Law Commission
Reforming the law

TRIENNIAL REVIEW OF THE LAW COMMISSION

Evidence from the Law Commission

February 2013

Contents

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The Law Commission of England and Wales is approaching its 50th anniversary. Over the years we have established a reputation for excellence at home and abroad for our approach to law reform. Stakeholders tell us we are valued for our expertise and thoroughness of approach to tackling technically complex areas of the law and for the process by which we arrive at our conclusions, namely well researched, thorough, highly participative consultation. Underpinning the way we work is our independence from Government and the objective way in which we conduct ourselves. Stakeholders tell us that it is this strong ethos that sets us apart as an organisation.

We aim to build on this heritage:

- to be the authoritative voice on law reform
- to continue to make a positive difference through our law reform work
- to be proactive in promoting the need for law reform and for having "good law", and
- to attract the best talent.

In preparing our evidence for this review, we have consulted stakeholders from across the legal community, policy and legal teams inside Government, the third sector, the business community, academia and Parliament. Their feedback has helped to shape our response.

"The establishment of the Law Commission was an inspired act of Government, born of the belief that accessible, intelligible, fair and modern law is the constitutional right of every citizen"

The Rt Hon Lord Justice Etherton, Chancellor of the High Court and former Chairman of the Law Commission. Law Commission Annual Report 2008/09.

Part I – Function

> "This is precisely the sort of area where the Law Commission could be immensely helpful to us. Many of us in the House recognise that the complexity of our legislation grows exponentially from Parliament to Parliament, and the Law Commission would have the authority and the experience to be able to give very good advice about how this could be avoided."
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> *Baroness Williams of Crosby. With reference to housing: landlord and tenant legislation. Hansard (HoL) 7 Nov 2011 : Column 10.*

The need for law reform

Society needs good law that is fair, clear and unambiguous. Bad law leads to injustice. It is ineffective, inefficient and wasteful. Indeed, for the rule of law to flourish people must be able to trust in and understand the law. Law reform, therefore, plays an essential role in a civilised society. It helps deliver law that is clearer, fairer and more efficient and supports the rule of law.

Before the establishment of the Law Commission in 1965 the Government appointed ad hoc committees to consider the reform of particular areas of the law. While some of the output from these committees was excellent, they did not have the remit, structure, resources or time to permit strategic and co-ordinated reviews of the law. Despite the work of these ad hoc bodies there was widespread concern that the law in many areas had become unclear, inaccessible, outdated and, in some instances, unjust. This concern was most notably expressed by Gerald Gardiner QC and Andrew Martin in their influential book "Law Reform – Now". This led to the creation of the Law Commission with a mandate to keep all of the law of England and Wales under review and to make recommendations for reform.

Almost half a century has elapsed since the establishment of the Commission, yet the need for a principled and strategic approach to law reform remains as strong as ever. As the pace of social and technological change has increased the need to keep the law up to date with the changing situation is more important than ever. The need for the law to be as simple and accessible as possible remains an imperative.

The law in force in this jurisdiction has a particularly high reputation around the world for its quality. Indeed, many people come here to do business or choose our law as the law governing their commercial transactions for that reason. The Law Commission makes a continuing contribution to that well-deserved reputation by identifying deficiencies and by working to ensure that the law is up to date.

The need for the functions set out in the Law Commissions Act 1965

SIMPLIFICATION AND MODERNISATION OF THE LAW

We promote the simplification and modernisation of the law through the different streams of our work: law reform projects, consolidation of statute law and statute law repeals. By far the greatest proportion of our time and resources is devoted to law reform projects. An integral part of this work is a comparative study of the law in force in other jurisdictions.

The requirement to receive and consider proposals and to prepare and submit to the Lord Chancellor programmes for the examination of different branches of the law enables us to take a long term, strategic approach to law reform.

On a three yearly cycle we consult widely and, on the basis of a thorough examination of the responses, we draw up a Programme of law reform which we propose to the Lord Chancellor.

- In the 11th Programme, which we launched on 19th July 2011, we received over 200 proposals from which we selected 14 projects. Those selected include projects covering areas of the law as diverse as elections, electronic communications, insurance contract law, contempt of court and the regulation of taxis. Each has the potential to promote reforms that could have a profound and far-reaching impact on the lives of many citizens.

We also take on projects referred to us by Ministers, enabling us to respond to pressing issues that emerge outside the cycle of our Programme.

- In January 2012 the Department for Business, Innovation and Skills asked us to review the recommendations we made in our joint report with the Scottish Law Commission on unfair terms in contracts to see whether the consumer provisions should form part of a new comprehensive Bill on consumer rights. The most controversial issue was which terms should be exempt from review.

BIS made the reference following the case of *Office of Fair Trading v Abbey National* where the issue was explored but not wholly resolved by the Supreme Court in the bank charges litigation.

Our projects, whether part of our Programme or referred to us, aim to meet the need of society to have good law which is fair, clear, unambiguous, up-to-date and which keeps pace with social and economic change.

Listed below is a selection of projects undertaken in recent years that illustrate this point:

- A series of insurance projects has involved the review of a whole area of commercial law which had failed to keep up to date with modern conditions and practice in the industry. The Consumer Insurance (Disclosure and Representations) Act 2012 effects major reform in this area, modernising the law and balancing the interests of insurers and insured.
- The Making Land Work project reviewed the law on easements, covenants and profits a prendre. The report identified anomalies, inconsistencies and complications and made proposals that, if accepted and implemented by the Government, would make the law in this area more accessible and easier to use for homeowners, businesses, mortgage lenders and those involved in the conveyancing process.
- The project on adult social care reviewed the existing adult social care legislation and found it to be opaque, outdated and confusing. The report recommended a unified legal framework for the provision of social care services for all adults, laying the foundation for the legal framework which is set out in the draft Care and Support Bill.
- The current project on contempt of court is looking at the issues associated with the use of social media by jurors during criminal trials.

