

Scottish Law Commission

(SCOT LAW COM NO 179)

THIRTY-FOURTH

ANNUAL REPORT

1998-99

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of the Law Commissions Act 1965

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

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

The Secretary of the Commission is Mr Norman Raven. Its offices are at 140 Causewayside, Edinburgh EH9 1PR.

* Amended by the Scotland Act 1998 (Consequential Modifications) (No 2) Order 1999 (S.I. 1999/1820).

Scottish Law Commission

Report to 31 December 1999

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

In accordance with section 3(3) as read with section 6(2) of the Law Commissions Act 1965 we have the honour to submit to the Scottish Ministers the Thirty-Fourth Annual Report of the Scottish Law Commission.

Brian Gill.

BRIAN GILL, Chairman

Kenneth G C Reid

KENNETH G C REID

Patrick S Hodge

PATRICK S HODGE

Gerard Maher

GERARD MAHER

Joseph M Thomson.

JOSEPH M THOMSON



NORMAN RAVEN, Secretary
19 June 2000

Commissioners and staff



Back left to right

Professor K G C Reid; Mr P S Hodge, QC; Mr N R Whitty; Mr W Barclay; Mr N Raven;
Dr E M Clive; Mr S Wortley; Mr S G Feltham

Middle left to right

Mrs G B Swanson; Mr J M Dods; Mrs A D Dryden; Miss J E Melville; Mrs H C Ryan;
Dr D I Nichols

Front left to right

Ms F M Killen; The Hon Lord Gill, Chairman; Mrs A V Manners; Miss S M Dewar;

Front of stairway left to right

Mrs C M Mitchell; Mrs J A Morrison; Mr N G T Brotchie; Miss H Campbell

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Foreword

Our Thirty-Fourth Annual Report covers an eventful period in Scotland's constitutional history. The establishment of the Scottish Parliament has had a considerable impact on the Commission. On the whole, the new legislative opportunities have benefited our work; but additional burdens imposed on the Scottish Parliamentary counsel have impeded progress on some of our current projects. We are grateful for the efforts that they have made in difficult circumstances. While we are frustrated by the pressure on drafting resources, we recognise that this is a problem to which there is no quick solution. Nevertheless, it is satisfactory to record that despite these difficulties most of our work during the period under review was completed on schedule.



At the end of the period covered by this Report, Dr Eric Clive CBE and Mr Niall Whitty retired from the Commission. Both of them are scholars of international renown who have enhanced the image of the Commission during their terms of office. I thank them for their long and valued service to the Commission.

We are a small organisation with limited resources but we are enthusiastic in our work. As always, on behalf of the Commission, I thank our Secretary and staff and our consultants and members of our advisory groups for their hard work and commitment.

For most of the period covered by this Report the Commission was within the area of responsibility of Lord Hardie, the then Lord Advocate. I thank him for the support that he gave us during that period.

I thank you too for the support that you have given us since you assumed office as Scotland's first Minister for Justice.

Brian Gill.

BRIAN GILL, Chairman

Summary of Aims and Achievements

Preliminary

1.1 This Annual Report represents a departure from our normal arrangements. The period covered by the Report is taken to the end of 1999. This has two main benefits.

1.2 First, it enables us to take account of the early part of the First Session of the Scottish Parliament and thus to report on how our work has been affected by the creation of the new Parliament and Scottish Executive.

1.3 Second, it will allow the Annual Report to be aligned more closely with our continuing work under our Sixth Programme of Law Reform (Scot Law Com No 176).¹ In that Programme

we indicated that our medium term projects would be scheduled for completion during the life of the Programme, that is, until the end of 2004, and that our Annual Reports would relate the progress made on each of those projects. The change to a calendar year basis for the Annual Report will allow us to provide progress reports more in line with the Sixth Programme itself. The aim is to submit our Annual Reports to Scottish Ministers by the end of March in the following year.

Publications

1.4 Table 1.4 lists the Reports and Discussion Papers that we published during the period from June 1998 to December 1999.

Table 1.4 SLC reports and discussion papers 1998-99

Title	Citation	Date of publication
Real Burdens	Discussion Paper No 106	October 1998
Diligence against Land	Discussion Paper No 107	October 1998
Attachment Orders and Money Attachment	Discussion Paper No 108	December 1998
Abolition of the Feudal System	Report (Scot Law Com No 168)	11 th February 1999
Unjustified Enrichment, Error of Law and Public Authority Receipts and Disbursements	Report (Scot Law Com No 169)	25 th February 1999
Remedies for Breach of Contract	Discussion Paper No 109	April 1999
Penalty Clauses	Report (Scot Law Com No 171)	18 th May 1999
Poinding and Sale: Effective Enforcement and Debtor Protection	Discussion Paper No 110	November 1999
Remedies for Breach of Contract	Report (Scot Law Com No 174)	23 rd December 1999

¹ Published on 17 March 2000.

1.5 Table 1.5 lists reports and discussion papers which were published by the Law

Commission either jointly, or in association with us.

Table 1.5 Joint LC/SLC reports and discussion papers 1998-99

Title	Citation	Date of publication
Company Directors : Regulating Conflicts of Interest and Formulating a Statement of Duties	Joint Consultation Paper (Consultation Paper No 153, Discussion Paper No 105)	August 1998
Chronological Table of Private and Personal Acts	Joint Report (Law Com No 256, Scot Law Com No 170)	2 nd March 1999
Trustees' Powers and Duties	Joint Report (Law Com No 260, Scot Law Com No 172)	20 th July 1999
Company Directors: Regulating Conflicts of Interest and Formulating a Statement of Duties	Joint Report (Law Com No 261, Scot Law Com No 173)	22 nd September 1999

Implementation of Reports

1.6 In Appendix 1 we give details of the Reports we have published in 1998 and 1999 and their implementation. Two Reports are before the Scottish Parliament in the Abolition of Feudal Tenure etc. (Scotland) Bill² and the Adults with Incapacity (Scotland) Bill.³ We understand that other outstanding Reports may also come before the Scottish Parliament in the near future.

Projects and objectives

1.7 Our work during 1998-99 fell into three main categories:

- Projects under our Fifth Programme of Law Reform (Scot Law Com No 159)
- Provision of advice under section 3(1)(e) of the Law Commissions Act 1965
- Consolidation and statute law revision.

1.8 For the most part, we met the objectives that we set ourselves during 1998-99. These objectives are described in Parts 2, 3 and 4. Our law reform objectives for the coming year are listed in Appendix 2A.

Sixth Programme of Law Reform

1.9 Our Sixth Programme of Law Reform was submitted to the Scottish Ministers on 22 December 1999. It follows the precedent set by the Fifth Programme providing a guide for our work over a five year period from the beginning of 2000 to the end of 2004.

Devolution

1.10 Devolution has made significant changes to our governing legislation, the Law Commissions Act 1965. We now submit our Reports, and other papers, to the Scottish Ministers and they are laid before the Scottish Parliament. We retain responsibility for Scots law in areas where legislative competence is reserved to the United Kingdom Parliament.

² The Abolition of Feudal Tenure etc. (Scotland) Act received Royal Assent on 9 June 2000.

³ The Adults with Incapacity (Scotland) Act received Royal Assent on 9 May 2000.

1.11 The advent of the Scottish Parliament has provided a forum where more Parliamentary time is available for the implementation of our Reports and we welcome that. We are pleased that our Reports on the Abolition of the Feudal System and on Incapable Adults have formed a major part of the Scottish Executive's legislative effort in the early part of the Scottish Parliament's First Session. We have also been engaged in dealing with references from the Scottish Executive as part of the legislative process.

1.12 The Scottish Parliament has also brought about changes to our working practices. We have been called on to provide both informal briefing and formal evidence to Committees of the Parliament. We welcome these opportunities to provide further information about our proposals for reform. We have also had to consider the different requirements which now apply to the ways in which our work is put before the United Kingdom Parliament and the Scottish Parliament. There are as yet some unresolved issues of detail.

Other activities

1.13 In Part 5 we describe the various ways in which we have promoted our work through

- links with departments of the UK government and the Scottish Administration, law reform agencies and other organisations
- seminars
- visits

Organisation and management

1.14 We have continued with the restructuring of our legal support services and the review of our working methods and internal organisation. Our complement of core legal staff, including our Secretary, drawn from the Government Legal Service for Scotland remains at six. Within that number, however, one post is vacant and one is filled on a part-time basis. Because of shortage of staff at the appropriate grade it is unlikely that the current vacancy will be filled in the near future. We continue to look creatively at ways in which the shortfall in staff can be accommodated.

1.15 We also engage legal assistants on a casual basis over the summer vacation and on fixed-term contracts for one year or more.

1.16 For the first time, we have also entered into a commitment to take four trainee solicitors from the Government Legal Service for Scotland over a two year period from September 1999.

1.17 We describe these and other developments in Part 6. In Appendix 2B we list our main management objectives for 2000.

Fifth Programme of Law Reform

Preliminary

2.1 In Part 2 we report our progress on the projects included in our Fifth Programme of Law Reform (Scot Law Com No 159). The items are numbered in accordance with the Fifth Programme We refer as appropriate to our Thirty-Third Annual Report 1997-98 (Scot Law Com No 167). Appendix 2A summarises our objectives for the coming year.

Item No 1: Civil Remedies - Diligence

Commissioner: Mr N R Whitty
(until 4 February 2000)
thereafter Professor G Maher

Project Manager: Dr D I Nichols

2.2 Our work on civil remedies consists of projects on

- diligence against land - land attachment and inhibition
- attachment orders and money attachment

Table 2.2 below shows our objectives for these projects during 1998-99 and summarises the progress we have made.

Table 2.2 Civil remedies - Diligence: Projects - objectives and progress 1998-99

Objective	Progress	References	Notes
To issue before the end of October 1998 a discussion paper on inhibition and land attachment	Discussion Paper (No 107) issued October 1998	Fifth Programme of Law Reform paras 2.7-2.9 Thirty-Third Annual Report 1997-98, paras 2.6-2.10	See paras 2.3 and 2.5
To issue, shortly after the above discussion paper, a discussion paper on attachment orders and money attachment	Discussion Paper (No 108) issued December 1998	Thirty-Third Annual Report 1997-98, paras 2.9-2.10	See paras 2.4 and 2.5
To issue before the end of 1999 a single report on inhibition, adjudication, land attachment and related topics	Timetable under consideration	Fifth Programme of Law Reform para 2.13 Thirty-Third Annual Report 1997-98, para 2.10	See paras 2.5-2.8

Land attachment and inhibition

2.3 As we mentioned in our Thirty-Third Annual Report 1997-98 (para 2.6) we decided to expand our proposed discussion paper on inhibition to include proposals for a new

diligence (which we term “land attachment”) replacing adjudication for debt in respect of heritable property registered or capable of being registered in the Land Register of Scotland or the Register of Sasines (the

“property registers”). In October 1998 we published Discussion Paper No 107 on Diligence Against Land. The main proposals in that discussion paper were that:

(i) Land attachment

- The archaic, expensive and inefficient diligence of adjudication for debt should be replaced by land attachment. Land attachment would be used only to enforce payment of money due under a court decree or other enforceable document of debt. If a charge to pay the sum due was not complied with within the requisite period, the creditor could register in the property registers first a notice of litigiosity prohibiting the debtor from dealing with the land, and later a notice of land attachment. This latter notice would attach the land specified in the notice and give the creditor security for his debt. Thereafter the creditor could apply to the sheriff for a warrant to sell the attached land.
- Various protections for debtors were proposed. The sheriff could refuse warrant if valuable land was being sold for a small debt or if the expenses of sale were likely to exceed the net proceeds recoverable by the creditor. Warrant to sell a dwellinghouse could be delayed for up to a year in order to allow the debtor or other occupant time to find alternative accommodation.
- A bona fide third party who obtains a disposition or security from the debtor should be protected against the registration of a land attachment in the interval between delivery of his deed and its registration. The proposed protection takes the form of a mandatory period of at least 14 days between the creditor’s registering the notice of litigiosity and the subsequent notice of land attachment. If an interim search carried out just prior to settlement shows no attacher’s notice of litigiosity, the third party purchaser or borrower knows that he has at least 14 days in which to register his deed and so obtain a right free from land attachment. Similar protection is proposed for disponees in competition with the debtor’s trustee in sequestration

or liquidation. These proposals deal with the uncertainties stemming from the House of Lords decision in *Sharp v Thomson* 1997 SC (HL) 66.

