

SCOTTISH LAW COMMISSION
(Scot Law Com No 161)



Thirty-Second Annual Report 1996-97

Laid before Parliament by the Lord Advocate under Section
3(3) of the Law Commissions Act 1965

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

The Honourable Lord Gill, *Chairman*
Dr E M Clive,
Mr P S Hodge, QC,
Professor K G C Reid,
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SCOTTISH LAW COMMISSION

Report for the year ended 15 June, 1997

To: The Rt Hon the Lord Hardie of Blackford, QC
Her Majesty's Advocate.

In accordance with section 3(3) as read with section 6(2) of the Law Commissions Act 1965, as amended,¹ we have the honour to submit this the Thirty-Second Annual Report of the Scottish Law Commission.

BRIAN GILL, *Chairman*

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J G S MACLEAN, *Secretary*
18 September 1997

¹ Transfer of Functions (Secretary of State and Lord Advocate) Order 1972 (SI 1972/2002).

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Foreword

It is a pleasure to present this Report of a busy and productive year. I hope that the Report will give a useful insight into the organisation of the Commission and our new methods of work. We are committed to a demanding programme of law reform which will impose considerable burdens on our resources. We are grateful to our draftsmen for assisting us so willingly in the preparation of draft legislation. We are grateful too to you and to your predecessor, the Rt Hon the Lord Mackay of Drumadoon, QC, for the unfailing support that we have received.

Our progress in the past year could not have been achieved without the enthusiasm and hard work of our staff. On behalf of the Commissioners, I thank them sincerely for all that they have done.

BRIAN GILL, *Chairman*

Part 1

Introduction: The year in brief

Publications

1.1 In the period from 16 June 1996 to 15 June 1997 (our reporting year) we published reports on

- *Multi-Party Actions*¹
- *The consolidation of certain enactments relating to Town and Country Planning in Scotland*²
- *Vulnerable Adults*.³

We also published, jointly with the Law Commission, a report on *The Chronological Table of Local Legislation*.⁴

1.2 We issued discussion papers on

- *Interpretation in Private Law*⁵
- *Leasehold Casualties*.⁶

We also contributed to the Law Commission's consultation paper on *Shareholder Remedies*.⁷

Implementation of reports

1.3 The Contract (Scotland) Act 1997 implemented our report on *Three Bad Rules in Contract Law*, published in January 1996.⁸

1.4 The Rules Council is preparing Rules of the Court of Session to implement the recommendations in our report on *Multi-Party Actions*, published in July 1996.⁹

1.5 In Appendix 1 we list a number of reports which have been in the public domain for some time without being implemented.¹⁰ We intend to review the status of each of these reports in consultation with officials from your department and The Scottish Office.

¹ Scot Law Com No 154, July 1996. See paras 3.16-3.18.

² Scot Law Com No 157, November 1996. See para 4.7.

³ Scot Law Com No 158, February 1997. See paras 2.31-2.33.

⁴ Law Com No 241, Scot Law Com No 155, July 1996. See paras 4.14-4.16.

⁵ No 101, August 1996. See paras 2.13-2.15.

⁶ No 102, May 1997. See paras 3.6-3.15.

⁷ Law Com No 142, October 1996. See paras 3.24-3.28.

⁸ Scot Law Com No 152. See para 2.18.

⁹ Scot Law Com No 154. See para 3.18.

¹⁰ We discuss one of these reports, *Civil Liability - Contribution*, (1988) Scot Law Com No 115 in our *Thirty-First Annual Report 1995-96*, Scot Law Com No 156, paras 1.10-1.13. See also para 2.19.

A change in direction

1.6 In October 1996 we decided to review our methods of working and our internal organisation. We started by reassessing our priorities for law reform. After extensive consultation with your predecessor and officials from your department and The Scottish Office, we published our *Fifth Programme of Law Reform* in February 1997.¹¹ In that programme, for the first time, we committed ourselves to firm timetables for projects. As a result we have had to develop new ways of working to ensure that timetables are met.¹²

1.7 We also decided to restructure our legal support services in order to have greater flexibility in drawing on the resources of the wider legal community.¹³ At the same time we had to adjust to changes in personnel among commissioners and legal staff.¹⁴

The new programme

1.8 Our purpose in preparing a new programme of law reform was to set priorities for the period between 1997 and 1999. We conceive of the programme, which supersedes all previous programmes,¹⁵ as the first of a series of rolling programmes, each running for three to five years. It has two important features.

1.9 First, we set firm timetables for projects. We also classify projects according to priority as

- short-term
- medium-term
- long-term.

Generally, we expect to spend about a year on short-term projects and two years or more on medium-term projects. The long-term projects are not time-limited. We see them as commitments arising from our statutory duty to promote the systematic development of the law.¹⁶

1.10 Second, we gather the separate projects under a number of headings or branches of the law, namely

- Civil remedies - Diligence
- Codification
- General principles of private law
- Obligations

¹¹ Scot Law Com No 159. See paras 1.8-1.11.

¹² See paras 6.17-6.18.

¹³ See paras 6.8-6.16.

¹⁴ See paras 6.2, 6.3, 6.5-6.7.

¹⁵ (1965) Scot Law Com No 1; (1968) Scot Law Com No 8; (1973) Scot Law Com No 29; (1990) Scot Law Com No 126.

¹⁶ Law Commissions Act 1965, section 3.

- Persons
- Property
- Trusts.

The centre-piece of the programme is our work on property. After that we attach the highest priority to our work on diligence.

1.11 In Part 2 we give details of our work under these headings. We are now directing our main effort to completing the short-term projects in the programme before the end of 1997 and the medium-term projects before the end of 1999. We also attach considerable importance to the long-term projects. But because they are not time-limited we may carry them forward to subsequent programmes, depending on progress on other projects. We may also break them down into short-term and medium-term projects as our thinking develops.

Part 2

Fifth Programme of Law Reform

Preliminary

2.1 We now describe the progress we have made on the projects included in our *Fifth Programme of Law Reform*.¹

Item No 1: Civil remedies - Diligence²

2.2 **Projects.** Our work on civil remedies consists of projects on

- diligence on the dependence and admiralty arrestments
- inhibition and adjudication.

2.3 Diligence on the dependence is a provisional measure giving security to litigants for sums claimed by them in pending actions. It prevents the defender from disposing of property or transferring it abroad so as to defeat the claims of the pursuer. It also gives the pursuer a preference in competition with other creditors of an insolvent defender.

2.4 Only two types of diligence can be used on the dependence of a court action: arrestment and inhibition. Arrestment attaches the debts and moveable property due to the defender by a third party. Inhibition prevents the debtor disposing of, or creating securities over, heritable property or contracting further debts to the prejudice of the inhibiting creditor. Inhibition gives the inhibiting creditor a preference in relation to the proceeds of sale over creditors whose debts were incurred after the inhibition. It is also used as an indirect means of enforcing decrees for payment of money.

2.5 Adjudication is a diligence used by creditors who have obtained a decree for their debt. It attaches the debtor's heritable property. It is rarely used in practice and has remained almost unchanged since 1672. It takes the form of a Court of Session action. Registration of the decree gives the creditor a security over the heritable property of the debtor specified in the decree. The debtor has a ten-year period in which to pay off the debt. At the end of this period a creditor whose debt remains unsatisfied can bring a further action in the Court of Session to have it declared that the ten-year period of redemption is at an end. Registration of the decree in this further action transfers the ownership of the property irredeemably from the debtor to the creditor.

2.6 **Objectives.** Under the *Fifth Programme of Law Reform* our objectives are to

¹ (1997) Scot Law Com No 159.

² Item No 1 subsumes and supersedes Item No 8 in our *Second Programme of Law Reform*, (1968) Scot Law Com No 8. See *Thirty-First Annual Report 1995-96*, Scot Law Com No 156, paras 2.6, 2.36; *Fifth Programme of Law Reform*, (1997) Scot Law Com No 159, paras 2.3-2.13.

- submit a report on diligence on the dependence and admiralty arrestments before the end of 1997
- issue a discussion paper on inhibition before the end of 1997
- submit a report on inhibition and adjudication before the end of 1999.

2.7 **Progress.** We have made good progress towards completing our report on diligence on the dependence, etc following consultation on a series of published papers.³ The report will also deal with the principle of the fair sharing of the fruits of arrestments and poindings outwith formal insolvency proceedings.⁴ We have prepared a first draft of substantially the whole of the report and are adjusting a draft Bill of some 60 clauses. We expect to fulfil our objective of submitting the report in early 1998.

2.8 We have also made good progress towards completing our discussion paper on aspects of inhibition. One of these, highlighted by a recent decision of the Court of Session,⁵ is the failure of searches in the Personal Register to discover an effective inhibition. Where a conveyancing transaction is settled in reliance on a search disclosing no effective inhibition, a third party who purchases the property in good faith and for value may suffer loss. We shall consider this problem in our discussion paper, which is now in draft. We expect to issue the discussion paper before the end of 1997.

