



Scottish Law Commission

*promoting law reform*

(SCOT LAW COM No 264)

**eleventh programme  
of law reform**



# Scottish Law Commission

*promoting law reform*

The Commission was established under the Law Commissions Act 1965

## Our function

To recommend reforms to improve, simplify and update the law of Scotland

## Our role

To play a leading role in developing the law for the people of Scotland so that it is just, principled, responsive and easy to understand



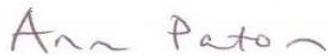
eleventh programme  
of law reform



## Eleventh Programme of Law Reform

To: Angela Constance MSP, Cabinet Secretary for Justice and Home Affairs

We have the honour to submit for approval by the Scottish Ministers our Eleventh Programme of Law Reform, which took effect on 1 January 2023.



ANN PATON, *Chair*



DAVID BARTOS



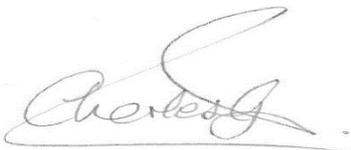
GILLIAN BLACK



KATE DOWDALLS



FRANKIE McCARTHY



CHARLES GARLAND, *Interim Chief Executive*  
17 May 2023

Laid before the Scottish Parliament by the Scottish Ministers under section 3(2) of the Law Commissions Act 1965

May 2023

The Scottish Law Commission was set up by section 2 of the Law Commissions Act 1965<sup>1</sup> for the purpose of promoting the reform of the law of Scotland. The Commissioners are:

The Right Honourable Lady Paton, *Chair*  
David Bartos  
Professor Gillian Black  
Kate Dowdalls KC  
Professor Frankie McCarthy

The Interim Chief Executive of the Commission is Charles Garland. Its offices are at 140 Causewayside, Edinburgh EH9 1PR.

Tel: 0131 668 2131  
Email: [info@scotlawcom.gov.uk](mailto:info@scotlawcom.gov.uk)  
Or via our website at <https://www.scotlawcom.gov.uk/contact-us/>

## NOTES

1. Please note that all hyperlinks in this document were checked for accuracy at the time of final draft.
2. If you have any difficulty in reading this document, please contact us and we will do our best to assist. You may wish to note that the pdf version of this document available on our website has been tagged for accessibility.
3. © Crown copyright 2023



You may re-use this publication (excluding logos and any photographs) free of charge in any format or medium, under the terms of the Open Government Licence v3.0. To view this licence visit <http://www.nationalarchives.gov.uk/doc/open-government-licence/version/3>; or write to the Information Policy Team, The National Archives, Kew, Richmond, Surrey, TW9 4DU; or email [psi@nationalarchives.gsi.gov.uk](mailto:psi@nationalarchives.gsi.gov.uk).

Where we have identified any third party copyright information you will need to obtain permission from the copyright holders concerned.

This publication is available on our website at <https://www.scotlawcom.gov.uk/>

Any enquiries regarding this publication should be sent to us at [info@scotlawcom.gov.uk](mailto:info@scotlawcom.gov.uk)

ISBN: 978-1-9989963-7-7

---

<sup>1</sup> Amended by the Scotland Act 1998 (Consequential Modifications) (No 2) Order 1999 (SI 1999/1820).

# Contents

Chair's foreword .....	6
Introduction .....	8
Background .....	8
Tenth Programme: completed projects and ongoing work .....	8
Eleventh Programme: project selection criteria .....	8
Consultation .....	9
Basis of the Eleventh Programme .....	10
Advice to Government departments and the Scottish Ministers .....	10
Joint work with the Law Commission of England and Wales.....	10
Insurance contract law.....	11
Surrogacy.....	11
Consolidation and statute law repeals .....	11
Eleventh Programme of Law Reform .....	13
Preliminary .....	13
Tenement law: compulsory owners' associations .....	14
Heritable securities.....	14
Aspects of leases .....	15
Homicide .....	15
Aspects of family law .....	15
Surrogacy.....	17
Damages for personal injury .....	17
Execution of documents .....	18
Limitation.....	18
Executry law .....	19
Consolidation: nature conservation.....	19
Appendix A Tenth Programme Projects .....	21
Appendix B Joint reports with the Law Commission of England and Wales completed during the Tenth Programme .....	22

## Chair's foreword



The Programme has been the subject of extensive consultation with the legal profession, the judiciary, academic lawyers, support groups, government bodies, MSPs, and members of the public. We are grateful to all those who suggested topics for our consideration.

