



Scottish Law Commission
promoting law reform

(SCOT LAW COM No 241)

annual report | 2014





Scottish Law Commission

promoting law reform

The Commission was established under the Law Commissions Act 1965

Our function

To recommend reforms to improve, simplify and update the law of Scotland

Our role

To play a leading role in developing the law for the people of Scotland so that it is just, principled, responsive and easy to understand

annual report | 2014



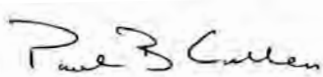
Commissioners and Chief Executive

Patrick Layden QC TD, (back row), Professor Hector L MacQueen, The Hon Lord Pentland, (Chairman) (middle row, left to right), Ms Laura J Dunlop QC, Malcolm McMillan (Chief Executive), Dr Andrew J M Steven (front row, left to right)

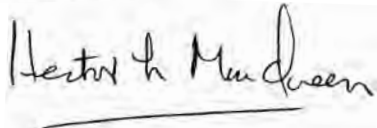
Annual Report 2014

To: Michael Matheson MSP, Cabinet Secretary for Justice

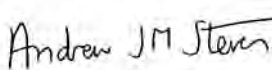
We are pleased to submit to the Scottish Ministers our Annual Report for the year to 31 December 2014.



PAUL B CULLEN, Chairman



HECTOR L MACQUEEN



ANDREW J M STEVEN



Malcolm McMillan, Chief Executive
21 January 2015

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

February 2015

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ISBN: 9780108561177

Printed in the UK for The Stationery Office Limited on behalf of the Queen's Printer for Scotland

02/15

Printed on paper containing 75% recycled fibre content minimum.

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Chairman's foreword



Throughout 2014 all of us at the Scottish Law Commission have been focused on our core task of improving, simplifying and modernising the law of Scotland. That is our role as an independent law reform agency. We examine the law and recommend changes to it from a neutral standpoint – independently of the Government, the Scottish Parliament and any other public authority, organisation or individual.

The increasing complexity and diversity of life in Scotland means that it is more important than ever to ensure that the law is kept up to date. At the heart of our work is a commitment to openness and engagement with Scottish civil society. In developing proposals for law reform, we take account of the views of all relevant stakeholders – members of the public, the business community, public authorities and the professions. Understanding what happens at the sharp end of legal issues helps to give us a solid foundation for the changes we recommend should be made to the law.

2014 was a productive year for us. Some highlights were:

- The Legal Writings (Counterparts and Delivery) (Scotland) Bill became the first law reform measure to be dealt with by the new Delegated Powers and Law Reform Committee of the Scottish Parliament – the Committee approved the principles of the Bill in November. The new Parliamentary procedure is a great step forward. It aims to improve the way the Parliament considers and implements our work;
- We published Reports recommending reform of Trust Law and on Adults with Incapacity;
- We published joint Reports with the Law Commission for England and Wales and the Northern Ireland Law Commission on Regulation of Healthcare Professionals and with the Law Commission for England and Wales on Insurance Law;
- We published Discussion Papers on Third Party Rights in Contract and on Compulsory Purchase;
- With the Law Commission for England and Wales and the Northern Ireland Law Commission we published a joint Consultation Paper on Electoral Law;
- We carried out an extensive consultation exercise on our next programme of law reform;
- We recruited two new Law Commissioners.

Further details can be found in the body of this Report.

Looking ahead, 2015 marks the 50th anniversary of the enactment of the Law Commissions Act in 1965; this established independent law reform agencies for Scotland and for England and Wales. As part of the celebrations the Scottish Law Commission will be playing host to an international conference on law reform to be held

by the Commonwealth Association of Law Reform Agencies in Edinburgh in April.

It is fitting that I should express my gratitude to my predecessor as Chairman, Lady Clark of Calton, for her distinguished leadership of the Commission before my appointment in January 2014. I also wish to thank two of our Commissioners who demitted office at the end of year: Patrick Layden QC TD and Laura Dunlop QC. Both of them made important and innovative contributions to our work. I welcome their successors as Law Commissioners, David Johnston QC and Caroline Drummond, Solicitor.

Finally, I thank all my colleagues in Causewayside for their dedication and commitment to the work of law reform.

A handwritten signature in black ink, reading "Paul B. Cullen". The signature is written in a cursive style with a large initial 'P' and 'C'.

THE HON LORD PENTLAND
Chairman

Publications 2014

| PUBLICATION | DATE OF PUBLICATION |
|--|---------------------|
| Annual Report 2013 (Scot Law Com No 236) | 20 March 2014 |
| Discussion Paper on Third Party Rights in Contract (DP No 157) | 28 March 2014 |
| Report on Regulation of Healthcare Professionals (Scot Law Com No 237) | 2 April 2014 |
| Report on Insurance Contract Law: Business Disclosure; Warranties; Insurers' Remedies for Fraudulent Claims; and Late Payment (Scot Law Com No 238) | 17 July 2014 |
| Report on Trust Law (Scot Law Com No 239) | 26 August 2014 |
| Report on Adults with Incapacity (Scot Law Com No 240) | 1 October 2014 |
| Electoral Law: A Joint Consultation Paper (DP No 158) | 9 December 2014 |
| Discussion Paper on Compulsory Purchase (DP No 159) | 17 December 2014 |

Implementation of our reports 2014

The Scottish Law Commission was established in 1965 in terms of the Law Commissions Act 1965. Our statutory function is to provide independent advice to Government on the reform of Scots law.

Our recommendations for reform are contained in reports, which usually include a draft Bill which would give effect to our recommendations. Most of our reports are submitted to the Scottish Ministers but some are submitted to UK Ministers where the subject matter involves areas of law reserved to the UK Parliament.

Implementation of the draft Bills annexed to our reports is a matter for the Scottish Government and Scottish Parliament or, where appropriate, the UK Government and UK Parliament. In both cases the Commission usually provides assistance to Government officials during the Parliamentary stages of the Bill.

