

## COMMISSION NEWSLETTER - SPRING 2010

This is the Scottish Law Commission's Spring 2010 Newsletter. We aim to issue a newsletter every six months or so 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

Two new Commissioners were appointed late last year, Professor Hector MacQueen and Ms Laura Dunlop QC. Professor MacQueen comes from Edinburgh University, and has an outstanding reputation as a commentator on the law of contract and intellectual property. He was in addition a member of an academic group that took part in the preparation of the Draft Common Frame of Reference, the document that contains principles, definitions and model rules for European private law.



Ms Dunlop is a member of the Faculty of Advocates, and is the Procurator to the General Assembly of the Church of Scotland. Both are very well qualified for the work of the Commission, and we welcome them both.

### Improving implementation of law reform measures

The Commission continues to work with the Scottish Government and the Scottish Parliament to improve the rate of implementation of Commission recommendations. We are pleased with progress so far and look forward to further practical results. A number of meetings have been held with Ministers and MSPs. A working group of officials was set up last year to consider ways to increase the capacity of the Scottish Parliament to deal with Commission Bills. Further, the Cabinet Secretary for Justice has announced that the Scottish Government will continue to provide initial responses to Commission Reports within three months of publication. We are publishing these responses on our website.

### Our Eighth Programme of Law Reform

In January we commenced work on our [Eighth Programme of Law Reform](#), which will run from 2010 until 2014. The Programme follows extensive consultation with key legal interests and other stakeholders on possible law reform projects. We held meetings with the Law Society of Scotland's Law Reform Committee, and with representatives of the Scottish Universities Law Schools. A public consultation on the Eighth Programme was also held last year. As part of the consultation, the Commission's website offered an online consultation page for suggestions for the Eighth Programme. An encouraging number of useful suggestions and comments were received by letter, email and online. The Commission appreciates the contributions received.



The Eighth Programme was approved by Scottish Ministers in January and was published and laid before the Scottish Parliament in February. The Cabinet Secretary for Justice, Mr Kenny MacAskill, provided a [Written Answer](#) on 12 February to a Parliamentary Question, announcing approval of the Programme.

## OUR CURRENT WORK

### Introduction

Work has started 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 continue with work arising from references from Scottish Ministers. We are currently working on a project on admissibility of evidence of bad character, of previous convictions and of similar fact evidence, and the *Moorov* doctrine – which is the last part of a reference on criminal law topics that we received from Scottish Ministers in November 2007.

We are also assisting the Law Commission with major joint projects on insurance contract law and on level crossings.

A summary of these various projects is given below.

### Trusts

We are continuing to work on our project on trust law. In January we published a Discussion Paper on the rules restricting the accumulation of income and various rules governing the length of time for which a trust may run (No 142). The rules have been in place for centuries and are not suited to the uses commonly made of trusts nowadays. The consultation period runs until April. This Paper completes our consultation exercise: we have published six previous Discussion Papers, on breach of trust (No 123), apportionment of trust receipts and outgoings (No 124), trustees and trust administration (No 126), variation and termination of trusts (No 129) (and the associated Report (Scot Law Com No 206)), the nature and constitution of trusts (No 133), and liability of trustees to third parties (No 138).

We are currently beginning work on a Report on the topics on which we have consulted. The Report will be accompanied by a new Trusts (Scotland) Bill. It will not, however, cover the nature and constitution of trusts. The reason is that, in our view, the "dual patrimony" theory is an accepted and satisfactory basis for explaining the nature of a trust, ie a trustee has a "personal patrimony", which contains those assets and liabilities which belong to him or her as an individual, and also a "trust patrimony" containing assets and liabilities which the trustee holds as a trustee.

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

### Judicial factors

A judicial factor is an officer appointed by the court to collect, hold and administer property in certain circumstances; for example, there may be a dispute regarding the property, there may be no one else to administer it or there may be alleged maladministration of it. As most of the legislation relating to this area of the law is extremely old, we are developing proposals to replace it



with provisions relevant to those dealing with this office in the 21st Century. A Discussion Paper will be published in the first half of 2010.

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. Work has started on initial research with a view to preparing a discussion paper. We intend to set up an advisory group to assist the project team.

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

### **Contract law**

This project was included in our recently-published Eighth Programme as a long-term project (ie it is likely to last until the end of the programme, in 2014, or beyond). Our proposal is to review aspects of the law of contract in the light of the publication, in 2009, of the Draft Common Frame of Reference. About ten or fifteen years ago we published a number of reports on the law of contract, but some of them remain unimplemented and the publication of the DCFR affords a useful opportunity to review certain aspects of our law. Although we are still at a very early stage of the project, our intention is to cover topics such as the formation and the interpretation of contracts. It is likely that this will be done by the publication of a number of papers on discrete subjects.

