

# Consultation on the Law of Succession

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“We have strong, resilient and supportive communities where people take responsibility for their own actions and how they affect others”

A National Outcome being pursued by the Scottish Government

Society has changed significantly over the past half century. Individuals are generally living longer with many more of us owning our own homes. Family structures have changed too, with more extended families. Whilst marriage forms the basis of nearly half of our family structures there are also civil partnerships and co-habitations. Just over a third of our population are single. In addition Scotland’s population is ageing with the percentage of those aged over 65 increasing fairly significantly. This is a positive trend, reflecting improvements in health care, but it is a trend that needs to be taken on board across a number of policy areas.

What hasn’t changed is the inevitability of death and the need for there to be clear and fair laws in place, which reflect our modern day society and deal with the aftermath which can be a very difficult time for those family and friends of deceased. To paraphrase Thomas Mann - a person’s dying is more the survivor’s affair than their own.

Given this context, we are grateful to the Scottish Law Commission for its valuable work in reviewing and recommending reforms for this very important aspect of the law – something which will touch us all at some point in our lives.

We are already taking forward some of the recommendations of the Commission to make the law on succession fairer, clearer and more consistent by modernising some technical aspects of the law relating to succession in Scotland. This package of modernisation is being taken forward in the Succession Bill announced in the Programme for Government.

This paper seeks views on the remaining recommendations of the Commission which promote a fundamental overhaul of the law of succession in Scotland. We know that there are some challenging issues to grasp. When we carried out a period of informal pre-consultation dialogue with stakeholders on a number of the Report’s key recommendations, that exercise revealed that there was no clear consensus about some of the recommendations before determining response.

We believe therefore that further work is warranted in order to focus on the key points and secure a clear understanding of the implications of the recommendations.

To help inform our policy we wish to engage with stakeholders so that we may take account of all relevant views in making progress. I am pleased therefore to publish this consultation this paper on issues regarding the law of succession and I look forward to considering the responses.

**Paul Wheelhouse MSP**  
**Minister for Community Safety and Legal Affairs**

## BACKGROUND

1.1 In August 2014, the Scottish Government published a consultation on technical issues relating to succession law. That paper set out that it would be followed by a further consultation on more fundamental changes to succession law to inform their policy development. This paper fulfils that commitment.

1.2 The Scottish Law Commission (the Commission) reviewed the law of succession and issued a Report in 2009 - Report on Succession (Scot Law Com No 215) (the Report). For information on the project including the Commission's Discussion Paper and Report see <http://www.scotlawcom.gov.uk/law-reform-projects/completed-projects/succession/>.

1.3. The Report made wide ranging recommendations:

- for a new scheme for intestate succession;
- on protection from disinheritance for spouses/civil partners and options for protection of children;
- on further protections for cohabitants;
- on choice of law and jurisdiction in international law matters;
- on testamentary writings and special destinations; and
- on a number of miscellaneous matters including the requirement for executors dative to obtain bonds of caution.

1.4 The Scottish Government carried out a period of informal pre-consultation dialogue with stakeholders on a number of the Report's key recommendations. That exercise revealed that there was no clear consensus about some of the recommendations and that further consultation would be needed.

1.5 As noted above, the August 2014 consultation focussed on the technical recommendations addressing a number of anomalies within the current legislative framework as opposed to the more fundamental changes of the wider Report. That consultation covered those recommendations described in the last 3 bullet points above which related to jurisdiction and choice of law; wills and survivorship; rights of succession in limited circumstances; bonds of caution and in addition the timescale for a surviving cohabitant to make a claim on a deceased cohabitant's intestate estate, some of which were carried forward from an earlier Report on succession law, published in 1990. Further to the consultation, the Scottish Government announced a Succession Bill in its Programme for Government on 26 November 2014. The consultation closed on 7 November, and a summary of the responses can be found at:

<http://www.scotland.gov.uk/Topics/Justice/law/damages/succession>.

## INTRODUCTION

1.6 The current law of succession is now over 50 years old, and as a result of the range of societal and other changes which have occurred over that period, no longer meets the expectations, or provides appropriately for the circumstances, of individuals in 21<sup>st</sup> century Scotland. The Commission's recommendations seek to address this.

1.7 This paper focuses on 3 key issues raised by the Commission:

- what should happen when there is no will;
- what protections should be put in place from disinheritance, in particular for children, where there is a will; and
- further protections for cohabitants.

1.8 In taking forward this further consideration of the Commission's recommendations the Scottish Government's policy is to ensure that any changes to the law of succession, both testate and intestate, reflect as widely as possible the expectations of individuals in 21<sup>st</sup> century Scotland. The law must be robust and provide appropriate outcomes. Succession law has the potential to affect us all – and we all have different views coloured by our own circumstances and life experiences. We know that it will not be possible to take account of every family's circumstances and so there will inevitably be hard cases.

1.9 The law on intestate succession provides a default position in cases where an individual dies without leaving a will and so we agree with the Commission that it should be as **simple and easily understood as possible whilst delivering fair outcomes**.

1.10 In terms of testate succession, it will be necessary to strike the appropriate balance between the autonomy of individuals to determine what should happen to their property and possessions and protection from disinheritance for the family.

1.11 For cohabitants we recognise the difficulties with the current scheme and the need for a replacement.

1.12 Whilst these issues have been split into 3 separate chapters it is important to recognise that the Commission has recommended (on one issue with options) an overall scheme for succession and not a 'pick and mix' of individual aspects of the scheme.

1.13 There is also a short final chapter covering a number of issues raised in the context of the earlier consultation on which there was no clear consensus.

1.14 Before bringing forward changes to the law it is vital to explore and understand the difficult issues from a range of perspectives to inform the necessary policy decisions.

## Impact Assessment

1.15 It is important to ensure that any resulting legislation, which has the potential to impact on us all, is robust and durable, with no unintended consequences and that it takes account of all relevant perspectives, including equalities considerations and any potential financial and regulatory implications.

1.16 As part of the consultation process, we hope to be able to gather information to enable us to assess the impact and costs of implementing any of the proposals, or indeed of not doing so, from the perspective of a range of interests. Previous experience in this area has revealed that such information can be difficult to access.

1.17 It is therefore important that we produce as robust financial and other impact assessments as possible if, following consultation, we are to take forward legislation. The Financial Memorandum, etc. will be subject to close scrutiny by the Scottish Parliament.

**1.18 At a number of points throughout the paper there are broadly framed questions seeking responses on the costs and benefits/drawbacks of implementing the proposals. It would be extremely helpful if you could consider these questions and respond (with an explanation) in so far as it is possible for you to do so, drawing on specific evidence and/or wider knowledge, experience and expertise.**

## Glossary of Terms

1.19 For clarity a glossary of terms is provided at **Annex A**.

## INTESTACY

### Introduction

2.1 This chapter corresponds to Part 2 of the Commission's Report. In this chapter we focus on the main recommendations but a full list of the Commission's recommendations as they relate to intestate succession are replicated at the end of this chapter.

2.2 If someone dies without leaving a valid will their estate is described as intestate. There are many reasons why someone may not leave a will; they may find it hard to deal with the prospect of death and to make plans to deal with their affairs; they may have put it off as something which they will do much later in life and have never got round to it; they may be satisfied that the law as it stands in relation to intestacy will fulfil their wishes; or they may think that it's not necessary because everything will go to their spouse or partner and/or children.

2.3 Research dating from 2006 found that only 37% of Scots had made a will, but this increased to 69% of those 65 years or over. In consequence, the number of persons who die intestate, and are therefore subject to the default rules, is substantial.

2.4 The law on intestacy is the default position for those who do not make a will and we recognise that it will not work for everyone. The default rules may result in unintended consequences in so far as those who the deceased had expected to inherit may not do so to the extent that the deceased anticipated or may not inherit at all.

### Current law

2.5 The default intestate position is that when a person dies in Scotland without leaving a will, his or her estate is distributed under the rules set out in the Succession (Scotland) Act 1964 (the 1964 Act). Those rights relate to specific types of property. The current law of intestate succession makes a distinction between heritable estate (land, property etc.) and moveable estate (cash, shares, jewellery, etc.). The estate is distributed as follows:

#### *Prior rights*

After debts have been paid, the first call on the estate are the prior rights of the surviving spouse or civil partner which comprises of:

- the right to the home in which s/he is living up to a value of £473,000
- furniture to a value of £29,000
- a cash payment of up to £89,000, or £50,000 where the deceased is also survived by issue, borne by and paid out of the heritable and moveable estate (referred to as "financial provision").

## *Legal rights*

After prior rights have been met, the next call on the estate is legal rights. Presently, legal rights can only be claimed from the deceased's moveable property.

The surviving spouse or civil partner has a legal right to one-third of a deceased's moveable estate if there are issue or to one-half of the moveable estate if there are no issue. The issue (children which failing the children of predeceasing children etc.) share one-half of the moveable estate if there is no surviving spouse or civil partner or a third if there is a surviving spouse or civil partner.

## *Remainder of the estate*

What remains of the estate is distributed in accordance with section 2 of the 1964 Act. This means that potentially parents, brothers, sisters, uncles, aunts, grandparents and other ancestors can inherit. Where no relatives can be traced the estate will pass to the Crown.

2.6 In terms of policy, the present law aims to ensure that in most cases the surviving spouse or civil partner can retain the family home and furniture and have a capital sum. It is fairly common now that where a home is owned jointly by spouses or civil partners that title to the home incorporates a *survivorship destination*. This means that on the death of one, his or her right in the property will automatically pass directly to the surviving spouse or civil partner. In these circumstances the property does not, in effect, form part of the estate. Survivorship destinations are considered further below.

## **Issues with the current system**

2.7 The current system comprises a complex sequence of rights and can produce different outcomes depending on how much of the estate is made up of heritable property or of moveable property. In some situations, those outcomes are unlikely to be what the deceased would have wanted. We set out below some examples by way of illustration.

### ***Example One***

In the case of a couple, whether married or civil partners, with no issue and one dies intestate with a house worth less than £473,000, furniture worth less than £29,000 and other property of less than £89,000, the survivor would be entitled to the whole estate.

### ***Example Two***

In the case of a couple, whether married or civil partners, with a child or children and one dies intestate with a house worth less than £473,000, furniture worth less than £29,000 and other property of less than £50,000 the surviving spouse/ civil partner would be entitled to the whole estate.

### ***Example Three***

In the case of a couple, whether married or civil partners, with children and one dies with a house worth less than £473,000, furniture worth less than £29,000 and moveable property of £80,000, the surviving spouse/ civil partner would be entitled to the house, the furniture and £50,000 in financial provision from the moveable property.

The remaining £30,000, as it is all moveable property, would be available for legal rights as a result of which the surviving spouse/ civil partner would get £10,000 and

the children would get £10,000 between them. The residue of £10,000 would pass to the children under section 2 of the 1964 Act.

#### **Example Four**

In the case of a couple, whether married or civil partners, with no issue and one dies intestate with a house worth less than £473,000, furniture worth less than £29,000 and other property worth more than £89,000, the surviving spouse/ civil partner would inherit the house, the furniture and £89,000. The surviving spouse/ civil partner would also have a legal right to one half of the remaining moveable estate. The remaining estate would then pass to remoter relatives according to the order provided for under section 2 of the 1964 Act.

#### **Example Five**

In the case of a couple, whether married or civil partners, with no issue who did not own the home in which they were ordinarily resident, and one dies intestate with furniture worth less than £29,000, moveable property of £150,000 and heritable assets worth £500,000, the survivor would inherit:

- the furniture
- £89,000 from the moveable property and
- a legal right to one half of the remaining moveable estate (£61,000 divided by 2= £30,500).

The deceased's other heritable assets (£500,000) and the remaining one half of the moveable estate (£30,500) would pass to remoter relatives under section 2 of the 1964 Act.

## **Proposed changes**

2.8 The Commission have recommended a radical new scheme. Fundamental to the new scheme is that rights should no longer be property specific but arise in relation to the whole of the estate whether moveable or heritable. This would mean that the estate is valued as a whole and the distinction described above relating to moveable and heritable property is removed.

2.9 However, the Commission were of the view that, while rights under the new scheme should not be property specific, **the current policy basis that a surviving spouse/civil partner can retain the family home should be maintained.** We agree that there should be no change to this policy aim as it is most likely to reflect a deceased spouse or civil partner's wishes.

2.10 We are also supportive of the need for a simple approach on intestacy which is easily understood. Nonetheless we recognise that such an approach would not be sufficiently nuanced to take account of the more complex or diverse range of relationships and family groupings in the 21<sup>st</sup> century and would not provide for every set of circumstances. It will however, be easy to understand and if people understand what the default position is they are then in a better position to consider whether or not they need to make a will in order to achieve a different effect and we believe that there is considerable merit in this outcome.

2.11 The key elements of the Commission's proposal are that:

- A spouse/civil partner should inherit the whole estate if there are no issue<sup>1</sup>;

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<sup>1</sup> By children we mean children or adopted children of the deceased but not step children.

- If there is no spouse/civil partner, any issue should inherit the whole estate;
- Where there is a spouse/civil partner and issue, the spouse/civil partner should receive up to a threshold sum (£300,000 was suggested by the Commission) out of the whole estate and the remainder of the estate should be divided in two, one part for the spouse/civil partner and the other to be divided between or amongst the children (or where appropriate their representatives);
- Where the deceased is survived by a spouse or civil partner and issue, and the net value of the deceased's right in a dwelling house which passes to the spouse or civil partner by virtue of a survivorship destination does not exceed the threshold sum, the threshold sum should be reduced by the net value of the deceased's right.<sup>2</sup>
- Where the deceased is survived by a spouse or civil partner and issue, and the net value of the deceased's right in a dwelling house which passes to the spouse or civil partner by virtue of a survivorship destination exceeds the threshold sum, the sum by which the survivorship destination exceeds the threshold sum should be deducted from the deceased's intestate estate. The surviving spouse/civil partner should be entitled to half of the resulting amount, if any, and the rest of the estate should be shared among the issue.

2.12 In recommending a new system, the Commission wants to move away from the current complex arrangements to something which is simple but as fair as possible. We agree that it would seem likely to accord with a deceased's wishes that if they were survived only by a spouse/civil partner or only by children, the survivors should inherit the whole estate.

### **Threshold**

2.13 Where there is a spouse/civil partner and issue, the Commission recommended that the spouse/civil partner should get the first £300,000 (the threshold sum) of the whole estate. In suggesting a threshold sum of £300,000 the Commission took into account the then current level of prior rights, which were:

- Dwelling house: £300,000
- Furniture: £24,000
- Financial Provision: £75,000 reduced to £42,000 if children.<sup>3</sup>

2.14 They added the above prior rights upper limits for house, furniture and cash (no issue) and arrived at a figure of £366,000. Then, on the basis that the new intestate scheme described above would also provide a spouse or civil partner with entitlement to half of the remainder of the estate, they amended that figure downwards to £300,000.

2.15 They were of the view that this figure would not leave a surviving spouse/civil partner with substantially less than under the current system. The Commission were

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<sup>2</sup> More on this issue is described at paragraphs 2.28 to 2.31 below.

<sup>3</sup> Since then the level of prior rights have changed and are currently: Dwelling house £473,000, Furniture £29,000 and Financial provision £89,000 (reduced to £50,000 if there are children).

clear however that the level of the threshold sum should be a matter for political judgment.

2.16 The Commission's recommendations on intestacy formed part of a Scottish Government informal pre consultation dialogue at official level with stakeholders in 2010 in order to test: the proposed value for the threshold sum; whether or not the spouse/civil partner should be entitled to the family home irrespective of value; and whether the value of property passing by way of survivorship destinations should form part of the threshold sum as set out in the example above.

2.17 Most stakeholders at that time agreed that the threshold sum was reasonable (or reasonable subject to minor adjustments). However a small number took the view that there should not be a threshold sum at all. Their view was that a spouse/civil partner should be able to retain, and remain in, the family home. Part of that group's concern was that the figure did not reflect the variation in property prices across Scotland. Another group of stakeholders took the view that the spouse/civil partner should have a right to retain the family home provided it was within the threshold sum.

2.18 For the relatively few cases where the value of the family home exceeds the threshold sum, it may be necessary to sell the family home, in order to satisfy the legal rights of the children of the deceased. As noted below, some stakeholders have suggested that the sale should not be allowed to take place until a certain period has elapsed (possibly 2 years – the period during which it is possible to draw up a Deed of Family arrangement for tax purposes) to allow the spouse/civil partner time to make alternative arrangements.

