

# **THE LAW COMMISSION**

(LAW COM No 328)

## **ANNUAL REPORT 2010–11**

### **The Forty-Fifth Annual Report of the Law Commission**

*Presented to Parliament pursuant to section 3(3) of the Law Commissions  
Act 1965*

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Ordered by the House of Commons to be printed on 21 June 2011

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# THE LAW COMMISSION

The Law Commission was set up by section 1 of the Law Commissions Act 1965 for the purpose of promoting the reform of the law.

Commissioners:                   The Rt Hon Lord Justice Munby, *Chairman*  
Professor Elizabeth Cooke  
David Hertzell  
Professor David Ormerod<sup>1</sup>  
Frances Patterson QC

Chief Executive:                 Mark Ormerod CB

The Commission is located at Steel House, 11 Tothill Street, London, SW1H 9LJ.



The Chairman, Commissioners and Chief Executive

(left to right) David Ormerod, Frances Patterson, Mark Ormerod,  
Sir James Munby, David Hertzell, Elizabeth Cooke

This Annual Report covers the period 1 April 2010 to 31 March 2011, although we have also included recent and relevant references beyond the reporting period.

The terms of this report were agreed on 27 May 2011.

The photographs in this report were kindly taken by Joel Wolchover, a member of the property family and trust law team, removing the need to pay for a professional photographer.

**The text of this report is available on the Internet at: <http://www.lawcom.gov.uk>.**

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<sup>1</sup> Professor David Ormerod succeeded Professor Jeremy Horder on 1 September 2010.

# THE LAW COMMISSION ANNUAL REPORT 2010–11

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# Highlights of 2010–11

2010					2011				
April	May	June	July	August	September	October	January	February	March
1st April	26th May	1st June	6th-8th July	25th August	1st September	4th October	11th January	16th February	4th March
Professor David Ormerod appointed Criminal Law Commissioner	Administrative Redress: Public Bodies and the Citizen report published	11th Programme consultation opens	Exhibition at Civil Service Live, London	Criminal Liability in Regulatory Contexts consultation opens	Professor David Ormerod takes up appointment	Coroners and Justice Act 2009 brings into force changes proposed in our Murder, Manslaughter and Infanticide project	Marital Property Agreements consultation opens	Law Commission accepts referral to review regulation of healthcare professionals	Charities Consolidation Bill published
8th April		11th June	10th July		2nd September		17th January		22nd March
Bribery Act 2010 receives Royal Assent		Five Commissions conference, London	Broker's Liability for Premiums consultation opens		Public Services Ombudsmen consultation opens		Government announces Trusts (Capital and Income) Bill to take forward reforms proposed in Capital and Income in Trusts: Classification and Apportionment project		Expert Evidence in Criminal Trials report published
		30th June	20th July		14th September	7th October			31st March
		First reading in the House of Commons of Estates of Deceased Persons (Forfeiture Rule and Law of Succession) Private Member's Bill, drawing on our Forfeiture and the Law of Succession project	Civil and Criminal Justice statute law repeals consultation opens		Trustee Exemption Clauses proposals accepted by Government	House of Lords approves procedure for Law Commission Bills			Analysis of Adult Social Care consultation responses published
		30th June	21st July		14th September	15th October	24th January		
		Chairman, Commissioners and Chief Executive attend Parliamentary reception in Foreign and Commonwealth Office	Insured's Post-contract Duty of Good Faith consultation opens		Government publishes its response to Adult Social Care consultation	Closure of 11th Programme consultation	Lord Chancellor makes first report to Parliament on implementation of Law Commission proposals		
			22nd July		16th September	21st October			
			Level Crossings consultation opens		Benevolent Institutions statute law repeals consultation opens	Unfitness to Plead consultation opens			
			27th July						
			High Court's Jurisdiction in Relation to Criminal Proceedings report published						
			29th July						
			Requirement for a Formal Marine Policy consultation opens						

# LAW COMMISSION ANNUAL REPORT 2010-11

*To the Right Honourable Kenneth Clarke QC, MP, Lord Chancellor and Secretary of State for Justice*

Of great significance for the Commission this year was the most welcome approval by the House of Lords of a procedure for Law Commission Bills. The procedure allows for the Second Reading of technical and politically uncontroversial Law Commission Bills to be taken off the floor of the House. Approval came in October after a trial period that saw two of our Bills pass through Parliament: Perpetuities and Accumulations, and Third Parties (Rights Against Insurers). We look forward to this procedure leading to the implementation of more Law Commission Bills in the near future and in this context I am very glad to see the recent introduction of the Consumer Insurance (Disclosure and Representations) Bill in the House of Lords.

This year also saw the coming into force of the Law Commission Act 2009. The Act provides statutory backing for a protocol on the relationship between the Commission and Departments in taking forward law reform projects. It places obligations on both. The requirement for Departments to give an undertaking that there is a serious intention to implement our projects of law reform before we start them has been a testing one during the discussions on our next programme of law reform. During the coming year we shall be reflecting further on how the protocol is working.

## **Implementation**

The new Act also requires you to report to Parliament on the Government's response to the Commission's reports. We warmly welcome this requirement, believing it to be a significant contribution to the transparency of the Government's approach to our work and a useful discipline in ensuring regular attention to outstanding reports.

In your report, you set out where the Government has recently accepted, and in some instances, implemented our recommendations. Our work on bribery saw enactment in the Bribery Act 2010, bringing the criminal law up to date and enabling the courts to respond more effectively to bribery at home or abroad. Our recommendations for modernising and simplifying the law on leaving property in trust were implemented when the Perpetuities and Accumulations Act 2009 came into force in April 2010. And in October our recommended reforms of the partial defences of diminished responsibility and provocation were substantially implemented in the provisions of the Coroners and Justice Act 2009.

In January the Government accepted our proposals relating to Capital and Income in Trusts: Classification and Apportionment, which recommended reform of the complicated rules governing the treatment of trust receipts and outgoings as capital or income. We look forward to seeing legislation enacting our recommended reforms being introduced into Parliament.

Your report to Parliament also made clear, however, that the Government had decided not to implement our recommendations on a number of subjects, for example, areas of housing and landlord and tenant law. The new Government also announced that it would not be proceeding with the draft Civil Law Reform Bill, published by the previous Government. This means that a number of important

reforms to the law in reports on damages and limitation will no longer be taken forward, to the deep regret of the Commission, and of those who supported them on consultation and the former Commissioners who worked on these reports.

I have written to you on two general points prompted by the report to Parliament. First, as will be apparent, I remain generally extremely concerned about the time that it takes for Government to respond to our reports. I very much hope that you will be able to set out soon where we stand on the significant number of reports for which a response had been promised for early in 2011 but has still not been forthcoming.

Second, the Government response when it does come often contains very little explanation of the decision not to implement our reports. A significant amount of work goes into each project, both by the Commission itself and more importantly by the many consultees, who devote time and trouble voluntarily to assist us in our work. If reports are to be rejected, at the very least there should be a detailed and reasoned explanation.

## **Murder**

As you know, I am particularly concerned about Government's response to a number of our reports relating to murder.

I am strongly of the view that our recommendations on joint enterprise murder, in particular, make a compelling case for immediate implementation. In the last twelve months there have been at least six appeals on the law in this area, many of these arising out of trials presided over by a High Court judge whose written directions were agreed by a number of experienced QCs. These cases show that experienced practitioners are finding the existing law very difficult to apply. Our reforms would remove the uncertainty that is generating so many appeals and would therefore produce significant savings almost immediately, consistent with the Government's current priorities.

The state of our law of homicide is a discredit to our legal system. It is long overdue for reform. By rejecting our core recommendations in the report on Murder, Manslaughter and Infanticide and not implementing those in Participating in Crime, the Government has missed an opportunity to put right the serious shortcomings in this area of the law. I understand the difficulties in finding space in the current legislative programme. But it is highly regrettable to have reforms which offer significant benefits to the administration of justice put off not merely beyond the lifetime of this Parliament but without even a commitment to implementation thereafter.

## **11th Programme of Law Reform**

During the year we have consulted on our 11th Programme of Law Reform. From time to time the Commission refreshes its programme of projects and we do this by seeking ideas from all our stakeholders through thorough and widespread consultation. We are enormously grateful for the valuable suggestions we have received. This has enabled us to recommend to you what we believe will be a challenging but exciting and highly relevant new programme of reform projects.



## **Support for the Commission**

As ever, we have been greatly encouraged by the support we have received throughout the year not just from our consultees and officials across Whitehall but also from members in both Houses of Parliament. We were delighted to welcome, among others, you, Lord McNally and Jonathan Djanogly MP to our stand in the House of Commons in February this year, and we are particularly grateful to Sir Alan Beith MP for his sponsorship of our exhibition. Our presence there was an opportunity to reinforce work we have done throughout the year to build relationships with members of both Houses. During the summer and, later, in September, we made contact with many individual members, inviting them to participate in both our 11th Programme consultation and our review of the public services ombudsmen.

## **Challenges**

In common with many others, however, this has been a testing year for the Commission. We were reviewed as part of the Government's overall review of Arm's Length Bodies, following which the very welcome decision was taken that the Law Commission should continue to exist, on the basis that there remains a need for a technically expert and independent law reform body. The Government's Public Bodies Bill for a time held the possibility that the statutory provisions governing the Law Commission could be amended by secondary legislation, though the Government later decided to drop those provisions of the Bill. We face a significant budget reduction over the next four years, in addition to the reduction in 2010-2011.

## **Looking forward**

With a tighter budget and the uncertainties brought about by changing – and difficult – times, the year ahead will be immensely challenging for the Law Commission. It is a credit to Commissioners and staff, to whose loyalty, commitment and hard work I pay tribute, that we have continued to function extremely well – as this report shows - during a period of such worrying concern on matters fundamental to the very existence and operation of the Commission.

We do expect that 2011 will be rewarding, however, not least because we will be launching, with your approval, our new programme of law reform. We continue to break new ground with work such as our project on adult social care, and make recommendations that will bring much needed reforms in areas of the law as diverse as insurance contracts, marital property agreements and level crossings to the benefit of the courts, businesses, communities and, not least, individual citizens. I am proud to set these achievements before you in this, the Law Commission's 45th annual report.



**Sir James Munby**  
**Chairman**

# **PART 1**

## **ABOUT THE COMMISSION**

### **Who we are**

- 1.1 The Law Commission was created in 1965<sup>1</sup> for the purpose of reforming the law. The Commission is headed by five Commissioners who are appointed by the Lord Chancellor.
- 1.2 The current Commissioners are:
  - (1) The Rt Hon Lord Justice Munby, Chairman.
  - (2) Professor Elizabeth Cooke, Property, Family and Trust Law.
  - (3) David Hertzell, Commercial and Common Law.
  - (4) Professor David Ormerod, Criminal Law.
  - (5) Frances Patterson QC, Public Law.
- 1.3 The Commissioners are supported by:
  - (1) the Chief Executive;
  - (2) members of the Government Legal Service, whose names can be found in Part 2;
  - (3) Parliamentary Counsel, who draft the Bills to reform and consolidate the law;
  - (4) legal research assistants, most of whom are recently qualified law graduates;
  - (5) economic advisers;
  - (6) librarians;
  - (7) a communications team;
  - (8) a corporate services team.

### **What we do**

- 1.4 The Law Commission's main task is to review areas of the law and make recommendations for change. The Commission seeks to ensure that the law is as simple, accessible, fair, modern and cost-effective as possible. A number of specific types of reform are covered by the Law Commissions Act 1965:
  - (1) simplification and modernisation of the law;
  - (2) codification;
  - (3) removal of anomalies;
  - (4) repeal of obsolete and unnecessary enactments;
  - (5) consolidation.

<sup>1</sup> Law Commissions Act 1965.

### **Departing Commissioner**

- 1.5 During the year we said goodbye to Professor Jeremy Horder, whose five year term as Commissioner for criminal law came to an end in August. Professor Horder was responsible for a number of significant achievements by the Law Commission on criminal law during his appointment, most noticeably his work on our report on bribery law, which was enacted by the Bribery Act 2010 shortly before the May 2010 general election. It is a signal achievement for a Commissioner to have started, finished and had his work enacted during his period of office and a tribute to Professor Horder's contribution to the Commission, its relevance and the criminal law. We were delighted to see that he was appointed as the Edmund Davies Professor of Criminal Law at King's College, London on leaving the Commission and wish him all the very best for the future.

### **New Commissioner**

- 1.6 In Professor Horder's place, we were delighted to welcome Professor David Ormerod, of Queen Mary University of London. Professor Ormerod has been a practising barrister and is a Bencher of Middle Temple. He is editor of *Smith and Hogan's Criminal Law*, and editor of *Blackstone's Criminal Practice* (with Lord Justice Hooper).

## **PART 2 OUR WORK**

- 2.1 This Part contains reports from our legal teams on the work they have undertaken during the period covered by this Annual Report.

### **COMMERCIAL LAW AND COMMON LAW**

#### **Commissioner**

David Hertzell

#### **Team members**

Tamara Goriely (*Team Manager*)

Christina Sparks, Jessica Ugucconi

#### **Research Assistants**

Lorenzo Arditi, Judy Fu, Oliver McEntee, James Sharpe

#### **Insurance contract law**

- 2.2 The Law Commission and Scottish Law Commission are conducting a wide-ranging joint review of insurance contract law. The law was codified in 1906 and is now seriously out-of-date. Our aim is to simplify the law and bring it into line with modern market practice.
- 2.3 In December 2009 we published a final report<sup>1</sup> and draft Bill covering disclosures and representations in consumer insurance. We were much encouraged by the widespread support given to our draft Bill. In July 2010, HM Treasury conducted a targeted consultation to 30 stakeholders. Consultees supported the Bill and considered it suitable for introduction through the procedure for uncontroversial Law Commission Bills. We have since been working with the Treasury and the Bill was introduced in the House of Lords on 16 May 2011.
- 2.4 We have also continued our series of issues papers, on specific aspects of insurance law.

- (1) In March 2010, we published Issues Paper 6 on damages for late payment. We asked whether an insurer should be liable for a policyholder's loss suffered as a result of a late or non-payment of an insurance claim. We received 32 responses, which indicated strong support for change. Consultees argued that if an insurer has declined a valid claim, then the law should provide a remedy, in line with general contract principles.

<sup>1</sup> Consumer Insurance Law: Pre-Contract Disclosure and Misrepresentation (jointly with Scottish Law Commission) (2009) Law Com No 319; Scot Law Com No 219.

- (2) In July 2010, Issues Paper 7 considered the insured's obligations. The paper focused on the law of fraudulent claims, and the remedies which should be available to the insurer. Fraudulent claims are a source of grave concern to insurers and impose a significant cost on honest policyholders. We received 33 responses. Consultees told us that the current law was unduly complex and in need of clarification.
  - (3) In July 2010 we also published Issues Paper 8 on brokers' liability for premiums. Under section 53 of the Marine Insurance Act 1906, marine brokers are directly responsible for paying premiums, even if they have not received them from policyholders. The broker is at risk if a policyholder becomes insolvent, and the insurer may be at risk if a broker becomes insolvent. The paper asked whether section 53 should be repealed, to bring brokers' liability into line with the general law of agency. Out of the 18 people who responded, most agreed, although marine insurers expressed some concerns.
  - (4) In October 2010, Issues Paper 9 considered the requirement for a formal marine policy under section 22 of the Marine Insurance Act. The section originated from the imposition of stamp duty in 1795, and was designed to prevent tax evasion. As stamp duty was abolished in 1970, the section is now obsolete and widely ignored. We argued that section 22 and several related sections should be repealed. Out of the 9 people who responded, 8 agreed.
- 2.5 We discussed these issues at seminars organised by the British Insurance Law Association, Beachcrofts, the Insurance Institute of London and the *Post Magazine*. We also took part in webinars on good faith and section 53.
  - 2.6 Copies of the papers are available on our website, together with summaries of the responses we received.
  - 2.7 We intend to issue a further consultation paper in late 2011. The paper will set out detailed proposals on the issues listed above, together with further proposals on insurable interest and on non-disclosure and warranties in business insurance.

