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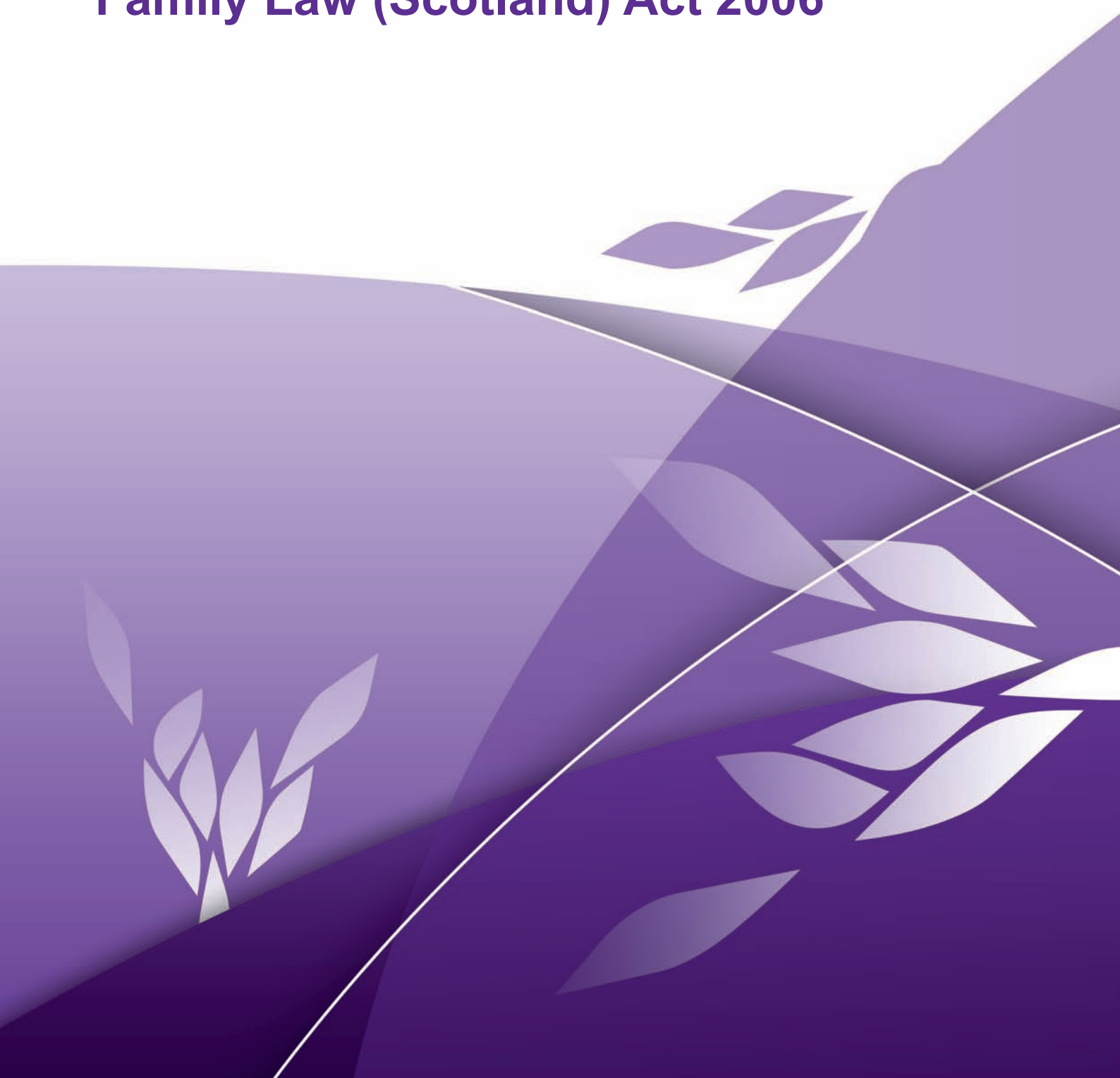
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Justice Committee

Post-Legislative Scrutiny of the Family Law (Scotland) Act 2006



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Justice Committee

To consider and report on a) the administration of criminal and civil justice, community safety and other matters falling within the responsibility of the Cabinet Secretary for Justice and b) the functions of the Lord Advocate other than as head of the systems of criminal prosecution and investigation of deaths in Scotland.



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Introduction

1. This short report is on the Family Law (Scotland) Act 2006, which the Committee considered over two evidence sessions in February and March. The purpose of this evidence-taking was to take stock of the effectiveness of aspects of the Act, in line with the Parliament's ongoing aim to keep under review the most important legislation that it has agreed to.
2. The 2006 Act is recognised as one such Act; probably the most significant legislation on family law that the current Scottish Parliament has agreed. The Bill for the Act was considered over seven meetings at Stage 1 and six meetings at Stage 2 by the then Justice 1 Committee, with some 190 amendments to it lodged.¹ Over 46 sections and three schedules, the 2006 Act makes provision in diverse areas:
 - Marriage: various reforms, including the general abolition of the last remaining form of “irregular” marriage: marriage by cohabitation with habit and repute;
 - Protection from partner abuse: various reforms to the Matrimonial Homes (Family Protection) (Scotland) Act 1981;
 - Divorce: various reforms, most notably a reduction in the period of separation required before a divorce can be granted;
 - Cohabitation: recognition of cohabitation as a relationship creating certain property and financial rights;
 - Parental responsibilities and rights: provision enabling unmarried fathers to assume parental responsibilities and rights where they register as a child's parent, and provision expressly requiring the courts to take into account the risk of abuse when making an order relating to the welfare of a child;
 - Other: reforms on matters including illegitimacy, civil partnerships, awards of damages to family members, the jurisdiction of the courts in relation to certain family law cases, and the interaction of aspects of private international law with family law.
3. With dissolution already looming when the Committee was able to commence this work, it was never going to be possible to examine every significant aspect of the 2006 Act. (We have commented elsewhere on the lack of time the Justice Committee has had to inquire into matters because of the volume of new legislation introduced during this session.²) Following a call for evidence, inviting views on which aspects of the Act the Committee should focus on, we settled on two main areas:
 - Provisions on cohabitation;

- The main reforms made by the 2006 Act in relation to parental responsibilities and rights, ie (a) rights and responsibilities of unmarried fathers, and (b) the express requirement on a court to take the risk of abuse into account when making certain orders in relation to a child.
4. Even on their own, these two issues are complex, and ideally would merit more extensive consideration than was possible in the time available. In this connection, it is important to underline that the call for evidence referred to in the preceding paragraph was not a general one, but was targeted at particular stakeholders, and that the time provided for replying was necessarily short. Not everyone who may have wished to express a view would have had an opportunity to do so. Accordingly, this report is best seen as a snapshot of selected stakeholders' opinions on these two important aspects of the 2006 Act, a decade after it became law. This is reflected in our conclusions and recommendations: they are mainly observations as to aspects of the Act in relation to which debate and discussion should be continued, rather than direct proposals for reform. For this reason, we decided that it was not necessary to invite the Scottish Government to give concluding evidence before we agreed this report.
 5. All Committee reports are technically reports to Parliament. In practice, they are also reports to the Government of the day. This report, agreed shortly before the Parliament's 4th session ends, is, in effect, a report to the next Scottish Government and Parliament. In particular, it is a report to our successors on the next justice committee, setting out views on which aspects of family law covered in the 2006 Act they may wish to consider in more depth in the next session, if they have more success finding time for inquiry work than we have had.
 6. We are most grateful to all who contributed to the Committee's scrutiny, whether as witnesses or by providing responses to our call for evidence.³

