

## NEWSLETTER ISSUE 5 – AUGUST 2007

Welcome to the Scottish Law Commission's fifth Newsletter. We aim to issue a newsletter at approximately six-monthly intervals to keep those interested in our work up to date with progress on current projects and with general news about the Commission's activities.

## OUR CURRENT WORK

### Introduction

Work is continuing on our *Seventh Programme of Law Reform*, which sets out the main areas of our law reform work up to the end of 2009. It covers substantial reviews of land registration, leasehold tenure, trusts and judicial factors, as well as four projects on succession, assignation and security over incorporeal moveables, unincorporated associations, and provocation, self-defence, coercion and necessity.

In addition to work under our Seventh Programme, we are continuing to work on projects arising from references from Scottish Ministers, for example our projects on limitation and prescription in personal injury actions and the law of damages for wrongful death.

### Damages for wrongful death

Our project on **damages for wrongful death** stems from a reference from Scottish Ministers in September 2006 asking us to consider the law relating to damages recoverable in respect of deaths caused by personal injury and damages recoverable by relatives of an injured person.

When a person is injured as a result of the wrongful actions of another, the injured party is usually entitled to compensation for the loss suffered as a result of the injury. In cases where the injuries result in death, three possibilities arise: first, the victim may claim compensation from the responsible person before death; second, the victim may die before proceedings have been completed; and third, the victim may die before raising proceedings. Each of these scenarios raises potential issues for reform. These issues are considered in our Discussion Paper on *Damages for Wrongful Death*, which was published on 1 August. Responses to the paper are invited to be submitted by 30 November 2007.

### Rape and other sexual offences

We published a Discussion Paper (Scot Law Com No 131) on *Rape and Other Sexual Offences* in January 2006 and the consultation period closed in May 2006.

We are currently working on the Report and the accompanying draft legislation. Amongst other reforms, we have it in mind to recommend a statutory definition of consent, which will apply to a wide range of sexual activity, and the expansion of the definition of rape. We shall also consider recommending that rape and other sexual offences be defined in gender neutral terms and that



sexual orientation will play no role. In addition, the draft Bill is likely to contain provisions designed to protect vulnerable groups, such as children and those with a mental disorder. We also have it in mind to provide statutory protection for those up to the age of 18 where an adult (such as a teacher, parent, carer in a local authority home, member of the medical staff in a hospital, etc) is in a position of trust.

### **Limitation in personal injury actions**

Following consultation on our Discussion Paper on *Personal Injury Actions: Limitation and Prescribed Claims*, work is progressing on our report and draft Bill which we aim to publish by the end of 2007.

The project stems from two references from the Scottish Ministers and concerns the so-called "knowledge test" and the power of the courts to override the limitation period if it is equitable to do so. Concern had been expressed about the way the test operates, particularly in cases involving industrial diseases. The question has been raised whether the Prescription and Limitation (Scotland) Act 1973 should be amended to specify factors to which the court should have regard in exercising its discretion. The second reference concerns claims for damages for personal injury which were extinguished as a result of prescription before 26 September 1984, when a number of amendments to the 1973 Act came into force. One of those amendments was the removal of personal injury actions from the scope of prescription. This change in the law did not affect claims which had already been extinguished. This topic was referred to us following concerns about the position of people, particularly those who had claimed to have suffered childhood abuse many years ago in various institutions in Scotland, whose claims were extinguished under the previous rules of prescription.

### **Property**

The project on **leasehold tenure** was completed in December 2006 with the publication of our Report on *Conversion of Long Leases* (No 204). The main recommendation is that tenants of ultra-long leases should be entitled to have their rights converted into ownership. An ultra-long lease in this context is a lease which is granted for more than 175 years and which still has more than 100 years to run.

Our review of the **Land Registration (Scotland) Act 1979** has continued to make progress. This project looks at the difficulties that have arisen in practice with the 1979 Act and considers the need for a conceptual framework to underpin its provisions. A discussion paper (No 125) on void and voidable titles, dealing with policy objectives of a system of registration of title, was published in 2004. A second discussion paper (DP 128) was published in August 2005, and looked at the three core issues of registration, rectification and indemnity against the background of the conceptual framework set out in the first paper. A third paper, which was published in December 2005, considered various other issues such as servitudes, overriding interests and the powers of the Keeper of the Register. The team has started the process of instructing a draft Bill.

