



Scottish Law Commission
promoting law reform

(SCOT LAW COM No 200)

annual report | 2004





Scottish Law Commission

promoting law reform



Established under the Law Commissions Act 1965

Our function

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

Our aim

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 | 2004

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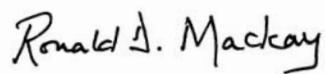


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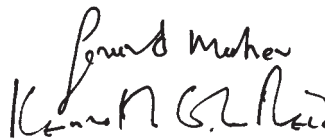
Annual Report 2004

To: Cathy Jamieson MSP, Minister for Justice

We are pleased to submit to the Scottish Ministers our Annual Report for the year to 31 December 2004.



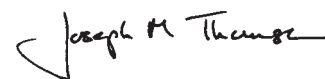
RONALD D MACKAY, *Chairman*



GERARD MAHER



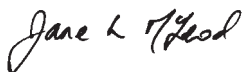
KENNETH G C REID



JOSEPH M THOMSON



COLIN TYRE



Miss Jane L McLeod, *Chief Executive*
17 March 2005

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

April 2005

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Chairman's foreword



It again gives me pleasure to present to the Minister for Justice and her colleagues the Annual Report of the Scottish Law Commission.

The year 2004 saw completion of our work on three law reform projects with the submission of our Reports on Insanity and Diminished Responsibility, on Damages for Psychiatric Injury and on Registration of Rights in Security by Companies. In addition to those reports we published two discussion papers as part of our ongoing work on land registration and trusts.

Our current project on land registration follows the earlier work carried out by the Commission over a number of years on the reform of the law of land ownership and it was very pleasing to see that work achieve practical fruition on 28 November 2004 when the Abolition of Feudal Tenure etc. (Scotland) Act, the Title Conditions (Scotland) Act and the Tenements (Scotland) Act all came into force. It was also satisfying to have been able, earlier in the year, to assist Executive officials in the preparation of the Tenements Bill. We regard the provision of such assistance as an important part of our function. We welcome the opportunity, during the preparation of any legislation arising from our recommendations, to offer any further explanation or elaboration of our policy approach which may be required and to assist with any technical aspects of implementation on which we can offer advice.

The year 2004 also saw the start of two new projects, both of which were referred to the Commission by Scottish Ministers. These are the references on rape and other sexual offences and limitation in personal injury actions. We continue to make progress with these and our other outstanding projects.

After a further round of consultation we completed the preparation of our Seventh Programme of Law Reform and submitted it towards the end of the year. We are pleased that the Programme has now received Ministerial approval and we look forward to embarking on the new projects contained in it.

The success which we have achieved during the year is due to the skill, dedication and hard work of all the staff of the Commission and my fellow Commissioners, to whom I would like to pay tribute.

Ronald A. Mackay

THE HON LORD EASSIE
Chairman

Summary of the year

Law reform projects

During 2004 we published reports on three of our law reform projects and issued discussion papers on two others.

We also received two new references from Scottish Ministers. The first of these concerns rape and other sexual offences. The second relates to limitation in personal injury actions.

Seventh Programme of Law Reform

Work on preparation of our Seventh Programme of Law Reform continued throughout the year, culminating in its submission to Scottish Ministers in December.

As part of our initial consultation with the main legal interest groups, we held meetings in the spring with representatives of the Scottish Law Schools and with the Crown Office.



Professor Reid and Professor Burns of The Robert Gordon University at the meeting with representatives of the Scottish Law Schools

A second round of consultation on revised proposals, with a wider range of interest groups, took place over the summer. At this stage we also issued around 11,500 leaflets seeking views and suggestions from the public at large. The leaflet was made available to members of the public through Citizens' Advice bureaux, local authority offices, public libraries, sheriff courts, MSPs' and MPs' constituency offices, and legal firms.



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.

Our Seventh Programme (approved by Scottish Ministers in January and published in February 2005) sets out the areas of law we intend to review over the next five years. As well as providing authority for carrying forward some of our current work, the Programme includes four new projects –

- succession;
- assignment of, and security over, incorporeal moveables;
- unincorporated associations; and
- provocation, self-defence, coercion and necessity.

Both succession and unincorporated associations are included as a result of suggestions made by consultees.

Publications in 2004

The full text of these publications and the news releases relating to them are available on our website www.scotlawcom.gov.uk

TITLE	PUBLICATION DATE
Discussion Paper on Land Registration: Void and Voidable Titles DP No. 125	16 February 2004
Annual Report 2003 Scot Law Com No. 194	7 April 2004
Report on Insanity and Diminished Responsibility Scot Law Com No. 195	1 July 2004
Report on Damages for Psychiatric Injury Scot Law Com No. 196	10 August 2004
Report on Registration of Rights in Security by Companies Scot Law Com No. 197	7 September 2004
Discussion Paper on Trustees and Trust Administration DP No. 126	16 December 2004

Law reform projects

Our main area of work is law reform. Some of our more substantial projects are undertaken under a programme of law reform approved by Scottish Ministers. This report covers projects carried out under the Sixth Programme of Law Reform.

Other projects arise from references from Scottish Ministers or, occasionally, from one of the UK government departments requesting us to review a particular area of the law and to make recommendations for reform.

On all our law reform projects we work in teams comprising a lead Commissioner, a legally qualified project manager and one or sometimes two legal assistants.

Many of our teams are supported by an advisory group, drawn from practitioners and others with expertise in the particular area of law. Occasionally we engage a consultant to assist with a project. The advisory groups and consultants provide considerable help to us when discussing difficulties in the current law, devising possible solutions and in making sure our recommendations for reform will work in practice.

Consultation is a key element of our work, enabling us to take account of a range of views. We are grateful to those who take the time to submit comments on our proposals.

For some of our projects we hold a seminar as part of the consultation process. These seminars help to raise awareness about our work on a particular law reform topic. They also enable us to discuss our provisional proposals with people who have practical experience in the area of law concerned.

We are currently reviewing our consultation practice in order to identify ways in which it can be adapted more readily to the needs of individual projects. The review includes an examination of ways of integrating consultees more closely in the law reform process through the provision of better information on the progress of a project.

