SCOTTISH LAW COMMISSION
(Scot Law Com No 135)

Report on Family Law

Laid before Parliament by the Lord Advocate under section 3(2) of the Law Commissions Act 1965

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Scottish Law Commission

Item 14 of our Second Programme of Law Reform

Family Law

To: The Right Honourable the Lord Fraser of Carmyllie, QC,
Her Majesty's Advocate

We have the honour to submit our Report on Family Law.

(*Signed*) C K DAVIDSON, *Chairman*
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KENNETH F BARCLAY, *Secretary*
27 January 1992

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Part I Introduction

Towards a Scottish code of child and family law

1.1 Under the Law Commissions Act 1965 it is our duty to keep each area of Scots law with which we are concerned under review

> "with a view to its systematic development and reform, including in particular the codification of such law, the elimination of anomalies, the repeal of obsolete and unnecessary enactments and generally the simplification and modernisation of the law."[1]

Family law is one of the areas with which we are concerned.[2] We have already published a number of reports in this area, most of which have been implemented by legislation. It is now time to draw together the many statutory provisions on family law, along with those few family law rules which still depend on the common law, into one single family law statute for Scotland. This would be of benefit to all users of the law. The proposal to this effect which we made in a recent discussion paper[3] received overwhelming support on consultation. This report therefore makes recommendations designed to put Scottish family law into such a form that the usual consolidation procedure in Parliament could be used to produce a single, comprehensive Act which would be arranged in a logical, coherent way. If this measure were combined with a new consolidation of the law on local authorities' powers and duties in relation to child care the result would be a comprehensive Scottish code of child and family law.

Background to Report

1.2 This report follows three discussion papers on family law topics which we published in 1990—*Family Law: Pre-consolidation Reforms*,[4] *The Effects of Cohabitation in Private Law*,[5] and *Parental Responsibilities and Rights, Guardianship and the Administration of Children's Property*.[6] We are grateful to all those who commented on these discussion papers. Lists of those who submitted written comments are appended.[7] We have been greatly assisted by the comments received.

1.3 We have also been greatly assisted by the results of two public opinion surveys which were arranged for us by the Central Research Unit of the Scottish Office and carried out by System Three Scotland. One was on attitudes towards giving certain legal effects to cohabitation as husband and wife. The other was on attitudes towards the corporal punishment of children by their parents. The results are referred to later in the relevant parts of this report. We were also assisted by research into the use made of judicial separation in Scotland which was carried out for us by the Central Research Unit. This too is referred to in more detail later.

1.4 Representatives of the Commission participated in two public meetings on the proposals on cohabitation. We are grateful to the Faculty of Law, Glasgow University and the Legal Services Agency, Glasgow for organising these meetings. We have also had discussions with a number of organisations who wished to elaborate on their written submissions or explore the thinking behind some of our provisional proposals. Again we found these discussions useful and constructive.

Scope of Report

1.5 Parts II to VI of the report are concerned with parental responsibilities and rights, the guardianship of children and the administration of children's property. These parts are based on Discussion Paper No. 88. They address such questions as whether the statute law should place more emphasis on parental responsibilities rather than parental rights; whether both parents should have parental responsibilities and rights, whether or not they are married to each other;

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1. S3(1).
2. It is item 14 of our Second Programme of Law Reform.
3. Discussion Paper No 85 (March 1990).
4. Discussion Paper No 85 (March 1990).
5. Discussion Paper No 86 (May 1990).
6. Discussion Paper No 88 (October 1990).
7. Appendix B.

whether the concepts of custody and access should be replaced, with a view to stressing that both parents remain parents even if they no longer live together; how far the child's own views should be taken into account when decisions affecting him or her are being made; and whether the parental right to administer corporal punishment should be retained as it is, restricted or abolished. Parts VII to XV deal with aspects of the law on marriage and divorce, which were discussed in Discussion Paper No 85. This section of the report addresses such questions as whether marriage by cohabitation with habit and repute should be retained, reformed or abolished; whether the law needs the concept of the voidable marriage; whether the remedy of judicial separation has outlived its usefulness and become a harmful anachronism; whether anything can be done to prevent occupancy rights in the matrimonial home from causing unnecessary expense and inconvenience in conveyancing transactions; and whether the protection afforded by a matrimonial interdict should be extended and should continue after divorce. Choice of law rules on the validity of marriages with some foreign element (for example, marriage abroad, one party domiciled abroad) are also considered, as are choice of law rules on the legal effects of marriage. Part XVI deals with the legal effects of cohabitation in private law. It follows on from Discussion Paper No 86. It addresses such questions as whether a cohabitant who has contributed to an increase in the other's wealth during the cohabitation (for example, by helping to build up a business) should have a statutory claim to some financial provision on the termination of the relationship; and whether a cohabitant should have some claim against the other's estate if the cohabitation is ended by the other's death. The legality of cohabitation contracts is also considered. Part XVII deals with the abolition of the status of illegitimacy which has now become legally insignificant and socially offensive. Part XVIII deals with one aspect of the law of aliment which was left untouched when this branch of the law was codified in 1985, namely the choice of the law governing the alimentary obligation when there is a foreign element in the case, such as the fact that one of the parties is domiciled abroad. Part XIX considers how the draft Bill appended to this report relates to other current developments in Scottish child and family law and suggests one way in which different areas of child and family law, public and private, could be brought together in a comprehensive code. Part XX contains a summary of recommendations. The draft Bill in Appendix A extends to 48 clauses, but it repeals 50 complete sections of existing Acts and parts of many more.

Part II Parental responsibilities and rights

Parental responsibilities

2.1 In our discussion paper on *Parental Responsibilities and Rights, Guardianship and the Administration of Children's Property*[1] we pointed out that the existing statute law referred expressly to parental rights but did not contain any general reference to parental responsibilities. We suggested that there would be advantages in such a general statement (which would be in addition to the existing statutory obligations in relation to, for example, aliment[2] and education[3]). We thought that the main advantages of a general statement of parental responsibilities were likely to be

(a) that it would make explicit what was already implicit in the law,[4]

(b) that it would counteract any impression that a parent had rights but no responsibilities, and

(c) that it would enable the law to make it clear that parental rights were not absolute or unqualified,[5] but were conferred in order to enable parents to meet their responsibilities.[6]

We were aware that the increased emphasis on parental responsibilities, rather than parental rights, in English law under the Children Act 1989 had met with very wide support and approval.

2.2 On consultation there was very strong support for a general statutory statement of parental responsibilities and, indeed, for shifting the whole expression of the law in the direction of emphasising parental responsibilities rather than parental rights. Only four consultees were opposed to a general statutory statement of parental responsibilities, mainly on the ground that such a statement would serve an educational or declaratory purpose rather than a strictly legal purpose, and that it was therefore inappropriate in legislation. There are, however, certain strictly legal purposes for which it is important to know what are a parent's legal responsibilities in relation to a child.[7] Moreover, as we have mentioned, the common law already recognises that there are general parental responsibilities so that the question is not between a statutory statement and a moral precept, but between expressing the law in one form rather than another. As there was very strong majority support for a clear *statutory* statement we recommend that

1.(a) There should be a statutory statement of parental responsibilities.

2.3 So far as the content of the statutory statement is concerned, we asked in the discussion paper whether it should be provided that a parent had a responsibility

(i) to care for his or her child throughout childhood,

(ii) to safeguard and promote the child's welfare throughout childhood, and

(iii) to administer, during the child's childhood, for the benefit of the child, any property belonging to the child.

This was generally supported. However, some helpful suggestions and comments were made. One was that the responsibility should not be absolute. It is clear, for example, that a soldier on active service abroad would be impeded in practice from fulfilling his or her parental responsibilities for some time. This could be met by adding some such words as "so far as is practicable". Some commentators referred to the United Nations Convention on the Rights of the Child, which was adopted by the General Assembly on 20 November 1989 and which the United Kingdom has now signed and ratified.[8] This refers in article 18 to the parental

1. Discussion Paper No 88, (Oct 1990) referred to in this part of the report as "the discussion paper".
2. Family Law (Scotland) Act 1985, s1; Child Support Act 1991, s1.
3. Education (Scotland) Act 1980, s30.
4. Stair recognised that parents had an obligation to care for their children and prepare them "for some calling and employment according to their capacity and condition". *Institutions* 1.5.6. For more recent recognitions of implicit duties of care and promotion of welfare, see eg Social Work (Scotland) Act 1968 s16(2); Law Reform (Parent and Child) (Scotland) Act 1986 s3. *Cf Gillick* v *West Norfolk & Wisbech Area Health Authority* [1986] AC 112 where, in relation to English law, the House of Lords clearly accepted that there were parental duties, including a duty of "protection". The responsibility to administer the child's property is clearly recognised in the existing law of Scotland. See *Scott* v *Occidental Petroleum (Caledonia) Ltd* 1990 SCLR 278.
5. *Cf Porchetta* v *Porchetta* 1986 SLT 105 (re access). For a discussion of the qualified nature of parental powers in English law, see Bainham, *Children, Parents and the State* (1988) 47–57.
6. See the speeches of Lord Fraser of Tullybelton and Lord Scarman in the *Gillick* case [1986] AC 112 at pp170 and 185.
7. See eg Social Work (Scotland) Act 1968, s16(2)(e); Adoption (Scotland) Act 1978, s16(2)(c).
8. See Scolag, Jan 1992, p4.

"responsibility for the upbringing *and development* of the child".

It was suggested to us that it would be useful to refer to the *development* of the child in any statement of parental responsibilities. We agree with this. Several commentators also pointed out the need for coherence between recommendations for reform of the private law and recommendations for reform of the public law in relation to child care. In this connection we note that the Scottish Child Care Law Review Group have recommended that one of the grounds for a parental rights order (by which a local authority would be able to acquire parental rights in relation to a child) should be that

> "the child has suffered or is likely to suffer *serious impairment to his health, development or well being,* as a result of not receiving a standard of parental care which could reasonably be expected."[1]

The term "wellbeing" is better than "welfare" in this context because it goes better with "impairment to". In the context of a positive statement of parental responsibilities "welfare" would, we think, be more appropriate. It is the term used in relation to court decisions on parental rights[2] and is also the term generally used in the Children Act 1989. With that minor adjustment, it would be possible to provide that a parent had a responsibility, so far as practicable, to safeguard and promote the child's health, development and welfare. That would include the important idea of development, reflect our policy and correspond very closely to the wording recommended by the Scottish Child Care Law Review Group in the context of grounds for public intervention. A statement in that form would make a separate reference to a responsibility to care for the child unnecessary. Omitting a reference to care would have the advantage that the statement of parental responsibilities could be applied more easily to separated parents, even in a situation where only one of them could care for the child physically, and to older children who might be living away from both parents.

2.4 Reference to the United Nations Convention also suggested to us the addition of a further parental responsibility, which is already recognised in Scots law, namely a responsibility, where this is in the interests of the child, to provide appropriate direction and guidance in those areas of life where the child has considerable scope for independent action.[3] Article 5 of the United Nations Convention refers to

> "the responsibilities . . . of parents . . . to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognized in the present Convention."

Article 5 concentrates, naturally enough, on the child's rights under the Convention. An equivalent provision in our law should not be so narrow. Appropriate direction and guidance might relate not only to the exercise by the child of his or her rights (such as his or her contractual rights under the Age of Legal Capacity (Scotland) Act 1991) but also, and importantly, to the child's responsibilities[4] and indeed generally to the child's activities and decisions.

2.5 We also think that any statement of parental responsibilities should include a reference to the responsibility of a parent who is not living with the child to maintain, when this is in the interests of the child, personal relations and direct contact with the child on a regular basis. "Access" to the child has traditionally been regarded as a parental right but we think that it should also be seen as a parental responsibility, but only where it is in the child's interests. There may be situations where, for example, the child of a brief affair by a married woman has been accepted by her husband and is being brought up as a child of the marriage. In some such circumstances, but not necessarily all, it may be in the child's best interests for the child's father to stay away.

2.6 A parent also has a responsibility to act as the child's legal representative, where that is appropriate and in the child's interests. This involves not only administering the child's property but also acting on behalf of the child in relation to such matters as giving legally effective consent, entering into important contracts, raising or defending court actions, granting discharges and so on, where the child is not legally capable of acting on his or her own behalf. This too should be mentioned. When these adjustments have been taken into account, our recommendation on the content of the proposed statutory statement of parental responsibilities is as follows.

1.(b) It should be provided that a parent has in relation to his or her child a responsibility, so far as is practicable and in the interests of the child,

(i) to safeguard and promote the child's health, development and welfare

(ii) to provide, in a manner appropriate to the child's stage of development, direction and guidance to the child

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1. Recommendation 42 (emphasis added). The words in italics are also used in recommendation 51 on the grounds for compulsory measures of care.
2. Law Reform (Parent and Child) (Scotland) Act 1986, s3 ("welfare of the child" to be the paramount consideration).
3. *Cf Harvey* v *Harvey* (1860) 22 D 1198.
4. On the importance of parental guidance, and the child's assumption of responsibilities, in relation to discipline in schools, see eg *Discipline in Schools* (the Report of the Committee of Enquiry chaired by Lord Elton, 1989) pp133–143.

(iii) if not living with the child, to maintain personal relations and direct contact with the child on a regular basis

(iv) to act as the child's legal representative and, in that capacity, to administer, in the interests of the child, any property belonging to the child.

2.7 In the discussion paper we suggested for consideration that, for the purposes of the parental responsibilities there suggested childhood should last until the child was 16. We recognised that many parents would be anxious to fulfil certain parental responsibilities long after that age but felt that when a child was old enough to be living independently a *legal* responsibility of care and protection might be unrealistic. We were *not* proposing, even tentatively, that the parental obligation of aliment should cease at 16. That obligation normally continues until the child is 18 but can continue until the age of 25 if the recipient is undergoing education or training.[1]

2.8 Consultees were divided as to the age to which parental responsibilities should continue. A majority supported the age of 16. A significant minority, however, were uneasy about this suggestion and thought that parental responsibilities should continue until the child was 18. It is clear that some of these consultees were thinking of financial support and did not appreciate that we were not suggesting any change in section 1 of the Family Law (Scotland) Act 1985, under which the obligation of aliment continues until the age of 18 or, in cases where there is continuing education or training, until the age of 25.[2] Other consultees were, however, concerned about a cessation of non-financial responsibilities at the age of 16. They pointed out that the adoption law allowed adoption of a child until the age of 18 and that the effect of an adoption order was to transfer "the parental rights and duties relating to the child".[3] They observed that it would be odd if there were, in the case of a 16 or 17 year old, no parental duties (other than aliment) to be transferred. It was also pointed out to us that a supervision requirement under section 47(2) of the Social Work (Scotland) Act 1968 may continue until the young person attains the age of 18, which implies that the existing public law recognises that there may be a need for some quasi-parental responsibility to continue until that age. Under the Children Act 1989 parental responsibility, in English law, continues until the child is 18.[4] Some consultees referred to the United Nations Convention on the Rights of the Child which defines a child, in article 1, as a

"human being below the age of 18 years unless, under the law applicable to the child, majority is attained earlier"

but which provides later, in article 41, that nothing in the Convention is to affect provisions in a State's laws which are more conducive to the realisation of the rights of the child than the provisions of the Convention.

2.9 The age at which legal parental responsibilities cease depends on what those responsibilities are and how they are expressed and qualified. Our concern that a legal responsibility to "care" for a child who was living independently might seem unrealistic disappears if the statutory list of parental responsibilities does not refer expressly to physical care. It is not unrealistic to talk of a parental responsibility to safeguard and promote, *so far as is practicable*, the health, development and welfare of a child of 16 or 17 who is living independently. The words in italics are an important qualification, as is the obligation which we recommend later to take the child's own views into consideration.[5] In practice many young people aged 16 and 17 are still living at home[6] and a legal parental responsibility, qualified as stated, would square with what actually happens. Others of that age might be living away from home but might still be undergoing education or training and might still be dependent on their parents. Again a suitably expressed and qualified parental responsibility would not be unrealistic.

2.10 The second responsibility we have recommended is a responsibility

"to provide, in a manner appropriate to the child's stage of development, direction and guidance to the child".

This responsibility could, we believe, last quite appropriately until the young person attained the age of 18. Indeed it may well be a particularly important responsibility in the case of those approaching that age.

2.11 The third responsibility relates to the maintenance of contact by an absent parent. This is so closely linked to the parent's right to contact (which we discuss later)[7] that it should, we think, last as a legally recognised responsibility only until the child is 16. Beyond that it is more of a question of a voluntary relationship between two adults. The

1. Family Law (Scotland) Act 1985, s1.
2. The obligation under the 1985 Act is potentially more long-lasting than the obligation of child support for the purposes of the Child Support Act 1991 but even that obligation can last, in some situations, until the child is 19.
3. Adoption (Scotland) Act 1978, ss12 and 65(1).
4. Ss2, 3 and 105(1).
5. See paras 2.60 to 2.66 below.
6. Research carried out for us in 1986 on the experiences and attitudes of young people who had left school in 1983–84 found that 87% had lived at home with a parent or parents on leaving school and that by the time of the survey a few years later there had been little change. 76% still lived with a parent or parents. See Buist and Gentleman, *The Legal Capacity of Minors and Pupils—Experiences and Attitudes to Change* (Scottish Office, Central Research Unit Papers, May 1987) p11.
7. See paras 2.31 and 2.35 below.

final responsibility relates to acting as the child's legal representative and administering the child's property. A young person acquires full capacity to enter into his or her own legal transactions at the age of 16.[1] So there is no need for direct action or administration by the parent after that age. There may well be a need for some parental direction and guidance after that age, but this is provided for by the second parental responsibility mentioned above. We do not believe that terminating the parental responsibility to act on behalf of the child in legal matters, and administer the child's property, at the age of 16 when the child acquires the legal capacity to do so himself or herself is inconsistent with the United Nations Convention on the Rights of the Child. Recognising that a person of 16 or 17 can enter into his or her own legal transactions and administer his or her own property, with appropriate parental guidance, gives more recognition to the rights of the young person than would a rule which required all such transactions and administration to be handled by a parent on behalf of the young person. Our proposed rule is therefore covered by article 41 of the Convention.

2.12 We recognise that it is less tidy to have different parental responsibilities ending at different ages than to have a uniform age. Nonetheless we think that the reality of family life is that certain parental responsibilities of a supportive, protective or advisory nature continue after the child attains the age when he or she has considerable legal capacity and freedom of action. This has always been recognised in Scots law.[2] Recognising that certain parental *responsibilities* continue after the age of 16 does not require an extension of parental *rights* in relation to the residence and upbringing of a young person to continue beyond that age. It would, in our view, be inappropriate to give a parent a *right* to control, say, the residence or conduct of a young person over the age of 16. A responsibility to provide support and guidance to another person does not necessarily imply a right to take decisions *for* that person. Our preferred policy would mean that while the law recognised that a person aged 16 or 17 was entitled to administer his or her property, enter into transactions, marry, make his or her own decisions about place of residence and contact with parents and so on, he or she was still entitled to parental support, interest and guidance. That would be in accordance with some carefully argued submissions we received from consultees and would be consistent with the United Nations Convention on the Rights of the Child. We suspect that it would also be in accordance with the views of many members of the public.

2.13 We therefore recommend that

1.(c) The parental responsibilities to safeguard and promote the child's health, development and welfare and to provide appropriate direction and guidance should last until the child attains the age of 18. The other responsibilities mentioned should last until the child attains the age of 16.

We wish to stress that

(d) The above responsibilities should be in addition to any other statutory parental duties or responsibilities, including those relating to financial support under the Family Law (Scotland) Act 1985 and the Child Support Act 1991 and those relating to education under the Education (Scotland) Act 1980.

(Draft Bill, clause 1.)

Parental rights

2.14 In the discussion paper we asked whether it should be made clear in any new legislation on this topic that parental rights were conferred on a parent in order to enable him or her to fulfil his or her parental responsibilities.[3] There was very strong support for this on consultation. Many consultees considered that the emphasis of the law in this area should be on parental responsibilities rather than parental rights and that it would fit in well with this view to emphasise that parents had parental rights in order to enable them to fulfil their parental responsibilities.

2.15 Under the existing law the most important parental rights[4] are guardianship, custody and access.[5] A parent's guardianship is his or her right to manage the child's property, enter into contracts on the child's behalf, litigate on the child's behalf, and generally to act on the child's behalf in any legally relevant matter where the child is incapable of acting on his or her own behalf. The parent as guardian is the child's administrator-in-law or legal representative. Guardianship lasts until the child is 16.[6]

1. Age of Legal Capacity (Scotland) Act 1991.
2. See *Harvey* v *Harvey* (1860) 22 D 1198.
3. Para 2.20.
4. It has frequently been pointed out that "rights" is here used in a loose sense. The right of guardianship, for example, is really a power to take legally effective action on behalf of a child. See Dickens "The Modern Function and Limits of Parental Rights" (1981) 97 LQR 462; Bainham, *Children, Parents and the State* 48.
5. These are the rights referred to specifically in the Law Reform (Parent and Child) (Scotland) Act 1986, s8, as amended by the Age of Legal Capacity (Scotland) Act 1991.
6. Age of Legal Capacity (Scotland) Act 1991.

2.16 Custody has never been precisely defined in Scots law but is generally taken to be the right of a person to have the child living with him or her (or otherwise to regulate the child's residence[1]) and to control the child's day to day upbringing.[2] "Child" in relation to custody means a child under the age of 16 years.[3]

2.17 Access is the right to have reasonable contact with the child, either by visiting the child or by being allowed to take out the child or by being allowed to have the child to stay ("residential access"). Conceivably, reasonable contact might in some cases be by telephone (for example, where the parent is in another country) but we know of no reported Scottish case where that has been an element in an award of access under the existing law. Access operates as a modification of the rights of the person who has custody or care of the child.[4]

2.18 The definition of "parental rights" in the Law Reform (Parent and Child) (Scotland) Act 1986 mentions tutory, curatory, custody and access but also refers to

> "any right or authority relating to the welfare or upbringing of a child conferred on a parent by any rule of law."[5]

This is not a particularly helpful addition. It was included in the 1986 Act as a holding measure. The principal purpose of the Act was to remove legal discrimination against children born out of marriage. In our report on *Illegitimacy*, which was implemented by the 1986 Act, we referred to concern about the vagueness of the term "parental rights".[6] We had not consulted on this question, however, and were obliged to conclude that our *Illegitimacy* report was not the place

> "to analyse these so-called rights in depth or to ask to what extent they actually exist as separate rights independent of, say, tutory or custody".[7]

Our concern in the *Illegitimacy* report was not with the content of parental rights but rather with the question whether any parental rights which did exist should be recognised in relation to children born out of marriage and, if so, when.[8] In this report we are concerned with the content of parental rights and we are anxious to meet the criticism of vagueness, if this is possible. Child law is of concern to a great many people who are not lawyers and who do not have access to complete sets of law reports. It is, we think, unsatisfactory and unfair to expect people to work with a definition of parental rights which says, in effect, that parental rights are what the common law says they are, without providing further assistance. We are working towards a codification of family law and a definition of a key concept which takes this form is particularly unsatisfactory in this context.

2.19 It should be noted that the residual category of parental rights in the 1986 Act is not concerned with rights under specific enactments. It applies only to any right or authority conferred on a parent by "any rule of law". That expression is normally used in statutes in relation to common law rules: if statutory rules are to be included the term normally used is "any enactment or rule of law". This in itself may be a source of confusion. Specific statutory rights do not need to be included in a general definition of parental rights. They stand on their own. For example, a parent's agreement to adoption is required by an express statutory provision.[9] That applies, and will continue to apply, no matter what a general definition of parental rights may provide. Similarly, a parent's right to appoint a guardian to act after his or her death depends on a specific statutory provision which applies regardless of any general definition of parental rights.[10] There are other examples of statutory parental rights.[11] All could be covered by making it clear that any general statement of parental rights was without prejudice to any right conferred by an enactment.

2.20 The residual common law parental rights which are commonly mentioned are: control of education and religious upbringing; choice of, or consent to, medical treatment; discipline; choice of name; and choice of nationality and domicile.[12]

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1. See eg *Pagan* v *Pagan* (1883) 10 R 1072.
2. See eg *Zamorski* v *Zamorska* 1960 SLT (Notes) 26 (control of religious upbringing). See also Thomson, *Family Law in Scotland* (2d edn 1991) 179.
3. Law Reform (Parent and Child) (Scotland) Act 1986, s8.
4. *Cf D* v *Strathclyde Regional Council* 1985 SLT 114 at p116.
5. S8.
6. Scot Law Com No 82 (1984), para 4.1.
7. *Ibid* para 4.2
8. *Ibid* para 4.2.
9. Adoption (Scotland) Act 1978, s16.
10. Law Reform (Parent and Child) (Scotland) Act 1986, s4.
11. See eg Registration of Births, Deaths and Marriages (Scotland) Act 1965, s14 (registration of birth—also a duty) Social Work (Scotland) Act 1968, s41 (presence at children's hearing—also a duty).
12. See eg Eekelaar, "What are Parental Rights?" 1973 89 LQR 210; Thomson, *Family Law in Scotland* (2d edn 1991) 182–193; Hoggett, *Parents and Children: The Law of Parental Responsibility* (3rd edn 1987) 7–17.

2.21 A parent's rights in relation to the child's education and religious upbringing are recognised by the European Convention on Human Rights[1] and by Scottish legislation.[2] However, control of these matters would fall clearly within the scope of control of the child's day to day upbringing.[3] There would seem to be no need for a separate residual right. The statutory position under the enactments relating to education would be unaffected.

2.22 Choice of medical treatment would also be part of the child's day to day upbringing in so far as no question of giving a legally effective consent arose. Deciding, for example, whether a three year old child should take certain pills, or should be taken to a doctor, would fall within control of day to day upbringing. The giving of a legally effective consent to medical treatment in any case which involved invasion of the child's bodily integrity and in which the child was incapable of consenting on his or her own behalf would fall within the right of legal representation, if that were defined as we suggest. Again there seems to be no need for special residual rights.

2.23 The discipline of a child would also be an aspect of control of the child's upbringing. The question of reasonable chastisement as a defence to a charge of assault is a separate question, which we consider later.[4] Recognising that a parent has a right to control the day to day upbringing of a young child in order to fulfil his or her parental responsibilities does not imply any recognition that corporal punishment is lawful or unlawful. That is a different question, relating not to the right to control but to the means used.

2.24 Choice of name, apart from the statutory rules on registration of birth or change of name or surname[5] is a matter of usage rather than law. In so far as there is a parental right it would fall within the scope of control of day to day upbringing. By virtue of the right to control the child's day to day upbringing a parent can control, at least in the case of a young child, the name by which the child is known.

2.25 Nationality is governed by specific statutory provisions,[6] which would be unaffected by a general definition of parental rights. It is misleading to talk of a parent's right to choose the domicile of his or her child. The child's domicile often follows that of the parent but that is a result of a legal rule, not of the exercise of a parental right.[7]

2.26 In the discussion paper we suggested, for consideration, a scheme based on a simple restatement and clarification of the existing parental rights of guardianship, custody and access. We suggested, however, that the parental right of guardianship might be called a right of legal representation. There was majority support for this general approach. However, there was also strong objection from experienced and well-informed consultees to the terminology of custody and access. These were seen as reflecting, to some extent, a sort of proprietorial approach to children. It was pointed out that the Children Act 1989 had got rid of "custody orders" and "access orders" in England and Wales and that this was generally regarded as a very useful reform. In the light of these concerns we have re-examined the question of parental rights. It will be convenient to deal with the existing rights, and possible modifications to them, one by one.

2.27 So far as the parental right of guardianship is concerned there was general agreement with our suggestion that this should be redefined in terms of a parental right of legal representation. In the discussion paper we pointed out that it was odd to define the parent's role in terms of the guardian's role,[8] given that parenthood was the primary relationship. Guardians are substitute parents, not the other way about. We also pointed out that the parent's right of guardianship differed from the rights conferred on non-parental guardians. The parent's guardianship did not need to include rights in relation to the child's person and day to day upbringing, which the parent had anyway as parent. A non-parental guardian might need to have such rights. We agreed with the view of the English Law Commission, now reflected in the Children Act 1989, that

> "parenthood should become the primary concept. Any necessary distinctions between parents and guardians who act *in loco parentis* could then clearly be drawn . . ."

We suggested therefore that one parental right should be the right of legal representation, defined as the right to administer the child's property and to act, or give consent, on behalf of the child in any legally significant matter where

1. Protocol No 1 Art 2—"No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions". *Cf Campbell and Cosans* v *United Kingdom* (1982) 4 EHRR 293.
2. Education (Scotland) Act 1980, ss28 and 28A.
3. See *Zamorski* v *Zamorska* 1960 SLT (Notes) 26.
4. Paras 2.67–2.105 below. See also Education (No 2) Act 1986, s48 (abolishing corporal punishment of pupils, as defined, in Scotland).
5. Registration of Births, Deaths and Marriages (Scotland) Act 1965, ss14, 43.
6. British Nationality Act 1981.
7. The two Law Commissions have recommended reforms in this area but they would not affect this point. See the Law Commission and the Scottish Law Commission Report on *The Law of Domicile* (Law Com No 168; Scot Law Com No 107, 1987) paras 4.1–4.33. See also paras 17.12–17.13 below.
8. This is a long-standing tradition, which was merely continued by the Law Reform (Parent and Child) (Scotland) Act 1986. See Stair 1.5.12 ("a father is tutor of law to his sons being pupils").

the child is incapable of acting or consenting on his or her own behalf. The only change we would suggest in that formulation is that "legally significant matter" should be replaced by "transaction having legal effect" to correspond to the terminology of the Age of Legal Capacity (Scotland) Act 1991.

2.28 So far as custody is concerned we received comments from well-informed and experienced consultees to the effect that the existing concept of custody was not well understood. This also emerged from the discussion on the Age of Legal Capacity (Scotland) Bill as it was going through Parliament. It is by no means clear whether the right to control the child's day to day upbringing is part of custody or an independent parental right. It seems too that some parents who have obtained an award of sole custody think that that gives them *all* the parental rights in relation to the child to the complete exclusion of the other parent. One highly respected solicitor with over 20 years of experience in matrimonial litigation said

> "I really do feel at the present time that the concept of custody is not a helpful one from the point of view of parents. It seems to me as a matter of fact that the parent who has custody tends to dictate matters to an extent far beyond that which one would necessarily think is reasonable . . . I have heard time and time again comments by one parent or the other that they are in charge, and they will dictate what is to happen."

The Law Society of Scotland also thought that the right of custody required further consideration and that some distinction should probably be drawn between the basic right of custody and rights in relation to major life decisions.

> "To the extent that the other parent is automatically cut out of such decisions by an award of custody, such an award gives more than is really in dispute between the parents, and there is an argument in the child's interests for reform."

The Humanist Society of Scotland considered that to include control of upbringing within custody

> "would conflict with the use of the term which ordinary folk employ and . . . would lack clarity and precision.".

They suggested that upbringing should be mentioned separately. Other consultees expressed the view, in different ways, that it would be desirable, in order to encourage a less adversarial and proprietorial approach to bringing up children after their parents had separated, to avoid a definition of custody which suggested that only the parent with custody had a role to play in the child's upbringing. The Family Charter Campaign made strong representations to this effect with examples of the divisive effect of a wide view of custody. They sent us a copy of a letter written by a father who had "lost" custody of his son, expressing gratitude to the head teacher at his son's primary school for allowing him to attend a parents' night, see his son's school work and experience for himself the happy atmosphere which prevailed at the school. Here we have a father who is keenly interested in how his son is doing at school, who has clear responsibilities in relation to his son's education, and who is anxious to fulfil them, expressing *gratitude* for being allowed to play a normal parental role. We found this letter at once touching and illuminating. If the concept of custody is interpreted by third parties in such a way as to freeze out this kind of caring parental involvement (whether by fathers or mothers) then it would, in our view, be desirable to change it.

2.29 In England and Wales the Children Act 1989 has replaced "custody orders" by "residence orders" which are defined as orders "settling the arrangements to be made as to the person with whom a child is to live". The main reasons for this change were

(i) that there was confusion about the meaning of an award of custody, with different meanings in different courts,

(ii) that the new terminology was intended to reflect more closely the practical realities of bringing up a child, rather than theoretical rights, and

(iii) that it was hoped that the new orders would be less productive of controversy, by helping to preserve each parent's responsibilities as much as possible and by allowing for and even encouraging more flexible arrangements, which might in turn avoid giving the impression that one parent is the good parent who has custody and the other is the bad parent who is restricted to access.[1]

There was also a distaste for the existing terminology—a feeling that an "award" of "custody" had unfortunate connotations. In our discussion paper we expressed reservations about the need for a similar change of terminology in Scotland. We thought that the meaning of custody was fairly clear in Scotland and that a change would be largely cosmetic. Many consultees disagreed. Family Conciliation Scotland, representing conciliators who see *both* parties to disputes over children, were strongly of the view that the law was unclear and that it should be changed. They thought that

> "a change in terminology would go a long way to create an atmosphere and public understanding that a child will continue to have two parents after separation or divorce who share responsibility for his/her upbringing."

1. Law Com No 172 (1988) paras 4.1 to 4.24.

In their experience an award of custody was

> "interpreted by parents as conferring all parental rights on the custodial parent and stripping all parental rights from the non-custodial parent . . . It is clear that custody and access have become synonymous with win and lose. The use of the term 'custody' in particular does increase the level of dispute, the acrimony and the danger of children being used as weapons in the fight . . . The parents' conception of 'custody' makes the conciliation task more difficult in very many cases."

They too referred to the difficulties often experienced by non-custodial parents in obtaining information about their children from schools, hospitals and other third parties.

> "A typical example is of a head teacher from a Fife school who told the non-custodial parent he would have to ask the custodial parent's permission before school reports could be sent to the non-custodial parent".

The Royal Scottish Society for the Prevention of Cruelty to Children also felt that the term "custody" was unfortunate and could work against the idea of trying to preserve each parent's responsibilities. The Scottish Child and Family Alliance expressed similar views, as did other consultees. We have found the views of those closely involved with conciliation, and with advising separated parents, very persuasive and helpful. The value of consultation is that it enables us to receive and take account of the views of those with extensive practical experience of the working of the law. In the light of the comments received it now seems to us that there would be value in moving away from the concept of custody. We think, however, that this should be done at the level of rights and not just at the level of court orders, as has been done in England. We suggest that instead of a parental right of custody which would include control of day to day upbringing it would be more helpful to refer to the right of a parent to have the child living with him or her, or otherwise to regulate the child's residence. We make a recommendation later to this effect as part of a general recommendation on parental rights.

2.30 If a "residence" right were provided for, as suggested above, it would clearly be necessary to provide in addition, but separately, for a right to control, direct or guide the child's upbringing, in a manner appropriate to the child's stage of development. This right, above all others, would in practice be exercised quite differently depending on the age and actual capacity of the child. This is why we have said "control, direct or guide". In the case of a very young child "control" would be the appropriate concept. Later there might be a constantly changing mixture of control, direction and guidance. In the case of an older child it would generally be a case of guidance. In relation to the exercise of this right the views of the child would also be particularly important. We deal with this question later.[1] We do not think that there would be anything particularly novel in setting out the parental right in relation to the upbringing of the child in this way. The gradually diminishing and changing nature of the right has long been recognised in both Scottish and English law.[2] Article 5 of the United Nations Convention on the Rights of the Child, which we have already mentioned in connection with parental responsibilities, requires States Parties to respect "the responsibilities, rights and duties of parents . . . to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognised in the ... Convention." In Scots law there used to be a fairly rigid distinction in this area between pupils (girls under 12 and boys under 14) and minors (those above those ages but under the age of majority). In the mid-nineteenth century the father had what was almost a right of dominion in relation to a pupil child but a dwindling right of control, direction or guidance in relation to a minor.[3] The whole approach to parental rights has changed. The idea of a more or less absolute right of dominion over a pupil child has been replaced, at least in court proceedings relating to parental rights, by the principle that the welfare of the child is the paramount consideration.[4] Although there may be a case, as suggested by some consultees, for a *presumption* that a young person of 12 or over is able to make reasonable decisions relating to his or her personal welfare, we do not believe that it would be useful to introduce, in a new statement of parental rights, a rigid distinction between those under and those over, say, the age of 12.[5] In reality the nature of the parental right in relation to the upbringing of the child changes imperceptibly as the years pass. The law ought, we think, to reflect this. The great advantage of stating the parental right in relation to the child's upbringing separately from the right in relation to residence is that it enables both parents more easily to retain a role in relation to the child's upbringing after a separation. Settling the question of residence would not carry the implication, which settling the question of sole custody may at the moment, at least in the eyes of some people, that the absent parent has no role to play in the child's upbringing.

2.31 In relation to the parental right of access we suggested in the discussion paper that this should be defined as the right to have reasonable contact with the child, either by visiting the child, or by being allowed to take out the child, or by being allowed to have the child to stay or by other appropriate means. There was general support for an approach along these lines. However, a number of consultees disliked the term "access" which seemed to suggest

1. See paras 2.60–2.66.
2. See eg *Harvey* v *Harvey* (1860) 22 D 1198 at 1208 to 1209; *Hewer* v *Bryant* [1970] 1 QB 357 at 369 ("It starts with a right of control and ends with little more than advice.")
3. See *Harvey* v *Harvey*, above. Minority at that time lasted until the age of 21.
4. Law Reform (Parent and Child) (Scotland) Act 1986, s3.
5. We deal with the question of a presumption later at para 2.65.

something like access to property and which did not indicate that what was involved was continuing parenting. Others objected to the use of the word "allowed" which seemed to imply that the custodial parent was in control. We think there is force in these objections and that the terminology used should reflect more clearly the idea of a continuing parental relationship. We would suggest, therefore, that the parental right of access should be replaced by a right, if not living with the child, to maintain personal relations and direct contact with the child on a regular basis.

2.32 A number of commentators suggested that the child should have a right to continuing contact with both his or her parents. We have attempted to meet this suggestion by recommending above that the maintenance of personal relations and direct contact should be a parental responsibility as well as a parental right.

2.33 In the discussion paper we asked whether, if the major parental rights (which we then thought of as legal representation, custody and access) were defined as we suggested, and if any rights conferred on parents by any other enactments were expressly preserved, it would be necessary to confer any other parental rights and, if so, which. Most of those who responded to this question did not think any additional parental rights would be necessary. Some referred to rights in relation to medical treatment and religion but these would clearly be covered by the general right to control, direct or guide the child's upbringing, coupled with the right of legal representation in so far as the giving of any legally effective consent was required. Provided that existing statutory rights are expressly preserved we do not believe that any residual general category of parental rights would be necessary. One or two respondents suggested that there should be an express parental right to obtain information about the child from third parties who have dealings with the child or contact with the child. This would correspond to an obligation on the third parties to provide such information. We think that a *general* parental right to obtain information about a child from any third party (including, say, a school friend or trusted uncle or aunt) would be an excessive interference with the legitimate interests of both the child and the third party. It would be intolerable if anyone who spoke to a child under the age of 16 were to be liable in damages to the parent for refusing to reveal what had been said. We could not recommend any such parental right. Whether in a particular context, such as education, child care or health,[1] a parent should have a right to certain information about his or her child and, if so, to what information depends very much on the special circumstances applying in that context. There would have to be full consultation with practitioners in the field concerned, and others, before any code of practice, far less any legislation, on a parental right to information were drafted. There is nothing in the results of our consultation on parental responsibilities and rights which would justify us in expressing a view on any of these matters. However, in our earlier work on the legal capacity of young people we did receive comments to the effect that it would be contrary to the interests of young people to *oblige* doctors to inform the parents of any young person under the age of 16 who sought medical treatment or advice. There was serious concern that young people would often be deterred from seeking much-needed professional treatment or advice if they knew their parents would be informed. We share this concern. As a matter of good practice doctors advising or treating a young person under the age of 16 who has sought advice or treatment on his or her own initiative will usually try to persuade the young person to involve a parent, or another person acting as a parent, in the consultation.[2] However, the patient is the young person and his or her views and possible desire for confidentiality are entitled to respect. There may be circumstances where the young person would have good reason to be strongly opposed to any information being passed to a parent. The parent, for example, may be the cause of the injury or condition in relation to which the young person is seeking medical help or advice. The parent may have used violence on similar occasions in the past and the young person may be terrified of the same happening again. The parent may have taken no interest in the young person for many years. We do not therefore recommend an express parental right to be given information about any medical treatment or advice sought by the child. On the general question of information for parents we should add that the reforms which we are recommending in relation to the concept of custody should help to eliminate the view that a parent who does not have the child living with him or her is not a parent. It should be perfectly clear under the new law that a parent remains a parent, whether or not living with the child for the time being. As such, he or she should be able to receive any information (for example, about progress at school) which would normally be supplied to a parent.

2.34 Under the existing law the parental rights of guardianship, custody and access last until the child is 16, even although parental duties in relation to aliment can continue beyond this age. This seems to us to be reasonable and we suggest that the reformulated parental rights should also last until the child is 16, even although some parental responsibilities may continue for longer than that.

2.35 Our recommendations on parental rights are therefore as follows.

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1. An amendment to oblige medical practitioners to consult and obtain the consent of the parent or guardian of a person under the age of 16 years before seeking the young person's own consent to any surgical, medical or dental procedure or treatment was put down, but not moved for procedural reasons, when the Age of Legal Capacity (Scotland) Bill was at the committee stage in the House of Lords in July 1991. The amendment, if moved, would have been resisted. See Parl. Deb. (HL) 22 July 1991, cols 632–636.
2. This is the advice given by the General Medical Council in its booklet on *Professional Conduct and Discipline* (Feb 1991) para 81.

2. **It should be made clear that parents have parental rights in order to enable them to fulfil their parental responsibilities.**

(Draft Bill, clause 2(1).)

3. **The existing parental rights of guardianship, custody and access should be replaced by new rights expressed in such a way as to reflect the policy that both parents, even after separation, normally have a continuing parental role to play in relation to the upbringing of the child.**

(Draft Bill, clause 2(2).)

4. **In addition to any rights conferred by any other enactment a parent should have the right, so long as the child is under the age of 16,**

   (a) **to have the child living with him or her, or otherwise to regulate the child's residence**

   (b) **to control, direct or guide, in a manner appropriate to the child's stage of development, the child's upbringing**

   (c) **if not living with the child, to maintain personal relations and direct contact with the child and**

   (d) **to act as the child's legal representative and, in that capacity to administer the child's property, and to act, or give consent, on behalf of the child in any transaction having legal effect where the child is incapable of acting or consenting on his or her own behalf.**

(Draft Bill, clause 2(1) and (4).)

Who should have parental responsibilities and rights?

2.36 Under the existing law, in the absence of a court order, the mother of a child always has parental responsibilities and rights but the father has parental responsibilities and rights only if he is married to the child's mother or was married to her at the time of the child's conception or subsequently.[1] It follows that a man who abandoned his wife when she was pregnant, and never saw his child, would have full parental responsibilities and rights, whereas a man who was cohabiting with the mother of his child and playing a full paternal role would have none. In the discussion paper we questioned whether this was in line with current social thinking.

2.37 The current law suggests that, in the case of a child born outside marriage, the mother alone has parental responsibilities and corresponding rights. This may be seen as encouraging irresponsibility in some men. The existing rule also seems to ignore the fact that an unmarried father[2] may be just as motivated to care for and protect his child as a married father, or indeed as the mother of the child. We asked therefore, in the discussion paper, whether the law ought not to be based on the general proposition that a person who brings a child into the world has certain responsibilities towards that child, and certain related rights.[3] This would mean conferring parental responsibilities and rights on the basis of parentage alone, subject to any court decree to the contrary. The answer to the question "Who has parental responsibilities and rights in the absence of a court decree?" would be, quite simply, "A parent".

2.38 Before considering the arguments on this question we should point out that where two people have parental responsibilities and rights by operation of law each of them may exercise those responsibilities and rights without the consent of the other person.[4] It follows that the completely uninterested absent parent is not a problem. Where a mother is bringing up her child alone and the father has abandoned the family and never taken any interest in the child then, even if the father has parental responsibilities and rights, the mother can exercise all the parental responsibilities and rights on her own without requiring to obtain the father's consent. The position is the same if the mother has abandoned the family and the father (if he has parental rights) is bringing up the child alone. In this type of situation the rights of the absent parent are of a purely theoretical nature. This is an important point which may not always have been fully appreciated by those who have in the past opposed parental responsibilities and rights for unmarried fathers.

2.39 One common argument against parental responsibilities and rights for all fathers is that the child may be the result of a casual liaison. However, it is not necessarily inappropriate to give parental responsibilities and rights to a father where the child has resulted from a casual liaison. Parental responsibilities and rights are conferred not for the benefit of the parents but for the benefit of the child. The mother's parental responsibilities and rights are recognised even if the child resulted from a casual liaison, and there is no self-evident reason why the father's should not be also. Of course, some fathers and some mothers will be uninterested but that is no reason for the law to encourage and reinforce an irresponsible attitude.

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1. Law Reform (Parent and Child) (Scotland) Act 1986, s2(1). The existing law, as we have noted, refers to parental rights and has no express provision on parental responsibilities. The father can, of course, apply to the court for custody or access, but the onus is on him to satisfy the court that an order would be in the child's interests. See *McEachan* v *Young* 1988 SCLR 98; *Sloss* v *Taylor* 1989 SCLR 407; *Whyte* v *Hardie* 1990 SCLR 23; *Nolan* v *Lindsay* 1990 SCLR 56; *Crowley* v *Armstrong* 1990 SCLR 361.
2. We use this term, slightly loosely, to mean a father who is not married to the mother of the child and who has not been married to her since the child's conception.
3. It is interesting to note that Stair considered that paternal authority reacheth all children, whether procreated of lawful marriage or not, so they be truly known to be children; because the same foundation and common principles and duties are in both.". *Institutions* 1.5.6.
4. Law Reform (Parent and Child) (Scotland) Act 1986, s2(4).

2.40 It is sometimes argued that conferring parental responsibilities and rights on unmarried fathers would cause offence to mothers who were struggling to bring up their children without support from the fathers. This, however, is not a weighty argument for denying parental responsibilities and rights to all unmarried fathers, some of whom may be providing support and fulfilling a parental role. A similar argument could be made in relation to divorced fathers. Indeed lone fathers (whether married, formerly married or never married) who are bringing up children without help from the mothers might feel the same way in relation to the mother's parental responsibilities and rights. The important point in all these cases is that it is not the feelings of one parent in a certain type of situation that should determine the content of the law but the general interests of children and responsible parents.

2.41 The same point can be made about the feelings of certain mothers that they might be at risk of interference and harassment by the father of their child if he had automatic parental responsibilities and rights. There is also the point that what is perceived as "interference" by one parent might be perceived as a manifestation of affection, concern and responsibility by the other, or even by a court or impartial observer. The interests of the child are not necessarily identical to the interests of the parent who has care of the child. Again, the same dislike of interference is often present after a marriage has broken down but the policy of the law is to encourage involvement by both parents in the child's life, where this is likely to be in the child's interest. The answer to parental involvement which is against the child's welfare is for a court to remove or regulate parental rights. It seems unjustifiable, however, to have what is in effect a presumption that any involvement by an unmarried father is going to be contrary to the child's best interests. Moreover it is by no means clear that the risk of harassment would be increased by changes in the law of the type we are considering.

2.42 It may be argued that it would be undesirable to involve the unmarried father in care or adoption proceedings. However, this argument cuts both ways. It could be said to be a grave defect in the existing law that a man who has been a social father to a child should have no legal position in such matters merely because he and the child's mother have not married each other.[1] The uninterested father who has abandoned his child (whether or not he has ever been married to the mother) can be dealt with under the existing law.[2]

2.43 The existing law discriminates against unmarried fathers in two ways.[3] It treats them less favourably than fathers who are or have been married to the child's mother: and it treats them less favourably than unmarried mothers. The increase in the number of cohabiting couples in recent years means that it is no longer possible, if it ever was, to assume that almost all unmarried fathers are irresponsible, uninterested in their children, or undeserving of a legal role as parent. By discriminating against unmarried fathers the law may foster irresponsible parental attitudes which it ought to be doing everything possible to discourage.

2.44 It can also be argued that the law discriminates against children born out of marriage by denying them a father with the normal legal responsibilities and rights.[4] If, for example, a child is being brought up by his parents, who are cohabiting but unmarried, and the mother is killed in a train crash it seems unfortunate that the child has no-one who is automatically qualified to act as his or her legal representative in relation, for example, to any claims for compensation. Many people would expect that the father would be able to act as the child's legal representative, but that is not the case, unless he obtains a court decree appointing him as the child's guardian.

2.45 Consultees were fairly evenly divided on this question, although more agreed than disagreed with the idea that all fathers should, in the absence of a court order, have parental responsibilities and rights. The arguments on each side were generally the ones which we had set out in the discussion paper and which we have summarised above. A number of consultees thought it was wrong that unmarried fathers should, in effect, be regarded as fathers only for financial purposes (aliment or child support, succession, damages). Others looked at the question from the child's point of view and considered it wrong to deprive a child of a parent with the normal parental responsibilities and rights merely because that parent, perhaps through no fault of his own, was not married to the other parent. Cases where the child's father wishes to marry the child's mother but she refuses to marry him are not uncommon.[5] Some of those who were opposed to the idea that all fathers should have parental responsibilities and rights regardless of marriage to the mother pointed out that there was a wide range of situations, from a casual relationship to a steady cohabitation,

1. See Bainham, "When is a Parent not a Parent? Reflections on the Unmarried Father and His Child in English Law" 3 International Journal of Law and the Family (1989) 208 at pp220 to 225. Under the existing law in Scotland the unmarried father, even if not regarded as a parent, may qualify as the child's "guardian" in certain situations. Under the Social Work (Scotland) Act 1968, for example, "guardian" includes any person who "has for the time being the custody or charge of or control over the child". (s94(1)). Under the Adoption (Scotland) Act 1978 the unmarried father is "guardian" if he has guardianship, custody or access or any other parental right by virtue of a court order. The difficulty is that the father may not have charge of, or control over, the child at the relevant time and may be too late in applying for custody or any other parental right. See eg *W* v *R* 1987 SLT 369. See also *C* v *Kennedy* 1991 SLT 755 where the sheriff held that the father was not entitled to be present at a children's hearing and "could not" (*sic*) be a guardian of the child as defined in s94 of the Social Work (Scotland) Act 1968. This was corrected on appeal.
2. See eg Social Work (Scotland) Act 1968, s15(1), s16(1), s41(2); Adoption (Scotland) Act 1978, s16(2).
3. For an example see *In re J. (A Minor) (Abduction: Custody Rights)* [1990] 3 WLR 492.
4. See Bainham, *Children, Parents and the State* (1988) 41 and 44.
5. See eg *In re K* [1990] 1 WLR 431.

and that unmarried fathers might be meritorious or unmeritorious. They thought it safer to require unmarried fathers to go to the court to establish their claim to be recognised as having parental responsibilities and rights. Others pointed out that children conceived in marriage may have had little or no contact with their father, that married fathers might be meritorious or unmeritorious, and that an unmarried father had a heavy onus to discharge if he wished to obtain parental rights by a court order. He would have to satisfy the court that the order would be in the best interests of the child[1] which might be difficult if he had not had regular contact with the child. The most serious objection to conferring parental responsibilities and rights on unmarried fathers was that this might lead, in some cases, to harassment of the mothers. However, if one parent is going to harass the other he or she will do so whether or not he or she has legal responsibilities and rights.

2.46 One or two consultees expressed concern that mothers might be reluctant to identify the fathers of their children if the fathers had parental responsibilities and rights. Again we doubt whether the legal position will be the important issue in this type of case. If the mother wishes to conceal the paternity of the child she will wish to do so whether the father has parental responsibilities and rights automatically or only after a successful court application. Since 1930 the father of a child born out of wedlock has had the right to apply to a court for custody or access.[2] Since 1968 he has had reciprocal rights of intestate succession in relation to the child.[3] We are not aware of any suggestion that these changes led to any increased concealment of the identities of fathers. It seems to us that social and personal considerations, rather than legal considerations, are likely to be the important ones in this area.

2.47 There was some concern about the position of the father where the child was the result of rape, although one consultee expressed the view that

> "the rapist father seems to be almost certainly a phantom whose existence should be discounted (unless it can be shown that such persons exist on any significant scale)."

We agree with this view. In any event, a special exception for rapist fathers would be unprincipled. The nature of the sexual intercourse (whether in or out of marriage) resulting in the conception should not affect the legal relationships arising from the procreation of the child. It is not unknown for rape to be committed by a husband upon his wife, or by a male cohabitant upon his female partner. It is not unknown for potentially fertile sexual intercourse to take place only because the normal inhibitions of one or both of the parties have been dulled by alcohol. It would, in our view, be wrong to allow such circumstances to affect parental responsibilities and rights which are there for the benefit of the child. They do not at present affect the questions of aliment, or succession rights, or rights to recover damages for wrongful death.

2.48 The question is not whether there should be an unalterable recognition or denial of parental responsibilities and rights. Whatever the initial position may be, a court order could alter it in the interests of the child. The question is whether the starting position should be that the father has, or has not, the normal parental responsibilities and rights. Given that about 25% of all children born in Scotland in recent years have been born out of wedlock,[4] and that the number of couples cohabiting outside marriage is now substantial,[5] it seems to us that the balance has now swung in favour of the view that parents are parents, whether married to each other or not. If in any particular case it is in the best interests of a child that a parent should be deprived of some or all of his or her parental responsibilities and rights, that can be achieved by means of a court order.

2.49 Support for conferring parental responsibilities and rights on all fathers, regardless of their marital position, came from a wide variety of sources including judges, reporters to children's panels, the British Agencies for Adoption and Fostering, the Family Charter Campaign, Family Conciliation Scotland, the Scottish Child and Family Alliance, Care in Scotland and several women's groups. Article 9(3) of the United Nations Convention on the Rights of the Child obliges States Parties to respect the child's right to contact with *both* parents. Article 18(1) obliges States Parties to use their best efforts to ensure recognition of the principle that *both* parents have common responsibilities for the upbringing and development of the child.

2.50 We recommend that

5. In the absence of any court order regulating the position, both parents of the child should have parental responsibilities and rights whether or not they are or have been married to each other.

(Draft Bill, clause 3(1).)

We are taking into account that the Human Fertilisation and Embryology Act 1990 regulates the question of who is a parent in certain situations involving artificial insemination, embryo transfer and similar techniques.[6]

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1. Law Reform (Parent and Child) (Scotland) Act 1986, s3(2).
2. Illegitimate Children (Scotland) Act 1930 (now replaced by the Law Reform (Parent and Child) (Scotland) Act 1986).
3. Law Reform (Miscellaneous Provisions) (Scotland) Act 1968, ss1–3.
4. See the Annual Reports of the Registrar General for Scotland.
5. See "Cohabitation in Great Britain—characteristics and estimated numbers of cohabiting partners". Population Trends (OPCS) Winter 1989.
6. The first two subsections of s29 say who is to be, and who is not to be, treated in law as the mother or the father. Subsection (3) says that "references to any relationship between two people in any enactment, deed or other instrument or document (whenever passed or made) are to be read accordingly."

2.51 The above recommendation makes it unnecessary to consider the alternative technique of enabling the unmarried father to acquire parental responsibilities and rights by means of a registered agreement with the mother of the child. We should place on record, however, that a majority of consultees supported this, if only as a reserve solution should the idea that all parents have parental responsibilities and rights regardless of their marital situation be rejected. We ourselves remain of the view that this would be a second best solution. It seems likely that many couples would not bother with an agreement so long as their relationship was good.[1] Many would not even be aware of the possibility of an agreement. If their relationship deteriorated the mother might then refuse to sign an agreement. Moreover there will be cases where an agreement is not an available option. If, for example, a couple are cohabiting and have a child and the mother dies in childbirth, the father will have no parental rights unless he takes court proceedings to obtain them. These are practical objections. A more fundamental objection is that it seems wrong that one parent should have a right to deny the other parental responsibility and parental rights unless the other resorts to court proceedings. As one consultee put it, the parental responsibility agreement relies too much on how the parents feel towards each other at a specific time rather than on the child's best interests.

Operation of parental responsibilities and rights

2.52 **Introduction.** The Children Act 1989 in England and Wales contains a number of provisions on the operation of parental responsibility—a term which, as we have seen, includes parental rights. As the Act was very carefully considered at all stages and has been very well received, it seems right that we should consider these provisions with a view to seeing whether they, or something like them, should be included in any new Scottish legislation on this topic. The provisions are in section 2 of the 1989 Act. The first three subsections of that section deal with the question of who has parental responsibility, which we have already discussed. We discuss the remaining provisions of section 2 of the 1989 Act below.

2.53 **Father's position.** Section 2(4) of the 1989 Act abolishes the rule of law that a father is the natural guardian of his legitimate child. This has already been achieved in Scotland by giving both parents equal parental rights where they are married to each other.[2] Moreover, we recommend later the abolition of the status of illegitimacy,[3] so that any rule framed in terms of a "legitimate child" would be inappropriate. Accordingly, we do not think that it is necessary or desirable to reproduce this provision, or any equivalent of it, in new Scottish legislation.

2.54 **More than one person.** Section 2(5) of the 1989 Act provides that

> "More than one person may have parental responsibility for the same child at the same time."

Again this is unnecessary in the Scottish context where the 1986 Act already makes it clear that more than one person may have parental rights in relation to a child,[4] and where any new statement of parental responsibilities would make it clear that the normal situation was for both parents to have such responsibilities.[5]

2.55 **Parental responsibilities endure.** Section 2(6) of the 1989 Act provides that

> "A person who has parental responsibility for a child at any time shall not cease to have that responsibility solely because some other person subsequently acquires parental responsibility for the child."

The idea behind this provision is to preserve a parent's position as parent to the maximum extent and to emphasise the continued responsibility of both parents.[6] In the discussion paper we asked whether a similar provision should be included in any new Scottish legislation. Although this was generally supported we now think that a specific provision to this effect would be unnecessary if, as we recommend later, express words are to be necessary in any court order before it will deprive any person of any parental responsibilities or rights.[7] We therefore do not recommend a Scottish equivalent of section 2(6) of the 1989 Act, because we think that the same policy can be put into effect by other means.

2.56 **Either parent can act alone.** Section 2(7) of the 1989 Act provides that

> "Where more than one person has parental responsibility for a child, each of them may act alone and without the other (or others) in meeting that responsibility; but nothing in this Part shall be taken to affect the operation of any enactment which requires the consent of more than one person in a matter affecting the child."

1. In English law an agreement must be in a set form, signed and witnessed, and must be registered, along with two copies, in the Principal Registry of the Family Division in London. Both parties are advised to seek legal advice before signing an agreement. See The Parental Responsibility Agreement Regulations 1991 (SI 1991 No 1478).
2. Law Reform (Parent and Child) (Scotland) Act 1986, s2. See now clause 2 of the draft Bill appended to this report.
3. Paras 17.1–17.10.
4. S2(4). See now clause 2 of the draft Bill.
5. See clause 1 of draft Bill.
6. Law Commission Report on *Guardianship and Custody* (Law Com No 172, 1988) para 2.11.
7. See para 5.39 below.

There is already a provision to very similar effect in the Law Reform (Parent and Child) (Scotland) Act 1986.[1] We do not think that any new provision is required although, for drafting reasons, the existing rule is repealed and re-enacted in the attached draft Bill.[2] We do, however, think that it would be useful to remove any doubts about whether removal of a child to a foreign country by one parent alone without the consent of the parent with whom the child was living is a wrongful removal for the purposes of the Hague Convention on the Civil Aspects of International Child Abduction.[3] We do not intend the right of independent action by one parent to provide grounds for any argument that he or she is within his or her rights, and not in breach of anyone else's rights, in removing the child without the other parent's consent. We therefore recommend that

6.(a) It should continue to be the position that, where two or more persons have any parental right, each of them may exercise that right without the consent of the other person or persons, unless any decree or deed conferring the right provides otherwise.

(b) However, none of those persons should be entitled to remove a child from, or to retain a child outwith, the United Kingdom without the consent of the parent (or other person entitled to control the child's residence) with whom the child is habitually resident in Scotland.

(Draft Bill, clause 2(2) and (3).)

2.57 **Court orders prevail.** Section 2(8) of the 1989 Act provides that

"The fact that a person has parental responsibility for a child shall not entitle him to act in any way which would be incompatible with any order made with respect to the child under this Act."

There is no equivalent of this provision in the existing Scottish legislation, although we have no doubt that parents would, rightly, regard their parental rights as being subject to any court orders. On consultation there was general support for the inclusion of a similar provision in the Scottish legislation, suitably adapted to include a reference to children's hearings. We therefore recommend that

7. It should be provided that the fact that a person has parental responsibilities or rights in relation to a child does not entitle him or her to act in any way which would be incompatible with any court decree relating to the child, or the child's property, or any supervision requirement relating to the child made by a children's hearing.

(Draft Bill, clause 3(3).)

2.58 **Delegation but no surrender or transfer.** Subsections (9), (10) and (11) of section 2 of the 1989 Act provide that

"(9) A person who has parental responsibility for a child may not surrender or transfer any part of that responsibility to another but may arrange for some or all of it to be met by one or more persons acting on his behalf.

(10) The person with whom any such arrangement is made may himself be a person who already has parental responsibility for the child concerned.

(11) The making of any such arrangement shall not affect any liability of the person making it which may arise from any failure to meet any part of his parental responsibility for the child concerned."

On consultation there was general support for our view that provisions on these lines would be a useful restatement of the existing law of Scotland.[4] The English Law Commission argued in their report on *Guardianship and Custody* that an express provision would be helpful for two reasons.[5]

"First, parents are now encouraged to agree between themselves the arrangements which they believe best for their children, whether or not they are separated. It is important, therefore, that they should feel free to do so. Secondly, . . . it is helpful if, for example, a school can feel confident in accepting the decision of a person nominated by the parents as a temporary "guardian" for the child while they are away."

We would add that in relation to the administration of a child's property it is particularly important to make it clear that the parent cannot transfer his or her rights and responsibilities to others but can appoint a factor or other agent to act on his or her behalf. These principles have recently been re-affirmed by the Court of Session[6] and ought to appear in any codification of this branch of the law. We recommend that

1. S2(4). This provides that "Where two or more persons have any parental right, each of them may exercise that right without the consent of the other person or, as the case may be, any of the other persons unless any decree or deed conferring the right otherwise provides."
2. Clause 2(2) and Sch 2.
3. See the Child Abduction and Custody Act 1985, Sch 1, art 3.
4. See, in relation to the administration of the child's property, *Scott* v *Occidental Petroleum (Caledonia) Ltd* 1990 SCLR 278 per L P Hope at p281.
5. Law Com No 172 (1988) para 2.13.
6. *Scott* v *Occidental Petroleum (Caledonia) Ltd*, *supra*. In this case it was further held that for a mother to hand over the child's funds to trustees for the child went beyond the mere appointment of a factor and amounted to an attempt to transfer her rights and duties in relation to the child's property. It was not therefore permissible.

8. **It should be provided that**
   (a) **a person who has parental responsibilities or rights in relation to a child may not surrender or transfer any part of these responsibilities or rights to another but may arrange for some or all of them to be met or exercised by one or more persons acting on his or her behalf;**

   (b) **the person with whom any such arrangement is made may be a person who already has parental responsibilities or rights in relation to the child concerned;**

   (c) **the making of any such arrangement does not affect any liability of the person making it which may arise from any failure to meet any part of his or her parental responsibilities for the child concerned.**

(Draft Bill, clause 3(4) to (6).)

Position of those who have care or control of a child

2.59 Section 3(5) of the Children Act 1989 contains a provision which supplements the provisions just considered. It provides that

> "A person who—
>
> (a) does not have parental responsibility for a particular child; but
>
> (b) has care of the child,
>
> may (subject to the provisions of this Act) do what is reasonable in all the circumstances of the case for the purpose of safeguarding or promoting the child's welfare."

One situation where this provision would be useful is where a young child is sent to stay with relatives or friends for a holiday. The provision would make it clear that the adult or adults with care of the child for the time being could, for example, arrange for any necessary medical treatment if the child became ill or had an accident.[1] The provision could also be very useful in the case of step-parents and foster parents. A step-parent or foster parent with actual care or control of a 5 year-old child ought, for example, to be able to give consent to any medical or dental treatment or procedure (such as an immunisation at school) which is in the child's interests and to which the child is not capable of consenting on his or her own behalf. The British Agencies for Adoption and Fostering were particularly anxious that this should be made clear. They and other consultees doubted whether the provision as drafted would be clear enough, in the Scottish context, to cover consent to medical treatment. This is something which could easily be clarified in the legislation. It would be helpful, in this respect, and consistent with our other recommendations, to refer to the child's health, development or welfare and also to refer expressly to giving consent to medical or dental treatment or procedures. It would also, we think, be useful to refer to persons with care or control of a child so as to cover more clearly people such as baby-sitters or child-minders. We think, however, that teachers in the school setting should not be within the scope of this provision which is intended to cover those with care or control of the child in a family or home situation. A teacher should not, for example, be able to give a blanket consent to the immunisation of a whole class of school children under his or her control. One or two respondents were concerned at the width of the provision and saw scope for conflict between a temporary carer and a parent. We think there is some force in this argument in relation to measures "promoting" rather than "safeguarding" the child's health, development or welfare and that it would therefore be safer to omit the reference to "promoting". In relation to safeguarding the child's health, development or welfare, however, we think that the risk of conflict between the adults involved has to be tolerated in the interests of the child. We are not concerned with such matters as major surgery of an optional nature. We are concerned with allowing people who actually have care or control of a child to do what is *reasonable* for the purpose of *safeguarding* the child's health, development or welfare. We were impressed by the submissions made to us that in practice doctors asked to treat the minor accidents which are a normal part of child care cannot be expected to investigate the precise legal rights of the person with care or control of the child. They should be entitled to assume that a person who has a responsibility for safeguarding the child's health and welfare at the time[2] has the necessary rights to go with that responsibility. Taking these points into account, we recommend that

9. **A person over the age of 16 years who does not have parental responsibilities or rights in relation to a child but has care or control of the child (other than as a teacher in a school) should be empowered to do what is reasonable in all the circumstances (and, in particular, to give legally effective consent to any medical or dental treatment or procedure where the child is not capable of consenting on his or her own behalf) for the purpose of safeguarding the child's health, development or welfare.**

(Draft Bill, clause 5.)

We do not believe that a provision of this kind would be inconsistent with a provision giving a local authority a specific

1. See Law Com No 172 (1988) para 2.16.
2. *Cf* the Children and Young Persons (Scotland) Act 1937, s12.

statutory responsibility for the health care of children in its care under a supervision requirement, as has been recommended by the Scottish Child Care Law Review Group.[1] It would supplement such a provision.

Views of child

2.60 Where a child is in the care of a local authority or voluntary organisation the authority or organisation must, in reaching any decision relating to the child,

> "so far as practicable ascertain the wishes and feelings of the child regarding the decision and give due consideration to them, having regard to his age and understanding."[2]

The Scottish Child Law Centre suggested to us, when we were in the course of preparing the discussion paper, that a young person between the ages of 12 and 16 years should be entitled to be consulted by a parent or guardian before any major decision is taken relating to the young person. The obligation to consult would be qualified by a reference to the young person's age and understanding and the parent or guardian would be obliged to give due weight to the young person's views, taking into account his or her age and understanding.

2.61 Although the suggestion was limited to children above the age of 12 we expressed the view in the discussion paper that the reference to age and understanding made any lower age limit unnecessary. The question, as we saw it, was whether a parent or other person exercising parental rights should be under a similar obligation to ascertain and have regard to the child's wishes and feelings as a local authority was under in relation to a child in its care.

2.62 There are great attractions in such an approach. It emphasises that the child is a person in his or her own right and that his or her views are entitled to respect and consideration. In relation to children above the ages of 12 (girls) or 14 (boys) it preserves a valuable feature of the Scottish common law. Yet it would be more flexible in recognising that arbitrary age limits are unsatisfactory in this respect. There are, however, some difficulties. First, the decisions which a local authority takes, as such, will be major decisions affecting the child. In the case of a parent, or other individual with parental rights, it would be unrealistic to require consultation on all decisions, however minor, relating to the child. This is recognised in the suggestion made by the Scottish Child Law Centre, which was limited to major decisions. However, it would be difficult to define major decisions with any precision. Secondly, it is not easy to see what the sanction would be for non-compliance. Again the parent's position is different from that of a local authority, which is accountable to the public and subject to judicial review. Neither of these objections is necessarily conclusive. There could be value in a provision which established a duty to consult the child, even if it was vague and unenforceable. It could have an influence on behaviour.

2.63 Article 12(1) of the United Nations Convention on the Rights of the Child provides that

> "States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child."

The reference to "views" is, we think, preferable to a reference to the child's "wishes and feelings" because it recognises that a young person may be perfectly capable of balancing his or her immediate wishes and feelings against long term considerations and the interests of others and coming to a considered view as to what is the right course of action in the circumstances. We also think that "maturity" is better than "understanding" because it recognises that more than just cognitive ability may have to be taken into account. If there were to be a provision on this subject we would therefore prefer something on the lines of article 12(1) rather than a provision corresponding exactly to section 20 of the Social Work (Scotland) Act 1968.

2.64 On consultation there was majority support for a provision requiring parents, in reaching any major decision relating to a child, to ascertain the child's wishes and feelings so far as practicable and give due consideration to them, having regard to the child's age and understanding. Similar provisions are already in force in the law of several other countries—including Germany, Sweden, Norway and Finland. The main reservations expressed by respondents were that a provision of this nature would be vague and unenforceable. That is true. It could, however, be relevant indirectly in any action relating to parental rights or their exercise. Many respondents clearly regarded such a provision as an important declaration of principle.

2.65 The Scottish Child Law Centre, in responding to the discussion paper, agreed that a rigid adherence to age limits was undesirable but made the interesting suggestion that there should be a presumption of maturity at the age of 12. This would continue a valuable feature of the Scottish common law and would be in line with psychological

1. Recommendation 38 is that "Where the child is in the care of the local authority under a supervision requirement, the local authority should have full responsibility in law for decisions relating to medical care and treatment."
2. Social Work (Scotland) Act 1968, s20.

evidence.[1] Professor Bissett-Johnson made a somewhat similar suggestion designed to prevent a too-ready assumption that children *never* needed to be consulted because they were too young to understand and express reasonable views. We agree with these suggestions. It would, of course, be essential to avoid giving the impression that the views of children under the age of 12 were never important. That, however, could be made clear in the legislation. We recommend that

10.(a) It should be provided that any person taking any major decision relating to a child in the exercise of any parental responsibility or right should, whenever practicable, ascertain the views of the child regarding the decision and give due consideration to them, having regard to the child's age and maturity.

(b) For this purpose there should be a presumption that a child of the age of 12 or more has sufficient maturity to express a reasonable view regarding the decision, but this should not carry any implication that the views of a child under that age are not worthy of consideration.

2.66 It is important that third parties should not be prejudiced by any failure of a parent or guardian to consult the child before, for example, dealing with the property of a child under the age of 16. The child should not be able to challenge a transaction entered into in good faith by arguing that he or she was not properly consulted or that his or her views were not sufficiently taken into account. We therefore recommend

10.(c) A transaction entered into in good faith by a third party dealing with a parent or other person acting as a child's legal representative should not be open to challenge on the ground that the child was not consulted or that due consideration was not given to the child's views.

(Draft Bill, clause 6.)

Corporal punishment

2.67 **Introduction.** Under the existing law a parent has a right to administer reasonable corporal punishment to his or her child. Such punishment, if within the bounds of what a court considers reasonable, will not expose the parent to liability to damages for assault or to a criminal conviction for assault. Certain other people, such as teachers, have a similar right of reasonable chastisement at common law.[2] That the defence of lawful chastisement is a matter of having parental (or analogous) rights, and not just a matter of not having an evil intent, is shown by the consideration that a newsagent who inflicted physical punishment on a paper boy or girl for being late for work would clearly be guilty of an assault, even although the motivation might be reasonable punishment in the long term interests of the boy or girl. The parental right of reasonable chastisement is recognised by statute, along with the right of teachers and others. Section 12 of the Children and Young Persons (Scotland) Act 1937, on cruelty to children, provides in subsection (7) that:

> "Nothing in this section shall be construed as affecting the right of any parent, teacher, or other person having the lawful control or charge of a child or young person to administer punishment to him."

The parental right of reasonable chastisement is also recognised in case law, although its limits are not always clear.[3] Research in England in the 1970's showed that smacking of children was extremely common in all social classes.[4]

2.68 For some time now there has been a body of opinion in favour of abolishing, or at least restricting, the parental right of corporal punishment. Several European countries have passed legislation purporting to remove or severely restrict the right.[5] The question of corporal punishment of children by parents, foster parents and others was debated in Parliament in 1989 during the proceedings on the Children Bill. In the House of Commons an attempt was made to introduce a new clause which, in civil proceedings, would have removed the defence of "reasonable chastisement" from parents, guardians and others having custody or control of a child or young person. The motion to add the new clause attracted some support and some opposition but was eventually withdrawn.[6] In the House of Lords an amendment was moved to repeal section 1(7) of the Children and Young Persons Act 1933[7] which corresponds to section 12(7) of the Children and Young Persons (Scotland) Act 1937 (quoted above). The amendment was opposed by the Government on the ground that it would "create complete obscurity" as to the position of a parent administering

1. See eg Piaget and Inhelder, *The Psychology of the Child* (1969); Weithhorn and Campbell, "The Competency of Children and Adolescents to Make Informed Treatment Decisions" (1982) 53 *Child Development* 1589.
2. See eg *McShane* v *Paton* 1922 JC 26; *Gray* v *Hawthorn* 1964 JC 69. The teacher's common law right has now been severely restricted by s48A of the Education (Scotland) Act 1980 (inserted by s48 of the Education (No 2) Act 1986).
3. See eg *Guest* v *Annan* 1988 SCCR 275; *B* v *Harris* 1990 SLT 208; *Peebles* v *MacPhail* 1990 SLT 245; *Coyle* v *Lowe* 1990 GWD 33–1887; *Byrd* v *Wither* 1991 SLT 206. In a case reported in *The Scotsman* and *Glasgow Herald* on 27 November 1991 a 55-year-old father who had whipped and caned his son and two daughters from the age of 7 onwards was jailed for four years by Lord Morton of Shuna at the High Court in Dunfermline. Lord Morton told the accused that his violence to the children "went far beyond anything that could have been described as reasonable."
4. John and Elizabeth Newson, *Four Year Olds in the Urban Community* (1970) and *Seven Year Olds in the Home Environment* (1976).
5. Sweden (1979), Finland (1984), Denmark (1986), Norway (1987), Austria (1989). See Newell, *Children Are People Too* (1989).
6. Parl Debs (HC) Standing Committee B, 13 June 1989, cols 549–567.
7. Parl Debs (HL) (1988–89) Vol 503 cols 542–548.

reasonable corporal punishment.[1] After a short debate the amendment was withdrawn. Similar amendments at later stages in the House of Lords met with the same objection and were also withdrawn.[2] At the Report stage in the House of Lords an amendment was moved with the objective of preventing corporal punishment of children in foster care. This amendment was the subject of a vigorous debate but was eventually defeated by 128 votes to 109.[3]

2.69 Given the level of public and Parliamentary interest in this subject, and the developments in other countries, a discussion paper on parental rights which did not address the issue of the parental right to administer reasonable corporal punishment would have been incomplete. We were well aware, however, that this was a controversial and emotive issue. We therefore set out in the discussion paper, in deliberately neutral terms, the arguments which might be made for retaining or abolishing the right. Without expressing any preliminary view ourselves we invited views on the question—

"Should the parent's right to administer reasonable corporal punishment to his or her child be retained or abolished?"

2.70 **Arguments for and against.** In the discussion paper we suggested that the following arguments might be put forward for retaining a parent's right to administer reasonable corporal punishment. We deliberately refrained from expressing any view on their weight.

(a) If parents wish to bring up their children in this way, and if there is no danger of lasting harm, the State ought not to interfere.

(b) The fact that a minority of parents go beyond what is reasonable is no reason why the remainder of parents should be treated as criminals if they so much as slap a child on the hand.

(c) Children have to be taught standards of behaviour or not to do dangerous things. Sometimes, if a child is too young to be reasoned with, physical punishment may be the only "language" he or she will understand.

(d) Case law makes it clear that punishment must not go beyond what is reasonable. This provides a safeguard against abuse and provides a test which is capable of reflecting changes in knowledge and in general perceptions of what is acceptable.

(e) Even if it became unlawful for a parent to use corporal punishment on his or her child such a law would be unenforceable and would be broken on a very wide scale.

(f) Outlawing something which nearly all parents do from time to time will not stop those who really are doing their children harm and may prevent potential child abusers from seeking professional help before it is too late.

(g) The question has recently been debated in Parliament, in relation to the law of England and Wales, and the debates do not suggest that there is majority support for abolition.

2.71 We suggested, on the same non-committal basis, that the following arguments might be made for abolishing the parent's right.

(a) A child, like any other individual, has a right not to be assaulted.

(b) Even although it is unlikely that many prosecutions would result from parents hitting their children in a way which would be lawful under the existing law, the law should attempt to encourage restraint. Even a law which was difficult to enforce might have an effect on conduct and might thereby reduce abuse and make easier the conviction of abusers.

(c) The existing requirement of "reasonableness" is an inadequate safeguard. Different cultures adhere to different values and so long as corporal punishment is allowed to continue there will be no consensus on what is reasonable.

(d) If all corporal punishment is made unlawful there is less chance of violent abuse taking place. Parents will know where the line is drawn. There will be less chance of conduct which begins as chastisement ending up as violent abuse because a parent does not know his or her own strength or because the initial chastisement does not produce the desired response.

(e) We should follow the lead taken by Sweden, Finland, Denmark, Norway and Austria. An American assessment of the Swedish legislation reported that:[4]

> "The 1979 law is now taken for granted in Sweden. Whereas in 1981 parents reported 'thinking twice' before using any physical punishment, in 1988 parents simply say they do not use it."

It does not appear that State intervention in Swedish family life has increased as a result of the legislation.[5]

1. *Ibid* at col 548.
2. Parl Debs (HL) (1988–89) Vol 504 cols 345–352 and Vol 505 cols 407–410.
3. Parl Debs (HL) (1988–89) Vol 503 cols 1443–1453.
4. Haeuser, *Assessment of Swedish Reforms: Reducing Violence Towards US Children: Transferring Positive Innovations from Sweden* (1988)University of Wisconsin, Milwaukee, School of Social Welfare.
5. Parl Debs (HC) Standing Committee B, 13 June 1989, col 555.

(f) The right to administer corporal punishment to pupils in state schools has been abolished,[1] and if that is right as a matter of principle it is difficult to see why it is not also right to abolish corporal punishment in the home.

(g) Some local authorities already prohibit all corporal punishment of foster children by local authority foster parents. If this is right for foster children why is it not also right for a parent's own children?

(h) The Committee of Ministers of the Council of Europe has recommended that member states should

"review their legislation on the power to punish children in order to limit or indeed prohibit corporal punishment, even if violation of such a prohibition does not necessarily entail a criminal penalty".[2]

(i) The United Nations Convention on the Rights of the Child, adopted by the General Assembly in November 1989, requires that States must take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation while in the care of parents, legal guardians or any other person who has the care of the child.[3]

2.72 **Results of consultation in general.** We received over a hundred submissions on this issue, many of them very substantial and carefully argued. There was, as might be expected, a division of opinion. Of those who expressed a clear view one way or the other 57 supported retention and 35 supported abolition but there were many qualified responses (e.g. favouring abolition for civil law but not criminal law purposes; favouring a clarification or restriction of the right) and, in any event, on a matter of this kind it is the weight of the evidence and arguments which matters rather than the number of submissions one way or the other.[4] We have derived a great deal of assistance from the comments received. It is very clear that the debate is not about whether children should grow up with or without parental control or guidance. Virtually everybody agreed on the need for effective control and guidance, appropriate to the child's age and development. Many of those who supported the abolition of corporal punishment stressed that they did not advocate permissiveness and indeed that they regarded an excessively permissive attitude on the part of parents as harmful and irresponsible. The debate is about a particular *method* of parental discipline, not about the need for consistent discipline (among other things, such as care, affection, approval, stimulation and increasing opportunities for self-determination) in bringing up children.

2.73 **Views of psychologists.** The British Psychological Society recognised that the issue of corporal punishment was a complex one on which it was difficult to make short definitive statements. However, it was of the view that

"As a broad general principle, punishment, including corporal punishment, is seen as an inefficient method of modifying behaviour, being situation-specific and of short-term effect, and with a possibility of providing undesirable side effects of both fear and learned imitative behaviour. More socially desirable attitudes would be encouraged by alternative methods of managing behaviour, such as withdrawal of privileges and the rewarding of more desirable alternatives."

The Society suggested that, as in the case of corporal punishment in schools, the burden of proof that corporal punishment of children was necessary rested with those who advocated its retention.

2.74 Dr Penelope Leach, in a very full and helpful submission, summarised a review of the literature by saying that,

"On the whole, then, the findings of experimental and applied human psychology provide less and less pragmatic support for physical punishment, or indeed for any punishment other than absence of the positive rewards that psychologists of all persuasions recognise as vital to learning."

She pointed out that the sort of moderate physical punishment permitted by the law and practised by many parents was particularly unlikely to be effective.

"The scientific evidence suggests that if physical punishment is to be effective in modifying behaviour, it must induce a greater intensity of pain than would be acceptable to most parents."

She referred to evidence from the social sciences that physical punishments tend to escalate over time and suggested that this could be accounted for by findings from research psychology that if punishment started by being mild, far more intense punishment was then required to suppress unwanted behaviour than if punishment was originally introduced at a reasonably intense level. On the important question whether "moderate and reasonable" physical punishment harmed children, she pointed out that there was no consensus among professionals as to what constituted harm. On one view any physical damage (as indicated, for example, by visible bruising) was harm. There was also

1. Education (No 2) Act 1986, s48.
2. Recommendation No 85(4) (1985) para 12. The explanatory memorandum notes (at p14) that "It is the very assumption that corporal punishment of children is legitimate that opens the way to all kinds of excesses and makes the traces or symptoms of such punishment acceptable to third parties".
3. Article 19.
4. Particularly as some submissions were by organisations with hundreds or thousands of members. In some cases the line to be adopted by an organisation had been approved expressly at a general meeting.

a danger of serious injuries as a result of punishment which was intended to be moderate and reasonable but went wrong—because, for example, of misplaced blows that landed on the head or caused a child to fall, or because of a parent's ignorance of the vulnerability of the immature body of a small child. However, she observed that some experts considered that there was no convincing evidence of serious, lasting harm to the recipients of "moderate and reasonable" punishment. So far as emotional harm was concerned it was exceedingly difficult to establish a causal link between any particular experience in childhood and any particular characteristic in later life. However, there was

> "an extensive literature associating parental physical punishment—especially its juxtaposition of love and pain, anger and submission—with a wide range of personality disorders and neuroses in adult life."

There was also an extensive body of research establishing a positive association between all levels of physical punishment and increased aggression in the children who received it and the adolescents and adults they became. Children had a tendency to model their behaviour on that of their parents. So it was not surprising that physical punishment, which would often be perceived by the child as aggression, had this effect. Dr Leach explained the mechanisms (including a need on the part of children to justify what their parents did) whereby attitudes favouring corporal punishment were transmitted from generation to generation. She referred to research indicating the value and effectiveness of firm, non-punitive discipline. Her conclusion was that a legal change removing the parental right to administer reasonable corporal punishment would be beneficial, as well as morally right.

> "Its likely immediate effects would be to improve the childhood experiences and relationships of many individuals; stimulate public discussion of parental responsibilities; remove overt public pressure on parents to hit their children; ease the work of child protection agencies; facilitate education in positive methods of discipline amongst parents and future parents and raise the social status of children. A composite longer-term effect could confidently be expected to include reductions in family-violence (including physical child abuse), bullying and disruptive behaviour in schools, juvenile delinquency and violent adult crime."

2.75 Dr Dorothy Rowe in her comments drew on over 25 years of experience as a clinical psychologist. She was in favour of a law forbidding parents to beat their children. She explained the negative and harmful conclusions which people actually drew from the experience of being beaten but also explained why a common response at the opinion poll level was "I was beaten as a child and it never did me any harm". This was because (a) people did not want to be publicly disloyal to their parents (b) they did not want to suggest that they had been harmed and thus reveal vulnerability and (c) if they were parents themselves they did not wish to raise questions about how they treated their own children. The responses would often be very different in private conversations with a trusted person at a deeper level. Dr Rowe's view was that none of the conclusions which people commonly drew from being beaten (eg "I am bad and unacceptable", "I have been treated unjustly", "I am afraid of the adult who beat me", "I must become indifferent to the pain") could ever promote health and happiness and harmonious relationships with other people. She concluded that

> "The greatest harm which beating does is to prevent the person being beaten from recognising the harm which has been done to him. A law forbidding parents to beat their children may not prevent all parents from doing so but it would go a long way to helping us all recognise the harm which corporal punishment does."

2.76 Professor Schaffer, of the Department of Psychology at the University of Strathclyde, on the other hand, did not support abolition of the parental right to administer reasonable corporal punishment. He said that the effects of physical punishment depended on a large number of associated conditions—including the nature of the relationship between parent and child.

> "In particular, it has been shown that punishment from a basically affectionate parent is more likely to produce the desired result than punishment from a cold or hostile parent. There is little evidence that punishment, in the context of a good relationship, creates maladjustment; when it occurs in the context of an unsatisfactory relationship any undesirable consequences are likely to be due to that relationship generally rather than to any one aspect of it such as punishment."

Much depended also on whether punishment was accompanied by explanation, and on whether the child perceived it as just. Much also depended on the timing and intensity of the punishment and on the consistency with which the parent enforced rules. The characteristics of the child were also important:

> "relatively non-aggressive children are likely to desist from the undesirable behaviour while aggressive children may persist in or even increase such behaviour when punished."

Professor Schaffer referred to the undesirable side effects which physical punishment might produce—such as the provision of an aggressive role model, the undermining of positive aspects of the parent-child relationship and the creation of an undesirable emotional atmosphere in the family—but said that none of these side effects was inevitable. They depended on the various conditions already mentioned.

> "As far as long-term effects are concerned, there is a well-established association between parental use of physical punishment and children's aggression or delinquency. However, this applies primarily when punishment is frequent,

harsh and erratic; this is likely to occur in particular types of families characterised by a general atmosphere of conflict and poor relationships. There is, in other words, no consistent evidence that physical punishment per se leads to increased child violence."

There was also the possibility that very aggressive children elicited more punishment from parents rather than the other way round. Professor Schaffer's general conclusion was as follows.

