



Scottish Law Commission

promoting law reform

(SCOT LAW COM No 250)

tenth 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

tenth programme
of law reform

Tenth Programme of Law Reform

To: Michael Matheson MSP, Cabinet Secretary for Justice

We have the honour to submit for approval by the Scottish Ministers our Tenth Programme of Law Reform, which took effect on 1 January 2018.



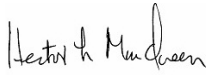
PAUL B CULLEN, *Chairman*



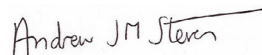
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Malcolm McMillan, Chief Executive
30 January 2018

Laid before the Scottish Parliament by the Scottish Ministers under section 3(2) of the Law Commissions Act 1965.
February 2018

The Scottish Law Commission was set up by section 2 of the Law Commissions Act 1965¹ for the purpose of promoting the reform of the law of Scotland. The Commissioners are:

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Chairman's foreword



I am very pleased to introduce the Scottish Law Commission's Tenth Programme of Law Reform. As the nation's independent law reform agency, it is our duty to identify areas of the law which are in need of modernisation and to propose reform in appropriate areas.

Our Tenth Programme includes a number of important new projects on which we intend to work over the next five years. We have carried out an extensive public consultation to help us establish where the law is deficient and in need of being brought up to date. The consultation elicited a large number of responses from many individuals and organisations across Scotland. We have given careful thought to all of the responses and are extremely grateful to everyone who took the time and trouble to respond. In developing our proposals we have also taken into account the Scottish Government's strategic objectives and national priorities.

We propose to embark on new projects on the law of homicide, on certain aspects of family law, and on some topics relating to damages for personal injury. In co-operation with the Law Commission for England and Wales, we intend also to undertake projects on the law of surrogacy and the law of automated vehicles. All the branches of the law that we intend to examine are of great importance in today's society. We need to ensure that the law in these areas is fit for purpose and works properly at the sharp end.

There are fuller descriptions of the new projects later in this paper.

In addition to these new projects, we will be continuing work on a number of items carried forward from our Ninth Programme. We will shortly complete our work on the law of contract and we will continue with our projects on heritable securities and aspects of the law of leases.

We look forward keenly to beginning work on the new topics in the Tenth Programme. I believe that it constitutes a forward-looking and socially relevant body of work. Our approach will continue to involve close engagement with the many stakeholders who provide such ready support to us in our work of law reform. We will rigorously examine the law, take account of developments in other jurisdictions and come forward with practical proposals for improvement of Scots law.

A handwritten signature in blue ink that reads "Paul B. Cullen". The signature is written in a cursive, slightly stylized font.

The Hon Lord Pentland
Chairman

Chapter 1: Introduction

Background

- 1.1 The 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 tenth such programme submitted for approval.² This Programme represents a rolling programme. It includes ongoing work from the Ninth Programme as well as identifying new projects to be undertaken. The Programme covers a period of five years, from the beginning of 2018 until the end of 2022. A period of five years will enable the Commission to address the substantial projects included in this Programme, as well as a number of focussed new projects.
- 1.2 We are also required³ to make a recommendation as to the agency by which any examination of branches of the law should be carried out. We recommend that the projects identified in this Programme should be undertaken by this Commission rather than by any other agency.

Ninth 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 Ninth Programme, which commenced in January 2015 and ran until the end of 2017. The table indicates the Ninth Programme projects that we have completed and the work that continues into the Tenth Programme.

Tenth 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 facilitate effective management of the Programme.

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

² 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).

³ See 1965 Act, s 3(1)(b).

