Scottish Law Commission
10th Programme of Law Reform
Consultation Submission

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I wish to make the case for family law to be reviewed by the SLC as part of its 10th Programme of Law Reform. Ideally, this would take the form of a review of the whole area of family law, including key pieces of legislation such as the Family Law (Scotland) Act 1985, the Children (Scotland) Act 1995, and the Family Law (Scotland) Act 2006. In the alternative, however, there are a number of discrete areas which I would like to propose as individual projects for the Commission to consider. This submission is therefore in two parts:

1. The case for a review of family law; and
2. A note of individual matters which are in need of review and reform.

Part I. The Need for a Review of Family Law

While there have been important legislative changes in the field of family law in the last 25 years, these have been government initiatives, rather than the result of SLC projects. There are four reasons why it is now critical that the SLC carries out a review of all family law legislation:

1. The significant changes in society since the Report on Family Law (SLC No. 135) published in 1992. In the last 25 years, family formation – such as cohabitation, same sex marriage, assisted reproduction, and blended families – has evolved considerably. There has been no overarching or principled review of family law as a whole, and how it currently serves the changing needs of Scottish families;
2. These social changes have been reflected in a number of statutes, but the reform has not always been consistent, and is typically fragmented (some examples are provided in Part II below). These new legislative developments (specifically the 2006 Act, the Civil Partnership Act 2004 and the Marriage and Civil Partnership (Scotland) Act 2014) are in need of review to see if they are meeting their intended purpose, or whether further reform and streamlining is now needed. Moreover, it is also necessary to review the interaction between these new statutes and existing legislation;
3. In addition to significant new statutes in the last 25 years, there has also been "tinkering" with the core statutes (particularly the 1985 Act and the 1995 Act). While this tinkering has been necessary, it has also sometimes had unforeseen or unintended consequences (again, some specific examples are included in Part II). The relevant legislation therefore needs to be reviewed in the round, to see whether these changes are indeed fit for purpose; and
4. Judicial interpretation of statutory provisions has sometimes produced results which are not always clearly in line with the intention of the original legislation. To what extent should these judicial developments of the law be consolidated in legislation, or specifically overturned?

Ideally, a holistic review of family law would identify the parts which work well and the parts which are in need of reform, and produce a codified and consolidated family law for Scotland for the 21st Century.

Such a review could also consider the need to safeguard in domestic legislation such rights as Art 8 ECHR and the UN Convention on the Rights of the Child.

Part II: Specific Areas of Family Law for Review

The matters below are all areas where review and reform are desirable. I have focused almost entirely on substantive matters, rather than procedural ones. It is submitted that these all meet the criteria for inclusion in the next Programme of Law Reform, ie importance, suitability, and resources.

Issue 1. Adult Relationships

The law regulating adult relationships is currently fragmented over at least five statutes (the Divorce (Scotland) Act 1976; the Marriage (Scotland) Act 1977; the Civil Partnership Act 2004; the Family Law (Scotland) Act 2006; and the Marriage and Civil Partnership (Scotland) Act 2014).

There needs to be an overarching review of the nature and purpose of (i) marriage; (ii) civil partnerships; (iii) cohabitation; and (iv) non-regulated adult relationships (see for example the Canadian Law Commission's 2001 Report on Beyond Conjugality.)

Questions which need to be addressed include:

1. Formation of marriage: why are some faith groups recognised and some not as being able to conduct marriage ceremonies? Would it be less discriminatory to require all marriages to be celebrated in a civil ceremony, with a faith ceremony being an optional extra for those who wish it (as per the Continental approach)?
2. Is 16 still the appropriate minimum age for entering into marriage? (Plus see Issue 7 below).
3. What role is there for civil partnerships now we have same sex marriage? Is it right to retain a discriminatory two-tier system, whereby only same sex couples can opt for a civil partnership?
4. If civil partnerships are to be maintained, two further questions arise:
    a. Should they be opened to opposite sex couples?
    b. Should there be a meaningful difference between the substantive rights attaching to them, compared with marriage? This could give people a genuine choice as to whether to opt for marriage or civil partnership.
5. What is the purpose of protecting cohabitants? This feeds in to the question of what rights cohabitants should acquire: Is it right that there is no obligation between them *during* the relationship? Are the remedies currently available on termination appropriate?
6. Are there any adult relationships which are not currently protected, but should be? Consider, for example, the case of the Burden sisters: *Burden v UK* (2008). To what extent are caring but non-sexual adult relationships in need of legal recognition and protection?
7. In cases of domestic abuse:

a. Is it appropriate or helpful to have the available remedies for victims scattered over a wide range of statutes? To seek an interdict, the pursuer may require to rely on, inter alia, the Matrimonial Homes (Family Protection) Act 1981, the Protection from Harassment Act 1997, the Protection from Abuse (Scotland) Act 2001, the Criminal Justice and Licensing (Scotland) Act 2010, and (where there are children) the Children (Scotland) Act 1995;

b. Should protection be equalised for married and for cohabiting couples?

Issue 2. Divorce

Divorce law is overdue for reform, on at least three separate grounds:

1. What is the rationale for maintaining the fault based elements to demonstrate the "irretrievable breakdown" of marriage? There is clearly an argument to be made for modernising divorce law, and moving towards (if not exactly to) a system of divorce on demand, as per the Scandinavian model – while ensuring that financial provision between the parties is safeguarded;
2. Divorce should be focused entirely on separating the adults to the marriage: child protection and child maintenance should be kept entirely separate. The current judicial procedure whereby divorce will only be granted if the parties provide extensive information regarding the care of the child confuses two separate issues. If child welfare is an issue for a divorcing couple, then it should be dealt with explicitly and separately;
3. Current divorce legislation risks infringing the Art 8 privacy rights of the parties, by requiring them to disclose extensive personal (often highly personal) information, for example, relating to adultery, behaviour, medical records, living patterns, sexual habits, and so on. There is no need for the court to require such information: in an "on-demand" system, divorce can be granted without requiring either party to prove fault or disclose such private information.

Issue 3. Financial Provision on Divorce

Although studies have shown (see Prof Jane Mair, for example) that solicitors are generally very happy with the financial provisions on divorce in the 1985 Act, three concerns could usefully be addressed:

1. Is the definition of "matrimonial property" still appropriate, given that it starts on marriage, yet many couples will have been living together for several years before getting married? Should there be some recognition of property acquired or accrued during a preceding cohabitation?
2. Have minor incremental revisions to the 1985 Act ("tinkering") been helpful, and how have they interacted with the existing provisions?
3. Is there a need for a statutory duty of full disclosure of financial information between parties?

Issue 4. Cohabitation

The 2006 Act addressed a very real need for couples in cohabiting relationships to receive some legal protection at the end of their relationship. Eleven years down the line, it is time for a thorough

review of the impact and application of ss25-29 of the 2006 Act. Specific concerns which are desperately in need of being addressed include:

1. The definition of "cohabitant" in s.25 (see the excellent work by Dr Frankie McCarthy on this point, including: "Defining Cohabitation" (2014 SLT) and "Cohabitation: Lessons from North of the Border" (2011 CFLQ)). There has been little judicial consideration of the meaning of "cohabitant" or how meaningful the statutory definition is;
2. Whether it is helpful to have a range of different definitions of "cohabitant" for different purposes in different statues, eg the 2006 Act, the Matrimonial Homes (Family Protection) (Scotland) Act 1981, and various social security and benefits legislation;
3. Whether the judicial decisions which have held that the 2006 Act excludes the protections of unjustified enrichment for cohabiting couples is (a) correct and (b) appropriate. (See for example *Courtney's Exrs v Campbell* [2016] CSOH 136);
4. Whether the time limits for bringing a claim are appropriate. Anecdotal evidence from the profession indicates that 12 months for s28 claims and 6 months for s29 claims are just too short, and are leading to actions being raised (and then sisted) before there is any chance of a negotiated settlement, in order to ensure that the claim is at least made within the time scale. Should these time limits be extended? Should there be scope for judicial discretion in accepting claims past the time limit?;
5. Whether the remedy provided by s28 is appropriate, and whether it has been interpreted and applied correctly judicially (in particular, in light of *Gow v Grant* [2012] UKSC 29, where a test of "fairness" was introduced, despite no reference to that in the statute);
6. Whether there should be an option for cohabitants to register their cohabitation. This would ensure they had access to the rights under the 2006 Act, without having to prove their cohabitation by a lengthy factual enquiry, often disclosing intimate details.
7. Whether it should be possible to contract out of the s.28 provisions.
8. Whether there should also be some degree of legal protection for, or obligation between, cohabitants *during* the cohabitation, and not only at the end.
9. What is the status of the cohabitation and s.28 rights if the parties subsequently marry? Could a couple who have cohabited for 15 years and then marry, and separate within 9 months of the marriage, make a claim under the 2006 Act, or would it be excluded by the rules on financial provision on divorce?
10. Whether the remedy provided by s29 appropriate, and whether it been interpreted and applied correctly in practice.

