



Scottish Law Commission
promoting law reform

(SCOT LAW COM No 194)

annual report | 2003



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 | 2003



Scottish Law Commission

promoting law reform

Annual Report 2003

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 2003.

Ronald D. Mackay

RONALD D MACKAY, *Chairman*

Gerard Maher
Kenneth G C Reid

GERARD MAHER

KENNETH G C REID

Joseph M Thomson

JOSEPH M THOMSON

Colin Tyre

COLIN TYRE

Jane L McLeod

Miss Jane L McLeod, Chief Executive
8 March 2004

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

April 2004

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Chairman's foreword



It gives me and my fellow Commissioners great pleasure to present to the Minister for Justice, and her ministerial colleagues, the Scottish Law Commission's Annual Report for 2003.

The year has been a productive one. We published three discussion papers and four reports, two of which were joint reports by ourselves and the Law Commission for England and Wales. One of the joint reports contained proposals for reform of the law of partnership, which has been a major project. In that connection I would like to record our gratitude to Patrick Hodge QC for liberally and gratuitously giving of his time, after his term as Commissioner ended in April 2003, in order to see this important project through to completion. We have greatly valued Patrick's services as a Commissioner. His successor is Colin Tyre QC and it was a great pleasure for me to be able to welcome him on board.

During the year we have also made progress in preparing the Seventh Programme of Law Reform, to commence in 2005 on the expiry of the current Programme.

We have embarked on the initial round of consultation on our provisional ideas for the new Programme and will shortly consult more widely in light of the responses to that first consultation. We much appreciate views on our proposals and suggestions of other areas of the law which may merit examination and reform.

There has been a much welcomed improvement in the availability of the services of Scottish Parliamentary Counsel to express our proposals in the shape of draft legislation but the scarcity of drafting resources is still causing some delay. It is unfortunate that the Executive is unable to provide the necessary resources to support us in undertaking work on the consolidation of existing legislation, which I regard as a very important function of the Commission.

As in previous years, this annual report notes the extent to which steps have been taken during the year to implement some of our earlier recommendations. It goes without saying that the ultimate usefulness of our work depends on the willingness of government to translate our proposals into legislation and we would warmly welcome recognition of the need to ensure a regular space for law reform measures within the understandably crowded parliamentary programme.

Finally, I would like to pay tribute to the dedication and hard work of all of the staff of the Commission and my fellow Commissioners during the year.

Ronald D. Mackay

THE HON LORD EASSIE
Chairman

Summary of the year

Publications in 2003

The table below lists our publications this year. In addition to our annual report for 2002, we published three discussion papers and four reports, two of which were joint reports with the Law Commission for England and Wales. We also published a consultation paper on codification of the criminal law of Scotland on behalf of a group of academic lawyers.

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 Insanity and Diminished Responsibility DP No. 122	24 January 2003
Thirty-Seventh Annual Report 2002 Scot Law Com No. 189	27 March 2003
Report on Law of the Foreshore and Sea Bed Scot Law Com No. 190	31 March 2003
Report on Irritancy in Leases of Land Scot Law Com No. 191	25 June 2003
Discussion Paper on Breach of Trust DP No. 123	3 September 2003
Discussion Paper on Apportionment of Trust Receipts and Outgoings DP No. 124	3 September 2003
Draft Criminal Code for Scotland, Consultation Paper (Not included in our numbered series)	10 September 2003
Report on Partnership Law (Joint report with the Law Commission) Scot Law Com No. 192	18 November 2003
Statute Law Revision: Seventeenth Report Draft Statute Law (Repeals) Bill (Joint report with the Law Commission) Scot Law Com No. 193	16 December 2003

Seventh Programme of Law Reform

Towards the end of the year we presented provisional proposals for our Seventh Programme of Law Reform to the Scottish Executive and to a first group of consultees for comment.

The provisional programme covers some topics which we intend to carry forward from our current programme. In addition, it includes proposals to review the law on assignation of, and security over, incorporeal moveable property, such as book debts. In relation to the criminal law, we propose a project on the law of provocation, self-defence and coercion, as a follow up to our current project on insanity and diminished responsibility.

In December Commissioners and the Secretary had a meeting with representatives of the Law Society of Scotland to discuss the proposed topics and to consider other areas of Scots law that we might include in the programme.

We will be undertaking wider consultation on the programme during the first half of 2004.

New projects

Interest on debt and damages

In November we received a new reference from Scottish Ministers to

“Examine the law of Scotland relating to interest on claims for payment of money arising from contractual and other obligations, including claims within the jurisdiction of tribunals and courts or submitted for decision to arbitration, adjudication or some other form of dispute resolution, and to make recommendations as to possible reform of the law.”

Colin Tyre QC will be the lead Commissioner on the project and he will be taking work forward in the coming months, with a view to publishing a discussion paper by the end of 2004.

Law reform projects

The main part of our work concerns our law reform projects. Some of the projects are carried out under a programme of law reform, approved by Scottish Ministers. We are currently working on projects under our Sixth Programme of Law Reform.

Our other law reform projects arise from references, usually from Scottish Ministers, but sometimes from a UK government department, requesting us to review an area of law and if necessary make recommendations for reform.

The main work on each project is undertaken by teams, consisting of a Commissioner, a legally qualified project manager and one or more legal assistants. The teams are often assisted by consultants and advisory groups whose expertise helps us to ensure that our recommendations for reform are workable.

Consultation is an essential part of law reform work. It enables us to ensure that our recommendations take account of a wide range of views from organisations and individuals with practical experience in particular areas of the law. We are aware of the pressures on bodies to respond to consultation exercises and for that reason we are particularly grateful to all those who take the time to submit comments on our proposals.

