



Scottish Law Commission  
*promoting law reform*

(SCOT LAW COM No 201)

annual report | 2005





Scottish Law Commission  
*promoting law reform*

Established under the Law Commissions Act 1965

**Our function**

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

**Our aim**

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

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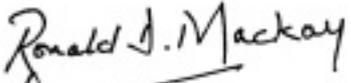
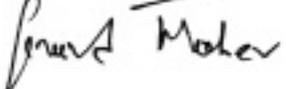
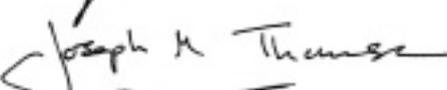
# Scottish Law Commission

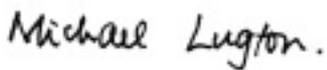
*promoting law reform*

## Annual Report 2005

To: Cathy Jamieson MSP, Minister for Justice

We are pleased to submit to the Scottish Ministers our Annual Report for the year to 31 December 2005.

	RONALD D MACKAY, <i>Chairman</i>
	GERARD MAHER
	JOSEPH M THOMSON
	COLIN TYRE



Michael Lugton, *Chief Executive*  
6 February 2006

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

March 2006

## Contents

Chairman's foreword	5
Summary of the year	7
Law reform projects	9
Joint projects with the Law Commission	17
Consolidation and statute law revision	20
Implementation of our reports	22
Promoting law reform	23
Commissioners, staff and management	24
Law reform publications planned for 2006	27
Advisory groups	28
Running costs	29

## Chairman's foreword



It gives me much pleasure to present the annual report for the year 2005, during which we saw the 40th anniversary of our establishment under the Law Commissions Act 1965. The anniversary was celebrated by a lecture given by the Rt Hon the Lord Hope of Craighead, preceded by a short address by the Minister for Justice. We are extremely grateful to both for their contribution to the occasion.

The year has been a productive one. Topics covered by our publications included interest on debt and damages, variation and termination of trusts, and land registration. Although publication of the discussion papers took place shortly after the end of the year much work was done on our major project on rape and sexual offences and on the project on limitation of actions and prescribed claims. We also made a start on a new joint project with the Law Commission on insurance contract law.

2005 has seen some departures and arrivals. In December the term of office of Professor Kenneth Reid CBE came to an end. It is difficult to overestimate the immense contribution which Kenneth Reid has made to the work of the Commission over the past decade. He has been the principal architect of the major reforms of the law

of landownership which have been effected during that period and it was very satisfying that in his last year at the Commission he was honoured by Her Majesty for his services to law reform. We are delighted that Professor Reid is to be succeeded by Professor George Gretton, whose distinguished career in the field of property law well qualifies him to continue our work on land registration. In September, after nearly five years excellent service to the Commission our Chief Executive, Jane McLeod, returned to the Solicitor's Office of the Scottish Executive and we were very pleased to welcome her successor, Michael Lugton.

We are grateful to Scottish Ministers for their continuing support and we greatly appreciated the visit of the Minister for Justice in May.

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

*Ronald A. Mackay*

THE HON LORD EASSIE  
*Chairman*



## Summary of the year

### The Commission's 40th anniversary

15 June 2005 marked the 40th anniversary of the setting up of the Scottish Law Commission along with the Law Commission for England and Wales.

The anniversary was celebrated with a reception in the Signet Library attended by Commissioners, staff and a wide range of those interested in law reform. We were particularly pleased to welcome the Minister for Justice, Cathy Jamieson, who gave an introductory speech, and the Rt Hon the Lord Hope of Craighead who delivered an address. In his closing remarks he said –

"I would conclude therefore that there is much life in this body yet. The pace of law reform has certainly not slackened during the past forty years. On the contrary, almost everywhere one looks it seems to be on the increase, and there is no doubt that devolution has opened up new opportunities.

So to my question 'Did we need, and do we still need, the Scottish Law Commission?', my own answer would be, very firmly, 'Yes.' "

The full text of Lord Hope's speech was published in the Edinburgh Law Review in January 2006.

### Our work in 2005

Work progressed on our Seventh Programme, published in February 2005. We issued four discussion papers and one joint report during the year. We received a new reference from Scottish Ministers asking us to consider the position of personal injury claims which have expired as a consequence of the law of prescription. We are taking this work forward as part of our existing project on limitation in personal injury actions. We also started work on a new project with the Law Commission relating to insurance law.



*The Chairman with the Minister for Justice, Cathy Jamieson and Lord Hope*

## Publications in 2005

The full text of these publications and the news releases relating to them are available on our website [www.scotlawcom.gov.uk](http://www.scotlawcom.gov.uk)

TITLE	PUBLICATION DATE
<b>Discussion Paper on Interest on Debt and Damages</b> DP No 127	17 January 2005
<b>Seventh Programme of Law Reform</b> Scot Law Com No 198	21 February 2005
<b>Report on Unfair Terms in Contracts</b> (Joint Report with the Law Commission) Scot Law Com No 199	24 February 2005
<b>Annual Report 2004</b> Scot Law Com No 200	15 April 2005
<b>Discussion Paper on Land Registration: Registration, Rectification and Indemnity</b> DP No 128	26 August 2005
<b>Discussion Paper on Variation and Termination of Trusts</b> DP No 129	15 December 2005
<b>Discussion Paper on Land Registration: Miscellaneous Issues</b> DP No 130	20 December 2005

## Law reform projects

### Seventh Programme

Our Seventh Programme outlines the areas of law which we will be reviewing up to the end of 2009. In addition to some major projects which have been carried forward, the programme includes four new projects:

- Succession;
- Unincorporated associations;
- Assignment of, and security over, incorporeal moveables; and
- Provocation, self-defence, coercion, and necessity.