In recent years we have extended the reach of our work and undertaken important regulatory projects which have the potential to promote economic growth as well as providing important legal reform.

The 11th Programme contains a number of such projects:

- The project on the regulation of health care professionals is considering the regulation of 1.34 million professionals in 32 professions. The existing arrangements have developed piecemeal over 150 years. There is an urgent need for a new coherent structure.
- The project on level crossings is examining the legislation relating to up to 8,000 level crossings in Great Britain. The Office of Rail Regulation sees the current law as difficult and expensive to operate, as well as an impediment to change which may be required for safety and business development reasons.

Our proposals have led to wide-ranging, profound and enduring changes in the law.

Our proposals have led to numerous changes in legislation. The following examples are illustrative of the range and importance of the changes which we have brought about since our creation.

- In the 1980s we proposed a major overhaul of legislation relating to children which formed the basis of the Children Act 1989. Almost 25 years on, this legislation remains largely intact and continues to meet the needs of society.
- In the 1990s we undertook a comprehensive review of the legislation protecting vulnerable people who are not able to make their own decisions. Ten years later our proposals were adopted and became the Mental Capacity Act 2005.
- At the start of this century, with the increasing pace of technological change, we published the report ‘Land Registration for the Twenty-First Century’. This formed the basis of the Land Registration Act 2002 which replaced legislation enacted in 1925 and paved the way for electronic conveyancing.
- In more recent years our ongoing reform of insurance law has resulted in two pieces of legislation, Third Parties (Rights Against Insurers) Act 2010 (based on a report published by us in 2001) and The Consumer Insurance (Disclosure and Representations) Act 2012.

It is striking that in the case of the Mental Capacity Act 2005 and Third Parties (Rights Against Insurers) Act 2010 there was a delay of several years between publication of our reports and implementation. Although delay is never desirable, this shows the value of an approach to law reform which is apolitical and takes a long term view.

While changes in legislation will often be the only effective means of achieving law reform, our proposals include, wherever appropriate, non-statutory solutions. Thus, for example:

- In our report on Trustee Exemption Clauses we recommended that the trust industry adopt a non-statutory rule of practice and that this should be enforced by the regulatory and professional bodies which govern and influence trustees and the drafters of trusts. Government accepted our recommendations and the trust industry adopted our recommended rule. Our approach was welcomed by the Better Regulation Executive which stated: "With complex and important issues such as trustee exemption clauses it is all too easy to play it safe and legislate. I'm glad to see that the Law Commission has listened to people on all sides of the debate and developed a proportionate risk-based approach to the issue."

Changes resulting from our proposals have delivered law that is clearer, fairer and more efficient, providing practical benefits to individuals, businesses, the courts and society and greater access to justice for all those whose lives are touched by the law.

While it is not possible to quantify precisely the impact of the changes resulting from our proposals, there are a number of ways in which we can gauge our success.

The primary measure of success in our law reform work is the number and proportion of our proposals which are implemented. Our record here is reasonably good. If one considers the entire work of the Law Commission since 1965, about 69% of the law reform reports have been implemented in whole or in part. Over 100 Acts of Parliament enacted since 1965 have implemented Law Commission recommendations. However, it is a cause for concern that implementation rates have fallen in each decade since the 1960s.

It is to be hoped that three recent developments in the machinery of law reform will assist in improving the implementation rate.

First, the Law Commission Act 2009 places a requirement on the Lord Chancellor to report to Parliament annually on the Government's progress in implementing our reports. The Lord Chancellor's third annual report was presented to Parliament in January 2013.

Secondly, following the commencement of the Law Commission Act 2009, in March 2010 the Law Commission and the Government concluded a Protocol in relation to our work. Under this Protocol the Law Commission will not take on a project unless there is an undertaking by the relevant Minister that there is a serious intention to take forward law reform in this area. Furthermore, once the Law Commission has published a report, the Minister for the relevant Department is required under the Protocol to provide an interim response to the Law Commission as soon as possible (but not later than six months after publication of the report), and to give a final response as soon as possible but within a year of the report being published.

Thirdly, on 7 October 2010 the House of Lords approved a new Parliamentary procedure. Developed in partnership with the Law Commission, it had been recommended by the House of Lords Procedure Committee as a means of improving the rate of implementation of Law Commission reports. Bills are suitable for this procedure if they are regarded as "uncontroversial".

It is too soon to ascertain the impact of these measures in ensuring that progress is made in considering and implementing our reports in a timely and efficient manner. We note the early success of the new House of Lords procedure which has resulted in two Acts under the pilot scheme – Perpetuities and Accumulations Act 2009 and Third Parties (Rights Against Insurers) Act 2010 – and two further Acts under the new procedure – Consumer Insurance (Disclosure and Representations) Act 2012 and Trusts (Capital and Income) Act 2013. The procedure is also available to the Scottish Law Commission and is currently being used for one of its Bills.

While implementation of our reports is a key measure, our work has a wider impact. Law Commission reports are frequently referred to in judgments, by other law reform bodies or during business in Parliament. In 2011 Law Commission

reports were referred to in 310 judgments in the United Kingdom and in 38 judgments from other common law jurisdictions. They were also referred to 65 times in Hansard. Furthermore, our work is widely quoted in academic journals and the media. A basic search on the internet reveals 512 references made in UK academic journals during 2011, and our monitoring service picked up 658 references to the Law Commission from the media during 2011-12. Some of these will be made in support of the Commission; some challenge our proposals on a particular point. At the very least these figures show that the Law Commission is gaining attention and stimulating debate on the issues which we are addressing.

Since 2007 we have published formal analyses of the likely economic effects of our proposals in order to achieve a better understanding of the likely financial benefits and costs of our proposals.