Cohabitation

Provisions in the Act

7. The 2006 Act included provisions on cohabitation that, although relatively modest in scope, are also a significant legislative landmark. Before 2006, the fact that individuals were cohabitants was not generally recognised in Scots law as having legal consequences.⁴ In particular, it did not give rise to any rights to make a claim in relation to shared property at the end of a relationship, or for aliment (ie financial support) from an ex-partner analogous to those of a couple who were or had been married. This was the case regardless of the stability and duration of the relationship or whether one partner had made financial sacrifices for the sake of the relationship – for instance, to care for children. By the early 2000s, there was an increasing consensus that the law had not kept up with social change in this area, and that this was leading to injustice in individual cases.
8. For centuries, Scots law provided a remedy of sorts for some cohabitants, by way of the doctrine of marriage by cohabitation with habit and repute. On the application of an individual who was, or had been, a cohabitant, the court could declare the relationship to be, or to have been, a marriage, with all the legal consequences that flow from it, even though no formal wedding ceremony had taken place. However, the courts could only make such a declaration if satisfied that the partners presented themselves socially as a married couple and were generally so perceived. In a social context in which unmarried cohabitation was generally disapproved of, this rule may have made some sense, but by the late 20th century this convention had all but collapsed, with more and more partners living together as an openly non-married couple. Accordingly, as the then Justice 1 Committee noted in 2005, instances of the courts applying the doctrine had reduced to a trickle.⁵ Clearly, the doctrine was also of no use to gay and lesbian cohabitants, as there could be no question at the time of them attempting to “pass off” as a married couple.⁶
9. Responding to concerns over the state of the law in this area, the 2006 Act introduced rights (and corresponding duties) for cohabitants by way of the following provisions:
 - section 25, which defines “cohabitant” for the purposes of the following sections. The key consideration is that the partners must be, or have been, living together “as if they were husband or wife” (or in the case of same sex partners, “as if they were civil partners”). No express minimum qualifying period is set out, although in determining whether a couple are cohabitants, the court may take into account how long they lived together. According to the Policy Memorandum for the Bill that became the 2006 Act, the aim of the legislation was to capture only “longstanding and enduring relationships”;⁷

- section 26, which creates a rebuttable presumption that cohabitants each have an equal share in the ownership of household goods acquired during the period of cohabitation;
 - section 27, which provides that money provided by either partner as an “allowance” for joint household expenses, or goods purchased with that money, is or are to be treated as belonging equally to each cohabitant;⁸
 - section 28, which entitles either partner to a cohabiting relationship that has ended otherwise than by death to make a financial claim against their ex-partner;
 - section 29, which entitles a surviving partner to a cohabiting relationship to make a claim on the estate of their deceased partner, where the latter has died intestate.
10. Overall, these provisions reflect two main policy aims of the then Scottish Executive. First, while cohabitants should have some mutual rights and responsibilities, the legal consequences of marriage and cohabitation should remain clearly differentiated. Cohabitation should not become, in legal terms, a form of quasi-marriage. Secondly, the law relating to cohabitants’ rights should be flexible, particularly in relation to determining financial claims made at the end of a relationship. It was the Executive’s view that, since cohabiting relationships are highly varied, the law should not be a straitjacket, and judges should have discretion to determine the “right” outcome in particular cases.⁹ The then Justice 1 Committee and the Scottish Parliament broadly endorsed this approach at the time.¹⁰

General abolition of doctrine of marriage by cohabitation with habit and repute

11. Separately, the Act prospectively abolished the doctrine of marriage by cohabitation with habit and repute¹¹ (with one limited exception: see next paragraph). This was not formally linked to the introduction of the provisions on cohabitation, as the doctrine was seen as having generally outlived its usefulness. But the introduction of the new provisions on cohabitation would have undermined any argument that the doctrine should be retained if only because abolishing it would deprive the minority of cohabitants who could hope to rely on it of any legal remedy.¹²
12. The doctrine was preserved to deal with the situation of a marriage contracted abroad in good faith that turned out to have been invalid. Although the issue was not discussed in any depth, we take the opportunity to note here 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.¹³

Evidence

13. Comment on the cohabitation provisions was quite widespread in responses to our call for evidence. Various critical comments were made, but this was against what we perceive as a backdrop of general acceptance of the provisions as having moved the law forward, and helped achieved greater justice in individual cases. Most comment was on section 28, discussed in depth below.
14. Comments on the other provisions on cohabitation are summarised as follows.
15. *Definition of “cohabitant”*: There was some limited discussion as to the drafting of section 25. It was argued that the definition provided was vague and/or circular: “in determining whether a person is a cohabitant the court has to take account of “the nature of the relationship” – which is the very point at issue”.¹⁴ The Law Society’s written submission weighed up the benefit, in terms of increased certainty, of the Act providing a “firmer definition” (which might include a minimum qualifying period) against “the need for flexibility to accommodate the wide range of relationships and circumstances that exist in reality” without coming down firmly on either side. Professor Kenneth Norrie of Strathclyde University Law School considered that it was unfortunate that the definition of “cohabitant” in the Act was not consistent with definitions of the same term in other legislation. He also observed that the relatively recent passing of legislation on same sex marriage has created some minor untidiness in the drafting of this section.¹⁵
16. Overall, we were left with the impression that the definition is not perfect but appears not to have created significant problems in practice. Any future Scottish Government review of the law on cohabitation (or of adult relationships in general) should certainly take the opportunity to consider whether the definition provided in the 2006 Act is optimum.
17. *Shared property and finances during a relationship*: Sections 26 and 27, concerning joint property and shared finances of the cohabiting relationship do not appear to be seen as problematic. This may be partly because these effectively apply to subsisting cohabiting relationships and, as one submission noted, couples rarely take disputes over property to court while they are together.¹⁶
18. *Provision on intestacy*: Section 29 appears to be seen as generally effective, although many of the concerns expressed about the rather vague scope of section 28, and the difficulty of advising clients what sort of outcome to expect (see below) were also expressed in relation to this section. The main criticism of section 29 was that the six-month time limit it provides for the surviving cohabitant to make a claim following their partner’s death is too short, not least because the survivor may still be in mourning.¹⁷ The Committee considers that there is some merit in this criticism. The Scottish Government is currently reviewing succession law and we note views that any wider review of the policy underlying section 29 would benefit from being considered in that context.¹⁸

Section 28 (financial provision where cohabitation ends otherwise than by death)

19. Section 28 attracted four main criticisms:

- that the test set out for determining whether to make an order is unclear;
- that it is unhelpful that judges can only make financial awards;
- that the definition of “relevant child” is too narrow;
- that the time limit for making a claim is too short.

The test in section 28

20. The wording of the test set out in section 28 is rather complex (Professor Mair described it as “poorly drafted” and “complicated”¹⁹), but in essence the court must weigh up whether the cohabiting relationship has caused one partner to become economically disadvantaged vis-à-vis the other, taking into account, where relevant, the economic burden of caring for a child of the relationship. Witnesses noted that in practice this left a great deal of discretion in the hands of judges, and that this made it hard to advise clients contemplating an action. Professor Kenneth Norrie of Strathclyde University Law School told the Committee that—

” “if you have a piece of legislation that deliberately allows judges to do what they think is fair in the individual case, you are inviting parties to take up cases on the off-chance that they will get a good deal.”²⁰

21. Legal practitioners tended to agree,²¹ although Stephen Brand of the Law Society suggested that this lack of certainty might, if anything, lead in the opposite direction, by encouraging clients to settle early because they lacked certainty as to how a case might be determined, and “people will compromise because they are afraid of the cost of going to court”.²²

22. The Committee notes that it can sometimes take time for new legislation to settle down, as the courts establish precedents that gradually help clarify its parameters and give meaning to key terms. Kirsty Malcolm, an advocate, agreed with other witnesses that there was too much uncertainty about the interpretation of section 28, but expressed scepticism about whether the solution lay in making the section more prescriptive—

” “It is impossible in my view to provide any further guidance within the legislative framework that would facilitate the understanding or application of section 28 because, as was identified at the time these provisions were in contemplation, each case will turn very much on its own facts and circumstances. A body of precedent will build up, and possibly is there already but simply needs to be collated and published, which will allow for more certainty to develop. Whilst heavily criticised, it is difficult to see what might take the place of section 28.”²³

23. In oral evidence, she expanded on this point—

” Some sheriffs are possibly reticent to publish judgments because they are not terribly certain about the approaches that they have taken to section 28. It can only help those in the shrieval profession if there is more publicity about the judgments that are being reached. Everybody will benefit from that, but I do not know how we move that on or persuade sheriffs to put their judgments on the internet.²⁴

24. In passing, we note further evidence, to which there appeared to be general agreement from witnesses around the table, that family law cases, most of which are determined at sheriff court level, are in general under-reported.²⁵ (A short note by the Scottish Parliament Information Centre, prepared in response to a request by the Committee for more information on this issue, is attached at Annexe C.)

