

COMMISSION NEWSLETTER – SPRING 2012

This is the Scottish Law Commission's Spring 2012 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

One of the Commission's project managers, John Dods, has retired. The Commission is very grateful to John for his commitment and dedication to the Commission, for over 20 years, in particular on property law projects.

IMPLEMENTATION OF COMMISSION REPORTS

The Commission was pleased to note the granting of Royal Assent to the Consumer Insurance (Disclosure and Representations) Bill in March 2012. That Act will implement our joint Report with the Law Commission for England and Wales on aspects of consumer insurance law – further detail is given below.

We are delighted that the Scottish Government has introduced two Bills into the Scottish Parliament which would implement outstanding Commission Reports: the Land Registration etc (Scotland) Bill, introduced on 1 December 2011; and the Long Leases (Scotland) Bill, re-introduced on 12 January 2012.

The Commission also warmly welcomes the Scotland Office consultation, published in April this year, on reforming the law on Scottish unincorporated associations, and on the criminal liability of Scottish partnerships. This consultation addresses the recommendations of two outstanding Commission reports on reserved matters of Scots law.

Where requested we support Scottish Government Directorates and UK Departments who are responsible for implementing our reports. We regard this service as an important part of our functions, enabling us to provide further explanation of our policy approach, if required, or to offer further advice.

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 working with the Law Commission for England and Wales on joint projects on insurance contract law and level crossings.

We are also working on a three-way project with the Law Commission for England and Wales and the Northern Ireland Law Commission reviewing UK legislation on the regulation of health care professionals.

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

Trusts

Trusts are very much a part of modern life and come in a variety of forms – for instance, as vehicles for pension schemes, as devices for providing for young children in the event of the death of a parent or grandparent, or as methods for investing in the stock market. Yet the law regulating trusts is generally old – it is mainly to be found in the Trusts (Scotland) Act 1921 – or obscure. It does not make the life of a trustee as easy as it could, nor does it provide all the benefits which it could do for people wanting to establish a trust.

Our review of this area of the law has been in progress for a number of years and we are now in the process of drafting a report on the many matters on which we have consulted. We are also instructing a new Trusts (Scotland) Bill which will set out the law in a clear and modern manner. In the course of our project we have consulted on a wide variety of different aspects of the law of trusts and we have also conducted a review of trust laws from various jurisdictions around the world.

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. Two options were put forward:

The first was 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 proposed 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.

We have considered the responses carefully and are now working on a draft report and Bill which we aim to publish this year.

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

Adults with incapacity

We are reviewing certain aspects of the Adults with Incapacity (Scotland) Act 2000 as part of our Eighth Programme of Law Reform. At present we are looking at the issue of deprivation of liberty and whether the 2000 Act needs to be amended 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 "Bournewood case", involved a person with learning disabilities who had been detained informally in a hospital for psychiatric treatment. The Court held that the person concerned had been deprived of his liberty and accordingly there had been a breach of Article 5 of the European Convention on Human Rights.

We are aiming to publish a discussion paper in the summer of 2012.

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, in part, as the basis for further work by the European Commission.

We have divided the area up into a number of topics. Our first discussion paper is on interpretation of contract ([DP No 147](#); February 2011). The second is on formation of contract ([DP No 154](#); March 2012, with comments invited by 29 June 2012). This includes consideration of the postal acceptance rule and the "battle of the forms". It also discusses the law and practice of the method of signing contracts known as "execution in counterpart" (that is, where a contract is drawn up in a single document and either is signed by all parties or each party signs a copy and sends it to the other party or parties). We make proposals for two types of situation, namely where "wet ink" signatures are used or where parties sign electronically. In addition, we propose the establishment of a repository for electronic contracts.

We will publish further papers on other aspects of the law of contract, and have begun work on topics within breach of contract.

Separately, we published advice jointly with the Law Commission of England and Wales on the European Commission's proposal for a regulation establishing a Common European Sales Law (or "[CESL](#)"). Our advice was published in November 2011 (and is available on our website at



http://www.scotlawcom.gov.uk/index.php/download_file/view/931/185/. The UK Government is currently consulting on this area, along with the Scottish Government and the Northern Ireland Executive, and the [Call for Evidence](#) closes on 21 May 2012.

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 is customary for businesses to use their assets to raise finance. Book debts (money owed but unpaid), loan books (sums due on mortgage, credit cards, car loans etc), stock in trade, equipment (fleet of motor vehicles etc) and intellectual property rights (patents etc) may all be used in this way. But Scots law in this area is cumbersome and out of date. This may place Scottish businesses at a competitive disadvantage and lead to the loss of legal, financial and commercial business to other jurisdictions.

In our Discussion Paper on Moveable Transactions (DP 151) published in June 2011 we propose the introduction of a new type of security right over moveable property which would be registered in a new online Register of Moveable Transactions. The new register could also be used to register transfers of financial rights, for example in securitisations and factoring. These reforms coupled with other improvements to the existing law should bring benefits to those who wish to raise finance and those who wish to provide finance and their advisers.