Our in-house economic adviser assists in drafting impact assessments for all our reports and many of our consultations. While the value of law reform is certainly not limited to quantifiable benefits, we recognise the significance of the financial costs and benefits of all law reform projects. As part of the process for selecting the projects in our 11th Programme, we applied a preliminary cost/benefit analysis to all the potential projects.

Many of our proposals deliver economic benefits, such as the two examples given below:

- The introduction of new procedures to aspects of trust and insurance law, which have benefited the financial sector.
- The removal of inconsistent laws (where a UK statute is overlain by EU regulations or where out of date laws are superseded by rules and guidance), thereby eliminating the costs of ‘double banking’. For instance our report on consumer insurance law simplified the law, where a 1906 Act was overlain by inconsistent Financial Services Authority rules and ombudsman guidance.

CODIFICATION

Codification is part of our general function under section 3 of the Law Commissions Act 1965. We view codification as including an element of the reform of the law, and not simply restating it.

Applying a broad definition, codification includes:

- reforming aspects of an unsatisfactory area of common law and codifying the result
- codifying any non-legislative legal rules, such as rules applied by an ombudsman or a regulatory body, and
- bringing all the law on a topic into a single code.

We consider codification a highly effective technique of law reform. We believe its continued availability to us as a statutory function is vital to our ability to provide the most appropriate solutions to reforming complex, problematic and anomalous law.

From our inception, we have included proposals that involve codification in our Programmes. In recent years, as priorities have changed, we have devoted our limited resources to conducting a number of smaller law reform projects, designed to simplify identified areas of law as a preliminary to a more extensive codification at some point in the future.

A good example is our series of projects on simplification of the criminal law, which is a valuable first step towards its codification.

The aim of our simplification projects is to identify those areas of the criminal law where the common law could be simplified and improved by the abolition, replacement or modification of offences that are unused in practice, or problematic in principle, for example because the definition is vague or anomalous.

In our 10th Programme, we identified three potential areas of the criminal law that we could examine with the aim of simplifying them:

- Public nuisance
- Kidnapping
- Treason

We have subsequently held public consultations on public nuisance and outraging public decency, and on kidnapping.

From time to time in individual projects we take the opportunity to codify an area of the law for which we are making reform proposals. For example, in our 1997 Report on hearsay evidence in criminal proceedings we recommended putting a reformed law of hearsay evidence on a wholly statutory basis.

STATUTE LAW REPEAL

We maintain a rolling programme dedicated to statute law repeal (SLR).

This work involves making proposals for the removal from the statute book of laws that no longer serve any useful purpose. The implementation of our proposals by means of Statute Law (Repeals) Bills helps to keep the statute book as up-to-date as possible, thereby increasing the accessibility of the law and ensuring that it does not fall into disrepute.

We have produced 19 reports since 1965, each accompanied by a draft Bill which has been introduced into and enacted by Parliament. The implementation rate is 100% and it is extremely rare for any changes to the Bill to be required by Parliament. In total over the past 45 years we have been responsible for the repeal of over 3,100 Acts in their entirety.

We produced our 19th SLR Bill in April 2012. It is the largest SLR Bill we have ever produced, identifying over 800 Acts (and parts of 50 other Acts) for repeal as being obsolete. The Bill was introduced by the Government in October 2012 and completed its Parliamentary passage and received Royal Assent at the end of January 2013.

The need for Statute Law Repeal will continue as long as Parliament continues to legislate. Indeed the ever-increasing pace of social, economic and political change means that the useful lifespan of much of Parliament's output is of limited duration.

The 19th SLR Act contains Acts that have cluttered up the statute book for many years, as well as more modern Acts. It includes Acts relating to:

- tax law at the request of HM Revenue and Customs,
- pension law at the request of the Department for Work and Pensions, and
- civil and criminal justice, including extradition, forgery, fraud and the police.

While Departments from time to time seek to introduce Bills which repeal obsolete legislation, the Law Commission is the only organisation in this jurisdiction that systematically keeps the whole of the statute book under review and has a continuing programme for the repeal of laws that have become obsolete.

Working with HM Revenue and Customs on our latest SLR Bill, we were able to propose repeals to 31 Tax Acts. This clearing out of the tax statute book was strongly welcomed by HMRC, which had little or no prospect of achieving the repeals in one of its own Finance Bills.

CONSOLIDATION

Consolidation has always been an important part of our statutory functions and we continue to regard consolidation as a core activity.

Consolidation involves drawing together and updating different enactments on the same subject matter.

Successive Acts on the same subject can quickly undermine the coherence and structure of legislation and create confusion, for example by introducing inconsistencies of expression and leaving untouched obsolete material. It can also become difficult to identify whether a provision is effective or not.

The process of consolidation is intended to return the legislation to a rational structure, as well as generally improving it. It will often involve altering the underlying structure, concepts and drafting terminology and re-assembling the material in a more coherent order. At the same time it provides the opportunity to modernise language, to omit material that is obsolete, to correct anomalies, mistakes and inconsistencies and to make modest changes that will improve the legislative text.

Consolidation is technically difficult and can be time-consuming. This is because Parliament expects a consolidation Bill to do those things outlined above while accurately reproducing the effect of the law being consolidated. That requirement is subject only to any proposed changes of the law that are recommended to Parliament as being necessary to secure a satisfactory consolidation and agreed by Parliament under the procedure for consolidation Bills. Decisions on the changes (if any) that should be proposed involve considerable judgement on the part of the drafter since the scope of what changes can be agreed under the consolidation procedure is limited.

Technological improvements have increased the accessibility to updated versions of amended Acts. However, an updated text, simply containing the amendments made to it, is no substitute for consolidation. There is still a need for consolidation in cases where the law is found in more than one statute or instrument, or where layers of amending legislation have distorted the structure of the original Act.

