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Do you have any suitable law reform projects to suggest?

Recent decades have seen very significant changes in the way society views what constitutes a family, on parentage, the social acceptance of different types of relationships, the role of marriage and same sex relationships. The law has tried to keep pace and there have been various laws introduced, such as the introduction of claims for cohabitants, civil partnership and the UK legislation in relation to assisted reproduction. While that is to be applauded, the downside is that we now have a disjointed plethora of different pieces of family law legislation.

The recent law reforms in the area of family law have each been narrow and have not always had an eye to their impact on other areas of family law. The definitions being used and tests being applied are now different, which is confusing and at times contradictory. No project has addressed the bigger question of the changes of society's views on relationships and families as a whole. Arguably, we have been "patching". It may be we have been repeatedly treating the most pressing symptom without stopping to stand back. properly consider the context, assess what is causing it and ask ourselves if there is a wider need of reform.

The last time family law was reviewed comprehensively was approximately 25 years ago in 1992. There have been significant changes during that time. My submission is that there should now be a wholesale review of family law with a view to giving Scotland a comprehensive, codified statute and a family law regime fit for the 21st Century.

Do you have any project to suggest that would be suitable for the Commission Bill process in the Scottish Parliament; or, in relation to reserved matters, for the House of Lords procedure for Commission Bills?

Please provide us with information about the issues with the law that you have identified:

Adult Relationships

The law regulating adult relationships in Scotland is currently contained in five different statutes. It would be helpful to review the nature and purpose of cohabitation, marriage and civil partnerships.

My experience is that there continues to be confusion and a lack of awareness and understanding of these different relationships amongst the public. We also have an issue with civil partnership being open to same sex couples only. Given the legal differences are minimal we do require to consider if we we require to retain it all, or if in fact there should be changes made so that if it is to be retained people have a real, meaningful choice.

1. Cohabitation

The 2006 Act introduced the ability for cohabiting couples to make a claim on the cessation of their cohabitation. While family lawyers are generally happy with the law relating to financial provision on divorce there are concerns that the cohabitants legislation is neither sufficiently clear nor comprehensive.

- (a) Should there be a single statutory definition of cohabitant? There are currently a range of different definitions used in different contexts.
- (b) Should there be an option, or a requirement, to register the cohabitation, as there is in other countries?
- (c) Should the time limits for claims under s28 and/or s29 be extended? Our experience is they are currently too short. Many actions are raised and sisted to beat the time bar. That is resulting in potentially unnecessary cost and animosity.
- (d) Should there be scope for judicial discretion in accepting claims past the time limit?
- (e) Is the test of “economic advantage” and “economic disadvantage” appropriate?
- (f) Should cohabitants be able to make claims on separation for child related costs that, arguably, married couples cannot?
- (g) How do cohabitation claims and claims on divorce interact? Does marriage exclude a future cohabitation claim? Should pre-marriage cohabitation be taken in to account when considering the extent of the matrimonial property?

2. Divorce

- (a) The current system of linking the financial aspects of divorce and the divorce itself with the care arrangements for children of the relationship is unhelpful. They are two separate issues and in my view should be treated as such.
- (b) My experience is that clients focus on the grounds of divorce and the averments made about their behaviour. In general terms these averments do not materially impact the outcome. They cause distraction and upset and polarise people for no gain. Our current system is harmful, particularly if the couple have children and require to co parent in the future. In my view the ground of adultery should be removed. The Commission could also consider if any fault based ground should remain in Scotland. While I am not necessarily an advocate of immediate divorce on demand (my experience is people often need some time to take stock and many are vulnerable) we should explore the alternatives.
- (c) Other than those people who can use the simplified divorce procedure we continue to have to raise an ordinary action to seek a divorce from the Court. This requires affidavits confirming the arrangements for any children and speaking to the ground of divorce. It is an administrative procedure which does not safeguard our children in practice and results in unnecessary costs for clients. I would suggest the following could usefully be considered:
 - a. Should the Court of Session and the local Sheriff Courts continue to process these undefended actions or should they be handled by another body?

- b. Should the requirement for affidavits in undefended divorce actions remain?
 - c. Should we move to a form based system for undefended divorces of all types, including those with children under 16?
 - d. Our current pleading system was introduced before the advent of the current technology. It is very rare for a family law client, including many who are intelligent educated individuals, to fully understand our pleadings system, to understand the terminology used, and so in turn to properly and fully follow their own case. We could consider the use of forms, statements or other methods to replace the, in my view, outdated, way of applying (and objecting to) family law orders in Scotland.
- (d) We should consider if there should be a statutory duty of disclosure of matrimonial property, income and resources in all family law cases.

I appreciate that some of these points may fall within the scope of other bodies.

3. Domestic Abuse (civil law)

The legislation relating to the protective civil orders that can be sought in domestic abuse cases is fragmented and the options are complicated. It is in need of review.

4. Pre-Nuptial Agreements

This has been brought in to focus in part by recent developments in relation to the enforceability of such contracts in England. Many people, including some Scottish family lawyers, have a degree of discomfort about them and the level of protection that is offered to the partner/spouse who is giving up their rights. There is currently very little or no formal regulation. The only remedy is s16 of the 1985 Act which is retrospective and is discretionary. The Commission could consider if regulations should be introduced, such as specifying a minimum period between the contract being signed and the marriage taking place.

Please provide us with information about the impact these issues are having in practice:

Recovery of Documents

As things stand in the absence of a duty of full disclosure significant time and cost can be spent in having to recover information about a spouse's assets and income unless it is volunteered. In theory this should be addressed with an award of expenses, but that rarely happens in practice, and even when it does it does not properly reflect the costs incurred. The process of recovery of documents/accessing information is also, in my view, outdated, cumbersome and expensive. The majority of Havers do not understand what is being asked of them which gives added delays and cost. Particularly given the advances in technology the Specification of Documents procedure could potentially be replaced and significantly improved.

Please provide us with information about the potential benefits of law reform:

General comments: