

SCOTTISH LAW COMMISSION
(Scot Law Com No. 176)

SIXTH PROGRAMME OF LAW REFORM

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The Scottish Law Commission was set up by section 2 of the Law Commissions Act 1965¹ for the purpose of promoting the reform of the law of Scotland. The Commissioners are:

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Dr E M Clive

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¹ Amended by the Scotland Act 1998 (Consequential Modifications) (No 2) Order 1999 (S.I. 1999/1820).

SCOTTISH LAW COMMISSION

SIXTH PROGRAMME OF LAW REFORM

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

Under section 3(1)(b) of the Law Commissions Act 1965 we have a duty to prepare and submit to Scottish Ministers from time to time programmes for the examination of different branches of the law with a view to reform, including recommendations as to the agency (whether the Commission or another body) by which any such examination should be carried out.

We now have the honour to submit for approval by Scottish Ministers a *Sixth Programme of Law Reform* for the examination of the topics and branches of the law specified in Part II with a view to their reform in the manner set out there. We recommend that the Commission should be the examining agency for each of the topics we propose.

(Signed) BRIAN GILL, *Chairman*

E M CLIVE

PATRICK S HODGE

KENNETH G C REID

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NORMAN RAVEN, *Secretary*
22 December 1999

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FOREWORD

Our *Sixth Programme of Law Reform* continues the aims and the methods of our *Fifth Programme*. It builds on the work in which we have been engaged for the last three years.

In our new Programme we are committed to producing good law reform that will benefit the Scottish Parliament and the public. We hope that our work will continue to receive the support of the profession.

We embark on our Programme with optimism, knowing that we can rely on the skills and commitment of our staff and of those colleagues, professional and academic, who assist us so readily in our work.

(Signed) BRIAN GILL, *Chairman*

PART I INTRODUCTION

Previous programmes

1.1 Between the establishment of the Commission in 1965 and 1997 four programmes of law reform were approved.² The *Fifth Programme*³ in 1997 consolidated and superseded all the previous programmes. It was conceived as the first of a series of rolling programmes, each running for a period of three to five years. It combined short, medium and long term projects⁴ and set out a timetable for the completion of the short and medium term projects.

The work of the *Fifth Programme*

1.2 Almost all the timetabled projects in the *Fifth Programme* have been or will be completed on time. The only remaining timetabled work that cannot be completed by the end of 1999 is the item on Diligence.⁵ The second part of that item related to diligence over heritable property and in particular to the replacement of adjudications for debt by land attachments and the reform of inhibitions.⁶ This was to complete our overall review of the law of diligence. In the course of our work on this item we came to the view that to complete the overhaul of this part of the law there should be two new forms of diligence, namely attachment orders (as the residual diligence over property not otherwise attachable, such as intellectual property) and money attachment.⁷ Because of the expansion in the scope of this project, and the resource problems that we discuss later, we have postponed completion of the project until 2000.

1.3 Our work on the law of Real Burdens was not a timetabled project in the *Fifth Programme* but is part of a long term project for further reforms linked to the abolition of the feudal system.⁸ A discussion paper was published in October 1998 and, subject to the availability of drafting resources, we intend to produce a report early in 2000.

² (1965) Scot Law Com No. 1; (1968) Scot Law Com No. 8; (1973) Scot Law Com No. 29; (1990) Scot Law Com No. 126.

³ (1997) Scot Law Com No. 159.

⁴ *Fifth Programme* (1997) Scot Law Com No. 159, paragraph 1.3.

⁵ *Fifth Programme*, paragraphs 2.3-2.13. Part of the item on Diligence was implemented by our *Report on Diligence on the Dependence and Admiralty Arrestments* (Scot Law Com No.164).

⁶ *Fifth Programme*, paragraphs 2.7-2.13.

⁷ *Thirty-Third Annual Report 1997-98* (Scot Law Com No.167), paragraphs 2.9 and 2.10; Discussion Paper No 108 on *Attachment Orders and Money Attachment* (1998).

⁸ *Fifth Programme*, paragraph 2.35.

Problems of resources

1.4 Our recent work has been seriously affected by factors beyond our control. The Office of the Scottish Parliamentary Counsel understandably required to deploy resources to the preparation of Scottish Executive legislation, including the Abolition of Feudal Tenure etc (Scotland) Bill, for consideration by the Scottish Parliament early in its first session. Moreover, the Scottish Ministers considered that in allocating such resources as were available to us we should give priority to the work on Real Burdens with a view to completing the process of feudal reform.

1.5 The report on the remaining Diligence topics in our *Fifth Programme* has been delayed in part by the diversion of drafting resources to other matters. It has also been delayed by the preparation of a discussion paper following on an urgent reference by Scottish Ministers relating to poiding and sale (paragraph 1.16 below). We have therefore decided that our work on this report should be carried forward into the *Sixth Programme of Law Reform* (paragraph 2.35 below).

1.6 These late difficulties have disappointed us. However, the aims of the *Fifth Programme* have been substantially achieved despite the competing demands of references from Ministers and joint projects with the Law Commission. The following Table sets out the non-programme work that we have done during the currency of the *Fifth Programme*.

TABLE

Non Programme Work: 1997 to date

<u>Project</u>	<u>References</u>	<u>Notes</u>
Companies Act 1985, Part X	Request for advice from the Department of Trade and Industry	Joint project with the Law Commission
Leasehold Casualties	Request for advice from Secretary of State for Scotland	
Partnership	Request for advice from Department of Trade and Industry	Joint Project with the Law Commission
Shareholder remedies	Request for advice from the Lord Chancellor and the President of the Board of Trade	Contribution to Law Commission Report
Third Parties (Rights against Insurers) Act 1930	Request for advice from the Department of Trade and Industry	Joint Project with the Law Commission
Pounding and Warrant Sale	Request for advice from Scottish Ministers	
Agricultural Holdings – dispute resolution and jurisdiction issues	Request for advice from Scottish Ministers	

Foundations of the *Sixth Programme*

1.7 In drawing up our *Sixth Programme* we propose to continue the basic approach of the *Fifth Programme*. We consider that law reform projects should be relevant to current needs; should be dealt with in an appropriate order of priority; should be realistically timetabled; and should be subject to efficient management planning.

1.8 In this Programme we continue to identify projects as short, medium or long term. A short term project such as the carry-over work on Diligence should normally have a target date well within the life of the Programme but until the difficulties concerning drafting

resources are resolved we shall be unable to commit ourselves to a particular date. We intend to complete our medium term projects at the latest by the end of the Programme; that is to say, by the end of 2004. Long term projects will be worked on as circumstances allow. Our Annual Reports will indicate progress on each project and will give more specific timetables as we go along. In addition, we expect to receive more work by way of Ministerial reference. Each reference will have a specific completion date.

1.9 We recognise that timetabling can create its own difficulties. Priorities can change. For example, we may be asked to respond urgently to references or requests for advice. Difficulties arising in a project may necessitate more detailed consideration and further consultation. Work on current projects may be delayed when we have to assist the Scottish Parliament or the Scottish Executive during the passage of a Bill. Shortage of resources may also arise through the need to carry staff vacancies.

1.10 The Scottish Law Commission is a small organisation. Two of our five Commissioners hold part-time appointments. Our permanent legal staff comprises the Secretary and five other solicitors seconded from the Office of the Solicitor to the Scottish Executive. These five solicitors fulfil the key role of project managers. Of that complement of five, one post has been vacant for some time and another is filled on a part-time basis. Because of resource requirements elsewhere, these vacancies are unlikely to be filled in the near future. Other ways of handling our workload are possible, such as the engagement of consultants; but in a small jurisdiction like Scotland there are a limited number of people able to devote the time to act as consultants and even when a project is given to a suitable consultant, the Commission must remain responsible for the contents of any Report.

Advice to government departments and the Scottish Administration

1.11 In addition to our work under this Programme and our continuing work on consolidation and statute law revision we shall continue to deal with requests for advice received from or through government departments or the Scottish Administration.⁹

1.12 We shall continue our long-standing practice of supporting, on request, those officials who are responsible for implementing our reports. We regard this as an especially important contribution to the legislative process of the new Scottish Parliament.

