

SCOTTISH LAW COMMISSION



THIRTY-SEVENTH  
ANNUAL REPORT  
2002

(SCOT LAW COM No 189)

# Scottish Law Commission

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2002

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The Scottish Law Commission was set up by section 2 of the Law Commissions Act 1965<sup>1</sup> for the purpose of promoting the reform of the law of Scotland. The Commissioners are:

The Honourable Lord Eassie, *Chairman*  
Patrick S Hodge, QC  
Professor Gerard Maher  
Professor Kenneth G C Reid  
Professor Joseph M Thomson

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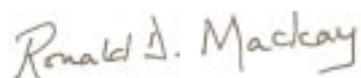


# Scottish Law Commission

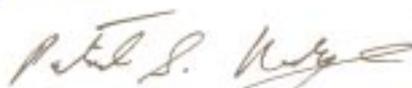
## Thirty-Seventh Annual Report 2002

To: Jim Wallace Esq QC MSP,  
Deputy First Minister and Minister for Justice

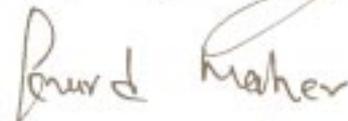
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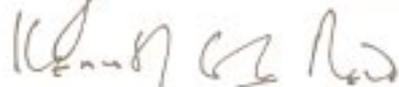
RONALD D MACKAY, *Chairman*



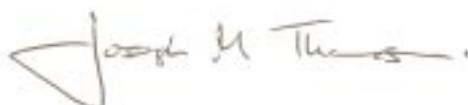
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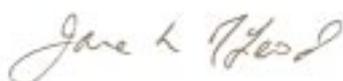
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KENNETH G C REID



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Miss Jane L McLeod, *Secretary*  
17 February 2003

# Commissioners and staff



## BACK ROW (left to right)

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# Foreword

It was a privilege to be invited, in July 2002, to succeed my distinguished predecessor, Lord Gill, as Chairman of the Scottish Law Commission and to build on his achievements. The months since my appointment have been rewarding and I have quickly come to appreciate the dedication and skill of my colleagues and of all the staff of the Commission.

I am pleased now to present the Thirty-Seventh Annual Report of the Commission. During the year 2002 the Commission submitted three reports and, in addition to a consultation paper prepared jointly with the Law Commission, published two discussion papers, one of which is devoted to the challenging topic of damages for psychiatric injury.

The problem of the absence of sufficient drafting resources to which reference was made by my predecessor in the last annual report has persisted and it is a matter of regret that we have been unable to complete work on one of our projects – the conversion of long leases – simply on that account.

That apart, the year 2002 saw further steady progress with the Sixth Programme of Law Reform approved by Scottish Ministers in 2000 and although it is scheduled to last until the end of 2004 we are now reaching the stage at which the process of compiling a successor programme of law reform needs to be commenced. In drawing up a draft Seventh Programme we intend to consult widely and to begin these consultations shortly. It is also to be hoped that progress may be made in preparing a programme for consolidation of legislation although I appreciate the difficulty, for this aspect of law reform, of the continuing pressures on parliamentary counsel. It is however pleasing to note that our report on the consolidation of legislation relating to salmon and freshwater fisheries, which we published in October, resulted in the introduction in Parliament of the relative draft legislation in the following month.



*Ronald D. Mackay*

RONALD D MACKAY, *Chairman*



# Summary of the year

## Introduction

1.1 The Scottish Law Commission's function is to keep the law of Scotland under review with a view to its systematic development and reform.

1.2 Our work falls into these main areas-

- Projects under our *Sixth Programme of Law Reform*<sup>1</sup>
- References from Ministers
- Consolidation
- Statute law revision

1.3 This report records the progress we made in 2002 with the four key areas of our work. It also looks ahead to our future work and outlines our objectives for 2003 in relation to our law reform projects.

## The Chairman

1.4 The Hon Lord Eassie was appointed as Chairman of the Commission, with effect from 15 July 2002. Lord Eassie's appointment is for a period of three years and is part-time.

1.5 Lord Eassie succeeds the Rt Hon Lord Gill who resigned as Chairman on being appointed Lord Justice Clerk.

## Publications 2002

1.6 Apart from our Annual Report, in 2002 we published three reports and three discussion papers of which one was a joint consultation paper with the Law Commission. Details of the publications are set out in Table 1.

Table 1: Our Publications 2002<sup>2</sup>

Title	Number	Publication date
Report on Age of Criminal Responsibility	Scot Law Com No 185	14 January 2002
Thirty-Sixth Annual Report 2001	Scot Law Com No 186	28 February 2002
Unfair Terms in Contracts ( <i>Joint Consultation/Discussion Paper with the Law Commission</i> )	Consultation Paper No 166 Discussion Paper No 119	7 August 2002
Report on Title to Sue for Non-Patrimonial Loss	Scot Law Com No 187	8 August 2002
Discussion Paper on Damages for Psychiatric Injury	Discussion Paper No 120	13 August 2002
Report on the Consolidation of certain Enactments relating to Salmon and Freshwater Fisheries in Scotland	Scot Law Com No 188	10 October 2002
Discussion Paper on Registration of Rights in Security by Companies	Discussion Paper No 121	31 October 2002

<sup>1</sup> Scot Law Com No 176.

<sup>2</sup> The full text of these publications and the news releases relating to them can be found on our website ([www.scotlawcom.gov.uk](http://www.scotlawcom.gov.uk)).

## Implementation of our reports

1.7 We are pleased that during the course of the year one Act taking account of our work received Royal Assent and a further four Bills were introduced in the Scottish Parliament which seek to give effect to some of our reports. Table 2 gives details of the Act and Bills and the reports concerned.

1.8 Appendix C gives details of Commission reports which have been implemented since 2000. It also provides information about the progress with implementation of other Commission reports published since 1998.

**Table 2: Act passed and Bills introduced in the Scottish Parliament in 2002 and relevant SLC Reports**

Act/Bill	Date introduced in the Scottish Parliament	Relevant Commission Report	Notes
Debt Arrangement and Attachment (Scotland) Act 2002	7 May 2002 (Royal Assent 17 December 2002)	Report on Poining and Warrant Sale (Scot Law Com No 177) April 2000	See para 1.9
Title Conditions (Scotland) Bill	6 June 2002	Report on Real Burdens (Scot Law Com No 181) October 2000	See paras 1.10 and 1.11
Agricultural Holdings (Scotland) Bill	16 September 2002	Report on Jurisdictions under the Agricultural Holdings (Scotland) Acts (Scot Law Com No 178) May 2000	See paras 1.12 to 1.14
Mental Health (Scotland) Bill	16 September 2002	Report on Vulnerable Adults (Scot Law Com No 158) February 1997	See paras 1.15 to 1.17
Salmon and Freshwater Fisheries (Consolidation) (Scotland) Bill	27 November 2002	Report on the Consolidation of certain Enactments relating to Salmon and Freshwater Fisheries in Scotland (Scot Law Com No 188) October 2002	See paras 1.18 and 1.19

### *Debt Arrangement and Attachment (Scotland) Act 2002*

1.9 The Debt Arrangement and Attachment (Scotland) Act 2002 received Royal Assent on 17 December 2002. Some of the provisions of the 2002 Act are derived from recommendations in our Report on *Poining and Warrant Sale* (Scot Law Com No 177, published in April 2000) although they do not follow them exactly.

### *Title Conditions (Scotland) Bill*

1.10 The Title Conditions (Scotland) Bill was introduced in the Scottish Parliament on 6 June 2002. The Bill largely implements the draft Bill annexed to our Report on *Real Burdens* (Scot Law Com No 181, published in October 2000). The Bill has recently completed Stage 2 of its parliamentary progress.

1.11 Our property law team worked closely with the Scottish Executive Justice Department and its Bill team both before and after introduction of the Bill. Professor Reid also briefed the Justice 1 Committee of the Scottish Parliament on the Bill.

#### *Agricultural Holdings (Scotland) Bill*

1.12 The Agricultural Holdings (Scotland) Bill was introduced in the Scottish Parliament on 16 September 2002. Part 7 of the Bill deals with dispute resolution. It implements the recommendations we made in our Report on *Jurisdictions under the Agricultural Holdings (Scotland) Acts* (Scot Law Com No 178, published in May 2000). We recommended the introduction of a new system of jurisdiction governing the resolution of disputes between landlords and tenants under agricultural tenancies, with all such disputes being determined by the Scottish Land Court unless the parties agree to go to arbitration.

1.13 Mrs Morrison and Miss Elliot have provided technical advice and legal services in relation to the provisions on dispute resolution both before and after introduction of the Bill. Mrs Morrison attended and gave evidence to the Scottish Parliament's Rural Development Committee on the Commission's Report. The team has also provided briefing for the Minister for the Committee proceedings. Our team will continue to assist the Executive during the remainder of the Bill's parliamentary stages, which are scheduled for completion early in 2003.

1.14 We are grateful to our former Chairman, the Rt Hon Lord Gill, who has continued to assist the team in relation to its work on the Bill.

