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Do you have any suitable law reform projects to suggest?

1. Child and Family Law

While it is tempting to suggest that the Scottish Law Commission should return to an idea first advanced in its 1992 Report on Family Law (Scot Law Com No 135, 1992) and devise a Scottish Child and Family Code, a project of that magnitude is probably too resource-intensive and long-term to be feasible in the current climate.

However, there are several discrete aspects of Scots child and family law that are arguably in need of reform and would benefit from review. A number of them could be addressed in combination, under a single umbrella project, or they could be addressed separately, but taken forward together in a single bill.

These discrete topics include (each is discussed more fully below):

- The implications of Brexit for child and family law.
- Non-marital cohabitation.
- Remedies for domestic abuse.
- Parental responsibilities and parental rights, particularly recognition of non-marital fathers, a 'welfare checklist' and obstruction of contact by the resident parent.
- Marriage: solemnisation.
- Divorce and civil partnership dissolution.
- Status of children – the exception to the Law Reform (Parent and Child) (Scotland) Act 1986, s 1, contained in section 9, relating to inheritance of titles and honours.

2. The binary notion of gender in Scots law

Scots law adheres to a binary notion of gender: that is, one is regarded as being either male or female. However, modern psychology, psychiatry and anecdotal evidence suggests that

such an approach is unduly simplistic and some other jurisdictions have developed a more nuanced approach. This area of the law would benefit from further exploration by the Commission.

3. Assisted dying

This issue has been a source of litigation and there have been attempts in the Scottish parliament to legislation on it, so far without success. The matter is undoubtedly controversial, but it is not 'political' in any party sense and would be ideal for the kind of rigorous legal analysis and calm reflection for which the Commission is rightly renowned.

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?

No.

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

1. Child and Family Law

- The implications of Brexit for child and family law

The precise details of Brexit are, of course, unknown at the time of writing, but it seems likely that it will have implications for jurisdiction in child and family law cases and in terms of enforcement of rights and judgments. The Commission is well placed to carry out a scoping exercise of all the implications and to explore how each might be addressed, making recommendations for legislation that would be ready and waiting if the need arises.

- Non-marital cohabitation

Prior to the Family Law (Scotland) Act 2006, parting non-marital cohabitants had only the common law to which to turn in resolving disputes over money and property. While it provided a remedy in some cases (e.g. Shilliday v Smith 1998 SC 725), it was inadequate in protecting many cohabitants. In its Report on Family Law, the Commission recommended statutory remedies for parting and bereaved cohabitants. The 2006 Act provided such remedies, albeit not always in the precise terms recommended by the Commission. It is familiar territory that the uncertainty created by aspects of the 2006 Act might have been avoided had the legislation followed the Commission's formulation more closely and it was not until Gow v Grant 2013 SC (UKSC) 1 that some of the ambiguity was resolved by the Supreme Court.

Problems remain, however, and the following are amongst the issues that would benefit from review: the definition of 'cohabitant' (Gutcher v Butcher 2014 GWD 31-610; Harley v Thompson 2015 Fam LR 45); the short time limit for raising an action after relationship breakdown and the lack of any discretion, on the part of the court, to waive it; and the

interaction of the 2006 Act with the concept of unjustified enrichment (Courtney's Executors v Campbell [2016] CSOH 136).

In addition, there is the provision dealing with the economic burden of child care (2006 Act, s 28(2)(b)). It is worth remembering that this matter was not considered by the Commission since other legislation in place at the time (and repealed by the time of the Bill that became the 2006 Act) addressed it. That does not explain the curious nature of the backward-looking statutory formulation which differs markedly from the similar provision that applies to parting spouses and civil partners (Family Law (Scotland) Act 1985, s 9(1)(c)). For cohabitants, a much narrower group of children is covered, the purpose of making an award is not stated, there is no checklist of factors to be considered in making an award, the relevance of the defender's resources is unclear and, while the statute does not mandate the award of a capital sum, that appears to be the way the provision is operating, limiting the scope for future variation.

The Scottish people have become accustomed to the idea of legal consequences flowing from non-marital cohabitation – consequences that some lay people believed existed before the 2006 Act came into force. It may be that there is scope to extend these consequences, to explore whether cohabitants should be liable to aliment each other during the relationship (removing the anomaly with the public law position on benefits) and whether the consequences on breakdown should be aligned more closely with those applying to marital breakdown.