*Ann Paton*

**THE RT HON LADY PATON**  
*Chair*

Our Eleventh Programme covers the 5 years from 2023 to 2027, and includes several projects continuing from the previous Programme, namely heritable securities, aspects of leases, homicide, aspects of family law (in particular, civil remedies for domestic abuse), surrogacy, and damages for personal injuries. Work on compulsory owners' associations in tenements (the subject of a ministerial reference) also continues. Additional topics will be execution of documents, limitation, and executry law. Further, a consolidation exercise is to be undertaken concerning nature conservation legislation.

We welcome the opportunity to make contributions to law reform in Scotland, and also to join with the Law Commission of England and Wales in GB-wide projects.



# Chapter 1 Introduction

## Background

1.1 The Scottish Law Commission has a duty under section 3 of the Law Commissions Act 1965 to prepare and submit to Scottish Ministers Programmes for the examination of different branches of the law with a view to reform. This is the eleventh such Programme submitted for approval.<sup>1</sup> It represents a rolling programme as it includes ongoing work from the Tenth Programme as well as identifying new projects to be undertaken. It covers a period of five years from the beginning of 2023 until the end of 2027.

1.2 We are also required to make a recommendation as to the agency by which any examination of branches of the law should be carried out.<sup>2</sup> We recommend that the projects identified in this Programme should be undertaken by this Commission rather than by any other agency.

## Tenth Programme: completed projects and ongoing work

1.3 As background we highlight in the table at Appendix A the projects that we have undertaken in terms of the Tenth Programme, which commenced in January 2018 and ran until the end of 2022. The table indicates the Tenth Programme projects that we have completed and the work that continues into the Eleventh Programme.

## Eleventh Programme: project selection criteria

1.4 For the purpose of selecting new projects for this Programme we adopted the following criteria:

- *importance*: the extent to which the law is unsatisfactory (for example, unfair, unclear, inefficient, unduly complex or outdated); and the potential benefits likely to accrue from undertaking 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; and
- *resources*: the expertise and experience of Commissioners and legal staff; 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 to facilitate effective management of the Programme.

---

<sup>1</sup> The previous programmes are: [Scot Law Com No 1](#) (1965); [Scot Law Com No 8](#) (1968); [Scot Law Com No 29](#) (1973); [Scot Law Com No 126](#) (1990); [Scot Law Com No 159](#) (1997); [Scot Law Com No 176](#) (2000); [Scot Law Com No 198](#) (2005); [Scot Law Com No 220](#) (2010); [Scot Law Com No 242](#) (2015); [Scot Law Com No 250](#) (2018).

<sup>2</sup> See 1965 Act, s 3(1)(b).

We also bear in mind whether a Bill on the topic may be suitable for the special Parliamentary law reform processes, in particular the procedure in the Scottish Parliament for referring certain Commission Bills to the Delegated Powers and Law Reform Committee.

## Consultation

1.5 In May 2022 we launched our consultation with an event in the Mackenzie Building of the Faculty of Advocates in Edinburgh. A recording was made and we put it on our YouTube channel for those unable to attend in person.<sup>3</sup> Lady Paton and the other Commissioners gave presentations of some possible topics for our next Programme, which included a number of projects in our Tenth Programme which are still in progress. These are the review of homicide; damages for personal injury; heritable securities; aspects of family law; aspects of leases; and surrogacy. The reference in respect of compulsory owners' associations in tenement buildings was also included.

1.6 Our consultation paper was published on our website and publicised via our Twitter account. Our opportunities to hold meetings were rather different from those at the comparable stage of the formation of previous Programmes, largely due to the continued shadow of the Covid-19 pandemic. However, we engaged as widely and appropriately as we were able. This was almost exclusively by virtual means. We met the Public Policy Committee of the Law Society of Scotland, and engaged closely with the Law Commission of England and Wales in relation to possible work which would benefit from our input, and also with Scottish Government officials.

