

Justice Committee

Letter from the Convener to the Cabinet Secretary for Justice

Unimplemented reports of the Scottish Law Commission

As you may be aware, two issues that the Committee has taken an interest in since it was set up last year are progress in implementing draft Bills proposed by the Scottish Law Commission and the possibility of pursuing a Committee Bill that would secure significant practical improvement in relation to an area of law within the Justice remit. You will appreciate that there is the potential for overlap between those two matters.

The Committee discussed these issues at our meeting on 8 May, and agreed to write to you in terms set out below.

We also agreed to take the opportunity to seek an update on a related issue (in that it concerns proposed future legislation, albeit not arising from an SLC report); fatal accident inquiries.

General observations

The Committee noted concerns from the SLC itself at what it saw as a relatively low implementation rate since the advent of devolution compared to other jurisdictions with law commissions, particularly in relation to reports concerning civil law.¹ We have sympathy with those concerns. One of the perceived advantages of the Scottish Parliament when it was set up was that it was expected to provide far more time to discuss and agree proposals emanating from the SLC and others to modernise and simplify Scots law.

We noted that there has been some discussion about the possibility of devising a special legislative process to expedite the agreement of technical SLC Bills, but that the prospect of the Parliament adopting such a process is probably still some way off. In any case, there are a large number of draft SLC Bills that are not, by any definition, purely “technical” in character.

The Committee acknowledged that it is appropriate for the initiative for implementing SLC reports to lie with the government of the day. We further noted the rule of Standing Orders² intended to prevent duplication of effort in circumstances where a committee and the Scottish Government are both pursuing the same policy aims through legislation, by providing, in effect, that it is for the Government to take the proposal forward.

However, we agreed that we would be prepared in principle to make a positive contribution towards increased implementation of SLC reports by taking forward one of them as a Committee Bill during this session. If so, we would aim to promote a Bill likely to secure real and practical benefit for the public, and which resonates with

¹ See for example, comments in the forewords to the 2008 and 2010 annual reports of the SLC. The Committee is pleased to acknowledge that the foreword to the 2011 report noted some recent progress.

² Rule 9.15.7A

priorities we have identified thus far in our scrutiny of the Justice portfolio, but which the Scottish Government appears to have no plans to take forward in this session.

The Committee acknowledged that the Justice Committee may not be the most appropriate committee to take forward some SLC reports and, for the avoidance of doubt, I should make clear that we would only propose a Bill that is clearly within the Justice remit.

Committee Members accept that the Committee has a role to play in modernising and improving the law that involves taking positive steps using the powers that are available to us. Bringing forward a Committee Bill is one way of doing so. The biggest challenge is likely to be a shortage of time, owing to our heavy workload of Scottish Government Bills. In this connection, the Committee fully acknowledges that implementing a SLC report would not be a simple matter of the Parliament applying a “rubber stamp” to the attached Bill; further consultation and debate would be required. Should the Committee decide to take forward a draft SLC Bill, we expect that the Scottish Government would wish to assist us by helping ensure that there is a window of opportunity within our work programme to take a Bill forward.

Unimplemented Scottish Law Commission reports

With these general comments made, I turn to the list of unimplemented SLC reports since devolution (excluding those concerning reserved matters). I acknowledge the assistance of the Scottish Parliament Information Centre in providing background material to help inform the contents of this part of the letter. (In this connection, I note that this letter will be published on the Committee’s webpages and may be of general interest as a public record of those SLC reports on devolved matters whose implementation remains outstanding.)

Succession

In 2009 the SLC published its [Report on Succession](#), recommending significant reforms of this area of the law. The associated draft bill comprises 57 sections (plus schedules).

The Scottish Government issued its [initial response](#) later in 2009. In a [letter](#) to the Public Petitions Committee in January 2012 the Scottish Government indicated that it hoped to consult on the topic of succession late 2012 or early 2013.

The Committee would welcome an update on the Scottish Government’s plans on succession.

Delict

There are two unimplemented SLC reports on the law of delict. [Damages for Psychiatric Injury](#) (2004), deals with the delictual liability of those who inflict mental harm, to individuals (whether intentionally or through lack of care), where the victims do not also suffer any physical injury or other damage. The report notes that the existing law in this area has developed in an ad hoc fashion through case law over hundreds of years. The SLC considers that the end result is an “unprincipled set of

rules full of anomalies”.³ The draft bill appended to the SLC report comprises eight sections.

[Personal Injury Actions: Limitation and Prescribed Claims](#) (2007), reviewed the rules relating to ‘limitation’ or ‘time bar’ of personal injury actions. The report’s main recommendation was that the limitation period for personal injury actions should be extended from three to five years. The draft bill appended to the SLC report comprises five sections.

