



## **NEWSLETTER ISSUE 1 – JUNE 2005**

Welcome to the Scottish Law Commission's newsletter. This is the first issue of what we hope will be a twice yearly publication. Our intention is to use the newsletter to keep those interested in our work up to date with progress on current projects and with general news about the Commission's activities.

### **40<sup>th</sup> ANNIVERSARY**

This first issue is being published on 15 June 2005, to coincide with our 40<sup>th</sup> anniversary (shared with the Law Commission for England and Wales.) We are marking the occasion with an address and reception in the Signet Library in Edinburgh at the end of the month.

This anniversary gives an opportunity both to reflect on the contribution that we have been able to make to law reform in Scotland since our creation in 1965 and to look forward to the contribution we can make in the years to come.

Looking simply at statistics, we have produced a total of 127 discussion papers and 141 law reform reports (including reports on consolidation and statute law revision) since 1965 and have achieved an implementation rate for our recommendations of just over 80%. Major reforms have been introduced based on our work, covering areas such as financial provision on divorce, debt enforcement, requirements of writing and adults with incapacity. Most recently the Scottish Parliament has enacted legislation implementing our recommendations for fundamental and far-reaching changes to land law in Scotland.

There is, however, no room for complacency on our part. Pressure on legislative time both at Holyrood and at Westminster means that opportunities for implementation particularly of some of the more technical law reform measures originating from the Commission are limited. There remains a difficult balance to be struck between undertaking work that is relevant to the wider policy imperatives within government and recommending technical reforms that are useful and worthwhile for their own sake.

We were pleased to have a visit recently from the Minister for Justice, Ms Cathy Jamieson, at which some of these issues were discussed. We hope that this may lead to further discussion and review of the Commission's relationship with the Executive and its role in devolved Scotland.



## COMMISSIONER NEWS

Two of our Commissioners have recently been reappointed to serve a further term at the Commission. Professor Thomson, who is the lead Commissioner on trusts and succession, has been reappointed until January 2010. Professor Maher, who leads our work on sexual offences and also on judicial factors, will serve until August 2008.



*Professor Thomson*



*Professor Maher*



*Professor Reid*

Professor Reid's work on property law reform has been recognised in the recent Queen's Birthday Honours List by his being awarded a CBE for services to law reform in Scotland.

The Scottish Executive will shortly be advertising a Commissioner vacancy which will arise at the end of this year when Professor Reid's term comes to an end.

## OUR CURRENT WORK

### Introduction

Most of our projects are carried out under our *Seventh Programme of Law Reform*, which was approved by Scottish Ministers at the beginning of 2005. It sets out our main workload for the next five years and covers substantial ongoing reviews of leasehold tenure, land registration, trusts and judicial factors, plus four new projects on succession, assignation of and security over incorporeal moveables, unincorporated associations, and provocation, self-defence, coercion and necessity. In addition, we continue to undertake reviews of specific topics at the request of the Scottish Ministers or a UK government department.

### Criminal law

Our review of **the law relating to rape and other sexual offences** got underway last summer. The project covers both the substantive definition of sexual offences and the evidential requirements for their proof. The main focus so far has been on the first of these elements, looking separately at sexual assaults, protective offences and offences against public morality. Among the issues being considered in relation to sexual assaults is whether and how the law should distinguish between different forms of infringement of a person's sexual autonomy. We are also considering whether the law on sexual offences can be based on a positive model of consent, and the models used in other jurisdictions are being studied.

The team has undertaken a lot of pre-consultation discussion with various interest groups to help develop its policy thinking. A useful seminar was held in March to consider the extent to which A



*Draft Criminal Code for Scotland* (published under our auspices in 2003) could provide a model for this project. The aim is to produce a discussion paper by the end of 2005.

### **Interest**

A review of **the law on interest on debt and damages** is at the half way stage. A discussion paper (No 127) was published in January this year proposing the introduction of a statutory right to claim interest during the period when a claimant is deprived of the use of his money, whether the claim is for payment of a contractual debt, a non-contractual debt or damages. The consultation period has now ended and the team is analysing responses with a view to working up final recommendations. We hope to complete the project by autumn 2006.

