RESPONDENT INFORMATION FORM:
CONSULTATION ON THE LAW OF SUCCESSION

Please Note That This Form **Must** Be Returned With Your Response To Ensure That We Handle Your Response Appropriately

1. Name/Organisation

Organisation Name

Faculty of Advocates

Title **Mr** ☐ **Ms** ☐ **Mrs** ☐ **Miss** ☐ **Dr** ☐ ***Please tick as appropriate***

Surname

Forename

2. Postal Address

Advocates' Library		
Parliament House		
Parliament Square		
Edinburgh		
Postcode EH1 1RF	**Phone**	**Email**

3. Permissions

I am responding as…

Individual ☐ / **Group/Organisation** ☒

Please tick as appropriate

(a) Do you agree to your response being made available to the public (in Scottish Government library and/or on the Scottish Government web site)?

Please tick as appropriate ☐ **Yes** ☐ **No**

(b) Where confidentiality is not requested, we will make your responses available to the public on the following basis

Please tick ONE of the following boxes

Yes, make my response, name and address all available ☐

or

Yes, make my response available, but not my name and address ☐

or

Yes, make my response and name available, but not my address ☐

(c) The name and address of your organisation ***will be*** made available to the public (in the Scottish Government library and/or on the Scottish Government web site).

Are you content for your ***response*** to be made available?

Please tick as appropriate ☒ **Yes** ☐ **No**

(d) We will share your response internally with other Scottish Government policy teams who may be addressing the issues you discuss. They may wish to contact you again in the future, but we require your permission to do so. Are you content for Scottish Government to contact you again in relation to this consultation exercise?

Please tick as appropriate ☒ **Yes**

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:

We agree that in principle there should be no distinction between the treatment of heritable and moveable property in the application of the law of intestacy. A beneficiary's right to share in an estate should depend upon what is a fair division of the deceased's estate and not upon the nature of the property which happens to make up the estate. This would bring Scotland into line with most other legal systems.

This principle underlay many of the reforms introduced by the Succession (Scotland) Act 1964 which largely abolished the earlier law under which different rules applied in relation to the succession to the heritable and moveable parts of the deceased's estate. One exception to this in the 1964 reforms was the retention of legal rights which continued to be exigible from the moveable estate only. We welcome the Commission's proposal to abolish this remaining distinction and its replacement with the proposed "legal share" which is calculated without regard to the distinction between moveable and heritable property.

The 1964 Act provided for a further limited derogation from this principle in sections 8 and 9 which gave a surviving spouse and, more recently, civil partner certain prior rights (i) to the deceased's interest in the spouse's or civil partner's ordinary residence up to a certain value; (ii) to certain furniture and plenishings: and (iii) to a sum of money. These prior rights replaced the earlier legal rights of terce and courtesy which gave a widow or, in more limited circumstances, a widower a liferent in the heritage of the deceased and a statutory preference to the first £5,000 in the estate.

The prior rights and earlier rights of terce and courtesy reflected the concern that the surviving spouse or civil partner should not be forced to move out of his or her ordinary home by the death of their partner. The Commission have recommended that this should continue to be a major policy consideration in setting the scheme of division on intestacy. As noted below we agree with this view. However, we believe that this policy should be achieved by making specific rules in relation to the

succession to the spouse's or civil partner's ordinary residence, and then dividing the remaining estate according to the general rules.

The rationale for having rules of division which are property nonspecific is that the property making up the estate should be irrelevant to the question of what is a fair division of the estate. Accordingly, to have property nonspecific rules, but to fix the rules to ensure that a specific property goes to a particular beneficiary, risks distorting the law of intestacy and overriding the interests of others, with the result that a fair division of the estate will not be achieved in many cases.

Therefore while we do support the general principle that rights in succession should be property nonspecific, we believe that where there is an overriding policy objective relating to a particular item of property, such as the family home, there should be rules for that specific type of property.

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 [X] **No** [ ] **Don't know** [ ]

Please give reasons for your answer:

The current intestacy laws enable a surviving spouse or civil partner to remain in the family home by giving the spouse or civil partner a prior right to claim the interest in the family home. We agree that this should continue to be a policy aim of the new scheme. However, we believe that the policy should be achieved by making specific provision in relation to the succession to the deceased's interest in the family home. In this way the spouse's interests can be protected and a proper balance struck between the interests of the surviving spouse and the deceased's children.

Figures quoted by the Commission suggest the large majority of couples will have made provision for the succession to the family home either through a survivorship destination or a will. Accordingly, it is only in a minority of cases that a surviving spouse or civil partner will need to rely on the laws of intestacy to secure the family home. We believe it is important to provide for those cases.

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 [X] **No** [ ] **Don't know** [ ]

Please give reasons for your answer:

We recognise that by setting the threshold sum sufficiently high the scheme can achieve the policy aim. However, this is an indirect method of achieving the aim and may involve overriding the interests of others, in particular the children of the deceased.

Under the existing prior rights scheme the surviving spouse or civil partner has a right to succeed to the family home if the deceased's share in the home is less than a set amount, presently £473,000. Given that the large majority of houses in Scotland are below this value, it means that in almost all cases the surviving spouse or civil partner would be entitled to claim the house, or more likely the deceased's half share in the house.

Under the proposals the surviving spouse or civil partner will have no direct right to claim the house. However, the approach is to set the threshold sufficiently high that the surviving spouse or civil partner will succeed either to the whole estate including any family home or at least a large enough share of the estate that he or she can "buy out" the deceased's interest in the family home. To ensure that even those in high value houses will not be "at risk", the threshold requires to be set very high. However, the threshold is then applied to all estates with the effect that in the overwhelming majority of cases the surviving spouse or civil partner will succeed to the whole estate and the children of the deceased will be entirely excluded.

Given that the rules in relation to protection from disinheritance are linked to those for intestacy, this means that in these cases the children will lose not only any rights on intestacy, but also of any protection against disinheritance because the proposed legal share (under option 1 in Chapter 3) is fixed as a proportion of the amount a child would have received on intestacy.

Accordingly, while we would agree that setting the threshold high does achieve the specific policy objective, it does so at the expense of the rights of the children and results in a scheme of division which may not reflect the public expectations demonstrated by the public attitude survey cited by the Commission.

On the other hand if the surviving spouse or civil partner were given a prior right to claim the interest in the family home similar to the existing rights, this would mean that in the relatively few cases where the right was needed, this would ensure that the surviving spouse or civil partner received the house without necessarily excluding the interests of the children entirely.

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 [X] **No** [ ] **Don't know** [ ]

Please give reasons for your answer:

We believe that most people's expectation would be that their spouse or civil partner and children would share the estate if they died intestate. While it is important to enable spouses and civil partners to remain in the family home, this should not be the only consideration and needs to be balanced against the rights of the children to at least a share in their parent's estate.

The variable nature of family structures means that often the surviving spouse or civil partner will not be the parent of the deceased's children. The children would have no

expectation of succeeding to the estate of the surviving spouse or civil partner on his or her later death. Accordingly, in our view it would be unfair to exclude the children from succeeding to their parent's estate entirely where there is a surviving spouse.

Further, we believe for the reasons set out in Answer 3 that a better method of balancing the interests of the spouse or civil partner and deceased's children would be to make specific provision for the succession to the family home and thereafter to divide the estate equally between the surviving spouse or civil partner and children.