The SLC’s [Annual Report for 2011](#) states that the Scottish Government intends to consult on these reports “in early 2012”.⁴ The Committee notes that this consultation has not yet been published.

The Committee would welcome an update on the Scottish Government’s plans in relation to the two outstanding reports on aspects of the law of delict.

Interest on Debt and Damages

In 2006 the SLC published its report, [Interest on Debt and Damages](#), which provides for a new statutory right of interest on late payment of contractual debts, non-contractual debts (e.g. claims for aliment), as well as damages awarded by courts.

In January 2008 the Scottish Government published its consultation on a draft [Interest \(Scotland\) Bill](#) (which comprised 18 sections). The [consultation responses](#) are available online, along with an [analysis](#) of those responses (published May 2008). The Committee notes that the proposals met with a mixed reaction on consultation.

The Committee is not certain whether, in its forthcoming consultation on the SLC reports on delict, the Scottish Government also proposes to ask respondents to comment on whether the issue of interest on damages should be revisited.

The Committee would welcome an update on the Scottish Government’s plans in relation to interest on debt and damages.

Property law

Four SLC reports on property law (one published very recently) are not yet implemented.

First, in 2003, the SLC published its [Report on Irritancy in Leases of Land](#), a remedy which entitles a landlord to terminate the lease prematurely on account of the tenant’s breach of contract. The SLC recommended that the remedy be retained but that its potentially harsh effects should be mitigated by a new system of statutory regulation. The accompanying draft bill has 22 sections (plus schedules).

Secondly, also in 2003, in response to a reference by Scottish Ministers, the SLC also published its report on the [Law of Foreshore and Seabed](#). This report recommended that the present extent of the Crown’s ownership of the seabed and

³ Scottish Law Commission (2004) *Damages for Psychiatric Injury*. Scottish Law Commission news release 10 August 2004.

⁴ The consultation will also include aspects of the SLC’s report on [Damages for Wrongful Death](#) which were not included in the Damages (Scotland) Act 2011.

foreshore should be defined in statute. More significantly, the report recommended that existing common law public rights over the foreshore, sea, seabed and navigable waters should be replaced by statutory rights held directly by the public (as opposed to by the Crown on behalf of the public).

The Committee acknowledges that the public debate in relation to the Crown Estate's ownership of the foreshore and seabed has moved on considerably since 2003 and that there is a reserved/devolved element to the debate.

Thirdly, in 2007, in response to a reference by Scottish Ministers, the SLC published its [Report on Sharp v Thomson](#). The case in question was a House of Lords case relating to a 'floating charge', a legal device used to secure a debt over property. The case highlighted the risk that the buyer of a property can, in some circumstances, lose the property and the price, due to the corporate insolvency of the seller. The SLC made recommendations for reform designed to help protect the purchaser against such risks. A draft bill of nine sections is appended to the report.

The Committee notes that the *Sharp* case touched on the law relating to floating charges and to diligences against heritable property. In that connection, we note that Parts 2 and 4 of the Bankruptcy and Diligence (Scotland) Act 2010 concerning, respectively, floating charges and the new diligence of land attachment. We are unclear whether this would have any bearing on implementation of the 2007 report.

Finally, I note that on 9 May, the day after the Committee's consideration of SLC reports, the SLC published its [Report on prescription and title to moveable property](#), proposing two new rules to enable the conversion of possession to ownership.

The Committee would welcome an update on the Scottish Government's plans in relation to the three outstanding SLC reports on property law.

The Committee would welcome, in due course, an indication of the Scottish Government's plans in relation to the recent report on prescription and title to moveables in due course.

Contract law

There are two unimplemented reports on contract law.

In 1999 the SLC published its report on [Remedies for Breach of Contract](#) which recommended four key reforms in this area. These had received strong support when the SLC consulted on the possible reform. The accompanying bill has five sections.

The Committee notes that in the Foreword to the [Annual Report for 2008](#), Lord Drummond Young suggested the above report would be a good candidate for a legislative initiative by the Scottish Government. On the other hand, in its Annual Report for 2011 the SLC indicated it intends to revisit remedies for breach of contract as part of its [current review of contract law](#).

Also in 1999 the SLC published its [Report on Penalty Clauses](#). A penalty clause requires a contracting party to pay a fixed sum on breach of contract. At present

some penalty clauses are unenforceable, some are not. The SLC report is intended to bring clarity and certainty to the approach of the current law to such clauses.

