



# **Engender response to the Scottish Law Commission Aspects of Family Law Discussion Paper on Cohabitation**

August 2020

## **INTRODUCTION**

Engender is Scotland's feminist policy and advocacy organisation, working to secure women's political, economic and social equality with men. Our aspiration is for a Scotland where women and men have equal access to rights, resources, decision-making and safety.

We welcome this opportunity to comment on the Scottish Law Commission Aspects of Family Law Discussion Paper on Cohabitation following early engagement with the Commission's research in 2018. Our view is that proposals to reform the law on cohabitation must take into account gendered inequalities including women's lesser access to resources, greater likelihood of poverty, the impact of care and motherhood on women's lifetime earnings, domestic abuse and restrictions to women's equal access to the legal system.

While modest protections for separating or bereaved cohabitants were introduced with the Family Law (Scotland) Act 2006, these have proven to be rarely used in the years following. We would wish to see greater access to asset sharing, the possibility of ongoing awards and an approach rooted in principles similar to divorce provisions in Scots law, where the facts of the relationship demonstrate significant contributions, where both financial and other forms of contribution are equally valued.

## **CONSULTATION QUESTIONS**

We have elected to approach the consultation broadly by responding to key chapter themes rather than to provide answers to all 26 questions in order to focus on our key concerns.

## 1. Access to legal protections for married and cohabiting couples

We have no view on whether the detail of legal provisions on divorce and cessation of cohabitation should remain formally separate. Our concern is that women have access to a regime that best protects the realisation of their rights and protects them from disadvantage based on gendered hierarchies or the state's preference of a particular form of relationship.

We recognise that Scotland's existing cohabitation regime attempts to redress dramatic inequalities on separation while respecting "the autonomy of cohabitants who have (apparently) chosen to live "unfettered" from financial obligations."<sup>1</sup> Thus, the existing regime assumes equal informed willingness to conduct a relationship outside of the legal regime applied to married couples. Marriage has of course evolved significantly over the years, but for many people, and particularly for women, it still can be seen as a system rooted in patriarchal and outdated ideals or closely bound up in religious or solemnised processes. While many traditional elements in some marriage ceremonies, such as being given away, may be dispensed with, for those with sincerely felt ideological opposition to entering a marriage the law currently offers no system of formal recognition, something due to change with the introduction of opposite sex civil partnerships.

In that context, we have previously noted that enabling different forms of commitment to be made which provide substantively the same rights and legal protections is a marker of a diverse and pluralistic society which respects these views.<sup>2</sup>

With 17.6% of families in Scotland headed by a cohabiting couple<sup>3</sup> and numbers opting against marriage consistently increasing, it must be acknowledged that cohabitants are not a homogenous group with singular choices and experiences. While it has been suggested that the absence of regulation is an effort in state neutrality, holding to the concept of a clean break when cohabitants separate is clearly not neutral, and further concentrates power and assets with the partner who likely has the strongest attachment to the labour market going forward and who is likely not providing care.

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<sup>1</sup> Garland, F (2015) Gender imbalances, economic vulnerability and cohabitation: evaluating the gendered impact of Section 28 of the Family Law (Scotland) Act 2006, *Edinburgh Law Review* 19(3), pp.311-332, p.315.

<sup>2</sup> Engender (2020) Engender submission of evidence to the Equalities and Human Rights Committee inquiry on the Civil Partnership (Scotland) Bill. Available at:

<https://www.engender.org.uk/content/publications/Engender-submission-of-evidence-to-the-Equalities-and-Human-Rights-Committee-inquiry-on-the-Civil-Partnership-Scotland-Bill.pdf>

<sup>3</sup> ONS (2020) Families and households in the UK: 2019. Available at:

<https://www.ons.gov.uk/peoplepopulationandcommunity/birthsdeathsandmarriages/families/bulletins/familiesandhouseholds/2019#things-you-need-to-know-about-this-release>

In short, power and economic resource is allowed to be concentrated during and then after the relationship comes to an end.<sup>4</sup>

Some advocates for a deregulated approach, such as the academic, lawyer, bioethicist and crossbench peer Baroness Ruth Deech, suggest that regulation of cohabitation overrides individual autonomy and therefore undermines gender equality, claiming that “women do not need and ought not to require to be kept by men after their relationship has come to an end”.<sup>5</sup> However, this position is also a blanket one which privileges some women over others by suggesting that all women have access to the same resources and does not recognise that circumstances change.