Issue 5. Family Law and Contract

1. Is the current regulation of ante-nuptial contracts appropriate? Do we need to distinguish between the regulation of pre-marriage, during marriage, and post-marriage (ie separation) agreements?
2. Is it right that ante-nuptial contracts are governed by a fair and reasonable test (as per s.16 of the 1985 Act), while pre-cohabitation contracts are not?
3. What is the status of a pre-cohabitation contract after the parties get married?
4. Should there be any requirements of form for ante-nuptial contracts, eg in line with the Requirements of Writing (Scotland) Act 1995?

Issue 6. Children and Parents

1. The terminology in this area would benefit from a review. For example, are "contact" and "residence" still appropriate, or do they give rise to "first class" and "second class" parental status? Is there merit in the English approach of a "child arrangement order" instead?

   Moreover, is it still helpful to talk of PRRs, and in particular, parental *rights*? If the focus is truly on the child, then it may be more appropriate to focus on parental *responsibilities* – which would encompass the ability for the parents to do things to meet their responsibilities, without promoting the idea of distinct "rights". This might also help address questions of whether grandparents should have "rights" too (a more political question): if the focus is on responsibilities, then no-one has "rights" in relation to the child. Related to this, the terminology could be further clarified by referring to "legal responsibilities" in respect of a child, rather than parental ones, since the responsibilities may not always be exercised by a parent.

2. A further area where there is need for clarity on terminology is in relation to who is a parent. Is it the genetic, the social, the psychological or the "intentional" parent who should be recognised in law as the parent? My preference would be for the phrase "legal parental status" to be used to designate the adults who are recognised in law (rather than in any social context) as the parents. This has the advantage of making it very clear that legal parental status is a legal construct rather than an innate "right" or natural position.

3. Is it right that the legal parental relationship between a father and child can be overturned on the basis of a lack of genetic link – despite a strong and established social parenting relationship? This is currently the position in terms of s7 (in conjunction with ss5 and 6) of the Law Reform (Parent and Child) (Scotland) Act 1986, where any party (father, mother, or any third party) can bring an action to show that, on the balance of probabilities, X is not the parent (typically father) of a child – and where there is DNA evidence that there is no genetic link, this will be more than sufficient to overturn the (legal) relationship.

   In the case of *CS v KS and JS (*[2014] SCLIVI 57), a "father" was able to obtain a declarator of non-parentage on the basis of evidence that he was not actually the boy's genetic father – even though he was originally viewed in law as the father by virtue of the *pater est* presumption, and indeed had filled that role for 16 years. To overturn 16 years of social, psychological and practical parenting in the pursuit of genetic "truth" seems very much at odds with the current understanding of family life being built round social ties, and the best interests of the child.

   Moreover, this is not the approach under the ECHR, nor in other jurisdictions. In terms of Article 8, the ECtHR has held (in *Anayo v Germany*, 2010) that "a biological kinship between a natural parent and a child alone, without any further legal or factual elements indicating the existence of a close personal relationship, is insufficient to attract the protection of Article 8… As a rule, cohabitation is a requirement for a relationship amounting to family life". Thus, family life in terms of article 8 is not seen solely in terms of genetics or biology. A broader understanding of family life is recognised in other legal systems, such as Germany, where a man who seeks to show that he is the father by virtue of having had sexual intercourse with the mother at the period of conception (rather than being married to her), can only do so where there is "no social and family relationship between the child and its father…, and that the person contesting is the natural father of the child." Thus, a third party could not step in and challenge another man's paternity where the other man has an

existing social and family relationship with the child (defined to mean "actual responsibility" for the child), eg under the pater est presumption. (For the German position, see the BGB, sec 1600, subsections 1 and 2.) A similar provision is contained in the USA's Uniform Parentage Act.

