



Scottish Law Commission
promoting law reform

(SCOT LAW COM No 221)



annual report | 2009





Scottish Law Commission

promoting law reform

The Commission was established under the Law Commissions Act 1965

Our function

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

Our role

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



Commissioners and Chief Executive



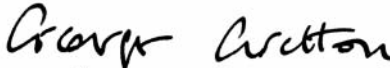
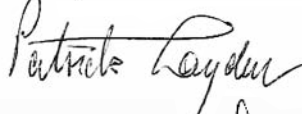
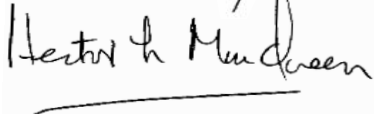
(Back row): Patrick Layden QC TD, Ms Laura J Dunlop QC, Professor Hector L MacQueen, Professor George Gretton

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

Annual Report 2009

To: Kenny MacAskill MSP, Cabinet Secretary for Justice

We are pleased to submit to the Scottish Ministers our Annual Report for the year to 31 December 2009.

| | |
|---|---------------------------------------|
|  | JAMES DRUMMOND YOUNG, <i>Chairman</i> |
|  | LAURA J DUNLOP |
|  | GEORGE GRETTON |
|  | PATRICK LAYDEN |
|  | HECTOR L MACQUEEN |



Malcolm McMillan, *Chief Executive*
8 February 2010

Laid before the Scottish Parliament by the Scottish Ministers under section 3(3) of the Law Commissions Act 1965.
February 2010

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Chairman's foreword

I am pleased to present the Commission's Annual Report for 2009. During the year we produced a significant number of discussion papers and reports, both under our Seventh Programme and in response to references from Ministers. The subjects covered include succession, unincorporated associations, the rule against double jeopardy, land registration and the permitted lifetime of trusts (both of the latter published early in 2010). Together with the Law Commission for England and Wales we have produced reports on consumer insurance and consumer remedies for faulty goods.

In the foreword to our last Annual Report I raised concern at the number of Commission reports that remain unimplemented. I am very pleased to record that both the Scottish Government and the Scottish Parliament have responded to our concerns. Since our last Annual Report was published, I have had meetings with Kenny MacAskill, the Cabinet Secretary for Justice, Bruce Crawford, the Minister for Parliamentary Business, Dr Ian McKee, the Deputy Convener of the Subordinate Legislation Committee, and Bill Aitken, the Convener of the Justice Committee, with a view to improving the implementation rate of Commission legislation. In June the Commission held a reception for MSPs at Holyrood to explain our work and the importance of systematic law reform. Our discussions with Ministers have produced results already. Procedures are under consideration to increase the capacity of Parliament to deal with Scottish Law Commission Bills. At the same time the Scottish Government has announced its intention to engage in a process of formal consultation on our Reports on Succession, Damages for Psychiatric Injury, Damages for Wrongful Death, and Limitation. On the criminal side, our Report on Rape and Other Sexual Offences has been implemented in the Sexual Offences (Scotland) Act 2009. Finally, in the Criminal Justice and Licensing (Scotland) Bill that is presently proceeding through the Scottish Parliament three of our reports are included; these are the Reports on Insanity and Diminished Responsibility, Age of Criminal Responsibility and Crown Appeals. In



addition, the Cabinet Secretary for Justice has agreed that it would be useful if, following the publication of our reports, the Government were to issue a statement of its position on our recommendations. This is excellent progress, and I look forward to seeing practical results from these changes.

Unfortunately the desire shown by the Scottish Government to promote the reform of Scots law is not replicated at a United Kingdom level. In 2003, together with the Law Commission for England and Wales, we published a Report on Partnership Law. In Scotland there is an almost universal view that major reform of this area of the law is plainly necessary; the law is based on a statute 120 years old, and has failed to keep up-to-date with modern commercial developments. The Report met with opposition from one section of the English legal profession, however, and the reaction of the Department of Trade and Industry (now the Department for Business, Innovation and Skills) was to decide that nothing should be done to implement the Report. This is not satisfactory so far as Scotland is concerned. In 2009 the Commission published a Report on Unincorporated Associations, another area of the law that is in serious need of reform. We have not yet had any reaction from the

United Kingdom Government. If the devolution settlement is to work properly, however, it is vital that United Kingdom Departments should take their responsibilities to Scotland seriously.

In view of the attitude of the Department of Trade and Industry to the reform of Scottish partnership law, I note with some concern a recommendation of the Calman Commission that the UK Insolvency Service (part of DBIS) should be made responsible for laying down rules to be applied by insolvency practitioners in Scotland as well as England and Wales; in effect this means the re-reservation of certain parts of insolvency law. It is not clear precisely what is meant by this recommendation, but if it means that all legislation bearing on insolvency is to be reserved to Westminster, under the control of DBIS, the result would, I fear, be that the sensible reform of Scottish commercial law becomes impossible.

Following extensive consultation we completed the preparation of our Eighth Programme of Law Reform and submitted it to Scottish Ministers in December. We are pleased that the Programme received Ministerial approval, and we are already working on a number of the projects in the Programme, including those on assignation of and securities over moveable property, the review of the law of contract and adults with incapacity.

In April Professor Joe Thomson's term of office as a Commissioner came to an end, and in September Colin Tyre's term of office also ended. During their time at the Commission both produced an enormous amount of work of the highest quality. Typical of their output are the last reports for which

each was responsible, those on Succession and Unincorporated Associations. We wish them both well, Professor Thomson in his retirement and Mr Tyre on his return to full-time practice at the Bar.

Professor Thomson and Mr Tyre have been succeeded as Commissioners by Professor Hector MacQueen and Ms Laura Dunlop QC. Professor MacQueen comes from Edinburgh University, and has an outstanding reputation as a commentator on the law of contract and intellectual property. He was in addition a member of an academic group that took part in the preparation of the Draft Common Frame of Reference, the document that contains principles, definitions and model rules for European private law. Ms Dunlop is a member of the Faculty of Advocates, and is the Procurator to the General Assembly of the Church of Scotland. Both are very well qualified for the work of the Commission, and we welcome them both.