While clearly an assumption of male-breadwinner female-care division in families is outdated, the current reality remains far more complex. Women are still more likely to provide unpaid care, to give up work to provide care,<sup>6</sup> to work part-time and Scotland’s overall gender pay gap is stubbornly persistent at 13.3%,<sup>7</sup> the result of a complex combination of factors such as women’s greater likelihood of working part-time in lower paid roles, occupational segregation which funnels women into lower paid and undervalued jobs, sexual harassment and workplace discrimination and the provision of care. There is clear evidence that the earnings divide becomes more acute with motherhood<sup>8</sup> but also with age even where women do not have children<sup>9</sup> and that income disparity persists into retirement with pension inequality.<sup>10</sup>

Commentators have noted that purchasing property in 2020 usually necessitates two incomes and a pooling of resources even if solely for that purpose.<sup>11</sup> Going in further, state-sourced income from social security via Universal Credit actually demands a

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<sup>4</sup> Sutherland, E.E. (2013) From ‘bidie-in’ to ‘cohabitant’ in Scotland: the perils of legislative compromise., *International journal of law, policy and the family*, 27(2), pp.143-175.

<sup>5</sup> Deech, R (2009) Couples don't need the law to tell them how to live together. Available at: <https://www.theguardian.com/commentisfree/2009/nov/22/ruth-deech-marriage-cohabitation-children>

<sup>6</sup> Engender (2020) Gender and Unpaid Work: The Impact of Covid-19 on Women’s Unpaid Caring Roles. Available at: [https://www.engender.org.uk/content/publications/1594974358\\_Gender--unpaid-work---the-impact-of-Covid-19-on-womens-caring-roles.pdf](https://www.engender.org.uk/content/publications/1594974358_Gender--unpaid-work---the-impact-of-Covid-19-on-womens-caring-roles.pdf)

<sup>7</sup> Close the Gap (2020) Working Paper 21: Gender Pay Gap Statistics. Available at: <https://www.closesthegap.org.uk/content/resources/Working-Paper-21-Gender-Pay-Gap-statistics-2019.pdf>

<sup>8</sup> Grimshaw, D, and Rubery, J (2015) The motherhood pay gap: A review of the issues, theory and international evidence. Available at: [https://eige.europa.eu/resources/wcms\\_371804.pdf](https://eige.europa.eu/resources/wcms_371804.pdf)

<sup>9</sup> TUC and IPPR (2016) The Motherhood Pay Penalty. Available at: <https://www.tuc.org.uk/sites/default/files/MotherhoodPayPenalty.pdf>

<sup>10</sup> Prospect What is the gender pension gap? Available at: <https://prospect.org.uk/article/what-is-the-gender-pension-gap/>

<sup>11</sup> Bottomley, A (2006) From Mrs. Burns to Mrs. Oxley: Do Co-habiting Women (Still) Need Marriage Law? Available at: <https://core.ac.uk/download/pdf/90077.pdf>

pooling of resources irrespective of whether a couple is married, with a single household payment that combines eligibility and award to be managed singularly.<sup>12</sup>

Resources may also become entangled as a result of domestic abuse due to forced or coerced pregnancy, financial abuse or violence which may have long term social, psychological and financial consequences for victim-survivors.

Analysis of Canadian cases showed that separating opposite sex cohabitants demonstrated highly gendered roles and contributions.<sup>13</sup> No cases found by the researchers involved a male primary caregiver. While 'breadwinning' was less uniformly male it was still predominantly so, while childcare and domestic work was overwhelmingly carried out by women. Where families had relocated, the research showed that it was women whose careers had suffered.

These findings show that cohabitation, at least where disputes over resources arise, reflects traditional gendered patterns in much the same way as marriage or least that the formalisation of the relationship is not of itself determinative in how contributions will be split. And while the evidence suggests that some cohabiting couples adopt or fall into more traditional gendered roles, elsewhere married couples are individualising, such as through maintaining separate bank accounts.<sup>14</sup>

In practice therefore, it seems that cohabitants and married couples do not behave in substantially different ways and combine their resources, labours and responsibilities irrespective of how they might have conceived of their relationship initially. Holding couples to a presumed active decision to opt out of state protection serves only to privilege the party with more power and assets. In other situations, the law no longer differentiates - the Adoption and Children Act 2002 places cohabiting couples in the same position as married couples or civil partners in terms of their ability to apply for a joint adoption order.