⁹ Law Commissions Act 1965, section 3(1)(e).

1.13 We shall also continue to offer the services of Commissioners and legal staff in the Government's own law reform projects, including those connected with European and international organisations.

References

1.14 Our main programme work is customarily supplemented by work undertaken in response to references from Ministers seeking our proposals on specific issues arising from time to time during the life of a Programme.¹⁰

1.15 As this Programme is submitted, we are engaged in the following references.

1.16 *Poinding and Warrant Sales*. On 2 September 1999 we were asked by Scottish Ministers to reconsider, as a matter of urgency, whether the reasons for the retention of the diligence of poinding and warrant sale set out in our report on Diligence and Debtor Protection¹¹ remain valid; to consider whether that form of diligence might be replaced by alternative measures which would be no less effective; and to consult relevant interests. In implementation of an obligation to consult, we issued a discussion paper on 30 November 1999.¹² We have been asked to submit our report in the early part of 2000.

1.17 *Agricultural Holdings*. In accordance with its Land Reform Action Plan the Land Reform Policy Group intends to issue by April 2000 a White Paper on land tenure issues. As a complement to that work, on 19 October 1999, the Deputy First Minister and Minister for Justice, asked us, taking account of the Land Reform Action Plan, to consider existing procedures for dispute resolution in the law on agricultural holdings, and other related matters, including appellate procedures, and to advise on possible reforms in jurisdiction and procedures with a view to improving access to justice and economy and speed and quality of justice. By undertaking this work in line with the Land Reform Policy Group's timetable we can contribute to the streamlining of procedures and the rationalisation of the jurisdictions of the various courts.

1.18 We have also been notified that we are to receive the following references in the near future.

¹⁰ Law Commissions Act 1965, section 3(1)(e).

¹¹ (1985) Scot Law Com No 95 which forms the basis of the present law on poinding and sale set out in the Debtors (Scotland) Act 1987.

¹² Discussion Paper No.110 on *Poinding and Sale: Effective Enforcement and Debtor Protection*.

1.19 *The Foreshore and Seabed*. In its Action Plan, the Land Reform Policy Group proposed that the Commission should undertake a comprehensive review of the law relating to the foreshore and the seabed. We expect shortly to receive a reference on this issue.

1.20 *Damages (Scotland) Act 1976*. In *Monteith v Cape Insulation*¹³ the Court of Session considered the question of who might constitute the “immediate family” in terms of sections 1(4) and 10(2) of and Schedule 1 to the 1976 Act. In light of the decision in that case it is likely that we shall be asked to examine its effects on the proposals set out in our report on the law relating to Damages for Injuries causing Death¹⁴.

1.21 *Delictual Liability for Psychiatric Injury*. Legislation is proposed for England and Wales on recovery of damages for psychiatric injury. The Law Commission in their report on Liability for Psychiatric Illness¹⁵ originally proposed legislative reform only where there were serious defects in the law, allowing development through judicial decision in all other areas. Recent decisions appear not to have established any clear trend, hence the proposed implementation of the Law Commission’s suggestions for limited legislation. In light of possible pressure on the Scottish Parliament to legislate in this area it is likely that we shall receive a reference to examine these issues.

Work of the Law Commission

1.22 We also take account of the work being carried out by the Law Commission. The Law Commission has recently published its *Seventh Programme of Law Reform*¹⁶ which sets out a 2 year Programme. A number of items included in that Programme have particular relevance to our work, namely

damages¹⁷

limitation of actions¹⁸

law of trusts¹⁹

law of business associations²⁰

electronic commerce²¹

third parties’ rights against insurers²²

¹³ 1999 SLT 116.

¹⁴ (1973) Scot Law Com No 31.

¹⁵ (1998) Law Com No 249.

¹⁶ (1999) Law Com No 259.

¹⁷ *Item 1*, page 9.

¹⁸ *Item 2*, page 10.

¹⁹ *Item 6*, page 14.

