

Consultation Response

A Scottish Government
Consultation on Family Law

April 2026



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Introduction

The Law Society of Scotland is the professional body for over 13,000 Scottish solicitors. We are a regulator that sets and enforces standards for the solicitor profession which helps people in need and supports business in Scotland, the UK and overseas. We support solicitors and drive change to ensure Scotland has a strong, successful and diverse legal profession. We represent our members and wider society when speaking out on human rights and the rule of law. We also seek to influence changes to legislation and the operation of our justice system as part of our work towards a fairer and more just society.

Our Child & Family Law sub-committee welcomes the opportunity to consider and respond to the Scottish Government's consultation: Family Law: consultation.¹ The sub-committee has the following comments to put forward for consideration.

¹ [A Scottish Government Consultation on Family Law](#)



Questions

Question 1: Do you disagree with any aspect of the SLC draft Bill to improve rights of cohabitants when their relationship ends otherwise than on death, or consider that any appropriate provision is missing?

Yes (disagree)

No

Don't know

If you answered Yes (you disagree with an aspect or aspects of the SLC draft Bill), please give reasons for your answer:

We consider that the draft Bill falls short in a key respect. While we accept that the wider question of aligning cohabitants' rights with those of married couples and civil partners is outwith the scope of the current reforms, we are of the view that cohabitation should have the same legal consequences as marriage and civil partnership. There remains a clear need to ensure that financial provision on separation operates fairly and reflects children's interests. The Bill improves the existing framework by introducing guiding principles and widening the range of available orders; these improve the existing section 28 framework.² However, it does not provide courts with the power to make ongoing periodical payments for future childcare, despite explicitly recognising that the economic responsibility of caring for a child should be shared fairly between former cohabitants.

Future childcare carries ongoing financial implications for the primary carer, including reduced earning capacity and the cost of alternative care. These realities are recognised in the provisions applying to former spouses and civil partners. Without an equivalent power for cohabitants, the Bill cannot fully realise its own principle of fair sharing of childcare responsibilities. We therefore consider that the absence of such provision is a significant omission and recommend that courts be empowered to make periodical payments to ensure a just and children-focused outcome.

We note that Scottish Government has not prepared a draft Children's Rights and Wellbeing Impact Assessment (CRWIA) for this area of the consultation. Given the significance of children's human rights, under both the ECHR, and the UNCRC, including (with particular relevance to this consultation), the UNCRC rights, not to be separated from their parents under Article 9; rights to participate in all proceedings under Articles 9.2 and 12.2; rights to respect for private and family life under Article 16; the right to be brought up by both parents who have common responsibilities and for State assistance for childcare, under Article 18; and the right to an adequate standard of living under Article 27 we would suggest that a

² Family Law (Scotland) Act 2006, s28



CRWIA is undertaken to identify any potential adverse impacts of the proposals and any current incompatibility gaps in existing laws and policies, to inform any future reforms. We would anticipate that the CRWIA should consider the impact of the proposals on children aged 16 and 17, and identify any incompatibility gaps in rights protections, when their co-habiting parents separate.

Question 2: Should the scheme for the reform of cohabitants' rights on separation apply to couples who separate after the date of commencement of the legislation implementing the proposed reforms?

Yes X

No

Don't know

If you answered No (you disagree with the Government's proposed transitional arrangements), please give any reasons for your answer:

We recognise that applying the reformed scheme to couples who began cohabiting before the new provisions come into force may be viewed as unfair, particularly where individuals have arranged their financial affairs in reliance on the existing law. Cohabitants may reasonably have structured their property and economic decisions on the basis of the current statutory framework.

However, it is a fundamental characteristic of any legal system that the law evolves. No one can legitimately expect the law to remain static, and the purpose of reform is to address deficiencies in the existing regime. Once a reformed framework is enacted, it is appropriate that it applies as soon as practicable to ensure legal certainty and to deliver the benefits of the improved scheme without unnecessary delay.

