Law Commission
Reforming the law

Inside Modern Law Reform

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The Law Commission

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

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Preface

Our objective in this book is to promote an understanding of how the Law Commission of England and Wales carries out law reform. We hope that, in so doing, we will enhance our co-operation with all those who have an interest in reforming the law. We see this as part of our duty, under section 3 of the Law Commissions Act 1965, to pursue the systematic development and reform of the law. As an institution, we are concerned with the laws of England and Wales. This work is however aimed at all those who share a concern for good law reform both nationally and internationally.

The text starts with an overview by the present Chair of the Law Commission, Sir Nicholas Green.[1] It is intended to offer a more personal perspective than the chapters which follow.

The level of detail we provide about each stage of the law reform process may be of more interest to those who are already familiar with the work of a law reform body than to those who are new to the subject. Nonetheless we hope that the work will be useful to both specialists and those seeking to learn more about an unfamiliar field. For anyone with no existing knowledge about the Law Commission and law reform, we recommend the material on our website for an introduction: https://www.lawcom.gov.uk/about/.

For a snapshot of the Commission's law reform work at any one time, we suggest our annual reports. These review all our current projects and survey progress towards the implementation of completed projects. They also set out broader plans and initiatives.

The examples we have given in the text to illustrate the Law Commission's work draw almost entirely on relatively recent work. To that extent, this publication is a reflection of the time, and memory, of those who have

contributed to it. However, the basic principles that we describe are, we believe, of enduring value.

The Law Commission is nearing 60 years of age. We are indebted to the many thousands of individuals and organisations who have contributed so fully and generously to our law reform projects over the decades and from whom we have learned and continue to learn. It is because of their active engagement that we have been able to build up the wide-ranging and varied experience of law reform which we describe in the following chapters.

Notes

1 Sir Nicholas Green's tenure as Chair will come to an end on 30 November 2023. Sir Peter Fraser will take up the position on 1 December 2023.

Chair's Introduction

Looking from the inside out

The "law" is a body of rules made by Parliament, ministers and the courts. It includes Acts of Parliament, regulations and other instruments made by ministers, individual decisions by public authorities and regulators, statutory orders and guides that decision makers are required to take into account. It includes up to date and operative measures, measures which have never been brought into effect and measures of diminishing utility and even obsolescence that no one has ever got around to amending or repealing. The "law" is vast and sprawling and sometimes unloved and forgotten. It can be extraordinarily complex and sometimes difficult to understand or even to find. Governments rarely have the time, energy, focus or resources to sort it out. Hence – Law Commissions.

This publication is intended to explain how the Law Commission of England and Wales works, from the inside looking out. There is a substantial body of literature about the Commission from the perspective of those looking at us from the outside. That material analyses our statutory powers and duties and combs our published reports for inspiration about our ways of working and thought processes. But there is little which captures the insider's view. This publication seeks to plug that gap.

The Law Commission is a small organisation. As of the time of writing we have about 70 staff almost all of whom are engaged on over 20 ongoing law reform projects at various stages of completion. At the same time, we provide support for the implementation of concluded projects, receive ideas for projects and conduct negotiations with Government departments to pave the way for new projects to start. We work across Government as well as with Parliament and with numerous non-governmental stakeholders.[1]

We are influential internationally not only with other law reform agencies around the world but also with governments who from time to time seek our advice on how to undertake reform often in relation to sensitive social and economic problems.[2]

The benefits of good law reform

With the help of external economists, we have undertaken a close analysis of the impact of our reform recommendations. The results are startling. Just five technical reform projects conducted between 2010 and 2017 have a cumulative positive net present value exceeding £3 billion over ten years.[3] Our highly technical Sentencing Code, a consolidation exercise which did not alter the substantive law, will generate about £250 million of savings over the same time period. Eleven projects between 2010 and 2017 were calculated to touch, positively, the lives of about 27 million individuals. Another highly technical report, which led to the Electronic Trade Documents Act, passed by Parliament in 2023, will generate savings for industry of over £1 billion over the next ten years.[4] Zenzic, a mixed public/private body overseeing work on automated vehicles, estimated that the automated vehicles market could be worth £52 billion in the UK alone by 2035.[5] Our ground-breaking work creating a regulatory framework for automated vehicles could help unlock this market.[6] A report on the digital economy by the International Chamber of Commerce on electronic trade documents estimated that modernising laws in order to digitise certain trade documents could generate £25 billion in new economic growth by 2024, and free up £224 billion in efficiency savings.[7]

Notwithstanding, the Law Commission is not an organisation at the forefront of the national consciousness. This is not a cause for complaint since we are content to play an understated role. But it remains the case that we should be better understood and it is therefore important that we shine more of a light upon how we work in practice. As Sir Robert Buckland, former Lord Chancellor, recently said, Law Commission work is "not a niche issue or a dry matter just for lawyers; it is a matter of public good and public benefit".[8]

History – how we came about

Byzantine law reform

There is nothing new in law reform agencies. They exist because they are needed. The emperor Justinian assumed power in 527. The law of the Roman

empire was in a state of confusion. It comprised a substantial body of law. This included old statutes passed in the days of the republic and early empire; decrees of the Senate passed at the end of the republic and during the first two centuries of the empire; the writings of jurists to whom the emperors had given the authority to declare the law; and newer laws consisting of imperial ordinances promulgated during the middle and later stages of the empire. Such was the state of disorganisation that upon assuming power the emperor instructed ten law commissioners, made up of well-known academics, lawyers and court officials, to review the law identifying those with continuing practical value and to remove all the rest. As they performed this consolidation and tidying up exercise they sought to create a more coherent and accessible set of laws.

In 530 Justinian created a new commission of 16 eminent lawyers who set about the task of further compiling, clarifying, simplifying, and ordering the law into what became 50 books or a Digest ("Digesta"). An outline or summary of the main elements of Roman law called the Institutes of Justinian (or "Institutiones") was published at about the same time. The Chair of the Commission was Tribonian, a Byzantine jurist who had practised as a lawyer before the Court of the praetorian prefect. The work of Justinian's Commissions paved the way for what was to become, nearly 1300 years later, Napoleon's Code Civil.

Francis Bacon, King James I, and Oliver Cromwell

From the 16th century onwards there were, in this jurisdiction, multiple calls for the King and Parliament to appoint jurists to simplify the law.

Francis Bacon in 1593 introduced a project into Parliament for reducing the volume of statutes. He said that they were "so many in number that neither the common people can practise them nor the lawyers sufficiently understand them". Nothing happened. In 1607 King James I suggested to Parliament that they update the laws so that they might be "cleared and made known to subjects ". Nothing happened. In 1616 Bacon returned to his theme and suggested the creation of "Law Commissioners" to revise and keep the laws up to date. Nothing happened. In 1652 Cromwell instituted a "Law Commission" chaired by Sir Matthew Hale to take into account "inconveniences" in the law. The Commission sat for five years and did a fair amount of drafting but: nothing (much) happened.

