

THE LEGAL REGULATION OF COHABITATION IN SCOTLAND: A FAILED ATTEMPT AT COMPROMISE

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INTRODUCTION

“The issues covered in this paper are sometimes difficult and controversial, but we think that they have to be discussed.”

This was the view of the Scottish Law Commission regarding the legal regulation of cohabitation¹ in its 1990 Discussion Paper, “The Effects of Cohabitation in Private Law.”² The subsequent thirty years of law reform,³ legislation,⁴ and judicial interpretation⁵ in Scotland have undoubtedly illustrated some of the envisaged difficulties with the legal regulation of cohabitating couples. However, over the same period, the data regarding societal demographics within the United Kingdom (UK) has shown the continuing growth of cohabitation as a family form,⁶ and this growth has been reflected by shifts in social attitudes towards much greater acceptance of unmarried cohabitation.⁷

1. In Scotland, the language of “cohabitants,” “cohabitation” or “cohabiting couples” has long been employed to describe what in other countries might be described as “unmarried partners” or “de facto partners;” that is relationships where couples, either mixed sex or same sex, live together in committed (sexual) relationships outside of marriage. Therefore, for ease, I will use this language of “cohabitation” throughout this article. SCOTTISH LAW COMMISSION, THE EFFECTS OF COHABITATION IN PRIVATE LAW, 1990, Discussion Paper No. 86, at 1.

2. *Id.* at 9.

3. SCOTTISH LAW COMMISSION, REPORT ON FAMILY LAW, 1992, Scot. Law Com. No. 135, at 115; SCOTTISH LAW COMMISSION, ASPECTS OF FAMILY LAW: DISCUSSION PAPER ON COHABITATION, 2020, Discussion Paper No. 170, at 2.

4. *See, e.g.*, Family Law (Scotland) Act 2006, (ASP 2) §§ 25–29 that will be considered in detail below.

5. There have been a series of cases that will be discussed below on both the definition of “cohabitant,” in section 25 of the Family Law (Scotland) Act 2006 and concerning the statutory test for financial provisions available to cohabitants after relationship breakdowns, in section 28. *See id.*; *see also* cases cited *infra* notes 70–87 and accompanying text.

6. OFFICE FOR NATIONAL STATISTICS, FAMILIES AND HOUSEHOLDS IN THE UK: 2019, at 13 (finding that there were 3.5 million cohabiting couple families in the UK, amounting to 18.4% of families); OFFICE FOR NATIONAL STATISTICS, SHORT REPORT: COHABITATION IN THE UK: 2012, at 1 (noting that in 2012, there were 5.9 million people cohabiting in the UK, around double the figure from 1996).

7. *See* Alison Park & Rebecca Rhead, *Personal Relationships: Changing Attitudes Towards Sex, Marriage and Parenthood*, *British Social Attitudes* 30, at 7–14 (NatCen

Writing in the wider British context, Barlow and James have suggested that “the social and cultural norms which made people feel that they had or ought to get married in order to be accepted as a decent member of society, seem to have disappeared. Cohabitation is now a perfectly acceptable family form.”⁸ In other words, while the legal complexities of effectively regulating cohabitation may remain, the underlying context of widespread moral suspicion and condemnation of unmarried cohabitation is no longer a feature of Scottish society, and the legal regulation of cohabitation is not considered “controversial” in the way that it once was. Thus, these demographic, attitudinal, and cultural shifts in the UK have underpinned the support for reform of the legal position of unmarried cohabitants.

In Scotland, this reform was achieved through the creation of a statutory regime of specific legal rights for cohabitants, in sections 25-29 of the Family Law (Scotland) Act 2006 (“the 2006 Act”).⁹ Sutherland describes these provisions as a “compromise solution,”¹⁰ which were designed with the goal of “striking a balance between offering some protection to cohabitants while embracing the notion of personal autonomy.”¹¹ Central to the policy rationale underpinning the 2006 Act’s “compromise” was a clear distinction between (unregistered) cohabitation and (registered) marriage and civil partnership, with the Scottish

Social Research 2013) (depicting survey data regarding changes in social attitudes towards marriage and cohabitation in the UK).

8. Anne Barlow & Grace James, *Regulating Marriage and Cohabitation in 21st Century Britain*, 67 MOD. L. REV. 143, 160 (2004) (reflecting on how cohabitation is now a perfectly acceptable family form).

9. There has been no equivalent legal reform in England and Wales, where the ordinary rules of private law continue to apply to cohabiting couples (with potentially harsh results) despite the same cultural and social changes having occurred as in Scotland. Notably, the Law Commission did propose a relatively similar statutory regime for cohabitants in England and Wales. See LAW COMMISSION, COHABITATION: THE FINANCIAL CONSEQUENCES OF RELATIONSHIP BREAKDOWN, 2007, Cm. 7182, at 6–7; Family Law (Scotland) Act 2006, (ASP 2) §§ 25–29. However, these proposals were not subsequently taken forward by successive UK governments, and such reform does not now appear to be on the political agenda. LAW COMMISSION, STATEMENT ON THE GOVERNMENT’S RESPONSE TO THE LAW COMMISSION REPORT “COHABITATION: THE FINANCIAL CONSEQUENCES OF RELATIONSHIP BREAKDOWN”, 2011, at 1.

10. Elaine Sutherland, *From ‘Bidie-In’ to ‘Cohabitant’ in Scotland: The Perils of Legislative Compromise*, 27 INT’L J.L. POL’Y & FAMILY 143, 144 (2013).

11. *Id.* at 151.

Government noting, in the accompanying policy memorandum to the Bill that became the 2006 Act, “that to regard cohabitation as equivalent to marriage fails to acknowledge the special place of marriage in Scottish society.”¹² Therefore, as Wasoff, Miles, and Mordaunt have noted, the 2006 Act “aims to create a middle way between the protection afforded to spouses and civil partners and no protection at all.”¹³ The result is a legislative scheme that was explicitly designed to provide *some* financial provision for cohabitants in the event of relationship breakdown,¹⁴ but does *not* provide access to the much more comprehensive and generous scheme of financial provision available on divorce or dissolution of a civil partnership.¹⁵

This legislative scheme has now been in operation for over fifteen years, but from the enactment of the 2006 Act there have been issues with the interpretation of the provisions, which has led to criticism from academics¹⁶ and legal practitioners.¹⁷ The overarching impression is that the statutory regime has not operated as effectively in practice as was hoped at its inception,¹⁸ and as a consequence of this, as Malcolm, Kendall, and Kellas have observed, “[t]here remains...a lack of knowledge within the

12. Family Law Bill 2005, SP Bill [36], Policy Memorandum ¶ 70 (Scot.).

13. FRAN WASOFF ET AL., LEGAL PRACTITIONERS’ PERSPECTIVES ON THE COHABITATION PROVISIONS OF THE FAMILY LAW (SCOTLAND) ACT 2006, at 2 (2010).

14. Family Law (Scotland) Act 2006, (ASP 2) § 28.

15. Family Law (Scotland) Act 1985 28 §§ 8–14.

16. See, e.g., Frankie McCarthy, *Cohabitation: Lessons from North of the Border?*, 23 CHILD AND FAM. L.Q. 277 (2011) (criticizing the property consequences resulting from the breakdown of cohabitation since the Law Commission’s 2007 report on reform); Fae Garland, *Gender Imbalances, Economic Vulnerability and Cohabitation: Evaluating the Gendered Impact of Section 28 of the Family Law (Scotland) Act 2006*, 19 EDINBURGH L. REV. 311, 315–316 (2015) (criticizing Section 28 of the Family Law (Scotland) Act of 2006 that gives only a short time frame to applicants to apply for relief after parties cease to cohabit).

17. See, e.g., FRAN WASOFF, *supra* note 13, at 47–122 (criticizing the application of the Family Law (Scotland) Act by interpreting the results of a study); Jo Miles et al., *Cohabitation: Lessons from Research North of the Border?*, 23 CHILD AND FAM. L.Q. 302, 305 (2011) (criticizing an interpretation of the limitation period provision); Jo Miles et al., *Reforming Family Law – the Case of Cohabitation: “Things May Not Work Out as You Expect,”*, 34 J. SOC. WELFARE AND FAM. L. 167, 169 (2012) (noting that the provisions of Family Law (Scotland) Act 2006 result in the undermining of policy objectives).