Question 3: Do you have any comments on our draft impact assessments on the proposals for improving cohabitants' rights when their relationship ends otherwise than on death?

Yes

No X

If you answered Yes, please outline these comments and/or evidence:



Question 4: Do you have any other comments on the proposals for improving cohabitants' rights when their relationship ends otherwise than on death?

Yes

No X

If you answered Yes, please outline these comments:

Question 5: Should the recommended definition of "cohabitant" under the SLC's proposals for reform of cohabitants' rights on separation, also apply to circumstances where a cohabitant is applying for financial provision from their deceased partner's intestate estate?

Yes X

No

Don't Know

If you wish, you can give reasons for your answer:

It is generally desirable that a defined legal term should carry a consistent meaning across the statute book unless there is a clear and justified reason for divergence. Consistency of terminology supports legal certainty and assists both practitioners and the public in understanding the scope and effect of the law.

In that context, consideration might be given, when implementing legislation arising from this consultation, to amending section 18 of the Matrimonial Homes (Family Protection) (Scotland) Act 1981 to include a definition of "cohabitant" aligned with the proposed reforms. Harmonising the definition across relevant statutes would promote coherence and avoid unnecessary fragmentation in this area of family law.

Question 6: Other than the time limit, what other practical difficulties are encountered by persons making an application for financial provision on intestacy under section 29 of the 2006 Act?

Significant practical difficulties arise from the current formulation of section 29 of the Family Law (Scotland) Act 2006. The statutory factors that the court must consider have long been the subject of criticism for their breadth and lack of focus. The Scottish Law Commission has previously observed that the court is "*overwhelmed by the number of potentially relevant factors so that in the absence*



of expressly articulated aims it is very difficult if not impossible to focus on those which are significant in the particular case”³.

In *Kerr v Mangan*, Lord Drummond Young noted that *“the lack of statutory criteria for an award makes the task of the court extremely difficult”*.⁴ The absence of clear statutory aims and the diffuse nature of the current factors create uncertainty for litigants and limit the court’s ability to reach consistent and principled decisions. Reform of section 29 is therefore necessary to provide a clearer framework and a more workable basis for applications for financial provision on intestacy.

³ Scot Law Com No. 215, para 4.4

⁴ *Kerr v Mangan* (No 2) 2015 S.C. 17 at [48]



Part 2: The minimum age of marriage and civil partnership

Question 7: Should the Scottish Government legislate to raise the minimum age of marriage and civil partnership to 18?

Yes

No

Don't Know

If you wish, you can choose a reason (or reasons) for your answer from the list below and/or add your own reasons:

- raising the minimum age would protect some children and young people from harm they would not otherwise suffer
- other measures can be taken to protect children from harmful conduct, without increasing the minimum age for marriage or civil partnership (please provide information about these other measures below)
- in general, people aged 16 or 17 do not have the capacity to understand what it means to marry or enter a civil partnership
- raising the minimum age in Scotland would meet our international obligations or we should keep the minimum age at 16 as it's consistent with some other rights that 16-year-olds can also exercise like leaving home
- there's not enough evidence to justify reform
- other (please add your reasons below):

The consultation provides a clear and balanced overview of the complex issues surrounding whether the minimum age for marriage and civil partnership should be raised to 18. Having considered the competing arguments, and recognising the strength of feeling on both sides, our view, albeit a cautious one, is that the case for reform on this isolated issue has not yet been made. Any change to such a significant legal threshold should follow a thorough review of the various ages at which young people in Scotland acquire rights and responsibilities, or are defined as children, or 'adults'. That wider review is overdue, and reform of the minimum age for marriage should form part of that work rather than precede it.

While concerns about harm associated with child marriage are well noted, much of the available evidence comes from jurisdictions with markedly different socio-economic conditions, and is therefore of limited relevance in the modern Scottish context, where the numbers of children affected is significantly less. Moreover, removing access to marriage for 16 and 17 year olds may simply lead to an increase in cohabitation, leaving young people with fewer rights and protections than they would otherwise have.



