

Margaret Mitchell MSP
Convener
Justice Committee
C/o Clerk to the Justice Committee
The Scottish Parliament
EDINBURGH
EH99 1SP

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22 June 2016

Dear Margaret,

POST-LEGISLATIVE SCRUTINY OF THE FAMILY LAW (SCOTLAND) ACT 2006

I attach the Scottish Government's response to the report on the 2006 Act which was prepared by the Justice Committee before the elections. The Scottish Government is grateful to the Committee for carrying out this comprehensive piece of work in a very limited time frame before the pre-election period.

The response covers the report's conclusions and recommendations on cohabitants and on parental responsibilities and rights and related matters.

The response also covers some other points raised by the Committee and/or by those who gave written or oral evidence.

My officials and I are happy to meet the Committee at any time to discuss the issues further. As the reply indicates, our main priorities in relation to family law are in relation to children and ensuring their interests are the paramount consideration when disputes arise.

Yours, Annabelle

ANNABELLE EWING

POST-LEGISLATIVE SCRUTINY OF THE FAMILY LAW (SCOTLAND) ACT 2006 RESPONSE BY THE SCOTTISH GOVERNMENT TO THE REPORT BY THE JUSTICE COMMITTEE

Introduction

1. The Scottish Government is grateful to the Committee for carrying out this post-legislative scrutiny.

2. The Scottish Government is committed to a wide range of work in relation to family law, mainly in relation to children. This work, outlined briefly below, is directly relevant to the conclusions and recommendations of the Committee in relation to parental responsibilities and rights (PRRs). In carrying out this work, the Scottish Government will wish to ensure that the welfare of the child remains paramount in these cases and that the voice of the child is heard wherever possible.

3. Areas of work include:

- On PRRs, we intend to review the Children (Scotland) Act 1995 in relation to the interests of children and them forming and maintaining relationships with key adults in their lives, such as parents, step-parents, grandparents and other family members.
- We are producing a Family Justice Modernisation Strategy, to improve how civil cases involving children are dealt with and to ensure the voice of the child is heard wherever possible. As the Committee noted, there is on-going work on the voice of the child in the Family Law Committee of the Scottish Civil Justice Council. The Family Justice Modernisation Strategy will cover permanence and adoption cases as well as cases on contact, residence and PRRs.
- As part of our work to reform and modernise legal aid, we intend to expand access to alternative methods of resolving disputes. As the Committee noted, that is particularly relevant in family cases. In considering the use of mediation and Alternative Dispute Resolution in family cases, the Scottish Government will take full account of the points made by Scottish Women's Aid about mediation not being recommended when domestic abuse is an issue. The Scottish Government will also take full account of the points made in Committee about the voice of the child being heard in mediation.
- As the Committee noted, as part of the current work on succession, the Scottish Government is already considering issues in relation to section 29 (application to court by surviving cohabitant for provision on intestacy).

Response on conclusions and recommendations by Committee.

Paragraph 36: Reforms granting limited rights to cohabitants under the 2006 Act have been a worthwhile addition to Scots family law, helping address a gap previously existing in the law that had left some deserving cases without a remedy.

4. The Scottish Government agrees. The Scottish Government thinks it important to note, as the Committee has done, that the provisions on cohabitants in

the 2006 Act are a worthwhile addition to Scots family law even though there is debate on some of the detailed aspects of the legislation.

Paragraph 37: It was noted at the time the reforms were introduced that they were intended to provide a framework only, with discretion given to the courts to determine what amount, if any, to award to an applicant making a claim under section 28 (which concerns financial provision where a cohabiting relationship ends other than by death). In practice, this approach has made it difficult for lawyers to advise clients as to what they can reasonably expect from this provision. The apparent paucity of published judicial determinations on section 28 cases has not helped. At the same time, the fact that awards made under section 28 are limited to sums of money may be too prescriptive. The efficacy of section 28 is an issue the next Scottish Government, and a future justice committee, may wish to consider in more detail.

5. The Scottish Government has no immediate plans to review section 28 of the 2006 Act. As outlined above, our main priorities in relation to family law at the moment are about children. However, the Scottish Government has noted particular concerns about section 28 raised in evidence given to the Committee and we will bear these in mind when we do come to review section 28.

6. Particular points the Scottish Government has noted are:

6.1 The potential need for greater clarity on the purpose of any award under section 28.

6.2 The potential need for the legislation to provide for awards in areas such as the transfer of property and periodical allowances.

6.3 Whether there should be provision on financial agreements between cohabitants similar to section 16 of the Family Law (Scotland) Act 1985 for spouses and civil partners (on the court being able to set aside any such agreements in certain circumstances).

6.4 Whether section 28(2)(b) of the 2006 Act (on the economic burden of caring for a child) should relate to a child accepted as a child of the family and not just a child where the cohabitants are the parents.