1.7 We received a total of 38 formal responses, from a wide range of consultees including representative bodies, public officials, solicitors, academic lawyers, and members of the public. We are most grateful to all who took part in our consultation.

1.8 We gave careful consideration to all the contributions that we received. A number of topics put to us did not meet our project selection criteria: for example, where the issues were more political than legal. Certain other topics which were suggested are worthy candidates for a law reform project; but we have limited capacity, and have had to select an appropriate number of topics for inclusion in this Programme. In doing so we gave due weight to the support expressed in the consultation for particular topics. In yet other cases the topic was suitable as a law reform project and was something for which we had resources but we considered that the timing was not appropriate for a Programme project, for example because we were aware of ongoing work in the same area by another body whose recommendations would affect any work we would want to do. In such a case, we may accept a reference from the Scottish Ministers or the UK Government for work when the time is right.

1.9 There is clearly much to do on law reform. We commend to Scottish Ministers and the Scottish Parliament the value of continuing to implement law reform measures, in order to maintain a modern and efficient system of law for Scotland.

---

<sup>3</sup> It can be viewed here <https://www.youtube.com/watch?v=9Ai24ViK710>.

## **Basis of the Eleventh Programme**

1.10 We have continued the previous practice of classifying projects broadly as short-term, medium-term or long-term for the purposes of our Programme. A project is:

- *short-term*, where we expect to complete it well within the life of the Programme;
- *medium-term*, where we intend to complete it by the end of the Programme, ie by the end of 2027;
- *long-term*, where the project will most likely be carried into the next Programme, because either the project is a substantial one or work on it will commence in the later stages of this Programme.

1.11 When classifying projects it should be borne in mind that priorities during a Programme can change, for a variety of reasons. Our resources may be re-directed due to other requirements, such as responding to a reference from Ministers, or undertaking joint projects with the Law Commission of England and Wales; or the legal questions arising in a project may turn out to be more complex or may change due to further developments, and as a result the project takes longer to complete than anticipated.

## **Advice to Government departments and the Scottish Ministers**

1.12 From time to time we accept references for advice made to us by the Scottish Ministers or the UK Government. Such requests are sometimes for an urgent review of the law, requiring us to focus resources on the topic and produce recommendations within a short period of time. In addition Ministers sometimes ask individual Commissioners, because of their expertise in a particular area of law, to serve on a working group; and equally the Government may ask for informal advice from us on current legal issues. In practice such references may have to be given priority over our Programme work and so affect progress on the Programme.

1.13 In January 2022 the Cabinet Secretary for Social Justice, Housing and Local Government referred to us a question regarding the establishment of compulsory owners' associations in tenement buildings. We have commenced work on that reference and it is to be continued into our Eleventh Programme.

## **Joint work with the Law Commission of England and Wales**

1.14 We take account of the work being carried out by the Law Commission of England and Wales. The Law Commission is currently working under its Thirteenth Programme of Law Reform.<sup>4</sup> Some of its work may have an effect on the law of Scotland and, if so, we will consider whether or not to give advice on Scots law or undertake a project as a joint one with the Law Commission.

---

<sup>4</sup> [Law Com No 377](#).

1.15 We have also undertaken joint law reform projects with both the Law Commission of England and Wales and the Northern Ireland Law Commission.

1.16 We set out in Appendix B the joint projects completed during the Tenth Programme, and we mention immediately below the joint projects which will continue into the Eleventh Programme.

#### *Insurance contract law*

1.17 For a number of years we have been assisting the Law Commission of England and Wales with a major project on insurance contract law. Following the implementation of our recommendations to date by the Consumer Insurance (Disclosure and Representations) Act 2012, and the Insurance Act 2015 as amended by Part 5 of the Enterprise Act 2016, there is one remaining substantive topic of this project, that of insurable interest. In 2018 we consulted on a working draft of a Bill the aim of which was to address issues in the current law of insurable interest which appear to be hindering the development of socially useful life-related insurance products. Since then, competing priorities at the lead Commission, the Law Commission of England and Wales, have meant that it has not yet been possible to bring this project to a conclusion. We will consider the continued case for this work as and when conditions and resources allow.

