

FAMILY LAW (SCOTLAND) BILL

POLICY MEMORANDUM

INTRODUCTION

1. This document relates to the Family Law (Scotland) Bill introduced in the Scottish Parliament on 7 February 2005. It has been prepared by the Scottish Executive to satisfy Rule 9.3.3(c) of the Parliament's Standing Orders. The contents are entirely the responsibility of the Scottish Executive and have not been endorsed by the Parliament. Explanatory Notes and other accompanying documents are published separately as SP Bill 36-EN.

POLICY OBJECTIVES OF THE BILL – AN OVERVIEW

2. The Bill will update family law to provide legal protection and safeguards for children and adults in today's family structures. It stems from a commitment in a *partnership for a better Scotland* to "legislate to reform family law for all of Scotland's people".

3. Where families are strong and functioning well, the Executive considers the state should play little or no role. Family life should, wherever possible be an issue for families themselves. The government's role should be enabling rather than prescriptive, geared to upholding values in family relationships (trust, mutuality, tolerance, fairness) rather than setting rigid patterns for families to conform to or telling parents how to raise their children.

4. Family law provides the legal framework that regulates responsibilities and rights between couples and between children and their parents and others with an interest in their welfare. Scotland, in common with many other countries has in recent decades seen significant changes in family formation and in attitudes towards the family¹. The Bill updates the law to reflect the way adults, in many instances with children, form and maintain relationships. Three core principles guide these reforms:

- safeguarding the best interests of children
- promoting and supporting stable families
- updating the law to reflect the reality of family life in Scotland today.

5. The Bill makes a range of provisions designed to address the legal vulnerabilities experienced by family members in Scotland today and to ensure that family law protects the best

¹ Family Formations and Dissolutions: Trends and attitudes among the Scottish population <https://www.scotland.gov.uk/cru/resfinds/lsf43-00.asp>

interests of children regardless of the type of family they belong to. The provisions of the Bill impact on a number of aspects of family law and include:

- the rules regulating divorce;
- parental responsibilities and rights (PRRs) for fathers;
- protection against domestic abuse;

as well as introducing new legal safeguards for cohabiting couples and their children. There are also a number of technical amendments designed to remove anomalies and clarify various matters relating to marriage and to the domicile of children. We have ensured that the changes made to the law of marriage are mirrored in amendments to the Civil Partnership Act 2004 to ensure parity of treatment between spouses and civil partners (Private International Law consequential will be introduced at stage 2).

6. These proposals to reform family law stem from reports by the Scottish Law Commission (SLC), *Report on Reform of the Grounds for Divorce* (1989) and *Reform of Family Law* (1992). Family law has changed significantly in the past 20 years. Key reforms between 1985 and 1995 have defined the legal relationship between parents and children, removed almost all of the stigma of illegitimacy, and modernised financial provisions on divorce. In particular, almost all of the SLC 1992 recommendations relating to children were implemented in the Children (Scotland) Act 1995. There is therefore no need to re-write Scottish family law or to undertake a major overhaul but there is a need to respond to changing family structures (especially where they affect children's welfare), to address perceived unfairness in the law, to replace obsolete provisions, and to ensure the current framework is coherent and clear.

7. However, the law, though an important instrument for change is not the sole instrument nor is it always the most effective in delivering good outcomes for families and children. Good laws need buttressed by other initiatives aimed at supporting families in the round. This Bill sits alongside and complements the Executive's many initiatives on families and children. The Executive has a range of well-developed policies geared to balancing work and family life, protecting children and bringing them out of poverty, promoting children's physical health and generally giving them the best possible start in life. Supporting children to realise their potential is the key to giving them a sense of self-belief and equipping them for the future. The report *For Scotland's Children* (2001), commissioned by the Scottish Ministers, emphasised the importance of an integrated approach to providing services and support for children, young people and their families. At a broader level, the policies of the UK Government in relation to taxation and social security, employment and equal opportunities all contribute to the goal of well functioning, stable and resourceful families.

8. The Executive is progressing a programme of activity built around a clear vision of key outcomes for all children and young people i.e. that they should be safe, nurtured, healthy, achieving, active, respected and responsible, and included. The Executive is working with external stakeholders to look at ways to reduce bureaucracy, overlap and duplication, so that resources and expertise can become more focused on improving service delivery for children, young people and families. Practical actions already under way, or in development, include a new integrated planning framework for children's services. This brings together a range of previously separate plans for children's services, education improvement objectives, child health, and youth justice; a framework for joint assessment and information sharing; joint inspection

across children's services: a new framework to deliver a consistent and integrated approach to quality improvement; and proposals for workforce development.

9. Such cross-cutting work streams support delivery of the Executive's specific policy commitments for children and young people, as set out in *a partnership for a better Scotland*. These commitments include ensuring excellence in education; flexible child care; effective child protection; a review of the Children's Hearings system; developing youth policy; tackling child poverty; reducing youth offending; and promoting health improvement.

10. The changing nature of families brings challenges for the long-term. Conflict in parental relationships and multiple changes in family form often pose real risks to children's welfare. Early intervention and ensuring a framework of support for when things go wrong - to increase family stability and to reduce harm to children from parental separation - is an important part of an integrated agenda to meet children's needs. The Executive is looking at ways to take a more holistic approach to the development of family support and to make use of links with existing programmes; and will be engaging closely with local government as this work proceeds.

11. The Executive recognises the importance of relationship support services in helping adults to overcome relationship difficulties and ensuring stable family settings where children can prosper. It believes that voluntary sector services for families under stress or in transition should be developed on a more integrated and coherent basis. Additional funding has been made available to four national family support organisations to promote joined-up working and strategic approaches to common functions. A recent external consultation has enabled these four national family support organisations dealing with family mediation, couple counselling and stepfamily support, to identify options for future integrated working. The expectation is that this will aid development of a national support network that is tightly focused and able to support families with early and effective intervention.

12. The Executive is currently reviewing the law on adoption and fostering. The review group is expected to report early in 2005. A number of the issues raised in consultation about family law reform are relevant to that work and will be taken into account in any proposals for change made as a result of their recommendations.