²⁰ *Item 7*, page 16.

²¹ *Item 8*, page 17.

partnership law²³.

It is important that we should respond to such work where it may have implications for the law of Scotland. The timing and the content of work done by us in response to Law Commission proposals is outwith our control. Such work is therefore not included formally among the projects in this Programme.

Consolidation and Statute Law Revision

1.23 In terms of section 3(1)(d) of the Law Commissions Act 1965 we have a 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”.

1.24 Consolidation gives statute law a more rational structure and makes it more accessible to those whom it affects. In our view, it is a major element in the process of law reform.

1.25 Government departments and the Scottish Administration play an important role in consolidation. At present, to our disappointment, departmental officials cannot commit the resources necessary to support a published programme of consolidation. We mentioned this in our *Thirty-Third Annual Report*.²⁴

1.26 While the prospects for consolidation are not good, we are encouraged by two matters. First, we have made good progress with the consolidation of the legislation relating to salmon and freshwater fisheries in Scotland. A Bill will shortly be ready for introduction. It has been delayed by the diversion of drafting resources to other more urgent legislation. Second, there has been strong support for consolidation of conveyancing legislation. We wish to embark on this project in the near future. It will fit well with our proposals for reform of the feudal system. There is also support for consolidation of game and fishing law in Scotland. We say more about these items in Part II (paragraphs 2.23 and 2.24).

1.27 We remain committed to the process of statute law revision which clears obsolete legislation from the statute book. We currently do this by means of Statute Law (Repeals) Bills appended to reports published jointly with the Law Commission.

²² *Item 9*, page 17.

²³ page 23.

²⁴ (1998) Scot Law Com No 167, paragraph 4.2.

1.28 The last Statute Law (Repeals) Bill was published in 1998. We continue to identify provisions for inclusion in the next Bill. We expect that repeals of United Kingdom or Great Britain legislation will continue to be dealt with in joint reports but that repeals of Scottish legislation will be dealt with by the Scottish Parliament to the extent of its legislative competence.

1.29 Current staffing constraints may affect our progress in these areas, but we shall continue to support consolidation and statute law revision as essential parts of the law reform effort.

Codification

1.30 Section 3(1) of the Law Commissions Act 1965 provides that

“it shall be the duty of each of the Commissions to take and keep under review all the law with which they are respectively concerned with a view to its systematic development and reform, including in particular the codification of such law”.

Paragraph (b) of section 3(1) also allows the Commission to recommend agencies other than the Commission itself by which examination of the law should be carried out.

1.31 In the *Fifth Programme of Law Reform*²⁵ we recognised the difficulties inherent in codification. Some of our recent work has involved a measure of codification; for example, our work on the Law of the Tenement and the partial codification of director’s duties in our joint project on Part X of the Companies Act 1985. Our current work on Real Burdens also involves an element of codification.

1.32 We are taking a close interest in two current codification projects.

1.33 Dr Eric Clive, one of our Commissioners will, on leaving the Commission at the end of this year, be involved in the preparation of a draft Scottish Civil Code. This project is being undertaken at Edinburgh University. A draft Scottish Criminal Code is being prepared on an informal basis by a small group of lawyers, including again Dr Clive. These are substantial exercises to which we cannot commit any existing resources. We support both

²⁵ Para 2.15.

projects as being worthwhile studies in codification. We hope that we may be able to make a useful contribution to these projects when drafts of the codes are published.

New constitutional arrangements

1.34 We have formulated this Programme at a time of major constitutional changes in Scotland.

1.35 The statutory basis of our existence, the Law Commissions Act 1965, has been extensively amended with effect from 1 July 1999 to reflect these changes. We are now responsible to Scottish Ministers and our reports will go before the Scottish Parliament. We welcome these changes as complementing our own targeted approach to law reform and providing greater opportunity for implementation of our proposals.

1.36 Our remit has not become restricted to the consideration of devolved matters. We continue to have a vital role in law reform that is solely within the legislative competence of the Westminster Parliament but which has an effect on the law of Scotland.