2.19 One stakeholder suggested that there should be a qualifying period before a spouse/civil partner could inherit the whole of the threshold sum. Arguably this would add a layer of complexity and could lead to hard cases where the individual died shortly before the end of the qualifying period.

2.20 Concern about the level of the threshold sum was expressed in some quarters in relation to step families and the potential unfairness to the deceased's children where the estate would pass to a surviving spouse/civil partner who was not the parent of the deceased's children. This does of course reflect the current position.

2.21 There was a suggestion that the threshold sum (£300,000) might be reduced in these circumstances. The Commission recognised that reconstituted families raised difficult issues but favoured a simple system as set out in paragraph 2.10 above, which has the merit of certainty. We are inclined to share that view.

2.22 However, prior rights limits were subsequently uprated in 2011 and so further consideration of the threshold sum is required. In setting the threshold sum, there is a tension between the competing interests of surviving spouses/civil partners and issue because the higher the threshold sum, the smaller the amount available, indeed if any, for the deceased's issue to inherit.

2.23 Over time the prior rights values have increased as set out in the table below. As Professor Meston pointed out<sup>4</sup> 'The original figure of £15,000 in 1964 represented approximately three times the value of a substantial city [Aberdeen] house

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<sup>4</sup> Succession (Scotland) Act, Fifth Edition, Professor Michael C. Meston 2002, page 39

purchased in that year by the author' and that in 2002 the then figure of '...£130,000 is approximately half of the current value of the same house and the protection afforded by the housing right may now be illusory.'

Period	House	Furniture	Cash (children)	Cash (no children)
1964	£15 000	£5 000	£2 500	£5 000
1973	£30 000	£8 000	£4 000	£8 000
1977	£30 000	£8 000	£8 000	£16 000
1981	£50 000	£10 000	£15 000	£25 000
1988	£65 000	£12 000	£21 000	£35 000
1999	£130 000	£22 000	£35 000	£58 000
2005	£300 000	£24 000	£42 000	£75 000
2012	£473 000	£29 000	£50 000	£89 000

2.24 In England and Wales, under the Inheritance and Trustees' Powers Act 2014, where someone dies intestate with a surviving spouse/civil partner and children, the surviving spouse/civil partner will receive the first £250,000 of the estate with the remainder being split between the spouse/civil partner and the children. A figure of £250,000 would only capture 75% of properties sold in Scotland in 2013. Setting the threshold sum at this level would not meet the policy objective. In 2009 approximately 92% of properties would have been within the Commission's proposed threshold sum of £300,000.

2.25 We are therefore consulting on a range of values based on adjusting the current prior rights limits to reflect 2013 prices. To do this we have used the average house price rise for Scotland from 2009 to 2013 (from the Office for National Statistics)<sup>5</sup> to up-rate the property based limits and used average earning increase for 2009-13 (from Annual Survey of Hours and Earnings)<sup>6</sup> to uprate the non-property threshold values. We have used house price data from the Registers of Scotland<sup>7</sup> for sales in 2013 to determine what proportion of properties fell below the range of threshold values. This reflects the approach used in the last uprating exercise of prior rights limits in 2011 -

<http://www.scotland.gov.uk/Publications/2011/02/21095302/0>. We accept that this approach will not capture all properties in Scotland. To do so, would require no limit to be set, which does not accord with our policy.

2.26 We are therefore seeking views on the following range of values. The table identifies the percentage of properties captured.

Threshold Basis	Threshold sum £000's	Houses sold under threshold
Scottish Law Commission's recommended threshold sum: £300,000 in 2009 as adjusted	£335	94%
Current <b>prior rights</b> : £473,000 as adjusted	£528	98.6%
Current <b>prior rights</b> : £473,000 as adjusted		

<sup>5</sup> <http://www.ons.gov.uk/ons/index.html>

<sup>6</sup> <http://www.ons.gov.uk/ons/rel/ashe/annual-survey-of-hours-and-earnings/2013-provisional-results/stb-ashe-statistical-bulletin-2013.html>

<sup>7</sup> <https://www.ros.gov.uk/>

plus current <b>furniture</b> entitlement: £29,000 as adjusted	£558	98.8%
Current <b>prior rights</b> : £473,000 as adjusted plus current <b>furniture</b> entitlement: £29,000 as adjusted plus current <b>financial provision</b> with deceased's issue: £50,000 as adjusted	£610	99.2%
Current <b>prior rights</b> : £473,000 as adjusted plus current <b>furniture</b> entitlement: £29,000 as adjusted plus current <b>financial provision</b> without deceased's issue: £89,000 as adjusted.	£650	99.4%

## Survivorship Destination

2.27 At the time of their writing, the Commission pointed out that 42% of homes owned in Scotland were owned in common by spouses or civil partners. About three-quarters of those contained a survivorship destination so that on death, the deceased's share passes automatically to the surviving spouse or civil partner. The Commission recommended that the threshold sum in this situation should be reduced by the value of the deceased's interest in the property and would be taken into account when determining the threshold sum of £300,000. This point may be better illustrated by way of the following example, using the Commission's proposed threshold sum of £300,000: -

### **Example Six**

A and B jointly own their home and have in place a survivorship destination. The home is worth £500,000 when A dies intestate. By virtue of the survivorship destination, A's share of £250,000 passes to B. A and B have 3 children, who all have survived A. A has other moveable assets valued at £300,000.

#### **(A) survivorship destination not taken into account**

If the survivorship destination is not taken into account, B would be entitled to the whole threshold sum of £300,000 and therefore inherits the entire estate. The children would inherit nothing.

#### **(B) survivorship destination taken into account**

If the survivorship destination is taken into account, the value of the share of the home transferred to B (£250,000) - would be subtracted from the threshold sum (£300,000). The threshold sum would therefore be reduced to £50,000.

The estate would be divided as follows:

B would receive £50,000, taken from the £300,000 of moveable assets.

The remaining £250,000 of moveable assets would be divided equally between B and the children.

B would therefore receive £175,000 from the moveable assets, and the children would receive £125,000 collectively.

2.28 The Commission also considered the situation where the deceased is survived by a spouse or civil partner and issue and where the value of the survivorship destination is greater than the threshold sum. Because the surviving spouse cannot be compelled to renounce any part of the property owned by virtue of the survivorship destination in this situation, the spouse is obtaining more than the £300,000 threshold. The Commission therefore recommended that, to balance the interests of the deceased's issue, the amount by which the value of the property

exceeds the threshold sum should be deducted from the deceased's intestate estate. Rather than being entitled to half of the intestate estate, the surviving spouse/civil partner would only be entitled to half of the resulting amount, if any, and the rest of the estate would be shared among the issue.

### **Example Seven**

A and B jointly own their home and have in place a survivorship destination. The home is worth £1,000,000 when A dies intestate. By virtue of the survivorship destination, A's share of £500,000 passes to B. A and B have 3 children, who all have survived A. A has other moveable assets valued at £300,000.

#### **(A) survivorship destination not taken into account**

If the survivorship destination is not taken into account, B would be entitled to the whole threshold sum of £300,000 and therefore inherits the entire estate. The children would inherit nothing.

#### **(B) survivorship destination taken into account**

If the survivorship destination is taken into account, the value of the share of the home transferred to B (£500,000) would be subtracted from the threshold sum (£300,000). The difference between the value of the property and the threshold sum is a negative value of £200,000. This difference is subtracted from the value of the estate (£300,000), leaving £100,000. B is entitled to half of this sum, and the children are entitled to the rest of the estate.

The estate would be divided as follows:

- B would receive half of £100,000- £50,000.
- The remaining £250,000 (£300,000 less B's share) would be divided equally amongst the 3 children.

### **Example Eight**

A and B jointly own their home and have in place a survivorship destination. The home is worth £1,000,000 when A dies intestate. By virtue of the survivorship destination, A's share of £500,000 passes to B. A and B have 3 children, who all have survived A. A has other moveable assets valued at £100,000.

#### **(A) survivorship destination not taken into account**

If the survivorship destination is not taken into account, B would be entitled to the whole threshold sum of £300,000 and therefore inherits the entire estate (£100,000). The children would inherit nothing.

#### **(B) survivorship destination taken into account**

If the survivorship destination is taken into account, the value of the share of the home transferred to B (£500,000) would be subtracted from the threshold sum (£300,000). The difference between the value of the property and the threshold sum is a negative value of £200,000. This difference is subtracted from the value of the estate (£100,000), leaving a negative value (-£100,000). As B cannot be compelled to renounce the property owned by virtue of a survivorship destination, the negative value is treated as nil. B is entitled to nothing, and the children are entitled to the rest of the estate.

The estate would be divided as follows:

- B would receive nothing.
- The entire estate of £100,000 would be divided equally amongst the 3 children.

2.29 Whether a survivorship destination should form part of the threshold sum was an issue on which the consultees who responded to the Commission's Discussion

Paper were divided. The Commission's rationale was that the level of the threshold sum should be set to ensure that the surviving spouse or civil partner should be able remain in the family home and that policy aim would be met where there was a survivorship destination. To fail to include the value of the survivorship destination as part of the threshold sum would prejudice the deceased's children.

2.30 Participants in the Scottish Government pre-consultation dialogue agreed that the inclusion of property passing by way of survivorship destination in determining the threshold sum was acceptable. However, one group took the view that a survivorship destination was an expression of testamentary intention and so the value of the property transferring in this way should be disregarded in determining the threshold sum in intestacy. In addition, attention was drawn to special destinations and nominations in relation to moveable property. It was suggested that if heritable property subject to destination is to be taken into account when distributing the intestate estate, moveable property subject to destination and nomination should also be taken into account.<sup>8</sup>

2.31 One set of stakeholders suggested that for the relatively few cases where the estate exceeds the threshold sum to the extent that it may be necessary to sell the family home, the sale should not be allowed to take place until a certain period has elapsed (possibly 2 years – the period during which it is possible to draw up a Deed of Family arrangement for tax purposes) to allow the spouse/civil partner time to make alternative arrangements.

### **Deceased survived by neither spouse/ civil partner nor issue**

2.32 In situations where an individual dies without making a will and does not have a surviving spouse, civil partner or children those who will inherit would follow the same order of succession as currently set out at section 2 of the 1964 Act and as described at paragraph 2.5 above.

### **Renunciation**

2.33 The Commission were clear that a person should be able to renounce his or her entitlement to a deceased's estate. The effect of a renunciation should be to treat the person as not having survived the deceased. This would mean that, for example, where a spouse or civil partner renounced his or her entitlement, the deceased's issue (if there are any) would share the whole estate.

2.34 There are circumstances in which the issue becoming entitled to share the estate may defeat the purpose of the renunciation. The Commission have therefore recommended that in a renunciation, a person should also be able to renounce the entitlement of their issue. The renunciation must be express.

2.35 A renunciation either increases the share of the existing heirs or opens the succession to the next set of entitled relatives. Unlike the current law, it is the Commission's view that the renounced estate should not fall immediately to the Crown.

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<sup>8</sup> An example of where moveable property might be subject to a survivorship destination is shares.

## Summary of Recommendations in Part 2 of the Commission's Report

2.36 In summary the Commission has recommended the following:-

1. Where a person dies intestate survived by a spouse or civil partner but not by issue the spouse or civil partner should inherit the whole of the net intestate estate.
2. Where a person dies intestate survived by issue but not by a spouse or civil partner the issue should inherit the whole of the net intestate estate.
3.
  - (1) Where a person dies intestate survived by a spouse or civil partner and issue the spouse or civil partner should have a right to the whole estate if less than the threshold sum. Any excess over the threshold sum should be divided equally, half to the spouse or civil partner and half to the issue.
  - (2) The threshold sum should be £300,000
  - (3) Scottish Ministers should have a duty to review the threshold sum annually and have the power to alter it from time to time by statutory instrument.
4. Where the deceased is survived by a spouse or civil partner and issue, and the net value of the deceased's right in a dwelling house which passes to the spouse or civil partner by virtue of a survivorship destination does not exceed the threshold sum of £300,000, the threshold sum should be reduced by the net value of the deceased's right.
5. Where the deceased is survived by a spouse or civil partner and issue, and the net value of the deceased's right in a dwelling house which passes to the spouse or civil partner by virtue of a survivorship destination exceeds the threshold sum of £300,000, any excess over this sum should be deducted from the deceased's intestate estate. The surviving spouse or civil partner should be entitled to one half of the resulting amount, if any: the rest of the estate should be shared by the issue.
6. Separation by itself should continue to have no effect on the succession rights of a spouse or civil partner.
7. A surviving spouse or civil partner should continue to be treated in the same way with regard to succession to an intestate estate whether or not the spouse or civil partner was a second or subsequent spouse or civil partner or the parent of the deceased's children.
8. The deceased's step-child and a child accepted by the deceased as a child of the deceased's family should continue not to be treated as the deceased's child for the purposes of the law of intestate succession.
9. With the exception of the deceased's spouse or civil partner, the existing list of categories of relative should continue but collaterals of the half-blood should inherit equally on intestacy with collaterals of the full-blood.

10. (1) Where a person who is the deceased's issue survives the deceased, that person's survival should preclude any of that person's issue from being entitled to share in the value of the deceased's estate.
- (2) Where two or more entitled issue are in the same degree of relationship to the deceased, the deceased's estate should be divided equally between them; otherwise it should be divided between them *per stirpes*.
11. (1) The current rules on distribution between parents and siblings and remoter relatives should continue to apply.
- (2) The current doctrine of representation should continue to apply.
- (3) Where two or more entitled relatives are in the same degree of relationship to the deceased, the deceased's estate should be divided equally between them; otherwise it should be divided between them *per stirpes*.
12. (1) Before or after the deceased's death a person should be able to renounce any entitlement to the deceased's intestate estate and should be treated as if he or she had not survived the deceased.
- (2) A person should be able expressly to renounce the entitlement of that person's issue to the deceased's intestate estate and that person's issue should not be treated as if they had not survived the deceased.
- 13 The Crown should continue to have the right to claim any intestate estate to which no surviving relatives of the deceased can be found to succeed.

## **Questions relating to Part 2 of the Commission's Report**

**Should rights in intestacy be property specific?**

Yes  
No  
Don't know

Please give reasons for your answer

**Should the policy aim of any scheme of intestacy be that a surviving spouse/civil partner should be able to remain in the family home?**

Yes  
No  
Don't know

Please give reasons for your answer

**Would the policy aim be achieved by the scheme of intestacy proposed by the Scottish Law Commission, after further consideration of the level of the threshold sum?**

Yes  
No  
Don't know

Please give reasons for your answer

**Should the threshold sum be set to strike a balance between the rights of a surviving spouse/civil partner and the deceased's children?**

Yes  
No  
Don't know

Please give reasons for your answer

**What do you think the level of threshold sum should be?**

**A - £335,000**  
**B - £528,000**  
**C - £558,000**  
**D - £610,000**  
**E - £650,000**

Please give reasons for your answer

**Should the spouse/civil partner retain the family home irrespective of value?**

Yes  
No

Don't know

Please give reasons for your answer

**Should the threshold sum be reduced by the value of survivorship destinations in the title to heritable property?**

Yes

No

Don't know

Please give reasons for your answer

**Should the threshold sum take into account the value of survivorship destinations in the title to moveable property?**

Yes

No

Don't know

Please give reasons for your answer

**Where the deceased is survived by a spouse or civil partner and issue, and the net value of the deceased's right in a dwelling house which passes to the spouse or civil partner by virtue of a survivorship destination exceeds the threshold sum, should the sum be deducted from the deceased's intestate estate and the surviving spouse/civil partner be entitled to half of the resulting amount, if any, with the rest of the estate shared among the issue?**

Yes

No

Don't know

Please give reasons for your answer

**Should there be a qualifying period before which a surviving spouse/civil partner could acquire some or all of the threshold sum?**

Yes

No

Don't know

Please give reasons for your answer

**Where the value of the family home exceeds the threshold sum, should there be a period during which the property could not be sold?**

Yes

No

Don't know

Please give reasons for your answer

**If you have answered yes, should that period be two years?**

Yes

No

Don't know

Please give reasons for your answer

**Where a person renounces their rights under an estate should they be regarded as not having survived the deceased?**

Yes

No

Don't know

Please give reasons for your answer

**Where a person renounces their entitlement under an estate should they also be able to renounce the entitlement of their issue?**

Yes

No

Don't know

Please give reasons for your answer

**Please also feel free to comment on any of the other recommendations made by the Commission and set out at paragraph 2.36 above.**

### **Impact**

As set out at paragraphs 1.15 to 1.17 we hope to be able to gather information to enable us to assess the impact and costs of implementing any of the proposals, or indeed of not doing so, from the perspective of a range of interests. It would therefore be helpful if you could offer a response to the following questions.

**What do you think the impact of implementing these proposals would be**

On individuals

On families

On the legal profession

On the courts

On business?

## PROTECTION FROM DISINHERITANCE

3.1 This chapter corresponds to Part 3 of the Commission's Report. In this chapter we focus on the main recommendations but a full list of the Commission's recommendations as they relate to protection from disinheritance are replicated at the end of this chapter. **Comments on these are also welcome.**

3.2 This chapter will consider who (spouses/civil partners and issue), if anyone, should be protected from disinheritance and to what extent. This is only relevant where the deceased has left a will – otherwise the provisions as set out in Chapter 2 for intestate estates would apply. As mentioned earlier however, all 3 chapters provide details of the overall scheme for succession as recommended by the Commission. The proposals for protection from disinheritance are intrinsically linked to the scheme for intestate estates. The proposed extent to which protection from disinheritance is afforded is set by reference to a percentage of what that individual or group would have received on intestacy.

3.3 There has historically been provision in succession law in Scotland to protect spouses/civil partners and children from being disinherited<sup>9</sup> by the will of a spouse/civil partner or parent. In Part 3 of their report the Commission set out the reasons for their conclusion that complete freedom to leave your property to whoever you choose is not in fact a 'viable option for the basis of reform'. They were of the view that until their death the deceased owed the spouse or civil partner an obligation of aliment, so why should that cease on death; and that where the deceased owed any child an obligation of aliment the same should apply.

### Current law

3.4 Under the current system a spouse/civil partner has *legal rights* and is able to claim a third of the deceased's moveable estate (cash, shares etc.) if the deceased is also survived by issue. If there are no issue, that claim is to a half of the moveable estate. Similarly, issue too have *legal rights* and are able to collectively claim a third of the deceased's moveable estate if there is also a surviving spouse/civil partner. Where there is no surviving spouse or civil partner, they can claim half of the moveable estate. These legal rights apply to intestate estates once any prior rights have been satisfied.

### Issues with the current law

3.5 The current system of *legal rights* was described by the Commission as flawed. The key issue is that the nature of the deceased's property determines whether or not there is estate available against which a claim can be met. As legal rights are claimed on the moveable estate, an individual may be able to convert the bulk of their estate into heritable property and so prevent, or at least limit, claims by spouses/civil partners and children.

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<sup>9</sup> Technically as there is no right to inherit, someone cannot be 'disinherited' but this is a term which is commonly used to describe the circumstance of someone who may have expected to inherit i.e. a spouse, civil partner or child, for whom no provision has been made.

### **Example Nine**

Z is widowed and has two children B and C. Z is estranged from B and Z does not wish to make any provision for them on death. Z intends to leave the home to C. Z also has money and shares to the value of £120,000.

Under the existing law, B would be able to claim legal rights of a 50% share of one-half of any moveable estate. In this case this would be £30,000.

To avoid this outcome, Z purchases a flat at a cost of £110,000. On death, Z leaves the heritable property (home to C and the flat to a friend who has acted as a carer for them in later life).

Z's savings and shares have now diminished to £6,000. If B claims their legal rights of a 50% share of one-half of any moveable estate, they will be entitled to £1,500. Z has reduced B's legal rights by £28,500 by converting moveable property into heritable property.

3.6 In terms of any changes to the law, the tension therefore lies between striking the appropriate balance between individuals having freedom to leave their property to whoever they want and giving family some rights to receive an inheritance.

## **Proposed changes**

### *Spouses/civil partners*

3.7 In place of *legal rights*, the Commission recommend that a spouse or civil partner should be able to claim a fixed share from the whole estate (heritable and moveable) and that the fixed share should be 25% of what he or she would have been entitled if the deceased had died intestate (under the proposed new scheme described in Chapter 2).

3.8 In the main, stakeholders with whom officials met agreed with this recommendation, although one group felt it was too low, suggesting increasing that share to one third of what he or she would have been entitled in intestacy, or in the case where there were no children, one half. Others took the view that it should be no higher to allow a reasonable degree of freedom to test.

### *Issue*

3.9 Respondents to the Commission's Discussion Paper were divided on whether, and to what extent, issue should continue to enjoy some protection from disinheritance.

3.10 The Commission considered whether

- all children (or issue of predeceasing children) should continue to be protected from disinheritance or
- there should be alimentary provision for dependent children<sup>10</sup> only.

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<sup>10</sup> A dependent child as is defined at s1(1) and (5) of the Family Law (Scotland) Act 1985 i.e. obligation to aliment ceases when the child reaches 18 or 25 if they are in appropriate education or training.

3.11 The responses they received were ‘sharply divided’ and the Commission did not make a specific recommendation in this regard. Instead, the Report offers two options for further consideration.

### **Option One – legal share for all children**

3.12 One option is that all children (or issue of predeceasing children) would have a claim to a fixed share of the deceased’s estate, both moveable and heritable, which would be 25% of what they would have got on intestacy, under the proposed new intestacy rules. This would mean that a claim would only be possible where the estate exceeded the threshold sum. If the estate did not exceed the threshold sum, only the surviving spouse/civil partner would inherit in intestacy<sup>11</sup>.

#### **Example Ten**

(Please note that the Commission’s proposed threshold sum of £300,000 is used for the purpose of this example).

C dies leaving a spouse or civil partner and 2 children. Their estate amounts to £290,000 (heritable and moveable). C leaves the entire estate to their spouse or civil partner and nothing to their children.

As the size of the estate (£290,000) does not exceed the intestacy threshold sum of £300,000, the children have no claim to a legal share.

If however in the same circumstances the estate totalled £340,000, if C had died intestate, their estate would have been divided as follows:

- The spouse or civil partner would get £300,000 (the threshold sum);
- the remainder of the estate (£40,000) would be divided in 2 with half going to the spouse or civil partner (£20,000) and the other half being divided equally between the children (£10,000 each).

Under Option One, where C had left a will which did not make provision for their children, the children would be entitled to a legal share of 5% of the amount which would have been due to them on intestacy - £2,500 each. As a result the spouse or civil partner would receive all but £5,000 of the estate.

**The ability of the estate to bear the cost of meeting claims for legal share may depend on the nature of the assets, how realisable they are and/or whether the principal beneficiary is able to borrow against the assets. If the estate is unable to meet the claims by making cash payments or by distributing some of the assets with the agreement of those making the claim, assets may have to be sold.**

### **Divergence of views and concerns**

3.13 In terms of our discussions with stakeholders, the divergence of views on protecting adult children from disinheritance was clear. This issue is particularly subjective and views are influenced by personal circumstances and experience, possibly changing over time. It is worth noting that in discussion only one group came out very strongly in favour of not protecting adult children.

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<sup>11</sup> Under the new scheme proposed by the Scottish Law Commission in Part 2 of their report and discussed at Chapter 2 in this paper.

3.14 Strong representations were, and continue to be, made in relation to the potential impact of legal share for spouses/civil partners and children on certain types of agricultural units. However, given that substantive changes to succession law have the potential to affect all those who live in Scotland we will continue seek views on the generality of the proposed changes in this section of the chapter. Part 2 will rehearse the concerns particular to sectors of the rural community.

## **Renunciation**

3.15 The Commission, in response to concerns about the ability of an estate to meet the cost of legal share, did not recommend exemptions but did provide that families could change the outcome. They recommended that the new proposed legal share could be **renounced**. They also recommended that renunciation should remove that person's issues' right to legal share from the deceased's estate and that renunciation would not increase the legal share of any other person.

## **Payment by instalments**

3.16 The Commission have also recommended that it should be possible to apply to the Court for inheritance flowing from legal share to be paid in instalments.

## **Option Two**

3.17 The alternative option is that the rights of adult children would be abolished and dependent children given the right to a capital sum payment, calculated on the basis of what would be required to maintain the child until no longer dependent (until age 18 or 25 if in education or training). In this context dependent children are those who were owed a duty of aliment by the person who has died, immediately before their death. This would include children accepted as children of the family and children owed an equivalent obligation of aliment under foreign law.

3.18 The capital sum would be determined by the needs and resources of the child reflecting the family's lifestyle and position. The child's resources would also be taken into account and the court would consider the existence of others who owed the child an obligation of aliment and the resources and earnings, needs etc. of those individuals.

3.19 In terms of this option there would, however, be no right to a capital sum payment to a dependent child in relation to any part of the deceased's estate (including property passing by way of special destination) which passes to an individual who at the date of the deceased's death was under an obligation to aliment the child (or an equivalent obligation under foreign law). What this means in practical terms is that if A and B are married or civil partners with dependent children and B dies, A will remain responsible for (be under an obligation to aliment) the dependent children, and as a result the children would have no right to a capital sum payment.

3.20 The Commission recommended that an application should be made within a year of the death; that the Court should have the power to allow an application after this time on cause shown; and that a child with capacity<sup>12</sup> could renounce the right.

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<sup>12</sup> under the Age of Legal Capacity (Scotland) Act 1991.

3.21 It is likely that the provision for aliment would apply only very rarely because (a) as people live longer, children are rarely dependent when a parent dies and (b) it would be necessary for the person to whom the deceased's estate was passing not to be the person liable to aliment the child, which would again be rare.

***Example Eleven***

Only dependent children have the right to a capital sum payment under Option 2.

B dies leaving a spouse or civil partner and 3 children (aged 25, 22 and 18). The 2 elder children are employed and the youngest child is undertaking further education. B leaves all of their estate to their spouse or civil partner. As the spouse or civil partner would remain responsible for any dependent children, no provision would be made.

In this same example, where B is pre-deceased by their spouse or civil partner and instead leaves their estate to a friend, then the youngest child, as the only dependent child, would have a valid claim for a capital sum payment.

**Discussion**

3.22 In discussion, one stakeholder suggested that the two options for children could be combined – with minimum protection for all and real protection where needed. Option 2 is consistent with the principle of not imposing an obligation on a parent's estate in circumstances where they would not have been under a legal obligation to aliment a dependent child while they were alive.

3.23 In terms of an alimentary scheme, there was widespread significant concern about the uncertainty created by a discretionary scheme and about how it would operate. One stakeholder suggested that discretion could lead to injustice. One group felt it would be for executors to make the decision on the amount payable whilst others thought this would be a matter for courts to decide, at least until the system bedded in. There was a concern that different courts would make different decisions and that making an application to court would take time and would have a cost to both the individual and the estate. There was also concern that applications could lead to family disharmony and distress.

3.24 There was nevertheless some acknowledgment of the benefit of alimentary provision tailored to meet the individual child's needs.

**Assessment**

3.25 This is a difficult balancing act. Removing protection for adult children and only providing for dependent children may not reflect the views of significant numbers of Scottish families. On the other hand, we are aware from correspondence that some parents are unhappy that under the current system, (and increasingly under the new proposals) they cannot prevent children having a right to a part of their estate on death, especially those who are estranged.

3.26 In paragraph 2.2 we outlined some of the reasons for individuals not making a will. Generally speaking however the lack of a will is unlikely to reflect a conscious or positive decision about who should inherit. Where it does it will be because the individual is content that the intestacy laws will make provision in line with their

wishes – and where someone dies intestate it is proposed that spouses or civil partners and children will have protection.

3.27 Writing a will is however a conscious and positive decision about who should inherit and not to give the appropriate respect to that decision may be seen as undermining testamentary freedom.

3.28 As proposed, if legal share is to be made available to all children, the effect may be limited because children will only benefit in cases where the estate exceeds the threshold sum in intestacy for surviving spouses/civil partners. Whilst this effect may also be open to some criticism it is arguably appropriate in smaller estates in terms of the policy that a spouse/civil partner should be able to remain in his or her home. However this does introduce an element of societal division in the way children are treated based on the size of their parent's estate. By default the child of a parent who has an estate which falls below the limit of the threshold can be effectively disinherited, but this would not be the case where the size of the estate is greater than the threshold.

3.29 A claim in a testate estate might go some way to alleviate concerns about the rights of children from a previous marriage of the deceased. There are however concerns that these children might miss out totally on any inheritance if the other parent remarries, dies and the estate goes to the new partner/family - although whether there is any inheritance will depend on the size of the threshold sum and the estate.

## Summary of Recommendations in Part 3 of the Commission's Report

3.30 In summary the Commission has recommended the following: -

14. The protection of a surviving spouse or civil partner from disinheritance should take the form of a right to a fixed share of the value of the deceased's estate.

15. A surviving spouse or civil partner's fixed share should be called a legal share and amount to 25% of what he or she would have inherited if the deceased dies intestate.

16. A spouse or civil partner should be able to renounce, either before or after the deceased's death, the right to a legal share and such a renunciation should not enlarge the legal share of the deceased's issue.

17. A surviving spouse or civil partner who elects to receive legal share should be treated as not having survived the deceased for all other purposes of succession to the deceased's estate.

18. An executor should be entitled to apply to the court for an order providing when legal share should be paid to a surviving spouse or civil partner: this may include provision for payment by instalments.

19. Legal share should be met from the estate in the following order:

- Intestate estate;
- Residue
- General legacies;
- Special legacies.

Within each category liability should be *pro rata*

20. (1) The deceased's issue should be entitled to a fixed legal share of the deceased's estate.

(2) The fixed legal share should be a sum equal to 25% of the amount that the issue would have inherited if the deceased had died intestate.

(3) An executor should be entitled to apply to the court for an order providing when legal share should be paid to the deceased's surviving issue: this may include provision for payment by instalments.

21. Unless there is express provision to the contrary in the deceased's will, if a person elects to receive legal share:

- (a) any other right of succession which that person has to the deceased's estate should be extinguished;
- (b) that person should be treated, in relation to such other right, as not having survived the deceased;
- (c) that person's deemed non-survival should not have the effect of enabling that person's issue to take the forfeited provisions in that person's place by virtue of the law of intestate succession, or as a conditional institute under the deceased's will or as a deemed conditional institute.

22. (1) Before or after the deceased's death a person should be able to renounce the right to legal share.
  - (2) The effect of such a renunciation should be to exclude the right of that person's issue to legal share from the deceased's estate.
  - (3) Such renunciations should not enlarge the legal share of any other person.
  
23. A person's legal share should be met from the estate in the following order:
  - Intestate estate;
  - Residue;
  - General legacies;
  - Special legacies.Within each category liability should be *pro rata*
  
24. There should be no requirement to collate advances and other benefits as a condition of claiming legal share.
  
25. Interest should be payable on legal share as it is currently payable on legal rights and legitim from the date of the deceased's death until payment.
  
26. Businesses, including agricultural farms and estates, should not be excluded from claims for legal share.
  
27. Children to whom the deceased owed an obligation of aliment (or an equivalent obligation under foreign law) immediately before death should be entitled to a capital sum payment from the deceased's estate.
  
28. No right to a capital sum payment to a dependent child should exist in relation to any part of the deceased's estate (including property passing by way of special destination) which passes to an individual who at the date of the deceased's death was under an obligation to aliment the child (or an equivalent obligation under foreign law).
  
29. A child's right to a capital sum payment should fall if the child dies before the payment has been agreed or awarded by the court.
  
30. (1) The capital sum payment award should represent the sum required to produce the total aliment due from the deceased's date of death to the date when the child's dependency is likely to terminate (taking into account the likelihood of the child undergoing further education or training after 18). The award should be what is reasonable in all the circumstances for the liable portion of the estate to provide having regard only to:
  - (a) the needs, resources and earning capacity of the child; and
  - (b) the existence of any other person owing the child an obligation of aliment and the needs, resources and earning capacity of that obligor;
  - (c) if the liable beneficiary is the deceased's spouse or civil partner, his or her needs, resources and earning capacity;

- (2) Regard may be had to conduct of the child or of any other person if it would be manifestly inequitable not to do so.
31. (1) The capital sum payment awarded to a dependent child should be payable immediately unless the court allows payment to be deferred or the sum to be paid by instalments.
- (2) The deferral and instalment provisions should be capable of being made later and of being subsequently varied or recalled.
- (3) The court should be able to determine what interest (if any) is payable while a capital amount remains outstanding.
32. A dependent child's capital sum payment should be met from the liable portions of the estate in the following order:  
Intestate estate;  
Residue;  
General legacies;  
Special legacies.  
Within each category liability should be *pro rata*
33. An application to the court by a child for a capital sum payment should have to be made within one year from the date of the deceased's death, but the court should be empowered to allow an application to be made after the expiry of this period on cause shown.
34. A child who elects to receive a capital sum payment under the scheme should be regarded for the purposes of other rights of succession to the deceased's estate as having failed to survive the deceased, unless the deceased's will provides otherwise.
35. It should be competent for a court dealing with an application by a child for a capital sum payment to order payment of a lump sum interim award pending the determination of the application. The sum of sums so paid should be deducted from any award ultimately made.

### **Questions relating to Chapter 3**

**Should a spouse or civil partner be able to claim a fixed share from the whole estate (heritable and moveable) as a protection from disinheritance where the deceased left a valid will?**

Yes  
No  
Don't know

Please give reasons for your answer

**Should that fixed share be 25% of what he or she would have received on intestacy?**

Yes  
No  
Don't know

Please give reasons for your answer

**Should all children be able to claim a fixed share from the whole estate (heritable and moveable) as a protection from disinheritance where the deceased left a valid will?**

Yes  
No  
Don't know

Please give reasons for your answer

**Should a child's claim from a fixed share from the whole estate (heritable and moveable) be 25% of what they would have received on intestacy?**

Yes  
No  
Don't know

Please give reasons for your answer

**Should it be possible to renounce legal share?**

Yes  
No  
Don't know

Please give reasons for your answer

**Should renunciation remove that person's issue having a right to a legal share of the estate?**

Yes

No  
Don't know

Please give reasons for your answer

**Should it be possible to apply to the court to pay the legal share in instalments?**

Yes  
No  
Don't know

Please give reasons for your answer

**Should dependent children be able to claim a capital sum payment, calculated on the basis of what would be required to maintain the child until no longer dependent?**

Yes  
No  
Don't know

Please give reasons for your answer

**Would providing for dependent children to be able to claim a capital sum payment, have an impact on the efficient winding up of estates?**

Yes  
No  
Don't know

Please give reasons for your answer

**Would a time limit of 1 year from death, unless on cause shown, assist in the efficient winding up of an estate?**

Yes  
No  
Don't know

Please give reasons for your answer

**Should dependent children with capacity be able to renounce a claim for a capital sum payment?**

Yes  
No  
Don't know

Please give reasons for your answer

**Please also feel free to comment on any of the other recommendations made by the Commission and set out at paragraph 3.30.**

### **Impact**

As set out at paragraphs 1.15 to 1.17 we hope to be able to gather information to enable us to assess the impact and costs of implementing any of the proposals, or indeed of not doing so, from the perspective of a range of interests. It would therefore be helpful if you could offer a response to the following questions.

**What do you think the impact of implementing these proposals would be**

On individuals

On families

On the legal profession

On the courts

On business?

## AGRICULTURAL UNITS

3A.1 Paragraph 3.14 referred to particular concern about the impact of replacing legal rights with a fixed share from the whole estate (heritable and moveable), on certain agricultural units. Legal rights currently only apply to moveable property. Entitling the deceased's spouse/civil partner and issue to a fixed share from the whole estate (including heritable property) potentially increases the legal share which may be claimed in the estate. If the estate is unable to meet the claims by making cash payments or by distributing some of the assets with the agreement of those making the claim, assets may have to be sold. Generally speaking the most significant asset for an agricultural unit is likely to be the land and where the income generation capacity of the unit is relatively small, parcels of land may have to be sold to fulfil legal share. This can compromise the unit's commercial viability.

3A.2 There have been calls for agricultural units to be exempt from legal share. The Commission considered whether there should be exemptions and, based on responses to their Discussion Paper on Succession, recommended against.

3A.3 In terms of developments since the publication of the Commission's Report, in 2012, the Land Reform Review Group was tasked to examine the role of Scotland's system of land ownership in the relationship between the people and land of Scotland, and make proposals for land reform measures. The Group's Final Report - The Land of Scotland and the Common Good - was published in May 2014.

3A.4 The Review Group noted that the distinction between heritable and moveable property does not occur in other European countries and the development of this distinction in Scots law has, over centuries, supported patterns of landownership that relate back to the introduction of feudal tenure. Among the Review Group's recommendations, is that the Scottish Government should, in the interests of social justice, develop proposals in consultation with the Scottish Law Commission for legislation **to end the distinction between immoveable and moveable property in Scotland's laws of succession (such as by replacing legal rights with a fixed share from the whole estate (heritable and moveable))**. Consulting on these issues within this paper responds to this recommendation and forms part of the Scottish Government's overall response to the Land Reform Review Group's report. There has subsequently been media interest and criticism of the potential threat to the continued viability of some agricultural units that such a change could bring.

### Discussion

3A.5 This issue had been explored in the earlier pre consultation dialogue on the Succession Report with stakeholders with an interest in the agricultural sector.

3A.6 To illustrate the potential impact on agricultural units we have worked up some examples below. Land values used are based on the figures below as the price range for a typical holding in Scotland, subject to the caveat set out below.

	<b>Market Value of Equipped land with vacant possession (per hectare)</b>
Arable	£17,300 to £29,650
Livestock	£7,400 to £13,600
Hill	£750 to £1,240

Caveat: These are very broad estimates and the value of land will depend on its unique characteristics (e.g. location, quality of land, development potential etc.). However, these upper and lower estimates for the different types of farms have been used in this analysis. For example, an owner occupied 100 hectares (ha) arable farm could have a value of approximately £2,500,000, while a 1000ha hill sheep farm in a less favoured area could have a value of £750,000 or much less depending on the amount of unusable areas on the holding. We have also taken more disaggregated data from recent market sales in order to provide a broader range of values for this analysis. Please note that in all of the examples provided the price per ha includes any investment in fixed equipment.

3A.7 Whilst families may agree not to claim legal share, the following are examples of the **additional cost** to the estate of legal share in a range of farming situations if legal share is claimed. The Commission's proposed threshold sum of £300,000 is used in these examples but it is worth noting that we are consulting on a significantly higher threshold sum.

#### **Example Twelve**

Dairy Farm of 200ha (120ha x £13K grassland and 80ha x £20K arable). Total value of heritable property (£1,560,000 + £1,600,000) = **£3,160,000**

Owner occupier farmer - spouse is still alive, they have three children, one of which does all of the work on the farm.

If no will:

Spouse inherits - £300,000 (threshold sum) plus (£1,430,000) (50% of residual estate) which totals £1,730,000

Children inherit the other 50% of the residual estate (£1,430,000) – therefore each receives £476,667.

If a will has been made in favour of the child who works on the farm the legal share which would require to be deducted would be

Spouse would inherit 25% of £1,730,000 (i.e. intestate inheritance amount) = £432,000

Remaining 2 children would inherit 25% £476,667 (i.e. intestate inheritance amount) x 2 = £238,333 or £119,167 each

The total legal share payable = £670,333 or 21% of whole estate

#### **Example Thirteen**

Livestock beef farm of 1,000ha (500ha at £12k, 100ha at £9k and remaining 400ha average value of £8k). Total value of heritable property (£6,000,000 + £900,000 + £3,200,000) = **£10,100,000**

Owner occupier farmer with no spouse or civil partner and 2 children.

If no will – each child inherits £5,050,000 (i.e. half of the estate)

If will in favour of one child the other child's legal share is £1,262,500 (i.e. 25% of what they would have inherited if the estate had been intestate which is 25% of half of the estate.

The total legal share payable is 20% of whole estate

#### **Example Fourteen**

Arable farm of 200ha owned (150ha x £20k and 50ha x £23k). Total value of heritable estate (£3,000,000 + £1,150,000) = **£4,150,000**

Owner occupier farmer has a will - which leaves the farm and business to one of their staff to whom they are not related. They have no spouse but do have two children.

In this example the children could claim for their legal share of 25% of what they would have inherited if the estate had been intestate i.e. 25% of the whole estate = £1,037,500 or £518,750 each.

The total legal share payable is 25% of whole estate

#### **Example Fifteen**

Mixed unit of 80ha (10ha x £20k arable, 40ha x £12k grassland and 30ha x £9k). Total value of heritable estate (£200,000 + £1,100,000 + £375,000) = **£950,000**

Owner occupier farmer has a will which leaves the farm and business to a distant relative. The deceased is separated from their spouse and their two children live elsewhere.

The spouse and children would be entitled to claim their legal share, which for the spouse would be 25% of £625,000 (£156,250) and for the children 25% of £162,500 (£40,625 each)

The total legal share payable is 25% of whole estate

3A.8 In these examples, regardless of how the testator leaves their estate, where a claim for legal share is made by a spouse and or children it generates a claim on the estate of around 20% to 25%.

3A.9 The concern within parts of the rural community has led to calls from them for an exemption from the proposed provisions relating to legal share. The Commission therefore asked in its Discussion Paper<sup>13</sup> whether or not any exemptions should be made. They did point out that if adult children were not to be protected from disinheritance the main difficulty would be in relation to a spouse/civil partner share on the basis that the Commission's proposals 'would lead to a potential increase in liability in respect of the legal share of a surviving spouse or civil partner'. This would therefore not provide a full remedy to the problem.

3A.10 The Commission concluded, given the responses they received, that businesses, including agricultural farms and estates, **should not be excluded** from claims for legal shares. They considered that any concerns were largely misplaced as farming families would be able to address the position either through renunciation or by arranging to pay any legal share in instalments – as outlined in paragraphs 3.15 and 3.16 above.

<sup>13</sup> <http://www.scotlawcom.gov.uk/files/1012/7885/3181/dp136.pdf>

## Agricultural Sector

3A.11 We appreciate that agriculture is an important sector of the Scottish economy. The vast majority of land in Scotland is under agricultural production and the sector is responsible for much of Scotland's food exports. In rural areas the industry creates many economic, environmental and social benefits with a large number of people directly employed in agricultural activities. Some also offer a range of diversified activities on their land which support local sustainable development through, for example, the tourism sector.

3A.12 We discussed the issues and a possible exemption with stakeholders generally and sent a paper to the Tenant Farming Forum at which the following are represented:

- NFU Scotland (NFUS)
- Scottish Tenant Farmers Association (STFA)
- Scottish Agricultural Arbiters & Valuers Association (SAAVA)
- Scottish Land and Estates (SLandE)
- Royal Institution of Chartered Surveyors Scotland (RICS Scotland)

3A.13 We found views significantly polarised. There was particular concern for marginal farms (traditional family farms) and tenanted farms.

3A.14 For context, in terms of farm ownership throughout Scotland and therefore how widely the impact might be felt, one stakeholder suggested that:

- ◆ Less than 20% of farms are held as companies (where the nature of ownership (shareholding) is moveable and which is available for legal rights under the existing law)
- ◆ Trust holding is common in larger estates – these trusts are not affected by the law of succession because the title to the land is held in the names of trustees for the Trust
- ◆ The majority of farms are held by individuals or partnerships sometimes with complex management structures for the operation of the business
- ◆ 90% of tenanted farms are held by individual tenants.

3A.15 On the one hand it was argued by most of the stakeholders who did not have a direct interest in the sector that farms etc. already enjoy exemptions in relation to:

- ◆ Agricultural Property Relief
- ◆ Business Property Relief
- ◆ European single farm subsidy
- ◆ Rates exemption
- ◆ Planning exemptions

and so there should be no need to provide an exemption in relation to succession. Significant numbers of our stakeholders pointed out that if proper advice is sought, provision can be made to deal with the impact of legal share, for example, by insurance.

3A.16 On the other hand, those directly involved in the sector suggested that the very fact that there are the above exemptions, points to farms being a special case. There was concern generally for farms and estates across the sector but one stakeholder suggested that a significant number of those operating family farms may not have wills. Whilst one potential solution for farms owned by individuals would be to sell off some of the land to fulfil legal share, we have been made aware that it is not always possible or desirable to sell off parcels of land, in part, because lenders take the view that 400 acres is the minimum acreage for a viable farm. This view however runs counter to what official data and research suggests are viable farms and any threshold would in any case differ depending on a variety of factors: including the type of farm; the quality of the land; and the skills or ability of the farmer.

3A.17 For tenanted farms the impact may be particularly acute. There is a concern about legal share coming from the whole estate because a value for the lease, currently regarded as heritable property, has to be included in the inventory. The value is purely notional but it nevertheless increases the value of the estate from which legal share can be claimed yet the only property from which legal share could be paid would be stock and equipment.

### **Exemption**

3A.18 If there were to be an exemption for agricultural units whose commercial viability could be compromised as a result of the operation of legal share, it would be necessary to determine a clear and robust definition of which agricultural units should be exempted from legal share.

3A.19 In the Scottish agricultural industry, holdings and agricultural businesses range from small to large and include crofts, small landholdings, owner-occupied farms including some estate land and tenanted farms. How these businesses function is directly related to their location and farming sector type.

3A.20 We have considered the different characteristics of agricultural estates in turn below– the type of agricultural business, the labour used, the size of the farm and economic factors operating around the farm in order to assess which of these types of estate, if any, should be exempt from a fixed share in the whole estate being claimed by a spouse, civil partner or children.

### **Agricultural Business**

3A.21 Farms, crofts and small holdings have different ownership structures and business models and structured according to the needs and personal preferences of those running the business. They are usually set up and run as sole traders, shared family firms/joint partnerships, Ltd Companies with senior and junior partners, Ltd Liability Companies and Trusts. Some assets such as land and buildings, or other fixed equipment may be held by the business for risk management and financial planning reasons.

3A.22 There are also land tenure arrangements on agricultural land for crofts, small landholdings and agricultural tenancies. These are usually in the name of an individual and the agricultural business may be separate in one of the ways identified

above. This distinction is important as the heritable lease is most likely to lie with than individual.

3A.23 The business structures of family farms for activities such as tax, public liability and succession planning; are in some cases no different to farms that fall into the large agricultural business.

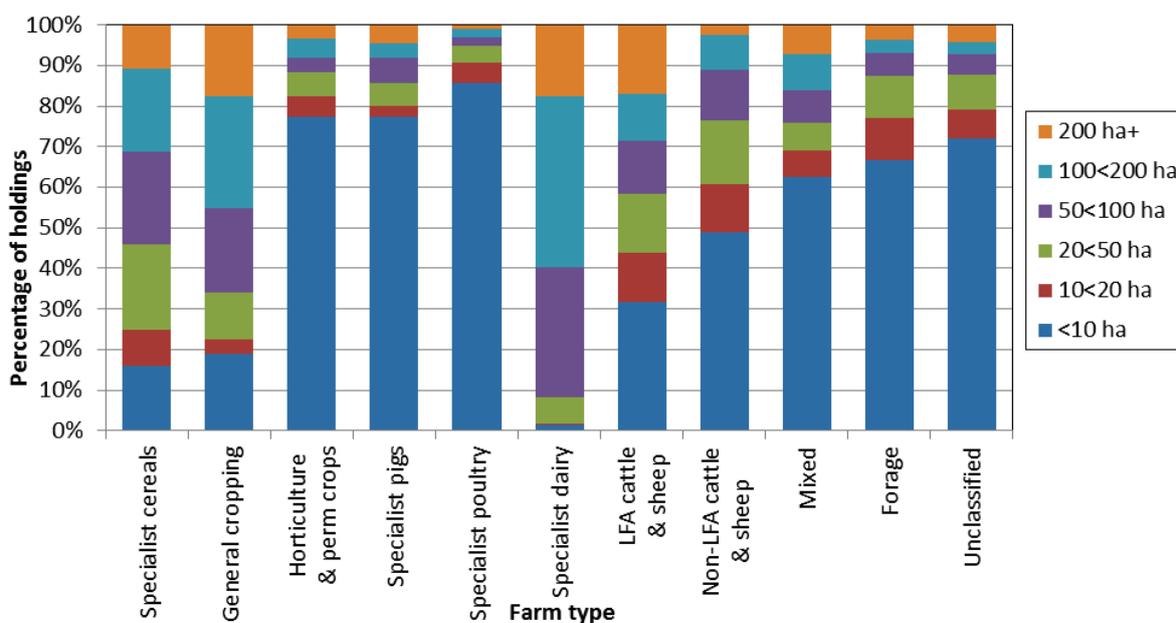
### Labour

3A.24 There is a significant range of labour used to run agricultural units. Depending on the farm type family member involvement will vary from immediate family members to cousins and distant relatives. For larger livestock units and more intensive operations such as dairy, soft fruits, veg and poultry there are significant labour demands and these businesses are often supported by a combination of external staff and family members.

3A.25 A significant amount of agricultural businesses utilise family labour regularly during the year and for all sectors there may also be paid or unpaid family labour on the holding for a wide range of purposes. The Annex contains further information on the number of holdings with occupiers, spouses and employees in June 2013, although this does not include the number of family members providing unpaid support to the farm or how each business is structured.

### Size

3A.26 The chart<sup>14</sup> below shows that farm size distribution varies considerably within each farm type. The majority of specialist poultry (86 per cent), horticulture, pigs (both 77 per cent), forage (67 per cent) and mixed holdings (62 per cent) were below ten hectares in size. With the exception of mixed and forage holdings, this trend is largely associated with the intensive nature of production among these farm types.



<sup>14</sup> Chart: Specialist farm types by holding size, June 2013

3A.27 The majority of dairy (92 per cent), general cropping (66 per cent) and cereal (54 per cent) holdings were 50 hectares or greater in size, reflecting the tendency of activity in these sectors to be carried out by larger producers.

3A.28 The distribution of cattle & sheep (LFA) holdings by farm size also shows a varied mix, incorporating large extensive holdings, small holdings and crofts. This tendency is largely determined by geography, with a tendency for smaller cattle & sheep (LFA) holdings to be concentrated in the north-west and larger ones in the south-west.

3A.29 Size in itself is therefore unlikely to be a variable which could be used solely to inform thinking around succession in this area as other factors, especially the type of farm are relevant.

### Economic factors

3A.30 Farm Business incomes vary significantly within and across sectors, as can be seen in Annex 4 which contains the average Farm Business Income (FBI) by farm type and quartile for 2012-13. At the 31st of May 2014, the total outstanding debts to Scottish agriculture, including bank loans and mortgages was £1.84 billion, which if divided by 52,277 holdings gives an average debt of £35,000. Although this is an average, the extremes of the debt vary from holdings with no debt to holdings which we know have significant levels of overdrafts of £500,000 or higher. When the assets of the farm businesses are taken into account, the latest statistics reveal that the average net worth of a farm business in Scotland (assets minus liabilities) was £1.3m in 2013-14<sup>15</sup>.

**3A.31 It is not clear that using any of these variables would offer a clear, fair and effective definition of what might be exempted. We are looking to stakeholders to make the case for a formula that might withstand the tests of robustness, fairness and proportionality.**

### **Other exemptions**

3A.32 If one category of business was to be exempted it would be necessary to consider if there are other businesses which would become unsustainable if legal share was applied to them. Similar difficulties would arise in terms of a definition.

### **Unfair and unequal treatment**

3A.33 Any exemption from the proposed provision could significantly disadvantage spouses and children of the individual owners of an exempted farm or other business.

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<sup>15</sup> Annual Estimates of Scottish Farm Business Income (FBA) 2015 – A Scottish Government Statistical Publication – 27 March 2015.  
<http://www.gov.scot/Resource/0047/00476524.pdf>

## Alternative arrangements

3A.34 The Commission did not recommend exemptions but did provide that families could change the outcome. In paragraph 3.15 we outlined that it is possible for families to agree not to claim their legal share. An informal agreement may not be binding however. The Commission recommended that legal share could be **renounced**. They recommended that renunciation should remove that person's issues' right to legal share from the deceased's estate and that renunciation would not increase the legal share of any other person.

3A.35 The Commission have also recommended that it should be possible to apply to the Court for legal share to be paid in **instalments**. Some stakeholders thought that this might not be a solution for all farms as they were already likely to be making instalment payments to the Her Majesty's Revenue and Customs in respect of Inheritance Tax and there may be particular difficulty if they generate only a low base fluctuating income.

**In examples 12-15 on pages 38-9, would there be scope for the legal share to be met by the principal beneficiary borrowing against the assets they have inherited (i.e. mortgaging a mortgage-able element of the agricultural unit)?**

Yes  
No  
Don't know

Please give reasons for your answer

**Should there be exemptions (limited or otherwise) for certain businesses from claims for a spouse/civil partner's legal share where this will compromise the commercial viability of the business?**

Yes  
No  
Don't know

Please give reasons for your answer

**If there were to be exemptions from claims for legal share, do you think it would be possible to define those types of businesses which would be exempt with precision?**

Yes  
No  
Don't know

Please give reasons for your answer

**What criteria could be used to inform any definition of an excepted business on the basis that any formula must be clear and certain and able to withstand the tests of robustness, fairness and proportionality?**

**What could be the impact of a formula which was not clear and certain?**

### COHABITANTS

4.1 This chapter corresponds to Part 4 of the Commission's Report. In this chapter we focus on the main recommendations but a full list of the Commission's recommendations as they relate to intestate succession are replicated at the end of this chapter.

#### Current law

4.2 The Family Law (Scotland) Act 2006 (the 2006 Act) introduced rights for cohabitants on intestacy only. A cohabitant has no protection from disinheritance in testate succession. In cases where the person who died does not leave a valid will, his or her cohabitant can ask the court for a share from the deceased cohabitant's estate under section 29 of the 2006 Act. The couple must have been cohabiting at the date of death. The award cannot exceed the amount which the survivor would have been entitled to under statutory rules of intestacy had the survivor been the spouse or civil partner of the deceased and the application must be made within 6 months of the date on which the deceased died.

4.3 In the previous consultation paper, we sought views on extending the period for making an application under section 29. Despite the well understood difficulties which it causes there was no consensus on whether the period should be extended or not. There was a view that instead of running from the date of death, the period should run from the date when confirmation was obtained. We are therefore taking the opportunity to use this paper to seek further views on the length of period for making an application for an award.

4.4 When the court considers giving a share of someone's estate to a surviving cohabitant, it will look at the length of the period during which the couple were living together, the nature of the couple's relationship and at the nature and extent of any financial arrangements subsisting, or which subsisted, during that period<sup>16</sup>. The court may make an order under section 29 after having regard to:

- (a) the size and nature of the deceased's net intestate estate;
- (b) any benefit received, or to be received, by the survivor—
  - (i) on, or in consequence of, the deceased's death; and
  - (ii) from somewhere other than the deceased's net intestate estate;
- (c) the nature and extent of any other rights against, or claims on, the deceased's net intestate estate; and
- (d) any other matter the court considers appropriate.

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<sup>16</sup> Section 25(2) of the 2006 Act.

## Issues with the current law

4.5 Section 29 has been subject to criticism. The Commission highlighted some particular concerns:

- ◆ the court is given no guidance on the purpose of the award-i.e. is it to provide for the cohabitant's future needs or is it in recognition of the nature and extent of contributions made by the cohabitant for the benefit of the deceased and their family during cohabitation? The only express guidance is that the award cannot be greater than the amount the applicant would have received if she had been the deceased's surviving spouse or civil partner.
- ◆ when exercising its discretion under section 29, the court is overwhelmed by the number of potentially relevant factors leading to difficulty in focusing on those which are significant in the particular case.
- ◆ due to a lack of case law there is very little judicial guidance on the most important factors to be taken into account.
- ◆ there is a potential conflict of interest between the applicant and the deceased's children who would otherwise inherit the estate. It is particularly acute where the only asset is the family home. A cohabitant's claim reduces the amount the deceased's children will inherit. Where the only asset is the family home, providing the cohabitant with a share of the estate, and placing the rest in trust for any children, may result in the sale of the home in which they all live.

Given the concerns, the Commission recommended repealing section 29.

## Proposed changes

4.7 The Commission took the view that section 29 should be replaced with a simpler provision and, on the basis of 'strong public support' for protection for cohabitants, that the new regime should apply in testate succession.

4.8 The court's discretion is to be much narrower and a cohabitant is to be awarded a percentage of what a spouse or civil partner would have received.

4.9 The proposed regime takes the form of a two stage process. The court will first determine whether the person making the claim was a cohabitant. In doing so, the court will consider:

- ◆ whether they were members of the same household,
- ◆ the stability of the relationship,
- ◆ whether they had a sexual relationship,
- ◆ whether they had children together or had accepted children as children of the family, and
- ◆ whether they as a couple appeared to others to be married, in a civil partnership, or cohabitants of each other.

4.10 If the court determines that the person making the claim was a cohabitant, the second stage is for the court to consider and fix the "appropriate percentage" that the

cohabitant is entitled to receive of what that person would have received had they been a surviving spouse or civil partner. The Commission set out three factors to consider in this regard:

- ◆ how long the couple have cohabitated;
- ◆ the nature of their interdependence during that time; and
- ◆ what contribution the surviving cohabitant made to their life together.

4.11 The court's discretion is fixed solely on the nature and quality of the parties' relationship. The court will not be able to take account of, for example, the size of the estate or of the other beneficiaries.

4.12 Once the appropriate percentage has been fixed, the cohabitant's entitlement can be calculated. A cohabitant can never be entitled to more than a surviving spouse or civil partner would have received.

***Example Sixteen***

A dies intestate leaving a cohabitant (B) as determined by a court. A has estate worth £300,000. Under the Commission's intestacy proposals if B had been a spouse/civil partner, B would have received the whole estate. As B is a cohabitant, B will be entitled to a percentage (as determined by the court) of £300,000. If that percentage was 50%, B is entitled to £150,000.

***Example Seventeen***

A dies testate leaving a cohabitant (B) as determined by a court. A has estate worth £300,000. Under the Commission's intestacy proposals if B had been a spouse/civil partner, B would have been entitled to 25% of what they would have received on intestacy (£300,000) which would have been £75,000. As B is a cohabitant, B will be entitled to a percentage (as determined by the court) of £75,000. If that percentage was 50%, B is entitled to £37,500.

4.13 Our discussion with stakeholders revealed a lack of consensus about whether or not provision should be made for cohabitants in testate cases. There was a fairly strong view, particularly among some of the younger stakeholders that individuals made a choice about whether to live together or to get married and part of that decision was about the legal and other implications of each. Cohabitation was seen as a conscious and clear rejection of marriage at that point in the couple's life together and their view was that the decision not to marry should be respected and not regulated. They took the view that cohabitants should be free to organise their own affairs as they wished and did not support the extension of cohabitants' rights to testate succession.

4.14 On the other hand others accepted that it was a logical step to extend provision to protect cohabitants from being disinherited by a partner. Such a provision could lead to a fairer outcome in a situation where one of a long term cohabiting couple had died having made a will prior to the cohabitation leaving all of their estate to a remoter relative. Currently in that situation the surviving cohabitant has no claim on the estate. However, it was pointed out that extending claims to testate cases will lead to an increase in court cases and settlement of estates may be delayed as the law is developed.

4.15 We asked whether the factors to determine what a cohabitant's appropriate percentage should be were sufficient. In response one set of stakeholders

suggested that a cohabitant's own financial circumstances and state of health might be relevant. Another group had concerns about the scope for subjectivity around 'the stability of the relationship'. They were also concerned about consideration of whether or not a couple had children and the potentially negative connotation for couples who did not.

*Surviving cohabitant and surviving spouse or civil partner.*

4.16 Under section 29 of the 2006 Act, where there is both a surviving spouse/civil partner and cohabitant, the cohabitant's claim is against the estate after deduction of a surviving spouse/civil partner's prior and legal rights, so prioritising their respective interests.

**Example Eighteen**

A and B are cohabiting. A also has a spouse, C. A dies intestate and leaves heritable property worth £350,000 (a house valued at £300,000 and field valued at £50,000) and moveable property worth £125,000 comprising furniture valued at £25,000 and investments and cash of £100,000.

Under the current law, C would have inherited the house and furniture under prior rights. As the remaining estate amounts to £150,000 made up of heritable - £50,000 (field) and moveable - £100,000 (cash and investments) - the financial provision of £89,000 would need to be satisfied proportionately from heritable and moveable i.e. 33% from heritable and 66% from moveable (approximately £29,666 from heritable and £59,334 from moveable).

Legal rights would then apply to the remaining moveable estate of £40,666 which would mean C is entitled to a half share of £20,333 as there are no issue. The remaining intestate estate is then £40,666.

B could raise an action against the remaining estate of £40 666.

4.17 If this same approach were to be applied to the new intestate scheme described in chapter 1, where a spouse or civil partner would inherit the entire estate there would be no scope for a cohabitant to make any claim. The Commission therefore propose a different solution for sharing the estate from that posed in their Discussion Paper (with which the majority of consultees agreed). The revised approach was discussed with the Advisory Group who considered it a sensible solution to a difficult issue.

4.18 The Commission's recommendation for change will have the effect that in an intestate estate the cohabitant's share is deducted from the spouse's share of the intestate estate, and in testate cases the cohabitant's share is in addition to the spouse's share, although the cohabitants claim can never be more than that of a surviving spouse/civil partner. The Commission's view is that it better reflects the policy of prioritising the succession rights of a surviving spouse or civil partner.

4.19 In terms of dividing an intestate estate between the spouse/civil partner and the cohabitant, the cohabitant would be entitled to the appropriate percentage (as described above) as determined by the court of half the amount the spouse/civil partner would have been entitled to if there was no cohabitant. The surviving spouse/civil partner would then take the remaining balance.

**Example Nineteen**

A dies intestate, leaving an estate valued at £300,000. They have a spouse S and cohabitant C. There are no children. Under the Commission's intestacy proposals, S would be entitled to the whole estate. C would therefore be awarded a percentage (set by the court) of half of the estate (£150,000). If the appropriate percentage is 50%, C would be awarded £75,000 and W would take the rest (£225,000).

4.20 In terms of dividing a testate estate between the spouse/civil partner and the cohabitant, the cohabitant would be entitled to a percentage of the spouse/civil partner's legal share.

**Example Twenty**

A dies, leaving an estate valued at £300,000. They have a spouse S and cohabitant C. There are no children. The will leaves the entire estate to a charity. Under the Commission's intestacy proposals, S's share is 25% of what they would have inherited on intestacy (the whole estate of £300,000). Their legal share would be £75,000. C would be awarded a percentage (set by the court) of the legal share they would have been awarded if they had been A's spouse. If the appropriate percentage is 75%, C would be awarded £56,250.

If S and C both take their legal share, the charity is entitled to the remainder of the estate, namely £168,750.

4.21 Whilst the Commission pointed to consistent public support in favour of giving succession rights to cohabitants, we found, albeit with a limited range of younger stakeholders speaking as both legal advisers and from personal perspectives, that there were those who took a different view and were in favour of cohabitants being free to regulate what happens to their estates through their wills.

4.22 Others expressed concerns about the fairness of provision for long term cohabitants where there was also a spouse from a short marriage many years before death. Set against this is the need to protect a spouse of a long marriage with responsibility for the dependents of the deceased, where the other party had been part of a short cohabitation before death. It would be possible for courts to be able to distinguish cases although this would add a layer of complexity.

## Summary of Recommendations in Part 4 of the Commission's Report

4.23 In summary the Commission has recommended the following:-

37. (1) Section 29 of the Family Law (Scotland) Act 2006 should be repealed and replaced by a new statutory regime providing succession rights for cohabitants.
- (2) The new statutory regime should apply to testate as well as intestate estates.
38. (1) Where the deceased is survived by a person who immediately before the deceased's death was living with the deceased in a relationship which had the characteristics of the relationship between spouses or civil partners, that person, the deceased's cohabitant, should have the right to apply for a proportion of the deceased's estate.
- (2) In determining whether the couple were living together in such a relationship, the court should have regard to:
- (a) whether they were members of the same household;
  - (b) the stability of the relationship;
  - (c) whether the parties had a sexual relationship;
  - (d) whether they had children together, or had accepted children as children of the family; and
  - (e) whether they appeared to family, friends and members of the public to be persons who were married to, in civil partnership with or cohabitants of each other.
- (3) A person should not be regarded as having ceased to be the cohabitant of another person by reason only of circumstances such as hospitalisation, imprisonment or service overseas in the armed forces.
39. (1) If the court declares the applicant to have been the deceased's cohabitant immediately before the death, the court should then fix the appropriate percentage of the entitlement to the estate which the deceased's spouse or civil partner would have received under the rules of intestate succession or legal share.
- (2) In fixing the appropriate percentage the court should only have regard to:
- (a) the length of the period of cohabitation;
  - (b) the interdependence, financial or otherwise, between the couple during the period of their cohabitation; and
  - (c) the surviving cohabitant's contribution to their life together (whether such contributions were financial or otherwise) as for example, running the

household, caring for the deceased and caring for their children or children accepted by them as children of the family.

