

Response to *Aspects of Family Law Discussion Paper on Cohabitation* (Scottish Law Commission, DP No 170)

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General

We consider it to be an appropriate time to review the law of cohabitation and, in particular, the legislative provisions relating to cohabitation in the Family Law (Scotland) Act 2006. There have been significant changes in society over the past fourteen years and it is important to take account of these in considering reforms to the law.

In the context of reform in this area, it is important to have in mind one of the law's crucial purposes: to protect people and their interests and to provide appropriate remedies. The current law regarding cohabitation was introduced to provide financial protection for cohabitants and to avoid such individuals suffering financial insecurity. Of course, it is true that if the rights of cohabitants are enhanced, this will inevitably lead to obligations being imposed upon others, and reformers should be mindful of this. However, the policy objective of protection for cohabitants may be considered to take priority, at least in certain respects. In addition, if changes are made to the law and parties enter into a relationship that qualifies for cohabitants' rights, then it may be said that they are impliedly agreeing to be subject to the obligations that may be imposed under the regime.

It is important, however, that the relevant law (including at the time of reform) should be widely publicised in order to inform the public of the changes and to make sure that parties are aware of the implications and potential consequences of their actions in the context of personal relationships. The level of misunderstanding in this respect regarding the current law, as referred to in the Discussion Paper, is deeply concerning, and it would be helpful if this could be addressed now (albeit that we understand this is not the role of the Scottish Law Commission). In terms of future changes, we wonder if some consideration should be given as to whether parties could be informed of the possibility that by entering into a cohabiting relationship this may give rise to significant legal consequences when they, for example, purchase or lease a home together.

As will be noted below, we are generally supportive of the approach taken by the Scottish Law Commission in seeking reform of the law of cohabitation and we would be happy to engage further as the project progresses. However, some members of the group were less convinced by the arguments for assimilating the rights of cohabitants to those of spouses and civil partners (CPs) on divorce or dissolution, and we hope that these concerns are reflected in our comments below. One of the chief concerns in this regard is the formal manner in which the status of marriage or civil partnership (CP) is constituted compared with the informal manner in which a cohabitation relationship is constituted. Formalities serve, *inter alia*, a valuable cautionary function and aid legal clarity by drawing a bright line between qualifying and non-qualifying relationships. Thus, in spite of the *de facto* resemblance of many cohabitation and marital/CP relationships in point of the pooling of resources, mutual reliance, economic advantages and disadvantages, etc., the fact remains that formalised relationships are, by definition, subject to certain constitutive protections which are lacking in the context of non-formalised relationships, which goes some way towards justifying the more onerous financial provision obligations associated with marriage/CP. Of course, many of the arguments concerning the need for protection against financial hardship and economic disadvantage carry as much normative weight as regards cohabitants as they do in relation to spouses/CPs, but the financial provision obligations imposed on spouses/CPs go beyond those particular protective aims and so should arguably be imposed sparingly. It is also possible that to impose the same financial consequences

on married couples/CPs and cohabitants would run counter to the law's increasing emphasis on the diversity of adult relationships, as evidenced, e.g., by the recognition of same-sex marriage. On a related note, it might be argued that the increasingly broad range of options open to a couple wishing to formalise their relationship reduces, rather than increases, the necessity of enhancing cohabitants' rights. Again, however, it should be emphasised that these arguments reflect a minority view.

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)

We consider there to be a strong argument in favour of a combined regime; however, there will need to be particular rules to take account of the fact that cohabiting relationships differ from marriage and CP in some respects (see our answers to questions below for further details). For example, the absence of formality marking the commencement of a cohabiting relationship, compared to both marriage and CP, means that it is more difficult to define a qualifying cohabiting relationship and to determine when it commences. The lack of a clear moment when a qualifying cohabitation relationship begins (in some cases) may lead to difficulties with determining exactly when the joining of property occurs for the purposes of property division/sharing.

Likewise, the relative absence of formality at the end of a cohabiting relationship, compared to marriage and CP, may justify a different approach regarding when an application for provision requires to be made. Spouses and CPs will, therefore, still have certain advantages in terms of legal consequences.

