

Scottish Law Commission

Eleventh Programme of Law Reform – Consultation

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We welcome this consultation and appreciate the opportunity to provide our suggestions. We propose four law reform projects, provided in order of our perceived priority (from highest (1) to lowest (4)):

1. Statutory debt solutions and diligence – including aspects of sequestration, protected trust deeds and debt arrangement schemes, as well as land attachment and residual attachment

Levels of personal debt are growing. It is an appropriate time to consider the extent to which the current debt regime is fit for purpose and what reforms are required to enable parties to successfully manage their debt. The level of protection conferred on debtors by the law of diligence also deserves attention. This includes the required protection for the family home and residential property more broadly in relation to diligence and statutory debt solutions, as well as the expectation of fair process in relation to proceedings such as summary warrants. On the other side, it is important that creditors have the ability to enforce their rights effectively and fairly, which means there is a need to consider statutory debt solutions from this perspective and to address the problems with the law of diligence. The latter arguably includes the fact that land attachment and residual attachment have still not been brought into force. The rise of digital assets strengthens the case for introducing residual attachment (as currently the only diligence available is likely to be the largely unsuitable adjudication for debt, as Scots law's residual diligence). Statutory debt solutions are currently being examined by the Scottish Government; diligence has recently been reviewed by the Accountant in Bankruptcy, and a report provided to the Scottish Government. There are contentious aspects of each of these areas and the reviews highlight a number of issues which require resolution. Some of these may be addressed without the necessity of a Scottish Law Commission (SLC) project. However, others are more challenging and would benefit from the involvement of the SLC. Given the interconnectedness of the relevant areas, it would be useful for the SLC to examine them together in order to recommend coherent reforms. In order to undertake this project effectively, it will be necessary to consult with the Scottish Government and to make sure there is no duplication of work.

2. Digital assets – particularly private international law issues and aspects of private law and potentially other areas of Scots law such as criminal law

The importance of digital assets (including cryptocurrencies) is increasing and the law needs to accommodate and deal with them appropriately. There is an ongoing Law Commission of England and Wales (LCEW) project on digital assets and it would be advisable for the SLC to either work on this as a joint project or to undertake its own project in tandem with the LCEW, with ongoing consultation between the bodies. Various issues that are being addressed in relation to digital assets in England and Wales also require attention in Scotland. A particularly important area to consider, and which would benefit from SLC involvement, is the impact of private international law on any domestic digital assets regime. Aspects of Scots private law (including property law, the law of

diligence, insolvency and succession) could also be considered, and there might be merit in examining criminal law issues involving digital assets.

The Scottish Government's Expert Reference Group on Digital Assets has been undertaking helpful work in relation to some areas of digital assets and it may be that this reduces the necessity of SLC involvement on certain matters or minimises the work required. Furthermore, new legislation on Electronic Trade Documents is expected following LCEW recommendations. Depending on the terms of that legislation, it might be appropriate for this to be extended to include Scotland, which would avoid any delay that might be caused by this becoming part of a wider Scottish Law Commission project.

3. Consolidation of contract law legislation – including identifying existing contract law legislation and proposing consolidating legislation, potentially with some minor changes to the law

There is a significant volume of contract legislation, which is fragmented and would benefit from consolidation. Some desirable minor amendments to the law may be identified from reviewing the existing legislation. One of the key advantages of a project of this type, aside from its utility to the public and the legal profession, is its likely achievability. It should be relatively straightforward to complete the required work and achieve a tangible outcome in the form of consolidating legislation.

A number of Acts and provisions could be consolidated within one piece of legislation (e.g. a Contract Law (Scotland) Act). Such Acts and provisions include the Law Reform (Miscellaneous Provisions) (Scotland) Act 1985, ss 8 (rectification of defectively expressed documents), 9 (provisions supplementary to s 8) and 10 (negligent misrepresentation), the Contract (Scotland) Act 1997, and the Contract (Third Party Rights) (Scotland) Act 2017. In addition, provisions relating to contracts in a number of other pieces of legislation, such as the Age of Legal Capacity (Scotland) Act 1991, the Requirements of Writing (Scotland) Act 1995 and the Legal Writings (Counterparts and Delivery) (Scotland) Act 2015, could be consolidated within a new piece of legislation on contracts; however, we are aware that this may require more consideration given that the scope of the aforementioned legislation extends beyond contract law.

4. Funding and expenses of litigation – focusing particularly on matters such as crowdfunding of litigation and expenses in relation to appeals from simple procedure and other low value actions

Crowdfunding of litigation has grown in prominence in recent times and can be somewhat controversial. Reviewing the existing law and considering policy factors and potential reforms would be useful. An example issue that could be considered is the extent to which crowdfunding should be permitted where it involves disclosing information publicly, in an attempt to raise funds or support, where parts of the case are likely to be dealt with by the court in private e.g. cases involving children. Another matter relating to access to justice and litigation involves expenses where simple procedure actions are appealed. Consideration could be given as to how such expenses could be restricted or otherwise dealt with in a fair manner for parties involved, so as to avoid escalation of costs that may inhibit a party's ability to obtain justice in practice.