(ii) Inhibition

- Inhibition should no longer give the inhibitor a preference over creditors whose debts were incurred after the inhibition became effective.
- *Atlas Appointments Ltd v Tinsley* (1997 SC 200) shows that in transactions registered in the Register of Sasines a bona fide purchaser may be at risk of reduction from an undiscovered inhibition. It was proposed that third parties taking a deed from an inhibited person should be protected if they had no actual knowledge of the inhibition and had taken reasonable steps to discover the inhibition. A computer-assisted search of the Register of Inhibitions and Adjudications using an appropriate programme should be regarded as acceptable.
- The paper also asked for views on whether, if land attachment were to be introduced, inhibition should be abolished or retained with the reforms noted above.

2.4 In December 1998 we published Discussion Paper No 108 Attachment Orders and Money Attachment. It put forward proposals for two new diligences, attachment orders and money attachment.

- Attachment orders were proposed as a diligence of last resort to replace adjudication in relation to moveable property, such as intellectual property, and unregistrable interests in heritable property. Attachment orders would be available where no other diligence was competent, giving effect to the principle that all the assets of a debtor should be subject to enforcement unless exempted deliberately to protect debtors from hardship. The creditor would first serve a formal demand for payment of the sum due under the decree or other document. After the requisite period had expired

without payment, the creditor could apply to the sheriff for an attachment order which would be served on the debtor, thereby attaching the property. Thereafter the creditor could apply to the sheriff for warrant to sell it.

- Money attachment would enable cash, cheques and other negotiable instruments in the debtor's possession to be made available to creditors in satisfaction of their debts. A creditor would have to apply to the sheriff for a special warrant authorising sheriff officers to search the debtor's premises and seize any money or negotiable instruments found there. Debtors and others on the premises would not be subject to search. The creditor would then have to apply to the sheriff for an order for the attached money to be paid to him, but the sheriff would have power to refuse to make the order if, for example, the money represented pay or benefits needed by the debtor for his and his family's living expenses.

2.5 We have commenced the preparation of a single report dealing with all of these topics in the light of consultation. The need for reform was generally accepted. There was unanimous support for the retention of inhibitions. Not surprisingly, however, the compulsory sale of dwellinghouses for debt and the attachment of money in dwellinghouses proved highly controversial issues. Many of those responding regarded the protections for debtors proposed in the discussion papers as inadequate. We see the force of these comments. Land attachment of dwellinghouses could have a harsh effect on home owners, increase homelessness substantially and have other adverse effects. Striking the right balance between the interests of creditors and debtors raises difficult questions of social policy best resolved by the Scottish Executive and the Scottish Parliament. Accordingly, we intend to put forward in our Report various options for land attachment together with drafts of the legislation required to implement them.

2.6 Our original aim to submit a Report on these matters before the end of 1999 has not been achieved for a number of reasons.

2.7 There was a necessary expansion of the project to encompass attachment orders and money attachment. In addition, the resources of the Office of the Scottish Parliamentary Counsel normally available to us through a dedicated drafting team had necessarily to be diverted to the preparation of Scottish Executive Bills for the new Scottish Parliament, including of course Bills to implement our Reports on Abolition of the Feudal System and on Incapable Adults. When drafting resources became available to us we decided that those resources should be deployed on the Bill to be attached to our Report on Real Burdens.

2.8 A further impediment to progress on this project was the requirement to respond urgently to a reference from Scottish Ministers on the implications of a Member's Bill before the Scottish Parliament to abolish the diligence of pouncing and warrant sale. This is discussed in Part 3. We shall return to the preparation of a Report on the various diligence topics mentioned above.

Item No 2: Codification

2.9 While we remain committed to the principle of codification in some form our Fifth Programme of Law Reform (para 2.15) recognised the difficulties inherent in promoting it. Some of our recent work has involved a measure of codification, for example, our work on the Law of the Tenement and the partial codification of directors' duties in our joint project with the Law Commission, Company Directors: Regulating Conflicts of Interest and Formulating a Statement of Duties. The same may be said of our current work on Real Burdens.

2.10 We support two current codification projects. Dr Eric Clive, who was one of our Commissioners until 31 December 1999, is involved in the preparation of a draft Scottish Civil Code. This is being undertaken at Edinburgh University. Dr Clive is also involved in the preparation of a draft Scottish Criminal Code along with Professor Gane of Aberdeen University, Professor Ferguson of Dundee University and Professor McCall Smith of Edinburgh University.

2.11 Our current workload and our scarcity of resources preclude us from devoting any

time to these substantial projects; but we take this opportunity to express our support for the projects and our hope that we shall be able to take part in them at a later stage.

Item No 4: Obligations

Contract:

Commissioner: Dr E M Clive

Project Manager: Mrs G B Swanson

Unjustified Enrichment:

Commissioner: Mr N R Whitty

Project Manager: Dr D I Nichols

2.12 Our work on obligations consists of projects on

- contract
- unjustified enrichment

Table 2.12 shows our objectives for these projects during 1998-99 and summarises the progress we have made.

Table 2.12 Civil remedies – Obligations: Projects - Objectives and progress 1998-99

Objectives	Progress	Reference	Notes
To submit during 1998 a report on the recovery of undue public authority receipts and disbursements	Report on Unjustified Enrichment, Error of Law and Public Authority Receipts and Disbursements (Scot Law Com No 169) published December 1998	Fifth Programme of Law Reform paras 2.24-2.29 Thirty-Third Annual Report 1997-98, paras 2.23-2.24	See para 2.28
To submit by the end of December 1999 a report on penalty clauses	Report on Penalty Clauses (Scot Law Com No 171) published May 1999	Fifth Programme of Law Reform paras 2.21-2.23	See paras 2.13-2.18
To issue in early 1999 a discussion paper or papers, on remedies for breach of contract; and to submit the relevant report by the end of December 1999	Discussion Paper (No 109) on Remedies for Breach of Contract issued in April 1999 Report (Scot Law Com No 174) submitted December 1999	Fifth Programme of Law Reform paras 2.21-2.23	See paras 2.19-2.27

(i) Contract

2.13 In paragraphs 2.17-2.20 of our Thirty-Third Annual Report 1997-98, we described our work on penalty clauses. In accordance with the commitment given in our Fifth Programme of Law Reform (para 2.23) to submit a report on this topic before the end of 1999, we submitted our Report on Penalty Clauses (Scot Law Com No 171) in April and published it in May 1999.

2.14 The Report recommends ways of dealing with two significant problems in the current law on penalty clauses. The first problem is that the law provides that a penalty clause is unenforceable unless the penalty for which it provides was a genuine pre-estimate of the loss likely to be caused by a breach of contract. This rule is unduly restrictive. It leads to penalty clauses that are in no way

oppressive or unreasonable being struck down as unenforceable. It is contrary to the general principle that contracts should be respected. We consider that there are good policy reasons for providing that penalty clauses are generally enforceable by applying a less restrictive test. A coercive element in a contract may encourage performance. If parties agree to regulate in advance the penalty for a broken contract, this is likely to reduce the possibility of dispute or litigation – and any associated delay or expense – if a breach of contract occurs. The whole premise of the existing “genuine pre-estimate” test is also illogical and unhelpful because it is precisely when contractual loss cannot be predicted with any certainty that penalty clauses may be most useful.

2.15 Our Report therefore recommends that the current “genuine pre-estimate” test should be replaced with a rule that a penalty clause is enforceable unless it provides for a penalty that is manifestly excessive under all the circumstances. This would uphold the principle that contracts should be respected, but would allow for judicial intervention in extreme cases. It would also be more realistic and workable than the old rule because it would free courts from the paradoxical burden of having to consider whether or not a penalty clause provided for a genuine pre-estimate of loss in circumstances where the penalty may have been agreed precisely because it was impossible accurately to predict the likely loss.

2.16 The second main problem with the existing law is that the courts are generally prevented from striking down oppressive clauses that are the equivalent of penalty clauses in every respect except that they operate in circumstances other than breach of contract. For example, a contract term may entitle a party to terminate the contract, but provide a penalty for so doing. Because the penalty does not arise on breach of contract, a court would have no power to strike down the penalty even if it were clearly unfair. We consider that it is inconsistent that courts should not have the power to strike out penalties that arise in such circumstances. The Report therefore recommends that the new test

of enforceability should apply to certain clauses in contracts that are penal in effect, whether or not the penalty arises on breach of contract.

2.17 The Report also makes a small number of related recommendations intended to clarify and improve the existing law on penalty clauses. In particular, it recommends that it be clarified that non-monetary penalties and penalties in the form of forfeitures (of deposits, for instance) are not exempt from judicial control. We consider that all penalties, whatever form they may take and however they may be described, should generally be subject to the same degree of judicial control.

2.18 We also recommend that where a penalty has been declared to be manifestly excessive and therefore unenforceable, the court should have the discretionary power to modify the penalty, whether by reducing its amount or by introducing conditions as to its exercise, so as to make the penalty enforceable.

2.19 Our remaining work on contract relates to the clarification of the law on remedies for breach of contract. As mentioned in paragraph 2.22 of our Thirty-Third Annual Report 1997-98, we engaged Professor William McBryde, then of the University of Dundee, as a consultant for part of this project. We acknowledge his contribution to this area of our work. We decided that it would be more helpful to consultees to combine the topics looked at by Professor McBryde with the topics examined in-house rather than to issue two or more discussion papers. Accordingly, we published our Discussion Paper on Remedies for Breach of Contract (No 109) in April 1999.

2.20 The consultation period ended on 16 July 1999. We are grateful to all those who responded and to the members of the Advisory Group on Contract Law for their invaluable assistance with this project. The members of the Group are listed in Appendix 3.

2.21 Our Report on Remedies for Breach of Contract was submitted to the Scottish Ministers in December 1999 in fulfilment of our objective. In many cases difficulties arising on a breach of contract cannot be

resolved by the parties themselves. The law therefore provides a range of remedies to enable the party aggrieved by the breach to obtain either the performance contracted for or some compensation for not receiving it. The four recommendations in this Report seek to develop and clarify certain of the remedies that may be available in such circumstances.