### References from Ministers

Our other law reform work arises from references from Scottish Ministers, or, particularly in relation to non-devolved areas of law, from one of the UK government departments, asking us to review specific areas of the law and to recommend appropriate reforms.

### Management of our projects

Work on our law reform projects is done in teams, in many cases supported by an advisory group of practitioners and others with expertise in the particular topic. Sometimes we appoint a consultant to assist the team. The contribution made by consultants and advisory groups is invaluable. We particularly welcome the practical experience which they are able to bring to discussions.

Each of our projects is subject to management planning and timetabling. Some of the projects under our Seventh Programme are categorised as

short or medium term projects, which we expect to complete by the end of 2009. Long term projects are more substantial, and although we expect to start work on them within the period of the Seventh Programme, they are likely to be carried forward for completion as part of the next programme.

### Consultation on proposals for reform

Consultation is an integral part of the law reform process. During the year we reviewed the way in which we undertake consultation on our law reform proposals to ensure that the consultation process is as efficient, effective and open as possible. For example, for some projects we have found it useful to hold a seminar, issue a questionnaire to consultees or undertake a public attitude survey. We have also explored ways in which we can communicate more effectively with consultees, to keep them informed about the progress of projects and to provide feedback. We have changed the format of the current projects page on our website to make it more user-friendly and to provide more information about progress.

We hope that by improving communication with consultees and giving them feedback in these ways, we will stimulate interest in our work and encourage people to respond to our consultation exercises.

## Progress in 2005

We outline below the progress we made in 2005 on our law reform projects.

### Criminal law

#### Rape and other sexual offences

##### Team members

**Professor Gerry Maher**, Commissioner  
**Alastair Clyde**, Project Manager  
**Fiona Southward**, Legal Assistant

This project stems from a reference from Scottish Ministers in 2004 asking us to examine the law relating to rape and other sexual offences and the evidential requirements for proving such offences.

During the year the team undertook extensive research into the history and development of this area of Scots law and held a number of useful meetings with the advisory group as part of the pre-consultation discussion with interested groups.

In March a seminar was held in conjunction with the University of Edinburgh on the Sexual Offences Provisions in "A Draft Criminal Code for Scotland." Participants heard papers delivered by Professor Jennifer Temkin, Professor Chris Gane, Dr Victor Tadros and Professor Eric Clive.

The team met Dr Raj Darjee, a psychiatrist specialising in the treatment of sex offenders. He offered the team a valuable insight into the relationship between different forms of offending and the issue of progression from one form of offending to another. Discussions also took place with Dr John Crichton, a psychiatrist with the Orchard Clinic at the Royal Edinburgh Hospital, who has expertise on the care of people with mental disorder. Among the issues discussed were sexual relations between people with mental disorder, and the capacity of people with various mental disorders to consent to sexual relations. Other meetings took place with

Jackie Robeson, Head of Practice at the Scottish Children's Reporter Administration and with members of the Crown Office sexual offences review team.

The team attended a conference in Glasgow in April organised by Rape Crisis Scotland on "Legal Responses to Rape: Scotland's Chance to Get it Right". The aim of the conference was to provide information on the legal developments in this area, such as the Crown Office review of the prosecution of rape and sexual offences, as well as the Commission's project, and to provide a forum to discuss the issues involved. Professor Maher presented a paper outlining the project and invited delegates to comment.

Our Discussion Paper on Rape and Other Sexual Offences, published in January 2006, is an important stage in the first ever systematic review of sexual offences in Scotland.

One of the key principles of the discussion paper is the protection of sexual autonomy. The paper examines criticisms of consent as a basis for sexual offences, and proposes a refined consent model, to be set out in statute. We propose a statutory definition of consent along with a non-exhaustive list of factual situations which would indicate absence of consent to sexual activity, for example, situations where at the time of the act the person was subject to force or violence, or the threat of force or violence. In addition, we propose that the giving of consent to one sexual act should not by itself constitute consent to a different sexual act, and that consent may be withdrawn.

We propose the introduction of a wider definition of the crime of rape to make clear that the victim could be male or female. New offences of sexual assault by penetration, sexual assault by touching and compelling another person to engage in any sexual activity are proposed. Also considered is the question of the 'honest belief' defence, where, although the victim did not consent, the accused person genuinely believed that the victim did consent.

We move on to propose special protection where there are problems relating to a person's capacity to consent to sexual activity. Such protection would apply to children, people with a mental disorder and people over whom others hold a position of trust or authority.

We propose that there should be strict liability for offences against young children, and we seek views on a number of other proposals relating to older children, with a view to making the law on protective offences more coherent and comprehensive.

Consideration is then given to the range of offences whose underlying rationale is a social or moral principle, for example whether there is a need for offences such as incest.