Economic transfers on separation are imperfect but can therefore (at least in theory) attempt to rebalance the financial gains and losses from being in a relationship. These gains and losses remain overwhelmingly gendered<sup>15</sup> and many will impact more

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<sup>12</sup> Engender (2016) Gender Matters in Social Security: Individual Payments of Universal Credit. Available at: <https://www.engender.org.uk/content/publications/Gender-matters-in-social-security---individual-payments-of-universal-credit.pdf>

<sup>13</sup> Leckey, R (2018) Cohabitation, Female Sacrifice, and Judge-Made Law. Available at: [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3202477](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3202477)

<sup>14</sup> Bottomley, A (2006) From Mrs. Burns to Mrs. Oxley: Do Co-habiting Women (Still) Need Marriage Law? Available at: <https://core.ac.uk/download/pdf/90077.pdf>

<sup>15</sup> Garland, F (2015) Gender imbalances, economic vulnerability and cohabitation: evaluating the gendered impact of Section 28 of the Family Law (Scotland) Act 2006, *Edinburgh Law Review*, 19(3), pp.311-332, p.331.

acutely over the life course. It is clear that there is a difference, as acknowledged in the discussion paper, between couples at different life stages: “A couple who begin to cohabit when they are young and impecunious students, for example, may go on to have children, buy property and develop careers or business interests.”<sup>16</sup> Of course, this is equally true with married couples and yet the law and society maintains distinctions based on an apparent intention at the start of the relationship.

While divorcing spouses may access an asset scheme based on five principles, Section 28 only provides two weaker principles based on “compensatory ideas.”<sup>17</sup> The distinction between (at best) “fair compensation”<sup>18</sup> for separating cohabitants and “fairness” for divorcing couples is particularly difficult to defend once the state has determined that at least some protection is necessary with the introduction of s.28.

The desire to restrict protections to marriage in all but the most egregious of dissolutions is inseparable from traditional social control and a maintenance of a hierarchy of relationships. While it may be true that state regulation of cohabitation devalues an individual choice to avoid its intervention, it can also be argued that an absence of regulation reflects a devaluation of personal choice in order to maintain the state’s preference toward marriage.

No form of relationship is an easy shorthand for the degree of comingling and interdependence. Assumptions that cohabitants actively want to avoid the regime of marriage, and remain committed to this view throughout their relationship, clearly does not apply in every case. This is especially clear given the proportion of people who express some surprise that they are not protected by the law when their relationship ends.<sup>19</sup> It is also important to remember that decisions about marriage are not made in a vacuum so active choice is even less easily assumed, whether one partner wants to be married and the other doesn’t, or whether both choose to prioritise other financial investments over a wedding.

While a protective mechanism for cohabitants cannot account for all gendered inequalities men and women exiting opposite sex relationship experience, there is a clear duty to account for inequalities that arise directly from choices made in the

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<sup>16</sup> Scottish Law Commission (2020) Aspects of Family Law: Discussion Paper on Cohabitation. Available at: [https://www.scotlawcom.gov.uk/files/1115/8270/8061/Aspects\\_of\\_Family\\_Law\\_-\\_Discussion\\_Paper\\_on\\_Cohabitation\\_DP\\_No\\_170.pdf](https://www.scotlawcom.gov.uk/files/1115/8270/8061/Aspects_of_Family_Law_-_Discussion_Paper_on_Cohabitation_DP_No_170.pdf) at 7.36

<sup>17</sup> Miles, J (2012) Cohabitation: Lessons for the South from North of the Border? The Cambridge Law Journal, 71(3), pp.492-495.

<sup>18</sup> *Post Gow v. Grant*.

<sup>19</sup> Scottish Law Commission (2020) Aspects of Family Law: Discussion Paper on Cohabitation. Available at : [https://www.scotlawcom.gov.uk/files/1115/8270/8061/Aspects\\_of\\_Family\\_Law\\_-\\_Discussion\\_Paper\\_on\\_Cohabitation\\_DP\\_No\\_170.pdf](https://www.scotlawcom.gov.uk/files/1115/8270/8061/Aspects_of_Family_Law_-_Discussion_Paper_on_Cohabitation_DP_No_170.pdf)

context of the relationship. When opposite sex couples with children separate “one partner leaves with his earning capacity intact while the other's earning capacity is not only hindered for as long as the children continue to live with her, but is impaired in the long term.”<sup>20</sup>

