



Scottish Law Commission
promoting law reform

(SCOT LAW COM No 223)

annual report | 2010





Scottish Law Commission

promoting law reform

The Commission was established under the Law Commissions Act 1965

Our function

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

Our role

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

annual report | 2010



Commissioners and Chief Executive

(Standing): Patrick Layden QC TD, Professor Hector L MacQueen, Ms Laura J Dunlop QC, Professor George Gretton

(Seated): Malcolm McMillan (Chief Executive), Lord Drummond Young (Chairman)



Scottish Law Commission

promoting law reform

Annual Report 2010

To: Kenny MacAskill MSP, Cabinet Secretary for Justice

We are pleased to submit to the Scottish Ministers our Annual Report for the year to 31 December 2010.

James Drummond Young

JAMES DRUMMOND YOUNG, Chairman

Laura J. Dunlop

LAURA J DUNLOP

George Gretton

GEORGE GRETTON

Patrick Layden

PATRICK LAYDEN

Hector L MacQueen

HECTOR L MACQUEEN

Malcolm McMillan

Malcolm McMillan, *Chief Executive*
10 February 2011

Laid before the Scottish Parliament by the Scottish Ministers under section 3(3) of the Law Commissions Act 1965.
February 2011

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Chairman's foreword

I am pleased to present the Commission's Annual Report for 2010. During the year we embarked on our Eighth Programme and have already started work on new projects involving the law of contract in the light of the Draft Common Frame of Reference, adults with incapacity, prescription and title to moveable property and the criminal liability of partnerships. In addition we have continued work on projects carried forward from the Seventh Programme and a Ministerial reference, notably transactions involving moveable property, trusts, judicial factors and similar fact evidence and the *Moorov* doctrine. We have also conducted projects jointly with the Law Commission for England and Wales in the fields of insurance contract law, misrepresentation, duress and unfair contract practices, and level crossings.

During the year we have produced a major Report on Land Registration, and Discussion Papers on the Lifetime of Private Trusts, Prescription and Title to Moveable Property, Similar Fact Evidence and the *Moorov* Doctrine and Judicial Factors. We have in addition just published a discussion paper on contractual interpretation and are about to produce a discussion paper on a number of supplementary issues in connection with the trusts project. In joint projects with the Law Commission for England and Wales, we have produced a Consultation Paper on Level Crossings and a series of issues papers on the law of insurance.

In recent annual reports I have raised concern at the poor rate of implementation of Commission reports. Progress has been made by the Scottish Government, especially in the field of criminal law, and I must pay tribute to the Cabinet Secretary for Justice, and the Minister for Community Safety, for their work in this regard. In particular, in the Criminal Justice and Licensing (Scotland) Act 2010, three of our Reports were implemented in whole or in part: those relating to Crown Appeals, the Age of Criminal Responsibility and the diminished responsibility part of our Report on Insanity and Diminished Responsibility. The Double Jeopardy (Scotland) Bill would implement our Report on that subject in a number of respects although with significant modifications.



In the field of civil law there has been limited progress, but there are two positive developments. The Long Leases (Scotland) Bill would implement our Report on Conversion of Long Leases, published in December 2006, and the Damages (Scotland) Bill, introduced by Bill Butler MSP, is intended to implement our Report on Damages for Wrongful Death, published in September 2008. We are pleased to see these steps being taken. During the year an attempt was made to use the Bill attached to our Report on Penalty Clauses, published in May 1999, as the pilot Bill for a new procedure designed to provide additional capacity in the Scottish Parliament for Law Commission Bills. We remain of the opinion that the recommendations in that Report are well conceived and would assist the international competitiveness of Scots law in the field of contract. Nevertheless, the Bill attracted opposition from a number of solicitors, and as a result the pilot project did not proceed. The question of penalty clauses, which clearly needs reform, will now be examined as part of our project on the law of contract. Despite the failure of the Penalty Clauses (Scotland) Bill, we still hope that procedures to increase the capacity of the Scottish Parliament to deal with Scottish Law Commission Bills will be introduced following the election of the new Parliament in May 2011.

On the positive side, we note with satisfaction that the Scottish Ministers have put into practice their agreement to respond to our reports within a period of three months. I should also note the help and encouragement that we continue to receive from Scottish Ministers.

Thus considerable progress has been made in the field of criminal law and at Ministerial level. It is nevertheless impossible to say that the general performance of the Scottish Parliament in the field of private law reform has been satisfactory. The facts speak for themselves. During the early years of the Scottish Parliament, from 2000 to 2004, a number of Acts based on Scottish Law Commission recommendations were passed, mostly in the field of land law. Apart from this, however, the only civil law statutes based on Scottish Law Commission recommendations that have been passed by the Parliament are the Adults with Incapacity (Scotland) Act 2000, the Agricultural Holdings (Scotland) Act 2003 (a small part of the Act), the Salmon and Freshwater Fisheries (Consolidation) (Scotland) Act 2003 (a consolidation statute), the Charities and Trustee Investment (Scotland) Act 2005 (three sections out of 102 in the Act), the Family Law (Scotland) Act 2006 (one section out of 46), and the Bankruptcy and Diligence etc. (Scotland) Act 2007. The Charities and Trustee Investment (Scotland) Act 2005 was based on a joint Report of this Commission and the Law Commission for England and Wales, published in 1999. The corresponding English legislation was passed in 2000. The delay in Scotland is obvious. Delay is also a feature of the Bankruptcy and Diligence etc. (Scotland) Act 2007; the relevant Commission Report was issued in 2001 but the legislation was not passed until 2007. This is in a field of law that had been regarded as seriously defective for many years; criticisms are found as far back as 1792, when Professor Ross's Lectures on Conveyancing were first published.

Since 2007 no civil law statutes based on Scottish Law Commission recommendations have been passed by the Scottish Parliament, although we have produced seven reports on devolved civil law subjects since September 2006. In addition, several earlier reports remain unimplemented.