CONSULTATION

13. The Scottish Office published a consultation paper in 1999, *Improving Scottish Family Law* setting out proposed changes arising from the Scottish Law Commission work. An Executive White Paper, *Parents and Children*, followed this in 2000. The Executive published its consultation document *Family Matters: Improving Family Law in Scotland* on 5 April 2004. This document picked up the outstanding Scottish Law Commission proposals relevant to addressing the legal vulnerabilities experienced by families in Scotland today.

14. *Family Matters: Improving Family Law in Scotland* focused on the need to consult further to refresh thinking and, in particular, to canvass opinion on issues on which a settled view had not been reached. Proposals were therefore set into two categories, firm proposals for the Bill (divorce, PRRs for unmarried fathers, changes to the Matrimonial Homes (Family Protection) (Scotland) Act 1981 and some technical amendments) and the issues for further

discussion (provisions for cohabiting couples, and stepparent agreements) on which comments were sought. Views were also sought about how best to improve continued contact between children and wider family and make the law work in practice.

15. The consultation document was sent to a wide range of people and organisations in the public, private and voluntary sectors. Copies of the document were also sent to key public places: libraries, registration offices, sheriff courts, Citizens Advice Bureaux (CABx) Offices, and local authority public offices. Over 4,000 copies were distributed. Further copies were distributed on request and the document was made available on the Scottish Executive and Young Scot websites. Young Scot journalists interviewed the Minister for Justice and their article along with answers to questions posed by young people were also posted on the Young Scot website.

16. During the consultation period, the Executive engaged in a pro-active consultation process to encourage responses from as many stakeholders as possible as well as from groups and individuals who would not normally respond to this type of consultation exercise. A series of focus group meetings were held around Scotland involving a range of interests including married and cohabiting parents, single parents, young people and other family members. Scottish Civic Forum held a series of 3 events across Scotland, on behalf of the Executive. In addition, Executive officials met with key stakeholders to discuss the proposals. The Parliament also debated these issues on 16 June 2004.

17. Notes of these events and meetings were taken and considered as part of the consultation responses that helped inform this Bill. The consultation ended on 28 June 2004.

18. The consultation exercise drew a strong response: over 300 replies from a wide range of organisations and individuals and across the full spectrum of consultation questions. Respondents were broadly supportive of the general principles underlying the reforms and of the proposals to change the rules regulating divorce; extend parental responsibilities and rights for fathers; strengthen protection against domestic abuse; and introduce new legal safeguards for cohabiting couples and their children. These are included in the Bill.

19. All responses to the consultation which the Scottish Executive has permission to publish, together with reports of the analysis of the consultation, the focus groups and the Scottish Civic Forum events are lodged with the Scottish Executive library and are available on the Scottish Executive website.

BILL PROVISIONS

DIVORCE

Key data^{2,3}

20. In Scotland today, many more people than in the past experience a number of different family formations and family transitions throughout their adult life and the trends in marriage and divorce should be seen against a backdrop of increasing cohabitation, lone parenthood and individuals choosing to have children later in life or simply to live alone.

21. The number of divorces in Scotland in 2003 was 10,928, slightly more than in 2002. The divorce rate rose rapidly between 1951 and the mid 1980s reaching a peak of over 13,000 in 1985. More recent years have seen a slight fall with the levels recorded settling around 11,000.

22. In 2003, non-cohabitation was the most frequent reason for divorce, accounting for 82% of all divorces with 18% being sought on fault grounds (adultery, unreasonable behaviour and desertion). Non-cohabitation (2 years with consent) increased from 25% of all divorces in 1981 to 55% of all divorces in 2003; non-cohabitation (5 years without consent) increased from 14% to 27%; and adultery as the stated reason for divorce fell from 17% to 4%.

23. In 2003, the median duration of marriage ending in divorce was 14 years, whereas the comparable duration in 1981 was 9 years. Of those divorcing in 2003, 15% of both men and women had divorced previously. This compares with 8% for males and 7% for females in 1981.

Research evidence

24. Overall research suggests that children benefit from being raised in emotionally and economically stable two parent families. However, in today's Scotland, the reality is that parental separation affects many children and their families. The impact on children of parental separation is complex, particularly in the long-term. Many children will experience unhappiness, low esteem and other problems during the process of separation. A smaller proportion of these children will continue to have problems in the longer-term. Research evidence suggests that children from separated families where there is financial hardship, high levels of parental distress and conflict, and constantly changing family circumstances may experience poorer outcomes.

25. Evidence suggests where the process of separation is handled well the adverse impact on children may be minimised. However, when separation is protracted and conflict-ridden, and in particular where children are drawn into parental conflict, this can be damaging for children. Conflict appears to be an important influence on a number of adverse outcomes for children. There is a wealth of research evidence available, for example, *Together and Apart: Children and*

² Scotland's Population 2003 – The Registrar General's Annual Review of Demographic Trends Chapter 1 - <http://www.gro-scotland.gov.uk/grosweb/grosweb.nsf/pages/03annual-report-chapter1>

³ Family Formations and Dissolutions: Trends and attitudes among the Scottish population - <https://www.scotland.gov.uk/cru/resfinds/lsf43-00.asp>

*parents experiencing separation and divorce*⁴ draws together a collection of research studies on what can help parents and children through the stress of family separation.

Policy objectives

26. The aim is that by shortening the periods of separation needed to establish breakdown of marriage, fewer couples will use the grounds of adultery or unreasonable behaviour with all the attendant acrimony, simply to get a speedy divorce. The Bill reduces the period of separation to establish irretrievable breakdown of the marriage from 5 years without consent to 2 years and from 2 years with consent to 1 year. In these circumstances, desertion is no longer required as a separate ground to establish irretrievable breakdown and the Bill removes this ground.

27. The intention is to reduce acrimony in divorce, especially where children are concerned, and to enable couples who are determined to end their marriage to do so without unnecessary conflict and recrimination. At present, the single ground for divorce is the irretrievable breakdown of the marriage. Such breakdown may be established by 2 years separation with consent or 5 years without consent. Alternatively, it may be established without a waiting period on any of the three "fault" grounds (adultery, unreasonable behaviour or desertion).

