

NEWSLETTER ISSUE 6 – FEBRUARY 2008

Welcome to the Scottish Law Commission's Sixth 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.

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, leasehold tenure, trusts and judicial factors, 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 started work on the first two projects under that reference, relating to Crown appeals and double jeopardy.

Crown Appeals

The Scottish Ministers' reference asked us, among other things, to consider the law relating to judicial rulings that can bring a solemn case to an end without the verdict of a jury, and rights of appeal against such rulings. (Solemn cases are those which are heard before a jury, either in the sheriff court or the High Court of Justiciary, and include trials for the most serious offences such as rape and murder.)

There are three principal means by which a ruling of the judge might bring a solemn case to an end without the jury being allowed to rule on the merits of the case. The first is via a submission of no case to answer in terms of section 97 of the Criminal Procedure (Scotland) Act 1995 in which the defence submits, at the close of the prosecution evidence, that there is insufficient evidence in law to justify a conviction. If the judge sustains such a submission, he or she must acquit the accused. The second is via what is sometimes termed a "common-law submission", made at the close of all the evidence, in which the defence submits that the judge should direct the jury not to convict, either on the basis of a legal insufficiency of evidence or on the basis that the quality or weight of evidence is such that no reasonable jury, properly directed, could convict. The third is a ruling on the admissibility of prosecution evidence, made during the course of the trial, which weakens the prosecution case to such an extent that the Crown is forced to abandon the prosecution. As the law presently stands, any ruling of the judge may potentially form the basis of an appeal against



conviction, alleging a miscarriage of justice, but the prosecution has no right to appeal any of the rulings just mentioned. Our project will consider both the law relating to the rulings themselves and whether such a right of appeal should be introduced.

We have conducted initial discussions with members of the judiciary and representatives of the Crown Office and of criminal law advocates and solicitors. These discussions have helped us to identify the issues which should be addressed in the course of our work. We aim to publish a discussion paper in the spring of 2008 and to submit our report to the Scottish Ministers in the summer of this year.

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 at an early stage. We expect to publish a discussion paper later in the year.

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. We received a number of helpful responses. We are now working on a report, which will be published in the summer.

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.

The report contains our recommendations and a draft Bill giving effect to them. Amongst other reforms, we recommend a statutory definition of consent, which will apply to a wide range of sexual activity. We also recommend the expansion of the definition of rape and that rape and other sexual offences be defined in gender neutral terms. In addition, we make recommendations designed to protect vulnerable groups, such as children, young people over whom an adult (eg a teacher, hospital worker or carer) is in a position of trust and those with a mental disorder. The Scottish Government is currently consulting on our recommendations (<http://www.scotland.gov.uk/Topics/Justice/criminal/17543/Scottishgovtconsultation>) and has undertaken to introduce a Bill in the Scottish Parliament in 2008.



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 inviting comments by 31 December 2007. We are currently analysing the comments received and hope to submit a report and draft Bill around the beginning of 2009.

Trusts

Our wide-ranging review of the law of **trusts** continues. Five 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) and on the nature and constitution of trusts (No 133), the last being published in October 2006. It explores the legal relationships between trustees, beneficiaries and third parties and the juridical acts that are necessary to create a trust. A discussion paper on trustees' liabilities to third



parties is to be published in Spring 2008. Our Report and draft Bill on Variation and Termination of Trusts was submitted to Scottish Ministers in February 2007.

Limitation in personal injury actions

Our Report on Personal Injury Actions: Limitation and Prescribed Claims was published in December 2007.

The report, which contains a draft Bill, recommends a number of changes to the Prescription and Limitation (Scotland) Act 1973. As regards the limitation rules, the report recommends that the current three-year period for personal injury actions be replaced by a five-year limitation period. In connection with the judicial discretion, we recommend the introduction of statutory guidelines listing the factors which the court may take into account in deciding whether to exercise its discretion to allow an otherwise time-barred action to proceed.

The report recommends that claims which have been extinguished as a result of the operation of prescription, should not be revived. In a statement in the Scottish Parliament on 7 February on Survivors of Institutional Abuse, the Minister for Children and Early Years announced that the Scottish Government accepted the recommendation that prescribed claims should not be revived.

Insurance law

We are working with the Law Commission for England and Wales on a major project on **insurance 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 and we are now 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 spring 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 in the second half of 2008.

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 autumn of this year.

ASSISTING IN THE IMPLEMENTATION OF REPORTS

In addition to the projects referred to above, we support, on request, departments 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.