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:

As stated in answer to Question 4 we believe that in fixing the level of the threshold a balance needs to be struck between the interests of the surviving spouse and those of the children. Setting the threshold at £335,000 would mean (i) that in the majority of cases the surviving spouse or civil partner would take the whole estate excluding the children from sharing in their parent's estate; and (ii) that under the new scheme of division a surviving spouse will have a more than adequate share to enable him or her to remain in the family home. Accordingly, even at the lowest suggested threshold level, the scheme of division would be weighted in favour of the interests of the surviving spouse or civil partner over the children. We therefore see no justification for increasing the threshold above that level.

Further, given that this is a new and different scheme of division which is intended to be property nonspecific, we question whether the threshold should be fixed to match the maximum theoretical value of prior rights under the current law or indeed to fix it according to the price of "substantial city houses". We would agree with the Commission that since the surviving spouse or civil partner will receive half of the remainder of the estate above any threshold then the level of the threshold can be restricted to ensure that children receive at least a small share in their parent's estate. Indeed we believe the threshold could have been set at a lower level without prejudicing the surviving spouse's ability to remain in the family home.

The evidence produced by the Commission demonstrates that the majority of intestate estates would be below a threshold of £335,000. In paragraph 2.1 of their report the Commission state that the average value for confirmed estates in Scotland in 2007 was £147,822. That figure is for both testate and intestate estates. The Commission cite earlier research which estimated that the average value of confirmed intestate estates was about half that of testate estates. They also note that confirmed estates represent only about half of all deaths in Scotland. The other half are estates which are too small to require confirmation or under which the property transmits by other means which do not require confirmation, such as survivorship

destinations. The Commission suggest that it is "likely that these estates will be intestate" and therefore the average value of intestate estates will be below the average for confirmed estates in Scotland. As a result the majority of intestate estates will be below a threshold of £335,000.

We would suggest that if the majority of estates whether testate or intestate would be below a threshold of £335,000 then in most cases the scheme of division would be weighted in favour of the surviving spouse. We do not believe that it is necessary to increase the threshold to provide any additional protection.

The latest figures published by the Registers of Scotland show that for the second quarter of 2015 the median house price in Scotland was £140,000 [Registers of Scotland, *Quarterly House Price Statistical Report, April-June 2015*, Table 13]. With a threshold at £335,000 the majority of Scottish homes will be below this level. The consultation paper states that about 94% of properties are below this level [para 2.26].

Further, as mentioned in answer to Question 2, in cases where the family home was owned jointly by the deceased and the surviving spouse or civil partner, the value of the deceased's interest will be only half the value of the house. In other words a threshold of £335,000 will cover a half interest in a shared property worth up to £670,000. We note that fewer than one per cent of properties in Scotland are above this value [para 2.26].

Even for the small number of estates which do include an interest in a family home which is above the threshold one must take into account other assets which will make up the estate and the new scheme of division proposed by the Commission. Figures published by the Inland Revenue show that for estates valued between £300,000 and £500,000 about 50% of the value of the estate is represented by residential property, the other half being moveable property or other types of buildings and land [HM Customs & Revenue, *Inheritance Tax Statistics, 2012-13*, Figure 2 and Table 12.5]. For estates greater than this the proportion of the estate represented by residential property falls significantly, being only about 25% in estates worth over £2 million. It is only in estates worth in the range £100,000 to £300,000 that the value of the residential property represents the majority of the assets.

Accordingly, an estate worth around £500,000 may include an interest in a house worth say £250,000. Under the Commission's proposals the spouse or civil partner will receive half of the estate after deduction of the threshold with the other half going to the children. Assuming a threshold of £335,000, the spouse or civil partner's share in an estate worth £500,000 would then be £417,500 (*i.e.* £335,000 plus half of the remaining £165,000). This would be likely to be sufficient to allow the spouse to remain in the family home.

It should be noted that figures published by the Inland Revenue are based on the estate declared at confirmation for inheritance tax purposes. This would include a family home which is subject to a special destination (which does not need confirmation and would not be part of the intestate estate but must be included in the inventory of property for inheritance tax purposes). However, it would not include

other moveable assets which pass on death but which do not form part of the estate of the deceased, such as death-in-service benefits, pension rights, insurance policies or other assets held in trust. These will generally go to the person nominated by the deceased, who will often be their spouse, civil partner or cohabitee. Accordingly, the surviving spouse or civil partner, particularly in a higher value estate, is likely to receive other assets as well as his or her share in the intestate estate. It is also likely that the surviving spouse or civil partner will have assets of their own. It appears unlikely therefore that with the threshold set at £335,000 a surviving spouse would be unable to remain in the family home even if the value of the home were above this level.

We would further suggest that the existing limits to prior rights are of limited assistance in fixing the threshold level. The existing prior right to a share in the family home is up to a limit of £473,000, to which can be added up to £29,000 in furnishings and plenishings and a sum of £50,000. However, in practice if the estate includes an interest in a house, it will be a half share in an average price house probably worth around £70,000. If one includes a half share in the furnishings and plenishings worth say £10,000, and the whole sum of money of £50,000, a more likely figure for the total value of the prior rights in a typical case would be about £130,000 with anything over that going mainly to the children.

The Commission concluded that their proposed figure for the threshold of £300,000 would mean that "in the vast majority of cases the surviving spouse will take the whole estate under the new proposals and only the children of the wealthiest Scots will have a claim on an intestate estate." [Scot Law Comm 2.14] That would also be the position if the figure was set at £335,000.

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:

We would favour an express provision which would enable the spouse or civil partner to succeed to the family home, similar to the present prior right to succeed to the interest in the family home. However, we believe that it should be limited to balance the interests of the children. The present limit of £473,000 already covers 98% of Scottish properties, and given that the majority of couples own their home in common, in practice this covers properties up to a value of £946,000. In the event that an equivalent to prior rights was retained that would be sufficient.

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:

Where title to heritable property passes under a survivorship destination it will not form part of the deceased's estate [s.45 of draft Bill, in effect re-enacting section 36

of the Succession (Scotland) Act 1964] and will not fall to be dealt with as part of the intestate estate. However, the proposed threshold sum has been set with regard to the existing level of prior rights and to the price of houses in order to ensure that the surviving spouse or civil partner can remain in the family home. Where there is a survivorship destination in favour of the surviving spouse or civil partner, they will be able to remain in the family home automatically, and therefore we believe the threshold should be adjusted to take account of this.

The existing system of prior rights already takes account of this situation. Where the title to the family home includes a survivorship destination, there will be no house for the surviving spouse or civil partner to claim. In other situations of partial intestacy the prior rights are also adjusted. For example, the right to a sum of money under section 9(1) is adjusted to take account of any legacies which have been left and accepted by the surviving spouse or civil partner.

Accordingly, we believe that the threshold should be adjusted to take account of a special destination and also in any situation of partial intestacy the threshold should be adjusted to take account of legacies left to and accepted by the spouse.

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

Yes [X] **No** [ ] **Don't know** [ ]

Please give reasons for your answer:

For the reasons set out in answer to Question 7 we agree the threshold should be adjusted for property passing to the surviving spouse or civil partner which does not form part of the intestate estate.

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 [X] **No** [ ] **Don't know** [ ]

Please give reasons for your answer:

This method of adjusting the estate takes into account the full value of the house passing to the surviving spouse or civil partner to ensure that the overall division of the estate including the family home will be the same whether or not the title includes a survivorship destination, which we believe is fair.

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** [X] **Don't know** [ ]

Please give reasons for your answer:

Marriage or civil partnership is a matter of status which people choose to enter into in the knowledge that they are undertaking certain obligations to their partner and acquiring certain rights, including succession rights. We do not believe any further qualification should be required from a spouse or civil partner before they acquire succession rights.

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** [X] **Don't know** [ ]

Please give reasons for your answer:

How likely this scenario is to arise will depend in part on the level of the threshold. However, even if the threshold is set at the lowest level suggested in Question 5 then, for the reasons set out above, the likelihood of the scenario arising is very small. Further, in the rare cases that the value of the family home does exceed the threshold sum, it is very likely that with the addition of half of the remainder of the estate over the threshold the actual share of the estate going to the surviving spouse or civil partner will exceed the value of the family home so that the spouse or civil partner can accept the family home in lieu of his or her share in the estate. Accordingly, we do not see the need for such a provision. In addition, the persons entitled to be appointed executor-dative will be the surviving spouse or civil partner together with the children. The surviving spouse or civil partner will accordingly be able to decide, or at least influence, how and when the property is sold, so it seems unnecessary to regulate this process. Further, the steps needed to obtain confirmation to a high value estate and to market a high value property mean that it would be likely to be a number of months at least before the property could actually be sold.

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

Yes [ ] **No** [ ] **Don't know** [ ]

Please give reasons for your answer:

Not applicable

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

Yes [X] **No** [ ] **Don't know** [ ]

Please give reasons for your answer:

This is the present law. Every person is entitled to renounce an inheritance if they do not wish to receive it for whatever reason. This is often done in the context of separation agreements, but can arise in other circumstances, including after the death of the deceased. The effect of the rule is that the person who has renounced their right is treated as if they had not survived the deceased and the share which would have gone to them goes instead to the person next in line either in accordance with the terms of a will or the law of intestacy. We believe that is the correct outcome as it means that the estate devolves in line with the wishes of the deceased as expressed in a will or, in the absence of a will, in line with the law of intestacy as the deceased will have expected.

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** ☒ x

Please give reasons for your answer:

We are not persuaded that there is a need for this provision. The Commission give the example of a person, A, who dies leaving a brother B and sister C, who is handicapped. B wishes to renounce his share in favour of C [para. 2.51]. Under the present law, the effect of a renunciation would be that B's share would go to his son, D. However, this result can be avoided in a number of ways. First, while still alive A could write a will leaving his estate to C. B and D would then receive no share. Second, after A's death, B could accept his share of the estate and then gift it to C. There may therefore be no need to grant a parent the right to renounce the rights of their children and other issue.

It is also possible that if such a right were to be granted it could be used by B for the purpose of disinheriting his children, which may not be an acceptable motivation.

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.

We have nothing to add to the answers to Questions 1 to 14.

Impact

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

We have commented on the changes in the law in general above. We are not in a position to assess in any more detail the impact of the proposals.

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 [X] **No** [ ] **Don't know** [ ]

Please give reasons for your answer:

In common with many other legal systems, Scots law has traditionally provided spouses and children with a degree of protection against disinheritance by giving them a legal right to share in the deceased's estate which cannot be defeated by the terms of a will. In this respect Scots law follows the European civil law approach which allows the deceased a right to leave part of his or her estate to whomsoever he or she chooses, but requires that part of the estate goes to his or her spouse and children. This distinguishes Scots law from the English common law approach with its emphasis on the deceased's absolute freedom to test.

We note that the public attitude surveys cited by the Commission [para. 3.1] strongly support the retention of this protection from disinheritance for both spouses and children. Accordingly, these rights remain in accordance with current public expectations.

The significance of these rights also needs to be considered in the wider context of succession law. Legal rights provide an important protection against accidental disinheritance by a spouse neglecting to change an old will. Under English law spouses and civil partners are protected by legislative provisions which provide that a will is in general revoked by marriage (s18, Wills Act 1837) or by entering into a civil partnership (s18B). The spouse or civil partner will then receive their entitlement under the law of intestacy unless the testator makes a subsequent will. Under Scots law marriage or civil partnership has no effect on the validity of a will (see Question 71).

Part of the justification for this approach is that spouses and civil partners are provided with guaranteed inheritance rights. There is no current proposal to change this rule and therefore we believe it is important to retain other protection against disinheritance.

We also agree with the Commission's proposal that the protection should be a fixed share from the whole estate. At present legal rights give a spouse or civil partner a share in the moveable estate only with the result that the extent of those rights may vary significantly depending on the nature of the property in the estate. The deceased may also seek to avoid the effect of legal rights by investing in heritage rather than moveable property. We agree that this distinction is outdated and that the legal share should be exigible from the whole estate.

Setting the legal share as a fixed share of what the spouse/civil partner would have received on intestacy has the benefit of simplicity and of avoiding disputes as to what would be a reasonable share. Determining what would be a reasonable share could involve consideration of many factors and there is a risk that the economically weaker party may be disadvantaged in any negotiation and forced to settle for a lower sum.

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

Yes ☐ **No** ☐ **Don't know** ☒ x

Please give reasons for your answer:

Whether the fixed share is 25% of what would have been received on intestacy or a slightly higher amount, such as 33%, appears to us to be a question of policy for the legislature to determine.

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 ☒ X **No** ☐ **Don't know** ☐

Please give reasons for your answer:

As set out in answer to Question 17, the protection of children from disinheritance is a longstanding and distinctive feature of Scots law. The public attitude surveys quoted by the Commission showed strong public support for the retention of this protection especially in the absence of a surviving spouse [para 3.1], although there was also majority support for the children to receive a share from the estate even if there was a surviving spouse or civil partner [para. 3.27]. Further, the evidence from executry practitioners was that most parents do not view the inability to disinherit their children as unreasonable [para. 3.28].

This proposal should also be considered in the context of other proposed reforms. The Commission has proposed the abolition of the rule whereby a will may be held to be revoked by the subsequent birth of a child of the testator (see Question 47). This rule provided children, most obviously young children, with some additional protection against accidental disinheritance. There are difficulties with the operation of the rule and we have supported its abolition. However, this is on the basis that the right of a child to a legal share is retained as part of the protection for children.

This rule apart, it is in general difficult to challenge a will under Scots law. For example, a disappointed child will often be suspicious of a will executed by their parent later in life, possibly when the parent is in failing health, which excludes that child in favour of another sibling or a new partner. However, in the absence of compelling evidence, the courts are reluctant to hold that there has been undue influence by the other sibling or new partner or that the parent has lost all capacity to make a will. The provision of a legal share for the children protects to some extent against the risk of such abuse and probably reduces the number of challenges to wills which are raised in the courts.

The proposal also still allows the testator complete testamentary freedom in respect of most of his or her estate. If he or she wishes to favour one child or to leave a substantial legacy to a charity they are free to do so. Further, through the use of devices such as liferent trusts the testator could leave the whole estate in liferent, for example to a disabled child, and then in fee to all of their children or their issue. Indeed where the testator's intentions are well-motivated there is no reason to believe the children will challenge them, and the very small number of claims for legal rights under the existing law suggests that in almost all cases testators either are making provision for their children or the children are content to respect their wishes.

We believe the proposal for children to receive a fixed legal share does strike the right balance between protecting the children and respecting the wishes of the testator.

We also agree that for the same reasons set out in answer to Question 17 that the legal share should come out of the whole estate, moveable and heritable, and that providing for a fixed share for children would be better.

