



Scottish Law Commission  
*promoting law reform*

(SCOT LAW COM No 198)

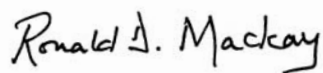
**seventh programme  
of law reform**



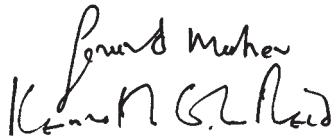
## Seventh Programme of Law Reform

To: Ms Cathy Jamieson MSP, Minister for Justice

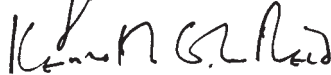
We have the honour to submit for approval by the Scottish Ministers our Seventh Programme of Law Reform to commence on 1 January 2005.



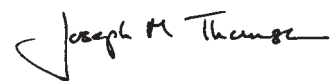
RONALD D MACKAY, *Chairman*



GERARD MAHER



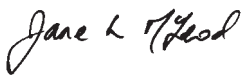
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COLIN TYRE



Miss Jane L McLeod, *Chief Executive*  
24 December 2004

Laid before the Scottish Parliament by the Scottish Ministers under section 3(2) of the Law Commissions Act 1965  
February 2005



The Scottish Law Commission was set up by section 2 of the Law Commissions Act 1965 for the purpose of promoting the reform of the law of Scotland. The Commissioners are:

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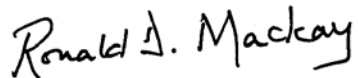
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## Chairman's foreword

In June 2005 we will mark the fortieth anniversary of the establishment of the Scottish Law Commission and this, our *Seventh Programme of Law Reform*, sets out the projects on which we intend to work in the initial years of the Commission's forthcoming fifth decade.

The Programme has been the subject of extensive consultation with the legal profession and other interested bodies and we have sought views from the public at large. We are very grateful to all who commented on our draft proposals and who made suggestions of other topics which we might consider. The result is a balanced programme of work, which we believe will be useful to the community in Scotland.

We look forward to making progress with the topics contained in the Programme, together with the other projects which come to us by ministerial reference. We do so knowing that we can rely on the dedication of our staff and on the advice and assistance of both colleagues in the legal and academic professions and other interested bodies whose participation in our projects is important to their success.



THE HON LORD EASSIE  
*Chairman*

# Part 1 Introduction

## Background

1.1 Under section 3 of the Law Commissions Act 1965 we are required to prepare and submit to the Scottish Ministers programmes for the examination of different branches of the law with a view to reform. This is the seventh such programme.<sup>1</sup> As with the last two, it has been conceived as a rolling programme, incorporating ongoing work from the *Sixth Programme* as well as identifying new projects to be undertaken, and comprising a mix of short, medium and long term projects. We recommend<sup>2</sup> that all of the projects identified should be undertaken by ourselves rather than by another agency.

## Project selection criteria

1.2 We have adopted the following criteria in selecting new topics for inclusion in the Programme:-

- *importance*: the extent to which the law is unsatisfactory (for example, unfair, unclear, unduly complex or outdated); and the scale of the problem in terms of the proportion of the community affected, the extent of the practical difficulties created by the existing law and whether these difficulties can be overcome other than by a change in the law.
- *suitability*: whether the issues concerned are predominantly legal rather than political and whether there is any other agency better placed to examine the topic in question.
- *resources*: the expertise and experience of Commissioners and legal staff and, in relation to projects where there may be a substantial role for a consultant, the availability of adequate funding; and the need for a mix of projects in terms of scale and timing in order to achieve a balanced workload among Commissioners and facilitate effective management of the Programme.

## Consultation

1.3 The consultation that we have undertaken in preparing the *Seventh Programme* has been more extensive than any undertaken in the preparation of previous programmes. It was carried out in two stages. First, a consultation letter was issued at the end of 2003 to the main legal interest groups seeking views on a provisional list of topics and inviting further suggestions. As part of this first stage meetings were held separately with the Law Reform Committee of the Law Society of Scotland, representatives of the Law Schools and the Crown Office. A second round of consultation on revised proposals took place over the summer of 2004, involving consultation with a wider range of interest groups. A list of all those consulted in these two stages is contained in the Appendix.

1.4 At the second stage of the process, we also consulted the legal profession at large, via notices in the legal press, and members of the public via our website and issue of a consultation leaflet. This leaflet was distributed to public libraries, university and FE college libraries, Citizens' Advice and local authority offices, MPs' and MSPs' constituency offices, sheriff courts and legal firms (for display in their reception area). As well as seeking views from members of the public

<sup>1</sup> The previous programmes are: Scot Law Com No 1 (1965); Scot Law Com No 8 (1968); Scot Law Com No 29 (1973); Scot Law Com No 126 (1990); Scot Law Com No 159 (1997); Scot Law Com No 176 (2000).

<sup>2</sup> See 1965 Act, section 3(1)(b).



about our future work, distribution of the leaflet served to increase public awareness of the existence and functions of the Commission.

1.5 We are very grateful to all who took part in this consultation exercise. While the number of responses made to the leaflet was small, we did receive comments from individuals whom we would not otherwise have reached. Overall our provisional list of topics for inclusion in the Programme received a favourable response and a number of suggestions were made about other areas of the law that merited review. Two items are included in the Programme as a direct result of suggestions made by consultees.<sup>3</sup> Although a number of topics suggested did not meet our project selection criteria, there were some, such as the call for a comprehensive review of civil justice and reform of arbitration law, that we felt appropriate to draw to the attention of the Scottish Executive for consideration.

### **Basis of the *Seventh Programme***

1.6 In drawing up this five year Programme we have continued to identify projects as short, medium or long term. A short term project has a target date for completion well within the life of the Programme. We intend to complete our medium term projects at the latest by the end of the Programme. Long term projects are those which are likely to extend into the following Programme, either because they are so substantial as to require more than five years for completion or because their scheduling is such that work will start only in the latter part of the Programme.

1.7 Within these broad parameters we will set realistic timetables for each project. However, past experience shows that changes in circumstances during the life of the Programme may give rise to new or different priorities. Timetabling of individual projects may be affected by urgent requests for advice, by our involvement in joint projects with the Law Commission for England and Wales or by our providing assistance to departmental officials with implementation of earlier reports. Progress on a project may sometimes be slower than anticipated. This may, for instance, be due to the complexity of the legal issues involved or because the consultation response on our provisional proposals requires us to reconsider our approach and perhaps consult further.