28. The Scottish Ministers consider that where possible, couples should be helped to confront relationship difficulties and overcome them for the benefit of their children and are working to strengthen the support available to couples facing difficulties. However, the state cannot force people to remain married and a certain proportion of marriages will end in divorce. In those circumstances, the feelings of the couple towards each other must be separated from the issues affecting property and children.

29. The Executive upholds the clean break principle underlying Scottish divorce law, which leaves questions of fault out of the issue of financial provision on divorce and rests on the principle of fair sharing tempered by provision to relieve, over a reasonable period, serious financial hardship for one partner resulting from the divorce. The Executive does not propose any change to this principle. Similarly, fault has no place in determining what is best for children. Children are entitled to the loving involvement of two parents in their lives, irrespective of how the parents feel about each other. The proposed changes to the rules for divorces will go some way to achieving that outcome.

Alternative approaches

30. The proposals adopted are based on recommendations made in the 1989 Scottish Law Commission Report, *Reform of the Grounds of Divorce*. Alternative approaches were considered in the 1999 document *Improving Scottish Family Law* namely:

- not to proceed with any reform of the grounds for divorce at present in Scotland;
- to implement the recommendation of the Scottish Law Commission to keep essentially the present ground of divorce but to reduce the separation period to 1 year with consent and 2 years without;

⁴ Joseph Rowntree Foundation March 2004 <http://www.jrf.org.uk/knowledge/findings/foundations/314.asp>

- to devise for Scotland more radical reforms on the lines of those that were about to be introduced in England and Wales.

The changes proposed for England and Wales, placing an emphasis on saving marriage, introducing “no fault” divorce and promoting a conciliatory approach to divorce coupled with a greater emphasis on mediation, were introduced in the Family Law Act 1996. On enactment, Part II of the Act acknowledged divorce as a process rather than a discrete event; it removed the concept of fault as evidence of irretrievable breakdown in the marriage; it introduced a period of time for reflection and consideration; and it required that all arrangements for the future, including matters of finance and property, to be made before divorce could be granted. Anyone wishing to apply for divorce would be required to attend an information meeting, where they would receive information on a variety of issues that may assist them in the decisions they needed to make regarding their relationship. However, Parliament recognised that this aspect of the Act needed to be fully piloted and assessed before implementation could be considered. In January 2001 the Lord Chancellor announced that part II of that Act was to be repealed as the pilot exercise had proved that it did not help the Government objective of saving marriages or helping divorcing couples to resolve problems with the minimum of acrimony. Consequently, England and Wales currently retains a mixed system of divorce based on irretrievable breakdown of marriage.

31. Eighty-five per cent of those responding to *Improving Scottish Family Law* favoured some kind of reform with a majority favouring the Scottish Law Commission recommendation. In the 2000 White Paper, *Parents and Children* the Scottish Executive indicated its intention to reduce the periods of separation required for divorce. At that time, the Executive also asked whether the headings of adultery and unreasonable behaviour should be merged into one. A majority of respondents, in particular those from religious and faith groups, were strongly in favour of retaining the separate grounds of adultery.

32. Scottish Ministers considered the issues again in 2004 and concluded that implementing the Scottish Law Commission recommendation remained the best option. In the 2004 consultation document, *Family Matters: Improving Family Law in Scotland* the Executive indicated its firm intention to introduce the changes to the period of separation required and to remove desertion as a ground, without proposing to make any further changes to the existing definition of irretrievable breakdown of a marriage.

Consultation

33. This was a firm proposal for change and responses were not specifically sought although consultees were given the opportunity to record their views. Views were sharply polarised. In total 190 respondents (62% of total) commented, most of them individuals. Some 90% of the individuals were opposed, whereas some 73% of other respondents were in support. However, a significant minority of responses from individuals contained a degree of identical wording of phrases and sentences, indicating the likelihood of various campaigns and lobbying of views amongst some communities. From some of the comments made in such responses, it could perhaps be deduced that some respondents had not had sight of the consultation paper itself but had based their submissions on information provided to them by a third party.

34. Some common ground did emerge. Many respondents, across the respondent categories, expressed concern for the children caught up in their parents' divorces and the negative effects on children assumed to be associated with these events. Whatever their view on waiting time periods, many highlighted the regrettable nature of divorce and its potential repercussions. The three main arguments used by objectors were that: numbers of divorces might increase, couples would have less time to re-think and seek reconciliation, and that the proposals belittled the seriousness of marriage. Supporters provided much less comment than those opposing but where it was provided it focused on reducing acrimonious divorces and recourse to "fault" divorces, lessening the financial burden on divorcing couples, and providing a cleaner break and enabling parties to move on.

PARENTAL RESPONSIBILITIES AND RIGHTS

Key data⁵

35. About 40% of births are registered jointly by unmarried parents, the majority of whom record the same address. Around 6% are sole registrations and the remaining 55% are registered by married parents. Children are living in a variety of family types. The 2001 census records 1,072,669 dependent children in Scotland. Of these children, 25% were living in a lone parent family, usually with the female parent. Almost 66% were living in a married couple family and 10% in a cohabiting couple family.

Research evidence⁶

36. Research shows that few unmarried cohabiting fathers in Scotland have a legal relationship with their children. A 2003 survey found that 95% of respondents who were currently cohabiting fathers had no parental responsibilities and rights order or agreement in relation to their children. Confusion over the rights of unmarried cohabiting fathers was shown to be particularly high – nearly half of respondents in Scotland mistakenly thought these fathers have the same rights as married fathers.

Policy objectives

37. The policy objective is to promote fathers' participation with their families by providing that fathers who are not married to the mother of a child will automatically acquire Parental Responsibilities and Rights (PRRs) if they jointly register the birth with the mother. This change is to take effect after the legislation is brought into force and the specific provision commenced. Joint registration means registration or re-registration by either parent or both, where both parents acknowledge that the man is the father of the child. It is not intended to cover the situation where joint registration is not agreed and is ordered by the court. In that situation, the court will remain in a position to impose PRRs under s.11 of the Children (Scotland) Act 1995 if it decides that this is in the best interests of the child.

