



Scottish Law Commission
promoting law reform

(SCOT LAW COM No 220)



eighth programme
of law reform



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

eighth programme
of law reform

Eighth Programme of Law Reform

To: Kenny MacAskill MSP, Cabinet Secretary for Justice

We have the honour to submit for approval by the Scottish Ministers our Eighth Programme of Law Reform to commence on 1 January 2010.

James Drummond Young

JAMES DRUMMOND YOUNG, *Chairman*

Laura J. Dunlop

LAURA J DUNLOP

George Gretton

GEORGE GRETTON

Patrick Layden

PATRICK LAYDEN

Hector L MacQueen

HECTOR L MACQUEEN

Malcolm McMillan

Malcolm McMillan, *Chief Executive*
22 December 2009

Laid before the Scottish Parliament by the Scottish Ministers under section 3(2) of the Law Commissions Act 1965
February 2010

© Crown Copyright 2010

The text in this document (excluding the Scottish Law Commission logo) may be reproduced free of charge in any format or medium providing it is reproduced accurately and not used in a misleading context. The material must be acknowledged as Crown copyright and the title of the document specified.

Where we have identified any third party copyright material you will need to obtain permission from the copyright holders concerned.

For any other use of the material in this document please write to the Office of the Queen's Printer for Scotland at Admail ADM4058, Edinburgh EH1 1NG
or e-mail: licensing@oqps.gov.uk.

ISBN: 9780108882470

Printed in the UK for The Stationery Office Limited on behalf of the Queen's Printer for Scotland.

02/10

Printed on paper containing 75% recycled fibre content minimum.

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:

The Honourable Lord Drummond Young, *Chairman*
Laura J Dunlop, QC
Professor George L Gretton
Patrick Layden, QC TD
Professor Hector L MacQueen.

The Chief Executive of the Commission is Malcolm McMillan. Its offices are at 140 Causewayside, Edinburgh EH9 1PR.

Tel: 0131 668 2131
Fax: 0131 662 4900
Email: info@scotlawcom.gov.uk

Or via our website at www.scotlawcom.gov.uk – select "Contact"

NOTES

1. For those wishing further copies of this paper it may be downloaded from our website or purchased from TSO (www.tsoshop.co.uk).
2. If you have any difficulty in reading this document, please contact us and we will do our best to assist. You may wish to note that an accessible electronic version of this document is available on our website.

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

Contents

	<i>Paragraph</i>	<i>Page</i>
Chairman's foreword		9
Part 1 Introduction		
Background	1.1	11
Seventh Programme: completed projects and ongoing work	1.3	11
Eighth Programme: project selection criteria	1.4	11
Consultation	1.5	11
Basis of the Eighth Programme	1.16	13
Advice to government departments and the Scottish Ministers	1.19	14
Similar fact evidence and the Moorov doctrine	1.21	14
Joint work with the Law Commission for England and Wales	1.22	14
Insurance law	1.25	14
Level crossings	1.29	15
Consolidation and statute law revision	1.35	16
Part 2 Eighth Programme of Law Reform		
Preliminary	2.1	17
Security over corporeal and incorporeal moveable property; assignation of incorporeal moveable property	2.4	17
Trusts	2.7	17
Judicial factors	2.11	19
Homicide	2.13	19
Criminal liability of partnerships	2.15	20
The law of contract in the light of the DCFR (Draft Common Frame of Reference)	2.16	20
Adults with incapacity	2.22	21
Compulsory purchase	2.25	22
Heritable securities	2.27	22
Prescription and corporeal moveable property	2.34	24
Appendix A		
Seventh Programme projects		25
Appendix B		
List of those consulted during preparation of the Eighth Programme		26
Appendix C		
References ongoing or started during the Seventh Programme		27
Appendix D		
Joint reports with the Law Commission for England and Wales completed during the Seventh Programme		28

Chairman's foreword

Our Eighth Programme of Law Reform sets out the projects on which we intend to work over the next five years. It continues the aims and methods of our last two Programmes.

The new Programme includes a significant element of commercial law in the form of projects on moveable property and the law of contract; to some extent heritable securities falls into the same category. Ensuring that Scotland has a modern and efficient system of commercial law is of great importance in promoting the development of the economy, and we hope that the foregoing projects will help to achieve that end. In addition, we intend to undertake a review of the law of compulsory purchase, where we received strong representations that the existing law is archaic and inefficient and to that extent acts as a brake on economic development.

In the non-commercial field, we intend to undertake projects on homicide and the criminal liability of partnerships, and also on adults with incapacity; all of these are areas where we are persuaded that the law requires examination with a view to reform.

The Programme has been the subject of extensive consultation with the legal profession, the judges, a wide range of academic lawyers and a substantial number of government and public bodies. We are very grateful to all those who commented on our draft proposals and suggested other topics that we might consider.

We look forward to making progress with the topics in the Programme, together with such other projects as come to us by Ministerial reference. We know that we can rely on the skill and dedication of our staff and the colleagues, professional and academic, who assist us so willingly in our projects.

James Drummond Young

THE HON LORD DRUMMOND YOUNG
Chairman

Part 1 Introduction

Background

1.1 The Commission has a duty under section 3 of the Law Commissions Act 1965 to prepare and submit to Scottish Ministers programmes for the examination of different branches of the law with a view to reform. This is the eighth such programme submitted for approval.¹ This Programme, as with the previous three, represents a rolling programme. It includes ongoing work from the Seventh Programme as well as identifying new projects to be undertaken. The Programme is for a period of 5 years, from the beginning of 2010 until the end of 2014.

