Scottish Law Commission
promoting law reform

RESPONSE FORM

PREPARATION OF THE TENTH PROGRAMME OF LAW REFORM

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- Wide ranging review of family law in Scotland is overdue – there have been significant social and legal changes since the last review. This type of review would best be undertaken by the SLC.
- By the mid-1990s, because of the work of the SLC, there was a strong legal framework in place in the form of "mini-codes": the Family Law (Scotland) Act 1985, the Children (Scotland) Act 1995 etc. Substantial new legislation has been enacted which disrupts this framework and we now have a very complex, fragmented and in places inconsistent range of statutes.
- Significant areas of family law have become intellectually incoherent which in turn causes problems in its practical application.
- Access to justice is improved when legal rules are simple to find and to understand. Increasingly this is not the case with Scots family law. There are strong examples of "good" legislation, which works well in practice – eg financial provision on divorce – and a similar approach could be followed in other areas of family law.
- The following response proposes (1) a wide-ranging review of Scots family law or (2) a range of specific areas in need of reform. Either would be an improvement on the current situation although "tinkering" with individual provisions is to be avoided.
- If I were to select only one reform project for the SLC, it would be the law relating to cohabitants. The Family Law (Scotland) Act 1985, as it applies to financial provision on divorce, is an outstanding model of good legislation. We have detailed research evidence of how it works in practice and why it works.[1] The 1985 Act offers a model of good practice, which could be used to inform the construction of a new scheme for financial provision on the breakdown of cohabitation.

I. Review of family law

From the 1970s to the 1990s, Scots family law and those who use it, benefited immeasurably from the work of the Scottish Law Commission. Family law topics were regularly reviewed, researched and reformed, thus ensuring that the law remained appropriate to contemporary families and workable for the legal practitioners who used them. Steps towards codification of specific aspects of family law – the Family Law (Scotland) Act 1985 and the Children (Scotland) Act 1995 – created well integrated statutory systems for regulation of key areas of adult and child law. The law was principled, it achieved a good mix of certainty and flexibility and it was presented in an accessible format.

The legislation, which emerged from this period, was notable for its clarity and its careful construction. It was 'lawyers' law' to the extent that it was technically well

[1] Mair, Wasoff and Mordaunt, *Built to Last*, http://eprints.gla.ac.uk/117617/1/117617.pdf.

crafted but it was also ambitious and forward thinking in its policy objectives and it was that combination which left Scotland with a very strong body of family law. The Family Law (Scotland) Act 1985 exemplified the strengths of the Scottish Law Commission's work during this period and recent research into the operation of the 1985 Act[2] has highlighted the many benefits which come from good legislation:

"*the structure and clarity of the Act is admirable ... I like the construction ... there's a logic to it".* [Solicitor 13]; it's "a *manageable, well drafted piece of legislation"* [Solicitor 08] especially "in *comparison to what we get now"* [Advocate 26].

There is much to learn from the 1985 Act about how to construct family law statutes which work well in practice and the Scottish Law Commission is best placed to undertake this work.

Since devolution, successive Scottish governments have had key policy objectives in respect of individuals, children and families, which have had substantial impact on family law. Some of this has been strongly welcomed, for example the introduction by the Marriage and Civil Partnership (Scotland) Act 2014 of same sex marriage, while other aspects have been highly controversial, for example the introduction of the "named person" scheme. Whether positive or negative, the nature of the legislative activity of the Scottish Parliament has led to significant new statutes and amendment of existing legislation with the effect that the clear and coherent statutory framework that existed at the point of devolution has become fragmented. New statutes have been enacted, particularly in the area of child law, with little or no attempt to integrate the new legislation into the existing framework. A striking example is the Children's Hearings (Scotland) Act 2011 and the Children and Young People (Scotland) Act 2014 which have now replaced much, but not all, of Part II of the Children (Scotland) Act 1995. Instead of one single Act regulating child law, with a coherent structure and consistent principles and definitions, we now have a fragmented, complex and in places inconsistent range of statutes.

