

COMMISSION NEWSLETTER - AUTUMN 2010

This is the Scottish Law Commission's autumn 2010 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

Link with Malawi Law Commission

The Scottish Law Commission has established a link with the law reform body in Malawi, the Malawi Law Commission. This is designed to facilitate co-operation and assistance between the Commissions for the purpose of promoting law reform. Agreement on the link was reached during a visit to the Malawi Commission by our Chief Executive, Malcolm McMillan.

This arrangement is a contribution to the Scottish Government's Programme of Capacity Building for Justice in Malawi. The Programme takes forward work envisaged in the Scotland-Malawi Co-operation Agreement signed in 2005. Challenges Worldwide (CWW), the Edinburgh-based charity appointed by Scottish Ministers to deliver the Programme, assisted in setting up the arrangement between the Commissions. CWW undertook a pilot study in Malawi, establishing the needs of bodies in the justice sector such as the Malawi Law Commission.

As part of the link between the law reform bodies one of the Commission's legal assistants, Garry MacLean, is undertaking a placement for 6 months at the Malawi Law Commission. Garry travelled to Malawi in September. He has joined the Malawi Commission's Intellectual Property Team, which is currently working on a review of the law on trademarks.

One of our Commissioners with an expertise in intellectual property law, Professor Hector MacQueen, has also given advice to the Malawi Commission on their project.

The Commission is donating surplus law library stock to the Malawi Commission.

Improving implementation of law reform measures

The Commission continues to work with the Scottish Government and the Scottish Parliament to improve the rate of implementation of Commission recommendations.

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 also working on 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 also assisting the Law Commission with joint projects on insurance contract law, misrepresentation and unfair commercial practices, and on level crossings.

A summary of these various projects is given below.

Trusts

We are continuing to work on our project on trust law. In January of this year we published our final Discussion Paper before beginning work on our Report: it was on the rules restricting the accumulation of income and various rules governing the length of time for which a trust may run (No 142). (We have published six previous Discussion Papers, on breach of trust (No 123), apportionment of trust receipts and outgoings (No 124), trustees and trust administration (No 126), variation and termination of trusts (No 129) (and the associated Report (Scot Law Com No 206)), the nature and constitution of trusts (No 133), and liability of trustees to third parties (No 138).)

We are now working on a Report on the topics on which we have consulted. A new Trusts (Scotland) Bill will be annexed to the Report; this will replace the Trusts (Scotland) Act 1921 and a number of other statutory provisions. In the course of considering the many topics on which we have already consulted we have identified a small number on which some further, limited consultation is desirable. We are undertaking this alongside the preparation of the Report.

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

Judicial factors

A judicial factor is an officer appointed by the court to collect, hold and administer property in certain circumstances; for example, there may be a dispute regarding the property, there may be no one else to administer it or there may be alleged maladministration of it. As most of the legislation relating to this area of the law is extremely old, we are developing proposals to replace it with provisions relevant to those dealing with this office in the 21st Century. We are aiming to publish a Discussion Paper by the end of 2010.

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

Adults with incapacity

Our Eighth Programme includes a medium-term project to review certain aspects of the regime introduced by the Adults with Incapacity (Scotland) Act 2000. We intend to concentrate initially on examining issues surrounding the compatibility of care arrangements with Article 5 ECHR. We are continuing with our research with a view to preparing a discussion paper for publication in 2011. An advisory group has been set up to assist the project team and had its first meeting in September.

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



Contract law

Our Eighth Programme includes a review of contract law as a long-term project (ie it is likely to last until the end of the Programme, in 2014, or beyond). This Commission has already considered a number of topics within the field of contract law, most recently in a series of Reports published in the late 1990s. Our aim in the current project 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. We are still at an early stage of the project, but we will begin by publishing a Discussion Paper on Interpretation, which we aim to do early in 2011, followed by one on Formation of Contract. We are being assisted by a number of advisory groups representing different relevant interests (such as practitioners, academics, the judiciary and the business community).

We have also been working on penalty clauses, which was another of the topics on which the Commission reported in the 1990s. The Scottish Government has recently consulted on a draft Penalty Clauses (Scotland) Bill.