1.2 We are also required² to make a recommendation as to the agency by which any examination of branches of the law should be carried out. We recommend that the projects identified in this Programme should be undertaken by this Commission rather than by any other agency.

Seventh Programme: completed projects and ongoing work

1.3 As background, we highlight in the table at Appendix A the projects that we have undertaken in terms of the Seventh Programme, which commenced in January 2005 and ran until the end of 2009. The table indicates the Seventh Programme projects that we have completed and also the work which will continue into the Eighth Programme.

Eighth Programme: project selection criteria

1.4 For the purpose of selecting new projects for this Programme we adopted the following criteria:

- *importance*: the extent to which the law is unsatisfactory (for example, unfair, unclear, inefficient, unduly complex or outdated); and the potential benefits likely to accrue from undertaking reform of the law;
- *suitability*: whether the issues concerned are predominantly legal rather than political and whether there is any other agency better placed to examine the topic in question;
- *resources*: the expertise and experience of Commissioners and legal staff and, in relation to projects where there may be a substantial role for a consultant, the availability of adequate funding; and the need for a mix of projects in terms of scale and timing in order to achieve a balance of workload among Commissioners and facilitate effective management of the Programme.

Consultation

1.5 We consulted widely in preparing this Programme. In February 2009 we issued a consultation letter to key legal interests and bodies, setting out our initial proposals for the Programme. A list of these consultees is set out in Appendix B. We sought comments and new suggestions for law reform topics. We also held meetings with the Law Reform Committee of the Law Society of Scotland, and with representatives of the Scottish Law Schools, to discuss the possible content of the Programme.

¹ The previous programmes are: Scot Law Com No 1 (1965); Scot Law Com No 8 (1968); Scot Law Com No 29 (1973); Scot Law Com No 126 (1990); Scot Law Com No 159 (1997); Scot Law Com No 176 (2000); Scot Law Com No 198 (2005).

² See 1965 Act, s 3(1)(b).

1.6 Informed by comments from these consultees, we proceeded to a second stage of the consultation process. We consulted the legal profession, via notices in the legal press, and we consulted the public via our website, and through the distribution of a consultation leaflet. Copies of the leaflet were issued to many different places for display to the public – to public libraries, university and college libraries, Citizens' Advice offices, local authority offices, Scottish MPs' and MSPs' constituency offices, sheriff courts, and to a large number of legal firms, ensuring a geographic spread across Scotland, including rural and island areas. We consider that this consultation process was valuable not only in order to seek contributions, but also to raise awareness of the role and functions of the Commission.

1.7 For the first time, our website contained an online section about the Programme. These online pages outlined our initial proposals, and sought comments and suggestions online.³ Sixteen contributions were posted online. This was an interesting and useful development in undertaking a consultation.

1.8 We received a total of 60 responses, including the online responses, from a range of consultees which included members of the public, public officials, solicitors and academic lawyers. We are most grateful to all who took part in our consultations. Useful comments were made, and new suggestions were received.

1.9 We gave careful consideration to all the contributions that we received. A number of topics put to us did not meet our project selection criteria – for example, where the issues were more political than legal. Most of our preliminary proposals received support from consultees, and we therefore include these within our Programme. A number of topics suggested, particularly in the area of property law, are worthy candidates for a law reform project. But we have limited capacity, and have had to select topics for inclusion in this Programme. In doing so we gave due weight to the support on consultation for particular topics.

1.10 Comments on consultation also influenced the scope of two of the projects that we are carrying forward from the Seventh Programme. In light of support from consultees, we have decided to combine a new project on security over corporeal moveable property with the existing project on security over, and assignation of, incorporeal moveable property. We have also decided to review the law of homicide generally, which will include consideration of provocation, self-defence, coercion and necessity, rather than undertake a review of the latter alone.

1.11 Two of our new projects arise from specific suggestions made by consultees. The proposed review of aspects of the law relating to adults with incapacity arises from comments made by the Mental Welfare Commission for Scotland, by Enable Scotland, and by the Mental Health and Disability Sub-Committee of the Law Society of Scotland. Secondly, the proposal for a review of contract law, drawing on the Draft Common Frame of Reference, emanated from discussions with the Law Reform Committee of the Law Society of Scotland.

1.12 We have stated that there were a number of good suggestions for projects that we are not able to undertake in this Programme. There is clearly much work required on law reform. We

³ See www.scotlawcom.gov.uk/html/eighth_programme.php.

commend to Scottish Ministers and the Scottish Parliament the value of continuing to implement law reform measures, in order to maintain a modern and efficient system of law for Scotland.

1.13 Out of the many useful suggestions we received but are not able to take up just now, we would highlight the following topics. These may be considered for the next Programme of Law Reform, the Ninth.

1.14 A general review of the law on leases of heritable property is required. A number of issues in relation to leases have been drawn to our attention by consultees. The topic that we put forward, a review of the proprietary effect of leases, received support on consultation. A general review would be a very substantial project, perhaps one to be undertaken in stages.

1.15 We consider that the law of roads and other public rights of way requires reform. We proposed this in our consultation, and the suggestion received significant support from consultees. There is a steady stream of litigation in relation to roads. In addition, the introduction of the right to roam by the Land Reform (Scotland) Act 2003 has given rise to interface issues. We took the view that in terms of resources we were in a position to address one major public law topic within this Programme, and the results of our consultation indicated a strong preference for a review of compulsory purchase. A review of roads and rights of way is also required when resources permit.

