

TREATMENT OF RECOMMENDATIONS & PROPOSALS

RECOMMENDATION OF SLC REPORT ON REFORM OF THE GROUND FOR DIVORCE	
<p>The ground for divorce in Scotland should continue to be the irretrievable breakdown of the marriage. It should be possible to establish irretrievable breakdown only by proving</p> <p>(a) adultery (b) intolerable behaviour (c) separation for one year plus the other party's consent to divorce, or (d) separation for two years.</p>	<p>Accept Chapter 4</p>

RECOMMENDATIONS OF SLC REPORT ON FAMILY LAW (Recommendation Nos. 42 to 91)	
<p>42 (a) Marriage by cohabitation and repute should be abolished as from the date of commencement of implementing legislation. (b) Accordingly, it should no longer be possible to contract such a marriage after that date, but this would be without prejudice to the validity of any such marriage already contracted before that date (whether or not a declarator of marriage had been obtained).</p>	<p>Reject Para 10.4</p>
<p>43. It should continue to be a ground of nullity of marriage that either party is at the time of the marriage already married.</p>	<p>Accept Para 6.4.1</p>
<p>44 It should continue to be a ground of nullity of marriage that either party is, at the time of the marriage, under the age of 16.</p>	<p>Accept Para 6.4.1</p>
<p>45. It should continue to be a ground of nullity of marriage that both parties are of the same sex.</p>	<p>Accept Para 6.4.2</p>
<p>46. It should continue to be a ground of nullity of marriage that the parties are within the prohibited degrees of relationship specified in the Marriage (Scotland) Act 1977, subject however, to the removal of the remaining limited restrictions on marriage between a person and the parent of his or her former spouse. Accordingly, the distinction between marriage with a deceased spouse's widowed parent (which is permitted under the present law) and other marriages with a former spouse's parent (which are not permitted) should no longer be part of Scots law.</p>	<p>Accept Paras 6.4.3 & 6.4.4</p>
<p>47 (a) There should continue to be a rule on the lines of section 23A of the Marriage (Scotland) Act 1977, to the effect that a duly registered marriage, where both parties were present at the ceremony, is not invalid by reason only of any failure to comply with any legal preliminaries or formal requirements or by reason of any lack of qualification on the part of the celebrant. This rule should extend to marriages in Scotland solemnised before as well as after the commencement of the new legislation, but a marriage solemnised before such commencement should not be validated in this way if it had already, before such commencement, been declared void by a competent court or followed by another marriage in reliance on its nullity. (b) In the case of a marriage in Scotland, the essential formal requirements (subject to the validating rule in recommendation 47(a) should</p>	<p>Accept Para 6.4.5</p>

<p>be</p> <ul style="list-style-type: none"> (i) the giving of notice of intention to marry (ii) the production to the approved celebrant, or availability to an authorised registrar, of a marriage schedule in respect of the marriage as required by section 13(1)(a) and 19(2)(a) respectively of the Marriage (Scotland) Act 1977 (iii) the presence of both parties at the ceremony (iv) the presence as witnesses of 2 persons professing to be 16 years of age or over (v) the presence of an authorised or legally recognised celebrant and (vi) the outward exchange by the parties of present consent to marriage. 	
<p>48</p> <p>(a) Subject to the subsidiary rules suggested below, a marriage should be void if, because of mental incapacity, error, or duress either party does not freely consent to marry the other party.</p> <p>(b) (i) A marriage should be void on the ground of a party's mental incapacity, whether temporary or permanent, only if the party is at the time of the marriage ceremony incapable of understanding the nature of marriage or of giving consent to marriage.</p> <p>(ii) Where a person was under a temporary mental incapacity at the time of the marriage ceremony but does not bring an action for declarator of nullity of marriage as soon as is reasonably practicable after regaining capacity the marriage should be regarded as having been valid as from the time of the ceremony.</p> <p>(c) (i) A marriage should be void on the ground of error only if at the time of the ceremony either party was in error as to the nature of the ceremony or the identity of the other party.</p> <p>(ii) A party should be regarded as being in error as to the identity of the other party only if he or she mistakenly believed that the other party at the ceremony was the person whom he or she had agreed to marry, regardless of the name or qualities of that person.</p> <p>(iii) Where a person was in error as to the nature of a ceremony or the identity of the other party to the marriage but does not bring an action for declarator of nullity of marriage soon as is reasonably practicable after discovering the error the marriage should be regarded as having been valid as from the time of the ceremony.</p> <p>(d) (i) A marriage should be void on the ground of duress only if one party was forced against his or her will to marry the other party.</p> <p>(ii) Where a person was forced against his or her will to marry the other party but does not bring an action for declarator of nullity of marriage as soon as is reasonably practicable after the duress ceases to have effect the marriage should be regarded as having been valid as from the time of the ceremony.</p> <p>(e) Without prejudice to the rules recommended above, a marriage should not be void merely because one or both parties went through the ceremony of marriage with a tacit mental reservation to the effect that notwithstanding the nature and form of the ceremony no legal marriage would result from it.</p>	<p>Accept Para 6.4.6</p>
<p>49</p> <p>Marriages should not be voidable on the ground of impotency</p>	<p>Reject Para 10.10</p>

