

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](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because the law is causing difficulties in practice, for example where the law is unfair, unclear, unduly complex or out-of-date.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- *Importance*: The extent to which the law is unjust or out of date (for example, unfair, unclear, inaccessible, inefficient, unduly complex or outdated); and the potential benefits likely to arise from reform of the law.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.

Name:

Dr Sorcha Hume

Organisation:

Friends at the End

Address:

4 Queen Street, Edinburgh, EH2 1JE

Email address:

sorcha.hume@fate.scot

Questions

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

Assisted dying for terminally ill adults with mental capacity

2. If suggesting a new project:-

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

Throughout the UK, a person assisting in the death of another risks being charged with criminal offences. In Scotland, there is no distinct legislation that governs ending your own life or assisted dying. The scope of the law in England and Wales (E&W) and in Northern Ireland (NI) is broader than in Scotland. In E&W under the Suicide Act 1961, and in NI under the Criminal Justice Act 1966, it is not a crime to take your own life, but it is a crime to encourage or assist suicide. The legislation in England, Wales and Northern Ireland does not apply to Scotland.

In Scotland, there is no equivalent legislation, thus while assisted dying is not, in itself, a specific criminal offence in Scotland, assisting the death of another may give rise to liability for either murder or culpable homicide where there is requisite intention and a causal link. While the Court of Session has held that “it is not a crime to assist in a suicide” in Scotland – and this includes “taking persons to places where they may commit, or seek assistance to commit, suicide” – the legal position for other forms of physical assistance which a medic, family member or friend may give to a terminally ill person remains unclear. The Lord Advocate in Scotland has indicated that where there is sufficient evidence that a homicide has occurred, they would regard such actions as deliberate killing, and thus a charge of murder or culpable homicide could be brought. This approach generates considerable uncertainty about what conduct is and is not lawful, exposing anyone who assists a family member, friend or patient to end their life to the risk of being indicted for murder or culpable homicide if their assistance appears to the prosecutor to be the “immediate and direct cause” of death.

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

According to Dignity in Dying, pre-pandemic one person every eight days travelled from the UK to Switzerland in order to end their life, and recent polling showed that over half the population in Scotland would consider travelling abroad for an assisted death if they had a terminal illness, or one which caused them incurable suffering.

At least 20 Scottish citizens have died at Swiss facilities such as Dignitas. Silvan Luley of Dignitas attended a Cross Party Group meeting at the Scottish Parliament and urged MSPs

to change the law, as his organisation and others are oversubscribed and overburdened by terminally ill people travelling abroad, due to the lack of assistance to die in their own country.

The issue is one of transparency, accountability, safety and justice. Scotland should not outsource this issue, driving it underground and away from the protective framework of the law. There have been numerous cases in Scotland of loved ones assisting a relative to die. These cases often go unreported or are considered by the Lord Advocate not to be in the public interest to prosecute. In the very few cases that do reach court, the result is often admonishment. Families are facing excruciating decisions on whether to assist a loved one to die, risking the prospect of life imprisonment. Or conversely, they are fearful of acting, and as a result, must witness a loved one suffering unbearably. Currently, the only record kept of people's intent/motives is in relation to a potential police investigation after a person has been assisted to die. The distress caused by a lengthy investigation/consideration of a case for prosecution that is eventually dropped cannot be understated and compounds the existing suffering of the family as a result of the lack of legal clarity.

The Scottish Government does not hold information on the number of people who have assisted another to die. Should such an incident lead to the recording of a homicide by Police Scotland or the prosecution of an individual through the courts, it will be included in the National Statistics on Homicide or the National Statistics on Criminal Proceedings, respectively. However, the information received for these publications does not specify whether the homicide involved an individual assisting another to die. Therefore, we know anecdotally that people are increasingly taking the law into their own hands, either by helping a loved one to die or by taking their own life alone, illinformed and often in violent and distressing ways, but we have no reliable record of such frequency. If the legal institutions are not prosecuting individuals, if they are treating convictions leniently and are allowing people to travel abroad to access/support assisted dying, then it would be better to allow assisted dying within a regulated framework. There is a risk to public trust in the legal institutions if the existing law proclaims an outright prohibition, but the consequences do not follow in practice. People living with terminal illness have an increased likelihood of attempting to end their own life, and many do, often alone and in traumatic circumstances.

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

Where assisted dying is legal, evidence shows that such laws are safe and effective. Implementing a framework for legal reform would ensure the right checks and balances are in place for individuals and their families as well as for professionals involved in their care and would remove the current covert practices. Arguably, the current law in Scotland does not provide adequate protection to vulnerable people. Only a minority of cases are investigated when someone travels overseas for an assisted death. The fact that assisted dying overseas is tolerated without clear regulation means that we lack any clear safeguards for vulnerable people.

Under the current law, decisions that doctors can take that may hasten a person's death, such as withdrawing treatment or double effect, involve far fewer safeguards and less oversight

than would be present under an assisted dying law. Where some doctors are currently acting illegally to directly end a person's life at their request (voluntary euthanasia), there are no safeguards in place at all. The barrier that the current law creates does not stop people taking action to control the end of their lives but instead drives the practice behind closed doors. This means potentially vulnerable people cannot be and are not being protected. In contrast, an assisted dying law would protect people by bringing these difficult decisions out into the open. It would introduce safeguards before a person could access an assisted death, and therefore provide both more protection and more choice than the current law allows.

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

Any Other Comments

N/A

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.