Basis of the Eighth Programme

1.16 We have continued the previous practice of classifying projects broadly as short, medium or long-term for the purposes of this Programme. A project is:

- *short-term*, where we expect to complete it well within the life of the Programme;
- *medium-term*, where we intend to complete it by the end of the Programme, ie by the end of 2014;
- *long-term*, where the project will most likely be carried into the next Programme, because either the project is a substantial one or work on it will commence in the later stage of this Programme.

1.17 When classifying projects it should be borne in mind that priorities during a Programme can change, for a variety of reasons. Our resources may be re-directed due to other requirements, such as responding to a reference from Ministers, or undertaking joint projects with the Law Commission for England and Wales; or the legal questions arising in a project may turn out to be more complex than anticipated.

1.18 Any projected timescales also assume that we have sufficient drafting resources available to prepare the draft Bills that we attach to our reports and which would implement our recommendations. We are fortunate at present to have the services of a senior Scottish

Parliamentary Counsel as a part-time consultant to the Commission. We are also grateful to the Office of the Scottish Parliamentary Counsel, who provide drafting resources to assist our consultant on particular Bills.

Advice to government departments and the Scottish Ministers

1.19 From time to time we accept references for advice made to us by Scottish Ministers or a UK government department. Such requests are sometimes for an urgent review of the law, requiring us to focus resources on the topic and produce recommendations within a short period of time. In addition Ministers sometimes ask individual Commissioners, because of their expertise in a particular area of law, to serve on a working group; and equally the government may ask for informal advice from us on current legal issues. In practice therefore such references can take priority over, and so affect progress on, our programme work.

1.20 The table in Appendix C sets out the formal references for advice that we considered during the Seventh Programme, noting the work completed by way of submission of our report on the matter.

Similar fact evidence and the Moorov doctrine

1.21 We are currently engaged on one ongoing area of work referred to us. This is admissibility of evidence of bad character or of previous convictions and of similar fact evidence and the *Moorov* doctrine, the last part of the reference made to the Commission by the Cabinet Secretary for Justice in November 2007. We are dealing with both of these topics as a single project.

Joint work with the Law Commission for England and Wales

1.22 We take account of the work being carried out by the Law Commission for England and Wales. The Law Commission is currently working under its Tenth Programme of Law Reform.⁴ Some of its work may have an effect on the law of Scotland, and if so we consider whether or not to give advice on Scots law or undertake a project as a joint one with the Law Commission. Such projects are not formally within this Programme.

1.23 Any such joint work may arise at any time, and resources may have to be diverted to address the issues. This may affect work on our other projects.

1.24 We set out in Appendix D the joint projects completed during the period of the Seventh Programme. We mention below the joint projects that we are currently involved in that will continue into the period of the Eighth Programme.

Insurance law

1.25 We are assisting the Law Commission for England and Wales with a project on insurance contract law which they are carrying out under their Tenth Programme of Law Reform.

⁴ Law Com No 311.

1.26 *Consumer insurance.* There is a wide consensus that consumer insurance law is in urgent need of reform - not only among consumer groups, lawyers and brokers, but also among most insurance companies. Consequently, following the analysis of responses to our Joint Consultation Paper on Misrepresentation, Non-Disclosure and Breach of Warranty by the Insured,⁵ we gave priority to this area of the law, publishing a Joint Report on Consumer Insurance Law: Pre-Contract Disclosure and Misrepresentation⁶ in December 2009.

1.27 *Business insurance.* There is also support for reform of pre-contractual business insurance law. We will develop recommendations for reform of that area of the law.

1.28 *Second Joint Consultation Paper* We are also working towards our second joint consultation paper. Its main topics will comprise insurable interest, fraud, post-contractual good faith and damages for late payment of claims.

Level crossings

1.29 The Law Commission's Tenth Programme of Law Reform includes a project to review the law relating to level crossings in Great Britain. The project was suggested by the Department for Transport following concerns raised by the Office of Rail Regulation (ORR) that the legislation relating to level crossings was in need of review.

1.30 The project is being undertaken jointly with this Commission, as much of the railway and other relevant legislation applies to Great Britain as a whole.

1.31 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 and statutory instruments as well as administrative orders made under statutory powers. The project is further complicated because it involves consideration of not only railway legislation but also law relating to other areas, for example, roads and planning, health and safety, rights of way and, in Scotland, access to land.

1.32 We are looking in particular at possible ways of improving the procedures for closure of level crossings. We are also considering a change of approach to the regulation of safety at level crossings. The proposed consultation paper will also consider whether there may be scope for improving consultation and co-operation between the various parties concerned with level crossings in order to encourage more involvement at local level.

1.33 Work on the project is being taken forward in close consultation with the key stakeholders, including ORR and Network Rail. The teams have also been assisted by an advisory group representing relevant organisations with an interest in railways and related matters such as rights of way and access to the countryside.

1.34 The Commissions are working on a joint consultation paper, which will be published in 2010.

⁵ SLC DP 134; LC CP 182.

⁶ Scot Law Com No 219; Law Com No 319.

Consolidation and statute law revision

1.35 One of our functions under the Law Commissions Act 1965 is to undertake work on consolidation of legislation. We are required under section 3(1)(d)⁷ to prepare from time to time at the request of Scottish Ministers comprehensive programmes of consolidation and statute law revision, and to undertake the preparation of draft Bills pursuant to any such programme approved by the Ministers. The work involves bringing together a number of enactments on an area of law into a single Act, with a view to making the provisions more accessible and generally tidying up the statute book. In carrying out work of this nature we are heavily dependent on having drafting resources available to us. We are also dependent upon involvement and support from the Scottish Government Directorate responsible for the policy area in question, as they provide policy instructions on the legislation and on technical amendments; and also on the availability of legislative time in the Scottish Parliament for this kind of legislative housekeeping.