25. Most other witnesses to express a view on section 28, however, did consider that there would be benefit in legislative amendment (or some other non-judicial intervention) to give more clarity on how section 28 is likely to be applied in specific cases.²⁶ One proposal, discussed further below, was to model section 28 on current legislative provision in relation to financial provision for divorce, as set out in section 9 of the Family Law (Scotland) Act 1985.

Form of award

26. If the court determines that it is appropriate to make an award under section 28, it may—

- require the defender to pay a capital sum to the applicant;
- require the defender to pay an amount of money to cover the economic burden of caring, after the cohabitation, for a child of whom the cohabitants are the parents, or
- make an “interim order” (not otherwise defined).

27. This has been interpreted as meaning that the courts have no power to order the transfer of property other than money (eg a house, a car, or a life insurance policy) to a successful applicant, and that an order 28 may require payments to be made in instalments, but orders for regular maintenance payments are apparently not competent.²⁷ If witnesses thought the basic test for making an award under section 28 was too vague and, if anything, too flexible, they saw this aspect of the section as too prescriptive, meaning that justice could not always be done in individual cases. Kirsty Malcolm cited a case she had dealt with of two former cohabitants who had built up a large property portfolio together. The judge was not able to make an order for the transfer to the applicant of any of the houses in the defender’s name, even though this might have been the best outcome for both parties.²⁸

Meaning of “child” in section 28

28. In determining whether to make an order under section 28 and, if so, how much to award, the court is entitled to take into account the economic burden of caring for children of the cohabiting household, including any step-children of either of the partners. (The legal test set out in the section is whether such a child is or was “accepted by the cohabitants as a child of the family”.) However, if the court decides under section 28 to make an award to the applicant in respect of caring for a child after the cohabitation has ended, then “child” takes on a different and narrower meaning: it means a child of which both cohabitants are parents.²⁹
29. The law applies differently for divorced couples: in that case, the court is permitted to make an order for financial support in relation to a child of the household of whom the defender is not the parent. As some evidence noted, this apparent inconsistency was not an error of drafting, but reflective of the then Executive’s policy that cohabitation and marriage are different and that an individual who has agreed to marry has, in effect, agreed to take on a different and wider set of responsibilities than someone entering into a cohabiting relationship.³⁰ Nonetheless, some witnesses argued that the law on this matter was unfair, especially in circumstances where a child of which one cohabitant was the parent had ended up living with the other, non-parent, cohabitant. (Witnesses acknowledged that this would be an uncommon circumstance.)³¹

Time limit for making a claim

30. A claim under section 28 must be made within one year of the cohabitants seeking to cohabit. Various submissions suggested that this was too short a time, and that in particular it might discriminate against couples who had separated but might yet reconcile.³² Professor Norrie suggested an upper limit of three years.³³ The Committee notes views that judging the date when a cohabiting relationship ended can be problematic,³⁴ but if there is a problem here it would seem to arise from the complexities of real-life relationships rather than having been created by the law. We note evidence that, on one of the few occasions on which this aspect of the 2006 Act has been tested in a reported case, the court apparently took a “common sense, real-life” approach, deeming the cohabitation to have ended not the first time the partner had left the household but sometime after.³⁵

The wider debate

31. Behind the discussion on detailed aspects of what the 2006 Act sets out about cohabitation is a far wider debate about the state of the law on adult relationships in general. Within a relatively short time, Scots law has gone from recognising only heterosexual marriage to recognising straight and same-sex marriage, civil partnerships (much like marriage, but for same-sex couples only), and cohabitation. Some witnesses argued that, while none of these developments was in itself objectionable, reform had been piecemeal and had taken place in the absence of a proper consideration of the fundamental principles on which any modern law on adult partnerships should rest. The result had been to leave the

law broadly functional but inconsistent on some important points of detail, and lacking in coherence.³⁶ As a result, it may be difficult for lay people to understand. Jennifer Gallagher of the Family Law Association told the Committee that “members of the public do not really fully understand the framework in Scotland”.³⁷

32. In remarks querying the policy basis of section 28, Professor Norrie commented that—

“Sheriffs and judges were very deliberately given the widest possible discretion, and the assumption behind that was that cohabiting couples present a huge array of different personal circumstances and that it is inappropriate to have a set of rules that applies to them all. I am not convinced by that argument; it seems to me that married couples also lead their lives in a very individual way – and they should be entirely free to do so. We give quite detailed guidance on the division of married couples’ assets, and Professor Mair’s recent research shows clearly that that works very well in Scotland. However, for cohabitants, sheriffs are allowed to do what they think is appropriate in the individual case, which makes it virtually impossible for practitioners to give any advice to couples and actually creates contention.”³⁸

33. The “detailed guidance” to which Professor Norrie would have been referring to was section 9 of the Family Law (Scotland) Act 1985, a provision referred to by his co-witness Professor Jane Mair of Glasgow University as “so clear and so well understood that it seems to work very easily”. The provisions in section 28 of the 2006 Act, she added—

“just stand out in such stark contrast to that very clear legislation and make it even more difficult for courts and sheriffs and judges to operate. I do not see any reason why the approach to cohabitation should not be similar to that for marriage. However, that will take a fundamental decision of principle: do we want to treat cohabitation and marriage in the same, or in a similar, way?”³⁹

34. Professor Mair added that the fundamental appraisal that she envisaged should include questioning whether the main purpose of the law should be to protect individuals (which, we surmise, would include extending the rights available to cohabitants: one cohabitant’s extended rights, of course being the other’s extended liabilities) or whether the law should consist more of “trying to send some sort of message and say to couples that we would rather they entered into one sort of relationship rather than another”.⁴⁰ Professor Norrie agreed, describing a debate on the legal status of different types of relationships as—

“a political debate worth having. It would presumably involve examination of the situation in other countries such as Australia and New Zealand, in which most states have more or less got rid of the differences [between cohabitation and marriage], certainly in relation to the financial situation.

You might also look at the statistics to see whether the number of people who get married in those countries has gone down. At the moment, the answer is no – take from that what you will. However, that is a very important political and social question rather than a precisely legal one.”⁴¹

35. Stephen Brand of the Law Society of Scotland agreed that the question of whether and how married couples and cohabitants should be legally differentiated was rightly a political one, but sounded a more cautious note on whether the distinction should be effectively erased—

” “I am not sure that people who are cohabiting would be comfortable with all the rights and responsibilities that would flow with being considered as if they were married. People who get married take a conscious decision to do so and they understand better that rights and responsibilities come with a marriage whereas they could fall into cohabiting and not realise that.”⁴²

Conclusions and recommendations

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.
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.
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.
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.