2.9 We shall start work on our report on inhibition and adjudication in 1998. We expect to fulfil our objective of submitting it before the end of 1999. We have already published proposals for replacing adjudication by a new diligence whereby the creditor could sell the debtor's land in order to obtain payment of the debt.⁶ Responses were received and consultations took place with representatives of the Law Society of Scotland and other organisations. The absence at that time, however, of up-to-date searches disclosing real rights (such as adjudication) registered in the Sasine Register made it difficult to proceed. The recent computerisation of the Presentment Book, which facilitates searches of real rights registered up to the previous day's close of business, has removed this difficulty. We intend to have further discussions with representatives of the Law Society of Scotland and the Registers of Scotland and with other interested parties.

Item No 2: Codification⁷

2.10 **Project.** The Law Commissions Act 1965 expressly recognises codification as an element in the systematic development and reform of the law which it is our duty to promote.⁸ Earlier attempts to produce comprehensive codes for the law of evidence and the law of obligations were unsuccessful. However, later incremental reforms, for example in family law, can be seen as requiring only consolidation to become a code in all but name.

³ Discussion Paper No 84 - *Diligence on the Dependence and Admiralty Arrestments* (1989); Consultation Paper - *Arrestments of Ships Securing Claims against Demise Charterers* (1990); Discussion Paper No 90 - *Extra-Territorial Effect of Arrestments and Related Matters* (1990) concerning the power of the court to protect arrestees from double jeopardy.

⁴ See Discussion Paper No 79 - *Equalisation of Diligences* (1988).

⁵ *Atlas Appointments Limited v Tinsley* 1997 SCLR 482 (First Division, reversing the Lord Ordinary's decision reported in 1996 SCLR 476). Earlier proceedings in the Outer and Inner Houses are reported in 1995 SLT 635.

⁶ Discussion Paper No 78 - *Adjudications for Debt and Related Matters* (1988).

⁷ See *Fifth Programme of Law Reform*, (1997) Scot Law Com No 159, paras 2.14-2.16.

⁸ Section 3(1).

2.11 **Objective.** We continue to believe that there may be a place for codification in the wider traditional sense; that is, a comprehensive legislative restatement of the general principles underlying some discrete area of the common law. Under our *Fifth Programme of Law Reform* our objective is to

- undertake, as a long-term project, a feasibility study of codification.

We intend to focus on a restricted area of the law as a pilot exercise. Possible candidates are selected topics in the law of property (eg servitudes) or in the law of obligations (eg aspects of contract).

2.12 **Progress.** Meantime, we do not have resources available for the project. However, the draft Bill annexed to our report on *Interpretation in Private Law* will contain what is in effect a short code.⁹ Similarly, the draft Bill annexed to our report on the law of the tenement will contain a restatement, with modifications, of existing common law rules.¹⁰

Item No 3: General principles of private law¹¹

2.13 **Project on interpretation.** In the course of recent work on contract we became aware of strong dissatisfaction with the rules on the interpretation not only of contracts but of legal writings generally.¹² We therefore decided to undertake a wider examination of the existing law, which starts from the position that extrinsic evidence is not admissible for the purpose of interpretation of any legal writing. This rule is so unrealistic, however, that it has been modified by numerous exceptions. The resulting law is complicated and unsatisfactory and is becoming increasingly out of touch with the practice of the courts. Radical simplification is long overdue.

2.14 **Objective.** Under the *Fifth Programme of Law Reform* our objective is to

- submit a report on interpretation in private law during 1997.

2.15 **Progress.** We have made excellent progress on the project. In August 1996 we issued a discussion paper.¹³ In that paper we invited views on a proposal to replace the morass of rules on the admissibility of extrinsic evidence with a simple rule that all relevant evidence would be admissible. Coupled with that we proposed reform of the substantive law on interpretation to make clear what matters would be relevant and what would be irrelevant. There was general support for this approach. A few consultees doubted whether it was necessary to restate in legislation all the substantive rules on evidence, and in particular the various canons of construction which may be applied to resolve cases of doubt. We have taken account of these responses. Our report will be published before the end of October 1997.¹⁴

⁹ See para 2.15.

¹⁰ See para 2.52.

¹¹ See *Fifth Programme of Law Reform*, (1997) Scot Law Com No 159, paras 2.17-2.19.

¹² See para 2.18.

¹³ No 101 - *Interpretation in Private Law*.

¹⁴ The report was submitted on 5 August 1997.

Item No 4: Obligations¹⁵

2.16 **Projects.** Our work on obligations consists of projects on

- contract
- unjustified enrichment.

(i) *Contract*¹⁶

2.17 In a series of reports since 1983, we have reviewed aspects of the law of contract as part of an exercise to modernise the law and make it more accessible.¹⁷ All but one of these reports have been implemented.

2.18 The most recent report, *Three Bad Rules in Contract Law*,¹⁸ was published in January 1996. It was well received and, with all-party support, was implemented by the Contract (Scotland) Act 1997. The Act abolishes the so-called parole evidence rule. This rule excluded evidence of anything outside the contractual document itself to prove that there were additional contract terms not mentioned in the document. The Act also abolishes the so-called supersession rule, which had particularly unfortunate effects. For example, by virtue of the rule a contract for the sale of a house was entirely superseded by a later conveyance. It was of no account that both parties might have wished the terms of the contract to survive the conveyance or that the terms dealt with matters which would not normally be covered in a conveyance. Finally, the Act abolishes the rule which precluded the buyer in a contract of sale of property from obtaining damages for breach of contract unless he rejected the property and rescinded the contract.

2.19 The one report which has not been implemented is our report on *Formation of Contract, etc.*¹⁹ Its recommendations would bring the law of Scotland into line with widely accepted international rules on formation of contract and would remove a number of anomalies and difficulties in the existing law. We believe it would be a useful and non-controversial law reform measure and we hope that favourable consideration will be given to its early implementation.

2.20 **Objectives.** Under the *Fifth Programme of Law Reform* our objectives are to

- issue a discussion paper on remedies for breach of contract and penalty clauses before the end of 1997
- submit the subsequent report before the end of 1999.

¹⁵ Item No 4 subsumes and supersedes Item No 2 in our *First Programme of Law Reform*, (1965) Scot Law Com No 1. See *Fifth Programme of Law Reform*, (1997) Scot Law Com No 159, paras 2.20-2.29.

¹⁶ See *Thirty-First Annual Report 1995-96*, Scot Law Com No 156, paras 2.7, 2.12-2.23.

¹⁷ *Obligations - Rectification of Contractual and Other Documents*, (1983) Scot Law Com No 79; *Requirements of Writing*, (1988) Scot Law Com No 112; *Formation of Contract: Scottish Law and the United Nations Convention on Contracts for the International Sale of Goods*, (1993) Scot Law Com No 144; *Three Bad Rules in Contract Law*, (1996) Scot Law Com No 152.

¹⁸ (1996) Scot Law Com No 152.

¹⁹ (1993) Scot Law Com No 144.

2.21 **Progress.** We have decided to deal first with penalty clauses, on which the Faculty of Advocates has made representations to us. We have engaged Professor W W McBryde of the University of Dundee as a consultant. He is the author of the leading modern Scottish textbook on contract law. He will prepare a draft discussion paper on penalty clauses for us with a view to publication before the end of 1997.

2.22 We intend to issue separately one or more discussion papers on other remedies for breach of contract during 1998.²⁰ This will enable us to meet our objective of submitting a final report before the end of 1999.

(ii) *Unjustified enrichment*²¹

2.23 In a recent discussion paper we examined the issues raised by the *Woolwich* case, which introduced in England a near absolute right to recover a payment of tax made to a public authority on an *ultra vires* demand.²² We sought views on whether the rule in the *Woolwich* case should be introduced by statute into the law of Scotland; or whether it would be better to develop broader and more liberal grounds of recovery of undue payments as part of a general reform of the law of unjustified enrichment.

2.24 We also examined the enactments dealing with refunds of the principal central and local government taxes and charges. We provisionally proposed that a refund of undue payments should be permitted whether or not the taxpayer was in error, but subject to certain defences. We considered statutory reform of the common law rule enabling the government, and perhaps other public authorities, always to recover *ultra vires* disbursements made by them. We sought views on whether it would be a better alternative to reform the law of unjustified enrichment as a whole.

2.25 As a result of our work on unjustified enrichment, we think that there are still structural defects in the present law, notwithstanding recent judicial intervention.²³ In time, however, the courts may have the opportunity to develop the law.

2.26 **Objectives.** Under the *Fifth Programme of Law Reform* our objectives are to

- submit a report on the issues raised by the *Woolwich* case, etc before the end of 1997
- undertake, as a long-term project, a more comprehensive reform of the law of unjustified enrichment.

