



# FACULTY OF ADVOCATES

## RESPONSE TO

### PREPARATION OF THE ELEVENTH PROGRAMME OF LAW REFORM

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# Questions

1. Do you have any suitable law reform projects to suggest?

**1. Reform of section 3 of the Damages (Scotland) Act 2011**

**2. Divorce law**

**3. Criminal Procedure (Scotland) Act 1995 (ss 274-275)**

**4. Review of regulatory regimes in light of changed working practices**

2. If suggesting a new project:-

(a) Please provide us with information about the issues with the law that you have identified:

**1. Amendment to the Damages (Scotland) Act 2011**

At present, a foetus is not a “person” for the purposes of the Act; and therefore there can be no “loss of society” awards made under section 4 of the Act to the parents of a baby who died *in utero* owing to the negligent act of another (for example, in a road traffic accident or during delivery).

**2. Divorce law**

To consider (1) whether it remains necessary, appropriate, and desirable to have adultery and/or unreasonable behaviour as grounds for divorce in 21<sup>st</sup> century Scotland; and (2) whether, as is now the case in England & Wales following the enactment of the Divorce, Dissolution and Separation Act 2020, couples should be permitted to apply to the court for divorce on a joint basis.

**3. ss. 274-275 of the Criminal Procedure (Scotland) Act 1995**

Section 274 of the 1995 Act imposes a general prohibition on the leading of character evidence and evidence relating to prior sexual activity in relation to sexual offences. Section 275 provides a limited exception to this prohibition. The experience of practitioners in sexual offence cases is that the interpretation of s. 275 has narrowed in recent years. The SLC is invited to consider whether the current approach to ss. 274 and 275 strikes an adequate balance between the rights of complainers and the rights of the accused to lead evidence which may be of relevance to the issues at trial.

**4. Review of regulatory regimes in light of changed working practices**

The pandemic has accelerated changes in working practices. Individual professionals and professional practices are, more and more frequently, operating online. It is, for example, now

possible for regulated professionals, such as doctors, lawyers, and accountants – to interact with their patients/ clients wholly online. Faculty considers that there would be a benefit in an audit being conducted of existing statutory, regulatory regimes to ensure that systems of, in particular, inspection - whether of files or premises - and professional discipline, are fit for purpose where, for some businesses, there may no longer be physical premises or physical files at all; and where the professionals in question may be based furth of Scotland but delivering their professional services to people physically in Scotland. Do regulators have the existing statutory powers to carry out their duties as regards online-only professional services? Is regulation focussed on the physical location of the patient/client or the professional in question? Could there be cross-border issues where more than one regulator has a, perhaps legitimate, claim to jurisdiction? Faculty considers a wholesale review of the regulatory regime underpinning professions operating in Scotland is required to ensure there are no loopholes exposed by changes to working practices.

(b) Please provide us with information about the impact this is having in practice:

### **1. Amendment to the Damages (Scotland) Act 2011**

As law stands currently, parents of a baby whose heart ceases to beat seconds before birth are not entitled to “loss of society” damages; but the parents of a baby whose heart ceases to beat seconds after birth are so entitled. It is the experience of Faculty that parents who find themselves in the former category cannot comprehend the distinction that the law has drawn.

### **2. Divorce law**

This is not being suggested owing to a recognised impact that this is having in practice. Rather, it is being proposed because Faculty considers – without expressing a view one way or the other for the time being – that the time is ripe for these issues to be considered as has just happened in England & Wales, where the parties to a marriage/ civil partnership can apply jointly to the court for a divorce order, and where the Matrimonial Clauses Act 1973 has been amended to remove the requirement to establish facts. While Scotland already has “no fault divorce”, it also permits of behavioural-based grounds of divorce. The question may be asked whether that should remain an option.

Further, as noted Faculty considers that consideration should be given to allowing couples to apply jointly to the court for a divorce. This was something which, during the reform process in England & Wales, was noted as being likely to encourage more amicable divorces. It seems to Faculty that there is merit in consulting on a similar change to the process in Scotland.

### **3. ss. 274-275 of the Criminal Procedure (Scotland) Act 1995**

A number of issues arise in relation to the present approach to the law. Firstly, there is a sense that the scope of the exception in s. 275 is unpredictable and subject to repeated judicial consideration. Appeals in relation to s. 275 applications form a substantial part of the Appeal Court’s business. This leads to practitioners having difficulty in advising clients and formulating trial strategies when it is difficult to predict what evidence will and will not be admitted. Further, the present approach arguably excludes too much evidence from a jury’s consideration. Relevant context may be excluded from the jury.

#### **4. Review of regulatory regimes in light of changed working practices**

Faculty is aware that this issue has come up as regards at least one regulated profession; but the purpose of the suggested audit would be to identify all potentially affected professions and to ensure that any identified loopholes are closed.

(c) Please provide us with information about the potential benefits of law reform:

#### **1. Amendment to the Damages (Scotland) Act 2011**

It would treat with parity the parents who suffer the tragedy of the death of their baby through negligence – regardless whether the baby’s heart was beating briefly at birth or whether it had stopped beating just before. For the avoidance of doubt, Faculty does not propose any broader reform to the question of when life is determined to begin as a matter of law; but rather envisages this to be a situation-specific solution to an identified unfairness in the law of damages, and which solution recognises that, if at the point of the accident or delivery there would have been a live birth but for the negligence, the parents are entitled to assert that they have suffered the loss of a child and a real bereavement, and receive damages from the wrongdoer.

#### **2. Divorce law**

As outlined above, Scotland already has “no fault” divorce, but there remains no option for a joint application for divorce, hence, the present system may be said to be unnecessarily adversarial. As noted, Faculty is not advocating one way or the other whether either of changes that are suggested for consideration are actually made. Rather, Faculty considers that these sub-topics in the law of divorce would merit consultation.

#### **3. ss. 274-275 of the Criminal Procedure (Scotland) Act 1995**

The law in relation to these provisions has developed incrementally in the context of specific factual circumstances in specific cases. The Faculty considers that it would be beneficial for the SLC to analyse the issues from first principles and consider whether any reformulation of the statutory tests is necessary in order to: (i) promote certainty, and (ii) strike the correct balance between the rights of complainers and the rights of the accused.

#### **4. Review of regulatory regimes in light of changed working practices**

As above. If loopholes exist but are not proactively identified and closed, regulators may find themselves being challenged when regulatory action is taken.

3. Do you consider that your suggested law reform project would be suitable for the law reform process in the Scottish Parliament; or, in relation to reserved matters, for the House of Lords procedure for Commission Bills?

**1. Amendment to the Damages (Scotland) Act 2011**

Faculty considers that this may be suitable for the Scottish Parliament's law reform process. The principal stakeholders are likely to be those who represent pursuers and insurers; however, it may be prudent to assess the strength of any objections received before making a decision.

**2. Divorce law**

No.

**3. ss. 274-275 of the Criminal Procedure (Scotland) Act 1995**

Potentially, depending on the outcome of any review of the existing law.

**4. Review of regulatory regimes in light of changed working practices**

Faculty considers that this may be suitable for the Scottish Parliament's law reform process.

**Any Other Comments**

None

Thank you for taking the time to respond to this consultation paper. Your suggestions and comments are appreciated and will be taken into consideration when preparing our Eleventh Programme of Law Reform.