Parental responsibilities and rights

40. Part 1 of the Children (Scotland) Act 1995 makes provision as to what parental responsibilities and rights are and who has them. Put broadly, parental responsibilities are the various duties that must be exercised by those caring for a child in bringing the child up, while parental rights are the corresponding rights they have to enable those duties to be fulfilled.⁴³ (Those exercising those rights and responsibilities will usually, but not of course always, be one or both of the birth parents: and it is important to stress, despite the nomenclature, that the law allows parental rights and responsibilities in relation to children to be exercised by individuals other than birth parents or adoptive parents.)
41. The 2006 Act amends the 1995 Act in two significant aspects: in relation to the parental responsibilities and rights of unmarried fathers; and in relation to the making of orders under section 11 of the Act. We sought views on these two matters in evidence.
42. It was inevitable that in soliciting views on these two aspects of parent and child law, the Committee would be drawn into a far wider discussion about how the legal system generally deals with cases involving children and their parents or other carers. This applies especially in relation to the discussion about section 11 of the 1995 Act. The only significant amendment the 2006 Act made to this important provision was to insert a requirement to take into account the risk of abuse when making any order under the section. However, stakeholders quite understandably took the opportunity to widen this into a discussion about the operation of section 11 more generally.
43. We allude to the main points arising from that discussion below, but with no pretence that the discussion was exhaustive or that everyone wishing to express an opinion on how the courts handle cases involving children had been heard. Participants in such a discussion should of course ideally include children themselves, but the opportunity to hear from them did not present itself on this occasion.⁴⁴ We note views expressed in evidence that it may be time for wholesale review of the 1995 Act.⁴⁵

Rights and responsibilities of unmarried fathers: the 2006 reforms

44. Under the 1995 Act, mothers acquire parental responsibilities and rights automatically. Fathers also automatically acquire them if, at the time of the child's birth, they are married to the mother, or if they marry the mother subsequently.⁴⁶ Unmarried fathers do not automatically acquire parental responsibilities and rights.

One way round this would be to apply for a court order for responsibilities and rights under section 11 of the 1995 Act. The court may grant this order only where satisfied (a) that it is better to make the order than not to make the order, and (b) that making the order is consistent with the “paramount consideration” of the welfare of the child (we will refer to this as the “welfare test” for short.)⁴⁷ But, as witnesses noted, the fact that obtaining a section 11 order requires the expense and uncertainty of litigation will always be off-putting for fathers.⁴⁸

45. The 1995 Act, at section 4, permits the mother and unmarried father of a child to sign a joint agreement granting the latter parental responsibilities and rights. The agreement has legal effect when it is registered. At the time the 1995 Act was agreed to, this was seen as a significant innovation, providing unmarried fathers with a non-judicial route to the acquisition of responsibilities and rights. However, it turned out to be used less than anticipated.⁴⁹ This may have been because it required couples to undertake the rather formal process of writing up an agreement and registering it with the Books of Council and Session in Edinburgh.
46. The Policy Memorandum accompanying the Bill for the 2006 Act stated that there was thus a need for the law to widen the opportunity for unmarried fathers to be involved in the lives of their children.⁵⁰ (Families Need Fathers’ evidence to us argued that it was “unavoidable” that the Executive do something because the law at the time was discriminatory in terms of the European Convention on Human Rights.⁵¹) Accordingly, the Executive brought forward in the Bill the provision that is now section 23 of the 2006 Act. It amends the 1995 Act to enable an unmarried father to acquire parental responsibilities and rights through being identified as the child’s father in the child’s birth certificate. It was felt that this was likely to be more effective than the approach already set out in section 4 of the 1995 Act because it involved a minor tweak to an existing administrative process –birth registration– that must be engaged with anyway.
47. It was a requirement set out in the new law that the child’s mother must consent to the unmarried father’s registration. The Policy Memorandum noted that the Scottish Executive had considered, and rejected, the option of giving unmarried fathers automatic parental responsibilities and rights—

” “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 that to go to court to have PRRs [parental responsibilities and rights] 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.”⁵²

Views expressed in evidence

48. The lack of adverse comment we received on the principle of section 23 indicates that the acquisition of parental responsibilities and rights by unmarried fathers at birth registration is now widely accepted as part of the legal landscape. Professor Elaine Sutherland of Stirling University Law School commented that section 23

had improved the law “at a stroke” by making it easier for unmarried fathers to be involved in their children’s lives.⁵³

49. The main discussion was as to whether, despite the advance section 23 represented for unmarried fathers, they continued to be unfairly disadvantaged under the law. We note that this issue was keenly debated when the 2006 Act was being passed. Some aspects of that debate may have moved on, but the fundamental question remains: to what extent should there be an effective presumption in law in favour of an unmarried father having the legal capacity to be involved in his child’s upbringing? For Families Need Fathers, the law remains “essentially discriminatory ... by building into statute that the status of separated fathers is largely contingent on the state of the relationship as perceived by the mother.”⁵⁴
50. Professor Sutherland argued that it was time to look again at provision enabling the mother to block an unmarried father’s registration. She said that the parallel law in England and Wales had moved on: since 2009 the general rule is that two parents should be named on a child’s birth certificate although, as she also noted, the law sets out significant exceptions, including in relation to cases where there is a risk of harm from the father.⁵⁵ The Policy Memorandum did not discuss whether, at the time the legislation was introduced, the then Executive had given consideration to an approach along these lines. We note the possibility of the mother finding the prospect of a particular individual registering as the father so objectionable that she refuses to engage with the registration process. Or she might dispute his claim to be the father, ultimately requiring legal resolution if the father continues to press his claim.

DNA testing

51. Faced with opposition to registration as the father of a new-born child, an unmarried father can try to prove paternity by going to court to seek a “declarator of parentage”.⁵⁶ If successful, he can be registered as the child’s father. It is important to stress that being declared a parent by the court and legally acquiring parental responsibilities and rights are not the same thing. However, where paternity is disputed, achieving legal recognition of biological parenthood may be the necessary first step in an unmarried father’s pursuit of responsibilities and rights, which is why the following discussion is relevant.
52. DNA evidence is not necessary in a declarator of parentage case, and we note evidence of reported cases where the courts have taken a variety of evidence other than DNA evidence into account when coming to a decision.⁵⁷ The courts are also entitled to draw inferences from a refusal to provide a DNA sample.⁵⁸ However, DNA differs from other evidence because of the very high level of certainty it provides. For DNA evidence to be useful in a court hearing, it must come from the child as well as from the person seeking to prove parenthood. Only the mother can consent to DNA testing of a child.⁵⁹ Professor Sutherland’s written evidence argued that the court should be empowered to order DNA testing of a

child, despite maternal objection, although this should continue to be subject to the overriding consideration of the welfare test.

53. In oral evidence, Professors Norrie and Mair both stated that they found the issue raised by Professor Sutherland a difficult one. On the one hand, it was a fundamental principle of civil procedure that a party to any action should not be compelled to produce evidence that benefits their opponent. Obtaining a DNA sample without consent is also a physical intrusion. Professor Norrie considered, on the other hand, that the intrusion would in most cases be negligible, and the production of DNA evidence would be almost certain to resolve the case swiftly. This led him to state with some reluctance that “on balance” he would support giving the courts this power. Professor Mair reserved her position. Both witnesses noted that, if this reform were to be agreed to, it would appear inconsistent not also to allow the courts to compel the production of DNA from an adult party to a paternity case. Professor Mair queried the ethics of the civil courts being able to compel an adult to provide DNA samples.⁶⁰
54. Professor Norrie appeared to question Professor Sutherland’s view that, if courts are to have the power to compel the production of DNA samples, this should be subject to the paramount consideration of the welfare test, remarking that “we should not take the welfare of the child into account in terms of avoiding the truth”.⁶¹ In this connection, we note that the welfare of the child is not set out as an express consideration for the court to take account of in an action for declarator of parentage. Louise Johnson of Scottish Women’s Aid said that they would not support compulsory DNA testing, commenting on the need for clear safeguards to protect the welfare of the child.⁶²


Retroactivity and section 23

55. Section 23 is not retrospective in effect. Accordingly, for fathers registered as the child’s father before 4 May 2006, their registration does not confer parental responsibilities and rights on them. Some evidence argued that this policy had been flawed from the outset and that it was still not too late to change it. Families Need Fathers described it as an “anomaly” that an unmarried father could have rights and responsibilities in relation to some of his children but not others, depending on when they had been born.⁶³ Practising lawyers told the Committee that it was unhelpful (or as one remarked, “a bit crazy”⁶⁴) that fathers sometimes had responsibilities and rights in relation to one child but not another because of birth dates, but expressed doubt as to whether making the legislation retroactive on this point would be the best solution. Getting an order under section 11 of the Children (Scotland) Act 1995 was seen as a neater solution to this issue, although it was acknowledged that there was likely to be a significant financial cost to this for most fathers.⁶⁵

Other relatives: grandparents and siblings

56. In considering the Bill for the 2006 Act, our predecessor committee considered the position of grandparents who, through no choice of their own, have no contact with

their grandchildren, and whether this could be addressed through the law. In the end, it supported the then Scottish Executive's view that a legislative approach was not the best way to deal with this difficult issue. A non-statutory "Charter for Grandchildren" providing best practice advice was introduced shortly afterwards by the then Executive.

57. The position accordingly remains that grandparents do not automatically have any parental responsibilities and rights, nor otherwise have any distinct legal status in relation to cases involving grandchildren. However, they may –like any other individual– apply under section 11 of the 1995 Act for a contact or residence order, for guardianship of a child, or for an order conferring parental responsibilities and rights. If the court is satisfied that the grandparent has sufficient interest in making the application then it will consider it.
58. Conversely, rather than having no contact with the child, grandparents (or other relatives) may find themselves with day-to-day responsibility for looking after a child but no formal legal responsibilities or rights in relation to them. Again, it is section 11 that potentially provides a remedy, in situations where it becomes necessary for the carer to formally acquire parental responsibilities and rights, although again this can be costly.⁶⁶ Stephen Brand of the Law Society told us that the law in this area would benefit from being re-examined.⁶⁷
59. The written submission from Grandparents Apart UK said that it remained an "anomaly" in family law that a child can "make a claim on their grandparent's estate if their parent predeceases their grandparent, BUT they have no legal claim to their grandparent's love or support in life." The submission complained that, while there had been some progress in the recognition of grandparents by the court system, there was still too much inconsistency of treatment and "we remain at the mercy of the personal opinion of professionals on any given day".
60. The sibling of a child does not have any distinct legal status in family law cases involving the child. The Law Society questioned whether—
-  it is appropriate that contact orders under s 11 of the Children (Scotland) Act are seen to be parental rights, therefore preventing siblings from applying for an order to maintain contact.⁶⁸
61. In oral evidence, the Society's Stephen Brand expanded on this point, stating that under the current law it is apparently not possible for (for instance) a 14 year to ask the court to grant him contact with his 10-year-old brother.⁶⁹

Section 11 orders under the 1995 Act: risk of domestic abuse

62. Under section 11 of the 1995 Act, the court has the power to make a variety of orders in relation to parental responsibilities and rights and related matters. This includes orders granting or removing parental responsibilities and rights, orders determining with whom a child is to ordinarily reside ("residence orders"), and

orders granting an applicant, characteristically the parent with whom the child does not reside, the right to have contact with a child (“contact orders”).

63. As noted earlier, in considering whether to make any such order, the court must apply the welfare test (ie take into account the welfare of the child concerned as the “paramount consideration”) and should not make any order unless satisfied that making it would be better for the child than not making it. The court must also, so far as practicable, taking account of the child’s age and maturity, give the child an opportunity to express his or her views.
64. The 2006 Act (at section 24) inserted two new subsections into section 11 of the 1995 Act. In essence, they require the courts to expressly take into account the risk of the child suffering abuse in deciding whether to make an order under section 11.

Evidence on the 2006 Act reform

65. Witnesses pointed out to the Committee that, as a matter of drafting, the new words inserted by the 2006 Act are not a counter-balance to the welfare test: they are matters to be compulsorily taken into account in applying the welfare test.⁷⁰ To put it differently, the point of section 24 was to require the court to take into account a factor –the risk of abuse– that it could already have taken into account and which, as a matter of good practice, it probably should have. This led Professor Norrie, to suggest to us that the purpose of this reform was probably “symbolic” rather than practical. He observed that—

” “There have been very few judicial discussions of the provision and there is certainly no evidence that court practice has changed in any noticeable way. Therefore, I can understand people who argue that the provision promised more than it delivered. My response to that is that, if we look carefully at the wording, we see that it did not actually promise much.”⁷¹

66. Professor Norrie also argued that the changes made by the 2006 Act had left section 11 in a somewhat untidy state. It set out the risk of abuse as the only factor expressly required to be taken into account in applying the welfare test, as if (to paraphrase his evidence), the Scottish Executive had begun to write a list of factors that the courts should take into account, but had stopped the list after just one item. Professor Mair broadly agreed with this analysis, describing the amendments made by the 2006 Act as having had a skewing effect on section 11.⁷² We do note that, although both academic witnesses agreed that the drafting of section 11 tended to “trip up” law students in exams, neither suggested that it had tended to trip up the courts. In written evidence, Professor Elaine Sutherland said that in many other jurisdictions the relevant legislation provides the court with an “extensive checklist of factors to assist in assessing the welfare of the child”.⁷³ We note Professor Norrie’s evidence that he did not generally support a “list of factors” approach in legislation because it encouraged the courts to take a box-ticking approach rather than assessing matters in the round.⁷⁴

67. The written evidence of Scottish Women’s Aid referred to a “crisis around child contact and domestic abuse” reflected in unsafe decisions by the justice system that left many children exposed to the risk of abuse. It described the amendment to section 11 of the 1995 Act that section 24 had made as—

” “good law” that “*could* [their emphasis] be a powerful tool in protecting women and children at risk of domestic abuse. The problem is the failure of implementation that has resulted from institutional reluctance to change discriminatory attitudes and practices, an absence of an awareness of the dynamics and impact of domestic abuse, and a lack of adequate and positive judicial case management.”

68. By contrast, Families Need Fathers argued that section 24 had provided a “perverse incentive” for conflict between parents in cases involving children, that had had a negative effect on the legal process, starting from the way lawyers communicated on behalf of their clients, and continuing on into the courtroom. They told us that—

” “the overall impact of the Act has been to assist a mother who wishes to control or stop the relationship between a non-resident father and their children. Section 24 ... is vulnerable to casual and opportunistic abuse.”⁷⁵

69. Regardless of such strong differences of opinion, stakeholders appeared united in lacking any clear view as to whether the revisions to section 11 had actually made children any safer. Professor Norrie argued that it had never been established in the first place whether there had been a problem of the courts ignoring domestic abuse before section 24 had been agreed to,⁷⁶ while Professor Mair noted a dearth of evidence as to the impact of the inserted provisions.⁷⁷

“Shared parenting”

70. Some evidence drew the Committee’s attention to the concept of shared parenting. We discuss this issue in the context of section 11 orders although we think it is also probably relevant in relation to the question of whether the law has got it right as to the circumstances when unmarried fathers should automatically obtain parental responsibilities and rights. Although we understand, “shared parenting” to be a gender-neutral expression in that it carries no necessary implications as to whether it is better for a child to be with one parent or another, it is clear that some stakeholders had very different views as to whether the legal system exhibits particular biases in relation to family law cases involving children, and the different viewpoints expressed on shared parenting were, to some extent, a proxy discussion of this issue.
71. The submission from Families Need Fathers argued strongly for greater recognition in the legal system for shared parenting. Their submission did not expressly provide a definition of the term, but it appears that, for the organisation, the core consideration is that—

” “children do better in all aspects of their life, attainment and wellbeing when both their parents are fully involved in their life and their parents have equal recognition by public services including schools and healthcare providers”.

