

Response ID ANON-B474-MQX3-A

Submitted to Family Law consultation
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Financial provision for cohabitants on separation

1 Do you disagree with any aspect of the SLC draft Bill to improve rights of cohabitants when their relationship ends otherwise than on death, or consider that any appropriate provision is missing?

No

Please provide comments in the text box below:

We welcome the reforms to cohabitants' rights on separation because the existing scheme under section 28 of the Family Law (Scotland) Act 2006 has certain flaws. The amendments proposed would address those flaws but without assimilating the financial rights of cohabitants on separation to those of spouses on divorce (or to those of civil partners on dissolution). The result is that cohabitants' rights will be enhanced in certain respects (e.g. by permitting cohabitants to seek property transfer orders) but not in others (e.g. in not recognising some equivalent to matrimonial property in the context of cohabitation). Those who favour the introduction of a single financial provision regime that treats cohabitation as on a par with marriage and civil partnership may nevertheless find the proposed law to be a step in the right direction. Conversely, even those who feel that spouses and cohabitants ought to be governed by distinct regimes may welcome at least some of the modest enhancements to the rights of cohabitants that the Scottish Law Commission has proposed. We also appreciate that, as well as enhancing cohabitants' rights, the proposed reforms may make for clearer law than is currently to be found under the 2006 Act.

The proposed amendments regarding the one-year time limit will be an improvement on the current law. There is value both in retaining a time limit for the sake of legal certainty and in allowing that time limit to be extended on cause shown. Further, allowing parties to agree to a short extension to the one-year time limit (for a maximum period of six months) would facilitate out-of-court settlements. At the same time, that there would be a two-year 'back-stop' beyond which no further extensions could be permitted would be conducive to legal certainty. For instance, suppose that two separated cohabitants agree to a six-month extension of the one-year time limit but that one of those cohabitants later seeks to raise an action after the new 18-month deadline. Here the court could grant such a cohabitant an extension for a maximum of six more months. In other words, the back-stop would be two years in all cases, which is a clear and simple approach. Finally, the proposed reforms would leave untouched any potential claims in unjustified enrichment. Because such claims negatively prescribe after five years, unjustified enrichment may still come to the aid of cohabitants claiming after the two-year back-stop.

We welcome the proposal regarding short-term relief of serious financial hardship paid over a maximum period of six months from the date of the order. It may be questioned why the period should be six months rather than, say, one year, but we appreciate that a certain arbitrariness attends the selection of any time limit (whether that limit concerns the remedy granted or, as discussed in the previous paragraph, the date by which an action must be raised). Be that as it may, there is value in allowing the court, in an appropriate case, to order the short-term relief of serious financial hardship without seeking to emulate the more open-ended sort of relief sometimes granted on divorce via a periodical allowance under, e.g., section 9(1)(e) of the Family Law (Scotland) Act 1985.

As a more general observation regarding this consultation, we are pleased that the Scottish Government is consulting on the matters discussed in the consultation document. The issues discussed do seem to form a miscellany but there is a loose connecting thread to the extent that the consultation concerns family law.

There are signs of a more inclusive approach based on persons' experience, e.g. regarding the withholding of one's address (discussed at paragraph 4.52 of the consultation document).

The consultation report is clearly written and accessible. It is also helpful to have the impact assessments. We do not know whether a particular order has been followed for setting out the commentary on the impact assessments. If there is no fixed order that has to be followed, perhaps the order in which the impact assessments are set out ought to be reconsidered.

2 Should the scheme for the reform of cohabitants' rights on separation apply to couples who separate after the date of commencement of the legislation implementing the proposed reforms?

Yes

Please provide comments in the text box below:

The proposed scheme should apply only to cohabitants who separate after that regime comes into force: i.e. it should not operate retrospectively. As such, the statutory regime currently regulating the rights of cohabitants on separation (section 28 of the 2006 Act) should continue to apply to cohabitants who separated before the new regime came into force.

3 Do you have any comments on our draft impact assessments on the proposals for improving cohabitants' rights when their relationship ends otherwise than on death?

Yes

Please provide comments in the text box below:

The Child Rights and Wellbeing Impact Assessment (CRWIA) does not discuss how law and legal processes can be a source of harm. The report could have engaged more thoroughly with literature on trauma-informed practice.

4 Do you have any other comments on the proposals for improving cohabitants' rights when their relationship ends otherwise than on death?

No

Please provide comments in the text box below:

See above our answer to question one.