In July 2010, the Scottish Government [consulted on a draft Penalty Clauses \(Scotland\) Bill](#) based on the SLC report. The draft bill has six sections. A [summary analysis](#) of consultation responses was published in January 2011 (and individual [consultation responses](#) are also available online). There were mixed responses to the consultation and, as a result, the Scottish Government asked the SLC to undertake further work as part of its [current review of contract law](#).

We are not clear whether the further work being undertaken on contract law means that these two reports are now considered wholly superseded or whether aspects of them might be taken forward as legislation.

The Committee would welcome an indication of the Scottish Government's plans in relation to the two outstanding reports on contract law.

Variation and termination of trusts

In 2007 the SLC published its [Report on Variation and Termination of Trusts](#) which has not been implemented. However, the SLC has confirmed that this report is to be superseded by a wide ranging SLC report on trusts due out in 2012. The latter report will include a draft Trusts (Scotland) Bill.

The Committee assumes that the 2007 report is superseded by the current wide-ranging project on trusts, but would welcome express clarification from the Scottish Government.

Age of Criminal Responsibility

In 2002 the SLC published its [Report on Age of Criminal Responsibility](#). Its recommendations were partially adopted by the Scottish Government in section 52 of the Criminal Justice and Licensing (Scotland) Act 2010 which introduced an absolute prohibition on the prosecution of children under the age of 12 in the criminal justice system. The Committee notes that during the passage of the Bill there was some debate over this provision, and in particular, whether it would be more appropriate to raise the age of criminal responsibility itself. We note that, in responding to the debate over an amendment to this provision in the Bill at Stage 3, you said that “we should leave matters as they are” (ie as amended by the provision that became section 52 of the 2010 Act), but that “members of my party are prepared to consider moving on from where we are at some future stage.”⁵

Under the current law children under the age of 8 do not have capacity to commit a criminal offence. The SLC also recommended abolition of this rule to allow referrals to the children's hearing system of a child under the age of 8 on the ground of having committed an offence.⁶ This recommendation was not accepted by the Scottish Government.

The Committee notes that there appear to be mixed views about how significant this is in practice. For example, several commentators have pointed out that a child

⁵ The Scottish Parliament, [Official Report, 30 June 2010](#)

⁶ The case of *Merrin v S* (1987 SLT 193) established that a child under the age of 8 could not be referred to the children's hearing system on the ground of having committed an offence.

under 8 would usually (but not always) be able to be referred to a children's hearing system under one of the alternative 'welfare grounds' of referral if he or she had committed what would be treated as a criminal offence (were that child over the age of 8).⁷

The Committee would welcome an update from the Scottish Government as to its plans (if any) in relation to unimplemented parts of the 2002 report or whether it is now satisfied with the law and practice on the age of criminal responsibility.

Crown appeals

In 2008, in response to a reference by Scottish Ministers, the SLC published its [Report on Crown Appeals](#) which considered the law relating to judicial rulings which can bring a solemn criminal case to an end without the verdict of a jury.

A number of recommendations contained in this report were implemented in sections 73–76 of the Criminal Justice and Licensing (Scotland) Act 2010, not all of them in full. Recommendation 1, that there should be an extension of the grounds on which the accused may submit, at the close of a Crown case, that there is no case to answer, has not been implemented. In the [Policy Memorandum](#) (paras 278, 282–286) to [the Bill as introduced](#) the Scottish Government explained its reasoning for the departures from the SLC report. In relation to recommendation 1, its reasoning included a “substantial level of opposition” (para 283) to the proposal from consultees.

The Committee presumes that the Scottish Government's policy in relation to the unimplemented part of the 2008 report has not changed, but would welcome express clarification on this point from the Scottish Government.

Future Legislation in relation to fatal accident inquiries

Finally, the Committee agreed to seek an update as to the Scottish Government's legislative plans in relation to Lord Cullen's [proposals](#) on fatal accident inquiries. (As you will recall, the Committee has corresponded with you on the past on this issue, as part of our consideration of [Petition 1280](#). In your most recent letter to the Committee on this issue, on 12 January 2012, you wrote that it was the Scottish Government's “firm intention” to bring forward a Bill to reform and modernise the law on fatal accident inquiries during this session, but that you were still contemplating the most appropriate legislative approach, and in particular, whether to update or to completely replace the current legislation.

It would be helpful if you could update the Committee as to your thinking on this issue, and as to a proposed timetable for bringing legislation forward.

I would be grateful for a response by 7 June if possible.

Christine Grahame MSP
Convener, Justice Committee
15 May 2012

⁷ K McK Norrie, *Children's Hearings in Scotland* (1997), p 28; Stair Memorial Encyclopaedia, vol 3, para 1336.