As noted during the Australian consultation treating marriage and cohabitants equally “does not remove people's choice; it protects the vulnerable party in an economic and emotional relationship... economic interdependence and dependence happens and should be recognised.”<sup>21</sup>

## 2. The definition of cohabitant

Engender would support amending the definition of cohabitant. We are persuaded that definition of cohabitants by reference to marriage is outdated and increasingly open to conflict, given the evolving and increasingly individualised ways in which married couples define their relationship.<sup>22</sup> We are also persuaded that removing the reference to marriage would reduce the public’s perception that marriage by habitation and repute or some other vague idea of ‘common law marriage’ remains operable in Scotland and that the removal would positively undermine a hierarchy in terms of relationships appropriate in a modern Scotland.

With the introduction of opposite sex civil partnerships and with same sex marriages now common, the idea of a single model of organising relationships and the resulting burdens and roles within them is increasingly difficult to state definitively. Married couples no longer necessarily share finances or even live together while cohabiting couples commonly do so. We would therefore urge a definition that is not overly reliant on a checklist of criteria, believing that a flexible approach would offer more protection in difficult and contested cases.<sup>23</sup> In particular we would be concerned that an undue degree of focus on financial arrangements would belie the complexity and nuances of modern relationships – joint finances may conceal gendered and abusive controls over access to funds while an absence of formalised arrangements does not mean a couple are not cohabiting nor reliant upon one another, particularly with increasingly digitalised finance products.<sup>24</sup> A court should therefore have a view to the whole facts of the particular relationship when determining its character.

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<sup>20</sup> Parkinson, P (1995) The property rights of cohabitantes - is statutory reform the answer?, in A Bainham and D Pearl (eds), *Frontiers of Family Law*, 2nd edn (1995) 301 at 314.

<sup>21</sup> Senate Standing Committee on Legal and Constitutional Affairs (Australia) (2008) para 3.50.

<sup>22</sup> McCarthy, F (2014) Defining cohabitation, *Scots Law Times*, 31, pp.143-145.

<sup>23</sup> Garland, F (2015) Gender imbalances, economic vulnerability and cohabitation: evaluating the gendered impact of Section 28 of the Family Law (Scotland) Act 2006, *Edinburgh Law Review*, 19(3), pp.311-332.

<sup>24</sup> Leckey, R (2018) Cohabitation, Female Sacrifice, and Judge-Made Law. Available at: [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3202477](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3202477)

We would not support a definition however that hinges solely on the provision of care or childcare as a contribution. While it is important that women with children are protected – and indeed that protection extends beyond the child’s 16<sup>th</sup> birthday and to other family members to whom women are more likely to give up work to care for and who are excluded by the current law – this could exclude other child-free or childless women who have made financial or domestic contributions in other ways.

The consultation paper and earlier research from 2010 suggest that in practice courts have heard very few short-term cohabitation disputes, because the facts of the relationships essentially rule them out of disputes over contributions.<sup>25</sup> Similarly, an absence of a minimum duration does not appear to have provoked a rush of cases from couples with minimal financial ties.<sup>26</sup>

Additionally, considerable advantage and disadvantage could conceivably occur in a very short space of time while other couples may be together for decades without making significant contributions to one another’s finances or lifestyles. It is impossible to develop a scheme with an arbitrary cut off that will be effective in every circumstance. We do not think that a minimum duration is necessary and may in fact reduce the effectiveness of a separation scheme. Couples who have maintained their financial independence or otherwise separated their life are already falling beyond the scope of the Family Law (Scotland) Act because of their circumstances.

It therefore seems to us proportionate to maintain the existing assumption that couples can utilise an asset sharing provision in any circumstance where one party is likely to be worse off than the other after entering into and because of choices made during the relationship. The central point is how couples view the pooling, and on what basis each made a contribution to the relationship and family<sup>27</sup> and, crucially, the degree to which resources were pooled by the end of the relationship should be decisive rather than a vague intention at the start of the relationship. This would ameliorate some of the difficulties that are inevitable in establishing the date a cohabitation began<sup>28</sup> in favour of focusing on a point of comingling of contribution, for example, when a child was born, the date of a big purchase (home) or the creation of a new business.

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<sup>25</sup> Wasoff, F, Miles, J, and Mordaunt, E (2010) Legal Practitioners’ Perspectives on the Cohabitation Provisions of the Family Law (Scotland) Act 2006. Available at: <http://www.cfr.ac.uk/assets/Cohabitation-final-report.pdf>

<sup>26</sup> Ibid.