We also recognise international commentary favouring a minimum age of 18⁵. However, these recommendations are not strictly binding, and neither the UNCRC, nor other international treaties, require Scotland to adopt such a position. We agree with the overarching policy intention to bring Scots law in line with international standards and obligations, for all children under 18, but consider that this must be done through a comprehensive legislative compatibility review, as suggested above. This will require assessment of the evolving capacities of children, the rights and responsibilities of parents in Scotland, and the protective duties of the State. Domestic protections for 16 and 17 year olds against forced marriage already exist, both through criminal law and through preventive civil measures.

Importantly, very few 16 or 17 year olds marry in Scotland, and the consultation acknowledges that some young people would cohabit instead, with fewer legal protections. These children may be parents themselves, and the legal framework, as it currently stands, can create complex and inconsistent rights and responsibilities. Given these factors, and the broader inconsistencies in the ages at which young people acquire legal capacity across Scots law, we consider it premature to raise the minimum age for marriage and civil partnership without a comprehensive review of the wider framework.

Question 8: Do you agree or disagree that the Scottish Government should legislate to extend the forced marriage offence? This would be so that any conduct with the intention of causing a person under 18 to marry or enter a civil partnership would be a criminal offence, including where there is no evidence of coercion.

Yes

No

Don't Know

If you wish, you can give reasons for your answer:

Even if the minimum age for marriage and civil partnership remains unchanged, this question is important, as it concerns circumstances falling outside the existing offence in section 122 of the Anti-social Behaviour, Crime and Policing Act 2014, namely, situations where a person under 18 is not subjected to violence, threats or coercion.

⁵ Most particularly, in the General Comments and Concluding Observations and Recommendations of the UN Committee on the Rights of the Child and the UN Committee on Eliminating Discrimination against Woman.



Any extension of the criminal law must be approached with caution. The most compelling reason against expanding the offence is the risk, identified in the consultation, that young people may be deterred from seeking help if they fear that family members or others could face prosecution. This would undermine safeguarding rather than enhance it.

It is also unclear whether extending the offence would meaningfully address concerns about informal or religious marriage ceremonies involving under-18s. These ceremonies are not legally valid marriages, and it is doubtful that widening the scope of a criminal offence would be an effective or proportionate response.

Question 9: Do you have any comments on our draft impact assessments about the minimum age of marriage and civil partnership? We are particularly interested in any evidence about the experience of harm (or other impacts) for parties aged 16 or 17 who are permitted to marry or enter a civil partnership in Scotland, to their children or to others. You should not include personal data in your response.

Yes

No X

If you answered Yes, please outline these comments and/or evidence:

We note that the draft CRWIA relies on statistics on 16 and 17 year olds' marriages from 2023. It is important that up to date data, and the views of children and young people, are used to inform consideration of any reforms going forward.

In addition, we consider that it is essential that in conducting the legislative compatibility review on definitions of child, adult, capacity, consent, and parental rights and responsibilities, that consideration is given to children in marginalised communities, and the CRWIA ought to include the rights of those 16 and 17 year olds who are disabled, or who are deemed to be 'adults' under existing law.⁶

Question 10: Do you have any other comments on the minimum age of marriage and civil partnership? You can, for example, suggest alternative or additional actions that you consider we should take.

Yes X

No

If you answered Yes, please outline these comments:

We agree with the consultation's view that the introduction of parental consent into Scots law would be inappropriate, as this concept is not part of our legal

⁶ See, for example, the Adults with Incapacity (Scotland) Act 2000



tradition. Likewise, we recognise the challenges associated with importing other non-Scottish mechanisms into this area of law.

However, if the minimum age for marriage and civil partnership remains at 16, there may be merit in considering whether judicial consent should be required where either party is under 18. Such an approach could offer additional safeguards while remaining consistent with the principles underpinning Scots family law.