I would strongly urge the Commission to consider a wide-ranging review of Scots family law. The once coherent and highly regarded system of family law is becoming increasingly disjointed, difficult to access and apply and in places ineffective and inappropriate. In each of the areas of family law highlighted below, relatively minor reforms could be introduced which would result in a "tidying up" of the current law and would undoubtedly bring some benefits but, without more fundamental review and reconsideration, these amendments may not provide a longer term solution. While greater clarity and coherence would improve the current legislation, in most cases the underlying systems also need attention. It might be argued that it is only lawyers and academics who fret about the "systems", their technical design and their fit within the wider Scottish legal system. As TB Smith remarked *"[t]he legal system, like a drainage system, tends to attract lay interest mainly when it obviously works badly"*. It is becoming increasingly clear, however, through judicial decisions (eg *In the Matter of EV (S Child) (Scotland)* [2017] UKSC 15) and political controversy (eg *The Christian Institute v The Lord Advocate* [2016] UKSC 51) that in many areas of

[2] Mair, Wasoff and Mordaunt, *Built to Last: the Family Law (Scotland) Act 1985 - 30 years of financial provision on divorce*: http://eprints.gla.ac.uk/117617/1/117617.pdf.

Scots family law, the system is beginning to crack and the people who use it are beginning to notice.

II. Some specific areas for reform

Many aspects of Scots family law would benefit from reform. Some of this could take the form of relatively minor "tidying-up" of unclear provisions. The more pressing issues, however, also require consideration of the wider framework. There are many areas which require attention as highlighted by the suggestions below.

A. Adult family law

The last time the SLC reviewed family law, the law relating to adult family relationships was still accurately described as the law of husband and wife. Since then, there has been significant, but piecemeal, legal reform and there has been further demographic change. Legal changes have taken place on a largely piecemeal basis, with the UK-wide introduction of civil partnership for same-sex couples in 2004,[3] followed by the Scottish cohabitation provisions in 2006[4] and then the introduction of marriage for same-sex couples in the Marriage and Civil Partnership (Scotland) Act 2014. Scots family law now has three forms of legally regulated relationships: marriage, civil partnership and cohabitation. There is, however, no adequate theoretical or functional framework underpinning the distinctions between these legal relationships and, if that is not addressed, the law in practice will become increasingly complex and incoherent and it will not reflect popular understanding and expectation.

Accurate statistics on cohabitation are notoriously difficult to find but for the UK as a whole, in 2014 there were 18.6 million families and of these 12.5 million were married couple families.[5] Clearly, marriage based families remain the most common form. Cohabiting couple families are, however, the fastest growing type of family, having increased by 29.7% since 2004. In 1990, when the Scottish Law Commission proposed the introduction of some legal rights for cohabitants, they noted that around '2% of households are now headed by a cohabitant.'[6] More recently, Census figures indicate that in 2001, 7% of households in Scotland were cohabiting couples and this had risen to 9% by 2011.[7]

Many of the following areas of suggested reform reflect these legal and social changes. Unless we address some of these changes, the tensions which are already being reflected in case law and legal practice are likely to become worse.

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[3] Civil Partnership Act 2004.
[4] Family Law (Scotland) Act 2006.
[5] Office for National Statistics (ONS), Social Trends: Families and Households 2014, Statistical Bulletin, January 2015.
[6] Scot Law Com, No 86, The Effects of Cohabitation in Private Law, 1990, para. 1.3.
[7] National Records of Scotland, Scotland's Census 2011: accessible at www.scotlandscensus.gov.uk/bulletin-figures-and-tables.