#### *Mental Health (Scotland) Bill*

1.15 The Mental Health (Scotland) Bill was introduced on 16 September 2002. Part 4 of the Bill sets out procedures to allow mental health officers to intervene where people with mental disorders may be at risk in the community. The provisions in Part 4 are based on recommendations in our Report on *Vulnerable Adults* (Scot Law Com No 158, published in February 1997).

1.16 Our recommendations were not restricted to people with mental disorders but related also to people who were unable to look after themselves or their finances due to age, infirmity or physical disability. The Bill introduced by the Executive deals with people with mental disorders only.

1.17 The Scottish Executive issued a consultation paper in December 2001 seeking views on the extension of the Bill's vulnerable adults provisions to other groups. It also sought views on the possible introduction of provisions to exclude from the house persons living with a vulnerable adult, where the adult's health is at risk (also based on our recommendations). An analysis of the responses to this consultation was published in December 2002 showing broad support for both proposals.

#### *Salmon and Freshwater Fisheries (Consolidation) (Scotland) Bill*

1.18 Our Report on the *Consolidation of certain Enactments relating to Salmon and Freshwater Fisheries in Scotland* (Scot Law Com No 188) was published in October 2002. The Bill which was the subject of the report was introduced in the Scottish Parliament on 27 November 2002. This is the first consolidation measure of the Scottish Parliament and is the subject of special procedure as set out in the Parliament's Standing Orders. A Consolidation Committee of the Scottish Parliament was set up in December to consider the Bill.

1.19 In addition to the Act and Bills mentioned above, we report in the following paragraphs on developments with implementation of some of our other reports.

#### *Other Commission Reports on Diligence*

1.20 In April 2002 the Scottish Executive issued a consultation paper *Enforcement of Civil Obligations in Scotland*, seeking comments on a wide range of issues on the law of diligence, including all those dealt with in our as yet unimplemented reports on this area of law. The paper gave broad support to a number of our recommendations. In particular it supported the reform of inhibitions, the

introduction of attachment orders, land attachment and money attachment, as recommended in our Report on *Diligence* (Scot Law Com No 183, published in May 2001) and the implementation of some of our recommendations on diligence on the dependence and those relating to admiralty arrestments, contained in our Report on *Diligence on the Dependence and Admiralty Arrestments* (Scot Law Com No 164, published in March 1998).

1.21 We understand that the Executive is considering the responses to the consultation exercise.

#### *Report on Third Parties – Rights against Insurers*

1.22 The Government's acceptance of the recommendations contained in our joint report with the Law Commission on *Third Parties – Rights against Insurers* (Law Com No 272, Scot Law Com No 184, published in July 2001) was announced in answer to a Parliamentary Question on 2 July 2002. A consultation paper was issued by the Lord Chancellor's Department in September 2002, inviting comments by 29 November 2002.

#### *Report on the Law of the Tenement*

1.23 Our Report on *the Law of the Tenement* (Scot Law Com No 162) was published in March 1998. The draft Tenements (Scotland) Bill which was included in that report was updated in 2001 to take account of our work on real burdens and title conditions. We were pleased to note that, during the debate on Stage 1 of the Title Conditions (Scotland) Bill, the Deputy First Minister and Minister for Justice, Mr Jim Wallace, indicated that the Scottish Executive intended to consult on the draft Tenements (Scotland) Bill with a view to introducing legislation.

#### *Report on Title to Sue for Non-Patrimonial Loss*

1.24 In December 2002, in a response to a Written Parliamentary Question, Mr Jim Wallace stated that the Executive was examining the content of our Report on *Title to Sue for Non-Patrimonial Loss* (Scot Law Com No

187, published in August 2002) and considering what the next step should be in the light of our recommendations. The response indicated that a wider consultation on damages was planned for 2003 and that our recommendation to extend title to sue for non-patrimonial loss under the Damages (Scotland) Act 1976 to brothers and sisters and others with close family ties was likely to form part of that consultation.

#### Summary of implementation since 1965<sup>3</sup>

1.25 The Commission has published a total of 142 reports<sup>4</sup> since it was established in 1965. Eight of these have not required implementing legislation. 107 have been implemented in whole or in part and a further four are currently being implemented by Bills in the Scottish Parliament. That makes for an overall implementation rate of around 82%.

#### Future arrangements for implementation of our reports

1.26 While we have been pleased with the rate of implementation of our reports since devolution, we are concerned that there is not yet any mechanism in place to ensure that legislative time is regularly made available for technical law reform measures which, although not forming part of the political agenda of the time, are nonetheless essential to make our law fair, accessible and able to meet the demands of the twenty-first century.

1.27 The likelihood of implementation of our reports is also relevant to assessing the priority to be given to projects and in planning timetables. It is relevant to the forward planning of our programmes of law reform. Moreover we feel that it would be useful to have a more systematic way of ascertaining the Executive's response to our recommendations so that we can plan ahead for any Commission resources required to assist the Executive in the implementation process.

1.28 We hope to discuss these issues further with the Scottish Executive in the coming months.

<sup>3</sup> Full details of implementation of Commission reports may be found on our website.

<sup>4</sup> This excludes annual reports, Programmes of Law Reform and Programmes of Consolidation and Statute Law Revision.

### Seventh Programme of Law Reform

1.29 We have started preliminary work on preparation of a Seventh Programme of Law Reform. Our intention is to consult as widely as possible on the content of the new programme in the course of 2003, with a view to having it in place by the end of 2004.

### Management objectives for 2002

1.30 We have achieved the management objectives that we set for 2002. We give more details about these developments and current management issues in Part 5.

### Law reform objectives for 2003

1.31 In Appendix B, we give details of our law reform objectives and the publications which, depending on resources and particularly drafting resources, we plan to issue in 2003.

# Projects under our Sixth Programme of Law Reform

## Introduction

2.1 In our *Sixth Programme of Law Reform* (Scot Law Com No 176), published in March 2000, we outlined the short, medium and long-term law reform projects that we planned to undertake from 2000 to the end of 2004.

2.2 This Part reports on the progress we made during 2002 with the projects included in the Programme. A summary is included in Appendix A.

## Item No 1: Codification

2.3 A small group of law professors is working on an unofficial project to prepare a draft criminal code.<sup>1</sup> In November 2000 Professor Maher and Dr David Nichols attended a consultation conference on a draft code. Following the conference the draft was revised and issued for further consultation. A paper on the project was presented at the Scottish Universities Law Faculties Conference at Pitlochry on 25 March 2002, which Professor Maher, Dr Nichols and Mr Fay attended. Mr Fay was also present as an observer at the two-day codification conference hosted by the University of Glasgow School of Law on 10 and 11 May 2002, attended by participants from England, Germany and the US as well as Scots universities and practice. The draft has been further revised to take account of input from these conferences and comments received on consultation. The full text of, and explanatory comments on, the proposed code are now complete.

2.4 We understand that the group intends to submit the draft code to the Minister for Justice early in 2003, with a request that an official consultation be initiated with a view to legislation in the Scottish Parliament when the legislative timetable permits.

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<sup>1</sup> Professor Chris Gane, Aberdeen, Professor Pamela Ferguson, Dundee, Professor Sandy McCall Smith, Edinburgh, Professor Sir Gerald Gordon, Edinburgh and Professor Eric Clive, CBE, Edinburgh.

## Item No 2: Obligations

*Team Members:*

Professor Joe Thomson, *Commissioner*  
Judith Morrison, *Project manager*  
Beth Elliot, *Legal assistant*

### *Irritancy in leases of land*

2.5 Irritancy is a remedy available to a landlord in the event of a breach of contract by his tenant, allowing the landlord to terminate the lease prematurely. The common law of irritancy in commercial leases is subject to statutory restrictions contained in sections 4-7 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1985.

2.6 We published our Discussion Paper on *Irritancy in Leases of Land* (DP No 117) on 25 October 2001. In the paper we examined whether the 1985 Act strikes the right balance between providing adequate protection to tenants and retaining an effective remedy for breach of contract.

2.7 The consultation period ended on 28 February 2002. We received an excellent response to the consultation and have taken the comments into account in developing our policy.

2.8 We are currently working on our report which will include a draft Bill. We aim to submit the report to Scottish Ministers in the first half of 2003.

## Item No 3: Persons

*Team Members:*

Professor Gerry Maher, *Commissioner*  
David Nichols, *Project manager*  
Cecilia Parker, *Trainee solicitor*

### *Judicial factors*

2.9 We included a review and modernisation of the legislation relating to judicial factors as a long-term project in our *Sixth Programme*. A radical overhaul of this

area of law is necessary because judicial factory is a cumbersome procedure involving expense which is disproportionate to the benefit.

2.10 The project is likely to be carried forward into the Seventh Programme of Law Reform, which we are currently developing. Initial research for the project will commence early in 2003.

#### Item No 4: Property

##### *Team Members:*

Professor Kenneth Reid, *Commissioner*  
John Dods, *Project manager*  
Alan Eccles, *Legal assistant*  
Martin Corbett, *on secondment from the Registers of Scotland*

##### *Land registration*

2.11 Experience has shown that there are difficulties with the Land Registration (Scotland) Act 1979. Other difficulties have come to light as a result of substantial litigation in recent years. Also the 1979 Act lacks a conceptual framework commensurate with the radical changes that it introduced. The relationship between different provisions is not sufficiently articulated; and the conceptual vacuum makes it difficult to deal with matters that are not expressly provided for in the legislation.