### **Consumer misrepresentation and unfair commercial practices**

- 2.8 In February 2010, the Department for Business, Innovation and Skills asked us to undertake a new consumer-related project, again jointly with the Scottish Law Commission. It considers what private rights should be available to consumers who have been the victims of unfair commercial practices.
- 2.9 In May 2008, the Consumer Protection from Unfair Trading Regulations implemented a European directive, replacing 22 previous UK consumer protection measures, including most of the Trade Descriptions Act 1968. They are enforced mainly by the OFT and by trading standards services. However, under current law, consumers do not have a right to compensation if a trader breaches the Regulations. Instead consumers must rely on a variety of private causes of action, including the law of misrepresentation and duress. These are complex, confusing and patchy.

- 2.10 In spring 2010, we started by talking to stakeholders. We were particularly interested in receiving examples of areas where the law fails to provide sufficient redress. We wish to thank those who provided such helpful evidence to the project. In October 2010 we summarised our findings on our website. We then continued our dialogue with stakeholders as we developed proposals for reform.
- 2.11 We were told that there is a need to simplify the law on misleading practices and to provide clearer, standardised remedies. There was also a need to fill in the gaps in the law on aggressive practices, providing better protection to vulnerable consumers.
- 2.12 In April 2011, we published a joint consultation paper.<sup>2</sup> We provisionally propose a new statutory right of redress for consumers who have suffered loss as a result of a misleading or aggressive trade practice. We seek views by July 2011.
- 2.13 We aim to publish a final report in March 2012.



Members of the Commercial and Common Law Team

<sup>2</sup> Consumer Redress for Misleading and Aggressive Practices (2011) Law Commission Consultation Paper No 199; Scottish Law Commission Discussion Paper No 149.

# **CRIMINAL LAW**

## **Commissioner**

Professor David Ormerod

## **Team members**

Claire Brown (*Team Manager*),

Raymond Emson, Christina Hughes, Simon Tabbush, Clare Wade

## **Research Assistants**

Fiona Alexander, Helena Duong, Hannah Noyce

### **The High Court's jurisdiction in relation to criminal proceedings in the Crown Court**

- 2.14 On 27 July 2010 we published our final report,<sup>1</sup> with a draft Bill. This report makes recommendations to simplify and clarify the routes of challenge to decisions made in the Crown Court relating to trials on indictment. It also recommends two additional statutory appeals. It follows our consultation paper,<sup>2</sup> published in October 2007.
- 2.15 The High Court has jurisdiction to entertain challenges to decisions made in the course of criminal proceedings in the Crown Court but only if the decision is not a "matter relating to trial on indictment".<sup>3</sup> The thinking behind the exclusion is that challenges to decisions made in the course of criminal proceedings should not be a means of unnecessarily delaying or interrupting trials. However, the expression "matter relating to trial on indictment" has been difficult to define and has led to uncertainty and needless litigation. In our report we recommend reforming the law so that judicial review of decisions in a trial on indictment is barred from the time the case goes to the Crown Court for trial to the end of the trial, with an exception where the judge refuses bail.
- 2.16 To further simplify challenges to the High Court we recommend the removal of appeal by way of case stated which adds a layer of unnecessary complication.
- 2.17 We also recommend the creation of two new statutory appeals where the absence of an appeal under the current law is unfair;
- (1) a new statutory appeal for a child or young person, where the trial judge refuses to restrict reporting to protect the child's identity; and
  - (2) a new statutory appeal where the trial judge's ruling entails a real and immediate risk to a person's life.

<sup>1</sup> The High Court's Jurisdiction in Relation to Criminal Proceedings (2010) Law Com No 324.

<sup>2</sup> The High Court's Jurisdiction in Relation to Criminal Proceedings (2007) Law Commission Consultation Paper No 184.

<sup>3</sup> Senior Courts Act 1981, s 29(3).

### **The admissibility of expert evidence in criminal proceedings**

- 2.18 We published our report<sup>4</sup> on 22 March 2011, following the publication of our consultation paper<sup>5</sup> on 7 April 2009.
- 2.19 It has long been accepted that specialised areas of knowledge, where relevant to the determination of a disputed factual issue, should be explained to the jury by experts in the field because the jury can be presumed to be unfamiliar with such areas. However, the possibility or likelihood of jury deference to expert witnesses in relation to complex areas of knowledge gives rise to problems if there are legitimate questions about the validity of an expert's opinion. Some recent cases suggest that unreliable expert evidence is being admitted too readily and that sometimes this can lead to miscarriages of justice.
- 2.20 In our report we recommend a new statutory reliability test for expert opinion evidence with guidance to assist judges in applying it and statutory codification (with some refinement) of the other elements of the common law test governing expert witness evidence. We recommend changes to the procedural regime to ensure that the new statutory admissibility requirements will work in practice. We also recommend that in exceptional cases, the Crown Court should have the power to appoint an independent expert to assist the judge in assessing the reliability of disputed expert evidence.

### **Simplification of criminal law**

- 2.21 In the 10th Programme of Law Reform,<sup>6</sup> the Law Commission expressed the intention of embarking on a project for the simplification of the criminal law. Simplification is not the same as codification, but includes work that could be preparatory to later codification.
- 2.22 The simplification project involves reviewing some of the older or less used common law or statutory offences, with a view to considering either the abolition of these offences or the making of relatively modest legal changes aimed at removing injustices or anomalies. In some cases it may recommend restating existing common law offences in statutory form.

### ***Public nuisance and outraging public decency***

- 2.23 Our consultation paper on public nuisance and outraging public decency, two common law offences,<sup>7</sup> was published on 31 March 2010.
- 2.24 Public nuisance consists of any wrongful act or omission which exposes members of the public to risks to life, health or safety or loss of comfort or amenity. Broadly, it can be divided between environmental nuisances that affect a neighbourhood on the one hand, and offensive behaviour in public on the other.

<sup>4</sup> Expert Evidence in Criminal Proceedings in England and Wales (2011) Law Com No 325.

<sup>5</sup> The Admissibility of Expert Evidence in Criminal Proceedings in England and Wales (2009) Law Commission Consultation Paper No 190.

<sup>6</sup> (2008) Law Com No 311, para 2.24 and following.

<sup>7</sup> Simplification of Criminal Law: Public Nuisance and Outraging Public Decency (2010) Law Commission Consultation Paper No 193.



A person is liable if the act or omission was performed negligently, that is to say, if he or she ought reasonably to have known of the possible bad effects.

2.25 Outraging public decency means doing an indecent act, or creating an indecent display, in such a place or in such a way that members of the public may witness it and be shocked or disgusted by it. To be liable, the person must intend to do the act in question; but there is no need to know or intend that it would be offensive, or even that it would be observed at all.

2.26 Our provisional proposals are:

- (1) Both offences should be restated in statutory form.
- (2) Both offences should require intention or recklessness: that is, that the person should either intend the bad effects or outrage, or be aware that they might ensue and decide to perform the act anyway.
- (3) The separate common law offence of conspiracy to outrage public decency should be abolished and replaced by the normal statutory conspiracy offence.

2.27 We aim to publish our report in 2012.

### ***Kidnapping***

2.28 Kidnapping is a common law offence, triable only in the Crown Court, and carries an unlimited sentence of imprisonment. It is defined as the taking or carrying away of one person by another, by force or fraud, without the consent of the person taken or carried away and without lawful excuse. Like false imprisonment, of which it is sometimes regarded as an aggravated form, it is classed as an attack on liberty.

2.29 One problem with this definition is whether the requirement of force or fraud should be separate from that of lack of consent: a child or mental patient, for example, may be taken away without consent but without the use of force or fraud. Another is that the definition concentrates entirely on the moving of the victim from one place to another, though a given kidnapping operation may also include a period of stationary confinement and this ought equally to form part of the offence.

2.30 We aim to publish a consultation paper in the summer of 2011.

### **Fitness to plead**

2.31 This project addresses the treatment of mentally disordered defendants prior to trial in the criminal courts.

2.32 Many of the problems surrounding the current rules for determining fitness to plead relate to the fact that they were devised when psychiatry was in its infancy. The project draws on relevant empirical evidence and comparative jurisdictions in an attempt to identify more appropriate contemporary legal tests and rules for determining fitness to plead.

- 2.33 We published our consultation paper<sup>8</sup> on 27 October 2010. Our provisional proposals were that the focus of the new test should be on whether an accused can play a meaningful and effective part in the trial and make relevant decisions. We also proposed that greater use be made of special measures to ensure that, where people could participate in trial meaningfully with extra help, that help is provided.

### **Insanity**

- 2.34 This project considers the circumstances in which a person, as a result of their mental condition at the time they committed an alleged offence, should not be held criminally liable.
- 2.35 The rules which currently govern what is known as the “insanity” defence date from 1843. They have been widely criticised. First, it is not clear whether the defence of insanity is even available in all cases. Secondly, the law lags behind psychiatric understanding, and this partly explains why in practice medical professionals do not apply the correct legal test. Thirdly, the label of “insane” is stigmatising and outdated as a description of those with mental illness and simply wrong as regards those who have learning disabilities or learning difficulties. Lastly, there are potential problems of compliance with the European Convention on Human Rights.
- 2.36 We plan to publish a consultation paper in the autumn of 2011.

### **Regulation, public interest and the liability of businesses**

- 2.37 This project appeared in our 10th Programme as an item of on-going work examining corporate criminal liability. Following a request from what is now the Department for Business, Innovation and Skills in late 2008 and as a result of discussion with that department and the Ministry of Justice in early 2009, our work has taken as its focus the use of criminal law as a way of promoting regulatory objectives or public interest goals, and particularly how businesses are treated by the criminal law.
- 2.38 The project examines: (1) the use of the criminal law as a way of promoting regulatory objectives and public interest goals, with the aim of producing a set of guidelines for lawmakers across Whitehall, (2) whether the doctrines of delegation and consent and connivance are unfair to small businesses and (3) the application of the identification doctrine in the regulatory or public interest context and the possibility of giving courts the power to apply a due diligence defence. We published our consultation paper<sup>9</sup> on 25 August 2010. The Ministry of Justice has indicated that many of our proposals on the use of criminal law in regulatory contexts will be taken forward by them in guidance for regulatory law makers to be published this year. We aim to publish our report on the remaining aspects of this project in 2012.

<sup>8</sup> Unfitness to Plead (2010) Law Commission Consultation Paper No 197.

<sup>9</sup> Criminal Liability in Regulatory Contexts (2010) Law Commission Consultation Paper No 195.



Members of the Criminal Law Team

# PROPERTY FAMILY AND TRUST LAW

**Commissioner**

**Professor Elizabeth Cooke**

**Team members**

Matthew Jolley (*Team Manager*)

Elizabeth Drummond, Julia Jarzabkowski,

Colin Oakley, Catherine Vine, Joel Wolchover

**Research Assistants**

Sarah Hansen, Nicholas Macklam, Eleanor Sanders

## **Easements, covenants and profits à prendre**

- 2.39 This project has examined the general law governing easements (rights enjoyed by one landowner over the land of another, such as rights of way), covenants (promises to do or not do something on one's own land, such as to mend a boundary fence or to refrain from using the land as anything other than a private residence) and profits à prendre (rights to take products of natural growth from land, such as rights to fish). We have looked closely at the characteristics of these rights, how they are created, how they come to an end and how they can be modified. Although the scope of the project is wide, it has been concerned only with private law rights and has not considered public rights such as public rights of way, nor covenants entered into between landlords and tenants.
- 2.40 We published our Report<sup>1</sup> on 8 June 2011. We have concluded that there is a need to simplify, modernise and improve the law in this area. A draft Bill to implement the Law Commission's final recommendations is attached to the Report.
- 2.41 Implementation of the Bill would bring a range of benefits for those who own and deal with land, including:
- (1) Positive obligations would be able to run with land: the current law does not allow positive obligations (for example, to maintain a boundary fence) to be enforceable against anybody other than the person who originally made the promise. The draft Bill enables such obligations to bind subsequent owners of the burdened land;
  - (2) Landowners would be able to create interests over their own land: the current law does not allow for the creation of easements, covenants or profits unless the land that benefits from them and the land that is burdened by them is in different ownership. This creates unnecessary difficulty, for example, on the establishment of housing estates. Our reform would reverse this position where land is registered and allow developers the freedom to create interests in land prior to sale;

<sup>1</sup> Making Land Work: Easements, Covenants and Profits à Prendre (2011) Law Com No 327.

- (3) The jurisdiction of the Lands Chamber of the Upper Tribunal would be extended: under the existing law, the Lands Chamber can vary or discharge covenants that restrict the use of land in certain tightly controlled circumstances, but there is no ability to vary or discharge easements or profits. This can mean that easements and profits unnecessarily restrict the use of land by an owner, even where they are obsolete. Our reform will extend the jurisdiction of the Lands Chamber to easements and profits created post-reform and will open up the prospect of better land use in the future.
- (4) The law which governs the acquisition of easements by prescription (long use) and implication (where an interest is read into a disposition despite not being set out expressly) would be simplified: there are currently several different rules for both prescription and implication that makes understanding and advising on these areas unduly difficult. Our proposals would create single rules for prescription and for implication.
- (5) Easements which grant an exclusive right would be less vulnerable to challenge: the current law is complicated and casts doubt over whether a right to use land to the exclusion of the owner – such as the right to park in a single allocated parking space – are valid. Our reform will give greater certainty that rights of this nature created post reform will be enforceable.

2.42 These recommendations, and a range of other technical improvements to the current law, are summarised in more detail in the Report and Executive Summary available on our website.<sup>2</sup>

### **Intestacy and family provision claims on death**

2.43 This project involves a wide-ranging review of the current rules governing the inheritance of assets where a person dies intestate (that is, without leaving a will which disposes of all of his or her property).

2.44 Many tens of thousands of people die intestate each year, and it appears that this figure is rising. Research suggests that more than 27 million adults in England and Wales do not have a will and that those who may need one most are the least likely to have one.<sup>3</sup>

2.45 Aspects of the current law under review include: the entitlements of different family members of a person who has died intestate, in particular any surviving spouse or civil partner and children, and cohabitants who were not married to or in a civil partnership with the deceased; the role of the “statutory legacy” paid to a surviving spouse or civil partner; and the rules which govern the administration of intestate estates and the distribution of assets to beneficiaries.

<sup>2</sup> At [www.lawcom.gov.uk](http://www.lawcom.gov.uk).

<sup>3</sup> National Consumer Council, Finding the Will: a Report on Will-Writing Behaviour in England and Wales (September 2007).

- 2.46 The project also involves a review of the operation of the Inheritance (Provision for Family and Dependents) Act 1975. Under this statute, certain family members and dependants may apply to court to challenge the distribution of a deceased person's estate on the ground that the intestacy rules or the terms of a will did not make reasonable financial provision for them. Among other things, the project is considering the range of relatives and dependants eligible to apply, the conditions which must be met in order for an application to succeed and the remedies available where an applicant is successful.
- 2.47 The project was included in the Law Commission's 10th Programme of Law Reform at the request of the Ministry of Justice.<sup>4</sup> The Ministry found widespread support for reform during its consultation on the level of the statutory legacy paid to the surviving spouse or civil partner of a person who dies intestate.<sup>5</sup>
- 2.48 We published a consultation paper<sup>6</sup> in October 2009 and received more than 120 responses. We are currently developing final policy recommendations. We hope to publish a Report and draft Bill in late 2011.

