

Citizen Participation and Public Petitions Committee

12th Meeting, 2023 (Session 6), Wednesday
6 September 2023

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

Lodged on 21 September 2022

Petitioner Sandy Izatt

**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.

Webpage <https://petitions.parliament.scot/petitions/PE1973>

Introduction

1. The Committee last considered this petition at its meeting on [21 December 2022](#). At that meeting, the Committee agreed to write to the Scottish Government, the Scottish Law Commission, the Law Society of Scotland, and the Family Law Association.
2. The petition summary is included in **Annexe A** and the Official Report of the Committee's last consideration of this petition is at **Annexe B**.

3. The Committee has received new responses from the Minister for Community Safety, the Scottish Law Commission, and the Law Society of Scotland which are set out in **Annexe C**.
4. Written submissions received prior to the Committee's last consideration can be found on the [petition's webpage](#).
5. Further background information about this petition can be found in the [SPICe briefing](#) for this petition.
6. The Scottish Government's initial position on this petition can be found on the [petition's webpage](#).
7. Every petition collects signatures while it remains under consideration. At the time of writing, 1 signature has been received on this petition.

Action

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

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

Extract from Official Report of last consideration of PE1973 on 21 December 2022

The Convener: PE1973 is about ending the use of sheriffs' discretion when ruling on civil cases and providing clear legal guidance on division of assets. The petition, which was lodged by Sandy Izatt, calls 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, 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 cohabiting couples; allowing appeals to be heard when it is determined that a sheriff has the rule of law wrong but has 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.

Sandy Izatt tells us that a "lack of clarity" in the law regarding the division of assets for cohabiting couples has resulted in cases proceeding to court and taking up "valuable court time". He suggests that the provision of clear legal guidance would offer clarity on that issue and enable matters to be resolved without the need for a court hearing.

In responding to the petition, the Scottish Government states that the Family Law (Scotland) Act 2006

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

The Scottish Government also highlights that the Scottish Law Commission is carrying out a review of aspects of family law. Following the Scottish Government's response, members might be aware that the Scottish Law Commission has now published its report and draft bill on cohabitation.

We have also received a written submission from Mr Izatt, who raises concerns that, where the division of assets has not been clearly defined in law,

"there is too much room for argument by competing solicitors,"

which leaves sheriffs with discretion

"to rule on how they feel, rather than what is fair, true and just."

That is interesting. Do members have any suggestions?

Alexander Stewart: I think that further information is required in order for us to continue with the petition. I suggest that we write to the Scottish Government to seek

its response to the recommendations that are proposed by the Scottish Law Commission in its report on cohabitation and the timetable for bringing forward legislation in that area. I also suggest that we write to the Scottish Law Commission to seek information on what consideration has been given to the use of judicial discretion as part of the review on aspects of family law. In addition, I suggest that we write to the Law Society of Scotland and Family Law Association to seek their views on the issues that are raised by the petitioner. I think that all of those suggestions have some merit.

The Convener: Since there are no further suggestions from members, are we content to proceed on that basis?

Members *indicated agreement.*

Annexe C

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 - \(Report No. 261\) \(scotlawcom.gov.uk\)](https://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/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.

Minister for Community Safety submission of 3 February 2023

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

I am grateful to the Clerks of the Committee for writing to my officials on 9 January 2023 following the Committee's consideration of this Petition at the Committee's meeting on 21 December 2022.

The Committee is seeking the Scottish Government's response to the recommendations proposed by the Scottish Law Commission in their Report on Cohabitation and the anticipated timetable for bringing forward legislation in this area.

At this stage, I cannot provide a timetable for bringing forward a Bill in this area. That depends on future decisions and announcements about the Scottish Government's legislative programme.

In Programme for Government 2021/22, the Scottish Government said that "In addition to the introduction of a Moveable Transactions Bill in the

first year of the Parliament, the Government is also giving consideration to a longer-term programme of implementation of Scottish Law Commission Reports to be introduced during this Parliament, such as Trusts, Judicial Factors, Contract law, Title Conditions, Cohabitation and Damages for Personal Injury”: <https://www.gov.scot/publications/fairer-greener-scotland-programme-government-2021-22/pages/12/>

That remains the position.