40. Unless express provision to the contrary is made in the deceased's will, election to receive the appropriate percentage of the deceased's estate should extinguish any other right of succession which the cohabitant has to the deceased's estate and the cohabitant and his or her issue should be treated in relation to any other such right as having not survived the deceased.
41. A person may, whether before or after the death of another person, renounce any entitlement to apply for an appropriate percentage of that person's estate.
42. (1) Where the deceased dies intestate survived by a spouse or civil partner and a cohabitant, the value of the estate which the spouse or civil partner would inherit (to be known as the relevant amount) should be shared between the cohabitant and the spouse or civil partner: the cohabitant should be entitled to the appropriate percentage of half the relevant amount and the spouse or civil partner should be entitled to the balance of the relevant amount.  
  
(2) Where the deceased dies testate, the cohabitant's entitlement to the appropriate percentage of a spouse's legal share of the deceased's estate should be in addition to the legal share of the spouse or civil partner.
43. Unless on cause shown the court otherwise permits, any application for a proportion of the deceased's estate should be made within the period of 1 year commencing on the date of the deceased's death.

## **Cohabitation - Questions**

**Do you agree with the criticisms set out above of section 29 of the Family Law (Scotland) Act 2006?**

Yes  
No  
Don't know

Please give reasons for your answer

**Do you agree that section 29 of the Family Law (Scotland) Act 2006 should be repealed?**

Yes  
No  
Don't know

Please give reasons for your answer

**Are the factors set out in Recommendation 38 sufficient/appropriate to determine if the individual was a cohabitant?**

Yes  
No  
Don't know

Please give reasons for your answer

**Should a cohabitant be able to make a claim in testate estates?**

Yes  
No  
Don't know

Please give reasons for your answer

**Should a cohabitant receive a percentage of what a surviving spouse/civil partner would have received?**

Yes  
No  
Don't know

Please give reasons for your answer

**Are the factors set out in Recommendation 39 sufficient/appropriate to determine the percentage a cohabitant should receive?**

Yes  
No  
Don't know

Please give reasons for your answer

**Where there is a surviving spouse/civil partner and a cohabitant in an intestate estate, should the value of the estate which the spouse/civil partner would inherit be shared between the cohabitant and the spouse/civil partner in line with recommendation 42(1)?**

Yes  
No  
Don't know

Please give reasons for your answer

**Where the deceased dies testate, should the cohabitant's entitlement be to the appropriate percentage of a spouse's legal share of the deceased's estate should be in addition to the legal share of the spouse or civil partner?**

Yes  
No  
Don't know

Please give reasons for your answer

**Should, unless permitted by the court, any application for a proportion of the deceased's estate be made within the period of 1 year from the date of the deceased's death?**

Yes  
No  
Don't know

Please give reasons for your answer

**Please also feel free to comment on any of the other recommendations made by the Commission and set out at paragraph 4.23 above.**

### **Impact**

As set out at paragraphs 1.15 to 1.17 we hope to be able to gather information to enable us to assess the impact and costs of implementing any of the proposals, or indeed of not doing so, from the perspective of a range of interests. It would therefore be helpful if you could offer a response to the following questions.

**What do you think the impact of implementing these proposals would be**

On individuals

On families

On the legal profession

On the courts

On business?

**ADDITIONAL MATTERS**

5.1 This Chapter seeks views on a number of matters. They comprise:

- ◆ issues which were consulted on in the earlier succession paper on which there was no consensus and which we feel would benefit from further consultation
- ◆ issues raised by consultees in the previous consultation exercise;
- ◆ additional issue to be considered at the instigation of the Scottish Government.

**Technical recommendations carried forward from the 2009 Report****Recommendation 45 - Private International Law**

*Capacity to make or revoke a will should, in the case of a will or revocation executed after commencement, be determined (whether the will disposes of moveables or immoveables) by the law of the testator's domicile at the time of making or revoking the will.*

5.2 This recommendation was carried forward from the Commission's 1990 Report. Currently the Private International Law rules are thought to be that testamentary capacity in relation to moveables is governed by the law of the domicile of the testator ("lex domicilii"), and capacity in relation to immoveables is governed by the law of the jurisdiction in which the property sits ("lex situs"). The Commission recommends that testamentary capacity should, in relation to all property, be governed by the law of the testator's domicile at the time of making or revoking the will. Fundamental to the Commission's recommendations on substantive law reform is that the distinction between heritable and moveable property is removed.

**Should capacity to make or revoke a will, in the circumstances set out at recommendation 45, be determined by the law of the testator's domicile at the time of making or revoking the will?**

Yes

No

Don't know

Please give reasons for your answer

**Issues which were consulted on in the earlier succession paper on which there was no consensus and which we feel would benefit from further consultation**

**Recommendation 53 – Effect of birth of child: *conditio si testator sine liberis decesserit***

*The rule known as the *conditio si testator sine liberis decesserit* (whereby a will may in certain circumstances be held to be revoked by the subsequent birth of a child to the testator) should be abolished*

5.3 The previous consultation paper sought views on Recommendation 53. The Commission recommended the abolition of the rule whereby a will may be challenged by a child of the deceased who is born after the will is executed, if the will makes no provision for the child. They justified their recommendation on the basis that the rule could “produce unfortunate results”. The Commission pointed to the situation where a testator left a will in favour of a long term partner/cohabitant. The will is not replaced or amended to provide for a child who is later born to the couple. The testator dies. The effect of the rule could be that the estate becomes intestate and the child would inherit the whole estate subject to a claim by the cohabitant under section 29 of the Family Law (Scotland) Act 2006. The result would still vary drastically from the testator’s intentions should the changes discussed in chapter 4 of this consultation be introduced.

5.4 Consultees were split on this recommendation. Some of those who disagreed argued that further policy consideration is required. There was suggestion that the rule should not apply in situations where the deceased has left provision for the parent (natural or adoptive) of the child.

5.5 One consultee argued strongly that the condition remains relevant to 21<sup>st</sup> century Scottish family life. The example given was the situation of a single parent who had before their child was born made a will in favour of a worthy charity. It was suggested that it was unlikely that the testator would have wanted their estate to go to the charity rather than the child, suggesting a reform to the effect that the rule should not apply where a life partner was benefited under the will. As a result of the responses we wish explore the issue in more depth in this consultation.

**Should the rule known as the *conditio si testator sine liberis decesserit* (whereby a will may in certain circumstances be held to be revoked by the subsequent birth of a child to the testator) be abolished?**

Yes

No

Don't know

Please give reasons for your answer

**Recommendation 75 (part) - Abolition of temporary aliment and *jure representationis***

*Any right at common law to claim the expense of mournings, aliment *jure representationis* or temporary aliment should be abolished.*

5.6 The Commission endorsed the recommendations in the 1990 Report on the abolition of a number of common law rights of succession on the basis that they were out of place in a modern law of succession. The first of these rights were ‘mournings’ which is the rule that the widow (not widower) and family of a deceased person are entitled to an allowance out of the estate for items such as special mourning clothes.

5.7 The second was a claim for aliment *jure representationis* where a person entitled to aliment from another person has a claim for aliment against someone

succeeding to that other person's estate. The final right was to temporary aliment which is a payment out of the estate to enable a widow to meet bills and subsist until such time as the estate is distributed.

5.8 A mixed response was received on this in the previous consultation. The majority did favour abolition of 'mournings'. A number of others questioned the desirability of abolishing temporary aliment, with one pointing out that some surviving spouses/civil partners might not have access to other funds, borrowed or otherwise at this point. It was suggested that aliment *jure representationis* and temporary aliment are closely linked to legal rights and might be better considered further in the paper on substantive succession reform.

5.9 As a result of the responses we plan to take forward the abolition of 'mournings' in the Succession Bill dealing with largely technical aspects of succession law. Given the concerns around temporary aliment and aliment *jure representationis*, we are seeking further views in this paper.

### **Should the right at common law to claim aliment *jure representationis* be abolished?**

Yes  
No  
Don't know

Please give reasons for your answer

### **Should the right at common law to claim temporary aliment be abolished?**

Yes  
No  
Don't know

Please give reasons for your answer

## **Recommendations 66-70 Executors and Bonds of Caution**

5.10 In the earlier succession consultation we consulted on the removal of the requirement for executors-dative to obtain a bond of caution and on what measures might be put in place to protect an estate.

5.11 Currently an executor must get authority to administer an estate by applying to the court for a grant of confirmation based on an Inventory of the estate. Before the court will grant confirmation in favour of an executor-dative (typically to an estate where there is no valid will) it will require the executor-dative to obtain a **bond of caution**, usually from an insurance company. The only exception is where, on intestacy, the executor-dative is the surviving spouse and his/her prior rights will exhaust the estate. The bond of caution is a guarantee for the protection of creditors and beneficiaries that the estate will be properly administered and will indemnify any creditor or beneficiary of an estate against loss caused by maladministration, negligence or fraud on the part of the executor. There are also a small number of exceptional circumstances where an executor-nominate (testate estate) may be required to find caution.

5.12 This issue affects a significant number of cases. In 2012-13 across the sheriff courts in Scotland, almost 24,000 estates were confirmed. In the same period 3,798 petitions for decree dative were granted which equates to around 16% of cases involving an application for appointment as executor-dative.

5.13 A number of difficulties have been identified in obtaining bonds of caution including the cost, the limited number of providers and the conditions which providers attach to the bond. The consultation paper therefore sought views on the removal of the requirement for an executor dative to obtain a bond of caution and on measures that could be put in place to provide a degree of protection for the estate in its stead.

5.14 A significant majority favoured the removal of the requirement for all executors to obtain a bond of caution. We are therefore of the view that the requirement should be removed.

5.15 However, whilst consultees flagged up positive impacts of removing the requirement for an executor dative to obtain caution, concerns were raised about lessening the protection for an estate from fraud and about the increased risk of a beneficiary emerging at a later stage without the checks imposed by bond providers. We therefore want to explore further what, if any, safeguards are needed. In considering any replacement safeguards we do not simply want to replace the burden of a bond of caution with another equally burdensome process. Rather, any safeguard needs to be proportionate both in terms of effort and cost.

### **Safeguards – outcome of initial consultation**

5.16 The Commission recommended that the court should not have a discretionary power to require bonds to be obtained by both executors-dative and executors-nominate. Consultees did not share this view, noting that there could be circumstances where it could still be appropriate to require a bond. All agreed that other measures would be required to protect an estate if the requirement for a bond of caution was abolished.

5.17 The vast majority agreed that the court should have the power to refuse to appoint an executor-dative. They were however split on whether granting the court with discretionary power would be sufficient to mitigate the risk to estates. There were also concerns about changing what is currently an administrative court process into one which required an element of judicial decision making, in terms of costs and delays.

5.18 Some consultees asked for guidance on the factors a court should consider when exercising discretion. Others suggested lodging a family tree and scheme of division with the dative petition. This was on the basis that these are currently required by the current providers of bonds of caution and would demonstrate some due diligence and knowledge on the part of the executor-dative that they had considered the range of likely beneficiaries and the legal position in terms of those who may have an entitlement to benefit.

5.19 The current intimation period for a petition to appoint an executor dative is nine days and this is done by posting it on the walls of court. A significant majority of

consultees agreed that the intimation period should be extended. A minority favoured extending the period to 14 days in line with the Commission's recommendation. The remainder favoured 21 days. However, as the petition is currently only intimated by posting on the walls of court it was pointed out that it was unlikely that any member of the public would ever view or have knowledge of any Writ advertised on the walls whatever the intimation period.

5.20 Given the lack of consensus, in particular, around what measures might be put in place to protect the estate we want to seek further views on a number of issues including whether the costs to estates and to the courts, of such measures would be proportionate. We also wish to test if, and to what extent, measures would create delay and additional burdens on an estate. We are keen to assess whether or not any new burdens would be proportionate, given our stated policy aim of reducing unnecessary burdens.

**If the requirement to obtain a bond of caution is removed should any measures be put in place to protect an estate given that there are very few calls on bonds of caution currently?**

Yes

No

Don't know

Please explain your answer

**Should the court have the power to refuse to appoint an executor dative?**

Yes

No

Don't know

Please explain your answer

5.21 If the court is given such a power to refuse to appoint an executor-dative we wish to explore ways to reduce the burden on certain estates and on the courts by removing some categories of estates where the scale of the risks to the estates involved is small.

5.22 Currently there is no requirement for a dative petition in 'small estates' (under £36,000) albeit the executor must, in most cases, obtain a bond of caution. We are interested in hearing views on whether executors of these estates should be subject to the court's discretion or not. This would be a significant change in practice.

5.23 Currently, where the executor is a spouse whose prior rights exhaust the estate there is no requirement to find caution. Clearly, there is no risk to the estate and beneficiary in this situation and we would therefore intend to exclude them from the court's exercise of discretion. Where the executor is the sole beneficiary, for example a similar exclusion could be applied. There may also be other potential exclusions.

**If the court is given a discretionary power to refuse to appoint an executor-dative should small estates be excluded?**

Yes  
No  
Don't know

Please explain your answer

**If the court is given a discretionary power to refuse to appoint an executor-dative should estates where the prior rights of the spouse exhaust the estate and the spouse is the executor-dative be excluded?**

Yes  
No  
Don't know

Please explain your answer

**If the court is given a discretionary power to refuse to appoint an executor-dative should estates where the executor-dative is the sole beneficiary be excluded?**

Yes  
No  
Don't know

Please explain your answer

**Are there any other categories of estates which could be excluded?**

### **Petition Process**

5.24 If the court is given discretionary power, we wonder if the impact of the change in terms of court time could be further limited by identifying a non-exhaustive list of factors the court might want to consider. These could include that the executor understands the nature of the role, has the necessary ability and is suitable to be appointed. These, or other factors, could be set out and evidenced in the dative petition.

5.25 Alternatively or in addition, the petition could be accompanied by a family tree, a scheme of division or other document should be lodged with the petition. The executor could be required to seek information from the Department for Work and Pensions ('DWP'), Recovery from Estates in relation to any benefits the deceased may have been receiving. A copy of the DWP response could be lodged with the petition. These are currently required by providers of bonds of caution and so should not involve additional work or cost to the executors.

**Would a non-exhaustive list of factors which the court may want to take into account when considering a petition for appointment as executor-dative be helpful?**

Yes  
No  
Don't know

Please explain your answer

**If so what factors should be included?**

**Should a petition for appointment as executor-dative be accompanied by (tick as many as you think would be necessary):**

- a family tree
- a scheme of division
- a letter from DWP providing information on benefits in relation to the deceased?

**Please set out below any other documentation which could usefully be included**

### **Intimation**

5.26 As set out above, intimation of a petition is currently posted on the walls of court. Personal intimation to potential beneficiaries may also provide a safeguard, although of course there will be associated costs which will need to be borne by the estate.

**Should the current process of intimation be replaced by personal intimation?**

Yes  
No  
Don't know

Please explain your answer

**If 'Yes', to whom should intimation be made?**

### **Appeal Period**

5.27 A petition may currently be the subject of appeal and the current appeal period is 2 days.

**Should the current appeal period be extended?**

Yes  
No  
Don't know

Please explain your answer

## **If 'Yes', what should the period be and why?**

Please explain your answer

### **Summary**

5.28 Whilst we have outlined a range of measure above which could be put in place to provide some safeguards if the requirement to obtain a bond of caution is removed we are interested in whether all or only some of the measures would be necessary – again bearing in mind the need to ensure that any replacement scheme is not overly burdensome but is proportionate. We are also interested in any other safeguards which could be adopted either in addition to or instead of those detailed above.

**In terms of the suggested safeguards please indicate below what combination would be necessary to provide a proportionate safeguard solution (tick as many as you think would be necessary).**

- **Power to prevent the appointment of an executor-dative**
- **Non-exhaustive list of factors to be taken into account**
- **Attachment of other documentation to the petition e.g. family tree**
- **Personal intimation**
- **Extended appeal period**
- **Other\***

**\*Please set out below any other suggested safeguards**

### **Impacts**

To help you in your assessment of the proportionality of any of the safeguarding measures we have set out some cost and resource data below:

- As published by the Zurich insurance company the cost of obtaining a bond of caution from them is as follows:-
  - Estates of up to £20,000 - £150
  - Estates of up between £20,000 and £30,000 - £200
  - Estates of up to £30,000 where a solicitor appointed - £150
  - For estates greater than £30,000 - written terms on application
- In the evidence provided to Petition 1412 it was suggested that both providers of bonds of caution insist upon a solicitor being appointed to carry out the estate administration – if this is the case then solicitor fees would also apply in all cases. The Law Society does not set guidelines on fees. The total fees charged will depend ultimately upon the size and complexity of the estate. We estimate that fees will start around £2,000 for a small estate, rising to considerably more for larger estates. The very fact that an estate is intestate is likely to attract some investigative work.
- If personal intimation is required, we understand each intimation would cost around £60 which would need to be borne by the estate.