2.22 Under the present law it appears that a party to a contract will still be entitled to receive payment for carrying out his obligations under the contract even where he has been informed by the other party to the contract that performance of those obligations is no longer wanted. This results in wasteful, unnecessary and unwanted performance. We therefore recommend that the party who performs under the contract will not be entitled to recover payment from the other party for this unwanted performance where a similar transaction could have been entered into or where it was generally unreasonable to proceed with the performance. Although the performing party will not be able to recover the payment contained in the contract in these circumstances, he will still be able, as under the current law, to obtain damages for the other party's breach.

2.23 At present, damages will not necessarily be awarded for all types of non-monetary loss or harm caused by breach of contract. Whereas damages can be recovered for physical illness or injury, or for trouble and inconvenience, caused by a breach of contract, it is not clear whether damages can be recovered for loss of reputation caused by a breach of contract.

2.24 There is also doubt as to the circumstances in which damages may be recovered for mental distress caused by breach of contract. Some recent cases have recognised that where, because of the nature of the contract, the likelihood of distress was or ought to have been in the contemplation of the defender at the time of the contract, damages for mental distress should be awarded. In one case, damages were awarded when a photographer was in breach of a contract to take photographs at a wedding even though the breach caused no monetary loss. The Report recommends that it should be made

clear that the loss or harm for which damages may be recovered for breach of contract includes non-monetary loss or harm of any kind and, in particular, loss of the satisfaction of obtaining what was contracted for and harm in the form of pain, suffering or mental distress.

2.25 In cases where loss or damage is sustained as a result of a breach of contract, it will often be the case that the aggrieved party is partly to blame for that loss or harm. The current law makes no provision for the fault of the aggrieved party to be taken into account when damages are being assessed. We therefore recommend that courts should have a discretionary power to take into account the conduct of the aggrieved party in contributing to the loss or harm forming the subject of the claim.

2.26 A decree for specific implement of a contractual obligation orders the defender to perform the obligation. There are doubts under the current law regarding the availability of an interim remedy of specific implement. Such a remedy is often needed to regulate the position until the final order can be obtained. Doubt as to the availability of an interim remedy of this nature means that practitioners are often forced to resort to other remedies, such as interdict, which are inappropriate in the circumstances. We therefore recommend that it should be competent to obtain a decree of interim specific implement in cases of breach of contract in both the sheriff court and the Court of Session.

2.27 The recommendations in this Report also apply to cases of unilateral voluntary obligations.

(ii) Unjustified enrichment

2.28 In our Thirty-Third Annual Report 1997-98 (para 2.23) we stated that we had decided to produce a short report recommending certain limited reforms of the law of unjustified enrichment. Comprehensive reform of the law would not be pursued meantime, but we would reassess the need for it after the end of 1999 in the light of the then state of the law and the pressure, if any, for reform. In fulfilment of our first limited objective we

submitted our Report on Unjustified Enrichment, Error of Law and Public Authority Receipts and Disbursements in December 1998. It was published in February 1999 and its main recommendations are:

- Undue payments made under an error of law are, since the decision of the Court of Session in *Morgan Guaranty Trust Co of New York v Lothian Regional Council* (1995 SC 151), now recoverable in the same way as payments made under error of fact. The Report recommends against the introduction of a statutory safeguard to protect payees from a possible flood of claims where payment had been made on the faith of a widespread “settled view” of the law that was overturned by a later judicial decision. We derived considerable assistance from the opinions of the majority of the House of Lords judges in the English case of *Kleinwort Benson Ltd v Lincoln City Council* ([1999] 2 AC 349) which approved the cautious approach to a statutory safeguard taken in our Discussion Paper No 99. The existing short negative prescription, which extinguishes any obligation to repay an undue payment five years after the date of payment, protects payees adequately and more simply.
- In *Woolwich Equitable Building Society v Inland Revenue Commissioners* ([1993] AC 70), the House of Lords introduced in English law a new ground of restitution under which a citizen, who has made an undue payment of tax or similar levy to a public authority in response to an ultra vires demand, has a prima facie right to repayment. The scope of the rule, for example whether it covers statutory charges and if so what type, is uncertain. Our Report does not recommend legislation enacting this rule in Scotland. We considered that Scots law could attain the same result by its own common law principles and that to introduce the public/private dichotomy into Scots enrichment law would create unnecessary uncertainty. In light of recent

developments, such as the introduction of self-assessment for income tax and the provisions of the Value Added Tax Act 1997 on refund of VAT, the Report does not recommend any changes on refunds of overpaid tax.

- However, we recommend a minor reform in relation to the refunds of undue non-domestic rates. At present such refunds are limited to payments made under error of fact in terms of section 20 of the Local Government (Financial Provisions) (Scotland) Act 1963. Our Report recommends extending refunds to errors of law, but excluding claims based on errors, of fact or law, which had been the subject of a judicial decision in favour of the rating authority or had been compromised.

Item No 5: Persons

Commissioner: Dr E M Clive

Project Manager: Dr D I Nichols

2.29 Our recent and prospective work includes projects on

- guardianship of the incapable
- judicial factors

(i) Guardianship of the incapable

2.30 As we mentioned in our Thirty-Third Annual Report 1997-98 (para 2.26) the Scottish Office issued in February 1997 a consultation paper, *Managing the Finances and Welfare of Incapable Adults*. The paper accepted as a basis for legislation many of the recommendations in our Report on Incapable Adults (Scot Law Com No 151) published in September 1995. The Scottish Executive issued a statement setting out their policy; *Making the Right Moves: Rights and Protection for Adults with Incapacity*. It was laid before the Scottish Parliament in August 1999. The Adults with Incapacity (Scotland) Bill was considered by the Scottish Parliament.⁴

⁴ The Adults with Incapacity (Scotland) Act received Royal Assent on 9 May 2000.

(ii) Judicial factors

2.31 We have become aware, as a result of our previous projects on family law and mental incapacity, that the law relating to judicial factors is in need of overhaul. We remain of the view that an examination of the legislation relating to judicial factors would be a useful long-term project. However, as we foresaw in our Thirty-Third Annual Report 1997-98 (para 2.28) resources were not available this year to allow work to start.

Item No 6: Property

Commissioner : Professor K G C Reid

Project Manager: Mr J M Dods

2.32 Following completion of the projects on mutual boundary walls and tenement property our work on property now consists of projects on

- feudal tenure
- leasehold tenure
- real burdens

Table 2.32 shows our objectives for these projects during 1998-99 and summarises the progress we have made.

Table 2.32 Property: Projects - Objectives and progress 1998-99

Objectives	Progress	Reference	Notes
To submit, by the end of 1998, a report with draft legislation to abolish and replace the feudal system of land tenure	Report on Abolition of the Feudal System (Scot Law Com No 168) submitted to the Lord Advocate in December 1998. Published in February 1999	Fifth Programme of Law Reform paras 2.33-2.35, Thirty-Second Annual Report 1996-97, paras 2.38-2.43	See paras 2.33-2.46
To undertake, as a long-term project, an examination of leasehold tenure, in particular long leases of residential subjects	Work on this project is unlikely to start until after our project on real burdens is completed. We intend to carry forward this project into our next Programme of Law Reform	Fifth Programme of Law Reform paras 2.36-2.37	See paras 2.47-2.49
To issue a discussion paper on real burdens before the end of 1998 and submit the subsequent report before the end of 1999	Discussion paper on Real Burdens (No 106) published in October 1998. Report delayed until mid 2000	Thirty-Second Annual Report 1996-97, paras 2.41-2.43	See paras 2.50-2.62

(i) Feudal tenure

2.33 Almost all land in Scotland continues to be held on feudal tenure, under which multiple rights of ownership co-exist in the same property. The case for abolition of the

system is well documented and not seriously disputed. It has outlived its usefulness and is open to abuse.

2.34 **Objective.** Our objective under our Fifth Programme of Law Reform (paras 2.33-2.35,

and see also paras 2.38-2.43 of our Thirty-Second Annual Report 1996-97) was to submit, by the end of 1998, a report with draft legislation to abolish and replace the feudal system of land tenure.

2.35 Progress. We submitted our Report on Abolition of the Feudal System (Scot Law Com No 168) to the Lord Advocate in December 1998. It was published in February 1999.

2.36 In the Report we recommend the abolition of the feudal system and its replacement with a modern system based on the principle of simple ownership of land. Feudal vassals will become outright owners and the rights of superiors will fall. The Crown will be treated in the same way as any other superior so that land will cease to be held from the Crown. But Crown prerogative rights as Sovereign or Head of State will remain. The dignity of baron will be preserved but will be severed from the ownership of land.

2.37 All remaining feuduties will be compulsorily extinguished but superiors will be able to claim full compensation on the same basis as under the Land Tenure Reform (Scotland) Act 1974 by serving an appropriate notice within two years. There is an instalment scheme for amounts of £100 or more.

2.38 Superiors will generally lose their right to enforce real burdens. In two cases they will be able to save the right. To do so they will have to register a notice in a prescribed form in the Land Register or Register of Sasines in the period between Royal Assent and the day of feudal abolition.

2.39 The first case is where the superior owns adjoining land. The right to enforce can be transferred to such land but, in the normal case, only where it contains a permanent building within 100 metres of the land affected by the burdens. The building will have to be in use as a place of human habitation or resort. This will allow the superior to continue to preserve the amenity of a house or other building.

2.40 The second case is where the burden preserves for the benefit of the public the architectural, historical or other special characteristics of land or buildings. An example would be an historic building restored by a conservation trust and feued subject to burdens designed to preserve the restoration work. Scottish Ministers are given power to draw up a list of conservation bodies which can register a notice to preserve such burdens.

2.41 Any burdens which survive will be subject to whatever legislation may result from the Commission's parallel project on real burdens.

2.42 We consider that our proposals, taken as a whole, are fully compatible with the European Convention on Human Rights. Superiors will be able to claim full compensation for the loss of feuduties. Real burdens which protect an essential interest can be preserved. Compensation will be available for the loss of development value real burdens, that is, real burdens which have been deliberately used to reserve development value for the superior when land has been sold at a discount, but will be payable only when a hitherto prohibited development has taken place and only to the extent that the former vassal has gained from the development. No compensation will be payable for the loss of the right to charge fees for waivers of ordinary real burdens.

2.43 We recommend that a maximum duration of 125 years should be introduced for new long leases. This period strikes a balance between the risk of the emergence of a quasi-feudal system and the risk of prejudicing commercial development in Scotland.

2.44 The draft Bill which accompanies the report repeals 45 Acts in their entirety as well as 246 sections, 57 Schedules and many obsolete and unnecessary words in other Acts.

2.45 In preparing our Report we consulted with the Land Reform Policy Group. We also received valuable assistance from our advisory group on the practical implications of our recommendations. The members are listed in

Appendix 3C. We are also grateful to the many other people who provided us with information or advice for the purposes of the Report.

2.46 The Abolition of Feudal Tenure etc. (Scotland) Bill was introduced to the Scottish Parliament on 6 October 1999 and substantially followed the provisions of our Bill.⁵

(ii) Leasehold tenure

2.47 Long leasehold tenure has many of the characteristics of ownership. Leases for periods of 999 years, or leases subject to indefinite rights of renewal, are in practice if not in law equivalent to perpetual feus. They were recognised as such by some landlords and many were granted because of restrictions on the power to feu. The problems caused by these leases are well documented. Tenants, on expiry of their leases, lose possession of their homes which, in some cases, they or members of their family have built. They may not be entitled to compensation and would have to pay large sums to their landlord to buy back property which they regard as their own.

