sex couples, available at: <https://www.parliament.scot/parliamentarybusiness/Bills/112997.aspx>.

⁸The Gender Recognition Act 2004 is currently under review by the Scottish Government: <http://www.parliament.scot/parliamentarybusiness/report.aspx?r=12196&i=110214> and at <https://www.gov.scot/publications/statement-gender-recognition/>.

currently under review.⁹ These changes and innovations have reflected developments in society, including the introduction and acceptance of new family forms. Despite these reforms and proposals there remains significant support, including in the responses to the Tenth Programme consultation,¹⁰ for review of various aspects of family law. Our approach to identifying those areas most in need of reform will be discussed in the paragraphs that follow.

Aspects of Family Law project

1.6 There was a significant degree of consensus among respondents to the Tenth Programme consultation on the areas of family law where review and, potentially, reform, were most needed. We therefore committed to carrying out a review of Aspects of Family Law as part of our Tenth Programme. Aspects of family law identified as in need of improvement and modernisation include the law in relation to cohabitants' rights on separation and death, civil partnership, marriage, divorce, civil remedies for domestic abuse, the legal age of adulthood, residence and contact orders, parental rights and responsibilities, and adoption and permanence. Following an in-depth scoping exercise, we identified the topics most suitable for us to consider, due to their importance, the level of demand or support for review and their legal rather than political nature. Those topics include the law relating to cohabitation¹¹ and civil remedies for domestic abuse. There was also some support among respondents and stakeholders for a wholesale review of the law relating to adult relationships. However, support for such a project was not universal and, in any event, limits of time and Commission resources did not allow for such an extensive project. We also doubted the necessity of a review of the sort carried out in the late 1980s / early 1990s, given legislative changes since then. Those considerations, coupled with the Government's ongoing work on Part 1 of the Children (Scotland) Act 1995,¹² its review of civil partnerships¹³ and its consultation on Emergency Barring Orders,¹⁴ led us to conclude that we should approach the Aspects of Family Law project in phases, concentrating during the first phase on review of the law relating to cohabitation. A decision on the content of phase two will be taken on completion of the current phase. By then, the work of the Scottish Government in relation to civil remedies for domestic abuse will be at a more advanced stage and we will consider whether there is further work for us to do in that area, or whether to focus on a different topic.

⁹ Surrogacy is regulated by the Surrogacy Arrangements Act 1985 and the Human Fertilisation and Embryology Act 2008. The law is currently the subject of a joint project by the Law Commission of England and Wales and this Commission:

<https://www.scotlawcom.gov.uk/law-reform/law-reform-projects/joint-projects/surrogacy/>.

¹⁰ The responses to the Consultation on the Tenth Programme of Law Reform are available at: <https://www.scotlawcom.gov.uk/law-reform/tenth-programme-of-law-reform-consultation/respondents-to-the-scottish-law-commissions-consultation-on-topics-for-inclusion-in-its-tenth-programme-of-law-reform/>.

¹¹ That is, informal cohabitation without marriage or civil partnership, in terms of ss 25 to 29 of the Family Law (Scotland) Act 2006.

¹² The Scottish Government consulted on a review of Part 1 of the Children (Scotland) Act 1995 from 15 May 2018 to 28 September 2018. Following this consultation, the Scottish Government introduced the Children (Scotland) Bill in the Scottish Parliament on 2 September 2019. The Bill makes various amendments to the 1995 Act and other legislation.

¹³ The Civil Partnership (Scotland) Bill was introduced in the Scottish Parliament on 30 September 2019. The Bill seeks to open up civil partnership to mixed sex couples.

¹⁴ Available at: <https://www.gov.scot/publications/consultation-protective-orders-people-risk-domestic-abuse/>. On 15 October 2019 the Scottish Government announced its intention to legislate in this area within the current parliament (<https://consult.gov.scot/justice/people-at-risk-of-domestic-abuse/>).

Phase 1: Cohabitation

Introduction

1.7 The law relating to cohabitants is contained within sections 25 to 29 of the Family Law (Scotland) Act 2006 (“the 2006 Act”).¹⁵ Those provisions prescribe the relationships to which the legislation will apply, create certain presumptions and rules relating to ownership of household goods, property and money acquired during the relationship and give parties in cohabiting relationships limited rights to seek financial provision on cessation of cohabitation, whether on separation or on death. The legislation had its genesis in recommendations made in the 1992 Report.¹⁶

1.8 We concentrate during this phase of the project on sections 25 to 28 of the 2006 Act. We have decided not to include review of section 29 of the 2006 Act, which relates to applications by surviving cohabitants for financial provision on intestacy. In February 2019 the Scottish Government published its Consultation on the Law of Succession.¹⁷ The succession rights of bereaved cohabitants in intestacy are currently being considered as part of that consultation. It would not therefore be appropriate for us to include a review of this provision. In any event, we are mindful of the observation made by Lady Smith in *Kerr v Mangan*¹⁸ that “[T]he conclusion that sec 29 reformed the law of succession and is, accordingly, a part of the Scots law of succession is inescapable.”

1.9 Since the 1992 Report, the number of cohabiting couples in Scotland has increased significantly.¹⁹ Cohabitation, whether between same or mixed sex couples, with or without children, is a socially and legally recognised family form. Couples 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 this Discussion Paper we consider, by reference to the available statistical, empirical and anecdotal evidence, how the law as it currently stands affects cohabiting couples and their children. In the chapters that follow, we will examine the law affecting cohabitants during their cohabitation and when it ends by separation. We will consider how cohabitants’ rights are protected in other jurisdictions and will explore the ways in which Scots law might be modernised and improved to better meet the needs of cohabitants in the 21st Century.

Previous Commission work on cohabitation

1.10 Part 16 of the 1992 Report recommended the introduction of statutory remedies for separating and bereaved cohabitants. Sections 28 and 29 of the 2006 Act provided such remedies, albeit in a slightly different way. The 1992 Report noted that, while a strong case existed for some limited reform of Scots private law to overcome certain legal difficulties faced by cohabiting couples, it was a subject on which widely differing views were held:

“There is, in particular, a respectable view that it would be unwise to impose marriage-like legal consequences on couples who may have deliberately chosen not to marry.

¹⁵ See Appendix A.

¹⁶ Scot Law Com No 135, 1992.

¹⁷ Available at: <https://consult.gov.scot/justice/law-of-succession-2019/>. The Scottish Government is not expected to publish its report before spring 2020.

¹⁸ 2015 SC 17, para [36].

¹⁹ For statistical data, see paras 1.12 to 1.14.

It was argued by some of those who commented on the discussion paper that the best approach would be to leave those who opt out of marriage to make their own legal arrangements by means, for example, of cohabitation contracts, insurance policies and wills. Although we have considerable sympathy with this view, we doubt whether it is realistic to expect all cohabiting couples to make adequate private legal arrangements. We accept, however, that legal intervention in this area ought to be limited and that it requires to be justified in each situation in which it is recommended. It should neither undermine marriage, nor undermine the freedom of those who have deliberately opted out of marriage. It should be confined to the easing of certain legal difficulties and the remedying of certain situations which are widely perceived as being harsh and unfair. Cohabitants who do not wish to be governed by any of the new rules proposed should, in general, be able to opt out of them - for example, by entering into a contract whereby they make their own legal arrangements and renounce other rights or claims in advance.”²⁰

1.11 A limited scheme of legal remedies on breakdown of a cohabiting relationship, which did not attempt to mirror the model for financial provision on divorce,²¹ was recommended. It was not until 2006 that the Government broadly implemented the 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

Factual background

Statistical information: family forms

1.12 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”),²³ in 1987 about 2% of households in Scotland were “headed by a cohabitant”.²⁴ The last national census in Scotland took place in 2011 and revealed that 16% of families (with or without children) were cohabiting couple families.²⁵ In the United Kingdom, in the period from 2005 to 2015 alone, the number of cohabiting couple families grew by 29.7%. Of those, 17%

²⁰ Scot Law Com No 135, 1992, para 16.1.

²¹ See Family Law (Scotland) Act 1985, ss 8 to 16.

²² Policy Memorandum for the Family Law (Scotland) Bill (now the Family Law (Scotland) Act 2006), para 65: available at: [https://www.parliament.scot/S2_Bills/Family%20Law%20\(Scotland\)%20Bill/b36s2-introd-pm.pdf](https://www.parliament.scot/S2_Bills/Family%20Law%20(Scotland)%20Bill/b36s2-introd-pm.pdf).

²³ Scot Law Com No 86, 1990.

²⁴ Para 1.3 (Information supplied by Central Research Unit, Scottish Office, and derived from the General Household Survey 1987).

²⁵ 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 next census in Scotland is due to take place in 2021.

were mixed sex cohabiting couple families, increased from 14% in 2005. Same sex cohabiting couple families, as a percentage of all families, had increased over the same period from 0.3% to 0.5%.²⁶

1.13 The Office for National Statistics (“ONS”) published a data set for 2016 with a breakdown for cohabiting couple families by English region and UK country.²⁷ This revealed that there were 268,100 cohabiting families in Scotland (and 103,600 of those families were cohabiting couples with dependent children). Although coming from different data sets, it is interesting to note the increase from 217,000 cohabiting families in Scotland in 2011 (according to the 2011 national census) to 268,100 in 2016.

1.14 The ONS also published data on UK family composition up to 2017, the main point to note being that the number of families in the UK continues to grow,²⁸ with cohabiting couple families growing the fastest. The most recent ONS statistical bulletin, released on 7 August 2019, reported that the number of cohabiting couple families “continues to grow faster than married couple and lone parent families, with an increase of 25.8% over the decade 2008 to 2018.”²⁹

Statistical information: litigation

1.15 The extent of litigation brought under section 28 of the 2006 Act is not easily discovered. The Scottish Government Civil Justice Statistics in Scotland 2017-2018 Report discloses that, while there was an overall increase in civil law cases initiated across the Court of Session and sheriff courts in the periods 2016-2017 and 2017-18, there was a 5% decrease in family cases to 12,700, in 2017-18. Family actions were the third most common action, constituting 16% of all primary craves.³⁰ Three quarters of family cases had divorce as the primary crave. This is of some assistance as it indicates that 75% of family cases in 2017-18 did not concern claims by former cohabitants under the 2006 Act. The remaining 25% of family actions (ie those without divorce as the primary crave) are made up of 19% with a primary crave relating to parental rights and responsibilities and 6% titled “other”.³¹ The Report does not provide a breakdown of “other”. There is also no breakdown between claims by cohabitants and other family cases.

1.16 What the foregoing statistics do suggest is that relatively few claims under section 28 are litigated. That is perhaps reflective of lack of public awareness of the legislation discussed

²⁶ Office for National Statistics, “Families and households in the UK: 2015”, (November 2015) available at: <https://www.ons.gov.uk/peoplepopulationandcommunity/birthsdeathsandmarriages/families/bulletins/familiesandhouseholds/2015-11-05#cohabiting-couples>.

²⁷ “Cohabiting couple families by English region and UK Country, 2016”, (September 2017) available at: <https://www.ons.gov.uk/peoplepopulationandcommunity/birthsdeathsandmarriages/families/adhocs/007468cohabitingcouplefamiliesbyenglishregionandukcountry2016>.

²⁸ 19.0 million families in the UK in 2017, up 15% from 16.6 million in 1996 (which is a rise similar to the growth in the UK population during this 20 year period).

²⁹ “Families and Households in the UK: 2018”, (August 2019) available at: <https://www.ons.gov.uk/peoplepopulationandcommunity/birthsdeathsandmarriages/families/bulletins/familiesandhouseholds/2018>.

³⁰ The crave in a court action sets out the order asked for.

³¹ Scottish Government, “Civil justice statistics in Scotland 2017-18” (April 2019) available at: <https://www.gov.scot/publications/civil-justice-statistics-scotland-2017-18/>.

below,³² or the complexity and inaccessibility of the provisions, discussed elsewhere in this Discussion Paper,³³ or both.

Legislative and policy background

1.17 As noted above, sections 25 to 29 of the 2006 Act make provision for cohabitants. For ease of reference, a copy of those sections is attached at Appendix A of this Discussion Paper. Section 25 of the 2006 Act explains the meaning of “cohabitant” for the purposes of sections 26 to 29.³⁴ Sections 26 and 27 respectively create presumptions in relation to cohabitants’ rights in certain household goods and certain money and property.³⁵ Section 28 makes provision for claims for financial provision by former cohabitants to the appropriate court³⁶ within one year of cessation of cohabitation otherwise than by death.³⁷ Section 29 provides a mechanism whereby a surviving cohabitant may make a claim against their deceased cohabitant’s intestate estate within 6 months of death.

1.18 Prior to the 2006 Act, 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,³⁸ it was inadequate in protecting many cohabitants.³⁹

1.19 The policy objectives of the 2006 Act provisions relating to cohabitants, set out in the Policy Memorandum were to:

“introduce greater certainty, fairness and clarity into the law by establishing a firm statutory foundation for disentangling the shared life of cohabitants when their relationship ends.”⁴⁰

“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.”⁴¹ and

“[provide] a set of basic safeguards relating to the sharing of household goods, money and property; financial provision on relationship breakdown where economic disadvantage can be shown; and discretionary provision (i.e. by application to the court) for a surviving cohabitant when a partner dies without a will. It also equips the courts with a power to take account of the needs of any child of the relationship (alongside any economic disadvantage experienced by the adult) in settling financial provision.”⁴²

1.20 There is a large body of opinion that those policy objectives have not been met by the current legislation. Sections 25, 28 and 29 in particular have been criticised. Aspects of these

³² In paras 1.21 to 1.29.

³³ See ch 5.

³⁴ See ch 3, part 1; note the changes effected by s 4 of the Marriage and Civil Partnership (Scotland) Act 2014, discussed in para 3.4.

³⁵ See ch 4.

³⁶ See ch 5.

³⁷ See ch 6 for discussion about time limit.

³⁸ See, for example, *Shilliday v Smith* 1998 SC 725.

³⁹ See ch 8.

⁴⁰ Para 64.

⁴¹ Para 65.

⁴² Para 66.

provisions have been consistently identified as in need of improvement and reform since the legislation was enacted. These criticisms and issues have been addressed and discussed in a report by Professor Fran Wasoff, Joanna Miles and Dr Enid Mordaunt on Legal Practitioners' Perspectives on the Cohabitation Provisions, published in 2010 ("the Wasoff, Miles and Mordaunt Report");⁴³ a report by the Scottish Parliament's Justice Committee published in 2016 ("the 2016 Justice Committee Report");⁴⁴ the responses to our consultation on the Tenth Programme of Reform in 2018;⁴⁵ and by stakeholders, including academics, practitioners, sheriffs and non-lawyers, we met with during our scoping exercise and research for this Discussion Paper. These criticisms and the provisions identified as most in need of reform, improvement or discussion will be discussed in the chapters that follow.

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

1.21 One issue that has been repeatedly raised with us during informal consultation is the general lack of public awareness of the cohabitation provisions in the 2006 Act. Public awareness and possible misperceptions were noted as concerns during the passage of the Bill in 2005, with one member of the Justice Committee, Fergus Ewing MSP, noting during stage 2 that:

"Cohabitation is not like Diet Coke is to Coke; it is a different type of relationship, and one that, if it is enshrined in law—as I believe it will be—may create a view among those who live together that they will be protected as though they were man and wife."⁴⁶

1.22 The Policy Memorandum states:

"There is considerable confusion amongst the Scottish public about the legal position of cohabitants with a majority (57%) reporting the belief that cohabiting couples have a "common law" marriage that gives them the same rights as married couples. This is not the case. Similarly, a significant number (35%) of those surveyed believed inaccurately that a woman who had cohabited with partner for 10 years would have the same rights as a married woman in relation to property on the death of her partner."⁴⁷

1.23 It seems that, in the years since the 2006 Act came into force, public awareness of its provisions and the absence of automatic rights for cohabitants has not improved. The British Social Attitudes 36th 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

⁴³ Report on Legal Practitioners' Perspectives on the Cohabitation Provisions of the Family Law (Scotland) Act 2006, October 2010 by Fran Wasoff (Centre for Research on Families and Relationships, the University of Edinburgh), Jo Miles, (Trinity College, University of Cambridge), Enid Mordaunt, (Centre of Research on Families and Relationships, the University of Edinburgh), available at: <http://www.cfr.ac.uk/assets/Cohabitation-final-report.pdf>.

⁴⁴ Scottish Parliament Justice Committee, Post-Legislative Scrutiny of the Family Law (Scotland) Act 2006, SP Paper 963 (6th Report, 2016 (Session 4)), 17 March 2016. Available at: http://www.parliament.scot/S4_JusticeCommittee/Reports/JS042016R06.pdf.

⁴⁵ See para 1.6 above.

⁴⁶ Scottish Parliament, Official Report of the Justice 1 Committee, Stage 2, 23 November 2005, at column 2359. Available at: <http://www.parliament.scot/parliamentarybusiness/report.aspx?r=2144&mode=html>.

⁴⁷ Para 59.

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%.⁴⁸

1.24 The figures mentioned above relate to Britain as a whole. Separate data is available for Scotland, albeit it relied upon a relatively small sample of 204.⁴⁹ Based upon that small sample, the proportion 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.

1.25 There are no more reliable figures available for Scotland, but in our discussions with stakeholders we have noted a lack of awareness of the legal position of cohabitants and a belief that “common law marriage” exists. 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 in relation to financial provision on breakdown of the relationship as spouses or civil partners, while others think they have no rights at all.

1.26 It is not clear whether this misconception arises from the form of irregular marriage known as “marriage by cohabitation with habit and repute”, which was abolished by section 3 of the 2006 Act.⁵⁰ Part VII of the 1992 Report assessed the law as it then stood and noted that:

“As a way of getting married, marriage by cohabitation with habit and repute has little to commend it. It is inherently vague and unregulated and causes difficulty and expense at a later stage. In reality this type of marriage is a way of conferring rights on some cohabitants, usually after the death of the other party to the relationship. It is as a protective mechanism for cohabitants that it must be judged.

One criticism of marriage by cohabitation with habit and repute as a protective mechanism for cohabitants is that it is not available to couples who have lived together without ever pretending to be married or acquiring the reputation of being married. This type of open cohabitation is increasingly common nowadays. Whatever its merits as a protective mechanism in the past, marriage by cohabitation with habit and repute is an inadequate, and statistically insignificant, protection for cohabitants in the conditions now prevailing.”⁵¹

⁴⁸ Albakri, M, Hill, S, Kelley, N and Rahim, N. (2019) “Relationships and gender identity: Public attitudes in within the context of legal reform” in Curtice, J, Clery, E, Perry, J, Phillips M and Rahim, N (eds), *British Social Attitudes: the 36th Report*, London: The National Centre for Social Research, 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.

⁴⁹ As compared with a sample of 1,998 people in England; details provided by the National Centre for Social Research.

⁵⁰ Save in relation to cohabitations that began before the commencement of the Act or where a party believed they were married prior to the commencement of the Act, having entered into a purported marriage abroad that was, in fact, invalid, which invalidity was discovered only after the death of the other party to the purported marriage; ss 3(2), (3) and (4).

⁵¹ Scot Law Com No 135, 1992, paras 7.4 and 7.5.

1.27 Another possible explanation for the belief in “common law marriage”, and rights arising from such a relationship is the treatment of cohabitants, for some public law purposes, in the same or a similar way to spouses.⁵² Examples include legislation relating to benefits and tax credits.⁵³

1.28 As is apparent from the discussion above, those who cohabited openly and without the pretence of marriage were never able to rely upon the irregular form of marriage as a possible route to financial claims at the end of the relationship. Our predecessors in 1992 recognised the importance of creating a new regime for cohabitants whose relationships ended, given the absence of any statutory provision or protection for them.

1.29 It is now almost fourteen years since the legislation abolished marriage by cohabitation with habit and repute and introduced limited rights for cohabitants on cessation of cohabitation. Legal practitioners tell us that many cohabitants only learn of their rights and potential liabilities under the legislation when the relationship ends. Others find out about the cohabitation provisions in the 2006 Act from conveyancing solicitors when legal advice is being sought in relation to purchasing property, though practice appears to vary. It is difficult to understand why these common misconceptions persist. But persist they do, and awareness should now be raised of the true legal position of cohabitants.⁵⁴ It may be, however, that public expectations are simply not matched by the law. We discuss these issues further in the following chapters.

General policy

1.30 We have had various social and policy considerations in mind in preparing this Discussion Paper. Our review of sections 25 to 28 of the 2006 Act is taking place a generation after this Commission’s recommendations were put to the UK Government in the 1992 Report.⁵⁵ As the statistics above show,⁵⁶ cohabiting relationships in Scotland and in the UK generally have increased significantly in that period. There is, at least, anecdotal evidence that attitudes have changed over this period, and that there is greater acceptance of cohabitation as a family form, including as a stable base within which to raise children. A YouGov opinion poll, undertaken on 4 April 2019, asked 3540 individuals in Great Britain whether or not they think it matters that marriage rates are declining.⁵⁷ Overall, 50% said it does not matter, 36% said it does matter and 14% said they do not know. The figures in the breakdown by region for Scotland were that 55% felt it does not matter, 31% felt it does matter and 14% did not

⁵² Anne Barlow & Grace James, “Regulating Marriage and Cohabitation in 21st Century Britain”, (2004) 67 *Modern Law Review* 143, p 162.

⁵³ Claims for tax credits may either be made by an individual or jointly as a couple. A couple includes a man and woman who are not married to each other but who live together as husband and wife, and two people of the same sex who are not civil partners but who live together as if they were (s 3(3) and (5) of the Tax Credit Act 2002). Similarly with Universal credit which replaces various other benefits, claims may be made by an individual or as part of a couple. A couple includes a man and woman who are not married to each other but who are living together as husband and wife, and two people of the same sex who are not civil partners of each other but who are living together as civil partners (ss 5 and 39 of the Welfare Reform Act 2012).

⁵⁴ The publication by the Scottish Government of an information booklet when the 2006 Act came into force is noted. See: <https://www2.gov.scot/Resource/Doc/113318/0027450.pdf>.

⁵⁵ Scot Law Com No 135, 1992.

⁵⁶ See paras 1.12 to 1.14.

⁵⁷ Available at: <https://yougov.co.uk/opi/surveys/results#/survey/79996292-56b7-11e9-9b1e-95d357781274/question/d6ecd578-56b7-11e9-84fd-a7c6f1b0bcd9/region>.

know. However the statistical evidence which shows the continued low level of public awareness of the rights of cohabitants is concerning.

1.31 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.

1.32 In carrying out our review of the law in this area, we are mindful of these competing interests. However, we must also take account of the 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 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.

1.33 We recognise that marriage and civil partnership differ from cohabiting relationships. There is no formality or public registration of a cohabiting relationship. There are no religious connotations connected with 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. Cohabitants are as likely as spouses and civil partners to pool their resources, make economic sacrifices, suffer economic losses and share economic benefits. 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 protection, at the end of the relationship, of an economically vulnerable partner. The need for protection is all the more apparent if there are children for whose benefit one partner has sacrificed a career, income or associated benefits.

1.34 Changes in social attitudes towards family life and the complexity of the issues with which we are concerned were recently highlighted by Lady Hale:⁵⁸

“... three things stand out from the developments of the last 50 years. The first is an increasing desire and respect for individual autonomy in adult decision-making – by both men and women. So we try to facilitate or at least acknowledge the family life created between same sex couples, through informal partnerships, through assisted reproduction, adoption and surrogacy. At the same time, we increasingly respect their decisions to bring their adult relationships to an end and their autonomy in deciding upon the financial consequences of doing so.... Secondly, at the same time, the interests of children involved are increasingly seen as paramount. The law has had to be flexible and inventive to make sure that there are ways of protecting their interests in this new and scientific landscape. Their rights to understand and develop their relationships with their parents – of all sorts – while feeling secure in their care arrangements lie at the heart of this.... But thirdly, therefore, is there a tension between these two evolving trends? Can we allow adults their individual autonomy if this

⁵⁸ Baroness Hale of Richmond, President of the UK Supreme Court 2017 to 2020.

conflicts with the best interests of their children? To what extent should the shouldering of child and family care responsibilities be compensated by the family, as its own little social security system, rather than the state?”⁵⁹

1.35 We will explore the extent to which public attitudes have changed and whether the cohabiting relationship is, or should now be, regarded as valuable in Scottish society as a base for family life, such that greater rights and protections should be afforded to those who choose to cohabit rather than marry or form civil partnerships.⁶⁰

Structure of this Discussion Paper

Content of Chapters

1.36 We have divided this Discussion Paper into this Introduction and 9 following chapters:

Chapter 2 Separate regimes?: In this chapter we consider whether separate regimes should be retained for financial provision for separating spouses and civil partners and for cohabitants.

Chapter 3 Who benefits?: In Part 1 of this chapter we discuss whether the definition of cohabitant in section 25 could be improved; whether there should be a qualifying period for access to remedies; whether a register of cohabitation should be established; and issues relating to people living in multiple party relationships. In Part 2 we consider whether rights and remedies similar to those available to cohabitants should be extended to people in platonic relationships.

Chapter 4 Sections 26 and 27: We consider whether sections 26 and 27 are outdated and in need of review.

Chapter 5 Section 28: In Part 1 we consider the purpose of section 28 and invite views as to whether the policy objectives of the legislation have been met. We discuss whether policy considerations have changed since 2006 and, if so, what the current purpose of and policy behind provision for financial claims should be. We ask whether, for the purposes of financial provision for former cohabitants, any 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. We also consider the test for deciding claims and whether a retrospective test is appropriate for awards under section 28(2)(b). In Part 2, we consider whether wider remedies should be available. The related question of whether resources should be taken into account in deciding what award, if any, to make is also explored.

Chapter 6 Time limit: In this chapter we discuss the one year time limit for claims under section 28. We ask whether it should be extended and / or whether judicial

⁵⁹ Lady Hale’s speech “What is a 21st Century Family?” to the International Centre for Family Law, Policy and Practice 2019, 1 July 2019, available at: <https://www.supremecourt.uk/docs/speech-190701.pdf>.

⁶⁰ This review is taking place at a time when the Scottish Government is opening up civil partnership to mixed sex couples. It is yet to be seen whether doing so will have any significant impact on the numbers of couples opting to cohabit. The Civil Partnership (Scotland) Bill was introduced in the Scottish Parliament on 30 September 2019, and is available at: <https://www.parliament.scot/parliamentarybusiness/Bills/112997.aspx>.

discretion to allow late claims should be introduced. We also consider whether parties should have the option, protected by statute, of extending the time limit by agreement.

Chapter 7 Cohabitation agreements: In this chapter we consider whether statutory provision should be introduced allowing the court to set aside or vary cohabitation agreements in certain circumstances. We also consider whether statutory provision should be made allowing the court to consider the terms of any agreement between the cohabitants when deciding what order for financial provision, if any, to make.

Chapter 8 Unjustified enrichment: The decision in *Courtney's Executors v Campbell*⁶¹ generated discussion among legal academics and practitioners about whether the common law remedy of unjustified enrichment remains available to former cohabitants in addition to or instead of a claim under section 28. The position has now been clarified by the Inner House of the Court of Session in *Pert v McCaffrey*.⁶² The level of interest in the issue has, however, persuaded us that the discussion in this chapter, in which the law relating to unjustified enrichment, including the principle of subsidiarity is considered, should be included in this Discussion Paper. We would welcome any views that consultees wish to express on the issues raised.

Chapter 9 Impact assessment

Chapter 10 Questions

1.37 We have asked a number of questions in Chapters 2 to 7 and 9, which are also set out in Chapter 10. Consultees are invited to respond to as many of those questions as they wish.

Structure of Chapters

1.38 We have included within each chapter a brief introduction explaining its purpose, followed by a review of this Commission's previous work on the topic with which it is concerned. We then discuss the policy objective of the Scottish Government in relation to the relevant legislative provision in the 2006 Act, criticisms of the existing legislative provision and relevant case law followed by, where appropriate, examination of legislation in other jurisdictions. We then summarise the issues and set out options for reform. Where this structure could not be followed, we have included headings intended to assist the reader in navigating each chapter.

Comparative law

1.39 Reference is made throughout this Discussion Paper to comparative law. We have undertaken comparative research into how financial provision for separating cohabitants is addressed in other jurisdictions. Our research has focused on Australia, New Zealand, Canada (primarily Alberta and British Columbia), Ireland and Nordic countries. We decided to focus on Australia and New Zealand as the Law Commissions in those jurisdictions have recently carried out family law reform projects which included reviews of the regimes for

⁶¹ 2017 SCLR 387.

⁶² [2020] CSIH 5; discussed in ch 8, paras 8.40 to 8.43.

cohabiting, or “de facto” couples.⁶³ Provinces in Canada were also useful comparators, particularly British Columbia where cohabitants have had access to financial provision since 2013, and Alberta where recent recommended changes came into force on 1 January 2020.⁶⁴ We studied the statutory regime for cohabitants in Ireland, introduced in 2010,⁶⁵ as it has some characteristics similar to that in Scotland, in the sense that it is separate from the regime for spouses and civil partners, while approaching the question of financial provision in a very different way. We decided also to review the position in Norway, Finland and Sweden, as near European neighbours, where there is some legislative provision for the distribution of property between former cohabitants.

1.40 In the absence of statutory provision, we have not looked closely at remedies for former cohabitants in England and Wales. However, the position in that jurisdiction is mentioned at times throughout this Discussion Paper. A private member’s “Cohabitation Rights Bill” was introduced in the House of Lords on 5 July 2017, sponsored by Lord Marks of Henley-on-Thames, who has introduced a similar private member’s bill in every parliamentary session since 2013–14.⁶⁶ The Bill’s financial provisions are based on recommendations of the Law Commission of England and Wales.⁶⁷ The Bill fell on suspension of the UK Parliament on 8 October 2019. The Bill was re-introduced on 6 February 2020 as the Cohabitation Rights Bill 2020.

1.41 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 the CEFL in reaching consensus as to these principles, and of how these might help to inform this phase of our project.⁶⁸

Advisory Group and acknowledgements

1.42 We met with practitioners, sheriffs, academics, equality groups and other interested parties and organisations while we were carrying out the scoping exercise for this phase of the project. These meetings helped us to build up a picture of the problems with the cohabitation provisions in the 2006 Act from several different perspectives and to start thinking

⁶³ Reports by the Law Commissions of Australia and New Zealand were published in March 2019 and July 2019 respectively.

⁶⁴ Alberta Law Reform Institute, Final Report, Property Division: Common-law Couples and Adult Interdependent Partners (June 2018), available at: <https://www.alri.ualberta.ca/index.php/publications/Series/final-report/property-division-common-law-couples-and-adult-interdependent-partners>.

⁶⁵ Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010.

⁶⁶ Available at: https://publications.parliament.uk/pa/bills/lbill/2017-2019/0034/lbill_2017-20190034_en_2.htm#pt2-pb3-l1g12.

⁶⁷ Report by the Law Commission of England and Wales Cohabitation: The Financial Consequences of Relationship Breakdown LC3072007.

⁶⁸ Katharina Boele-Woelki, Frédérique Ferrand, Cristina González-Beilfuss, Maarit Jänäterä-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). 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.

of possible options for reform. We are very grateful to those who provided us with advice and information.

1.43 We established an Advisory Group in March 2019, whose advice and assistance in the course of our preparation of this Discussion Paper has been invaluable. We look forward to working with this group further following publication of this paper and prior to publication of our Report on Cohabitation. Members of the Advisory Group are listed in Appendix B. No member of this group is to be held to have taken any substantive position on the various reform options discussed in this paper.

1.44 A questionnaire aimed principally at obtaining some statistical data on public awareness and the use made of the legislation was circulated on our behalf by the Family Law Association to its members. A similar, but briefer, questionnaire was also circulated on our behalf by the Glasgow Bar Association and Deans of Kilmarnock, Dunbartonshire and Greenock local faculties of solicitors to their members.⁶⁹ We are grateful to these organisations for this assistance and to those who responded to the questionnaires.

1.45 We are grateful to Dr Louise Crowley⁷⁰ and Paul McCarthy SC⁷¹ for their time discussing Irish cohabitation law with us. We are also grateful to the Honourable Justice Sarah Derrington,⁷² Justice Michelle May,⁷³ Helen McQueen⁷⁴ and Laura Buckingham⁷⁵ for taking time to discuss with us the law of cohabitation and family law reform projects in Australia, New Zealand and Alberta. Hearing about the challenges and opportunities for reform in this area of law in these jurisdictions has helped us greatly in our work. Our thanks also go to Professor Anne Barlow, Miranda Phillips at NatCen, Professor Jane Mair and CEFL colleagues, Professor Hector MacQueen and Dr Andy Hayward for their assistance during this phase of the project.

Legislative competence

1.46 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 Discussion Paper relates to family law in Scotland (specifically adult cohabiting relationships). As family law is not a reserved matter under the Scotland Act, the proposals within this paper generally lie within the legislative competence of the Scottish Parliament. Part 2 of Chapter 5 of this paper discusses the remedies available to cohabitants in an action for financial provision on cessation of the relationship, and seeks views from consultees on whether the current remedies should be extended to include pension sharing and property transfer orders. In terms of paragraph F3, Part II of Schedule 5 to the Scotland Act, the regulation of occupational pension schemes and personal pension schemes, including the obligations of the trustees or managers of such schemes, is reserved to the UK Government. The law of property and obligations are not reserved matters in terms Schedule 5. However a court order for the transfer of property may

⁶⁹ This questionnaire was also published on our website.

⁷⁰ Senior Lecturer in Family Law, University College Cork, Ireland.

⁷¹ Senior counsel specialising in family law in Ireland.

⁷² President of and Commissioner at the Australian Law Reform Commission (“ALRC”).

⁷³ Commissioner at ALRC.

⁷⁴ Deputy President and Commissioner at the New Zealand Law Commission.

⁷⁵ Alberta Law Reform Institute.

have capital gains tax implications and capital gains tax is reserved to the UK Government in terms of paragraph AI, Part II of Schedule 5. Therefore, if there are any resulting proposals concerning pension sharing and / or property transfer orders following this consultation, further consideration will require to be given to the legislative competence of the proposals.

1.47 A further aspect of legislative competence in terms of section 29 of the Scotland Act is that an Act of the Scottish Parliament must be compatible with rights under the European Convention on Human Rights (“the Convention”) and with European Union law.⁷⁶ 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 are mindful of ECtHR jurisprudence, in particular in relation to compliance with Articles 8 and 14,⁷⁷ and will continue to be so following consultation when developing our recommendations for legislative change.

⁷⁶ This still applies during the transitional period following Brexit.

⁷⁷ 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) and *X v Austria* (2013) 57 EHHR 14 App No 19010/07 (19 February 2013). See also *Jackson v Secretary of State for Work and Pensions* [2020] EWHC 183 (Admin).

Chapter 2 Separate regimes?

Introduction

2.1 In this chapter we consider whether there is a need for retention of separate regimes for financial provision on divorce and dissolution of civil partnership on the one hand, and, on the other, on cessation of cohabitation otherwise than by death. We compare the financial remedies available on breakdown of cohabiting relationships with the orders for financial provision available on divorce and dissolution. This Commission's 1992 recommendations and the policy objective behind the cohabitation provisions in the 2006 Act are then discussed, before we set out and examine criticism of the current legislative provision for cohabitants in Scotland. We then consider the legislative approaches taken in other jurisdictions and conclude by seeking views on possible reform.

Current law

2.2 As noted in Chapter 1,¹ the law relating to cohabitation is contained within sections 25 to 29 of the 2006 Act. These provisions describe the type of relationship to which the legislation will apply, create certain presumptions and rules relating to ownership of household goods, property and money acquired during the relationship and give parties in a cohabiting relationship limited rights to seek financial provision on cessation of cohabitation, whether on separation or on death.

2.3 For the purposes of this chapter, we compare the test and remedies set out in section 28 of the 2006 Act² with the provisions in the Family Law (Scotland) Act 1985 ("the 1985 Act") relating to applications for financial provision by spouses and civil partners on divorce and dissolution.³

Cessation of cohabitation

2.4 Section 28(2) of the 2006 Act provides that on an application by a cohabitant who has ceased to cohabit otherwise than by reason of death⁴ (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.

¹ See ch 1, para 1.7.

² See paras 2.4 to 2.6 and fuller discussion in ch 5.

³ 1985 Act, ss 8-16, discussed in paras 2.8 to 2.12.

⁴ S 28(1).

2.5 The matters mentioned in subsection (3) 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.

2.6 Section 28(4) provides that in considering whether to make an order requiring the defender to pay a capital sum in terms of section 28(2)(a), the court is to have regard to the matters mentioned in subsections (5) and (6), which we shall refer to as “the offsetting provisions”, as follows:

(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.⁵

(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.

2.7 Apart from setting out the test for financial provision in section 28(2) to (6), no guidance is given within the 2006 Act as to the principles that ought to apply when the court is determining what, if any, order will 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.⁶

Divorce and dissolution of civil partnership

2.8 The relevant legislation in relation to financial provision for spouses and civil partners on divorce and dissolution of civil partnerships is at sections 8 to 16 of the 1985 Act.⁷ Section 8(1) allows either party to 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 pensions⁸ or an incidental order within the meaning of section 14(2) of the 1985 Act.⁹

2.9 Section 8(2) provides that (subject to sections 12 to 15) the court shall make such order, if any, as is:

⁵ S 28(10) provides that 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.

⁶ *Gow v Grant* 2013 SC (UKSC) 1; Lord Hope DPSC at paras [31] to [33]. Discussed in ch 5, para 5.39.

⁷ S 17 extends the provisions, with some exceptions, to applications for nullity of marriage and civil partnership.

⁸ In terms of ss 8A, 12A and 12B of the 1985 Act.

⁹ S 8(1)(a) to (c).

- (a) justified by the principles set out in section 9; and
- (b) reasonable having regard to the resources of the parties.

2.10 The principles which the court shall apply in deciding what order for financial provision, if any, to make are set out in section 9. The factors to be taken into account in applying the principles in section 9 are set out in section 11. The section 9 principles are as follows:

(a) the net value of the matrimonial property should be shared fairly between the parties to the marriage or as the case may be the net value of the partnership property should be so shared between the partners in the civil partnership;

(b) 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;

(c) any economic burden of caring,

- (i) after divorce, for a child of the marriage under the age of 16 years
- (ii) after dissolution of the civil partnership, for a child under that age who has been accepted by both partners as a child of the family or in respect of whom they are, by virtue of sections 33 and 42 of the Human Fertilisation and Embryology Act 2008, the parents,

should be shared fairly between the persons;

(d) a person who has been dependent to a substantial degree on the financial support of the other person should be awarded such financial provision as is reasonable to enable him to adjust, over a period of not more than three years from

- (i) the date of the decree of divorce, to the loss of that support on divorce,
- (ii) the date of the decree of dissolution of the civil partnership, to the loss of that support on dissolution,

(e) a person who at the time of the divorce or of the dissolution of the civil partnership, seems likely to suffer serious financial hardship as a result of the divorce or dissolution should be awarded such financial provision as is reasonable to relieve him of hardship over a reasonable period.

2.11 Section 10(1) of the 1985 Act provides that, in applying the principle in section 9(1)(a), the net value of the matrimonial property shall be shared fairly when it is shared equally or in such other proportions as are justified by special circumstances, further described in section 10(6). There is provision for the identification¹⁰ and valuation¹¹ of matrimonial or partnership property and a mechanism for apportionment of the value of life policies and similar arrangements and of pension rights.¹²

2.12 The scheme for financial provision under the 1985 Act is comprehensive. A framework is provided for the identification, valuation and distribution of the net value of matrimonial property together with a range of orders which may be made by the court having regard to the application of a set of principles and subject to discretion, including consideration of available resources and special circumstances. In contrast, the 2006 Act provides only limited remedies

¹⁰ S 10(4) and (4A).

¹¹ S 10(2), (3) and (3A).

¹² S 10(5).

for former cohabitants, without setting out guiding principles for determining what, if any, order will be made.

Commission's 1992 recommendations

2.13 Responses to the consultation on the 1990 Discussion Paper¹³ confirmed that, while there was a strong case for reform of Scots private law to enable certain legal difficulties faced by cohabiting couples to be overcome and to enable certain anomalies to be remedied, any such reform should be limited. The 1992 Report noted that this was a subject on which there were widely differing views and, in particular, a respectable view that it would be unwise to impose marriage-like legal consequences on couples who may have deliberately chosen not to marry.¹⁴ Therefore the 1992 Report did not recommend to the Government that the resulting statutory regime for cohabitants should mirror the 1985 Act provisions on divorce.¹⁵

Policy objective

2.14 Fourteen years later, when explaining the approach to the cohabitation provisions in the Bill which became the 2006 Act, the Policy Memorandum¹⁶ set out alternatives:

“An alternative approach would be to retain the status quo in legislative terms and concentrate effort on information and awareness raising about the legal position of cohabiting couples, encouraging them to draw agreements setting out what would happen in a range of possible circumstances. While this approach has some merit it is considered unlikely to result in all cohabiting couples making adequate private legal arrangements, leaving a significant number of cohabiting couples and their children without legal protection. ...Another option might be to recognise that cohabitation is now an accepted lifestyle choice for many couples in Scotland, including those with children. Consequently, it could be argued that the distinction between marriage and cohabitation has lessened and cohabitation should automatically attract marriage-equivalent rights and responsibilities. A key consideration here is the extent to which Government should impose rights and obligations on cohabiting couples. 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.”¹⁷

2.15 The Justice 1 Committee Report (7th July 2005) at stage 1 of the Bill process through the Scottish Parliament (“the Justice Committee Report”) noted some policy concerns in relation to what is now section 28 of the 2006 Act:

¹³ Scot Law Com, No 86, 1990.

¹⁴ Scot Law Com No 135, 1992, para 16.1.

¹⁵ In 1992, the 1985 Act did not contain provision for the dissolution of civil partnership, given this was not introduced until the Civil Partnership Act 2004 came into force.

¹⁶ Policy Memorandum to the Family Law (Scotland) Bill, available at: [https://www.parliament.scot/S2_Bills/Family%20Law%20\(Scotland\)%20Bill/b36s2-introd-pm.pdf](https://www.parliament.scot/S2_Bills/Family%20Law%20(Scotland)%20Bill/b36s2-introd-pm.pdf).

¹⁷ Policy Memorandum, paras 69 & 70.

“The Committee considers that the differences between some provisions relating to financial provisions on divorce and provisions in the Bill relating to cohabitants are neither sufficiently clear nor adequately justified in policy terms by the Executive....

The Committee recommends that the Executive consider amending section 21 so that the orders available under section 8 of the 1985 Act are all available, but that the justifications for making the order are explicitly limited to those in section 9[1](b) and (c) (ie imbalances and child-care costs). This would clarify matters and also more explicitly show that ex-cohabitants can access far fewer justifications for claiming financial provision than ex-spouses.”¹⁸

2.16 The Scottish Government’s response makes it clear that this is in fact the policy:

“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....The context for the breakdown of cohabitations is different; and we do not intend to merge the two systems....We are intent on providing *safeguards*, not a system parallel to marriage/civil partnership or which imitates marriage/civil partnership. Arguments that start from the position that a particular feature of marriage/civil partnership is absent from our proposals miss the point. ...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.”¹⁹

Criticism of current law

2.17 A range of views has been expressed to us by respondents to the Tenth Programme consultation,²⁰ stakeholders, and Advisory Group members as to whether there is a justification for retaining different regimes for financial provision on cessation of cohabitation and on divorce or dissolution.

2.18 Many respondents to the Tenth Programme consultation questioned the justification and rationale for maintaining separate regimes. One respondent called for a “wholesale review of cohabitants’ claims” and another for “the whole of the current law on cohabitation” to be subject to review and reform. A further respondent said there would be “merit in a complete review of financial provision on the breakdown of adult relationships ... with particular emphasis on the very different regimes for married and unmarried couples ...”. Some academics, in particular, observed that it was difficult to discern the policy behind the legislation. Other respondents questioned whether aligning cohabitation more closely with marriage might run the risk of removal of freedom of choice and asked whether protection of the economically vulnerable or preservation of freedom of choice should be prioritised.

2.19 Some of the stakeholders we met with informally during the scoping exercise for this Discussion Paper also questioned the justification and rationale for maintaining separate regimes. Others questioned the justification for imposing marriage-like rights on parties who had deliberately chosen not to marry. Advisory Group members raised similar issues. A range

¹⁸ Justice Committee Stage 1 Report, paras 196 and 197, available at: <https://archive.parliament.scot/business/committees/justice1/reports-05/j1r05-08-vol01-02.htm#1920>.

¹⁹ Scottish Government Response to the Justice Committee’s stage 1 Report into the Bill, p 17, available at: https://www.parliament.scot/S2_Justice1Committee/Reports/SEresponseFamilyLawStage1.pdf.

²⁰ Scottish Law Commission, Tenth Programme of Law Reform, Scot Law Com No 250, 2018.

of views, comments and observations on this issue has been expressed to us, of which the following are examples:

- The 2006 Act was a means of addressing the lack of legislative recognition of and provision for cohabitants at the time. However, if the same scheme is available for cohabitants as is available to spouses and civil partners there is a risk that the law is not showing respect for those who actively choose to cohabit because of the limited legal consequences; affording cohabitants the same rights (as spouses and civil partners) would remove freedom of choice, given that people opt out of marriage for all sorts of reasons;
- People have a choice to cohabit or to enter into a formalised relationship such as marriage, although many people are not making a choice at all. Some cohabitants might avoid marriage for particular reasons; therefore civil partnership, if opened up to mixed sex couples, might provide additional choice for cohabitants;²¹
- The question is a public policy one. What is the purpose of family law in the area of financial provision for cohabitants? For example, is the policy objective to increase protection or protect party autonomy?
- The answer to whether separate legal regimes should be maintained depends on how “cohabitant” or “cohabitation” is defined. If the public are asked what they think about the consequences of cohabitation in a two month relationship compared to two years the answers might be different;
- Some may argue 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;
- There is a fundamental distinction between cohabitation and marriage or civil partnership that lies in the state recognition and regulation of marriage and civil partnership. Parties thereto have deliberately made a change from single to united and the undertaking of legal obligations to one another which the state will enforce;
- Unmarried couples are being unfairly discriminated against and have too few rights compared to married couples. There should be no distinction in the interests of fairness and equality;
- A system that is closer to the system of division of assets on divorce, guided by principles of fairness and equality, would be more appropriate for former cohabitants.

2.20 One Advisory Group member, who had carried out research with young people on attitudes to cohabitation and commitment in the early 2000s,²² told us that results showed that

²¹ The Civil Partnership (Scotland) Bill was introduced in the Scottish Parliament on 30 September 2019. The Bill if enacted will open up civil partnership to mixed sex couples. The Bill is available at: <https://www.parliament.scot/parliamentarybusiness/Bills/112997.aspx>. Mixed sex civil partnership is already available in the rest of the UK.