As part of the consultation process we sometimes hold seminars before we publish a discussion paper. This serves a dual purpose. It raises awareness of our work on a particular area of law and enables people with expertise or practical experience of the law to share their knowledge with us and to comment on our provisional ideas for reform. We have found seminars to be a very effective way of obtaining early feedback on our work.

From time to time we submit articles on our law reform projects for inclusion in legal journals, with the aim of promoting awareness of our work and encouraging responses to our proposals for reform.



Professor Joe Thomson

For example, an article by Professor Thomson on “Unravelling Trust Law: Remedies for Breach of Trust” was published in the *Juridical Review* and in November an article by David Nichols on our review of trust law was published in the *Journal of the Law Society of Scotland*.

Progress this year

During 2003 our law reform work covered a wide range of topics as outlined below.

Commercial Law

Partnership

Team Members

Patrick Hodge QC,
Commissioner (until end of April 2003)
Gillian Swanson, Project Manager
Louisa Wallace, Trainee Solicitor

This is a joint project with the Law Commission for England and Wales which stemmed from a reference from the Department of Trade and Industry.

The Commissions' Joint Report on Partnership Law was published in November. It recommends major changes to the Partnership Act 1890 and the Limited Partnerships Act 1907.

The report's recommendations seek to retain the main advantages of a business partnership - flexibility and informality. The report also addresses the problem of instability, which arises in cases where there are changes in the membership of the partnership. To remedy this problem the report recommends a clarification of the concept of separate legal personality for partnerships in Scotland and the introduction of that concept in England and Wales. As a result the partnership would not automatically dissolve on any change of partners and would be able to enter contracts and hold property. However, partners would continue to be personally responsible for the obligations of the partnership and would owe a duty of good faith towards the partnership and one another.

Our policy has been to "think small first".

Larger partnerships are likely to know the kind of agreement they wish to enter into and will have access to appropriate advice. Smaller partnerships may not. The draft Bill which accompanies the report gives guidance in the form of a default code that will apply unless the partners choose to vary it. The default code deals with matters that partners would expect to be covered by a partnership agreement, such as the sharing of profits and losses, how differences among partners are to be settled and the financial entitlement of a partner on leaving the partnership.

When the partnership is broken up the partners themselves will usually carry out the winding up of a solvent partnership. However, where differences arise, our recommendations enable interested parties to appoint a new official, a partnership liquidator, to wind up the partnership.

The report also clarifies the law on limited partnerships which were introduced by the 1907 Act. These differ from general partnerships in that there must be at least one partner who does not wish to take part in the management of the partnership but merely to invest in it. That partner's capital is at risk to the extent of his or her investment. With one exception, we recommend that separate legal personality should apply to limited partnerships too.

Registration of Rights in Security by Companies

Team Members

The Hon Lord Eassie, Commissioner
Gillian Swanson, Project Manager
Louisa Wallace, Trainee Solicitor

The Department of Trade and Industry referred this project to us in May 2002 as part of its wider programme of reform of company law.

The purpose of the project is to review the current scheme relating to the registration and priority of rights in security as it applies to companies registered in Scotland and to security granted under Scots law by overseas companies and companies registered in England and Wales.

The Law Commission for England and Wales received a similar although more extensive reference.

The current scheme for registration of rights in security granted by companies is widely accepted as being unsatisfactory. One of the main problems is that the Register of Charges is incomplete and unreliable. Not all forms of security require to be registered and the list of those that do need to be registered is often seen as illogical and out of date. The current legislation provides for a period of 21 days within which particulars of a security are to be registered. This results in an "invisibility period" during which a search of the Register will not disclose all registrable securities.

Another problem concerns unnecessary duplication. The current legislation requires registration at Companies House in Edinburgh of securities which are registered in a specialist register, such as the Shipping Register (for ship mortgages) and the Land Register of Scotland (for securities over land).

A further problem is that the sanctions applied in the event of a charge not being registered in time are thought to be unsatisfactory.

Our Discussion Paper on Registration of Rights in Security by Companies was published in October 2002, inviting comments by the end of January 2003. It proposed reforms in three main areas: floating charges, standard securities and other registered rights in security, and assignments.

One of our proposals was that floating charges should continue to be registrable at Companies House but that registration should be constitutive of the real right. This would be consistent with the usual role of registration in Scots law and would do away with the need for sanctions for non-registration. Registration would be the priority point for ranking.

We also proposed that standard securities and other securities, which are already publicised in a specialist register, should no longer require to be registered at Companies House, thereby greatly simplifying the current registration scheme. Another proposal was that assignments in security should cease to be registrable.

We received a number of helpful responses to our discussion paper which we have taken into account in developing the policy for our report. In addition to the responses from consultees, the team has been assisted by the Registrar of Companies, the Keeper of the Registers and by David Guild, Advocate, who was appointed in 2002 as consultant to the project.

We have also had discussions with the Department of Trade and Industry and the Scottish Executive on some of our proposed recommendations which, in our view, raise devolution issues. In course of these discussions, the Department of Trade and Industry indicated that the report was not required by the original target date of December 2003.

We have made good progress with our report which we hope to submit in the first half of 2004.

Criminal Law

Insanity and Diminished Responsibility

Team Members

Professor Gerry Maher, Commissioner

Susan Sutherland, Project Manager

Saira Kapasi, Legal Assistant

This project arises from a reference from Scottish Ministers.

In January 2003 we published our Discussion Paper on Insanity and Diminished Responsibility inviting comments on our proposals to introduce statutory tests to replace the common law rules on diminished responsibility and on insanity as a defence and plea in bar of trial.