New law reform procedure in the Scottish Parliament

The Commission welcomes a significant development in the Scottish Parliament with regard to the implementation of Commission recommendations. The Scottish Parliament decided in 2013 to make changes to its Standing Orders to provide for a committee of the Parliament with a specific remit on law reform – the Delegated Powers and Law Reform Committee. The Committee can take the lead in scrutinising such Bills.

The Presiding Officer made a determination in 2014 setting out the criteria for Commission Bills for this process:

As well as implementing all or part of a report of the Scottish Law Commission, the Presiding Officer has determined that a Scottish Law Commission Bill is a Bill within the legislative competence of the Scottish Parliament—

- where there is a wide degree of consensus amongst key stakeholders about the need for reform and the approach recommended;
- which does not relate directly to criminal law reform;
- which does not have significant financial implications;
- which does not have significant European Convention on Human Rights implications; and
- where the Scottish Government is not planning wider work in that particular subject area.

This development reflects the Parliament's wish to find a way forward for implementing more Commission Bills that update the law to keep in step with changes in society, or to develop the common law. Many Commission Bills, emanating from useful law reform projects designed to address the practical difficulties in the law, are likely to qualify for the process.

The establishment of this new process is a significant achievement, heralding a new era in the Scottish Parliament for law reform. The first Government Bill taking forward Commission recommendations by way of the new procedure was introduced in 2014 and a second Bill was also identified as a potential candidate.

Acts passed by the Scottish Parliament in 2014

No Acts implementing Commission Bills were passed by the Scottish Parliament in 2014.

Bill introduced in the Scottish Parliament in 2014

We were pleased that the Legal Writings (Counterparts and Delivery) (Scotland) Bill was introduced in the Scottish Parliament on 14 May 2014. The Bill implements the legislative recommendations in the Commission's Report on

Formation of Contract: Execution in Counterpart, published in April 2013. The Bill is the first to follow the new procedure in the Scottish Parliament for implementation of Scottish Law Commission reports. The Bill completed Stage 1 in November.

Act passed by the United Kingdom Parliament in 2014

Co-operative and Community Benefit Societies Act

The Co-operative and Community Benefit Societies Act 2014 received Royal Assent on 14 May 2014. The Act consolidates the legislation relating to co-operative and community benefit societies and in particular the Industrial and Provident Societies Act 1965. The Act gives effect to some changes to the law recommended in our joint Report with the Law Commission on the consolidation, published in December 2013.

Bills introduced in the UK Parliament in 2014

Consumer Rights Bill

The Consumer Rights Bill was introduced in the UK Parliament in January 2014. Part 1, Chapter 2 of the Bill includes provisions which will implement some of the key recommendations in the joint Report with the Law Commission on Consumer Remedies for Faulty Goods, published in November 2009.

Part 2 of the Bill consolidates the legislation governing unfair contract terms in relation to consumer contracts, as recommended in our 2005 joint Report with the Law Commission on Unfair Terms in Contracts, as updated in our joint Advice to the Department of Business, Innovation and Skills on Unfair Terms in Consumer Contracts, published in March 2013.

We gave written and oral evidence to the Parliamentary Committee in February. We also assisted the Bill team by suggesting an alternative form of words governing, in relation to Scotland, contracts to which Part 1, Chapters 2 (goods) and 4 (services) of the Bill do not apply.

Insurance Bill

The Insurance Bill was introduced in the UK Parliament in July 2014. With some modifications it will implement the recommendations in the joint Report with the Law Commission for England and Wales on Insurance Contract Law: Business Disclosure; Warranties; Insurers' Remedies for Fraudulent Claims; and Late Payment, published in July 2014.

Regulations made by UK Ministers in 2014

Consumer Protection (Amendment) Regulations 2014

The Consumer Protection (Amendment) Regulations 2014 are part of a package of measures which seeks to clarify consumer law. They give effect to recommendations in our joint Report with the Law Commission on Consumer Redress for Misleading and Aggressive Practices, published in March 2012.

The Regulations amend the Consumer Protection from Unfair Trading Regulations 2008. The new rights came into force on 1 October 2014 and give consumers the right to unwind a contract and receive a refund or, in certain circumstances, receive a discount on the price paid, if they were subjected to misleading or aggressive practices.

Government response to our recommendations

Prescription and Title to Moveable Property

Our Report on Prescription and Title to Moveable Property was submitted to the Scottish Ministers in May 2012. The Scottish Government intends to issue a consultation paper seeking views on taking forward the proposed Bill.

Scottish Government's Programme for Scotland 2014-2015

Succession law

On 26 November 2014, the Scottish Government published its Programme for Scotland 2014-2015, setting out the legislation it intends to bring forward in the coming year.

The Commission welcomes the announcement by the First Minister that the Scottish Government intends to introduce a Bill on aspects of succession law and to consult during 2015 on further legislation to overhaul the law of succession in Scotland. In recognition of its technical nature, it is intended, subject to it meeting the necessary criteria, that the Bill will be progressed under the Scottish Parliament's new procedure for implementing Commission reports. If it meets the criteria, the Bill will be the second Commission Bill to follow the new procedure.

References to the Commission's work

There are further indications of the impact and value of the Commission's work, aside from implementation of our recommendations. The Commission's work is widely quoted in court judgments, in academic journals and in the media.

While any views expressed may or may not support the Commission and our recommendations, this information does reflect the level of attention given to the Commission in these contexts.

During 2014 our monitoring service identified 27 references in court judgments to Commission publications. In addition 61 journal articles mentioned the Commission or Commission publications. There were 5 references to the Commission in national news articles and 18 references in regional news articles.

A table providing information about implementation of our Reports can be found on the Publications page of our website www.scotlawcom.gov.uk

Law reform projects

The Commission's law reform work stems from our programmes of law reform and from references from Scottish Ministers and on occasions, UK Ministers.