18. See SCOTTISH PARLIAMENT JUSTICE COMMITTEE, POST-LEGISLATIVE SCRUTINY OF THE FAMILY LAW (SCOTLAND) ACT 2006, 2016, SP Paper 963, at 8–10.

general public about the nature of these provisions.”¹⁹ On the basis of these ongoing issues, the Scottish Law Commission published a new Discussion Paper, “Aspects of Family Law: Discussion Paper on Cohabitation” in 2020,²⁰ and as I commented in response to the associated consultation, “[w]ithout wishing to sound glib, there would not be a reform project regarding a set of legal rules that have been in force for less than 15 years if they were working as had been hoped at the time of their creation.”²¹ Relatedly, there is consensus that the statutory scheme has not achieved its own aims, with the new discussion paper acknowledging that “[t]here is a large body of opinion that those policy objectives have not been met by the current legislation. Sections 25, 28, and 29 in particular have been criticised. Aspects of these provisions have been consistently identified as in need of improvement and reform since the legislation was enacted.”²² The legal regime is currently being reconsidered by the Scottish Law Commission and it is highly likely that reforms will subsequently be proposed to the legal regulation of cohabitation.²³

In this article, I will first briefly set out the history of the legal regulation of cohabitation in Scotland in order to provide the background context in which the statutory scheme of the 2006 Act was created. Second, I will examine the provisions of the 2006 Act themselves, focusing upon two specific provisions²⁴ that have

19. KIRSTY MALCOLM ET AL., COHABITATION xxxi (W. Green, 2d ed. 2011).

20. SCOTTISH LAW COMMISSION, ASPECTS OF FAMILY LAW, *supra* note 3, at 3.

21. ALAN BROWN, COLLATED RESPONSES TO DISCUSSION PAPER ON ASPECTS OF FAMILY LAW: COHABITATION (DP No. 170), at 314, 315 (2020).

22. SCOTTISH LAW COMMISSION, ASPECTS OF FAMILY LAW, *supra* note 3, at 6–7.

23. The ordinary process of the Scottish Law Commission is for an initial Discussion Paper to be followed by a period of consultation, after which the commission produces a Report, containing their recommendations for law reform, which are thereafter considered by the Scottish Government. See Scottish Law Commission, *Aspects of Family Law*, SCOTTISH LAW COMMISSION (May. 19, 202, 4.26 PM), <https://www.scotlawcom.gov.uk/law-reform/law-reform-projects/aspects-of-family-law/> (explaining that the commission plans to “publish the report in early 2022”).

24. The statutory regime provides some specific rights in relation to household goods, in sections 26 and 27, and a (very limited) entitlement for cohabitants to apply to the court for payment upon the death of their partner (which only applies if their partner died intestate, i.e. without leaving a will), in Section 29. See *Kerr v. Mangan* [2014] CSIH 69 [2], [24], (2015) SC 17, 17–21 (Scot.) (considering section 29 of the 2006 Act). However, detailed consideration of these provisions is outside the scope of this work.

been subject to judicial interpretation and sustained academic criticism: the definition of “cohabitant” in section 25, and the financial provision available to cohabitants upon the breakdown of their relationships in section 28. Finally, I will conclude by considering the ongoing law reform project of the Scottish Law Commission and what this project may mean for the future of the legal regulation of cohabitation in Scotland.

II. A (BRIEF) HISTORY OF THE LEGAL REGULATION OF COHABITATION

Before examining these specific provisions of the 2006 Act, it is worth setting out the history of the legal regulation of cohabitation in Scotland in slightly more detail. Historically, in Scots law, in common with other “anglosphere” legal systems, marriage was the only adult personal relationship which resulted in any legal rights and obligations, and cohabitation was effectively ignored by the law.²⁵ Relatedly, for most of the history of Scots law, marriage was only available to mixed sex couples, until the definition of marriage was changed by the Marriage and Civil Partnership (Scotland) Act 2014 (“the 2014 Act”) to allow same sex couples to marry.²⁶ The Civil Partnership Act 2004 also created an alternative form of registered adult relationship²⁷ – civil partnership – that replicates the substantive legal rules of marriage²⁸ and was initially only available to same sex couples, before being opened to mixed sex couples in 2021.²⁹ Regardless of

25. The historical doctrine of “marriage by cohabitation with habit and repute,” only abolished by section 3 of the Family Law (Scotland) Act 2006, allowed a cohabiting couple to be considered married within Scots law despite the lack of a marriage ceremony if the “tacit consent” of the parties could be illustrated from the circumstances of their relationship. For more information on the operation of this doctrine, see, e.g., J. M. THOMSON, *FAMILY LAW IN SCOTLAND* 20–23 (7th ed. Bloomsbury Professional 2014); Nicol v. Bell (1954) SLT 314, 314–315 (Scot.); Low v. Gorman (1970) SLT 356, 356 (Scot.).

26. Marriage and Civil Partnership (Scotland) Act 2014, (ASP 5) § 1(2)(c).

27. Civil Partnership Act 2004, c. 33, §§ 85–136 (UK).

28. Nicholas Bamforth, *‘The Benefits of Marriage in All but Name’? Same-Sex Couples and the Civil Partnership Act 2004*, 19 CHILD AND FAM. L.Q. 133, 155 (2007) (discussing the argument that civil partnership was explicitly designed to replicate the features of mixed sex marriage).

29. Civil Partnership (Scotland) Act 2020, (ASP 15) § 1 (these provisions came into force on January 2, 2021).

these changes to registered adult relationships, there remains a clear legal distinction between these registered relationships and unregistered cohabiting relationships. However, the complete lack of recognition of cohabitation within Scots law began to change in the latter part of the 20th century, as statutory rights in a variety of contexts were extended to include cohabiting couples.³⁰ This process occurred in a largely piecemeal and ad hoc manner,³¹ without any apparent consistency or overarching policy basis. Thomson has commented that “[o]ver the years Scots law has given rights to and imposed obligations upon cohabitants. It has done so in a haphazard and unprincipled way.”³² As a consequence of this trend, the aforementioned Scottish Law Commission discussion paper, considering a specific regime of legal rights for cohabitants, was published in 1990.³³ Relatively shortly thereafter, in 1992, the Scottish Law Commission’s “Report on Family Law”³⁴ proposed a series of reforms providing for such specific legal rights for cohabitants.³⁵ At the outset of this proposal, it was noted that “[w]e accept, however, that legal intervention in this area ought to be limited and that it requires to be justified in each situation in which it is recommended. It should neither undermine marriage, nor undermine the freedom of those who have deliberately opted out of marriage.”³⁶ Thus, the proposed regime was narrow in its scope and explicitly designed not to provide equivalent legal rights and obligations to cohabiting couples as those already available to married couples; instead, the purpose of the proposals was described as, “confined

30. See, e.g. Matrimonial Homes (Family Protection) (Scotland) Act 1981 c. 59 § 18; Rent (Scotland) Act 1984 c. 58, sch. 1; and Housing (Scotland) Act 1988 c. 43, § 31(4).

31. See Rebecca Probert, *Cohabitation in Twentieth Century Eng. and Wales*, 26 LAW & POLICY 13, 23 (2004) (reporting a detailed description of a similar process that occurred in England and Wales).

32. See THOMSON, *supra* note 25, at 195.

33. SCOTTISH LAW COMMISSION, THE EFFECTS OF COHABITATION IN PRIVATE LAW, *supra* note 1, at 1.

34. SCOTTISH LAW COMMISSION, REPORT ON FAMILY LAW, *supra* note 3, at 1–2. The 1992 Report is incredibly wide-ranging, containing proposals on various issues, including: parental responsibility and rights, children’s guardianship, marriage, international private law, and the doctrine of illegitimacy, amongst others. Many of these proposals have subsequently been enacted within Scots law.

35. See *id.* at 115–27, (setting out these reforms in paragraphs 16.1–16.47).

36. *Id.* at 115.

to the easing of certain legal difficulties and the remedying of certain situations which are widely perceived as being harsh and unfair.”³⁷

In spite of this limited and carefully crafted scope, these proposals were not taken forward by the then-UK government³⁸ and lay dormant until the substance of the proposals was reanimated and largely enacted by sections 25-29 of the 2006 Act.³⁹ This lengthy delay from proposals to legislation prompted McCarthy to rather dryly observe that “[t]he cohabitation provisions had a somewhat elephantine gestation period.”⁴⁰ Therefore, despite the demographic changes and cultural shifts that occurred in the intervening period, the 2006 Act’s provisions continue to reflect the scope and approach of the 1992 Report’s proposals. This commonality can be seen from the Scottish Government’s policy memorandum, which commented that “[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.”⁴¹ This illustrates that respect for party autonomy remained a key feature of the 2006 Act’s cohabitation provisions. Moreover, the policy memorandum also noted that “the policy objective” of the Bill in relation to cohabitation “is to introduce greater certainty, fairness and clarity into the law by establishing a firm statutory foundation for disentangling the shared life of cohabitants when their relationship ends.”⁴² From this, it is clear

37. *Id.*

38. The Scotland Act 1998 c. 46, sch. 5, ¶ 11 (creating the current devolved Scottish Parliament and Scottish Government, then described as the “Scottish Executive,” which assumed responsibility for all issues that were not reserved to the UK Parliament, Schedule 5). Therefore, from May 1999, the devolved Scottish institutions assumed responsibility for legislating for Scots family law.