### **Marital property agreements**

- 2.49 This project examines the status and enforceability of agreements made between spouses and civil partners (or those contemplating marriage or civil partnership) concerning their property and finances. Such agreements might regulate the couple's financial affairs during the course of their relationship. Equally they might seek to determine how the parties would divide their property in the event of divorce, dissolution or separation. They might be made before marriage (when they are often called "pre-nuptial agreements" or "pre-nups") or during the course of marriage or civil partnership. They need not be made in anticipation of impending separation; but they might constitute separation agreements reached at the point of relationship breakdown.
- 2.50 The project was included in the Law Commission's 10th Programme of Law Reform and work commenced in October 2009. We had planned to publish a Consultation Paper in late summer 2010 but decided to wait for the judgment of the Supreme Court in a case concerning the status of pre-nuptial agreements in English law.<sup>7</sup> The Supreme Court confirmed that, in contrast to the position in many other jurisdictions, marital property agreements are not currently enforceable in the event of divorce or the dissolution of the civil partnership. But it ruled that the courts of England and Wales should give effect to a nuptial agreement that is freely entered into by each party with a full appreciation of its implications unless in the circumstances prevailing it would not be fair to hold the parties to their agreement.<sup>8</sup>

<sup>4</sup> (2007) Law Com No 311, paras 2.9 to 2.13.

<sup>5</sup> Ministry of Justice, *Administration of Estates – Review of the Statutory Legacy: Response to Consultation* (2008).

<sup>6</sup> Intestacy and Family Provision Claims on Death (2009) Law Commission Consultation Paper No 191.

<sup>7</sup> *Radmacher v Granatino* [2010] UKSC 42.

<sup>8</sup> *Radmacher v Granatino* [2010] UKSC 42 at [75] by Lord Phillips.

- 2.51 The Supreme Court's decision was made in the context of the existing legislation under which a couple cannot prevent each other from asking the courts to decide how their property should be shared. The courts must therefore still decide on a case-by-case basis how much weight to give to any agreement the couple may have made. In many cases this can offer important protection but it can also lead to uncertainty and expensive litigation, and there have been calls for statutory reform.
- 2.52 Our project is therefore considering whether the current law's approach to the status and enforceability of marital property agreements is correct, or whether certain sorts of agreements ought to be capable of legal enforcement, subject to safeguards. In doing so, we have examined the law and practical experience of a number of other countries that recognise marital property agreements and talked to those who advise couples on legal issues relating to marriage and separation. We have considered previous proposals for reform and have commissioned Dr Emma Hitchings of the University of Bristol to conduct research into the experiences and views of family practitioners in this area. We are also working with Professor Anne Barlow of Exeter University who is researching public attitudes towards pre-nuptial agreements with the National Centre for Social Research.
- 2.53 We published a Consultation Paper<sup>9</sup> in January 2011 which explores the arguments for and against a range of options for reform and invites views about the correct balance between a couple's autonomy to decide for themselves the financial effects of divorce or dissolution and the need for the law to provide protection for economically weaker parties.
- 2.54 The consultation period closed on 11 April 2011 and we have received 78 responses. We are currently analysing those responses with a view to formulating final policy recommendations.



Members of the Property, Family and Trust Law Team

<sup>9</sup> Marital Property Agreements (2011) Law Commission Consultation Paper No 198.

## **PUBLIC LAW**

### **Commissioner**

Frances Patterson QC

### **Team members**

Richard Percival (*Team Manager*)  
Lauren Jamieson, Tim Spencer-Lane,  
Keith Vincent, Sarah Young

### **Research Assistants**

Zahra Al-Rikabi, Ashleigh Keall, Justin Leslie

### **Adult social care**

- 2.55 The adult social care project was announced in the 10th Programme of Law Reform.<sup>1</sup> We have outlined the defects of the current law in previous Annual Reports.<sup>2</sup> In summary, the legislative framework for adult social care is a confusing patch of conflicting statutes, built up over the past 60 years. It uses outdated concepts, is confusing for local authorities and service users alike, and leads to much inefficiency in the delivery of adult social care services.
- 2.56 The project to review adult social care was a major undertaking which required a substantial and ongoing commitment from both the Law Commission and Government. The project was therefore broken into three separate phases, with an opportunity at the end of each phase for both the Commission and the Government to consider whether to proceed to the next phase. The first phase was completed in November 2008 with the publication of a scoping report, which outlined our view of what the substantive law reform project should cover. The second phase – the substantive law reform phase – included the publication of the consultation paper in February 2010, which set out our provisional proposals for reform. This was followed by a broad public consultation on those proposals, which closed on 1 July 2010. Our analysis of consultation responses was published on 31 March 2011.<sup>3</sup>
- 2.57 During the consultation period, the public law team attended 72 events covering the breadth of England and Wales. These events covered a very wide audience, including service users, carers, social workers and other local authority staff, health staff, academics, representatives from safeguarding boards and regional networks, community care lawyers, service providers and representatives from charities and campaigning organisations. Examples of some of the events 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; a consultation stand at a Young Carers’ Festival in Southampton; and a two-hour workshop with service users, carers, service providers and local authority staff, organised by Reach in

<sup>1</sup> (2007) Law Com No 311, paras 2.2 to 2.8.

<sup>2</sup> (2009) Law Com No 316, paras 7.4 to 7.10.

<sup>3</sup> See Law Commission, *Adult Social Care: Consultation Analysis* (2011).



Newport.

- 2.58 In addition to consultation events, we received 231 written responses to the consultation paper, from a range of different individuals and organisations. The consultation analysis sets out the feedback we received on each of our provisional proposals and consultation questions.
- 2.59 In June 2010, the new Minister of State for Care Services, Paul Burstow MP, asked the Law Commission to bring forward the timetable for the adult social care final report by three months, so as to co-ordinate better with the Commission on the funding of long-term care.<sup>4</sup> Accordingly, we published our final report<sup>5</sup> on 11 May 2011. This marked the completion of the second phase of the adult social care project. The third stage would have seen the production of a draft Bill to implement the recommendations of the report. However, the Government has set out its intention to introduce legislation in the second session of this Parliament to implement the recommendations it accepts in our final report.<sup>6</sup> From the Law Commission's point of view, this is the most positive outcome, as it means the Government will be implementing what they accept in the report much more quickly than would be the case if the Law Commission produced draft legislation.
- 2.60 Given the Government's commitment, the Commission concluded that there should be no third stage. The publication of the final report will thus mark the completion of the adult social care project.

#### **The law relating to level crossings**

- 2.61 This joint project with the Scottish Law Commission is part of our 10th Programme of law reform, proposed by the Office of Rail Regulation and Department for Transport. The Chairman of the Law Commission has taken personal responsibility for the project, with Frances Patterson QC.
- 2.62 The aim of the project is to simplify and modernise the law relating to level crossings. The relevant law in Great Britain is difficult, obscure and inaccessible, involving a complex relationship between nineteenth century private or local Acts, individual administrative orders under the Level Crossings Act 1983 and the Health and Safety at Work etc Act 1974. Procedures for making changes to level crossings, in order to improve safety or convenience or to meet technological advancements, are burdensome and inefficient. The powers to close highways (vehicular highways, bridlepaths and footpaths) which cross the railway at a level crossing are limited and there are no practical powers to compulsorily close a private right of way over a level crossing.
- 2.63 The project has included consideration of a wide range of law in both jurisdictions. As well as railways law, much of which dates back to the original construction of the railways, the project has covered aspects of highways law, planning law (developments often impact on level crossings), compulsory

<sup>4</sup> The Commission on funding of long-term care is an independent body launched in July 2010 to review the funding system for social care in England. It is due to report in July 2011.

<sup>5</sup> Adult Social Care (2011) Law Com No 326.

<sup>6</sup> See Equity and Excellence: Liberating the NHS (2010) Cm 7881, para 1.19.

purchase, safety and criminal law. In developing our proposals, we have maintained close contacts with the Property, Family and Trust Law team and the Criminal Law team.

- 2.64 We published a joint consultation paper<sup>7</sup> on level crossings law, together with the Scottish Law Commission, in July 2010. The consultation period ran until the end of November 2010, after which we continued to work closely with members of our expert advisory group to get to grips with the complex range of legal, technical and policy issues raised in consultation.
- 2.65 During the consultation period, we attended a large number of consultation events with interested groups, including highway authorities, the Office of Rail Regulation and Department for Transport, Network Rail, heritage railway and tramway operators, railway safety and accident bodies, British Transport Police, railway inspectors and engineers, passenger groups, disability groups, representatives of farmers and landowners, train operating companies, the Automobile and Royal Automobile Associations, industrial site and dock owners, and cycling, horse riding and ramblers' organisations. We also benefitted from very helpful site visits to level crossings on both the mainline railway and a heritage railway, and a tramway system. We are grateful to the Office for Rail Regulation, Network Rail, West Sussex County Council, West Somerset Railway, the Heritage Rail Association, Sheffield City Council, Stagecoach Supertram in Sheffield and the Confederation of Passenger Transport for facilitating these visits.
- 2.66 We received 113 written responses to the consultation paper, from a wide range of organisations and individuals. Commissioners from both Commissions will consider the results of the consultation in May, with a view to publishing a final report with a draft Bill in the autumn of 2012.

### **Public Services Ombudsmen**

- 2.67 This project goes back in its origins to the Commission's 9th Programme of Law Reform and our project on Remedies Against Public Bodies. That project dealt with possible reform of the availability of compensation on judicial review, and of the liability of public bodies in negligence, and reform of the public sector ombudsmen.
- 2.68 In May 2010, we published a report<sup>8</sup> which expressed our conclusion that we would not continue to develop proposals in relation to the first two categories of provisional proposals.
- 2.69 However, we decided to pursue further work on what we have come to term the public services ombudsmen, that is, the Parliamentary Commissioner for Administration, the Health Service Ombudsman,<sup>9</sup> the Local Government Ombudsman, the Public Services Ombudsman for Wales and the Independent

<sup>7</sup> Level Crossings: a Joint Consultation Paper (2010) Law Commission Consultation Paper No 196/Scottish Law Commission Discussion Paper 143.

<sup>8</sup> Administrative Redress: Public Bodies and the Citizen (2010) Law Com No 322.

<sup>9</sup> This post is invariably held by the same person as the Parliamentary Commissioner for Administration.

Housing Ombudsman.

2.70 Our consultation paper was published in September 2010, and contained 24 provisional proposals plus 13 consultation questions.<sup>10</sup> Our provisional proposals sought to improve transparency, accessibility and flexibility in the legal regimes for the public services ombudsmen. In particular we provisionally proposed that:

- (1) the Parliamentary Commissioner be appointed on the nomination of Parliament;
- (2) written requirements for the submission of complaints be removed;
- (3) specific powers be given to the public services ombudsmen allowing them to use the full range of methods for Alternative Dispute Resolution;
- (4) the “statutory bars”, that limit the ability of the public services ombudsmen to take complaints that they otherwise would, be reformed;
- (5) the “MP filter” for the Parliamentary Commissioner be replaced by a dual track procedure, so that complaints could be made direct to the Commissioner;
- (6) there should be a specific power allowing the Administrative Court to stay and transfer a matter before it to the public services ombudsmen;
- (7) the public services ombudsmen be given a power to ask a question of law of the Administrative Court;
- (8) the reporting procedures of the public services ombudsmen be harmonised;
- (9) the findings of the public services ombudsmen should be binding – subject to judicial review – but that the recommendations of the ombudsmen should not; and
- (10) the relationship between the public services ombudsmen and Parliament, or the National Assembly for Wales in the case of the Public Services Ombudsman for Wales, be strengthened.

2.71 The formal consultation period started on 2 September 2010 and ran until 3 December 2010. During that period, we were able to meet the public services ombudsmen, academics with a particular interest in the subject and practitioners in the area. We addressed the Administrative Justice and Tribunals Council in London on 15 September 2010 and its Welsh Committee on 13 October 2010. We participated in two events organised by the Public Law Project in Manchester and London.

2.72 We are now moving to publish our report on the public services ombudsmen in July 2011.

<sup>10</sup> Public Services Ombudsmen (2010) Law Commission Consultation Paper No 196.

### **Regulation of health and social care professions**

- 2.73 In February 2011, the Department of Health referred to us a project on the regulation of the health care and social care professions. The reference was jointly to the Law Commission, Scottish Law Commission and Northern Ireland Law Commission in respect of 30 health professions regulated by nine regulatory councils. In relation to social workers, the reference was to the Law Commission alone, and in respect of social workers in England only. Research work started in the period covered by this annual report, with a consultation paper expected in the spring of 2012.

### **Professor Alex March**

- 2.74 In September 2010, Alex Marsh, Professor of Public Policy at Bristol University, ceased to be our visiting academic consultant after over three and a half years. From January 2006, he worked on secondment with the team for between two days a week and one day a month. During that time, he contributed enormously to a number of projects, bringing to bear a wide range of extra-legal learning from many disciplines, not just his own. We would like to thank him for his work and wish him well in the future.



Members of the Public Law Team

# STATUTE LAW

## Team members

### i) Consolidation

The Chairman, Robin Dormer, Lucy Baines and Anne Piper

### ii) Statute Law Repeals

The Chairman, John Saunders, Jonathan Teasdale, Penny Lewis and Carmen McFarlane

## CONSOLIDATION

### Introduction

- 2.75 The consolidation of statute law has been an important function of the Law Commission since its creation. Consolidation consists in drawing together different enactments on the same subject matter to form a rational structure and to make more intelligible the cumulative effect of different layers of amendment. Usually this is done by preparing a single new statute. However, in the case of a large consolidation, it may be done by means of several new statutes.<sup>1</sup> The aim is to make statutory law more comprehensible, both to those who have to operate it and to those who are affected by it.
- 2.76 In recent years we have prepared fewer consolidation measures than in previous years. One reason for this has been the change since the 1970s to the way Parliament amends legislation. Amendments are now routinely done by textual amendment: that is, by inserting, removing or replacing text in the original statute. This means that with modern electronic sources of legislation, and with existing printed reference material which is constantly updated, it is much easier now than it used to be to read the up-to-date version of an Act. The UK Legislation database<sup>2</sup> (formerly the Statute Law Database) is an addition to the sources of such material. The need to consolidate simply to take account of textual change has therefore largely disappeared.
- 2.77 However, consolidations can do things which cannot be replicated by a version of an Act which is merely an updated version of its text. There is still a need for consolidation, especially where there has been a large amount of legislative activity. This is because the law on the subject may now be found in a number of different Acts, or because the structure of the original Act has become distorted by subsequent amendment.
- 2.78 Consolidations are technically difficult to do and require a considerable amount of work, often extending over periods of years. It is not just a matter of identifying the amendments made to an original Act. Changes elsewhere in our statute law,

<sup>1</sup> The most recent example of this is the consolidation of the law on the National Health Service in England and Wales, which comprised three Acts: the National Health Service Act 2006 (c 41), the National Health Service (Wales) Act 2006 (c 42) and the National Health Service (Consequential Provisions) Act 2006 (c 43).

<sup>2</sup> <http://www.legislation.gov.uk>

changes in European law, or changes resulting from court decisions may also need to be reflected in a consolidated text. The effects of devolution can be particularly complex, and the impact of the Human Rights Act 1998 may need to be considered. Provisions that have become obsolete need to be identified and repealed. In some cases the substantive law needs to be altered before a satisfactory consolidation can be produced. All of this requires meticulous accuracy. It also requires the application of significant resources, both at the Law Commission and in the Department responsible for the area of law in question. There are often competing priorities for consolidation, and (especially in Departments) other priorities of theirs may mean that they cannot devote resources to consolidation.