Programmes of law reform

Our Eighth Programme of Law Reform, covered the period from the beginning of 2010 to the end of 2014. During that period we have completed projects and published Reports on Trust Law, Judicial Factors, Adults with Incapacity, Criminal Liability of Partnerships, and Prescription and Title to Moveable Property.

Projects included in the Programme which have not been completed will be carried forward to our Ninth Programme of Law Reform.

During 2014 we consulted on topics for inclusion in our Ninth Programme of Law Reform. The consultation ended in September. We received a number of helpful responses and are grateful to those who made suggestions for projects to be included in the Programme, all of which have been carefully considered against the criteria for selecting topics. In deciding on suitable projects, we consider three main points -

Importance - the extent to which the area law concerned is unsatisfactory and the potential benefits from reform.

Suitability - whether the issues are mainly legal rather than political; and whether a topic may be suitable for the special Parliamentary law reform processes, in particular the new procedure in the Scottish Parliament.

Resources - the availability of expertise and experience of Commissioners and legal staff; and the need for a mix of projects in terms of scale and timing to achieve a balance of workload among Commissioners, and effective management of the Programme.

Following its formal approval by the Scottish Ministers, our Ninth Programme will be published

early in 2015. It will guide much of our work from the beginning of 2015 to the end of 2017.

In addition to work under our own Programmes of Law Reform, we also undertake law reform projects jointly with the Law Commission for England and Wales, under their Programmes of Law Reform, where the subject matter relates to Scotland as well as other parts of the United Kingdom.

Projects included in our Eighth Programme of Law Reform

Item 1 - Moveable transactions

Project Team

Dr Andrew Steven, Commissioner

Lesley Mure, Project Manager

Grant Barclay, Legal Assistant

This was a medium-term project in our Eighth Programme of Law Reform which will be carried forward to be completed under our next Programme.

The project involves a review of the law on (i) outright transfer (assignment) of incorporeal moveable property (ii) security over incorporeal moveable property and (iii) security over corporeal moveable property. Thus book debts (money owed but unpaid), loan books (sums due on mortgage, credit cards, car loans etc), intellectual property rights (patents etc), stock in trade, and equipment (vehicle fleets etc) all fall within the scope of the project. The project does not cover the transfer of corporeal moveable property, a subject that is mainly covered by the Sale of Goods Act 1979.

All three areas (assignment, security over incorporeal moveable property, and security over corporeal moveable property) are important to the smooth running of the Scottish economy but in all three areas Scots law appears to be out of date and insufficiently business-friendly. This may place Scottish businesses at a competitive disadvantage and lead to the loss of legal, financial and commercial business to England and elsewhere.

We published a Discussion Paper on Moveable Transactions in June 2011. The Paper considered the current law, identified its shortcomings and suggested possible ways forward. Other legal systems were looked at, including the model that originated in the USA (Article 9 of the Uniform

Commercial Code) and which has now been adopted (with some variations) in a number of other countries including Australia, Canada, New Zealand and most recently Belgium. Although the Discussion Paper concluded that a wholesale adoption of this model would not be appropriate, it was suggested that Scots law would benefit from adopting some of its ideas.

The Discussion Paper proposed that there should be a new type of security right that could cover both corporeal and incorporeal moveable property. There would be a new online Register of Moveable Transactions, in which the security right would be registered. The new register could also be used to register transfers of financial rights, for example in securitisations and factoring.

Nearly 40 responses were received to the Discussion Paper. Following the end of the consultation period, we have conducted a number of meetings with interested parties and our Advisory Group to discuss the issues raised by the consultation responses. These discussions, together with the consultation responses themselves, are informing the report and draft Bill on which we are currently working.

We expect to complete the project in 2015.

Item 2 – Trusts

Project Team

The Hon Lord Pentland, Chairman

The Rt Hon Lord Drummond Young,
Former Chairman

Charles Garland, Project Manager

We published our Report on Trust Law, with a draft Trusts (Scotland) Bill, in August 2014. This represents the culmination of over a decade of work on a wide variety of topics in the law of trusts, in the course of which we published eight Discussion Papers, two short Consultation Papers, and one previous Report.

We are greatly indebted to our former Chairman, the Rt Hon Lord Drummond Young, who led the work on this project as Chairman, and who actively assisted in completing the project after his term of office as Chairman.

The Scottish Ministers have yet to respond formally to our latest Report and to let us know their intentions in relation to implementation.

The draft Bill included in the Report would replace the current legislation, including the Trusts (Scotland) Act 1921, with a new statute which is suitable in style and content for the modern era. Trusts have been recognised in Scots law for many centuries and have been used for a wide variety of purposes; their flexibility and simplicity make them invaluable tools.

For instance they are often used to protect the interests of the vulnerable (eg to hold money for those who lack capacity to manage their own affairs, or in personal injury trusts for those who suffer major accidents, or disabled persons trusts) and they are routinely used in wills to provide for minor children. Equally, they are prevalent in the pensions industry, so many people with a pension will, indirectly, benefit from an efficient trust law.

Further examples are to be found in the commercial world, a recent one being to cover liabilities under environmental legislation.

A trust of this type, which is set up for a defined purpose rather than for specific beneficiaries, is one which is not generally recognised under the law of England and Wales, but has been specifically provided for in a number of other jurisdictions which are competing in the global trusts market. We consider that it is important for Scots law to keep pace with the best of those international developments, and our draft Bill seeks to do so, in this case by eliminating any doubt that purpose trusts are competent in Scotland.

In recognition of the flexibility of the trust, the Bill has been drafted so that many of the provisions are

optional, thereby allowing those setting up trusts, and their advisors, to select what is most suitable for their particular needs.

Item 3 – Judicial factors

This project was completed in August 2013 when our Report on Judicial Factors was published. The Report has not yet been implemented.

