

Citizen Participation and Public Petitions Committee

19th Meeting, 2022 (Session 6), Wednesday
21 December 2022

PE1973: End the use of Sheriffs Discretion
when ruling on civil cases and provide clear
legal guidance on division of assets.

Petitioner	Sandy Izatt
Petition summary	<p>Calling on the Scottish Parliament to urge the Scottish Government to review the Family Law (Scotland) Act 2006 and provide greater clarity on the division of assets in cases of cohabitating couples who are separating by:</p> <ul style="list-style-type: none">• Removing the use of Sheriffs Discretion rulings in civil cases;• Providing clear legal guidance to the Law Society of Scotland on the division of assets for cohabitating couples;• Allowing appeals to be heard where it is determined that a Sheriff has the rule of law wrong but have used their discretion to prevent an appeal, at no cost to the appellant; and• Publishing information on what resources have been allocated to provide clear legal guidance.
Webpage	https://petitions.parliament.scot/petitions/PE1973

Introduction

1. This is a new petition that was lodged on 21 September 2022.
2. A full summary of this petition and its aims can be found at **Annexe A**.
3. A SPICe briefing has been prepared to inform the Committee's consideration of the petition and can be found at **Annexe B**.
4. While not a formal requirement, petitioners have the option to collect signatures on their petition. On this occasion, the petitioner elected not to collect this information.

5. The Committee seeks views from the Scottish Government on all new petitions before they are formally considered. A response has been received from the Scottish Government and is included at **Annexe C** of this paper.
6. A submission has been provided by the petitioner. This is included at **Annexe D**.
7. Members may wish to note that the Scottish Law Commission published their [Report on Cohabitation and draft Bill](#) on 2 November 2022.

Action

The Committee is invited to consider what action it wishes to take on this petition.

Clerk to the Committee

Annexe A

PE1973: End the use of Sheriffs Discretion when ruling on civil cases and provide clear legal guidance on division of assets.

Petitioner

Sandy Izatt

Date lodged

21 September 2022

Petition summary

Calling on the Scottish Parliament to urge the Scottish Government to review the Family Law (Scotland) Act 2006 and provide greater clarity on the division of assets in cases of cohabitating couples who are separating by:

- Removing the use of Sheriffs Discretion rulings in civil cases;
- Providing clear legal guidance to the Law Society of Scotland on the division of assets for cohabitating couples;
- Allowing appeals to be heard where it is determined that a Sheriff has the rule of law wrong but have used their discretion to prevent an appeal, at no cost to the appellant; and
- Publishing information on what resources have been allocated to provide clear legal guidance.

Previous action

I have contacted my MSP David Torrance several times regarding this issue. He has been unable to obtain any information on the progress of the relevant guidance.

I have also sought information and guidance from a solicitor, QC and The Law Society of Scotland. They have stated that they await the Scottish Government guidance on this issue.

Background information

For years the lack of clarity in the law regarding the division of assets of cohabitating couples has allowed perhaps unnecessary cases to take up valuable court time.

Clarity on this issue could resolve these matters without a court hearing, saving both parties considerable costs and, in certain cases, legal aid funding.

Providing clear legal guidance would also prevent the likelihood of solicitors unnecessarily prolonging cases to gain more revenue.

My MSP advised me to create this petition as he was not getting answers on these issues. We have sought answers for well over a year and no response has been issued. The lack of clarity causes unnecessary stress, anxiety and confusion to the separating couple at a time where emotions are already elevated. This can cause mental health problems adding stress to other services.

Annexe B

The logo for SPICe (The Information Centre) is a purple rounded rectangle. The text 'SPICe' is in white, with 'The Information Centre' and 'An t-Ionad Fiosrachaidh' in a smaller white font to its right.

The Information Centre
An t-Ionad Fiosrachaidh

Briefing for the Citizen Participation and Public Petitions Committee on Petition PE1973: End of the use of Sheriffs Discretion when ruling on civil cases and provide clear legal guidance on division of assets, lodged by Sandy Izatt

Brief overview of issues raised by the petition

The regime currently applicable to cohabitants' property and finances on relationship breakdown is found in the [Family Law \(Scotland\) Act 2006](#) ('the 2006 Act'). The key provisions include:

- **section 28**, which entitles either partner to a cohabitating relationship that has ended otherwise than by death, to make a financial claim against their ex-partner. There is a strict time limit of one year from the end of the relationship to start legal proceedings.
- **section 25** which, when read in conjunction with section 4 of the [Marriage and Civil Partnership \(Scotland\) Act 2014](#), defines 'cohabitant' for the purposes of the other sections of the 2006 Act which apply to cohabitants. The main requirement is that the couple must be, or have been, living together as if they were married. No express minimum qualifying duration of cohabitation is set out in section 25. However, in determining whether a couple are cohabitants, the court may consider as one relevant factor how long they lived together.