We received responses to our proposals from consultees representing the areas of psychiatric medicine, mental health, the legal profession, and academics in criminal law in universities in Scotland and abroad. The comments received have been extremely useful to us in considering the policy approach for our report.

During the course of the year we have had meetings and further discussions with mental health experts on the proposed tests for the defence and pleas and with the Crown Office on matters of criminal procedure in relation to mentally disordered offenders.

In the latter part of the year we have been working along with Scottish Parliamentary Counsel on the draft Bill which will be

annexed to our report. Preparation of the Bill has proven to be more time-consuming than we had anticipated, mainly due to the complexities of the Criminal Procedure (Scotland) Act 1995 and the amendments made to it by recent legislation. As a result, we are now aiming to complete the report and draft Bill in the first half of 2004.

Law of Obligations

Damages for Psychiatric Injury

Team Members

Professor Joe Thomson, Commissioner

David Nichols, Project Manager

Sheila Skinner, Legal Assistant

Psychiatric injury caused by another person is one of the topics which Scottish Ministers have asked us to examine.

We published our Discussion Paper on Damages for Psychiatric Injury in August 2002, inviting comments by the end of November 2002.

The discussion paper set out a number of proposed changes to the existing law. For example, at present a person claiming damages for psychiatric injury must establish that he or she has a medically recognised psychiatric illness or disorder. We proposed that this requirement should remain but asked for comments on whether a psychiatric injury should be significantly disabling as well as medically recognised in order to give rise to an entitlement to damages.

Damages are only awarded under the current law if the psychiatric injury arises from a sudden shock, for example, the impact of a horrifying event or experience. This restriction means that, for example,

parents seeing their child die over the course of a period of time cannot claim damages for any resulting psychiatric injuries. We therefore proposed that the restriction should be abolished.

Among our other proposals we invited comments on whether it should be possible to claim damages for unforeseen psychiatric injury only if the victim suffered a physical as well as a psychiatric injury.

We received a number of responses from both the medical and legal professions. The responses showed agreement amongst consultees on certain issues, such as the proposal to abolish the shock requirement. However, there was a lack of consensus on the major issue of liability for "secondary" victims, that is, persons who suffer a psychiatric disorder from witnessing or learning about an injury to another person.

We have had to reconsider our policy approach in the light of consultation and further discussion. Our objective is to replace the present rigid rules (which are difficult to justify and produce harsh anomalies) by a more flexible approach. However, controls other than foreseeability seem necessary in order to keep claims for damages within acceptable limits, particularly in the case of liability to a "secondary" victim. We have found balancing these policy considerations a difficult task.

The additional work involved has delayed completion of our report, and we are now aiming to submit it by the end of 2004.

Irritancy in Leases of Land

Team Members

Professor Joe Thomson, Commissioner
Judith Morrison, Project Manager
Beth Elliot, Legal Assistant

This project derived from our Sixth Programme of Law Reform. We completed work on it in June this year when our Report on Irritancy in Leases of Land was published.

Irritancy is a remedy which entitles a landlord to terminate the lease prematurely on account of the tenant's breach of contract. It can also be used on the occurrence of events which have been specified in the contract, typically the tenant's insolvency. At present the law of irritancy in commercial leases is regulated by sections 4-7 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1985. The present controls do not extend to agricultural or residential leases. The current law was criticised by the House of Lords in *Dollar Land (Cumbernauld) Ltd v CIN Properties Ltd* 1998 SC (HL) 90.

The purpose of our review was to assess whether the current law strikes the right balance between providing adequate protection to tenants and retaining an effective remedy for breach of contract.

The report recommended that irritancy should be retained, but the exercise of a right to terminate any lease should be controlled more firmly than at present. The report also recommended that the provisions in the 1985 Act should be replaced by a new comprehensive scheme of statutory regulation across all leases of land.

Unfair Terms in Contracts

Team Members

Professor Joe Thomson, Commissioner
Gillian Swanson, Project Manager
Louisa Wallace, Trainee Solicitor

This is a joint project with the Law Commission for England and Wales. It arises from references given to us in 2001 by the Department of Trade and Industry and by Scottish Ministers.

The existing law on unfair contract terms is governed by the Unfair Contract Terms Act 1977 and the Unfair Terms in Consumer Contracts Regulations 1999. The legislation is intended to protect consumers from being caught out by small print in contracts. It is also important in contracts between businesses. However, both the 1977 Act and 1999 Regulations are complex and in need of clarification.

We issued a joint consultation paper with the Law Commission in August 2002 seeking comments on possible reform of the legislation. The main proposal was that the existing legislation should be replaced by a single statute, which should be drafted in clearer and more accessible language in order to make it more user-friendly.

In developing the policy for our report, we have taken account of the responses from consultees and views expressed at a seminar in July this year hosted by the Society for Advanced Legal Studies in London to discuss the policy on small businesses.

Due to demands on drafting resources in London we have had to change the timetable for the project and now hope to submit the report and draft Bill to the Department of Trade and Industry and Scottish Ministers by the end of 2004.

Property Law

Foreshore and Sea Bed

Team Members

Professor Joe Thomson, Commissioner
Judith Morrison, Project Manager
Beth Elliot, Legal Assistant

Scottish Ministers referred this project to us towards the end of 1999. We completed work on it in March 2003 when our report was published.

The report recommended that the exercise of public rights over the foreshore and sea bed, under the common law, should be abolished and replaced with statutory rights. These rights, taken together with access rights under the Land Reform (Scotland) Act 2003, would preserve the current extent of the common law rights.