The precise relationship between cohabitation and marriage (and CP) is a very difficult and wide-ranging issue with many policy factors involved. It also impacts upon the remaining questions below. We do note, however, that the justification for treating cohabitation differently from marriage may be weaker than in 2006 due to a number of societal developments including the increase in the number of people cohabiting (despite the availability of other options to formalise relationships). Furthermore, there is a widespread misconception amongst the public that long-term cohabiting relationships give rise to legal consequences approximating marriage. If this is considered to reflect what the public considers to be a fair and desirable outcome it supports bringing cohabitation more into line with marriage and CP.

Of course, some couples have deliberately avoided committing to the formalities of marriage or a CP while others have simply fallen into cohabitation. Cohabitation therefore covers a range of different relationships meaning that an alternative regime to marriage/CP could be appropriate but, as noted above, we err towards the same system applying. This is supported by the general rationale of protecting cohabiting parties, which might be especially applicable in scenarios where e.g. one member of a couple wished to marry and the other one did not or when one or both of the parties mistakenly assume that they are protected as a consequence of their cohabiting relationship. It could be possible to contract out of (some or all of) the default consequences of a qualifying cohabiting relationship, if the couple did not wish to be bound by them, but the notion of protection is important in this context too (this issue is discussed further below at question 24).

If the same regime applies to cohabitants and married couples/CPs, we think consideration should be given to the relationship between a cohabitant's rights to financial provision and any concurrent financial rights arising from an existing marriage/CP (specifically on the issue of whether the marriage would be prioritised over the cohabitation in terms of financial provision). Situations where a cohabitation relationship begins when there is a pre-existing marriage/divorce pending will not be uncommon, and we think that some legislative steer would be helpful to give guidance to the courts as to how to deal with any competing claims (although we would caution against any strict rule e.g. a requirement for the prior subsisting marriage/CP to have ended before cohabitation rights arise). We note that at the present time the claims of a surviving spouse or CP in relation to a deceased's intestate estate are met before any claim arising from the cohabitant

of the deceased is met per Family Law (Scotland) Act 2006, s 29(2) and (10). i.e. a surviving cohabitant can only claim from the deceased's "net intestate estate", and as such, if the deceased was also party to a marriage or CP, the claims of the surviving spouse or civil partner to prior rights and legal rights are met first, thus leaving a net intestate estate, from which the surviving cohabitant's claims can then be met. So, the law as it stands already provides: (i) a person may be a party to a marriage/CP on the one part and a party to a cohabiting couple; (ii) the marriage/CP ranks above the cohabitation. Depending on the extent to which cohabitation is more fully defined, and the extent to which financial provision for cohabitants is to be augmented, the principle of simultaneous marriage/CP on the one hand, and cohabitation on the other, and the principle of ranking may need to be reviewed/more clearly defined, including in the context of the cohabitation ending otherwise than by death. The Commission ought to consider the extent to which a prior subsisting marriage/CP will have a bearing on the determination of the commencement date of a cohabitation for the purposes of financial provision.

A final point is that it is important to consider human rights issues (especially ECHR Arts 8 and 14) when thinking about the law that should apply to cohabitation and the justification for maintaining different systems. It may be simpler to meet human rights obligations by bringing marriage/CP and cohabitation closer together. Keeping separate regimes arguably prioritises one family form over another and the appropriateness of this can be questioned in light of the societal changes referred to above. In reforming the law in this area, the Commission should consider the extent to which Arts 8 and 14 case law supports equal rights for cohabitants and spouses/CPs, and also the broader consequences of having a joint regime.

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

(Paragraph 3.101)

Yes. Although (as the Discussion Paper explains) the definition has not caused many difficulties in practice we are of the view that the definition is confusing and outdated.

On the issue of whether the term "cohabitant" should be completely replaced with an alternative (e.g. de facto couple), we think that consideration should be given (a) to the fact that the term is widely understood by the general public (although the legal consequences of cohabiting do not appear to be) and (b) to whether there is some inherent value in retaining a term that is currently used and understood beyond legal circles.