1.36 We are currently working on a project to consolidate the legislation relating to bankruptcy in Scotland. This will be only the second Scottish consolidation project since devolution.⁸ The Bankruptcy (Scotland) Act 1985 forms the basis of the current legislation, but the Act has been heavily amended in recent years. The aim of the project is to bring the provisions together into a rational and coherent form for the benefit of users.

1.37 We are aware that there are 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 during this Programme once the work on bankruptcy is completed. This would require continued support from the Government, and time for consideration of consolidation Bills in the Scottish Parliament.

1.38 The Commission also undertakes work on the repeal of obsolete or otherwise unnecessary legislation. This work is complementary to our work on consolidation as it plays an important part in keeping legislation up to date.

1.39 We undertake most of this work in conjunction with the Law Commission. Draft Repeals Bills are prepared by the Law Commission team and we assist in relation to the Scottish aspects of the repeals, undertaking consultation with interested bodies on repeals that extend to Scotland. In addition we identify appropriate Scottish provisions that are suitable for repeal. For example, in our current project we have identified sixteen Two Pennies Scots Acts as suitable for repeal. The Acts enabled the appropriate 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.

1.40 The Eighteenth Statute Law Repeals Report was published jointly with the Law Commission in January 2008.⁹ The Bill was enacted by the United Kingdom Parliament in the summer of 2008, after the Scottish Parliament had passed a legislative consent motion agreeing to the inclusion of the Scottish repeals in the Bill.

1.41 Work is now well underway on preparation of the next Repeals Bill, which it is hoped will be completed around 2012.

⁷ As read with s 6(2) as amended by the Scotland Act 1998 (Consequential Modifications) (No 2) Order 1999 (SI 1999/1820), Art 4 and Sch 2, para 36.

⁸ The first consolidation was the Salmon and Freshwater Fisheries (Consolidation) (Scotland) Act 2003, implementing our Report (Scot Law Com No 182).

⁹ Scot Law Com No 210; Law Com No 308.

Part 2 Eighth Programme of Law Reform

Preliminary

2.1 Our Eighth Programme of Law Reform is set out in this Part, for approval by Scottish Ministers. This Programme will run for a period of five years, from the beginning of 2010 until the end of 2014.

2.2 If during the subsistence of the Programme we consider that we should undertake work on any other topic, we will request approval of Scottish Ministers to a modification of the Programme, or a reference from Ministers under section 3(1)(e) of the Law Commissions Act 1965.

2.3 A summary of the projects in the Eighth Programme is given in the table below, along with the classification of the project as short, medium or long-term. The Programme comprises four projects carried forward from the Seventh Programme. These are trusts; judicial factors; homicide; and (following significant modifications to scope in light of comments from consultees) a project on issues relating to moveable property. There are also six new projects, namely items 5 to 10 in the table. Each of these projects is described in more detail below.

Item No	Project	Classification of project
1	Security over corporeal and incorporeal moveable property; assignation of incorporeal moveable property	Medium-term
2	Trusts	Medium-term
3	Judicial factors	Short-term
4	Homicide	Medium-term
5	Criminal liability of partnerships	Short-term
6	Law of contract in light of the DCFR	Long-term
7	Adults with incapacity	Medium-term
8	Compulsory purchase	Long-term
9	Heritable securities	Long-term
10	Prescription and corporeal moveable property	Medium-term

Security over corporeal and incorporeal moveable property; assignation of incorporeal moveable property

2.4 In our Seventh Programme we proposed a project on the assignation of, and security over, incorporeal moveable property. We noted that "work is unlikely to start on it until after we have completed our review of land registration". In the event, the land registration project took longer than anticipated, though in fact it has already proved possible to put a limited amount of work into the assignation project.

2.5 But since the publication of the Seventh Programme we have come to think that the subject of security over corporeal moveable property should also be included. It too is regarded by many as being outmoded. We do, however, recognise that the addition of corporeal moveables would bring with it a degree of asymmetry to the project, for whilst outright assignments would be covered, outright transfers of corporeal moveables would not be. (In most cases the outright transfer of corporeal moveables is covered by the Sale of Goods Act 1979.) This asymmetry may cause certain difficulties for the project. But the link, from a practical point of view, between security over corporeal moveable property and security over incorporeal moveable property is strong, and the link between security over incorporeal moveable property and outright assignment of incorporeal moveable property is likewise strong. Hence there exists some degree of unity in the expanded project.

2.6 Article 9 of the Uniform Commercial Code has been adopted by all states in the USA and has been copied (with variations) in a number of other jurisdictions, for example New Zealand with its Personal Property Securities Act 1999. It is likely that something broadly on these lines would at least be an option worth considering for Scotland, though of course bearing in mind the differences between our background law and that of the common law tradition. We would also take account of such recent initiatives as (i) the Draft Common Frame of Reference (Book III Ch 5 and Book IX), (ii) the United Nations Convention on the Assignment of Receivables in International Trade, and (iii) the European Bank for Reconstruction and Development Model Law on Secured Transactions.

Trusts

2.7 Review of trust law has formed part of our work for a number of years: we included it in our Fifth Programme of Law Reform,¹ as a long-term project, and we carried it forward to our Sixth Programme of Law Reform² as a medium-term project. At that time we identified a number of specific areas for investigation. This led to our splitting our work into two phases, one dealing with the powers and duties of trustees and the other focussing more on trusts themselves. In our Seventh Programme of Law Reform³ we recorded that the project, viewed as a whole, had turned out to be more substantial than we at first envisaged and, accordingly, it reverted to being included as a long-term project.

