

RESPONSE FORM

PREPARATION OF THE ELEVENTH PROGRAMME OF LAW REFORM

We hope that by using this form it will be easier for you to respond to the questions set out above in the consultation paper. Respondents who wish to address only some of the questions may do so. The form 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.gov.uk. Comments not on the response form may be submitted via that 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?

1. Consider whether to raise the minimum age of marriage from 16 to 18 in Scotland.
- 2 Consider whether reform of the children's hearing system is necessary
- 3 Consider whether a review of the law regarding children being placed away from their parents is necessary.
- 4 Consider whether the law regarding the division of matrimonial property should be reviewed to ensure that it reflects family life in 2022
- 5 Consider whether a remedy should be made available to parties (whether married or cohabiting) where they have entered into a binding agreement/ a court order has been made for sale/transfer of a property and one party refuses to cooperate/vacate the property

2. If suggesting a new project:-

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

1 It is suggested that the law as it presently stands with regard to age of capacity to marry may place young people at risk of being encouraged/ coerced into marriage by parents, family members or others. According to recent data, this is especially true of young women from Asian and traveller communities. The age of legal consent to marry in Scotland is based on the Marriage (Scotland) Act 1977- and it is suggested that this may be an area the SLC would consider worthy of consideration for reform.

2 Children's panels consist of members of the public who are volunteers often with little to no experience of child law. Whilst they receive training, it is suggested that it may be appropriate now to consider whether the constitution of children's hearings serves children as well as it might and was intended to do. Decisions made in children's hearings can be life changing and have far reaching consequences for children and families. A Children's hearing is akin to a tribunal and with all other tribunals (employment, housing, child maintenance) professional judges are appointed with experience of the matter at issue. It may be that there would be merit in considering whether each panel should include a legal member to sit with other panel members (distinct from of the reporter).

3 There are currently no statutory timescales by which local authorities should make decisions regarding a looked after child's future. As a curator ad litem, one of our colleagues has come across situations where children have been in foster care for more than three years before the local authority pursues a permanence order or places a child with prospective adopters (and thereafter raises a direct petition for adoption). It may be that this is an area worthy of consideration for reform to provide clearer guidance and statutory timescales for decision making, to prevent children languishing in the system.

4 It may be that the time has come for a wholesale review of the Family Law (Scotland) Act 1985 and its rules for the division of matrimonial property and post-divorce/dissolution maintenance of spouses and civil partners. The section 9 principles have been generally accepted as having provided clear parameters for advisors and decision makers for almost 40 years but it is questionable whether they have served the financially weaker spouse /partner (conventionally but no longer exclusively the woman) well. Other jurisdictions e.g England and Wales have a needs based approach which avoids undue hardship post-divorce and dissolution. A worthy project for reform would be to consider how our system of post-divorce /dissolution financial provision could be adjusted to better serve all parties and to avoid the inequality which besets outcomes in many cases despite the principle of "fairness" being the apparent touchstone of the 1985 Act .

5 Consideration should be given as to whether a remedy can be put in place to more easily resolve situations where a binding agreement is entered into or an order is made for a property to be sold or transferred and then at the time of sale or transfer the individual still in the property refuses to cooperate with the sale/transfer or to leave the property. Colleagues have come across this situation and our

understanding is that the only remedy in such a situation is a costly and time-consuming one of raising a separate action for eviction. We believe a remedy in legislation to allow for the automatic removal of the uncooperative individual by force (i.e. Sheriff Officer) from a property e.g. within 6 weeks of the date of signature of an agreement or within 6 weeks of an order being made by a court may be beneficial. This could apply regardless of the status of the relationship-i.e married or cohabiting.

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

The impact is outlined in the previous section but further information is provided below:

1 The change to the law would align Scotland with the approach in England and Wales and better align with the protections under the UNCRC. There is a concern that as the law currently stand, children could be coerced into marriage.

2 This may lead to better outcomes for children within the system as it is felt that those with training in this area may be better placed to determine the issues that arise.

3 Children are often in the care system for too long before a permanence order is granted/children are placed with prospective adopters.

4 Given that the Family Law (Scotland) Act 1985 has been in place for almost 40 years, it may be time to consider its current efficacy and achieve its stated aim of fairness between divorcing couples or partners seeking dissolution.

5 If an individual refuses to vacate a property following on from an agreement or order for sale/transfer, the only remedy available if they refuse to leave is an action for eviction.

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

1. Providing more protection to those more vulnerable to coercion and pressure to marry because of cultural, familial, or religious pressures.

2 Provides better protection to vulnerable children

3 Provides better protection and certainty to vulnerable children

4 To ensure that our system of financial provision on divorce achieves its stated aim of fairness between parties and is informed by current societal values

5 Provides a remedy in situations where one party fails to cooperate in the sale/transfer process and in particular, where they refuse to leave.

3. Do you consider that your suggested law reform project would be suitable for the law reform process in the Scottish Parliament; or, in relation to reserved matters, for the House of Lords procedure for Commission Bills?

Yes, these matters relate to devolved legislation.

Any Other 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 Eleventh Programme of Law Reform.