1.8 A significant factor in our ability to complete projects on schedule is the availability of drafting resources. We are largely dependent on the Office of the Scottish Parliamentary Counsel to draft the Bills attached to our reports and its resources are, quite understandably, devoted primarily to the preparation of Bills for the Scottish Executive's legislative programme. Accordingly, until such time as different arrangements can be agreed, our drafting work has to be accommodated around those prior demands on the Office's resources.

1.9 This factor alone has seriously affected progress on some of our law reform projects in recent years although we are pleased to report that these difficulties appear to be easing slightly as the Office of the Scottish Parliamentary Counsel increases in size. Nevertheless it remains the case that the availability of drafting resources and, in particular, the timing of their availability, is outwith our control. Our assessment of the likely timescale for completion of all

<sup>3</sup> See paras 2.21 to 2.30 and 2.40 to 2.45.

the projects included in the *Seventh Programme* assumes that we will have adequate drafting resources available to us at the stage at which they are required.

## Projects undertaken during the *Sixth Programme*

1.10 It may be helpful to set our new programme of law reform against the background of the work that we have undertaken during the *Sixth Programme*. This provides some context for the judgments we have made in selecting items for the *Seventh Programme* and also highlights the extent to which our workload can be determined by requests for advice which are unrelated to our programme work.

1.11 The following table summarises the projects that we have undertaken since the beginning of 2000. It includes both those carried out under the *Sixth Programme* itself and those that have been specifically referred to us by the Scottish Ministers or by a UK government department.<sup>4</sup>

| PROJECTS UNDER THE <i>SIXTH PROGRAMME</i> |  |
|---|--|
| <b>Irritancies</b>                        | Medium term project – report submitted May 2003 (Scot Law Com No 191)  |
| <b>Judicial factors</b>                   | Long term project – ongoing  |
| <b>Leasehold tenure</b>                   | Medium term project – ongoing  |
| <b>Land registration</b>                  | Medium term project – ongoing  |
| <b>Trusts</b>                             | Medium term project – ongoing  |
| <b>Completion of work on diligence</b>    | Short term project – report submitted April 2001 (Scot Law Com No 183) |

<sup>4</sup> Under section 3(1)(e) of the Law Commissions Act 1965.

## OTHER ADVISORY WORK ONGOING AT JANUARY 2000 OR STARTED SINCE THAT DATE

|   |  |
|---|--|
| Jurisdictions under the Agricultural Holdings (Scotland) Acts | Reference from Scottish Ministers – report submitted March 2000 (Scot Law Com No 178)  |
| Poiding and warrant sale                                      | Reference from Scottish Ministers – report submitted March 2000 (Scot Law Com No 177)  |
| Damages under the Human Rights Act 1998 *                     | Reference from the Lord Chancellor and Scottish Ministers – report submitted August 2000 (Scot Law Com No 180)                 |
| Third parties – rights against insurers *                     | Advice to the Department of Trade and Industry – report submitted June 2001 (Scot Law Com No 184)                              |
| Age of criminal responsibility                                | Reference from Scottish Ministers – report submitted November 2001 (Scot Law Com No 185)                                       |
| Title to sue for non-patrimonial loss                         | Reference from Scottish Ministers – report submitted August 2002 (Scot Law Com No 187)   |
| Law of the foreshore and seabed                               | Reference from Scottish Ministers – report submitted March 2003 (Scot Law Com No 190)  |
| Partnership *   | Reference from the Department of Trade and Industry – report submitted October 2003 (Scot Law Com No 192)                      |
| Insanity and diminished responsibility                        | Reference from Scottish Ministers – report submitted May 2004 (Scot Law Com No 195)  |
| Registration of rights in security by companies               | Reference from the Department of Trade and Industry – report submitted June 2004 (Scot Law Com No 197)                         |
| Damages for psychiatric injury                                | Reference from Scottish Ministers – report submitted July 2004 (Scot Law Com No 196)   |
| Unfair terms in contracts*                                    | Reference from Scottish Ministers and the Department of Trade and Industry – report completed and to be submitted January 2005 |
| <i>Sharp v Thomson</i>  | Reference from Scottish Ministers – ongoing  |
| Interest on debt and damages                                  | Reference from Scottish Ministers – ongoing  |
| Rape and other sexual offences                                | Reference from Scottish Ministers – ongoing  |
| Limitation in personal injury actions                         | Reference from Scottish Ministers – ongoing  |

\* Projects undertaken jointly with the Law Commission for England and Wales

## Advice to government departments and the Scottish Administration

1.12 The above table shows that, during the lifetime of the *Sixth Programme*, we have been engaged on a total of 16 projects originating in requests for advice made by the Scottish Ministers or the Department of Trade and Industry. Four of these projects were already underway at the start of the Programme and three more were known about and expected. A further nine were received during the Programme.

1.13 These references have generally been requests for advice on a relatively narrow legal issue (though not in the case of the reference on partnership which was a very substantial exercise). There has usually been a degree of urgency about the requests, requiring us to produce recommendations within a short timescale. Of necessity these requests have often taken priority over our larger scale programme work, with a consequential adverse effect on the progress of that work.

1.14 While we cannot forecast the number or complexity of the requests for advice that might come to us during this Programme, we need to keep some capacity in reserve for such references as may be made. As the Programme is submitted, we are engaged on the following references.

1.15 *Sharp v Thomson*. In September 2000 we were asked by Scottish Ministers to consider the implications of the House of Lords' decision in *Sharp v Thomson*<sup>5</sup> and to make recommendations as to possible reform. The issue concerned the protection afforded to purchasers buying land from insolvent sellers. In this case a floating charge crystallised after the debtor company had granted a disposition of a flat but before the disposition had been registered. Despite the absence of registration, the flat was held not to form part of the property and undertaking of the company and therefore was not attached by the floating charge.