The Victorians – the greatest law reform speech ever

What is generally considered to be the greatest law reform speech ever was delivered to Parliament by Henry Brougham, on 7 February 1828. It lasted 6 hours and 3 minutes. Brougham sustained himself with a "hatful" of oranges (this being the sole sustenance then allowed by custom during sessions). Just a few years after Waterloo he invoked Napoleon's achievements in law reform:

> You saw the greatest warrior of the age – the conqueror of Italy – the humbler of Germany – the terror of the North – account all his matchless victories poor, compared with the triumph you are now in a condition to win – saw him contemn the fickleness of fortune, while, in despite of her, he could pronounce his memorable boast 'I shall go down to posterity with the Code in my hand'. You have vanquished him in the field; strive with him now to rival him in the sacred art of peace. Outstrip him as a law-giver, which in arms you overcame.

As he wound up his peroration he famously advocated codification. Brougham concluded his speech by inviting His Majesty to issue a Commission for inquiring into the "defects occasioned by time and otherwise in the law of this realm…". When he sat down, the Solicitor General (perhaps weary) proposed an adjournment. The debate resumed three weeks later. The motion was accepted. But: nothing happened. Two years later, in 1830, Brougham became Lord Chancellor, and in 1833 he set up a "Royal Commission on the Consolidation of Statute Laws". The Commission reported in 1835 but: nothing happened.

Lord Cranworth became Lord Chancellor in 1853 and, upon taking office, he wished to appoint five Commissioners to compose a "Board for Consolidating and Digesting the Statute Book". So more or less immediately (after three weeks in office) he wrote to the Treasury asking for £3,400 per annum, a room, a messenger, and some stationery. Nothing happened.

Finally, Lord Gardiner and the Law Commissions Act 1965

But his work was not wholly in vain. On April Fool's Day 1965 Lord Gardiner, the then Lord Chancellor, waved Lord Cranworth's letter about during the debate in the House of Lords over the Law Commissions Bill.[9]

The Law Commission was brought into being to fill a void – reform of the law.[10] As Lord Gardiner put it during the debate:

> … it may be your Lordships' experience that things in life do not get done unless it is somebody's job to do them. It has never been anybody's job in England who would do it to see that our law is in good working order and kept up to date.

When Lord Gardiner made this observation, he was not ignoring the contribution that the judges made to the incremental development of legal principle. He was thinking in much more basic terms about fundamental law reform.[11]

Being useful

When the Law Commission was instituted in 1965, great significance was attached to the creation of independent Law Commissioners but there was also interest in whether they would produce reform recommendations acceptable to Government that would be implemented: Would the Commission become an ivory tower more concerned with its independence than with achieving actual reform? One commentator observed astutely that if the Commission produced work of academic interest only then its "independence [would] be costly indeed". But if it successfully managed to balance independence with reforms that attracted judicial and legislative acceptance then "its prospects … are extremely bright".[12]

Interestingly then, as now, there was a recognition that an important strength of a strong Law Commission would lie in its taking up "controversial" issues. That strength lay in the fact that it could receive submissions from all interested parties, analyse them from an objective perspective with the benefit of evidence collected during a review, and then set out transparently why it accepted or rejected a line of argument. An independent Commission could take the heat away from an argument, for instance: "… it [could] supply an impartial account of the history of the existing legal position, which a long and heated debate may have obscured".[13]

Also of interest to the present day is the recognition that by embarking upon "controversial" issues the Commission risked being perceived to be "aligned" to one side or another of the argument thereby placing its independence at risk. The solution was that the Commissioners had to exercise "circumspection", or put another way "judgement".[14]

Mr Justice Scarman (as he then was), the first Chair of the Law Commission, wrote in 1969 that provided the Commission remained aware

of its limitations it could make a "valuable contribution to the resolution of social problems". This would be by the process of "consultation and research and as a medium for the collection and assimilation of information gleaned from other fields such as the social and economic sciences".

History has established that a bold, independent and impartial Commission, that arrives at clear recommendations on difficult and controversial issues, does not lose the trust of the public. To the contrary, we are expected to come to clear conclusions, and we do, and this has not led to any dimming in the confidence reposed in us by Government, Parliament, the professions or the public.

The statutory framework

We were created by the Law Commissions Act 1965. This is a framework Act, big on principle, short on detail. It has, for this reason, proven to be a remarkably adept and flexible measure.

The Act created two Commissions: the Law Commission of England and Wales and the Scottish Law Commission. When they were created, the notion of devolved law was not in contemplation. That has changed and there is now a growing body of devolved Welsh law which means that we are the Law Commission of England and Wales for most projects, but when we deal with a project concerning devolved Welsh law we are in a real sense the Law Commission of Wales only. Equally, the growing body of devolved Welsh law necessarily means that there is a growing body of law that applies in relation to England only. It is for this reason also possible for us to undertake a project that is confined in its scope to the law applicable in England.[15]

Under the Act the Commission has five full-time Commissioners, including the Chair, all appointed by the Lord Chancellor. The Commissioners are to have experience working in the legal profession, academia or the judiciary. The Chair is a judge of the High Court or Court of Appeal; by protocol it is the latter.[16]

The overarching duty of the Commission is to keep the law of England and Wales under review

> with a view to its systematic development and reform, including in particular the codification of such law, the elimination of anomalies, the repeal of obsolete and unnecessary enactments,

> the reduction of the number of separate enactments and generally the simplification and modernisation of the law.[17]

For this purpose, the Commission's duties are:

1 to consider any proposals for law reform given or directed to them;
2 to prepare recommendations for programmes of law reform;
3 to prepare draft bills or other documents for such programmes;
4 to prepare statute law revision or consolidation programmes;
5 to provide legal advice to government departments concerning law reform; and
6 to examine the legal systems of other nations to obtain any information that would facilitate programs of law reform.[18]

Good law reform

What is meant by "good"?

The task performed by the Commission under the Act reflects political reality. Governments profess their legislative ambitions in election manifestos. Governments are capable of far-sighted and generational reform. However, in power, Governments tend to be buffeted by a long list of external pressures both domestic and international and an essential role for Government is to manage the myriad crises and exigencies of the day. There is often, even with the best will in the world, little headroom for reforming the law through new legislation, however desirable.

There are also some reforms which are so complex and chunky that they present an almost insuperable challenge for Parliament. There is nothing new in this. The constitutional historian AV Dicey in his seminal *Law of the Constitution* in 1885 condemned the "cumbersomeness and prolixity of English statute law" which was due "in no small measure to futile endeavours of Parliament to work out the details of large legislative changes". Even by the late Victorian period society had become so complex that the legislature was sorely challenged to address that complexity in legislation.

The Law Commission seeks to fill the gap left by Government and to address the problems identified by Dicey by promulgating clear, coherent "good law". In recent years we have done so by focussing upon how we can best serve the "state", in its broadest sense.