We also support the consultation's position that any increase in the minimum age should not retrospectively affect the recognition of foreign marriages or civil partnerships where the parties had no connection with Scotland at the time of the ceremony. This is a sensible and pragmatic approach that avoids unnecessary disruption and respects established private international law principles.



Part 3: Qualifying requirements for religious and belief bodies to meet when they solemnise marriage or register civil partnership

Question 11: Should the Scottish Government lay down qualifying requirements for religious or belief bodies to meet when they solemnise marriage or register civil partnership?

Yes

No

Don't know

If you wish, you can give reasons for your answer:

We take the view that reform, whether through primary legislation or regulation, should only proceed where there is clear evidence of a mischief requiring intervention. Although this area is already subject to extensive regulation, there appear to be gaps in the current framework. Setting out a comprehensive and consolidated list of relevant requirements would therefore be beneficial, improving clarity, accessibility, and the overall coherence of the law.

Question 12: Should the qualifying requirements outlined in this consultation be laid down? [Question 13 asks about requirements that you think have been omitted]

Yes

No

Don't know

If you answered No, please confirm whether you think this is because:

The requirements should generally be laid down as outlined, but with modification(s):

Only some of the requirements outlined should be laid down:

Please outline what modifications you think are needed or which requirements you think should not be laid down:



Question 13: Should any further qualifying requirements be laid down?

Yes

No X

Don't know

If so, please outline what should be laid down and why

Question 14: Should the Scottish Government and NRS draw up a Code of Conduct for celebrants instead of laying down qualifying requirements?

Yes

No X

Don't Know

If you wish, you can give reasons for your answer:

Given that qualifying requirements are already set out in regulations, it would be preferable for any additional requirements to be incorporated within the same regulatory framework. Consolidating these in a single, accessible source would enhance clarity for bodies, celebrants, and the public. Introducing a separate Code of Conduct risks unnecessary duplication and could complicate rather than simplify the regulatory landscape.

Question 15. Do you have any comments on the draft Impact Assessments about the Qualifying Requirements?

Yes

No X

If yes, please outline these comments and/or evidence:

Question 16. Do you have any other comments on the Qualifying Requirements?

Yes

No X

If yes, please outline these comments:



Part 4: Extending Simplified Divorce and Dissolution to cases where there are children under 16 and no dispute about their welfare

Question 17: The Scottish Government is considering making simplified divorce and dissolution procedures available in cases where:

- there are children (one or more) of the family under 16; and
- the spouses or civil partners have agreed about the upbringing of the children and so neither applies for an order under section 11 of the 1995 Act in relation to the children.

Do you agree or disagree with making the simplified procedures available in these cases?

Agree

Disagree

Don't know

If you wish, you can give reasons for your answer:

We consider that the simplified procedure for both divorce and dissolution could be extended in the manner proposed, subject to there being appropriate procedures for the Court to be satisfied about the welfare, rights and best interests of any children of the marriage or civil partnership.

The question of the appropriate level of judicial oversight of the arrangements made for care of a couple's child post-divorce is challenging. On the one hand, it can be argued that meaningful oversight would require an enquiry to be conducted by an independent third party into the proposed arrangements for the future care of every child whose parents are divorcing with the third party producing a child welfare report.

On the other hand, it can be argued that such an approach intrudes unduly into family privacy and creates unnecessary expense. In any event, there is no automatic oversight of the arrangement for the care of a child when unmarried cohabiting parents separate, nor when a parent, whether married or not, dies.

It is also worth bearing in mind that the parents may be living separately already. In any event, what they have determined is a workable arrangement may be all that is on offer.

In addition, as far as child welfare is concerned, there is also the two-fold safety net comprising:

- (a) the option for an interested party who is concerned about the child's welfare to take the matter to a court, and
- (b) the, albeit overstretched, child protection system.