Financial provision for cohabitants on intestacy

5 Should the recommended definition of "cohabitant" under the SLC's proposals for reform of cohabitants' rights on separation, also apply to circumstances where a cohabitant is applying for financial provision from their deceased partner's intestate estate?

Yes

Please provide comments in the text box below:

Yes, the definition of cohabitants should be the same in both contexts.

6 Other than the time limit, what other practical difficulties are encountered by persons making an application for financial provision on intestacy under section 29 of the 2006 Act?

Please provide comments in the text box below:

In the absence of an automatic right for a surviving cohabitant (cf. the automatic rights of surviving spouses to legal rights, and to prior rights on intestacy), it is possible the cohabitant lacks a right to receive information from an executor regarding the extent of their entitlement, if any. Information from the executor regarding assets in the deceased's estate, including assets about which the surviving cohabitant may be unaware, could inform a surviving cohabitant's decision whether to claim financial provision under section 29 of the 2006 Act.

As regards the new six-month time limit for surviving cohabitants (albeit, this new time limit is not yet in force), we note that this will align the time limit for claiming under section 29 (cohabitation ending as a result of the death of one cohabitant) with that for claiming under section 28 (cohabitation ending otherwise than by death). However, we think that, in the case of a claim under section 29, the one-year time limit should be an absolute time limit, with no scope for extensions even on cause shown. That is because the ability to extend the time limit for the purpose of section 29 would cause practical difficulties in dealing with the deceased's estate.

The minimum age of marriage and civil partnership

7 Should the Scottish Government legislate to raise the minimum age of marriage and civil partnership to 18?

Yes

other (please add your reasons below)

Please provide comments in the text box below:

There is at least theoretically value in allowing parties aged 16 or 17 to marry (or to enter into civil partnerships). If increasing the minimum age of marriage to 18 is intended to protect the vulnerable, it is worth remembering that marriage confers strong protections, ranging from financial provision on divorce to the existence of automatic occupancy rights during marriage. In denying 16 and 17-year-olds the ability to marry, we would be depriving them of such protections. It is also worth noting that, in Scotland, 16-year-olds have contractual capacity, subject to the ability, prior to reaching the age of 21, to seek reduction of prejudicial transactions entered into before the age of 18. Marriage is at least loosely akin to a contract: it is constituted by agreement and imposes legal obligations between the parties to that agreement. Consequently, there is at least an argument in favour of aligning the minimum age for marriage with the age at which individuals usually obtain legal capacity in Scots law and can thereby enter into a contract: i.e. the age of 16. (Provisions of the 1991 Act conferring capacity on those aged below the age of 16, notably section 2(1), are irrelevant here).

In spite of the above points, we are ultimately of the view that the minimum age of marriage and civil partnership should be increased to 18. The question, while in theory akin to that of contractual capacity (see above), is in practice more complex. We appreciate that if the concerns raised by the present law relate to significant (and gendered) age-gaps between spouses, there is a strong practical argument for increasing the minimum age for marriage to 18. We also note that Scotland would be something of an outlier compared with other jurisdictions were we to continue to permit 16 and 17-year-olds to marry. If the Scottish Government's concerns relate to age gaps – and, more specifically, to very young women marrying significantly older men – perhaps a new minimum age of 18 could be subject to an exception permitting, say, those aged 16 and 17 to marry other 16 and 17-year-olds, but, on balance, there is probably something to be said for a simple blanket minimum age of 18 years. If the minimum age is to be raised to 18, perhaps attention could also be given to how 16 and 17-year olds in relationships may be provided with protective rights in the absence of those that automatically arise from marriage.

8 Do you agree or disagree that the Scottish Government should legislate to extend the forced marriage offence?

Agree

Please provide comments in the text box below:

Though we are broadly sympathetic to this proposal, we have some reservations about the potential for over-criminalisation of persons for making apparently innocuous remarks about whether a relative is in a relationship and is considering getting married etc. That over-criminalisation may, in turn, deter children from seeking support: the child may fear that, by seeking support, the relative asking whether the child is in a relationship etc may be subject to criminal sanctions.

9 Do you have any comments on our draft impact assessments about the minimum age of marriage and civil partnership?

Yes

Please provide comments in the text box below:

The draft Fairer Scotland Duty Assessment concludes that the very low number of registered marriages and civil partnerships involving people aged 16 or 17 means that there is little scope for effecting measurable socio-economic change through the proposed reforms (para 2.73). This reasoning is internally contradictory as the consultation elsewhere acknowledges that we lack reliable data in this area (para 2.38) and forced marriage is generally under-reported (para 2.40). It seems at least questionable to simultaneously acknowledge that the data is unreliable/incomplete while relying on that data to conclude that reform would have a limited impact.