<sup>27</sup> Bottomley, A (2006) From Mrs. Burns to Mrs. Oxley: Do Co-habiting Women (Still) Need Marriage Law? Available at: <https://core.ac.uk/download/pdf/90077.pdf>

<sup>28</sup> Guthrie, T, and Hiram, H (2007) Property and Cohabitation: Understanding the Family Law (Scotland) Act 2006, *Edinburgh Law Review*, 11(2), pp.208-229.

We would not support the requirement to register as a condition of accessing protection. Registration is likely to replicate at least to some degree the difficulties of accessing protection that is seen with limiting it to marriage. Protection for cohabitants should be about preventing serious unfairness and hardship. An opt in system would do nothing to address public assumptions that the law is already protecting them. However an opt out system also has the potential to deny basic protection to women who do not predict the future disentanglement of their relationship will take place in a different power dynamic to that at the start of their relationship let alone those who experience domestic abuse perpetrated by their partner or ex-partner.

If an opt out of the asset sharing regime or an opt out via cohabitation agreement is permitted, there must be a requirement to ensure legal advice for both partners before the agreement is signed and the court should maintain powers of discretionary challenge in cases of manifest unfairness or domestic abuse.

### **3. Reforming sections 26 and 27**

Engender has no expertise on the operation of sections 26 and 27 in practice.

However, we agree with the Commission's suggestion that the language in the sections is increasingly outdated and has the potential to restrict its effectiveness – e.g. “housekeeping allowance”. The pattern of one partner paying an allowance to the other for housekeeping may not be so accurately described, even where there is a cash transfer from a partner working outside the home to the other working within the home. A form of words that recognises the equal value of different forms of contribution and the pooling of these would further entrench the social and economic value of reproductive labour, including domestic labour.

### **4. Awards for financial provision for former cohabitants, where cohabitation ends otherwise than by death (section 28.)**

Engender supports strengthening the principles which govern s.28 awards and cohabitation cessation. Section 28 of the Family Law (Scotland) Act absorbs the principle of ‘clean break’, which is not accurate where children or economic ventures remain entangled after separation, nor does it reflect the ongoing economic impacts of time taken out of the labour market.

Section 28 allows the court to make an order “in respect of the economic burden of caring for a child” of the former cohabitants but this is not the same as a principle



governing the sharing of the economic costs and burdens as is provided for in section 9(1)(b) of the Act in respect of divorcing couples. Unlike s.9, s.28 is backwards looking and makes no attempt to equalise the disparity in ongoing costs borne as a result of providing childcare. Men are typically more able to leave the relationship with their earning potential unimpacted while women's economic and social costs are higher because of their social roles as caregivers, continuing to provide the majority of primary care for children and disabled and older people. Even where both parents work fulltime, childcare and domestic work is not distributed fairly,<sup>29</sup> a trend that continues post-separation, as nine in ten lone parents are women.<sup>30</sup>

The principles governing asset sharing on divorce include the fair sharing of the economic burden of caring. Section 28 merely allows the court to make an order "in respect of the economic burden of caring for a child" of the former cohabitants but this is not the same as a principle governing the sharing of the economic costs and burdens as is provided for in section 9. Although the Scottish Law Commission did suggest a principle of fair compensation prior to drafting, this was not included in the text of s.28 and has only been broadened in that direction by interpretation following the decision in *Gow v Grant*.

Narrowly construed, s.28 focuses on quantifying the precise economics at play and 'correction' by a one-off sum (that may be payable in instalments but is not an ongoing or lifetime award.) Both (2)(a) and (2)(b) reduce caregiving to an economic and quantifiable cost of childcare, resulting in small awards that ignore the long-term costs of childcare for women throughout their whole lives, as well as other forms of care and domestic work.<sup>31</sup> This makes it difficult where domestic contributions and care contributions have reduced women's lifetime earning potential in such a way that is difficult to quantify on an individual level.<sup>32</sup> The broader reading of s.28's causal requirement "in the interests of the defender" following *Gow v. Grant*<sup>33</sup> allows for a weaker focus on balancing blunt costs and earnings and more comparison of the parties' financial positions, in theory making it easier for a partner who has made more domestic contributions to the relationship which are harder to quantify.