Finally, we examine the rules of evidence which are specific to sexual offences or which have a special significance in proving these offences and invite views on whether there should continue to be a requirement of corroboration for proof of guilt in sexual offences.

Comments on the discussion paper are invited by 1 May 2006.

## Interest

### Interest on debt and damages

#### Team members

**Colin Tyre QC**, Commissioner  
**Alastair Clyde**, Project Manager  
**Edward Emerson**, Trainee Solicitor

The reference for this project was received from Scottish Ministers in November 2003.

Our Discussion Paper on Interest on Debt and Damages, published in January 2005, considered the extent to which the current law satisfies three basic principles:

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

Applying these principles, we invited comments on the introduction of a statutory right to claim interest during the period when a claimant was deprived of the use of his money.

The consultation period ended on 29 April and the feedback from consultees on our proposals was generally favourable.

One of our consultees raised the question whether interest should run on outlays incurred in the course of litigation, for example, the expenses of obtaining expert reports. We have explored this issue with the Auditor of the Court of Session.

We are aiming to publish our report and draft Bill by the end of 2006.



*Interest on debt and damages team*

## Limitation and prescription

### Personal injury actions: limitation and prescribed claims

#### Team members

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

This project arises from two references from Scottish Ministers. Under the first reference we were asked to consider the provisions of the Prescription and Limitation (Scotland) Act 1973 which deal with the so called "knowledge test" in relation to time-bar, and the judicial discretion to override the limitation period if it is equitable to do so.

During the year the team researched the history and development of the legislation and examined provisions applying in other countries. The team also had discussions with our advisory group of practitioners with expertise in this area of law who provided valuable assistance on the practical issues involved.

In the course of preparing our discussion paper on the first reference, we received a further reference from Scottish Ministers the terms of which are:

"To consider the position of claims in respect of personal injury which were extinguished by operation of the long negative prescription prior to 26 September 1984; and to report."

This reference does not involve a review of the current law (as prescription ceased to apply to personal injury claims on 26 September 1984), but rather the position of claims for damages for personal injury which were extinguished more than 20 years ago as a result of the rules of prescription. The reference arose against the background of concerns about the position of people who may have suffered abuse while they received education

or care in institutions run by local authorities or religious orders or other bodies, but whose claims for damages prescribed before September 1984.

Although the new reference raises very different issues from the initial reference on limitation, both topics relate to claims for damages for personal injury and the consequences of the passage of time. For that reason, we decided that work on the two references should be taken forward as one project, although that might result in a slight delay to the timetable planned for the first reference.

Our Discussion Paper on Personal Injury Actions: Limitation and Prescribed Claims, published in February 2006, examines the provisions of the 1973 Act relating to the knowledge test. The paper goes on to consider the relationship between the test and the judicial discretion to allow time-barred actions to proceed and invites views on whether the length of limitation period should be increased. A number of points of practice and procedure relating to limitation are also discussed. Finally, the paper considers the issues arising in relation to the second reference.

Comments on the discussion paper are invited by 31 May 2006.

## Property law

### Land registration

#### Team members

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

This project is included in our Seventh Programme. Our first Discussion Paper, on Void and Voidable Titles, was published in February 2004, and examined the legal policy issues underlying land registration.

A second Discussion Paper, on Registration, Rectification and Indemnity, was published in August 2005. This paper analysed the provisions of the Land Registration (Scotland) Act 1979 with a view to determining which should be included in a proposed statutory reformulation of the law. The consultation period ended on 30 November and we are currently analysing the responses.

A third and final Discussion Paper, on Miscellaneous Issues, was published in December 2005 and puts forward our proposals for reform of a number of further matters, including descriptions and boundaries, servitudes, overriding interests, and decision-making by the Keeper of the Registers of Scotland. Comments are invited by 31 March 2006.

We are grateful to the Registers of Scotland for their continued assistance in the project.

## Leasehold tenure

### Team members

**Professor Kenneth Reid**, Commissioner  
**John Dods**, Project Manager  
**Sarah Maguire**, Legal Assistant

Leasehold tenure is another topic included in our Seventh Programme. The project is looking at whether some categories of long lease should be converted into ownership.

The main work on our report was completed in 2002. Due to pressure on Scottish Parliamentary Counsel it has not been possible to complete the draft Bill to be annexed to the report. However, towards the end of the year Parliamentary Counsel made substantial progress, although further work will be necessary in the coming weeks. We aim to publish the report in the summer of 2006.



Property law team

## Sharp v Thomson

### Team members

**Professor Kenneth Reid**, Commissioner  
**John Dods**, Project Manager  
**Sarah Maguire**, Legal Assistant

This project arises from a reference from Scottish Ministers in September 2000 following the decision in the case of *Sharp v Thomson* 1997 SC (HL) 66. In that case a floating charge crystallised after the debtor company had granted a disposition of a flat but before the disposition had been registered. The House of Lords held that, despite the absence of registration, the flat did not form part of the property and undertaking of the company. Accordingly it was not attached by the floating charge.