38. Joint registration takes place where:

⁵ Family Formations and Dissolutions : Trends and attitudes among the Scottish population <https://www.scotland.gov.uk/cru/resfinds/lsf43-00.asp>

⁶ Family Formations and Dissolutions : Trends and attitudes among the Scottish population <https://www.scotland.gov.uk/cru/resfinds/lsf43-00.asp>

- both the mother and the person acknowledging himself to be the father have attended the registrar's office and signed the register together; or
- the mother produces a statutory declaration by the person acknowledging himself to be the father and she declares in the prescribed form that he is the father; or
- the father produces a statutory declaration by the mother that he is the father, and he acknowledges himself in the prescribed form to be the father.

39. It is a common misconception that being named as the father in the register of births confers PRRs. It does not. At present, the law in Scotland gives no automatic recognition to unmarried fathers, apart from their child support obligations. This does not reflect the reality of many families in Scotland today.

40. PRRs include the responsibilities to:

- safeguard and promote the child's health, development and welfare;
- provide direction and guidance to the child;
- maintain personal relations and direct contact with the child on a regular basis;
- act as the child's legal representative.

41. Rights are given in order to allow a person to fulfil his or her parental responsibilities. Having PRRs entitles a parent to take significant decisions relating to the child, such as schooling, medical treatment and place of residence.

42. Unmarried fathers can acquire PRRs at present by:

- marriage to the mother;
- making a Parental Responsibilities and Parental Rights Agreement (PRPRA) with the mother and registering it in the Books of Council and Session; or
- obtaining a court order.

43. The aim is to promote stable relationships within families, particularly for children. If the father and mother have not married, that is their business as adults, but a child has two parents and is entitled to the loving involvement of both of them in his or her upbringing. The evidence suggests that in the majority of cases of children born outwith marriage, the partners are living together in a stable relationship. However, even where a father is not living with the mother either at the time of the birth or later, he may still wish to be fully involved in his child's upbringing.

44. The Bill introduces provisions so that a father automatically acquires PRRs if, following the commencement of the provision, he becomes registered as the child's father under Sections 18 (1)(a) or 18(1)(b)(i) or 18(1)(c) or 18(2)(c) of the Registration of Births Deaths and Marriages (Scotland) Act 1965. It also ensures that where registration as a child's father in England and Wales and Northern Ireland confers PRRs it also does so in relation to a child subject to the law of Scotland. Scottish Ministers are also taking powers to make regulations so that registration as

the child's father under equivalent legislation in other countries can, where appropriate, also confer PRRs in respect of a child subject to the law of Scotland.

Alternative approaches

45. An alternative approach would be to retain the status quo, i.e. to continue the situation where unmarried fathers do not have PRRs but acquire them by marriage to the mother, by the mother agreeing to give them to the father using a Parental Responsibilities and Parental Rights Agreement (PRPRA) or by the father applying to the courts. However, Scottish Ministers do not favour this option as they consider that this approach deters rather than promotes fathers' participation with their families.

46. Another approach would be to give all fathers PRRs automatically regardless of whether the birth is jointly registered or not. Fathers would be in the same position as mothers and have PRRs unless a court removed them. The only criterion for the automatic acquisition of PRRs would be biological parenthood. The genetic parents of adopted children or those conceived by artificial techniques would not be covered. The presumption would remain that the man who was married to the mother at any time during the pregnancy was the father. This presumption could be rebutted in court. There would be no need to have PRPRAs. People other than the biological parents could continue to apply to the courts for PRRs.

47. The Scottish Ministers consider that this approach would not be appropriate. It would not be fair if women who had suffered trauma such as rape, or had become pregnant as a result of a casual liaison then had to go to court to have PRRs removed from the father. Scottish Ministers believe that some evidence of commitment to joint parenting such as the joint registration of the child's birth should be required before a man gains PRRs.

48. It would also be possible to make the new arrangement retrospective, i.e. apply to unmarried fathers who have already jointly registered a birth. The advantage of this approach would be that automatic PRRs would not depend on an accident of the calendar and fathers would have PRRs for both existing and future children, i.e. they would not be placed in a situation where they have PRRs for one child but not for an older sibling.

49. The Scottish Ministers do not favour retrospection since the law should be clear, precise and predictable. They consider that it would be inappropriate for parents who had registered the birth of their child on the basis of one set of legal consequences then to find that subsequent legislation had materially changed those legal consequences. In addition, there is a need to protect families whose arrangements had already been settled by courts, it would not be in anyone's interests to re-open such cases. Although this would mean that children already registered prior to that date would not benefit from the change, it would avoid any interference in both the child's and the mother's family life. Fathers who did want to play an active part would be able to acquire PRRs by the existing methods, which involve either the consent of the mother or a decision by the court.

50. Although not favouring retrospection, the Scottish Ministers uphold the key principle that both mothers and fathers should fulfil their responsibilities towards their children and should hold the rights that enable them to do so. They firmly believe that it is in the best interest of

children to have both parents actively involved in their upbringing and the Executive will actively promote the use of PRPRAs.

Consultation

51. Just under a third of all respondents to the consultation document *Family Matters: Improving Family Law in Scotland*, commented, with 75% of those in support. By a small majority, most respondents agreed the provisions should not be retrospective, since the law should be clear and should not undermine past decisions reached on a different basis.

52. Many saw good reasons for automatic PRRs: it would promote the involvement of the father in the upbringing of the child; enhance and substantiate the parental status and role of the father; address the perceived current unfair discrimination against fathers; may reduce stress on the parent or child at a later time and should contribute to the stability for the child.

53. Objections, mainly from individuals, included points such as: fathers should have to marry the birth mother to be entitled to such PRRs; the proposals did not address the issue of mother denying contact between the child and the father; provision would undermine “the family unit” and that fathers may take advantage of their new rights whilst shirking the accompanying responsibility. There was some confusion about the processes for joint registration with a few respondents querying the need for the father always to be present at the time of registration (which is not the case – see paragraph 38) and concern that mothers would be able to withhold the father’s name from the registration document.