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

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



THE HON LORD DRUMMOND YOUNG
Chairman

Publications 2009

| TITLE | PUBLICATION DATE |
|---|------------------|
| Discussion Paper on Double Jeopardy DP No 141 | 21 January 2009 |
| Annual Report 2008 Scot Law Com No 214 | 27 February 2009 |
| Report on Succession Scot Law Com No 215 | 15 April 2009 |
| Report on Consumer Remedies for Faulty Goods Scot Law Com No 216 (Joint Report with the Law Commission) | 4 November 2009 |
| Report on Unincorporated Associations Scot Law Com No 217 | 26 November 2009 |
| Report on Double Jeopardy Scot Law Com No 218 | 2 December 2009 |
| Report on Consumer Insurance Law: Pre-Contract Disclosure and Misrepresentation Scot Law Com No 219 (Joint Report with the Law Commission) | 15 December 2009 |

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

Introduction

Seventh Programme of Law Reform

2009 marked the final year of our Seventh Programme of Law Reform which outlined our main projects over the last five years.

During that period we completed the projects we proposed in the Programme on conversion of long leases, succession law and unincorporated associations. At the end of December 2009 we also completed our work on a review of land registration.

In addition to completing work on these Programme topics, we also completed a number of projects arising from Ministerial References made to us during the course of the last five years, some of which were substantial projects, while others had to be done within a short timescale. As a result, work on some of the projects in the Programme had to be delayed in order to deal with urgent references.

The Programme included a long-term project on the law of trusts, and a project on assignation of, and security over, incorporeal moveables. It also included a medium-term project on judicial factors, and one on provocation, self-defence, coercion and necessity. Work on these projects is being carried forward into our next Programme.

Eighth Programme of Law Reform

We submitted our Eighth Programme of Law Reform to the Scottish Ministers in December 2009, for their approval. The Programme outlines the main projects on which we intend to work over the next five years, until 2014.

We consulted widely in preparing the new Programme. As a result of comments we received we have decided to adjust the scope of two of the projects that are being carried forward from the Seventh Programme. A new project on security over corporeal moveable property will be combined with the existing project on security over, and assignation of, incorporeal moveable property.

We will also undertake a review of the law of homicide generally, which will include a review of provocation, self-defence, coercion and necessity, carried forward from the Seventh Programme. In addition we intend to undertake a short-term project to review the law relating to criminal liability of partnerships.

Following suggestions by consultees, we have included a project to consider further the law relating to adults with incapacity and in particular certain aspects of the new regime introduced by the Adults with Incapacity (Scotland) Act 2000, which implemented our Report published in 1995.

The Programme outlines a number of topics which we plan to review. One of these, on the law of contract, was suggested to us in the course of consultation on the draft Programme. Other topics included in the Programme are: compulsory purchase, heritable securities, and prescription and corporeal moveable property.

Further information about our Eighth Programme can be found on our website www.scotlawcom.gov.uk

References from Ministers

In addition to working on projects under our programmes of law reform, we also undertake projects on topics which come to us in the form of references from Scottish Ministers or a United Kingdom Department. Some of these projects require to be completed within a short timescale. As a consequence we sometimes require to adjust the timescale for completion of our programme work and on occasions medium-term projects, as well as long-term projects, are carried forward from one programme to the next.

During 2009 we completed work on our reference from Scottish Ministers on double jeopardy, which was the second part of a reference of November 2007 from Scottish Ministers. Work on the third part, similar

fact evidence and the *Moorov* doctrine, is continuing. We also completed work on our joint reference with the Law Commission on consumer remedies. We received no new references in 2009.

Implementation of our reports: general

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

In our last Annual Report we expressed concern about the rate of implementation of our reports in recent years.

Implementation is constrained by the availability of Parliamentary time and the number of legislative opportunities. We were therefore pleased that during 2009 a Bill was introduced in the Scottish Parliament to implement recommendations in three of our Reports.

Our last Annual Report recorded our concern that there was no formal procedure for the Scottish Government to respond to the Reports that we submit to Scottish Ministers. The Cabinet Secretary for Justice agreed in 2009 that it would be useful to issue a statement of the Government's position as regards recommendations in our reports. We were therefore pleased that recently in the case of our Report on Succession we received a Ministerial response to our recommendations.

Progress with implementation during 2009

Sexual Offences (Scotland) Act 2009

The Sexual Offences (Scotland) Act 2009 was passed by the Scottish Parliament in June 2009 and

received Royal Assent on 14 July 2009. The Act implements the recommendations in our Report on Rape and Other Sexual Offences, published in December 2007.

Criminal Justice and Licensing (Scotland) Bill

We welcomed the introduction in the Scottish Parliament of the Criminal Justice and Licensing (Scotland) Bill in March 2009. The Bill includes provisions to implement our Report on Crown Appeals (2008) and in particular our recommendation that the Crown should be able to appeal against court decisions that end solemn trials without a jury verdict, thereby allowing retrials to take place where the court upholds the Crown's appeal. It also contains provisions to increase the age of criminal responsibility from age 8 years to age 12 years, as recommended in our Report on Age of Criminal Responsibility (2002) and provisions to implement our recommendations relating to diminished responsibility in criminal proceedings, contained in our Report on Insanity and Diminished Responsibility (2004).

Third Parties (Rights Against Insurers) Bill

A Bill to give effect to the recommendations made in our joint Report with the Law Commission on Third Parties – Rights Against Insurers, published in 2001, was introduced in the House of Lords towards the end of 2009.