72. The submission argued that the courts in Scotland were insufficiently receptive to the concept of shared parenting, leaving Scotland behind the curve compared to some other European jurisdictions. Similar views were expressed in the written submission from Grandparents Apart UK. It argued in particular that non-resident parents of children were badly served by the current legal system, as well as by public sector bureaucracy, which often did not recognise them as a child’s parent. Grandparents Apart called for—

” “an even playing field. No discrimination, no preconceived opinions and no assumptions about which gender is better at which role within the family.”

73. The written evidence⁷⁸ of Scottish Women’s Aid indicated that the definition of “shared parenting” is not settled and that it can sometimes be misused simply to mean both parents dividing up their time to look after a child. They cited one possible definition: “a co-parenting approach characterised by flexibility and focussed on the child’s needs.” Scottish Women’s Aid said that it had no objection to the courts taking an approach along these lines, provided the child’s welfare remained the central consideration, but they said there was no research evidence establishing a clear, direct link between shared care and better outcomes for children. They further argued that, not only is the current system not discriminatory against fathers but instead is pre-disposed to tolerate “an unacceptably low standard of parenting” from what its submission labelled “*good enough fathers*” that it would not tolerate from the primary carer of the child.

74. In oral evidence, Louise Johnson of Scottish Women’s Aid advocated against any “blanket proposals for shared parenting”⁷⁹ as contrary to the principle that the welfare of the child should be the paramount consideration.

Conflict resolution in cases concerning children

75. Some stakeholders argued that aspects of the current largely adversarial system for resolving family law disputes often fail children, and worsen relations between their parents or other carers. Families Need Fathers argued that current law encourages—

” “an adversarial attitude between separated parents that parenting time with their children must be won at the emotional, moral and financial expense of the other.”⁸⁰

76. A related viewpoint was that it was not necessarily the letter of the law that was to blame, but the way it was applied, as well as the professional culture encompassing the family law system. (To some extent, this argument has already been rehearsed in some of the evidence set out earlier.) Stephen Brand of the

Law Society said that “the issue may be more how the law is interpreted rather than the substance of the law itself.”⁸¹ The written submission from Grandparents Apart UK said that “the laws created for families in the main are fair: it is the way they are abused and manipulated in practice that is the problem.” The submission was critical of the role of professionals within the family law system who, it argued, often made relations between parties worse. It also stated that parents who flouted legal rulings often appeared able to do so with impunity, contributing to an overall lowering of respect for the legal process.

77. Not everyone agreed that the current system essentially set up people to fail, by forcing them into confrontation. Professor Mair told the Committee that most separated couples with children in fact reach agreements about their care without ever having to go to court.⁸² In response to a question as to how he would make family law less adversarial, Professor Norrie replied that—

” “I would slightly reformulate it, to ask whether there was anything in our current law that disables people from coming to appropriate agreements. I think the answer to that is probably no, and that there is nothing in our current legislation that specifically sets couples up as adversaries, apart from the whole divorce process. [...] The bottom line is that some separated couples will never come to an agreement.”⁸³

78. It appears to the Committee that these two sets of viewpoint are not mutually exclusive: the current system may not force people into the courtroom, but if disagreement cannot be resolved without legal recourse, then relations between parties may spiral downwards.

Mediation

79. The Committee is disappointed to note evidence that, despite some progress, the use of mediation to solve disputes about children is still not widespread. Ian Maxwell of Families Need Fathers told the Committee that—

” “Many of the mediation services are run by voluntary organisations that depend on year-to-year funding, often in tight circumstances, so we would certainly support a call for more financial support for mediation. We see a growth in lawyer mediation, but it seems to us that is more growth in enthusiasm for lawyer mediation than in the practice of it. One of the barriers is obviously cost. In some cases, the Scottish Legal Aid Board will fund lawyer mediation and in other cases it will not. We want swift solutions to family disputes, rather than great long waits to get into court.”⁸⁴

80. Stephen Brand of the Law Society told the Committee that uptake of mediation might be low in part because awareness remained relatively low. He expressed caution about requiring people to resort to mediation (a power sheriffs have in some situations), noting that it works less well when parties are being effectively forced to participate.⁸⁵ Louise Johnson of Scottish Women’s Aid expressed some doubt over using mediation to resolve familial conflicts, arguing that there was a

risk of the process handing power to the person accustomed to having the dominant influence in a relationship.⁸⁶

Eliciting children's views

81. In cases under section 11 of the 1995 Act, the court must, so far as practicable, seek to ascertain the child's view, having regard to the child's age and maturity. In evidence, it was taken as a given that the courtroom itself was rarely if ever the best place to elicit a child's views, not only because it is an intimidating environment but because any courtroom-style interview is highly unlikely to ascertain a child's true feelings. Evidence was led on the following matters:

- *Mediation*: Legal practitioners told us that, although the point of mediation in family law disputes in relation to children is to put the child, and the child's welfare, "at the centre of the process"⁸⁷ it is in fact very rare for children actually to be present during mediation.
- *Family group conferencing*: This was cited by June Loudoun of Grandparents Apart UK. We do not understand this to be exclusively concerned with eliciting a child's view, but that can be one purpose. Ms Loudoun explained—

“It would be any family member who had contact with the child before the parents separated, and could include a school or nursery teacher, someone from a sports group that the child attended or anyone else who was involved in the child's life and could see how they interacted with their parents and family, and who perhaps picked up their behaviour problems. Why cannot everybody get together to discuss the situation and find a solution?”⁸⁸

- *Forms*: several witnesses made reference to a standard form – the “F9” form – used by the sheriff court to elicit a child's views, where appropriate, in relation to family law cases. This was referred to variously⁸⁹ as “not a wonderful method of getting children's views”, “wholly inadequate” and “very bald and non-child friendly”. The question of parental influence in relation to the form was also raised.⁹⁰ We note evidence that the use of the form is currently under review by the family law committee of the Scottish Civil Justice Council.

- *Reporters*: Kirsty Malcolm explained to us that—

“Reporters are appointed through the court to meet the children and the family. They do not meet as a group, but the reporter will meet with each parent and the people who are involved with the child. Sometimes they will speak to teachers or to social workers if there has been social work involvement. They speak to people across the board and pull together a report, which is then presented as independent evidence to the sheriff or the judge, who can use it to help to formulate a view.”⁹¹

Specialist courts

82. The written submission of Grandparents Apart UK suggested that the quality of decision-making in family law cases was often poor. Witnesses told us that the quality of handling of family law cases involving children could vary widely, depending in large part on the aptitude and interest of the sheriff in relation to family law cases, and whether or not the same sheriff heard a continuing case all the way through.⁹² Stephen Brand said that most family law solicitors would prefer “a degree of specialisation” so that such cases came before sheriffs interested in family law. He told us that—

” “Edinburgh and Glasgow have specialist family sheriffs but unfortunately in most areas outwith the main cities a wide variety of sheriffs are involved and they will not keep the same case from hearing to hearing.”⁹³

83. Ian Maxwell of Families Need Fathers called for there to be family courts, focussed on looking to a child’s future, and the child’s future relationships with family members, rather than trying address disputes from the past. Mr Maxwell called for lessons to be learned from foreign jurisdictions that had made “radical change” to the way they handled court proceedings in family cases.⁹⁴

Conclusions and recommendations

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 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.