1.16 We published a discussion paper in July 2001<sup>6</sup> in which we suggested that the approach adopted by the House of Lords should be abandoned and that special legislative protection for purchasers should be introduced. Our main proposal has, however, been largely superseded by the decision in *Burnett's Trustee v Grainger*<sup>7</sup> where the House of Lords declined to apply *Sharp v Thomson* to ordinary personal insolvency. It remains for us to consider the implications of this decision further in order to decide how best to draw this project to a conclusion. There may be scope for dealing with some of the remaining proposals in our project on land registration.

1.17 *Interest on debt and damages*. In November 2003 we received a reference from Scottish Ministers to examine the law relating to interest on claims for payment of money arising from contractual and other obligations, including claims within the jurisdiction of tribunals and courts or submitted for decision to arbitration, adjudication or some other form of dispute resolution, and to make recommendations as to possible reform. Our discussion paper on this topic will be published in January 2005.<sup>8</sup>

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<sup>5</sup> 1997 SC (HL) 66.

<sup>6</sup> Discussion Paper No 114.

<sup>7</sup> 2004 SC (HL) 19.

<sup>8</sup> Discussion Paper No 127.

1.18 *Rape and other sexual offences.* In June 2004 we were asked by Scottish Ministers to examine the law relating to rape and other sexual offences and to make recommendations for reform. The reference arose from concern over the current state of the law as indicated in recent court decisions. We aim to publish a discussion paper by the end of 2005.

1.19 *Limitation in personal injury actions.* We received a reference from Scottish Ministers in September 2004 asking us to examine the operation of sections 17(2)(b), 18(2)(b) and 19A of the Prescription and Limitation (Scotland) Act 1973 and to make any appropriate recommendations for possible reform of the law.

1.20 The first two of those provisions of the 1973 Act are concerned with the commencement date of the three year limitation period in cases in which the pursuer has been unaware of some factual element essential to his claim and are of particular application in claims arising out of an industrial or occupational disease where symptoms of the disease may not emerge until some considerable time after exposure to the harm ceased. Concerns have been expressed that the current provisions may be too restrictive. There are also questions relating to the exercise of the discretionary power under section 19A to override the limitation period. We aim to publish a discussion paper on this topic by the end of 2005.

1.21 *Assisting on implementation of reports.* In addition to undertaking specific projects referred to us, we intend to continue our present practice of supporting, on request, departmental officials who are responsible for implementing our reports. We regard this "after sales" service as an essential 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. During the *Sixth Programme* we have been closely involved in supporting Scottish Executive officials in implementation of recommendations contained in our Reports on *The Law of the Tenement*,<sup>9</sup> *Abolition of the Feudal System*<sup>10</sup> and *Real Burdens*.<sup>11</sup>

## Work of the Law Commission

1.22 It is important for us to take account of the work being carried out in England and Wales by the Law Commission. The Law Commission is currently working under its *Eighth Programme of Law Reform*<sup>12</sup> and is likely to be submitting its *Ninth Programme* for approval early next year. Its ongoing work on the law of trusts<sup>13</sup> is of particular interest to us.

1.23 We consider it important that we should respond to the Law Commission's work where it may have implications for the law of Scotland. Where a response is called for, the timing and content of the work involved is not wholly within our control.

1.24 In addition, where the Law Commission is proposing to embark on a new project, particularly in an area that for Scotland falls within reserved matters and is therefore outside the legislative competence of the Scottish Parliament,<sup>14</sup> we need to consider with our English

<sup>9</sup> Scot Law Com No 162, implemented by the Tenements (Scotland) Act 2004.

<sup>10</sup> Scot Law Com No 168, implemented by the Abolition of Feudal Tenure etc. (Scotland) Act 2000.

<sup>11</sup> Scot Law Com No 181, implemented by the Title Conditions (Scotland) Act 2003.

<sup>12</sup> Law Com No 274.

<sup>13</sup> Referred by the Lord Chancellor in January 2001; see *Eighth Programme of Law Reform* (Law Com No 274), pp 19 to 21.

<sup>14</sup> Scotland Act 1998, s 29(2)(b) and Sch 5.

colleagues whether it would be appropriate, or indeed necessary, for the two Commissions to undertake the work jointly. Such work as may emerge in this way is not included formally among the projects in this Programme.

1.25 Depending on the extent to which it may be necessary for us to become involved in any of the Law Commission's new projects under its *Ninth Programme*, this joint work may affect progress on other projects.

## Consolidation and statute law revision

1.26 In terms of section 3(1)(d)<sup>15</sup> of the Law Commissions Act 1965 we have a duty:-

"to prepare from time to time at the request of the [Scottish Ministers] comprehensive programmes of consolidation and statute law revision, and to undertake the preparation of draft Bills pursuant to any such programmes approved by the [Ministers]."

1.27 Consolidation gives statute law a more rational structure and makes it more accessible to those whom it affects. It is an essential element in the process of law reform.

1.28 Government departments and the Scottish Executive have an important role in consolidation, not only in providing policy advice on the legislation in question and on any minor technical amendments that might be made in the process of consolidation but also in providing the drafting resources necessary for preparation of the consolidation bill itself. As has been mentioned in recent Annual Reports,<sup>16</sup> we very much regret the fact that the Executive has not as yet been able to commit the resources necessary to support a programme of consolidation. While we continue to assist the Law Commission on consolidation of UK or GB legislation, we have undertaken only one Scottish consolidation exercise during the *Sixth Programme*, namely consolidation of the legislation relating to salmon and freshwater fisheries.<sup>17</sup>

1.29 In preparing this Programme, we have received some suggestions from consultees about subject areas that might be considered for consolidation, for example, education and agricultural holdings. Indeed there are a number of areas of the statute book that can be readily identified as in urgent need of this treatment.

1.30 For our part, as noted in the *Sixth Programme*, we see merit in consolidation of conveyancing legislation. This would be of benefit to the legal profession and indirectly to the public. It would follow naturally on the recent property law reforms enacted in the Abolition of Feudal Tenure etc. (Scotland) Act 2000, the Title Conditions (Scotland) Act 2003 and the Tenements (Scotland) Act 2004. Given our close involvement with these reforms, it may be that we would need less policy support for consolidation in this area than we would for consolidation in other areas.

<sup>15</sup> As read with section 6(2), amended by the Scotland Act 1998 (Consequential Modifications) (No 2) Order 1999 (SI 1999/1820), art 4 and Sch 2, para 36.