²² Lynn Jamieson, Michael Anderson, David McCrone, Frank Bechhofer, Robert Stewart, Yaojun Li, “*Cohabitation and Commitment: Partnership Plans of Young Men and Women*” (2002) ‘Sociological Review 50, pp 354-375; reprinted in Diduck, A (Ed) *Marriage and Cohabitation: Regulating Intimacy, Affection and Care*. (1st edn, 2008).

young cohabitants often start the relationship with commitment while not assuming the relationship would be lifelong; the subsequent accrual of commitments, including property, then causes them to change their views and the level of commitment to grow or lessen.

2.21 Although the question was not asked in the questionnaire circulated to solicitors,²³ two respondents expressed the view that a regime based upon or in line with that for financial provision on divorce and dissolution, rather than a separate regime, would be beneficial.

Comparative law

2.22 As noted in Chapter 1,²⁴ we have undertaken comparative research into cohabitants' rights in other jurisdictions, focusing on Australia, Ireland, New Zealand, Canada (primarily Alberta and British Columbia), and three Nordic countries. In the following paragraphs, we set out, briefly, some of the background to the law in this area in each jurisdiction (relevant for the Discussion Paper as a whole), before focusing on how the law in relation to cohabitants' rights on separation compares to the law in that jurisdiction on financial provision on dissolution of other adult relationships.

Australia

2.23 Until December 2008 each Australian state and territory had its own legislation dealing with the rights of cohabitants or those in "de facto relationships"²⁵ on separation. Since then, South Australia, Queensland, New South Wales, Victoria, Tasmania, the Northern Territory and the Australian Capital Territory have referred their powers on such matters to the Commonwealth of Australia.²⁶

2.24 The primary source of law in relation to the breakdown of relationships is the Family Law Act 1975 (Cth) ("the 1975 Act").²⁷ This was amended by the Family Law Amendment (De Facto Financial Matters and Other Measures) Act 2008 (Cth) ("the 2008 Act"), to provide for mixed and same sex de facto couples to access the federal family law courts on property and maintenance matters. It also extended the financial settlement regime for married couples under the 1975 Act to de facto relationships, and consequently offer de facto couples a

²³ See para 1.44.

²⁴ See para 1.39.

²⁵ S 4AA of the Family Law Act 1975 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." For discussion of the definition of "de facto relationship" under the 1975 Act, see ch 3, part 1, paras 3.53 to 3.56.

²⁶ The Commonwealth of Australia is a federation of states made up of Western Australia, South Australia, Queensland, New South Wales, Victoria and Tasmania. There are also separate territories, the Northern Territory and the Australian Capital Territory. The constitution of the Commonwealth of Australia defines the powers allocated to the Commonwealth Government and all other areas are legislated for by individual states, unless powers have been delegated to the Commonwealth by agreement. Western Australia is the only state which has not comprehensively referred its powers over de facto relationships to the Commonwealth. Instead state law applies ((the Family Court Act 1997 (WA)), which makes similar provision for couples in de facto relationships to Part VIIAB of the Family Law Act 1975 which applies to all the other Australian states.

²⁷ Max Meyer and Louise Carter, *Australia*, in James Stewart (Ed), *Family Law: A Global Guide from Practical Law* (Thomson Reuters, 4th edn 2018), p 17.

nationally consistent financial settlement regime.²⁸ In the above referring states, the rights of cohabitants are now equal to those of parties to a marriage with some minor exceptions.²⁹

2.25 During the passage of the Bill which became the 2008 Act, the Australian Government heard opposing arguments as to whether property rights of unmarried couples should be equated with those who are married, which have been summarised as follows:

“On the one hand, the interests of individual autonomy would seem to require that parties be free in a pluralist society to choose between categories of relationships with substantive differences as legal institutions. On the other hand, it can be argued that the law of property adjustment serves exactly the same function on the breakdown of a de facto relationship as it does upon marriage breakdown, and so the substance of the two laws should be the same.”³⁰

2.26 The conclusion reached by the Australian Government Committee was that:

“... it is important to recognise the reality that increasing numbers of Australians are living in de facto relationships, and that there is a need to streamline legal processes for such couples if their relationship breaks down.”³¹

2.27 It has been said that the acceptance of the pragmatic view of the issue might be a result of the long-standing state legislation for de facto couples. While de facto couples have not always had the same rights as married couples, the existence of some rights in the state legislation perhaps “enabled the idea of legislation for de facto relationships to seem more palatable and less of a threat to marriage.”³²

2.28 The Australian Law Reform Commission (“ALRC”) recently undertook a comprehensive review of the Australian family law system. The final report, which sets out 60 recommendations for reform, was published on 10 April 2019.³³ This includes recommendations for a simplified approach to property division which would apply equally to spouses and de facto couples.³⁴ The Australian Government has no immediate plans to implement the recommendations and has commenced a parliamentary inquiry into the issues considered, which is due to report in October 2020.³⁵

²⁸ Explanatory Memorandum to the Family Law Amendment (De Facto Financial Matters and Other Measures) Bill 2008, p 1 available at: <https://www.legislation.gov.au/Details/C2008B00184/Explanatory%20Memorandum/Text>.

²⁹ Part VIIAB of the Family Law Act 1975 governs financial matters relating to de facto relationships.

³⁰ Lisa Young, Adiva Sifris, Robyn Carroll & Geoffrey Monahan, *Family Law in Australia* (Lexis Nexis, 2016, 9th edn) at 5.88.

³¹ Standing Committee on Legal and Constitutional Affairs, Report on the Family Law Amendment (De Facto Financial Matters and Other Measures) Bill 2008, August 2008, para 3.158 available at:

https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Completed_inquiries/2008-10/family_law/report/index.

³² Hannah Baker, “New Cohabitation Law in Australia” (2009) 39(12) Fam Law 1201 at 1205.

³³ Australian Government, Australian Law Reform Commission, *Family Law for the Future – An Inquiry into the Family Law System*, Final Report (ALRC Report 135) March 2019, available at: https://www.alrc.gov.au/wp-content/uploads/2019/08/alrc_report_135.pdf.

³⁴ See pp 217-246.

³⁵ See details at: https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Family_Law_System.

Ireland

2.29 The only family that is recognised under the Irish Constitution of 1937 is that which is predicated on the existence of a legally sanctioned union of marriage. Article 41 states:

“The State recognises the Family as the natural primary and fundamental unit group of Society, and as a moral institution possessing inalienable and imprescriptible rights, antecedent and superior to all positive law.”³⁶

“The State pledges itself to guard with special care the institution of Marriage, on which the Family is founded, and to protect against its attack.”³⁷

2.30 The Irish courts have also emphasised that the rights under Article 41 of the Constitution are confined to marital families. In *Ennis v Butterly*,³⁸ a couple (both of whom were married to other people) lived together for over eight years before their relationship ended. The plaintiff claimed that the defendant had promised to support her for life and sought damages for breach of promise. Kelly J concluded, however, that such a promise was unenforceable as to enforce such agreement would equate cohabitation with marriage, giving the agreement a “similar status in law as a marital contract”.³⁹

2.31 The question of whether the State ought to provide remedies for and impose duties on persons who chose to cohabit but not marry, and if so to what extent, was considered by the Law Reform Commission of Ireland (“LRC”) in the early 2000s.⁴⁰ The LRC considered that legal recognition of cohabitants could take three forms: (1) a registration approach where parties opt-in; (2) a presumptive approach where cohabitants become entitled to rights once they establish that they have been living together in circumstances resembling marriage for the requisite period; and (3) a contractual approach where parties regulate their relationships by contract.⁴¹

2.32 In its report, the LRC recommended a redress scheme which would impose certain legal rights and duties on couples who live together in a “marriage like” relationship for a continuous period of three years, or two years where there is a child of the relationship.⁴² It also considered it appropriate to have a tiered approach in which each of the models referred to above could play a part, specifically registration and redress could operate in conjunction, with the latter system acting as a safety-net or default system for couples who do not register their relationship.⁴³

2.33 The Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010 (“the 2010 Act”) came into force on 1 January 2011. It legislated for civil partnership and, in Part 15, implemented the recommendations of the LRC to provide a redress scheme for

³⁶ Article 41.1.1.

³⁷ Article 41.3.1.

³⁸ [1996] 1 IR 426.

³⁹ Para 32.

⁴⁰ A consultation paper was published in 2004 (“Consultation Paper on the Rights and Duties of Cohabitants” (LRC CP 32-2004) available at: <https://www.lawreform.ie/fileupload/consultation%20papers/cpCohabitants.pdf>), followed by a report in 2006 (“Report: Rights and Duties of Cohabitants” (LRC 82-2006) available at: <https://www.lawreform.ie/fileupload/Reports/R822006cohabitants.pdf>).

⁴¹ Consultation Paper, para 1.02.

⁴² Report, paras 2.15 and 2.18.

⁴³ Para 1.26.

cohabitants and recognition of cohabitant agreements.⁴⁴ The regime does not confer any automatic rights on cohabiting couples. It is a discretionary redress scheme for economically dependent qualifying cohabitants. Section 173(2) of the 2010 Act provides that:

“If the qualified cohabitant satisfies the court that he or she is financially dependent on the other cohabitant and that the financial dependence arises from the relationship or the ending of the relationship, the court may, if satisfied that it is just and equitable to do so in all the circumstances, make the order concerned.”

2.34 It has therefore been said of the provisions in the Act that it “is clear that cohabitants have a much harder time getting relief than spouses” and “even if successful, the outcomes are very uncertain and likely to be far inferior to the position of a spouse.”⁴⁵ It has also been said that “the legislature is treading softly for fear of backlash, making clear the distinction between relief provided for cohabitants and that provided for spouses.”⁴⁶

New Zealand

2.35 In New Zealand, those in a cohabiting or “de facto relationship”⁴⁷ of at least three years duration⁴⁸ are equated with those in legally formalised relationships, meaning they participate in the same property sharing regime as they would do on divorce or dissolution of a civil union.⁴⁹ The Property (Relationships) Act 1976 (“the 1976 Act”), as amended by the Property (Relationships) Amendment Act 2001 (“the 2001 Amendment Act”)⁵⁰ sets out rules for division of property owned by married couples, those in de facto relationships and those in civil unions, when they separate or when one of them dies.⁵¹

2.36 In the Parliamentary debates preceding the 2001 Amendment Act, consideration was given to arguments for retaining a distinction between marriage and civil unions, on one hand, and cohabiting relationships on the other. However, the question of equality was at the centre of the discussion and the prevailing position was summarised as follows:

“Some of the most longstanding and stable relationships are in the nature of de facto relationships, and it reflects badly on the principle of the proper recognition of the value of both partners’ contribution to a relationship if the present law is not amended to rectify the situation... a de facto relationship for all intents and purposes has the same

⁴⁴ Civil Partnership and Certain Rights and Obligations of Cohabitants Act, 2010 (Commencement) Order 2010, S.I No. 648/2010. Part 15, ss 171 to 207.

⁴⁵ Justin Spain, “Live with me” (2015) *Law Society Gazette* 26 at 26.

⁴⁶ Niamh Rodgers, “Should Have Put a Ring on It: A Comparative Analysis of the Law of Cohabitation in Ireland, Scotland and England and Wales” (2012) *Hibernian LJ* 122 at 158.

⁴⁷ The term is defined in the Property (Relationships) Act 1976, s 2D(1). See also ch 3, part 1, paras 3.63 to 3.66.

⁴⁸ For further discussion about the qualifying period see ch 3, part 1.

⁴⁹ Professor Frankie McCarthy highlights the benefits of a system that builds on the existing law of property division on divorce. See Frankie McCarthy, “Playing the percentages: New Zealand, Scotland and a global solution to the consequences of non-marital relationships?” (2011) 24 *New Zealand Universities Law Review* 499, p 516.

⁵⁰ The 2001 Amendment Act recognised de facto couples of same and mixed sex as equivalent to married couples in terms of the property consequences of their relationship.

⁵¹ We are told that the ability to opt out mitigates criticism of having the same regime for de facto unions as for formalised relationships.

strengths and features as a marriage, and therefore deserves to have the same recognition.”⁵²

2.37 In May 2016, the Law Commission of New Zealand (“the NZ Commission”) launched a review of the 1976 Act.⁵³ An Issues Paper was published in October 2017⁵⁴ along with a Study Paper which set out empirical evidence to demonstrate the significant demographic changes, and changes in the ways in which relationships and families are formed, since the 1976 Act came into force.⁵⁵ Although there were some submissions that property sharing obligations should only be imposed on de facto relationships if the partners opt in to the regime, the NZ Commission did not favour an opt-in regime as (a) the eligibility criteria ensure that only those relationships that are substantively the same as marriages and civil unions are captured; having different rules for relationships that are substantively the same risks being discriminatory on the basis of marital status under human rights law, and it is also out of step with the increasing prevalence of de facto relationships and changing public attitudes and values on issues such as living together before marriage or not marrying at all; (b) experience in jurisdictions that do have opt-in regimes for de facto relationships demonstrates that opt-in rules fail to reduce the number of people who must rely on the law of equity;⁵⁶ and (c) de facto partners have been included in the 1976 Act on an opt-out basis since 2001 and introducing such a significant change would likely lead to public confusion and uncertainty.⁵⁷

2.38 Having concluded that the law required reform to meet the expectations of most New Zealanders in respect of fairness when a relationship ends, a “Preferred Approach” Paper was published in November 2018,⁵⁸ which set out a package of reforms. The final Report, published on 23 July 2019,⁵⁹ made 140 recommendations. It concluded that the 1976 Act was no longer fit for purpose, and a new Relationship Property Act should be introduced covering relationships ending by separation.⁶⁰ Recommendations included that the new Act should

⁵² Georgina Te Heuheu during the second reading debate (5 May 1998) 40 NZPD 8235. See also Frankie McCarthy, “Playing the percentages: New Zealand, Scotland and a global solution to the consequences of non-marital relationships?” (2011) 24(4) New Zealand Universities Law Review 499 at p 505.

⁵³ For an overview of the project see: <https://www.lawcom.govt.nz/our-projects/review-property-relationships-act-1976>.

⁵⁴ Law Commission, “Dividing Relationship Property – time for change?” Issues Paper 41 (October 2017, Wellington, New Zealand) available at:

<https://www.lawcom.govt.nz/sites/default/files/projectAvailableFormats/PRA%20Issues%20Paper%20FINAL.pdf>.

⁵⁵ Law Commission, “Relationships and Families in Contemporary New Zealand” Study Paper 22 (October 2017, Wellington, New Zealand) available at:

https://www.lawcom.govt.nz/sites/default/files/projectAvailableFormats/Study%20Paper%20-%20FINAL_0.pdf.

The NZ Commission was also able to make use of results of a specific survey of public attitudes and values on relationship property division.

⁵⁶ Law Commission, “Review of the Property (Relationships) Act 1976” Report 143 (June 2019, Wellington, New Zealand) available at: <https://www.lawcom.govt.nz/sites/default/files/projectAvailableFormats/NZLC%20-%20PRA%20Review%20Project%20-%20Final%20Report%20R143.pdf>. See para 6.16 for discussion of the Canadian opt-in regime.

⁵⁷ Paras 6.32 to 6.33.

⁵⁸ Law Commission, “Review of the Property (Relationships) Act 1976: Preferred Approach” Issues Paper 44 (November 2018, Wellington, New Zealand) available at:

<https://www.lawcom.govt.nz/sites/default/files/projectAvailableFormats/PRA%20-%20Preferred%20Approach%20-%20Issue%20Paper%2044%20-%20Final.pdf>.

⁵⁹ Law Commission, “Review of the Property (Relationships) Act 1976” Report 143 (June 2019, Wellington, New Zealand). See above.

⁶⁰ The report recommends that: “The new Act should be titled the Relationship Property Act because this name is simple, clear and reflects the key subject matter of the statute.” (p 59).

apply in the same way to all marriages, civil unions and qualifying de facto relationships. The New Zealand government has not yet implemented the recommendations.

Canada

2.39 In Canada, the primary sources of family law are found in provincial, territorial and federal statutes. In some areas, judge-made principles of law prevail and in the province of Quebec, the Civil Code regulates family law other than divorce.⁶¹

2.40 For the purposes of our comparative study, we briefly refer to sources of law and some relevant federal legislation, before focusing on the financial provision regime for cohabitants in British Columbia and the recently reformed regime in Alberta. Some reference is made to the position in other Provinces and Territories where appropriate.

2.41 Cohabitants receive some protection across Canada under the doctrine of unjust enrichment, “but this doctrine, unlike statutory matrimonial support regimes, does not trigger any presumption of equal sharing on the breakdown of the relationship”.⁶² Some Provinces and Territories in Canada provide cohabiting partners with the same property entitlements as married partners, provided certain qualifying criteria are met (British Columbia, Alberta, Manitoba, Saskatchewan, Nunavut and the Northwest Territories). Others do not accommodate cohabiting partners in the same regime for property sharing as spouses at all (Ontario, Quebec and New Brunswick), whereas some accommodate on an opt-in basis only (Nova Scotia, Newfoundland and Labrador, Prince Edward Island and Yukon). Recent law reform reviews in Alberta⁶³ and Nova Scotia⁶⁴ recommended that cohabitants⁶⁵ be granted the same property entitlements as married partners.

2.42 In 1998, the British Columbia Law Institute (“BCLI”) was asked to review and make recommendations for legislative changes necessary to provide legal recognition to the variety of family relationships in the province, and to address the rights and obligations that should be attached to those relationships.⁶⁶ Although a report on the recognition of spousal and family status was subsequently published in 1998, no legislation immediately followed.⁶⁷ A Government White Paper in 2010 noted that it was time to modernise and update the family

⁶¹ Julien D Payne and Marilyn A Payne, *Canadian Family Law* (7th edn, 2017) at p 2.

⁶² Above at pp 50-51. For discussion of the position in Scots law see ch 8.

⁶³ Discussed below in paras 2.44 to 2.45. The recommendations were implemented on 1 January 2020.

⁶⁴ In Nova Scotia cohabitants are afforded the same rights as spouses but only on an opt-in basis. The Law Reform Commission in Nova Scotia made the recommendation on the basis that a “common law partner” is defined as a person who has cohabited with another person in a conjugal relationship continuously for a period of not less than two years. See the final report, Law Reform Commission of Nova Scotia (now the Access to Justice and Law Reform Institute of Nova Scotia), *Division of Family Property*, (September 2017) available at: <https://static1.squarespace.com/static/5bc6671f0490795182e54b80/t/5c647a129b747a6490eb4ea2/1550088732749/Division+of+Family+Property+-+Final+Report.pdf>.

⁶⁵ Referred to in those jurisdictions as “common law partners”.

⁶⁶ This request from the Attorney General followed amendments made by the legislature to the Family Relations Act in 1997 to recognise certain marriage-like relationships. The earlier Family Relations Act, RSBC 1996, c 128, generally did not apply to unmarried spouses, and cohabitants had to make constructive trust claims to seek a share in the other's property. Unmarried couples could, however, make an agreement under the Act with regards to their property.

⁶⁷ British Columbia Law Institute, *Report on Recognition of Spousal and Family Status*, Report No 5 (1998) available at: <https://www.bcli.org/project/recognition-spousal-and-family-status>. The BCLI also went on to publish a report in 2006 in pension division: British Columbia Law Institute, *Pension Division on Marriage Breakdown: A Ten Year Review of Part 6 of the Family Relations Act*, Report No 44 (May 2006), available at: http://www.bcli.org/sites/default/files/Pension_Division_Review_FRA_Part_6.pdf.

statute “in order to bring it more into line with social, legal and procedural changes, and with research and policy developments of the last three decades.”⁶⁸ The following recommendation was made:

“It is proposed that [the] property division scheme in the new statute apply to all married spouses as well as to unmarried spouses who have cohabited in a marriage-like relationship for at least two years, or less if they have a child together...”⁶⁹

2.43 The legislature of British Columbia went on to expand the category of “spouse” in the Family Law Act 2011⁷⁰ (“the 2011 Act (BC)”) to confer upon former cohabitants the presumption of equal division of family property that applied to married spouses. The 2011 Act (BC) allows spouses to apply for property division orders, pension division orders and spousal support orders. The qualifying period for property and pension division for former cohabitants is two years. Spousal support is also available to spouses who have lived in a marriage-like relationship for less than two years if they have a child together.⁷¹

2.44 In Alberta, until 1 January 2020, “common law partners” (couples who live together in a marriage-like relationship without being legally married) were not accommodated within the regime for property sharing⁷² and had to rely on legal ownership and the law of unjust enrichment for property division when a relationship broke down. Under the Adult Interdependent Relationships Act, SA 2002, c A-4.5 (“the 2002 Act”), common law partners who meet certain criteria are recognised as “adult interdependent partners”.⁷³ Some people who are not common law partners may register as adult interdependent partners.⁷⁴ Adult interdependent partners had many of the same rights, benefits and obligations as married spouses, but none of these extended to property division on the breakdown of the relationship. On the application of the adult interdependent partner a court could (i) in relation to property, grant exclusive possession of the family home, make an order with respect to property within the home, and grant exclusive use of household goods;⁷⁵ (ii) in relation to maintenance or support, grant an adult interdependent partner support order when the relationship has broken down;⁷⁶ and (iii) in relation to succession, grant relief from an intestacy or the terms of a will where inadequate provision has been made for them.⁷⁷

⁶⁸ British Columbia, Ministry of Attorney General, *White Paper on Family Relations Act Reform: Proposals for a new Family Law Act* (Justice Services Branch Civil Policy and Legislation Office, July 2010) p 2 available at: <http://www.vancouver.sun.com/pdf/Family-Law-White-Paper.pdf>.

⁶⁹ See p 83.

⁷⁰ Family Law Act, SBC 2011, c 25.

⁷¹ The qualifying period is also 2 years in Saskatchewan, 3 years in Manitoba (or registered as a common law relationship under the Vital Statistics Act), and 2 years of cohabitation (or having lived together in a relationship of some permanence if there is a child) in Northwest Territories and Nunavut.

⁷² This is also the position in Quebec and New Brunswick.

⁷³ As defined in the Adult Interdependent Relationships Act, SA 2002, c A-4.5, s 1(1)(f): “relationship of interdependence” means a relationship outside marriage in which any 2 persons (i) share one another’s lives, (ii) are emotionally committed to one another, and (iii) function as an economic and domestic unit. NB: relationships in which one person is being remunerated to provide domestic support or personal care to the other are excluded, per s 4(2).

⁷⁴ S 3. For fuller discussion see ch 3, part 2, paras 3.115 to 3.117.

⁷⁵ Family Law Act, SA 2003, c F-4.5, ss 68(1)-(2) and 73(1).

⁷⁶ Family Law Act, SA 2003, c F-4.5, ss 56-63.

⁷⁷ Wills and Succession Act, SA 2010, c W-122, ss 60-62, 72(b) and 88.

2.45 The Alberta Law Reform Institute (“ALRI”) launched a review of property division for cohabitants in August 2016⁷⁸ and made twenty recommendations in its final report, which was published in 2018.⁷⁹ The overarching policy was that adult interdependent partners should be granted the same property entitlements as married partners on an opt out basis. The Family Statutes Amendment Act 2018,⁸⁰ which received Royal Assent in December 2018, implements nearly all of ALRI’s recommendations.⁸¹ On 1 January 2020 the Matrimonial Property Act was amended by repeal of the title and chapter number and substitution therefor of the Family Property Act 2000 Chapter F-4.7, which applies to both married spouses and adult interdependent partners.⁸²

Nordic countries

2.46 This section provides an overview of the financial provision available for separating cohabitants in Norway, Sweden and Finland, as compared with that for couples in formal relationships, including any proposed reform of the law.⁸³

2.47 In Norway, informal relationships remain largely unregulated by statute.⁸⁴ There are no specific legislative provisions for regulating the financial consequences of the termination of cohabitation.⁸⁵ There are however some limited rights in the Household Community Act 1991 (“the 1991 Act”),⁸⁶ which permits a household member to purchase what was previously the common residence and household goods at market value upon the termination of the household.⁸⁷ The provisions of the 1991 Act apply when:

“two or more unmarried persons over 18 years of age have lived together in a household, and this household community ceases to exist when one of them dies, or when it comes to an end in any other way than by death. These provisions shall

⁷⁸ For an overview of the project see: <https://www.alri.ualberta.ca/index.php/completed-projects/property-division-for-cohabitants>.

⁷⁹ Alberta Law Reform Institute, *Property Division: Common Law Couples and Adult Interdependent Partners*, Final Report 112 (June 2018) available at: <https://www.alri.ualberta.ca/images/stories/docs/FR112.pdf>.

⁸⁰ Family Statutes Amendment Act, SA 2018, ca 18.

⁸¹ For a summary of the implementation see: <https://www.alri.ualberta.ca/index.php/news/235-bill-28-family-statutes-amendments-act-received-royal-assent>.

⁸² The Law Reform Commission in Nova Scotia, now renamed the “Access to justice and Law Reform Institute of Nova Scotia,” (where cohabitants are afforded the same rights as spouses but only on an opt-in basis) recently made a similar recommendation. The recommendation is made on the basis that a “common law partner” is defined as a person who has cohabited with another person in a conjugal relationship continuously for a period of not less than two years. See the final report, Law Reform Commission of Nova Scotia, *Division of Family Property*, (September 2017) available at: <https://static1.squarespace.com/static/5bc6671f0490795182e54b80/t/5c647a129b747a6490eb4ea2/1550088732749/Division+of+Family+Property+-+Final+Report.pdf>.

⁸³ We have relied on the CEFL reports as source material for this section; some further commentary was provided by government guidance and academic literature.

⁸⁴ For discussion on Norwegian policy relating to cohabitants see Turid Noack, “Cohabitation in Norway: an accepted and gradually more regulated way of living” 15(1) (2001) *International Journal of Law, Policy and the Family* 102 and John Eriksen, “Unmarried Cohabitation and Family Policy in Norway” 11(1) (2001) *International Review of Sociology* 63.

⁸⁵ Prof. dr. Tone Sverdrup, CEFL, National Report on Informal Relationships: Norway (April 2015) at question 2 available at: <http://ceflonline.net/wp-content/uploads/Norway-IR.pdf>.

⁸⁶ Copy of Act No. 45 of 4 July 1991 relating to the right to the joint residence and household goods when a household community ceases to exist is available via the CEFL website at: <https://app.uio.no/ub/ujur/oversatte-lover/data/lov-19910704-045-eng.pdf>.

⁸⁷ Prof. dr. Tone Sverdrup, CEFL, National Report on Informal Relationships: Norway (April 2015) at question 2 available at: <http://ceflonline.net/wp-content/uploads/Norway-IR.pdf>.

however only apply when the parties have lived together for at least two years, or when they have, have had or are expecting a child together.”⁸⁸

2.48 A Government-appointed commission was set up in 1996 to carry out research into the problems relating to the rights, contributions and obligations of (and between) cohabitants.⁸⁹ A report was published in 1999 but proposals were limited, noting that individuals’ autonomy and freedom of choice are important. The report did not propose introducing a rule on equal division of property following relationship breakdown, a duty of maintenance or a legal right for cohabitants to inherit from one another. In 2003, a principles-based recommendation for cohabitation legislation was made in a Government White Paper.⁹⁰ It has since been noted that “it was evident from the white paper that the government believed it important to emphasise that marriage was the ‘most desirable form of family living’ since marriage entailed stability and a formalisation of mutual obligations.”⁹¹ Some inheritance reforms followed in 2009 (which give a surviving cohabitant a limited right of inheritance and the right to retain possession of the undivided estate) but there were no reform developments in terms of property division on separation.

2.49 In Swedish law there has been legislation since 1974 focusing on informal relationships between couples living together, including an Act on division of cohabitants’ property, which was introduced in 1987.⁹² The current legislation is the Cohabitees Act, SFS 2003:276 (“the 2003 Act”), which makes some provision for the division of property on cessation of cohabitation, whether by separation or death.⁹³ The 2003 Act defines cohabitees as: “two people who live together on a permanent basis as a couple and who have a joint household.”⁹⁴

2.50 It has been said that the cohabitee must live with his or her partner on a permanent basis, as a couple, and in a shared household (eg sharing chores and expenses) and that the aim of the provision is to exclude people in other kinds of relationships from the scope of the Act, such as parents and grown-up children, siblings or friends who live together.⁹⁵

2.51 The 2003 Act provisions are limited compared with those available for married couples or registered couples or partners.⁹⁶ There are, for example, no provisions relating to maintenance. The 2003 Act aims to provide minimum protection for the weaker party when a

⁸⁸ Act No 45 of 4 July 1991 relating to the right to the joint residence and household goods when a household community ceases to exist, s 1.

⁸⁹ Cohabitants were defined as people in a “stable relationship similar to marriage”.

⁹⁰ st.meld. no.29 (2002-2003), om familien – forpliktende samliv og foreldreskap, available at: <https://www.regjeringen.no/no/dokumenter/stmeld-nr-29-2002-2003/id471301/>.

⁹¹ See John Asland, Margareta Brattstrom, Goran Lind, Ingrid Lund-Andersen, Anna Singer and Tone Sverdrup, *Nordic Cohabitation Law* (Intersentia, Cambridge 2015) p 21 onwards. *Asland and Others* sets out law reform discussions since the 1991 Act came into force.

⁹² See Prof. Maarit Jantera-Jareborg, Prof. Margareta Brattstrom and LisaMarie Eriksson, CEFL, National Report on Informal Relationships: Sweden (March 2015) available at: <http://ceflonline.net/wp-content/uploads/Sweden-IR.pdf>.

⁹³ Cohabitees Act (2003:376). NB: the Swedish Government has not produced any translation of this Act into a foreign language. An English explanation of the legislation can be found via the CEFL website at: <http://ceflonline.net/wp-content/uploads/Sweden-IR-Legislation.pdf>.

⁹⁴ Cohabitees Act (2003:376), s 1.

⁹⁵ Prof Maarit Jantera-Jareborg, Prof Margareta Brattstrom and LisaMarie Eriksson, CEFL, National Report on Informal Relationships: Sweden (March 2015) at question 4.

⁹⁶ Registered partnerships in Sweden can only be entered into by two persons of the same sex. However, Registered Partnership was repealed in 2009 when the Marriage code became gender-neutral. Couples already living in a registered partnership can choose to remain as registered partners or convert their partnership into a marriage.

cohabiting relationship ends and contains rules on dividing the joint dwelling and household goods of cohabitants, the right of a cohabitee to take over a dwelling that is not included in the division and restrictions on the right to dispose of the joint home.⁹⁷

2.52 In Finland, the Act on the Dissolution of the Household of Cohabiting Partners 26/2011 (“the 2011 Act (Finland)”) ⁹⁸ sets out the rights and obligations of cohabiting partners,⁹⁹ in particular relating to property matters following breakdown of a cohabiting relationship.¹⁰⁰ The aim of the 2011 Act (Finland) was not to put cohabiting partners on an equal footing with married couples:

“There has been no wish to turn cohabitation into a marriage-like institution. Thus, the new law contains no rules on separation or division of property that entail transferring property or economic value in the same way as in Sweden, nor does it contain any right of inheritance for surviving cohabiting partners in the same way as in Norway. Behind the Finnish restraint is the idea that in order to apply the legal consequences of marriage to a cohabiting partnership, that partnership would have to be based on the express will of both parties, and that cohabiting partners may have chosen to cohabit precisely in order to avoid the legal consequences that ensue from marriage. According to the Finnish legislator, that freedom of choice would be lost if excessively far-reaching marriage-like legal consequences were to govern cohabiting partnerships.”¹⁰¹

Comparative statistics

2.53 Some statistical information on the incidence of cohabitation in most of the comparator jurisdictions is available. In Australia, de facto partners represented 15% of all people living socially as married in 2006.¹⁰² In New Zealand, 22% of people who were partnered were in a de facto relationship in 2013.¹⁰³ In 2016, in Ireland, approximately 12% of families were cohabiting couples;¹⁰⁴ in Alberta, common law partners accounted for 16.8% of all relationships; in British Columbia, common law partners accounted for 16.7% of all

⁹⁷ Government Offices of Sweden, *Family Law: Information on the rules* (26 August 2013) at 3.1 available at: <https://www.government.se/information-material/2013/08/family-law/>.

⁹⁸ An unofficial translation of the Finnish legislation can be found 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>.

⁹⁹ Dr, Salla Silvola, CEFL, National Report on Informal Relationships: Finland (January 2015) available at: <http://ceflonline.net/wp-content/uploads/Finland-IR.pdf>.

¹⁰⁰ S 3 of the 2011 Act (Finland) defines “cohabiting partner” and “cohabiting relationship” as follows: “In the context of this Act, cohabiting partner refers to partners who live in a relationship (*cohabiting partnership*) in a shared household and who have lived 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. However a person who is married shall not be deemed a cohabiting partner.”

¹⁰¹ John Asland, Margareta Brattstrom, Goran Lind, Ingrid Lund-Andersen, Anna Singer and Tone Sverdrup, *Nordic Cohabitation Law* (Intersentia, Cambridge 2015) at 1.3.4. on p 37.

¹⁰² “Living socially as married” means all those in a registered marriage or a de facto relationship. Marriages, Divorces and De Facto Relationships. Australian Bureau of Statistics: 2008. Available at: <https://www.abs.gov.au/ausstats/abs@.nsf/Previousproducts/D5F4805AD4C3E03ECA2573D2001103E0?opendocument>.

¹⁰³ Law Commission, “Relationships and Families in Contemporary New Zealand” Study Paper 22 (October 2017, Wellington, New Zealand) available at:

https://www.lawcom.govt.nz/sites/default/files/projectAvailableFormats/Study%20Paper%20-%20FINAL_0.pdf, p 15.

¹⁰⁴ Census 2016 Summary Results – Part 1. Central Statistics Office Ireland: 2017. Available at: <https://www.cso.ie/en/media/csoie/newsevents/documents/census2016summaryresultspart1/Census2016SummaryPart1.pdf> p 41.

relationships¹⁰⁵ and in Norway, 28% of all in a ‘live-in’ relationship were cohabitants.¹⁰⁶ In Finland, mixed sex cohabiting couples accounted for 23.3% of all families in 2018.¹⁰⁷ We were unable to find any statistics which clearly distinguish between people who are married and those cohabiting in Sweden.¹⁰⁸

2.54 Evidence of the level of public understanding of the difference between cohabitation and marriage in the comparator jurisdictions is not readily available. In Ireland, with regard to the implementation of the 2010 Act, a commentator noted that: “there are many couples out there who are blissfully unaware of the fact they may have rights and obligations against each other.”¹⁰⁹ The ALRI Final Report noted that there was a widespread misconception in Alberta that the law about division of property treats partners and spouses alike.¹¹⁰ ALRI deemed that imposing the same rules was appropriate, based on data collected about the attitudes and expectations of common law partners.¹¹¹ In British Columbia, a Government White Paper in 2010 noted that many British Columbians wrongly assumed that the Family Relations Act presumption of equal property division already applies to common-law couples after two years of living together.¹¹² As a result, the 2011 Act (BC) expanded the category “spouse” to confer upon former cohabitants the presumption of equal division of family property that applied to married spouses. By contrast, a general population survey in 2018 in New Zealand found that 68% of respondents knew about the equal property sharing law and that it applied to married and unmarried couples in the same way.¹¹³

Summary

2.55 In the jurisdictions considered and discussed above, there is a variety of approaches to addressing financial provision on breakdown of a cohabiting relationship. In most Australian states, cohabitants’ rights are now equal to those of parties to a marriage with some minor exceptions. In New Zealand, cohabitants participate in the same property sharing regime as on divorce or dissolution of a civil union, provided they meet the three year qualifying period.

¹⁰⁵ Percentage of common-law unions, Canada, provinces and territories, 1981 and 2016. Symbol of Statistics Canada: 2017. Available at: <https://www150.statcan.gc.ca/n1/daily-quotidien/170802/cg-a004-eng.htm>.

¹⁰⁶ Fewer young and more older cohabitants. Statistics Norway: 2018. Available at: <https://www.ssb.no/en/befolkning/artikler-og-publikasjoner/fewer-young-and-more-older-cohabitants>.

¹⁰⁷ Same-sex persons living together are not considered to be cohabiting couples. See Families by type in 1950-2018. Office Statistics of Finland: 2018. Available at: https://www.stat.fi/til/perh/2018/perh_2018_2019-05-22_tau_001_en.html.

¹⁰⁸ See Number of persons by type of household, household status and sex. Official Statistics of Sweden: 2018. Available at: https://www.scb.se/contentassets/20b89a6bd31b4c5bb92733b1af685074/be0101_tab5hushall_eng_2018.xlsx.

¹⁰⁹ Justin Spain (2013), “Legal Opinion: Cohabitation legislation urgently needs information campaign” The Irish Times. Available at: <https://www.irishtimes.com/news/crime-and-law/legal-opinion-cohabitation-legislation-urgently-needs-information-campaign-1.1454114>.

¹¹⁰ Alberta Law Reform Institute, *Property Division: Common Law Couples and Adult Interdependent Partners*, Final Report 112 (June 2018) at [46] available at: <https://www.alri.ualberta.ca/images/stories/docs/FR112.pdf>.

¹¹¹ The changes recommended came into force on 1 January 2020, from which date married spouses and adult interdependent partners receive substantially the same treatment under the Family Property Act 2000.

¹¹² British Columbia, Ministry of Attorney General, *White Paper on Family Relations Act Reform: Proposals for a new Family Law Act* (Justice Services Branch Civil Policy and Legislation Office, July 2010) p 83 available at: <http://www.vancouver.sun.com/pdf/Family-Law-White-Paper.pdf>.

¹¹³ Binnie and others Relationship Property Division in New Zealand: Public Attitudes and Values – A general population survey (Michael and Suzanne Borin Foundation, Technical research report, October 2018) available at: https://uploads-ssl.webflow.com/5a5f12f5f1856e000182afb6/5bd029d878fcc5c30434a1c5_Technical%20Research%20Report%202018.pdf, p 22 para 113.

However, in Ireland, Norway, Sweden and Finland, while cohabitants have some rights on cessation of cohabitation, these are limited and not equal to the rights of spouses and civil partners on divorce and dissolution. 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.¹¹⁴

Discussion

2.56 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 creation of a legal regime that interfered unduly with the private lives of individuals. As noted in the Policy Memorandum for the Bill that became the 2006 Act,¹¹⁵ the Scottish Ministers were also clear that marriage has a special place in society and they wanted to preserve its distinctive legal status.

2.57 In light of changes in social attitudes and values since the 2006 Act came in to force, should further change be guided by the same or different policy objectives? The number of cohabiting couples in Scotland has increased significantly and continues to grow.¹¹⁶ The function of the relationship 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?”¹¹⁷

2.58 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. The ideological preference for marriage and the constitutional and legislative advantages attached to marriage have not prevented the growth in family diversity.”¹¹⁸ He quotes an observation (in relation to Northern Ireland) that:

¹¹⁴ See paras 2.39 to 2.45. Recent law reform reviews in Nova Scotia have recommended that de facto partners be granted the same property entitlements as married partners.

¹¹⁵ Para 70. Available at: [https://www.parliament.scot/S2_Bills/Family%20Law%20\(Scotland\)%20Bill/b36s2-intro-dp.pdf](https://www.parliament.scot/S2_Bills/Family%20Law%20(Scotland)%20Bill/b36s2-intro-dp.pdf).

¹¹⁶ See ch 1, paras 1.12 to 1.14.

¹¹⁷ Anne Barlow and Janet Smithson, “Legal assumptions, cohabitants’ talk and the rocky road to reform”, (2010) 22 CFLQ 328, at pp 346–347.

¹¹⁸ Fergus Ryan, “Out of the Shadow of the Constitution: Civil Partnership, Cohabitation and the constitutional family” (2012) 48(2) *The Irish Jurist* 201, at 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.”¹¹⁹

2.59 Other commentators have observed that:

“Commitment levels are no longer ascribed solely by union type but rather by other life events and the couple’s own perceived level of commitment.”¹²⁰

2.60 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 (in New Zealand three years) can weed out the fringe associations that should be outside a marriage-based regime.”¹²¹

2.61 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. A respondent to the Tenth Programme consultation made the point that Scottish people have become accustomed to the idea of legal consequences flowing from non-marital cohabitation, at least since the 2006 Act came into force. It should also 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.”¹²²

¹¹⁹ Claire Archbold, “Divorce—The View from the North” in Shannon (ed), *The Divorce Act in Practice* (Dublin: Round Hall, 1999), p 50.

¹²⁰ Ann Berrington, Brienna Perelli-Harris and Paulina Trevena, “Commitment and the changing sequence of cohabitation, childbearing and marriage: Insights from qualitative research in the UK” (2015) 33(12) *Demographic Research Journal* 327, p 328.

¹²¹ 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.

¹²² 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, at p 241. See also Joanna Miles and Rebecca Probert, “Civil partnership: ties that (also) bind?” (2019) 31(4) *CFLQ* 303.

2.62 Having regard to the views discussed in the preceding paragraphs, we must consider whether it is necessary or desirable to impose marriage or civil partnership-like consequences upon people who choose to live in informal cohabiting arrangements. If it is, we must then consider how best to strike a balance between preserving and respecting the right of individuals to choose how they wish to live and protecting economically vulnerable cohabitants.

2.63 One option would be to extend the current regime for financial provision for spouses and civil partners to cohabitants, perhaps with additional qualifying criteria. If cohabitants were able to opt out of the statutory regime, the autonomy of individuals to make their own arrangements would be preserved.

2.64 Alternatively, a separate regime for cohabitants could be maintained but one which provides for a wider range of financial remedies to be available to cohabitants on cessation of their relationship. Such a regime could be supported by clear principles, including the ability to opt out or limit the consequences of the regime by agreement. That approach would have the benefit of providing greater protection and certainty for economically vulnerable cohabitants while still respecting party autonomy, at least for those who were sufficiently aware of their rights to enter into agreements.¹²³ These issues will be discussed further in later chapters.

Options for reform

2.65 The question for us is whether there remains justification for retaining separate regimes in Scotland for financial provision on cessation of cohabitation and for financial provision on divorce and dissolution of civil partnership. If there is, we then need to ask whether the regime for financial provision for separating cohabitants should be aligned more closely to that on divorce and dissolution.¹²⁴ If not, we need to consider whether there is now a need or policy justification for a single regime for financial provision when adult intimate relationships come to an end otherwise than on death, and what special provisions, if any, should be made for cohabitants within that regime.¹²⁵

2.66 Accordingly we would be grateful for consultees' views on the following question:

- 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?**

¹²³ Cohabitation agreements are discussed in ch 7. For discussion of the issues surrounding "opt out" regimes for cohabitants, see Andy Hayward, "The *Steinfeld* Effect: equal civil partnerships and the construction of the cohabitant" (2019) 31(4) CFLQ 283.

¹²⁴ The purpose, test and remedies available to cohabitants are discussed in ch 5, including comparison with the 1985 Act provisions for financial provision on divorce and dissolution.

¹²⁵ For discussion on the definition of "cohabitant", including qualifying criteria, see ch 3.

Chapter 3 Who benefits?

Part 1 - Definition of cohabitant

Introduction

3.1 In Part 1 of this chapter we focus on the definition of the term “cohabitant” in section 25 of the 2006 Act. We examine why the legislation defines the term as it does, by reference to this Commission’s 1992 recommendations and the policy objectives of the Scottish Government during the Bill process for the 2006 Act. We then set out and examine the criticism of the current definition from a variety of perspectives, including analysis of section 25 in relevant commentary and case law, before comparing the definition with those used in other Scottish and wider UK legislation. Those other definitions are considered and discussed, again by reference to case law and commentary. We then look at the approaches taken to defining “cohabitant” and “cohabitation”¹ in other jurisdictions. We also consider the case for a register of cohabitation and issues relating to people in multiple party relationships, before setting out our provisional thoughts and seeking views on possible options for reform.

3.2 In Part 2 we will consider whether people who do not fall within the definition in section 25, 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 look at approaches in other jurisdictions before setting out our conclusion.

Background

Section 25 of the 2006 Act

3.3 Section 25 of the 2006 Act defines “cohabitant” for the purposes of sections 26 to 29. It is notable that it is the person and not the relationship that is defined. Section 25 does not create a new legal status or form of relationship. It merely identifies those individuals who (or whose estates) are subject to the provision in sections 26 to 29.

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.

¹ And equivalent terms.

(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.

3.4 The definition has been modified by section 4 of the Marriage and Civil Partnership (Scotland) Act 2014 (“the 2014 Act”), which provides as follows:

(2) Subsection (3) applies to references (however expressed) in any enactment to two people who—

- (a) are (or were) not married to each other, but
- (b) are (or were) living together as if they were husband and wife.

(3) The references include two people of the same sex who are (or were) not married to, nor in civil partnership with, each other but who are (or were) living together as if they were married to each other.

(4) References (however expressed) in any enactment to two people of the same sex who are (or were) living together as if they were in a civil partnership cease to have effect.

3.5 The effect of the modification of section 25 of the 2006 Act by section 4 of the 2014 Act is to define “cohabitant” by reference to persons living together as if they were spouses, whether same or mixed sex, but not as civil partners. Our view is that this aspect of the provision would benefit from being clarified.

Commission recommendations

3.6 The 1990 Discussion Paper² noted that the term “cohabitation” referred to:

“... the relationship of a man and a woman who are not legally married to each other but who are living together as husband and wife, whether or not they pretend to others that they are married to each other. We refer to such a couple as “cohabitants”.³

3.7 Views were not sought on how the term “cohabitant” should be defined. Rather, views were sought on whether, for certain purposes, including presumptions as to equal shares in

² Scot Law Com No 86, 1990.