Item 4 – Homicide

Project Team

Patrick Layden QC TD, Commissioner

Dr Heike Gading, Project Manager

We included a review of the law of homicide in our Eighth Programme but due to the need to give priority to other projects, we have not been able to take this project forward.

Item 5 – Criminal liability of partnerships

This project was completed in December 2011 with the publication of our Report on Criminal Liability of Partnerships. The Report was implemented by the Partnerships (Prosecution) (Scotland) Act 2013.

Item 6 - Law of contract in the light of the Draft Common Frame of Reference

Project Team

Professor Hector MacQueen, Commissioner

Charles Garland, Project Manager

Lauren Smith, Legal Assistant

This project was included as a long-term one in our Eighth Programme of Law Reform. It will now be carried forward to our next Programme.

To date we have published three Discussion Papers (Interpretation of Contract (2011), Formation of Contract (2012) and Third Party Rights in Contract (2014)) and one Report

(Formation of Contract: Execution in Counterpart (2013)). In addition, in conjunction with the Law Commission for England and Wales we published Joint Advice to the UK Government on a proposal by the European Commission for a Common European Sales Law (2011).

During 2014 we continued to be closely involved with the Parliamentary process of the Legal Writings (Counterparts and Delivery) (Scotland) Bill. It gives effect to two of the main recommendations in our Report on Formation of Contract: Execution in Counterpart. The first is that there should be no doubt that it is competent in Scots law for parties to sign a document in counterpart (that is, for all parties to sign their own counterpart copy of the document), with the document taking legal effect after the counterparts have been delivered by the signing parties. Secondly, delivery – whether of counterparts or other written documents – may be effected by fax, email or other electronic means.

The Bill is being considered by the Delegated Powers and Law Reform Committee under the new procedure established for certain Scottish Law Commission Bills. The Committee recommended that the principles of the Bill be agreed to.

In June 2014 the Committee took evidence from the Commission's Chairman and from Professor MacQueen, the lead Commissioner, as well as from a range of other interested parties. The Commission team attended all of the evidence sessions. We are pleased to see the first of what we hope will be a steady succession of Bills introduced under this procedure.

We expect that our work in 2015 will concentrate on the publication of a Report on Third Party Rights in Contract, which we aim to publish in the spring. It will recommend the replacement of the existing common law doctrine with a statutory third party rights regime. As with our



Charles Garland, Professor Hector MacQueen and Lauren Smith

earlier Report on Execution in Counterpart, we will consult closely on our draft recommendations to ensure that they meet the demands of practitioners and others as fully as possible. We will then complete our Discussion Paper on Remedies for Breach of Contract.

Item 7 - Adults with incapacity

Project Team

Laura Dunlop QC, Commissioner

Dr Heike Gading, Project Manager

Susan Robb, Solicitor

Our project on adults with incapacity was completed in 2014.

As part of our Eighth Programme of Law Reform, we examined whether the Adults with Incapacity (Scotland) Act 2000 should be amended in the light of the decision of the European Court of Human Rights in *HL v UK* (often called the “Bournewood” case). After that decision it was considered that a process to authorise deprivation of liberty of adults lacking capacity in hospitals and residential care settings was needed to ensure that proper effect was given to the right to liberty and security.

In October 2014 we published our Report and draft Bill which would put in place legal processes for specific authorisation of measures amounting to a deprivation of liberty. Although individuals may need to be restricted to protect them from harm, it is important that the authorisation does not go beyond what is required to safeguard the individual’s welfare.

In our Report we recommend legal safeguards in two areas: for adults who lack capacity to agree to remain in hospital to receive medical treatment for physical illnesses and for adults who lack capacity to agree to their own living arrangements in care settings within the community (“community process”).



Laura Dunlop, QC Susan Robb and Dr Heike Gading

The Adults with Incapacity (Scotland) Act 2000 already provides a process to ensure that any medical treatment received by a person who lacks capacity to consent to it is properly authorised. We recommend that where that treatment is given in hospital and additional measures are adopted to prevent the person from leaving the hospital unaccompanied, an authorisation process should cover those restrictive measures. There is a right for the individual and others concerned with their welfare to challenge the measures in court.

We recommend that the community process should apply to those whose liberty is restricted to a significant extent as a result of a combination of at least two restrictive measures. The process seeks to identify the care regimes with the most restrictions. The need for restrictive measures to be applied to an adult would be scrutinised by mental health officers and medical practitioners. A guardian or welfare attorney would be able to grant authorisation of the proposed measures. Where that is not possible, (for example, where no guardian or attorney has been appointed) application for authorisation should be made to the sheriff court. Any significant restriction of liberty that is authorised should remain in place for no longer than one year at a time, with periodic review of the arrangement taking place during that year.

A renewal should be possible where appropriate. There are also rights to challenge the measures in court.

In addition to the two legal processes, we recommend a provision for application to the sheriff to bring to an end unlawful detention in care homes and in accommodation arranged by adult placement services.

In preparing our Report, we were greatly assisted by input from members of the Advisory Group, the thoughtful responses to our Discussion Paper of 2012 and small group meetings which took place around the turn of the year 2013/14.

Item 8 - Compulsory purchase

Project Team

Patrick Layden QC TD, Commissioner

Dr Andrew Steven, Commissioner

Lucy Galloway, Project Manager

Jane Simpson, Legal Assistant

The Eighth Programme included a long-term project to examine the law and practice of compulsory purchase in Scotland.

In December 2014 we published our Discussion Paper on Compulsory Purchase, inviting comments from all interested parties.

In Scotland, the underlying legislation on compulsory purchase is generally considered to be antiquated and obscure. There are several difficult issues relating to both the procedure for compulsory purchase and compensation. There is widespread agreement that change is needed.

