LECTURE BY LADY CLARK OF CALTON

AS CHAIRMAN OF THE SCOTTISH LAW COMMISSION

BY INVITATION OF SCOLAG ON 26 SEPTEMBER 2012

I want to thank the Scottish Legal Action Group for inviting me as the new Chairman of the Scottish Law Commission to speak to you tonight at your Annual Conference.

Reform of the law of Scotland both devolved and reserved law is at the heart of the function of the Scottish Law Commission. I recognise that in our democratic society, law reform is a matter of concern for all of us. The contribution of politicians, judges, the legal profession, charities, pressure groups and individuals who sometimes effectively highlight an injustice are all necessary as participants in the process of law reform. I see it as a very complex process reflecting and sometimes leading, public opinion and values and taking into account other pragmatic values such as cost, efficiency and the need for reform. And in some areas the public response will be silence and even lawyers may not care. There are many areas of law which rarely engender any public interest or debate but some fair regulatory scheme may be required to be developed and kept updated. For example we are working to update the law relating to judicial factors. This is not a subject likely to find its way into the manifesto of any political party. There are no votes on the doorstep for this reform. But reform is important nevertheless to an effective legal system.

I see law reform as a dynamic, inclusive and ongoing process which is essential if our Scottish legal system is to be fit for purpose in the 21st century even though its concepts may sometimes date back to Roman law. The 21st century requires a sophisticated legal system capable of providing civil and criminal justice to citizens

and suitable to regulate the enormous complexity of modern life in our new constitutional landscape. Scots law must comply with European Union law and the European Convention on Human Rights. Scots law must also have the confidence of companies and individuals at home and from across the world who choose to use Scots law for their business purposes.

Tonight I want to explain why it is so essential to have a permanent body, the Scottish Law Commission, at the heart of law reform and to refer briefly to two of our current projects.

But before I deal with that let me say something about my early experiences with the Scottish Legal Action Group which is one of the many groups which have contributed to law reform in Scotland.

The Scottish Legal Action Group was born in 1975. I was one of the new members present at its birth. The first Bulletin appeared in October 1975. The Editor stated that "There has been too little discussion and criticism of many of the unique features of the Scottish legal system, too little attention paid to suggestions for reform, and indeed too little reform.".

Since the Group was established, members have been very active over the years discussing wide-ranging reforms. In 1975, divorce reform, reform of the district courts and reform of the bail system were some of the hot topics which we discussed in long meetings.

I remember some of my active involvement in the Group. What I lacked in experience, I certainly made up for in enthusiasm and strong opinions. Experience in my case has tempered my views. Experience has led me to conclude that issues are often much more complex than they seemed in these early days of SCOLAG. But I hope I have retained my enthusiasm. If you had suggested to me or to my colleagues that I would end up as the Chairman of the Scottish Law Commission, I think a stunned silence might have been the kindest response.

Nevertheless I was always aware of the Scottish Law Commission which was established in 1965 the year before I started studying law as a student under Professor Willock. Scots law, the Scottish Legal Action Group and his many students owe a great debt to Professor Willock. His vision and theories about the way in which law, morality and social customs interacted were ahead of their time. He shaped the thinking and inspired generations of lawyers.

As I scanned the early Bulletins of the Scottish Legal Action Group in preparation for this evening, I discovered that Professor Willock had written about the Scottish Law Commission in the second issue of the Bulletin in October 1975. The article entitled "The Scottish Law Commission: Pragmatism before Principles" was a celebration and analysis of the work of the Scottish Law Commission on its tenth anniversary. I note the Tenth Annual Report of the Scottish Law Commission 1974-75 cost 60p with postage at 69p. That was undoubtedly a bargain. The article by Professor Willock discussed problems faced by the Commission including limited resources, time and personnel, difficulties in obtaining drafting assistance with Bills and Parliamentary time for implementation. Over the years the Commission has tried to ameliorate these difficulties but some of these difficulties will always exist.

We can however find creative ways of working such as new Parliamentary methods for processing legislation from the Commission and sharing scarce resources such as Parliamentary draftsmen. The existence of inevitable difficulties should not deter or delay us in pursuing law reform.

One criticism made by Professor Willock which I consider could no longer fairly be made is the lack of attention by the Commission in 1975 given to social research. The Commission in its modern form has been very proactive in finding and using new ways to consult and new methods to assess the impact of potential changes. There was a perception in 1975 that the Commission was more focussed on what we might traditionally call "lawyers' or black letter law". The Commission has long since moved into more controversial areas of policy but we have not neglected the need for reform in less glamorous areas and we continue with the worthy task of consolidation. At present we are concluding a project on the consolidation of bankruptcy law.