- 2.79 The increasing volume of legislation also poses a problem. The Public General Acts enacted by Parliament ran to 3,204 A4-sized pages in 2008 and 2,895 pages in 2009. By contrast, in 1965, the year in which the Law Commission was created, the figure was 1,817 pages, and those are pages of the smaller format then in use. Consolidation cannot sensibly be undertaken unless the legislation to be consolidated remains relatively stable during the period it takes to complete the consolidation. It is not unknown for a consolidation to be postponed or even abandoned completely because of new changes in the legislation to be consolidated.



Members of the Parliamentary Drafting Team

### **The past year**

- 2.80 During the past year, work has continued on three consolidation Bills, but only two now remain live projects.
- 2.81 A draft Bill consolidating the legislation on charities was published for consultation in September 2009. A consolidation Bill was ready to be introduced into Parliament in January 2010, but in the event it was not introduced (the 2009-10 session of Parliament had, of course, to be brought to an end by the dissolution before the general election). The relevant Department is the Cabinet Office, of which the division concerned is the Office for Civil Society (formerly the

Office of the Third Sector). The Cabinet Office had made funds available to enable the Law Commission to engage a freelance drafter (formerly a member of the Office of the Parliamentary Counsel) to undertake the consolidation. After January 2010 there was a delay in renewing Departmental support for the Bill, and work on it was therefore suspended. The Cabinet Office renewed its support in October 2010, the work was resumed, and a consolidation Bill was introduced into Parliament on 3 March 2011.

- 2.82 We have also made progress with a consolidation of the legislation on bail, which is now well advanced. The relevant Department is the Ministry of Justice. We hope that it will be possible to publish a consultation draft of this consolidation this year, with a view to introducing a consolidation Bill into Parliament in the current session.
- 2.83 We had also been undertaking a consolidation of the legislation about private pensions. The work was funded on the same basis as for the charities consolidation, except that the relevant Department in this case was the Department for Work and Pensions. That Department decided in October 2010 that it would no longer support the pensions consolidation project. The project has therefore been abandoned, as we did not have the resources to complete it ourselves, and there are no plans to revive it. It was a very large exercise. Work on it started in 2006, and by October 2010 we were within less than 5 months of the planned date for publishing a draft Bill for consultation. At the time the project was abandoned, the draft Bill ran to 848 clauses and 21 Schedules. This represents a very large amount of work. The withdrawal of support by the Department for Work and Pensions means that, in terms of the production of a consolidation Bill, almost all the expenditure and work on the project over the last 4 years has been wasted.

#### **The future for consolidation**

- 2.84 Our recent experiences on consolidation projects have not been uniformly happy ones. As noted above, the pensions consolidation has been abandoned following the withdrawal of Departmental support; and the charities consolidation was suspended for a time for lack of such support, although that fortunately proved temporary. In addition, our consolidation of the law on Representation of the People remains suspended, and must now be considered effectively defunct, again following a request for suspension of work from the relevant Department (this time the Ministry of Justice). It has also proved difficult to obtain support for new consolidation projects. As has been mentioned above, consolidation is (for understandable reasons) often not high in Departmental priorities; and the increased volume of legislation often means that the law is insufficiently stable to contemplate a consolidation in the relevant area. In summary, it is hard work to get a consolidation project off the ground; and then it is hard work to keep it flying.
- 2.85 In the light of our own reduced resources, and of recent experiences as set out above, we have decided to adopt a different approach to consolidation projects. We are mindful that consolidation is one of our statutory functions, and we remain of the view that consolidation is a valuable contribution to improving the state of the statute book. We should welcome any encouragement which can be given to Departments to see consolidation as a higher priority than now seems to be given

to it, and we will always do our best to encourage it ourselves. But we have reluctantly concluded that, by contrast with our approach in the past, we should not at present proactively pursue new consolidation projects ourselves, other than in exceptional circumstances, although we will continue to consider suggestions made by Departments and others for new consolidation projects. As before we will be able to undertake one only if we have (or can secure) sufficient drafting capacity to do so. In addition, however, we will in future also be looking for a firmer commitment from the relevant Department than we have in the past been content with to provide sufficient support, in the form certainly of time and probably also of money, to see a consolidation project through to the passing of a consolidation Act.

## **STATUTE LAW REPEALS**

- 2.86 Our statute law repeals work involves removing legislation from the statute book if it is obsolete or if it otherwise has no further practical utility. The work helps to modernise the statute book, leaving it clearer and shorter, and is an integral part of the general process of statute law reform. The vehicle used for repealing such obsolete legislation is the Statute Law (Repeals) Bill. The Law Commission has drafted eighteen such Bills since 1965. All have been enacted. They have repealed some 2500 Acts in their entirety and have achieved the partial repeal of thousands of other Acts.
- 2.87 The work of the statute law repeals team during 2010 and early 2011 has focused on four main projects – civil and criminal justice, benevolent institutions, taxation and London.
- 2.88 The civil and criminal justice project proposed the repeal of thirteen obsolete statutory provisions relating to such issues as binding-over, distress, extradition, fraud, forgery and the police. The proposals were contained in our consultation paper, published in July 2010, and included the possible repeal of provisions in the Statute of Marlborough which, dated 1267, is the oldest unrepealed Act on the statute book.
- 2.89 The benevolent institutions (originally called the charitable institutions) project examined a number of obsolete Acts relating to charitable and analogous bodies such as schools, hospitals and almshouses which were established in the eighteenth and nineteenth centuries to meet the needs of the sick, poor and elderly. Our consultation paper, published in September 2010, proposed the repeal of 73 obsolete Acts spanning the period 1721 to 1958. These include the Female Orphan Asylum Act of 1800 (which helped to establish an orphanage in south London) and the Imprisoned Debtors Discharge Society's Act 1856 (passed to help imprisoned civil debtors to secure their early release from prison).
- 2.90 The taxation project is being carried out at the request of HM Revenue and Customs and results from the major Tax Law Rewrite Project (a consolidation and updating project spanning nearly fifteen years) which left many legislative provisions unrepealed. Work on this topic is in progress and we expect to publish a consultation paper by summer 2011.
- 2.91 The London project involves the examination of a selection of obsolete Acts all relating to London. The Acts span the period from the Tudors to the early



nineteenth century. They cover such topics as the building of London churches, the eighteenth century improvements of London streets and the construction of the new London docks in the early nineteenth century. Work on this topic is in progress and we expect to publish a consultation paper by summer 2011.

- 2.92 In each area of statute law repeals work the team produces a consultation paper on a selection of repeal proposals. These papers are then circulated for comments to Government departments and other interested bodies and individuals, as well as appearing on our website. Subject to the response of consultees, repeal proposals relating to all our statute law repeals work, including the projects mentioned above, will be included in our next Statute Law Repeals Report (and draft Bill) which is planned for 2012.
- 2.93 Much of the Law Commission's work on statute law repeals is conducted jointly with the Scottish Law Commission and many of the repeal candidates contained in Statute Law Repeals Reports extend to Scotland. Indeed because Statute Law (Repeals) Acts extend throughout the United Kingdom and the Isle of Man, the statute law repeals team liaises regularly on its repeal proposals not only with the Scottish Law Commission but also with the devolved authorities for Wales and Northern Ireland and with the authorities for the Isle of Man. Their help and support in considering and responding to the repeal proposals is much appreciated. The team have also worked with officials at the Ministry of Justice in preparation for the Government's own repeals legislation planned for 2012.
- 2.94 For some years now the statute law repeals team has hosted a seminar for Commonwealth drafters. These annual seminars – the most recent was held in June 2010 – are organised by arrangement with the Institute of Advanced Legal Studies and are designed to facilitate the understanding of overseas' delegates of the law reform, Bill drafting, consolidation and statute law rationalisation functions delivered by the Law Commission.



Members of the Statute Law Repeals Team

## ECONOMIC ANALYSIS

### Team members

Vindelyn Smith-Hillman (Economic Adviser), Keightley Reynolds (Assistant Economist)

### Impact assessment

- 2.95 A formal impact assessment now accompanies all our final reports. This assessment evaluates the likely costs and benefits of proposed changes, together with the identified risks and assumptions. Impact assessments have assumed increased importance with the enhanced role of the Government's Regulatory Policy Committee (RPC) and the Reducing Regulation Committee.
- 2.96 In writing impact assessments, information provided by our consultees continues to play a central role informing the evaluation of the likely costs that may be incurred and benefits that may be derived from legislative change.
- 2.97 We also ensure liaison with analysts in the department with policy responsibility for the area of law under consideration, so that there can, if possible, be agreement on impact.

### Education and engagement

- 2.98 The economics team has been instrumental in arranging for a number of speakers from the RPC, Government Economics Service, the National Audit Office and the Better Regulation Executive to visit the Law Commission. The aim is to enhance understanding within the Commission and to establish links with economics departments in other organisations.
- 2.99 The economics team represented the Law Commission at the Annual Government Economic Service (GES) in July 2010. This provided the opportunity to raise our profile. We also provided a seminar slot at the recent pilot workshop *Economics for Non-economists* which was hosted by the GES. The intention is to roll out provision throughout Central Government if feed-back suggests a favourable view.



The Economics Team

# PART 3

## IMPLEMENTATION OF LAW COMMISSION REPORTS

### INTRODUCTION

3.1 This Part sets out the progress that has been made towards implementation of our reports over the past year. A table showing the implementation of our reports is available at Appendix A. In summary:

- (1) the Law Commission published three law reform reports between 1 April 2010 and 31 March 2011;
- (2) two reports were implemented during that period;
- (3) one report is in the process of being implemented;
- (4) four reports now await implementation;
- (5) ten reports await a decision from Government;
- (6) two reports were accepted but not implemented; and
- (7) four reports were rejected.

3.2 Our progress during the year can be seen in the context of the Law Commission's overall achievements since its creation:

Law reform reports published	100%	(187)
Accepted, implemented and decision awaited (maximum potential for implementation)	76%	(142)
Accepted and implemented in whole or in part	68%	(128)
Accepted by Government in whole, in part or in principle but awaiting implementation	3%	(5)
Response from Government awaited	5%	(10)
Rejected	16%	(29)
Superseded	4%	(8)

3.3 Progress towards improving the rate of implementation has been assisted by three recent developments. In November 2009 Parliament passed the Law Commission Act 2009 (amending the Law Commissions Act 1965). A key feature of this Act is that it places a requirement on the Lord Chancellor to report to Parliament annually on the Government's progress in implementing Law

Commission reports. The first report to Parliament was delivered on 24 January 2011.<sup>1</sup>

- 3.4 Following the commencement of the Law Commission Act 2009, in March 2010 the Government and the Law Commission agreed the terms of a Protocol in relation to Law Commission work. The latter part of the Protocol sets out departmental responsibilities once the Law Commission has published a report. The Minister for the relevant department will provide an interim response to the Law Commission as soon as possible (but not later than six months after publication of the report), and will give a final response as soon as possible but within a year of the report being published.
- 3.5 In February 2008, the House of Lords Procedure Committee recommended a new Parliamentary procedure, initially on a trial basis, as a means of improving the rate of implementation of Law Commission Reports.<sup>2</sup> Bills are suitable for this procedure if they are regarded as “uncontroversial”. This was accepted by the House as a whole on 3 April 2008.<sup>3</sup>
- 3.6 The first trial procedure Bill was the Perpetuities and Accumulations Act 2009, which was introduced in April 2009, and received Royal Assent on 12 November 2009. The second trial procedure Bill was the Third Parties (Rights against Insurers) Act 2010, which was introduced in November 2009 and received Royal Assent on 25 March 2010. Both were MoJ Bills, with our support.
- 3.7 The House of Lords Procedure Committee’s report on the trial procedure recommended that the procedure should be made permanent; and that it should specifically be extended to reports of the Scottish Law Commission, as well as the Law Commission for England and Wales.<sup>4</sup> This was approved by the whole House on 7 October 2010.<sup>5</sup>
- 3.8 We welcome these developments, which will greatly assist in ensuring that progress is made in considering and implementing Law Commission reports in a timely and efficient manner.

## **IMPLEMENTED REPORTS**

### **By way of primary legislation passed through Parliament**

#### ***Reforming Bribery***<sup>6</sup>

- 3.9 In our final report, published in November 2008, we recommended replacing the common law offence of bribery and various statutory offences of corruption with two new offences. We also recommended the creation of two specialised

<sup>1</sup> <http://www.justice.gov.uk/publications/docs/report-implementation-law-commission-proposals.pdf> (last visited on 24 March 2011).

<sup>2</sup> <http://www.publications.parliament.uk/pa/ld200708/ldselect/ldprohse/63/6303.htm> (last visited on 24 March 2011).

<sup>3</sup> <http://www.publications.parliament.uk/pa/ld200708/ldhansrd/text/80403-0002.htm#08040373000008> (last visited on 24 March 2011).

<sup>4</sup> <http://www.publications.parliament.uk/pa/ld201011/ldselect/ldprohse/30/3003.htm#a1> (last visited on 24 March 2011).

<sup>5</sup> <http://www.publications.parliament.uk/pa/ld201011/ldhansrd/text/101007-0001.htm#10100714000813> (last visited on 24 March 2011).

<sup>6</sup> (2008) Law Com No 313.

offences relating to the bribery of foreign officials and to corporations who fail to prevent bribery on the part of employees or agents.

- 3.10 The recommendations have been implemented in the Bribery Act 2010, which received Royal Assent on 8 April 2010, and will come into force on 1 July 2011.

### **By other means**

#### ***Trustee Exemption Clauses***<sup>7</sup>

- 3.11 A trustee exemption clause is a provision in a trust instrument which excludes or restricts a trustee's liability for breach of trust. In July 2006 we published a report recommending that the use of trustee exemption clauses would be most effectively regulated by the adoption across the trust industry of a non-statutory rule of practice governing the disclosure and explanation of relevant clauses. This should be enforced by the regulatory and professional bodies who govern and influence trustees and trust drafters. A number of bodies have already implemented the rule.<sup>8</sup> The report recommends that Government should promote the application of the rule of practice as widely as possible across the trust industry.
- 3.12 The Government has accepted our recommendations.<sup>9</sup>

### **REPORTS IN THE PROCESS OF BEING IMPLEMENTED**

#### **The Forfeiture Rule and the Law of Succession**<sup>10</sup>

- 3.13 In July 2005 we published a final report and draft Bill to solve a particular problem in succession law. We recommended that where a person forfeits an inheritance because they kill the person from whom they would inherit, the property should be distributed as if the killer had died before the victim. The effect is that property may pass to the killer's children (eg, the victim's grandchildren) who may be excluded under current law. Our recommendations would also apply where the heir voluntarily disclaims the property or in certain cases where a beneficiary dies under the age of 18 leaving a child.
- 3.14 In 2006, the Government accepted our recommendations, subject to minor modifications.<sup>11</sup> Mr Greg Knight MP introduced the Estates of Deceased Persons (Forfeiture Rule and Law of Succession) Bill as a private member's bill on 30 June 2010. The bill is currently being considered by Parliament.

<sup>7</sup> (2006) Law Com No 301.

<sup>8</sup> The Society of Trusts and Estates Practitioners has introduced a version of the rule that binds its members in England and Wales. The Law Society has introduced new guidance to the profession to support the Code of Conduct binding solicitors as from 1 July 2007. The Institute of Chartered Accountants in England and Wales has also published guidance on trustee exemption clauses in line with our recommendations which is binding on its members.