2.8 We have already published 7 Discussion Papers: Breach of Trust (No 123), Apportionment of Trust Receipts and Outgoings (No 124; both published in 2003), Trustees and Trust Administration (No 126; 2004), Variation and Termination of Trusts (No 129; 2005), Nature and Constitution of Trusts (No 133; 2006), Liability of Trustees to Third Parties (No 138; 2008) and Accumulation of Income and Lifetime of Private Trusts (No 142; 2010). Our Report on Variation and Termination of Trusts (Scot Law Com No 206) was published in 2007.

2.9 We propose to follow up this work with the preparation of a report which will aim to reform the Trusts Acts. It will cover a number of topics, including trustees and trust administration, the accumulation of income and the lifetime of private trusts and the recommendations from our Report on Variation and Termination of Trusts. The report will contain a new Trusts Bill which will set out, in a modern and comprehensive manner, those aspects of trust law which are of

¹ Scot Law Com No 159.

² Scot Law Com No 176.

³ Scot Law Com No 198.

particular interest and relevance to trustees. We will, thereafter, consider how best to proceed in respect of the remaining topics within the trust law project.

2.10 We have, on occasion, expressed an intention to examine the remedies available to beneficiaries, within the current trust law review.⁴ One of the central points of focus would be the constructive trust. We considered the desirability of this in 1996; a seminar was held to discuss the topic in detail, following which it was decided not to continue with the work at that stage.⁵ We have recently reviewed once more the case for undertaking a project of this scope. Whilst it is recognised that the law in this area is not clear or settled, in particular in relation to the constructive trust, we do not consider that it would be appropriate to devote resources to such a project at the moment. Leaving aside the question of constructive trusts, the existing remedies open to beneficiaries against trustees or third parties who have obtained trust property are thought to be broadly satisfactory. There are particular issues arising in connection with the constructive trust but it is not a subject on which there is much litigation, thereby suggesting that there is relatively little practical call for reform. (This was a significant factor behind the decision in 1996.) In addition, we consider that an examination of constructive trusts would inevitably involve consideration of a relatively wide range of issues (such as insolvency policy and the nature of the fiduciary in Scots law) which extend beyond the boundaries of the current trust law review. For these reasons we have decided not to proceed with such a project at the moment, but if matters change (if, for example, there is a significant increase in the number of cases in which it is argued that a constructive trust exists) then this may justify further consideration of whether a project would be of value.

Judicial factors

2.11 A review of the law relating to judicial factors was first mentioned in our Fifth Programme of Law Reform⁶ but, unfortunately, due to competing priorities, it has been necessary to put the project on hold on several occasions. We carry this project into our new Programme as a short-term project.

2.12 The bulk of the relevant legislation relating to judicial factors stems from the late 19th century and is now in need of clarification and simplification. Our preliminary consultation with those interested in this area of the law has confirmed that the existing legislation is out of step with current practice; judicial factory is regarded as a cumbersome procedure sometimes involving expense which is disproportionate to benefit. Our discussion paper will put forward various options for reform.

Homicide

2.13 Our Seventh Programme of Law Reform included a project to review the defences of provocation, self-defence, coercion, and necessity. We included the project in the Programme partly because of the case of *Drury v HM Advocate* 2001 SCCR 583, in which the court commented that the law of provocation should be reformed and restated in statutory form. In addition the project was to cover self-defence, coercion, and necessity, as these topics were also in need of review. Because we were asked by Scottish Ministers to give priority to the criminal

⁴ Eg in our Discussion Paper on Liability of Trustees to Third Parties (No 138; 2008), para 1.1.

⁵ See our *Thirty-Second Annual Report* 1996-97 (Scot Law Com No 161), para 2.56.

⁶ *Fifth Programme*, paras 2.30-2.31.

law projects referred to us in November 2007, we have not yet begun work on those matters. We have reconsidered the scope of the project, both in the light of developments in other jurisdictions, and in response to the consultation on the Eighth Programme. We have come to the conclusion that it would be more useful to conduct a general review of the law of homicide, and to deal with provocation, self-defence, coercion and necessity as part of that project.

2.14 While work on the matters referred to us in November 2007 is progressing well, we have not yet concluded it. But we anticipate that the remaining part of the reference – which deals with the *Moorov* doctrine and similar fact evidence – will be a relatively short project. Thereafter (and subject to any other references which may be made to us) we would hope to complete work on the homicide project during the period covered by the Eighth Programme.

Criminal liability of partnerships

2.15 Following a fire in a nursing home run by a partnership, the partnership was dissolved, and attempts to indict the dissolved partnership, and/or the members of it, in relation to the causes of the fire failed. It is clear that the traditional concepts of the law of partnership do not fit easily into the modern regulatory structure within which many of these organisations operate. While we and the Law Commission for England and Wales investigated and proposed reforms of the general law of partnership⁷ in 2003, we did not focus particularly on criminal liability. It is, however, an area in which the public might reasonably expect a greater degree of clarity than is currently provided by the law. We propose to take this matter forward as a short-term project in the Eighth Programme.