³ Para 1.2 At the time of publication of the 1990 Discussion Paper, the common law form of irregular marriage by cohabitation with habit and repute remained available. That form of marriage relied upon the parties’ pretence to the outside world that they were, in fact, married. Marriage by cohabitation with habit and repute was abolished (prospectively) by s 3 of the 2006 Act, save in relation to a purported marriage entered into outwith the UK, which the parties believed to be valid, the invalidity of which became known only after the death of one of the parties.

household goods, money and property or in order to be able to apply for orders for financial provision, there should be any qualifying period of cohabitation.⁴

3.8 The 1992 Report⁵ noted that some consultees responding to the 1990 Discussion Paper expressed concern about the difficulty in applying any definition of cohabitation to the very variable types of living arrangements which couples can adopt. Others were uneasy about the arbitrariness of requiring qualifying periods of cohabitation for certain purposes. These concerns were taken into account and fixed rules and arbitrary time limits were avoided. No qualifying period of cohabitation was recommended in the 1992 Report.⁶ Clause 33 of the draft Family Law (Scotland) Bill attached as Appendix A to the 1992 Report, provides:

“This Part of the Act applies to cohabitants, that is to say a man and a woman who are not married to each other but who (whether or not they represent to others that they are married to each other) are living with each other as if they were husband and wife; and in this Part “cohabitant”, “cohabitation”, and “cohabiting” shall be construed accordingly.”⁷

3.9 The definition of cohabitant was again considered in Part 4 of this Commission’s 2009 Report on Succession.⁸ No amendment to the definition in section 25 of the 2006 Act was suggested. Our predecessors observed then that it is strange that the factors in section 25(2), such as the length and nature of the relationship, are relevant to whether or not the applicant is a cohabitant rather than to be taken into consideration when the court is exercising discretion to make an award for provision on intestacy under section 29.⁹ A two stage process to establish surviving cohabitants’ rights on death was recommended. The first stage would be to determine whether the couple were living together in a relationship which had the characteristics of the relationship between spouses or civil partners, having regard to whether they were members of the same household; the stability of the relationship; whether they had a sexual relationship; whether they had children, including children accepted as children of the family; and whether they appeared to family, friends and members of the public to be persons who were married to, in civil partnership with or cohabitants of each other.¹⁰ The second stage would determine, by reference to the quality of the relationship, the percentage of the estate the survivor should inherit.¹¹

⁴ Scot Law Com No 86, 1990, paras 3.6, 4.2, 5.15 and 5.18 (see also paras 6.18 - 32 (relating to claims on death) and para 7.6 (relating to occupancy rights under the Matrimonial Homes (Family Protection) (Scotland) Act 1981).

⁵ Scot Law Com No 153, 1992.

⁶ Para 16.4.

⁷ P 186.

⁸ Scot Law Com No 215, 2009. This report focused principally on the distribution of intestate estates, particularly in relation to a surviving spouse, civil partner or cohabitant; and on the protection of close relatives, including a surviving spouse, civil partner or cohabitant, from disinheritance by the deceased.

⁹ Para 4.4 (which also notes that when exercising this discretion, the court is overwhelmed by the number of potentially relevant factors so that in the absence of expressly articulated aims it is very difficult if not impossible to focus on those which are significant in the particular case).

¹⁰ Para 4.13.

¹¹ That percentage would reflect the extent to which the cohabitant should be treated in the same way as a spouse or civil partner of the deceased for this purpose. Once the percentage was determined that would be the proportion of a spouse/civil partner’s rights that the cohabitant would receive. There were three factors to consider in this regard: 1. how long the couple have cohabitated; 2. the nature of their interdependence during that time; and 3. what contribution the surviving cohabitant made to their life together.

3.10 The Scottish Government later carried out a series of consultations in relation to the 2009 Report's recommendations.¹² A 2014 consultation focused on the Report's more technical recommendations.¹³ This led to the Succession (Scotland) Act 2016. No legislative changes were made following upon a further consultation in 2015, which focused on the Report's more fundamental recommendations for change.¹⁴ On 17 February 2019, the Scottish Government published a further consultation¹⁵ seeking views on a fresh approach to intestate succession, including on cohabitants' rights in intestacy. It has committed to publishing its response to the consultation in spring 2020, in line with the 2019 to 2020 Programme for Government. The Scottish Government has indicated that it will "reflect further" upon the definition of cohabitant for the purposes of any replacement of section 29.¹⁶

Policy objective

3.11 The Policy Memorandum¹⁷ explains the approach taken by the Scottish Ministers to the definition of "cohabitation" in section 18 of the Bill as introduced in the Scottish Parliament (now section 25).¹⁸ The Scottish Ministers were clear that marriage has a special place in Scottish society and that its distinctive legal status should be preserved. Having rejected options such as giving marriage-equivalent rights and responsibilities to cohabitants or a registration system for cohabitation,¹⁹ the Policy Memorandum sets out the two main approaches that were considered.²⁰ One approach was to use the analogy of marriage and define cohabitation in terms of the characteristics of the relationship between husband and wife (irrespective of the gender of the parties), which approach the Policy Memorandum states "has the merit of being straightforward and readily understood by the courts." The other approach was to set out a list of the features or factors that a court would take into account in determining whether a relationship was a cohabiting relationship.

3.12 The Policy Memorandum notes that the Scottish Ministers see merit in the latter approach, while opting to take an approach resting on the marriage analogy tempered by a list of factors for the court to consider:

"Taken together, these factors are intended to focus attention on cohabitants who have developed a shared life with a degree of interdependence, whilst leaving courts in disputed cases the necessary flexibility in interpreting the facts of each case and discretion in securing fair and just outcomes."²¹

¹² An informal pre-consultation with stakeholders following publication of the 2009 Report revealed there was no clear consensus on some of the 2009 Report's recommendations.

¹³ Scottish Government, Consultation on Technical Issues Related to Succession (14 August 2014) available at: <https://www2.gov.scot/Publications/2014/08/1185>.

¹⁴ Scottish Government, Consultation on the Law of Succession, (25 June 2015) available at: <https://www2.gov.scot/Publications/2015/06/7518>. There was agreement on some issues discussed in the 2015 consultation but no consensus on a number of the more controversial recommendations.

¹⁵ Scottish Government, Law of Succession: consultation, (17 February 2019) available at: <https://www.gov.scot/publications/consultation-law-succession/>.

¹⁶ Para 3.16.

¹⁷ Policy Memorandum for the Family Law (Scotland) Bill (now the Family Law (Scotland) Act 2006), available at: [https://www.parliament.scot/S2_Bills/Family%20Law%20\(Scotland\)%20Bill/b36s2-introd-pm.pdf](https://www.parliament.scot/S2_Bills/Family%20Law%20(Scotland)%20Bill/b36s2-introd-pm.pdf).

¹⁸ It is notable that the Policy Memorandum refers to the definition of the relationship of "cohabitation", rather than the individuals who enter into such relationships.

¹⁹ Discussed below in paras 3.80 to 3.88.

²⁰ Para 75.

²¹ Para 75.

3.13 It seems therefore that the policy aim was for the definition to capture those cohabitants in an established relationship with a degree of mutual dependence, but also for the definition to provide sufficient flexibility to include the various different types of cohabitating relationship.

3.14 The Scottish Ministers also considered setting a qualifying time period for access to the safeguards provided in the legislation, but concluded that there was “more to be lost than gained in doing so”. The Policy Memorandum states that setting such a qualifying time period:

“would be arbitrary, rigid and unresponsive to individual cases; would create problems of proof; could distort behaviour; and could lead to especially harsh outcomes in relation to discretionary awards on death.”²²

3.15 It was considered that “facts and circumstance will, over time, build up an understanding of the situations in which recourse to the courts is likely to succeed.”²³

Living together as if husband and wife

3.16 The Bill, as introduced, set out the meaning of “cohabitant” in section 18.²⁴ The definition relied upon the characteristics of a relationship between husband and wife as a comparator, including where the parties to the relationship were of the same sex. By the time the Bill was passed, on 15 December 2005, amendments had been made to reflect the availability of civil partnership.²⁵

3.17 There was significant consideration given, during the Bill’s passage through Parliament, to the definition’s reliance on reference to a couple “living together as if they were husband and wife”, with Fergus Ewing MSP commenting during stage 2 that:

“...the words “as if” represent the essential conundrum, paradox and irresolvable conflict that the Executive faces. To equiparate cohabitants with married couples is simply wrong, and to say that people who cohabit are the same as, or that cohabitants live together “as if” they were man and wife is wrong....”²⁶

3.18 Margaret Mitchell, MSP argued that:

“The Bill refers to people living together “as if husband and wife”. In other words, we are not talking about flatmates. The relationship has to be explored and spelled out. The definition of “cohabitants” applies to two people who live together as if they are husband and wife. In evidence, we were assured that such a relationship could not be short term. The policy intention was that a relationship would be intimate, long-lasting and committed, so the length and nature of the relationship would be taken into account by the court, as would financial dependence....

²² Para 67.

²³ Para 68.

²⁴ Family Law (Scotland) Bill, available at:

[https://www.parliament.scot/S2_Bills/Family%20Law%20\(Scotland\)%20Bill/b36s2-introd.pdf](https://www.parliament.scot/S2_Bills/Family%20Law%20(Scotland)%20Bill/b36s2-introd.pdf). The definition is now in section 25 of the 2006 Act.

²⁵ The Civil Partnership Act 2004 was not in force when the Family Law (Scotland) Bill was introduced, but was in force by the time the Bill passed (it was given Royal Assent on 18 November 2004 and came into force on 5 December 2005).

²⁶ Scottish Parliament, Official Report of the Justice 1 Committee, 16 November 2005, available at: <http://www.parliament.scot/parliamentarybusiness/report.aspx?r=2143&mode=html>.

...It is not intended that brief, experimental or non-binding relationships be covered, but rather that mutually supportive relationships—ventures in life's hopes—with choices and financial decisions all made together be covered. The focus is quite clearly on evidence of commitment to a joint life.”²⁷

3.19 There were, therefore, some differences of view at stage 2 of the Bill process about the definition of cohabitant relying on comparison with a married couple. Some argued that it did not make sense to define the term by reference to a legal status that cohabitants do not share, and others that such a definition was appropriate as it was a generally well understood concept.

Significance of children

3.20 Section 18(4)(c) of the Bill as introduced provided that in determining whether a person is a cohabitant, the court must have regard to “whether the cohabitants have a child of whom they are the parents”. The provision was amended at stage 2 of the Bill’s Parliamentary process. Hugh Henry, the then Deputy Minister for Justice, stated that this provision had caused considerable confusion during stage 1. He added that the Scottish Government was therefore removing this reference from the list of determining factors, and that “the court’s consideration will rest on the nature of the cohabitation as at section 18(4)(a); we believe that that will include consideration of the existence of any children.”²⁸

Criticism of the current definition

3.21 The definition of cohabitant in section 25 has been criticised by academics, practitioners and others for various reasons, not least because it is considered to be outdated and not reflective of modern day relationships:

“Couples in formalised adult relationships do not conduct themselves in a uniform manner. Whilst some spouses and civil partners may own property together, have a sexual relationship and co-parent children, none of these factors is essential to the existence of the marriage or partnership. A husband and wife who choose to live apart and speak rarely are just as married as spouses who spend each day together. This notion is reinforced by our modern law of marriage and civil partnership, which has stripped away most of the historical obligations owed by spouses to one another, leaving only a minimal obligation to aliment and title to claim financial provision should the relationship end. The only characteristic which all spouses and civil partners necessarily have in common is that they have formally registered their relationship. In other words, the one characteristic shared by all spouses and partners is the very characteristic that cohabitants by definition do not share.”²⁹

3.22 In 2016 the Scottish Parliament’s Justice Committee conducted post-legislative scrutiny of the 2006 Act and heard evidence that the definition was vague and/or circular: “in

²⁷ Scottish Parliament, Official Report of the Justice 1 Committee, 16 November 2005.

²⁸ The Official Report of the Justice Committee’s consideration of the relevant amendment (amendment 47) is attached (at 2319):

<http://www.parliament.scot/parliamentarybusiness/report.aspx?r=2143&mode=html>.

²⁹ Frankie McCarthy, “Defining Cohabitation”, (2014) 31 SLT (News) 143, p 143.

determining whether a person is a cohabitant the court has to take account of “the nature of the relationship” – which is the very point at issue”.³⁰ The Committee observed that:

“Overall, we were left with the impression that the definition is not perfect but appears not to have created significant problems in practice. Any future Scottish Government review of the law on cohabitation (or of adult relationships in general) should certainly take the opportunity to consider whether the definition provided in the 2006 Act is optimum.”³¹

3.23 The following additional criticisms and observations have been expressed to us in informal meetings with stakeholders and by Advisory Group members:

- The definition does not take account of couples “living apart together” (ie couples in committed relationships who do not share a single common home);
- The current definition may be seen as disrespectful of same sex relationships;
- It would be logical to have a more modern definition;
- The definition is vague and inconsistent with that in other legislation.

3.24 We also note that when the CEFL principles were drafted, the term “cohabitation” was rejected as being “outdated and old-fashioned”. The CEFL decided instead to use the term “*de facto*” union, and to refer in the principles to those in such unions as “partners”.³²

3.25 However, there has also been some support expressed for the current definition. Stakeholders have commented that the absence of a qualifying period has not been an issue in practice. In 2010, the Wasoff, Miles and Mordaunt Report concluded that, in practice, it had not proved difficult to identify “cohabitation” and that the absence of a minimum duration in the definition of cohabitant in section 25 was seen as a success. The authors concluded:

“The Act therefore appears in practice to meet the Executive’s intention to create safeguards only for those in “long-standing and enduring relationships.”³³

Case law on section 25 of the 2006 Act

3.26 The question of whether or not a couple are cohabitants within the meaning of section 25 has only rarely been litigated. In *Harley v Robertson*,³⁴ the fact of cohabitation was not in dispute. Sheriff Caldwell, however, took the opportunity to observe, having regard to the brevity of the cohabitation (7 months) and the facts of the case, that had he been asked to decide he would not have found cohabitation established in terms of section 25, since the

³⁰ Professor Kenneth Norrie, written submission; see also Professor Jane Mair and Dr Frankie McCarthy written submission – available at: <https://www.parliament.scot/parliamentarybusiness/CurrentCommittees/96575.aspx>.

³¹ Scottish Parliament Justice Committee, Post-Legislative Scrutiny of the Family Law (Scotland) Act 2006, SP Paper 963 (6th Report, 2016 (Session 4)), 17 March 2016, para 16. Available at: https://www.parliament.scot/S4_JusticeCommittee/Reports/JS042016R06.pdf.

³² 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).

³³ P 125 (As per Scottish Executive 2005a, para 67). Available at: <http://www.crfr.ac.uk/assets/Cohabitation-final-report.pdf>.

³⁴ Unreported, Falkirk Sheriff court, 9 December 2011: (2012 GWD 4-68).

relationship lacked the necessary stability to be characterised as “living together as husband and wife”.³⁵ In *M v I*,³⁶ 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 found that it was “overwhelmingly clear” from the evidence that the parties were cohabiting as if they were husband and wife. 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”.³⁷

3.27 In *Gutcher v Butcher*³⁸ the pursuer appealed against the dismissal of her section 28 claim. Sheriff Principal Pyle, refusing the appeal, observed as follows:

“[I]t will not be sufficient to prove that the parties are merely living together; the living must have the characteristics of a married couple. But it is also true that such characteristics will change over time to reflect modern habits and ways of life. An example of that is Lord Goddard's description in *Thomas v Thomas* [1948] KB 294 of cohabitation consisting of “the wife rendering housewifely duties to the husband and the husband cherishing and supporting his wife as a husband should do...” (p297) That is scarcely an accurate description of a modern marriage. In a similar vein, the fact that parties have sexual relations is much less a significant factor than it might have been in the 1940s. On the other hand, judges have to be careful not to translate their own individual experience of marriage as being the universal experience of others in that relationship. ... In so far as the sheriff appears to have concluded that it is normal for married couples to have joint finances, I have some sympathy with that criticism. But it is important to note everything that the sheriff said about the parties' financial arrangements. As I understand him, he was not suggesting that all of their financial affairs should be joined; his concern was that there was no joining at all and, in particular, that the appellant did not associate her own important financial affairs with the respondent's address. Indeed, for many of them she continued to use her own property as the address of choice. 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.”³⁹

3.28 In *B v B*,⁴⁰ Sheriff Principal Stephen upheld the sheriff's decision that the claim was not time barred.⁴¹ At proof and on appeal, the defender's argument focused on the use of the words “living together” in the statutory definition. Sheriff Principal Stephen observed that “... cohabitation and cohabitants are more easily recognised than defined.”⁴² She set out her view that:

“[U]ndue 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 cohabiting relationship requires to work abroad or is sufficiently ill or infirm that he or she requires to reside in a care home or

³⁵ P 12.

³⁶ Unreported, Stranraer Sheriff Court, 20 February 2012: (2012) GWD 11-205).

³⁷ Para 23.

³⁸ [2014] 9 WLUK 514; 2014 GWD 31-610.

³⁹ Para 13.

⁴⁰ [2014] 9 WLUK 169; 2014 GWD 30-593.

⁴¹ The time limit for claims under s 28 is one year, per s 28(8) of the 2006 Act; see ch 6.

⁴² Para 27.

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.”⁴³

3.29 At paragraph 34 she returned to what she described as the difficulty in determining what constitutes being “husband and wife” and went on to discuss the sheriff’s approach in the case. Like Sheriff Principal Pyle in *Gutcher v Butcher*, discussed above, Sheriff Principal Stephen considered the definition in section 25 by reference to the range of living arrangements that couples might make and concluded:

“By its nature cohabitation is, of course, not the relationship of husband and wife albeit the definition in s.25(1) of the 2006 Act uses the analogy of living together as husband and wife. It is reasonable to say that the factors referred to in *Clive – Husband and Wife – 21.075*⁴⁴ may have greater or lesser significance depending upon the individuals involved in the relationship; the careers and characters of the parties and the duration of the relationship. None of the factors are conclusive or determinative of the issue. The importance of being affectionate and having sexual relations will vary from case to case. The wellbeing of the parties and the relationship itself may thrive if the parties sleep apart.”

Finally, Sheriff Principal Stephen opined that “... public recognition of the parties as a couple is important.”⁴⁵

3.30 While the definition of “cohabitant” in section 25 has not often been the subject of litigation, it is clear from the cases outlined above that the definition has been subject to wide judicial interpretation. The case law suggests that some element of stability is required as well as features of co-dependent lives (such as a couple having some degree of linked finances, socialising and holidaying together). While living together is not on its own sufficient to establish that a couple are cohabitants, it is also not necessarily required (given modern relationships, including marriages, can involve couples living apart together).

Definition of cohabitant in other domestic legislation: commentary and case law

3.31 To assist in considering whether the current definition of “cohabitant” in section 25 is optimum we now look at definitions of the term and equivalent terms in other Scottish and wider UK legislation and relevant commentary and case law.

Scottish legislation: commentary and case law

3.32 Several Scottish statutes define “cohabitant,” “cohabitee,” “nearest relative,” “a qualifying relationship,” “partner” or equivalent term by reference to marriage or civil partnership (or living together as if husband and wife or in a relationship which has the characteristics of the relationship between civil partners). Some require, in addition, that the

⁴³ Para 32.

⁴⁴ Discussed below at para 3.39.

⁴⁵ Para 35.

parties have lived in such relationships for a qualifying period ranging from six months⁴⁶ to five years.⁴⁷

3.33 While some statutory definitions of a cohabiting couple have not yet attracted any specific academic commentary or been the subject of reported case law,⁴⁸ there are others where the approach has been subject to judicial or academic comment. For example, section 18(1) of the Matrimonial Homes (Family Protection) (Scotland) Act 1981 (“the 1981 Act”), which governs the occupancy rights of cohabiting couples, describes “a cohabiting couple” as:

“[A] man and a woman ... living with each other as if they were man and wife or two persons of the same sex ... living together as if they were civil partners ...”⁴⁹

3.34 Section 18(1) of the 1981 Act was considered in *Souter v McAuley*,⁵⁰ which concerned a same sex couple, one of whom sought an order suspending the other’s occupancy rights. They made competing claims to vest the joint tenancy in their sole name. The fact of the parties’ cohabitation was not in dispute. The key factor taken into account by the Sheriff in deciding whether the parties were a cohabiting couple and therefore entitled to seek orders under the 1981 Act was the sexual nature of the relationship.

3.35 Section 29(3) of the Adoption and Children (Scotland) Act 2007 (“the 2007 Act”) defines “relevant couple” for the purpose of an application for adoption as:

- (a) persons who are married to each other,
- (b) persons who are civil partners of each other,
- (c) persons who are living together as if husband and wife in an enduring family relationship, or
- (d) persons who are living together as if civil partners in an enduring family relationship.

3.36 The Explanatory Notes to the 2007 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

⁴⁶ S 14(11) of the Criminal Justice (Scotland) Act 2003 defines “cohabitee” as a person who has lived with the victim as if in a married relationship or in a relationship which had the characteristics of the relationship between civil partners, for at least six months. Section 35(7) of the Burial and Cremation (Scotland) Act 2016 provides that references to a spouse of a person includes references to a person who immediately before the deceased’s death was living with the deceased as if they were married to each other and had been so living for a period of at least six months.

⁴⁷ S 254(8) of the Mental Health (Care and Treatment) (Scotland) Act 2003 defines “nearest relative” as including a person who has lived with the relevant person for at least five years.

⁴⁸ S 8(6)(za) of the Succession (Scotland) Act 1964; s 14(11) of the Criminal Justice (Scotland) Act 2003; s 19(1) of the Interests of Members of the Scottish Parliament Act 2006; s 108 of the Housing (Scotland) Act 2001; s 254 of the Mental Health (Care and Treatment) (Scotland) Act 2003; s 65(3)(b) of the Burial and Cremation (Scotland) Act 2016; s 6(4) of the Land and Buildings Transaction Tax (Amendment) (Scotland) Act 2016; s 67(1)(b), (3), 67(2)(c) and 70(1) of the Private Housing (Tenancies) (Scotland) Act 2016; s 1 of the Abusive Behaviour and Sexual Harm (Scotland) Act 2016; s 11(2) of the Domestic Abuse (Scotland) Act 2018.

⁴⁹ S 18(2) of the 1981 Act provides that the court shall have regard, when determining whether a couple are cohabiting, to the time for which it appears that the parties have been living together and “whether there is any child (i) of whom they are the parents; or (ii) who they have treated as a child of theirs.”

⁵⁰ 2010 SLT (Sh Ct) 121.

or financial interdependency will be relevant factors in assessing the overall strength of a relationship and the suitability of a couple to adopt.”⁵¹

3.37 The Explanatory Notes further clarify that the phrase “enduring family relationship” does not apply to two people who do not have a relationship akin to a marriage or civil partnership, such as two platonic friends or two siblings who live together.⁵² Professor Kenneth Norrie is of the opinion that the words “enduring family relationship” add little of substance to the requirement of living together as if husband and wife or civil partners, apart from to emphasise the need for stability:

“It is difficult to imagine the circumstances in which a couple would be held to be a cohabiting couple for the purposes, for example of ss. 25 – 29 of the Family Law (Scotland) Act 2006, but not a relevant couple for the purposes of the Adoption and Children (Scotland) Act 2007. Nevertheless the formulation used to describe the respective couples in the two Acts is noticeably different, which may be taken to indicate a parliamentary intention that only the most stable and enduring of cohabiting couples are eligible to make a joint application to adopt a child.”⁵³

3.38 The analogy with marriage in the Scottish legislation mentioned above bears some consideration.⁵⁴ The question whether spouses are cohabiting as such has been considered academically and judicially. In the divorce context, the Divorce (Scotland) Act 1976 (“the 1976 Act”) provides that the irretrievable breakdown of marriage may be established where there has been a period of non-cohabitation between the parties.⁵⁵ Section 13(2) defines “cohabitation” as follows:

“For the purposes of this Act, the parties to a marriage shall be held to cohabit with one another only when they are in fact living together as man and wife; and “cohabitation” shall be construed accordingly.”⁵⁶

3.39 Section 13(2) of the 1976 Act is discussed in some detail by Professor Eric Clive⁵⁷ and has been subject to judicial scrutiny.⁵⁸ Professor Clive explained that “in fact living together as man and wife” must be approached by applying the statutory words directly to the circumstances of each case. He explained that various factors will be important, including the

⁵¹ Explanatory Notes to the Adoption and Children (Scotland) Act 2007, para 118 available at: <http://www.legislation.gov.uk/asp/2007/4/notes>.

⁵² Para 119.

⁵³ Professor Kenneth Norrie, *The Law Relating to Parent and Child in Scotland* (3rd edition, W Green 2013) at 21.29.

⁵⁴ It is acknowledged and noted that in some of the statutes mentioned, reference is also made, by analogy, to civil partnership. As explained in para 3.5 above, the effect of s 4 of the Marriage and Civil Partnership (Scotland) Act 2014 is that s 25 of the 2006 Act defines cohabitants only by reference to spouses, whether same or mixed sex and not by reference to civil partners.

⁵⁵ Divorce (Scotland) Act 1976, s 1(2)(d) and (e).

⁵⁶ The somewhat old fashioned language of this section has been modified by s 4 of the Marriage and Civil Partnership (Scotland) Act 2014. See para 3.4.

⁵⁷ Eric M Clive, *The Law of Husband and Wife in Scotland*, (4th edition, W Green 1997) paras 21.068 to 21.083.

⁵⁸ See *Banks v Banks* 2005 Fam LR 116 at para 33 for the formulation of the test, approved by the IH in *S v S* 2015 SC 513. See also *M v T* [2011] 11 WLUK 503; *Garrad v Inglis* 2013 WL 6980541; [2013] WLUK 499; 2014 GWD 1-17 and *Bain v Bain* 2008 Fam LR 81.

amount of time spent together and the sharing of resources,⁵⁹ but stressed that no factor will be conclusive on its own.⁶⁰

3.40 It is important, however, to recall that the date of cessation of cohabitation by a married couple or civil partners will be critical in determining such matters as whether they have been separated for the requisite period to establish irretrievable breakdown,⁶¹ or what the relevant date is for the purpose of determining the value of matrimonial or partnership property.⁶² It is not determinative of whether they were, or remain, married or civil partners; such relationships are established when they are entered into and are dissolved only by order of court or on death.

Wider UK legislation: commentary and case law

3.41 Some legislative provisions extending elsewhere in the UK also define cohabitants by reference to marriage and civil partnership. One example of this approach is section 137(1) of the Social Security Contributions and Benefits Act 1992 (“the 1992 Act”).⁶³ In other statutes, “cohabitant”, “partner” or equivalent terms are defined by reference to parties being in an enduring family relationship (although some also provide that the couple must live together).⁶⁴

3.42 The definition in section 137(1) of the 1992 Act was considered in the UK Upper Tribunal case of *JP v Secretary of State for Work and Pensions*.⁶⁵ This decision predated amendments made to the 1992 Act.⁶⁶ Prior to those amendments, the definition of “couple” in section 137(1) was:

- (a) a man and woman who are married to each other and are members of the same household;
- (b) a man and woman who are not married to each other but are living together as husband and wife otherwise than in prescribed circumstances;
- (c) two people of the same sex who are civil partners of each other and are members of the same household; or
- (d) two people of the same sex who are not civil partners of each other but are living together as if they were civil partners otherwise than in prescribed circumstances.⁶⁷

3.43 The Secretary of State decided that the appellant Ms P was part of a couple with Ms R and that the assessment applied from the day when the Civil Partnership Act 2004 came into force. Prior to this, two people of the same sex living together could not be a “couple” under

⁵⁹ Para 21.075 – other factors listed as relevant are living under the same roof, sleeping together, having sexual intercourse together, eating together, supporting one another, being affectionate to each other and so on.

⁶⁰ Para 21.081.

⁶¹ 1976 Act, s 1(2); 2004 Act s 117(3).

⁶² In terms of s 10(3) of the Family Law (Scotland) Act 1985.

⁶³ Which extends to Scotland, England and Wales.

⁶⁴ S 57ZE(7)(b) of the Employment Rights Act 1996; s 27(5)(b) of the Sexual Offences Act 2003; s 54(8) of the Human Tissue Act 2004.

⁶⁵ [2014] UKUT 0017 (AAC) (Judge H Levenson) January 17, 2014. (For a brief overview see: Case Comment, “Living together as if civil partners (income support): Civil Partnership Act 2004”, (2014) JSSL D89).

⁶⁶ By the Marriage (Same Sex Couples) Act 2013 (Consequential and Contrary Provisions and Scotland) Order 2014/560, the Marriage and Civil Partnership (Scotland) Act 2014 and the Civil Partnership Act 2004 (Consequential Provisions and Modifications) Order 2014/3229. See para 3.44 below.

⁶⁷ S 137(1A), which has since been repealed, further provided that “two people of the same sex are to be regarded as living together as if they were civil partners if, but only if, they would be regarded as living together as husband and wife were they instead two people of the opposite sex.”

the 1992 Act. The question on appeal was whether the relationship between Ms P and Ms R satisfied the definition of couple. Judge Levenson commented that the concept of “living together as husband and wife” had “proved elusive and difficult to apply.”⁶⁸ The common law position in England was highlighted, which is that it is not sufficient that a man and woman are simply living in the same household. Instead, it is necessary to ascertain in so far as possible the manner in which they live together. This includes whether there is stability, financial support, a sexual relationship, children and public acknowledgment.⁶⁹ Having regard to the facts, he held that the Secretary of State had not demonstrated that the two women were in a relationship of the above kind and allowed the appeal. He agreed with the following analysis of the authors of *Social Security Legislation 2013/2014* (Sweet and Maxwell):

“It is not immediately clear what the new concept of two people living together as if they were civil partners entails. Centuries of case law has established what the nature of a marriage is with the result that there is some chance of being able to say when an unmarried heterosexual relationship resembles marriage. By contrast there is no established model of what is involved in a civil partnership. Any two people can register a civil partnership as long as they are of age, of the same sex, not within the prohibited degrees of relationship and not already married or in another civil partnership... There is therefore a much wider variety of relationships that could be registered as civil partnerships and it is therefore more difficult to say whether any particular informal relationship resembles a civil partnership.”⁷⁰

3.44 Section 137(1) was also considered by the Inner House of the Court of Session in *K v Secretary of State for Work and Pensions*.⁷¹ By then, the definition of “couple” in section 137(1) had been amended to:

- (a) two people who are married to, or civil partners of, each other and are members of the same household; or
- (b) two people who are not married to, or civil partners of, each other but are living together as a married couple otherwise than in prescribed circumstances;⁷²

3.45 The appellant contended that she and GO, with whom she lived, were not a couple as he was homosexual and that the absence of a sexual relationship should have a bearing upon the issue of whether they were living together “as a married couple”. The appeal was refused. It was held that the sexuality of GO and the existence or otherwise of a sexual relationship between the appellant and GO were factors which may be relevant to, but not determinative of, the critical question.⁷³

⁶⁸ Para 20.

⁶⁹ See *Crake v Supplementary Benefits Commission* [1982] 1 ALL ER 498.

⁷⁰ Above para quoted from; David Bonner (with John Mesher, Penny Wood, Richard Poynter, Nick Wikeley and the Child Poverty Action Group), *Social Security Legislation 2013/14* (Volume II, 2013, Sweet and Maxwell) p 218 at para 2.34.

⁷¹ Also known as *DK v Secretary of State for Work and Pensions* 2017 SC 176 (For a brief case comment see Tom Royston and Charlotte O’Brien, “Living together isn’t all about sex” 2017 JSSL D15).

⁷² S137(1A) has since been amended by the Civil Partnership (Opposite Sex Couples) Regulations 2019/1458, Sch 3(1), para 14(2)(a), with effect from 2 December 2019, to include in subsection (1)(b) reference to living together as civil partners.

⁷³ 2017 SC 176 at para 18.

3.46 The changes and amendments to this definition over time, and the issues focused in the cases mentioned, are illustrative of the difficulties inherent in determining whether parties are cohabitants by reference to other, formal, relationships.

3.47 The other approach⁷⁴ is to refer to parties being in an “enduring family relationship”. As that term is not further defined in the legislation in which it appears, the interpretation of it has been left to the courts. Although many of the same factors are taken into account by the courts when considering language such as “enduring family relationship” and “as if husband and wife/civil partner”, the difference in wording may suggest attitudes moving away from the comparison of cohabitants to spouses.

3.48 The Adoption and Children Act 2002 (“the 2002 Act”),⁷⁵ provides that adoption orders may be made in favour of couples who are not married or in a civil partnership. Section 144(4)(b) defines the term “couple” as including:

“two people (whether of different sexes or the same sex) living as partners in an enduring family relationship.”

Unlike its Scottish counterpart,⁷⁶ the 2002 Act does not require that couples live together to adopt jointly. It has been said that this definition therefore focuses on the relationship as opposed to the fact of cohabitation.⁷⁷

3.49 The definition in the 2002 Act was considered in the case of *T and Anor v CC*⁷⁸ where a same sex couple had been together for 20 years but did not live in the same home. One child lived with each of them but they spent significant time as a unit of four and had decided on that arrangement for the benefit of the family. The judge considered the terms of section 144(4) and concluded that the words “living as partners in an enduring family relationship” were:

“... no doubt chosen so as not to require the residence of both in the same property. That is not surprising as historically many a parent has had to work abroad whilst the family remained at home without in any way imperilling an enduring family relationship. Nor is that unusual today with people having to move jobs often at short notice.”⁷⁹

3.50 In the Human Fertilisation and Embryology Act 2008 (which also extends to Scotland) a similar definition is used to describe couples who are not married or civil partners. Section 54(2)(c) 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.”

⁷⁴ Mentioned in para 3.41.

⁷⁵ The 2002 Act extends to England and Wales.

⁷⁶ Adoption and Children (Scotland) Act 2007, s 29(3)(c).

⁷⁷ Professor Kenneth Norrie, *The Law Relating to Parent and Child in Scotland* (3rd edition, W Green 2013) at 21.29.

⁷⁸ [2010] EWHC 964 (Fam) (For a breakdown see Brian Sloan, “Enduring families, enduring the adoption process” (2011) LQR 173).

⁷⁹ Para 16.

3.51 In *F (Children) (Thai Surrogacy: Enduring Family Relationship)*⁸⁰ an application was made by a same sex couple for a parental order in respect of twins born in Thailand as a result of a commercial surrogacy arrangement. By the time of the hearing the couple had been in a relationship for almost two years and had been through the treatment and conception process with the surrogate. They had supported each other through the process and had both cared for the children from birth.⁸¹ A Parental Order Reporter expressed concern that the parties were not in an enduring family relationship as required by section 54(2)(c). Russell J concluded that the applicants were a couple, were part of a family and theirs was an enduring family relationship, noting that there is limited reported case law relating to the definition of an “enduring family relationship”⁸² and that:

“Parliament pointedly and specifically decided not to define an enduring family relationship in terms of its longevity... and to leave it to the High Court to test whether a couple are in an enduring family relationship.”⁸³

Other jurisdictions: commentary and case law

3.52 The definition of “cohabitant” or equivalent term varies among jurisdictions outwith Scotland and the UK. The reference in section 25 of the 2006 Act to parties living as if married is not widely replicated elsewhere.⁸⁴

Australia

3.53 In Australia the 1975 Act⁸⁵ provides that the rights of couples in qualifying cohabiting or “de facto” relationships are equal to those of parties to a marriage, with some minor exceptions. The approach involves consideration of a number of factors to determine whether a person qualifies under the 1975 Act as a party to a de facto relationship and thus may seek financial provision on separation. Section 4AA of the 1975 Act explains the meaning of de facto relationship as follows:

- (1) 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.

- (2) Those circumstances may include any or all of the following:
 - (a) the duration of the relationship;
 - (b) the nature and extent of their common residence;
 - (c) whether a sexual relationship exists;
 - (d) the degree of financial dependence or interdependence, and any arrangements for financial support, between them;
 - (e) the ownership, use and acquisition of their property;
 - (f) the degree of mutual commitment to a shared life;

⁸⁰ [2016] EWHC 1594 (Fam), [2016] 4 WLR 126.

⁸¹ Para 32.

⁸² Para 19.

⁸³ Para 32.

⁸⁴ But see the approach in British Columbia, Canada, discussed in paras 3.70 to 3.72.

⁸⁵ Family Law Act 1975 (Cth).

- (g) whether the relationship is or was registered under a prescribed law of a State or Territory as a prescribed kind of relationship;
- (h) the care and support of children;
- (i) the reputation and public aspects of the relationship.

3.54 A person is excluded from making financial claims if they have lived in a de facto relationship for less than two years unless they have a child, are in a registered relationship under Australian state law or have made substantial contributions and a failure to make an order would result in serious injustice.⁸⁶ It is possible for a couple to be in a de facto relationship without residing in the same home.⁸⁷ The legislation specifies that a de facto relationship can exist even where one of the persons is legally married to someone else or is in another de facto relationship.⁸⁸

3.55 The definition in section 4AA of the 1975 Act has been criticised for lacking clarity because it is open and flexible, and because the approach requires evidence on the most intimate of questions. It has also been commented that it will not be easy for lawyers to give advice to clients about the circumstances in which a relationship is likely to attract the court powers of the 1975 Act, particularly since maintaining a separate household will not be enough to avoid the provisions. However, the same commentator noted that these issues are likely to be unavoidable without allowing the court to hinge only on relationship registration.⁸⁹ The definition of de facto relationships was not considered in the recent inquiry into family law undertaken by the ALRC.⁹⁰

3.56 We have been told by Australian judges that much of the contentious litigation involving parties to de facto relationships focuses on determining whether they meet the criteria set out in the section 4AA definition. That is perhaps unsurprising as, if they do, they are subject to broadly the same regime for financial provision as divorcing spouses.

Ireland

3.57 In Ireland, a cohabitant is defined in the 2010 Act as “one of 2 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.”⁹¹ The legislation also provides that the

⁸⁶ S 90SB. The legislation defines the qualifying period of the de facto relationship as “the period, or the total of the periods.” As such, relationships which break down and recommence can be aggregated to establish the requisite two-year qualifying period. See *Dahl & Humblin* (2011) Fam LR 229.

⁸⁷ See *Clarence & Crisp* [2016] FamCAFC 157 (18 August 2016).

⁸⁸ Family Law Act 1975 (Cth), s 4AA(5)(b). However, see *Jonah and White* [2012] FamCAFC 200 (30 October 2012) where a Judge found that a 17 year relationship between a woman and a married man lacked the “coupledom” and public aspects necessary for a finding in fact that the two parties were in a de facto relationship. For further commentary see Michelle Fernando and Olivia Rundle, “Love ‘Em, Keep ‘Em, Leave ‘Em: (Non) application of de facto relationship laws to clandestine intimate relationships” (2016) 4(1) Alt LJ 93.

⁸⁹ Juliet Behrens, “*De Facto Relationship?: Some early case law under the Family Law Act*” (2010) 24 AJFL 350, pp 358-360.

⁹⁰ For an overview of the Inquiry into the Family Law System by ALRC see ch 2, para 2.28 and <https://www.alrc.gov.au/inquiries/family-law-system>.

⁹¹ Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010, s 172(1).

relationship shall not cease to be an intimate relationship merely because it is no longer sexual in nature.⁹²

3.58 A list of factors is provided to assist in determining whether or not two adults are cohabitants. The court is required to take into account all the circumstances of the relationship and in particular to have regard to the following:

- (a) the duration of the relationship;
- (b) the basis on which the couple live together;
- (c) the degree of financial dependence of either adult on the other and any agreements in respect of their finances;
- (d) the degree and nature of any financial arrangements between the adults including any joint purchase of an estate or interest in land or joint acquisition of personal property;
- (e) whether there are one or more dependent children;
- (f) whether one of the adults cares for and supports the children of the other; and
- (g) the degree to which the adults present themselves to others as a couple.⁹³

3.59 The legislation also provides that cohabitants who are still married (to someone else) are excluded from the regime if, at the end of the cohabitation, they have not lived apart from their spouse for at least 4 of the 5 previous years. A person is only treated as a qualifying cohabitant from the point where he or she would be entitled to a divorce; the rights of spouses of either party prevail over those of qualified cohabitants.⁹⁴

3.60 Conversations with an Irish academic and practitioner suggest that the term “intimate and committed relationship” has not caused any particular difficulty in practice. Some commentators are doubtful, however, with one noting that the “rather subjective nature of the definition is compounded when one considers the difficulties that may arise in determining whether a couple are cohabiting.”⁹⁵

3.61 A person who meets the definition of cohabitant is entitled to benefit from the rules on cohabitation contracts in the 2010 Act,⁹⁶ but only a “qualified cohabitant” may apply for financial redress.⁹⁷ A “qualified cohabitant” for the purposes of the 2010 Act is a person who, immediately before the time that the relationship ended, lived with the other adult as a couple for at least five years, or for at least two years if they have a child.⁹⁸

3.62 The 2010 Act had its genesis in work by the LRC which suggested that even though “[n]otions of dependency and need, contributions and sacrifices, play a more significant role than where there is no child involved... extending an automatic right to make an application,

⁹² S 172(3). It has been argued that the phrase “no longer sexual” implies that there must at some point have been a sexual basis to the relationship. See Inge Clissmann SC and Ciara McMenamin, “*We can work it out*”, October 2013 Law Society Gazette 30, p 32.

⁹³ S 172(2).

⁹⁴ S 172(6).

⁹⁵ Fergus Ryan, “*Out of the shadow of the constitution: civil partnership, cohabitation and the constitutional family*” 2012 48(2) *The Irish Jurist* 201 at pp 243-244.

⁹⁶ See ch 7, para 7.23.

⁹⁷ 2010 Act, s 173(1).

⁹⁸ S 172(5)(a) and (b).

regardless of the duration of the relationship.. is ...far-reaching.”⁹⁹ There is also no “fall-back” provision for cohabitants who do not meet the qualifying criteria but might have made substantial contributions. The LRC had suggested that an application should be permitted if serious injustice would arise, however this was not carried into the 2010 Act.¹⁰⁰ This strict approach has been supported in Irish academic literature since:

“The Act is limited in its ambitions and the certainty provided by fixed minimum periods allows potential defendants to know for certain where they stand and avoids the dangers of claims being made for their nuisance value in the bitterness of the termination of a shorter cohabitation.”¹⁰¹

New Zealand

3.63 In New Zealand remedies under the 1976 Act¹⁰² are available to people who are in a “de facto relationship”, defined as:

- ... a relationship between 2 persons (whether a man and a woman, or 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;¹⁰³ and
 - (c) who are not married to, or in a civil union with, one another.¹⁰⁴

3.64 In determining whether two persons live together as a couple, all the circumstances of the relationship are to be taken into account, including any of the following matters that are relevant in a particular case:

- (a) the duration of the relationship;
- (b) the nature and extent of common residence;
- (c) whether or not a sexual relationship exists;
- (d) the degree of financial dependence or interdependence, and any arrangements for financial support, between the parties;
- (e) the ownership, use and acquisition of property;
- (f) the degree of mutual commitment to a shared life;
- (g) the care and support of children;
- (h) the performance of household duties;
- (i) the reputation and public aspects of the relationship.¹⁰⁵

3.65 No finding in respect of any of the above 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.¹⁰⁶

⁹⁹ The LRC, “Report: Rights and Duties of Cohabitants” (LRC 82-2006) at p 32 para 2.17 available at: <https://www.lawreform.ie/fileupload/Reports/R822006cohabitants.pdf>.

¹⁰⁰ LRC 82-2006 at pp 34-35.

¹⁰¹ John Mee, “Cohabitation law reform in Ireland” (2011) 23(3) CFLQ 323 at pp 331-332.

¹⁰² Property (Relationships) Act 1976.

¹⁰³ The definition originally proposed in the De Facto Relationships Bill 1998 was “a relationship in the nature of marriage” but the Justice and Electoral Reform Committee accepted the criticism that referencing marriage to describe a relationship which was not marriage was inappropriate, and therefore amended the wording to “live together as a couple.”

¹⁰⁴ s 2D(1).

¹⁰⁵ s 2D(2).

¹⁰⁶ S 2D(3)(a) and (b).

3.66 De facto relationships enduring for at least three years are subject to the same regime of relationship property sharing as married couples and civil unions.¹⁰⁷ Where this qualifying period is not met, alternative rules currently apply to “relationships of short duration”, if there is a child of the relationship or the applicant has made a substantial contribution to the relationship and the court is satisfied that failure to make an order would result in serious injustice.¹⁰⁸

3.67 The approach to the definition of de facto relationship in New Zealand was summarised in *Scragg v Scott*¹⁰⁹ where the court noted:

“The test must inevitably be evaluative, with the Judge having to weigh up as best he or she can all of the factors – not only those contained in s 2D, but also any others there may be – and applying a commonsense objective judgment to the particular case... Generalisations are to be avoided because every case is fact specific.”¹¹⁰

3.68 The NZ Commission launched a review of the 1976 Act in May 2016.¹¹¹ The NZ Issues Paper¹¹² asked whether the policy, principles and rules of the 1976 Act were still sound. The NZ Report, published on 23 July 2019,¹¹³ made recommendations in respect of qualifying relationships under the 1976 Act:¹¹⁴

- The eligibility criteria for de facto relationships should retain the existing definition of de facto relationship and the existing three year qualifying period.
- The new Act should include a rebuttable presumption that two people are in a qualifying de facto relationship when they have maintained a common household for a period of at least three years.¹¹⁵
- A qualifying de facto relationship should include a de facto relationship that does not satisfy the three year qualifying period if there is a child of the relationship and the court considers it just to make an order for division or the applicant has made substantial contributions to the relationship and the court considers it just to make an order for division.

¹⁰⁷ S 1C(2)(b).

¹⁰⁸ S 14A(2).

¹⁰⁹ [2006] NZFLR 1076 (HC).

¹¹⁰ Para [37].

¹¹¹ For an overview of the project see: <https://www.lawcom.govt.nz/our-projects/review-property-relationships-act-1976>.

¹¹² Law Commission, “Dividing Relationship Property – time for change?” Issues Paper 41 (October 2017, Wellington, New Zealand) available at:

<https://www.lawcom.govt.nz/sites/default/files/projectAvailableFormats/PRA%20Issues%20Paper%20FINAL.pdf>.

¹¹³ Law Commission, “Review of the Property (Relationships) Act 1976” Report 143 (June 2019, Wellington, New Zealand) available at:

<https://www.lawcom.govt.nz/sites/default/files/projectAvailableFormats/NZLC%20-%20PRA%20Review%20Project%20-%20Final%20Report%20R143.pdf>.

¹¹⁴ Recommendations set out in ch 6 and 7 of the 2019 Report; see also ch 2, para 2.38.

¹¹⁵ See ch 2, para 2.37. The NZ Commission agreed with submissions which noted that the start date of a de facto relationship is frequently the key issue in relationship property proceedings and that the breadth of the current definition and the uncertainty it often creates means that issues cannot be resolved efficiently. Some members of the public were dissatisfied with the degree of flexibility in the current definition.

3.69 No decision has yet been taken by the New Zealand Government on implementation of the NZ Commission's recommendations.

Canada

3.70 In British Columbia, remedies under the 2011 Act (BC) (which include property division, pension division and orders for maintenance) are available to people who fall within the category of "spouse", which is defined as follows:

- (1) A person is a spouse for the purposes of this Act if the person
 - (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 2 years, or
 - (ii) except in Parts 5 [*Property Division*] and 6 [*Pension Division*], has a child with the other person.
- (2) A spouse includes a former spouse.
- (3) A relationship between spouses begins on the earlier of the following:
 - (a) the date on which they began to live together in a marriage-like relationship;
 - (b) the date of their marriage.
- (4) For the purposes of this Act,
 - (a) spouses may be separated despite continuing to live in the same residence, and
 - (b) the court may consider, as evidence of separation,
 - (i) communication, by one spouse to the other spouse, of an intention to separate permanently, and
 - (ii) an action, taken by a spouse, that demonstrates the spouse's intention to separate permanently.¹¹⁶

3.71 People who are not married must therefore be in a "marriage-like relationship" for two years to have applications for property and pension division orders considered. The qualifying period is strict in these areas, but an applicant who has been in a relationship for less than two years is eligible to apply for maintenance if the couple have a child together.¹¹⁷

3.72 A 2017 paper refers to the definition of spouse in the 2011 Act (BC). The paper outlines the findings from a comparative study of reported cohabitation claims cases in British Columbia and Saskatchewan pre-reform (via unjustified enrichment) and post-reform (via legislative provision akin to that available for spouses) and concludes that:

"... The findings highlight that intensifying the financial consequences of cohabitation may multiply disputes over the characterization of individual relationships and their duration. These aggravated sites of contention point to the unlikelihood of achieving wholly identical treatment by assimilating a factually defined group to one defined by formal markers of status. Ultimately, this article's findings might lead proponents and opponents of reform to temper their stronger claims."¹¹⁸

¹¹⁶ Family Law Act, SBC 2011, c 25, s 3.