In our discussion paper (published in July 2001) we suggested that the approach adopted by the House of Lords should be abandoned. Most of our consultees agreed. However, our main proposal was largely overtaken by the House of Lords' decision in *Burnett's Trustee v Grainger* 2004 SC (HL) 19. Some of the remaining proposals may be dealt with in the Bankruptcy and Diligence etc. (Scotland) Bill, currently before the Scottish Parliament. Other proposals may be taken forward in our report on land registration. Professor Reid has kindly agreed to

assist the team with preparation of the report on Sharp v Thomson, even though his term of office has come to an end. We plan to publish this report in 2006.

## Succession, trusts and judicial factors

### Succession

#### Team members

**Professor Joe Thomson**, Commissioner  
**David Nichols**, Project Manager  
**Hayley Manson**, Legal Assistant

This is a new project which is included in our Seventh Programme of Law Reform.

We have reviewed succession law before, although most of the recommendations in our 1990 report have not been implemented. With the passage of time, there is renewed concern that the current law does not reflect modern relationships and social attitudes. The project is re-examining the law of succession, focusing on the position of a surviving spouse or civil partner in cases where the deceased has died intestate. It is also looking at the protection of spouses, civil partners, cohabitants, children and other relatives from disinheritance.

At the end of March Professor Reid and Dr David Nichols attended a Conference on Succession Law at Stellenbosch University as part of a group of Scottish participants. The Conference provided an opportunity to outline the project and obtain ideas on the approaches we might take to reform.

As part of our research we commissioned a public attitude survey, the results of which – Attitudes Towards Succession Law: Finding of a Scottish Omnibus Survey - were published by the Scottish Executive in July 2005.

Feedback from the survey has been useful to the team in developing provisional proposals for reform. Progress has been made with our discussion paper which we plan to publish in the middle of 2006.

We would also record that the team provided assistance to the Scottish Executive Bill team in connection with amendments to the Family Law (Scotland) Bill relating to the discretionary power to make financial provision for a surviving cohabitant out of the deceased's intestate estate, and other succession matters.



Succession team

### Trusts

#### Team members

**Professor Joe Thomson**, Commissioner  
**Colin Tyre QC**, Commissioner  
**David Nichols**, Project Manager  
**Hayley Manson**, Legal Assistant

This is a long term project included in our Seventh Programme.

In view of the breadth of the topic we are working on it in stages. Our first two Discussion Papers – on Breach of Trust and on Apportionment of Trust Receipts and Outgoings – were published in September 2003.

The third Discussion Paper – on Trustees and Trust Administration - was published in December 2004. Our proposals on nominees and delegation in the investment field were favourably received and have been implemented by provisions in the Charities and Trustee Investment (Scotland) Act 2005. This legislation also implemented our recommendations for trustee investments, made in our joint Report on Trustees' Powers and Duties, published in 1999.

### Variation and termination of trusts

A fourth Discussion Paper - on Variation and Termination of Trusts - was published in December 2005. It deals with the variation and termination of private trusts and the reorganisation of non-charitable public trusts.

Under the current law, where all beneficiaries of a private trust are 18 or over and of full capacity, and no trust purposes exist which require retention of the trust property and thus continuation of the trust, the beneficiaries can agree either to vary or to terminate the trust. We propose that these rules should be retained and that Scotland should not adopt the USA rule whereby the truster or the court has a veto if a material purpose is sought to be varied.

Where a beneficiary is under 18, incapable, unborn or not yet ascertained, the court can approve a variation or termination if satisfied that the proposed arrangement will not be prejudicial to him or her. However, all the other capable beneficiaries must agree to the proposed arrangement. The paper puts forward proposals to deal with the situations where there are people who would benefit (or cease to benefit) from the trust only if extremely unlikely events occurred, or a capable beneficiary who would not be prejudiced declined to consent. We also seek views on whether parents should be able to consent on behalf of their children under 16 and whether 16 and 17 year olds should be able to consent themselves.

As regards public trusts we propose a new scheme for the extra-judicial re-organisation of non-charitable public trusts and educational endowments which will parallel the scheme for charitable trusts in the Charities and Trustee Investment (Scotland) Act 2005.

Comments are invited on our proposals by 17 March 2006. We plan to publish a report on variation and termination of trusts by the end of 2006.

### Nature and constitution of trusts

In March we hosted a seminar to stimulate discussion about the concept of legal personality for trusts. As a result of the views expressed we have decided not to proceed with a proposal for conferring legal personality on trusts. But we do wish to explore the dual patrimony theory, particularly in relation to trustees' liability to third parties, their execution of trust deeds, latent trusts of heritable property and the constitution of trusts.

We aim to publish a discussion paper on the nature and constitution of Scottish trusts (the fifth in our trust law series) in the summer of 2006, which will include a discussion of that topic.

We are considering what other areas of trust law might be the subject of future discussion papers.

### Judicial factors

#### Team members

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

This topic has been carried forward into our Seventh Programme as a medium term project to be completed by the end of 2009.

A judicial factor is an officer appointed by the court under the supervision of the Accountant of Court, to

collect, hold and administer property usually in difficult circumstances. For example, a judicial factor may be appointed where there is nobody else to administer a property or there is a dispute about it.

The relevant legislation dates back to the late 19th century and is in need of modernisation and simplification, as it neither reflects what happens in practice nor addresses the concerns of those who come into contact with this office.