PART II SIXTH PROGRAMME OF LAW REFORM

Preliminary

2.1 In this Part we set out for approval by Scottish Ministers our *Sixth Programme of Law Reform* which will occupy us until the end of 2004. The Programme consolidates and supersedes all previous programmes.²⁶ Changes in circumstances within the period of the Programme may give rise to new or different priorities. If we come to the view that work is urgently required which is outside the scope of this Programme, we shall request either approval of a formal modification of the Programme or a reference in terms of section 3(1)(e) of the Law Commissions Act 1965.

2.2 In preparing this Programme we have sought views from a wide range of consultees and have taken their responses into account. We are grateful to all those who helped us in this way.

2.3 Following the precedent set by the *Fifth Programme of Law Reform* the new Programme consists of a number of projects, under the following general headings or branches of the law:

- Codification
- Obligations
- Persons
- Property
- Statute Law Revision and Consolidation
- Trusts
- Diligence

The centrepiece of the Programme remains our work on property, which we expect to absorb the most significant part of our resources.

²⁶ See para 1.7.

Item No 1: Codification

2.4 Our general views on codification are set out in paragraph 1.30 *et seq.*

Item No 2: Obligations

2.5 We propose to study the question of **irritancies**. This is a medium term project. At present sections 4 to 7 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1985 provide a degree of protection for tenants against the penal enforcement of irritancies in leases by stipulating a notice procedure and allowing the courts to grant relief from abuse or oppressive use of irritancies.

2.6 There is a view, however, that the protections in the 1985 Act are unduly limited. This was illustrated in the cases involving *Dollar Land (Cumbernauld) Ltd.*²⁷ In the original case in 1992 the loss to the tenants of a significant investment prompted Lord Jauncey to observe that “further consideration could profitably be given to situations where a tenant because of an oversight and/or omission on his part stands to lose large sums of money with consequent benefit to the landlord”. The House of Lords also raised the question whether irritancy clauses for non payment of rent in long-term investment leases were a proper reflection of current social policy.

2.7 The 1985 Act does not protect third parties such as sub-tenants or heritable creditors. Where a tenant goes into receivership the receiver has no specific protection against the operation of an irritancy clause. These difficulties were illustrated in the *Aubrey Investments* case²⁸ where it was concluded that the operation of an irritancy clause in such circumstances did not necessarily offend against the “fair and reasonable landlord” test.

2.8 In making this proposal we have considered whether such work might be done as part of our proposed work on leasehold tenure discussed in paragraph 2.11 *et seq.* We take the view that it is more appropriate for there to be a wider consideration of this question as part of the general law of contract.

Item No 3: Persons

2.9 In our *Fifth Programme of Law Reform* at paragraphs 2.30 and 2.31 we identified as a long-term project the review and modernisation of the legislation relating to **judicial factors**.

²⁷ 1992 S.C. (H.L.) 104; 1997 S.L.T. 260; 1998 S.C. (H.L.) 90.

²⁸ *Aubrey Investments Ltd v DSC (Realisations) Ltd (in receivership)* 1998 G.W.D. 31-1623.

We took the view that a radical overhaul was necessary. The experience of those consultees who expressed a view on this topic is that judicial fact-finding is a cumbersome procedure involving expense that is disproportionate to benefit. Our own experience in our work on family law and incapable adults was that a significant amount of time had to be spent in scrutinising the provisions of the legislation so as to identify the necessary consequential amendments.

2.10 Although there is a need for reform in this area, because of the priorities which we have to give to other matters we believe that this should remain a long-term project in this Programme.

Item No 4: Property

2.11 **Leasehold Tenure.** In our *Fifth Programme of Law Reform* at paragraph 2.36 this was identified as a long-term project.

2.12 We propose that in our new Programme as a medium term project we should concentrate on the question of the **conversion of some categories of long lease** to ownership. In particular the problems caused by long leases of residential subjects are well documented. On the expiry of such leases, tenants lose possession of their homes which they and their predecessors may well have occupied for a long time. An examination of this topic will complement our work on the abolition of the feudal system. It will raise the important question whether this form of tenure should be integrated into the new system.