50 There should be no new grounds on which a marriage is voidable in Scots law.	Accept Para 10.10
51 Actions for declarator of marriage or nullity of marriage should be competent not only in the Court of Session but also in the sheriff courts.	Accept Para 6.4.8
52 (a) The remedy of an action for declarator of freedom and putting to silence should be abolished. (b) It should be made clear that the court's ordinary powers to grant interdicts and interim interdicts include power to grant interdict or interim interdict against the repetition of a false assertion of marriage to the applicant.	Accept Para 6.4.11
53 The rules on jurisdiction applying to actions for declarator of marriage should also apply to actions for declarator that a divorce, annulment or legal separation is, or is not, entitled to recognition in Scotland.	Accept Para 6.4.9
54 Section 2(2) of the Law Reform (Husband and Wife) Act 1962 (which gives the court power to dismiss certain proceedings between spouses in delict) should be repealed.	Accept Para 6.4.12
55 (a) Under section 6(1) of the Matrimonial Homes (Family Protection) (Scotland) Act 1981 (which relates to the continued exercise of occupancy rights after a dealing) a person acquiring a home or an interest in it should not be affected by the occupancy rights of the spouse of a former owner (i.e. an owner prior to the person making the transfer to that acquirer) if the acquirer was (i) a transferee for value acting in good faith or (ii) someone who derives title from such a transferee. (b) The period referred to in section 6(3)(f) of the 1981 Act should be reduced from 5 years to 2 years. (c) A court should be able to dispense with consent to a proposed dealing under section 7 of the 1981 Act notwithstanding that no negotiations have yet been entered into or concluded, provided that the dispensation relates to (i) a sale at not less than a specified price and within a specified time from the date of the court's order, or (ii) the grant of a heritable security for a loan of not more than a specified amount to be executed within a specified time from the date of the court's order. (d) A court which refuses to dispense with a non-entitled spouse's consent to a dealing should have the power (i) to order that spouse, if he or she is in occupation of the home, to make payments in lieu of rent and (ii) to attach to the refusal of consent such other conditions relating to the occupation of the home by the non-entitled spouse as it thinks fit. (e) Section 6(3)(e) of the 1981 Act should apply to all transfers for value, not merely sales. (f) The references to affidavits in section 6(3)(e) and section 8(2A) of the 1981 Act should be replaced by references to written declarations (attracting the penalties of the False Oaths (Scotland) Act 1933) subscribed by the transfer of the property or grantor of the security. (g) Where a dealing consists of a termination by the entitled spouse of his or her tenancy of the matrimonial home then, if section 6 of the 1981 Act applies, the non-entitled spouse should be deemed, so long as he or she is entitled to continue to exercise occupancy rights, to be a tenant of the home	Accept Chapter 3