Consultation

- 1.5 As part of our preparations for our consultation on the Tenth Programme, we convened a focus group of legal academics to assist us in considering the areas of the law most in need of reform. We are most grateful to them for sharing their time and expertise with us.⁴
- 1.6 We consulted widely on the Programme. In April 2017 we launched our consultation with an event at the Advocates Library, hosted by the Faculty of Advocates. We issued a consultation letter and note about the Programme. We noted that a number of existing projects in the Ninth Programme would be carried forward into the Tenth Programme. These are the review of contract law; heritable securities; and the project on leases.
- 1.7 We also publicised the consultation through our website, and via our Twitter account.
- 1.8 We held meetings with the Lord Advocate; the Public Policy Committee of the Law Society of Scotland; the Law Reform Committee of the Faculty of Advocates; the Committee of Heads of the Scottish Law Schools; with academics, and with leading legal practitioners in a number of areas of law, to discuss possible topics for the Programme. We also engaged closely with Scottish Government officials with a view to shaping a Programme that broadly fits with the Scottish Government's national objectives and priorities. This has an important bearing on the prospects for implementation of our eventual recommendations. In addition, individual Commissioners liaised with contacts from across the legal profession to obtain an understanding of the problems and challenges being encountered in practice.
- 1.9 We received a total of 57 formal responses, from a wide range of consultees including judges, representative bodies, public officials, advocates, solicitors, academic lawyers, and members of the public. We are most grateful to all who took part in our consultation.
- 1.10 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 suggested are worthy candidates for a law reform project. But we have limited capacity, and have had to select topics for inclusion in this Programme. In doing so we gave due weight to the support expressed in the consultation for particular topics.
- 1.11 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.

Basis of the Tenth Programme

- 1.12 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 2022;
 - *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.
- 1.13 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 redirected due to other requirements, such as responding to a reference from Ministers, or undertaking joint projects with the Law Commission for 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.

⁴ The group comprised: Professor Abbe Brown, University of Aberdeen; Professor James Chalmers, University of Glasgow; Professor Jane Mair, University of Glasgow; Professor Aileen McHarg, University of Strathclyde, and Andrew Tickell, Glasgow Caledonian University.

Advice to Government departments and the Scottish Ministers

- 1.14 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.
- 1.15 The Minister for Community Safety and Legal Affairs referred to us a review of section 53 of the Title Conditions (Scotland) Act 2003 in the context of Part 4 of the Act. We have commenced work on that reference.

Joint work with the Law Commission for England and Wales

- 1.16 We take account of the work being carried out by the Law Commission for England and Wales. The Law Commission is currently working under its Thirteenth Programme of Law Reform.⁵ 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.
- 1.17 We have also undertaken in the past joint law reform projects with both the Law Commission for England and Wales and the Northern Ireland Law Commission.
- 1.18 We set out in Appendix B the joint projects completed during the period of the Ninth Programme. We mention below the joint projects which will continue into or commence during the period of the Tenth Programme.

Insurance contract law

- 1.19 For a number of years we have been assisting the Law Commission for 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. We expect to publish a joint report on the topic in the early part of this Programme.

Surrogacy

- 1.20 A joint law reform project on surrogacy will be carried out by the Law Commission for England and Wales, and this Commission. The project is included in this Commission's Tenth Programme (see paragraphs 2.32 to 2.37 below).

Automated vehicles

- 1.21 The Government's Centre for Connected and Autonomous Vehicles (CCAV) has asked the Law Commission for England and Wales, and this Commission, to undertake a far-reaching review to deliver a modern and robust package of reforms promoting the development and use of automated vehicles, and their application as part of public transport networks and on-demand passenger services by 2021.
- 1.22 Technical innovations are opening new ways for people and businesses to plan and undertake their journeys, and the Government wants to facilitate this, for example by enabling the use of automated vehicles. Automated vehicles do not readily fit within existing legal frameworks, so the review will identify pressing problems in the law that may be barriers to the use of automated vehicles, as well as considering broader, longer term reforms. The Law Commissions will also explore how automated vehicles could fit within existing regulation of public transport frameworks, and provision of innovative on-demand passenger transport.

⁵ [Law Com No 377](#).

