

## RESPONSE FORM

### PREPARATION OF THE TENTH PROGRAMME OF LAW REFORM

We hope that by using this form it will be easier for you to respond to the questions set out in the consultation paper. Respondents who wish to address only some of the questions may do so. The form reproduces the questions as set out in the paper and allows you to enter comments in a box after each one. At the end of the form, there is also space for any general comments you may have.

Please note that information about this consultation paper, including copies of responses, may be made available in terms of the Freedom of Information (Scotland) Act 2002. Any confidential response will be dealt with in accordance with the 2002 Act.

We may also (i) publish responses on our website (either in full or in some other way such as re-formatted or summarised); and (ii) attribute comments and publish a list of respondents' names.

In order to access any box for comments, press the shortcut key F11 and it will take you to the next box you wish to enter text into. If you are commenting on only one or two of the questions, continue using F11 until you arrive at the box you wish to access. To return to a previous box press Ctrl+Page Up or press Ctrl+Home to return to the beginning of the form.

Please save the completed response form to your own system as a Word document and send it as an email attachment to [info@scotlawcom.gsi.gov.uk](mailto:info@scotlawcom.gsi.gov.uk). Comments not on the response form may be submitted via said email address or by using the [general comments form](#) on our website. If you prefer you can send comments by post to the Scottish Law Commission, 140 Causewayside, Edinburgh EH9 1PR.

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# Questions

1. Do you have any suitable law reform projects to suggest?

## Comments on Question 1

1. Hearsay
2. Financial provision on the breakdown of adult relationships with particular emphasis on the very different regimes for married and unmarried couples
3. Consolidation of legislation on parental responsibilities and rights, adoption and permanence and children's hearings
4. Jurisdiction in child cases within the UK
5. Nuisance

2. 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?

## Comments on Question 2

No

3. If suggesting a new project:-

- (a) Please provide us with information about the issues with the law that you have identified:

### 1. Hearsay

The SLC looked at this in its Report on *Hearsay Evidence in Criminal Proceedings* in 1994 and reforms were made in the *Criminal Justice (Scotland) Act 1995*.

Since then there have been a number of developments. Various Law Commissions have considered hearsay, which has led in some countries to changes in the law. Examples of this are

- New Zealand (*Evidence Act 2006*, then a Law Commission Review of that Act in 2013);
- England (Report 1997, *Criminal Justice Act 2003*)
- Ireland (Report 2016)
- Australia (Report 2006)
- Hong Kong (Report 2009, Bill to be introduced 2017).
- Reforms are also under consideration in various US jurisdictions: see eg papers from *Symposium on Hearsay Reform* published in 84 *Fordham L. Rev.* 1455 2015-2016

We note that in 2013 the New Zealand Law Commission reviewed how the 2006 Act was working in practice. It seems to us that such reviews are a useful exercise.

There would be merit in the SLC reviewing hearsay in the light of experience in Scotland and reform elsewhere since it last reported on that issue.

## **2. Financial provision on the breakdown of adult relationships with particular emphasis on the very different regimes for married and unmarried couples**

The law on financial provision on divorce in Scotland has been in place for over 30 years and is contained in the *Family Law (Scotland) Act 1985*. It was expanded to include civil partnership dissolution by the 2004 Act. In relation to unmarried couples, the SLC looked at financial provision on breakdown in its report on *Family Law* in 1992 and a scheme was introduced by the *Family Law (Scotland) Act 2006*. There would be merit in a complete review of financial provision on the breakdown of adult relationships in Scotland with particular emphasis on the very different regimes for married and unmarried couples against the background of societal change, the increasing number of enduring adult relationships outside marriage.

## **3. Consolidation of legislation on parental responsibilities and rights, adoption and permanence and children's hearings.**

At present child law is spread over a number of statutes. There would be merit in consolidating and codifying this area of law, particularly from an access to justice perspective.