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.

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.

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.

¹ More information on the passage of the Bill available at:

<http://www.scottish.parliament.uk/parliamentarybusiness/Bills/25041.aspx> [accessed March 2016]

² See the introductory section of the Committee's Session 4 Legacy Paper. The paper is being published on 17 March 2016, and will be accessible at

<http://www.scottish.parliament.uk/parliamentarybusiness/CurrentCommittees/29846.aspx> [accessed March 2016]

³ A list of meetings (including witnesses) is set out at Annexe A of this report. A list of written submissions provided, with hyperlinks, is set out at Annexe B.

⁴ There were exceptions, for instance in some statutory provisions to prevent abuse by an ex-partner.

⁵ Justice 1 Committee, Stage 1 report on the Family Law (Scotland) Bill 2005, paragraph 23. Available at:

<http://archive.scottish.parliament.uk/business/committees/justice1/reports-05/j1r05-08-vol01-01.htm>

[Accessed March 2016]

⁶ The law to enable same-sex marriage in Scotland came into force in 2014.

⁷ Family Law (Scotland) Bill, Policy Memorandum, paragraph 67. Available at

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

[accessed March 2016]

⁸ The provision allows this rule to be overridden if the partners have made an agreement to the contrary

⁹ Policy Memorandum, paragraphs 64-75

¹⁰ This is reflected in the fact that the relevant provisions were not subjected to substantial amendment during the amendment process. See also Justice 1 Committee, Stage 1 report on the Family Law (Scotland) Bill 2005, paragraph 180

¹¹ Section 3 of the 2006 Act

¹² Kirsty Malcolm, written submission

¹³ Official Report, 23 February 2016, cols 3-4 (Professor Norrie)

¹⁴ Professor Norrie, written submission; see also Professor Mair and Dr McCarthy written submission

¹⁵ Written submission

¹⁶ Elaine Sutherland, written submission

¹⁷ Official Report, 23 February 2016, col 22 (Professor Norrie); Law Society of Scotland, written submission; Kirsty Malcolm, written submission

¹⁸ Official Report, 8 March 2016, cols 23-24 (Kirsty Malcolm). In its 2009 report on Succession, at page 76, the Scottish Law Commission recommended that the time limit in section 29 should be increased to one year: <http://www.scotlawcom.gov.uk/files/7112/7989/7451/rep215.pdf> Further information on the Scottish Government's succession review project available at

<http://www.gov.scot/Topics/Justice/law/damages/succession> [both pages accessed March 2016]

¹⁹ Official Report, 23 February 2016, col 8. See also Professor Sutherland's written submission.

²⁰ Official Report, 23 February 2016, col 7

²¹ Jennifer Gallagher, written submission; Lynne Collingham, written submission

²² Official Report, 8 March 2016, col 22

²³ Written submission. These views were broadly supported in oral evidence by Stephen Brand of the Law Society of Scotland (Official Report, 8 March 2016, col 22)

²⁴ Official Report, 8 March 2016, col 26

²⁵ Official Report, 8 March 2016, col 26 (Ian Maxwell, Families Need Fathers)

²⁶ 23 February, col 8 (Professor Norrie, Professor Mair); Jennifer Gallagher, written submission; Official Report, 8 March 2016, col 28 (Jennifer Gallagher, Family Law Association Scotland) Professor Sutherland, written submission; Lynne Collingham, written submission

²⁷ Professor Sutherland, written submission; Law Society of Scotland, written submission; Jennifer Gallagher, written submission

²⁸ Official Report, 8 March 2016, col 25

²⁹ Law Society of Scotland, written evidence

³⁰ Official Report, 23 February 2016, cols 10-11 (Professor Norrie)

- ³¹ Official Report, 23 February 2016, cols 10-11 (Professors Mair and Norrie); Professor Sutherland, written evidence
- ³² Law Society of Scotland, written submission
- ³³ Official Report, 23 February 2016, col 22
- ³⁴ Eg Professor Mair and Dr McCarthy, written submission
- ³⁵ Official Report, 23 February 2016, col 21 (Professor Mair)
- ³⁶ Official Report, 23 February 2016, cols 6-10 (Professor Mair and Professor Norrie; see also both of their written submissions, and the written submission of Professor Sutherland)
- ³⁷ Official Report, 8 March 2016, col 19
- ³⁸ Official Report, 23 February 2016, cols 6-7
- ³⁹ Official Report, 23 February 2016, cols 7-8
- ⁴⁰ Official Report, 23 February 2016, col 9
- ⁴¹ Official Report, 23 February 2016, cols 9-10
- ⁴² Official Report, 8 March 2016, cols 19-20
- ⁴³ Responsibilities are set out at section 1 of the 1995 Act and rights at section 2.
- ⁴⁴ We did invite the Scottish Commissioner for Children and Young People to give evidence, who accepted the invitation. Unfortunately the Commissioner was then required to cancel his attendance at short notice, for reasons outwith his control.
- ⁴⁵ Families Need Fathers, written submission. In response to a question on review of child law, Professors Norrie and Mair agreed that there would be merit in reviewing it and family law in general. (Official Report, 23 February 2016, cols 16-17). The view of Scottish Women's Aid (written submission) was that, regardless of the content of the 1995 Act, there had been a "failure of implementation" that required urgent review.
- ⁴⁶ Sections 3 and 4.
- ⁴⁷ As set out in subsection (7) of section 11. The court must also so far as is practicable, taking into account the child's age and maturity, give the child an opportunity to express their views
- ⁴⁸ Official Report, 8 March 2016, cols 10-11 (Ian Maxwell, Families Need Fathers and Jennifer Gallagher, Family Law Association Scotland)
- ⁴⁹ By the time of the 2006 Act being passed, parental responsibilities and rights agreements between unmarried parents appear to have peaked at in the region of 500 per annum, representing about 2% of births to unmarried parents (Elaine Sutherland, *Child and Family Law* 2nd Ed. (2008), W. Green & Son, Ltd, paragraph 6-067.)
- ⁵⁰ Policy Memorandum, paragraphs 37-43
- ⁵¹ Written submission
- ⁵² Policy Memorandum, paragraph 47
- ⁵³ Written submission
- ⁵⁴ Written submission
- ⁵⁵ Written submission
- ⁵⁶ Law Reform (Parent and Child) (Scotland) Act 1986, section 7
- ⁵⁷ Official Report, 23 February 2016, col 18 (Professor Norrie)
- ⁵⁸ Law Reform (Miscellaneous Provisions)(Scotland) Act 1990, section 70
- ⁵⁹ Strictly speaking, it is the person (or persons) holding parental responsibilities and rights in respect of the child who may refuse. In cases of disputed paternity, it is presumed that the person in this position would usually be the child's natural mother. The child could in theory consent to a DNA sample if the court deemed the child to be mature enough. However, it is presumed that in the vast majority of paternity cases, the child would be considered insufficiently mature to consent.
- ⁶⁰ Official Report, 23 February 2016, cols 17-20
- ⁶¹ Official Report, 23 February 2016, col 19
- ⁶² Official Report, 8 March 2016, col 12
- ⁶³ Written submission
- ⁶⁴ Official Report, 8 March 2016, col 9 (Stephen Brand, Law Society of Scotland)
- ⁶⁵ Official Report, 8 March 2016, col 9-11
- ⁶⁶ Official Report, 8 March 2016, col 18 (Jennifer Gallagher, Family Law Association Scotland)
- ⁶⁷ Official Report, 8 March 2016, col 18
- ⁶⁸ Written submission
- ⁶⁹ Official Report, 8 March 2016, col 13
- ⁷⁰ Official Report, 23 February 2016, cols 13-15 (Professors Mair and Norrie)
- ⁷¹ Official Report, 23 February 2016, col 13
- ⁷² Official Report, 23 February 2016, cols 13-15

⁷³ See also Law Society of Scotland, written submission

⁷⁴ Official Report, 23 February 2016, cols 13-14

⁷⁵ Written submission

⁷⁶ Official Report, 23 February 2016, col 13

⁷⁷ Official Report, 23 February 2016, col 14

⁷⁸ The quotes in this paragraph come from both of the written submission provided by the SWA, including a supplementary submission specifically on shared parenting.