<sup>9</sup> See Written Answer, *Hansard* (HC), 14 September 2010, vol 515, col 38WS.

<sup>10</sup> (2005) Law Com No 295.

<sup>11</sup> Written Ministerial Statement, Baroness Ashton, *Hansard* (HL), 18 December 2006, vol 687, col WS223.

## REPORTS AWAITING IMPLEMENTATION

### **Unfair Terms in Contracts<sup>12</sup>**

- 3.15 The present law on unfair contract terms is unacceptably confusing. It is covered by two pieces of legislation, containing inconsistent and overlapping provisions. In February 2005 we published a report and draft Bill jointly with the Scottish Law Commission. The draft Bill rewrites both laws as a single regime, in a way that is much more accessible to consumer and business advisers. The report also recommends improving protection for the smallest and most vulnerable businesses, employing nine or fewer members of staff.
- 3.16 In July 2006, Department for Trade and Industry Minister Ian McCartney wrote to us to say that the Government accepted the Commissions' recommendations in principle, subject to an evaluation of the impact of the reforms.<sup>13</sup>
- 3.17 However, in October 2008, the European Commission published a proposal for a draft directive on consumer rights which would, among other things, harmonise the law on unfair contract terms.<sup>14</sup> Any legislation in this area awaits the outcome of the European negotiations.

### **Renting Homes: The Final Report<sup>15</sup>**

- 3.18 On 13 May 2009, the Government published its response to a report it had commissioned into the private rented sector led by Dr Julie Rugg. That response also stood as the Government's response to our report on Renting Homes in relation to England.
- 3.19 In its response, the Government acknowledged the contribution made by our report to the development of housing policy but took the firm view that the time was not right to implement the fundamental reforms proposed in Renting Homes. We are encouraged to note that the Government's reasoning is based on an assessment of the housing market in the current financial climate, rather than a fundamental disagreement on the merits of our proposals. We therefore hope that the Government will return to the proposals at an appropriate time in the future.
- 3.20 However, the Welsh Assembly Government has accepted the desirability of implementing Renting Homes in Wales. A legislative competence order allowing for the implementation of the bulk of the recommendations had been passed by the National Assembly under the pre-May 2011 devolution arrangements, but legislation has yet to be forthcoming.

### **Capital and Income in Trusts: Classification and Apportionment<sup>16</sup>**

- 3.21 This project examined the complex rules which determine the classification of trust receipts from companies and require trustees to apportion funds between capital and income. Our Report, published in May 2009, recommended a clear

<sup>12</sup> (2005) Law Com No 292; Scot Law Com No 199.

<sup>13</sup> See <http://webarchive.nationalarchives.gov.uk/+/http://www.dti.gov.uk/consumers/buying-selling/sale-supply/unfair-contracts/index.html> (last visited on 24 March 2011).

<sup>14</sup> Com (2008) 624/3, published on 8 October 2008.

<sup>15</sup> Law Com No 297, published 5 May 2006.

<sup>16</sup> (2009) Law Com No 315.

rule reclassifying shares distributed on exempt demergers as capital, and the abolition of the rules of apportionment for all new trusts.

- 3.22 The project also considered the current rules on investment applicable to charitable trusts which have permanent capital endowment. Such charities can only use the income generated by the endowment to further the charity's objects, and not the capital itself. This may inhibit the achievement of the charity's objects and encourage investment practices which concentrate on the form of receipts rather than on maximising overall return. The report recommended a new power for such charitable trusts to invest on a total return basis in compliance with a scheme regulated by the Charity Commission.
- 3.23 Following consultation, these recommendations were accepted by Government on 22 March 2010<sup>17</sup> and on 17 January 2011 Government announced its decision to take forward legislative reform.<sup>18</sup>

### **Partnership Law<sup>19</sup>**

- 3.24 Our joint report with the Scottish Law Commission was published in November 2003. It was in two parts. Most of the recommendations concerned general partnerships. In 2006, the Government rejected this part of the report.<sup>20</sup> We also made recommendations about limited partnerships. Limited partnerships (as distinct from limited liability partnerships) allow general partners and limited partners to join together. A general partner manages the business and has unlimited liability for its obligations, while limited partners take no part in the management and assume only limited liability. Our recommendations were designed to clarify the relationship between limited partnerships and general partnership law.
- 3.25 In July 2006 the Government announced its intention to implement this part of our report.<sup>21</sup> In August 2008, the Department for Business, Enterprise and Regulatory Reform published a consultation paper and draft Legislative Reform Order. Subsequently, however, the Government announced that it would proceed with the limited partnership reforms in stages.
- 3.26 So far, one order has come into effect. The Legislative Reform (Limited Partnerships) Order 2009 makes two main changes: making a certificate of registration conclusive evidence that a limited partnership has been formed at the date shown on the certificate; and requiring all new limited partnerships to include "Limited Partnership" or "LP" or equivalent at the end of their names. The Government intends to discuss alternative options for taking forward our other recommendations. These include proposals relating to capital contributions and clarifying what activities are permitted for limited partners without jeopardising

<sup>17</sup> <http://www.publications.parliament.uk/pa/ld200910/ldhansrd/text/100322-wms0004.htm#1003221000267> (last visited on 24 March 2011).

<sup>18</sup> <http://www.publications.parliament.uk/pa/ld201011/ldhansrd/text/110117-wms0001.htm#1101171000012> (last visited on 24 March 2011).

<sup>19</sup> (2003) Law Com No 283; Scot Law Com No 192.

<sup>20</sup> Written Ministerial Statement, Ian McCartney, *Hansard* (HC), 20 July 2006, vol 449, col 53WS.

<sup>21</sup> See above.

their limited status. The Government plans to address the remaining recommendations as and when resources and priorities allow.<sup>22</sup>

## **REPORTS AWAITING A GOVERNMENT DECISION**

### **Company Security Interests<sup>23</sup>**

- 3.27 In August 2005 we published a final report and draft legislation on Company Security Interests recommending major reforms. These would replace the present paper-based system with a new on-line process to register charges cheaply and instantaneously. They would also provide simpler and clearer rules to determine “priority” disputes between competing interests over the same property.
- 3.28 We were disappointed that the then Department for Trade and Industry was not able to include our main recommendations within the Companies Act 2006, though a power was included to make some amendments to the registration scheme. In 2010, the Department for Business, Innovation and Skills consulted on changes to the scheme,<sup>24</sup> and subsequently announced an intention to introduce regulations.<sup>25</sup> We still await a decision on our broader recommendations.

### **Termination of Tenancies<sup>26</sup>**

- 3.29 This project examined the means whereby a landlord can terminate a tenancy because the tenant has not complied with his or her obligations. This is an issue of great practical importance for many landlords and tenants of residential and commercial properties. The current law is difficult to use and littered with pitfalls for both the lay person and the unwary practitioner. It does not support negotiated settlement and provides little protection for mortgagors and chargees.
- 3.30 The Commission's report, published in October 2006, recommended the abolition of forfeiture and its replacement by a modern statutory scheme for the termination of tenancies on the ground of tenant default which would balance the interests of all parties affected and promote more proportionate outcomes. The Law Commission and Government are in discussion on the report.<sup>27</sup>

### **Cohabitation: The Financial Consequences of Relationship Breakdown<sup>28</sup>**

- 3.31 The Law Commission published its report on cohabitation on 31 July 2007. The publication of the report followed two years of work by the Law Commission conducted at the request of, and funded by, the Ministry of Justice. On 6 March 2008, the Ministry of Justice provided an interim response in a Statement to

<sup>22</sup> <http://www.justice.gov.uk/publications/docs/report-implementation-law-commission-proposals.pdf>, para 17 (last visited on 24 March 2011).

<sup>23</sup> (2005) Law Com No 296.

<sup>24</sup> <http://www.bis.gov.uk/Consultations/registration-of-charges> (last visited on 24 March 2011).

<sup>25</sup> <http://www.bis.gov.uk/assets/biscore/business-law/docs/g/10-1319-government-response-consultation-registration-of-charges.pdf> (last visited on 24 March 2011).

<sup>26</sup> (2006) Law Com No 303.

<sup>27</sup> <http://www.justice.gov.uk/publications/docs/report-implementation-law-commission-proposals.pdf>, para 25 (last visited on 24 March 2011).

<sup>28</sup> (2007) Law Com No 307.



Parliament by the then Parliamentary Under-Secretary of State, Bridget Prentice. The response indicated that the Government was postponing its decision on the Law Commission's "very thorough and high quality" report because it was concerned to establish estimates of the financial costs and financial benefits of bringing into effect the Law Commission's recommended scheme. The Government hoped to do so by examining the operation of the Family Law (Scotland) Act 2006. The Government aims to make an announcement in early 2011.<sup>29</sup>

### **Intoxication and Criminal Liability<sup>30</sup>**

- 3.32 On 15 January 2009 we published our report. It addresses the law governing the extent to which a defendant may avoid liability by relying on his or her intoxicated state at the time he or she committed a criminal offence. The report focuses on the situation where the defendant was voluntarily intoxicated. However, the report also addresses the more unusual situation where the defendant's intoxication was involuntary.
- 3.33 We recommended that the distinction between offences of basic and specific intent be removed and the law made more comprehensible, logical and consistent by providing, instead, a definitive list of states of mind to which self-induced intoxication would be relevant. The Government gave an interim response in February 2011.

### **Consumer Remedies for Faulty Goods<sup>31</sup>**

- 3.34 This was a joint project with the Scottish Law Commission, referred to us by the Department for Business, Enterprise and Regulatory Reform in December 2007.
- 3.35 In November 2009, we published our final report recommending ways to simplify the law on the remedies available to consumers who buy goods which "do not conform to contract". This followed a consultation paper<sup>32</sup> in November 2008.
- 3.36 This area of law affects almost everyone and is particularly complex. Currently, UK consumers have the "right to reject" faulty goods. This means they have a right to a full refund, provided they act within "a reasonable time". The area is also governed by the European Consumer Sales Directive, under which consumers' first recourse is to repair or replacement. In October 2008, the European Commission published a proposal which, if adopted, would have required the UK to abolish the right to reject.
- 3.37 We recommended that the right to reject should be retained as a short-term remedy of first instance. It is simple and easy to use and it inspires consumer confidence. In our opinion poll, 94% of consumers considered that the right to a refund was important to them, and 89% of consumers thought it should be retained, even though consumers can get replacements and repairs.

<sup>29</sup> <http://www.justice.gov.uk/publications/docs/report-implementation-law-commission-proposals.pdf>, para 29 (last visited on 24 March 2011).

<sup>30</sup> (2009) Law Com No 314.

<sup>31</sup> (2009) Law Com No 317; Scot Law Com No 216.

<sup>32</sup> Consumer Remedies for Faulty Goods (2008) Law Commission Consultation Paper No 188; Scottish Law Commission Discussion Paper No 139.

- 3.38 However, there needs to be greater clarity about how long the right to reject lasts. We think that in normal circumstances, a consumer should have 30 days to return faulty goods and receive a refund, with limited flexibility for special circumstances such as perishable goods, or goods which both parties know will not be used for some time.
- 3.39 We are pleased that in March 2010, Viviane Reding, the EU Commissioner responsible for this area, acknowledged the importance of the UK's right to reject and undertook to amend the proposed new directive.<sup>33</sup> Any legislation in this area awaits the outcome of the European negotiations which we expect to be in late 2011.

#### **Consumer Insurance Law: Pre-Contract Disclosure and Misrepresentation**<sup>34</sup>

- 3.40 Please see Part 2<sup>35</sup> for further details.

#### **The Illegality Defence**<sup>36</sup>

- 3.41 We published this report in March 2010. It looks at how the law should respond when a claimant in a civil action has been involved in illegal conduct that is connected to the claim in some way. We concluded that in claims in contract, unjust enrichment or tort, improvements were best left to the courts, to develop through case law.
- 3.42 However, in one area – the law of trusts – we recommended legislative reform. We therefore published a short draft Bill. It would apply where a trust has been created or continued to conceal the beneficiary's interest for a criminal purpose. In most cases, the beneficiary would be entitled to their normal legal rights. However, in exceptional circumstances, the court would have a discretion to prevent the beneficiary from enforcing the trust.
- 3.43 The Government has recently provided a proposed response, which we are considering.

#### **Administrative Redress: Public Bodies and the Citizen**<sup>37</sup>

- 3.43 This report was published in May 2010. The 2008 consultation paper had considered two main areas for reform:
- (1) court-based mechanisms for compensation from public bodies in both public law and tort; and
  - (2) reforms for public sector ombudsmen.
- 3.44 The responses in relation to court-based mechanisms for redress were largely negative. The report therefore discontinued the project in respect of the court-based mechanisms. However, in the light of the difficulties experienced by the team in trying to create a dataset on the compensation liability of public bodies,

<sup>33</sup> Speech, Madrid 15 March 2010 (available on <http://europa.eu>).

<sup>34</sup> (2009) Law Com No 319; Scot Law Com No 219.

<sup>35</sup> Para 2.3.

<sup>36</sup> (2010) Law Com No 320.

<sup>37</sup> (2010) Law Com 322.

the report made recommendations for future collation and publication of this information.

- 3.45 In relation to the public sector ombudsmen, the consultation process and subsequent developments led us to conclude that further investigation of issues relating to ombudsmen was necessary and desirable. We published a further consultation paper on 2 September 2010 focusing solely on the public sector ombudsmen, with a report due in 2011.
- 3.46 The Government's consideration of this report has been delayed by the need to focus on other priorities, but it aims to respond in 2011.<sup>38</sup>

### **The High Court's Jurisdiction in Relation to Criminal Proceedings<sup>39</sup>**

- 3.47 The usual way for the prosecution or defence to challenge a decision of the Crown Court in a trial on indictment is by appeal to the Criminal Division of the Court of Appeal. There are, however, two less common ways of challenging a decision of the Crown Court: by way of judicial review and by appeal by way of case stated.
- 3.48 The Law Commission was asked to consider the power of judicial review of the High Court over the Crown Court in criminal proceedings, as provided in section 29(3) of the Senior Courts Act 1981, because interpretation of that section had resulted in confusion and anomalies. We were also asked to examine the provision providing for appeal by way of case stated from the Crown Court to the High Court.
- 3.49 Our report, which is published on 27 July 2010, contains recommendations and a draft Bill. In brief, we recommend:
- (1) abolishing appeal by case stated from the Crown Court to the High Court in criminal proceedings;
  - (2) reforming the law on judicial review of the Crown Court in criminal proceedings so that judicial review of decisions in a trial on indictment is barred from the time the case goes to the Crown Court for trial to the end of the trial, with an exception where the judge refuses bail; and
  - (3) two new statutory appeals.

- 3.50 The Government is considering this report and is aiming to provide its initial response in 2011.<sup>40</sup>

### **Expert Evidence in Criminal Proceedings in England and Wales<sup>41</sup>**

- 3.51 This project addressed the admissibility of expert evidence in criminal proceedings in England and Wales. In a criminal trial, a jury or magistrates' court is required to determine disputed factual issues. Experts in a relevant field are

<sup>38</sup> <http://www.justice.gov.uk/publications/docs/report-implementation-law-commission-proposals.pdf>, para 43 (last visited on 24 March 2011).

<sup>39</sup> (2010) Law Com 324.

<sup>40</sup> <http://www.justice.gov.uk/publications/docs/report-implementation-law-commission-proposals.pdf>, para 45 (last visited on 24 March 2011).

<sup>41</sup> (2011) Law Com 325.

often called as witnesses to help the fact-finding body understand and interpret evidence with which that body is unfamiliar.