2.48 **Objective.** Under our Fifth Programme of Law Reform (paras 2.36-2.37) our objective is to

- undertake, as a long-term project, an examination of leasehold tenure, in particular long leases of residential subjects.

2.49 **Progress.** We have not yet started work on the project and are unlikely to do so until after our project on real burdens is completed. However, having finished the feudal project, it seems logical to turn our attention to other forms of tenure similar to feudal tenure with a view to integrating these tenures into the new system of land ownership. Ultra-long leasehold tenure can be regarded as a sort of shadow feudal tenure. There is a strong argument that the interest of the tenant under a lease for several hundred years should be converted into simple ownership on payment of compensation to the landlord. We intend to carry this project forward into our next Programme of Law Reform.

(iii) Real burdens

2.50 Real burdens are conditions imposed in title deeds for the purpose of regulating the maintenance and use of land and buildings for the benefit of neighbours. They developed in the late eighteenth and early nineteenth centuries as a means of controlling the rapid urbanisation which accompanied the industrial revolution. At a time when there was no planning legislation and the idea of public control over land was still in its infancy, they provided a highly effective method of private regulation. Today they continue to perform a useful function. They are found throughout Scotland. They are not uncommon in rural areas, but in the main they are an urban phenomenon. Similar forms of private regulation are found in other industrialised countries. The law on real burdens is unsatisfactory in many respects and with the abolition of the feudal system and the extinction of many feudal real burdens the time is right for a review of the law.

2.51 **Objectives.** Our objectives (see paras 2.41-2.43 of our Thirty-Second Annual Report 1996-97) were to

- issue a discussion paper on real burdens before the end of 1998
- submit the subsequent report before the end of 1999

2.52 **Progress.** In accordance with our published commitment we issued a Discussion Paper on Real Burdens (No 106) in October 1998. The paper considers the future of real burdens in a post-feudal Scotland by reference to the two broad categories of burdens that will survive feudal abolition, namely community burdens and neighbour burdens.

2.53 Community burdens impose common obligations on a number of different properties which are then mutually enforceable by the owners of these properties. Neighbour burdens impose obligations on one property for the benefit of another property, which is not itself subject to the obligations. They are enforceable by one neighbour against another.

⁵ The Abolition of Feudal Tenure etc. (Scotland) Act received Royal Assent on 9 June 2000.

2.54 The paper puts forward proposals for the clarification and simplification of the law. The proposals are designed to make it easier to identify the person with the right to enforce a real burden, taking into account the problem of implied rights; to resolve doubts as to the validity of real burdens which regulate the maintenance and management of common facilities; to deal with the problem of obsolete burdens; and to make it easier quicker and cheaper to discharge real burdens.

2.55 We received an excellent response to the paper from a wide range of consultees, including the legal profession, public and conservation bodies, representative bodies, the property sector and individuals. We are grateful to all those who found the time to comment.

2.56 The general tenor of the responses was favourable. We are preparing a Bill substantially on the lines of the paper. The Bill will be a major piece of legislation with some 100 sections. Work on the Bill has however been delayed by the shortage of drafting resources (see para 2.7). We do not now think that it will be possible to submit the Report until the middle of 2000.

2.57 There will be some changes to the proposals in the Discussion Paper. For instance, we are considering the introduction of a system of rudimentary management rules which would apply to a development unless contrary provision was made. These might empower the owners of a majority of units (i) to carry out maintenance in accordance with any maintenance burdens; (ii) to appoint a manager/factor; and (iii) to discharge any real burdens, whether for an individual unit or for the whole community.

2.58 We have been considering further the problem of implied rights to enforce taking into account the results of a survey of owner occupiers commissioned by us through the Legal Studies Research Branch of the Central Research Unit of the Scottish Executive, and also the results of a survey carried out by us of deeds of conditions. The rules are based on the two leading cases of *Hislop v MacRitchie's Trustees* (1881) 8 R (HL) 95 and *J A Mactaggart*

& Co v Harrower (1906) 8 F 1101). They are complicated and obscure. They present practical difficulties in their operation.

2.59 We continue to think that implied rights should be abolished but have reconsidered the savings proposed in the Discussion Paper. We are considering whether, where a number of properties are subject to identical or equivalent burdens, "a common scheme", the general rule should be that such burdens should be enforceable against any given burdened property by immediate neighbours who are within a four-metre radius. This would be restricted to cases where the burdens are currently enforceable by those neighbours.

2.60 We continue to support a saving for burdens which regulate the maintenance and use of common facilities and services. The burdens would be enforceable by all those who take benefit from them whether or not they already hold implied rights.

2.61 We also continue to support the notice procedure for neighbour burdens (cf. the *Mactaggart* case, *supra*). Implied rights to enforce such burdens would be extinguished if a notice was not registered.

2.62 Following consultation we remain inclined to recommend the introduction of a sunset rule whereby burdens would expire after a certain period; but not one that would apply automatically. It would require to be triggered by the burdened proprietor's serving a notice on the benefited proprietor. The benefited proprietor must then either apply to the Lands Tribunal for renewal of the burden within a set period or lose the right. The rule would apply to any burden older than a hundred years, but with some exceptions.

Item No 7: Trusts

Commissioner : Dr E M Clive
(until 31 December 1999)

Project Manager: Dr D I Nichols

2.63 Under our Fifth Programme of Law Reform (paras 1.13-1.14, 2.43-2.45) we set ourselves the objective of examining aspects of the law on trusts as a long term project. This

project is carried forward to our Sixth Programme of Law Reform and we intend to start work when resources become available after completion of our present projects.

2.64 This year we have collaborated with the Law Commission on the investment powers of trustees. This work follows on from H M Treasury's consultation document *Investment Powers of Trustees* published in May 1996, and the Law Commission's Consultation Paper *Trustees' Powers and Duties*, Published in June 1997. A Joint Report of the two Commissions on *Trustees' Powers and Duties* (Scot Law Com No 172, Law Com No 260) was submitted to the Lord Chancellor, the Secretary of State for Scotland and the Minister for Justice in June 1999. Only the section on trustee investments was completed jointly, the rest of the Report made recommendations for reforming trust law in England and Wales. As far as Scotland is concerned the Report recommends that all trustees (except those of trusts set up by statute) should have unrestricted powers of investment, unless the trust deed provides otherwise. Most trustees would therefore no longer be restricted to investments specified in the Trustee Investments Act 1961, and if they wished to invest in shares would no longer have to divide the trust fund into two portions, one portion invested in "narrower range" investments, mainly interest-bearing accounts and bonds, and the other in "wider range" shares. Beneficiaries would continue to be protected from trustees investing rashly or imprudently by the duty of care that the common law imposes on trustees. Another protection is that trustees would be bound to obtain and consider proper advice on investments unless they reasonably concluded that that was unnecessary. The Report also recommends that Scottish trustees should be entitled to acquire land (in Scotland or elsewhere) except where the trust deed provided otherwise. It represents a reversal of the present law whereby trustees have no power to acquire land, other than a dwellinghouse for occupation by a beneficiary, unless they are expressly authorised to do so.

Advisory Work

Preliminary

3.1 We have a duty under section 3(1)(e) of the Law Commissions Act 1965 to provide advice and information to government departments, the Scottish Administration and other bodies concerned with law reform at the instance of the UK Government or of the Scottish Administration. Sometimes we incorporate our advice in a published report following on a discussion paper and full consultation. Sometimes we advise informally. We also provide advice and information outwith the strict terms of our statutory remit where we think that this would promote the cause of law reform generally.

3.2 From time to time we provide advice informally to the Law Commission's project teams on aspects of Scots law. We regard this as an important task in light of the requirement under section 3(4) of the Law Commissions Act 1965 that the Commissions should act in consultation with each other in the exercise of their functions.

3.3 We have carried out work in response to requests for advice on

- Companies Act 1985, Part X
- multi-party actions
- partnership
- shareholder remedies
- Third Parties (Rights Against Insurers) Act 1930
- poinding and warrant sale
- jurisdictions under the Agricultural Holdings (Scotland) Acts
- review of the law of the foreshore and seabed.

Table 3.3 shows our main objectives for the ongoing projects during 1998-99 and summarises the progress we have made. We

refer, as appropriate, to our Thirty-Second Annual Report 1996-97 (Scot Law Com No 161) and to our Thirty-Third Annual Report 1997-98 (Scot Law Com No 167).

Companies Act 1985, Part X

Commissioner: Mr P S Hodge, QC

Project Manager: Mrs D F Barbirou
(until 31 March 1999)
thereafter Mrs G B Swanson

3.4 In our Thirty-Third Annual Report 1997-98 (paras 3.6-3.10) we described the work being carried out in response to a request from the Department of Trade and Industry for the Law Commission and the Scottish Law Commission to review the provisions in Part X of the Companies Act 1985 which regulate directors' fair dealing and conflicts of interests. As part of this review, we were also asked to consider whether there was a case for a statutory statement of the fiduciary duties and the duty of care owed by directors to their company.

3.5 This has been an unusual project for the Law Commissions. Normally we would review a specific area of the law with the intention of preparing a draft Bill to implement our recommendations for reform. In this project we have not done so. Instead, the project contributes to the wider company law review being conducted by an independent Steering Group appointed by the Department, whose consultative document, *Modern Company Law for a Competitive Economy: The Strategic Framework*, was published in February 1999. That review is looking at matters which are directly relevant to this project such as the interrelationship between statute and self-regulation, decriminalisation of company law, the needs of small companies and the rights and responsibilities of directors and shareholders. These matters were therefore outside our remit. Accordingly, a number of our recommendations may require further consideration as the wider review progresses.

Table 3.3 Advisory work: Objectives and progress 1998-99

Project	Objective	Progress	References	Notes
Companies Act 1985, Part X	To contribute to a joint report on Part X of the Companies Act to be published during 1999	Report submitted September 1999	Request for advice from the Department of Trade and Industry	See paras 3.4-3.7
Multi-party actions	To provide further views to the Rules Council	Views provided on 24 th November 1999	Request for advice from the Lord President of the Court of Session	See para 3.8
Partnership	To contribute to a joint consultation/discussion paper, or papers, with the Law Commission on partnership, to be issued in 1999	Joint consultation paper/discussion paper delayed to first half of 2000 to accommodate the work on Part X	Request for advice from Department of Trade and Industry (February 1997) Thirty-Second Annual Report 1996-97, paras 3.19-3.23	See paras 3.9-3.12
Third Parties (Rights Against Insurers) Act 1930	To contribute to a joint report with the Law Commission on the Third Parties (Rights against Insurers) Act 1930 to be published during 1999	Report still being drafted. Drafting resources at the Law Commission unavailable until end 1999/beginning of 2000	Request for advice from the Department of Trade and Industry Thirty-Second Annual Report 1996-97, paras 3.29-3.31	See paras 3.13 and 3.14
Jurisdictions under the Agricultural Holdings (Scotland) Acts	To produce a report by 31 March 2000	Work nearing completion	Request for advice from Scottish Ministers	See paras 3.15-3.17
Poining and Warrant Sale	To produce a discussion paper by November 1999 and a report in early 2000	Discussion Paper published in November 1999	Request for advice from Scottish Ministers	See paras 3.18-3.20
Review of the law of the Foreshore and Seabed	To produce a report by the end of 2002	Initial work under-way	Request for advice from Scottish Ministers	See paras 3.21-3.23

3.6 Our Report was published in September 1999. In the Report, we recommend the retention of the majority of provisions in Part X but with substantive amendments. We also recommend a partial codification of directors' fiduciary duties and the duty of care. These recommendations were made after considering a number of factors such as the consultation responses, our guiding principles and economic considerations set out in the Joint Consultation/Discussion Paper and the results of the empirical survey of over 1200 directors throughout the United Kingdom. In addition, we held meetings with an advisory group of specialists in company law and with the Business Law Committee of the Institute of Chartered Accountants in Scotland. These meetings were both informative and helpful. We are grateful to those involved for their time and effort.