²⁰ In October 1995 we held a seminar on remedies for breach of contract in association with the Universities of Edinburgh and Strathclyde. Updated versions of the seminar papers have now been published: A Burrows, "Legislative Reform of Remedies for Breach of Contract: The English perspective", (1997) *Edinburgh Law Review* (ELR) 155; W Lorenz, "Reform of the German Law of Breach of Contract", (1997) 1 *ELR* 317; W W McBryde, "Remedies for Breach of Contract", (1996) 1 *ELR* 43; H L MacQueen, "Remedies for Breach of Contract: The Future Development of Scots Law in its European and International Context", (1997) 1 *ELR* 200.

²¹ See *Thirty-First Annual Report 1995-96*, Scot Law Com No 156, paras 1.16 -1.17, 2.26-2.35.

²² No 100 - *Recovery of Ultra Vires Public Authority Receipts and Disbursements* (1996). The *Woolwich* case was decided by the House of Lords: *Woolwich Equitable Building Society v Inland Revenue Commissioners* [1993] AC 70.

²³ See *Morgan Guaranty Trust Company of New York v Lothian Regional Council* 1995 SC 151 (court of five judges) and Discussion Paper No 99 - *Judicial Abolition of the Error of Law Rule and its Aftermath* (1996).

2.27 **Progress.** We have carried out some preliminary work on the report on the issues raised by the *Woolwich* case and other cases. We have also had a most useful meeting with representatives of the Convention of Scottish Local Authorities to discuss those issues.

2.28 We have encountered unexpected complexities in finalising the report on diligence on the dependence and admiralty arrestments. Consequently, we have had to concentrate resources on that project. We now intend to publish during 1998 a short report on unjustified enrichment, proposing certain limited reforms. On completion of our work on diligence, we will reassess the need for comprehensive reform of the law of unjustified enrichment in the light of the then state of the law and the pressure, if any, for reform.

Item No 5: Persons²⁴

2.29 **Projects.** Our recent and prospective work includes projects on

- guardianship of the incapable
- judicial factors

(i) *Guardianship of the incapable*²⁵

2.30 For the last few years we have been examining legal issues arising out of mental incapacity and vulnerability, especially in relation to the welfare and financial affairs of mentally incapable or vulnerable adults. In September 1995 we published a wide-ranging report on *Incapable Adults*.²⁶ In February 1997 The Scottish Office issued a consultation paper accepting as a basis for legislation many of the recommendations in that report.²⁷

2.31 We have also been examining the powers available to public authorities for protecting the vulnerable. We submitted our report on *Vulnerable Adults* to your predecessor in December 1996.²⁸ At a late stage in the preparation of the report we held a meeting with representatives of various interested bodies. These included local authority social work departments, the Mental Welfare Commission for Scotland and organisations involved with disabled or vulnerable people. At the meeting we discussed an earlier version of the draft Bill which is annexed to the report. We obtained many comments and suggestions for the achievement of our policy objectives.

2.32 The report contains recommendations to assist local authorities and the Mental Welfare Commission for Scotland when making enquiries and in taking short-term measures to protect the welfare and property of vulnerable adults. For the purposes of the report vulnerable adults are those -

- (a) in need of care and attention owing to age or infirmity;
- (b) suffering from illness or mental disorder; or

²⁴ Item No 5 subsumes and supersedes item No 17 in our *Fourth Programme of Law Reform*, (1990) Scot Law Com No 126. See *Fifth Programme of Law Reform*, (1997) Scot Law Com No 159, paras 2.30-2.31.

²⁵ See *Thirty-First Annual Report 1995-96*, Scot Law Com No 156, paras 1.3-1.6, 2.9-2.11.

²⁶ Scot Law Com No 151.

²⁷ *Managing the Finances and Welfare of Incapable Adults*.

²⁸ Scot Law Com No 158, following on Discussion Paper No 96 - *Mentally Disordered and Vulnerable Adults: Public Authority Powers* (1994).

- (c) substantially handicapped by a disability.

We recommend that local authorities should be under a new duty to investigate where adults are, or are thought to be, vulnerable and where their welfare or property is in need of protection. Local authorities should be entitled to enter premises, interview people there and have vulnerable adults medically examined.

2.33 We also recommend the replacement of the existing powers to remove people from their own homes under the Mental Health (Scotland) Act 1984 and the National Assistance Act 1948, as amended by the National Assistance (Amendment) Act 1951. The new power of removal would require an order from the sheriff, who would have to be satisfied that the adult was vulnerable and at substantial risk of harm unless removed. A justice of the peace would have a similar power where urgent action was required. We also recommend that a sheriff should have power to remove a person who is abusing the vulnerable adult at home. It would be a condition of exercising the power that removal was necessary for the vulnerable adult's protection and would be better than the removal of the vulnerable adult. We recommend procedural safeguards to ensure that there are adequate opportunities of objecting to any proposed intervention. This would be subject to exception where urgent action was necessary. In general, we consider that measures should not be taken against the will of a vulnerable adult unless he is mentally disordered or under undue pressure from others.

(ii) *Judicial factors*

2.34 A judicial factor is an individual appointed by the court to take over the management of another person's property or financial affairs. One of the commonest reasons for such an appointment is mental incapacity. In that case the judicial factor is known as a curator bonis. During our work on mental incapacity, and our earlier work on family law, we became aware that the law relating to judicial factors generally was in need of overhaul.

2.35 **Objective.** Under the *Fifth Programme of Law Reform* our objective, as a long-term project, is to

- review the legislation relating to judicial factors.

2.36 **Progress.** We will start the project in or after 1999. It is likely to be mainly of a technical nature. We propose to work closely with the Accountant of Court and his staff and to consult the legal and accountancy professions. We shall probably establish a small advisory group at the outset.

Item No 6: Property²⁹

2.37 **Projects.** Our work on property consists of projects on

- feudal tenure
- leasehold tenure

²⁹ Item No 6 subsumes and supersedes Item No 16 in our *Fourth Programme of Law Reform*, (1990) Scot Law Com No 126. See *Fifth Programme of Law Reform*, (1997) Scot Law Com No 159, paras 2.32-2.42.

- mutual boundary walls
- tenement property.

This is the centre-piece of our *Fifth Programme of Law Reform* and is likely to absorb the largest part of our resources between 1997 and 1999.

(i) *Feudal tenure*³⁰

2.38 Almost all land in Scotland continues to be held on feudal tenure, under which multiple rights of ownership co-exist in the same piece of land. Our aim is to abolish this system and to replace it with a modern system based on the principle of absolute ownership of land. We expect to identify in the course of our work further reforms which, though not essential to the primary reform, we may wish to pursue as a long-term objective. One example may be the modernisation and consolidation of the conveyancing legislation.

2.39 **Objectives.** Under the *Fifth Programme of Law Reform* our objectives are to

- submit, by the end of 1999, a report with draft legislation to abolish and replace the feudal system
- consider, as a long-term project, further reforms ancillary to the primary reform.

2.40 **Progress.** We have allocated additional resources to the project and have made good progress as a result. We are concerned in a project of this importance to have access to the best possible sources of outside advice. We have therefore established an advisory group of senior practitioners with wide experience in conveyancing. Their function is to comment from a practitioner's standpoint on the work as it develops. The members of the group are listed in Appendix 2B.

2.41 One of the most criticised features of the feudal system is the opportunity that it gives to the feudal superior to exact a premium from the vassal for waiving a real burden. We propose to recommend the abolition of the right of former superiors as such to enforce real burdens. However, many real burdens would remain and some would be enforceable as ordinary non-feudal real burdens by former superiors in their capacity as neighbouring landowners. We think there is a case for examining the whole of the law on non-feudal real burdens with a view to fundamental reform. This is a separate topic from the abolition of the feudal system and we propose to issue a separate discussion paper on it during 1998.

2.42 Extending the project will not adversely affect our timetable for the primary reform. We expect to submit our report on the abolition of the feudal system in 1998 along with the discussion paper on non-feudal real burdens. We shall then submit a report on non-feudal real burdens before the end of 1999.

2.43 We intend to hold a seminar in 1998 to discuss our provisional proposals for reforming non-feudal real burdens. That will take place before we issue the discussion paper.

³⁰ See *Thirty-First Annual Report 1995-96*, Scot Law Com No 156, paras 1.15, 2.38-2.40.

(ii) *Leasehold tenure*

2.44 Long leasehold tenure has many of the characteristics of ownership. Leases for periods of 999 years, or leases subject to indefinite rights of renewal, are in practice if not in law equivalent to perpetual feus. They were recognised as such by some landlords and many were granted because of restrictions on the power to feu. The problems caused by these leases are well documented. Tenants, on expiry of their leases, lose possession of their homes which, in some cases, they and members of their family have built. They may be entitled to no compensation or to inadequate compensation. They may have to pay large sums to their landlord to buy back property which they regard as their own.

2.45 **Objective.** Under the *Fifth Programme of Law Reform* our objective is to

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

2.46 **Progress.** We have not yet started work on the project and are unlikely to do so until after we have completed our project on feudal tenure. However, we have in the past carried out work which will be useful for the project. We examined one aspect in some depth, namely, the possibility that tenants under long leases of residential property might be given the right to convert their interests into rights of absolute ownership. That work can readily be included in the wider project on leasehold tenure.