In addition, the report recommended that, reflecting common social practice, the statutory rights exercisable on the foreshore should also be exercisable on areas of the shore above or landward of the foreshore. The statutory rights would be held directly by the public and not by the Crown on their behalf. As with access rights under the 2003 Act, the local authority would be under a duty to protect the public rights although an individual could take action to vindicate them in the sheriff court or Court of Session.

The report also included recommendations on the extent of Crown ownership of the foreshore and sea bed; crofters' rights to take seaweed from the foreshore; the precedence of udal titles to the foreshore in Orkney and Shetland; and competing grants derived from the Crown.

Land Registration

Team Members

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

Our current programme of law reform includes a project to review the Land Registration (Scotland) Act 1979.

Difficulties have arisen in practice with the 1979 Act, which has been the subject of quite extensive litigation. One of the main problems with the Act is that, although it introduced radical changes, it lacks a robust conceptual framework. As a result, it is difficult to deal with matters on which there is no specific provision.

We intend to issue two discussion papers on land registration. The first paper entitled Land Registration: Void and Voidable Titles (published in February 2004) explores the theoretical basis of registration of title from the point of view of policy and technique. It considers the fundamentals of the system and lays down the foundations for consideration of the more practical issues, which will be dealt with in our second paper, which we hope to publish by the end of 2004.

We intend to carry the project forward into our Seventh Programme of Law Reform. Depending on the issues raised on consultation and the availability of drafting resources, we hope to submit our report and draft Bill to Scottish Ministers by the end of 2005.

We are grateful to the Registers of Scotland and to our consultant Professor George Gretton

of the University of Edinburgh for the support and assistance that they have given us during the year.

Leasehold Tenure

Team Members

Professor Kenneth Reid, Commissioner
John Dods, Project Manager
Alexandra Lush, Legal Assistant

Leasehold tenure is another topic included in our Sixth Programme of Law Reform. The project is considering whether some categories of long lease should be converted to ownership.

Our Discussion Paper on Long Leases was published in April 2001. The paper proposed that ultra-long leases for more than 175 years should be converted into ownership. The proposed scheme followed closely the scheme for conversion of feus introduced by the Abolition of Feudal Tenure etc. (Scotland) Act 2000.

We also sought comments on a second conversion scheme (modelled on the scheme in the Long Leases (Scotland) Act 1954) for residential ground leases granted for 50 years or more which would be too short to qualify under the main scheme. The paper considered whether, as an alternative to a second conversion scheme, tenants of such leases would be better served by a form of security of tenure, such as an extension of the lease for a fixed period.

We completed work on the main part of our report in 2002. However, due to problems in obtaining drafting resources, we have not been able to complete work on the draft Bill which will accompany it. Although some drafting resources were made available in 2003, much work remains to be done. Depending on the continued availability of drafting resources, we are aiming to submit the report by the end of 2004.

Sharp v Thomson

Team Members

Professor Kenneth Reid, Commissioner

John Dods, Project Manager

Alexandra Lush, Legal Assistant

This project derives from a reference from Scottish Ministers, which we received in September 2000.

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. Despite the absence of registration, the flat was held not to form part of the property and undertaking of the company. Accordingly, it was not attached by the floating charge.

This decision of the House of Lords has been criticised both as to result and as to reasoning. In our discussion paper, published in July 2001, we suggested that the approach adopted by the House of Lords should be abandoned and that special legislative protection for purchasers should be introduced in its place. The consultation period ended on 31 October 2001 and most consultees supported our proposals.

Our first proposal has largely been superseded by *Burnett's Tr v Grainger* where, in a decision handed down on 4 March 2004, the House of Lords declined to apply *Sharp v Thomson* to ordinary personal insolvency. The question of protection for purchasers now remains to be considered in light of the new decision.

Trusts and Judicial Factors

Trusts

Team Members

Professor Joe Thomson, Commissioner

David Nichols, Project Manager

Stephen Waclawski, Legal Assistant

Trust law is one of the topics in our current programme of law reform.

We are taking the project forward in phases. The intention is to publish a number of separate discussion papers on different aspects of trust law.

In September 2003 we published the first two discussion papers - on Breach of Trust and on Apportionment of Trust Receipts and Outgoings.

Breach of Trust

Breaches of trust can arise in many different situations. One type of breach occurs when trustees do something that is not authorised either by the terms of the trust deed or by the general law. For example, trustees may make over trust property to someone other than the true beneficiary. With some minor exceptions, trustees are currently liable for this type of breach even though they acted honestly and in good faith. This rule may seem unduly harsh. The discussion paper invited comments on whether trustees should cease to be liable if they acted in good faith and, after taking all reasonable steps and making all reasonable enquiries, believed that their actions were authorised.

The discussion paper also invited comments on our proposals in relation to situations where trustees commit a breach of trust by carrying out authorised acts carelessly. It also asked for views on whether trustees should be able to protect themselves against personal liability by means of immunity clauses or obtaining insurance at the trust estate's expense.

Another type of breach of trust involves trustees dealing in a personal capacity with the trust and the trust estate. The discussion paper proposed that such a dealing should not be treated as a breach provided it was at fair market value. The paper also raised a number of issues relating to remuneration of trustees.

Apportionment of Trust Receipts and Outgoings

Where a trust has different classes of beneficiaries the trustees have to apportion payments made to or by the trust estate between the various classes. The current rules on apportionment are complex and sometimes fail to achieve a fair balance among the various classes of beneficiaries.

Our discussion paper set out proposals to deal with these anomalies. We proposed that the trustees should have a discretionary power to apportion any receipts or outgoings of the trust estate so as to maintain a fair balance among the various classes of beneficiary.