4. In cases of child contact, where the court orders contact and this is not complied with, the remedies for contempt of court should be clarified. In particular, it seems entirely contrary to the best interests of the child for the court to be able to imprison the parent who has failed to facilitate contact when this parent will be (by definition) the parent with whom the child resides. Ideally, imprisonment for contempt of court for failing to obtemper an order for contact should be prohibited. See *SM v CM* [2017] CSIH 1.

Issue 7. Children and Legal Capacity

While the Age of Legal Capacity (Scotland) Act 1991 is very clear that capacity begins at 16 (with limited capacity before then for certain purposes, eg instructing a solicitor), it seems that more recent legislation has tended to protect children until the age of 18 (which is of course in line with the definition of a "child" under the UNCRC). It would be useful to review the age of legal capacity and protection for children across the board, to ensure, where possible, a rational approach is followed. Where the relevant age is increased to 18, or reduced to 16, or set at a different age altogether, then there should be good reason for doing so, and a consistent approach should be taken.

Issue 8. Permanence and Adoption: the Adoption and Children (Scotland) Act 2007

1. In light of the critical judgment of the UKSC earlier this year, there is a need to revisit the legislation governing permanence orders (specifically ss80-84 of the Adoption and Children (Scotland) Act 2007). In *Re EV (A Child)* [2017] UKSC 15, Lord Reed set out clearly the judicial difficulties which have arisen through the complexities of s.84. The legislation here is unnecessarily complex and misleading, and would benefit from reform. Lord Reed specifically approved the words of Lord Drummond Young on behalf of the Inner House, in a 2016 decision on the same point (*KR v Stirling Council* [2016] CSIH 36, at para 15):

> The threshold test [in s84(5)(c) of the 2007 Act] is in our opinion a matter of fundamental importance, and we must express regret at the manner in which section 84 of the Adoption and Children (Scotland) Act 2007 is structured. In that section the fundamental threshold provision comes at the end, after the subsections dealing with the welfare of the child. It would clearly be more sensible to state the threshold test at an earlier point, before the welfare provisions, because the threshold test must be satisfied before any of the other provisions becomes relevant… We were informed that subsection (5) was added to section 84 at a very late stage in the Parliamentary procedure, when it became apparent that no criterion for dispensing with parental consent had been specified. If that is so, it clearly represents a serious error on the part of those responsible for determining the policy of the section and instructing Parliamentary counsel. The result is a very poor piece of draughtsmanship.

2. Moreover, the exact relationship between a permanence order, a permanence order with authority to adopt, and adoption could be further clarified. One question which could be addressed is what role the foster (and potential adoptive parents) have in any PO hearing, where the application can only be made by the local authority.

Issue 9. Surrogacy

The law governing surrogacy is in desperate need of reform, not least in view of the declaration of incompatibility re s54 of the Human Fertilisation and Embryology Act 2008, handed down by Sir James Munby (*In the matter of Z (A Child) (No2)* [2016] EWHC 1191 (Fam)), because it fails to respect applicants' art 8 rights by requiring parental orders to be applied for by couples, rather than single persons. The role of commercial surrogacy, and the two tier system which is emerging between overseas and domestic surrogacy urgently needs to be clarified. However, since this is a reserved issue and is currently subject to review by the Law Commission of England and Wales, it may not be a possible project for the SLC.

Issue 10. Illegitimacy and Titles, Honours, Dignities and Coats of Arms

The status of illegitimacy was apparently abolished by the reforms to the Law Reform (Parent and Child) (Scotland) Act 1986, effected by the 2006 Act. Section 1 of the 1986 Act (as revised) now reads:

> "No person whose status is governed by Scots law shall be illegitimate; and accordingly the fact that a person's parents are not or have not been married to each other shall be left out of account in—
> (a) determining the person's legal status; or
> (b) establishing the legal relationship between the person and any other person."

However, section 9(1)(c) of that Act provides:

> "Nothing in this Act shall—
> (c) apply to any title, coat of arms, honour or dignity transmissible on the death of the holder thereof or affect the succession thereto or the devolution thereof (including, in particular, the competence of bringing an action of declarator of legitimacy, legitimation or illegitimacy in connection with such succession or devolution);"

There is therefore an ongoing discrimination against heirs in relation to titles, coats of arms, honours and dignities, where the status of illegitimacy is still relevant. This discriminatory provision must be reviewed.