2.13 **Land Registration.** The Land Register for Scotland was set up under the Land Registration (Scotland) Act 1979 as a replacement for the Register of Sasines, which had been in use since 1617. The new Register has been brought into operation gradually, county by county, and is expected to apply to the whole of Scotland by 2003.

2.14 The important innovation in 1979, however, was the new type of registration, known as **registration of title**, which accompanied the creation of the new Register. Under the previous system based on the Register of Sasines, registration did not of itself confer rights in land. The validity of a right depended primarily on the validity of a constitutive deed. If the deed was invalid, no right was created, and mere registration of the deed made no difference. Registration of title works in a fundamentally different way. The Land Register is a register, not of deeds, but of interests in land. The Keeper of the Register evaluates such deeds as are presented to him and, on the basis of that evaluation, makes an entry in the Register. A right is created by being entered on the Register, and all rights so entered are valid even if the

initiating deed was not. In general, entries in the Register are guaranteed and the possibility of mistake is covered by an indemnity scheme.

2.15 So ambitious a change was unlikely to be trouble-free. Over time, experience of the new system has uncovered a number of difficulties with the 1979 Act. Other difficulties have come to light as a result of litigation²⁹. These include: the relationship between registration and rectification; the grounds on which the Register may be rectified; the meaning of certain key, but unfamiliar, terms used in the Act such as ‘inaccuracy’, ‘proprietor in possession’ and ‘carelessness’; the circumstances in which indemnity is payable, and the amount due; and the scope of the rule that the Keeper must reimburse expenditure in claims made against him. Underlying all these detailed questions is a more general one. The 1979 Act lacks a conceptual framework commensurate with the radical changes that it introduced. The relationship between different provisions is not sufficiently articulated; and the conceptual vacuum makes it difficult to deal with matters that are not expressly provided for in the legislation.

2.16 At the suggestion of the Keeper of the Registers of Scotland, whose view is supported by Civil Law Division of the Scottish Executive Justice Department, we have decided to include a review of the 1979 Act as a medium term project as part of this programme. This important and difficult subject will form the centrepiece of our work on property law.

2.17 In carrying this project forward we shall bear in mind the possibility of early introduction of automated registration of title. In 1998 a member of staff at the Registers of Scotland published a survey of automated registration in a number of jurisdictions³⁰. Since then investigations of feasibility have been taking place in Scotland. In England and Wales the Law Commission and the Land Registry have also given this subject some consideration³¹. Until the technical aspects are more fully worked out, it is not clear whether, or to what extent, automated registration will require a new legislative framework. For present purposes, however, it is important that any legislation that may result from our review of the 1979 Act is fully compatible with the idea of automated registration.

²⁹ See in particular: *Brookfield Developments Ltd v Keeper of the Registers of Scotland* 1989 SLT (Lands Tr) 105; *Short’s Tr v Keeper of the Registers of Scotland* 1996 SC (HL) 14; *Short’s Tr v Chung (no 2)* 1999 SLT 751; *Kaur v Singh* 1999 SC 180; *Kaur v Singh (no 2)* 1999 GWD 24-1163; *M R S Hamilton Ltd v Keeper of the Registers of Scotland (no 1)* 1999 SLT 829; *Keeper of the Registers of Scotland v M R S Hamilton Ltd* 1999 SLT 855; *Douglas Properties Ltd v Keeper of the Registers of Scotland* 1999 SCLR 458; *Stevenson-Hamilton’s Exrs v McStay* 1999 SLT 1175; *Wilson v Keeper of the Registers of Scotland* 1999 SCLR 872. There has been a sharp increase in the volume of litigation during the last two years.

³⁰ Ian Burdon, *Automated Registration of Title to Land*.

³¹ *Land Registration for the Twenty-first Century: A Consultative Document* (Law Com No 254, 1998).

Item No 5: Statute Law Revision and Consolidation

2.18 We propose to continue our work on these areas, although progress will be dependent on resources.

2.19 We shall continue to build up a bank of repeal notes for provisions to be contained in a Statute Law (Repeals) Bill as part of our joint work with the Law Commission. We understand that the Law Commission is also subject to resource constraints in this area. We both intend to have a Bill ready for consideration by the Westminster Parliament in 2002-2003.