Progress in 2004

Commercial Law

Registration of Rights in Security by Companies

Team members

The Hon Lord Eassie, Commissioner
Gillian Swanson, Project Manager
Gavin Henderson, Trainee Solicitor

This project derived from a reference from the Department of Trade and Industry in May 2002 as part of its wider reform of company law. The Law Commission for England and Wales is also undertaking a project on this topic following receipt of a more extensive reference.

We completed work on the project in July 2004 with the submission of our Report on Registration of Rights in Security granted by Companies.

Under the current law a company which grants a floating charge or certain other securities has to register particulars with the Registrar of Companies within 21 days of creating the security. In addition a company maintains its own register of securities at its registered office. There are several problems with the current system.

The period allowed for registration at Companies House results in an "invisibility period" during which the register is unreliable. A search may not disclose securities granted during the previous 21 days which causes a particular problem in the case of floating charges as they are not publicised in any other way. The reliability of the Register of Charges is further undermined by the fact that not all forms of security require to be registered and the particulars of those that do need to be registered may be inaccurate or out of date.

Securities other than floating charges may be granted by non-corporate debtors. These securities have their own forms of publicity. It is difficult to justify making the validity of those securities subject to additional requirements when granted by a company.

There is unnecessary duplication in so far as securities, particularly securities over land, must be registered at Companies House despite the fact that they are also registered in other specialist registers.

Although creditors of the company are entitled to inspect the company's own register and copies of the deeds entered in it, the register is often poorly maintained.

Our recommendations seek to rationalise the law on registration of rights in security granted by companies by removing unnecessary registration requirements and by improving the structure of the law relating to floating charges in Scotland. The Report recommends that -

- A new register of floating charges should be set up and maintained by the Keeper of the Registers of Scotland.
- Registration of the document granting a floating charge in the new register should be essential in order to constitute a floating charge and floating charges should generally rank *inter se* and with other forms of security by date of registration or constitution of the real right as the case may be.
- Similarly, any variation, assignment or discharge of a floating charge should require to be registered before it may affect any third party.
- To facilitate the mechanics of a secured transaction it should be possible to register an advance notice in the Register of Floating Charges; and if the floating charge is registered within 21 days it should be treated as having been registered on the date of registration of the advance notice.

- Standard securities over land and other securities by companies which are already publicised in a specialist register should no longer require additional registration at Companies House and particulars of assignments in security should also cease to be registrable.
- With the aim of fostering financial transparency, a company should be obliged to list all securities which it has granted and which have not been discharged as part of the annual return to the Registrar of Companies; to supply to anyone making a request and paying any fee within prescribed limits details of any right in security granted after the date of the last annual return; and to permit inspection of copies of the security documents at the company's registered office on payment of any fee within prescribed limits.

We are grateful to David Guild, Advocate, for his assistance throughout the project.

Criminal Law

Insanity and Diminished Responsibility

Team members

Professor Gerry Maher, Commissioner
Susan Sutherland, Project Manager
Saira Kapasi, Legal Assistant

This project derived from a reference from Scottish Ministers in 2001.

The term "insanity" is used in two different contexts in Scots criminal law. First, insanity at the time of the offence is a defence to a criminal charge. Secondly, insanity at the time of the trial can act as a plea in bar of trial.

One of the main problems with the current law relating to both the defence and plea is the use of outmoded terminology. The test for the defence requires that the accused has to be suffering from

"a complete alienation of reason". This language is not easily understood by jurors and psychiatrists and others who have to apply the test. The current test also fails to reflect modern thinking on mental health.

Diminished responsibility arises only in cases in which murder is charged and if pled successfully results in the accused being convicted of culpable homicide instead of murder. Prior to *Galbraith v HM Advocate* 2002 JC 1, the courts tended to apply a narrow definition of the plea, requiring the accused to be suffering from a condition close to insanity. Although in *Galbraith* the High Court of Justiciary widened the range of conditions which could form the basis of the plea, the current test excludes those suffering from a mental abnormality based on a personality disorder.

Our Report on Insanity and Diminished Responsibility was submitted to Scottish Ministers in May and published at the beginning of July. The Report makes various recommendations to modernise the criminal law in relation to mentally disordered offenders. In particular it recommends that -

- The test for insanity as a defence should be re-stated to reflect modern terminology and thinking on mental health. Specifically, the common law defence should be replaced by a statutory defence that the accused lacked criminal responsibility by reason of mental disorder. The new defence should require the presence of a mental disorder suffered by the accused at the time of the alleged offence. The core element of the defence should be that, by reason of a mental disorder at the relevant time, the accused was unable to appreciate the nature or wrongfulness of his or her conduct.
- As regards diminished responsibility, the definition of the plea should be set out in statute on substantially the same basis as formulated in *Galbraith*, namely that the accused's ability to determine or control his or her conduct at the

time of the killing was substantially impaired by reason of mental abnormality. The plea should continue to apply in cases of murder only. If successful, the effect should be that the accused is convicted of culpable homicide instead of murder. In a change from the common law, the statutory test for the plea should include mental abnormality based on a personality disorder.

- In relation to insanity as a plea in bar of trial the common law plea should be replaced by a statutory plea called "unfitness for trial". The test for the plea should be that the accused person is unfit for trial where as a consequence of a mental or physical condition at the time of the trial he or she cannot participate effectively in the proceedings.

The Report also recommends improvements to procedural rules applying in criminal cases involving mental disorder.



Discussion at a Commission meeting

Rape and Other Sexual Offences

Team members

Professor Gerry Maher, Commissioner
Alastair Clyde, Project Manager
Kate Mulligan, Legal Assistant

During consultation on our Seventh Programme several consultees suggested that the law on sexual offences was in need of review. Following two widely-reported High Court cases in 2003 there was academic, professional and public concern that the law of rape, in particular, was in confusion. This led to our receiving a reference from Scottish Ministers in June 2004 inviting us to:

"Examine the law relating to rape and other sexual offences and the evidential requirements for proving such offences and to make recommendations for reform."

The reference is the first time the whole range of sexual offences in Scotland has been examined with a view to reform and the first phase of the project is to carry out extensive research into the history and development of the law in this area. We have established an advisory group to assist the project team, and have had some preliminary discussions with interest groups such as Rape Crisis Scotland. Meetings have also been held with other law reform bodies and with the Crown Office.