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:

Whether the legal share should be 25% or a slightly higher percentage, such as 33% of what the child would have received on intestacy appears to us to be a matter of policy for the legislature to determine (as with our answer to Question 18).

We agree with the proposal to link the legal share to what the child would have received on intestacy. Under the current law the legal rights are calculated as a

share of the moveable estate without regard to the spouse's prior rights. This can result in cases where the children are entitled to receive more in legal rights if there is a will than they would on intestacy. This does not seem to be a sensible outcome. Linking the legal share to the share received on intestacy avoids this difficulty.

The overall effect of the proposed changes is that in some cases children will have less protection against disinheritance than under the existing law. At present, regardless of the size of the estate, the children will have a claim for legal rights out of the moveable part of the estate. Under the proposals, if there is a spouse or civil partner the children will have no claim for a legal share if the estate is below the threshold. Even for estates above the threshold, in some cases the children's legal share will be lower than under the present law.

For example, A dies leaving his whole estate consisting of an interest in a house worth £150,000 and moveable estate of £90,000 to his spouse, B. At present his children would be entitled to claim legal rights of £30,000. However, under the new proposals they would have no claim.

If the estate consisted of an interest in a house of £265,000 and moveable property of £150,000, then under the present law the children could claim £50,000 between them in legal rights. Under the proposals assuming a threshold of £335,000, the children would be able to claim only £10,000 in total.

Under the proposed new provisions, a child will only be better protected than at present if there is no spouse and the majority of the estate is heritable property. In all other cases there is less protection.

There is one further issue in relation to how the legal share is calculated. The children's legal share is calculated as a share of the net testate estate or, if there is a partial intestacy, the combined net testate and net intestate estate [s.12, Draft Bill]. In either case this would not include property passing under a special destination [s.45(2), Draft Bill]. This significantly diminishes the value of the estate used to calculate the legal share and would mean that the children will receive significantly less than 25% of what they would have received on intestacy.

For example, assume A dies leaving a half share in a house worth £250,000 and other moveable property worth £150,000. If title to the house passes under a special destination to A's spouse, B, then A's net estate will be £150,000. If A dies intestate, then, assuming the threshold was £300,000 (as proposed by the Commission) B would receive a further £100,000 and A's two children C and D would each receive £25,000. This is because under section 3 of the Draft Bill the threshold is modified to take account of the house passing under the special destination. The threshold is accordingly reduced to £50,000 with the effect that B gets the first £50,000 out of the net estate and half of the balance, and C and D split the other half of the balance.

However, if A dies testate leaving the whole estate to B, then for the purposes of calculating C and D's legal share under section 12, A's net testate estate would be £150,000. Section 12(3) of the Draft Bill then provides that the legal share is to be calculated as 25% of what C and D would have received had A died leaving net intestate estate of the same value as the net testate estate. However, if the value of

the net intestate estate had been only £150,000 then C and D would have received nothing on intestacy and therefore would have no claim for a legal share.

This can be contrasted with the same situation where there is no special destination. The same division would be achieved on intestacy. However, if A dies testate leaving the whole estate, including the half share in the house, to B, because the deemed value of the net intestate estate would now be £400,000, C and D would receive 25% of £50,000.

This does not appear to be what was intended under the scheme, namely that C and D would receive as a legal share 25% of what they would actually have received had A died intestate. Further, there seems no justification for the outcome to be affected by the existence of the special destination. Accordingly, we would suggest that the definition of net testate estate for the purposes of section 12 should be altered so that it includes property passing under a special destination. We note that under the alternative proposal for a dependent child to claim a capital sum the definition of net estate is extended to include property passing under a special destination (ss. 18 and 21).

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

Yes [X] **No** [ ] **Don't know** [ ]

Please give reasons for your answer:

We agree that if someone wishes to renounce their legal share they should be entitled to do so as is presently the case with legal rights. This right is an important part of executry administration in that an executor often needs to establish whether a beneficiary is accepting a legacy and renouncing his legal rights, or whether he wishes to claim his legal rights and reject the legacy. This same issue will arise under the new scheme in relation to the legal share.

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

Yes [ ] **No** [ ] **Don't know** [x]

Please give reasons for your answer:

For reasons analogous to those set out in answer to Question 14 we are not certain that this power is necessary.

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

Yes [X] **No** [ ] **Don't know** [ ]

Please give reasons for your answer:

There will be cases where meeting a claim for a legal share immediately might require an executor to sell an asset which the testator intended should be passed to one of the beneficiaries under the will, for example a farming or other small business which is intended to be passed to one of the testator's children. In this situation the executor should be able to apply to the court to pay the legal share with interest in instalments. In practice this is a matter which the executor and the beneficiaries should be able to resolve by negotiation, although the existence of the power will no doubt assist parties in reaching a reasonable compromise.

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 [X] **No** [ ] **Don't know** [ ]

Please give reasons for your answer:

As set out in answer to Question 19, we believe that the principle that children should be protected against complete disinheritance should remain part of the Scots law of succession.

If that is to be the case then Option 1 must be adopted. Option 2 is not based on that principle and addresses a different issue, namely whether a parent's obligation to aliment their children should extend after their death so that the estate is bound to make provision for the child. To that extent we do not regard the options as alternatives.

Under the existing law the obligation to aliment a child ends when a parent dies. However, if before the parent's death, the child or its legal guardian has obtained a court order ordaining the parent to make payments of aliment to the child then the court order remains enforceable as a debt due by the parent's estate. The executor can apply for the order to be varied to nil, although there is no reason in principle to preclude this being done only on condition that there is to be a capital payment to the child. A similar issue arose under the former divorce law where a spouse, typically a husband, could be ordered to make regular payments to his former wife for the rest of her life or until she remarried. If the husband pre-deceased his former wife then his estate was bound to continue to make the payments, although this was often settled by making a capital payment to the former spouse in return for a discharge of the obligation.

The circumstances under which the proposed right will be exercised will be relatively rare, not least because today few parents die while their children are under 18, or even under 25 and in full time education. Further, in many of those cases the parent will have made provision for the children either directly in their will or by leaving their estate to the person with care of the children. If there is no will the intestate beneficiaries will either be the children if there is no spouse, or the deceased's spouse who will often have care of the children in any event.

The main circumstances in which the children would be left without provision would be where the deceased is married or in a civil partnership but the children of the

deceased are not living with the deceased. In that situation the deceased may have left their whole estate to their spouse or civil partner or on intestacy the spouse or civil partner would in most cases be able to claim the whole estate. It may be thought surprising that in these circumstances, the obligation of aliment which the deceased would have owed to the children during their lifetime does not continue to be met to some extent by the estate at least until the children reach 18 or finish their education. In our view it is a legitimate criticism of the proposed scheme of division on intestacy that if there is a surviving spouse or civil partner then in the large majority of cases the children will be left without any provision and without any protection against disinheritance. This is as a result of the priority given to the surviving spouse or civil partner in setting the threshold. We address a number of these issues above.

However, whatever scheme is adopted, it is likely that there will be a small number of dependent children who are left without any provision following upon the death of their "absent" parent. In these circumstances we would favour a provision which allows the children to claim a capital payment in place of the obligation of aliment which the deceased would otherwise have owed to them.