"Research provides little evidence that physical punishment per se leads to harmful consequences. It may do so under certain circumstances, but it appears to be those circumstances (with particular reference to conflict in the home, poor relationships and erratic child rearing practices) that are primarily responsible for ill-effects. Given the fact that the vast majority of parents believe in the use of physical punishment and, moreover, seem to have no difficulty in drawing the line between reasonable and excessive use, there appears to be no reason to abolish their right to discipline their children in this manner. On the contrary, such a measure aimed at one specific aspect of the parent-child relationship may draw attention away from the real need, i.e. to provide the much more broadly based programme of parent support and education that is required if one is to improve the lot of children in the long term."

2.77 **Views of legal commentators.** Most of the legal respondents to the discussion paper, including the Court of Session judges, the Sheriffs' Association, the Law Society of Scotland, the Procurators Fiscal Society and the Family Law Association, thought that the parental right should be retained or at least expressed doubts about the wisdom and practicability of abolition. A recurring concern was that abolition would be unenforceable. The law would be widely disregarded and would fall into disrepute. Some legal respondents suggested, however, that reform was necessary. The Association of Reporters to Children's Panels thought that, at the very least, clarification of the scope of reasonable chastisement was required. The Scottish Child Law Centre, in a submission which dealt one by one with the various arguments for retention of the parental right, recommended abolition of the parental right to administer corporal punishment. They considered that this would help to shape public attitudes. They too thought that there was some confusion in the public mind, pointing out that the decision in one case,[1] in which it was held that a mother was not guilty of assault when she had punished her 9 year old daughter with a belt, had been mediated to the public through banner headlines proclaiming "IT'S OK TO BELT YOUR KIDS". The Centre advocated the repeal of section 12(7) of the Children and Young Persons (Scotland) Act 1937 and a clear prohibition of corporal punishment, even if it did not entail a criminal penalty. The Children's Legal Centre (based in London) also supported abolition for civil law purposes, but not criminalisation. They too criticised the arguments for retention. On the argument that the existing case law set a commonsense standard of reasonableness they commented that

"Any examination of the relevant cases will show that standards and values vary so wildly that no rule of thumb definition could be extracted . . .".

Citizens Advice Scotland strongly supported abolition of all corporal punishment. They thought that children should be considered as people and citizens in their own right.

2.78 We received a particularly cogent submission from Professor Michael Freeman, of the Faculty of Laws, University College, London. He argued that if assault was wrong, the age of the person assaulted and his or her relationship to the assaulter could not excuse or mitigate the offence. He suggested that if the law did not presently allow the hitting of children and a proposal were to be presented to allow parents to do so it would be objected to on moral grounds. He said that opinions had already shifted greatly on this issue in one generation.

"Most of my contemporaries were hit with implements by their parents but very few would contemplate doing the same."

The right to chastise children might, like the right to chastise a wife, fall into disrepute and obsolescence but it would be better to declare it wrong (and unlawful) now. The present law was, in any event, so imprecise and uncertain in its application as to be unjust to parents (as well as children). Moreover much child abuse was corporal punishment gone wrong. Professor Freeman quoted an American study which had concluded that well over half of all instances of child abuse appeared to have developed out of disciplinary action taken by the parent. He then reviewed the evidence (which we have already mentioned in summarising the responses of psychologists to our discussion paper) on the relative ineffectiveness of corporal punishment.

"Its very failure tends to lead to more chastisement and to the application of more force and if this fails yet more."

2.79 Other academic legal commentators also supported abolition. Jonathan Montgomery of the Faculty of Law of the University of Southampton regretted that the English Children Act had left the content of parental responsibility and rights to the common law. He thought that there had to be clear guidance and that in the case of corporal punishment

1. *B* v *Harris* 1990 SLT 208. This case can be contrasted with *Peebles* v *MacPhail* 1990 SLT 245 (slapping a 2 year old child on the face, knocking him over, held to be as remote from reasonable chastisement as could possibly be imagined) and the 1991 case noted in the footnote to para 2.67 where a father was jailed for 4 years for whipping and caning his children.

the reasonableness test was too imprecise. The limits could only be established by court action. He suggested that outright prohibition was the only way of giving clear guidance. Elaine Sutherland of the Department of Private Law at the University of Glasgow also favoured abolition. She thought it was highly anomalous that children alone should be exposed to corporal punishment.

> "The reasons why children are singled out for this form of treatment probably lie in our economic, social and religious past and have no validity in a society which acknowledges children as people with rights."

Andrew Bainham of the School of Law, University of East Anglia suggested that corporal punishment should be ignored in legislation.

> "While I think it might be unrealistic to outlaw it in legislation I do not approve of its positive statutory endorsement."

We read this as a suggestion that section 12(7) of the 1937 Act should be repealed. Professor Bissett-Johnson of the Department of Law, University of Dundee did not favour the complete outlawing of corporal punishment but did think that it might be possible for the law to be more precise about when chastisement became unreasonable.

2.80 **Views of churches and religious bodies.** The Free Presbyterian Church of Scotland was in favour of retaining the parental right of corporal punishment. They said that

> "the Scriptures concur that corporal punishment is a valid form of parental discipline when used at the correct time, with due restraint."

They claimed that to remove the defence of reasonable chastisement from parents and others was

> "certain to leave a legacy of ill-disciplined young people . . . ."

The Glasgow Presbytery of the Free Church of Scotland also favoured retention. They argued that smacking of children in the ordinary course of discipline was very different from child abuse; that any restriction would be impossible to enforce; that a major section of society would be criminalised, including "many Christian parents who hold it their duty under God to bring up their children making responsible use of corporal punishment"; and that a change in the law would remove some of the sanctions that parents might have recourse to in order to correct the behaviour of their children. CARE (Christian Action Research and Education) in Scotland also favoured retention for essentially the same reasons. They said

> "We support the *limited* use of physical punishment in a context of love and affirmation of the individual child." (Emphasis in original).

We did not receive comments from any other major churches or religious bodies, although several individual respondents referred to what they claimed was scriptural backing for the use of corporal punishment.

2.81 **Views of bodies concerned with social work.** The Convention of Scottish Local Authorities (COSLA) did not take a formal view on retention or abolition of the *parental* right but considered that there should be no corporal punishment of children by non-parents.

> "Most social work authorities incorporate within their own operational procedures clear statements excluding the use of physical chastisement of children in public care and increasingly this approach is being extended in guidance to child minders. It is therefore recommended that a clear national lead should be given for all children who are being looked after by a person or agency other than their own parent, regardless of whether they are in public care, and that lead should exclude the use of physical chastisement."

Grampian Regional Council's Department of Social Work favoured abolition of the parental right. So did the National Association of Social Workers in Education.

> "As Social Workers we constantly see children who are suffering at the hands of their parents. It is very difficult to work with parents to get them to desist from hitting their children when they can assert that they have the right. It becomes a matter of degree which is open to debate and personal interpretation."

The Association referred to the common experience of punishment escalating in severity when what was felt to be reasonable punishment failed to alter the child's behaviour.

2.82 **Views of other societies and agencies.** The British Agencies for Adoption and Fostering did not find the existing case law sufficiently clear about what was a "reasonable" level of chastisement.

> "The Sheriffs and Judges hold different views about this and the public are consequently confused."

The general view of most BAAF members was in favour of abolition of corporal punishment of children but they saw difficulty in finding an appropriate strategy to achieve this end. Childwatch recommended abolition and made the point that the line between smacking and physical abuse had never been more fragile. The National Childminding Association also favoured abolition. They mentioned that a resolution to ban physical punishment of minded children had been passed at a recent annual general meeting of the Association by over 4000 votes to 8.

2.83 The Royal Scottish Society for the Prevention of Cruelty to Children (RSSPCC) gave a qualified response. While not approving of the use of corporal punishment as a means of child discipline, they thought that an abrupt abolition would cause great anxiety for parents and could be counter-productive, with the focus solely on the legal implications rather than on the promotion of the best parent and child relationships. They did not therefore favour making all corporal punishment of children a criminal offence but they did urge the repeal of section 12(7) of the Children and Young Persons (Scotland) Act 1937, which they regarded as a harmful anachronism. The RSSPCC had held a conference and seminar on the issue and had issued a questionnaire to experienced staff members which elicited 44 completed responses.

> "What is apparent from the questionnaire is that in their work fieldwork staff frequently and regularly come across children who are physically punished. From experience staff know that cases of child abuse often start as physical punishment and escalate. And questionnaire results indicate that in a significant number of cases carried by staff in the last year where children are known to be physically punished, staff have had concerns that this might develop into abuse. It is clear that a significant amount of fieldwork staff time in the RSSPCC concerns child management, i.e. working with parents to effect changes in child rearing practice, diverting them away from, and suggesting alternatives to, hitting children or otherwise treating them in humiliating or degrading ways."

Almost three quarters of the respondents to the staff questionnaire thought that the RSSPCC should openly adopt a policy that corporal punishment was wrong. A slight majority, however, expressed concern that if physical punishment of children by parents were banned, families who practised physical punishment would become less open with staff members about issues relating to child care. There was an almost unanimous view that the RSSPCC should be at the forefront of an educational campaign to help parents to look at alternative ways to discipline children. The RSSPCC recognised that the responses related to families who were experiencing some degree of difficulty and took this into account in drawing up their final, qualified, comments to us.

2.84 We received a very helpful submission, and supporting literature, from EPOCH (End Physical Punishment of Children) which has campaigned vigorously since 1989 to protect children and young people in the United Kingdom from physical punishment and other humiliating and degrading treatment. EPOCH pointed out the highly anomalous nature in our society, which generally condemns violence and bullying, of the parental right to use physical punishment.

> "[P]hysical punishment of children now remains the only lawful inter-personal violence in the family home. Over the last century society has accepted a considerable degree of intrusion by the law into the home to deter or prevent all other forms of inter-personal violence."

They emphasised the point of principle—that children have a right to equal protection of their physical integrity—and also other connected justifications for abolishing the parental right, namely

> "to reduce child abuse;
>
> to reduce other forms of inter-personal violence by removing the current parental modelling of violent ways of resolving conflicts;
>
> to reduce 'accidental injuries' to children arising from reasonable physical punishment;
>
> to fulfil international commitments."

EPOCH answered the various arguments for retaining the parental right which we had set out (along with arguments the other way) in the discussion paper. On the argument that, if there is no danger of lasting harm, the State ought not to intervene they observed that the State was under an obligation to protect the physical integrity of *all* its citizens and that the European Commission on Human Rights had declared inadmissible an application by a group of Swedish parents alleging that the Swedish law of 1979 breached their right to privacy and family life.[1] They observed also that there was ample evidence that

> "current acceptance of physical punishment does carry with it the danger of lasting harm".

On the argument that the excesses of some parents were not a reason for treating the remainder as criminals if they so much as slap a child on the hand they pointed out that this ignored the point of principle of the child's right and that, in those countries which had abolished the parental right, it seemed that in practice parents had not been prosecuted. In any event, as will be seen later, EPOCH was not advocating a change in the *criminal* law. On the argument that physical punishment might be necessary to control the behaviour of children who are too young to be reasoned with, they accepted the need for physical intervention ("grabbing the child running towards the road") but not the need for smacking. There were other, more positive, ways of encouraging good behaviour. On the argument that existing case law provided a safeguard against abuse and a flexible standard capable of changing as knowledge and perceptions changed, they argued that the existing definition was subjective and that the parenting public could not be expected to be "finely tuned" to the detail of judicial decisions on such matters. There was already enough relevant knowledge to justify abolition. On the argument that a law abolishing the parental right would be broken

1. Application 8811/79; *Seven Individuals* v *Sweden*, May 13, 1982.

on a very wide scale and would be unenforceable, they commented that all legislation on behaviour within the family was difficult to enforce but that that was not a reason for not having it. Even laws which were difficult to enforce could influence behaviour.

> "The evidence from the other European countries which have banned physical punishment is that such reforms do have a dramatic effect on attitudes and practice."

On the argument that outlawing all physical punishment would not stop those parents who really are doing their children harm and might prevent potential abusers from seeking help before it was too late, EPOCH referred to the danger of parents using escalating levels of force towards children who refuse to modify their behaviour. They referred to evidence that many cases of serious abuse started as "ordinary" punishment. They did not accept that potential abusers would seek help later.

> "On the contrary, as there will be an earlier awareness that physical punishment is no longer regarded as normal or acceptable, they may well seek help earlier. An acknowledgement in the law that no physical punishment is acceptable would enable health visitors and child protection workers to promote alternatives from the beginning of their relationship with parents. Many have told us that the current situation inhibits them from actively discouraging physical punishment in its early stages, rendering any discussion of the issue a matter of their personal opinion. In any case this argument would not be used in any other context. No-one would support repealing the legal framework intended to protect women from male violence because of the possibility that perpetrators will not seek help.".

EPOCH were not impressed either by the fact that recent Parliamentary debates in relation to the law of England and Wales had suggested that there was not majority support for reform. In the case of many social reforms majority support *followed* reform. There was evidence that this had been the case in some of the countries which had banned physical punishment. In any event there was reason to believe that public opinion on this issue was changing. More than 30 major child welfare and professional groups had considered the issue and supported EPOCH's campaign. A Gallup Poll commissioned by EPOCH in late 1989 found that, although 75% of the sample "believed in" physical punishment, this reduced to 59% of those aged 16–24. The poll also found that over 90% of respondents agreed with the statements that "Parents should never smack babies under a year old" and that "Parents should never hit their children with belts, sticks, slippers or other implements". The legal reform which EPOCH recommended was

(a) the repeal of section 12(7) of the Children and Young Persons (Scotland) Act 1937, and

(b) the provision of a remedy in civil law for children aggrieved by physical punishment.

They did not recommend criminalising parents who used moderate and reasonable corporal punishment of a type permitted by the present law. There were pragmatic and practical reasons for this. To criminalise "ordinary" physical punishment would provoke much unnecessary opposition. Prosecution of parents would be likely to affect children adversely. The idea of having only a civil sanction followed the example of the abolition of corporal punishment in state schools by section 48 of the Education (No. 2) Act 1986. EPOCH also suggested that any reform should apply to non-parents having control of children and should protect all children in all settings.

2.85 A number of other organisations submitted comments supporting abolition of corporal punishment of children, sometimes only for civil law purposes.[1] Many of these organisations drew directly on the experience of people professionally involved with children. A few organisations (other than ones already mentioned) favoured retention of the parental right[2] or, after full discussion, were unable to reach agreement.[3]

2.86 **Views of individual respondents.** Most of the individual members of the public who wrote to us favoured retention of the parental right to administer reasonable corporal punishment. Common arguments were

(a) a law abolishing the parental right could not be enforced;

(b) careful administration of ordinary corporal punishment did not do a child any harm;

(c) abolition would infringe a parent's rights under the European Convention on Human Rights;

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1. The Scottish Child and Family Alliance (SCAFA) (civil law sanction only); the Scottish Association of Family Centres; Kidscape, Campaign for Children's Safety; the Scottish Pre-School Play Association (civil law sanction only); the Humanist Society of Scotland (civil law sanction only); the Voluntary Organisations Liaison Council for Under Fives (VOLCUF); Working for Childcare; Edinburgh Association of University Women; Dundee Association of University Women (abolish or restrict); Perth Association of University Women; Scottish Women's Aid (but other changes necessary too); Hamilton Women's Aid.
2. The National Children's Bureau: Scottish Group (but recognised that there were arguments on both sides); the Scottish Convention of Women (but recognised strength of feelings on both sides of argument); the Mother's Union in Scotland; the Business and Professional Women's Club, Inverclyde Branch (but only if "reasonable" can be defined).
3. Glasgow Association of University Women.

   "Our group spent much time on the pros and cons . . . . As our group included teachers—nursery, primary, secondary and university—as well as parents and grandparents, much experience was evident, as was disagreement . . . . It *was* agreed that children can be as much harmed psychologically by sarcasm, verbal harassment, physical confinement and so on, as by physical punishment."

(d) corporal punishment of children was approved of by the Bible;

(e) abolition would undermine family life.

Many of those favouring retention made it clear that they thought there was a clear difference between physical abuse and ordinary physical punishment by a loving parent.

2.87 **Assessment of arguments.** The question with which we are faced is a difficult question of policy. We do not believe that there is any short cut to an answer based on children's rights. Children's rights (for example, to liberty and freedom of movement) can, within certain limits, be curtailed by reference to the rights and duties of parents which in turn exist primarily for the protection and proper development of the children. A parent can lawfully confine his or her small child in a playpen in circumstances in which one private citizen could not lawfully confine another adult in a wooden cage. Recognition that children are individuals with certain fundamental rights does not necessarily mean that they are individuals who must have precisely the same rights in relation to those who are responsible for their care, protection and proper upbringing as one adult with full legal capacity has in relation to another. This is not to deny the force of the argument that, as a matter of policy, a child's interest in not being hit by others should be taken fully into account and given the fullest respect.

2.88 We do not believe either that there is any short cut to an answer based on parental rights. Parental rights are not absolute. They are subject to regulation by the state, which already sets limits on the type of punishment which can be administered. The question at issue is simply whether these limits ought to be adjusted. This is not to deny the force of the argument that the state should be reluctant to intervene unnecessarily in the way parents bring up their children.

2.89 International obligations do not seem to us to provide a ready made answer. Like the laws of individual countries they have to balance children's rights against parental rights and responsibilities. The European Convention for the Protection of Human Rights and Fundamental Freedoms provides in article 3 that no-one shall be subjected to torture or inhuman or degrading treatment or punishment[1] but it seems most unlikely that an ordinary smack by a loving parent would come into that category.[2] Some individual respondents, as we have seen, claimed that the outlawing of corporal punishment by parents would violate a parent's rights under the Convention. This seems unlikely. Resort to the Convention by a small group of Swedish parents who objected to the abolition of their right to use corporal punishment was unsuccessful. The European Commission on Human Rights held their application inadmissible.[3] Respect for "private and family life" under article 8 does not require toleration of everything that may happen within a family. Some of our respondents referred to article 2 of Protocol 1 which says that

> "No person shall be denied the right to education. In exercise of any functions which it assumes in relation to education and teaching, the State shall respect the right of parents to ensure such education and teaching in accordance with their own religious and philosophical convictions."

This article does not seem to us to be relevant to family law reform. It relates to education and teaching. Even if it were relevant we do not think that it would give parents a licence to indulge in any practices they wished in relation to their children on the ground that those practices were in accordance with their own religious and philosophical convictions. The United Nations Convention on the Rights of the Child (which has now been ratified by the United Kingdom) obliges states who are parties to it to

> "take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has care of the child."[4]

This is a valuable and important provision, to which a number of our respondents referred. However, it is by no means clear that an ordinary smack, which causes no injury, would come within the category of violence, abuse or maltreatment.[5] Certainly, many of the people who wrote to us would hotly deny that this was so. The question of when physical contact, even physical contact intended to cause temporary pain, becomes physical violence is, in our view, a question of degree, just as is the question of when words, even words intended to cause temporary unhappiness,

1. Article 37 of the United Nations Convention on the Rights of the Child also provides that "No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment."
2. In the *Tyrer* case (25 April 1978) (on judicial birching in the Isle of Man) the European Court of Human Rights noted that judicial corporal punishment "was . . . violence having an institutionalized character which was compounded by the aura of official procedure attending the punishment and by the fact that those inflicting it were total strangers to the offender". In the *Campbell and Cosans* case (25 Feb 1982) (on the threat of corporal punishment in Scottish schools) the Court held that there had been no violation of article 3.
3. Decision on admissibility of application 8811/79; *Seven Individuals* v *Sweden* May 13, 1982.
4. Article 19(1).
5. Chambers Dictionary defines "violence", in the sense with which we are here concerned, as "excessive, unrestrained, or unjustifiable force". The Shorter Oxford Dictionary refers to "the exercise of physical force so as to inflict injury on or damage to persons or property". It says that a violent action is one "characterized by the doing of harm or injury . . . characterized by the exertion of great physical force or strength . . . done or performed with intense or unusual force, and with some degree of rapidity; not gentle or moderate."

become mental violence. The Convention does not, it seems to us, outlaw an ordinary smack any more than it outlaws an ordinary scolding. In any event a state's obligation under the Convention is only to take all "appropriate" legislative and other measures.[1] That introduces a margin for taking into account such questions as the likely effectiveness or consequences of any particular measure. A state might well conclude, for example, that to make all smacking a criminal offence would not be an "appropriate" measure. We referred in the discussion paper to the recommendation on the corporal punishment of children made in 1985 by the Committee of Ministers of the Council of Europe. Some of our respondents suggested that abolition was necessary in order to comply with this recommendation. We do not believe that this is so. The recommendation was only that member states should

> "review their legislation on the power to punish children in order to limit or indeed prohibit corporal punishment, even if violation of such a prohibition does not necessarily entail a criminal penalty".[2]

This falls well short of a firm recommendation that corporal punishment should be abolished.

2.90 So far as arguments of fact and expediency are concerned, we have not been provided with any reliable evidence that children suffer significant harm from being subjected to the occasional carefully controlled smack in the context of a good parent and child relationship. We refer to the comments by Professor Schaffer which we have summarised above.[3] Severe or regular beatings, beltings or canings would be another matter, even if within the limits of the present law. We refer to the comments by Dr Leach and Dr Rowe, also summarised above,[4] on the psychological harm this type of upbringing can cause. There is a good deal of evidence that corporal punishment, of the type permitted by the law, is ineffective as a method of modifying behaviour and that other methods are more effective. This is an answer to those who argue that retention is necessary or that abolition would undermine family life and destroy all discipline but it is not in itself, in our view, a sufficient argument for abolition. Our concern is not with what is the best or most effective parenting practice, but with whether a particular practice is so harmful or unacceptable that it ought to be made unlawful, given that the state quite properly allows parents a very wide margin of freedom and discretion in the way in which they bring up their children. We accept, and regard as important, the arguments to the effect that physical punishments tend to escalate in severity, that parents using physical force may inadvertently cause damage, and that much abuse starts as ordinary punishment. However these arguments do not necessarily, in our view, lead to the conclusion that *all* corporal punishment must be made unlawful. They do suggest that the line between the permissible and the unlawful should, at the very least, be drawn as clearly as possible, and at a point which provides a margin of protection against inadvertent overstepping of the limit. We do not accept the argument that the only way of drawing a clear line between lawful and unlawful punishment is to abolish all corporal punishment. We accept that children tend to model their behaviour on that of their parents and that it is not desirable to encourage young people to resort to violent ways of resolving conflicts. Again, however, we sympathise with those who believe that loving parents who occasionally resort to a careful smack are not necessarily providing violent role models for their children.

2.91 A few of those who were in favour of retaining the parental right of corporal punishment claimed that the abolition of corporal punishment in state schools had led to widespread indiscipline and disruption. Such research evidence as we have been able to assess does not bear this out. Discipline problems were present before corporal punishment was abolished. Indeed

> "behaviour tended to be worse in schools with a high level of corporal punishment (which might mean more punishment leads to more rebellion, or more rebellion leads to more punishment). Certainly, it seems that schools with strict punitive strategies [did] not avert delinquency."[5]

Since corporal punishment in state schools was abolished, schools have developed a variety of strategies and sanctions to cope with discipline problems.[6] Research done in Scotland, at a time when some schools had voluntarily abolished corporal punishment and others had not, found that

> "irrespective of whether a school employed corporal punishment, there was a distinct gap between the best and the worst classroom climates. In the schools which had given up corporal punishment wholly or substantially, teaching and learning went on as elsewhere. Standards of behaviour were not generally giving more cause for concern to teachers, parents or pupils than in other schools. Nor did the teacher-observers find the behaviour of pupils in the class rooms detectably different from elsewhere."[7]

1. The obligation under art 19 to take all "appropriate" measures may be contrasted with the obligation under art 37 to "ensure" that no child is subjected to torture, or other cruel, inhuman or degrading treatment or punishment.
2. Recommendation No 85(4) (1985) para 12.
3. At para 2.76.
4. At paras 2.74 and 2.75.
5. Johnstone and Munn, *Discipline in School: A Review of 'Causes' and 'Cures'* (Scottish Council for Research in Education, 1987) p39 (footnotes omitted).
6. *Discipline in Schools* (Report of the Committee of Enquiry chaired by Lord Elton, HMSO 1989) p63.
7. Cumming, Lowe, Tulips and Wakeling, *Making the Change: a study of the process of the abolition of corporal punishment* (Scottish Council for Research in Education, 1981) p.3.

None of the schools which had abandoned, or moved towards abandoning, corporal punishment had considered re-introducing it. The majority opinion among staff and pupils was that standards of behaviour were no worse since abolition or reduction of corporal punishment.

2.92 The arguments in favour of abolition are strongest in relation to punishment at the severe end of what may be permissible under the present law. In relation to the violent parent who often lacks self-control, who punishes his or her child frequently, severely and erratically, who responds to criticism by friends and relatives by saying "I have the right to do this. You mind your own business", who is eventually reported to the police by concerned neighbours, and who escapes prosecution for child abuse only because the local procurator fiscal believes that there would be a successful defence of reasonable parental chastisement in relation to any incidents which could be proved, it is easy to see the force in the arguments of the abolitionists that the child would be better protected from danger if the parental right of reasonable chastisement were removed completely. Similarly, in relation to the self-controlled but strict parent, who regards it as a parental duty not to spare the rod, and who enforces very demanding standards of conduct by frequent canings, which are reasonable and moderate in the parent's view (and, let us suppose, would also be so regarded by some judges) but which in fact have placed the child in a state of suppressed fear and anxiety, it is easy to see the force in the arguments of the abolitionists that the child's rights as a person are being overlooked or undervalued; that the child is likely to be harmed; and that an inappropriate role model is being provided. On the other hand, in relation to the firm but affectionate parent who sets reasonable standards and who only occasionally resorts to a safe smack to emphasise the seriousness of his or her displeasure, it is easy to see the force in the arguments of the retentionists that this type of conduct cannot reasonably be categorised as violence, abuse or maltreatment; that a parent could legitimately take the view that it is in the interests of the child and of those liable to be affected by anti-social behaviour by the child; that the child will not be harmed; and that it would be unduly interventionist, and calculated to bring the law into disrepute, to make such conduct unlawful.

2.93 **Assessment of options.** At the most general level we have to choose between recommending some change or no change in the present law. We have been impressed by the level of support, particularly from organisations concerned with child care or child welfare, for some change. We have accepted that there is force in some of the arguments for change, particularly in relation to corporal punishment at the severe end of what may be permitted by the present law. We do not therefore recommend that the law should remain unaltered.

2.94 So far as the direction of change is concerned we have no doubt that, if there is to be any change, it should be in the direction of reducing the level of physical force which can lawfully be used in the punishment of children. No-one argued that the existing law unduly curtailed the powers of parents, even although what is permitted today probably falls short of what was regarded as normal and desirable in earlier times.[1]

2.95 The most radical option would be to make all corporal punishment unlawful, for both civil and criminal law purposes. A safe parental smack on the bottom for disciplinary purposes would become, legally, an assault. We do not recommend this option. We think that it would be going too far to criminalise ordinary safe smacks of the type occasionally resorted to by many thousands of normal affectionate parents. It is significant that some of the strongest advocates of reform do *not* advocate that smacking should be a criminal offence.[2] Outright abolition of all corporal punishment, for both civil and criminal law purposes, would not be in accord with the overall results of our consultation. It would probably go beyond what has actually been done in Sweden, given that in Sweden it seems that not all trivial smacks would legally amount to criminal assault.[3]

2.96 An option which was strongly urged by some respondents was that all corporal punishment of children by parents should be made unlawful for civil law purposes but not for criminal law purposes. A child subjected to corporal punishment of a type permitted by the existing law could sue his or her parent for damages for assault, but the parent could not be prosecuted. Even conduct at the extreme end of what is permitted by the present law, involving perhaps the use of belts, sticks or other implements, would not be made a criminal offence. Those supporting this option pointed out that this technique had been used successfully in effecting the abolition of corporal punishment in state schools. Section 48 of the Education (No.2) Act 1986 adds the following provisions to the Education (Scotland) Act 1980.

1. The Free Presbyterian Church of Scotland referred us to Proverbs 13 v. 24 ("He that spareth his rod hateth his son") and Hebrews 12 v. 6 ("For whom the Lord loveth he chasteneth, and scourgeth every son whom he receiveth"). They also referred us to a passage in Ephesians 6 vv 2–4, which seems to refer only to the desirability of a Christian upbringing and which comes immediately before a passage urging slaves to obey their masters with fear and trembling.
2. See eg the views of EPOCH, summarised at para 2.84 above.
3. A leaflet published by the Swedish Department of Justice after the abolition of the parental right to administer corporal punishment explained that "Should physical chastisement meted out to a child cause bodily injury or pain which is more than of very temporary duration it is classified as assault and is an offence punishable under the Criminal Code" and that under the new law, as under the old, "trivial offences will remain unpunished, either because they cannot be classified as assault or because an action is not brought".

"Corporal Punishment

Abolition of corporal punishment of pupils.

48A.—(1) Where, in any proceedings, it is shown that corporal punishment has been given to a pupil by or on the authority of a member of the staff, giving the punishment cannot be justified on the ground that it was done in pursuance of a right exercisable by the member of the staff by virtue of his position as such.

(2) Subject to subsection (3) below, references in this section to giving corporal punishment are references to doing anything for the purposes of punishing the pupil concerned (whether or not there are also other reasons for doing it) which, apart from any justification, would constitute physical assault upon the person.

(3) A person is not to be taken for the purposes of this section as giving corporal punishment by virtue of anything done for reasons which include averting an immediate danger of personal injury to, or an immediate danger to the property of, any person (including the pupil concerned).

(4) A person does not commit an offence by reason of any conduct relating to a pupil which would, apart from this section, be justified on the ground that it was done in pursuance of a right exercisable by a member of the staff by virtue of his position as such."

We do not recommend this option. It would convey a confusing message to parents who would be told, in effect, that the lawfulness of smacking, belting or caning their children depended on what court they came before. If they came before a criminal court they would still have the defence of reasonable chastisement, as before. If their child sued them in a civil court, which would be extremely unlikely, they would not. This solution would give the quite false impression that the state is not greatly interested in this matter and that it is simply a private matter between parent and child. The whole reason for setting a legal limit is that the state *is* interested in protecting children. If the state is sufficiently interested to intervene and set a limit it should not, in our view, simply leave it to beaten children to enforce the limit by taking civil proceedings against their parents. It would not be acceptable to say that moderate corporal punishment of a wife by her husband was a civil wrong but not a criminal offence. The Education Act model is not persuasive. First, it seems a bad model on its merits. For a teacher in a state school to belt a child nowadays, contrary to everybody's expectations and the accepted norms of classroom conduct, surely *ought* to be a criminal offence. Secondly, the fact that this solution worked in the education context does not mean that it would work in the parental context. A parent can initiate civil proceedings against a teacher on behalf of a young child. The child can be protected from severe retaliation. Damages will benefit the child without adversely affecting the parent. There are effective disciplinary sanctions. A belting teacher would probably lose his or her job—certainly if the conduct persisted. The position in the family, as between parent and child, is very different in all these respects.

2.97 Some commentators suggested that, at the very least, there should be an attempt to clarify the limits beyond which parents cannot go in exercising their right of reasonable chastisement. This is an option which we find attractive. It is a clear approach which addresses the real question—"What are the acceptable limits?"—without trying to fudge the issue. It could do a lot of good if it disabused some parents of any views they might have that floggings and beatings are acceptable. It could be used as a basis for education campaigns (such as that planned by the RSSPCC) which, of course, could go far beyond a simple explanation of the new law and could stress the positive alternatives to physical punishment. It seemed to us, on reviewing the response to our discussion paper as a whole, that there was more common ground than might be supposed. Many of those who favoured retention of the parental right talked in terms of ordinary smacking in the context of an affectionate relationship. Many of them stressed that they did not support the abuse or maltreatment of children. On the other hand, as we have seen, many of those who favoured comprehensive reform drew the line at criminalising the many thousands of good parents who resort to the occasional safe smack. In short, there was universal opposition to, and indeed revulsion at, the idea that parents should be permitted to subject their children to abuse or maltreatment and a general, but not universal, reluctance to categorise an ordinary safe disciplinary smack as abuse or maltreatment, at least for purposes of the criminal law.

2.98 It seemed to us, on the basis of the comments which we had received, that there would be likely to be general agreement that a parent should not, in the purported exercise of parental rights, be allowed to cane, belt, whip or flog a child or hit the child with a shoe, slipper, wet cloth, piece of rope, wooden spoon, fish slice or any of the other objects which we know some parents use as instruments of punishment. It also seemed to us that almost everybody would agree that a parent should not be allowed to strike a child in a way which actually injured the child (by breaking an arm, for example, or damaging an internal organ, or lacerating the skin) or involved a risk of injury to the child (as a heavy blow to the head, face or abdomen would do, even if by good fortune it did not cause injury in a particular instance). It also seemed to us that almost everyone would agree that a parent should not be able to strike a child in such a way as to cause, or risk causing, *prolonged* pain. The essence of the ordinary safe parental smack, which many of our respondents did not wish to criminalise, was, it seemed to us, that it caused no injury and only transient pain. We therefore concluded that a possible way of increasing the protection of children from physical force would be to remove the defence of reasonable chastisement in the exercise of parental rights if the conduct complained of involved striking the child

(a) with a stick, belt or other object, or

(b) in such a way as to cause, or to risk causing, injury, or

(c) in such a way as to cause, or to risk causing, pain or discomfort lasting more than a very short time.

2.99 A provision on the above lines would meet the desire of a number of consultees for a clarification of the scope of the parental right of punishment. It would draw the line at a point which could be easily explained and understood. "No implement. No injury or risk of injury. No lasting pain or discomfort or risk of lasting pain or discomfort." It would outlaw the worst practices while not criminalising the ordinary safe smack. It would be enforceable through criminal prosecutions for assault or child abuse if need be, and also through civil proceedings, although these would probably be rare. It would not leave it to the beaten child to sue his or her parent. It would provide increased protection for children without interfering unduly with parental rights.

2.100 To test the view that drawing a distinction between ordinary safe smacking, on the one hand, and canings, beltings or beatings with objects of various sorts, on the other, might be a generally acceptable way of clarifying and limiting the extent of the parental right of chastisement we commissioned a public opinion survey, which was carried out for us by System Three Scotland in September 1991. We sought views on the acceptability of

(a) smacking with the open hand in a way not likely to cause lasting injury, or

(b) hitting with a belt, stick or other object in a way not likely to cause lasting injury.

The interviewers asked these questions in relation to children of different ages because we thought it possible that some people might be more tolerant of, say, caning a 15 year old than caning a 3 year old. Respondents were first asked the following question.

"Thinking first of a 3 year old child who has behaved badly, do you think it should be lawful or against the law for a parent to

(a) smack the child with the open hand in a way not likely to cause lasting injury

(b) hit the child with a belt, stick or other object in a way not likely to cause lasting injury?"

Respondents were then asked the same question in relation to a 9 year old and a 15 year old.

2.101 In relation to a 3 year old who had behaved badly 83% of the respondents considered that it should be lawful for a parent to smack the child with the open hand in a way not likely to cause lasting injury. However, 94% considered that it should be against the law for a parent to hit the child with a belt, stick or other object, even if the hitting was not likely to cause lasting injury. Only 3% thought that it should be lawful for a parent to hit a 3 year old child with a belt, stick or other object. In relation to a 9 year old, 87% thought that it should be lawful to smack, but 91% thought it should be against the law to hit with a belt, stick or other object. Only 7% thought that it should be lawful to hit a 9 year old with a belt, stick or other object. In relation to a 15 year old, 68% thought that it should be lawful to smack but 85% thought that it should be against the law to hit with a belt, stick or other object. Again, only a small minority (10%) thought that it should be lawful for a parent to hit a 15 year old with a belt, stick or other object. The combined results for all three sets of questions were as follows.

(Unweighted base: 1055)

	Smack			*Hit with belt, stick or other object*		
	3 year old percent	*9 year old percent*	*15 year old percent*	*3 year old percent*	*9 year old percent*	*15 year old percent*
Lawful	83	87	68	3	7	10
Unlawful	14	11	25	94	91	85
Don't know	3	2	7	2	2	5

Older respondents were, on the whole, more likely to think that corporal punishment with a belt, stick or other object should be lawful. For example, only 6% of those in the 15–44 year old age group thought this should be lawful in the case of a 15 year old, whereas 11% of those in the 45–64 year old age group and 18% of the over 65's did so. Other variations in attitudes among sub-groups of the population were found. One of the most interesting was that respondents with children in the household were two to four times *less* likely to think that hitting with a belt, stick or other object should be lawful than were respondents with no children in the household. There was, however, very little difference between these two groups so far as the lawfulness of smacking was concerned. The fact that only 1% of those with children in the household thought that it should be lawful to use a belt, stick or other object on a 3 year old and that the corresponding figures for 9 year olds and 15 year olds were only 3% and 6% respectively is particularly significant as it is this group which contains those who are in a position to claim that their parental rights would be affected by the relevant legislation.

2.102 The results of the survey confirmed that the distinction between smacking and the use of belts, sticks or other objects was indeed one which was likely to be acceptable to the great majority of the general public at this time. A solution based on this distinction would not please the small minority who think that it should be lawful for a parent to hit his or her child with a belt, stick or other object, nor the larger minority who think that all smacking should be against the law, but it would be a practicable way forward which would improve the lot of some unfortunate children. It would not be inconsistent with education campaigns aimed at discouraging corporal punishment generally and emphasising the benefits of alternative child-rearing practices.

2.103 Some of those who commented on the discussion paper suggested that, even if nothing else were done, section 12(7) of the Children and Young Persons (Scotland) Act 1937 should be repealed. This is the provision which, in the context of cruelty to children, expressly refers to the parental right to administer punishment. A number of our respondents regarded it as an unfortunate and confusing anachronism. Section 12(7) can be properly understood only by reference to section 12(1) which provides as follows.

"Cruelty to persons under sixteen.

12.—(1) If any person who has attained the age of sixteen years and has custody, charge, or care of any child or young person under that age, wilfully assaults, ill-treats, neglects, abandons, or exposes him, or causes or procures him to be assaulted, ill-treated, neglected, abandoned, or exposed, in a manner likely to cause him unnecessary suffering or injury to health (including injury to or loss of sight, or hearing, or limb, or organ of the body, and any mental derangement), that person shall be guilty of an offence . . .".

Section 12(7) then provides that:

"(7) Nothing in this section shall be construed as affecting the right of any parent, teacher, or other person having the lawful control or charge of a child or young person to administer punishment to him."

It should be noted that section 12(7) does not create a new defence. It merely refers, presumably for the avoidance of doubt, to an existing common law right to administer punishment. If it were repealed, the common law defence of lawful chastisement would still remain. The law would still distinguish between an assault on the one hand and lawful chastisement on the other. However, to repeal section 12(7) at this stage without doing more would probably create confusion. People would wonder whether the express reference to "assaults" in section 12(1) covered an ordinary smack, or at least one which a court considered to have been "unnecessary". There would be an argument that section 12(7) must have had some purpose and that its repeal must have been intended to effect some change. The risk of confusion is caused by the reference to assault in section 12(1) and by the fact that, in Scots law, quite trivial blows, slaps or smacks can constitute assault. The references to assault in section 12(1) are plainly unnecessary as assault, or aiding and abetting assault, would in any event be a common law offence. One option therefore would be to remove the unnecessary references to assault in section 12(1). Assault would be left to turn on the common law. If this were done section 12(7) would clearly be inappropriate and could safely be repealed. There is no existing common law right to ill-treat, neglect, abandon or expose a child in a manner likely to cause him or her unnecessary suffering or injury to health and it would be absurd and objectionable to preserve a provision which seemed to suggest that there was. We are in favour of repealing section 12(7). At best it is unnecessary. At worst it conveys the message that cruelty to children is acceptable if done in the name of punishment. If the repeal was accompanied by the other changes we are recommending there would be no risk of confusion so far as those exercising parental responsibilities or rights are concerned.

2.104 It remains to consider the positions of teachers and of those such as step-parents who have care or control of a child in a family situation but who do not have parental responsibilities or rights. So far as teachers are concerned, it would be going beyond the scope of this report, and beyond the scope of our consultation, to make any recommendation. The existing position, whereby corporal punishment is effectively outlawed in some schools but not, or not entirely, in others,[1] may seem anomalous and we did receive suggestions that it should be changed. It might seem even more anomalous if some teachers were to have a greater right than parents to cane or belt children under their control. However, that is not a matter of family law and not a matter for us. The position of step-parents, cohabitants, foster parents or other people who have care or control of a child in a family situation but who do not have parental responsibilities or parental rights is different. We have already recommended that they should have certain powers to do what is reasonable in the circumstances for the purposes of safeguarding the child's health, development or welfare.[2] At present, such people are regarded, while they have charge or care of the child, as having the defence

1. S48A of the Education (Scotland) Act 1980 (inserted by s48 of the Education (No.2) Act 1986) does not apply to teachers in private schools in so far as they inflict punishment on pupils whose fees are not paid out of public funds. It is worth emphasising again that s12(7) does not *confer* any defence. It simply refers to an existing common law defence which would, so far as teachers are concerned, be unaffected by our proposals. The teacher's right to administer corporal punishment, in so far as it has survived s48A of the Education (Scotland) Act 1980, is an independent right. It is not a parental right or a delegated parental right. It is, in the words of s48A, "a right exercisable by the member of the staff by virtue of his position as such".
2. Para 2.59 above.

of reasonable chastisement available to them.[1] It would clearly be anomalous if they were to have greater rights to administer corporal punishment than the child's own parent. We therefore suggest that it should be made clear in the new legislation that, without prejudice to the position of teachers, a person who has care or control of a child but does not have parental responsibilities or parental rights in relation to the child should have no greater right than a parent has to administer corporal punishment to the child.

2.105 **Recommendation.** We recommend that

11.(a) In any proceedings (whether criminal or civil) against a person for striking a child, it should not be a defence that the person struck the child in the purported exercise of any parental right if he or she struck the child

(i) with a stick, belt or other object; or

(ii) in such a way as to cause, or to risk causing, injury; or

(iii) in such a way as to cause, or to risk causing, pain or discomfort lasting more than a very short time.

(b) A person who has care or control of a child but who does not have parental responsibilities or rights in relation to the child should have no greater right than a parent has to administer corporal punishment to the child.

(c) Section 12(1) of the Children and Young Persons (Scotland) Act 1937 should be amended by deleting the references to assault, which is adequately covered by the common law.

(d) Section 12(7) of the Children and Young Persons (Scotland) Act 1937 should be repealed.

(Draft Bill, clause 4 and Schedule 2.)

1. See eg *Byrd* v *Wither* 1991 SLT 206 (cohabitant). *Cf* Children and Young Persons (Scotland) Act 1937, s12(7).

Part III Guardianship of children

Introduction

3.1 In this part of the report we are concerned with non-parental guardians of children, appointed either by a court[1] or by a parent[2] who wishes to ensure that after his or her death there will be someone to look after the child. There is now only one type of guardian, the old division of guardians into tutors and curators having been abolished by the Age of Legal Capacity (Scotland) Act 1991.[3] This Act brought about some simplification and modernisation of the law on guardianship. Other improvements had already been made by the Law Reform (Parent and Child) (Scotland) Act 1986. However, there remain certain aspects of the law on guardianship which are in need of modernisation. We made some suggestions for reform, based to some extent on the provisions of the (English) Children Act 1989, in the discussion paper. These were very widely supported on consultation.

Appointment of guardians

3.2 **Appointment by parent.** The existing law[4] provides that:

> "4. The parent of a child may appoint any person to be guardian of the child after his death, but any such appointment shall be of no effect unless—
>
> (a) the appointment is in writing and signed by the parent; and
>
> (b) the parent at the time of his death was guardian of the child or would have been such guardian if he had survived until after the birth of the child."

We see no reason to suggest any major change in this provision. We do, however, recommend two minor changes. First, a minor change in terminology is necessary to reflect our earlier recommendation that the parent should be regarded as the child's legal representative rather than the child's "guardian".[5] This would simply involve replacing the two references to "guardian" in section 4(b) of the 1986 Act (quoted above) by references to the parent's being entitled to act as the child's legal representative. Secondly, we recommend that the word "person" should be replaced by the word "individual". It should not be possible, given the responsibilities and rights which we recommend later that guardians should have,[6] to appoint a body corporate to be guardian to a child. We recommend

12.(a) The references to the parent being the "guardian" of the child in section 4 paragraph (b) of the Law Reform (Parent and Child) (Scotland) Act 1986, as amended, should, as a consequence of the changes recommended earlier, become references to the parent being entitled to act as the child's legal representative.

(b) The reference to a "person" in section 4 of the 1986 Act should become a reference to an individual.

(Draft Bill, clause 7.)

These recommendations are implemented in the draft Bill by repealing section 4 of the 1986 Act and enacting new provisions.[7]

3.3 **Appointment by court.** The Court of Session and the sheriff courts have power to make orders relating to guardianship (including appointment, regulation and termination) under the very general provision in section 3(1) of the Law Reform (Parent and Child) (Scotland) Act 1986. This gives the court power to make orders relating to parental rights, which are defined at present as including guardianship.[8] Again we see no reason to suggest any change to the substance of this provision, although a minor technical change is necessary because of our earlier recommendation that guardianship (as distinct from the right of legal representation) should no longer be included within the definition

1. See s3 of the Law Reform (Parent and Child) (Scotland) Act 1986 and clause 7 of the draft Bill.
2. See s4 of the Law Reform (Parent and Child) (Scotland) Act 1986 and clauses 11 and 12(4) of the draft Bill.
3. S5.
4. Law Reform (Parent and Child) (Scotland) Act 1986, s4 as amended by the Age of Legal Capacity (Scotland) Act 1991, s10 and Sch 1 para 41.
5. Para 2.35 above.
6. See para 3.15 below.
7. See clause 7 and Sch 2.
8. S8, as amended by the Age of Legal Capacity (Scotland) Act 1991, s10 and Sch 1 para 43.

of parental rights. The change would simply involve the addition to section 3(1) of an express reference to guardianship. As this is a purely consequential amendment involving no change in policy we do not think it justifies a separate recommendation. It is dealt with in the draft Bill appended to this report by repealing section 3 and enacting new provisions which include a reference to guardianship.[1]

3.4 **Appointment by existing guardian.** The Children Act 1989 provides that, in England and Wales:

> "A guardian of a child may appoint another individual to take his place as the child's guardian in the event of his death."[2]

The Law Commission found, on consultation, that the balance of opinion amongst respondents was in favour of this solution. They pointed out that

> "if appointing a guardian is an aspect of responsible parenthood, it can be no less an aspect of responsible guardianship."[3]

Although the situation is unlikely to arise very often, we think that there could be value in a provision expressly allowing a guardian to appoint a replacement.[4] An elderly grandparent, for example, might be acting as a sole guardian and might be anxious about the arrangements for the child in the event of his or her death. On consultation there was unanimous support for a provision on the lines of the English provision quoted above. We therefore recommend that

13. A guardian of a child should be able to appoint another individual to take his or her place as the child's guardian in the event of his or her death.

(Draft Bill, clause 7(2).)

3.5 **Views of child on appointment of guardian.** Some consultees suggested that, where the child was old enough and mature enough to have a view on the matter, his or her views should be taken into consideration by a guardian proposing to appoint a replacement. We agree with this suggestion. The same should apply to an appointment of a guardian by a parent. We therefore recommend that

14. An appointment of a guardian by a parent or existing guardian should, for the purposes of any provision implementing recommendation 10 above (views of child to be taken into consideration, depending on age and maturity) be regarded as a major decision involving the exercise of a parental right.

(Draft Bill, clause 7(6).)

In relation to the child's rights it is perhaps worth noting here that a child who objected to the appointment of a guardian could apply to a court for the termination of the appointment and, if necessary, the appointment of someone else.[5]

Revocation of appointment

3.6 Section 6 of the Children Act 1989 makes provision in England and Wales for the revocation of appointments as guardian. The relevant provisions are as follows.

> "(1) An appointment . . . revokes an earlier such appointment (including one made in an unrevoked will or codicil) made by the same person in respect of the same child, unless it is clear (whether as the result of an express provision in the later appointment or by any necessary implication) that the purpose of the later appointment is to appoint an additional guardian.
>
> (2) An appointment . . . (including one made in an unrevoked will or codicil) is revoked if the person who made the appointment revokes it by [the appropriate form of writing]
>
> (3) An appointment . . . (other than one made in a will or codicil) is revoked if, with the intention of revoking the appointment, the person who made it—
>
> (a) destroys the instrument by which it was made; or
>
> (b) has some other person destroy that instrument in his presence.
>
> (4) For the avoidance of doubt, an appointment ... made in a will or codicil is revoked if the will or codicil is revoked."

The question for consideration is whether provisions on the lines of section 6(1) to (4) of the Children Act would be useful in Scotland.

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1. See Appendix I, clauses 12 and 13.
2. S5(4).
3. Law Com No 172 (1988) para 2.25.
4. It is already possible for a trustee to assume a new trustee, and a tutor is deemed to be a trustee for this and various other purposes. Trusts (Scotland) Act 1921, ss2 and 3.
5. See clause 11(1) and (3) and clause 12(4) of the draft Bill.

3.7 An appointment of a guardian can be revoked under the existing Scots law but the authorities on this are very old and do not cover all the points covered in subsections (1) to (4) above.[1] We suggested in the discussion paper that there would be advantages in having similar provisions in Scots law. There was almost unanimous support for this suggestion. We therefore recommend that

15. Provision should be made for the revocation of an appointment of a nominated guardian, on similar lines to the provisions in section 6(1) to (4) of the Children Act 1989 (set out in paragraph 3.6).

(Draft Bill, clause 8(1) to (4).)

When should appointment take effect?

3.8 **Need for acceptance.** The guardianship of a child is a very heavy responsibility indeed and it is important, in the interests of the child as well as the guardian, that it should not be imposed on anyone who is not willing to accept it. It may be supposed that a parent would normally seek the consent of a person in advance before naming him or her as guardian in a will or other writing, but there is no guarantee that this will be done in all cases and, in any event, the circumstances may have changed materially by the time of the parent's death. The existing law in Scotland is that "no person is obliged to accept of the office" of guardian[2] and we think this should continue to be the case. Under the existing law acceptance may be express (for example, by a minute or letter of acceptance addressed to the executors of the deceased parent) or may be implied from acts which are not consistent with any other intention.[3] Although the authorities on this point are very old they seem to us to establish a sound principle. The position under the Children Act 1989 in England and Wales is different. Under that Act an appointment takes effect automatically but may be disclaimed by an instrument in writing registered in a way to be prescribed.[4] It seems to us to be preferable not to place the burden of formal disclaimer, which would normally involve the inconvenience and expense of obtaining legal advice, on someone who may never even have been consulted about the appointment. Almost all of those who commented on this question in responding to the discussion paper agreed with this view. We therefore recommend that

16. An appointment as guardian should not take effect until accepted, either expressly, or impliedly by acts which are not consistent with any other intention.

(Draft Bill, clause 7(3).)

3.9 **Acceptance by one of several.** A question which gave rise to difficulty in the old law was whether, if two or more tutors were appointed, it was possible for one or more to accept even if all did not accept. It was eventually established that, if the deceased parent had not indicated to the contrary, any one or more could accept.[5] We suggested in the discussion paper that it might be useful to embody this rule, for the avoidance of doubt, in a modern statute on guardianship. Almost all of those who expressed a view on this point on consultation agreed. We therefore recommend that

17. If two or more persons are appointed as guardians any one or more should be able to accept office, even if both or all do not accept, unless the appointment expressly provides otherwise.

(Draft Bill, clause 7(4).)

3.10 **Acceptance where there is a surviving parent.** An interesting and difficult question is whether a guardian should be precluded from accepting office so long as the child has a surviving parent with full parental responsibilities and rights. Under the existing law in Scotland there is no such bar. The surviving parent will (in the usual case) continue to have full parental responsibilities and rights. In such circumstances a guardian would not usually wish to accept office, with all the difficulties and responsibilities that that would involve, unless there was some very good reason, such as the absence or unsuitability of the surviving parent, for doing so. Even if the guardian did accept office, that would not deprive the surviving parent of parental responsibilities and rights. Both would have parental responsibilities and rights, either being able to act without the other, unless the deed appointing the guardian had provided otherwise.[6] Again, in many cases it would be expected that the guardian would be content for the surviving parent to exercise parental responsibilities and rights but the guardian would be available, in reserve, just as an absent parent would be, in case of emergencies. This system is therefore capable of providing a solution readily adaptable to different circumstances. In some cases there might be conflict between the guardian and the parent. For example, the mother may have been divorced from the father, and may have appointed her mother or her new husband as guardian. On the mother's death the father's wish to have the child living with him may be resisted by the grandmother or stepfather.

1. See Stair 1.6.6; *Scott* v *Wilson* (1773) Mor 6585; Fraser, *Parent and Child* (3rd edn 1906) p242.
2. Erskine, *Principles* 1.7.16: See also Stair 1.6.11 ("with us all tutors are free to accept or refuse"), read with the Age of Legal Capacity (Scotland) Act 1991, s5.
3. *Beatson* v *Beatson* (1678) Mor 16298; *Lockhart* v *Ellies* (1682) Mor 16301; *Watson* v *Watson* (1714) Mor 12767; *Mollison* v *Murray* (1833) 12 S 237 (summons in name of parties as tutors and curators, coupled with other evidence, held to indicate acceptance of office).
4. S6(5).
5. *Young* v *Watson* (1740) Mor 16346; *Drumore* v *Somerville* (1742) Mor 14703.
6. Law Reform (Parent and Child) (Scotland) Act 1986, s2(4). Draft Bill clause 2(2).

However, such conflicts can arise in any event even if there has been no appointment of a guardian. Whether they result in litigation or difficulty is, we think, likely to depend on the facts of the case and the relationships between the parties, rather than on whether the law has a rule precluding a guardian from accepting office during the life of the surviving parent.

3.11 In England and Wales the Children Act 1989 provides that an appointment by one parent does not take effect until the other parent dies or ceases to have parental responsibility for the child.[1] However, the appointment takes effect immediately if the appointing parent immediately before his or her death had a residence order in his or her favour, and in force.[2] We are not convinced that this exception covers all the cases. It is quite possible for the parents of a child to be separated and yet for there to be no residence order. The father, for example, may simply have abandoned his family. Moreover, the idea that both parents should retain full parental responsibilities and rights after separation, and not seek court orders unless this is necessary in the interests of the child, is gaining ground. Section 3(2) of the Law Reform (Parent and Child)(Scotland) Act 1986 already provides that a court should not make any order relating to parental rights "unless it is satisfied that to do so will be in the interests of the child" and there is a similar provision for England and Wales in the Children Act 1989, which is expressed even more firmly.[3] In the future therefore there will be many cases of separated parents where there is no residence order. In many of these cases it might well be desirable for an appointment of a guardian to be capable of coming into operation, even although there is a surviving parent somewhere.

3.12 We are not persuaded that the existing rule in Scotland needs to be changed. It is open to a parent who is content for the other parent to have sole parental responsibilities and rights after his or her death to provide that an appointment of a guardian is not to take effect until after the other parent's death.[4] If he or she does not so provide it seems to us that the more flexible solution, which is more likely to ensure that there is someone to look after the child's interests, is *not* to preclude a guardian from accepting office merely because there is a surviving parent in existence. Almost all of those who commented on this question agreed that there was no need to change the existing rule that a guardian appointed by a parent to act after his or her death is not precluded from accepting office merely because the other parent is surviving. We therefore make no recommendation on this point.

Responsibilities and rights of guardian

3.13 A guardian is a substitute parent and we agree with the view of the English Law Commission,[5] now embodied in the Children Act 1989,[6] that the most appropriate approach in modern conditions is to give a guardian the normal parental responsibilities and rights. This would mean, if the recommendations made earlier in this report are accepted, that a guardian would be responsible, so far as is practicable, for safeguarding and promoting the child's health, development and welfare; for providing, in a manner appropriate to the child's stage of development, direction and guidance to the child; for maintaining contact with the child; and for acting as the child's legal representative and administering the child's property.[7] Under existing legislation the guardian would be bound to aliment the child (that is, provide such support as is reasonable in the circumstances) once he or she accepted the child as a child of his or her family.[8] A guardian already counts as a parent for the purposes of the Education (Scotland) Act 1980[9] and for most purposes of the Social Work (Scotland) Act 1968.[10] To give the guardian the *general* parental responsibilities with which we are here concerned would therefore be consistent with existing legislation. To enable the guardian to fulfil his or her responsibilities he or she would, on this approach, have the normal parental rights in relation to residence, upbringing, contact and legal representation.[11]

3.14 What we are suggesting is to some extent a reversal of the scheme of the existing law. The existing law defines some parental rights and duties in terms of a guardian's rights and duties. We are suggesting that, as is the case in England and Wales under the Children Act 1989, parenthood should be regarded as the primary concept and that a guardian's rights and responsibilities should be defined in terms of a parent's rights and responsibilities. We consider the implications of this for the administration of the child's property later. Almost all of those who commented on this question agreed with our suggestion. However, the Scottish Child Law Centre added the proviso that a testamentary guardian should have no greater rights and duties than the appointer. They thought that it would be unacceptable if a parent deprived of the right to have the child living with him or her could appoint a guardian with that right. We

1. S5(8).
2. S5(7)(b).
3. S1(5). See also clause 12(3) of the draft Bill.
4. See eg *Lockhart* v *Ellies* (1682) Mor 16301.
5. Law Com No 172 (1988) para 2.25.
6. S5(6).
7. See para 2.6 above.
8. Family Law (Scotland) Act 1985, s1(1)(d).
9. S135(1).
10. See eg ss15, 16, 30(2).
11. See para 2.35 above.

think a proviso of this kind would be unnecessary and undesirable. If a court order had provided that the child should live with the mother that order would remain in force and the rights of any guardian appointed by the father would be subject to it.[1] A court order which was personal to the father (for example, restricting his contact with the child because of his disturbed personality) should not necessarily apply to a guardian. We think it would be better and simpler to give the guardian the normal responsibilities and rights, subject to any court order which is still applicable after the guardian takes office. In the case of any dispute which could not be settled amicably the matter could be resolved by a court. We therefore recommend that

18.(a) A guardian should have the same responsibilities in relation to the child as a parent has.

(b) To enable him or her to fulfil these responsibilities a guardian should have the same parental rights as a parent has.

(Draft Bill, clause 7(5).)

3.15 We envisage that the rules applying to parental responsibilities and rights would apply to guardians with these responsibilities and rights. For example, the rule that where two or more persons have any parental right each of them may exercise it without the consent of the other or others, unless the deed or decree conferring the right provides otherwise,[2] would apply to cases where there were two or more guardians.

Termination of guardianship

3.16 Although a person should be free to accept or refuse the guardianship of a child, the interests of the child require that, once the guardian has unequivocally accepted office, he or she should not be able to surrender or transfer his or her responsibilities, other than by means of an appropriate court order or orders. This was probably the position under Scots law, prior to 1921, although some doubt has been introduced by the Trusts (Scotland) Act of that year.[3] It is the position under the Children Act 1989 in England and Wales.[4] If this rule were to be adopted, or re-adopted, in Scotland, it would follow that, unless the appointment provided for an earlier termination, guardianship would terminate (a) on the child's attaining the age of 18[5] (b) on the death of the child or the guardian or (c) by virtue of a court order (including an adoption order). At present a court order terminating guardianship could be made, on the application of any person claiming interest, under section 3 of the Law Reform (Parent and Child)(Scotland) Act 1986.[6] Our recommendation that guardianship should be separated out from parental rights requires some minor drafting changes,[7] but these do not affect the basic policy. There was general agreement on consultation with the basic rules on the termination of guardianship which we suggested in the discussion paper. We were then thinking in terms of termination at the age of 16 and one suggestion made to us was that guardianship should continue until the child is 18. This now follows from the fact that some parental responsibilities continue until that age. Another suggestion was that guardianship should be terminated by the guardian's mental incapacity. However, the onset of mental incapacity is not an event which can always be clearly identified by third parties. Moreover, mental incapacity is difficult to define and may be temporary or partial. We think that it is better to leave this as a ground on which a court could be asked to terminate the guardianship. A parent, after all, does not cease to be a parent on the onset of mental incapacity. We recommend that

19. Once a guardian has accepted office then, unless the appointment provides for earlier termination, guardianship should be terminated only by

(a) the child's attaining the age of 18 years,

(b) the death of the child or the guardian, or

(c) a court order.

(Draft Bill, clause 8(5).)

1. See para 2.57 above and clause 3(3) of the draft Bill (court orders prevail).
2. Law Reform (Parent and Child)(Scotland) Act 1986 s2(4) (which would be replaced by clause 2(2) of the draft Bill).
3. See eg *Dow* v *Seaton* (1708) 2 Fount Dec 451 (a curator "having once accepted, he could not be legally freed"); *Gordon* v *Dunbar* (1711) Mor 16333 (curators, once having accepted, could not resign). *Robertsons* (1865) 3 M 1077. Under s31 of the Judicial Factors Act 1849 the Court of Session has power to accept the resignation of a guardian "on cause shown". Under the Trusts (Scotland) Act 1921, s3 a trustee (a term which includes a guardian) can resign office and assume new trustees. This, however, seems inappropriate in relation to guardians.
4. Ss2(9) and 6(7).
5. Under the existing law guardianship terminates when the child is 16. Age of Legal Capacity (Scotland) Act 1991. s5. The extension of *some* parental responsibilities until the age of 18 means that guardianship should continue until that age. However, the guardian would not have any *rights* in relation to the child or the child's property once the child attains the age of 16. The guardian's role would be that of an adviser.
6. See also s31 of the Judicial Factors Act 1849 which gives the Court of Session power to remove a guardian on cause shown.
7. See the draft Bill, clauses 11(1) and 12(4).

Part IV Administration of children's property

Introduction

4.1 Nowadays any substantial family property which is left or donated to children is usually tied up in a trust. Where a child acquires substantial property in his or her own right, and free from a trust, this is usually as a result of (a) an award of damages (b) a payment by the Criminal Injuries Compensation Board or (c) an inheritance resulting from a bequest, where the prospect of the child inheriting while under age has not been provided for,[1] or the death, intestate, of a parent, or the right to legitim. We consider these three cases and other cases in turn and then consider the court's general powers to protect the property of children by appointing a judicial factor or otherwise. Finally we consider the general question of how a parent's or guardian's right of legal representation should operate in relation to the administration of property.

4.2 One general point which must be borne in mind throughout this discussion of the administration of a child's property is that children develop and gain in cognitive ability and experience as they grow older. At present Scots law recognises that young people over the age of 16 can enter into legal transactions and manage their own property.[2] Even before that age young people can enter into a wide range of ordinary contracts and transactions.[3] Nothing in our recommendations on children's property is intended to prevent children or young people under the age of 16 from handling pocket money or other small sums on their own behalf.

Damages

4.3 There are rules of court which deal with the situation where damages are awarded to a child. In the Court of Session, rule 131 provides as follows

"(a) In any action of reparation in which decree is granted for payment of a sum of damages to, or in which decree of absolvitor has been pronounced following upon an extra-judicial settlement in favour of, any

(i) pupil child, acting with the concurrence of a curator *ad litem*; or

(ii) minor *pubes* acting with or without the concurrence of his or her father or of a curator *ad litem*; or

(iii) parent acting on behalf of his or her pupil child,

it shall be competent for the court granting such decree, if it appears that there is no person available to give a full and valid discharge for the damages, or if the court is satisfied that the administration of the damages for the benefit of such minor or pupil cannot otherwise be reasonably secured, to appoint *de plano* some responsible person as factor in accordance with the provisions hereinafter contained.

(b) Every appointment of a factor under this rule shall be limited to take effect in so far only as regards the said damages.

(c) In appointing any such factor, the court may give him such powers of disbursing both the capital and the income of said damages to or for behoof of the minor or pupil, and such other powers as may be thought necessary or expedient in the interest of such minor or pupil, and may direct that the said damages (both capital and income) shall be paid to or for behoof of the minor or pupil in such amounts and at such times as the court may fix.

(d) Such factor shall be bound to find caution for his intromissions and shall be under the superintendence of the Accountant of Court by virtue of the Pupils Protection (Scotland) Act 1849, and the Judicial Factors (Scotland) Act 1889."

The procedure for applying for the appointment of a factor is regulated[4] and provision is made for the discharge of a factor.[5] On the death or resignation of a factor, any person interested, or the Accountant of Court, can apply for

1. For example, a bequest intended for the child's parent may pass to the child if the parent has predeceased the testator.
2. Age of Legal Capacity (Scotland) Act 1991, ss1 and 5.
3. Age of Legal Capacity (Scotland) Act 1991, s2(1).
4. Rule of Court 132.
5. Rule of Court 134(a).

a new appointment.[1] A judicial factor is normally a solicitor or accountant. He or she must prepare an inventory of the property under his or her management, and must submit annual accounts to the Accountant of Court, a public official based in Edinburgh.[2]

4.4 In the sheriff courts the relevant rule provides as follows.[3]

"(1) Where in any action of damages by or on behalf of a person under legal disability, arising out of injury sustained by such person, or out of the death of some other person in respect of whose death the person under legal disability is entitled to damages, a sum of money becomes payable to such person, such sum shall, unless otherwise ordered, be paid into court and shall be invested, applied, or otherwise dealt with and administered by the court for the benefit of the person entitled thereto, and the receipt of the sheriff clerk shall be a sufficient discharge in respect of the amount paid in.

(2) The sheriff clerk of any sheriff court is also authorised at the request of any competent court to accept custody of any sum of money paid into such court in any action of damages by or for behoof of a person under legal disability provided always that such person is then resident within the jurisdiction of such sheriff court and such sum shall be invested or otherwise dealt with as in this rule.

(3) Where any money is paid into court under this rule it shall thereafter be paid out by the sheriff clerk or otherwise applied for the benefit of the person entitled thereto after such intimation and service and such inquiry as the sheriff may direct.

(4) On payment into court under this rule of money which has become payable to a person under legal disability, the sheriff clerk shall:—

(a) issue to the person making the payment a receipt in or as nearly as may be in terms of Form P as set out in the Appendix to this Schedule to which receipt there shall be added a form in terms of Form Q as set out in the Appendix to this Schedule;

(b) transmit forthwith to the Secretary of State a copy of the said receipt, having appended thereto the additional particulars specified in Form R as set out in the Appendix to this Schedule and the person making the payment shall forthwith complete and transmit to the Secretary of State Form Q intimating the payment into court.

(5) Any sum which in terms of this rule is ordered to be invested, shall be invested in any manner in which trustees are authorised to invest by virtue of the Trustee Investments Act 1961 and no such sum shall be invested otherwise than in accordance with this rule."

Paragraph (2) in the above rule used to refer to any competent court within the British Dominions,[4] which may help to give some idea of its purpose. The above procedure is used quite frequently in the sheriff courts and appears to function well.[5] In practice the investment of the funds, and questions of disbursements for special purposes, are decided by the sheriff after discussion with the child's parent or parents.[6] If the child is old enough, then he or she may also be consulted before any substantial payment is authorised.[7]

4.5 The Court of Session rules now require to be updated to take account of the Age of Legal Capacity (Scotland) Act 1991 but, quite apart from that, it is for consideration whether these rules ought to be generalised and extended so that all courts dealing with sums of money payable to children[8] would have the same options available. There seems to be no good reason for having different rules for different courts, when the problems and the available solutions are the same.

4.6 In the discussion paper we suggested a comprehensive scheme. With one qualification, this was approved of, and supported, by virtually all who commented on it, including the Court of Session judges, the Sheriffs' Association, the Accountant of Court, the Law Society of Scotland, the Family Law Association, the Scottish Child Law Centre, the Scottish Child and Family Alliance and the Committee of Scottish Clearing Bankers. The qualification related to the application of the Trustee Investments Act 1961. We discuss this separately later. For the rest we feel justified by the results of our consultation in recommending the adoption of the scheme suggested in the discussion paper which is as follows.

1. Rule of Court 134(b).
2. See the Judicial Factors Act 1849 and the Judicial Factors (Scotland) Act 1889.
3. Sheriff Courts (Scotland) Act 1907, First Schedule, rule 128, as substituted by SI 1983 No 747.
4. Act of Sederunt, 16th July 1936; Dobie, Sheriff Court Practice (1952) 82.
5. In April 1990 funds of over £150,000 were held in Glasgow Sheriff Court under rule 128 on behalf of 39 entitled persons. Letter from Mr McLay, Regional Sheriff Clerk, 4 April 1990.
6. Macphail, *Sheriff Court Practice, 698.*
7. *Ibid.*
8. In most cases involving adults under an incapacity the action will be raised by a *curator bonis* to whom the damages can be paid. See Macphail, *loc cit.* 697.

20.(a) The powers available to the courts to make special provision for sums payable to children should be extended and generalised and should be the same for all courts.

(b) Where in any court proceedings a sum of money becomes payable to, or for the benefit of, a person under legal disability by reason of non-age the court should have power to make such order relating to the payment and management of the money for the benefit of that person as it thinks fit.

(c) The court's power should expressly include

(i) power to appoint a judicial factor, with appropriate powers, to invest, apply or otherwise deal with, the money for the benefit of the person concerned,

(ii) power to order the money to be paid to the sheriff clerk or the Accountant of Court, to be invested, applied or otherwise dealt with, under the directions of the court, for the benefit of the person concerned,

(iii) power to order the money to be paid to the parent or guardian of the person concerned, to be invested, applied or otherwise dealt with, as directed by the court, for the benefit of that person, and

(iv) power to order payment to be made directly to the person concerned.

(d) It should be made clear that the receipt of any person to whom payment is made in terms of the court's order is a sufficient discharge.

(Draft Bill, clause 16.)

4.7 We think that these general powers and the provision for discharge should be in primary legislation. Any supplementary detailed rules should be in rules of court. The advantage of having the main provisions in primary legislation is that the Act could provide uniform powers for all courts and could provide for a receipt by the person receiving the money in pursuance of the court's order to be a good discharge, which is a matter of substantive law and not merely a matter of procedure.

4.8 In the discussion paper we asked whether any sum ordered to be invested by the court under the new scheme should, in the absence of any direction by the court to the contrary, be subjected to the rules of the Trustee Investments Act 1961.[1] Most respondents thought that it should. However, the Law Society of Scotland thought that this would be too restrictive considering the variety of circumstances involved. We think that there is substance in the Law Society's point. We recommend later that parents or guardians administering funds on behalf of children should no longer be regarded as trustees for the purposes of the Trusts (Scotland) Acts (which, for various reasons, do not apply very appropriately in this situation). It would be more consistent with that recommendation not to apply the Trustee Investments Act. As the matter is under the direction of the court in any event, and as the sums involved may well be quite modest, we think it better to follow the Law Society's view on this question and to make no recommendation for the application of the 1961 Act.

Criminal Injuries Compensation

4.9 Payments, sometimes substantial, may be made to, or for the benefit of, a child under the non-statutory Criminal Injuries Compensation Scheme. The Criminal Injuries Compensation Board has a discretion to make suitable arrangements in cases where it may not be in the interests of a successful applicant for payment to be made directly to him or her.[2] The Board's practice in relation to awards to Scottish applicants under the age of 18 is explained in a leaflet issued by the Board.

1. An immediate payment may be made of any amount of the award which represents loss of earnings and out-of-pocket expenses, incurred by the applicant or his parent.
2. An immediate payment may also be made on the parent's undertaking to use it for the applicant's benefit. The amount will depend on the size of the award and the applicant's age and requirements.
3. Subject to the above (and to the applicant's age at the date of the award) the award will be paid into the Board's Deposit Account at Barclays Bank or Investment Account at the National Savings Bank, earmarked in the applicant's name.
4. Advances may be made from the award, while held in either of these accounts, at the discretion of the Board if it can be shown that the funds will be used solely for the applicant's advancement, education or other benefit.

We mention these arrangements for the purposes of information only and to show that adequate safeguards exist in relation to payments due to children. As payments under the Scheme are *ex gratia* it is clear that considerable flexibility is possible and that questions of obtaining a good discharge do not arise.

1. Para 4.12.
2. 1990 Scheme, para 9.

Inherited property

4.10 The greatly improved position of the surviving spouse in the modern law of succession, and improved life expectancy, mean that cases of inheritance by children under the age of 16 are probably less common than they once were. Many of the early cases on tutors are cases where the child's father had died but the mother was still alive. In many such cases nowadays the mother would inherit the whole estate. Even under the existing law the prior rights on intestacy of the surviving spouse exhaust the whole estate in some 78% of cases of intestacy where both a spouse and issue survive.[1] If the recommendations in our report on *Succession*[2] were implemented the position of the surviving spouse would be improved still further. Nonetheless, there are, and will continue to be, some cases where children under 16 years of age inherit.

4.11 Under the existing law the parent of a child under the age of 16, as the child's guardian, can give a good receipt or discharge on behalf of the child, and the executor is bound to pay over to the parent any sum due to the child.

> *Example.* The young children of Mrs B inherited about £10,000 from their grandmother, their mother having predeceased their grandmother. The grandmother's testamentary trustees were unwilling to pay over this amount to the father of the children. It was held that they must do so. Lord Young said of the children: "They have a legal guardian, and he is entitled to receive the money due to them and to give an effectual discharge. His duty will be to manage it for them, and he is not obliged by law to find caution."[3]

There are, however, older cases which suggest that if the executor has reason to believe that the parent is in embarrassed circumstances he or she can insist on the parents finding caution.[4]

4.12 Prior to the Children Act 1989 the position in England was that an executor could not safely pay to the parent of a minor beneficiary: an executor who did so was liable to pay again to the legatee when he or she attained full age.[5] This has been changed by the 1989 Act. Section 3 gives the parent (or other person having parental responsibility) the rights which a guardian of the child's estate would have had in relation to the child's property, including

> "in particular, the right of the guardian to receive or recover in his own name, for the benefit of the child, property of whatever description and wherever situated which the child is entitled to receive or recover".[6]

So the new English law on this point would appear to be essentially the same as the existing Scottish law.

4.13 The system whereby the executor can obtain a good receipt or discharge from the parent or guardian, without having to involve a court, has obvious advantages from the executor's point of view, particularly in relation to small legacies or small sums payable on intestacy or by way of legal rights. We do not suggest any fundamental change in that system.

4.14 The question arises, however, whether an executor should be obliged to inform the Accountant of Court if he or she transfers substantial funds or property to, or to be administered by, a child's parent or guardian. Under the existing law any parent or guardian who administers the estate of a child under the age of 16 years is subject to the provisions of the Judicial Factors Act 1849, except that he or she does not have to find caution unless the court so directs.[7] This means that a parent who receives a legacy, or other funds or property, on behalf of his or her child is, as the child's guardian, under the supervision of the Accountant of Court and is bound to lodge an inventory of the estate under his or her charge and submit annual accounts.[8] The parent is also bound to lodge any money in his or her hands, as guardian, in an approved bank or other approved institution in a separate account or on deposit, in his or her own name as guardian.[9] The parent is liable to a fine for any misconduct or failure in the discharge of his or her duty,[10] and may, if the Accountant of Court suspects malversation or misconduct, be reported to the Lord Advocate who may direct such inquiry and take such proceedings as seem proper.[11]

4.15 There are two serious problems in this scheme. The first is that the Accountant of Court may never know that money has been paid to, or property transferred to be administered by, a parent or guardian as a child's legal representative. The second is that the scheme is totally unrealistic in relation to small or modest sums. In such cases,

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1. See Jones, *Succession Law* (Scottish Office, Central Research Unit, 1990) p33.
2. Scot Law Com No 124 (1990).
3. *Murray's Trs* v *Bloxsom's Trs* (1887) 15 R 233 at 237.
4. *Govan* v *Richardson* (1633) Mor 16263; *Dumbreck* v *Stevenson* (1861) 4 Macq 86, affirming 19 D 462.
5. Williams, Mortimer and Sunnucks, *Executors, Administrators and Probate* (16th edn) 921–922. This rule sometimes caused difficulties for Scottish trustees where a minor beneficiary was domiciled in England. See e g *Atherstone's Trs* (1896) 24 R 39.
6. S3(2) and (3).
7. Judicial Factors Act 1849, s25(2), read with the Age of Legal Capacity (Scotland) Act 1991.
8. Judicial Factors Act 1849, ss3 and 4.
9. *Ibid* s5, as amended by the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990.
10. 1849 Act, s6.
11. *Ibid* s21.

it is excessive, and not likely to be in the child's interest, to require annual accounts and supervision by the Accountant of Court.

4.16 In the discussion paper we suggested that it was inappropriate to treat all parents and guardians as judicial factors, but that it might be appropriate to have a judicial factor, or other arrangement, in certain cases involving substantial amounts or special circumstances, such as the parent's bankruptcy. We suggested that any executor proposing to pay funds to, or to transfer property to be administered by,[1] a parent or guardian of a child acting on behalf of the child might be required to inform the Accountant of Court of the intention to do so in any case where he or she had reasonable cause to believe that the total value of the funds or property exceeded a certain sum or that the parent was an undischarged bankrupt or had a criminal conviction for any offence involving dishonesty. The executor might also be obliged to furnish a brief report to the Accountant of any arrangements made or proposed for the investment or administration of the funds and of any known circumstances affecting the parent's suitability as an administrator. The Accountant of Court might then have a period (say, two months) within which to—

(a) direct the executor to apply to the court for the appointment of a judicial factor in respect of all or part of the funds;

(b) require all or part of the funds to be transferred to the Accountant of Court to be invested, administered or otherwise dealt with on behalf of the child, or

(c) make such other direction as he or she might consider appropriate for the investment, administration or use of all or part of the funds for the benefit of the child.

In appropriate cases the Accountant might direct some of the funds to be paid directly to the child. If none of these steps were taken by the Accountant within the specified period, the executor would be free to pay the funds to, or transfer the property to be administered by, the parent or guardian. The executor would not, however, obtain a good discharge if he or she either failed to report to the Accountant of Court, in a case where that was required, or if, having reported, he or she paid or transferred to the parent or guardian *within* the prescribed period.

4.17 Almost all of those who wrote to us on this issue thought that the existing law was unsatisfactory, and that some attempt should be made to distinguish cases where some external control of the administration of a child's property was appropriate from cases where the administration could be left to the discretion of the parent or guardian. Almost all favoured a reporting obligation of the type we suggested in the discussion paper. Views as to the level of estate above which the executor would be bound to report to the Accountant of Court varied. The Accountant of Court's own suggestion was that it should be £20,000 in the normal case (and £5,000 in certain cases where there was reason to suspect the solvency or honesty of the parent or guardian). These limits seem to us to be as reasonable as any and we are happy to adopt them. The levels should be modifiable by statutory instrument. On the question of the parent or guardian known to be bankrupt or to have been convicted of an offence involving dishonesty, there was a fairly general view that some wider formula should be adopted. A suggestion which was made by several consultees and which we find attractive is that the executor should have a general discretion (subject to a lower limit designed to prevent the Accountant of Court from being overburdened by small cases) to report to the Accountant of Court in any case where there is reason to suspect that the parent would not administer the funds in the best interests of the child. We think, however, that it would be better to confer an unfettered discretion to report (subject to a lower monetary limit of, say, £5,000) so that the executor could tell the parent that the Accountant of Court's directions were being sought without necessarily implying that the parent's honesty or abilities were in doubt. One consultee suggested that the executor should enjoy absolute privilege in relation to any such report so that he or she would not be exposed to any action for defamation by the parent or guardian. However, there would clearly be qualified privilege anyway, which would provide protection in the absence of malice on the part of the executor, and that should be sufficient. On the action to be taken by the Accountant of Court on receiving a report, the Accountant's own suggestion was that there should be power

(i) to apply to the Court for the appointment of a Judicial Factor, who could be the parent or guardian if the Accountant considered this appropriate;

(ii) to administer the funds directly, and

(iii) to direct all or part of the funds to be handed over to the parents under such conditions as the Accountant considered appropriate including a requirement to have the Accountant's approval of capital expenditure and to exhibit annually the securities and bank books which formed the capital of the estate.

This suggestion meets some of the concerns expressed by other consultees about our original suggestion, which would have given the Accountant wide powers under head (iii), and we are happy to adopt it. The Accountant of Court also suggested that once a report had been made the executor should not be free to hand over the funds to the parent

1. It should be noted that, as the property belongs to the child, the title to heritable property will be in the name of the child. The parent or guardian merely administers it.

or guardian until receiving the Accountant's approval or direction to do so. This approach was supported by the Lord President on behalf of the Court of Session judges and we are happy to adopt it. We asked in the discussion paper whether a similar approach to that suggested for executors should be applied in other cases where substantial sums or property (for example, under a trust) were about to be handed over to a parent or guardian acting on behalf of a child under the age of 16. Almost all of those who responded thought that similar rules should apply. It was suggested to us, however, that the rules should not apply where the parent or guardian had been expressly appointed a trustee under a trust deed; in that case the parent or guardian should be treated in the same way as any other trustee. We agree with this suggestion. The Law Society of Scotland thought that to apply the rules to all cases would be going too far, because of the wide variety of circumstances which might arise. We can see the force in this so far as an *obligation* to report is concerned. It might be better for this reason to confine the reporting obligation, at least to begin with, to executors or trustees. However, there can be no objection, in our view, to giving any person (whether or not an executor or trustee) who is about to hand over a substantial sum to a parent or guardian, acting as such, the optional facility of seeking directions from the Accountant of Court. Taking all these points into consideration, we recommend that

21.(a) Where an executor or trustee holds property owned by, or due to, a child under the age of 16, and the amount or value of the property exceeds £20,000 the executor or trustee should be bound, before handing over the property to the parent or guardian of the child to be administered by the parent or guardian (otherwise than as a trustee under a trust deed) to report to the Accountant of Court that the property is due to be handed over, and to seek the Accountant's directions.

(b) Where (in a case not covered by paragraph (a) above and not covered by our proposals on sums payable in court proceedings) any person holds property owned by, or due to, a child under the age of 16, and the amount or value of the property exceeds £5,000, the person may, at his or her option, before handing over the property to the parent or guardian to be administered by the parent or guardian (otherwise than as a trustee under a trust deed), report the matter to the Accountant of Court and seek the Accountant's directions.

(c) Where a report, and request for directions, has been received by the Accountant of Court he or she should have power

(i) to apply to the court for the appointment of a judicial factor (who could be the parent or guardian) and to direct that all or part of the property be transferred to the judicial factor,

(ii) to administer all or part of the property on behalf of the child and to direct that the property be transferred to him or her for that purpose,

(iii) to direct that all or part of the property be transferred to the parent or guardian subject to such conditions, if any, as the Accountant may consider appropriate, which conditions may include a requirement to have the Accountant's approval of capital expenditure and to exhibit annually the securities and bank books representing the capital of the estate.

(d) A person who has reported to the Accountant of Court, and sought his or her directions, under these provisions should not be free to transfer the property except in accordance with the Accountant's directions.

(Draft Bill, clause 9.)

Court's powers

4.18 There may be cases where property belonging to a child is already being administered on behalf of a child and where some reason for concern becomes apparent. We suggested in the discussion paper that the court's powers to make orders, on the application of any person claiming an interest, relating to the legal representation of a child should include power to make orders relating to the administration of the child's property and, in particular, power to appoint a judicial factor where appropriate or to order funds belonging to the child to be handed over to the Accountant of Court or sheriff clerk to be invested, administered or otherwise dealt with for the benefit of the child. This would provide an extra layer of protection for those cases where, for example, damages or a legacy or other funds belonging to a child had been transferred to a parent for administration but where subsequent events showed that there was a serious risk of maladministration. There was general agreement with this proposal. The Accountant of Court suggested, however, that it would be sufficient if the options specifically mentioned were (a) the appointment of a judicial factor and (b) a remit to the Accountant of Court to consider and report on suitable arrangements for the future management of the property. This seems to us to be a reasonable suggestion. We recommend that

22. The court's powers to make orders relating to children should expressly include power to make orders relating to the administration of a child's property and, in particular, power to appoint a judicial factor, where appropriate,

or to order a remit to the Accountant of Court to consider and report on suitable arrangements for the future management of the property.

(Draft Bill, clauses 11(1) and 12(1)(e).)

Powers of parent or guardian

4.19 The right to act on behalf of the child in relation to the child's property is normally an aspect of the right of legal representation. This is made clear in the draft Bill.[1] One of the defects in the old law on tutory was the narrow notion that a tutor's function, in relation to heritage, was to *preserve* the child's property.[2] This led to the need for a tutor to obtain special authority to take certain steps in relation to the property which might be regarded as being at variance with that primary function. As it was not always clear in advance whether, for example, a sale of heritable property was at variance with the purposes of the tutor's "trusteeship" it was often necessary to seek the court's authority, even if the result was expected to be that the application would be dismissed as unnecessary.[3] We suggested in the discussion paper that it should be made clear in any new legislation that the child's legal representative (whether parent or guardian) has power, in relation to the child's property, to do any act which the child could have done if of full age and not subject to any legal disability. The representative would, of course, be liable to account to the child[4] but this would not affect the position of third parties dealing with him or her. They could deal with the representative on the footing that he or she had full powers in relation to both moveable and heritable property. The transaction could not be set aside later on the ground that it was beyond the representative's powers. This suggestion was agreed to by almost all of those who commented. We therefore recommend that

23. It should be made clear that, subject to the obligation of the parent or guardian to account to the child, the right of legal representation in relation to a child carries with it the right to do any act in relation to the child's property which the child is legally incapable of doing but could have done if of full age and capacity.

(Draft Bill, clause 10(3)(b).)

4.20 A rule on the above lines would make it clear that third parties acquiring property from a parent or guardian acting as the child's legal representative would not need to be concerned about the extent of the representative's powers. Applications to the court for special powers would be unnecessary.

4.21 We suggested in the discussion paper that a parent or guardian acting as a child's legal representative should no longer be regarded as a trustee for the purposes of the Trusts (Scotland) Acts. That is inappropriate because the parent or guardian, unlike a trustee, does not have title to the property. The property belongs to the child and the parent or guardian merely acts on behalf of the child in relation to it. Moreover some rules applying to trustees, such as the power to resign and the power to assume new trustees,[5] are not appropriate in the case of parents or guardians. The parent or guardian would, of course, be subject to the general parental responsibilities including in particular the responsibilities to safeguard and promote the child's welfare and to administer the child's property in the interests of the child. The parent or guardian would be in a fiduciary position and would be accountable for his or her administration.[6] That does not mean, however, that the rules of the Trusts Acts should apply. All consultees, except one, who dealt with this issue agreed. We therefore recommend that

24. A parent or guardian acting as a child's legal representative in relation to the child's property should no longer be regarded as a trustee for the purposes of the Trusts (Scotland) Acts.