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)

We note that other jurisdictions examined in the Discussion Paper tend to avoid using the terminology of "husband and wife" and avoid comparisons with spouses when defining cohabitants (or equivalent) in legislation.

Identifying a suitable definition is obviously a critical issue but is very difficult. We are of the view that the definition should reflect the policy objective of the law if possible. Perhaps it could refer to "two individuals in a committed and inter-dependent relationship" or "intimate partners in a committed and inter-dependent relationship." We think there may be some merit in referring to "a couple" or "intimate partners" in the definition and/or expressly excluding family members to reach the meaning sought. We note that the term "intimate partners" appears in domestic abuse legislation and the courts are therefore likely to be familiar with the concept (although some may argue that it is ambiguous).

There is also an argument in favour of using the terminology of "de facto couple" and "de facto relationship" (as in Australia) or some equivalent to this. In part, this is because the term "cohabitant" itself

may become misleading if it is not to be limited to people living together. For this same reason, we are sceptical about the term “genuine domestic basis” as the word “domestic” perhaps implies that the couple should be living together. We are also of the view that the word “enduring” in “enduring family relationship” would imply that the relationship must be long-standing in order to qualify.

We do have some disappointment that the Scottish Law Commission is not considering rights and obligations in “platonic” relationships involving some element of inter-dependency, such as between family members. This is something that could be considered in the future, albeit that there may be some broader issues regarding the imposition of obligations in this area.

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)

We are unsure as to whether this is necessary but for the sake of certainty it is not harmful to include it. Indeed, depending on the definition, the absence of an express provision could implicitly extend protection to other family members. There should be equivalence with marriage on this point.

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)

If the rights of cohabitants are to be expanded, we see some merit in introducing a required time period in order to access remedies under the 2006 Act. We think that extension of cohabitants’ rights gives rise to a stronger argument for a qualifying period and note that many of the jurisdictions referred to in the Discussion Paper have qualifying periods in the region of two or three years.

However, we think that there is a need for some flexibility in this area and also a recognition that, as with marriage, a qualifying cohabiting relationship could be very short.

Perhaps a suitable approach would be to introduce a rebuttable presumption that after a certain period of cohabitation (three years may be suitable) parties are deemed to be in a qualifying relationship but that parties who have cohabited for a shorter period of time can still qualify on cause shown. There could be statutory guidance (perhaps including a list of factors) to assist a court determining the existence of a qualifying relationship if the relationship is less than three years or if there has been a break in the relationship during the three-year period. One of these factors could be the existence of children of the relationship or, alternatively, there could be a separate rebuttable presumption that the parties are in a qualifying relationship if the parties have a child/children. While we are wary of treating children as markers of commitment and creating a hierarchy of relationships, we recognise that the existence of children increases the likelihood of financial interdependency and that the need for financial protection may be greater if one partner has made career/income sacrifices to raise a child/children.

Some members of the group took the view that the extension of rights gives rise to an argument for a strict qualifying period and we can all see some merit in the certainty of a strict qualifying period for certain marriage-equivalent rights. We would also encourage the Commission to consider any unintended consequences that may arise from introducing a qualifying period. Contrast the following possible approaches: (1) cohabitants enjoy marriage-equivalent rights, but a strict minimum period of cohabitation

of three years is necessary for two parties to qualify as cohabitants as regards *some* of those marriage-equivalent rights, for instance an equivalent to the right to fair division of the net value of the “matrimonial/partnership” property; or (2) cohabitants enjoy marriage-equivalent rights, but a strict minimum period of cohabitation of three years is necessary for two parties to qualify as cohabitants for the purposes of *any* right to financial provision. The latter strict approach may have the unintended consequence of depriving cohabitants of rights that they would have enjoyed under the old regime (i.e. the current law), where the relationship of “cohabitation” was more loosely defined. For instance, if P and D have cohabited for a mere two years, they would, under approach (2), be deprived entirely of any statutory financial provision remedies, whereas under the current law, P and D would still have the opportunity to claim under section 28 of the 2006 Act. Approach (1) is arguably more nuanced because it would define a qualifying cohabitation relationship more strictly but only for the purposes of certain rights. In short, if a minimum period of cohabitation is introduced, that minimum period should perhaps not always apply.