#### *Surrogacy*

1.18 A joint law reform project on surrogacy, carried out by the Law Commission of England and Wales and this Commission, began during the Tenth Programme and continued into the early stages of the Eleventh Programme (see paragraphs 2.21-2.23 below). We published a Report and draft Bill in March 2023.

### **Consolidation and statute law repeals**

1.19 One of our functions under the Law Commissions Act 1965 is to undertake work on consolidation of legislation. The work involves bringing together a number of enactments on an area of law into a single Act, with a view to making the provisions more accessible and generally tidying up the statute book. In carrying out work of this nature we are heavily dependent on having drafting resources made available to us. We are also dependent on involvement and support from the Scottish Government Directorate responsible for the policy area in question, as they provide policy instructions on the legislation and on technical amendments.

1.20 We are aware that there are important areas of the Scottish statute book that are in need of consolidation. Several areas have been suggested by consultees. We have brought these to the attention of the Scottish Government. We would like to see consolidation work continue during this Programme and accordingly we include a topic of this nature, which relates to nature conservation legislation (see paragraphs 2.33 to 2.35 below).

1.21 The Commission also from time to time undertakes work on the repeal of obsolete or otherwise unnecessary legislation. This work is complementary to our work on consolidation as it plays an important part in keeping legislation up to date.

1.22 As resources permit, we undertake this work in conjunction with the Law Commission of England and Wales. Draft Repeals Bills are prepared by the Law Commission team and we assist in relation to the Scottish aspects of the repeals, undertaking consultation with interested bodies on repeals that extend to Scotland. In addition we identify appropriate Scottish provisions that are suitable for repeal.

## Chapter 2      Eleventh Programme of Law Reform

### Preliminary

2.1 Our Eleventh Programme of Law Reform is set out in this Chapter, for approval by Scottish Ministers. This Programme will run for a period of five years, from the beginning of 2023 until the end of 2027.

2.2 If during the Programme we consider that we should undertake work on any other topic, we will request approval from Scottish Ministers to a modification of the Programme, or seek a reference from Ministers under section 3(1)(e) of the Law Commissions Act 1965.

2.3 A list of the projects in the Eleventh Programme is given in the table below, along with the classification of each project as short, medium or long-term.<sup>1</sup> The Programme comprises six projects carried forward from the Tenth Programme. These are heritable securities, aspects of leases, homicide, aspects of family law, surrogacy, and damages for personal injury. In addition, in January 2022 we received a reference on tenement law, relating to the establishment of compulsory owners' associations; that work, which has already begun, will be carried forward too into the new Programme. There are also 4 new projects, namely execution of documents, limitation periods, executry law, and consolidation of nature conservation statutes. Each of these projects is described in more detail below. We anticipate that Bills suitable for the Delegated Powers and Law Reform Committee procedure in the Scottish Parliament will emerge from some of these projects.

Item No	Project	Classification of project
1	<b>Tenement law: compulsory owners' associations</b>	Short-term
2	<b>Heritable securities</b>	Short-term
3	<b>Aspects of leases</b>	Short-term
4	<b>Homicide</b>	Short-term
5	<b>Aspects of family law</b>	Short-term
6	<b>Surrogacy</b>	Short-term
7	<b>Damages for personal injury</b>	Short-term
8	<b>Execution of documents</b>	Medium-term

<sup>1</sup> See para 1.10 above for the explanation of these terms.

Item No	Project	Classification of Project
9	Limitation	Medium/Long-term
10	Executory law	Long-term
11	Consolidation: nature conservation	Medium/Long-term

## Tenement law: compulsory owners' associations

2.4 In January 2022 we received a reference from the Cabinet Secretary for Social Justice, Housing and Local Government for a project on the introduction of compulsory owners' associations in tenements. Although owners of flats in tenements usually have shared responsibility for maintaining key parts of the building such as the roof, there is no central body of owners responsible for facilitating maintenance arrangements and payment of the costs of this work. A Scottish Parliamentary Working Group had identified the absence of a central body as a major challenge to the maintenance and upgrading of these buildings, and recommended the introduction of compulsory owners' associations as one of a package of measures aimed at improving the condition of the tenement stock.