(Draft Bill, Schedule 2.)

Obligation to account

4.22 Under the existing law a parent or guardian is liable to account to the child, on the termination of the administration, for his or her intromissions with the child's funds.[7] Although it must be right, as a matter of principle, that the child should be able to call the parent or guardian to account, and to hand over any property belonging to the child when the child is no longer under legal disability, it is necessary in our view that the law should be realistic about the position of the parent who has had the management and control of small funds and who may have used them for the child's benefit or the promotion of the child's welfare.[8] We suggested in the discussion paper that the right balance would be achieved if the parent or guardian were not to be liable to the child in respect of sums used in the proper

1. See clause 1(3).
2. See *Linton* v *Inland Revenue* 1928 SC 209 at 213.
3. See *Cunningham's Tutrix* 1949 SC 275.
4. See para 4.22 below.
5. Trusts (Scotland) Act 1921, s3.
6. See para 4.22 below.
7. See Fraser, *Parent and Child* (3rd ed 1906) 418–419.
8. *Cf Polland* v *Sturrock's Trs* 1952 SC 535 (no absolute rule that father could not encroach on daughters' capital for their maintenance and education).

discharge of his or her responsibility to promote the child's welfare. This was generally agreed and we now recommend that

25.(a) A parent or guardian who has, as a child's legal representative, held, administered or dealt with the child's property should continue to be liable (as under the existing law) to account to the child, when the parent or guardian ceases to be the child's legal representative, for his or her intromissions with the property.

(b) In accounting, the parent or guardian should not be liable to the child in respect of any of the child's funds used in the proper discharge of the parent's or guardian's responsibility to promote the child's welfare.

Standard of care

4.23 At common law the standard of care expected of a tutor who was administering a child's property varied according to the type of tutor concerned.[1] Generally, a tutor appointed by a court was expected to come up to the standard of a prudent person managing his or her own affairs. However, a testamentary tutor had only to show the same degree of care as he or she exercised in the management of his or her own affairs, and a parent was liable only for gross negligence. We suggested in the discussion paper that one standard of care should apply to any parent or guardian acting as a child's legal representative. Trustees are required to follow the ordinary course of business that would be used by a prudent person in his or her own affairs[2] and we proposed that a similar standard of care should be applied to all parents and guardians acting as a child's legal representative in relation to the administration of the child's property. This was supported unanimously by those who commented. We recommend that

25.(c) A parent or guardian acting as a child's legal representative in relation to the administration of the child's property should be required to act in that capacity as a reasonable and prudent person would act on his or her own behalf.

(Draft Bill, clause 10.)

1. See Fraser, *op cit*, 390–393. Section 13 of the Judicial Factors Act 1849, however, provides that the Accountant of Court is to audit factors' accounts (and that includes guardians' accounts) "on the general principles of good ordinary management for the real benefit of the estate and of those interested therein".
2. See Wilson and Duncan, *Trusts, Trustees and Executors* (1975) p385.

Part V Court orders relating to parental responsibilities and rights etc.

Introduction

5.1 The most important provision in the existing law on court orders relating to parental rights is section 3 of the Law Reform (Parent and Child) (Scotland) Act 1986 which provides as follows.

"Orders as to parental rights

3—(1) Any person claiming interest may make an application to the court for an order relating to parental rights and the court may make such order relating to parental rights as it thinks fit.

(2) In any proceedings relating to parental rights the court shall regard the welfare of the child involved as the paramount consideration and shall not make any order relating to parental rights unless it is satisfied that to do so will be in the interests of the child."

The basic philosophy of this provision was not challenged on consultation. However, some extensions and modifications are required, partly as a consequence of changes already recommended in the law on parental responsibilities and rights, and partly for independent reasons. We discuss these below.

What orders can be applied for?

5.2 One consequential change, resulting from our earlier recommendations is that section 3, or any replacement for it,[1] should refer not just to parental rights but also to parental responsibilities, guardianship and the administration of a child's property.

5.3 Another consequential change, resulting from the reformulation of parental rights already recommended, is that the section should specify the main types of order which could be made in place of custody orders and access orders. It would clearly be inappropriate to retain custody orders and access orders if there were no longer parental rights of custody and access. The new orders should relate more closely to the new underlying rights in relation, in particular, to the residence of the child and the maintenance of contact with the child.

5.4 We recommend that

26.(a) The existing law on court orders relating to parental rights should, as a consequence of changes recommended earlier in this report, be expanded to cover not only parental rights but also parental responsibilities, guardianship and the administration of a child's property.

(b) Without prejudice to the generality of the court's powers to make such orders as it thinks fit, it should be provided that a court may, on an application for an order relating to any of the above matters, make any one or more of the following orders

(i) an order ("a residence order") regulating the arrangements to be made as to the person with whom a child is to live;

(ii) an order ("a contact order") regulating the arrangements to be made for maintaining personal relations and direct contact between a child and a parent, or other person, with whom the child is not, or will not be, living;

(iii) an order ("a specific issue order") regulating any specific question which has arisen, or which may arise, in connection with any of the matters mentioned in paragraph (a) above;

(iv) an interdict prohibiting the taking of any step in the exercise of parental responsibilities or parental rights or guardianship of a child, or the administration of a child's property.

(Draft Bill, clauses 11(1) and 12(1).)

5.5 The court's powers under section 3 are, we believe, wide enough to deprive a person of some or all of his or

1. The technique adopted in the annexed draft Bill is to repeal section 3 and re-enact it with the necessary modifications. See clauses 11 and 12.

her parental responsibilities or rights, and to appoint or remove a guardian. However, in case there should be any argument that an order "relating" to parental responsibilities or rights or guardianship implied the continuing existence of the responsibilities or rights or office we recommend that

27. For the avoidance of any doubt, it should be made clear that a court in an order relating to parental responsibilities or rights or guardianship may

(a) deprive a person of some or all of his or her parental responsibilities or rights

(b) appoint or remove a guardian.

(Draft Bill, clause 12(4).)

We have already recommended that the courts should have a statutory power to make orders relating to the administration of a child's property.[1]

5.6 We do not claim that the changes in terminology recommended in this report will have a dramatic effect on problems relating to parental responsibilities and rights when the relationship between a child's parents breaks down. It is possible that they may have little effect. There will still be disputes about where children are to live, about how much contact with them a parent should have and when, and about aspects of their upbringing. There will still be reasonable people with widely differing views about what is best for their children. There will still be unreasonable or bitter people. We would not wish to raise expectations unduly. There has been a good deal of experience in other countries of the type of joint custody order which involves the retention by both parents of most parental rights while the care of the child is committed to one parent.[2] It is clear that the use of this type of order is not a panacea. A court order which settles only the arrangements for the child's residence, and leaves both parents with full parental responsibilities and rights, is no guarantee that arguments will not occur or that both parents will be equally content with the situation. There will inevitably be situations where in *fact* the person with whom the child lives will have the major say in his or her upbringing. This will often happen where the other parent lives at a distance. There is nothing that can be done about that. The law cannot alter brute facts. Nonetheless, while we do not overestimate the likely impact of our proposals, we have been impressed by the support from experienced lawyers and conciliators for a change in the basic approach and we hope that the changes recommended here may contribute in some small measure to a change in perceptions and to an increasing recognition that both parents remain parents, and have a role to play as such, even if their own relationship has unfortunately broken down and their child can no longer live with both of them at the same time.

Who can apply?

5.7 The Law Reform (Parent and Child) (Scotland) Act 1986, following the policy of the previous Scottish case law,[3] deliberately conferred title to apply for an order relating to parental rights on "any person claiming interest". There are obvious advantages in allowing wide access to the courts in matters relating to the welfare of children and we see no reason to change the basic philosophy of Scots law, now embodied in section 3 of the 1986 Act, in this matter. However, we should discuss two specific restrictions which appear in the English Children Act 1989, because they raise matters of policy relating to local authorities' child care powers.

5.8 Section 9(2) of the Children Act 1989 provides that no application may be made by a local authority for a residence order or contact order. The Children Act also makes it clear that only an individual can apply for guardianship of a child.[4] The reason for these restrictions is that there are special statutory rules regulating the circumstances in which a child can be taken into care, or parental rights can be assumed, by a local authority and that it would be wrong to allow a local authority to by-pass these rules by applying for guardianship, or a residence order or a contact order. This reason applies in Scotland too and it would seem to be desirable that policy on this matter should be the same throughout the United Kingdom. A local authority should, however, be able to apply for a specific issue order or an interdict. Most consultees agreed with this approach. We therefore recommend that

28. It should be made clear that a local authority cannot by-pass the normal rules on compulsory measures of care or assumptions of parental rights by applying for guardianship or for a residence order or a contact order. However, a local authority should be able to apply for a specific issue order or an interdict.

(Draft Bill, clause 11(4).)

5.9 Section 9(3) of the Children Act 1989 imposes restrictions on an application by a person who is, or was at any time within the previous six months, a local authority foster parent of the child. The idea behind this provision is to

1. Para 4.18 above. See clause 12(1)(e) of the draft Bill.
2. We have found the papers on joint custody presented to the Montreal Conference of the International Bar Association: Section on General Practice in June 1991 very helpful.
3. Wilkinson, "Children Act 1975" 1976 SLT (News) 221 and 237 at 239–40.
4. S5(1).

enable parents to feel confident, in placing a child voluntarily in local authority care, that foster parents will not apply for a residence order. However, the restriction is not absolute. The foster parent can apply if he or she has the consent of the local authority, or is a relative of the child, or has had the child for at least three years.[1] So a parent's reassurance would not be total. In the discussion paper we expressed the view that there was no need to introduce a similar restriction in Scots law. We pointed out that foster parents had had title to sue for custody in Scotland since before the 1986 Act[2] and there was no evidence that this had led to any abuse or to any reluctance on the part of parents to seek child care help from local authorities. The court, in any event, would always regard the welfare of the child as the paramount consideration and would not make any order unless satisfied that to do so would be in the interests of the child.[3] This view was supported by almost all of those who commented on it. Our recommendation is that

29. There is no need to place any restrictions on applications by local authority foster parents for orders relating to parental responsibilities or rights.

5.10 There is a bizarre set of pseudo restrictions in section 47(2) of the Children Act 1975. This, as amended, provides as follows.

> "(2) Notwithstanding the generality of section 3(1) of the Law Reform (Parent and Child) (Scotland) Act 1986, custody of a child shall not be granted in any proceedings to a person other than a parent or guardian of the child unless that person—
>
> (a) being a relative or step-parent of the child, has the consent of a parent or guardian of the child and has had care and possession of the child for the three months preceding the making of the application for custody;
>
> (b) has the consent of a parent or guardian of the child and has had care and possession of the child for a period or periods, before such application, which amounted to at least twelve months and included the three months preceding such application; or
>
> (c) has had care and possession of the child for a period or periods before such application which amounted to at least three years and included the three months preceding such application; or
>
> (d) while not falling within paragraph (a), (b) or (c), can show cause why an order should be made awarding him custody of the child."

This provision was a modified extension to Scotland of English provisions on custodianship[4] which have now been repealed.[5] It was criticised from the start.[6] The fundamental defect in it is that paragraph (d) makes the whole subsection pointless. The welfare of the child is the paramount consideration in any custody application.[7] So the "cause" which has to be shown under section 47(2)(d) must relate to the child's welfare. A person who can satisfy the court that a custody order in his favour would be in the child's best interests would have shown cause why the order should be made. However, this test has to be met by *any* applicant for custody. So section 47(2)(d) adds nothing to the general law. *Any* person who would obtain a custody award under the general law can obtain one, by virtue of section 47(2)(d), notwithstanding the pseudo restrictions in the earlier part of section 47(2). Section 47(2) is therefore completely pointless. In our report on *Illegitimacy*[8] we recommended the repeal of section 47(2) for the reasons given above. We see no reason to change our view. The remaining parts of section 47, in so far as they are still in force, are purely ancillary to section 47(2). All of those who commented on this point agreed with the suggestion made in the discussion paper that section 47 should be repealed. We therefore recommend that

30. Section 47 of the Children Act 1975 should be repealed.

(Draft Bill, Schedule 2.)

5.11 It is now clear, after an initial doubt,[9] that the words "any person" in section 3(1) of the Law Reform (Parent and Child) (Scotland) Act 1986 are not confined to parents.[10] However, if the law is being re-stated anyway it may be useful, for the avoidance of any doubt, to make it clear that the child concerned may apply for an order. No-one has a greater interest. We recommend that

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1. S9(3).
2. *Cheetham* v *Glasgow Corporation* 1972 SLT (Notes) 50 at p51.
3. 1986 Act s3(2).
4. Wilkinson, *loc cit.*
5. Children Act 1989, s108(7) and Sch 15.
6. Wilkinson, *loc cit.*
7. Law Reform (Parent and Child) (Scotland) Act 1986, s3.
8. Scot Law Com No 82 (1984).
9. See *A B Petr* 1988 SLT 652.
10. *M* v *Lothian Regional Council* 1990 SLT 116; *F* v *F* 1991 SLT 357.

31. For the avoidance of any doubt it should be made clear that the child concerned may apply for an order relating to parental responsibilities or rights, guardianship or the administration of his or her property.
(Draft Bill, clause 11(3).)

In what proceedings can applications be made?

5.12 Section 3 of the Law Reform (Parent and Child) (Scotland) Act 1986 is quite general in scope and, so far as the sheriff courts are concerned, is a sufficient basis for orders relating to parental rights. This is because the sheriff courts have a general jurisdiction to deal with applications under section 3.[1] There is no need for the provision in section 38C of the Sheriff Courts (Scotland) Act 1907 which deals specifically with the position in actions for divorce or separation. This was inserted as a by-product of the consolidation of legislation relating to the Court of Session[2] and, given that consolidation should not change the law, was quite properly inserted. In the longer term, however, there is no need to have two overlapping provisions.

5.13 The position is different in the Court of Session. At common law the Outer House had no jurisdiction to deal with custody in a divorce or separation action: a separate petition had to be presented to the Inner House. This state of affairs was remedied by section 9 of the Conjugal Rights (Scotland) Act 1861 which gave the Outer House judges jurisdiction to deal with custody in the course of certain consistorial actions. The modern equivalent of section 9 is section 20(1) of the Court of Session Act 1988 which provides that:

> "In any action for divorce, judicial separation or declarator of nullity of marriage, the Court may make, with respect to any child of the marriage to which the action relates, such order (including an interim order) as it thinks fit relating to parental rights and may vary or recall such order."

This is too narrow in that it does not enable parental rights to be dealt with in the Court of Session in an action, such as an action for declarator of marriage or parentage, which is not one for divorce, separation or nullity of marriage.[3] In the discussion paper we suggested a rationalisation of the position in the way recommended below. All of those who commented on it agreed. We therefore recommend that

32.(a) Section 38C of the Sheriff Courts (Scotland) Act 1907 and section 20(1) of the Court of Session Act 1988 should be repealed.

(b) It should be provided that an application for an order relating to parental responsibilities or rights, guardianship or the administration of a child's property may be made either

(i) in independent proceedings in the Court of Session or a sheriff court (whether or not the application is accompanied by an application for any other remedy which can competently be sought in those proceedings) or

(ii) in an action for divorce or for a declarator of marriage, nullity of marriage, parentage or non-parentage.
(Draft Bill, clauses 11(2) and 19 and Schedule 2.)

5.14 A change on the above lines would expand the jurisdiction of the Outer House of the Court of Session not only in relation to the type of action in which parental rights could be dealt with but also in relation to the children concerned. The jurisdiction in a divorce action would no longer be confined to "any child of the marriage"—a term which includes any child who (a) is the child of both parties to the marriage or (b) is the child of one party to the marriage and has been accepted as a child of the family by the other party.[4] Although there is a theoretical danger that the scope for applications in a consistorial action would be too wide, we think that in practice applications would be self-limiting.

5.15 It would help to simplify the statute book if it were provided that in a divorce action (or other consistorial action) the court could make an order relating to parental responsibilities or rights, guardianship or the administration of a child's property even if it refused the principal remedy sought. This would retain the substance of the existing law but would enable section 9(1) of the Matrimonial Proceedings (Children) Act 1958 to be repealed, and the references to custody, education and access in section 21 of the Family Law (Scotland) Act 1985 to be removed. It would tidy up the statute book considerably. This, however, is a matter of drafting, not policy, and does not merit a separate recommendation. It is taken into account in the draft Bill.[5]

1. Section 5(2C) of the Sheriff Courts (Scotland) Act 1907 (as inserted by the Law Reform (Parent and Child) (Scotland) Act 1986).
2. Court of Session Act 1988.
3. See *Hogg* v *Dick* 1987 SLT 716 (declarator of paternity).
4. Court of Session Act 1988, s20(2)(b).
5. Clause 12(2)(b) and Sch 2.

Avoidance of unnecessary orders

5.16 An important objective of the Children Act 1989 was the avoidance of unnecessary court orders relating to children. The English Law Commission explained the position in this way in their report on *Guardianship and Custody*.[1]

> "3.2 As we pointed out in our Working Paper on Custody, a tendency seems to have developed to assume that some order about the children should always be made whenever divorce or separation cases come to court. This may have been necessary in the days when mothers required a court order if they were to acquire any parental powers at all, but that is no longer the case. Studies of both divorce and magistrates' courts have shown that the proportion of contested cases is very small, so that orders are not usually necessary in order to settle disputes. Rather, they may be seen by solicitors as 'part of the package' for their matrimonial clients and by courts as part of their task of approving the arrangements made in divorce cases. No doubt in many, possibly most, uncontested cases an order is needed in the children's own interests, so as to confirm and give stability to the existing arrangements, to clarify the respective roles of the parents, to reassure the parent with whom the children will be living, and even to reassure the public authorities responsible for housing and income support that such arrangements have in fact been made. However, it is always open to parents to separate without going to court at all, in which case there will be no order. If they go to court for some other remedy, they may not always want an order about the children. The proportion of relatively amicable divorces is likely to have increased in recent years and parents may well be able to make responsible arrangements for themselves without a court order. Where a child has a good relationship with both parents the law should seek to disturb this as little as possible. There is always a risk that orders allocating custody and access (or even deciding upon residence and contact) will have the effect of polarising the parents' roles and perhaps alienating the child from one or other of them.
>
> 3.3 For these reasons, the Working Paper proposed a more flexible approach, in which it was not always assumed that an order should be made, but the court would be prepared to make one even in uncontested cases if this would promote the children's interests. Most of those who responded agreed with this approach. In particular, the Association of Chief Officers of Probation, who are responsible for the work of divorce court welfare officers, supported a change in practice towards fewer orders being made. Such a change would be consistent with the view that anything which can be done to help parents to keep separate the issues of being a spouse and being a parent will ultimately give the children the best chance of retaining them both. On the other hand, the impression should not be given that an application or an order is a hostile step between them. We therefore recommend that the court should only make an order where this is the most effective way of safeguarding or promoting a child's welfare."

This recommendation was implemented in the Children Act 1989 which provides that

> "Where a court is considering whether or not to make one or more orders under this Act with respect to a child, it shall not make the order or any of the orders unless it considers that doing so would be better for the child than making no order at all".[2]

5.17 We agree with the English Law Commission about the undesirability of unnecessary orders relating to parental rights. At one time an award of custody of a child was often sought by the mother in order to enable a claim for aliment for the child to be made. Under the Family Law (Scotland) Act 1985, however, this is no longer necessary. Either parent (or indeed anyone having care of a child) can apply for aliment for the child without applying for custody.[3] This provision was based on a recommendation in our report on *Aliment and Financial Provision* which was expressly designed to reduce unnecessary applications for custody.[4]

5.18 The concern about unnecessary orders relating to parental rights is also recognised in Scotland by section 3(2) of the Law Reform (Parent and Child) (Scotland) Act 1986. This provides that a court

> "shall not make any order relating to parental rights unless it is satisfied that to do so will be in the interests of the child".

We asked in the discussion paper whether this provision was sufficient to discourage unnecessary orders relating to parental rights. There was a division of opinion on this. Some consultees thought that the provision was sufficient. Others thought that a stronger provision, on the lines of that in the Children Act 1989, was needed. The matter is affected by the recommendations which we have made already. Under the existing law the concluding words of section 3(2) of the 1986 Act ought, in theory at least, to discourage unnecessary orders awarding sole custody or exclusive custody to one parent, because the effect of such an order is to deprive the other parent of an important parental right and it can rarely, if ever, be in a child's interests to deprive one parent *unnecessarily* of any parental rights. However, the new emphasis on orders which, so far as possible, do not deprive either parent of any parental rights weakens that argument and, in our view, makes it necessary to strengthen the concluding words of section 3(2). We recommend that

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1. Law Com No 172 (1988) paras 3.2–3.3 (footnotes omitted).
2. S1(5).
3. S2(4).
4. Scot Law Com No 67 (1981) para 2.63.

33.(a) It should be provided that a court should not make any order relating to parental responsibilities, parental rights, guardianship or the administration of a child's property unless satisfied that making the order will be better for the child than making no such order at all.

In the case of orders relating to the administration of a child's property it is necessary to safeguard the position of third parties who may have acquired such property, or any right or interest in it, in good faith and for value. A court should not be obliged to refuse them a remedy merely because this would not be in the interests of the child. We recommend therefore that

33.(b) In relation to orders relating to the administration of a child's property the court's duty to regard the welfare of the child as the paramount consideration, and not to make any order unless satisfied that to do so would be in the interests of the child and better than making no order at all, should be qualified by a provision protecting the position of third parties who have acquired any property of the child, or any right or interest in relation to it, in good faith and for value.

(Draft Bill, clause 12(3).)

Criterion to be applied

5.19 Under section 3(2) of the 1986 Act the court must regard the welfare of the child involved as the "paramount consideration". The same formula has been used in the Children Act 1989[1] and we suggest no change.

A statutory checklist of factors

5.20 The Children Act 1989 provides that where a court is considering whether to make, vary or discharge a section 8 order (that is, a residence order, a contact order, a specific issue order, or a prohibited steps order) and the making, variation or discharge of the order is opposed by any party to the proceedings, the court must "have regard in particular to" the following factors.[2]

"(a) the ascertainable wishes and feelings of the child concerned (considered in the light of his age and understanding);

(b) his physical, emotional and educational needs;

(c) the likely effect on him of any change in his circumstances;

(d) his age, sex, background and any characteristics of his which the court considers relevant;

(e) any harm which he has suffered or is at risk of suffering;

(f) how capable each of his parents, and any other person in relation to whom the court considers the question to be relevant, is of meeting his needs;

(g) the range of powers available to the court under this Act in the proceedings in question."

5.21 A statutory checklist of this type was recommended by the English Law Commission, after the idea had received "a large majority of support" from consultees who considered the matter.[3] Supporters of a checklist considered that it would help to ensure that the same factors were taken into account by the wide range of professionals involved in such matters, including judges, social workers and legal advisers. They also considered that it would be useful to those lacking experience in the area, and might assist parents and children in understanding how judicial decisions were arrived at, and even in reaching agreement as to the appropriate outcome.

5.22 The arguments against a statutory checklist are that, being necessarily incomplete, it might divert attention from other factors that ought to be considered, and that it might cause the process of decision making to become more mechanical, with judges routinely listing the statutory factors merely to minimise the prospect of a successful appeal. We did not reach a conclusion on this question in the discussion paper but invited views.

5.23 Most respondents favoured a statutory checklist but there was significant opposition from legal consultees who feared that it could lengthen proceedings and cause judges to adopt a mechanical approach to going through the list even in, say, an application for a minor variation in an order. We ourselves do not favour a lengthy statutory checklist. The absence of such a list in primary legislation would not, of course, prevent legal advisers, social workers and others from using their own checklists for their own purposes, as already happens. Section 3(2) of the 1986 Act already refers, as we have seen, to the paramountcy of the child's welfare and that embraces practically everything that would be in a checklist, however long. An important exception relates to the child's own views. These, we believe, ought to

1. S1(1).
2. S1(3) and (4).
3. Law Com No 172 (1988) paras 3.17 to 3.21. The checklist recommended by the Commission was essentially the same as that enacted in the Children Act, although there are some differences in wording.

be taken into account in their own right and not just as an aspect of welfare. We consider this point in the following paragraphs.

The child's views

5.24 Article 12 of the United Nations Convention on the Rights of the Child provides that

> "1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.
>
> 2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.".

In English law section 1 of the Children Act 1989 obliges a court considering whether to make, vary or discharge a "section 8 order" (ie a residence order, contact order, specific issue order or prohibited steps order), in any case where the application is opposed, to have regard to

> "(3)(a) the ascertainable wishes and feelings of the child concerned (considered in the light of his age and understanding)".

Under the existing law and practice in Scotland the views of a child who is able to form his or her own opinion are frequently taken into account by a court deciding a dispute about custody or access. The views of a minor child (of or above the age of 12 in the case of a girl, 14 in the case of a boy) have always been regarded as particularly important[1] but nowadays no rigid line is drawn at these ages and the views of younger children may also be taken into account.[2]

5.25 We think that it would be desirable in principle, particularly in view of article 12 of the United Nations Convention, to provide expressly by statute that the views of a child who is capable of forming his or her own views, and who wishes those views to be considered, should be taken into account by a court before making any order relating to parental responsibilities or rights, guardianship or the administration of a child's property, due weight being given to those views in accordance with the age and maturity of the child. We also think that it would be useful, as was suggested by the Scottish Child Law Centre, to have a presumption that a child of the age of 12 years or more is capable of forming his or her own views and is sufficiently mature to be able to express a reasonable view on matters affecting him or her. This would not only reflect in a statutory, non-discriminatory form the long-standing Scottish approach to the views of minors above the age of puberty but would also, and more importantly, recognise the actual capacities of most young people in that age group.[3] The presumption would not be intended, however, to discourage courts from having regard to the clearly expressed views of children below the age of 12 who are capable of forming their own views.

5.26 We are anxious that any statutory provisions on taking the child's views into account should not lead to any unnecessary increase in the complexity and expense of court proceedings. We have noted that it is only in *opposed* proceedings for a "section 8 order" that a court is bound, under the Children Act 1989, to have regard to, among other things, the ascertainable wishes and feelings of the child. We considered whether we should recommend a similar solution in Scotland. However, the fact that the two adult parties to, say, a divorce action are content with proposed arrangements for the child does not necessarily mean that it is any less important to have regard to the child's views. We have heard of one recent case in Scotland where access arrangements were agreed between the mother and the father but where the child wished the court to know that he had a well-founded objection to the actual form of access contemplated, although he was anxious to maintain contact with the absent parent by other means. There are many cases in which evidence of the child's views is before the court even although the application relating to parental rights ends up by being unopposed. It seems to us that it would be difficult to justify a provision which appeared to regard the child's views as of less importance merely because an application was, or ended up being, unopposed. The child is the central figure in these matters. He or she is the person most directly affected. At the same time we do not think that it would be realistic to propose a solution in which separate legal representation had to be arranged for a child

1. See eg *Harvey* v *Harvey* (1860) 22 D 1198 (boy of 14, girl of 15); *Flannigan* v *Inspector of Bothwell* (1892) 19 R 909 (girl of 13); *Morrison* v *Quarrier* (1894) 21 R 1071 (girl of 12); *Fisher* v *Edgar* (1894) 21 R 1071 (girl of 12). It should be noted that expressing a view on a matter affecting one's upbringing is not entering into a transaction and is not affected by the Age of Legal Capacity (Scotland) Act 1991.
2. See eg *Pow* v *Pow* 1931 SLT 485 (girl of 10, boy of 8); *Hannay*, 1947 SLT (Notes) 55 (boy of 12); *Johnson* v *Johnson* 1972 SLT (Notes) 15 (six children aged 7 to 14); *Blance* v *Blance* 1978 SLT (Notes) 74 (boys of almost 12 and 13); *O'Hogan* v *O'Hogan* 1989 GWD 8-319 (girl of 11); *Russell* v *Russell* 1991 SCLR 429 (girl of 6). *Fowler* v *Fowler* 1981 SLT (Notes) 9 and 78 (girl of 10); *Mackenzie* v *Hendry* 1984 SLT 322 (girl of 8); *Mirza* v *Mirza* 1990 GWD 40-2303 (boy of 11).
3. There is evidence that many children reach adult levels of cognitive development between the ages of 12 and 14. See Piaget "Intellectual Evolution from Adolescence to Adulthood", Human Development 15 : 1–12 (1972); Conger and Peterson, *Adolescence and Youth, Psychological Development in a Changing World* (3rd ed 1984) pp158–173; Melton, Koocher and Saks, *Children's Competence to Consent* (1983) esp at pp245–246. See also Freeman, *The Rights and Wrongs of Children* (1983) p46.

in every case where a court was considering an application relating to parental responsibilities and rights. However attractive such an idea may be in theory it would certainly be ruled out on grounds of cost to the legal aid fund. There would be similar objections to any solution which made a report on the child's views mandatory in every case. Certainly, however, a child with independent views should be able to intervene in the proceedings if he or she wishes to and should, as the United Nations Convention requires, have an opportunity to be heard. These are matters for rules of court but we think that it would be helpful if they made express provision for an appropriate procedural mechanism (for example, by lodging a minute) whereby a child who wishes his or her views to be put directly before the court can ensure that this is done.[1] In many cases, however—indeed probably in the vast majority of cases—the child would not wish to intervene in the proceedings by minute or otherwise. Under the existing law and practice the views of the child can often be ascertained by the court from the evidence presented in the case, and from any report which is ordered, without the child having to be separately represented. We see no reason why that should not continue to be the case.

5.27 We would not wish any new rule to be seen as forcing a child to express a view or to choose between parents. Many children would not wish to be placed in that position.[2] We do not believe that a new statutory rule requiring the views of a mature child to be taken into account, where those views are before the court, would increase the pressure on children or require any change in the approach to be taken by anyone interviewing a child in order to prepare a report for the court. The following advice by an experienced court welfare officer working in England would be as useful and important under the new law as under the old.[3]

> "The [person preparing the report] must take care not to add to the child's burden by appearing to ask him to choose between the conflicting demands of his parents. His views may be invited, in due recognition of the fact that he is the person most directly affected by the proceedings, and that as such he has the right to be heard should he so wish. He should not, however, be forced into the position in which he feels compelled to state a preference and neither, in the event of his doing so, should he be permitted to assume that this will be the determining factor in the court's adjudication. Many a child will feel that he has been relieved of an intolerable burden when it is made clear to him that the responsibility for the final decision does not rest with him alone."

5.28 There is a danger that young children will be unduly influenced by one parent and persuaded to express a view which is not genuinely their own. This danger is well recognised by judges and by those preparing reports for the court and can be taken into account.[4] The proposed new rule should not affect the position in this respect.

5.29 Our recommendations on taking the child's views into account are as follows.

34.(a) Rules of court should ensure that a child who is capable of forming his or her own views and who wishes to have his or her views put directly before a court in any proceedings relating to parental responsibilities or rights, or guardianship or the administration of the child's property, has a readily available procedural mechanism for doing so.

(b) In considering whether to make an order relating to parental responsibilities or rights, or guardianship or the administration of a child's property a court should be required to give due consideration to any relevant views of the child concerned which are properly before it, taking account of the child's age and maturity.

(c) Without prejudice to the generality of the rules recommended above, it should be presumed that a child of or above the age of 12 years is capable of forming his or her own views and has sufficient maturity to express a reasonable view.

(d) The new rules recommended above are not intended to require a child who is not an independent party to the proceedings to be separately legally represented.

(Draft Bill, clause 12(5) and (6).)

Duty to consider arrangements for children

5.30 A court is under a duty, subject to certain qualifications, not to grant a decree of divorce, nullity or separation until it is satisfied as to the arrangements made for any children of the marriage under the age of 16. The duty is imposed by section 8 of the Matrimonial Proceedings (Children) Act 1958. Its main provisions are as follows.

1. There is at present no express provision of general application in the Rules of Court or sheriff court rules entitling a child affected by proceedings relating to parental rights to intervene, although it is possible that general discretionary powers could be used to permit this to be done. *Cf Smith* v *Smith* 1964 SC 218 and Rules of Court 164 and 165. See also *Morrison* 1943 SC 481, where it was held that a boy of 14 was entitled to be heard on the question of his custody and should be cited as a respondent to a petition for custody.
2. See Mitchell, *Children in the Middle* (1985).
3. Wilkinson, *Children and Divorce* (1981) pp106–107.
4. *Cf Cosh* v *Cosh* 1979 SLT (Notes) 72.

"8—(1) Subject to the provisions of this section, in any action for divorce, nullity of marriage or separation the court shall not grant decree of divorce, nullity of marriage or separation unless and until the court is satisfied as respects every child for whose custody the court has power to make provision in that action—

(a) that arrangements have been made for the care and upbringing of the child and that those arrangements are satisfactory or are the best which can be devised in the circumstances; or

(b) that it is impracticable for the party or parties appearing before the court to make any such arrangements.

In this subsection 'child' does not include a child with respect to whom the court has made an order under section 13(6) or 14(2) of the Family Law Act 1986 [ie declining or refusing jurisdiction because custody etc is to be dealt with or has been dealt with by another court].

(2) The court may, if it thinks fit, proceed to grant decree of divorce, nullity of marriage or separation without observing the requirements of the foregoing subsection if it appears that there are circumstances making it desirable that decree should be granted without delay and if the court has obtained a satisfactory undertaking from either or both of the parties to bring the question of the arrangements for the children before the court within a specified time."

5.31 This provision was based on a recommendation of the Royal Commission on Marriage and Divorce which reported in 1956.[1] It reflects a very widespread and continuing concern about the welfare of children when a marriage breaks down. The Royal Commission's main concern was "the desirability of bringing home to the parties to the divorce suit their continuing parental responsibility."[2] The provision in section 8 can, however, be criticised on the ground that the time of the legal divorce is rather late for bringing home to the parties their responsibilities for their children. The interests of the children should have been considered before words were said, acts were done and decisions were taken which led to the breakdown of the relationship. By the time the marriage has broken down and a legal divorce is being sought, perhaps years after the parties have separated, the damage has been done. The provision in section 8 can also be criticised on the ground that it places a duty on courts without giving them the means of fulfilling it.[3] It may raise unrealistic expectations about what can be achieved. In practice there is no way in which a court can be fully satisfied that the arrangements for children are satisfactory or are the best which can be devised in the circumstances. However, to attempt to rectify this by, for example, providing for an independent welfare report in all cases, even if there is no dispute about parental responsibilities or rights and no application before the court relating to them, would be an extremely expensive and wasteful use of resources.

5.32 In England and Wales the equivalent of section 8 of the 1958 Act is section 41 of the Matrimonial Causes Act 1973. This used to be essentially the same as section 8. However, it has been replaced by a new, and more realistic, version.[4] The new version of section 41, as substituted by the Children Act 1989, begins as follows.

"—(1) In any proceedings for a decree of divorce or nullity of marriage, or a decree of judicial separation, the court shall consider—

(a) whether there are any children of the family to whom this section applies; and

(b) where there are any such children, whether (in the light of the arrangements which have been, or are proposed to be, made for their upbringing and welfare) it should exercise any of its powers under the Children Act 1989 with respect to any of them.

(2) Where, in any case to which this section applies, it appears to the court that—

(a) the circumstances of the case require it, or are likely to require it, to exercise any of its powers under the Act of 1989 with respect to any such child;

(b) it is not in a position to exercise that power or (as the case may be) those powers without giving further consideration to the case; and

(c) there are exceptional circumstances which make it desirable in the interests of the child that the court should give a direction under this section,

it may direct that the decree of divorce or nullity is not to be made absolute, or that the decree of judicial separation is not to be granted, until the court orders otherwise."

The Children Act 1989 provides elsewhere that the court can make certain orders relating to children even though no application for them has been made.[5]

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1. Cmnd 9678, paras 360–428.
2. *Ibid* para 377.
3. See the Report of the Royal Commission on Legal Services in Scotland (Cmnd 7846, 1980) vol 1, pp157–160.
4. Children Act 1989, Sch 12 para 31.
5. Children Act 1989, s10(1)(b).

5.33 The solution adopted in the Children Act 1989 is based on a recommendation of the English Law Commission who had found on consultation that there was a large measure of support for the idea of substituting a duty to consider the arrangements proposed for the duty to be satisfied. As the Commission observed,

> "requiring the court to find the arrangements satisfactory may be imposing higher standards on those who divorce than on those who remain happily married."[1]

We agree with that observation. Indeed section 8 intervenes more in the child care arrangements of those who divorce than of those who remain unhappily married but live apart: it also treats those who marry and divorce as being more in need of intervention than those who cohabit and then split up. The interventionist philosophy of section 8 is fundamentally at variance with the non-interventionist philosophy of the Children Act 1989 and it is not surprising that it was replaced by that Act.

5.34 In the discussion paper we suggested that section 8 of the 1958 Act should be replaced in Scotland by a provision on the lines of the one introduced by the Children Act, and set out in paragraph 5.32 above. Most of those who commented agreed with this suggestion. Only four disagreed. The only reasoned objection was that a provision on the lines proposed would probably make it necessary to appoint a reporter in every divorce case involving children under the age of 16 so that the court could be fully informed. This is certainly not the intention and it is difficult to see why this result should follow from the lesser duty to consider whether to make an order when it does not follow at present from the much more onerous duty to be satisfied as to the arrangements proposed. However, it would be easy to meet this objection by making it clear in the statute that the court's duty is to consider, in the light of the information before it, whether to exercise any of its powers. The evidence in a divorce action would be required, as at present, to include full information as to the arrangements made or proposed for the children.[2]

5.35 We think that a more modest duty, as now introduced in England and Wales, would be more realistic and less open to criticism than the duty to be satisfied imposed by section 8 of the 1958 Act. It would be necessary to give the courts power to make orders even if they were not applied for. This is consistent with a child-centred approach to parental responsibilities and rights, although no doubt it would be rare for this power to be exercised. We recommend later, following a recommendation of the Scottish Child Care Law Review Group, that the court should have a power in certain circumstances to refer a case to the reporter to the children's panel.[3] That power is perhaps more likely to be used by a court than a power to make, say, a contact order which has not been requested, but the idea that a parent has a certain responsibility to maintain reasonable contact with his or her child means that the latter type of order must at least be kept in mind as a possibility. We recommend that

35. Section 8 of the Matrimonial Proceedings (Children) Act 1958 (court's duty in relation to arrangements for children) should be replaced by a provision, on the lines of section 41 of the Matrimonial Causes Act 1973 as substituted by the Children Act 1989, requiring the court in an action for divorce or nullity of marriage, to consider

(a) whether there are any children of the family under the age of 16 and

(b) if so, whether the court should make any order relating to them even if none has been applied for by the parties.

(Draft Bill, clause 14. See also clause 12(2)(a).)

5.36 We suggested in the discussion paper that "child of the family" for the above purpose should mean any child of both the parties to the marriage and any other child, not being a child placed with those parties as foster parents by a local authority or voluntary agency, who had been treated by both of those parties as a child of their family. This definition is slightly wider than the existing definition which refers only to children of both parties or children *of one party* who have been *accepted* by the other as children of the family. The proposed new definition would cover, for example, a case where a young widow with two young stepchildren (the children of her deceased husband) in her care remarries and then divorces some years later, while the children are still under 16. Under the existing definition the children would not be within the scope of the court's duty. Under the new definition they would be. The word "treated" also has the advantage of introducing a more factual test than that implied by the word "accepted" which leaves scope for legalistic arguments about what is meant by acceptance.[4] In England and Wales the "accepted" test was replaced by the "treated" test many years ago,[5] because of difficulties with the concept of acceptance.[6] The new

1. Law Com No 172 (1988) para 3.10.
2. See the practice notes on affidavit evidence in undefended divorce actions in the Court of Session, 11 April 1978, para 11 (Parliament House Book at C 521) and corresponding practice notes for the sheriff courts (Parliament House Book at D 606 and D 1004)
3. See para 5.43 below.
4. See eg *Bowlas* v *Bowlas* [1965] P 450; *Holmes* v *Holmes* [1966] 1WLR 187; *R* v *R* [1968] P 414; *Dixon* v *Dixon* [1968] 1WLR 167; *B* v *B and F* [1969] P 37; *P* v *P* [1969] 1WLR 898; *Kirkwood* v *Kirkwood* [1970] 1WLR 1042; *Snow* v *Snow* [1972] Fam 74.
5. Matrimonial Causes Act 1972, s52.
6. See cases in last footnote but one.

test seems to have worked well and has been continued, with only a minor amendment, by the Children Act 1989.[1] On consultation there was some difference of opinion. Some respondents obviously thought that there would be little difference between the two tests in practice (which is true) and had no preference. Others expressed a preference for the existing test, without giving reasons. Most, however, agreed with the suggested new test. The Law Society of Scotland suggested a composite test "treated, accepted or resident with" but we think that it would be unnecessary to have both "treated" and "accepted" and that "resident with" could be too weak. A friend of the family could be resident with the couple on a purely temporary basis. One or two respondents thought that foster children placed by local authorities or voluntary agencies should perhaps be included. The reason for excluding them is that an outside agency is already supervising their welfare and there is therefore no need to add another layer of intervention. Having taken all these comments into account, we recommend

36. For the purposes of the preceding recommendation "child of the family" in relation to the parties to a marriage should mean

(a) a child of both of those parties; and

(b) any other child, not being a child who is placed with those parties as foster parents by a local authority or voluntary organisation, who has been treated by both of those parties as a child of their family.

(Draft Bill, clause 14(4).)

Effect of orders

5.37 The Children Act 1989 provides that

> "Where the court makes a residence order in favour of any person who is not the parent or guardian of the child concerned that person shall have parental responsibility for the child while the residence order remains in force.".[2]

It was strongly suggested to us on consultation that a similar provision would be useful in Scotland and that if a court decided that a child was to live with, say, a grandmother it was entirely appropriate that the grandmother should have parental responsibilities and rights. In particular, the right of legal representation should go with a residence order. We agree with this suggestion. However, we think that it would be better not to talk of a residence order "in favour of" someone. That re-introduces the idea of winners and losers which the new terminology seeks to abandon. We recommend that

37. Where a court makes a residence order to the effect that a child is to live with a person who is not a parent or guardian of the child concerned, that person should have parental responsibilities and rights in relation to the child while the residence order is in force.

(Draft Bill, clause 13(2).)

5.38 The Children Act 1989 goes on to provide that the person with parental responsibility by virtue of this provision does not have the right to consent to adoption or to appoint a guardian. This is necessary in England because of the very wide definition of parental responsibility, which includes all statutory and common law parental rights.[3] It would not be necessary in Scotland because of the more precise definitions which we have recommended.

5.39 An important part of the general approach to parental responsibilities and rights which we are recommending is an emphasis on the point that parents remain parents even if they can no longer live together or live with the child. Court orders should interfere with this position to the minimum necessary extent. We therefore suggested in the discussion paper that an order granting any parental right to a person should deprive any other person of any parental right only so far as the order expressly so provides and only to the minimum extent necessary to give effect to the order. We had custody orders in mind at the time. The new emphasis on residence orders should meet many of our concerns about the perceived effect of custody orders in cutting out one parent from the child's life. We would hope, for example, that it would be clear to all concerned that an order to the effect that a child should live with one parent did not deprive the other parent of his or her right to have reasonable contact with the child. However, even in relation to residence orders the principle of minimum necessary interference with parental responsibilities and rights seems to us to be important. An order that a child should live with a grandmother, for example, should give the grandmother the necessary responsibilities and rights but should not deprive the child's parents of their responsibilities and rights unless this is actually intended, in which case this should be expressly stated in the order. Most consultees agreed with our original suggestion and, although the context has now changed, we think the principle remains important. The

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1. The current definition of a child of the family in relation to the parties to a marriage is
   "(a) a child of both of those parties; and
   (b) any other child, not being a child who is placed with those parties as foster parents by a local authority or voluntary organisation, who has been treated by both of those parties as a child of their family."
2. S12(2).
3. Children Act 1989, s3.

availability of a non-exclusive package of parental responsibilities and rights, conferred in a way which is as non-threatening to the absent parent as possible, could be particularly useful for step-parents. Under the existing law step-parents who want some legal recognition of the parental role they actually play often feel obliged to apply for adoption. This has to be done jointly with the spouse (who is already a parent) and the effect is not only to deprive the absent parent of all parental rights but also to convert the other real parent into an adopter. This is clearly an excessive legal response to a commonly felt need. Under our proposals the parent and step-parent could simply apply for a residence order confirming the arrangement that the child is to live with them. This would leave both the child's parents with their full parental responsibilities and rights but would give the step-parent parental responsibilities and rights in addition. It might not be the perfect answer to the step-parent's legal problems in all cases but it could be a sufficient answer in many cases. The important feature would be the non-exclusive nature of the order. We recommend that

38. A court order by which any person acquires any parental responsibility or right should deprive any other person of any parental responsibility or right only in so far as the order expressly so provides and only to the extent necessary to give effect to the order.

(Draft Bill, clause 13(1).)

5.40 The Children Act 1989 provides that a residence order in favour of one of two parents who both have parental responsibility ceases to have effect if the parents live together for a continuous period of more than six months.[1] A contact order which requires the parent with whom a child lives to allow the child to have contact with the other parent also ceases to have effect, under the Children Act 1989, if the parents live together for a continuous period of more than six months.[2] We asked in the discussion paper whether there would be support for the introduction of similar provisions in Scotland. There was only limited support on consultation. Many respondents saw no need for such provisions. Some thought they would be harmful if, say, the couple separated again after 7 months. It was pointed out that any time limit would be arbitrary. We are not convinced that provisions of this type are necessary and, given the mixed reaction on consultation, make no recommendation for their introduction.

5.41 There was unanimous agreement on consultation with our provisional view that there was no need to introduce in Scotland provisions equivalent to those in section 13 of the Children Act 1989 which restrict any change in a child's surname or removal of the child from the United Kingdom when a residence order is in force with respect to that child. So far as change of surname is concerned, this could be dealt with in Scotland by means of a specific issue order relating to parental rights which include the right to control the upbringing of a young child and therefore the name by which he or she is known.[3] We do not think that anything more is needed. There is a danger of making excessively legalistic a matter which has always been regarded as one of usage. Nor do we think that the existence of a residence order ought to bring a special rule into operation. Many separated parents will not have a residence order. This is a good thing, because unnecessary court orders are to be discouraged, and yet problems about change of name could arise equally easily in such situations. We do not recommend any change in Scots law. So far as removal from the United Kingdom is concerned, Scottish courts already have wide powers to grant interdict or interim interdict prohibiting the removal of a child from the United Kingdom or any part of the United Kingdom.[4] Breach of such a prohibition by a person connected with the child is a criminal offence.[5] Moreover, under the Child Abduction Act 1984 it is an offence for a person connected with a child to take the child out of the United Kingdom without the appropriate consent if there is an order of a court in the United Kingdom awarding custody of the child to any person. The draft Bill extends that to include a reference to a residence order in respect of a child.[6] Given the existing provisions and the response on consultation we make no recommendation for new Scottish provisions equivalent to section 13 of the Children Act 1989.

Avoidance of delay

5.42 The Children Act 1989 contains certain provisions designed to avoid delay in proceedings relating to the residence or upbringing of children.[7] While we have every sympathy with the objective, our view is that this issue, which is essentially procedural, is best dealt with at the level of rules of court. We are aware that the courts already give priority to custody proceedings and that they make considerable efforts to dispose of such cases as expeditiously as possible. We understand that certain amendments to rules of court designed to speed up the present timetable are already under consideration.

1. S11(5).
2. S11(6).
3. *Registration* of a change of surname is governed by s43 of the Registration of Births, Deaths and Marriages (Scotland) Act 1965. The consent of both parents is normally required if the child is under the age of 16.
4. Family Law Act 1986, s35(3) and (4).
5. Child Abduction Act 1984, s6(1)(b).
6. Sch 1, para 79.
7. S1(2) and s11.

Care and supervision orders

5.43 Under the existing law a court dealing with a divorce action, and certain other types of action, in which a child is involved has power to commit the care of the child to a local authority, or place the child under the supervision of a local authority.[1] This is an anomalous route into care or supervision. In their recent report the Child Care Law Review Group concluded that it was undesirable for children in care to be subject to "multiple legislation" and that the children's hearings system, the normal source of supervision requirements, offered a better way of deciding whether a child should be subject to local authority care or supervision. They recommended that, where a court in matrimonial, guardianship or adoption proceedings considered that grounds existed for compulsory measures of care and that the child might be likely to be caused unnecessary suffering or serious impairment to health, development or well-being because of lack of parental care, the court should be able to certify such grounds as established and to remit the case to the reporter to consider arranging a children's hearing.[2] We agree with the broad principle behind this recommendation and have included appropriate provisions in the draft Bill to be appended to this report.[3] The provisions do not follow the Child Care Law Review Group's recommendation exactly as we think it would be too restrictive to require both that grounds exist *and* that the child should be likely to be caused unnecessary suffering or serious impairment to health. If any appropriate grounds for compulsory measures of care exist that ought, in our view, to be sufficient to trigger the court's power, given that it is only a power. By "appropriate grounds" we mean grounds other than (a) the commission of an offence by the child or (b) the grounds in paragraphs (h) or (i) of section 32(2) of the Social Work (Scotland) Act 1968 (which presuppose that the case has already been brought to the notice of a children's hearing or local authority). We wish to stress that clause 15 of the draft Bill (which deals with this matter) should be regarded as a provisional or interim solution pending the outcome of the government's consideration of the legislative changes which may be required as a result of the Scottish Child Care Law Review.

1. Matrimonial Proceedings (Children) Act 1958 ss10 and 12; Guardianship Act 1973, s11; Adoption (Scotland) Act 1978, s26.
2. Paras 19.1 to 19.6 and Recommendation 81. There are similar provisions in ss168 and 364 of the Criminal Procedure (Scotland) Act 1975 and in s44 of the Education (Scotland) Act 1980.
3. Clause 15. This clause merely provides for the matter to be referred to the reporter. We anticipate that the legislation to follow on the Child Care Law Review will specify the action which the reporter is to take on receiving the reference.

Part VI Private international law relating to parental responsibilities and rights etc.

Introduction

6.1 Questions of jurisdiction and recognition and enforcement of judgments in relation to orders relating to parental rights are very largely regulated by recent statutes which could not readily be changed without negotiation with the other countries involved. In this part of the report we confine ourselves primarily to a discussion of choice of law.[1] Our concern is to suggest simple, coherent and acceptable answers to the following questions.

(a) Which law should determine whether a person has parental responsibilities and rights?

(b) Which law should determine whether a person is the guardian of a child and regulate the legal consequences of guardianship?

(c) Which law should govern the administration of a child's property?

We are concerned with parental responsibilities and rights as defined earlier in this report, and not with such topics as aliment and succession.

Parental responsibilities and rights

6.2 In matters relating to responsibilities and rights of a personal or family nature the traditional connecting factor in Scots law is the law of the domicile.[2] In relation to jurisdiction and recognition of judgments in matters relating to children, however, the law of the domicile has been receding and the law of the child's habitual residence advancing.[3] We think that a similar change ought to be reflected in the choice of law rules. If a family is habitually resident in Scotland then it seems reasonable and proper that Scots law should regulate the long-term parental responsibilities and rights even if the persons concerned retain, by virtue of a clearly expressed intention to return, a domicile in another country.[4] Habitual residence seems a better connecting factor than mere presence, except in relation to laws designed for immediate protection, such as those on corporal punishment.

6.3 The existing law is not very helpful in cases where the parents and the child have different domiciles or habitual residences. There is an absence of modern authority and the older authorities date from a time when the father had all or most of the relevant rights and responsibilities and when his domicile determined the domicile of the whole family. The type of case which could arise nowadays is as follows.

> A father is habitually resident and domiciled in, and is a national of, country A. By the law of country A he alone has parental responsibilities and rights and the mother has none. The mother and child are domiciled and habitually resident in Scotland. By the law of Scotland she has parental responsibilities and rights as well as the father and can exercise them alone. The mother wishes to act as the child's legal representative in relation to medical treatment of a non-urgent nature and in relation to a legacy left to the child by a maternal relative. Can she do so?

We suggest that in this type of situation the decisive factor ought to be the habitual residence of the child. We are aware that English law appears to apply the *lex fori* in such matters, whenever an English court has jurisdiction, but this seems an inadequate solution. We are primarily concerned with cases where there are no court proceedings and hence no forum: once a case comes before a court then, no matter who has parental responsibilities and rights, the welfare of the child becomes the paramount consideration.[5] There was almost unanimous agreement with the provisional suggestions which we made in the discussion paper. One or two consultees were concerned about the position which would arise if the child became habitually resident in a country with less liberal laws than ours but choice of law rules have to accept that the law chosen may be regarded by one party or the other as less beneficial than certain other laws. We recommend that

1. Except in relation to a few aspects of administration of a child's property. See para 6.7 below.
2. Fraser, *Parent and Child* (3rd edn, 1906) p731; Anton, *Private International Law*, (2d edn) pp121–122.
3. See Family Law Act 1986, ss9 and 26.
4. Some modern authors in Scotland take the view that the law of the country where the child and parents are "living" or "residing" already governs important parental rights and duties. See Walker, *Principles* (4th edn, 1988) vol 1 p168; Leslie in *Stair Memorial Encyclopaedia* vol 17, p75.
5. Law Reform (Parent and Child) (Scotland) Act 1986, s3(2).

39.(a) Whether a person has, by operation of law, parental responsibilities and rights (as these terms are used in this report) in relation to a child, and the nature and extent of those responsibilities and rights, should depend on the law of the child's habitual residence.

(b) However, the applicability of any rules designed for the immediate protection of the child should depend on the law of the place where the child is for the time being.

(c) These rules should be subject to the rule that in court proceedings in Scotland relating to parental responsibilities and rights the welfare of the child is the paramount consideration.

(Draft Bill, clause 17(1)(2) and (3).)

Guardianship

6.4 The separation of guardianship from parental rights, and the new quasi-parental role of the guardian, which we suggest in this report, require a new look to be taken at choice of law rules. The most general rules of the existing law are that whether a person is guardian of a child and the extent of his or her rights (except in relation to immoveable property, as noted below) depend on the law of the country where the child is domiciled.[1] This seems more or less suitable for the new rules recommended in this report, although we suggest that the connecting factor should be the child's habitual residence. It seems reasonable that the question whether a person is validly constituted guardian (eg by will, or by a court, or by operation of law on the death of a parent) should depend on the law of the child's habitual residence at the time of the appointment or constitution but that the responsibilities, powers and rights of the guardian at any time should depend on the law of the child's habitual residence at that time. A foreign guardian who comes to Scotland with his ward, should have, while habitually resident with the child here, the responsibilities and rights conferred on guardians by Scottish law. Similarly, if a Scottish parent who has gone to live in another country appoints a friend or relative in Scotland as guardian, and the child comes to Scotland to live with the guardian on the parent's death, it would be more convenient that the responsibilities and rights of the guardian should be governed by Scottish law rather than the law of the country where the child was habitually resident when the parent died. The position of the guardian is the same as that of a parent and, as in the case of a parent, we would suggest that the applicability of rules designed for the immediate protection of the child should depend on the law of the place where the child is for the time being. There was almost unanimous agreement on consultation with the approach suggested here.

6.5 There is authority to the effect that the guardian of a child domiciled abroad may not deal with a child's immoveable property in Scotland even if he or she has power to do so by the law of the child's domicile.[2] This seems an old-fashioned and inconvenient rule. If a person is recognised as the child's guardian and legal representative, and if by the law governing his or her powers he or she can deal with immoveable property anywhere, then there seems to be no reason why he or she should not be able to deal with immoveable property in Scotland.

6.6 We recommend that

40.(a) The question whether a person is validly appointed or constituted guardian of a child should depend on the law of the child's habitual residence at the time the appointment is made (which, in the case of a testamentary appointment, should be regarded as the date of the appointer's death) or the constituting event occurs.

(b) The responsibilities and rights of a guardian of a child at any time should depend on the law of the child's habitual residence at that time.

(c) However, the applicability of any rules designed for the immediate protection of the child should depend on the law of the place where the child is for the time being.

(d) The rules recommended in paragraphs (b) and (c) should be subject to the rule that in court proceedings in Scotland relating to guardianship the welfare of the child is the paramount consideration.

(Draft Bill, clause 17.)

Administration of children's property

6.7 We are concerned here only with cases not already covered by the rules on the responsibilities and rights of parents and guardians. We are therefore concerned primarily with the reporting duty recommended earlier[3] and with the jurisdiction of the court to make orders relating to a child's property. We recommend that

41.(a) The reporting duty recommended in recommendation 21 above should apply to any person who proposes to hand over property to, or to be administered by, the parent or guardian of a child habitually resident in Scotland.

1. *Cf Sawyer* v *Sloan* (1875) 3 R 271; *Seddon* (1891) 19 R 101; (1893) 20 R 675; *Atherstone's Trs* (1896) 24 R 39; *Elder* (1903) 5 F 307; *McFadzean* 1917 SC 142.
2. *Ogilvy* v *Ogilvy's Trs* 1927 SLT 83 (guardian of child domiciled abroad could not grant a discharge for conveyance of Scottish heritage to child); *Waring* 1933 SLT 190.
3. Para 4.17 above.

(b) The Court of Session should have jurisdiction to make orders relating to the administration of a child's property

(i) if the child is habitually resident in Scotland or

(ii) if the property is situated in Scotland.

(c) A sheriff should have jurisdiction to make such orders

(i) if the child is habitually resident in the sheriffdom or

(ii) if the property is situated in the sheriffdom.

(Draft Bill, clause 18.)

Part VII Marriage by cohabitation with habit and repute

Introduction

7.1 Most of the law on the constitution of marriage is statutory.[1] However, the law on marriage by cohabitation with habit and repute still depends on the common law. In the context of a proposed codification of family law the question therefore arises whether this form of marriage should be left to depend on the common law, put into statutory form, with or without changes, or abolished.

Present law

7.2 If a man and a woman who are free to marry each other cohabit as husband and wife in Scotland for a considerable time and are generally regarded as being husband and wife they are presumed to have consented to be married, even if only tacitly, and, if the presumption is not rebutted, will be held to be married by cohabitation with habit and repute.[2] Although the marriage results from the combination of mutual consent and the outward elements of cohabitation and repute, without the need for a court decree, in practice a court decree of declarator is sometimes necessary before third parties will accept that the requirements for this type of marriage have been met. There are never more than a few declarators of marriage by cohabitation with habit and repute per year.[3] Section 21 of the Marriage (Scotland) Act 1977 requires the principal clerk at the Court of Session to send to the Registrar General for Scotland details of any decree of declarator of marriage by cohabitation with habit and repute including "the date, as determined by the court, on which the marriage was constituted" so that the marriage can be registered. As a marriage by cohabitation with habit and repute exists independently of any court decree of declarator, it follows that third parties, such as the trustees of occupational pension funds, may choose to accept the evidence of a marriage without requiring a court decree to be obtained.[4] It also follows that there are, at any one time, a number of undeclared and unregistered marriages by cohabitation with habit and repute.

Problems in present law

7.3 The law on marriage by cohabitation with habit and repute gives rise to a number of difficulties. First, what is a sufficient length of cohabitation? No firm answer can be given. It was stated in the Inner House in 1909 that a period of 10 months was not enough.[5] More recently, however, a period of 10 months and 23 days was accepted as sufficient in the Outer House.[6] Secondly, what is sufficient reputation? Again no firm answer can be given. The fact that a few people know that the cohabitants have never been regularly married will not necessarily prevent a marriage,[7] but the repute of marriage must be "substantially unvarying and consistent".[8] Thirdly, when will the presumption of tacit consent be rebutted? Clearly the presumption will be rebutted if both parties deny, credibly, that they ever intended to get married.[9] Indeed, as both parties must consent, it should be sufficient if one party denies ever having had matrimonial intent, provided that he or she is believed.[10] The presumption will also be rebutted if the parties believed throughout the period of cohabitation that one of them was married to someone else, even if, unknown to the parties, that marriage had ended by death or divorce.[11] In theory the presumption ought to be rebutted if the parties thought that a regular ceremony was necessary for marriage and intended to go through such a ceremony at some time in the

1. See the Marriage (Scotland) Act 1977.
2. *Campbell* v *Campbell* (1866) 4 M 867 at p925; *Nicol* v *Bell* 1954 SLT 314 at p326. For a discussion of the origin and nature of cohabitation with habit and repute in Scots law see Clive, *Husband and Wife* (2nd edn 1981) pp59–76. The most recent reported example of this type of marriage is *Donnelly* v *Donnelly's Exr* 1992 SLT 13.
3. The average since 1961 has been between 3 and 4 a year. Annual Reports of Registrar General for Scotland.
4. Another consequence of the existence of the marriage, independently of a declarator, is that either spouse can raise an action for damages for the death of the other without first obtaining a declarator of marriage. See *Forbes* v *House of Clydesdale Ltd* 1987 SCLR 136.
5. *Wallace* v *Fife Coal Co* 1909 SC 682 at p686. See also *Low* v *Gorman* 1970 SLT 356.
6. *Shaw* v *Henderson* 1982 SLT 211.
7. *Ibid.* See also *Donnelly* v *Donnelly's Exr* 1992 SLT 13.
8. *Cunningham* v *Cunningham* (1814) 2 Dow 482 at p514. Cf *Petrie* v *Petrie* 1911 SC 360.
9. *Cf Bairner* v *Fels* 1931 SC 674.
10. In *Nicol* v *Bell* 1954 SLT 314 the man was not believed.
11. *Cf Lapsley* v *Grierson* (1845) 8 D 34; 1 HLC 498.

future.[1] In practice, however, judges have sometimes been prepared to hold a marriage by cohabitation with habit and repute established in this type of case.[2] The presumption of tacit consent may also be held to be rebutted by evidence of the bad terms on which the parties lived together.[3] There may, of course, be other situations where the presumption will be rebutted: it is all a question of evidence. A further problem is that of fixing the date of the marriage. There are cases and *dicta* which tend to push the date of the marriage back to the earliest possible date—for example, the date when cohabitation began or when an impediment to the marriage is removed—but, as a matter of logic, it seems odd to regard a marriage as constituted before the requirements for it (including a sufficient period of cohabitation in Scotland while the parties are free to marry) have been fulfilled.[4]

Assessment of present law

7.4 As a way of getting married, marriage by cohabitation with habit and repute has little to commend it. It is inherently vague and unregulated and causes difficulty and expense at a later stage. In reality this type of marriage is a way of conferring rights on some cohabitants, usually after the death of the other party to the relationship. It is as a protective mechanism for cohabitants that it must be judged.

7.5 One criticism of marriage by cohabitation with habit and repute as a protective mechanism for cohabitants is that it is not available to couples who have lived together without ever pretending to be married or acquiring the reputation of being married. This type of open cohabitation is increasingly common nowadays.[5] Whatever its merits as a protective mechanism in the past, marriage by cohabitation with habit and repute is an inadequate, and statistically insignificant, protection for cohabitants in the conditions now prevailing.

7.6 A second criticism of marriage by cohabitation with habit and repute as a protection for cohabitants is that, even among those who have had the reputation of being married, it operates in a capricious way because of the vagueness and uncertainty of the law and the emphasis on tacit consent. A cohabitant may lose protection simply because the couple were unaware that the man's prior marriage had been ended by divorce and continued to believe, throughout the period of cohabitation, that he was still married to his first wife. A person who thinks he is married to X cannot tacitly consent to marry Y. Much may depend on how a surviving cohabitant answers questions about the couple's attitude to a regular marriage. If he or she says "We intended to get married in a registrar's office but kept putting it off" it could be difficult, from a strictly logical point of view, to hold that there was a tacit consent to marriage.[6] An intention to get married in the future seems inconsistent with regarding oneself as married now.

7.7 A third, and possibly the most serious, criticism of marriage by cohabitation with habit and repute as a protective device is that it creates uncertainty and endangers subsequent regular marriages. It seems likely that in many cases of marriage by this method the couple never regard themselves as married at all, and that the idea of marriage first presents itself when the survivor consults a solicitor after the death of the other partner. People who do not think they are married do not think they need a divorce when they separate. The device of holding a couple to be actually married by cohabitation with habit and repute is therefore potentially dangerous. They may split up. One of them may marry someone else. That marriage will always be at risk from an attempt by the former cohabitant to establish a marriage by cohabitation with habit and repute. A woman could lose all her succession rights on the death of the man to whom she thought she had been married because another woman with whom her "husband" had formerly cohabited establishes a marriage by cohabitation with habit and repute.

Results of consultation

7.8 In the discussion paper we invited views on three options:

(1) retention unchanged,

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1. See *Wallace* v *Fife Coal Co* 1909 SC 682 at p686.
2. See eg *Shaw* v *Henderson* 1982 SLT 211 and the unreported case of *Doran* v *Lord Advocate*, Feb 13, 1975 referred to in Clive, *Husband and Wife* (2nd edn 1981) at p66, footnote 32.
3. *Cf Low* v *Gorman* 1970 SLT 356.
4. The cases are reviewed in Clive, *op cit* pp67–74.
5. See "Cohabitation in Great Britain—characteristics and estimated numbers of cohabiting partners" *Population Trends* (OPCS) Winter 1989) pp23–31. It is estimated that in 1986–87 9.4% of people in Scotland, who were single, separated or divorced, were cohabiting with a person of the opposite sex (p28). The interviewers for the General Household Survey have found that people are quite prepared to describe themselves as living together, without claiming to be married. *Ibid* p23. See also the report of the 1986 General Household Survey p23. There is clearly much less stigma attaching to cohabitation than formerly.
6. See *Wallace* v *Fife Coal Co* 1909 SC 682 at p686. Judges have, however, sometimes overcome this difficulty. See eg the cases of *Shaw* v *Henderson* and *Doran* v *Lord Advocate* referred to above. The rather odd result of holding a couple married by cohabitation with habit and repute even although they intended to have a regular ceremony is that, logically, they could not have had a valid regular marriage. They would already have been married and people who are married already cannot get married again, without an intervening divorce.

(2) retention with changes (for example, specification of a minimum period of cohabitation) and

(3) abolition.

Most of those who commented on this question supported abolition. The criticisms of the existing law—vagueness, uncertainty, arbitrariness, illogicality, discrimination against open and honest cohabitation, difficulties caused by not knowing whether there is or is not a marriage—were accepted and reinforced by further examples. There was hardly any support for the option of retaining but reforming the law on marriage by cohabitation with habit and repute. The few who supported retention generally did so on the footing that it would be premature to abolish this form of marriage until there had been some reform of the rights of cohabitants generally in private law. We deal with this topic later.[1] The results of consultation confirm us in our view that this form of marriage is an archaism and should be abolished for the future—although that should not affect any marriage already constituted by tacit consent coupled with the requisite cohabitation and repute before the date of commencement of the new legislation, even if no declarator had been obtained by the date of commencement.

Recommendation

7.9 We recommend that

42.(a) Marriage by cohabitation with habit and repute should be abolished as from the date of commencement of implementing legislation.

(b) Accordingly, it should no longer be possible to contract such a marriage after that date, but this would be without prejudice to the validity of any such marriage already contracted before that date (whether or not a declarator of marriage had been obtained).

(Draft Bill, clause 22.)

7.10 It is perhaps worth pointing out that abolition of marriages by cohabitation with habit and repute would have little or no effect on the legal position of children which, under Scots law, is generally exactly the same whether or not their parents are, or have been, married to each other.[2] The children of a cohabiting couple have, for example, the same rights of aliment against both parents, and the same rights of succession in relation to both parents and other relatives, as if the parents were married to each other. So far as social, as opposed to legal, effects are concerned, it seems doubtful whether there would be any social advantages for children in a marriage by cohabitation with habit and repute. If the parents have successfully passed themselves off as married in their community then the children probably stand to lose rather than gain by any embarrassing disclosures made in an action for declarator of marriage. If the parents have not successfully passed themselves off as married in their community then there is little hope of establishing a marriage by cohabitation with habit and repute.

7.11 It is also worth pointing out that abolition of this form of marriage would not affect any evidential value which long cohabitation and a reputation of being married may have in, for example, raising a presumption that a couple were married in a foreign ceremony of which records have not survived.[3]

7.12 In the past marriage by cohabitation with habit and repute has sometimes proved useful as a way of, in effect, validating void marriages. However, there is now express statutory provision for the validation of marriages in Scotland which would otherwise be void because of some formal defect, such as failure to give adequate notice.[4] Moreover, a court granting a declarator of nullity now has the same powers to make orders for financial provision as a court granting a decree of divorce.[5] If the invalidity of a long and apparently regular marriage comes to light only on the death of one of the partners then the other would have the right, if recommendations made later in this report are implemented, to apply as a cohabitant for a provision out of the deceased's estate and, in such circumstances, could expect a generous provision.[6]

7.13 Finally, we should note that there is an argument that the abolition of marriage by cohabitation with habit and repute would leave in existence an innominate class of irregular marriage by tacit consent[7] inferred from circumstances

1. See Part XVI below.
2. Law Reform (Parent and Child)(Scotland) Act 1986, s1. See also paras 2.36 to 2.52, above and paras 17.1 to 17.15 below.
3. See eg *Barclay* v *Barclay* (1849) 22 Scot Jur 127.
4. Marriage (Scotland) Act 1977, s23A (added by the Law Reform (Miscellaneous Provisions)(Scotland) Act 1980, s22(1)(d)). See also para 8.14 below.
5. Family Law (Scotland) Act 1985, s17.
6. See paras 16.24 to 16.37 below.
7. Irregular marriages by express declarations of present consent were abolished by s5 of the Marriage (Scotland) Act 1939.

other than promise *subsequente copula*[1] or cohabitation with habit and repute.[2] We express no view on the merits of this argument. If it is correct, the need for reform of the law on irregular marriages is even greater than we had supposed. Clause 21 of the draft Bill (which lays down certain formal requirements for any marriage entered into in Scotland after the new legislation comes into force) should prevent this argument from causing difficulty in the future.

1. Irregular marriages by promise *subsequente copula* were also abolished by s5 of the Marriage (Scotland) Act 1939.
2. Sellar, "Marriage by Cohabitation with Habit and Repute: Review and Requiem" (to be published in 1992 in a volume of essays in memory of Professor Sir Thomas Smith). Mr Sellar has kindly made this essay available to us in advance of publication. In it he concludes that "The true position under Scots common law then appears to be that declarator of marriage will be granted if there exist facts and circumstances from which consent to marriage can lawfully be inferred; such facts and circumstances will usually, but need not necessarily, include cohabitation with habit and repute.".

Part VIII Nullity of marriage

Introduction

8.1 We deal with private international law questions relating to marriage later.[1] In this part of the report, therefore, it is assumed that there are no foreign aspects to complicate matters: the marriage in question is celebrated in Scotland between parties who are domiciled in Scotland.

8.2 Some rules on nullity of marriage are already in statutory form in Scotland. Section 1(2) of the Marriage (Scotland) Act 1977 provides that a marriage is void if either party is under the age of 16 and section 2 provides that a marriage is void if the parties are within the prohibited degrees of relationship laid down in the Act. Section 23A of the same Act provides that the validity of certain marriages is not to be questioned on the ground of certain formal defects.[2] However, most of the rules on nullity of marriage still depend on the common law. One of the early reports of the English Law Commission was on nullity of marriage[3] and it led to the Nullity of Marriage Act 1971 (now consolidated in the Matrimonial Causes Act 1973). We have not engaged in a similar law reform project on nullity of marriage until now because it did not seem to us that it was of high priority. Problems are very infrequent in practice. However, a proposed codification makes it necessary to consider putting the existing law into statutory form. This provides a useful opportunity to reform some aspects of the present law—notably the law on sham marriages and the law on nullity for impotency—which are unsatisfactory. For the rest, not much more is envisaged than a restatement, with clarification of doubtful points where appropriate, of the existing common law. The proposals which we made, to this end, in the discussion paper proved uncontroversial.

Prior subsisting marriage

8.3 All that is required here is an enactment in statutory form of the existing rule of law that a marriage is void if either party to it is, at the time of the marriage, already married. As we have noted, we deal with private international law questions later.[4] We recommend therefore that

43. It should continue to be a ground of nullity of marriage that either party is at the time of the marriage already married.

(Draft Bill, clauses 20 and 21(1).)

Nonage

8.4 We are assuming for present purposes that the policy on the minimum age for marriage is unchanged since the Marriage (Scotland) Act 1977 was enacted. On this basis all that is required is a re-enactment of the existing rule that a marriage is void if either of the parties is, at the time of the marriage, under the age of 16. We recommend therefore that

44. It should continue to be a ground of nullity of marriage that either party is, at the time of the marriage, under the age of 16.

(Draft Bill, clauses 20 and 21(1).)

Parties of same sex

8.5 In the discussion paper we made the assumption that public policy in this country on the question of same-sex marriages was unchanged since the enactment of the Marriage (Scotland) Act 1977, section 5(4)(e) of which provides that there is a legal impediment to a marriage if both parties are of the same sex. Few of our respondents questioned this assumption. However, one or two suggested that the law should be changed so as to allow marriage between persons of the same sex. One or two others thought that this was a question which might have to be re-examined in

1. See Part XIV.
2. This section was inserted by the Law Reform (Miscellaneous Provisions) (Scotland) Act 1980. We consider later whether it could with advantage be slightly widened and strengthened. See para 8.14.
3. Law Com No 33, 1970.
4. See Part XIV.

the future but did not advocate change at the present time. Since the discussion paper was published, the question whether a genetically male transsexual, living life socially, physically and psychologically as a woman, has a right under the European Convention on Human Rights to marry a man has been considered by the European Court of Human Rights.[1] The court by a majority of 14 to 4 held that the denial by English law of such a right was not a violation of article 12 of the Convention (right to marry). Article 12 referred to the traditional concept of marriage between persons of opposite biological sex.[2] A dissenting opinion pointed out that several European states had acknowledged, subject to certain conditions, the right of a transsexual to marry someone of the opposite social sex but same biological sex. A transsexual who had undergone gender reassignment surgery, as the applicant had in this case, had no realistic possibility of marrying someone of the opposite biological sex and the only humane solution was to allow marriage with someone of the opposite social sex. This case gave rise to a good deal of comment in the media, much of it sympathetic to the case for same-sex marriages, at least where genuine transsexuals are concerned. We have some sympathy with the view that the existing law can operate in an inhumane way in certain situations and we agree with those consultees who suggested that this was a topic which might merit further consideration at some time in the future. However, we would clearly not be justified in recommending any change in the law on such a highly controversial matter in this report. We therefore recommend that, at least for the time being

45. It should continue to be a ground of nullity of marriage that both parties are of the same sex.
(Draft Bill, clauses 20 and 21(1).)

Prohibited degrees of relationship

8.6 The Marriage (Scotland) Act 1977 provides that a marriage is void if the parties are within the prohibited degrees of relationship set out in the Act.[3] In the case of blood relationships this means that a person cannot marry his or her parent, grandparent, or great-grandparent; child, grandchild or great-grandchild; brother or sister; uncle, aunt, nephew or niece.[4] We do not suggest any change in these rules.

8.7 In the case of relationships by marriage the only restrictions are on marriage with a former spouse's child, grandchild or parent,[5] and even in these cases the law was relaxed in 1986.[6] In the case of a former spouse's child or grandchild, marriage is now permitted provided that both parties are at least 21 years of age at the time of the marriage and

> "the younger party has not at any time before attaining the age of 18 lived in the same household as the other party and been treated by the other party as a child of his family."[7]

Whether this restriction is necessary or desirable is a question on which different views could be held, but it is not manifestly unreasonable and, as the law was reformed as recently as 1986, we do not think that this would be an appropriate time to re-open debate on this issue. In the case of a former spouse's parent, marriage is now permitted provided that both parties have attained the age of 21 and the marriage is solemnised

> "(a) in the case of a man marrying the mother of a former wife of his, after the death of both the former wife and the former wife's father;
>
> (b) in the case of a man marrying a former wife of his son, after the death of both his son and his son's mother;
>
> (c) in the case of a woman marrying the father of a former husband of hers, after the death of both the former husband and the former husband's mother;
>
> (d) in the case of a woman marrying a former husband of her daughter, after the death of both her daughter and her daughter's father."[8]

These restrictions seem odd and unreasonable. As we were beginning work on our discussion paper we were referred by a Member of Parliament to a case involving a constituent of his, where the restrictions had caused difficulty and distress.

8.8 The case involved a woman who divorced her husband and obtained custody of the children of the marriage. She was greatly supported in looking after the children by her former husband's father and mother. She in turn provided support when her ex-mother-in-law became ill. Some time after the death of the ex-mother-in-law the woman and her former husband's father decided they would like to marry each other but found that they could not because the

1. *Cossey* v *United Kingdom* ECHR 27 September 1990.
2. This was also the view of article 12 taken by the court, unanimously, in the earlier decision of *Rees* v *United Kingdom* ECHR 17 October 1986.
3. S2.
4. 1977 Act Sch 1, para 1.
5. Marriage (Scotland) Act 1977, Sch 1 paras 2 and 2A, as substituted by the Marriage (Prohibited Degrees of Relationship) Act 1986.
6. Marriage (Prohibited Degrees of Relationship) Act 1986.
7. Marriage (Scotland) Act 1977, s2(1A), as inserted in 1986.
8. 1977 Act s2(1B), as inserted in 1986.

woman's former husband was still alive. Section 2(1B) of the Marriage (Scotland) Act 1977 provides, as we have seen, that a marriage between a woman and the father of a former husband is permissible only

"after the death of both the former husband and the former husband's mother."

8.9 Other cases where the restrictions in section 2(1B) might seem even more unreasonable can readily be imagined. Suppose that a man aged 40 marries a woman aged 25 who has never known her father. The wife is killed in a road accident and, some time later, the man and his former wife's mother, who is closer to his own age, want to get married. Why should it matter whether the former wife's father, who might not even know that she ever existed, is alive or dead? What is the point of this restriction on a marriage between two people who are both unmarried and unrelated by blood? Or suppose that a man divorced his wife in 1970. She remarried and went to live in London, taking the son of the marriage with her. In 1977 the son married. He continued to live in London and saw very little of his father. In 1980 the son and his wife were divorced. In 1983 the son's former wife moved to Scotland. She and her former father-in-law began to see more of each other. They would now like to marry each other. Why should they have to wait until both of their former spouses are dead?

8.10 It is worth noting that a person can marry his or her former cohabitant's parent, without restriction. It is also worth noting that sexual intercourse between a person and the parent of his or her former spouse is not incest, so that in all the examples given the couple could cohabit as husband and wife without committing any offence. All that the law does is to prevent them from marrying each other.

8.11 Section 2(1B) is the result of an amendment introduced at the report stage in the House of Lords, at a time when the Bill in question did not yet extend to Scotland.[1] It was a compromise amendment designed to meet objections which had resulted in the defeat of an earlier proposal to allow people to marry the parent of a former spouse. The reasons for the rejection of the earlier proposal were that to allow such marriages

"would endanger roles within the family and would open up possible erotic overtones."[2]

The type of case which concerned the objectors was explained by Lord Meston as follows.[3]

"One can take a typical example. A young couple marry. They may go to live with the parents of, say, the young husband. There may be a weak, immature perhaps teenage daughter-in-law who may be very vulnerable to the influence of her father-in-law. There is a situation of proximity and dependency. If a relationship did develop between the young husband's wife and his father, there are two subsisting marriages which potentially would be ended by divorce."

The question which must be asked is whether the prohibition in section 2(1B) is likely to prevent this type of situation. Are the parties likely to know the law at the time when an attachment is developing? Even if they do, is that likely to prevent the attachment developing further? It must also be asked why this situation, unfortunate and distressing though it may be, is regarded as so much worse than any other situation in which an attraction between two married people results in the break-up of the two families? Why does the parent-in-law relationship itself justify a restriction? Would the situation be so much less distressful if the younger man were the older man's foster son or brother or nephew or business partner or close friend? Would it be so much less distressful if the young woman were the son's cohabitant rather than his wife?

8.12 These issues were considered in the report entitled *No Just Cause* by a group appointed by the Archbishop of Canterbury to look into the law of affinity in England and Wales.[4] A majority of the group's members referred to the fear that the removal of prohibitions might encourage the formation of attachments between parents-in-law and their sons-in-law or daughters-in-law, but did not feel that the law could prevent such cases arising. They pointed out that similar fears had been expressed in relation to the removal of earlier prohibitions, such as the former prohibition of marriage with the brother or sister of a former spouse, but that there was no evidence to suggest that the removal of these prohibitions had had any ill effects.[5] They did not accept that the removal of the remaining prohibitions on marriage with former in-laws would tend to undermine the family.[6] They thought that marriages between former in-laws would in practice be rare and that most people, particularly those with religious objections to them, might still prefer to avoid them but that this was not a reasonable argument for prohibiting the lawful marriage of such former in-laws as did wish to marry.[7] They concluded that the prohibition was based simply on tradition and could not now be justified on any logical, rational or practical ground.[8] The experience of other states where there had never been

1. See Parl Debs (HL) (1985–86) Vol 471 cols 885–892.
2. *Ibid* col 887. See also Vol 470 cols 957–960.
3. Parl Debs (HL) (1985–86) Vol 471 col 891.
4. The Report was published in 1984.
5. Para 100.
6. Para 101.
7. Para 102.
8. Para 221.

such a prohibition provided a strong and persuasive argument for abolishing the impediment.[1] A minority of the group recommended that the existing legal impediments to marriage between parent-in-law and children-in-law should not be removed.[2] They said that to allow such marriages would be

> "to condone sexual rivalry between father and son, or mother and daughter, which, within the close confines of the family, would be destructive of the father and son, or mother and daughter, relationships.[3]
>
> In addition, it would deprive the child-in-law of his or her safety of place as child in the new family into which he or she marries. When, for instance, a son brings his wife to his father's home, there is an underlying assumption that the daughter-in-law will assume a role in relation to her father-in-law which is exempt from sexual expectations. To admit the possibility of a future marriage between parent-in-law and child-in-law would be to undermine assumptions which make for the safety and comfort of the adult family."[4]

These arguments are very similar to the arguments which were made many years ago against marriage with a deceased wife's sister. They seem to us to be just as unrealistic and just as unsupported by anything in the way of evidence. The picture of sexual rivalry painted by the minority seems to us to be far removed from the ordinary decencies of family life in this country, and far removed, for example, from the actual constituency case referred to earlier. The idea that women visiting their fathers-in-law are passive creatures who need the protection of a provision in the Marriage (Scotland) Act 1977 to give them "safety of place" and "a role . . . which is exempt from sexual expectations" strikes us as unconvincing. The minority's arguments would seem to lead to an outright prohibition of marriage with a former parent-in-law and that is what they actually recommended. They did concede, however, that there were not such strong objections to a marriage between a parent-in-law and a child-in-law if the intervening spouse[5] were dead

> "for then our concern about disruption within the immediate family circle would lose some of its immediate force."[6]

As we have seen, it was a compromise solution on these lines which was adopted in the Marriage (Prohibited Degrees of Relationship) Bill for England and Wales and which was later extended to Scotland when the Bill was amended to include Scottish clauses.

8.13 It is not satisfactory that Scots law should be based on the unconvincing arguments of a minority of a group appointed by the Archbishop of Canterbury to consider the law of affinity in England and Wales. We concluded in the discussion paper that this question deserved to be properly discussed in Scotland. Our preliminary view was that the restrictions presently in section 2(1B) of the Marriage (Scotland) Act 1977 led to anomalies and results which could not be justified by any reasonable argument. We therefore suggested the removal of the few remaining restrictions on marriage between a person and the parent of his or her former spouse. This suggestion was supported by a majority of those who commented on it. Some consultees thought that it was desirable that the prohibited degrees of relationship should be the same for marriage and for incest and, as it is not incest to have intercourse with a former parent-in-law, favoured removal of the remaining restrictions for this reason. The minority who opposed any change did so for various reasons. Some appealed to the statement of forbidden degrees in the Old Testament. However, the biblical degrees were departed from in 1907 when marriage with a deceased wife's sister was permitted and we do not think that there can be any question of going back to them. In any event, so far as the civil law is concerned, this is a question which has to be decided, for all citizens whatever their religious views, by reference to social considerations. People who have religious objections to particular types of marriage do not need to enter into them. One group of consultees thought that the Scottish law on this subject should remain the same as English law. We do not see, however, why that need be so. There would be no practical difficulties or inconveniences in having different laws on this rather esoteric point.[7] Another group expressed concern about pressures on children. We do not see, however, why children should be prejudiced by the regularisation, through marriage, of an affectionate and supportive relationship which already exists. We do not think it likely that a step-parent who already has a close family relationship with his or her step-children will necessarily be worse for the children than an unrelated step-parent with no such relationship. Nor do we see why children should be prejudiced by the dual roles which result from such marriages. Adoption by grandparents is not uncommon and gives rise to similar dual roles. Moreover such dual roles can arise under the existing marriage law in those cases where the very limited restrictions on marriages with the relatives of a former spouse do not apply (eg marriage with former husband's brother, or deceased husband's widowed father). No-one, so far as we know,

1. Para 221.In many states of the USA there are no prohibitions based on affinity.
2. Para 276.
3. Para 257.
4. Para 258.
5. This refers to the former spouse of the son-in-law or daughter-in-law and not to any spouse the parent-in-law might have had. See para 9 of the Report.
6. Para 274. The minority said that what they would really have liked to recommend was a return to the position as it was before the Marriage (Enabling) Act 1960 (when marriage with a divorced wife's sister, aunt or niece, or a divorced husband's brother, uncle or nephew was prohibited so long as the divorced spouse was still alive). They accepted, however, that such a recommendation would not be realistic.
7. Capacity to marry depends primarily on the law of a person's domicile. So a person domiciled in England could not validly marry in Scotland if the marriage would be within the prohibited degrees by English law. Nor would a person domiciled in Scotland be able to have a marriage celebrated in England if the parties were within the prohibited degrees by English law. (Cheshire and North, *Private International Law* 11th ed 1987, p586). So the Scots law on this subject is of no direct concern to England, just as the English law is of no direct concern to Scotland.

has suggested that they cause any problems. Most importantly, we think that there is a danger of being excessively paternalistic in this area. Parents are not generally unmindful of the interests of their own children. Finally, the number of marriages which would result from the removal of the remaining restrictions would be likely to be very small indeed and the number of such marriages where there are minor children even smaller. Our conclusion is that the remaining restrictions on marriage with the parent of a former spouse should be abolished. We can see no need for confining this change to persons over the age of 21. Both parties, in the type of case we are considering, will inevitably be old enough to have had at least one former marriage. We therefore recommend that

46. It should continue to be a ground of nullity of marriage that the parties are within the prohibited degrees of relationship specified in the Marriage (Scotland) Act 1977, subject, however, to the removal of the remaining limited restrictions on marriage between a person and the parent of his or her former spouse. Accordingly, the distinction between marriage with a deceased spouse's widowed parent (which is permitted under the present law) and other marriages with a former spouse's parent (which are not permitted) should no longer be part of Scots law.

