



Scottish Law Commission
promoting law reform

(SCOT LAW COM No 214)



annual report | 2008





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



Commissioners and Chief Executive (from left to right)

Colin Tyre QC, Professor Joe Thomson, Malcolm McMillan (Chief Executive), Professor George Gretton, Lord Drummond Young (Chairman), Patrick Layden QC TD



Scottish Law Commission

promoting law reform

Annual Report 2008

To: Mr 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 2008.

James Drummond Young JAMES DRUMMOND YOUNG, *Chairman*

George Gretton GEORGE GRETTON

Patrick Layden PATRICK LAYDEN

Joseph M Thomson JOSEPH M THOMSON

Colin Tyre COLIN TYRE

Malcolm McMillan

Malcolm McMillan, *Chief Executive*

10 February 2009

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

February 2009

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Chairman's foreword

During 2008 the Commission continued to produce a significant number of discussion papers and reports, both in pursuance of our Seventh Programme and in response to references from Ministers. The latter category includes our Reports on Crown Appeals and Damages for Wrongful Death. We also intend during 2009 to produce major reports on succession, land registration, unincorporated associations and the rule against double jeopardy.

It is a matter of some concern that the number of Commission reports that remain unimplemented has risen significantly since devolution. Many of these reports result from Ministerial references, and in nearly all cases the report has not received any official reaction. The rate of implementation of Scottish Law Commission reports now compares unfavourably with other jurisdictions of similar size such as New Zealand and the larger Australian states. The work of law reform bodies is particularly important in such jurisdictions because the opportunities to develop the law through court decisions are not as numerous as in larger jurisdictions. The danger is that Scots law will fall behind the rest of the world's legal systems in responding to the challenges of an era marked by rapid technological and economic change.

Nevertheless, I am pleased that in the field of criminal law the Sexual Offences (Scotland) Bill, implementing our Report on the subject, is currently passing through the Scottish Parliament.

In the field of civil law, we understand that the Scottish Government is still giving consideration to the possibility of legislation following our Report on Interest on Debt and Damages and our Report on Conversion of Long Leases, which were both published in 2006.

There are indications that certain of our other outstanding reports may be considered for implementation. We welcome this development. We would suggest that significant improvements



could be made in the law of delict by implementation of our Reports on Damages for Wrongful Death (published in 2008), Prescription and Limitation (published in 2007) and Damages for Psychiatric Injury (published in 2004); and in the law of contract by implementation of our Reports on Penalty Clauses and Remedies for Breach of Contract (both dating from 1999). We understand that the First Minister will make a statement later in 2009 outlining the Government's Programme for 2009 - 2010.

At Westminster, I note with satisfaction that the draft Bill appended to our Joint Report with the Law Commission on Third Parties – Rights Against Insurers (published in 2001) is being considered for the trial of a new expedited procedure in the United Kingdom Parliament for implementation of Bills from the Law Commissions. I very much hope that this procedure will lead to greater – and faster – implementation of proposals from the Scottish Law Commission in reserved matters.

It is regrettable, however, that the two Law Commissions' Joint Report on Partnership (published in 2003) remains unimplemented and seems unlikely to be implemented owing to opposition in

certain circles in England. The Report attracted widespread support among the Scottish legal profession, where it was seen as a necessary updating of an area of law that remains based on statutes that are more than a century old.

In August the term of office of Professor Gerry Maher came to an end. He has played a major part in the Commission's work in the fields of criminal law and diligence. He has returned to his Chair at Edinburgh University, where I am sure that he will continue to make a major contribution to legal scholarship. In March Michael Lugton retired as Chief Executive. I must pay tribute to his work here; at a personal level, I can say that he was of immense assistance in helping me to settle into the Chairmanship of the Commission. Professor Maher has been succeeded by Patrick Layden QC, who joins us from a senior position in the Government Legal Service for Scotland. His wide experience in public law well qualifies him for the work of the

Commission. Michael Lugton is succeeded by Malcolm McMillan, who also joins us from the Government Legal Service for Scotland. We were very pleased to welcome both Mr Layden and Mr McMillan to the Commission.

We are grateful to Scottish Ministers for their continuing support, and we greatly appreciate the opportunity to discuss our work with them and their officials.

Finally, I must pay tribute to the dedication and enthusiasm of my fellow Commissioners and the whole of the staff of the Commission.



THE HON LORD DRUMMOND YOUNG
Chairman

Publications 2008

TITLE	PUBLICATION DATE
Statute Law Repeals: Eighteenth Report: Statute Law (Repeals) Bill (Joint Report with the Law Commission) Scot Law Com No 210	29 January 2008
Annual Report 2007 Scot Law Com No 211	28 February 2008
Discussion Paper on Crown Appeals DP No 137	31 March 2008
Discussion Paper on Liability of Trustees to Third Parties DP No 138	7 May 2008
Report on Crown Appeals Scot Law Com No 212	31 July 2008
Report on Damages for Wrongful Death Scot Law Com No 213	30 September 2008
Consumer Remedies for Faulty Goods: a Consultation Paper (Joint consultation paper with the Law Commission) DP No 139	10 November 2008
Discussion Paper on Unincorporated Associations DP No 140	3 December 2008

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

Law reform projects

Seventh Programme of Law Reform

The Seventh Programme of Law Reform outlines our main projects up to the end of 2009. It includes our long-term project to review the law of trusts and medium-term projects on land registration and judicial factors. The Programme includes our current projects on succession law and unincorporated associations which were topics suggested to us during consultation on the draft Programme.

