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Dr Andrew Steven
Scottish Law Commission
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Dear Andrew,

NINTH PROGRAMME

Here are some thoughts about the Ninth Programme – not all of them about property law.

In your letter you say that capacity in the area of property law is likely to be limited for some time to come. I entirely understand.

One thing that a published programme can do is mention projects that would be desirable even though resources do not presently exist. The SLC did that in the Eighth Programme (para 1.13 ff) and may have done it in earlier ones too.

Servitudes without a benefited property

Servitudes without a benefited property would indeed be a reasonable project. Real burdens without a benefited property already exist. There is some current law on eg electricity cables, with which I am not very familiar. Long ago I did some work for a landowner who wished to challenge an electricity agreement across his land, because he wanted to get more money out of the company, and when I studied the legislation it struck me as a mess. So yes: a very reasonable project. I might add that (famous last words) it would probably not consume huge resources. Moreover, I suspect that reform proposals would not be particularly controversial: I see this as a technical project. One final thought: it might involve some crossover between private law and public law.

Leases - Registration of Leases (S) Act 1857.

The Eighth Programme (para 1.14) said: "A general review of the law on leases of heritable property is required. A number of issues in relation to leases have been drawn to our attention by consultees. The topic that we put forward, a review of the proprietary effect of leases, received support on consultation. A general review would be a very substantial project, perhaps one to be undertaken in stages." That remains true. But it probably also remains true that resource problems would make this project difficult at the present time, even if it were to be confined to Registration of Leases (S) Act 1857.

Roads and other public rights of way – Roads (S) Act 1974

The Eighth Programme (para 1.15) said: "We consider that the law of roads and other public rights of way requires reform. We proposed this in our consultation, and the suggestion received significant support from consultees...." That remains true. But it probably also remains true that resource problems would make this project difficult at the present time, even if it were to be confined to Roads (S) Act 1974.

Whilst the ideal would be a comprehensive review of the 1974 Act would be desirable, it might be possible to launch a more limited review aiming at very limited amendments to the 1974 Act. There are some real obscurities in the Act about such key terms as "public right of passage", "public", "road" etc.

Criminal code

The idea of a criminal code has been discussed, both inside and outside HMS Causewayside, for a long time. It is one I strongly support. Having said that, I realise that there is little appetite for it among the Scottish Ministers or at PH. Moreover, it is doubtful whether it could be resourced, given other projects. In the Republic of Ireland they set up a separate Criminal Law Codification Advisory Committee, because they knew that the Law Reform Commission on its own would not be able to do it. I don't see the Ministers doing that here.

So: almost certainly not a runner. But I mention it for the sake of conscience: this is something that Scotland ought to be facing up to.

Codification of trust law

Those involved should be congratulated on bringing the trusts project to a conclusion with the publication of the Report on Trust Law. It's been a huge project.

Having said that, the next step would be a Trusts Code. My reasons for saying this are different for my wish for a Criminal Code. I recognise that the former is probably just wishful thinking. But there seems to me to be a real, practical, utilitarian, case for a Trusts Code. Trust business is now international. If Scotland wants to attract international trust business, it needs a trust Code. It's a shopfront issue. Foreigners and their lawyers need to know what they are getting involved with. The only way to achieve that is through a code.

This is something that should interest the Scottish ministers – perhaps even to the point that they might give the SLC some extra funding for it.

Obviously the project would not be small simple, but equally I don't think it would be particular big or difficult. Trust law has been codified in some other jurisdictions, so there

would be good comparative material. And once the Trust Law Report has been implemented, a lot of the snagging problems of the current law would have been sorted out already.

No doubt PH would not be keen. But the Law Society would almost certainly like it. I have already mentioned the Scottish Government.

Private foundations

This topic leads on from the last. A private foundation is functionally more or less the same as a private trust, the difference being that it has full juristic personality. Many international financial centres now offer private foundations as well as private trusts. Both are on the menu. Although in functional terms they (trusts and foundations) offer much the same thing, foundations have two practical advantages. (i) There are some jurisdictions (many, in fact) that won't recognise trusts. But they will (usually) recognise private foundations, because private foundations are juristic persons, and thus have an automatic "fit" into local law. (ii) Clients from non-trust jurisdictions are sometimes unhappy with trusts, because they don't understand them.

The English don't have private foundations, so this would be the chance to take the lead within the UK.

In terms of size and complexity, this project would be comparable to a trust code project. As with trusts, there are several statutes in other jurisdictions that could be used as a starting point. I would imagine that a lot of the codal text would be the same for both, so it might be that these two projects would naturally run in harness together, with the same team.

As with the trust codification idea, I think foundations would appeal to the Scottish Government and to the Law Society. (PH might be less interested.) The possibility of SG extra funding might exist.

With best wishes as ever,

George