2.5 This project will develop the detail of this recommendation, considering which legal entity should be used for owners' associations, which powers and duties the body should hold, and how powers can be exercised. We intend to publish a Discussion Paper, followed by a final Report and draft Bill, during the Eleventh Programme.

## Heritable securities

2.6 This topic was included in our Eighth and Ninth Programmes. Commitments in relation to other property law projects prevented work beginning until the Tenth Programme. We anticipate completing this project during the Eleventh Programme.

2.7 The law of heritable securities is about the securing of debt over heritable property, ie land and buildings. (The English term "mortgage" is often used colloquially.) If there is default in repayment of the debt, the security can be exercised. This will usually mean that the property is sold, and the outstanding debt recouped from the proceeds of the sale. The last systematic reform of the law in this area was effected by the Conveyancing and Feudal Reform (Scotland) Act 1970. An overhaul of the law is needed to bring it up-to-date with modern practice.

2.8 We have published two Discussion Papers within this project. The first focused on pre-default matters, including the creation, assignation and redemption of standard securities. The second focused on default and post-default issues, including the procedure by which a security is exercised and the enhanced protection measures available to residential debtors. A third Discussion Paper, dealing with sub-security arrangements and security in respect of non-monetary obligations, will follow. We will then publish a final Report and draft Bill encompassing recommendations arising from all three Discussion Papers.

## Aspects of leases

2.9 A review of the law governing leases of heritable property (land and buildings) was included in our Ninth and Tenth Programmes. It was recognised to be a substantial project which requires to be undertaken in stages. In the first stage we focussed on the termination of leases culminating in our Report on Aspects of Leases: Termination (Scot Law Com No 260; 2022). That Report proposed reform to the way leases of commercial property terminate on their expiry, recommending a new code in place of the common law rules on tacit relocation. It also left some elements of modernisation outstanding. We will seek to complete that work. One area will be a review of the Tenancy of Shops (Scotland) Act 1949. Another will be the clarification of the law of *confusio*, where a tenant acquires ownership of the let property (which need not be commercial property), and the closely related concept of renunciation (relinquishment).

2.10 In the second stage of the project we will focus on rules governing the creation of leases and identification of landlords' obligations that run with the landlord's interest under a lease irrespective of a change in landlord. The current rules are to be found, principally, in two dated statutes: the Leases Act 1449 which, while pioneering and historic in its day, has been encrusted with over 500 years of case law and might be thought unfit for modern society; and the Registration of Leases (Scotland) Act 1857. The common law is also relevant. The need for review, clarification and updating of the law in this area has been raised by consultees both in relation to this Programme and previous ones.

2.11 The current rules are of significant commercial importance as they determine for example, whether a tenant's option to purchase is transferred. Further, given the fundamental importance of these Acts to all tenants' security of tenure in the properties which they occupy, substantial work will be required; and this cannot be limited to commercial property. Consideration of the effect of leases on obligations of warrandice may also be appropriate.

## Homicide

2.12 This topic was included in our Eighth Programme, but other projects took priority. Work began in the Tenth Programme, and a Discussion Paper on the Mental Element in Homicide (DP No 172) was published in May 2021. That Paper raises important socio-legal issues concerning the current Scots law of murder, culpable homicide, defences (including self-defence, provocation, and diminished responsibility), and also the question of domestic abuse. The need for public opinion resulted in the instruction of an opinion survey company who conducted focus groups and interviews in the latter part of 2022.

2.13 The project will continue into the Eleventh Programme when a Report and draft Bill will be published, taking account of the responses to the Discussion Paper and the results of the public opinion survey.

## Aspects of family law

2.14 Work on aspects of family law was included in our Tenth Programme and will continue into the Eleventh Programme. Phase 1 of the project, which examined the rights of cohabitants on the breakdown of their relationship, was completed in November 2022 with the publication of the Report on Cohabitation (Scot Law Com No 261). A second phase is planned and we anticipate that it will be completed during the Eleventh Programme.