We invited comments on both discussion papers by 31 December 2003. We will be considering the responses early in 2004.

Trustees and Trust Administration

We have been working on a third discussion paper dealing with trustees and trust administration. It will make proposals about decision making by trustees; appointment by trustees of agents and nominees; appointment, resignation and removal of trustees; the role of the courts in trust administration; and authorising advances of capital to beneficiaries. We are planning to publish the discussion paper in the first half of 2004.



*In discussion at a Commission meeting
(from left: Professor Reid, Miss McLeod and the Hon Lord Eassie)*

Legal Personality for Trusts

Towards the end of the year we started work on our fourth discussion paper, which will deal with the question whether trusts should have legal personality. The aim is to publish the paper by the end of 2004.

Judicial Factors

Team Members

Professor Gerry Maher, Commissioner
Gillian Swanson, Project Manager
Alexandra Lush, Legal Assistant

Our Sixth Programme of Law Reform includes a project to review the law relating to judicial factors.

We have undertaken initial research and had preliminary meetings to discuss the subject with the Accountant of Court and the Law Society of Scotland.

The next stage of the project will involve the development of proposals for consultation. These will be included in a discussion paper which, depending on resources, we hope to publish during 2005.

Summary of progress on our law reform projects in 2003

PROJECT	ORIGIN	PUBLICATION OF DISCUSSION PAPER	OBJECTIVE FOR 2003	STATUS AT 31 DECEMBER 2003
Partnership (Joint project with the Law Commission)	Reference from Department of Trade and Industry	DP No. 111 published September 2000 and DP No. 118 published October 2001	To submit report to Department of Trade and Industry in the summer of 2003	Project completed - Report (Scot Law Com No. 192) published November 2003
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 by the end of 2003	Report and draft Bill being prepared with a view to submission in the first half of 2004
Insanity and Diminished Responsibility	Reference from Scottish Ministers	DP No. 122 published January 2003	To submit report to Scottish Ministers by the end of 2003	Report and draft Bill being prepared with a view to submission in the first half of 2004
Damages for Psychiatric Injury	Reference from Scottish Ministers	DP No. 120 published August 2002	To submit report to Scottish Ministers in the summer of 2003	Report and draft Bill being prepared with a view to submission by the end of 2004
Irritancy in Leases of Land	Sixth Programme, Item 3	DP No. 117 published October 2001	To submit report to Scottish Ministers in the first half of 2003	Project completed - Report (Scot Law Com No. 191) published June 2003
Unfair Terms in Contracts (Joint project with the Law Commission)	References 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 2003	Report and draft Bill being prepared with a view to submission by the end of 2004
Foreshore and Sea Bed	Reference from Scottish Ministers	DP No. 113 published April 2001	To submit report to Scottish Ministers early in 2003	Project completed - Report (Scot Law Com No. 190) published March 2003

PROJECT	ORIGIN	PUBLICATION OF DISCUSSION PAPER	OBJECTIVE FOR 2003	STATUS AT 31 DECEMBER 2003
Land Registration	Sixth Programme, Item 4		None set. Project to be carried forward into Seventh Programme	First discussion paper to be published February 2004. Second discussion paper to be prepared with a view to publication by the end of 2004
Leasehold Tenure	Sixth Programme, Item 4	DP No. 112 published April 2001	None set due to lack of drafting resources	Report has been prepared, but will need to be amended. Draft Bill being prepared with a view to submission of the report and Bill by the end of 2004
Sharp v Thomson	Reference from Scottish Ministers	DP No. 114 published July 2001	None set	Work on report has been delayed because of the appeal in <i>Burnett's Tr v Grainger</i>
Trusts	Sixth Programme, Item 6	DP No. 123 and DP No. 124 published September 2003	To publish a discussion paper on trustees in the summer of 2003	First two discussion papers on Breach of Trust and Apportionment of Trust Receipts and Outgoings published September 2003. Third and fourth discussion papers being prepared with a view to publication in the first half of 2004 and by the end of 2004 respectively

Consolidation and statute law revision

One of our functions is to undertake work on the consolidation and repeal of statutes. This is a vital part of the process of law reform. We undertake much of this work jointly with the Law Commission for England and Wales.

Consolidation

Team Members

The Hon Lord Eassie, Commissioner
Susan Sutherland, Project Manager
Legal Assistants as assigned

Consolidation of statutes involves the bringing together of a number of Acts on a particular area of law into a single Act. It is often necessary to make some amendments to the provisions concerned so as to update the way they are drafted and make the consolidated Act simpler. Our role is to recommend these amendments and to instruct the drafting of the consolidation Bill.

Following our Report on the Consolidation of the Legislation relating to Salmon and Freshwater Fisheries in Scotland, which was published in 2002, we have not undertaken any work on consolidation of legislation applying to Scotland only.

We had hoped to be able to develop a programme of work on consolidation and statute law revision during the course of 2003, in consultation with the Scottish Executive. We regret that this has not been possible because the Executive cannot devote the necessary resources to support this area of work. We hope this situation will be remedied before too long, but in the meantime we can make little progress without the Executive's support.

Consolidation of the legislation on representation of the people

This is a joint project with the Law Commission and a draft Bill has been prepared in London. However, in December 2003, the UK Department for Constitutional Affairs decided that work on the project should be suspended until the Department had time to consider the implications of the proposals in the Electoral Reform Commission's Report - *Voting for Change*.