The law of contract in the light of the DCFR (Draft Common Frame of Reference)

2.16 We propose to review the law of contract in the light of the publication in 2009 of the Draft Common Frame of Reference: Principles, Definitions and Model Rules of European Private Law (the DCFR). The DCFR provides a contemporary statement of contract law, based on comparative research from across the European Union and written in accessible and non-archaic English. The DCFR has a considerable amount to offer in the law reform process. It may be seen as an instrument to provide an important area of Scots law with a systematic health check, giving a basis for treatment where the law is found to be ailing or otherwise in need of remedial treatment. The DCFR is at least a good working platform for a series of discrete and relatively limited projects on contract law, akin in some ways to our work on trusts and having significance for the well-being of the Scottish economy.

2.17 The suggestion that such a project be undertaken was made in our consultation on the possible content of the Eighth Programme and received support from a number of consultees. We see this as a substantial long-term project involving a process of consultation with stakeholders in and beyond the legal profession, including particularly businesses.

2.18 We have already carried out a substantial amount of work on contract law topics, some of which remains unimplemented despite attracting support when the Commission's conclusions were first published. Much of that earlier work made use of material on which the DCFR is

⁷ Law Com No 283; Scot Law Com No 192.

based, notably the Vienna Convention on the International Sale of Goods (CISG) 1980, the UNIDROIT "Principles of International Commercial Contracts" (PICC; 1st edition 1994; 2nd edition 2004), and, above all, the Principles of European Contract Law (PECL; 3 volumes 1995-2003). There are four unimplemented reports in which this is apparent, as follows:

- Formation of Contract: Scottish Law and the United Nations Convention on Contracts for the International Sale of Goods (Scot Law Com No 144, 1993);
- Report on Interpretation in Private Law (Scot Law Com No 160, 1997);
- Report on Penalty Clauses (Scot Law Com No 171, 1999);
- Report on Remedies for Breach of Contract (Scot Law Com No 174, 1999).

2.19 The first of these used CISG, the other three PECL and PICC. The recommendations in the first two, and last, of these Reports relate to areas all of which remain difficult or uncertain in the Scots law of contract, and are thus worth revisiting with the benefit of the revisions of the earlier texts in the DCFR. The Report on Penalty Clauses, however, remains suitable for implementation as it stands and it is not thought that further review is needed on this particular topic.

2.20 In addition the DCFR might also be valuable in reviewing areas of contract law which have not yet been the subject of detailed Scottish Law Commission activity but where informal consultation and published commentary suggest that there are practical issues affecting the utility and attractiveness of Scots law to both domestic and foreign users. These include:

- The law on retention, or the withholding/suspension of contract performance in response to the other party's breach of contract, in relation to questions of lien and set-off;
- Implied terms and remedies in contracts of hire, services and storage;
- The law on illegal contracts.

2.21 It is not necessary, however, to see use of the DCFR as leading to the codification of the Scots law of contract (although we note that in 2008 the Business Experts Law Forum thought codification was a way of making the law "clearer and more accessible to potential users" (2008 Report, para 1.3.3)). In the long run, however, the project might be a basis for a statutory restatement/revision/simplification of contract law or of aspects of it or of the law on specific contracts, especially where such law is at present lacking or is out of synch with the modern world and commercial/legal practice.

Adults with incapacity

2.22 The Adults with Incapacity (Scotland) Act 2000 effected major reform of Scots law concerning adults who are not able to make decisions about their own affairs. Many of the

provisions of the Act were based on our Report No 151, published in 1995. In the period since the Act was passed, it has become apparent that certain aspects of the new régime may require to be further developed.⁸ Issues such as the powers which may competently be sought in an application for the appointment of a welfare guardian and the implications of the often lengthy duration of the appointment have been highlighted to us.

2.23 The European Court of Human Rights has also had occasion to consider an allegation of breach of the right to liberty, enshrined in Article 5 of the Convention, in the case of an individual with learning disabilities who had been detained informally in hospital for psychiatric treatment. The Court's decision, in what is generally known as the *Bournewood* case,⁹ has generated UK-wide analysis and comment; in Scotland, *Bournewood* may have implications for both mental health and incapacity legislation.

2.24 The Mental Welfare Commission, the Law Society of Scotland's Mental Health and Disability Sub-Committee and Enable Scotland have all suggested to us that issues in this area require review. We agree. We therefore intend to revisit the area, and hope to carry out this work as a medium-term project.

Compulsory purchase

2.25 The law of compulsory purchase is generally considered to be antiquated and obscure. Much of it is still contained in the Lands Clauses (Consolidation) (Scotland) Act 1845. The law at present is broadly similar to the law in England and Wales. In its work on this area,¹⁰ the Law Commission for England and Wales found that almost two thirds of owners were either dissatisfied or very dissatisfied with the compulsory purchase process, and that broadly the same proportion found the process stressful. They also found that the process at present can take from two to seven years to complete, and generates uncertainty and financial loss for those involved. Our impression is that much the same is true north of the border. There was support from consultees for a reform project in this area; we noted in particular a strong joint submission in support of such a review from the Royal Institution of Chartered Surveyors in Scotland and the Royal Town Planning Institute.

2.26 There is little prospect of the requirement for some form of compulsory purchase becoming redundant. As long as it continues to be necessary, it is in the interests of all those affected for the law to be clear, accessible, fair and up-to-date. We would accordingly intend to examine the law and practice of compulsory purchase as a medium-term project during the Eighth Programme.

Heritable securities

2.27 The law of heritable security is about the securing of debt over heritable property – land and buildings. (The English term, "mortgage", is often used by non-lawyers.) The security is created by registration in the Land Register. (For the declining number of properties still in the Register of Sasines, the security is recorded in that register.) If the debtor defaults on the loan, the security can be enforced. Enforcement generally means the sale of the property. The law applies to heritable property of all types – residential, commercial, agricultural etc. But for residential property the debtor-protection rules are stricter than for other types of property.