Consolidation is a particularly valuable contribution to improving the state of the statute book. The implementation of our consolidation Bills has made the relevant statutes more accessible and comprehensible.

We have produced over 200 consolidation Bills since 1965, which have been introduced into and enacted by Parliament. Over 40 of those Bills were accompanied by a Law Commission report recommending changes to the law that would improve the quality of the consolidation. All of the Law Commission consolidation Bills introduced into Parliament have been enacted, and the vast majority of changes recommended by the Commission have been accepted.

Our consolidation Bills have covered a huge range of topics. Some, such as the Companies and Housing consolidations in 1985 were enormous Bills, while others such as the Lieutenancies Bill in 1997 were quite short. Our most recent consolidation Act was the Charities Act 2011, a substantial measure.

The need for consolidation will continue so long as Parliament continues to legislate.

The need for consolidation is most pressing after repeated legislative activity in a particular area of law over a period of several years, without the original legislation being replaced. The sheer volume of legislation produced every year means that the need is likely to increase rather than reduce over time.

In January 2012 the Prime Minister announced that the Government wished to consolidate the law relating to co-operative and public benefit societies (also known as industrial and provident societies). We were invited to take the necessary work forward with the responsible Department (HM Treasury). We are also working currently on a consolidation of the legislation on bail.

The Law Commission has a statutory responsibility in this field, which it is keen to discharge. Consolidation contributes to better regulation (as it often enables a lot of older law to be repealed and the current law to be stated more clearly and briefly) and to good law generally. Furthermore, Parliamentarians have voiced their desire to see more rather than fewer consolidation Bills. Subject to other priorities and the availability of human and financial resources at both the Law Commission and the Department responsible for the area of law in question, there are several other candidates for consolidation.

ADVICE

In addition to the three main streams of work at the Commission (projects of law reform, statute law repeals and consolidation), on occasion we provide independent advice to Government.

We are able to respond quickly to requests for advice, drawing on our expertise to give in-depth analysis.

The support we have given the UK Government in negotiations within the EU offers a good example of our role.

In May 2011, the Ministry of Justice and the Department for Business, Innovation and Skills asked the Law Commission to advise the Government on the advantages and disadvantages for UK businesses and consumers of an optional system of European contract law. We provided an in-depth analysis and met regularly with officials as the proposals evolved, identifying improvements and retrograde steps. In the ensuing negotiations the UK Government was able to put forward constructive and fully reasoned arguments, based on our independent advice, as well as show an understanding of other legal systems and the views expressed in other member states. This enabled the Government to exert a higher level of influence and to deliver a better result for the UK.

We published our advice in November 2011, just six months after the referral and one month after the European Commission had published its final draft of what is now known as the Common European Sales Law (CESL). Since publication, the advice has been well received by Government, Parliamentarians and academics and is frequently referred to in articles about the CESL.

We have recently been approached once again by the Department for Business, Innovation and Skills to provide advice on the Kay Review, an independent review, undertaken by Professor John Kay and published last year, into the effect of UK equity markets on the competitiveness of UK business.

The need for additional powers or functions

Since our establishment in 1965 we have adapted to several statutory changes.

In the last few years there have been three major changes, principally aimed at improving the rate of implementation of proposals for law reform.

- The requirement placed on the Lord Chancellor in the Law Commission Act 2009 to report to Parliament annually on the Government's progress in implementing our reports. In January 2013 the Lord Chancellor published his third annual report.

- The Protocol agreed between the Government and the Law Commission in March 2010 pursuant to the Law Commission Act 2009.
- The new Parliamentary procedure approved by the House of Lords on 7 October 2012 for Bills regarded as "uncontroversial". To date it and its pilot have been used for four Bills.

Prior to these recent developments, in 1998 the 1965 Act was amended pursuant to Scottish devolution. Since then issues have emerged regarding the 1965 Act and the powers of the Welsh Government. We have found solutions to these issues on a case by case basis.

- While the Government rejected our Renting Homes Report in 2006, the Welsh Government has indicated in its "Homes for Wales" White Paper published in May 2012, that it wishes to model closely its own proposals for reform on our Report. In view of developments since the publication of the report and draft Bill in 2006, the Welsh Government has asked the Commission to review and update the Renting Homes report. This update report will be published at the end of March 2013.
- We recommended that in the Adult Social Care project that two statutes (one for England and one for Wales) would be required to implement the reforms that we were proposing. This advice has been accepted.

However, there are points of principle that remain an issue (see next section).

ADDITIONAL POWERS OR FUNCTIONS

The Commission considers that the Welsh Government should have the same access to the reference procedure as UK Government Departments.

Initially, under the Welsh devolution settlement only executive functions were transferred to the National Assembly, which had little significance for law reform. With the implementation of Part 4 of the Government of Wales Act 2006 in May 2011 the National Assembly attained substantive legislative powers. No amendments have been made to the Law Commissions Act 1965 to reflect the new role of the National Assembly and the (now statutory) Welsh Government.

The result is that, the Welsh Government does not have the same power as a UK Government Department to refer a project to the Law Commission. In devolved areas, it is the Welsh Government and Assembly that have legislative competence, and the UK Department now only has responsibility for the law effective in England. This is true of major areas of law in which the Commission has been and continues to be active, including housing law, social services law, health and wildlife (and most areas of environmental policy).

If the Welsh Government wanted to refer a project to the Commission, and the Commission agreed, it could only be accomplished by asking the Wales Office to refer the matter on behalf of the Welsh Government. This is unsatisfactory. Most importantly, it does not reflect, as a matter of principle, the constitutional position of the devolved Welsh institutions. It also adds unnecessary and inefficient administrative hurdles to the process.