2.12 We were only able to start work on this project during the latter part of 2002. We have carried out comparative work on the Australian, English and German systems of registration of title. We have seen the Torrens system of registration of title in operation in New South Wales and thank the Registrar-General and his staff and also Professor Peter Butt of the University of Sydney for their advice and assistance. We also thank those members of the legal profession who responded to our request for views on the operation of the Act, in particular on the legal issues that have caused difficulties in practice. We shall take into account the points raised in our further work.

2.13 At present this is a medium-term project which is due for completion by the end of 2004 when the *Sixth Programme* comes to an end. However, subject to the availability of

drafting resources, we now intend to carry the project forward into our Seventh Programme of Law Reform and submit our report and Bill to Scottish Ministers by December 2005.

##### *Leasehold tenure*

2.14 This project is considering whether some categories of long lease should be converted to ownership.

2.15 We published our Discussion Paper on *Conversion of Long Leases* (DP No 112) on 17 April 2001.

2.16 The paper proposed that ultra-long leases, that is to say, 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. On a fixed day, known as the "appointed day", all ultra-long leases would be upgraded to ownership subject to the possibility of opting out by the tenant. The landlord would be entitled to compensation for loss of rent. The conditions in the lease would be extinguished except those concerned with maintenance and use of common facilities or the provision of services, or those preserved by the landlord for the benefit of neighbouring land. Special provision would be made for rights of way and other servitudes.

2.17 We also considered whether a second conversion scheme (modelled on the scheme in the Long Leases (Scotland) Act 1954) should be introduced for residential ground leases granted for 50 years or more which are too short to qualify under the main scheme. Our research suggested that there are a small number of such leases – possibly fewer than 1000. As an alternative we asked whether 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.

2.18 We completed work on our report in April 2002. However, we have been unable to complete work on the draft Bill that will be annexed to the report because of the difficulties in availability of drafting resources. The aim remains to submit the report and Bill by the end of 2004.

### Item No 5: Statute Law Revision and Consolidation

2.19 We outline the progress with our work on Statute Law Revision and Consolidation in Part 4.

### Item No 6: Trusts

*Team Members:*

Professor Joe Thomson, *Commissioner*  
David Nichols, *Project manager*  
Julie Casey, *Legal assistant*  
Kevin Gibson, *Legal assistant*  
Cecilia Parker, *Trainee solicitor*

2.20 We started work in 2002 on a wide-ranging review of trust law. The project is concentrating on voluntary private and public trusts.

2.21 We have decided to split the project into two phases. The first will cover the powers, duties and liabilities of trustees. However, it will not cover trustees' investment powers, which were dealt with in our joint Report on *Trustees' Powers and Duties* (Scot Law Com No 172, Law Com No 260, published in July 1999). We will also look in this first phase at the appointment, retirement and removal of trustees. We aim to publish a discussion paper on these topics in the summer of 2003.

2.22 The Law Commission is reviewing the law relating to trustee exemption clauses, apportionment and the rights of creditors. These topics fall within the first phase of our project and we will liaise with the Law Commission on these matters of common interest.

2.23 We are planning to start work on the second phase in 2003. It will concentrate on the law relating to trusts themselves. Topics identified for inclusion are the requirements for validity, latent trusts of heritage, the extent to which the same rules should apply to both public and private trusts and the statutory anti-accumulation provisions.

2.24 The second part of the project is likely to be carried forward into our Seventh Programme of Law Reform.

2.25 In November 2002 we held a seminar in order to obtain views on possible reform of

trust law. The invited audience was made up of practitioners, academics and officials from the Scottish Executive and government departments.

2.26 Papers were presented by Professor Thomson on "Unravelling Trust Law"; Mr Simon Mackintosh, Turcan Connell, Solicitors on "Current Problems in Practice"; and Professor David Hayton, King's College London on "The Trustee Act 2000 and Further Trust Law Committee Recommendations". The comments made at the seminar will be of great assistance to us in developing our proposals.

### Item No 7: Diligence

2.27 We published our Report on *Diligence* (Scot Law Com No 183) in May 2001, which completed our work on this item of the *Sixth Programme*.

# References from Ministers

## Introduction

3.1 One of the key areas of our work on law reform projects relates to references from Ministers. We give priority to these projects where we are asked to complete them in a short timescale.

3.2 In this Part we report on progress in 2002 on our references. A summary is included in Appendix A.

## Partnership

### *Team Members:*

Patrick Hodge QC, *Commissioner*  
Gillian Swanson, *Project manager*  
David Bonvarlet, *Legal assistant*

3.3 This is a joint project with the Law Commission stemming from a reference from the Department of Trade and Industry. Our terms of reference are:

"To carry out a review of partnership law, with particular reference to: independent legal personality; continuity of business irrespective of changes in ownership; simplification of solvent dissolution; a model partnership agreement; and to make recommendations. The review is to be conducted under the present law of partnership, namely the Partnership Act 1890 and the Limited Partnerships Act 1907."

3.4 We published a joint Consultation Paper with the Law Commission on *Partnership Law* (Consultation Paper No 159, DP No 111) on 13 September 2000. On 6 November 2001, we published a further joint Consultation Paper on the *Limited Partnerships Act 1907* (Consultation Paper No 161, DP No 118). The responses have been invaluable to both Commissions in considering the policy approach for our report. Our policy is to recommend reform that will create a modern, accessible structure for partnership law throughout Great Britain, replacing the

Partnership Act 1890 and the Limited Partnerships Act 1907.

3.5 We aim to submit a joint report to Ministers in summer 2003.

## Unfair Terms in Contracts

### *Team Members:*

Professor Joe Thomson, *Commissioner*  
Gillian Swanson, *Project manager*  
David Bonvarlet, *Legal assistant*

3.6 In March 2001 we received a reference from Scottish Ministers and the Department of Trade and Industry to undertake this project jointly with the Law Commission. The terms of reference are as follows:

"To consider the desirability and feasibility of:

- (1) Replacing the Unfair Contract Terms Act 1977 and the Unfair Terms in Consumer Contracts Regulations 1999 with a unified regime which would be consistent with Council Directive 93/13 on Unfair Terms in Consumer Contracts;
- (2) Extending the scope of the Unfair Terms in Consumer Contracts Regulations (or the equivalent in any legislation recommended to replace those Regulations in accordance with (1) above) to protect businesses, in particular small enterprises; and
- (3) Making any replacement legislation clearer and more accessible to the reader, so far as is possible without making the law significantly less certain, by using language which is non-technical with simple sentences, by setting out the law in a simple structure following a clear logic and by using presentation which is easy to follow."

3.7 The law on unfair contract terms is a vital consumer protection, intended to prevent consumers being caught out by small print. It

is also important in contracts between businesses. However, the legislation - the Unfair Contract Terms Act 1977 and the Unfair Terms in Consumer Contracts Regulations 1999 - are extremely complicated and, taken together, cause confusion.

3.8 In a joint consultation paper with the Law Commission on *Unfair Terms in Contracts* (Consultation Paper No 166, DP No 119, published on 7 August 2002), we proposed:

- Replacing the 1977 Act and 1999 Regulations with a single piece of legislation, which will provide both the protection required by European Community legislation and the additional protection given to consumers by the 1977 Act;
- Rationalising the controls over non-negotiated terms in business-to-business contracts, so that these apply not only to clauses that exclude or limit liability but also to other unfair terms that have not been negotiated between the parties; and
- Re-writing the legislation in a way that is clearer and more accessible to consumer and business advisers.

Comments on our proposals were invited by 8 November 2002.

3.9 We are now considering the responses and aim to submit a joint report to Ministers by the end of 2003.

### Registration of Rights in Security granted by Companies

*Team Members:*

The Hon Lord Eassie, *Commissioner*  
Gillian Swanson, *Project manager*  
David Bonvarlet, *Legal assistant*

3.10 In May 2002 we received a reference from the Department of Trade and Industry asking us:

"To examine the present scheme on the registration and priority of rights in security granted by companies and to make recommendations for its reform as it applies to-

- (a) companies having their registered office in Scotland wherever the assets are located;
- (b) security granted under Scots law by oversea companies and companies having their registered office in England and Wales."

3.11 The current scheme for registration of rights in security granted by companies is widely regarded as unsatisfactory. As a source of information about the extent to which a company may have granted securities over its property, the register of charges is both incomplete and, in some respects, unreliable. It may be incomplete in that not all securities or types of security are covered by the current statutory list of registrable securities. The register contains only particulars of the security as opposed to a copy of the security deed itself so that inaccuracies may arise. However, inaccuracy in the particulars on the register does not invalidate the registration nor does it affect the actual measure of the security right. Even if the particulars recorded initially are accurate, they may become out of date. Since the Companies Act requires registration of the particulars only within 21 days after the creation of the security there is what is often described as an "invisibility period". Thus, an inspection of the register of charges which does not disclose the existence of any security by the company cannot be relied upon as meaning that no floating charge exists, since the company may have created a floating charge in the preceding 21 days.