⁸ The 2000 Act has been amended by the Adult Support and Protection (Scotland) Act 2007.

⁹ *HL v UK* 2004 (Application No 45508/99); 40 EHRR 761.

¹⁰ LC 286, LC 291.

2.28 The law was systematically reformed by the Conveyancing and Feudal Reform (Scotland) Act 1970 and that remains the main source of the law. The 1970 Act swept away the old types of heritable security, replacing them with the "standard security", which is thus now the only type of heritable security in use. Though the 1970 Act represented a great improvement on the previous law, time has shown that it was not perfect, and even if it had been perfect at the time, the world has not stood still. Five areas of concern occur to us.

2.29 First, the rules about enforcement are complex and hard to understand, and indeed it may be open to debate whether even after exhaustive study they really make sense. This issue of complexity and obscurity is separate from the issue of fairness: the rules could be complex but fair, or simple and unfair. The issue of fairness of the enforcement process is an aspect of the more general issue of fairness, to which we now turn.

2.30 Second, the fairness of the terms of a loan is, in itself, not a matter of the law relating to the security (if any) for that loan. Put another way, if there is a need for debtor protection, that is, on the whole, a matter for the law of credit rather than for the law of security. Whether the law should permit (say) 250% interest is a matter for the law of credit, not the law of security. If the law of credit allows it, a security for such a loan has to be enforceable. Nevertheless, security-specific fairness issues do exist, especially in relation to the process of enforcement. Pro-debtor changes have been made since 1970, especially by the Mortgage Rights (Scotland) Act 2001, and further changes will happen if the Home Owner and Debtor Protection (Scotland) Bill, currently before the Scottish Parliament, is passed. But the issue of security-specific fairness has never been subject to a comprehensive review and we think that the time for such review has arrived. Such matters are not necessarily limited to debtors who are consumers.

2.31 Third, a section-by-section review of the 1970 Act reveals numerous technical problems. Individually they are generally minor but taken together there is an opportunity for significant technical improvement.

2.32 Fourth, the statutory reforms of the law of heritable security that have taken place over the years – the process has been going on since the 17th century – seem never to have involved looking at the law of other legal systems. Whether we have much to learn from other systems is uncertain. At all events, we will not know unless we look.

2.33 Fifth, Islamic law does not prohibit loans secured by heritable security. But it does prohibit interest on loans, and since banks do not wish to make interest-free loans, other devices ("murabaha", "ijara" etc) have been developed, whereby the bank can make an advance, and recover it, with a profit. Because there cannot be interest, the advance cannot take the form of a loan. When heritable property is involved such devices are commonly called Islamic mortgages, or Halal mortgages or Sharia mortgages, these terms all meaning the same. Section 9 of the 1970 Act says (we paraphrase) that any arrangement that is functionally a heritable security must take the form of a standard security, on pain of nullity. Whether Islamic mortgages successfully circumvent this rule is not an easy question. The matter has never been litigated and thus far the number of Islamic mortgages has been very small. Whether the law

should provide for Islamic mortgages is ultimately a political question and hence is one on which we are likely to take a neutral stance. But if the political decision is affirmative, it is important that Islamic mortgages should fit into the general structure of our law. That question of "fit" has two aspects. The first is section 9 of the 1970 Act. (A rule which is not merely a technical rule but an expression of public policy.) The second is that all legislation since 1970 has presupposed that mortgages will take the form of standard securities – which, standing section 9, was a safe presupposition. For example, the Matrimonial Homes (Family Protection) (Scotland) Act 1981 protects (adequately or inadequately) a wife whose husband grants a security without her consent, and the Mortgage Rights (Scotland) Act 2001 protects (adequately or inadequately) debtors against trigger-happy creditors. Both statutes presuppose that the mortgage is a standard security. Other examples could be adduced. If Islamic mortgages are to enter the Scottish scene, not only these two statutes but the whole corpus of legislation since 1970 will have to be reviewed to see to what extent it would need to be revised. We think that the whole question of "fit" is a large and difficult one. As we have said, on the question of the desirability of Islamic mortgages we are likely to take a neutral stance: our view is that *if* Islamic mortgages are to be introduced then a good deal of difficult groundwork is going to be needed.

Prescription and corporeal moveable property

3.34 The law of prescription is about the gaining or losing of rights by the running of time. The main statute at present is the Prescription and Limitation (Scotland) Act 1973. This has fairly full coverage of prescription in relation to heritable property and also in relation to incorporeal moveable property. But on corporeal moveable property it has less to say, especially on the important question of whether possession of a corporeal moveable object can ever ripen into ownership. Usually this does not matter much because most corporeal moveables have limited value and a short lifespan. But some can be valuable and long-lasting, such as art work and antiquities. The lacuna in our law is thus relevant to, for example, the art world and the museum world. This project will also provide the opportunity to consider the lacuna in the 1973 Act identified by the House of Lords in *Fisher v Brooker*¹¹ about the effect of negative prescription upon copyright and other forms of intellectual property right. The topic is one where comparative work would be particularly useful to enable Scots law to have a rational and up-to-date law about prescription and moveable property.

¹¹ [2009] UK HL 41.