The Commission considers that the Welsh Government should have the same access to the reference procedure as UK Departments. In November 2012 Commissioners agreed to support such an alteration to the current arrangements. Following preliminary meetings with Wales Office officials and the Welsh Government, the Chairman of the Commission wrote to the Secretary of State for Wales on 5 February 2013 to ask that a transfer of functions order be made under the Government of Wales Act 2006 in respect of the functions of UK Ministers in relation to references under section 3(1)(e) of the Law Commissions Act 1965.

A further potential problem relates to the procedures for the Law Commission's Programme of work. Once agreed internally the Programme is approved by the Lord Chancellor. There is no provision for the Welsh Government to be involved in consenting to the Programme in so far as it relates to devolved matters. That is unsatisfactory and an issue that requires further consideration in the fullness of time.

The Commission is very conscious of its duty to continue to meet the law reform needs of Wales. We have drafted a revised protocol dealing with arrangements for Wales and are awaiting a response from the Welsh Government.

The Commission is also in the process of establishing an advisory committee for Wales. The objective of the committee would be to provide the Commission with advice on the exercise of its functions in relation to Wales. An inaugural seminar is to be held in March 2012.

The Commission considers that there may be scope for enhancing its role in relation to the special procedure in the House of Lords.

We are very pleased to have used the procedure successfully on four occasions. Now that it is established, we think it would be appropriate for there to be a review of how the procedure has worked in practice and what improvements could be made. We believe there is scope for greater utilisation of the procedure than at present to enable more of our Bills to be enacted. We welcomed the development in 2012 of the Government permitting carry over of one of our Bills between sessions.

Part II – Form

> "Those of you who take an interest in these things, and I hope that most of us do, will recognise that during the course of the chairmanship of each, there was a carefully measured output of thought through proposals for the improvement and reform of the law in all its many different facets. Each paper of the Law Commission was marked by intellectual rigour and they proposed practical application of the law to modern life and conditions…"
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> *The Lord Judge, Lord Chief Justice of England and Wales. Royal Courts of Justice, on the swearing in as Heads of Divisions of Munby and Etherton LJJ, former chairmen of the Law Commission, 11 January 2013.*

Introduction

The public needs an independent, expert body which is able to take an objective, long term view of the need for law reform. In 1965 the Law Commission was created by Parliament as an independent law reform body funded through a direct grant from Parliament to meet this need. We are charged by Parliament with specific functions and duties in relation to law reform which we are required by statute to perform independently of central Government and any political agenda. Our Chairman is a senior judge and our Commissioners are, by statute, Crown Appointments and are not civil servants. Almost half a century on from our creation we have established a wealth of experience in law reform and an outstanding reputation for objectivity and expertise. We have been the model for law reform bodies in other jurisdictions and we frequently respond to requests for advice and co-operation from Law Commissions, particularly in the Commonwealth.

The current model

NDPB

Since its establishment back in 1965 the Law Commission has been a public body at arms' length from Government. Applying contemporary classifications it is an advisory NDPB (non-departmental public body).

This model accords with our statutory framework. It is the most appropriate for our functions and supports our unique attributes. We are:

- independent from Government, but associated with it
- experts in law reform with a dedicated focus, funding and staff, and
- led by Commissioners.

Independent from Government, but associated with it

The value of the Commission's independence has been recognised by Government. In October 2010, the Government concluded, in its Public Bodies Reform Review, that the Commission should be retained on the grounds of our "performing a technical function which should remain independent of Government". In February the following year, speaking in the House of Lords about the 150 organisations, including the Law Commission, in Schedule 7 of the Public Bodies Bill, former Cabinet Minister, Lord Taylor of Holbeach, acknowledged that "the Government absolutely recognises that some public functions need to be carried out independently of Ministers."

We are able to take an impartial and long-term view of law requiring reform and to seek the best solutions free from the influence of any political ideology.

"…[The Law Commission] is clearly focused on making the law better and easier to use, rather than on using the law to achieve particular political objectives…" (Tim Butler, Solicitor to the National Trust)

The Government itself benefits from our independence, in that it enables Government to review and reform the law in areas where the public might have reservations about Government's ability to take an impartial approach to formulating policy (eg our forthcoming work on misconduct in public office) or where the subject matter may be unpopular or controversial (eg our current work on reform of the licensing laws for taxis and private hire vehicles). The following extract from a letter received by the Law Commission from Miss P A Brown, a policy adviser in the Department for Transport, in respect of our project on taxis and private hire vehicles strikingly illustrates this point:

"The Minister decided to opt for a review by the Law Commission even though it meant resisting a recommendation from the Transport Select Committee for an

in-house review. Naturally one of the main reasons for doing so was because of the Law Commission's experience and expertise in unravelling and restructuring complex and archaic legislation. But the principal consideration was the independence of the Law Commission.

"We consider that the quality of the review is vastly improved by being undertaken by a body which is independent and is seen to be independent. There have been allegations by certain cynical elements of the taxi trade that the whole exercise is a sham which has been arranged by Government to secure particular outcomes."

We are able to engage effectively with Government.

Although we are independent from Government influence, we work closely with Departments in formulating our proposals. Our status as office holders under the Crown or civil servants provides a sound basis for open and constructive interaction with departmental officials.

In 2010 we agreed the Protocol with the Lord Chancellor. This governs how we formally conduct our relationship with Government Departments through the course of our law reform projects, placing obligations on both the Commission and Government.

Furthermore, there is an increasing practice whereby on some of our more technical reports we are closely involved in the work of the departmental Bill Team responsible for implementing the Bill in Parliament. This occurred on the recent Consumer Insurance (Disclosure and Representations) Bill and the Trusts (Capital and Income) Bill.

We are able to engage effectively with Parliament.

Under the 1965 Act we are required to lay before Parliament our Programmes of reform and our reports. Over the years we have developed a strong relationship with Parliament, securing special arrangements to facilitate the passage of our Bills. We have a fast-track route for our SLR and consolidation Bills and,

introduced in 2010, a special procedure in the House of Lords for uncontroversial Bills. This is indicative of Parliament's trust in the Commission and the Bills we produce for them to enact.