3.12 In so far as the register of charges may be seen as having the function of giving publicity to securities which would otherwise remain covert, the creation of a fixed security as a real right under Scots law is generally dependent on other forms of publicity. One form is registration, in the case of standard securities over land and certain other securities such as ship mortgages registrable in a specialist register. Another form of publicity, in the case of assignments of incorporeal moveable property, is intimation to the account debtor. Seen from that standpoint, the utility of the register of charges in those instances is also questionable.

3.13 On 31 October 2002 we published our Discussion Paper on *Registration of Rights in Security by Companies* (DP No 121). The principal proposals on which we invited comment are:

- Floating charges should continue to be registrable at Companies House but registration should be constitutive of the 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.
- Standard securities and other securities which are already publicised in a specialist register should no longer be required to be registered at Companies House too. This would greatly simplify the current registration scheme.
- Assignations in security should cease to be registrable.

3.14 We also sought views on a number of other matters such as whether it would be preferable to register the actual deed granting a floating charge rather than simply particulars of the charge. If, contrary to our provisional view, a scheme providing for registration with the Registrar of Companies of securities other than floating charges were to continue, the question arises whether the existing catalogue of registrable securities should be extended or restricted.

3.15 The discussion paper also looked at whether the existing reciprocal arrangements should be preserved whereby Scottish companies register only in Edinburgh and companies incorporated in England and Wales in Cardiff. Our preference is for preservation of those arrangements.

3.16 Comments on the discussion paper were invited by 31 January 2003. We aim to submit our report to Ministers by the end of 2003.

#### *Sharp v Thomson*

*Team Members:*

Professor Kenneth Reid, *Commissioner*  
John Dods, *Project manager*  
Alan Eccles, *Legal assistant*

3.17 On 27 September 2000 we received the following reference from Scottish Ministers:

"To consider the implications of the decision of the House of Lords in *Sharp v Thomson* 1997 SC (HL) 66 and to make recommendations as to possible reform of the law."

3.18 In *Sharp v Thomson* a floating charge crystallised after the debtor company had granted and delivered a disposition of land but before the disposition was registered. The decision of the House of Lords, to the effect that the subjects of the sale ceased to form part of the selling company's property and undertaking on delivery of the disposition, has been the subject of criticism. The question whether the speeches in *Sharp v Thomson* disclosed a wider principle applicable in a conflict between the holder of an unrecorded conveyance and a trustee in bankruptcy was considered in *Burnett's Trustees v Grainger* 2002 SLT 699 and that decision is currently under appeal to the House of Lords.

3.19 We published our Discussion Paper on *Sharp v Thomson* (DP No 114) on 16 July 2001. In the paper we suggested that the approach adopted by the House of Lords should be abandoned and that in its place special legislative protection for the purchaser should be introduced. We also made a number of proposals of a technical nature with two broad aims in mind. The first was to improve the flow of information about insolvency processes to the various registers. The second was to ensure that a person acquiring land who registers title to the land promptly is unaffected by the insolvency of the seller.

3.20 The consultation period ended on 31 October 2001. Most consultees supported our proposals.

3.21 Given the dependence of the appeal in *Burnett's Trustees v Grainger* and the availability of resources, we are unlikely to commence work on our report during 2003.

#### *Law of the Foreshore and Seabed*

*Team Members:*

Professor Joe Thomson, *Commissioner*  
Judith Morrison, *Project manager*  
Beth Elliot, *Legal assistant*

3.22 Towards the end of 1999 we received a reference from Scottish Ministers as follows:

"Taking account of the Land Reform Action Plan, to consider the existing law of the foreshore and seabed, and to advise on possible reforms, with a view to improving clarity and consistency."

3.23 The reference came to us as part of the Scottish Executive's wider programme of land reform.

3.24 We published our Discussion Paper on *Law of the Foreshore and Seabed* (DP No 113) on 19 April 2001. In the paper we examined the legal definition of the foreshore and seabed, the nature of the Crown's interest and the extent and protection of the public rights exercisable on the foreshore. We also considered a number of miscellaneous topics relating to the foreshore and seabed that had been identified in the course of the Land Reform Policy Group's public consultation on reform. For example, we discussed crofters' rights, udal law and the ownership and control of the foreshore and seabed within harbours.

3.25 We received helpful comments from consultees in response to our discussion paper and we have taken these into account in preparing our report.

3.26 We had intended to submit our report to Scottish Ministers by the end of December 2002. However, as our central recommendations interact with certain provisions of the Land Reform (Scotland) Act (which was passed by the Scottish Parliament on 23 January 2003), the Executive has agreed that our report should be submitted early in 2003, so enabling us to take account of those provisions.

### Age of Criminal Responsibility

*Team Members:*

Professor Gerry Maher, *Commissioner*  
David Nichols, *Project manager*  
Alasdair Fay, *Legal assistant*

3.27 On 31 October 2000 we received a reference from Scottish Ministers:

"To identify the legal issues which are involved in rules fixing an age of criminal responsibility; to consider in the light of contemporary legal doctrines and principles the rule contained in section 41 of the Criminal Procedure (Scotland) Act 1995 that it shall be conclusively presumed that no child under the age of 8 can be guilty of any offence; to identify the legal implications of any change to that rule; and to make recommendations for reform."

3.28 Our Report on *Age of Criminal Responsibility* (Scot Law Com No 185) was published on 14 January 2002. It contained three main recommendations. First, it recommended the abolition of the rule in section 41 of the Criminal Procedure (Scotland) Act 1995 which provides that a child under the age of eight cannot be guilty of an offence. Second, the discretionary power of the Crown to prosecute offenders under the age of sixteen in terms of section 42(1) of the 1995 Act should be retained for the rare cases where prosecution is in the public interest. However, the report recommended that the prosecution of children under the age of twelve should become incompetent, in order to protect such children from being subjected to procedures which they are unable fully to participate in or comprehend. The third recommendation concerned children's hearings. We recommended that child offenders under the age of eight be dealt with by children's hearings even though they are immune from prosecution in the courts.

### Insanity and Diminished Responsibility

*Team Members:*

Professor Gerard Maher, *Commissioner*  
Susan Sutherland, *Project manager*  
Julie Casey, *Legal assistant*  
Alasdair Fay, *Legal assistant*

3.29 In October 2001 we received the following reference from Scottish Ministers:

"(1) To consider -

- (a) the tests to establish insanity (either as a defence or as a plea in bar of trial) and the plea of diminished responsibility; and

- (b) issues of the law of evidence and procedure involved in raising and establishing insanity and diminished responsibility;
- (2) To make recommendations for reform, if so advised; and
- (3) Consequent upon any such recommendations for reform, to consider what changes, if any, should be made to the powers of the courts to deal with persons in respect of whom insanity (either as a defence or a plea in bar of trial) or diminished responsibility has been established."

3.30 The reference followed publication of a report by the Millan Committee which made recommendations for reform of the civil law on mental health. The Committee received representations that the tests for insanity and diminished responsibility in criminal law often posed problems for mental health practitioners. The Committee recommended in its report that we should review these topics.

3.31 In April 2002 we held a joint seminar with the University of Edinburgh on "Reform of the Law of Insanity and Diminished Responsibility", in order to learn about law reform developments in other countries and to discuss the approach to reform in Scotland.

3.32 The speakers were Professor Sandy McCall Smith, University of Edinburgh, Professor R D Mackay, De Montfort University, Professor Richard Bonnie, Director, Institute of Law, Psychiatry & Public Policy, University of Virginia, Professor Warren Brookbanks, University of Auckland and Professor Finbarr McAuley, University College, Dublin and Commissioner, Law Reform Commission of Ireland. Participants included academics, psychiatrists, solicitors and representatives of mental health organisations.

3.33 The comments made at the seminar were extremely helpful to us in developing our proposals.

3.34 Work on our Discussion Paper on *Insanity and Diminished Responsibility* (DP No 122) was completed in December 2002.<sup>1</sup> It considers the topics of insanity as a defence, diminished

responsibility, and insanity as a plea in bar. We propose that there should be a new statutory insanity defence of 'not guilty by reason of mental disorder.' This defence would apply where the accused was suffering from a mental disorder, which had the effect that he lacked a full or correct appreciation of his conduct at the time of the offence. We also propose that the defence should exclude anti-social personality disorder, but we invite views on whether the defence should extend to persons lacking substantial capacity to control their actions (the so-called 'volitional prong' of the defence).

3.35 In relation to the plea of diminished responsibility, we propose that it should be retained, but not extended beyond cases of murder. Following the decision in *HM Advocate v Galbraith*, 2002 JC 1 we seek the views of consultees on whether there is a need for statutory reformulation of the plea. We also seek views of consultees on whether the relationship between diminished responsibility and intoxication requires statutory clarification and whether there are any good reasons for maintaining the exclusion of anti-social personality disorder from the scope of the plea. We question whether the term 'diminished responsibility' should be changed and if so, what the name of the plea should be.

3.36 In relation to insanity as a plea in bar of trial, we propose that it should be formulated in statute and that it should be renamed 'disability in bar of trial,' to indicate that it would extend to physical as well as mental disorders. The basis of the test would be in terms of the capacity of the accused to participate effectively in the trial process. However, we take the view that loss of memory by itself should not be sufficient to constitute the plea.