2.20 At the same time we shall identify items within the legislative competence of the Scottish Parliament in order to maximise the legislative opportunities that the new Parliament provides. We have not set a specific target for this work since it is at an exploratory stage.

2.21 In paragraphs 1.25 and 1.26 we have mentioned the difficulties surrounding a potential consolidation programme. A number of subject areas have been suggested to us for consolidation:

- Court of Session
- Fisheries and shellfish
- Mental health
- National Health Service
- Police
- Rating
- Regulatory criminal offences
- Sheriff court.

2.22 We shall bear these suggestions in mind for inclusion in any future programme of statute law revision and consolidation. For the present, however, we propose to concentrate on two items.

2.23 There was strong support for a consolidation of **conveyancing legislation**. Such work would fit well with our recent and current work on reform of the feudal system and would be of benefit to the profession and, indirectly, the public.

2.24 We also propose to look at consolidation of **game and fishing laws**. This consolidation was suggested to us by the then Scottish Office Agriculture, Environment and

Fisheries Department. It would provide a valuable follow-up to our current work on salmon and freshwater fisheries.

Item No 6: Trusts

2.25 We propose to follow up invitations made by consultees that we should carry out work on this topic. This will be a medium term project. It was identified as a long-term project in our *Fifth Programme of Law Reform* (paragraphs 2.43-2.45).

2.26 The Law Commission has already undertaken a substantial amount of work in this area and expects to report in 2000-2001. We consider that this is the right time to promote this topic to a medium term project in this Programme. Reform of the law would assist the legal profession and respond to commercial pressure for changes to arrangements that are nowadays considered to be unduly restrictive. The Law Society of Scotland supports reform of the law on this topic.³²

2.27 We intend that any reform of trust law should be confined to express trusts. Implied and constructive trusts raise different issues. The latter category in particular is closely connected with unjustified enrichment which the Commission has decided not to pursue for the time being.³³ We intend to examine initially the following issues, which seem to be the matters on which reform is most urgently needed.

2.28 There is a view that **judicial factors and curators bonis** should be excluded from the scope of the Trusts (Scotland) Acts. They are court-appointed managers acting under the supervision of the court and the Accountant of Court rather than trustees. The Commission's *Report on Incapable Adults*³⁴ recommended a new statutory regime outwith the Trusts (Scotland) Acts for guardians, who would replace curators, tutors and Mental Health Act guardians.

2.29 It has been suggested that there should be **separate regimes for private trusts and public trusts** (especially charitable trusts). Under the Charities Act 1993, charities in England and Wales can take part in collective investment schemes. At present Scottish charities cannot do so. There may be a case for rectifying this anomaly.

³² *Law Reform in the 21st Century: A Manifesto for Change*, Ch.3.

³³ cf *Report on Unjustified Enrichment, etc* (1999) (Scot Law Com No 169), Pt 5.

³⁴ (1995) Scot Law Com No 151.

2.30 The **restrictions on accumulation of income** in the Trustee Investments (Scotland) Act 1961 also merit re-examination. The position when the accumulation period comes to an end is not clear. Nor is it clear whether the restrictions apply to public trusts. The accumulation periods are thought to be unsatisfactory for lifetime trusts for disabled persons, in that there may be a need to save income after the 21 years period has expired.

2.31 The **powers and duties of trustees** need to be reviewed. In the *Report on Trustees' Powers and Duties*³⁵ the Commission, together with the Law Commission, made recommendations regarding powers of investment and the power to buy land. The core recommendation was to repeal the Trustee Investments Act 1961 and give trustees powers of investment as if they were absolute owners of the trust funds. Sections 29, 30 and 33 of the Trusts (Scotland) Act 1921 should be reviewed if this recommendation is implemented. Other topics that should be considered include the holding of investments in nominee accounts, the delegation of administrative functions, and the charging of remuneration by professional trustees in the absence of a charging clause. It is apparent that the list of powers in section 4 of the 1921 Act should be overhauled and restated in more general terms.