Lord Justice Etherton, former Law Commission Chairman, wrote: "During my time as Chairman of the Law Commission I secured a number of critical changes in the Commission's relationship with Parliament and the Executive which could never have been achieved if the Law Commission had been perceived as part of the Ministry of Justice or in some way the Government's research body. In particular, I do not believe there would have been any prospect of securing the special procedure in the House of Lords for uncontroversial Law Commission Bills, which has proved to be so invaluable in the enactment of a range of Law Commission recommendations."

We are able to engage effectively with the Scottish and Northern Ireland Law Commissions.

At an organisational level we maintain a close relationship with the Scottish and Northern Ireland Law Commissions. We communicate on a regular basis and provide mutual support, exchanging knowledge and expertise. For example we have been sharing our expertise in the special procedure which the Scottish Law Commission is currently using for one of its Bills.

We also work together on a significant number of joint law reform projects. The following are examples of where we have worked with both the Scottish and Northern Irish Law Commissions.

In 2010 we embarked on our first tripartite project with all three Law Commissions working collaboratively to reform the UK law on the regulation of health care professionals. A final report and draft bill are due in 2014.

That model has been followed with a further three Commission projects on the reform of electoral administration. Due to report with a draft Bill in 2017 that project will bring significant reforms of a UK-wide nature that will benefit all of the electorate.

While we work collaboratively with the other Commissions we usually take a lead role on the UK-wide law reform projects and statute law repeals.

We are able to engage effectively with the public.

Effective engagement with the public is vital to our law reform work. Individuals and organisations representing the business, public and voluntary sectors contribute to the work of the Law Commission by proposing law reform projects and by responding to our consultations.

Stakeholders tell us that the fact that the Commission is independent enables the public to be confident that proposals will be considered impartially and without political bias and that the Commission will seek the best solutions, employing legal and intellectual rigour and free from any political ideology or constraint.

The following extract from a letter received by the Law Commission from Stephen Worthington QC, Chairman, Law Reform Committee, Bar Council illustrates this point.

“It is the responses of consultees which is a vital part of the dynamics of law reform. Any impression that the Law Commission was not wholly independent could cause serious damage to the reputation and relationship which the Law Commission has built up over many years with those with whom it regularly consults.”

While our independence is crucial to effective engagement, so too is our association with Government, as illustrated by recent feedback we have received from BILA (the British Insurance Law Association).

BILA, a membership organisation representing insurers, insurance brokers and other intermediaries, academic lawyers, solicitors and barristers, has been a pivotal stakeholder in our long-standing work on insurance contract law. BILA considers the Commission as being closely enough associated with “Government” that we can effect change, yet far enough removed to be able to act independently and achieve balanced outcomes. This perception of the Commission proved particularly valuable in our work on disclosure and misrepresentation in insurance contracts. We were able to achieve such a level of consensus between the insurance industry and its influential consumers that Government was able to take the Consumer Insurance (Disclosure and Representation) Bill through Parliament via the House of Lords special procedure available only in the case of uncontroversial measures, receiving Royal Assent on 8 March 2012.

Experts in law reform with a dedicated focus, funding and staff

We are able to take a long term approach to law reform.

The Law Commissions Act 1965 requires us to take a strategic view of the need for law reform across the entire legal landscape of England and Wales. A key element of the performance of this role is the consultation and preparation of Programmes of law reform on a three yearly cycle. We have begun planning the approach to our 12th Programme which is due to commence in 2014.

We make realistic proposals for law reform.

Our experience in law reform, combined with our links with Government ensures that we make practical proposals that can realistically be implemented.

Our proposals on adult social care provide a good example of this. The Government, in its response to the report said, “The work of the Law Commission has laid the foundation for the legal framework which is set out in the draft Care and Support Bill. It has not only provided crucial analysis of the problems posed by the current law, but also has given clear and practical solutions which will make a difference to those who receive care and support and those who manage the system. The Government is grateful for the Law Commission’s very significant contribution to the debate”.

We have technical, specialist knowledge.

The Commission’s work has always been on technical areas of the law: the unique combination of expert Commissioners and teams of specialist lawyers gives us a capacity to offer effective work on some of the most technically difficult legal topics.

The Capital and Income in Trusts: Classification and Apportionment project illustrates this point. This project examined the complex rules that determine the classification of trust receipts from companies and require trustees to apportion

funds between capital and income. It also considered the current rules on investment applicable to charitable trusts that have permanent capital endowment. Such was the technical, specialist nature of this work, we played a significant role in steering the Bill through Parliament.

We are specialists in consultation.

Consultation is the fulcrum of our law reform projects. It is critical to the final outcome in that it allows us to gain an in-depth, up-to-date and through understanding of an area of law, the problems that arise and how they are experienced by the courts, legal practitioners and other interested parties, be they business, the voluntary sector, private citizens or others. The result of our consultation process is virtually always to produce a more effective set of final recommendations. A case study on how we consulted with providers and service users in our Adult Social Care project powerfully illustrates this point.

The system of adult social care clearly needed improving. Our aim was to make sure that people who provide, deliver and use adult social care services have a say in how it should be changed for the better.

Our public consultation on adult social care ran from 24 February until 1 July 2010. During this period, members of the Public Law team attended 72 consultation events across England and Wales.

Our programme included:

- a half-day workshop with deafblind people and carers, organised by Sense
- a joint conference organised by the Older People's Commissioner for Wales and Age Cymru for over 100 people in Cardiff, including service users, carers, professionals and academics
- a consultation stand at a Young Carers' Festival in Southampton
- a two-hour workshop with service users, carers, professionals and academics
- a two-hour workshop with service users, carers, service providers and local authority staff, organised by Reach in Newport

- a full-day conference with local authority lawyers, social workers and advocates in Newcastle
- a half-day workshop with over 40 family carers in Camden, London, and
- a blog that ran throughout the consultation period on which people could post their comments.

