FACULTY OF ADVOCATES

# Response from the Faculty of Advocates to Scottish Law Commission Discussion Paper on Cohabitation

**Introduction**

The Faculty of Advocates is grateful to the Scottish Law Commission for including in its Tenth Programme the vexed issue of statutory financial rights for cohabitants. We agree that the provisions in the Family Law (Scotland) Act 2006 are in need of reform. They are at present over-complex and unclear. We are therefore pleased to be able to respond to the discussion paper. We should however point out that a number of the issues raised involve matters of social policy, where there are conflicting views. The Faculty itself does not hold any particular position on policy. Our comments are principally directed towards the efficacy of the law and the practical issues which arise in the context of the Discussion Paper.

**Response to questions**

**<u>Distinction between financial provision for cohabitants and spouses/civil partners</u>**

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?**

   Whether there should be a distinction between marriage or civil partnership and cohabitation in relation to the consequences of breakdown is a matter of policy. The Faculty recognises that the responses to many of the questions posed will depend on the policy adopted.

   We note that when the 2006 Act was passed there were considered to be policy reasons for differentiating between an intended lifelong exclusive union and an informal *de facto* union. For the reasons explained above we have confined our comments on reforming the law to practical legal issues, based on our experience of advising and litigating in relation to the cohabitation provisions of this Act.

If parties do not choose to marry or enter into a civil partnership, then they choose not to undertake the financial commitments of such a formal union and, it may be said, should not find themselves bound by, or be able to benefit on breakdown of their relationship from, the financial constraints that would follow from marriage or civil partnership.

On the other hand we acknowledge that some cohabiting relationships are of considerable length and involve significant commitment, and it can appear unfair in those cases to deny similar financial benefits on breakdown to those enjoyed by a spouse or civil partner.

We recognise that financial consequences may flow from informal *de facto* unions of whatever length, and fairness requires the possibility of redress and measures for protection of those who may be left at an economic disadvantage on breakdown of cohabitation.

A balance may require to be struck between maintaining the value of marriage and civil partnership as key units in Scottish society and the autonomy of those who do not choose to marry on the one hand and fair treatment of separating cohabitants, including protection of the vulnerable, on the other.

We also draw attention to the existence of multiple contemporaneous relationships. A person who is still married or a person still in a civil partnership may cohabit in the context of a new relationship. If that person is to be subject to claims from a spouse or civil partner and a cohabitant, that may give rise to complexity and a need to prioritise between the two claims. It may be considered unfair for the claim of a spouse to be reduced by reference to the need to provide for a cohabitant. There may equally be concerns about a person claiming financial provision from a spouse and at the same time from a cohabitant. This issue is not addressed in the Discussion Paper and should, in our view, be considered. The problems arising from contemporaneous marriage and cohabitation may be avoided to some degree by recognition of different purposes for the two sets of provisions.

**Definition of cohabitant**

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

We acknowledge that the current definition is familiar and has caused no particular difficulty in practice, but in our opinion a change is required. The definition should have been amended when the Marriage and Civil Partnership (Scotland) Act 2014 was passed. It is no longer appropriate to refer, as section 25(1)(a) does, to "a man

and a woman who are (or were) living together as if they were husband and wife". The spouses may be of the same sex.

More fundamentally we recognise the incoherence of a definition of cohabitants as persons who are living together "as if" husband and wife or civil partners, when they are not spouses or civil partners. This becomes particularly contradictory if the policy of the legislation is to distinguish between financial remedies on breakdown of a marriage and those available to cohabitants on the ending of their relationship. We note that definitions of "cohabitant" have now been attempted in other jurisdictions. We are persuaded of the desirability of an amended definition.

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?**

A difficulty of trying to define "cohabitant" is that the term covers a wide variety of *de facto* relationships. These may vary in length. There may, or may not, be children involved. In some cases there may not be a sexual relationship. Some committed couples live apart for reasons of work, or choice. There may be multiple other factors. The definition therefore needs to encompass the breadth of relationships involved, while excluding relationships it is not intended to cover, such as sibling relationships and flatmates. We do however note that if there is a wide definition of cohabitant then there will be a need for flexibility in the financial provision available, to reflect the variety of circumstances covered.

The key elements for present purposes are that the couple have been living as partners in an intimate and committed relationship characterised by emotional and financial interdependence and they are not married or civil partners.