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

(Paragraph 3.101)

Yes, as noted above, if more protection is to be made available to former cohabitants (akin to marriage/CP) then there is a stronger argument for a required time period of cohabitation/the relationship. But this limit should not be so arbitrary as to exclude all other relationships that have lasted for a shorter period.

If cohabitation is to be treated more like marriage, with default rules to apply regarding provision at the end of the relationship, there is a need to consider how and why exceptions to the rule are to be made available for cohabitants. Flexibility could be achieved by allowing a range of factors involving the relationship to be taken account of as “special circumstances” (see, e.g., the sorts of circumstance mentioned in Family Law (Scotland) Act 1985, s 10(1) and (6)) in determining the precise remedies to be given.

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)

It may be useful to have a list of factors, as in other jurisdictions, but the list should be non-exhaustive and it ought to be made clear that no one or more factor(s) is determinative. That said, there may be an argument for placing greater weight on the degree of financial interdependence between the parties (assuming that the principal policy objective of the reformed regime is to correct financial imbalance/inequity, arising from interdependency, at the end of the relationship).

The definition could also expressly exclude e.g. platonic relationships. If rebuttable presumptions were introduced (as suggested above) consideration would of course need to be given as to how these would interact with a list of factors.

One factor that may be particularly important to include is whether the couple share a household; however, this should still only be an indicative factor and not determinative of there being, or not being, a qualifying relationship. The definition should not be limited to couples living together – we recognise there are cohabitants who do not live together but nevertheless deserve to be entitled to remedies under the legislation due to their particular circumstances and the nature of their relationship.

Although we appreciate that a list of factors would be non-exhaustive and non-determinative, the selection of factors is still symbolically significant insofar as it may indicate how the state views particular relationships and the features that characterise certain relationships. Including the existence of a sexual

relationship, for example, clearly signals that the state deems sexual intimacy as a marker of commitment and as worthy of protection (and this is not altogether uncontroversial).

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

(Paragraph 3.101)

We do not consider this to be a useful idea due to the issues mentioned in the Discussion Paper, including the incurring of expense without sufficient advantage. Making this change would bring cohabiting relationships closer to civil partnerships in terms of form. As such, a change along these lines would need to be considered in light of impending changes to civil partnerships (and see the Civil Partnership (Scotland) Bill in this regard).

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

(Paragraph 4.34)

As academic lawyers, we do not have direct knowledge of difficulties in practice and we defer to the views of practitioners in this area.

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

(Paragraph 4.34)

Yes, we think the language in the sections should be modernised. In particular, the references to “any allowance” for “household expenses” could be usefully updated (unless there is evidence to suggest that household/housekeeping allowances are still used to any significant extent). The same applies to s 26 of the Family Law (Scotland) Act 1985. The Commission may wish to consider if there is a gendered dimension here as women are (presumably) more likely to be recipients of so-called “housekeeping allowances”.

If cohabitation is to approximate marriage or civil partnership more closely (as far as legal consequences at the end of the relationship are concerned), it may be desirable to further align the wording in s 27 of the 2006 Act with s 26 of the 1985 Act, so that the provision in the 1985 Act is also modernised. (We note too that the residence where the parties live together is expressly excluded by s 27(3) of the 2006 Act but is not referred to in s 26 of the 1985 Act.)

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

(Paragraph 4.34)

No.

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)

The answer below is provided on the assumption that cohabitants would not be granted full marriage/CP-equivalent rights. If cohabitants were to be given marriage/CP-equivalent financial rights, there would be a strong argument for the policy underpinning those rights to mirror that of the 1985 Act i.e. equal sharing/facilitation of a clean break (otherwise there would be different policy underpinnings for an identical regime – the logic of this could be questioned.) The mirroring of the 1985 Act would consist not only of the same principles and policies applying but of those principles and policies being arranged in a hierarchy, and of certain principles corresponding to certain orders, etc.