<p>under a tenancy in the same terms (apart from the identity of the tenant) as the terminated tenancy.</p> <p>(h) (i) An attorney acting under a power of attorney should be permitted to execute a declaration, consent or renunciation for the purposes of the 1981 Act.</p> <p>(ii) The curator bonis of an incapax should be permitted to execute a declaration, consent or renunciation for the purposes of the 1981 Act.</p>	
<p>56 The occupancy rights of a non-entitled spouse in a matrimonial home should terminate if the spouses have been separated for a continuous period of 2 years or more during which period the non-entitled spouse has not occupied the home.</p>	<p>Accept Chapter 3</p>
<p>57 (a) Section 14(1) of the Matrimonial Homes (Family Protection) (Scotland) Act 1981 should confer an express power to grant matrimonial interdicts.</p> <p>(b) It should be made clear in the Act that a matrimonial interdict under section 14(1) cannot be used as an easy alternative to an exclusion order. A matrimonial interdict should not be available so as to exclude an entitled spouse, or a spouse with occupancy rights, from the matrimonial home unless the interdict is ancillary to an exclusion order or to a refusal by the court of leave to exercise occupancy rights in the circumstances mentioned in section 1(3) of the Act.</p> <p>(c) The definition of "matrimonial interdict" in section 14(2) of the 1981 Act should be extended so that paragraph (b) extends not only to a matrimonial home but also to any home or other premises occupied by the applicant, to the applicants place of work and to the school attended by any child in the applicant's care.</p>	<p>Accept Chapter 3</p>
<p>58 It should be made clear in section 15(1)(b) of the 1981 Act (power of arrest) that the onus is on the non-applicant spouse to show that a power of arrest is unnecessary.</p>	<p>Accept Chapter 3</p>
<p>59 Where a power of arrest is attached to an interdict the police should continue to have a discretion as to whether or not to arrest where a breach is reasonably suspected.</p>	<p>Accept Chapter 3</p>
<p>60 A power of arrest attached to a matrimonial interdict should not cease to have effect on the termination of the marriage but should cease to have effect, whether or not there is a divorce, three years after the date when the power was granted, unless it has been recalled, or renewed on cause shown, within that time.</p>	<p>Accept Chapter 3</p>
<p>61 The definition of a " matrimonial interdict" should be extended to cover a corresponding interdict for the protection of a former spouse.</p>	<p>Accept Chapter 3</p>
<p>62 Subsection (4) and subsection (5)(b)(ii) of section 17 of the 1981 Act (procedure after arrest for breach of a matrimonial interdict) should be repealed.</p>	<p>Accept Chapter 3</p>
<p>63 It should be made clear in the definition of "matrimonial home" that the term does not include a residence provided or made available by anyone for one spouse to reside in, whether with any child of the family or not,</p>	<p>Accept Chapter 3</p>

separately from the other spouse.	
64 It should be made clear that the definition of "matrimonial home" includes any ground or building which is required for its amenity or convenience even if not attached to it.	Accept Chapter 3
65 It should be made clear that where the tenancy of a matrimonial home is transferred from one spouse to the other with the intention that the house is thereafter to be the residence of the transferee separately from his or her spouse, the house is not a matrimonial home after the transfer.	Accept Chapter 3
66. Judicial separation should be abolished.	Reject Para 10.12
67. The reference in section 1(3) of the Divorce (Scotland) Act 1976 to adultery which "has been connived at in such a way as to raise the defence of lenocinium" should be replaced by a reference to adultery which has been actively promoted or encouraged by the pursuer.	Accept Para 6.4.13
68 (a) It should be expressly provided that the court in an action for divorce should not grant a decree of divorce if satisfied that (whether or not as a result of collusion) the pursuer has put forward a false case or the defender has withheld a good defence. (b) Collusion as a separate bar to divorce should be abolished.	Accept Para 6.4.13
69 Section 1(5) of the Divorce (Scotland) Act 1976 should be repealed.	Accept Para 6.4.13
70 (a) Subject to the Foreign Marriage Act 1892 as amended, the question whether a marriage is formally valid should be governed by the law of the place of celebration. (b) Subject to the following recommendation and to section 50 of the Family Law Act 1986 (effect of divorce) the question whether a marriage is essentially invalid because either party was under a legal incapacity to enter into it or did not give a legally effective consent to it should be governed by the law of that party's domicile immediately before the marriage.	Accept Paras 6.4.14 – 6.4.16
71 A marriage entered into in Scotland should be invalid, no matter what the domiciles of the parties, if, according to Scottish internal law, at the time when the marriage was entered into (a) the parties were within the forbidden degrees of relationship (b) either party was already married (c) either party was under the age of 16 (d) the parties were of the same sex, or (e) because of mental incapacity, error or duress, either party did not effectively consent to the marriage but, without prejudice to the law on error or duress, should not be invalid merely because one or both parties went through the ceremony of marriage with a tacit mental reservation to the effect that notwithstanding the nature and form of the ceremony no legal marriage would result from it.	Accept Paras 6.4.17 – 6.4.18
72 A rule requiring a person under a certain age to obtain the prior consent of a parent or guardian before he or she can marry should be regarded as resulting in a legal incapacity for marriage if, but only if, it precludes a marriage by that person anywhere in any form while under that age.	Accept Paras 6.4.19 – 6.4.22