- 1.23 The review will build on previous work from the UK Department of Transport, and CCAV's Code of practice for testing of automated vehicles technologies, as well as the insurance reforms contained in the Automated and Electric Vehicles Bill currently being considered by the House of Lords. The review will directly support the UK Government's aims of ensuring the UK remains one of the best places in the world to develop and use connected and automated vehicles. The Law Commissions' work will aim to promote public confidence in the safe use of automated vehicles, and to ensure the UK has a vibrant, world-leading connected and automated vehicles industry. This project will also feed in to the recently announced regulatory review as part of the 'Future of Mobility' Grand Challenge.
- 1.24 The project is expected to start in February 2018, and last for three years.

Consolidation and statute law repeals

- 1.25 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.
- 1.26 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. This would require support from the Government, and time for consideration of consolidation Bills in the Scottish Parliament.
- 1.27 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.
- 1.28 As resources permit, we undertake this work in conjunction with the Law Commission for 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: Tenth Programme of Law Reform

Preliminary

- 2.1 Our Tenth 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 2018 until the end of 2022.
- 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 Tenth Programme is given in the table below, along with the classification of each project as short or medium-term. The Programme comprises three projects carried forward from the Ninth Programme. These are contract, heritable securities, and leases. There are also four new projects, namely homicide, aspects of family law, surrogacy and damages for personal injury: items 4 to 7 in the table. 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 for certain Commission Bills will emerge from some of these projects.

| Item No | Project | Classification of project |
|---------|--------------------------------------|---------------------------|
| 1 | Law of contract in light of the DCFR | Short-term |
| 2 | Heritable securities | Medium-term |
| 3 | Aspects of leases | Medium-term |
| 4 | Homicide | Medium-term |
| 5 | Aspects of family law | Medium-term |
| 6 | Surrogacy | Medium-term |
| 7 | Damages for personal injury | Medium-term |

The law of contract in the light of the DCFR (Draft Common Frame of Reference)

- 2.4 This topic was included in our Eighth Programme of Law Reform, where it was designated as a long-term project. The aim is to review the law of contract in the light of the publication in 2009 of the Draft Common Frame of Reference: Principles, Definitions and Model Rules of European Private Law (the DCFR). The DCFR provides a contemporary statement of contract law, based on comparative research from across the European Union and written in clear English (and translated into some other languages). It may be seen as an instrument to provide an important area of Scots law with a systematic health check, giving a basis for treatment where the law is found to be ailing or otherwise in need of remedial treatment. The DCFR is thus a good working platform for a series of discrete and relatively limited projects on contract law with significance for the wellbeing of the Scottish economy.
- 2.5 The Commission has published five Discussion Papers and two Reports within this project. The two Reports have already been implemented by Acts in the Scottish Parliament: the Legal Writings (Counterparts and Delivery) (Scotland) Act 2015, and the Contract (Third Party Rights) (Scotland) Act 2017.

- 2.6 It is expected to complete the project with a final report and Bill in spring 2018, and so the project is being carried forward into the Tenth Programme. The final report will cover a number of topics on which the Commission has already consulted; namely remedies for breach of contract, penalty clauses, formation and interpretation of contract.

Heritable securities

- 2.7 In our Eighth and Ninth Programmes we proposed reviewing the law of heritable securities as a long-term project. Commitments in relation to other property law projects prevented work starting on heritable securities and so this project is being carried forward into our Tenth Programme.
- 2.8 The law of heritable securities is about the securing of debt over heritable property – land and buildings. (The English term, "mortgage", is often used by non-lawyers.) The security is created by registration in the Land Register. (For the declining number of properties still in the Register of Sasines, the security is recorded in that Register.) If the debtor defaults on the loan, the security can be enforced. Enforcement generally means the sale of the property. The law applies to heritable property of all types – residential, commercial, agricultural etc. But for residential property the debtor protection rules are stricter than for other types of property.
- 2.9 The law was systematically reformed by the Conveyancing and Feudal Reform (Scotland) Act 1970 and that remains the main source of the law. Though the 1970 Act represented a great improvement on the previous law, time has shown that it was not perfect. In particular, the rules about enforcement are complex and hard to understand as the decision in *Royal Bank of Scotland v Wilson* [2010] UKSC 50 has demonstrated. A section-by-section review of the 1970 Act also reveals numerous technical problems. Individually they are generally minor but taken together there is an opportunity for significant technical improvement.

