

## NEWSLETTER ISSUE 9 – SEPTEMBER 2009

This is the Scottish Law Commission's ninth 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 projects, and with general news about the Commission's activities.

### FEEDBACK ON THE NEWSLETTER

We would be grateful for your views on the Commission's Newsletter. Do you find the Newsletter useful? Are there any improvements that you can suggest? Comments are welcome at [info@scotlawcom.gov.uk](mailto:info@scotlawcom.gov.uk).

### NEWS

Professor Joe Thomson left the Commission towards the end of April this year, after serving as a Commissioner for over 9 years. During that time he made a valuable contribution to the work of the Commission, leading law reform projects on a number of areas of private law, including the Succession Report published in April.

### Improving implementation of law reform measures

The Commission is working with the Scottish Government and the Scottish Parliament to improve the rate of implementation of Commission recommendations. At a reception for MSPs and officials, hosted by Dr Ian McKee MSP at the Parliament on 3 June, the Scottish Law Commission's Chairman, Lord Drummond Young, welcomed the establishment of a working group of officials to look at ways of increasing capacity to enact law reform measures.

### Preparation for next Programme of Law Reform

This year we are preparing for our Eighth Programme of Law Reform, which will run from 2010 until 2014. We consulted 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 launched in the spring of this year, ending on 31 July.

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 online. The Commission appreciates the contributions received. They can be viewed at [http://www.scotlawcom.gov.uk/html/eighth\\_programme.php](http://www.scotlawcom.gov.uk/html/eighth_programme.php).

The Commission is now considering the responses received, and will prepare a draft Programme this autumn. The draft Programme will be sent to Scottish Ministers for approval by the end of this year.



## 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 this year. We are working on substantial reviews of land registration and trusts as well as projects on unincorporated associations and judicial factors.

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 (now the Department for Business, Innovation and Skills) on consumer remedies, and we are assisting the Law Commission with major joint projects on insurance contract law and on level crossings.

### 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 [current 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 Discussion Paper on *Double Jeopardy* on 21 January 2009, with responses sought by 17 April. The team is now working on the preparation of the Report and draft Bill, which we expect to publish in the autumn this year.

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

### 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

This project was completed in September 2008 with the publication of our Report on Damages for Wrongful Death. It is encouraging that the Bill annexed to the Report has been taken up by Bill Butler MSP who is keen to see it implemented. At the end of April 2009 he lodged a proposal



for a Members Bill. The Justice Committee decided that there should be further consultation with the public before the Bill is introduced in the Scottish Parliament. Mr Butler's Consultation Paper was published on 3 August 2009.

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

## **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.

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

## **Trusts**

Our long-running review of the law of trusts is progressing. We are preparing a Discussion Paper on the rules against excessive accumulation of income and various rules governing the length of time for which a trust may run; we plan to publish the Paper in the autumn. (Readers may recall that we have already published six Discussion Papers: 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)). Once the latest Discussion Paper has been published we will report on the topics on which we have consulted. Our current thinking is that we will, first of all, produce a Report focussing on those aspects of our



project which relate to trustees. This will then be followed by a separate Report on the law on trusts themselves.

For further information, please see the [current 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. Other jurisdictions have similar officers. The problem is that most of the legislation relating to this area of the law is extremely old so 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 before the end of 2009.

For further information, please see the [current 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 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 by the end of 2009. After that, we will publish our recommendations in this area of the law in relation to business insurance. We are also working on 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 [current projects page](#).

### **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**

Against the background of a general review of consumer directives by the European Commission, we are looking 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. Having published a Consultation Paper in 2008, it is clear that there is support for retaining the right to reject defective goods, the basic remedy in Scots and English law. We aim to publish a report around the end of October 2009.

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



## Unincorporated associations

We are currently examining the law relating to unincorporated associations such as clubs. Such bodies 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. Having published a Discussion Paper in 2008, we will publish a report and draft Bill before the end of 2009.

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

## Level crossings

Work is in hand on a consultation paper seeking comments on reform of the legislation relating to level crossings in Great Britain. This is a joint project with the Law Commission in London. The aim is to produce a consultation paper by the end of 2009. For further information, please see the [current projects page](#).

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## 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 are working closely with the Commission team.

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

## ASSISTING IN THE IMPLEMENTATION OF 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.

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. The Scottish Government introduced a Bill into the Scottish Parliament in June 2008 which, in many respects, was similar to our draft Bill. This resulted in the Sexual Offences (Scotland) Act 2009.

## COMMENTS AND FURTHER INFORMATION

Further information about the Commission 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.