Among the issues being considered in the review is whether the definition of rape should be extended to include sexual assaults against male or gender-re-aligned victims. We are also considering the defence of consent and whether models of consent used in other jurisdictions could be usefully employed in Scots law.

In addition we are looking at *A Draft Criminal Code for Scotland*, (which was published under our auspices in 2003) to see the extent to which it could provide a model for this project.

We aim to publish a discussion paper for public consultation by the end of 2005.

Interest

Interest on Debt and Damages

Team members

Colin Tyre QC, Commissioner
Alastair Clyde, Project Manager
Dawn Archer, Trainee Solicitor

This project derives from a reference received from Scottish Ministers in November 2003 to examine the law relating to interest on payments under contractual and other obligations.

Work on our Discussion Paper on Interest on Debt and Damages was completed in December. The paper (published in January 2005) examines the current law to determine the extent to which it satisfies three basic principles -

- Interest should run on different types of claim for money during the same period and at the same rate regardless of whether the claim is for payment of a contractual debt, a non-contractual debt or damages.
- The primary goal of an award of interest should be the realistic compensation, in commercial terms, of the creditor for loss of the use of money. Interest should not as a general rule be payable at a punitive rate.
- An award of interest should compensate the creditor for loss of the use of money throughout the period during which that loss has subsisted.

Applying these principles, our proposals, if accepted, would see the introduction of a statutory right to claim interest during the period when a claimant was deprived of the use of his money.

The paper identifies the following specific areas of concern in the present law –

- *Inconsistent treatment of debt and damages:* Injured parties suing for damages may claim interest from the date when the right of action arose (for example the date of an accident); but a party pursuing a contractual debt may claim interest only from the date when a court action is raised.
- *Contractual debt and "wrongful withholding":* Interest is not payable on a debt unless payment has been "wrongfully withheld" and in the case of contractual debt money is not wrongfully withheld until court proceedings are commenced. This means that the creditor will not be compensated for losing the use of his money prior to starting proceedings in court. We propose the introduction of a statutory entitlement to interest on debt which would run from the date when payment is due. The statutory entitlement would not apply where parties have made express provision for interest in their contract, nor to circumstances in which other statutory provision for payment of interest is made (for example, interest on taxes).
- *Interest on damages:* At present the court has a discretion to award interest for any part of the period since the date when the right of action arose and a duty to award interest on damages or solatium for personal injury unless satisfied that there are reasons special to the case why no interest should be given. We propose that this commencement date should be replaced by an entitlement to interest on each head of loss from the date when the loss in question was sustained.

- **Rate of interest:** There is no statutory mechanism at present which would apply a rate of interest similar to that which is available commercially. The "judicial rate" is currently set at a fixed rate of 8% but we propose that there should be a prescribed rate of interest which would fluctuate in step with changes in the Bank of England base rate. If the prescribed rate were a specified percentage, such as 1% or 1.5%, above the Bank of England rate, the resulting rate of interest would be comparable to the rate which a prudent individual might obtain for a secured loan, or the average company might pay on its borrowing.

We also propose that interest on a claim should be compounded at specified intervals (at present, with only a few exceptions, simple interest is awarded). The use of compound interest, combined with a rate of interest which reflected rates available in the market, would be a more accurate reflection of the cost of money over the period of a claim. Calculation of compound interest has been rendered much easier by computer programmes and, to demonstrate this, an online compound interest calculator has been made available on our website.

Comments are invited on the Discussion Paper by the end of April 2005.

Limitation of Actions

Limitation in Personal Injury Actions

Team members

The Hon Lord Eassie, Commissioner
Susan Sutherland, Project Manager
Katie Delap, Legal Assistant

This project arises from a reference received from Scottish Ministers in September 2004, inviting 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 reform."

The reference relates to the so-called "knowledge test" in sections 17(2)(b) and 18(2)(b) of the 1973 Act in relation to limitation in personal injury claims and to the power under section 19A of the Act which enables the courts to override the limitation period if it is equitable to do so. Concern has been expressed about the way the test is operating, particularly in cases involving industrial diseases, and the question has been raised whether the 1973 Act should be amended to specify factors to which the court should have regard in exercising its judicial discretion.

As part of the first stage of the project we are undertaking research into the legislation in other countries and the historical background to the legislation in Scotland. We also intend to have meetings with practitioners who have experience in this area of law, to discuss the issues arising with a view to developing proposals for consultation.

We aim to issue a discussion paper for consultation by the end of 2005.

Law of Obligations

Damages for Psychiatric Injury

Team members

Professor Joe Thomson, Commissioner
David Nichols, Project Manager
Sheila Skinner, Legal Assistant

We started this project in 2001 when we received a reference from Scottish Ministers to examine the law relating to damages for psychiatric injury caused by another person.

Our Report on Damages for Psychiatric Injury was submitted to Scottish Ministers in July and published in August.

The existing law on delictual liability for psychiatric harm has been developed by the courts over the last hundred years or so in a largely *ad hoc* fashion. As a result it forms an unprincipled set of rules with a number of defects -