We would favour a broad general definition based on these key elements. We do not consider that a supplementary list of factors would assist. A list risks being too prescriptive. If it is broadened by a reference to the need to consider "all the circumstances" then it is likely to be pointless. The central focus is whether the relationship is such that there is an entitlement to seek redress. We consider this is best captured by a broad definition, particularly if there is flexibility in relation to the financial provision that may be awarded.

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?**

   On the one hand it may be appropriate to exclude from the legislation persons who are in 'natural' family relationships, which are of a different nature to cohabitation. A family relationship such as that between parent and child, or between siblings, will continue regardless of ceasing to live together. On the other hand 'forbidden degrees of relationship' are a concept pertinent to marriage, and this is not marriage. If certain relationships are to be excluded then it may be preferable to give a list of excluded relationships, which may include, for example, parent and child, grandparent and grandchild, and siblings.

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?**

   A qualifying period would introduce a 'bright line' provision that would make the legislation easier to apply, but is likely to introduce injustice in borderline cases. One of the issues in the current legislation is the restriction of the period for application for financial provision to one year after cessation of cohabitation. There are good arguments to mitigate the severity of that provision. It would be unfortunate to introduce another provision capable of restricting the availability of financial provision in potentially deserving cases.

   It would be more straightforward to justify a definite qualifying period if the proposed benefit on separation were tightly defined and available as of right, but if financial provision is to be awarded by reference to the merits of the individual case, this sits uneasily with a restriction based on a qualifying period of cohabitation. In our experience contributions may be made in anticipation of commencement of a relationship, for example payment towards a home. While that could be covered by the law of unjust enrichment, it would be more difficult to provide compensation for sacrifices, such as giving up a secure job, in the interests of a relationship, which could then fail at an early stage. Also, relationships vary in nature and intensity, not just longevity. That argues in favour of a qualitative, rather than a quantitative test.

   If however the Commission is persuaded to introduce a qualifying period, then we would favour a short period of perhaps one year, but no more than two years. We would support the removal of any qualifying period in cases where the parties have

children. That is because a party may have made sacrifices in the interests of that child, such as giving up full-time work. There may be a need to cover child care costs or to provide a home for a dependent child.

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

   No.

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?**

   No, see above.

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

   We do not support the establishment of a register of cohabitants. We would be concerned that this would defeat the object of providing financial provision for unmarried cohabitants generally by limiting the benefits of the legislation to the few who decide not to marry, but to put their cohabitation on a formal footing by registration. The benefits of financial provision should be available to all those in *de facto* unions.

**Sections 26 and 27**

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

   In our experience these sections are only occasionally resorted to. We have some limited experience of claims for declarator of ownership, and for delivery of goods. Parties tend to think that if they funded the purchase of an item they should keep it. On the other hand, the provision is potentially useful as a "fall-back" for determination of a dispute about household goods.

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

    We would question the present relevance of section 27. It is drafted to reflect an assumption of a "housekeeping allowance" which is more appropriate to a past era. It reflects section 26 of the Family Law (Scotland) Act 1985, which was included to

reverse the effect of *Preston v Preston* 1950 SC 253, where a wife was held to have no interest in an allowance remitted by her husband for her support, but which she had not actually used. If it is to be retained then it would be more appropriate to refer to "pooled resources", but that might be unfair to those couples who agree to divide expenses in some other way, such as where each takes separate responsibility for an area of expenditure. In our experience these issues are in any event generally absorbed into a substantive claim under section 28.

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

Whether these sections continue to have any utility depends on other elements of the proposed reform. If the principal claim for financial provision is capable of addressing the issues that could potentially be raised under the existing provisions of sections 26 and 27, there may be no point in retaining these as separate provisions.

**Section 28**

**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?**

How this question is answered depends on the policy adopted in relation to financial provision for cohabitants. We are not therefore in a position to respond, without trespassing into matters of policy. The policy objectives of the existing section 28 are unclear. Complex and convoluted drafting make it difficult to discern what the policy objectives might be. As a matter of principle, we agree that there need to be clear policy objectives and a scheme for awards that accurately reflects the policy intentions.

We do however observe that if the policy adopted is to make financial provision at the end of a cohabiting relationship equivalent to financial provision on divorce or dissolution then it may be necessary to revisit the terms of the Family Law (Scotland) Act 1985. At present, spouses and civil partners will share the net value of property acquired between marriage and separation (or earlier commencement of proceedings). They do not share the net value of property acquired before marriage, although that may be susceptible to a claim under section 9(1)(b).