We very much welcome the work the Commission has carried out on cohabitation. The Scottish Government will consider further whether or not it would be helpful for the Scottish Government to carry out a consultation on the Commission’s recommendations. Specific points we have noted on the Commission’s report are outlined below.

The Commission note, in paragraph 1.3 and in paragraph 3.3, that it would be helpful if their proposed new definition of “cohabitant” applied to section 29 of the Family Law (Scotland) Act 2006, as well as to sections 26 to 28. As the Commission note in their report, they did not generally make recommendations on section 29, which relates to court applications for financial provision by a surviving cohabitant when the other cohabitant has died without leaving a will. The Scottish Government will consider further whether any revised definition of cohabitant should extend to section 29.

On the definition of “cohabitant” generally, the Commission say that “we intend that those who are currently treated as cohabitants for the purposes of the legislation will continue to be so”. The Scottish Government agrees this is an important issue and notes that in paragraph 3.49 the Commission concluded that it did not propose legislative change to introduce a qualifying period for access to claims.

The Commission conclude in paragraph 3.66 that a registration system for cohabitants, whereby legal protections would apply where couples had registered as cohabitants, should not be introduced. The Scottish Government agrees with this conclusion, for a number of reasons:

- It is not clear how a registration system would work when a couple start to cohabit outside of Scotland and then move to Scotland.
- Similarly, it is not clear how a registration system would work for couples who are already cohabiting in Scotland when it is introduced.
- As the Commission note, the most vulnerable, who are most in need of protection, may be unlikely to register their relationships.

- As the Commission also note, there would also be a need for de-registration
- A registration system would have costs and may require significant monitoring and communication to ensure accuracy.

The Commission note in a number of places in their report that people may be unaware of their rights when they are cohabiting. The Scottish Government plans to provide more public-facing information about cohabitants' rights on mygov.scot – <https://www.mygov.scot/>.

The Commission note in paragraphs 1.19, 1.20 and 5.56 that points were raised on domestic abuse in responses to their Discussion Paper. The Commission have recommended that the legislation should require the courts when determining a claim for financial provision to take account of any behaviour (including abusive behaviour) by either cohabitant that has an effect on the economic position of, or the resources of, the parties or either of the parties. In relation to financial provision on divorce or dissolution, the court is required to disregard conduct unless it has adversely affected the couple's financial resources: see section 11(7) of the [Family Law \(Scotland\) Act 1985](#). The Scottish Government appreciates the points made on domestic abuse, including economic abuse, and will consider them carefully as we look further into the Commission's recommendation in this area.

The Scottish Government notes that the Commission have **not** recommended the introduction of pension sharing orders as a potential remedy when cohabitants separate. As the Commission notes in paragraph 1.25, occupational and personal pensions are, with some limited exceptions, reserved to Westminster.

The [1985 Act](#) contains provisions on financial provision on divorce and dissolution of a civil partnership. The Scottish Government notes the detailed discussion in Chapter 2 of the report on whether separate regimes should be retained for financial provision on divorce and dissolution and on cessation of cohabitation. We note the conclusion in paragraph 2.38 that “in the absence of clear, unqualified and unequivocal support from a majority of the legal profession, the academic world, equality groups and the general public, it is not possible for us to recommend reform of the law to the extent required to fully align the regimes for financial provision on cessation of cohabitation, divorce and dissolution”.

The petitioner has raised points on the need for greater clarity on the division of assets in cases of cohabiting couples who are separating.

The Commission's recommendations in Chapter 5 of their report are intended to increase clarity: the Commission notes in paragraph 5.35 that they "are persuaded of the need for greater certainty and clarity, within a legislative framework that sets out guiding principles, underpinned by a policy of fairness to both parties." Under the Commission's proposals, there would be guiding principles for the courts to follow and relevant factors for the court to have regard to when applying these guiding principles.