The law on compulsory purchase recognises that there will be circumstances where the public interest in a particular project will be more important than the individual's right to undisturbed ownership of his or her private property. The essential problem is that the law on compulsory purchase is mainly set out in



Patrick Layden QC TD, Dr Andrew Steven, Lucy Galloway and Jane Simpson

legislation passed between the middle of the 19th century and the middle of the 20th century, and is largely out of date.

This Discussion Paper sets out the current law and asks questions about how it could be improved. It also deals with the question of compensation, with a view to ensuring that the owner of property receives proper recompense for his or her loss. We suggest that there should be a new statute setting out the law, so that everyone involved – public authorities, practitioners and landowners – can see clearly how the system works.

We have greatly appreciated and benefited from the on-going support for the project from practitioners and academics during 2014, including those in our Advisory Groups and those who attended the Conference of the Scottish Compulsory Purchase Association in June.

We are looking forward to receiving and considering the responses to our Discussion Paper and then, as part of our Ninth Programme of Law Reform, to moving on to draft our Report and Bill, in light of these.

Item 9 - Heritable securities

Project Team

Dr Andrew Steven, Commissioner

Lesley Mure, Project Manager

Grant Barclay, Legal Assistant

A heritable security is a security over heritable property (such as land and buildings) in respect of a debt. (The equivalent term in English law, “mortgage”, is often encountered.)

The law of heritable security is governed mainly by the Conveyancing and Feudal Reform (Scotland) Act 1970. The Act has been amended over the years, most notably by the Mortgage Rights

(Scotland) Act 2001 and by the Home Owner and Debtor Protection (Scotland) Act 2010. But many shortcomings with the 1970 Act have come to light and remain unreformed. The Supreme Court’s decision in *Royal Bank of Scotland plc v Wilson* highlights one such area of difficulty.

We intended to begin a review of the law of heritable securities during the course of our Eighth Programme. However, other priorities have meant that starting work on this project will be carried forward to our Ninth Programme.

Item 10 - Prescription and title to moveable property

The final item included in our Eighth Programme related to prescription and title to moveable property. Our Report on that project was published in May 2012.

References from Scottish Ministers

As mentioned above, our law reform work stems in part from topics which are referred to us by Ministers. This work sometimes has to be undertaken in a short timescale to meet Government needs, and in those cases we adjust the timetables for our programme topics as necessary.

Reference on section 53 of the Title Conditions (Scotland) Act 2003

In September 2013 the Cabinet Secretary for Justice asked the Commission to undertake a review of section 53 of the Title Conditions (Scotland) Act 2003 in the context of part 4 of the Act. The Commission accepted the reference, on the basis as agreed with the Scottish Government that the review would most likely commence during the period covered by our Ninth Programme of Law Reform.

This reference arises from an Inquiry by the Justice Committee of the Scottish Parliament into the effectiveness of the provisions of the Title Conditions (Scotland) Act 2003. In their Report, the Committee noted concern expressed about the operation of section 53, and that there was no consensus as to how the issues should be addressed. The Committee called on the Scottish Government to invite the Commission to take forward a review of the section.

Future reference from Scottish Ministers on not proven verdict in criminal proceedings

The verdict of not proven is unique to Scots law. It arises where juries acquit the accused because of an insufficiency of evidence.

In June 2013 the Cabinet Secretary for Justice, Kenny MacAskill, MSP, announced that in due course he intended to invite the Commission to review the not proven verdict.

Joint projects

In addition to law reform projects under our Programmes of Law Reform, we undertake joint projects with the Law Commission for England and Wales and the Northern Ireland Law Commission where the area of law is reserved to the United Kingdom Parliament in terms of the Scotland Act 1998.

Joint projects with the Law Commission for England and Wales

During 2014 we continued to work on a number of joint projects with the Law Commission for England and Wales. The projects relate mainly to areas of the law which are reserved to the United Kingdom Parliament in terms of the Scotland Act 1998.

Insurance contract law

Project Team

Professor Hector MacQueen, Commissioner

Gillian Swanson, Project Manager

Lauren Smith, Legal Assistant

We are assisting the Law Commission with a major project on insurance contract law which they have carried over into their Twelfth Programme of Law Reform.

The project began by turning its attention to consumer insurance reform and our recommendations in that regard, as set out in our joint Report on Consumer Insurance Law: Pre-Contract Disclosure and Misrepresentation (2009), have already been implemented by the Consumer Insurance (Disclosure and Representations) Act 2012.

In other areas of insurance contract law, we published two further joint Consultation Papers. The first was on Post Contract Duties and other Issues (2011); it covered damages for late payment, insurers' remedies for fraudulent claims, insurable interest and policies

and premiums in marine insurance. The second was on the Business Insured's Duty of Disclosure and the Law of Warranties (2012). The aim was to draft a further report and draft Bill on these topics.

The latter came to fruition in July 2014 with the publication of our joint Report on Insurance Contract Law: Business Disclosure; Warranties; Insurers' Remedies for Fraudulent Claims; and Late Payment.

Business Disclosure

The Marine Insurance Act 1906 imposes a duty on a prospective policyholder to disclose to the insurer "every material circumstance" which would "influence the judgment of a prudent insurer" in fixing the premium or deciding whether to take the risk. Many businesses have little idea of what might influence a prudent insurer. Yet the penalties for failure to disclose information to insurers are harsh. If a policyholder fails to disclose material information, the insurer may treat the policy as if it does not exist and refuse all claims under it.

Accordingly, we recommended replacing the duty of disclosure with a duty of fair presentation, based on developments in case law. We also recommended (a) that insurers should take a more active role in this part of the process; (b) the setting out of rules concerning attribution of knowledge, particularly to non-natural persons such as companies; and (c) a regime of proportionate remedies in the event of breach by the policyholder based on what the insurer would have done if it had received a fair presentation of the risk.