3.7 We have also been assisted in our work by Mr Robert Bertram, visiting Professor to the Heriot Watt University and the University of Edinburgh, who has acted as our consultant. We are grateful to him for his assistance throughout this project.

Multi-party actions

Commissioner: Mr P S Hodge, QC

Project Manager : Mrs D F Barbirou
(until 31 March 1999)
thereafter Mrs G B Swanson

3.8 At the request of the Lord President of the Court of Session we have provided further views to the Court of Session Rules Council on the draft Act of Sederunt appended to our Report on Multi-Party Actions (Scot Law Com No 154).

Partnership

Commissioners: Dr E M Clive,
Mr P S Hodge, QC

Project Manager: Mrs D F Barbirou
(until 31 March 1999)
thereafter Mrs G B Swanson

3.9 In paragraphs 3.19-3.24 of our Thirty-Third Annual Report 1997-98, we described the terms of reference, given by the Department of Trade and Industry to the Law Commission and the Scottish Law Commission, for a review of the law of partnership. We also identified

some of the problem areas which both Commissions are examining.

3.10 Work is proceeding well on the preparation of a joint consultation paper in which we plan to seek views on proposals for reform of the law on ordinary partnerships, contained mainly in the Partnership Act 1890.

3.11 There are three main problem areas. First, a partnership has no legal personality in English law and in Scots law a legal personality which is insufficiently clear as to continuity of the personality. This leads to practical difficulties in relation to the ownership of property, the continuance of rights and obligations and, in English law, the execution of deeds. Secondly, the existing law often leads unnecessarily to the complete dissolution of partnerships. There are several common situations, such as the death of a partner or the attempted withdrawal of a partner from a partnership of undefined duration, where, in the absence of agreement to the contrary, the result under the existing law is that the partnership is dissolved as regards all the partners. Thirdly, the rules on winding up the affairs of a dissolved partnership are unsatisfactory, both in theory and in practice. In theory there is the unsatisfactory position, particularly acute in Scotland because of the legal personality of the partnership, that the partnership must be supposed both to continue and not to continue for the purposes of the winding-up. In practice there are difficulties caused by the absence of appropriate mechanisms and powers.

3.12 We plan to publish this paper in the summer of 2000. We propose to deal in a separate paper with the law on limited partnerships, currently contained in the Limited Partnerships Act 1907.

Third Parties (Rights against Insurers) Act 1930

Commissioner: Dr E M Clive
(until 31 December 1999)
Mr P S Hodge, QC
(until 31 January 2000)
thereafter Professor
J M Thomson

Project Manager: Mrs D F Barbirou
(until 31 March 1999)
thereafter Mrs G B Swanson

3.13 A further joint project, in which the Law Commission has the major role, is the review of the Third Parties (Rights against Insurers) Act 1930 in the light of the current law and market practices of the insurance industry. The 1930 Act deals with third party claims against an insured person who is or becomes insolvent.

3.14 As we said in paragraph 3.29 of our Thirty-Third Annual Report 1997-98 we hoped that a joint report on this topic could be published during 1999. Unfortunately however, work on this project in London has been delayed due to a lack of resources at the Law Commission. Although work is now proceeding on the preparation and revisal of a draft joint report, we understand from the Law Commission that it is unlikely that drafting resources for this project will be made available until the beginning of 2000.

Jurisdictions under the Agricultural Holdings (Scotland) Acts

Commissioner: The Hon Lord Gill
Project Manager: Mrs J A Morrison

3.15 On 19 October 1999 the Commission received a reference from Scottish Ministers in the following terms:

“Taking account of the Land Reform Action Plan, to consider existing procedures for dispute resolution in the law on agricultural holdings, and other related matters, including appellate procedures and to advise on possible reforms in jurisdiction and procedures with a view to improving access to justice and economy and speed and quality of justice.”

3.16 The objective is to produce a report for incorporation into a Scottish Executive White Paper for publication in the early part of 2000. Given the time constraints and the detailed

technical nature of the project we have departed from our usual practice of engaging in wide public consultation before submitting our proposals. Instead our proposals have been subjected to the scrutiny of a small advisory group comprising leading practitioners in this field of law. In addition we have consulted with current and previous members of the Scottish Land Court. As part of their publication with the Scottish Executive White Paper our proposals will be subject to public consultation. We are grateful to all those who have assisted us so far in this project. Details of the advisory group are given in Appendix 3D. A Bill is not required for this Report.

3.17 We are well on target to meet the requirement to submit our Report to Scottish Ministers for inclusion in the White Paper.⁶

Pounding and Warrant Sale

Commissioner: Mr N R Whitty
(until 4 February 2000)
thereafter Professor G Maher

Project Manager : Dr D I Nichols

3.18 In response to a Member’s Bill introduced in the Scottish Parliament to abolish poundings and warrant sales, Scottish Ministers requested the Commission

“to report (after consulting relevant interests) on whether the conclusion in its 1985 Report on Diligence and Debtor Protection that pouncing and warrant sale should not be abolished remains valid, and whether that diligence could be replaced by alternative enforcement measures which would be no less effective”.

3.19 The Commission was asked to report in the early part of 2000 and as part of the consultation process we produced, in accordance with our objectives, a Discussion Paper in November 1999. Views of consultees were invited by 28 January 2000.

⁶ The Report on Jurisdictions under the Agricultural Holdings (Scotland) Acts (Scot Law Com No 178) was submitted to Scottish Ministers ahead of schedule on 23 March 2000 and published on 17 May 2000 with the Scottish Executive White Paper Agricultural Holdings – Proposals for Legislation.

3.20 We are on schedule to produce our Report as requested early in 2000.⁷

Review of the Law of the Foreshore and Seabed

Commissioner Professor K G C Reid
(until 31 January 2000)
thereafter Professor
J M Thomson

Project Manager: Mrs J A Morrison

3.21 Towards the end of 1999 the Commission received a reference from Scottish Ministers in the following terms:

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

3.22 We propose to examine comprehensively the existing Scots law and to carry out a comparative study of experience in certain other countries. We shall concentrate on the technical issues with a view to informing the Scottish Executive on the range of policy issues that might be available in any change in the law.

3.23 Our objective is to produce a report by the end of 2002.

⁷ The Report on Poiding and Warrant Sale (Scot Law Com No 177) was published on 13 April 2000.

Statute law

Preliminary

4.1 Our work on statute law is carried out in close co-operation with the Law Commission. Major projects are underway on

- consolidation
- statute law revision

Table 4.1 shows our main objectives for these projects during 1998-99 and summarises the progress we have made. Appendix 2A summarises our objectives for the coming year. In our account we refer, as appropriate, to our Thirty-Third Annual Report 1997-98 (Scot Law Com No 167).

Table 4.1 Statute law: Main objectives and progress 1997-99

Objective	Progress
To prepare a Bill for introduction into the Scottish Parliament to consolidate the legislation relating to salmon and freshwater fisheries in Scotland	Bill should shortly be ready for introduction
To contribute, jointly with the Law Commission, to the preparation of a chronological table of Private and Personal Acts, to be published in the first half of 1999	Chronological Table of Private and Personal Acts (Law Com 256, Scot Law Com 170) published jointly with the Law Commission on 2 March 1999
To prepare a schedule of repeals of Scottish local Acts and public general Acts of application to Scotland to be included in the first Report to the Scottish Ministers on Statute Law Revision in so far as such matters are within the legislative competence of the Scottish Parliament and in a joint report with the Law Commission so far as outwith such competence.	Detailed preliminary research and consultation is underway in relation to the proposed repeal of over 60 local Scottish Acts and a further 15 public general Acts of local application in Scotland
To prepare a schedule of repeals of Scottish local Acts to be included in subordinate legislation.	Extensive preliminary research carried out.
To contribute to a joint report with the Law Commission on statute law revision, to be published in 2002 or 2003	Work continues at a satisfactory rate

Consolidation

Commissioner: The Hon Lord Gill

Project Manager: Mrs D M Howieson
(until 12 May 1999)
thereafter Mrs J A Morrison

4.2 Work continues on the consolidation of the legislation relating to salmon and freshwater fisheries in Scotland to allow for its introduction in the Scottish Parliament. Work is simultaneously underway on the preparation of Recommendations to accompany the draft Bill.

4.3 Efforts were made to finalise the Commission's Report including the draft Bill with the aim of presenting it to the Westminster Parliament prior to the transfer of power to the Scottish Executive. Slippage in the original drafting timetable meant, however, that a policy decision was then taken, in consultation with the then Scottish Office Agriculture Environment and Fisheries Department, to present the Report with its draft Bill to the Scottish Parliament. Work continues on the basis that this Bill is likely to be the first consolidation of Scottish legislation to be introduced in the Parliament.

4.4 Complications have been created for this particular project through the transfer in May 1999 of Scottish Parliamentary Counsel from London to Edinburgh, the introduction of new software to assist draftsmen in the preparation of Bills, and the transfer to other posts, as a direct consequence of devolution, of both the draftsman and the member of our staff working on this particular Bill. However, the work is proceeding and we are fortunate to continue to have the services of the Department's consultant, Mr Robert Williamson. The original draftsman, Mr Patrick Layden, now the Legal Secretary to the Lord Advocate and our own staff member, Mrs Dianne Howieson, now also in the Legal Secretariat, agreed to continue responsibility for this Bill. We are grateful to them both.

Statute law revision

Commissioner: The Hon Lord Gill

Project Manager: Mrs D M Howieson
(to 12 May 1999)
thereafter Mrs J A Morrison

4.5 Statute law revision is the process whereby obsolete legislation is removed from the body of statute law. One of our statutory duties under section 3(1) of the Law Commissions Act 1965 is to promote the repeal of such legislation. Our work on the statute law revision project in conjunction with the Law Commission is continuous, periodically culminating in the publication of a Joint Report to which is annexed a draft Statute Law (Repeals) Bill.

(i) Sixteenth Report

4.6 The Statute Law (Repeals) Bill presented to the UK Parliament in May 1998 received Royal Assent on 19 November 1998. The main focus of the 1998 Act from our perspective was the review of Scottish local Acts, of which 75 were repealed in their entirety.

(ii) Seventeenth Report

4.7 Work has now commenced on the Seventeenth Report on statute law revision. In addition to providing advice to the Law Commission's Project Team on the Scots law aspects of their GB and UK statute law revision programme, we are maintaining our emphasis on the need to rationalise Scottish local legislation. Detailed preliminary research and consultation is underway in relation to the proposed repeal of over 60 such Acts. A further 15 Public General Acts of local application in Scotland are similarly under investigation.