Aspects of leases

- 2.10 In our Eighth Programme of Law Reform we identified topics which we were not able to take forward at that time but which could be considered for our Ninth Programme. One of these was the law of leases of heritable property. We recognised that this would be a very substantial project, which should perhaps be undertaken in stages. Therefore we put forward the specific suggestion of proprietary aspects of leases. This received support from consultees who responded to consultation on the proposals for our Eighth Programme and it was clear to us from the responses to consultation on our Ninth Programme that there continued to be support for such a project. The Ninth Programme therefore included a project on the proprietary aspects of leases. This project is being carried forward into the Tenth Programme, with the scope being widened to cover aspects of leases generally.
- 2.11 The law of leases can be broadly divided into three areas: (1) agricultural; (2) commercial; and (3) residential. The first and third of these are already subject to detailed statutory regulation. It is only commercial leases which have little legislation dedicated to them. While our project would be general in scope we would not intend to disturb existing statutory rules relating to specific types of lease.
- 2.12 The project will take a focussed and selective approach as to where law reform is most needed. We have been advised by consultees that uncertainties in the current law lead to increased costs and act as a disincentive to investment particularly in the commercial leasing sector.

- 2.13 In relation to commercial leases we will initially concentrate on issues relating to termination. We will consider the doctrine of tacit relocation. This is where a lease continues after its expiry by operation of law because neither party has taken steps to terminate the arrangement. We will also consider notices to quit and the provisions of the Sheriff Courts (Scotland) Act 1907. These are notices which are served in order to bring a lease to an end. The topic of rent apportionment at early termination of a lease will be addressed.
- 2.14 We will also consider the Tenancy of Shops (Scotland) Act 1949. This Act was introduced to protect small businesses in the post war era by allowing them to apply to the sheriff for an extension to their lease. The relevance of this Act has been questioned by stakeholders. We will revisit our 2003 Report on Irritancy in Leases of Land,⁶ and test whether there is still appetite for reform in this area.
- 2.15 We will also look at the application of the doctrine of *confusio* in Scots law, and its relevance to all leases. This doctrine is relevant where the interests of tenant and landlord come into the same ownership, and the interests are said to be merged or amalgamated. Challenges with the operation of this doctrine have been highlighted to us by several stakeholders.
- 2.16 We may also look at further aspects of leases as and when we identify these as being in need of reform.

Homicide

- 2.17 We intend to examine the law of homicide and to develop proposals for modernising the law in this important and sensitive area. The topic has been included in some of the Commission's previous Programmes, but the need to give priority to other projects has meant that it has not, as yet, been possible to take the matter forward. We believe that the time has now come when it is appropriate and necessary to do so.
- 2.18 By way of context we note that in the case of *Petto v HMA* 2011 SCCR 519 the Criminal Appeal Court stated that a comprehensive re-examination of the mental element in homicide was overdue. The Court observed that the definitional structure in Scots law was antiquated and said that: 'we remain burdened by legal principles that were shaped largely in the days of the death penalty, that are inconsistent and confused and are not yet wholly free of doctrines of constructive malice'. We would propose to examine these issues and to consider how the law might best be developed and reformulated to address the difficulties identified by the court.
- 2.19 Some years earlier in the case of *Drury v HMA* 2001 SCCR 583, the same court had commented that the law of provocation should be reformed and restated in statutory form. This is an area of the law that often arises in homicide cases.
- 2.20 Against that background, we consider that the project should examine the principles underlying and the boundaries between the crimes of murder and culpable homicide; and the mental element required for the commission of each of these offences. As presently advised, we think that this work would constitute the core of the project. Under the current law the mental element of these crimes is defined in terms of concepts and language from a bygone age. This can give rise to difficulties in understanding and applying the law and in directing juries in modern and accessible terms.
- 2.21 The project will consider how the mental element for the various types of homicide should be expressed and how differing degrees of culpability should be reflected in the law.
- 2.22 We also intend to examine the nature, scope and definitions of the main defences that arise in cases of homicide; these include self-defence; provocation; and diminished responsibility.