- There is likely to be associated costs in terms of preparation of supporting documents such as a family tree and a scheme of division.
- The estimated cost to the Court of a discretionary power and the consideration of the petition and the additional documentation such as the family tree will be around £63 per application as the process would change from being an administrative one to one that involved judicial decision making.

In all, we need to be clear that measures are only as robust as they need to be and that costs are proportionate.

### **Do you agree with the data provided above?**

Yes  
No  
Don't know

Please explain your answer

### **Please provide any additional data in terms of quantifiable volumes and costs associated with any of the suggested new safeguards.**

#### **Refusal to Confirm of Executors Nominate**

5.29 As well as recommending that the court should have discretion to refuse to appoint an executor dative, the Commission recommended that the court should have the power to refuse to confirm an executor nominate. In consultation 58% of respondents agreed that discretionary power should extend to executors-nominate arguing that to do so would be equitable and consistent. One, however, suggested the power should be subject to very strict parameters and the court should not interfere with the judgement of the testator lightly.

5.30 Those who disagreed pointed to the fact that the executor had been named particularly by the deceased, that such a requirement would act as an alert to insurers and that it might be an avenue for family disputes and encourage spurious allegations about the executor to be made. It was pointed out that currently confirmation in a nominate case is largely administrative and if the court had the discretionary power to require an executor nominate to find caution, this would introduce a judicial decision-making element to the general process, which could impact on processing and costs.

5.31 The arguments against this power are persuasive. We have concerns that costs and potential delay as a result of changing the nature of the process might not be proportionate. We have decided to test this issue again.

### **Should the court have the power to refuse to confirm an executor nominate?**

Yes  
No  
Don't know

Please explain your answer

**Are there likely impacts of such a change?**

Yes

No

Don't know

Please explain your answer

**How might any impact of such a change be mitigated?**

Please explain your answer

**New Issues raised by consultees in the previous consultation exercise.**

**Equitable Compensation**

5.32 Section 13 of the Succession (Scotland) Act 1964 ("the 1964 Act"), in relation to wills executed after 10 September 1964, provides that a beneficiary cannot claim a share of the deceased's estate and legal rights at the same time unless there is express provision to the contrary. Prior to the 1964 Act coming into force, a beneficiary could claim legal rights without necessarily forfeiting his or her legacy. In such a situation, the principle of equitable compensation was applied so compensation could be due to beneficiaries disadvantaged by a claim for legal rights being paid out of the estate.

5.33 Consultees to the previous consultation on succession issues suggest that the case of *Munro's Trustees v Munro* 1971 SLT 280 cast doubt on the interpretation of section 13 and that the effect is that there may be equitable compensation for other beneficiaries adversely affected by a claim for legal rights. They asked for clarity to be provided, in particular whether the concept survives or not.

Professor Gretton summarised as follows:

“The doctrine of equitable compensation provides that when a testamentary provision is forfeited in order to obtain legal rights, then that provision is to be applied to compensate those persons (if any) who have been prejudiced by the claiming of legal rights.”<sup>17</sup>

5.34 It requires executors or testamentary trustees to retain the forfeited testamentary provision and to accumulate the resulting income, to provide a fund for compensation. As such, it can only operate in certain situations – where a liferent terminates otherwise on the death of the liferenter and the fee does not vest at that point and in relation to annuities or similar arrangements.

5.35 The SLC 2009 report did not recommend expressly that equitable compensation be abolished. It did recommend that where a liferent terminates early, the fee should vest at that point. We have provided for this in the Succession Bill currently going through Parliament.

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<sup>17</sup> G L Gretton, "Vesting, Equitable Compensation and the Mysteries of the Shadow Liferent" 1988 SLT (News) 149, 151.

5.36 The Report also recommended that a person who claims legal share is deemed to have failed to survive the deceased for all purposes other than that claim.

5.37 The effect therefore should be that the doctrine of equitable compensation is reduced but not abolished. We would welcome views on whether or not there may be a case for examining express and complete abolition.

### **Should the doctrine of equitable compensation be abolished?**

Yes

No

Don't know

Please explain your answer

### **Additional issue to be considered at the instigation of the Scottish Government**

#### **Effect of marriage or civil partnership on a will**

5.38 The Commission, in 1990 and again in 2009, considered whether the current rule - that a marriage or civil partnership entered following the drafting of a will has no effect on that will - should remain, or whether a rule should be introduced whereby a will is revoked by a subsequent marriage.

5.39 They concluded that there should be no change in the law. The argument in favour of a subsequent marriage revoking a will is that 'the importance of marriage as an event makes it likely to destroy the basis on which the will was made'. The Commission were more persuaded by the argument against, that such a step would be a disproportionate response to the mischief to be addressed. They suggested that a testator would not necessarily wish a second marriage to have effect on provisions in a will which favoured children of the previous marriage. In England and Wales, a will would be revoked in these circumstances.

5.40 It has been highlighted that this can generate hard cases. For example, where a young person dies tragically leaving a spouse or civil partner and children. The couple had both contributed to the purchase of their home which was in the sole name of the deceased. The property comprised the bulk of the estate. A will made before the marriage/partnership bequeaths the deceased's property to another relative, essentially leaving the deceased's young family homeless. The spouse/civil partner was not in a position to buy back the deceased's share of their home and as a result they and their children would lose their family home. We are therefore seeking views on this issue.

### **Should a marriage or a civil partnership result in the revocation of an earlier will?**

Yes

No

Don't know

Please explain your answer

## Glossary of Terms

**Collation** –to ensure equality in the distribution of the fund for legal rights, if one claimant of legal rights has received lifetime advances from the deceased, and there are other claimants, those others can require the advances to be notionally added to the fund. Where a person entitled to claim legal rights chooses not to do so, but his or her siblings do, those claimants cannot compel the person who does not claim legal rights to collate any lifetime advances.

**Conditional Institute** – an alternative legatee, for instance a bequest to A or if A fails to survive, to B. B is the conditional institute. If A later dies following receiving the bequest, B will not inherit.

**General legacies** –a legacy of a certain value from the estate it has no distinguishing features and may be paid from any source and is usually in the form of a monetary value e.g. £1000.

**Intestate estate** – term for the estate of someone who dies without leaving a valid will.

**Issue** – normally means all descendants, both legitimate and illegitimate, and is not limited to immediate children

**Legal rights** – the rights of a surviving spouse/civil partner and children (or where a child has predeceased his or her parent, that child's child or children) to a portion of a deceased's moveable estate which can be claimed both where the deceased died leaving a valid will and where there was no valid will if there is any moveable estate remaining after prior rights have been met.

**Legitim** – the Latin name for legal rights to which children (or where a child has predeceased his or her parent, that child's child or children) to a portion of a deceased's moveable estate

**Per stirpes** – the equal division of an estate at one level of a deceased's descendants,

**Prior rights** – the rights of a surviving spouse/civil partner of someone who has died without leaving a valid will to a fixed share of the estate on intestacy. Such prior rights must be met before the entitlement of any blood relatives can be met.

**Renunciation** – giving up rights in succession.

**Representation** - if a member in that level of beneficiaries is deceased and survived by any descendants, then that deceased beneficiary's descendants will take "by representation" what their deceased parent would have taken.

**Pro rata** – in proportion.

**Residue** – what remains of an estate once debts and legacies have been paid. A legacy would include a bequest of specified property to a specified beneficiary.

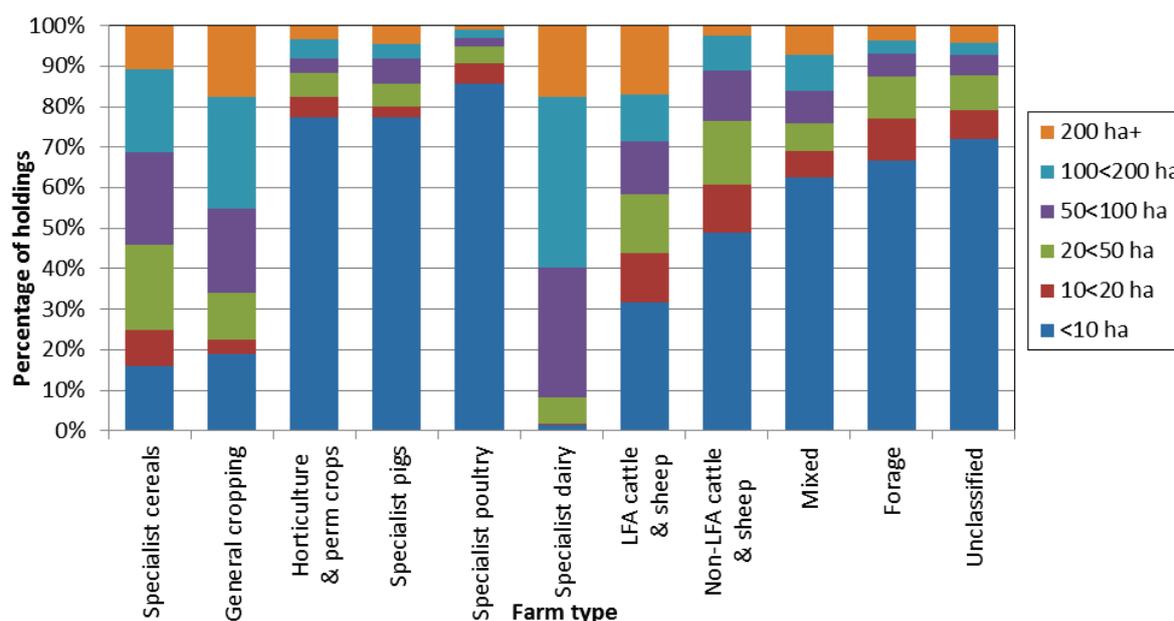
**Special legacies** – a legacy of a specific item of estate for example a particular piece of jewellery or a collection of china.

## Scottish Agriculture – Statistical Data

### Size of holdings by farm type

The chart below shows that farm size distribution varies considerably within each farm type. The majority of specialist poultry (86 per cent), horticulture, pigs (both 77 per cent), forage (67 per cent) and mixed holdings (62 per cent) were below ten hectares in size. With the exception of mixed and forage holdings, this trend is largely associated with the intensive nature of production among these farm types.

Chart: Specialist farm types by holding size, June 2013



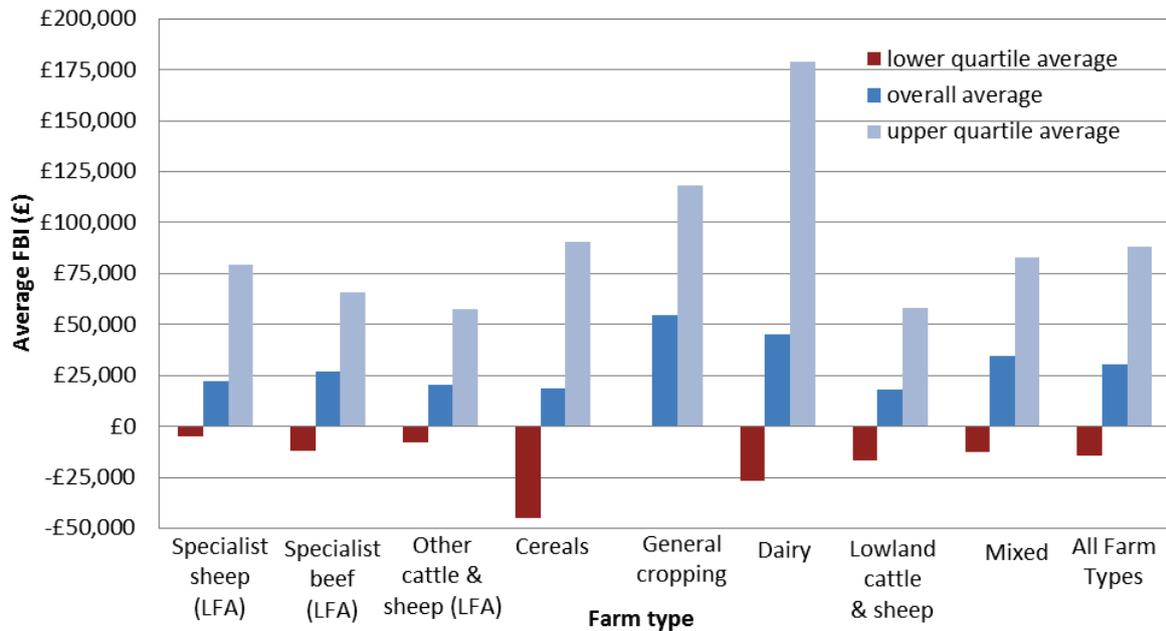
The majority of dairy (92 per cent), general cropping (66 per cent) and cereal (54 per cent) holdings were 50 hectares or greater in size, reflecting the tendency of activity in these sectors to be carried out by larger producers.

The distribution of cattle & sheep (LFA) holdings by farm size also shows a varied mix, incorporating large extensive holdings, small holdings and crofts. This tendency is largely determined by geography, with a tendency for smaller cattle & sheep (LFA) holdings to be concentrated in the north-west and larger ones in the south-west.

### Farm Business Income

The chart below shows the average FBI of all farm types by quartile, i.e. the average for farm businesses with the lowest 25 per cent of FBI values, the overall average, and the average of those farm businesses with the highest 25 per cent of FBI values.

Average FBI by farm type and quartile (lowest 25 per cent, average, upper 25 per cent), 2012-13



Across all farm types there was a considerable difference between higher and lower performing farms. The overall average FBI of farms in the lower quartile was -£14,000, the overall average was £30,000 and for those in the upper quartile it was £88,000 (nearly three times the average FBI).

Lower quartile farms for all farm types except general cropping made an overall loss in terms of FBI. For general cropping, the average FBI of lower quartile farms was just above zero, and hence hardly visible on the chart.

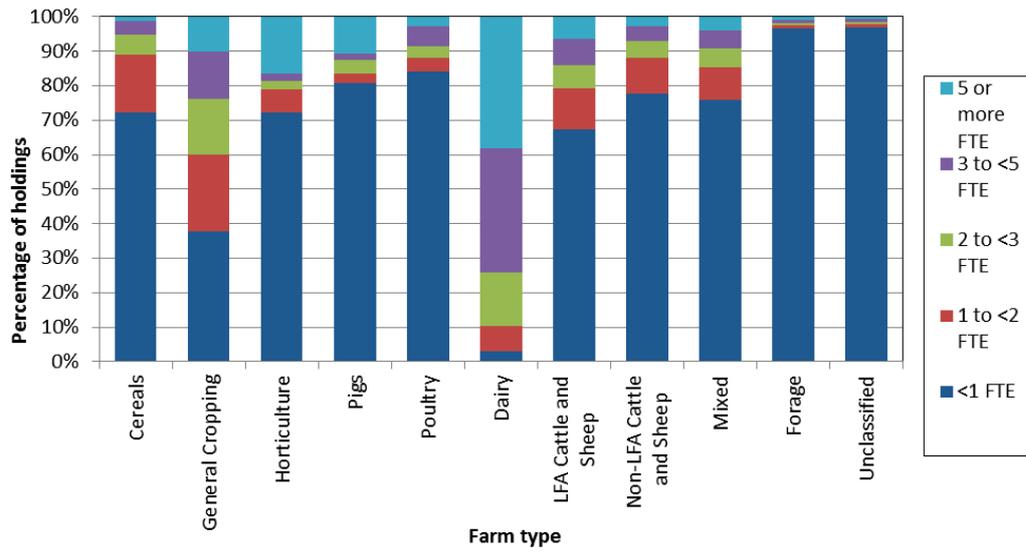
The average FBI for upper quartile farms ranged from two to five times the overall average for each farm type. There are many factors which can contribute to the relative performance of a farm business, including: tenure of the farm (with tenant farms having relatively higher overheads); prices and duration of contract for produce; supply costs and efficiency of application of inputs; level of indebtedness; as well as the motivations for farming and preferences for methods of farming of individual

### Farm labour in Scotland

The chart shows the Standard Labour Requirement (SLR) of holdings in Scotland, by farm type. SLR is a notional calculation of the typical amount of labour that would be required for a UK holding, given the levels and types of production on that holding.