2.15 We envisage that Phase 2 of the project will consider the law of civil remedies for domestic abuse. There was significant support from respondents (mainly practitioners and academics) to the Tenth Programme consultation for work to be carried out in that area. During the scoping exercise for phase 1, the team became aware of work underway by Scottish Government which risked duplicating or overlapping with our possible work in this area. We therefore decided to work on cohabitation during phase 1 and, once that work was complete, to begin work on civil remedies for domestic abuse. We stated publicly then that we hoped to carry out work on domestic abuse during phase 2 of the Aspects of family law project. Some respondents to the consultation for the Eleventh Programme also called for work to be done in this area.

2.16 The Scottish Government's work resulted in the introduction of the Domestic Abuse (Protection) (Scotland) Act 2021. That legislation, which is not yet in force, makes provision for (third party) domestic abuse protection notices and orders for the purpose of protecting a person from abusive behaviour by the person's partner or ex-partner and makes provision for the termination of Scottish secure tenancies in cases involving behaviour by a tenant which is abusive of the tenant's partner or ex-partner. Nothing in that legislation is likely to affect, overlap or conflict with our planned work in this area.

2.17 Civil remedies for domestic abuse are currently available under the common law, by way of interdict, and by statute. The relevant statutory provisions are: the Matrimonial Homes (Family Protection) (Scotland) Act 1981, the Protection from Abuse (Scotland) Act 2001, the Civil Partnership Act 2004 (replicating the remedies available to spouses under the 1981 Act), the Protection from Harassment Act 1997 (as amended by the Domestic Abuse (Scotland) Act 2011), the Protection from Abuse (Scotland) Act 2001 and the Domestic Abuse (Protection) (Scotland) Act 2021. The "ancient form of process" of Lawburrows (under the Lawburrows Act 1429, as amended) also remains available.

2.18 Remedies available under the various statutory provisions include declarator of occupancy rights; matrimonial/relevant/domestic interdict and interim interdict; domestic abuse interdict; powers of arrest; non-harassment orders; and Domestic Abuse Protection Notices and Orders. The criminal law also recognises domestic abuse as a separate statutory offence under the Domestic Abuse (Scotland) Act 2018.

2.19 Problems that have been identified include: the law is set out over numerous pieces of legislation and is therefore unwieldy and inaccessible; inconsistency of approach, in the various statutes, to the types of remedies available (which depend on the nature of the relationship), the threshold test and the duration of orders for the purpose of enforcement; and different treatment of spouses and civil partners, on the one hand, and cohabitants on the other in relation to occupancy rights, which in turn affects accessibility of exclusion orders.

2.20 Other issues include: whether remedies should be available to parties in relation to intra-family abuse or those who live in the same household; whether additional protections may be required for victims in vulnerable groups; lack of effective enforcement of orders; insufficient protection provided by available remedies (including Lawburrows); the definition of domestic abuse; whether the existing statutory remedies provide adequate protection for victims; whether sufficient account is taken of the effect of domestic abuse in relation to the making of orders under section 11 of the Children (Scotland) Act 1995; and whether the

UK's obligations under the Convention on the Elimination of all forms of Discrimination against Women (CEDAW) have been adequately complied with. Questions have also arisen as to the possible treatment of forced marriage as a form of abuse, and whether adequate protection is afforded under the Forced Marriage etc. (Protection and Jurisdiction) (Scotland) Act 2011.

## **Surrogacy**

2.21 The surrogacy project, which was a joint project with the Law Commission of England and Wales, commenced in 2018 as part of our Tenth Programme. It continued into the early months of the Eleventh Programme, and was completed in March 2023, when we published our final Report alongside a draft Bill. Details of the project are included here, as it formed part of our Eleventh Programme.

2.22 This project comprised a review of the current law regulating surrogacy, in relation both to domestic and to international surrogacies. The primary provisional proposal in our Discussion Paper was to introduce a “new pathway” for intended parents and surrogates in domestic surrogacy: under those proposals, where the parties satisfy specified statutory measures (primarily concerning eligibility, screening and safeguarding), the intended parents would be the legal parents of the child at birth. This would be a significant shift from the current law, where the surrogate is always the legal mother at birth and the intended parents must seek a parental order to transfer legal parental status to them. Our proposals detailed the steps that would need to be taken to access the new pathway, and provided for the regulatory regime supporting it. Parental orders would continue to be available where the parties do not meet the criteria for the new pathway. Our proposals therefore also extended to the review and reform of the parental order process, to ensure a coherent scheme with the new pathway and to address current concerns with procedural issues.