Preparation of the Eighth Programme

Work is now underway on preparation of our Eighth Programme, which will set out the main areas of law which we intend to review from 2010 to 2014. We plan to carry out a first stage consultation with key legal interests and stakeholders, followed by a wider public consultation in the spring of 2009.

We aim to submit the Eighth Programme to Scottish Ministers for approval by the end of 2009.

References from Ministers

In addition to projects under our Seventh Programme, we continue to receive references from Ministers, inviting us to undertake work on specific areas of the law which are considered to be in need of reform. In some cases, these projects require to be completed within a short timescale and this can have an impact on progress with our Programme work. For example, in November 2007 we received a reference to review the law relating to Crown appeals, double jeopardy and certain evidential issues and submit a report to Scottish Ministers on Crown appeals within a year of commencing work. In order to tackle the reference, we have had to postpone starting work on the criminal law project included in the Seventh Programme.

New projects in 2008

Level crossings

The Law Commission's Tenth Programme of Law Reform, published in June 2008, includes a project to review the law relating to level crossings. The project follows a suggestion made by the Department for Transport and the Office of Rail Regulation as part of the Law Commission's consultation on items for the Tenth Programme.

Much of the legislation relating to level crossings applies to Great Britain. For that reason we have agreed to undertake the project jointly with the Law Commission.

Consolidation of the Bankruptcy legislation

Towards the end of 2008 we agreed with the Scottish Government to undertake work to consolidate the legislation relating to bankruptcy in Scotland. The project is supported by the Accountant in Bankruptcy with whom we will be working closely in the coming months. We aim to complete work on the consolidation Bill by the end of 2009.

Implementation of our reports

We welcome recent indications that recommendations in some of our earlier reports are to be considered for implementation by the Scottish Government. We look forward to assisting the Bill teams as we have done on a number of Bills since devolution.

Sexual Offences (Scotland) Bill

During 2008 we assisted the Scottish Government Bill team in connection with the Sexual Offences (Scotland) Bill. The Bill will implement the Report on Rape and Other Sexual Offences, which we published in December 2007. We also provided assistance to SPICe (Scottish Parliament Information Centre) in connection with briefings for MSPs.

Before his term of office expired in August 2008, Professor Gerry Maher was the lead Commissioner on the project. For that reason, in November, he gave evidence on behalf of the Commission to the Justice Committee of the Scottish Parliament in the course of the Committee's consideration of the Bill.

Report on Third Parties - Rights against Insurers

The draft Bill appended to our joint Report with the Law Commission on Third Parties - Rights against Insurers, which was published in 2001, is being considered as a candidate for the trial of a new procedure in the United Kingdom Parliament for implementation of Law Commission Bills. The procedure is intended to provide a means for the implementation of those Law Commission Bills which are generally agreed to be uncontroversial.

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

www.scotlawcom.gov.uk

Projects under our Seventh Programme

Land registration

Project Team

Professor George Gretton, Commissioner

John Dods, Project Manager

Bonnie Holligan, Legal Assistant

John Glover, Registers of Scotland

The modern system of land registration was introduced by the Land Registration (Scotland) Act 1979. While the system has many benefits, it has become apparent over the years that there are problems with the legislation.

The aims of the project are to enhance the technical functionality of the system; to improve the fit between registration law and general property law; to remove certain practical difficulties arising from the current legislation; to clarify matters that are obscure in that legislation; and to overhaul existing property statutes to make them e-compatible.

In view of the subject's complexity, we published separate Discussion Papers seeking views on different aspects of the project. The first - on Void and Voidable Titles - examined the legal policy issues underlying land registration. This was followed by our Discussion Paper on Registration, Rectification and Indemnity, which examined the provisions of the 1979 Act. The third Discussion Paper - on Miscellaneous Issues - considered a number of topics such as descriptions and boundaries, servitudes, overriding interests and decision-making by the Keeper of the Registers.

The Department of the Registers of Scotland continues to provide extensive support for the project and we are very grateful to them for that support.

We should mention two particular developments over the last year. The first is the decision of the Lands Tribunal in *PMP Plus v the Keeper of the Registers* in November 2008, highlighting problems in the registration of common areas in new developments. We are considering whether a legislative response is needed, and if so, what. The second is that following representations from the Law Society of Scotland we have been considering whether a system of advance (priority) notices should be introduced. This would be designed to cover the gap period between (i) the eve of settlement of the transaction, when the latest information from the relevant registers is available, and (ii) registration. At present a letter of obligation from the seller's solicitor guarantees that during the gap period nothing will appear on the registers to prejudice the grantee's title. The guarantee is backed up by the "master policy" with the professional insurers. But concerns have been expressed as to whether the system of letters of obligations continues to be an acceptable way of dealing with the gap period. We have devised a scheme of advance notices (which will be optional) and will be consulting interested parties.

Work is continuing on our report and draft Bill, both of which are likely to be substantial. During 2008 we had a useful meeting with our advisory group and we are grateful to them for their continued assistance on the project. We aim to complete the project in 2009.

Trusts

Project Team

Professor Joe Thomson, Commissioner
David Nichols, Consultant
Charles Garland, Project Manager
Rebecca Reid, Legal Assistant

This is a substantial law reform project and for that reason we have been working on it in two main parts, one dealing with trustees and the other with trusts.

In May 2008 we published a further Discussion Paper - on Liability of Trustees to Third Parties. This paper was the third in the series on trusts themselves although to some extent the paper also deals with trustees. The paper invited comments on proposals aimed at clarifying the liability of trustees, both personally and in their role as trustees, arising from their administration of a trust. The consultation period ended on 31 August 2008.

During 2009 we plan to publish a further discussion paper on the rules about the accumulation of income and lifetime of private trusts.

We intend to produce a report in 2010 on the topics covered by the discussion papers published by that time.

As the reform of trust law is a major long-term project, it is likely that we will carry the remaining aspects of the project into our Eighth Programme of Law Reform starting in 2010.

Succession

Project Team

Professor Joe Thomson, Commissioner
David Nichols, Consultant
Charles Garland, Project Manager
Rebecca Reid, Legal Assistant

This is the second time we have undertaken a review of succession law. We published our first Report on Succession in 1990 but, in the main, that Report has not been implemented. In the course of consultation on topics for inclusion in our Seventh Programme of Law Reform, there was strong support for another review of aspects of the law on succession and for that reason we decided to include it in our current programme of work. Our aim is to ensure that succession law reflects, to a fair degree, current social attitudes and types of relationship.

The two main topics which we are examining are the distribution of intestate estates, particularly from the perspective of a surviving spouse, civil partner or cohabitant, and the protection of close relatives from disinheritance. We published a discussion paper in August 2007 and received over 40 responses.

We have also been helped by an advisory group whose members have assisted us in considering the policy issues at various stages of the project.

We have now almost completed work on our report which will include a substantial draft Bill. We intend to publish the report in the spring of 2009.

Assignment of and security over incorporeal moveable property

Project Team

Professor George Gretton, Commissioner

John Dods, Project Manager

Bonnie Holligan, Legal Assistant

This project was suggested to us by the Law Society of Scotland and other consultees in response to consultation on topics for inclusion in our Seventh Programme of Law Reform. It is a substantial long-term project which we intend to carry forward into our next programme of law reform.

We have been concentrating our resources on the project on land registration and for that reason we decided to postpone further work on this project until the land registration project has been completed. The Chairman, however, after attending the Australasian Law Reform Agencies Conference in September 2008, took the opportunity to consult parties in New Zealand with knowledge and experience of the operation of the New Zealand Personal Property Securities Act 1999. That Act establishes an electronic register of personal property security interests and provides a possible model for the reform of the law in Scotland.

Unincorporated associations

Project Team

Colin Tyre QC, Commissioner

Gillian Swanson, Project Manager

Garry MacLean, Legal Assistant

Unincorporated associations exist for a wide variety of purposes and in a wide range of sizes and structures. At one end of the scale they may be substantial organisations with property, employees and contractual commitments. At the other end, they may be informal groupings of individuals joining together for temporary and specific purposes. These non-profit making associations include bodies such as charities and clubs.

In Scotland, as in the rest of the United Kingdom, unincorporated associations are not recognised as legal entities separate from their members. As a consequence, such associations cannot enter into contracts or other legal relationships and cannot hold title to land in the association's name. The absence of separate legal personality for such associations often leads to unfortunate repercussions for members and can cause uncertainty for creditors and claimants.

Our Discussion Paper on Unincorporated Associations was published in December 2008. It suggests that the current difficulties could be remedied by granting some form of legal status to unincorporated associations. Views are being sought on various possibilities such as the automatic attribution of legal personality to all organisations meeting certain specified minimum criteria; allowing organisations to opt in to legal personality either by registration or by statement of intent; granting certain legal capacities to organisations without according them the status of legal persons and introducing a new corporate vehicle for non-profit organisations which are not registered as charities. Comments on the proposals are invited by 6 March 2009.

The Commission's proposals were highlighted in a recent article by Mr Tyre in the *Journal of the Law Society of Scotland* and *Third Force News*. In addition, Mr Tyre attended focus group meetings organised by the Scottish Council for Voluntary Organisations at which the proposals were discussed.

As the subject matter of this project is reserved under the Scotland Act 1998, any recommendations which we may make will fall to be implemented by the United Kingdom Parliament. For that reason we have kept in close touch with the Office of the Third Sector as regards progress of our work.

We aim to complete work on our report and draft Bill by the end of 2009.