Warranties and other terms

An insurance warranty is a promise made by the policyholder to the insurer which, if broken, has harsh consequences for the policyholder as the insurer may refuse a claim for a trivial mistake which has no bearing on the risk. Furthermore, a statement may be converted into a warranty using obscure words that few policyholders understand. For example, if a policyholder signs a statement on a proposal form that their answers

form the "basis of the contract", it can have the same harsh consequences.

We made three recommendations in this area. The first was that "basis of the contract" clauses in business insurance should be abolished. (This has already been done for consumer insurance in the Consumer Insurance (Disclosure and Representations) Act 2012.) The second was that, where a warranty has been breached, the insurer's liability should be suspended, rather than discharged. Also, where a breach has been remedied before loss, the insurer should be brought back on risk. Thirdly, that where a term relating to a particular type of loss, or loss at a particular time or in a particular location, is breached, the insurer's liability should only be suspended in relation to that type of loss or loss at that time or place.

Insurers' remedies for fraudulent claims

The current law on insurers' remedies for fraudulent claims appears confused and contradictory. In theory, the insurer can not only refuse to pay any part of the fraudulent claim but also avoid the entire policy from the outset.

We recommended that where an insured makes a fraudulent claim, the insurer should not be liable to pay the claim and should be able to recover any sums already paid in respect of it. In addition, the insurer should have the option to treat the contract as having been terminated at the time of the fraudulent act and the insurer should remain liable for genuine losses before the fraudulent act.

Damages for late payment

Where an insurer has unreasonably refused to pay a claim or paid it only after unreasonable delay, the current law in England and Wales does not provide a remedy for the insured. Notably, the insured is not entitled to damages for any loss suffered as a result of the insurer's unreasonable actions. This differs from the law in Scotland and most major common law jurisdictions where such damages are available.

Accordingly, we recommended that there should be an implied term in every insurance contract that the insurer will pay sums due within a reasonable time. Breach of that term should give rise to contractual remedies, including damages. In Scotland, a statutory provision would serve to confirm and clarify the position already established at common law. We also recommended guidance as to factors to be taken into account when considering what constitutes a “reasonable time” and that insurers should not be liable for delays caused by genuine disputes.

We are pleased that the majority of the recommendations in our joint Report are reflected in the Insurance Bill currently before the UK Parliament. Both Commissions gave written and oral evidence to the Special Public Bill Committee in November and December. Unfortunately, however, our recommended provision relating to damages for late payment was omitted from the Bill as the Government did not consider it suitable for the special procedure for uncontroversial Law Commission Bills being used for the Insurance Bill. We will continue to work with stakeholders to find a workable solution to be introduced at the next legislative opportunity.

Joint projects with the Law Commission for England and Wales and the Northern Ireland Law Commission

Electoral Law

| <i>Project Team</i> |
|--|
| The Hon Lord Pentland , Chairman |
| Gillian Swanson , Project Manager |
| Lauren Smith , Legal Assistant |

The project to review UK legislation in relation to electoral law is a joint project with the Law Commission for England and Wales and the Northern Ireland Law Commission. The project follows a reference to this Commission from the UK Cabinet Office as regards reserved areas of Scots law, and from Scottish Ministers as regards devolved areas.

Electoral law in the UK has grown to be complex, voluminous and fragmented. Recent years have seen a steady increase in the numbers and types of election. One issue arising from this is that each type of election brings its own set of rules and systems, and combining different types of election into one electoral event introduces yet more layers of electoral law. The overall aim of the project is to ensure that the law governing elections is modern, fit for purpose, and meets the expectations of voters.

Accordingly, an overarching theme of the proposals in the joint Consultation Paper on Electoral Law, which was published in December 2014, is that electoral law should be set out in a consistent and holistic way; election-specific divergence should be scaled back with the result that only differences justified by principle (such as the use of a different voting system), or political policy, should be retained.

The substantive chapters of the Consultation Paper consider particular aspects of electoral law, such as registration of electors, absent voting,

timetables and combination of polls, and legal challenge, across all elections in the UK. The last chapter focusses on the law of referendums, national and local. The consultation period ends on 31 March 2015.

Following the analysis of consultees' responses, it is hoped to publish substantive law reform recommendations in the second half of 2015. There would then be a further review point. If, at that time, the Commissions and the respective Governments decided to continue with the project, the aim would be to publish a final report, together with a substantial draft Bill, in 2017.



Our legal assistants, Grant Barclay, Lauren Smith and Jane Simpson

Assistance to the Law Commission for England and Wales

We have been pleased to continue assisting the Law Commission with its projects on Groundless Threats in Patent, Trade Mark and Design Litigation, and Fiduciary Duties of Investment Intermediaries. In January 2014, following a similar successful seminar on the former project in 2013, we co-hosted a seminar with the Edinburgh Centre for Commercial Law (at Edinburgh Law School, the University of Edinburgh) and the Law Commission to encourage Scottish input to the consultation on Fiduciary Duties of Investment Intermediaries. Also, in relation to both projects, we provided text on relevant aspects of Scots law for incorporation in the Law Commission's Reports on these topics, published in April and July 2014 respectively.

Further information about our law reform projects is available on the law reform projects page on our website
www.scotlawcom.gov.uk

Progress on our law reform projects: summary

Projects under our Eighth Programme

| Project | Publications in 2014 | Position at the end of 2014 |
|--|--|--|
| Moveable transactions (Eighth Programme, item 1) | | Working on report and draft Bill, to be published in 2015 |
| Trusts (Eighth Programme, item 2) | Report on Trust Law (Scot Law Com No 239) | Project completed August 2014 |
| Judicial factors (Eighth Programme, item 3) | | Project completed August 2013 |
| Homicide (Eighth Programme, item 4) | | Some preliminary work undertaken |
| Criminal liability of partnerships (Eighth Programme, item 5) | | Project completed December 2011 |
| Law of contract in the light of the Draft Common Frame of Reference (Eighth Programme, item 6) | | Working on report on third party rights in contract, to be published in 2015 |
| Adults with incapacity (Eighth Programme, item 7) | Report on Adults with Incapacity (Scot Law Com No 240) | Project completed October 2014 |
| Compulsory purchase (Eighth Programme, item 8) | Discussion Paper on Compulsory Purchase (DP No 159) | Awaiting responses to the Discussion Paper |
| Heritable securities (Eighth Programme, item 9) | | Some preliminary work undertaken |
| Prescription and title to moveable property (Eighth Programme, item 10) | | Project completed May 2012 |