Appendix A

Seventh Programme projects

Item No	Project	Classification/stage of project
1	Conversion of long leases	Short-term – Report submitted November 2006 (Scot Law Com No 204)
2	Land registration	Medium-term – Report submitted December 2009 (Scot Law Com No 222)
3	Trusts	Long-term – ongoing – Report on Variation and Termination of Trusts submitted February 2007 (Scot Law Com No 206)
4	Judicial factors	Medium-term – ongoing
5	Succession	Medium-term – Report submitted March 2009 (Scot Law Com No 215)
6	Assignment of, and security over, incorporeal moveables	Long-term – ongoing
7	Unincorporated associations	Medium-term – Report submitted September 2009 (Scot Law Com No 217)
8	Provocation, self-defence, coercion and necessity	Medium-term – ongoing

Appendix B

List of those consulted during preparation of the Eighth Programme

We consulted a wide range of bodies and interests (as well as the public). These included –

Accountant in Bankruptcy	Royal Faculty of Procurators in Glasgow
Accountant of Court	Royal Incorporation of Architects in Scotland
Association of British Insurers	Royal Institution of Chartered Surveyors in Scotland
Association of Chief Police Officers in Scotland	SACRO
Association of Law Teachers	SCOLAG
Association of Scottish Police Superintendents	Scotland Office
Association of Sheriffs' Principal	Scottish Conservative Party
British Library (and also Legal Deposit Office)	Scottish Churches Parliamentary Office
Capability Scotland	Scottish Environment Protection Agency
CBI Scotland	Scottish Labour Party
Chartered Institute of Bankers in Scotland	Scottish Law Agents Society
Chartered Institute of Arbitrators (Scottish Branch)	Scottish Liberal Democrats
Citizens Advice Scotland	Scottish Government
Committee of Scottish Clearing Bankers	Scottish Green Party
Consumer Focus Scotland	Scottish Housing Regulator
Convention of Scottish Local Authorities	Scottish National Party
Crofters Commission	Scottish Natural Heritage
Crown Office and Procurator Fiscal Service	Scottish Police Federation
Department for Business, Innovation and Skills	Scottish Property Federation
Edinburgh Napier University	Scottish Public Law Group
ENABLE Scotland	Scottish Socialist Party
Equality and Human Rights Commission	Scottish Trades Union Congress
Faculty of Actuaries	Scottish Youth Parliament
Faculty of Advocates	Sheriffs' Association
Family Advice and Information Resource	Sheriff Clerks, Scottish Courts
Glasgow Bar Association	Society of Advocates in Aberdeen
Glasgow Caledonian University	Society of Legal Scholars
Heriot-Watt University	Society of Local Authority Lawyers and Administrators in Scotland
HM Revenue and Customs	Society of Writers to HM Signet
Institute of Chartered Accountants of Scotland	Society of Solicitor Advocates
Law Commission for England and Wales	Society of Solicitors in the Supreme Courts of Scotland
Law Society of Scotland	Transport Scotland
Lord President of the Court of Session	University of Aberdeen
Members of Parliament	University of Abertay Dundee
Members of Scottish Parliament	University of Edinburgh
Mental Welfare Commission for Scotland	University of Dundee
Museums Galleries Scotland	University of Glasgow
National Archives of Scotland	University of Stirling
NHS Scotland	University of Strathclyde
Procurators Fiscal Society	University of the West of Scotland
Registers of Scotland	
Robert Gordon University	

Appendix C

References ongoing or started during the Seventh Programme	
Interest on debt and damages	Reference from Scottish Ministers – Report submitted September 2006 (Scot Law Com No 203)
Personal injury actions – limitation and prescribed claims	Reference from Scottish Ministers – Report submitted November 2007 (Scot Law Com No 207)
<i>Sharp v Thomson</i>	Reference from Scottish Ministers – Report submitted November 2007 (Scot Law Com No 208)
Rape and other sexual offences	Reference from Scottish Ministers – Report submitted November 2007 (Scot Law Com No 209)
Damages for wrongful death	Reference from Scottish Ministers – Report submitted September 2008 (Scot Law Com No 213)
Aspects of criminal law and procedure	Reference from Scottish Ministers
(a) Crown appeals	Report submitted June 2008 (Scot Law Com No 212)
(b) Double jeopardy	Report submitted December 2009 (Scot Law Com No 218)
(c) Similar fact evidence and the <i>Moorov</i> doctrine	Ongoing

Appendix D

Joint reports with the Law Commission for England and Wales completed during the Seventh Programme

Unfair Terms in Contracts	Reference from Parliamentary Under Secretary of State for Consumers and Corporate Affairs – joint Report submitted February 2005 (Scot Law Com No 199/Law Com No 292)
Parliamentary Costs Bill: Report on Consolidation of Legislation relating to Parliamentary Costs	Joint Report submitted June 2006 (Scot Law Com No 202/Law Com No 298)
Statute Law Repeals: Eighteenth Report	Joint Report submitted December 2007 (Scot Law Com No 210/Law Com No 308)
Consumer Remedies for Faulty Goods	Reference from Department for Business, Enterprise and Regulatory Reform – joint Report submitted September 2009 (Scot Law Com No 216/Law Com No 317)
Consumer Insurance Law: Pre-Contract Disclosure and Misrepresentation	Joint Report submitted November 2009 (Scot Law Com No 219/Law Com No 319)



Published by TSO (The Stationery Office) and available from:

Online
www.tsoshop.co.uk

Mail, Telephone, Fax & E mail
TSO
PO Box 29, Norwich, NR3 1GN
Telephone orders/General enquiries: 0870 600 5522
Fax orders: 0870 600 5533
E mail: customer.services@tso.co.uk
Textphone 0870 240 3701

TSO@Blackwell and other Accredited Agents

Customers in Ireland can order publications from:
TSO Ireland
16 Arthur Street, Belfast BT1 4GD
Tel 028 9023 8451 Fax 028 9023 5401

£7.95