39. Much like the 1992 Report, the 2006 Act is a wide-ranging piece of legislation that reformed various aspects of Scots family law, both substantive and technical, including legal rules relating to: marriage, divorce, the rights of unmarried fathers and the abolition of the doctrine of the “illegitimacy” of children. Family Law (Scotland) Act 2006, (ASP 2) §§ 25–29.

40. McCarthy, *supra* note 16, at 280.

41. Family Law (Scotland) Bill 2005, Explanatory Notes ¶ 70.

42. *Id.* ¶ 64.

that the Bill was understood by the then-Scottish Government as having various aims, which included: providing certainty and clarity to an area of law where there was significant uncertainty and public misconception;⁴³ ensuring that the new legal regime was underpinned by a notion of “fairness,” the need to protect vulnerable cohabitants from unfairness and hardship caused by their relationships;⁴⁴ and recognising and respecting the autonomy of cohabiting couples.

In the next two sections, I will set out some of the specific provisions of the 2006 Act relating to cohabitation and examine how those provisions attempted to give effect to these (somewhat contradictory) policy aims. Through this, I will highlight the main criticisms of the legal regime for cohabitants in Scotland that have been advanced in the fifteen years since the legislation was enacted.

III. SECTION 25 OF THE FAMILY LAW (SCOTLAND) ACT 2006: THE DEFINITION OF “COHABITANT”

The first issue to consider regarding the 2006 Act, and indeed any regime for the legal regulation of unmarried cohabitation, is that of eligibility – which couples are entitled to the legal rights and subject to the legal consequences, and on what basis is this eligibility determined. To that end, section 25 of the 2006 Act provides the following definition of “cohabitant,”⁴⁵ for the

43. See, e.g., FRAN WASOFF & CLAUDIA MARTIN, *SCOTTISH SOCIAL ATTITUDES SURVEY 2004: FAMILY MODULE REPORT*, 41 (2005) (finding that 51% of respondents believed that some form of ‘common law’ marriage existed in Scotland). Such attitudes are also present in England. See, e.g., ANNE BARLOW ET. *COHABITATION AND THE LAW: MYTHS, MONEY AND THE MEDIA*, BRITISH SOCIAL ATTITUDES SURVEY 24, 29 (Alison Park et al. eds., 2008).

44. Discourse regarding reform of the legal rights of cohabitants in the UK has been shaped by the conceptualization of the unfairly treated, “deserving” cohabitant – understood as a woman who performed the traditional role of “mother” and “homemaker” in a lengthy cohabitation involving children, who was left with little to no assets (including no ownership of the family home), income, or earning capacity after the relationship broke down, often described as the “Mrs. Burns” figure after this famous English case. See *Burns v. Burns* [1983] EWCA (Civ) 4, [1983] Ch. 317, [318]–[320] (Eng.).

45. The legislative definition does not expressly consider whether a subsisting marriage would exclude an individual from the definition of “cohabitant,” and this issue has not been considered judicially. Family Law (Scotland) Act 2006, (ASP 2) § 25. However, in other statutory contexts, it has been held that individuals in subsisting marriages can

purposes of the other provisions of the Act, (1): “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.”⁴⁶ Crucially, this definition now requires to be read in line with section 4 of the 2014 Act, which sets out how references to “marriage” and other related language in prior legislation is to be interpreted in light of marriage being opened to same sex couples. As a consequence of the operation of section 4, the gendered language of section 25(1)(a) of the 2006 Act (“a man and a woman” and “husband and wife”) is to be read in a gender-neutral manner as referring to a either a mixed sex or a same sex married couple.⁴⁷ Section 25(1)(b) will ‘cease to have effect,’⁴⁸ as same sex couples are now included within the gender-neutral language of section 25(1)(a). Norrie has been critical of this overly complex approach to statutory drafting, describing the relationship between the provisions of the 2006 and 2014 Acts as “recondite.”⁴⁹

With that said, I have previously observed of this definition that “cohabitation is regulated because it is constructed and understood as being a ‘marriage-like’ relationship on the basis of its conjugality.”⁵⁰ It is apparent that the linguistic comparison with marriage is designed to exclude other forms of non-sexual

meet the equivalent statutory requirements. *See, e.g., Watson v. Lucas* [1980] EWCA (Civ) [1980] 1 WLR 1493 (Eng.) in the context of Rent Act 1977 sch. 1, ¶ 3 § (2)(1)(b) c. 42. It is highly likely that a similar approach would be adopted for the purposes of the 2006 Act, depending (of course) upon the specific facts and circumstances of each individual case.

46. The definition is expressly limited to relationships involving two people (“either member of a couple”) and does not include polyamorous, or other multiple-party, relationships. Family Law (Scotland) Act 2006, (ASP 2) § 25. It is clear from the contemporaneous documentation that such relationships were not considered (or contemplated) by the Scottish Law Commission in its 1992 Report, or by the Scottish Government at the time of the 2006 Act. *See* SCOTTISH LAW COMMISSION, REPORT ON FAMILY LAW, *supra* note 3.

47. Marriage and Civil Partnership (Scotland) Act 2014, (ASP 5) § 4(2)–(3).

48. *See id.* § 4(4).

49. Kenneth McK. Norrie, COLLATED RESPONSES TO DISCUSSION PAPER ON ASPECTS OF FAMILY LAW: COHABITATION (DP NO. 170), at 81 (2020).

50. ALAN BROWN, WHAT IS THE FAMILY OF LAW? THE INFLUENCE OF THE NUCLEAR FAMILY 97 (2019).

adult relationships⁵¹ from the definition.⁵² This method of defining cohabitation through comparison with marriage has previously (and subsequently) been adopted in a variety of contexts within Scots law,⁵³ and does not represent a departure from the generally established method of providing a statutory definition of “cohabitant.”⁵⁴ Nonetheless, the definitional approach of the 2006 Act has been criticised by academic commentators,⁵⁵ with McCarthy arguing that “the usefulness of such a comparison is doubtful”⁵⁶ on the basis that “[c]ouples in formalised adult relationships do not conduct themselves in a uniform manner.”⁵⁷ This lack of homogeneity within marriage (and civil partnership) is central to the academic criticism of the section 25(1) definition. McCarthy expands upon this, noting that “[t]he only characteristic which all spouses and civil partners necessarily have in common is that they have formally registered their relationship. In other words, the one characteristic shared by all spouses and partners is the very characteristic that cohabitants by definition do not share.”⁵⁸ The definition of “cohabitant” can be criticized due to the comparison with marriage being of limited utility, because the ongoing relationship of marriage has very little substantive legal content

51. This association of marriage with the conjugal relationship occurs despite judicial acknowledgment that marriage itself does not require a sexual relationship. *See, e.g., Re X (A Child – Foreign Surrogacy)* [2018] EWFC 15 [8], [2018] 2 FLR 660 (Eng.) (noting that “[a] sexual relationship is not necessary for there to be a valid marriage”).

52. *See* SCOTTISH LAW COMMISSION, *ASPECTS OF FAMILY LAW*, *supra* note 3, at 65–71 (providing information for considering the regulation of wider categories of platonic or care giving adult relationships).

53. *See, e.g.,* Matrimonial Homes (Family Protection) (Scotland) Act 1981 c. 59 § 18(1); Adoption and Children (Scotland) Act 2007, (ASP 4) § (29)(3)(c).

54. Some statutory provisions use a definition that does not include a comparison with marriage. *See, e.g.,* Human Fertilisation and Embryology Act 2008, c. 22, § 54(2) (UK) (defining cohabitants as “two persons who are living as partners in an enduring family relationship and are not within prohibited degrees of relationship in relation to each other.”).

55. *See, e.g.,* SCOTTISH LAW COMMISSION, *ASPECTS OF FAMILY LAW*, *supra* note 3, at 41 (noting that this criticism has been for, “various reasons, not least because it is considered to be outdated and not reflective of modern-day relationships”).