Dairy farms are noticeably different from other types, with three quarters requiring at least three full time equivalent (FTE), and about 40 per cent requiring five or more. General cropping farms are the next most labour intensive, with 40 per cent requiring two or more FTE. Of other farms, over 80 per cent can be run by one person with many more only additionally needing some part time assistance.

Chart: Standard Labour Requirements by farm type, June 2013



## I. THE SCOTTISH GOVERNMENT CONSULTATION PROCESS

A.01 Consultation is an essential and important aspect of Scottish Government working methods. Given the wide-ranging areas of work of the Scottish Government, there are many varied types of consultation. However, in general, Scottish Government consultation exercises aim to provide opportunities for all those who wish to express their opinions on a proposed area of work to do so in ways which will inform and enhance that work.

A.02 The Scottish Government encourages consultation that is thorough, effective and appropriate to the issue under consideration and the nature of the target audience. Consultation exercises take account of a wide range of factors, and no two exercises are likely to be the same.

A.03 Typically Scottish Government consultations involve a written paper inviting answers to specific questions or more general views about the material presented. Written papers are distributed to organisations and individuals with an interest in the issue, and they are also placed on the Scottish Government web site enabling a wider audience to access the paper and submit their responses. Consultation exercises may also involve seeking views in a number of different ways, such as through public meetings, focus groups or questionnaire exercises. Copies of all the written responses received to a consultation exercise (except those where the individual or organisation requested confidentiality) are placed in the Scottish Government Library at Victoria Quay, Edinburgh (Area GD-Bridge, Victoria Quay, Edinburgh, EH6 6QQ, telephone 0131 244 4560).

A.04 All Scottish Government consultation papers and related publications (e.g., analysis of response reports) can be accessed at: Scottish Government consultations (<http://www.scotland.gov.uk/consultations>).

A.05 The views and suggestions detailed in consultation responses are analysed and used as part of the decision making process, along with a range of other available information and evidence. Depending on the nature of the consultation exercise the responses received may:

- indicate the need for policy development or review
- inform the development of a particular policy
- help decisions to be made between alternative policy proposals
- be used to finalise legislation before it is implemented

A.06 Final decisions on the issues under consideration will also take account of a range of other factors, including other available information and research evidence.

**A.07 While details of particular circumstances described in a response to a consultation exercise may usefully inform the policy process, consultation exercises cannot address individual concerns and comments, which should be directed to the relevant public body.**

## II. How to Respond to this Consultation Paper

**A.08 We are inviting written responses to this consultation paper by Friday 18 September 2015. Please send your response with the completed Respondent Information Form (see "Handling your response" below), to:**

[succession@scotland.gsi.gov.uk](mailto:succession@scotland.gsi.gov.uk)

or

Scottish Government, Civil Law Reform Unit, Room GW.15, St Andrew's House, Regent Road, Edinburgh, EH1 3DG.

If you have any queries, please contact the team as above, or on 0131 244 4212 or 0131 244 6931.

A.09 We would be grateful if you would use the consultation questionnaire provided or, where this is not possible, would clearly indicate in your response which questions or parts of the consultation paper you are responding to as this will aid our analysis of the responses received.

A.10 This consultation, and all other Scottish Government consultation exercises, can be viewed online on the consultation web pages of the Scottish Government website at [www.scotland.gov.uk/consultations](http://www.scotland.gov.uk/consultations).

A.11 The Scottish Government has an email alert system for consultations (SEconsult: [www.scotland.gov.uk/consultations/seconsult.aspx](http://www.scotland.gov.uk/consultations/seconsult.aspx)). This system allows stakeholder individuals and organisations to register and receive a weekly email containing details of all new consultations (including web links). SEconsult complements, but in no way replaces SG distribution lists, and is designed to allow stakeholders to keep up to date with all SG consultation activity, and therefore be alerted at the earliest opportunity to those of most interest. We would encourage you to register.

### Handling your response

A.12 We need to know how you wish your response to be handled and, in particular, whether you are happy for your response to be made public. Please complete and return the **Respondent Information Form** below as this will ensure that we treat your response appropriately. If you ask for your response not to be published we will regard it as confidential, and we will treat it accordingly.

A.13 All respondents should be aware that the Scottish Government are subject to the provisions of the Freedom of Information (Scotland) Act 2002 and would therefore have to consider any request made to it under the Act for information relating to responses made to this consultation exercise.



## CONSULTATION QUESTIONS

B.01 This Annex summarises all the questions that appear in this consultation paper. Respondents should not feel obliged to answer all of them. However, the Scottish Government would appreciate all responses, whether from individuals or from organisations, with views on any or all of these matters.

B.02 Please explain and, where possible, provide evidence for each answer that you give.

### Chapter 2: Intestacy – Questions relating to Part 2 of the Commission’s Report

Q.1 Should rights in intestacy be property specific?

Yes  No  Don't know

**Please give reasons for your answer:**

Q.2 Should the policy aim of any scheme of intestacy be that a surviving spouse/civil partner should be able to remain in the family home?

Yes  No  Don't know

**Please give reasons for your answer:**

Q.3 Would the policy aim be achieved by the scheme of intestacy proposed by the Scottish Law Commission, after further consideration of the level of the threshold sum?

Yes  No  Don't know

**Please give reasons for your answer:**

Q.4 Should the threshold sum be set to strike a balance between the rights of a surviving spouse/civil partner and the deceased's children?

Yes

No

Don't know

**Please give reasons for your answer:**

Q.5 What do you think the level of threshold sum should be? (Please circle your answer)

A - £335,000

B - £528,000

C - £558,000

D - £610,000

E - £650,000

**Please give reasons for your answer:**

Q.6 Should the spouse/civil partner retain the family home irrespective of value?

Yes

No

Don't know

**Please give reasons for your answer:**

Q.7 Should the threshold sum be reduced by the value of survivorship destinations in the title to heritable property?

Yes

No

Don't know

**Please give reasons for your answer:**

Q.8 Should the threshold sum take into account the value of survivorship destinations in the title to moveable property?

Yes  No  Don't know

Please give reasons for your answer:

Q.9 Where the deceased is survived by a spouse or civil partner and issue, and the net value of the deceased's right in a dwelling house which passes to the spouse or civil partner by virtue of a survivorship destination exceeds the threshold sum, should the sum be deducted from the deceased's intestate estate and the surviving spouse/civil partner be entitled to half of the resulting amount, if any, with the rest of the estate shared among the issue?

Yes  No  Don't know

Please give reasons for your answer:

Q.10 Should there be a qualifying period before which a surviving spouse/civil partner could acquire some or all of the threshold sum?

Yes  No  Don't know

Please give reasons for your answer:

Q.11 Where the value of the family home exceeds the threshold sum, should there be a period during which the property could not be sold?

Yes  No  Don't know

Please give reasons for your answer:

Q.12 If you have answered yes, should that period be two years?

Yes

No

Don't know

**Please give reasons for your answer:**

Q.13 Where a person renounces their rights under an estate should they be regarded as not having survived the deceased?

Yes

No

Don't know

**Please give reasons for your answer:**

Q.14 Where a person renounces their entitlement under an estate should they also be able to renounce the entitlement of their issue?

Yes

No

Don't know

**Please give reasons for your answer:**

Q.15 Please also feel free to comment on any of the other recommendations made by the Commission and set out at paragraph 2.36 above.

## **Impact**

Q.16 What do you think the impact of implementing the Chapter 2 proposals would be:

Q.16(a) On individuals

Q.16(b) On families

Q.16(c) On the legal profession

Q.16(d) On the courts

Q.16(e) On business?

## **Chapter 3: Protection from Disinheritance**

Q.17 Should a spouse or civil partner be able to claim a fixed share from the whole estate (heritable and moveable) as a protection from disinheritance where the deceased left a valid will?

Yes

No

Don't know

**Please give reasons for your answer:**

Q.18 Should that fixed share be 25% of what they would have received on intestacy?

Yes  No  Don't know

Please give reasons for your answer:

Q.19 Should all children be able to claim a fixed share from the whole estate (heritable and moveable) as a protection from disinheritance where the deceased left a valid will?

Yes  No  Don't know

Please give reasons for your answer:

Q.20 Should a child's claim from a fixed share from the whole estate (heritable and moveable) be 25% of what he or she would have received on intestacy?

Yes  No  Don't know

Please give reasons for your answer:

Q.21 Should it be possible to renounce legal share?

Yes  No  Don't know

Please give reasons for your answer:

Q.22 Should renunciation remove that person's issue having a right to a legal share of the estate?

Yes

No

Don't know

**Please give reasons for your answer:**

Q.23 Should it be possible to apply to the court to pay the legal share in instalments?

Yes

No

Don't know

**Please give reasons for your answer:**

Q.24 Should dependent children be able to claim a capital sum payment, calculated on the basis of what would be required to maintain the child until no longer dependent?

Yes

No

Don't know

**Please give reasons for your answer:**

Q.25 Would providing for dependent children to be able to claim a capital sum payment, have an impact on the efficient winding up of estates?

Yes

No

Don't know

**Please give reasons for your answer:**

Q.26 Would a time limit of 1 year from death, unless on cause shown, assist in the efficient winding up of an estate?

Yes

No

Don't know

**Please give reasons for your answer:**

Q.27 Should dependent children with capacity be able to renounce a claim for a capital sum payment?

Yes

No

Don't know

**Please give reasons for your answer:**

Q.28 Please also feel free to comment on any of the other recommendations made by the Commission and set out at paragraph 3.30.

**Impact**

Q.29 What do you think the impact of implementing the Chapter 3 proposals would be:

Q.29(a) On individuals

Q.29(b) On families

Q.29(c) On the legal profession

Q.29(d) On the courts

Q.29(e) On business?

### Chapter 3A: Agricultural Units

Q.30 In examples 12-15 on pages 38-9, would there be scope for the legal share to be met by the principal beneficiary borrowing against the assets they have inherited (i.e. mortgaging a mortgage-able element of the agricultural unit)?

Yes

No

Don't know

**Please give reasons for your answer:**

Q.31 Should there be exemptions (limited or otherwise) for certain businesses from claims for a spouse/civil partner's legal share where this will compromise the commercial viability of the business?

Yes

No

Don't know

**Please give reasons for your answer:**

Q.32 If there were to be exemptions from claims for legal share, do you think it would be possible to define those types of businesses which would be exempt with precision?

Yes

No

Don't know

**Please give reasons for your answer:**

Q.33 What criteria could be used to inform any definition of an excepted business on the basis that any formula must be clear and certain and able to withstand the tests of robustness, fairness and proportionality?

**Please give reasons for your answer:**

Q.34 What could be the impact of a formula which was not clear and certain?

**Please give reasons for your answer:**

#### **Chapter 4: Cohabitants**

Q.35 Do you agree with the criticisms set out above of section 29 of the Family Law (Scotland) Act 2006?

Yes

No

Don't know

**Please give reasons for your answer:**

Q.36 Do you agree that section 29 of the Family Law (Scotland) Act 2006 should be repealed?

Yes

No

Don't know

**Please give reasons for your answer:**

Q.37 Are the factors set out in Recommendation 38 sufficient/appropriate to determine if the individual was a cohabitant?

Yes

No

Don't know

**Please give reasons for your answer:**

Q.38 Should a cohabitant be able to make a claim in testate estates?

Yes

No

Don't know

**Please give reasons for your answer:**

Q.39 Should a cohabitant receive a percentage of what a surviving spouse/civil partner would have received?

Yes

No

Don't know

**Please give reasons for your answer:**

Q.40 Are the factors set out in Recommendation 39 sufficient/appropriate to determine the percentage a cohabitant should receive?

Yes  No  Don't know

**Please give reasons for your answer:**

Q.41 Where there is a surviving spouse/civil partner and a cohabitant in an intestate estate, should the value of the estate which the spouse/civil partner would inherit be shared between the cohabitant and the spouse/civil partner in line with recommendation 42(1)?

Yes  No  Don't know

**Please give reasons for your answer:**

Q.42 Where the deceased dies testate, should the cohabitant's entitlement be to the appropriate percentage of a spouse's legal share of the deceased's estate should be in addition to the legal share of the spouse or civil partner?

Yes  No  Don't know

**Please give reasons for your answer:**

Q.43 Should, unless permitted by the court, any application for a proportion of the deceased's estate be made within the period of 1 year from the date of the deceased's death?

Yes  No  Don't know

**Please give reasons for your answer:**

Q.44 Please also feel free to comment on any of the other recommendations made by the Commission and set out at paragraph 4.23 above.

**Impact**

Q.45 What do you think the impact of implementing these proposals would be?

Q.45(a) On individuals

Q.45(b) On families

Q.45(c) On the legal profession

Q.45(d) On the courts

Q.45(e) On business?

**Chapter 5: Additional Matters**

Q.46 Should capacity to make or revoke a will, in the circumstances set out at recommendation 45, be determined by the law of the testator's domicile at the time of making or revoking the will?

Yes  No  Don't know

**Please give reasons for your answer:**

Q.47 Should the rule known as the *conditio si testator sine liberis decesserit* (whereby a will may in certain circumstances be held to be revoked by the subsequent birth of a child to the testator) be abolished?

Yes  No  Don't know

**Please give reasons for your answer:**

Q.48 Should the right at common law to claim *aliment jure representationis* be abolished?

Yes  No  Don't know

**Please give reasons for your answer:**

Q.49 Should the right at common law to claim temporary *aliment* be abolished?

Yes  No  Don't know

**Please give reasons for your answer:**

Q.50 If the requirement to obtain a bond of caution is removed should any measures be put in place to protect an estate given that there are very few calls on bonds of caution currently?

Yes  No  Don't know

**Please give reasons for your answer:**

Q.51 Should the court have the power to refuse to appoint an executor dative?

Yes

No

Don't know

**Please give reasons for your answer:**

Q.52 If the court is given a discretionary power to refuse to appoint an executor-dative should small estates be excluded?

Yes

No

Don't know

**Please give reasons for your answer:**

Q.53 If the court is given a discretionary power to refuse to appoint an executor-dative should estates where the prior rights of the spouse exhaust the estate and the spouse is the executor-dative be excluded?

Yes

No

Don't know

**Please give reasons for your answer:**

Q.54 If the court is given a discretionary power to refuse to appoint an executor-dative should estates where the executor-dative is the sole beneficiary be excluded?

Yes

No

Don't know

**Please give reasons for your answer:**

Q.55 Are there any other categories of estates which could be excluded?

Yes

No

Don't know

**Please give reasons for your answer:**

Q.56 Would a non-exhaustive list of factors which the court may want to take into account when considering a petition for appointment as executor-dative be helpful?

Yes

No

Don't know

**Please give reasons for your answer:**

Q.57 If so what factors should be included?

**Please provide your answer:**

Q.58 Should a petition for appointment as executor-dative be accompanied by (tick as many as you think would be necessary):

- a family tree
- a scheme of division
- a letter from DWP providing information on benefits in relation to the deceased?

Q.59 Please set out below any other documentation which could usefully be included.

Q.60 Should the current process of intimation be replaced by personal intimation?

Yes

No

Don't know

**Please give reasons for your answer:**

Q.61 If 'Yes', to whom should intimation be made?

**Please provide your answer:**

Q.62 Should the current appeal period be extended?

Yes

No

Don't know

**Please give reasons for your answer:**

Q.63 If 'Yes', what should the period be and why?

Yes

No

Don't know

**Please provide your answer:**

Q.64 In terms of the suggested safeguards please indicate below what combination would be necessary to provide a proportionate safeguard solution (tick as many as you think would be necessary).

- Power to prevent the appointment of an executor-dative
- Non-exhaustive list of factors to be taken into account
- Attachment of other documentation to the petition e.g. family tree

- Personal intimation
- Extended appeal period
- Other\*

\*Please set out below any other suggested safeguards

Q.65 Do you agree with the data provided on page 65?

Yes  No  Don't know

**Please give reasons for your answer:**

Q.66 Please provide any additional data in terms of quantifiable volumes and costs associated with any of the suggested new safeguards.

Q.67 Should the court have the power to refuse to confirm an executor nominate?

Yes  No  Don't know

**Please give reasons for your answer:**

Q.68 Are there likely impacts of such a change?

Yes  No  Don't know

**Please explain your answer:**

Q.69 How might any impact of such a change be mitigated?

**Please explain your answer:**

Q.70 Should the doctrine of equitable compensation be abolished?

**Yes**       **No**       **Don't know**

**Please give reasons for your answer:**

Q.71 Should a marriage or a civil partnership result in the revocation of an earlier will?

**Yes**       **No**       **Don't know**

**Please give reasons for your answer:**



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