Consultation ended on 30 September 2011, but in October 2011 the Edinburgh Centre for Private Law at the University of Edinburgh held a very helpful symposium on the security aspects of the discussion paper. The symposium was well attended by practitioners, academics and representatives of the banking and finance sector. We have also held a number of meetings recently with law firm consultees in order to gain a better insight into practical issues in this area and to discuss their responses to the discussion paper. We are now formulating policy and expect to publish our report at the end of 2013.

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.

This project is nearing completion and we expect to publish our report in May 2012.

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 – including evidence of previous convictions – in criminal trials. The consultation period ended on 8 April 2011 with responses received from a variety of sources including, professional bodies, public bodies, members of the judiciary, academics and individuals. A report setting out the Commission's recommendations will be published in May 2012.

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

Consumer redress for misleading and aggressive practices

This project, which stemmed from a joint reference to this Commission and the Law Commission for England and Wales, has now been completed. Our joint Report was published in March 2012 and we hope that our recommendations will be included in the UK Government's proposed Consumer Bill of Rights.

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 argued that this was a failing of the current law which required to be addressed.

Having fully considered the many helpful responses to our joint Consultation Paper (April 2011), the Commissions recommended limited reform, targeting the most serious cases of consumer detriment due to unfair trade practices. We recommended a new right of redress for consumers, which would give them the right to a refund or a discount on the price. It was also recommended that damages may be recoverable where consumers have suffered additional loss

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 recommendations were set out in our joint Report and draft Bill (December 2009) and have now been implemented by the Consumer Insurance (Disclosure and Representations) Act 2012. Royal Assent was granted on 8 March 2012 and we hope that the Act will come into force next spring.

The Act will apply only to consumers and will deal only with the issue of what a consumer must tell an insurer before entering into or varying an insurance contract. It will abolish the consumer's duty to volunteer material facts. Instead, consumers must take reasonable care to answer their insurer's questions fully and accurately. If consumers do volunteer information, they must take reasonable care to ensure that the information is not misleading. The new legislation will also prescribe the insurer's remedies where it has been induced by a misrepresentation to enter into an insurance contract. These remedies will vary according to whether the misrepresentation was honest and reasonable, careless or deliberate or reckless.

At the end of 2011, we published a second joint Consultation Paper which made proposals to improve remedies for late payment of valid insurance claims, clarify the law on insurers' remedies for fraudulent claims, extend the categories of life insurance and simplify the law on policies and premiums in marine insurance. The consultation period has now closed and we are analysing the responses. A third and final joint Consultation Paper will follow this summer covering what a business must tell insurers when it purchases insurance and the remedies which should be available to insurers where there has been non-disclosure or misrepresentation by the business. It will also deal with particular insurance contract terms known as "warranties" for both businesses and consumers. A report, covering the topics in the latter two Consultation Papers, will be published in 2013.

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

Level crossings

Following consultation on our provisional proposals for reform of the legislation relating to level crossings in Great Britain, we are working with the Law Commission for England and Wales on preparation of a draft Bill to be annexed to the joint report. We are aiming to publish the joint report in the autumn of 2012.

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

Consolidation of bankruptcy legislation

We published our consultation paper seeking comments on a number of proposed amendments to the Bankruptcy (Scotland) Act 1985 on 15 August 2011. The consultation period ended on 30 November 2011. We are now working on a report and draft consolidation Bill which we hope to publish in the autumn of 2012.

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.

Our discussion paper, published in May 2011, addressed 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. It also asked whether the existing legal position would benefit from clarification and whether there would be support for amending the Scottish approach to prosecuting partnerships.

The period of consultation ended on 12 August 2011, with a Report and draft Bill being published in December 2011. The Scotland Office is presently consulting on draft legislation which would implement a number of our recommendations.

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. In addition, it has become clear that some work is required to clarify the definition of murder in Scots law, in light of the decision of the High Court in *Petto v HM Advocate* [2011] HCJAC 78.

Work on this project has been deferred pending the completion of the projects on Similar Fact Evidence and the Moorov Doctrine and Criminal Liability of Partnerships. We expect to complete the project during the period covered by the Eighth Programme.

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

Regulation of health care professionals

We are working with the Law Commission of England and Wales and the Northern Ireland Law Commission on a joint project reviewing UK legislation in relation to the regulation of health care professionals. This project follows a reference from the UK Department of Health.

The intention is to review the regulatory framework with a view to modernising and simplifying the existing law.



Our joint consultation paper Regulation of Health Care Professionals; Regulation of Social Care Professionals in England (Discussion Paper 153), was published on 1 March 2012. A separate summary and impact assessment are also available. Responses are invited by 31 May.

The paper seeks views on how the regulation of health care professionals in the UK and social workers in England can be made clearer, simpler, more modern and more consistent. Provisional proposals are set out for the structure of a new legal framework across the UK and views are sought on how a new framework would (i) give the regulators increased flexibility in the use of their powers while ensuring their public accountability (ii) enable the regulators to ensure proper standards of professional education, conduct and practice, and establish and maintain a register of professionals, and (iii) have at its heart a duty on the regulators to protect the public.

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

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 all of our reports and discussion papers.