56. Frankie McCarthy, *Defining Cohabitation*, 31 SCOTS L. TIMES 143, 143 (2014).

57. *Id.*

58. *Id.*

beyond the fact of the registration of the relationship,⁵⁹ something that cohabiting couples will necessarily lack.⁶⁰ Thus, the section 25(1) definition is criticised for not being capable of providing sufficient clarity as to the basis upon which couples will be eligible for the legal rights contained in the other provisions of the 2006 Act. Notably, the statutory provision includes some additional factors that are to be considered within the definition of “cohabitant,” with section 25(2) providing that:

[i]n determining for the purposes of any of sections 26 to 29 whether a person (“A”) is a cohabitant of another person (“B”), the court shall have regard to -
(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.⁶¹

Thus, the legislation identifies three specific factors for the court to “have regard to” in determining whether the section 25(1) definition applies to the factual circumstances of an individual case. The Scottish Government policy memorandum observed that “[t]aken together, these factors are intended to focus attention on cohabitants who have developed a shared life with a degree of interdependence, whilst leaving courts in disputed cases the necessary flexibility in interpreting the facts of each case and discretion in securing fair and just outcomes.”⁶² In considering the role of these factors within the statutory definition, first, it is worth noting that while section 25(2)(a) refers to the “length of the period” that the couple have been living together, there is no

59. See, e.g., *Ghaidan v. Godin-Mendoza* [2004] UKHL 30 [78], [2004] 2 AC 557 (HL) 588 (appeal taken from Eng.) (Lord Millett observed that marriage “need not be loving, sexual, stable, faithful, long-lasting or contented”); *Re X (A Child – Foreign Surrogacy)* [2018] EWFC 15 [7], [2018] 2 FLR 660, 661 (Eng.) (Sir James Munby noted that “the marriage is a marriage. The fact that it is platonic, and without a sexual component, is, as a matter of long-established law, neither here nor there and in truth no concern of the judges or of the State.”).

60. McCarthy, *supra* note 56.

61. Family Law (Scotland) Act 2006, (ASP 2) § 25(2).

62. Family Law (Scotland) Bill 2005, Policy Memorandum ¶ 75.

minimum period of “living together” required to satisfy this definition of “cohabitant.”⁶³ This was a deliberate policy choice of both the Scottish Law Commission⁶⁴ and the Scottish Government.⁶⁵ This choice contrasts with the approach taken to eligibility in some other jurisdictions, which employ a “qualifying period” that couples are required to satisfy to access the relevant legal provisions.⁶⁶

Second, it is worth noting that the relationship between this list of factors and the overarching definition in section 25(1) has been the subject of academic criticism, with Thomson observing that “[t]o give the definition of cohabitant in s.25 (1) and then redefine it in s.25 (2) is intellectually incoherent,”⁶⁷ and Norrie commenting that “in determining whether a person is a cohabitant the court has to take account of ‘the nature of the relationship’ – which is the very point at issue and so is circular. I am not sure that it adds anything of import to the court’s consideration.”⁶⁸ Thus, another criticism of the statutory definition is that the drafting is insufficiently clear regarding the role of the three factors in section 25(2), how those factors relate to one another, and how the factors relate to section 25(1). Hence, the definition of “cohabitant” in the 2006 Act has been criticised both on substantive grounds, due to the normative issues with the

63. Family Law (Scotland) Act 2006, (ASP 2) § 25(2)(a); Notably, in *Harley v. Robertson* [2011] ScotSC 194, it was accepted by both parties that a relationship where the parties lived together for less than seven months satisfied the section 25 definition of “cohabitant.” However, Sheriff Caldwell noted that he would not have found that there was cohabitation for the purposes of the 2006 Act if it had not been accepted by the parties.

64. SCOTTISH LAW COMMISSION, REPORT ON FAMILY LAW, *supra* note 3, at 115–116 (observing that they have “avoided fixed rules and arbitrary time limits.”).

65. See, e.g., Family Law (Scotland) Bill 2005, Policy Memorandum, ¶ 67 (describing a “qualifying time-period” as “arbitrary, rigid and unresponsive to individual cases”).

66. See, e.g., Family Law Act 1974 (Cth) s 90SB (Austl.) (requiring a two year duration to access the legal regime if the couple do not have a child). See also Property (Relationships) Act 1976 (Cth) s 1C(2)(b) (N.Z.) (drawing a distinction between those cohabitating relationships of three or more years duration, which are able to access the regime of financial provision on divorce, and those of under three years duration, where a separate regime of financial provision applies).

67. THOMSON, *supra* note 25, at 198.

68. KENNETH NORRIE, SUBMISSION TO THE JUSTICE COMMITTEE ON THE FAMILY LAW (SCOTLAND) ACT 2006 3 (2016).

comparison with marriage, and on technical grounds, due to this apparently incoherent statutory drafting.

Given these criticisms, it is unsurprising that the definition has given rise to case law considering its scope and application to different facts and circumstances,⁶⁹ reflecting Sheriff Principal Stephen's comment in *B v. B*⁷⁰ that "cohabitation and cohabitants are more easily recognised than defined."⁷¹ Within this case law, Sheriff Principal Pyle recognised, in *Gutcher v. Butcher*,⁷² that when considering the definition, "judges have to be careful not to translate their own individual experience of marriage as being the universal experience of others in that relationship."⁷³ The following factors have all been identified, within the case law, as significant in determining whether the section 25 definition applied to different factual circumstances: the couple "would prepare and eat meals together,"⁷⁴ "the parties shared household tasks such as shopping, laundry, cooking and dish-washing,"⁷⁵ the sharing of "household expenses such as gas, electricity, council tax, groceries,"⁷⁶ the "parties presented as a couple to their respective families,"⁷⁷ the parties "bought, furnished and improved a house together,"⁷⁸ "had a child,"⁷⁹ "had intrinsically linked financial arrangements,"⁸⁰ and "socialised and went on holiday together."⁸¹ The fairly prosaic nature of these factors illustrates the fact-specific manner in which the statutory definition has been interpreted by the courts. As Sheriff Morrison

69. See, e.g., *Fairley v. Fairley* [2008] CSOH 104 [26-31], [2008] FamLR 112, 114-15 (Scot.); *M v. T* [2011] ScotSC 181 [32-33]; *Harley v. Robertson* [2011] ScotSC 194, 18; *EM v. AI* [2012] ScotSC 24 [23]; *Gutcher v. Butcher* [2014] ScotSC 97 [13]; and *MB v. JB* [2014] ScotSC 89 [34-35].

70. *MB v. JB* [2014] ScotSC 89 [27].

71. *Id.*

72. *Gutcher v. Butcher* [2014] ScotSC 97 [13].

73. *Id.*

74. *M v. T* [2011] ScotSC 181 [32].

75. *Id.*

76. *Id.*

77. *Id.*

78. *M v. I* [2012] ScotSC 24 [23].

79. *Id.*

80. *Id.*

81. *Id.*

put it in *Garrad v. Inglis*,⁸² determining whether a couple meet the section 25(1) definition “is a question of objective fact to be determined having regard to the particular circumstances of the particular case.”⁸³ Notably, in *B v. B*, Sheriff Principal Stephen observed that “undue concentration on the words ‘*living together*’ is both wrong in law and inequitable. Strict application of the requirement that cohabitants live together ignores the realities of life.”⁸⁴ This suggests that the parties’ living arrangements are not solely determinative, but instead, a wider and more holistic view of the circumstances of the relationship is adopted by the courts. However, this statement was made in the context of the timing of the end of a relationship,⁸⁵ and the courts have not yet considered whether the definition of “cohabitant” is capable of encompassing relationships where the parties maintain entirely separate residences throughout their relationship.⁸⁶

To conclude this section, in their recent discussion paper, the Scottish Law Commission summarised what can be derived from the case law on the definition of “cohabitant” in section 25 as follows:

the definition has been subject to wide judicial interpretation. The case law suggests that some element of stability is required as well as features of co-dependent lives (such as a couple having some degree of linked finances, socialising and holidaying together). While living together is not on its own

82. *Garrad v. Inglis* [2013] ScotSC 101 [8].

83. *Id.* at [8]. See also *id.* at [9] (listing twelve different factors that will be relevant in determining whether parties are “cohabitants” within the definition of Section 25(1)).

84. See SCOTTISH LAW COMMISSION, ASPECTS OF FAMILY LAW, *supra* note 3, at 43 (citing *B v. B* [2014] ScotSC 89 [32]).

85. See *B v. B* [2014] ScotSC 89 [32] (discussing circumstances considered when determining the timing of the end of a relationship). The date of the end of the cohabitation is fundamentally important within the legislative scheme because claims for financial provision under section 28 can only be made within one year “after the day on which the cohabitants cease to cohabit.” Family Law (Scotland) Act 2006, (ASP 2) § 28(8); See generally SCOTTISH LAW COMMISSION, ASPECTS OF FAMILY LAW, *supra* note 3, at 110–14 (discussing criticisms of the time limit).

86. SCOTTISH LAW COMMISSION, ASPECTS OF FAMILY LAW, *supra* note 3, at 42 (terming such relationships as “living apart together”).

sufficient to establish that a couple are cohabitants, it is also not necessarily required (given modern relationships, including marriages, can involve couples living apart together).⁸⁷

Thus, it is apparent that the definition of “cohabitant” in the 2006 Act has been interpreted by the courts in a flexible and fact-specific way, which has resulted in fewer issues arising in the case law than the academic commentary and criticism anticipated.⁸⁸ Nevertheless, the academic criticism of the statutory drafting and the underlying normative comparison with marriage within the definition remain persuasive.