Judicial factors

Project Team

Patrick Layden QC TD, Commissioner

Gillian Swanson, Project Manager

Laurence Diver, Legal Assistant

The legislation relating to judicial factors has been in existence for over a hundred years and is in need of modernisation. With that in mind our Seventh Programme of Law Reform includes a project to review the legislation and recommend reform. Although we completed the necessary research, we had to suspend work on the project during 2008 in order to give priority to our criminal law projects. Early in 2009 we re-commenced work on the project with a view to producing a discussion paper inviting comments on our proposals for reform. We hope to complete work on the paper as soon as time permits, taking account of other priorities.



Laurence Diver, Legal Assistant

Provocation, self-defence, coercion, and necessity

Our Seventh Programme of Law Reform includes a project to review the defences of provocation, self-defence, coercion, and necessity. We included the project in the Programme partly because of the case of *Drury v HM Advocate* 2001 SCCR 583, in which the court commented that the law of provocation should be reformed and restated in statutory form. In addition the project will cover self-defence, coercion, and necessity, as these topics are also in need of review.

As we were asked by Scottish Ministers to give priority to the criminal law projects referred to us in November 2007, we have deferred work on this project at present. We intend to carry the project forward for completion under our Eighth Programme of Law Reform.

References from Scottish Ministers

Crown appeals

Project Team

The Hon Lord Drummond Young, Commissioner

Alastair Smith, Project Manager

Chloë Kennedy, Legal Assistant

The topic of Crown appeals forms the first part of a reference on criminal law, received from Scottish Ministers in November 2007. This part of the reference relates to judicial rulings that can bring a case under solemn criminal procedure to an end without the merits of the case being considered by a jury, and Crown rights of appeal against such rulings.

Work on the project was given priority to enable us to complete consultation on our proposals and to report with recommendations within a short timetable, agreed with Scottish Ministers.

We completed the project in July 2008 with the publication of our Report on Crown Appeals.

Our main recommendation is that the Crown should be given a right of appeal against all of the judicial rulings that can result in the acquittal of the accused without consideration of the merits of the case by the jury. These include rulings (under section 97 of the Criminal Procedure (Scotland) Act 1995) that there is no case to answer, rulings following a statutory equivalent of the existing common law submission, and evidential rulings made in the course of a trial. Any such appeal should be on the ground that the judge's ruling was wrong in law. In the event of a successful appeal, we recommend that the Appeal Court should have power to grant authority to bring a new prosecution where that is not contrary to the interests of justice.

We make a number of detailed recommendations in relation to procedure in Crown appeals.

We further consider the existing common law submission, which permits the defender at the close of the evidence to move the judge to direct the jury that the accused should be acquitted on a particular charge or that a guilty verdict may only be returned on a reduced or amended charge. We recommend that the law should be placed on a statutory basis, with any acquittal being by the judge rather than the jury, on his or her direction. This recommendation is essential if the Crown are to be given a right of appeal against such an acquittal.

Double jeopardy

Project Team

Patrick Layden QC TD, Commissioner

Alastair Smith, Project Manager

Chloë Kennedy, Legal Assistant

Double jeopardy is the second part of the reference on criminal law topics, received from Scottish Ministers in November 2007. Double jeopardy is the rule that a person may not be tried more than once for the same offence.

In April 2008, we hosted a seminar in order to inform our approach to the project. We would like to thank Mr James Chalmers, Professor Andrew L-T Choo, Professor Ian Dennis, Peter W Ferguson QC, Dr Fiona Leverick, Professor Mike Redmayne and Professor Paul Roberts for their participation in the seminar.

Our Discussion Paper on Double Jeopardy was published on 21 January 2009.

After examining the underlying rationales of the rule against double jeopardy and the present state of the law, the paper asks whether the rule should be restated in statute and, if so, what form the rule should take.

The paper also considers whether exceptions to the rule against double jeopardy should be introduced to allow an acquitted person to be retried for an offence if the acquittal was tainted by an offence against the administration of justice or on the emergence of new evidence pertaining to the case.

We invite comments on the questions and proposals made in the paper by 17 April 2009.

Evidential issues

Project Team

Patrick Layden QC TD, Commissioner

Alastair Smith, Project Manager

Chloë Kennedy, Legal Assistant

In this, the third project to arise from the Scottish Ministers' reference of November 2007, we consider the law relating to the admissibility of evidence of bad character or of previous convictions, the admissibility of similar fact evidence, and the Moorov doctrine.

Work has started on our initial research, with a view to publishing a discussion paper.

Damages for wrongful death

Project Team

Professor Joe Thomson, Commissioner

Susan Sutherland, Project Manager

Graham Crombie, Trainee Solicitor
(until end August 2008)

This project arose from a reference from Scottish Ministers in September 2006 at the time when the Bill which became the Rights of Relatives to Damages (Scotland) Act 2007 was being considered by the Scottish Parliament. We were invited to review the law of damages for wrongful death and in particular the provisions of the Damages (Scotland) Act 1976.

We completed the project in September 2008 with the publication of our Report on Damages for Wrongful Death. The Report recommends changes to the law of damages in cases where a person dies as a result of personal injuries.

The Report recommends that the Damages (Scotland) Act 1976 should be repealed and replaced

with a new Act which restates the current law in a clearer and simpler form. The 1976 Act has been heavily amended over the last 30 years and consultees agreed with us that it should be restated in simpler terms.

