

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because the law is causing difficulties in practice, for example where the law is unfair, unclear, unduly complex or out-of-date.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- *Importance*: The extent to which the law is unjust or out of date (for example, unfair, unclear, inaccessible, inefficient, unduly complex or outdated); and the potential benefits likely to arise from reform of the law.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

Hilary Gordon, Director, Knowledge and Development Lawyer
Lila Gailling, Knowledge and Development Lawyer

Organisation:

Burness Paull LLP

Address:

50 Lothian Rd, Edinburgh EH3 9WJ

Email address:

Hilary.Gordon@burnesspaull.com
Lila.Gailling@burnesspaull.com

Questions

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

1. **Legislative changes to the Requirements of Writing (Scotland) Act 1995**
2. **Review the drafting of [section 3\(2\) of the Law Reform \(Miscellaneous Provisions\) \(Scotland\) Act 1940](#)**

2. If suggesting a new project:-

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

1. Legislative changes to the Requirements of Writing (Scotland) Act 1995

We suggest amending the Requirements of Writing (Scotland) Act 1995 (“RoWSA”) to deal with issues that arise frequently in practice. This would update the law around execution of documents and improve market practice by making the signing of documents in Scotland more efficient.

There are a number of amendments that could be made to the RoWSA. Our suggestions are provided under the three headings below.

(a) Support of the Law Society response to this consultation in respect of the RoWSA

We understand the Law Society of Scotland is suggesting as part of their response to this consultation, changes to the RoWSA.

We support the Law Society response in this respect, in particular on the following issues:

- i. to include a provision expressly permitting execution in mixed media (partly wet ink, partly electronic). Signing in mixed media is very common in practice and disagreement between firms as to whether this creates a valid signature can delay the signing process. This is market practice in English law¹ and the position in Scotland should be aligned to embrace the technology available and to facilitate further digitalisation as well as cross border work (which is beneficial for investment and the wider economy). The RoWSA should expressly allow a contract mentioned in section 1(2) of the RoWSA to be constituted by a mix of electronic and traditional documents.
- ii. how to achieve a valid and self-proving signature where a company appoints another company to sign on its behalf, by a power of attorney. This situation occurs frequently in practice and clarity on the point would be appreciated.

¹ See the Law Society of England and Wales [Execution of a document using an electronic signature](#) at paragraph 4.5

- iii. Certainty that two or more signatories signing on behalf of a single entity (eg. two directors signing on behalf of a company or two trustees signing for a trust) can each sign a separate counterpart. This clarification is much needed in order to simplify and improve practice in relation remote signings, which are used frequently even post-lockdown. The position in England and Wales is clear and the practical guidance on this point² makes it easier for parties to execute documents and complete transactions.
- iv. update the requirements around what constitutes a signature. Kenneth Reid in *Greens Annotated Acts RoWSA* states in respect of section 7 that “the methods of signature permitted by subs. (2) are so wide that [they are] unlikely to cause hardship in practice”³. Although we agree this provision is widely drafted, we have encountered reason to broaden the scope of what constitutes a signature, in particular in view of our international work. In light of continued globalisation and the ability to transact worldwide, we should seek to ensure execution is available to all citizens or entities who meet the relevant criteria. Insufficiently legible signatures, a common occurrence, are also problematic and it is frustrating to have to explain to clients that their “usual” signature is not legible and can they please sign in a legible way.
- v. whether a document can be authenticated by an attorney appointed by an LLP. Again, this comes up often in practice and should be aligned with the common law and updated in respect of electronic signatures.
- vi. clarity around the process for signing a document by email. This method of signing has become extremely common. There are several points that could be clarified when sending a document electronically for execution. For example, it would facilitate the signing process to dispense with the requirement to print the document in full before signing. This requirement is outdated in the context of present day environmental concerns. If there are concerns that this may lead to fraud or error, variations could be provided, depending on the type of document being signed, ie. printing the full document could still be required in respect of certain documents but not others. . This would align with the current English practice⁴. A second example is whether a witness in a self-proving signature: allowing virtual witnessing (ie. allowing a witness to see the signatory sign by video rather than in person) would make counterpart signing much easier and bring this area of the law in line with that around notarising document.
- vii. the meaning of “the last page” in section 7(1). The lack of clarity around this concept leads to (i) delays in signing, in particular when working with counterparties outside Scotland, and (ii) wasted paper, as there are often large sections of the page left blank.
- viii. the meaning of “one continuous process” in section 3. Guidance around this concept would facilitate all self-proving signings.
- ix. update the law around how other bodies corporate can sign in a self-proving manner. This would assist our work with international clients and simplify execution requirements in this area.

(b) Review of annexations to traditional documents

² See the Law Society of England and Wales [Execution of a document using an electronic signature](#) at paragraph 4.3(a)(i)

³ Page 24, 2015 edition.

⁴ See the Law Society of England and Wales [Execution of documents by virtual means](#). Paragraph 2 outlines the various signing options.

Review of annexations to traditional documents and in particular those relating to land where an annexation describes or shows all or any part of the land. This can sometimes be a very burdensome requirement, for example in relation to a large photograph schedule of condition. Developments in technology, and the move to electronic documentation and execution mean that the requirement to sign on every page being retained for a traditional document may seem archaic, with clients having no choice whilst we await further developments on acceptance of electronically executed documents for registration. Again, comparisons with other jurisdictions may be beneficial to support doing business in Scotland. Consideration should be given to other electronic means by which land may be described or shown, eg. video or other similar footage available in electronic format.

(c) Single authorised signatory signing on behalf of multiple granters

Finally, further clarification would be appreciated where an authorised signatory signs on behalf of multiple parties to a document. Consideration should be given to whether such an authorised signatory may validly sign the document once for all relevant parties. Section 7(4) relates to a person granting a document in more than one capacity and is arguably distinguished from our proposed scenario. Therefore, the cautious approach is for such a signatory to sign a separate signature block on behalf of each party. This has been an issue for us on several occasions, and when there is a large number of parties the result can be quite onerous for the signatory.

It would be helpful to have an express provision to deal with this in the RoWSA. In relation to companies signing under English law, section 44(6) of the Companies Act 2006 is clear that *where a document is to be signed by a person on behalf of more than one company, it is not duly signed by that person for the purposes of this section unless he signs it separately in each capacity*. The approach could be taken that, for documents outside of section 1(2), a single authorised signatory could sign once on behalf of multiple parties because the requirements for valid execution in the RoWSA do not apply. However, an express provision in the RoWSA would make the position clear.

2. Review the drafting of section 3(2) of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1940

Reason : when acting for a client who is a joint wrongdoer who wants to settle a claim with a pursuer and then pursue a right of relief against the other wrongdoer, the client cannot enter into an extra judicial settlement which results in decree of absolvitor passing against them as that will prevent such a claim. However, consenting to decree passing in order to preserve a right of relief is a very unattractive option to many commercial clients. The drafting of this section needs reviewed.

The issue was recently highlighted in the judgment of [Loretto Housing Association v Cruden and others 2021cs0h127](#): *“The opening words of section 3(2) make clear that the party relying on that provision should have paid the sum specified in the decree – the sum “in which he has been found liable”. That requirement cannot be satisfied in the case of a decree of*

absolvitor, which by definition, contains no reference to any sum, let alone does it find the defender liable to pay any sum.”

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

See above.

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

See above.

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?

N/A

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.