A major problem appears to be a lack of capacity in the Scottish Parliament to deal with law reform measures. These are not political, and consequently they do not seem to be prioritised by contrast with

more obviously political Bills. Nevertheless, it is of vital importance to Scots law and the Scottish economy that the legal system should be kept up to date. If Scottish private law ceases to be generally regarded as an effective modern system, that is likely to drive legal business away from Scotland. We are aware that lawyers in jurisdictions where the legal system is kept up to date, for example the Channel Islands, are using the modern nature of their law as a strong selling point in attracting foreign legal business. This may be accompanied by an unfavourable comparison with the United Kingdom, describing the law here as "outdated". If Scotland is to realise its full potential in the legal, financial and other commercial fields, it is plainly essential that our legal system should be modernised and should be perceived as such. At present that is not happening.

We accordingly intend to continue to press for new Parliamentary procedures to increase the capacity of the Scottish Parliament to deal with Law Commission Bills. This is imperative if the basic fabric of Scots law is to be kept up to date. It is also essential that, in planning the legislative programme, Ministers should take account of the need for law reform Bills, and include them in the programme on a systematic basis.

There is, accordingly, a great deal of work to be done if effective procedures for the modernisation of Scots law are to be put in place. We are, however, grateful to Scottish Ministers for their continuing support in this connection. We also greatly appreciate the opportunity to discuss our work with both Ministers and officials.

Finally, I would like to express my appreciation of the dedication and enthusiasm of my fellow Commissioners and of the whole of the staff at the Commission.



THE HON LORD DRUMMOND YOUNG
Chairman

Publications 2010

| TITLE | PUBLICATION DATE |
|--|------------------|
| Discussion Paper on Accumulation of Income and Lifetime of Private Trusts DP No 142 | 7 January 2010 |
| Eighth Programme of Law Reform Scot Law Com No 220 | 12 February 2010 |
| Annual Report 2009 Scot Law Com No 221 | 18 February 2010 |
| Report on Land Registration Scot Law Com No 222 | 26 February 2010 |
| Consultation Paper on Level Crossings (Joint consultation paper with the Law Commission) DP No 143 | 22 July 2010 |
| Discussion Paper on Prescription and Title to Moveable Property DP No 144 | 9 December 2010 |
| Discussion Paper on Similar Fact Evidence and the <i>Moorov</i> Doctrine DP No 145 | 21 December 2010 |
| Discussion Paper on Judicial Factors DP No 146 | 22 December 2010 |

These publications are available on our website www.scotlawcom.gov.uk

Miscellaneous papers

For some projects we publish miscellaneous consultation and other papers which are not included in our series of numbered discussion papers and reports. During 2010 we and the Law Commission for England and Wales published several papers in this category in connection with our joint project on insurance contract law. These papers were published in electronic form and are available on our website.

- Issues Paper 6: Damages for Late Payment and the Insurer's Duty of Good Faith
- Issues Paper 7: The Insured's Post-Contract Duty of Good Faith
- Issues Paper 8: The Broker's Liability for Premiums: Should Section 53 be Reformed?
- Issues Paper 9: The Requirement for a Formal Marine Policy: Should Section 22 Be Repealed?

Implementation of our reports

The Commission's function is to provide independent advice to Government on law reform. Our recommendations are contained in reports, usually accompanied by a draft Bill containing provisions which would give effect to our recommendations. Once we have submitted our reports to the Scottish Ministers, or on occasion to UK Ministers, implementation of the draft Bills annexed to the reports is for the Scottish Government and Scottish Parliament or, where appropriate, the UK Government and UK Parliament.

During 2010 we continued our efforts to work with both the UK Government and the Scottish Government towards the implementation of individual outstanding Commission reports. We also worked with Government towards improving legislative planning for implementation of law reform measures; and with the Scottish Parliament to expand the capacity of the Parliament to enact law reform recommendations. We will continue to press for improvements in all of these areas in 2011.

Bills introduced in the Scottish Parliament in 2010

During 2010 three Bills were introduced in the Scottish Parliament that followed from Commission reports on areas of Scots law.

Double Jeopardy (Scotland) Bill

Our Report on Double Jeopardy was published in December 2009. The Scottish Government accepted the majority of the Report, but proposed going beyond the Commission's recommendations in a number of respects. The Scottish Government conducted a consultation on its proposals, before introducing the Double Jeopardy (Scotland) Bill (on 7 October 2010). Patrick Layden QC, the lead Commissioner on the project, gave evidence to the Justice Committee of the Scottish Parliament on 16 November 2010 during Stage 1 consideration of the Bill. The Bill completed Stage 1 on 3 February 2011.

Damages (Scotland) Bill

On 1 June 2010, Bill Butler MSP introduced the Damages (Scotland) Bill as a Members' Bill in the Scottish Parliament. Subject to one exception, the Bill is in the same terms as the draft Bill included in our Report on Damages for Wrongful Death, published in September 2008.

Our Chairman and our Commissioner Ms Dunlop QC, gave evidence to the Justice Committee in September, during Stage 1 of the Bill. The Bill passed Stage 1 on 15 December 2010.

Long Leases (Scotland) Bill

The Long Leases (Scotland) Bill was introduced in the Scottish Parliament on 10 November 2010, following a consultation exercise undertaken by the Scottish Government earlier in the year. The Bill is based on the draft Bill included in the Report on Conversion of Long Leases which we published in December 2006. Following our recommendations, the Bill provides for the conversion of ultra-long leases (often of 999 years) into ownership. The Bill also provides for payment of compensation to former owners of land for loss on conversion of long leases.

Bill passed by the Scottish Parliament in 2010

Criminal Justice and Licensing (Scotland) Act 2010

The Criminal Justice and Licensing (Scotland) Act 2010 received Royal Assent on 6 August 2010. The Act implements our Report on Crown Appeals and makes provision to increase the age of criminal responsibility from 8 years to 12 years as recommended in our Report on Age of Criminal Responsibility. The Act also implements the recommendations relating to diminished responsibility contained in our Report on Insanity and Diminished Responsibility.

Bill passed by the UK Parliament in 2010

Third Parties (Rights against Insurers) Act 2010

We were pleased that in March 2010 the Third Parties (Rights against Insurers) Act 2010 received

Royal Assent. The Act implements our joint Report with the Law Commission on Third Parties - Rights against Insurers, published in July 2001. The Bill was the second put through the new House of Lords' procedure for implementation of certain Law Commission reports.

Government responses to other recommendations

We noted in our last Annual Report that Scottish Ministers had agreed to provide a response to our reports within three months of submission to them. We are pleased to record the responses received during 2010 and action taken by the Scottish Government following our reports.