The Bill would replace the Third Parties (Rights against Insurers) Act 1930. The principal effect of the Bill would be to remove the existing requirement that the third party must establish the existence and amount of the insured's liability to it before it can proceed against the insurer. In terms of the Bill, the third party would be able to proceed against the insurer to establish both the insured's liability and the potential liability of the insurer.

In April 2008 the House of Lords approved the adoption, initially for a trial period, of new procedures for consideration of uncontroversial Law Commission Bills, under which Bills would be

referred to a "Second Reading Committee" which would function like a Grand Committee, with unlimited membership. Bills would then be committed to a Special Public Bill Committee, with powers to take evidence and then consider the Bill clause by clause in the usual way. The Third Parties (Rights Against Insurers) Bill is being taken forward as part of this trial.

Reports relating to the law of damages

Since 2004 we have published three Reports relating to the law of damages in Scotland:

- Report on Damages for Psychiatric Injury (2004);
- Report on Personal Injury Actions: Limitation and Prescribed Claims (2007);
- Report on Damages for Wrongful Death (2008).

The Scottish Ministers accepted our recommendation in the second of these Reports as regards prescribed claims. No legislation was required to give effect to that recommendation as it did not involve any change to the law.

In December 2009 the Scottish Government announced that it was considering the Reports and that it intended to consult on the topics covered by the Reports. We understand that a single consultation paper will be published during the course of 2010.

Further information about implementation of our reports can be found on the Publications page of our website
www.scotlawcom.gov.uk

Promoting law reform

During 2009 we maintained strong links with other bodies and organisations as part of our role in promoting law reform.

We continued to build on our relations with the Scottish Parliament and with Scottish Ministers to increase interest in our work and encourage greater commitment to implementation of our reports. We welcome developments in recent months in this regard. We also maintained close working relations with officials in the Scottish Government and we are grateful for the support they give us.

Some of our projects are undertaken jointly with the Law Commission for England and Wales. We continued to work closely with the Law Commission during 2009 not only on the joint projects, but more generally in promoting an awareness of law reform. We were pleased to welcome the Chairman of the Law Commission, Sir James Munby, who visited us in October.

In June the Chairman and Chief Executive attended a joint meeting of Law Commissions from England and Wales, Northern Ireland, Ireland and Jersey when common issues relating to law reform were discussed.

In October, Patrick Layden and our Parliamentary Counsel, Gregor Clark, gave evidence to the Subordinate Legislation Committee of the Scottish Parliament on behalf of the Commission on the Interpretation and Legislative Reform (Scotland) Bill.

Projects under our Seventh Programme of Law Reform

Introduction

As we mention above, our Seventh Programme finished at the end of December 2009 and is now superseded by our Eighth Programme which will guide much of our work over the next five years. We outline here work on the projects under the Seventh Programme during 2009. Those projects which have not been completed are being carried forward into the new Programme which, as mentioned above, includes a number of other areas of the law which we plan to review in the next few years.

Land registration

Project Team

Professor George Gretton, Commissioner
John Dods, Project Manager
Adam Machray, Legal Assistant
John Glover, Registers of Scotland

We submitted our Report on Land Registration to the Scottish Ministers in December 2009. It will be published early in 2010.

The Land Registration (Scotland) Act 1979 introduced a radically new system of land registration. Unsurprisingly, such a major change has not been free from problems. The aims of the project were to address those problems, while at the same time retaining the benefits of the new system. The changes recommended are thus evolutionary, building on the achievements of the 1979 Act.

We are grateful to the Registers of Scotland for their support and assistance throughout the project.

Trusts

Project Team

The Hon Lord Drummond Young, Commissioner
Charles Garland, Project Manager
Rebecca Reid, Legal Assistant

This is a major long-term project which is carried forward into our Eighth Programme.

Work on our review of trust law continued in 2009 with the preparation of our Discussion Paper on Accumulation of Income and Lifetime of Private Trusts (published in January 2010).

We envisage that this will be the final discussion paper in the current project. It deals with a number of long-standing rules which limit the period during which trusts may function in certain ways. The main ones are the rule restricting accumulation and the rule restricting the creation of successive liferents.

These rules have proved to be unclear, uncertain and a trap for the unwary; in addition, they can frustrate the wishes of reasonable and sensible testators. We consider that they hamper the attraction of Scots law as a jurisdiction for trusts. They can also be seen as an unreasonable restriction on testators' freedom. We recognise, though, that there is a balance to be struck between that freedom and the freedom of future generations to have unrestricted enjoyment of the assets in question. In other words, the "dead hand" of the testator should not be allowed to control assets to an unreasonable extent after death.

Our central proposal is to abolish these rules and create a new court power by which the terms of a long-term trust may be altered if, after a minimum period of time has elapsed (say, 25 years), it is clearly expedient to do so. In order to exercise the power (which is modelled on the existing *cy-près* jurisdiction in relation to public trusts), the court

would need to be persuaded that a significant change in circumstances had occurred since the trust was set up and that the alteration was justified by that change of circumstances. In this way testators will be free to set up trusts of whatever length they wish, for any lawful purpose. We believe that the proposed court power will be a sufficient and adequate measure to regulate "dead hand" control.

In relation to the future course of the project we have considered whether to issue a discussion paper on beneficiaries' remedies against trustees, with an examination of the constructive trust. Whilst recognising that this is an area of the law which is far from clear, we have decided not to proceed with it at the moment. Instead, our next publication will be a report covering those topics on which we have consulted so far which relate to trustees, trust administration and related issues. The accompanying legislation will update and replace the existing Trusts Acts.

Succession

Project Team

Professor Joe Thomson, Commissioner
(until end of April 2009)

David Nichols, Consultant
(until end of March 2009)

Charles Garland, Project Manager

Rebecca Reid, Legal Assistant

We completed work on this project in April 2009 with the publication of our Report on Succession.