(iii) *Mutual boundary walls*

2.47 We have been working for some time, as resources permitted, on an examination of the rights and obligations of adjoining proprietors in respect of walls and fences erected on the boundary between their properties.³¹

2.48 **Objective.** Under the *Fifth Programme of Law Reform* our objective is to

- submit a report on mutual boundary walls, etc before the end of 1999.

2.49 **Progress.** We shall resume our work on the project in the near future. We intend to submit our report along with our report on the law of the tenement.³²

(iv) *Tenement property*³³

2.50 The existing law of the tenement is based on common law rules which developed in the 17th century. These rules are now widely seen as defective, particularly as they provide no mechanism for collective decision-making by owners. As a consequence it is often difficult to obtain the necessary agreement to carry out repairs. Our aim is to remedy these defects.

2.51 **Objective.** Under the *Fifth Programme of Law Reform* our objective is to

- submit a report on the law of the tenement before the end of 1997.

³¹ See Consultation Paper - *Mutual Boundary Walls* (1992).

³² See paras 2.50-2.52.

³³ See *Thirty-First Annual Report 1995-96*, Scot Law Com No 156, paras 1.15, 2.41 - 2.42.

2.52 **Progress.** Our work on the topic is now well advanced, after a radical change in policy following on our initial discussion paper.³⁴ The new approach has been tested in seminars held in September 1995 and September 1996.³⁵ These seminars were organised in association with the University of Edinburgh and the University of Glasgow respectively and were attended by legal practitioners, architects, factors and representatives of local authorities and consumer bodies. We expect to meet our objective of submitting our report before the end of 1997. Our recommendations will apply to both existing and new tenements, whether used as dwelling-houses or as business premises. The draft Bill, which will be annexed to the report, will restate with modifications the existing common law of the tenement. It will contain a management scheme which will apply automatically to all tenements, unless disapplied, as well as a voluntary management scheme which can be adopted as an alternative. It will be possible to vary both schemes.

Item No 7: Trusts³⁶

2.53 **Projects.** Recently we have been carrying out work on

- constructive trusts³⁷
- trustee investments.³⁸

We are also aware of a number of other problems which may require further examination. For example, there is a doubt whether trustees' powers to appoint and pay factors under section 4 of the Trusts (Scotland) Act 1921 allow trust funds to be placed under the control of fund managers. Another problem is the use of nominee accounts by trustees. Recent developments in share dealing, especially the introduction of a five day rolling settlement for stock-market transactions, have favoured the use of nominee holdings. There are practical problems too in relation to the strict accumulation period under section 5 of the Trusts (Scotland) Act 1961.

2.54 **Objective.** Under the *Fifth Programme of Law Reform* our objective is to

- undertake, as a long-term project, an examination of certain aspects of the law of trusts.

2.55 **Progress.** The timing and content of the project may be influenced by the work of the Law Commission, which is presently engaged on a review of the law of trusts in conjunction with the Trust Law Committee.³⁹ It is unlikely that we will embark on the project before 1999.

³⁴ No 91 - *Law of the Tenement* (1990).

³⁵ See paras 5.22-5.23.

³⁶ See *Fifth Programme of Law Reform*, (1997) Scot Law Com No 159, paras 2.43-2.45.

³⁷ See *Thirty-First Annual Report 1995-96*, Scot Law Com No 156, paras 1.18, 2.52-2.53.

³⁸ See *Thirty-First Annual Report 1995-96*, Scot Law Com No 156, paras 1.18, 2.24-2.25.

³⁹ The Trust Law Committee is a group of practising trust lawyers and academics which was formed under the chairmanship of Sir John Vinelott to promote reform of trust law. In June 1997 the Law Commission published Consultation Paper No 146 - *Trustees' Powers and Duties*.

2.56 In October 1996 we held a seminar on constructive trusts. A number of distinguished scholars delivered papers to an invited audience of lawyers from Scotland and other countries.⁴⁰ In light of the views expressed at the seminar we decided meantime to discontinue our work on the topic.

2.57 For the time being we do not intend to undertake further work on trustee investments. Our previous work, in conjunction with the Law Commission, concluded with the publication by H M Treasury of its consultation document, *Investment Powers of Trustees*.⁴¹ A draft order was prepared under the Deregulation and Contracting Out Act 1994 to implement the proposals in that document. The order lapsed with the prorogation of Parliament in March 1997 and has not so far been revived.

⁴⁰ See para 5.25.

⁴¹ The document was published in May 1996. See *Thirty-First Annual Report 1995-96*, Scot Law Com No 156, paras 2.24-2.25.

Part 3

Advisory work

Preliminary

3.1 We have a statutory duty to provide advice and information to government departments and other bodies concerned with law reform.¹ Sometimes we incorporate our advice in a published report following on a discussion paper and full consultation. Sometimes we advise informally, or even confidentially. We also provide advice and information outwith the strict terms of our statutory remit, where we think this would promote the cause of law reform generally.

3.2 The major projects on which we have been working in response to requests for advice are

- administrative law
- leasehold casualties
- multi-party actions
- partnership
- shareholder remedies
- third party rights against insurers.

Administrative law²

3.3 For a number of years, as resources permitted, we have been working on title and interest to sue in relation to judicial review of the decisions of administrative authorities. When we reviewed our priorities for law reform in consultation with your predecessor in October 1996,³ he stated that he wished to withdraw the reference in its present form.

3.4 We are now discussing with your officials the possibility that we might receive a reconstituted reference on title and interest to sue. The new reference would focus on representative bodies. It would address issues arising from recent developments on access to justice within the European Union. A directive is proposed which would require member states to facilitate representative actions to protect consumers' interests under certain Community regulations.⁴ If we were to receive a new reference, we would be able to utilise our previous work on judicial review. The new reference, however, would not be confined to judicial review.

¹ Law Commissions Act 1965, section 3(1)(e).

² See *Thirty-First Annual Report 1995-96*, Scot Law Com No 156, paras 2.2-2.4.

³ See para 1.6.

⁴ Proposal for a Directive of the European Parliament and of the Council on injunctions for the protection of consumers' interests (Com(96) 725 final).

3.5 We are also discussing the possibility that a reference on aspects of interdict might be coupled with the reference on title and interest to sue. The two references would together constitute a substantial body of work on important questions of civil justice which are of current public concern.

Leasehold casualties

3.6 **Project.** In February 1997 we received a request from the Secretary of State for Scotland "to consider the law on leasehold casualties and advise on possible reforms". He asked us to report by March 1998.

3.7 **Progress.** We were able to utilise previous work which we had carried out as part of a wider exercise on residential long leases.⁵ As a result, we completed the first phase of the project quickly and published a discussion paper in May 1997.⁶ We asked consultees to respond by 31 July 1997. We recognised that this was a relatively short period for consultation but we had to adopt a tight timetable for each stage of our work in order to report by March 1998. We gave advance notice of the discussion paper to persons and organisations with a known interest in the subject and to the professional bodies who routinely respond to our discussion papers. We expect to fulfil our objective of submitting the report before the end of March 1998.

3.8 **The issues.** A leasehold casualty is an amount, over and above the rent, which the tenant must pay to the landlord from time to time if the lease so requires; for example, on the death of the tenant or on sale of his interest or every so many years. Only long leases, such as leases for 99 or 999 years, provide for casualties. These leases are comparatively rare and are largely confined to specific areas; for example, parts of Lanarkshire.

3.9 Leasehold casualties survive from the old unreformed feudal law. Historically they mirror the casualties which were at one time common in feudal tenure.⁷ Feudal casualties based on annual value or rental were regarded as unjust, because they taxed vassals on the value of their own improvements. They were abolished in 1914. Existing leasehold casualties remain in place, although it has not been lawful to create new casualties since 1974. In practice many landlords do not claim existing casualties. There are therefore good grounds for abolishing leasehold casualties even in the absence of any evidence that they are causing hardship or concern.

3.10 In fact, there is recent evidence that some landlords are reviving rights to casualties which have previously lain dormant. Where the casualty is based on annual value or rental, substantial capital sums can be involved. It has been suggested to us that this is causing hardship and distress in some cases. The anomalous nature of leasehold casualties and the vagueness of some clauses requiring payment of the annual value or rental leave scope for disagreement and litigation. The problem has arisen acutely in certain communities and has led to calls in Parliament for the reform of the law.⁸

⁵ See para 2.46.

⁶ No 102 - *Leasehold Casualties*. In our work we had valuable assistance from a small advisory group: see Appendix 2C.

⁷ See para 2.38.

⁸ See *Hansard* (HC), 6 November 1996, vol 284, cols 1151-1174; 13 November 1996, vol 285, cols 461-468.

