

SCOTTISH LAW COMMISSION
ELEVENTH PROGRAMME OF LAW REFORM: CONSULTATION

Introduction

1. The Scottish Law Commission is seeking suggestions for suitable law reform projects for our next Programme of Law Reform, our Eleventh Programme. It will commence in 2023.
2. The Commission would greatly value any suggestions or comments that you may have. The consultation period closes on 29 July 2022.
3. The Commission's current Programme, the Tenth Programme of Law Reform (Scot Law Com No 250), was published in February 2018 and runs until the end of 2022. The Programme can be viewed on our website, at the following link: https://www.scotlawcom.gov.uk/files/5615/1922/5058/Tenth_Programme_of_Law_Reform_Scot_Law_Com_No_250.PDF.
4. We will submit a draft of the Eleventh Programme to Scottish Ministers for approval, and laying before the Scottish Parliament.

The context

5. In preparing for the Eleventh Programme, the Commission will have regard to the Scottish Government's National Performance Framework, which aims to:
 - create a more successful country
 - give opportunities to all people living in Scotland
 - increase the wellbeing of people living in Scotland
 - create sustainable and inclusive growth
 - reduce inequalities and give equal importance to economic, environmental and social progress.

6. The Commission's remit covers all of Scots law, both reserved and devolved areas of the law. Reform may be needed because the law is causing difficulties in practice, for example where the law is unfair, unclear, unduly complex or out-of-date. It may also be desirable in areas where consolidation of existing legislation, or repeal of spent legislation, would be beneficial.

Criteria for selection of topics for the Eleventh Programme

7. The selection criteria for the Eleventh Programme are as follows –

- *Importance:* The extent to which the law is unjust or out of date (for example, unfair, unclear, inaccessible, inefficient, unduly complex or outdated); and the potential benefits likely to arise from reform of the law.
- *Suitability:* Whether the issues concerned are predominantly legal rather than political; and whether there is any other body better placed to examine the topic in question.
- *Resources:* The expertise and experience of Commissioners and legal staff and, in relation to projects where there may be a substantial role for a consultant, the availability of adequate funding; and the need for a mix of projects in terms of scale and timing in order to achieve a balance of workload among Commissioners and facilitate effective management of the Programme.

The Commission will also bear in mind whether a Bill on the topic may be suitable for the special parliamentary law reform processes, in particular the procedure for certain Commission Bills in the Scottish Parliament which is described below.

Projects to be carried forward into the Eleventh Programme

8. A number of projects under the Tenth Programme will be carried forward into the Eleventh Programme in 2023. These are –

- Homicide
- Heritable securities
- Damages for personal injury
- Aspects of family law.

9. Further details of these projects can be found on our website: <http://www.scotlawcom.gov.uk/law-reform-projects/>.

10. Also, in January 2022 the Cabinet Secretary for Social Justice, Housing and Local Government made a reference to the Commission to undertake a review of tenement law in connection with compulsory owners' associations.

11. As regards law reform work with other Law Commissions, the Commission may continue to work on joint law reform projects with the Law Commission for England and Wales.

12. In considering the content of the Eleventh Programme, the Commission needs to take account of our existing workload, together with any joint law reform projects.

Projects intended for special Parliamentary processes for law reform

13. The Commission has worked for a number of years with the Scottish Government and the Scottish Parliament to improve planning for implementation of Commission Reports, and to put in place further mechanisms to improve the rate of implementation.

14. This resulted in the Scottish Parliament introducing a procedure to improve consideration of certain Commission Bills. These can now be dealt with by the Delegated Powers and Law Reform Committee. The criteria set by the Presiding Officer for such a Bill were revised in March 2022 and apply to bills whose primary purpose is to:-

“(a) simplify, modernise or improve the law to—

- (i) ensure it is fit for purpose,
- (ii) respond to developments, or address deficiencies, in the common law, or
- (iii) respond to other developments in the law;

(b) make provision which is not likely to generate substantial controversy among stakeholders.”

15. As part of our business planning and our law reform methodology, the Commission considers that it is important to take account of the procedure and to identify projects that may produce draft legislation suitable for it. We would wish to stress, however, that the procedure will not be suitable for all Commission Bills. We envisage that some Commission Bills will continue to go through the conventional Parliamentary procedures, with the lead committee being the Equalities, Human Rights and Civil Justice Committee, or the Criminal Justice Committee, or one of the other subject committees.

16. In the UK Parliament in Westminster, there is also a special procedure for certain Law Commission Bills, including Scottish Law Commission Bills, in the House of Lords. The procedure is available for uncontroversial law reform measures.

17. The Commission would be grateful for any suggestions by consultees for a law reform project for the Commission Bill process in the Scottish Parliament; and for a project addressing an issue of Scots law reserved to the UK Parliament that may be a suitable candidate for the House of Lords procedure for Commission Bills.

Conclusion

18. The Commission would be grateful for your suggestions and comments on the content of the Eleventh Programme of Law Reform. In particular –

1. Do you have any law reform projects to suggest?
2. Do you have any project to suggest that would be suitable for the Commission Bill process in the Scottish Parliament; or, in relation to reserved matters, for the House of Lords procedure for Commission Bills?

19. If suggesting a new project, the Commission would be grateful if you could also provide us with information about:

- the problems and weaknesses with the law that you have identified;
- the impact this is having in practice; and
- the potential benefits of law reform.

A response form is attached below.