This claim for alimentary provision could arise on intestacy where the estate would otherwise go to the surviving spouse or civil partner, or where the deceased has made a will. In the latter case the child would have to elect whether to accept any legacy under the will or to claim a legal share or to claim for alimentary provision. There could not be a claim for more than one of these options and the child would have to elect which one to receive. However, given that there would be uncertainty as to what level a court might fix the capital sum at, we believe the legislation should make it clear that the child will not have made an irrevocable election to accept the capital sum unless and until the child knows what that sum is to be. We do not believe that the mere making of a claim, which may result in no order being made, should be enough to constitute an election nor should the acceptance of an interim payment, which may ultimately have to be repaid.

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:

In cases where the deceased was already making alimentary payments to the child whether voluntarily or under an agreement there would in principle be no difficulty in calculating what would be an appropriate capital sum to be paid in place of that ongoing obligation.

In other cases where there was no existing arrangement, there is more scope for dispute between the child and the executor as to the appropriate level of payment. However, the courts regularly deal with issues of this nature and there is no reason why disputes could not be resolved relatively quickly. Section 18(5) of the Draft Bill identifies the relevant information needed in order to determine the level of the capital payment. The parties should be able to provide all of that information fairly readily.

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 [X] **No** [ ] **Don't know** [ ]

Please give reasons for your answer:

There will be some uncertainty in cases of this type as to whether or not any claim will be pursued, particularly if the children were not previously being supported by the deceased. Having a time limit would therefore be appropriate to enable the executor to proceed with the winding up of the estate if no claim is made.

In relation to the length of the time limit, there is concern that a limit of one year might unduly delay the administration of an estate. Section 29(6) of the Family Law (Scotland) Act 2006 set the time limit for claims by cohabitants for provision on intestacy at six months, although it is now proposed to extend this to one year (see Question 43). We believe that the same time limit should be adopted for all claims under the proposed legislation. Although six months would be sufficient for a cohabitant, we recognise that for children who will not have been living with the deceased and therefore may not hear about the death for some time, this time limit might be too short. We would therefore agree with the proposal of one year.

It is important, however, to make provision for later claims on cause shown. There is no obligation on the executor to advise the children or their legal guardian of the right to claim and given that the children will often be under 16 and entirely unaware of their rights, there may well be a good explanation for a late claim.

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

Yes [X] **No** [ ] **Don't know** [ ]

Please give reasons for your answer:

As mentioned in answer to Questions 13 and 19, any person with full legal capacity should be free to renounce a claim.

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.

We have nothing further to add to what is set out in answers to Q17 to Q27.

Impact

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

We have set out in the above answers our comments on the changes in relation to the distribution of estate. We are not in a position to estimate the precise impact of these proposals on the groups identified.

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:

The question does not admit of an unqualified yes or no answer. Whether or not a beneficiary can borrow will depend on a number of factors, one of which might be the current indebtedness of the farm. If there is a large overdraft then further borrowing might not be possible.

Further, the value of land is often in excess of the agricultural return that can be made from the land. Thus there might be a large legal share claim (say 25% of the value of the land), but the agricultural return from the land might not be sufficient to meet repayments on money borrowed on security of the value of the land, particularly if the farm already carries an overdraft.

As far as agricultural tenancies are concerned, an agricultural tenant cannot at present borrow on the security of the tenancy. Tenancies under the Agricultural Holdings (Scotland) Act 1991 can have a substantial value, which is often between 25 and 50% of the open market value of the land. Long Duration Tenancies and the proposed Modern Long Duration Tenancies also have value. While borrowing against the security of the owned land by an owner occupier might be possible this is not an option for a tenant. At present a low value may be entered in the Confirmation

because legal rights cannot be claimed from that part of the estate, and agricultural property relief applies so HMRC has no current interest in attributing a value. In *Baird's Executors v IRC* 1991 SLT (Lands Tribunal) 9, a tenancy was valued at 25% of the open market value for capital transfer tax where a father assigned a tenancy to his daughter.

A further difficulty in the tenanted sector is that the tenancy will be in the name of the tenant, but may not be partnership property, so if the tenant dies, the next tenant may not be the principal beneficiary. This may occur if, for example, the whole stock and other moveable assets of the farm are transferred to the son, but the lease is transferred to the spouse who is a minority partner with the son.

Where a farm is farmed by a partnership the deceased's capital account in the partnership is moveable in succession and already liable to pay legal rights. If the farm is partnership property, then the value of the deceased's share of the farm is reflected in the capital account. However, the principal beneficiary might not be able to borrow against the farm, as he or she, as an individual, would not own the farm and so could not borrow against it without the consent of the other partners.

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:

We consider that it would be unfair that some spouses or civil partners (and indeed children) should be denied the right to claim a legal share just because the deceased was involved in some particular business that is exempt. There is no reason why an elderly person should not take steps to minimise potential legal rights (or, as proposed, legal share) claims by passing on the business assets in life and more generally to take out insurance against an unexpected death which might lead to a legal rights or legal share claim. This might also help achieve one of the other Scottish Government objectives, which is to get elderly farmers to retire and pass on the farming business to the younger generation in reasonable time (see e.g. Review of Agricultural Holdings Legislation – Final Report Section 7.1).

Many farms in Scotland are farmed in a family partnership where the value of all or most of the assets, often including the land, are held in the respective partners' capital accounts. At present, legal rights are payable from that capital account. Most farmers take advice and arrange to pass on part of the capital account during their lifetimes either by bringing children into the partnership or by passing on capital within the partnership accounts.

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:

We consider that this would be very difficult, if not impossible. Particularly in a farming business, the fortunes of the business can vary significantly from year to year depending on global prices, so a business might or might not be viable depending on the date of death. Thus there might be a legitimate expectation of getting a legal share because a farm was usually viable, but at the date of death international prices might have fluctuated so that it was not viable at that date, but in the next year higher prices suddenly made it viable. That could lead to unfairness. There is also the issue as to what account is to be made of the efficient farmer against the inefficient farmer, so that a business might become exempt on some financial criteria only because the farmer was inefficient. That too would lead to unfairness.

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:

We would find it difficult to define a fair formula for exemption as there are so many different farming arrangements and so many different farming efficiencies.

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

Please give reasons for your answer:

An unclear formula is likely to lead to litigation within the family as to whether or not the business is exempt. The cost of litigation in any event might make the business unviable and require it to be sold.

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:

We do not entirely agree with all the criticisms. The section as drafted allows the court the freedom to reach a fair solution in the circumstances of each case, but in order to do so sacrifices certainty. We do accept, on balance, that the arguments set out in paragraph 4.5 of the Consultation make a case for guidance as to the underlying principles for courts asked to apply the section, and would be helpful to practitioners advising clients.

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

Yes [X] **No** [ ] **Don't know** [ ]

Please give reasons for your answer:

Yes, on balance, we agree. However, if section 29 is repealed, there must be some new statutory regime providing succession rights for cohabitants.

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:

The relationship between sections 28 and 29 of the 2006 Act should be recognised. In our view, the test for determination of whether a person is a cohabitant as set out in recommendation 38 of the Scottish Law Commission's Report on Succession (2009, Report 215) is not required. There is already a test for determination of whether a person is a cohabitant in section 25 of the 2006 Act, which applies to sections 28 and 29 – whether the couple were living together 'as if' they were husband and wife or civil partners. This formula is also used in section 31(4) of the Housing (Scotland) Act 1988 and paragraph 2(2) of schedule 1A to the Rent (Scotland) Act 1988, concerning succession to residential tenancies.