<sup>16</sup> See *Annual Report 2003* (Scot Law Com No 194), p 20; *Thirty-Seventh Annual Report 2002* (Scot Law Com No 189), para 4.2; *Thirty-Sixth Annual Report 2001* (Scot Law Com No 186) para 4.2; *Thirty-Fifth Annual Report 2000* (Scot Law Com No 182) para 4.3.

<sup>17</sup> Scot Law Com No 188, enacted in the Salmon and Freshwater Fisheries (Consolidation) (Scotland) Act 2003.

1.31 While we are unable to make progress on consolidation of any Scottish legislation at present, we remain committed to undertaking more work in this area whenever the necessary support can be made available to us.

1.32 Statute law revision is the process whereby obsolete legislation is removed from the statute book. The most recent Statute Law (Repeals) Bill was appended to the Seventeenth Report on Statute Law Revision published jointly with the Law Commission in 2003<sup>18</sup> and was enacted in 2004.

1.33 We continue to work with the Law Commission on repeal of UK and GB legislation relating to matters which are reserved under the Scotland Act 1998. At the same time we have been carrying out some work on preparing a first report to Scottish Ministers recommending the repeal of Scottish legislation on matters that are devolved to the Scottish Parliament. Other priorities tend to affect progress on statute law revision but we shall continue to work in this area as resources allow.

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<sup>18</sup> Law Com No 285/Scot Law Com No 193.

## Part 2 Seventh Programme of Law Reform

### Preliminary

2.1 In this Part we set out for approval by Scottish Ministers our *Seventh Programme of Law Reform* which will run until the end of 2009. It consolidates and supersedes all previous programmes. If at any stage during the life of the Programme we conclude that work must be undertaken which is outside its scope, we shall request either approval of a formal modification of the Programme or a reference in terms of section 3(1)(e) of the Law Commissions Act 1965.

2.2 The table below summarises the projects included in the Programme, giving an indication of the likely timescale for completion in terms of their classification as short, medium or long term projects. It comprises four projects carried forward from the *Sixth Programme* and four new projects.

| Item No | Project   | Classification      |
|---------|---|---------------------|
| 1       | Leasehold tenure – conversion of long leases            | Short term project  |
| 2       | Land registration                                       | Medium term project |
| 3       | Trusts  | Long term project   |
| 4       | Judicial factors  | Medium term project |
| 5       | Succession  | Medium term project |
| 6       | Assignment of, and security over, incorporeal moveables | Long term project   |
| 7       | Unincorporated associations                             | Medium term project |
| 8       | Provocation, self-defence, coercion and necessity       | Medium term project |

### Leasehold tenure – conversion of long leases

2.3 This was first identified as a long term project in our *Fifth Programme of Law Reform*.<sup>1</sup> In the *Sixth Programme*<sup>2</sup> we proposed to examine as a medium term project the question of the conversion of some categories of long lease to ownership. We considered that a review of this topic would complement our work on the abolition of the feudal system.

2.4 Long leasehold tenure has many of the characteristics of ownership. Leases for periods such as 999 years are in practice, if not in law, equivalent to perpetual feus. They were recognised as such by some landlords and many were granted because of restrictions on the power to feu. Ultra-long leasehold tenure can be regarded as a shadow feudal tenure. It suffers from many of the disadvantages of feudal tenure with its often complex hierarchical structure of leases and subleases and potential for abuse. There may also be problems in the very long term when such leases come to an end and the tenant loses the property without compensation, including compensation for improvements.

<sup>1</sup> Scot Law Com No 159, para 2.36.

<sup>2</sup> Scot Law Com No 176, para 2.12.



2.5 Our Discussion Paper on *Conversion of Long Leases* was published in April 2001.<sup>3</sup> In it we proposed that ultra-long leases for more than 175 years should be converted into ownership. The proposed scheme followed closely the scheme for conversion of feus introduced by the Abolition of Feudal Tenure etc. (Scotland) Act 2000. We also considered options for reform in relation to residential ground leases granted for 50 years or more which would be too short to qualify under the main scheme.

2.6 We completed work on the main part of our report in 2002 but because drafting resources were not then available we were unable to complete work on the draft Bill to accompany it. However, preparation of the draft Bill is now fairly advanced and we intend to complete our work on this topic as a short term project.

## Land registration

2.7 A review of the Land Registration (Scotland) Act 1979 was identified as a medium term project in our *Sixth Programme*.<sup>4</sup>

2.8 The 1979 Act introduced a new Land Register, to replace the Register of Sasines, and with it a new type of registration known as registration of title. The Land Register operates in a fundamentally different way from the Register of Sasines in that it is a register of interests in land, not of deeds. A right is created on being entered in the Register and all rights so entered are valid even if the initiating deed is not. In general, entries in the Register are guaranteed and the possibility of mistake is covered by an indemnity scheme.

2.9 Difficulties have arisen in practice with the 1979 Act which has been the subject of quite extensive litigation. These difficulties include: the relationship between registration and rectification; the grounds on which the Register may be rectified; the meaning of key terms used in the Act such as "inaccuracy", "proprietor in possession" and "carelessness"; the circumstances in which indemnity is payable and the amount due; and the scope of the rule that the Keeper of the Registers of Scotland must reimburse expenditure in claims made against him. An underlying problem with the Act is that, although it introduced radical changes, it lacks a proper conceptual framework. As a result it is difficult to deal with matters that are not expressly provided for in the legislation.

2.10 The legal issues involved in this exercise have proved extremely complex. We issued a first Discussion Paper on *Land Registration: Void and Voidable Titles*<sup>5</sup> in February 2004. It explores the theoretical basis of registration of title from the point of view of both policy and technique. It considers the fundamentals of the system and lays down the foundations for consideration of the more detailed issues, to be dealt with in a second discussion paper.

2.11 Preparation of the second discussion paper is well advanced and is due for publication in 2005. The review will be completed under the Programme as a medium term project.

<sup>3</sup> Discussion Paper No 112.

<sup>4</sup> Scot Law Com No 176, paras 2.13 to 2.17.

<sup>5</sup> Discussion Paper No 125.