3.11 **Proposals.** In our discussion paper we suggest that the ultimate aim should be to phase out leasehold casualties. We ask for views on whether all casualties or all casualties of a particular type should be abolished without compensation. We provisionally conclude that casualties based on rental value should not be so abolished. We also conclude provisionally that there may be a stronger case for outright abolition of casualties payable on death and casualties based on a multiple of the rent, which are generally small sums. In practice landlords rarely demand either.

3.12 If outright abolition is rejected, there remains the problem of eliminating dead or abandoned casualties. We propose that all casualties, or all casualties of a particularly moribund type, should be abolished without compensation unless the landlord has opted to preserve his rights. The option would be exercised by notice served within one year of the commencement of the legislation and registered in the Register of Sasines or noted in the Land Register. This would enable landlords who take a commercial attitude to casualties to preserve their position. By identifying live casualties it would facilitate the operation of any scheme for compulsory redemption on sale.

3.13 We propose that those casualties which are preserved should be redeemed at the option of the tenant. A scheme for compulsory redemption, or redemption at the option of the landlord, would not be acceptable for tenants who have no intention of selling their property, or who have never had to pay a casualty. There is not the same objection to compulsory redemption on sale and we ask for views on that.

3.14 We also invite views on the method to be used to determine the sum payable on redemption. The redemption figure should not be unfair or unduly harsh to tenants, who must have the opportunity to redeem casualties on reasonable terms. Equally, it should be fair to landlords. But in assessing what may be reasonable compensation to landlords we must recognise that it has been known for many years that leasehold casualties had a precarious existence. There was always the possibility of their being abolished on terms no more generous than those applying to similar redemption schemes in the past. Accordingly, we put forward a number of possible bases for calculating redemption sums for the different kinds of casualties.

3.15 We also make proposals to clarify and reform the law on leasehold casualties in relation to prescription, liability for a former tenant's casualties, liability of sub-tenants, irritancies and duplicands.

Multi-party actions⁹

3.16 **Report and recommendations.** In July 1996 we published our report on *Multi-Party Actions*.¹⁰ Our main objective in that report is to outline a class action procedure whereby a single court action can be used to resolve factual or legal issues common to a group of claimants. Certain North American jurisdictions have introduced an "opt-out" procedure by which claimants are automatically included in the group action unless they formally dissociate themselves from it. We reject that approach. Instead we recommend an "opt-in" procedure which allows claimants to choose, without the need for legal process, whether or not to pursue an action.

⁹ See *Thirty-First Annual Report 1995-96*, Scot Law Com No 156, paras 1.7-1.9, 2.45.

¹⁰ Scot Law Com No 154.

3.17 We also recommend that the new procedures should be restricted to the Court of Session, at least for an initial period. We annex to our report a draft Act of Sederunt regulating group proceedings. The underlying principle is that the Court should be able to develop a body of rules for case management which will be sensitive to the range and variety of circumstances likely to arise.

3.18 **Implementation.** The Rules Council is preparing an Act of Sederunt to implement our report. The Faculty of Advocates and the Law Society of Scotland have commented on the proposed rules. The Lord President has asked us to consider their comments. We have also received comments from Messrs W & J Burness WS, Solicitors. We intend to submit our views before the end of September 1997, so that the Rules Council can consider them at its meeting in December 1997.

Partnership

3.19 **Project.** In February 1997 the Department of Trade and Industry asked the two Law Commissions:

"To carry out a review of partnership law, with particular reference to: independent legal personality; continuity of business irrespective of changes of ownership; solvent dissolution; a model partnership agreement; whether and how the intended limited liability partnership structure might be made available to the wider range of businesses; and to make recommendations."

3.20 **Progress.** In April 1997 we issued a pre-consultation paper prepared for us by Mr William Holligan, Solicitor. We are very grateful to him for assisting us so willingly and for completing the work so quickly.

3.21 The purpose of the paper was to seek initial views on the issues which should be given priority in a full discussion paper. We issued the pre-consultation paper to selected consultees who have a special interest in or knowledge of the problems of partnership law.

3.22 We have received a most useful response from our consultees. Analysis of their comments has disclosed widespread concern that the current law is inadequate in a number of areas. In particular, consultees criticised the shortcomings of the concept of separate legal personality, in that it does not have the effect of keeping the firm in existence when its membership changes. Consultees also criticised the complex and expensive mechanism for dissolution of a solvent firm.

3.23 **Objective.** We are now working with the Law Commission on a joint consultation paper. Our objective is to publish the paper during 1998. Thereafter we shall consult widely with those who commonly use partnership as a business structure in pursuing a profession or trade.

Shareholder remedies¹¹

3.24 **Project.** In February 1995 the Lord Chancellor and the President of the Board of Trade requested the Law Commission, in consultation with us, to carry out a review of the remedies currently available to shareholders. The Law Commission published their consultation paper in October 1996.¹² We contributed to that paper.

3.25 **The issues.** The consultation paper addresses three main issues:

- (a) the restrictions arising from *Foss v Harbottle*¹³, which prevent a shareholder enforcing liability for breach of duty by a director of the company;
- (b) the inefficiency of the remedy under sections 459-461 of the Companies Act 1985 for unfairly prejudicial conduct of the company's business; and
- (c) the enforcement of contractual rights under articles of association.

Provisional recommendations for reform of the law are made in each of these areas.

3.26 **Objective.** We are now working with the Law Commission on a draft report and Bill. As with the consultation paper, it is the Law Commission which is formally responsible for the report. We shall make our contribution by providing clauses for Scotland in the draft Bill and supporting text for the report.

3.27 Our primary aim is to clarify and simplify the common law, so that a member of a company will have a clear right to enforce liability for breach of duty by the company's directors. We also seek to simplify the provisions of the Companies Act 1985 for the protection of minority shareholders in small private companies.¹⁴ Our policy is to give a simpler and less expensive remedy to a shareholder who has been excluded from the management of the company and who seeks a court order to have his shareholding bought out.

3.28 The Law Commission intends to publish the report in October or November 1997.

Third party rights against insurers¹⁵

3.29 **Project.** At the instigation of the Department of Trade and Industry, we are working jointly with the Law Commission on a review of the Third Parties' (Rights against Insurers) Act 1930 in light of current insurance practices and recent case law.

3.30 The 1930 Act deals with third party claims against an insured person who is or becomes insolvent. Without the legislation the sum payable by the insurance company under the policy would be paid to the insolvent insured person's estate so that the third party would receive, at most, only a proportion of the amount claimed. Where the third party's claim is agreed, or is established by arbitration or legal proceedings, the Act transfers

¹¹ See *Thirty-First Annual Report 1995-96*, Scot Law Com No 156, para 2.50.

¹² No 142 - *Shareholder Remedies*. See Law Commission, *Thirty-First Annual Report 1996*, Law Com No 244, paras 3.1-3.8.

¹³ (1843) 2 Hare 461; 67 ER 189.

¹⁴ Sections 459-461.

¹⁵ See *Thirty-First Annual Report 1995-96*, Scot Law Com No 156, paras 1.18, 2.51.

to the third party the insured person's rights to be indemnified by the insurance company under the policy. Any sums payable by the company are paid directly to the third party claimant.

3.31 **Objective.** We have now investigated the current law and practice in the United Kingdom and similar legislation in other countries. The Law Commission has the major role and intends to prepare a draft consultation paper with a view to publication before the end of 1997. We have participated in policy discussions and meetings and shall contribute to that paper.

Advice to the Law Commission

3.32 From time to time we provide advice informally to the Law Commission's project teams on aspects of Scots law which are of interest to them in their work. This is distinct from our contribution to joint projects,¹⁶ or projects on which consultation with us is formally required.¹⁷

3.33 In April 1997 we received from the Law Commission a draft consultation paper on claims for damages under the Fatal Accident Act 1976, dependency claims and bereavement damages under section 1A of the Act.¹⁸ The paper dealt with certain aspects of Scots law in some detail. The Law Commission asked us to verify the Scottish material and invited us to comment on the proposals for reform. We engaged Mrs Marian Gilmore, Advocate, to prepare a memorandum commenting on the Law Commission's draft. She provided us with an excellent paper which we were able to adopt, without qualification, and to send direct to our English colleagues. We are grateful to her for her assistance.

¹⁶ An example is our review of partnership law: see paras 3.19-3.23.

¹⁷ The project on shareholder remedies is an example: see paras 3.24-3.28.

¹⁸ See Law Commission, *Thirty-First Annual Report 1996*, Law Com No 244, para 2.14. The Law Commission intends to publish Consultation Paper No 148 - *Claims for Wrongful Death* in September 1997.

Part 4

Statute law

Preliminary

4.1 We carry out our work on statute law in close co-operation with the Law Commission. Major projects are underway on

- consolidation
- statute law revision.

Consolidation

4.2 **The purpose of consolidation.** Consolidation gathers together separate statutes on the same subject into a single statute. It gives statute law a more rational structure and makes it more accessible to those whom it affects.