Consolidation of the legislation on wireless telegraphy

This is also a joint project with the Law Commission. It was suspended during most of 2003 because of the passage of the Communications Act 2003, which made substantial additions and changes to the legislation relating to the management of the radio spectrum. Work resumed in late December after the Law Commission produced a draft Bill incorporating provisions derived from the 2003 Act. As wireless telegraphy is a reserved matter under Schedule 5 to the Scotland Act 1998 the consolidation Bill has been drafted for implementation by the UK Parliament. The two Commissions will be taking this project forward in 2004.

Statute law revision

Team Members

The Hon Lord Eassie, Commissioner
Susan Sutherland, Project Manager
Legal Assistants as assigned

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 and GB 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 and GB 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 2004.

Seventeenth Report on Statute Law Revision

In December we and the Law Commission published our Seventeenth Report on Statute Law Revision, which included a draft Bill.

Schedule 1 to the draft Bill lists the candidates for repeal while Schedule 2 makes some minor amendments to legislation as a consequence of the repeals. The Bill is divided into 17 parts. Part 15 sets out the repeal of a number of Scottish Acts, most of which are local Acts on matters that are reserved under the Scotland Act 1998.

Some of the repeals of UK and GB Acts in the Bill relate to matters that are devolved under the Scotland Act 1998, such as agriculture, local government, public health and education. We consulted the Scottish Executive on these repeals and the UK Departments on the repeal of legislation in relation to reserved matters.

The Bill was introduced in the UK Parliament to coincide with publication of the report and is expected to receive Royal Assent during 2004, when it will come into force.

In the coming months we will be starting research and consultation on proposed repeals for inclusion in the next joint report.

Implementation of our reports

We are pleased to note that since our last annual report recommendations in a number of our reports have been implemented by Acts of the Scottish Parliament.

We have welcomed the opportunity to assist the Scottish Executive during the Parliamentary stages of some of the Bills. We see this involvement as an important part of our function.

Title Conditions (Scotland) Act 2003

The Title Conditions (Scotland) Act 2003 was passed by the Scottish Parliament on 26 February and received Royal Assent on 3 April. This is a substantial piece of legislation which implements most of the recommendations in our Report on Real Burdens, published in October 2000.

Mental Health (Care and Treatment) (Scotland) Act 2003

The Mental Health (Care and Treatment) (Scotland) Act 2003 was passed by the Scottish Parliament on 20 March and received Royal Assent on 25 April. Provisions of the Act give local authorities powers to protect vulnerable adults, as recommended in our Report on Vulnerable Adults, published in February 1997.

Agricultural Holdings (Scotland) Act 2003

The Agricultural Holdings (Scotland) Act 2003 was passed by the Scottish Parliament on 12 March and received Royal Assent on 22 April. Part 7 of the Act implements our Report on Jurisdictions under the Agricultural Holdings (Scotland) Acts, published in May 2000.

Salmon and Freshwater Fisheries (Consolidation) (Scotland) Act 2003

The Salmon and Freshwater Fisheries (Consolidation) (Scotland) Act 2003 was passed by the Scottish Parliament on 26 March and received Royal Assent on 1 May. This was the first consolidation Act of the Scottish Parliament. It implements the Bill annexed to our report on the consolidation, published in October 2002.

Vulnerable Witnesses (Scotland) Act 2004

The Vulnerable Witnesses (Scotland) Bill was introduced in the Scottish Parliament on 23 June 2003 and was passed on 4 March 2004. Provisions in the Act implement recommendation 9 of our Report on the Evidence of Children and Other Potentially Vulnerable Witnesses, published in 1990, that steps should be taken to avoid the need for vulnerable witnesses to identify the accused in court in the course of criminal proceedings. The Law Reform (Miscellaneous Provisions) (Scotland) Act 1990 implemented the recommendation in relation to children.

Further information about progress with implementation of all our reports is available on our website: www.scotlawcom.gov.uk

Promoting law reform

We have continued to maintain close links with other law reform bodies and organisations, including the Scottish Executive, the Law Society of Scotland, other professional bodies and university law schools.

Draft Criminal Code

During the last few years we have been taking a close interest in the work of a group of Scottish academics 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 has also been involved in the group's work.

We believe that the group has made a significant and substantial contribution to the literature on Scots criminal law and that a wide-ranging debate on the issues arising from the draft code is desirable. We therefore took the decision to publish the draft code and commentary.

The draft code, which was published in September, takes the form of a draft Bill for the Scottish Parliament, written in a simple and intelligible way. It attempts to put the general principles of criminal liability and the common law crimes into statutory form and includes a small number of related statutory offences. It seeks to preserve the main features and rules of the existing law while at the same time removing what the group considers are anomalies, defects and inconsistencies.

The draft invited comments on the general question whether the basic criminal law of Scotland should be put into a code and also on the merits of the group's approach and suggested provisions.

Comments on the draft code were invited by 15 December 2003. All responses will be considered by the group, while comments on the principle of codification will also be passed to the Scottish Executive.

Since the draft code seeks principally to translate the existing common law into statutory form, a decision on the principle of codification does not, of course, affect the need to keep the existing law under review and to carry through appropriate reforms to both the substantive and procedural criminal law.

International links

The Chairman attended the Commonwealth Law Conference in Melbourne, Australia in April, including a one day conference for representatives of law reform agencies. We welcome the decision which was taken at this event to establish the Commonwealth Association of Law Reform Agencies which will strengthen links among the members.



Professor Gerry Maher

In August Professor Maher attended the Twenty-First World Congress of the Internationale Vereinigung für Rechts- und Sozialphilosophie at Lund, Sweden. He presented a paper on "Age of Criminal Responsibility", which was the subject of our report in January 2002.

Conferences, visitors and other events in 2003

During the year Commissioners and staff participated in a number of conferences and seminars on law reform topics. We welcome the opportunity to take part in these events and present papers on matters relating to our work.

