



## **SCOTTISH LAW COMMISSION: WRITTEN EVIDENCE TO THE COMMISSION ON JUSTICE IN WALES**

This document provides information as requested about the Scottish Law Commission.

### **Introduction**

The Scottish Law Commission (“the Commission”) is an independent body established by an Act of the UK Parliament, the Law Commissions Act 1965 (“the 1965 Act”), along with a similar body for England and Wales.

The Commission has a statutory duty to keep all of the law of Scotland under review with a view to its simplification and modernisation. That general duty, in relation to all of Scots law, continues after the devolution settlement for Scotland: the duty was not modified on devolution.

The Commission provides Government, both the UK Government and the Scottish Government, with independent advice on law reform for Scotland. This usually involves examining whole areas of law and making recommendations for reform.

Reform of the law is implemented through the Scottish Parliament as regards devolved matters, and by the UK Parliament for matters reserved to the UK under the Scotland Act 1998 as amended.

### **Commissioners**

The Commission consists of 5 Commissioners, appointed by the Scottish Ministers. One of the Commissioners is the Chair of the Commission, and by convention is a Court of Session judge. The other Commissioners are drawn from those holding judicial office, or are advocates, solicitors or university law teachers. Commissioners are appointed for a maximum term of 5 years, with the possibility of an extension of up to 8 years in total. Two of the current Commissioners, including the Chair, are appointed on a part-time basis; and 3 Commissioners are appointed on a full-time basis.

## **Staffing**

The 1965 Act provides that Scottish Ministers shall provide such staffing for the Commission as they may determine.

The Commission has a Chief Executive, 5 lawyers (2 part-time) and 5 administrative support staff, all seconded from the Scottish Government. The Commission also currently has 4 legal assistants, appointed for a one-year fixed term.

On legislative drafting, the Commission uses the services of a part-time consultant Parliamentary Counsel, and is supported by a service from the Parliamentary Counsel Office in the Scottish Government.

The Commission is part of the Government Legal Service for Scotland, an umbrella organisation comprising a number of the Government legal offices in Scotland.

The Commission has a library and knowledge management service from the Scottish Legal Information Centre. This service is shared with other legal bodies in the Government Legal Service for Scotland.

## **The Commission's functions**

The Commission's substantive work is to make proposals to reform the law of Scotland.

Most of the Commission's work is carried out under programmes of law reform. Each programme is prepared following extensive consultation with stakeholders, including the legal profession, and civic society including members of the public. The programme comprises a number of law reform projects, and is approved by Scottish Ministers, and laid before the Scottish Parliament.

The Commission is currently working on the Tenth Programme of Law Reform, which began in January 2018 and runs for a period of 5 years until 2022. This Programme incorporates ongoing work from the previous Programme, as well as new projects to be undertaken on a short-term or medium-term basis.

Under the 1965 Act the Commission has functions in relation to the consolidation of statutes, being the re-enactment, in one Act, of all the provisions on one topic of the law scattered throughout various statutes. This makes the law more accessible for users. Consolidation work has been undertaken by the Commission alone, and also jointly with the Law Commission for England and Wales.

The Commission has a statutory function in relation to statute law repeals. This work has been undertaken jointly with the Law Commission for England and Wales. Statute law repeals Bills have been prepared regularly on a UK basis, and sometimes contain repeals for Scotland in devolved areas. These Bills repeal Acts of Parliament which have been superseded by other Acts or which deal with situations which have ceased to exist.

Ministers, both UK and Scottish, can also refer proposals for reform of the law to the Commission to consider.

The Commission also gives advice and information to Government.

The 1965 Act contains a provision requiring the Commission and the Law Commission for England and Wales, in exercise of their functions under the Act, to act in consultation with each other (see section 3(4)).

### **Law reform projects: devolved/reserved matters**

The devolution settlement reflected in the Scotland Act 1998 as amended provides the Scottish Parliament with responsibility for a wide range of matters. These include the civil law, criminal law, and Scots private law including family law and property law.

The wide scope of devolved matters means that in general most of the Commission's law reform work focuses on devolved matters. So reports and recommendations on these matters are made to Scottish Ministers, to be taken forward by legislation in the Scottish Parliament.

In furtherance of its duty to keep all of Scots law under review, the Commission also undertakes law reform projects in areas of the law reserved to the UK Parliament. These projects can be carried out either by the Commission alone, or jointly with the Law Commission for England and Wales. These Reports are made to UK Ministers, to be taken forward by legislation in the UK Parliament.

The Commission's work generally includes a number of projects in reserved areas; the proportion of the overall workload may vary, and sometimes may be around a third of the total.

An example of a Commission project on a reserved matter for Scotland is the Report on the Criminal Liability of Partnerships in 2011. It was implemented by the UK Parliament as the Partnerships (Prosecution) (Scotland) Act 2013. The Bill passed through the special procedure in the House of Lords for Commission Bills.

Examples of current joint projects covering reserved areas of Scots law agreed between the Commission and the Law Commission for England and Wales are the joint projects on surrogacy, automated vehicles, and insurable interest.

Completed joint projects in recent years covering reserved areas of Scots law include the Twentieth joint Report on Statute Law Revision (the previous nineteen joint Reports were implemented quickly); a Report and Bill in 2013 on consolidation of legislation relating to Co-operative and Community Benefit Societies, implemented in 2014; a joint Report on insurance in 2015, implemented by the Insurance Act 2015; and a tripartite joint project, involving the Northern Ireland Law Commission as well as the Commission for England and Wales, on the Regulation of Healthcare Professionals with a Report in 2014.