4.8 Prior to 1 July 1999, Statute Law (Repeals) Bills were presented to Parliament by the Lord Chancellor and the Lord Advocate on the joint recommendation of the two Law Commissions. The Bills were subject to expedited Parliamentary procedure and were taken through Parliament by the legal staff of the Law Commissions. Following devolution, aspects of future Statute Law (Repeals) Bills which are within the legislative competence of the Scottish Parliament may be considered by the Scottish Parliament, again by way of expedited procedure under the Scotland Act 1998 (Transitory and Transitional Provisions)(Standing Orders and Parliamentary Publications) Order 1999 (S.I. 1999/1095). It is expected that from now on there will be a separate Scottish Statute Law (Repeals) Bill dealing with matters within the legislative competence of the Scottish Parliament. It is intended that the Seventeenth Report on statute law revision should be published during 2002 or 2003. We await confirmation of the Scottish Executive's requirements for publication of the first Scottish Report on statute law revision.

(iii) Chronological Table of Private and Personal Acts

4.9 In March 1999 in association with the Law Commission we published the Chronological Table of Private and Personal Acts, and presented to Parliament the Joint Report (Law Com No 256, Scot Law No 170). Publication marked the completion of a project authorised in 1974 for the preparation of a Chronological Table of Local, Private and Personal Acts to complement the long-established Chronological Table of Statutes dealing with Public General legislation. This was first published in 1870 and issued annually since 1898. For the first time a complete record of all Public General, Local, Private and Personal Acts passed by the Parliaments at Westminster since 1539 is publicly available.

4.10 The purpose of the Table is to provide an accessible and authoritative means for determining the extent to which private and personal legislation is in force. As such it will prove an important source of information for legislators, legal practitioners and members of the public. Accordingly we hope that the Table will permit us to include projects for the repeal of Private and Personal Acts in future programmes of statute law revision. Such projects are long overdue. It is estimated that the majority of the 10,400 extant Private and Personal Acts covering the United Kingdom are obsolete or spent.

(iv) Repeal of local legislation

4.11 In our Thirty-Third Annual Report 1997-98, paragraph 4.13 we mentioned our proposed project in conjunction with the legal department of Glasgow City Council to review legislation promoted by the former Glasgow Corporation which has been repealed in general terms by the Local Government (Scotland) Act 1973, with a view to explicit repeal of such provisions by subordinate legislation. The general repeal is still a source of considerable confusion. The extensive preliminary research required is continuing as resources permit. It remains our intention to prepare a schedule of selected repeals for inclusion in appropriate subordinate legislation under the 1973 Act as soon as other priorities allow.

Promoting Law Reform

Preliminary

5.1 One of our main objectives is the promotion of law reform. It is therefore important for our work that we maintain links with those who have an interest in law reform. We seek to maintain close relationships in the United Kingdom and elsewhere with

- the Scottish Administration and agencies
- UK government departments and agencies
- law reform agencies
- legal and other societies and organisations
- universities.

We hold meetings with representatives of the main legal institutions concerned with law reform in Scotland, for example the Law Society of Scotland, the Faculty of Advocates, the Society of Public Teachers of Law and the Universities' Faculties of Law.

5.2 While we are mindful of the resource implications, Commissioners and legal staff are encouraged to make their expertise available to other organisations concerned with law reform. In connection with individual projects, we occasionally hold seminars to which we invite specialists and representatives from public authorities, organisations and interest groups. We are also willing to receive visits, or to visit others, to present or discuss our work.

5.3 Some of the more notable of these activities during 1998-99 are mentioned in the following paragraphs.

Consultation

5.4 An effective process of consultation is essential for our work. Our main instrument of consultation remains the discussion paper. In a typical project we issue several hundred copies of a discussion paper to public authorities, organisations and interested groups and individuals. From time to time we

hold seminars. These enable us to target a small, well-informed audience and to discuss central issues in depth.

5.5 We benefit substantially from the contribution of our consultees. It is not always easy for consultees to find time to consider complex issues of law reform and we gratefully acknowledge the help which they give so willingly.

Website

5.6 We are keen to develop new ways of providing information about our projects and developing our contacts with others. We are close to establishing a website on which we aim to have information about the Commission itself and about our current and future work.

5.7 We see the website also as a means of making widely available our Reports and Discussion Papers.

International links

5.8 It is important that we should, consistent with the demands of our other work, monitor and contribute to law reform at the international level given that law reform in Scotland is increasingly affected by international developments.

(i) Council of Europe

5.9 Dr Eric Clive, a Commissioner until 31 December 1999, acted as vice-chairman of the Group of Specialists set up by the Council of Europe to prepare a draft Recommendation on principles concerning the legal protection of incapable adults. The Recommendation was adopted by the Committee of Ministers of the Council of Europe on 23 February 1999.

(ii) Hague Conference on Private International Law

5.10 Dr Clive also acted as Chairman of a Special Commission of the Hague Conference on Private International Law which concluded

negotiations for a Worldwide Convention on the International Protection of Adults. The Special Commission met in the Hague from 20 September to 2 October 1999 and concluded with a Diplomatic Session at which the draft Convention was signed. As a result of this work and of Dr Clive's subsequent suggestions the Scottish Executive succeeded in moving amendments to the Adults with Incapacity (Scotland) Bill which resulted in the Convention being incorporated into the law of Scotland. The Scottish Parliament was the first legislature in the world to take this step.

(iii) Law of trusts

5.11 Professor Kenneth Reid was the Scottish representative on an international working group set up by the University of Nijmegen to examine the law of trusts and to draw up common principles of European Trust Law. The principles were published in January 1999 and Professor Reid gave a paper at the inaugural conference in The Hague. Professor Reid gave a further paper on European Trust Law at the University of Utrecht in June 1999.

(iv) Other contributions

5.12 From 24 to 26 September 1998 the Chairman participated in a conference of European judges in Cracow, Poland. The principal topic of the conference was the possible relevance of UK legal concepts to Polish law.

5.13 On 1 October 1998 the Chairman attended a dinner given by the then Lord Advocate in Edinburgh Castle on the occasion of the visit to Edinburgh of the judges of the European Court of Justice.

5.14 Between 6 and 10 October 1998 the Chairman participated in British Law Week in Beijing. He spoke at the opening ceremony and took part in seminars with students of two universities in Beijing. He was also interviewed on the BBC World Service and on Chinese television.

5.15 In May 1999 the Chairman was a guest of the Louisiana Association of Defence Counsel on the occasion of their Convention in Edinburgh.

5.16 From 13 to 16 September 1999 the Chairman attended the 12th Commonwealth Law Conference at Kuala Lumpur. In conjunction with his attendance there he also attended a meeting of the Commonwealth Law Reform Agencies.

5.17 On 21 September 1999 the Chairman was a guest of the Hong Kong Law Reform Commission and attended a meeting of the Commission.

5.18 From 23 to 25 September 1999 the Chairman took part in and presented a paper at a conference of European Judges in Brno, in the Czech Republic.

Links with government departments and agencies and the Scottish Administration

5.19 During 1998-99 the Chairman took part in meetings of the Lord Chancellor's Advisory Committee on Statute Law held in London.

5.20 The Chairman had meetings with the then Lord Advocate and with officials of the Department of Trade and Industry and had regular meetings with officials of the then Scottish Courts Administration and the Office of the Solicitor to the Secretary of State. The Chairman and members of the Commission staff have also had meetings with the Minister for Justice.

5.21 The Chairman represented the Commission at the Service of the Kirking of the Scottish Parliament and at its Opening Ceremony on 30 June and 1 July 1999 respectively.

5.22 There continued to be regular contact between members of our property law team, Commissioners and staff, and members of the Land Reform Policy Group. Our discussions with the Group have been helpful to our work on both the feudal tenure and real burdens projects.

5.23 Professor Reid served as a member of the Scottish Executive's Consultative Panel on Information about Land which was set up to develop the Land Reform Policy Group's recommendations on that subject.

Links with law reform agencies

5.24 We have continued to maintain our contacts with law reform agencies in the United Kingdom and elsewhere and to exchange publications with them.

(i) Law reform agencies in the United Kingdom

5.25 During 1998-99 we worked closely with the Law Commission on a number of joint law reform projects as well as in the field of statute law.

5.26 The Chairman was in regular contact with Mr Justice Carnwath, the Chairman of the Law Commission, and his predecessor Mrs Justice Arden, and established closer informal links with Mr Justice Girvan, the Chairman of the Law Reform Advisory Committee for Northern Ireland. Other Commissioners and legal staff exchanged visits in the course of their work. The Secretary had occasional meetings throughout the year with the Secretary of the Law Commission and on 16 July 1999 had a meeting with the Secretary of the Law Reform Advisory Committee for Northern Ireland.

(ii) Law reform agencies elsewhere

5.27 Dr Clive and the Secretary met with Roderick A McDonald, President of the Law Commission of Canada when he made an informal visit to the Commission on 10 September 1999.

5.28 We welcome such visitors and seek to establish reciprocal arrangements with their institutions.

Links with legal and other societies and organisations

5.29 We wish to strengthen our links with legal and other professional societies and organisations throughout Scotland. We welcome invitations from such societies and organisations to address them on subjects of mutual interest or to meet their representatives.

(i) Insolvency Practitioners Association

5.30 Mr Patrick Hodge gave a talk on Company Law Reform at Dunkeld on 9 September 1998. He also gave a talk on

Company Litigation at the Company Law Conference in Edinburgh on 25 September 1998.

5.31 The Chairman delivered the Bernard Phillips Memorial Lecture to the Insolvency Practitioners Association in London on 14 October 1998.

(ii) Franco-British Judicial Co-operation Colloque

5.32 The Chairman took part in the Franco-British Judicial Co-operation Colloque held in Edinburgh between 17 and 19 September 1998.

(iii) Law Society of Scotland

5.33 The Law Society of Scotland has a key role in law reform. In June 1999 we met representatives of the Law Society of Scotland's Conveyancing Committee and of the Joint Committee of the Law Society and the Society of Messengers-at-Arms and Sheriff Officers to discuss issues relating to land attachment. We have also written to the Scottish Executive supporting the Law Society's proposals for legislation on floating charges to deal with the issues raised in *Sharp v Thomson* (1997 SC (HL) 66). These proposals cohere with those that we put forward in our Discussion Paper *Diligence Against Land* to deal with competitions between the holder of a delivered but unregistered deed and a creditor of the granter using land attachment or the granter's trustee in sequestration or liquidator.

5.34 The Chairman prepared a paper on the future of real burdens for a conveyancing seminar in Dundee organised by the Society. Due to judicial commitments he was not able to deliver the paper and in his absence Mr Scott Wortley one of our legal assistants delivered a paper on the same subject to the seminar.

5.35 The Chairman attended the inaugural meeting of the Society's Civil Justice Forum in July 1998. The Chairman and Secretary attended the annual dinner of the Council of the Society. On 13 July, the Secretary met with representatives of the Society's Law Reform Committee.

5.36 Mr Hodge attended the Society's Civil Justice Forum on 11 November 1998, and also

gave a talk at the Law Society's Partnership Law Conference on 18 March 1999.

