

RESPONSE FORM

PREPARATION OF THE NINTH PROGRAMME OF LAW REFORM

We hope that by using this form it will be easier for you to respond to the questions set out in the consultation paper. Respondents who wish to address only some of the questions may do so. The form reproduces the questions as set out in the paper and allows you to enter comments in a box after each one. At the end of the form, there is also space for any general comments you may have.

Please note that information about this consultation paper, including copies of responses, may be made available in terms of the Freedom of Information (Scotland) Act 2002. Any confidential response will be dealt with in accordance with the 2002 Act.

We may also (i) publish responses on our website (either in full or in some other way such as re-formatted or summarised); and (ii) attribute comments and publish a list of respondents' names.

In order to access any box for comments, press the shortcut key F11 and it will take you to the next box you wish to enter text into. If you are commenting on only one or two of the questions, continue using F11 until you arrive at the box you wish to access. To return to a previous box press Ctrl+Page Up or press Ctrl+Home to return to the beginning of the form.

Please save the completed response form to your own system as a Word document and send it as an email attachment to info@scotlawcom.gsi.gov.uk. Comments not on the response form may be submitted via said email address or by using the [general comments form](#) on our website. If you prefer you can send comments by post to the Scottish Law Commission, 140 Causewayside, Edinburgh EH9 1PR.

Name:
Faculty of Advocates
Organisation:
See above
Address:
Advocates' Library, Parliament House, EDINBURGH EH1 1RF
Email address:
deans.secretariat@advocates.org.uk

Questions

1. Do you have any suitable law reform projects to suggest?

Comments on Question 1

The Faculty of Advocates is grateful for the opportunity to respond to this consultation. Advocates are involved in all areas of law. In answer to Question 3, the Faculty identifies certain issues which have been identified arising in practice.

2. Do you have any project to suggest that would be suitable for the law reform process in the Scottish Parliament; or, in relation to reserved matters, for the House of Lords procedure for Commission Bills?

Comments on Question 2

The nature of the matters which the Faculty may usefully bring to the Commission's attention (as discussed above) may mean that certain of those matters are indeed suitable for those procedures.

3. If suggesting a new project:-
 - (a) Please provide us with information about the issues with the law that you have identified:

Arranged under the general headings listed below (in alphabetical order), we identify issues which Faculty members have noted to arise in the course of their practice:-

- Bankruptcy – in Scotland (unlike in the other UK jurisdictions), it is possible for a summary warrant to be granted in favour of HMRC and certain other creditors. In the case of *Chaudhry v The Advocate General for Scotland* 2013 SLT 548, Lord Tyre concluded that as a result of the reforms contained in the *Bankruptcy and Diligence (Scotland) Act 2007*, a summary warrant was now authorisation to serve a charge for payment. However, in reaching that decision, he indicated “*unease as to whether the opening up of this route to sequestration truly reflects the intention of the Scottish Parliament when enacting the 2007 changes*”: in particular, he could “*identify no indication that one of the perceived benefits of the reform was facilitation of the use of sequestration by a creditor without the need for a decree granted in an action for payment. There may be cases ... where a debtor would have a stateable defence to an action for payment but is prevented from advancing it because the creditor chooses to proceed by way of summary warrant followed by service of a charge*”.

The Faculty would accordingly respectfully suggest that this may raise an issue worthy of the Commission's consideration.

- Children – at present, cases involving children can include the appointment of a curator *ad litem* at common law, of a statutory curator *ad litem*, of a reporter (to look at a specific area of the child's life or to take the child's views), or of a safeguarder (this last only being possible in children's hearings proceedings, or court proceedings arising therefrom). The statutory role of curator *ad litem* in public law cases involving adoption and permanence is defined by Regulations, and seems to the Faculty to operate without difficulty. However, there is no definition of the role and powers of a curator *ad litem* appointed at common law (which appointment may occur in private law, and public law, cases). It seems to the Faculty's members that there may be differing practice across Scotland, which has contributed to considerable confusion as to the roles of a reporter, and a curator *ad litem* (and thus, for example, to the appointment of a curator *ad litem*, when it might be thought that what was intended was the instruction of a reporter) – despite the fact that these roles are, in law, distinct. In the Supreme Court case of *NJDB v JEG* 2012 SC 293, attention was drawn to an apparent lack of clarity as to the role of the curator *ad litem* in that case (particularly at the proof). Lord Reed (with whom other of the Justices agreed) noted that the “*report of the Scottish Civil Courts Review noted concerns about the appointment and remuneration of curators (and other persons appointed to safeguard a child's interests), their qualifications and training, the standards of their work, and a lack of clarity and consistency about what is expected of them. A number of recommendations were made in relation to these matters. The present case highlights the need for these matters to be addressed*”. Accordingly, the Faculty would suggest that the appointment, role, and powers, of curators *ad litem* at common law, would be an issue worthy of the Commission's consideration.
- Defamation – it is important that the Scots law of defamation continues to take adequate account of technological advances such as the internet, and legal developments such as the incorporation of the European Convention on Human Rights and the case of *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127. In this regard, consideration might perhaps be given by the Commission as to whether any of the legislative solutions adopted in England and Wales in the *Defamation Act 2013* might be worthy of introduction into Scots law.
- Heritable property – in terms of the current rules, all actions for recovery of possession of heritable property must, in general, be raised under the summary cause procedure of the Sheriff Court (without any upper limit to the value of the

heritable property involved), unless there is claimed in addition (or alternatively) a decree for the payment of money over a particular amount. However, the value of, for example, modern commercial property may be considerable. *Macphail on Sheriff Court Practice* (at paras 23.11ff) also draws attention to a lack of clarity as to how a pursuer ought properly to proceed when seeking recovery of possession of heritable property together with another remedy, such as damages over the defined amount, or interdict (and see the case of *City of Edinburgh Council v Burnett* 2012 SLT (Sh Ct) 137). The Faculty would therefore suggest that consideration might be given as to whether it would be desirable to provide that actions to recover the possession of heritable property over a certain value might be reserved for the Sheriff Court ordinary cause procedure, or the Court of Session. In this respect, an analogy might perhaps be drawn with the rule providing that the Sheriff Court only has the power to wind up a company where that company's share capital (paid up, or credited as paid up) does not exceed £120,000. Furthermore, any uncertainty which might exist as to the correct procedure where additional remedies are sought, might also be removed.

- Prescription and limitation – the UK Supreme Court has recently considered the correct interpretation of section 11(3) of the *Prescription and Limitation (Scotland) Act 1973*, in the case of *David T Morrison & Co Ltd t/a Gael Home Interiors v ICL Plastics Ltd* 2014 SLT 791. However, the Faculty notes that this case may cause practitioners to re-assess their understanding and approach to other aspects of the 1973 Act, and it may be that issues worthy of the Commission's consideration will arise over the next few years. The Faculty would accordingly suggest that this is an area which the Commission may wish to monitor, as a possible subject for consideration in the future – whilst recognising that (with the potential impact on other areas) this might ultimately represent a substantial project.

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

As indicated above, all of the issues raised above are ones which have been seen to arise in practice by members of Faculty. The Faculty is not really in a position to comment upon their broader impact on society.

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

The law should be clear and should respond adequately to current issues. Law reform is an

essential activity if these aims are to be achieved.

General Comments

We have nothing further to add to the above, but should of course be delighted to provide any further information which the Commission might think helpful.

Thank you for taking the time to respond to this consultation paper. Your suggestions and comments are appreciated and will be taken into consideration when preparing our Ninth Programme of Law Reform.