The Report makes wide-ranging recommendations on the important question of who gets what on death. We cover situations where the deceased left a will (testacy) as well as where the deceased left no will (intestacy). If implemented, our recommendations would simplify the existing law which dates back to 1964, and modernise it to take account of current

family arrangements and public expectation of how estates should be distributed on death.

Most people in Scotland die without leaving a will and in our Report we recognise the great importance of simple and fair provisions to deal with intestate estates. Our recommendations aim to be both readily understandable and also to approximate to what most reasonable people would have provided in a will, had they made one. So, where the deceased is survived by either a spouse/civil partner or by issue (but not by both) we recommend that the survivor(s) take the whole estate. Where both survive, our recommendation is that the spouse/civil partner take the whole estate where it is less than £300,000 and that any excess over that sum be shared equally with the issue. We recognise that the figure of £300,000 may be controversial and indicate that the final decision on the precise figure is one for the Scottish Parliament. Where a deceased leaves neither a spouse/civil partner nor issue, the estate would be taken by parents, siblings or remoter relations in much the same way as at present. However, the estate would no longer be divided into heritable and moveable property, with separate rules applying to each: all assets belonging to the deceased at death would be taken together.

Where the deceased leaves a will the estate will generally be divided accordingly. However, we recommend that the current principle whereby close family members are protected against disinheritance should continue, but in a radically simplified form. Our recommendation is that a surviving spouse/civil partner be entitled to 25% of what he or she would have inherited if the deceased had not left a will. We found the question of what protection is to be offered to children to be very difficult, and there was no clear majority view amongst those who responded to our Discussion Paper. We therefore decided to offer two alternative sets of recommendations and to invite the Scottish Parliament to consider the options. So, we recommend *either* that all children, whether adult or

not, be entitled to 25% of what they would have taken on intestacy *or* that protection be limited to dependent children, who are to be entitled to a capital sum from the estate (but not from any part of the estate which is taken by a person – typically the surviving parent – who is under an obligation to aliment the child).

In relation to cohabitants the current legislation, although relatively recent, is widely recognised to suffer from certain defects. We recommend a new and simpler approach. First, the criteria a person must satisfy in order to be regarded as a cohabitant are specified. Then the court is required to determine, as a percentage, the degree to which the relationship between the deceased and the cohabitant should be treated as equivalent, for the purposes of succession, to that between spouses/civil partners. Finally, the cohabitant is entitled to that percentage of what he or she would be entitled to if the parties had been married/in a civil partnership. This not only gives the cohabitant an entitlement on intestacy but also offers protection against disinheritance in testate cases. For example, where the court determines the appropriate percentage to be 75%, the cohabitant is entitled, on intestacy, to 75% of the whole estate (if under £300,000) and, where the deceased made inadequate, or no, provision in a will, to 75% of a surviving spouse/civil partner's entitlement by way of protection against disinheritance.

In July 2009 the Scottish Ministers made an initial response to our Report, indicating that, as the legislation governing succession was over 40 years old, there was a strong case for reform and that the Scottish Government would undertake further consideration of the issues in our Report.

Assignment of and security over incorporeal moveable property

Project Team

Professor George Gretton, Commissioner

John Dods, Project Manager

Adam Machray, Legal Assistant

This is a substantial long-term project which was included in our Seventh Programme.

Although substantial work on the project had to be postponed until completion of the project on land registration, we had initial discussions with interested groups, including the financial sector, about the underlying financial and economic background and the current problems. We also undertook comparative research to see how the issues are dealt with in other jurisdictions.

We have decided to combine this project with a new one on security over corporeal moveable property, which is also in need of reform. As a result, the combined project will now be undertaken as part of our Eighth Programme of Law Reform.

As work on the land registration project was completed at the end of December 2009, we intend to concentrate resources during 2010 on this project. An important development during 2009 was the publication of the Draft Common Frame of Reference which in Books III and IX contains material of relevance to the project.

Unincorporated associations

Project Team

Colin Tyre QC, Commissioner
(until end of September 2009)

Gillian Swanson, Project Manager

Garry MacLean, Legal Assistant

We completed work on this project in November 2009 when our Report on Unincorporated Associations was published.

At present, associations and clubs are not recognised as legal entities separate from their members. This creates practical problems such as preventing such organisations from entering into contracts.

Lack of legal personality can also cause unforeseen repercussions for members. For example, under the current law it is possible that a member of an unincorporated association could find himself or herself personally liable in delict to a third party injured at an event organised by the association. Often members of associations are unaware that they are exposing themselves to potential personal financial risk in this way.

In our Report, we recommend a simple regime with the minimum of administrative burdens. Separate legal personality would be accorded to associations which satisfy certain conditions. The main conditions are that an association has at least two members; that its objects do not include making a profit for its members; and that it has a constitution containing certain minimum specified provisions. These provisions are: the association's name; its purpose; membership criteria; the procedure for the election or appointment of those managing it; the powers and duties of its office-bearers; the rules for distributing its assets if it is dissolved; and the procedure for amending its constitution. Many associations will already have constitutions which contain these provisions.

To ensure that as many associations as possible benefit from the reforms, we recommend that all associations which meet these criteria should be treated as separate legal entities unless they resolve to opt out.

Our recommendations also address the protection of those who might have contractual or other dealings with an association with separate legal personality; for example, such an association will be required to disclose its name and official address on documents and publications and certain documents must be made publicly available on application to that address.

The law of unincorporated associations is reserved to the United Kingdom Parliament in terms of the Scotland Act 1998. For that reason any legislation to implement our recommendations would require to be passed by the United Kingdom Parliament.

Judicial factors

Project Team

Patrick Layden QC TD, Commissioner

Gillian Swanson, Project Manager

Laurence Diver, Legal Assistant

The law on judicial factors is governed principally by 19th century legislation which is so out of date that it no longer adequately addresses the concerns and requirements of those who come into contact with it. We consider that there is a continuing need for judicial factors in modern times and, consequently, our aim is to make proposals as to how the current law might be clarified and simplified.