## Trusts

2.12 Trusts was first identified as a long term project in our *Fifth Programme of Law Reform*<sup>6</sup> and was carried forward to our *Sixth Programme*<sup>7</sup> as a medium term project examining aspects of the law governing express trusts.

2.13 We have already undertaken a substantial amount of work on this topic. Early on in our review, we decided to split the project into two phases, the first phase dealing broadly with the powers and duties of trustees and the second phase dealing with trusts themselves. In the first phase discussion papers have been published on *Breach of Trust*,<sup>8</sup> *Apportionment of Trust Receipts and Outgoings*<sup>9</sup> and *Trustees and Trust Administration*.<sup>10</sup> These papers examine issues such as: trustees' liability for *ultra vires* acts, breaches of fiduciary duty or failure to meet the required standard of care when administering the trust; the extent to which a trust deed can protect trustees from such liabilities (immunity and exemption clauses); the ways in which trustees can make binding decisions; the extent to which trustees can delegate their functions by appointing agents and nominees; the appointment and removal of trustees; and the allocation of jurisdiction in trust proceedings between the sheriff court and the Court of Session.

2.14 Before embarking on the second phase we intend to consult on the question of whether trusts should have legal personality. The consultation response to this paper will have a significant impact on the policy direction taken in the rest of the project.

2.15 In the second phase of the review we intend to examine issues concerning the constitution and variation of trusts, re-organisation of non-charitable public trusts, restraints on accumulation of income, long-term private trusts and enforcement of beneficiaries' rights.

2.16 In carrying forward this work we are mindful of the changes proposed in the current Charities and Trustee Investment (Scotland) Bill<sup>11</sup> in relation to the regulation and reorganisation of charities. We also keep in close touch with the work being undertaken by the Law Commission on aspects of English trust law.<sup>12</sup>

2.17 This project is more substantial than was first envisaged. We have therefore categorised it as a long term project likely to continue beyond the end of 2009 although we intend to report on some aspects of our work before that date.

## Judicial factors

2.18 In both our *Fifth* and *Sixth Programmes of Law Reform*<sup>13</sup> we identified as a long term project the review and modernisation of the legislation relating to judicial factors.

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<sup>6</sup> Scot Law Com No 159, paras 2.43 to 2.45.

<sup>7</sup> Scot Law Com No 176, paras 2.25 to 2.34.

<sup>8</sup> Discussion Paper No 123.

<sup>9</sup> Discussion Paper No 124.

<sup>10</sup> Discussion Paper No 126.

<sup>11</sup> Introduced to the Scottish Parliament on 15 November 2004.

<sup>12</sup> See Law Commission *Annual Report 2003/04* (Law Com No 288) paras 7.16 to 7.26.

<sup>13</sup> *Fifth Programme*, paras 2.30 and 2.31; *Sixth Programme*, paras 2.9 and 2.10.

2.19 We remain of the view that a radical overhaul of this area of the law is necessary. A judicial factor is an officer appointed by the court to collect, hold and administer property in accordance with the law applicable to his office. However, since the Judicial Factors Acts of the late 19th century there has been no primary legislation pertaining specifically to judicial factory. The passage of time has shown that the role and purpose of this office is neither clearly defined nor well understood. It is also apparent from our preliminary discussions with the Accountant of Court and practitioners experienced in this field that the existing legislation is considerably out of step with current practice and that judicial factory is regarded as a cumbersome procedure involving expense which is disproportionate to benefit. Our aim will be to examine the existing law with a view to clarifying and simplifying it.

2.20 Other priorities permitting, we aim to undertake the review as a medium term project to be completed before the end of 2009.

## Succession

2.21 We propose to carry out, as a medium term project, a review of the law of succession. Both the Law Society of Scotland and Law School representatives suggested this topic in our first round of consultation about the *Seventh Programme*. This suggestion received broad support in the subsequent round – from individual solicitors and academics, as well as from the Sheriffs' Association and the Institute of Chartered Accountants of Scotland. In addition, we have received some representations recently from members of the public criticising the present law in relation to children's entitlement to a share in their parent's estate and in relation to inheritance rights for a surviving (non-married) partner.

2.22 We last examined this area some fifteen years ago. At that time we undertook a comprehensive review of the law, considering the major policy issues surrounding intestate succession and the protection of the deceased's spouse and children from disinheritance. We also looked at some of the more technical difficulties with the present law which had given rise to complaint. The resulting Report on *Succession*,<sup>14</sup> published in 1990, has not been implemented. Yet the defects that we previously identified still exist. In our view, the law no longer reflects current social attitudes nor does it cater adequately for the range of family relationships that are common today.

2.23 As regards defects in the current law, the surviving spouse comes too low in the order of succession to the free estate on intestacy. In even modest estates, a spouse may have to share a substantial proportion of the estate with the deceased's parents, siblings or even cousins. There was overwhelming agreement in the consultation<sup>15</sup> leading to our 1990 Report that where the deceased died intestate leaving a spouse but no children the spouse should inherit the entire estate.

2.24 In addition, the rules on intestate succession are too complex. The rules distinguish two types of assets and debts (heritable and moveable) and five separate rights:<sup>16</sup> housing prior right; contents prior right; cash sum prior right; legal rights (a fixed share of the net moveable estate);

<sup>14</sup> Scot Law Com No 124.

<sup>15</sup> See Consultative Memorandum No 69 (1986) and Scot Law Com No 124, para 2.3.

<sup>16</sup> See Succession (Scotland) Act 1964, ss 2, 8, 9 and 10(2).

and the right to the free estate. The surviving spouse's entitlement depends crucially on the type of assets in the estate. It is hard to justify one spouse getting all of a £200,000 estate while another gets very little of an estate of the same value, simply because of the particular type of assets comprised in the estate.

2.25 The division of an estate where the deceased is survived by both spouse and issue is equally variable. Both are entitled to a fixed share of the deceased's net moveable estate (one third if there are both surviving spouse and issue, one half if there is only surviving spouse or issue). This is the case even in the face of conflicting testamentary provision by the deceased. These automatic rights of succession may be discharged by the potential recipient during the deceased's life or may be renounced after his death. The testator may, however, largely defeat these rights by ensuring that all or the most significant assets in his estate consist of heritable property.