On the assumption, then, that a different regime would apply, all of the policies listed above are, or will be, relevant to some extent – one of them alone would be insufficient. The necessity of (d) in light of the Child Support Act 1991 and alimentary provision needs to be considered. Perhaps (a) could be re-phrased slightly to read “compensation for economic loss sustained during or in the interests of the relationship” or “correcting economic loss sustained during or in the interests of the relationship.” If the sole policy underpinning were (b) relief of need, this may exclude wealthier applicants.

Again, if cohabitants’ rights are enhanced but not completely assimilated to those of married couples/CPs, some attention should be given to what might be included within each of the policies underpinning this reform and whether there is to be any form of hierarchy. Although all of the policies listed above are relevant, it seems to us that correcting financial loss or economic imbalance sustained during or in the interests of the relationship is the primary objective of the planned reform and the policy that comes through most strongly in the Discussion Paper. If this primary objective is adequately met, then the other policy objectives would, in some cases at least, also be achieved e.g. relief of need/sharing the economic burden of childcare.

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)

No. We agree with the arguments in the Discussion Paper regarding this matter. We are particularly concerned with how the current distinction negatively affects same-sex parents and wonder if it is subject to challenge on human rights grounds. Removing the distinction is also better aligned with policies in this area.

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)

As indicated above, our preference is that the regime that applies to spouses/CPs is extended to cohabitants. If there is not support for this, however, then we strongly support the amendment of s 28. The test of “fairness” set out in *Gow v Grant* is insufficient and vague and subsequent case law indicates that there is a clear need for guiding principles/applicable factors. Clear guiding principles would reduce the scope for judicial discretion, offer considerably more certainty and possibly ensure that the s 28 provisions are used more frequently. We note that many of the jurisdictions referred to in the Discussion Paper use a list of relevant (not prescriptive) factors and we think this is a sensible approach.

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

(Paragraph 5.92)

No. As noted above, we are in favour of extending cohabitants’ rights and see extension of the current remedies as an inevitable part of this. The current remedies are widely regarded as inadequate and insufficient.

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)

We would like the court to have the same remedies available as under s 8 of the 1985 Act. In other words, we would like the court to have as broad a range of orders available to them as possible. If there is not support for such a significant change then, at a minimum, we think that the court should have the remedy of a property transfer order available to it as, along with a capital sum payment order, this is the most commonly applied for order in divorce/dissolution cases. PTOs may be especially useful to cohabitants who wish to remain in the family home with children of the relationship and ensure stability. Extending the range of orders available to the court will assist with certainty and improve the quality/specificity of the advice that lawyers can give to their clients. This is likely to have a positive knock-on effect in terms of the numbers of individuals who use the regime.

We also agree that the court should be able to consider the resources available to the parties when making an award/s.

If explicit provision is made for the payment of periodical allowances, the Commission may wish to consider whether to include a proviso that a capital sum payment/property transfer order is preferable to a periodical allowance (similar to that under s 13(2) of the 1985 Act). The appropriateness of such a provision in the context of s 28(2)(b) (or the equivalent new provision) requires consideration as periodical

allowances are generally, but not exclusively, more suited to childcare situations. We note that s 28(2)(b) does not explicitly refer to periodical allowances and that this has caused some confusion and attracted academic commentary.

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)

Yes. As noted above, we are in support of adding such a provision. It seems logical to include it, especially if the range of remedies is expanded. We note that other jurisdictions seem to make express provision for this.

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

(Paragraph 6.35)

We consider it necessary to strike a balance between ensuring protection is available to those who need it and ensuring that parties are able to move on with their lives, and take the view that the current one-year time limit does not strike an appropriate balance (especially in light of the lack of public awareness of the time limit). We also think that extending the time limit is compatible with the extension of rights and protection to cohabitants (if this route is taken) and note that there may be a stronger argument for a lengthier time limit for cohabitation claims (as compared with other legal claims) due to the emotional trauma of relationship breakdown and the potential for hostility/complications if the couple have children. We take the view that the current limit produces overly harsh results, and we are particularly convinced by the argument in the Discussion Paper that the time limit may be especially problematic where there is a power imbalance in the relationship/domestic abuse.

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

(Paragraph 6.35)

We would suggest a new time limit in the region of 18 months to two years but with discretion to allow late claims. We note that many of the jurisdictions referred to in the Discussion Paper have a time limit in the region of two years.