When the Commission is considering accepting an invitation to take on a law reform project, given our limited resources, we form a view as to the benefit of the project, if implemented.

Our starting point is to consider the role of law reform in society. Good law reform can generate enormous public benefit be that measured in financial, social, fairness, happiness or other terms. As our economic impact assessments routinely demonstrate, good law reform can save both Government and society money by improving the efficiency and certainty of systems; but it can also unlock economic potential and generate wealth.

We are however firm in our belief that good law reform is not just about money. It is about increasing personal freedom and happiness because there is, for instance, an increase in choices in how a person lives their life. It is about ensuring improved access to justice and making law more accessible and certain to those to whom it applies. It is about creating laws on sensitive or controversial matters which are durable and provide clear signals, for instance in relation to protection of the environment. It is about creating laws that the public feel confident in, because the process leading up to adoption of the law was fair and objective and the public was extensively consulted. It is about creating laws which reflect and respect the social, cultural and ethnic mix of society and it is about protecting the vulnerable from those who consider themselves to be invulnerable. There is no one list of conditions for good law reform.

Good law reform and democratic accountability

Good law reform should also be democratic. As I explain below, the Commission obtains its work in two different ways, one of which is through agreement with Government of a programme of law reform. When we seek to agree a programme, we start by talking at length to interested stakeholders both within and outside of Government. Then we launch a consultation in which we identify some possible themes for reform and we seek submissions. In preparation for our 14th programme we received around 200 fully worked up proposals for reform, mostly from specialist groups with real expertise in their subject. We also received many suggestions from members of the public, often in simple letter form or by email. A huge effort then went into refining the proposals and conducting additional research upon them. It was astonishing how many really good ideas for reform were submitted to us. This is real democracy in action. When we then discuss possible projects

with ministers and departments and explain that significant problems in the area have been identified by the public, the proposal has added weight.

We are also vigorously evidence based. Commission reports are the culmination of intensive consultation exercises. They are fully reasoned with extensive referencing to the supporting evidence. We will often place the evidence base which has been sent to us into the public domain. When our reports are placed before ministers and Parliament the breadth of the consultation is self-evident. Our analysis of consultation responses, across the full range of views expressed by the public as well as by legal experts and representative groups of those affected, genuinely informs our ultimate law reform recommendations.[19]

It is also important to understand that there is nothing pure about the exercise of law reform. It is the quintessential art of the workable and the possible, there rarely being but one possible answer to a problem. Our task is to recommend a solution which reflects the best workable way forward and this is driven by intensive analysis of the evidence submitted by consultees.

And of course the Commission is not a legislator. We recommend law reform but it is Parliament that is the final arbiter. The Government and Parliament place trust in our work for the very reason that we consult so intensely, are responsive to stakeholders and our proposed solutions reflect the evidence that has been placed before us. A democratic process therefore leads to a recommendation for reform to a democratically elected Government who presents the proposal to a democratically elected Parliament. In our work we feel we are part of that beating heart of democracy.

Who we are: The dramatis personae

The Chair

The Chair must, under the 1965 Act, be a member of the High Court or Court of Appeal, though in practice the Chair is always a Court of Appeal judge. The role is full time though the Chair will still sit from time to time in the Court of Appeal.

As a sitting judge the Chair owes two duties. The first is the duty of allegiance to the Monarch and involves well and truly serving "according to law". The second is the judicial oath which is to "do right to all manner of people after the laws and usages of this realm, without fear or favour, affection or ill will".

Both duties are as relevant to the Law Commission as they are to the judicial function. The seniority of the Chair acts as a bulwark of independence. Court of Appeal judges become Privy Counsellors upon appointment which under our unwritten constitution gives them certain privileges. Ministers of the Crown, also Privy Counsellors, cannot refuse to meet with a fellow Privy Counsellor and must respond to letters from them.[20] When I first took up the Chair, I was advised by a previous Chair that the threat of a Privy Counsellor's letter being sent was a powerful tool in the Chair's armoury, especially if the letter might be placed in the public domain.

The Chair plays a central role in all aspects of the work of the Commission. The role of the Chair is split about 50:50 between inward facing work focused upon different ongoing reform projects, and outward facing work.

The internal work involves working closely with Commissioners and lawyers on individual projects. This can be acting as a devil's advocate on an issue or attending stakeholder meetings. On one occasion I spent a day with the Commissioner and the team on a sensitive criminal law project. We set out on a whiteboard what we thought was the overarching theory for a proposed piece of law reform. By the end of a long day we had discarded all the prior thinking and identified a new essential principle around which to create a legislative framework. The role of the Chair can be to facilitate debate and discussion.

The Chair also presides over peer review meetings of Commissioners and of course the Board.[21]

Externally the Chair might lead on negotiations for new projects with ministers, engage in trouble shooting, meet with Parliamentarians, lead on discussions with the senior judiciary, give evidence before Parliamentary committees, attend stakeholder meetings, lead discussions with foreign delegations or law reform agencies, etc.

At the core of all the work of the Chair however is the duty to protect the independence of the Commission.

Commissioners

Commissioners are Crown appointees selected by open competition.[22] There are four subject matter Commissioners. The 1965 Act does not specify what their specialisations should be. At present the Commissioners cover the following: (i) property, family and trust law; (ii) criminal law; (iii) commercial and common law; and (iv) public law and the law in Wales. The expression "public law" is not a reference to administrative law but covers

any issue of law whereby the relationship between the individual and the state is affected. It covers a wide array of regulatory regimes. Commissioners lead policy formation on all the projects in their team. The work of each team is not hermetically sealed, and Commissioners often provide advice and guidance to other teams.

The role is of extraordinary richness and breadth. A Commissioner actively engages with ministers, officials and Parliamentarians on new and ongoing projects. They direct and lead the consultation process, meeting with the public, press and media, and oversee and direct the formulation of policy that will go into the draft consultation papers and reports that are submitted to the peer review process. They take a leading role in the process of steering legislation through Parliament and Senedd Cymru[23] and participate in shaping the future strategy of the Commission.

Like the Chair, Commissioners are not appointed for their personal views. They are chosen for their legal and professional skills. Commissioners become prominent figures across Westminster, Government, the judiciary and elsewhere. They are appointed for five year terms. However this can be renewed and in practice Commissioners often remain in post for ten years. Given the gestation period of legislation, this longevity is important. A first-term Commissioner might inherit legacy projects from a predecessor but will soon wish to lead on new projects. From inception to legislation reform can easily take five or six years.