- Primary victims (those directly involved in the incident) may recover for an unforeseeable psychiatric injury provided some physical injury was foreseeable even if it did not occur.
- Secondary victims (those who see or learn of others being killed or injured) may recover compensation for psychiatric injury only if they suffered a "nervous shock" and their injuries were foreseeable in a person of ordinary fortitude.
- Secondary victims must also meet the criteria set out in the case of *Alcock v Chief Constable of South Yorkshire Police* [1992] 1 AC 310. There must have been a close tie of love and affection between the victim and the injured or dead person; the victim must have been present at the incident or during its immediate aftermath; and the psychiatric injury must have been caused by direct perception of the incident or its immediate aftermath.
- There is doubt whether rescuers have to fear for their own physical safety before they can claim compensation.
- First, there would be no liability for mental harm (whether caused intentionally or unintentionally) if a person could reasonably be expected to endure it without seeking damages. People would be expected to put up with mental harm resulting from bereavements and the normal stresses of life. For example, the fact of a mother learning of her child's death would not be sufficient to impose liability, but damages might be claimable if she had seen the accident in which her child was killed or the child had been intentionally killed in a violent manner.
- Secondly, mental harm resulting from a person's negligent act or omission would give rise to liability only if it constituted a medically recognised mental disorder and was a foreseeable consequence of the negligent act or omission. The test of foreseeability should be judged by the standard of the ordinary reasonable person, unless the wrongdoer was aware of the victim's undue susceptibility.
- Thirdly, a person who suffers mental harm as a consequence of witnessing or learning of the death or injury of another in an incident in which he or she was not directly involved would not be entitled to damages, unless there was a close relationship (strong ties of affection, loyalty or personal responsibility) between them, or the sufferer had been acting as a rescuer. A mere bystander would not be compensated even if seeing a horrific incident. A close relationship would be presumed for near relatives, such as children, parents, spouses or cohabitants, and siblings, but others such as long-standing friends or colleagues might be able to show that one had existed.

The Report recommends that the existing common law should be replaced by new statutory rules on a more principled basis. Under our recommendations the basic rule would be that a person who through a wrongful act or omission caused another to suffer mental harm would be liable in damages for that harm. However, in order to place acceptable limits on liability, this general rule would be subject to certain qualifications -

Unfair Terms in Contracts

Team members

Professor Joe Thomson, Commissioner
Gillian Swanson, Project Manager
Dawn Archer, Trainee Solicitor

This joint project with the Law Commission for England and Wales derived from references received in 2001 from the Department of Trade and Industry and Scottish Ministers.

Currently, there are two major pieces of legislation dealing with unfair terms in contracts: the Unfair Contract Terms Act 1977 and the Unfair Terms in Consumer Contracts Regulations 1999. Although the two regimes have separate scopes of application and use different concepts and terminology, they overlap to some extent.

One aim of the project has been to consider how to replace the existing provisions with a single unified statute setting out the law on unfair terms in contracts in a clear and accessible way.

An additional concern has been the level of protection available to businesses. Accordingly, the project has looked at whether there should be extended protection for businesses and, if so, what kinds of businesses should benefit from such increased protection. In 2002 a joint consultation paper was published inviting comments on possible reform of the legislation.

Work on the project was substantially completed by the end of 2004. A joint Report on Unfair Terms in Contracts was submitted to the Department of Trade and Industry and Scottish Ministers in January and published in February 2005.

The draft Bill annexed to the Report sets out the law on unfair terms in a clear and accessible way that consumer advisors and businesses will find easier to

understand. Guidelines are included on how to decide whether a contract term is unfair. The term's transparency, its substance and effect and the circumstances in which the contract was made are to be taken into account.

Consultation demonstrated strong support for greater protection for small businesses. The small business (one with fewer than nine employees) is often unaware of the significance of the contractual terms in the other party's "small print" or is unable to avoid having to accept those terms. Following further consultation, the Report recommends (subject to certain exceptions) a separate scheme to protect small businesses by allowing them to challenge a wider range of non-negotiated terms.

Property Law

Land Registration

Team members

Professor Kenneth Reid, Commissioner
John Dods, Project Manager
David Irvine, Legal Assistant
Martin Corbett, on secondment from the Registers of Scotland

A review of the system of land registration, a topic in our Sixth Programme, is being carried forward to be completed as a medium term project under our Seventh Programme.

The legal issues involved in this project have proved extremely complex. Our Discussion Paper on Void and Voidable Titles, published in February 2004, looks at registration of title from the point of view both of policy and legal technique. The paper focuses on certain key issues as regards the operation and effect of land registration such as void and voidable titles, the State guarantee of title, the underlying theoretical structure, and positive prescription. It makes certain proposals as to the

fundamentals of land registration and lays the foundations for consideration of the more detailed issues to be dealt with in two further discussion papers. The paper makes the following proposals -

- A *bona fide* acquirer should be able to rely on the Register, supported by a guarantee from the State (as under the present law).
- Usually this would mean that, if the seller (or other grantor) was shown on the Register as owner, the acquirer would receive ownership in turn.
- In addition to protection from Register error an acquirer should be protected in respect of any errors – forgery, for example – which affect the current transaction ("transactional error"). In such a case, however, the entitlement would be to indemnity and not to the property.
- Protection against error should require good faith on the part of the acquirer rather than, as at present, the absence of fraud or carelessness.
- Subject to these proposals, the question of whether registration confers a real right should be determined by the ordinary law of property. In other words, there should be a move from what may be a "positive" system of registration under the current law in the direction of a "negative" system.
- Finally, positive prescription, excluded in most cases by the 1979 Act, should be reintroduced as a means of cutting off future challenges to the title of the acquirer.

The consultation period ended in May and responses from consultees indicate general support for our proposals.

Work on the second discussion paper is well advanced. It will look at the three core issues of

registration, rectification, and indemnity against the background of the conceptual framework set out in the first paper. We aim to publish the paper in the summer of 2005.

A third discussion paper will consider various miscellaneous issues such as servitudes, overriding interests and the powers of the Keeper. The aim is to publish this paper in the autumn of 2005.

We are grateful to the Registers of Scotland and Professor George Gretton of the University of Edinburgh for their support and assistance on the project.

Leasehold Tenure

Team members

Professor Kenneth Reid, Commissioner
John Dods, Project Manager
David Irvine, Legal Assistant

This is one of the topics included in our Sixth Programme which is being carried forward into the Seventh Programme. The project considers whether some categories of long lease should be converted into ownership.

In our Discussion Paper on Long Leases, published in 2001, we propose that ultra-long leases for more than 175 years should be converted into ownership. We also consider whether legislative protection is needed for residential ground leases granted for 50 years or more which would be too short to qualify under the main scheme and, if so, what form the protection should take.

The main part of our report was completed 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 aim to submit our report by the end of 2005.

Sharp v Thomson

Team members

Professor Kenneth Reid, Commissioner
John Dods, Project Manager
David Irvine, Legal Assistant

This project arises from a reference from Scottish Ministers in September 2000. It concerns the protection afforded to purchasers buying land from insolvent sellers.