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

### **Security over corporeal and incorporeal moveable property; assignation of incorporeal moveable property**

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 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 have also carried out comparative research to see how such issues are dealt with in other jurisdictions. We are carrying out further research and working on a list of issues to be considered in the discussion paper.

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

### **Evidential issues**

The final project to be conducted under the reference from Scottish Ministers in 2007 concerns the law relating to the admissibility of evidence of bad character or of previous convictions, similar fact evidence, and the *Moorov* doctrine. We are presently drafting a discussion paper with a view to publication in late spring.

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 have given priority to drafting new legislation dealing with 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, misrepresentation and warranties in business insurance will be considered next. We are also working towards a second consultation paper on topics such as insurable interest, fraud, post-contractual good faith and damages for late payment of claims.

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

## **Level crossings**

We are continuing to work with the Law Commission for England and Wales on preparation of a joint consultation paper seeking comments on reform of the legislation relating to level crossings in Great Britain.

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.

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

## **RECENTLY COMPLETED PROJECTS**

A summary of the projects we have recently completed is given below.

### **Crown appeals**

The majority of the recommendations in our Report on Crown Appeals (Scot Law Com No 212) which was published on 31 July 2008, were accepted by the Scottish Government and are now reflected in Part 3 of the Criminal Justice and Licensing (Scotland) Bill, which is presently before the Scottish Parliament.

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

### **Double jeopardy**

The second project to be conducted under the Scottish Ministers' reference of 20 November 2007 concerns the law relating to the principle of double jeopardy – broadly, that a person should not be liable to be tried or punished more than once for the same offence – and whether there should be exceptions to it. We published our Report on Double Jeopardy on 2 December 2009.



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

## **Property**

Our review of the Land Registration (Scotland) Act 1979 has now been completed with the publication of our Report on Land Registration in February 2010. They include recommendations to speed up the process of bringing properties into the Land Register, to facilitate electronic conveyancing in all cases including missives, to minimise delays in the registration process, to make it simpler to put mistakes right, and to introduce a system of advance notices to protect buyers from last-minute adverse entries in the Land Register (or in the interlocking Register of Inhibitions), replacing the system of "letters of obligation".

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

## **Succession**

The law of succession largely dates from the mid-60s, since when social attitudes and the way substantial numbers of people live have changed significantly. Review and reform of the law is therefore highly desirable. We published our Report in April 2009; it follows our earlier review of this area nearly 20 years ago (although the recommendations at that time have, in large part, not been implemented). The Report covers both testate and intestate succession and focuses on three main topics: the division of intestate estates; the protection of close family against disinheritance; and the succession rights of cohabitants. There was broad support amongst those who responded to our Discussion Paper on many topics covered by the Report, though there was a marked and even division of views over how adult children who are "cut out of the will" should be treated. On this we have, therefore, offered two alternative options for consideration. The recommendations are reflected in a draft Bill which is annexed to the Report. The Minister for Community Safety responded to our Report on behalf of the Scottish Government, in a letter dated 13 July 2009, which is on our website.

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

## **Consumer remedies**

Against the background of a general review of consumer directives by the European Commission, we have recently looked at ways of simplifying the remedies which are available to consumers when they purchase goods which do not conform to contract because, for example, they are faulty. The domestic law in this area overlaps with EU remedies resulting in complexity and confusion for consumers and retailers alike. Consultation highlighted clear support for retaining the right to reject defective goods, the basic remedy in Scots and English law. Our Report, recommending retention of the right to reject, was published in November 2009. In order to clarify the right to reject, we recommended that consumers should normally exercise it within thirty days.

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

## **Unincorporated associations**

Unincorporated associations such as clubs exist for a wide variety of purposes and in a wide range of sizes and structures. In Scotland, as in the rest of the United Kingdom, unincorporated associations are not recognised as legal entities separate from their members. Consequently, they cannot enter into contracts or other legal relationships and cannot hold title to land in the



association's name. The absence of separate legal personality for such associations often leads to unfortunate repercussions for members and can cause uncertainty for creditors and claimants. We reported in November 2009, recommending a simple regime according separate legal personality to associations satisfying certain conditions unless they resolve to opt out.

For further information, please see the [law reform/completed 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, and to offer advice on technical aspects of implementation.

The Scottish Government has announced its intention to engage in a process of formal consultation on our Reports on Succession, Damages for Psychiatric Injury, Damages for Wrongful Death, and Limitation. Meantime, Bill Butler MSP has obtained sufficient support to introduce his proposed Member's Bill which would implement our Report on Damages for Wrongful Death, should he wish to do so. On the criminal side, our Report on Rape and Other Sexual Offences has been implemented in the Sexual Offences (Scotland) Act 2009. Finally, in the Criminal Justice and Licensing (Scotland) Bill that is presently proceeding through the Scottish Parliament three of our reports are included; these are the Reports on Insanity and Diminished Responsibility, Age of Criminal Responsibility and Crown Appeals.

## **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 [www.scotlawcom.gov.uk](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.