We have had extensive preliminary meetings with the Accountant of Court, the Director of the Law Society of Scotland's Interventions Department and the Office of the Scottish Charity Regulator as well as with practitioners with experience in this field. A number of issues have emerged, for example:

- The procedure for appointment of judicial factors requires to be streamlined;
- The functions, powers and duties of judicial factors require to be clarified and modernised;
- The procedure for formal discharge of a judicial factor can be expensive and time-consuming.

From time to time, we have had to suspend work on this project so that we could give priority to other projects. The project is therefore being carried forward into our Eighth Programme. Recently we have been able to resume work on our discussion paper which we aim to publish in spring 2010.

Provocation, self-defence, coercion, and necessity

Project Team

Patrick Layden QC TD, Commissioner

Alastair Smith, Project Manager

Laurence Diver, Legal Assistant

Our Seventh Programme of Law Reform included a criminal law project to review the defences of provocation, self-defence, coercion, and necessity. We had hoped to complete the project within the period of the Programme, but we had to divert our resources to completing work on urgent criminal law references on Crown appeals and double jeopardy. For that reason we have carried the project forward into our Eighth Programme. Instead of completing it as a separate project we have decided to combine it with a review of the law of homicide generally. We intend to start work on the project once we have completed work on the reference relating to similar fact evidence and the *Moorov* doctrine. The aim will be to complete the project during the period of the Eighth Programme.

References from Scottish Ministers

Double jeopardy

Project Team

Patrick Layden QC TD, Commissioner

Alastair Smith, Project Manager

Laurence Diver, Legal Assistant

We completed work on this project in December 2009, when we published our Report on Double Jeopardy. This topic was the second part of the reference on criminal law topics, received from the Scottish Ministers in November 2007. The first part of the reference concerned the topic of Crown appeals.

Scots law has long recognised a rule against multiple trials for the same offence. However, the precise scope of this rule was unclear. Our Report recommends that the rule against multiple trials for the same offence should be set out clearly in statute. We also recommend that this clear rule against multiple trials for the same offence should be supplemented by a broader rule against multiple trials arising out of the same, or substantially the same, acts of the accused.

We recommend that despite these rules, it should be possible to retry an acquitted person where it can be shown that the trial which resulted in acquittal was tainted by an offence against the course of justice, such as the bribery or intimidation of witnesses or jurors. It should also be possible for an acquitted person to be retried where, following the acquittal, that person credibly admits to having committed the offence to which the acquittal relates.

The Report considers the question of whether an exception should be made to the rule against double jeopardy in a case in which an acquittal is followed by the discovery of significant new evidence of guilt. We regarded the arguments on this question to be finely balanced, and the Report makes no

recommendation as to whether or not such an exception should be introduced. The Report does, however, contain a number of proposals relating to the appropriate scope of a new evidence exception, should the Scottish Parliament decide that such an exception should be introduced. We recommend that any such exception should be restricted to the most serious offences - murder and rape - but that the Scottish Ministers should be empowered, with the approval of the Parliament, to alter the list of offences to which the exception might relate. We recommend that any such exception should apply only where the new evidence is highly significant. We also recommend that any such exception should apply only prospectively, to those crimes for which the first trial takes place after the introduction of the exception.

In response to our Report the Cabinet Secretary for Justice, Kenny MacAskill, said that change was needed and that the Scottish Government would bring forward new legislation at the earliest practicable opportunity.

Similar fact evidence and the Moorov doctrine

Project Team

Patrick Layden QC TD, Commissioner

Alastair Smith, Project Manager

Laurence Diver, Legal Assistant

This is the third topic covered by the reference from the Scottish Ministers in November 2007. The project concerns certain evidential issues: the admissibility of evidence of bad character or of previous convictions, the admissibility of similar fact evidence, and what is called the *Moorov* doctrine.

"Similar fact evidence" is evidence which relates to misconduct other than that with which the accused is charged, but which may be seen as rendering it more likely that the accused committed that

offence. Under this broad definition, evidence of bad character or of previous convictions may be seen as examples of similar fact evidence.

At present, it is not generally possible in Scotland for the prosecution to present evidence of the commission of offences which are not themselves charged, or which do not arise as part of the facts and circumstances surrounding a charged offence.

The project involves consideration of whether the present law is satisfactory or whether it should be changed to allow the introduction, in certain circumstances, of evidence of an accused's uncharged misconduct, perhaps including evidence of the accused's having been accused, acquitted or convicted of similar offences.

The *Moorov* doctrine is a mechanism which applies where a person is accused of two or more separate offences, connected in time and circumstances. In such a case, where each of the offences charged is spoken to by a single credible witness, that evidence may corroborate, and be corroborated by, the other single witnesses, so as to enable the conviction of the accused on all the charges. In order for the doctrine to operate, each of the offences must be competently charged. It is not possible to rely for corroboration of a charge upon evidence of conduct, however similar, in respect of which the accused has previously been convicted or acquitted.

The operation of the doctrine involves similar issues to cases of similar fact evidence, since it permits evidence relating to one alleged crime to be used in support of a charge relating to a separate incident.

We have been considering the origins and present state of the doctrine, and whether any reform is required. In particular, we intend to consider whether it would be appropriate, as part of a wider reform of the law of similar fact evidence, to allow corroboration to be found in evidence of similar offences which cannot be tried on the same indictment, such as, for example, offences in relation

to which the accused has already been tried and acquitted or convicted.

We aim to publish a discussion paper in late spring 2010 inviting comments on our proposals for reform.

Joint projects with the Law Commission for England and Wales

We continued to work during 2009 on a number of projects along with the Law Commission for England and Wales. Our work on joint projects relates mainly to areas of the law which are reserved to the United Kingdom Parliament in terms of the Scotland Act 1998.