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

(Paragraph 6.35)

Yes. We still think that it is sensible to avoid a hard-line rule in this context (due to the emotional and practical complexities of relationship breakdown) and that some flexibility would be beneficial.

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

(Paragraph 6.35)

Yes. Indeed, if the time limit is not extended, it is even more important to allow discretion for late claims (for the reasons outlined in above answers) to avoid overly harsh results.

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)

We think that the court is most likely to be familiar with the concept of “exceptional” or “special circumstances” in the context of relationship breakdown (e.g. 10(6) of the 1985 Act) and would suggest that a non-exhaustive list of “exceptional circumstances” could be provided for when, for example: --

- the persons are engaged in “(a) family dispute resolution with a family dispute resolution professional, or (b) a prescribed process.” (as in British Columbia)
- where “hardship would be caused to the party or a child if leave were not granted” (Australia)
- where there is evidence of domestic abuse (to be established on civil standard of proof)

Although we are generally in favour of flexibility, we think that a backstop would help to allay concerns about any extension making it difficult for cohabitants to move on and may therefore be beneficial. We would suggest a backstop of three years if the time period is extended to two years or, alternatively, one year beyond the legislative time limit (e.g. if the time limit is kept at one year the backstop should be two years).

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)

Yes. We note that the Discussion Paper does not state whether such express statutory provision would be instead of, or in addition to, any extension to the time limit – we assume the latter but would stress nonetheless that we do not think that express provision should be considered as an alternative to a general extension. The Commission may wish to consider how express provision to allow parties to extend the time period would interact with any backstop period if this were introduced (e.g. would parties be able to contract out of the backstop period?), and would suggest that the Commission perhaps look to the law of prescription on this point (we are mindful of the changes that are being introduced in this area re: contracting out of prescription).

On a separate note, we consider that there may be value in an express statutory provision that cohabitants’ rights in statute are without prejudice to any rights at common law (e.g. unjustified enrichment). At the same time, this need may to a large extent have been obviated by the decision in *Pert v McCaffrey* [2020] CSIH 5, 2020 SLT 225. Furthermore, expressly providing in a statute that cohabitants’ statutory rights are without prejudice to any rights that they might enjoy at common law under, say, unjustified enrichment may have unintended consequences. For instance, such a statutory provision might be taken to suggest that a remedy under unjustified enrichment is always subsidiary to a remedy under statute in the absence of an express statutory provision to the contrary. Although such an argument would not necessarily be a strong one – statutes, unlike cases, set down fact-specific rules rather than principles and so a statutory provision specifically concerned with subsidiarity in the context of cohabitants’ rights should not have a bearing on the doctrine of subsidiarity outside that context – it should be borne in mind that including a statutory provision of the sort just mentioned might lend some (albeit specious) credibility to that argument.

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)

Yes. We think that the regime for cohabitants should be brought more closely in line with that for spouses and civil partners and therefore consider that the court should have similar powers as they have under section 16 of the 1985 Act (and that similar principles should apply). We would stress, however, that there is a need to ensure public awareness of such agreements (which are likely to become more common if rights are extended).

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)

Yes. Such provision is essential to ensure that vulnerable parties are protected and that the court has the authority to take any power imbalances between the parties into account. We also take the view that express statutory provision for cohabitation agreements would strengthen the case for extension of the time limit (in order to ensure adequate time for the potential review of such agreements and fairness to vulnerable parties). We note that many of the jurisdictions referred to in the Discussion Paper have statutory provision along these lines and that several do not simply have one test for setting aside or variation. A test could combine both (a) and (b) above. We are concerned that applying (a) alone would mean overlooking (perhaps unforeseen) changes arising during the relationship that render one party particularly vulnerable (if agreements are made prior to the cohabitation beginning, as they often are). In other words, any provision should be drafted to allow the court to consider as wide a time period as possible and should reflect the fact that cohabitants may enter into agreements prior to cohabitation.

Consideration should also be given as to whether the same test will apply to both pre-cohabitation agreements and agreements made on relationship breakdown.

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)

We do not have any further information or data to bring to the Commission's attention.