6.5 Whether more is needed on the applicability of the provisions in the Act on cohabitants in cross-border situations.

7. Some of the evidence noted that there should be more publicity around cohabitants' rights. The Scottish Government would not plan a publicity campaign on cohabitants, given the need to target public resources. However, the Scottish Government website is undergoing some changes. As part of that, the Scottish Government will consider how information for the public on cohabitants' rights can best be provided on the Scottish Government's mygov.scot website.

8. The Scottish Government has noted the points made to the Committee about the publication of sheriff court judgements. As a general rule, only where there is a

significant point of law or particular public interest will a judgment be published. The Scottish Government appreciates that the publication of decisions in a developing area of law is important, if legal practitioners are to be able to advise their clients effectively. As the information contained in Annexe C of the Committee's report indicates, decisions on publishing sheriff court judgements are a matter for the sheriff who heard the case. The Scottish Government has passed on the comments on publication of judgements which were made by the Committee and in the evidence submitted to the Committee to the Lord President's Private Office.

Paragraph 38. There would also be merit in reconsidering the time limits for making a claim under section 28 and under section 29 (which concerns a claim against the estate of a deceased cohabiting partner). There was a consensus in the evidence we considered that the time limit was too short. We note that section 29 is already under review as part of a Scottish Government project to examine succession law.

9. As indicated above, the Scottish Government has no immediate plans to review section 28. However, when we do come to review section 28, we will bear in mind the points made by the Committee and in evidence to the Committee on the time limit. Clearly, one reason for the time limit is to increase certainty and avoid "stale claims".

10. As the Committee's report indicates, the Scottish Government is already reviewing section 29 as part of our work on succession law. In this review, we will bear in mind the points made by the Committee and in evidence to the Committee on the time limit.

Paragraph 39. We note views that, while the law on adult relationships – marriage, civil partnership, and cohabitation – in Scotland may be broadly fit for purpose, it has evolved in a piecemeal fashion over the last decade and a half, with limited consideration of what the underlying aims and principles of the law should be.

11. Given other priorities, the Scottish Government would not plan at this stage to review the law on adult relationships generally.

12. Following the introduction of same sex marriage, we have reviewed the law on civil partnership and have carried out a public consultation¹. We expect to publish shortly the responses to the consultation where the respondent indicated they were content for their response to be published and the analysis of the responses.

Paragraph 84. Section 23 of the 2006 Act, which provides a means for unmarried fathers to acquire parental responsibilities and rights through registration of the birth, has been welcomed. But it has not resolved the debate over the extent to which the law should recognise the parental responsibilities and rights of unmarried fathers. Some stakeholders consider

¹ The consultation on the review of civil partnership is at <https://consult.scotland.gov.uk/family-law/review-of-civil-partnership>

that the law continues to be discriminatory against unmarried fathers. Regardless of what the answer to this issue is, the Committee considers that the debate is an important one, and that there would be merit in it being continued in the next session.

13. The Scottish Government agrees that this is an important issue and intends to consider it as part of our review of the Children (Scotland) Act 1995.

Paragraph 85. The Committee notes views that section 23 should have been retrospective in effect. On the basis of the limited evidence led, the Committee is not in a position to express a collective view of whether we agree or disagree with these views, but we note that if they have any merit they should be acted upon sooner rather than later.

14. The Scottish Government intends to consider this as part of our review of the 1995 Act.

15. In doing this, the Scottish Government will take account of the arguments against retrospection which were put forward by the then Scottish Executive when promoting the Bill which became the 2006 Act².

Paragraph 86. There is a lack of evidence as to the extent to which the amendment made by section 24 of the 2006 Act to section 11 of the Children (Scotland) Act 1995 has made children any safer. There are conflicting views as to whether there is a significant problem of court orders under section 11 putting children at the risk of abuse.

16. The Scottish Government has noted the mixed views in the evidence received by the Committee on the amendments made by section 24. The Scottish Government is aware of a Pilot Study, funded by the Royal Society of Edinburgh, being carried out by Dr Richard Whitecross, a Law Lecturer at Edinburgh Napier University. The aim of the Pilot Study is to understand the practical impact of section 11(7A) to (7E) of the 1995 Act (the amendments made by section 24), particularly in the context of contact cases. The Scottish Government will take account of the outcomes of this Pilot Study when carrying out its review of the 1995 Act.

17. The Scottish Government will also take full account generally in its review of the 1995 Act of the points being made about domestic abuse and contact.

Paragraph 87. Overall, the way in which the Scottish legal system handles family law cases involving children raises strong and conflicting views. With the main legislation over 20 years old, we note views that it may be time for a wholesale review, focussed as much on how the law is applied, and the mechanism used to resolve disputes, as on what the law says. We consider that cases would benefit from increased use of mediation and, if necessary, from being heard by specialist family law sheriffs.