54. Some concerns emerged. Some suggested that consideration should be given to ensuring that absent fathers fulfil their new responsibilities but the most common concern was to ensure that women and children were protected from inappropriate contact with an abusive father holding PRRs. There was a suggestion that the status quo should be retained to protect women and children from men who have been abusive. However, Scottish Ministers do not consider that this is the appropriate way to deal with this concern. They recognise that there is a need to deal effectively with the question of continued and safe contact for children where domestic abuse has been, and/or remains an issue. However, this need arises whether or not the parents have been married to one another and irrespective of whether the father holds PRRs or not. The Executive takes the question of continued and safe contact for children very seriously and will be examining the issues involved to ensure that appropriate and early action is taken when domestic abuse is alleged.

LEGAL SAFEGUARDS FOR COHABITANTS

Key data⁷

55. At the time of the 2001 Census, there were 163,434 non-marital cohabiting-couple households. For many, cohabitation and parenting now go hand in hand. In 2001, 38% of the cohabiting families in Scotland had dependent children (either from a current or previous relationship), 10% of Scotland’s 1,072,669 children were living in a cohabiting couple family.

⁷ Family Formations and Dissolutions : Trends and attitudes among the Scottish population <https://www.scotland.gov.uk/cru/resfinds/lsf43-00.asp>

Some individuals enter into cohabiting relationships whilst still legally married to another; but we have no robust data on how many.

56. According to Census data in 2001, 2% of Scottish families were cohabiting couples of the same sex. These families were recorded as “ungrouped individuals” in previous census exercises.

Research evidence⁸

57. The available evidence suggests that cohabitation has moved from a minority to a dominant family type in the UK. However, data also suggests that cohabitations rarely last in the long-term. Cohabiting unions appear to last (at median) 2-3 years before being converted into marriage, or dissolving. About two-thirds of cohabitations result in marriage and the remaining third mostly dissolve within 10 years.

58. Increasing numbers of people are cohabitating at some stage in their lives, though this experience may be short-lived. Survey data suggests that in the region of 30-40% of adults have experience of cohabitation. Given that cohabitation is more common among younger people, key commentators expect both the incidence and duration of cohabitation to increase over time.

59. There is considerable confusion amongst the Scottish public about the legal position of cohabitants with a majority (57%) reporting the belief that cohabiting couples have a “common law” marriage that gives them the same rights as married couples. This is not the case. Similarly, a significant number (35%) of those surveyed believed inaccurately that a woman who had cohabited with partner for 10 years would have the same rights as a married woman in relation to property on the death of her partner.

60. There is evidence that many cohabitants do not use the legal provisions currently available to them in the circumstances of relationship breakdown or the death of a partner. Recent research found that the majority of cohabitants in a survey (57%) owned accommodation, but less than half of these owned their property jointly. Only 6% of owner-occupiers had written agreements on ownership sharing – the remaining 94% were reliant on rules of property law to ascertain shares on breakdown/death. Only 16% of this sample had made wills.

61. Across jurisdictions in many developed countries, there is increasing focus on the legal policy issues surrounding the regulation of non-marital cohabitation. Governments have intervened in various ways as they attempt both to respect individual choice and autonomy (including the right of couples to avoid the responsibilities and rights pertaining to marriage) whilst at the same time to protect the vulnerable (including the children of cohabitants) when relationships break down. Several countries have introduced ‘opt-in’ registration schemes conferring a distinctive legal status on cohabitants with a framework of responsibilities and rights as between the parties and between them and any children. There is wide variation in the nature and extent of the attendant rights and their relationship to those available under the status

⁸ Family Formations and Dissolutions : Trends and attitudes among the Scottish population <https://www.scotland.gov.uk/cru/resfinds/lstf43-00.asp>

of marriage. In some cases, the rights are designed by the parties themselves. A persistent question for such systems is uptake; and whether those most likely to need or benefit from legal protection actually choose to be regulated by the available schemes.

62. Other states have provided a statutory basis for recognising when a relationship is a cohabitation and attach consequences to that recognition, irrespective of whether the parties themselves have chosen to be regarded in that light. Again, the consequences – typically a range of entitlements and obligations – differ markedly amongst jurisdictions. So too does the settlement method, with some jurisdictions giving wide discretion to courts to reach just and reasonable settlement of disputes when a relationship breaks down or one party dies; and others setting fixed rules for reaching such settlements.

63. What seems clear is that no one system could simply be transplanted wholesale into Scotland: new provisions have to fit culturally and legally into the Scottish context. To aid the debate in this complex area the Scottish Executive has published research findings⁹ describing the position in France, the Netherlands, New Zealand and Australia. This international comparison of the legal position of cohabiting couples reveals a complex and varied picture.

Policy objectives

64. The policy objective is to introduce greater certainty, fairness and clarity into the law by establishing a firm statutory foundation for disentangling the shared life of cohabitants when their relationship ends. Provision already exists in various statutes – dealing for example with tenancy rights, damages and occupation of the marital home – to protect and empower cohabitants. The rights granted in these cases typically enable a cohabitant to benefit the partner (for example, a cohabitant may be a “nearest relative” for the purposes of supporting an adult with incapacity), or to secure a fundamental protection that would be available in similar circumstances to a spouse (for example, in cases of domestic violence). But the distribution of cohabitants’ property on relationship breakdown (which may give rise to conflicts between them), or on the death of a partner is left to the common law with all the variability inherent in this. The Scottish Ministers consider that the legal vulnerability arising from the current absence of systematic regulation sits uncomfortably alongside the increasing number of cohabiting couples and the significant number of Scotland’s children living in cohabiting-couple families.

65. The Scottish Ministers aim to provide a clearer statutory basis for recognising when a relationship is a cohabiting relationship; and a set of principles and basic rights to protect vulnerable people either on the breakdown of a relationship, or when a partner dies. The Scottish Ministers do not intend to create a new legal status for cohabitants. It is not the intention that marriage-equivalent legal rights should accrue to cohabiting couples, nor is it the intention to undermine the freedom of those who have deliberately opted out of marriage or of civil partnership. The Scottish Ministers consider it vital to balance the rights of adults to live unfettered by financial obligations towards partners against the need to protect the vulnerable. This is reflected in the detailed provisions – for example, the presumption of equal shares in household goods acquired during the cohabitation is rebuttable.