- 3.52 Under the current judicial approach too much expert opinion evidence is admitted without adequate scrutiny because no clear test is being applied to determine whether the evidence is sufficiently reliable to be admitted.
- 3.53 In the report we formally recommend that there should be a new reliability-based admissibility test for expert opinion evidence in criminal proceedings. The test would not need to be applied routinely or unnecessarily, but it would be applied in appropriate cases and it would result in the exclusion of unreliable expert opinion evidence. Under the test, expert opinion evidence would not be admitted unless it was adjudged to be sufficiently reliable to go before a jury. Accordingly, juries would be less likely to reach their conclusions on unreliable evidence and there would be fewer miscarriages of justice, which would result in greater public confidence in the criminal justice system.
- 3.54 We await the Government's response.

#### **REPORTS ACCEPTED BUT WILL NOT BE IMPLEMENTED BY THE GOVERNMENT**

- 3.55 During the year the Government indicated that two reports were accepted but would not be implemented. These reports were:

##### **Participating in Crime<sup>42</sup> and Conspiracy and Attempts<sup>43</sup>**

- 3.56 In May 2007, the Commission published a report and draft Bill setting out recommendations for reform of the law of secondary liability for assisting and encouraging crime. The Government indicated that it would consider the recommendations when it received the Commission's report on conspiracy and attempts.
- 3.57 In December 2009 we published our final report and draft Bill on conspiracy and attempts. Our main recommendation on conspiracy would resolve the problem with the current law highlighted by the House of Lords decision in *Saik*<sup>44</sup> which sets the fault element too high in respect of conspiracies to commit certain offences. We also recommended that certain exemptions relating to conspiracy be abolished or clarified. On attempt we recommended reform to resolve a number of uncertainties and ambiguities under the current law, including provision for the offence of attempted murder by omission.
- 3.58 In March 2011 the Government indicated that it accepted the recommendations in these reports but that they would not be implemented saying that, while they were worthwhile projects for the future, they could not be considered a priority in the shorter term because of the pressure on resources.

<sup>42</sup> (2007) Law Com 305.

<sup>43</sup> (2009) Law Com 318.

<sup>44</sup> [2006] UKHL 18, [2007] 1 AC 18.

## REPORTS REJECTED BY THE GOVERNMENT

3.59 During the year, four reports were rejected by the Government. These were:

**Damages for Personal Injury: Medical, Nursing and other Expenses: Collateral Benefits;<sup>45</sup> Claims for Wrongful Death;<sup>46</sup> Pre-judgment Interest on Debts and Damages<sup>47</sup>**

3.60 The first two reports carried out a major review of damages. In particular, the reports examined the availability of bereavement damages, the ability of relatives to claim under the Fatal Accidents Act 1976 and whether those who provide gratuitous care should be reimbursed retrospectively.

3.61 Pre-judgment Interest on Debts and Damages was a stand alone report which addressed the way that courts award interest on debts and damages in the course of court proceedings. It was found that individual debtors were over-compensating creditors for short-term delays in payment, often at a time when they faced financial hardship.

3.62 The proposals contained within these reports that were accepted by the previous Government were included in the draft Civil Law Reform Bill, which was published for pre-legislative scrutiny during the 2009/2010 session of Parliament. However, as the Civil Law Reform Bill would not contribute to the delivery of the Government's key priorities, the Government has decided not to proceed with it. Statements confirming this decision were made in the House of Commons<sup>48</sup> and the House of Lords<sup>49</sup> on 10 January 2011.

**Murder, Manslaughter and Infanticide<sup>50</sup>**

3.63 In November 2006 we published a report setting out recommendations for reform of the law of homicide. In it we recommended restructuring the law of homicide into three tiers, first degree murder, second degree murder and manslaughter. Within that structure, we recommended reform to secondary liability for homicide. The report also made recommendations in relation to partial defences to murder and the offence/defence of infanticide.

3.64 Although our recommendations on partial defences were implemented to a substantial extent in the Coroners and Justice Act 2009, in January 2011 the Government informed us that it would not implement the remainder of the recommendations in this report stating that the time was not right to take forward such a substantial reform of the criminal law.

<sup>45</sup> (1999) Law Com 262.

<sup>46</sup> (1999) Law Com 263.

<sup>47</sup> (2004) Law Com 287.

<sup>48</sup> [www.publications.parliament.uk/pa/cm201011/cmhansrd/cm110110/wmstext/110110m0001.htm#1101104000017](http://www.publications.parliament.uk/pa/cm201011/cmhansrd/cm110110/wmstext/110110m0001.htm#1101104000017).

<sup>49</sup> [www.publications.parliament.uk/pa/ld201011/ldhansrd/text/110110-wms0001.htm#1101103000074](http://www.publications.parliament.uk/pa/ld201011/ldhansrd/text/110110-wms0001.htm#1101103000074).

<sup>50</sup> (2006) Law Com 304.

## PART 4

# MEASURING SUCCESS

### Performance

- 4.1 Table 4.1 summarises our main targets for the year 2010-11 and how we met those targets.

**Table 4.1: Targets 2010-11**

TARGET	OUTCOME
<b>To complete Reports on:</b>	
Adult Social Care	Published 11 May 2011 (LC326)
Expert Evidence in Criminal Trials	Published 22 March 2011 (LC325)
Easements, Covenants and Profits à Prendre	Published 8 June 2011 (LC327)
Public Services Ombudsmen	To be published July 2011
<b>To complete Consultation Papers on:</b>	
Marital Property Agreements	Published 11 January 2011 (LCCP198)
Insurance Contract Law	Carried forward
Consumer Redress for Misleading and Aggressive Practices	Published 12 April 2011 (LCCP199)
<b>To publish the following issues papers:</b>	
Insurance Contract Law: Insured's Post-Contractual Duty of Good Faith	Published 9 July 2010
Insurance Contract Law: Brokers' Liability to Pay Premiums	Published 19 July 2010

- 4.2 Table 4.2 summarises our major targets for 2011-12 (in addition to those targets carried forward from 2010-11, as indicated in Table 4.1).

**Table 4.2: Targets 2011-12**

TARGET
<b>To complete Reports on:</b>
Consumer Redress for Misleading and Aggressive Practices
European Optional Instrument on Contract Law
Statute Law Repeals
Intestacy and Family Provision Claims on Death
<b>To complete Consultation Papers on:</b>
Simplification of the Criminal Law: Kidnapping
Insanity
Insurance Contract Law
Healthcare Regulation

**Measuring success**

- 4.3 There are a number of ways in which the Commission gauges success. Implementation of our reports is clearly key and is covered in detail in Part 3 of this report.
- 4.4 However, implementation does not fully demonstrate the breadth of the Commission's impact. To address this, we record instances during the calendar year when the Law Commission is cited in judgments, by other law reform bodies or during business in the Houses of Parliament.
- 4.5 Table 4.3 shows the number of citations for the calendar year 2010.

**Table 4.3: Citations 2010**

2010 calendar year	
In UK judgments	85
In judgments from other common law jurisdictions	7
In Hansard	19

- 4.6 In addition, the Commission's work is widely quoted in academic journals and the media. A basic search on the internet reveals 418 references made in UK academic journals during the calendar year 2010, and our monitoring service picked up 727 references to the Law Commission from the media during 2010-11. Some of these will be made in support of the Commission; some may not be. At the very least these figures show that the Law Commission is gaining attention and stimulating debate on the issues with which we are tasked to deal.

# PART 5

## HOW WE WORK

### Developing our programme of work

- 5.1 Decisions about whether to include a particular subject in a programme of reform are based on the importance of the issues it will cover, the availability of resources in terms of both expertise and funding, and whether the project is suitable to be dealt with by the Commission.
- 5.2 Although we have a duty to “take and keep under review *all* the law”,<sup>1</sup> it is important that our efforts are directed towards areas of the law that most need reform and reforms that are most likely to be implemented. There should be a focus on change that will deliver real benefits to the people, businesses, organisations and institutions to which that law applies.
- 5.3 The 10th Programme of Law Reform<sup>2</sup> was launched in April 2008. Part 2 of this report provides an update on the progress of this Programme.
- 5.4 During the summer of 2010 we consulted on our 11th Programme. By the closing date of the consultation in October we had received over 200 suggestions for law reform projects. All suggestions have been assessed against our criteria and in accordance with the provisions of the Protocol.<sup>3</sup> We expect to present the recommended 11th Programme to the Lord Chancellor with a view to commencing work early in the summer.

### The Law Commission’s role and methods

- 5.5 We usually start our projects by producing a scoping or discussion paper. The aim of this is to explore how extensive the project should be, find out the key issues as seen by others, and identify interested parties. We will then produce a consultation paper to describe the present law and its shortcomings, and set out provisional proposals for reform. During the consultation period, we try actively to seek out interested parties and engage them, including holding meetings and debates. All responses are analysed and considered very carefully.
- 5.6 The Commission’s final recommendations are set out in a report. When the implementation of any recommendations would involve primary legislation, the report will usually contain a Bill drafted by Parliamentary Counsel. The report is laid before Parliament. It is then for the Government to decide whether it accepts the recommendations and to introduce any necessary Bill in Parliament, unless a Private Member or Peer agrees to do so. After publication of a report the Commission and Parliamentary Counsel who worked on the draft Bill often give further assistance to Government ministers and departments.
- 5.7 The Commission publishes the responses to consultations, either separately or in the final report.

<sup>1</sup> Law Commissions Act 1965, s 3(1).

<sup>2</sup> (2007) Law Com No 311.

<sup>3</sup> Protocol between the Lord Chancellor (on behalf of the Government) and the Law Commission (2010) Law Com No 321, published 29 March 2010.



- 5.8 The Commission has signed up to the Government Code on Consultation.

### **Protocol between the Lord Chancellor and the Law Commission for England and Wales**

- 5.9 In March 2010, the Law Commission agreed a statutory protocol with the Lord Chancellor that governs how the Commission and Government departments should work together on law reform projects. The protocol is provided for under the Law Commission Act 2009, which came into force on 12 January 2010 and amends the Law Commissions Act 1965, and applies to all projects commencing after 29 March 2010.
- 5.10 Under the Act, the Lord Chancellor is also required to report annually to Parliament on the extent to which the Law Commission's proposals have been implemented by the Government. The Lord Chancellor issued his first such report on 24 January 2011, setting out the Government's reasons for decisions taken during the year to accept or reject our proposals and giving an indication of when decisions can be expected on recommendations that are still being considered.

### **Code of best practice for Law Commissioners**

- 5.11 In accordance with Government policy for all non-departmental public bodies, there is a written code for Law Commissioners, agreed with the Ministry of Justice. It incorporates the Seven Principles of Public Life and covers matters such as the role and responsibilities of Commissioners. The code is available on our website.<sup>4</sup>
- 5.12 The work of the Commission is based on thorough research and analysis of case law, legislation, academic and other writing, law reports and other relevant sources of information both in the United Kingdom and overseas. It takes full account of the European Convention on Human Rights and of relevant European law. We act, where appropriate, in consultation with the Northern Ireland Law Commission and the Scottish Law Commission, and work jointly with our Scottish colleagues on a number of projects.

### **Equality and diversity**

- 5.13 The Commission is committed to consulting fully with those likely to be affected by its proposals, assessing the impact of its proposed policies and removing or mitigating any unfairly adverse effect on particular groups within society wherever possible.
- 5.14 The Commission's full Equality and Diversity Action Statement can be seen on our website.<sup>5</sup>
- 5.15 We continue to try to make our work accessible to a wide range of people. In October 2010 we launched our consultation on Unfitness to Plead, making the consultation paper available in an EasyRead format. Similarly, the paper for our consultation on Adult Social Care, which closed in July 2010, was available in EasyRead format, as well as in large print and in audio.

<sup>4</sup> <http://www.lawcom.gov.uk>.

<sup>5</sup> As above.

## **External relations**

- 5.16 The Law Commission works hard to establish strong links with a wide range of organisations and individuals who have an interest in law reform, and greatly values these relationships. We are indebted to all those who send us feedback on our consultation papers, contribute project ideas for our programmes of law reform, and provide input and expertise at all stages of the process of making recommendations to Government.
- 5.17 It would not be possible in this Annual Report to thank individually everyone who provides us with guidance or offers us their views. We would, however, like to express our gratitude to all those organisations and individuals who have worked with us as members of advisory groups on our many projects. We are grateful, also, to the academics and members of the judiciary who have contributed in many ways to our work during the course of the year.
- 5.18 We acknowledge the support and interest shown in the Commission and its work by a number of ministers, Members of Parliament and Peers from across the political spectrum and public officials. And we thank the many practitioners and legal associations working in specialist and general fields who have given us their time and support to further our awareness and understanding of various areas of interest.
- 5.19 In February 2011 we staged a week-long exhibition in the House of Commons, using the opportunity to build new relationships with members of both Houses. In June 2010, we attended a Parliamentary reception in the Foreign and Commonwealth Office, during which the Chairman and Commissioners took the opportunity to meet some of the new members of Parliament.
- 5.20 Members of the Law Commission accept invitations throughout the year to attend and speak at seminars, lectures and conferences. We continue to seek out opportunities for reaching and engaging those people who are interested in law reform and the processes by which the law is improved.
- 5.21 During the year, the Law Commission welcomed a number of distinguished speakers to our lunchtime lecture series, including Sir Thomas Legg KCB, QC, His Honour Judge John Phillips (Director of Studies, Judicial College), Lord Neuberger of Abbotsbury (Master of the Rolls), Tony Pedrotti (Director, Regulatory Policy Committee), Chris Shapcott and George Crockford (National Audit Office), Fergus Randolph QC (Brick Court Chambers), Professor Alison Wride (University of Exeter), Elisabeth Baraka (Advocates for International Development), Sharon Witherspoon (Deputy Director, Nuffield Foundation) and Pragna Patel (The Southall Black Sisters).

- 5.22 In May 2010, a team of legal and other staff from the Commission joined members of the judiciary and teams from many of London's law firms and sets of chambers in the annual London Legal Walk. The team raised over £3,000 for the London Legal Support Trust, which organises the event to support free legal advice agencies in and around London, including Law Centres and pro bono advice surgeries.
- 5.23 On 11 June 2010, we were delighted to host the year's meeting of the four law reform bodies of the UK and the Republic of Ireland, together with the Jersey Law Commission. The Commissions come together for an annual meeting, which we take in turns to host.
- 5.24 Over the course of the year we have worked closely with the Scottish Law Commission on a number of projects. We continue to collaborate on insurance contract law and have together launched a number of issues papers seeking views from stakeholders in this project. We have also continued our contacts with the Northern Ireland Law Commission.
- 5.25 Much of the Law Commission's work on statute law repeals is also conducted jointly with the Scottish Law Commission and many of the repeal candidates contained in Statute Law Repeals Reports extend to Scotland. Indeed because Statute Law (Repeals) Acts extend throughout the United Kingdom and the Isle of Man, the Law Commission liaises regularly on its repeal proposals not only with the Scottish Law Commission but also with the authorities in Wales (the Office of the Secretary of State for Wales and the Counsel General to the National Assembly for Wales) and with the authorities in Northern Ireland and in the Isle of Man. Their help and support in considering and responding to the repeal proposals is much appreciated. We also keep in touch with the Law Commission of Northern Ireland on this area.
- 5.26 The Law Commission also plays a wide role in the international business of law reform. We are pleased to continue to receive international guests at our offices in London. During the year, these included Public Administration International, Law Subjects Associations, Korea, Turkey and the Dutch Academy for Legislation.