⁶ [Scot Law Com No 191](#).

- 2.23 Comparative analysis of the approach taken in other jurisdictions will be important in regard to all of these topics. It will also be important to understand the views and experiences of stakeholders, including practitioners and members of the academic community. We propose to work closely with these groups amongst others.
- 2.24 We envisage that the project will be a medium-term one (ie lasting five years) and that we may issue a series of discussion papers addressing particular areas of the law.

Aspects of family law

- 2.25 A review of particular aspects of family law will be undertaken. The specific project or projects, and their scope, will be finalised and agreed following the appointment of a new Commissioner this year, with expertise in family law, to lead the project.
- 2.26 Under earlier Programmes of Law Reform the Commission undertook regular reviews of family law, culminating in our Report on Family Law in 1992.⁷ Our recommendations resulted in a body of legislation for Scotland which was regarded as forward thinking, coherent, based on principle, and which worked well in practice. The legal framework provided clarity, and was accessible to families and their legal advisers.
- 2.27 There have, however, been significant changes in society and in family life since these earlier legislative reforms. The law may now be regarded in certain respects as inappropriate, fragmented, inaccessible, and difficult to apply. There is pressure for the statutory framework to be reviewed with a view to reform in order to meet the needs of modern society and families.
- 2.28 The consultation therefore produced strong and persuasive support from a range of consultees for reform of a number of areas of family law. These included the Royal Society of Edinburgh, Scottish legal academics and the Law Schools, and family law practitioners.
- 2.29 Two possible topics within the area of family law suitable for the Commission to consider can be identified now for consideration later this year. These topics were put forward by a number of consultees.
- 2.30 First, aspects of adult relationships; specifically, financial provision for cohabitants whose relationship breaks down. It has been suggested that the Family Law (Scotland) Act 1985, which reflected Commission recommendations, may be a useful model for considering a new scheme for financial provision on the breakdown of cohabitation. This would be a medium-term project, involving comparative work.
- 2.31 Second, violence in families: there may be scope for a law reform project in the area of remedies. This would consider, amongst other matters, whether the existing legislative framework is adequate and sufficient to provide the victims of abuse and violence with prompt and effective protection.

⁷ [Scot Law Com No 135](#).