2.26 Consultation leading to our earlier Report on *Succession* showed widespread dissatisfaction with the present scheme for protecting spouse and issue against disinheritance but opinion was divided on how to replace it. We eventually recommended retention of fixed shares, but out of the whole estate, for spouses and also, but with much hesitation, for issue too. This recommendation proved to be controversial and we intend to reconsider it.

2.27 In addition, a variety of social changes in the 40 years since the Succession (Scotland) Act 1964 was enacted point to the need for a further review of succession law now. Many more people are living together as unmarried cohabiting couples (either in same-sex or opposite-sex relationships).<sup>17</sup> People are living much longer with the result that many children are middle-aged or older when their parents die.<sup>18</sup> Wealth is more widely distributed, particularly through ownership of heritable property.<sup>19</sup> And more marriages end in divorce, with step-families becoming more common.<sup>20</sup>

<sup>17</sup> Among UK women under 50, the proportion cohabiting at some time in their lives has increased from 9% to 29% between 1976 and 1998: Scottish Executive, *Research Findings No 43/2004*, p 2. In the UK only 2% of those born before 1930 cohabited before marriage compared with almost 50% of those born since 1960: [www.brookes.ac.uk/schools/social/population-and-household-change/1\\_scott.html](http://www.brookes.ac.uk/schools/social/population-and-household-change/1_scott.html). Between 1991 and 2001 the proportion of cohabiting couple families in Scotland rose from 4% of total households to 7%: *Research Findings No 43/2004*, Table 1. 2% of cohabiting couples in Scotland in 2001 were of the same sex. This was the first time the Census recorded them as a separate category: *Research Findings No 43/2004*, p 1.

<sup>18</sup> Life expectancy has increased from 64.4 years for males and from 68.7 years for females born around 1951 to 73.5 years and 78.8 years respectively for those born around 2002: *Scotland's Population 2003: The Registrar General's Annual Review of Demographic Trends*, p 20. The average age of mothers at their children's birth has increased from 27.4 years in 1964 to 29.3 years in 2003: *ibid*, p 16.

<sup>19</sup> In 1964 28,472 estates were granted confirmation, with an average value of £4,688 or £56,258 when adjusted for inflation to 2002. The corresponding figures for 2002 were 22,820 estates with an average value of £136,494: *Civil Judicial Statistics 1965 and 2002*, Commissary Business tables, pp 31 and 19 respectively. Nearly two-thirds of homes in Scotland are now owner-occupied, compared with a figure of just over 30% in 1970: *Scottish Household Survey 2003*, ch 4 and <http://thescotsmen.scotsmen.com/index.cfm?id=819752002>.

<sup>20</sup> In 1965 there were 2,510 divorces in Scotland. The figures for 1985 and 2003 are 13,373 and 10,593 respectively: *Civil Judicial Statistics 1964 and 1985* and *Scotland's Population 2003*, p 29. The number of marriages has decreased from over 40,000 in the 1960s to 30,757 in 2003: *Scotland's Population 2003*, p 26. In 2001 and 2002 29% of marriages were between parties resident outside Scotland: *Research Findings No 43/2004*, p 2. One in four marriages is now between individuals one or both of whom were married previously: *ibid*. Around one in eight children now experience life in a step-family: Scottish Executive's *Report for Scotland's Children* (2000).

2.28 Recent and proposed legislation gives further impetus for a re-examination of the law of succession. The Civil Partnership Act 2004 gives same-sex couples the opportunity to register their relationship and thereby obtain rights and obligations broadly equivalent to those of married couples. A surviving civil partner will therefore have rights on intestacy and legal rights to a proportion of the net moveable estate equivalent to those of a spouse.<sup>21</sup> The Scottish Executive's proposed Family Law Bill may include provision allowing a surviving cohabitant to apply for a discretionary share out of the deceased partner's estate on intestacy.<sup>22</sup> However, this may not deal with the issue of protecting cohabitants from disinheritance where their deceased partner's will fails to provide adequately for them. The introduction of rights of succession for cohabitants necessitates a re-examination of the current rights of succession for spouses and civil partners in order to resolve competing claims where the deceased is survived by both a spouse (or civil partner) and a cohabitant.

2.29 In light of all these factors, there are a number of issues that will be particularly relevant for us to examine:

- Who should be entitled to share in the deceased's intestate estate?
- Should the distinction between heritable and moveable estate in relation to intestate succession be abolished?
- Should the surviving spouse (or civil partner) and children continue to be protected from disinheritance and, if so, what form should this protection take? In particular, should adult children have any legal right of succession in an estate left to others?
- Should cohabitants be protected from disinheritance? If so, how?

2.30 We do not propose to re-examine the more technical aspects of the law dealt with in our earlier Report. These concerned, for example, validation and rectification of wills, the effect of divorce and nullity of marriage, the presumption of survivorship, and disqualification of the unlawful killer. These are all unrelated to the major issues to be considered now in relation to intestacy and protection from disinheritance. The recommendations that we made about them in our 1990 Report will be unaffected by the recommendations emerging from this review.

## Assignment of, and security over, incorporeal moveables

2.31 We propose to review the law on assignment of, and security over, incorporeal moveables. We see this as a substantial long term project. Work is unlikely to start on it until after we have completed our review of land registration.

2.32 This item was originally suggested by the Law Society of Scotland and a few other consultees in the context of our recent review of registration of securities granted by companies.<sup>23</sup> Inclusion of this item was supported also by a number of other legal bodies in our consultation about preparation of the Programme.

<sup>21</sup> s 131 and Sch 28, Part 1.

<sup>22</sup> Scottish Executive's Consultation Paper *Family Matters – Improving Family Law in Scotland* (2004), section 4.

<sup>23</sup> See Discussion Paper No 121 and Scot Law Com No 197.

2.33 In modern times, both in a personal and especially in a commercial context, incorporeal moveables have become an increasingly important source of wealth. In type they are extremely diverse. Some may be extremely valuable, including company shares, insurance policies and intellectual property such as trade marks and patents. Of particular significance in the commercial field are receivables (book debts), that is to say, money owed but unpaid. For a trading business, receivables often constitute a substantial asset and hence an important potential source of security for credit.