¹¹⁷ *Weber v Leclerc* BCCA 492.

¹¹⁸ Robert Leckey, "Cohabitation, Law Reform, and the Litigants", (2017) 31(2) Int J Law Policy Family 131 at 132.

3.73 In Alberta, the 2002 Act¹¹⁹ 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 2 persons

- (i) share one another’s lives,
- (ii) are emotionally committed to one another, and
- (iii) function as an economic and domestic unit.¹²⁰

3.74 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.¹²¹ Since 1 January 2020 these recognitions have been extended to include property division on the breakdown of the relationship. Following the ALRI recommendations in 2018, the Matrimonial Property Act, RSA 2000, c M-8, (“the 2000 Act”) was renamed the Family Property Act 2000 and its provisions were extended to adult interdependent partners.

Nordic countries

3.75 In Norway there is an extremely limited right in the 1991 Act,¹²² allowing a “household member” to purchase what was previously the common residence and household goods at market value upon the termination of the household.”¹²³

3.76 In Sweden, the 2003 Act 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.”¹²⁴ 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.¹²⁵ Government guidance states that “cohabitees” in the 2003 Act 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

¹¹⁹ Adult Interdependent Relationships Act, SA 2002, c-A-4.5.

¹²⁰ S 1(1)(f).

¹²¹ S 3.

¹²² Household Community Act 1991. A copy of Act No 45 of 4 July 1991 relating to the right to the joint residence and household goods when a household community ceases to exist is available via the CEFL website at: <https://app.uio.no/ub/ujur/oversatte-lover/data/lov-19910704-045-eng.pdf>.

¹²³ Prof. dr Tone Sverdrup, CEFL, National Report on Informal Relationships: Norway (April 2015) at question 2 available at: <http://ceflonline.net/wp-content/uploads/Norway-IR.pdf>.

Although this provision of the 1991 Act is limited, it applies when “two or more unmarried persons over 18 years of age have lived together in a household, and this household community ceases to exist when one of them dies, or when it comes to an end in any other way than by death. These provisions shall however only apply when the parties have lived together for at least two years, or when they have, have had or are expecting a child together.” (Act No 45 of 4 July 1991 relating to the right to the joint residence and household goods when a household community ceases to exist, s 1. See ch 3, part 2, para 3.118 for further discussion of the legal position in Norway).

¹²⁴ Cohabitees Act (2003:376), s 1. NB: the Swedish Government has not produced any translation of this Act into a foreign language. An English explanation of the legislation can be found via the CEFL website at: <http://ceflonline.net/wp-content/uploads/Sweden-IR-Legislation.pdf>.

¹²⁵ S 4.

normally forms part”; or have “a joint household, which means chores and expenses are shared”.¹²⁶

3.77 No qualifying period or criteria are set in the legislation; however the explanatory notes to the Act suggest six months as a “benchmark”.¹²⁷ The appeal court did accept in one case that a relationship was subject to the 2003 Act despite only lasting two and a half months.¹²⁸ It has been noted that “factors such as the existence of mutual wills, whether the couple have formed an agreement concerning the family’s financial affairs and whether they have a joint bank account, have been regarded as grounds for accepting shorter periods.”¹²⁹

3.78 The expression “marriage-like relationship” had been used to define cohabiting relationships between members of the opposite sex for the purposes of the Swedish Act on Cohabitees’ Joint Home 1987.¹³⁰ When the 2003 Act was being considered, it was noted that since “the law was now also intended to cover same-sex couples, who at that time could not legally contract a marriage, the expression ‘marriage-like relationship’ was not considered appropriate.”¹³¹

3.79 The 2011 Act (Finland) applies to “cohabiting partners” defined as:

“...partners who live in a relationship (*cohabiting partnership*) in a shared household and who have lived 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. However, a person who is married shall not be deemed a cohabiting partner.”¹³²

The reason for excluding childless cohabiting partners who have lived together for less than five years was that such couples “are viewed as being unlikely to have merged or pooled their financial resources by then to any great degree so that there would be less need for economic protection.”¹³³ In social sector issues, such as social insurance and benefits, reference is made to “a man and woman who cohabit in circumstances akin to marriage.”¹³⁴

¹²⁶ Government Offices of Sweden, *Family Law: Information on the rules* (26 August 2013) at 3.2.1 available at: <https://www.government.se/information-material/2013/08/family-law/>.

¹²⁷ Prof Maarit Jantera-Jareborg, Prof Margareta Brattstrom and LisaMarie Eriksson, CEFL, National Report on Informal Relationships: Sweden (March 2015) at question 4 available at: <http://ceflonline.net/wp-content/uploads/Sweden-IR.pdf>.

¹²⁸ Court of Appeal judgment *RH 2005:34*, cited in John Asland, Margareta Brattstrom, Goran Lind, Ingrid Lund-Andersen, Anna Singer and Tone Sverdrup, *Nordic Cohabitation Law* (Intersentia, Cambridge 2015) at p 43.

¹²⁹ John Asland, Margareta Brattstrom, Goran Lind, Ingrid Lund-Andersen, Anna Singer and Tone Sverdrup, *Nordic Cohabitation Law* (Intersentia, Cambridge 2015) at p 43.

¹³⁰ (1987:232) see also Prof Maarit Jantera-Jareborg, Prof Margareta Brattstrom and LisaMarie Eriksson, CEFL, National Report on Informal Relationships: Sweden (March 2015) at question 8 available at: <http://ceflonline.net/wp-content/uploads/Sweden-IR.pdf>.

¹³¹ John Asland, Margareta Brattstrom, Goran Lind, Ingrid Lund-Andersen, Anna Singer and Tone Sverdrup, *Nordic Cohabitation Law* (Intersentia, Cambridge 2015) at p 42.

¹³² Act on the Dissolution of the Household of Cohabiting Partners 26/2011, s 3. An unofficial translation of the Finnish legislation can be found 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>.

¹³³ John Asland, Margareta Brattstrom, Goran Lind, Ingrid Lund-Andersen, Anna Singer and Tone Sverdrup, *Nordic Cohabitation Law* (Intersentia, Cambridge 2015) at p 38.

¹³⁴ Salla Silvola, CEFL, National Report on Informal Relationships: Finland (January 2015) at question 4 available at: <http://ceflonline.net/wp-content/uploads/Finland-IR.pdf>.

Registration of cohabitation

3.80 It has been suggested by some stakeholders that the need for parties to prove the fact of cohabitation, which may include examination of the intimate details of cohabitants' personal lives, should and could be avoided if cohabitants were able to register the fact of their cohabitation. On the other hand, cohabitation by its very nature is an informal arrangement and those who enter into it will often do so quite deliberately to avoid formality. There is also a concern that the most vulnerable cohabitants, who by definition are most likely to be in need of protection, are least likely to formalise their relationships by way of registration. That may be due to factors such as lack of awareness¹³⁵ or power imbalances within the relationship. In the following paragraphs we examine the approaches taken in this and other jurisdictions to the formalisation of cohabitation by registration.

3.81 The issue of registration was not considered in the 1990 Discussion Paper¹³⁶ or the 1992 Report.¹³⁷ However, a system of registration was considered but rejected by the Scottish Government prior to the introduction of the Bill which became the 2006 Act, for the following reasons:

“A further approach would be to introduce a system of registration where the legal protection only applies where the couple have registered their partnership. However, this type of system would be costly, cumbersome and inappropriate as a mechanism for the delivery of a policy intention that focuses on protecting the vulnerable on the termination of a relationship rather than on the existence of the relationship itself. It would be unlikely to result in all cohabiting couples registering their relationship, leaving a significant number of cohabiting couples and their children without sufficient legal protection. A significant additional complication would be where one party – or even both parties - to a cohabiting relationship had not dissolved marriages to previous partners. That situation could not easily be reconciled with a system of formal registration.”¹³⁸

3.82 Since then, there has been no further consideration given to establishing a system of registration for cohabitants in Scotland.¹³⁹ We can see, however, that a registration system could be effective and helpful for many cohabiting couples. Proof of cohabitation would be likely to cause less difficulty if cohabitants could register the fact of their cohabitation and therefore have access to rights under the 2006 Act without the need for further inquiry. Such a provision may be useful for people whose domestic arrangements are unusual or do not include sharing a home, but who nonetheless consider themselves as cohabitants and are willing to submit to the 2006 Act regime. For others, registration may be viewed as an unnecessary and unwanted level of bureaucracy.

3.83 The people most likely to make use of a system of registration are those who are well informed and therefore most likely to enter into their own contractual arrangements on

¹³⁵ Discussed in ch 1.

¹³⁶ Scot Law Com No 86, 1990.

¹³⁷ Scot Law Com No 135, 1992.

¹³⁸ The Policy Memorandum, para 72.

¹³⁹ A private members Bill was introduced in the House of Commons in 2001 which provided for a registration system in England and Wales. The Relationships (Civil Registration) Bill did not proceed beyond its second reading. For discussion see Andy Hayward, “The *Steinfeld* Effect: equal civil partnerships and the construction of the cohabitant” (2019) 31(4) CFLQ 283.

cohabitation.¹⁴⁰ For those who do not register the fact of their cohabitation, there would therefore still need to be access to court to establish that they were or had been cohabitants.

3.84 Establishing a new register of cohabitation is likely to be costly. We understand from informal discussions with officials from the National Records of Scotland, that the main costs incurred would relate to making IT changes to the electronic registration system; policy time; process mapping; internal staff and registrar awareness-raising / training; re-prescription of relevant forms and the general administration of supporting this work. It is difficult for officials to provide us with an approximate figure for these costs but they estimate it might be in the region of £225,000, with additional annual operational costs.

Other jurisdictions

3.85 In order to inform our views on this issue, we have considered the approaches taken in other jurisdictions. France has a form of registration system for cohabiting couples, although this is optional. The Pacte civil de solidarité (“PACS”), or civil solidarity pact is a civil union contract entered into by two persons over the age of 18, of different sexes or the same sex, in order to structure their life together.¹⁴¹ Iceland also allows for registration of a cohabiting relationship. A National Register of Cohabitation is maintained and weight is given to the fact of registration of the cohabitation in determining whether the parties are cohabitants.¹⁴²

3.86 Five jurisdictions in Australia provide an option for couples to register their relationships.¹⁴³ Registration is one of the criteria for determining whether a de facto relationship exists and one of the possible qualifying criteria for a claim under the Commonwealth legislation discussed above, albeit it is not necessary. The ability to register a relationship in some states means there are essentially three types of relationship recognition that now exist in Australia: marriage, non-marriage relationship registration and the presumptive recognition of non-formalised de facto relationships.¹⁴⁴ We are told, however, that the Australian registration system is not well used.

3.87 There is no registration system for cohabitants in British Columbia. Other jurisdictions in Canada do however provide for registration, namely Nova Scotia¹⁴⁵ and Manitoba.¹⁴⁶ Parties can register their relationship with a government agency allowing them to opt in to particular consequences of marriage, including legislated property division rules. Experience in Nova

¹⁴⁰ See ch 7: Cohabitation Agreements.

¹⁴¹ The contract is governed by Articles 515-1 to Article 515-7-1 of the Code Civil or French Civil Code (a translation accessible here <https://www.legifrance.gouv.fr/Traductions/en-English/Legifrance-translations>). Article 515-5 of the Civil Code sets out a statutory regime similar to that of *séparation de biens* (separation of assets), which is applicable except where otherwise provided for in the PACS agreement. Therefore, from the moment that the PACS is registered and for its whole duration, each partner retains the right to manage, use and access their personal assets as they see fit. There is otherwise no express statutory provision in French law for cohabitants. The general law of property applies and there is some, limited case law regulating cohabitants' rights on separation.

¹⁴² John Asland, Margareta Brattstrom, Goran Lind, Ingrid Lund-Andersen, Anna Singer and Tone Sverdrup, *Nordic Cohabitation Law* (Intersentia, Cambridge 2015) p 51.

¹⁴³ Tasmania, the Australian Capital Territory, Victoria, New South Wales and Queensland.

¹⁴⁴ Lisa Young et al, *Family Law in Australia* (Lexis Nexis 9th edn, 2016) at 5.116 – 118 and 5.2.

¹⁴⁵ Vital Statistics Act, RSNS 1989, c 494, s 53 and 54. A registered domestic-partner declaration can be made in Nova Scotia, which can be filed by “two individuals who are cohabiting or intend to cohabit in a conjugal relationship”, see s 53(1).

¹⁴⁶ Vital Statistics Act, CCSM, c V60, s 13.1(1)(4). A “common-law relationship” is registrable, which means “the relationship between two adults who, not being married to each other, are cohabiting with each other in a conjugal relationship”, see s 1.

Scotia and Manitoba suggests, however, that a registration system is unlikely to substantially reduce the number of people who have to rely on common law claims. Both Provinces have had registration systems in place for almost ten years; however the uptake on registration has been low:

“Out of tens of thousands of common-law couples (38,460 in Nova Scotia and 39,060 in Manitoba, according to the 2011 census), only a tiny fraction have registered. In Manitoba, a total of 416 couples registered common-law relationships in the first ten years of the registration system. Cumulative numbers are not available for Nova Scotia, but the annual number of registrations is similar to Manitoba. There were 68 registrations in Nova Scotia in 2013 (the latest year for which statistics are available), 51 in 2012, and 76 in 2011.”¹⁴⁷

3.88 There is no statutory provision allowing for cohabitants to register their relationship in Ireland, New Zealand or the Nordic countries considered (Norway, Sweden and Finland).

Multiple party relationships

3.89 As noted in Chapter 1, family forms have changed significantly over the last 30 years or so and the definition of “cohabitant” in section 25 does not include, for example, families where more than two adults are involved in raising children, or are in a relationship together. This may be particularly relevant in the LGBTI+ community where three or more adults are raising a child together.¹⁴⁸ Another group that might be affected are those who live in polyamorous families.¹⁴⁹ There is no statistical information available in Scotland as to the incidence of such relationships, and we are not aware of evidence of strong support for legislative provision to be made for financial protections for people in such relationships when they end. These issues have, however, been raised with us during our informal discussions and research for this Discussion Paper.¹⁵⁰

Comparative commentary

3.90 In its recent review, the NZ Commission noted that there is no evidence of the number of multi-partner relationships in the country, but that it is likely to be small, and asked whether the 1976 Act should specifically recognise multi-partner relationships and, if so, how should they be defined and what property division rules should apply?¹⁵¹ The NZ Commission decided not to recommend extending recognition and property division rules to multi-partner relationships at this time. They noted that doing so would be a fundamental shift in policy and should be considered within a broader context involving more extensive consultation about

¹⁴⁷ These research findings were noted in a report by the Alberta Law Reform Institute, *Property Division: Common Law Couples and Adult Interdependent Partners*, Report for Discussion 30 (September 2017) at [95] available at: <https://www.alri.ualberta.ca/images/stories/docs/RFD30>.

¹⁴⁸ Bianca Jackson, “‘It Takes a Village to Raise a Child’: An overview of co-parenting and same-sex couples”, (2019) May Fam Law 522.

¹⁴⁹ Elizabeth S Scott; Robert E Scott, “From Contract to Status: Collaboration and the Evolution of Novel Family Relationships”, (2015) 115 Colum L Rev 293.

¹⁵⁰ The issue of multiple partner relationships was not considered by our predecessors in the 1990s. That is perhaps unsurprising, given prevailing social trends and attitudes at that time. Likewise, the issue is not referred to in the Scottish Government’s Policy Memorandum for the Bill that became the 2006 Act, nor does it appear to have been discussed during the Bill’s passage through the Scottish Parliament.

¹⁵¹ NZ Commission Issues Paper (2017) at 7.27.

how family law should recognise and provide for adult relationships that do not fit the mould of an intimate relationship between two people.¹⁵²

3.91 There is no legislative provision for multiple partner relationships in Ireland, Australia, British Columbia, Alberta, Sweden or Finland as the definitions in those jurisdictions of “cohabitant”, “de facto relationship”, “spouse”, “relationship of interdependence”, “cohabitee” and “cohabiting partner” are expressly limited to two persons. ALRI did however consider, in its recent law reform review, the issue of how the law of Alberta could best address the needs of those in relationships involving more than two partners. They concluded that the issue was outwith the scope of the project and suggested that future research may offer further insight.¹⁵³ This issue was also raised in a recent report by the Law Reform Commission of Nova Scotia (since re-named the Access to Justice & Law Reform Institute of Nova Scotia),¹⁵⁴ which concluded that the principles (in the proposed new Act) “should be applicable to the claim of someone leaving a multiple common law relationship with potentially greater complexity but no greater uncertainty.”¹⁵⁵

3.92 There is some potential recognition of multiple partner relationships within the 1991 Act in Norway as it can apply when “two or more people” are living together in a household, albeit the rights are limited.¹⁵⁶ We have not been able to identify any other jurisdiction within which recognition is given to multiple partner relationships (save where polygamous marriage is permitted by law).¹⁵⁷

Discussion

3.93 As the foregoing paragraphs show, there are several different approaches to defining the parties to cohabiting relationships. While some define the terms “cohabitant” or “cohabitation” by reference to a couple “living as if husband and wife” or “as if married”, others approach the definition by reference to the fact of the parties’ “enduring family relationship”. The latter approach does not rely on a comparison of cohabitants to those in formalised or registered relationships and, arguably, better reflects how modern couples live. It also has the benefit of using language that is gender neutral and is sufficiently broad to encompass the wide range of arrangements that couples make for a shared life together. This approach should therefore be easier to apply and recognise than a model based upon more traditional notions of living as if spouses.

3.94 The analogy with marriage and the arrangements that spouses, whether they be mixed or same sex, make for their shared life together may be regarded as unhelpful, as it tends to conflict with the language of section 25, which refers to parties “living together”. The exclusion, by reason of the enactment of section 4 of the 2014 Act, discussed above,¹⁵⁸ of any reference to civil partnership requires further consideration. It cannot be presumed that the way in which

¹⁵² NZ Report (2019) at 7.75.

¹⁵³ ALRI Final Report (2018) at [17] from pp 5-6.

¹⁵⁴ Law Reform Commission of Nova Scotia, *Division of Family Property*, (September 2017), available at: <https://static1.squarespace.com/static/5bc6671f0490795182e54b80/t/5c647a129b747a6490eb4ea2/1550088732749/Division+of+Family+Property+-+Final+Report.pdf>.

¹⁵⁵ P 115. The recommendations in the Report have not yet been implemented.

¹⁵⁶ See ch 2, para 2.47.

¹⁵⁷ Polygamy is permitted in some Muslim-majority countries in Africa and Asia, including Algeria, Saudi Arabia and Iran.

¹⁵⁸ See paras 3.4 and 3.5.

civil partners order their lives will mirror the arrangements that spouses make, or that same and mixed sex couples, whether in formal or informal relationships, will adhere to similar lifestyle patterns. What is perhaps more relevant to consider is the function of the relationship and the presence of features such as mutual emotional and financial support, intimacy, child rearing and homemaking.¹⁵⁹

3.95 Whatever language is used to describe and identify cohabitants, another consideration is whether the legislation should provide a list of factors or characteristics to assist the court in determining whether a person falls within the definition. That is the approach adopted in Australia, Ireland and New Zealand.¹⁶⁰ Careful thought would have to be given, however, to the particular features or characteristics of the parties or the relationship in the Scottish context. We therefore seek consultees' views on the possible introduction of a test that includes reference to a list of factors or characteristics (and what those might be) that would help to determine whether a couple are cohabitants for the purpose of the 2006 Act and therefore able to access the available statutory protections and remedies.

3.96 Some legislation from jurisdictions outwith the UK provides that parties cannot qualify as cohabitants if they are married to anyone else or are within prohibited degrees of relationship to each other.¹⁶¹ Some legislation, both from within and outwith the UK, sets a qualifying period of cohabitation in order to qualify for access to statutory remedies, which may be shorter, as in Ireland¹⁶² or removed altogether, as in Australia,¹⁶³ if there are children. To date, no such limitations have been placed upon Scottish cohabitants' rights to claim financial provision on cessation of cohabitation. That said, the remedies currently available to separated cohabitants under the Scottish legislation are relatively limited when compared with those available in some of the other jurisdictions that we have discussed.

3.97 We acknowledge the body of opinion, in particular within the LGBTI+ community, in favour of recognition of family forms that are not limited to relationships between couples. Academic writing on the question of multiple party relationships has tended to focus on parties' parental rights and responsibilities relating to children brought up in such family arrangements.¹⁶⁴ Recently, however, it has been suggested that "... with a little imagination, it would be possible to amend the legislation on cohabitation so that it embraces polyamory."¹⁶⁵

3.98 The economic consequences of relationships among multiple partners are complex and issues arise in relation to state benefits, tax, insurance, succession, contractual arrangements and the interaction between multiple party relationships and existing marriages or civil partnerships. The complexity of the issues surrounding such relationships, including in relation to parental rights and financial provision on relationship breakdown, have been

¹⁵⁹ 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.

¹⁶⁰ See paras 3.53, 3.58 and 3.64.

¹⁶¹ In Scotland, the forbidden degrees of relationship are set out in the Marriage (Scotland) Act 1977, Sch 1.

¹⁶² Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010, s 172(5).

¹⁶³ Family Law Act 1975 (Cth), s 90SB.

¹⁶⁴ See Jackson, fn 148 above.

¹⁶⁵ Elaine Sutherland, "Scots child and family law: liberty, equality and protection revisited", (2019) 1 Jur Rev 33, p 42.

considered in academic writing.¹⁶⁶ We are mindful also that people in relationships of such complexity could avail themselves of the protections available under bespoke contractual arrangements or by making wills. A wider question also arises about whether people in multiple party relationships ought to be permitted to marry or form civil partnerships. It seems to us that if recognition is given to informal multiple party relationships, involving rights and obligations during or at the end of those relationships, it follows that thought should also be given to other forms of relationship, such as plural marriage.¹⁶⁷ Our view is that consideration of regulation of multiple party relationships, and the availability of financial remedies on separation would involve significant changes in policy and raise complex matters of domestic public law and private international law. We have therefore reached the conclusion that these matters are beyond the scope of this project.

Options for reform

3.99 In Chapter 2, we discussed whether separate regimes should remain in place for, on the one hand, separating spouses and civil partners and, on the other, cohabitants whose cohabitation has ceased. In Part 2 of Chapter 5 we will consider whether the remedies currently available under the 2006 Act on cessation of cohabitation otherwise than by death are adequate. The availability of more extensive remedies may mean that the qualifying criteria should be more stringent. Therefore, we need to consider whether it is sufficient, in order for parties to access the remedies under the 2006 Act, that they meet the definition of “cohabitant,” regardless of the duration of the cohabiting relationship. This Commission earlier rejected the imposition of qualifying periods as arbitrary,¹⁶⁸ as did the Scottish Government in the Bill that became the 2006 Act.¹⁶⁹ We invite consultees’ views on whether, in the event that a wider range of remedies is available to former cohabitants, there ought to be further qualifying criteria, such as a minimum period during which they have cohabited or having a common child.

3.100 We have discussed the possibility of introduction of a registration system for cohabitants.¹⁷⁰ Questions arise as to the likelihood of parties registering the fact of their cohabitation. Lack of public awareness of the provisions for cohabitants in the 2006 Act has been highlighted by stakeholders, as discussed in Chapter 1.¹⁷¹ Of the jurisdictions that we have considered, few provide for registration of cohabiting relationships and there is evidence of poor use of the system in Australia, Nova Scotia and Manitoba. This, coupled with concern that such a system is likely to be used mainly by couples who are well informed and therefore less likely to be economically vulnerable may militate against the introduction of a register of cohabiting relationships in Scotland. Those cohabitants who are aware of the provisions and wish to formalise their relationships may do so, if they wish, contractually¹⁷² or by marrying or

¹⁶⁶ See Argentino and Fiore, “Dissolution of Polyamorous Relationships, Multiple Parent Families and Other Complex Arrangements”, in Abbie E Goldberg and Adam P Romero, (eds) *LGBT Divorce and Relationship Dissolution* (2019 OUP) at p 422.

¹⁶⁷ See Ronald C Den Otter, *A Perfectionist Argument for Legal Recognition of Polyamorous Relationships* in Elizabeth Brake and Lucinda Fergusons (eds) *Philosophical foundations of Children’s and Family Law* (2018, OUP) at p 95.

¹⁶⁸ Scot Law Com No 135, 1992, paras 16.4, 16.8 & 16.13.

¹⁶⁹ The Policy Memorandum, para 67.

¹⁷⁰ See paras 3.80 to 3.88.

¹⁷¹ See ch 1, paras 1.21 to 1.29.

¹⁷² Cohabitation agreements are discussed in ch 7.

entering into civil partnership. Our provisional view is that a system of registration may not be well used and may not provide adequate protection for the most vulnerable cohabitants.

3.101 A range of options is open as to how to reform the definition of cohabitant in section 25 of the 2006 Act, including leaving it as it is. Accordingly, we would be grateful for consultees' views on the following questions:

- 2. Should the definition of cohabitant in section 25 of the 2006 Act be amended?**
- 3. If consultees think the definition should be amended, should the comparison with spouses be removed in favour of a description of the nature of the relationship, such as “enduring family relationship”, “genuine domestic basis”, or something else?**
- 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?**
- 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?**
- 6. Would the response to Question 5(a) or (b) change if the remedies available to former cohabitants were extended?**
- 7. Would the definition of cohabitant be improved by the introduction of a list of features or characteristics to be taken into account in deciding whether the parties are cohabitants? If so, what features or characteristics should be included?**
- 8. What are consultees' views on the introduction of a registration system for cohabitants?**

Part 2 – Platonic relationships

Introduction

3.102 It has been suggested by some stakeholders that family relationships such as sibling relationships, or domestic caring arrangements can involve an element of financial and emotional dependence and are therefore worthy of recognition.¹⁷³ In this part of the chapter, we consider whether people who do not fall within the definition of “cohabitant” in section 25, such as siblings and others who live together in platonic relationships, should be afforded similar protections to those available to cohabitants under the 2006 Act. We consider the approaches taken to such arrangements in this and other jurisdictions before setting out our conclusion.

Scottish Law Commission

3.103 The 1990 Discussion Paper acknowledged that some of the arguments for legal recognition of cohabiting couples could equally be made in relation to other types of couples:

“..such as two men living together, or two women living together, or a man and a woman living together but not as husband and wife.”¹⁷⁴

3.104 The 1992 Report¹⁷⁵ noted receipt of submissions pointing out that there was an even stronger argument for some legal intervention in the case of two men or two women living together because they did not have the option of marrying each other. While these carefully reasoned arguments were acknowledged, it was considered, on pragmatic grounds, likely to be more productive to concentrate on cohabitation between a man and a woman living together as if husband and wife. The Report concluded by noting that it was this type of cohabitation which was statistically more important and in relation to which there was the greater demand for reform at that time. Of course, some of these arguments no longer apply, notably for those same sex couples who wish to formalise their relationships, since the introduction of civil partnership¹⁷⁶ and the extension of marriage to same sex couples.¹⁷⁷

Policy objective of the Family Law (Scotland) Bill

3.105 This issue was also considered during the Bill’s passage through the Scottish Parliament. Fergus Ewing, MSP questioned why the definition of cohabitant does not extend, for example, to siblings:

¹⁷³ These matters were considered by ECtHR in *Burden v UK* App No 13378/05 (Grand Chamber, 29 April 2008); [2008] 2 FLR 787; [2008] 47 EHRR 38. The case concerned sisters who had lived together their whole lives in what was argued to be a stable, committed and mutually supportive relationship.

¹⁷⁴ Scot Law Com No 86, 1990, para 1.13.

¹⁷⁵ Scot Law Com No 135, 1992, para 16.3.

¹⁷⁶ Civil Partnership Act 2004.

¹⁷⁷ Marriage and Civil Partnership (Scotland) Act 2014. Civil partnership is likely to be extended to mixed sex couples in Scotland during 2020 and has been extended to mixed sex couples in the rest of the UK.

“The committee considered in detail the position of siblings, particularly in relation to succession, at stage 1. ... The relevant point to be made at this stage is that the Bill will provide new rights to a group of people, who will have a legal definition and therefore a new status. Those rights will entitle them to claim a capital sum *inter vivos*. They will be able to claim money during their lifetime if their relationship breaks up and they will be able to make a claim on a person's death. Sisters and brothers—siblings—who have lived together and may have spent their whole lives together will have no such rights. Some people would say that the proposals will mean discrimination in favour of people who have sexual relationships or relationships that have a sexual element, and against siblings who obviously do not have such relationships. ... it seems to me that what I have described is a fundamental objection in principle, and that there is an opportunity for the committee to decide that such matters should be dealt with separately in relation to the law of succession. The position of siblings in particular should be considered.”¹⁷⁸

3.106 In response, the then Deputy Minister for Justice, Hugh Henry, commented that while there was awareness of other types of living arrangements, including elderly sisters or adult friends living together, the Government's interest was in providing legal safeguards for families:

“... based primarily on ensuring the child's best interests. I do not think that it would be appropriate for the law to step into the wide range of private living arrangements that adults enter into.”¹⁷⁹

3.107 During our informal consultations, Advisory Group members and stakeholders have raised with us the question whether consideration should be given to extending the definition of cohabitant to include those people who live together in familial or platonic relationships. One respondent to the questionnaire circulated to solicitors¹⁸⁰ also raised this issue, though not in response to a question posed.

Comparative commentary

Australia

3.108 In Australia, the 1975 Act does not extend to sibling or family relationships as parties to *de facto* relationships cannot be within the prohibited degrees of relationship to each other. However, in some Australian states, statutory rights to seek orders on separation with respect to parties' property and/or for maintenance have been extended to partners who fall outside the traditional model of marriage and *de facto* relationships but nonetheless enjoy a close and caring personal relationship.¹⁸¹

3.109 The definitions of these relationships vary among the states. In New South Wales, the Property Relationships Act 1984 extends to “close personal relationships” (other than a marriage or a *de facto* relationship) between two adult persons, whether or not related by family, who are living together, one or each of whom provides the other with domestic support and personal care, provided that the support and care is not provided for fee or reward, or on

¹⁷⁸ Scottish Parliament, Official Report of the Justice 1 Committee, Stage 2, 16 November 2005, at column 2322. Available at:

<http://www.parliament.scot/parliamentarybusiness/report.aspx?r=2143&mode=html>.

¹⁷⁹ As above, at column 2327.

¹⁸⁰ See ch 1, para 1.44.

¹⁸¹ See Lisa Young et al, *Family Law in Australia* (Lexis Nexis 9th edn, 2016) at para 5.118.

behalf of another person or organisation.¹⁸² In the Australian Capital Territory a “domestic relationship” is defined as a personal relationship between two adults in which one provides personal or financial commitment and support of a domestic nature for the material benefit of the other, which is not for fee or reward.¹⁸³ In Tasmania, provision is made for people in “caring relationships” other than marriage or a significant relationship between two adult persons, whether or not related by family, one or each of whom provides the other with domestic support and personal care and not for fee or reward.¹⁸⁴ The Domestic Partners Property Act 1996 in South Australia defines domestic partners as those in a “close personal relationship”, between two adults (whether or not related by family and irrespective of their gender) who live together as a couple on a genuine domestic basis but are not a legally married couple.¹⁸⁵ In Victoria, the Relationships Act 2008 recognises “caring relationships” between two adults who are not a couple or married to each other, and who may or may not otherwise be related by family, where one or each of the persons in the relationship provides personal or financial commitment and support of a domestic nature for the material benefit of the other, whether or not they are living under the same roof.¹⁸⁶ Caring relationships can be registered in Tasmania and Victoria.¹⁸⁷

3.110 Of the Australian states and the territory mentioned above, all provide a right to seek a property adjustment order on separation,¹⁸⁸ and all but one provide a right to seek a maintenance or interim maintenance order on separation.¹⁸⁹ There are no automatic entitlements on separation and applications for orders must be made to the appropriate court. All impose a qualifying period of either two or three years (unless there is a child of the relationship or the applicant has made substantial contributions which he or she would otherwise not be adequately compensated for)¹⁹⁰ and a time limit for applications of one or two years with discretion to extend to avoid hardship or serious injustice.¹⁹¹ Some succession rights also extend to people in platonic relationships or domestic arrangements in the four states mentioned above.¹⁹²

¹⁸² Property (Relationships) Act 1984 (NSW), s 5(1)(b) and (2).

¹⁸³ Domestic Relationships Act 1994 (ACT), s 3(1).

¹⁸⁴ Relationships Act 2003 (TAS), s 5(1) and (2).

¹⁸⁵ Domestic Partners Property Act 1996 (SA), s 3(1).

¹⁸⁶ Relationships Act 2008 (Vic), s 5.

¹⁸⁷ See Relationships Act 2003 (TAS), s 11; and Relationships Act 2008 (Vic), s 6.

¹⁸⁸ See Property (Relationships) Act 1984 (NSW), s 14; Domestic Relationships Act 1994 (ACT), part 3; Relationships Act 2003 (TAS), s 36; Domestic Partners Property Act 1996 (SA), s 9; and Relationships Act 2008 (Vic), s 41(1).

¹⁸⁹ There is no provision for maintenance orders in South Australia.

¹⁹⁰ See Property (Relationships) Act 1984 (NSW), s 17; Domestic Relationships Act 1994 (ACT), s 12; Relationships Act 2003 (TAS), s 37; Domestic Partners Property Act 1996 (SA), s 9(2)(c); and Relationships Act 2008 (Vic), s 42(2).

¹⁹¹ See Property (Relationships) Act 1984 (NSW), s 18; Domestic Relationships Act 1994 (ACT), s 13; Relationships Act 2003 (TAS), s 38; Domestic Partners Property Act 1996 (SA), s 9(3); and Relationships Act 2008 (Vic), s 43.

¹⁹² See Succession Act 2006 (NSW), s 57(1)(f), which provides that a person in a close personal relationship with the deceased is an eligible person for the purposes of applying for a family provision order; Domestic Partners Property Act 1996 (SA), s 9(4) which provides that an application for property adjustment may be made or continued by or against the legal representative of a deceased domestic partner; and Administration and Probate Act 1958 (Vic) which provides that a registered caring partner of the deceased is eligible to apply for a family provision order, s 90(h) and 90A. See also Intestacy Act 2010 (TAS), s 6, which defines spouse for the purposes of intestate succession as including a party to a registered personal relationship within the meaning of the 2003 Act (which includes registered caring relationship).

Ireland

3.111 In Ireland, the definition of cohabitant expressly excludes domestic relationships between family members within the prohibited degrees. However, it has been said that while the 2010 Act avoided the issue of whether to recognise non-romantic relationships, it remains unclear how the courts will interpret the phrase “intimate and committed”:

“Intimacy and commitment are merely two hard-to-measure factors to consider in a plethora of other factors, and it is apparent that there is no clear-cut method of objectively determining who is in an ‘intimate and committed’ relationship.”¹⁹³

New Zealand

3.112 In New Zealand, the definition of de facto relationship in the 1976 Act does not apply to non-intimate relationships.¹⁹⁴ A 2015 article questions whether the 1976 Act should be extended to grant property rights to people in other types of domestic relationships. The author notes that “the legal recognition of domestic relationships would have impact beyond the immediate sphere of relationship property sharing between partners” and that “careful consideration would need to be paid to the implications of domestic relationships on succession, insurance and superannuation entitlements, tax breaks, state funded health and welfare benefits, student loans, dependent children, and even medical consent in emergency situations, to name but a few examples.”¹⁹⁵ These are all matters of considerable importance for policy makers in deciding whether to extend property rights to people in platonic domestic relationships.

3.113 This issue was raised by the NZ Commission in the 2017 Issues Paper, which asked whether the 1976 Act should apply to domestic relationships and, if so, on what basis?¹⁹⁶ The NZ Commission received 18 submissions in response to this question, which were mixed.¹⁹⁷ In the Final Report the NZ Commission did not recommend extension to non-intimate domestic relationships, for reasons similar to those outlined above in relation to multi-partner relationships.¹⁹⁸ They also noted that it would be a complex task and, whilst some Australian states have extended property rights to domestic partners,¹⁹⁹ their property sharing regime, unlike that in New Zealand, is not constrained by a general rule of equal sharing; rather, property is divided on a discretionary basis.²⁰⁰

¹⁹³ Inge Clissmann SC and Ciara McMenamin, “We can work it out”, (October 2013) Law Society Gazette 30, p 32.

¹⁹⁴ Such as an elderly couple sharing a home for convenience – see *Sloan v Cox* [2004] NZFLR 777 (HC).

¹⁹⁵ Margaret Briggs, “Rethinking Relationships”, (2015) 46 VUWLR 649 at 670.

¹⁹⁶ NZ Commission Issues Paper (2017) at 7.34.

¹⁹⁷ Five respondents supported extension and nine did not. One organisation and two practitioners did not support any extension as there was no compelling case for reform. Members of the National Council of Women of New Zealand were divided on the issue.

¹⁹⁸ See para 3.90.

¹⁹⁹ See details at paras 3.108 and 3.110 above.

²⁰⁰ NZ Commission Final Report (2019), see paras 7.85 to 7.90 in particular.

Canada

3.114 In British Columbia, the 2011 Act (BC) does not provide for platonic or other domestic relationships. The definition of “spouse” is limited to those who are married or in marriage-like relationships.²⁰¹

3.115 As noted elsewhere in this chapter, in Alberta, the 2002 Act recognises a relationship between two people which meets certain criteria as a “relationship of interdependence”.²⁰² However parties must be “adult interdependent partners” to qualify for the legal recognitions discussed below, which requires that the two adults must live together for three years, live together with some permanence and have a child together or enter into an agreement to become adult interdependent partners.²⁰³

3.116 A “relationship of interdependence” therefore may not include a sexual element, and may be satisfied by a platonic domestic relationship outwith the traditional model of cohabitation, for example between two people who are related by blood, provided they enter into an adult interdependent partner agreement. People in relationships such as sibling and parent / child relationships are not therefore automatically protected but can access the legal rights and benefits by opting in to the legislative regime. Relationships in which one person is being remunerated to provide domestic support or personal care to the other are also excluded from constituting a relationship of interdependence.²⁰⁴

3.117 Before 1 January 2020 adult interdependent partners had many of the same rights, benefits and obligations as spouses. However, none of these extended to property division on the breakdown of the relationship.²⁰⁵ The ALRI 2018 Report recommended that the legislated property division rules which apply to married couples under the Matrimonial Property Act 2000 (which provide a presumption of equal sharing of non-exempt property acquired during the marriage, unless such a division would not be just and equitable)²⁰⁶ should also apply to those in adult interdependent relationships as defined in the 2002 Act.²⁰⁷ This recommendation was implemented in the Family Statutes Amendment Act 2018,²⁰⁸ which came in to force on 1 January 2020.²⁰⁹

Nordic countries

3.118 As previously noted,²¹⁰ informal relationships remain largely unregulated by statute in Norway. There is however the limited right in the 1991 Act, of a “household member” to purchase what was previously the common residence and household goods at market value upon the termination of the household. The definition of “household member” is wide enough

²⁰¹ Family Law Act, SBC 2011, c 25, s 3(1). See part 1, paras 3.70 to 3.72.

²⁰² Which term is defined in the Adult Interdependent Relationships Act, SA 2002, c A-4.5, s 1(1)(f); see part 1, para 3.74).

²⁰³ S 3.

²⁰⁴ Ss 3 and 4.

²⁰⁵ The Matrimonial Property Act, RSA 2000, c M-8 (“the 2000 Act”) extended only to spouses.

²⁰⁶ S 7(4) and (8).

²⁰⁷ ALRI Final Report (2018) Recommendations 5 and 6.

²⁰⁸ Family Statutes Amendment Act 2018, c 18.

²⁰⁹ The 2018 Act amended the Matrimonial Property Act 2000 by repealing the title and chapter number of the Act and substituting therefor the Family Property Act 2000 Ch F-4.7.

²¹⁰ See ch 2, para 2.47.

to include relationships such as those between siblings, relatives, students and others who live together.²¹¹

3.119 In Sweden, the 2003 Act definition of “cohabitee” requires that parties live “together as a couple”. It has been noted that the aim of this provision was to exclude people in other types of relationship from the scope of the Act, such as parents and grown-up children, siblings or friends who live together.²¹² Government guidance also notes that living together as a couple would normally entail a joint sexual life.²¹³

3.120 The definition of “cohabiting relationship” in the 2011 Act (Finland) requires parties to “live in a relationship” in a “shared household” for at least five years or have a child or parental responsibility for a child together.²¹⁴ The title of the Act and the language of the provision do, however, tend to suggest that the legislation is intended to provide for people in intimate relationships.²¹⁵

England and Wales

3.121 The issue of extending rights to people in non-intimate relationships was discussed in the House of Lords on 15 March 2019 at the second reading of the Cohabitation Rights Bill.²¹⁶ Lord Lexden stated:

“Some of the provisions of the Bill before the House today—the right to have an insurable interest in the life of a partner, the right to succeed to a partner’s estate under intestacy rules, and so on—would be of the greatest value to cohabiting siblings and other family members who pair up, whether as companions through life or, as is frequently the case, as carers of an elderly relative. So I ask: why should they be excluded from this Bill simply because their relationship is platonic? Why single out for discrimination the only group of people left who have no access, through any means, to any legal rights and are crying out for them? Why assume that the only kind of relationship worthy of legal protection should be one based on sex, when two family members living together in adulthood in the way I have described so obviously represent a social good?”

3.122 In response, Lord Marks of Henley-on-Thames said:

“I have a great deal of respect for the point made by ... Lord Lexden, and for his tenacity in campaigning for the rights of siblings and blood relatives. But I think he knows ... that while I agree with every point he made about the unfairness to siblings and blood relatives of many of the fiscal provisions of our law that leave such blood relatives at a significant disadvantage during life, on succession and in relation to

²¹¹ Tone Sverdrup, CEFL, National Report on Informal Relationships: Norway (April 2015) at question 2 available at: <http://ceflonline.net/wp-content/uploads/Norway-IR.pdf>. See also ch 2, para 2.47.

²¹² Maarit Jantera-Jareborg, Prof Margareta Brattstrom and LisaMarie Eriksson, CEFL, National Report on Informal Relationships: Sweden (March 2015) at question 4 available at: <http://ceflonline.net/wp-content/uploads/Sweden-IR.pdf>.

²¹³ Government Offices of Sweden, *Family Law: Information on the rules* (26 August 2013) at 3.2.1 available at: <https://www.government.se/information-material/2013/08/family-law/>.

²¹⁴ S 3.

²¹⁵ See, for example, the following press release where no reference is made to other types of relationship: Ministry of Justice Finland, Act on the Dissolution of the Household of Cohabiting Partners entered into force on 1 April (Press Release 8.4.2011) available at: https://oikeusministerio.fi/en/article/-/asset_publisher/act-on-the-dissolution-of-the-household-of-cohabiting-partners-entered-into-force-on-1-april.

²¹⁶ See ch 1, para 1.40.

landlord and tenant matters, this is not the Bill for them. ... this is a Bill for cohabitants living together in an intimate relationship.”²¹⁷

Conclusion

3.123 The economic and emotional vulnerability of caregivers has been highlighted in academic literature. It is noted that feminist scholars, in particular, have criticised the (English) law’s lack of concern for those who compromise their earning capacity to raise a family or perform other caregiving or “socially reproductive” labour.²¹⁸ We have some sympathy with the argument that caregiving and platonic relationships, which benefit society, should have legal protections, perhaps similar to those currently afforded to cohabitants. The extent of any such protections, and the groups of people to whom they might be available, as well as wider issues such as the impact upon matters of taxation, housing and social security benefits, require careful and thorough exploration. These are, however, complex matters of policy, worthy of further research and consideration, separately from the issues with which we are principally concerned.²¹⁹ We have therefore reached the conclusion that the matters referred to in this part of this chapter are beyond the scope of this project.

²¹⁷ The Cohabitation Rights Bill [HL vol. 796] 15 March 2019 available at: [https://hansard.parliament.uk/Lords/2019-03-15/debates/03B0DD3A-19D3-4BE5-ACC6-C2AE2537EE7E/CohabitationRightsBill\(HL\)?highlight=cohabitation%20rights%20Bill#contribution-77563827-DFE9-46F0-AFB4-48B6CA8D61F0](https://hansard.parliament.uk/Lords/2019-03-15/debates/03B0DD3A-19D3-4BE5-ACC6-C2AE2537EE7E/CohabitationRightsBill(HL)?highlight=cohabitation%20rights%20Bill#contribution-77563827-DFE9-46F0-AFB4-48B6CA8D61F0).

²¹⁸ Ellen Gordon-Bouvier, “Relational Vulnerability: The Legal Status of Cohabiting Carers” (2019) *Fem Leg Stud* 163.

²¹⁹ It should also be noted that people in such relationships can obtain some protections by entering into contractual arrangements between themselves and by making wills.

Chapter 4 Sections 26 and 27

Introduction

4.1 In this chapter we discuss sections 26 and 27 of the 2006 Act, which provide, respectively, certain rights to cohabitants relating to household goods and other money and property. We consider the recommendations in the 1992 Report¹ and the Scottish Government's policy objective in relation to these provisions. We then examine criticism of sections 26 and 27 before considering relevant case law and comparing the provisions with the legislative approach in other jurisdictions. We conclude by seeking views on options for reform.

The Commission's 1992 recommendations

Household goods

4.2 In the 1990 Discussion Paper,² the respective legal positions of cohabitants and married couples in relation to the question of ownership of household goods were considered and compared. It was noted that section 25(1) of the 1985 Act,³ which has since been amended by the Civil Partnership Act 2004⁴ to include reference to civil partnership, creates a presumption that each spouse (or civil partner) has an equal share in any household goods obtained in prospect of or during the marriage (or civil partnership) other than by gift or succession from a third party.