⁹ Cross-jurisdictional Comparison of Legal Provisions for Unmarried Cohabiting Couples: <http://www.scotland.gov.uk/publications/recent>

66. The Bill provides a set of basic safeguards relating to the sharing of household goods, money and property; financial provision on relationship breakdown where economic disadvantage can be shown; and discretionary provision (i.e. by application to the court) for a surviving cohabitant when a partner dies without a will. It also equips the courts with a power to take account of the needs of any child of the relationship (alongside any economic disadvantage experienced by the adult) in settling financial provision.

67. The intention is to create legal safeguards for the protection of cohabitants in long-standing and enduring relationships, not to cater for short-term cohabitation. The Scottish Ministers considered carefully whether access to these safeguards should be limited by setting a qualifying time-period. They concluded that there is more to be lost than gained in doing so. It would be arbitrary, rigid and unresponsive to individual cases; would create problems of proof; could distort behaviour; and could lead to especially harsh outcomes in relation to discretionary awards on death.

68. The Bill is therefore silent on any qualifying time period but sets out the factors, including the duration of the relationship, to which a court should have regard in determining legally relevant cohabitation. In this way, facts and circumstance will, over time, build up an understanding of the situations in which recourse to the courts is likely to succeed.

Alternative approaches

69. An alternative approach would be to retain the status quo in legislative terms and concentrate effort on information and awareness raising about the legal position of cohabiting couples, encouraging them to draw agreements setting out what would happen in a range of possible circumstances. While this approach has some merit it is considered unlikely to result in all cohabiting couples making adequate private legal arrangements, leaving a significant number of cohabiting couples and their children without legal protection.

70. Another option might be to recognise that cohabitation is now an accepted lifestyle choice for many couples in Scotland, including those with children. Consequently, it could be argued that the distinction between marriage and cohabitation has lessened and cohabitation should automatically attract marriage-equivalent rights and responsibilities. A key consideration here is the extent to which Government should impose rights and obligations on cohabiting couples. There is a need to strike a reasonable balance between addressing the legal vulnerabilities of many cohabiting couples in Scotland and avoiding the creation of an unwieldy legal framework that interferes unduly with the private lives of individuals. The Scottish Ministers do not believe it would be right to impose comprehensive and strenuous obligations equivalent to those attaching to marriage on individuals who have not deliberately selected them. Moreover, they believe that to regard cohabitation as equivalent to marriage fails to acknowledge the special place of marriage in Scottish society.

71. The Scottish Ministers are clear that marriage has a special place in society and that its distinctive legal status should be preserved. In addition, the rights that might be considered appropriate to those in a relatively brief relationship should arguably differ from those of a couple who have been together in a committed relationship for much longer. To try to capture this would be complex, possibly involving a system of accrued rights whereby entitlement would

progressively enlarge with the duration of the relationship. There is no suggestion that Scottish people would welcome such a radical approach.

72. A further approach would be to introduce a system of registration where the legal protection only applies where the couple have registered their partnership. However, this type of system would be costly, cumbersome and inappropriate as a mechanism for the delivery of a policy intention that focuses on protecting the vulnerable on the termination of a relationship rather than on the existence of the relationship itself. It would be unlikely to result in all cohabiting couples registering their relationship, leaving a significant number of cohabiting couples and their children without sufficient legal protection. A significant additional complication would be where one party – or even both parties - to a cohabiting relationship had not dissolved marriages to previous partners. That situation could not easily be reconciled with a system of formal registration.

73. Some might argue for the development of an alternative status for mixed sex couples who choose not to marry, akin to registering a Civil Partnership. To create an additional framework for cohabiting couples equivalent to marriage would run contrary to Scottish Ministers' commitment to the distinctive legal status of marriage and to preserving its special place in society. It would also attract the difficulty already mentioned, namely that those who may be in most need of the protections offered by regulation may not choose, or be free or permitted to choose, the status through which the protection is accessed.

74. In any event, the Civil Partnership Act 2004 creates a new status specifically for same sex couples who are not able to marry. Opposite sex couples who want to make a lifetime and legally binding commitment to one another are already able to do so through marriage, whether civil or religious. Additionally, while it would be within the legislative competence of the Scottish Parliament to create a new status of, for example, "civil domestic partnership," it would not be within the Parliament's competence to replicate marriage equivalent rights and responsibilities for such a partnership. Many of the rights and responsibilities that accrue to both marriage and civil partnerships are reserved to the UK Government.

75. Having decided in favour of a 'presumptive' approach, under which all cohabiting relationships exhibiting certain characteristics would benefit from specific legal safeguards, the Scottish Ministers considered options in relation to the definition of cohabitation. Two main approaches are possible. One approach is to use the analogy of marriage and to define cohabitation in terms of the characteristics of the relationship between husband and wife (irrespective of the gender of the parties). This has the merit of being straightforward and readily understood by the courts. Another approach, favoured by some other jurisdictions which have developed presumptive approaches to the regulation of cohabitation, is to set out a list (usually non-exhaustive) of the features or factors that a court would take into account in determining whether a relationship was a cohabiting relationship. The Scottish Ministers see merit in the latter approach. Section 18 of the Bill therefore sets out the definition for same- or opposite-sex cohabitation, resting on the marriage analogy tempered by a list of factors that a court shall have regard to in determining a legally relevant cohabitation. Taken together, these factors are intended to focus attention on cohabitants who have developed a shared life with a degree of interdependence, whilst leaving courts in disputed cases the necessary flexibility in interpreting the facts of each case and discretion in securing fair and just outcomes.

Consultation

76. The Executive indicated in *Family Matters: Improving Family Law in Scotland* its belief that there should be legal safeguards for cohabiting couples. It considered that the Scottish Law Commission recommendations struck the correct balance between addressing the legal vulnerabilities of many cohabiting couples while avoiding the creation of an unwieldy legal framework which would interfere unduly with the private lives of individuals and which failed to recognise the special place of marriage in society. However, this was a matter on which a settled view had not been reached and consultees were invited to provide views about the principles as well as the detailed proposals.

77. The consultation showed a robust support for the general principle of creating a coherent set of basic safeguards rather than any regulatory system akin to marriage. Legal safeguards were seen as necessary in order to protect the vulnerable. Many respondents defended the right of adults to live outwith the comprehensive rights and obligations created by marriage. A number pointed to the short-term nature of most cohabitations and argued that safeguards should seek to protect those cohabitants who have taken a real stake in a relationship, and those with children. The main reasons in opposition to the proposal were that this would undermine marriage and discourage people from marrying, with the option always there for cohabitants to marry if they wish to have safeguards.