3.37 The Millan Committee commented that the problems in the current tests for the defence and pleas were experienced not only by the legal profession but also by psychiatrists and psychologists. We therefore seek comments on definitions for the proposed new defence and pleas. The discussion paper also addresses the issue of burden and standard of proof in relation to the defence and pleas.

<sup>1</sup> The Discussion Paper was published on 24 January 2003.

3.38 The consultation period is due to end on 18 April 2003. We aim to submit our report to Scottish Ministers by the end of 2003.

### Damages (Scotland) Act 1976 - Title to Sue for Non-Patrimonial Loss

*Team Members:*

Professor Joe Thomson, *Commissioner*  
Susan Sutherland, *Project manager*  
Christine Munro, *Trainee solicitor*  
Kerry Trewern, *Legal assistant*

3.39 In March 2001 we received the following reference from the Scottish Ministers:

"To consider the provisions of the Damages (Scotland) Act 1976 that set out which relatives of a deceased person can claim non-patrimonial damages; and to make recommendations as to possible changes in the law."

3.40 The Damages (Scotland) Act 1976 provides that, where a person dies as a result of personal injuries caused by another person's delictual conduct, the deceased's family may be entitled to claim damages under the Act. The Act allows for damages to be claimed under two heads (1) patrimonial loss (loss of financial support) and (2) non-patrimonial loss (in respect of grief, sorrow and other intangible losses).

3.41 Schedule 1 to the 1976 Act lists the members of the deceased's "immediate family" who are entitled to sue for non-patrimonial loss. The deceased's immediate family is a subset of the deceased's "relatives" who are entitled to sue for patrimonial loss. At present the "immediate family" consists of the deceased's surviving spouse, opposite sex cohabitant, parent and child, and also relatives by affinity (those by marriage, for example, the deceased's mother-in-law).

3.42 Our Discussion Paper on *Title to Sue for Non-Patrimonial Loss* (DP No 116) was published in October 2001. In the paper we asked consultees for their views on a number of questions as to how the 1976 Act should be amended to better reflect modern family structures. We received responses from a wide variety of interested organisations and individuals.

3.43 Our Report on *Title to Sue for Non-Patrimonial Loss* (Scot Law Com No 187) was published on 8 August 2002. It recommended the retention of the concept of the deceased's "immediate family" which should comprise only those relatives who are likely to have had a close tie of love and affection with the deceased. However, we recommended that relatives by affinity should no longer be entitled to sue for non-patrimonial loss, as they are generally too remote from the deceased to suffer such loss. We recommended that those entitled to sue for non-patrimonial loss should continue to be the deceased's surviving spouse, the surviving opposite sex cohabitant, the parents and children. In addition we recommended that the 1976 Act should be amended to allow the deceased's brothers and sisters, surviving same-sex cohabitant, grandparents and grandchildren to sue for non-patrimonial loss.

### Damages for Psychiatric Injury

*Team Members:*

Professor Joe Thomson, *Commissioner*  
David Nichols, *Project manager*  
Julie Casey, *Legal assistant*

3.44 In July 2001 we received a reference from Scottish Ministers as follows:

"To examine the law of Scotland relating to psychiatric injury caused by another person and to make recommendations as to possible changes in the law."

3.45 We published our Discussion Paper on *Damages for Psychiatric Injury* (DP No 120) on 13 August 2002. The discussion paper concentrated on situations where a person suffers a psychiatric injury arising from an act or omission of another person without any physical or other injury. It is in this area where the pursuer suffers a "pure psychiatric injury" that the problems mainly arise.

3.46 The discussion paper considered the following-

- Whether there should be a threshold of severity for compensatable injury and if so where it should lie;

- The requirement that the pursuer's injury must arise from a sudden shock;
- The definition of a primary victim and the need for foreseeability of psychiatric injury;
- The secondary victim and the conditions of claim;
- Claims where the primary victim is partly or wholly responsible for the accident.

3.47 The consultation period ended on 30 November 2002. We are now considering the responses and aim to submit a report to Scottish Ministers in the summer of 2003.

# Consolidation and Statute Law Revision

## Introduction

4.1 Consolidation and statute law revision are important elements in the process of law reform. This is reflected in the fact that under the Law Commissions Act 1965 one of our functions is to prepare programmes of consolidation and statute law revision. So far we have completed work on four such programmes.<sup>1</sup>

4.2 We do not, however, have a current programme of consolidation and statute law revision because the Scottish Executive has been unable to commit any resources to support this area of our work. However, we believe that a new programme would be beneficial. The Deputy First Minister, Mr Jim Wallace, commented in the Scottish Parliament about the advantages of consolidation.<sup>2</sup> We hope to have discussions with the Executive in 2003 with a view to developing a fifth programme of consolidation and statute law revision which the Scottish Ministers will support.

4.3 Although we have no formal programme, we have continued to work on consolidation and statute law revision projects as detailed below.

## Consolidation

### *Team Members:*

The Hon Lord Eassie, *Commissioner*  
Susan Sutherland, *Project manager*  
Legal assistants as assigned

4.4 Bringing together a number of Acts relating to a particular subject into a single statute often calls for some changes to be made to the existing provisions. For example, provisions in earlier Acts may be expressed in outdated language or there may be technical matters which need to be updated. These changes are necessary in order to make for a coherent consolidation.

4.5 Our role in this area is to recommend amendments to the legislation that we consider are necessary in order to produce a satisfactory consolidation that is both up to date and clear. This makes the legislation easier to use and provides a more coherent legislative base for subsequent amendments.

### *Consolidation of the legislation relating to Salmon and Freshwater Fisheries*

4.6 We published our Report on *the Consolidation of certain Enactments relating to Salmon and Freshwater Fisheries in Scotland* (Scot Law Com No 188) on 10 October 2002.

4.7 The Bill, which is the subject of our report, consolidates the main legislation relating to salmon and freshwater fisheries in Scotland and seeks to implement the recommendations in our report. The Bill was introduced in the Scottish Parliament on 27 November 2002.

4.8 We are grateful to Mr Patrick Layden QC, the Legal Secretary to the Lord Advocate for drafting the Bill annexed to our report.

### *Consolidation of the legislation relating to Representation of the People*

4.9 We have had discussions with the Law Commission about a possible project on the consolidation of the legislation relating to representation of the people. A firm decision has still to be made as to whether the project will go ahead.

### *Consolidation of the legislation relating to Wireless Telegraphy*

4.10 This is a joint project with the Law Commission. Work on the project remained suspended in 2002 because of the UK government's plans to legislate in this area. The Communications Bill was introduced in November 2002 and if enacted will make

<sup>1</sup> (1966) Scot Law Com No 2; (1973) Scot Law Com No 27; (1978) Scot Law Com No 46; and (1982) Scot Law Com No 71.

<sup>2</sup> Official Report of the Justice 1 and Justice 2 Committee Joint Meeting on 17 September 2002, col 218.

changes to the wireless telegraphy legislation. Those changes will be picked up when work resumes on the consolidation.

### Statute Law Revision

#### *Team Members:*

The Hon Lord Eassie, *Commissioner*  
Susan Sutherland, *Project manager*  
Legal assistants as assigned

4.11 The purpose of statute law revision is to repeal statutes that are obsolete or which no longer serve any useful purpose, in order to remove them from the statute book. The process of tidying-up the statute book makes it easier for lawyers and others to use.

4.12 Since devolution we have divided our work on statute law revision into two parts. This reflects the changes in the way that statute law revision proposals are prepared and implemented following the establishment of the Scottish Parliament.

#### *Seventeenth Joint Report on Statute Law Revision*

4.13 The first part concerns our work with the Law Commission on preparation of the Seventeenth Report on Statute Law Revision, which will include a Statute Law (Repeals) Bill. Since 1965 the two Commissions have completed 16 such Bills, all of which have been enacted by the Westminster Parliament.

4.14 During 2002 the Law Commission has produced consultation documents containing proposed repeals on certain areas of law for inclusion in the Seventeenth Report. Our role is to review those proposals, submit our own comments and consult with the Scottish Executive, relevant UK Departments and others. During the course of the year we consulted on a number of repeal proposals including proposals relating to agriculture, mental health and environmental protection.

4.15 Depending on the response from consultees, these repeals will be included in the next Statute Law (Repeals) Bill which will accompany the Seventeenth Report. The aim is to submit the report to the Lord Chancellor and Scottish Ministers in the autumn of 2003.

#### *First Report to Scottish Ministers on Statute Law Revision*

4.16 The second part of our work concerns proposed repeals of legislation relating to matters that are within the devolved competence of the Scottish Parliament. During 2002 we continued our work on possible repeals of legislation relating to water supplies. We will include these repeals in a Statute Law (Repeals) (Scotland) Bill, which will accompany our First Report to Scottish Ministers on Statute Law Revision.

# Promoting law reform

## Introduction

5.1 An important part of our role is to promote law reform and maintain links with a wide range of organisations that are involved in law reform. This includes government departments, particularly the Scottish Executive Justice Department, professional bodies, other law reform agencies and university law faculties. In this Part we outline some of the things we did in 2002 to promote our work and raise an interest in law reform generally.

