

# Scottish Law Commission submission of 18 January 2023

## PE1973/C: End the use of Sheriff's Discretion when ruling on civil cases and provide clear legal guidance on division of assets

The Citizen Participation and Public Petitions Committee seeks information “on what consideration has been given (by the Scottish Law Commission) to the use of judicial discretion as part of the review on aspects of family law”.

The Commission's work on reform of the law relating to cohabitants' claims on separation (sections 25 to 28 of the Family Law (Scotland) Act 2006) started in the summer of 2018 and was completed on publication of the Report on Cohabitation (Scot Law Com No. 261) on 2 November 2022: [Cohabitation Report and draft Bill - \(Report No. 261\)](https://www.scotlawcom.gov.uk) ([scotlawcom.gov.uk](https://www.scotlawcom.gov.uk)).

We gave careful consideration throughout the Cohabitation phase of the Aspects of family law project to the questions of what financial provision should be available to cohabitants and the extent of the court's discretion in relation to outcomes. The issue of judicial discretion was considered, in particular, in relation to the test for the making of orders under (what is now) section 28 (see chapter 5 of the Report); the definition of “cohabitant” (see chapter 3); and the time limit within which a claim must be made (see chapter 6). The focus of this Petition is upon the approach to claims for financial provision, so we will focus in our response on the issues discussed in chapter 5 of the Report.

The breadth of discretion afforded to the court in claims for financial provision under section 28 of the 2006 Act has been the subject of judicial comment since the 2006 Act was enacted. The UKSC, in the leading case of *Gow v Grant* 2013 SC (UKSC) 1, concluded that the underpinning principle of the legislation was “fairness to both parties”. Referring, in *Whigham v Owen* 2013 SLT 482, to the “notion of fairness in the absence of a proper economic context”, Lord Drummond Young expressed some unease, commenting that “this is perhaps merely an aspect of the breadth of the discretion that the court must exercise”. Sheriff Principal Pyle, in *Smith-Milne v Langler* 2013 Fam LR 58, commented on “the difficulty for family law practitioners in advising their clients what awards the court is likely to make” and observed that UKSC

“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 ...”. Similar concerns have been raised more recently, by Sheriff Holligan in *HAT v CW* [2020] EDIN 37 and Sheriff Principal Pyle in *Duthie v Findlay* 2020 Fam LR 141. These criticisms are discussed in paras 5.8 to 5.16 of the Cohabitation Report.

In the Discussion Paper on Cohabitation (Scot Law Com No.170, 2020) [Aspects of Family Law - Discussion Paper on Cohabitation \(DP No 170\) \(scotlawcom.gov.uk\)](https://www.scotlawcom.gov.uk/Aspects-of-Family-Law-Discussion-Paper-on-Cohabitation-DP-No-170), we noted the difficulties identified in relation to the existing legislation (see discussion at paras 5.62 to 5.68). We noted that the test in section 28 of the 2006 Act and the breadth of judicial discretion that it affords are widely regarded as unhelpful, and that a more principled approach, which recognised the equal value of contributions made during the relationship (whether financial or non-financial), would be welcomed. We therefore sought consultees’ views on the policy underpinning awards for financial provision for cohabitants (Q.12) and an improved test for determining what order, if any, should be made (Q.14).

Respondents to the Discussion Paper echoed the concerns discussed above. Those responses are summarised in paras 5.31 to 5.34 of the Cohabitation Report. Following consideration of these responses, it was clear there was limited support for a property sharing regime for cohabitants; there was no substantial support for a policy of equalising cohabitants’ economic positions at the end of the relationship; but there was support for treating cohabitants fairly, having regard to the facts and circumstances in each case.

We were persuaded of the need for greater certainty and clarity in the legislation, within a framework based on guiding principles, underpinned by a policy of fairness to both parties (para 5.35 of our Report). The first of those guiding principles builds upon the language of section 28(3) of the 2006 Act, which provides that the court must take account of economic advantage derived by the defender from the pursuer’s contributions and of economic disadvantage suffered by the pursuer in the interests of the defender or any relevant child. We recommend a principle that gives the courts and advisors guidance as to what is to be done once economic advantage or disadvantage is identified; that is, to **fairly** distribute the advantage and **fairly** compensate for the disadvantage. To aid that exercise, factors relevant to the decision are set out in the draft Bill. Those factors are the extent to which there has been a change, over the course of the cohabitation, in the economic circumstances of either or both cohabitants and, if there has been such

a change, the extent to which the cohabitant has derived economic advantage from the other's contributions, or has suffered economic disadvantage in the interests of the other or a relevant child (see Report para 5.58, Recommendations 6 and 7(1) and draft Bill sections 28B(1)(a) and 28C(1)). Any award made must also be reasonable having regard to each of the cohabitant's resources (draft Bill section 28(2)(b)).

The policy underpinning our recommended reforms is to achieve an outcome that is fair to both parties. This approach is consistent with the weight of opinion expressed to us by stakeholders and consultees, including respondents to the Discussion Paper, and strikes the correct balance, we think, between predictability of outcomes and not unduly fettering the exercise of judicial discretion (see paras 5.40 to 5.42 and 5.57 to 5.58 of the Report).

I trust that this is of assistance.