⁷⁹ Official Report, 8 March 2016, col 4

⁸⁰ Written submission

⁸¹ Official Report, 8 March 2016, col 4

⁸² Official Report, 23 February 2016, cols 4-5

⁸³ Official Report, 23 February 2016, col 5

⁸⁴ Official Report, 8 March 2016, cols 13-14

⁸⁵ Official Report, 8 March 2016, col 15

⁸⁶ Official Report, 8 March 2016, col 16

⁸⁷ Official Report, 8 March 2016, col 17 (Jennifer Gallagher, Family Law Association Scotland)

⁸⁸ Official Report, 8 March 2016, col 7

⁸⁹ Official Report, 8 March 2016, cols 4-6

⁹⁰ Official Report, 8 March 2016, cols 4-6

⁹¹ Official Report, 8 March 2016, cols 7-8. The Committee notes that the Scottish Government has undertaken work recently to improve the child welfare reporter system, although we have not had time to take account of this work for the purposes of this report. More information:

<http://www.gov.scot/Topics/Justice/law/17867/reporters>

⁹² Official Report, 8 March 2016, cols 15 (Ian Maxwell, Families Need Fathers, Jennifer Gallagher, Family Law Association Scotland)

⁹³ Official Report, 8 March 2016, col 8

⁹⁴ Official Report, 8 March 2016, col 8

Annexe A

Extracts from the minutes of the Justice Committee and associated written and supplementary evidence

4th Meeting, 2016 (Session 4) Tuesday 26 January 2016



Work programme (in private): The Committee considered its work programme and agreed to [. . .] (b) undertake post-legislative scrutiny of aspects of the Family Law (Scotland) Act 2006; and (c) write to relevant individuals and organisations inviting comments on the operation of that Act to inform the Committee's scrutiny.

[7th Meeting, 2016 \(Session 4\) Tuesday 23 February 2016](#)

Family Law (Scotland) Act 2006: The Committee took evidence from—
Professor Jane Mair, School of Law, University of Glasgow;
Professor Kenneth Norrie, Law School, University of Strathclyde.

Roderick Campbell declared an interest as a member of the Faculty of Advocates.




Written evidence

-  [Professor Jane Mair and Dr Frankie McCarthy, School of Law, University of Glasgow](#)
-  [Professor Kenneth Norrie, Law School, University of Strathclyde](#)

[9th Meeting, 2016 \(Session 4\) Tuesday 8 March 2016](#)

Family Law (Scotland) Act 2006: The Committee took evidence, in round-table format, from—
Stephen Brand, Family Law Sub-Committee, Law Society of Scotland;
Jennifer Gallagher, Family Law Association Scotland;
Louise Johnson, Legal Issues Worker, Scottish Women's Aid;
June Loudoun, Grandparents Apart UK;
Kirsty Malcolm, Advocate;
Ian Maxwell, Families Need Fathers.

Written evidence

-  [Law Society of Scotland](#)
-  [Jennifer Gallagher, Partner, Lindsays Solicitors](#)
-  [Scottish Women's Aid](#)

Justice Committee

Post-Legislative Scrutiny of the Family Law (Scotland) Act 2006, 6th Report, 2016 (Session 4)



[Grandparents Apart UK](#)



[Kirsty Malcolm, Advocate](#)



[Families Need Fathers](#)

Supplementary written evidence







[Scottish Women's Aid](#)

10th Meeting, 2016 (Session 4) Tuesday 15 March 2016

Family Law (Scotland) Act 2006 (in private): The Committee considered a draft report. Various changes were agreed to and the Committee agreed its report to the Parliament.

Annexe B

List of other written evidence

-  [Elaine E Sutherland, Professor of Child and Family Law, University of Stirling](#)
-  [Linda George, Linda George Family Law Limited](#)
-  [Lynne Collingham, Partner, TC Young Solicitors](#)
-  [Professor Janeen Carruthers and Professor Elizabeth Crawford, School of Law, University of Glasgow](#)

Annexe C



Post-legislative scrutiny of the Family Law (Scotland) Act 2006

Publication of sheriff court judgements relating to section 28

1. Section 28 of the Family Law (Scotland) Act 2006 ('the 2006 Act') makes provision for a cohabitant to apply to the court for a financial award where the cohabiting relationship in question has broken down. The court has a wide discretion as to whether to grant such an order.
2. In the Committee's evidence session on 8th March 2016 Kirsty Malcolm (an advocate and the author of a textbook on cohabitation) suggested that there were sheriff court judgements relating to section 28 which were not being published on the Scottish Court and Tribunal Service's website. Furthermore, she suggested that this was not helpful to practitioners who relied on case law on section 28 to help determine how a court might interpret the law in an individual case. The Committee asked SPICe to explore this issue further.
3. SPICe approached various officials for assistance in relation to this matter. On 9th March 2016 we received the following response from Roddy Flinn (Legal Secretary to the Lord President):

"As I understand it, views were expressed at an oral evidence session before the Justice Committee (I understand in respect of post-legislative scrutiny of the 2006 Act) to the effect that sheriffs are not publishing, on the Scotcourts website, judgments they make in family law cases, and that this is particularly the position in cases under section 28 of the Act; financial provision where co-habitants have separated.

I am not in a position to comment on whether that is in fact the case; I have not seen any data supporting those propositions. I am aware that only a modest proportion of family law actions (and in particular divorces) go to proof. There may well be reasons for that; these are not professional litigants and in many cases are more open to settlement than some others; the cost of going to all the way to proof is often substantial, and may be a deterrent; and family lawyers might be more inclined than others to try to find common ground. I cannot say whether those reasons, if they are correct, are equally true of section 28 cases, but I can see that this might be the case. But the pool of cases which go to

debate / proof may in fact be quite small, and the number which contain a significant point of law smaller still.

I can confirm that it is for the sheriff (or sheriff principal) who has heard the case to decide whether it should be published. As the Scottish Courts website says: *“Only where there is a significant point of law or particular public interest will the details be published.”* That decision sits with the sheriff, since only he is familiar with the case. I suspect that it would not be an efficient use of judicial resources to have another judge review that decision, and that would, in any event, impact on judicial independence.

I can confirm that there is no published guidance available to sheriffs on the decision of whether or not to publish. However, newly appointed sheriffs are offered a mentor, who, amongst other things, can advise on issues such as this, and a sheriff could seek the views of the sheriff principal, in a particular case. I am aware that there exists a checklist which should be completed when a judgment has been written, and which requires a sheriff to address issues associated with publication. Sheriff clerks often assist sheriffs in this exercise.

Once the decision to publish is made, there is guidance available to sheriffs on whether the decision should be anonymised or redacted. That is to be found in *‘Anonymising Opinions: Guidance issued by the Lord President’* of 21 February 2013. In some cases it will be sufficient to redact particular details within the judgment, in others it will be necessary to anonymise the whole opinion by reference to the parties’ names, and other details which might identify them. Sheriffs take particular care in protecting the interests of children, where that is appropriate. They also give consideration to the risk of jigsaw identification, where details in an anonymised judgment, combined with what is already available online, may allow parties to be identified.”

4. An official from the Scottish Courts and Tribunal Service was also able to confirm that, at present, no data was routinely collected about the percentage of cases heard under section 28 which was published on its website.

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