### **Limitation in personal injury actions**

Work began last autumn on a review of the provisions of the Prescription and Limitation (Scotland) Act 1973 concerning **limitation in personal injury actions**. The project looks at the so-called "knowledge test" and at the power of the courts to override the limitation period if it is equitable to do so. Concern has been expressed about the way the test operates, particularly in cases involving industrial diseases. The question has been raised whether the Act should be amended to specify factors to which the court should have regard in exercising its discretion. We aim to publish a discussion paper by the end of 2005.

### **Property**

A long-standing project on **leasehold tenure** is nearing a conclusion. A discussion paper (No 112) on *Conversion of Long Leases* was published in April 2001 proposing that leases for more than 175 years should be converted into ownership. It also sought views on whether conversion should be available for leases of shorter duration (50 years or more). A possible alternative for these leases would be to introduce some form of security of tenure. Much of the report has already been written but progress on the Bill has been intermittent due to other priorities and limited availability of drafting resources. Preparation of the draft Bill is now fairly advanced and we hope to submit our report by the end of 2005.

We are also working on a review of the **Land Registration (Scotland) Act 1979**. 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 the policy objectives of a system of registration of title, was published in February 2004. A second discussion paper, to be published shortly, will look 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 will follow in the autumn, considering various miscellaneous issues such as servitudes, overriding interests and the powers of the Keeper of the Register.

A further project concerns the protection of purchasers buying property from insolvent sellers and the issues highlighted by the House of Lords decision in ***Sharp v Thomson*** 1997 SC (HL) 66. A discussion paper (No 114) was published in July 2001. One of the main proposals has largely been superseded by *Burnett's Trustees v Grainger* 2004 SC (HL) 19 where the House of Lords declined to apply *Sharp v Thomson* to ordinary personal insolvency. We are now considering how best to draw this project to a conclusion. There may be scope for dealing with some of the remaining proposals in the land registration project. It may be possible to deal with other aspects in the Executive's proposed Diligence and Personal Bankruptcy Bill.



## Succession

A new project has started under our Seventh Programme on **the law of succession**. We last reviewed this area 15 years ago although the recommendations made then 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 that are common today. The project focuses mainly on a surviving spouse's rights on intestacy and the protection of spouses, cohabitants, children and other relatives from disinheritance. As a first step a public attitude survey has been commissioned to help shape provisional proposals for reform and the team is now considering the survey results. We aim to publish a discussion paper by the end of 2005.

## Trusts and judicial factors

Our wide-ranging review of **the law of trusts** continues. Three discussion papers have been published so far - on breach of trust (No 123), on apportionment of trust receipts and outgoings (No 124) and on trustees and trust administration (No 126). Our proposals to allow trustees to use nominees and delegate their discretionary management functions in relation to investments have been enacted in the Charities and Trustee Investment (Scotland) Act 2005. Two further discussion papers are being prepared on variation and termination of trusts and on the nature and constitution of Scottish trusts, for publication respectively in late 2005 and early 2006. A seminar was held in March to discuss the concept of legal personality for trusts. The views expressed there have been very influential in developing our thinking on this issue.

Our project concerning **the law relating to judicial factors** (persons appointed by a court in certain circumstances to hold or administer property) is now fully underway. The initial stages have involved empirical research into the current use of judicial factory and extensive consultation with practitioners experienced in this field. A general policy approach has been developed and we hope to publish a discussion paper in 2006.

## COMMENTS AND FURTHER INFORMATION

We welcome comments on the current work outlined in this newsletter and indeed on any aspect of our work. Please contact us at [info@scotlawcom.gov.uk](mailto:info@scotlawcom.gov.uk). Further information about our work and publications may be found on our website at [www.scotlawcom.gov.uk](http://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. We intend to make the text of all our publications, back to 1965, available on-line over the coming months.



*Commissioners and Chief Executive, from l to r: Professor Gerry Maher, Colin Tyre QC, Jane McLeod (Chief Executive), Professor Kenneth Reid, Professor Joe Thomson and the Hon Lord Eassie (Chairman)*