(iv) Edinburgh Insolvency Discussion Group

5.37 The Chairman presented a paper on Company Law Reform to the Edinburgh Insolvency Discussion Group on 1 June 1999.

(v) Other legal and professional societies

5.38 The Chairman accepted a number of invitations received from other legal societies, including the Society of Solicitors in the Supreme Courts.

Links with universities

5.39 We look initially to the Scottish universities for consultants and legal research staff and take every opportunity to meet their staff and students and to participate in academic conferences and seminars.

(i) Events, etc

5.40 In October 1998 Commissioners attended a Symposium on Good Faith in Contract and Property Law in Aberdeen University. The Chairman also attended a Dinner hosted by Professor Robert Rennie of the Department of Conveyancing in Glasgow University.

5.41 On 17 December 1998, Dr Clive gave the Wilson Memorial Lecture at Edinburgh University on "Law Making in Scotland: From APS to ASP".

5.42 In March 1999 the Chairman was judge of the Moot Final at Strathclyde University Law School.

5.43 On 15 November 1999 the Chairman was a guest at a dinner given in Glasgow University by the Chancellor, Sir William Fraser.

5.44 On 2 December 1999 the Commissioners and Secretary had a meeting with representatives of the Society of Public Teachers of Law.

(ii) Awards

5.45 The Chairman was awarded an honorary LL.D by Glasgow University on 17 June 1998.

(iii) British Council European Young Lawyers Programme

5.46 We continue to support this Programme by offering a place to a participant and by hosting a meeting of all participants at our offices. In May 1999 we received a visit from participants in the extended study programme for young European lawyers run by the University of Edinburgh. Dr Clive and two members of our legal staff gave short talks on the role of the Law Commissions, our current programme of law reform and methods of working and our work on statute law. The supervisors of the programme confirmed that our contribution to the programme had been well received by participants.

5.47 We are grateful to Mr Henning Brath, one of the participants of the scheme, for the paper that he prepared for us in connection with the real burdens project on the Norwegian law relating to restrictions on the use of land.

(iv) Universities outwith Scotland

5.48 Mr Whitty attended a conference, and delivered a paper on The Taxonomy of Unjustified Enrichment at the University of Cambridge on 7 to 11 April 1999.

Visits

5.49 On 13 August 1999 the Commission was visited by the Advocate General, Ms Lynda Clark QC.

5.50 On 4 November 1999 we were visited by Mr Patrick Layden TD, the Legal Secretary to the Lord Advocate.

5.51 As well as the visits already mentioned, the Commission enjoyed a number of other visitors including Mr Michael Hamilton, School of Public Policy, Economics and Law, University of Ulster.

Staff and Management

Commissioners, staff and Parliamentary counsel

6.1 Commissioners and staff as at 31 December 1999 are listed in the organisation chart in Appendix 4. Our legislative drafting is carried out for us mainly by Mr Gregor Clark and Miss Madeleine Mackenzie in the Office of the Scottish Parliamentary Counsel and, for reserved matters, by Mr Gregor Kowalski in the Office of Parliamentary Counsel.

6.2 On 31 December 1999 Dr Eric Clive retired from the Commission after 19 years' service as a Commissioner. We were delighted that Dr Clive was awarded a CBE in the Queen's Birthday Honours List. On 4 February 2000 Mr Niall Whitty will retire from the Commission after some 28 years' service, initially as a member of the legal staff and latterly as a Commissioner. The contribution of both Dr Clive and Mr Whitty to the work of the Commission can only be described as immense. We thank them and wish them well.

6.3 To lose two Commissioners of the stature of Dr Clive and Mr Whitty so close together is an undoubted loss to the Commission. However, we welcome two new Commissioners of repute in Professor Gerard Maher of Strathclyde University and Professor Joseph Thomson of Glasgow University.

6.4 During the previous year, the Commission has seen a significant amount of staff movement. On 31 March 1999 our Secretary, Mr Jim Maclean, was promoted to the post of Deputy Solicitor in the Office of the Solicitor to the Secretary of State (now the Office of the Solicitor to the Scottish Executive). We take this opportunity to thank him for his invaluable contribution to the work of the Commission. The post of Secretary is now held by Mr Norman Raven, a Divisional Solicitor in the Office of the Solicitor to the Scottish Executive.

6.5 Other significant staff changes affecting our permanent staff throughout the year are as follows; Mr J Heggie, administrative assistant,

transferred to a post in the Scottish Office on 25 September 1998. Mr J Beckett, legal assistant, left in September 1998 to pursue an LLM at Glasgow University. Miss S M Dewar, legal assistant, left to take up a traineeship at Brodies WS on 25 September 1998. Ms F Killen, legal assistant, took up a post with the Scottish Parliament Information Centre on 19 March 1999. Mrs D F Barbirou, solicitor, returned, on promotion, to the Office of the Solicitor to the Secretary of State on 31 March 1999. Mrs A McCabe, personal secretary, left to take up a post in the Scottish Parliament on 9 April 1999. Mrs D M Howieson, solicitor, transferred to the Legal Secretariat to the Lord Advocate on 12 May 1999. Mr P J McGrath, legal assistant, left to take up a post with the Law Society of Scotland on 14 May 1999. Mrs J Mudede-Smith, legal assistant, left the Commission in June 1999 to pursue further education. Mr Scott Wortley, legal assistant, left the Commission on 31 December 1999 to take up a lectureship at Strathclyde University. We are grateful to them all for their work on our behalf and to other staff who are not specifically mentioned here.

6.6 We are grateful to our Parliamentary counsel and to all of our staff for their contribution to our work.

Legal support services

6.7 In our Thirty-Second Annual Report 1996-97 (Scot Law Com No 161, paras 6.8-6.9) we described our plans for diversifying our legal support services and reallocating a proportion of resources to finance a mix of

- advisory groups of legal and other experts to support particular projects
- attachments for experienced legal academics
- consultancies involving lawyers from the universities and the private sector
- fixed-term research posts for new law

graduates

- scholarships for post-graduate research in areas of law with which we are concerned.

6.8 Our Secretary, the three full time members and one part time member of our core legal staff are on loan from the Office of the Solicitor to the Scottish Executive. Such staff come to us for periods of three to five years, or in a few cases for longer. They bring to our work an experience and knowledge of the machinery of government and the legislative process which we value highly and which we could not readily get from any other source. We hope also in the fullness of time to be able to fill the vacancies which we currently carry in our core complement. The demands of devolution have meant that such staff are in short supply at present.

6.9 Our legal assistants are recent law graduates employed under fixed-term contracts for periods of up to two years. The numbers fluctuate throughout any one year. One of the assistants was assigned to us by McGrigor Donald, Solicitors, Glasgow. We are grateful to them for helping us in this way. The arrangement proved to be most successful. We hope to set up similar arrangements with private firms in future. Our general aim is to complement the skills and experience of our core legal staff with the skills and ideas of young lawyers fresh from training in the university or the private sector.

6.10 We have continued our practice of employing a small number of law students or recent law graduates as temporary research assistants during the summer months.

6.11 We hope to devise a scholarship scheme, under which a law graduate could count his work for us towards a post-graduate qualification. We have had preliminary discussions with the deans of the law faculties of the Universities of Aberdeen, Dundee, Edinburgh, Glasgow and Strathclyde. However, we cannot develop the idea further until we have resources available.

6.12 We are glad to say that we have been

able to enter into a commitment to take four trainee solicitors over a two year period as part of a scheme with the Office of the Solicitor to the Scottish Executive. We had found that some good candidates were deterred from accepting research appointments with us because the completion of their professional training would be postponed. The posts we offer will be more attractive if service with us can count as part of the traineeship requirement. The trainees will come to us for six months each. We hope to continue this commitment after the initial two year period.

Consultancies

6.13 We wish to make more use of consultants. In future, our consultants may spend a proportion of their time at our office in Edinburgh, where they will have support from our legal and administrative staff and access to our library and computer facilities. Professor William McBryde, then of the University of Dundee, was engaged in a major consultancy on our work on contract. This consultancy has been successful. We are grateful to Professor McBryde for his work. We hope to build on that experience in future consultancies.

6.14 We have continued also to use consultancies of the more traditional form. Mr Robert Bertram, for example, has advised us on matters of company law. In the feudal reform project Dr Andrew Steven provided a paper on rights held by superiors in addition to the rights to collect feuduty and to enforce real burdens.

Advisory groups

6.15 During 1998-99 we enjoyed substantial benefit from the work of our advisory groups on

- company law
- contract law
- feudal tenure
- real burdens
- agricultural holdings

Their practical knowledge and experience has been invaluable and we are grateful to those who have contributed their time and expertise. We list the members of these groups in Appendix 3.

6.16 The members of the feudal tenure group kindly agreed to reconvene to assist our work on the real burdens project. We also plan to establish an advisory group on partnership law in the near future. In addition we intend to set up an advisory group to assist our consideration of the law of the foreshore and seabed.

Library

6.17 Our library and the expertise of our librarian, Mr Nick Brotchie, are vital assets. Our librarian maintains excellent working relationships with fellow law librarians, in particular those of the Faculty of Advocates, the Scottish Executive, the Society of Solicitors to the Supreme Courts and the University of Edinburgh. We welcome reciprocal arrangements with these and other libraries.

Information technology

6.18 The period under review saw the installation of a new computer system. It is fair to say that the system has not been without its troubles. We do not benefit from the assistance provided by Business Support Units as in the larger headquarters offices. We are grateful for the help which has been provided to us by the IT experts in Scottish Courts Service.

6.19 The difficulties with the system have delayed some of our initiatives particularly the establishing of a website. However, that is now close and will be a benefit to our working methods.

6.20 Latterly, the availability of the internet has been of great benefit to our research.

Office procedures

6.21 We continue to review our internal organisation and procedures through the medium of a number of small groups of administrative and legal staff. Our Secretary has concluded that these groups would benefit

from a more focused remit and this is in hand. In the early part of 1999 a scrutiny by the then Scottish Office Efficiency Unit made certain recommendations about staffing and job responsibilities. We intend to implement those recommendations.

Co-ordination and finance

6.22 Responsibility for the co-ordination of our work with that of the Scottish Executive and for our funding rests with Courts Group in the Scottish Executive Justice Department. We are grateful to Mr Peter Beaton, Head of Civil Justice and International Division and to Mr David Stewart, Head of Judicial Appointments and Finance Division and their staff, for the advice and support they have so willingly provided on these respective matters during the period of this Report.

6.23 In mid-1999 we underwent an audit study by the Scottish Executive Audit Unit. That found that the financial monitoring and controls were in good order but made some useful recommendations on some areas of detail. We intend to implement these recommendations.

6.24 In Appendix 5 we summarise our running costs for the year to 31 March 1999 and our projected running costs for the year to 31 March 2000. We include for comparison the corresponding figures for the year to 31 March 1998. In future Annual Reports we shall seek to align the running costs information more closely with the period covered by the Report.

Scottish Law Commission: Reports 1998-1999

(*Produced jointly with the Law Commission)

Scot Law Com No	Title	Implementation
162	The Law of the Tenement	
163	Boundary Walls	None required
164	Diligence on the Dependence and Admiralty Arrestments	
165	Leasehold Casualties	8
166*	Statute Law Revision: 16 th Report	Statute Law Repeals Act 1998 (c.43)
168	Abolition of the Feudal System	Abolition of Feudal Tenure etc. (Scotland) Bill ⁹
169	Unjustified Enrichment, Error of Law and Public Authority Receipts and Disbursements	
170*	Chronological Table of Private and Personal Acts	None required
171	Penalty Clauses	
172*	Trustees' Powers and Duties	
173*	Company Directors: Regulating Conflicts of Interest and Formulating a Statement of Duties	
174	Remedies for Breach of Contract	

⁸ A Member's Bill with Scottish Executive support was introduced in the Scottish Parliament on 10 May 2000.