THE SCOTTISH LAW COMMISSION

MAY 2022

RESPONSE FORM

PREPARATION OF THE ELEVENTH PROGRAMME OF LAW REFORM

We hope that by using this form it will be easier for you to respond to the questions set out above in the consultation paper. Respondents who wish to address only some of the questions may do so. The form allows you to enter comments in a box after each one. At the end of the form there is also space for any general comments you may have.

Please note that information about this consultation paper, including copies of responses, may be made available in terms of the Freedom of Information (Scotland) Act 2002. Any confidential response will be dealt with in accordance with the 2002 Act.

We may also (i) publish responses on our website (either in full or in some other way such as re-formatted or summarised); and (ii) attribute comments and publish a list of respondents' names.

In order to access any box for comments, press the shortcut key F11 and it will take you to the next box you wish to enter text into. If you are commenting on only one or two of the questions, continue using F11 until you arrive at the box you wish to access. To return to a previous box press Ctrl+Page Up or press Ctrl+Home to return to the beginning of the form.

Please save the completed response form to your own system as a Word document and send it as an email attachment to info@scotlawcom.gov.uk. Comments not on the response form may be submitted via that email address or by using the [general comments form](#) on our website. If you prefer you can send comments by post to the Scottish Law Commission, 140 Causewayside, Edinburgh EH9 1PR.

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Questions

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

The admissibility of expert evidence in Scots criminal law

2. If suggesting a new project:-

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

The admissibility of expert evidence has been subject to extensive discussion in other jurisdictions (notably the USA, and England and Wales). This has been prompted by in-depth investigations into the reliability and validity of forensic science (e.g. the US National Academy of Science (NAS) report “*Strengthening Forensic Science: The Path Forward*” (2009) and the US President’s Council of Scientific Advisors (PCAST) report “*Forensic Science in Criminal Courts: Ensuring Scientific Validity of Feature-Comparison Methods*” (2016)).

These reports found that substantial swathes of forensic science are *not in fact scientific*: “*much* forensic evidence—including, for example, bitemarks and firearm and toolmark identifications—is introduced in criminal trials without *any* meaningful scientific validation, determination of error rates, or reliability testing to explain the limits of the discipline” [emphasis added]. The substance of expert evidence is international. The scientific standards which should apply to fingerprints, DNA, blood spatter, telephone analysis, drug analysis, etc. are the same in Scotland as in the USA, England and Wales, Europe, Australasia etc. Therefore if other jurisdictions have, after extensive investigations, found their expert evidence provision to be lacking in a scientific basis and their admissibility rules to be hitherto deficient in identifying this, then the same legal and scientific scrutiny is due in Scotland.

Significantly, the above-noted reports generated changes to admissibility practices and outcomes in US state and federal courts; a Law Commission of England and Wales consultation and report on “*The Admissibility Of Expert Evidence In Criminal Proceedings In England And Wales: A New Approach to the Determination of Evidentiary Reliability*” (2011); new Practice Directions on expert evidence (in England and Wales) in 2015; and amendments to US Federal Rule 402 on the admissibility of relevant evidence in 2021.

In comparison, only a single reported case in Scotland (*Young (Thomas Ross) v HM Advocate [2013] HCJAC 145*) appears to advance the Scots criminal law on the admissibility of expert evidence. *Young* sets out some rules for the admissibility of expert evidence in Scots criminal law, but confined by the nature of the case facts, it naturally confines itself to the necessary circumstances. Very little has been written academically or judicially in relation to *Young*, despite the abundance of jurisprudence and debate about the admissibility of expert evidence abroad, and the clear applicability of those issues to Scots forensic science and criminal law.

In the Scots civil forum, *Kennedy (Appellant) v Cordia (Services) LLP (Respondent) (Scotland) [2016] UKSC 6* (on appeal from *[2014] CSIH 76*) does elucidate some of the issues raised internationally but clearly it is not directly authoritative in the canon of Scots criminal law. (Despite this, there is anecdotal evidence to suggest that criminal practitioners in Scotland – both prosecution and defence – are more familiar with and rely more heavily on *Kennedy*, without reference to *Young* at all.) This is perhaps an indication of the low level of attention which has been drawn to this issue in Scotland over the past few decades (e.g. post-*Shirley McKie*.)

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

As above. Scots criminal law utilises the same forensic science as the Americans, English, Welsh, Europeans etc. Yet in practice, and despite the significant efforts made in those jurisdictions to tighten and develop their rules of admissibility for expert evidence, to better ensure that only evidence based on valid and reliable science is admitted into criminal proceedings, almost no comment or change has been made in Scotland.

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

The obvious risk arising from the admission of unscientific expert evidence in Scots criminal law is that of miscarriages of justice. This risk is particularly high where limits on legal aid inhibit the defence from properly being able to scrutinise prosecution expert evidence, and where the pool of available expert witnesses (outside of the Crown's provision) is extremely small. In such circumstances, it is imperative that the Crown itself can be sure of the validity and reliability of its evidence, and that the judiciary is properly aware of the emerging international evidence about this issue. Law reform based upon wide consultation about the admissibility of expert evidence in Scots criminal law is long overdue and will ensure that Scots criminal law has the best possible chance of avoiding avoidable miscarriages of justice, and of upholding the rule of law.

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?

Yes. For reasons of economics, the 2011 recommendations of the Law Commission of England and Wales were not followed; legislation was overlooked in favour of Practice Directions. This has resulted in ongoing difficulties with the use of expert evidence in those jurisdictions (including serious disclosure scandals – e.g. *Liam Allen 2017-18*) and perhaps indicates that a more serious approach – by engaging the legislative process – should be preferred.

Any Other Comments

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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.