During a first term a Commissioner will learn about legislative and consultative techniques, and will become adept at stakeholder engagement, Parliamentary procedure and how to get the best out of Whitehall. They will get to know the senior players in the governmental, Parliamentary and judicial worlds as well as the main stakeholders. That lengthy rite of passage is the invaluable hinterland for a second term. Crucially, it is experience that is available to the Commission as a whole and is shared as between Commissioners. There is great value in the Commission having second-term Commissioners in the mix. The institutional memory, and accumulated wisdom and experience of such Commissioners should not be underestimated.[24]

The workload of a Commissioner can be huge. From my research it appears that in the past Commissioners might have had perhaps three ongoing projects at any one time. Now it is commonplace for a Commissioner to have five or six projects, and on occasion even more. The time pressures that the Commission now works to on projects are greater than they were in the past. Moreover, the growth of social media means that much larger

numbers of people want to communicate with the Commission. Not only must the Commissioner run a significant number of different projects but they must also contribute to peer review, which is an intricate and time consuming task. Every document leaving the Commission as a formal Commission document is agreed to by each of the five Commissioners following peer review.[25]

When the 1965 Law Commissions Bill was being debated in Parliament it was suggested that there should be six Commissioners (five plus a Chair). As enacted this became four plus a Chair. The capacity of the Commission is limited by the number of projects that the Commissioners collectively can, humanly, cope with. There is therefore a de facto capacity limit to our work. The limit on the number of Commissioners creates a structural bottleneck in the Commission.

Law reform lawyers

Each Commissioner has a team of lawyers and research assistants, led by a Team Head. It is a feature of the way that we work that most projects are run by small teams. A typical project team might have one (maybe two) lawyers, who manage the project, and at least one research assistant. All work with and report to the Team Head and ultimately to the Commissioner. Our lawyers become immersed in their projects. They get to know stakeholders well. They also develop links with their Whitehall or Welsh departmental counterparts. They are responsible for running the project which includes organising and attending meetings with stakeholders, liaising across Whitehall and Welsh Government departments, receiving and analysing stakeholder submissions, researching the law both in the UK and internationally, working on draft consultation papers and reports for submission in due course for peer review, and helping with preparing briefings for the Commissioner, for instance when they are giving evidence to Parliamentary or Senedd committees.

As Chair I am routinely amazed at the skill and expertise the staff bring to their task. Nowhere across Government can one find a remotely comparable corpus of law reform specialists who can so skilfully deconstruct old, poorly-working legislative regimes and then carefully reconstruct them so that they become modern, relevant and workable.

Team Heads

Team Heads, who have in most cases themselves spent many years running individual law reform projects as team lawyers, provide leadership to the team

and support their Commissioner in the performance of his or her role. The role requires formidable knowledge of all the project areas undertaken by lawyers in the team. Team Heads take a prominent role with key stakeholders in all the team's projects, liaise with Government departments in relation to both individual projects and the development of new projects, and oversee the drafting of each project's publications. Their experience and insight help the team to find creative solutions to legal policy issues. Ideas are tested and challenged within the team before drafts are presented to Commissioners for peer review. Team Heads engage directly with their Commissioner but also regularly speak to and advise the Chair and Chief Executive. They participate in the regular meetings of Commissioners and other senior management.

Head of Legal Services

One of the Team Heads also acts as Head of Legal Services, working closely with the Chair and Chief Executive on strategic law reform and internal management issues. The Head of Legal also represents the Commission in dealings with key legal stakeholders inside and outside Government on a range of external issues. That includes playing a leading role in the Commission's international work discussed in Chapter 10. Internally, the Head of Legal is responsible for developing and promulgating best law reform practice across the teams.

Research Assistants

We recruit around 15 to 18 Research Assistants ("RAs") annually. In the main these are young exceptionally talented lawyers straight out of university or post-graduate work, or newly qualified barristers or solicitors, although sometimes more experienced candidates come to us following a career change. They are sometimes from overseas. They spend one to two years with us working on particular projects with the team under the supervision of more experienced members of the team. Competition for places is fierce. In 2022 there were just over 500 applicants for 15 places. We recruit on a name and university blind basis to increase diversity.[26] RA's make a remarkable contribution to the life, both professional and social, of the Commission.

Parliamentary counsel

Parliamentary counsel also work alongside our law reform teams. William Pitt was appointed the first person to draft all the Government's bills in 1833. The Office of the Parliamentary Counsel to the Treasury (OPC) was

founded in 1869. The Commission is privileged to have counsel seconded from the OPC to us. As individuals we involve them closely in our day-to-day affairs. They provide invaluable advice to the Chair, Commissioners and lawyers on a wide range of issues for example concerning the sorts of solutions to problems that can most easily be translated into legislative language and on how best to "work" the Parliamentary machine. In many projects we prepare a draft bill alongside preparation of a report. Performing the two tasks in tandem is salutary. It enables the lawyers to road test ideas with Parliamentary counsel as they evolve. We involve counsel in our peer review exercises. They offer a new and different approach and perspective to Commissioners, bringing expertise in legislative drafting and an insight into the Parliamentary process.

The Board of the Law Commission

The Commission has a Board which comprises Commissioners, senior staff and three non-executive Board Members. It meets regularly.[27] The Board plays a role in governance and institutional matters. It has no role in policy formulation in relation to individual law reform projects. The Commission, however, extracts great value from its non-executive Board Members, who are generous in imparting their experience and wisdom on a range of important matters. By way of illustration, over the past few years they have assisted in advising us on: Parliamentary relations; communications strategy; diversity and inclusion; relations with particular stakeholders; and recruitment and governance issues. Their value to the Commission lies in the breadth of their existing networks and contacts, their experience of Government and Parliament, and their knowledge and skill in dealing with communications and the media.

Chief Executive

The Chief Executive role is critical to all we do. In a small organisation such as the Commission the Chief Executive has the scope to be involved in detail across the organisation. At present we have a job share as joint Chief Executive. This is a model increasingly seen across Whitehall. From the perspective of Chair it offers two sources of advice and experience. Chief Executives invariably have extensive knowledge of Whitehall, Parliament and the judiciary and they advise on all issues both internal and external. They act as a first port of call for the Chair to use as a sounding board. They lead on human resources issues and other institutional matters. They also

engage as, in effect, policy ambassadors. By way of example, in a Protocol agreed in 2015 with Welsh Ministers on reform of Welsh devolved law, the Chief Executive is identified as the main point for contact.

Support team

The Commission has a very small support team responsible for the operational and corporate side of the organisation, making sure that the Commission runs effectively and efficiently. The team has a wide and diverse range of responsibilities, including accounting, knowledge and records management, human resources, internal and external communications, personal assistant support to the Commissioners and diversity and inclusion. The Commission has made efforts to make its support team as efficient as possible, and so minimise our spend on non-frontline work. This requires our Corporate Services Team to take a flexible and highly streamlined approach.

How we get our work

We obtain our work in two different ways. I have already referred to programmes which we negotiate and agree periodically with Government. A programme should ideally contain a mix of different types of project which the Commission can plan and allocate resources to over an extended period of time. It is not, therefore, the best vehicle for agreeing more urgent projects which, perhaps, relate to newly-emerging social, economic, technical, environmental or other issues.

For this reason we also accept *ad hoc* references from ministers for projects outside the confines of a programme. In recent years a high percentage of our ongoing work has come from such references.

