

## COMMISSION NEWSLETTER – AUTUMN 2011

This is the Scottish Law Commission's autumn 2011 Newsletter. We aim to issue a newsletter twice a year by email to keep those interested in our work up to date with progress on current and recent projects, and with general news about the Commission's activities.

### NEWS

The Commission welcomed the appointment by Scottish Ministers of a new Commissioner, Dr Andrew Steven, a senior lecturer in law and an associate director of the Edinburgh Centre for Private Law at the University of Edinburgh. Dr Steven took up his appointment at the end of August, for a period of 5 years. He is leading the Commission's projects on moveable transactions, and prescription and title to moveable property.

The Commission also welcomed the re-appointment by Scottish Ministers of Patrick Layden QC TD as a Commissioner for a further period of 2 years, as from September. Mr Layden is currently leading the Commission's projects on similar fact evidence, the criminal liability of partnerships and judicial factors.

### OUR CURRENT WORK

#### Introduction

Work continues on our Eighth Programme of Law Reform, which sets out the main areas of our law reform work up to the end of 2014.

In addition to work under our Eighth Programme, we are dealing with a reference from Scottish Ministers on admissibility of evidence of bad character, of previous convictions and of similar fact evidence, and the *Moorov* doctrine. This is the last part of a reference on criminal law topics that we received from Scottish Ministers in November 2007.

We are working with the Law Commission for England and Wales on joint projects on insurance contract law, consumer redress for misleading and aggressive practices, and level crossings.

We are also working on a three way project with the Law Commission of England and Wales and the Northern Ireland Law Commission reviewing UK legislation on the regulation of health care professions.

A summary of progress on our various projects is given below.



## Trusts

Trusts are very much a part of modern life and come in a variety of forms – for instance, as vehicles for pension schemes, as devices for providing for young children in the event of the death of a parent or grandparent, or as methods for investing in the stock market. Yet the law regulating trusts is generally old – it is mainly to be found in the Trusts (Scotland) Act 1921 – or obscure. It does not make the life of a trustee as easy as it could, nor does it provide all the benefits which it could do for people wanting to establish a trust.

Our review of this area of the law has been in progress for a number of years and we are now in the process of drafting a report on the many matters on which we have consulted. We are also instructing a new Trusts (Scotland) Bill which will set out the law in a clear and modern manner. In the course of our project we have consulted on a wide variety of different aspects of the law of trusts and we have also conducted a review of trust laws from various jurisdictions around the world.

For further information, please see the [law reform projects page](#).

## Judicial factors

A judicial factor is someone appointed by the court to look after or to gather in and distribute property belonging to someone else. Anyone can be appointed as a judicial factor though the majority taking up the role tend to be accountants or solicitors. The appointment can be made in a variety of circumstances such as where it appears that there has been misconduct in the management of a charity, where the liabilities of a solicitor appear to exceed his or her assets, where someone dies without leaving a will and nobody is prepared to act as executor or where someone is missing and the court has granted decree to the effect that the person has died. The legislation relating to judicial factors is extremely old and is no longer fit for purpose.

Our Discussion Paper on Judicial Factors (DP No 146) was published in December 2010. Two options were put forward:

The first was to keep the existing structure but to modernise it and make it more efficient by means such as updating the powers and duties of judicial factors as well as the procedure by which they are discharged.

The second option proposed a new public official, the Official Judicial Factor, who would carry out all judicial factor work unless the court wished to appoint someone else. An existing public official would become the Official Judicial Factor so that the functions would be part of the functions of an existing public office.

We have considered the responses carefully and are now working on a draft report and Bill which we aim to publish in the spring of 2012.

For further information, please see the [law reform projects page](#).

## Adults with incapacity

We are reviewing certain aspects of the Adults with Incapacity (Scotland) Act 2000 as part of our Eighth Programme of Law Reform. At present we are looking at the issue of deprivation of liberty and whether the 2000 Act needs to be amended following the decision of the European Court of



Human Rights in the case of *HL v UK* (2004) 40 EHRR 761. The case, which is often referred to as the "*Bournemouth* case", involved a person with learning disabilities who had been detained informally in a hospital for psychiatric treatment. The Court held that the person concerned had been deprived of his liberty and accordingly there had been a breach of Article 5 of the European Convention on Human Rights.

We hope to issue a discussion paper during the first half of 2012.

For further information, please see the [law reform projects page](#).

## **Contract law**

The law of contract is central to many areas of life in Scotland, touching businesses and consumers alike. Under our Eighth Programme we have embarked on a major review of contract law. (This follows a series of reports on contract published by this Commission in the 1990s.) The current project is a long-term one, ie it is likely to last until the end of the Programme, in 2014, or beyond. Our aim is to review particular aspects of the law of contract in the light of the publication, in 2009, of the Draft Common Frame of Reference which is now being used, in part, as the basis for further work by the European Commission.

We have divided the area up into a number of topics. Our first discussion paper, which was published in February 2011 (DP No 147), is on interpretation of contract. The next topic is to examine the rules on formation of contract. This will include consideration of, amongst others, the postal acceptance rule, the "battle of the forms" and the law and practice of the method of signing contracts known as "execution in counterpart". We will then publish papers on other aspects of the law of contract.