4.3 The 1990 Discussion Paper noted that there was, at that time, no such presumption in the case of cohabitants and that the ordinary law applied:

“[T]he question of who owns an item such as a kitchen table may depend on such factors as who happened to buy it, whether the purchaser was acting as an agent for the other party, and whether the presumption of ownership based on possession can be rebutted.”⁵

4.4 It was also noted that the justification for the presumption of equal shares in household goods in the case of married couples “has little to do with the concept of marriage or with the nature of the public commitment of spouses to each other, but is essentially practical.”⁶ The argument was then posited that this practical justification might be thought to apply equally strongly to cohabitants who are not married.

4.5 The 1990 Discussion Paper proposed that the presumption of equal shares in household goods⁷ in section 25 should be applied, with the necessary modifications, to

¹ Scot Law Com No 135, 1992.

² Scot Law Com No 86, 1990, paras 3.1 and 3.2.

³ Family Law (Scotland) Act 1985.

⁴ Schedule 28(2), para 28(2)(a) & (b).

⁵ Para 3.2.

⁶ Para 3.3.

⁷ For spouses (and civil partners since the introduction of the Civil Partnership Act 2004).

cohabitants, subject to a qualifying period before the presumption would apply; it asked if three years would be an appropriate qualifying period.⁸ The 1992 Report noted that most respondents to the 1990 Discussion Paper agreed that such a presumption should apply to cohabitants⁹ (as did 68% of the respondents to a public opinion survey,¹⁰ who were asked if household goods should belong to cohabitants in equal shares if the couple had been cohabiting for five years).

4.6 Despite this relatively high level of support, a more cautious approach was recommended. One of the difficulties in applying the presumption to cohabitants lay in deciding upon a suitable qualifying period of cohabitation. There was a mixture of views from respondents to the 1990 Discussion Paper on this.¹¹ It was concluded that the answer lay in the dual role of the presumption in section 25 of the 1985 Act which was designed:

“... first, to resolve disputes where proof of actual ownership is lacking, as it often is when household goods have been bought many years ago and when neither party can remember, far less prove, who bought them. This role of the presumption seems to us to be appropriate for cohabitants. A qualifying period would be unnecessary. In the case of short cohabitations there would be every likelihood that the parties would remember, and would be able to prove if necessary, who had bought a particular item. The second role of the presumption, in the case of married couples, is to make it irrelevant who actually bought a particular item. This goes beyond the mere resolution of factual disputes and, in effect, introduces an element of common property. The relevant provision is section 25(2) which provides that the presumption of equal shares is not to be rebutted “by reason only that while parties were married and living together the goods in question were purchased from a third party by either party alone or by both in unequal shares”. This role seems to us to be inappropriate for cohabitants. It risks imposing co-ownership on them contrary to their wishes.”¹²

4.7 Our predecessors agreed with a submission from the Law Society of Scotland in response to the proposal in the 1990 Discussion Paper, that the application to goods obtained “in prospect of” a relationship was unsuitable for cohabitants because of the different nature of the commencement of cohabitation and because of the evidential problems to which it would give rise. They also considered that the wording would be more natural if it referred to “goods *acquired* during the cohabitation *otherwise* than by gift or succession from a third party.”¹³

4.8 Clause 34(1) and (2) of the draft Bill¹⁴ therefore provided as follows:

(1) If any question arises as to the respective rights of ownership of cohabitants in any household goods acquired during the cohabitation otherwise than by gift or succession from a third party, it shall be presumed, unless it is proved that the goods belong to one of the cohabitants alone or to both but in unequal shares, that each has a right to an equal share in the goods in question.

⁸ Para 3.6 (proposals 2(a), (b) and (c)).

⁹ Para 16.7

¹⁰ A public opinion survey on attitudes towards giving certain legal effects to cohabitants, was arranged by the Scottish Office and carried out by System Three Scotland.

¹¹ Some agreed with the 3 year period suggested, others favoured a longer period, and some pointed out that any qualifying period would be arbitrary and difficult to apply. Scot Law Com No 135, 1992 para 16.8.

¹² Scot Law Com No 135, 1992 para 16.9.

¹³ Para 16.10.

¹⁴ Appendix A to the 1992 Report.

(2) This section applies whether the question arises during or after the cohabitation.

4.9 Clause 34(3) defined “household goods” along similar lines to the definition in section 25 of the 1985 Act:

any goods (including decorative or ornamental goods) kept or used at any time during the cohabitation in the house in which the cohabitants are or were cohabiting for their joint domestic purposes, other than (a) money or securities; (b) any motor car, caravan or other road vehicle; (c) any domestic animal.

Draft clause 34 was largely replicated in section 26 of the 2006 Act, albeit the section was differently structured.¹⁵ Section 26 also provides that the presumption of common ownership of household goods may be rebutted by proof that the parties contributed to the purchase of the goods in unequal shares.¹⁶

Savings from housekeeping allowance

4.10 The 1990 Discussion Paper also considered the respective positions of cohabitants and spouses in relation to savings from a housekeeping allowance.¹⁷ The historical background to the provision was explained,¹⁸ along with the provisional view that the equitable considerations behind the presumption of equal shares in savings from a housekeeping allowance should apply to cohabitants as well as to spouses, with no requirement for any qualifying period of cohabitation.¹⁹

4.11 Almost all consultees agreed with this provisional view and of these around half thought that no qualifying period should apply. Our predecessors concluded that no qualifying period was necessary. It was recommended that the presumption of equal shares in money and property derived from a housekeeping or similar allowance in section 26 of the 1985 Act should be applied, with the necessary modifications, to cohabitants.²⁰ Clause 35(1) and (2) of the draft Bill provided that:

(1) If any question arises as to the right of a cohabitant to money derived from any allowance made by either of the cohabitants to the other cohabitant for their joint household expenses or for similar purposes, or as to any property acquired out of such money, the money or property shall, in the absence of any agreement between them to the contrary, be treated as belonging to each cohabitant in equal shares.

(2) This section applies whether the question arises during or after the cohabitation.

¹⁵ See paras 4.13 to 4.17 for discussion on the development of s 26 during the Bill process in the Scottish Parliament.

¹⁶ In contrast with s 25(2) of the 1985 Act.

¹⁷ Part IV. S 26 of the 1985 Act provides that “If any question arises (whether during or after a marriage or civil partnership) as to the right of a party to a marriage or as the case may be of a partner in a civil partnership to money derived from any allowance made by either party or partner for their joint household expenses or for similar purposes, or to any property acquired out of such money, the money or property shall, in the absence of any agreement between them to the contrary, be treated as belonging to each party or partner in equal shares.”

¹⁸ Scot Law Com No 86, 1990 para 4.1.

¹⁹ Para 4.2.

²⁰ Scot Law Com No 135, 1992 para 16.13.

4.12 This provision was largely replicated in section 27 of the 2006 Act albeit it is structured differently. Section 27(3) provides, in addition, that “property” does not include a residence used by the cohabitants as the sole or main residence in which they live (or lived) together.

Policy objective

4.13 The policy behind sections 26 and 27 is not discussed in any detail in the Policy Memorandum, other than to note in general terms that the Bill provides for:

“...**a set of basic safeguards relating to the sharing of household goods, money and property**; financial provision on relationship breakdown where economic disadvantage can be shown; and discretionary provision (ie by application to the court) for a surviving cohabitant when a partner dies without a will.”²¹

4.14 The Policy Memorandum also notes that the Scottish Ministers considered carefully whether access to these various safeguards should be limited by setting a qualifying period, but concluded that there was more to be lost than gained in so doing and that “[i]t would be arbitrary, rigid and unresponsive to individual cases; would create problems of proof; could distort behaviour...”.²²

4.15 During stage 2 of the Bill’s progress through the Scottish Parliament Bill Adam MSP raised the following concerns:

“Section 19²³ relates to sharing household goods. The presumption that all goods acquired during the period of cohabitation are jointly owned is problematic. For example, one party in the relationship may have paid to upgrade the residence using money that he or she saved before the relationship was established. Under the current proposals, any upgraded items would be divided 50:50. On the face of it, that does not seem just, because no bargain has been made. People who get married or enter civil partnerships do so with their eyes open—they know what the consequences will be. However, that is not necessarily the case for people who choose to cohabit, as individual expectations might be different.

Section 20²⁴, on “Rights in certain money and property”, introduces financial provisions that would place cohabiting couples on an equal footing with married couples. That is detrimental to the institution of marriage. The [Scottish] Executive should not send out the signal that marriage is merely one lifestyle choice among many.”²⁵

4.16 Fergus Ewing MSP, also had concerns:

“Because, under the provisions on household goods in section 19, property rights will be preferred to the rights of children, any possible protection is further reduced. If the protection provided under section 19 is negated simply by the male cohabitant saying, “I paid for this sofa, this fridge and all these things. Here are my receipts; I own all of them,” what protection does the provision provide?... It means that there is no protection for the vulnerable or for children in circumstances in which the presumption

²¹ Policy Memorandum for the Family Law (Scotland) Bill (now the Family Law (Scotland) Act 2006), para 66, available at: [https://www.parliament.scot/S2_Bills/Family%20Law%20\(Scotland\)%20Bill/b36s2-introd-pm.pdf](https://www.parliament.scot/S2_Bills/Family%20Law%20(Scotland)%20Bill/b36s2-introd-pm.pdf).

²² Para 67.

²³ Which became s 26 of the 2006 Act.

²⁴ Which became s 27 of the 2006 Act.

²⁵ Scottish Parliament, Official Report of the Justice 1 Committee, 23 Nov 2005, column 2342, available at: <http://www.parliament.scot/parliamentarybusiness/report.aspx?r=2144&mode=html>.

can be rebutted by proof of purchase, property rights and expenditure of money by the stronger, financially better-off, higher income earner of the couple, who will be able to say, "You'll have had your cohabitant's rights now, because they don't apply. I bought those things, so you don't have any claim." That could put somebody in a worse position."²⁶

4.17 In response, the then Deputy Minister for Justice, Hugh Henry, MSP reiterated that the legislation was intended to provide "a set of basic safeguards relating to the sharing of household goods, money and property":²⁷

"We are not talking about the introduction of marriage-equivalent rights; we seek to protect vulnerable adults and children when relationships break down. In producing that package of safeguards, we have borne it in mind that it is just as vital to protect the rights of adults to live unfettered by financial obligations to partnerships as it is to protect those who are vulnerable."²⁸

The Bill provisions as introduced were left unchanged.

Criticism of sections 26 and 27 of the 2006 Act

4.18 Sections 26 and 27 have not been the subject of significant criticism or academic comment. Save as discussed below,²⁹ the sections have not been focused upon in litigation. While there were many calls in the responses to our Tenth Programme consultation for the provisions in the 2006 Act relating to cohabitation to be reviewed,³⁰ none specifically mentioned problems with sections 26 and 27.

4.19 During their 2010 research, Wasoff, Miles and Mordaunt³¹ noted no material findings or comments from the legal practitioners and academics they interviewed in relation to section 26 of the Act. However section 27 was subject to some criticism:

"Section 26 of the 1985 Act and section 27 of the 2006 Act contain a somewhat anachronistic provision dealing with the ownership of assets acquired from the savings made from a housekeeping allowance provided by one spouse or cohabitant to the other. Such assets are presumed to be owned in equal shares, in the absence of other agreement. In the case of spouses, this can (perhaps somewhat implausibly) include the family home. But in the case of cohabitants, this asset is expressly excluded from the operation of the rule. No reported case has yet considered this provision and our interviewees regarded it as useless."³²

4.20 In its post legislative scrutiny of the 2006 Act in 2016, the Scottish Parliament's Justice Committee heard evidence to the effect that sections 26 and 27 were not viewed as problematic.³³ Legal practitioners have told us that sections 26 and 27 have not caused any

²⁶ Above at column 2363.

²⁷ Above at column 2367.

²⁸ Above at column 2368.

²⁹ In paras 4.21 to 4.23.

³⁰ The responses to the Consultation on the Tenth Programme of Law Reform are available at: <https://www.scotlawcom.gov.uk/law-reform/tenth-programme-of-law-reform-consultation/respondents-to-the-scottish-law-commissions-consultation-on-topics-for-inclusion-in-its-tenth-programme-of-law-reform/>.

³¹ Wasoff, Miles and Mordaunt Report. Available at: <http://www.cfr.ac.uk/assets/Cohabitation-final-report.pdf>.

³² P 23.

³³ Justice Committee – Post Legislative Scrutiny of Family Law (Scotland) Act 2006, 6th Report, 2016 (session 4) para 17, available at: http://www.parliament.scot/S4_JusticeCommittee/Reports/JS042016R06.pdf.

real difficulty in practice. One commented that cohabitants often presumed that each party owns the property they have paid for and were surprised that the presumption in section 26 exists. Views were also expressed that the language of section 27 was considered to be old-fashioned. Respondents to the questionnaire circulated to solicitors³⁴ did not raise any concerns regarding the provisions.³⁵

Case law

4.21 In *Harley v Robertson*,³⁶ in which claims were advanced by the pursuer based upon both section 28 and the common law remedy of unjustified enrichment, sections 26 and 27 were referred to by Sheriff Caldwell, but only to observe that the legislation supplants the common law in relation to the matters raised in those sections.³⁷

4.22 In *Jackson v Burns*³⁸ the pursuer sought decree for payment of a capital sum and an order for delivery of half of certain household goods said to have been purchased jointly by the parties, which failing an order under section 28(2)(a) for payment of an additional capital sum. The sheriff considered the terms of section 26 but was not satisfied on the evidence that certain specified and sufficiently identified items had been retained by the defender and were the sole property of the pursuer.

4.23 *Whigham v Owen*³⁹ concerned a claim for payment of a capital sum under section 28(2)(a). Lord Drummond Young commented, with reference to section 26, that generally speaking the household goods should not come into the determination of whether any sum is due in terms of section 28, because they are already presumed to be owned equally.

4.24 As far as we can ascertain, section 27 of the 2006 Act has not been the subject of judicial scrutiny to date.⁴⁰

Comparative law

4.25 We have considered legislation relating to cohabitants in Australia, Ireland, New Zealand, Canada and Nordic countries, and whether provision is made in any of those jurisdictions to protect cohabitants' rights in relation to household goods, money and property.

Australia

4.26 In Australia, while there is no equivalent to sections 26 and 27 in relation to ownership of goods, money or property, the 1975 Act provides the family courts with wide powers to adjust property interests between former parties to de facto relationships (the court may make

³⁴ See ch 1 para 1.44.

³⁵ We note that the subject matter of 10 of the cases respondents had dealt with related to these provisions.

³⁶ [2011] 12 WLUK 328; 2012 GWD 4-68. Discussed in ch 8, para 8.37.

³⁷ For discussion on the availability to former cohabitants of the common law remedy of unjustified enrichment see ch 8.

³⁸ [2018] 2 WLUK 723; 2019 GWD 7-90.

³⁹ 2013 SLT 483.

⁴⁰ Section 27(3) was, however, mentioned in the English case of *Stack v Dowden* [2007] 2 AC 432, which related to distribution between former cohabitants of their family home; Lord Hope of Craighead observed that, as in English law, Scots property law would require to be looked to for a solution in similar circumstances, as s 27(3) specifically excludes the parties' residence from its ambit.

such order as it considers appropriate)⁴¹ and property is defined broadly as property to which those parties are or that party is, as the case may be, entitled, whether in possession or reversion.⁴² This includes all property of the parties at the date of trial, whether acquired before their relationship began, during the relationship or after the relationship ended.⁴³ There is, however, no presumption of co-ownership.

Ireland

4.27 In Ireland, the 2010 Act sets out a financial redress scheme for qualifying cohabitants. There are no provisions directly equivalent to sections 26 and 27 in relation to ownership of household goods, money or property. However, the 2010 Act does provide the court with wide powers to adjust property interests between former cohabitants through property adjustment, compensatory maintenance and pension adjustment orders.⁴⁴

New Zealand

4.28 The 1976 Act does not contain provisions akin to sections 26 and 27, but does provide that a couple (who have been in a relationship for at least 3 years) are entitled to share equally in “relationship property” on the breakdown of the relationship, subject to some exceptions.⁴⁵ The 1976 Act sets out the effect of the Act while property is undivided (for example during the relationship) at section 19:

Except as otherwise expressly provided in this Act, nothing in the Act shall –

(a) affect the title of any third person to any property, or affect the power of either spouse or partner to acquire, deal with, or dispose of any property or to enter into any contract or other legal transaction whatsoever as if this Act had not been passed; ...

4.29 The 1976 Act has been described as amounting to a deferred community property regime as, “for the most part, ordinary rules of legal and beneficial title apply during the course of the relationship” but “at the end of the relationship, the concept of ‘community’ comes into play”.⁴⁶ In other words, there is a presumption of equal sharing of property on separation, but not of equal ownership during the relationship.

Canada

4.30 In British Columbia, under the 2011 Act (BC),⁴⁷ there are no provisions directly equivalent to sections 26 and 27. There is provision entitling a spouse to one half of the family property on separation,⁴⁸ unless equal division would be significantly unfair in the

⁴¹ Family Law Act 1975 (Cth), s 90SM(1)(a).

⁴² S 4(1).

⁴³ Belinda Fehlberg and Lisa Sarmas, *Australian Family Property Law: Current Issues and Challenges* in Shazia Choudry and Jonathan Herring (Eds), *The Cambridge Companion to Comparative Family Law* (Cambridge University Press, 2019) pp 106-127 at p 109.

⁴⁴ Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010, ss 174, 175 and 187.

⁴⁵ Property (Relationships) Act 1976, s 11. Discussed in ch 5 para 5.83.

⁴⁶ Bill Atkin, “What Kind of Property is Relationship Property” (2016) 47 *Victoria U Wellington L Rev* 345 at p 351.

⁴⁷ Family Law Act, SBC 2011, c 25.

⁴⁸ All property owned by either or both spouses at the date of separation is considered to be family property: see ss 84 and 85.

circumstances.⁴⁹ In Alberta, under the new regime, in what is now the Family Property Act 2000, there are no presumptions akin to sections 26 and 27.⁵⁰

Nordic countries

4.31 In Norway, the 1991 Act contains no presumptions similar to those in sections 26 and 27.⁵¹ In Sweden, qualifying cohabitees under the 2003 Act are entitled on separation to an equal division of “cohabitation property” (that is property acquired during the relationship for joint use), unless such a division would be unreasonable.⁵² During the relationship the general rule is that each cohabitee owns and manages his or her own property. However, there are some restrictions which limit a cohabitee’s options for disposing of property. For example, one cohabitee cannot give away or sell the joint home or household goods without the consent of the other.⁵³ The 2011 Act (Finland) does not create any personal or economic rights and / or duties that would have legal effect as long as the partnership persists,⁵⁴ but there is a presumption of co-ownership of property on separation if it cannot be proven which partner owns a particular item of property.⁵⁵

Options for reform

4.32 Sections 26 and 27 have not been the subject of close judicial scrutiny and any reference to the provisions in case law has been incidental. Further, such criticism of the provisions as there has been has focused on the language used in the provisions, which has been described as outdated. Indications are that these provisions do not cause any real difficulty in practice.

4.33 Our preliminary view is that there is no particular need for amendment of section 26. However, we think section 27 should now be updated, as the concept of one person in a couple paying the other an allowance for joint housekeeping expenses appears somewhat anachronistic for 21st Century relationships. Language that better reflects modern couples’ economic arrangements, acknowledging their respective contributions towards household expenses, would seem to us to be more appropriate.

4.34 We would be grateful therefore for views on the following:

- 9. Do sections 26 and / or 27 cause any difficulty in practice?**
- 10. Should the language in sections 26 and / or 27 be modernised?**
- 11. Should sections 26 and / or 27 be modified in some other way?**

⁴⁹ Family Law Act, SBC 2011, c 25, ss 81 and 95(1).

⁵⁰ Family Property Act 2000, discussed in ch 2, paras 2.44 to 2.45.

⁵¹ Household Community Act 1991.

⁵² Cohabitees Act (2003:376), ss 14 and 15.

⁵³ S 23.

⁵⁴ Tuulikki Mikkola, *Family and Succession Law in Finland*, (Wolters Kluwer, 2018) ch 3 at p 108.

⁵⁵ Act on the Dissolution of the Household of Cohabiting Partners 26/2011, s 6.

Chapter 5 Section 28

Part 1 - Purpose and test

Introduction

5.1 The background to the introduction of a scheme for financial provision for separating cohabitants, including consideration of this Commission's recommendations in the 1992 Report¹ and the Scottish Government's policy objectives, has been set out in Chapters 1 and 2. In Part 1 of this chapter, we will look more closely at section 28 of the 2006 Act, including the Scottish Government's policy objectives. We will consider the test for making an order under section 28(2)(a) and (b). We will then look at criticism of the policy and test. We will discuss relevant case law, before considering approaches in other jurisdictions. Finally, we will seek views on possible options for reform. In Part 2, the adequacy of the remedies available to former cohabitants under section 28(2) will be considered. Later, in Chapter 6, we will discuss the time limit within which an application for financial provision under section 28 must be made.²

Section 28

5.2 Section 28(2) to (6) is set out in full in Chapter 2³ and in Appendix A. The court may make an order requiring the defender to pay a capital sum, such amount as may be specified in respect of the economic burden of caring for a child of whom the cohabitants are parents, or such interim order as it thinks fit. 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.⁴

5.3 In considering whether to make an order requiring the defender to pay a capital sum in terms of section 28(2)(a) the court is to have regard, in addition, to the matters in

¹ Scot Law Com No 135, 1992.

² In terms of s 28(8).

³ Paras 2.4 to 2.6.

⁴ S 28(3).

subsections (5) and (6), which we shall refer to as the “offsetting provisions”.⁵ The offsetting provisions do not apply where an order is sought under section 28(2)(b), that is, an amount in respect of the economic burden of caring, after the end of the cohabitation, for a child of whom the cohabitants are parents.

5.4 Section 28(7) provides that, in making an order under subsection (2)(a) or (b), the court may specify that:

- the amount shall be payable –
 - (a) on such date as may be specified;
 - (b) in instalments.

5.5 A “relevant child” for the purposes of subsections (3)(b)(ii), (5)(b) and (6)(b) is defined in section 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. A child, for the purpose of subsection (2)(b), is a child of whom the cohabitants are parents.

Policy objective, including Commission’s 1992 recommendations

1992 Report

5.6 The 1992 Report notes, with respect to termination of cohabitation otherwise than by death, that the obvious approach is to consider the law on financial provision on divorce and ask how far the principles there might be applied to cohabitation.⁶ However our predecessors concluded that they did not favour a comprehensive system of financial provision on termination of a cohabitation comparable to the system on divorce:

“That would be to impose a regime of property sharing, and in some cases continuing financial support, on couples who may well have opted for cohabitation in order to avoid such consequences. Almost all consultees agreed with our provisional view that there was no adequate justification for applying to cohabitants the principle of equal sharing of property in section 9(1)(a) of the Family Law (Scotland) Act 1985. There was also general support for our provisional view that one cohabitant should not be ordered, on the termination of the cohabitation, to make financial provision for the other on principles analogous to those in section 9(1)(d) or 9(1)(e) of the Family Law (Scotland) Act 1985.”⁷

5.7 Our predecessors noted that the principle in section 9(1)(b) of the 1985 Act (that fair account should 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 the family) could be applied appropriately to cohabitants:

“[I]t would enable some provision to be made for cases where, for example, one party has worked unpaid for years helping to build up the other’s business or one party has

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 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.” (s 28(5) and (6)).

⁶ Family Law (Scotland) Act 1985, s 9. Discussed in ch 2.

⁷ Scot Law Com No 135, 1992 para 16.15.

given up a good pensionable career in order to look after the children of the relationship..... The argument for applying it is that it would be unfair to let economic gains and losses arising out of contributions or sacrifices made in the course of a relationship of cohabitation simply lie where they fall. To allow a remedy for the type of situation covered by section 9(1)(b) would ... be to give them the benefit of a principle designed to correct imbalances arising out of the circumstances of a non-commercial relationship where the parties are quite likely to make contributions and sacrifices without counting the cost or bargaining for a return.”⁸

5.8 The recommendation in the 1992 Report was that where a cohabitation has terminated otherwise than by death, a former cohabitant should be able to apply to a court, within one year after the end of the cohabitation, for financial provision on the basis of the principle in section 9(1)(b) of the 1985 Act.⁹ However, there is little discussion in the 1992 Report about the test to be applied by the court in reaching its decision on financial provision on cessation of a cohabiting relationship.

5.9 Clause 36 of the draft Bill, annexed to the 1992 Report, 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.

...

(7) In this section and section 37 of this Act-

"economic advantage" includes gains in capital, in income and in earning capacity, and "economic disadvantage" shall be construed accordingly;
"contributions" includes indirect and non-financial contributions and, in particular, any such contribution made by looking after the house in which the couple were cohabiting or caring for any children of the couple.

(8) Any reference in this section and section 37¹⁰ of this Act to the children of a former cohabiting couple or of the applicant and the deceased shall include a reference to children treated by both of them as children of their family.

5.10 The legislation as enacted¹¹ did not follow precisely this Commission’s recommended wording. No “fairness and reasonableness” test was included in section 28 and the offsetting

⁸ Scot Law Com No 135, 1992, para 16.17 to 16.18.

⁹ Para 16.23.

¹⁰ Relating to financial provision from the estate of a deceased cohabitant; later provided for in s 29 of the 2006 Act.

¹¹ See paras 5.2 to 5.5.

provisions now seen in subsections (5) and (6) were not included in the draft Bill annexed to the 1992 Report.¹²

5.11 We should note that our predecessors did not make any recommendations in the 1992 Report in relation to the introduction of a principle designed to ensure that the economic burden of child care after the end of the cohabitation should be shared fairly between the former cohabitants.¹³ While they favoured the introduction of such a principle, this question was superseded by the introduction of the Child Support Act 1991, making it unnecessary to make any such recommendation.¹⁴ We also note that no distinction was made in the draft Commission Bill between a child of whom the cohabitants are parents and a child accepted as a child of the family.

Family Law (Scotland) Bill and Scottish Government policy

5.12 Section 21 of the Family Law (Scotland) Bill, as introduced in 2005, contained the following provision in relation to financial provision where cohabitation ends otherwise than by death:

... (2) On the application of a cohabitant (the “applicant”), the 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 the cohabitants;¹⁵
- (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 child of the cohabitants.

5.13 The Policy Memorandum notes that the Scottish Government’s consultation prior to introduction of the Bill¹⁶ showed robust support for the general principle of creating a coherent set of basic safeguards for cohabitants rather than any regulatory system akin to marriage.¹⁷ What is now section 28 is not specifically discussed.¹⁸

¹² See para 5.17.

¹³ Similar to the principle in s 9(1)(c) of the 1985 Act. Consultees’ views were sought on the introduction of such a principle in the 1990 Discussion Paper, Scot Law Com No 86, 1990, para 5.18, question 7(a).

¹⁴ Scot Law Com No 135, 1992 para 16.16.

¹⁵ The Act, at s 28(2)(b), refers to a child “of whom the cohabitants are the parents”; for discussion see para 5.18 to 5.23.

¹⁶ *Family Matters: Improving Family Law in Scotland*, 5 April 2004 available at:

<https://www.webarchive.org.uk/wayback/archive/20180516111342/http://www.gov.scot/Publications/2004/04/19220/35694>.

¹⁷ Para 77. Available at: [https://www.parliament.scot/S2_Bills/Family%20Law%20\(Scotland\)%20Bill/b36s2-introd-pm.pdf](https://www.parliament.scot/S2_Bills/Family%20Law%20(Scotland)%20Bill/b36s2-introd-pm.pdf).

¹⁸ The policy objectives set out in the Policy Memorandum are discussed in ch 1, para 1.19.

5.14 Following stage 1 of the Bill process, the Justice Committee Report¹⁹ outlined some of the Committee's policy concerns in relation to what is now section 28 of the 2006 Act:

"The Explanatory Notes suggest that section 21 is intended to make provision for situations where, on the break up of a committed cohabiting relationship, one party finds themselves in a position of financial vulnerability. However, the Committee understands that despite this suggestion, there is no requirement of vulnerability contained in the Bill. A claim could also be made by a very wealthy person. The justification for the claim is equity and reasonable expectations rather than financial vulnerability. If it is the intention of the Executive to limit the claims only to those who are financially vulnerable then the Bill as it stands does not do so. ..."²⁰

"The Committee recommends that the Executive consider amending section 21 so that the orders available under section 8 of the 1985 Act are all available, but that the justifications for making the order are explicitly limited to those in section 9[1](b) and (c) (i.e. imbalances and child-care costs). This would clarify matters and also more explicitly show that ex-cohabitants can access far fewer justifications for claiming financial provision than ex-spouses."²¹

5.15 The Scottish Government responded as follows:

"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. ...The Committee are correct in pointing out that financial provision under our proposals would not be limited to the financially insecure: wealthy cohabitants would also have recourse to them. We accept that not every single applicant for provision will be financially vulnerable. But many for whom the law provides redress will in fact be financially vulnerable and for them the law as we propose it will also be protective. ...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."²²

5.16 The Scottish Government accepted that a possible consequence of the provision was that not just those who are financially vulnerable would be protected.²³ An award of a capital sum was to be compensatory in nature and the policy was not to replicate the remedies available to married spouses or civil partners on divorce or dissolution, but to provide a more limited set of safeguards.

5.17 The test for financial provision was not discussed in the Policy Memorandum. Discussions in the Scottish Parliament during the course of the Bill process focused on

¹⁹ Justice 1 Committee Stage 1 Report, 5 July 2005 available at: <https://archive.parliament.scot/business/committees/justice1/reports-05/j1r05-08-vol01-01.htm>.

²⁰ Para 193.

²¹ Para 197.

²² Scottish Government Response to the Justice Committee's stage 1 Report into the Bill, August 2005, p 17. Available at: https://www.parliament.scot/S2_Justice1Committee/Reports/SEresponseFamilyLawStage1.pdf.

²³ In *M v S* 2018 Fam LR 26, at para 144 Lord Erich, observed that "... the purpose of section 28 is to redress any economic disadvantage. Its purpose is not the relief of one of the parties from poverty. Accordingly s 28 can apply in situations like the present where both the pursuer and the defender have successful careers and substantial assets."

including balancing provisions, resulting in the inclusion, by amendment at Stage 2 of the Bill process, of the offsetting provisions now seen in subsections (5) and (6) of section 28.²⁴

Definition of child

5.18 During stage 1 of the Bill process the Scottish Government was asked to explain the rationale for section 21(2)(b) (now 28(2)(b)) excluding a child, who is not biologically related to both cohabitants or “accepted” as a child of the family, from consideration when deciding whether an order should be made requiring the defender to pay such amount as specified in respect of the economic burden of caring for a child after the end of the cohabitation, in contrast with the obligation of aliment in section 1 of the 1985 Act. The Justice Committee pointed out the difference between what was then section 21 of the Bill and section 9(1)(c) of the 1985 Act,²⁵ noting that spouses on divorce²⁶ have to share the costs of bringing up a child of *either both or of one of them* so long as the other has accepted the child as a child of their family. The Committee asked the Government to explain its rationale for excluding a child accepted as a child of the family in more detail.²⁷

5.19 The Scottish Government’s response was as follows:

“Section 21(2)(b) expresses the principle that cohabitants who have a child together should remain jointly responsible for meeting expenses incurred by the adult who, after separation, cares for that child. The alimentary needs of children are fully and adequately addressed in terms of the existing provisions within the Family Law (Scotland) Act 1985 and the Child Support Act 1991. Section 21(2)(b) of the Bill does not set out to introduce additional alimentary provisions for children but is intended to reflect the principle defined in section 9(1)(c) of the 1985 Act, i.e. *“that any economic burden of caring, after divorce, for a child of the marriage under 16 years should be shared fairly between the parties.”* For this reason the wording of section 21(2)(b) is precise: what the court is invited to take into account is the *“economic burden of caring...for a child of the cohabitants.”*²⁸

5.20 Having set out various scenarios in which a former cohabitant may, after separation, care for a child who is not a child of both cohabitants, and having explained that provisions have been made in other legislation for claims for financial support of such children,²⁹ the response continued:

“Our view is that the harm that would arise in relation to the inclusion of ‘accepted’ children – harm in the sense of the imposition of unfair burdens – is greater than the

²⁴ 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:

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

²⁵ S 9(1)(c) provides that any economic burden of caring, (i) after divorce, for a child of the marriage under the age of 16 years (ii) after dissolution of the civil partnership, for a child under that age who has been accepted by both partners as a child of the family or in respect of whom they are, by virtue of sections 33 and 42 of the Human Fertilisation and Embryology Act 2008, the parents, should be shared fairly between the persons.

²⁶ There was no reference to civil partners in the 1985 Act at the time this was considered by the Justice Committee.

²⁷ Justice 1 Committee, Stage 1 Report, 5 July 2005, paras 198-200. available at:

<https://archive.parliament.scot/business/committees/justice1/reports-05/j1r05-08-vol01-01.htm>.

²⁸ Scottish Government’s Response to the Justice 1 Committee’s Stage 1 Report on the Bill, August 2005, p 18. available at: http://www.parliament.scot/S2_Justice1Committee/Reports/SEresponseFamilyLawStage1.pdf.

²⁹ Referring to the obligation of aliment by a person to a child accepted as part of the family and s.4(4) of the Family Law (Scotland) Act 1985, whereby a claim for aliment (including the expenses incurred by the person caring for the child) may be brought by or on behalf of a child under 16.

harm that would follow their exclusion – especially since the expenses of those caring for (non-biological) children who were formerly accepted as children of a cohabitation can be addressed under current law.”³⁰

5.21 The position of children of couples in same sex relationships was also considered in the response:

“The position of the children of same sex couples is complicated by the fact that, under the current law of adoption and of human fertilisation, we have no means of recognising *as children of the relationship* those children whom same sex couples may choose to have jointly (for example, by means of AID). Such children are at present children ‘accepted’ as children of the family rather than children of the relationship itself. But as such, they do of course enjoy exactly the same rights as children accepted into any family and this would include ... the right to claim aliment including the reasonable expenses of the caregiver. So although same sex cohabitants, like their heterosexual counterparts, would not be able to raise direct claims against one another in relation to children of whom they were not both the biological parents, such children would not be disadvantaged and through the child’s claim for aliment the caregiver could secure whatever additional support was deemed reasonable for the purposes of the child’s care.”³¹

5.22 Speaking in support of proposed amendments during Stage 2 of the Bill process, which clarified the distinction between the meaning of “child” now seen in section 28(2)(b) and elsewhere in the section, the then Deputy Justice Minister, Hugh Henry, further explained the proposed approach:

“[S]ection 21 provides for two related, but distinct, awards. First, it provides for awards to cover the net economic disadvantage that has resulted from the relationship. That involves the court taking a look at the whole of the duration of the relationship. Secondly, it provides for future child care costs... It is appropriate that different tests are to be applied to those different situations. In both instances, the courts are invited to consider whether children were a part of the cohabiting couple family. In their retrospective look, the courts are rightly invited to consider whether the applicant has suffered net economic disadvantage, either on their own account, as a result of the relationship, or in the interests of children who are, or were, accepted as children of the family, as well as children of whom the cohabitants are parents. As regards future child care costs, the Executive is applying the principle that cohabitants who have a child together should remain jointly responsible for meeting expenses incurred by the adult who, after separation, cares for the child. We are not setting out to introduce additional alimentary provisions for children, but to reflect the principle that is defined under section 9(1)(c) of the 1985 Act... Our intention has always been to limit that to children of whom the cohabitants are the parents. ...We recognise that the provisions exclude certain circumstances, for example where children are conceived by artificial insemination by couples who do not use a licensed clinic, or indeed by lesbian mothers.”³²

5.23 In summary, the Scottish Government’s policy objective in relation to what became section 28 of the 2006 Act was to introduce a compensatory scheme that provided certain, fair and clear safeguards for separating cohabitants. Economically vulnerable cohabitants in

³⁰ Scottish Government’s Response to the Justice 1 Committee’s Stage 1 Report on the Bill, August 2005, p 19.

³¹ Above at p 19.

³² Justice 1 Committee Meeting, Stage 2, 23 November 2005, at columns 2374 and 2375. Available at: <http://www.parliament.scot/parliamentarybusiness/report.aspx?r=2144&mode=html>.

particular would benefit from the provisions. The system would not imitate marriage or civil partnership and would include provision for the future costs of caring for a child of whom both cohabitants are parents.

Criticism - purpose and test

5.24 As the following discussion will show, criticism of section 28 is widespread and has been expressed since shortly after the 2006 Act came into force. Much of that criticism contrasts the section 28 provisions unfavourably with the 1985 Act scheme for financial provision on divorce and dissolution of civil partnership.

5.25 The policy objective(s) discussed above are widely regarded as not having been met and as lacking clarity. The test in section 28(3) to (6) has been criticised for being unclear and complicated. The Wasoff, Miles and Mordaunt Report³³ described the test as “cumbersome” and section 28 was viewed as poorly drafted. By comparison, application of the principle in section 9(1)(b) read with section 11(2)(a) of the 1985 Act was praised for its simplicity.³⁴ It was noted, however, that the 1985 Act has as its starting point the fair³⁵ division of the net value of the matrimonial or partnership property,³⁶ which may already have gone some way towards correcting imbalances and which is absent from the cohabitation provisions in the 2006 Act. 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 childcare”. The rationale for differentiating within the section between a child of whom the cohabitants are parents and a child accepted as a child of the family was also questioned.

5.26 In 2016, 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 Scottish Government. The inconsistency of the definition of child in section 28(2)(b) with the wider definition in the 1985 Act was highlighted as unfair. The clarity of the test and limited remedies available to the court were also identified as problematic.³⁷

5.27 In responses to the Tenth Programme consultation,³⁸ there were calls for a redraft (at least) of section 28 which was described as a “poorly drafted provision”, lacking any clearly defined purpose or objective. The legislation was described by one respondent as “confusing, unhelpful, unnecessarily complex” and having led to litigation that could have been avoided. While family lawyers are generally happy with the law relating to financial provision on divorce

³³ Available at: <http://www.crf.ac.uk/assets/Cohabitation-final-report.pdf>.

³⁴ 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. S 11(2)(a) of the 1985 Act details the factors that must be taken into account by the court in applying the principles in s 9(1)(b).

³⁵ In terms of s 10(1) of the 1985 Act, “the net value of the ... property shall be taken to be shared fairly ... when it is shared equally or in such other proportions as are justified by special circumstances.”

³⁶ Defined in s 10(4) of the 1985 Act.

³⁷ Scottish Parliament Justice Committee, Post-Legislative Scrutiny of the Family Law (Scotland) Act 2006, SP Paper 963 (6th Report, 2016 (Session 4)), 17 March 2016, pp 6-11. Available at: https://www.parliament.scot/S4_JusticeCommittee/Reports/JS042016R06.pdf.

³⁸ Available at:

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

and dissolution, there were concerns that this legislation is neither sufficiently clear nor comprehensive. As one respondent put it:

“The 1985 Act offers a model of good practice, which could be used to inform the construction of a new scheme for financial provision on the breakdown of cohabitation...The problems with section 28 are particularly striking when it is contrasted with the clarity and effectiveness of sections 8 and 9 of the Family Law (Scotland) Act 1985.”

5.28 Section 28(2)(b) was described by a respondent as including “a curious backward-looking statutory formulation which differs markedly from the similar provision that applies to parting spouses and civil partners.”³⁹ Respondents also questioned the justification and rationale for the difference in approach between section 28(2)(b) and sections 9(1)(c) and 27⁴⁰ of the 1985 Act in relation to the definition of a child. It was commented that for cohabitants, a much narrower group of children is covered, the purpose of making an award is not stated and there is no checklist of factors to be considered in making an award.⁴¹

5.29 Many stakeholders also commented that the definition of “child” for the purposes of sections 28(2)(b) and (10) is inconsistent and should be reviewed. Others questioned whether the definition of child in section 28(2)(b) is too narrow. The reference in section 28(2)(b) to the economic burden of caring for a child of whom the cohabitants are parents is a matter of particular concern for same-sex couples. It has been noted that when female same sex couples decide to have a child via sperm donation, many organise the donor insemination themselves rather than using a licensed clinic (which can be very expensive). Under the Human Fertilisation and Embryology Act 2008 (“the 2008 Act”) the legal mother of a child is the gestational mother, even if she has undergone treatment placing an embryo or sperm and eggs in her.⁴² Therefore, if the women were married or civil partners at the time of the insemination, and the mother’s spouse or civil partner consented to the insemination taking place, she is the child’s other parent,⁴³ and the sperm donor is not legally a parent.⁴⁴ However, if the women were cohabiting at the time of the insemination, and the insemination was conducted outwith a licensed clinic, the sperm donor is legally the other parent, unless and until the mother’s partner adopts the child.⁴⁵ Anecdotal evidence is that many female couples do not go through the adoption step. Therefore there will be a number of cohabiting female couples who together made the choice to have a child, and raise the child together, but are not both legally recognised as the child’s parent. The child would not therefore meet the definition in section 28(2)(b), but would if the definition was widened to match that in section 28(10).⁴⁶

5.30 Establishing legal parental status for male couples, whether their relationship is formalised or not, is more complicated, since a biological man cannot gestate and give birth

³⁹ 1985 Act, s 9(1)(c).

⁴⁰ The definition of a child in s 27 of the 1985 Act includes a child accepted by the parties as a child of the family.

⁴¹ This has also been the subject of academic criticism, Joe Thomson, *Family Law in Scotland* (7th edn, 2014), p 204.

⁴² S 33(1).

⁴³ S 42.

⁴⁴ S 41(1).

⁴⁵ Adoption and Children (Scotland) Act 2007, s 30(1)-(5).

⁴⁶ This issue was raised and discussed at a meeting of the Justice 1 Committee on 23 November 2005, during the Bill process, discussed above in para 5.22.

to a child.⁴⁷ In this situation, if the role of gestational mother is undertaken through a surrogacy arrangement, the surrogate is the child's legal mother at birth.⁴⁸ If the surrogate is married to a man, her husband will be presumed to be the father of the child unless it is shown that he did not consent to the treatment.⁴⁹ If the surrogate is in a civil partnership or married to another woman at the time of the treatment, then her civil partner/spouse will be treated as a parent of the child unless it is shown that she did not consent to the treatment.⁵⁰ For the male same-sex couple to become parents a parental order is required, transferring legal parentage from the surrogate and her spouse/civil partner (if applicable) to the male couple.⁵¹ If the surrogate is not in a formal relationship, she could provide notice consenting to one of the men being treated as the child's father, provided the agreed fatherhood conditions are met.⁵² However, this would mean that the male partner of the legal father would have no legal relationship with the child. In this situation, the male partner of the legal father would not become a legal parent of the child unless he adopts the child.⁵³

5.31 One stakeholder, Engender, wondered whether the provision should take account of the economic and social burden of being a primary carer, observing that that economic and social role has a disproportionate impact of on women.⁵⁴ A similar point has been highlighted in recent academic writing:

“Academics have written extensively about the difficulties facing individuals, often women, on the breakdown of informal relationships where there is no recourse to the system of property redistribution upon relationship breakdown used by spouses and civil partners.”⁵⁵

5.32 Many stakeholders have told us that the section 28(3) test is difficult to understand and explain and is therefore unsatisfactory; an approach such as that under the 1985 Act would be preferred. One practitioner commented that section 28 was the product of legislative drafting designed to avoid similarity with the rules relating to marriage and described the section as “unworkable”. We were also told that the purpose of section 28 was regarded as unclear and should be reconsidered; practitioners had difficulty offering clear advice,

⁴⁷ The status of legal mother persists even where an individual assigned female at birth has acquired a male gender subsequent to the child's birth under the Gender Recognition Act 2004, see s12 of that Act. See also *R (on the application of TT) v Registrar General for England and Wales* [2019] EWHC 2384 (Fam).

⁴⁸ 2008 Act, s 33(1).

⁴⁹ Law Reform (Parent and Child) (Scotland) Act 1986, s 5(1)(a); Human Fertilisation and Embryology Act 2008, s 35(1)(a)&(b). The presumption is rebuttable, at least in terms of the 1986 Act. The biological father could be registered as such if he and the mother register the birth of the child together, or an agreement under s 4 of the Children (Scotland) Act 1995 is concluded or if an order of court is made declaring him father of the child. No parental status is, however, conferred upon his male partner.

⁵⁰ 2008 Act, s 42(1).

⁵¹ 2008 Act, s 54(6). See also *R (on the application of H) v Secretary of State for Health and Social Care* [2019] EWHC 2095 (Admin). The facts of this case highlight the difficulties faced by same-sex male couples in establishing legal parental status under the 2008 Act.

⁵² 2008 Act, ss 36 & 37.

⁵³ Adoption and Children (Scotland) Act 2007, s 30(1)-(5).

⁵⁴ Note that the definition of “contributions” in s 28(9) of the 2006 Act includes contributions “made by looking after any relevant child”.

⁵⁵ 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 at p 227. The article references G Douglas, J Pearce and H Woodward, ‘Cohabitants, property and the law: a study of injustice’ (2009) 27 MLR 24; A Barlow and J Smithson, ‘Legal assumptions, cohabitants’ talk and the rocky road to reform’ (2010) CFLQ 328. See also Fae Garland, “Gender imbalances, economic vulnerability and cohabitation: evaluating the gendered impact of section 28 of the Family Law (Scotland) Act 2006”, (2015) Edin LR 1.

particularly on quantification of claims, which militated against settlement; a principled structure (similar to that in the 1985 Act) would be welcomed. Our survey of Scottish solicitors⁵⁶ revealed significant dissatisfaction with the operation of the legislation in practice. Many of those who responded to the questionnaire described the difficulty they faced in advising clients and highlighted the absence of guiding principles. All stakeholders that we spoke to agreed that the test should be reconsidered.

5.33 We asked our Advisory Group whether they considered the policy objectives of the legislation⁵⁷ had been met by the provisions in section 28 of the 2006 Act. No member thought that they had. Discussing how the legislation might be improved, one member reiterated the need to consider what the policy is and what interest deserves to be protected. He wondered whether it is the commitment to the relationship that should be recognised and said that the policy needs to be clearly formulated. Various options were suggested, including equating cessation of cohabitation with divorce or dissolution of civil partnership, a “fairness” test, consistent with the UKSC decision in *Gow v Grant*,⁵⁸ a compensation scheme and an arithmetical structure or formula.

Case law – purpose and test

5.34 Since the 2006 Act came into force, practitioners and decision makers have criticised section 28 for the lack of clarity of its policy or purpose and for the absence of adequate guidance as to the factors to be taken into account in deciding how an application for financial provision by a former cohabitant should be determined. The complicated and unclear test and the limited range of remedies have also been highlighted. Both the offsetting provisions and the requirement that the court consider historic economic advantage and disadvantage in reaching a decision whether to make an award relating to the future economic burden of caring for any child of the relationship have been the subject of criticism by decision makers.