## Consultation

5.2 Consultation is vital to the Commission's work. It enables us to learn from the experience and expertise of others involved in law reform, to get useful guidance from practitioners and to assess the acceptability of our proposals to the public at large. The responses to our consultation exercises help Commissioners and the teams working on law reform projects to decide on the policy approach to be followed in our reports. We are extremely grateful to all who take the time to contribute to our work in this way.

## Seminars

5.3 In recent years we have held a number of seminars to obtain preliminary views on possible reform of the law in relation to areas on which we are working. We held two seminars in 2002 in connection with our projects on Insanity and Diminished Responsibility and Trusts.

## International links

5.4 We have continued to build on our links with other bodies throughout the world that are involved or interested in law reform. In April 2002 we were pleased to welcome Professor Richard Bonnie of the University of Virginia, and Professor Warren Brookbanks of the University of Auckland, who presented papers at our seminar on insanity and diminished responsibility.

5.5 In June 2002 Professor Reid represented the Commission at the Australasian Law Reform Agencies Conference in Darwin. The topic of the conference was "Law Reform Issues in the 21<sup>st</sup> Century – Expansion or Contraction". Our former Chairman, the Rt Hon Lord Gill, was a keynote speaker on "Law Reform Issues for the 21<sup>st</sup> Century".

5.6 In November, Professor Reid was one of the keynote speakers at the First Worldwide Congress in New Orleans on "Mixed Jurisdictions – Salience and Unity in Mixed Jurisdiction Experience – Traits, Patterns, Culture, Commonalties". He gave a paper on "Keeping it in the Family: Comparing Mixed Systems".

## Links with the Law Commission

5.7 We greatly value the close working relationship that we continue to enjoy with the Law Commission in London. During 20002 Commissioners and staff had a number of meetings with their counterparts from the Law Commission to discuss joint projects, and in particular the project on partnership, as well as other matters of mutual interest.

## Visitors to the Commission

5.8 We are always pleased to welcome visitors to the Commission who come to exchange ideas with us on matters of law reform. In 2002 our visitors included the Hon Justice Bruce Robertson, President of the New Zealand Law Commission and the Hon Mr Justice Declan Budd, President of the Law Reform Commission of Ireland.

## Presentations and talks by Commissioners and staff

5.9 From time to time Commissioners and members of our legal staff are invited to give presentations at seminars and conferences. We welcome the opportunity to participate in these events, which enable us to raise an awareness of our current projects and the role of the Commission generally.



Commission meeting, 27 January 2003.

**BACK ROW (left to right)**

Patrick Hodge, Mark Hudson (Parliamentary Counsel), Willie Ferrie (Scottish Parliamentary Counsel), Professor Gerry Maher.

**FRONT ROW (left to right)**

Professor Kenneth Reid, The Hon Mr Justice Toulson (Chairman, Law Commission), The Hon Lord Eassie, Jane McLeod, Professor Joe Thomson.

**Eurodevils**

5.10 In March 2002 Renaud Simar from Belgium and David Løfgren from Sweden came to the Commission as part of the British Council European Young Lawyers Programme organised by the University of Edinburgh. They provided assistance to the team working on Trusts.

**Guide to the Commission**

5.11 We produced a new guide to the Commission in 2002, the aim of which is to explain very briefly what the Commission is

and what work it carries out. We distributed copies to libraries, secondary schools and other bodies.

**Articles on our law reform projects**

5.12 From time to time we submit articles on our work for inclusion in legal journals. These articles are intended to provide information about our projects and encourage comments on our discussion papers. An article by the Chairman on "Reforming registration of company charges" was included in the December issue of the Journal of the Law Society of Scotland.

# Resources and Management

## Commission staff

6.1 Appendix E gives the names of members of staff in post as at 31 December 2002.

## Drafting resources

6.2 The provision of drafting resources for our projects remains a matter of concern. The pressures on the Office of the Scottish Parliamentary Counsel in the preparation of Scottish Executive Bills are such that we appointed Professor Eric Clive CBE and Ms Lorna Drummond, who are both on the drafting panel for the Scottish Parliament's Non-Executive Bills Unit, to prepare the draft Bills to enable us to complete our projects on Age of Criminal Responsibility and Title to Sue for Non-Patrimonial Loss respectively.

6.3 We have also commissioned Professor Clive to draft the Bill which will be annexed to our forthcoming Report on Irritancy in Leases of Land and to prepare the draft Sea, Shore and Inland Waters (Scotland) Bill which will be annexed to our Report on the Law of the Foreshore and Sea Bed.

6.4 However, it is not always appropriate for us to appoint consultants to draft our Bills, particularly where they relate to major projects. This is partly for reasons of cost. However, we also consider it essential that the Office of the Scottish Parliamentary Counsel should draft the longer and more complex Bills for us since that office will ultimately be responsible for any Executive Bills implementing our recommendations. It was for this reason that we asked the Office of the Scottish Parliamentary Counsel to draft the Bill for our project on leasehold tenure. However, that Office has not had capacity to complete the drafting of this Bill alongside its Executive work, to which it must give priority. We therefore had to take the serious decision in 2002, when the draft report was completed, to suspend work on the project until such time as drafting resources became available to us.

6.5 We view this situation with grave concern. Suspension of a project in its final stage is not only extremely frustrating but also an inefficient use of our resources. We hope that the current recruitment programme within the Office of the Scottish Parliamentary Counsel will in time enable it once again to meet all our drafting requirements.

## Legal support to Commissioners

### *Government legal service staff*

6.6 The six members of our core legal staff, including our Secretary, are drawn from the Government Legal Service for Scotland. They are all qualified lawyers. Generally they join the Commission after a number of years' experience in the Scottish Executive. Apart from the Secretary who performs the role of the Commission's chief executive, one of the main functions of these senior lawyers is to manage the law reform projects which we are currently undertaking. They play a key part as project managers in planning the timetable for projects and in co-ordinating the allocation of work among the trainees and legal assistants who undertake much of the research. They act as a link with officials in the Scottish Executive and also the Law Commission, with whom we have a number of joint projects. In addition, they play a vital role in the development and appraisal of our trainees and legal assistants.

### *Legal assistants*

6.7 Currently we have six legal assistants, who are all law graduates. They are assigned to the various project teams and undertake research and comparative law work as well as assisting in the preparation of material for publication.

### *Trainee solicitors*

6.8 During the course of 2002, three trainee solicitors spent time at the Commission as part of their training under our arrangement with the Office of the Solicitor to the Scottish Executive.

### Administrative staff

6.9 At present we have nine members of staff who provide vital administrative, IT, secretarial and library services which ensure that the office runs smoothly.

6.10 We are grateful to all staff, including those who have moved to new posts during the year, for their assistance and contribution to our work.

### Recruitment

6.11 In autumn 2002 we continued our policy of recruiting law graduates for fixed-term contracts as legal assistants with the Commission. Recruitment opportunities are posted on our website.

6.12 In February, along with 22 other law graduate employers, we took part in the Strathclyde Law Fair as a means of advertising our legal assistant vacancies and generally promoting the work of the Commission among the students at Strathclyde Law School and the Glasgow Graduate School of Law.

### Legal consultancies

6.13 From time to time we appoint consultants who have expertise in a particular area to assist us with our law reform projects.

6.14 In January 2002, we appointed Mr Alasdair Fox WS, a member of our former advisory group on agricultural holdings, as a consultant to assist the team on our project on irritancy in leases of land. He has also acted as consultant to our team advising the Executive on the provisions concerning dispute resolution in the Agricultural Holdings (Scotland) Bill.

6.15 We also appointed Professor George Gretton of the University of Edinburgh as a consultant on our project on land registration. He has been considering with the team the theoretical framework of the system and the relationship between the key concepts.

6.16 Mr David Guild, Advocate, was appointed as consultant on our project on registration of rights in security granted by companies. He prepared a detailed research paper and assisted with our discussion paper.

6.17 Mr Robert Williamson, a retired inspector of salmon fisheries, continued to assist us throughout the year as consultant on our project on the consolidation of the salmon and freshwater fisheries legislation.

### Advisory groups

6.18 Throughout 2002 we were assisted in our work by a number of advisory groups and two panels of practitioners as detailed in Appendix D. We thank the members of all these groups for the practical advice and guidance they have given us.

### Library

6.19 We are fortunate to have an excellent library which is vital to the research that we undertake for our projects. The library continues to develop and take advantage of new technology. In addition to our collection of printed materials we make extensive use of electronic sources of information to underpin our research work. For example, we have access to several databases of legal information, both Internet and CD-ROM based, including Westlaw, and the Statute Law Database (in test form). Some of these are made available via each individual desktop PC. We also monitor the Internet for sources to include in our extensive in-house database of useful law-related websites.

### Website

6.20 During 2002 there were two significant developments in the design and management of our website. First, we introduced a text-only accessible site which parallels the existing website. The site allows people with visual, hearing, cognitive, and physical disabilities to access the information.

6.21 Secondly, towards the end of the year we added a search system. The system has been developed in-house, with the help of our consultant, Mr Sam Price. It allows visitors to our website to search for individual words in any document. We will monitor the operation of this search facility and take account of any comments that we receive on its usefulness.