1. Marriage

- ***The underlying tension***: Legislation in recent years, concerning the legalisation of same sex marriage and the replacement of the previous category of religious marriage with the new category of religion or belief marriage, but ironically very little attention has been paid to the legal nature of marriage itself. Scotland is one of many jurisdictions struggling with the remnants of the privileged status of marriage while trying to respond to demographic change and social demand for other legally recognised formats. The mixed messages that Scots law sends are summed up in two separate statements from a recent government publication designed to give guidance on marriage and family law:

Marriage is special, it is the pillar around which so much of the strength of family life is built, and it deserves to be cherished.[8]

Families now come in all shapes and sizes and every family is important no matter how it is formed.[9]

The problem is often identified as a problem of social and demographic change but family law itself is part of the problem. If marriage is to be retained as a special institution in law then it needs more careful scrutiny to clarify what it is that makes it special. The provisions of the 2006 Act, and the way they are being applied in practice, highlight the problems of statutory compromise. Thorough review is needed to establish the place of marriage in Scotland, what this means for civil partnership and where cohabitation fits into the framework.[10]

- ***A law of marriage or a law of weddings?***

Weddings offer couples the opportunity to make their own meaning, in the presence of their own communities, but the extent to which that meaning is constrained by any underlying legal model has barely been considered in Scots family law. It is only in the context of immigration law and policy, dominated by the spectre of the "sham marriage" or the "marriage of convenience,"[11] that the link between a wedding and a "genuine relationship"[12] is made explicit. More broadly the question remains unresolved as to whether "marriage has become a matter of form, effected where prescribed procedures are followed … or involves matters of substance that go to the root of the marriage relationship".[13]

- ***Celebrants***: The regulation of marriage solemnisation in Scotland has been substantially reformed and there is now a wide range of choice as to ceremony: civil, religious or belief. There is undoubtedly demand for humanist

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[8] Scottish Executive, Family Matters: Marriage in Scotland: accessible at http://www.gov.scot/Resource/Doc/113328/0027452.pdf.
[9] Ibid.
[10] See further Mair, "Belief in Marriage" (2014) 5 *International Journal of the Jurisprudence of the Family* 63; Mair, "Marriage: a meaningful relationship? in Eekelaar, J.(ed.) *Family Law in Britain and America in the New Century* (2016, Brill), 17 – 29.
[11] *Sadovska v Secretary of State for the Home Department (Scotland)* [2017] UKSC 54.
[12] Immigration and Asylum Act 1999, s24(5)(b).
[13] *H v H* 2005 SLT 1025 at 1033.

and other belief weddings in Scotland[14] and the statutory reforms introduced by the Marriage and Civil Partnership (Scotland) Act 2014 to change the category of "religious" to "religious or belief are broadly welcome. While there is much to be said for the ease of change which resulted from the flexible, responsive and pragmatic Scottish system, the deliberations of the English Law Commission make explicit some of the uncertainties which remain unconsidered in Scotland.[15] Permitting couples to design their own ceremony and to construct their individual vows enables them "to make their commitment to each other in a way that is meaningful for them"[16] but, as the Law Commission indicated, this must be subject to some limit. It "does not and should not mean that the law should regard any expression of commitment as a marriage".[17] Without clearer definition of what legal marriage is, however, it is difficult to see where to draw this line.

When the Marriage (Scotland) Act 1977 was amended by the Marriage and Civil Partnership (Scotland) Act 2014 to include the new combined category of "religious or belief" marriage, the Scottish Government indicated the intention to provide criteria for qualification as a "religion or belief body." This has not been forthcoming and we are left in the unsatisfactory situation of not knowing on which basis celebrants will be authorised. Is it appropriate to restrict celebrants to those who represent organisations? Should the authorisation of celebrants be opened up further? Or is it now time for Scotland to follow the lead of other European countries and move towards a single form of civil marriage?

- ***Child marriage:*** The age of marriage in Scotland is 16 whereas, according to international law and in particular the UN Convention on the Rights of the Child, marriage under the age of 18 constitutes child marriage and should not be permitted. Should the age of marriage in Scotland be raised?

2. Cohabitation

The provisions of the Family Law (Scotland) Act 2006 are clearly in need of reform. There is, at least, a pressing need for redrafting of section 28, which lacks clarity but ideally there should be a more extensive review of the law including consideration of where cohabitation fits within the hierarchy of adult family relations. A root-and-branch review of the law of adult relationships would allow us to revisit the question of whether cohabitation law should build on the good practice model contained within the existing regulation of financial provision on divorce. Specific issues include the following:

- ***Definition of cohabitant***: section 25 is causing increasing difficulty for the courts and in legal practice. Section 25 defines cohabitation in terms of living together "as if husband and wife". Scots law continues to use the phrase "living together as husband and wife" as if it were a term of art, "a familiar concept,"[18] but in practice it

[14] From a relatively modest 434 humanist ceremonies in 2006, the figure in 2014 was 3551 and numbers continue to grow: the latest annual statistics for all marriages by type of ceremony are available at: http://www.nrscotland.gov.uk/files//statistics/vital-events-ref-tables/2014/section-7/14-vital-events-ref-tab-7-5.pdf.