See further, Elaine E Sutherland, 'From "Bidie-In" to "Cohabitant" in Scotland: The Perils of Legislative Compromise' (2013) 27(2) International Journal of Law, Policy and the Family 143.

- Remedies for domestic abuse

The legislative foundation of protection from domestic abuse, the much-amended Matrimonial Homes (Family Protection) (Scotland) Act 1981, was a product of the Commission's recommendations. The Act itself has been supplemented over the years by numerous statutes designed to provide remedies for intimate partners and former partners and others threatened with harm or abuse from family members, acquaintances or strangers.

That is a creditable testament to the commitment, in Scotland, to addressing these pressing problems, but the result is a bewildering patchwork of legislation and remedies that makes the law more complex and less accessible than it needs to be. The Commission is ideally suited to undertaking a comprehensive review of the current law in order to render it simpler and more coherent and, thus, more accessible.

- Parental responsibilities and parental rights, particularly recognition of non-marital fathers, a 'welfare checklist' and obstruction of contact by the resident parent

The law on parental responsibilities and parental rights (PR&R) is very much a product of recommendations made by the Scottish Law Commission that found statutory expression in the Children (Scotland) Act 1995. On the whole, the recommendations were sound and the

law works well, but it is submitted that it is time to revisit some aspects of PR&R. Three areas are highlighted below.

o Non-marital fathers

When the Family Law (Scotland) Act 2006 amended the Children (Scotland) Act 1995, s 3, to allow non-marital fathers to gain PR&R automatically simply by registering as the child's father, it brought the law more closely into alignment with the Commission's original recommendations made in the Report on Family Law. As a result, many more children are now owed obligations by two parents and many non-marital fathers have gained legal recognition.

Non-marital fathers can still face obstacles, however, if the child's mother does not want them to be involved in the child's life. First, the mother can refuse to permit the father to register. He will then be put to the trouble and expense of seeking a declarator of parentage (Law Reform (Parent and Child) (Scotland) Act 1986, s 7).

If he takes this path, the child's mother can obstruct his progress further by withholding consent to DNA testing of the child (1986 Act, s 6) and the court has no power to order testing in the face of maternal opposition. While it may draw an adverse inference from her refusal (Law Reform (Miscellaneous Provisions) (Scotland) Act 1990, s 70) and courts have done so on occasion (S v S 2014 SLT (Sh Ct) 165), such an outcome is far from guaranteed (Smith v Greenhill 1994 SLT (Sh Ct) 22).

Arguably, this stacking of the deck against non-marital fathers infringes their and their children's right to respect for private and family life under the European Convention on Human Rights, art 8 (Schneider v Germany (2012) 54 EHRR 12) and the children's rights under the United Nations Convention on the Rights of the Child, arts 2, 9 and 18. There are a number of ways to address this problem and the Commission would be well-placed to explore them.

o Welfare checklist

The Children (Scotland) Act 1995, s 11(7)(a), provides that the welfare of the child concerned shall be the paramount consideration when a court is making a decision about PR&R. Unlike the position in many other jurisdictions, there is no extensive statutory checklist of factors for a Scottish court to consider in assessing welfare.

In its original form, the 1995 Act followed the Scottish Law Commission's recommendation, rejecting such a checklist on the basis that it would be necessarily incomplete, might divert attention from other factors which ought to be considered and might result in judges taking a mechanical approach to decision-making (Report on Family Law, paras 5.20–5.23).

Subsequently, the Family Law (Scotland) Act 2006 amended the Children (Scotland) Act 1995, s 11, adding two factors that the court must take into account when considering making an order in relation to PR&R – protecting the child from domestic abuse and taking account of the prospect of parental cooperation. Thus, what the current statute provides is a partial welfare checklist that highlights two relevant factors, but makes no mention of other

considerations that might be of equal or greater relevance in a given case. Arguably, having a partial checklist is worse than having none at all.