6.22 In addition to these major developments, as we now positively encourage the electronic

submission of responses to our discussion papers, we have introduced a website comments facility to add a further channel for online communication.

6.23 We have set up a rolling programme to add to the website the full text of our older publications (ie those pre-dating the launch of the website in September 2000). By the end of 2002 we had added 11 of our law reform reports dating back to 1996 and hope eventually to have all our publications available online.

6.24 The day to day work of maintaining and updating the website is now carried out in-house. We still retain access to the technical consultancy services of a former member of Commission staff.

#### **Intranet**

6.25 Our local intranet continues to develop and provides a very useful means of storing and accessing shared electronic documents and databases within the Commission. A search facility for the intranet is currently being developed and we hope to have it operational by the spring of 2003.

#### **Other management and organisational issues:**

##### *Development of new databases*

###### *Publications database*

6.26 We have completed work on our publications database which brings together all the information that we need to manage the distribution of our publications. The database lists our publications and gives details of recipients and the distribution costs involved.

###### *Filing database*

6.27 We have completed the reorganisation of our legal files, details of which have been added to our searchable file database.

##### *Environmental strategy*

6.28 In July 2002 we introduced an environmental strategy. We have set a number of targets to achieve environmental best practice for our activities: to make best use of resources, to minimise waste and to encourage the purchase of environmentally friendly

goods and services. These include targets for reduction of stationery costs and energy consumption.

##### *Awayday*

6.29 In December 2002 we held a one-day workshop for Commissioners and staff at which we discussed general management issues. This was an excellent opportunity to air matters of shared interest outwith the usual office environment. We will be taking steps early in 2003 to address some of the main issues raised.

##### *Equal opportunities*

6.30 The Commission is subject to a duty under the Race Relations Act 1976 to have due regard when exercising its functions to the need -

- to eliminate unlawful racial discrimination; and
- to promote equality of opportunity and good relations between persons of different racial groups.

6.31 This has an impact on all aspects of our work, both in relation to personnel matters and in relation to our law reform function and the way we undertake our consultation process. While we have a basic policy statement in place about our approach to these matters, we are planning to incorporate this in a more general equality strategy to be developed over the course of 2003.

6.32 The Commission is also subject to a new specific statutory duty, with effect from 30 November 2002, to undertake the ethnic monitoring of its staff. The duty applies only in relation to staff employed directly, not those who are seconded to us from the Executive. In practice, therefore, it applies only to the legal assistants who are with us on fixed-term contracts. We are required to have in place arrangements for the ethnic monitoring of existing staff in this category, applications for training made by such staff and applicants for legal assistant vacancies. The results of this monitoring will be published in future annual reports.

*Co-ordination and finance*

6.33 The Commission continues to be sponsored by the Scottish Executive Justice Department which is responsible for most of our funding and for co-ordinating our work with that of the Scottish Executive. In 2002 we received a contribution from the Department of Trade and Industry to our costs in respect of our projects on Unfair Terms in Contracts and Registration of Rights in Security granted by Companies. Our running costs for the last three years are detailed in Appendix F.

# Progress with our law reform projects 2002

Project	Background	Discussion Paper	Report	Progress to end December 2002	Notes
<b>Irritancy in Leases of Land</b>	<i>Sixth Programme</i> Item 2, paras 2.5-2.8	DP No 117 published October 2001	To be submitted to Scottish Ministers in the first half of 2003	On schedule	See paras 2.5 to 2.8
<b>Judicial Factors</b>	<i>Sixth Programme</i> Item 3, paras 2.9-2.10			Long-term project. Will be carried forward into the Seventh Programme of Law Reform	See paras 2.9 and 2.10
<b>Land Registration</b>	<i>Sixth Programme</i> Item 4, paras 2.13-2.17		To be submitted to Scottish Ministers by end December 2005	Work started on discussion paper latter part of 2002. Project will be carried forward into the Seventh Programme of Law Reform	See paras 2.11 to 2.13
<b>Leasehold Tenure</b>	<i>Sixth Programme</i> Item 4, paras 2.11-2.12	DP No 112 published April 2001	To be submitted to Scottish Ministers by end December 2004	On schedule - awaiting drafting resources to complete the draft Bill	See paras 2.14 to 2.18
<b>Trusts</b>	Item 6, paras 2.15-2.34	Discussion Paper on Trustees to be published summer 2003	To be submitted to Scottish Ministers by end December 2004	Project in two phases. Discussion paper on first phase on schedule	See paras 2.20 to 2.26
<b>Partnership</b> <i>(Joint project with the Law Commission)</i>	Reference from the Department of Trade and Industry	DP No 111 published September 2000 DP No 118 published November 2001	To be submitted to Ministers in summer 2003	On schedule	See paras 3.3 to 3.5
<b>Unfair Terms in Contracts</b> <i>(Joint project with the Law Commission)</i>	Reference from Scottish Ministers and the Department of Trade and Industry	DP No 119 published August 2002	To be submitted to Ministers by end December 2003	On schedule	See paras 3.6 to 3.9

APPENDIX 1: PROGRESS WITH OUR LAW REFORM PROJECTS 2002

Project	Background	Discussion Paper	Report	Progress to end December 2002	Notes
<b>Registration of Rights in Security granted by Companies</b>	Reference from the Department of Trade and Industry	DP No 121 published October 2002	To be submitted to Ministers by end December 2003	On schedule	See paras 3.10 to 3.16
<i>Sharp v Thomson</i>	Reference from Scottish Ministers	DP No 114 published July 2001	To be submitted to Scottish Ministers after publication of Discussion Paper on Land Registration	Work on report unlikely to start in 2003	See paras 3.17 to 3.21
<b>Law of the Foreshore and Seabed</b>	Reference from Scottish Ministers	DP No 113 published April 2001	To be submitted to Scottish Ministers early 2003	On schedule	See paras 3.22 to 3.26
<b>Age of Criminal Responsibility</b>	Reference from Scottish Ministers	DP No 115 published July 2001	Report (Scot Law Com No 185) submitted to Scottish Ministers November 2001, and published January 2002	Project completed	See paras 3.27 and 3.28
<b>Insanity and Diminished Responsibility</b>	Reference from Scottish Ministers	DP No 122 completed December 2002 <sup>1</sup>	To be submitted to Scottish Ministers by end December 2003	On schedule	See paras 3.29 to 3.38
<b>Damages (Scotland) Act 1976</b>	Reference from Scottish Ministers	DP No 116 published October 2001	Report (Scot Law Com No 187) submitted to Scottish Ministers and published August 2002	Project completed	See paras 3.39 to 3.43
<b>Damages for Psychiatric Injury</b>	Reference from Scottish Ministers	DP No 120 published August 2002	To be submitted to Scottish Ministers summer 2003	On schedule	See paras 3.44 to 3.47

<sup>1</sup> Discussion Paper published 24 January 2003.

# Law reform objectives for 2003

## Law reform publications planned for 2003

Publication	Objective	Notes
Report on the Law of the Foreshore and Sea Bed	To submit the report to Scottish Ministers early in 2003	See paras 3.22 to 3.26
Report on Irritancy in Leases of Land	To submit the report to Scottish Ministers in the first half of 2003	See paras 2.5 to 2.8
Report on Partnership ( <i>Joint Report with the Law Commission</i> )	To submit the report to Ministers in the summer of 2003	See paras 3.3 to 3.5
Discussion Paper on Trustees	To publish the discussion paper in the summer of 2003	See paras 2.20 to 2.26
Report on Damages for Psychiatric Injury	To submit the report to Scottish Ministers in the summer of 2003	See paras 3.44 to 3.47
Statute Law Revision: Seventeenth Report Draft Statute Law (Repeals) Bill ( <i>Joint Report with the Law Commission</i> )	To submit the report to Ministers in the autumn of 2003	See paras 4.13 to 4.15
Report on Registration of Rights in Security granted by Companies	To submit the report to Ministers by the end of 2003	See paras 3.10 to 3.16
Report on Insanity and Diminished Responsibility	To submit the report to Scottish Ministers by the end of 2003	See paras 3.29 to 3.38
Report on Unfair Terms in Contracts ( <i>Joint Report with the Law Commission</i> )	To submit the report to Ministers by the end of 2003	See paras 3.6 to 3.9

# Implementation of our reports<sup>1</sup>

## SLC Reports which have been implemented 2000 - 2002

Report	Year of publication	Implementing legislation
Powers of the Criminal Courts (Sentencing) Bill (Law Com No 264, Scot Law Com No 175)	2000	Powers of the Criminal Courts (Sentencing) Act 2000, c.6 sections 159 and 167 (implements Scottish recommendations)
Abolition of the Feudal System (Scot Law Com No 168)	1999	Abolition of Feudal Tenure (Scotland) Act 2000 (asp 5)
Report on Leasehold Casualties (Scot Law Com No 165)	1998	Leasehold Casualties (Scotland) Act 2001 (asp 5)
Report on Incapable Adults (Scot Law Com No 151)	1995	Adults with Incapacity (Scotland) Act 2000 (asp 4)

## SLC Reports published 1998 - 2002 and progress with implementation

Report	Year of publication	Progress with implementation
Report on the Consolidation of certain Enactments relating to Salmon and Freshwater Fisheries in Scotland (Scot Law Com No 188)	2002	Salmon and Freshwater Fisheries (Consolidation) (Scotland) Bill introduced in the Scottish Parliament on 27 November 2002 (SP Bill 70)
Report on Title to Sue for Non-Patrimonial Loss (Scot Law Com No 187)	2002	None, but see para 1.24
Report on Age of Criminal Responsibility (Scot Law Com No 185)	2002	None
Third Parties - Rights against Insurers (Law Com No 272, Scot Law Com No 184) ( <i>joint report with the Law Commission</i> )	2001	Consultation paper issued by Lord Chancellor's Department September 2002. See para 1.22
Report on Diligence (Scot Law Com No 183)	2001	Scottish Executive consultation paper issued April 2002. See paras 1.20 and 1.21

<sup>1</sup> Full details of implementation of Commission reports may be found on our website ([www.scotlawcom.gov.uk](http://www.scotlawcom.gov.uk)).