In the case of *Sharp v Thomson* 1997 SC (HL) 66 a floating charge crystallised after the debtor company had granted a disposition of a flat but before the disposition had been registered. The House of Lords held that, despite the absence of registration, the flat did not form part of the property and undertaking of the company. Accordingly it was not attached by the floating charge.

This decision has been criticised both as to result and as to reasoning. In our Discussion Paper, published in July 2001, we suggest that the approach adopted by the House of Lords should be abandoned and that special legislative protection for purchasers should be introduced. Most consultees support our proposals.

Our main proposal has, however, been largely superseded by the decision in *Burnett's Trustee v Grainger* 2004 SC (HL) 19 where the House of Lords declined to apply *Sharp v Thomson* to ordinary personal insolvency. It remains for us to consider 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.

Trusts and Judicial Factors

Trusts

Team members

Professor Joe Thomson, Commissioner
Colin Tyre QC, Commissioner
David Nichols, Project Manager
Stuart Turner, Legal Assistant

This is a long term project which is being carried forward into our Seventh Programme.

We are taking the project forward in stages and so far have published three discussion papers seeking comments on proposals for reform. The first two Discussion Papers – on Breach of Trust and on Apportionment of Trust Receipts and Outgoings – were published in September 2003.

Trustees and Trust Administration

The third of our Discussion Papers, on Trustees and Trust Administration, was published in December 2004. The paper deals with various topics in the field of trusteeship and the administration of trusts. The main topics are -

- Decision-making by trustees and holding meetings.
- The scope of trustees' powers to appoint agents and delegation by trustees of their discretionary functions.
- The holding of trust property by nominees.
- Whether trustees should have the same general powers to manage and deal with the trust property that fully capable adults would have in relation to their own property. The trustees' powers would have to be exercised with proper care and in accordance with the trust purposes.

- Removal of a trustee by the court, the other trustees or the beneficiaries.
- Authorisation by the court to the trustees to distribute trust property so that they would not incur personal liability if the facts were not as they had reasonably believed or some unlikely contingency occurred later.
- Jurisdiction of the sheriff courts in applications relating to trusts.
- Advances of capital or income to beneficiaries.

Legal Personality for Trusts

We have begun to consider whether it would be advantageous to confer legal personality on a trust and, if so, how that might be arranged. Under one such scheme the trust would become a legal entity capable of owning and dealing with property. Trust property would be held in the name of the trust and contracts and other obligations would run in the name of the trust. The trustees would be the legal representatives or managers of the trust and would be liable to the trust and to the beneficiaries for the proper performance of their duties. However, trustees would not be personally liable for obligations of the trust or delictual claims against it unless they had undertaken such obligations personally or they had been at fault. As a preliminary step, we will discuss this topic with practitioners and academics to seek their comments on such a scheme.

We aim to publish a discussion paper by the end of 2005.

Variation and Termination of Trusts

We have also started work on the variation and termination of trusts. This part of the project will involve examination of: (a) the common law whereby a trust may be varied or brought to an end if all the beneficiaries are capable of agreeing and do agree; (b) section 1 of the Trusts (Scotland) Act 1961 which empowers the court to consent to a variation or termination on behalf of underage, incapable or

unborn future beneficiaries, or to authorise the renunciation of an alimentary liferent; and (c) the reorganisation of non-charitable public trusts. We aim to publish a discussion paper by the end of 2005.



*In discussion at a Commission meeting
(from left: Professor Reid, Professor Thomson and Mr Tyre)*

Judicial Factors

Team members

Professor Gerry Maher, Commissioner
Gillian Swanson, Project Manager
Katie Delap, Legal Assistant

Our Sixth Programme included a long term project to review and modernise the legislation relating to judicial factors. It is being carried forward into our Seventh Programme as a medium term project.

There has been no legislation dealing with this area of law since the Judicial Factors Acts in the late 19th century. At present the role and purpose of the office of judicial factor is neither clearly defined nor well understood. It would appear that the existing legislation is 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 is to clarify and simplify the legislation.

We plan to meet the Accountant of Court and those practitioners with experience in this area of law, with a view to seeking their assistance in developing proposals for reform.

We aim to publish a discussion paper by the middle of 2006.

Summary of progress on our law reform projects in 2004

PROJECT	ORIGIN	PUBLICATION OF DISCUSSION PAPER	OBJECTIVE FOR 2004	STATUS AT 31 DECEMBER 2004
Registration of Rights in Security by Companies	Reference from Department of Trade and Industry	DP No. 121 published October 2002	To submit report to Department of Trade and Industry in the first half of 2004	Project completed Report and draft Bill submitted July and published September 2004
Insanity and Diminished Responsibility	Reference from Scottish Ministers	DP No. 122 published January 2003	To submit report to Scottish Ministers in the first half of 2004	Project completed Report and draft Bill submitted May 2004 and published July 2004
Rape and Other Sexual Offences	Reference from Scottish Ministers			New reference Research underway
Interest on Debt and Damages	Reference from Scottish Ministers	DP No. 127 published January 2005	To publish a discussion paper by the end of 2004	Work on discussion paper completed
Limitation in Personal Injury Actions	Reference from Scottish Ministers			New reference Research underway
Damages for Psychiatric Injury	Reference from Scottish Ministers	DP No. 120 published August 2002	To submit report to Scottish Ministers by the end of 2004	Project completed Report and draft Bill submitted July 2004 and published August 2004
Unfair Terms in Contracts (Joint project with the Law Commission)	Reference from Department of Trade and Industry and Scottish Ministers	DP No. 119 published August 2002	To submit report to Department of Trade and Industry and Scottish Ministers by the end of 2004	Report and draft Bill completed

PROJECT	ORIGIN	PUBLICATION OF DISCUSSION PAPER	OBJECTIVE FOR 2004	STATUS AT 31 DECEMBER 2004
Land Registration	Sixth Programme, Item 4	DP No. 125 published February 2004	To publish first discussion paper in the first half of 2004 and a second discussion paper by the end of 2004	First discussion paper published February 2004 Work progressing on second discussion paper
Leasehold Tenure	Sixth Programme, Item 4	DP No. 112 published April 2001	To submit report to Scottish Ministers by the end of 2004	Report prepared but may need amendment as work progresses on the draft Bill
Sharp v Thomson	Reference from Scottish Ministers	DP No. 114 published July 2001	None set	Considering implications of <i>Burnett's Trustee v Grainger</i>
Trusts	Sixth Programme, Item 6	DP No. 123 and DP No. 124 published September 2003 DP No. 126 published December 2004	To publish third discussion paper on trustees and trust administration in the first half of 2004 To publish fourth discussion paper by the end of 2004	Discussion Paper published December 2004 Work progressing on fourth discussion paper Work started on fifth discussion paper
Judicial Factors	Sixth Programme, Item 3		None set	Further research being undertaken

Consolidation and Statute Law Revision

One of our functions is to undertake work on the consolidation and repeal of statutes. Much of the work is done jointly with the Law Commission for England and Wales.

