Women and Equalities Committee Inquiry: 'The Rights of Cohabiting Partners' - Response

This response considers the legal regime for cohabiting partners in Scotland. The intention is that this summary and analysis will offer useful insight to help inform the inquiry.

Summary

- The Scottish regime for cohabiting partners, in the Family Law (Scotland) Act 2006, offers lessons for any reforms in England.
- Two key lessons from the definition of 'cohabitant' in section 25: (1) defining cohabitation is not as easy as it may appear, and (2) avoid defining cohabitation through explicit comparison with marriage.
- Section 28, which provides financial provision upon relationship breakdown, has been criticised for its complex statutory drafting, and for the lack of an underlying rationale upon which awards should be made. This was only partially addressed by the Supreme Court decision in *Gow v Grant*.
- Section 29, which provides financial provision upon death, has been criticised for very similar reasons.
- Two lessons from these substantive provisions: (1) clarity of statutory drafting is crucial, especially when creating a novel legal regime, and (2) clarity of the underlying policy rationale is even more fundamental, because without that, the judiciary lack understanding of the basis upon which awards should be made.
- The 2006 Act was based upon a range of contradictory policy objectives, which reflected a lack of clarity about the overarching purpose of regulating cohabitation.
- Given these lessons from Scotland, including cohabiting partners within the existing regime of financial provision on divorce should be strongly considered.

Introduction

In Scotland, specific legal rights for cohabitants were established by sections 25-29 Family Law (Scotland) Act 2006 ('the 2006 Act'). This statutory regime has operated for over fifteen years and has been subject to significant criticism from both academics and legal

practitioners. Consequently, the Scottish Law Commission are currently reviewing the law relating to cohabiting partners in Scotland.[1] Therefore, I suggest that lessons from the Scottish experience will be helpful to the Committee in considering potential changes to the law for cohabiting couples in England.

To that end, given the terms of reference, this response will focus upon the following issues:

(1) The definition of 'cohabitant' - section 25
(2) Financial provision after relationship breakdown - section 28
(3) Financial provision after death - section 29
(4) The policy objectives of the Scottish regime
(5) The need for a separate regime of financial provision for cohabitants

1. The Definition of Cohabitant

Section 25 (1) provides the definition of 'cohabitant', for the purpose of the 2006 Act, as:[2] 'either member of a couple consisting of - (a) a man and a woman who are (or were) living together as if they were husband and wife; or (b) two persons of the same sex who are (or were) living together as if they were civil partners.' However, somewhat confusingly, this is read in line with section 4 Marriage and Civil Partnership (Scotland) Act 2014. Consequently, this gendered definition should be read in a gender-neutral manner,[3] as referring to a married couple whose members are either mixed sex or same sex. Professor Kenneth Norrie has described the interaction of the provisions these two Acts as 'obscure',[4] and it is difficult to disagree. The statutory drafting is highly complex, and this is not an esay provision for a lawyer to interpret, far less for a member of the public to understand.

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[1] See https://www.scotlawcom.gov.uk/law-reform/law-reform-projects/aspects-of-family-law/. Scottish Law Commission, 'Aspects of Family Law: Discussion Paper on Cohabitation', (Discussion Paper No. 170, February 2020), has been published, followed by a consultation, responses available at - https://www.scotlawcom.gov.uk/files/4116/2618/3312/Response_form_for_Aspects_of_Family_Law_-_Discussion_Paper_on_Cohabitation_DP_No_170.pdf. The commission will publish a final report, containing their recommendations, expected in 'early 2022'.

[2] Similar definitions are used in other Scottish legislation, see e.g. s.18 (1) Matrimonial Homes (Family Protection) (Scotland) Act 1981 and s.29 (3) (c) Adoption and Children (Scotland) Act 2007.

[3] s.4 (2)-(4) Marriage and Civil Partnership (Scotland) Act 2014.

[4] Kenneth Norrie, 'Written Submission to the Scottish Parliament Justice Committee', (February 2016), at 3, available at - http://archive2021.parliament.scot/S4_JusticeCommittee/Inquiries/FL5._Kenneth_Norrie.pdf.

More substantively, the definition has been criticised because of the comparison with marriage, through the phrase 'living together as if they were husband and wife'. Professor Frankie McCarthy has argued 'the usefulness of such a comparison is doubtful',[5] on the basis that: 'Couples in formalised adult relationships do not conduct themselves in a uniform manner'[6] and, I have previously written that this constitutes: 'a fundamental mischaracterisation of what the statuses of marriage and civil partnership involve.'[7] The definition is premised upon there being a singular experience of marriage against which cohabitating relationships can be compared. This premise is neither reflected by the social reality of married life, nor by the legal understanding of marriage.[8] The only feature that all marriages share is their registration, something that cohabiting partners are incapable of replicating.

