



*The Royal Society
of Edinburgh*

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Malcolm McMillan
Scottish Law Commission
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28 July 2017

Dear Malcolm,

Tenth Programme of Law Reform

The RSE welcomes the invitation from the Scottish Law Commission to respond to the consultation regarding the preparation of the tenth programme of law reform in Scotland. In preparing our response the RSE has drawn from the expertise of its Fellowship and the Young Academy.

The RSE recognises the importance of reform to ensure that laws remain relevant in a fast changing world. However Scots Law and, more generally, the court system which supports it are going through an unprecedented time of change. Recent reform efforts have led to significant change and these are still in the process of being implemented. The implementation of the Courts Reform (Scotland) Act 2014 is bringing huge changes to the way Scots law is litigated before the Scottish Courts. There are also significant changes currently being consulted upon by the Scottish Civil Justice Council, which will bring further radical change in the civil courts.

In other areas of law, more change is underway: both the criminal courts and public and constitutional sphere are the subject of reform which has yet to be implemented. Brexit will present the biggest legal challenges in a hundred years. Its magnitude and impact on the legal system should not be under-estimated.

The Scottish Law Commission has also been busy in major projects on prescription and contract which are near completion; these will also bring further expected reform to the sector

if adopted. There are also a number of other significant Commission reports that are yet to be taken forward by the Scottish Government and are outstanding. These are also expected to bring further significant change to the legal system.

It is clear that there is a significant level of reform underway and another wave of reform is included in Commission reports which have still to be implemented. The legal system is complex, with strong connections among all areas of law. Therefore the RSE would urge caution in proposing further reform and significant change at this time.

Nonetheless, there are areas that the Commission could usefully consider for reform.

Consolidation

The Scottish Law Commission has been involved in Consolidation since 1965: a recent and valuable example is the work that led to the Bankruptcy (Scotland) Act 2016. However, in recent history this has been rather an isolated example. Consolidation is not the most glamorous work and often does not attract much notice but it is useful in ensuring the statute book does not become a mess. If consolidation is not looked at there is a risk that the law will lose transparency, which will lead to increases in cost to those who wish to find out what the law is.

The amount of consolidation work that is needed is large and the position has deteriorated in recent years. To tackle everything that is needed would be well beyond the limited resources of the Commission. The RSE believes that the Commission could chip away at the problem by always having a project on the go at any one time. This may involve the Commission producing a new consolidation report every two or three years or so.

Codification

Codification is systematic legislation that covers a substantial area of law, it can overlap with consolidation but normally codification involves the replacement of common law. Codification is important because, like consolidation, it makes the law more accessible. Unlike consolidation, codification may and commonly does involve the alteration of the law in areas where it has been found to be unsatisfactory.

The RSE understands that large-scale codification on lines of the French or German civil code would be beyond the resources of the Commission and it would be doubtful if there is a political appetite for such extensive codification. However, limited codification could be possible; the Commission may want to consider codification in three areas: criminal law, contract law, and trust law. Mostly all western countries have a criminal code (England and Scotland are unique in not having one), therefore this could be the focus of the Commission's reform around codification.

The case for codifying contract law and trust law is different, as these are areas of the law that are of particular interest to outsiders who are potentially going to be investing in Scotland. It is not easy for potential investors to know what they are dealing with in these areas. In order to promote investment Scotland needs to demonstrate its legal wares, and without codification this is hardly possible.

The RSE believes that codification of any of these three areas would be a major job for the Commission; therefore it would recommend that the Commission takes on this work one area at a time as it does not have sufficient resources.

Cohabitation

Currently it is common for couples to live together without being married or in a civil partnership. Many of those in relationships wrongly believe that on separation or the death of their partner they will be treated as if they had been married. The current law on cohabitation has been in force for just over ten years and the time is right to revisit the issue of whether modern relationships in which the couples do not enter marriage or a civil partnership should for that reason alone continue to be financially disadvantaged. The current law is generally unsatisfactory, and unclear in determining both the commencement and the ending of cohabitation. While consequential issues arising when the relationship ends on the death of one of the parties was examined by the Scottish Law Commission in 2009, the RSE believes that the whole of the current law on cohabitation could be subject to review and reform. Reform should lead to a comprehensive statute on the rights and obligations of cohabitants, and especially the definition of cohabitation, that would help cover all couples who are not in a marriage or civil partnership.

Surrogacy and Gender Recognition

The RSE would recommend that the Scottish Law Commission considers areas of law which are currently being considered for reform by the English Law Commission. One such area is surrogacy. Although this matter is reserved, the existing law attempts to replicate adoption law, which is not reserved and the current regulations in places apply only with some awkwardness to Scots law. Therefore the Scottish Law Commission could examine the existing rules on surrogacy and parental orders in order to reduce complexity and ensure that regulations better apply to Scots Law. At the very least, close liaison with the English Law Commission as it examines the reserved aspects of the law of surrogacy (as it applies in Scotland) is called for. Alternatively, recommendations for change could be made direct to the UK authorities.

The UK Government has recently announced its intention to simplify the gender recognition process (in England and Wales). This matter is not reserved and might form a short and speedy project to ensure that Scotland does not fall behind best practice in this area of legal regulation.

This response was completed with input from members of the RSE's Fellowship and of the Young Academy of Scotland. The RSE would like to thank the Scottish Law Commission for the invitation to respond to the consultation. If you would like to find out more about this response please contact Paul Stuart at pstuart@therse.org.uk.

Yours sincerely,

A handwritten signature in black ink that reads "Alan Alexander". The signature is written in a cursive style with a large initial 'A'.

Professor Alan Alexander OBE FRSE FAcSS
General Secretary