Consolidation involves bringing together a number of statutes on a particular area of law into a single Act. In some cases it is necessary to make amendments to the provisions concerned so as to modernise the language and make the consolidated Act simpler. The Law Commissions' role is to recommend these amendments and to instruct the drafting of the consolidation Bill.

We have not undertaken any work on consolidation of Scottish (as opposed to UK) legislation since the publication in 2002 of our Report on the Consolidation of the Legislation relating to Salmon and Freshwater Fisheries in Scotland. Regrettably we have not yet developed a further programme of work on consolidation because the Scottish Executive has not been able to devote the necessary resources, particularly drafting resources, to support this area of work.

We remain of the view that consolidation is an essential element of the process of law reform. Consolidation gives statute law a more rational structure and makes it more accessible to those whom it affects. We made this point in our submission in August to the Subordinate Legislation Committee of the Scottish Parliament in relation to its Inquiry into the Regulatory Framework in Scotland.

We intend to discuss this issue again with the Executive in the coming months.

Consolidation

Team members

The Hon Lord Eassie, Commissioner
Susan Sutherland, Project Manager
Kate Mulligan, Legal Assistant

Consolidation of the legislation relating to wireless telegraphy

This is a joint project with the Law Commission.

During the early part of the year we assisted the Law Commission team in connection with preparation of the draft Bill and the Department of Trade and Industry on the draft consultation paper, both of which were issued for consultation in August. We consulted the Crown Office and the Scottish Executive on the draft Bill which seeks to consolidate six Acts dating back to 1949 concerning radio spectrum management. As the legislation being consolidated relates to matters which are reserved under the Scotland Act 1998, we have liaised closely with colleagues in the Office of the Solicitor to the Advocate General on the preparation of the draft Bill and on the handling of consultation in Scotland.

The consultation period ended on 28 October. The Department of Trade and Industry is considering the responses to the consultation with a view to finalising the Bill for introduction in the UK Parliament.

As this consolidation does not involve any substantive amendments to the existing law, there is no need for the Law Commissions to make any recommendations. For that reason there will be no joint report by the Commissions. The Bill will simply be presented to the UK Parliament for enactment.

Consolidation of the legislation relating to representation of the people

This is a joint project with the Law Commission. Although a draft Bill has been prepared, the project has been suspended since December 2003 to allow the Department for Constitutional Affairs to consider the implications of the Electoral Reform Commission's proposals in *Voting for Change*.

Statute Law Revision

Statute law revision involves the repeal of legislation that has become obsolete or otherwise unnecessary. Its purpose is to tidy up the statute book so as to make it easier to use.

The way we approach our work on statute law revision has had to be altered since devolution to take account of the constitutional changes. We continue to work with the Law Commission on joint projects, as we did prior to devolution. These deal with the repeal of UK legislation which relates to reserved matters under the Scotland Act 1998. They also include the repeal of provisions on matters that are devolved to the Scottish Parliament, and in some cases the repeal of Scottish local Acts, where it is sensible to include them as part of the repeal of UK Acts on particular areas of law.

In addition, our work involves the preparation of reports recommending the repeal of Scottish legislation on matters that are devolved to the Scottish Parliament. In view of the need to concentrate resources on our joint project with the Law Commission, we have not been able to make much progress this year with work on the first Scottish report. Depending on other priorities we hope to resume work on this project in 2005.

Eighteenth Statute Law (Repeals) Bill

Team members

The Hon Lord Eassie, Commissioner
Susan Sutherland, Project Manager
Kate Mulligan, Legal Assistant

Work has started in conjunction with the Law Commission on the next repeals Bill.

In the coming months we will be undertaking consultation with interested bodies regarding the Scottish aspects of the Law Commission's proposed repeals on reserved matters. We also intend to identify separate Scottish provisions for possible repeal with a view to consulting appropriate government departments and other interested parties.

Subject to the comments from consultees, the repeal proposals will be included in the next joint statute law revision report which is currently planned for 2008.

Implementation of our reports

Tenements (Scotland) Act 2004

The Tenements (Scotland) Act 2004 was passed by the Scottish Parliament on 16 September, received Royal Assent on 22 October and came into force on 28 November 2004. The Act implements our Report on the Law of the Tenement, which was published in March 1998.

The property law team worked closely with the Scottish Executive Bill team both prior to the introduction of the Bill and during its Parliamentary stages.

The Tenements (Scotland) Act is the third and final part of a package of property law reforms based on our work. This Act, together with the Abolition of Feudal Tenure etc. (Scotland) Act 2000 and the Title Conditions (Scotland) Act 2003 (the main provisions of which also came into force on 28 November 2004), make fundamental and far-reaching changes to property law and have considerable practical impact on all who own or rent property in Scotland.

Statute Law (Repeals) Act 2004

The Statute Law (Repeals) Act 2004 came into force on 22 July 2004. It implements our Seventeenth Report with the Law Commission on Statute Law Revision which was published in December 2003.

The Act repeals 68 whole Acts and removes obsolete provisions from over 400 other Acts. Some of these repeals relate exclusively to Scotland.

A member of our statute law revision team attended the Parliamentary proceedings in London along with the Law Commission team and provided briefing to the Committee on the Scottish aspects of the Bill.

