

COMMISSION NEWSLETTER – SPRING 2011

This is the Scottish Law Commission's spring 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

Professor George Gretton, one of our Commissioners, completed his term of office at the end of April. He has now resumed work at the Law School of Edinburgh University. Professor Gretton made a valuable contribution to the work of the Commission, and in particular led the teams working on property-related matters. A Report on Land Registration was published in February last year; a Discussion Paper on Prescription and Title to Moveable Property was issued in December last year; a Discussion Paper on Moveable Transactions is to be published shortly, and a joint Consultation Paper on Level Crossings was published in July last year. In addition, Professor Gretton and the property law team have provided advice on various property law matters to the Scottish Government.

A recruitment exercise to fill the Commissioner post has been held, and an announcement of the new appointment will be made shortly.

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

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

Trusts

Our project on trusts is involving us in a comprehensive and detailed review of the law. In April we published a further Discussion Paper, our eighth discussion paper within this review. It serves two purposes. First, views are sought on a variety of points in connection with topics on which we have



already consulted but where we consider that further input is needed. Second, a number of wider questions are raised, such as whether it would be desirable to set out the law of trusts in a comprehensive legislative statement (as has happened in a number of jurisdictions including the Channel Islands and several other off-shore centres) and whether there would be support for introducing specialised types of trust which are found in a number of leading trust jurisdictions.

Our Report will cover the topics on which we have consulted (other than those in the Discussion Paper on the Nature and Constitution of Trusts (DP No 133)) and will have annexed to it a new Trusts (Scotland) Bill to replace the Trusts (Scotland) Act 1921 and a number of other statutory provisions. In working on this project we are very much aware of the contribution which can be made to the Scottish economy by updating and clarifying the law in the broad area of trusts – some of which is now very dated – and (if supported on consultation) by legislating for new types of trust to be created.

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 and invited views on updating the way in which the function of judicial factor is carried out. The consultation closed on 15 April 2011. Two options were put forward.

The first is 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 proposes a new public official, the Official Judicial Factor, who would carry out all judicial factory 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. Costs would generally be recovered from the property being managed.

We are considering the results of the consultation.

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 are considering whether reform is needed 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 there had been a violation of Article 5 of the Convention because the person had not been detained in accordance with a procedure prescribed by law.

We hope to issue a discussion paper by the end of 2011.

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 as the basis for drafting a Common Frame of Reference, which will be considered at a European level in connection with a possible common contract law).

We published a Discussion Paper on Interpretation in February 2011 (DP No 147), whose consultation period runs until 20 May 2011. We had a good deal of assistance from a number of advisory groups representing different relevant interests, such as practitioners, academics, the judiciary and the business community.

Our next topic, on which we aim to publish a Discussion Paper towards the end of 2011, is on the formation of contract. In particular we will examine two areas of the law: first, what is known as "the postal acceptance rule", under which an acceptance which is put in the post is deemed to take effect at that point in time (and not when it reaches the addressee), and secondly the law and practice of the method of signing contracts known as "execution in counterpart". We will convene a further advisory group to assist us, particularly in relation to the latter topic.

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 June 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 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. We intend to publish our Report by the end of 2011.

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 and responses from a variety of sources including, professional bodies, public bodies, members of the judiciary, academics and individuals are currently being reviewed. A report should be expected in late 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.

A joint Consultation Paper was published on 12 April 2011. We propose 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 is not possible, it is proposed that 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 can show that they took all reasonable precautions to avoid committing an offence. The consultation period ends on 12 July 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 this year. We are also working towards a second consultation paper, to be published 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.

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 ended on 30 November 2010 and the Commissions received over 100 responses. The Commissions are now working on developing the policy paper for the report, which we aim to publish 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. We expect to issue a consultation paper, with a draft Bill and draft recommendations, by the summer 2011. The aim is to complete work on the Bill and publish a report by the end of 2011.

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.

We aim to publish a Discussion Paper in May, that will address 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.

The discussion paper will ask whether the existing legal position would benefit from clarification and whether there would be support for amending the Scottish approach to prosecuting partnerships.

Following the consultation period we plan to publish a final report in the late autumn this year.

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.

Work on this project is progressing and a Discussion Paper may be expected in the second half of 2011. It is hoped that this project will be completed during the period covered by the Eighth Programme.

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 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, or to offer further advice.

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



The Scottish Government introduced a Bill on Double Jeopardy in the Scottish Parliament, having considered our Report on the matter published in December 2009. The Bill received Royal Assent on 27 April 2011.

Further to our Report on Damages for Wrongful Death, published in September 2008, a Member's Bill was introduced in the Scottish Parliament by Bill Butler MSP. Our Chairman, Lord Drummond Young, gave evidence on the Bill in September last year. The Bill received Royal Assent on 7 April 2011.

The Scottish Government introduced a Bill on Long Leases which was intended to convert ultra long leases into ownership. The Bill did not complete the necessary Parliamentary stages before dissolution of the Parliament in March. That Bill would have implemented our Report on Conversion of Long Leases, which was published in 2006. Professor Gretton gave evidence on the Bill to the Justice Committee in January this year.

The Registers of Scotland, on behalf of the Scottish Government, have carried out a consultation on the recommendations contained in our Report on Land Registration which was published in February 2010. The consultation period closed 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.