² Please see paragraphs 48 to 50 of the Policy Memorandum for the Bill:

[http://www.parliament.scot/S2_Bills/Family%20Law%20\(Scotland\)%20Bill/b36s2-introd-pm.pdf](http://www.parliament.scot/S2_Bills/Family%20Law%20(Scotland)%20Bill/b36s2-introd-pm.pdf)

18. The Scottish Government agrees that work is needed in this area.

19. As well as the review of the 1995 Act, the Scottish Government is also preparing a Family Justice Modernisation Strategy. The Strategy will cover family cases generally (eg contact, residence, adoption and permanence) as there are many similarities about the issues raised in relation to procedures. The overarching aim is to improve outcomes for children. The Strategy will be based on the clear understanding that the welfare and wellbeing of children and young people must be at the centre of family justice and that the voice of the child must be heard wherever possible.

20. The Strategy is about improving procedures. The Strategy will focus on civil family cases involving children.

21. The Scottish Government agrees that Alternative Dispute Resolution, including mediation, has a valuable role to play in family cases. We will consider what more can be done to promote the use of mediation. As indicated above, in considering the use of mediation and Alternative Dispute Resolution in family cases, the Scottish Government will take full account of the points made by Scottish Women's Aid about mediation not being recommended when domestic abuse is an issue. The Scottish Government will also take full account of the points made in Committee about the voice of the child being heard in mediation.

22. On specialist family law sheriffs, under the Courts Reform (Scotland) Act 2014, decisions on specialist judiciary in the sheriff courts are a matter for the Lord President. The Scottish Government has passed on the comments on specialisation of sheriffs in family cases which were made by the Committee and in the evidence submitted to the Committee to the Lord President's Private Office.

Other points

23. A number of other points were made by the Committee or in evidence to the Committee, where it might be useful for the Scottish Government to offer comments.

Marriage by cohabitation with habit and repute

24. In paragraphs 11 and 12 of its report, the Committee noted that section 3 of the 2006 Act preserved the doctrine of marriage by cohabitation with habit and repute in relation to certain marriages contracted overseas that turned out to be invalid. Paragraph 12 noted "the evidence of one witness that the case for preserving the doctrine even for this one relatively narrow set of circumstances had not been convincingly made, and that, when the legislative opportunity next arises, the doctrine should be wholly abolished".

25. The Scottish Government consulted on abolishing this when we consulted on a draft of the Marriage and Civil Partnership (Scotland) Bill. Following comments from consultees, we decided not to proceed with this proposed abolition³.

26. We have noted the comments from Professor Norrie in his evidence to the Committee that if these provisions are not repealed, similar provisions should be put in place for civil partnerships.

Section 15 (postponement of decree of divorce where religious impediment to remarry exists)

27. Section 15 inserted section 3A into the Marriage (Scotland) Act 1977. The Scottish Government has noted the written evidence in this area. We have no plans to repeal these provisions.

Adultery in divorce law

28. The Scottish Government considered the provisions on adultery in divorce law when promoting the Marriage and Civil Partnership (Scotland) Bill. The Scottish Government outlined then that we did not intend to make any changes in relation to adultery in divorce law. It remains the position that we do not intend to make any changes in this area⁴.

International private law

29. The Scottish Government has noted the written evidence from Professors Crawford and Carruthers. In particular, we have noted the concerns raised about section 22 (domicile of persons under 16) and section 39 (matrimonial property) and the points on section 38 (validity of marriages). We will bear this evidence in mind when the next legislative opportunity to review these provisions should arise.

DNA testing

30. The Scottish Government has noted the mixed views on this, as outlined in paragraphs 51 to 54 of the Committee's report.

Siblings and contact

31. The Scottish Government has noted the evidence on siblings and contact, as outlined in paragraphs 60 and 61 of the Committee's report. We will consider this issue further in our review of the 1995 Act.

³ Please see paragraphs 153 and 154 of the Policy Memorandum for the Marriage and Civil Partnership (Scotland) Bill:

[http://www.parliament.scot/S4_Bills/Marriage%20and%20Civil%20Partnership%20\(Scotland\)%20Bill/b36s4-introd-pm.pdf](http://www.parliament.scot/S4_Bills/Marriage%20and%20Civil%20Partnership%20(Scotland)%20Bill/b36s4-introd-pm.pdf)

⁴ Please see paragraphs 127 to 143 of the Policy Memorandum for the Marriage and Civil Partnership (Scotland) Bill:

[http://www.parliament.scot/S4_Bills/Marriage%20and%20Civil%20Partnership%20\(Scotland\)%20Bill/b36s4-introd-pm.pdf](http://www.parliament.scot/S4_Bills/Marriage%20and%20Civil%20Partnership%20(Scotland)%20Bill/b36s4-introd-pm.pdf)

Status of illegitimacy and succession to titles and honours

32. On the abolition of the status of illegitimacy, the Scottish Government has noted the suggestion in written evidence from Professor Elaine Sutherland. Professor Sutherland suggested that the exception to the abolition in relation to succession to titles and honours could be removed. This is a reserved matter and we have drawn it to the attention of the Scotland Office.

Enforcement of contact orders

33. The Scottish Government has noted the point in the written evidence from Grandparents Apart UK on the enforcement of contact orders. The Scottish Government intends to hold a round table on this issue. This will form part of our review of the 1995 Act.

The Scottish Government
June 2016