## **PART 6**

### **STAFF AND RESOURCES**

#### **Staff**

- 6.1 The Commissioners very much appreciate the dedication and expertise of all the staff at the Law Commission and are grateful for their contribution to the work of the Commission.

#### ***Legal staff***

- 6.2 The Commission's lawyers are barristers, solicitors or legal academics from a wide range of professional backgrounds, including private practice and the public service.
- 6.3 Parliamentary Draftsmen who prepare the draft Bills attached to the law reform reports, and who undertake the consolidation of existing legislation, are seconded to the Law Commission from the Office of the Parliamentary Counsel. The Commission is very grateful to them all for their expertise and hard work.

#### ***Research assistants***

- 6.4 Each year a dozen or so well qualified graduates have been recruited to assist with research, drafting and creative thinking. They generally spend a year or two at the Commission before moving on to further their legal training and careers. The selection process is extremely thorough and the Commission has aimed to attract a diverse range of candidates of the highest calibre through contact with faculty careers advisers, as well as through advertisements both online and in the press. For many research assistants, working at the Commission has been a rung on the ladder to an extremely successful career. The Commission recognises the contribution they make, not least through their enthusiastic commitment to the work of law reform and their lively participation in debate.

#### ***Communications***

- 6.5 The team: Phil Hodgson, Dan Leighton, Terry Cronin.
- 6.6 The Communications team supports the work of the Law Commission by providing strategic direction on the Commission's communications issues and services to the Commissioners and legal teams that include: media management, stakeholder engagement, PR, internal communications, event management, eCommunications and publishing.



The Communications Team

***Corporate services***

- 6.7 The team: Donna Greene, Jacqueline Griffiths, Barbara Wallen, Nicole Latte, Alison Meager, Jackie Samuel, Carmen McFarlane.
- 6.8 The Commission has continued to benefit from the experience, expertise and commitment of its small Corporate Services Team (CST) of administrative staff. The CST is responsible for accommodation, health and safety, human resources, information technology, programme management, records management, resource accounting, information assurance and secretarial assistance. These support services help the Commission to function effectively and smoothly.
- 6.9 The CST values the help available to them from colleagues in MoJ, in particular from Justice Policy Group's Legal Policy Team, Information Directorate and the Human Resources Directorate. The CST is also grateful to the Corporate HQ Workplace Management Team and Central Health and Safety Branch.

***Library***

- 6.10 The team: Keith Tree, Michael Hallissey.
- 6.11 The Library service continues to provide a vital information service in support of the legal work of the Commission. The Law Commission makes use, reciprocally, of a number of other libraries and particular thanks are due to the Judges' Library at the Royal Courts of Justice, MoJ and the Institute of Advanced Legal Studies. In addition, a large collection of printed sources is available for research. Library staff also provide training and advice in all areas of legal information research.

6.12 The Library makes full use of the internet and other electronic services and databases. Where possible, these are also made available through each individual desktop PC. The internet is also being used to make available old Law Commission reports and consultation papers through the British and Irish Legal Information Institute.<sup>1</sup> Our older publications, which are not available on our website, can be supplied in electronic format (pdf) on request.<sup>2</sup>



The Corporate Services Team and the Library Team

### **Working at the Commission**

#### ***Work/life balance***

6.13 There are a wide variety of work/life balance arrangements in place, such as home-working and working part-time or compressed hours.

#### ***Health and safety***

6.14 The Commission attaches great importance to the health and safety of its staff and others who visit its premises. Quarterly meetings of the Steel House Health and Safety Committee take place, chaired by MoJ's Central Health and Safety Branch. The Head of Corporate Services is the Competent Person for health and safety management at the Commission, representing staff at the Committee and monitoring progress against a detailed Health and Safety Plan.

<sup>1</sup> <http://www.bailii.org>.

<sup>2</sup> This service is currently provided by the communications team.

(Signed)

SIR JAMES MUNBY, *Chairman*

ELIZABETH COOKE

DAVID HERTZELL

DAVID ORMEROD

FRANCES PATTERSON QC

MARK ORMEROD, *Chief Executive*

27 May 2011

# APPENDIX A

## TABLE SHOWING IMPLEMENTATION STATUS OF LAW COMMISSION LAW REFORM REPORTS

LC No	Title	Status	Related Measures
<b>1966</b>			
3	Proposals to Abolish Certain Ancient Criminal Offences	Implemented	Criminal Law Act 1967 (c58)
6	Reform of the Grounds of Divorce: The Field of Choice (Cmnd 3123)	Implemented	Divorce Reform Act 1969 (c55); now Matrimonial Causes Act 1973 (c18)
7	Proposals for Reform of the Law Relating to Maintenance and Champerty	Implemented	Criminal Law Act 1967 (c80)
8	Report on the Powers of Appeal Courts to Sit in Private and the Restrictions upon Publicity in Domestic Proceedings (Cmnd 3149)	Implemented	Domestic and Appellate Proceedings (Restriction of Publicity) Act 1968 (c63)
<b>1967</b>			
9	Transfer of Land: Interim Report on Root of Title to Freehold Land	Implemented	Law of Property Act 1969 (c59)
10	Imputed Criminal Intent ( <i>Director of Public Prosecutions v Smith</i> )	Implemented in part	Criminal Justice Act 1967 (c80), s 8
11	Transfer of Land: Report on Restrictive Covenants	Implemented in part	Law of Property Act 1969 (c59)
13	Civil Liability for Animals	Implemented	Animals Act 1971 (c22)
<b>1968</b>			
16	Blood Tests and the Proof of Paternity in Civil Proceedings (HC 2)	Implemented	Family Law Reform Act 1969 (c46)
<b>1969</b>			
17	Landlord and Tenant: Report on the Landlord and Tenant Act 1954, Part II (HC 38)	Implemented	Law of Property Act 1969 (c59)
18	Transfer of Land: Report on Land Charges affecting Unregistered Land (HC 125)	Implemented	Law of Property Act 1969 (c59)
19	Proceedings against Estates (Cmnd 4010)	Implemented	Proceedings against Estates Act 1970 (c17)
20	Administrative Law (Cmnd 4059)	Implemented	See LC 73
21	Interpretation of Statutes (HC 256)	Rejected	
23	Proposal for the Abolition of the Matrimonial Remedy of Restitution of Conjugal Rights (HC 369)	Implemented	Matrimonial Proceedings and Property Act 1970 (c45)
24	Exemption Clauses in Contracts: First Report: Amendments to the Sale of Goods Act 1893: Report by the Two Commissions (SLC 12) (HC 403)	Implemented	Supply of Goods (Implied Terms) Act 1973 (c13)
25	Family Law: Report on Financial Provision in Matrimonial Proceedings (HC 448)	Implemented	Matrimonial Proceedings and Property Act 1970 (c45); now largely Matrimonial Causes Act 1973 (c18)
26	Breach of Promise of Marriage (HC 453)	Implemented	Law Reform (Miscellaneous Provisions) Act 1970 (c33)
<b>1970</b>			
29	Criminal Law: Report on Offences of Damage to Property (HC 91)	Implemented	Criminal Damage Act 1971 (c48)
30	Powers of Attorney (Cmnd 4473)	Implemented	Powers of Attorney Act 1971 (c27)



<b>LC No</b>	<b>Title</b>	<b>Status</b>	<b>Related Measures</b>
31	Administration Bonds, Personal Representatives' Rights of Retainer and Preference and Related Matters (Cmnd 4497)	Implemented	Administration of Estates Act 1971 (c25)
33	Family Law: Report on Nullity of Marriage (HC 164)	Implemented	Nullity of Marriage Act 1971 (c44), now Matrimonial Causes Act 1973 (c18)
34	Hague Convention on Recognition of Divorces and Legal Separations: Report by the two Commissions (SLC 16) (Cmnd 4542)	Implemented	Recognition of Divorces and Legal Separations Act 1971 (c53); now Family Law Act 1986 (c55), Part II
35	Limitation Act 1963 (Cmnd 4532)	Implemented	Law Reform (Miscellaneous Provisions) Act 1971 (c43)
40	Civil Liability of Vendors and Lessors for Defective Premises (HC 184)	Implemented	Defective Premises Act 1972 (c35)
<b>1971</b>			
42	Family Law: Report on Polygamous Marriages (HC 227)	Implemented	Matrimonial Proceedings (Polygamous Marriages) Act 1972 (c38); now Matrimonial Causes Act 1973 (c18)
43	Taxation of Income and Gains Derived from Land: Report by the two Commissions (SLC 21) (Cmnd 4654)	Implemented in part	Finance Act 1972 (c41), s 82.
<b>1972</b>			
48	Family Law: Report on Jurisdiction in Matrimonial Proceedings (HC 464)	Implemented	Domicile and Proceedings Act 1973 (c45)
<b>1973</b>			
53	Family Law: Report on Solemnisation of Marriage in England and Wales (HC 250)	Rejected	
55	Criminal Law: Report on Forgery and Counterfeit Currency (HC 320)	Implemented	Forgery and Counterfeiting Act 1981 (c45)
56	Report on Personal Injury Litigation: Assessment of Administration of Damages (HC 373)	Implemented	Administration of Justice Act 1982 (c53)
<b>1974</b>			
60	Report on Injuries to Unborn Children (Cmnd 5709)	Implemented	Congenital Disabilities (Civil Liability) Act 1976 (c28)
61	Family Law: Second Report on Family Property: Family Provision on Death (HC 324)	Implemented	Inheritance (Provision for Family and Dependents) Act 1975 (c63)
62	Transfer of Land: Report on Local Land Charges (HC 71)	Implemented	Local Land Charges Act 1975 (c76)
<b>1975</b>			
67	Codification of the Law of Landlord and Tenant: Report on Obligations of Landlords and Tenants (HC 377)	Rejected	
68	Transfer of Land: Report on Rentcharges (HC 602)	Implemented	Rentcharges Act 1977 (c30)
69	Exemption Clauses: Second Report by the two Law Commissions (SLC 39) (HC 605)	Implemented	Unfair Contract Terms Act 1977 (c50)
<b>1976</b>			
73	Report on Remedies in Administrative Law (Cmnd 6407)	Implemented	Rules of Supreme Court (Amendment No 3) 1977; Supreme Court Act 1981 (c54)
74	Charging Orders (Cmnd 6412)	Implemented	Charging Orders Act 1979 (c53)

LC No	Title	Status	Related Measures
75	Report on Liability for Damage or Injury to Trespassers and Related Questions of Occupiers' Liability (Cmnd 6428)	Implemented	Occupiers' Liability Act 1984 (c3)
76	Criminal Law: Report on Conspiracy and Criminal Law Reform (HC 176)	Implemented in part	Criminal Law Act 1977 (c45)
77	Family Law: Report on Matrimonial Proceedings in Magistrates' Courts (HC 637)	Implemented	Domestic Proceedings and Magistrates' Courts Act 1978 (c22)
<b>1977</b>			
79	Law of Contract: Report on Contribution (HC 181)	Implemented	Civil Liability (Contribution) Act 1978 (c47)
82	Liability for Defective Products: Report by the two Commissions (SLC 45) (Cmnd 6831)	Implemented	Consumer Protection Act 1987 (c43)
83	Criminal Law: Report on Defences of General Application (HC 566)	Rejected	
<b>1978</b>			
86	Family Law: Third Report on Family Property: The Matrimonial Home (Co-ownership and Occupation Rights) and Household Goods (HC 450)	Implemented	Housing Act 1980 (c51); Matrimonial Homes and Property Act 1981 (c24)
88	Law of Contract: Report on Interest (Cmnd 7229)	Implemented in part	Administration of Justice Act 1982 (c53); Rules of the Supreme Court (Amendment No 2) 1980
89	Criminal Law: Report on the Mental Element in Crime (HC 499)	Rejected	
91	Criminal Law: Report on the Territorial and Extra-Territorial Extent of the Criminal Law (HC 75)	Implemented in part	Territorial Sea Act 1987 (c49)
<b>1979</b>			
95	Law of Contract: Implied Terms in Contracts for the Sale and Supply of Goods (HC 142)	Implemented	Supply of Goods and Services Act 1982 (c29)
96	Criminal Law: Offences Relating to Interference with the Course of Justice (HC 213)	Rejected	
<b>1980</b>			
99	Family Law: Orders for Sale of Property under the Matrimonial Causes Act 1973 (HC 369)	Implemented	Matrimonial Homes and Property Act 1981 (c24)
102	Criminal Law: Attempt and Impossibility in Relation to Attempt, Conspiracy and Incitement (HC 646)	Implemented	Criminal Attempts Act 1981 (c47)
104	Insurance Law: Non-Disclosure and Breach of Warranty (Cmnd 8064)	Rejected	
<b>1981</b>			
110	Breach of Confidence (Cmnd 8388)	Rejected	
111	Property Law: Rights of Reverter (Cmnd 8410)	Implemented	Reverter of Sites Act 1987 (c15)
112	Family Law: The Financial Consequences of Divorce (HC 68)	Implemented	Matrimonial and Family Proceedings Act 1984 (c42)
<b>1982</b>			
114	Classification of Limitation in Private International Law (Cmnd 8570)	Implemented	Foreign Limitation Periods Act 1984 (c16)
115	Property Law: The Implications of <i>Williams and Glyn's Bank Ltd v Boland</i> (Cmnd 8636)	Superseded	See <i>City of London Building Society v Flegg</i> [1988] AC 54

LC No	Title	Status	Related Measures
116	Family Law: Time Restrictions on Presentation of Divorce and Nullity Petitions (HC 513)	Implemented	Matrimonial and Family Proceedings Act 1984 (c42)
117	Family Law: Financial Relief after Foreign Divorce (HC 514)	Implemented	Matrimonial and Family Proceedings Act 1984 (c42)
118	Family Law: Illegitimacy (HC 98)	Implemented	Family Law Reform Act 1987 (c42)
<b>1983</b>			
121	Law of Contract: Pecuniary Restitution on Breach of Contract (HC 34)	Rejected	
122	The Incapacitated Principal (Cmnd 8977)	Implemented	Enduring Powers of Attorney Act 1985 (c29)
123	Criminal Law: Offences relating to Public Order (HC 85)	Implemented	Public Order Act 1986 (c64)
124	Private International Law: Foreign Money Liabilities (Cmnd 9064)	Implemented	Private International Law (Miscellaneous Provisions) Act 1995 (c42)
125	Property Law: Land Registration (HC 86)	Implemented	Land Registration Act 1986 (c26)
<b>1984</b>			
127	Transfer of Land: The Law of Positive and Restrictive Covenants (HC 201)	Rejected	
132	Family Law: Declarations in Family Matters (HC 263)	Implemented	Family Law Act 1986 (c55), Part III
134	Law of Contract: Minors' Contracts (HC 494)	Implemented	Minors' Contracts Act 1987 (c13)
137	Private International Law: Recognition of Foreign Nullity Decrees (SLC 88) (Cmnd 9347)	Implemented	Family Law Act 1986 (c55), Part II
<b>1985</b>			
138	Family Law: Conflicts of Jurisdiction (SLC 91) (Cmnd 9419)	Implemented	Family Law Act 1986 (c55), Part I
141	Covenants Restricting Dispositions, Alterations and Change of User (HC 278)	Implemented in part	Landlord and Tenant Act 1988 (c26)
142	Forfeiture of Tenancies (HC 279)	Rejected	
143	Criminal Law: Codification of the Criminal Law: A Report to the Law Commission (HC 270)	Superseded	See LC 177
145	Criminal Law: Offences against Religion and Public Worship (HC 442)	Implemented	Criminal Justice and Immigration Act 2008 (c4)
146	Private International Law: Polygamous Marriages (SLC 96) (Cmnd 9595)	Implemented	Private International Law (Miscellaneous Provisions) Act 1995 (c42)
147	Criminal Law: Poison Pen Letters (HC 519)	Implemented	Malicious Communications Act 1988 (c27)
148	Property Law: Second Report on Land Registration (HC 551)	Implemented	Land Registration Act 1988 (c3)
149	Criminal Law: Report on Criminal Libel (Cmnd 9618)	Rejected	
151	Rights of Access to Neighbouring Land (Cmnd 9692)	Implemented	Access to Neighbouring Land Act 1992 (c23)
152	Liability for Chancel Repairs (HC 39)	Rejected	
<b>1986</b>			
157	Family Law: Illegitimacy (Second Report) (Cmnd 9913)	Implemented	Family Law Reform Act 1987 (c42)