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<sup>29</sup> Scottish Government (2019) Centre for Time Use Research Time Use Survey 2014-15: Results for Scotland, Scottish Government. Available at: <https://www.gov.scot/publications/centre-time-useresearch-time-use-survey-2014-15-results-scotland/pages/5/>

<sup>30</sup> NHS Health Scotland (2016) Lone parents in Scotland, Great Britain and the UK: health, employment and social security. Available at: <https://www.scotpho.org.uk/media/1157/scotpho161123-lone-parents-scotland-gb-uk.pdf>

<sup>31</sup> Garland, F (2015) Gender imbalances, economic vulnerability and cohabitation: evaluating the gendered impact of Section 28 of the Family Law (Scotland) Act 2006, *Edinburgh Law Review*, 19(3), pp.311-332.331.

<sup>32</sup> *Ibid.*, p.324

<sup>33</sup> [2012] UKSC 29.

While section 28 has been criticised for being “cumbersome” section 9(1)(b) has been noted positively for its simplicity.<sup>34</sup> As noted in our response above, it is difficult to rationalise such a distinction in treatment between separating married couples and cohabitants who are otherwise in manifestly the same position unless from the perspective of a policy decision to privilege the institution of marriage.

However, neither economic advantage nor fair compensation is as broad as the “fairness” principle that governs asset sharing on divorce in s.9(1)(b) and the narrower protection afforded to cohabitants rests on assumptions that this state of being “unfettered” from financial obligations is the positive choice of the couple. S.28 cannot address prospective losses, imbalances and unfairness in the way s.9 does.<sup>35</sup>

Although s.28(2)(a) addresses (narrowly) economic imbalances of the past, s.28(2)(b) may provide more protection in allowing the court to make an order in respect of post-separation care of children under 16 and more awards appear to have been made on (b) over (a).<sup>36</sup> The fact that courts are more willing to recognise the costs directly associated with children serves to further reduce women to the role of mother without her own life and aspirations.

However, when children are over the age of 16, this section is of little protection, likely to disadvantage older women who may have been providing care for longer, had different attachment to the labour market etc. Additionally Fae Garland notes that “section 28(2)(b) awards have been overly modest” and focused on immediate costs such as childcare.<sup>37</sup> However younger women or women in shorter cohabiting relationships will also be disadvantaged by the need to prove economic disadvantage under s.28(2)(a) as opposed to women who have made longer career sacrifices, while not necessarily meaning that their career will not suffer as their children still require care.

On the basis of the evidence as to women’s material circumstances that are a product of and a contributor to inequality, Engender believes that fairness, equality and compensation for advantage gained must be key elements of the policy rational for

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<sup>34</sup> Wasoff, F, Miles, J, and Mordaunt, E (2010) Legal Practitioners’ Perspectives on the Cohabitation Provisions of the Family Law (Scotland) Act 2006. Available at: <http://www.crfr.ac.uk/assets/Cohabitation-final-report.pdf>

<sup>35</sup> Garland, F (2015) Gender imbalances, economic vulnerability and cohabitation: evaluating the gendered impact of Section 28 of the Family Law (Scotland) Act 2006, *Edinburgh Law Review*, 19(3), pp.311-332, p.324.

<sup>36</sup> Sutherland, E.E. (2013) From ‘bidie-in’ to ‘cohabitant’ in Scotland: the perils of legislative compromise., *International journal of law, policy and the family*, 27(2), pp.143-175.

<sup>37</sup> Garland, F (2015) Gender imbalances, economic vulnerability and cohabitation: evaluating the gendered impact of Section 28 of the Family Law (Scotland) Act 2006, *Edinburgh Law Review*, 19(3), pp.311-332.

cohabitation protection. Our primary concern is therefore the effectiveness of s.28 in minimising financial disadvantage where cohabitation ends.

A clean break approach, as seen in *Jamieson*,<sup>38</sup> has the potential to bake in long term economic disadvantage – the court found that Ms Jamieson had received economic support for a ‘homemaking role’ during the relationship which balanced out her lack of assets and employment prospects going forward to her long-term detriment. In essence, one partner’s ability to move on will be much stronger than one who has given up paid work to provide care and domestic work.<sup>39</sup>

Interpreting and reinterpreting s.28 does not address the fundamental problem of its short term and overly mathematical outlook. Garland also suggests that without periodic payments, courts will inevitably have to speculate about a primary caregiver’s future childcare needs and costs regardless of how broad they interpret s.28. She also argues that the inability to accurately predict is, based on cases so far, likely to result in their underestimating rather than overestimating, benefitting largely men, who are also more likely to have avoided career losses and be able to make the “clean break.”<sup>40</sup> Periodic awards also have the benefit of being amendable where circumstances develop.