Separately, we are engaged in a joint project with the Law Commission of England and Wales to provide advice to the UK Government on certain aspects of work being undertaken by the European Commission in the field of contract law. In May 2011 the Commission published what it termed a Feasibility Study on a future initiative on European contract law. This was intended to form the basis of an Optional Instrument which, if parties wish, may be used for contracting within the European Union. The European Commission's proposal for a regulation establishing a European Sales Law Optional Instrument was published on 11 October. We expect to publish advice in November 2011.

For further information, please see the [law reform projects page](#).

## **Security over corporeal and incorporeal moveable property; assignation of incorporeal moveable property ("Moveable transactions")**

This is a medium-term project in our Eighth Programme of Law Reform.

It is customary for businesses to use their assets to raise finance. Book debts (money owed but unpaid), loan books (sums due on mortgage, credit cards, car loans etc), stock in trade, equipment (fleet of motor vehicles etc) and intellectual property rights (patents etc) may all be used in this way. But Scots law in this area is cumbersome and out of date. This may place Scottish businesses at a competitive disadvantage and lead to the loss of legal, financial and commercial business to other jurisdictions.



In our Discussion Paper on Moveable Transactions (DP 151) published in June 2011 we propose the introduction of a new type of security right over moveable property which would be registered in a new online Register of Moveable Transactions. The new register could also be used to register transfers of financial rights, for example in securitisations and factoring. These reforms coupled with other improvements to the existing law should bring benefits to those who wish to raise finance and those who wish to provide finance and their advisers.

For further information, please see the [law reform projects page](#).

### **Prescription and title to moveable property**

This is a medium-term project in our Eighth Programme of Law Reform. The project's main focus is upon whether it should be possible for the possessor of moveable property to acquire title by prescription. The project also considers whether the Prescription and Limitation (Scotland) Act 1973 should be amended to make it clear that it does not apply to rights the duration of which are governed by another enactment, with particular reference to the Copyright, Designs and Patents Act 1988.

We published our discussion paper on 9 December 2010.

Following a seminar held by the Edinburgh Centre for Private Law at the University of Edinburgh in February 2011, we received a good range of responses to our discussion paper. The project has been slightly delayed by the gap between the departure of Professor Gretton and the appointment of his successor, Dr Andrew Steven, and we now expect to publish a report in April 2012.

For further information, please see the [law reform projects page](#).

### **Similar fact evidence and the *Moorov* doctrine**

This is the final project to be conducted under the reference received from the Scottish Ministers in 2007. The project has sought to examine the use of propensity evidence in criminal trials (evidence that does not directly relate to the charge at hand but which may show an increased likelihood to partake in the charged misconduct). The specific aspects addressed by the project include: evidence of bad character (either in terms of morality or previous contact with the justice system); similar fact evidence (evidence to show that on another occasion the accused has behaved or acted in a manner consistent with the charged conduct); and the *Moorov* doctrine (a doctrine which allows uncorroborated charges against a single accused, which are connected in time, character and circumstance, to corroborate each other).

A discussion paper detailing existing law and practice in Scotland and other jurisdictions was published in December 2010. The discussion paper sought views on whether there would be support for legislating to provide for increased opportunities to lead, and rely on, propensity evidence in criminal trials. The consultation period ended on 8 April 2011 with responses received from a variety of sources including, professional bodies, public bodies, members of the judiciary, academics and individuals. We are preparing a draft report and draft Bill in light of these responses, which we expect to publish early in 2012.

For further information, please see the [law reform projects page](#).



## **Consumer redress for misleading and aggressive practices**

This project stems from a joint reference to this Commission and the Law Commission for England and Wales.

The Consumer Protection from Unfair Trading Regulations 2008 ("CPRs") outline two categories of prohibited commercial practices: those which are unfair if they would cause the average consumer to make a transactional decision he or she would otherwise not have made (misleading practices, misleading omissions and practices which are contrary to professional diligence); and those which are unfair in all circumstances (a blacklist of 31 banned practices).

The CPRs do not, however, provide consumers with a direct cause of action where they have suffered loss as a result of an unfair commercial practice. Consumers must rely instead upon the remedies which they are afforded under the existing law; for example, under the law of misrepresentation. Consumer groups have argued that this is a failing of the current law which requires to be addressed.

A joint consultation paper was published in April 2011. We proposed that consumers should have a right, which would be limited in time, to "unwind" a transaction, return the item and obtain a refund. If unwinding was not possible, a discount in price could be claimed. Extra losses, for example for distress and inconvenience, could be claimed if proved, with traders having a right to escape liability if they could show that they took all reasonable precautions to avoid committing an offence. We are now examining the many helpful responses with a view to publishing a report in the spring of 2012.

For further information, please see the [law reform projects page](#).