During the year we had discussions with the Accountant of Court, representatives of the Office of the Scottish Charity Regulator and practitioners with experience in this field, with a view to developing proposals to replace the existing legislation with modern provisions designed to govern the office of judicial factor in the 21st century.

We aim to publish a discussion paper in 2006.



*Judicial factors team*

## Other projects under our Seventh Programme

In addition to the projects mentioned above, our Seventh Programme includes a number of other projects:

- unincorporated associations
- provocation, self-defence, coercion, and necessity
- assignation of, and security over, incorporeal moveables

The first two of these are medium term projects which are due to be completed by 2009 when the programme ends. The third item is a long term project on which we are unlikely to be able to start work until we have completed work on land registration.

## Joint projects with the Law Commission

Some of our law reform projects are undertaken jointly with Law Commission for England and Wales, which involves our teams working closely with the equivalent teams in London.

### Insurance contract law

#### Team members

**Colin Tyre QC**, Commissioner  
**Gillian Swanson**, Project Manager  
**Edward Emerson**, Trainee Solicitor

We are working with the Law Commission on aspects of this new project under its Ninth Programme of Law Reform.

Insurance law is criticised as being outmoded and in some cases unfair to policy holders. Non-disclosure of material facts and breach of warranty are two areas that have been identified as being in need of reform.

In January 2006 the Commissions published a joint scoping paper on insurance contract law to stimulate debate on other aspects of this area of law which might be reviewed and on whether a statutory insurance code or codes would be useful. The intention is to issue a joint consultation paper between the end of 2006 and mid-2007, depending on the number of areas that the scoping study identifies as being in need of review.

### Unfair terms in contracts

#### Team members

**Professor Joe Thomson**, Commissioner  
**Gillian Swanson**, Project Manager

We completed work on this project in February 2005 with the publication of our joint report with the Law Commission.

The report recommends replacing the existing provisions on unfair terms in contracts with a single unified statute setting out the law in a clear and accessible way, so that those using the legislation will find it easier to understand. It also includes guidance on how to decide if a contract term is unfair. To protect the interests of small businesses (which are often unaware of the significance of the terms in the other party's "small print" or cannot avoid having to accept such terms) the report recommends that small firms should be allowed to challenge a range of non-negotiated contract terms.

The draft Bill annexed to the report aims to set out the law on unfair terms in a clear and simple way.

## Summary of current position on our law reform projects

PROJECT	ORIGIN	OBJECTIVE FOR 2005	PUBLICATION OF DISCUSSION PAPER	CURRENT POSITION
<b>Rape and other sexual offences</b>	Reference from Scottish Ministers	To publish a discussion paper	DP No 131 published January 2006	Consultation period for discussion paper ends 1 May 2006
<b>Interest on debt and damages</b>	Reference from Scottish Ministers		DP No 127 published January 2005	Work progressing on report to be published by end of 2006
<b>Personal injury actions: limitation and prescribed claims</b>	Two references from Scottish Ministers	Prior to receipt of the second reference, to publish a discussion paper	DP No 132 published February 2006	Consultation period for discussion paper ends 31 May 2006
<b>Land registration</b>	Seventh Programme	To publish discussion papers on Registration, Rectification and Indemnity and on Miscellaneous Issues	(1) DP No 125 on Void and Voidable Titles published February 2004 (2) DP No 128 on Registration, Rectification and Indemnity published August 2005 (3) DP No 130 on Miscellaneous Issues published December 2005	Work completed on discussion papers (2) and (3) Consultation period for discussion paper (3) ends 31 March 2006
<b>Leasehold tenure</b>	Seventh Programme	To submit report to Scottish Ministers	DP No 112 published April 2001	Work well advanced on draft Bill Report prepared but may need to be adjusted once work on Bill completed
<b>Sharp v Thomson</b>	Reference from Scottish Ministers		DP No 114 published July 2001	Considering whether to include some proposals in report on land registration

PROJECT	ORIGIN	OBJECTIVE FOR 2005	PUBLICATION OF DISCUSSION PAPER	CURRENT POSITION
<b>Succession</b>	Seventh Programme	New project in 2005		Public attitude survey undertaken in 2005 Work progressing on discussion paper
<b>Trusts</b>	Seventh Programme	To publish discussion papers on legal personality for trusts and on variation and termination of trusts	(1) DP No 123 on Breach of Trust published September 2003 (2) DP No 124 on Apportionment of Trust Receipts and Outgoings published September 2003 (3) DP No 126 on Trustees and Trust Administration published December 2004 (4) DP No 129 on Variation and Termination of Trusts published December 2005	Consultation period for discussion paper (4) ends 17 March 2006 A report on variation and termination of trusts to be published by the end of 2006 Work progressing on discussion paper (5) on nature and constitution of trusts, which will include discussion of legal personality for trusts
<b>Judicial factors</b>	Seventh Programme			Work progressing on discussion paper to be published in 2006
<b>Unfair terms in contracts</b>	Reference from Department of Trade and Industry and Scottish Ministers		DP No 119 published August 2002	Project completed Report published February 2005
<b>Unincorporated associations</b>	Seventh Programme			Work due for completion by end of 2009
<b>Provocation, self-defence, coercion, and necessity</b>	Seventh Programme			Work due for completion by end of 2009
<b>Assignment of, and security over, incorporeal moveables</b>	Seventh Programme			Work to be started once project on land registration completed

# Consolidation and statute law revision

## Consolidation

### Team members

**The Hon Lord Eassie**, Commissioner  
**Susan Sutherland**, Project Manager  
**Edward Emerson**, Trainee Solicitor

One of our functions is to undertake work on consolidation of legislation.