Penalty clauses

As part of our work under our Fifth Programme of Law Reform (1997-1999), we undertook to review the law on penalty clauses as part of a wider project on remedies for breach of contract. The review of penalty clauses followed concerns raised by the Faculty of Advocates during their wider work on Remedies for Breach of Contract.

We published our Report on Penalty Clauses in May 1999. In July 2010 the Scottish Government issued a consultation paper inviting views on the practical impact of implementing the draft Bill annexed to the consultation paper. Following the consultation we have been asked by the Scottish Government to re-examine the topic as part of our work on contract law.

Unfair terms in contracts

Our joint Report with the Law Commission on Unfair Terms in Contracts was published in February 2005. Although the recommendations have been accepted in principle by the UK Government, implementation is on hold pending negotiation of the draft EU Consumer Rights Directive. Negotiations on the Directive are expected to conclude in late 2011.

Consumer remedies for faulty goods

Our Report on Consumer Remedies for Faulty Goods was published jointly with the Law Commission for England and Wales in November 2009. In January 2010 we received a response from the Scottish Minister for Community Safety. While acknowledging that the subject matter is reserved to the UK Parliament in terms of the Scotland Act 1998, the Minister welcomed the recommendations and indicated that the Scottish Government would support moves to take the Commission's recommendations forward. The UK Government has indicated that the Commissions' Report is being considered in the context of the ongoing negotiations on the proposed EU Consumer Rights Directive, mentioned above.

Unincorporated associations

Our Report on Unincorporated Associations was published in November 2009. It clarifies the law affecting thousands of non profit-making associations in Scotland, including charities and clubs.

In March 2010 we received a response from the Scottish Minister for Community Safety, noting that the subject matter of the Report is reserved in so far as it relates to the creation, operation, regulation and dissolution of business associations, other than charities. Mr Hurd MP, the UK Minister for Civil Society, has replied indicating that he cannot hold out any prospect that implementing our recommendations soon will be a priority for the UK Government.

Consumer insurance

We published a joint Report with the Law Commission on Consumer Insurance Law: Pre-Contract Disclosure and Misrepresentation, in December 2009. We received a response from the Scottish Minister for Community Safety in March 2010. He acknowledged that while the subject matter of our recommendations was reserved to the UK Parliament, matters concerning financial services and consumer protection were of importance for devolved matters and the purpose

of the Scottish Government. He confirmed that the Scottish Government supported the overall thrust of the Report and expressed the hope that the recommendations for reform would be accorded priority by UK Departments. The UK Government has indicated that it is undertaking work to study and consider the Report and aims to respond in the early part of 2011.

Reports on the law of damages

Shortly after the introduction in the Scottish Parliament of the Damages (Scotland) Bill by Bill Butler MSP, the Scottish Government launched a consultation paper on proposals developed from the recommendations in our Report on Damages for Wrongful Death.

In the autumn of 2010, the Scottish Government was called to give evidence to the Justice Committee at Stage 1 of the Members' Bill. In the course of giving oral evidence, the Minister for Community Safety initially indicated that Scottish Ministers supported the broad objectives of the Bill, but took the view that it would be preferable to bring forward a single Bill to implement the Commission's Reports on Psychiatric Injury (2004), Personal Injury Actions: Limitation and Prescribed Claims (2007) and Damages for Wrongful Death (2008). The Minister subsequently wrote to the Committee in January 2011 in response to the Committee's report, indicating that the Scottish Government was hopeful that, with appropriate amendments, it would be able to support enactment of the Bill.

Land Registration (Scotland) Bill

In February 2010 the Commission published its Report on Land Registration, recommending the introduction of new legislation on land registration in Scotland. The Minister for Enterprise, Energy and Tourism, responded in June 2010 indicating that the Scottish Government would consult further on some of the more significant recommendations.

In September 2010, the Registers of Scotland issued a consultation paper on behalf of the Scottish Ministers

on the Commission's proposed new Land Registration (Scotland) Bill in order to gauge public reaction to the more significant changes to the system of land registration recommended by the Commission. The consultation paper also invited views on a number of additional areas going beyond the Commission's recommendations. The consultation period ended on 30 November 2010.

Further information about implementation of our reports can be found on the Publications page of our website

www.scotlawcom.gov.uk

Our law reform projects

Introduction

The Commission's law reform work stems from our programmes of law reform or references from Ministers. Since the Commission was set up in 1965 we have had seven programmes of law reform which have guided our work over the last forty five years. 2010 saw the start of work on our Eighth Programme of Law Reform which sets out areas of Scots law that we intend to review during the five years to the end of 2014. In addition to work on our Programme of Law Reform, we continued work on our remaining reference from Scottish Ministers. We received no new references from Ministers during 2010.

How we undertake our law reform projects

- **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 consultation responses**
- **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 reserved areas of law, in the UK Parliament at Westminster.

In order to engage with stakeholders during the course of our work, we often set up advisory groups of people with expertise in the areas of law concerned. These small groups provide valuable assistance and guidance to our project teams.

We wish to record our thanks to the members of our current advisory groups for the contribution they have made to our projects during 2010. We appreciate that they give of their time without any payment in order to help us with our work.

Projects included in our Eighth Programme of Law Reform

Item 1 - Moveable transactions

Project Team

Professor George Gretton, Commissioner

John Dods, Project Manager

Shona Wilson, Legal Assistant

This is a substantial long-term project which was carried forward from our Seventh Programme of Law Reform.

The project was originally included in our last Programme as a review of the law relating to the assignation of, and security over, incorporeal moveable property. But in our Eighth Programme it was expanded to include the law relating to security over corporeal moveable property. The project thus now covers security over both corporeal and incorporeal moveable property. It also covers the transfer (assignation) of incorporeal moveable property. It does not cover the transfer of corporeal moveable property, a subject that is mainly covered by the Sale of Goods Act 1979.

During the course of the Seventh Programme only limited progress was made, on account of other priorities, especially the project on land registration. But during 2010 substantial progress was made and a discussion paper will be published in 2011.

Item 2 - Trusts

Project Team

The Hon Lord Drummond Young, Commissioner

Charles Garland, Project Manager

Emma Boffey, Legal Assistant

We have continued to work on the major long-term project on trust law, which was carried forward into our Eighth Programme.