Section 25 (2) provides three factors that the court shall 'have regard to' in determining whether section 25 (1) is satisfied in an individual case: '(a) the length of the period during which A and B have been living together (or lived together); (b) the nature of their relationship during that period; and (c) the nature and extent of any financial arrangements subsisting, or which subsisted, during that period.' Firstly, Scots law avoids a minimum 'qualifying period' within its definition of 'cohabitant', as has been adopted in other jurisdictions. This has not proved problematic in practice. Secondly, the relationship between these factors and section 25 (1) represents another criticism of the definition, with the late Professor Joe Thomson observing that: 'To give the definition of cohabitant in s.25 (1) and then redefine it in s.25 (2) is intellectually incoherent'.[9] The statutory drafting is unclear, and this creates the potential for ambiguity and complexity in interpretation. Therefore, a key lesson from the Scottish definition is the importance of clear statutory drafting.

Finally, there has been some limited case law considering this definition.[10] These cases show the judiciary adopting a flexible and fact specific approach to section 25. Surprisingly, given the extensive criticism of the statutory drafting, the definition does not appear to have caused

[5] Frankie McCarthy, 'Defining Cohabitation' 2014 31 *Scots Law Times (News)* 143, at 143.
[6] Ibid.
[7] Alan Brown, 'Written Response to the Consultation on the Discussion Paper on Aspects of Family Law Cohabitation (DP No. 170)', at 315.
[8] See e.g. Lord Millett in *Ghaidan v Godin-Mendoza* [2004] UKHL 30, [2004] 2 AC 557, at 588, who observed that marriage, 'need not be loving, sexual, stable, faithful, long-lasting or contented'.
[9] J. M. Thomson, *Family Law in Scotland*, 7th edition (London, Bloomsbury Professional, 2014), at 198.
[10] See e.g. *Fairley v Fairley* 2008 Fam LR 112, *M v T* 2011 GWD 40-828, *Gutcher v Butcher* 2014 GWD 31-610, and *B v B* 2014 GWD 30-593.

significant problems in these cases. Nonetheless, this lack of practical issues should not be taken to suggest that the Scottish approach to the definition of 'cohabitant' is one that English law should seek to copy.

2. Financial Provision After Relationship Breakdown

The substantive regime for financial provision on relationship breakdown is contained in section 28; with section 28 (2) providing that the court 'may' make an order for payment of a 'capital sum'[11] or for 'any economic burden of caring, after the end of the cohabitation, for a child of whom the cohabitants are the parents'.[12] This limited range of orders can be unfavourably compared to the much wider range available upon divorce.[13] Regardless of differences in the substantive legal rules, it is unclear why the court should have fewer options for cohabiting couples. Awards under section 28 (2) should be made based upon the 'matters' that the court must 'have regard to', listed in section 28 (3): '(a) whether (and, if so, to what extent) the defender has derived economic advantage from contributions made by the applicant; and (b) whether (and, if so, to what extent) the applicant has suffered economic disadvantage in the interests of - (i) the defender; or (ii) any relevant child.'[14] Within the Scottish regime of financial provision for cohabitants, the key concepts are 'economic advantage' and 'economic disadvantage'. This reflects (but does not replicate) the language of one principle of the Scottish regime of financial provision on divorce,[15] however, the cohabitation provisions remain distinct from those divorce provisions.

The has been significant academic[16] and practitioner criticism[17] of this provision and the Scottish Law Commission have noted: 'Much of that criticism contrasts the section 28 provisions unfavourably with the 1985 Act scheme for financial provision on divorce and dissolution of civil partnership.'[18] Professor Elaine Sutherland has observed: '[a] fundamental

[11] s.28 (2) (a).
[12] s.28 (2) (b).
[13] s.8 and s.12-s.14 Family Law (Scotland) Act 1985.
[14] When awarding a 'capital sum', under s.28 (2) (a), the court must also consider the 'offsetting' provisions, s.28 (5) and s.28 (6), which require the 'economic advantage' and 'economic disadvantage' of both parties to be 'offset' against each other before any award can be made.
[15] s.9 (1) (b) Family Law (Scotland) Act 1985; s.9 (1) contains the five 'principles' of the regime of financial provision on divorce.
[16] See Fae Garland, 'Gender Imbalances, Economic Vulnerability and Cohabitation: Evaluating the Gendered Impact of Section 28 of the Family Law (Scotland) Act 2006' (2015) 19 (3) *Edinburgh Law Review* 311.
[17] See Fran Wasoff, Jo Miles and Enid Mordaunt, 'Legal Practitioners' Perspectives on the Cohabitation Provisions of the Family Law (Scotland) Act 2006' (October 2010), available at - https://nuffieldfoundation.org/sites/default/files/files/Cohabitation-final-report.pdf.