(Draft Bill, clauses 20, 21(1) and Schedule 2.)

Non-compliance with formal requirements

8.14 Most marriages in Scotland are now immune from challenge on the ground of non-compliance with formal requirements. This is the result of section 23A of the Marriage (Scotland) Act 1977 (added in 1980)[1] which provides that, subject to the provisions in the Act on under-age marriages and marriages within the prohibited degrees,

> "where the particulars of any marriage at the ceremony in respect of which both parties were present are entered in a register of marriages by or at the behest of an appropriate registrar, the validity of that marriage shall not be questioned, in any legal proceedings whatsoever, on the ground of failure to comply with a requirement or restriction imposed by, under or by virtue of this Act."[2]

This is a very useful provision. We think, however, that it should be widened in two respects. First, it should be applied to non-compliance with formal requirements under earlier laws (provided that there had not already been a decree of declarator of nullity in respect of the marriage in question or a later marriage to someone else in reliance on the nullity of the first marriage) and, secondly, it should provide that the marriage in question is not invalid rather than that its validity "shall not be questioned". The latter formula suggests that the marriage might actually be invalid but that there is a sort of procedural bar to raising this question. We recommend that

47.(a) There should continue to be a rule on the lines of section 23A of the Marriage (Scotland) Act 1977, to the effect that a duly registered marriage, where both parties were present at the ceremony, is not invalid by reason only of any failure to comply with any legal preliminaries or formal requirements or by reason of any lack of qualification on the part of the celebrant. This rule should extend to marriages in Scotland solemnised before as well as after the commencement of the new legislation, but a marriage solemnised before such commencement should not be validated in this way if it had already, before such commencement, been declared void by a competent court or followed by another marriage in reliance on its nullity.

(Draft Bill, clause 21(5) and (7).)

8.15 There are some formalities which are not serious enough to warrant invalidity (even of a type curable by registration) if they are not complied with. They are not essential formalities. A marriage should not be void, for example, merely because one of the parties gave wrong information to a registrar when giving notice of intention to marry.[3] Similarly, failure to produce a birth certificate or one of the other documents referred to in section 3(1) of the Marriage (Scotland) Act 1977 should not invalidate the marriage if, through inadvertence, the district registrar overlooks the omission and completes a marriage schedule. Also, a mere failure to register a marriage in time should not in itself be a ground of nullity. We think that it would be useful in new legislation to make it clear that only failures to comply with the more important formal requirements result in nullity. The sanction for non-compliance with other formalities may be simply refusal of administrative co-operation—the registrar will not complete a marriage schedule if the required documents are not produced—or, in some cases, a criminal penalty.[4] After consulting the Registrar General for Scotland on this question, we suggest that those formal requirements which can be regarded as essential (subject to cure in some cases by registration) are

(a) the giving of notice of intention to marry

(b) the production to the approved celebrant, or availability to an authorised registrar, of a marriage schedule in respect of the marriage as required by section 13(1)(a) and 19(2)(a) respectively of the Marriage (Scotland) Act 1977

1. By the Law Reform (Miscellaneous Provisions)(Scotland) Act 1980 s22(1)(d).
2. The "appropriate registrar" is, in the case of a civil marriage, an authorised registrar and, in any other case, a district registrar. S23A(2).
3. This is the present law. See *Gall* v *Gall* 1968 SC 332.
4. See eg s24 of the Marriage (Scotland) Act 1977.

(c) the presence of both parties at the ceremony

(d) the presence as witnesses of two persons professing to be 16 years of age or over

(e) the presence of an authorised or legally recognised celebrant and

(f) the outward exchange by the parties of present consent to marriage.

These formal requirements would apply only in relation to marriages entered into in Scotland and the new express ground of nullity would not be retrospective. It is not our intention to invalidate any irregular marriages entered into in Scotland at a period when such marriages were possible. The formal validity of marriages entered into outside Scotland would be governed by the law of the place of celebration.[1] Failure of a marriage ceremony to comply with any of these requirements except that relating to the presence of the parties would be curable by due registration. So, for example, once the marriage had been duly registered it could not be challenged on the ground that the celebrant was unauthorised. We recommend that

47.(b) In the case of a marriage in Scotland, the essential formal requirements (subject to the validating rule in recommendation 47.(a)) should be

(i) the giving of notice of intention to marry

(ii) the production to the approved celebrant, or availability to an authorised registrar, of a marriage schedule in respect of the marriage as required by section 13(1)(a) and 19(2)(a) respectively of the Marriage (Scotland) Act 1977

(iii) the presence of both parties at the ceremony

(iv) the presence as witnesses of two persons professing to be 16 years of age or over

(v) the presence of an authorised or legally recognised celebrant and

(vi) the outward exchange by the parties of present consent to marriage.

(Draft Bill, clause 21(1)(c).)

Defects in consent

8.16 A marriage is void in Scots law if either party is incapable of understanding the nature of marriage or of consenting to marriage; or if either party is in error as to the nature of the ceremony or the identity of the other party; or if either party was forced against his or her will to marry the other party.[2] In all of these cases it is probably necessary for the validity of the marriage to be challenged as soon as is reasonably practicable after the incapacity (if temporary) has disappeared, or the error has been discovered, or the source of the duress has been removed.[3] The law to this effect is, however, not clear. There is a lack of modern authority. We consider that the substance of the above rules is reasonably satisfactory. There is, so far as we are aware, no evidence that the law in this area gives rise to any difficulty or injustice. The ready availability of divorce as a remedy for marriage breakdown means that there is little need for the law of nullity to provide a remedy in a wide range of cases. This being so, there is in our view much to be said for keeping that law within its existing narrow bounds.

8.17 A marriage is also void in Scots law if the parties, even although consenting freely to go through a marriage ceremony and in no error, had at the time of the ceremony a mental reservation to the effect that a legal marriage would not result from the ceremony. For example, the parties may have tacitly withheld consent to be married by a civil ceremony because they believed a religious ceremony to be essential for their religious purposes, or because they were going through the ceremony merely for immigration purposes.[4] Although this rule is consistent with the traditional view that true consent, and not merely the external appearance of consent, is essential for the constitution of marriage it is open to the objection that it allows parties to use the Scottish marriage law and Scottish marriage ceremonies cynically for their own purposes. In the case of *Akram* v *Akram*[5] Lord Dunpark was clearly unhappy with the state of the present law but was forced to grant the decree of declarator of nullity sought. He said that it was for Parliament to decide

> "whether legislation should preclude parties from challenging the legal effect of any formal ceremony of marriage on the ground that they knowingly but tacitly withheld their true consent to marriage."[6]

1. See para 14.4 below.
2. See Clive, *Husband and Wife* (2nd ed 1982) pp95–101.
3. *Ibid* pp110–111.
4. See *Brady* v *Murray* 1933 SLT 534; *Orlandi* v *Castelli* 1961 SC 113; *Mahmud* v *Mahmud* 1977 SLT (Notes) 17; *Akram* v *Akram* 1979 SLT (Notes) 87. The immigration rules are now such that a sham marriage will normally be ineffective for immigration purposes. See the *Statement of Changes in Immigration Rules* (1989 HC 388) paras 50–52 and 131.
5. 1979 SLT (Notes) 87.
6. *Ibid* at p89.

Scots law seems to be peculiarly generous in relation to such sham marriages. In England and Wales secret mental reservations have no effect.[1] The Canadian courts have generally taken the same view.[2]

8.18 Although there is authority for the view that one party will not be allowed to found on his own unilateral mental reservation of matrimonial consent,[3] the existing law of Scotland allows one party to a marriage to have it declared null on the ground that the other party did not really intend to get married.[4] This can give rise to some remarkable results if, for example, a man wrongly believes that he is committing bigamy when in fact his prior marriage has been dissolved by divorce. His second marriage, although not bigamous, can nonetheless be declared void because he thought it was bigamous and could not therefore have given true consent.[5]

8.19 It seems to us that it is undesirable to allow parties, who know full well what they are doing, to determine for themselves the legal effects which will follow from participation in a formal legal ceremony of marriage. In our view this is a matter for the law to determine. This view was supported almost unanimously on consultation. We recommend therefore that tacit mental reservations as to the legal effects of a marriage ceremony should have no effect. The draft Bill achieves this result by setting out the *only* grounds of nullity and by not including tacit mental reservations among them.[6]

8.20 Our combined recommendations on defects in consent as grounds for nullity are as follows.

48.(a) Subject to the subsidiary rules suggested below, a marriage should be void if, because of mental incapacity, error, or duress either party does not freely consent to marry the other party.

(b) (i) A marriage should be void on the ground of a party's mental incapacity, whether temporary or permanent, only if the party is at the time of the marriage ceremony incapable of understanding the nature of marriage or of giving consent to marriage.

(ii) Where a person was under a temporary mental incapacity at the time of the marriage ceremony but does not bring an action for declarator of nullity of marriage as soon as is reasonably practicable after regaining capacity the marriage should be regarded as having been valid as from the time of the ceremony.

(c) (i) A marriage should be void on the ground of error only if at the time of the ceremony either party was in error as to the nature of the ceremony or the identity of the other party.

(ii) A party should be regarded as being in error as to the identity of the other party only if he or she mistakenly believed that the other party at the ceremony was the person whom he or she had agreed to marry, regardless of the name or qualities of that person.

(iii) Where a person was in error as to the nature of the ceremony or the identity of the other party to the marriage but does not bring an action for declarator of nullity of marriage as soon as is reasonably practicable after discovering the error the marriage should be regarded as having been valid as from the time of the ceremony.

(d) (i) A marriage should be void on the ground of duress only if one party was forced against his or her will to marry the other party.

(ii) Where a person was forced against his or her will to marry the other party but does not bring an action for declarator of nullity of marriage as soon as is reasonably practicable after the duress ceases to have effect the marriage should be regarded as having been valid as from the time of the ceremony.

(e) Without prejudice to the rules recommended above, a marriage should not be void merely because one or both parties went through the ceremony of marriage with a tacit mental reservation to the effect that notwithstanding the nature and form of the ceremony no legal marriage would result from it.

(Draft Bill, clause 21(1)(b) and (2).)

Voidable marriages: impotency

8.21 Under the existing law in Scotland a marriage is voidable if either party is at the time of the ceremony permanently and incurably impotent in relation to the other spouse.[7] A person can found on his or her own impotency.[8] This is the only ground on which a marriage is voidable, as opposed to void, in Scots law.[9]

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1. *H* v *H* [1954] P 258; *Silver* v *Silver* [1955] 2 All ER 614.
2. See eg *Singh* v *Singh* (1977) 77 DLR (3d) 154. The cases are discussed in Hahlo, *Nullity of Marriage in Canada* (1979) pp31–35.
3. *Cf Balshaw* v *Balshaw* 1967 SC 63 at p82.
4. See eg *McLeod* v *Adams* 1920 1 SLT 229.
5. See the unreported cases of *McEwan* v *Risi* (March 25, 1964) and *Scott* v *Risi* (March 25, 1965) discussed in Clive, *op cit* at pp106–107.
6. Clause 21.
7. *CB* v *CB* (1884) 11 R 1060 at p1067; affd (1885) 12 R (HL) 36. See generally, Clive, pp111–116.
8. *F* v *F* 1945 SC 202.
9. For a historical and highly critical account of the concept of the voidable marriage in Scots law, see Norrie, "Transsexuals, the Right to Marry and Voidable Marriages in Scots Law", 1990 SLT (News) 353.

8.22 The idea of a voidable marriage, which is perfectly valid until declared void by a court but which is then regarded as having been void from the beginning, leads to difficulty. What, for example, is the position if one of the parties entered into a second marriage before the declarator of nullity was granted? Is the second marriage retrospectively validated when the first is declared void? There is no clear answer to this problem in Scots law.[1] It is a question of whether logic or commonsense is to prevail. What is the effect of a declarator of nullity on the ground of impotency on other transactions which turned on the existence of a valid marriage and which were entered into while the marriage was valid? Are completed transactions to be retrospectively disturbed? Again there is a lack of certainty on this point in Scots law, although it seems likely that the artificial theory of retroactive nullity would not be pushed to its logical conclusion where this would lead to absurdity or interference with completed transactions.[2]

8.23 In English law a decree of nullity in respect of a voidable marriage now has prospective effect only. It operates

> "to annul the marriage only as respects any time after the decree has been made absolute, and the marriage shall, notwithstanding the decree, be treated as if it has existed up to that time."[3]

The view that a separate category of voidable marriage is necessary or desirable in English law has been subjected to cogent criticism.[4]

8.24 Proof of incurable impotency generally requires medical evidence. The courts assess incurability in the light of the circumstances of the particular marriage, and will not regard impotency as curable merely because in other hypothetical circumstances it might have responded to treatment.[5] A pursuer may, in certain circumstances, be personally barred from founding on impotency (whether his or her own, or the other spouse's) in order to obtain a declarator of nullity.[6]

8.25 There are not now many actions for declarator of nullity on the ground of impotency. Divorce on one of the separation grounds will often be a simpler and more acceptable remedy for the spouses. The Civil Judicial Statistics for Scotland since 1979 reveal an average of 8 actions for declarator of nullity of marriage a year. Even if all of these are on the ground of impotency the number is still very low.

8.26 The question for consideration is whether nullity for impotency is worth retaining in a new codified family law. Our view is that it is not. The notion of the valid but retrospectively voidable marriage is very odd and leads to unnecessary difficulties. There would not be much point in amending the law to provide that a declarator of nullity for impotency dissolves a marriage only for the future. That would simply be divorce by another, and singularly inappropriate, name. Given the availability of non-fault divorce on the basis of a reasonably short period of separation, it must be open to doubt whether a special ground of so-called nullity of this nature would be justifiable.[7] There are various serious personal inadequacies, which may be present at the time of a marriage, and which may unfortunately cause it to break down irretrievably. We are not convinced that there is sufficient justification for singling this one out for special treatment. If a marriage survives serious difficulties, whether sexual or otherwise, then well and good. If it does not, and breaks down irretrievably, then there is a remedy in divorce. Moreover the ground of impotency invites the drawing of distinctions which seem meaningless from the point of view of the viability of a marriage. Why should it matter whether impotency was present at the time of the marriage, or supervened a week later? If the sexual side of a marriage has been unsatisfactory from the start, is any good purpose served by a careful consideration of whether a person was capable on one or two occasions of sufficiently complete intercourse for legal purposes or only of insufficiently complete intercourse for such purposes?[8] Why should incapacity for sexual intercourse make a marriage voidable but not a deliberate refusal to attempt sexual intercourse?[9] Why should a woman who marries an impotent man, not knowing of his impotency, be able to obtain a declarator of nullity but a woman who marries a sterile man, not knowing of his sterility, be unable to do so? In either case, if she accepts the position she does not need a legal remedy while if she cannot accept the position and the marriage breaks down irretrievably she has the remedy of

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1. See Clive, p88.
2. See Clive, p87; *Mackle* v *Mackle* 1984 SLT 276.
3. Matrimonial Causes Act 1973, s16.
4. Cretney and Masson, *Principles of Family Law* (5th ed, 1990) pp70–73. The concept of the voidable marriage no longer appears in Australian law. Family Law Act 1975, s51.
5. See *M* v *W or M* 1966 SLT 152.
6. *L* v *L* 1931 SC 477; *AB* v *CB* 1961 SC 347.
7. In our report on *Reform of the Ground for Divorce* (Scot Law Com No 116, 1989) we have recommended a shortening of the separation periods to 1 year (with the consent of the other party to divorce) or 2 years (even in the absence of such consent).
8. *Cf J* v *J* 1978 SLT 128.
9. This might in certain circumstances justify divorce on the ground that

   "since the date of the marriage, the defender has at any time behaved (whether or not as a result of mental abnormality and whether such behaviour has been active or passive) in such a way that the pursuer cannot reasonably be expected to cohabit with the defender".

   Divorce (Scotland) Act 1976, s1(2)(b).

divorce. The only reason for the distinctions presently drawn by the law on voidable marriages is, we think, tradition.[1] They make no sense today.

8.27 We have considered whether, if impotency were no longer recognised as a ground on which a marriage is voidable, it ought to be added to the Divorce (Scotland) Act 1976 as one of the facts from which the irretrievable breakdown of a marriage may be inferred. The argument for this is that it would provide the possibility of an immediate divorce. The party who wished to have the marriage dissolved would not have to wait for a period of years, after the parties had separated, before raising an action.[2] There are also, however, arguments against special provision for impotency. First, impotency by itself is not necessarily an indication of marriage breakdown. Both parties may have known the position at the time of the marriage. The marriage may have been entered into for companionship only. The pursuer may have accepted the position for many years. At the very least, therefore, the law on divorce for impotency would have to provide for certain additional bars to divorce. Secondly, the new ground would apply to only a few cases a year. In recent years there have only been about 8 declarators of nullity a year in Scotland. It must be doubtful whether a special new ground for divorce should be enacted to cater for such a small number of cases, particularly as there would usually be no great hardship involved in waiting for a year or two. Thirdly, a new ground of divorce for impotency would involve making arbitrary distinctions of the type criticised above. Why distinguish between impotency at the time of marriage and impotency occurring later? Why distinguish between impotency and near-impotency? Why allow divorce for impotency but not sterility or incurable disease or severe drug addiction or a serious personality defect or any other condition which might make it more difficult for both parties to achieve a fully satisfying marriage? We are not persuaded that there is an overwhelming case for making special provision for impotency as a fact justifying divorce but this is an option which could be borne in mind if, contrary to our recommendation, there is no reduction in the length of the separation periods required for a non-fault divorce.

8.28 A majority of those who responded to this question in the discussion paper agreed with our provisional assessment that it was no longer necessary or desirable to retain impotency as a ground on which a marriage is voidable. The general view was that, in cases of marriage breakdown, divorce was a more satisfactory and logically defensible civil remedy than either retrospective or prospective nullity for impotency. It was regarded as undesirable to focus narrowly on the one question of sexual impotency at the date of the marriage in determining whether a remedy should be available.

> "It is recognised that a marriage may be entered, or may continue, without a sexual relationship being a factor. The crucial factor in whether a marriage should be brought to an end should be whether there has been a breakdown of the relationship, whether or not impotency is an aspect of such breakdown. It would seem particularly anomalous to retain the rule at a time when, owing to the development of modern technology, it is possible to have children of a marriage notwithstanding that one partner is impotent."[3]

Of those few consultees who favoured retaining impotency as a ground on which a marriage is voidable, two referred to opposition to divorce on religious grounds. We do not believe, however, that the ordinary law of the land on the remedies available to all, for purely civil purposes, in cases of marriage breakdown ought to be determined by the views of any particular religion. From a civil law point of view we can see no advantages, but several disadvantages, in calling a decree dissolving a valid marriage which has unfortunately broken down a decree of nullity rather than a decree of divorce.

8.29 We recommend that

49. Marriages should not be voidable on the ground of impotency.

(Draft Bill, clause 21(8).)

Voidable marriages—other possible grounds

8.30 It will be clear from what we have said above that we regard the concept of the valid but retrospectively voidable marriage as thoroughly unsatisfactory and that we regard the conferring of the name "nullity" on a decree which dissolves a valid marriage for the future as an inappropriate use of words. The provisional proposal in the discussion paper that there should be no new grounds on which a marriage is voidable in Scots law was agreed to unanimously by those who commented on it. We therefore recommend that

50. There should be no new grounds on which a marriage is voidable in Scots law.

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1. Impotency has been a ground of nullity since before the Reformation. The existing law derives from 16th century canon law, which did not recognise divorce.
2. Under the present law the period would be 2 years if the other spouse consented to divorce or 5 years if he or she did not. Divorce (Scotland) Act 1976 s1(1)(d) and (e). Under the recommendation in our report on *Reform of the Ground for Divorce* (1989) these periods would be reduced to 1 year and 2 years respectively.
3. Comment by the Law Society of Scotland in their response to the discussion paper.

8.31 If the two preceding recommendations are implemented the result would be that the concept of the voidable marriage would disappear from Scots law. That would in itself be a simplification and it would also help to resolve in a clear and simple way some problems in private international law which have caused difficulty in the past.[1]

Consequential changes to Marriage (Scotland) Act 1977

8.32 At present some of the provisions of the Marriage (Scotland) Act 1977 relate partly to prohibitions of certain marriages and partly to grounds of nullity. For example, section 1 provides that

"(1) No person domiciled in Scotland may marry before he attains the age of 16.

(2) A marriage solemnised in Scotland between persons either of whom is under the age of 16 shall be void."

The first subsection is a prohibition, directed to the individuals potentially concerned. The second subsection lays down a rule of nullity. It is, as it were, addressed to the courts and legal advisers who have to decide on the validity of a marriage after the event. Section 2 of the 1977 Act contains nullity rules for marriages of people within the prohibited degrees of relationship. The actual prohibition comes later, in section 5, where the impediments to a regular marriage in Scotland are listed. If the grounds of nullity of marriage, of which some are in the 1977 Act and some are in the common law, are comprehensively set out in a new statutory provision then some consequential changes in the 1977 Act will be required. That Act should, in our view, be confined to the prospective situation, but should not deal with nullity. It should, as it were, be addressed to citizens contemplating marriage and to the marriage officials but not to the courts hearing actions for declarator of nullity. It should also, we think, set out comprehensively at the beginning of the Act all the legal impediments to an intended marriage in Scotland and all the cases where a person domiciled in Scotland is legally incapable of marrying outside Scotland. Clause 20 of the draft Bill contains the appropriate amendments for this purpose. Other minor and consequential amendments to the 1977 Act are explained in the notes on the draft clauses.

Capacity for polygamy

8.33 The new provisions on the legal incapacities for marriage attaching to Scottish domiciliaries who marry abroad, and on the associated grounds for nullity, would make it clear (a) that a person who is domiciled in Scotland cannot marry if he or she is already married and (b) that a person who is domiciled in Scotland cannot marry a person who is already married. They would, however, like the existing law of Scotland, contain no express prohibition on an unmarried person domiciled in Scotland marrying an unmarried person abroad, even if the marriage is in polygamous form. As the new rules would be exhaustive it would be clear that there was no implied prohibition of such marriages. This would remove a minor source of doubt in Scots law and give effect to a recommendation in an earlier joint report of the two Law Commissions.[2]

Invalidity under earlier laws

8.34 The question of essential invalidity under earlier laws is of practical importance only in relation to the law on the prohibited degrees of relationship, where the law has been gradually liberalised by a series of Acts dating from 1907.[3] The question for consideration is whether a marriage which would be valid if entered into now should be invalid because entered into, perhaps abroad or in ignorance of the existence of the impediment, at an earlier date when the laws were different and more restrictive. There are two possible approaches.

8.35 One approach is to say that the law in force at the time when the marriage was entered into must apply. This is awkward because it means that anyone considering the validity of a marriage has to investigate what the law was in the past, perhaps many years ago. Nonetheless this was the approach adopted in the Marriage Enabling Act 1960 which allowed (a) marriage with a divorced wife's sister, aunt or niece and (b) marriage with a divorced husband's brother, uncle or nephew. It was also the approach adopted by the Marriage (Scotland) Act 1977 although as that Act made only the most minimal changes in the prohibited degrees its lack of retrospectivity is of no practical importance.[4]

8.36 The other approach is to apply the new, more liberal, law retrospectively. The effect is to grant an amnesty to those couples (if there happen to be any) who managed to marry in spite of the earlier laws. This was the approach

1. See para 14.13 below.
2. Polygamous Marriages: *Capacity to Contract a Polygamous Marriage and Related Issues* (Law Com No 146; Scot Law Com No 96, 1985) para 2.34.
3. See Law Com No 126; Scot Law Com No 96, paras 2.11 to 2.12, 2.16 and 2.32.
4. See s27(3) of the 1977 Act. The Act permitted marriage with a great-uncle, great-aunt, great-nephew or great-niece and also with a great-great-grandparent or great-great-grandchild or a former spouse's great-grandparent or great-grandchild. It must be doubtful whether there have been any such marriages.

adopted in the Deceased Wife's Sister's Marriage Act 1907, as amended by the Deceased Brother's Widow's Marriage Act 1921 and the Marriage (Prohibited Degrees of Relationship) Act 1931.[1] It seems to us to be both more humane and more convenient. We have adopted this approach in the draft Bill appended to this report.[2] The draft Bill makes it clear, however, that no marriage will be invalidated retrospectively and it also makes it clear that retrospective validation will not operate in relation to a marriage which was, before the commencement of the new legislation, declared void by a competent court or followed by another marriage entered into in reliance on the nullity of the first marriage.[3]

1. S1 of the 1907 Act said that "No marriage heretofore or hereafter contracted between a man and his deceased wife's sister, within the realm or without, shall be deemed to have been or shall be void." For an example of its operation see *Re Green, Green* v *Meinall* [1911] 2 Ch 275.
2. Clause 21(6).
3. Before the Age of Marriage Act 1929 a girl could marry at 12 and a boy at 14. Any marriage by a person under the age of 16 which was valid under the pre-1929 law will not be invalidated by the Bill. See clause 21(4) and (7).

Part IX Declarators relating to marriage

Declarators of marriage or nullity of marriage

9.1 There was unanimous agreement with our provisional proposal that declarators of marriage and declarators of nullity of marriage should be competent in the sheriff courts. There are only about 8 actions for declarator of nullity of marriage a year in Scotland on average and even fewer actions for declarator of marriage.[1] The abolition of impotency as a ground of nullity and of marriage by cohabitation with habit and repute would reduce the number of such actions even further. So any effects on the courts' workloads would be minimal. We recommend that

51. Actions for declarator of marriage or nullity of marriage should be competent not only in the Court of Session but also in the sheriff courts.

(Draft Bill, clause 23(1) and Schedule 1 paragraph 2.)

9.2 The draft Bill appended to this report applies the rules on jurisdiction in divorce to these actions.[2] We have not, however, thought it necessary to make special provision for the jurisdiction of the sheriff courts in those very rare cases where an action for declarator of marriage or nullity of marriage is raised after the death of both parties. In such cases resort could be had to the Court of Session under existing rules.[3]

Declarators of freedom and putting to silence

9.3 An action for declarator of freedom and putting to silence is a hybrid remedy available against someone who falsely asserts that he or she is married to the person bringing the action. The pursuer seeks (a) a declarator that he or she is free of the asserted marriage and (b) a decree ordaining the defender to desist from asserting that he or she is the spouse of the pursuer, and putting the defender to silence thereanent.[4]

9.4 There may have been a need for this type of nominate action in the days when irregular marriages were common and when there was often doubt as to whether a couple had privately exchanged consent to marry. The action is, however, now virtually unknown. Given the courts' general powers to grant interdict, we do not believe that a special form of action, with special rules of jurisdiction,[5] is now necessary to deal with a false assertion of marriage. Petitions for jactitation of marriage, which were equivalent in function to actions for declarator of freedom and putting to silence, were abolished in England and Wales by the Family Law Act 1986.[6] They have also been abolished in Australia and New Zealand.[7]

9.5 All of the responses on consultation, except one, supported our provisional conclusion that the remedy of an action for declarator of freedom and putting to silence should be abolished. The Law Society of Scotland, in supporting abolition, suggested that it might be advisable to make it clear that a repeated false assertion of marriage may be a wrong sufficient to ground an interdict. We think that this is a valuable suggestion and we adopt it. We therefore recommend that

52.(a) The remedy of an action for declarator of freedom and putting to silence should be abolished.

1. Civil Judicial Statistics for Scotland.
2. See draft Bill, Sch 1 (amendments to Domicile and Matrimonial Proceedings Act 1973, s8).
3. Domicile and Matrimonial Proceedings Act 1973, s7(3)(c).
4. See *M* v *Y* 1934 SN 20; Rules of Court Appendix, Form 2, para 19.
5. Domicile and Matrimonial Proceedings Act 1973, s7.
6. S61. This implemented a recommendation of the English Law Commission in its report on *Declarations in Family Matters* (Law Com No 132, 1984).
7. See Law Com No 132 para 4.9.

(b) It should be made clear that the courts' ordinary powers to grant interdicts and interim interdicts include power to grant interdict or interim interdict against the repetition of a false assertion of marriage to the applicant.

(Draft Bill, clause 23(2) and (3).)

Other declarators relating to marriage

9.6 The courts in Scotland, unlike the courts in England, have a general declaratory power. Accordingly, there is no need for special statutory provisions making it competent to grant, for example, a declarator that the validity of a foreign divorce is entitled to recognition in Scotland.[1] The Scottish courts can already grant such declarators, although of course it will only be in cases of genuine doubt (as to domicile, for example) that a declarator will be necessary.[2] In most cases it will be clear that a foreign divorce is entitled to recognition here. Recognition is automatic and does not require any registration or decree in Scotland.[3] In the discussion paper we asked whether it would nonetheless be useful (even if not strictly necessary) to provide by statute for the competency of a declarator as to whether a divorce, annulment or legal separation obtained outside Scotland was entitled to recognition in Scotland and, if so, whether the rules as to jurisdiction, title to sue and the effect of the decree should be the same as in the case of a declarator of marriage.[4]

9.7 Most consultees thought that some statutory provision for these declarators would be useful. Some, however, doubted the wisdom of expressly providing for their competency. On reconsidering this matter we have concluded that, given the courts' general powers, it would be inappropriate to provide that this type of declarator is competent. Moreover, there seems to be no need to regulate title to sue or the effect of a decree of declarator. These can be left to the general law. There is, however, a real practical problem in relation to jurisdiction. The ordinary grounds of jurisdiction in, for example, section 6 of the Sheriff Courts (Scotland) Act 1907 are not appropriate for such family law declarators. The Civil Jurisdiction and Judgments Act 1982 does not apply to matters relating to status. We therefore recommend that

53. The rules on jurisdiction applying to actions for declarator of marriage should also apply to actions for declarator that a divorce, annulment or legal separation is, or is not, entitled to recognition in Scotland.

(Draft Bill, Sch 1, amendments to Domicile and Matrimonial Proceedings Act 1973, section 7.)

9.8 The effect of the above recommendation, if implemented, would be that the Court of Session would have jurisdiction in such an action for declarator if either of the parties to the marriage

(a) is domiciled in Scotland on the date when the action is begun; or

(b) was habitually resident in Scotland throughout the period of one year ending with that date; or

(c) died before that date and either—

(i) was at death domiciled in Scotland, or

(ii) had been habitually resident in Scotland throughout the period of one year ending with the date of death.[5]

The sheriff court would have jurisdiction on the same grounds as currently apply in divorce actions.[6]

9.9 We have taken the opportunity, while amending the Domicile and Matrimonial Proceedings Act 1973, to tidy up the references to certain incidental or collateral orders, some of which have become out of date as a result of amendments to other legislation. The draftsman has substituted descriptive references for the previous references to specific statutory provisions.[7] This not only simplifies the legislation but should also prevent the same problem from occurring again.

1. Family Law Act 1986, s55(1), implementing recommendations in Law Com No 132, cited above.
2. *Makouipour* v *Makouipour* 1967 SC 116; *Galbraith* v *Galbraith* 1971 SLT 139; *Bain* v *Bain* 1971 SLT 141; *Broit* v *Broit* 1972 SLT (Notes) 32.
3. See Family Law Act 1986, ss44–54.
4. Para 4.6.
5. See Domicile and Matrimonial Proceedings Act 1973, s7(3).
6. See s8 of the 1973 Act.
7. Draft Bill, Sch 1, (amendments to Domicile and Matrimonial Proceedings Act 1973, s10 and Sch 3).

Part X Litigation between spouses

Introduction

10.1 At one time spouses could not sue each other in contract or delict.[1] This was sometimes said to be based on the idea that the husband and wife were one person in law, but there was also a fear that the courts would be burdened by actions arising out of domestic squabbles and that such litigation would not be in the spouses' own interests.[2] The courts departed from this rule in the case of contract, holding that the changes in the legal position of married women made by the Married Women's Property (Scotland) Act 1920 were inconsistent with the restriction.[3] Parliament changed the rule in the case of delict, allowing spouses to sue each other but giving the court a power to dismiss the proceedings if it appeared that no substantial benefit would accrue to either party.[4] The question for consideration here is whether this power to dismiss is necessary.

Present law

10.2 The present law on actions between spouses in delict is contained in section 2 of the Law Reform (Husband and Wife) Act 1962 which provides as follows.

> "(1) Subject to the provisions of this section, each of the parties to a marriage shall have the like right to bring proceedings against the other in respect of a wrongful or negligent act or omission, or for the prevention of a wrongful act, as if they were not married.
>
> (2) Where any such proceedings are brought by one of the parties to a marriage against the other during the subsistence of the marriage, the court may dismiss the proceedings if it appears that no substantial benefit would accrue to either party from the continuation thereof; and it shall be the duty of the court to consider at an early stage of the proceedings whether the power to dismiss the proceedings under this subsection should or should not be exercised."

The power to dismiss conferred by subsection (2) does not apply to proceedings under the Matrimonial Homes (Family Protection) (Scotland) Act 1981.[5]

Background to present law

10.3 The power to dismiss in subsection (2) of the 1962 Act is based on a recommendation of the (English) Law Reform Committee.[6] In recommending the removal from English law of the old prohibition of actions in tort between spouses (which was similar to the prohibition operating in Scotland) the Committee noted that in several foreign countries "whose social standards are similar to our own" there was no bar on proceedings and that there was no reason to believe that marriages had been put in jeopardy in consequence.[7] They also noted, however, that only one of the memoranda submitted to them advocated the removal of all restrictions. They considered that to allow spouses to sue each other in tort without any restrictions could lead to harmful results. An action could lead to strains in the relationship and, if the action was in respect of "petty acts of negligence in the domestic sphere", would "certainly not be conducive to the continuance of the marriage".[8] In a later passage the Committee explained that the recommended power to stay proceedings should apply even if the spouses were no longer cohabiting, because there might be some possibility of a reconciliation and because, in any event, litigation might serve "only as an excuse for the airing of matrimonial grievances and bitterness".[9] The Committee's recommendation was therefore that the court should have power to stay an action in tort between spouses

1. *Young* v *Young* (1903) 5 F 330; *Harper* v *Harper* 1929 SC 220; *Cameron* v *Glasgow Corporation* 1935 SC 533; 1936 SC (HL) 26.
2. *Young* v *Young* (1903) 5 F 330.
3. *Horsburgh* v *Horsburgh* 1949 SC 227.
4. Law Reform (Husband and Wife) Act 1962, s2.
5. 1981 Act, s21.
6. Ninth Report, *Liability in Tort between Husband and Wife.*
7. Para 8.
8. Para 9.
9. Para 13.

"if, having regard to all the circumstances, including the conduct of the parties and the nature of the matter complained of, the judge is satisfied that the complaint is not one of substance or that it is not in the interests of the parties that the action should proceed."[1]

10.4 The last part of the Law Reform Committee's recommendation (relating to the interests of the parties) was not included in the Bill put before Parliament because it was recognised that it would be impracticable and undesirable to ask a court to assess in the early stages of an action what would be in the best interests of the parties. That would require an examination of the whole nature of their relationship. As was pointed out in Parliament, securely married couples would be allowed to sue each other, and couples whose relationship had already broken down would be allowed to sue each other, but those whose relationship was in a state of doubt might not be. Indeed, a court would have to ask itself not only about the soundness of the parties' marriage and the likely effect of the action on it, but also about "the advantages or disadvantages of maintaining a married state in the society in which we live."[2] The "no substantial benefit" formula was intended to provide a more practicable test which would meet the concern behind the other part of the Law Reform Committee's recommendation. It was explained in Parliament that the formula had nothing to do with the likely effect of the litigation on the spouses' relationship or with the "ethical or moral disadvantages or advantages of pursuing a spouse in a court of law".[3] It was confined to monetary or property matters and was intended to allow cases to be dismissed if there was no prospect of recovery from the other party or if the injury complained of was quite trivial.[4] It was explained that if either party could show that he or she would receive a substantial benefit from pursuing the litigation the court would not have power to dismiss.[5]

10.5 The "no substantial benefit" formula did not escape criticism in Parliament. It was pointed out that it was vague and would be difficult to apply, and that if there was any real damage, sufficient to justify litigation at all, then compensation for that damage could be said to be a substantial benefit.[6]

Assessment of present law

10.6 It is anomalous to give a court power to dismiss proceedings because in the judge's view their continuation would result in no substantial benefit to either party. Normally it is for the pursuer or petitioner to decide whether litigation is worthwhile. There are obvious and powerful disincentives to embarking on litigation without legal aid if no substantial benefit is likely to accrue. Civil legal aid is not available unless the Legal Aid Board is satisfied that the applicant has a *probabilis causa litigandi* and that

"it is reasonable in the particular circumstances of the case that he should receive legal aid."[7]

It is not available at all for defamation proceedings.[8] A Lexis search of Scottish cases, reported and unreported, in the Court of Session and sheriff courts, since 1962 has revealed no case in which section 2(2) has been referred to. We know of no case, and those who responded to our discussion paper mentioned none, which did not proceed because of section 2(2) but which would have proceeded in the absence of section 2(2). There is no equivalent of section 2(2) in relation to actions between other near relatives, or between cohabitants, or between any other categories of litigants. Yet the courts are not flooded by pointless actions.

Results of consultation

10.7 All but one of the responses to this issue on consultation agreed with our provisional view that section 2(2) of the 1962 Act was anomalous and unnecessary and should be repealed.

Recommendation

10.8 We recommend that

54. Section 2(2) of the Law Reform (Husband and Wife) Act 1962 (which gives the court power to dismiss certain proceedings between spouses in delict) should be repealed.

(Draft Bill, clause 24(c) and Schedule 2.)

This recommendation is given effect to by clause 24 of the draft Bill which collects together in one provision some rules relating to the legal equality and independence of spouses which currently appear in various places. This enables the whole of the 1962 Act to be repealed in Schedule 2.

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1. Para 17(2).
2. Parl Debs (HC) (1961–62) Vol 659 cols 1705–1708.
3. *Ibid* col 1708 (Solicitor-General).
4. *Ibid* col 1708 (Solicitor-General).
5. *Ibid* cols 1707 and 1709 (Solicitor-General).
6. *Ibid* cols 1695, 1698,1701 and 1710.
7. Legal Aid (Scotland) Act 1986 s14(1).
8. *Ibid* s13 and Sch 2, Part II, para 1.

Part XI The Matrimonial Homes (Family Protection) (Scotland) Act 1981

Introduction

11.1 The Matrimonial Homes (Family Protection) (Scotland) Act 1981 implemented, with certain important changes, this Commission's report on *Occupancy Rights in the Matrimonial Home and Domestic Violence*.[1] The basic policy objectives of the Act are to confer occupancy rights in the matrimonial home on the "non-entitled spouse" who happens not to be the owner or tenant (so that he or she cannot be evicted like a mere squatter or unwelcome guest by the "entitled spouse" who is the owner or tenant) and to provide increased protection against domestic violence (in particular by providing for exclusion orders, and interdicts with a power of arrest attached). These basic policy objectives were strongly endorsed when the Bill was going through Parliament.[2] Research on the operation of the Act[3] and the responses to our discussion paper show that the basic objectives of the Act are very widely accepted. There is, in our view, no question of repealing the Act entirely or of altering its basic structure.

11.2 Certain provisions of the 1981 Act have, however, been the subject of criticism and have given rise to practical difficulties. It is with these provisions, rather than the basic policy or structure of the Act, that we are here concerned. We begin with the provisions on dealings with third parties.

Dealings with third parties

11.3 **Introduction.** Some protection against dealings, such as a sale of the home, by the entitled spouse is obviously necessary. Otherwise he or she could sell the home to an accomplice and the purchaser could evict the non-entitled spouse. There would be little point, for example, in one spouse's obtaining an exclusion order if the excluded spouse could immediately defeat occupancy rights by selling the home. The Commission's report on *Occupancy Rights in the Matrimonial Home and Domestic Violence*[4] therefore recommended a scheme for the protection of a spouse's occupancy rights against dealings, such as a sale, by the other spouse. In the case of owner-occupied houses, the Commission's scheme was based on registration of a matrimonial home notice in the Register of Sasines or the Land Register. If, but only if, a spouse had registered such a notice, he or she could have any subsequent dealing struck down within certain, fairly short, time limits. This scheme was designed to enable protection to be obtained against transactions designed to defeat occupancy rights while confining protection to cases where it was likely to be needed.

11.4 The Commission's scheme, which was admittedly likely to be more complicated in its practical operation than the above summary suggests, was not favoured by the government. The following explanation was given in the House of Commons.

> "The reasons why we chose not to exercise the matrimonial notice option are basically twofold. First, the Law Commission's view was that if a spouse had lodged a matrimonial notice which indicated her occupancy rights, then that should be an entirely overriding right which gave her total protection as regards occupancy of her home. There are many attractions in this approach, but I think the biggest single unattractive aspect is that it is unlikely that other than a relatively small minority of spouses would have taken advantage of such an opportunity, because of an unawareness of the opportunities existing under the law, but, more importantly, because spouses are unlikely to conceive of the need for such precautions as long as the marriage is working well. By the time the marriage has broken down, it might be too late to start thinking in terms of the lodging of a matrimonial notice. Therefore, it seems sensible and appropriate to have a wider-ranging provision, which will give a high level of protection to the vast majority of spouses, whether or not they have at an earlier date, when the marriage was working quite successfully, anticipated the problems that might arise in the event of marital breakdown.
>
> That, therefore, was the main reason why the Government did not feel that the matrimonial notice approach was suitable. There are also the additional bureaucratic requirements that such a procedure would involve. It would

1. Scot Law Com No 60 (1980).
2. See Parl Debs (HL) (1980–81) Vol 417 cols 1000–1013; (HC) Scottish Grand Committee, 12 May 1981, cols 8, 15, 17, 21, 26, 28, 34, 35.
3. See Jackson, Robertson and Robson, (of the Law School, University of Strathclyde) *The Operation of the Matrimonial Homes (Family Protection) (Scotland) Act 1981* (a report to the Scottish Home and Health Department, 1988) (referred to in the rest of this Part as the "Strathclyde report") p4.
4. Scot Law Com No 60 (1980).

involve very significant increases in staffing in the Department of Registers in terms of dealing with the lodging and processing of matrimonial notices. These and other implications which I mentioned earlier led the Government to conclude that a different approach, as outlined in the Bill, would be suitable."[1]

11.5 **Existing law.** The scheme preferred by the government, and now enacted, conferred general protection against dealings, without any need for registration of a notice, and did not provide for dealings in fraud of occupancy rights to be struck down or set aside. Instead the spouse's occupancy rights can continue to be exercised after the dealing and the person acquiring the home or an interest in it is not entitled to occupy it. This achieved the objective of protection without registration but it means that occupancy rights are a potential problem in every conveyancing transaction. The purchaser of any house has to be sure that there are no occupancy rights or that an appropriate consent or renunciation or dispensation is obtained, and cannot rely on the registers. Even a purchaser from an unmarried person has to be sure that the person is unmarried. To make the position of purchasers more tolerable the 1981 Act provides that a purchaser who acts in good faith is protected if there is produced to him or her by the seller

"(i) an affidavit sworn or affirmed by the seller declaring that the subjects of sale are not or were not at the time of the dealing a matrimonial home in relation to which a spouse of the seller has or had occupancy rights; or

(ii) a renunciation of occupancy rights or consent to the dealing which bears to have been properly made or given by the non-entitled spouse".[2]

There is a similar protection for heritable creditors who may, if conditions similar to the above are fulfilled, exercise their normal rights (e.g. their rights to sell on default) under the security and may also apply to a court for an order requiring the non-entitled spouse to make any payment due by the entitled spouse in respect of the loan.[3]

11.6 A further protection for purchasers was added in 1985.[4] It was provided that the non-entitled spouse's protection against a dealing would not apply if

"the entitled spouse has permanently ceased to be entitled to occupy the matrimonial home, and at any time thereafter a continuous period of 5 years has elapsed during which the non-entitled spouse has not occupied the matrimonial home".[5]

This means that the purchaser of a house from someone who has owned it, and had exclusive occupation of it, for five years or more does not need to be concerned about the occupancy rights of spouses of former proprietors.[6] It also protects the purchaser from an entitled spouse against a delayed assertion of occupancy rights if, for example, there has been a false affidavit or forged consent.

11.7 The protection of occupancy rights against dealings applies also to leased property. If the spouse who is the sole tenant assigns or renounces the tenancy without the consent of the other spouse (or a renunciation or a dispensation) the other spouse's occupancy rights are not prejudiced by the dealing. This is a simpler system than that recommended by the Commission in 1980, which would have required the non-entitled spouse to give notification to the landlord of his or her occupancy rights. It does, however, mean that a landlord may find that the property is occupied by someone who is not a tenant and who has rights but no corresponding obligations.[7]

11.8 We have referred to the obtaining of a dispensation. This is provided for in section 7 of the 1981 Act which enables a court to make an order dispensing with the consent of a non-entitled spouse to a dealing which has taken place or a proposed dealing if, among other things, the consent is unreasonably withheld. There is a problem about how much specification must be given of a proposed dealing.[8] We return to this later.[9]

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1. Parl Deb, (HC) First Scottish Standing Committee, 16 June 1981, col 101 (Mr Rifkind).
2. 1981 Act s6(3)(e) as amended by the Law Reform (Miscellaneous Provisions) (Scotland) Act 1985, and the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990.
3. S8, as amended.
4. By the Law Reform (Miscellaneous Provisions) (Scotland) Act 1985, s13.
5. 1981 Act s6(3)(f).
6. It is arguable that such occupancy rights are not protected anyway because s6 says that the continued exercise of occupancy rights is not to be prejudiced "by reason *only* of any dealing *of the entitled spouse* relating to that home". A sale by a subsequent owner is not a dealing by the entitled spouse.
7. See paras 11.19 to 11.21 below. There is valuable information on housing policies and the 1981 Act in the Final Report of the Institute of Housing (Scottish Homeless Group) (University of Strathclyde) on *Housing and Marital Breakdown—The Local Authority Response* (Feb 1985).
8. *Cf O'Neill* v *O'Neill* 1987 SLT (Sh Ct) 26 at p30; *Fyfe* v *Fyfe* 1987 SLT (Sh Ct) 38. See also *Longmuir* v *Longmuir* 1985 SLT (Sh Ct) 33 for valuable observations about the procedure for applying for a dispensation. In *Perkins* v *Perkins* Glasgow Sheriff Court, 11 Dec 1984, (unreported but referred to in the Strathclyde report at p45) the sheriff dispensed with the husband's consent to a sale of the home by his wife. Among the sheriff's reasons were that the husband had not lived in the house for 2 years and had accommodation of his own. It appeared that his reason for withholding consent related to disagreement as to how the proceeds of sale should be divided.
9. Para 11.13.

11.9 **Results of consultation.** In the discussion paper we sought views on various options, including a radical change of approach, for reform of the provisions on dealings.[1] The prevailing view was that the existing balance between protection of the non-entitled spouse and protection of third parties was broadly right and that a set of minor reforms to remove unnecessary irritations and inconveniences, rather than a completely new start, was all that was required. The impression we gained from consultees was that the requirements of the 1981 Act had been absorbed into ordinary conveyancing practice and that a radical new departure would be unwelcome. In these circumstances we have confined ourselves to recommending minor amendments which would be designed to avoid a number of conveyancing difficulties without disturbing the existing scheme of the Act or significantly affecting the protection given to the non-entitled spouse.

11.10 **Spouses of former owners.** One modification to the existing provisions which would have significant benefits, particularly in relation to registration of title, would be to reduce or eliminate the need to be sure that there are no occupancy rights of spouses of former owners (i.e. owners prior to the person now selling the property) liable to interfere with vacant possession. There is some doubt whether, under the existing law, the spouse of a former owner could ever assert occupancy rights. Clearly the former owner is no longer an entitled spouse and therefore his or her spouse no longer has occupancy rights under section 1 of the Act. Any claim by the spouse of a prior owner must be based on section 6(1) of the Act which provides that "the continued exercise" of occupancy rights

> "shall not be prejudiced *by reason only* of any dealing *of the entitled spouse* relating to that home"

and that a third party

> "shall not *by reason only* of such a dealing be entitled to occupy that matrimonial home or any part of it.". (Emphasis added.)

A sale by someone who has bought from an entitled spouse is not a dealing by or of the entitled spouse. A spouse whose claim to occupy the home is challenged or resisted by a subsequent purchaser is not prejudiced *by reason only* of the entitled spouse's dealing but at least partly by the fact that there has been a subsequent sale by someone other than the entitled spouse. It may perhaps be thought unlikely that the legislature, in enacting a family protection measure, would have intended that the husband or wife of a former owner should be able to come along and put a family out of the house which they had acquired in good faith and at considerable cost, or that, in enacting provisions which were designed to avoid extra demands on the staff at Register House, it would have intended that checks would have to be made in relation to prior owners in connection with registration of title.[2] Nonetheless, the official view appears to be that spouses are protected not only against dealings by the entitled spouse but also against subsequent dealings by other people. This causes a great deal of trouble and expense in relation to registration of title.[3] The position is relieved to some extent by section 6(3)(f) of the 1981 Act[4] which says that section 6 does not apply if

> "the entitled spouse has permanently ceased to be entitled to occupy the matrimonial home, and at any time thereafter a continuous period of 5 years has elapsed during which the non-entitled spouse has not occupied the matrimonial home.".

11.11 The obvious remedy for the difficulties caused by the doubt about whether section 6 affects subsequent purchasers would be to make it clear that it does not provided that they are in good faith. This could be done by adding a provision to section 6 to the effect that the section does not affect third parties who have acquired the home, or an interest in it, in good faith and for value from anyone other than the entitled spouse or who derive title from any such acquirer. Section 6(3)(f) would still have a role to play in protecting the *first* purchaser from an entitled spouse against a delayed assertion of occupancy rights by the seller's spouse. The period of five years seems too long, however. The object of the Act is to protect spouses from eviction or the threat of eviction, not to enable them to evict others from houses which were formerly the matrimonial home. We would suggest that a period of 2 years would be quite sufficient to protect a spouse who has been temporarily absent.

11.12 We do not believe that amendments on the above lines would significantly reduce the protection afforded by occupancy rights to spouses in occupation of the matrimonial home, or only temporarily absent from it. What they would do would be to prevent spouses who had long ceased to occupy a home from putting out *bona fide* purchasers. That seems to us to be the right policy to adopt in a provision designed to protect occupancy rights. There is no reason

1. Paras 6.9 to 6.29. The options considered were (1) repeal of sections 6 to 9 (2) a new form of more limited protection, based on a judicial power to set aside certain dealings intended to defeat occupancy rights (3) a notice system and (4) minor modifications. Although there was some support for option (2) there was also strong opposition to it on well-argued grounds. The first three options would all be regarded as retrogressive by many consultees.
2. A different view is, however, taken in Nichols and Meston, *The Matrimonial Homes (Family Protection) (Scotland) Act 1981* (2d edn 1986) para 6.05.
3. See Robertson, "The Matrimonial Homes (Family Protection) (Scotland) Act 1981" (1982) Journal of the Law Society of Scotland (Workshop) p308.
4. Added by the Law Reform (Miscellaneous Provisions) (Scotland) Act 1985, s13.

why the occupancy rights of the *bona fide* purchaser and his or her family should be regarded as less worthy of protection than those of the spouse of a former owner.

11.13 **Proposed dealings.** Another amendment which could usefully be made to the existing provisions is a clarification of what is meant by a "proposed dealing". In the case of *Fyfe* v *Fyfe*,[1] the sheriff principal held that

> " 'a proposed dealing' requires that a stage of negotiations has been reached in which proposals in regard to price and other conditions are being discussed"

and that

> "the consent of the non-entitled spouse must specifically relate to a particular dealing or proposed dealing".

He explained that until the terms of such a dealing were known a court could not determine whether the non-entitled spouse was reasonably or unreasonably withholding consent. Accordingly, the husband's application for a dispensation in relation to a proposed sale of the home was held to have been properly refused by the sheriff, as matters had only reached the stage where he wished to put the house on the market, knowing that there were several prospective purchasers.

11.14 This view of the meaning of "proposed dealing" is highly inconvenient for entitled spouses wishing to sell the house in circumstances where it is likely that a court would eventually dispense with consent. The seller wants to be able to make an offer to sell with as few difficult conditions as possible attached. A prospective purchaser is likely to be discouraged if it is a condition of the sale that a court dispenses with the spouse's consent. From both seller's and purchaser's points of view it is clearly desirable that a court should be able to dispense with the spouse's consent before the house is put on the market. Provided that the dispensation relates to a sale at not less than a certain price and within a specified time we can see no risk of prejudice to the non-entitled spouse. A suggestion on these lines was put to us by the Law Society of Scotland in October 1989. The Society also suggested a similar set of provisions in relation to the grant of a heritable security and this too seems right.

11.15 **Court's powers on refusing to dispense with consent.** A further amendment might be to give the court power, on refusing to dispense with the consent of the non-entitled spouse to a dealing, to order the non-entitled spouse to make reasonable payments to the owner of the house in lieu of rent and to attach such other conditions to the occupancy as it thinks fit. The effect of refusing to dispense with consent is that the non-entitled spouse can continue to occupy the home. This could cause hardship enough to the entitled spouse or other owner of the house. It would seem to be completely unjustifiable that the continued occupation should be free of charge. The prospects of recovery under common law principles of recompense[2] would be poor or non-existent where the occupancy is by virtue of a statutory right and where the statute clearly envisages that occupancy will be gratuitous.

11.16 **Affidavits.** Section 6(3)(e)(i) of the 1981 Act protects a purchaser in good faith if the purchaser has received from the seller

> "an affidavit sworn or affirmed by the seller declaring that the subjects of sale are not a matrimonial home in relation to which a spouse of the seller has occupancy rights."

There is a similar provision in section 8 for the protection of heritable creditors. The need to swear or affirm an affidavit (which can be done only before a notary public) can cause considerable inconvenience and irritation. We received representations from the Joint Consultative Committee of the Registers of Scotland Executive Agency and the Law Society of Scotland to the effect that the legal requirement for swearing or affirming an affidavit before a notary public should be relaxed. The Committee mentioned in particular that

> "in rural areas people sometimes had to travel considerable distances to avail themselves of a Notary Public's services: in one instance a young man had been injured in a road accident while undertaking such a journey."

The requirement was

> "generally regarded as undesirable and increased the costs of conveyancing for those in outlying areas."

The Committee suggested to us that we should include an appropriate recommendation for amendment in our current exercise.

11.17 We have a lot of sympathy with this suggestion. It fits in with our preferred policy of keeping the basic structure of the 1981 Act but removing as many sources of expense, inconvenience and irritation as possible. We considered several approaches. One would be to allow any solicitor or qualified conveyancer to act as a notary public in relation

1. 1987 SLT (Sh Ct) 38 at p41.
2. See e g *Earl of Fife* v *Wilson* (1864) 3 M 323; *Glen* v *Roy* (1882) 10 R 239; *Cooke's Circus Buildings Co Ltd* v *Welding* (1894) 21 R 339; *County Council of Stirling* v *Cullen* (1943) 59 Sh Ct Rep 83; *HMV Fields Properties Ltd* v *Skirt 'n' Slack Centre of London Ltd* 1987 SLT 2; *Shetland Islands Council* v *B P Petroleum Development* 1990 SLT 82.

to an affidavit under sections 6 or 8. That, however, would not solve the problem of sellers in rural areas who might still have to journey to the nearest sizeable town in order to swear or affirm an affidavit. Another possible approach would be to allow affidavits to be sworn or affirmed before a justice of the peace. Again, however, that could cause inconvenience without, perhaps, providing much real protection. The most promising approach, it seemed to us, would be to replace the affidavit by a written declaration subscribed by the seller, and to ensure that the declaration came within the scope of the False Oaths (Scotland) Act 1933. Section 2 of the 1933 Act provides that

> "If any person knowingly and wilfully makes (otherwise than on oath) a statement false in a material particular, and the statement is made—
>
> (a) . . .
>
> (b) in a . . . declaration . . . which he is authorised or required to make . . . by, under, or in pursuance of any public general Act of Parliament for the time being in force ...
>
> he shall be guilty of a crime and offence and shall be liable on conviction thereof to imprisonment for any term not exceeding two years, or to a fine, or to both such imprisonment and fine."

The result would be that the inconvenience and expense of swearing or affirming an affidavit before a notary public would be completely removed. A criminal sanction would, however, remain. Any forms sent out for signature by the seller's solicitor could contain a prominent statement warning that a false declaration could be a serious criminal offence.

11.18 A minor alteration suggested to us was that the protection of the affidavit in section 6 should extend to all transfers for value. At present it is confined to sales. This seems to us to be a sensible suggestion and, subject to replacing the references to affidavits by references to the new form of statutory declaration, we endorse it.

11.19 **Dealings with tenancies.** We have concentrated until now on house sales because that is where the minor irritations caused by the existing law are most apparent. There are also, however, problems in relation to tenancies. Under the existing law a non-entitled spouse's occupancy rights do not prevent the tenant spouse from terminating the tenancy without the other spouse's consent. If he or she does terminate the tenancy[1] there is then no tenancy left to transfer. So the non-entitled spouse cannot obtain a tenancy transfer order under section 13 of the 1981 Act.[2] However, the continued exercise of that spouse's occupancy rights is not prejudiced by the other spouse's termination of the tenancy. So the spouse continues in occupation, but not as a tenant—a somewhat anomalous situation, which makes it impossible to apply any statutory provisions regulating tenancies. If the owner of the house wishes to terminate the occupancy rights and cannot obtain the occupying spouse's consent or agreement he or she would have to ask the court to dispense with the non-entitled spouse's consent to the dealing under section 7 of the 1981 Act.[3] In practice a new tenancy would often be granted to the occupying spouse who would then become "entitled" and would no longer have rights pertaining only to a non-entitled spouse. This would, however, require the occupying spouse's agreement and if that agreement is withheld the former landlord is in an awkward position.

11.20 It is unsatisfactory, both from the point of view of the occupying spouse and from the point of view of the landlord, to leave the non-entitled spouse in a legal limbo. A clarification of the legal position was strongly urged by Scottish Women's Aid, who pointed out that the problem was one which arose frequently in practice. They gave the following two case histories from their recent experience.

> "(1) Mrs. A went to stay in a Women's Aid refuge because of Mr. A's violent behaviour. While she was away Mr. A went to the District Council, told them his wife had deserted him and gave up the tenancy which was in his sole name. As soon as Mrs. A heard of this from a relative she went to the District Council who said the house had already been re-allocated. Because Mrs. A had children she was allocated another house under the Homeless Persons provisions, but it was a less desirable house in a less desirable area.
>
> (2) Mrs. B was deserted by her husband who went to stay with his mother. Their council house was in Mr. B's name. Some weeks later the children of the family went to live with Mr. B who approached the District Council for housing. They refused as he already had a house (the matrimonial home). However they accepted from him the termination of the tenancy so that they could rehouse him and the children. They have refused to grant the tenancy of the matrimonial home to Mrs. B on the grounds that she is not in "priority need" because

1. In the case of a public sector secure tenancy coming under the Housing (Scotland) Act 1988 the tenancy may be brought to an end by, among other things, "4 weeks' notice given by the tenant to the landlord". 1988 Act s46(1).
2. *Cf Morgan* v *Morgan and Kyle and Carrick District Council*, Ayr Sheriff Court, 12 June 1984 (unreported—referred to in the Strathclyde Report at p43).
3. It is by no means clear when it would be held to be unreasonable for a spouse to withhold consent in this situation. It is, however, clear that section 48 of the Housing (Scotland) Act 1987 could not be used to recover possession, there being no tenancy, no tenant and no landlord. It is arguable that if the landlord grants a tenancy to a new tenant, that tenant is not affected by s6, because his or her rights do not arise by reason *only* of a dealing by the entitled spouse.

she does not have the children. Nevertheless she has occupancy rights in the house and is refusing to move out. She cannot apply for a transfer of tenancy under the Act because there is no tenancy to transfer. The situation is equally unsatisfactory for Mrs. B and for the District Council."

11.21 One suggestion made to us on consultation was that, if the tenant gives up the tenancy without the consent of the non-entitled spouse, the landlord should be bound to grant a tenancy to the non-entitled spouse. This, however, is not a complete answer. The non-entitled spouse may not consent to a tenancy, which would involve obligations not involved in just exercising occupancy rights. Another suggestion was that the court should be able to transfer the tenancy to the non-entitled spouse under the tenancy transfer provisions of section 13 of the 1981 Act. However, there is the logical difficulty that there is no tenancy left to transfer. Even if this is surmounted by deeming the tenancy to continue for the purposes of section 13 there is the practical difficulty that the non-entitled spouse might not wish to apply for a tenancy transfer but might prefer to sit tight and exercise occupancy rights. It seems to us that what is needed is a provision deeming the non-entitled spouse, so long as he or she is entitled to continue to exercise occupancy rights, to be a tenant under a tenancy in the same terms (apart from the identity of the tenant) as the terminated tenancy. He or she would be treated as a tenant for such purposes as liability for rent and recovery of possession. This would clarify the legal position of both the spouse and the landlord.

11.22 **Other minor amendments in relation to dealings.** It has been suggested that a curator bonis or a person acting under a power of attorney should be allowed to execute affidavits, consents or renunciations for the purposes of the 1981 Act.[1] We endorse this suggestion, subject to replacing affidavits by the new form of declaration referred to above.

11.23 **Recommendations on dealings.** Our recommendations for minor amendments to the provisions on dealings in the 1981 Act are as follows.

55.(a) Under section 6(1) of the Matrimonial Homes (Family Protection) (Scotland) Act 1981 (which relates to the continued exercise of occupancy rights after a dealing) a person acquiring the home or an interest in it should not be affected by the occupancy rights of the spouse of a former owner (i.e. an owner prior to the person making the transfer to that acquirer) if the acquirer was (i) a transferee for value acting in good faith or (ii) someone who derives title from such a transferee.

(b) The period referred to in section 6(3)(f) of the 1981 Act should be reduced from 5 years to 2 years.

(c) A court should be able to dispense with consent to a proposed dealing under section 7 of the 1981 Act notwithstanding that no negotiations have yet been entered into or concluded, provided that the dispensation relates to

(i) a sale at not less than a specified price and within a specified time from the date of the court's order, or

(ii) the grant of a heritable security for a loan of not more than a specified amount to be executed within a specified time from the date of the court's order.

(d) A court which refuses to dispense with a non-entitled spouse's consent to a dealing should have power (i) to order that spouse, if he or she is in occupation of the home, to make payments in lieu of rent and (ii) to attach to the refusal of consent such other conditions relating to the occupation of the home by the non-entitled spouse as it thinks fit.

(e) Section 6(3)(e) of the 1981 Act should apply to all transfers for value, not merely sales.

(f) The references to affidavits in section 6(3)(e) and section 8(2A) of the 1981 Act should be replaced by references to written declarations (attracting the penalties of the False Oaths (Scotland) Act 1933) subscribed by the transferor of the property or grantor of the security.

(g) Where a dealing consists of a termination by the entitled spouse of his or her tenancy of the matrimonial home then, if section 6 of the 1981 Act applies, the non-entitled spouse should be deemed, so long as he or she is entitled to continue to exercise occupancy rights, to be a tenant of the home under a tenancy in the same terms (apart from the identity of the tenant) as the terminated tenancy.

1. See, in particular, Gretton, "Matrimonial Homes Act—Conveyancing" 1990 JLSS 412–417.

(h) (i) **An attorney acting under a power of attorney should be permitted to execute a declaration, consent or renunciation for the purposes of the 1981 Act.**

(ii) **The curator bonis of an *incapax* should be permitted to execute a declaration, consent or renunciation for the purposes of the 1981 Act.**

(Draft Bill, clause 26 and Schedule 1.)

Prescription of occupancy rights

11.24 There is no provision in the 1981 Act for occupancy rights, in a question between the spouses, to be lost by the passage of time even if the spouses have been separated. Section 6(3)(f) of the 1981 Act, which we have considered above, operates only to disapply the protection against dealings in a case where the entitled spouse has sold the house, or otherwise ceased to be entitled to occupy it. It has no application where the entitled spouse continues to occupy the house. It follows that a spouse who owns the matrimonial home, or is the tenant of it, could be exposed to an assertion of occupancy rights by the other spouse even after the couple had been separated for, say, 15 years. It is probable that the long negative prescription of 20 years would apply[1] but this seems excessively long.

11.25 It would be dangerous to allow occupancy rights to be lost by a short period of non-occupation and separation, as a violent spouse might terminate the other spouse's rights by making him or her terrified to return. We suggested in the discussion paper that a period of a year ought to suffice to enable a spouse to obtain legal advice with a view to seeking an exclusion order[2] and that the occupancy rights of a non-entitled spouse in a home should terminate if the spouses had been separated for a continuous period of one year during which period the non-entitled spouse had neither occupied the home nor been engaged in court proceedings to assert his or her occupancy rights. This would protect a spouse from an assertion of occupancy rights by a separated husband or wife after many years, but would ensure that a non-entitled spouse would not lose occupancy rights merely because the spouses had been living together elsewhere for a year or more.

11.26 There was a mixed reaction to this proposal. Almost all of those who commented on it agreed that there should be some prescriptive period. However, some consultees thought that the period of one year was too short. One consultee thought that one year was too long and that a period of 6 months would suffice. Some consultees thought that our provisional proposal could force spouses into hasty court actions to protect their occupancy rights before the year expired. Another consultee pointed out that occupancy rights provided a way of preventing disposal of the matrimonial home pending a divorce and that this function would no longer be performed if they prescribed too soon after separation. Two consultees expressed anxiety that police officers called to a scene of domestic violence could have great difficulty in knowing whether occupancy rights had prescribed.

11.27 We found the comments on this proposition very helpful. The one thing that seems clear is that there should be some prescriptive period. It is thoroughly unsatisfactory that, say, a wife who is deserted by her husband should be liable to be faced by an assertion of occupancy rights by him ten or fifteen years later. We accept, however, that the suggested period of one year might be considered too short. The choice of a suitable period must be arbitrary, within a certain range, but we consider that a period of two years would be about right. A spouse who has been separated and living elsewhere for two years is unlikely to have a live claim for an exclusion order and, given that he or she has not been resident in the home for that period, the risk of difficulties for police officers called to deal with domestic disputes would be minimal. The argument about preventing disposals prior to divorce is not conclusive. The primary purpose of occupancy rights is to prevent a spouse from being evicted like a mere invitee, not to preserve assets for division on divorce. There are other legal remedies to prevent or set aside transactions likely to defeat a spouse's claims for financial provision on divorce.[3] Nor do we think that there would be any encouragement of unnecessary court actions. Either a spouse wishes to seek an exclusion order, or leave to enter under section 1(3) of the Act, or he or she does not. If he or she does wish to seek such a remedy there are, in any event, strong incentives to do so soon after the precipitating events rather than after a long period of separation. If the prescriptive period were two years it would, we think, be unnecessary to provide for interruption by court action within that period. There would therefore be no incentive to begin proceedings which had no real hope of success just to keep occupancy rights in being for some time longer.

1. Prescription and Limitation (Scotland) Act 1973, s8. This is on the assumption that the right is not a right exercisable as a *res merae facultatis*.
2. Para 6.31.
3. Family Law (Scotland) Act 1985, s18.

11.28 We recommend that

56. The occupancy rights of a non-entitled spouse in a matrimonial home should terminate if the spouses have been separated for a continuous period of two years or more during which period the non-entitled spouse has not occupied the home.

(Draft Bill, clause 25.)

Exclusion orders

11.29 We received a suggestion that section 4(3)(a) of the 1981 Act should be repealed as unnecessary. This provision qualifies the court's obligation to grant an exclusion order if, *on the hypothesis that both spouses were in the home*,[1] it appears to the court that

> "the making of the order is necessary for the protection of the applicant or any child of the family from any conduct or threatened or reasonably apprehended conduct of the non-applicant spouse which is or would be injurious to the physical or mental health of the applicant or child."

Section 4(3)(a) introduces an element of discretion by providing that a court is not to make an exclusion order if it appears to the court that the making of the order would be unjustified or unreasonable

> "(a) having regard to all the circumstances of the case including [various matters such as the conduct, needs and financial resources of the spouses]."

It has sometimes been suggested that if protection is necessary it will never be unjustified or unreasonable to make an exclusion order.[2] This, however, ignores the point that protection may be necessary on the assumption that both spouses are in the house and yet quite unjustified and unreasonable in the actual circumstances of the case. Without section 4(3)(a), for example, a court would have to make an exclusion order against a wife whose conduct would be injurious to her husband's health if he returned to the home, even if he was living elsewhere in perfectly satisfactory accommodation and had no need to return to the home. We have no doubt that section 4(3)(a) must remain.

Interdicts

11.30 Section 15 of the 1981 Act provides for a power of arrest to be attached to certain interdicts in the matrimonial context. This has proved to be a useful weapon in the fight against domestic violence, often making the task of the police very much easier.[3] The interdicts to which a power of arrest may (or, in some cases, must) be attached are described in the Act as "matrimonial interdicts" and a "matrimonial interdict" is defined in section 14(2) as

> "an interdict including an interim interdict which—
>
> (a) restrains or prohibits any conduct of one spouse towards the other spouse or a child of the family, or
>
> (b) prohibits a spouse from entering or remaining in a matrimonial home or in a specified area in the vicinity of the matrimonial home."[4]

It has been suggested by the Law Society of Scotland[5] and by Scottish Women's Aid[6] that this definition is too narrow. Paragraph (b) does not apply, for example, to a house bought or rented by a spouse after separation which is not a matrimonial home,[7] or to a refuge where a spouse is staying temporarily, or to a spouse's place of work, or to the school which the parties' children attend. It may be argued that in all of these cases protection may be necessary. On the other hand an interdict without a power of arrest could be obtained against molestation in these places and there is an argument that attachment of a power of arrest should not be used too widely because it might unduly restrict a citizen's freedom of movement. In a small village, for example, a person who could not go near a house at one end of the main street, a shop where his or her spouse worked in the middle, or a school at the other end might be very severely restricted indeed. Against this it could be said that a court, if it had enough discretion,[8] would not grant such an interdict and that there would be no harm in at least giving the power to do so in appropriate cases.

11.31 On consultation there was considerable support for an extension of the definition of matrimonial interdict on the lines suggested. Indeed one consultee suggested extending the wording of section 14(2)(b) (quoted above) to cover, on cause shown, any specified area. This, however, would be too wide. It would enable a power of arrest to be attached

1. See *Brown* v *Brown* 1985 SLT 376 at p379.
2. See eg *Brown* v *Brown* 1985 SLT 376 at p378; Strathclyde report at pp101 and 159.
3. See the Strathclyde report pp122–144.
4. S14(2).
5. In their Memorandum on the Matrimonial Homes (Family Protection) (Scotland) Act 1981 dated October 1983.
6. In comments on the above Memorandum published in the Journal of the Law Society of Scotland (1984) at p436.
7. We consider the definition of "matrimonial home" later. Here it is enough to note that it does not include a new home provided by a spouse (eg after separation) for himself or herself to live in, whether or not with children, separately from the other spouse. See s22.
8. See para 11.34 below.

to any interdict against any married person prohibiting him or her from entering or remaining in any place—such as a factory which was the subject of an industrial dispute. There has to be some link in section 14(2)(b) between the place and the applicant spouse. A few consultees mentioned that in practice interdicts under section 14(2)(a) against "conduct" can be so framed as to cover a very wide range of situations. This is true. Nonetheless there may be cases where it is mere presence in, for example, a street outside a school which needs to be prohibited rather than any conduct towards the spouse or child.

11.32 The widening of the scope of matrimonial interdicts raises a question about the way in which section 14(1) of the 1981 Act is expressed. Section 14(1) provides that

> "It shall not be incompetent for the court to entertain an application by a spouse for a matrimonial interdict by reason only that the spouses are living together as man and wife."

The negative way in which this is expressed leaves it open to someone to argue that a matrimonial interdict is incompetent for some other reason—for example, that the conduct to be prohibited is not a legal wrong. It is not a legal wrong, for example, to stand in a street outside a school. So applications for some of the extended interdicts now to be available could be opposed on this ground. What is needed is a positive statement that the court may grant matrimonial interdicts, as defined.

11.33 It would clearly be wrong, as the Court of Session has recognised,[1] to allow an application for a matrimonial interdict to be used as a back door method of obtaining an exclusion order. A recasting of section 14(1) in positive terms would make it necessary to provide expressly that a matrimonial interdict could not be used in this way.[2] Where the effect of such an interdict would be to exclude an entitled spouse, or a spouse with occupancy rights, from the matrimonial home it ought to be incompetent to grant it unless it is ancillary to (a) an exclusion order or (b) a refusal of leave by a court to exercise occupancy rights in the circumstances mentioned in section 1(3) of the 1981 Act.[3] There is no objection to an interdict being used to exclude from the home a non-entitled spouse who has renounced occupancy rights. A wife, for example, who has separated from her husband because of his violence may agree to re-admit him to the house of which she is owner or tenant only if he renounces occupancy rights. If he then becomes violent again she should be able to obtain any necessary matrimonial interdicts even if the effect is to exclude him from the home. Taking the above three points on the scope of section 14 together, we recommend that

57.(a) Section 14(1) of the Matrimonial Homes (Family Protection) (Scotland) Act 1981 should confer an express power to grant matrimonial interdicts.

(b) It should be made clear in the Act that a matrimonial interdict under section 14(1) cannot be used as an easy alternative to an exclusion order. A matrimonial interdict should not be available so as to exclude an entitled spouse, or a spouse with occupancy rights, from the matrimonial home unless the interdict is ancillary to an exclusion order or to a refusal by the court of leave to exercise occupancy rights in the circumstances mentioned in section 1(3) of the Act.

(c) The definition of "matrimonial interdict" in section 14(2) of the 1981 Act should be extended so that paragraph (b) extends not only to a matrimonial home but also to any home or other premises occupied by the applicant, to the applicant's place of work and to the school attended by any child in the applicant's care.

(Draft Bill, clause 27(1).)

Powers of arrest

11.34 It has already been mentioned that a power of arrest must be attached to matrimonial interdicts in some cases whereas in others the court has some discretion. This is governed by section 15(1) of the 1981 Act which provides as follows

> "The court shall, on the application of the applicant spouse, attach a power of arrest—
>
> (a) to any matrimonial interdict which is ancillary to an exclusion order, including an interim order under section 4(6) of this Act;
>
> (b) to any other matrimonial interdict where the non-applicant spouse has had the opportunity of being heard by or represented before the court, unless it appears to the court that in all the circumstances of the case such a power is unnecessary."

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1. See *Tattersall* v *Tattersall* 1983 SLT 506.
2. Under the existing law it can be argued that section 14(1) does not expressly make a matrimonial interdict competent. See *Tattersall* v *Tattersall*, above, at p509.
3. Section 1(3) deals with the situation where a non-entitled spouse who is not in occupation of the home seeks to enter and occupy it. It provides that— "If the entitled spouse refuses to allow the non-entitled spouse to exercise the right [to enter and occupy], the non-entitled spouse may exercise that right only with the leave of the court. . .". For example, a violent husband who has been living apart for a year may return to find that his wife has changed the locks and refuses him entry. He may then be refused leave by the court to re-enter the home and assert his occupancy rights against the wishes of the other spouse. In such a situation an interdict against the husband attempting to force entry to the home should be available.

11.35 In the discussion paper we referred to a suggestion that the court should be bound to attach a power of arrest to all matrimonial interdicts.[1] We had reservations about this suggestion. It seemed to us to be wrong to require a court to attach a power of arrest even in a case where it appeared to the court to be unnecessary. Most consultees agreed with our provisional view that the attachment of a power of arrest should not be mandatory in all cases. Some consultees suggested, however, that it should be made clear in section 15(1)(b) that the onus is on the non-applicant spouse to show that a power of arrest is unnecessary. We recommend the adoption of this useful suggestion.

58. It should be made clear in section 15(1)(b) of the 1981 Act (power of arrest) that the onus is on the non-applicant spouse to show that a power of arrest is unnecessary.

(Draft Bill, clause 27(2).)

11.36 Section 15(3) of the 1981 Act provides that

> "If . . . a power of arrest is attached to an interdict, a constable may arrest without warrant the non-applicant spouse if he has reasonable cause for suspecting that spouse of being in breach of the interdict."

There have been suggestions that "may" should be changed to "shall" in this provision.[2] We did not support this suggestion in the discussion paper. It did not seem to us to be sensible to place a police constable under a legal obligation to arrest a man or woman in circumstances where there was no need for that to be done. It seemed to us to be unwise to insist on automatic arrest in all cases, even if the breach was trivial and had not upset the "protected" spouse, or even if the breaching spouse had left the scene in a case where the only breach was passing along a street. An obligation to arrest would be particularly unreasonable, we thought, if the breach (for example, being in the matrimonial home) had occurred at the invitation of the protected spouse. It would bring the law, and the police, into disrepute to force a constable to make an arrest if he or she observed the interdicted spouse and the protected spouse emerging happily from the matrimonial home after a mutually arranged visit.[3] There could also be cases where it was a matter of doubt whether there had been a breach of interdict, and where a duty to arrest would place a constable in a difficult position.[4] The imposition of a statutory duty to arrest would also raise the question of the sanction for breach of that duty. Most consultees agreed with our provisional view that the police should continue to have a discretion in this area. We therefore recommend that

59. Where a power of arrest is attached to an interdict the police should continue to have a discretion as to whether or not to arrest where a breach is reasonably suspected.

11.37 Under the existing law a power of arrest attached to a matrimonial interdict ceases to have effect on divorce.[5] Moreover, a power of arrest cannot be attached to an interdict against molestation of one *former* spouse by the other.[6] There have been suggestions that the power of arrest attached to a matrimonial interdict should continue after divorce and that interdicts with attached powers of arrest should be available after divorce.

11.38 We agree with these suggestions and so did almost all those who commented on this question. There is clearly something artificial about a cut-off on divorce. A divorce changes the legal position but not the factual position and a need for protection may well continue. On the other hand there is a case for not continuing powers of arrest indefinitely. They are liable to get out of date because of changed circumstances, such as a move by the protected spouse to a new address. To clog up police records with dead interdicts also seems undesirable and not in the interests of those in need of current protection. We suggested in the discussion paper that powers of arrest should terminate five years after the date when the power was granted, but should continue for the full five years (unless previously recalled) notwithstanding the termination of the marriage.[7]

11.39 There was general agreement, as we have noted, with the idea that a power of arrest should not terminate on divorce. There were, however, differing views as to the appropriate duration of such a power. Some consultees thought that five years was a reasonable period. Others thought it was too long. One group suggested that 6 months would be long enough, presumably on the view that a power of arrest is meant to deal with a situation of temporary stress and danger and should not continue any longer than is necessary. Another group, however, suggested that the power of arrest should continue indefinitely, on the view that the interdicted spouse could always seek a recall. Another suggestion was that the power should last for 3 years unless renewed on cause shown. It seems to us that this last suggestion strikes the right balance between terminating powers of arrest which are no longer required or appropriate and preserving protection for a reasonable length of time. We accordingly recommend that

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1. Para 6.37.
2. See 1984 Journal of the Law Society of Scotland 436 at p437 and the Strathclyde report at pp144 and 162.
3. An interdict made in connection with an exclusion order will prohibit the interdicted spouse from entering the matrimonial home "without the express permission of the applicant". 1981 Act s4(4)(b). However, a matrimonial interdict under s14 might be quite general.
4. There might, for example, be doubt about the precise extent of a prohibited area mentioned in the interdict. *Cf* the Strathclyde report p136.
5. 1981 Act s15(2).
6. This follows from the definition of "matrimonial interdict" in s14(2).
7. Para 6.41.

60. A power of arrest attached to a matrimonial interdict should not cease to have effect on the termination of the marriage but should cease to have effect, whether or not there is a divorce, three years after the date when the power was granted, unless it has been recalled, or renewed on cause shown, within that time.

(Draft Bill, clause 27(3).)

11.40 Almost all of those who commented on the question thought that the definition of matrimonial interdict should be wide enough to cover an interdict against molestation of a former spouse or against being or remaining in or near certain places connected with the former spouse, such as the former spouse's home or place of work or the school attended by a child in his or her care. We therefore recommend that

61. The definition of "matrimonial interdict" should be extended to cover a corresponding interdict for the protection of a former spouse.

(Draft Bill, clause 27(1).)

11.41 The 1981 Act provides quite a complicated procedure for the situation where a person has been arrested under a power of arrest attached to a matrimonial interdict. If the arrested person has not been liberated by the police (on the ground that there is no likelihood of violence to the other spouse or any child of the family)[1] and the procurator fiscal has decided that no criminal proceedings are to be taken then the arrested person must, wherever practical, be brought before a sheriff by the end of the first day after the arrest (not being a Saturday, Sunday or court holiday).[2] Before the person is brought before the sheriff the procurator fiscal must take all reasonable steps to intimate to the other spouse and his or her solicitor that no criminal proceedings will be taken.[3] The purpose of this is to enable the other spouse to decide whether or not to take civil proceedings for breach of interdict. The procedure once the arrested person is brought before the sheriff is regulated by section 17(5) of the 1981 Act, which provides as follows.

"(5) On the non-applicant spouse being brought before the sheriff under subsection (2) above, the following procedure shall apply—

(a) the procurator fiscal shall present to the court a petition containing—

(i) a statement of the particulars of the non-applicant spouse;

(ii) a statement of the facts and circumstances which gave rise to the arrest; and

(iii) a request that the non-applicant spouse be detained for a further period not exceeding 2 days;

(b) if it appears to the sheriff that—

(i) the statement referred to in paragraph (a)(ii) above discloses a *prima facie* breach of interdict by the non-applicant spouse;

(ii) proceedings for breach of interdict will be taken; and

(iii) there is a substantial risk of violence by the non-applicant spouse against the applicant spouse or any child of the family,

he may order the non-applicant spouse to be detained for a further period not exceeding 2 days;

(c) in any case to which paragraph (b) above does not apply, the non-applicant spouse shall, unless in custody in respect of any other matter, be released from custody;

and in computing the period of two days referred to in paragraphs (a) and (b) above, no account shall be taken of a Saturday or Sunday or of any holiday in the court in which the proceedings for breach of interdict will require to be raised."

11.42 The procedure outlined above is not effective.[4] Procurators fiscal often encounter considerable practical difficulties in making intimation to the other spouse and to his or her solicitor, as required by section 17(4) of the 1981 Act,[5] and often have to spend a great deal of time and effort to no effect. Solicitors often encounter difficulties in obtaining instructions from their clients, within the short time available, in relation to the taking of proceedings for breach of interdict.[6] In practice there is rarely, if ever, adequate information before the sheriff as to whether or not proceedings for breach of interdict are to be taken. Unless it appears to the sheriff that proceedings for breach of interdict will be taken the arrested person must be released from custody.[7] We have been informed by one sheriff

1. S16.
2. S17(1) and (2).
3. S17(4). Intimation should be made, where reasonably practicable, to "the solicitor who acted for [the other spouse] when the interdict was granted or to any other solicitor who the procurator fiscal has reason to believe acts for the time being for that spouse."
4. Strathclyde report pp139–140, 142, 144.
5. *Ibid* p140.
6. *Ibid* p139.
7. S17(5)(b)(ii) and (c) provided, of course, that he or she is not in custody in respect of any other matter.

that he has never been able to grant a petition presented under section 17(5) because there has never been information before him indicating that proceedings for breach of interdict would be taken. The Procurator Fiscals Society told us that they had been unable to find a depute who had ever been present when a sheriff was able to grant a petition under section 17(5). Even if a petition were granted, the further period of two days (excluding Saturday and Sunday) is hardly long enough in practice to enable proceedings for breach of interdict to be brought before a court.[1] It is certainly not long enough to permit the determination of breach of interdict proceedings if the breach is denied and a proof has to be fixed.[2]

11.43 In the discussion paper we referred to various options for reform of the procedure for dealing with a person arrested under a power of arrest attached to a matrimonial interdict.[3] One option was to make any breach of a matrimonial interdict with a power of arrest attached to it a criminal offence. There was some support for this on consultation, but also strong opposition. It is not a new suggestion. We consulted on it at the time of our earlier work on occupancy rights and found then that it was strongly opposed, mainly on the ground that it would cause an undesirable confusion of civil and criminal remedies. The creation of a new criminal offence (which might consist of simply being in a street or building) is not something to be taken lightly and, given the opposition to this option, we cannot recommend it.

11.44 We suggested in the discussion paper that another option might be simply to give the police power to detain the arrested person for up to 48 hours. There would be an obligation to report the circumstances to the procurator fiscal. The detained person would have the normal rights of a detained person under section 3(1) and (2) of the Criminal Justice (Scotland) Act 1980 (intimation to named person). There was a lot of support for this option but also opposition. The police associations which commented were opposed to the suggestion on the grounds that it was contrary to principle to allow detention of this type where there was no breach of the criminal law and no control by a court and that it would place the police in an invidious position. Other consultees were also concerned that the police would be placed in an anomalous position and that there would be a threat to civil liberties. In the light of the comments received on this option we think that it would prove controversial and difficult to introduce. We think that there is a more simple and acceptable way of dealing with the difficulties in the section 17 procedure.

11.45 The two main problems with section 17, which everybody agreed was practically unworkable as it stands, are caused by subsection (4) and subsection (5)(b)(ii). Subsection (4) obliges the procurator fiscal, within the very short time available before the arrested person is brought before a sheriff, to take all reasonable steps to intimate to the applicant spouse and to the solicitor who acted for that spouse when the interdict was granted or to any other solicitor who he or she has reason to believe acts for that spouse that criminal proceedings will not be taken. This, as we have seen, is a major source of difficulty. It seems to us that, in practical terms, nothing would be lost and much would be gained by repealing subsection (4). The other troublesome provision is subsection (5)(b)(ii) which requires the sheriff to be satisfied that "proceedings for breach of interdict will be taken" before he or she can order a further short period of detention under section 17(5). As we have seen, it is apparently extremely rare for a sheriff to have the necessary information to be so satisfied. We think that subsection (5)(b)(ii) could also be repealed. The result of these two repeals would be to preserve the basic scheme of the present procedure, including the important roles of the police, the procurator fiscal and the sheriff, but to remove the two blockages in its effective operation. In practice, given the ineffectiveness of the present procedure, there would be no loss of protection for the applicant spouse. We therefore recommend that

62. Subsection (4) and subsection (5)(b)(ii) of section 17 of the 1981 Act (procedure after arrest for breach of a matrimonial interdict) should be repealed.

(Draft Bill, clause 27(4).)