## **Insurance contract law**

We are working with the Law Commission for England and Wales on a major project on insurance contract law. As there is a wide consensus that consumer insurance law is in urgent need of reform, we turned our attention firstly to consumers' obligations to give pre-contractual information to insurers and insurers' remedies where they fail to do so. Our joint report and draft Bill were published in December 2009. We recommended that the consumer's duty to volunteer information to the insurer should be abolished; insurers should be required to ask questions about the things they want to know and consumers should have a duty to take reasonable care to answer those questions fully and accurately. A Bill implementing our recommendations is currently before the House of Lords. We are also working towards a second consultation paper, to be published at the end of this year, on topics such as insurable interest, fraud, post-contractual good faith and damages for late payment of claims. Issues papers relating to those topics are available on the web page indicated below. A third and final joint consultation paper will follow early in 2012 covering what a business must tell insurers when it purchases insurance. It will also deal with particular insurance contract terms known as "warranties" for both businesses and consumers. A report will be published in 2013.

For further information, please see the [law reform projects page](#).



## Level crossings

Following consultation on our provisional proposals for reform of the legislation relating to level crossings in Great Britain, the Commissions are now working on preparation of instructions to Parliamentary Counsel for a draft Bill to be annexed to the joint report. We expect to publish the joint report in the autumn of 2012.

For further information, please see the [law reform projects page](#).

## Consolidation of bankruptcy legislation

Our consultation paper seeking comments on a number of proposed amendments to the Bankruptcy (Scotland) Act 1985 was published on 15 August. The consultation period is due to end on 30 November.

For further information, please see the [law reform projects page](#).

## Criminal liability of partnerships

This short-term project, conducted as part of our Eighth Programme of Law Reform, considers the criminal liability of partnerships. Of particular concern is the effect that dissolution of a partnership may have on prosecution.

Our discussion paper, published in May 2011, addressed the following issues: (i) the dissolution issue (the effect dissolution of a partnership will have on the prosecution of that partnership as an entity); (ii) the bases upon which individual partners may be criminally liable in relation to partnership offences; and (iii) the effect (if any) dissolution of the partnership will have upon such individual liability. It also asked whether the existing legal position would benefit from clarification and whether there would be support for amending the Scottish approach to prosecuting partnerships.

The period of consultation ended on 12 August. We aim to publish a report and accompanying draft Bill before the end of 2011.

For further information, please see the [law reform projects page](#).

## Homicide

The newest project that the Criminal Law Team is working on is the Homicide project, which evolved from the original proposals contained in the Seventh Programme of Law Reform. Intended to be a medium-term project, it will encompass a review of defences including provocation, self defence, coercion and necessity and will also examine the law of homicide more broadly.

The project was partly inspired by the case of *Drury v HM Advocate* 2001 SCCR 583 in which the High Court commented that the law of provocation was unsatisfactory, but that reform would require legislation. Rather than consider this issue alone it was decided, based on responses received during our consultation on the Eighth Programme of Law Reform and in the light of recent developments in other jurisdictions, that it would be more useful to conduct a general review of the law of homicide, and to deal with defences as part of that project. In addition, it has become clear that some work is required to clarify the definition of murder in Scots law, in light of the decision of the High Court in *Petto v HM Advocate* [2011] HCJAC 78.



Work on this project has been deferred pending the completion of the projects on Similar Fact Evidence and the *Moorov* Doctrine and Criminal Liability of Partnerships. We expect to publish a discussion paper during 2012 and to complete the project during the period covered by the Eighth Programme.

For further information, please see the [law reform projects page](#).

### **Regulation of health care professions**

We are working with the Law Commission of England and Wales and the Northern Ireland Law Commission on a project reviewing UK legislation in relation to the regulation of health care professions. This project follows a reference from the Department of Health.

The intention is to review the regulatory framework with a view to modernising and simplifying the existing law.

For further information, please see the [law reform projects page](#).

### **IMPLEMENTATION OF COMMISSION REPORTS**

In addition to these projects, where requested we support Scottish Government Directorates and UK Departments who are responsible for implementing our reports. We regard this service as an important part of our functions, enabling us to provide further explanation of our policy approach, if required, or to offer further advice.

In September the Scottish Government announced its Legislative Programme for Scotland 2011-2012. The Commission is pleased to note that 2 outstanding Commission reports are to be taken forward by Government Bills in the Programme – the Bill on Long Leases is to be re-introduced, and a Bill on Land Registration. The Commission welcomes the further statement in the Programme that the Government will continue to reform the law in key areas, with mention of our project on similar fact evidence.

As regards the UK, the Consumer Insurance (Disclosure and Representations) Bill was introduced into the UK Parliament on 16 May by HM Treasury. The Bill derives from the joint report of the Scottish Law Commission and the Law Commission for England and Wales in December 2009; part of a wider joint project to reform insurance law. The Bill was introduced via the procedure available for uncontroversial Law Commission Bills. The procedure is intended to reduce the time that Law Commission Bills spend on the floor of the House of Lords by providing for certain stages to be carried out in Committee. This allows the Bills to be considered and scrutinised despite the pressures of Parliamentary time.

### **COMMENTS AND FURTHER INFORMATION**

Further information about the Commission, the Commissioners and staff, and our law reform publications can be found on our website at <http://www.scotlawcom.gov.uk/>. The website has full text versions of all of our reports and discussion papers.