In accordance with a Protocol that was agreed between Government and the Commission in 2010 we will not include a project in a programme or take on an *ad hoc* reference unless we have a formal expression from Government that it has a serious intention to take forward law reform in the field. This is known as "Protocol support".

One example of an urgent *ad hoc* project that we agreed to take on was a reference made to us by Welsh Ministers on coal tips in Wales. In February 2020 following Storms Ciara and Dennis there were coal tip landslides. The prevailing legislation was enacted following the Aberfan disaster in 1966, when a coal tip collapsed onto a primary school, resulting in the death of 116 children and 28 adults. The applicable law related to a time when there was

an active coal industry. It did not create a framework for managing disused coal tips in the 21st century. Research carried out indicated that there were about 2500 disused coal tips in Wales, the majority in private ownership. Some dated back to Roman times and some were in valleys above centres of population. Climate change has brought with it the risk of increased rainfall and this, in turn, has increased the risk of coal tip instability.

In October 2020 Welsh Ministers asked the Commission to undertake a project to create a new framework for the management and regulation of these tips. The project was of real urgency given both the highly emotive subject matter and the real and immediate threat posed by climate change. We agreed to work on an expedited basis of 12 to 15 months. The Commission found the resources to embark, more or less, immediately upon the project. We issued a consultation paper on 9 June 2021 and published our final report containing detailed recommendations on 24 March 2022.

The Law Commission and independence

The independence of the Commission is utterly fundamental to its success and effectiveness and as such to our ability to produce work of the highest quality and utility to the state. The Chair and Commissioners are, under our unwritten constitution, office holders: our roles, status and functions derive from and are governed by an Act of Parliament. Under the 1965 Act, our staff are appointed by the Lord Chancellor and are, in contrast, civil servants. But, critically, they all work under the authority of the Commissioners and the Chair, and are imbued with that same spirit of rigorous independence. We do not bring personal views or opinions to the table.

Staying out of politics

It is almost an article of faith that we do not take on projects which are "political" in nature or which have no legal content. What amounts to a "political" project is however very hard to define. It can vary from Government to Government, minister to minister, month by month, or even week by week. In broad terms we ask: is there a real issue of law to be reformed or is a proposal simply the result of a popular sentiment that "something must be done"; is the underlying issue a religious or ethical matter which cannot be solved by legal analysis or for which there might not be any answer that will attract broad-based public support; is it a project that the Government of the day simply feels strongly about and wishes to implement despite a

lack of evidence that law reform is required, perhaps because it is a manifesto promise? If a project has any of these characteristics we are unlikely to take it on. There are occasions though where the Government takes a "political" decision but then asks the Law Commission to recommend the best way to implement that decision.[28]

As a group, the five Commissioners develop an instinct as to the projects that are simply too political for an independent Commission of law reformers.

There is though a big difference between a project that is "political" and one that is controversial. The Commission is often at its best when rebuilding some large and complex system where there are strongly held opposing views amongst stakeholders. We can remain immune to swirling political noise and the clamour for action that might appear in the press. Our strength lies in the intensity with which we listen to all points of view and the rigour with which we challenge perceived wisdom or views in an objective evidence-based way. We believe that we get the best out of stakeholders due to the vigour of our engagement.

A good illustration of how we have to steer a path through strong contrasting views lies in the work we have been undertaking involving digital communications, the internet and social media. Law reform projects on hate crime, intimate image abuse and communications offences, amongst others, have required us to grapple with three competing pressures. The first is the powerful concern to protect freedom of speech, a value which any independent law reform agency will hold dear. The second is the equally strong and valid concern to protect the vulnerable. The third is the need to ensure that whatever we recommend is capable of being effective. There is little point in us recommending a package of elegant and beautifully crafted reforms if, on the ground, they are incapable of being enforced. We cannot therefore be oblivious to the fact that there are, quite literally, billions of messages, many encrypted, sent daily. If only a minuscule fraction are filled with hate or intimate content, that still represents a vast number which enforcement agencies are not resourced to cope with. In situations like this our ability to ask consultees to help us divine the path through is essential. The intensity of our consultative process enables us to tap into the skill, wisdom and expertise of consultees and devise workable solutions.

Functional independence

I was appointed Chair in 2018. The past five years have witnessed tumultuous change: the run up to Brexit; Brexit itself; Parliamentary log jams; hung

Parliaments, repeated changes of Prime Minister; a series of Lord Chancellors, Secretaries of State and junior ministers; COVID; and the Russia-Ukraine War leading to a recession and energy crisis.

The environment in which we work is of course the political arena. We are never ignorant of or indifferent to political context. We observe all such events with professional interest but also considerable circumspection. It is not our business to be political or judgemental. We must, and we do, take Government and Parliament as we find them. We must, and we do, work constructively and pragmatically with the Government of the day. We have done this successfully for nearly 60 years. But we are also utterly independent. We determine for ourselves which projects we accept and we determine for ourselves the positions we take on the substance of law reform.

I describe our independence as "functional". We are not immunised from any stakeholder, and that includes Government. From experience I know that some Law Commissions around the world have different relationships with their governments and operate at longer arm's length than we do. Equally, some have less autonomy. We engage with Government on a routine basis. This will cover a range of matters including, for example, discussions over new projects, terms of reference, the progress of existing projects, information about changing Government priorities and implementation issues. This has, on occasion, led outsiders to question how we maintain independence.

The answer lies in the existence of five publicly-appointed Commissioners none of whom are civil servants and all of whom, individually but especially collectively, are sufficiently confident in their own sense of independence to decide where the line is that is not to be crossed. Commissioners hold regular meetings to discuss all the issues of the day. This can include substantive points in individual projects, how to engage with particular stakeholders and with the press and social media, how to address misinformation about projects, and how we interact with ministers or Parliamentary committees. It may also include how to respond to challenges to our independence.

In practice it is rare that politicians or others even seek to intrude upon our independence. When this happens it is generally the result of misunderstanding, including about our role. It is my experience that Government accepts that there is a real value in being able to ask the Commission to undertake work, independently. The Government has nearly 60 years of experience of working with the Commission. Over that time the Commission has published more than 400 reports, over 250 of

which contain law reform recommendations. The implementation rate for Law Commission reports is very high. Long experience breeds trust.[29]

If we were ever to lose that reputation for absolute independence we would forfeit the trust of the public and we would, overnight, become less valuable to Government and Parliament.

There are a variety of safeguards in place which prevent political pressure from impinging upon our independence.

One of the most important is that we take great care in agreeing initial terms of reference. If there are issues we consider to be "political" we will generally carve those out of the terms of reference and leave the issue for Government to decide separately. There are also some instances where we only agree to take on a project if the Government takes a prior decision which then forms a predicate of the terms of reference. An example was residential leasehold reform where the Government took the decision that it wished to improve the position of leaseholders. We were then asked to treat this as our point of departure. The Commissioners agreed that this was a reasonable basis upon which we could undertake the project. Another example was surrogacy where we agreed to take on a project focusing upon how to improve the existing system. We did not take on a project where we were to make recommendations about whether surrogacy should be prohibited. The Government's position is that surrogacy plays an important role in the weft of family life. Our task was to make recommendations to improve protections and make the system better regulated and more secure.