Definition of matrimonial home

11.46 Section 22 of the 1981 Act, as amended in 1985, defines a matrimonial home as

> "any house, caravan, houseboat or other structure which has been provided or has been made available by one or both of the spouses as, or has become, a family residence and includes any garden or other ground or building attached to, and usually occupied with, or otherwise required for the amenity or convenience of, the house, caravan, houseboat or other structure but does not include a residence provided or made available by one spouse for that spouse to reside in, whether with any child of the family or not, separately from the other spouse".

There are a few small points here which could usefully be tidied up. The first relates to a home provided by one spouse for the other spouse to live in separately. As a matter of policy we think that this should not be regarded as a matrimonial home and it has been held in the Outer House of the Court of Session that it is not.[4] The existing definition, however,

1. Strathclyde report p140.
2. See Macphail, *Sheriff Court Practice*, p775.
3. Paras 6.45 to 6.49.
4. *McRobbie* v *McRobbie* 3 Aug 1983 (noted at 1984 Journal of the Law Society of Scotland p5).

leaves room for doubt and we think that doubt should be removed. A similar doubt exists in relation to a home provided by a third party—say, a spouse's parent—for that spouse to live in separately after the marriage has broken down. Again we think that this should not be a matrimonial home for the purposes of the Act. Consultees agreed, almost unanimously. We recommend that

63. It should be made clear in the definition of "matrimonial home" that that term does not include a residence provided or made available by anyone for one spouse to reside in, whether with any child of the family or not, separately from the other spouse.

(Draft Bill, clause 28(b).)

If, as we have recommended earlier,[1] matrimonial interdicts were not defined in terms of the matrimonial home then this proposal would not cut down the protection which they can give.

11.47 The second point is a very minor one indeed. There is a doubt as to whether the definition of "matrimonial home" includes any garden or other ground or building which is not attached to the house but which is required for its amenity or convenience—for example, a garage situated a short distance from the house.[2] We think that this should be included and recommend that

64. It should be made clear that the definition of "matrimonial home" includes any ground or building which is required for its amenity or convenience even if not attached to it.

(Draft Bill, clause 28(a).)

11.48 A third minor reform which has been suggested to us is a provision making it clear, for the removal of any doubt, that where the tenancy of a matrimonial home is transferred from one spouse to the other (voluntarily, or under section 13 of the 1981 Act, or under Schedule 2 paragraph 16 of the Housing (Scotland) Act 1987) with the intention that the home is thereafter to be the residence of the transferee spouse separately from the other spouse, the house should not be a matrimonial home after the transfer. This may well be the position at present but there is room for doubt because the house has been the parties' matrimonial home in the past. We recommend that

65. It should be made clear that where the tenancy of a matrimonial home is transferred from one spouse to the other with the intention that the house is thereafter to be the residence of the transferee separately from his or her spouse, the house is not a matrimonial home after the transfer.

(Draft Bill, clause 28(c).)

Other points on 1981 Act

11.49 We deal later with the rights of cohabitants under the 1981 Act.

11.50 Section 4(4)(b) of the 1981 Act requires the court which makes an exclusion order, on the application of the spouse concerned, to grant an interdict prohibiting the non-applicant spouse

"from entering the matrimonial home without the express permission of the applicant".

It was represented to us that difficulties often arose for the police when consent was given and then withdrawn. It was suggested that the words "without the express permission of the applicant" should be repealed. While we can understand the difficulties caused by repeated changes of mind on the part of the protected spouse we do not think that it would be reasonable to remove the possibility of waiving the protection of the interdict. There may be many reasons for permitting the interdicted spouse to enter the home—for example, to collect personal effects, to visit an ill child, to discuss a reconciliation—and it would, we think, be unwise to regard a visit as a breach of interdict if it was made with the express permission of the other spouse.

11.51 Section 15(2) of the 1981 Act provides that a power of arrest attached to a matrimonial interdict does not have effect until the interdict, with the attached power of arrest, is served on the interdicted spouse. We received a suggestion that it should be made clear that service was required even if the interdicted spouse was present or represented in court. We think, however, that this is already clear from the terms of section 15, including section 15(4) which refers to a certificate of service.

11.52 We also received a suggestion that exclusion orders under the 1981 Act should be available, on the application of a social worker or other third party, for the purpose of having a person who was suspected of child abuse excluded from the home where the child is living. There is, at first sight, a plausible argument for removing the suspected abuser rather than the child from the home. However, this has nothing to do with occupancy rights in a matrimonial home

1. Para 11.33 above.
2. See Nichols and Meston *op cit* para 2.14.
3. Paras 16.38–16.40 below.

and if a remedy of this nature is required it would have to be a separate and distinct remedy. This matter has recently been considered by the Child Care Law Review Group who found that there were significant difficulties, such as enforcement, in the suggestion and did not recommend an independent remedy.[1] In these circumstances we do not think that it would be appropriate for us to take this suggestion further.

1. *Review of Child Care Law in Scotland* (Scottish Office, 1990) pp43–44.

Part XII Judicial Separation

Introduction

12.1 Judicial separation is a remedy for marital breakdown which terminates the spouses' obligation of adherence (i.e. their obligation to live together) and ordains the defender to live apart, but which does not terminate the marriage. It is an older remedy than divorce and was well developed in the canon law before the Reformation. For centuries the only grounds were cruelty and adultery but in 1976 the grounds were changed to (a) adultery (b) intolerable behaviour (c) desertion followed by two years' separation (d) two years' separation plus the defender's consent to decree and (e) five years' separation.[1]

12.2 The usefulness of judicial separation in Scotland has varied over the years. Before 1938 there was no divorce for cruelty or intolerable behaviour and a decree for permanent aliment could only be obtained along with a decree for separation or adherence. A decree of separation and aliment was therefore an important remedy for abused wives. Before the introduction of legal aid in 1950 another attraction of separation was that it was a more readily accessible remedy for many people. It was available in the sheriff courts, whereas divorce was only available, at greater cost, in the Court of Session.

12.3 Before the Married Women's Property (Scotland) Acts of 1881 and 1920 a separation decree had important effects in relation to obligations and property. Property acquired by a wife after she had obtained a decree of separation was excluded from her husband's *jus mariti* and *jus administrationis* and, on her death intestate, passed to her heirs as if her husband was dead.[2] A judicially separated wife could enter into obligations, sue and be sued, as if she were unmarried.[3] These consequences, apart from the provision on intestate succession, ceased to be of importance with the disappearance of the old law on matrimonial property and the incapacity of married women.[4] The provision on succession is now anomalous. It applies only to a separation decree obtained by a *wife*, only if the wife dies *intestate*, and only to property acquired *after* the decree. In our report on *Succession* we have recommended its repeal.[5] At one time some local authorities used to require a married person applying for a tenancy of a local authority house on the ground of marital breakdown to obtain a divorce or judicial separation before they would make an allocation or put the applicant on a waiting list.[6] Where there was an objection to divorce this practice could push people into raising court proceedings for a judicial separation which they did not want and did not otherwise need. However, the Housing (Scotland) Act 1987 now provides that

> "In the allocation of local authority housing a local authority . . .
> shall not impose a requirement . . .
> that a divorce or judicial separation be obtained".[7]

The present position

12.4 The legal reasons for separation actions have now disappeared. Divorce is as readily available as separation, in the same courts and on the same grounds. It is a more effective remedy than judicial separation in relation to property and succession. Those who do not wish to seek a divorce, or who do not wish to do so yet, can obtain all the remedies they need without seeking a judicial separation. It is not now necessary to seek a separation decree in order to obtain aliment. An action for aliment can be raised on its own.[8] It is not now necessary to seek a judicial separation in order to obtain a local authority house.[9] It never has been necessary to raise a separation action in order to obtain custody of, and aliment for, a child. Separate proceedings for custody and aliment can be raised. A separation decree is not

1. Divorce (Scotland) Act 1976, ss1 and 4.
2. Conjugal Rights (Scotland) Amendment Act 1861 s6.
3. *Ibid.*
4. See now the Family Law (Scotland) Act 1985, s24.
5. Scot Law Com No 124 (1990) para 7.33.
6. See Symon (ed), *Housing and Divorce* (Centre for Housing Research, Glasgow University, Studies in Housing No. 4, 1990) p86.
7. S20(2)(b)(ii).
8. Family Law (Scotland) Act 1985, s2.
9. Housing (Scotland) Act 1987, s20(2)(b)(ii).

a good remedy for a spouse who is the victim of domestic violence. It does not say that either spouse is to leave the home. It is concerned with personal relations, not occupancy rights. Exclusion orders and matrimonial interdicts under the Matrimonial Homes (Family Protection) (Scotland) Act 1981 are more appropriate and effective remedies. The fact that a separation decree cancels the obligation of adherence between the spouses is of no practical importance. A spouse does not need a separation decree from a court in order to separate. A court will not order him or her to return.[1] If there is reasonable cause for separating, he or she cannot be divorced for desertion.[2] A spouse does not need a court decree to prove, for income tax or other purposes, that he or she is living apart. A separation decree is not conclusive proof in any event, as the parties may have resumed cohabitation notwithstanding the decree. A spouse who wishes to keep open the right to aliment, or the chance of a widow's pension, or a prospect of reconciliation, may not want a divorce but does not need a judicial separation either. Indeed from the point of view of reconciliation, raising a separation action on, say, the ground of intolerable behaviour is inadvisable. Raking over the spouse's past conduct, having him or her judicially found to be at fault, and having him or her ordained to live apart, is hardly the best way of promoting a reconciliation. Legally, judicial separation has become an unnecessary remedy.

12.5 Separation actions are now comparatively infrequent. The numbers appear to be declining steadily. In the 5 year period from 1985 to 1989 the numbers of actions of separation and aliment raised in Scotland were as follows:[3]

1985	234
1986	215
1987	174
1988	158
1989	116

There are no statistics on the number of separation actions which do *not* include a crave for aliment but it is estimated that the above figures represent about half of all separation actions raised.[4] The number of separation decrees granted is considerably less than the number of actions raised. Many actions do not proceed to decree.[5] Some may be converted into actions for divorce.[6] In some cases the parties may become reconciled. In some cases the client may be satisfied with interim measures obtained to deal with such practical problems as aliment and personal protection and may no longer feel the need to pursue the crave for judicial separation.[7]

12.6 There are pronounced geographical variations in the use of judicial separation. In most parts of Scotland it is extremely rare. In the five-year period from 1985 to 1989 inclusive there were no separation actions at all in 8 sheriff courts and not more than one a year on average in another 21 sheriff courts.[8] Most separation actions are raised in the sheriffdoms of North Strathclyde, South Strathclyde and Glasgow.[9]

> "Indeed, over half the actions raised in 1989 were raised in just 5 sheriff courts within these sheriffdoms, and a similar pattern can be identified in previous years."[10]

12.7 Most separation actions are raised by women, and most are on the ground of intolerable behaviour.[11] Most include craves for aliment, custody or remedies under the Matrimonial Homes (Family Protection) (Scotland) Act 1981.[12] It is estimated that approximately half of the pursuers are legally aided.[13] In most cases the pursuer has dependent children.[14]

Assessment

12.8 The question for consideration is whether there is a place for the remedy of judicial separation in a new family law code. Legally, as we have seen, it is now an unnecessary remedy. A spouse who does not wish to seek a divorce

1. The action for adherence was abolished by the Law Reform (Husband and Wife) (Scotland) Act 1984 s2(1). Even before that a decree for adherence would not be enforced. See *Hastings* v *Hastings* 1941 SLT 323 at p325.
2. Divorce (Scotland) Act 1976 s1(2)(c). In our report on *Reform of the Ground for Divorce* (Scot Law Com No 116, 1989) we recommended the abolition of divorce for desertion, which is now little used.
3. Platts, *The Use of Judicial Separation* (Scottish Office, Central Research Unit, 1992) Chap 2, para 2 ("Platts").
4. Platts, Chap 2, para 2.
5. Platts, Chap 4, para 6. "Only one third of actions in the sample studied (all of which were raised in 1989) had proceeded to decree by the time of the data collection exercise (summer 1991)". See also Chap 2, para 19. "Court staff suggested that it was unlikely that any further action would take place in many of the 'ongoing' cases".
6. Platts, Chap 3, para 41.
7. Platts, Chap 4, para 6.
8. Platts, Chap 2, para 3.
9. Platts, Chap 2, para 3.
10. Platts, Chap 2, para 3.
11. Platts, Chap 2, paras 7, 11 and 12.
12. Platts, Chap 2, paras 14 to 18.
13. Platts, Chap 2, para 22.
14. Platts, Chap 2, para 9. In 80% of the small sample studied there were dependent children.

can separate and can obtain protection, aliment and any necessary orders relating to children without seeking a decree of separation. Unnecessary remedies are undesirable. They add to the complexity of the law and make it less efficient. Moreover, the remedy of judicial separation may be considered undesirable in itself, in that it creates a legally sanctioned divergence between the social position and the legal position. The parties are legally ordained to live apart but remain legally married. This has been the subject of adverse comment for over a hundred years.[1] In practice, too, almost all actions for separation are fault-based. Unnecessary allegations of fault by one spouse against the other in court proceedings are undesirable, particularly in those cases where children are involved. They are not likely to promote a conciliatory approach in relation to the fulfilling of parental responsibilities after the marriage breakdown. Judicial separation has been abolished in Sweden,[2] Australia[3] and Jamaica.[4]

12.9 In the past the main argument for retaining judicial separation has been that it provides a remedy for people who object to divorce on religious grounds.[5] However, the legal changes which we have mentioned already have destroyed the argument that judicial separation is necessary as an alternative remedy. A person who wishes, whether for religious reasons or other reasons, to remain married but to live apart from his or her spouse can just separate. He or she does not need permission from a court to do so. Aliment, orders relating to children, exclusion orders or interdicts can be sought, if necessary, without also seeking a judicial separation.

12.10 There is something absurd about the existing grounds for judicial separation, in that three of them (desertion, and the two separation grounds) require the parties to have been already separated for at least two years.[6] To ask a court, in such circumstances, to permit the pursuer to live apart and to ordain the defender to live apart seems patently unnecessary. It is not surprising that these three grounds appear to be little used in practice.[7]

12.11 In the discussion paper we provisionally proposed that judicial separation should be abolished. A majority of those who commented on the issue agreed with this proposal. The minority who favoured retention did so primarily on the ground that it was a useful remedy for those who objected to divorce on personal or religious grounds. However, none of the consultees explained where its usefulness lay. A person who feels that he or she must live apart from his or her spouse but who objects to divorce can simply separate without a court decree and, if necessary, seek appropriate remedies such as awards of aliment or custody or interdict or exclusion orders. A court decree ordaining one spouse to live apart from the other is in itself antithetical to the marriage bond and is unlikely to promote reconciliation. It could hardly be claimed that a fault-based action, in which one spouse sets out all the worst aspects of the other's behaviour during the marriage, is useful from the point of view of the children of the marriage.

12.12 Two consultees suggested increasing the legal effects of a separation decree. One suggested that a spouse should be able to seek the same orders for financial provision on a judicial separation as on divorce. We do not think this would be appropriate. It would enable a spouse to seek financial benefit both on the basis that the marriage had ended and on the basis that it continued. For example, a spouse could seek a share in the value of the other spouse's accrued pension rights on the footing that the marriage was over while still expecting to benefit under the same pension scheme as a widow or widower on the footing that the marriage continued. This would be quite unacceptable. Another consultee suggested that the effects of judicial separation on succession should be extended. It is clear that the present law, which covers only separation decrees obtained by wives, and applies only where the wife dies intestate and only to property acquired after the decree, is unsatisfactory.[8] However, to extend the effects of separation decrees would lead to new anomalies. Would it be right, for example, to distinguish between separation decrees and separation agreements? What about those who had been separated for years without a decree or an agreement? What about those who had raised a divorce action but not yet obtained decree? Why distinguish between succession rights and other rights dependent on marriage, such as rights under certain pension schemes or insurance policies or trusts? Clearly a separation decree on non-fault grounds would have to affect both spouses equally. There would be no justification for preserving the pursuer's succession and other rights but terminating the defender's. Probably the same rule would have to be applied to all separation decrees. To distinguish between fault and non-fault grounds in this respect would be undesirable. It would provide an incentive to establish fault, which is contrary to current policies on marriage breakdown. Yet

1. See the quotations, dating from 1889, in Maidment, *Judicial Separation* (1982) pp73–75.
2. As from 1 Jan 1974. See Schmidt "The Scandinavian Law of Procedure in Matrimonial Causes" in *The Resolution of Family Conflict* (Eekelaar & Katz, eds, 1984).
3. Family Law Act 1975, s8(2).
4. Matrimonial Causes Act 1989, s35.
5. This was why the Royal Commission on Divorce and Matrimonial Causes of 1912 (the Gorell Commission) recommended the retention of judicial separation in spite of criticising it as "an unnatural and unsatisfactory remedy". (Cd 6478). We have been informed, however, that the present position of the Roman Catholic church is that, while finding any marriage breakdown regrettable, it accepts that civil divorce proceedings may be a necessary and proper method of dealing with property matters, financial provision, the future of the children and so forth.
6. Divorce (Scotland) Act 1976, s4.
7. Platts, Chap 2, para 11. In the sample of 45 cases examined there was only one on the ground of desertion and one on the ground of separation.
8. In our report on *Succession* (Scot Law Com No 124, 1990, paras 7.28 to 7.33) we recommended that separation decrees obtained after the commencement of implementing legislation should have no effect on succession.

a separation decree might be even less attractive to a pursuer than it is already if it cut off the pursuer's succession rights as well as the defender's.

12.13 No new arguments were put forward by the minority of consultees who favoured retention of judicial separation. At most, there was a view that some people seem to want to use the remedy and that therefore they should be allowed to continue to do so. This is not a good argument for retaining a remedy which is in fact unnecessary. Legal proceedings are expensive. Legal craves which, in practice, are based almost entirely on allegations of fault on the part of the other spouse are likely to increase bitterness within an already divided family. Unnecessary and potentially embittering remedies should not be provided. Our inclination, therefore, having taken the results of consultation into account, was to confirm our provisional view that judicial separation should be abolished. However, we were concerned that we might have overlooked some strong practical reason for the fact that some separation actions are still raised, albeit in diminishing numbers. We therefore asked the Central Research Unit of the Scottish Office to carry out some empirical research into the characteristics of separation actions and the views of solicitors with experience of them. This research was carried out in the summer of 1991. The results are set out in a published Central Research Unit Paper.[1] We summarise the main findings in the following paragraphs.

12.14 The researcher interviewed a dozen solicitors who had all used separation actions and who all practised in one of the few high-use areas in Scotland. The solicitors identified various situations where a divorce might not be wanted even although the marriage had apparently broken down. The client might have religious objections to divorce; the client might want to keep open the possibility of a reconciliation; the client might want to preserve for as long as possible[2] the right to aliment and a widow's pension; the client might want to prevent for as long as possible[3] any remarriage by the other spouse; it might be advantageous for a client who owned the matrimonial home or other property not to activate the powers which a court has on divorce in relation to capital sums and property transfers; it might be advantageous to preserve the power of arrest attached to a matrimonial interdict;[4] the client might have been divorced already and might not want "the stigma of a second divorce". All of these are reasons for not pursuing a divorce action and for letting the other spouse seek a divorce if he or she wishes to and has grounds. They are not reasons for seeking a court decree of judicial separation. Most of the interviewed solicitors routinely dealt with the legal problems arising on marriage breakdown, where a divorce was not wanted, by raising proceedings for the appropriate remedies (exclusion orders, interdicts, aliment, custody and so on) independently of a separation action. They made comments such as the following.[5]

> "It was the coming of the Matrimonial Homes Act which killed separation as a regularly used tool, in that now with a range of other remedies available people can judicially enforce a state of separation without pursuing a separation action as well."
>
> "The reason for people taking action, apart from to end the marriage, is to regulate financial matters and my view is that this can be done through individual actions. . . . You do not need a crave for separation."
>
> "You can now get measures which serve a person's needs more readily (than a judicial separation)."
>
> "There are no legal reasons (for a judicial separation). . . . If it's a case of not wanting divorce but wanting to seek other orders you just raise ordinary aliment actions etc. There is not really any legal need to tag on a crave for separation unless the client really wants it—there is no point in having to put together a case of unreasonable behaviour."

Three of the solicitors in the sample, however, while acknowledging that it was possible to seek appropriate remedies without also seeking a separation decree, regarded this practice as "untidy" or "incomplete".[6] They thought a separation decree was more "presentable" and that people liked "having ancillary craves tagged on to a 'status' action".[7] These solicitors positively favoured including a crave for separation. Even solicitors who themselves saw no legal need for a decree of separation would seek such a remedy if the client really wanted it. It seemed, however, that clients were often confused about this.[8]

> "Clients are often confused—they think they need a judicial separation in order to get a divorce on the grounds of separation. They do not appreciate that it is a court action like a divorce."
>
> "There is a great misconception that you need a judicial separation before you can do anything."

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1. Platts, *The Use of Judicial Separation* (Scottish Office, Central Research Unit, 1992).
2. After 5 years of separation the other spouse could raise an action of divorce at any time, so "as long as possible" might mean five years at most if the other spouse wanted a divorce.
3. Again this might mean five years at most.
4. Under the existing law the power of arrest ceases to have effect on divorce. We have recommended above (para 11.39) that this should be changed.
5. Platts, Chap 3, paras 5 and 33.
6. Platts, Chap 3, para 35.
7. Platts, Chap 3, para 35.
8. Platts, Chap 3, para 20.

Some clients wanted to have fault officially recognised and recorded.[1]

"People want to identify the question of fault. It allows them to get on record the allegations of conduct."

"It's an option for a person who does not want divorce but wants a declaration from the court that the marriage has broken down and that their spouse is wrong."

Some clients wished simply to

"make a statement about the breakdown of their marriage"[2]

or to

"get formal recognition of the breakdown of their marriage".[3]

12.15 Two solicitors saw a use for a separation decree in cases where the criteria for an exclusion order would not be met—for example, where the conduct complained of was adultery. Even if an application for an exclusion order failed the client had the "comfort" of a decree which ordered the other spouse to live apart.[4]

"In some cases you may not have enough for an exclusion order. So applying for a judicial separation as well means that you have something if you do not get the exclusion order—it acts as a safeguard."

This raises an interesting question as to the interaction between a separation decree and occupancy rights under the Matrimonial Homes (Family Protection) (Scotland) Act 1981. The starting point is that before 1981 a separation decree had no effect on property rights. It affected the personal relations between the spouses, by cancelling the obligation of adherence, but not their rights as owners or tenants. Two examples may be considered:

1. The wife was sole owner or tenant of the home. She committed adultery. Her husband, before 1981, obtained a separation decree on the ground of this adultery. Clearly, this did not entitle him to put the wife out of her own home. If the husband wanted to live apart from his wife, it was up to him to leave the home.
2. The wife was sole owner or tenant of the home. The husband committed adultery. She, before 1981, obtained a separation decree on the ground of the adultery. This made no difference to the parties' rights in the home. The wife could put the husband out. However, she could have done this anyway, even without the separation decree, by virtue of her position as owner or tenant.[5]

In short, before 1981 the owner or tenant could stay in the house no matter who obtained the separation decree. In practice, the other spouse would probably have left, or been ordered out of, the home long before the separation decree was obtained. Before 1981 a separation decree was a consistorial remedy, which cancelled the obligation of adherence but had nothing to do with the occupation of any particular matrimonial home. It would not be specifically enforced by imprisonment for contempt of court, or by physical force by officers of court.[6] It was not a sort of common law exclusion order.[7]

12.16 It would be very surprising if the 1981 Act had converted a separation decree into an effective substitute for an exclusion order. However, let us see how the two cases mentioned above would be affected by the 1981 Act. In the first case the wife, who is sole owner or tenant of the home, commits adultery. Her husband obtains a separation decree. The only difference which the 1981 Act makes is that he has occupancy rights. That, however, still does not entitle him to put his wife out of her own home without an exclusion order. If he wants to live apart it is still up to him to leave the home.

12.17 In the second case the wife is the owner or tenant of the home and the husband commits adultery. The wife obtains a separation decree. Before 1981 this made no difference to occupancy rights. The wife could put the husband out before the decree, and after the decree. Under the 1981 Act, the husband has occupancy rights. The wife could not put him out before the separation decree, unless she had grounds for an exclusion order. Does the separation decree change the position? We think not. It has no effect on the husband's occupancy rights. He still has, by statute,

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1. Platts, Chap 3, para 24.
2. Platts, Chap 3, para 22.
3. Platts, Chap 4, para 7.
4. Platts, Chap 3, para 30.
5. *Cf MacLure* v *MacLure* 1911 SC 200; *Millar* v *Millar* 1940 SC 56.
6. See the *obiter dicta* in *Hislop* v *Hislop* (1878) Guthrie's Select Cases (2nd series) 205 at 207.
7. This was one of the reasons why the more effective remedies in the 1981 Act were considered necessary. See the consultative memorandum on *Occupancy Rights in the Matrimonial Home and Domestic Violence* (Scot Law Com Memo 41, 1978) Vol 2 para 2.64.

   "While it is true that a decree of separation . . . is in form a judicial order requiring one spouse to live apart from the other, and while it is also frequently said that the decree is granted for the protection of the pursuer, the decree does not in fact adequately protect the pursuer. If the defender attempts to resume cohabitation, the attempt is not visited by the court with any sanction for contempt of the court's decree. In truth, the decree is a mere declarator that the pursuer is entitled to live apart from the defender, and the main legal effect is to entitle the pursuer to live apart without desertion. . . ."

"a right to continue to occupy the matrimonial home."[1]

A separation decree would not oblige the defender to leave a house which he had a right to occupy. The 1981 Act has not changed the nature of a separation decree. It is still a consistorial remedy, operating only on the obligation of adherence, and not a remedy operating on a person's rights in relation to a particular house. A separation decree still has no role to play as a sort of common law exclusion order for those situations where grounds for an exclusion order under the 1981 Act are not available. It is a false "comfort"—a useless "safeguard".

12.18 The majority of the solicitors interviewed could envisage no legal problems if judicial separation was abolished. Some, however, thought that judicial separation was the right remedy in some situations and that it should remain as an option that they were able to offer to clients.

Recommendation

12.19 The results of the empirical research did not reveal any strong practical reason for seeking judicial separation where a divorce is not wanted, rather than seeking other remedies such as an award of aliment, or orders relating to children, or an exclusion order or interdicts. The research also confirmed that judicial separation actions have declined steadily and rapidly in numbers in recent years. In some sheriff courts they are virtually unknown. In most parts of Scotland they are now rare. It may be that in time they would wither away of their own accord as more and more people saw the pointlessness of getting involved unnecessarily in allegations of fault and the futility of seeking a separation decree on the basis of the non-fault separation grounds. However, in relation to a proposed recasting of Scottish family law in a new comprehensive statute or code it is necessary to decide whether to complicate the legislation by including special provisions on a remedy which is unnecessary, obsolescent, and undesirable in that it is likely to hinder, rather than promote, attempts at reconciliation or conciliation. We do not think this would be justifiable. We therefore recommend that

66. Judicial separation should be abolished.

(Draft Bill, clause 29.)

1. Matrimonial Homes (Family Protection) (Scotland) Act 1981, s1(1).

Part XIII Bars to divorce

Introduction

13.1 In our report on *Reform of the Ground for Divorce* we recommended that the ground for divorce should continue to be the irretrievable breakdown of the marriage but that the periods of separation which can be used to establish breakdown should be reduced from 2 years to 1 year (where the defender consents to the divorce) and from 5 years to 2 years (where the defender does not consent). As a consequence, divorce for desertion followed by 2 years separation would no longer be necessary. If this recommendation is implemented the ground for divorce would be the irretrievable breakdown of the marriage and this could be established by proving

(a) adultery

(b) intolerable behaviour

(c) separation for one year plus the other party's consent to divorce or

(d) separation for two years.

The main reason for our recommendation was to enable spouses, whose marriages had broken down irretrievably, to use the non-fault separation grounds in a higher proportion of cases, rather than the more hostile and aggressive fault grounds of adultery or intolerable behaviour. It is a serious criticism of the existing law that it encourages people who do not want to wait five years for a divorce to make exaggerated or unfounded allegations of intolerable behaviour against their spouses. We mention the ground for divorce only by way of background. Our concern in this part of this report is only with bars to divorce and, in particular, with *lenocinium*, collusion and grave financial hardship. The questions with which we are concerned are (a) whether the term "*lenocinium*" should be replaced, in any new legislation, by a more informative expression, without altering the substance of the law, (b) whether collusion has any role to play, as an independent bar to divorce, in the new divorce law and (c) whether the power to refuse certain divorces on the ground of grave financial hardship should continue to be available.

Lenocinium

13.2 Section 1(3) of the Divorce (Scotland) Act 1976 provides that
"The irretrievable breakdown of a marriage shall not be taken to be established in an action for divorce by reason of [adultery] if the adultery . . . has been connived at in such a way as to raise the defence of *lenocinium*."
This is not particularly helpful to a lay person reading the Act. The policy, however, is clear and understandable. A pursuer should not be able to divorce his or her spouse for adultery if the pursuer has actively promoted the adultery in question. For example, a husband who has encouraged his wife to prostitute herself should not be able to found on the adultery in question in order to obtain a divorce.[1]

13.3 Cases on *lenocinium* have been very rare but they establish that there must be active promotion of, and not merely passive acquiescence in, the adultery.[2] A spouse is not, for example, barred by *lenocinium* merely because he or she does not attempt to dissuade the other from committing adultery,[3] or merely because, suspecting adultery, he or she has the other spouse watched by detectives in order to obtain evidence.[4] The cases also establish that the pursuer's words or conduct must have been the immediate cause of the adultery before there will be *lenocinium*.[5]

13.4 We think that the policy of the present law is correct. So long as adultery is used as an indicator of marriage breakdown it must, we think, be right to say that it is not a good indicator of breakdown if it has been actively promoted or encouraged by the spouse founding on it. On the other hand it remains a good indicator of marriage breakdown notwithstanding that the pursuer has merely acquiesced in something he or she had no power to prevent. Our concern is not with the policy but with the terminology. We would be reluctant to see the uninformative word "*lenocinium*"

1. *Marshall* v *Marshall* (1881) 8 R 702. Contrast *Hunter* v *Hunter* (1883) 11 R 359 where the husband's words were not intended to be taken seriously.
2. *Hannah* v *Hannah* 1931 SC 275; *Riddell* v *Riddell* 1952 SC 475.
3. *McMahon* v *McMahon* 1928 SN 37 and 158. But *cf CD* v *AB* 1908 SC 737.
4. *Cf Thomson* v *Thomson* 1908 SC 179.
5. *Gallacher* v *Gallacher* 1928 SC 586 and 1934 SC 339.

appear in a new family law code. We suggested in the discussion paper[1] that the reference to *lenocinium* should be replaced by a reference in plain English to adultery which had been actively promoted or encouraged by the pursuer. This was supported by almost all who commented on it. We therefore recommend that

67. The reference in section 1(3) of the Divorce (Scotland) Act 1976 to adultery which "has been connived at in such a way as to raise the defence of *lenocinium*" should be replaced by a reference to adultery which has been actively promoted or encouraged by the pursuer.

(Draft Bill, clause 30(1).)

Collusion

13.5 Section 9 of the Divorce (Scotland) Act 1976 abolished the oath of calumny in divorce actions (and other consistorial actions) but provided that

"nothing in this section shall affect any rule of law relating to collusion".

The oath of calumny was an oath by the pursuer to the effect that there was no agreement between the parties to put forward a false case or hold back a good defence. Collusion was sometimes defined by reference to the oath of calumny,[2] which is no doubt why the saving provision in section 9 was thought necessary. The existing law is that collusion remains a bar to divorce. Notwithstanding the abolition of the oath of calumny, collusion is still defined as an agreement to permit a false case to be substantiated or to keep back a good defence.[3] The question is whether it has any independent function as a bar to divorce, given that if the court discovers that there is a false case or a good defence divorce will be refused anyway whether or not the parties have colluded.

13.6 A typical case of collusion would be one where both parties want a divorce but do not want to wait for two years in order to obtain one. They, therefore, agree to concoct a false case of adultery. The husband pretends to commit adultery with a woman hired for the purpose and the parties arrange for witnesses to be able to speak to the events observed by them. If the absence of true grounds for divorce does not come to light before decree then, whether or not collusion remains part of the law, the divorce will be granted. If it comes to the court's knowledge before decree of divorce then, whether or not collusion forms part of the law, no divorce will be granted. Any liability to sanctions for contempt of court, perjury or subornation of perjury arises from the facts, regardless of whether or not collusion forms part of the law. Collusion as a bar to divorce has no independent function. We can think of no case where, if collusion were abolished, a judge would say "Collusion has been abolished. Therefore I must grant this divorce even although the parties have clearly combined to present a false case to the court.".

13.7 Collusion has been abolished as a bar to divorce in English law. The Divorce Reform Act 1969 provided that

"nothing . . . in any rule of law shall be taken as empowering or requiring the court to dismiss such a petition [i.e. for divorce or judicial separation] . . . on the ground of collusion between the parties in connection with the presentation or prosecution of the petition . . .".[4]

13.8 Most consultees who commented on this issue agreed that collusion served no useful independent function. We think that it should be abolished. However, to avoid any misunderstanding about the effect of abolition it would be as well to make it clear in the legislation that, regardless of collusion, a court should not grant a decree of divorce if satisfied that the pursuer has put forward a false case or the defender has withheld a good defence. We recommend that

68.(a) It should be expressly provided that the court in an action for divorce should not grant decree of divorce if satisfied that (whether or not as a result of collusion) the pursuer has put forward a false case or the defender has withheld a good defence.

(b) Collusion as a separate bar to divorce should be abolished.

(Draft Bill, clause 30.)

Grave financial hardship

13.9 Section 1(5) of the Divorce (Scotland) Act 1976 provides that

"Notwithstanding that irretrievable breakdown of a marriage has been established in an action for divorce by reason of [5 years' separation], the court shall not be bound to grant decree in that action if in the opinion of the court the grant of decree would result in grave financial hardship to the defender. For the purposes of this subsection, hardship shall include the loss of the chance of acquiring any benefit."

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1. *Para 8.4.*
2. See eg *Fairgrieve* v *Chalmers* 1912 SC 745 at 747—"there never can be collusion unless you can show facts which, if proved, would show that the oath of calumny had been falsely sworn".
3. See *Walker* v *Walker* 1911 SC 163 at p168; *Fairgrieve* v *Chalmers* 1912 SC 745 at p747; *Riddell* v *Riddell* 1952 SC 475 at p482.
4. S9(3).

This provision is inconsistent with the philosophy of the Act, in that it envisages a marriage which has irretrievably broken down being kept in existence for purely financial reasons. It was enacted before the reform of the law on financial provision on divorce by the Family Law (Scotland) Act 1985 and does not fit well with that law. The 1985 Act is designed to enable the court to make whatever financial provision on divorce is (a) justified by the principles in the Act and (b) reasonable having regard to the resources of the parties.[1] The principles in the 1985 Act include the principle that

> "a party who at the time of the divorce seems likely to suffer serious financial hardship as a result of the divorce should be awarded such financial provision as is reasonable to relieve him of hardship over a reasonable period."[2]

The logical, but perhaps surprising, result is that the power to refuse a divorce under section 1(5) of the 1976 Act is in reality a power to refuse a divorce on the grounds of hardship which it is reasonable or justifiable that the defender should be expected to suffer. This seems unnecessary and undesirable. The approach of the law should be to enable such financial provision as is justifiable and reasonable to be ordered on divorce, but not to give one party a bargaining counter to seek more by threatening to found on section 1(5).

13.10 There have been very few reported cases on section 1(5). In *Boyd* v *Boyd*[3] it was held that there was no financial hardship where the periodical allowance awarded to the defender on divorce exceeded the aliment she was receiving before divorce. In *Nolan* v *Nolan*[4] it was held that the contingent loss of a widow's pension rights (under an occupational pension scheme and the state scheme) coupled with the loss of the contingent right to claim legal rights out of any lump sum received by the husband's estate from his occupational pension fund amounted to grave financial hardship. Divorce was refused, even although the parties had been separated for more than 5 years, and the action was continued to enable the husband to produce better proposals for compensating the wife for these losses. This case was decided in 1979. It illustrates the inconsistency between section 1(5) of the 1976 Act and the new law on financial provision on divorce introduced in 1985. Under the 1985 law the purpose of financial provision on divorce is *not* to place the spouses in the position in which they would have been had the marriage continued. That used to be the objective in England, and it is that objective which seems to be reflected in the decision in *Nolan* v *Nolan*. However, it has now been abandoned in England as unrealistic and undesirable.[5] It has never been part of the statute law in Scotland. The approach of the 1985 Act to occupational pension rights is to regard the accrued rights as a form of savings. The proportion applicable to the years between the date of the marriage and the final separation is regarded as matrimonial property and, as such, is subject to the norm of equal division.[6] If section 1(5) were to be applied now as it was in *Nolan* the husband would, in effect, be asked to make financial provision on a basis which has now been firmly abandoned and which is inconsistent with the principles of the 1985 Act.

13.11 Almost all of those who commented on this issue agreed with our provisional proposal that section 1(5) of the Divorce (Scotland) Act 1976 should be repealed. One consultee suggested, however, that the position of elderly spouses in relation to state pensions should be considered, not with a view to refusing a divorce but with a view to ensuring that pension rights were not lost as a result. This is not a question for us to determine. However, we note that it is already the case that a woman who is divorced after she has attained pensionable age and has become entitled to a retirement pension by virtue of her husband's contributions does not lose that right merely because of the divorce: it continues throughout her life.[7] We also note that a person divorced before he or she attained pensionable age can already use the contributions record of his or her former spouse to help him or her to qualify for a retirement pension.[8]

13.12 We recommend that

69. Section 1(5) of the Divorce (Scotland) Act 1976 should be repealed.

(Draft Bill, clause 30(3).)

1. S8(2).
2. S9(1)(e).
3. 1978 SLT (Notes) 55.
4. 1979 SC 40.
5. See Law Com No 112 (1981) para 17; Matrimonial and Family Proceedings Act 1984, s3.
6. Family Law (Scotland) Act 1985, s10(1) and (5).
7. Social Security Act 1975 s29(1)(2) and (9).
8. Social Security (Widow's Benefit etc) Regulations 1979, para 8.

Part XIV Choice of law rules on validity and dissolution of marriage

Introduction

14.1 The rules as to which law governs the validity of a marriage in cases involving a foreign element (eg where a party domiciled in one country married in another) depend partly on statute and partly on common law. The Scottish and English Law Commissions reviewed this whole area in a discussion paper published in 1985[1] and summarised the results of the consultation in a report published in 1987.[2] The report recommended certain changes in the Foreign Marriage Act 1892, designed to remove anomalies (such as the application of English law to Scottish domiciliaries) and bring the Act up to date. It also recommended certain minor changes in related subordinate legislation and the repeal of various spent Acts validating certain foreign marriages. The report was implemented by the Foreign Marriage (Amendment) Act 1988.

14.2 On the broader question of the basic choice of law rules in marriage the report summarised the results of the consultation and the views of the two Commissions on some of the major questions for consideration but did not recommend legislation. The main reason for this was that there was little dissatisfaction with the basic rules of the existing law, so that the need for reforming legislation was not established. Subsidiary reasons were that the resolution of some of the uncertainties in the existing law was thought to require quite complicated legislation and that to reduce the law to statutory form might prevent its further development by the courts.[3] The first of these arguments loses its force in the context of a proposed codification, where the law is being set out in statutory form in any event. The second argument—that complicated legislation would be required—also loses its force in the context of a proposed Scottish codification where, as we show later, the most difficult problems canvassed in the discussion paper[4] can be dealt with quite simply.[5] The third reason—that statutory rules would prevent judicial development of a still undeveloped area of the law—is hardly applicable in Scotland where cases on this area of the law are few and far between, and it must in any event, as was recognised in the report,[6] be weighed in the balance against the argument that it is desirable, in the public interest, to provide a clear statement of the law in those areas where the very lack of development makes it impossible to state with any certainty what the law is.

14.3 We have no doubt that a new Scottish family law code should include choice of law rules on marriage and we think that those rules should be those which commended themselves to both Law Commissions in their joint work on this topic a few years ago, subject to some minor clarifications and developments which are possible in the purely Scottish context. We have kept the English Law Commission fully informed of our proposals and progress in this area since work on the discussion paper began in September 1989.

Proposed basic rules

14.4 **Formal validity.** We recommend that, subject to the Foreign Marriage Act 1892 as amended (which deals with marriages by British consuls etc abroad), the question whether a marriage is formally valid should be governed by the law of the place of celebration. This is the existing law[7] and it was strongly supported on consultation both in the Law Commissions' joint exercise and in response to Discussion Paper No 85. We do not think it is necessary or desirable to prevent a reference of the matter by the law of the place of celebration to some other law (*renvoi*) in the unlikely event of this occurring. Nor do we think it necessary (although a few consultees suggested this) to state expressly that *renvoi* is permitted. If, say, the law of the place of celebration provides that foreign nationals can marry in any form permitted by their law then that rule would plainly be itself part of the law of the place of celebration and no express

1. *Private International Law: Choice of Law Rules in Marriage* (Law Com Working Paper No 89; Scot Law Com Consultative Memorandum No 64), referred to in this Part as "the discussion paper" or "the 1985 discussion paper".
2. *Private International Law: Choice of Law Rules in Marriage* (Law Com No 165; Scot Law Com No 105), referred to in this Part as "the 1987 report".
3. Report, paras 2.13 and 2.14.
4. Particularly the so-called common law exception to the rule that formal validity is governed by the law of the place of celebration and the choice of law rules on annulment for impotency or wilful refusal to consummate a marriage.
5. See paras 14.13 to 14.19 below.
6. Para 2.12.
7. See Anton, *Private International Law*, (2nd ed 1990) pp421–428; Clive, *Husband and Wife* (2nd ed 1982 pp145–148 (cited in the rest of this report as "Anton" and "Clive" respectively).

provision to this effect seems necessary. Nor do we think it necessary to spell out that the law of the place of celebration should be applied in the light of any retrospective changes made in it. It may happen, for example, that all marriages celebrated in a particular place over a certain period were formally invalid because of some factor which was not appreciated at the time and that a statute is subsequently passed validating those marriages retrospectively. A reference to the law of the place of celebration after this statute has been passed would have to take account of it. This, we think, would be the result which would follow in the absence of any provision to the contrary[1] and we do not think that any such provision to the contrary should be inserted.

14.5 **Essential validity.** We proposed in Discussion Paper No 85 that, subject to a special exception for marriages celebrated in Scotland,[2] the question whether a marriage is essentially invalid because either party was under a legal incapacity to enter into it, or did not give a legally effective consent to it, should be governed by the law of that party's domicile immediately before the marriage.[3] This proposal was supported by all of those who commented on it. Under the existing law there is some uncertainty as to whether a party must also have capacity by the law of the place of celebration.[4] We propose later that a party marrying in Scotland should be required to have capacity by Scots law, but we regard this as a limited exception on grounds of public policy to the general rule and do not recommend that, in the case of a marriage outside Scotland, the law of the place of celebration should have any role to play in relation to capacity.[5] In relation to capacity to marry, the rule which we propose would resolve a doubt in the existing law but would not be inconsistent with the existing authorities.[6] In relation to defective consent the proposed rule would clarify what is a very uncertain area of the present law.[7] Again, we do not think it necessary or desirable to prevent the law of the domicile referring a question of essential validity to another personal law (*renvoi*).[8] Nor do we think it necessary or desirable to exclude from the scope of the applicable law of the domicile any rules providing for defects in capacity or consent to be disregarded in certain situations. Examples of such rules might be a rule that a lack of capacity due to nonage would be retrospectively ignored if the marriage had not been challenged by the time the younger party attained the minimum age, or a rule that a defect in consent due to duress would be retrospectively ignored if the marriage had not been challenged promptly once the source of the duress was removed.[9] The Law Society of Scotland suggested that, as recommended in an earlier report by the Commission,[10] it should be made clear that a person domiciled in Scotland does not lack capacity to enter into a marriage by reason only that the marriage is entered into under a law which permits polygamy. We agree. As we have noted above, the draft Bill covers this point when, in dealing exhaustively with impediments to marriage, it omits any reference to an incapacity to enter into a marriage abroad in polygamous form.[11]

14.6 **Marriages in Scotland.** No matter where the parties are domiciled a marriage solemnised in Scotland is void if either party is under the age of 16 or if the parties are within the prohibited degrees of relationship set out in the Marriage (Scotland) Act 1977.[12] The justification for this exception to the rule that capacity to marry is governed by the law of the domicile is no doubt that it would be contrary to public policy to allow people under 16 or within the, now quite restricted, prohibited degrees to conclude a *valid* marriage in Scotland even if they had, by lies or concealment of the truth, managed to induce someone to solemnise a purported marriage. The same considerations, we believe, apply to the other grounds of essential invalidity in Scots law.[13] These are all of a fundamental nature—going to the very basis of the concept of marriage—and we do not think that a marriage purportedly entered into in Scotland should be regarded as valid if one of these grounds of invalidity exists. We therefore suggested, in Discussion Paper No 85[14] that, no matter what the domiciles of the parties may be, a marriage entered into in Scotland should be invalid if, according to Scottish internal law, (a) the parties are within the prohibited degrees of relationship (b) either party is already married (c) either party is under the age of 16 (d) the parties are of the same sex or (e) because of mental incapacity, error, duress or other reason either party does not effectively consent to the marriage. This suggestion was supported by all who commented on it. In relation to the last ground mentioned it is worth stressing that Scots

1. *Cf Starkowski* v *Att-Gen* [1954] AC 155.
2. Para 14.6 below.
3. Para 9.5.
4. This is certainly required in relation to nonage and prohibited degrees of relationship in the case of marriages celebrated in Scotland. Marriage (Scotland) Act 1977 ss1 and 2. See also *Lendrum* v *Chakravarti* 1929 SLT 96 at p103.
5. This is the view favoured by both Law Commissions in the 1987 Report. See para 2.6.
6. See Anton, pp428–438; Dicey and Morris, *The Conflict of Laws* (11th ed 1987) p638; Cheshire and North, *Private International Law* (11th ed 1987) pp586 and 587 (cited in the rest of this report as "Dicey and Morris" and "Cheshire and North" respectively).
7. See Clive, pp156–157; Anton pp439–441 ("one can only speculate what the Scottish choice of law rule will be ...").
8. *Cf* the Marriage (Scotland) Act 1977, s3(5).
9. We have recommended a rule of this nature for Scots law at para 8.20 above. Clearly if Scots law were the law governing the question of duress this rule would apply as part of Scots law.
10. Report on *Polygamous Marriages* (Law Com No 146; Scot Law Com No 96, 1985) para 2.34.
11. Clauses 20 and 21.
12. Marriage (Scotland) Act 1977 ss1(2) and 2(1).
13. See Part VIII above. We are referring to Scottish internal law here.
14. Para 9.6. In the 1987 report both Commissions favoured the idea that parties marrying in the United Kingdom should require to have capacity by the law of the relevant part of the United Kingdom. Para 2.6.

law confines invalidity for defective consent to cases where the lack of consent goes to the very root of the marriage and where there is no meaningful consent at all.

14.7 We have already recommended that a tacit mental reservation on the part of one or both of the parties as to the legal effect they intend the ceremony to have should not be regarded as a defect in consent. In some of the cases where this gives rise to difficulty the marriage is entered into for immigration purposes, and one of the parties may well be domiciled abroad. It could frustrate the operation of the proposed rule, in so far as it is designed to prevent abuse of Scottish marriage ceremonies, if a party were allowed to plead that by the law of his or her ante-nuptial domicile a tacit mental reservation precluded consent. We therefore recommend that this rule too should apply to marriages entered into in Scotland, no matter what the domiciles of the parties may be.[1]

Proposed ancillary rules

14.8 **Parental consent.** At present a requirement of parental consent to the marriage of a minor is regarded as a matter of form.[2] It is therefore governed by the law of the place of celebration rather than by the law of the domicile of the party concerned. This rule has been much criticised.[3] It seems perverse to characterise all requirements of parental consent as pertaining to form. Such a requirement may be a mere matter of form if, for example, it applies only to a marriage celebrated in the jurisdiction concerned or one celebrated in a particular way. But it may not be. It may be intended to prevent the young person from entering into a valid marriage anywhere, in any way, just as the Scottish rule about under-age marriages is intended to prevent a Scottish domiciliary under the age of 16 from entering into a valid marriage anywhere.[4]

14.9 The 1985 discussion paper suggested that this question should be left to judicial development. It also, however, set out various possible legislative solutions and invited comments.[5] In the context of a new code it would, we think, be desirable to include a provision on this matter. In the light of the criticisms made of the present law and of the comments made on the 1985 discussion paper we consider that it would be unsatisfactory to classify all requirements of parental consent automatically as formal requirements. It would be equally unsatisfactory to classify a requirement which related only to marriages in a particular form or place as one which resulted in a legal incapacity. It would also be unsatisfactory if our courts were obliged to follow a foreign classification, which might be perverse or non-existent. As a number of commentators on the 1985 discussion paper pointed out, it is for our law to classify rules, for our choice of law purposes, as rules relating to form or legal capacity. We suggested in Discussion Paper No 85 that the simplest and most satisfactory solution would be to provide that a rule requiring a person under a certain age to obtain the prior consent of a parent or guardian before he or she can marry would be regarded as resulting in a legal incapacity for marriage if, but only if, it precluded a marriage by that person anywhere in any form while under that age.[6] This was agreed by all those who commented on it.[7]

14.10 A solution on these lines would mean that the rule of English law requiring consent to the marriage of a person under 18 would continue to be regarded in Scots law as one which did not result in a legal incapacity for marriage, because it applies only to marriages in certain forms.[8] Similarly, a rule of a foreign system which merely delayed a minor's marriage without parental consent for a period after consent was refused (in order to give time for second thoughts) would not be regarded in Scots law as giving rise to a legal incapacity because it would not preclude, but would only delay, the marriage of the minor.[9] A rule of the law of the domicile which said that a minor could not marry anywhere in any form without parental consent would, however, be regarded as resulting in a legal incapacity for marriage.[10] This, as we have seen earlier, would have meant a different decision in *Bliersbach* v *MacEwan*[11] where the question was whether a Dutch minor should be allowed to marry in Scotland without the parental consent required

1. The draft Bill achieves this result by listing exhaustively the grounds of nullity for marriage entered into in Scotland and by not including tacit reservations.
2. *Bliersbach* v *MacEwan* 1959 SC 43. The position is the same in English law. See *Simonin* v *Mallac* (1860) 2 Sw & Tr 67; 164 ER 917; *Ogden* v *Ogden* [1908] P 46.
3. See eg Falconbridge, *Essays on the Conflict of Laws* (2nd ed 1954) pp74–86; Anton, pp69, 420, 433–434; Cheshire and North, pp50 and 51.
4. Marriage (Scotland) Act 1977 s1(1).
5. Paras 4.8 to 4.10.
6. Para 9.9.
7. One consultee pointed out that the foreign law might provide for the retrospective validation of a marriage which was initially invalid because of lack of parental consent. This is a separate question which we have dealt with in para 14.5 above. A rule of the applicable foreign law providing, in effect, that an incapacity due to lack of parental consent would be retrospectively ignored in certain cases would simply have effect as part of that applicable law.
8. Marriage Act 1949, s3. The requirement applies only to marriages by common licence or on the authority of a superintendent registrar's certificate. It would probably be characterised in English law as relating to form. See Dicey and Morris, p604. The English Law Commission has recommended its abolition. Report on *Guardianship and Custody* (Law Com No 172, 1988) para 7.11.
9. Thus the same result would be reached on the facts of *Simonin* v *Mallac* (1860) 2 Sw & Tr 67; 164 ER 917.
10. See eg art 148 of the French Civil Code which provides that minors cannot contract marriage without the consent of their parents, or one of them.
11. 1959 SC 43.

by Dutch law. The result under our proposed rule would be much more consistent with the policy behind section 3(5) of the Marriage (Scotland) Act 1977, which requires foreign domiciliaries to produce certificates of capacity to marry under their own law and which was designed to discourage "runaway" marriages by foreign minors without parental consent.[1] The proposed rule would also have resulted in a different decision in the much-criticised case of *Ogden* v *Ogden*.[2]

14.11 **Effect of divorce.** It may happen that the law of a person's ante-nuptial domicile does not recognise that he or she is divorced, and therefore regards him or her as still married, whereas the divorce is recognised in Scotland. Indeed the divorce may have been granted in Scotland. This matter is dealt with by section 50 of the Family Law Act 1986 which, broadly speaking, provides that in this situation the divorce granted or recognised in Scotland prevails. Accordingly the person can marry in Scotland,[3] and a marriage by that person (wherever it takes place) is not treated as invalid in Scotland. This provision would be repeated in any consolidation or codification. We mention it here only because it is an essential qualification of the rule that legal capacity to marry depends on the law of the domicile.

14.12 **Public policy.** Under the present law there are certain cases where the normal choice of law rules will not be applied because to do so would be contrary to Scottish public policy. For example, an incapacity by the law of the domicile would probably not be recognised if it were based on religion[4] or skin colour.[5] Conversely, a law of the domicile conferring capacity might not be recognised if, for example, it allowed a girl of five years of age to marry. In the 1985 discussion paper we suggested that a public policy exception should continue to apply.[6] No-one disagreed with this.

14.13 **Annulment of voidable marriages on grounds unknown to Scots law.** The question for consideration here is whether, assuming that an initially valid marriage has been entered into,[7] a Scottish court should be able to declare it null on some ground, such as wilful refusal to consummate, not recognised as a ground of nullity in Scots law. We are concerned here with initially valid marriages. The question is really whether such marriages should be dissoluble. This question is similar to the question whether Scottish courts should grant divorces on grounds unknown to Scots law. We suggested in Discussion Paper No 85 that it should be made clear that a marriage, which on applying the above choice of law rules is initially valid, could not be annulled or declared null by a Scottish court on any ground.[8] This is consistent with our earlier recommendation on the abolition of the concept of the voidable marriage in Scots law.[9] Our proposal was accepted by all except one of those consultees who commented on it. It would not change the existing Scottish practice in relation to grounds of voidability unknown to Scots law. It would be for other countries to decide whether their courts should dissolve initially valid marriages on various grounds, and whether the decree dissolving them should be called a divorce or a nullity decree or something else. Of course, foreign nullity decrees would continue to be recognised in Scotland, if the foreign court had jurisdiction, even if the ground of annulment were one not found in Scots law.[10] There would be no change in that rule. However, people domiciled or habitually resident in Scotland who seek to have valid marriages dissolved in Scottish courts can reasonably be expected to find that Scots law applies.[11] The difficulty of any other approach is shown by the fact that, in relation to voidable marriages in English law, the English courts have certain statutory restrictions placed on them.[12] These restrictions would not affect a Scottish court. Yet it would seem to be wrong to apply an English rule without its attendant qualifications. Moreover an English decree annulling a voidable marriage has prospective effect only.[13] A Scottish decree of declarator of nullity declares the marriage to have been void from the beginning. This would be an inappropriate remedy for a defect, governed by the law of the domicile, which that law does not regard as making a marriage void from the beginning.

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1. See the *Report of the Committee on the Marriage Law of Scotland* (1969) Cmnd 4011.
2. [1908] P 46.
3. See also Marriage (Scotland) Act 1977 s3(5).
4. *Cf MacDougall* v *Chitnavis* 1937 SC 390.
5. *Cf Sottomayor* v *De Barros (No 2)* (1879) 5 PD 94 at p104.
6. Para 3.49.
7. It should be noted that a marriage may be initially invalid under an applicable law notwithstanding that in that law there are restrictions on title to sue for a declarator of nullity.
8. Para 9.13. In the discussion paper we said "any ground other than incurable impotency". As we have recommended that impotency should cease to be a ground on which a marriage is voidable in Scots law that qualification can now be dropped.
9. See paras 8.29 and 8.30 above.
10. Family Law Act 1986, s46.
11. The one consultee who disagreed with our suggestion on this point was concerned, among other things, that there should be a choice of law rule on incapacity for marriage because of impotency. However, there would be such a rule. Capacity for marriage depends on the law of the person's ante-nuptial domicile. If that law says that a person, if impotent, lacks the legal capacity for marriage then the marriage will be void. The trouble is that some legal systems say that impotency does not result in a legal incapacity for marriage but yet say that it is a ground for dissolving a valid marriage later. Our view is simply that the grounds available in the Scottish courts for dissolving a valid marriage should depend on Scots law.
12. Matrimonial Causes Act 1973, s13. For example, proceedings must be begun within 3 years of the date of the marriage. S13(2).
13. Matrimonial Causes Act 1973, s16.

Matters omitted from proposed rules

14.14 The ***Sottomayor* v *De Barros*** rule. This is a rule of English law to the effect that an incapacity by the law of one party's domicile will be ignored if the marriage is celebrated in England and the other party is domiciled in England.[1] This rule has been strongly criticised as being nationalistic and unprincipled.[2] There is an apparent recognition of it in one Scottish case,[3] but it is not included in the Marriage (Scotland) Act 1977.[4] In the 1985 discussion paper it was suggested that this rule should be abolished.[5] This proved, in general, to be acceptable to those who commented on the paper, some Scottish consultees taking the view that as the rule was not a clearly established rule of Scots law its abolition would have no effect in Scotland. We suggested in Discussion Paper No 85 that the rule should simply be omitted from the proposed new statutory scheme. No-one disagreed with this suggestion.

14.15 **A general exception to the rule that formal validity depends on the law of the place of celebration.** In England there is a common law exception to the rule that the law of the place of celebration governs the formal validity of a marriage. English law recognises a marriage as formally valid if (a) it is celebrated in circumstances where compliance with the local law is virtually impossible or is celebrated in a country under belligerent occupation where one of the parties is a member of the occupying forces and (b) it complies with the requirements of the English common law.[6] There have been suggestions that there is a similar exception in Scots law,[7] but there is no modern authority on it and the law is undeveloped.

14.16 The 1985 discussion paper sought views on various options in relation to this common law exception.[8] So far as Scotland is concerned the preservation of the existing law is not an option, because there is no satisfactory existing law to preserve, and the options are (a) to provide a new statutory exception or (b) to provide no exception. If a new exception were to be provided it might be to the effect that a couple would not be regarded as invalidly married by reason only of non-compliance with the formal requirements of the law of the place of celebration of the marriage, if compliance with those formal requirements was impossible or not reasonably to be expected in the circumstances and if they exchanged present consent to marry each other. Would such an exception be necessary or desirable?

14.17 It can hardly be argued that an exception on the above lines is necessary. The need for it has not been obvious in the past. The only Scottish case in which it has been mentioned concerned a marriage in 1780 and the case would have been decided in exactly the same way even if the exception had not been mentioned.[9] There are statutory provisions for consular marriages abroad where compliance with local forms may be difficult and there are also provisions for marriages of members of the armed forces, and certain accompanying persons, abroad.[10] The speed of travel now means that parties will often be able to marry in their own country in circumstances where in previous centuries an early marriage would have been impossible. Marriage itself is less necessary than in former times, when cohabitation before marriage would have been unthinkable for many people and when the legal consequences of marriage were more important than they are now. There is also a provision in the Marriage (Scotland) Act 1977 which enables people who have gone through a marriage ceremony outside the United Kingdom but who are not, or are unable to prove that they are, validly married to each other in Scots law, to have a second marriage ceremony performed in Scotland.[11] The Marriage Schedule is endorsed by the authorised registrar with the words

> "The ceremony of marriage between the parties mentioned in this Schedule was performed in pursuance of section 20 of the Marriage (Scotland) Act 1977, following a statutory declaration by them that they had gone through a ceremony of marriage with each other on the day of 19 , at ".

This facility could be useful, for example, in cases where parties have been forced to resort to a ceremony of doubtful validity in a time of war or great civil upheaval. In short, if an exception has not been found necessary so far in Scots law it would certainly not seem to be necessary now.

14.18 On the question whether, even if not demonstrably necessary, a statutory exception should be introduced just in case a situation should arise for its application, there are two arguments which point against introduction. The first

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1. *Sottomayor* v *De Barros (No 2)* (1879) 5 PD 94.
2. See eg Dicey and Morris, p624; Cheshire and North, p585.
3. *MacDougall* v *Chitnavis* 1937 SC 390 at pp403 and 407.
4. *Cf* ss3(5) and 5(4).
5. Para 3.48.
6. The exception is fully discussed in the 1985 discussion paper at paras 2.14, 2.20 to 2.30 and 2.54 to 2.68.
7. See Fraser, *Husband and Wife*, Vol II pp1313 and 1314, and *Barclay* v *Barclay* (1849) 22 Scot Jur 127 per Lord Ivory at p131. Modern text-book writers are, not surprisingly, non-committal on this point. See Anton, p428; Clive, pp147 and 148.
8. Paras 2.54 to 2.68.
9. *Barclay* v *Barclay* (1849) 22 Scot Jur 127. This case concerned the validity of a marriage between Protestants in a Catholic country in 1780. The parties had always been regarded as validly married during their lives and there was a very strong presumption in favour of their having been validly married, either by the ceremony in question (about which there was a division of legal opinion) or by some other ceremony. This presumption was not rebutted by the evidence led.
10. Foreign Marriage Act 1892 as amended.
11. S20. "Ceremony" is not defined.

is that there would be a loss of certainty. People who, for some reason, had not married in the regular form might try to avail themselves of the exception. Although designed for genuine cases of difficulty and hardship, the exception might be founded on in undeserving cases with resulting confusion. The uncertainty caused by the old law on marriages by declaration of present consent would, within this limited area, be re-introduced. That the common law exception itself has not given rise to problems of this nature is not a conclusive counter argument. The statutory exception would be drawn to people's attention by the mere fact of its appearance in the legislation and would not be such a speculative ground on which to rely as is the common law exception, especially in Scotland. The second argument is one relating to the form, rather than the substance, of proposed legislation. The full advantages of codification will be gained only if unnecessary exceptions, qualifications and complications are excluded. This seems to us to be an unnecessary exception.

14.19 The conclusion which we reached in Discussion Paper No 85 was therefore that there should be no exceptions to the rule that the formal validity of a marriage is governed by the law of the place of celebration, other than those provided for in the Foreign Marriage Act 1892 as amended. Only one consultee disagreed with this conclusion, on the ground that an exception might be useful in very rare cases.

14.20 **A rule on prospective validation.** We have referred earlier to the common type of retrospective validating legislation designed to cure formal defects in certain marriages or to validate marriages void because of, say, error if the error is not founded on timeously. Such rules fall to be regarded, we have suggested, simply as part of the applicable law and require no separate provision to be made for them.[1] It could also happen that a foreign law provided for a marriage to become valid at some time after it had been entered into. For example, there might be a rule validating a bigamous marriage prospectively as from the date when the first marriage is dissolved by the death of the other party or by divorce,[2] or a rule validating an under-age marriage prospectively if the parties are cohabiting as husband and wife when the younger party attains the minimum age for marriage. We would be reluctant to burden a new statute with special rules on a topic which is likely to arise rarely if at all and have therefore asked ourselves whether any problems caused by prospective validation could be solved by applying the proposed general rules. We think they could be. The first marriage is invalid when entered into and is not retrospectively validated. In reality therefore there is a new marriage at the time of the validating event. It is rather like a marriage by promise *subsequente copula* in the old Scots law, inasmuch as it is a marriage as a result of an event following on an antecedent ineffective mutual commitment. Under the normal rules the marriage would, we suggest, be recognised if the law of the country where the parties are when the event occurs regards this as sufficient in respect of formal validity and if the laws of their domiciles at that time regard them as having capacity to marry and regard their deemed or tacit consent as sufficient for marriage.

Choice of law in divorce

14.21 There is a well-established rule that a Scottish court applies Scots law in a divorce action.[3] Even if the parties are both domiciled abroad it is the Divorce (Scotland) Act 1976 which determines whether a divorce will be granted, and the Family Law (Scotland) Act 1985 which regulates financial provision on divorce. This rule has worked well over the years whereas any rule referring to a foreign domiciliary law could have resulted in inconvenience, expense and (at least before wives were able to have their own domiciles) injustice. The existing rule was considered and supported by this Commission in 1972.[4] It would be useful, from the point of view of an eventual codification, to have it set out in statutory form and we so recommend.

Summary of recommendations

14.22 There was almost unanimous support for our provisional proposals on choice of law rules on the validity of marriages. We therefore recommend

70.(a) Subject to the Foreign Marriage Act 1892 as amended, the question whether a marriage is formally valid should be governed by the law of the place of celebration.

(b) Subject to the following recommendation and to section 50 of the Family Law Act 1986 (effect of divorce), the question whether a marriage is essentially invalid because either party was under a legal incapacity to

1. Para 14.5 above.
2. *Cf Prawdzic-Lazarski* v *Prawdzic-Lazarska* 1954 SC 98 where, however, the content of the foreign law was not proved and the case was disposed of by applying Scots law.
3. See *Jack* v *Jack* (1862) 24 D 467 at p475; Anton, pp465–467.
4. *Report on Jurisdiction in Consistorial Causes Affecting Matrimonial Status* (Scot Law Com No 25, 1972) at pp10–13. The English Law Commission came to the same conclusion: *Report on Jurisdiction in Matrimonial Causes* (Law Com No 48, 1972) at pp38–39.

enter into it or did not give a legally effective consent to it should be governed by the law of that party's domicile immediately before the marriage.

(Draft Bill, clause 31(1) and (2).)

71. A marriage entered into in Scotland should be invalid, no matter what the domiciles of the parties, if, according to Scottish internal law, at the time when the marriage was entered into

(a) the parties were within the forbidden degrees of relationship,

(b) either party was already married,

(c) either party was under the age of 16,

(d) the parties were of the same sex, or

(e) because of mental incapacity, error or duress either party did not effectively consent to marriage

but, without prejudice to the law on error or duress, should not be invalid merely because one or both parties went through the ceremony of marriage with a tacit mental reservation to the effect that notwithstanding the nature and form of the ceremony no legal marriage would result from it.

(Draft Bill, clauses 20 and 21.)

72. A rule requiring a person under a certain age to obtain the prior consent of a parent or guardian before he or she can marry should be regarded as resulting in a legal incapacity for marriage if, but only if, it precludes a marriage by that person anywhere in any form while under that age.

(Draft Bill, clauses 20 and 31(4).)

73. Where, on the application of the above rules, a marriage is initially valid it should not be annulled or declared null by a Scottish court on any ground.

(Draft Bill, clause 21(8).)

74. A foreign rule as to the validity or invalidity of a marriage should not be recognised or applied in Scotland where to do so would be contrary to Scottish public policy.

(Draft Bill, clauses 20 and 31(3).)

75. The existing rule that a Scottish court applies Scots law in a divorce action, no matter what the domiciles of the parties may be, should be put into statutory form.

(Draft Bill, clause 31(5).)

Part XV Choice of law rules on legal effects of marriage

Introduction

15.1 Marriage has different legal effects, in different legal systems, on capacity, obligations, property and occupancy rights. The question which we consider in this part of the report is whether a new family law code should contain choice of law rules on these matters and, if so, what these should be. Although there has been no joint work by the two Law Commissions in this area we have kept the English Law Commission fully informed of our proposals, which involve minimal alterations to the existing law and should give rise to no cross-border difficulties.

Capacity

15.2 We do not think that there is any need for a special rule on incapacity arising from marriage. There may well be a need to consider the choice of law rules on capacity generally, because they are not entirely clear or satisfactory,[1] but that is another matter.

Obligations

15.3 The same applies, in our view, to obligations. Any reform should be general. There appears to be no need for any special rule for obligations arising out of marriage, with the exception of the obligation of aliment which we consider separately later.[2]

Property

15.4 There are very important differences between legal systems in relation to matrimonial property. Although in practice choice of law problems involving matrimonial property appear to arise very rarely in Scotland, there is no doubt that they could arise in any case where spouses domiciled in one country own property situated in another.[3]

15.5 The existing Scottish rules (which are the same as the rules applying elsewhere in the United Kingdom) draw a distinction between moveable and immoveable property. In general the law of the spouses' domicile governs their moveable property (with the result that if they are domiciled in Scotland each owns his or her own property) and the law of the country where the property is situated governs immoveable property.[4] This is subject to any agreement between the spouses to the contrary.[5] It is also probably subject to a proviso that vested rights are not affected by a change in domicile.[6] The existing rules date from a period when a wife took her husband's domicile automatically. There is no authority on the position (rare in practice) where the spouses have different domiciles. Most of the cases and textbooks still express the rules primarily in terms of the husband's domicile[7] but this seems inconsistent with the principles of equality and independence which now apply to the legal effects of marriage.[8] If uncertainty and fruitless speculation are to be avoided a legislative solution seems desirable.

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1. See Anton, pp275–279.
2. See Part XVIII.
3. There is an extensive international literature on this subject which seems to give rise to more difficulty in practice in countries with community property regimes. See eg *Régimes Matrimoniaux, Successions et Liberalités: Droit International privé et Droit comparé* (Verwilghen ed 1979). There is a Hague Convention on the Law Applicable to Matrimonial Property Regimes which was concluded on March 14, 1978 but which, as at March 22, 1989, had been ratified by only France and Luxembourg. It makes the governing law, in the absence of express agreement and subject to some important and quite complex qualifications, the law of the State in which both spouses establish their first habitual residence after marriage. (Art 4).
4. See Anton, pp584–589; Dicey and Morris, pp1066–1067; Cheshire and North, p864; Clive, p335.
5. Anton, pp576–584; Dicey and Morris, pp1053–1058; Cheshire and North, pp869–872; Clive, pp335, 337.
6. Dicey and Morris, p1068; Cheshire and North, p868; Clive, p336.
7. See eg Dicey and Morris, p1066; Cheshire and North, p864. The Married Women's Property (Scotland) Act 1881 used to contain a reference to the husband's domicile in s1 but this has now been repealed.
8. See Anton, p584.

15.6 In the present context we do not think that there is any need to call into question the rules relating to immoveable property, vested rights or marriage contracts. The difficulty arises in relation to moveables where there is no choice of regime by the parties. Where the spouses have the same domicile, which is the situation in most cases, then there is no reason why the law of that domicile should not apply. Where they have different domiciles it is at first sight tempting to say that, for each party, the effect which marriage has on his or her property should be determined by the law of his or her domicile. This, however, could mean that if a husband was domiciled in a country which gave each spouse an undivided one-half share in the other's property and the wife was domiciled in a separate property country, the husband would lose half of his property but would not acquire any share in the wife's property in return. This would be an unfair and unacceptable result. The simplest and most satisfactory solution, we suggest, is to say that if the parties are domiciled in different countries then marriage will have no automatic effect on their moveable property.[1] This will leave it open to them to opt into a community property regime if they so wish. It will be a very rare situation indeed where spouses remain domiciled in different countries throughout their marriage and, as separate domiciles imply an absence of a common life plan, it seems appropriate to provide that marriage has no automatic effect on the spouses' moveable property. Alternative solutions, such as the law of the common habitual residence, or the law of the last common domicile, or the law of one spouse's domicile, are all likely to produce arbitrary results and impose on the parties a matrimonial regime with which they have, as a couple, no strong connection. The common habitual residence, for example, may be only temporary, for employment purposes. The last common domicile may have ceased to exist twenty or thirty years previously. To impose the law of one party's domicile on the other seems unjustifiable. Moreover solutions based on nationality would not be suitable as they would not solve problems where, for example, the parties were both British citizens but the question was whether Scots law or English law should apply.

15.7 It follows from the fact that the effect of marriage in relation to immoveable property depends,[2] and would continue under our proposals to depend, on the law of the country where the property is situated that the question whether a spouse has occupancy rights in a house by virtue of marriage will depend on the law of the country where the house is situated. This is consistent with the provisions of the Matrimonial Homes (Family Protection) (Scotland) Act 1981, many of which would be inappropriate or ineffective in relation to houses outside Scotland. However, the rule relating to the effects of marriage on immoveable property does not go far enough in relation to occupancy rights and related protective rules. First, some matrimonial homes are moveable property (caravans and houseboats) but the law of the country where they are situated would still seem to be the appropriate governing law. Secondly, the protective rules connected with occupancy rights may apply, as they do in Scotland, to the contents of a matrimonial home and to outgoings related to it but, as these rules are ancillary to the rules on occupation of the home, it would seem to be appropriate that they should be governed by the same law. Thirdly, cohabitants may have occupancy rights and again the same rules ought to apply. We suggest therefore that there ought to be a special rule, applying the law of the country where the home is situated, for protective rights related to the occupation or use of the matrimonial home or its contents.

15.8 All of the above suggestions met with the general approval and support of those who submitted comments on them. Two consultees, however, suggested that there would be merit in having a choice of law rule on matrimonial property which was the same for moveables and immoveables. It might be worth re-examining this suggestion later if a unitary rule is adopted in relation to succession. In the meantime, however, there is no evidence that the present rule for immoveable property causes practical difficulty or inconvenience or gives rise to any complaint.

Recommendations

15.9 We recommend that

76. The effect, if any, which marriage has on a person's capacity and obligations (other than the obligation of aliment, which is considered separately later) should be determined by the law governing that person's capacity and obligations generally.

77. The effect, if any, which marriage has on the spouses' property should be determined, in the case of immoveable property, by the law of the country where that property is situated and, in the case of moveable property, by the law of the spouses' common domicile. Where the spouses do not have the same domicile marriage should have no automatic effect on their moveable property.

(Draft Bill, clause 32.)

78. The rules in the preceding recommendation should be subject

(a) to any agreement between the spouses, and

1. *Cf* Anton, p586. (Where, in relation to moveables, no immutable regime has been established by express contract or operation of law, the "logic of the present law suggests that the proprietary relationships of the spouses must simply be assimilated to those of unmarried persons".)
2. *Welch* v *Tennant* (1891) 18 R (HL) 72.

(b) to the proviso that a change of domicile by one or both spouses should not affect either spouse's vested rights in property.

(Draft Bill, clause 32(3) and (4).)

79. Notwithstanding the rules in the preceding recommendations, the question whether a person is entitled to the benefit of protective rules relating to the occupation or use of the matrimonial home (whether moveable or immoveable) or its contents should be determined by the law of the country where the matrimonial home is situated.

(Draft Bill, clause 32(2).)

Part XVI Cohabitation

Introduction

16.1 In our discussion paper on *The Effects of Cohabitation in Private Law*[1] we noted that the incidence of cohabitation[2] had increased greatly in recent years[3] and sought views on various preliminary proposals and questions relating to the legal effects which cohabitation should have in private law. The results of our consultation on this subject, and of the public opinion survey and public meetings on it,[4] have confirmed us in our view that there is a strong case for some limited reform of Scottish private law to enable certain legal difficulties faced by cohabiting couples to be overcome and to enable certain anomalies to be remedied. However, we are also confirmed in our impression that this is a subject on which widely differing views are held. There is, in particular, a respectable view that it would be unwise to impose marriage-like legal consequences on couples who may have deliberately chosen not to marry. It was argued by some of those who commented on the discussion paper that the best approach would be to leave those who opt out of marriage to make their own legal arrangements by means, for example, of cohabitation contracts, insurance policies and wills. Although we have considerable sympathy with this view, we doubt whether it is realistic to expect all cohabiting couples to make adequate private legal arrangements. We accept, however, that legal intervention in this area ought to be limited and that it requires to be justified in each situation in which it is recommended. It should neither undermine marriage, nor undermine the freedom of those who have deliberately opted out of marriage. It should be confined to the easing of certain legal difficulties and the remedying of certain situations which are widely perceived as being harsh and unfair. Cohabitants who do not wish to be governed by any of the new rules proposed should, in general, be able to opt out of them—for example, by entering into a contract whereby they make their own legal arrangements and renounce other rights or claims in advance.[5]

16.2 Scottish private law already makes some provision for cohabitants. A cohabitant can claim damages for the wrongful death of the other cohabitant under the Damages (Scotland) Act 1976,[6] and can apply to a court for occupancy rights under the Matrimonial Homes (Family Protection) (Scotland) Act 1981.[7] Cohabitation is also recognised for various purposes in the legislation on social security, tenants' rights, housing and mental health.[8] The question therefore is not whether the law should recognise cohabitation for certain legal purposes. It already does so, and only one consultee suggested that this recognition should be withdrawn. The question is whether the existing legal response is adequate.

16.3 We recognised in the discussion paper that similar arguments for legal recognition could also be made in relation to other types of couples, such as two men living together, or two women living together. We received submissions pointing out that there was an even stronger argument for some legal intervention in the case of such couples because they did not have the option of marrying each other. We can see the force of these arguments and we are grateful for the carefully reasoned comments submitted to us on this issue. Nonetheless we consider, on pragmatic grounds, that it is likely to be more productive to concentrate on cohabitation as we have defined it above. It is this type of cohabitation which is statistically more important and in relation to which there is currently the greater demand for reform.

16.4 Some consultees expressed concern about the difficulty of applying any definition of cohabitation to the very variable types of living arrangements which couples can adopt. Others were uneasy about the arbitrariness of requiring fixed periods of cohabitation for certain purposes. We have taken these concerns into account and have avoided fixed

1. Discussion Paper No 86, (May 1990) referred to in this part of the report as "the discussion paper".
2. By "cohabitation" in this context we mean the relationship of a man and a woman who are not legally married to each other but are living together as husband and wife, whether or not they pretend to others that they are married to each other.
3. See "Cohabitation in Great Britain—characteristics and estimated numbers of cohabiting partners". *Population Trends* (OPCS) Winter 1989.
4. See paras 1.3 and 1.4 above.
5. Opting out is discussed more fully at para 16.47 below. We say it should be possible "in general" because we do not think that it should be possible to opt out of protection against domestic violence.
6. See Sch 1 para (aa) (added by the Administration of Justice Act 1982, s14(4)).
7. S18.
8. See eg the Social Security Act 1986, s20(11); the Rent (Scotland) Act 1984, s3 and Sch 1; the Housing (Scotland) Act 1988, s31(4); the Mental Health (Scotland) Act 1984, s53(5) (definition of "nearest relative"). Cohabitation has also been recognised in the criminal law on provocation. See *McDermott* v *H M Adv* 1973 JC 8; *McKay* v *H M Adv* 1991 SCCR 364.

rules and arbitrary time limits. The rules which we recommend would either be self-limiting (in the sense that a short cohabitation or one involving little mutual commitment would be likely to give rise to minimal legal consequences) or would involve sufficient discretion to enable a court to take account of all the relevant circumstances of the case.

Aliment

16.5 Spouses are bound to aliment each other.[1] Cohabitants are not. We suggested in the discussion paper that this should continue to be the case and that it was difficult to justify the imposition of a potentially onerous obligation of support by the mere fact that a couple were cohabiting. So long as the relationship continued, a legal obligation would be largely irrelevant. Once it broke down a legal obligation based on the fact of former cohabitation would be objectionable, particularly as there would be no prospect of terminating it by divorce. Almost all of those who commented agreed with this view. We therefore do not recommend that there should be any obligation of aliment between cohabitants.

16.6 Where there is a child of the relationship, and the cohabitation has come to an end, the provisions of the Child Support Act 1991 ensure that the absent parent's liability for child support includes an element for the maintenance of the parent with care of the child.[2] The absent parent's liability in this case arises not from the fact of former cohabitation, but from the liability to the child. It would be the same even if the two parents had never cohabited.

Household goods

16.7 In the case of a married couple there is a presumption that each spouse has an equal share in any household goods obtained in prospect of or during the marriage other than by gift or succession from a third party.[3] The presumption cannot be rebutted by proving only that while the parties were married and living together the goods in question were purchased from a third party by either party alone or by both in unequal shares.[4] "Household goods" are defined as any goods (including decorative or ornamental goods) kept or used at any time during the marriage in any matrimonial home for the joint domestic purposes of the parties to the marriage. They do not, however, include money or securities; cars, caravans or other road vehicles; or domestic animals.[5] In the discussion paper we asked whether a presumption of this type should be applied, with the necessary modifications, to cohabitants.[6] Most respondents thought that it should. The public opinion survey produced a similar response.[7]

16.8 In spite of this support, we have decided to recommend a more cautious approach. One of the difficulties in applying the presumption to cohabitants lies in deciding on a suitable qualifying period of cohabitation. The presumption would be inappropriate in the case of a short cohabitation, where there might not be any long-term commitment and where each partner may well buy household goods in the expectation that he or she would own them and would keep them if or when the relationship ended. In the discussion paper we suggested a three-year qualifying period of cohabitation. Some consultees were content with that suggestion. Others favoured a longer period. Some, as we have noted, pointed out that any qualifying period would be arbitrary and could be very difficult to apply. We see the force in these submissions and have sought to find a way of accommodating them.

16.9 The answer, we think, lies in the dual role of the presumption in section 25 of the Family Law (Scotland) Act 1985. It is designed, first, to resolve disputes where proof of actual ownership is lacking, as it often is when household goods have been bought many years ago and when neither party can remember, far less prove, who bought them. This role of the presumption seems to us to be appropriate for cohabitants. A qualifying period would be unnecessary. In the case of short cohabitations there would be every likelihood that the parties would remember, and would be able to prove if necessary, who had bought a particular item. The second role of the presumption, in the case of married couples, is to make it irrelevant who actually bought a particular item. This goes beyond the mere resolution of factual disputes and, in effect, introduces an element of common property. The relevant provision is section 25(2) which provides that the presumption of equal shares is not to be rebutted

> "by reason only that while the parties were married and living together the goods in question were purchased from a third party by either party alone or by both in unequal shares".

This role seems to us to be inappropriate for cohabitants. It risks imposing co-ownership on them contrary to their wishes.

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1. Family Law (Scotland) Act 1985, s1.
2. Child Support Act 1991, s11 and Sch 1.
3. Family Law (Scotland) Act 1985, s25(1).
4. S25(2).
5. S25(3).
6. Para 3.6.
7. 68% of respondents thought that, where a couple had been cohabiting for five years, household furniture and equipment should belong to them in equal shares.

16.10 The presumption in section 25 applies to goods "obtained in prospect of or during the marriage other than by gift or succession from a third party". The Law Society of Scotland suggested that the application to goods obtained "in prospect of" a relationship was unsuitable for cohabitants because of the different nature of the commencement of cohabitation and because of the evidential problems to which it could give rise. We agree with this submission. We also think that the wording would be more natural if it referred to "goods *acquired* during the cohabitation *otherwise* than by gift or succession from a third party". The draft Bill adopts this formula.

16.11 We recommend that

80.(a) The presumption of equal shares in household goods in section 25 of the Family Law (Scotland) Act 1985 should be applied, with modifications, to cohabitants.

(b) The presumption should apply only to goods acquired during the cohabitation, and not to goods bought "in prospect of" cohabitation.

(c) The presumption should be rebuttable by proving that the goods belong to one party alone or to both in unequal shares and subsection (2) of section 25 (which restricts such proof in certain cases) should not be applied to cohabitants.

(Draft Bill, clause 34.)

Savings from housekeeping allowance

16.12 Section 26 of the Family Law (Scotland) Act 1985 provides that certain savings from housekeeping allowances, and other similar allowances, are to be treated as owned in equal shares. It is in the following terms.

> "26. If any question arises (whether during or after a marriage) as to the right of a party to a marriage to money derived from any allowance made by either party for their joint household expenses or for similar purposes, or to any property acquired out of such money, the money or property shall, in the absence of any agreement between them to the contrary, be treated as belonging to each party in equal shares."

This is an updated version of a similar provision, applying only to an allowance made by a husband, which was enacted in 1964.[1] It was designed to remedy the type of situation which arose in the case of *Preston* v *Preston*.[2]

> A husband provided his wife with an allowance for the upkeep of the household. She used her own earnings for this purpose and put the sums received from her husband in the bank. A question arose as to the ownership of these savings and it was held that they remained the property of the husband. The wife was regarded as only a stewardess of the funds remitted to her. In the absence of any evidence of donation or special agreement the money which was originally the husband's remained his.

In the case of cohabitants the legal theory which led to the decision in *Preston* v *Preston* would apply if in fact an allowance was made by one cohabitant to the other as a housekeeping allowance, to be used by the recipient as a housekeeper. Any savings would belong to the person making the allowance.

16.13 In the discussion paper we expressed the provisional view that the equitable considerations behind the presumption of equal shares in savings from a housekeeping allowance applied to cohabitants as well as to spouses.[3] We doubted whether any qualifying period was required but invited views. Almost all consultees agreed with our provisional view and, of these, about half thought that no qualifying period would be necessary. The rest favoured some qualifying period but the periods suggested by them ranged from 1 month to 3 years. For reasons already explained, we would prefer to avoid arbitrary qualifying periods if at all possible. Here a qualifying period does not seem necessary. We therefore recommend that

81. The presumption of equal shares in money and property derived from a housekeeping or similar allowance in section 26 of the Family Law (Scotland) Act 1985 should be applied, with the necessary modifications, to cohabitants.

(Draft Bill, clause 35.)

The existing provision in section 26 of the 1985 Act does not make it clear that the allowance must be made by one spouse *to the other*. This is perhaps implicit but we think that it should be made clear in relation to both spouses and cohabitants. The draft Bill does this in clause 35 (for cohabitants) and by an appropriate provision in the schedule of amendments (for spouses).

Financial adjustment on termination of cohabitation

16.14 We are concerned in this section with termination of a cohabitation otherwise than by death. The obvious approach is to consider the law on financial provision on divorce and ask how far the principles found there might

1. Married Women's Property Act 1964, s1.
2. 1950 SC 253.
3. Para 4.2.

be applied on the termination of cohabitation. The principles to be applied by a court in deciding what order for financial provision to make on divorce are that:

"(a) the net value of the matrimonial property should be shared fairly between the parties to the marriage;

(b) fair account should be taken of any economic advantage derived by either party from contributions by the other, and of any economic disadvantage suffered by either party in the interests of the other party or of the family;

(c) any economic burden of caring, after divorce, for a child of the marriage under the age of 16 years should be shared fairly between the parties;

(d) a party who has been dependent to a substantial degree on the financial support of the other party should be awarded such financial provision as is reasonable to enable him to adjust, over a period of not more than three years from the date of the decree of divorce, to the loss of that support on divorce;

(e) a party who at the time of the divorce seems likely to suffer serious financial hardship as a result of the divorce should be awarded such financial provision as is reasonable to relieve him of hardship over a reasonable period."[1]

These principles are supplemented by various rules and definitions. The most important in the present context is that fair sharing of the net value of matrimonial property (which means roughly property acquired by the parties during the marriage and before their final separation otherwise than by gift or inheritance)[2] means equal sharing unless there are special circumstances justifying a departure from this norm.[3]

16.15 We do not favour a comprehensive system of financial provision on termination of a cohabitation comparable to the system of financial provision on divorce in the Family Law (Scotland) Act 1985. That would be to impose a regime of property sharing, and in some cases continuing financial support, on couples who may well have opted for cohabitation in order to avoid such consequences. Almost all consultees agreed with our provisional view that there was no adequate justification for applying to cohabitants the principle of equal sharing of property in section 9(1)(a) of the Family Law (Scotland) Act 1985.[4] There was also general support for our provisional view that one cohabitant should not be ordered, on the termination of the cohabitation, to make financial provision for the other on principles analogous to those in section 9(1)(d) or 9(1)(e) of the Family Law (Scotland) Act 1985. Section 9(1)(d) relates to an award of short-term financial support to enable one party to adjust, over a period of not more than three years from the date of the divorce, to the loss of financial support from the other. Almost all consultees considered that this would be inappropriate on the termination of a cohabitation, given that there would be no obligation of support during the cohabitation and that cases involving child care or compensation for contributions or sacrifices in the interests of the family could be otherwise covered.[5] Section 9(1)(e) is concerned with the relief of long-term financial hardship which is likely *as a result of the divorce*. Again, this is linked to the loss of the obligation of support which exists during a marriage and almost all consultees agreed with our provisional view that it would be inappropriate to apply it on the termination of a cohabitation. In the public opinion survey, respondents were shown a card saying

"Suppose that a couple cohabited for 5 years and then separated. They have no child. Should the one who is better off financially be bound to pay aliment (or maintenance) to the other?"