78. Responses about individual aspects of the proposed package attracted fewer responses but in each case, there was a majority in favour of the recommendation with some fine-tuning suggested, particularly in relation to the discretionary share of a deceased partner's estate. Legal professionals pointed to the difficulty in applying this discretion to both testate and intestate situations. In certain testate cases, the proposals would have given cohabitants recourse to the courts that would be denied to a spouse. The Bill therefore limits the changes to intestacy cases leaving testate situations to any future wider review of succession.

MATRIMONIAL HOMES (OCCUPANCY RIGHTS AND PROTECTION FROM VIOLENCE)

Policy objectives

79. The primary aim is to improve the protection offered to members of families, and extend them to include vulnerable cohabitants, including same sex couples, rather than to make changes to the basic policy of the *Matrimonial Homes (Family Protection) Act 1981*. The aim is to ensure that the protection which is given is sufficient and extends to cover the victim's every day life while at the same time intervening in family life and property rights no more than is necessary for the protection of the potential victim. The Bill extends the scope of matrimonial interdicts (and introduces domestic interdicts) to cover the applicant's home, place of work and the school attended by any child and makes interdicts with attached powers of arrest available to divorced partners and present and former cohabitants whether same- or opposite-sex.

80. The Bill also makes minor changes to the 1981 Act to deal with problems in the conveyancing of homes that may be subject to occupancy rights. These principally: restrict the occupancy rights of the spouses of former owners; clarify what is meant by "a proposed dealing"; give the courts powers to order payments or impose conditions where it refuses a

dispensation; replace the need for sworn affidavits with written declarations subject to criminal sanctions for false statements; and give more protection to non-entitled spouses in tenancies.

81. The Scottish Ministers are committed to tackling domestic abuse and ensuring that vulnerable people have appropriate protection and believe that these reforms complement existing legislative provisions.

Alternative approaches

82. An alternative approach would be to retain the status quo relying on the provisions in the *Protection from Harassment Act 1997* and the *Protection from Abuse (Scotland) Act 2001*. However, the Executive considers it appropriate to extend the protective provisions of the 1981 Act to ensure that the appropriate protection of the law is offered regardless of which legislative route is followed.

Consultation

83. The proposed changes were strongly supported in previous consultations and were designated as firm proposals for change in *Family Matters: Improving Family Law in Scotland*. Responses were not specifically sought although consultees were given the opportunity to record their views. They attracted relatively little response. Most of those who responded simply indicated their support for what was proposed.

MISCELLANEOUS TECHNICAL AMENDMENTS

Policy objectives

Marriage

84. The family law framework in Scotland is coherent with respect to marriage. Marriage brings with it a comprehensive set of rights and responsibilities that has evolved over a significant period. However, a number of the rules depend on common law and the aim is to remove anomalies and redundant provisions and provide clarification of a small number of aspects of the law. The reforms are largely technical in nature and impact on nullity of marriage, declarators relating to marriage, litigation between spouses and choice of law rules on the legal effects of marriage. A number impact upon the rules of court, court jurisdictions and Private International Law.

Children

85. The policy intention is to further reduce the significance of the status of illegitimacy by removing the reference to illegitimacy in legislation relating to adoption (the *Adoption (Scotland) Act 1978*) and by changing the rules as to domicile of children. Virtually all the effects of illegitimacy were removed for the law of Scotland by the *Law Reform (Parent and Child) (Scotland) Act 1986*. However, the domicile of a child remains broadly determined by the domicile of the father if the child is legitimate and by the domicile of the mother if the child is illegitimate. In addition, the existing choice of law rules on legitimacy, illegitimacy and legitimation are uncertain. The Bill provides that a child's domicile before the age of 16 is reached will be that of the country with which the child is for the time being most closely

connected. There will therefore no longer be a link between a child's domicile and that of his or her parents' marital status in relation to both the domicile of origin and dependant domicile.

Sharing of matrimonial property on divorce

86. The consultation drew attention to the potential for unfair division between divorcing spouses of the value of matrimonial property, in particular pensions and the matrimonial home.

87. Scots law favours a clean break in divorce settlements. This is based on the fair sharing of the net value of all matrimonial property, i.e. all property acquired during the marriage up to the 'relevant date' which is usually the date of separation. However, often the parties have been living apart for 2 years or more before the value of the matrimonial property is shared. For pensions, the potential unfairness arises when pension-sharing methodology interacts with features of certain types of pension schemes. The issues are similar for the matrimonial home, which is valued at the 'relevant date', long before any transfer of property order, which may assign the home to one party.

88. The Bill provides the court with a discretion (which it does not have at present) to take account of any alteration in the value of the jointly owned asset between the relevant date and the date of the proof or settlement. The intention is to enhance protection & fairness in the division of matrimonial assets not to alter in any way the well-understood concept of the 'relevant date' when it comes to the sharing of matrimonial property. The main aim is to deliver greater overall fairness and flexibility in the divorce process.

Administration of Justice

89. Similarly, consultation drew attention to section 13 of the Administration of Justice Act 1982 which specifies who is to be considered a relative of a person in relation to the right of that person to take action to claim for damages for the effects of personal injury. The list of persons considered to be relatives includes spouse, civil partner and opposite-sex cohabiting partner. The Bill extends this list to include same-sex cohabiting partners.

Consultation

90. The proposed changes regarding marriage and children were supported in previous consultations and were designated as firm proposals for change in *Family Matters: Improving Family Law in Scotland*. Responses were not specifically sought although consultees were given the opportunity to record their views. They attracted relatively little response. Most of those who responded simply indicated their support for what was proposed.

OTHER ISSUES

91. There are two proposals on which views were sought that are not included in the Bill; to introduce Stepparent Parental Responsibilities and Parental Rights Agreements (SPRPRAs) and contact with wider family, in particular grandparents.