difficulty with the 2006 Act is that it offers the court no guidance on how to approach its task nor the ultimate goal of a section 28(2)(a) order. This occasioned a fairly constant judicial lament'.[19] This judicial discomfort is illustrated by the initial decisions,[20] which resulted in what Professor Frankie McCarthy described as a 'bewildering array of outcomes'.[21] This was resolved by the Supreme Court in *Gow v Grant*,[22] where Lord Hope established that 'fairness' is the key principle underpinning awards, observing: 'what sec 28 seeks to achieve is fairness in the assessment of compensation for contributions made or economic disadvantages suffered in the interests of the relationship.'[23] This occurred despite there being no reference to 'fairness' in the language of section 28. Post-*Gow*, the Scottish courts appear more likely to make larger awards to former cohabitants.[24] The Supreme Court judgment clarified the underlying basis of awards, but this does not address the criticism of the wide judicial discretion in section 28, because 'fairness is in the eye of the beholder'. However, given the centrality of 'fairness' to the regime of financial provision on divorce in English law,[25] it may be that this principle would prove less uncomfortable and problematic for the English judiciary than it has for the Scottish judiciary. Overall, the lesson from section 28 is to ensure that any regime of financial provision for cohabiting partners is underpinned by a clear and easily identifiable policy rationale for the making of awards.

3. Financial Provision After Death

Similar issues have been identified with the statutory provision containing the substantive regime of financial provision upon death in section 29; with section 29 (2) providing that the court 'may' make an order for a 'capital sum'[26] or property transfer,[27] but this only applies when the deceased lacked a will.[28] This provision contains substantial judicial discretion, and awards should be made based upon the 'matters' that the court must 'have regard to', listed in

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[18] Scottish Law Commission Discussion Paper No. 170 (n 1), para 5.24, at 87.
[19] Elaine Sutherland, 'From "Bidie-In" to "Cohabitant" in Scotland: The Perils of Legislative Compromise' (2013) 27 (2) *International Journal of Law Policy and the Family* 143, at 156.
[20] See e.g. *M v S* 2008 SLT 871, *Lindsay v Murphy* 2010 2010 Fam LR 156, and *Mitchell v Gibson* [2011] 2011 Fam LR 53.
[21] Frankie McCarthy, 'Cohabitation: Lessons from North of the Border?' (2011) 23 (3) *Child and Family Law Quarterly* 277, at 298.
[22] 2013 SC (UKSC) 1.
[23] Ibid, per Lord Hope of Craighead, at 12.
[24] Contrast the decisions in *Whigham v Owen* 2013 SLT 483 and *Jamieson v Rodhouse* 2009 Fam LR 34.
[25] *Miller v Miller, McFarlane v McFarlane* [2006] 2 AC 618.
[26] s.29 (2) (a).
[27] s.29 (2) (a) (i).
[28] s.29 (1) (a).

section 29 (3): '(a) the size and nature of the deceased's net intestate estate; (b) any benefit received, or to be received, by the survivor – (i) on, or in consequence of, the deceased's death; and (ii) from somewhere other than the deceased's net intestate estate; (c) the nature and extent of any other rights against, or claims on, the deceased's net intestate estate; and (d) any other matter the court considers appropriate.' Awards under section 29 cannot exceed the amount that a spouse or civil partner would have been entitled to.[29] Thus, it is explicit that such awards must be lower than those available to spouses, whereas in section 28 this is merely implied by the nature of the statutory test.