Over three-quarters (76%) of all respondents thought that the one who was better off should *not* be bound to pay aliment to the other. Although this question was not tied to the criteria in sections 9(1)(d) or (e) of the 1985 Act, the response does suggest a rejection of the idea of a maintenance obligation after the end of a cohabitation. This is particularly interesting in the light of the widespread support by respondents to the public opinion survey for other rights for cohabitants. It was the only question in the survey which resulted in a negative response in relation to improved rights for cohabitants. We therefore do not recommend the introduction of principles for property-sharing or financial provision, on or after the end of a cohabitation, corresponding to the principles in section 9(1)(a), (d) or (e) of the Family Law (Scotland) Act 1985.

16.16 In the discussion paper we favoured the introduction of a principle designed to share the economic burden of child-care after the end of a cohabitation.[6] There was support for this on consultation and from respondents to the public opinion survey, but the view was also expressed that both parents ought to share the economic burden of child-care whether or not they had been cohabiting. In the event, this question has been overtaken by the provisions in

1. Family Law (Scotland) Act 1985, s9.
2. 1985 Act, s10(4). There is special provision for property acquired before the marriage for use by the parties as their family home or as furniture or plenishings for it.
3. 1985 Act, s10(1).
4. Discussion Paper, para 5.11.
5. See paras 16.16 to 16.23 below.
6. Para 5.16. The principle would have corresponded to section 9(1)(c) of the Family Law (Scotland) Act 1985 which is that "any economic burden of caring, after divorce, for a child of the marriage under the age of 16 years should be shared fairly between the parties". This is in addition to aliment for the child.

the Child Support Act 1991 which make an absent parent liable not only for maintenance of his or her children but also for an element of support for the person having care of the child.[1] The liability will exist whether or not the parents were cohabiting. This makes it unnecessary for us to make any recommendation on this question.

16.17 We asked in the discussion paper whether, on the termination of cohabitation, a cohabitant should be able to apply to a court for an order for financial provision based on the principle in section 9(1)(b) of the Family Law (Scotland) Act 1985.[2] This provides that

> "fair account should be taken of any economic advantage derived by either party from contributions by the other, and of any economic disadvantage suffered by either party in the interests of the other party or of the family".

If this principle were applied to cohabitants it would enable some provision to be made for cases where, for example, one party has worked unpaid for years helping to build up the other's business or one party has given up a good pensionable career in order to look after the children of the relationship. The existing common law on unjustified enrichment does not provide a clear or certain remedy in such cases,[3] not being designed for intimate relationships where parties may well incur disadvantages as a result of contributions made out of love and affection[4] and partly for their own benefit.[5] Moreover, the Scottish courts have not yet developed remedies for cohabitants based on implied contracts or trusts, as has been done by courts in some other countries,[6] and it probably would not be easy for them to do so at this stage. In any event remedies based on common-law principles of uncertain application would seem to be less satisfactory in this area than specific statutory remedies.[7]

16.18 The principle in section 9(1)(b) could be applied, quite readily and appropriately, to cohabitants. The argument for applying it is that it would be unfair to let economic gains and losses arising out of contributions or sacrifices made in the course of a relationship of cohabitation simply lie where they fall. To allow a remedy for the type of situation covered by section 9(1)(b) would not be to impose on cohabitants a solution based on a particular view of marriage. It would merely be to give them the benefit of a principle designed to correct imbalances arising out of the circumstances of a non-commercial relationship where the parties are quite likely to make contributions and sacrifices without counting the cost or bargaining for a return. Indeed the potential applicability of the principle to cohabitation is recognised in the 1985 Act which includes pre-marital advantages, disadvantages and contributions within the scope of section 9(1)(b).[8] It might be thought anomalous to provide a remedy for economic contributions and sacrifices made during a cohabitation which is followed by a short marriage and then divorce[9] but not for those made during a cohabitation of equal length and similar nature which ends without a marriage.[10] An argument against extending section 9(1)(b) to cohabitants, with any necessary modifications, is that parties who opt for cohabitation rather than marriage ought to know that gains and losses will lie where they fall and that common law remedies may be inadequate or difficult. They ought to make their own arrangements for any necessary adjustments or accept the consequences.[11] This, however, seems unrealistic. Many cohabitants will not know the law and will not make their own legal arrangements. It might also be argued that to provide an adjustive remedy for cohabitants would be to encourage cohabitation and devalue marriage. This, however, depends on the point of view. From the point of view of the unjustly enriched partner an adjustive remedy may make cohabitation less attractive than it would otherwise be. Moreover, even from the other partner's point of view, an adjustive remedy designed merely to mitigate injustice is hardly likely to be seen as a positive encouragement to cohabit rather than marry.

16.19 A majority of those who commented on this question in response to the discussion paper thought that a cohabitant should be able to apply for financial provision on the basis of the principle in section 9(1)(b) of the Family Law (Scotland) Act 1985. There was also strong support from the respondents to the public opinion survey. They were asked the following question.

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1. Child Support Act 1991, s11 and Sch 1.
2. Para 5.15.
3. A claim by a cohabitant based on recompense was, however, successful in *Scanlon* v *Scanlon* 1990 GWD 12–598.
4. There is no claim for recompense based on unjustified enrichment if the enrichment arose from a donation. See eg *Wilson* v *Paterson* (1826) 4 S 817; *Drummond* v *Swayne* (1834) 12 S 342; *Turnbull* v *Brien* 1908 SC 313 at p315.
5. See eg *Rankin* v *Wither* (1886) 13 R 903.
6. The courts in England (see eg *Cooke* v *Head* [1972] 1 WLR 518, applying *dicta* in *Gissing* v *Gissing* [1971] AC 886), Canada (see eg *Pettkus* v *Becker* (1980) 117 DLR (3d) 257), Australia (see eg *Baumgartner* v *Baumgartner* (1987) 76 ALR 75) and New Zealand (see eg *Oliver* v *Bradley* [1987] 1 NZLR 586) have used the idea of the constructive trust to provide a remedy for cohabitants in certain situations.
7. This has been the experience in a number of Commonwealth jurisdictions. See paras 5.2 to 5.4 of the discussion paper and *Gillies* v *Keogh* [1989] 2 NZLR 327. See also the Queensland Law Reform Commission's discussion paper on *Shared Property: Resolving property disputes between people who live together and share property* (Discussion paper No 36, Oct 1991) pp1–4.
8. 1985 Act, s9(2).
9. See eg *Kokosinski* v *Kokosinski* [1980] Fam 72 (where a cohabitation which lasted for 24 years was followed by a marriage and then by a separation a few months later).
10. We recognised this anomaly in our report on *Aliment and Financial Provision*, Scot Law Com No 67, (1981) para 3.98 but concluded that the remedy for it might be to deal with the legal effects of cohabitation, something with which we were not concerned in that report.
11. We consider the legality of such arrangements in para 16.46 below.

"Suppose that a couple cohabited for some years. They do not have a child. They have now split up. During the cohabitation one of them worked unpaid to help build up the other's business. Should that person have any financial claim against the other because of this contribution to the other's wealth?"

Over four-fifths (85%) of respondents believed that a person should have such a financial claim, 13% thought that a person should not and 2% were undecided.

16.20 Although a claim based on contributions or sacrifices could often not be valued precisely, it would provide a way of awarding fair compensation, on a rough and ready valuation, in cases where otherwise none could be claimed. We agree with the majority of consultees and survey respondents that such a claim should be possible. We do not think that any qualifying period of cohabitation would be necessary or desirable. The provision would be self-limiting in that in a short cohabitation where there was little or no commitment to a potentially durable relationship there would be likely to be fewer qualifying contributions and sacrifices.

16.21 It seems clear that a claim should have to be made within a certain time after the end of the cohabitation. Any period is arbitrary but we think that, in the interests of discouraging stale claims and allowing parties to a terminated cohabitation to know where they stand, the time limit should be fairly short. We would suggest a period of one year.[1] That should allow adequate time for a former cohabitant to take legal advice and for any action to be raised. The claim would be a pecuniary claim and, on general principles, would transmit to an executor, if the former cohabitant died within the year after termination of the cohabitation in the same way as would a claim based on breach of contract or unjustified enrichment.

16.22 So far as questions of jurisdiction, procedure and the powers of the courts are concerned we think that

(a) a court should have jurisdiction to deal with a claim under the proposed provision if it would have had jurisdiction to entertain an action of divorce between the parties

(b) the procedure should be regulated by rules of court

(c) the court should have power to make an order for the payment of a capital sum, and should have power to make an interim award, an order for the payment of the capital sum by instalments, and an order for a deferred payment.

We do not think it necessary to provide for orders for the transfer of property in this connection. The claim is akin to a claim based on unjustified enrichment and an award of a capital sum ought to be sufficient to enable justice to be done. This also simplifies the legislation. An order for a transfer of property might have been an appropriate remedy if we had been recommending a sharing of the net value of certain property on the ending of a cohabitation, on the lines of section 9(1)(a) of the Family Law (Scotland) Act 1985, but we are not.

16.23 We recommend that

82.(a) Where a cohabitation has terminated otherwise than by death, a former cohabitant should be able to apply to a court, within one year after the end of the cohabitation, for a financial provision on the basis of the principle in section 9(1)(b) of the Family Law (Scotland) Act 1985—namely that fair account should be taken of any economic advantage derived by either party from contributions by the other, and of any economic disadvantage suffered by either party in the interests of the other party or of any child of the family.

(b) The Court of Session and the sheriff courts should have jurisdiction to entertain an application if they would have had jurisdiction to entertain an action for divorce between the parties.

(c) An application should be made by action, any necessary regulation of procedure being by rules of court.

(d) The court hearing an application should have power to award a capital sum (including a deferred capital sum and a capital sum payable by instalments) and to make an interim award.

(Draft Bill, clause 36.)

We have referred, at the end of paragraph (a) above, to the interests of the other party or of any child of the family. This is a slightly narrower formula than that used in section 9(1)(b) of the 1985 Act which refers to "the interests of the other party *or of the family*". We considered using the 1985 Act formula but came to the conclusion that it was too vague and potentially too wide. Would it cover the wider family of, say, brothers, sisters, uncles, aunts and cousins? Should it apply in such cases if there was no benefit to the other partner in the relationship? Why should one partner be liable to the other if the other has, of his or her own volition, incurred costs in looking after an ill brother or parent who lived nearby. Having decided to refer, more precisely, to children of the family in the context of cohabitants we concluded also that the same change ought to be made in the Family Law (Scotland) Act 1985. This is done in the

1. This is the period most commonly allowed in recent Canadian statutes on claims by cohabitants after the end of the cohabitation. See the Alberta Institute of Law Research and Reform *Towards Reform of the Law Relating to Cohabitation Outside Marriage* (1987) pp59–60.

schedule of amendments in the draft Bill. This would not necessarily preclude a claim by, say, a wife who had given up work to look after an old parent of the husband but she would need to show either that her contributions in doing so had been of economic advantage to the husband or that the disadvantage suffered by giving up work had been in his interests, as it very often would be.

Discretionary provision on death

16.24 In the discussion paper we raised the question whether a surviving cohabitant should succeed on intestacy to his or her deceased partner. We examined this question in some detail, distinguishing between long and short cohabitations, between cases where there had been or had not been a child of the relationship, between cases where there was or was not a surviving spouse, and between cases where the deceased was or was not survived by other relatives. Given the need, in this situation, for some qualifying period of cohabitation and given the various qualifying periods possible, the range of permutations was extensive. Perhaps for this reason the results of our consultation were inconclusive. There was majority support for intestate succession rights for a cohabitant where the cohabitation had lasted for ten years or more and had been terminated by the death. Most consultees considered that in such cases of long cohabitation, whether or not there had been a child of the union, the cohabitant should succeed on intestacy in preference to all other claimants except a surviving spouse. However, there were those who saw difficulties and dangers in conferring fixed rights of intestate succession on cohabitants even in such cases, including difficulties in proving the duration of the relationship and the danger of spurious claims. On the other hand there were those who argued that a long-standing cohabitant should be preferred to a long-separated spouse. There was less support for rights of intestate succession for the surviving cohabitant where the cohabitation had lasted less than ten years. In relation to such shorter cohabitations opinion was sharply divided even when it was assumed that there had been a child of the union.

16.25 Respondents to the public opinion survey were also asked about possible rights of intestate succession for cohabitants. The first question was as follows.

> "A man and a woman have cohabited for more than 10 years and have two children. The man has now died suddenly without leaving a will. He is not survived by a wife or any other relatives. His property is worth £20,000 in all. Should the property go to the cohabitee, to the children or to the cohabitee and the children?"

Over two-thirds of all respondents (68%) believed that the property should go to the cohabitant and the children, 17% thought it should go to the cohabitant and 13% thought it should go to the children. 2% claimed to be undecided. Where the same hypothetical couple had been cohabiting for only 3 years when the man died, 64% of respondents thought that the property should go to the cohabitant and children—not a significantly lower number than when the period of cohabitation was 10 years—15% thought it should go to the cohabitant and 18% thought it should go to the children. Respondents were also asked about a situation involving no children but a surviving spouse.

> "A man and a woman have cohabited for more than 10 years. They have no children. The man was married to someone else, when the couple started cohabiting and has never obtained a divorce. The man has now died suddenly without leaving a will. He is survived by his cohabitee and his wife, but not by any other relatives. His property is worth £20,000 in all. Should his property go to the wife, the cohabitee or to the wife and the cohabitee?"

Almost half of all respondents (47%) favoured an even division between the wife and cohabitant, 27% thought the property should go to the cohabitant and 19% thought it should go to the wife. 7% expressed no opinion. A further question dealt with the situation where there was a surviving cohabitant and an adult son of the deceased by a former marriage (now ended by divorce). The preferred solution in this case was for a division between the cohabitant and the adult son. The shorter the period of cohabitation, the more support there was for the property going to the son alone.

16.26 It is clear from the results of our consultation and public opinion survey that there is considerable support for giving cohabitants some succession rights on intestacy. Beyond that, however, no clear pattern emerges. In some common situations the preferred response of members of the public would appear to be that the cohabitant should take a share of the estate along with other claimants, such as a surviving spouse or children, but not the whole of the estate.

16.27 In relation to testate succession our provisional view in the discussion paper was that there was no justification for giving a cohabitant a claim for legal rights (or legal share[1]) out of the deceased's estate where the deceased's will left the property to someone else. However, this was on the view that the cohabitant might be able to claim financial provision out of the deceased's estate, on a principle analogous to that in section 9(1)(b) of the Family Law (Scotland)

1. The expression used for the fixed share of spouse or issue, even against the terms of the deceased's will, in our report on *Succession* (Scot Law Com No 124, 1990).

Act 1985, to recompense him or her for contributions or sacrifices made to or for the benefit of the deceased.[1] We recognised, however, that different views could reasonably be taken on the question of legal rights for cohabitants, and pointed out that a Scottish public opinion survey some years ago had found that 73% of respondents supported the idea of giving a surviving cohabitant a right to some part of the deceased partner's estate in spite of omission from his or her will.[2] Most of those who commented on the discussion paper agreed that a cohabitant should not be given a right to claim a legal share of the deceased's estate in opposition to the terms of his or her will. However, the Law Society of Scotland thought that the court should have a discretion to award a share even in opposition to the terms of the will. The Committee of the Scottish Clearing Bankers also favoured a system of discretionary provision, pointing out that one significant factor would be the date of the will in relation to the date of commencement of cohabitation. Two other consultees thought that the cohabitant should not necessarily be denied a claim against the estate merely because he or she was omitted from the deceased's will, one pointing out that the presence of children of the relationship who had also been omitted from the will could be an important factor.

16.28 In our report on *Succession* we rejected, in the light of consultation, the idea that a discretionary system of family provision might replace a system of fixed legal rights, or legal shares, for spouses and children.[3] We also rejected the idea of allowing other categories of people to claim discretionary provision out of the estate of a deceased person, although we noted that of those who favoured such a system for claimants other than spouses or issue most would have extended it to *de facto* spouses.[4] In rejecting at that stage the idea of discretionary provision for cohabitants we were strongly influenced by the views of consultees. In our earlier consultation paper on this subject we had expressed the view that there was a clear case for allowing a cohabitant to apply for a provision out of the deceased's estate.[5] It was therefore of interest to us to note that important consultees, including the Law Society of Scotland which had at one stage opposed discretionary provision, now supported it for cohabitants. We do not find this in any way surprising. Public opinion on the question of discretionary provision or fixed rights is very evenly divided.[6] There are good arguments on both sides, which we have fully discussed in earlier papers.[7] In the light of the general support for some provision for a cohabitant out of the estate of the deceased partner in at least some cases, coupled with the inconclusive results of our consultation on fixed rights, we have been driven back to reconsidering the case for a system of discretionary provision for cohabitants. We still think, however, that a system of fixed rights is preferable for spouses.

16.29 The main advantage of a discretionary system for cohabitants is that it can take account of the widely differing circumstances of different cases, including the duration of the cohabitation, the presence of children, the rights or claims of a surviving spouse (if any), the rights of other relatives (if any), the terms of the deceased's will and the date when it was made, the extent of any contributions or sacrifices made by the surviving cohabitant which were to the benefit of the deceased, and so on. This flexibility is probably of more value in cohabitation cases than in any other class of case. One disadvantage is that a court application is necessary. However, where the alternative is no rights at all, that is unlikely to be perceived as a serious disadvantage. In practice, cases will often be settled without the need for court proceedings. Another disadvantage is that a widely framed discretionary provision can be difficult for courts to apply. Again, however, that is the price which has to be paid for a flexible discretionary system. The experience of countries which have had discretionary systems for many years suggests that they work well enough in practice. The tendency has been to expand, rather than restrict, their scope.[8] Where, as in the case of a spouse, there is a choice between a system of fixed rights and a system of discretionary provision the advantages of a system of fixed rights appear to us to outweigh the advantages of a discretionary system. Where, however, the relationship giving rise to the claim is of a less certain character and where, accordingly, the choice may have to be between a system of discretionary provision and no provision at all, we think that the disadvantages of a discretionary system are tolerable. We have therefore concluded that we should now recommend the introduction of a system of discretionary provision for a surviving cohabitant out of the estate of the deceased cohabitant.

16.30 In devising a suitable scheme we have considered the laws of England and Wales, and of various Commonwealth countries. We have not, however, followed any one non-Scottish model in all respects, mainly because we are concerned with one narrow case—the surviving cohabitant—whereas the other systems we have examined are concerned also with spouses and children and other cases. The nature and scope of our recommendations has enabled us to opt for a simpler system than some of those we have examined. In particular, we do not propose to include power to order

1. Paras 6.29 and 6.30.
2. Manners and Rauta, *Family Property in Scotland* (OPCS, 1981) p21 and table 4.8.
3. Scot Law Com No 124 (1990), paras 3.3 to 3.14.
4. *Ibid* para 3.14.
5. *Intestate Succession and Legal Rights* (Consultative Memorandum No 69, 1986) para 4.86.
6. See our report on *Succession* (Scot Law Com No 124, 1990) para 3.6.
7. See the consultative memorandum and report referred to in the last two footnotes.
8. It is particularly interesting, in this connection, to note the extension of the provisions for cohabitants recommended by the English Law Commission in its report on *Distribution on Intestacy* (Law Com No 187) 1989. Under the existing law a surviving cohabitant must show that he or she was dependent on the deceased. The Commission has recommended (para 59) that this should no longer be required. It has also recommended (para 60) that the factors to be taken into account in assessing a cohabitant's claim should be the same as in the case of a spouse.

periodical payments. Such a power is given by the English legislation[1] but we think that it reflects the maintenance-based origins of that legislation. We do not think that provision for a surviving cohabitant should be confined to maintenance. In some cases it may be intended to provide recompense for past contributions or sacrifices. In others it may be intended to reflect the view that the deceased, if he had made a will, would in all probability have made provision for the cohabitant. In some such cases (particularly where the only other claimant is the Crown or a remote relative) the appropriate award may be the entire estate. Omitting periodical payments enables the law to be considerably simplified. We have also decided to omit anti-avoidance provisions, because we are not satisfied that there is any need for them in cases where the claim is made by a cohabitant who was living with the deceased immediately before his death.[2] Again this enables the law to be stated in a much simpler way.

16.31 So far as jurisdiction is concerned, the close connection with succession suggests that the domicile of the deceased (which is the normal basis of jurisdiction in succession matters) should be the connecting factor. We suggest that the Court of Session should have jurisdiction if, at the date of death, the deceased was domiciled in Scotland and that a sheriff court should have jurisdiction if, at the date of death, the deceased was domiciled in the sheriffdom. In addition to the Court of Session, the sheriff at Edinburgh should, we suggest, have jurisdiction if the deceased was domiciled in Scotland when he died but cannot be assigned a domicile in a particular sheriffdom. These rules are similar to rules in the Succession (Scotland) Act 1964[3] (prior rights) and in the draft Bill appended to our report on *Succession*.[4] It is important that the court dealing with general aspects of succession to the deceased's estate should have jurisdiction to deal with a cohabitant's claim.

16.32 Title to apply should be confined to a person who was, immediately before the deceased's death, living with him or her as husband and wife (whether or not pretending to be married) although not actually married to him or her. The criterion should be essentially the same as that in the Damages (Scotland) Act 1976[5] which allows a claim for damages for wrongful death by "any person, not being the spouse of the deceased, who was, immediately before the deceased's death, living with the deceased as husband or wife." We do not think that any qualifying period of cohabitation should be required. This would introduce an element of arbitrariness and, in some cases, difficulties of proof. The duration of the cohabitation should simply be a factor to be taken into account in quantifying a claim. In deciding whether two people were cohabiting immediately before the death of one of them, any absence of either as an in-patient in a hospital or similar institution, and any temporary absence such as absence on a vacation or a work assignment, should be ignored.[6]

16.33 The ground of application should, we suggest, be that the disposition of the deceased's estate was not such as to make such financial provision for the applicant as it would be reasonable to expect the applicant to receive having regard to all the circumstances of the case[7] and, in particular, to the following factors

(a) the length of the cohabitation

(b) the existence of any children of the relationship between the applicant and the deceased or of any children treated by them as children of their family

(c) the size and nature of the deceased's net estate

(d) any benefit received, or to be received, by the applicant on, or as a result of, the deceased's death otherwise than out of his net estate

(e) the nature and extent of any other rights against, or claims on, the deceased's net estate[8]

(f) the nature and extent of any contributions made by the applicant from which the deceased has derived economic advantage

(g) the nature and extent of any economic disadvantage suffered by the applicant in the interests of the deceased or of their children.

16.34 So far as the powers of the court are concerned we suggest that the court should be given power, if the above ground is established, to make such order, if any, for financial provision for the applicant out of the deceased's net

1. Inheritance (Provisions for Family and Dependants) Act 1975, s2(1).
2. We reached the same conclusion in relation to legal shares in our report on *Succession* (Scot Law Com No 124, 1990) paras 3.49 to 3.54.
3. S8(5) (appointment of arbiter re prior rights).
4. Clause 12 (validation of certain documents); clause 13 (rectification of wills). See Scot Law Com No 124 (1990) p156.
5. Sch 1, para 1(aa).
6. See the Social Security Benefit (Persons Residing Together) Regulations (SI 1977 No 956) where a similar test is used in relation to spouses.
7. The ground recommended by the Law Commission for England and Wales is very similar to this but includes after "receive" the words "for his maintenance". See Law Com No 187, *Distribution on Intestacy* (1989) para 60. We do not think that the ground should be so closely tied to maintenance. There may be cases where the applicant has no need of any provision for his or her maintenance (having, for example, a good salary or a good pension) but where he or she has a good claim based on contributions or on the absence of any other person who was close to the deceased.
8. This would include any claim to inheritance tax.

estate as it considers reasonable. In appropriate cases the award might extend to the whole net estate. The court should have power to order payment of a capital sum or a transfer of property or both. It should have power to order the payment to be in instalments, or the payment or transfer to be deferred, or any combination of these orders. It should also have power to order interim payments, in appropriate cases. It should be possible, on a change of circumstances after the order, to vary the order for payment by instalments or for payment or transfer at a deferred date, but not so as to alter the total amount awarded.

16.35 We think that it is important that claims by cohabitants should not be allowed to delay unduly the administration of estates. For this reason we favour a time limit on applications of six months from the date of death, with power to the court to allow late applications on cause shown, for example, if a later will is discovered after the expiry of the limit which revokes an earlier will in favour of the cohabitant, or if the executor or relatives have led the cohabitant to believe that a reasonable provision would be made and then refuse any payment after the time limit has expired. Executors, however, should not be liable for having distributed any estate without taking account of the possibility of a claim being made, and allowed, later than 6 months after the date of death.[1] If the *surviving* cohabitant dies before having commenced proceedings his or her right to claim would, as a normal pecuniary claim, transmit to his or her executor. We do not think that any special provision is necessary in order to achieve this result.

16.36 Any award to a cohabitant under these provisions should be paid out of the net estate[2] after debts and funeral expenses have been provided for. We recommend that the court, which will have the relevant facts before it anyway for the purposes of the claim, should have power to say which parts of the estate (e.g. residue, or bequest to a long-separated spouse) should bear the cost of the award. For the purposes of inheritance tax any money or property due to the cohabitant by virtue of an order should be treated as if it had been left by the deceased to the cohabitant.[3]

16.37 We therefore recommend that

83. Where a cohabitation is terminated by death the surviving cohabitant should not have automatic rights of intestate succession or fixed rights to a legal share of the deceased's estate but should be able to apply to a court for a discretionary provision out of the deceased's estate under a scheme of the type set out in paragraphs 16.31 to 16.36.

(Draft Bill, clauses 37 and 38.)

Occupancy rights and protection from violence

16.38 A cohabitant who is not the owner or tenant has no automatic occupancy rights in the family home under the Matrimonial Homes (Family Protection) (Scotland) Act 1981. However, he or she can apply to a court for a grant of occupancy rights for a period of up to six months, which can be extended for a further period or periods but not by more than six months at a time.[4] In the discussion paper we asked for views on whether cohabitants should be given occupancy rights under the 1981 Act without the need to apply to a court for them. Most respondents were opposed to this idea. They thought that the existing provisions were adequate and that automatic rights would cause difficulties both for owners or tenants who wished to exclude a violent partner and for third parties, such as police officers, who might find it difficult to decide whether or not there was cohabitation which was sufficient to bring occupancy rights into existence. Opposition was expressed not only by legal organisations, such as the Law Society of Scotland and the Family Law Association, but also by the Building Societies Association, the Committee of Scottish Clearing Bankers, the Association of Chief Police Officers (Scotland) and the Association of Scottish Police Superintendents. Interestingly, opposition was also expressed at one of the public meetings by a representative of Scottish Women's Aid, on the ground that automatic rights for cohabitants would be against the interests of the many women who were sole tenants of their homes. We do not recommend automatic occupancy rights for cohabitants.

16.39 In the discussion paper we said that we would not be in favour of extending to cohabitants the existing provisions of the 1981 Act relating to dealings but invited views on whether some other form of protection against, say, a sale of the house by the other cohabitant might be provided.[5] At this time we were consulting on other forms of protection for spouses too[6] and considered that some limited forms of protection might be equally suitable for spouses and cohabitants. In the end we have decided not to recommend fundamental changes in the 1981 scheme for spouses and

1. There is a similar protection in the English legislation. Inheritance (Provision for Family and Dependants) Act 1975, s20.
2. "Net estate" is used here in the same sense as in our report on *Succession* (Scot Law Com No 124, 1990). It means the whole estate belonging to the deceased at the date of his death less debts and funeral expenses.
3. This is the same solution as we have recommended for legal shares in our report on *Succession* (Scot Law Com No 124, 1990) para 9.21. It produces the same effect as s146(1) of the Inheritance Tax Act 1984 which deals with claims under the (English) Inheritance (Provision for Family and Dependants) Act 1975.
4. 1981 Act, s18(1) as amended.
5. Para 7.8.
6. Discussion Paper No 85 (1990) paras 6.13 to 6.29.

so, although there was some support on consultation for giving cohabitants protection against dealings, we have decided not to pursue this question further. We are not aware that the existing law gives rise to any difficulty in practice.

16.40 The existing position with regard to interdicts against domestic violence to which a power of arrest can be attached ("matrimonial interdicts") is, however, unsatisfactory in relation to cohabitants. The protection of a matrimonial interdict is available only if a cohabitant has obtained a grant of occupancy rights from a court, or if both cohabitants are entitled, or permitted by a third party, to occupy the home.[1] It follows that if a woman who is the owner or tenant of a house cohabits there with a man who is not owner or tenant, and he begins to be violent towards her, she cannot obtain the protection of a matrimonial interdict unless he has applied successfully for occupancy rights. This is unfortunate and, in our view, unjustifiable. In the discussion paper we suggested that matrimonial interdicts, with powers of arrest attachable, should be available to cohabitants, whether or not they had occupancy rights, and without the need for any qualifying period of cohabitation.[2] There was strong support for this on consultation. It was suggested, however, by one consultee that the term "matrimonial interdict" was inappropriate for a remedy available to unmarried persons and that this type of interdict should be called a "domestic" interdict or given some other suitable name. We agree with this suggestion and recommend that

84.(a) Interdicts of the type described in section 14(2) of the Matrimonial Homes (Family Protection) (Scotland) Act 1981, to which a power of arrest can be attached, should be available to cohabitants, whether or not they have occupancy rights, and without the need for any qualifying period of cohabitation.

(b) Such interdicts for cohabitants (currently called "matrimonial interdicts") should be renamed or described in a way which does not suggest that they are confined to married persons.

(Draft Bill, clause 39.)

Life Assurance

16.41 **Insurable interest.** A person effecting a policy of assurance on someone else's life must have an insurable interest in the other person's life.[3] It is accepted that one spouse has an insurable interest in the life of the other.[4] This is not regarded as being merely pecuniary. It is not directly linked to the obligation of aliment but is regarded as the same type of interest as a person has in his or her own life.[5] Family protection policies, whereby one spouse insures the life of the other so as to receive, say, an annuity to cover the period when children are dependent and likely to impair earning potential, are commonplace. It seems to us, and almost all consultees agreed, that it would be unfortunate if any legal barrier were to be placed in the way of a cohabitant wishing to take out a policy of this nature. We were told by the Association of British Insurers that several insurance companies already regard one cohabitant as having an insurable interest in the life of the other, and it may well be that the courts would take the same view. However, a statutory provision would clarify the position. No qualifying period of cohabitation would seem to be necessary for this purpose. A cohabitant would be likely to think of effecting an insurance policy on the life of his or her partner only if the relationship was one of some permanence. We therefore recommend that

85.(a) For the avoidance of doubt, it should be made clear by statute that a cohabitant has an insurable interest in the life of his or her partner of the same type as he or she has in his or her own life.

(b) No qualifying period of cohabitation should be required for this purpose.

(Draft Bill, clause 40.)

16.42 The Association of British Insurers was, for administrative reasons, strongly in favour of any reform being on a United Kingdom basis. We do not consider, however, that a clarifying provision, which would enable existing practices to be continued on a more secure basis, need create any difficulty in this respect. We do not think, therefore, that a provision on the lines suggested need await a corresponding provision in English law.

16.43 **Married Women's Policies of Assurance (Scotland) Act 1880.** Section 2 of this Act, as amended,[6] enables a person to take out a policy of assurance on his or her own life for the benefit of his or her spouse in such a way that

1. Matrimonial Homes (Family Protection) (Scotland) Act 1981, s18(3).
2. Para 7.10.
3. Life Assurance Act 1774, s1. This provides that ". . . no insurance shall be made . . . on the life . . . of any person . . . wherein the person or persons for whose use, benefit, or on whose account such policy or policies shall be made, shall have no interest, or by way of gaming or wagering; and every assurance made contrary to the true intent and meaning hereof shall be null and void . . .".
4. MacGillivray & Parkington on *Insurance Law* (8th edn, 1988) paras 67 and 68. The insurable interest of a person in the life of his or her spouse was not doubted in *Champion* v *Duncan* (1867) 6 M 17; *Wight* v *Brown* (1849) 11 D 459. See also *Griffiths* v *Fleming* [1909] 1 KB 805 at pp820–823.
5. See *Griffiths* v *Fleming*, above, at pp821–822.
6. The amendments were made by the Married Women's Policies of Assurance (Scotland) (Amendment) Act 1980 which implemented this Commission's Report on *The Married Women's Policies of Assurance (Scotland) Act 1880* (Scot Law Com No 52, 1978). Before the amendments s2 applied only to a policy effected by a "married man".

the policy is held in trust for the beneficiary as soon as it is effected, without the need for any delivery or intimation.[1] "Spouse" includes a person, named in the policy as a beneficiary, who later becomes the spouse of the person effecting the policy.[2] A cohabitant could take out a policy on his or her own life for the benefit of his or her partner, without the benefit of the Act, and could do so either by naming the partner as the direct beneficiary,[3] or by taking the policy in trust for the cohabitant. In either case, however, there would have to be delivery of the policy, or some sufficient equivalent of delivery (such as intimation, or registration in the Books of Council and Session) before the cohabitant would acquire a vested beneficial right.[4] The 1880 Act is useful because it obviates the need for delivery or intimation and avoids the difficulties which might arise at a later stage if delivery or some equivalent could not be established. It enables a simple family trust to be created in a very easy way. It also contains a provision on the rights of the creditors of the person effecting the policy which is arguably better adapted to the circumstances of this type of transaction than the general rules on gratuitous alienations.[5] The fact that cohabitants cannot rely on benefits under many superannuation schemes will often make the taking out of private life assurance a very wise precaution. The law should, in our view, do what it can to make it easier for people to provide for their dependants in this way. If the 1880 Act were to be extended to cohabitants no qualifying period of cohabitation would seem to be necessary. A person can already, as we have seen, take out a policy in favour of a cohabitant (or anyone else) so long as there is the necessary intimation or delivery. There is no great question of policy involved. All that is involved is a simple extension of a facility.

16.44 Our provisional proposal that the benefits of the 1880 Act should be extended to cohabitants was supported by virtually all of those who commented on it. The Association of British Insurers, while supporting the proposal, again suggested that equivalent changes should be made to English law at the same time. However, given that there is already separate Scottish legislation on this subject we do not consider that this useful minor reform of Scots law need await corresponding changes in England.

16.45 We recommend that

86.(a) The benefits of the Married Women's Policies of Assurance (Scotland) Act 1880 (which enables a person to take out a life insurance policy on his or her own life for the benefit of his or her spouse in such a way that the policy is held in trust for the beneficiary as soon as it is effected) should be extended to cohabitants.

(b) No qualifying period of cohabitation should be required for this purpose.

(Draft Bill, clause 41.)

We have taken the opportunity presented by the draft Bill to include a provision repealing section 1 of the 1880 Act, which is now unnecessary. It is based on notions of married women's property and married women's contractual capacity which have long ceased to be reflected in the law.[6]

Cohabitation contracts

16.46 Where cohabitants have the foresight to attempt to regulate by contract the questions of property and finance arising out of the cohabitation, it might be thought that the policy of the law should be to give effect to their arrangements. There is, however, a possibility that at least some contracts between cohabitants would be held to be illegal and unenforceable.[7] The following passage is taken from Gloag on *Contract*.[8]

> "A contract having as its object the furtherance of illicit sexual intercourse is illegal. Thus a bond granted to a woman to induce her to submit to intercourse, or to reward her for having submitted, cannot be enforced. Where a bill was given to induce a man to take back his divorced wife—there being no provision that he should remarry her, and the agreement being in effect that he should live with her as his mistress—opinions were given that this consideration amounted to *turpis causa*. And neither a bond nor a legacy given or promised as the price of continued illicit intercourse can be enforced. On the other hand, there is no legal objection to a provision made for the woman

1. The section also applies to policies for a person's children, including children whose parents are not married to each other. See s2. So it can already be used by either cohabitant to take out a policy for his or her children.
2. S2.
3. Thus giving him or her a *jus quaesitum tertio*. See *Carmichael* v *Carmichael's Exrx* 1920 SC (HL) 195.
4. See *Jarvie's Tr* v *Jarvie's Trs*(1887) 14 R 411; *Carmichael* v *Carmichael's Exrx* 1920 SC (HL) 195.
5. S2 provides that "if it shall be proved that the policy was effected and premiums thereon paid with intent to defraud creditors, or if the person upon whose life the policy is effected shall be made bankrupt within two years from the date of such policy, it shall be competent to the creditors to claim repayment of the premiums so paid from the trustee of the policy out of the proceeds thereof.". This provision is expressly preserved by s34 of the Bankruptcy (Scotland) Act 1985 (gratuitous alienations).
6. The repealing provision is in Sch 2 of the draft Bill. For the full capacity and property rights of married women, see now the Family Law (Scotland) Act 1985, s24. See also clause 24 of the Draft Bill.
7. This question has been the subject of fairly extensive discussion in England. See eg Barton, *Cohabitation Contracts* (1985) pp37–49; Parry, *The Law Relating to Cohabitation* (2d ed 1988) paras 9.06 to 9.10; Poulter, "Cohabitation Contracts and Public Policy" (1974) 124 New Law Journal pp999 and 1034; Bottomley, Gieve, Moon & Weir, *The Cohabitation Handbook* (1981) pp190–192.
8. (2nd edn, 1929) p562 (footnotes omitted). See also Walker, *Contracts* (2d edn 1985) para 11.34.

after the illicit intercourse has ceased. And the fact that A. and B. were living, and continued to live, in adultery, was held not to invalidate a mutual will, so as to deprive a third party of a benefit under it."

The cases cited in support of these propositions all date from the 19th century or earlier and it is to be hoped that a court today would not regard a contract between cohabitants relating to aliment, property or other such matters as contrary to public policy. Given that cohabitation is already recognised for various legal purposes (including occupancy rights in the matrimonial home,[1] succession to certain tenancies[2] and damages on death[3]) such a view would be highly questionable. The typical cohabitation relationship nowadays is not one of female, or male, prostitution but is a reciprocal arrangement for living together, supporting each other and sharing important areas of life, which is often indistinguishable from marriage from the factual point of view. Whether legislation is necessary on this point is open to question[4] but if there is any legal doubt which might deter cohabitants from making effective contractual arrangements relating to property or financial matters then it ought to be removed. The Committee of Ministers of the Council of Europe adopted a recommendation on 7 March 1988 that governments of member states should take the necessary measures

"to ensure that contracts relating to property between persons living together as an unmarried couple, or which regulate matters concerning their property either during their relationship or when their relationship has ceased, should not be considered to be invalid solely because they have been concluded under these conditions.".[5]

In the discussion paper we suggested that a contract between cohabitants or prospective cohabitants should not be void or unenforceable on any ground if it would not have been void or unenforceable had they been spouses or prospective spouses.[6] Almost all consultees agreed with this suggestion, although one criticised the technique of using spouses as the criterion and preferred the type of wording in the Council of Europe recommendation. We accept this criticism. There is no need to assimilate cohabitants to spouses in this context and it could produce the wrong results if there were ever to be special restrictions applying to spouses only. We therefore adopt the type of approach used by the Council of Europe and recommend that

87. A contract between cohabitants or prospective cohabitants relating to property or financial matters should not be void or unenforceable solely because it was concluded between parties in, or about to enter, this type of relationship.

(Draft Bill, clause 42.)

Opting out

16.47 On consultation a number of people suggested that, if cohabitation were to have certain legal consequences, cohabitants should be able to opt out of them. We have not included any specific provision on opting out in our draft Bill because we do not think that it is necessary, given the nature and limited extent of our proposals. Cohabitants could, for example, agree in advance on the division of household goods and thereby, in effect, opt out of the provision on this matter which, in any event, is only a presumption.[7] The provision on savings from housekeeping allowances applies only "in the absence of any agreement between them to the contrary".[8] A claim for financial provision on the termination of a cohabitation could, like any other pecuniary claim[9] be renounced in a prior agreement. Even if an agreement between the cohabitants did not amount to an actual renunciation, which excluded the jurisdiction of the court, it could certainly be taken into account by the court, as part of the circumstances of the case, in deciding what was a fair and reasonable award. We do not think that opting out of the possibility of a domestic interdict ought to be any more permissible than opting out of the possibility of a matrimonial interdict between spouses. These are protective remedies aimed primarily at the prevention of domestic violence, or further domestic violence, and opting out seems inappropriate in relation to them. So far as insurance policies and cohabitation contracts are concerned, any legal consequences are the result of opting in, and there is therefore no need to provide for opting out.

1. Matrimonial Homes (Family Protection) (Scotland) Act 1981, s18.
2. Housing (Scotland) Act 1988, s31(4).
3. Damages (Scotland) Act 1976, ss1 and 10(2) and Sch 1, para (aa) (added by the Administration of Justice Act 1982, s14(4)).
4. A number of courts in the United States of America have rejected the view that cohabitation contracts are unenforceable. See Weitzman, *The Marriage Contract* (1981) pp392–401. The best known American case is *Marvin* v *Marvin* 18 Cal 3d 660 (1976). Some of our consultees, including the Faculty of Advocates, considered that a court would not now strike down a typical cohabitation contract as immoral.
5. R (88) 3.
6. Para 9.1.
7. See draft Bill, clause 34.
8. See draft Bill, clause 35.
9. Including a claim for financial provision on divorce and a claim for legal rights on death.

Part XVII Illegitimacy

Introduction

17.1 The question for consideration in this part is whether there is any place in a new Scottish family law code for the concepts of legitimacy, illegitimacy and legitimation. We suggested in the discussion paper that there was not and that these concepts, and the associated declarators of legitimacy, illegitimacy and legitimation, should not feature in the new law. These suggestions were supported, in some cases very strongly, by almost all of those who commented on them. One of the very few objections came from the Law Society of Scotland's law reform committee. The committee recognised that legitimacy and illegitimacy were of much reduced practical significance nowadays and had sympathy with the view that the concepts should be consigned to history. However the committee thought that, because there would have to be some qualifications and saving provisions, there was a risk that the reform might cause confusion and might be seen as nothing more than an exercise in semantics. The committee's comments were reasonable ones, reasonably made. However, the status of illegitimacy is much more than a matter of semantics to those individuals who are affected by it, and the committee may not have fully appreciated that in the context of a new code a decision has to be made now about whether or not to include provisions on illegitimacy, legitimacy and legitimation and the associated declarators. This is not a decision which can be sensibly deferred. It would, in our view, be wrong to burden a new code with outdated concepts which have no current legal significance for the vast majority of the population, when a simple savings provision for hereditary titles and certain existing deeds and enactments is all that is required. We are not therefore persuaded by the committee's comments although we have considered them carefully and have tried to frame the necessary savings in such a way as to minimise confusion.

The 1986 reform

17.2 The Law Reform (Parent and Child) (Scotland) Act 1986, which implemented this Commission's report on *Illegitimacy*,[1] removed the few remaining disabilities of people born out of wedlock and enacted the general principle that

> "The fact that a person's parents are not or have not been married to one another shall be left out of account in establishing the legal relationship between the person and any other person, and accordingly any such relationship shall have effect as if the parents were or had been married to one another."[2]

This general principle is, however, subject to a number of savings (for example, for enactments passed or made, or deeds executed, before the Act came into force) and it does not mean that fathers of children always have parental rights.[3] Under the Act a child's father has parental rights automatically only if he is married to the child's mother or was married to her at the time of the child's conception or subsequently.[4] Otherwise he must apply to a court if he wishes to obtain parental rights.[5] We have already discussed the question of the father's parental responsibilities and rights.[6] It is a separate question.

17.3 The Law Reform (Parent and Child) (Scotland) Act 1986 did not abolish the status of legitimacy or the status of illegitimacy. Indeed it referred, in the context of rules on jurisdiction, to actions for declarator of legitimacy, legitimation or illegitimacy,[7] and it left the Legitimation (Scotland) Act 1968 unrepealed. This Commission recommended, however, that the terms "legitimate" and "illegitimate", as applied to people, should whenever possible cease to be used in legislation.[8] We recognised that it was offensive for the law to use terms which suggested that some people were legitimate or lawful, and some people illegitimate or unlawful.[9] We considered at that time that it would not

1. Scot Law Com No 82 (1984).
2. S1(1).
3. S1(2) and (3).
4. S2(1)(b).
5. S3.
6. See paras 2.36 to 2.51 above.
7. S7.
8. Scot Law Com No 82 (1984) para 9.2. A similar recommendation was made by the English Law Commission in its report on *Illegitimacy* (Law Com No 118, 1982) para 4.51.
9. Scot Law Com No 82 (1984) para 9.1.

be appropriate to legislate to remove the status of illegitimacy in Scots law. This was partly because the terms "legitimate" and "legitimated" continued to appear in certain United Kingdom statutes and were likely to be found for some time in pre-Act documents, and partly because we hoped that, almost all legal differences between people born in marriage and people born out of marriage having been removed, the idea of a separate status of illegitimacy would gradually wither away.[1]

Completing the task

17.4 If the advantages of a codification of family law are to be fully realised, unnecessary and anachronistic concepts will have to be eliminated. Legitimacy, illegitimacy and legitimation now fall into this category. A separate status is justifiable in the law where it indicates that the person possessing it is in a significantly different legal position from other people. There are now virtually no legal differences between those whose parents are, or have been, married to each other and those whose parents have never been married to each other, and the retention of a separate status of legitimacy is unnecessary. The separate status of illegitimacy is not only unnecessary but is also considered by many to be offensive. Given the strong support received on consultation, we have no difficulty in concluding that the concepts of legitimacy, illegitimacy and legitimation should not feature in a new code. In the new Scottish family law children should just be children, and people should just be people, whether their parents were married to each other or not. We proceed to consider what legislative changes this requires and what savings might be needed.

17.5 It is a simple matter to amend section 1(1) of the Law Reform (Parent and Child) (Scotland) Act 1986 so as to make it clear that the status of illegitimacy is being abolished.[2] The status of legitimacy will also cease to have any content, as everyone will be equally legitimate, but it is unnecessary to provide expressly for this.

17.6 If the status of illegitimacy is abolished the concept of legitimation by subsequent marriage ceases to have any meaning, because everyone is legitimate by operation of law. The Legitimation (Scotland) Act 1968 should therefore be repealed. Its provisions would, in any event, even if no change were made in the underlying concepts, be quite inappropriate in a new code. It proceeds on the assumption that legitimacy carries with it a whole bundle of rights and obligations. That is no longer so. However, the Act did make a useful change in relation to succession to hereditary titles and, following on representations to this effect from the Lord Lyon, we have taken care in the draft Bill to preserve its effect in this area.[3]

17.7 If the above changes were made then clearly declarators of legitimacy, illegitimacy or legitimation would be unnecessary and inappropriate. References to them, including the references in section 7 of the 1986 Act and in section 8 of the Civil Evidence (Scotland) Act 1988, would fall to be repealed. Declarators of parentage would, of course, continue to be available.

17.8 These changes would simplify and improve the law. There would, however, continue to be references to legitimate persons, (or "lawful heirs" or "lawful issue" and so on) and possibly also to illegitimate persons, in some old enactments and deeds. Some content has to be given to these. It is, however, easy enough to provide that where a reference is made, directly or indirectly, in whatever terms,[4] to a legitimate or lawful person in an enactment passed or made before the date of commencement of the new legislation or in a deed executed before that date it is to be taken to be a reference to a person whose parents were married to each other at the time of that person's conception or at any later time.[5] Any reference in a pre-commencement enactment or deed to an illegitimate person would have a corresponding meaning—that is, it would be taken as a reference to a person whose parents had never been married to each other at any time since the time of the person's conception.[6] All of this would be subject to the rules on the effects of adoption, noted below. People drafting future deeds and enactments would be expected not to use non-existent concepts. Any reference to a lawful child of X in a post-commencement deed or enactment would apply to any child of X. These rules would replace section 1(4) of the 1986 Act, which deals with similar questions but is not consistent with the abolition of the status of illegitimacy.

17.9 Minor consequential amendments would also be needed in the Adoption (Scotland) Act 1978. Section 39(1) provides that an adopted child is to be treated as the "legitimate" child of the marriage or (if adopted by one person) as the "legitimate" child of the adopter, and as if he were not the child of any other person. The express reference

1. *Ibid* para 9.3.
2. See Draft Bill, clause 44.
3. See Draft Bill, clause 47(2). Nothing in the Act (including the repeal of the 1968 Act) affects the succession to hereditary titles, honours or dignities.
4. Eg lawful heir, lawful issue.
5. See Draft Bill, clause 44(2).
6. See Draft Bill, clause 44(2).

to legitimacy would be inappropriate, if our earlier suggestion were implemented, and the draft Bill appended to this report makes amendments accordingly. Similar minor amendments are made in relation to sections 39(2) and 46(2).[1]

17.10 We recommend that

88.(a) Section 1(1) of the Law Reform (Parent and Child) (Scotland) Act 1986 should be amended so as to provide expressly that no person whose status is governed by Scots law should be regarded as illegitimate.

(b) The Legitimation (Scotland) Act 1968 should be repealed as unnecessary.

(c) References in existing legislation to actions for declarator of legitimacy, legitimation and illegitimacy should be repealed.

(d) Any reference to a legitimate or lawful person in any enactment passed or made, or in any document executed, before the commencement of the new legislation should be construed as a reference to a person whose parents were married to each other at the time of the person's conception or at any later time, and any reference to an illegitimate person in any such enactment or document should be construed accordingly.

(e) Consequential amendments should be made in sections 39 and 46 of the Adoption (Scotland) Act 1978.

Coats of arms

17.11 The existing law excludes coats of arms from the changes made by the Law Reform (Parent and Child) (Scotland) Act 1986. The Lord Lyon suggested to us that this was unreasonable and unnecessary and that the reference to coats of arms in section 9(1)(c) of the Law Reform (Parent and Child) (Scotland) Act 1986 should be repealed. We are glad to accept this suggestion. The fewer exceptions to the general rule of equality in the 1986 Act the better. We therefore recommend that

88.(f) The reference to coats of arms in section 9(1)(c) of the Law Reform (Parent and Child) (Scotland) Act 1986 should be repealed.

(Draft Bill, clause 44 and Schedules 1 and 2.)

Domicile of children

17.12 If the status of illegitimacy were abolished in Scotland the rules on the domicile of children would have to be changed. The existing law is broadly to the effect that the domicile of a pupil child depends on the domicile of the child's father if the child is legitimate but depends on the domicile of the child's mother if the child is illegitimate.[2] There is a statutory exception in the case of a legitimate child whose parents are living apart.[3] It would be unreasonable if the child's domicile automatically followed that of the father in all cases even if, for example, the child was living with the mother in Scotland and the father had emigrated. The details of this exception, and the other refinements of the present law need not detain us. The important point is that the existing law makes a child's domicile depend on his or her legitimacy and that this has to be changed.

17.13 The Scottish and English Law Commissions made joint recommendations on the law of domicile in 1987.[4] These have not yet been implemented. In the context of the abolition of the status of illegitimacy in Scots law it is clearly essential that the existing law on the domicile of children be changed. We therefore suggest that, if the joint report on domicile has not been implemented by the time this report is implemented, the Scottish law on the domicile of children should be changed in the way recommended in the joint report. We recommend that

89.(a) The existing law on the domicile of children (which makes domicile depend on legitimacy) should be changed.

(b) The domicile of a child under the age of 16 should be determined as follows—

(i) the child should be domiciled in the country with which he or she is for the time being most closely connected;

(ii) where the child's parents are domiciled in the same country and the child has his or her home with either or both of them, it is to be presumed, unless the contrary is shown, that the child is most closely connected with that country;

(iii) where the child's parents are not domiciled in the same country and the child has his or her home with one of them, but not with the other, it is to be presumed, unless the contrary is shown, that the child is most closely connected with the country in which the parent with whom the child has his or her home is domiciled.

1. See Draft Bill, Sch 1.
2. See Anton, pp130–136.
3. Domicile and Matrimonial Proceedings Act 1973, s4.
4. Report on the *Law of Domicile* (Scot Law Com No 107; Law Com No 168, 1987).

(c) **It should be made clear that a person's domicile of origin is the first domicile which he or she has under the above rules.**

(Draft Bill, clause 45.)

Choice of law rules

17.14 The existing choice of law rules on legitimacy, illegitimacy and legitimation are uncertain[1] and, in so far as they give primacy to the father's domicile, old-fashioned. They would, in any event, have to be reframed if the status of illegitimacy were abolished. In a new code there ought to be clear new rules adapted to the new substantive law. If the law on the domicile of children were reformed as we have recommended[2] then it would be possible to have a very simple choice of law rule which would not be biased in favour of the father or the mother but would use the person's own domicile at the relevant time as the connecting factor. We suggested such a rule in the discussion paper, on the assumption that the joint recommendations of the two Commissions on domicile would be implemented, and it was supported by all those who commented on it.

17.15 We recommend that

90. The way, if any, in which a person's status at any time is affected by whether his or her parents are or have been married to each other should depend on the law of the person's domicile at that time.

(Draft Bill, clause 46.)

1. For the existing law see Anton, pp484–495. The Legitimation (Scotland) Act 1968 uses the domicile of a person's father at the date of the marriage as the main connecting factor in relation to legitimation by subsequent marriage. See s1(1) and s4.
2. See para 17.13 above and the joint report on the *Law of Domicile* (Scot Law Com No 107; Law Com No 168, 1987).

Part XVIII Aliment: choice of law rules

Introduction

18.1 The rules of jurisdiction and recognition and enforcement of foreign judgments in relation to aliment are very largely statutory.[1] They also reflect multilateral or bilateral arrangements with other countries. For this reason, we do not propose to discuss them here. We envisage that the statutory provisions on these matters would remain outside, and unaffected by, the proposed codification of Scottish family law. There is, however, a gap in the statute law in relation to choice of the law governing the obligation of aliment. This is the subject of this part of the report.

Present law

18.2 There is a remarkable dearth of authority on choice of law in relation to the alimentary obligation. The tendency has been for Scottish courts simply to apply Scots law, often without any consideration of private international law questions.[2] In many cases, of course, the parties would gain no advantage from raising such questions as the other system of law would recognise that, say, a person was bound to support his or her spouse or child, any differences relating only to matters of procedure or quantification which are generally regarded as being matters for the *lex fori* in any event. In many cases, too, aliment will arise as an incidental matter in a divorce action and will tend to be subsumed under the rule that the *lex fori* governs such matters. The choice of law question was however clearly raised in one case[3] in which an impecunious man of mature years raised an action of aliment against various relatives including his mother who was resident and domiciled in England. She argued that by English law she was under no liability to support the pursuer. The court accepted the argument that English law applied and sisted the action to allow the opinion of English lawyers to be obtained. Here the law of the domicile of the alimentary debtor was apparently taken as the governing law. In another case[4] a woman claimed damages for seduction and aliment for her child from an Indian prince temporarily resident in Scotland. It was held that her right to recover aliment for her child depended on English law, which was the law of the place where the alleged seduction took place, and which was also the law of her domicile, but which was not the law of the defender's domicile. The case was treated primarily as an action for seduction and was decided on the ground that the acts complained of were not actionable by the *lex loci delicti*—"the grounds of action having arisen entirely in England, the rights and liabilities of parties must be regulated by English law, and . . . as by that law the action was not . . . maintainable, it must be dismissed."[5] Two of the judges dealt separately with the aliment issue but seemed to assume that the same principles applied.[6] The case, therefore is strongly coloured by the delictual approach and is an unsatisfactory authority on aliment as such. A more sophisticated approach was favoured by Lord Keith in *Jelfs* v *Jelfs*[7] when he referred to Bar's opinion that the law of the residence governed the obligation to aliment although it would give effect to a more extensive duty of support sanctioned by the personal law, the underlying consideration being that "if a man was released from his obligation to maintain his wife, because his personal law knew of no such obligation, or ignored it in the particular circumstances of the case, a foreign wife would now and again require to be supported at the expense of the poor's box."[8]

18.3 The Maintenance Orders (Reciprocal Enforcement) Act 1972 contains special choice of law rules for the purposes of proceedings under Part II of the Act for the obtaining and registering of provisional orders. Section 21 defines a maintenance order as an order for the periodical payment of sums of money towards the maintenance of a person whom the person liable to make the payment is, "*according to the law applied in the place where the order was made*, liable to maintain". Section 7(2) of the Act provides that a Scottish court asked to confirm a provisional order made

1. Civil Jurisdiction and Judgments Act 1982, s20 and Sch 8, rules 1 and 2(5); Maintenance Orders Act 1950; Maintenance Orders (Reciprocal Enforcement) Act 1972.
2. *Cf Allsop* v *Allsop* (1830) 8 S 1032; *Thomson* v *Thomson* (1838) 11 Sc Jur 165; *Finlay* v *Finlay* (1885) 23 SLR 583; *Pearce* v *Pearce* (1898) 5 SLT 338; *Foxwell* v *Robertson* (1900) 2 F 932; *Fraser* v *Campbell* 1927 SC 589; *Silver* v *Walker* 1938 SC 595; *Allum* v *Allum* 1965 SLT (Sh Ct) 26.
3. *Macdonald* v *Macdonald* (1846) 8 D 830. The pursuer's children were also defenders. Two of the judges were for dismissing the action against them on the ground that they had no means: two were for finding out whether there was any liability by English law, the law of their domicile.
4. *Ross* v *Sinhjee* (1891) 19 R 31.
5. *Ibid per* the Lord Justice-Clerk at p37.
6. Lord Young at p37 and Lord Trayner at p38.
7. 1939 SLT 286 at pp288–289.
8. L von Bar, *Private International Law*, translated by G R Gillespie, 2nd edn (Edinburgh, 1892) p380.

by a court in a reciprocating country must recognise those defences, and only those defences, available under the law of that country: a statement of the defences available is sent with the provisional order and must be accepted as conclusive. Similarly, under section 3(5) of the Act, the documents sent from a sheriff court which has made a provisional order against a defender resident in a reciprocating country must include a statement of the defences available under Scots law. The scheme of this part of the Act is that the law of the court making the provisional order applies: given the rules on jurisdiction under Part II, this will also be the law of the pursuer's residence.

The Hague Convention

18.4 The Hague Convention of 1973 on the Law Applicable to Maintenance Obligations has not been signed by the United Kingdom.[1] It adopts the general principle that the law of the alimentary creditor's habitual residence governs the alimentary obligation, but it qualifies this general principle in several important respects. In the discussion paper we examined at some length the option of a solution based on the Hague Convention but concluded that it would have few advantages over a simple rule that a Scottish court dealing with a claim for aliment applies Scots law. Indeed, given that most actions for aliment in Scotland are brought by people who are habitually resident in Scotland,[2] the results under a Hague option and a *lex fori* option would generally be the same. As there was no support on consultation for a solution based on the Hague Convention we do not repeat our analysis of the modifications to the convention rules which would probably have to be made if a solution on these lines were to be acceptable in Scotland.[3]

Recommendation

18.5 The conclusion which we reached in the discussion paper was that the practical effects of a suitably modified version of the Hague rules would be almost the same as those which would be achieved by a simple provision to the effect that a Scottish court should apply Scots law in dealing with any claim for aliment. As the latter solution would be simpler and easier to apply, as it would be directly in line with current practice throughout the United Kingdom, and as it received unanimous support on consultation, we recommend that it be adopted.

91. It should be provided that, subject to the provisions of the Maintenance Orders (Reciprocal Enforcement) Act 1972, courts in Scotland should apply the internal law of Scotland in dealing with claims for aliment.

(Draft Bill, clause 43.)

1. It replaced an earlier convention of 1956 which was also not signed by the United Kingdom.
2. Under the Civil Jurisdiction and Judgments Act 1982, Sch 8 rule 5(2) the Scottish courts have jurisdiction in "matters relating to maintenance" on the basis of the maintenance creditor's domicile or habitual residence, as well as on the general ground of the defender's domicile available under rule 1.
3. See Discussion Paper No 85, paras 12.6 to 12.10.

Part XIX The legislation required

The draft Bill

19.1 The draft Family Law (Scotland) Bill appended to this report would, if enacted, implement the recommendations made in this report and make other minor and consequential amendments. In some clauses of the draft Bill the draftsman has re-enacted existing provisions in a modified form, rather than create a patchwork of amendments. Where this has been done it is mentioned in the notes on the draft clauses. These notes also explain the reasons for any minor or consequential amendments which have not been mentioned already in the preceding parts of this report. The draft Family Law (Scotland) Bill appended to this report is a major law reform measure in its own right, but it is also part of a wider process of reform.

Other developments

19.2 Important developments are currently taking place in relation to child care law. A Review Group was appointed by the Secretary of State for Scotland in 1988

> "to identify, in the light of developments since the implementation of the Social Work (Scotland) Act 1968, options for change and improvement in child care law which would simplify and improve arrangements for protecting children at risk and caring for children and families in need.".

The Review Group reported in 1990.[1] Its report contains 95 recommendations, not all of which would require legislation. A White Paper setting out the government's proposals for legislation is expected in the autumn. Another important current development is the Inter-Departmental Review of Adoption Law being carried out in the United Kingdom. In Scotland this is being handled by the Social Work Services Group of the Scottish Office. It is based on a series of four discussion papers and is still at the consultation stage. Other developments of potential relevance to reform of the law on child care and protection are the inquiry by Sheriff Kearney into matters relating to child care in Fife; the inquiry by Mr Skinner into certain aspects of residential child care; the review by Mr Finlayson of the role of reporters under the Social Work (Scotland) Act 1968; and the public inquiry under Lord Clyde into the circumstances surrounding some controversial child protection measures in Orkney. It remains to be seen whether these reviews and inquiries will result in recommendations for important changes in child law.

The need for a coherent approach

19.3 It seems clear that the public interest would be better served by a coherent rather than an incoherent approach to the reform of Scottish child and family law. This has been appreciated for some time. We had an observer at the meetings of the Scottish Child Care Law Review Group and we have been consulted regularly by the Social Work Services Group in connection with the adoption law review. We in turn have tried to keep the Social Work Services Group fully informed about the progress of our work in relation to the private law aspects of parental responsibilities and rights. We are aware that some of the provisions in the draft Bill attached to this report which touch on matters of child care or adoption law must be regarded as interim measures, pending the outcome of the other developments mentioned. There is no reason, however, why the various reform developments should not eventually be brought together into a coherent whole.[2] There is no reason why Scotland should not eventually have a comprehensive code of child and family law. How this might best be achieved will depend largely on the legislative opportunities available. One possible approach, however, would be (a) to enact the draft Bill appended to this report, along with our earlier report on divorce law reform (where we recommended a reduction in the length of the periods of separation required, with a view to reducing the incentive which currently exists to resort to the fault-based behaviour ground for divorce), (b) to enact the changes in child care law which already have been, and may soon be, recommended, (c) to enact any changes in adoption law which may eventually be recommended by the inter-departmental review, and then (d)

1. *Review of Child Care Law in Scotland* (HMSO).
2. Something similar happened in England and Wales where separate projects by the English Law Commission and the relevant government department were eventually brought together in the Children Act 1989.

to use the consolidation procedure[1] to put everything together. This would be more efficient and more productive of early benefits than attempting to put everything together first in one giant Bill which would, to a large extent, simply reproduce existing provisions, which might involve long delay and which would be very demanding of Parliamentary time and resources.

Outline of a Scottish code of child and family law

19.4 In our Discussion Paper No 85 we set out in outline the contents of a possible consolidated Act. Some of the headings in it were provisional, pending the results of consultation. They can now be firmed up and it may be useful to set out a revised and re-ordered version. We would emphasise that this is just one possible scheme and that it is not intended to restrict the freedom of action of whichever Parliamentary counsel is given responsibility for the consolidation. A consolidation would present the opportunity to introduce some coherence of language and style and to eliminate many spent, transitional and overlapping provisions. Therefore, when we refer below to the incorporation of existing provisions we are not implying that they would be reproduced exactly as they are.

DRAFT OUTLINE OF A SCOTTISH CHILD AND FAMILY LAW CODE

BOOK I—THE LAW RELATING TO CHILDREN

TITLE I

CHILDREN, NATURAL PARENTS AND GUARDIANS

PART I

PARENTAGE

General rule.

(Take in definition of "parent" from clause 47(1) of draft Bill.)

Presumptions.

(Take in section 5 of Law Reform (Parent and Child) (Scotland) Act 1986.)

Use of samples of blood or other tissue.

(Take in section 6 of 1986 Act and section 70 of Law Reform (Miscellaneous Provisions) (Scotland) Act 1990.)

Legal equality of children regardless of marital status of parents.

(Take in section 1 of Law Reform (Parent and Child) (Scotland) Act 1986, as amended by draft Bill.)

Declarators relating to parentage.

(Take in from section 7(1) and 7(5) of 1986 Act, as amended by draft Bill.)

PART II

PARENTAL RESPONSIBILITIES AND RIGHTS

(Take in clauses 1 to 6 of draft Bill.)

PART III

GUARDIANSHIP OF CHILDREN

(Take in clauses 7 and 8 of draft Bill.)

PART IV

ADMINISTRATION OF CHILDREN'S PROPERTY

(Take in clauses 9 and 10 of draft Bill.)

1. This is the very useful Parliamentary procedure whereby a number of separate statutes dealing with one subject matter can be consolidated into a single Act, without the consolidating Bill having to go through all the Parliamentary stages which an ordinary Bill has to go through.

PART V

COURT ORDERS RELATING TO PARENTAL RESPONSIBILITIES AND RIGHTS ETC.

(Take in clauses 11 to 16 of draft Bill.)

PART VI

PRIVATE INTERNATIONAL LAW

Domicile of children.

(Take in clause 45 of draft Bill.)

Choice of law determining child's status.

(Take in clause 46 of draft Bill.)

Jurisdiction in actions for declarator of parentage.

(Take in from section 7(2), (3) and (6) of Law Reform (Parent and Child) (Scotland) Act 1986.)

Jurisdiction in actions relating to parental responsibilities and rights and guardianship.

(Take in from Family Law Act 1986.)

Jurisdiction in actions relating to administration of child's property.

(Take in clause 18 of draft Bill.)

Choice of law on parental responsibilities and rights and guardianship.

(Take in clause 17 of draft Bill.)

TITLE II

LEGAL PARENTAGE

PART I

ADOPTION

(Take in from Adoption (Scotland) Act 1978, as amended (a) by draft Bill and (b) as a result of current inter-departmental review of adoption law.)

PART II

OTHER CASES

(Take in sections 27 to 30 of the Human Fertilisation and Embryology Act 1990.)

TITLE III

FOSTERING OF CHILDREN

(Take in from Foster Children (Scotland) Act 1984.)

TITLE IV

LOCAL AUTHORITIES' POWERS AND DUTIES IN RELATION TO CARE AND PROTECTION OF CHILDREN

(Consolidate existing legislation, with any amendments made as a result of the *Review of Child Care Law in Scotland* and other current inquiries.)

BOOK II—THE LAW RELATING TO MARRIAGE AND DIVORCE

TITLE I
MARRIAGE

PART I
ENGAGEMENT TO MARRY

(Take in Law Reform (Husband and Wife) (Scotland) Act 1984.)

PART II
FORMATION OF MARRIAGE.

(Take in Marriage (Scotland) Act 1977, as amended by draft Bill.)

PART III
NULLITY OF MARRIAGE.

Grounds.

(Take in clause 21 of draft Bill.)

Actions relating to validity or nullity of marriage.

Competency.

(Take in clause 23 of draft Bill.)

Need for evidence.

(Take in section 8 of Civil Evidence (Scotland) Act 1988.)

Power to award financial provision in action for declarator of nullity.

(Take in section 17 of Family Law (Scotland) Act 1985.)

TITLE II
LEGAL EFFECTS OF MARRIAGE

PART I
GENERAL

Legal equality and independence of spouses.

(Take in clause 24 of draft Bill.)

PART II
PROVISIONS RELATING TO THE MATRIMONIAL HOME

Occupancy rights.

(Take in occupancy rights provisions from Matrimonial Homes (Family Protection) (Scotland) Act 1981, as amended by draft Bill.)

Protection from domestic violence.

(Take in matrimonial interdicts provisions from Matrimonial Homes (Family Protection) (Scotland) Act 1981, as amended by draft Bill.)

PART III
OTHER SPECIAL RULES

Household goods.

(Take in section 25 of Family Law (Scotland) Act 1985.)

Savings from housekeeping allowance.

(Take in section 26 of Family Law (Scotland) Act 1985.)

Policies of assurance.

(Take in from Married Women's Policies of Assurance (Scotland) Act 1880.)

TITLE III
DIVORCE

Ground.

(Take in section 1(1) and (2) of Divorce (Scotland) Act 1976, with amendments recommended in our report on Reform of the Ground for Divorce 1989.)

Defences and bars.

(Take in section 1(3) of Divorce (Scotland) Act 1976, as amended by draft Bill.)

Encouragement of reconciliation.

(Take in section 2 of Divorce (Scotland) Act 1976.)

Need for evidence and standard of proof.

(Take in from section 8 of Civil Evidence (Scotland) Act 1988, and section 1(6) of Divorce (Scotland) Act 1976.)

TITLE IV
PRIVATE INTERNATIONAL LAW

Jurisdiction in actions for divorce, declarator of marriage or nullity of marriage.

(Take in from Domicile and Matrimonial Proceedings Act 1973.)

Choice of law rules on validity of marriages.

(Take in clause 31(1) to (4) of draft Bill.)

Choice of law rules on legal effects of marriage.

(Take in clause 32 of draft Bill.)

Choice of law rule in divorce.

(Take in clause 31(5) of draft Bill.)

Recognition of foreign divorces, annulments and separations.

(Take in from Part II of Family Law Act 1986.)

BOOK III—FINANCIAL OBLIGATIONS IN RELATION TO CHILDREN AND SPOUSES

TITLE I
ALIMENT

(Take in from Family Law (Scotland) Act 1985, and clause 43 of draft Bill.)

TITLE II
FINANCIAL PROVISION ON DIVORCE

(Take in from Family Law (Scotland) Act 1985. Also take in rules on financial provision after foreign divorce from Part IV of Matrimonial and Family Proceedings Act 1984.)

BOOK IV—LEGAL EFFECTS OF COHABITATION

(Take in clauses 33 to 42 of draft Bill.)

Part XX Summary of Recommendations

1.(a) There should be a statutory statement of parental responsibilities.

(b) It should be provided that a parent has in relation to his or her child a responsibility, so far as is practicable and in the interests of the child,

(i) to safeguard and promote the child's health, development and welfare

(ii) to provide, in a manner appropriate to the child's stage of development, direction and guidance to the child

(iii) if not living with the child, to maintain personal relations and direct contact with the child on a regular basis

(iv) to act as the child's legal representative and, in that capacity, to administer, in the interests of the child, any property belonging to the child.

(c) The parental responsibilities to safeguard and promote the child's health, development and welfare and to provide appropriate direction and guidance should last until the child attains the age of 18. The other responsibilities mentioned should last until the child attains the age of 16.

(d) The above responsibilities should be in addition to any other statutory parental duties or responsibilities, including those relating to financial support under the Family Law (Scotland) Act 1985 and the Child Support Act 1991 and those relating to education under the Education (Scotland) Act 1980.

(Paragraphs 2.1 to 2.13. Draft Bill, clause 1.)

2. It should be made clear that parents have parental rights in order to enable them to fulfil their parental responsibilities.

(Paragraph 2.14. Draft Bill, clause 2(1).)

3. The existing parental rights of guardianship, custody and access should be replaced by new rights expressed in such a way as to reflect the policy that both parents, even after separation, normally have a continuing parental role to play in relation to the upbringing of the child.

(Paragraphs 2.15 to 2.35. Draft Bill, clause 2(2).)

4. In addition to any rights conferred by any other enactment a parent should have the right, so long as the child is under the age of 16,

(a) to have the child living with him or her, or otherwise to regulate the child's residence

(b) to control, direct or guide, in a manner appropriate to the child's stage of development, the child's upbringing

(c) if not living with the child, to maintain personal relations and direct contact with the child and

(d) to act as the child's legal representative and, in that capacity to administer the child's property, and to act, or give consent, on behalf of the child in any transaction having legal effect where the child is incapable of acting or consenting on his or her own behalf.

(Paragraphs 2.15 to 2.35. Draft Bill, clause 2(1) and (4).)

5. In the absence of any court order regulating the position, both parents of the child should have parental responsibilities and rights whether or not they are or have been married to each other.

(Paragraphs 2.36 to 2.50. Draft Bill, clause 3(1).)

6.(a) It should continue to be the position that, where two or more persons have any parental right, each of them may exercise that right without the consent of the other person or persons, unless any decree or deed conferring the right provides otherwise.

(b) However, none of those persons should be entitled to remove a child from, or to retain a child outwith, the United Kingdom without the consent of the parent (or other person entitled to control the child's residence) with whom the child is habitually resident in Scotland.

(Paragraph 2.56. Draft Bill, clause 2(2) and (3).)

7. It should be provided that the fact that a person has parental responsibilities or rights in relation to a child does not entitle him or her to act in any way which would be incompatible with any court decree relating to the child, or the child's property, or any supervision requirement relating to the child made by a children's hearing.

(Paragraph 2.57. Draft Bill, clause 3(3).)

8. It should be provided that

(a) a person who has parental responsibilities or rights in relation to a child may not surrender or transfer any part of these responsibilities or rights to another but may arrange for some or all of them to be met or exercised by one or more persons acting on his or her behalf;

(b) the person with whom any such arrangement is made may be a person who already has parental responsibilities or rights in relation to the child concerned;

(c) the making of any such arrangement does not affect any liability of the person making it which may arise from any failure to meet any part of his or her parental responsibilities for the child concerned.

(Paragraph 2.58. Draft Bill, clause 3(4) to (6).)

9. A person over the age of 16 years who does not have parental responsibilities or rights in relation to a child but has care or control of the child (other than as a teacher in a school) should be empowered to do what is reasonable in all the circumstances (and, in particular, to give legally effective consent to any medical or dental treatment or procedure where the child is not capable of consenting on his or her own behalf) for the purpose of safeguarding the child's health, development or welfare.

(Paragraph 2.59. Draft Bill, clause 5.)

10.(a) It should be provided that any person taking any major decision relating to a child in the exercise of any parental responsibility or right should, whenever practicable, ascertain the views of the child regarding the decision and give due consideration to them, having regard to the child's age and maturity.

(b) For this purpose there should be a presumption that a child of the age of 12 or more has sufficient maturity to express a reasonable view regarding the decision, but this should not carry any implication that the views of a child under that age are not worthy of consideration.

(c) A transaction entered into in good faith by a third party dealing with a parent or other person acting as a child's legal representative should not be open to challenge on the ground that the child was not consulted or that due consideration was not given to the child's views.

(Paragraphs 2.60 to 2.66. Draft Bill, clause 6.)

11.(a) In any proceedings (whether criminal or civil) against a person for striking a child, it should not be a defence that the person struck the child in the purported exercise of any parental right if he or she struck the child–

(i) with a stick, belt or other object; or

(ii) in such a way as to cause, or to risk causing, injury; or

(iii) in such a way as to cause, or to risk causing, pain or discomfort lasting more than a very short time.

(b) A person who has care or control of a child but who does not have parental responsibilities or rights in relation to the child should have no greater right than a parent has to administer corporal punishment to the child.

(c) Section 12(1) of the Children and Young Persons (Scotland) Act 1937 should be amended by deleting the references to assault, which is adequately covered by the common law.

(d) Section 12(7) of the Children and Young Persons (Scotland) Act 1937 should be repealed.

(Paragraphs 2.67 to 2.105. Draft Bill, clause 4 and Schedule 2.)

12.(a) The references to the parent being the "guardian" of the child in section 4 paragraph (b) of the Law Reform (Parent and Child) (Scotland) Act 1986, as amended, should, as a consequence of the changes recommended earlier, become references to the parent being entitled to act as the child's legal representative.

(b) The reference to a "person" in section 4 of the 1986 Act should become a reference to an individual.

(Paragraph 3.2. Draft Bill, clause 7.)

13. A guardian of a child should be able to appoint another individual to take his or her place as the child's guardian in the event of his or her death.

(Paragraph 3.4. Draft Bill, clause 7(2).)

14. An appointment of a guardian by a parent or existing guardian should, for the purposes of any provision implementing Recommendation 10 above (views of child to be taken into consideration, depending on age and maturity) be regarded as a major decision involving the exercise of a parental right.

(Paragraph 3.5. Draft Bill, clause 7(6).)

15. Provision should be made for the revocation of an appointment of a nominated guardian, on similar lines to the provisions in section 6(1) to (4) of the Children Act 1989 (set out in paragraph 3.6).

(Paragraphs 3.6 to 3.7. Draft Bill, clause 8(1) to (4).)

16. An appointment as guardian should not take effect until accepted, either expressly, or impliedly by acts which are not consistent with any other intention.

(Paragraph 3.8. Draft Bill, clause 7(3).)

17. If two or more persons are appointed as guardians any one or more should be able to accept office, even if both or all do not accept, unless the appointment expressly provides otherwise.

(Paragraph 3.9. Draft Bill, clause 7(4).)

18.(a) A guardian should have the same responsibilities in relation to the child as a parent has.

(b) To enable him or her to fulfil these responsibilities a guardian should have the same parental rights as a parent has.

(Paragraphs 3.13 to 3.15. Draft Bill, clause 7(5).)

19. Once a guardian has accepted office then, unless the appointment provides for earlier termination, guardianship should be terminated only by

(a) the child's attaining the age of 18 years,

(b) the death of the child or the guardian, or

(c) a court order.

(Paragraph 3.16. Draft Bill, clause 8(5).)

20.(a) The powers available to the courts to make special provision for sums payable to children should be extended and generalised and should be the same for all courts.

(b) Where in any court proceedings a sum of money becomes payable to, or for the benefit of, a person under legal disability by reason of non-age the court should have power to make such order relating to the payment and management of the money for the benefit of that person as it thinks fit.

(c) The court's power should expressly include

(i) power to appoint a judicial factor, with appropriate powers, to invest, apply or otherwise deal with, the money for the benefit of the person concerned,

(ii) power to order the money to be paid to the sheriff clerk or the Accountant of Court, to be invested, applied or otherwise dealt with, under the directions of the court, for the benefit of the person concerned,

(iii) power to order the money to be paid to the parent or guardian of the person concerned, to be invested, applied or otherwise dealt with, as directed by the court, for the benefit of that person, and

(iv) power to order payment to be made directly to the person concerned.

(d) It should be made clear that the receipt of any person to whom payment is made in terms of the court's order is a sufficient discharge.

(Paragraphs 4.3 to 4.8. Draft Bill, clause 16.)

21.(a) Where an executor or trustee holds property owned by, or due to, a child under the age of 16, and the amount or value of the property exceeds £20,000 the executor or trustee should be bound, before handing over the property to the parent or guardian of the child to be administered by the parent or guardian (otherwise than as a trustee under a trust deed) to report to the Accountant of Court that the property is due to be handed over, and to seek the Accountant's directions.

(b) Where (in a case not covered by paragraph (a) above and not covered by our proposals on sums payable in court proceedings) any person holds property owned by, or due to, a child under the age of 16, and the amount or value of the property exceeds £5,000, the person may, at his or her option, before handing over the property to the parent or guardian to be administered by the parent or guardian (otherwise than as a trustee under a trust deed), report the matter to the Accountant of Court and seek the Accountant's directions.

(c) Where a report, and request for directions, has been received by the Accountant of Court he or she should have power

(i) to apply to the court for the appointment of a judicial factor (who could be the parent or guardian) and to direct that all or part of the property be transferred to the judicial factor,

(ii) to administer all or part of the property on behalf of the child and to direct that the property be transferred to him or her for that purpose,

(iii) to direct that all or part of the property be transferred to the parent or guardian subject to such conditions, if any, as the Accountant may consider appropriate, which conditions may include a requirement to have the Accountant's approval of capital expenditure and to exhibit annually the securities and bank books representing the capital of the estate.

(d) A person who has reported to the Accountant of Court, and sought his or her directions, under these provisions should not be free to transfer the property except in accordance with the Accountant's directions.

(Paragraphs 4.10 to 4.17. Draft Bill, clause 9.)

22. The court's powers to make orders relating to children should expressly include power to make orders relating to the administration of a child's property and, in particular, power to appoint a judicial factor, where appropriate, or to order a remit to the Accountant of Court to consider and report on suitable arrangements for the future management of the property.

(Paragraph 4.18. Draft Bill, clauses 11(1) and 12(1)(e).)

23. It should be made clear that, subject to the obligation of the parent or guardian to account to the child, the right of legal representation in relation to a child carries with it the right to do any act in relation to the child's property which the child is legally incapable of doing but could have done if of full age and capacity.

(Paragraphs 4.19 to 4.20. Draft Bill, clause 10(3)(b).)

24. A parent or guardian acting as a child's legal representative in relation to the child's property should no longer be regarded as a trustee for the purposes of the Trusts (Scotland) Acts.

(Paragraph 4.21. Draft Bill, Schedule 2.)

25.(a) A parent or guardian who has, as a child's legal representative, held, administered or dealt with the child's property should continue to be liable (as under the existing law) to account to the child, when the parent or guardian ceases to be the child's legal representative, for his or her intromissions with the property.

(b) In accounting, the parent or guardian should not be liable to the child in respect of any of the child's funds used in the proper discharge of the parent's or guardian's responsibility to promote the child's welfare.

(c) A parent or guardian acting as a child's legal representative in relation to the administration of the child's property should be required to act in that capacity as a reasonable and prudent person would act on his or her own behalf.

(Paragraphs 4.22 to 4.23. Draft Bill, clause 10.)

26.(a) The existing law on court orders relating to parental rights should, as a consequence of changes recommended earlier in this report, be expanded to cover not only parental rights but also parental responsibilities, guardianship and the administration of a child's property.

(b) Without prejudice to the generality of the court's powers to make such orders as it thinks fit, it should be provided that a court may, on an application for an order relating to any of the above matters, make any one or more of the following orders

(i) an order ("a residence order") regulating the arrangements to be made as to the person with whom a child is to live;

(ii) an order ("a contact order") regulating the arrangements to be made for maintaining personal relations and direct contact between a child and a parent, or other person, with whom the child is not, or will not be, living;

(iii) an order ("a specific issue order") regulating any specific question which has arisen, or which may arise, in connection with any of the matters mentioned in paragraph (a) above;

(iv) an interdict prohibiting the taking of any step in the exercise of parental responsibilities or parental rights or guardianship of a child, or the administration of a child's property.

(Paragraphs 5.1 to 5.4. Draft Bill, clauses 11(1) and 12(1).)

27. For the avoidance of any doubt, it should be made clear that a court in an order relating to parental responsibilities or rights or guardianship may

(a) deprive a person of some or all of his or her parental responsibilities or rights

(b) appoint or remove a guardian.

(Paragraph 5.5. Draft Bill, clause 12(4).)

28. It should be made clear that a local authority cannot by-pass the normal rules on compulsory measures of care or assumptions of parental rights by applying for guardianship or for a residence order or a contact order. However, a local authority should be able to apply for a specific issue order or an interdict.

(Paragraphs 5.7 to 5.8. Draft Bill, clause 11(4).)

29. There is no need to place any restrictions on applications by local authority foster parents for orders relating to parental responsibilities or rights.

(Paragraph 5.9. No legislation required.)

30. Section 47 of the Children Act 1975 should be repealed.

(Paragraph 5.10. Draft Bill, Schedule 2.)

31. For the avoidance of any doubt it should be made clear that the child concerned may apply for an order relating to parental responsibilities or rights, guardianship or the administration of his or her property.

(Paragraph 5.11. Draft Bill, clause 11(3).)

32.(a) Section 38C of the Sheriff Courts (Scotland) Act 1907 and section 20(1) of the Court of Session Act 1988 should be repealed.

(b) It should be provided that an application for an order relating to parental responsibilities or rights, guardianship or the administration of a child's property may be made either

(i) in independent proceedings in the Court of Session or a sheriff court (whether or not the application is accompanied by an application for any other remedy which can competently be sought in those proceedings) or

(ii) in an action for divorce or for a declarator of marriage, nullity of marriage, parentage or non-parentage.

(Paragraphs 5.12 to 5.14. Draft Bill, clauses 11(2) and 19 and Schedule 2.)

33.(a) It should be provided that a court should not make any order relating to parental responsibilities, parental rights, guardianship or the administration of a child's property unless satisfied that making the order will be better for the child than making no such order at all.

(b) In relation to orders relating to the administration of a child's property the court's duty to regard the welfare of the child as the paramount consideration, and not to make any order unless satisfied that to do so would be in the interests of the child and better than making no order at all, should be qualified by a provision protecting the position of third parties who have acquired any property of the child, or any right or interest in relation to it, in good faith and for value.

(Paragraphs 5.16 to 5.18. Draft Bill, clause 12(3).)

34.(a) Rules of court should ensure that a child who is capable of forming his or her own views and who wishes to have his or her views put directly before a court in any proceedings relating to parental responsibilities or rights, or guardianship or the administration of the child's property, has a readily available procedural mechanism for doing so.

(b) In considering whether to make an order relating to parental responsibilities or rights, or guardianship or the administration of a child's property a court should be required to give due consideration to any relevant views of the child concerned which are properly before it, taking account of the child's age and maturity.

(c) Without prejudice to the generality of the rules recommended above, it should be presumed that a child of or above the age of 12 years is capable of forming his or her own views and has sufficient maturity to express a reasonable view.

(d) The new rules recommended above are not intended to require a child who is not an independent party to the proceedings to be separately legally represented.