There are however pressures which potentially impact upon our independence.

The funding of independent law reform

The most potent pressure placed upon our independence has, in the past, come from cuts to our budget. Over recent years, the Law Commission has cost around £4.6 million per annum to run. Almost all of that is allocated to projects and in particular to staff costs (ie salaries). As a result, almost all our costs are attributable to front-line law reform. A typical, medium-sized, project costs £350,000 – 400,000 to conduct and will involve one lawyer (possibly two) with a research assistant under the supervision of the Team Head and the Commissioner.

In practice, our funds come out of the Ministry of Justice budget. From 2010 onwards the budget of the Commission was cut. In 2017 the Ministry

decided further to reduce the budget of the Law Commission so that when I became Chair in 2018 the budget was at about 46% of 2010 levels.[30]

The budget cuts had potentially devastating consequences for our ability to undertake our work. Our only option over these years, if we wished to remain relevant, was proactively to seek project financing from Government departments who wished us to undertake a reform project. Of necessity, the Commission became more sophisticated in the way in which we dealt with Government. We actively went about improving relations with Government departments. We became more outward looking and became better known across Whitehall. Departments inviting us to take on a project agreed to provide funding and, accordingly, became more closely invested in its success. Within a short span of time the total revenue of the Commission exceeded that which had existed prior to the cuts.

But there were significant downsides. First, we had less discretion over the projects that we accepted and we were forced, to some degree, to prioritise income-producing work.[31] To this extent our independence was undermined, though I am clear that all the projects that we did take on were important and valuable in their own right. Secondly, the funding model undermined our ability to recruit and retain law reform lawyers. If our funding for a project was (say) for two years we could not guarantee employment once the project ended. A lawyer on a two-year project naturally enough tends to be seeking employment elsewhere towards the end of the two-year term. The core strength of the Commission is the unique skills of its lawyers, abilities honed over time as the lawyers become more experienced through working on multiple projects. The volatility of our funding risked our ability to recruit and retain such staff.

In 2018 and 2019 we embarked upon negotiations with the Ministry of Justice about a return to a fully funded model, the detail of which is considered in Chapter 3 on project selection. In 2019 I signed a new Memorandum of Understanding with the then Lord Chancellor, Sir Robert Buckland. This new model has worked well. It has enabled the Commission to look more strategically at the work we accept. We have been able to place more of our lawyers on permanent contracts. The ability to finance projects from core funds and from individual departments has also enabled us to take on an increasing number of projects and devote more time and resources to working with departments on the implementation of our reports.

In overall governmental terms our budget is a tiny amount. We cost a speck of a fragment of a governmental peanut. Yet the benefit to the

Government and to the economy and society of the Commission working more efficiently and with greater focus is substantial. When, as is often the case, a single project costing (say) £350,000 can generate a societal benefit measured in billions it makes no sense to underfund us.

Let me give an example concerning our project on electronic trade documents. The law relating to many documents in international trade, such as bills of lading or bills of exchange, assumes that they are capable of physical possession. The possessor of the document can enforce performance of the obligation recorded in the document and can transfer the right to claim performance by transferring (physical) possession. English law however prevented the transition to electronic versions of these documents because (like many other jurisdictions internationally) it did not recognise intangible things as amenable to possession. As a result, electronic and therefore intangible forms of trade documentation could not be possessed and used in a manner equivalent to their paper counterpart. This became relevant once technology emerged which provided electronic equivalents of paper trade documents. The Law Commission recommendations and draft bill corrected this lacuna by, in effect, creating a legal equivalence between electronic documents and paper documents. The cost to the Law Commission of this project was just under £400,000. The Government's median economic assessment of the Electronic Trade Documents Bill was that it would create £1.14 billion in net benefit to the UK over ten years.[32]

Appointments

A second pressure concerns appointments. There is across Whitehall and arm's length bodies a process for making senior appointments which, unless care is taken, carries with it risks to independence. That process applies to senior appointments which, in relation to the Commission, covers the Chair, Chief Executive, new Commissioners and non-executive Board Members. These are Lord Chancellor appointments. The appointment of the Chair and Commissioners is for the Lord Chancellor under the 1965 Act. The Lord Chancellor is also responsible for appointing the Chief Executive and Board Members. Although the power to appoint therefore lies with the Lord Chancellor, as with all other public law powers it must be exercised rationally and in accordance with the statutory purposes behind the 1965 Act, and in accordance with other relevant statutory duties, for example concerning equality. It is not an open-ended power; it is a circumscribed power.

The process involves an independent selection and interview panel (which routinely would include the Chair of the Commission) which makes recommendations to the Lord Chancellor who, in practice, will liaise with Number 10. The interview panel that makes the recommendations will be tasked with ensuring that any person it recommends is appropriate for appointment to work in an independent Commission. Such a person will be recommended regardless of any political views they might or might not have. It is fundamental that a candidate would not be considered if it was thought that he or she would seek to introduce personal political views into their role within the Commission.

There are two systemic risks. The first is that, as these are ministerial appointments, they are capable of being influenced by political considerations. It would be anathema to the impartial, apolitical and independent nature of the Commission if a person, otherwise considered to be suitable for appointment, was vetoed for some perceived "political" reason. The second is the time taken for appointment processes to complete. All due allowances must be given for the pressures that the public appointments team work under, but it causes real damage to an arm's length body, such as the Commission, if the process takes so long that we are without senior personnel for months, or even longer.

Independence and transparency

We endeavour to be transparent in all we do. Openness is the essence of consultation and is critical to trust. It has relevance in many different areas of our work.

Transparency is a defining feature of our relationship with Parliament and the Senedd. We strongly believe that our responsibility is to the state as a whole which includes Parliament, the Senedd and stakeholders. We are always ready to give evidence to Parliamentary or Senedd committees or to Parliamentary groups or to brief Members of Parliament, Members of the Senedd or Members of the House of Lords. This means that we provide briefings to political parties. We do this on an apolitical basis whereby we explain our work and listen to their ideas. We would not for instance become drawn into what a party might wish to include in a manifesto. When we conduct a briefing it is undertaken by the Chair and Commissioner only since we are statutorily independent and are not civil servants. We are not bound by the Civil Service Code which limits the engagement civil servants can have with opposition politicians.

Transparency also means exposing to the greatest degree practical our inner workings. Subject to data protection laws, resource constraints and confidentiality we often place consultation responses or analyses of consultation responses into the public domain. This material is used by researchers and others who wish to see how the evidence might fit against the conclusions we reach in a final report. It can also be very useful for academics doing independent research on related topics.

A potential threat to our ability to be independent and impartial arises from the risk that Government withholds evidence from us, for example on security issues. In practice we have been able to find solutions. In our reports we will candidly explain particular difficulties we encountered in obtaining evidence.