2.23 Our final Report contained our recommendations which were based in large part on these proposed reforms, revised to reflect the evidence submitted through the consultation exercise and other legal developments since the Discussion Paper. Our Report and draft Bill set out our recommended new pathway, with rigorous pre-conception screening and safeguarding, overseen by a Regulated Surrogacy Organisation. If the surrogate and intended parents were approved to enter the new pathway, the intended parents would be recognised as the legal parents at birth unless the surrogate had withdrawn her consent to the agreement before then. The surrogate would have a right to withdraw consent to the agreement during the pregnancy and for a six week period post-birth, in which case the court would be able to decide the child's legal parents by way of a parental order process. We also recommended reforms to the parental order process. Full details are contained in our Report and draft Bill.

## **Damages for personal injury**

2.24 This topic was included in our Tenth Programme. A Discussion Paper was published in February 2022 (DP No 174). Issues include the scope of damages recoverable for services rendered to or by an injured person; items deductible from damages; provisional damages including time-bar problems in asbestos-related cases (particularly where asymptomatic pleural plaques have been diagnosed); and management of damages awarded to children.

2.25 The project will continue into the Eleventh Programme, during which time a Report and draft Bill will be published.

## Execution of documents

2.26 Aspects of execution of documents was suggested as a suitable law reform project by a significant number of respondents to our Eleventh Programme consultation. Support came from solicitors, including representatives of major commercial firms across Scotland, and the Law Society of Scotland. Many respondents gave details of particular issues which are causing difficulties in practice. Although the responses raised various different proposals, they were all united by the desire to overhaul and streamline the current legal regime for the execution of documents, and the need to provide clarity as regards electronic and digital signatures. The primary Act is the Requirements of Writing (Scotland) Act 1995, as amended, together with the more recent Legal Writings (Counterparts and Delivery) (Scotland) Act 2015 (which was the product of a previous Commission project: see our Report on Formation of Contract: Execution in Counterpart (Scot Law Com No 231; 2013)).

2.27 A range of issues has been raised regarding the execution of documents, including the interaction between traditional (hard copy) and electronic execution in a single contract; what constitutes a signature; how bodies corporate can validly execute when signing in their capacity as director/secretary/member of another company or limited liability partnership (LLP), and how this signature can be self-proving; whether LLPs can appoint an attorney to execute on their behalf; whether subscription on the page containing the last operative clause should continue to be required; and whether two or more signatories signing on behalf of a single entity can execute in counterpart.

2.28 Ensuring that the method of signing and witnessing documents of all types is clear and effective is obviously an essential concern across personal and commercial life in Scotland. Given the number and spread of concerns raised, it seems clear that this is an area which would benefit from an holistic review, assessing how the 1995 Act has weathered the passage of time, and the efficacy of subsequent reforms relating to electronic signature and execution in counterpart. We classify this as a medium-term project.

## Limitation

2.29 Our Eleventh Programme consultation process revealed major concerns on the part of personal injury practitioners about the current law of limitation, whereby an injured person's claim to damages may be time-barred. Four current issues were highlighted:

- stringent and unrealistic standards for the reasonable practicability test for constructive knowledge in section 17(2) of the Prescription and Limitation (Scotland) Act 1973;
- failure to recognise the need to obtain expert evidence (for example, a medical or liability report) before raising an action;
- apparent reluctance on the part of Scottish Courts to exercise the discretion available under section 19A of the 1973 Act, and an unwelcome reliance upon an Australian authority, *Brisbane South Regional Health Authority v Taylor* [1996] HCA 25; and

- lack of guidance as to the criteria to be applied in section 19A cases, and a question whether a non-exhaustive list of factors to be taken into account would be useful.

2.30 We envisage that we would begin work on Limitation after the Damages for Personal Injury project has concluded, part-way into the Eleventh Programme. There is likely to be a link between the asbestos-related cases mentioned in paragraph 2.24 above, and a more general examination of limitation law.