The regime for cohabitants is currently much more limited in scope than that which exists for married couples and civil partners under the [Family Law \(Scotland\) Act 1985](#), sections 8-17. For example, significantly, there

is no specific provision in the 2006 Act relating to how the family home should be treated on separation of the cohabiting couple.

For financial claims by cohabitants under section 28 of the 2006 Act, the court has a wide discretion as to whether it awards and how much it awards. Broadly speaking, an award by the court is based on the idea that one person might have suffered an economic disadvantage in terms of their contributions (financial and otherwise) during a relationship. Furthermore, the other person might have gained an economic advantage from these contributions.

[The 2006 Act has been criticised for being unclear and overly complicated, making it hard for solicitors to advise their clients on what to expect.](#)

The [Scottish Law Commission](#), the law reform body which makes recommendations to Scottish Ministers on possible law reform, is currently reviewing the law relating to cohabitants contained in the 2006 Act. [The Commission's final report on the topic was originally expected to come out at the end of summer 2022](#) but is now expected later this year.

Sarah Harvie-Clark
Senior Researcher
29/9/2022

The purpose of this briefing is to provide a brief overview of issues raised by the petition. SPICe research specialists are not able to discuss the content of petition briefings with petitioners or other members of the public. However, if you have any comments on any petition briefing you can email us at spice@parliament.scot

Every effort is made to ensure that the information contained in petition briefings is correct at the time of publication. Readers should be aware however that these briefings are not necessarily updated or otherwise amended to reflect subsequent changes.

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Annexe C

Scottish Government submission of 6 October 2022

PE1973/A: End the use of Sheriffs Discretion when ruling on civil cases and provide clear legal guidance on division of assets

The Committee has asked for a response by the Scottish Government to Public Petition PE 1973. The Petition is “Calling on the Scottish Parliament to urge the Scottish Government to review the Family Law (Scotland) Act 2006 and provide greater clarity on the division of assets in cases of cohabiting couples who are separating.”

The 2006 Act introduced legal protections for cohabiting couples should their relationship come to an end by separation or death.

Under section 28 of the 2006 Act, where a cohabiting couple separate one of them can ask the court for an order for financial provision. Any application to the court must be made within a year. The Explanatory Notes for section 28 summarise what the court considers in assessing the application.

The court can order payment of a capital sum and/or such amount as the court specifies in respect of the financial implications of caring for a child.

The Scottish Law Commission are already carrying out a review of the law in this area. Information on the Commission’s work is on their website at [Scottish Law Commission: Aspects of family law \(scotlawcom.gov.uk\)](https://www.scotlawcom.gov.uk). This weblink includes:

- Their Discussion Paper [equivalent to a consultation paper] issued on 26 February 2020.
- A summary by the Commission of their Discussion Paper.
- The responses to the Discussion Paper.

The Commission are currently working on their Report, which will include a draft Bill. I understand this Report will be finalised shortly and will be published by the end of 2022.

The Scottish Government will consider the outcomes of the Commission's work carefully once the Report is published.

Annexe D

Petitioner submission of 10 October 2022 PE1973/B: End the use of Sheriffs Discretion when ruling on civil cases and provide clear legal guidance on division of assets

Unfortunately, what the Scottish Government claim under the provisions of the Family Law (Scotland) Act 2006 is not what is happening in reality.

Where division of assets are not clearly defined in law, there is too much room for argument by competing solicitors, and where a sheriff has the rule of law wrong, an appeal is likely to be unsuccessful due to their use of Sheriffs Discretion. This allows a sheriff to rule on how they feel rather than what is fair, true, and just.

This also allows the potential for a sheriff to favour one solicitor or client over another, as they appear to be able to do what they like. The system, in its current form, could lead to corruption or the integrity of the court system being undermined.

I would not have raised this petition if there was not a problem.

When it comes to making progress on this issue, I am bewildered as to why it is taking so long to sort this out. It feels to me like everyone is passing the buck and claiming it is the responsibility of another organisation.

I am pleased, however, to note the report from the Scottish Law Commission will be published by the end of 2022.