Joint projects with the Law Commission for England and Wales

| Project | Publications in 2014 | Position at the end of 2014 |
|------------------------|---|---|
| Insurance contract law | Insurance Contract Law: Business Disclosure; Warranties; Insurers' Remedies for Fraudulent Claims; and Late Payment (Scot Law Com No 238) | Insurance Bill before the UK Parliament |

Joint projects with the Law Commission for England and Wales and the Northern Ireland Law Commission

| Project | Publications in 2014 | Position at the end of 2014 |
|---------------|---|--|
| Electoral Law | Electoral Law: A Joint Consultation Paper (DP No 158) | Awaiting responses to the Consultation Paper |

Consolidation and statute law repeals

Consolidation

Project Team

The Hon Lord Pentland, Chairman

Susan Sutherland, Project Manager

In addition to our law reform projects we also undertake work on consolidation of primary legislation.

Consolidation work involves preparing a draft Bill to bring together earlier enactments on an area of law with the aim of making the legislation easier to use. Consolidation is an important way of tidying up the statute book.

Bankruptcy legislation in Scotland

Our Report on the consolidation of the legislation relating to bankruptcy in Scotland was published in May 2013.

The Report included a draft consolidation Bill and Tables of Destinations and Derivations relating to the provisions. It also included a draft Order which we envisage would be made under section 104 of the Scotland Act 1998 so as to give effect to certain provisions of the Bill in other parts of the UK. The making of such an order would be a matter for UK Ministers and for the UK Parliament.

During 2014 we undertook work to update the draft Bill annexed to our Report, so as to take account of changes to bankruptcy legislation provided for in the Bankruptcy and Debt Advice (Scotland) Act 2014.

Almost all the formal recommendations for technical improvements to bankruptcy legislation which we recommended in our Report have been implemented by the 2014 Act.

In June 2014 the Accountant in Bankruptcy announced a change to the Programme for Government announced in September 2013.

The intention is that the Scottish Government will introduce its planned Bankruptcy Consolidation Bill once the requisite regulations have been made to implement provisions in the Bankruptcy and Debt Advice (Scotland) Act 2014 and after allowing a period of time for the reforms to settle down. The change to the legislative programme was needed in order to ensure that improvements introduced by the 2014 Act could be commenced on 1 April 2015.

The Scottish Government has indicated that it remains firmly of the view that a consolidation of bankruptcy legislation is needed and should be progressed as soon as time and resources allow.



Our Parliamentary Counsel, Gregor Clark, CB

Statute law repeals

Project Team

The Hon Lord Pentland, Chairman

Susan Sutherland, Project Manager

The Commission's statutory functions also extend to making recommendations for the repeal of obsolete legislation. We undertake this work jointly with the Law Commission for England and Wales, whose team takes the lead in preparing the Reports and draft Repeals Bills.

The aim of our statute law repeals work is to remove obsolete and otherwise unnecessary legislation from the statute book, with a view to simplifying and modernising the law and making it more accessible. The removal of obsolete legislation from the statute book also saves time and costs for lawyers and others working with legislation.

The work involves detailed research of possible statutory provisions which may be suitable for repeal, followed by consultation with interested parties to obtain their agreement to the repeals. We undertake consultation in Scotland on the Scottish proposals for repeal. Following consultation on each of the repeal proposals, the Law Commission team prepares a draft Bill for inclusion in a Report to Government. Since 1965 there have been 19 such Reports including Statute Law Repeals Bills, all of which have been enacted by the UK Parliament.

During 2014 we continued work on repeal candidates for inclusion in the next Bill. We consulted on several repeal proposals relating to Scottish legislation. We also consulted Scottish consultees on the Law Commission's repeal proposals which extend to Scotland as well as to other parts of the United Kingdom.

Work is progressing well on preparation of the Commission's 20th Repeals Bill. The aim is to complete the current project and publish our joint Report and draft Bill in the first half of 2015.

Promoting law reform

The Commission works to promote law reform and share our experience, both within Scotland and beyond.

We liaise closely with the Cabinet Secretary for Justice, the Minister for Parliamentary Business, and other Ministers and Government officials on law reform work, and to support plans for implementation of Commission recommendations in devolved areas. We also liaise with the Advocate General for Scotland and his officials in relation to our work on reserved areas of Scots law. The Chairman and Chief Executive had meetings with these Ministers.

During 2014 we continued to work closely with the Scottish Parliament. The Chairman and Chief Executive met with the Presiding Officer to discuss law reform and the new Parliamentary procedure. The Chairman, the Chief Executive, Professor MacQueen and members of our contract law team also met with the Convener and members of the Delegated Powers and Law Reform Committee of the Parliament to provide a briefing on the first Bill for the new process involving scrutiny by the Committee.

The Commission enjoys close working relationships with the legal profession in Scotland. We are very grateful to members of the profession who serve as members of our advisory groups on law reform projects, and to those who respond to our consultations. Contributions from the profession contribute significantly to the law reform process, by virtue of their practical experience of the law.

In the context of preparing for our Ninth Programme of Law Reform, Commissioners and our Chief Executive met with the President, Vice President and Director of Law Reform of the Law Society of Scotland; and separately with the Convener and members of the Law Reform Committee of the Law Society of Scotland, and the Director of Law Reform, to discuss possible future law reform work.

