

Sent: 15 September 2014 11:32

Subject: Ninth Programme of Law Reform

Dear Malcolm,

I enclose the Society's memorandum of comments on the Commission's consultation regarding the ninth programme.

The Law Reform Committee was grateful to have had the opportunity to meet the chairman other commissioners and yourself on 26 August and I know that the President, Vice President and Chief Executive valued the meeting with the Chairman and you on 1 September.

At the meeting at 1 September we discussed the issue of putting Professional Regulation to the Commission as a topic for inclusion in the ninth programme particularly as it concerns Scottish solicitors and the Solicitors (Scotland) Act 1980.

Due to internal governance reasons this is not been included in the memorandum of comments and I will send you further material when this item has passed through the Society's processes.

Yours sincerely

Michael Clancy

The Law Society of Scotland



From: David Paton
Sent: 29 September 2014 13:10
To: SLC info
Subject: FW: Crofting Law reform

Dear all

Further to the Law Society's submission in relation to the 9th Programme of Law Reform, I have been asked by a member of our Rural Affairs sub-committee to forward the email below. This relates to our suggestion that the Crofting Acts were an area worthy of reform.

Kind regards

David

David Paton
Solicitor
Law Reform Assistant
The Law Society of Scotland

From: Eilidh Ross
Sent: 26 September 2014 10:26
To: David Paton
Subject: FW: Crofting Law reform

David,

I was emailed a couple of weeks ago by Keith Graham (retired Principal Clerk of the Scottish Land Court), regarding crofting law reform. I have been rather tardy in dealing with his email I'm afraid.

Could I ask you please to forward the email on to your contact at the Scottish Law Commission?

Many thanks,
Eilidh

Eilidh I.M. Ross
Inksters Solicitors
Forward Thinking Crofting Law
www.inksters.com
www.croftinglawblog.com

1 Wentworth Street, Portree, Isle of Skye IV51 9ER
AND
Drummondhill, Stratherrick Road, Inverness IV2 4JZ
Also in Glasgow and Wick

From: Pat Graham
Sent: 02 September 2014 12:11
To: Eilidh Ross
Subject: Crofting Law reform

Hello Eilidh

Many thanks for including me in the exchange of emails about the Scottish Law Commission. Like you I entirely agree that the various acts are a shambles and consolidation of the 1993 Act would be a great benefit to all and a relatively straight forward exercise.

The example I have used is section 1 of the 1993 Act. This has five subsections, namely 1(1), 1(2), 1(2A), 1(3) and 1(6). Subsections 1(4) and 1(5) were repealed by the 2010 Act but to a reader of the Act as amended who does not have the enormous benefit of the most helpful notes prepared by the Commission, one could find this confusing. Were subsections 1(4) and 1(5) repealed or was this a printer's error(which has happened in others sections)? To be absolutely sure that you were referring to the correct subsection, for example in a notice from a landlord to a crofter to do something, one would have to take a lot of time going through the 2007, 2010 and 2013 Acts to check this out. Otherwise that notice might be open to a valid challenge as it referred to the wrong subsection.

When the subject of consolidation was mentioned I told Richard Frew that I would be most interested in trying to help with a consolidation act.

If you are in touch with the Scottish Law Commission could you please tell them of my interest in helping and give them my details?

Many thanks

With my best wishes

Regards

Keith





THE LAW SOCIETY
of SCOTLAND
www.lawscot.org.uk

Consultation Response

Scottish Law Commission

Ninth Programme of Law Reform

The Law Society of Scotland's response

September 2014

Introduction

The Law Society of Scotland aims to lead and support a successful and respected Scottish legal profession. Not only do we act in the interests of our solicitor members but we also have a clear responsibility to work in the public interest. That is why we actively engage and seek to assist in the legislative and public policy decision making processes.

The Law Reform Committee has considered the consultation paper and has the following comments to make:-

General Comments

Defamation Law

In the Society's view, a full and comprehensive review of the Scots law of defamation (including convicium, where the last noted case was as far back as 1855) and privacy is needed. This review should, in particular, take account of the position in the major European jurisdictions which the Society perceives to have a more developed law on balancing privacy and freedom of speech. The relevance of the European Convention Human Rights ECHR in this area of private law is likely to grow and any reforms must properly take account of this influence. There has been some, very limited, recent change through the Defamation Act 2013 of which only section 6 in its entirety applies to Scotland (Peer-reviewed statement in scientific or academic journal etc.). Prior to this there has been little development since the Defamation Act 1996, which predates the Human Rights Act 1998 and the rights of privacy, family life, freedom of speech etc. afforded by the ECHR. There are considerable reservations in Scotland about the compatibility of the current law with basic tenets of freedom of speech.

Defamation law in Scotland has also fallen significantly behind social change and fails to take into account the advancement and use of social media and other means of electronic communications. The Society believes that defamation law is one particular area where it is important to ensure regular review to ensure that the law reflects social trends and the increasing development of communications technology.

Threats of litigation, and possible liability of defenders for expenses, often result in statements being retracted or not being published at all, although the threatened defamation claim may have little merit. There are also issues with the rights of juristic persons to sue for defamation. And there are wider issues about litigation funding that are particularly relevant to potential defenders in defamation proceedings.

We would, in this regard, mention the decision of European Court of Human Rights in *MGN Ltd v UK* (Application no. 39401/04, 18 January 2011): these Strasbourg proceedings were brought by defendants following a decision of the House of Lords in the proceedings between Naomi Campbell and the Mirror Newspapers Group: *Campbell v Mirror Group Newspapers Ltd* [2004] 2 AC 457). The Strasbourg court did not find English law itself to be a breach of Art 10 ECHR. But it did make an important ruling on expenses. The claimant, Campbell, sought to hold the defendants liable to pay the costs as set out in a conditional fee arrangement (CFA) between Ms Campbell and her lawyers (this part of the case is reported at [2005] 1 WLR 3394). This involved a 100% uplift in the event of success. The Strasbourg court has held that to subject unsuccessful litigants to such fee arrangements is a breach of Art 10.

CFAs are not permitted under Scots law, but “success fees” are allowed. Success fees may involve an uplift of a figure not exceeding 100% (RCS 42.17). But the uplift is paid by the successful client out of the damages awarded. The unsuccessful litigant does not pay the success fee in addition to the damages and taxed expenses. It is therefore more likely than not that the present Scottish arrangements are ECHR compliant.



The wider issue of potential expenses for unsuccessful defenders – particularly in a defamation case where there may be no patrimonial loss, as in celebrity cases, – is of considerable importance. Legal aid is not generally available for defamation cases. The Scottish Ministers have provided Directions to the Scottish Legal Aid Board limiting the provision of legal aid to litigants in defamation proceedings to exceptional cases; (Civil Legal Aid for Defamation or Verbal Injury Proceedings (Scotland) Direction 2010) that is to say, cases where legal aid is necessary in order to avoid the UK breaching Convention rights, as in those circumstances set out by the European Court of Human Rights in the so-called “McLibel” case: *Steel and Morris v UK Application no. 68416/01, 15th February 2005.*”

Even if the ranks of potential pursuers were augmented by legally-aided individuals, most potential defenders of defamation actions are unlikely to qualify for legal aid. They are more likely to find themselves in the position of Simon Singh, the science writer who was sued by the British Chiropractic Association which took exception to his statements about chiropractors. The Association succeeded at first instance but lost on appeal: *British Chiropractic Association v Singh [2010] EWCA Civ 350; [2011] 1 WLR 133*). How many individuals would be able and willing to persevere in such circumstances against a deep-pocket adversary? It has been reported that Singh’s defence took up 46 weeks and cost £200,000.

We also emphasise that there is a major difficulty in Scottish media organisations being subjected to English super-injunctions, as Scottish media reports tend to be accessible in England.

Homicide

The Criminal Law Committee would be happy to consider smaller projects such as special defences, but the law of homicide is in need of reform.

In particular, regarding the mens rea element, *Drury v HMA 2001 SLT 1013*, added a degree of wickedness to the mens rea regarding murder committed by intentional killing?

This would change Macdonald's definition:-

"Murder is constituted by any wilful act causing the destruction of life, either intending? to kill or displaying such wicked recklessness as to imply a disposition depraved enough to be regardless of the consequences" (Criminal Law 5th edition pages 89).

However, the position changed again in *Elsherkis v HMA [2011] HC JAC100* where, on appeal, Lord Hardie stated that the trial judge was correct to state an intention to kill in that case was obviously wicked.

Also, the issue of wicked recklessness was recently considered in *Petto v HMA [2011] HC JAC 78*

In this case, the Appeal Court decided to remit to a larger court on the basis that the law of murder as associated with wilful fire raising should be reviewed.

Lord Gill held that that, although there's no desiderative element in the mind of the accused, he is guilty of murder on the basis that he started a major fire on the ground floor of a block of flats in the certain knowledge that those within the building, especially on the upper floors, were at grave risk of being killed or seriously injured.

Not Proven Verdict

In our response to Michael McMahon MSP in October 2012 we stated that there had not been research around abolition of the not proven verdict, but that it, along with weighted majority verdicts, should be taken into account as part of a full scale review. This may be something which Lord Bonomy will consider as part of his additional safeguards.

Consolidation

The Criminal Procedure (Scotland) Act 1995 is in need of consolidation, although it was noted that many practitioners may be getting used to the revised section numbers.

Crofting Acts

The Rural Affairs Sub-Committee has expressed the view that the Crofting Acts are unsatisfactory and in need of reform. In short, they feel there is a need for greater clarity in the present law and a need to encourage the development of a new legislative base for crofting, enabling the law to be modernised and restated.

There have been a number of legislative reforms in this area in recent years. The Crofting (Scotland) Act 1993 was followed by the Crofting Reform (etc.) Act 2007, Crofting Reform (Scotland) Act 2010 and Crofting Amendment (Scotland) Act 2013. The law is now seen as convoluted which causes difficulties for crofters and their advisers.

Partnership Law

The Law Reform Committee takes the view that elements of the law of partnership should be updated and reformed particularly where concerns have been expressed about the legal personality of a partnership.



For further information and alternative formats, please contact:

Michael P Clancy

Director, Law Reform

The Law Society of Scotland

26 Drumsheugh Gardens

Edinburgh

EH3 7YR

www.lawscot.org.uk