The Report also recommends a number of substantive changes to the existing law, including a new method of calculating the damages payable to a victim's family. It also recommends limiting the group of relatives who are entitled to claim damages as a result of a victim's death, so as to focus more clearly on the victim's immediate family.

In addition, we recommend several technical changes to the calculation of damages by the courts.

The Report does not recommend any change to the law in cases where a person dies of mesothelioma. The Rights of Relatives to Damages (Mesothelioma) (Scotland) Act 2007 amended the 1976 Act to allow a victim's relatives to seek damages for their grief and suffering after the victim died, even if the victim had already been awarded damages. We took the view that this was appropriate in view of the special nature of mesothelioma and that these provisions should be restated in the new legislation.

We are grateful to the members of our advisory group who provided us with practical advice throughout the project.



Legal Assistants in the library

Joint projects with the Law Commission for England and Wales

Insurance contract law

Project Team

Colin Tyre QC, Commissioner
Gillian Swanson, Project Manager
Garry MacLean, Legal Assistant

We are assisting the Law Commission with this project which they have carried forward to their Tenth Programme of Law Reform.

Insurance law has been criticised as being outdated and, in some cases, unfair to policy holders. We aim to modernise the law and to set it out in clear terms which will be fair to all parties.

As indicated by the responses to our joint Consultation Paper on Misrepresentation, Non-Disclosure and Breach of Warranty by the Insured which we published in 2007, there is a wide consensus that consumer insurance law is in urgent need of reform. The current position has overlapping layers of law, regulation and ombudsman discretion which appear needlessly complex, confusing and inaccessible. There is a need for a clear statutory statement of the obligations on consumers to give pre-contract information and the remedies available to insurers if consumers fail to do so. We are, therefore, giving priority to the preparation of draft legislation on that topic with a view to publishing a report and draft Bill in the second half of 2009.

The Consultation Paper also made provisional proposals in relation to business insurance, an area where there is also support for reform. We are planning to undertake further consultation to assist us in the development of our policy in this equally important field.

In addition, we are working towards our second formal consultation paper. Its main topics will comprise insurable interest, fraud, post-contractual good faith and damages for late payment of claims.

Consumer remedies

Project Team

The Hon Lord Drummond Young, Commissioner
Gillian Swanson, Project Manager
Laurence Diver, Legal Assistant

This is a joint project with the Law Commission and stems from a reference from the Department for Business, Enterprise and Regulatory Reform. The Commissions have been asked to consider simplifying the remedies available to consumers who purchase goods which do not conform to contract because, for example, they are faulty.

The domestic law in this area overlaps with EU remedies resulting in complexity and confusion for consumers and retailers.

The EU Commission is currently carrying out a general review of consumer directives, including the Consumer Sales Directive which was implemented in the UK in 2002. In October 2008 the Commission published a proposal for a new directive which would reform the law on consumer remedies. We have been asked to advise on any issues which appear to be relevant to the EU Commission's review. If implemented, the proposed directive would impose a uniform system of remedies on all EU states; in particular the right to reject defective goods, as recognised in the Sale of Goods Act 1979, would be abolished.

Our joint Consultation Paper on Consumer Remedies for Faulty Goods was published in November 2008. We propose a law which is fair to consumers and retailers and which incorporates both existing European remedies and the right to

reject defective goods, the basic remedy in Scots and English law. The key questions for consultees concern when a consumer should be entitled to reject faulty goods and receive a refund and when a retailer should be entitled to choose to repair or replace the goods.

The European Commission has proposed that repair and replacement should be the first option and that the consumer should be entitled to a refund only in restricted circumstances. We believe that retaining the right to reject goods is crucial for consumer confidence and our research shows that consumers want this. It is unclear, however, how long the right to reject goods and claim a refund lasts. We provisionally propose that a consumer should normally exercise the right within 30 days.

Consultation on our provisional proposals ended on 2 February 2009.

Level crossings

Project Team

Professor George Gretton, Commissioner

Susan Sutherland, Project Manager

Susan Robb, Solicitor

Bonnie Holligan, Legal Assistant

During 2008 we started work on a project assisting the Law Commission for England and Wales with a review of the legislation governing level crossings in Great Britain. The project is included as a new project in the Law Commission's Tenth Programme of Law Reform, published in June 2008.

Much of the current legislation relating to level crossings dates back to Victorian times when the railways were constructed. In more recent times there have been amendments establishing a new regulatory framework in connection with privatisation of the railways. As a result the legislation governing level crossings is difficult to access and is in need of modernisation and simplification.

The project involves consideration of the interaction between the public law aspects of the legislation and private law rights such as those of landowners whose land adjoins level crossings, and issues relating to rights of way. Differences between the law in England and Wales and that in Scotland as regards private law rights, such as rights of way, must also be considered.



Professor Gretton (centre) and Andrew Harvey of the Office of Rail Regulation on a site visit to Cornton automatic half barrier level crossing near Stirling

Other issues to be addressed include the inter-relationship with other legislation, for example, planning and roads legislation. Another important area for consideration will be the economic issues relating to level crossings. We will also be considering the statutory provisions on safety at level crossings currently governed by the Health and Safety at Work etc Act 1974 and also the Level Crossings Act 1983. In relation to Scotland account will need to be taken of the rights of access to land introduced by the Land Reform (Scotland) Act 2003.