If an unmarried couple, on separation, share the net value of property acquired during cohabitation a claim may exceed the claim available were they to marry. We are familiar with cases where a couple decide to marry after a long cohabitation, and then separate shortly after marriage. It would appear somewhat strange if marriage reduced a claim for financial provision.

If sharing of property acquired during the cohabitation is to be adopted then it will be important that couples can enter into agreements allowing them to opt out. This would cover the position of, for example, an older person who wishes to protect the position of children of earlier relationships, bearing in mind that assets owned before cohabitation may be used to fund assets acquired during cohabitation. The question of pre-cohabitation agreements is not however without difficulty, as we explain below.

The Faculty acknowledges that sharing the future economic burden of child care, over and above alimentary provision for a child, may be considered a reasonable policy objective in its own right. This should not be linked (as it is now) to economic advantage or disadvantage to one of the cohabitants.

We also see the argument for some provision for relief of need, but given the limited emphasis on relief of need in financial provision on divorce or dissolution, this should not be more generous than for former spouses or civil partners. It might be restricted to relief of hardship following a relationship of dependency. In this event a maximum period of support might be inappropriate.

**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?**

The issue here is whether to include children who are not children of the parties but are accepted as children of the "family" as relevant to a claim for the cohabitant. Such children will be eligible for both child support from a parent and aliment under section 1 of the Family Law (Scotland) Act 1985 from the cohabitant who is not the parent. It would not be logical to exclude them from consideration when considering financial provision for the cohabitant parent. If the child has been accepted by the cohabitants as a child of the family, that child should be considered when determining an award of financial provision based on the burden of childcare.

On the other hand, the scope to draw a distinction which presently exists in cases where the child's other parent is providing support to the child should remain, as the burden of child care will be reduced by the availability of support from that source.

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?**

An overriding criteria of "fairness and reasonableness" would be imprecise. It would lead to uncertainty when offering advice and could lead to a wide variation in decisions. It could lead to financial provision for cohabitants being more generous than financial provision for spouses or civil partners, where there are less flexible principles for financial provision. If this change is made then financial provision on divorce or dissolution would probably require to be revisited.

There is an argument for retaining a principled approach to financial provision for cohabitants that is similar to, but less extensive than, the provision to be made on divorce or dissolution.

**Remedies and resources**

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

No. It is our experience in practice that property is regularly transferred as part of a settlement between cohabitants. It would be helpful for the court to have the power to make a property transfer order as part of financial provision.

There have been cases where the court seeks to make provision for future income needs, based on the burden of child care, by way of estimating what they may

amount to and ordering a capital sum (as in *M v S* 2008 SLT 871). It would be far more sensible to cover the burden of child care in such cases by a periodical allowance, which could be varied on a material change in circumstances.

If the scope of financial provision is extended to cover need more generally, then it is logical to allow the court to order periodical payments, which should be subject to variation on a material change in circumstances.

Pension-sharing may also be a helpful option in cases where there is no available capital, or income is to be derived from a pension.

We see no reason to limit the orders the court may make. In the context of divorce, incidental orders are generally helpful in allowing matters to be litigated in one action, rather than requiring multiple cases. This applies in particular to sale, where an order for sale in the context of the cohabitant's claim would remove the potential requirement for a separate action of division and sale. Incidental orders for valuation of property would be useful, as would orders relating to interest, security for payment and ancillary orders generally. Occupancy rights and regulation of liabilities are generally covered by the Matrimonial Homes (Family Protection) (Scotland) Act 1981.

**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?**

Yes, remedies should be extended. Please see our answer to question 15 above.

**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?**

In our experience courts are generally pragmatic about the awards they make and do not order payment that cannot be made, but express provision requiring consideration of resources would be welcome. This will be particularly necessary if remedies are to be extended. Choosing a remedy will involve the court in considering how an award might best be made, which will require an examination of the available resources.

**Time limit**

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

The present provision which prevents claims being made more than a year after separation requires to be amended. It results in unfairness where there is an ignorance of the law, or one cohabitant delays to the last minute with the intention, or the result, that a cross-claim is precluded. On the other hand we do favour a fairly short time limit for claims, to allow cohabitants to move on with their lives without the prospect of a claim hanging over them.

On balance we would support retention of the one year limit, with a discretion entrusted to the court to extend the limit in appropriate cases.

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

We would support a one year time limit. If the time limit is to be extended then we do not consider that it should be extended beyond two years.