Civil Partnership Act 2004

The Civil Partnership Act 2004, which received Royal Assent on 18 November 2004, implements recommendation 10 of our Report on Title to Sue for Non-Patrimonial Loss, published in August 2002. It entitles a same-sex cohabitant of a deceased person to sue for non-patrimonial and patrimonial loss suffered where his or her partner has died as a result of another person's delictual conduct.

Further information about implementation of our Reports is available on our website:
www.scotlawcom.gov.uk

Promoting law reform

One of our statutory functions is to promote law reform.

During the course of 2004 we continued to foster our links with the Scottish Executive and others including the Law Society of Scotland, various professional bodies and the university law schools. We maintained close contact with our colleagues in the Law Commission in London, not only on our joint projects but more generally in connection with development of our Seventh Programme and other matters relating to our law reform work.

Draft Criminal Code

Over the course of the last few years we have been taking an interest in the work of a group of academics who have been working on a draft criminal code for Scotland. The group comprises Professor Eric Clive CBE (Edinburgh University), Professor Pamela Ferguson (Dundee University), Professor Christopher Gane (Aberdeen University) and Professor Alexander McCall Smith (Edinburgh University). Professor Sir Gerald Gordon QC has also been involved in the work of the group.

In view of our statutory role in relation to codification we considered that a wide-ranging debate on the draft code would be desirable. For that reason we published the draft code for consultation on behalf of the group in September 2003.

All consultation responses have been passed to the authors of the code for consideration. In addition, we have passed to the Scottish Executive comments received on the general question whether the criminal law should be codified. Perhaps not surprisingly, opinion among consultees was divided on the principle of codification. Some were in favour of codification because it would make the law more coherent and accessible and easier to amend. Others considered that the principles of Scots criminal law were well established and that the flexibility inherent in the common law should be retained. We understand that the Executive is

considering what action might be taken to promote further debate and we have indicated our willingness to be involved in any future deliberations.

International links, conferences and other events in 2004

Throughout the year we were pleased to welcome a number of visitors to the Commission and to participate in various conferences and seminars on law reform topics. Of those visits and conferences we would mention -

- In April the Chairman and Chief Executive attended the Australasian Law Reform Agencies Conference in New Zealand on the topic of "Access to Justice: Rhetoric or Reality?"
- In September, the Chairman attended the 65th Biennial Congress of the "Deutscher Juristentag" (German Jurists' Association) in Bonn and presented a paper on the constitution and work of the Commission and the system of law reform in the UK.
- Mrs Jean Kyazze of the Uganda Law Reform Commission visited us for a week in October following a two-week visit to the Law Commission in London. The purpose of her visit was to learn about law reform generally and in particular about the interaction of Scots and English law and the impact of devolution.
- Professor Thomson presented a paper on "Reform of Trustees and Trust Administration" at the Association of Pension Lawyers Scottish Group seminar in October.

Resources and management

Commissioners

The Commission has three full-time and two part-time Commissioners appointed by Scottish Ministers. The current Commissioners are –

The Hon Lord Eassie, Chairman (part-time)

Professor Gerry Maher QC

Professor Kenneth Reid

Professor Joe Thomson

Mr Colin Tyre QC (part-time)

Drafting resources

Our reports generally include draft legislation in the form of a Bill that would give effect to our recommendations. Most of our Bills are prepared by the Office of the Scottish Parliamentary Counsel in Edinburgh, although occasionally we also employ the assistance of members of the drafting panel for the Scottish Parliament's Non-Executive Bills Unit.

Recruitment

As in recent years, we took part in the law fair at the University of Strathclyde in February. For the first time we also took part in the University of Edinburgh law fair. These events coincided with the beginning of our recruitment campaign for legal assistant posts arising in the autumn.

We participated also in the University of Aberdeen law fair held in October. Although the fair took place after the close of our recruitment campaign, it enabled us to increase awareness about employment opportunities at the Commission. This was the first time that we had been represented at one of these events outwith the central belt and we hope to follow this up in 2005 by attending law fairs at both Aberdeen and Dundee.



Three of our legal assistants

Commission staff as at 31 December 2004

Commissioners are assisted by the Chief Executive of the Commission and legal and non-legal staff. The Chief Executive and project managers are qualified lawyers and are members of the Government Legal Service for Scotland (GLSS). Our legal assistants are law graduates employed on fixed term contracts. They undertake much of the research and comparative law work. We also take on trainee solicitors for six month periods as part of their training with the GLSS.

We have one qualified librarian and seven support staff who provide administrative, IT, secretarial and typing services.

Chief Executive

Jane McLeod

Project Managers

Alastair Clyde
John Dods
David Nichols
Susan Sutherland
Gillian Swanson

Trainee Solicitor

Dawn Archer

Legal Assistants

Katie Delap
David Irvine
Kate Mulligan
Stuart Turner

Librarian

Nick Brotchie

Personal Secretaries

Joan Melville
Heather Ryan

Office and IT Systems Manager

Lesley Young

Administrative and Typing Services Staff

Avril Dryden
Jackie Palkowski
Iain Ritchie
Graeme Young



General Office and typing staff

Website

In April our website was redesigned as part of our corporate identity review. In the process of redesign, we moved to a single accessible site meeting Level A of the W3C Web Content Accessibility Guidelines 1.0.

We now make available on the website an electronic response form for each of our discussion papers and would encourage consultees to make use of this on-line facility.



Image from our website

Library

Our Library has continued to develop and to provide essential support for our research work. The extensive collection of printed resources is backed up by structured use of the information available on the internet, both public and commercially hosted. For example, we have moved away from CD-ROM based legal information to using fully online databases, including core sources such as Westlaw and the Statute Law Database, provided to us through LINETS (the Legal Information Network for Scotland).

Freedom of information

The Freedom of Information (Scotland) Act 2002 came fully into force on 1 January 2005. The aim of the Act is to increase openness and accountability in government and across the public sector by conferring a public right to access information held by Scottish public authorities, including the Commission.

In terms of the Act each public authority has had to prepare a publication scheme setting out the classes or types of information that it proactively provides or will provide. Our publication scheme was approved by the Scottish Information Commissioner in September and is available on our website.