Case law has developed since the enactment of section 25 in relation to the determination of who is a cohabitant and the period of cohabitation – see *Fairley v Fairley* 2008 Fam LR 112; *Forbes v Land*, Sheriff Noble, 3 February 2011; *M v T*, Mungo Bovey QC, 17 November 2011; *Wilson v Farrand*, Sheriff Morrison, 21 June 2013; *Garrad v Inglis*, Sheriff Morrison, 19 November 2013; *MB v JB*, Sheriff Holligan, 22 January 2014; *MB v JB*, Sheriff Principal Stephen, 5 September 2014; *Gutcher v Butcher*, Sheriff Principal Pyle, 23 September 2014; *Malcolmson v Atkinson*, Sheriff Stirling, 27 February 2015. Case-law from England concerning the 'as/as if' formula is also available, e.g. *Ghaidan v Godin-Mendoza* [2004] UKHL 30, [2004] 2 AC 557; *Amicus Horizon Ltd v. Estate of Judy Mabbott and Brand* [2012] EWCA Civ 895; [2012] HLR 42). Replacement of the 'as if' formula with the phrase 'having the characteristics of' appears to us to be sacrificing concision without obvious benefit.

While there was some initial criticism of section 25(2) as potentially unnecessary and confusing, given the general definition of "cohabitant" in section 25(1), in practice the courts have been able to reach a view on cohabitation on the basis of the existing section and it is now reasonably established and understood. Case-law has identified the following factors in relation to the existing definition in section 25:
- the length of time living together
- the amount and nature of the time the parties spent together
- whether they lived under the same roof in the same household
- whether they slept together

- whether they had sexual intercourse
- whether they ate together
- whether they had a social life together
- whether they supported each other, talked to and were affectionate to each other
- outward appearances
- their financial arrangements, whether they shared resources, household and child-care tasks
- the intentions of each party and whether any of them were communicated to the other party
- physical separation.

It is therefore unnecessary to attempt to introduce a new definition of cohabitant as recommended in terms of recommendation 38. This would serve to confuse the legal position as the definition of cohabitation in section 25 would continue to apply to cohabitants in relation to section 28 of the 2006 Act. We do not consider it would be helpful to undermine the definition in section 25 by imposing a new and different definition for the purposes of the law of succession.

We would recommend, however, that subparagraph (3) of recommendation 38 be added into section 25 of the 2006 Act. This subparagraph proposes that 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. We would suggest that "periods spent in residential care" be added to the list. The addition of these matters in recommendation 38(3) to section 25 would assist in clarifying a remaining area of uncertainty in the existing test for determination of whether or not a person is a cohabitant for all purposes.

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

Yes [X] **No** [ ] **Don't know** [ ]

Please give reasons for your answer:

Without advancing any view on policy, we can see that it would be illogical not to allow a cohabitant to make a claim in testate succession in the context of the proposals taken as a whole.

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:

We do not think it matters how the amount is expressed. A percentage is acceptable. It should be made clear, for the avoidance of any doubt, that the percentage can be zero. We would also favour retention of the possibility of transfer of property, as in section 29(2)(a)(ii).

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:

At present, under section 29 the court has a discretion to fix a specific payment to be made to the cohabitant taking account of the size and nature of the estate, any benefit received or to be received by the cohabitant (e.g. by contractual pension, under a will where there is partial intestacy, special destination) and the nature and extent of the competing beneficiary's claim which would exist in the absence of the cohabitant's claim.

The short list of factors now included reflects a clear policy choice to take away the court's consideration of these matters. As the Commission state in paragraph 4.19 of the 2009 report, the effect is to introduce 'a veil of ignorance' and to focus only on the 'nature and quality of the parties' relationship' so that the weaker the relationship the less deserving is the cohabitant and the less is the percentage. There will be no consideration of the future needs of the surviving cohabitant, or any benefit received as a result of the other party's death. All that the court does is to assess the relationship by fixing a percentage on a 'broad axe' basis. Standing this policy aim, we have not identified any additional factors which would assist in assessing the nature and quality of the relationship.

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:

Whether the competition is between the spouse and the cohabitant or the children and the cohabitant is a policy matter and we do not propose to comment on matters of policy.

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:

We refer to our answer to Question 41 above. This relates to a matter of policy on which we do not propose to comment.

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:

Reference is made to the Faculty's previous response (2014) on Technical Issues Relating to Succession, a copy of which is provided. As noted therein, it is our view that to extend the period for making a claim to one year is likely to cause unacceptable delay to the settling of estates, and that most cohabitants ought to be able to instigate a claim far more quickly than one year. In practice most do, and if further time is needed to assess the value of the estate, enter into discussions or resolve grieving issues, cases can be sisted to accommodate those problems. We did, however, recognise that there may well be occasions where injustice could arise due to a failure to meet the 6 month deadline, particularly where the delay was not the claimant's fault. The Faculty's view was that section 29 should be revised to include a provision whereby, on the basis of cause shown, the court could allow a late application to be received. That was in the original Bill which preceded the 2006 Act but was not carried forward into the Act. In the Faculty's experience the six-month time limit and the lack of such a provision to allow late applications on cause shown has created occasional difficulties in practice.

Situations we are aware of include:

- Circumstances where a case is brought to reduce a will, which otherwise made suitable provision for the surviving cohabitant. Success in an action of reduction may render the estate intestate. The effect in the absence of a claim under section 29 due to missing the six-month time period, leaves the cohabitant with nothing.

- Circumstances where there is an application to revoke a will in reliance on the conditio si testator sine liberis decesserit. At the time of death, and until the will is revoked, the estate is testate, rendering the claim by the cohabitant incompetent pending an action of declarator being concluded. By that stage again the right to claim will have been lost due to the passage of time.

We suggested therefore that rather than change the six month period for bringing a claim, provision be made for late applications to be received on cause shown. To avoid over use or abuse of such a provision we suggested that the test imposed be that the claimant must show exceptional circumstances.

It remains the Faculty's view that the six month time period for a cohabitant to make a claim is sufficient, subject to late applications being allowed on cause shown, and that this should apply in relation to the proposed new regime. It is noted however that in respect of other provisions under consideration, notably the possibility of dependent children being able to claim for a capital sum payment from an estate, that the proposed time scale is within one year from death, unless on cause shown. If such a timescale is to apply to dependent children then retaining a six month time

limit for cohabitants would be illogical and unfair. In that instance the Faculty would endorse a consistent approach being taken, whereby the timescale is the same for cohabitants, that is one year from the date of death, unless on cause shown.

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.

We have no further comment.

Impact

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

We are not in a position to comment on the impact of implementation of the proposals.

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 [X] **No** [ ] **Don't know** [ ]

Please give reasons for your answer:

The testator's capacity to make or revoke a will should be determined by the same law irrespective of whether the estate disposed of under the will is moveable or heritable. The uniform choice of law on capacity rule should be based on the same connecting factor as the existing choice of law rule for capacity in relation to moveable property, i.e. the testator's domicile.

The testator's domicile should be determined at the time of execution or revocation. The other option, i.e. at the time of the testator's death, would make it impossible for the testator to predict, when making or revoking a will, which law would eventually govern his or her capacity to make it. In general, it would be odd if a person's capacity to do something were governed by the law identified with reference to what happens only after the person in question has purported to do it. The applicable law should be expressly stated to be the internal law of the testator's domicile at the time of execution or revocation. The express reference to internal law would avoid the undesirable effect of *renvoi*.