2.34 The law in Scotland has not developed to match the growing importance of incorporeals. Except in relation to floating charges, the rules on the creation of securities over incorporeals have been largely unchanged since the Institutional writers. These rules largely pre-date the industrial revolution and are cumbersome and unsuited to modern commerce. No security right can be created in the strict sense of the term. Instead a person or business, wishing to borrow money on the credit of incorporeal moveables, must make an outright transfer of the property so that the bank or other creditor becomes the owner (subject to an obligation to re-convey when the debt is paid). This transfer is effected by a legal deed known as an assignation followed by formal intimation of the transfer to the person who owes the obligation that is being transferred.

2.35 The requirement of formal intimation in particular can be troublesome, especially in a commercial context. A business that wishes to assign book debts owed by 1000 customers must send a copy of the assignation to each; and as new debts become due, so new copies must be sent out. In practice the requirement of intimation may make assignation unattractive.

2.36 While a partial solution exists for companies (and limited liability partnerships) in their ability to grant security in the form of a floating charge over assets of any kind, including incorporeal moveables,<sup>24</sup> an unincorporated business – typically a small business – or a sole trader is left without an effective method of borrowing money against book debts and other incorporeals.

2.37 From the lender's standpoint the value of the floating charge has been adversely affected by the Enterprise Act 2002. Under the Act<sup>25</sup> it is usually no longer possible for the creditor under a floating charge to appoint a receiver for the purposes of enforcement. Furthermore, certain funds ring-fenced for ordinary creditors are not to be available to satisfy floating charges.<sup>26</sup> In English law it is possible, subject to certain conditions, to create a fixed charge over book debts and other incorporeals without assignation and lenders have regularly sought to take such fixed, non-possessory security which will have priority over preferential debts. If a system of 'notice-filing' is introduced for companies in England and Wales, as is likely to be proposed,<sup>27</sup> the security interest taken by the creditor will usually be a fixed security and the expectation is that the floating charge will fall out of use.

2.38 It is widely thought that the difficulty in creating an effective fixed security over receivables in Scotland places Scottish businesses at a competitive disadvantage which is not

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<sup>24</sup> Companies Act 1985, s 462 and Limited Liability Partnerships Regulations 2001(SI 2001/1090).

<sup>25</sup> s 250.

<sup>26</sup> s 252.

<sup>27</sup> Law Commission Consultation Papers Nos 164 and 176.



fully offset by the existence of the floating charge. For non-corporate borrowers, the difficulties associated with assignation cannot be even partially overcome by the floating charge.

2.39 While some consideration was given to securities over incorporeals in a government consultation paper issued in 1994,<sup>28</sup> a more extended examination of the law is, in our view, now required. A necessary part of this review is to examine the law of “ordinary” assignation, that is, assignation as outright transfer, not in security.

## Unincorporated associations

2.40 We propose to carry out as a medium term project a review of the law relating to unincorporated associations. This topic was suggested to us by the WS Society in our preliminary consultation about the possible content of the *Seventh Programme*. The suggestion received considerable support in the subsequent round of consultation, notably from the Sheriffs’ Association, the Law Society of Scotland, the Charity Law Research Unit at the University of Dundee, the Institute of Chartered Accountants in Scotland and the Scottish Episcopal Church.

2.41 Unincorporated associations cover a wide range of organisations from local sports clubs and residents’ associations to larger scale voluntary bodies with affiliated groups across the country. The central legal characteristic of an unincorporated association is that it does not have an identity separate from its members. Its legal identity is simply the aggregate of its members from time to time. This lack of a separate legal existence causes a number of practical difficulties in the operation of the association, particularly in relation to entering into contracts, holding property and dealing with claims by or against the association and its members. For instance, members cannot sue the association or the membership collectively if they are injured. A pursuer must identify an individual or individuals within the association who owed a duty of care to him and who breached that duty.<sup>29</sup> This may be difficult to do where management responsibility is ill-defined or diffuse.

2.42 A third party, on the other hand, can sue members of an association collectively in some circumstances.<sup>30</sup> Liability of the members may be personal and unlimited.<sup>31</sup> Although members have a right of relief against the association’s assets, they may be personally liable if there is a shortfall. Arguably this unfairly exposes to substantial claims members who do not have any part in management.

2.43 While one possible solution to these and other practical difficulties faced by an unincorporated association is to incorporate as a company limited by guarantee, this involves fairly onerous compliance requirements and the management committee also becomes burdened with the duties of directors. This may not be a feasible solution for modest organisations.

<sup>28</sup> Department of Trade and Industry, Consultation Paper *Security over Moveable Property in Scotland*.

<sup>29</sup> *Harrison v West of Scotland Kart Club* 2001 SC 367 and [www.scotcourts.gov.uk/opinions/A300\\_01.html](http://www.scotcourts.gov.uk/opinions/A300_01.html).

<sup>30</sup> eg in the case of vicarious liability for a delict committed by an employee or liability under the Occupiers’ Liability (Scotland) Act 1960. In relation to claims under the 1960 Act, see *McQueen v Ballater Golf Club* 1975 SLT 160.

<sup>31</sup> *Harrison v West of Scotland Kart Club* 2001 SC 367 and [www.scotcourts.gov.uk/opinions/A300\\_01.html](http://www.scotcourts.gov.uk/opinions/A300_01.html).

2.44 We therefore intend to explore the possibility of giving a new legal status to unincorporated associations. This would clarify the legal implications of membership, make internal management of the organisations easier and facilitate their dealings with third parties. One solution that we are likely to consider is that adopted in New Zealand<sup>32</sup> (and also in Australia and some American states<sup>33</sup>), creating a separate, fairly straightforward system of incorporation for non-profit making associations.

2.45 This topic is a reserved matter under Section C1 of Schedule 5 to the Scotland Act 1998 insofar as it concerns the creation, operation, regulation and dissolution of types of business association,<sup>34</sup> other than charities. To that extent therefore implementation of any recommendations for reform would fall to the UK Parliament. Before embarking on this project, we intend to discuss the implications of this with the Department of Trade and Industry and also discuss with the Law Commission whether there is a need for a joint project. We will also bear in mind any implications for the project arising out of the current Charities and Trustee Investment (Scotland) Bill which provides for reorganisation of certain types of charitable bodies into Scottish charitable incorporated organisations.