## **4. Jurisdiction in child cases within the UK**

There are a number of difficulties with cross border cases between Scotland and England, particularly in relation to child abduction. For example, while there is a statutory prohibition against removal of a child from the United Kingdom without the consent of someone who holds parental responsibilities and rights in relation to the child (*Children (Scotland) Act 1995*, section 2), there is no equivalent provision for abduction within the UK albeit that the child's habitual residence would not alter in such a situation. Also, recognition and enforcement of orders relating to the care of children between the territorial jurisdictions of the UK (contained for Scotland in sections 29 and 30 of the *Family Law Act 1986*) is not well understood and there is confusion about what role if any a receiving court might have to make a welfare enquiry. These are issues in which our English and Northern Irish counterparts have a similar interest and working together with their Law Commissions would be beneficial.

## **5 Nuisance**

Nuisance is an area of common law which would benefit from rigorous analysis and being brought up to date. The analysis by Professor Whitty in the *Stair Encyclopaedia* shows that there has been confusion as to the principles to be applied, and as to the extent to which English law of nuisance is relevant. There have been very few Scottish cases, and these often relate to nineteenth century economic conditions rather than the contemporary world. It would be desirable to have a modern statement of the law which could be more readily applied to modern conditions.

An example of the types of issue within this topic which might benefit examination by the SLC might be how the private law of nuisance (regulation of an activity by an individual i.e. the owner of neighbouring land) should relate to public law regulation such as planning permission, health and safety regulation, pollution regulation etc (regulation of that same activity by the state on behalf of the community as a whole). This is an issue which has arisen in various countries eg *American Electric Power Co v Connecticut* 564 U.S. 410 (2011) (US Supreme Court); *St. Lawrence Cement Inc. v. Barrette*, [2008] S.C.J. No. 65 (Canadian Supreme Court). English law on this is being developed by the courts (eg *Coventry v Lawrence* [2014] UKSC 13; [2014] AC 822) and has been the subject of academic comment (eg Maria Lee, *The Public Interest in Private Nuisance*, *Camb Law J* 74 [2015] 329; Paul Singh *Rethinking Private Nuisance in the 21<sup>st</sup> Century* 2016 *Const L J* 606; Elspeth Reid *Implications for the Scots Law of Nuisance: Coventry v Lawrence* 2014 *Edin LR* 383). Similar issues arise in Scotland eg *Chalmers v Diageo* [2017] CSOH 36.

(b) Please provide us with information about the impact this is having in practice:

### **1. Hearsay**

The complexity of the current law on hearsay results in a considerable proportion of the judge's charge to the jury consisting of a detailed explanation of the law of hearsay and the exceptions to the hearsay rule. These are complicated and technical matters which the jury may find difficult and disproportionately distracting from the issues at the heart of the trial.

### **2. Financial provision on the breakdown of adult relationships with particular emphasis on the very different regimes for married and unmarried couples**

The continuing and very significant differences between financial provision for married and unmarried couples can cause real hardship for some dependent partners and the main criterion for raising a cohabitation claim (that the parties have been living together as if spouses) illustrates the rather outmoded basis on which the legislation was based. The test in the current legislation for cohabitants can be difficult to apply. In *Whigham v Owen* 2013 SLT 483, para [6] Lord Drummond Young stated "This area of law has caused enormous difficulties in practice".

### **3. Consolidation of legislation on parental responsibilities and rights, adoption and permanence and children's hearings**

We are aware that challenges have arisen for decades in relation to all aspects of child protection on account of the relevant legislation being sporadic and scattered across different statutes and secondary legislation. It would very much assist practitioners and the courts in identifying precisely what is applicable and consequently promote the best interests of children if an outcome can be achieved whereby all the law in relation to their welfare can be found in the same place.

**4. Jurisdiction in child cases within the UK**

The lack of clear rules results in delays when children are taken between Scotland and England or indeed between other jurisdictions within the UK and confusion about the limits of the jurisdiction of the court in the territory to which the child has been taken.

**5. Nuisance**

See above

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

See previous answers.

**General Comments**

None

Thank you for taking the time to respond to this consultation paper. Your suggestions and comments are appreciated and will be taken into consideration when preparing our Tenth Programme of Law Reform.