

Dear Malcolm,

SLC TENTH PROGRAMME OF LAW REFORM

One or two thoughts about the 10th Programme.

(1) One of the SLC's tasks as set out in the 1965 Act is consolidation, and much good work has been done over the years, such as the project that led to the Bankruptcy (S) Act 2016. But the truth is that such work was mostly done in the earlier decades. It is not glamorous work, but it is useful, and it is something that the SLC ought to be doing, albeit it is true that limited resources mean that not a great deal can be done. But "not a great deal" is not the same as "nothing".

(2) Another of the SLC's tasks as set out in the 1965 Act is codification. I fully appreciate the difficulties here. But is it really the case that nothing can be done? Apart from resources (a major issue admittedly) there is the problem that politicians seem uninterested. But here one can put forward the "shop window" argument, namely that a small country such as Scotland needs some elements of codification in order to be business-friendly.¹ The smaller a country is, the more it needs its law to be clearly on-display. And here two areas stand out. One is contract law. There is of course the unhappy story of the early failed attempt to codify, as a joint project with London. But things have changed. The codification of contract law was, 50 years ago, an insuperably difficult project. Now a vast amount of groundwork has been done, partly at the European level (PECL, DCFR) and partly of course by the SLC itself. Moreover, I think that today a Scotland-only contract code would be feasible, something that would not have been true 50 years ago.

(3) The other codification for which there is a strong shop-window argument is trust law. Trust law nowadays has an international aspect. Those wishing to place assets in trust nowadays often choose the jurisdiction where the trust is to be established. If Scotland is to be seen as a suitable jurisdiction, it needs good trust law. On the whole, it does have good trust law. But it also needs a trust law that can be inspected by potential settlors and their advisors. That we do not have, because so much of our trust law is unenacted. A Trust Code (Scotland) Act would thus (i) incorporate the existing statutory law (including of course the recommendations of the SLC Report on Trust Law and (ii) enact what is at present unenacted. Other jurisdictions have done this. We could too.

(4) The "shop-window" argument (which applies both to contract and to trusts) is not only valid in itself, but an argument that politicians should be able to grasp. Hence there would, I think, be some prospects of implementation.

(5) Timing and capacity. Both of the above – contract codification and trust codification – would take a good deal of time and resource. Clearly they would have to be taken one at a time. And it may be that in the period of the 10th Programme resource could not be found. But in that case it would be good if a marker could be put down, ie if the SLC could say, in its new programme, something on the lines of "we cannot undertake either a contract or trust

¹ Obviously a criminal code is not subject to the "shop window" argument: Scotland is not wanting to attract international criminal business! Nevertheless a contract code is desirable for other reasons. When told that Scotland lacks a criminal code, foreign lawyers have to be picked up off the floor. If they are polite they manage to avoid muttering remarks about "primitive legal systems". But in this letter I won't discuss criminal law.

codification at present but we regard that work as important and hope to be able to embark on it hereafter.”

(6) Finally, I have a proposal for substantive law reform. It links with what I have said above about trust law and the importance of Scots law having an international appeal. Many countries offer an asset-management vehicle called the private foundation.² This is functionally the same as a private-law trust, with this important difference: it has full juristic personality. Title is vested in the entity itself, not its trustees. Nowadays many countries offer both vehicles, ie both (i) the private-law trust and (ii) the private foundation. Scotland does not. The latter is not on the menu. This is a historical accident. It should be put right.

Scotland needs the private-law foundation for reasons of competition at the international level (including competition with England, which does not have the private-law foundation).

I have been meaning for some time to write an article on this subject, but alas other things have prevented me. But I would be happy to provide more details if you would like.

With best wishes,

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² Names vary: *la fondation privée*, *die privatstiftung* etc. For examples see the Foundations (Jersey) Law 2009, the Austrian *Privatstiftungsgesetz* (1993) etc.