

NEWSLETTER ISSUE 8 – FEBRUARY 2009

This is the Scottish Law Commission's Eighth Newsletter. We aim to issue a newsletter every six months or so 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 and trusts 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. We received a reference from Scottish Ministers on 20 November 2007 and have made progress on the first two projects under that reference, relating to Crown appeals and double jeopardy. We also have a joint reference with the Law Commission for England and Wales from the Department for Business, Enterprise and Regulatory Reform on consumer remedies, and we are assisting the Law Commission with major joint projects on insurance contract law and on level crossings.

This year we are preparing for our Eighth Programme of Law Reform, which will run from 2010 until 2014. We are consulting key legal interests and other stakeholders on our initial proposals, and seeking suggestions for law reform projects. A public consultation on the Eighth Programme will be launched in the spring of this year.

Crown appeals

Our Report on *Crown Appeals* (Scot Law Com No 212) was published on 31 July 2008. The Report, which contains a draft Bill, recommended the extension of section 97 of the Criminal Procedure (Scotland) Act 1995 to allow a submission to be made at the close of the prosecution case that, on the evidence led, no reasonable jury, properly directed, could convict; the replacement of the "common law submission" at the close of all of the evidence with a new statutory submission; and that the Crown be granted a right of appeal against a decision of the trial judge under either submission and against a ruling, made during the course of the trial, regarding the admissibility of prosecution evidence.



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 Discussion Paper on *Double Jeopardy* on 21 January 2009. After examining the underlying rationales of the rule against double jeopardy and the present state of the law, the paper asks whether the rule should be restated and, if so, what form the rule should take. The paper also considers whether exceptions to the rule against double jeopardy should be introduced to allow an acquitted person to be retried for an offence if the acquittal was tainted by an offence against the administration of justice or on the emergence of new evidence pertaining to the case. Responses to the Discussion Paper are sought by 17 April 2009.

Evidential issues

The final project to be conducted under the reference 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 have begun initial research on these topics with a view to preparing a discussion paper.

Damages for wrongful death

Our project on damages for wrongful death stemmed 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 were considered in our Discussion Paper on *Damages for Wrongful Death*, which was published on 1 August 2007. Our Report, which includes a draft Bill to amend the Damages (Scotland) Act 1976, was published in September 2008.

Property

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 now working on the preparation of the Report and draft Bill.



Succession

A project on succession was included in our Seventh Programme. We last reviewed this area nearly 20 years ago, although the recommendations in our 1990 Report have, in large part, 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 two topics: the division of intestate estates, looking in particular at cases where the deceased is survived by a spouse or civil partner; and the protection of spouses, civil partners, cohabitants, children and other relatives from disinheritance. We published a discussion paper in August 2007 and are currently working on a draft report and Bill. We plan to complete this project in the spring this year.

Trusts

Our wide-ranging review of the law of trusts continues. Six discussion papers have been published so far: 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), the nature and constitution of trusts (No 133) and liability of trustees to third parties (No 138), the last being published in May 2008. Our report and draft Bill on Variation and Termination of Trusts was submitted to Scottish Ministers in February 2007 (Scot Law Com No 206). Although work is continuing on this project in the meantime, we will be in a position to devote more resources to it once the Succession Report has been submitted, which we anticipate will be done in the spring this year. We plan to issue at least one more discussion paper, which will look at the rules on the accumulation of income and on the lifetime of private trusts, and we will then report on the matters on which we have consulted.

Judicial factors

Our project on the review of the law relating to judicial factors has been re-commenced recently after having been on hold for some time due to the need to commit resources to the criminal law references. The legislation relating to judicial factors has been in existence for over a hundred years and is in need of modernisation. As soon as time permits, taking account of other priorities, we will complete work on a discussion paper containing proposals for reform.

Insurance contract law

We are working with the Law Commission for England and Wales on a major project on insurance contract law. Our first joint Consultation Paper on *Insurance Contract Law: Misrepresentation, Non-Disclosure and Breach of Warranty by the Insured* was published in 2007. Summaries of the responses which we received are available on our website. As there is a wide consensus that consumer insurance law is in urgent need of reform, we are giving 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. We aim to publish a report and draft Bill in the second half of 2009.

The Consultation Paper also made provisional proposals in relation to business insurance, an area where there is also support for reform. We intend to carry out some further consultation to assist us in the development of our policy in this equally important field.



