



## 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](mailto:info@scotlawcom.gsi.gov.uk). Comments not on the response form may be submitted via said email address or by using the [general comments form](#) on our website. If you prefer you can send comments by post to the Scottish Law Commission, 140 Causewayside, Edinburgh EH9 1PR.

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## Questions

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

### Comments on Question 1

Codification of Child and Family Law

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

Ultimately, this codification project would require legislation in the Scottish Parliament but this proposal is that the Scottish Law Commission should undertake it before it reaches that stage.

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

The nature of the problem, the need for codification and the benefits it would bring, are discussed in a short article I wrote in 2013: see, ““Bringing Order to Family Law”, (2013) 58(9) *Journal of the Law Society of Scotland online*, at: <http://www.journalonline.co.uk/Magazine/58-9/1013027.aspx> The main points made in the article are encapsulated more briefly in the answers to these questions.

Child and family law is currently scattered over a plethora of statutes and secondary legislation and it is often necessary to cross-reference between many of them in order to establish the legal position on a given issue. Examples of this complexity abound, but one need only look at the fact that the various child protection orders, originally located together in the Children (Scotland) Act 1995, are now scattered across three different statutes. Similarly, establishing the options for dealing with a party’s pension in the context of divorce involves consulting numerous statutory instruments.

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

The fragmented nature of child and family law makes accessing the law more difficult than it needs to be.

For the lay person, the law can appear impenetrable. As the changes to legal aid provision have made serving legally-aided clients less attractive to family law practitioners, more members of the public are driven to seek legal advice from lay advisers or to represent themselves. The inaccessible nature of much of the law makes the task of lay advisers more

difficult and can present an insurmountable barrier to lay people seeking to understand how the law affects them.

For lawyers, the result is that their work becomes more time-consuming, something reflected in the cost of their services.

For the courts, unduly complex law means more time spent unravelling it, something that becomes all the more of an issue as party litigants appear more frequently. This has significant cost implications.

A secondary effect of the fragmented nature of child and family law is the scope it presents for omissions and inconsistencies to occur in the course of law reform. An example of this problem arose in the context of civil partnership dissolution when no provision was made for dispensing with evidence from a third party under the simplified procedure, something that had been done in respect of divorce. As a result, the validity of some dissolutions was left in doubt. That problem was resolved, prospectively, by statutory instrument, and retrospectively, by the Marriage and Civil Partnership (Scotland) Act 2014. The point remains, however, that the error might not have occurred had the law been presented in a more coherent manner.

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

Child and family law would be rendered more coherent, more comprehensible and more accessible by a process of codification.

The benefits are twofold, being both principled and practical. The law is there to serve the whole community. As a matter of principle, everyone should have access to the law and the legal process. Fine laws can become no more than an arcane abstraction if they are understood only by the privileged minority who have had legal training or can afford to pay for legal advice and representation.

It would be naïve to suggest that the subtle and nuanced corpus of law that is required in order to address the range of inter-personal relationships found in modern Scottish society can be reduced to a simple set of rules, fully intelligible to the whole population without assistance. It can however, be made more accessible than it is at present.

As a practical matter, more accessible law would result in cost-savings for those using the services of lawyers and in court time. It would make the task of lay advisers easier and would enable some party litigants to represent themselves more effectively, again, leading to savings in court time.

### **General Comments**

The Scottish Law Commission understood the need to codify child and family law when it raised the issue in 1992 in its *Report on Family Law*. It now has the opportunity to take the idea forward and make it a reality.

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.