Through these events we were able to reach, and hear from, a wide audience with diverse views and experiences of the sector. Participants included service users, carers, social workers and members of safeguarding boards, community care lawyers, service providers and representatives from charities and campaigning organisations.

At each event, people shared with us the difficulties they were experiencing as a result of the complexities of the law: for example, some were confused or unaware of their basic legal entitlements, while others had been involved in long-standing disputes with their local authorities. Time and again we were struck by the strength of support for our project and the need to reform this area of law as a matter of priority.

Our consultation approach was well received by many who participated in the events. For example, we were commended by the Hampshire Personalisation Expert Panel, a service user-led organisation, for our "willingness to engage with users and carers" and Andrew Tyson, Head of Policy at Social Enterprise In Control, said: "This consultation enabled us to bring together people whose efforts to achieve change have been frustrated, with a Law Commission team who are trying to make a difference. The Commission's direct, face-to-face approach allowed ordinary people to articulate their day-to-day experiences and say how they think the law should change. Too often with such exercises, as we make our way through the layers of bureaucracy, our messages get diluted".

We have a team of Parliamentary Counsel embedded in the organisation.

Parliamentary Counsel are responsible for drafting the Commission's law reform Bills on the instructions of the relevant law reform team. The close working between Parliamentary Counsel and the teams contributes significantly to the quality of our output. On the one hand it enables Counsel to develop a thorough understanding of the team's intentions and ensure these are reflected accurately and appropriately in our draft Bills. On the other hand it provides the teams with an opportunity to test the viability of our provisional proposals.

Parliamentary Counsel also provide advice on questions relating to legislation and Parliamentary procedure arising in the course of the Commission's work. This has been particularly valuable on the occasions when we have supported the implementation of Law Commission Bills, such as the Perpetuities and Accumulations Bill and the Trusts (Capital and Income) Bill.

Led by Commissioners

We are a high-status organisation.

The standing and reputation of the Commissioners gives the Commission a status it would not otherwise enjoy. The Chairman is a Lord Justice of Appeal and, for that reason, also a Privy Councillor. The other four Commissioners are experienced barristers, solicitors or university professors with outstanding reputations in their specialist areas of law.

We have a wide sphere of influence.

The Commissioners play a key role in developing our external relationships. They undertake a range of activities, including speaking at conferences and media appearances. They also liaise on a regular basis with Law Commissions in other jurisdictions.

The following two examples convey the extent of the Commissioners' influence and the impact this has on the quality of our work.

- In 2012 we conducted a consultation on the Electronic Communications Code (Schedule 2 to the Telecommunications Act 1984), which regulates the legal relationships between network operators (for example, mobile phone companies) and the owners of the land they use for apparatus such as cables and masts. We held a number of events for stakeholders, which were praised by those who attended for the way in which Professor Cooke facilitated a calm and constructive dialogue. Professor Cooke was able to develop good relationships with landowners and organisations representing them, and with network operators, and the result was a very effective consultation which gave us a wealth of information that had not been previously available. Our Report, which will be published in February 2013, makes recommendations for a much more transparent and efficient Code.
- The Criminal Law Team headed by Professor Ormerod recently hosted a symposium as part of the Contempt of Court project consultation exercise. Speakers included members of the press, circuit judges, the Chief Magistrate, a Chief Constable, a Member of Parliament, academics and expert legal practitioners. Over 120 delegates attended including present and former members of the Court of Appeal, members of the House of Lords and a wide range of other stakeholders.

Our work is widely considered to be of high quality.

Each Commissioner is responsible for overseeing the Commission's law reform work in a specific area of law in which he or she is a leading expert.

The quality of the work is assured through our internal process of peer review. This allows each Commissioner to draw on the considerable expertise of his or her fellow Commissioners, and provides Commissioners as a group with an opportunity to challenge each other's work.

Additional powers and flexibilities

Within the current model and rules relating to arms'-length bodies, the Law Commission could operate more effectively if it was given more powers and flexibilities.

We believe that the current funding model requires a review to enable us to plan our future work more effectively.

Connected with this, we would benefit from having greater control over expenditure and recruitment. While we understand that we must operate within a framework, it seems that there should be scope for increasing our currently very limited powers to make decisions on expenditure and recruitment without the need for prior approval from the Department. Increased delegation would cut out unnecessary processes and speed up decision-making, thereby reducing delay and uncertainty.

Abolition, merger or alternative model

ABOLITION

Is a dedicated law reform resource still needed? Yes

For the reasons explored in this paper there is and there will continue to be a need for law reform. If the Government stops funding a dedicated resource, there will, inevitably, be a return to the situation pre-1965 with Government using committees to achieve law reform. While some of the output from these committees was excellent, they did not have the time, resources or remit to take a long term or strategic view of law reform. It was, of course, in this context that the decision was made to establish the Law Commission.

MERGER

If abolition is not an option, could the Law Commission merge with another arms' length body? No

The purpose of merger is to secure better value for money for the taxpayer or to prevent duplication of functions. Typically a decision might be taken to merge together public bodies if they are closely aligned in terms of policy or subject matter. The Law Commission is the only body dedicated to reforming the law. It is difficult to identify significant areas of overlap with another arms' length body or to see where savings could be achieved by joining us with another body. Merger, therefore, is not a credible option.

ALTERNATIVE MODEL INSIDE GOVERNMENT

Could the function be brought inside Government through the creation of a dedicated law reform unit inside a Department? No. Independence from Government is fundamental to the functioning of the Law Commission for the reasons set out at length above. Such a body would not be able to deliver effective proposals for law reform.