4.3 **The process of consolidation.** The government departments have an important role in consolidation. They may themselves promote particular consolidations; or they may support consolidations promoted by the Law Commissions. We could not carry through any consolidation without the positive support of the appropriate department. Every consolidation has the advantage of expedited Parliamentary procedure. A distinct advantage of pursuing consolidation through the Law Commissions is that they may recommend the rectification of at least certain kinds of anomalies which come to light in the process of consolidation.

4.4 The enacted law cannot be changed fundamentally in a consolidation. For that the appropriate government department must bring forward a pre-consolidation measure which is subject to the ordinary Parliamentary procedures.

4.5 **Programmes of consolidation.** We have a statutory duty -

"to prepare from time to time at the request of the Minister comprehensive programmes of consolidation and statute law revision, and to undertake the preparation of draft Bills pursuant to any such programme approved by the Minister".¹

4.6 There have been four programmes to date.² Since they are now largely implemented, your predecessor asked us to prepare a new programme.³ We considered a number of possible candidates for inclusion in the programme. We then attempted to obtain a firm commitment from the appropriate government departments to support the programme. Unfortunately, the departments were unable to provide the necessary resources. We

¹ Law Commissions Act 1965, section 3(1)(d).

² (1966) Scot Law Com No 2; (1973) Scot Law Com No 27; (1978) Scot Law Com No 46; (1982) Scot Law Com No 71.

³ See *Fifth Programme of Law Reform*, (1997) Scot Law Com No 159, para 1.4.

therefore had to abandon meantime our plan for a published programme. We continue to believe that such a programme would prove useful in co-ordinating the consolidation effort and we shall pursue this at a more opportune time.

4.7 **Progress: Scotland only consolidations.** In November 1996 we published our report on *The consolidation of certain enactments relating to Town and Country Planning in Scotland*.⁴ The report contains some forty recommendations rectifying anomalies in order to produce a satisfactory consolidation. It is the culmination of a very substantial exercise lasting several years and has now been implemented with the enactment of four statutes:

Town and Country Planning (Scotland) Act 1997

Planning (Listed Buildings and Conservation Areas)(Scotland) Act 1997

Planning (Hazardous Substances)(Scotland) Act 1997

Planning (Consequential Provisions)(Scotland) Act 1997.

4.8 Work is continuing on the consolidation of the statutes relating to the National Health Service in Scotland and the statutes relating to lands clauses. It is not possible yet to give a date for the introduction of the Bills into Parliament.

4.9 Although for the time being we cannot publish a formal programme of new consolidations, arrangements are in hand for consolidating the statutes relating to

- police
- salmon and freshwater fisheries.

The government departments concerned are enthusiastic and have committed themselves to providing sufficient staff to work along with our staff on these exercises. At present we cannot provide firm timetables for the work.

4.10 **Progress: United Kingdom and Great Britain consolidations.** The Law Commission has the primary role in consolidations of legislation relating to the United Kingdom or Great Britain. In the year to June 1997 the following measures were enacted:

- Architects Act 1997
- Lieutenancies Act 1997
- Nurses, Midwives and Health Visitors Act 1997.

4.11 Work is continuing on the consolidation of statutes dealing with the following topics:

- armed forces
- petroleum.

⁴ Scot Law Com No 157.

Statute Law Revision

4.12 **The process of statute law revision.** Statute law revision is the process whereby obsolete legislation is removed from the body of statute law. We have a statutory duty to promote the repeal of such legislation.⁵ The work is continuous and the results are published in periodical joint reports to which are annexed draft Statute Law (Repeals) Bills. These Bills are subject to expedited Parliamentary procedure and are taken through Parliament by the legal staff of the two Law Commissions. We also sometimes include repeals in appropriate Bills in the government's legislative programme.

4.13 **Progress on public general Acts.** We are now working in close association with the Law Commission on the sixteenth report in the series. The intention is to submit that report during 1998.

4.14 **Chronological Table of Local Legislation.** In July 1996 The Stationery Office published the Chronological Table of Local Legislation. This substantial work in four volumes of 2,681 pages is the result of more than twenty years' work by the two Law Commissions. The Law Commission has provided by far the major input.

4.15 Since 1870 the Chronological Table of the Statutes has listed all public general Acts passed and recorded which have been repealed or amended (and how amended) and by which Acts they have been repealed or amended. The Chronological Table of Local Legislation provides, for the first time, the same comprehensive information for the 26,500 local Acts passed since 1797.

4.16 The new Table has received wide acclaim and sales have already covered the costs of publication. The value of the work depends on regular updating. We are therefore pleased that the Statutory Publications Section of The Stationery Office has given a commitment to keep the text updated annually, at least until the publication of the next full edition.

4.17 **Repeal of local legislation.** For a number of years we have been working intermittently on local Acts.⁶ We include the resulting repeals in our Statute Law (Repeals) Bills in the ordinary way. The Statute Law (Repeals) Act 1995, for example, dealt extensively with local Acts. There is also the possibility of encouraging the use of subordinate legislation to effect repeals. For example, under the Local Government (Scotland) Act 1973 the Secretary of State for Scotland has powers which can be used in appropriate cases to repeal legislation promoted by local authorities. We intend to press for the use of these powers and are willing to carry out the work needed for the purpose.

4.18 Our work on local legislation has moved into a new phase with the publication of the Chronological Table of Local Legislation. Apart from continuing our work on local legislation relating to Glasgow, a very substantial body of legislation, we can now identify all extant Scottish local Acts and systematically revise whole areas of legislation. For example, we have identified as ripe for repeal local Acts dealing with subjects as diverse as charities and pension funds, insurance companies, oyster and mussel fisheries and school premises. We are now consulting those concerned with the legislation about possible repeals.

⁵ Law Commissions Act 1965, section 3(1).

⁶ See *Thirty-First Annual Report 1995-96*, Scot Law Com No 156, para 2.58.

4.19 We have also used the Chronological Table of Local Legislation to identify other local Acts which might be dealt with more appropriately by government departments. We have drawn the Acts to their attention. In every case the department concerned was unaware of the existence of the legislation and willingly agreed to pursue the repeal at the first opportunity. Similarly, we are encouraging others to promote appropriate repeals. For example, we have reminded water authorities, and other bodies concerned with public utilities, of the great volume of largely unused local legislation for which they are responsible and which is still formally in force.

4.20 Statute law revision, particularly in the field of local legislation, is a slow and methodical enterprise. It requires patient, detailed historical and legal research and extensive consultation. We are now trying to maximise the opportunity arising from the publication of the Chronological Table of Local Legislation. For the first time, we can be confident of making substantial progress towards reducing the mass of local legislation to its essential core.

Part 5

Links with other organisations, etc

Preliminary

5.1 It is important for our work that we maintain links with other organisations and legal specialists, whether at home or abroad. We therefore look to hold regular meetings with organisations and groups in Scotland such as the Faculty of Advocates, the Law Society of Scotland, the Society of Public Teachers of Law, and the Universities. We also keep in close touch with the Law Commission and with the government departments. In Europe and beyond we have contacts with law reform agencies, governmental institutions and universities.

5.2 Within the limits of our resources, Commissioners and legal staff are encouraged to make their expertise available to other organisations and specialists concerned with law reform. In connection with individual projects, we occasionally hold seminars to which we invite interested parties. We are also willing to receive visits, or to visit others, and to present or discuss our work. In what follows we record some of the more notable events of this sort during the year to 15 June 1997.

Centre for Parliamentary and Legislative Studies

5.3 In May 1997 the Centre for Parliamentary and Legislative Studies, University of Strathclyde, invited a number of lawyers concerned with devolution to discuss the implications of devolution for the law of Scotland. Our Chairman and Dr E M Clive attended.

Commonwealth Law Conference

5.4 In August 1996 the Eleventh Commonwealth Law Conference was held in Vancouver. Representatives of a number of Commonwealth law reform agencies were present. Immediately before the start of the main conference these representatives met together and spent a day discussing issues of common concern. Mr N R Whitty attended the conference and pre-conference meeting on our behalf.

Council of Europe: Incapable and other vulnerable adults

5.5 The Council of Europe has invited Dr E M Clive to be a member of a small Group of Specialists on the law relating to incapable and other vulnerable adults. The Group's task is to draw up draft principles with a view to the preparation of an international instrument (recommendation or convention); and to make proposals for consideration by the European Committee on Legal Co-operation.

5.6 The Group comprises eight specialists from different member states of the Council of Europe. All have been involved in the revision of national laws on the subject. The Group elected Dr Clive as Vice-Chairman and commissioned him to prepare a report on the topic

for the use of the Group. His report was considered by the Group at its third meeting from 21-24 January 1997 and was used as the basis for a first draft of a set of principles.

European symposium, etc

5.7 In February 1997 our Chairman attended a symposium at the Hague. The topic for the symposium was "Towards a European civil code".

5.8 In May 1997 our Chairman attended a conference held at the University of Aberdeen. The topic of the conference was "The Outer Limits of European Community Law". The conference was followed by the European Law Annual Lecture.