As stated in our response above, we see little practical reason to differentiate between the principles that underpin asset sharing on divorce and those that underpin separation of cohabitants where the facts of the relationship are otherwise substantively the same. We therefore would support entrenching the broader approach developed by courts within the legislation and further strengthening it to include a fairness principle that allows for longer term advantages to be addressed where the facts of the relationship merit such an approach.

With this in mind, section 28 must be clear that there is no hierarchy between types of contribution as seen with the comparable New Zealand law, which notes that care, childcare and domestic work is no lesser in value than earning of income or the acquisition of property. Similarly, the New Zealand law recognises that a straight split of property or assets already accumulated may not be enough to compensate for the ongoing inequality in economic and social capital which can affect future earning

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<sup>38</sup> *Jamieson v Rodhouse* 2009 FLR 34.

<sup>39</sup> Garland, F (2015) Gender imbalances, economic vulnerability and cohabitation: evaluating the gendered impact of Section 28 of the Family Law (Scotland) Act 2006, *Edinburgh Law Review*, 19(3), pp.311-332.

<sup>40</sup> *Ibid.*

capital.<sup>41</sup> This requires principles underpinning the sharing of assets to have minds to the principles of equality and fairness.

While some couples will clearly opt for cohabitation because they do not want to intermingle their lives, the reality of this position in practice will depend on the facts of the case. While discretion as to whether assets have been combined in an unfair way has the potential to offer greater protection and flexibility, responding to the needs of particular couples, we also recognise that this may provide less predictability for couples keen to avoid or unable to access courts.<sup>42</sup> We would argue that this lack of predictability already exists in the current section 28, and can be compensated for through a more prescriptive approach to asset sharing.

Additionally, it should be clear in any replacement to section 28 that it is at least open to the court to consider future and ongoing losses when a couple separates. This will clearly be contingent on the levels of entwinement that are at issue in each case.

The downside of this approach is clearly the costs necessary to go to court. A more prescriptive approach may in fact encourage parties to settle fairly as expectations and rights are clearer. Advice could be more clearly given that encourages couples to avoid court while enabling review or challenge where assets are divided unfairly.

While Scotland is comparatively progressive in terms of having a cohabitation regime which pays any attention to ‘global accounting’ and valuing wider contributions at dissolution, it is worth noting that this creates a substantial evidence burden and is complex and unclear.<sup>43</sup> The lack of clarity in section 28 coupled with the one year time limit is likely to play a part in the small number of cases to date as well as further benefitting the party with greater resources and access to legal advice.

The extent of the lack of clarity undermines the very protection to vulnerable parties the introduction of the regime intended to provide. There is a further need to examine vulnerability – the regime was developed principally to address financial vulnerability,<sup>44</sup> which we do not consider it to be doing adequately. But legal vulnerability – access to advice, access to courts – is also gendered, and women’s physical vulnerability, whether in terms of abuse or access to security in terms of

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<sup>41</sup> Law Commission of New Zealand (2017) Dividing relationship property – time for change? Available at: <https://www.lawcom.govt.nz/sites/default/files/publicationAttachments/PRA%20Issues%20Paper%20IP41.pdf>

<sup>42</sup> Kelly, R (2013) Calculating the cost of cohabitation: a consideration of *Gow v Grant* (Scotland) [2012] UKSC 295.

<sup>43</sup> Rodgers, N (2012) Should Have Put a Ring on It; A Comparative Analysis of the Law of Cohabitation on Ireland, Scotland and England and Wales, *Hibernian LJ*, 11, p.122.

<sup>44</sup> Guthrie, T, and Hiram, H (2007) Property and Cohabitation: Understanding the Family Law (Scotland) Act 2006, *Edinburgh Law Review*, 11(2), pp.208-229.

property, is not addressed by the existing regime. Pension and property transfers would be one way to address the latter while a more interventionist approach in the legislation, such as allowing for ongoing orders, addressing time bars and review of agreements (post- or pre-separation) would go some way to addressing the former.