Independent, but associated with Government?

As a division within the Ministry of Justice, the unit would be required to select reform projects in accordance with departmental priorities. It would be inhibited from taking a long-term, strategic view, or from taking on projects from other Departments.

The direct relationship with Parliament would be destroyed. The current requirements for the Law Commission to lay before Parliament its Programme of law reform and its Reports and for the Lord Chancellor to lay before Parliament the Law Commission Annual Report and his annual progress report on implementation would all disappear. It is unlikely that Parliament would agree to fast track or give special treatment to Bills as the unit which produced them could no longer be trusted as being impartial.

The strong links with the other UK Law Commissions could not be maintained by Government officials. Law reform projects covering the whole of the UK would become much more difficult to undertake.

Finally, society at large would be less willing to engage. It would regard a consultation issued by the unit as an exercise in advancing the Government agenda with the outcome pre-determined. An extract from a letter received by the Law Commission from David Allison, former Chairman of Resolution, illustrates this point:

“Inevitably Government consultations were aimed to support the incumbent Government’s policy objectives and so, whilst compliant with requirements for such, were not seen as coming from a neutral standpoint or one that was truly aimed at doing what was right by the people who would be affected by the particular policy objective. Often such consultations were rushed and were not backed by significant research.

“Conversely Law Commission consultations were seen (and continue to be seen) as a very different animal. They were never undertaken with a view to achieving a particular policy objective. They were thoroughly researched and considered and as such where implemented led to better law. As a consequence Resolution put considerable time and effort in responding to requests from the Law Commission.”

Experts in law reform with a dedicated focus, funding and staff?

A law reform unit inside a Department would have less scope for setting its agenda and would not have the space to plan in the long term. It would also have less control over its budget and staff. It would not, for example, be able to maintain its own team of Parliamentary Counsel. In these circumstances it is doubtful that the unit would be able to maintain an expertise in law reform or undertake effectively law reform projects.

Led by Commissioners?

The reputation and independence of the Law Commission is what draws candidates of such great experience and expertise to interrupt their existing successful careers to seek appointment as Commissioner. Indeed no member of the judiciary could chair the Commission if it were not independent of Government.

A law reform body not led by Commissioners would be greatly diminished in terms of status, influence and confidence in the quality of its output.

Could the issues related to bringing the function inside Government be resolved through the creation of an Executive Agency? No

The agency model is designed for the delivery of executive functions within Government and is not suitable for the type of advisory work undertaken by the Law Commission.

In any event, an Executive Agency operates within a Government Department. Therefore the same objections apply to delivery through an Executive Agency as to delivery through a law reform unit within a Department.

ALTERNATIVE MODEL OUTSIDE GOVERNMENT

Could the function be taken outside Government? It is essential for the achievement of its objectives that the Law Commission remain a public body.

Independent, but associated with Government?

An outsourced law reform body would have more limited access to Ministers and officials. The current statutory framework which underpins the relationship between the Law Commission and the Government and sets out their respective roles and responsibilities would be extremely difficult, if not impossible, to replicate if the Law Commission ceased to be a public body. The effect of this would be to dramatically reduce the likelihood that the outsourced body's proposals would be implemented.

An outsourced body would have no formal links with Parliament. Crucially it would not have the benefit of the special treatment currently given to some Law Commission Bills on the basis that the Law Commission is a well established and trusted public body. This, too, would have a negative impact on implementation.

An outsourced body would also have a looser relationship with the other Law Commissions. Currently the three UK Law Commissions have close ties rooted in their history, function and form. An outsourced body would not have those ties and would in turn find it much more difficult to agree and work with the Scottish and Northern Ireland Law Commissions on joint projects.

Finally, without the status of an independent public body closely associated with Government and Parliament, an outsourced body would have limited reach into society at large. As illustrated by the recent feedback from BILA, consultees respond to the Law Commission both because it is independent and because it is seen to be close enough to Government to effect change.

Experts in law reform with a dedicated focus, funding and staff?

Funding arrangements will vary according to the model. They may lack certainty, in which case the body will be unable to plan in the long term or build up a permanent core of expertise in law reform. Alternatively they may be from a source that would inevitably make the Commission appear to be partisan.

Led by Commissioners?

Commissioners could not be accommodated within an outsourced body. They are appointed by the Lord Chancellor, which is a measure of their status and influence, and the Chairman is a serving Court of Appeal Judge. As stated earlier, a law reform body not led by Commissioners would be greatly diminished in terms of status, influence and confidence in the quality of its output.

Closing remarks

The evidence we have provided here makes a strong case for retaining the functions of the Law Commission and for its continued existence as an arms'-length body. Evidence from our stakeholders demonstrates that we are valued for our expertise, independence and thoroughness of approach.

The recent changes introduced by the 2009 legislation have improved the accountability of the Commission, Government Departments and the Lord Chancellor as to how we conduct our law reform work and the implementation of it. We have cited areas where we believe further improvements need to be made that would:

- reflect the changing legal landscape as a result of devolution in Wales
- enable more effective use of the Commission's procedure for legislation in order to increase implementation rates, and
- allow the Commission greater freedom to run our own affairs.

These improvements would enable the Commission to continue to make a positive difference through our law reform work and enhance the important role we play in underpinning the rule of law in England and Wales.

6 February 2013

> "The Government are committed to ensuring that the law is modern, simple and accessible, and we hold the Commission's work in high regard. I am confident that the measures flowing from the Law Commission Act 2009…will help to improve the implementation rate of Commission proposals. A higher rate of implementation will help to ensure more effective and accessible law, delivering better value for money as valuable Law Commission work is put to good use."
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> *Jonathan Djanogly MP, Parliamentary Under-Secretary of State for Justice. Hansard (HoC), 21 January 2011, vol 521, col 1149-50.*