We were also pleased to forge closer links with the Faculty of Advocates during the year, with the Chairman and Chief Executive meeting the Dean and the Convenor of the Law Reform Committee. The Commission also welcomed to our office the Convener and members of the Law Reform Committee of the Faculty to discuss the development of our Ninth Programme of Law Reform.

We value our links with the Law Schools in Scotland. A number of seminars on our law reform projects have been hosted jointly by the Commission and the Universities. We are grateful for the support of the academic community for our work.

The Commission has contacts with law reform bodies throughout the world. We have a close working relationship in particular with the Law Commission for England and Wales, and the Northern Ireland Law Commission, with whom we have carried out tripartite law reform work.

In October 2014, the Chairman and Chief Executive attended the annual conference of the law reform bodies of Scotland, England and Wales, Ireland, Northern Ireland and Jersey. This was hosted by the Law Commission of Ireland in Dublin. Each Commission gave a presentation on their programme of law reform; on progress with their current law reform projects, and on any general issues that the Commission faced. The conference discussed law reform methodology, in particular as regards the most effective means of structuring a law reform project and interacting with consultees. Such exchanges between law reform bodies are of considerable value in considering our working methods with a view to making improvements where possible.

Our Chief Executive made a presentation to the 2014 Symposium of the Federation of Law Reform Agencies of Canada, in Vancouver in February, at the request of the British Columbia Law Institute.

The presentation focussed on the establishment of a new process in the Scottish Parliament for law reform Bills, and in particular how that development came about. Such issues are of considerable interest to other law reform bodies and to Ministries of Justice in other jurisdictions.

The Commission also receives overseas visitors from time to time. In February 2014, Professor MacQueen met with a delegation of judges from Yunnan, China.

In November Professor Eric Dirix, a Belgian Supreme Court Judge and the architect of the recent new Belgium law on security over moveable property, visited the Commission and met with the Chairman and the moveable transactions team. He was accompanied by his colleague Professor Vincent Sagaert who helped prepare the new legislation.

Looking ahead to 2015

2015 will mark fifty years since the Commission was established in 1965. As part of our marking that milestone in the history of the Commission, we are looking forward to hosting the biennial conference of the Commonwealth Association of Law Reform Agencies, in Edinburgh in April. This is an excellent opportunity to promote the Commission and developments in law reform in Scotland and to discuss best practice with law reformers from around the world.



Scottish Law Commission
promoting law reform

Publications - 2015

Some projects included in our Eighth Programme will be carried forward into our Ninth Programme. Once the new Programme has been published, we aim to make further progress on those projects during 2015. We will also start work on some of the new law reform topics included in the new Programme.

During 2015 we expect to publish Reports on two of the projects which will be carried forward into the Ninth Programme - Moveable Transactions, and Third Party Rights in Contract.

In the first half of the year we also expect to publish our Twentieth joint Report with the Law Commission on Statute Law Repeals.

Later in the year we expect to publish substantive recommendations on the joint project on electoral law.

Commissioners and staff (as at 31 December 2014)

Commissioners

The Hon Lord Pentland, Chairman

Laura Dunlop QC

Patrick Layden QC TD

Professor Hector MacQueen

Dr Andrew Steven

Chief Executive

Malcolm McMillan

Parliamentary Counsel (Consultant)

Gregor Clark CB

Project Managers (Solicitors)

Dr Heike Gading

Lucy Galloway

Charles Garland

Lesley Mure

Susan Sutherland

Gillian Swanson

Solicitor

Susan Robb

Legal Assistants

Grant Barclay

Jane Simpson

Lauren Smith

Librarian

Emma McLarty

Office Manager

Susan Cutsforth

Personal Secretaries

Wilma MacAskill

Joan Melville

Administrative Staff

Iain Ritchie

Gordon Speirs

The Commission's running costs 2014

The Scottish Law Commission is funded by the Scottish Government. Our running costs for 2014 were offset by payments received from Skills for Justice and the Royal Commission on the Ancient and Historic Monuments of Scotland for use of part of our office accommodation.

| Expenditure | Year to 31 December 2014 |
|--|-----------------------------|
| Salaries – Commissioners (including national insurance contributions, superannuation payments and pensions to former Commissioners) | £602,771 |
| Salaries – Chief Executive and legal staff (including national insurance contributions, superannuation payments and consultants' fees and expenses) | £636,608 |
| Salaries – Administrative staff (including national insurance contributions and superannuation payments) | £116,591 |
| Accommodation (including maintenance, rates and utilities) | £122,378 |
| Printing and publishing (including costs of books and library purchases, binding, maintenance of equipment, printing costs of publications, photocopying and stationery) | £57,515 |
| Telephone and postage | £3,716 |
| Travel and subsistence | £6,608 |
| Miscellaneous (including the provision and maintenance of the IT system, training of staff, office services and hospitality) | £77,467 |
| Total | £1,623,654 |

How we undertake our law reform projects

- Research into the existing Scots law and review of comparative law
- Analysis of problems with the current law
- Development of policies for reform
- Consultation on proposed reforms
- Consideration of consultation responses
- Review of policy in the light of consultation
- Publication of a report to Ministers with recommendations for reform, including in most cases a draft Bill to implement the recommendations. Implementation of the recommendations in our reports requiring legislation is taken forward in the Scottish Parliament or, in reserved areas of law, in the UK Parliament at Westminster.
- Role of advisory groups – to assist us with our projects we often set up advisory groups of people with expertise in the relevant areas of law. These small groups provide valuable assistance and guidance to our project teams.

For more information about the Commission please contact:

Malcolm McMillan, Chief Executive
Scottish Law Commission
140 Causewayside
Edinburgh EH9 1PR

Tel: 0131 668 2131

Fax: 0131 662 4900

E-mail: info@scotlawcom.gsi.gov.uk

Freedom of Information enquiries: FOI@scotlawcom.gsi.gov.uk

Website: www.scotlawcom.gov.uk

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