In January 2010 we published our seventh Discussion Paper on this area of the law, focussing on the rules concerning accumulation of income and the lifetime of private trusts. We received nine responses.

Our current work is divided into two strands, on which we are working in parallel. First we have begun work on a report which will cover the topics on which we have consulted, with the exception of the subject-matter of our Discussion Paper on the Nature and Constitution of Trusts (published in 2006), on which we do not presently envisage the need for legislation.

We have also begun the drafting process for a new Trusts (Scotland) Bill to replace and update the Trusts (Scotland) Act 1921 and a number of other pieces of legislation. We intend to include provisions contained in the draft Bill annexed to our 2007 Report on Variation and Termination of Trusts.

The second strand of work has arisen from our consideration of the responses to our earlier discussion papers. For reasons which we explain below, we have decided that there are several topics on which some further consultation would be desirable. In some cases this is because of changes in the law since the relevant discussion paper was published, and in other cases our preferred options have evolved, prompted in many instances by consultation responses.

We therefore intend to publish another discussion paper early in 2011. In addition to seeking further responses on some issues on which we have already consulted, we will also include certain new issues on which views will be welcomed. These will include suggestions for legislation permitting the creation of new types of trust which are increasingly found in dynamic and thriving trust law jurisdictions but which do not presently form part of Scots law. We raise these topics because we think that it is vital that the law of trusts in Scotland should meet contemporary needs in the fields of investment, financial services and estate planning. Investment and financial services are of great importance to the

Scottish economy, and the trust is one of the main legal vehicles used in these fields. At present, we do not think that the Scots law of trusts is adequate in this respect. We also note a very welcome movement in various parts of the world to review and reform trust law. A current example of this can be found in the work of the New Zealand Law Commission, which has embarked on a general review of the law, taking account of the commercial importance of the trust for the financial services industry.

Although the time taken to prepare the discussion paper will inevitably have some impact on the overall project timetable, we expect it to be only slight. At the same time we are mindful that trust law is of great importance for many aspects of Scottish life and for the Scottish economy and that reform of the outdated legislation is likely to have a beneficial effect in numerous ways.

Item 3 - Judicial factors

Project Team

Patrick Layden QC TD, Commissioner

Gillian Swanson, Project Manager

Verity Robson, Trainee Solicitor

Our project on judicial factors has been carried forward into our Eighth Programme as a short-term project for completion within the period covered by the Programme.

A judicial factor is someone appointed by the court to look after or gather in and distribute property belonging to someone else. In practice, most judicial factors are solicitors or accountants, although anyone can be appointed by the court. A judicial factor can be appointed in a variety of circumstances, for example, where someone dies without leaving a will and nobody is willing to act as executor.

The law on judicial factors is governed mainly by 19th century legislation which is so out of date that

it is no longer fit for purpose. The aim of the project is to modernise and simplify the legislation.

Our Discussion Paper on Judicial Factors was published in December 2010, inviting comments on two options for reform. The first option is to keep the existing structure but to modernise it and make it more efficient by updating the powers and duties of judicial factors as well as the procedure by which they are discharged. The second option is to establish a new public official, the Official Judicial Factor, who would carry out all judicial factory work unless the court wished to appoint someone else. An existing public official would become the Official Judicial Factor so that the functions would be part of the functions of an existing public office.

In addition to seeking comments on these options, we invite suggestions for an alternative name for "judicial factor" which is, we suspect, little understood by the public.

Comments on the Discussion Paper are invited by 15 April 2011.

Item 4 - Homicide

Project Team

Patrick Layden QC TD, Commissioner

Alastair Smith, Project Manager

Verity Robson, Trainee Solicitor

Our last Programme of Law Reform included a criminal law project to review the defences of provocation, self-defence, coercion, and necessity. Due to the need to concentrate on urgent references on Crown appeals and double jeopardy, we were not able to start work on the project before the Programme came to an end. We have therefore included the project in our current Programme to be undertaken as part of a review of homicide generally.

We have started our research work with a view to preparing a discussion paper. The aim is to complete the project during the period of the Eighth Programme.

Item 5 - Criminal liability of partnerships

Project Team

Patrick Layden QC TD, Commissioner

Alastair Smith, Project Manager

Verity Robson, Trainee Solicitor

We have included in the current Programme a short-term project on criminal liability of partnerships.

Following a fire in a nursing home run by a partnership, the partnership was dissolved, and attempts to indict the dissolved partnership, and/or the members of it, in relation to the causes of the fire failed. It is clear that the traditional concepts of the law of partnership do not fit easily into the modern regulatory structure within which many of these organisations operate.

While we and the Law Commission for England and Wales recommended reform of the general law of partnership in our joint Report on Partnership Law, published in 2003, we did not focus particularly on criminal liability. We are now considering that topic with particular emphasis on preventing the avoidance of such liability by the dissolution of the partnership.

Work has started on preparation of a discussion paper which we plan to publish in the first half of 2011.

Item 6 - Law of contract in the light of the Draft Common Frame of Reference

Project Team

Professor Hector MacQueen, Commissioner

Charles Garland, Project Manager

Emma Boffey, Legal Assistant

Since it was set up in 1965, the Commission has reviewed the law of contract at various times. The most recent exercise involved a series of five Reports published during the 1990s, but only one of the five was followed by legislation (the Contract (Scotland) Act 1997).

Our Eighth Programme includes a new project on contract law. It is designed to keep this commercially important area of the law under review, and in particular it affords the opportunity to give Scots law a "health check" by comparing it to the relevant provisions in the recently completed Draft Common Frame of Reference (DCFR). The DCFR contains, amongst other things, a set of rules on contract law and was drafted by a team of eminent academics from a variety of European countries. We are finding it of value in several of our current projects.

The project will examine a number of topics in turn. The first topic is contractual interpretation. We have recently published our Discussion Paper on Interpretation of Contract. The law has changed since our last examination of this in 1997, when we published a Report on Interpretation in Private Law which covered not just contracts but wills and other juridical acts too. In particular, we consider the impact of a number of House of Lords cases in which Lord Hoffmann gave leading judgments, beginning with *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896 (HL). We also examine the approaches taken by major common law jurisdictions as well as by some civilian ones. The Discussion Paper considers the role of rectification too, a topic which was not covered to any significant degree in our 1997 Report.