LC No	Title	Status	Related Measures
<b>1987</b>			
160	Sale and Supply of Goods (SLC 104) (Cm 137)	Implemented	Sale and Supply of Goods Act 1994 (c35)
161	Leasehold Conveyancing (HC 360)	Implemented	Landlord and Tenant Act 1988 (c26)
163	Deeds and Escrows (HC 1)	Implemented	Law of Property (Miscellaneous Provisions) Act 1989 (c34)
164	Formalities for Contracts for Sale of Land (HC 2)	Implemented	Law of Property (Miscellaneous Provisions) Act 1989 (c34)
165	Private International Law: Choice of Law Rules in Marriage (SLC 105) (HC 3)	Implemented	Foreign Marriage (Amendment) Act 1988 (c44)
166	Transfer of Land: The Rule in <i>Bain v Fothergill</i> (Cm 192)	Implemented	Law of Property (Miscellaneous Provisions) Act 1989 (c34)
168	Private International Law: Law of Domicile (SLC 107) (Cm 200)	Rejected	
<b>1988</b>			
172	Review of Child Law: Guardianship (HC 594)	Implemented	Children Act 1989 (c41)
173	Property Law: Fourth Report on Land Registration (HC 680)	Superseded	See LC 235
174	Landlord and Tenant: Privity of Contract and Estate (HC 8)	Implemented	Landlord and Tenant (Covenants) Act 1995 (c30)
175	Matrimonial Property (HC 9)	Rejected	
<b>1989</b>			
177	Criminal Law: A Criminal Code (2 vols) (HC 299)	Superseded	Superseded by the criminal law simplification project: see Tenth Programme.
178	Compensation for Tenants' Improvements (HC 291)	Rejected	
180	Jurisdiction over Offences of Fraud and Dishonesty with a Foreign Element (HC 318)	Implemented	Criminal Justice Act 1993 (c36), Part I
181	Trusts of Land (HC 391)	Implemented	Trusts of Land and Appointment of Trustees Act 1996 (c47)
184	Title on Death (Cm 777)	Implemented	Law of Property (Miscellaneous Provisions) Act 1994 (c36)
186	Computer Misuse (Cm 819)	Implemented	Computer Misuse Act 1990 (c18)
187	Distribution on Intestacy (HC 60)	Implemented in part; Rejected in part	Law Reform (Succession) Act 1995 (c41)
188	Overreaching: Beneficiaries in Occupation (HC 61)	Implemented in part	Trusts of Land and Appointment of Trustees Act 1996 (c47)
<b>1990</b>			
192	Family Law: The Ground for Divorce (HC 636)	Rejected	Family Law Act 1996 (c27), Part II (enacted, but never brought into force)
193	Private International Law: Choice of Law in Tort and Delict (SLC 129) (HC 65)	Implemented	Private International Law (Miscellaneous Provisions) Act 1995 (c42)
<b>1991</b>			
194	Distress for Rent (HC 138)	Implemented in part; Rejected in part	Tribunals, Courts and Enforcement Act 2007 (c15), Part III (enacted, but not yet brought into force)
196	Rights of Suit: Carriage of Goods by Sea (SLC 130) (HC 250)	Implemented	Carriage of Goods by Sea Act 1992 (c50)
199	Transfer of Land: Implied Covenants for Title (HC 437)	Implemented	Law of Property (Miscellaneous Provisions) Act 1994 (c36)

LC No	Title	Status	Related Measures
201	Obsolete Restrictive Covenants (HC 546)	Rejected	
202	Corroboration of Evidence in Criminal Trials (Cm 1620)	Implemented	Criminal Justice and Public Order Act 1994 (c33)
204	Land Mortgages (HC 5)	Rejected	
<b>1992</b>			
205	Rape within Marriage (HC 167)	Implemented	Criminal Justice and Public Order Act 1994 (c33)
207	Domestic Violence and Occupation of the Family Home (HC 1)	Implemented	Family Law Act 1996 (c27), Part IV
208	Business Tenancies (HC 224)	Implemented	Regulatory Reform (Business Tenancies) (England and Wales) Order 2003
<b>1993</b>			
215	Sale of Goods Forming Part of a Bulk (SLC 145) (HC 807)	Implemented	Sale of Goods (Amendment) Act 1995 (c28)
216	The Hearsay Rule in Civil Proceedings (Cm 2321)	Implemented	Civil Evidence Act 1995 (c38)
217	Effect of Divorce on Wills (Cm 2322)	Implemented	Law Reform (Succession) Act 1995 (c41)
218	Legislating the Criminal Code: Offences against the Person and General Principles (Cm 2370)	Implemented in part	Domestic Violence Crime and Victims Act 2004 (c28)
219	Contributory Negligence as a Defence in Contract (HC 9)	Rejected	
<b>1994</b>			
220	Delegation by Individual Trustees (HC 110)	Implemented	Trustee Delegation Act 1999 (c15)
221	Termination of Tenancies (HC 135)	Superseded	See LC 303
222	Binding Over (Cm 2439)	Implemented in part	In March 2007, the President of the Queen's Bench Division issued a Practice Direction
224	Structured Settlements (Cm 2646)	Implemented	Finance Act 1995 (c4); Civil Evidence Act 1995 (c38); Damages Act 1996 (c48)
226	Judicial Review (HC 669)	Implemented in part	Housing Act 1996 (c52); Access to Justice Act 1999 (c22); Tribunals, Courts and Enforcement Act 2007 (c15)
227	Restitution: Mistakes of Law (Cm 2731)	Implemented in part; Rejected in part	See <i>Kleinwort Benson v Lincoln City Council</i> [1999] 2 AC 349
228	Conspiracy to Defraud (HC 11)	Implemented	Theft (Amendment) Act 1996 (c62)
<b>1995</b>			
229	Intoxication and Criminal Liability (HC 153)	Superseded	See LC 314
230	The Year and a Day Rule in Homicide (HC 183)	Implemented	Law Reform (Year and a Day Rule) Act 1996 (c19)
231	Mental Incapacity (HC 189)	Implemented	Mental Capacity Act 2005 (c9)
235	Land Registration: First Joint Report with HM Land Registry (Cm 2950)	Implemented	Land Registration Act 1997 (c2)
236	Fiduciary Duties and Regulatory Rules (Cm 3049)	Rejected	
<b>1996</b>			
237	Involuntary Manslaughter (HC 171)	Implemented in part; Superseded in part	Corporate Manslaughter and Corporate Homicide Act 2007 (c19); see LC 304

LC No	Title	Status	Related Measures
238	Responsibility for State and Condition of Property (HC 236)	Accepted in part but will not be implemented; Rejected in part	
242	Contracts for the Benefit of Third Parties (Cm 3329)	Implemented	Contracts (Rights of Third Parties) Act 1999 (c31)
243	Money Transfers (HC 690)	Implemented	Theft (Amendment) Act 1996 (c62)
<b>1997</b>			
245	Evidence in Criminal Proceedings: Hearsay (Cm 3670)	Implemented	Criminal Justice Act 2003 (c44)
246	Shareholder Remedies (Cm 3759)	Implemented	Companies Act 2006 (c46)
247	Aggravated, Exemplary and Restitutionary Damages (HC 346)	Rejected	
<b>1998</b>			
248	Corruption (HC 524)	Superseded	See LC 313
249	Liability for Psychiatric Illness (HC 525)	Rejected	
251	The Rules against Perpetuities and Excessive Accumulations (HC 579)	Implemented	Perpetuities and Accumulations Act 2009 (c18)
253	Execution of Deeds and Documents (Cm 4026)	Implemented	Regulatory Reform (Execution of Deeds and Documents) Order 2005
255	Consents to Prosecution (HC 1085)	Accepted	<i>(Advisory only, no draft Bill)</i>
<b>1999</b>			
257	Damages for Personal Injury: Non-Pecuniary Loss (HC 344)	Implemented in part; Rejected in part	See <i>Heil v Rankin</i> [2000] 3 WLR 117
260	Trustees' Powers and Duties (SLC 172) (HC 538; SE2)	Implemented	Trustee Act 2000 (c29)
261	Company Directors: Regulating Conflicts of Interests (SLC 173) (Cm 4436; SE/1999/25)	Implemented	Companies Act 2006 (c46)
262	Damages for Personal Injury: Medical and Nursing Expenses (HC 806)	Rejected	
263	Claims for Wrongful Death (HC 807)	Rejected	
<b>2001</b>			
267	Double Jeopardy and Prosecution Appeals (Cm 5048)	Implemented	Criminal Justice Act 2003 (c44)
269	Bail and the Human Rights Act 1998 (HC 7)	Implemented	Criminal Justice Act 2003 (c44)
270	Limitation of Actions (HC 23)	Rejected	
271	Land Registration for the Twenty-First Century (jointly with HM Land Registry) (HC 114)	Implemented	Land Registration Act 2002 (c9)
272	Third Parties – Rights against Insurers (SLC 184) (Cm 5217)	Implemented	Third Parties (Rights Against Insurers) Act 2010 (c10)
273	Evidence of Bad Character in Criminal Proceedings (Cm 5257)	Implemented	Criminal Justice Act 2003 (c44)
<b>2002</b>			
276	Fraud (Cm 5560)	Implemented in part	Fraud Act 2006 (c35)
277	The Effective Prosecution of Multiple Offending (Cm 5609)	Implemented	Domestic Violence, Crime and Victims Act 2004 (c28)
<b>2003</b>			
281	Land, Valuation and Housing Tribunals: The Future (Cm 5948)	Rejected	

<b>LC No</b>	<b>Title</b>	<b>Status</b>	<b>Related Measures</b>
282	Children: Their Non-accidental Death or Serious Injury (Criminal Trials) (HC 1054)	Implemented	Domestic Violence, Crime and Victims Act 2004 (c28)
283	Partnership Law (SLC192) (Cm 6015; SE/2003/299)	Implemented in part; Accepted in part; Rejected in part	The Legislative Reform (Limited Partnerships) Order 2009
284	Renting Homes (Cm 6018)	Superseded	See LC 297
286	Towards a Compulsory Purchase Code: (1) Compensation (Cm 6071)	Accepted but will not be implemented	
<b>2004</b>			
287	Pre-judgment Interest on Debts and Damages (HC 295)	Rejected	
289	In the Public Interest: Publication of Local Authority Inquiry Reports (Cm 6274)	Accepted but will not be implemented	
290	Partial Defences to Murder (Cm 6301)	Implemented	Coroners and Justice Act 2009 (c25)
291	Towards a Compulsory Purchase Code: (2) Procedure (Cm 6406)	Accepted but will not be implemented	
<b>2005</b>			
292	Unfair Terms in Contracts (SLC 199) (Cm 6464; SE/2005/13)	Accepted in principle	
295	The Forfeiture Rule and the Law of Succession (Cm 6625)	Accepted	
296	Company Security Interests (Cm 6654)	Pending	
<b>2006</b>			
297	Renting Homes: The Final Report (Cm 6781)	Rejected for England, Accepted in principle for Wales	
300	Inchoate Liability for Assisting and Encouraging Crime (Cm 6878)	Implemented	Serious Crime Act 2007 (c27)
301	Trustee Exemption Clauses (Cm 6874)	Implemented	See Written Answer, Hansard (HC), 14 September 2010, vol 515, col 38WS
302	Post-Legislative Scrutiny (Cm 6945)	Implemented	See Post-Legislative Scrutiny: The Government's Approach (2008) Cm 7320
303	Termination of Tenancies (Cm 6946)	Pending	
304	Murder, Manslaughter and Infanticide (HC 30)	Implemented in part; Rejected in part	Coroners and Justice Act 2009 (c25)
<b>2007</b>			
305	Participating in Crime (Cm 7084)	Accepted but will not be implemented	
307	Cohabitation: The Financial Consequences of Relationship Breakdown (Cm 7182)	Pending	
<b>2008</b>			
309	Housing: Proportionate Dispute Resolution (Cm 7377)	Accepted in part	

<b>LC No</b>	<b>Title</b>	<b>Status</b>	<b>Related Measures</b>
312	Housing: Encouraging Responsible Letting (Cm 7456)	Rejected	
313	Reforming Bribery (HC 928)	Implemented	Bribery Act 2010 (c23)
<b>2009</b>			
314	Intoxication and Criminal Liability (Cm 7526)	Pending	
315	Capital and Income in Trusts: Classification and Apportionment (HC 426)	Accepted	
317	Consumer Remedies for Faulty Goods (Cm 7725)	Pending	
318	Conspiracy and Attempts (HC 41)	Accepted but will not be implemented	
319	Consumer Insurance Law: Pre-Contract Disclosure and Misrepresentation (Cm 7758)	Pending	
<b>2010</b>			
320	The Illegality Defence (HC 412)	Pending	
322	Administrative Redress: Public Bodies and the Citizen (HC 6)	Pending	
324	The High Court's Jurisdiction in Relation to Criminal Proceedings (HC 329)	Pending	
<b>2011</b>			
325	Expert Evidence in Criminal Proceedings in England and Wales (HC 829)	Pending	
326	Adult Social Care (HC 941)	Pending	



## APPENDIX B

### THE COST OF THE COMMISSION

B.1 The Commission's resources are mainly made available through the Ministry of Justice in accordance with section 5 of the Law Commissions Act 1965.

	2008/2009 (April/March)		2009/2010 (April/March)		2010/2011 (April/March)	
	£000	£000	£000	£000	£000	£000
Commissioner salaries (including ERNIC)	541.3		521.5**		540.3	
Staff salaries*	2899.5		2972.2		3008.4	
		<b>3440.8</b>		<b>3493.7</b>		<b>3548.7</b>
Communications, printing and publishing, online subscriptions, publicity and advertising Design, print and reprographic services Events and conferences (non-training) Supply of information technology, equipment maintenance, hire of photocopiers Library services (books and other on-line subscriptions) Postage and distribution Grants in aid and utilities (includes telecommunications)	216.3		216.3		173.9	
Rent for accommodation (met by MoJ)	544.1		541.7		546.3	
Travel and subsistence (includes non-staff)	35.2		20.1		17.4	
Stationery and office supplies, cleaning, office refuse collection, depreciation charges Recruitment, training, professional bodies membership Ex-gratia payments to staff, payroll services (non-PFI), staff recognition and reward scheme awards Health and safety equipment	146.4		108.5		43.9***	
Entertainment	4.5		5.0		3.3	
		<b>946.5</b>		<b>891.6</b>		<b>784.8</b>
<b>TOTAL</b>		<b>4387.3</b>		<b>4385.3</b>		<b>4333.5</b>

\* Includes ERNIC, ASLC, bonuses (not covered under the recognition and reward scheme), consultancy, secondees/contract staff, agency staff (includes provision of security), Treasury Solicitor's fees and early retirement costs.

\*\* Cost reduced due to a revised start date of a new Commissioner.

\*\*\* Cost reduced due to general economies and a more efficient system for stationery/office supply costs, under which these are supplied directly by MoJ.

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