10 Do you have any other comments on the minimum age of marriage and civil partnership?

No

Please provide comments in the text box below:

We have no further comments on this.

Qualifying requirements for religious and belief bodies to meet when they solemnise marriage or register civil partnership

11 Should the Scottish Government lay down qualifying requirements for religious or belief bodies to meet when they solemnise marriage or register civil partnership?

Yes

Please provide comments in the text box below:

12 Should the qualifying requirements outlined in this consultation be laid down?

Yes

Only some of the requirements outlined should be laid down

Please provide comments in the text box below:

In large part, the requirements are reasonable, but some may be queried, e.g. the proposed requirement that the body state that it is content with its track record. On a general note, we think that fulfilling the requirements proposed here should not be overly onerous.

13 Should any further qualifying requirements be laid down?

No

Please provide comments in the text box below:

14 Should the Scottish Government and National Records of Scotland draw up a code of conduct for celebrants instead of laying down qualifying requirements?

No

Please provide comments in the text box below:

No. This would place too much of a burden on celebrants. It is preferable for celebrants to adhere to codes of conduct if they choose to do so, rather than for such codes of conduct to be imposed by the Scottish Government.

15 Do you have any comments on the draft impact assessments about the qualifying requirements?

No

Please provide comments in the text box below:

We have no comments.

16 Do you have any other comments on the qualifying requirements?

No

Please provide comments in the text box below:

Extending simplified divorce and dissolution

17 The Scottish Government is considering making simplified divorce and dissolution procedures available in cases where:

Agree

Please provide comments in the text box below:

In principle, we agree with making the simplified procedure available in these cases. However, it is important that safeguards be provided for cases where a party in an abusive relationship has been coerced or prevailed upon to counter-sign. In such cases, would it be possible to 'look behind' the counter-signature? At the same time, we appreciate that the issue just identified could arise in the context of simplified procedure more generally (i.e. even where no children are involved).

18 Should Ministers amend the Orders which helped establish the simplified divorce and dissolution procedures to remove the references to "mental disorder" and instead exclude only cases where one of the parties actually "lacks capacity"?

Yes [the Orders should be amended]

Please provide comments in the text box below:

Yes. A test based on mental disorders is over-inclusive. A test based on capacity is more principled.

19 Considering these points, do consultees think any changes are required to the procedures for withholding addresses in simplified divorce and dissolution cases?

Yes

Please provide comments in the text box below:

As paragraph 4.56 of the consultation document acknowledges, requiring a party to explain in detail the reasons why they wish to withhold their address risks, inter alia, re-traumatising that party. One solution would be to allow such a party to declare simply that they do not wish to disclose their address, with no requirement for the party to explain why they do not wish to disclose it. It could then be open to the court to decide not to inquire into the matter any further or, if the court saw fit to inquire into the matter, to do so with a 'light touch' approach.

20 Do you have any comments on our draft impact assessments about extending the simplified divorce and dissolution procedures?

Yes

Please provide comments in the text box below:

As with the other impact assessments in this consultation document, we feel that the financial assessments appear unobjectionable but that the CRWIA impact assessments could be more thorough.

21 Do you have any other comments on extending the simplified divorce and dissolution procedures?

No

Please provide comments in the text box below:

We have no further comments on this.

About you

22 What is your name?

Name:

Dr Euan West, Dr Alisdair MacPherson and Ms Courtney Crilly

23 Are you responding as an individual or an organisation?

Organisation

24 What is your organisation?

Organisation:

Centre for Scots Law, School of Law, University of Aberdeen

25 Further information about your organisation's response

Please add any additional context:

This response is provided by Dr Euan West, Dr Alisdair MacPherson and Ms Courtney Crilly as members of the Centre for Scots Law.

26 The Scottish Government would like your permission to publish your consultation response. Please indicate your publishing preference:

Publish response with name

27 Do you consent to Scottish Government contacting you again in relation to this consultation exercise?

Yes

28 What is your email address?

Email:

euan.west@abdn.ac.uk

Evaluation

29 Please help us improve our consultations by answering the questions below. (Responses to the evaluation will not be published.)

Matrix 1 - How satisfied were you with this consultation?:

Very satisfied

Please enter comments here.:

Comments are included in our answer to question 1.

Matrix 1 - How would you rate your satisfaction with using this platform (Citizen Space) to respond to this consultation?:

Very satisfied

Please enter comments here.: