

NEWSLETTER ISSUE 7 – SEPTEMBER 2008

Welcome to the Scottish Law Commission's Seventh Newsletter. We aim to issue a newsletter at approximately six-monthly intervals to keep those interested in our work up to date with progress on current projects and with general news about the Commission's activities.

NEW COMMISSIONER

Patrick Layden QC TD was appointed as a full-time Commissioner in September 2008. He replaced Professor Gerry Maher QC who retired as a Commissioner at the end of August.



Patrick practised as an advocate at the Scottish Bar for a period, then took up an appointment with the Lord Advocate's Department in London in 1977. In that office he dealt with a wide range of legislative and advisory issues, focusing latterly on European and constitutional matters. He was appointed Queen's Counsel in 2000. On devolution, Patrick was appointed Legal Secretary to the Lord Advocate. In 2003 he was appointed Deputy Solicitor to the Scottish Government .

NEW CHIEF EXECUTIVE

The Commission have a new Chief Executive, Malcolm McMillan. He was appointed in April 2008, following the retirement of his predecessor, Michael Lugton. Malcolm is a practising solicitor, and is on secondment from the Government Legal Service for Scotland. He has held various legal posts within government since 1982. From 1999 to 2003 he was the Deputy Legal Secretary to the Lord Advocate, and prior to his appointment to the Commission he was the Divisional Solicitor for the Rural Affairs Division in the Scottish Government Legal Directorate. Malcolm also worked as a member of the legal staff of the Commission between 1984 and 1989.



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, for example our project on the law of damages for wrongful death. We received a new 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 a major joint project on insurance contract law.

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, recommends a number of amendments to the Criminal Procedure (Scotland) Act 1995, so far as relating to solemn procedure. As regards the submission of no case to answer under section 97 of that Act, the Report recommends that the test for a submission of no case to answer should be broadened from the present technical test of sufficiency (that is, the presence or absence of corroboration in respect of all essential elements of the charge) to the broader test of whether the evidence presented by the Crown would entitle a reasonable jury, properly directed, to convict. The Report further recommends that the Crown should be entitled, with leave of the trial court, to appeal against the judge's ruling on a submission of no case to answer.

The Report recommends that the "common law submission" which may presently be made by the defence at the close of the evidence (by leave of the Crown) or after the Crown speech to the jury (by right) be replaced by a new statutory submission. This submission would be made immediately after the close of all of the evidence on the basis (either or both) that the evidence is insufficient in law to justify the accused's being convicted of the offence charged or of any other offence of which he could be convicted under the indictment, or that there is no evidence to support some part of the circumstances set forth in the indictment. Where the judge, after hearing both parties, is satisfied that the evidence is insufficient to justify the conviction of the accused of the offence charged or of any other offence of which he could be convicted under the indictment, the judge shall acquit the accused of the offence in respect of which the submission was made. Alternatively, where the evidence is sufficient to support a lesser charge, the judge shall direct the prosecutor to amend the indictment accordingly. The Report recommends that the prosecutor should have the right, with leave of the trial court, to appeal against any of these orders.

The Report suggests that while it may be possible in some cases to have a Crown appeal heard during an adjournment of the trial, and for the trial to continue following the disposal of that appeal, the consequence of a prosecution appeal will generally be the desertion of the trial diet in respect of the charge or charges concerned. The Report recommends that the bringing of fresh proceedings following any such appeal should require the leave of the appeal court, and that this leave should not be granted where that court considers that to bring a new prosecution would be contrary to the interests of justice.

Double jeopardy

In this, the second project to be conducted under the Scottish Ministers' reference of 20 November 2007, we are considering 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. Work on this project is progressing, and we expect to publish a discussion paper by the end of this year or very early in 2009.



Damages for wrongful death

Our project on **damages for wrongful death** stems 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. We received a number of helpful responses. Work is progressing on our Report, which will include a draft Bill. The Report will be published this autumn.

Rape and other sexual offences

We published our Report on *Rape and Other Sexual Offences* (Scot Law Com No 209) in December 2007. This followed publication of a Discussion Paper (Scot Law Com No 131) in January 2006. Our work stems from 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. Our report, as usual, contained a draft Bill to give effect to our recommendations.

The Scottish Government introduced a Bill into the Scottish Parliament, in June 2008. In many respects it is similar to our draft Bill, and it follows consultation by the Government earlier in the year. We have been called upon to give evidence to the Justice Committee as part of its examination of the Bill during Stage 1.

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.

Our project concerning the issues highlighted by the House of Lords decision in *Sharp v Thomson* 1997 SC (HL) 66. was completed in December 2007 with the publication of our Report (No 208). At present someone buying property can, in some circumstances, lose the property if a corporate seller becomes insolvent before the purchaser registers title to it. With the aim of reducing the risk where a company sells property, the report recommends that the rules be tightened (1) to ensure that buyers can readily find out whether winding-up proceedings against a corporate seller have been initiated and (2) to ensure that floating charges cannot attach to the property without the attachment having been publicly registered – the "no attachment without registration" principle.



Two proposals in our earlier discussion paper are not included in the recommendations. One of the proposals related to the doctrine of the "purchaser's beneficial interest", but following the House of Lords decision in *Burnett's Trustee v Grainger* 2004 SC (HL) 19, there is no longer any need for legislation on that issue. The other proposal has already been taken forward in section 17 of the Bankruptcy and Diligence etc. (Scotland) Act 2007, which enhances a buyer's protection against the insolvency of an individual non-corporate seller.

Succession

A new project on **succession** has been started under our Seventh Programme. We last reviewed this area nearly 20 years ago, although the recommendations in our 1990 Report have 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 the division of intestate estates 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 inviting comments by 31 December. We are currently working on drafting a report and Bill, and plan to complete this around the beginning of 2009.

Trusts and judicial factors

Our wide-ranging review of the law of **trusts** continues. Six discussion papers have been published so far - on breach of trust (No 123), on apportionment of trust receipts and outgoings (No 124), on trustees and trust administration (No 126), on variation and termination of trusts (No 129), on the nature and constitution of trusts (No 133) and on 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. 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 early in 2009. 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.

Our project on the review of the law relating to judicial factors has been put on hold due to the need to commit resources to the criminal law references.

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 on 17 July 2007. A summary of the responses which we received in relation to the consumer insurance proposals is available on our website. A further paper will be published summarising the responses received in relation to the business insurance proposals. We have published the consumer summary first as there is a wide consensus that consumer insurance law is in urgent need of reform and we intend to give 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 are also working on the second consultation paper. It will cover topics such as insurable interest, fraud, post-contractual good faith and damages for late payment of claims. We aim to publish it around summer 2009. In working towards the second consultation paper, in January of this year an Issues Paper on insurable interest was published. 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 are currently carrying 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 are also carrying out comparative research to see how such issues are dealt with in other jurisdictions.

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. We have also been asked to look at remedies relating to the supply of goods. This is another joint project with the Law Commission for England and Wales.

The Davidson Review, which reported in November 2006, concluded that this area of law is unnecessarily complex due to an overlap of domestic and EU remedies. One result of this complexity is that consumers, sales staff and consumer advisers find the law difficult to understand.

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. As part of this project, the Department has asked us to advise it on any issues which appear to be of relevance to that review.

Our aim will be to recommend appropriate remedies which make this area of the law easier for all users to understand and use. We plan to publish a joint consultation paper by the end of the year.

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 Scots law, such associations are not recognised as having a separate legal personality. It is this absence of personality which can create difficulties and injustices in areas such as contract and delict.



Under the present law, a non-profit making organisation which wishes to escape the consequences of the absence of legal personality has little choice but to incorporate. In many jurisdictions there have been statutory interventions by virtue of which clubs and associations have ceased to be treated as legal non-entities. We think that it may be time to propose legislative change for Scotland which would accord some form of legal status to clubs and associations. We will look at various options and put some forward for consideration in a discussion paper which we hope to publish by the end of this year.

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 background research. The aim is to publish a joint consultation paper in mid-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.

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.