## 5. Adequate and sufficient remedies

The remedies available under section 28 are limited when compared to those available on divorce or dissolution in terms of the 1985 Act. Courts have limited the awards possible to capital sums despite this not being the only interpretation open to them.<sup>45</sup>

As noted elsewhere in this response, the exclusion of property transfers means that separating cohabitants with children have less protection with regards to the family home. Women's lesser access to legal advice is relevant here, as where parties cannot come to an agreement on what to do with property, the party with access to legal advice will more likely be privileged.<sup>46</sup> The exclusion of property transfer seems to have been considered on the basis that cohabitants should not benefit from a principle of fairness,<sup>47</sup> a position we consider to be unjustified.

We would also draw attention to the highly gendered nature of pensions. With women's lifetime earnings lower than men's, especially but not only women with children, access to an adequate standard of living is lesser for women at retirement. Pension sharing provisions should be actively considered to address this inequality.

## 6. Extending the one year time limit for making a claim under section 28(2)

It is clear that one year is exceptionally narrow and there is evidence that uncooperative parties may use it to pressure an ex-partner into decisions that may not be in their best interests. The ability to 'run out the clock' will likely be to the detriment of the party with lower resources and who is seeking a claim against the other. Discretion to allow late claims should be included but additional to a full extension of the limit.

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<sup>45</sup> Sutherland, E.E. (2013) From 'bidie-in' to 'cohabitant' in Scotland: the perils of legislative compromise, *International journal of law, policy and the family*, 27(2), pp.143-175.

<sup>46</sup> Wasoff, F, Miles, J, and Mordaunt, E (2010) *Legal Practitioners' Perspectives on the Cohabitation Provisions of the Family Law (Scotland) Act 2006*. Available at: <http://www.cfr.ac.uk/assets/Cohabitation-final-report.pdf>

<sup>47</sup> Ibid.

## 7. Freedom of contract

Engender has no view on the use of cohabitation agreements where their use does not allow one party to gain material advantage. If they are to be used, both parties should be required to get independent legal advice and the court must maintain a discretionary power to vary or set aside in part or in full. We support the use of both tests put forward by the commission – “that the agreement was not fair or reasonable at the time it was entered into” and/ or “that there has been a material change in the parties’ circumstances since the agreement was entered into.” Material change should clearly include children born during the period of cohabitation and the purchase of property or other significant investments.

We note the extremely low (6%) levels of couples who have made written agreements on ownership sharing when purchasing property either individually or jointly.

Cohabitation agreements should not be encouraged as capable of being used as a means of avoiding the overarching principle of fair sharing. Asset sharing provisions on divorce at least to some extent recognise that circumstances change before and over the course of a marriage. Cohabitants are not afforded the same degree of protection and while use of a cohabitation agreement may protect in some circumstances, their drafting may also lead to clear unfairness where the circumstances change significantly over the course of the relationship.

## CONCLUSION

Engender’s primary interest is in ensuring that women are not disadvantaged by cohabitation. A system which presumed that equitable asset sharing, or independence of finances did not have long term consequence would not reflect the available evidence. Women remain financially disadvantaged by the social roles of mother and caregiver while fathers are socially and economically rewarded, however the extent of the benefit cannot easily be foreseen when decisions about relationships are entered into.

At the same time, we recognise that cohabitation is a positive choice for many women who may wish to avoid marriage due to its historic patriarchal associations or for whom marriage is no longer a social necessity. Some may wish to avoid financial consequences and deliberately avoid the legal consequences of marriage. However, we do not believe that this intention can be assumed by the form that a relationship takes. We do not believe that creating a protective arrangement for asset sharing on dissolution of a cohabiting relationship will necessarily bring into its ambit couples who

have kept their finances and responsibilities separate or who have only been together a short time.

We therefore suggest that any reform to the law be focused on the circumstances of the relationship and the ongoing intentions, responsibilities and practical finances of the parties throughout, with the aim of responding to advantages and disadvantages from the perspective of a fairness principle that allows for ongoing circumstances to be considered, in the same way that s.9 of the Family Law (Scotland) Act treats divorcing couples.

We believe that a more prescriptive approach to asset sharing, like that contained in s.9, may compensate for a more flexible definition of cohabitants eligible for its protection.

We have also indicated support for a broader range of remedies and increasing the time limit for bringing a claim.

#### **FOR FURTHER INFORMATION**

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#### **ABOUT US**

Engender is a membership organisation working on feminist agendas in Scotland and Europe, to increase women's power and influence and to make visible the impact of sexism on women, men and society. We provide support to individuals, organisations and institutions who seek to achieve gender equality and justice.