Surrogacy

- 2.32 Surrogacy describes the situation where a woman bears a child on behalf of another person or persons who intend to become the child's parents for all purposes. Typically, intended parents enter into a surrogacy arrangement because they have experienced fertility problems or are unable to conceive naturally. In the UK surrogacy is governed by the Surrogacy Arrangements Act 1985 and certain provisions of the Human Fertilisation and Embryology Act 2008, areas of law generally reserved to the UK Parliament under the Scotland Act 1998. The intended parents can become the legal parents of the child born to the surrogate mother by obtaining a Parental Order after the child has been born.
- 2.33 Although it is likely that children born as a result of surrogacy arrangements to UK-based intended parents number only in the hundreds rather than thousands each year, the use of such arrangements has significantly increased over the last ten years, and is expected to continue to rise. The greater acceptance of same-sex relationships, with the introduction of civil partnerships and the extension of marriage, is one of a number of factors likely to result in an increase in the number of children born as a result of a surrogacy arrangement. For a same-sex male couple, surrogacy is the only formal way of having a child who is biologically related to one of the intended parents. Surrogacy may also be an important route to parenthood for some transgender people. The law of surrogacy engages very important issues and rights for both the children and adults involved in such arrangements: these include questions of parentage and the prevention of exploitation of children and others.
- 2.34 It has therefore become a matter of concern that there are significant problems with the law. The law has fallen behind changing social attitudes and the increasing prevalence of surrogacy, including surrogacy arrangements with international aspects. For example, in England and Wales the courts have struggled to implement the statutory conditions for a Parental Order because the paramount position of the child's best interests makes it difficult for the court to refuse to recognise an existing relationship between the intended parents and child. Consequently, courts have extended or modified many of the statutory requirements for a Parental Order, but case law has not been able to resolve the underlying problems in the statute, or find solutions to all difficulties. The law, as governed by the 1985 and 2008 Acts, may therefore be honoured more in the breach than in the observance.
- 2.35 There are, therefore, significant questions relating to the procedure for the grant of Parental Orders to the intended parents. But these are only some of the issues that arise. Surrogacy arrangements also raise issues of children's rights to access information about their parentage, both genetic and gestational, while there are wider questions around the basis on which surrogacy arrangements should be permitted. International surrogacy arrangements bring into focus problems surrounding the nationality of children born to surrogates (including the risk of statelessness), bringing surrogate-born children into the UK, and the risk of exploitation of all the parties involved.
- 2.36 Reform will deliver significant benefits of clarity, modernity and the protection of those who enter into surrogacy arrangements and, most importantly, of the children born as a result of such arrangements.
- 2.37 This project will be a joint law reform project with the Law Commission for England and Wales. The project is expected to start in spring 2018, and to be completed within three years.

Damages for personal injury

- 2.38 As part of our consultation exercise, the Commission held meetings about a review of the law of damages for personal injury with leading legal practitioners in the field, both at the Faculty of Advocates, and with solicitors. Written submissions were provided to the Commission on topics within this area suitable for reform.
- 2.39 In this project we will review aspects of the law applicable to damages for personal injuries. Much of this dates back to the Administration of Justice Act 1982, which deals with (a) awards of damages in relation to services; (b) deduction from damages of specified benefits; and (c) awards of provisional damages. Each of these issues appears to us to merit review to take account of contemporary circumstances. In particular:
- Awards of damages for services are currently restricted to 'relatives'. We think consideration needs to be given to whether the current definition of 'relative' remains appropriate and to the wider question whether that general restriction should continue to apply.
 - The law in Scotland and in England differs on the items deductible from damages. This has generated uncertainty in relation (eg) to deductibility of private health insurance and residential care costs, the quantum of which may be very substantial. The policy in relation to deductibility appears to us to be ripe for review.
 - A related issue (albeit one not arising directly from the 1982 Act) is whether arrangements need to be put in place to protect awards of damages made to children; there have been instances where parents or guardians have sought to exploit a child's misfortune for financial gain.
 - Provisional damages. We think it appropriate to review how provisional damages operate in cases where the full extent of a person's injury emerges only after a substantial period of latency. This is important in order to make sure, on the one hand, that claims are brought without undue delay but, on the other, that pursuers are not under-compensated owing to the need to raise proceedings before the full circumstances of their injury can properly be appreciated.

Appendix A

Ninth Programme projects

| Item No | Project | Classification of project |
|---------|---|---|
| 1 | Moveable transactions (security over corporeal and incorporeal moveable property; assignation of incorporeal moveable property) | Completed – Report submitted December 2017 (Scot Law Com No 249) |
| 2 | Law of contract in light of the DCFR | Ongoing – to be completed in spring 2018 |
| 3 | Compulsory purchase | Report on consultation responses made to the Scottish Government September 2016 |
| 4 | Heritable securities | Ongoing |
| 5 | Defamation | Completed – Report submitted December 2017 (Scot Law Com No 248) |
| 6 | Proprietary aspects of leases | Ongoing |
| 7 | Aspects of the law of prescription | Completed – Report submitted July 2017 (Scot Law Com No 247) |

Appendix B

Joint reports with the Law Commission for England and Wales completed during the Ninth Programme

Statute Law Repeals: Twentieth Report

Joint Report submitted May 2015
(Scot Law Com No 243/Law Com No 357)





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