2.32 There are also questions of whether the common law duty of care owed by trustees to the trust and its beneficiaries should be set out in statutory form; and whether there should be a higher standard for "professional" trustees, if that is not the position already.

2.33 It is uncertain how far a trust deed can confer on trustees immunity from personal liability. It may be that a statutory restatement would clarify the law. There is an associated question whether non-professional trustees should be entitled to obtain personal liability insurance paid for by the trust.

2.34 We propose to consider whether the Inner House should remain the only forum for the hearing of a petition for variation of a trust under section 1 of the 1961 Act; whether 16 and 17 year-olds should have capacity to consent to a variation of trust purposes; and whether, to avoid any later challenge, the decree of variation should be deemed to be a ratification of the consent. It might be administratively advantageous if applications under the 1921 Act could go to the sheriff court as well as, or instead of, the Court of Session.

³⁵ (1999) Law Com No 260; Scot Law Com No. 172

Item No 7: Completion of Work on Diligence

2.35 **Land attachment, inhibitions, attachment orders and money attachment.** For the reasons that we have given, work on these matters will be completed as a short term project under the *Sixth Programme*. Further consultation is needed on the controversial topics of land attachment of dwellinghouses and attachment of money in dwellinghouses.

2.36 **Other diligence matters.** Diligence has re-attained a high political profile as a result of the debate on the Abolition of Poidings and Warrant Sales Bill (SP Bill 3) introduced by Mr Tommy Sheridan, MSP on 24 September 1999 and currently before the Scottish Parliament. In connection with that Bill, some bodies have represented to the Justice and Home Affairs Committee of the Scottish Parliament that abolition of poiding and sale cannot be considered in isolation and that there should be a comprehensive review of the system of diligence (including the so-called “diligence stoppers”, namely time to pay directions and orders and debt arrangement schemes).

2.37 There is also a view that funds in bank accounts which are traceable to in-payments of social security, and earnings which were exempt from arrestment or earnings arrestment at source, should be wholly excluded from the scope of arrestment. The solution is not self-evident.

2.38 It seems likely that concern about the law of diligence will persist. Nevertheless, we have not thought it necessary or desirable to propose that we should undertake further work on diligence. If Scottish Ministers require it they can make appropriate references to us.

2.39 The recommendations and draft Bill for the reform of admiralty arrestments in our *Report on Diligence on the Dependence and Admiralty Arrestments*³⁶ will be affected by the United Nations/International Maritime Organisation’s *International Convention on the Arrest of Ships 1999* adopted at their Conference in Geneva on 12 March 1999 and open for signature from 1 September 1999 to 31 August 2000. We have been asked by the Scottish Executive Justice Department to advise on the implications for Scotland.

Work with the Law Commission

2.40 Our joint work with the Law Commission does not form a specific item of our Programme; but certain projects currently underway will carry over into the period covered by our new Programme and will inevitably have an impact on our resources.

³⁶ (1998) Scot Law Com No.164.

2.41 *Partnership law.* This is a joint project to consider how partnership law might be developed to enable it to meet the needs of the business community in the next century. Although superficially straightforward, partnership law contains significant uncertainties both in Scotland and in England and Wales.

2.42 The Department of Trade and Industry have requested the two Commissions to have particular regard to the independent legal personality of a firm, continuity of business irrespective of changes of ownership, and the simplification of the solvent dissolution of a firm.

2.43 We intend to publish a discussion paper on the general law of partnership. Thereafter we propose to examine the Limited Partnerships Act 1907.

2.44 *Third Parties' Rights against Insurers.* A third party's right of action against an insurer comes into play only when the insured's liability to that third party has been established. This can be wasteful of time and money. We and the Law Commission are jointly examining the scope and operation of the Third Parties' (Rights against Insurers) Act 1930 in light of current law and market practices of the insurance industry.

2.45 *Other Law Commission projects.* We have to keep in view that the Scottish implications of the other work of the Law Commission may involve us in further work. It is not possible to plan for such work, but we recognise that it may have an impact on our planning of this Programme.