## Provocation, self-defence, coercion and necessity

2.46 Having recently completed a review of the criminal law defences of insanity and diminished responsibility,<sup>35</sup> we now propose to examine the defences of provocation, self-defence, coercion and necessity. Our original proposal, which was limited to the first three of these defences, received broad support from consultees in the legal and criminal justice fields. Indeed some consultees encouraged us to consider a much wider review of criminal defences generally. We concluded, particularly in light of our current work on rape and other sexual offences, that this would be too large a project to accommodate within our available resources. We have, however, acted on one suggestion made to us which extended the scope of the proposed exercise to cover the defence of necessity.

2.47 These defences all share the core characteristic of being 'reactive' in nature. In other words, each concerns the situation where at the time of the crime the accused acts in response to some external factor such as the actions of another person and the law allows the accused's reaction to remove or mitigate his criminal liability for his own act. A major issue in respect of each defence is how the law should assess the accused's reactive conduct: whether on a purely objective criterion (a reasonable or ordinary person standard); or on the subjective basis of how the particular accused in fact responded to the other party's act (or other external factor); or on a combination of both.

2.48 A further general characteristic of these defences is the relatively undeveloped and uncertain state of the law. Many of the key issues have not been considered by the courts and some cases in which consideration took place are the subject of criticism. In relation to

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<sup>32</sup> Under the Incorporated Societies Act 1908.

<sup>33</sup> An outline of the legislative provisions in these jurisdictions is contained in the Law Reform Advisory Committee for Northern Ireland's Report on *Unincorporated Associations* (Report No 14, 2004), ch 4.

<sup>34</sup> "Business association" is defined there to mean "any person (other than an individual) established for the purpose of carrying on any kind of business, whether or not for profit; and "business" includes the provision of benefits to the members of an association".

<sup>35</sup> Report on *Insanity and Diminished Responsibility* (Scot Law Com No 195) published in July 2004.



provocation, for example, the rationale adopted by the court in *Drury v HM Advocate*,<sup>36</sup> that an accused who kills under provocation lacks (or is deemed to lack) the *mens rea* for murder and is to be convicted of culpable homicide, is controversial.<sup>37</sup> This decision leaves the law unclear regarding the effect of a successful plea of provocation in assault cases – acquittal or mitigation of sentence – and regarding its application in cases of attempted murder. There is also the separate issue, not yet explored by the courts, whether the defence is available where the accused has been subject to a long course of provocative conduct, such as by way of domestic violence.

2.49 While the law on the defences of self-defence, coercion and necessity is on the whole more settled, there remain areas where it is also open to criticism or is unclear. For instance, it is not clear what interests may be protected by self-defence, other than the accused's own life; and there has been some criticism of the decision in *Cochrane v HM Advocate*<sup>38</sup> where the court emphasised in relation to coercion that the test for assessing the threat to the accused was an objective one, based on an ordinary sober person of reasonable firmness of the same age and sex as the accused.<sup>39</sup>

2.50 The main impetus for our review comes from the state of the current law on provocation. In *Drury v HM Advocate*<sup>40</sup> the court accepted not only that the law required reform and clarification but also that legislation was the best mechanism for changing the law. Given that the law on self-defence, coercion and necessity is also unclear to an extent and involves broadly similar issues to those in the law of provocation, we believe it is sensible to examine these defences together. We hope to carry out this review as a medium term project. However, as we are unlikely to begin work until our current review of rape and other sexual offences has been completed, it may be that the project will extend beyond the end of 2009.

<sup>36</sup> 2001 SCCR 583.

<sup>37</sup> See, for example, Sir Gerald Gordon 2001 SCCR 618-620; James Chalmers, "Collapsing the Structure of Criminal Law" 2001 SLT (News) 241; Michael Christie, "The Coherence of Scots Criminal Law: Some aspects of *Drury v HM Advocate*", 2002 JR 273; and Fiona Leverick, "Mistake in Self-Defence after *Drury*", 2002 JR 35.

<sup>38</sup> 2001 SCCR 655.

<sup>39</sup> Sir Gerald Gordon 2001 SCCR 672-673.

<sup>40</sup> 2001 SCCR 583 at 613 and 614.

# Appendix

## List of those consulted on preparation of Seventh Programme

|  |   |
|--|---|
| Accountant in Bankruptcy's Office                | Royal Institution of Chartered Surveyors in Scotland              |
| The Accountant of Court                          | SACRO   |
| Association of British Insurers                  | Scottish Conservative Party                                       |
| Association of Chief Police Officers in Scotland | Scottish Consumer Council   |
| Association of Scottish Police Superintendents   | Scottish Green Party  |
| Association of Sheriffs Principal                | Scottish Law Agents Society                                       |
| The Centre for Law Reform                        | Scottish Labour Party   |
| Chartered Institute of Arbitrators               | Scottish Liberal Democrats  |
| Chartered Institute of Bankers in Scotland       | Scottish National Party   |
| Commission for Racial Equality                   | Scottish Police Federation  |
| Convention of Scottish Local Authorities         | Scottish Socialist Party  |
| Crown Office                                     | Sheriffs' Association   |
| Department of Trade and Industry                 | Scottish Trades Union Congress                                    |
| Disability Rights Commission                     | Society of Advocates in Aberdeen                                  |
| Equal Opportunities Commission                   | Society of Local Authority Lawyers and Administrators in Scotland |
| Faculty of Advocates                             | Society of Legal Scholars   |
| Glasgow Bar Association                          | Society of Solicitor Advocates                                    |
| Glasgow Caledonian University                    | Society of Solicitors in the Supreme Courts of Scotland           |
| Heriot-Watt University                           | Society of Writers to HM Signet                                   |
| Institute of Chartered Accountants of Scotland   | University of Aberdeen  |
| Keeper of the Registers of Scotland              | University of Abertay Dundee                                      |
| Law Commission for England and Wales             | University of Dundee  |
| Law Society of Scotland                          | University of Edinburgh   |
| Lord President of the Court of Session           | University of Glasgow   |
| Napier University                                | University of Paisley   |
| Procurators Fiscal Society                       | University of Stirling  |
| Robert Gordon University                         | University of Strathclyde   |
| Royal Faculty of Procurators in Glasgow          |   |
| Royal Incorporation of Architects in Scotland    |   |



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