⁹ The Abolition of Feudal Tenure etc. (Scotland) Act received Royal Assent on 9 June 2000.

Objectives for 2000

A. Law Reform Objectives

Objective	Source	Notes
To submit a report on Pounding and Sale by April 2000 ¹⁰	Request for advice from Scottish Ministers	See paras 3.18-3.20
To submit a report with draft legislation on Real Burdens in mid 2000	Project arising from work on the Abolition of the Feudal System: Fifth Programme of Law Reform para 2.35	See paras 2.50-2.62
To submit a report on Jurisdictions under the Agricultural Holdings (Scotland) Acts by 31 March 2000 ¹¹	Request for advice from Scottish Ministers	See paras 3.15-3.17
To contribute to a joint consultation/discussion paper with the Law Commission on Partnership to be issued in mid 2000	Request for advice from the Department of Trade and Industry	See paras 3.9-3.12
To contribute to a joint report with the Law Commission on the Third Parties (Rights against Insurers) Act 1930, to be published during 2000	Request for advice from the Department of Trade and Industry	See paras 3.13 and 3.14
To submit a report with draft legislation on Inhibition, Adjudication, Land Attachment and Money Attachment by the end of 2000	Fifth Programme of Law Reform paras 2.7-2.13	See paras 2.2-2.8

¹⁰ The Report on Pounding and Warrant Sale (Scot Law Com No 177) was submitted to the Scottish Ministers on 31 March 2000.

¹¹ The Report on Jurisdictions under the Agricultural Holdings (Scotland) Acts (Scot Law Com No 178) was submitted to the Scottish Ministers on 23 March 2000.

B. Management Objectives

Key Area	Objective	Notes
Project planning	(i) To secure publication of the Sixth Programme of Law Reform by end March 2000 ¹²	See para 1.3
	(ii) To secure publication of the Thirty-Fourth Annual Report by mid 2000	See para 1.1
Recruitment of legal staff	To assess the feasibility of introducing a scholarship scheme	See para 6.11
Use of advisory groups	(i) To formulate guidance on the establishing of advisory groups by June 2000	See para 6.15
	(ii) To establish advisory groups as necessary for projects within the Sixth Programme of Law Reform	
Information technology	(i) To establish a website by June 2000	See paras 5.6, 5.7 and 6.19
	(ii) To establish appropriate strategies for IT use	See para 6.18
Internal organisation and office procedures	(i) To continue the review of office procedures	See para 6.21
	(ii) To provide focused remits for review groups by July 2000	
	(iii) To prepare an induction pack for new staff by June 2000	
Efficiency Scrutiny	To implement recommendations by July 2000	See para 6.21
Audit Study	To implement recommendations by June 2000	See para 6.23

¹² The Sixth Programme of Law Reform was published on 17 March 2000.

Advisory groups

A. Companies Act: Advisory group on Part X

Mr Robert Bertram	Heriot Watt and Edinburgh University
Mr Michael Livingston	Solicitor, Edinburgh
Ms Morag McNeill	Solicitor, Edinburgh
Mr David Sellar	Advocate, Edinburgh
Mr William Simmons	Solicitor, Edinburgh
Mr Campbell Smith	Solicitor, Edinburgh
Mr James Birrell	Solicitor, Edinburgh
Consultants	
Professor Dan Prentice	University of Oxford
Mr Richard Nolan	University of Cambridge

B. Obligations: Advisory group on contract law

Dr E M Clive (Chairman)	Scottish Law Commission
Mr J M Arnott	Solicitor, Edinburgh
Professor R Black, QC	University of Edinburgh
Professor J W G Blackie	University of Strathclyde
Mr M G Clarke, QC	Edinburgh
The Hon Lord Coulsfield	Court of Session
Professor A D M Forte	University of Aberdeen
Mr G Jamieson	Solicitor, Paisley
Miss L J Macgregor	University of Glasgow
Professor H L MacQueen	University of Edinburgh
Professor W W McBryde	University of Dundee
Ms C A McLintock	Solicitor, Edinburgh
Sheriff Principal C G B Nicholson, QC	Edinburgh
Dr H A Patrick	Solicitor, Edinburgh
Ms L A Patterson	Solicitor, Edinburgh
The Hon Lord Penrose	Court of Session
Mr D P Sellar	Advocate, Edinburgh
Professor J M Thomson	University of Glasgow
Mr N R Whitty	Scottish Law Commission
Sheriff A B Wilkinson, QC	Edinburgh
Mr J Wolffe	Advocate, Edinburgh
Mr S Woolman	Advocate, Edinburgh
Mrs G B Swanson (Secretary)	Scottish Law Commission

Observers

Mr P M Beaton	Scottish Courts Administration
Mr H F MacDiarmid	Office of the Solicitor to the Secretary of State

C. Property: Advisory group on feudal tenure and real burdens

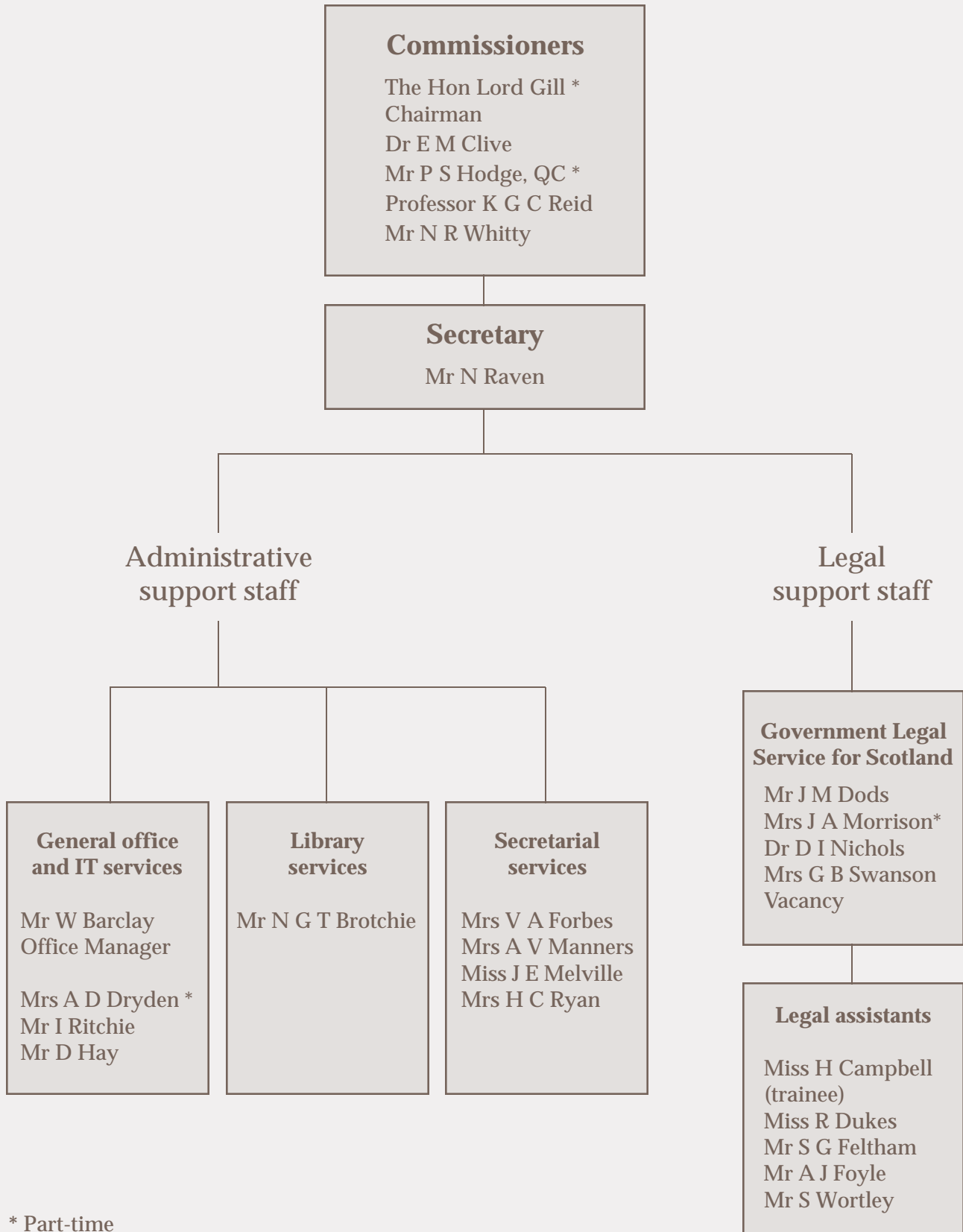
Mr S Brymer	Solicitor, Dundee
Professor D J Cusine	University of Aberdeen
Mr I Davis	Registers of Scotland
Mr B A Merchant	Solicitor, Inverness
Mr W Rankin	Registers of Scotland
Professor R Rennie	University of Glasgow
Mr R G Shearer	Solicitor, Edinburgh
Professor J H Sinclair	University of Strathclyde
Mr C White	Solicitor, Glasgow
Mr J M Dods (Secretary)	Scottish Law Commission

D. Agricultural Holdings: Advisory group on Jurisdiction under the Agricultural Holdings (Scotland) Acts

Mr A G Fox, WS	Solicitor, Edinburgh
Mr J G Reid, QC	Edinburgh
Mr D G Rennie, OBE WS	Solicitor, Edinburgh
Mr R D Sutherland	Advocate, Edinburgh
Mrs J A Morrison (Secretary)	Scottish Law Commission

Scottish Law Commission: Establishment and organisation

As at 31 December 1999



* Part-time

Running Costs

	Year to 31 March 2000		Year to 31 March 1999		Year to 31 March 1998	
	£000	£000	£000	£000	£000	£000
Accommodation charges ⁽¹⁾		108.6		108.6		163.5
Salaries, etc of Commissioners ⁽²⁾	380.3		310.0		309.9	
Salaries, etc of legal staff ⁽³⁾	319.9		400.4		466.2	
Salaries, etc of non-legal staff ⁽⁴⁾	166.4	866.6	150.1	860.5	150.5	926.6
Printing and publishing, etc ⁽⁵⁾		80.0		73.9		76.9
Telephone and postage		11.3		10.5		10.5
Travel and subsistence		7.4		7.8		7.8
Miscellaneous ⁽⁶⁾		4.3		2.2		2.2
		<u>1078.2</u>		<u>1063.5</u>		<u>1187.5</u>

Notes

- (1) Charges include maintenance, rates, rent and utilities. From 1st April 1998 PRS (Property Repayment Scheme) charges were phased out and replaced by a lesser capital charge.
- (2) ERNIC, superannuation payments and pensions to former Commissioners are included.
- (3) ERNIC, superannuation payments and consultants' fees and expenses are included.
- (4) ERNIC and superannuation payments are included.
- (5) Costs of binding, library purchases, machinery maintenance, photocopying, reprographic services and stationery are included.
- (6) Costs of hospitality, office services and training are included.