Support for further guidance on welfare (best interests) comes from the United Nations Committee on the Rights of the Child. In its General Comment No. 14 on the right of the child to have his or her best interests taken as a primary consideration (art 3, para. 1), the Committee indicated that it 'considers it useful to draw up a non-exhaustive and non-hierarchical list of elements that could be included in a best-interests assessment by any decision-maker having to determine a child's best interests' (CRC/C/GC/14 (2013), para 50). Clearly, that falls short of mandating a checklist and, in any event, General Comments are simply non-binding guidance to states parties to the Convention (International Law Association: Committee on International Human Rights Law and Practice, Final Report on the Impact of Findings of the United Nations Human Rights Treaty Bodies (London, 2004), paras 16 and 18). That guidance, however, when taken with the prevailing norm in other jurisdictions, suggests that the time has come to revisit the possibility of devising a welfare checklist.

o Obstruction of contact

Courts around the world face an enormous challenge in dealing with resident parents who obstruct the non-resident parent's contact with the child. Where the obstructive parent is particularly intransigent, the options are limited and the sense of frustration was summed up by one English judge when she outlined the four options open to the court as being (1) send the parent to prison; (2) fine the parent; (3) transfer residence to the other parent; or (4) 'give up' (V v V (contact: implacable hostility) [2004] 2 FLR 851, para10, per Bracewell J.).

In the attempt to address the problem, the Family Law (Scotland) Act 2006 amended the Children (Scotland) Act 1995, s 11, directing a court, when making an order that would require two or more relevant persons to co-operate with one another, to 'consider whether it would be appropriate to make the order' (1995 Act, s 11(7D)). The provision does not offer the court guidance on what, if anything, it should do when faced with intransigence and the limited options in Scotland are similar to those identified by the frustrated Bracewell J. The courts are rightly reluctant to imprison the obstructive parent, since removal of the resident parent is unlikely to serve the child's welfare. They have done so on occasion (M v S 2011 SLT 918), however, and further guidance was provided recently on when this might be appropriate and how cases of this kind should be approached (SM v CM 2017 SLT 197).

As SM v CM demonstrates, disputes of this kind can be particularly prey to continuations and delays, take up a disproportionate amount of court time and result in considerable cost to individual litigants and to the public purse (see also B v G 2012 SC (UKSC) 293). Most troubling, however, is the impact on the child concerned whose welfare should be the paramount consideration. In SM v CM, the Inner House saw a role for the Scottish Civil Justice Council in addressing aspects of the problem, but it may be that a review by the Commission of strategies adopted in other jurisdictions would provide further insights into how such cases can be resolved more efficiently and effectively.

- Marriage: solemnisation

At present, marriage between persons of different sexes may be solemnised in Scotland by certain religious or belief celebrants or by a district registrar or assistant district registrar (Marriage (Scotland) Act 1977, s 8). All ministers and deacons of the Church of Scotland qualify as celebrants, as do all celebrants of certain religious or belief bodies specified by regulation, with other such bodies being able to nominate individual celebrants. Thus, the law treats Church of Scotland and some religious or belief bodies more favourably than other groups. Religious and belief bodies must 'opt in' if they wish to marry persons of the same sex, with the result that same sex couples are not receiving equal treatment across the board. In short, there is a rather complicated and discriminatory system in place for the solemnisation of marriage. That alone suggests it would be worth exploring whether the system could be simplified.

Marriage has been famously described as embodying elements of both status and contract and it has important legal consequences during the currency of the relationship, on breakdown and on the death of one of the parties. It is the only legal status that can be acquires by a religious process and, thus, is something of an anomaly in Scotland. In many other jurisdictions, marriage may only be solemnised through a secular process presided over by a representative of the state, signalling the separation of church and state. Arguably, the time has come, in multicultural Scotland, to adopt that approach and render marriage a wholly civil legal process. To do so would not remove religious or belief participation in marriage since couples would be free to have whatever kind of religious or belief celebration they wished in addition to the civil process.

By placing the solemnisation of marriage solely in the hands of the state, it would be in a position to oversee all marriages directly and would be better placed to identify cases of forced marriage and to offer the victims protection. There is no guarantee that civil marriage will always prevent forced marriage since, in the past, duress has been found to be present despite the civil ceremony (Mahmud v Mahmud 1977 SLT (Notes) 17). However, public and official awareness of the possibility of coercion has been heightened over recent years and registrars are now very much more alert to it.

See further, Elaine E Sutherland, 'Giving the state sole jurisdiction over marriage would simplify the law' (2013) 58(4) Journal of the Law Society of Scotland 5.

- Divorce and civil partnership dissolution

In order to secure a divorce the pursuer must establish either that the marriage has broken down irretrievably or that an interim gender recognition certificate has been issued to one of the parties (Divorce (Scotland) Act 1976, s 1). Irretrievable breakdown can only be demonstrated by showing that one of four factual situations is present. Often referred to as the 'grounds' for divorce, these are, in colloquial terms: adultery; behaviour; non-cohabitation for one year, accompanied by the defender's consent; and non-cohabitation for two years. While irretrievable breakdown itself is a no-fault concept, there is no escaping the lingering association with fault, embodied in the reference to adultery and behaviour.

For reasons of history and definition (MacLennan v MacLennan 1958 SC 105), divorce founded on adultery is only available where sexual intercourse has taken place between the erring spouse and a person of a different sex, albeit same sex infidelity can be used to satisfy the behaviour ground. This limitation was applied expressly to same sex couples when the Marriage and Civil Partnership (Scotland) Act 2014 added a somewhat tortured provision to the Divorce (Scotland) Act 1976 (1976 Act, s 1(3A)). Drawing this distinction based on the gender of the third party involved could be perceived as suggesting that same sex infidelity is of less consequence than infidelity with a different sex person, perpetuating a discriminatory attitude that equal access to marriage sought to eliminate and the law is more complex than it needs to be.

However, there is a more fundamental question: whether the time has come to remove the last vestiges of fault from divorce and civil partnership dissolution. The vast majority of them – in 2015-2016, some 94% of divorces and 96% of civil partnership dissolutions – proceeded on the basis of non-cohabitation (Civil Justice Statistics in Scotland 2015-16 (Scottish Government 2017)), suggesting that there is little public appetite for pursuing either on the basis of blaming one's partner for the relationship breaking down. It would be worth exploring whether divorce should be simplified by removing adultery and behaviour as evidence of breakdown, with behaviour being deleted similarly in respect of civil partnership dissolution, and what, if any, further reform of the law in this area would render it better suited to modern needs.

- Status of children – the exception to the Law Reform (Parent and Child) (Scotland) Act 1986, s 1, contained in section 9, relating to inheritance of titles and honours

When the Family Law (Scotland) Act 2006 amended the Law Reform (Parent and Child (Scotland) Act 1986, s 1, the purpose was to abolish the status of illegitimacy: something the Commission viewed as 'completing the task' of eliminating this 'unnecessary and anachronistic' legal concept (Report on Family Law, para 17.4).

Section 9 of the 1986 Act retains certain exceptions to that general rule on abolition. One exception (1986 Act, s 9(1)(d)) is the usual sort of transitional provision and is unobjectionable. However, 'illegitimacy' remains relevant to the transmission of titles, coats of arms, honours or dignities and to the functions of the Lord Lyon King of Arms (1986 Act, s 9(1)(c) and (ca)). In the Report on Family Law, the Commission did not explain why this exception was thought to be appropriate beyond a passing reference to representations from the Lord Lyon, but it may have had something to do with perceived difficulty of getting reforming legislation through the House of Lords. That obstacle is no longer present for Scottish legislation.

Similarly, while the Succession to the Crown Act 2013 removed gender discrimination in respect of the monarchy, it had no effect on succession to other titles or honours, something the Succession to Peerages Bill, introduced recently in the House of Lords by Lord Trefgarne, seeks to remedy. While these remaining grounds of discrimination will affect very few people, they are out of place in modern, egalitarian Scotland (as, indeed, may be having an aristocracy) and the law would benefit from modernisation.

2. The binary notion of gender in Scots law

While the Gender Reassignment Act 2014 improved the law in the light of a more sophisticated understanding gender identity, it remains the case that the legal system adheres to a binary notion of gender: that is, one is treated as being either male or female, albeit there is now the possibility of moving from one category to the other.

Yet there is evidence that gender identity is not as simple as that and some individuals do not identify as being either male or female or are uncertain of where they fall. See, George Dvorsky and James Hughes, 'Postgenderism: Beyond the Gender Binary' (Institute for Ethics and Emerging Technologies 2008): https://ieet.org/archive/IEET-03-PostGender.pdf

Other jurisdictions embrace a more nuanced approach to gender. In Oregon, for example, a court recently permitted an individual to adopt a 'non-binary' sex/gender classification. See, In the Matter of the Sex Change of Jamie Shupe, Oregon Circuit Court, Multnomah County, 10 June 2016, unreported. The two-paragraph judgment can be found in 'Oregon Judge Grants Legal Sex Change to Person Who Identifies as Non-Binary': https://thelawworks.wordpress.com/2016/06/10/oregon-judge-grants-sex-change-to-non-binary/ and the case is discussed more fully in Christopher Mele, 'Oregon Court Allows a Person to Choose Neither Sex' New York Times, June 13, 2016: http://www.nytimes.com/2016/06/14/us/oregon-nonbinary-transgender-sex-gender.html?_r=0
Since July 2017, drivers in Oregon have been able to choose between 'M', 'F' and 'X' as their gender designation on driving licenses, with the third option denoting non-binary gender.