Good Practice Group on Neurosurgery for Mental Disorders, etc

5.9 Dr D I Nichols, a member of our legal staff, was Chairman of the Good Practice Group on Neurosurgery for Mental Disorders which was set up under the Scottish Office Clinical Resource and Audit Group. The Group's report, *Neurosurgery for Mental Disorders*, was published in September 1996. It contains recommendations for the reform of the law and practice of neurosurgery for mental disorder in Scotland.

5.10 Dr Nichols also served as a member on the Advisory Committee of the Legal Services Agency's Mental Health Legal Representation Project (Lothian) until May 1997.

Government departments: Conference for permanent secretaries

5.11 In March 1997 our Chairman and Dr E M Clive attended a conference in London for permanent secretaries of the government departments. The purpose of the conference, which was organised by the Law Commission, was to discuss the relations between the government departments and the Law Commissions. Mr P M Beaton, Scottish Courts Administration, also attended on behalf of The Scottish Office.

Hague Conference on Private International Law: Convention on Children

5.12 In October 1996 Dr E M Clive led the United Kingdom delegation at the Eighteenth Session of the Hague Conference on Private International Law. The topic was a new Convention on Children. Dr Clive had previously attended in the same capacity two Special Commissions which drew up a preliminary draft text.¹ He was a member of the Drafting Committee for the Convention. The Conference agreed on a draft Convention on *Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of Parental Responsibility and Measures for the Protection of Children*.

5.13 More recently Dr Clive has been asked to lead the United Kingdom delegation at meetings under the auspices of the Hague Conference to prepare a new Convention on Incapable Adults. He has again been invited to be a member of a small drafting committee to prepare a preliminary text.

¹ February 1995 and September 1995.

Law Commission

5.14 For successful law reform it is essential that we and our English counterparts should have a close and harmonious working relationship. Throughout the year we have maintained such a relationship. Apart from the projects on which we are formally linked, we have commented informally on several of the Law Commission's projects.²

5.15 In December 1996 our Chairman visited the Law Commission as the guest of its Chairman, Mrs Justice Arden. In January 1997 he and Mrs Justice Arden had a meeting in London with your predecessor and certain of his officials. In addition, throughout the year our Chairman and Mrs Justice Arden have been in frequent informal contact on numerous matters.

5.16 We are indebted to our colleagues in the Law Commission, both Commissioners and staff, for all the assistance that they have given us.

Legal societies, etc

5.17 We wish to take every opportunity to strengthen our links with legal and other professional societies throughout Scotland. To this end we willingly respond to invitations from such societies to address them on subjects of mutual interest.

5.18 In February 1997 Mrs Dianne Howieson, a member of our legal staff addressed the Association of Underwriters and Insurance Brokers in Glasgow on the subject of our work on statute law.

5.19 In May 1997 Dr E M Clive addressed a conference of the Royal Faculty of Procurators in Glasgow on the subject of law reform.

5.20 In June 1997 our Chairman addressed the Society of Procurators and Solicitors in Angus, at Forfar on the subject of our work on the feudal system.

Seminars

5.21 An effective process of consultation is essential for our work. The main element in the process is the discussion paper. In a typical project we issue several hundred discussion papers to all the organisations, interest groups and persons who may be concerned with the area of law under review. From time to time we hold seminars to supplement the ordinary process of consultation. This enables us to target a smaller expert audience and to focus on central issues which can be discussed in depth.

² We report on specific projects in para 2.57 (trustee investments), paras 3.19-3.23 (partnership), paras 3.24-3.28 (shareholder remedies), paras 3.29-3.31 (third party rights against insurers), para 3.33 (claims for wrongful death), paras 4.10-4.11 (consolidation), paras 4.12-4.20 (statute law revision and the Chronological Table of Local legislation). In addition, we have commented informally on projects on damages (collateral benefits) and offences of dishonesty.

(i) *Property*

5.22 In September 1996 we held a joint seminar with the University of Glasgow on our proposals for reform of the law of the tenement.³ Professor K G C Reid presented a position paper outlining our new approach to reform, along with draft clauses from a Tenements (Scotland) Bill. Professor R Rennie of the University of Glasgow responded with a paper commenting on our proposals.

5.23 The seminar was attended by legal practitioners, architects, property managers and representatives of local authorities and consumer bodies. We are pleased that Professor C G van der Merwe of the University of Stellenbosch, South Africa, who is an authority on the comparative law of apartment ownership, was able to attend and give us his views on our proposals. There was wide support for our new approach to reform, and we value the comments of those who attended.

5.24 We are planning to hold a seminar in 1998 to discuss our provisional proposals for reforming non-feudal real burdens.⁴

(ii) *Trusts*

5.25 In October 1996 we held a joint seminar with the Universities of Glasgow and Strathclyde on the topic of constructive trusts. Professor J W G Blackie of the University of Strathclyde, Mr Justice Cameron of the Supreme Court of South Africa, Professor G L Gretton of the University of Edinburgh and Mr C Harpum, a member of the Law Commission, all delivered papers to an invited audience of lawyers from Scotland and other countries.⁵

Visits

(i) *European Lawyers Programme*

5.26 The University of Edinburgh runs each year an extended study programme for young European lawyers. The programme includes optional placements with practising solicitors and advocates and governmental and other legal institutions. As part of the programme we hosted two of the participants for three weeks each in early 1997.

5.27 In April 1997 we received a visit from all twelve of the participants in the programme. Our Chairman and members of our legal staff gave a series of short talks on the role of the Law Commissions, our current programme of law reform and our methods of working. The talks were followed by a lively question and answer session.

5.28 The supervisors of the programme afterwards confirmed that the placements and the visit had been well received by the participants. It is likely, therefore, that we will continue to participate in the programme in future years.

³ See para 2.52.

⁴ See para 2.43.

⁵ See para 2.56. Two of the seminar papers have been published: G L Gretton, "Constructive Trusts", (1997) 1 Edinburgh Law Review (ELR) 281; C Harpum, "The Uses and Abuses of Constructive Trusts: The Experience of England and Wales", (1997) 1 ELR 437. The other papers, as yet unpublished, were: J W G Blackie, "The logical structure of the relationship between unjustified enrichment and trusts"; and E Cameron, "Why no constructive trusts in South African Law? The experience of another mixed legal system".

(ii) *Tanzanian Law Reform Commission*

5.29 During the last week of April 1997 we hosted a visit from two representatives of the Tanzanian Law Reform Commission, Mr Justice Anthony Nabiji Bahati, Chairman, and Mr Albert Adiel Msangi, Principal Research Officer. The visit was arranged in conjunction with the Law Commission, where the visitors spent three weeks of their month-long stay in the United Kingdom.

5.30 Throughout the week Commissioners and members of our legal staff made themselves available to discuss their work. We also arranged a series of visits to the Crown Office, the Sheriff Court, the Court of Session and the Law Society of Scotland. At the conclusion of the visit we agreed to maintain links for the future and to exchange publications.

(iii) *Other visitors*

5.31 Since his appointment in October 1996 our Chairman has personally received numerous visitors, among whom we would mention in particular: Mr Michael Dailly, Editor, SCOLAG; Mr Robert Eadie, Parliamentary Commissioner for Administrative Investigations, Western Australia; Deirdre Hutton, Chairman and Lynne MacMillan, Head of Legal Policy, Scottish Consumer Council; Professor Cheryl Loots, University of Witwatersrand, South Africa.

Part 6

Staff and management

The Commission

6.1 As at 15 June 1997 the members of the Commission were:

| | |
|---|--------------------------|
| The Honourable Lord Gill, <i>Chairman</i> | (Part-time) ¹ |
| Dr E M Clive | (Full-time) |
| Mr P S Hodge, QC | (Part-time) ² |
| Professor K G C Reid | (Part-time) |
| Mr N R Whitty | (Full-time). |

6.2 Our former Chairman, Lord Davidson, retired on 30 September 1996 after a distinguished tenure of office from 1 October 1988. We thank him for his contribution to our work and wish him well in his retirement.

6.3 Mr W A Nimmo Smith, QC, now Lord Nimmo Smith, resigned on 30 September 1996 on his appointment as a Senator of the College of Justice. We thank him also for his contribution to our work and congratulate him on his appointment.

Staff

6.4 As at 15 June 1997 our core legal staff comprised our Secretary and six other qualified lawyers. In addition we have the services of Parliamentary draftsmen in the Lord Advocate's Department in London. Our complement of support staff was seven full-time and three part-time. The principal members of staff were:

| | |
|---------------------|-------------------------------|
| <i>Secretary:</i> | Mr J G S Maclean ³ |
| <i>Legal staff:</i> | Mrs D F Barbirou ⁴ |
| | Mr J M Dods |
| | Mrs D M Howieson |
| | Dr D I Nichols |
| | Mrs S Sutherland |
| | Mrs G B Swanson |

¹ Lord Gill was appointed for three years with effect from 1 October 1996.

² Mr Hodge was appointed for three years with effect from 21 April 1997.

³ Mr Maclean took up post on 2 September 1996.