### **Funding**

On expenses the 1965 Act, as amended following devolution in Scotland in 1998, provides that Scottish Ministers shall pay the expenses of the Commission including staff costs.

This funding is provided by the Scottish Government Justice Directorate, with a budget of around £1.5 million for 2018/19 for salaries and operating costs; with the Chair's salary being paid separately, from the budget for judicial salaries in the Scottish consolidated fund.

### **Working methods**

For the purposes of any law reform project, a project team is established in order to lead the project. The team will comprise a Commissioner, to lead the project team; a lawyer, acting also as the project manager; and a legal assistant for research and administrative purposes.

The project team investigate and analyse defects in the existing law; consider the law of other jurisdictions where relevant to identify possible models for reform; carry out extensive consultation, publishing online a discussion paper, with questions; they may hold seminars on the issues, and meetings with advisory groups of experts and practitioners, legal and non-legal, chosen for their experience and expertise in the topic in question.

Following consultation, the team analyse the responses and formulate policy for reform. The consultation responses and the policy paper are put by the team to a meeting of Commissioners, for peer review and approval of the policy. Once Commission policy is approved, the team prepare drafting instructions for Parliamentary Counsel. A Bill that would implement the recommendations is prepared. The Commission usually consult on a working draft of the Bill, by publishing it on the Commission website and inviting comment on the provisions. The team draft a report with recommendations for reform, attaching the draft Bill and an impact assessment of the recommendations. These papers are put by the team to Commissioners for peer review, and for approval for submission to Ministers and publication online via the Commission's website.

A report is submitted to Scottish Ministers, and laid before the Scottish Parliament, as regards areas of law devolved to the Scottish Parliament; and as regards areas of Scots law reserved to the Westminster Parliament, to UK Ministers with a report being laid before the UK Parliament.

### **Ministers' reporting obligations**

As regards Scotland, there is no equivalent statutory obligation along the lines provided for in the Law Commission Act 2009 and the Wales Act 2014 requiring Ministers to report annually to Parliament on the implementation of Commission reports.

The Cabinet Secretary for Justice in Scotland however agreed in 2009 to provide a response to Commission reports within 3 months from the date of submission. The Lord Chancellor and Secretary of State for Justice agreed to write annually to the Chairman of the Commission, providing a report on progress by the UK Government in implementing Commission recommendations in reserved areas of Scots law. This includes recommendations in the joint law reform reports with the Law Commission for England and Wales.

The letters from the Cabinet Secretary for Justice, and from the Lord Chancellor and Secretary of State for Justice, are published on the Commission's website.

### **Law reform links**

The Commission has a link with other law reform bodies. Representatives of the law reform bodies of Scotland, England and Wales, Ireland and Jersey meet regularly to discuss issues relating to law reform.

The Commission works on joint law reform projects with the Law Commission for England and Wales, and worked also with the Northern Ireland Law Commission when that Commission was in operation.

The Commission is a member of the Commonwealth Association of Law Reform Agencies, and is active in the work of the Association to promote law reform and share expertise in law reform. The Commission hosted the Association's conference in Edinburgh in 2015. This is a biennial international conference of law reformers and those interested in law reform.

The Commission developed special links with the Malawi Law Commission, in working as part of a Scottish Government Programme for capacity building for justice in Malawi.

### **General**

The establishment of the Commission as a standing law reform body for Scotland, with stable funding and staffing, enabled the Commission to develop significant experience and expertise in law reform and in law reform methodology.

This also allowed the Commission to take on large and complex law reform projects, as well as smaller and more technical projects. As a standing body the Commission is also able to plan ahead for a programme of work, on the basis of the resources available; and to aim at the systematic development of the law where possible.

It may be regarded as important for a small jurisdiction to establish a standing law reform body in order to address issues in the law, given that a small jurisdiction may not produce sufficient cases to enable the courts to consider particular legal difficulties and develop the law as appropriate.

The context of operating in a small jurisdiction enables the Commission, while a body with independent functions, to foster good working relationships and work closely where appropriate with Ministers, Government and Parliament, and their officials; with the Law Schools and academics; and with other stakeholders and interests. This can assist in addressing law reform, in planning for law reform and in implementation of law reform reports.

This context also offers opportunities to work efficiently, saving resources where appropriate; for example the Commission shares services, such as library and knowledge management, with other government legal offices.

Operating successfully as a relatively small law reform body is however challenging. For example, resources are very tight. Resources for the Commission have been reduced in recent years as a result of austerity measures. So the law reform teams in the Commission are small, even for large-scale projects aiming at comprehensive and far-reaching reforms. This inevitably can affect the timescales for completion of projects.

A further challenge, shared with law reform bodies across the world, lies in the implementation of Commission reports. Commission reports and Bills need to be considered and accepted by the Government in order to be taken forward as a Government Bill; resources have to be identified for a Government Bill team; and a place for such Bills has to be found in the Government's legislative programmes, which tend to be pressurised given other Government priorities and commitments. There is too a need for Parliamentary business planning, to enable the legislature to consider the Bill. This can be challenging in a small and busy legislature with limited capacity.

In recent years the Commission worked with the Scottish Government and the Scottish Parliament to find a way of increasing the capacity of the Parliament to consider law reform Bills. This produced a decision by the Parliament in 2013 to establish a Committee, the Delegated Powers and Law Reform Committee, with a remit to take the lead in scrutinising certain Commission Bills – Bills that meet criteria set by the Presiding Officer of the Parliament. This process has been a success, with 4 Commission Bills, plus a Commission consolidation Bill, passing through the process successfully so far. The challenge remains for implementation generally, in particular for substantive Commission Bills that do not meet the current criteria for this process.

## **Scottish Law Commission**

October 2018