It is worth noting that The Law Society of Scotland permits individuals to register as gender neutral ('Scottish solicitors can register as gender neutral' Scottish Legal News, 4 February 2015) and there are other domestic examples of similar flexibility. The Scottish government expressed a willingness to re-examine this issue and the Commission is more than qualified to undertake the task.

3. Assisted dying

At present, most individuals who wishes to end their lives must rely on the somewhat haphazard methods available to amateurs. For individuals whose physical condition limits independent action, the situation is even more unsatisfactory since family members risk prosecution if they help the person to die and health care professionals are unlikely to assist for fear of prosecution and/or professional sanctions. Anecdotal evidence suggests that some individuals have travelled to countries where assisted suicide is facilitated. Indeed, it seems that some have done so earlier than might have been the case had their needs been accommodated in Scotland in order to ensure that they could take the step themselves and without implicating loved ones. In short, Scots law is failing to meet the needs of this section of the population.

Undoubtedly, the issue is controversial and courts have struggled with cases brought by litigants with debilitating conditions (Pretty v United Kingdom (2002) 35 EHRR 1; R (on the application of Purdy) v DPP [2010] 1 AC 345; R (on the application of Nicklinson) v Ministry

of Justice [2014] 2 All ER 32; Ross v Lord Advocate 2016 SCCR 176). There have been attempts to secure legislation in the Scottish Parliament (see, most recently, Assisted Suicide (Scotland) Bill 2013, SP Bill 40), so far without success. A calm and rigorous analysis of the issue and what the law might provide is called for and the Commission is well placed to undertake the task.

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

See above.

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

All law reform must pass the basic test – that it will improve the current state of the law – and it can be argued that there is scope for improvement in respect of all of the topics highlighted above. Beyond that, a range of benefits would or might flow from reform.

- Addressing new challenges

From time to time, the legal system is presented with novel challenges to which it must respond. It would be fair to say that Brexit is one such challenge.

- Modernising the law

In order to meet the needs of the people it is there to serve, the law must keep pace with changing circumstances, knowledge and attitudes. Arguably, attitudes to both assisted dying and to gender identity have changed and our understanding of the latter has become more sophisticated. Undoubtedly, the current law is failing sections of the community in respect of each. A thorough review of the options for reform would provide the opportunity for the Commission to recommend the future direction of the law on these important matters.

It is now over ten years since legislation gave significant rights to cohabitants. In that time, attitudes may have changed sufficiently to warrant revisiting the matter with a view to increasing the consequences. Similarly, it is clear that most parties contemplating divorce or civil partnership dissolution do so on the basis of non-cohabitation. It may be that there is no longer a need for the adultery and behaviour grounds for divorce.

- Clarifying the law

While the Supreme Court decision in Gow v Grant clarified aspects of the statutory provisions allowing for recovery by parting cohabitants, ambiguity and problems remain in respect of other parts of the legislation. While these areas were being reviewed, it would be efficient to explore whether there was now support for attaching greater consequences to cohabitation during the relationship and on breakdown. Similarly, the aspects of parental responsibilities and parental rights would benefit from clarification and review.

- Simplifying the law

Simplifying the law is one of the Commission's stated goals and it is not difficult to see why: simplicity increases accessibility. However, this imperative that has become more pressing in the light of increasing fiscal constraints on the legal system. As the number of self-represented litigants increases, greater reliance is placed on lay advisers, and lawyers and courts are called on to operate more efficiently, it becomes all the more important for the law itself to be simpler and more accessible. Of the areas outlined above, there is scope for simplification of the law on the remedies for domestic abuse, solemnisation of marriage and divorce.

General comments:

Whole sections of Scottish child and family law have resulted from Scottish Law Commission recommendations. Resuming its prominent role in this field would be consistent with the Commission's history and its stated aim 'to improve, simplify and update the law'. In the light of the Commission's record, there is every reason to anticipate that the important areas of the law highlighted in this response would benefit from the application of its comprehensive and rigorous critical analysis.