⁴ Mrs Barbirou took up post on 7 April 1997.

Librarian: Mr N G T Brotchie

Office Manager: Mr W Barclay

We are grateful to all our staff for their contribution to our work.

6.5 Our former Secretary, Mr K F Barclay, Solicitor (Senior Civil Service), retired on 30 August 1996. We thank him for his service to the Commission over many years and wish him well in his retirement.

6.6 Mr R Bland, Solicitor (Senior Civil Service), retired on 31 March 1997. We thank him also for his work on our behalf over the years and wish him well in his retirement.

6.7 Mrs A D B McFee, Solicitor, transferred to the Scottish Land Court on 7 April 1997. We thank her for her work on our behalf and wish her well in her new post.

Legal support services

6.8 The seven members of our core legal staff are all on loan from the Office of the Solicitor to the Secretary of State for Scotland. Such staff come to us for periods of three to five years, or in some cases longer. They bring to our work an experience of the machinery of government and the legislative process which we value highly and which we could not readily get from any other source.

6.9 We have decided, however, that we must supplement these particular skills by drawing on the resources of the wider legal community. We have therefore taken the opportunity presented by two vacancies in our complement of core legal staff to release resources for this purpose by surrendering the vacant posts. We intend to use the resources thereby released to finance a mix of

- fixed-term research posts for new law graduates
- consultancies involving legal experts from the academic community and the private sector
- attachments for experienced legal academics
- advisory groups of legal and other experts to support particular projects
- scholarships for post-graduate research in areas of law with which we are concerned.

Research assistants

6.10 As a first step, we have engaged five recent law graduates as research assistants on contracts for one year from July 1997, renewable by agreement for one further year; and one research assistant on a contract for eighteen months from October 1997, renewable by agreement for a further six months.

6.11 In addition, we have continued our practice of employing recent law graduates as research assistants for 10-12 weeks during the summer months. Between July and September 1996 we employed five; and between July and September 1997 we shall employ two.

Consultancies

6.12 We have engaged Professor W W McBryde of the University of Dundee as a consultant.⁵ This is a major consultancy on the law of contract and in setting it up we have departed somewhat from our usual practice.⁶ Professor McBryde will work for two months full-time on the project. He will spend a proportion of his time each week at our office in Edinburgh, where he will have support from our legal and administrative staff, as well as access to our library and computer facilities.

Advisory groups, etc

6.13 For a number of years we have had a working party on contract law. We list the members in Appendix 2A. The working party is fairly large and operates mainly as a forum for general discussion of issues arising in connection with our work on contract. We are very grateful to the members of the working party for their positive support and help in planning and focusing our work in this area.

6.14 We wish to develop this approach by integrating more fully into our work the advice and assistance of legal practitioners in particular. We have therefore established two small advisory groups in connection with our projects on feudal tenure and leasehold casualties.⁷ Our initial experience of the operation of these groups has been most encouraging and we are grateful to those who have contributed their time and their expertise to the projects. We list the members of the groups in Appendix 2B and Appendix 2C respectively.

Plans for the longer term

6.15 Over the period to 2002 we intend progressively to reduce the size of the core legal staff drawn from the Office of the Solicitor to the Secretary of State for Scotland. The reduction may be of the order of two or possibly three posts. We shall use the additional resources thereby released to develop the supplementary forms of legal support we have described.

6.16 The core legal staff, whatever its eventual size, will continue to have a pivotal role. Co-ordination at the centre will be vital to the success of any plan to diversify our legal support services. Members of the core legal staff will continue to carry out legal research, to advise on legal policy, to draft discussion papers and reports and, in particular, to instruct draft legislation. But, in addition, they will have a major role as project managers responsible for co-ordinating the contributions of research assistants, consultants, academic associates and advisory groups.

⁵ See para 2.21.

⁶ At paras 3.20, 3.33 we mention two consultancies (Mr William Holligan, Mrs Marian Gilmore) of the more traditional form we have used in the past.

⁷ See paras 2.38-2.43, 3.6-3.15.

Project management

6.17 We have committed ourselves to firm timetables for the projects included in our *Fifth Programme of Law Reform*.⁸ Following on from that, we have had to develop a more complex team structure and a more sophisticated system of project planning to support the published timetables. While we are only at the start of this development, we are already seeing benefits, thanks to the adaptability and commitment of our staff.

6.18 We are also discussing with your officials how we might handle requests for legal advice from government departments. We envisage a centralised process, whereby requests from different departments can be co-ordinated and prioritised. Such a process is necessary to allow us properly to assess the implications for resources in light of our commitments under the *Fifth Programme of Law Reform*.⁹

Library

6.19 Our library has continued to develop under the expert supervision of our Librarian, Mr N G T Brotchie. He also maintains excellent working relationships with fellow librarians, in particular those responsible for the libraries maintained by the Faculty of Advocates, the Scottish Office, the Society of Solicitors to the Supreme Courts and the University of Edinburgh. Reciprocal arrangements with these and other libraries in Scotland and elsewhere in the United Kingdom are important for our work.

Information technology

6.20 As part of a recent refurbishment of our office, cabling was installed for a new computer network. We are now about to embark on the process of acquiring the necessary hardware and software to provide internal and external e-mail, access to the internet and a website. For this purpose we will have the assistance of a consultant engaged by Scottish Courts Administration.

6.21 We are grateful to the staff of Scottish Courts Administration for their help with the new technology and, more generally, with the refurbishment of our office. In particular, we wish to acknowledge the assistance we have had from David Stewart, Deputy Director, who has so willingly provided advice and support during a difficult period of rapid change.

Publications

6.22 We have decided to discontinue our practice of appending lists of our publications to our annual reports. We will, however, maintain the lists and copies of them may be obtained from our office without charge. When our new information technology is available we intend to make this information available through our website.

⁸ (1997) Scot Law Com No 159. See paras 1.6, 1.9; Part II.

⁹ (1997) Scot Law Com No 159. See Part II.

Running costs

6.23 In Appendix 3 we summarise our running costs for the year to 31 March 1997. The figures were supplied by Scottish Courts Administration, which is responsible for providing our resources.

Reports submitted prior to 1994 and not yet implemented¹

1. *Child Abduction*, (1987) Scot Law Com No 102.
2. *Private International Law – The Law of Domicile*, (1987) Law Com No 168, Scot Law Com No 107.
3. *Civil Liability - Contribution*, (1988) Scot Law Com No 115.
4. *Reform of the Ground for Divorce*, (1989) Scot Law Com No 116.
5. *Recovery of Possession of Heritable Property*, (1989) Scot Law Com No 118.
6. *Prescription and Limitation of Actions (Latent Damage and Other Related Issues)*, (1989) Scot Law Com No 122.
7. *Succession*, (1990) Scot Law Com No 124.
8. *The Passing of Risk in Contracts for the Sale of Heritable Property*, (1990) Scot Law Com No 127.
9. *The Effect of the Execution of Diligence on the Operation of Prescription*, (1991).²
10. *Statutory Fees for Arrestees*, (1992) Scot Law Com No 133.
11. *Family Law*, (1992) Scot Law Com No 135, Law Com No 135.³
12. *Formation of Contract: Scottish Law and the United Nations Convention on Contracts for the International Sale of Goods*, (1993) Scot Law Com No 144.

¹ See para 1.5

² This report was not published by The Stationery Office.

³ This report has been partially implemented by the Children (Scotland) Act 1995.

Advisory groups, etc

A. Obligations: Working party on contract law

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

Observers

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

B. Property: Advisory group on feudal tenure

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

C. Property: Advisory group on leasehold casualties

| | |
|-------------------------|--|
| Mr M D Barclay | Chartered Surveyor, Glasgow |
| Miss L J Miller | Solicitor, Edinburgh |
| Mr A G Rennie | Deputy Keeper of the Registers of Scotland |
| Professor R Rennie | University of Glasgow |
| Mr J M Dods (Secretary) | Scottish Law Commission |

Appendix 3

Running costs for the year to 31 March 1997

| | £000 | £000 |
|---|-------|--------|
| Accommodation charges ¹ | | 163.0 |
| Salaries, etc of Commissioners ² | 254.8 | |
| Salaries, etc of legal staff ³ | 432.7 | |
| Salaries, etc of non-legal staff ⁴ | 154.3 | |
| | — | 841.8 |
| Printing and publishing, etc ⁵ | 58.8 | |
| Telephone and postage | 6.9 | |
| Travel and subsistence | 5.6 | |
| Miscellaneous ⁶ | 1.7 | |
| | — | 73.0 |
| Total | | 1077.8 |

¹ Charges include rent, rates and utilities.

² ERNIC, superannuation payments and pensions to former Commissioners are included.

³ ERNIC, superannuation payments and fees to consultants are included.

⁴ ERNIC and superannuation payments are included.

⁵ The figure includes costs of binding, library purchases, machinery maintenance, photocopying, reprographic services and stationery.

⁶ The figure includes costs of hospitality, office services and training.