Professor Hector MacQueen and members of the contract law advisory group

In preparing our Discussion Paper we benefitted greatly from views received from a number of advisory groups. We met practitioners and academics, then members of the judiciary, and more recently we convened small groups of business people from both the private and public sector, from a wide range of industries and from different parts of the country. The input we received was invaluable in a number of ways, not least in assisting us to respond to a Green Paper published by the European Commission "on policy options for progress towards a European Contract Law for consumers and businesses" and shortly before that to a preliminary call for evidence put out by the UK Ministry of Justice and the Scottish Government in connection with the Green Paper.

We invite views on our proposals by 20 May 2011.

Other topics which we expect to examine in the course of the project include: formation of contract (including a review of the postal acceptance rule, and the rules of execution and in particular of "execution in counterpart" - the latter topic was suggested to us by a number of practitioners, who thought that clarification of the law would bring practical benefits to them and their clients), and also remedies, third party rights, and penalty clauses.

Item 7 - Adults with incapacity

Project Team

Ms Laura Dunlop QC, Commissioner

Susan Sutherland, Project Manager

Susan Robb, Solicitor

This project was included in our Eighth Programme following a suggestion from the Mental Welfare Commission, the Law Society of Scotland's Mental Health and Disability sub-committee and Enable Scotland.

Early in the project we set up an advisory group of practitioners, academics and others with expertise in this area of law, to assist us with our work. We also had meetings with representatives of the Law Society's sub-committee, Alzheimer Scotland and others. From these meetings and from the comments received prior to inclusion of the project in our current Programme, it became clear that there were several areas of concern that could be included in our review. The nature of the issues varied widely. Some related to financial guardianship, property matters and powers of attorney.

But the main issue related to the potential application of Article 5 of the European Convention on Human Rights (the right to liberty) in relation to care arrangements of people who fall within the scope of the Adults with Incapacity (Scotland) Act 2000. We decided that we should give priority to an examination of this area first.

The fundamental issue which we are considering is whether reform is needed following the decision of the European Court of Human Rights in the case of *HL v UK* (2004) 40 EHRR 761. The case, which is often referred to as the "Bournewood case", involved a person with learning disabilities who had been detained informally in a hospital for psychiatric treatment. The Court held that there had been a violation of Article 5 of the Convention because the person had not been detained in accordance with a procedure prescribed by law.

As part of our comparative research, we have been looking at the legislation introduced in England and Wales, where specific statutory procedures have been provided for by way of amendment to the Mental Capacity Act 2005, following the Bournemouth case.

We are now working on a discussion paper which we plan to publish towards the end of 2011.

Item 8 - Compulsory purchase

The Eighth Programme includes a long-term project to review the law of compulsory purchase in Scotland. Much of the law is still based on the Lands Clauses (Consolidation) (Scotland) Act 1845. During consultation on topics for inclusion in the Programme, we received strong support for a project to review the law on this topic. The law of compulsory purchase belongs mainly to public law but it also has important private law aspects. In view of the need to concentrate resources on other projects, only preliminary work has so far been undertaken.

Item 9 - Heritable securities

Our Eighth Programme includes a long-term project to review the law relating to heritable securities in Scotland.

A heritable security is a security over heritable property (immoveable property, such as land and buildings) in respect of a debt. (The equivalent term in English law, "mortgage", is often encountered.) The law of heritable security is governed mainly by legislation dating back to 1970: the Conveyancing and Feudal Reform (Scotland) Act 1970. The Act has been amended in a piecemeal way over the years, most notably by the Mortgage Rights (Scotland) Act 2001 and by the Home Owner and Debtor Protection (Scotland) Act 2010, which were aimed at enhancing debtor protection in the case of security over residential property. But many shortcomings in the 1970 Act have come to light that remain unreformed. The Supreme Court's decision in Royal

Bank of Scotland plc v Wilson [2010] UKSC 50, 2010 SLT 1227 highlights one such area of difficulty.

The law of heritable security is of considerable economic significance and is relevant to property of every type, including residential property, agricultural property and commercial property. It is time for the legislation to be given a thorough overhaul. Finally, the question of "Islamic mortgages" needs to be reviewed.

Two limitations of the scope of the project should be mentioned: (i) the project will not cover the regulation of the mortgage market and (ii) the project will be about the law of security, rather than about the law relating to loans. So, for example, the subject matter of the Consumer Credit Act 1974 will be, for the most part at least, outwith the project's scope.

Many of the issues are complex and the project will involve considerable research. So far only very preliminary work has been done. Substantial progress will happen when resources permit.



Our current legal assistants and trainee solicitor (left to right) Anna Crilly, Emma Boffey, Shona Wilson and Verity Robson

Item 10 - Prescription and title to moveable property

Project Team

Professor George Gretton, Commissioner

Alastair Smith, Project Manager

Shona Wilson, Legal Assistant

As part of our Eighth Programme we are reviewing the current law relating to the law of prescription and title to moveable property.

The principal focus of the project is on positive (acquisitive) prescription of moveable property: that is, with the question of whether the passage of time converts possession to ownership. This is mainly of relevance to art and antiquities, since most other corporeal moveable property has a short life-span and declines in value over time. The present law is unclear. The project also addresses the negative prescription of title to moveable property, including incorporeal moveable property such as copyright.

We published our Discussion Paper on Prescription and Title to Moveable Property, in December 2010, inviting comments on a number of questions and proposals for reform. The consultation period ends on 11 March 2011.

References from Ministers

From time to time we receive references from Scottish Ministers or UK Ministers or Government Departments asking us to review certain areas of law and advise on their reform. Most of these projects are required to be completed within a short timescale and as a result we have to adjust the timetable for completion of the law reform projects under our programmes of law reform.

During 2010 we had only one project which arose from a reference from Scottish Ministers.

Similar fact evidence and the *Moorov* doctrine

Project Team

Patrick Layden QC TD, Commissioner

Alastair Smith, Project Manager

Verity Robson, Trainee Solicitor

Our project on similar fact evidence and the *Moorov* doctrine is the final project to be conducted under the reference made by the Scottish Ministers in November 2007. (The previous Reports were Crown Appeals (2008) and Double Jeopardy (2009)).

The current project is reviewing the rules as to when it is permissible in proving a criminal charge to lead evidence showing that the accused has committed other crimes, or is otherwise of "bad character". Currently, a person's previous convictions cannot be presented as evidence in Scottish courts, but such convictions can be used in England and can be used in sentencing in Scotland once someone has been convicted.