The enormity of the task of the Scottish Law Commission is recognised by Professor Willock and he is generous in acknowledging the immensely hard work which the then Commissioners and their staff put into their task. He concluded that "without them the adaptability of the Scottish legal system would be greatly impaired. But it may be that the Commission's full potential will only be realised in a Scotland with more control over its legal future.".

Since that article was written, almost 40 years have passed and the legal and constitutional landscape have changed significantly. The Commission will celebrate its 50th Anniversary in 2015.

No fault divorce in the sheriff courts, a reform proposed and supported by the Scottish Legal Action Group is long-established. The district courts staffed by non-legally qualified judges have been abolished. Immense constitutional changes have taken place, including the establishment of a Scottish Parliament with significant legislative powers, the incorporation of the European Convention of Human Rights into Scots law and, the establishment of a Supreme Court in London which replaced the House of Lords.

There is a new legal landscape and the Commission is part of that. Let me return therefore to my main theme, the importance and work of the Scottish Law Commission.

The Scottish Law Commission is an established, standing publicly funded body and its function and focus is law reform. That permanence has led to stability and continuity for the law reform process. It is an institution with a history and process related to law reform unlike *ad hoc* committees and inquiries which may be set up for limited purposes from time to time. In my opinion such a model leads to efficiency of operation and also allows for experimentation and development with lessons being learned to enable future projects to be more effectively handled. There is an attempt by the Commission to rationalise the process of law reform to make it more reactive, more adaptable and more reflective of the various views and interests in a democratic society. The Commission attempts to analyse the implications of various potential changes so that the effect of changes are properly understood in their wider context so that informed choices can be made.

Over the years the Commission has become well known for its detailed analyses of the law, and its expansive and imaginative consultation processes which often result in a report and draft Bill which can be taken forward straight to the legislative process. The Commission has produced some 172 reports with recommendations for changing the law or for a consolidation or statute law repeals Bill. Further reports include the Annual Reports and the five-yearly Programme of Law Reform. In addition we have published some 156 consultation papers. The last Discussion Paper No 156, on Adults with Incapacity was published in July 2012 and I will say a bit more about that later.

As a result of the experience and the impressive body of work which the Commission has produced over almost 50 years, the reports are generally considered to be extremely useful and authoritative. The analyses of the Law Commission are often cited in our court and there are examples of the Commission's proposed reforms being adopted in judicial thinking even where no legislative solution has occurred.

I consider the most important feature of the Commission is that it is independent. It is independent of government but it is also independent of party political or pressure group views. The fact that it is independent of government is very important both for the Commission and for government. Many decisions about law reform are controversial and complex. It is very useful to have an institution which can consider all the implications and all the opposing and conflicting views and try to identify the policy decisions which require to be made and the legal implications of various policy solutions. The Law Commission with its neutral non party political role is able to gather a range of factual information including expert information and consult widely without party political bias. It has a successful history of comparative work and often

considers the solutions and models adopted in other jurisdictions including any problems which such models have demonstrated. By identifying the problems, the gaps in the law and the pros and cons of various possible solutions the Commission can help provide a basis for a solution which can attract party political and public support to enable a legislative solution to be achieved.

The independent model of a standing Law Commission was established in England and Wales and Scotland under the Law Commissions Act 1965. Many common law based countries have adopted similar solutions for similar reasons albeit there is variation in the models used. When I last looked there were some 23 national Law Commissions, 21 state/territorial bodies and 2 supranational bodies, the Commonwealth Association of Law Reform Agencies of which the Scottish Law Commission was a founder member and the Association of Law Reform Agencies of East and South Africa. Law Commissions across the world provide a fruitful source of comparative material. It is not always necessary to reinvent the wheel. Other jurisdictions often grapple with problems similar to those we face in Scotland. Comparative material however must be looked at with care and the expertise of the Commissions ensures that is done.

I want to give two examples of our current programme of work. The first relates to Discussion Paper No 156 on Adults with Incapacity. This is a devolved matter.

The Adults with Incapacity project stemmed from a decision of the European Court of Human Rights in what is known as the Bournewood case.[1] The project was included

[1] *HL v UK*(2005) 40 EHRR 32.

in our Eighth Programme of Law Reform after ENABLE Scotland, the Law Society and the Mental Welfare Commission all suggested that we should look at the law in this area.

Let me briefly remind you about the issues arising from Bournewood. HL was a man with autism, living with carers, who was admitted to a psychiatric hospital at Bournewood, in Surrey after becoming very agitated at a day centre. Once he had become calm, he was not allowed to return home, despite requests from his carers that he should. He remained in the hospital for 5½ months. For the first three months, he was regarded as and called an informal or voluntary patient - although he lacked the legal capacity to consent to hospital admission. The status of "voluntary patient" had generally been accorded to such individuals if they were compliant with admission, as HL was.

Proceedings were started in the English courts on the basis of false imprisonment, with a central issue being whether L had been subject to "detention". The High Court said no, the Court of Appeal yes and the House of Lords (by a majority) no.

A claim for breach of Article 5 of ECHR, which protects the right to liberty, was then made on behalf of HL to the European Court of Human Rights at Strasbourg. That Court decided that HL had been detained. The key factor was that the health professionals exercised "complete and effective control" over his care and movements. Once it was concluded that he had been detained, the only way to comply with Article 5 was to show that the detention had been on the basis of a

lawful process.[2] The European Court of Human Rights did not have much difficulty in concluding that it had not.

Following this decision legislation was introduced to apply in England and Wales by way of a new schedule to the Mental Capacity Act 2005 which introduced, what were called, new deprivation of liberty safeguards. These changes have been described as "complex, voluminous, overly bureaucratic and difficult to understand".

The English legislation anchors its definition to Article 5 of the European Convention on Human Rights. But what does that mean? Well, leading cases include *Engel*[3] (soldiers subjected to military punishment), *Guzzardi*[4] (convicted Italian gangster sent to live on a tiny island) and, more recently, *Austin*[5] (the use of kettling by the Metropolitan Police to contain demonstrators in Oxford Circus). There are also cases involving detention on the basis of “unsoundness of mind”, the relevant exception provided for in Art 5(1)(e). All these cases made clear that issues of deprivation of liberty are determined on a case by case basis. As a result it is very difficult to lay down clear rules for those who work with adults with incapacity.

The English courts have tried to develop some principles of definition. The tool most commonly used so far has been the idea of “purpose” – if the purpose of a regime is to protect and benefit the person to whom it is applied, then it will not be regarded by the Courts as a deprivation of liberty. But this may be controversial. Purpose, you might think, applies at the stage of justification, not at the stage of deciding whether

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[2] Article 5(1)(e).
[3] *Engel and Others v The Netherlands* (1982) 4 EHRR 188.
[4] *Guzzardi v Italy* (1981) 3 EHRR 333.

there is a deprivation of liberty at all. That you might think is a more objective question.

Let me now return to the Scottish project and the scale of the problem in Scotland.

Unlike England and Wales, Scots law had not been amended to reflect the perceived implications of Bournewood. But the case has been considered in the Scottish Courts. Sheriff Baird considered it in the cases of *Muldoon*[6] and *Docherty*.[7] He determined that:

> "the position of the place of residence of all adults, (and I do mean *all* adults), who are incapable but compliant, and where that is currently managed on an informal basis, will have to be reviewed and guardianship orders contemplated (that being an explicit recognition of the potential outcome which was put forward (as a kind of "floodgates" argument) by Counsel for the UK Government in his presentation before the European Court of Human Rights in HL)."

There are estimated to be 84,000 Scots with dementia. As far as learning disability is concerned, there are estimated to be 15,000 to 20,000 individuals with severe or multiple disability. Many such individuals will come to need residential care. State involvement in their care is frequent, whether as funder, inspector of care homes or indeed provider of care home or hospital. The resource implications of initiating

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[5] *Austin v Commissioner of Police of the Metropolis* [2009] 1 AC 564; *Austin v UK* 15 March 2012 (Grand Chamber).
[6] 2005 SLT (Sh Ct) 52.
[7] Unreported http://www.scotcourts.gov.uk/opinions/aw56.html.

guardianship proceedings in the Sheriff Court for all such individuals are obvious. And how do families, many of whom make their own arrangements for their members with disabilities, feel about the idea that such arrangements could only be made through the Sheriff Court?

We have considered the English solution and note that there are difficulties with it. The Law Commission in Melbourne has just examined the law of guardianship and found that the English provisions are “not supportable”. Our research does not tempt us to recommend the solution followed in England. So can we do something better?

That is our challenge. We published our Discussion Paper, Executive Summary and easy-read leaflet on 31 July 2012. That contains significant comparative material from other jurisdictions. Consultation runs till 31 October, and we intend to produce a Report with our conclusions and recommendations next year.

This is an important project with serious implications for vulnerable people and their carers. We would welcome comments from SCOLAG and any other groups or individuals so that we can take into account the widest spectrum of views and experience.

The second project I want to highlight is part of our work in reserved areas. This is the Commission’s project on the criminal liability of dissolved partnerships. As this is a reserved matter legislation is required by the UK Parliament.

Let me remind you briefly of the background to this project.

In January 2004 there was a horrific fire at the Rosepark Nursing Home in Glasgow, then run by a partnership whose members were Thomas, Anne and Alan Balmer. 14 residents were killed and 4 were injured.

In February 2005 the partnership was dissolved, and the three Balmers formed a limited company, Balmer Care Homes Ltd. Thereafter the three Balmers were charged as individuals with a number of offences under the Health and Safety at Work Act 1974. While there is provision in that Act allowing for the prosecution of responsible individuals even where the business entity is not prosecuted, it was held not competent to make use of that provision in this case because each of the alleged offences was a strict liability offence which could only be committed by an employer. As a matter of law it was the partnership, and not the partners, who were the employer.

The Crown made two further unsuccessful attempts to prosecute the Care Home, and then the Balmers as the whole surviving partners of the dissolved firm, under different formulations.

In relation to the indictment against the Care Home, this was narrated as “a now dissolved firm”. The indictment failed as a result of petitions to the *nobile officium*. In its judgment the High Court said, after a full consideration of the law prior to the Partnership Act 1890, as well as the terms of that Act:“---------[T]hese petitions, and the argument, have been directed at the particular indictment in which the purported accused is a dissolved partnership. For the reasons which we have indicated, we conclude that the dissolved partnership does not have any continuing legal

personality following dissolution and accordingly we consider that the indictments to which the petitions are directed are incompetent."

At common law, a partnership in Scotland is of course a legal person distinct from the partners of whom it is composed, and that position is reflected in the Partnership Act 1890. So there was nothing particularly surprising about the conclusion reached by the High Court. But the result was that no prosecution could be undertaken.

This led, not unnaturally, to considerable public concern. The question of the criminal liability of dissolved partnerships was therefore included in the Scottish Law Commission's 8th programme.

Since partnership law is a reserved matter, in terms of the Scotland Act 1998, any report and any draft legislation accompanying a report requires to be addressed to the UK Government. That is something to which I should draw particular attention. While the Scottish Law Commission is primarily responsible to the Scottish Government, our responsibilities extend to all areas of Scots law, including those matters which are reserved. And Scottish Governments of all political persuasions have welcomed our work on reserved as well as devolved matters.

In the case of the law of partnership, this had already been addressed by ourselves and our English colleagues in a very full joint Report into the whole of partnership law, in 2003.

The earlier work proved useful to our present task. In our earlier Report the two Commissions looked at the problem of partnership obligations which might not be

settled prior to the dissolution of a partnership. The solution we reached was to suggest that the dissolution of a partnership should be a two stage process. When the partners had decided that the partnership was to come to an end – or the number of partners had dropped below two – the partnership would be said to have broken up. The consequence would be that, thereafter, only those activities necessary to wind up the operations of the partnership could be carried on, but the partnership would retain legal personality until that had happened. Formal dissolution would occur only when the winding up activities were complete.

In our criminal liability project, one of the questions which we asked our consultees was whether the implementation of the recommendations in the Joint Report would prevent any future Rosepark-style failure of prosecution. In the light of the responses, and of our own work on the subject, we concluded that the provisions, in the Law Commissions' Bill, applied only to the civil rights and obligations of partnerships.

The ideal solution from our perspective – and we think from the perspective of Scots law as a whole – would have been to implement our 2003 Report, with suitable amendments to cover the question of continuing criminal liability. But that was not feasible.

As a supplement to our general recommendation, therefore, we suggested that a short Bill be introduced to provide that it remains competent to prosecute a partnership, notwithstanding its dissolution, provided that proceedings are brought within 5 years of the date on which the partnership is dissolved. We suggested that the Bill should also make clear, for the avoidance of doubt, that the dissolution of a

partnership, or a change in its membership, would not prevent the prosecution of culpable individuals in circumstances where the law already provides for individual liability. In the event of the partnership's being convicted, then any fine is payable by the partners in the same way as a fine imposed prior to dissolution – that is, it can be recovered from them jointly or severally, as if it were a payment due under a civil court decree.

Since our Report was published, the UK Government has conducted a consultation as to whether or not legislation along the lines we have suggested would be appropriate. While the results have yet to be published, we are hopeful that they will support the introduction of legislation.

As some of you will be aware, the Westminster Parliament has introduced a special procedure for legislation to implement Law Commission proposals of a non-controversial nature. In essence, such Bills are introduced into the House of Lords, where they are referred to a special committee. That committee takes evidence on the provisions of the bill, and considers amendments, before it reports back to the House for Report and Third Reading. Essentially, it enables the critical parts of the House's consideration of the measure to be conducted off the floor of the House, and therefore relieves the business managers of the problem of finding time for them in the House itself. The fact that the House of Lords will have looked at the Bill in some detail enables the Commons, if so advised, to accelerate its progress through that House.

We are hopeful that a Bill on the criminal liability of dissolved partnerships will be the first Scottish Bill to be taken through its legislative stages using that new procedure.

The Commission have so recommended. We are awaiting a response from the UK Government.

It is a great privilege to be Chairman of the Scottish Law Commission. I learnt much during my distant days as an executive member of SCOLAG. I am looking forward to my dual role as judge and chairman actively involved in law reform. That dual role helps to underpin the independence of the Commission and I hope it will also help inform me in my task as judge.