

## RESPONSE FORM

### DISCUSSION PAPER ON COHABITATION

We hope that by using this form it will be easier for you to respond to the questions set out in the Discussion Paper. Respondents who wish to address only some of the questions may do so. The form reproduces the questions as summarised at the end of the paper and allows you to enter comments in a box after each one. At the end of the form, there is also space for any general comments you may have.

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We may also (i) publish responses on our website (either in full or in some other way such as re-formatted or summarised); and (ii) attribute comments and publish a list of respondents' names.

In order to access any box for comments, press the shortcut key F11 and it will take you to the next box you wish to enter text into. If you are responding to / commenting on only a few of the questions, continue using F11 until you arrive at the box you wish to access. To return to a previous box press Ctrl+Page Up or press Ctrl+Home to return to the beginning of the form.

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# Summary 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)

## Comments on Question 1

Yes, but there will be some crossover principles. There are very good personal reasons why people choose their status in relationships and the law must reflect this.

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

(Paragraph 3.101)

## Comments on Question 2

While one size does not fit all, if the aim is to make provision for as many cohabitants as possible, there will be merits in widening the definition. Making reference to marriage and civil partnerships does not seem forward thinking.

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)

## Comments on Question 3

Yes, something along the lines of domestic relationship may be a broader definition.

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)

## Comments on Question 4

Societal norms would be supportive of this proposition.

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)

**Comments on Question 5**

We would be opposed to the imposition of a qualifying period. Each case will arise on its own merits, facts and circumstances and the overarching principles should be fairness and promoting access to justice.

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

(Paragraph 3.101)

**Comments on Question 6**

We would welcome the Courts having the ability to extend a time bar case in cohabitation claims, as they do in reparation claims.

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)

**Comments on Question 7**

A list of features should not preclude a case proceeding, which always should be heard on its own facts and circumstances. Illustrative characteristics may preclude cases. We do not want this to be prescriptive. Judicial knowledge is such that this would be implemented as guidance, but any publicity campaign for the public, in raising their awareness, would have to ensure that it is a guidance and not definitive features. Current issues regarding public knowledge and perceptions should inform how this information campaign could better inform the public.

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

(Paragraph 3.101)

**Comments on Question 8**

The public resources in proceeding with this would seem disproportionate to the gain. We anticipate there will be a lack of public knowledge and engagement.

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

(Paragraph 4.34)

**Comments on Question 9**

Not to our knowledge.

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

(Paragraph 4.34)

**Comments on Question 10**

Yes, "housekeeping allowance" has traditional marriage values and connotations.

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

(Paragraph 4.34)

**Comments on Question 11**

We have no additional modifications to propose.

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)

**Comments on Question 12**

A fairness argument lends itself to the conclusion that a combination of factors (a) to (d) should be adopted.

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)

**Comments on Question 13**

No. However, we recognise the legislation in relation to child maintenance by a natural father and submit that such a provision is a factor to be taken into consideration.

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)

**Comments on Question 14**

We support the consideration of a combination of all of the factors (a) to (d) if the paramount principles are to focus on fairness and reasonableness.

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

(Paragraph 5.92)

**Comments on Question 15**

No. The current obstacle initially is time, (12 month barrier from date of separation), thereafter the current provisions are limiting assessment to economic advantage and disadvantage which are very challenging to quantify and ultimately, the relief of a cash settlement may not be adequate or sufficient to truly reflect a fair and reasonable sharing.

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)

**Comments on Question 16**

Yes, all of the above (a) to (c).

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)

**Comments on Question 17**

Yes, this would produce a result which reflects fairness and reasonableness in relation to the issue.

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

(Paragraph 6.35)

**Comments on Question 18**

Yes. The current legislation, without a provision to allow the exercise of judicial discretion for relief of this time limit is a barrier to settlement of claims and ultimately applies pressure to litigate. We acknowledge the equivalent principle of a clean break between parties to a marriage and believe that it is in no-one's interest to delay unreasonably. Allowing judicial discretion to waive a time limit based on facts and circumstances will always be a safety net for the minority.

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

(Paragraph 6.35)

**Comments on Question 19**

We would support the extension of the time limit, proposing a two year limit is provided for. This gives sufficient time for vouching, negotiations and extra-judicial settlement, while supporting a clean break deadline that is more workable, realistic and achieves fairness.

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

(Paragraph 6.35)

**Comments on Question 20**

Yes, for the reasons previously stated, we would welcome the provision of judicial discretion to allow late claims.

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

(Paragraph 6.35)

**Comments on Question 21**

Yes, primarily because this promotes fairness.

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)

**Comments on Question 22**

On cause shown would ensure that the principle of fairness is the paramount consideration. If this is the overarching principle driving legislative change, then it is hard to argue for a backstop, which will prevent a claim. There will inevitably be cases on the fringe of a spectrum but if the concept is to cast the net wide, then removing barriers instead of imposing them will have the greatest impact.

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)

**Comments on Question 23**

Yes, this would be a useful tool for negotiations, allowing extra time by mutual agreement.

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)

**Comments on Question 24**

We would submit that this is another useful tool, but should not be considered in isolation. Each case considered on its own facts and circumstances will always give the most equitable solution.

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)

### Comments on Question 25

Consideration of both (a) and (b) would allow the widest judicial discretion and is likely to produce the most equitable outcome..

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)

### Comments on Question 26

The current legislation is causing barriers to settlement and inequality of settlement. As with any financial settlement, there are always legal and financial implications but that leaves parties to make an informed choice about the remedies available to them. Extending the legislation to make the remedies more accessible will inevitably mean the potential for more litigation, but SCTS is there to serve, not to place impediments in the way. Extending remedies will also require associated guidance from the Scottish Legal Board but there is already a baseline knowledge of remedies and clawback provisions in place for marriages that are transferrable to this scenario. The Scottish Government, in modernising this inadequate legislation, will be seen to be forward thinking, meeting the needs of modern families and removing barriers to fairness and reasonableness.

### General Comments



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Thank you for taking the time to respond to this Discussion Paper. Your comments are appreciated and will be taken into consideration when preparing a report containing our final recommendations.