In Chapter 7, the Commission recommend that in applying the guiding principles the court must have regard to the terms of any agreement between the cohabitants (with the court having the power to set aside or vary an agreement if it was not fair or reasonable at the time it was entered into).

In relation to the remedies available to the court when dealing with an application for financial provision, the Commission propose the introduction of property transfer orders and payments, for a maximum of 6 months, for the short-term relief of serious financial hardship.

Towards the end of Chapter 5, the Commission recommend there should be no distinction between a child of whom the cohabitants are parents and a child accepted by them as a child of the family, for the purpose of assessing financial provision on cessation of cohabitation. The Scottish Government agrees this recommendation.

In Chapter 6, the Commission consider the time limits for making a claim. The time limit for making a claim would generally remain at 1 year. However, the Commission recommend:

- There should be judicial discretion to allow a late claim to proceed "on special cause shown". [The Commission outline in paragraphs 6.36 to 6.40 of their report that this would mean cause which is special to the particular case. They note that "Mere ignorance of the time limit would not be sufficient for the exercise of discretion. We would expect the court to take account of matters such as the illness of one of the parties or their children, whether there is a history of domestic abuse and other social and economic factors arising from the relationship breakdown which have caused or contributed to the lateness of the claim."]
- There should be a maximum period of two years (a "back stop") from the date of cessation of cohabitation beyond which no claim for financial provision could competently be made by a former cohabitant.

- The parties themselves should be able to agree in writing one extension of up to 6 months of the one year time limit.

The Scottish Government notes that on couples being able to agree in writing an extension of up to 6 months, it might be helpful for the Scottish Government to publish an example of how the agreement might be set out.

Finally, footnote 36 on page 10 of the Commission's report notes that "It is not intended any of the Bill provisions will have retrospective effect. Commencement of the Bill provisions is a matter for the Scottish Government ... S5(3) provides that commencement regulations may include transitional, transitory, or saving provision and make different provision for different purposes".

Following any Bill enacted by Parliament, the Scottish Government would have to consider:

- Work needed to implement the Bill.
- What transitional arrangements may be needed as we move from the current regime for financial provision for cohabitants on separation to the new regime.

Work needed to implement any Bill enacted by Parliament could include:

- Training (as noted in the Business and Regulatory Impact Assessment published by the Commission).
- More public-facing information (as mentioned in paragraph 1.07 of the Report). To help keep costs down, any such public-facing information is likely to be web-based.
- Court rules.
- The Commencement Regulations (including any transitional provision) envisaged by section 5 of the Commission's draft Bill.

The Scottish Government is committed to giving an initial response to Commission reports within 3 months of them being published. I am therefore also writing today to the Commission, in similar terms.

Elena Whitham MSP, Minister for Community Safety

Law Society of Scotland submission of 29 July 2023

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

Thank you for your letter seeking views on the above petition.

In terms of removing the discretion of Sheriffs in civil cases, we would not support this position. Every court decision involves an element of discretion, or judgement, on the part of a Sheriff. This is the nature of our adversarial court system.

In terms of the discretion provided to the court in the division of assets of cohabiting couples, this is an area that we have previously stated would merit reform¹. In particular, we considered that there should be discretion provided to the courts to accept applications beyond a one year period, which we believed unduly harsh. We also responded to the consultation from the Scottish Law Commission's proposed reforms in this area. The changes proposed to the division of assets under section 28 of the Family (Scotland) Act 2006 are detailed in the report published by the Commission in November 2022². We are broadly supportive of these reforms.

In terms of guidance to our members, should legislation be brought forward, we would engage with this process and, on enactment, make appropriate training available to our members around the changes made.

We hope that this information is helpful and if we can assist further in consideration of this petition, we will be very happy to do so.

¹ [rights-of-cohabitants-paper.pdf \(lawscot.org.uk\)](https://www.lawscot.org.uk/pe1973-e-1)

² [Cohabitation Report and draft Bill - \(Report No. 261\) \(scotlawcom.gov.uk\)](https://www.scotlawcom.gov.uk/reports-and-recommendations/2022/11/cohabitation-report-and-draft-bill-report-no-261)