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

We consider that extension of the limit to two years, or discretion to extend the one year time limit, are alternatives. If the limit is extended generally then we would not support discretion to extend in a particular case, although this is not our primary position (see above).

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

Yes, we do consider that there should be a discretion to allow late claims made beyond a one year time limit.

**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?**

"On cause shown" is a relatively low test for allowance of late claims. We see merit in adopting the test in section 19A of the Prescription and Limitation (Scotland) Act 1973. This would give power to the court to allow a late claim "if it seems equitable to do so". The test in section 19A is more stringent than "cause shown" and there is an established case law, albeit in a different context, to offer some guidance.

If a test at the lower end of the scale is employed then in our opinion it would require to be accompanied by a backstop, to allow parties to proceed with confidence that there would be no further prospect of a claim. We consider that the backstop should be two years, but in any event should not be longer than three years.

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

We appreciate that commencing an action and then sisting results in expense and exacerbation of tension, but this has to be balanced against the need for certainty within a reasonable period, and to avoid situations in which a party seeking to delay is not acting in good faith.

Section 29A already extends the time limit where there is a cross-border mediation in progress, although we know of no case where that measure has been applied. There is however already included in the legislation a provision for extension when there is realistic scope for settlement. We would support extension where there is engagement in alternative dispute resolution, whether mediation, arbitration or collaboration.

We are less enthusiastic about agreement to delay, where the parties are not actively engaged in a process designed to bring about resolution of their dispute. On balance we would prefer that delay in these circumstances is left as a factor for the court in deciding whether to allow a discretionary extension of the time limit.

If the Commission is nevertheless minded to allow an extension we propose that this should be for a fixed term of no more than six months, on one occasion only, to prevent the process of resolution becoming protracted.

**<u>Cohabitation agreements</u>**

**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?**

It would be consistent with Scots law generally to respect and enforce agreements. Cohabitation agreements are, to our knowledge, already a feature of family law. There could be an unacceptable discrepancy between the position of spouses and civil partners on the one hand and cohabitants on the other if the former could enter into a binding agreement relating to financial provision on divorce, whereas the latter could not make a binding agreement on financial provision arising from cohabitation.

On the other hand we are bound to acknowledge the unsatisfactory nature of the current law in relation to setting aside of agreements on financial provision, as explained below.

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)?**

Further thought needs to be given to the concept of a "cohabitation agreement". Does this include a "stand alone" agreement over a particular item of property, such as when a couple buy a house together? Or is this to be an agreement regulating financial matters during a relationship, or an agreement on financial provision should the parties separate, or all of these?

Using the model of section 16 of the Family Law (Scotland) Act 1985 in relation to setting aside or varying an agreement illustrates the problem. The section operates well in relation to "separation agreements". It has however been held to be relevant to pre-nuptial agreements (*Kibble v Kibble* 2010 SLT (Sh Ct) 5), where its application is much more difficult. A test of fairness and reasonableness at the time a pre-nuptial or pre-cohabitation agreement was entered into may have limited relevance at the time it comes to be implemented. Parties' circumstances may by then have moved on, potentially very considerably. This may be particularly the case in a cohabitation where the quality of the relationship may have changed over time. There may, for

example, be a child for whom no provision has been made, or dependency, or other material change in financial circumstances.

How such a provision might apply to an agreement relating to financial provision at the conclusion of a cohabitation will depend on the policy and precise terms of the legislation governing any award. A pre-nuptial agreement may, for example, exclude certain property from sharing, and is at least comprehensible in that context. Without clear principles for financial provision on breakdown of cohabitation, it is difficult to comment on how legislation might be framed that would support legitimate and fair cohabitation contracts, but allow the court to set aside those which were for some reason considered unacceptable.

On one view this could be left to the ordinary law of contract. If it were possible to set aside an agreement on a material change in circumstances that would open the possibility of setting aside in almost all cases, as there can be few relationships where there is no such change over time. That would reduce the effectiveness of agreements. We would prefer to encourage robust drafting in the first place. We do however appreciate that this would involve acceptance that vulnerable cohabitants might not be protected. The balance is, of course, a matter of policy.

**Impact assessment**

**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?**

We are not in a position to provide detailed assistance in relation to an impact assessment. We would anticipate that reform will encourage claims. At present the difficulty of comprehending and applying the provisions means they are not as well used as they should be. On the other hand clarity should result in such claims as there are being easier to settle.