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

## Parliamentary costs legislation

The legislation relating to charges for Parliamentary agents and solicitors in bringing forward or opposing private Bills in the UK Parliament dates back to Victorian times and is in need of modernisation. The Law Commission has produced a draft Bill which was issued recently to Parliamentary agents and other interested bodies for consultation. The aim is to introduce the Bill in the UK Parliament during 2006.

## Wireless telegraphy legislation

At present there are provisions in six Acts dating back to 1949 dealing with various aspects of regulating the radio spectrum. The Law Commission team has prepared a draft Bill to consolidate the relevant provisions into a single Act. The Department of Trade and Industry, which is sponsoring the Bill, has consulted interested organisations on the terms of the draft Bill which is now being finalised with a view to being introduced in the UK Parliament.

## Representation of the people legislation

A draft consolidation Bill was prepared by the Law Commission in London, but the project has been suspended since December 2003 because UK Ministers wished to consider the Electoral Reform Commission's proposals in *Voting for Change*.

## Consolidation of regulations

During the year we undertook to assist the Scottish Executive with preparation of draft statutory instruments to consolidate a number of health regulations. We see this arrangement as a useful way to work in co-operation with the Executive while at the same time helping to fulfil our function in relation to consolidation of legislation. We hope to continue with the arrangement in 2006 once work has been completed on the existing consolidation regulations.

## Statute law revision

### *Team members*

**The Hon Lord Eassie**, Commissioner  
**Susan Sutherland**, Project Manager  
**Edward Emerson**, Trainee Solicitor

Another function of both Commissions is to undertake work on statute law revision, which involves making recommendations for the repeal of obsolete or otherwise unnecessary legislation. The aim of this work is to tidy up the statute book so as to make it easier for those using it. Since 1965 the Commissions have produced 17 reports on statute law revision along with accompanying Bills, all of which have been implemented.

### **Eighteenth statute law (repeals) Bill**

During 2005 we have assisted the Law Commission with preparation of the next statute law repeals Bill. We have undertaken consultation with interested bodies in Scotland on a number of repeal proposals identified by the Law Commission, including those relating to obsolete legislation concerning town and country planning, education and police.

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

## Implementation of our reports

Over the last forty years the Commission has produced 132 discussion papers and 141 law reform reports, including reports on consolidation and statute law revision. On the basis of our recommendations, major reforms have been introduced, including changes in family law, the law relating to adults with incapacity and most recently in property law in Scotland.

We were pleased that during the course of 2005 further legislation was enacted implementing our recommendations for reform of Scots law.

### Trustees' powers and duties

Part 3 of the Charities and Trustee Investments (Scotland) Act 2005 implements recommendations in our Joint Report with the Law Commission on Trustees' Powers and Duties, published in 1999. The Act also implements two proposals in our Discussion Paper on Trusts and Trust Administration, published in 2004.

### Family law

The Family Law (Scotland) Act 2006 implements our recommendations on divorce in our 1989 Report on Reform of the Ground of Divorce. Where a couple have not lived together for a year, one spouse will be able to start a divorce action if the other consents to divorce. If there is no consent the period required will be two years. Divorce for desertion will no longer be possible. The 2006 Act also implements a substantial number of the remaining recommendations in our 1992 Report on Family Law.

### Title to sue for non-patrimonial loss

The Family Law (Scotland) Act 2006 also includes provisions which implement our Report on Title to Sue for Non-Patrimonial Loss, published in August 2002. The provisions amend the Damages (Scotland) Act 1976 so as to extend the list of relatives of a deceased person who are entitled to sue for damages for non-patrimonial loss. For example, the changes

will allow brothers, sisters and grandparents of a deceased person to claim damages on the death of their relative.

### Diligence

The Bankruptcy and Diligence etc. (Scotland) Bill, introduced in the Scottish Parliament in November 2005, seeks to implement our 1998 Report on Diligence on the Dependence and Admiralty Arrestments and our 2001 Report on Diligence. It also implements provisions relating to the law of floating charges as recommended in our 2004 Report on Registration of Rights in Security by Companies.

Further information about implementation of our reports is available on our website:  
[www.scotlawcom.gov.uk](http://www.scotlawcom.gov.uk)

## Promoting law reform

Throughout 2005 we continued to build on our links with the Scottish Executive, the Law Society of Scotland, the Faculty of Advocates, other professional bodies and the university law schools.

We maintain close contact with the Law Commission in London, not only in connection with our joint projects but more generally in relation to our law reform work. In June a joint meeting of the Commissions took place in London, which gave Commissioners an opportunity to reflect on the last 40 years of work on law reform.

On 15 June, to coincide with the Commission's 40th Anniversary, we published our first Newsletter aimed at keeping those with an interest in our work up to date with progress on our projects and general news about our activities.

