

## NEWSLETTER ISSUE 4 – FEBRUARY 2007

Welcome to the Scottish Law Commission's fourth 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.

### NEW CHAIRMAN

Lord Drummond Young has been appointed Chairman of the Commission for five years from 1 January 2007. He succeeds Lord Eassie, who has been appointed to the Inner House of the Court of Session. James Drummond Young has been a judge since 2001, having been admitted to the Faculty of Advocates in 1976. The appointment is on a part-time basis with 60% of his time being spent on Commission business. Announcing Lord Drummond Young's appointment, Justice Minister Cathy Jamieson said

"I am sure he will make an excellent contribution to the work of the Commission. His wide experience and skills ensure that he is well qualified to take forward the Commission's ongoing commitment to law reform in Scotland."



### COLIN TYRE'S APPOINTMENT EXTENDED UNTIL SEPTEMBER 2009

Colin Tyre QC was reappointed in September for a further three year term as a part-time Commissioner. Mr Tyre was first appointed to the Commission in October 2003 and his term of office now runs to September 2009. Mr Tyre is the current President of the Council of the Bars and Law Societies of Europe (CCBE), and during his term of office he is devoting only one third, rather than one half, of his time to Commission work.



### PARLIAMENTARY COUNSEL

Gregor Clark CB joined the Commission in November as Parliamentary Counsel. Mr Clark was previously Senior Parliamentary Counsel in the Office of the Scottish Parliamentary Counsel within the Scottish Executive.





## OUR CURRENT WORK

### Introduction

Work on our Seventh Programme of Law Reform, approved by the Scottish Ministers, continues apace. The Programme sets out our main workload to the end of 2009 and covers substantial reviews of land registration, leasehold tenure, trusts and judicial factors, as well as four new projects on succession, assignation and security over incorporeal moveables, unincorporated associations, and provocation, self-defence, coercion and necessity. Alongside the Seventh Programme, we continue to undertake reviews of specific topics in response to references from Scottish Ministers or the UK Government.

### New project on Damages for wrongful death

In September 2006 we received a reference from Scottish Ministers 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. The reference was prompted in part by the Rights of Relatives to Damages (Mesothelioma) (Scotland) Bill which seeks to amend the law of damages as it applies to mesothelioma sufferers and their families. We have undertaken preparatory research with a view to issuing a discussion paper later this year.

### Rape and other sexual offences

The consultation period following the publication of our Discussion Paper (Scot Law Com No 131) on **Rape and Other Sexual Offences** closed in May 2006. The key issues covered in the paper include: the need to define 'consent'; the redefinition of rape to cover a wider range of sexual acts; and ensuring the protection of people vulnerable to sexual exploitation. The Discussion Paper emphasised the need for gender equality and proposed that the existing homosexual offences should be replaced by offences which are neutral as to gender and sexual orientation. The paper also considered arguments for and against the requirement of corroboration and sought public views as to whether this requirement should be modified or abolished for sexual offences.

More than 80 responses were received from a variety of organisations, as well as from members of the public. The responses are being analysed with a view to formulating policy and a final report, including draft legislation, will be submitted to the Scottish Ministers in the summer.

### Interest

Our Report on **Interest on Debt and Damages** (Scot Law Com No 203) was published in September 2006. If enacted, the draft Bill attached to the Report would create a statutory right to interest on claims for payment arising from contractual and other obligations, which would run from the date when the claimant loses use of the money. To rule out inconsistencies in the current law, the Bill would provide for interest to run during the same period and at the same rate regardless of the legal basis for the claim. However, parties would be able to agree in advance that interest should run at a different rate, or not at all. The new entitlement would not apply in cases where interest is due under other statutory provisions, such as interest on unpaid tax.

The Bill would give courts discretion to vary the rate of interest that should be paid to take into account the actions of the person to whom the interest is due, but the actions of the debtor would not be a relevant factor. Interest would be set at a fluctuating rate of 1.5% above the Bank of England base rate, which is similar to the rate at which businesses and consumers can borrow, and it would be calculated as simple rather than compound interest. The proposals are intended to provide adequate compensation for the person to whom interest is payable, without being punitive.

The Report and draft Bill are available on our website.



## Limitation in personal injury actions

Our Discussion Paper on *Personal Injury Actions: Limitation and Prescribed Claims* was published in February 2006. We have received a number of responses commenting on our proposals for reform of the provisions in the Prescription and Limitation (Scotland) Act 1973. We are currently preparing our report and draft Bill, which we are aiming to publish later in 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 Act 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 is currently reviewing the issues involved with a view to preparing instructions for 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 Trustees 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 bringing this project to an end in the course of this year.

## Succession

Work has begun 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 plan to publish a discussion paper by the middle of 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. We are planning to submit our report on variation and termination of trusts to the Scottish Ministers by Spring 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**. A joint scoping paper was published last year. As a result of the helpful comments submitted in response to that paper, it has been decided that the project will include topics such as misrepresentation, non-disclosure, warranties, insurable interest and unjustifiable delay. To assist in the development of our thinking, we are publishing a series of Issues Papers on our website. We intend to publish two joint consultation papers, the first of which we aim to publish in the summer of this year. It will deal with non-disclosure, misrepresentation and breach of warranty. It may also cover some aspects of post-contractual good faith. A second joint consultation paper will cover the remaining topics and is scheduled to be published in the spring of 2008. A report will follow in 2010.

### **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. We are currently closely involved in supporting Scottish Executive officials in implementation of some of the recommendations contained in our Report on *Registration of Rights in Security by Companies*. Relevant provisions have been included in the Bankruptcy and Diligence etc. (Scotland) Act 2007 and in the Companies Act 2006.

### **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. We intend to make the text of all our publications, back to 1965, available on-line when time permits.