Insurance contract law

Project Team

Colin Tyre QC, Commissioner
(until end of September 2009)

Professor Hector MacQueen, Commissioner
(since September 2009)

Gillian Swanson, Project Manager

Garry MacLean, Legal Assistant

We are assisting the Law Commission with this major project which has been carried forward into their Tenth Programme of Law Reform.

The project is looking at two aspects of insurance, namely consumer insurance and business insurance.

It is widely agreed by consumer groups, lawyers, brokers and indeed the insurance industry that the law regarding pre-contractual consumer insurance is in urgent need of reform. For that reason during 2009 we gave priority to this part of the project. Our joint Report on Consumer Insurance Law: Pre-Contract Disclosure and Misrepresentation was published in December 2009.

Although the current law requires a consumer to volunteer information about anything which a "prudent insurer" would consider relevant, most consumers are unaware that they are under such a duty. Even if they are aware of it, they usually have little idea of what an insurer might think relevant. Most insurers now accept that they should ask questions about the things they want to know.

Accordingly, in the joint Report, we recommend replacing the duty to volunteer information with a duty on consumers to take reasonable care to answer the insurer's questions fully and accurately. If consumers do volunteer information, they must take reasonable care to ensure that the information is not misleading.

Where an insurer has been induced by a misrepresentation to enter into an insurance contract, under our recommendations the insurer's remedy will depend on the consumer's state of mind. In relation to *reasonable* misrepresentations, we recommend that the insurer must pay the claim. In relation to *careless* misrepresentations, we recommend a proportionate remedy, based on what the insurer would have done had it known the facts. For example, if the insurer would have added an exclusion, the insurer need not pay claims which fall within the exclusion but must pay all other claims. If the insurer would have charged more, it must pay a proportion of the claim. In relation to *deliberate or reckless* misrepresentations, we recommend that the insurer may refuse the claim.

Our recommendations reflect the approach already taken by the Financial Ombudsman Service and generally accepted good practice within the industry. Our recommended reforms would, however, make the law simpler and clearer, allowing both insurers and insureds to know their rights and obligations. Insurers would therefore be less likely to turn down claims unfairly, and consumers would have greater confidence in the insurance industry.

Insurance is often bought through intermediaries, who may use a variety of titles (such as "broker", "agent" or "consultant"). In law, if an agent acts for the consumer, the consumer is held responsible for the agent's actions. This means that if the consumer's agent acted deliberately or recklessly then, under our recommended scheme, the insurer could avoid the claim. If the agent acted carelessly, a

compensatory remedy would be applied. This is true even if the consumer had acted reasonably throughout the process. The consumer would then face the difficulty of bringing a claim against the intermediary. On the other hand, if the intermediary acted as an agent for the insurer, the insurer would be required to pay the claim. It could then pursue its own remedy against the intermediary. It is therefore important to know for whom an intermediary acts when helping a consumer to complete an insurance application. We recommend a statutory code, based largely on the existing law, as supplemented by Financial Ombudsman Service practice and industry understanding: An intermediary is considered to act for the insurer if the intermediary is the appointed representative of the insurer; the insurer has given the intermediary express authority to collect the information as its agent; or the insurer has given the intermediary express authority to enter into the contract on the insurer's behalf. In other cases, the intermediary is presumed to act for the consumer unless it appears that it acts for the insurer. The issue would need to be determined by looking at all the circumstances.

In addition, the Report recommends the abolition of "basis of the contract" clauses and makes special provision for group schemes, where one party (typically an employer) arranges insurance to benefit members of the group (typically employees). The Report also deals with situations where one consumer takes out insurance on the life of another and prevents insurers from contracting out of the recommended scheme to the detriment of the consumer.

As there is also support for reform of pre-contractual *business* insurance law, we have returned to that topic with a view to preparing a policy statement on non-disclosure and misrepresentation in business insurance. There are also several other remaining issues within the project generally such as damages for late payment, post-contractual good faith and insurable interest.



Gregor Clark, Patrick Layden and Malcolm McMillan at a Commission meeting

Consumer remedies

Project Team

The Hon Lord Drummond Young, Commissioner

Gillian Swanson, Project Manager

Laurence Diver, Legal Assistant

We completed this project in November 2009 with the publication of a joint Report with the Law Commission on Consumer Remedies for Faulty Goods.

In the UK consumers are currently entitled to reject faulty goods and obtain a refund, providing they do so "within a reasonable time." But, rather confusingly, UK consumers' first remedy is repair or replacement in terms of parallel remedies introduced to implement the European Consumer Sales Directive.

In October 2008, the European Commission proposed a new directive on consumer rights which, if adopted as published, would mean that the UK would have to abolish the right to reject. When we consulted on our proposals for reform, there was strong support for retention of the right to reject goods.

Our Report makes recommendations against the background of the proposed directive. Our

recommendations are intended to be part of the current European debate about the proposed directive, with a view to improving the remedies suggested in it. We think that the law should be easily understood and fair to both consumers and retailers.

We believe that the right to reject should be retained in the UK as a short-term remedy of first instance. It is a simple, easy to use remedy which inspires consumer confidence. Our research indicated that consumers valued the right to reject very highly and generally retailers were not opposed to it.

The main problem with the right to reject is uncertainty over how long it lasts. We recommend that consumers should normally have 30 days within which to reject goods. We think this would represent a reasonable time to test the goods and this period was supported by consultees. It would be important for there to be flexibility to allow for shorter or longer periods to reject in certain circumstances. For example, in the case of perishable goods, a shorter period would be more appropriate.

Under the Consumer Sales Directive, where a retailer is unable to repair or replace faulty goods within a reasonable time or without significant inconvenience, the consumer is entitled to ask for rescission or a reduction in price. It is often difficult to know what constitutes "a reasonable time" or "significant inconvenience". As a result, consumers may become trapped into a cycle of failed repairs. We recommend that in future consumers should be entitled to ask for a refund or price reduction after one failed repair or one failed replacement; or where the goods have proved dangerous; or where the retailer has behaved so unreasonably as to undermine trust between the parties.