[15] Law Commission, *Getting Married: A Scoping Paper*, 2015: available at www.lawcom.gov.uk.

[16] Ibid, para 3.9.

[17] Ibid.

[18] *Harley v Robertson* 2012 GWD 4-68.

has little clear substance and it is being left to the courts to try to discern within it some objective meaning. While for many years Scots law, and the Scottish courts, have tended to avoid detailed engagement with what it means to live together as husband and wife, within marriage, they are now being forced to discover its meaning within the context of informal cohabitation. The difficulties are increasingly evident and as one sheriff commented, cohabitation is "not the relationship of husband and wife albeit the definition … uses the analogy of living together as husband and wife".[19]

It is not clear how the factors set out in section 25(2) relate to the concept of living as if married in section 25(1). The drafting has been described as "intellectually incoherent".[20] In practice, the courts have tended to pay little attention to the specific factors mentioned in section 25(2), referring instead to a wider range of factors such as those listed in Garrad v Inglis.[21]
The focus of the court decisions is often the stability of the relationship, and the reasonable expectation by the parties that it will continue. When this is lost, for example by one party explicitly informing the other that they are seeking to separate, the cohabitation will be over. If it is commitment to a stable relationship that gives rise to a claim by a cohabitant, this should be explicitly stated in the legislation. A list of factors which might tend to demonstrate this level of commitment (sharing a home, interdependent finances, an intimate relationship, co- parenting) could then be included, but with no one factor being determinative.[22]

- ***Section 28***: this is a poorly drafted provision, which lacks clarity as to the type of orders available and the nature of the principles to be applied. To date, awards under section 28 have been limited and much of the court time appears to have been taken up with trying to understand and apply the difficult wording of the statute.[23] The problems with section 28 are particularly striking when it is contrasted with the clarity and effectiveness of sections 8 and 9 of the Family Law (Scotland) Act 1985; a point made frequently by practitioners in recent research into the latter Act - *"it's very, very difficult to advise clients at the moment about cohabitation claims because it's so woolly ... whereas the '85 Act has got a bit more direction". [Solicitor 11] Comparing the two Acts it was commented that "the 2006 Act – really it's how long is a piece of string? ... It's very difficult to advise clients in those circumstances, because the judicial discretion is so broad and there is so little guidance that you just don't know". [Advocate 21]*

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- ***Lack of clear purpose***: Many of the problems in practice with claims under section 28 are caused by the lack of any clearly defined purpose or objective. In the leading case of *Gow v Grant*,[24] the Supreme Court looked for the underlying principle of the section and concluded that it was "fairness". Lady

[19] Ibid, at para 34.
[20] J.M. Thomson, *Family Law in Scotland* (6th ed), 2006, 30.
[21] 2014 GWD 1-17.
[22] For further discussion, see F McCarthy, "Defining Cohabitation" 2014 SLT 143.
[23] See Griffiths, Fotheringham & McCarthy, *Family Law* (4th ed, 2015), paras 13-93 to 13-98.
[24] 2013 SC (UKSC) 1.

Hale suggested a rather different approach to that which had been adopted by the Scottish courts to date:

Who can say whether the non-financial contributions, or the sacrifices, made by one party were offset by the board and lodging paid for by the other? That is not what living together in an intimate relationship is all about. It is much more practicable to consider where they were at the beginning of their cohabitation and where they are at the end and then to ask whether either the defender has derived a net economic advantage from the contributions of the applicant or the applicant has suffered a net economic disadvantage in the interests of the defender or any relevant child.

While this may be a sensible approach, it is difficult to discern it within the current statutory provision, which focuses to such an extent on the offsetting process. While there was an initially positive response to the guidance provided by the Supreme Court, this has been short lived. In a recent sheriff court appeal decision, the sheriff principal observed that he was "left with some unease that too much reliance on the broad approach of fairness runs the risk of doing violence to the terms of section 28(3)(a)".[25] If section 28 is to be effective, it is essential that some clarity is provided as to the underlying principles. The tension between detailed statutory provisions and a general concept of "fairness" has not troubled the Scottish courts in the context of financial provision on divorce but it is clearly a problem in cohabitation claims.

- ***Orders:*** on divorce, the court is able to make a range of orders in relation to financial provision, including capital payment, property transfer, periodical allowance and pension orders. By contrast, on the breakdown of cohabitation, section 28 only mentions a capital sum payment. Arguably, the general reference to "an order" in section 28(2)(b) could be interpreted as including a range of different types of order but to date that is not an approach which has been taken by the courts. Instead they have proceeded on the basis that they can only make a capital payment order albeit it can be payable in instalments. This is a significant limitation on the effectiveness of section 28, which contrasts badly with section 8 of the Family Law (Scotland) Act 1985.

- ***Time limits***: The problems caused by the strict time limits under the 2006 Act are well known. Early research into the views and experiences of legal practitioners concerning the provisions for cohabitants found that time limits were identified by 76% of the sample of 97 solicitors as being a problem.[26] Subsequent cases tend to confirm this early view that the imposition of a short time limit does cause problems. A significant proportion of cases, which have been reported to date, are preliminary hearings dealing with the question of whether a claim has been submitted within the time limit of one year. The Court of Session on appeal in *Simpson v Downie* has confirmed that

[25] *Smith-Milne v Langler* 2013 Fam LR 58.
[26] Wasoff, Miles and Mordaunt, *Legal Practitioners' Perspectives on the Cohabitation Provisions of the Family Law (Scotland) Act 2006,* 2010, available at: crfr.ac.uk/assets/Cohabitation-final-report.pdf, at p. 55, Table 5.4.

compliance with the statutory time limit is essential.[27] Particularly in the context of a long relationship, it can be difficult to pinpoint the precise date at which cohabitation ceased as was evident in *B v B*, on appeal.[28]

3. Divorce

Divorce law seems to be working reasonably well in practice in Scotland. The latest *Civil Justice Statistics in Scotland*, for 2015-16,[29] indicate that 96% of divorces in Scotland are undefended, 94% proceed on the separation – or 'no-fault' - grounds and 62% use the simplified procedure.[30] Nonetheless, the unsatisfactory compromise of the 1976 Act continues between irretrievable breakdown as the "ground" for divorce and adultery, intolerable conduct, separation for one year with consent and separation for two years without consent as the "mini-grounds" or factors.

- Adultery is an obvious target for reform. It is not included as a ground for dissolution of civil partnership and, although it has been confirmed by section 1(3A) of the Divorce (Scotland) Act 1976 that it applies to both same sex and different sex marriage, as Kenneth Norrie has commented, "[t]he hetero-specificity of adultery is not altered in any way".[31] Adultery is by far the least used of the grounds (only 32 divorces proceeded on the basis of adultery in 2015-16)[32] and it stands out as discriminatory in an otherwise gender-neutral legal framework.

4. Financial provision on divorce

Recent research into financial provision on divorce has clearly shown that the 1985 Act works very well in practice and the strong conclusion is that:
English law is broken and needs mending: but ours doesn't. Ours doesn't. Ours can always be improved, of course it can always be improved; but generally speaking, it's a gem. [Solicitor 05][33] There is no appetite for "radical reform" and strong resistance to "tinkering" or "micro-management" but regular review is still important in order to ensure that the legislation continues to work in the future as well as it has worked to date. The age limit of 16 in section 9(1)(c) may be too low and certainly is out of line with other alimentary obligations, not to mention the reality for many of family life and continuing child care. The three year time limit in section 9(1)(d) may be too strict and perhaps five years would give more flexibility in the small number of cases where it is needed. Greater statutory clarity on pensions may be desirable, particularly in view of the very recent decision of the Supreme Court in *McDonald v McDonald* [2017] UKSC.