A further project concerns the protection of purchasers buying property from insolvent sellers and the issues highlighted by the House of Lords decision in *Sharp v Thomson* 1997 SC (HL) 66. A discussion paper (No 114) was published in July 2001. One of the main proposals has largely been superseded by *Burnett's Trustee v Grainger* 2004 SC (HL) 19 where the House of Lords declined to apply *Sharp v Thomson* to ordinary personal insolvency. Another proposal has been



implemented by section 17 of the Bankruptcy and Diligence etc. (Scotland) Act 2007. We aim to submit our report on this project by the end of the year.

## **Succession**

Work is under way on the new project on **succession** which has been started under our Seventh Programme. We last reviewed this area 15 years ago although the recommendations made then have not been implemented. The concern remains that the law does not reflect current social attitudes nor does it cater adequately for the range of family relationships which are common today. The project focuses mainly on a surviving spouse's rights on intestacy and the protection of spouses, cohabitants, children and other relatives from disinheritance. As a first step a public attitude survey was commissioned to help shape provisional proposals for reform and the team has been considering the survey results. We published a discussion paper in August inviting comments by 31 December 2007.

## **Trusts and judicial factors**

Our wide-ranging review of the law of **trusts** continues. Five discussion papers have been published so far - on breach of trust (No 123), on apportionment of trust receipts and outgoings (No 124), on trustees and trust administration (No 126), on variation and termination of trusts (No 129) and on the nature and constitution of trusts (No 133), the last being published in October 2006. It explores the legal relationships between trustees, beneficiaries and third parties and the juridical acts that are necessary to create a trust. Our Report and draft Bill on Variation and Termination of Trusts was submitted to the Scottish Ministers in February 2007.

Our work on judicial factors has been delayed due to other priorities but we aim to publish a discussion paper around the end of this year.

## **Insurance law**

We are working with the Law Commission for England and Wales on a major project on **insurance law**. Our joint Consultation Paper on *Insurance Contract Law: Misrepresentation, Non-Disclosure and Breach of Warranty by the Insured* was published on 17 July 2007. We would welcome comments on all or any of our proposals before 16 November 2007.

The current law dates from 1906, a time when private insurance as we know it today was the preserve of the wealthy few. Today the insurance industry is a huge business and an integral part of our personal lives. The proposals largely focus on misrepresentation and non-disclosure and explore the issues around what happens when claimants make mistakes in application forms.

The industry, aware that the 1906 Act is outdated and inappropriate to a modern consumer market, has compensated with codes of practice. Regulation by the Financial Services Authority (FSA) and the dispute resolution service provided by the Financial Ombudsman Service (FOS) have also mitigated the harsh effects of the law. Whilst well intentioned, this is confusing for all parties. The law says one thing, the FSA rules require another and the FOS reaches decisions based on a third. This also leaves gaps in protection, and has little impact on business insurance.

The Commissions' proposals distinguish between business and consumer policyholders. For consumers, they largely reflect the FSA rules and FOS guidelines. A clear distinction is made



between those who act deliberately or recklessly, those who act carelessly and those who act reasonably. In short, the proposals are tough on fraudsters, take a proportionate approach to those who acted carelessly, and provide proper protection for those who acted reasonably. A more detailed explanation of the proposals, using examples of real cases from the FOS, is available **on our website** together with a **Summary** of the Consultation Paper and the Consultation Paper itself.

A similar suggestion is made for business policyholders although for them it would operate as a default regime, leaving the parties free to contract out.

The material in the Consultation Paper is based to a large extent on a series of Issues Papers. These did not represent the policy of either Commission but were intended as a vehicle for sharing initial thinking with interested parties. The first was on *Misrepresentation and Non-Disclosure*, the second on *Warranties* and the third on *Intermediaries and Pre-contract Information*. We received very helpful responses to the papers which led us to modify several preliminary proposals. The papers are also available on our website.

We aim to publish a further consultation paper in 2008 and a report in 2010.

### **Assignment of and security over incorporeal moveable property**

This is a long-term project in our *Seventh Programme of Law Reform*. Particularly in a commercial context, the existing law about the transfer of incorporeal moveable property, such as book debts, appears cumbersome and may be in need of reform. The same is true for security rights granted over such property. We are currently carrying out preliminary 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 are also carrying out comparative research to see how such issues are dealt with in other jurisdictions

## **ASSISTING IN THE IMPLEMENTATION OF REPORTS**

In addition to the projects referred to above, we support, on request, departments 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.

## **COMMENTS AND FURTHER INFORMATION**

If you have any comments on our current work, please contact us at [info@scotlawcom.gov.uk](mailto:info@scotlawcom.gov.uk). Further information about our current projects and our law reform publications can be found on our website at [www.scotlawcom.gov.uk](http://www.scotlawcom.gov.uk). The website has full text versions of nearly all our reports since 1992 and of all our discussion papers since 1997.