(Paragraphs 5.24 to 5.29. Draft Bill, clause 12(5)and (6).)

35. Section 8 of the Matrimonial Proceedings (Children) Act 1958 (court's duty in relation to arrangements for children) should be replaced by a provision, on the lines of section 41 of the Matrimonial Causes Act 1973 as substituted by the Children Act 1989, requiring the court in an action for divorce or nullity of marriage, to consider

(a) whether there are any children of the family under the age of 16 and

(b) if so, whether the court should make any order relating to them even if none has been applied for by the parties.
(Paragraphs 5.30 to 5.35. Draft Bill, clause 14. See also clause 12(2)(a).)

36. For the purposes of the preceding recommendation "child of the family" in relation to the parties to a marriage should mean

(a) a child of both of those parties; and

(b) any other child, not being a child who is placed with those parties as foster parents by a local authority or voluntary organisation, who has been treated by both of those parties as a child of their family.
(Paragraph 5.36. Draft Bill, clause 14(4).)

37. Where a court makes a residence order to the effect that a child is to live with a person who is not a parent or guardian of the child concerned, that person should have parental responsibilities and rights in relation to the child while the residence order is in force.
(Paragraphs 5.37 to 5.38. Draft Bill, clause 13(2).)

38. A court order by which any person acquires any parental responsibility or right should deprive any other person of any parental responsibility or right only in so far as the order expressly so provides and only to the extent necessary to give effect to the order.
(Paragraph 5.39. Draft Bill, clause 13(1).)

39.(a) Whether a person has, by operation of law, parental responsibilities and rights (as these terms are used in this report) in relation to a child, and the nature and extent of those responsibilities and rights, should depend on the law of the child's habitual residence.

(b) However, the applicability of any rules designed for the immediate protection of the child should depend on the law of the place where the child is for the time being.

(c) These rules should be subject to the rule that in court proceedings in Scotland relating to parental responsibilities and rights the welfare of the child is the paramount consideration.
(Paragraphs 6.1 to 6.3. Draft Bill, clause 17(1)(2) and (3).)

40.(a) The question whether a person is validly appointed or constituted guardian of a child should depend on the law of the child's habitual residence at the time the appointment is made (which, in the case of a testamentary appointment, should be regarded as the date of the appointer's death) or the constituting event occurs.

(b) The responsibilities and rights of a guardian of a child at any time should depend on the law of the child's habitual residence at that time.

(c) However, the applicability of any rules designed for the immediate protection of the child should depend on the law of the place where the child is for the time being.

(d) The rules recommended in paragraphs (b) and (c) should be subject to the rule that in court proceedings in Scotland relating to guardianship the welfare of the child is the paramount consideration.
(Paragraphs 6.4 to 6.6. Draft Bill, clause 17.)

41.(a) The reporting duty recommended in recommendation 21 above should apply to any person who proposes to hand over property to, or to be administered by, the parent or guardian of a child habitually resident in Scotland.

(b) The Court of Session should have jurisdiction to make orders relating to the administration of a child's property

(i) if the child is habitually resident in Scotland or

(ii) if the property is situated in Scotland.

(c) A sheriff should have jurisdiction to make such orders

(i) if the child is habitually resident in the sheriffdom or

(ii) if the property is situated in the sheriffdom.
(Paragraph 6.7. Draft Bill, clause 18.)

42.(a) Marriage by cohabitation with habit and repute should be abolished as from the date of commencement of implementing legislation.

(b) Accordingly, it should no longer be possible to contract such a marriage after that date, but this would be without prejudice to the validity of any such marriage already contracted before that date (whether or not a declarator of marriage had been obtained).

(Paragraphs 7.1 to 7.13. Draft Bill, clause 22.)

43. It should continue to be a ground of nullity of marriage that either party is at the time of the marriage already married.

(Paragraph 8.3. Draft Bill, clauses 20 and 21(1).)

44. It should continue to be a ground of nullity of marriage that either party is, at the time of the marriage, under the age of 16.

(Paragraph 8.4. Draft Bill, clauses 20 and 21(1).)

45. It should continue to be a ground of nullity of marriage that both parties are of the same sex.

(Paragraph 8.5. Draft Bill, clauses 20 and 21(1).)

46. It should continue to be a ground of nullity of marriage that the parties are within the prohibited degrees of relationship specified in the Marriage (Scotland) Act 1977, subject, however, to the removal of the remaining limited restrictions on marriage between a person and the parent of his or her former spouse. Accordingly, the distinction between marriage with a deceased spouse's widowed parent (which is permitted under the present law) and other marriages with a former spouse's parent (which are not permitted) should no longer be part of Scots law.

(Paragraphs 8.6 to 8.13. Draft Bill, clauses 20, 21(1) and Schedule 2.)

47.(a) There should continue to be a rule on the lines of section 23A of the Marriage (Scotland) Act 1977, to the effect that a duly registered marriage, where both parties were present at the ceremony, is not invalid by reason only of any failure to comply with any legal preliminaries or formal requirements or by reason of any lack of qualification on the part of the celebrant. This rule should extend to marriages in Scotland solemnised before as well as after the commencement of the new legislation, but a marriage solemnised before such commencement should not be validated in this way if it had already, before such commencement, been declared void by a competent court or followed by another marriage in reliance on its nullity.

(b) In the case of a marriage in Scotland, the essential formal requirements (subject to the validating rule in recommendation 47(a)) should be

(i) the giving of notice of intention to marry

(ii) the production to the approved celebrant, or availability to an authorised registrar, of a marriage schedule in respect of the marriage as required by section 13(1)(a) and 19(2)(a) respectively of the Marriage (Scotland) Act 1977

(iii) the presence of both parties at the ceremony

(iv) the presence as witnesses of two persons professing to be 16 years of age or over

(v) the presence of an authorised or legally recognised celebrant and

(vi) the outward exchange by the parties of present consent to marriage.

(Paragraphs 8.14 to 8.15. Draft Bill, clause 21(1)(c), (5) and (7).)

48.(a) Subject to the subsidiary rules suggested below, a marriage should be void if, because of mental incapacity, error, or duress either party does not freely consent to marry the other party.

(b) (i) A marriage should be void on the ground of a party's mental incapacity, whether temporary or permanent, only if the party is at the time of the marriage ceremony incapable of understanding the nature of marriage or of giving consent to marriage.

(ii) Where a person was under a temporary mental incapacity at the time of the marriage ceremony but does not bring an action for declarator of nullity of marriage as soon as is reasonably practicable after regaining capacity the marriage should be regarded as having been valid as from the time of the ceremony.

(c) (i) A marriage should be void on the ground of error only if at the time of the ceremony either party was in error as to the nature of the ceremony or the identity of the other party.

(ii) A party should be regarded as being in error as to the identity of the other party only if he or she mistakenly believed that the other party at the ceremony was the person whom he or she had agreed to marry, regardless of the name or qualities of that person.

(iii) Where a person was in error as to the nature of the ceremony or the identity of the other party to the marriage but does not bring an action for declarator of nullity of marriage as soon as is reasonably practicable

after discovering the error the marriage should be regarded as having been valid as from the time of the ceremony.

(d) (i) A marriage should be void on the ground of duress only if one party was forced against his or her will to marry the other party.

(ii) Where a person was forced against his or her will to marry the other party but does not bring an action for declarator of nullity of marriage as soon as is reasonably practicable after the duress ceases to have effect the marriage should be regarded as having been valid as from the time of the ceremony.

(e) Without prejudice to the rules recommended above, a marriage should not be void merely because one or both parties went through the ceremony of marriage with a tacit mental reservation to the effect that notwithstanding the nature and form of the ceremony no legal marriage would result from it.

(Paragraphs 8.16 to 8.20. Draft Bill, clause 21(1)(b) and (2).)

49. Marriages should not be voidable on the ground of impotency.

(Paragraphs 8.21 to 8.29. Draft Bill, clause 21(8).)

50. There should be no new grounds on which a marriage is voidable in Scots law.

(Paragraph 8.30. No legislation required.)

51. Actions for declarator of marriage or nullity of marriage should be competent not only in the Court of Session but also in the sheriff courts.

(Paragraphs 9.1 to 9.2. Draft Bill, clause 23(1) and Schedule 1 paragraph 2.)

52.(a) The remedy of an action for declarator of freedom and putting to silence should be abolished.

(b) It should be made clear that the courts' ordinary powers to grant interdicts and interim interdicts include power to grant interdict or interim interdict against the repetition of a false assertion of marriage to the applicant.

(Paragraphs 9.3 to 9.5. Draft Bill, clause 23(2) and (3).)

53. The rules on jurisdiction applying to actions for declarator of marriage should also apply to actions for declarator that a divorce, annulment or legal separation is, or is not, entitled to recognition in Scotland.

(Paragraphs 9.6 to 9.8. Draft Bill, Schedule 1, amendments to Domicile and Matrimonial Proceedings Act 1973, section 7.)

54. Section 2(2) of the Law Reform (Husband and Wife) Act 1962 (which gives the court power to dismiss certain proceedings between spouses in delict) should be repealed.

(Paragraphs 10.1 to 10.8. Draft Bill, clause 24(c) and Schedule 2.)

55.(a) Under section 6(1) of the Matrimonial Homes (Family Protection) (Scotland) Act 1981 (which relates to the continued exercise of occupancy rights after a dealing) a person acquiring the home or an interest in it should not be affected by the occupancy rights of the spouse of a former owner (i.e. an owner prior to the person making the transfer to that acquirer) if the acquirer was (i) a transferee for value acting in good faith or (ii) someone who derives title from such a transferee.

(b) The period referred to in section 6(3)(f) of the 1981 Act should be reduced from 5 years to 2 years.

(c) A court should be able to dispense with consent to a proposed dealing under section 7 of the 1981 Act notwithstanding that no negotiations have yet been entered into or concluded, provided that the dispensation relates to

(i) a sale at not less than a specified price and within a specified time from the date of the court's order, or

(ii) the grant of a heritable security for a loan of not more than a specified amount to be executed within a specified time from the date of the court's order.

(d) A court which refuses to dispense with a non-entitled spouse's consent to a dealing should have power (i) to order that spouse, if he or she is in occupation of the home, to make payments in lieu of rent and (ii) to attach to the refusal of consent such other conditions relating to the occupation of the home by the non-entitled spouse as it thinks fit.

(e) Section 6(3)(e) of the 1981 Act should apply to all transfers for value, not merely sales.

(f) The references to affidavits in section 6(3)(e) and section 8(2A) of the 1981 Act should be replaced by references to written declarations (attracting the penalties of the False Oaths (Scotland) Act 1933) subscribed by the transferor of the property or grantor of the security.

(g) Where a dealing consists of a termination by the entitled spouse of his or her tenancy of the matrimonial home then, if section 6 of the 1981 Act applies, the non-entitled spouse should be deemed, so long as he or she is entitled to continue to exercise occupancy rights, to be a tenant of the home under a tenancy in the same terms (apart from the identity of the tenant) as the terminated tenancy.

(h) (i) An attorney acting under a power of attorney should be permitted to execute a declaration, consent or renunciation for the purposes of the 1981 Act.

(ii) The curator bonis of an *incapax* should be permitted to execute a declaration, consent or renunciation for the purposes of the 1981 Act.

(Paragraphs 11.3 to 11.23. Draft Bill, clause 26 and Schedule 1.)

56. The occupancy rights of a non-entitled spouse in a matrimonial home should terminate if the spouses have been separated for a continuous period of two years or more during which period the non-entitled spouse has not occupied the home.

(Paragraphs 11.24 to 11.28. Draft Bill, clause 25.)

57.(a) Section 14(1) of the Matrimonial Homes (Family Protection) (Scotland) Act 1981 should confer an express power to grant matrimonial interdicts.

(b) It should be made clear in the Act that a matrimonial interdict under section 14(1) cannot be used as an easy alternative to an exclusion order. A matrimonial interdict should not be available so as to exclude an entitled spouse, or a spouse with occupancy rights, from the matrimonial home unless the interdict is ancillary to an exclusion order or to a refusal by the court of leave to exercise occupancy rights in the circumstances mentioned in section 1(3) of the Act.

(c) The definition of "matrimonial interdict" in section 14(2) of the 1981 Act should be extended so that paragraph (b) extends not only to a matrimonial home but also to any home or other premises occupied by the applicant, to the applicant's place of work and to the school attended by any child in the applicant's care.

(Paragraphs 11.30 to 11.33. Draft Bill, clause 27(1).)

58. It should be made clear in section 15(1)(b) of the 1981 Act (power of arrest) that the onus is on the non-applicant spouse to show that a power of arrest is unnecessary.

(Paragraphs 11.34 to 11.35. Draft Bill, clause 27(2).)

59. Where a power of arrest is attached to an interdict the police should continue to have a discretion as to whether or not to arrest where a breach is reasonably suspected.

(Paragraph 11.36. No legislation required.)

60. A power of arrest attached to a matrimonial interdict should not cease to have effect on the termination of the marriage but should cease to have effect, whether or not there is a divorce, three years after the date when the power was granted, unless it has been recalled, or renewed on cause shown, within that time.

(Paragraphs 11.37 to 11.39. Draft Bill, clause 27(3).)

61. The definition of "matrimonial interdict" should be extended to cover a corresponding interdict for the protection of a former spouse.

(Paragraph 11.40. Draft Bill, clause 27(1).)

62. Subsection (4) and subsection (5)(b)(ii) of section 17 of the 1981 Act (procedure after arrest for breach of a matrimonial interdict) should be repealed.

(Paragraphs 11.41 to 11.45. Draft Bill, clause 27(4).)

63. It should be made clear in the definition of "matrimonial home" that that term does not include a residence provided or made available by anyone for one spouse to reside in, whether with any child of the family or not, separately from the other spouse.

(Paragraph 11.46. Draft Bill, clause 28(b).)

64. It should be made clear that the definition of "matrimonial home" includes any ground or building which is required for its amenity or convenience even if not attached to it.

(Paragraph 11.47. Draft Bill, clause 28(a).)

65. It should be made clear that where the tenancy of a matrimonial home is transferred from one spouse to the other with the intention that the house is thereafter to be the residence of the transferee separately from his or her spouse, the house is not a matrimonial home after the transfer.

(Paragraph 11.48. Draft Bill, clause 28(c).)

66. Judicial separation should be abolished.

(Paragraphs 12.1 to 12.19. Draft Bill, clause 29.)

67. The reference in section 1(3) of the Divorce (Scotland) Act 1976 to adultery which "has been connived at in such a way as to raise the defence of *lenocinium*" should be replaced by a reference to adultery which has been actively promoted or encouraged by the pursuer.

(Paragraphs 13.1 to 13.4. Draft Bill, clause 30(1).)

68.(a) It should be expressly provided that the court in an action for divorce should not grant decree of divorce if satisfied that (whether or not as a result of collusion) the pursuer has put forward a false case or the defender has withheld a good defence.

(b) Collusion as a separate bar to divorce should be abolished.

(Paragraphs 13.5 to 13.8. Draft Bill, clause 30.)

69. Section 1(5) of the Divorce (Scotland) Act 1976 should be repealed.

(Paragraphs 13.9 to 13.12. Draft Bill, clause 30(3).)

70.(a) Subject to the Foreign Marriage Act 1892 as amended, the question whether a marriage is formally valid should be governed by the law of the place of celebration.

(b) Subject to the following recommendation and to section 50 of the Family Law Act 1986 (effect of divorce), the question whether a marriage is essentially invalid because either party was under a legal incapacity to enter into it or did not give a legally effective consent to it should be governed by the law of that party's domicile immediately before the marriage.

(Paragraphs 14.1 to 14.5. Draft Bill, clause 31(1) and (2).)

71. A marriage entered into in Scotland should be invalid, no matter what the domiciles of the parties, if, according to Scottish internal law, at the time when the marriage was entered into

(a) the parties were within the forbidden degrees of relationship,

(b) either party was already married,

(c) either party was under the age of 16,

(d) the parties were of the same sex, or

(e) because of mental incapacity, error or duress either party did not effectively consent to marriage

but, without prejudice to the law on error or duress, should not be invalid merely because one or both parties went through the ceremony of marriage with a tacit mental reservation to the effect that notwithstanding the nature and form of the ceremony no legal marriage would result from it.

(Paragraphs 14.6 to 14.7. Draft Bill, clauses 20 and 21.)

72. A rule requiring a person under a certain age to obtain the prior consent of a parent or guardian before he or she can marry should be regarded as resulting in a legal incapacity for marriage if, but only if, it precludes a marriage by that person anywhere in any form while under that age.

(Paragraphs 14.8 to 14.10. Draft Bill, clauses 20 and 31(4).)

73. Where, on the application of the above rules, a marriage is initially valid it should not be annulled or declared null by a Scottish court on any ground.

(Paragraph 14.13. Draft Bill, clause 21(8).)

74. A foreign rule as to the validity or invalidity of a marriage should not be recognised or applied in Scotland where to do so would be contrary to Scottish public policy.

(Paragraph 14.12. Draft Bill, clauses 20 and 31(3).)

75. The existing rule that a Scottish court applies Scots law in a divorce action, no matter what the domiciles of the parties may be, should be put into statutory form.

(Paragraph 14.21. Draft Bill, clause 31(5).)

76. The effect, if any, which marriage has on a person's capacity and obligations (other than the obligation of aliment, which is considered separately later) should be determined by the law governing that person's capacity and obligations generally.

(Paragraphs 15.1 to 15.3. No legislation required.)

77. The effect, if any, which marriage has on the spouses' property should be determined, in the case of immoveable property, by the law of the country where that property is situated and, in the case of moveable property, by the law of the spouses' common domicile. Where the spouses do not have the same domicile marriage should have no automatic effect on their moveable property.

(Paragraphs 15.4 to 15.6. Draft Bill, clause 32.)

78. The rules in the preceding recommendation should be subject

(a) to any agreement between the spouses, and

(b) to the proviso that a change of domicile by one or both spouses should not affect either spouse's vested rights in property.

(Paragraph 15.6. Draft Bill, clause 32(3) and (4).)

79. Notwithstanding the rules in the preceding recommendations, the question whether a person is entitled to the benefit of protective rules relating to the occupation or use of the matrimonial home (whether moveable or immoveable) or its contents should be determined by the law of the country where the matrimonial home is situated.

(Paragraph 15.7. Draft Bill, clause 32(2).)

80.(a) The presumption of equal shares in household goods in section 25 of the Family Law (Scotland) Act 1985 should be applied, with modifications, to cohabitants.

(b) The presumption should apply only to goods acquired during the cohabitation, and not to goods bought "in prospect of" cohabitation.

(c) The presumption should be rebuttable by proving that the goods belong to one party alone or to both in unequal shares and subsection (2) of section 25 (which restricts such proof in certain cases) should not be applied to cohabitants.

(Paragraphs 16.7 to 16.11. Draft Bill, clause 34.)

81. The presumption of equal shares in money and property derived from a housekeeping or similar allowance in section 26 of the Family Law (Scotland) Act 1985 should be applied, with the necessary modifications, to cohabitants.

(Paragraphs 16.12 to 16.13. Draft Bill, clause 35.)

82.(a) Where a cohabitation has terminated otherwise than by death, a former cohabitant should be able to apply to a court, within one year after the end of the cohabitation, for a financial provision on the basis of the principle in section 9(1)(b) of the Family Law (Scotland) Act 1985—namely that fair account should be taken of any economic advantage derived by either party from contributions by the other, and of any economic disadvantage suffered by either party in the interests of the other party or of any child of the family.

(b) The Court of Session and the sheriff courts should have jurisdiction to entertain an application if they would have had jurisdiction to entertain an action for divorce between the parties.

(c) An application should be made by action, any necessary regulation of procedure being by rules of court.

(d) The court hearing an application should have power to award a capital sum (including a deferred capital sum and a capital sum payable by instalments) and to make an interim award.

(Paragraphs 16.14 to 16.23. Draft Bill, clause 36.)

83. Where a cohabitation is terminated by death the surviving cohabitant should not have automatic rights of intestate succession or fixed rights to a legal share of the deceased's estate but should be able to apply to a court for a discretionary provision out of the deceased's estate under a scheme of the type set out in paragraphs 16.31 to 16.36.

(Paragraphs 16.24 to 16.37. Draft Bill, clauses 37 and 38.)

84.(a) Interdicts of the type described in section 14(2) of the Matrimonial Homes (Family Protection) (Scotland) Act 1981, to which a power of arrest can be attached, should be available to cohabitants, whether or not they have occupancy rights, and without the need for any qualifying period of cohabitation.

(b) Such interdicts for cohabitants (currently called "matrimonial interdicts") should be renamed or described in a way which does not suggest that they are confined to married persons.

(Paragraphs 16.38 to 16.40. Draft Bill, clause 39.)

85.(a) For the avoidance of doubt, it should be made clear by statute that a cohabitant has an insurable interest in the life of his or her partner of the same type as he or she has in his or her own life.

(b) No qualifying period of cohabitation should be required for this purpose.

(Paragraph 16.41 to 16.42. Draft Bill, clause 40.)

86.(a) The benefits of the Married Women's Policies of Assurance (Scotland) Act 1880 (which enables a person to take out a life insurance policy on his or her own life for the benefit of his or her spouse in such a way that the policy is held in trust for the beneficiary as soon as it is effected) should be extended to cohabitants.

(b) No qualifying period of cohabitation should be required for this purpose.

(Paragraphs 16.43 to 16.45. Draft Bill, clause 41.)

87. A contract between cohabitants or prospective cohabitants relating to property or financial matters should not be void or unenforceable solely because it was concluded between parties in, or about to enter, this type of relationship.

(Paragraph 16.46. Draft Bill, clause 42.)

88.(a) Section 1(1) of the Law Reform (Parent and Child) (Scotland) Act 1986 should be amended so as to provide expressly that no person whose status is governed by Scots law should be regarded as illegitimate.

(b) The Legitimation (Scotland) Act 1968 should be repealed as unnecessary.

(c) References in existing legislation to actions for declarator of legitimacy, legitimation and illegitimacy should be repealed.

(d) Any reference to a legitimate or lawful person in any enactment passed or made, or in any document executed, before the commencement of the new legislation should be construed as a reference to a person whose parents were married to each other at the time of the person's conception or at any later time, and any reference to an illegitimate person in any such enactment or document should be construed accordingly.

(e) Consequential amendments should be made in sections 39 and 46 of the Adoption (Scotland) Act 1978.

(f) The reference to coats of arms in section 9(1)(c) of the Law Reform (Parent and Child) (Scotland) Act 1986 should be repealed.

(Paragraphs 17.1 to 17.11. Draft Bill, clause 44 and Schedules 1 and 2.)

89.(a) The existing law on the domicile of children (which makes domicile depend on legitimacy) should be changed.

(b) The domicile of a child under the age of 16 should be determined as follows–

(i) the child should be domiciled in the country with which he or she is for the time being most closely connected;

(ii) where the child's parents are domiciled in the same country and the child has his or her home with either or both of them, it is to be presumed, unless the contrary is shown, that the child is most closely connected with that country;

(iii) where the child's parents are not domiciled in the same country and the child has his or her home with one of them, but not with the other, it is to be presumed, unless the contrary is shown, that the child is most closely connected with the country in which the parent with whom the child has his or her home is domiciled.

(c) It should be made clear that a person's domicile of origin is the first domicile which he or she has under the above rules.

(Paragraphs 17.12 to 17.13. Draft Bill, clause 45.)

90. The way, if any, in which a person's status at any time is affected by whether his or her parents are or have been married to each other should depend on the law of the person's domicile at that time.

(Paragraphs 17.14 to 17.15. Draft Bill, clause 46.)

91. It should be provided that, subject to the provisions of the Maintenance Orders (Reciprocal Enforcement) Act 1972, courts in Scotland should apply the internal law of Scotland in dealing with claims for aliment.

(Paragraphs 18.1 to 18.5. Draft Bill, clause 43.)

Appendix A

FAMILY LAW (SCOTLAND) BILL

ARRANGEMENT OF CLAUSES

PART I

PARENTAL RESPONSIBILITIES AND RIGHTS, GUARDIANSHIP AND ADMINISTRATION OF CHILDREN'S PROPERTY

Parental responsibilities and rights

Clause

Guardianship

Administration of child's property

Court Orders

Choice of law rules and jurisdication

PART II

PROVISIONS RELATING TO MARRIAGE

DRAFT

OF A

BILL

TO

A.D. 1992.

Amend the law of Scotland relating to the family; and for connected purposes.

BE IT ENACTED by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

PART I

PARENTAL RESPONSIBILITIES AND RIGHTS, GUARDIANSHIP AND ADMINISTRATION OF CHILDREN'S PROPERTY

Parental responsibilities and rights

Parental responsibilities.

1.—(1) A parent has in relation to his or her child the following responsibilities ("parental responsibilities"), that is to say, the responsibility—

(a) to safeguard and promote the child's health, development and welfare;

(b) to provide, in a manner appropriate to the stage of development of the child, direction and guidance to the child;

(c) if the child is not living with the parent, to maintain personal relations and direct contact with the child on a regular basis;

(d) to act as the child's legal representative,

but only in so far as compliance with paragraph (a), (b), (c) or (d) above (as the case may be) is practicable and in the interests of the child.

(2) "Child" means for the purposes of—

(a) paragraphs (a) and (b) of subsection (1) above, a person under the age of 18 years;

(b) paragraphs (c) and (d) of that subsection, a person under the age of 16 years.

(3) Any reference in this Part of this Act to a person acting as the legal representative of a child is a reference to that person, in the interests of the child—

(a) administering any property belonging to the child; and

(b) acting in, or giving consent to, any transaction having legal effect where the child is incapable of so acting or consenting on his or her own behalf.

(4) This section is without prejudice to any duty imposed on a parent in relation to a child under any other enactment.

Parental rights.

2.—(1) In order to enable a parent to fulfil his or her parental responsibilities, a parent shall have in relation to his or her child the following rights ("parental rights"), that is to say, the right—

(a) to have the child living with him or her or otherwise to regulate the child's residence;

(b) to control, direct or guide, in a manner appropriate to the stage of development of the child, the child's upbringing;

(c) if the child is not living with the parent, to maintain personal relations and direct contact with the child on a regular basis;

(d) to act as the child's legal representative.

(2) Where two or more persons have any parental right, each of them may exercise that right without the consent of the other person or, as the case may be, any of the other persons, unless any decree or deed conferring the right otherwise provides.

(3) Notwithstanding subsection (2) above, no person shall be entitled to remove a child from, or to retain a child outwith, the United Kingdom without the consent of a relevant person if the child was habitually resident in Scotland with that relevant person immediately before the removal or retention; and in this subsection "relevant person" means a parent or the parents of the child or any other person who has the right to control the child's residence.

(4) This section is without prejudice to any right conferred on a parent by any other provision of this Act or any other enactment.

EXPLANATORY NOTES

Note. In the interests of brevity these notes are written on the assumption that the Bill is enacted—eg "Clause 1 implements Recommendation 1", rather than "Clause 1, if enacted, would implement Recommendation 1".

Clause 1

Clause 1 implements Recommendation 1. It sets out in statutory form parental responsibilities which are to a large extent already implicit in the law. One of the policies of the Report is that there should be an increased emphasis on parental responsibilities rather than on parental rights.

Subsection (1)

This states the four main parental responsibilities. A parent also has responsibilities for aliment or maintenance under the Family Law (Scotland) Act 1985 and the Child Support Act 1991 and responsibilities in relation to education under the Education (Scotland) Act 1980.

Subsection (2)

This subsection defines "child" for the purposes of each of the parental responsibilities set out in subsection (1). As certain parental responsibilities continue after a child attains the age when he or she has considerable legal capacity and freedom of action, two ages are used in the definition. In respect of the parental responsibilities to safeguard and promote the child's health, development and welfare and to provide, in a manner appropriate to the stage of development of the child, direction and guidance, "child" means a person under the age of 18 years. In respect of the parental responsibilities, if the child is not living with the parent, to maintain personal relations and direct contact with the child on a regular basis and to act as the child's legal representative, "child" means a person under the age of 16 years.

Subsection (3)

This subsection makes it clear that a child's legal representative has the responsibility both to administer the child's property and to act in, or give consent to, any transaction having legal effect where the child is incapable of so acting or consenting on his or her own behalf. The legal capacity of children and young persons is dealt with by the Age of Legal Capacity (Scotland) Act 1991.

Subsection (4)

This subsection makes it clear that the general statement of parental responsibilities is in addition to any existing statutory duties in relation to, for example, aliment and education.

Clause 2

Clause 2 implements Recommendations 2 to 4 and 6. The existing parental rights of guardianship, custody and access are replaced by new rights which reflect the policy that both parents, even after separation, should normally have a continuing parental role to play in relation to the child's upbringing.

Subsection (1)

This subsection sets out the proposed new parental rights.

Subsection (2)

This subsection re-enacts section 2(4) of the Law Reform (Parent and Child) (Scotland) Act 1986.

Subsection (3)

This subsection makes it clear that although one of two or more people who have parental rights can act alone, the other or others having no power of veto, a "removal" of a child in the circumstances described would constitute "unlawful removal" within the terms of the Hague Convention on Child Abduction.

Subsection (4)

Subsection (4) ensures that the provisions of this clause are without prejudice to any rights conferred on a parent by any other provision of this Bill (for example, clause 7 on the right to appoint a guardian) or by any other enactment (for example, the Adoption (Scotland) Act 1978).

(5) In this section "child" means a person under the age of 16 years.

Provisions relating to both parental responsibilities and rights.

3.—(1) The parental responsibilities and parental rights of a parent shall not be dependent on that parent being or having been married to the other parent of the child concerned.

(2) Nothing in this Part of this Act shall affect any enactment or rule of law by virtue of which a person may be granted or deprived of parental responsibilities or parental rights.

(3) The fact that a person has parental responsibilities or parental rights in relation to a child shall not entitle that person to act in any way which would be incompatible with any court decree relating to the child or the child's property, or any supervision requirement relating to the child made under section 44(1) of the Social Work (Scotland) Act 1968.

(4) A person who has parental responsibilities or parental rights in respect of a child may not surrender or transfer any part of those responsibilities or rights to another but may arrange for some or all of them to be met or exercised by one or more persons acting on his or her behalf.

(5) The person with whom any such arrangement is made may be a person who already has parental responsibilities or parental rights in respect of the child concerned.

(6) The making of any such arrangement shall not affect any liability of the person making it which may arise from any failure to meet any part of his or her parental responsibilities for the child concerned.

Protection of children from violence.

4.—(1) In any proceedings (whether criminal or civil) against a person for striking a child, it shall not be a defence for the person to establish that he or she struck the child in the purported exercise of any parental right if he or she struck the child—

(a) with a stick, belt or other object of whatever description; or

(b) in such a way as to cause, or to risk causing—

(i) injury; or

(ii) pain or discomfort lasting more than a very short time.

(2) In section 12 of the Children and Young Persons (Scotland) Act 1937 the following are hereby repealed—

(a) in subsection (1) the words "assaults," and "assaulted,";

(b) subsection (7).

Persons, without parental responsibilities or rights, having care or control of child.

5.—(1) A person over the age of 16 years who—

(a) has care or control of a child under the age of 16 years; but

(b) does not have parental responsibilities or parental rights in respect of that child, may do what is reasonable in all the circumstances of the case (and may in particular give consent to any medical or dental treatment or procedure where the child is not able to give such consent on his or her own behalf) for the purpose of safeguarding the child's health, development or welfare.

(2) Section 4 of this Act shall have effect in relation to a person mentioned in subsection (1) above as if for the words "any parental right" there were substituted the words "a right of reasonable chastisement by virtue of having the care or control of the child".

(3) Nothing in this section shall apply to a person in so far as the person has care or control of a child in a school within the meaning of section 135(1) of the Education (Scotland) Act 1980.

Subsection (5)

Subsection (5) defines "child" for the purposes of this clause as a person under the age of 16 years. Under the existing law, the parental rights of custody, access and guardianship last until the child is 16. (Law Reform (Parent and Child) (Scotland) Act 1986, s8, as amended by the Age of Legal Capacity (Scotland) Act 1991).

Clause 3

Subsection (1)

This subsection implements Recommendation 5. The policy of the Report is that both parents should have parental responsibilities and rights whether or not they are or have been married to each other.

Subsection (2)

This subsection re-enacts (with the inclusion of a reference to responsibilities) section 2(3) of the Law Reform (Parent and Child) (Scotland) Act 1986. It preserves the effect of, for example, s16 of the Social Work (Scotland) Act 1968 (assumption of parental rights by local authority).

Subsection (3)

This subsection implements Recommendation 7.

Subsections (4) to (6)

Subsections (4)–(6) implement Recommendation 8.

Clause 4

Subsection (1)

This subsection implements Recommendation 11(a) by clarifying and limiting the extent of the parental right of chastisement. This is done by drawing a distinction between an ordinary safe smack, on the one hand, and canings, beltings or beatings with objects of various sorts, and any blow which causes, or risks causing, injury or prolonged pain or discomfort, on the other. Many forms of punishment not referred to in this clause are already covered by section 12 of the Children and Young Persons (Scotland) Act 1937 which outlaws ill-treatment of children generally.

Subsection (2)

This subsection implements Recommendation 11(c) and (d). It removes from the statute book a provision which is unnecessary and which appears to condone ill-treatment of children.

Clause 5

Subsection (1)

This subsection is concerned with those over the age of 16 who have care or control of a child but who do not have parental responsibilities or rights in relation to that child. It implements the policy contained in Recommendation 9 that such persons may do what is reasonable, including consenting to medical treatment, to safeguard the child's health, development or welfare. This would cover situations where, for example, a young child is sent to stay with relatives or friends for a holiday, or where a step-parent or foster parent has care of a child.

Subsection (2)

Subsection (2) makes it clear that those, without parental responsibilities or parental rights, having care or control of a child, have no greater right than a parent has to administer corporal punishment to a child. See Recommendation 11(b).

Subsection (3)

This subsection makes it clear that the provisions of clause (5) are without prejudice to the position of teachers and others with care or control of a child in a school within the meaning of section 135(1) of the Education (Scotland) Act 1980.

Views of children.

6.—(1) Before a person reaches a major decision which involves fulfilling a parental responsibility or exercising a parental right, the person shall, so far as practicable, ascertain the views of the child concerned regarding the decision, and shall give due consideration to those views, taking account of the child's age and maturity.

(2) Without prejudice to the generality of subsection (1) above, a child of the age of 12 years or more shall be presumed to have sufficient maturity to enable him or her to express a reasonable view regarding any such decision.

(3) A transaction entered into in good faith by a third party and a person acting as the legal representative of a child shall not be challengeable on the ground that the child was not consulted or that due consideration was not given to the child's views before the transaction was entered into.

Guardianship

Appointment of guardians.

7.—(1) The parent of a child may appoint another individual to be guardian of the child after the parent's death, but any such appointment shall be of no effect unless—

(a) the appointment is in writing and signed by the parent; and

(b) the parent at the time of his or her death was entitled to act as the legal representative of the child or would have been so entitled if he or she had survived until after the birth of the child.

(2) A guardian of a child may appoint another individual to take his or her place as the child's guardian in the event of his or her death, but any such appointment shall be of no effect unless the appointment is in writing and signed by the person making the appointment.

(3) An appointment as guardian shall not take effect until accepted, either expressly, or impliedly by acts which are not consistent with any other intention.

(4) If two or more persons are appointed as guardians, any one or more of them shall be entitled to accept office, even if both or all of them do not accept office, unless the appointment expressly provides otherwise.

(5) Subject to section 12 of this Act, a person appointed as a child's guardian under this section shall have in respect of the child the responsibilities imposed, and the rights conferred, on a parent by sections 1 and 2 of this Act respectively; and those sections and sections 3(2) to (6), 4 and 6 of this Act shall apply in relation to a guardian as they apply in relation to a parent.

(6) A decision as to the appointment of a guardian under subsection (1) or (2) above shall be regarded for the purposes of section 6 of this Act or that section as applied by subsection (5) above as a major decision which involves exercising a parental right.

Clause 6

Clause 6 implements Recommendation 10. It recognises that the child is a person in his or her own right and that his or her views are entitled to respect and consideration, taking account of the child's age and maturity.

Subsection (1)

This provides that any person taking any major decision relating to a child in the exercise of any parental responsibility or parental right should, so far as practicable, ascertain the views of the child regarding the decision and give due consideration to them having regard to the child's age and maturity.

Subsection (2)

Subsection (2) contains a presumption that a child of 12 years or more has sufficient maturity to enable him or her to express a reasonable view regarding any such decision.It should not be implied, however, that the views of a child under that age are never worthy of consideration.

Subsection (3)

It is important to ensure that third parties would not be prejudiced by any failure of a person to consult the child before, for example, dealing with the property of a child under the age of 16. Accordingly this subsection provides that a transaction entered into in good faith by a third party, and a person acting as a child's legal representative, is not open to challenge on the ground that the child was not consulted or that due consideration was not given to the child's views.

Clause 7

Clause 7 concerns the appointment of guardians and implements Recommendations 12 to 14, and 16 to 18.

Subsection (1)

Subsection (1) re-enacts section 4(1) of the Law Reform (Parent and Child) (Scotland) Act 1986 incorporating only minor amendments consequential upon the policy contained in clauses 1 and 2 that a parent should have responsibilities and rights to act as the child's legal representative, the term "guardian" being restricted to non-parents. The use of the word "individual" clarifies that it would not be competent to appoint a body corporate as a guardian. See Recommendation 12.

Subsection (2)

This subsection implements Recommendation 13. It enables an existing guardian to appoint another individual to take his or her place as the child's guardian in the event of his or her death.

Subsection (3)

Subsection (3) implements Recommendation 16 and deals with the question of when an appointment of a guardian should take effect. It puts into statutory form the existing law that the office of guardian must be accepted, either expressly, or impliedly by acts which are not consistent with any other intention.

Subsection (4)

This subsection, implementing Recommendation 17, puts into statutory form the principle that where two or more persons are appointed as guardians,any one or more are entitled to accept office, even if both or all do not accept, unless the appointment expressly provides otherwise.

Subsection (5)

As the policy is that a guardian should be a substitute parent, this subsection makes it clear that, subject to any court order, a guardian would have the parental responsibilities and parental rights set out in clauses 1 and 2. See Recommendation 18.

Subsection (6)

Subsection (6) implements Recommendation 14. It makes it clear that a decision by a parent or guardian as to the appointment of a guardian would be regarded as a major decision which involves exercising a parental right and would therefore require the parent or guardian (in terms of clause 6 or that clause as applied by clause 7(5)) to ascertain, so far as practicable, the views of the child and to give due consideration to those views taking account of the child's age and maturity.

Revocation and other termination of appointment.

8.—(1) An appointment under section 7(1) or (2) of this Act revokes an earlier such appointment (including one made in an unrevoked will or codicil) made by the same person in respect of the same child, unless it is clear (whether as a result of an express provision in the later appointment or by any necessary implication) that the purpose of the later appointment is to appoint an additional guardian.

(2) Subject to subsections (3) and (4) below, the revocation of an appointment under section 7(1) or (2) of this Act (including one made in an unrevoked will or codicil) shall not take effect unless the revocation is in writing and is signed by the person making the revocation.

(3) Any appointment under section 7(1) or (2) of this Act (other than one made in a will or codicil) is revoked if, with the intention of revoking the appointment, the person who made it—

(a) destroys the document by which it was made; or

(b) has some other person destroy that document in his presence.

(4) For the avoidance of doubt, an appointment under section 7(1) or (2) of this Act made in a will or codicil is revoked if the will or codicil is revoked.

(5) Once an appointment of a guardian has taken effect under section 7 of this Act, then, unless the terms of the appointment provide otherwise, it shall terminate only by virtue of—

(a) the child concerned attaining the age of 18 years;

(b) the death of the child or the guardian; or

(c) the termination of the appointment by a court order under section 12 of this Act.

Administration of child's property

Safeguarding of child's property.

9.—(1) Subject to section 16 of this Act, this section applies where—

(a) property is owned by or due to a child;

(b) the property is held by a person other than a parent or guardian of the child; and

(c) but for this section, the property would be required to be transferred to a parent or guardian for administration by him or her on behalf of the child.

(2) Subject to subsection (4) below, where this section applies and the person holding the property is an executor or trustee, then—

(a) if the value of the property exceeds £20,000, the executor or trustee shall; or

(b) if that value is not less than £5000 and not more than £20,000, the executor or trustee may,apply to the Accountant of Court for a direction as to the administration of the property.

(3) Subject to subsection (4) below, where this section applies and the person holding the property is a person other than an executor or trustee, then, if the value of the property is not less than £5000, that person may apply to the Accountant of Court for a direction as to the administration of the property.

(4) Where a parent or guardian of the child has been appointed a trustee under a trust deed to administer the property concerned, subsections (2) and (3) above shall not apply, and the executor, trustee or other person shall transfer the property to the parent or guardian.

Clause 8

Clause 8 implements Recommendations 15 and 19 concerning revocation of an appointment of a guardian and termination of a guardianship.

Subsections (1)–(4)

These subsections implement Recommendation 15. They would supersede the existing Scots law authorities on revocation which are very old and not comprehensive.

Subsection (5)

Subsection (5) implements Recommendation 19. The interests of the child require that, once the guardian has unequivocally accepted office, the guardianship should not terminate otherwise than by court order, by the child attaining the age of 18 or by the death of the child or guardian (unless the terms of the appointment provide otherwise).

Clause 9

This clause deals with the safeguarding of children's property and implements Recommendations 21 and 41(a). It replaces the existing unsatisfactory scheme by one which attempts to distinguish cases where external control of the administration of a child's property is appropriate from cases where the administration can be left to the discretion of the parent or guardian.

Subsection (1)

This subsection deals with the application of clause 9. Subject to clause 16 (which deals with awards of damages to children), clause 9 applies where (a) property is owned by or due to a child; (b) the property is held by a person other than a parent or guardian of the child; and (c) but for this clause, the property would be required to be transferred to a parent or guardian for administration by him or her on behalf of the child.

Subsection (2)

This subsection provides that where the person holding the property is an executor or trustee he or she has a duty, where the property exceeds £20,000 in value, and has a discretion, where that value is not less than £5,000 and not more than £20,000, to apply to the Accountant of Court for a direction as to the administration of the property before handing it over to the parent or guardian.

Subsection (3)

Subsection (3) provides that where the person holding the property is someone other than an executor or trustee, then if the value of the property is not less than £5,000, that person has a discretion to apply to the Accountant of Court for a direction as to the administration of the property before handing it over to the parent or guardian.

Subsection (4)

This subsection provides that subsections (2) and (3) above do not apply where a parent or guardian has been appointed a trustee under a trust deed to administer the property in question. In such circumstances the executor, trustee or other person would be required to transfer the property to the parent or guardian.

(5) On receipt of an application under subsection (2) or (3) above, the Accountant of Court may—

(a) apply to the court for the appointment of a judicial factor to administer the property concerned, and in the event of the court appointing a judicial factor shall direct the property in relation to which the appointment has been made to be transferred to the factor;

(b) direct all or part of the property concerned to be transferred to the Accountant of Court to be administered directly on behalf of the child; or

(c) direct all or part of the property to be transferred to a parent or guardian to be administered by him or her on behalf of the child.

(6) A direction under subsection (5)(c) above may include such conditions as the Accountant of Court considers appropriate, including in particular a condition—

(a) that in relation to that property no capital expenditure shall be incurred without the approval of the Accountant of Court; or

(b) that there shall be exhibited annually to the Accountant of Court the securities and bank books which represent the capital of the estate.

(7) A person who has applied under subsection (2) or (3) above for a direction shall not transfer the property concerned except in accordance with a direction under subsection (5) above.

(8) For the purposes of subsections (2) and (3) above, the Secretary of State may by regulations from time to time vary any sum referred to therein.

(9) The power to make regulations conferred by subsection (8) above shall be exercisable by statutory instrument which shall be subject to annulment in pursuance of a resolution of either House of Parliament.

(10) In this section "child" means a person under the age of 16 years who is habitually resident in Scotland.

Obligations and rights of person administering child's property.

10.—(1) A person, on ceasing to act as a child's legal representative, shall be liable to account to the child for his or her intromissions with the child's property.

(2) A person shall not be liable to the child in respect of any of the child's funds which have been used in the proper discharge of the person's responsibility to safeguard and promote the child's health, development or welfare.

(3) A person acting as a child's legal representative in relation to the administration of the child's property—

(a) shall be required to act as a reasonable and prudent person would act on his or her own behalf; and

(b) subject to section 12 of this Act, shall be entitled to do anything in relation to it that the child could do if of full age and capacity.

Court Orders

Application for court order.

11.—(1) Any person claiming an interest may make an application under this section to the court for an order relating to—

(a) parental responsibilities;

(b) parental rights;

(c) guardianship; or

(d) the administration of a child's property.

Subsection (5)

Subsection (5) details the powers of the Accountant of Court upon receipt of an application under subsection (2) or (3) above.

Subsection (6)

This subsection provides that where the Accountant of Court directs all or part of the property to be transferred to a parent or guardian under subsection (5)(c) above, the direction may include such conditions as the Accountant of Court considers appropriate including a condition that no capital expenditure shall be incurred without the approval of the Accountant of Court or that the securities and bank books representing the capital of the estate shall be exhibited annually to the Accountant of Court.

Subsection (7)

Subsection (7) provides that a person who has applied to the Accountant of Court under subsection (2) or (3) above is not free to transfer the property except in accordance with a direction under subsection (5) above.

Subsections (8) and (9)

These subsections enable the sums referred to in subsections (2) and (3) above to be altered by statutory instrument.

Subsection (10)

Subsection (10) defines "child" for the purposes of clause 9 as a person under the age of 16 habitually resident in Scotland. See Recommendation 41(a).

Clause 10

Clause 10 implements Recommendations 23 and 25 regarding the powers of, the obligation to account of, and the standard of care required of, a person administering a child's property.

Subsection (1)

This subsection implements Recommendation 25(a). It continues the existing law that a person, on ceasing to be a child's legal representative, is liable to account to the child for his or her intromissions with the child's property.

Subsection (2)

Subsection (2) implements Recommendation 25(b). In order to take account of the position of the person who has had the management and control of small funds and who may have used them for the child's benefit, this subsection provides that, in accounting, the person is not liable in respect of any funds used in the proper discharge of the person's responsibility to safeguard and promote the child's health, development or welfare.

Subsection (3)

This subsection implements Recommendations 23 and 25(c). It applies one standard of care, namely, the requirement to act as a reasonable and prudent person would act on his or her own behalf, to any person acting as a child's legal representative in relation to the administration of the child's property. Subsection (3)(b) provides that, subject to any court order, a person acting as a child's legal representative in relation to the administration of the child's property may do anything in relation to it that the child could do if of full age and capacity. One effect of this rule would be that third parties acquiring property from a child's legal representative would not need to be concerned about the extent of the representative's powers.

Clause 11

Clause 11 implements Recommendations 26(a), 28, 31 and 32. It re-enacts section 3(1) of the Law Reform (Parent and Child) (Scotland) Act 1986 taking account of these recommendations.

Subsection (1)

The policy of this subsection is the same as in section 3(1) of the Law Reform (Parent and Child) (Scotland) Act 1986, which it replaces.

(2) Any application under this section may be made in a consistorial action or in proceedings in the Court of Session or sheriff court which are independent of a consistorial action.

(3) An application may be made under this section by the child concerned.

(4) It shall be incompetent for a local authority to make an application under this section except for such an order as is referred to in section 12(1)(c) or (d) of this Act.

(5) Any reference in this section and in sections 12 and 13 of this Act to an order includes a reference to an interim order or to an order varying or discharging an order.

Disposal of application under s.11.

12.—(1) On an application being made to it under section 11 of this Act, the court may make such order relating to the matters mentioned in subsection (1) of that section as it thinks fit and may in particular make any of the following orders—

(a) an order ("a residence order") regulating the arrangements to be made as to the person with whom a child under the age of 16 years is to live;

(b) an order ("a contact order") regulating the arrangements to be made for maintaining personal relations and direct contact between a child under the age of 16 years and a parent, or other person, with whom the child is not, or will not be, living;

(c) an order ("a specific issue order") regulating any specific question which has arisen, or which may arise, in connection with any of the matters mentioned in section 11(1) of this Act;

(d) an interdict prohibiting the taking of any step, which is of a kind specified in the interdict, in the exercise of parental responsibilities or parental rights or rights of guardianship relating to a child or in the administration of a child's property;

(e) an order appointing a judicial factor to manage a child's property or remitting the matter to the Accountant of Court to report on suitable arrangements for the future management of the property.

(2) The court may make an order under this section in a consistorial action—

(a) whether or not an application has been made for such an order under section 11 of this Act; or

(b) even if the court refuses to grant the principal remedy sought in the action.

(3) In any proceedings under this section, the court shall regard the welfare of the child concerned as the paramount consideration and shall not make any order under this section unless it is satisfied that to do so will be in the interests of the child and, in particular, that making the order will be better for the child than making no such order at all:

Provided that nothing in this subsection shall adversely affect the position of a person who has acquired any property of a child, or any right or interest in such property, in good faith and for value.

(4) The court may in an order under this section—

(a) deprive a person of some or all of his or her parental responsibilities or parental rights,

(b) appoint or remove a guardian.

Subsection (2)

This subsection is designed to simplify, rather than change, the law. It enables section 38C of the Sheriff Courts (Scotland) Act 1907 and section 20(1) of the Court of Session Act 1988 to be repealed in Schedule 2.

Subsection (3)

This clarifies, but does not change, the law. A child is already "any person" for the purposes of section 3(1) of the Law Reform (Parent and Child) (Scotland) Act 1986.

Subsection (4)

Subsection (4) provides that a local authority cannot apply for an order under clause 11 other than a specific issue order or an interdict. The reason for this limitation is that there are express statutory provisions regulating the circumstances in which a child can be taken into care, or parental rights can be assumed, by a local authority and it is considered that a local authority should not be permitted to by-pass these provisions by applying for guardianship, residence or contact.

Subsection (5)

For the avoidance of doubt this subsection declares that any references in clauses 11, 12 and 13 to an order include a reference to an interim order or to an order varying or discharging an order.

Clause 12

Clause 12 implements Recommendations 22, 26(b), 27, 33 and 34(b), (c) and (d). It supplements the reformulation of parental rights in clause 2, by specifying the main types of order which a court has power to make in place of custody orders and access orders etc.

Subsection (1)

This subsection provides that on an application under clause 11 the court has power to make such order relating to the matters specified in clause 11(1) as it thinks fit and, in particular, has power to make any of the following orders:– (a) a residence order, roughly corresponding to the former custody order; (b) a contact order, roughly corresponding to the former access order; (c) a specific issue order, regulating any specific question in relation to the matters mentioned in clause 11(1); (d) an interdict prohibiting the taking of any step in the exercise of parental responsibilities or parental rights or rights of guardianship or in the administration of a child's property; and (e) an order appointing a judicial factor or remitting the matter to the Accountant of Court to report on future management of the property. See Recommendation 22 and 26(b).

Subsection (2)

Subsection (2) provides that the court can make an order under this clause in a consistorial action whether or not an application has been made for it under clause 11. This provision has to be read with clause 14 below. Subsection (2)(b) expresses the existing law in a shorter way and enables some overlapping statutory provisions to be repealed in Schedule 2.

Subsection (3)

This subsection re-enacts section 3(2) of the Law Reform (Parent and Child)(Scotland) Act 1986, with the addition of the words "and, in particular, that making the order will be better for the child than making no such order at all". This is intended to further discourage applications for unnecessary orders. Furthermore, a proviso is added to ensure that nothing in the subsection would adversely affect the position of a person who had acquired any property of a child, or any right or interest in such property, in good faith and for value. See Recommendation 33.

Subsection (4)

This subsection implements Recommendation 27. For the avoidance of doubt, subsection (4) provides expressly that a court in an order under clause 12 has power to deprive a person of some or all of his or her parental responsibilities or parental rights or appoint or remove a guardian.

(5) In considering whether to make an order under this section the court shall give due consideration to the ascertainable views of the child concerned which are properly before the court, taking account of the child's age and maturity; and, without prejudice to the foregoing provisions of this subsection, a child of the age of 12 years or more shall be presumed to have sufficient maturity to enable him or her to express a reasonable view.

(6) Nothing in subsection (5) above shall require a child to be legally represented if the child is not a party to the proceedings.

Effect of court orders under s.12.

13.—(1) An order under section 12 of this Act by which a person acquires a parental responsibility or parental right shall deprive any other person of a parental responsibility or parental right only in so far as the order expressly so provides and only to the extent necessary to give effect to the order.

(2) Where the court makes a residence order to the effect that a child is to live with a person who is not the child's parent or guardian, that person shall have parental responsibilities and parental rights in respect of the child while the residence order remains in force.

Restrictions on decrees for divorce or annulment affecting children.

14.—(1) In any action for divorce or for a declarator of nullity of marriage, the court shall consider—

(a) whether there are any children of the family to whom this section applies; and

(b) where there are any such children, whether (in the light of information before the court as to the arrangements which have been, or are proposed to be, made for their upbringing) it should exercise the powers conferred on it by section 12 of this Act, or section 37(1B) of the Social Work (Scotland) Act 1968, with respect to any of them.

(2) Where, in any case to which this section applies, it appears to the court that—

(a) the circumstances of the case require it, or are likely to require it, to exercise any of its powers under section 12 of this Act, or the said section 37(1B), with respect to any such child;

(b) it is not in a position to exercise such a power without giving further consideration to the case; and

(c) there are exceptional circumstances which make it desirable in the interests of the child that it should not grant decree in the action until it is in a position to exercise such a power,

it shall postpone its decision on the granting of decree in the action until it is in such a position.

(3) This section applies to any child of the family who has not reached the age of 16 years at the date when the court considers the case in accordance with the requirements of this section.

Subsection (5)

An obligation is placed upon the court by this subsection (similar to that placed by clause 6 upon any person taking a major decision relating to a child in the exercise of any parental responsibility or parental right) to give due consideration to the child's views which are properly before the court, taking account of the child's age and maturity. Again there is a presumption that a child of 12 years or more has sufficient maturity to enable him or her to express a reasonable view. This subsection implements Recommendation 34(b) and (c). A similar obligation is imposed upon courts in England and Wales by section 1(3)(a) of the Children Act 1989.

Subsection (6)

For the avoidance of doubt subsection (6) states that nothing in subsection (5) would require a child to be separately legally represented if the child is not a party to the proceedings. See Recommendation 34(d). The Commission's view is, however, that a child with independent views should be able to intervene in the proceedings (and become a party to them) if he or she wishes to and should, in line with article 12 of the United Nations Convention on the Rights of the Child, have the opportunity to be heard. See paragraph 5.26 of the Report and Recommendation 34(a). The distinction is between enabling a child to be heard in a case concerning parental responsibilities or rights if the child wants to be heard (which the Commission advocates), and automatically appointing a legal representative to a child in every such case whether the child wants that or not (which the Commission does not advocate).

Clause 13

Clause 13 concerns the effect of court orders under clause 12 and implements Recommendations 37 and 38.

Subsection (1)

Subsection (1) implements Recommendation 38. An important part of the policy of the Report is that parents remain parents even if they can no longer live together or live with the child and that court orders should interfere with this position to the minimum necessary extent. Accordingly, this subsection stresses that an order under clause 12 by which any person acquires a parental responsibility or parental right deprives any other person of a parental responsibility or parental right only insofar as the order expressly so provides and only to the extent necessary to give effect to the order.

Subsection (2)

Subsection (2) implements Recommendation 37. Where the court makes a residence order to the effect that a child is to live with a person who is not the child's parent or guardian, it is appropriate that that person should have parental responsibilities and parental rights in respect of the child while the residence order is in force.

Clause 14

Clause 14 implements Recommendations 35 and 36. It replaces section 8 of the Matrimonial Proceedings (Children) Act 1958 which requires the court, in an action for divorce, nullity of marriage or separation, not to grant decree unless and until it is satisfied as to the arrangements made for any children of the marriage under the age of 16. Clause 14 is modelled on section 41 of the English Matrimonial Causes Act 1973, as substituted by the Children Act 1989, and places a more realistic duty on the courts.

Subsection (1)

Under this subsection the duty on the court is to consider whether there are any children of the family to whom this clause applies and, where there are, whether (in the light of information before it as to the arrangements which have been, or are proposed to be, made for their upbringing) it should exercise the powers conferred on it by clause 12 or by section 37(1B) of the Social Work (Scotland) Act 1968 (inserted by clause 15 below).

Subsection (2)

Subsection (2) is an adaptation of section 41(2) of the Matrimonial Causes Act 1973 as amended and deals with the postponement of decree until the court is in a position to exercise any of its powers under clause 12 or section 37(1B) of the Social Work (Scotland) Act 1968 (inserted by clause 15 below).

Subsection (3)

Clause 14 applies to any child of the family under 16 at the date when the court considers the case. For the definition of 'child of the family' see subsection (4) below.

(4) In this section "child of the family", in relation to the parties to a marriage, means—

(a) a child of both of those parties; and

(b) any other child, not being a child who is placed with those parties as foster parents by a local authority or voluntary organisation, who has been treated by both of those parties as a child of their family.

Treatment in consistorial actions etc of children requiring compulsory measures of care.

15. In section 37 of the Social Work (Scotland) Act 1968 after subsection (1A) there shall be inserted the following subsections—

"(1B) Where it appears to the court in the course of any proceedings to which this subsection applies that a child is in need of compulsory measures of care by reason that any of the conditions mentioned in paragraphs (a) to (f) and (gg) of section 32(2) of this Act is satisfied with respect to the child, it may refer the matter to the reporter specifying the relevant condition.

(1C) Subsection (1B) above applies to—

(a) an action for divorce or for a declarator of marriage, nullity of marriage, parentage or non-parentage;

(b) proceedings relating to parental responsibilities or parental rights or rights of guardianship within the meaning of Part I of the Family Law (Scotland) Act 1992;

(c) proceedings for an adoption order under the Adoption (Scotland) Act 1978 or for an order under section 18 of that Act declaring a child free for adoption.".

Awards of damages to children.

16.—(1) Where in any court proceedings a sum of money becomes payable to, or for the benefit of, a person under legal disability by reason of non-age, the court may make such order relating to the payment and management of that sum for the benefit of that person as it thinks fit.

(2) Without prejudice to the generality of subsection (1) above, the court may in an order under this section—

(a) appoint a judicial factor to invest, apply or otherwise deal with the money for the benefit of the person concerned;

(b) order the money to be paid to the sheriff clerk or the Accountant of Court, to be invested, applied or otherwise dealt with, under the directions of the court, for the benefit of that person;

(c) order the money to be paid to a parent or guardian of that person, to be invested, applied or otherwise dealt with, under the directions of the court, for the benefit of that person; or

(d) order the money to be paid directly to that person.

(3) The receipt of any person to whom payment is made in accordance with an order under this section shall be a sufficient discharge of the obligation to make the payment.

Subsection (4)

Subsection (4) implements Recommendation 36. The definition of "child of the family" is slightly wider than the existing definition which refers only to children of both parties or children of one party who have been "accepted" by the other as children of the family.

Clause 15

Clause 15 introduces into the Social Work (Scotland) Act 1968 a provision dealing with the treatment, in certain actions, of children requiring compulsory measures of care. See paragraph 5.43 of the Report. This follows upon a recommendation of the Scottish Child Care Law Review Group which reported in 1990. The court is empowered to remit a case to the reporter to the children's panel in certain circumstances. The provision applies to actions for divorce or for declarator of marriage, nullity of marriage, parentage or non-parentage, to proceedings relating to parental responsibilities or parental rights or rights of guardianship within the meaning of Part I of this Bill and to proceedings for an adoption order, or for an order declaring a child free for adoption, under the Adoption (Scotland) Act 1978. It enables existing provisions, whereby the court itself makes care or supervision orders, to be repealed in Schedule 2. This clause must be regarded as an interim solution pending the outcome of the government's consideration of the recommendations of the Scottish Child Care Law Review Group.

Clause 16

Clause 16 implements Recommendation 20 and deals with awards of damages to children. Whereas currently there are different rules for different courts, Recommendation 20 proposes a comprehensive scheme extending and generalising for all courts the powers available to make special provision for sums payable to children.

Subsection (1)

This subsection gives the court power to make such order as it thinks fit relating to the payment and management of the money where, in any court proceedings, a sum of money becomes payable to, or for the benefit of, a person under legal disability by reason of non-age.

Subsection (2)

Subsection (2) provides four options for a court making an order under this clause but these options are without prejudice to the court's power in subsection (1) above to make such order as it thinks fit.

Subsection (3)

This subsection ensures that the receipt of any person to whom payment is made in terms of the courts order would be a sufficient discharge of the obligation to make the payment.

Choice of law rules and jurisdiction

Parental responsibilities and parental rights and guardianship.

17.—(1) Subject to subsection (2) below, any question arising as to parental responsibilities or parental rights, or as to the responsibilities or rights of a guardian, in relation to a child shall be determined by the law of the place of the child's habitual residence at the time when the question arises.

(2) Any question concerning the immediate protection of a child shall be determined by the law of the place where the child is when the question arises.

(3) The foregoing provisions of this section are without prejudice to section 12(3) of this Act.

(4) Any question arising as to whether a person is validly appointed or constituted as guardian of a child shall be determined by the law of the place of the child's habitual residence on the date when the appointment was made or the event constituting the guardianship occurred.

(5) For the purposes of subsection (4) above, if the appointment was made by will, the date of the appointment shall be regarded as the date of death of the testator.

Jurisdiction in relation to administration of child's property.

18.—(1) The Court of Session shall have jurisdiction to entertain an application for an order relating to the administration of a child's property if the child is habitually resident, or the property is situated, in Scotland.

(2) A sheriff shall have jurisdiction to entertain such an application if the child is habitually resident, or the property is situated, in the sheriffdom.

Interpretation of Part I.

19. In this Part of this Act—

"consistorial action" means an action for divorce or for a declarator of marriage, nullity of marriage, parentage or non-parentage;

"parental responsibilities" has the meaning assigned by section 1 of this Act;

"parental rights" has the meaning assigned by section 2 of this Act;

"transaction" has the same meaning as in section 9 of the Age of Legal Capacity (Scotland) Act 1991.

Clause 17

Clause 17 concerns choice of law rules in respect of any question arising as to parental responsibilities, parental rights and guardianship. The separation of guardianship from parental rights and the new quasi-parental role of the guardian required a new look to be taken at choice of law rules. Clause 17 makes the habitual residence of the child the decisive factor. This is consistent with the primary rules on jurisdiction and recognition of judgments in the Family Law Act 1986.

Subsection (1)

This subsection implements Recommendations 39(a) and 40(b). Subject to subsection (2) below (which concerns any question about the child's immediate protection) any question arising as to parental responsibilities or parental rights or as to the responsibilities or rights of a guardian would be determined by the law of the place of the child's habitual residence at the time the question arises.

Subsection (2)

Subsection (2) ensures that the law of the place where the child is when the question arises will determine any question concerning the child's immediate protection. See Recommendations 39(b) and 40(c).

Subsection (3)

This subsection provides that subsections (1) and (2) above are without prejudice to the welfare principle set out in clause 12(3). See Recommendations 39(c) and 40(d).

Subsection (4)

Under this subsection the law of the place of the child's habitual residence on the date when the appointment was made or the event constituting the guardianship occurred determines questions as to whether a person is validly appointed or constituted as guardian. See Recommendation 40(a).

Subsection (5)

This subsection makes it clear that, for the purposes of subsection (4) above, the date of the appointment is regarded as the date of the testator's death in the case of an appointment made by will. See Recommendation 40(a).

Clause 18

Clause 18 implements Recommendation 41(b) and (c) and concerns the jurisdiction of the court to make orders relating to a child's property. The proposals in subsections (1) and (2) below regarding the *lex situs* are to cater for cases where there is a need for emergency action to protect the property or where a Scottish court is the only court which can deal with the matter effectively. An example of the latter would be where the law of the child's habitual residence did not give the child's guardian power to deal with immoveable property in Scotland.

Subsection (1)

Subsection (1) gives the Court of Session jurisdiction to entertain an application for an order relating to the administration of the child's property if the child is habitually resident, or the property is situated, in Scotland.

Subsection (2)

This subsection gives a sheriff jurisdiction to entertain an application for an order relating to the administration of a child's property if the child is habitually resident, or the property is situated, in the sheriffdom.

Clause 19

Clause 19 defines certain terms used in Part I of the Bill.

PART II

PROVISIONS RELATING TO MARRIAGE

Legal impediments to marriage.

20. In the 1977 Act for the words from the cross heading "Minimum age for marriage" to the end of section 2 there shall be substituted the following—

"Legal impediments to marriage

Person below the minimum age.

1.—(1) No person under the age of 16 may marry in Scotland.

(2) No person domiciled in Scotland may marry elsewhere while under that age.

Persons within the forbidden degrees of relationship.

2.—(1) No person may marry in Scotland a person related to him or her in a degree specified in column 1, or (as the case may be) column 2, of Schedule 1 to this Act.

(2) No person domiciled in Scotland may marry elsewhere a person so related to him or her.

(3) Nothing in the foregoing provisions of this section shall prevent a person marrying a person related to him or her in a degree specified in column 1 or 2 of paragraph 2 of that Schedule if—

(a) both persons have attained the age of 21 at the time of the intended marriage; and

(b) the younger of the persons has not at any time before attaining the age of 18 lived in the same household as the other person and been treated by the other person as a child of his or her family.

(4) References in this section and in Schedule 1 to this Act to relationships and degrees of relationship shall be construed in accordance with section 1(1) of the Law Reform (Parent and Child) (Scotland) Act 1986 and section 29 of the Human Fertilisation and Embryology Act 1990.

Persons of the same sex.

2A.—(1) No person may marry in Scotland another person of the same sex.

(2) No person domiciled in Scotland may marry elsewhere another person of the same sex.

Persons already married.

2B.—(1) No person who is already married may marry in Scotland.

(2) No person domiciled in Scotland may marry elsewhere if—

(a) he or she is already married; or

(b) the person whom he or she intends to marry is already married.

(3) This section is without prejudice to section 20 of this Act and section 50 of the Family Law Act 1986.

Legal incapacity by law of country where person domiciled.

2C. No person may marry in Scotland who is domiciled in a country other than Scotland and who according to the law of that country is incapable of marrying in Scotland:

Provided that this section—

(a) shall not apply to a person who is incapable only by reason of his or her colour, race or religion or for any other reason which is contrary to public policy in Scotland;

(b) shall not prevent a person marrying in Scotland on the ground that according to the law of that other country that person while under a certain age would require parental consent to marrying, unless that consent would be required while under that age, whatever the form of the marriage and wherever it were being celebrated.

Clause 20

Clause 20 deals with impediments to marriage from the point of view of parties contemplating marriage. It is to a large extent a re-enactment, with minor modifications, of provisions in the Marriage (Scotland) Act 1977. However, section 2(1B) of the 1977 Act is deliberately omitted. (See Recommendation 46). The proposed section 2C contains two new provisos, in implementation of Recommendations 72 and 74. The proposed section 2E is also new. It is a generalisation of a provision currently in section 2(5) of the 1977 Act and could be useful in, for example, cases where it is uncertain whether a person has in fact been treated as a child of a person's family, or where it is uncertain whether the public policy proviso in the proposed section 2C(a) applies.

Mental incapacity.

2D.—(1) No person who is incapable of understanding the nature of marriage or of giving consent to marriage may marry in Scotland.

(2) No person domiciled in Scotland who is incapable as aforesaid may marry elsewhere.

(3) This section is without prejudice to section 21(2) of the Family Law (Scotland) Act 1992.

Application to court for declarator of no legal impediment.

2E. Either party to an intended marriage may (whether or not an objection to the marriage has been submitted in accordance with section 5(1) of this Act) apply to the Court of Session or (if the marriage is to be solemnised in Scotland) to the sheriff of the sheriffdom in which the solemnisation is to take place, for a declarator that there is no legal impediment to the marriage under any of sections 1 to 2D of this Act.".

Void marriages.

21.—(1) A marriage entered into in Scotland shall be void if, but only if,—

(a) it was entered into in contravention of any of sections 1 to 2C of the 1977 Act;

(b) subject to subsection (2) below, either party did not freely consent to the marriage because he or she—

(i) at the time of the marriage ceremony was in error as to its nature or mistakenly believed that the other party at the ceremony was the person whom he or she had agreed to marry;

(ii) at the time of the marriage ceremony was incapable of understanding the nature of marriage or of giving consent to marriage; or

(iii) was forced against his or her will to marry the other party; or

(c) subject to subsection (5) below, there was a failure to comply with any of the following formal requirements of marriage—

(i) the giving of notice of intention to marry in accordance with section 3 of the 1977 Act;

(ii) the production to the approved celebrant, or (as the case may be) the availability to the authorised registrar, of a Marriage Schedule in respect of the marriage issued or completed in accordance with the 1977 Act;

(iii) the presence of both parties at the marriage ceremony;

(iv) the presence as witnesses of two persons professing to be 16 years of age or over;

(v) the solemnisation of the marriage by an approved celebrant or authorised registrar within the meaning of section 8 of the 1977 Act;

(vi) the outward exchange by the parties of present consent to the marriage.

(2) Where a party who has not freely consented to a marriage by reason of subsection (1)(b)(i),(ii) or (iii) above discovers the error, ceases to be subject to the incapacity or ceases to be forced against his or her will to accept the marriage, then, unless the party raises an action of declarator of nullity of the marriage as soon as is reasonably practicable after such discovery or cessation, the marriage shall be regarded as valid as from the date of the ceremony.

(3) A marriage entered into outwith Scotland by a person who at the time of the ceremony is domiciled in Scotland shall be void on the ground of that person's legal incapacity or lack of free consent to the marriage if, but only if, that person—

(a) was incapable of entering into the marriage by virtue of any of the prohibitions set out in sections 1(2), 2(2), 2A(2), 2B(2) and 2D(2) of the 1977 Act;

(b) did not freely consent to the marriage; and subsections (1)(b) and (2) above shall apply for the purposes of this paragraph as they apply for the purposes of a marriage solemnised in Scotland.

Clause 21

Clause 21 deals with the grounds on which a marriage is void. To a large extent it simply restates the existing law. The main change is the abolition of the concept of the voidable marriage in Scots law. Clause 21 implements Recommendations 43 to 50.

Subsection (1)

This sets out the grounds of nullity for marriages in Scotland, partly by reference back to clause 20. In summary, the grounds are:–

(a) party under the age of 16
(b) parties within forbidden degree of relationship
(c) parties of same sex
(d) party already married
(e) party lacking capacity to marry by law of foreign domicile
(f) lack of free consent, and
(g) failure to comply with essential formal requirements.

A failure to comply with certain formal requirements can, however, be cured by registration of the marriage. See subsection (5).

Subsection (2)

This implements Recommendation 48. The validity of a marriage must be challenged promptly if the marriage is to be regarded as invalid on the ground of a temporary defect in consent.

Subsection (3)

This deals with the substantive (as opposed to formal) grounds of nullity for marriages outside Scotland by people domiciled in Scotland. The formal validity of such marriages will normally depend on the law of the place of celebration. See clause 31.

(4) Nothing in the foregoing provisions of this section shall affect the validity or invalidity of any marriage entered into before the commencement of this Act.

(5) Without prejudice to section 24(1) of the 1977 Act, a marriage solemnised in Scotland (whenever solemnised) shall not be void because there has been a failure to comply with a formal requirement of marriage or because the person solemnising the marriage was not qualified to do so, if both parties were present at the marriage ceremony and the particulars of the marriage have been entered in a register of marriages by or at the behest of—

(a) in the case of a civil marriage, an authorised registrar;

(b) in any other case, a district registrar.

(6) Any marriage entered into before the commencement of this Act which at the time when it was entered into was void under Scots law by reason only of the degree of relationship between the parties to it, but which would not have been void for that reason if it had been entered into after the commencement of this Act, shall be deemed to have been valid as from that time.

(7) Nothing in subsection (5) or (6) above shall validate a marriage solemnised before the commencement of this Act and void at the time it was solemnised if, before such commencement, the marriage has been declared void by a competent court or another marriage has been entered into by either of the parties in reliance on the nullity of the first marriage.

(8) No marriage shall be voidable under the law of Scotland; and no action may be brought in any court in Scotland after the commencement of this Act for declarator of nullity of a marriage which at the time when the marriage was entered into was valid.

Abolition of marriages by cohabitation with habit and repute.

22. Marriage by cohabitation with habit and repute is hereby abolished, but such a marriage shall be regarded as having been contracted (whether or not a decree of declarator of marriage has been obtained before the commencement of this Act), if the legal requirements for establishing it were satisfied before the commencement of this Act.

Declaratory actions and interdicts relating to marriage.

23.—(1) The Court of Session or the sheriff court shall have jurisdiction to entertain actions of declarator of marriage or nullity of marriage.

(2) No person shall after the commencement of this Act be entitled to raise an action for declarator of freedom and putting to silence.

(3) For the avoidance of doubt, a court shall be entitled to grant an interdict or interim interdict against the repetition of a false assertion of marriage on the basis that such an assertion is a legal wrong.

Subsection (4)

The foregoing subsections are not retrospective. This means, among other things, that irregular marriages validly entered into in Scotland prior to the date of commencement are not invalidated by clause 21(1)(c).

Subsection (5)

This is a slightly expanded version of section 23A of the Marriage (Scotland) Act 1977. It prevents apparently regular marriages which have been duly registered in the normal way from being declared null later on the ground of non-compliance with a formal requirement. Being a protective provision, this subsection applies to marriages whenever solemnised (subject to subsection (7)).

Subsection (6)

This subsection validates any marriage entered into (perhaps abroad) by persons who were within the prohibited degrees of affinity at the time of the marriage but who are not within the prohibited degrees laid down by the Bill. It is subject to subsection (7).

Subsection (7)

This prevents the validating effect of subsections (5) and (6) from operating if the marriage in question had already been declared void or if another marriage had been entered into by either party in reliance on the nullity of the first marriage.

Subsection (8)

This subsection implements Recommendations 49 and 50. Its effect is to abolish nullity for impotence and to make it clear that a marriage which is initially valid will not be "annulled" by a Scottish court.

Clause 22

This clause implements Recommendation 42. It abolishes marriage by cohabitation with habit and repute, but only for the future. Any marriage by cohabitation with habit and repute already entered into by the date of commencement of the new legislation (whether or not a decree of declarator has been granted by a court) will be unaffected. There has been some academic debate about the true nature of marriage by cohabitation with habit and repute. Any argument to the effect that there is an innominate class of marriages by tacit consent which would remain unaffected by clause 22 would be met by clause 21(1)(c) which lays down certain formal requirements for all marriages entered into in Scotland in the future.

Clause 23

This clause implements Recommendations 51 and 52.

Subsection (1)

The only change in the law made by this subsection is that the sheriff courts are given jurisdiction in actions for declarator of marriage or nullity of marriage.

Subsections (2) and (3)

These subsections abolish actions for declarator of freedom and putting to silence (which have survived as a curious form of quasi-consistorial action) but make it clear that, if necessary, an ordinary interdict can be obtained to prevent false assertions of marriage.

Legal equality and independence of spouses.

24. Subject to the provisions of any enactment, marriage shall not by itself affect—

(a) the respective rights of the parties to the marriage in relation to their property;

(b) the legal capacity of the parties to the marriage;

(c) the right of either party to the marriage to bring proceedings against the other party;

(d) the domicile of either party to the marriage;

(e) the right of either party to determine where he or she is to live;

(f) the liability of either party for any debt or obligation incurred by the other party; or

(g) the liability of either party for the expenses of any proceedings to which the other party to the marriage is a party.

Prescription of occupancy rights in matrimonial home.

25. At the end of section 1 of the 1981 Act there shall be added the following subsection—

"(7) If an entitled spouse and a non-entitled spouse have been living apart from each other for a continuous period of two years and the non-entitled spouse has not occupied the matrimonial home at any time during that period, the occupancy rights of the non-entitled spouse in the home shall be extinguished at the end of that period.".

Occupancy rights in matrimonial home: dealings with third parties.

26.—(1) In section 6 of the 1981 Act—

(a) after subsection (1) there shall be inserted the following subsection—

"(1A) The rights conferred on a non-entitled spouse by the provisions of this Act in respect of a matrimonial home shall not be exercisable in a case where anyone—

(a) has acquired in good faith and for value the home or an interest in it from a person other than the entitled spouse; or

(b) has derived title to it from a person who has so acquired it.";

(b) in subsection (3)(f) for "5" there shall be substituted "2";

(c) at the end there shall be added the following subsection—

"(5) Where—

(a) there is an entitled spouse and a non-entitled spouse;

(b) the entitled spouse is the tenant of the matrimonial home; and

(c) the entitled spouse terminates the tenancy in a case where subsection (3) above does not apply,

the entitlement of the non-entitled spouse to continue to exercise occupancy rights in the matrimonial home shall be on the basis that the non-entitled spouse is the tenant of it under a tenancy on the same terms and conditions as the tenancy held by the entitled spouse immediately before the termination.".

Clause 24

This clause is a re-enactment, with minor modifications, of rules contained at present in several different statutes. (See Law Reform (Husband and Wife) Act 1962, s2; Domicile and Matrimonial Proceedings Act 1973, s1; Law Reform (Husband and Wife) (Scotland) Act 1984, ss3(2), 4, 6, 7 and 8; Family Law (Scotland) Act 1985, ss22 and 24.) It enables the above provisions to be repealed, simplifies the statute book and provides a suitable statement for inclusion in an ultimate code.

The only significant change in the law effected by the clause is the removal, in implementation of Recommendation 54, of the anomalous discretion which a court has under the Law Reform (Husband and Wife) Act 1962 to dismiss certain proceedings in delict between spouses.

Clause 25

This implements Recommendation 56. It protects a spouse from a delayed assertion of occupancy rights under the 1981 Act by his or her long-separated spouse.

Clause 26

This clause makes a number of minor reforms in relation to occupancy rights under the Matrimonial Homes (Family Protection) (Scotland) Act 1981.

Subsection (1)

This subsection removes some features of the existing law on "dealings" with the matrimonial home which can cause irritation, delay and inconvenience in ordinary conveyancing transactions. See Recommendation 55.

Subsection (1)(a)

This paragraph protects a person who has bought a house in good faith from claims to occupancy rights by the spouses of people who owned the house before the seller.

Subsection (1)(b)

Under section 6(3)(f) of the 1981 Act, if a person has bought a house from a married person and has immediately entered into occupation of it, the seller's spouse cannot assert occupancy rights in the house after a period of 5 years from the date of entry. This paragraph reduces the period to 2 years and thus provides earlier protection for the purchaser.

Subsection (1)(c)

Under the existing law if the sole tenant gives up the tenancy of a matrimonial home in such a way that his or her spouse retains occupancy rights in it, the spouse is not legally the tenant, which can cause difficulties both for the spouse remaining in the house and for the landlord. This paragraph deems the non-entitled spouse to be a tenant and thus places his or her occupation on a solid legal footing.

(2) In section 7 of the 1981 Act, after subsection (3) there shall be inserted the following subsections—

"(3A) Notwithstanding that negotiations have not yet been started or concluded in relation to a proposed dealing, the court may make an order under subsection (1) above but subject to the dealing consisting of—

(a) a sale which is for a price not less than an amount specified in the order and which is concluded within such time after the making of the order as may be specified therein;

(b) the grant of a heritable security for a loan of not more than an amount specified in the order and to be executed within such time after the making of the order as may be specified therein.

(3B) If the court declines to make an order under this section, it may make occupation of the matrimonial home by the non-entitled spouse subject to the non-entitled spouse making such payment or payments to the owner of the home, and subject to such other conditions, in respect of the occupancy as the court may specify.".

Matrimonial interdicts.

27.—(1) For section 14 of the 1981 Act there shall be substituted the following section—

"General provision.

14.—(1) The court may, on the application of a spouse, grant an interdict, or an interim interdict, (to be known as a "matrimonial interdict") which—

(a) restrains or prohibits any conduct of the non-applicant spouse towards the applicant spouse or a child of the family; or

(b) subject to subsection (2) below, prohibits the non-applicant spouse from entering or remaining in—

(i) the matrimonial home;

(ii) any other home or other premises occupied by the applicant spouse;

(iii) any place of work, or the school attended by any child in the care, of the applicant spouse; or

(iv) a specified area in the vicinity of any such home, premises, place of work or school.

(2) If the non-applicant spouse is entitled, or permitted by a third party, to occupy the matrimonial home, or has occupancy rights in it, the court shall not grant a matrimonial interdict prohibiting that spouse from entering, or remaining in, that home or a specified area in its vicinity unless the interdict is ancillary to an exclusion order or (as the case may be) to a refusal by the court of leave to exercise occupancy rights in the circumstances mentioned in section 1(3) of this Act.

(3) In the foregoing provisions of this section and sections 15 to 17 of this Act—

"applicant spouse" means the spouse who has applied for the interdict;

"non-applicant spouse" shall be construed accordingly;

"spouse" includes former spouse.

Subsection (2)

The new subsection (3A) added to section 7 of the 1981 Act enables a non-entitled spouse's consent to a proposed dealing to be dispensed with, on the statutory grounds, at an earlier stage than may be possible under the present law. See *Fyfe* v*Fyfe* 1987 SLT (Sh Ct) 38. The new subsection (3B) added to section 7 of the 1981 Act enables a court which refuses to dispense with consent to a dealing or proposed dealing to attach conditions, such as the making of payments in lieu of rent, to the continued occupancy of the home by the non-entitled spouse.

Clause 27

This clause extends the circumstances in which matrimonial interdicts and powers of arrest under the Matrimonial Homes (Family Protection) (Scotland) Act 1981 can provide protection against domestic violence.

Subsection (1)

This implements Recommendations 57 and 61. It re-enacts section 14 of the 1981 Act with the following changes.

The new section 14(1)(b) extends the potential geographical scope of a matrimonial interdict to include, in particular, the applicant spouse's place of work or the school attended by any child in his or her care.

The new section 14(2) puts into statutory form a principle recognised already by the courts—namely that a matrimonial interdict should not be used as a substitute for an exclusion order in a case where an exclusion order is the proper remedy. See *Tattersall* v *Tattersall* 1983 SLT 506.

The new section 14(3) enables a matrimonial interdict to be granted to a divorced spouse.

Subsection (2)

This resolves a doubt as to the onus of proof under section 15(1)(b) of the 1981 Act. See Recommendation 58.

Subsection (3)

At present a power to arrest attached to a matrimonial interdict ceases to have effect on divorce. This subsection enables it to continue to have effect after divorce. However, the power to arrest, whether or not there is a divorce, would cease to have effect after three years. See Recommendation 60.

(4) It shall be competent for the court to entertain an application for a matrimonial interdict, whether or not the spouses concerned are living together as husband and wife.".

(2) In section 15(1)(b) of the 1981 Act for the words "it appears to the court" there shall be substituted the words "the court is satisfied by the non-applicant spouse".

(3) In section 15(2) of the 1981 Act for the words from "unless" to the end there shall be substituted the words "cease to have effect on the expiry of a period of three years commencing with the date on which the power was granted unless it has been recalled or, on cause shown, renewed within that period.".

(4) In section 17 of the 1981 Act, subsections (4) and (5)(b)(ii) are hereby repealed.

The matrimonial home for the purposes of the 1981 Act.

28. In section 22 of the 1981 Act in the definition of the "matrimonial home"—

(a) the words "attached to, and" are hereby repealed;

(b) for the words "one spouse for that" there shall be substituted the words "anyone for one";

(c) at the end there shall be added the following words—

"and if the tenancy of a matrimonial home is transferred from one spouse to the other by agreement or under any enactment in order that the home may become the residence of the transferee separately from the other spouse, the residence shall not be a matrimonial home after the transfer.".

Abolition of actions for separation.

29. No person shall after the commencement of this Act be entitled to raise an action for separation.

Bars to divorce.

30.—(1) In section 1(3) of the 1976 Act for the words from "connived" to *"lenocinium"* there shall be substituted the words "actively promoted or encouraged by the pursuer".

(2) In the 1976 Act after the cross-heading "Supplemental" there shall be inserted the following section—

"Provisions relating to bars to divorce.

8A. In an action for divorce the court shall not grant decree of divorce if it is satisfied that (whether or not through the collusion of the parties) the pursuer has put forward a false case or the defender has withheld a good defence.".

(3) The following provisions of the 1976 Act are hereby repealed—

(a) section 1(5);

(b) section 9.

(4) Any rule of law whereby collusion between the parties is a bar to their divorce from each other is hereby abolished.

(5) In this section "the 1976 Act" means the Divorce (Scotland) Act 1976.

Choice of law rules on validity, and grounds for dissolution, of marriage.

31.—(1) Subject to the Foreign Marriage Act 1892, the question whether a marriage is formally valid shall be determined by the law of the place where the marriage is celebrated.

(2) Subject to section 50 of the Family Law Act 1986, in the case of a marriage solemnised outwith Scotland, the question whether the marriage is invalid on the ground that at the time of the marriage ceremony either party was legally incapable of entering into the marriage or did not give consent to it shall be determined by the law of the place where that party was domiciled immediately before the marriage.

Subsection (4)

This removes some provisions, which have proved to be unworkable in practice, concerning the procedure to be followed in relation to persons arrested under matrimonial interdicts. See Recommendation 62.

Clause 28

This clause removes some minor sources of doubt in the definition of "matrimonial home". It implements Recommendations 63 to 65.

Clause 29

This clause abolishes actions for judicial separation. It implements Recommendation 66.

Clause 30

This clause implements Recommendations 67 to 69.

Subsection (1)

No change in the law is made by this subsection but it replaces a phrase containing the Latin word *lenocinium* by an equivalent phrase in English.

Subsections (2) and (4)

These replace the law on collusion as a bar to divorce by a new provision making it clear that, whether or not there is collusion between the parties, the court will not grant divorce if satisfied that the pursuer has put forward a false case or that the defender has held back a good defence.

Subsection (3)

The bar to divorce in section 1(5) of the 1976 Act is inconsistent with the new law on financial provision on divorce which was introduced in 1985 and is removed by this subsection. The repeal of section 9 (which refers to collusion) is made possible by subsections (2) and (4).

Clause 31

This sets out choice of law rules on the validity of marriages and grounds for divorce. It states in statutory form what is probably the existing law on these questions. See Recommendations 70 to 75.

Subsection (1)

This puts into statutory form the well-established rule that the formal requirements of marriage are governed by the law of the place of celebration. The 1892 Act deals with consular etc. marriages abroad and the marriages abroad of certain people in, or connected with, the armed forces.

Subsection (2)

This provides that the question of a party's legal capacity to marry, and the question whether a party gave effective consent to the marriage, are governed by the law of that party's domicile immediately before the marriage. For marriages in Scotland, and for the rules applying to Scottish domiciliaries who marry outside Scotland, see clause 21.