We are also working on a second consultation paper. It will cover topics such as insurable interest, fraud, post-contractual good faith and damages for late payment of claims. An Issues Paper on insurable interest has already been published on our website. As with previous issues papers, this sets out the preliminary thinking of the joint team. Regarding life insurance, we tentatively propose extending the categories of people able to insure others' lives. Regarding indemnity insurance, we point out the confused state of the current law and discuss whether the concept of insurable interest is needed at all.

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 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. Further work will be carried out once the project on land registration has been completed.

Consumer remedies

The Department for Business, Enterprise and Regulatory Reform has asked us to look at 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.

The EU Commission is currently carrying out a general review of consumer directives, including the Consumer Sales Directive which was implemented in the UK in 2002. In October 2008 the Commission published a proposal for a new directive which would reform the law on consumer remedies. We have been asked to advise on any issues which appear to be relevant to the EU Commission's review. If implemented, the proposed directive would impose a uniform system of remedies on all EU states; in particular the right to reject defective goods, as recognised in the Sale of Goods Act 1979, would be abolished.

Our joint Consultation Paper on Consumer Remedies for Faulty Goods was published in November 2008. We propose a law which is fair to consumers and retailers and which incorporates both existing European remedies and the right to reject defective goods, the basic remedy in Scots and English law. The key questions for consultees concern when a consumer should be entitled to reject faulty goods and receive a refund and when a retailer should be entitled to choose to repair or replace the goods.

As the consultation process has recently closed, we are currently analysing comments and awaiting with interest the result of the consultation on the proposed EU directive.

Unincorporated associations

We are currently examining the law relating to unincorporated associations. Such bodies exist for a wide variety of purposes and in a wide range of sizes and structures. At one end of the scale they may be substantial organisations with property, employees and contractual commitments. At the



other end, they may be informal groupings of individuals joining together for temporary and specific purposes.

In Scotland, as in the rest of the United Kingdom, unincorporated associations are not recognised as legal entities separate from their members. As a consequence, such associations 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.

Our Discussion Paper was published in December 2008. It suggests that the current difficulties could be remedied by granting some form of legal status to unincorporated associations. Views are being sought on various possibilities such as the automatic attribution of legal personality to all organisations meeting certain specified minimum criteria; allowing organisations to opt in to legal personality either by registration or by statement of intent; granting certain legal capacities to organisations without according them the status of legal persons and introducing a new corporate vehicle for non-profit organisations which are not registered as charities. Comments on the proposals are invited by 6 March 2009.

Level crossings

We are assisting the Law Commission for England and Wales with this project, which is included in the Law Commission's Tenth Programme following a suggestion by the Department for Transport.

Level crossings present the largest single risk of catastrophic train accident on Britain's railways. The current law on level crossings is complex, outdated and difficult to access, creating problems for regulators, owners and operators and increasing the safety risk for users. The project will be concerned with examining the legal framework with a view to its modernisation and simplification. The aim is to make recommendations with a view to reforming the framework so that it is more coherent, accessible and up-to-date, allowing for better regulation and reduction of risk.

We are currently undertaking research and discussing issues with key stakeholders, with a view to publication of a joint consultation paper.

Consolidation of bankruptcy legislation

We have started work on a project to consolidate the legislation relating to bankruptcy in Scotland. This will be the second Scottish consolidation project since devolution. The current project is being supported by the Accountant in Bankruptcy's office, whose officials will be working closely with the Commission team. The aim is to produce a draft consolidation Bill by the end of 2009.

ASSISTING IN THE IMPLEMENTATION OF REPORTS

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



We have provided assistance in relation to our Report on *Rape and Other Sexual Offences* (Scot Law Com No 209), which was published in December 2007. (This project had its origins in a reference from the Scottish Ministers in June 2004, which was prompted by widespread concerns over certain rape decisions in the High Court of Justiciary.) The Scottish Government introduced a Bill into the Scottish Parliament in June 2008 which, in many respects, is similar to our draft Bill. We were involved in discussions about particular aspects of our recommendations not only with the Bill team within the Scottish Government but also with officials at SPICe, the Scottish Parliament Information Centre, in relation to briefing which they were preparing for MSPs. In addition, Professor Maher, who led this project at the Commission, gave evidence to the Justice Committee as part of its examination of the Bill during Stage 1. We were pleased to be invited to make all of these further contributions after the publication of the Report.

COMMENTS AND FURTHER INFORMATION

If you have any comments on our current work, please contact us at 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. The website has full text versions of nearly all our reports since 1992 and of all our discussion papers since 1997.