IV. SECTION 28 OF THE FAMILY LAW (SCOTLAND) ACT 2006: FINANCIAL PROVISION ON BREAKDOWN OF COHABITATION

The second issue to consider regarding the 2006 Act is the legal entitlements and obligations that it creates for cohabitants upon relationship breakdown; simply put, what financial provision is available to members of a cohabiting couple if their relationship ends,⁸⁹ what the policy rationale is for this regime of financial provision, and how the judiciary should approach the making of awards for financial provision in individual cases. In this context, one simple policy approach that has been adopted by some other jurisdictions,⁹⁰ is to extend the existing legal rules that apply to financial provision on divorce⁹¹ to cohabiting couples

87. *Id.* at 44.

88. See SCOTTISH PARLIAMENT JUSTICE COMMITTEE POST-LEGISLATIVE SCRUTINY OF THE FAMILY LAW (SCOTLAND) ACT 2006, 2016, SP Paper No. 963, at 5 (observing, “overall, we were left with the impression that the definition is not perfect but appears not to have created significant problems in practice”).

89. Compare Family Law (Scotland) Act 2006, (ASP 2) § 28 (applying where cohabitation ends by reason other than death) with *id.* § 29 (applying where a member of the cohabitating couple has died).

90. Cf. Family Law Act 1974 (CLR) s. 90(SB) (Austl.) (qualifying cohabitants not married as subject to “de facto relationship” laws); Property (Relationships) Act 1976, s. 2D(1) (N.Z.) (qualifying cohabitants not married as subject to “de facto relationship” laws).

91. See Family Law (Scotland) Act 1985, § 9. Briefly summarised, *id.* section 9(1) sets out the five principles that “the court shall apply” in making orders for financial provision upon divorce or dissolution. These principles are: fair sharing of the “net value” of the matrimonial property, *id.* section 9(1)(a); “fair account” being taken of “economic advantage” and “economic disadvantage”, *id.* section 9(1)(b); “fair sharing” of the

who meet the eligibility requirements. However, this option was not favored in the Scottish Law Commission's 1992 Report⁹² and was rejected by the Scottish Government,⁹³ who stated that they "do not believe it would be right to impose comprehensive and strenuous obligations equivalent to those attaching to marriage on individuals who have not deliberately selected them."⁹⁴ Therefore, section 28 of the 2006 Act, which sets out the legal regime of financial provision for cohabitants upon relationship breakdown, was explicitly designed to provide a different (lesser) system of financial provision for cohabitants than the existing system available upon divorce or dissolution. Garland has observed that "this scheme was designed to achieve a delicate balance between protecting the financially vulnerable and respecting the autonomy of cohabitants who have (apparently) chosen to live 'unfettered' from financial obligations."⁹⁵ The contradictory policy objectives of the overall legislative regime⁹⁶ can clearly be seen in the approach taken to financial provision by the 2006 Act.⁹⁷

To that end, section 28(2) provides the orders that are available to the court upon the breakdown of cohabitation, stating:

"economic burden of caring" for children under 16, *id.* section 9(1)(c); if a party has been "dependent to a substantial degree" upon the other party they are to be awarded any financial provision that is "reasonable to enable him to adjust", over a period of up to three years, *id.* section 9(1)(d); and, if a party is "likely to suffer serious financial hardship" due to the divorce they are to be awarded any financial provision that is "reasonable to relieve him of hardship over a reasonable period", *id.* section 9(1)(e).

92. SCOTTISH LAW COMMISSION, REPORT ON FAMILY LAW, *supra* note 3, at 118.

93. SP Bill 36 2005, Explanatory Notes ¶ 70 (Scot.).

94. *Id.*

95. Garland, *supra* note 16, at 314.

96. See discussion *supra* Section 1.

97. See Family Law (Scotland) Act 2006, (ASP 2) § 28. In common with the emphasis on private ordering in other areas of Scots family law, it is possible for cohabitants to opt-out of the regime of financial provision in the 2006 Act through agreement between themselves, and such agreement can be made either prior to the commencement of the cohabitation or during the period of cohabitation. Indeed, as there are no specific provisions regarding "cohabitation agreements" in the 2006 Act, the ordinary rules of Scots contract law would continue to apply to such agreements. However, it is evident that in practice the use of "cohabitation agreements" in Scotland is limited. See generally SCOTTISH LAW COMMISSION, ASPECTS OF FAMILY LAW, *supra* note 3, at 120–29.

On the application of a cohabitant (the “applicant”), the appropriate court may, after having regard to the matters mentioned in subsection (3) - (a) make an order requiring the other cohabitant (the “defender”) to pay a capital sum of an amount specified in the order to the applicant; (b) make an order requiring the defender to pay such amount as may be specified in the order in respect of any economic burden of caring, after the end of the cohabitation, for a child of whom the cohabitants are the parents; (c) make such interim order as it thinks fit.⁹⁸

As the Scottish Law Commission has noted, “[t]he limited remedies available to the court have been the subject of much criticism.”⁹⁹ This criticism has unfavorably contrasted the narrow range of orders available under section 28(2) with the much wider range of orders – including property transfer orders,¹⁰⁰ “periodical allowances,”¹⁰¹ and various orders for the sharing of pension entitlements¹⁰² – that are available to the court when making awards for financial provision on divorce or dissolution.¹⁰³ The basis upon which the courts should make awards is provided by the “matters” that the court must “have regard to.” Listed in section 28(3), these are “(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.”¹⁰⁴

98. Family Law (Scotland) Act 2006, (ASP 2) § 28.

99. SCOTTISH LAW COMMISSION, ASPECTS OF FAMILY LAW, *supra* note 3, at 104.

100. Family Law (Scotland) Act 1985, § 8(1) (listing the order available to either party in an action for divorce).

101. Family Law (Scotland) Act 1985, c. 37, § 8(1)(b).

102. *Id.* § 8(1)(baa–bb).

103. *Id.* §§ 12–14.

104. Section 28, paragraph 3(b) refers to “any relevant child.” Family Law (Scotland) Act 2006, (ASP 2) § 28, ¶ 3(b). “Any relevant child” is defined as “a child who is or was accepted by the cohabitants as a child of the family,” as well as any child of both cohabitants. *Id.* § 28, ¶ 10(b). However, section 28, paragraph 1(b), which provides the power to make an award in relation to the economic burden of caring for a child, only applies to a child of both cohabitants. *Id.* § 28, ¶ 1(b). The lack of apparent policy justification for this inconsistent treatment of children within section 28 has been

Thus, the key concepts within the regime of financial provision for cohabitants are “economic advantage” and “economic disadvantage.” This language reflects (but does not completely replicate) one of the five “principles”¹⁰⁵ of the regime of financial provision on divorce and dissolution.¹⁰⁶ However, the other four principles of that regime are not similarly reflected in the language of section 28. So, any comparison with the regime for divorce and dissolution is partial, because “economic advantage” and “economic disadvantage” stand alone in the cohabitation regime, rather than being one part of a more comprehensive package in the divorce regime. Sutherland has observed that this “leaves the courts to work with an incomplete set of tools in addressing the overall economic impact of the relationship on the lives of the parties.”¹⁰⁷ Additionally, the section provides that if the court is making an order for a “capital sum” under section 28(2)(a), it must “have regard to” the “offsetting” provisions of section 28 (5) and section 28 (6).¹⁰⁸ These sections direct the court to consider whether any “economic advantage” gained by one party is offset by any “economic disadvantage” they may have suffered in the interests of the other party or “any relevant child,”¹⁰⁹ and similarly, whether any “economic disadvantage” suffered by one party is correspondingly offset by any “economic advantage” they may have derived from the contributions of the other.¹¹⁰ Thus, the statutory regime envisages that the court will examine the financial circumstances of the couple holistically before any award can be made on the basis of either “economic advantage” or “economic

criticized. See SCOTTISH LAW COMMISSION, ASPECTS OF FAMILY LAW, *supra* note 3, at 85–88 for more detail regarding this criticism.

105. Family Law (Scotland) Act 1985, c. 27, § 9(1).

106. See *id.* § 9(1)(b) (providing that a “[F]air account should be taken of any economic advantage derived by either person from contributions by the other and of any economic disadvantage suffered by either person in the interests of the other person or of the family.”).

107. Sutherland, *supra* note 10 at 143, 162.

108. Family Law (Scotland) Act 2006, (ASP 2) § 28(4).

109. *Id.* § 28(5).