Our publication scheme covers a wide range of information about the Commission and its work, much of which we already made available on our

website or on request, for example our publications and news releases. In addition the scheme lists new material that we are making available for the first time, such as minutes and papers for Commission meetings relating to projects completed after November 2004.

The scheme has been approved until September 2008, although we intend to review it in November 2005 and annually thereafter.

In addition to work on our publication scheme, we have put in place arrangements for dealing with any requests for information not covered by the scheme. We have also set up a dedicated FOI e-mail address for enquiries.

As part of our work on freedom of information we have been undertaking a review of our records management systems to assist us to meet our duties under the Act. This work will continue during 2005.

Equality and ethnic monitoring

The Race Relations Act 1976 requires us to undertake ethnic monitoring of staff employed directly by the Commission and to publish the results. This duty applies only in relation to our legal assistants whom we recruit directly on fixed term contracts. The results of the monitoring for legal assistants appointed in 2004 are shown below.

ETHNIC GROUP	APPLICATIONS	INVITED FOR INTERVIEW	WITHDRAWN BEFORE INTERVIEW	OFFERED POST	ACCEPTED POST
White	40	20	3	4	4
Mixed	-	-	-	-	-
Asian	1	-	-	-	-
Black	-	-	-	-	-
Total	41	20	3	4	4

Law reform publications planned for 2005

At the time of publication of this Report we have issued three publications in 2005 -

- **Discussion Paper on Interest on Debt and Damages** (published 17 January)
- **Seventh Programme of Law Reform** (published 21 February)
- **Joint Report on Unfair Terms in Contracts** (published 24 February)

We plan to complete a further seven publications during the course of 2005 -

- **Discussion Paper on Rape and Other Sexual Offences**
- **Discussion Paper on Limitation in Personal Injury Actions**
- **Two Discussion Papers on Land Registration**
- **Report on Long Leases**
- **Discussion Paper on Variation and Termination of Trusts**
- **Discussion Paper on Legal Personality for Trusts**

Advisory groups

Registration of Rights in Security by Companies

Robin Clarkson, *Solicitor*
R Edward M Davidson, *Solicitor*
Professor George L Gretton, *University of Edinburgh*
Bruce R Patrick, *Solicitor*
Charles Smith, *Solicitor*

Rape and other Sexual Offences

Janette de Haan, *Women's Support Project*
Sandy Brindley, *Rape Crisis Scotland*
Frances McMenamin QC
Iain Fleming, *Solicitor*
James Chalmers, *University of Aberdeen*
Brian Dempsey, *Outright Scotland and SCOLAG*
Tim Hopkins, *Equality Network*
Stephanie Whitehead, *Brook Organisation*

Interest on Debt and Damages

John Downie, *Federation of Small Businesses in Scotland*
Dr Lucy O'Carroll, *Economist, Royal Bank of Scotland*
David Stevenson, *Solicitor*
Sheriff James Taylor, *Glasgow Sheriff Court*
Michael Wood, *Solicitor*

Limitation in Personal Injury Actions

Robert Carr, *Solicitor*
David Johnston, *Advocate*
Ranald Macdonald, *Scottish Health Service Central Legal Office*
Robert Milligan, *Advocate*
Fiona Moore, *Solicitor*

Damages for Psychiatric Injury

Dr Pamela Abernethy, *Solicitor*
Dr Douglas Brodie, *University of Edinburgh*
Dr Chris Freeman, *Royal Edinburgh Hospital*
Dr Ian Mackay QC
Ishbel McLaren, *Solicitor*
Peter G Milligan, *Advocate*
Professor Barry Rodger, *University of Strathclyde*

Land Registration

Professor Stewart Brymer, *Solicitor*
Professor George L Gretton, *University of Edinburgh*
Professor Roderick Paisley, *University of Aberdeen*
Professor Robert Rennie, *University of Glasgow*

Leasehold Tenure

Professor Stewart Brymer, *Solicitor*
Angus McAllister, *University of Paisley*
Somered Notley, *Solicitor*
Professor Robert Rennie, *University of Glasgow*

Trusts

Alan Barr, *Solicitor, University of Edinburgh*
Robert Chill, *Solicitor*
Andrew Dalgleish, *Solicitor*
Frank Fletcher, *Solicitor*
Alexander McDonald, *Solicitor*
Simon A Mackintosh, *Solicitor*
James McNeill QC
Allan Nicolson, *Solicitor*
Professor Kenneth Norrie, *University of Strathclyde*
Scott Rae, *Solicitor*
Mark Stewart, *Secretary, Society of Trust and Estate Practitioners (Scotland)*
Alister Sutherland, *Consultant Solicitor*

Running costs

The Scottish Executive Justice Department provides most of the Commission's funding although our projects on Registration of Rights in Security by Companies and Unfair Terms in Contracts were partly funded by the Department of Trade and Industry. Our running costs in 2004 were offset by payment received from Skills for Justice for use of part of our office accommodation.

EXPENDITURE	YEAR TO 31 DECEMBER 2004		YEAR TO 31 DECEMBER 2003	
	£000	£000	£000	£000
Salaries – Commissioners (including national insurance contributions, superannuation payments and pensions to former Commissioners)	548.1		508.0	
Salaries – legal staff (including national insurance contributions, superannuation payments and consultants' fees and expenses)	487.4		466.5	
Salaries – support staff (including national insurance contributions and superannuation payments)	171.7	1207.2	171.4	1145.9
Accommodation (including maintenance, rates and utilities)		69.3		65.9
Printing and publishing (including costs of binding, library purchases, machinery maintenance, photocopying, reprographic services and stationery)		74.0		70.3
Telephone and postage		15.0		12.7
Travel and subsistence		11.5		9.5
Miscellaneous (including training, office services and hospitality)		25.8		8.9
Total		1402.8		1313.2

Scottish Law Commission www.scotlawcom.gov.uk

The Commission is a public body established under the Law Commissions Act 1965.

Our main function is to keep the law of Scotland under review and when necessary to recommend reforms. Our law reform projects involve -

- **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 responses from consultees**
- **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 is for the Scottish Parliament or in some cases the UK Parliament at Westminster

For more information about the Commission please contact:

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It may also be purchased from TSO Scotland Bookshop.

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