73 Where, on the application of the above rules, a marriage is initially valid it should not be annulled or declared null by a Scottish court on any ground.	Accept Para 6.4.23
74 A foreign rule as to the validity or invalidity of a marriage should not be recognised or applied in Scotland where to do so would be contrary to Scottish public policy.	Accept Para 6.4.24
75 The existing rule that a Scottish court applies Scots law in a divorce action, no matter what the domiciles of the parties may be, should be put into statutory form.	Accept Para 8.2
76 The effect, if any, which marriage has on a person's capacity and obligations (other than the obligation of aliment which is considered separately later) should be determined by the law governing that person's capacity and obligations generally.	Accept Para 8.2
77 The effect, if any, which marriage has on the spouses' property should be determined in the case of immovable property, by the law of the country where that property is situated and, in the case of moveable property, by the law of the spouses' common domicile. Where the spouses do not have the same domicile marriage should have no automatic effect on their moveable property.	Accept Para 8.2
78 The rules in the preceding recommendation should be subject (a) to any agreement between the spouses, and (b) to the proviso that a change of domicile by one or both spouses should not affect either spouse's vested rights in property.	Accept Para 8.2
79 Notwithstanding the rules in the preceding recommendations, the question whether a person is entitled to the benefit of protective rules relating to the occupation or use of the matrimonial home (whether moveable or immovable) or its contents should be determined by the law of the country where the matrimonial home is situated.	Accept Para 8.2
80 (a) The presumption of equal shares in household goods in section 25 of the Family Law (Scotland) Act 1985 should be applied, with modifications, to cohabitants. (b) The presumption should apply only to goods acquired during the cohabitation, and not to goods bought "in prospect of" cohabitation. (c) The presumption should be rebuttable by proving that the goods belong to one party alone or to both in unequal shares and subsection (2) of section 25 (which restricts such proof in certain cases) should not be applied to cohabitants.	Accept Para 7.4(a)-(c)
81 The presumption of equal shares in money and property derived from a housekeeping or similar allowance in section 26 of the Family Law (Scotland) Act 1985 should be applied, with the necessary modifications, to cohabitants.	Accept Para 7.4(d)
82 (a) Where a cohabitation has terminated otherwise than by death, a former cohabitant should be able to apply to a court, within one year after the end of the cohabitation, for a financial provision on the basis of the principle	Accept Para 7.4(e)-(h)

<p>in section 9(1)(b) of the Family Law (Scotland) Act 1985 - namely that fair account should be taken of any economic advantage derived by either party from contributions by the other, and of any economic disadvantage suffered by either party in the interests of the other party or of any child of the family.</p> <p>(b) The Court of Session and the sheriff courts should have jurisdiction to entertain an application if they would have had jurisdiction to entertain an action for divorce between the parties.</p> <p>(c) An application should be made by action, any necessary regulation of procedure being by rules of court.</p> <p>(d) The court hearing an application should have power to award a capital sum (including a deferred capital sum and a capital sum payable by instalments) and to make an interim award.</p>	
<p>83 Where a cohabitation is terminated by death the surviving cohabitant should not have automatic rights of intestate succession or fixed rights to a legal share of the deceased's estate but should be able to apply to a court for a discretionary provision out of the deceased's estate under a scheme of the type set out in [paragraph 7.4(e)].</p>	<p>Accept Para 7.4(i)</p>
<p>84 (a) Interdicts of the type described in section 14(2) of the Matrimonial Homes (Family Protection)(Scotland) Act 1981, to which a power of arrest can be attached, should be available to cohabitants, whether or not they have occupancy rights, and without the need for any qualifying period of cohabitation.</p> <p>(b) Such interdicts for cohabitants (currently called "matrimonial interdicts") should be renamed or described in a way which does not suggest that they are confined to married persons.</p>	<p>Accept Chapter 3.9</p>
<p>85 (a) For the avoidance of doubt, it should be made clear by statute that a cohabitant has an insurable interest in the life of his or her partner of the same type as he or she has in his or her own life.</p> <p>(b) No qualifying period of cohabitation should be required for this purpose.</p>	<p>Reserved matter Para 10.23</p>
<p>86 (a) The benefits of the Married Women's Policies of Assurance (Scotland) Act 1880 (which enables a person to take out a life insurance policy on his or her own life for the benefit of his or her spouse in such a way that the policy is held in trust for the beneficiary as soon as it is effected) should be extended to cohabitants.</p> <p>(b) No qualifying period of cohabitation should be required for this purpose.</p>	<p>Reserved matter Para 10.23</p>
<p>87 A contract between cohabitants or prospective cohabitants relating to property or financial matters should not be void or unenforceable solely because it was concluded between parties in, or about to enter, this type of relationship.</p>	<p>Accept Para 7.4(j)</p>
<p>88 (a) Section 1(1) of the Law Reform (Parent and Child) Act 1986 should be amended so as to provide expressly that no person whose status is governed by Scots law should be regarded as illegitimate.</p> <p>(b) The Legitimation (Scotland) Act 1968 should be repealed as unnecessary.</p> <p>(c) References in existing legislation to actions for declarator of legitimacy, legitimation and illegitimacy should be repealed.</p> <p>(d) Any reference to a legitimate or lawful person in any enactment</p>	<p>Accept Para 8.1</p>