During the second half of 2008 we assisted the Law Commission with background research into the legislation and the current regulatory structure. At the start of the project, an advisory group of interested bodies was set up to assist and advise the joint teams. The first meeting of the group took

place in the summer and further meetings will be held as the project progresses.

We have also had useful meetings with some of the key stakeholders, including the Office of Rail Regulation, Network Rail, Ramblers Scotland, Scottish Natural Heritage and the Scottish Rights of Way Society.

The research undertaken so far has indicated that the project is more substantial than we had initially anticipated and that further research will be needed.

During the early part of 2009 we plan to have further meetings with key stakeholders with a view to preparing a joint consultation paper inviting comments on proposals and questions for reform.



Progress on our law reform projects

Projects under our Seventh Programme

Project	Discussion Paper / Report	Current position
Land registration	Discussion Papers on - <ul style="list-style-type: none"> • Land Registration: Void and Voidable Titles (No 125) published February 2004 • Land Registration: Registration, Rectification and Indemnity (No 128) published August 2005 • Land Registration: Miscellaneous Issues (No 130) published December 2005 	Working on report and draft Bill
Trusts	Discussion Papers on - <ul style="list-style-type: none"> • Breach of Trust (No 123) published September 2003 • Apportionment of Trust Receipts and Outgoings (No 124) published September 2003 • Trustees and Trust Administration (No 126) published December 2004 • Variation and Termination of Trusts (No 129) published December 2005 • The Nature and the Constitution of Trusts (No 133) published October 2006 • Liability of Trustees to Third Parties (No 138) published May 2008 Report on - <ul style="list-style-type: none"> • Variation and Termination of Trusts (Scot Law Com No 206) published March 2007 	Working on discussion paper on the rules about the accumulation of income and lifetime of private trusts.
Succession	Discussion Paper on Succession (No 136) published August 2007	Working on report and draft Bill
Assignment of and security over incorporeal moveable property		Project to be resumed once land registration project completed
Unincorporated associations	Discussion Paper on Unincorporated Associations (No 140) published December 2008	Consultation period due to end on 6 March 2009

Judicial factors		Work recently resumed on discussion paper
Provocation, self-defence, coercion, and necessity		Project not yet started

References from Ministers

Project	Discussion Paper / Report	Current position
Crown appeals	Discussion Paper on Crown Appeals (No 137) published March 2008 Report on Crown Appeals (Scot Law Com No 212) published July 2008	Project completed
Double jeopardy	Discussion Paper on Double Jeopardy (No 141) published January 2009	Consultation period due to end on 17 April 2009
Evidential questions		Undertaking research for discussion paper
Damages for wrongful death	Discussion Paper on Damages for Wrongful Death (No 135) published August 2007 Report on Damages for Wrongful Death (Scot Law Com No 213) published September 2008	Project completed

Joint projects with the Law Commission for England and Wales

Project	Joint Consultation Paper / Report	Current position
Insurance contract law	Consultation Paper on Insurance Contract Law: Misrepresentation, Non-Disclosure and Breach of Warranty by the Insured (No 134) published July 2007	Working on report and draft Bill on consumer insurance and a consultation paper on insurable interest etc
Consumer remedies	Consultation Paper on Consumer Remedies for Faulty Goods (No 139) published November 2008	Analysing responses to consultation paper
Level crossings		Working on consultation paper

Consolidation and statute law repeals

Consolidation

Project Team

The Hon Lord Drummond Young, Commissioner
Susan Sutherland, Project Manager

One of the Commission's functions is to undertake work on consolidation of legislation. This work involves bringing together a number of enactments on an area of law into a single Act, with the aim of making the provisions more accessible.

We had been assisting the Law Commission in London with work on a Bill to consolidate the legislation relating to representation of the people, but the project is currently suspended pending possible future changes to electoral law.

Bankruptcy legislation

At the end of 2008 we started work on a project to consolidate the legislation relating to Bankruptcy in Scotland. This will be the second Scottish consolidation project since devolution and we are hoping to increase our work on consolidations in future if support can be provided from the Scottish Government.

The current project is being supported by the Accountant in Bankruptcy's office, whose officials are working closely with the Commission team. We are grateful to Gregor Clark, our consultant Scottish Parliamentary Counsel, for agreeing to undertake the drafting of the Bill.

The Bankruptcy (Scotland) Act 1985 forms the basis of the current legislation, but the Act has been heavily amended in recent years. The aim of the project is to bring the provisions together into a rational and coherent form which will be readily accessible for users.

The aim is to produce a report and draft Bill by the end of 2009.

Statute law repeals

Project Team

The Hon Lord Drummond Young, Commissioner
Susan Sutherland, Project Manager

Another of our functions in relation to statute law is to recommend the repeal of obsolete or otherwise unnecessary legislation. This work is complementary to our work on consolidation and it plays an important part in keeping legislation up to date and making it easier for people to use.