5.35 In *Lindsay v Murphy*⁵⁹ Sheriff Miller commented on the flexibility of the legislation but said that this “does no more than reflect the reality that cohabitation is a less formal, less structured and more flexible form of relationship than either marriage or civil partnership.”⁶⁰ He 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 on Sheriff Mackie’s analysis of section 28 in *Gow v Grant*.⁶¹ He said:

“... 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). I diverge from her analysis only in that I decline to characterise any payment ordered under s.28 to be “in the nature of compensation”. ... The term compensation is not used in the 2006 Act and is perhaps pre-loaded with too many other shades of meaning in law to be of assistance here.⁶² The position is more simply and, in my view

⁵⁶ See ch 1 para 1.44.

⁵⁷ Set out in para 5.15.

⁵⁸ 2013 SC (UKSC) 1, discussed in para 5.39.

⁵⁹ 2010 Fam LR 156.

⁶⁰ Above, para 58.

⁶¹ 2010 Fam LR 21, decision in Sheriff Court.

⁶² But see Scottish Government policy, discussed at paras 5.12 and 5.23.

accurately, stated by Sheriff Mackie at p 26, para 43: “If at the end of the exercise the applicant appears to be left with some economic disadvantage then an award may be made ...”⁶³

5.36 Discussing the pursuer’s claim under subsection (2)(b), Sheriff Miller raised the following further concerns:

“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 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. The question thus arises of what account I should take of the defender’s assertion that he would be willing to offer considerable support with future childcare.”⁶⁴

5.37 The issues raised by Sheriff Miller illustrate that it is only after close analysis of the legislative background that the policy intention becomes apparent, since that intention is not spelled out within the provision itself; in relation to section 28(2)(b), there is a dissonance between the apparent policy intention and the effect of the legislation.

5.38 In *Mitchell v Gibson*,⁶⁵ 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.”⁶⁶

5.39 The UKSC decision in *Gow v Grant*⁶⁷ is the leading authority in relation to section 28. The case concerned an application for financial provision under section 28(2)(a) of the 2006 Act. The UKSC concluded that the principle underpinning the provision was “fairness to both parties”.⁶⁸ Referring to the principle in section 9(1)(b) of the 1985 Act, which they considered had been adopted into section 28, the Justices concluded that the court must engage in an exercise of correction of imbalances; this is to be done in a non-technical and practicable way; a common sense approach is advocated, rather than forensic analysis of detailed accounts. The guidance provided by the UKSC did not resolve the difficulties with the application of section 28 encountered in practice and identified in the Wasoff, Miles and Mordaunt Report, as is apparent from the later cases,⁶⁹ the evidence provided to the Justice Committee in 2016, discussed above, and views expressed to us.

5.40 In *Whigham v Owen*,⁷⁰ Lord Drummond Young expressed the view that the application of section 28 has proved to be very difficult in practice and that:

⁶³ 2010 Fam LR 156, para 62.

⁶⁴ Para 66.

⁶⁵ 2011 Fam LR 53.

⁶⁶ Para 10.

⁶⁷ 2013 SC (UKSC) 1, upholding the decision of Sheriff Mackie referred to in para 5.35 above.

⁶⁸ Lord Hope, paras [31] – [33].

⁶⁹ Discussed in paras 5.40 to 5.42.

⁷⁰ 2013 SLT 483.

“... the result is that the court must arrive at an award under s.28 or 29 without any proper guidance in the legislation as to what the amount of that award should be.”⁷¹

5.41 The complexity of the legislation and the application of the *Gow v Grant* “fairness” test was also discussed by Sheriff Principal Pyle in *Smith–Milne v Langler*.⁷²

“[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 where mathematical calculation will not be made during its course. It may of course be that over time there will be enough decisions of the higher courts upon which sheriffs and practitioners can draw so that much of the uncertainty will be dissipated.”⁷³

5.42 In fact, there have been few appellate decisions in relation to section 28 cases since Sheriff Principal Pyle’s remarks in *Smith–Milne v Langler*, and none that have reviewed the test under which an application for financial provision by a former cohabitant is determined. As the above cases show, the lack of guiding principles has proved problematic for the courts. However even if the principle of fairness had underpinned the provision, decision makers would still have been left with wide discretion and little guidance in the legislation to assist with its exercise. The logic of the offsetting provisions has also been questioned, it not being clear why a former cohabitant’s disadvantage should be offset by any economic advantage they have enjoyed when considering a claim under subsection (2)(a) but not under (2)(b).

Comparative law – purpose and test

Australia

5.43 As noted in previous chapters, the policy position in Australia is that once the qualifying requirements have been met,⁷⁴ the court on an application for financial provision by a former de facto partner has the same powers as in proceedings between spouses on divorce. The court can therefore make orders for maintenance, property adjustment and superannuation splitting (ie pension splitting).⁷⁵ Legal and equitable interests prevail unless the court is satisfied that, in all the circumstances, justice and equity require an adjustment:

“Australia is not a community property jurisdiction. Property rights are altered neither by cohabitation nor by marriage. The starting point in any case is to identify legal and equitable title to the assets. Then the question to be asked is whether the parties’ rights in those assets should be altered. The right to apply under...the Act gives no entitlement to an interest in property held in the name of another prior to any order of a court.”⁷⁶

5.44 In relation to maintenance orders, while the court may make such order as it considers proper for the maintenance of one of the former parties to the de facto relationship, it must

⁷¹ Para 8.

⁷² 2013 Fam LR 58.

⁷³ Para 12.

⁷⁴ See ch 3, paras 3.53 to 3.54.

⁷⁵ Family Law Act 1975 (Cth), ss 90SH – 90SJ, 90SL – 90SN, 90MA – 90MZH.

⁷⁶ Patrick Parkinson, “Family Property Division and the Principle of Judicial Restraint” (2018) 41(2) UNSW Law Journal 380 at 386.

apply the principle that a de facto partner must maintain their partner only to the extent that they are reasonably able to do so, and only if the other partner is unable to support themselves adequately, whether (i) by reason of having the care and control of a child of the de facto relationship who has not attained the age of 18 years; or (ii) by reason of age or physical or mental incapacity for appropriate gainful employment; or (iii) for any other adequate reason.⁷⁷

5.45 Property adjustment orders will be made only if the court is satisfied that, in all the circumstances, it is just and equitable to do so,⁷⁸ and the court is directed to a list of factors that must be taken into account in reaching this decision.⁷⁹ Those factors include: the financial and non-financial contributions made by or on behalf of a party to the de facto relationship, or a child of the relationship in relation to the acquisition, conservation or improvement or otherwise of any of the property of the parties; the contribution made by a party to the de facto relationship to the welfare of the family constituted by the parties to the relationship and any children of the relationship (including made in the capacity of homemaker or parent); the effect of any proposed order upon the earning capacity of either party; any other order made under the Act affecting a party to the de facto relationship or a child of the relationship; and any child support under the Child Support (Assessment) Act 1989 that a party to the relationship has provided, is to provide, or might be liable to provide in the future, for a child of the relationship.⁸⁰

5.46 The ALRC Inquiry considered the existing division of property approach. One of its recommendations for change was the inclusion of a presumption of equality of contributions during the relationship.⁸¹ However one academic noted that a starting point of equality might be disadvantageous in certain relationships, particularly where resources have not been pooled or the parties have not agreed that they would financially support one another.⁸² The Family Court of Australia also raised concerns that this recommendation might have unintended consequences for de facto couples who have chosen not to get married to avoid the consequences, or assumptions, of that status.⁸³ Other respondents, who had experienced the system, said that they felt there was no starting point or standard approach. Taking all of this into account, the ALRC concluded that a presumption of equal contributions during the relationship would be beneficial, but that, if implemented, it should be accompanied by an education campaign to explain the operation of the law, particularly for de facto couples who may not be aware that their relationship status has an impact on their property entitlements.⁸⁴ The Australian Government has yet to make a decision on implementation of the ALRC

⁷⁷ S 90SE(1) and SF(1).

⁷⁸ S 90SM(3).

⁷⁹ S 90SM(4). It has been said that this list encourages (but does not require) contributions to property to be considered first before contributions to the welfare of the family (Belinda Fehlberg and Lisa Sarmas, *Australian Family Property Law: Current Issues and Challenges* in Shazia Choudry and Jonathan Herring (Eds), *The Cambridge Companion to Comparative Family Law* (Cambridge University Press, 2019) pp.106-127 at p 110).

⁸⁰ S 90SM(4)(a) to (g).

⁸¹ Australian Government, Australian Law Reform Commission, *Family Law for the Future – An Inquiry into the Family Law System*, Final Report (ALRC Report 135) March 2019, p 12. Available at: https://www.alrc.gov.au/wp-content/uploads/2019/08/alrc_report_135.pdf.

⁸² Patrick Parkinson, "Family Property Division and the Principle of Judicial Restraint" (2018) 41(2) UNSW Law Journal 380 at pp 398-399.

⁸³ ALRC Report, p 222. We note that one Commissioner dissented, stating that property matters need to be considered individually based on the facts and not any preconceived notion that contributions were equal; and that a system of presumptions with exceptions creates more complexity and potentially increases litigation. ALRC Report, pp 239-240 paras 7.97-7.98.

⁸⁴ ALRC Report, p 223 para 7.27.

recommendations, pending the outcome of a Parliamentary Inquiry into Family Law, due to report in October 2020.⁸⁵

Ireland

5.47 In Ireland, the policy behind the cohabitation provisions in the 2010 Act⁸⁶ is to ensure that a qualifying cohabitant who is financially dependent on the other cohabitant, because of the relationship or the ending of it, has a right of redress. The court must also be satisfied that it is just and equitable to make an order in all of the circumstances, having regard to factors set out in section 173(3) of the 2010 Act. The factors are: the financial circumstances, needs and obligations of each party; the rights and entitlements of any spouse or former spouse; the rights and entitlements of any civil partner or former civil partner; the rights and entitlements of any dependent child or any child of a previous relationship of either cohabitant; the duration of the relationship; the basis on which the parties entered into the relationship and the degree of their commitment to one another; the contributions that each of the parties have made (or are likely to make in the foreseeable future) to the welfare of each of them, including any contribution made by each of them to the income, earning capacity or property and financial resources of the other; any contributions made by either of them in looking after the home; the effect on the earning capacity of each of them of the responsibilities assumed by each during the period they lived together and the degree to which the future earning capacity of either of them is impaired by reason of the other having relinquished or foregone the opportunity of remunerative activity in order to look after the home; any physical or mental disability of each of them; and the conduct of each of them if such that, in the opinion of the court, it would be unjust to disregard it.

5.48 The requirement of financial dependence has been the subject of criticism, because it provides no remedy for claimants who may have suffered financial loss during the relationship but have not become financially dependent as a result. The example cited is that of a woman in her 50s who has lived in a “marriage-like” relationship for most of her life and who has missed out on career opportunities as a result of her contributions to the family:

“A claimant in this category may (depending on all the facts) be clearly deserving of a remedy against her partner. However, she could also be equally deserving if the result of her sacrifices was that she had suffered the same economic loss but, because, eg of an inheritance from a parent, she was not rendered financially dependent by the termination of the cohabitation.”⁸⁷

5.49 There is, however, some support for the financial dependence requirement and the 2010 Act more generally, which has been said to achieve an equitable balance between the competing concerns of undue paternalism and providing protection for the vulnerable cohabitant.⁸⁸

⁸⁵ See: https://www.apf.gov.au/Parliamentary_Business/Committees/Joint/Family_Law_System.

⁸⁶ Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010.

⁸⁷ John Mee, “Cohabitation law reform in Ireland” (2011) 23(3) CFLQ 323 at p 335.

⁸⁸ Brian Tobin, “The regulation of cohabitation in Ireland: achieving equilibrium between protection and paternalism?” (2013) 35(3) Journal of Social Welfare and Family Law 279 at 282 at p 284.

New Zealand

5.50 The 1976 Act applies to couples in de facto relationships, provided they meet the qualifying requirements.⁸⁹ The legislation also applies to spouses and couples in civil unions. The purpose of the legislation is set out in the 1976 Act⁹⁰ as follows:

(a) to reform the law relating to the property of married couples and civil union couples, and of couples who live together in a de facto relationship:

(b) to recognise the equal contribution of both spouses to the marriage partnership, of civil union partners to the civil union, and of de facto partners to the de facto relationship partnership:

(c) to provide for a just division of the relationship property between the spouses or partners when their relationship ends by separation or death, and in certain other circumstances, while taking account of the interests of any children of the marriage or children of the civil union or children of the de facto relationship.⁹¹

5.51 The 1976 Act sets out guiding principles: that men and women have equal status, and their equality should be maintained and enhanced; all forms of contributions to the partnership are to be treated as equal; a just division of relationship property has regard to the economic advantages or disadvantages to the partners arising from their relationship; and questions arising under the 1976 Act about relationship property should be resolved as inexpensively, simply and speedily as is consistent with justice.⁹² The overarching principle is equal sharing but there are exceptions;⁹³ including where the relationship is of short duration.⁹⁴ Where the court is satisfied that any of the exceptions apply, the test for deciding the share each partner is to be awarded is determined in accordance with the contribution of each de facto partner. Contributions include: the care of any child of the relationship or of any aged or infirm relative or dependent of either partner; the management of the household and household duties; the provision of money, including the earning of income, for the purpose of the relationship; the acquisition or creation of relationship property; the forgoing of a higher standard of living than would otherwise have been available, and the giving of assistance or support (whether or not of a material kind).⁹⁵ The legislation provides that there is no presumption that a contribution of a monetary nature is of greater value than a contribution of a non-monetary nature.⁹⁶

⁸⁹ See ch 3 paras 3.63 to 3.64.

⁹⁰ Property (Relationships) Act 1976.

⁹¹ S 1M.

⁹² S 1N.

⁹³ S 13: if there are extraordinary circumstances that make equal sharing repugnant to justice, the share of each partner in that property or money is to be determined in accordance with the contribution of each partner to the relationship.

⁹⁴ If the relationship is of less than the 3 year qualifying period, an order cannot be made unless (a) the court is satisfied - (i) that there is a child of the de facto relationship; or (ii) that the applicant has made a substantial contribution to the de facto relationship; and (b) the court is satisfied that failure to make the order would result in serious injustice (s 14A(2)). If the court is so satisfied, the share of each de facto partner in the relationship property is to be determined in accordance with the contribution of each de facto partner to the relationship (s 14A(3)).

⁹⁵ S 18(1). This includes the giving of assistance or support (i) that enables the other to acquire qualifications, or (ii) aids them in the carrying on of their occupation or business.

⁹⁶ s 18(2).

5.52 The NZ Commission set out its recommendations for reform of the division of relationship property in the NZ Report,⁹⁷ including sharing economic advantages and disadvantages. Retention of equal sharing was proposed because it is a simple rule that most people are aware of and think is fair; however, it recommended change as to *what* property is shared, proposing that only property acquired during the relationship, or acquired for the couple's common use or benefit, should be shared equally.⁹⁸ The response of the New Zealand Government to the recommendations is awaited.

Canada

5.53 In British Columbia, the policy principle is that each partner has a right to an undivided half interest in all family property and is equally responsible for family debt.⁹⁹ The court may order unequal division of family property or debt if equal division would be significantly unfair. The court has to consider various factors in reaching this determination including: the duration of the relationship; the terms of any agreement between the partners; a partner's contribution to the other's career or career potential; whether family debt was incurred in the normal course of the relationship; and whether a partner, after the date of separation, caused a significant decrease or increase in the family property or debt, beyond market trends.¹⁰⁰

5.54 The 2011 Act (BC) provides that "spousal support" will be available if, after considering the prescribed objectives of such support, the other partner has a duty to provide support.¹⁰¹ These objectives are to recognise any economic advantages or disadvantages to the partners arising from the relationship or the breakdown of the relationship; to apportion any financial consequences arising from care of their child, beyond the duty to provide support for the child, between the partners; to relieve any economic hardship arising from the breakdown of the relationship and, as far as practicable, to promote the economic self-sufficiency of each spouse within a reasonable period of time.¹⁰²

5.55 In Alberta, the 2002 Act (SA)¹⁰³ recognises a relationship between two people which meets certain criteria as a relationship of interdependence. In 2018 ALRI recommended that property division rules for adult interdependent partners should be based on the provisions for spouses in the Matrimonial Property Act 2000, which include a presumption of equal division for non-exempt property acquired during the marriage.¹⁰⁴ The recommendations in the ALRI 2018 Report were implemented on 1 January 2020. Under what is now the Family Property

⁹⁷ Law Commission, "Review of the Property (Relationships) Act 1976" Report 143 (June 2019, Wellington, New Zealand) available at: <https://www.lawcom.govt.nz/sites/default/files/projectAvailableFormats/NZLC%20-%20PRA%20Review%20Project%20-%20Final%20Report%20R143.pdf>. See ch 3 para 3.68.

⁹⁸ NZ Commission Preferred Approach Paper (2018) at p 47 proposal 5. This includes the family home; if one partner owned the home before the relationship only the increase in value during the relationship should be shared (NZ Commission Preferred Approach Paper (2018) at p 47 proposal 9). The NZ Commission also recommended Family Income Sharing Arrangements ("FISAs") where partners would be required to share their combined income for a limited period after they separate, to ensure the economic advantages and disadvantages flowing from the relationship are shared more fairly. These would be open to people who have children, have been together for 10 years or more or who have built or sacrificed careers because of the relationship (NZ Commission Preferred Approach Paper (2018) at p 110 proposals 18 and 19).

⁹⁹ Family Law Act, SBC 2011, c 25, s 81.

¹⁰⁰ S 95(2).

¹⁰¹ S 160.

¹⁰² S 161.

¹⁰³ Adult Interdependent Relationships Act, SA 2002.

¹⁰⁴ Alberta Law Reform Institute, *Property Division: Common Law Couples and Adult Interdependent Partners*, Final Report 112 (June 2018) available at: <https://www.alri.ualberta.ca/images/stories/docs/FR112.pdf>.

Act 2000,¹⁰⁵ the matters that will be taken into consideration in making a distribution of property in the case of adult interdependent partners are set out in section 8 and include: the contribution made (during the relationship of interdependence) by each partner to the relationship of interdependence and to the welfare of the family, including any contribution made as a homemaker or parent; the contribution, whether financial or in some other form, made directly or indirectly to the acquisition, conservation, improvement, operation or management of a business, farm, enterprise or undertaking owned or operated by one or both partners; the contribution, whether financial or in some other form, made directly or indirectly by or on behalf of a partner to the acquisition, conservation or improvement of the property; the income, earning capacity, liabilities, obligations, property and other financial resources of each partner on the date the relationship of interdependence began and at the time of the trial; the duration of the relationship of interdependence; and any fact or circumstance that is relevant.

Nordic countries

5.56 Cohabiting relationships remain largely unregulated by statute in Norway.¹⁰⁶ The 1991 Act,¹⁰⁷ which applies to cohabitants and to other people who live together in a household provides a “limited opportunity for a household member to purchase what was previously the common residence and household goods at market value upon the termination of the household.”¹⁰⁸ Various proposals for review of this aspect of law have taken place since the 1990s.¹⁰⁹ Some inheritance reforms followed in 2009, but no reform development in terms of property division on separation has taken place.¹¹⁰

5.57 While, unlike Norway, Sweden has some legislative provision for the division of property on cessation of cohabitation, whether by separation or death,¹¹¹ the provisions in the 2003 Act are limited in comparison with those available for married couples or registered couples or partners¹¹² (for example, there are no provisions relating to maintenance). The Government Offices of Sweden have published an online brochure explaining that the 2003 Act aims to provide a minimum protection for the weaker party when a cohabitee relationship

¹⁰⁵ The Matrimonial Property Act 2000 was amended by the Family Law Statutes Act 2018 by repealing the title and chapter number and substituting therefor the “Family Property Act 2000 Chapter F-4.7”.

¹⁰⁶ For discussion on Norwegian policy relating to cohabitants see Turid Noack, “Cohabitation in Norway: an accepted and gradually more regulated way of living” (2001) 15(1) *International Journal of Law, Policy and the Family* 102 and John Eriksen, “Unmarried Cohabitation and Family Policy in Norway” (2001) 11(1) *International Review of Sociology* 63.

¹⁰⁷ Copy of Act No 45 of 4 July 1991 relating to the right to the joint residence and household goods when a household community ceases to exist (Household Community Act 1991) is available via the CEFL website at: <https://app.uio.no/ub/ujur/oversatte-lover/data/lov-19910704-045-eng.pdf>.

¹⁰⁸ Prof dr Tone Sverdrup, CEFL, National Report on Informal Relationships: Norway (April 2015) at question 2 available at: <http://ceflonline.net/wp-content/uploads/Norway-IR.pdf>.

¹⁰⁹ See ch 2 para 2.48.

¹¹⁰ See John Asland, Margareta Brattstrom, Goran Lind, Ingrid Lund-Andersen, Anna Singer and Tone Sverdrup, *Nordic Cohabitation Law* (Intersentia, Cambridge 2015) p 21 onwards.

¹¹¹ Cohabitees Act (2003:376). NB: the Swedish Government has not produced any translation of this Act into a foreign language. An English explanation of the legislation can be found via the CEFL website at: <http://ceflonline.net/wp-content/uploads/Sweden-IR-Legislation.pdf>.

¹¹² Registered partnerships in Sweden can only be entered into by two persons of the same sex. However, Registered Partnership was repealed in 2009 when the Marriage code became gender-neutral. Couples already living in a registered partnership can choose to remain as registered partners or convert their partnership into a marriage.

ends.¹¹³ The scope of the 2003 Act is limited to the regulation of distribution of the couple's joint home and household goods¹¹⁴ (if they qualify as "cohabitation property", namely property acquired for "joint use") upon the termination of the relationship, in addition to protecting one cohabitee's interests in the property against unilateral actions taken by the other.

5.58 The 2011 Act (Finland)¹¹⁵ does not create any personal or economic rights and / or duties that would have legal effect as long as the partnership persists but includes provision for separation of property, which cannot be waived while the relationship persists; the principle that when the property is separated each cohabiting partner will keep his or her own property unless otherwise agreed; and an obligation to dissolve joint ownership on demand.¹¹⁶

England and Wales

5.59 As discussed,¹¹⁷ there is no legislative provision for cohabitants in England and Wales. At the only second reading of the private member's Cohabitation Rights Bill, Lord Marks stated that the purpose or policy of the Bill was to "... address economic unfairness at the end of a relationship that has enriched one party and impoverished the other in a way that demands redress."¹¹⁸

Summary

5.60 We have looked to other jurisdictions for examples of guiding principles whereby former cohabitants' claims for financial provision are determined. While we doubt that any of the approaches taken in the jurisdictions we have looked at would provide a complete solution to the difficulties highlighted in relation to the cohabitation provisions in the 2006 Act, there are aspects of each that may assist in identifying what may, or may not, work well in this jurisdiction. Unless there is support for adopting a system comparable with that in Australia or New Zealand, whereby qualifying cohabitants enjoy much the same rights and remedies as couples in formal relationships such as marriage and civil unions, it is unlikely that such a regime could operate in Scotland. We might, however, learn from the way in which legislation in those jurisdictions sets out the overall principle, such as justice and equality (Australia), or equal sharing (New Zealand, British Columbia and Alberta), underpinned by a list of exceptions, factors or features that the court must take into account in exercising its discretion.

5.61 The tests for awarding financial provision on separation (where there is any provision) vary among the jurisdictions considered. However, there is some commonality, particularly in the use of a list of relevant factors when determining an application for financial provision (Australia, Ireland, British Columbia, Alberta). The Irish model, which requires that the applicant establishes financial dependence arising from the relationship, or the ending of it,

¹¹³ Government Offices of Sweden, *Family Law: Information on the rules* (26 August 2013) available at: <https://www.government.se/information-material/2013/08/family-law/>.

¹¹⁴ S 3.

¹¹⁵ Act on the Dissolution of the Household of Cohabiting Partners 26/2011. An unofficial translation of the Finnish legislation can be found 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>.

¹¹⁶ The 2011 Act (Finland), ss 2, 4, 5, 7, 8 & 9.

¹¹⁷ See ch 1, para 1.40.

¹¹⁸ The second reading took place on 12 December 2014 in the 2014 – 2015 UK Parliamentary session. House of Lords, Library Briefing, Cohabitation Rights Bill, HL Bill 34 of 2017 – 2019, p 4. Available at: <https://researchbriefings.files.parliament.uk/documents/LLN-2019-0030/LLN-2019-0030.pdf>.

would be unlikely to improve the position for cohabitants in Scotland. However, an approach similar to that adopted in that jurisdiction, whereby the court must decide, on the basis of justice and equity and having regard to a number of factors set out in the legislation, what order, if any, to make might be clearer and more straightforward.

Discussion

5.62 The issues discussed in the foregoing paragraphs can be summarised as follows: the policy behind section 28(2) and the purpose of an award under section 28(2)(a) or (b) is unclear; the economic advantage / disadvantage test, including the offsetting provisions, has failed to meet the stated policy aims of certainty, fairness and clarity;¹¹⁹ the absence of guiding principles¹²⁰ has caused difficulties for the courts and advisors; and limiting the term “child” in section 28(2)(b) to include only children of whom the cohabitants are parents appears arbitrary and may disproportionately adversely affect same sex couples.¹²¹

5.63 The test set out in section 28 and the breadth of judicial discretion that it affords are widely regarded as unhelpful. Solicitors cannot predict outcomes and therefore find it difficult to advise clients during negotiations or in litigation; decision makers complain about the lack of clarity of purpose of the test; members of the public, insofar as they are aware of the legislation, cannot be expected to apply the complex test, including the offsetting provisions, to their own circumstances. It is unsurprising therefore that many parties are reluctant to spend limited resources pursuing an uncertain outcome, sometimes at the expense of fairness. Separating cohabitants and their advisors ought to be able to identify from the legislation what factors will be taken into account in determining the value of their claim, and what the outcome might be. A retrospective test appears inappropriate for awards under section 28(2)(b) which are, usually, for future purposes.

5.64 It has been suggested to us by stakeholders that a principled approach to claims by cohabitants, similar to that in the 1985 Act, would be appropriate. While there is not universal support among stakeholders for abandoning a separate regime for cohabitants altogether or for creating a regime in which cohabitants acquire the right to share the value of property acquired during cohabitation in quite the same way as spouses, there is significant support for adopting a regime that provides greater certainty and clarity within a legislative framework not dissimilar to that in the 1985 Act. Certain principles have emerged in discussions as being a basis upon which to determine claims by former cohabitants when their cohabitation ends otherwise than by death. These include:

- Fairness, having regard to all of the circumstances;
- Recognition of the equal value of contributions made during the relationship, whether they be economic and financial contributions or contributions towards care of the household and family, including children;
- Sharing the future burden of child care fairly;

¹¹⁹ Set out in the Scottish Government’s Policy Memorandum for the Bill that is now the 2006 Act available at: [https://www.parliament.scot/S2_Bills/Family%20Law%20\(Scotland\)%20Bill/b36s2-introd-pm.pdf](https://www.parliament.scot/S2_Bills/Family%20Law%20(Scotland)%20Bill/b36s2-introd-pm.pdf).

¹²⁰ Perhaps similar to those in s 9 of the 1985 Act.

¹²¹ See discussion at paras 5.29 and 5.30.

- Compensating a partner who has suffered economic disadvantage in the interests of the relationship or the family;
- Relief of hardship caused by the relationship or the end of the relationship

5.65 It is interesting to note that these principles are consistent in many respects with possible theories or models for economic remedies on relationship breakdown that have been considered in academic writing. In an article examining New Zealand’s law of financial and property division on breakdown of de facto and spousal relationships, remedies based on entitlement¹²² (where parties share resources on relationship breakdown in accordance with pre-ascertained rules that determine the destination of resources according to an accrued entitlement); compensation¹²³ (where one party may receive a share of the other’s resources in order to compensate for specified economic losses caused by the functioning of the relationship and / or its termination); and need (where one party on relationship breakdown, requires to relieve the other party’s economic needs) are considered.¹²⁴ The article compares each model and concludes that “[t]he principle strength of compensation theories is their response to the differential impact on the parties of collaboration in their relationship, which may be addressed by neither an entitlement-based equal sharing of existing property nor a needs-based award alone....”.¹²⁵ Awards based on need “would seek only to relieve need, even if the equivalent compensable loss were greater. By contrast, compensation does not presuppose need.”¹²⁶ Further, “unlike entitlement theories...a needs-based system operates only on however much property and income is required to meet the need, leaving any surplus to its owner”;¹²⁷ and “[u]nlike entitlement and compensation theories, whose principles rest on past events, a needs-based approach may be entirely forward-looking and pragmatic.”¹²⁸

5.66 The author also notes that some of the theories are not incompatible, and may be combined.¹²⁹ A scheme combining entitlement with compensation and a scheme combining entitlement / compensation with needs and the advantages and disadvantages of each are considered.¹³⁰ These possible theoretical underpinnings to the law on financial provision on relationship breakdown are informative when considering options for reform of the approach to financial provision for cohabitants in Scots law.

Options for reform

5.67 The option of leaving the legislation as it is was not favoured by any of the groups we have spoken to. Appetite for improvement, greater certainty and clarity and a wider range of possible remedies for parties has not declined since the 2010 Wasoff, Miles and Mordaunt

¹²² Entitlement can be based on intention and / or contribution, or on the fact of the relationship (where entitlement to share each other’s property on dissolution arises simply from the existence and nature of the relationship and the parties contributions to it).

¹²³ A party seeking compensation is required to demonstrate that they have suffered a loss because of the relationship and / or its termination and that justice requires that this be compensated by the other party.

¹²⁴ Joanna Miles, “Financial Provision and Property Division on Relationship Breakdown: A Theoretical Analysis of the New Zealand Legislation”, (2004) 21(2) New Zealand Universities Law Review.

¹²⁵ P 276.

¹²⁶ P 284.

¹²⁷ P 284.

¹²⁸ P 285.

¹²⁹ The article footnotes this Commission’s Report on Aliment and Financial Provision, Scot Law Com No 67, 1981, which discussed combining models in detail.

¹³⁰ Pp 288 and 289.

Report. We have noted increased dissatisfaction with the law as it stands. Solicitors report that the lack of clarity in the section 28 test, coupled with the absence of a wider range of orders, causes difficulty advising clients and achieving settlement. The UKSC decision in *Gow v Grant*¹³¹ has not provided greater clarity or guidance.

5.68 We recognise that introducing a regime for financial provision on cessation of cohabitation that is substantially the same as that for divorcing spouses and civil partners on dissolution would also require provision of substantially the same rights and obligations for cohabitants, spouses and civil partners while their relationships remain intact.¹³² If there is wide support for a system whereby the regimes are broadly the same, the approaches in Australia, New Zealand, Alberta and British Columbia, which we have already examined and discussed elsewhere in this Discussion Paper,¹³³ could potentially be followed in Scotland, subject to some adjustments. Alternatively, this jurisdiction could adopt some of the language and principles relied on in those, and other, jurisdictions in order to clarify the purpose of the provisions. The purpose of the award should be clearly identifiable from the language of the statute, whether that be fair distribution of the value of relationship property; compensation for economic disadvantage suffered; relief of financial hardship; sharing the future economic burden of child care;¹³⁴ a combination of some or all of the foregoing; or a broader test of fairness and reasonableness. The test for determining what, if any, order for financial provision will be made should be clear and based on readily understood principles, such as justice and equity (as in Australia and Ireland), having regard to a raft of relevant, but not prescriptive, factors. Another option would be to adopt an approach similar to that already found in the 1985 Act, whereby an order may be made based on fairness and reasonableness, underpinned by identified principles. We have formed no concluded view on these matters and have set out the options in this Discussion Paper, upon which consultees' comments and views are sought.

5.69 We would welcome consultees' views on the following questions:

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

- (a) compensation for economic loss sustained during the relationship;**
- (b) relief of need;**
- (c) sharing of property acquired during the cohabitation;**
- (d) sharing the future economic burden of child care;**
- (e) a combination of any or all of (a) to (d) above; or**
- (f) something else?**

¹³¹ 2013 SC (UKSC) 1.

¹³² Such as a mutual obligation to maintain.

¹³³ See discussion in ch 2.

¹³⁴ Which might include provision of accommodation, sharing the cost of child care and compensation for loss of career progression or pension rights.

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?
14. Should the test for determining what order, if any, the court may make for financial provision on cessation of cohabitation otherwise than by death be based on fairness and reasonableness, having regard to all the circumstances of the case, including a list of relevant factors such as:
- (a) the financial and non-financial contributions made by each party to the relationship, including the contribution made by each party to the care of the family and the family home;
 - (b) the effect of the cohabitation upon the earning capacity of each of the parties;
 - (c) the parties' respective needs and resources;
 - (d) relief of financial hardship caused by the cohabitation or the end of the cohabitation;
 - (e) a combination of any or all of (a) to (d) above; or
 - (f) something else?

Part 2 – Remedies and resources

Introduction

5.70 The remedies currently available to former 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. The legislation does not expressly permit or require the court to have regard to parties' financial resources when deciding what order, if any, to make for financial provision on cessation of cohabitation.

5.71 In this Part, we will discuss the policy behind the remedies available to former cohabitants, criticism of the remedies, including the absence of any provision regarding resources, and relevant case law before considering the approaches in other jurisdictions. We will then discuss possible options for reform.

Policy objective, including the 1992 Commission recommendations

Remedies

5.72 The remedies available under section 28 are limited when compared to those available on divorce or dissolution in terms of the 1985 Act.¹³⁵ However, as noted in Chapter 2, it was not the policy objective of the Scottish Government to allow cohabitants the same remedies on cessation of the relationship as spouses on divorce or civil partners on dissolution of the civil partnership.¹³⁶

5.73 Our predecessors did not favour provision for orders for the transfer of property in the context of a claim by a former cohabitant:

“The claim is akin to a claim based on unjustified enrichment and an award of a capital sum ought to be sufficient to enable justice to be done. This also simplifies the legislation. An order for a transfer of property might have been an appropriate remedy if we had been recommending a sharing of the net value of certain property on the ending of a cohabitation, on the lines of section 9(1)(a) of the Family Law (Scotland) Act 1985, but we are not.”¹³⁷

5.74 The Policy Memorandum does not address the question of whether it is necessary or desirable to provide a range of remedies for former cohabitants.¹³⁸ During the passage of the Bill, there was some discussion relating to the form that financial provision would take. Comments included:

¹³⁵ See s 8 of the 1985 Act.

¹³⁶ Paras 2.15 and 2.16.

¹³⁷ Scot Law Com No 135, 1992, para 16.22.

¹³⁸ Policy Memorandum, para 66.

- “The decision [to go down the route of discretionary financial provision for cohabitants who separate rather than the rules-based approach that is used in the divorce of married couples] was connected with the need to balance the protection of the vulnerable with the protection of people’s rights to live outwith such legal constraints if they so desire. That was the judgement call that had to be made. To protect the vulnerable, we considered situations in which somebody who was economically disadvantaged as a result of the relationship should be entitled to some recompense, as it were, rather than to an absolute claim for aliment or for any on-going responsibility resulting from the relationship.”¹³⁹
- “Property law would take care of any claim that was to be made on a home.”¹⁴⁰
- “The bill seeks to ensure that, in the case of dispute, they have a right to get out of a relationship in financial terms what they put into it and no more.”¹⁴¹

Resources

5.75 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 award of financial provision in favour of a former cohabitant. The 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 that for claims by bereaved cohabitants in section 22 (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.¹⁴² The Scottish Government’s response was that these two provisions can be differentiated in that, in the latter, there are potentially competing claims for the intestate estate. In section 21 (now section 28) there is no competition. Rather, “there is simply one person pursuing a compensatory claim against a former cohabitant.”¹⁴³

Criticism – remedies and resources

5.76 The limited remedies available to the court have been the subject of much criticism. The Wasoff, Miles and Mordaunt Report concluded that the availability of an order for payment of a capital sum as the only tool available to judges is unduly restrictive. In its 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

¹³⁹ Scottish Government official, Justice 1 Committee Official Report, Stage 1, 16 March 2005, column 1632. Available at: <http://www.parliament.scot/parliamentarybusiness/report.aspx?r=2120&mode=html>.

¹⁴⁰ As above, column 1634.

¹⁴¹ Margaret Mitchell MSP, Justice 1 Committee Meeting, Stage 2, 23 November 2005, at column 2356. Available at: <http://www.parliament.scot/parliamentarybusiness/report.aspx?r=2144&mode=html>.

¹⁴² 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>.

¹⁴³ Response to Justice Committee Stage 1 Report by Hugh Henry, Deputy Minister for Justice, August 2005, p19. Available at: https://www.parliament.scot/S2_Justice1Committee/Reports/SEresponseFamilyLawStage1.pdf.

resolving disputes between former cohabitants.¹⁴⁴ The Justice Committee noted in the Official Report that:

“[T]he fact that awards made under section 28 are limited to sums of money may be too prescriptive. The efficacy of section 28 is an issue the next Scottish Government, and a future justice committee, may wish to consider in more detail.”¹⁴⁵

5.77 Responses to the Tenth Programme consultation were also critical. One respondent thought that the relevance of the defender’s resources was unclear. Another commented:

“On divorce, the court is able to make a range of orders in relation to financial provision, including capital payment, property transfer, periodical allowance and pension orders. By contrast, on the breakdown of cohabitation, section 28 only mentions a capital sum payment... This is a significant limitation on the effectiveness of section 28, which contrasts badly with section 8 of the Family Law (Scotland) Act 1985....”

5.78 Many of the solicitors who responded to our questionnaire¹⁴⁶ commented on the limited remedies available to the court. Several said that the availability of a property transfer order would be helpful, with two noting that the absence of the remedy of transfer of property is restrictive. Another commented that “[t]he most common remedy sought by clients ... is a transfer of property” and another that “[w]e often have no choice but to litigate where a property is in joint names and we cannot reach agreement on the transfer of property ... The raising or the threat of litigation is often used as a means to try to force an agreement for the property to be transferred.”

Case law - remedies and resources

5.79 In *M v S*¹⁴⁷ the issue of the limited remedies available to the court was commented on. Lord Matthews declined to make any award under section 28(2)(a). In reaching a decision to award financial provision under section 28(2)(b), he said:

“Section 28(2)(b) seems to me to have the potential for injustice built in. It might be far better if these matters fell within the ambit of the Child Support Agency to be considered along with aliment or at least if the court were given the power specifically to order periodical payments in respect of the costs of child care which could be varied from time to time on a relevant change of circumstances.”¹⁴⁸

While some criticism was made regarding the lack of regard to resources in the legislative scheme, Lord Matthews explained that in his view the courts would probably “be slow to make an award which will be plainly unenforceable.”¹⁴⁹

5.80 Since then, different approaches have been taken to the question of consideration of available resources, with some decision makers refusing an order on the basis of insufficient resources¹⁵⁰ and others refusing to take account of the matter of resources, there being no

¹⁴⁴ Justice Committee, Official Report, 8 March 2016, columns 22 and 25.

¹⁴⁵ Justice Committee Post-Legislative Scrutiny of the Family Law (Scotland) Act 2006, 6th Report, 2016 Session 4), para 37. Available at: http://www.parliament.scot/S4_JusticeCommittee/Reports/JS042016R06.pdf.

¹⁴⁶ See ch 1 para 1.44.

¹⁴⁷ Also known as *C v S* 2008 SLT 871.

¹⁴⁸ Para 262.

¹⁴⁹ Para 261.

¹⁵⁰ *G v F* 2011 SLT (Sh Ct) 161.

requirement in the legislation to do so.¹⁵¹ In *Lindsay v Murphy*, Sheriff Miller noted that it would be surprising if the result of the court's discretion under section 28 resulted in an award that exceeded the value of the defender's assets.¹⁵²

Comparative law – remedies and resources

Australia

5.81 In Australia, the court can make orders for maintenance, property adjustment and superannuation splitting (ie pension splitting).¹⁵³ The court may have regard to parties' resources, including their ability to support themselves and others, in relation to a decision concerning maintenance.¹⁵⁴

Ireland

5.82 In Ireland, the remedies available to qualifying cohabitants are a property adjustment order, a compensatory maintenance order and a pension adjustment order.¹⁵⁵ There is however a hierarchy of remedies. In the first instance, a maintenance order must be sought; if that is insufficient, a pension adjustment order may also be sought, and if these are insufficient, the court may allocate property of either party by means of a property transfer order.¹⁵⁶ The court must also take into account the resources of the parties.¹⁵⁷

New Zealand

5.83 In New Zealand, the court is able to make any order for division of relationship property¹⁵⁸ that it considers just, including deciding the respective shares of each partner in relationship property; orders for the benefit of children of the relationship; orders for the postponement of the vesting of shares in relationship property; orders regulating the right to occupy the family home or other premises forming part of the relationship property; and orders in relation to superannuation rights.¹⁵⁹ The court is also able to make an additional order where, subsequent to the equal sharing of relationship property, the post-relationship income and living standards of one party are likely to be significantly higher than those of the other, as a result of the division of functions within the relationship.¹⁶⁰ The court may, exceptionally, depart from the principle of equal sharing if such would be "repugnant to justice".¹⁶¹

¹⁵¹ *F v D* 2009 Fam LR 11.

¹⁵² 2010 Fam LR 156, para 67.

¹⁵³ Family Law Act 1975 (Cth), ss 90SH – 90SJ, 90SL – 90SN, 90MA – 90MZ.

¹⁵⁴ S 90SF(3).

¹⁵⁵ Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010, ss 174, 175, 187.

¹⁵⁶ Ss 174(2) and 187(6). It has been observed that this hierarchy "seems to represent the opposite order to that which would be dictated by the goal of creating a clean break between the parties" (John Mee, "Cohabitation law reform in Ireland" (2011) 23(3) CFLQ 323 at p 340).

¹⁵⁷ S 45(3). An affidavit of means is sworn by the parties and the court will not make an order that the payer could not afford to implement, see s 197 which requires disclosure from each party to the other of the particulars of his or her property or income.

¹⁵⁸ This includes the family home, family chattels and any other relationship property (s 11 of the Property (Relationships) Act 1976).

¹⁵⁹ 1976 Act, ss 25, 26, 26A, 27, 31.

¹⁶⁰ S 15(1). The court is directed to consider the likely earning capacity of each party, their childcare responsibilities and any other relevant circumstances (s 15(2)). The court may award lump sum payments or order transfer of property in these circumstances (s 15(3)).

¹⁶¹ S 13.

Canada

5.84 In British Columbia, the remedies available under the 2011 Act (BC) include property division, pension division and orders for maintenance.¹⁶² “Spousal support” is also provided for if, after considering the objectives of such support, the other spouse has a duty to provide it in accordance with the legislation.¹⁶³ One objective of spousal support is to relieve any economic hardship arising from the breakdown of the relationship.¹⁶⁴ The court has discretion to deviate from equal sharing of family property, and also to sharing excluded property, if, having regard to certain factors, doing so would be “significantly unfair”.¹⁶⁵

5.85 In Alberta the remedies available to former cohabitants include, since 1 January 2020, orders for payment of money or transfer of property interests, sale of property and distribution of proceeds and declaration of an interest in property.¹⁶⁶ The Family Property Act 2000¹⁶⁷ makes provision for the resources (the income, earning capacity, liabilities, obligations, property and other financial resources) of parties to be taken into consideration by the court in making a distribution of property order.¹⁶⁸

Nordic countries

5.86 Limited provision is made for cohabitants in Norway, which does not include orders for financial provision on cessation of cohabitation. In Sweden, the 2003 Act provides for the division of property on cessation of cohabitation, whether by separation or on death.¹⁶⁹ The remedies are more limited than those available for married couples or registered couples or partners;¹⁷⁰ for example, there is no provision relating to maintenance. The legislation provides for distribution of the couple’s joint home and household goods, in addition to protecting one cohabitee’s interests in the property against unilateral actions taken by the other. The 2011 Act (Finland)¹⁷¹ governs property division on the breakdown of a cohabiting relationship. There are two main remedies, being an application to the court for the appointment of an “estate distributor” to separate the property,¹⁷² or an application to court for compensation if the

¹⁶² Family Law Act 2011, Parts 5 and 6.

¹⁶³ “Spouse” includes a person who has lived with another person in a marriage-like relationship, and has done so for a continuous period of at least 2 years, or except in Parts 5 [Property division] and 6 [Pension division], has a child with the other person (2011 Act (BC), s 3(1)(b)).

¹⁶⁴ S 161.

¹⁶⁵ S 95(2).

¹⁶⁶ Family Property Act 2000, Ch F-4.7, s 9.

¹⁶⁷ The Matrimonial Property Act 2000 was amended by the Family Law Statutes Amendment Act 2018 by repealing the title and chapter number and substituting therefore the Family Property Act 2000 Ch F-4.7.

¹⁶⁸ Family Property Act 2000, s 8(d.1).

¹⁶⁹ Cohabitees Act (2003:376). NB: the Swedish Government has not produced any translation of this Act into a foreign language. An English explanation of the legislation can be found via the CEFL website at: <http://ceflonline.net/wp-content/uploads/Sweden-IR-Legislation.pdf>.

¹⁷⁰ Registered partnerships in Sweden can only be entered into by two persons of the same sex. However, Registered Partnership was repealed in 2009 when the Marriage code became gender-neutral. Couples already living in a registered partnership can choose to remain as registered partners or convert their partnership into a marriage.

¹⁷¹ An unofficial translation of the Finnish legislation can be found 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>.

¹⁷² 2011 Act (Finland), s 7. The estate distributor cannot make changes to property ownership or transfer property ownership between the partners. Therefore property is usually divided in accordance with what belongs to whom and the normal rules of property law apply (Tuulikki Mikkola, *Family and Succession Law in Finland* (Wolters Kluwer, 2018) chapter 3 at p 111).

dissolution of the household according to ownership would result in unjust enrichment.¹⁷³ Neither Sweden nor Finland makes provision for the resources of parties to be taken into consideration in relation to property division for former cohabitants.

England and Wales

5.87 The Cohabitation Rights Bill contained provision for former cohabitants to seek financial settlement orders (including the payment of a lump sum, transfer of property, property settlements, sale of property and pension sharing). The Bill also required the court to consider the resources each party has, or is likely to have in the foreseeable future in making any award.¹⁷⁴

Summary

5.88 The jurisdictions where qualifying cohabitants are treated in a similar way to spouses and civil union couples on cessation of their relationships provide the broadest range of remedies for cohabitants. The availability of orders relating to the division of property and sharing of pensions (Australia, Ireland, New Zealand, and British Columbia) has not been noted as causing any particular difficulty. Approaches to maintenance for former cohabitants vary. In Ireland, for example, maintenance may be awarded, which appears logical given the test of financial dependency.¹⁷⁵ In other jurisdictions, such as Australia, New Zealand and British Columbia, where similar regimes are in place for spouses and civil union couples, maintenance awards may be made, albeit based on different principles and tests.