<p>passed or made, or in any document executed, before the commencement of the new legislation should be construed as a reference to a person whose parents were married to each other at the time of the person's conception or at any later time, and any reference to an illegitimate person in any such enactment or document should be construed accordingly.</p> <p>(e) Consequential amendments should be made in sections 39 and 46 of the Adoption (Scotland) Act 1978.</p>	
<p>(f) The reference to coats of arms in section 9(1)(c) of the Law Reform (Parent and Child) (Scotland) Act 1986 should be repealed.</p>	Reserved matter Para 10.23
<p>89 (a) The existing law on the domicile of children (which makes domicile depend on legitimacy) should be changed.</p> <p>(b) The domicile of a child under the age of 16 should be determined as follows-</p> <p>(i) the child should be domiciled in the country with which he or she is for the time being most closely connected;</p> <p>(ii) where the child's parents are domiciled in the same country and the child has his or her home with either or both of them, it is to be presumed, unless the contrary is shown, that the child is most closely connected with that country;</p> <p>(iii) where the child's parents are not domiciled in the same country and the child has his or her home with one of them, but not with the other, it is to be presumed, unless the contrary is shown, that the child is most closely connected with the country in which the parent with whom the child has his or her home is domiciled.</p> <p>(c) It should be made clear that a person's domicile of origin is the first domicile which he or she has under the above rules.</p>	Accept Para 8.3
<p>90 The way, if any in which a person's status at any time is affected by whether his or her parents are or have been married to each other should depend on the law of the person's domicile at that time.</p>	Accept Para 8.3
<p>91 It should be provided that, subject to the provisions of the Maintenance Orders (Reciprocal Enforcement) Act 1972, courts in Scotland should apply the internal law of Scotland in dealing with claims for aliment.</p>	Accept Para 8.3

QUESTIONS IN IMPROVING SCOTTISH FAMILY LAW	
<p>Whether to provide in an action for divorce where the parties were married according to certain religious usages that a court may, on application of either party, require a declaration that they have taken the necessary steps to dissolve the marriage in accordance with those usages (Question 2).</p>	Accept Paras 8.4 – 8.5
<p>Whether in an action for divorce to make the provision of information about the arrangements for the children compulsory (Question 2)</p>	Reject Para 10.3
<p>Whether to have a new statutory basis for funding family mediation and marriage support services (Question 3)</p>	Chapter 5
<p>Whether to make new provision for the acquisition of parental responsibilities and rights by unmarried fathers (Questions 14 – 17)</p>	Chapter 2

Whether to enable a step-parent to make an agreement with both the natural parents of a child, which would give parental responsibilities and rights (Question 18)	Accept Paras 2.24
Whether to make special provision in relation to parental responsibilities and rights where one parent has a history of abuse against the other parent (Questions 19 – 21)	Reject Paras 10.17 – 10.22
Whether to make special provision for increases in matrimonial property after the end of the marriage or non-matrimonial property during the marriage (Questions 22 – 23)	Reject Paras 10.13 - - 10.16
Whether to allow a sheriff to direct a sheriff clerk to execute deeds relating to moveable as well as heritable property (Question 24)	Accept Para 8.6