110. *Id.* § 28(6).

disadvantage.”¹¹¹ From this description, it is evident the drafting of this legislative test is complex, and section 28 has been criticised as “unnecessarily cumbersome,”¹¹² “poorly drafted”¹¹³ and “complicated.”¹¹⁴ As the Scottish Law Commission has noted, “criticism of section 28 is widespread and has been expressed since shortly after the 2006 Act came into force. 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.”¹¹⁵ Therefore, much like the definition of “cohabitant” in section 25,¹¹⁶ the statutory regime of financial provision for cohabitants in section 28 has been the subject of significant criticism for the entirety of its existence.

V. THE JUDICIAL INTERPRETATION OF SECTION 28

The interpretation and application of the regime of financial provision for cohabitants proved even more vexing to the Scottish judiciary than the interpretation of the definition of “cohabitant.”¹¹⁷ Sutherland has commented that “[a] fundamental 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.”¹¹⁸ In the early reported decisions concerning section 28, the judiciary consistently expressed discomfort with both the language and the approach of the statutory test.¹¹⁹ In addition to the issues regarding statutory drafting, this critical judicial language focused upon the wide judicial discretion granted under

111. For judicial language reflecting this understanding of the statutory test, see *W v. M* [2015] ScotSC SC_72 [33], 2016 FamLR 15, 19 (Sherriff Principal Murray comments, “I consider the sheriff here has correctly applied a holistic approach and sought to achieve fairness between the parties and reached the conclusion that there is a loss (disadvantage) to the pursuer which is reflected in some benefit (advantage) to the defender.”).

112. Wasoff, *supra* note 13, at 30.

113. THE SCOTTISH PARLIAMENT: JUSTICE COMMITTEE, OFFICIAL REPORT, 2016-4, at 8 (statement of Jane Mair).

114. *Id.*

115. See SCOTTISH LAW COMMISSION, ASPECTS OF FAMILY LAW, *supra* note 3 at 87.

116. See *id.*, at Section 2.

117. *Id.*

118. Sutherland, *supra* note 10, at 156.

119. *Id.*

section 28¹²⁰ and the lack of explanation or guidance within the legislation about the underlying basis for the exercise of this discretion.¹²¹ The comments of Sheriff Miller in *Lindsay v. Murphy*,¹²² that “I share her regret that the logic of these provisions is not more readily apparent;”¹²³ Sheriff Principal Dunlop in *Mitchell v. Gibson*,¹²⁴ that “[t]his might be thought to be a rather unsatisfactory manner of resolving the competing claims of parties on the cessation of cohabitation but seems to me to be the inevitable consequence of the manner in which Parliament has legislated;”¹²⁵ and Lord Drummond-Young in *Whigham v. Owen*,¹²⁶ “[t]he result is that the court must arrive at an award under s.28 or 29 without any proper guidance in the legislation as to what the amount of that award should be,”¹²⁷ are representative of the general judicial attitude towards section 28 in the early reported decisions. Unsurprisingly, given the repeatedly expressed judicial discomfort with the provision, this early case law also produced marked differences between decisions regarding the correct approach to be taken to making awards for financial provision under section 28.¹²⁸ This is

120. See *Lindsay v. Murphy* [2010] ScotSC 116 [62], 2010 FamLR 156, 159. See also *Mitchell v. Gibson* (2011) FamLR 53, 55 (Scot.); *Whigham v. Owen* [2013] CSOH 29 [8], 2013 SLT 483, 486.

121. See *M v. S* [2008] CSOH 125, [2008] SLT 871, 889 (Lord Matthews observing, “it seems to me that the discretion afforded to the court is very wide indeed.”).

122. It is notable that neither the Scottish Law Commission’s 1992 Report nor the Scottish Government’s 2005 Policy Memorandum contain any significant discussion of the basis upon which judges should approach determining awards for financial provision. See generally SCOTTISH LAW COMMISSION, REPORT ON FAMILY LAW, 1992, HC. See also Family Law (Scotland) Bill 2005, c. 36, Explanatory Notes.

123. *Lindsay v. Murphy* [2010] ScotSC 116 [62], 2010 FamLR 156, 159.

124. *Id.* (statement of Sherriff Miller).

125. *Mitchell v. Gibson* (2011) FamLR 53, 55 (Scot.).

126. *Id.* (statement of Sherriff Principal Dunlop).

127. *Whigham v. Owen* [2013] CSOH 29 [8], 2013 SLT 483, 486 (Scot.).

128. See, e.g., *Fairley v. Fairley* [2008] CSOH 104 [1], 2008 Fam LR 112, 112 (Scot.) (focusing on the date of separation to determine whether pursuer was entitled to a capital sum pursuant to Section 28 of the Family Law (Scotland) Act 2006); *Jamieson v. Rodhouse* [2008] ScotSC 36 [1], 2009 FamLR 34, 36 (Scot.) (focusing on the economic advantages and disadvantages suffered by both parties to determine whether to award a capital sum pursuant to Section 28 of the Family Law (Scotland) Act 2006); *Mitchell v. Gibson* 2011 FamLR 53, 55 (Scot.) (focusing on the economic advantages and disadvantages suffered by both parties to determine whether to award a capital sum pursuant to Section 28 of the

illustrated by the contrast between the judgment of Lord Matthews in *M v. S*, which explicitly draws a comparison with the similar statutory provisions relating to divorce and dissolution,¹²⁹ and the approach taken by Sheriff Miller in *Lindsay v. Murphy*, which entirely rejects any comparison with the provisions relating to divorce and dissolution.¹³⁰ Based upon these early decisions, McCarthy identified “three different models”¹³¹ being employed judicially as the rationale for the exercise of discretion, and commented that

[t]he primary difficulty highlighted by the jurisprudence is the confusion caused by the absence in the legislation of a clearly stated redistributive rationale. The court, provided with discretion, is not given direction as to the purpose of exercising that discretion...This bewildering array of outcomes could fairly be described as ironic, given that one of the stated aims of the legislation was to bring certainty to what had been a complex and little understood area of the law.¹³²

Given this range of judicial interpretations and outcomes, the explicit policy objective of providing greater clarity and certainty was clearly not being met by the statutory regime. This

Family Law (Scotland) Act 2006); *G v. F* [2011] ScotSC 100 [4], 2011 SLT (Sh ct) 161, 164-65 (Scot.) (focusing on whether there are quantifiable economic imbalances resulting from cohabitation to determine whether to award capital sum pursuant to Section 28 of the Family Law (Scotland) Act 2006).

129. See *M v. S* [2008] CSOH 125 [272], 2008 SLT 871, 890 (Scot.) (“The provisions, although not absolutely identical, are so similar in my opinion as to make it clear, at least to me, that the Scottish Parliament must have intended the courts to approach them in the same way.”). See also *F v. D* 2009 FamLR 111, 113 (Scot.) (“At the end of a period of cohabitation, a former cohabitant may be able to make application to the courts for financial provision orders, as can a spouse or civil partner at the end of a marriage or civil partnership.”).

130. See *Lindsay v. Murphy* [2010] ScotSC 116 [58], 2010 FamLR 156, 158 (Scot.) (“[t]his comparison serves little practical purpose when it comes to understanding the purpose and scope the provisions of the 2006 Act.”). See also *Selkirk v. Chisholm* [2010] ScotSC 11 [98], 2011 FamLR 56,64 (Scot.) (“It does not appear that Parliament intended cohabitants to be placed in the same position upon separation as spouses upon divorce.”).

131. McCarthy, *supra* note 16, at 289-93 (identifying “the partnership model,” “the compensation model,” and “the restitutionary model”).

132. *Id.* at 298.

divergence of judicial approach to section 28 resulted in the Supreme Court decision in *Gow v. Grant*,¹³³ which resolved these interpretative differences and set out the underpinning rationale upon which the discretion should be exercised. In his judgment, Lord Hope acknowledged some of the issues with the statutory provision, commenting that “[t]he drafting of this section was much criticised while it was undergoing parliamentary scrutiny, and the questions that it raises are not free from difficulty.”¹³⁴ Thereafter, his judgment considers the history and development of the statutory regime¹³⁵ in order to determine “the mischief that [the section]...was designed to address.”¹³⁶ In this attempt to ascertain the policy behind the legislation,¹³⁷ the judgment considers various ministerial statements made during the Parliamentary process.¹³⁸ From this, Lord Hope identifies “fairness” as the key principle that should underpin the determination of awards under section 28, with his lordship stating that “[c]ommon to all these statements is an emphasis on fairness to both parties. This is the principle that lies at the heart of the award that the court is able to make under this section.”¹³⁹ The judgment expanded upon the meaning of “fairness” within the statutory test, observing that “[i]n that context what sec 28 seeks to achieve is fairness in the assessment of compensation for contributions made or economic disadvantages suffered in the

133. *Gow v. Grant* [2012] UKSC 29 [54]-[55], 2013 SC (UKSC) 1, 18-19 (appeal taken from Scot.), *rev'g* [2011] CSIH 25, 2011 FamLR 50 (Scot.), *reinstating* 2010 FamLR 21(Scot.).