We published our Discussion Paper on Similar Fact Evidence and the *Moorov* Doctrine, in December 2010 asking whether the blanket rule against leading evidence of previous convictions remains appropriate, or whether it should be possible, in some cases, to refer to the accused's record in proving a charge.

The Discussion Paper also considers the *Moorov* doctrine, whereby evidence of a single witness to one offence may be corroborated by the evidence of a single witness to another offence that is the subject of a charge in the same trial. We invite views on whether the doctrine should be restated in statute.

The consultation period runs until 8 April 2011.

Joint projects with the Law Commission for England and Wales

During 2010 we continued work on a number of joint projects with the Law Commission for England and Wales. These projects relate mainly to areas of the law which are reserved to the UK Parliament in terms of the Scotland Act 1998.

Insurance contract law

Project Team

Professor Hector MacQueen, Commissioner

Gillian Swanson, Project Manager

Anna Crilly, Legal Assistant

We are assisting the Law Commission with this major project which they are carrying out under their Tenth Programme of Law Reform. As mentioned in our Annual Report 2009, the project is looking at both consumer and business insurance.

Having published our joint Report on Consumer Insurance Law: Pre-Contract Disclosure and Misrepresentation in December 2009, our attention has turned to a number of remaining topics which have been the subject of a series of Issues Papers, the purpose of which is to set out our preliminary thinking in order to promote discussion before we formulate proposals for reform.

The topics of the Issues Papers published in 2010 were: Damages for Late Payment and the Insurer's

Duty of Good Faith (Issues Paper 6); the Insured's Post-Contract Duty of Good Faith (Issues Paper 7); The Broker's Liability for Premiums: Should Section 53 be Reformed? (Issues Paper 8); and The Requirement for a Formal Marine Policy: Should Section 22 Be Repealed? (Issues Paper 9).

Issues Paper 6, published in March 2010, asked whether an insurer should be liable for a policyholder's loss suffered as a result of a late payment or non-payment of an insurance claim. In June 2010, as part of the consultation, we and the Law Commission hosted a seminar in conjunction with the University of Edinburgh to discuss the Issues Paper.

The consultation indicated strong support for change. Consultees emphasised that if an insurer has declined a valid claim and acted unreasonably, then insurance law ought to be brought into line with general commercial contractual principles and the policyholder should be offered an appropriate remedy.

Issues Paper 7 examined whether the law should provide greater clarity on the remedies available to insurers when policyholders act fraudulently. Many consultees told us that fraudulent claims have become increasingly costly for the insurance industry. There was strong support for clarification of this area of the law.

Issues Paper 8 looked at the broker's liability for premiums under section 53 of the Marine Insurance Act 1906. Section 53 makes the broker directly responsible to the insurer for the premiums due under an insurance contract, whether or not the broker has received them from the policyholder. The Paper identified anomalies within the provision, which probably applies to marine insurance only, and described the conflicting case law arising from it. It considered whether there should be reform to bring the broker's liability into line with the general law on contract and agency and to allow greater flexibility in contractual arrangements.

Issues Paper 9 concerned section 22 of the Marine Insurance Act 1906 which applies only to marine insurance. By virtue of section 22, a contract of marine insurance is inadmissible in evidence unless it is "embodied in a marine policy". This introduces a technicality with potentially drastic consequences for the insured. It provides that, where there is no marine policy one is not allowed to prove the terms of the contract in court, and therefore cannot prove a right to make a claim. This appears, however, to have little effect in practice. Insurers will pay claims whether the insured has a written policy document or not. We tentatively concluded that no statutory formalities should be required and that section 22 should be repealed.

We are now developing our proposals on those topics, along with insurable interest (on which we published an Issues Paper in 2008), with a view to publishing them in a joint Consultation Paper in 2011. A policy statement on business insurance will also be published in 2011.

Misrepresentation and duress

Project Team

Professor Hector MacQueen, Commissioner

Gillian Swanson, Project Manager

Anna Crilly, Legal Assistant

We and the Law Commission have been asked by the UK Department for Business, Innovation and Skills to undertake a joint project on consumer law and, in particular, misrepresentation and unfair commercial practices.

The Consumer Protection from Unfair Trading Regulations 2008 ("CPRs") came into force on 26 May 2008, thereby implementing the Unfair Commercial Practices Directive 2005/29/EC ("UCPD") in the United Kingdom. The CPRs outline two categories of prohibited commercial practices: those

which are unfair if they would cause the average consumer to make a transactional decision which he or she would otherwise not have made (misleading practices, misleading omissions and practices which are contrary to professional diligence); and those which are unfair in all circumstances (a blacklist of 31 banned practices).



Ms Laura Dunlop, the Chief Executive and the Chairman at a joint meeting with the Law Commission

While the UCPD required Member States to provide effective means of enforcement, it did not prescribe a means by which enforcement was to be achieved. The Office of Fair Trading and local authority Trading Standards Services are responsible for civil and criminal enforcement of the CPRs in England and Wales, although in Scotland they are only responsible for civil enforcement (under Part 8 of the Enterprise Act 2002). In Scotland, the Crown Office and the Procurator Fiscal Service on behalf of the Lord Advocate is responsible for criminal enforcement. The CPRs do not, however, provide consumers with a direct cause of action where they have suffered loss as a result of an unfair commercial practice. Consumers must rely instead upon the remedies which they are afforded under the existing law; for example, under the law of misrepresentation. Consumer groups have argued that this is a failing of the current law which requires to be addressed.

The purpose of this project is to advise on a possible restatement and simplification of the law of misrepresentation, to make it more transparent and

easier for businesses and consumers to understand and also to remove unnecessary differences between the civil law and the CPRs. The project will also consider two further matters. First, it will look at the law of duress in order to clarify whether aggressive commercial practices under the CPRs should be automatically classed as a form of illegitimate pressure. Secondly, it will consider the justification for the introduction of a private right of redress where there is clear evidence that consumers have suffered loss as a result of an unfair commercial practice and no private right currently exists.

Having carried out a preliminary consultation to find out more about situations in which consumers or businesses have been affected by the CPRs, we are preparing a joint consultation paper which we will publish in the spring of 2011.

