

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. 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

This response will cover three suggested areas of law reform: (1) Surrogacy and Parental Orders, (2) Cohabitation and (3) Review of Family Law.

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

N/A

3. If suggesting a new project:-

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

(1) The England and Wales Law Commission have previously identified the law relating to surrogacy (particularly concerning 'parental orders') as a potential project in their 13th Programme of Law Reform.¹ We would agree that the specific issues that they identify concerning parental orders, single parents and the overarching regulation of surrogacy arrangements provide a useful starting point for a law reform project in this area.

The issues in this area relate both to the restrictive regulatory framework for surrogacy provided by the Surrogacy Arrangements Act 1985 and to the operation of section 54 Human Fertilisation Embryology Act 2008, which sets out the conditions for the granting of 'parental orders' to intended parents after surrogacy arrangements. The weaknesses of the current legal regime in this area have been illustrated by a series of recent decisions of the High Court of England and Wales,² and are detailed in the academic literature, which has consistently featured calls for reform.³

¹ <http://www.lawcom.gov.uk/surrogacy/>

² These cases concerned the interpretation of the conditions for the granting of a parental order in s.54 HFEA 08. See e.g. *Re X and Y (Children) (Parental Order: Foreign Surrogacy)* [2009] 1 FLR 733, *A v P (Surrogacy)*:

Moreover, we would suggest that not only is this an important and necessary area for law reform, but that there are aspects of the legal regime in this area where Scots law differs from English law, particularly relating to the importation of provisions from the relevant adoption legislation into the parental order regime,⁴ which would require input from the Scottish Law Commission to ensure that these differences are recognised in any law reform project.

(2) The operation of the provisions of sections 28 and 29 of the Family Law (Scotland) Act 2006 concerning financial provision at the end of a cohabiting relationship and succession entitlements for cohabitants on intestacy of one partner.

The Supreme Court decision in *Gow v Grant*⁵ set out that 'fairness' was the principle underpinning the interpretation s.28. However, a contrasting approach was taken by the Inner House to s.29 in *Kerr v Mangan*,⁶ where Lady Smith commented, 'fairness is not a particularly helpful test'.⁷ Given this position we believe that it would be worth the Scottish Law Commission reviewing the legislative provisions and case law with a view to providing more guidance as to how the provisions should be interpreted, or alternatively to undertaking a more fundamental reform of the provisions themselves and their underpinning rationale.⁸

(3) It is now 25 years since the Scottish Law Commission's 'Report on Family Law' (No. 135). While there have been some significant legislative reforms in family law since then,⁹ we would suggest that the passage of time merits a wholesale review and examination of whether Scots family law continues to reflect and serve the range and diversity of families that populate 21st century Scotland.

Parental Order: Death of Applicant [2012] 2 FLR 145, *Re X (A Child) (Parental Order: Time Limit)* [2015] 1 FLR 349 and *Re Z (A Child) (Surrogate Father: Parental Order)* [2017] 1 FLR 472.

³ See e.g. Kirsty Horsey and Sally Sheldon, 'Still Hazy After All These Years: The Law Regulating Surrogacy' (2012) *Medical Law Review* 20 (1) 67, Claire Fenton-Glynn, 'The Regulation and Recognition of Surrogacy under English Law: An Overview of the Case-Law' [2015] 27 (1) *Child and Family Law Quarterly* 83 and Amel Alghrani and Danielle Griffiths, 'The Regulation of Surrogacy in the United Kingdom: The Case for Reform' [2017] 29 (2) *Child and Family Law Quarterly* 165.

⁴ For a recent consideration of some of these issues, see Kenneth McK Norrie, 'English and Scottish Adoption Orders and British Parental Orders After Surrogacy: Welfare, Competence and Judicial Legislation' [2017] 29 (2) *Child and Family Law Quarterly* 93.

⁵ 2013 SC (UKSC) 1.

⁶ 2014 SLT 866.

⁷ *ibid*, at 872.

⁸ See e.g. Frankie McCarthy, 'Cohabitation: Lessons from North of the Border' [2011] 23 (3) *Child and Family Law Quarterly* 277.

⁹ For example, Children (Scotland) Act 1995, Family Law (Scotland) Act 2006 and Adoption and Children (Scotland) Act 2007.

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

(1) The current law does not serve the needs of those conceiving children through surrogacy arrangements, because it was explicitly designed to restrict the practice of surrogacy, which was viewed as morally problematic.¹⁰ As surrogacy grows in social and moral acceptability, and therefore continues to increase in usage, the issues with the current legal regime will affect even greater numbers of families.

(2) As well as the apparent incoherence in judicial approach to the two provisions, due to the highly discretionary nature of the 'fairness' test there is a lack of clarity as to the scope and extent of awards that are likely to be made under s.28 and s.29. This results in difficulties for judges and sheriffs in making determinations, as well as for solicitors in assessing the claims of clients and therefore creates a legal regime which is unclear, unsatisfactory and has been little used.

(3) Over the past 25 years family life and social attitudes have continued to evolve, such that the understandings and certainties of the past are no longer necessarily representative of the present.

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

(1) A simplified system of assigning and determining parenthood in cases of surrogacy will provide greater clarity for the adults involved in surrogacy arrangements, as well as serving the best interests of children born as a result of those arrangements. Relatedly, reforms would address the situation under the current regime, where judges have been given what has been described as an 'impossible task'¹¹ of balancing public policy considerations with the paramountcy of the welfare of the child.

(2) There would be benefits to judges and sheriffs who are currently deciding cases without clear guidance as to the basis on which they should make their awards. As well as solicitors

¹⁰ See the 'Report of the Committee of Inquiry into Human Fertilisation and Embryology', (Department of Health and Social Security, July 1984), available at - http://www.hfea.gov.uk/docs/Warnock_Report_of_the_Committee_of_Inquiry_into_Human_Fertilisation_and_Embryology_1984.pdf

¹¹ C Fenton-Glynn, 'The Regulation and Recognition of Surrogacy under English Law: An Overview of the Case-Law' [2015] 27 (1) Child and Family Law Quarterly 83, at 95.

who are seeking to advise clients on potential awards and lay people attempting to navigate this area of the law without legal advice.

(3) A reformed system would more accurately reflect contemporary family life and therefore would better serve the citizens whose lives it was regulating. In this context, we would wish to associate ourselves with the responses concerning similar issues made to the consultation on the 9th Programme of Law Reform by Dr Gillian Black¹² and Professor Elaine Sutherland.¹³

General Comments

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.

¹² https://www.scotlawcom.gov.uk/files/3714/3160/8919/Dr_Gillian_Black_University_of_Edinburgh.pdf

¹³ https://www.scotlawcom.gov.uk/files/6314/3161/2107/Elaine_E_Sutherland_University_of_Stirling.pdf