92. The first of these proposals was that a married stepparent could acquire full PRRs in relation to a stepchild by a registered agreement with the birth parents, without the need to go to

court. The consultation document noted that earlier consultation on this issue had not produced a consensus and the Executive had not reached a settled view on whether or not to include SPRPRAs within a future Family Law Bill.

93. Once again, this issue drew a mixed response with many expressing serious reservations about how to safeguard children's views and interests in a process focused on the convenience of adults. Scottish Ministers considered whether a child's rights could be safeguarded if the proposed process were adjusted but concluded that this would entail such complication of the original idea that any advantage over recourse to the court would be lost. Within existing legislation, there are solutions for children and parents, which though they may fall short of establishing full PRRs would deal with most of the day-to-day situations families face. The Executive does not intend to introduce new legislation but will ensure people are better informed about existing solutions and will examine the potential for change within the current processes.

94. There has been pressure to introduce a right of contact for grandparents. In the consultation document, the Executive made its view clear, that a legal right of contact would not be appropriate and sought views on how to promote contact with wider family where voluntary arrangements cannot be reached.

95. Consultation revealed widespread appreciation of the contribution that grandparents often make to the lives of their grandchildren; but also reinforced the argument that for such contact to be effective, it has to be negotiated and cannot be demanded as of right. An automatic right for grandparents would ignore the views of children themselves; would be inconsistent with the basic framework of law that is founded on adults' responsibilities towards children, not adults' rights in relation to the child and would, in some circumstances give grandparents greater legal rights than fathers.

96. The consultation reinforced the Executive's view that an automatic right of contact is not in the best interests of the child or the wider family and that the solution does not lie in legislation. A number of suggestions were made for ways to promote continued contact where voluntary agreements proved elusive and the Executive will continue to engage closely with interest groups, working with them to develop solutions.

97. In addition, a number of issues were raised in consultation about the type and level of support available to families facing difficulties. As indicated in paragraphs 7 to 11, the Executive remains firmly committed to promoting stability in relationships and supporting families in relationship difficulties and will be working with key stakeholders to develop a range of non-legislative measures to support and complement the proposed law reform.

EFFECTS ON EQUAL OPPORTUNITIES, HUMAN RIGHTS, ISLAND COMMUNITIES, LOCAL GOVERNMENT, SUSTAINABLE DEVELOPMENT ETC.

Equal opportunities

98. The Bill's provisions are not discriminatory on the basis of race, disability, age, sexual orientation, language or social origin or of other personal attributes, including beliefs or opinions, such as religious beliefs or political opinions. It does not carry any unjustified gender

imbalance; however, there are some proposals that are likely to benefit one gender more than the other.

99. Scots law favours a clean break in divorce settlements. This is based on the equal sharing of the net value of all matrimonial property - all property acquired during the marriage up to the 'relevant date' - usually the date of separation. The Bill proposes to give the court a discretion (which it does not have at present) to take account of any alteration in the value of the jointly owned asset between the relevant date and the date of the proof or settlement. This will address unfairness that can arise when matrimonial property dramatically increases (or decreases) in value between those dates with the result that one party to the divorce benefits at the expense of the other. In practice this will most likely impact on pension sharing or where the transfer of the matrimonial home to one party forms part of the settlement. The proposed changes are more likely to benefit women when pension sharing is taken into account and men when the matrimonial home is considered. However, both aspects could potentially benefit either gender. The main aim is to deliver greater overall fairness and flexibility in the divorce process.

100. The proposals on PRRs for unmarried fathers will be seen by some as rectifying a long-standing prejudice. It could be argued that to deny automatic PRRs to all parents would discriminate against those fathers who jointly registered the birth prior to the commencement of the legislation. However, to apply the changes retrospectively might cause difficulties for mothers who had chosen not to marry the father – they would be faced with a change in the legal situation and would be obliged to take legal action simply to restore the status quo. Given that unmarried fathers will be in no worse situation than before, and will still be able to acquire PRRs by marriage, by agreement with the mother or by court order on balance, it is considered that the Bill will not unfairly discriminate against unmarried fathers.

101. The legal protection proposed for cohabiting couples is a new benefit which will be available to both men and women regardless of whether the partnership is of opposite or same sex. However, in practice, extending legal protection to cohabiting couples is likely to confer more benefit on cohabiting women than on men, as women are more likely to have taken on domestic and/or caring responsibilities during the course of the relationship and therefore decrease their ability to generate income, career opportunities and other economic benefit. They are also more likely to be the primary carer of any children resulting from the relationship. The practical impact of these proposals will therefore be to promote greater fairness and equity between men and women, rebalancing a historic detriment or lack of fairness disproportionately experienced by women under the current legal position.

102. The consultation document was sent to a wide variety of individuals and organisations including equal opportunity groups and Church and Faith groups. Executive officials met with representatives from key stakeholders including LGBT groups and religious and faith communities to discuss the proposals. The impact of the proposals in the Bill on the people most likely to be affected by them, women, unmarried fathers, same sex couples, peoples with strong religious views about family law, etc have been assessed as well as discussed with representatives of the affected groups.

Human rights

103. The Bill does not give rise to any issues under the European Convention on Human Rights (ECHR).

Island communities

104. The Bill has no disproportionate effect on island communities.

Sustainable development

105. The Bill will have no impact on sustainable development.

Local government, business and the voluntary sector

106. The Bill updates family law and removes anomalies and obsolete provisions. The overall effect of the Bill is to provide legal protection and safeguards for children and adults in today's family structures. It will impact across a number of aspects of family law including the rules regulating divorce; parental responsibilities and rights for fathers; and protection against domestic abuse; as well as introducing new legal safeguards for cohabiting couples and their children. It will largely affect how families regulate their affairs and the rules of the Scottish Courts who adjudicate where necessary.

107. Local authorities are the key players in managing and commissioning local services to support families and children. However, the provisions of this Bill will not place any additional burdens on them, or on business or the voluntary sector. For these reasons, a Regulatory Impact Assessment is not required.

This document relates to the Family Law (Scotland) Bill (SP Bill 36) as introduced in the Scottish Parliament on 7 February 2005

FAMILY LAW (SCOTLAND) BILL

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Produced and published in Scotland on behalf of the Scottish Parliamentary Corporate Body by Astron.

ISBN 1-4061-0567-8



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