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 [X] **No** [ ] **Don't know** [ ]

Please give reasons for your answer:

There are two broad considerations against retaining the rule. First, it is not widely known to non-lawyers and does not represent what testators, in our experience, typically expect from the law in the circumstances to which the rule applies. Second, the far-reaching consequences of the rule, i.e. complete revocation of the will at the instance of an after-born child, including provisions as to the appointment of executors, go beyond preventing prejudice to that child. As such, they are disproportionate. In supporting abolition, we anticipate that Option 1 (legal share for all children) is likely to be adopted. If so, there will be a more effective and less drastic form of protection against disinheritance, which is the mischief at which the rule is directed. Reference is made to our answer to Question 19.

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

Yes [X] **No** [ ] **Don't know** [ ]

Please give reasons for your answer:

The dependence of the right to claim continuing aliment on the claimant's need for support exposes beneficiaries enriched by succession to the deceased's estate to a contingent liability of uncertain extent and duration. The right may currently be significant if most of the estate is heritable and so unavailable for legal rights, which reflects the original historical context of the rule where the heir inherited the lion's share of the estate by default. Option 1 seeks to protect specified categories of persons against disinheritance irrespective of the division of the estate into heritable and moveable assets. There is a substantial overlap between the class of persons with the right to claim continuing aliment under the current law and the class of persons who would be protected against disinheritance under Option 1.

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:

The right to claim temporary aliment should be retained for four reasons. First, temporary aliment deals with the practical cash-flow difficulties that a recipient of aliment from the deceased might face immediately after the deceased's death prior to distribution of the estate. Second, temporary aliment is a debt of the estate and, unlike continuing aliment, does not give rise to a claim against rightful beneficiaries in receipt of their respective entitlements. Third, it is restricted to the period of six months after death and does not create an open-ended liability of indeterminate duration and amount. Fourth, the historical rationale for its abolition with reference to the availability of social security benefits to meet the same short-term need appears to be no longer valid.

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:

The requirements to obtain the bond of caution, with its disclosure requirements, and to meet its cost in the first place act as a filter to exclude unsuitable applicants. In line with our response (2014) on Technical Issues Relating to Succession, we do not support abolition of the requirement. If the filter in its current form is removed, however, it will need to be replaced by other safeguards. Further, it cannot be taken that the number of calls on bonds of caution accurately reflects any difficulties with executors-dative in general.

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:

In the absence of such a power all of the protection offered currently by the bond of caution would be lost. It would leave beneficiaries potentially vulnerable to loss from misdistribution by persons whom the deceased would not have considered trustworthy. It can be very difficult for wronged beneficiaries to obtain redress in the event of misdistribution of the estate. The executor-dative or beneficiaries may have spent the money or moved outwith the jurisdiction. The practical rationale for both the existing requirement for a bond of caution and the proposed power of the court to refuse to appoint an executor-dative is the same in both cases. It is the risk that, absent appropriate safeguards, persons who are not suitable to the task will misdistribute the estate, without the deceased having accepted that risk by his or her nomination.

If the requirement for bonds of caution were to be removed, the court should accordingly have the power to refuse to appoint an executor dative in specified circumstances. The test should be whether or not an applicant is a fit and proper person to be appointed. An applicant should be appointed if (i) he or she has complied with certain administrative requirements (see our answer to Question 56); and (ii) no objection to the proposed appointment has been made by any of the persons to whom the application has been intimated. If an objection is lodged, the court should determine, on a balance of probabilities, whether the applicant is a fit and proper person. The burden of displacing the presumption that the applicant who has fulfilled the administrative requirements is a fit and proper person to act as executor-dative should rest on the objector.

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:

The administrative requirements with which an applicant would have to comply would not, in our view, represent a significant cost, even in relation to a small estate of £36,000 or less. If an objection to the appointment is made, the applicant's status as a fit and proper person should not escape scrutiny by the court merely because the declared value of the estate does not exceed the relevant threshold. An estate worth £36,000 may still provoke a legitimate dispute over whether or not an applicant wishing to confirm to it is a suitable person to administer it. The court's power to refuse appointment to small estates should not be undermined by unsuitable persons understating the value of estates to avoid scrutiny.

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:

This assumes that (i) there is an intestacy; and (ii) the rights of the spouse or civil partner exhaust the whole estate.

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:

The exclusion should be defined in the following terms: (i) the executor-dative is the sole beneficiary; and (ii) there are no other claimants to a legal share from the estate.

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

Yes ☐ **No** ☒ **Don't know** ☐

Please give reasons for your answer:

There would have to be a compelling reason why the protection to be provided by the court should be excluded. Other than in the circumstances envisaged in Questions 53 and 54, we see no reason to exclude the relevant protection.

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:

In line with our response to Question 51 above, we do not envisage that the court would require to assess the suitability of the applicant in each case. The applicant should (i) present a simple application in standard form, accompanied by a family tree, draft scheme of division and pro-forma declaration; and (ii) intimate the application to all persons included in the draft scheme of division and any known co-habitant of the deceased. If these formal requirements are complied with and there is no objection to the appointment, the application should be granted. If the formal requirements are not complied with, the application should be refused. If there is an objection, the application should be determined by the sheriff with reference to the fit and proper test. It is only at that stage that the non-exhaustive list of factors would be relevant.

Q.57 If so what factors should be included?

Please provide your answer:

The sheriff should be empowered to refuse an application for appointment on cause shown that the proposed executor is not a fit and proper person to act as executor-dative of the estate. If the applicant has complied with the administrative requirements, he or she should be presumed to be a fit and proper person, and the application for appointment granted, unless the presumption is rebutted by the objector. We would expect that the process would remain largely administrative, with the majority of applications granted without objections.

Sheriffs should be given statutory guidance on the factors to be taken into account in applying the fit and proper test in the context of an objection to the appointment of a proposed executor-dative. The list of factors should be non-exclusive and should

relate to the applicant's financial probity and his or her ability to act in a fiduciary capacity in relation to the beneficiaries of the intestate estate.

The factors should include:
(i) whether the applicant has been sequestrated and/or has entered into a trust deed for the benefit of creditors;
(ii) whether he or she has any unspent convictions for crimes of dishonesty;
(iii) whether he or she has been disqualified from being involved in the management of a limited company or a limited liability partnership;
(iv) whether he or she has been the subject of a prohibition order under section 56 of the Financial Services and Markets Act 2000; and
(v) whether there are any other circumstances indicating that the applicant is not be a fit and proper person to be appointed executor dative.

If a person is disqualified from acting as a fiduciary, such as a director, it seems appropriate that this should be taken into account in deciding whether or not he or she should be allowed to act as a fiduciary in administering an intestate estate. The "fit and proper person" test is one used in other administrative situations (e.g. under the Financial Services and Markets Act 2000 and in licensing).

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? ☐

A family tree and a draft scheme of division should accompany an application for appointment as executor-dative. It is not clear to us why a letter from DWP is being considered as a potential supplement to the application, so we cannot comment on whether or not it would be necessary.

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

There should be a pro-forma declaration as to (i) the absence of bankruptcy (or a trust deed for creditors) within a 5-year period anywhere in the world; (ii) non-disqualification as a director at any time; (iii) the absence of any prohibition order in force or within a 5-year period; and (iv) the lack of awareness of any circumstances which may indicate that the applicant is not a fit and proper person to act as executor-dative.

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

Yes [X] **No** [ ] **Don't know** [ ]

Please give reasons for your answer:

The options for intimation should include (i) recorded delivery post (which would be likely to become the most common manner of intimation); and (ii) personal service by sheriff officers (which would presumably be used very rarely). There can be no reason for restricting intimation to the walls of court as it is at present. Such intimation is, in reality, no intimation at all. The applicant should be required to certify to the court that he or she has intimated the application to the relevant persons.