An interesting example of how we deal with sensitive and classified information is found in our report on protection of official data. We were asked to take this project on by the then Prime Minister, David Cameron. We agreed broad terms of reference with the Cabinet Office in January 2016 which included undertaking a review of the effectiveness of the criminal law provisions that protect Government information from unauthorised disclosure. The review included, but was not limited to, the Official Secrets Acts 1911, 1920 and 1989, the Data Protection Act 1998, the Public Interest Disclosure Act 1998 and the protections for information exempt from release under the Freedom of Information Act 2000. We were to research and consult independently on options for an effective and coherent legal response to unauthorised disclosures. We were to consider the relationship between criminal law and any civil remedies. As with all Law Commission reports, any recommendations we made had to be compliant with the European Convention on Human Rights.

By early 2019 the internal work was nearing completion but we faced a difficulty. We were being told from within Government that, were some of our provisional conclusions to be implemented, there could be unforeseen and adverse consequences for national security and the lives of intelligence operatives could even be placed at risk. When we sought evidence to back up these claims we were told that the evidence was classified and could not be revealed and in any event could not be referred to in a public report. We however were reluctant to approve a final report based upon claims as to risk to national security said to be based upon evidence we could not review. We arrived at an impasse. A solution was arrived at after some delicate negotiations with Number 10, the Home Office and the security services. In our report, published in 2020, we said this of the problem:

To overcome this, we agreed with the Government and the security services a procedure for dealing with confidential and secret evidence that has enabled us to maintain transparency to the greatest degree possible.

We agreed that the Government would provide open submissions to us drafted on the basis that everything provided could be referred to in our final report and placed in the public domain. Where the Government wished to illustrate a point with classified evidence (for example, in order to highlight the risks attached to a particular proposal), or where we had requested specific evidence, it would set out hypothetical cases based upon real life experience but would not in those open submissions refer to classified evidence from actual cases. To enable the Commissioners to be confident that the hypothetical examples were a fair reflection of reality, the Commissioner for Criminal Law and the senior lawyer working on the project would be given access to the actual evidence from the intelligence, defence and security services, and they would then form their own, independent, conclusion as to whether the examples in the open submissions could be relied upon.

This exercise in verification occurred. It included [the Commissioner and senior lawyer] asking for further details in some cases and being able to question relevant officials from Government and the intelligence community on particular points of concern to them. When the assessment of the classified evidence was complete, [the Commissioner and senior lawyer] provided a statement to the Commissioners certifying that they were satisfied by the evidence provided that the risks that the hypothetical examples were designed to illustrate are material risks, so that the hypothetical examples could be relied upon by Commissioners. It follows that the only evidence that the other Commissioners took into account when approving the final report is that which is in the public domain. We have included in the final report all of the evidence provided to us in the open submission from Government.[33]

> We are grateful to the Government and intelligence community for their co-operation in working with us to enable Commissioners to form their conclusions on the basis of evidence that they could share in this manner with the public.

There is one final aspect of transparency that is worth mentioning. Many of our reports are extensive. It is not uncommon for a report to be 300 to 600 pages, reflecting the amount of evidence submitted to us and the breadth and complexity of the subject matter. We know, however, that only a few die-hards will ever get around to reading the report in full – albeit that sections will often be closely scrutinised, for example, in Parliament or by the courts. In almost all cases we therefore produce a summary of our report and its conclusions, or sometimes, instead of or additionally, what we internally call a "designed summary". There is a real art (involving a great deal of work) in reducing 500 pages to (say) 20 pages. In the summary we try to use plain language yet at the same time provide an accurate overview of our conclusions and recommendations. We increasingly use different techniques to aid accessibility. We can, for instance, include diagrams or produce digital versions with links providing routes or road maps through the full report for those interested in only one issue out of many. Our practice of doing this over the past few years has, we believe, meant that our key messages get through to a much wider audience.

In our report on surrogacy, published in March 2023, we published not only a full report of over 500 pages and a short 24-page designed summary, but also a "core report" of just under 70 pages in which we provided an explanation of how the new system we were recommending would operate in the majority of cases. Through this combination of methods, we hoped to be able to convey our proposals in a variety of easily understood ways. We know that, if we do not make a real effort to explain ourselves in accessible ways, there is a serious risk that our proposals will be misunderstood. We have also learned how to use social media to get out some key messages, and try to draw people to engage with our work in more detail.

There is another advantage of dissemination in a variety of forms. We have learned, sometimes to our cost, that vested interests who perhaps dislike one or more of our recommendations might seek to sow disinformation about our report in the press or on social media. This is far less likely to succeed if others can easily verify for themselves whether what is being said is factually accurate.

Stakeholders

The Commission works with "stakeholders". This is an unsatisfactory and overly broad term but it is almost universally used to describe the cohort of those with an interest or "stake" in law reform. It is overly broad because it includes just about everyone and fails to distinguish between legally and constitutionally different groups, for example, the three pillars of the constitution: the Executive, Parliament and the judiciary. Nonetheless it is the term in use.

In subsequent chapters we describe in detail how we seek to identify and target relevant stakeholders to obtain evidence and information and how we synthesise and analyse that evidence. At this stage I wish only to emphasise a few points.

The first point is that everyone is potentially affected by law reform and deserves a voice. This includes the Executive who has to decide whether to implement our proposals but who might also become subject to laws we propose. It also includes Parliament and Parliamentarians as the institution which, ultimately, implements a great deal of our work. And it includes the judiciary who are the guardians of the common law, but who are charged with resolving disputes concerning laws we recommend.

Civil society, in its broadest sense, is of course our most active stakeholder and consultee. It is the individuals whose lives and projects and businesses are affected by our proposals from whom we hear most often, and most vociferously.

When we are considering a reform project we sit at the epicentre of all these interests. We do so with no agenda and strive to be impartial, objective and evidence-led.

As an institution we believe we have a deep understanding of our stakeholders built up over approaching 60 years of experience. We have, as it were, a contact book that is second to none. What marks a Law Commission out is the intensity and impartiality of the consultation process. Critically we do things that no other part of Government can ever hope to replicate. This is a core reason why we are valued by stakeholders.

The Law Commission as an asset to Government

As Chair I have frequently been asked, in particular by politicians, Parliamentarians and lawyers from abroad, how it is that the Government trusts five independent lawyers to take on such a volume of law reform work.

Surely, it is suggested, we fall out regularly with Government. The answer to this lies in our independence.

The Executive can invite the Commission to take on law reform projects confident in the knowledge that the outcome will be independent, evidence-led and will take into account the views of all affected persons. We will propose reforms that are pragmatic, durable, and workable. It is understood that we are a real part of the democratic process and we enhance the rule of law. As Edward Argar MP, Minister of State at the Ministry of Justice, said on behalf of the Government during a recent debate on the work of the Law Commission:

> Its independence and commitment to open consultation is a key asset when trying to build consensus on sensitive issues across a broad range of different interests.[34]

We create a capacity for law reform that the Executive might not have the headroom for. If the Law Commission is doing the heavy lifting on big complex legislative projects it leaves space for the Government to deal with the issues of the day and those matters of highest political priority to it.