5. Relationship contracts

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[27] *Simpson v Downie* 2013 SLT 178, para. 13.
[28] *B v B* 2014 GWD 30-593.
[29] http://www.gov.scot/Topics/Statistics/Browse/Crime-Justice/Datasets/DatasetsCJS/CJDow16.
[30] Divorce (Scotland) Act 1976, s1(2)(d) and (e).
[31] K Norrie, "Now the dust has settled: the Marriage and Civil Partnership (Scotland) Act 2014" (2014) Juridical Review 135.
[32] http://www.gov.scot/Topics/Statistics/Browse/Crime-Justice/Datasets/DatasetsCJS/CJDow16.
[33] Mair, Wasoff and Mordaunt, *Built to Last: the Family Law (Scotland) Act 1985 - 30 years of financial provision on divorce*: http://eprints.gla.ac.uk/117617/1/117617.pdf, at 155.

It is a key strength of Scots family law that it has a long history of enforceable agreements – ante-nuptial, post-nuptial and separation – a highly effective system of registration which leads to simple execution of agreements and a strong and settled culture of solicitor-negotiated settlement. These are important benefits which other jurisdictions seek to achieve through specific policies aimed at moving family law disputes out of court. Our recent research, looking at registered separation agreements, found evidence of widespread use and strong support for "minutes of agreement" or separation agreements. and It is tempting to leave this area, which has tended to work well in practice, undisturbed but there are some areas of concern.

- Scots law does not appear to distinguish between agreements concluded before marriage, after marriage and on separation or divorce.[34] In a system, where it is also clear that a couple may agree to oust the jurisdiction of the court in terms of financial provision on divorce,[35] this may leave parties vulnerable. Is it appropriate that a contract entered into before marriage should be treated in the same way as a contract entered into at the point of separation, particularly in respect of a very long marriage, where there are children and where there may be significant relational disadvantage? Section 16 of the Family Law (Scotland) Act 1985 provides limited scope for the court to vary or set aside an agreement on the basis that it was not fair and reasonable at the time at which it was concluded. While this is an important, albeit rarely litigated, provision, is it sufficient to protect the spouse who entered into a contract in very different circumstances to those which exist at the point of separation?
- With a long established history of enforceable agreements, there has been no need for contemporary consideration of the formalities of such agreements. While solicitors are likely to take great care in advising their clients in respect of such agreements, should there be more explicit regulation? The informality of Minutes of Agreement and their use in the Scottish family law environment is a real strength but, in view of their potentially significant contractual effect, is there need for some review of formalities in order to ensure the law offers sufficient protection to potentially vulnerable parties?
- Anecdotal evidence, and a small pilot study of a sample of registered agreements, would indicate growth in the use of cohabitation contracts. This gives rise to many issues. It is presumed that cohabitation contracts are legally enforceable but it may be desirable to have some statutory provision to that effect. What is the interaction between cohabitation contracts and marriage-based agreements where a couple move from unmarried to married cohabitation? Currently section 16 of the Family Law (Scotland) Act 1985 gives the court important scope to vary or set aside terms of an agreement in respect of financial provision on divorce but there is no comparable provision in respect of cohabitation.

B. Child law

[34] *Kibble v Kibble* 2010 SLT (Sh Ct) 5.
[35] *Milne v Milne* 1987 SLT 45 at 47.

As with adult family law, child law is in need of wide ranging review. The integrated approach of the Children (Scotland) Act 1995 has been seriously damaged by the enactment of a range of new statutes, in particular the Children's Hearings (Scotland) Act 2011 and the Children and Young People (Scotland) Act 2014. The section 11 principles of welfare, minimum intervention and the right of the child to be heard remain intact but their operation is challenged by, for example, a growing focus on the human rights of the parents (ECHR, art 8) and the new statutory framework based around "wellbeing" which has been introduced by the 2014 Act. The lack of a statutory welfare "checklist" stands in stark contrast to the extensive statutory criteria for assessment of wellbeing. It may be time to review various foundation questions such as - who is a parent; who is a child and what is the appropriate legal relationship between them?