Level crossings

Project Team

Professor George Gretton, Commissioner

Susan Sutherland, Project Manager

Susan Robb, Solicitor

Shona Wilson, Legal Assistant

The Law Commission's Tenth Programme of Law Reform includes a project to review the law relating to level crossings. The project was included in the Programme following concerns raised by the Office of Rail Regulation that the legislation relating to level crossings was in need of reform.

Although the project is being led by the Law Commission, it is being taken forward as a joint project as much of the relevant legislation applies to Scotland as well as to England and Wales.

The law governing level crossings is complex and not easy to find. It involves railway legislation dating back to Victorian times as well as more recent legislation

on health and safety, planning, roads and access to land. One of the main aims of the project is to simplify the legislative framework.

Our joint Consultation Paper on Level Crossings was published in July 2010. The Paper set out a number of proposals and questions about how the legislation governing safety regulation, management and where appropriate, closure of level crossings might be reformed. It also considers whether new criminal offences should be created that are specific to level crossings.



The Rt Hon Lord Justice Munby, Chairman of the Law Commission and Professor Hector MacQueen at a joint Commission meeting

The consultation period concluded at the end of November 2010 and we have received more than 100 responses from a wide range of interested bodies and individuals. We are now considering the responses with a view to commencing work on a report and draft Bill.

Progress in 2010 on our law reform projects: summary

| Project | Publications 2010 | Current position |
|--|---|---|
| Moveable transactions (Eighth Programme, item 1) | | Working on discussion paper |
| Trusts (Eighth Programme, item 2) | Discussion Paper on Accumulation of Income and Lifetime of Private Trusts (DP No 142) published January 2010 | Working on discussion paper covering supplementary issues and on report and draft Trusts (Scotland) Bill |
| Judicial factors (Eighth Programme, item 3) | Discussion Paper on Judicial Factors (DP No 146) published December 2010 | Consultation period due to end on 15 April 2011 |
| Homicide (Eighth Programme, item 4) | | Undertaking research work |
| Criminal liability of partnerships (Eighth Programme, item 5) | | Working on discussion paper |
| Law of contract in the light of the DCFR (Eighth Programme, item 6) | | Discussion Paper on Interpretation of Contracts published in February 2011. Consultation period due to end on 20 May 2011 Working on next discussion paper |
| Adults with incapacity (Eighth Programme, item 7) | | Working on discussion paper |
| Compulsory purchase (Eighth Programme, item 8) | | Some preliminary research work undertaken |

| Project | Publications 2010 | Current position |
|---|--|--|
| Heritable securities (Eighth Programme, item 9) | | Some preliminary research work undertaken |
| Prescription and title to moveable property (Eighth Programme, item 10) | Discussion Paper on Prescription and Title to Moveable Property (DP No 144) published December 2010 | Consultation period due to end on 11 March 2011 |
| Similar Fact Evidence and the <i>Moorov</i> Doctrine (Reference from Scottish Ministers) | Discussion Paper on Similar Fact Evidence and the <i>Moorov</i> Doctrine (DP No 145) published December 2010 | Consultation period due to end on 8 April 2011 |
| Insurance contract law (Joint project with the Law Commission for England and Wales) | | Working on second joint consultation paper |
| Misrepresentation and duress (Joint project with the Law Commission for England and Wales) | | Working on joint consultation paper |
| Level crossings (Joint project with the Law Commission for England and Wales) | Consultation Paper on Level Crossings (DP No 143) published July 2010 | Analysing responses to the Consultation Paper and preparing a joint policy paper for the report and draft Bill |

Further information about our law reform projects is available on the Law Reform Projects page on our website

www.scotlawcom.gov.uk

Consolidation and statute law repeals

Consolidation

Project Team

The Hon Lord Drummond Young, Commissioner

Susan Sutherland, Project Manager

Susan Robb, Solicitor

One of our functions is to undertake work on consolidation of legislation. This work involves preparing a draft Bill to bring together earlier enactments on an area of law, with a view to making the provisions easier to find and more user-friendly while at the same time tidying up the statute book.

Some of our consolidation work is undertaken jointly with the Law Commission for England and Wales. During 2010 we were involved in assisting the Commission on two consolidation projects where they were taking the lead in preparing the draft Bill. Joint work on consolidation relates to legislation applying to Great Britain or the United Kingdom. The resultant Bills are for the UK Parliament to implement, with approval of Scottish Ministers as appropriate in relation to any matters which are within the legislative competence of the Scottish Parliament.

Bankruptcy legislation

We are undertaking this project with a view to a consolidation Bill being introduced in the Scottish Parliament.

The principal legislation on bankruptcy is the Bankruptcy (Scotland) Act 1985 but the Act has been heavily amended in recent years. The aim of the consolidation is to bring the provisions together into a rational and coherent form for the benefit of users.

Work continued during 2010 on preparation of a draft consolidation Bill. We are being assisted by officials in the Accountant in Bankruptcy's Office who are supporting the project. We are also working

closely with colleagues in the Scottish Government with policy responsibility for this area of law.

The draft Bill has been adjusted to take account of the Home Owner and Debtor Protection (Scotland) Act 2010, which contains provisions relating to bankruptcy.

Towards the end of 2010 the Accountant in Bankruptcy sent copies of the Bill to key stakeholders inviting comments on the draft.

The aim is to complete work on the consolidation by the autumn of 2011.

Other Scottish consolidations

In addition to bankruptcy legislation, we are aware that there are other important areas of Scottish legislation that would benefit from being consolidated. In undertaking any further work on consolidation of Scottish legislation, we would look to Scottish Government officials with responsibility for the policy area concerned for support and assistance in preparing any draft Bills. We would hope to undertake other consolidation projects in the future.

Charities legislation

The Law Commission is taking the lead on a consolidation of the Recreational Charities Act 1958, the Charities Act 1993 and Part 1 of the Charities Act 2006. The Charities Act 1993, which is the main piece of legislation being consolidated, applies primarily to England and Wales, although some of its provisions extend to Scotland.

In September 2010 we were asked to assist the Law Commission on the Scottish aspects of the consolidation Bill. We provided comments on the draft Bill and a draft Order which will make pre-consolidation amendments to the existing legislation with a view to facilitating the consolidation. The Order will come into force immediately before the consolidation comes into force.