Discussion

5.89 As is plain from our informal discussions to date, the current remedy of a capital sum and / or an amount in recognition of the economic burden of child care is widely regarded as inadequate. While, we are told, most actions settle, many do so on a basis that could not be achieved under the current provisions (for example, by agreeing a transfer of property) or on a purely economic basis, having regard to the uncertainty of outcome and the limited orders that are available. While it was not the policy of the Scottish Government at the time the Bill was enacted to allow cohabitants the same or similar remedies on cessation of the relationship as spouses on divorce or civil partners on dissolution, the rationale for limiting the orders the court can make for former cohabitants now seems harder to justify.

Options for reform

5.90 We therefore seek views on whether the range of remedies should be extended and, if so, what orders for financial provision should be available to former cohabitants. Where there are limited cash resources or there is inadequate capital and a need to provide accommodation for children, it seems that alternatives to a capital sum would be welcomed.

¹⁷³ 2011 Act, ss 8 and 9. It has been noted that from an international perspective, “the principle of *unjust enrichment*, which in many legal systems has evolved though case law without any direct support in statute, has been written into the new Finnish law.” (John Asland, Margareta Brattstrom, Goran Lind, Ingrid Lund-Andersen, Anna Singer and Tone Sverdrup, *Nordic Cohabitation Law* (Intersentia, Cambridge 2015) at p 38.

¹⁷⁴ Available at:

https://publications.parliament.uk/pa/bills/lbill/2017-2019/0034/lbill_2017-20190034_en_2.htm#pt2-pb3-l1g12.

See also ch 1, para 1.40.

¹⁷⁵ See part 1, paras 5.47 to 5.49.

There is significant support among the stakeholders that we have spoken to for extending the remedies to include, at least, an order for transfer of property. Some also favour the introduction of pension sharing for cohabitants and the availability of post-separation periodical payments to relieve hardship occasioned by the separation.¹⁷⁶

5.91 It is also clear from the discussions that we have had to date that the introduction of a wider range of remedies, taking into account parties' resources, would be welcomed by most stakeholders and, in particular, by the cohabitants who are affected by the legislation. Section 8(2)(b) of the 1985 Act allows the court to take account of the parties' resources in deciding what orders to make for financial provision in an action for divorce or dissolution. It may be that a similar provision is required in relation to former cohabitants.

5.92 We would be grateful for consultees' views on the following:

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

¹⁷⁶ We note that there may be capital gains tax implications in the event that property transfer is available, and that this and the introduction of pension sharing could raise legislative competence issues given capital gains tax and pensions are reserved to the UK Government. See ch 1, para 1.46.

Chapter 6 Time limit

Introduction

6.1 A claim for financial provision under section 28 of the 2006 Act must be made within one year of the date on which the parties cease to cohabit.¹ In this chapter we discuss this time limit. We consider the recommendations in the 1992 Report² and the Scottish Government policy objectives in relation to the time limit. Criticism of the time limit will then be considered, before discussing relevant case law. Statutory limitation provisions in other areas of Scots law will then be discussed, as will comparative legislative provision outwith Scotland. We then seek views on options for reform.

Section 28(8) of the 2006 Act

6.2 The time limit for claims for financial provision where cohabitation ends otherwise than by death³ is provided for in section 28(8) of the 2006 Act, as follows:

“Subject to section 29A,⁴ any application under this section shall be made not later than one year after the day on which the cohabitants cease to cohabit.”

No provision is made for discretionary extension of the time limit.

Policy objective and Commission’s 1992 recommendations

6.3 The policy thinking behind the time limit for claims by former cohabitants when cohabitation ends otherwise than on death was discussed in the 1992 Report:

“It seems clear that a claim should have to be made within a certain time after the end of the cohabitation. Any period is arbitrary but we think that, in the interests of discouraging stale claims and allowing parties to a terminated cohabitation to know where they stand, the time limit should be fairly short. We would suggest a period of one year. That should allow adequate time for a former cohabitant to take legal advice and for any action to be raised. The claim would be a pecuniary claim and, on general principles, would transmit to an executor, if the former cohabitant died within the year after termination of the cohabitation in the same way as would a claim based on breach of contract or unjustified enrichment.”⁵

6.4 When the Bill was introduced, the one-year time limit was already provided for in section 21(5). The only reference made to the time limit during the passage of the Bill was by Bruce McFee MSP, who commented:

¹ 2006 Act, s 28(8). This does not affect the ability to claim alimentary provision for children.

² Scot Law Com No 135, 1992.

³ The time limit for claims under s 29 is 6 months from the date of death; s 29(6). The Scottish Government has undertaken to extend that period to one year.

⁴ S 29A provides for extension of the one year time limit in s 28(8) and the six month time limit in s 29(6) to a date 8 weeks after the date upon which mediation in a relevant cross border dispute, in terms of Directive 2008/52/EC of the European Parliament, ends.

⁵ Para 16.21.

“[T]he Executive has made it clear that, if someone is going to make a claim under the bill, they must do so within a year of the end of the cohabitation.”⁶

Criticism of the time limit

6.5 In our discussions with stakeholders and Advisory Group members, a range of views has been expressed in relation to the time limit. Some stakeholders are of the view that the time limit is not problematic at all. Others call for it to be extended, or tell us that the courts should be afforded discretion to allow late claims on cause shown or in exceptional circumstances. The general view among sheriffs was that one year might be seen as generous and was reasonable in most circumstances. Practitioners generally felt the time limit was short but that they were used to working with it. They told us they tended to advise that court actions were raised and then sisted⁷ to protect the client’s position and allow time to negotiate. Practitioners were concerned that the time limit could have the effect of barring counterclaims if actions were raised close to the deadline.⁸ There was consensus among the groups we spoke to that, if there was to be judicial discretion to permit late claims, the basis upon which such could be exercised should be clearly spelled out.

6.6 Advisory Group members’ views were mixed. The time limit was not universally criticised, with some members considering it adequate. Reference was, however, made to power imbalances in relationships and lack of knowledge of the time limit. An example was given of a former cohabitant who, 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. In those circumstances, the one-year time limit might seem overly restrictive. Solicitors told us that they are often instructed too late for their clients to make a claim under section 28. When one considers also lack of awareness of the remedy, it is easy to see why some former cohabitants miss that opportunity.

6.7 It was generally agreed that extension of the time limit to (for example) three years or more would not allow cohabitants to move on with their lives. The collective view of the Advisory Group was that extension of the time limit to three years, in line with that available in personal injury cases, would be inappropriate. The point was made that personal injury claims are entirely different to claims arising from relationship breakdown and that the time limit for claims may be influenced by the rest of the provisions in the legislation. It was also commented that, if the scheme for cohabitants becomes closer to that on divorce or dissolution, or if the available remedies are extended, then there may be an argument for a longer time limit.⁹

6.8 Advisory Group members were not opposed to the introduction of an element of judicial discretion. The observation was made that decision makers exercise discretion in various areas. The view was expressed that a test such as equity (or fairness), as in section 19A of the Prescription and Limitation (Scotland) Act 1973 (“the 1973 Act”) (power of court to override

⁶ Justice 1 Committee, Stage 2, 16 November 2005 column 2328. Available at: <http://www.parliament.scot/parliamentarybusiness/report.aspx?r=2143&mode=html>.

⁷ Set aside, pending settlement or further order of court.

⁸ See paras 6.14 – 6.16 for discussion of this issue in the case of *Simpson v Downie* 2013 SLT 178.

⁹ See ch 2 for discussion on separate regimes for cohabitants and for spouses and civil partners; see also ch 5, part 2 for discussion of remedies. There is no time limit for making an application for financial provision on divorce or dissolution; ordinarily, any award is made at the time of the divorce or dissolution so must be applied for in the divorce or dissolution process.

time-limits etc.)¹⁰ would be more suitable than “on special cause shown”. Other suggestions included a test based simply on “fairness”, which would be more readily understood by the public. The suggestion was also made that a backstop maximum period of extension would be helpful; in other words, in no circumstances could the time limit be extended beyond, say, two years.

6.9 Some members favoured the introduction of an option for parties to agree an extension to the time limit during negotiation, without prejudicing their right to litigate if they were unable to settle. Such a provision would enable parties to negotiate, or use alternative forms of dispute resolution to settle potential claims, without the pressure of an impending time limit or being compelled to raise an action. It would also help to flush out parties who were not negotiating in good faith. This could be achieved by an express statutory provision which would enable parties to enter into a written agreement to extend the time limit, which agreement would fall at the end of the agreed period or on either party giving written notice of withdrawal of their agreement to the extension. Thereafter, a brief period would be allowed for the raising of a court action. This would allow cohabitants who genuinely wished to resolve their financial claims to do so, without worrying that an action might be raised against them, or that they need to settle within a fixed timescale.

6.10 Many responses to the questionnaire circulated to solicitors¹¹ gave accounts of clients approaching them for advice after the expiry of the time limit; others described the need to raise court action swiftly to avoid time bar. Lack of public awareness of the 2006 Act provisions, and of the time limit in particular, was highlighted. A majority of respondents favoured extending the time limit.

6.11 The time limit for making claims under section 28(8) and the absence of provision for judicial discretion to allow late claims have also been mentioned in the context of considering whether the common law remedy of unjustified enrichment remains available to former cohabitants, notwithstanding the right to make a claim under section 28.¹² On one view, if there was at least discretion to permit late claims, there would be less need for claims based on unjustified enrichment. That was the conclusion reached in a 2017 article that questioned the decision in *Courtney’s Executors v Campbell*¹³ on 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 further.¹⁴ Since then, however, in *Pert v McCaffrey*,¹⁵ a full bench of five judges in the Inner House of the Court of Session disagreed with the decision in *Courtney’s Executors v Campbell*, thereby confirming the availability of claims based on unjustified enrichment.

¹⁰ S 19A(1): “Where a person would be entitled, but for any of the provisions of s 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.”

¹¹ See ch 1 para 1.44.

¹² Discussed in ch 8.

¹³ 2017 SCLR 387.

¹⁴ 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.

¹⁵ [2020] CSIH 5; discussed in ch 8, paras 8.40 to 8.43.

6.12 In 2018, the Law Society of Scotland published a consultation on the rights of cohabitants under sections 28 and 29 of the 2006 Act.¹⁶ Views were not sought, specifically, on the matter of the time limit for section 28 claims. However, some respondents took the opportunity to express their views in relation to the matter. Views were mixed as to whether the time limit causes difficulty in practice and, if so, how the problem should be resolved. As discussed above, our own preliminary consultation and research have disclosed similar differences in experience and a range of opinions as to where the solution lies, if indeed there is a problem with the time limit at all.

6.13 The resulting report, published in March 2019,¹⁷ stated:

“It is clear from the court’s approach to cases under sections 28 and 29 of the Act that a ‘hard line’ is taken to the one-year time limit for applications. This, coupled with a lack of discretion for the court to accept late applications, can produce harsh results, for example where a party was not aware of their rights, where advice was deliberately not sought immediately after the parties ceased to cohabit, or where difficulties arise with service. ... [W]e suggest that legislation is introduced providing the court with discretion to accept an application under section 28 in particular circumstances after 12 months from the date on which the parties ceased to cohabit. We suggest that this could be ‘on cause shown’ or ‘on special cause shown’. This would have the effect of affording the court powers in limited circumstances and subject to the Sheriff or Judge’s discretion to accept a late application where it appears to be in the interests of justice to do so.”

Case law

6.14 In *Simpson v Downie*¹⁸ the defender made a counterclaim for financial provision under section 28, more than a year after the parties ceased to cohabit. The pursuer unsuccessfully sought dismissal of the defender’s claim on the basis that it was time-barred. His appeal to the Sheriff Principal failed. He then appealed to the Inner House of the Court of Session, arguing that compliance with the one year time limit was an integral and imperative precondition to a claim under section 28. The defender argued that section 28(8) comprised only a procedural bar capable of being asserted or waived by the benefited party.

6.15 In the Inner House an Extra Division allowed the pursuer’s appeal and held that a cohabitant has no substantive right to financial provision:

“[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. Section 28(2) conferring the new entitlement, and subs.(8) spelling out the time limit, seem to us to be intimately connected, such that their combined effect is exactly as it would have

¹⁶ The Law Society of Scotland, “Call for views – rights of cohabitants” (November 2018) available at: <https://www.laws Scot.org.uk/media/363108/18-10-17-rights-of-cohabitants-call-for-views.pdf>.

¹⁷ The Law Society of Scotland, *Rights of cohabitants: Family Law (Scotland) Act 2006, sections 28 and 29* (March 2019) available at: <https://www.laws Scot.org.uk/media/361911/rights-of-cohabitants-paper.pdf>.

¹⁸ 2013 SLT 178.

been if subs.(2), standing alone, had commenced with the words “On an application made not later than one year after the day on which the cohabitants cease to cohabit ...”. Either way, in our opinion, it is only compliance with the time limit which validates an application and clothes the court with the necessary jurisdiction. ... [T]he issue [is] one of jurisdictional competency, rather than ... one involving either an extinctive prescription or, alternatively, the limitation of a pre-existing right of action.”¹⁹

6.16 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. In any event, the provisions of section 28(3), (5) and (6) clearly entitle a party to lodge effective offsetting defences even though the possibility of a net payment in his or her favour may be denied on time bar grounds.”²⁰

Other Scottish legislation

6.17 We have considered other areas of Scots law where a time limit is imposed for the making of a claim or assertion of rights, and the extent to which statutory provision is made to extend or override the time limit.

6.18 Section 6 of the 1973 Act²¹ sets out the rules by which certain rights and obligations prescribe.²² The rule in section 19A of the 1973 Act, that the court may override the prescriptive period within which claims may be made for damages for personal injuries and in certain other classes of actions, “if it seems to it equitable to do so”, does not apply to claims under section 28 of the 2006 Act.

6.19 Section 111(1) of the Employment Rights Act 1996, a UK Act which extends to Scotland, provides that a complaint may be presented to an employment tribunal against an employer by any person that he was unfairly dismissed by the employer. The legislation provides that the employment tribunal shall not consider the claim unless it is presented to the tribunal before the end of the period of three months beginning with the effective date of termination, or within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months.²³

6.20 In terms of section 133 of the Criminal Justice Act 1988,²⁴ a person may apply to the Scottish Ministers for compensation for a miscarriage of justice. The claim must be made within three years, with discretionary power to the Scottish Ministers to accept the application outwith the time limit “if they think it is appropriate in exceptional circumstances to do so”.

¹⁹ Para [13].

²⁰ Para [14].

²¹ Prescription and Limitation (Scotland) Act 1973.

²² That is, are extinguished after a period of time.

²³ Employment Rights Act 1996, s 111(2).

²⁴ As amended by s 113 of the Criminal Justice and Licensing (Scotland) Act 2010.

6.21 The Scottish Public Services Ombudsman Act 2002 provides, at section 10, that the Ombudsman must not consider a complaint made more than twelve months after the date on which the person aggrieved first had notice of the matter complained on, unless the Ombudsman “is satisfied that there are special circumstances which make it appropriate to consider a complaint outwith that period.”

6.22 There is therefore some legislative provision whereby strict time limits may be overridden in exceptional circumstances or where it is considered appropriate to do so.

Comparative law

Australia

6.23 In Australia, a party to a de facto relationship may apply for an order under the 1975 Act only if the application is made within the period of two years after the end of the de facto relationship.²⁵ The court may, however, grant the party “leave to apply” after the end of the standard application period if it is satisfied that:

- (a) hardship would be caused to the party or a child if leave were not granted; or
- (b) in the case of an application for an order for the maintenance of the party - the party’s circumstances were, at the end of the standard application period, such that he or she would have been unable to support himself or herself without an income tested pension, allowance or benefit.²⁶

Ireland

6.24 In Ireland, a claim by a qualifying cohabitant under the 2010 Act must be instituted within two years of the time that the relationship between the cohabitants ends (whether through death or otherwise); however there is discretion for extension “in exceptional circumstances”.²⁷ The view was expressed to us by an Irish practitioner that there is no practical issue with the time limit, although one year might be more suitable. We also spoke to an Irish academic who felt that two years is appropriate and commented, by reference to the Scottish legislation, that one year is “very tight, particularly given the lack of public awareness”.

New Zealand

6.25 By comparison, in New Zealand, an application by a party to a de facto relationship under the 1976 Act must be made “no later than 3 years after the de facto relationship has ended.”²⁸ However, the court may extend the time for making an application after hearing the applicant and any other persons who would have an interest in the property that would be affected by the order sought and whom the court considers should be heard.²⁹

²⁵ Family Law Act 1975 (Cth), s 44(5). The time limit for claims was not a matter of concern raised during the recent ALRC Inquiry into the Family Law System.

²⁶ S 44(6)(a)-(b).

²⁷ Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010, s 195.

²⁸ Property (Relationships) Act 1976, s 24(1)(c).

²⁹ S 24(2). The factors frequently cited as relevant in deciding whether or not to grant an extension are the length of time between the expiry of the time limit and the application, the adequacy of the explanation for delay, the merits of the case, and the likely prejudice to the respondent. These factors are described as tests by which the justice of

6.26 The time limit for claims was not raised as an issue by any respondents to the recent review of the 1976 Act by the NZ Law Commission.³⁰ We were told by a member of the New Zealand judiciary that some members of the public found it difficult to engage in property division negotiations in the immediate aftermath of separation due to the need to recover emotionally in this early stage. Therefore, the generous timeframe under the New Zealand legislation, with discretion to extend in the interests of justice, is considered to be appropriate.

6.27 The regimes for financial provision on cessation of cohabitation in Australia and New Zealand, mentioned above, are similar to those on divorce in both those jurisdictions, as well as on dissolution of civil union in New Zealand. It is perhaps, therefore, not surprising that the time limits for claims by former cohabitants in those jurisdictions are relatively long and may be extended in certain circumstances.

Canada

6.28 In British Columbia spouses, including people in “marriage-like” relationships must commence a claim under the 2011 Act (BC) no later than two years after the date of separation.³¹ The running of that time limit is however suspended during any period in which the persons are engaged in “(a) family dispute resolution with a family dispute resolution professional, or (b) a prescribed process.”³² The policy intention behind this section was to discourage the need to start proceedings in court where it is likely the dispute will be resolved out of court, without prejudicing the parties if settlement is not achieved.³³

6.29 The new property division regime for cohabitants in Alberta came into force on 1 January 2020. An adult interdependent partner must commence an application within “2 years after the date the applicant first knew, or in the circumstances ought to have known, that the applicant had become a former adult interdependent partner.”³⁴ The inclusion of the words “the partner first knew, or in the circumstances, ought to have known” was said to avoid injustice to parties who do not immediately know of the triggering event, for example if their partner marries a third party without their knowledge thus terminating the adult interdependent relationship.³⁵

Nordic countries

6.30 In Sweden, qualifying cohabitants under the 2003 Act must make a request for division of property not later than one year after the relationship has ended.³⁶ There is no scope for extension of this time limit. Under the 2011 Act (Finland) cohabiting partners may apply to the

the application is to be measured in all of the circumstances. See *Beuker v Beuker* A102/72 [1997] NZHC 74 (1 June 1977) at pp 3 to 4.

³⁰ Law Commission, “Review of the Property (Relationships) Act 1976” Report 143 (June 2019, Wellington, New Zealand) available at: <https://www.lawcom.govt.nz/sites/default/files/projectAvailableFormats/NZLC%20-%20PRA%20Review%20Project%20-%20Final%20Report%20R143.pdf>.

³¹ Family Law Act, SBC 2011, c 25, s 198(2)(b).

³² S 198(5)(a)-(b); “prescribed process” is defined in the Family Law Act Regulation, BC Reg 347/2012, Reg. 25.1.

³³ British Columbia Ministry of Justice, *The Family Law Act Explained*, part 10 available at: <https://www2.gov.bc.ca/gov/content/justice/about-bcs-justice-system/legislation-policy/legislation-updates/family-law-act/the-family-law-act-explained>.

³⁴ Family Property Act 2000 Ch F-4.7, s 6.1(1).

³⁵ Alberta Law Reform Institute, *Property Division: Common Law Couples and Adult Interdependent Partners*, Final Report 112 (June 2018) paras [406]-[407] available at: <https://www.alri.ualberta.ca/images/stories/docs/FR112.pdf>.

³⁶ Cohabitants Act (2003:376), s 8.

court for the appointment of an “estate distributor” to carry out a “separation of property” based on legal ownership.³⁷ Where division outwith legal ownership is sought, an action for compensation must be brought.³⁸ In cases where a separation of property has taken place, an action for compensation must be brought within six months of the separation of property. In cases where no separation of property has been carried out, the right to compensation will lapse if no claim has been made within three years of the partners having moved permanently apart.³⁹ There is no provision for extension of either of these time limits.

England and Wales

6.31 The Cohabitation Rights Bill⁴⁰ provided for claims to be made up to 24 months from the date parties ceased living together as a couple and for a late application to be accepted in exceptional circumstances.⁴¹

Discussion

6.32 There is a concerning lack of public awareness of the provisions for cohabitants in the 2006 Act, and of the time limit for claims in particular.⁴² 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. That, taken with the absence of provision for judicial discretion to permit late claims, might suggest the Scottish approach takes something of a hard line. A balance has to be struck, however, between protection from stale claims and affording a sufficient and accessible remedy to former cohabitants on the breakdown of their relationships. While there has been no consensus noted during our informal consultation with stakeholders and with our Advisory Group as to whether any change is needed, and if so what changes ought to be made, there is a considerable body of opinion that, for some former cohabitants, the one year time limit carries a risk of injustice and possible hardship.

6.33 We think that the options available to address this risk include extending the time limit (possibly to two years, given the collective view of the Advisory Group that a three year limit would be too long) or making provision for the exercise of judicial discretion to allow late claims (with or without a maximum backstop period), whether “on cause shown” or a more stringent “exceptional hardship” test. It may also be possible to make statutory provision for both of these changes. If consultees disagree with the above options, the time limit in section 28(8) could be left as it is. If so, we would welcome any steps taken by the Scottish Government and professional bodies to make information relating to cohabitants’ rights more widely available, perhaps by use of social media.

6.34 Finally, we think that parties should, if they wish, be permitted to extend the time limit for claims by agreement. We envisage express statutory provision enabling parties to enter into a written agreement to extend the time limit, which agreement would fall at the end of the agreed period or on either party giving written notice. Thereafter, a brief period would be

³⁷ 2011 Act (Finland), s 4. For an overview of practicalities of the regime see Tuulikki Mikkola, *Family and Succession Law in Finland*, (Wolters Kluwer, 2018) ch 3.

³⁸ S 8.

³⁹ S 9.

⁴⁰ See ch 1 para 1.40.

⁴¹ Clause 7(3). The Bill has now fallen. The Bill was re-introduced on 6 February 2020 as the Cohabitation Rights Bill 2020.

⁴² See ch 1.

allowed for the raising of an action. The benefit of such an 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, by whatever means available,⁴³ without worrying that a court action might be raised against them, or that they need to settle within a fixed timescale.⁴⁴

Options for reform

6.35 The questions upon which consultees' views are sought are:

- 18. Should the one year time limit for making a claim under section 28(2) of the 2006 Act be extended?**
- 19. If the time limit is extended, what should the new time limit be?**
- 20. If the time limit is extended, should the court be afforded discretion to allow late claims?**
- 21. If the time limit is not extended, should the court be afforded discretion to allow late claims?**
- 22. If the court is afforded discretion to allow late claims:**
 - (a) should the test for the exercise of discretion be “on cause shown”, “in exceptional circumstances” or something else?**
 - (b) should there be a maximum period (backstop) beyond which no claim may competently be made?**
- 23. Should express provision be made in the 2006 Act to allow parties to agree extension of the time limit to facilitate settlement?**

⁴³ Including mediation or arbitration.

⁴⁴ See “Prescription and Limitation of Actions” (SULI), 2nd ed, Ch 4, para 4.05 and White Book 2019, Vol.1, C7-004 re “standstill agreements”, which can be used in the commercial context, and in relation to professional negligence claims, to afford parties time to negotiate.

Chapter 7 Cohabitation agreements

Introduction

7.1 In this chapter we consider contractual arrangements between cohabitants, which we refer to as “cohabitation agreements”.¹ We ask whether provision should be made to allow the court to take account of the terms of any cohabitation agreement when reaching a decision as to financial provision on cessation of cohabitation. We also discuss whether there are some circumstances in which the agreement, or any of its terms, should be susceptible to setting aside or variation by the court. We will consider first the law as it currently relates to cohabitation agreements, before comparing this with the law on agreements between spouses and civil partners for financial provision on divorce and dissolution. We will discuss this Commission’s approach to cohabitation agreements as set out in the 1992 Report,² and the policy objective of the Scottish Government during the Bill process for the 2006 Act. Criticism that the 2006 Act does not contain any provision referring to such agreements will then be considered, before looking at provision for cohabitation agreements in other jurisdictions. Finally, we set out some possible options for reform.

Current law

7.2 As noted above, the 2006 Act does not contain any provision relating to cohabitation agreements. Such agreements are therefore subject to the ordinary law of contract,³ binding on contracting parties and valid unless reduced on grounds of extortion, fraud, facility and circumvention, undue influence, and error.⁴

Legislative provision for agreements between spouses and civil partners

7.3 Provision is made for agreements between spouses and civil partners in sections 10 and 16 of the 1985 Act.⁵ It should be noted, however, that sections 10 and 16 are part of a comprehensive framework within which financial provision is determined, including rules as to the identification, valuation and distribution of matrimonial and partnership property according to a prescribed set of principles. Such a framework, and a principled approach to financial provision on cessation of cohabitation, is absent from the 2006 Act.

7.4 Section 10(6)(a) of the 1985 Act provides that the terms of any agreement as to the ownership or division of any of the matrimonial or partnership property may constitute a special circumstance,⁶ justifying departure from the presumption that property shall be taken to be

¹ Such agreements might include matters such as opting out of the 2006 Act regime, provision for ownership of property, ring-fencing of certain assets or arrangements for division of assets on separation.

² Scot Law Com No 135, 1992.

³ Including as to implementation and damages in the event of breach.

⁴ Gloag and Henderson *The Law of Scotland*, 14th ed, para 7.10, Hector MacQueen and The Rt Hon Lord Eassie, eds.

⁵ Family Law (Scotland) Act 1985.

⁶ In terms of s 10(1) of the 1985 Act.

shared fairly when it is shared equally. There are very few reported cases in which section 10(6)(a) has been determinative of the issues between the parties.⁷

7.5 Section 16(1) of the 1985 Act permits the court to vary or set aside agreements between spouses and civil partners as to financial provision on divorce and dissolution, as follows:

Where the parties to a marriage or the partners in a civil partnership have entered into an agreement as to financial provision to be made on divorce or on dissolution of the civil partnership, the court may make an order setting aside or varying ... (b) the agreement or any terms of it where the agreement was not fair and reasonable at the time it was entered into.

7.6 In most cases, an order under section 16 is made on the granting of decree of divorce, or on dissolution of civil partnership;⁸ that is, at the same time that any order for financial provision is made under section 8 of the 1985 Act.

7.7 Section 16 applies to agreements made during or prior to marriage⁹ and parties are not limited in terms of the model, time scale or content of the agreement.¹⁰ In *Gillon v Gillon* the court set out the principles to be applied in relation to a decision whether to set aside an agreement. Those principles were that the agreement would 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.¹¹ Circumstances in which an order under section 16(1) have been made include failure to disclose material information relating to matrimonial property;¹² absence of knowledge (of both spouses) that pension interests could constitute matrimonial property;¹³ coercion and failure to disclose assets and liabilities.¹⁴

Commission's 1992 recommendations

7.8 Although the issue was not raised in the 1990 Discussion Paper,¹⁵ a number of respondents suggested that, if cohabitation were to have certain 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 We do not disagree. It was, however, assumed by our

⁷ Examples are *P v P* [2016] SCBAN01; 2016 GWD 2-43 and *Miller v Miller* [2014] SCEDIN15; 2014 GWD 22-420.

⁸ 1985 Act, s 16(2)(b).

⁹ *Kibble v Kibble* 2010 SLT (Sh Ct) 5.

¹⁰ *Bradley v Bradley* [2017] SAC (Civ) 29.

¹¹ *Gillon v Gillon* (No.3) 1995 SLT 678.

¹² *McKay v McKay* 2006 SLT (Sh Ct) 149.

¹³ *Watt v Watt* 1994 SLT (Sh Ct) 54

¹⁴ *McDonald v McDonald* 2009 Fam LR 131.

¹⁵ Scot Law Com No 86, 1990.

¹⁶ Scot Law Com No 135, 1992, para 16.47.

predecessors 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 in due course 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 The 2006 Act, however, contains no such provision.

Policy objective

7.9 The Policy Memorandum noted that recent research had shown that cohabitants did not use legal provisions, such as written agreements or wills, available to them. The research also showed that, while 57% of cohabitants owned accommodation, less than half owned jointly and that only 6% had written agreements on ownership sharing.¹⁹

7.10 The Policy Memorandum discussed “alternative approaches” to legislating for basic safeguards for cohabitants, including leaving things as they were. In that context, reference was made to cohabiting couples drawing agreements relating to sharing of household goods and financial provision at the end of the relationship:

“An alternative approach would be to retain the status quo in legislative terms and concentrate effort on information and awareness raising about the legal position of cohabiting couples, encouraging them to draw agreements setting out what would happen in a range of possible circumstances. While this approach has some merit it is considered unlikely to result in all cohabiting couples making adequate private legal arrangements, leaving a significant number of cohabiting couples and their children without legal protection.”²⁰

7.11 The Bill contained no reference to agreements between cohabitants as to financial provision, whether in relation to regulation of their own arrangements (including opting out of the statutory regime) or permitting the court to take account of the fairness and reasonableness of the terms of an agreement in reaching a decision as to financial provision on cessation of cohabitation.

7.12 At Stage 1 of the Bill process, there was some discussion regarding the ability of cohabitants to make agreements between themselves, and the content of such agreements:

“We hope that, over time, case law will develop that makes it clear what kind of cohabitation comes into the ambit of the provision and what kind of judgments are being made. We hope that, in time, cohabitants will be able to make agreements between them based on that without having recourse to court.”²¹

¹⁷ Para 16.47.

¹⁸ See clause 36(2)(b) of the draft Bill, annexed to the 1992 Report.

¹⁹ Policy Memorandum, para 60, available at: [https://www.parliament.scot/S2_Bills/Family%20Law%20\(Scotland\)%20Bill/b36s2-introd-pm.pdf](https://www.parliament.scot/S2_Bills/Family%20Law%20(Scotland)%20Bill/b36s2-introd-pm.pdf).

²⁰ Para 69.

²¹ Justice 1 Committee Meeting, Stage 1, 16 March 2005, Scottish Government Official column 1630 available at: <http://www.parliament.scot/parliamentarybusiness/report.aspx?r=2120&mode=html>.

7.13 The potential for opting out of the regime was also discussed. It was recognised that, under the law of contract, the court could take into account the terms of any agreement between the parties and that:

“... such agreements—as is currently the case for prenuptial contracts—would be just one of the factors that the court would take into consideration in deciding what the parties’ true intent was when they entered into the relationship.”²²

7.14 That analysis of the provisions, as they appeared in the Bill and in the 2006 Act, is difficult to follow in the absence of any statutory provision relating to the status of agreements between parties and any clear principle by which the court is required to decide claims for financial provision. There was no further discussion during the Bill’s passage of the likely status or effect of agreements made between cohabitants, save to observe that parties would have no property rights unless they made an agreement.²³

Criticism of lack of provision for cohabitation agreements

7.15 The Wasoff, Miles and Mordaunt Report²⁴ considered whether there was a need for provision (similar to that in section 16 of the 1985 Act) permitting variation or setting aside of cohabitation agreements in certain circumstances. The views of the legal practitioners interviewed were, however, mixed.

7.16 As noted in previous chapters, we met with a number of stakeholders while carrying out our research for this paper (including sheriffs, practitioners and academics). None of the sheriffs had dealt with a case where the parties had a cohabitation agreement. They commented that, if parties are encouraged to make their own arrangements and enter into agreements, there ought to be recognition of imbalances within relationships; vulnerable partners should have some protection, perhaps similar to that provided for spouses under section 16 of the 1985 Act.²⁵ Some practitioners had come across written cohabitation agreements, mainly in relation to claims by bereaved cohabitants under section 29 of the 2006 Act, though one described such agreements as “rare”.²⁶ The point was made that parties were often advised (by solicitors and financial advisors) at an early stage of their cohabitation, such as upon purchase of property, to seek advice on entering into an agreement. It was felt, however, that if cohabitants were to be encouraged to opt in / out of a financial regime by agreement, a remedy such as that in section 16 of the 1985 Act should be available. 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 reduction of a contract²⁷ were difficult to apply in the circumstances. She would welcome a provision similar to that in section 16 of the 1985 Act.

7.17 Advisory Group members’ experiences of agreements between cohabitants were mixed. One solicitor had been approached by some clients wishing to enter into cohabitation agreements, but had not advised anyone who had already done so and whose cohabitation

²² Above at column 1636.

²³ Justice 1 Committee Meeting, Stage 2, 23 November 2005 available at:

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

²⁴ Available at: <http://www.crf.ac.uk/assets/Cohabitation-final-report.pdf>.

²⁵ Discussed at paras 7.5 to 7.7.

²⁶ See para 7.19.

²⁷ See para 7.2.

had ended. Another solicitor had dealt with one agreement. Another said that wealthy clients often fund deposits for their adult children who are buying a home with their partner; she thought it was often the parents who insist on a cohabitation agreement to ensure that the funds are ring-fenced. One solicitor suspected that agreements are entered into purely to protect property and specific assets, as opposed to any other contributions stemming from the relationship. Another encouraged clients to treat their agreement as a “living document”, to be reviewed and revised as circumstances changed; few clients, however, returned to vary the terms of their agreements.

7.18 In summary, practitioners have mixed experiences of cohabitation agreements. Commonly, where there is a cohabitation agreement, it has been drawn up before or at the outset of cohabitation, with a view to protecting certain assets. The sheriffs that we spoke to had not come across cohabitation agreements in the course of litigation. There was a commonly held view, however, that if parties were to be encouraged to make their own arrangements there should be some provision that would permit the court to vary or set aside an agreement in certain circumstances. The circumstances envisaged were that the agreement was unfair or unreasonable at the time it was made (acknowledging the risk that advantage might be taken by one partner of the other) or that the parties’ circumstances had materially changed since the agreement was reached (for example, if they had had children or acquired property during the relationship).

7.19 There is some academic research that suggests an increase in the use of cohabitation agreements following the introduction of the 2006 Act provisions. A 1997 study, analysing a sample of 1,042 agreements made by married and cohabiting couples in 1992, found that 7% of the agreements were made by cohabiting couples.²⁸ 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.²⁹

Comparative law

Australia

7.20 In Australia, the 1975 Act provides that married and de facto couples who are ordinarily resident in a participating jurisdiction can enter into a financial agreement before the relationship, during the relationship or after the breakdown of the relationship. Such an agreement may set out how part or all of the parties’ property or financial resources and maintenance should be dealt with in the event that the relationship ends.³⁰ It is binding if it is signed by both parties, they have each received independent legal advice, and the agreement has not been terminated or set aside by the court³¹ but is of no force or effect until a “separation declaration” is made.³²

²⁸ Frances Wasoff, Ann McGulkin and Lilian Edwards, *Mutual Consent: Written Agreements in Family Law*, (1997) Edinburgh: Central Research Unit, the Scottish Office.

²⁹ Jane Mair, Frances Wasoff and Kirsteen Mackay, *All Settled? A study of legally binding separation agreements and private ordering in Scotland*, (2013) Edinburgh: Centre for Research on Families and Relationships.

³⁰ The Family Law 1975 (Cth), ss 90UB, 90UC and 90UD.

³¹ S 90UJ(1). If the requirements relating to legal advice are not satisfied, the court can make an order declaring that the agreement is binding, provided it is satisfied that it would be unjust and inequitable if the agreement were not binding. Parties can also terminate a financial agreement (s 90UL).

³² S 90UF(1).

7.21 The court may set aside a financial agreement or termination agreement if it was obtained by fraud, is void, voidable or unenforceable, or circumstances have arisen since the agreement was made that make it impracticable for the agreement or part of it to be carried out. An agreement may also be set aside if 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.³³

7.22 The issue of financial agreements was considered in the ALRC's recent review of the family law system in Australia,³⁴ but no recommendations for reform were made. It was noted that uncertainty and lack of clarity in property division provisions can encourage parties, particularly those with significant wealth, to consider agreements as a way of avoiding uncertainty as to how the court would divide their property on separation. However, the lack of clarity in the property provisions makes it difficult for parties who are asked to sign an agreement to assess how those terms compare with their entitlements under the 1975 Act. The ALRC decided that the primary attention of reform efforts should be on providing certainty and clarity to the property provisions and made no recommendations in relation to financial agreements.³⁵

Ireland

7.23 In Ireland, individuals are able to contract out of the cohabitation scheme, by entering into a cohabitants' agreement to provide for financial matters during the relationship or when the relationship ends, whether through death or otherwise.³⁶ A cohabitants' agreement is only valid if both parties have received independent legal advice before entering into the agreement or have received legal advice together and waived the right to independent advice, it is in writing and signed by both cohabitants and the general law of contract is complied with.³⁷ The court may vary or set aside a cohabitants' agreement "in exceptional circumstances, where its enforceability would cause serious injustice."³⁸

New Zealand

7.24 In New Zealand, spouses, civil union partners and de facto partners retain the right to opt out of the 1976 Act by regulating the property consequences of their relationships through an agreement.³⁹ An agreement can be made (either before or during the relationship) relating

³³ 1975 Act, s 90UM; see *Thorne v Kennedy* [2017] HCA 49 (8 November 2017).

³⁴ The ALRC were not aware of any empirical data on the number of agreements entered into but they had heard that, anecdotally, they are not common (Australian Government, ALRC, Review of the Family Law System, Discussion Paper (DP 86) October 2018 available at <https://www.alrc.gov.au/publications/review-family-law-system-discussion-paper> (para 3.149). Submissions to the ALRC's Issues Paper noted various criticisms of financial agreements, including that they often benefit the more economically powerful member of a couple and that they might not anticipate changes in circumstances (para 3.150)).

³⁵ Australian Government, ALRC, Family Law for the Future – An Inquiry into the Family Law System, Final Report (ALRC Report 135) March 2019, para 7.82 available at: <https://www.alrc.gov.au/inquiry/review-of-the-family-law-system/>.

³⁶ Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010, s 202.

³⁷ S 202(2)(a)-(c).

³⁸ S 202(4). It has been commented that these formalities are relatively onerous and expensive, with the result that the impact could be that fewer cohabitation contracts will be enforceable than before the enactment of the legislation: John Mee "Cohabitation law reform in Ireland" (2011) 23(3) CFLQ 323 at p 341.

³⁹ Property (Relationships) Act 1976, s 21(1).

to the status, ownership, and division of property during the joint lives of the partners and/or when one of the partners dies.⁴⁰

7.25 An agreement is void unless it complies with certain requirements. It must be in writing and signed by both parties; each party must have had independent legal advice before signing the agreement; the signature of each party to the agreement must be witnessed by a lawyer; and the lawyer who witnesses the signature of a party must certify that, before the party signed the agreement, the lawyer explained to that party the effect and implications of the agreement.⁴¹ Where an agreement meets these requirements, the court may still set it aside if, “having regard to all the circumstances, it is satisfied that giving effect to the agreement would cause serious injustice.”⁴²

7.26 The NZ Issues Paper,⁴³ noted that the ability to opt-out of the 1976 Act provisions reflects the implicit principle that, subject to safeguards, the 1976 Act gives partners “the freedom to organise their affairs in a manner of their choosing.”⁴⁴ The NZ Commission’s preliminary view was that the contracting out provisions generally strike the right balance between the interests of autonomy and protection, albeit it was acknowledged that it might be a difficult process for New Zealanders who may be unaware of the provisions and unable to meet the high cost of compliance.⁴⁵

7.27 The NZ Final Report set out the final recommendations to Government⁴⁶ in respect of section 21 agreements as follows:⁴⁷

- The new Act should continue to enable partners to make their own agreement about how to divide their property during or in anticipation of entering into a relationship and in order to settle any differences that arise between them.⁴⁸
- A court should continue to have the power to give effect to a contracting out or settlement agreement that is void for non-compliance with the procedural requirements under the new Act. The new Act should direct a court to have regard to the same matters that are relevant when deciding whether to set aside an agreement for serious injustice.

⁴⁰ S 21(2).

⁴¹ S 21F(2)-(5). However the court may declare that the agreement has effect, wholly or in part for any particular purpose, if it is satisfied that the non-compliance has not materially prejudiced the interests of any party to the agreement (s 21H(1)).

⁴² S 21J(1). For the factors to which the court must have regard see s 21(J)(4)(a) to (f). See also *Harrison v Harrison* [2005] 2 NZLR 349 (CA) and *T v T* [2015] NZFLR 185.

⁴³ The NZ Commission Issues Paper (2017) available at: <http://www.lawcom.govt.nz/sites/default/files/publicationAttachments/PRA%20Issues%20Paper%20IP41.pdf>.

⁴⁴ NZ Commission Issues Paper (2017) at 30.46.

⁴⁵ Above at 30.51 and 30.53.

⁴⁶ The New Zealand Government has yet to implement the recommendations.

⁴⁷ NZ Commission Final Report (2019) see ch 13.

⁴⁸ The NZ Commission did however note that there is a need for more public education on the ability to contract out or resolve PRA matters by agreement. A recommendation was for the publication of an information guide for separating partners, which should include information about contracting out and settlement under the PRA (NZ Commission Preferred Approach Paper (2018) at 8.18 and 8.19).

- A court should have the power to set aside a contracting out or settlement agreement wholly or in part or to vary an agreement if, having regard to all the circumstances, it is satisfied that giving effect to the agreement would cause serious injustice.

Canada

7.28 In British Columbia, under the 2011 Act (BC), spouses⁴⁹ may make agreements with regard to family property or family debt or both.⁵⁰ The court may, however, set aside or replace all or part of a written agreement in certain circumstances⁵¹ or if the substance of the agreement is “significantly unfair”.⁵² 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. Spouses may also enter into an agreement in respect of spousal support, which may also be set aside.⁵³ The ability to deviate, by agreement, from the statutory regime and the importance of “procedural and operational fairness” of agreements were highlighted by the British Columbia Supreme Court in the case of *Asselin v Roy*.⁵⁴

7.29 As noted in previous chapters, ALRI recently reviewed property division for cohabitants.⁵⁵ On the subject of cohabitation agreements, the ALRI 2018 Report recommended, among other things, that there should be legislated rules describing how partners may make an agreement about ownership and division of property, that the agreement would be enforceable if certain procedural requirements were met and that a court should be able to consider any agreement in a decision about dividing property. With effect from 1 January 2020, the Family Property Act 2000⁵⁶ provides legislative rules on the formation and enforcement of agreements between adult interdependent partners.⁵⁷ Provision is made⁵⁸ for the court to consider the terms of any agreement in making a distribution of property.⁵⁹

Nordic countries

7.30 In Sweden, cohabitants who want to keep their financial affairs separate may conclude an agreement to the effect that the rules on division of property contained in the 2003 Act shall

⁴⁹ The definition of “spouses” includes people who have lived in a “marriage like” relationship for at least two years; see ch 3, para 3.70.

⁵⁰ Family Law Act, SBC 2011, c 25, s 92.

⁵¹ S 93(3). The circumstances are: (a) a spouse failed to disclose significant property or debts, or other information relevant to the agreement; (b) a spouse took improper advantage of the other spouse's vulnerability, including the other spouse's ignorance, need or distress; (c) a spouse did not understand the nature or consequences of the agreement; (d) other circumstances that would, under the common law, cause all or part of a contract to be voidable.

⁵² S 93(5) (significantly unfair on consideration of the following: (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; (c) the degree to which the spouses relied on the terms of the agreement). See also British Columbia Ministry of Justice, *The Family Law Act Explained*, part 5 available at: <https://www2.gov.bc.ca/gov/content/justice/about-bcs-justice-system/legislation-policy/legislation-updates/family-law-act/the-family-law-act-explained>.

⁵³ Ss 163 and 164.

⁵⁴ 2013 BCSC 1681. For an overview see John-Paul Boyd, “Supreme Court Publishes First Decision Dividing Property Under the FLA” (17 June 2014) available at: <https://www.canliiconnects.org/en/commentaries/27666>.

⁵⁵ For an overview of the project see: <https://www.alri.ualberta.ca/index.php/completed-projects/property-division-for-cohabitants>.

⁵⁶ The Family Law Statutes Amendment Act 2018, which came into force on 1 January 2020 amended the Matrimonial Property RSA 2000, repealing the title and chapter number of the Act and substituting the “Family Property Act 2000 Chapter F-4.7”.

⁵⁷ Ss 37 and 38.

⁵⁸ S 8.

⁵⁹ In terms of s 7.

not apply to their relationship.⁶⁰ The contract must be in writing and signed by both of the cohabitants, but it need not be witnessed or registered.⁶¹ Derogation from the provisions of the 2011 Act (Finland) is allowed by agreement. However, anticipatory agreements waiving the right to demand separation of property or the right to apply for an estate distributor to be appointed are not permitted.⁶²

7.31 There is a general provision in contract law,⁶³ which is replicated in all Nordic countries as to the modification of agreements:

“Under this provision an agreement 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.”⁶⁴

England and Wales

7.32 The Cohabitation Rights Bill⁶⁵ contained provisions allowing cohabitants to opt out of financial settlement orders by agreement, allowing the court to vary or revoke unfair opt out agreements, and allowing the court to vary or revoke cohabitation agreements.

Discussion

7.33 Earlier in this chapter, we considered the terms of sections 10(6) and 16 of the 1985 Act.⁶⁶ It is important to bear in mind that the circumstances in which spouses and civil partners enter into agreements are materially different from those in which cohabitants are likely to do so. Spouses and civil partners who agree financial and other matters following separation commonly record their arrangements in a written Minute of Agreement prior to divorce or dissolution. While agreements reached prior to marriage and civil partnership are covered by section 16, provided they are agreements as to financial provision on divorce and dissolution,⁶⁷ it is apparent that the incidence of ante nuptial agreements or agreements reached in contemplation of civil partnership coming before the court in the context of divorce or dissolution litigation is relatively uncommon.

7.34 In contrast, it is more likely that couples who decide to cohabit will enter into agreements, if they do so at all, before they live together or early in their cohabitation, for the reasons mentioned by the practitioners that we spoke to.⁶⁸ On separation, a cohabiting couple may come to an agreement on financial matters, with or without legal advice. If so, they will

⁶⁰ Cohabitees Act, SFS 2003:376, s 9.

⁶¹ Government Offices of Sweden, *Family Law: Information on the rules* (26 August 2013) at 3.2.3 available at: <https://www.government.se/information-material/2013/08/family-law/>.

⁶² Act on the Dissolution of the Household of Cohabiting Partners 26/2011, s 2.