### International links, conferences and other events in 2005

- Arthur Moir, Clerk to the Northern Ireland Assembly, and Dr Peter Gilleece, researcher, visited us in May to outline plans for establishment of their Law Commission.
- Gillian Braddock, Chairperson of the Law Reform Commission of Western Australia, visited us and attended our 40th Anniversary reception in June, as part of her visit to Edinburgh to attend the conference of the International Society for the Reform of Criminal Law.
- Sir Roger Toulson, Chairman of the Law Commission, the Honourable Mrs Justice Catherine McGuinness, President of the Law Reform Commission of Ireland, and Mr Justice Morgan, President of the Law Reform Advisory Committee for Northern Ireland, also attended the reception.

- Professor Maher represented the Commission in June at a presentation entitled "Thirty Years of Law Reform" given by Ronan Keane, former Chief Justice and President of the Irish Law Reform Commission, to mark the Commission's 30th Anniversary.
- In September the Chairman, Chief Executive and Mr Tyre attended the inaugural Conference in London of the Commonwealth Association of Law Reform Agencies, of which the Commission is a member.



*Sir Roger Toulson (centre) talking to the Hon Lord Hodge (one of our former Commissioners), and Professor Alan Paterson of Strathclyde University*

## Commissioners, staff and management

### Commissioners

In August Lord Eassie was re-appointed as Chairman until July 2007. He will continue on a part time basis combining his role as Chairman with his judicial work.

This year two of our Commissioners were re-appointed for a further term - Professor Maher until August 2008 and Professor Thomson until January 2010.

Professor Reid's term of office as Commissioner ended on 31 December 2005. He joined the Commission in October 1995 as the lead Commissioner on the property law projects. During his time at the Commission he oversaw the publication of Reports on Law of the Tenement, Abolition of the Feudal System, and Real Burdens, and he assisted the Scottish Executive Bill teams during the passage of the legislation which implemented the recommendations. Latterly he has been working on the reform of land registration.

### New Commissioner

The appointment of Professor George Gretton of the University of Edinburgh, as successor to Professor Reid, was announced on 24 January 2006. Professor Gretton has been appointed as Commissioner for a period of five years and will take up post in May 2006.

### Chief Executive

Michael Lugton joined the Commission as Chief Executive in September, taking over from Jane McLeod who returned to the Office of the Solicitor to the Scottish Executive after almost five years at the Commission. Mr Lugton is a senior civil servant who was previously head of the Criminal Justice and Licensing Division in the Scottish Office, and head of Constitution and Legal Services Group in the Scottish Executive.



*Chief Executive*

## Commission staff

Commissioners and the Chief Executive are assisted by legal and non-legal staff.



*Chief Executive and project managers*

The project managers are qualified lawyers and are members of the Government Legal Service for Scotland (GLSS). Our legal assistants are law graduates employed on fixed term contracts, usually for one year. They are mainly responsible for undertaking research and comparative law work and for assisting with analysing responses to our consultation exercises. We also take on trainee solicitors for six month periods as part of their training with the GLSS.

In addition to the legal staff we currently have a qualified librarian and six members of staff who provide administrative, IT, secretarial and typing services.

### Project managers

Alastair Clyde  
John Dods  
David Nichols  
Susan Sutherland  
Gillian Swanson

### Trainee Solicitor

Edward Emerson

### Legal assistants

Katie Delap  
Hayley Manson  
Sarah Maguire  
Fiona Southward

### Librarian

Nick Brotchie

### Office manager

Lesley Young

### Personal secretaries

Joan Melville

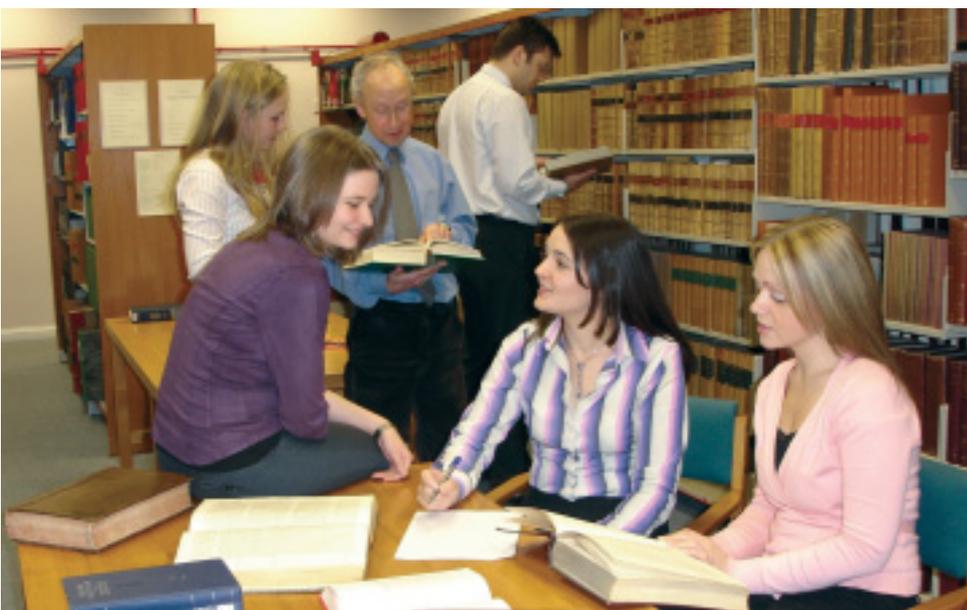
Heather Ryan

### Administrative and typing services staff

Avril Dryden

Jackie Palkowski

Iain Ritchie



*Librarian, legal assistants and trainee*

## Parliamentary Counsel

Most of our reports include a draft Bill which would give effect to our recommendations. The Bills are generally drafted by Parliamentary Counsel in the Office of the Scottish Parliamentary Counsel, although on occasions some Bills have been prepared by members of the drafting panel for the Scottish Parliament's Non-Executive Bills Unit. We are grateful to Counsel for their contribution to our work.