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 covers assignation and security over incorporeal moveable property (such as book debts) which has been carried forward from our Seventh Programme of Law Reform and also as a new topic security over corporeal moveable property. In all these areas and particularly in a commercial context the law appears cumbersome and in need of reform. We have carried out discussions with interested groups, including the financial sector, about the underlying financial and economic background, current practices, and deficiencies that are thought to exist. We have also carried out comparative research to see how matters are dealt with in other jurisdictions such as the USA (Article 9 of the Uniform Commercial Code) and New Zealand (Personal Property Securities Act 1999). We are presently preparing a discussion paper which we intend to publish in May 2011.

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 aim to publish a discussion paper by the end of 2010.

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



Similar Fact Evidence and the *Moorov* Doctrine

The final project to be conducted under the reference from Scottish Ministers in 2007 concerns the law relating to the admissibility of evidence of bad character or of previous convictions, similar fact evidence, and the *Moorov* doctrine. We aim to publish a discussion paper by the end of 2010 or early in 2011.

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

Misrepresentation and unfair commercial practices

We have undertaken, jointly with the Law Commission for England and Wales, a joint reference on Misrepresentation and unfair commercial practices. 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.

We have produced an [initial paper](#) on the relevant Scots law which is available on the web page indicated below. We are aiming to publish a joint Consultation Paper in spring 2011.

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 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. Our policy in relation to the law of non-disclosure and misrepresentation in business insurance will be considered next year. We are also working towards a second consultation paper 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.

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



Level crossings

A joint consultation paper with the Law Commission for England and Wales was published in July 2010 seeking comments on reform of the legislation relating to level crossings in Great Britain. The consultation period runs until 30 November 2010. The aim is to publish a report in 2012.

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

Consolidation of bankruptcy legislation

Work is continuing on preparation of a draft Bill to consolidate the legislation relating to bankruptcy in Scotland. The project is being supported by the Accountant in Bankruptcy's office, whose officials are working closely with the Commission team. The aim is to complete work on the Bill and publish a report in spring 2011.

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

RECENTLY COMPLETED PROJECTS

A summary of the projects we have recently completed is given below.

Property

Our review of the Land Registration (Scotland) Act 1979 has been completed with the publication of our Report on Land Registration in February 2010. The Report includes recommendations to speed up the process of bringing properties into the Land Register, to facilitate electronic conveyancing in all cases including missives, to minimise delays in the registration process, to make it simpler to put mistakes right, and to introduce a system of advance notices to protect buyers from last-minute adverse entries in the Land Register (or in the interlocking Register of Inhibitions), replacing the system of "letters of obligation".

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

IMPLEMENTATION OF COMMISSION REPORTS

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

The Criminal Justice and Licensing (Scotland) Act 2010, which received Royal Assent on 6 August, implements three of our reports (on Insanity and Diminished Responsibility, Age of Criminal Responsibility and Crown Appeals).

The Scottish Government has introduced a Bill on Double Jeopardy in the Scottish Parliament, having considered our Report on the matter published in December last year.

The Scottish Government issued a consultation paper in July 2010 on Damages for Wrongful Death seeking views on the recommendations contained in our Report published in September 2008. Meantime, a Member's Bill introduced in Scottish Parliament by Bill Butler MSP is being



considered by the Parliament's Justice Committee and our Chairman, Lord Drummond Young, gave evidence to the Committee at one of its meetings in September.

In its Legislative Programme for 2010/11, announced in September, the Scottish Government has stated that it intends to introduce legislation to convert ultra long leases into ownership. A Bill on Long Leases would implement our Report on Conversion of Long Leases, which was published in 2006.

The Registers of Scotland, on behalf of the Scottish Government, are presently carrying out a consultation on the recommendations etc contained in our Report on Land Registration which was published earlier this year. The consultation period closes on 30 November 2010 (see <http://www.ros.gov.uk/lrbillconsultation/index.html>).

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 nearly all our reports since 1965 and of all our discussion papers since 1997.