⁶³ See Norwegian Contract Act 1918, s 36; Cohabitees Act, SFS 2003:276 (Sweden), s 9(3) & Finnish Contracts Act 1929, s 36.

⁶⁴ John Asland, Margareta Brattstrom, Goran Lind, Ingrid Lund-Andersen, Anna Singer and Tone Sverdrup, *Nordic Cohabitation Law* (Intersentia, Cambridge 2015) pp 156-157. For further explanation see: <https://www.juridicainternational.eu/index.php?id=15316>.

⁶⁵ See ch 1, para 1.40. The Bill has now fallen. The Bill was re-introduced on 6 February 2020 as the Cohabitation Rights Bill 2020.

⁶⁶ Paras 7.3 to 7.7.

⁶⁷ As required by s 16; see *Kibble v Kibble* 2010 SLT (Sh Ct) 5.

⁶⁸ See paras 7.16 to 7.18.

usually record their agreement in writing in a Minute of Agreement, the intention of the parties being to record the settlement of financial matters between them without recourse to the courts. Because there is no process necessary whereby the cohabitation is formally brought to an end, there is unlikely to be any further opportunity for scrutiny of the agreement, unless by reference to the common law rules already mentioned.⁶⁹

7.35 Even where, on reflection, parties who have reached agreement after separation consider that the agreement is unfair or may not in fact be in their best interests, the short and strict time limit for claims under section 28 of the 2006 Act⁷⁰ means that there is little opportunity to revisit the terms of the agreement. If, however, the time limit was extended, or judicial discretion was introduced to allow late claims, there may be more likelihood of former cohabitants who drew up agreements quickly following cessation of cohabitation seeking review of the terms of those agreements.

7.36 The value of cohabitation agreements as a means by which to opt out of a presumptive statutory scheme is clear. Parties will be left to make their own arrangements relating to financial and other matters, without submitting to a scheme to which they do not wish to conform.⁷¹ However, there is a risk that lack of awareness of the statutory provisions may lead to assumptions that certain rights and obligations are automatically acquired and imposed on cohabitation, or that the absence of formality means that no rights or obligations accrue at all. In either case, it is unlikely that use will be made of agreements to regulate cohabitation. On the other hand, it is quite possible that advantage may be taken of an unaware or vulnerable cohabitant, who might be persuaded to enter into an agreement that is contrary to their interests. Even where knowledge and power are balanced, a couple could enter into an agreement which is unresponsive to the changing and developing nature of their relationship over time. A couple who begin to cohabit when they are young and impecunious students, for example, may go on to have children, buy property and develop careers or business interests. Any agreement entered into by them at the beginning of their relationship is unlikely to adequately take account of economic sacrifices made or benefits accrued over many years. For all of the above reasons, it may be useful for statutory provision to be introduced that provides a means by which such agreements could be taken into account by the court when deciding what order, if any, to make on a section 28 application for financial provision or subjected to review in the event of perceived unfairness or changes in circumstances, or both.

Options for reform

7.37 The incidence of use of Minutes of Agreement by cohabitants to regulate their affairs, including on separation, is unknown. While some agreements are registered, many others are not. It is likely that parties will 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. Other agreements are likely to be superseded when parties marry or form civil partnerships.

7.38 The benefit of agreements between cohabitants has, however, been recognised by our predecessors in the 1990s, by the Scottish Government during the passage of the Bill and in

⁶⁹ See para 7.2.

⁷⁰ Discussed in ch 6.

⁷¹ For discussion of the issues surrounding “opt out” regimes for cohabitants, see Andy Hayward, “The *Steinfeld* Effect: equal civil partnerships and the construction of the cohabitant” (2019) 31(4) CFLQ 283.

other jurisdictions, where there is statutory provision regulating such agreements. We therefore seek consultees' views on whether provision should be made, similar to that for agreements between spouses and civil partners in the 1985 Act, in relation to agreements as to financial provision on cessation of cohabitation.

7.39 We therefore seek views on the following:

- 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?**
- 25. Should express statutory provision be made allowing the court to set aside, or vary any term of, a cohabitation agreement? If so, should the test for setting aside or variation be:**
 - (a) that the agreement was not fair or reasonable at the time it was entered into;**
 - (b) that there has been a material change in the parties' circumstances since the agreement was entered into, or**
 - (c) another test (and if so what should that test be)?**

Chapter 8 Unjustified enrichment

Introduction

8.1 A number of respondents to the Tenth Programme consultation raised the issue of whether the common law remedy of unjustified enrichment remains available when either a claim under section 28 of the 2006 Act is not pursued or is unsuccessful. Uncertainty on this issue had arisen, primarily, because of the decision in the case of *Courtney's Executors v Campbell* ("*Courtney's Executors*"),¹ 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.²

8.2 Shortly before publication of this Discussion Paper, in the case of *Pert v McCaffrey*,³ a full bench of five judges in the Inner House of the Court of Session disagreed with the decision in *Courtney's Executors*, stating that failure to exercise the right to make an application under section 28 does not bar the use of any common law remedy otherwise available.⁴ While the uncertainty caused by the decision in *Courtney's Executors* has therefore been resolved, at least for the time being, we have decided to include in this Discussion Paper a chapter devoted to discussion of the issues highlighted in these cases.

8.3 To assist consultees, we first provide an overview of the Scots law of unjustified enrichment and how it has developed. We then consider the context in which this Commission considered the availability of claims under the principle of unjustified enrichment in the 1992 Report⁵ and the 1999 Report on Unjustified Enrichment, Error of Law and Public Authority Receipts and Disbursements ("the 1999 Report").⁶ The doctrine of subsidiarity will then be discussed. By reference to academic comment and case law, we then consider the interaction of the common law remedy of unjustified enrichment with the statutory remedy under section 28. Critical analysis of the decision in *Courtney's Executors* is also discussed, followed by discussion of the recent decision in *Pert v McCaffrey*. We then briefly summarise the issues in relation to cohabitation and unjustified enrichment raised in responses to the Law Society of Scotland's 2018 consultation,⁷ the Tenth Programme consultation and by stakeholders during informal consultation while preparing this Discussion Paper, before making our final observations. While we do not seek views in this chapter on possible options for reform, we would welcome consultees' comments on the matters discussed.

¹ 2017 SCLR 387. Discussed at paras 8.38 to 8.39.

² Para [70].

³ [2020] CSIH 5. Discussed in paras 8.40 to 8.43.

⁴ Para [24].

⁵ Scot Law Com No 135, 1992.

⁶ Scot Law Com No 169, 1999.

⁷ See ch 6, paras 6.12 and 6.13.

Unjustified enrichment

8.4 In the following paragraphs we consider, first, the traditional approach to unjustified enrichment claims. There then follows a summary of the key developments in case law between 1995 and 1998, which transformed some of the traditional elements of unjustified enrichment.

General concept

8.5 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.”⁸

Traditional approach

8.6 The traditional approach to unjustified enrichment in Scots law was for cases to be treated under three separate headings, referring to the remedies of:

- (a) Repetition, for cases involving recovery of money;
- (b) Restitution, for cases involving recovery of property (other than money); and
- (c) Recompense, for cases in which the defender benefits unjustifiably from expenditure or actings of the pursuer or from the use of his property.

8.7 The concept of unjustified enrichment was traditionally considered within the strictures of Roman law *condictiones* (*condictio* referring to the single cause (or ground)⁹ of action). The *condictiones* were as follows:

- (a) *Condictio indebiti* – a claim for the recovery of payment which is not due;
- (b) *Condictio causa data causa non secuta* – a claim for something transferred for a future lawful purpose that failed;
- (c) *Condictio ob turpem vel injustam* – claim for recovery of money or property transferred for an immoral or illegal purpose; and
- (d) *Condictio sine causa* – claim for something retained without legal justification.

8.8 Developments in case law discussed below have redefined this approach. Put short, the law currently is that where enrichment of another is supported by no legal ground, it should be reversed. The remedies of repetition, restitution and recompense may be combined to

⁸ W M Gloag and R C Henderson, *The Law of Scotland* (14th edn, edited by the Rt Hon Lord Eassie and Hector L MacQueen 2017) at para 24.01.

⁹ *Shilliday v Smith* 1998 SC 725 at 728D, per Lord President (Rodger).

achieve this end. The *condictiones* are not therefore discussed in detail in this chapter, but a full overview can be found within relevant textbooks.¹⁰

Key developments in case law

8.9 It is said that the trilogy of cases decided between 1995 and 1998 created the “Scottish enrichment revolution”,¹¹ which has altered the traditional approach towards claims of unjustified enrichment.

8.10 In *Morgan Guaranty Trust Company of New York v Lothian Regional Council*¹² the parties had entered into an interest rate and currency exchange agreement. The pursuers sought repayment of a sum from the defenders on the ground that it was paid by them pursuant to an agreement which was void *ab initio*.¹³ The case came before a full bench in the Inner House of the Court of Session.

8.11 There was some difficulty for the court in clarifying which specific *condictio* the wording of the pursuer’s plea was founded upon. Lord President Hope observed that Scots law lacked a clear and coherent structure in the field of unjustified enrichment,¹⁴ and Lord Clyde emphasised that the equitable basis of a right to recompense should be the paramount consideration as opposed to becoming entrapped in the process of labelling claims under the *condictiones*.¹⁵ It was therefore observed that “the pursuers’ claim may be described generally as one for the recovery of money on the ground of unjustified enrichment.”¹⁶

8.12 In *Shilliday v Smith*,¹⁷ a former cohabitant sought to recover the amount which she had spent on carrying out repairs and improvements to the house in which she and the defender were living, title to which was in the defender’s sole name. The claim was based on the principle of the *condictio causa data causa non secuta*, which is described as a “claim to recover something transferred for a future lawful purpose that failed.”¹⁸ The reason for the expenditure had been the pursuer’s expectation of marriage with the defender and their mutual understanding that the house was to become the matrimonial home. The subsequent breakdown of the relationship meant that the pursuer’s reason for the expenditure had failed to materialise.

8.13 The case came before the First Division in the Inner House of the Court of Session on appeal by the defender. The First Division refused the defender’s appeal, holding, among other things, that the pursuer’s claim was one for both recompense and repetition, that both claims fell within the *condictio causa data causa non secuta* and that it was sufficient for the

¹⁰ Robin Evans-Jones, *Unjustified Enrichment Volume 1, enrichment by deliberate conferral: condictio* (2003). See s 2, from para 1.04 for discussion of the history of the general concepts and structure of unjustified enrichment. See also Gloag and Henderson 14th Edn (above), Ch 24.; Stair Memorial Encyclopaedia, Vol 15, ch 3.

¹¹ See, for example, Robin Evans-Jones, *Unjustified Enrichment Vol 2, enrichment acquired in any other manner* (2013) at 1.44.

¹² 1995 SC 151.

¹³ The local authority had exceeded its powers in entering into the agreement, which was therefore void from the outset.

¹⁴ At 155D-E.

¹⁵ At 169E-F.

¹⁶ At 154D-E, per Lord President Hope.

¹⁷ 1998 SC 725.

¹⁸ Gloag and Henderson 14th Edn (above) at 24.12.

pursuer to prove that she had expended sums in contemplation of a marriage that had failed to materialise.

8.14 Lord President Rodger observed:

“Discussions of unjust enrichment are bedevilled by language which is often almost impenetrable. ... a person may be said to be unjustly enriched at another’s expense when he has obtained a benefit from the other’s actings or expenditure, without there being a legal ground which would justify him retaining that benefit. The significance of one person being unjustly enriched at the expense of another is that in general terms it constitutes an event which triggers a right in that other person to have the enrichment reversed”.¹⁹

8.15 He further explained that “repetition, restitution, reduction and recompense are simply examples of remedies which the courts grant to reverse an unjust enrichment, depending on the way in which the particular enrichment has arisen.”²⁰ It has therefore been said that the effect of *Shilliday* was to transpose the three headings of repetition, restitution and recompense “from the domain of substantive law to the law of remedies” and to affirm “the existence of a unitary system of grounds applying to all types of benefit conferred.”²¹

8.16 In *Dollar Land (Cumbernauld) Ltd v CIN Properties Ltd*,²² consideration was given to the traditional remedies of repetition, restitution and recompense, as well as the decisions in the *Morgan Guaranty* and *Shilliday* cases. Lord Hope observed:

“For my part I see no harm in the continued use of these expressions to describe the various remedies, so long as it is understood that they are being used merely to describe the nature of the remedy which the court is being asked to provide in order to redress the enrichment. The event which gives rise to the granting of the remedy is the enrichment. In general terms it may be said that the remedy is available where the enrichment lacks a legal ground to justify the retention of the benefit. In such circumstances it is held to be unjust.”²³

8.17 Discussing how the facts in a claim for unjustified enrichment should be subjected to analysis, Lord Hope commended the approach of Lord Rodger in the Inner House,²⁴ stating:

“...the pursuers must show that the defenders have been enriched at their expense, that there is no legal justification for the enrichment and that it would be equitable to compel the defenders to redress the enrichment.”²⁵

8.18 The position in Scots law has moved away from viewing the remedies separately and the *condictiones* as discrete causes of action. In principle, therefore, “an enrichment at another’s expense is unjustified and should be reversed if its retention is supported by no legal ground.”²⁶

¹⁹ 1998 SC 725 at 727 A-D.

²⁰ At 728B-C.

²¹ Professor Niall R Whitty, “Transco plc v Glasgow City Council: developing enrichment law after *Shilliday*” (2006) 10(1) Edin LR 113 at 114.

²² 1998 SC (HL) 90.

²³ At 98H-I.

²⁴ 1996 SC 331 at 353D.

²⁵ 1998 SC (HL) 90 at 99E.

²⁶ Gloag and Henderson 14th edn (above) at 24.01.

Consideration of unjustified enrichment by the Scottish Law Commission

8.19 Throughout the 1990s our predecessors had in view the possibility of comprehensive reform of the law of unjustified enrichment.²⁷ In response to developments stemming from the case law outlined above, the conclusion reached in the 1999 Report was:

“The old structure which we criticised in our Fifth Programme has gone. The law is no longer based on actions for repetition, restitution or recompense... In the light of these judicial developments we are of the view that our own involvement in this topic should now come to an end, at least for the time being.”²⁸

8.20 The availability of a remedy based on unjustified enrichment in contract disputes was also considered in the 2018 Report on Contract Law: Formation, Interpretation, Remedies for Breach and Penalty Clauses,²⁹ but no opinion was expressed on the matter.

8.21 In the 1990 Discussion Paper,³⁰ reference was made to the availability of unjustified enrichment as a remedy for former cohabitants. Those references are mainly concerned with the availability of the remedy to cohabitants at that time (in other words, prior to there being a statutory right to claim financial provision on cessation of cohabitation). It should also be noted that these discussions took place prior to the decisions in the trilogy of cases already discussed³¹ and the conclusion mentioned in paragraph 8.19 above.

8.22 In the 1990 Discussion Paper it was noted that so far as private law is concerned, while a cohabitant is afforded protection by the Matrimonial Homes (Family Protection) (Scotland) Act 1981 and can claim damages for the wrongful death of the other cohabitant under the Damages (Scotland) Act 1976:³²

“[t]here are no other private law rules applying specifically to cohabitants although, of course, a cohabitant may in certain circumstances be able to found on general rules, such as those of the law on unjustified enrichment, to obtain a remedy for a situation arising out of the cohabitation.”³³

8.23 Part V of the 1990 Discussion Paper proposed various options for financial provision on termination of cohabitation and considered the position in other countries in relation to the legal recognition of claims by former cohabitants. It noted that in some jurisdictions, such as Canada, Australia, parts of Yugoslavia and Hungary,³⁴ there is some special legislation. It also noted that sometimes existing remedies, such as those based on implied partnership, unjustified enrichment, implied contract, estoppel or trust have been used in a more or less creative way.³⁵ However it commented that this approach has not always been regarded as

²⁷ Scot Law Com No 169, 1999, para 5.1.

²⁸ Paras 5.15 to 5.16.

²⁹ Scot Law Com No 252, 2018; see for example para 10.16.

³⁰ Scot Law Com No 86, 1990.

³¹ In paras 8.10 to 8.17.

³² Damages (Scotland) Act 1976, sch 1, para 1(aa); since replaced by the Damages (Scotland) Act 2011 s 14(1).

³³ Para 1.9.

³⁴ Para 5.4. See the contributions by Sarcenic and Solteszin in *Marriage and Cohabitation in Contemporary Societies* (Eekelaar & Katz eds 1980) at pp 184 & 293 to 297.

³⁵ See eg contributions by Villeia (Brazil), Nerson (France), Groffier (Quebec), Grossen (Switzerland), Weyrauch (USA), Graue (West Germany), Deech (England), Folberg (USA) and Cretney (England) in *Marriage and Cohabitation in Contemporary Societies* (Eekelaar & Katz eds, 1980) at pp 174-176, 205, 237, 260-261, 268-271, 284-285, 308-310, 348-352 and 359-361 respectively.

satisfactory and referred to a New Zealand Court of Appeal case involving a claim by a cohabitant based on work he had done in extending and improving his partner's house:

“the court was unable, on the facts, to use existing common law doctrines to provide a remedy. The main reason for this was that the female cohabitant had always made it perfectly clear, and the male cohabitant had accepted, that the house was hers alone.”³⁶

8.24 It was noted that one option would be to leave the law as it is and make no legislative provision for financial provision or property readjustment, which would leave matters to be regulated by the common law:

“A cohabitant might be able to base a claim on unjustified enrichment. However this would be an uncertain remedy. Actings or expenditure by the cohabitant which had enriched the other party might be held to have been done or undertaken out of love and affection, or for the cohabitant's own benefit. The law on unjustified enrichment is not easy to discover and apply and the results could well be unpredictable.”³⁷

8.25 Further reference was made to unjustified enrichment in the 1992 Report. Financial adjustment on termination of cohabitation otherwise than by death was considered,³⁸ including whether, on termination of cohabitation, a cohabitant should be able to apply to a court for an order for financial provision based on the principle in section 9(1)(b) of the 1985 Act,³⁹ noting that:

“The existing common law on unjustified enrichment does not provide a clear or certain remedy in such cases, not being designed for intimate relationships where parties may well incur disadvantages as a result of contributions made out of love and affection and partly for their own benefit. ...In any event remedies based on common-law principles of uncertain application would seem to be less satisfactory in this area than specific statutory remedies.”⁴⁰

8.26 The possibility of claims for transfer of property was discussed, again with reference to unjustified enrichment:

“We do not think it necessary to provide for orders for the transfer of property in this connection. The claim is akin to a claim based on unjustified enrichment and an award of a capital sum ought to be sufficient to enable justice to be done.”⁴¹

8.27 Our predecessors' analysis did not extend to considering whether the common law remedy should remain available once a statutory right to make a financial claim following cohabitation breakdown became available, and, if so, in what circumstances. Rather, they considered the similarity between the common law remedy and the proposed statutory remedy and concluded that the proposed statutory remedy would provide greater clarity and certainty for separating cohabitants.

³⁶ *Gillies v Keogh* [1989] 2 NZLR 327, referred to in para 5.4 of the 1990 Discussion Paper, Scot Law Com No 86, 1990.

³⁷ Para 5.5.

³⁸ Paras 16.14 to 16.23.

³⁹ See ch 5, paras 5.7 and 5.8.

⁴⁰ Para 16.17.

⁴¹ Para 16.22.

The doctrine of subsidiarity

8.28 Subsidiarity has been described as “the relationship between two claims or doctrines where the scope and operation of one claim are constrained by another claim, even where all elements of the former claim are made out.”⁴² Put simply, if it is possible to make a claim in any area of law other than unjustified enrichment then that claim must be pursued.

8.29 The doctrine of subsidiarity was clarified almost half a century ago in *Varney (Scotland) Ltd v Lanark Town Council*.⁴³ The council had refused to construct sewers for the drainage of houses that the pursuers planned to build. The pursuers therefore constructed the drainage systems themselves and subsequently sought reimbursement of the cost from the council. When the council refused to pay, the pursuers raised an action for payment on the basis that it was equitable that they would receive recompense, the defenders having benefited from their action. The defenders pleaded irrelevancy on the basis that, before resorting to recompense, the pursuers should have raised an action requiring the council to implement their statutory duties. At first instance Lord Stott repelled the defender’s plea and allowed a proof before answer.⁴⁴ The defenders reclaimed and the case was subsequently heard by the Second Division in the Inner House of the Court of Session. The action was dismissed. The Lord Justice-Clerk, Lord Wheatley stated:

“Recompense is an equitable doctrine. That being so, it becomes a sort of court of last resort, recourse to which can be had only when no other legal remedy is or has been available. If a legal remedy is available at the time when the action which gives rise to the claim for recompense has to be taken, then normally that legal remedy should be pursued to the exclusion of a claim for recompense.”⁴⁵

Lord Fraser observed:

“I do not know that it is absolutely essential to the success of an action for recompense that the pursuer should not have, and should never have had, any possibility of raising an action under the ordinary law, but in my opinion it would at least require special and strong circumstances to justify an action of recompense where there was, or had been, an alternative remedy open to the pursuer.”⁴⁶

8.30 The doctrine of subsidiarity was later reaffirmed in *Transco Plc v Glasgow City Council*.⁴⁷ Transco Plc was a utility company with statutory duties for the provision and maintenance of gas line pipes. The company carried out work on a bridge and subsequently raised an action for recompense against the council on the basis that the duty to maintain the bridge rested with the roads authority. The defenders argued that they had not been enriched and that a claim for recompense was not available as the pursuers had an alternative statutory remedy. In his Opinion Lord Hodge stated:

“In my opinion the redefinition of the law of unjustified enrichment has not superseded the old rules relating to the law of recompense such as the general rule that the remedy

⁴² Professor Ross Grantham and Professor Charles Rickett, “On the subsidiarity of unjust enrichment” (2001) 117 LQR 273 at p 273.

⁴³ 1974 SC 245.

⁴⁴ *Varney (Scotland) Limited v Burgh of Lanark* 1974 SLT 80.

⁴⁵ 1974 SC 245 at 252-253.

⁴⁶ At 259-260.

⁴⁷ 2005 SLT 958.

is not available where a pursuer had a legal remedy whether under the common law or under statute and had chosen not to exercise it.”⁴⁸

The pursuers contended that there was no absolute requirement to pursue an alternative remedy as there were special and strong circumstances to support their action. Lord Hodge was not persuaded that the pursuers had averred strong and special circumstances sufficient to take them out of the general rule of the subsidiarity of the remedy of recompense⁴⁹ and the action was dismissed.

Unjustified enrichment and section 28 of the 2006 Act

Academic comment and case law

8.31 We will now discuss, by reference to academic comment and case law, the interaction of the common law remedy of unjustified enrichment with the statutory remedy under section 28 of the 2006 Act.

8.32 In a 2010 Working Paper, Professor Hector MacQueen suggested that unjustified enrichment claims still have an important and useful role in family law cases:

“The Family Law (Scotland) Act 2006 does not explicitly prevent the common law from applying to any of the situations within its purview; nor, it is submitted, should enrichment claims be seen as subsidiary to, or excluded by, the existence of the statutory ones.”⁵⁰

8.33 While he accepted that the 2006 Act was perhaps more likely to be used in practice as it is a direct route to the issues at stake, he submitted that the common law can be used specifically to fill those gaps not covered by the Act, such as in cases where there is doubt about whether the parties satisfy the definition in section 25;⁵¹ cases where parties live together but not as husband and wife; and cases where the time limits have been exceeded,⁵² as a common law claim will only prescribe five years after it becomes enforceable.⁵³

8.34 More recently, Professor MacQueen has further considered the issues surrounding the relationship between the statutory provisions and the law of unjustified enrichment raised by *Courtney’s Executors* and concluded that:

“It would be unfortunate indeed if legislation intended to improve the legal position of cohabitants was left having the formal effect of cutting off rights that they might

⁴⁸ At [13].

⁴⁹ At [18].

⁵⁰ Professor Hector MacQueen, “Unjustified Enrichment and Family Law” (2010) Edinburgh Law School Working Papers, no 2010/01 at p 4.

⁵¹ Discussed in ch 3. If the definition of “cohabitant” in s 25 is not met, there is no claim available under s 28 of the 2006 Act.

⁵² No claim is available under s 28 outwith the statutory limitation period of one year; 2006 Act s 28(8); see also *Simpson v Downie* 2013 SLT 178. The issue of the time limit in relation to the making of claims under s 28 is discussed fully in ch 6.

⁵³ Professor Hector MacQueen, “Unjustified Enrichment and Family Law” (2010) Edinburgh Law School Working Papers, no 2010/01, p 5.

otherwise have. But that will be the result if *Courtney's Executor (sic)* is left untouched by either the higher courts or the current moves to reform.”⁵⁴

8.35 In Part 2 of the same paper, Professor MacQueen observes that, in cases such as *Gow v Grant*,⁵⁵ based entirely upon economic disadvantage, and *M v S*,⁵⁶ based partly upon economic disadvantage suffered as a result of loss of income, a claim based on unjustified enrichment may not have been possible and makes the point that:

“The cases on section 28 tend to emphasise compensation for economic disadvantage rather than the reversal of economic advantage: in other words, loss rather than enrichment is the basis of recovery.”⁵⁷

8.36 In *Esposito v Barile*,⁵⁸ Sheriff Way held that one did not have to exhaust the remedies otherwise available under the 2006 Act (or based on the negligence of a solicitor) before a claim based on unjustified enrichment could be pursued, observing:

“I... see no merit in the submission that in order to pursue a claim for recompense a claimant must take any possible action that might result in a payment to him. I do not accept that any of the authorities, to which I was referred, require a potential claimant to embark upon the uncertain waters of actions for breach of contract or duty by solicitors or yet in the almost uncharted depths of estranged cohabitant claims under the family legislation, before he or she can have recourse to equity.”⁵⁹

8.37 The difficulties surrounding the interaction between section 28 and the common law remedy of unjustified enrichment were also discussed by Sheriff Caldwell in the unreported case of *Harley v Robertson*.⁶⁰ In that case, the pursuer sought payment of a capital sum, relying on both section 28 and unjustified enrichment. Sheriff Caldwell refused the claim on both grounds, on the facts. He doubted whether a claim based on unjustified enrichment was available in addition to, or as an alternative to, a section 28 claim.

8.38 The case of *Courtney's Executors* concerned a claim by executors of the estate of the deceased, Mr Courtney, against his former cohabitant for unjustified enrichment said to have arisen from the deceased's contributions to the benefit of the defender during their relationship. Mr Courtney cohabited with the defender, Ms Campbell, and made payments to her towards the purchase of a property to which she held sole title but which was to be their shared home. Mr Courtney also contributed to renovations to the property, using his own labour to carry those out. The couple subsequently separated. More than twelve months passed before Mr Courtney sought legal advice, thus barring any claim under section 28 of the 2006 Act. Mr Courtney later died. His executors brought an action for unjustified enrichment against Ms Campbell in which they claimed payment of £100,000, being the sums

⁵⁴ Professor Hector MacQueen; Cohabitants, unjustified enrichment and law reform (Part 1), Fam LB 2019, 160, 1-7.

⁵⁵ 2013 SC (UKSC) 1.

⁵⁶ 2018 Fam LR 26.

⁵⁷ Professor Hector MacQueen; Cohabitants, unjustified enrichment and law reform (Part 2), Fam LB 2019, 161, 1-6.

⁵⁸ 2011 Fam LR 67.

⁵⁹ Above at [21].

⁶⁰ Falkirk Sheriff Court 9 December 2011; 2012 GWD 4-68.

paid to her towards the house purchase and £50,000 as recompense for the benefits gained by her as a result of the deceased's contributions to the renovations.

8.39 The defender argued, *inter alia*, that the claim as pled was irrelevant on the basis that the availability of a remedy under section 28, which had not been pursued by the deceased, excluded any equitable remedy. Lord Beckett, noting that Parliament and parliamentary draftsmen are expected to be aware of the common law,⁶¹ said that where Parliament has imposed a time limit there would need to be strong and special circumstances before a claim could be brought for an equitable remedy after that time has passed.⁶² He was not satisfied, on the pursuers' pleadings, that a relevant case had been pled and, for that reason, dismissed the action.

8.40 In *Pert v McCaffrey*, a full bench of the Inner House of the Court of Session refused the pursuer's appeal against the sheriff's decision to dismiss her action for recompense based on unjustified enrichment. 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 pursuer has not made an application for financial provision under section 28. The parties cohabited between 2004 and 2012. A property was purchased during their cohabitation, title to which was taken in joint names. The pursuer averred that there was an agreement between them that, should the relationship end, the defender would not claim any value from the property. After the cohabitation ceased, the pursuer made no claim for financial provision under section 28. She was later sequestrated, whereupon her trustee sold the house and used one half of the proceeds to pay creditors. The remaining half was paid to the defender. The pursuer sought recovery of that sum on the basis of unjustified enrichment.

8.41 The appeal was decided, 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 (since the house had now been sold) seek damages for breach of contract. The Court did, however, take the opportunity to consider the availability of a common law remedy where a claim under section 28 is available. The Lord President (Carloway), with whom the other judges agreed, stated:

“[S]ection 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*].”⁶³

8.42 Lord Brodie, referring to *Dollar Land (Cumbernauld) v CIN Properties*,⁶⁴ said:

“[C]laims 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

⁶¹ Para [60].

⁶² Para [67].

⁶³ *Pert v McCaffrey* [2020] CSIH 5, para [24].

⁶⁴ 1998 SC (HL) 90, discussed at paras 8.16 to 8.17.

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.”⁶⁵

8.43 Lord Brodie also questioned whether it was necessary to consider the principle of subsidiarity in unjustified enrichment cases:

“[W]here parties’ rights and obligations can be worked out satisfactorily by reference to some other legal framework..., unjustified enrichment will usually not arise. However, if it be the case that the concept of unjustified enrichment is such that it can only arise in circumstances where one of the parties has no other way open to him to achieve a reasonable or fair outcome, superimposing the subsidiarity principle on the requirements for an action of reversal of unjustified enrichment would seem to be redundant.”⁶⁶

Critique of the approach in Courtney’s Executors

8.44 The following paragraphs summarise various critiques of the doctrine of subsidiarity insofar as it relates to claims by former cohabitants and the approach taken by the Lord Ordinary in *Courtney’s Executors*. The comments discussed pre-date the decision in *Pert v McCaffrey*.

8.45 The interaction between subsidiarity and section 28 was considered in an article by Kirsty Malcolm, in which the decisions in the unreported case of *Jenkins v Gillespie*⁶⁷ and *Courtney’s Executors* were questioned.⁶⁸ The article points out that the factual circumstances surrounding the separation of a cohabiting couple are entirely different to those in cases such as *Varney*:

“In the case of former cohabitants, where the enrichment generally arises out of a *transfer*, that is the conferral of benefit with the recipient’s consent, at the time that benefit is being conferred there is usually no issue of a remedy being necessary nor indeed available. It is a subsequent event that results in a cohabitant having a right to claim under the 2006 Act (the ending of the relationship) or in the enrichment being capable of being classified as unjust, and therefore at that point giving rise to a claim. At the time the transfer takes place, which eventually results in the basis of an unjustified enrichment claim, there is no alternative remedy available to a cohabitant. It is an entirely different context in which the enrichment is created.”⁶⁹

8.46 In a separate commentary, the decision in *Courtney’s Executors* is considered unsatisfactory:

“The cohabitation cases in which recourse is had to unjustified enrichment are unusual, often those where, self-evidently, there is a considerable injustice. The high threshold and limited scope for recovery make unjustified enrichment a genuine remedy of last resort, relied on by only a small minority of separated individuals... The Parliament’s intention in passing the 2006 Act remedies was surely not to restrict the ability of a financially vulnerable party to make a financial claim. For those people, the effective

⁶⁵ Para [39].

⁶⁶ Para [40].

⁶⁷ Unreported 8 September 2015 (Sh Ct (Tayside Central and Fife at Alloa)). No written judgment is available.

⁶⁸ Kirsty Malcolm, “The Family Law (Scotland) Act 2006 s.28 and unjustified enrichment: the “subsidiarity rule”” (2017) 145 Fam LB 4.

⁶⁹ Pp 6-7.

removal of their safety net is a backward step, however persuasive the legal technicalities may, or may not, have been.”⁷⁰

8.47 A brief case comment on the decision in *Courtney’s Executors* noted that it is surprising that the defender’s argument prevailed since “(1) the authorities on subsidiarity dealt with circumstances remote from those of the conferral of benefit in the context of a domestic relationship; and (2) it is a canon of statutory interpretation that the common law should only be set-aside expressly or by clear implication.”⁷¹

8.48 Dr Gillian Black and Dr Daniel Carr concluded that *Courtney’s Executors* raised issues about the correct application of unjustified enrichment in cases where a remedy might have been sought under section 28 and the potential need for reform of the 2006 Act to protect cohabitants further.⁷² They put the issue as follows:

“... the judicial inclination to interpret the statutory provisions as excluding a common law claim combines unforgivingly with the strict time limits in the 2006 Act; together they have the potential to knock out cohabitants’ claims, leaving the economically-disadvantaged party in a worse position than that existing pre-2006. Statutory clarity on the interaction of the 2006 Act provisions with unjustified enrichment might ameliorate this somewhat, as would a slight extension of the time limits, or the recognition of judicial discretion to extend them.”⁷³

8.49 Professor Robin Evans-Jones, author of specialised Scots texts on unjustified enrichment, has criticised the doctrine of subsidiarity more generally (ie without specific reference to section 28 of the 2006 Act). He is of the view that although there is considerable authority in Scots law to the effect that claims of recompense are subsidiary, there is no reason why this should be the case in all circumstances. As recompense is now conceived as a remedy which arises from a whole range of causes of action, Professor Evans-Jones is of the view that Scots law cannot assert unequivocally that recompense is a subsidiary claim.

8.50 Similar criticisms of subsidiarity more generally have been expressed in a 2006 article in which Professor Niall Whitty asserts that the *Transco* case belongs specifically in the sub-category of payment of another’s debt or performance of another’s obligation and, as such “[while] subsidiarity in *Transco* achieved just results, the case is probably best seen as authority for subsidiarity only in cases of unauthorised performance of another’s obligation.”⁷⁴ Professor Whitty believes that the *Varney* doctrine of recompense was never “as general as is commonly supposed” and submits that “the successor doctrine of subsidiarity of enrichment claims to other claims should have a restricted role in the future development of Scots enrichment law.”⁷⁵

⁷⁰ Alison Edmondson, “Timed out? Alternative financial claims by cohabitants” (2016) 61(11) JLSS 17-19, available at: <http://www.journalonline.co.uk/Magazine/61-11/1022479.aspx#.XEGtgrp2uM8>.

⁷¹ Bryan Heaney, “Family law cohabitation remedy displaces unjustified enrichment remedy” Case Comment (2016) 132 Civ PB 8.

⁷² Dr Gillian Black and Dr 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.

⁷³ Above at 300. See discussion on the time limit for section claims in ch 6.

⁷⁴ Professor Niall R Whitty, “*Transco plc v Glasgow City Council*: developing enrichment law after *Shilliday*” (2006) 10(1) Edin LR 113, p 131.

⁷⁵ Above at 132.

8.51 Consistent with the recent decision in *Pert v McCaffrey*, there is wide consensus among commentators that *Courtney's Executors* was not correctly decided. The ordinary rule is that statute excludes the common law only where it does so expressly or by necessary implication.⁷⁶ There is nothing on the face of section 28 which excludes the common law remedy of unjustified enrichment. Nonetheless, the difficulty in establishing a claim based on unjustified enrichment means that such a claim is likely to remain a remedy of last resort.

8.52 The right to make the common law claim will prescribe five years after enrichment,⁷⁷ thereby providing some protection against the prospect of stale claims. In those cases in which the *condictio causa data causa non secuta* is relied upon, the date from which the prescriptive period begins to run is the date upon which the event fails to occur, resulting in the unjustified enrichment.⁷⁸ Thus, a former cohabitant may avail him or herself of the common law remedy, if it is available, long after the time limit in section 28(8) of the 2006 Act⁷⁹ has passed.

Law Society of Scotland Consultation

8.53 In November 2018, the Law Society of Scotland published its consultation: "Call for views: Rights of Cohabitants".⁸⁰ Views were sought on a number of matters, including whether the common law claim of unjustified enrichment should be available where the one-year time limit in section 28 of the 2006 Act had been missed. 15 of the 22 respondents who offered views on the issue agreed that the common law claim of unjustified enrichment should be available in the circumstances described. Some of the responses were conditional. For example, one respondent agreed, provided the period for making an application was restricted to one year; one queried whether this matter should be considered as part of a wider review of the law on cohabitation; two said it should be available only in limited or exceptional circumstances. Four respondents did not agree that the remedy should remain available; two of these highlighted that the time bar for claims should be extended (one proposed a period of five years). The Report, published in March 2019,⁸¹ recommended that section 28 be amended to allow the court to accept an application made after the one-year time limit "on cause shown". Concern was expressed that, following the decision in *Courtney's Executors*, "the common law claim of unjustified enrichment may no longer be considered by the court to be open to parties who could make a claim under the provisions of section 28, whether or not the time limit has been missed."

Responses to the Tenth Programme consultation

8.54 A number of respondents to our Tenth Programme consultation referred or raised queries in relation to unjustified enrichment in the context of the breakdown of cohabiting

⁷⁶ Bennion Statutory Interpretation 7th edn, p 655, s 25.6, citing Lord Browne-Wilkinson in *R v Secretary of State for the Home Department, ex p Peirson* [1998] AC 539 at p 573.

⁷⁷ Prescription and Limitation (Scotland) Act 1973, s 6 and sch 1, para 1(b).

⁷⁸ *Thomson v Mooney* 2014 Fam LR 15; see also Professor Martin Hogg, "Unjustified Enrichment claims: when does the prescriptive clock begin to run?" (2013) 17(3) Edin. L.R. 405.

⁷⁹ One year from the date of cessation of cohabitation; see discussion in ch 6.

⁸⁰ 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>.

⁸¹ 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>.

relationships.⁸² One solicitor observed that “the interaction (or lack of) between existing cohabitation legislation and unjustified enrichment is not helpful.” One academic asked, without expanding further:

“[w]hether the judicial decisions which have held that the 2006 Act excludes the protections of unjustified enrichment for cohabiting couples are (a) correct and (b) appropriate. (See for example *Courtney’s Exrs v Campbell*).”

8.55 Some respondents considered that the common law remedy of unjustified enrichment was not available after the expiry of the one-year time limit in section 28 of the 2006 Act, further commenting that:

“[Section 28] is a statutory version of the old common law remedy of unjustified enrichment which the courts were developing up to the time of the Family Law (Scotland) Act 2006.”⁸³

8.56 The “very short and strict time limit for making a claim” was highlighted and it was noted that:

“The short and strict time limit was not an insurmountable problem, however, because the old common law remedy was still competent, first of all in parallel with the statutory remedy, and then alone, after the expiry of the 12-month period, or so we thought.”⁸⁴

8.57 The observation was made that no one suggested at the time the legislation was being discussed that the common law remedy would not persist and that if they had and that was Government policy, it would have been strongly opposed.⁸⁵ By reference to an article which discusses the unreported case of *Jenkins v Gillespie*⁸⁶ one respondent observed:

“As the pursuer was timebarred from making a section 28 claim, he could not successfully plead unjustified enrichment. The principle underpinning the decision in this case is that unjustified enrichment is an option of last resort - ‘if a legal remedy is available at the time when the action which gives rise to the claim for recompense has to be taken then normally that legal remedy should be pursued to the exclusion of a claim of recompense’.”

Stakeholders’ views

8.58 Views were expressed during the scoping exercise for this Discussion Paper by sheriffs, academics and practitioners and, since then, by members of the Advisory Group on whether unjustified enrichment should remain available as a remedy for separating cohabitants. The complexity of this issue was highlighted and there was no consensus among the groups interviewed. Some thought that unjustified enrichment should not be available as

⁸² Responses to the Tenth Programme Consultation are available at: <https://www.scotlawcom.gov.uk/law-reform/tenth-programme-of-law-reform-consultation/respondents-to-the-scottish-law-commissions-consultation-on-topics-for-inclusion-in-its-tenth-programme-of-law-reform/>.

⁸³ A similar point was made in a recent commentary: See Scottish Law Agents Society, News 15 April 2019; Consultation – Law of Succession Co-habitants’ Rights, Michael Sheridan. Available at: <https://www.scottishlawagents.org/news/consultation-law-succession-co-habitants%E2%80%99-rights>.

⁸⁴ The time limit for claims is discussed in ch 6; see paras 6.3 and 6.4. There appears to have been no discussion of the policy reason for the one-year time limit during the passage of the Bill that became the 2006 Act.

⁸⁵ No record has been found of any discussion during the passage of the Bill regarding the availability of the remedy based on unjustified enrichment.

⁸⁶ Michael Hughes, “The subsidiarity exclusion: cohabitation and unjustified enrichment,” 2016 SLT (News) 7.

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 under section 28 might, therefore, be the simplest way of addressing the issue. Leaving matters to be determined by the common law was another suggested solution.

Final observations

8.59 It is apparent from the foregoing discussion that the decision in *Courtney's Executors* caused concern among practitioners, academics and decision makers. We acknowledge those concerns, expressed to us directly and in wider academic and judicial commentary. The clarification provided in *Pert v McCaffrey* will therefore, we think, be welcomed. We do note, however, that the absence of provision for judicial discretion to allow claims outwith the time limit in section 28(8)⁸⁷ 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 whether the remedy of unjustified enrichment remains available to cohabitants, at least in some circumstances, there may yet be some for whom the common law claim will not provide a solution. In Chapter 6, we discuss whether, if there was a longer time limit or, at least, discretion to permit late claims, there may be less need for recourse to claims based on unjustified enrichment and invite consultees' views on the options for reform set out at the end of that chapter.

8.60 Subject to consultees' comments in response to this Discussion Paper, and on the matters discussed in this chapter, we have reached the view that, at this time and in light of the clarification provided in the recent full bench decision in *Pert v McCaffrey*, there is no need for legislative provision clarifying whether the common law remedy of unjustified enrichment is available in addition to, or as an alternative to a claim for financial provision under section 28 of the 2006 Act.

⁸⁷ 2006 Act s 28(8) sets the time limit for claims as one year from the date of cessation of cohabitation; for further discussion see ch 5.

Chapter 9 Impact assessment

9.1 The Report which will follow this Discussion Paper will be accompanied by a Business Regulatory Impact Assessment (“BRIA”) outlining and assessing the probable impact, particularly the economic impact, of any reform proposals we might eventually recommend. To assist us in this evaluation we would be grateful for any responses to this paper which provide evidence on, or otherwise address, either the economic impact of the present law or the anticipated impact of our proposals or both. We would be especially grateful for any evidence with which we can begin to quantify the issues raised. Clearly, assessment of the likely economic impact of a possible reform depends substantially on the economic impacts of the present law. Information on costs associated with advice or claims relating to sections 26 and 27 (if any) and section 28 of the 2006 Act (including for example court fees and legal aid costs), as well as information on the likely costs associated with establishing and operating a register of cohabitants¹ would be extremely helpful.

9.2 A particular issue on which we would welcome more information is the impact of the possible extension of the remedies available to former cohabitants to include transfer of property and pension sharing.² We would value information as to the likely tax implications of any such proposal(s).

9.3 We have noted that the legislation as presently framed appears somewhat under-used. One possible consequence of reform is that there will be greater recourse by separating cohabitants to the legislation, particularly if remedies are extended. In Chapter 6 we discuss the possible extension of the time limit for making claims for financial provision under section 28 of the 2006 Act, and the possible introduction of judicial discretion to allow late claims. Any such reforms could result in greater recourse to the courts to determine claims under the provisions. As such, the Scottish Courts and Tribunals Service (“SCTS”) and Scottish Legal Aid Board budgets are likely to be impacted. We acknowledge too that greater clarity, increased time limits and additional remedies may also result in more use of alternative methods of dispute resolution, such as arbitration and mediation, and that parties may be more likely to resolve disputes by agreement. We would welcome information on the likely economic impact of any reforms on SCTS, legal aid and any other related services.

9.4 To assist us in our task of law reform as well as impact assessment, we therefore ask:

26. What information or data do consultees have on:

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

(b) the potential economic impact of any option for reform discussed in this Discussion Paper (in particular the impact in terms of tax law of the possibility of extending the remedies available to cohabitants on

¹ Discussed in ch 3.

² Discussed in ch 5.

cessation of cohabitation otherwise than by death to include property transfers/pension sharing/maintenance)?

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

Chapter 10 List of questions

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

(Paragraph 2.66)

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

(Paragraph 3.101)

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

(Paragraph 3.101)

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

(Paragraph 3.101)

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

- (a) how long should that qualifying period be?

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

(Paragraph 3.101)

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

(Paragraph 3.101)

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

(Paragraph 3.101)

8. What are consultees' views on the introduction of a registration system for cohabitants?
(Paragraph 3.101)
9. Do sections 26 and / or 27 cause any difficulty in practice?
(Paragraph 4.34)
10. Should the language in sections 26 and / or 27 be modernised?
(Paragraph 4.34)
11. Should sections 26 and / or 27 be modified in some other way?
(Paragraph 4.34)
12. Should the policy underpinning awards for financial provision for former cohabitants, where cohabitation ends otherwise than by death, be:
- (a) compensation for economic loss sustained during the relationship;
 - (b) relief of need;
 - (c) sharing of property acquired during the cohabitation;
 - (d) sharing the future economic burden of child care;
 - (e) a combination of any or all of (a) to (d) above; or
 - (f) something else?
- (Paragraph 5.69)
13. For the purposes of financial provision for former cohabitants, should any distinction be made between a child of whom the cohabitants are parents and a child who is or was accepted by the cohabitants as a child of the family?
(Paragraph 5.69)
14. Should the test for determining what order, if any, the court may make for financial provision on cessation of cohabitation otherwise than by death be based on fairness and reasonableness, having regard to all the circumstances of the case, including a list of relevant factors such as:
- (a) the financial and non-financial contributions made by each party to the relationship, including the contribution made by each party to the care of the family and the family home;
 - (b) the effect of the cohabitation upon the earning capacity of each of the parties;

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

(Paragraph 5.69)

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

(Paragraph 5.92)

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

- (a) transfer of property;
- (b) pension sharing;
- (c) periodic payments for a period after the end of the cohabitation, sufficient to relieve short term financial hardship; or
- (d) something else?

(Paragraph 5.92)

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

(Paragraph 5.92)

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

(Paragraph 6.35)

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

(Paragraph 6.35)

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

(Paragraph 6.35)

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

(Paragraph 6.35)

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

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

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

(Paragraph 6.35)

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

(Paragraph 6.35)

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

(Paragraph 7.39)

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

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

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

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

(Paragraph 7.39)

26. What information or data do consultees have on:

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

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

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

(Paragraph 9.4)

Appendix A

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 20 February 2020.)

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] 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 B

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