Professor Maher presented a paper on "Reforming the Law of Insanity and Diminished Responsibility" at the International Conference on Psychology and Law which took place in Edinburgh on 10 July.

Following publication of our report on Partnership Law, Mr Hodge was one of the speakers at a seminar in London on the subject, hosted by the Institute of Advanced Legal Studies.

We continue to enjoy close working relations with the Law Commission in London and maintained regular contact with our colleagues there at both Commissioner and staff level throughout the year. In May we hosted a meeting of the two Commissions to discuss our joint project on Unfair Terms in Contracts and other matters of mutual interest.

We were pleased to welcome the Advocate General, Dr Lynda Clarke QC, when she visited the Commission in October with Mr Charles Mullin, her Legal Secretary. They met the Chairman, other Commissioners and the Secretary.

Officials from Northern Ireland visited us in February as part of their preparations in setting up a Northern Irish Law Commission.

In July we welcomed senior civil servants of the Bavarian State Chancellery, who visited us for an overview of our work and how it fits into the legal framework in Scotland and the UK.

In March two Eurodevils spent some time at the Commission under the auspices of the British Council European Young Lawyers Programme organised by the University of Edinburgh. Siv Elisabeth Hveberg from Norway and Bora Balci from Turkey assisted the teams working on land registration and insanity and diminished responsibility.

Resources and management

The Commission comprises three full-time and two part-time Commissioners and eighteen members of staff.

Commissioners

At the end of April, Patrick Hodge QC completed his term of office as a Commissioner after six years at the Commission.



Colin Tyre QC

In October we welcomed Colin Tyre QC as our part-time Commissioner, in succession to Mr Hodge. His appointment is for three years and was made in accordance with the guidance issued by the Office of the Commissioner of Public Appointments.

Mr Tyre has been a practising advocate since 1987 and was appointed Queen's Counsel in 1998. Prior to 1987 he was a lecturer in law at Edinburgh University and has written and contributed to a number of books on tax law.

Drafting resources

Most of the draft Bills annexed to our reports are drafted by members of the Office of the Scottish Parliamentary Counsel.

We were pleased that in the latter part of the year that Office was able once again to provide drafting resources for some of our projects, alongside its work on the Scottish Executive's legislative programme. We hope that these resources will continue to be available to us so that we can complete our forthcoming reports as planned.

In recent years we have also appointed consultants to prepare some of our draft Bills where it has not been possible for them to be prepared by the Office of the Scottish Parliamentary Counsel. Professor Eric Clive CBE, who is on the drafting panel for the Scottish Parliament's Non-Executive Bills Unit, prepared the draft Bill annexed to our Reports on Irritancy in Leases of Land and Law of the Foreshore and Sea Bed.

Recruitment

We took part again this year in the University of Strathclyde Law Fair, along with other graduate employers. We welcome the opportunity to attend this annual event which is a useful way of raising awareness about the legal assistant posts available at the Commission. In the autumn, we appointed four law graduates as legal assistants on one year fixed-term contracts.

Commission staff as at 31 December 2003

The Commission's Secretary (now to be designated Chief Executive) and project managers are qualified lawyers who are members of the Government Legal Service for Scotland. Our legal assistants are law graduates who undertake much of the research and comparative law work that is involved in our law reform projects. We also take on legal trainees from the Government Legal Service for Scotland. They come to us for six month periods as part of their training to become qualified solicitors. We have one qualified librarian and seven non-legal support staff who provide administrative, IT and secretarial services.



General Office and typing staff



Nick Brotchie with legal assistants and trainee solicitor in the library

Secretary/ Chief Executive

Jane McLeod

Project Managers

John Dods
David Nichols
Susan Sutherland
Gillian Swanson

Trainee Solicitor

Louisa Wallace

Legal Assistants

Saira Kapasi
Alexandra Lush
Sheila Skinner
Stephen Waclawski

Librarian

Nick Brotchie

Personal Secretaries

Joan Melville
Heather Ryan

Office and IT Systems Manager

Lesley Young

Administrative and Typing Services Staff

Avril Dryden
Irene Hennessey
Jackie Palkowski
Iain Ritchie

Other management developments this year

Corporate identity review

Towards the end of the year we embarked on a review of our corporate identity with a view to developing a more modern public image consistent with the values that underpin our law reform work.

Shaw Marketing and Design were engaged as consultants on this exercise, initially undertaking some research with a few key stakeholders to understand their perception of us as an organisation. Much of the feedback from that research was positive, indicating an appreciation of the quality and authoritative nature of our work. However, comments were also made to the effect that our current identity was outdated and "too establishment" and that we should be more open and outward-looking in the way we present ourselves.



Members of the Publications Team considering corporate identity proposals

These comments, and many others from within the Commission, have helped shape our new identity which is officially launched with publication of this report. We are currently considering other initiatives to address some of the issues that have been raised in this exercise.



Website

Although we continue to publish our discussion papers and reports in printed form, we also make them available electronically on our website.

We have made good progress during the year with our rolling programme to add earlier publications to the website. We will be continuing this process over a period of years until all our earlier discussion papers and reports are available electronically.

In addition to featuring on our own website, some of our publications now appear on the website of the British and Irish Legal Information Institute (BAILII). This is a major gateway for accessing UK and Irish electronic legal resources.