### **Executory law**

2.31 Support for a project in this area came from the Law Society of Scotland, who gave a detailed account of the issues in need of review and reform, as well as from a member of the public. Executory law concerns the ingathering, administration, and distribution of a deceased person's estate on death. The law here is of considerable age and lacks clarity, which can give rise to uncertainty, leading to litigation and additional costs. There are many areas within executory law that a project could consider, including:

- ownership and rights and duties in relation to property between death and confirmation being obtained;
- the legal position where confirmation (ie probate in England and Wales) is not obtained;
- duties specific to executors such as in relation to legal rights;
- discharge of executors;
- the continued existence of executors;
- rights against beneficiaries;
- the order of right to the office of executor where multiple possibilities exist;
- further exploration of bonds of caution and alternatives; and
- whether some or all of the executory process could be simplified through the use of online processes.

2.32 Succession law is of fundamental importance, given that death (and taxes) is one of the few things relevant to all of us. It affects individuals and the economy. However, succession has been looked at recently by the Commission and by the Scottish Government. This underlines its importance. While previous projects have addressed substantive issues of succession law, we consider that executory (being the administrative dimension) is a separate and suitable project to take forward, where reform could bring real benefits to individuals across Scotland.

### **Consolidation: nature conservation**

2.33 As already mentioned,<sup>2</sup> the consolidation of separate and disparate pieces of legislation covering the same topic or topics is an important function of the Commission. On consultation we received a number of suggestions where consolidation would be beneficial. One of these is nature conservation, where the law is complex and spread across many different parts of the statute book. Important legislation includes the Wildlife and Countryside Act 1981, the Conservation (Natural Habitats etc.) Regulations 1994, the

---

<sup>2</sup> See paras 1.19 and 1.20 above.

Protection of Badgers Act 1992, the Wild Mammals (Protection) Act 1996, and the Nature Conservation (Scotland) Act 2004. The Salmon and Freshwater Fisheries (Consolidation) (Scotland) Act 2003 may also require inclusion.

2.34 Both the 1981 Act and the 1994 Regulations have different versions applicable to England and Wales, and Scotland respectively. Both have been amended on numerous occasions. This has made them very difficult to use even for experts in the area. The kaleidoscope of scattered laws in this area poses an unnecessary barrier to a clear understanding of legal responsibility for Scotland's natural world, for both the public and regulators. A consequence is that these laws are less likely to achieve their valuable objectives.

2.35 In the project we will single out key items of legislation in this area which are in force, and bring them together to form a coherent and systematic body of legislation.

# Appendix A

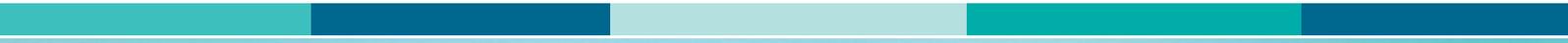
## Tenth Programme projects

Item No	Project	Classification/stage of project
1	Law of contract in light of the DCFR	Completed – Report on Review of Contract Law: Formation, Interpretation, Remedies for Breach and Penalty Clauses submitted in March 2018 (Scot Law Com No 252)
2	Heritable securities	Ongoing
3	Aspects of leases	Carried forward into Eleventh Programme; Report on Aspects of Leases: Termination submitted in September 2022 (Scot Law Com No 260)
4	Homicide	Ongoing
5	Aspects of family law	Carried forward into Eleventh Programme; Report on Cohabitation submitted in November 2022 (Scot Law Com No 261)
6	Surrogacy	Carried forward into, and completed early in Eleventh Programme – Joint Report on Surrogacy submitted in March 2023 (Scot Law Com No 262/ Law Com No 411)
7	Damages for personal injury	Ongoing

## Appendix B

### Joint reports with the Law Commission of England and Wales completed during the Tenth Programme

Joint reports completed during the Tenth Programme	
<b>Report on Electoral Law</b>	Joint Report submitted in March 2020 (Scot Law Com No 256/ Law Com No 389)
<b>Report on Automated Vehicles</b>	Joint Report submitted in January 2022 (Scot Law Com No 258/ Law Com No 404)



Produced for the Scottish Law Commission by APS Group Scotland, 21 Tennant Street, Edinburgh EH6 5NA

This publication is available on our website at <http://www.scotlawcom.gov.uk>

ISBN: 978-1-9989963-7-7

PPDAS1300622 (05/23)