There are many specific aspects of child law which would benefit from review and reform. The following are some examples.

1.Parentage and parenting

- Scots law currently distinguishes between those who have the legal status of "parent," – with the status being allocated according to different rules depending on whether the child is conceived by traditional method (Law Reform (Parent and Child) (Scotland) Act 1986), assisted reproduction (Human Fertilisation and Embryology Act 2008) or is adopted (Adoption and Children (Scotland) Act 2007) - those who have parental responsibilities and rights and those who have some lesser responsibilities and rights as a consequence of their de facto care of a child (Children (Scotland) Act 1995). The rules are spread across various statutes and could be integrated in a more accessible way.

- While, at present, a child can have only two "parents", at least in theory parental responsibilities and rights can be held and exercised by more than two. To what extent does this distinction between parentage and parenting remain appropriate in view of changing demographics? Some questions have already been debated on a number of occasions – the position of unmarried fathers and the "gatekeeping" role of mothers in terms of such men being able to access their parental status and PR and R. Others concerning the status and role of step-parents, the role of grandparents and the possibility of multiple parent families have been less fully considered in Scotland.

- What is the relevance of the legal status of "parent"? Do the presumptions of paternity[36] remain appropriate? Some of the difficulties in this area were highlighted in the recent decision in *CS v KS*[37] where the presumptive father, who had fulfilled the parenting role for 17 years, was able to obtain a declarator of non-parentage by establishing that he was not the genetic father. Despite the principle of welfare as the paramount consideration in other areas

[36] Law Reform (Parent and Child) (Scotland) Act 1986, s5.
[37] 2014 SLT (Sh Ct) 165.

of child law, it was not relevant in this case and indeed is not considered in the context of establishing paternity.

If Scots law is to remain appropriate in this area of child law, it may be time to begin to consider a new legal framework perhaps informed by the categories identified by Baroness Hale of genetic, social and psychological parents[38] or the concepts, used by Andrew Bainham, of parentage, parenthood and parental responsibility or "parenting". [39]

- Who is a child? The question of who precisely is a child has no simple answer in Scotland, For some purposes, a child is a person under the age of 16 but increasingly the Scottish government appears to be treating all those under the age of 18 as children. While this is in keeping with international definitions of a child – for example, the Convention on the Rights of the Child – there are inconsistencies, most obviously the right to vote and the right to marry at 16. The latter is of course "child marriage" in the eyes of international human rights law although it has so far attracted relatively little attention or concern in Scotland.

- Residence, contact and welfare. Difficult child contact cases are increasingly common in the Scottish courts but whether these can be alleviated by any change in family law is uncertain. It has been suggested that a change of terminology might help. An imbalance between the assessment of welfare (1995 Act) and the assessment of wellbeing (2014 Act is also emerging. These are major issues which would benefit from careful consideration but it is beyond the scope of this general response to set them out in any further detail.

C. Cross-cutting areas for consideration

- Domestic abuse sits between public and private law; between criminal, family and property law and, as such, it has become particularly fragmented. Statutory measures are found within a range of Acts, ranging from the Matrimonial Homes (Family Protection) (Scotland) Act 1981 to the recent Domestic Abuse Bill.

- Choice of law rules have become an increasingly significant area of family law in practice and, in the light of 'Brexit', they will need to be reformed. Even without the complications of leaving the EU, it is an area of law in need of clarification, simplification and codification. While some statutes, for example the Family Law (Scotland) Act 1985, make some provision for the international private law aspects of areas of substantive family law, other areas make no provision for choice of law matters. The legal rules are complex, lacking in transparency and in many respects uncertain. This is particularly problematic in view of increasing family and personal mobility.

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[38] Discussed further in B Hale, "New frontiers and the welfare of children" (2014) 36(1) *Journal of Social Welfare and Family Law* 26.
[39] For example, in Bainham et al (eds), *What is a Parent*?, Hart, 1999.