We undertake work on statute law repeals jointly with the Law Commission, undertaking consultation with appropriate bodies in relation to repeals that relate to Scotland. The draft Bills are prepared by the Law Commission and we assist in relation to the Scottish aspects of the repeals.

The Eighteenth Statute Law Repeals Report was published jointly with the Law Commission in January 2008. The Bill was enacted by the United Kingdom Parliament in the summer of 2008, after the Scottish Parliament had approved the Scottish elements by means of a legislative consent motion.

The Statute Law (Repeals) Act 2008 came into force at Royal Assent on 21 July 2008.

Work is now underway on preparation of the Nineteenth Statute Law Repeals Bill, which it is hoped will be completed around 2012.

Promoting law reform

The promotion of law reform is an important part of our role. During 2008 we promoted our work and an interest in law reform by attendance at various law reform conferences and events, including those mentioned below. We maintained our close working relationship with the Scottish Government. In addition we continued to work closely with the Law Commission in London on our joint projects and on matters of law reform generally.

We welcomed members of the Law Reform Commission of Ireland when they came for a meeting with Professor Maher in February to discuss issues relating to law reform, including codification.

In May we hosted an annual meeting with the Law Commissions of England and Wales, Ireland, Northern Ireland and Jersey. Topics discussed included current law reform themes, including the preparation of impact assessments for law reform projects.

The Commonwealth Law Conference took place in Edinburgh in July and we were pleased that delegates from the Ministry of Justice and Law Reform in Sri Lanka and Michael Sayers, the Secretary of the Commonwealth Association of Law Reform Agencies, came to the Commission during their visit to the Conference.

In September the Chairman attended the Australasian Law Reform Agencies Conference held in Vanuatu, which brought together representatives of a number of law reform agencies across the world.

The Chairman also had meetings in Auckland and Wellington, New Zealand to discuss matters relating to our projects on moveable property and the law relating to consumer sales. The meetings were extremely useful and will assist the Commission in its work.

The Commission was represented by Professor Gretton at the first conference of the newly

constituted Northern Ireland Law Commission in September.

In October Professor Gretton visited Berlin for a meeting with the Chamber of Notaries (Bundesnotarkammer) to discuss the German system of priority notices in the German land register, in connection with our project on reform of land registration.

In December Commissioners and the Chief Executive met Kenny MacAskill MSP, Cabinet Secretary for Justice, to discuss preparations for the Eighth Programme of Law Reform, and matters relating to implementation of Commission reports.



Law reform publications planned for 2009

SLC Discussion Papers

- Accumulation of Income and Lifetime of Private Trusts

Joint Consultation Papers with the Law Commission

- Insurance Contract Law (second consultation paper)
- Level Crossings

SLC Reports

- Land Registration
- Succession
- Unincorporated Associations
- Double Jeopardy
- Consolidation of the Bankruptcy legislation

Joint Reports with the Law Commission

- Consumer Insurance: Pre-Contract Information



Commissioners and staff

Commissioners and staff

Commissioners

The Hon Lord James Drummond Young, Chairman
 Professor George Gretton
 Patrick Layden QC TD
 Professor Joe Thomson
 Colin Tyre QC

Chief Executive

Malcolm McMillan

Scottish Parliamentary Counsel (Consultant)

Gregor Clark CB

Consultant

David Nichols

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 Charles Garland
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 Jackie Palkowski
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 Gordon Speirs

Project advisory groups

We are grateful to the members of our advisory groups for their assistance with our law reform projects in 2008

Damages for wrongful death

Professor Douglas Brodie *University of Edinburgh*
Laura Dunlop QC
Roderick Dunlop *Advocate*
Gilles Graham *Solicitor*
Maria Maguire QC
Harvey McGregor QC
Thomas Marshall *Solicitor*

Land registration

Professor Stewart Brymer *Solicitor*
Professor Roderick Paisley *University of Aberdeen*
Professor Kenneth Reid *University of Edinburgh*
Professor Robert Rennie *University of Glasgow*

Crown appeals

The Hon Lord Bracadale
The Rt Hon Lord Eassie
Sheriff Kenneth Maciver

Insurance law

Professor Angelo Forte *University of Aberdeen*
Sarah P L Wolffe QC

Trusts

Alan Barr *University of Edinburgh*
Graham Burnside *Solicitor*
Robert Chill *Solicitor*
Andrew Dalgleish *Solicitor*
Frank Fletcher *Solicitor*
Nicholas Holroyd *Advocate*
Alexander McDonald *Solicitor*
Christopher McGill *Society of Trust and Estate Practitioners (Scotland)*
Simon A Mackintosh *Solicitor*
James McNeill QC
Allan Nicolson *Consultant Solicitor*
Professor Kenneth Norrie *University of Strathclyde*
Scott Rae *Solicitor*
Alister Sutherland *Consultant Solicitor*

Succession

Alan Barr *University of Edinburgh*
John Kerrigan *Solicitor*
Ross Macdonald *University of Dundee*
Christopher McGill *Society of Trust and Estate Practitioners (Scotland)*
Iain Maclean *Advocate*
Professor Michael Meston *University of Aberdeen*
Alison Paul *Solicitor*
John Robertson *Advocate*
Malcolm Strang Steel *Solicitor*
Eilidh Scobbie *Solicitor*
Scott Rae *Solicitor*
Gordon Wyllie *Solicitor*