Freedom of information

We have set up a small team to prepare for the coming into force of the Freedom of Information (Scotland) Act 2002 on 1 January 2005. In the early part of 2004, we will be developing a publication scheme listing the types of information that we routinely publish or intend to publish and how it can be accessed. We will be liaising with the Law Commission in London on this, so that our respective schemes adopt a co-ordinated approach to making information about our work available. The scheme will be posted on our website and made available in other ways, once it has been approved by the Scottish Information Commissioner. This work will involve a review of our paper and electronic records management systems.

Along with representatives of other public bodies, one of our project managers took part in a workshop held by the Scottish Executive Freedom of Information Unit in November as part of the Executive's Scottish Public Records Strategy.

Information systems

During the year we finalised an information systems strategy to ensure that in the period to March 2006 our IS/IT development supports the delivery of our business objectives and efficiency improvements.

Ethnic monitoring

One of our statutory duties under the Race Relations Act 1976 is to undertake the ethnic monitoring of staff employed directly by the Commission and to publish the results of that monitoring. In practice this duty applies only in relation to our legal assistants all of whom are employed by us on fixed-term contracts. The monitoring results, covering the legal assistants in post at the end of 2003 and the recruitment process leading to their appointment, are shown in the following table.

ETHNIC GROUP	APPLICATIONS	INVITED FOR INTERVIEW	WITHDRAWN BEFORE INTERVIEW	OFFERED POST	ACCEPTED POST
White	22	16	4	5	2
Mixed	2	2	-	2	2
Asian	1	-	-	-	-
Black	1	-	-	-	-
Total	26	18	4	7	4

Law reform publications planned for 2004

Publication	Objective
<p>Commercial Law Report on Registration of Rights in Security by Companies</p>	<p>To submit the report to the Department of Trade and Industry in the first half of 2004</p>
<p>Criminal Law Report on Insanity and Diminished Responsibility</p>	<p>To submit the report to Scottish Ministers in the first half of 2004</p>
<p>Law of Interest Discussion Paper on Interest on Debt and Damages</p>	<p>To publish the paper by the end of 2004</p>
<p>Law of Obligations Report on Damages for Psychiatric Injury</p> <p>Report on Unfair Terms in Contracts (Joint project with the Law Commission)</p>	<p>To submit the report to Scottish Ministers by the end of 2004</p> <p>To submit the report to the Department of Trade and Industry and Scottish Ministers by the end of 2004</p>
<p>Property Law Discussion Paper on Land Registration: Void and Voidable Titles</p>	<p>To publish the paper in the first half of 2004</p>
<p>Discussion Paper on Land Registration</p>	<p>To publish the paper by the end of 2004</p>
<p>Report on Leasehold Tenure</p>	<p>To submit the report to Scottish Ministers by the end of 2004</p>
<p>Trusts Discussion Paper on Trustees and Trust Administration</p>	<p>To publish the paper in the first half of 2004</p>
<p>Discussion Paper on Legal Personality for Trusts</p>	<p>To publish the paper by the end of 2004</p>

Advisory groups

We thank the members of our advisory groups for their contribution to our law reform projects throughout 2003.

Partnership

R Craig Connal QC, *Solicitor Advocate*
Professor George L Gretton,
University of Edinburgh
David Guild, *Advocate*
Sheriff William H Holligan
David B Sinton, *Retired Chartered Accountant*
Ian M Stubbs, *Solicitor*
David S Williamson QC, *Solicitor Advocate*
(who died in January 2004)

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*

Irritancy in Leases of Land

Ian Bennet, *Chartered Accountant*
Gordon Christie, *Chartered Accountant*
Hamish Hodge, *Solicitor*
Iain Macniven, *Solicitor*
Blair Nimmo, *Chartered Accountant*
Ian Rankin, *Chartered Accountant*
Sandy Reid, *Solicitor*
Professor Robert Rennie,
University of Glasgow
David Smith, *Solicitor*
Ian Wattie, *Solicitor*

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*

Foreshore and Sea Bed

Ian Abercrombie QC
Sheriff Vincent Canavan
Martin Corbett, *Registers of Scotland*
Professor Alan Page, *University of Dundee*
Professor Robert Rennie, *University of Glasgow*

Damages for Psychiatric Injury

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

Trusts

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

Running costs

The Commission receives most of its funding from the Scottish Executive, through the Department of Justice, although we have also received funding from the Department of Trade and Industry towards the costs of our projects on Unfair Terms in Contracts and Registration of Rights in Security by Companies.

EXPENDITURE	YEAR TO 31 DECEMBER 2003		YEAR TO 31 DECEMBER 2002	
	£000	£000	£000	£000
Salaries - Commissioners (including national insurance contributions, superannuation payments and pensions to former Commissioners)	508.0		510.9	
Salaries - legal staff (including national insurance contributions, superannuation payments and consultants' fees and expenses)	466.5		490.0	
Salaries - support staff (including national insurance contributions and superannuation payments)	171.4	1145.9	192.0	1192.9
Accommodation (including maintenance, rates and utilities)		65.9		60.7
Printing and publishing (including costs of binding, library purchases, machinery maintenance, photocopying, reprographic services and stationery)		70.3		65.3
Telephone and postage		12.7		15.9
Travel and subsistence		9.5		9.3
Miscellaneous (including costs of hospitality, office services and training)		8.9		8.9
Total		1313.2		1353.0

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 work usually consists of -

- **Research** into areas of Scots law and how other countries have reformed their law in these areas
- **Identification of problems** with the current law
- **Formulation of policy** on how the law might be reformed
- **Consultation** on proposals set out in a discussion paper
- **Consideration of responses to consultation**
- **Review of policy** in the light of consultation
- **Publication of a report** to Ministers with recommendations on how the law should be reformed. Most of our reports include draft legislation (in the form of a draft Bill) to give effect to 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 contact:

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