Report	Year of publication	Progress with implementation
Report on Real Burdens (Scot Law Com No 181)	2000	Title Conditions (Scotland) Bill introduced 6 June 2002 (SP Bill 54)
Report on Jurisdictions under the Agricultural Holdings (Scotland) Acts (Scot Law Com No 178)	2000	Agricultural Holdings (Scotland) Bill introduced 16 September 2002 (SP Bill 62)
Report on Pounding and Warrant Sale (Scot Law Com No 177)	2000	See para 1.9
Report on Remedies for Breach of Contract (Scot Law Com No 174)	1999	None
Company Directors: Regulating Conflicts of Interest and Formulating a Statement of Duties (Law Com No 261, Scot Law Com No 173) ( <i>joint report with the Law Commission</i> )	1999	Main recommendations of the report adopted by the Company Law Review Steering Group: Modern Company Law for a Competitive Economy: Final Report, URN 01/942 (July 2001) Annex C, Explanatory Notes, para 22.
Trustees' Powers and Duties (Law Com No 260, Scot Law Com No 172) ( <i>joint report with the Law Commission as regards trustee investments</i> )	1999	None as regards Scottish recommendations
Report on Penalty Clauses (Scot Law Com No 171)	1999	None
Report on Unjustified Enrichment, Error of Law and Public Authority Receipts and Disbursements (Scot Law Com No 169)	1999	None
Report on Diligence on the Dependence and Admiralty Arrestments (Scot Law Com No 164)	1998	Scottish Executive consultation paper issued April 2002 See para 1.20
Report on the Law of the Tenement (Scot Law Com No 162)	1998	Scottish Executive to consult on draft Bill See para 1.23

# Advisory groups

## Projects under our Sixth Programme of Law Reform (Scot Law Com No 176)

### Item No 1: Obligations: Panel of Practitioners on Irritancy in leases of land (see paragraphs 2.5 to 2.8)

Mr Hamish Hodge	Solicitor, Edinburgh
Mr Iain Macniven	Solicitor, Glasgow
Mr Sandy Reid	Solicitor, Edinburgh
Professor Robert Rennie	University of Glasgow
Mr David Smith	Solicitor, Edinburgh
Mr Ian Wattie	Solicitor, Edinburgh
Mrs Judith Morrison (Secretary)	Scottish Law Commission

### Panel of Insolvency Practitioners on Irritancy in leases of land (see paragraphs 2.5 to 2.8)

Mr Ian Bennet	PricewaterhouseCoopers, Glasgow
Mr Gordon Christie	Christie Griffith Corporate, Glasgow
Mr Blair Nimmo	KPMG, Glasgow
Mr Ian Rankin	PricewaterhouseCoopers, Glasgow
Mrs Judith Morrison (Secretary)	Scottish Law Commission

### Item No 4: Advisory Group on Conversion of Long Leases (see paragraphs 2.14 to 2.18)

Professor Stewart Brymer	Solicitor, Dundee
Mr Angus McAllister	University of Paisley
Mr Somerled Notley	Solicitor, Edinburgh
Professor Robert Rennie	University of Glasgow
Mr John Dods (Secretary)	Scottish Law Commission

### Item No 6: Advisory Group on Trust Law (see paragraphs 2.20 to 2.26)

Mr Alan Barr	University of Edinburgh, Solicitor, Edinburgh
Mr Robert Chill	Solicitor, Edinburgh
Mr Andrew Dalgleish	Solicitor, Edinburgh
Mr Frank Fletcher	Solicitor, Glasgow
Mr Alexander McDonald	Solicitor, Dundee
Mr Simon A Mackintosh	Solicitor, Edinburgh
Mr James McNeill QC	Advocate, Edinburgh
Mr Allan Nicolson	Solicitor, Edinburgh
Professor Kenneth Norrie	University of Strathclyde
Mr Scott Rae	Solicitor, Edinburgh
Mr Mark Stewart	Secretary, Society of Trust and Estate Practitioners (Scotland)
Mr Alister Sutherland	Consultant Solicitor
Dr David Nichols (Secretary)	Scottish Law Commission

## References from Ministers

## Advisory Group on Partnership Law (see paragraphs 3.3 to 3.5)

Mr R Craig Connal QC	Solicitor Advocate, Glasgow
Professor George Gretton	University of Edinburgh
Mr David Guild	Advocate, Edinburgh
Sheriff William Holligan	Sheriff, Glasgow
Mr David Sinton	Chartered Accountant, Edinburgh
Mr Ian Stubbs	Solicitor, Glasgow
Mr David Williamson	Solicitor, Edinburgh
Mrs Gillian Swanson (Secretary)	Scottish Law Commission

## Advisory Group on Registration of Rights in Security by Companies (see paragraphs 3.10 to 3.16)

Mr Robin Clarkson	Solicitor, Aberdeen
Mr R Edward Davidson	Solicitor, Glasgow
Professor George Gretton	University of Edinburgh
Mr Bruce Patrick	Solicitor, Edinburgh
Mr Charles Smith	Solicitor, Edinburgh
Mrs Gillian Swanson (Secretary)	Scottish Law Commission

## Advisory Group on Law of the Foreshore and Seabed (see paragraphs 3.22 to 3.26)

Mr Ian Abercrombie, QC	Advocate, Edinburgh
Sheriff Vincent Canavan	Sheriff, Greenock
Mr Martin Corbett	Registers of Scotland
Professor Alan Page	University of Dundee
Professor Robert Rennie	University of Glasgow
Mrs Judith Morrison (Secretary)	Scottish Law Commission

## Advisory Group on Damages for Psychiatric Injury (see paragraphs 3.44 to 3.47)

Dr Pamela Abernethy	Solicitor, Edinburgh
Dr Douglas Brodie	University of Edinburgh
Dr Chris Freeman	Consultant Psychiatrist, Royal Edinburgh Hospital
Mr D Ian Mackay QC	Advocate, Edinburgh
Miss Ishbel McLaren	Solicitor, Edinburgh
Mr Peter Milligan	Advocate, Edinburgh
Professor Barry Rodger	University of Strathclyde
Dr David Nichols (Secretary)	Scottish Law Commission

# Commission staff

Commission staff as at 31 December 2002

**Secretary:**

Jane McLeod

**Librarian:**

Nick Brotchie

**Project Managers:**

John Dods

Judith Morrison

David Nichols

Susan Sutherland

Gillian Swanson

**Office & IT Systems Manager:**

Lesley Young

**Trainee solicitor:**

Cecilia Parker

**Administrative staff:**

Avril Dryden

Valerie Forbes

Irene Hennessey

Anne Manners

Joan Melville

Heather Ryan

Iain Ritchie

**Legal assistants:**

David Bonvarlet

Julie Casey

Alan Eccles

Beth Elliot

Alasdair Fay

Kevin Gibson

# Running costs

	Year to 31 December 2002		Year to 31 December 2001		Year to 31 December 2000	
	£000	£000	£000	£000	£000	£000
Salaries, etc of Commissioners <sup>1</sup>	510.9		518.5		490.4	
Salaries, etc of legal staff <sup>2</sup>	490.0		449.1		389.6	
Salaries of administrative staff <sup>3</sup>	<u>192.0</u>	1192.9	<u>194.0</u>	1161.6	<u>179.7</u>	1059.7
Accommodation charges <sup>4</sup>		60.7		59.1		68.0
Printing and publishing <sup>5</sup>		65.3		69.2		75.8
Telephone and postage		15.9		15.4		15.0
Travel and subsistence		9.3		7.5		13.0
Miscellaneous <sup>6</sup>		8.9		4.7		5.0
<b>Totals</b>		<u>1353.0</u>		<u>1317.5</u>		<u>1236.5</u>

<sup>1</sup> Earnings Related National Insurance Contributions, superannuation payments and pensions to former Commissioners are included.

<sup>2</sup> Earnings Related National Insurance Contributions, superannuation payments and consultants' fees and expenses are included.

<sup>3</sup> Earnings Related National Insurance Contributions and superannuation payments are included.

<sup>4</sup> Charges include maintenance, rates and utilities.

<sup>5</sup> Costs of binding, library purchases, machinery maintenance, photocopying, reprographic services and stationery are included.

<sup>6</sup> Costs of hospitality, office services and training are included.

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