When compared to section 28, this provision has not resulted in as much case law,[30] but what there is has been highly critical of section 29. In *Kerr v Mangan*,[31] Lady Smith noted that the provisions themselves, 'provide little, if any, indication of underlying principle',[32] before commenting: 'the court's discretion is so unfettered as to make it extraordinarily difficult, if not impossible, to predict accurately what may be the outcome, at first instance, of an application under s.29.'[33] This criticism of the lack of principle and the discretionary nature of the section reflects the criticisms of section 28. However, despite this similarity, the judgment in *Kerr* rejected the argument that the principle of 'fairness' should underpin section 29 decisions, as *Gow* established for section 28 decisions.[34] Notably, section 29 was considered by the Scottish Law Commission's 2009, 'Report on Succession',[35] where it was noted: 'Section 29 has given rise to much concern'[36] and that, 'section 29 in its current form is unsatisfactory. There is no express aim or purpose for the exercise of the court's discretion.'[37] The report recommended provision by repealed and replaced by a provision with much more limited discretion.[38] However, this recommendation has not been taken forward by the Scottish Government and the provision remains in force.

As with section 28, section 29 lacks clarity as to its underpinning policy rationale and the basis upon which awards should be made. Therefore, the key lesson from these substantive

[29] s.29 (4).
[30] See e.g. *Savage v Purches* 2009 SLT (Sh Ct) 36 and *Windram, Applicant* 2009 Fam LR 157.
[31] 2014 SLT 866.
[32] Ibid, per Lady Smith, at 870.
[33] Ibid.
[34] Ibid, at 873.
[35] Scottish Law Commission, 'Report on Succession', (No. 215, April 2009), Part 4, at 66-77.
[36] Ibid, para 4.4, at 67.
[37] Ibid, para 4.7, at 68.
[38] Ibid.

provisions is that policy clarity is fundamental to an effective regime of financial provision for cohabiting partners.

4. Policy Objectives

The 2006 Act's cohabitation provisions pursue various policy objectives, but, as the Scottish Government's accompanying policy memorandum notes, the central idea underpinning these objectives was: 'that to regard cohabitation as equivalent to marriage fails to acknowledge the special place of marriage in Scottish society.'[39] The statutory provisions do not challenge the privileged position of marriage within Scots law, and cohabitation was not treated as a functional equivalent to marriage. This meant that the statutory regime was designed to offer lesser financial provision than available on divorce. The policy memorandum further noted: '[t]here is a need to strike a reasonable balance between addressing the legal vulnerabilities of many cohabiting couples in Scotland and avoiding the creation of an unwieldy legal framework that interferes unduly with the private lives of individuals',[40] while earlier noting 'the policy objective' in relation to cohabitation: 'is to introduce greater certainty, fairness and clarity into the law'.[41] The 2006 Act had the following policy objectives: (1) protecting the privileged position of marriage in Scots law, (2) providing clarity and certainty to an area of uncertainty, (3) ensuring that the legal regime produced 'fair' outcomes, (4) protecting vulnerable cohabitants from hardship and unfairness, and (5) respecting personal autonomy. This represented complex and somewhat contradictory policy objectives, and given this confusion regarding the underlying policy, the issues that have arisen with section 25 and section 28 are unsurprising. Therefore, any proposed reforms in England would benefit from providing far greater clarity about the purpose of regulating cohabiting partners to avoid this policy confusion.

5. Separate Regimes

The 2006 Act's provisions are premised upon a separate regime of financial provision for cohabiting couples from that which is available for spouses and civil partners, and the regime

[39] Scottish Government, 'Family Law (Scotland) Bill: Policy Memorandum', (February 2005), para 70, at 14, available at - https://archive2021.parliament.scot/S2_Bills/Family%20Law%20(Scotland)%20Bill/b36s2-introd-pm.pdf.
[40] Ibid.
[41] Ibid, para 64, at 13.

for cohabitants was designed to provide less generous and less comprehensive financial provision than that available to spouses and civil partners. However, the question of, 'whether there remains justification for retaining separate regimes in Scotland'[42] is currently being considered by the Scottish Law Commission. The commission are yet to express their view, but in my view, given the changes in societal demographics and social attitudes in the intervening period, it is now much harder to justify the distinction between marriage and cohabitation than when the 2006 Act was enacted. I acknowledge the differences between the divorce regimes in Scotland and England,[43] which cannot be entirely ignored. However, despite these differences, I believe that extending the existing divorce regime to cohabitants has significant merit and should be properly explored in any reform process. I appreciate that starting from the current English position such an option will appear radical, but the Scottish experience shows that comprise solutions do not necessarily produce better outcomes than radical solutions.

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[42] Scottish Law Commission Discussion Paper No. 170 (n 1), para 2.65, at 35.

[43] Very briefly, English law provides more judicial discretion in determining financial provision on divorce and is based upon the principle of 'fairness'. Whereas Scots law is based upon five statutory principles and contains less judicial discretion. This results in the perception that English law provides more generous financial provision than Scots law.