134. [2012] UKSC 29 [8], 2013 SC (UKSC) at 5.

135. *Id.* at [25]-[33], 2013 SC (UKSC) at 10-12.

136. *Id.* at [25], 2013 SC (UKSC) at 10.

137. Lord Hope reinforces the policy distinction between marriage and cohabitation within the legal regime and noting that “the statutory purpose does no more than reflect the reality that cohabitation is a less formal, less structured and more flexible form of relationship than either marriage or civil partnership.” *Id.* at [35], 2013 SC (UKSC) at 13. This statement explicitly reflects the wording of Sheriff Miller in *Lindsay v. Murphy* [2010] ScotSC 116 [58], 2010 FamLR 156, 159 (Scot.).

138. The judgement focuses upon the written statement of Deputy Minister for Justice, Hugh Henry, and the oral contributions of the Minister for Justice, Cathy Jamieson. *Id.* at [35]-[36], 2013 SC (UKSC) at 13. *See* DEPUTY MINISTER FOR JUSTICE, RESPONSE TO JUSTICE 1 COMMITTEE STAGE REPORT (2005); *see also* MINISTER FOR JUSTICE, PARLIAMENT DEBATE (2005) (“It is important to achieve fairness.”).

139. *Id.* at [31], 2013 SC (UKSC) at 12.

interests of the relationship. The wording of subsecs (3), (5) and (6) should be read broadly rather than narrowly.”¹⁴⁰ Interestingly, this emphasis on “fairness” occurs despite the language of “fairness” not appearing in section 28 itself, which prompted Sutherland to comment that “a niggling doubt remains that the effect of the decision in *Gow v. Grant* is to expand the reach of the statutory provision, albeit in a welcome direction.”¹⁴¹ Nonetheless, Thomson suggested that the Supreme Court decision “transformed this area of the law,”¹⁴² and Garland commented, “*Gow* marked a significant step away from the arithmetical, narrow approach that had dominated the earlier courts.”¹⁴³

Subsequently, the judiciary responded to the decision in *Gow* by accepting that “fairness informs the exercise of the discretion,”¹⁴⁴ and thereafter, adopting what has been variously described as “a rough and ready calculation,”¹⁴⁵ or “a broad brush approach,”¹⁴⁶ with Sheriff Principal Pyle observing in *Duthie v. Findlay* that “[t]he emphasis on ‘fairness’ necessarily means that the sheriff is entitled to take a broad axe approach.”¹⁴⁷ The most significant substantive consequence of this post-*Gow* emphasis on “fairness,” within the exercise of the discretion under section 28, is that the judiciary now appears prepared to make larger awards upon the breakdown of cohabiting relationships than prior to the judgment in *Gow*.¹⁴⁸ While the Supreme Court decision has resolved the issue of the earlier contradictory judicial

140. *Id.* At [33], 2013 SC (UKSC) at 12.

141. Sutherland, *supra* note 10, at 163.

142. Thomson, *supra* note 25, at 207.

143. Garland, *supra* note 16, at 321.

144. *See T v. W* [2020] EDIC 37 [28] (Scot.); *see also Saunders v. Martin* 2014 FamLR 86, 91 (Scot.).

145. *Whigham v Owen* [2013] CSOH 29; 2013 SLT 483, per Lord Drummond-Young, at 486; *Cameron v. Lukes* [2013] ScotSC 95 [18] (Scot.); 2014 GWD 7-144, per Sheriff Principal Scott, at para 18.

146. *E.g., Whigham v. Owen* [2013] CSOH 29 [10], 2013 SLT 483, 486 (Scot.); *Cameron v. Lukes* [2013] ScotSC 95 [18] (Scot.).

147. *Duthie v. Findlay* [2020] SAC (Civ) 13 [9], 2020 FamLR 141, 143 (Scot.).

148. *See* [2013] CSOH 29 [32], 2013 FamLR 30, 37 (Scot.) (awarding £250,000 after the breakdown of a 27-yearlong cohabitation). *Cf. Jamieson v. Rodhouse* [2008] ScotSC 36 [50], 2009 FamLR 34, 39 (Scot.) (pre-*Gow* decision awarding nothing after the breakdown of a 31-year-long cohabitation).

interpretation, by setting out the centrality of the principle of “fairness” to section 28, the judgment does not address the other issues identified with the statutory test, particularly those caused by the existence of wide judicial discretion within the test. Indeed, relying upon the principle of “fairness” to underpin this section introduces a further discretionary concept into the exercise of judicial discretion, because “fairness” is itself a necessarily vague and indefinable concept. As Lord Nicholls has previously acknowledged, in the context of the English law concerning financial provision on divorce,

[f]airness is an elusive concept. It is an instinctive response to a given set of facts. Ultimately it is grounded in social and moral values. These values, or attitudes, can be stated. But they cannot be justified, or refuted, by any objective process of logical reasoning. Moreover, they change from one generation to the next.¹⁴⁹

As the aphorism says, “fairness is in the eye of the beholder,” and as the recent Scottish Law Commission discussion paper notes, “even if the principle of fairness had underpinned the provision, decision makers would still have been left with wide discretion and little guidance in the legislation to assist with its exercise.”¹⁵⁰ As a result of the Supreme Court decision in *Gow*, when making awards under section 28, first instance judges and Sheriffs now understand that the overarching principle is “fairness,” but reliance upon that principle has not necessarily provided additional clarity as to how the wide judicial discretion inherent to the statutory test should be exercised in individual cases.

To conclude this section, while the legal regime of financial provision for cohabitants upon relationship breakdown, in the 2006 Act, provides specific legal rights where previously there had been none, the regime has not proved to be effective as was hoped by the Scottish Government when the provisions were

149. *Miller v. Miller* [2006] UKHL 24, [2006] 2 AC 618 (HL) 631 (appeal taken from Eng.).

150. SCOTTISH LAW COMMISSION, ASPECTS OF FAMILY LAW, *supra* note 3, at 92.

enacted. As the Scottish Law Commission discussion paper chapter on financial provision concludes that:

[t]he test set out in section 28 and the breadth of judicial discretion that it affords are widely regarded as unhelpful. Solicitors cannot predict outcomes and therefore find it difficult to advise clients during negotiations or in litigation; decision makers complain about the lack of clarity of purpose of the test; members of the public, insofar as they are aware of the legislation, cannot be expected to apply the complex test, including the offsetting provisions, to their own circumstances.¹⁵¹

Therefore, based to a large extent upon the wide-ranging criticisms of both section 25 and section 28 of the 2006 Act set out over the course of the past two sections, the Scottish Law Commission is currently in the process of a law reform project reconsidering the legal regime for cohabitants in Scotland, and it is to this project that this article will now directly turn.

VI. THE CURRENT SCOTTISH LAW COMMISSION REFORM PROJECT ON COHABITATION

As mentioned above, in February 2020, the Scottish Law Commission published a new discussion paper on the legal regime regulating cohabitation, “Aspects of Family Law: Discussion Paper on Cohabitation.” This discussion paper provided a comprehensive account of the provisions of the 2006 Act,¹⁵² the subsequent judicial interpretation of those provisions, a comparative analysis of other jurisdictions,¹⁵³ and the major academic and practitioner criticisms of the current law.¹⁵⁴ The

151. *Id.* para. 5.63.

152. *See generally id.* at 130–44 (explaining that sections 26 and 27 of the Family Law 2006 Act provides certain rights to cohabitants relating to household goods, money, and other property, and that section 28 provides for the common law remedy of unjustified enrichment in addition to a claim for financial provision).

153. *Id.* at 22 (noting that comparative research on cohabitants’ rights focuses on the approach of Australia, Ireland, New Zealand, Canada, and three Nordic countries).

154. *Id.* at 20 (noting that many respondents questioned the justification and rationale for maintaining separate regimes, while others questioned whether aligning cohabitation more closely with marriage might run the risk of removal of freedom of choice,

discussion paper is only the first stage of this ongoing law reform project.¹⁵⁵ It was followed by a consultation with stakeholders and members of the public,¹⁵⁶ and will subsequently be followed by the publication of a final report containing the commission's proposals for reform of the legal regime for cohabitation in Scotland. At the time of writing, this final report has not yet been published.¹⁵⁷ As such, the nature, scope, and extent of the reforms ultimately proposed by the Scottish Law Commission is not yet apparent. However, from the content of the discussion paper it is clear that significant and substantial reforms are being contemplated.