The aim is for the Bill to be introduced in the UK Parliament early in 2011.

Pensions legislation

Early in 2010 we were asked to assist the Law Commission in connection with preparation of a Bill to consolidate the legislation on private pensions.

We provided the Law Commission with comments on the Scottish aspects of the Bill. However, in the autumn a decision was taken by UK Department of Work and Pensions to cease funding work on the consolidation. For that reason we and the Law Commission had to abandon work on the draft Bill.

Statute law repeals

Project Team

The Hon Lord Drummond Young, Commissioner

Susan Sutherland, Project Manager

Susan Robb, Solicitor

Another of our functions under the Law Commissions Act 1965 is to recommend the repeal of legislation which has become redundant or otherwise unnecessary.

The aim of this work is to keep legislation up to date and make it easier for people to use. This is particularly important as legislation becomes more widely accessible on statute databases. Since 1965 the Commissions have published eighteen Reports containing draft Bills which have all been implemented by the UK Parliament.

We undertake this work jointly with the Law Commission for England and Wales, who take the lead in preparing a report including a draft Repeals Bill. We assist with the preparation of repeal proposals and consult with appropriate bodies on any repeal proposals relating to Scotland.

Work progressed well during 2010 on preparation of the nineteenth statute law repeals Bill. For each set of repeal proposals we assist the Law Commission as necessary in preparing a consultation paper. Depending on the subject matter of the legislation concerned, we circulate the consultation papers to the Scottish Government and to the Office of the Solicitor to the Advocate General and other consultees in Scotland. Subject to comments we receive from consultees the repeal proposals are included in the draft repeals Bill.

During 2010 we undertook consultation in Scotland on a number of proposed repeals, including some relating to legislation on pensions and civil and criminal justice.

The aim is to complete work on the current repeals project early in 2012, with the publication of a report and draft Bill.

Promoting law reform

We have continued to maintain close links with the Scottish Government and bodies such as the Law Society of Scotland and the Faculty of Advocates in connection with our law reform work.

The Commission is also asked by the Scottish Government from time to time for informal advice on current legal issues, due to the expertise of Commissioners in particular areas of the law. In 2010 Professor George Gretton gave advice on a number of property-related issues.

We value our links with other law reform bodies, in particular with the Law Commission for England and Wales, and the law reform bodies in Northern Ireland, Ireland and Jersey. From time to time we welcome representatives from other jurisdictions and law reform bodies to the Commission.

Links with the Malawi Law Commission

During 2010 a significant aspect of our work on promoting law reform lay in establishing a link with the Malawi Law Commission, as part of the Scottish Government's Programme on Capacity Building for Justice in Malawi. This was achieved, working closely with Challenges Worldwide, the development agency appointed by Scottish Ministers to prepare and deliver the Programme for the justice sector. This Programme is based on the Scotland-Malawi Governmental Agreement in 2005. The arrangement is intended to encourage co-operation and assistance between the Commissions in promoting law reform; and to increase the capacity of our partner bodies in Malawi to promote law reform there.

As part of our link with the Malawi Law Commission one of our legal assistants, Garry MacLean, flew to Malawi in September 2010 to commence a six month placement with that Commission. He is assisting the Commission's intellectual property law team which is currently undertaking a review of the law on trade marks. Professor Hector MacQueen, one of our Commissioners, has also given advice to the Commission on the project.



Filimoni House, Lilongwe, where the Malawi Law Commission has its offices

Another way in which we are assisting the Malawi Law Commission is by donating law books to them. A consignment of our surplus library stock was despatched to the Commission in November 2010.

We intend to develop our links with the Malawi Law Commission in 2011.

Law reform publications planned for 2011

SLC Discussion Papers

- Review of Contract Law: Interpretation of Contract (published February 2011)
- Criminal Liability of Partnerships
- Supplementary and Miscellaneous Issues Relating to Trust Law
- Moveable Transactions
- Review of Contract Law (second discussion paper)
- Adults with Incapacity

Joint Consultation Papers with the Law Commission

- Consumer Redress for Misleading and Aggressive Practices
- Insurance Contract Law (second consultation paper)

SLC Reports

- Prescription and Title to Moveable Property
- Similar Fact Evidence and the *Moorov* Doctrine
- Consolidation of Bankruptcy Legislation
- Trust Law

Commissioners and staff

Commissioners

The Hon Lord James Drummond Young, Chairman

Ms Laura Dunlop QC

Professor George Gretton

Patrick Layden QC TD

Professor Hector MacQueen

Chief Executive

Malcolm McMillan

Parliamentary Counsel (Consultant)

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John Dods

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Susan Sutherland

Gillian Swanson

Solicitor

Susan Robb

Legal Assistants

Emma Boffey

Anna Crilly

Garry MacLean

(on a placement at the Malawi Law Commission)

Shona Wilson

Trainee solicitor

Verity Robson

Librarian

Nick Brotchie

Office Manager

James Barbour

Personal Secretaries

Joan Melville

Heather Ryan

Administrative Services Staff

Iain Ritchie

Gordon Speirs

The Commission's running costs 2010

The Commission is funded by the Scottish Government. Our running costs for 2010 were offset by payment received from Skills for Justice and the Royal Commission on the Ancient and Historic Monuments of Scotland for use of part of our office accommodation.

| Expenditure | Year to 31 December 2010 |
|--|-----------------------------|
| Salaries – Commissioners (including national insurance contributions, superannuation payments and pensions to former Commissioners) | £613,010 |
| Salaries – Chief Executive and legal staff (including national insurance contributions, superannuation payments and consultants' fees and expenses) | £678,530 |
| Salaries – administrative staff (including national insurance contributions and superannuation payments and agency staff costs) | £183,785 |
| Accommodation (including maintenance, rates and utilities) | £62,869 |
| Printing and publishing (including costs of books and library purchases, binding, machinery maintenance, photocopying, reprographic services and stationery) | £96,069 |
| Telephone and postage | £8,172 |
| Travel and subsistence | £7,951 |
| Miscellaneous (including training, office services and hospitality) | £14,599 |
| Total | £1,664,985 |



Scottish Law Commission

promoting law reform

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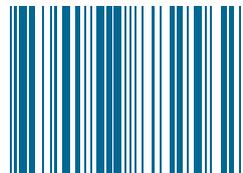
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