The UK Minister for Further Education, Skills, Apprenticeships and Consumer Affairs has acknowledged receipt of the joint Report and has undertaken to consider our recommendations in the context of the ongoing negotiations on the proposed directive.

Level crossings

Project Team

Professor George Gretton, Commissioner

Susan Sutherland, Project Manager

Susan Robb, Solicitor

Adam Machray, Legal Assistant

The Law Commission's Tenth Programme of Law Reform includes a project to review the law relating to level crossings. Although the Law Commission is in the lead, it is being taken forward as a joint project as much of the relevant legislation applies to Scotland as well as to England and Wales. The project arose following concerns raised by the Office of Rail Regulation (ORR) that the legislation relating to level crossings was in need of review.

Unlike many of our law reform projects which concern core areas of Scots law such as delict, contract, property law or criminal law, this is a project involving aspects of the law on which we had little prior knowledge. For that reason we have had to undertake a great deal of research into the relevant legislation spanning not only railways, but planning, roads, and health and safety, as well as recent legislation in Scotland relating to access to land.

The project is complicated by the fact that the relevant legislation is scattered over various parts of the Statute Book and is contained in a combination of public general Acts, private Acts (for example those relating to the former British Transport Commission and numerous British Railways Acts) and statutory instruments as well as administrative orders made under statutory powers. Another complication arises from the fact that whilst health and safety law and most aspects relating to railways are reserved to the United Kingdom Parliament under the Scotland Act 1998, other areas of law which are relevant to level crossings (for example, roads, planning and access to land) fall within the legislative competence of the Scottish Parliament.

Work started in 2009 on preparation of a joint consultation paper. We have been looking in particular at possible ways of improving the procedures for closure of level crossings and considering whether changes are needed as regards regulation of safety at level crossings. We have also been considering whether there may be scope for improving consultation and co-operation between the various parties concerned with level crossings so as to encourage more involvement at a local level in decision-making about level crossings.



A full barrier level crossing in operation

During 2009 we had a number of meetings with the key stakeholders, including ORR, Network Rail, the Rail Safety and Standards Board as well as the Department for Transport and Transport Scotland. In December we had a useful meeting with the advisory group, set up by the Law Commission, to discuss our provisional policy approach to reform.

We are aiming to publish the joint consultation paper during 2010.

Progress on our law reform projects

Projects under our Seventh Programme

| Project | Discussion Paper / Report | Current position |
|--|--|---|
| Land registration | <p>Discussion Papers on -</p> <ul style="list-style-type: none"> • Land Registration: Void and Voidable Titles (No 125) published February 2004 • Land Registration: Registration, Rectification and Indemnity (No 128) published August 2005 • Land Registration: Miscellaneous Issues (No 130) published December 2005 | Report submitted to Scottish Ministers December 2009/ project completed |
| Trusts | <p>Discussion Papers on -</p> <ul style="list-style-type: none"> • Breach of Trust (No 123) published September 2003 • Apportionment of Trust Receipts and Outgoings (No 124) published September 2003 • Trustees and Trust Administration (No 126) published December 2004 • Variation and Termination of Trusts (No 129) published December 2005 • The Nature and the Constitution of Trusts (No 133) published October 2006 • Liability of Trustees to Third Parties (No 138) published May 2008 • Accumulation of Income and Lifetime of Private Trusts (No 142) published January 2010 <p>Report on Variation and Termination of Trusts (Scot Law Com No 206) published March 2007</p> | <p>Working on Report and draft Bill covering trustees, trust administration and related issues</p> <p>Project carried forward into the Eighth Programme of Law Reform</p> |
| Succession | <p>Discussion Paper on Succession (No 136) published August 2007</p> <p>Report on Succession (Scot Law Com No 215) published April 2009</p> | Project completed |
| Assignment of and security over incorporeal moveable property | | Research work continuing |
| Unincorporated associations | <p>Discussion Paper on Unincorporated Associations (No 140) published December 2008</p> <p>Report on Unincorporated Associations (Scot Law Com No 217) published November 2009</p> | Project completed |

| | | |
|--|--|--|
| Judicial factors | | Work progressing on discussion paper |
| Provocation, self-defence, coercion, and necessity | | Project carried forward into the Eighth Programme of Law Reform as part of a review of the law of homicide |

References from Ministers

| Project | Discussion Paper / Report | Current position |
|--|--|-----------------------------|
| Double jeopardy | Discussion Paper on Double Jeopardy (No 141) published January 2009 Report on Double Jeopardy (Scot Law Com No 218) published December 2009 | Project completed |
| Similar fact evidence and the <i>Moorov</i> doctrine | | Working on discussion paper |

Joint projects with the Law Commission for England and Wales

| Project | Joint Consultation Paper / Report | Current position |
|------------------------|---|--|
| Insurance contract law | Consultation Paper on Insurance Contract Law: Misrepresentation, Non-Disclosure and Breach of Warranty by the Insured (No 134) published July 2007 Report on Consumer Insurance Law: Pre-Contract Disclosure and Misrepresentation (Scot Law Com No 219) published December 2009 | Work continuing, initially on damages for late payment |
| Consumer remedies | Consultation Paper on Consumer Remedies for Faulty Goods (No 139) published November 2008 Report on Consumer Remedies for Faulty Goods (Scot Law Com No 216) published November 2009 | Project completed |
| Level crossings | | Work continuing on joint consultation paper |

Consolidation and statute law repeals

Consolidation

Project Team

The Hon Lord Drummond Young, Commissioner

Susan Sutherland, Project Manager

Susan Robb, Solicitor

Under the Law Commissions Act 1965 one of our functions is to undertake work on consolidation of legislation. This work involves preparing a draft Bill to bring together earlier enactments on an area of law. The aim is to make the relevant provisions easier to find and more user-friendly and at the same time to tidy up the Statute Book.