Any suggestion that beneficiaries should be left to lodge caveats would be a quite unsatisfactory solution. During the period after death beneficiaries will usually be unaware of their right to lodge caveats. They will not know, without legal advice, what a caveat is. In any event, it is not widely known that caveats can be lodged in opposition to executor applications. A fee payable for a caveat against an application that may or may not occur would be an unnecessary cost. The burden should be on the applicant to let those with an interest know about the application, not on those with an interest to protect themselves against the risk of an application being granted without notice**.**

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

Please provide your answer:

Intimation should be made to two categories of persons: (i) all persons who may have claims for legal share, under putative testate provisions or under intestacy to the estate; and (ii) any cohabitant of the deceased at the time of death. Persons falling within (i) would be indicated in the draft scheme of division to be enclosed with the application for appointment.

Q.62 Should the current appeal period be extended?

Yes [X] **No** [ ] **Don't know** [ ]

Please give reasons for your answer:

The period of notice for objections should be 21 days (or 42 days if intimation is to be made to a person outwith Europe). A 14-day period of notice would be too short, given the potential for illness or a period away from home.

21 days is the standard time limit in relation to applications to court in general. These include administrative applications under the Summary Application Rules (e.g. Summary Application Rule 2.7(2), which requires the sheriff's consent if the 21-day or (42-day outwith Europe) time limits in the Ordinary Cause Rules are not to be followed). There should be provision to reduce the 21-day period of notice on cause shown, e.g. due to the need for an executor to raise proceedings to protect the estate.

In the absence of objections, the appointment would be made automatically. If an objection is made, it would need to be determined, with reference to the "fit and proper person" test, at a summary process hearing. The sheriff's decision on the objection could then be appealed to the Sheriff Appeal Court within 14 days, in line with normal rules of appellate procedure.

As a consequence of these changes, sections 4, 5 and 6 of the Confirmation of Executors (Scotland) Act 1858 should be repealed and replaced by modern provisions reflecting the above procedural requirements.

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

Yes [X] **No** [ ] **Don't know** [ ]

Please provide your answer:

The appeal period should be 14 days, in line with the existing appellate procedure.

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

Please see our answers to Questions 51 and 56 to 63.

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

Yes [ ] **No** [ ] **Don't know** [X]

Please give reasons for your answer:

We are not in a position to comment.

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

We are not in a position to comment.

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

Yes [ ] **No** [X] **Don't know** [ ]

Please give reasons for your answer:

The court should not have the relevant power for reasons of (i) testator autonomy and (ii) simplicity of process.

First, as it is the testator's decision whom to nominate as an executor, his or her estate should bear the risk of the executor being untrustworthy or incompetent. If the risk materialises, the executor can be removed from office, on an application to the court, on the grounds of malversation, and the test is the same as for the removal of trustees generally. It would, in our view, be an unjustified and disproportionate interference with testator autonomy for the court to scrutinise executors nominate in advance of confirmation. In our experience, the risk only materialises in a small minority of cases, and guarding against it in all cases by prior scrutiny of executors nominate is unnecessary. The court granting confirmation should also have jurisdiction to remove an executor, without the person seeking removal having to apply to the Court of Session in a separate process.

Second, if the court had the relevant power, the process of obtaining confirmation would be likely to become unduly complicated and costly where in most cases such prior scrutiny would serve no useful purpose. The court would have to decide whether or not to exercise that power on the basis of some available information about an executor nominate, and it would inevitably change the nature of the process from administrative to judicial. Confirmation would take longer and cost more to obtain, and there would be potential for preliminary disputes of fact and advance challenges to confirmation. The increased complexity and cost of the process in all cases outweighs the benefits of scrutiny in a small minority of cases.

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

Yes [X] **No** [ ] **Don't know** [ ]

Please explain your answer:

Please see our answer to Question 67.

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

Please explain your answer:

Please see our answer to Question 67.

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

Yes [X] **No** [ ] **Don't know** [ ]

Please give reasons for your answer:

The doctrine should be abolished but only subject to provision that if a person vested with legal share elected to retain it in preference to a testamentary provision, the

effect of this would be would be that, except as provided in the will, the legal share claimant would be deemed to have predeceased the testator only for the purposes of any testamentary provision or special destination.

The Scottish Law Commission has impliedly proposed, in paragraph 3.44 of the 2009 Report (no. 215) and cl.13(2) of the 2009 Bill, the abolition of equitable compensation for legal share and its substitution with a deemed predecease of the legal share taker. Insofar as the proposal seeks to remove the complexity involved in equitable compensation it is welcome, but it goes too far in the following respects.

First, it excludes all rights of succession of the legal rights taker. This goes well beyond section 13 of the Succession (Scotland) Act 1964. There seems no good reason in principle why the legal rights taker should be prevented from inheriting under the laws of intestacy in a partial intestacy situation. That would not infringe any will of the testator as, by definition, a will does not apply on intestacy.

Second, it excludes all rights of the issue of the legal share taker. In the present law, the taking of legal rights does not affect the rights of the issue of the legal rights taker to a legacy in their favour (as in *Munro's Trs v Munro* 1971 SC 280). We can see no difficulty with the current position. The existing law gives effect to the testator's wish to favour his or her grandchildren, which we consider understandable. We do not see this as an unlikely event, as suggested by the Scottish Law Commission. It seems fair that rejection by a parent of legal rights should not affect a child's rights to take under the will or on intestacy. If cl.13(2) of the Scottish Law Commission's 2009 draft bill were to be used as a legislative provision to abolish equitable compensation, part (b) of cl. 13(2) should be deleted.

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:

In relation to effective revocation of a will, in whole or in part, there should, in our view, be (i) consistency in the law between marriage/civil partnership and the birth of a child as life-changing events for a testator who has made a prior will; and (ii) a difference in the law between the treatment of marriage/civil partnership and divorce/dissolution of a civil partnership. It is safer to presume that a testator would *not* wish to benefit his or her former spouse or civil partner than to presume that a testator would necessarily wish to benefit a post-will spouse or civil partner to the extent of their entitlement on intestacy.

First, given our support for the abolition of *conditio si testator*, we do not favour automatic revocation of a prior will by a marriage or civil partnership. While a marriage or civil partnership is, on any view, a significant event in the life of a testator, it does not justify the automatic presumption that the testator's intentions have changed from a determinate division of the estate under a prior will to the statutory division required by the law of intestacy. The position of a post-will spouse or civil partner is more adequately protected through provisions against

disinheritance in a testate succession than through complete revocation of a prior will and the resulting intestacy. A prior will may well contain provisions which are unrelated to the testator's status as a single person, such as the appointment of executors or a legacy to a charity. A marriage or civil partnership should not render such provisions ineffective.

Second, there is good reason for a presumption that, following a divorce or dissolution of a civil partnership, the testator has changed his or her prior testamentary intentions in one respect, i.e. in that the testator does not wish a former spouse or civil partner to succeed to the estate to any extent. This presumption should not have the effect of revoking a pre-divorce or dissolution will in its entirety, but is best reflected in the former spouse or civil partner being deemed to have predeceased the testator for the purposes of succession to the testator's estate (as proposed in section 1 of the Succession (Scotland) Bill currently before the Scottish Parliament). An analogous provision already exists for revocation of special destinations on divorce or annulment (section 19 of the Family Law (Scotland) Act 2006).