Running costs

The Commission is funded by the Scottish Government. Our running costs for 2008 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 2008	Year to 31 December 2007
Salaries – Commissioners (including national insurance contributions, superannuation payments and pensions to former Commissioners)	£628,200	£585,500
Salaries – Chief Executive and legal staff (including national insurance contributions, superannuation payments and consultants' fees and expenses)	£630,100	£564,500
Salaries – administrative staff (including national insurance contributions and superannuation payments and agency staff costs)	<u>£173,300</u>	<u>£176,500</u>
	£1,431,600	£1,326,500
Accommodation (including maintenance, rates and utilities)	£46,500	£49,800
Printing and publishing (including costs of books and library purchases, binding, machinery maintenance, photocopying, reprographic services and stationery)	£90,100	£91,600
Telephone and postage	£10,600	£10,100
Travel and subsistence	£18,100	£7,900
Miscellaneous (including training, office services and hospitality)	£8,800	£23,800
Total	£1,605,700	£1,509,700

Our law reform 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 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 some cases in the UK Parliament at Westminster

For more information about the Commission please contact:

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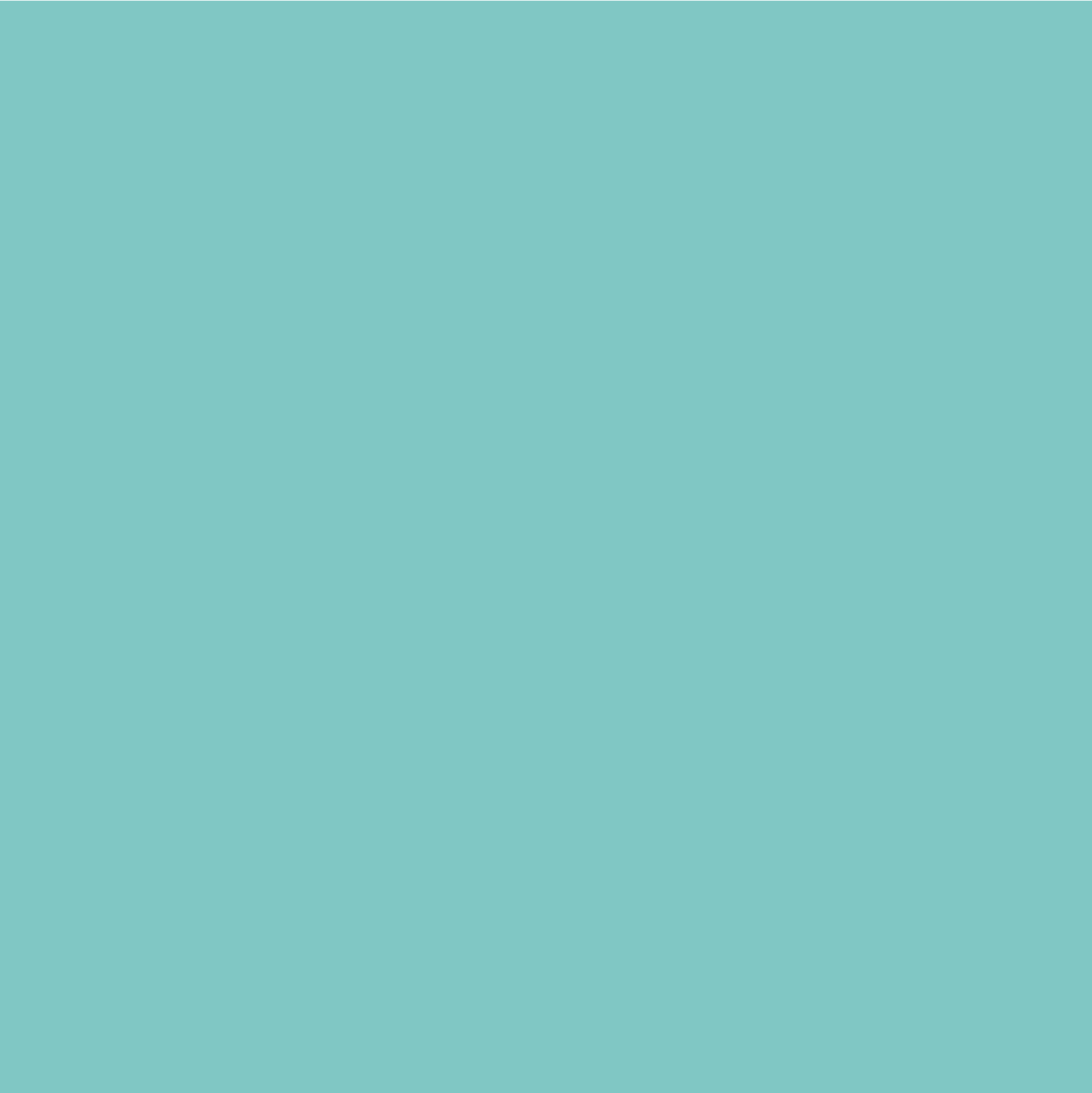
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