

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because the law is causing difficulties in practice, for example where the law is unfair, unclear, unduly complex or out-of-date.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- *Importance*: The extent to which the law is unjust or out of date (for example, unfair, unclear, inaccessible, inefficient, unduly complex or outdated); and the potential benefits likely to arise from reform of the law.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

There is much inter-relation between insolvency law and other areas of law – Property Law, Health & Safety Law, Environment Law – to name a few.

2. If suggesting a new project:-

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

There is significant interaction between insolvency law and other areas of law. In most cases it is clear whether insolvency legal provisions take priority (e.g. cessation of diligence) or whether an insolvency practitioner is subject to competing legal provisions (for example employment law). In certain situations it is not clear which provision takes priority. In other instances a competing legal provision takes priority to the detriment of the entity subject to the insolvency process. We outline a number of such scenarios below for consideration.

Abandonment of property in corporate cases

The case of *Scottish Coal Company Limited (Liquidation)*, [2013] CSIH 108, Second Division, Inner House, Court of Session, confirmed that a Liquidator of a registered company has no power to abandon heritable property in Scotland unlike a liquidator of company with property in England and Wales. In the latter case, the liquidator can by virtue of the statutory power of disclaimer of onerous property (including land) under ss.178-182 of the Insolvency Act 1986 abandon property. The inability to disclaim onerous property in Scotland can have significant impact on creditors, given that costs of actively dealing with an asset and its disposal may, as demonstrated by the Scottish Coal decision, outweigh any realisations. It should also be noted that the power to abandon heritable property and assets generally vests in the Trustee in sequestration.

Environmental Law

In the case, *Joint Liquidators of Doonin Plant Ltd, Noters ('Doonin')* was decided on 28 August 2018. On 20 July 2015 the court ordered that the company be wound up. Prior to that date the Scottish Environmental Protection Authority ('SEPA') had issued notices requiring the company to remove waste from its site, but these were under appeal at the commencement of the winding up. After considering both the Environmental Protection Act and the Waste Framework Directives of the EU, which the Act was intended to implement Lord Doherty decided that the 'polluter pays' policy of the legislation meant that expenditure to remove harmful waste and remedy any damage was a liquidation expense having priority over creditors' claims and, according to the ranking of such expense in the insolvency rules, had

priority over the liquidator's remuneration. Lord Doherty, however, was able to exercise his discretion to change the ranking of expenses under the Insolvency Act 1986 s.156 and ordered that the liquidator's remuneration and outlays be paid in priority to the debts arising from the environment protection legislation.

While the outcome in Doonin did provide the liquidator with assurance that his legitimate claim for running the liquidation process would have priority, it is unsatisfactory (at least) that this depends on the court exercising its discretion, notwithstanding his Lordship's view that 'there is no real risk that the court would refuse such an order'. If steps are not taken to accord the liquidator's claim priority over all other expenses as a matter of right, there must be a risk that insolvency practitioners will not accept appointment as liquidator where environmental costs might deny his claim for the expense of carrying out the liquidation procedure. If no practitioner is prepared to accept the appointment, who will conduct the liquidation?

Whilst Doonin related to an insolvent company, the legislation also applies (with adaptation) to LLPs. The new Scottish insolvency rules for receivership and liquidation took effect from 6 April 2019. The treatment of expenses in liquidations is not amended, so the problem created by Doonin will remain unless and until this is addressed.

Review of personal insolvency and debt solutions in Scotland – Stage 3

In September 2019, the then Minister for Business, Fair Work and Skills Jamie Hepburn pledged to take forward a wide-ranging review of Scotland's debt solutions.

There has been a significant amount of consultation and scrutiny of the debt solutions operating in Scotland which will help to lay the foundation for this wider review. At the Ministerial Working Group on Statutory Debt Solutions on 26 October 2020, it was agreed that the general review would be conducted in a three stages. Stage 3 involves a longer term strategic review of the debt solutions to assess if they meet the needs of a modern economy. This work is likely to include consider:

- Critical assessment of existing debt solutions to establish if they are fit for purpose and meet the needs of a modern economy
- Treatment of the family home in debt solutions
- Need for assessment of trading entities within the personal insolvency system – whether they need to be treated differently
- Funding of the insolvency/debt system
- Regulation of the insolvency system

We are aware that the Accountant in Bankruptcy has written to SLC with a formal request that the Commission conducts this Stage 3 review and we support that request.

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

The inconsistency and conflicts between insolvency law and other areas of law do not support an effective and economically beneficial UK regime of corporate insolvency particularly where corporates have interests in both England and Scotland.

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

Significant cost savings to creditors.

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?

Any Other Comments

If you would like to virtually meet or if you have any other queries, please contact R3's Head of Technical, Ben Luxford, at ben.luxford@r3.org.uk or on 020 7566 4218.

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.