(3) Where, according to the law of the place where a party to a marriage was domiciled immediately before the marriage, the party was legally capable or incapable of entering into the marriage, that capacity or incapacity shall not be recognised in Scotland if such recognition would be contrary to public policy in Scotland.

(4) For the purposes of this section, a party shall not be regarded as legally incapable of entering into a marriage by virtue of lack of parental consent unless that consent falls within proviso (b) to section 2C of the 1977 Act.

(5) A court in Scotland, in relation to any action for divorce coming before it, shall apply the internal law of Scotland.

Choice of law rules relating to matrimonial property.

32.—(1) Subject to the following provisions of this section, any question as to the rights of spouses to each other's property arising by virtue of the marriage shall be determined—

(a) in the case of immoveable property, by the law of the country where the property is situated;

(b) in the case of moveable property—

(i) if the spouses have the same domicile, by the law of that domicile;

(ii) if they do not have the same domicile, by assuming that the marriage has no effect on their rights to each other's property.

(2) Any question relating to the occupation or use of a matrimonial home which is moveable or the use of the contents of a matrimonial home (whether the home is moveable or immoveable) shall be determined by the law of the country where the matrimonial home is situated.

(3) A change of domicile by one or both of the spouses shall not affect a right in moveable property which has vested in either spouse immediately before that change.

(4) The foregoing provisions of this section are without prejudice to any agreement between the spouses to the contrary.

(5) This section shall not apply in relation to the law on aliment, financial provision on divorce, the transfer of property on divorce, or succession.

Subsection (3)

This puts into statutory form a public policy exception which would, for example, enable a Scottish court to disregard a foreign incapacity based on skin colour.

Subsection (4)

The effect of this subsection is that whether a requirement of parental consent goes to form or capacity depends on the nature of the requirement. If it prevents a marriage anywhere in any form it is a matter of capacity. If it prevents, say, only a marriage in a certain form or only a marriage in a particular place, then it is treated as a formal requirement. See clause 20 (inserting a new section 2C in the Marriage (Scotland) Act 1977).

Subsection (5)

This puts into statutory form the well-established rule that a Scottish court applies Scottish law in a divorce action.

Clause 32

Clause 32 implements Recommendations 76 to 79.

Subsection (1)

This lays down new choice of law rules in relation to matrimonial property. Paragraphs (a) and (b)(i) represent what is probably the present law. Paragraph (b)(ii) introduces a new rule to take account of the fact that a husband and wife can now have different domiciles.

Subsection (2)

This gives a choice of law rule for questions relating to the occupation or use of moveable homes (eg caravans) and to the use of the contents of a matrimonial home. The law of the country where the home is situated governs.

Subsection (3)

Vested rights are not to be affected by changes in domicile.

Subsection (4)

The parties can opt out of the normal choice of law rules by agreement (eg in a marriage contract).

Subsection (5)

This is for the avoidance of doubt. In relation to aliment and financial provision on divorce, or the transfer of property on divorce, a Scottish court would apply Scots law. Succession to moveable property is normally governed by the law of the deceased's last domicile: succession to immoveable property by the law of the country where the property is situated.

PART III

COHABITATION

Application of Part III.

33. This Part of this Act applies to cohabitants, that is to say a man and a woman who are not married to each other but who (whether or not they represent to others that they are married to each other) are living with each other as if they were husband and wife; and in this Part "cohabitant", "cohabitation" and "cohabiting" shall be construed accordingly.

Presumption of equal shares in household goods.

34.—(1) If any question arises as to the respective rights of ownership of cohabitants in any household goods acquired during the cohabitation otherwise than by gift or succession from a third party, it shall be presumed, unless it is proved that the goods belong to one of the cohabitants alone or to both but in unequal shares, that each has a right to an equal share in the goods in question.

(2) This section applies whether the question arises during or after the cohabitation.

(3) In this section "household goods" means any goods (including decorative or ornamental goods) kept or used at any time during the cohabitation in the house in which the cohabitants are or were cohabiting for their joint domestic purposes, other than—

(a) money or securities;

(b) any motor car, caravan or other road vehicle;

(c) any domestic animal.

Presumption of equal shares in money and property derived from housekeeping allowance.

35.—(1) If any question arises as to the right of a cohabitant to money derived from any allowance made by either of the cohabitants to the other cohabitant for their joint household expenses or for similar purposes, or as to any property acquired out of such money, the money or property shall, in the absence of any agreement between them to the contrary, be treated as belonging to each cohabitant in equal shares.

(2) This section applies whether the question arises during or after the cohabitation.

Financial adjustment on termination of cohabitation otherwise than by death.

36.—(1) Where a cohabitation is terminated otherwise than by death, the court may, on an application by either of the former cohabitants made within one year after the termination, make an order for the payment of a capital sum to the applicant by the other former cohabitant.

Clause 33

Clause 33 introduces Part III of the Bill which applies to cohabitants. "Cohabitants" are defined as a man and a woman who are not married to each other but who are living together as husband and wife whether or not they represent to others that they are married to each other. The words "cohabitant", "cohabitation" and "cohabiting" would be construed accordingly.

The policy of the Report is that legal intervention in this area ought to be confined to the easing of certain difficulties and the remedying of certain situations which are perceived as being harsh and unfair. It should neither undermine marriage nor undermine the freedom of those who have deliberately chosen not to marry.

Clause 34

Clause 34 applies to cohabitants a presumption of equal shares in household goods. This is a modification of the presumption which is applied by section 25 of the Family Law (Scotland) Act 1985 to married couples.

Subsection (1)

Subsection (1) implements Recommendation 80. It applies to household goods acquired during the cohabitation otherwise than by gift or succession from a third party. The presumption is that each cohabitant has a right to an equal share in the goods unless it is proved that the goods belonged to one of the cohabitants alone or to both but in unequal shares.

Subsection (2)

This subsection applies clause 34 whether the question as to the respective rights of ownership of the cohabitants in household goods arises during or after the cohabitation.

Subsection (3)

Subsection (3) contains the proposed definition of "household goods". It is a modification of the definition in section 25(3) of the Family Law (Scotland) Act 1985.

Clause 35

Clause 35 implements Recommendation 81 and applies to cohabitants a presumption of equal shares in money and property derived from a housekeeping allowance.

Subsection (1)

Subsection (1) is a modification of section 26 of the Family Law (Scotland) Act 1985 which applies such a presumption to married couples. The money or property is, in the absence of any agreement to the contrary, to be treated as belonging to each cohabitant equally. The presumption applies to money derived from any allowance made by one cohabitant to the other for their joint household expenses or similar purposes, and to any property acquired out of such money.

Subsection (2)

This subsection applies clause 35 whether the question as to the right of a cohabitant to such money or property arises during or after the cohabitation.

Clause 36

Clause 36 implements Recommendation 82 and concerns financial adjustment on termination of cohabitation otherwise than by death. The Report does not favour a comprehensive system of financial provision comparable to the system of financial provision on divorce provided by the Family Law (Scotland) Act 1985 as that would be to impose a regime on couples who may well have opted for cohabitation in order to avoid such consequences. It is considered however that it would be unfair to let economic gains and losses arising out of contributions or sacrifices made in the course of a relationship of cohabitation simply lie where they fall.

Subsection (1)

Subsection (1) permits a former cohabitant, where the cohabitation has terminated otherwise than by death, to apply to the court for an order for the payment of a capital sum. The ground of application is based on the principle in section 9(1)(b) of the Family Law (Scotland) Act 1985. The application would have to be made within one year after the termination of the cohabitation.

(2) The court shall make an award to the applicant in pursuance of an application under subsection (1) above only if it is satisfied—

(a) that the other former cohabitant has derived economic advantage from contributions by the applicant, or that the applicant has suffered economic disadvantage in the interests of the other former cohabitant or their children; and

(b) that having regard to all the circumstances of the case it is fair and reasonable to make such an award.

(3) A court shall have jurisdiction to entertain an application under subsection (1) above if, on the assumption that the parties were married to each other, it would have jurisdiction to entertain an action of divorce between them.

(4) The court, on an application being made to it under subsection (1) above, may make such interim award to the applicant as it thinks fit.

(5) The court, on making an order under this section for the payment of a capital sum, may do either or both of the following—

(a) stipulate that the order shall come into effect at a specified future date; or

(b) order that the capital sum shall be payable by instalments.

(6) Where the court makes an order in accordance with paragraph (a) or (b) of subsection (5) above, it may, on an application by any party, vary the date or method of payment of the capital sum or the number of instalments payable, the amount of any instalment or the date on which any instalment becomes payable.

(7) In this section and section 37 of this Act—

"economic advantage" includes gains in capital, in income and in earning capacity, and "economic disadvantage" shall be construed accordingly;

"contributions" includes indirect and non-financial contributions and, in particular, any such contribution made by looking after the house in which the couple were cohabiting or caring for any children of the couple.

(8) Any reference in this section and section 37 of this Act to the children of a former cohabiting couple or of the applicant and the deceased shall include a reference to children treated by both of them as children of their family.

Financial provision from estate of deceased cohabitant.

37.—(1) Where a person dies domiciled in Scotland and immediately before his or her death was cohabiting, the surviving cohabitant may apply to the court for an order under section 38 of this Act on the ground that the disposition of the deceased's estate (whether under a will or on intestacy) is not such as to make such financial provision for the applicant as it would be reasonable to expect the applicant to receive having regard to all the circumstances of the case, including in particular the following matters—

(a) the length of the cohabitation;

(b) the existence of any children resulting from the relationship of the applicant with the deceased;

(c) the size and nature of the net estate of the deceased;

(d) any benefit received, or to be received, by the applicant from a third party on, or as a result of, the deceased's death;

(e) the nature and extent of any other rights against, or claims on, the deceased's net estate;

(f) the nature and extent of any contributions made by the applicant from which the deceased has derived economic advantage;

(g) the nature and extent of any economic disadvantage suffered by the applicant in the interests of the deceased or of their children.

Subsection (2)

The court would make an award only if it was satisfied that the other former cohabitant had derived economic advantage from contributions by the applicant or that the applicant had suffered economic disadvantage in the interests of the other former cohabitant or their children (as defined in subsection 8), and that it was fair and reasonable to make such an award having regard to all the circumstances of the case.

Subsection (3)

A court would have jurisdiction to entertain a subsection (1) application if it would have had jurisdiction to entertain an action of divorce between the parties.

Subsection (4)

This subsection would enable an interim award to be made.

Subsection (5)

Subsection (5) would enable the court on making an order for the payment of a capital sum to defer the coming into effect of the order until a specified date, or to order that the capital sum be payable by instalments.

Subsection (6)

The court would have power, where it defers the coming into effect of the order, or where it makes an order for payment by instalments, on an application by any party, to vary that order in a number of ways relating to the time and method of payment but not to vary the total amount.

Subsection (7)

Subsection (7) defines "economic advantage" and "contributions" for the purposes of this clause and clause 37. It is based on section 9(2) of the Family Law (Scotland) Act 1985, with minor modifications.

Subsection (8)

This subsection provides that any reference in this clause and clause 37 to the children of a former cohabiting couple or of the applicant and the deceased includes a reference to children treated by both of them as children of their family.

Clause 37

Clause 37 (together with clause 38) implements Recommendation 83 and concerns financial provision from the estate of a deceased cohabitant. The clause introduces a discretionary system in order that the widely differing circumstances of different cases could be taken into account.

Subsection (1)

Subsection (1) sets out the circumstances in which a surviving cohabitant may apply to a court for an order under clause 38. The deceased cohabitant must have died domiciled in Scotland and, immediately before death, must have been cohabiting with the applicant. "Immediately" is, however, qualified by subsection (2) below. The only ground of application is that the disposition of the deceased's estate, whether under a will or on intestacy, was not such as to make such financial provision for the applicant as it would have been reasonable to expect the applicant to receive having regard to all the circumstances of the case, including, in particular, the matters listed in (a)–(g) of subsection (1).

(2) For the purposes of subsection (1) above, in determining whether the deceased and another person were cohabiting with each other immediately before the death of the deceased there shall be disregarded—

(a) any temporary absence of those persons from each other; and

(b) any absence of them from each other, whether temporary or not, by reason only of the fact that either of them was, or both of them were, undergoing medical or other treatment as an in-patient in a hospital or similar institution.

(3) An application for an order under section 38 of this Act shall not be made after the end of the period of 6 months commencing with the date of the deceased's death unless the court, on cause shown, permits such an application to be made after the end of that period.

(4) The deceased's executor shall not be liable for having distributed any part of the deceased's estate after the end of the said period of 6 months on the ground that the executor ought to have taken into account the possibility that the court might permit the making of an application for an order under section 38 of this Act after the end of that period: Provided that this subsection shall not prejudice any power to recover, by reason of the making of such an order, any part of the estate so distributed.

(5) For the purposes of this section and section 38 of this Act—

"the court" means—

(a) the Court of Session; or

(b) the sheriff in whose jurisdiction the deceased was domiciled at the date of death or, if the deceased was domiciled in Scotland at that date but not in a particular part of it or it is unknown in which part the deceased was so domiciled, the sheriff at Edinburgh;

"net estate", in relation to the deceased person, means the deceased's estate less—

(a) the debts (other than inheritance tax) for which the estate is liable as at the date of death; and

(b) any funeral expenses.

Disposal by court of application under s.37.

38.—(1) Where the court, on an application being made to it under section 37 of this Act, is satisfied that the applicant has established the ground mentioned in subsection (1) of that section, it may make either or both of the following orders—

(a) an order for the payment to the applicant out of the deceased's net estate of a capital sum of such amount as may be specified in the order;

(b) an order for the transfer to the applicant of such property comprised in that estate as may be so specified.

(2) The court, on an application being made to it under section 37 of this Act, may make such interim award to the applicant as it thinks fit.

(3) The court, on making an order under—

(a) paragraph (a) of subsection (1) above, may do either or both of the following—

(i) stipulate that the order shall come into effect at a specified future date; or

(ii) order that the capital sum shall be payable by instalments;

(b) paragraph (b) of that subsection, may stipulate that the order shall come into effect at a specified future date.

(4) Where the court makes an order in accordance with subsection (3)(a) or (b) above, it may, on an application by any party, vary the date or method of payment of the capital sum, the number of instalments payable, the amount of any instalment or the date on which any instalment becomes payable, or the date of transfer of property (as the case may be).

Subsection (2)

It would be unfair to cut off a cohabitant's rights merely because, for example, the deceased had died in hospital. This subsection accordingly provides that in determining whether the deceased and another person were cohabiting with each other immediately before the death of the deceased any temporary absence, and any absence (whether temporary or not) by reason of medical or other treatment as an in-patient in a hospital or similar institution, is to be disregarded.

Subsection (3)

Subsection (3) places a time limit on applications of six months from the date of death with power to the court to allow late applications on cause shown.

Subsection (4)

This subsection ensures that executors will not be liable for having distributed any estate after the period of six months from the date of death without having taken account of the possibility of a claim having been made and allowed, under subsection (3) above, later than six months after the date of death. However nothing in subsection (4) would prejudice any power to recover, by reason of the making of such an order, any part of the estate so distributed.

Subsection (5)

This subsection defines "the court" and "net estate" for the purposes of this clause and clause 38. The proposed rules of jurisdiction are similar to the rules in the Succession (Scotland) Act 1964 and in the draft Bill appended to our report on *Succession*, Scot Law Com No 124 (1990) page 156. "Net estate" has the same meaning as in our report on *Succession*.

Clause 38

Clause 38 (together with clause 37) implements Recommendation 83 and concerns the disposal by the court of an application under clause 37 for an order for financial provision.

Subsection (1)

Subsection (1) empowers the court to make an order for payment of a capital sum or a transfer of property or both.

Subsection (2)

This subsection enables the court to make an interim award.

Subsection (3)

Where the court orders payment of a capital sum it would have power to order the payment to be deferred or the payment to be by instalments or both; where the court orders a transfer of property it would have power to order the transfer to be deferred.

Subsection (4)

The court, where it orders the payment of a capital sum to be deferred or the payment to be by instalments, or where it orders the transfer of property to be deferred, could vary that order in a number of ways on an application by any party.

(5) In making an award to the applicant in an order under subsection (1) above, the court shall order that the liability for meeting the award shall be met by or apportioned among such other persons with a right in the deceased's net estate, and in such proportions, as to the court seems appropriate.

(6) After section 147 of the Inheritance Tax Act 1984 there shall be inserted the following section—

"Scotland: court award to cohabitant of deceased.

147A. Where on the death of a person a capital sum is payable, or property is transferable, to a cohabitant of the deceased out of the deceased's net estate by virtue of an order under subsection (1) of section 38 of the Family Law (Scotland) Act 1992, this Act shall have effect as if—

(a) that capital sum or property had been left by the deceased to the cohabitant; and

(b) the amount to which any other person was entitled out of the deceased's net estate had been altered in accordance with any order under subsection (5) of that section.".

Domestic interdicts

39. After section 18 of the Matrimonial Homes (Family Protection) (Scotland) Act 1981 there shall be inserted the following section—

"Domestic interdicts.

18A.—(1) The court may, on the application of one partner of a cohabiting couple, grant an interdict, or an interim interdict, (to be known as a "domestic interdict") which—

(a) restrains or prohibits any conduct of the non-applicant partner towards the applicant partner or a child of the family; or

(b) subject to subsection (2) below, prohibits the non-applicant partner from entering or remaining in—

(i) the house in which the couple are or were cohabiting;

(ii) any other house or other premises occupied by the applicant partner;

(iii) any place of work, or the school attended by any child in the care, of the applicant partner; or

(iv) a specified area in the vicinity of any such house, premises, place of work or school.

(2) If the non-applicant partner is entitled, or permitted by a third party, to occupy the house in which the couple are or were cohabiting, or has occupancy rights in it, the court shall not grant a domestic interdict prohibiting that partner from entering, or remaining in, that house or a specified area in its vicinity unless the interdict is ancillary to an exclusion order or (as the case may be) to a refusal by the court of leave to exercise occupancy rights in the circumstances mentioned in section 1(3) of this Act.

(3) Sections 15 to 17 of this Act shall, subject to any necessary modifications, apply to a cohabiting couple as they apply to parties to a marriage.

(4) In this section—

(a) "applicant partner" means the partner who has applied for the interdict and non-applicant partner shall be construed accordingly;

(b) any reference to a cohabiting couple includes a reference to a couple who formerly cohabited.

(5) Expressions used in this section and in section 18 of this Act have the same meanings in this section as in that section.".

Subsection (5)

The court could order that the liability for any award would be met or apportioned among such other persons with a right in the deceased's net estate, and in such proportions, as it thought appropriate.

Subsection (6)

This subsection contains a consequential addition to section 147 of the Inheritance Tax Act 1984.

Clause 39

Clause 39 implements Recommendation 84. The existing position whereby the protection of a matrimonial interdict is available only if a cohabitant has obtained a grant of occupancy rights from a court, or if both cohabitants are entitled, or permitted by a third party, to occupy the home (the Matrimonial Homes (Family Protection) (Scotland) Act 1981, section 18(3)) is anomalous. The policy of the Report is that domestic interdicts (the term "matrimonial interdict" being inappropriate for a remedy available to unmarried persons) with powers of arrest attachable, should be available to cohabitants, whether or not they have occupancy rights. Accordingly, clause 39 adds a new section, section 18A, to the said 1981 Act.

The proposed new section 18A of the 1981 Act incorporates, in subsection (1)(b), the extended application proposed in respect of matrimonial interdicts by Recommendation 57 and clause 27 of the Bill. The protection would also apply to a couple who formerly cohabited, by virtue of the definition in subsection (4)(b). This would be in line with Recommendation 61 and clause 27 of the Bill which propose that the definition of matrimonial interdict should be extended to protect a former spouse.

Insurable interest in life of cohabiting partner.

40. For the avoidance of doubt, a cohabitant has, and shall be deemed always to have had, an insurable interest in the life of the other cohabitant to the same extent as a cohabitant has an insurable interest in his or her own life.

Extension of Married Women's Policies of Assurance (Scotland) Act 1880 to cohabitants.

41. Section 2 of the Married Women's Policies of Assurance (Scotland) Act 1880 (which enables a person to take out a life insurance policy on his or her own life for the benefit of his or her spouse and their children in such a way that the policy is held in trust for the beneficiary as soon as it is effected) shall have effect as if any reference to a spouse included a reference to a cohabitant.

Contracts between cohabitants.

42. A contract shall not be void or unenforceable solely because it is a contract between cohabitants or between persons who enter into the contract in contemplation of cohabiting with each other.

Clause 40

Whereas it is clear that one spouse has an insurable interest in the life of the other it is not clear that one cohabitant has an insurable interest in the life of the other. In order to remove any doubt, clause 40 implements Recommendation 85 by providing that a cohabitant has, and shall be deemed always to have had, an insurable interest in the life of the other cohabitant to the same extent as he or she has an insurable interest in his or her own life.

Clause 41

Clause 41 extends the benefits of the Married Womens Policies of Assurance (Scotland) Act 1880 to cohabitants. See Recommendation 86. This would make it easier for people to provide for their dependants. The 1880 Act enables a person to take out a life insurance policy on his or her own life for the benefit of his or her spouse in such a way that the policy is held in trust for the beneficiary as soon as it is effected without the need for any delivery or intimation. Currently, a cohabitant can take out a policy on his or her own life for the benefit of his or her partner, without the benefit of the Act, by either naming the partner as the direct beneficiary or by taking the policy in trust for the cohabitant. In either case however there would have to be delivery of the policy or the equivalent of delivery before the cohabitant would acquire a vested beneficial right.

Clause 42

Clause 42 implements Recommendation 87. It provides, for the avoidance of doubt, that a contract between cohabitants or prospective cohabitants regulating questions of property and finance arising out of their cohabitation is not void or unenforceable solely because it was concluded between parties in this type of relationship.

PART IV

MISCELLANEOUS AND GENERAL

Choice of law rules in actions for aliment.

43. Subject to the Maintenance Orders (Reciprocal Enforcement) Act 1972, a court in Scotland, in relation to any action for aliment coming before it, shall apply the internal law of Scotland.

Abolition of status of illegitimacy.

44.—(1) In section 1(1) of the Law Reform (Parent and Child) (Scotland) Act 1986 for the words from "establishing" to "accordingly" there shall be substituted the words "determining the person's legal status and in establishing the legal relationship between the person and any other person; and accordingly no person whose status is governed by Scots law shall be illegitimate and".

(2) For section 1(4) of the said Act of 1986 there shall be substituted the following subsection—

"(4) Any reference (whether directly or indirectly and however expressed) in any enactment passed or made, or in any deed executed, before the commencement of the Family Law (Scotland) Act 1992 to—

(a) a legitimate or lawful person shall be construed as a reference to a person whose parents were married to each other at the time of that person's conception or at any later time;

(b) an illegitimate person shall be construed as a reference to a person whose parents have never been married to each other at any time since that person's conception.".

Domicile of children.

45.—(1) A child is domiciled in the country with which he or she is for the time being most closely connected.

(2) Where the child's parents are domiciled in the same country and the child has his or her home with either or both of them, it is to be presumed, unless the contrary is shown, that the child is most closely connected with that country.

(3) Where the child's parents are not domiciled in the same country and the child has his or her home with one of them, but not with the other, it is to be presumed, unless the contrary is shown, that the child is most closely connected with the country in which the parent with whom the child has his or her home is domiciled.

(4) The rules laid down by the foregoing provisions of this section apply to times before this Act comes into force but only for the purpose of determining where at any time after this Act comes into force a child is domiciled.

(5) Where those rules apply, they do so in place of the corresponding rules of the common law and section 4 of the Domicile and Matrimonial Proceedings Act 1973 and section 9(1)(a) of the Law Reform (Parent and Child) (Scotland) Act 1986.

(6) In this section—

"child" means a person who has not attained the age of 16 years;

"country" includes territory and means, in relation to a person whose domicile at a particular time is in question, a country which has its own system of law at that time.

Choice of law rules as to whether parents' marriage affects person's status.

46. Any question arising as to the effect, if any, that the marriage or former marriage of a person's parents to each other may have in determining that person's status at any time, shall be determined by reference to the law of the country in which that person is domiciled at that time.

Interpretation, saving and transitional provisions, minor and consequential amendments and repeals.

47.—(1) In this Act—

"the 1977 Act" means the Marriage (Scotland) Act 1977;

"the 1981 Act" means the Matrimonial Homes (Family Protection) (Scotland) Act 1981;

"parent", in relation to any person, means, subject to Part IV of the Adoption (Scotland) Act 1978 and sections 27 to 30 of the Human Fertilisation and Embryology Act 1990, that person's genetic father or mother.

Clause 43

This implements Recommendation 91.

Clause 44

This clause implements Recommendation 88(a) and (d).

Subsection (1)

This subsection abolishes the legal status of illegitimacy in Scots law.

Subsection (2)

To cater for "old" enactments or deeds which refer to "legitimate" persons or "illegitimate" persons this subsection provides a translation. A reference to an "illegitimate" person in a trust deed executed in, say, 1960 will be construed in accordance with the new section 1(4)(b) of the 1986 Act.

Clause 45

This implements Recommendation 89. This clause could be removed from the Bill if the report of the Scottish and English Law Commissions on the *Law of Domicile* (Scot Law Com No 107; Law Com No 168, 1987) were implemented before the Bill was introduced.

Clause 46

This clause implements Recommendation 90. Its effect would be that no person domiciled in Scotland would, while so domiciled, be regarded by the law of Scotland as an unlawful, or illegitimate or second-class person simply because his or her parents had not married each other.

Clause 47

Subsection (1)

This definition of "parent" is simply for clarification.

(2) Nothing in this Act including in particular the repeal of the Legitimation (Scotland) Act 1968 shall apply to any title, honour or dignity transmissible on the death of the holder thereof or affect the succession thereto or the devolution thereof.

(3) Nothing in this Act shall affect any legal proceedings commenced, or any application made to a court, before this Act comes into operation.

(4) The repeal by this Act of section 25(2) of the Judicial Factors Act 1849 shall not affect the administration of any estate in relation to which an account of charge and discharge has been lodged with the Accountant of the Court of Session before the commencement of this Act.

(5) The enactments mentioned in Schedule 1 to this Act shall have effect subject to the minor and consequential amendments respectively specified in that Schedule.

(6) The enactments specified in Schedule 2 to this Act are hereby repealed to the extent set out in the third column of that Schedule.

(7) The Secretary of State may by order make such amendments or repeals, in such enactments as may be specified in the order, as appear to the Secretary of State to be necessary or expedient in consequence of any provision of this Act.

(8) The power to make an order conferred by subsection (7) above shall be exercisable by statutory instrument which shall be subject to annulment in pursuance of a resolution of either House of Parliament.

Short title, commencement and extent.

48.—(1) This Act may be cited as the Family Law (Scotland) Act 1992.

(2) This Act, apart from this section, shall come into operation on such day as the Secretary of State may appoint by order made by statutory instrument.

(3) Paragraphs 9, 11, 91, 92, 109, 110, 111, 113, 114 and 115 of Schedule 1 to this Act shall extend to England and Wales but, save as aforesaid, this Act shall extend to Scotland only.

Subsection (2)

This is similar to section 37(1)(a) of the Succession (Scotland) Act 1964 except that, in accordance with suggestions made by the Lord Lyon, there is no reference to coats of arms and there is an express reference to the Legitimation (Scotland) Act 1968. See paragraphs 17.6 and 17.11.

Subsections (3) and (4)

These are transitional provisions.

Subsections (7) and (8)

Although we have tried to identify all necessary consequential amendments, it is possible (in the absence of a computerised data base for Scottish statutes) that we have overlooked some obscure reference to, say, "custody orders" which ought to be updated. These provisions, which are based on similar provisions in the Children Act 1989, would enable the updating to be done by statutory instrument.

Clause 48

These are provisions in the usual form on short title, commencement and extent.

SCHEDULES

Section 47(5).

SCHEDULE 1

MINOR AND CONSEQUENTIAL AMENDMENTS

The Improvement of Land Act 1864 (c.114)

1. In section 24 for the words from the beginning to the word "feoffee" where it last occurs there shall be substituted the words "Any person entitled to act as the legal representative of a person under legal disability by reason of non-age or mental incapacity shall be entitled to act on behalf of that person for the purposes of this Act; and any trustee, judicial factor, executor or administrator shall have the same rights and powers for the purposes of this Act as if the property vested in or administered by him had been vested in him in his own right; but no such legal representative".

The Sheriff Courts (Scotland) Act 1907 (c.51)

2. In section 5 for subsections (2) to (2C) there shall be substituted the following subsection—

"(2) Actions relating to family law matters.".

The Judicial Proceedings (Regulation of Reports) Act 1926 (c.61)

3. For section 1(5) there shall be substituted the following subsection—

"(5) In relation to judicial proceedings in Scotland, subsection (1)(b) shall have effect as if for the words from "dissolution" to "rights" there were substituted the words "dissolution of marriage or for nullity of marriage.".

The Children and Young Persons (Scotland) Act 1937 (c.37)

4. In section 12—

(a) in subsection (1) for the words from "has the custody" to "that age" there shall be substituted the words "who has parental responsibilities in relation to a child or to a young person under that age or the charge or care of a child or such a young person,";

(b) in subsection (2)(a) after the words "young person" there shall be inserted the words "or the legal guardian of a child or young person";

(c) in subsection (4) for the words from "of whom" to "or care" there shall be substituted the words "and he had parental responsibilities in relation to, or the charge or care of, that child or young person".

5. In section 15(1) and (2) for the words "the custody" there shall be substituted the words "parental responsibilities in relation to, or having the".

6. In section 22 for the words from "having the custody" to "seven years" there shall be substituted the words "and who has parental responsibilities in relation to a child under the age of seven years or the charge or care of such a child,".

7. In section 27, in the second paragraph for the words "the custody of" there shall be substituted the words "parental responsibilities in relation to".

8. In section 110(1) after the definition of "local authority" there shall be inserted the following definition—

""parental responsibilities" has the same meaning as in section 1 of the Family Law (Scotland) Act 1992;".

Schedule 1

Paragraph 1

This is consequential on the new terminology on legal representation. It modernises some out-dated wording in section 24.

Paragraph 2

As the sheriff courts will be competent in all family law matters once the Bill is enacted it is possible to simplify section 5 considerably. This paragraph makes the necessary amendment.

Paragraph 3

This provision is consequential on the abolition of judicial separation.

Paragraphs 4–8

These paragraphs replace references to "custody" by "parental responsibilities" and insert a definition of "parental responsibilities". Paragraph 4(b) adds to section 12(2)(a) a reference to the legal guardian of a child or young person which is consistent with the amendment made to the Children and Young Persons Act 1933 by the Children Act 1989, Schedule 12, paragraph 2.

The Mines and Quarries Act 1954 (c.70)

9. In section 182(1) in the definition of "parent" for the words from "means" to "and includes" there shall be substituted the words "means a parent of a young person or any person who is not a parent of his but who has parental responsibility for him (within the meaning of the Children Act 1989) or who has parental responsibilities in relation to him (within the meaning of section 1 of the Family Law (Scotland) Act 1992), and includes".

The Matrimonial Proceedings (Children) Act 1958 (c.40)

10. In section 11(1) for the words from the beginning to "the court may" there shall be substituted the words "Where the court is considering any question relating to the care and upbringing of a child, it may".

The Factories Act 1961 (c.34)

11. In section 176(1) in the definition of "parent" for the words from "means" to "and includes" there shall be substituted the words "means a parent of a child or young person or any person who is not a parent of his but who has parental responsibility for him (within the meaning of the Children Act 1989) or who has parental responsibilities in relation to him (within the meaning of section 1 of the Family Law (Scotland) Act 1992), and includes".

The Education (Scotland) Act 1962 (c.47)

12. In section 145(33) for the words "the actual custody of" there shall be substituted the words "parental responsibilities (within the meaning of section 1 of the Family Law (Scotland) Act 1992) in relation to, or has care of,".

The Registration of Births, Deaths and Marriages (Scotland) Act 1965 (c.49)

13. In section 20(3)(a) for sub-paragraphs (i) and (ii) there shall be substituted the words "by the person's parent or guardian; or".

14. In section 43(3) after the words "mother of the child" there shall be inserted the words "or (if there is no entry for the father as such in the register of births or the Register of Corrections Etc) the mother of the child".

15. In section 43(10) for the words from "and who" to the end there shall be substituted the words "unless his name appears in the register of births or the Register of Corrections Etc as the child's father".

16. In section 53(3)(c) after the word "fails" there shall be inserted the words "without reasonable excuse".

The Law Reform (Miscellaneous Provisions) (Scotland) Act 1966 (c.19)

17. In section 8(1) for paragraphs (b) to (d) there shall be substituted the following paragraphs—

"(b) an order for payment by one of the former spouses to the other of a periodical allowance on divorce;

(c) an order under section 12 of the Family Law (Scotland) Act 1992 or under any earlier enactment relating to the custody, care or supervision of a child, or access to a child;"

18. In section 8(6), in the definition of "sheriff"—

(a) in paragraph (a) for the words "subsection (1)(a), (b) or (c)" there shall be substituted the words "subsection (1)(a) or (b)";

(b) in paragraph (b) for the words "subsection (1)(d)" there shall be substituted the words "subsection (1)(c)".

Paragraph 9

The Children Act 1989, Schedule 13, paragraph 13 altered the definition of "parent" for England and Wales only. This paragraph inserts a definition in a form which is suitable for both English and Scots law.

Paragraph 10

This is consequential on the repeal of section 8 of the 1958 Act (see Recommendation 35) and on the proposed replacement of the term "custody".

Paragraph 11

The purpose of this paragraph is to provide a definition of "parent" which is suitable for both English and Scots law.

Paragraph 12

This paragraph substitutes the proposed new concept of "parental responsibilities" for "custody".

Paragraphs 13-16

These paragraphs are mainly consequential on the provision in clause 3 giving both parents parental responsibilities and rights whether or not they are or have been married to each other. Paragraph 16 makes a minor amendment which would give a person a defence to a prosecution for failing to register a child's birth if the person had reasonable cause for failing to do so—as a father might have if, for example, he was abroad on military service at the time of the birth.

Paragraphs 17 and 18

These paragraphs simplify the existing section 8(1)(b)–(d) and make amendments consequential on the provisions in the Bill regarding parental responsibilities, parental rights and guardianship.

19. In section 5B(4)(b) for the word "rights" there shall be substituted the words "responsibilities and parental rights (within the meaning of Part I of the Family Law (Scotland) Act 1992)".

20. In section 16(11)(c) for the words from "the Law" to "1986" there shall be substituted the words "Part I of the Family Law (Scotland) Act 1992".

21. In section 17A—

(a) in subsection (1) for the words from "access" to "make such" there shall be substituted the words "the maintenance of personal relations and direct contact between a child who is the subject of a resolution under section 16 of this Act and his parent or guardian ("contact arrangements") or refuse to make contact";

(b) in subsection (3) for the words "access shall state that access" there shall be substituted the words "contact arrangements shall state that the arrangements";

(c) in subsection (4) for the words "arrangements for access" there shall be substituted the words "contact arrangements" and the words "for access" where they occur for the second time are hereby repealed;

(d) in subsection (5) for the words "arrangements for access" there shall be substituted the words "contact arrangements" and for the word "access" where it occurs for the second and third time there shall be substituted the word "contact".

22. In section 17B—

(a) in subsection (1) for the words "an "access order"" there shall be substituted the words "a "contact order"";

(b) in subsection (2) for the words "An access" there shall be substituted the words "A contact" and for the words from "allow" to the end there shall be substituted the words "make such arrangements for the maintenance of personal relations and direct contact between the child and the parent or guardian as the order may specify";

(c) in subsection (3) for the words "an access" there shall be substituted the words "a contact".

23. In section 17C—

(a) in subsection (1) for the words "access to a child by" there shall be substituted the words "contact between a child and" and for the words "an access" there shall be substituted the words "a contact";

(b) in subsections (2) and (3) for the word "access" there shall be substituted the word "contact".

24. In section 17D for the words "an access" there shall be substituted the words "a contact".

25. In section 17E(1) for the words from "access" to the end there shall be substituted the words "the maintenance of personal relations and direct contact between children who are in care or who are subject to a supervision requirement under section 44 of this Act and their parents or guardians or other persons with whom they have had close personal relations.".

26. In section 18(4) for the words "the Law" to "1986" there shall be substituted the words "Part I of the Family Law (Scotland) Act 1992".

Paragraphs 19–27

These paragraphs contain amendments consequential on the Bill's provisions on parental responsibilities and parental rights (doing away with "custody" and "access"), on guardianship and on giving both parents parental responsibilities and parental rights whether or not they are or have been married to each other. Many of these proposed amendments must be regarded as of a provisional and interim nature, pending the outcome of the current review of child care law. See paragraph 19.2 of the Report.

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27. In section 94(1)—

(a) in the definition of "guardian" for the words from "the custody" to "over" there shall be substituted the words "parental responsibilities (within the meaning of section 1 of the Family Law (Scotland) Act 1992) in relation to, or the charge of or the control over,";

(b) for the definition of "parent" there shall be substituted the following definition—

""parent" means the father or mother of a child whether or not they are or have been married to each other,".

The Sheriff Courts (Scotland) Act 1971 (c.58)

28. In section 37(2A) for the words "the custody" there shall be substituted the words "parental responsibilities or parental rights (within the meaning of Part I of the Family Law (Scotland) Act 1992) in respect of a child or the".

The Employment of Children Act 1973 (c.24)

29. In section 2(2A), for paragraph (b) there shall be substituted the following paragraph—

"(b) in Scotland, if he has parental responsibilities (within the meaning of section 1 of the Family Law (Scotland) Act 1992) in relation to the child or care of him.".

The Domicile and Matrimonial Proceedings Act 1973 (c.45)

30. In section 7—

(a) in subsection (1)(a) for the words from "separation" to the end of the paragraph there shall be substituted the words "declarator of nullity of marriage, declarator of marriage and declarator that a divorce, annulment or legal separation obtained in any country outwith Scotland is entitled to recognition in Scotland,";

(b) in subsection (3) after the words "nullity of marriage" there shall be inserted the words "or declarator that a divorce, annulment or legal separation obtained in any country outwith Scotland is entitled to recognition in Scotland";

(c) in subsection (5) for the words from "separation" to "silence" there shall be substituted the words "or declarator of marriage, declarator of nullity of marriage or declarator that a divorce, annulment or legal separation obtained in any country outwith Scotland is entitled to recognition in Scotland".

31. In section 8 for the words "separation or divorce" wherever they occur there shall be substituted the words "divorce, declarator of nullity of marriage, declarator of marriage or declarator that a divorce, annulment or legal separation obtained in any country outwith Scotland is entitled to recognition in Scotland.".

32. In section 10—

(a) in subsection (1)—

(i) for the words from the beginning to "in connection with" there shall be substituted the words "Where after the commencement of this Act an application is competently made to the Court of Session or to a sheriff court for the making, or the variation or recall, of an order which is ancillary or collateral to";

(ii) the words "as respects the person or property in question" shall cease to have effect;

Paragraphs 28 and 29

These provisions are consequential on the changes in terminology regarding parental responsibilities and parental rights.

Paragraphs 30–34

These paragraphs are to a large extent consequential on the abolition of judicial separation and declarators of freedom and putting to silence, and on the changed terminology relating to parental rights. The opportunity has also been taken to express the provisions in the 1973 Act on ancillary or collateral orders in a more simple way. Paragraphs 30 and 31 implement Recommendation 53.

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(b) after subsection (1) there shall be inserted the following subsection—

"(1A) For the purposes of subsection (1) above, references to an application for the making, or the variation or recall, of an order, are references to the making, or the variation or recall, of an order relating to children, aliment, financial provision on divorce or nullity of marriage or to expenses.".

33. In section 12(1)—

(a) for the words "of freedom and putting to silence" there shall be substituted the words "that a divorce, annulment or legal separation obtained in any country outwith Scotland is entitled to recognition in Scotland";

(b) after the word "purported" there shall be inserted the words "or the former".

34. In paragraph 11 of Schedule 3—

(a) in sub-paragraph (1)—

(i) for the words from "any of the following" to "for any" there shall be substituted the words "either of the following remedies, namely, divorce and declarator of nullity of marriage is sisted by reference to proceedings in a related jurisdiction for either";

(ii) in the definition of "the relevant order" for the words from "made" to the end of the definition there shall be substituted the words "relating to aliment or children";

(b) in sub-paragraph (3) for the words "custody of a child, and the education of a child" there shall be substituted the words "arrangements to be made as to the person with whom a child is to live, contact with a child, and any other matter relating to parental responsibilities or parental rights".

The Rehabilitation of Offenders Act 1974 (c.53)

35. In section 7(2) for the words ""minor" means" to the end there shall be substituted the words "for paragraph (c) there shall be substituted the following paragraph—

"(c) in any proceedings relating to parental responsibilities or parental rights (within the meaning of Part I of the Family Law (Scotland) Act 1992), guardianship, adoption or the provision by any person of accommodation, care or schooling for children under the age of 18 years;"".

The Criminal Procedure (Scotland) Act 1975 (c.21)

36. In section 39—

(a) in the proviso to subsection (4) for the words from "if" to the end shall be substituted the words "the attendance of a parent who does not have such actual possession and control may also be required.";

(b) in subsection (5) for the word "custody" there shall be substituted the word "care".

37. In section 307—

(a) in the proviso to subsection (4) for the words from "if" to the end there shall be substituted the words "the attendance of a parent who does not have such actual possession and control may also be required.";

(b) in subsection (5) for the word "custody" there shall be substituted the word "care".

Paragraph 35

This is consequential on the Bill's provisions on parental responsibilities, parental rights and guardianship. A similar amendment for England and Wales has already been implemented by the Children Act, Schedule 13, paragraph 35.

Paragraphs 36 and 37

These amendments are consequential on the proposed redefinition of parental rights. They take account of the fact that fathers and mothers have equal parental responsibilities and rights.

38. In section 50 for the words from "custody" to "authority" there shall be substituted the words "a child under the age of sixteen is residing with and being cared for (other than as a foster child) by a person other than a parent of the child, a regional or islands council".

39. In section 51—

(a) in subsection (1) for the words "custody of" there shall be substituted the words "a residence order in relation to";

(b) at the end there shall be added the following subsection—

"(5) In this section and sections 52 and 53 of this Act "residence order" has the same meaning as in section 12 of the Family Law (Scotland) Act 1992.".

40. In section 52 for the words "custody of" there shall be substituted the words "a residence order in relation to".

41. In section 53—

(a) in subsection (1) for the words from "the provisions" to "custody)" there shall be substituted the words "section 25 of the Adoption (Scotland) Act 1978";

(b) for the words from "custody order" in subsection (1)(a)(i) to the end of the section there shall be substituted the following—

"residence order under which the child would live with the applicant; and

(ii) that it would be appropriate to make such a residence order; or

(b) in any other case, that the making of such a residence order would be more appropriate than the making of an adoption order in favour of the applicant,

the court shall direct that the application is to be treated as if it had been made for a residence order in relation to the child.

(2) In the application of this Part of this Act to any case where a direction under subsection (1) above has been made, in section 51(1)—

(a) for the words "a residence order in relation to" there shall be substituted the words "an adoption order in respect of";

(b) in paragraph (a) for the reference to the making of an application there shall be substituted a reference to the making of a direction under subsection (1) of this section.

(3) In this section "adoption order" means an order under section 12 of the Adoption (Scotland) Act 1978.".

42. In section 55 for the words "sections 47 to 54" in both places where they occur there shall be substituted the words "sections 50 to 53".

43. In section 103—

(a) in paragraph (a) of subsection (1) for the words from "rules or" to the end there shall be substituted the words "an act of sederunt be appointed for the purposes of section 58 of the Adoption (Scotland) Act 1978;";

(b) in paragraphs (a) and (b) of subsection (2) for the words "local authorities" there shall be substituted the words "a regional or islands council".

Paragraphs 38–43

These amendments take account of the proposed redefinition of parental rights. The amendment to section 50 of the 1975 Act has been expressed in such a way as to remove an incentive to seek unnecessary court orders. In so far as these amendments relate to adoption they must be regarded as being of an interim nature, pending the outcome of the adoption law review mentioned in paragraph 19.2 of the Report.

The Sexual Offences (Scotland) Act 1976 (c.67)

44. In section 11(1) for the words "the custody" there shall be substituted the words "parental responsibilities (within the meaning of section 1 of the Family Law (Scotland) Act 1992) in relation to, or having the".

45. In section 14(1) for the words "the custody" there shall be substituted the words "parental responsibilities (within the meaning of section 1 of the Family Law (Scotland) Act 1992) in relation to, or having the".

The Marriage (Scotland) Act 1977 (c.15)

46. In section 5—

(a) in the proviso to subsection (1) for the words "subsection (4)(d) below" there shall be substituted the words "section 2D of this Act";

(b) in subsection (3)—

(i) in paragraph (a) after the words "to the marriage" there shall be inserted the words "under any of sections 1 to 2D of this Act";

(ii) in paragraph (b) after the word "no" there shall be inserted the word "such";

(c) for subsection (3A) there shall be substituted the following subsection—

"(3A) Where the Registrar General, on consideration of such an objection as aforesaid, is unable to determine whether or not there is a legal impediment to the marriage under any of sections 1 to 2D of this Act, he may decline to allow the marriage to proceed until there is produced to him a certified copy of a declarator granted in pursuance of section 2E of this Act to the effect that there is no such legal impediment; and, on such a certified copy being produced to him, the Registrar General shall inform the district registrar that there is no legal impediment to the marriage.".

47. In section 6—

(a) in subsection (1) after the words "to the marriage" there shall be inserted the words "under any of sections 1 to 2D of this Act";

(b) in subsection (5) for the words "23A of this Act" there shall be substituted the words "21(5) of the Family Law (Scotland) Act 1992".

48. In section 8(1) for the words "23A of this Act" there shall be substituted the words "21(5) of the Family Law (Scotland) Act 1992".

49. For section 20(2)(b) there shall be substituted the following paragraph—

"(b) in sections 5(3)(a) and 6(1) for the words "to 2D of this Act" there shall be substituted the words "2, 2A, 2C and 2D of this Act or under section 2B of this Act by reason that one of the parties is, or both are, already married to a person other than the other party.".

50. In section 21—

(a) in paragraph (a) after the word "marriage" there shall be inserted the words "contracted before the commencement of the Family Law (Scotland) Act 1992";

(b) for the words from "in the Court" to "clerk of Session" there shall be substituted the words "by a competent court, the clerk of court".

Paragraphs 44–45

These are consequential on the proposed changes in terminology relating to "custody".

Paragraphs 46–49

These amendments are consequential on clause 20. The new subsection 5(3A) of the 1977 Act inserted by paragraph 46(c) is designed to cater for the situation where the Registrar General is unable, on the information presented, to be satisfied one way or the other as to the existence of a legal impediment. It enables a marriage to be postponed until a declarator has been obtained from a court.

Paragraph 50

This is consequential on clause 23 which gives the sheriff courts jurisdiction in actions for declarator of marriage.

51. In section 12—

(a) in subsections (1) and (2) after the word "parental" there shall be inserted the word "responsibilities,";

(b) in subsection (3)(a) after the word "parental" there shall be inserted the word "responsibility,".

52. In section 14(1) for the word "custody" there shall be substituted the word "residence".

53. In section 15(1) for the word "custody" there shall be substituted the word "residence".

54. In section 16(2)—

(a) at the beginning of paragraph (a) there shall be inserted the words "is not known or";

(b) in paragraph (c) for the word "duties" there shall be substituted the word "responsibilities".

55. In section 18(5) after the word "parental" there shall be inserted the word "responsibilities,".

56. In section 19(2) after the word "parental" there shall be inserted the word "responsibilities,".

57. In section 20—

(a) in subsections (1), (2) and (3) after the word "parental" wherever it occurs there shall be inserted the word "responsibilities,";

(b) in subsection (3)(b) after the word "those" there shall be inserted the word "responsibilities,";

(c) in subsection (3) after the words "affect any" there shall be inserted the word "responsibility,".

58. In section 21, in subsections (1) and (3) after the word "parental" there shall be inserted the word "responsibilities,".

59. In section 25(1) for the words "vesting the custody of the child in" there shall be substituted the words "giving parental responsibilities and rights to".

60. In section 32, for subsection (4) there shall be substituted the following subsection—

"(4) A protected child ceases to be a protected child—

(a) on the grant or refusal of the application for an adoption order;

(b) on the notification to the local authority for the area where the child has his home that the application for an adoption order has been withdrawn;

(c) in a case where no application is made for an adoption order, on the expiry of the period of 2 years commencing with the date of the giving of the notice;

(d) on the making of a residence order under section 12(1) of the Family Law (Scotland) Act 1992 in relation to the child;

(e) on the making of a supervision requirement under section 44 of the Social Work (Scotland) Act 1968 in relation to the child;

(f) on his attaining the age of 18 years; or

(g) on his marriage,

whichever first occurs.".

Paragraphs 51–65

These paragraphs are all consequential on the Bill's provisions relating to parental responsibilities and parental rights, legitimacy and illegitimacy. In paragraph 60 the opportunity is taken to modernise section 32(4). The Children Act 1989, Schedule 10, paragraph 18(4) made a similar amendment to the equivalent provision in the Adoption Act 1976. All of these amendments must be regarded as of an interim and provisional nature pending the outcome of the adoption law review mentioned in paragraph 19.2 of the Report.

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61. In section 39—

(a) in subsection (1)(b) for the words "legitimate child" there shall be substituted "child of a marriage";

(b) in subsection (2) for the words from "affect" to "legitimate" there shall be substituted the words "prevent the child from being treated in law as the".

62. In section 46(2) for the words from the beginning to "and mother" there shall be substituted the words "(2) Where the parents of a child, one of whom has adopted him by virtue of a regulated adoption, have subsequently married each other.".

63. In section 49(1) after the word "parental" there shall be inserted the word "responsibilities,".

64. In section 58(2)(c) after the word "parental" there shall be inserted the word "responsibilities,".

65. In section 65(1) after the definition of "overseas adoption" there shall be inserted the following definitions—

""parent" means the father or mother of a child whether or not they are or have been married to each other and "child", "father", "mother", "step-parent" and "relative" shall be construed accordingly;

"parental responsibilities" and "parental rights" shall have the same meaning as they have respectively in sections 1 and 2 of the Family Law (Scotland) Act 1992, and "parental responsibility" and "parental right" shall be construed accordingly;".

The Education (Scotland) Act 1980 (c.44)

66. In section 135(1), in the definition of "parent" for the words "the actual custody of" there shall be substituted the words "parental responsibilities (within the meaning of section 1 of the Family Law (Scotland) Act 1992) in relation to, or has care of,".

The Criminal Justice (Scotland) Act 1980 (c.62)

67. In section 3(5)(b) for the words "actual custody" there shall be substituted the word "care.".

The Matrimonial Homes (Family Protection) (Scotland) Act 1981 (c.59)

68. In section 1(6) after the word "spouse" there shall be inserted the words "or a person acting on behalf of the non-entitled spouse under a power of attorney or as curator bonis".

69. In section 6(3)(a) after the word "spouse" there shall be inserted the words "or a person acting on behalf of the non-entitled spouse under a power of attorney or as curator bonis.".

70. In section 6(3)(e) for the words from the beginning to the end of head (ii) there shall be substituted the following words—

"the dealing comprises any transfer for value to a third party who has acted in good faith if there is produced to the third party by the transferor—

(i) a written declaration signed by the transferor or a person acting on behalf of the transferor under a power of attorney or as curator bonis that the subjects of the transfer are not, or were not at the time of the dealing, a matrimonial home in relation to which a spouse of the transferor has or had occupancy rights, or

(ii) a renunciation of occupancy rights or consent to the dealing which bears to have been properly made or given by the non-entitled spouse or a person acting on behalf of the non-entitled spouse under a power of attorney or as curator bonis.".

Paragraph 66–67

These paragraphs are consequential on the Bill's provisions on parental rights.

Paragraphs 68–71

These implement Recommendation 55(e), (f) and (h).

Sch. 1

71. In section 8(2A)—

(a) in paragraph (a) for the words from the beginning to "declaring" there shall be substituted the words "a written declaration signed by the grantor or a person acting on behalf of the grantor under a power of attorney or as curator bonis";

(b) at the end of paragraph (b) there shall be added the words "or a person acting on behalf of the non-entitled spouse under a power of attorney or as curator bonis".

72. In section 13(2) for paragraphs (a) and (b) there shall be substituted the words "for divorce or declarator of nullity of marriage, the court".

73. In section 16(2) for the words from "to the persons" to the end there shall be substituted the words—

"(a) to the applicant spouse; and

(b) to the solicitor who acted for that spouse when the interdict was granted or to any other solicitor who the procurator fiscal has reason to believe acts for the time being for that spouse.".

74. In section 18(3) immediately after paragraph (b) there shall be inserted the words "section 1(3)" and for the words from "sections 13" to "and 17" there shall be substituted the words "section 13".

75. In section 22 in the definition of "child" for the word "accepted" there shall be substituted the word "treated".

The Civil Jurisdiction and Judgments Act 1982 (c.27)

76. In Schedule 9, for paragraph 2 there shall be substituted the following paragraph—

"2. Proceedings relating to parental responsibilities or parental rights.".

The Mental Health (Scotland) Act 1984 (c.36)

77. In section 53(4) after paragraph (b) there shall be inserted the following paragraph—

"(bb) being the father or mother of the patient, has never had the care of the patient; or".

78. In section 55—

(a) for subsection (1) there shall be substituted the following subsection—

"(1) Where—

(a) a guardian has been appointed for a child who has not attained the age of 18 years; or

(b) there is in force a residence order or a custody order granted by a court in the United Kingdom, or an analogous order granted by a court outwith the United Kingdom which is entitled to recognition in Scotland, identifying a person as the person with whom a child under the age of 16 years is to live,

that guardian or person shall, to the exclusion of any other person, be deemed to be the child's nearest relative.";

(b) for subsection (3) there shall be substituted the following subsection—

"(3) In this section "guardian" does not include a guardian under this Part of this Act.".

Paragraph 72

This is consequential on clause 23 which gives sheriff courts jurisdiction in actions for declarator of nullity of marriage.

Paragraph 73

This is consequential on clause 27(4) which repeals section 17(4) of the 1981 Act.

Paragraph 74

This applies section 1(3) of the 1981 Act to cases where a cohabitant has occupancy rights by virtue of a court decree. The effect is that the cohabitant, if not in occupation of the home, cannot use force to gain entry but must obtain the leave of the court to exercise his or her right to enter and occupy the home. The rest of the paragraph is consequential on clause 39 and the new section 18A(3) inserted by it into the 1981 Act.

Paragraph 75

This makes a minor change in the interests of consistency with other similar provisions in the Bill.

Paragraph 76

This paragraph is consequential on the Bill's provisions on parental responsibilities and parental rights.

Paragraph 77

Section 53(2) of the Mental Health (Scotland) Act 1984 is repealed in Schedule 2 as a consequence of the abolition of illegitimacy. The result is that an unmarried father may be regarded as a person's "nearest relative". This paragraph makes a consequential change to ensure that *any* parent who has never had the care of the child concerned is not treated as the nearest relative. A married father who has never seen his child is treated in the same way as an unmarried father who has never seen his child.

Paragraph 78

These amendments are consequential on the changes made in the law on parental rights and guardianship, particularly the disappearance of the concept of custody.

The Child Abduction Act 1984 (c.37)

79. In section 6—

(a) in subsection (1)(a)(i) after the word "person" there shall be inserted the words "or naming any person as the person with whom the child is to live";

(b) in subsection (2)(b) after the words "to him" there shall be inserted the words "or naming him as the person with whom the child is to live";

(c) in subsection (3)(a)(i)(b) for the word "(whether" there shall be substituted the words "or who is named as the person with whom the child is to live (whether the award is made, or the person so named is named,".

The Family Law (Scotland) Act 1985 (c.37)

80. In section 2—

(a) for subsection (2)(c) there shall be substituted the following paragraph—

"(c) concerning parental responsibilities or parental rights (within the meaning of Part I of the Family Law (Scotland) Act 1992) or guardianship in relation to children;";

(b) in subsection (4)(c) for sub-paragraph (iii) there shall be substituted the following sub-paragraph—

"(iii) a person with whom the child lives or who is seeking a residence order under Part I of the Family Law (Scotland) Act 1992 in respect of the child.".

81. In section 9—

(a) in subsection (1)(b) for the words "the family" there shall be substituted the words "their children";

(b) in the definition of "contributions" in subsection (2) for the word "family" where it occurs for the second time there shall be substituted the words "children of the parties";

(c) at the end of the section there shall be added the following subsection—

"(3) In subsection (1)(b) and in the definition of "contributions" in subsection (2) above the reference to the children of the parties shall include a reference to children treated by both of the parties as children of their family.".

82. In section 10(3)(b) after the word "summons" there shall be inserted the words "or initial writ".

83. In section 13(1)(c)(iii) after the words "been a" there shall be inserted the word "material".

84. In section 26 after the words "either party" there shall be inserted the words "to the other party".

85. In section 28(3)(a) after the words "subsection (2)" there shall be inserted the words "or (3)".

86. At the end of section 28(3) there shall be added the words "and the powers of the court to vary or recall an order under the said subsection (4) shall include power to backdate such variation or recall to the date of the application for the variation or recall or, on cause shown, to an earlier date.".

Paragraph 79

This paragraph is also consequential on the disappearance of "custody".

Paragraphs 80–86

These amendments are mainly consequential on the Bill's provisions on parental responsibilities, parental rights and guardianship. Paragraph 81 makes slight changes in section 9 of the Family Law (Scotland) Act 1985 in the interests of greater clarity and for the sake of consistency with clause 36 of the Bill. See paragraph 16.23 of the Report.

The Child Abduction and Custody Act 1985 (c.60)

87. In section 27(4) after the word "Wales" there shall be inserted the words "or Scotland".

88. In Schedule 3 in paragraph 5—

(a) after the words "respect to the" there shall be inserted the word "residence.";

(b) before the word "access" there shall be inserted the words "contact with, or";

(c) in sub-paragraph (iii) for the words "tutory or curatory" there shall be substituted the word "guardianship".

The Law Reform (Parent and Child) (Scotland) Act 1986 (c.9)

89. In section 6(2) for the words from "guardian" to "custody or" there shall be substituted the words "parent or guardian or any other person having parental responsibilities (within the meaning of section 1 of the Family Law (Scotland) Act 1992) in relation to him or having".

90. In section 7, in subsections (1) and (5) for the words from "non-parentage" to "illegitimacy" there shall be substituted the words "or non-parentage".

The Disabled Persons (Services, Consultation and Representation) Act 1986 (c.33)

91. In section 1(3)(a) for the words from the beginning to "the authorised" there shall be substituted the words—

"(a) may provide for—

(i) the parent of a disabled person under the age of 16; or

(ii) any other person who is not a parent of his but who has parental responsibility for him (within the meaning of section 3 of the Children Act 1989); or

(iii) any other person who is entitled to act as his legal representative (within the meaning of section 1 of the Family Law (Scotland) Act 1992),

as the authorised".

92. In section 2(3), in paragraph (a) for the words from "section" to the end of the paragraph there shall be inserted the words "section, for the words "by the disabled person" there shall be substituted the words "by any person mentioned in section 1(3)(a)(i), (ii) or (iii)," and".

93. In section 13(8)(b) after the word "parent" there shall be inserted the words "or any other person entitled to act as the legal representative of the child (within the meaning of section 1 of the Family Law (Scotland) Act 1992)".

94. In section 16, in paragraph (b) of the definition of "parent" for the words from "means" to the end there shall be substituted the words "means the father or mother of a child, whether or not the father and mother are or have been married to each other;".

The Family Law Act 1986 (c.55)

95. In section 1(b)—

(a) for the words "custody, care or control of a child" there shall be substituted the words "residence, custody, care or control of a child, contact with or";

(b) in sub-paragraph (iv) for the words "for the custody of" there shall be substituted the words "giving parental responsibilities and parental rights in relation to".

Paragraphs 87–88

These amendments are consequential on the Bill's provisions on parental rights, particularly the replacement of the concepts of custody and access in relation to children.

Paragraphs 89–90

These amendments are consequential on the disappearance of the concepts of custody, access and illegitimacy.

Paragraphs 91–94

These amendments are consequential on the Bill's provisions on parental responsibilities, parental rights and guardianship.

Paragraph 95

The Family Law Act 1986, in its application to Scotland as well as to England and Wales, has been amended by the Children Act 1989, Schedule 13. This paragraph would insert further minor amendments consequential on the Bill's provisions regarding parental responsibilities and parental rights.

Sch. 1

96. In section 13—

(a) in subsection (2) for the words "under section 9(1) of the Matrimonial Proceedings (Children) Act 1958" there shall be substituted the words "in those proceedings";

(b) in subsection (4) for the words "under section 9(1) of the Matrimonial Proceedings (Children) Act 1958" there shall be substituted the words "in matrimonial proceedings where the court has refused to grant the principal remedy sought in the proceedings".

97. In section 15—

(a) in subsection (1)(b) for the words "for the custody of" there shall be substituted the words "relating to the parental responsibilities or parental rights in relation to";

(b) in subsection (4) for the words from the beginning to "above" there shall be substituted the words "Where by virtue of subsection (1) above a child is to live with a different person,".

98. In section 17—

(a) in subsection (3) for the words from "is the child" to "other party" there shall be substituted the words ", although not a child of both parties to the marriage, is a child of the family of those parties";

(b) at the end of the section there shall be added the following subsection—

"(4) In subsection (3) above "child of the family" means any child who has been treated by both parties as a child of their family, except a child who has been placed with those parties as foster parents by a local authority or a voluntary organisation.".

99. In section 18(1) in the definition of "matrimonial proceedings" for the words "nullity of marriage or judicial separation" there shall be substituted the words "or nullity of marriage".

100. For section 26 there shall be substituted the following section—

"Recognition: special Scottish rule.

26. An order relating to parental responsibilities or parental rights in relation to a child which is made outside the United Kingdom shall be recognised in Scotland if the order was made in the country where the child was habitually resident.".

101. In section 33(3) for the words "for the custody of" there shall be substituted the words "relating to parental responsibilities or parental rights in relation to".

102. In section 35(3) for the words "whose custody" there shall be substituted the words "whose care".

103. In section 42(1) after the definition of "certified copy" there shall be inserted the following definitions—

""parental responsibilities" and "parental rights" have the same meaning as they have in sections 1 and 2 of the Family Law (Scotland) Act 1992 respectively;"

104. In section 42(4)(b) for the words from "of one of the parties" to the end there shall be substituted the words "who has been treated by both parties as a child of their family, except a child who has been placed with those parties as foster parents by a local authority or a voluntary organisation;".

The Criminal Justice (Scotland) Act 1987 (c.41)

105. In section 49(4)(b) for the words "actual custody" there shall be substituted the word "care".

Paragraph 96

This paragraph makes amendments consequential on the repeal of section 9 of the Matrimonial Proceedings (Children) Act 1958 which is provided for in Schedule 2 to this Bill and which is itself consequential on clause 12(2)(b).

Paragraph 97

These minor amendments are consequential on the Bill's provisions on parental responsibilities and parental rights, particularly the disappearance of "custody".

Paragraph 98

Paragraph 98 substitutes the "treated" test for the "accepted" test in relation to "child of the family" for the sake of consistency with other provisions in the Bill.

Paragraph 99

This is consequential on the abolition of the remedy of judicial separation.

Paragraph 100

Section 26 of the Family Law Act 1986 had to be changed because of the disappearance of "custody". The opportunity has been taken to recast it in a way which would be more suitable for inclusion in an eventual code.

Paragraphs 101–103

These paragraphs make minor amendments consequential on the Bill's provisions on parental responsibilities and parental rights.

Paragraph 104

Paragraph 104 amends the definition of "child of the family" to maintain consistency with other provisions.

Paragraph 105

This amendment is consequential on the disappearance of the concept of custody in relation to children.

The School Boards (Scotland) Act 1988 (c.47)

106. In section 22(2) in the definition of "parent" for the word "custody" there shall be substituted the words "parental responsibilities (within the meaning of section 1 of the Family Law (Scotland) Act 1992) in relation to him or who has care".

The Self-Governing Schools etc (Scotland) Act 1989 (c.39)

107. In section 80(1), in the definition of "parent" for the words "the actual custody" there shall be substituted the words "parental responsibilities (within the meaning of section 1 of the Family Law (Scotland) Act 1992) in relation to him or has care".

The Children Act 1989 (c.41)

108. In section 79(e) for the words from "in whom" to "vested" there shall be substituted the words "having parental responsibilities (within the meaning of section 1 of the Family Law (Scotland) Act 1992) relating to the child;".

The Access to Health Records Act 1990 (c.23)

109. In section 3(1) for paragraphs (c) and (d) there shall be substituted the following paragraph—

"(c) where the patient is a child, if the record is held in—

(i) England and Wales, a person having parental responsibility for the patient;

(ii) Scotland, a person having parental responsibilities and parental rights in relation to the patient;".

110. In section 4(1) for paragraphs (a) and (b) there shall be substituted the words "the patient is a child".

111. At the end of section 11 there shall be added the following definitions—

""parental responsibilities" has the same meaning as in section 1 of the Family Law (Scotland) Act 1992;

"parental rights" has the same meaning as in section 2 of the Family Law (Scotland) Act 1992.".

The Horses (Protective Headgear for Young Riders) Act 1990 (c.25)

112. In section 1(2)(a)(ii) for the word "custody" there shall be substituted the words "parental responsibilities (within the meaning of section 1 of the Family Law (Scotland) Act 1992) in relation to, or has".

The Child Support Act 1991 (c.48)

113. In section 3(4)(d) for the words from "having" to the end there shall be substituted the words "with whom a child is to live by virtue of a residence order under section 12 of the Family Law (Scotland) Act 1992.".

114. In section 5(1) for the words "rights over" in both places where they occur there shall be substituted the words "responsibilities and parental rights in relation to".

115. In section 54 for the definition of "parental rights" there shall be substituted the following definitions—

""parental responsibilities" has the same meaning as in section 1 of the Family Law (Scotland) Act 1992;

"parental rights" has the same meaning as in section 2 of the Family Law (Scotland) Act 1992;".

Paragraph 106–112

These amendments are consequential on the Bill's provisions on parental responsibilities and parental rights. In relation to paragraph 109 it should be noted that section 3(1)(d) of the Access to Health Records Act 1990 already applies to all patients under the age of 16 because of the effect of section 1(2) of the Age of Legal Capacity (Scotland) Act 1991.

Paragraph 113

This amendment is consequential on the introduction of residence orders instead of custody orders.

Paragraphs 114–115

These amendments are consequential on the new emphasis on parental responsibilities and parental rights, rather than simply parental rights.

The Age of Legal Capacity (Scotland) Act 1991 (c.50)

116. In section 1(3)(g) for sub-paragraphs (i) and (ii) there shall be substituted the words "exercising parental responsibilities and parental rights (within the meaning of Part I of the Family Law (Scotland) Act 1992) in relation to any child of his.".

117. In section 5(2) for the words from "section 3" to the end there shall be substituted the words "section 7 of the Family Law (Scotland) Act 1992.".

The Armed Forces Act 1991 (c.62)

118. At the end of section 17(4)(c) there shall be added the words "or, as respects Scotland, has parental responsibilities and parental rights in relation to him;".

119. At the end of section 18(7)(c) there shall be added the words "or, as respects Scotland, has parental responsibilities and parental rights in relation to him;".

120. In section 19(4)(c) after the word "him" there shall be inserted the words "or, as respects Scotland, has parental responsibilities and parental rights in relation to him".

121. In section 20(6)(b)(ii) and (8)(b) after the word "him" there shall be inserted the words "or, as respects Scotland, has parental responsibilities and parental rights in relation to him".

122. In section 21(3) after the word "him" there shall be inserted the words "or, as respects Scotland, has parental responsibilities and parental rights in relation to him".

123. In section 22(5)(d) after the word "him" there shall be inserted the words "or, as respects Scotland, has parental responsibilities and parental rights in relation to him".

124. In section 23(1)—

(a) at the end of the definition of "contact order" there shall be added the words "or, as respects Scotland, section 12(1) of the Family Law (Scotland) Act 1992";

(b) after the definition of "parental responsibility" there shall be inserted the following definitions—

""parental responsibilities" has the same meaning as in section 1 of the Family Law (Scotland) Act 1992;

"parental rights" has the same meaning as in section 2 of the Family Law (Scotland) Act 1992;".

Paragraphs 116–117

These amendments are consequential on the provisions in the Bill confining guardianship to non-parents, on the changes in terminology introduced by the Bill and on the provisions of clause 7 of the Bill.

Paragraphs 118–124

These minor amendments are consequential on the Bill's provisions on parental responsibilities and parental rights, and on the corresponding court orders as set out in clause 12 of this Bill.

SCHEDULE 2

Section 47(6)

REPEALS

Chapter	*Short title*	*Extent of repeal*
11 Geo.4 & 1 Will.4 c.69.	The Court of Session Act 1830	Section 33.
12 & 13 Vict. c.51	The Judicial Factors Act 1849	Section 25(2).
13 & 14 Vict. c.36	The Court of Session Act 1850	The whole Act.
27 & 28 Vict. c.114	The Improvement of Land Act 1864	In section 18 the words from "nor shall they" to the end. In section 21 the words from "or if the landowner" to "minors" and the words "or circumstance" in both places where they occur.
43 & 44 Vict. c.26	The Married Women's Policies of Assurance (Scotland) Act 1880	Section 1. In section 2, in the definition of "children" the words "illegitimate or".
7 Edw.7 c.51	The Sheriff Courts (Scotland) Act 1907	In section 5(1) the words "(except declarators of marriage or nullity of marriage)". Section 38C.
11 & 12 Geo.5 c.58	The Trusts (Scotland) Act 1921	In section 2, in the definition of "trustee" the words from "guardian" to "years)".
1 Edw.8 & 1 Geo.6 c.37	The Children and Young Persons (Scotland) Act 1937	In section 12, in subsection (1) the words "assaults," and "assaulted,", and subsection (7). In section 27, the first paragraph.
1 & 2 Geo.6 c.73	The Nursing Homes Registration (Scotland) Act 1938	In section 4(1)(b)(iii) the words "custody or".
12, 13 & 14 Geo.6 c.100	The Law Reform (Miscellaneous Provisions) Act 1949	Section 4.
14 & 15 Geo.6 c.65	The Reserve and Auxiliary Forces (Protection of Civil Interests) Act 1951	In section 8(1)(d) the words from "or any order" to the end.
6 & 7 Eliz.2 c.40	The Matrimonial Proceedings (Children) Act 1958	Sections 8 to 10. Section 12.
10 & 11 Eliz.2 c.48	The Law Reform (Husband and Wife) Act 1962	The whole Act.
1965 c.12	The Industrial and Provident Societies Act 1965	In section 25, in subsection (1) the words "subject to subsection (2) of this section" and subsection (2).
1968 c.22	The Legitimation (Scotland) Act 1968	The whole Act.
1968 c.49	The Social Work (Scotland) Act 1968	In section 5B(5) the words from "and" at the end of the definition of "child" to the end of the subsection. In section 17A(4) the words "for access" where they occur for the second time.
1972 c.18	The Maintenance Orders (Reciprocal Enforcement) Act 1972	Section 4(3).
1972 c.38	The Matrimonial Proceedings (Polygamous Marriages) Act 1972	Section 2(2)(d).
1973 c.29	The Guardianship Act 1973	The whole Act.

Schedule 2

General

Most of the repeals in this Schedule are consequential and technical. An explanatory note is given only where some further explanation is required. Where words in a statute applying throughout the United Kingdom are repealed by this schedule the repeal would take effect only in relation to Scots law. (See clause 48(3).) In due course, therefore, Statutes in Force would contain the existing provision in its present form (if it has not already been repealed for the rest of the United Kingdom) with a note pointing out that certain words had been repealed for Scotland.

Improvement of Land Act 1864

The repealed words in section 18 are now out of date and spent. (The Agricultural Credits Act 1923 provided that this part of section 18 should cease to have effect.) They assume that only fathers have the right of legal representation.

The repealed words in section 21 are out of date in the same way and are unnecessary. These words were repealed for England and Wales by the Settled Land Act 1882.

Married Women's Policies of Assurance (Scotland) Act 1880

Section 1 of this Act is now obsolete and unnecessary as married women now have full contractual capacity and can own their own property. The repeal of the words in section 2 is consequential on the abolition of the status of illegitimacy.

Sheriff Courts (Scotland) Act 1907

The repeal of section 38C is made possible by clause 11(2). It implements Recommendation 32(a).

Trusts (Scotland) Act 1921

This repeal implements Recommendation 24. A parent or guardian acting as a child's representative in relation to the child's property is no longer to be regarded as a trustee for the purposes of the Trusts (Scotland) Acts.

Children and Young Persons (Scotland) Act 1937

The repeals in section 12 implement Recommendation 11(c) and (d).

Matrimonial Proceedings (Children) Act 1958

The repealed sections would be superseded by Clauses 12(2)(b), 14 and 15 of the Bill.

The Industrial and Provident Societies Act 1965

These repeals are consequential on the abolition of the status of illegitimacy.

Legitimation (Scotland) Act 1968

This repeal implements Recommendation 88(b). The saving provision in clause 47(2) is relevant.

Matrimonial Proceedings (Polygamous Marriages) Act 1972

This repeal is consequential on the abolition of the remedy of judicial separation.

Sch. 2

Chapter	*Short title*	*Extent of repeal*
1973 c.45	The Domicile and Matrimonial Proceedings Act 1973	Section 1. Section 4. In section 7, in subsection (2) the words from "separation" to "silence" and subsections (6) and (7). In section 10(1) the word "separation" and the words "as respects the person or property in question". In section 11 the word "separation". Section 12(3). Schedule 2. In Schedule 3, in paragraph 2 the word "separation", in paragraph 11(1) the definition of "custody" and in paragraph 11(3) the word "four".
1974 c.46	The Friendly Societies Act 1974	In section 68, subsection (2) and in subsection (3) the words from "and for" to the end.
1975 c.72	The Children Act 1975	Sections 47 to 49. Section 100. Section 102. Section 103(3). Section 107 except the definitions of "adoption society", "child" and "voluntary organisation" in subsection (1). Section 108.
1976 c.39	The Divorce (Scotland) Act 1976	Section 1(5). Section 4. Section 9.
1977 c.15	The Marriage (Scotland) Act 1977	Section 5(4). Section 23A. Section 27. In Schedule 1, paragraph 2A.
1978 c.28	The Adoption (Scotland) Act 1978	Section 2(d). In section 12, in subsection (3)(b) the words "or by" and in subsection (4) the word "(a)" and paragraph (b). In section 15(3) the word "natural" wherever it occurs. Section 18(7). Section 26. In section 39(1)(a) the word "legitimate". In section 65(1), in the definition of "guardian" the word "(a)" and the words from "and (b)" to the end, in the definition of "relative" the words from "and includes" to the end.
1981 c.59	The Matrimonial Homes (Family Protection) (Scotland) Act 1981	In section 15, in subsection (5)(b) the words "(within the meaning of subsection (6) below)" and subsection (6). In section 17, subsections (4) and (5)(b)(ii). Section 21.
1982 c.27	The Civil Jurisdiction and Judgments Act 1982	In Schedule 9, in paragraph 1 the words "(including proceedings for separation)".
1983 c.12	The Divorce Jurisdiction, Court Fees and Legal Aid (Scotland) Act 1983	Section 1.
1984 c.15	The Law Reform (Husband and Wife) (Scotland) Act 1984	Section 3(2). Section 4. Sections 6 to 8.
1984 c.36	The Mental Health (Scotland) Act 1984	Section 53(2). Section 55(4).
1984 c.37	The Child Abduction Act 1984	In section 6(2) the words from "or (c)" to the end.

Domicile and Matrimonial Proceedings Act 1973

The repeal of section 4 (which deals with the domicile of children) is consequential on clause 45.

The Friendly Societies Act 1974

These repeals are consequential on the abolition of the status of illegitimacy.

Children Act 1975

The Children Act 1989 repealed this Act entirely for England and Wales. These repeals would modernise Scots law as far as is possible in this regard pending the outcome of the current reviews of child care law and adoption law. The repeal of section 47 implements Recommendation 30. Sections 48 and 49 are repealed because they refer to applications for "custody" and because they deal with a matter (notices of certain court applications) which would be better regulated by rules of court in whatever way may be thought appropriate in the context of the new types of court order available under clause 12. The other repealed provisions are no longer needed because there is nothing to which they will refer.

Marriage (Scotland) Act 1977

The repeal of paragraph 2A in Schedule 1 to the 1977 Act implements Recommendation 46 when taken along with the changes made by clauses 20 and 21 of the Bill.

Adoption (Scotland) Act 1978

These minor repeals are consequential on our recommendations on parental responsibilities, parental rights, legitimacy and illegitimacy. Section 26 would be replaced by Clause 15 of the Bill which gives the court power to refer the matter to the reporter.

Divorce Jurisdiction, Court Fees and Legal Aid (Scotland) Act 1983

This is consequential on Schedule 1, paragraph 2 (which gives the sheriff courts jurisdiction in all actions relating to family law matters).

Mental Health (Scotland) Act 1984

The repeal of section 53(2) is consequential on the abolition of the status of illegitimacy. The repeal of section 55(4) is consequential on the new section 55(1) inserted by Schedule 1, paragraph 78.

Sch. 2

Chapter	*Short title*	*Extent of repeal*
1984 c.56	The Foster Children (Scotland) Act 1984	In section 21(1) in the definition of "relative" the words from "and includes" to the end.
1985 c.37	The Family Law (Scotland) Act 1985	In section 2(2), in paragraph (a) the word "separation" and in paragraph (d) the words "or legitimacy,". In section 6(1)(b) the word "separation". In section 21 the words "or separation" and the words from "or an order" to "child". Sections 22 and 24.
1985 c.66	The Bankruptcy (Scotland) Act 1985	In section 74(4) the word "(a)" and the words from "and" at the end of paragraph (a) to the end of paragraph (b).
1985 c.73	The Law Reform (Miscellaneous Provisions) (Scotland) Act 1985	In section 13(6)(b), sub-paragraphs (i), (ii) and (iii).
1986 c.9	The Law Reform (Parent and Child) (Scotland) Act 1986	In section 1(2) the words "Subject to subsection (4) below". Section 1(3). Sections 2 to 4. In section 5(2) the words "voidable or irregular" and "and regular". In section 8, the definitions of "child" and "parental rights". In section 9, subsection (1)(a) and in subsection (1)(c) the words "coat of arms".
1986 c.33	The Disabled Persons (Services, Consultation and Representation) Act 1986	In section 16, in the definition of "guardian" paragraph (b).
1986 c.45	The Insolvency Act 1986	In section 435(8) the word "(a)" and the words from "and" at the end of paragraph (a) to the end of paragraph (b).
1986 c.55	The Family Law Act 1986	In section 15(4) the words from "under section" to "1973". In section 17, in subsection (1) the words "Subject to subsection (2) below" and subsection (2). In section 35(4)(c) the words "custody or".
1987 c.26	The Housing (Scotland) Act 1987	In section 20(2)(b)(ii) the words "or judicial separation.".
1988 c.32	The Civil Evidence (Scotland) Act 1988	In section 8, in subsection (2) the words "separation" and "legitimacy, legitimation, illegitimacy" and in subsection (3) the word "separation".
1988 c.36	The Court of Session Act 1988	Section 20.
1990 c.23	The Access to Health Records Act 1990	In section 4(2) the words "or (d)". In section 5(3) the word "(d)".
1991 c.48	The Child Support Act 1991	In section 28(2) the words "or illegitimacy".
1991 c.50	The Age of Legal Capacity (Scotland) Act 1991	In section 9, the definition of "parental rights".

Bankruptcy (Scotland) Act 1985

This repeal removes a reference to "illegitimate" children but does not change the substance of the law.

Law Reform (Parent and Child) (Scotland) Act 1986

The repeals in section 1 are consequential on the abolition of the status of illegitimacy. See clause 44. Sections 2 to 4 are replaced by provisions in clauses 1–3, 7 and 11–12 of the Bill, implementing our recommendations on parental responsibilities, parental rights, court orders and guardianship. The repeal in section 9(1)(c) implements Recommendation 88(f).

Insolvency Act 1986

This repeal removes a reference to "illegitimate" children but does not change the substance of the law.

Family Law Act 1986

It may be asked why section 13(3) of this Act, which refers to decrees of separation, is not repealed. The reason is that the section will continue to have effect for some time in relation to separation decrees already granted before the date of commencement of the new legislation.

Court of Session Act 1988

This repeal implements Recommendation 32(a). It is made possible by clause 11(2) of the Bill.

Appendix B

List of those who submitted written comments on any or all of the propositions or questions put forward for consideration in Discussion Papers Nos. 85, 86 and 88.

Mrs Moira Abbotts, Dundee
The Accountant of Court
Sylvia Alexander, Dundee
Association of British Insurers
Association of Chief Police Officers (Scotland)
Association of Directors of Social Work
Association of Reporters to Children's Panels
Association of Scottish Police Superintendents
Mrs Wendy Back, Birmingham
Mrs Rona Baillie, Ayr
Andrew Bainham, University of East Anglia
Kristin Barrett, Blairgowrie
Mr & Mrs R J Barton, Romford
Professor Alastair Bissett-Johnson, University of Dundee
British Agencies for Adoption and Fostering
British Association of Social Workers
British Psychological Society
Stewart Brunton, Dundee
Building Societies Association
Business and Professional Womens Club (Inverclyde Branch)
Rev K Campbell, Dundee
CARE, (Christian Action Research and Education), in Scotland
Childrens Legal Centre (England and Wales)
Childwatch (English Registered Charity)
Citizens Advice Scotland
City of Edinburgh District Council, Women's Committee
Committee of Scottish Clearing Bankers
Convention of Scottish Local Authorities
Lord Coulsfield
Court of Session Judges
Dr E B Crawford, University of Glasgow
Professor S M Cretney, University of Bristol
Mrs N Davidson, Glasgow
Deckchairs Collective, Edinburgh
Dr E G Dick, Dundee
Anne Dickson, Solicitor, Glasgow
Dundee Association of University Women
Edinburgh Association of University Women
EPOCH (End Physical Punishment of Children)
Mrs J Ewbank, Oxford
Faculty of Advocates
Family Charter Campaign
Family Law Association
John Fotheringham, Solicitor, Inverkeithing
Free Church of Scotland
Free Presbyterian Church of Scotland
Professor M D A Freeman, University College, London
Dr James R G Furnell, Consultant in Child Clinical Psychology, Stirling
Eric Galloway, Blairgowrie

John M K Galloway, Edinburgh
Mrs R Garforth-Bles, London
Mrs J Gevers, Dundee
Andrew T F Gibb, Solicitor, Edinburgh
Mrs J Gibson, Jedburgh
Glasgow Association of University Women
Dr I A Glen, Airdrie
Professor W M Gordon, University of Glasgow
Grampian Regional Council, Department of Social Work
George L Gretton, University of Edinburgh
Dr Anne Griffiths, University of Edinburgh
Mrs S Hamilton, Dundee
Hamilton Womens Aid
Mrs M H Henderson, Dundee
Humanist Society of Scotland
Alice Ann Jackson, University of Strathclyde
George Jamieson, Solicitor, Paisley
Daniel Johnston, Carnoustie
Mrs B J Kahan, OBE, Oxfordshire
Kidscape (Campaign for Children's Safety)
Elizabeth Kingdom, University of Liverpool
Mrs C F Kingston, Bristol
Mr & Mrs S Lafferty, Dundee
Law Society of Scotland
Dr Penelope Leach, Clinical Psychologist, London
Dr Robert Leslie, Dean of the Faculty of Law, University of Edinburgh
David Lessels, University of Aberdeen
The Lord Lyon King of Arms
Mr C McCanna, Enfield
Mr J McColl, Huntly
Mr & Mrs S McKay, Aberdeen
Dr I Mackie, Dundee
Norman D MacLeod QC, Sheriff Principal of Glasgow and Strathkelvin
N M Macnaughtan, Edinburgh
D J McNeil, Solicitor, Edinburgh
J J Maguire, Sheriff Principal of Tayside, Central and Fife
Mrs A Marshall, Wolverhampton
Mrs J Martin, Romford
Mr M Martin, Dundee
K R Matthews, Wiltshire
Russell Meek, Broughty Ferry
Alastair Mennie, Advocate
Alison Mills, Nottingham
Ann Mitchell, Edinburgh
Dr A J Montgomery, Dundee
Mrs C H Montgomery, Grantown-on-Spey
Mr J C D Montgomery, Grantown-on-Spey
Jonathan Montgomery, University of Southampton
Mrs N Montgomery, Dundee
Mrs T Morrison, Dundee
Mothers Union in Scotland
National Association of Social Workers in Education
National Childminding Association
National Children's Bureau: Scottish Group
Kenneth McK Norrie, University of Strathclyde
C A Partington, County Durham
Mrs K Patterson, Cheshire
Mrs L Pawley, Carnoustie
Perth Association of University Women
Mr & Mrs R J Pooley, Wales
Rev D Prentis, Banchory
Procurators Fiscal Society

Mr D Rankin, Inverness
Regional Sheriff Clerks
Reporter to the Children's Panel in Lothian Region
Reporter to the Children's Panel in Tayside Region
Dr Peter Robson, University of Strathclyde
Mr & Mrs C Rose, Edinburgh
Dr Dorothy Rowe, Clinical Psychologist, Sheffield
Royal Scottish Society for the Prevention of Cruelty to Children
Professor H R Schaffer, Department of Psychology, University of Strathclyde
Scottish Association of Family Centres
Scottish Association of Family Conciliation Services
Scottish Child and Family Alliance
Scottish Child Law Centre
Scottish Convention of Women
Scottish Council for Single Parents
Scottish Legal Action Group
Scottish Pre-School Play Association
Scottish Society for the Mentally Handicapped
Scottish Womens Aid
Sheriffs Association
W D H Sellar, Faculty of Law, University of Edinburgh
Mr K D Smith, Bristol
Mr & Mrs Southwick, Dundee
Mrs C Stewart, Dundee
Supreme Courts (Senior Management)
Elaine Sutherland, University of Glasgow
Tor Sverne, Sweden
Mrs D M Temple, Edinburgh
Professor J M Thomson, University of Glasgow
Truro Christian Concern
Voluntary Organisations Liaison Council for Under Fives
Professor D M Walker, University of Glasgow
Mrs S Watson, Edinburgh
Mr A T de B Wilmot, Kent
Dr R C Witcomb, Cheltenham
Working for Childcare
Youthscan

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