Reflecting on the changes in societal demographics and social attitudes that have occurred since the 2006 Act was enacted, the discussion paper notes that one of its main purposes is to "explore the ways in which Scots law might be modernised and improved to better meet the needs of cohabitants in the 21st Century."¹⁵⁸ Central to this potential "modernisation" of the law is a reconsideration of the policy rationale for maintaining a separate regime of financial provision for cohabitants from that available upon divorce and dissolution that underpins the current legislative approach.¹⁵⁹ As noted above, at the time of the 2006 Act, this distinction was justified by the Scottish Government on the basis "that to regard cohabitation as equivalent to marriage fails to acknowledge the special place of marriage in Scottish society."¹⁶⁰ Evidently, the policy was based upon a normative understanding that cohabitation should not be treated as the

and some questioned the justification for imposing marriage-like rights on parties who had deliberately chose not to marry).

155. *Id.* at 2 (stating that a decision on the content of phase two will be taken on completion of the first phase).

156. *See generally* SCOTTISH LAW COMMISSION, COLLATED RESPONSES TO DISCUSSION PAPER ON ASPECTS OF FAMILY LAW: COHABITATION, 2020, 170 (documenting the responses of stakeholders and members of the public during the consultation that followed the discussion paper).

157. *See* SCOTTISH LAW COMMISSION, *Aspects of Family Law*, <https://www.scotlawcom.gov.uk/law-reform/law-reform-projects/aspects-of-family-law/> (last visited May 19, 2022) (noting that the report should be released in 2022).

158. SCOTTISH LAW COMMISSION, ASPECTS OF FAMILY LAW, *supra* note 3, at 3.

159. *Id.* at 16.

160. SP Bill 36 2005, Explanatory Notes ¶ 70 (Scot.).

functional equivalent of marriage, because the relationships were constructed and understood differently.¹⁶¹

However, it is an open question whether this normative privileging of marriage continues to have sufficient resonance and support in contemporary Scottish society to continue to underpin the difference in treatment between marriage and cohabitation. As the discussion paper puts it, “[t]he question for us is whether there remains justification for retaining separate regimes in Scotland for financial provision on cessation of cohabitation and for financial provision on divorce and dissolution of civil partnership.”¹⁶² This is the *key* question for the law reform project, and as I suggested in my consultation response, “whether these separate regimes should continue is this the fundamental question at the heart of this Discussion Paper, and indeed represents the fundamental issue with the current regime for financial provision on cohabitation.”¹⁶³ This is illustrated by the fact that the answers to many of the other questions that are raised within the discussion paper¹⁶⁴ depend (to a greater or lesser extent) upon whether this central distinction between the financial provision that is available to cohabitants and that which is available to spouses and civil partners is retained. However, it is worth observing that there is not necessarily a consensus on how to approach this issue,¹⁶⁵ and as the discussion paper notes, “[a] range of views has been expressed to us...as to whether there is a justification for retaining different regimes for financial provision on cessation of cohabitation and on divorce or

161. *Id.* at 13 (noting that “[i]t is not the intention that marriage-equivalent legal rights should accrue to cohabitating couples. . .”).

162. SCOTTISH LAW COMMISSION, ASPECTS OF FAMILY LAW, *supra* note 3, at 35.

163. Brown, *supra* note 21, at 314, 315.

164. See generally SCOTTISH LAW COMMISSION, ASPECTS OF FAMILY LAW, *supra* note 3, at 147–51 (documenting the list of questions used in the discussion paper to seek the views of consultees).

165. SCOTTISH LAW COMMISSION, COLLATED RESPONSES TO DISCUSSION PAPER ON ASPECTS OF FAMILY LAW: COHABITATION, 2020, *supra* note 156 at 155 (noting that this lack of consensus amongst stakeholders is evident from the Written Consultation Responses to Scottish Law Commission Discussion Paper No. 170 (n 155)).

dissolution.”¹⁶⁶ As well as this normative point, as detailed above, the legislative regime of financial provision for cohabitants has consistently been unfavorably compared to the equivalent regime available upon divorce or dissolution;¹⁶⁷ and, as Sutherland has observed of the 2006 Act’s approach, “the compromise solution itself has caused problems. By taking two pieces from the coherent package of remedies available on the breakdown of marriage or civil partnership and offering only those pieces to parting cohabitants, the legal system lost the very coherence that is the strength of the package.”¹⁶⁸ The discussion paper is undoubtedly informed by the consistently expressed academic and practitioner criticism of the cohabitation provisions and the support for the divorce provisions. This is shown in the later chapter concerning the specific context of financial provision where the discussion paper notes that “[m]any stakeholders have told us that the section 28(3) test is difficult to understand and explain and is therefore unsatisfactory; an approach such as that under the 1985 Act would be preferred.”¹⁶⁹ With that said, despite noting and reflecting this criticism, the discussion paper does not take a definitive position on the issue of whether the separate regime of financial provision for cohabitation should be retained, instead seeking further views¹⁷⁰ and leaving the answer to this fundamental question for its upcoming final report.

Nonetheless, regardless of how this question is answered, it is apparent from the discussion paper that the criticisms of the cohabitation provisions in the 2006 Act, which have been consistently expressed by academics, legal practitioners, and the judiciary since the enactment of the legislation, are likely to result in proposals for substantial reform (whatever the precise scope of the proposed reforms) to the legal regulation of cohabitation in Scotland.

166. SCOTTISH LAW COMMISSION, ASPECTS OF FAMILY LAW, *supra* note 3 at 20 (noting that a “range of views” both for and against retention of the separate regimes is summarized in paras. 2.18-2.21).

167. Family Law (Scotland) Act 2006, (ASP 2) § 28.

168. Sutherland, *supra* note 10, at 166.

169. SCOTTISH LAW COMMISSION, ASPECTS OF FAMILY LAW DISCUSSION, *supra* note 3, at 89.

170. *Id.* at 35.

VII. CONCLUSION

In this article, I have set out how the position of cohabitants within Scots law has changed over the course of the late 20th and early 21st centuries and noted that this process is not yet finished. Cohabiting relationships have progressed from being completely ignored by the law to possessing a range of legal rights, responsibilities, and obligations in a variety of contexts. Within this, the specific legal rights for cohabitants created by sections 25 to 29 of the Family Law (Scotland) Act 2006 represented the most substantial and fundamental reform, providing a novel system of financial provision upon the breakdown of cohabiting relationships. The central principle underpinning the system created by the 2006 Act was that the financial provision available to cohabiting couples was different from (and lesser than) the financial provision available to married couples and civil partners, because cohabitation continued to be understood and conceptualised as different from those registered relationships. However, in the fifteen years since it was enacted, the legislative scheme has been the subject of significant criticism from academics, practitioners, and the judiciary. This criticism has mainly focused upon two aspects of the legislative scheme: the definition of “cohabitant” in section 25, and the regime for financial provision in section 28. First, the definition of “cohabitant” has been criticised both for the incoherence of the statutory drafting, and on a more substantive basis, due to the problematic comparison with marriage that is central to the definition in section 25(1). Second, the regime of financial provision in section 28 has similarly been criticised on the basis of its overly complicated statutory drafting, as well as on more substantive bases, due to the apparent lack of a rationale for how the wide judicial discretion it provides should be exercised, and through unfavorable comparisons with the more comprehensive regime of financial provision available upon divorce or dissolution. Overall, I argue that the 2006 Act provides a legal regime that has not met its policy objectives, that is poorly used and understood by the public, and that has not succeeded in the way that its proponents hoped and anticipated. Consequently, the Scottish Law Commission is currently reviewing the 2006 Act and

the wider legal regime relating to cohabitation, with proposals for further reform expected in 2022.

Finally, as McCarthy commented in 2011, “[i]f any lesson can be learned from the Scottish experience so far, it is that a break from the old regime does not necessarily offer a clear new dawn.”¹⁷¹ Ten years on, it is apparent that there has not been a “clear new dawn” and the 2006 Act’s provisions appear unlikely to survive the ongoing law reform process. What this regime is replaced with, and whether that reformed system is able to address the criticisms of the current law and effectively regulate cohabitation, is a question for the future. On that future, as I have previously noted, “while the law is influenced by both changes in social attitudes and a paternalistic desire to protect vulnerable (female) cohabitants, the central justification for legal regulation of cohabitation is acknowledging that cohabitation is a ‘marriage-like’ relationship, based primarily upon the shared conjugality which features in these different types of relationship.”¹⁷² The approach to the regulation of cohabitation in the 2006 Act clearly illustrates this justification; the question that remains unanswered is whether the law reform project currently being undertaken by the Scottish Law Commission will take this justification to its logical conclusion and provide cohabiting couples with access to the regime of financial provision that exists upon divorce and dissolution. It is my view that it would represent a missed opportunity for Scots family law if this approach was not proposed, and instead another “compromise solution” was offered. Whether or not this opportunity is taken will be answered by the Scottish Law Commission’s upcoming and eagerly awaited final report, and the subsequent decisions of the Scottish Government.

171. McCarthy, *supra* note 16, at 301.

172. Brown, *supra* note 50, at 95.