## Website

During 2005 we invited comments from users of our website to identify the scope for improvements, and a number of changes have been made. We are also planning a major redesign of the home page.

## Freedom of information

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

During the year we received a number of requests for information, all of which were dealt with within the required timetable.

We have recently reviewed our Publication Scheme under the 2002 Act, and we have extended the classes of information which we make available routinely to include summaries of responses to consultation exercises which we will post on our website once they have been considered by Commissioners.

## Equality and ethnic monitoring

Under the Race Relations Act 1976 we are obliged to undertake ethnic monitoring in respect of our legal assistants. The results of monitoring are available on our website.

## Environmental strategy

We have set up a team to revise our present environmental policy, in line with our duty to further the conservation of biodiversity under the Nature Conservation (Scotland) Act 2004. We will be identifying objectives and setting annual targets, aimed at improving our performance in areas such as energy use, water and paper consumption, waste disposal and official use of transport.



*Edinburgh law fair*

## Recruitment

As part of our recruitment process for legal assistants, we took part in the law fairs at Aberdeen and Dundee Universities in October and more recently at Edinburgh University.

## Law reform publications planned for 2006

So far we have issued three publications in 2006.

- **A Scoping Paper on Insurance Contract Law** (published 18 January) (jointly with the Law Commission)
- **A Discussion Paper on Rape and Other Sexual Offences** (published 30 January)
- **A Discussion Paper on Personal Injury Actions: Limitation and Prescribed Claims** (published 27 February)

We plan to issue a further three discussion papers and three reports during 2006.

Discussion papers on-

- **Succession**
- **Judicial Factors**
- **Nature and Constitution of Trusts**

Reports on-

- **Conversion of Long Leases**
- **Sharp v Thomson**
- **Interest on Debt and Damages**
- **Variation and Termination of Trusts**

## Advisory groups

We wish to thank the members of our advisory groups for the assistance they have given us with our law reform projects during 2005

### Rape and other sexual offences

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

### Interest on debt and damages

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

### Personal injury actions

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

### Land registration

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

### Leasehold tenure

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

### Trusts

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

## Running costs

The Commission is funded by the Scottish Executive Justice Department. Our running costs for 2005 were offset by payment received from Skills for Justice for use of part of our office accommodation.

EXPENDITURE	YEAR TO 31 DECEMBER 2005		YEAR TO 31 DECEMBER 2004	
	£000	£000	£000	£000
<b>Salaries – Commissioners</b> (including national insurance contributions, superannuation payments and pensions to former Commissioners)	580.6		548.1	
<b>Salaries – Chief Executive and legal staff</b> (including national insurance contributions, superannuation payments and consultants' fees and expenses)	539.7		487.4	
<b>Salaries – administrative staff</b> (including national insurance contributions and superannuation payments)	154.5	1274.8	171.7	1207.2
<b>Accommodation</b> (including maintenance, rates and utilities)		60.3		69.3
<b>Printing and publishing</b> (including costs of binding, library purchases, machinery maintenance, photocopying, reprographic services and stationery)		68.5		74.0
<b>Telephone and postage</b>		18.9		15.0
<b>Travel and subsistence</b>		10.7		11.5
<b>Miscellaneous</b> (including training, office services and hospitality)		7.9		25.8
<b>Total</b>		<b>£1441.1</b>		<b>£1402.8</b>



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

Our main function is to keep the law of Scotland under review and when necessary to recommend reforms. Our work involves-

- **Research** into the existing Scots law and review of comparative law
- **Analysis of problems** with the current law
- **Development of policies** for reform
- **Consultation** on proposed reforms
- **Consideration of responses from consultees**
- **Review of policy** in the light of consultation
- **Publication of a report** to Ministers with recommendations for reform, including in most cases a draft Bill to implement the recommendations

Implementation of the recommendations in our reports requiring legislation is taken forward in the Scottish Parliament or in some cases in the UK Parliament at Westminster

For more information about the Commission please contact:

Michael Lugton, Chief Executive  
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**Fax:** 0131 662 4900  
**E-mail:** [info@scotlawcom.gov.uk](mailto:info@scotlawcom.gov.uk)  
**FOI enquiries:** [FOI@scotlawcom.gov.uk](mailto:FOI@scotlawcom.gov.uk)

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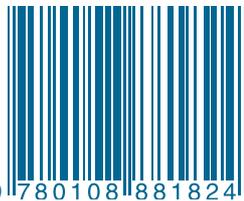
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