One further issue is worth noting. The Children (Scotland) Act 1995, section 6, requires that, when making a major decision in the course of fulfilling parental responsibilities or exercise parental rights, the decision-maker gives any child involved the opportunity to express views and take account of those views. “Major decision” is not defined but, arguably, the arrangements for the care of a child after parental divorce is such a decision. Consulting the child is addressed in Question 10 on Forms F33B, CR30A, 49.73-D and 49.80B but, assuming the parent answers “Yes” and indicates that the child is happy with the arrangement, there does not seem to be any way to verify whether the child was actually consulted. Nor is it clear what would result from a “No” response. It is concerning that the relevant provisions of the Children (Scotland) Act 2020 have not yet been fully brought into force. Given that children in family law proceedings do not have automatic legal standing in proceedings concerning their family relationships, residence and contact, we are concerned that they are not afforded the right to meaningfully participate in proceedings, or to challenge decisions made⁷. Any changes to the rights of adults in dissolution and divorce should also consider whether improvements could be made in the rights of children affected.

Question 18: Should Ministers amend the Orders which helped establish the simplified divorce and dissolution procedures to remove the references to “mental disorder” and instead exclude only cases where one of the parties actually “lacks capacity”?

Yes [the Orders should be amended] X

No

Don't know

If you wish, you can give reasons for your answer:

As the consultation notes, replacing the current reference to “mental disorder” with an approach based on capacity aligns with the terminology used in the Adults with Incapacity (Scotland) Act 2000. Replacing the current wording would widen access to the simplified divorce procedure for parties who may meet the wide Mental Health (Care and Treatment) (Scotland) Act 2003 definition of “mental disorder” but do not meet the 2000 Act definition of incapacity. We consider this appropriate. A capacious person should not be discriminated against or preclude from consenting to or engaging in simplified proceedings simply because they have a mental disorder.

Aligning with the 2000 Act definition of incapacity also ensures greater consistency across the statutory framework. However, the 2000 Act definition of

⁷ By contrast children in the Children's Hearings System have legal standing and rights to participate, have advocacy support, challenge and appeal decisions, and seek reviews.



incapacity does still refer to mental disorder, and refers back to the 2003 Act for interpretation. The concept of “mental disorder” would therefore remain relevant in determining where the simplified procedure can be used.

In making the changes proposed in the consultation paper, it will be important to provide clarity on how incapacity should be assessed in relation to the specific tasks involved in simplified divorce- is an assessment by a medical practitioner required where capacity is in question?

We also note that there appears to be no independent check on an assertion by a person seeking a simplified divorce or dissolution that their partner has capacity, and that there was no undue influence or other vitiating factor at play. Consideration may need to be given to the consequences should it subsequently emerge, after the decree has been granted, that a party lacked capacity or that there was some other invalidating factor.

Again, the issues around defining a 16 or 17 year old child as an ‘adult’ in this area of law, raises rights concerns, as noted above.

Question 19: Considering these points, do consultees think any changes are required to the procedures for withholding addresses in simplified divorce and dissolution cases?

Yes X

No

Don't know

If you wish, you can give reasons for your answer and set out any changes you think should be made:

Question 20: Do you have any comments on our draft impact assessments about extending the simplified divorce and dissolution procedures?

Yes

No X

If you answered Yes, please outline these comments and/or evidence:



Question 21: Do you have any other comments on extending the simplified divorce and dissolution procedures?

Yes

No

If you answered Yes, please outline these comments:

While this falls out with the scope of the current consultation, consideration could be given in future to further streamlining the processes for divorce and dissolution. One potential option, limited to couples without children and with no outstanding property disputes, would be to introduce a wholly administrative procedure requiring no judicial involvement. In such cases, parties could complete a prescribed form, processed in a manner comparable to applications for a change of name. Although this would entail some administrative and infrastructure costs, it could deliver meaningful efficiencies within the court system, including reduced judicial workload.



For further information, please contact:

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