

## 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

Family Law – either (and preferably) a wholesale review, failing which specific topics (as listed below) could be addressed

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

3. If suggesting a new project:-

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

### Family Law

#### Adult relationships – marriage, civil partnerships, cohabitation

- formation of; cessation of; financial consequences of
- age for marriage – increase to 18
- address potential for discrimination eg faith groups/authorised personnel
- incompatibility issue re civil partnerships – should we continue to have at all?
- Cohabitation to be defined? Opt in, not opt out. Restrict to cohabitation in Scotland?
- Extend time frame for raising proceedings under both the Family Law (Scotland) Act s28 & s29

- How do claims on cessation of cohabitation sit with unjustified enrichment
- Ante-nuptial contracts – status; requirements
- Grounds for divorce – “irreconcilable differences”; remove fault altogether; 6 months if both agree?
- Court procedure – form based; duty of full disclosure – remove need for antiquated specification/commission and diligence
- Financial provision – review pension legislation in light of McDonald case
- Age 16 too young for purposes of the Family Law (Scotland) Act 1985 – S.9(1)(c)
- How to deal with competing and/or concurrent claims by spouses/cohabitants
- Wholesale review of cohabitant’s claims – redraft (at least) s28 of Family Law (Scotland) Act 2006
- Codification/consolidation – eg definition of child – age etc
- Reform Civil Evidence Act – statutory framework for ADR – cf Hague convention case/mediation
- Mandatory mediation?
- Integrate family and criminal courts for domestic abuse cases

### Children

- Terminology – abolish “residence”/“contact”. “Parenting/child arrangements”; “spend time with”/“stay with”. Remove power & emotion from terminology
- Extend to people who have cared for child for extended period of time
- Assisted reproduction – who is a parent; what rights should be conferred upon whom; number of names on birth certificates extended? Should gender of parent and/or of

child be specified?

- Different definitions of “child” eg age 12/16/17/18 for different legislation – unify?

Jurisdiction/Cross border issues

- Recognition of foreign orders
- Post- Brexit loss of some reciprocal treaties – needs to be addressed
- Domicile – legal parentage, eg same sex couples; should we just use nationality?

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

- It seems anomalous in today’s society to be able to marry at the age of 16; Scotland is out of step
- At present there is an incompatibility issue re civil partnerships. This needs to be addressed
- The existing cohabitation legislation is confusing, unhelpful, unnecessarily complex and has led to numerous litigations that could have been avoided. The need to carry out a complex and confusing balancing exercise as provided in s28(2) (but not (3)) is cumbersome and unhelpful. The legislation has been interpreted inconsistently by the courts thus far. The interaction (or lack of) with unjustified enrichment is not helpful. The strict time limits have led to premature and inflammatory actions being raised – the lack of ability to answer timeously with a counterclaim in the event of an action being served on the last day leads to unfairness or at the very least unnecessary costs incurred to have pre-emptive strike ready. Why are property transfer orders not possible – that is what most cohabitants want/need. In some cases cohabitants could be significantly better off than spouses due to the definition of “matrimonial property” and lack of definition of “relationship property” – claims based on economic disadvantage wider ranging re cohabitation when compared to marriage. Unfair and unintentional? Cohabitant’s occupancy rights also potentially anomalous.
- Ante-nuptial contracts are becoming increasingly common. Clarification on their status may be of assistance. Should we have statutory requirements as to

formation?

- If we reduce timescale for consent divorce remove need to raise on fault based behaviour/adultery.
- Court procedure should be modernised and overhauled. See above re grounds. Use forms as in England? Full certified disclosure should be a requirement from the outset – remove need for expensive, difficult to understand commission & diligence procedure – much time and cost could be saved.
- Allow claims for children up to 20 in S9(1)(c) in keeping with CMS legislation – most children still at school in important exam years when cut off at 16 occurs – very unhelpful
- Determine what should happen in the event of competing/concurrent claims by/against the same person re marriage and cohabitation – first family takes priority? How to cater for children of both relationships?
- Children's needs are not being properly catered for in current litigious system where one parent frequently abuses power/process; ignores orders etc. Start from the position of truly equal responsibilities; focus a lot less on rights. Look to Scandinavia – both parents generally work and share the care of their children at least almost equally; little child support is paid one to the other – state benefits/parental leave etc much higher. Support parents in separated families – mediation, education, counselling – far better use of resource than current antiquated intimidating court system. If we must – consider dedicated family courts – ideally in separate buildings.

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

See above

### **General Comments**

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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.