Bankruptcy legislation

During 2009 we continued work on preparation of a draft Bill to consolidate the legislation relating to bankruptcy in Scotland. This will be the second Scottish consolidation project since devolution.

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

We have been working closely with the Accountant in Bankruptcy's Office who are supporting the project. We have also been liaising with colleagues in the Scottish Government with policy responsibility for this area of law.

We had hoped to complete work on a draft Bill by the end of 2009. However, we have decided to delay completion of the draft in view of the introduction on 1 October 2009 of the Home Owner and Debtor Protection (Scotland) Bill which contains provisions relating to bankruptcy. We think it would be sensible for our consolidation Bill to take account of that Bill when it is passed.

We are aware that there are a number of other important areas of the Scottish Statute Book that are in need of consolidation. We would like to see a programme of consolidation work continue once the work on bankruptcy has been completed. This would require continued support from the Scottish Government and the availability of drafting resources, as well as time for consideration of consolidation Bills by the Scottish Parliament.

Statute law repeals

Project Team

The Hon Lord Drummond Young, Commissioner

Susan Sutherland, Project Manager

Susan Robb, Solicitor

We also have a duty under the Law Commissions Act 1965 to recommend the repeal of legislation which has become obsolete or otherwise unnecessary. This work complements our work on consolidation and is aimed at keeping legislation up to date and making it easier for people to use.

Since 1965 there have been eighteen Statute Law Repeals Acts implementing the Law Commissions' draft Bills.

We undertake this work jointly with the Law Commission for England and Wales. We assist with the preparation of repeal proposals and consult with appropriate bodies as regards any repeal proposals relating to Scotland.

In addition we identify appropriate Scottish provisions that are suitable for repeal. For example, during 2009 we identified a number of Two Pennies Scots Acts dating back to 1798 as suitable for repeal. The purpose of each of the Acts, which apply to Scotland only, was to enable the local burgh to levy a duty of two pennies Scots on every Scots pint of ale, porter or beer brewed or sold in that burgh. The monies

raised were added to burgh funds and applied for public purposes such as the building of roads. We have received no objections to the proposals.

During 2009 we and the Law Commission undertook consultation on proposed repeal of legislation relating to railways - rates and charges. The Acts involved range over the years 1853 to 1909, and all pre-date the grouping of the national railway system in 1923. The Acts were mainly intended to confirm provisional orders made by the Board of Trade, setting down the maximum rates and charges to be levied by rail operators for carrying various prescribed classes of merchandise. With one exception, the railway companies concerned all operated within Great Britain. Some of the repeal proposals had a Scottish element and for that reason we consulted with interested bodies in Scotland.

Work progressed well during 2009 on preparation of the current draft Bill. We hope that this draft Bill, together with an accompanying report, will be published in early 2012.

Law reform publications planned for 2010

SLC Discussion Papers

- Judicial Factors
- Similar Fact Evidence and the *Moorov* Doctrine

Joint Consultation Papers with the Law Commission

- Level Crossings

SLC Reports

- Land Registration



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The Hon Lord James Drummond Young, Chairman
 Ms Laura Dunlop QC
 Professor George Gretton
 Patrick Layden QC TD
 Professor Hector MacQueen

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Scottish Parliamentary Counsel (Consultant)

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Project advisory groups

Introduction

One of the ways in which we seek to consult and engage with stakeholders is by discussing our proposals with advisory groups of experts on the various areas of the law which we are reviewing. The members of the groups give their time to assisting us without remuneration. We are very grateful to them for the contribution which they make to the process of formulating our recommendations for reform.

Land registration

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

Insurance law

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

Trusts

Alan Barr *University of Edinburgh*
Andrew Dalgleish *Solicitor*
Frank Fletcher *Solicitor*
Derek Francis *Advocate*
Nicholas Holroyd *Advocate*
Simon Mackintosh *Solicitor*
Sandy McDonald *Solicitor*
James McNeill QC
Scott Rae *Solicitor*

Succession

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

Running costs

The Commission is funded by the Scottish Government. Our running costs for 2009 were offset by payment received from Skills for Justice and the Royal Commission on the Ancient and Historic Monuments of Scotland for use of part of our office accommodation.

| Expenditure | Year to 31 December 2009 | Year to 31 December 2008 |
|--|-----------------------------|-----------------------------|
| Salaries – Commissioners (including national insurance contributions, superannuation payments and pensions to former Commissioners) | £520,051 | £628,200 |
| Salaries – Chief Executive and legal staff (including national insurance contributions, superannuation payments and consultants' fees and expenses) | £664,797 | £630,100 |
| Salaries – administrative staff (including national insurance contributions and superannuation payments and agency staff costs) | <u>£142,178</u> | <u>£173,300</u> |
| | £1,327,026 | £1,431,600 |
| Accommodation (including maintenance, rates and utilities) | £66,042 | £46,500 |
| Printing and publishing (including costs of books and library purchases, binding, machinery maintenance, photocopying, reprographic services and stationery) | £119,168 | £90,100 |
| Telephone and postage | £11,139 | £10,600 |
| Travel and subsistence | £9,509 | £18,100 |
| Miscellaneous (including training, office services and hospitality) | £8,423 | £8,800 |
| Total | £1,541,307 | £1,605,700 |

Our law reform work involves-

- **Research** into the existing Scots law and review of comparative law
- **Analysis of problems** with the current law
- **Development of policies** for reform
- **Consultation** on proposed reforms
- **Consideration of consultation responses**
- **Review of policy** in the light of consultation
- **Publication of a report** to Ministers with recommendations for reform, including in most cases a draft Bill to implement the recommendations. Implementation of the recommendations in our reports requiring legislation is taken forward in the Scottish Parliament or in some cases in the UK Parliament at Westminster

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