We consider that one way in which to describe the benefit of the work that we do is that it promotes reform that any political party should find acceptable.

And because of its independent, objective, evidence-led, approach, there is a broad appreciation that our recommendations are often the best way through what might otherwise be an intractable social or economic problem.

Timing

It is sometimes suggested that the Commission takes a long time over its work. When viewed in context this is anything but true. It is normal for the Commission to spend months, and even in some cases years, negotiating the scope of a project with Government before it is agreed to and terms of reference settled. We are not the master of this timetable. The rapid turnover of ministers causes successive delays as new ministers come and go and civil servants have to bring yet another minister up to speed. I had experience of discussions with one arm's length body that was anxious to see implemented a report of ours where the Chair of the body had faced six new ministers over the course of 18 months: on average a new minister every 12 weeks.

In some extreme cases preliminary discussions, at a low level, take years or even decades. For example, certain technical components of a project we have taken on in relation to criminal appeals were the subject of discussions for over a decade with Government and with the Court of Appeal Criminal Division before the project was embarked upon. When we take on a project we agree a timetable. A short project might be 18 months and a longer one three years or more. We strive to stick to agreed timings, albeit that the breadth and complexity of work makes it very difficult to assess likely duration at the outset. It is also the case that we can fall victim of external events such as the calling of an election which means that progress is curtailed during the pre-election period, or some world crisis affecting the economics of a sector which makes the economic case for reform questionable. Nonetheless we work very hard to stick to timetables.

There is a final point to make about timing. Numerous political factors completely beyond the Commission's control can affect both the rate and the extent of the implementation of our reports. Over the last 18 months, the Law Commission has had six bills in Parliament and the Senedd which contain Law Commission recommendations. For those reports that await implementation we are always confident that their day will come. A report that is of high quality and which makes pragmatic, sensible reading will never lose traction. It lurks as a continuing pressure point around which interested stakeholders congregate. This is why it is not unusual for reports to return to the fore some years after publication and it is a reason why implementation has to be looked at over a relatively long-term horizon.

Future law reform

Part of the process of keeping the law under review involves keeping abreast of deeper political, social, economic and technical currents. As a corpus of 70 lawyers and research assistants there is a constant discussion about themes for reform. In the context of the 14th programme of law reform we identified a number of important themes for future law reform as "kite flyers" (by which we mean suggestions put out to gauge public opinion and stimulate debate): emerging technology; leaving the EU; the environment and carbon neutrality; legal resilience; and simplification of the law. Pressures for reform are, however, in a constant state of flux and some themes are more susceptible to politics than others. Let me give, as an example of how a theme can affect our work, the rapid growth in the digitisation of

the economy. This is a universal phenomenon the evolution of which lies beyond the control of a single state.

A good deal of our work over the past few years has involved considering the regulation of new technology. For example, in relation to automated vehicles, we have created a legal and regulatory framework for a technology that (at the time) did not yet fully exist and posed problems we could only hypothesise about. The team had to start from the most elementary of first principles: for example in considering how the laws of crime and tort should apply to a vehicle that was run by a computer. Issues of who takes responsibility for accidents raise deep questions as much to do with legal philosophy as with practicalities.

Our work has involved creating a legally certain and workable framework which facilitates the creation of a new market. Our reports have been received very well both domestically and internationally. The experience we obtained in these projects was made available to Government during the implementation phase and has now led, for example, to a new project on autonomy in aviation being accepted by us.

Recently we have undertaken a 360 degree view of principles of law applicable to the digital sector. In the commercial field the advent of digital trading, based upon distributed ledgers, requires the review of commercial laws which have their foundations embedded in Victorian business practices. These laws take it as read that value cannot reside in anything that is not "property" as traditionally defined.

Our work in this area has ranged wide and for example includes: electronic signatures (does a signature on a document have to be handwritten); the classification of digital assets (are they property); smart contracts (how do traditional principles of contract law apply to contracts run substantially or wholly by software where the "contract" might consist entirely of code); decentralised autonomous organisations (what principles of law apply to commercial entities run without human intervention upon the basis of sophisticated algorithms which can determine both governance and trading decisions); and the application of private international law to digital assets (where in the world is a cryptocurrency and which courts govern disputes).

Techniques of law reform vary. In relation to transport and automation, we have recommended the creation of comprehensive regulatory and legal regimes. In contrast, in relation to the digital economy, we have adopted a more subtle and surgical approach. We seek to identify key legal principles in need of change and recommend reform to the bare minimum required to

create legal certainty. In relation to electronic trade documents, we decided that the bare minimum was to create a statutory rule that a digital equivalent of a paper document was to be treated as a "document". The Electronic Trade Documents Act 2023 is very short, only a few sections long. We leave it to business and to the courts to then work out the consequences. In relation to digital assets, we have asked ourselves whether we need a very short statutory provision clarifying that certain types of digital transaction are not precluded from being treated as "property in law". Once that is confirmed, we can leave it to the courts to flesh out the principles of property law as they now apply to digital value. In all cases, we are conscious of the imperative of ensuring that our proposals for reform are technology neutral. There is little point in creating an elegant legislative framework which then becomes irrelevant because of some astonishingly novel technology which makes everything redundant.

Our work in Wales

A word about our work in Wales, about which much more will be said later in this publication. We are the Law Commission for both England and Wales. Since devolution the functions of the Law Commission in relation to Wales have been split between reform projects where we are working on laws applicable across both jurisdictions, and projects relevant only to Wales. As I explained at the outset of this introduction, when we undertake work on devolved Welsh law, we are acting as the Law Commission of Wales.

We believe that we can make a real difference to Wales. Welsh law might be new but the Commission is nearly 60 years old and we have a unique depth of experience and skill that we can make available to the Welsh Government and to the Senedd. At present we are in discussion with the Welsh Government about strengthening and deepening our relationship so that it replicates to a greater degree the relationship that has evolved over the decades between the Law Commission and Whitehall and Parliament. We will be seeking to increase points of contact across the entire Welsh administration, creating a greater physical presence in Wales, deepening our web of contacts across Wales, and generally creating a system whereby we can be proactive in helping Welsh Ministers identify suitable projects for law reform.[35]

Diversity and inclusion

Many of the projects we undertake may have profound ramifications for the least privileged sectors of society. Our work on hate crime, the immigration rules, mental capacity and disabled children's social care, are examples.

If we are to serve the state to the optimal degree we have to be able to reach out to the underprivileged and marginalised in society. We have to be seen to be, but also actually to be, receptive and non-judgemental. We also, internally, have to be able to assess effectively and empathetically the evidence submitted to us and we have to be able then to translate out conclusions into law reform proposals that are effective in protecting and improving the lives of those affected.

Over the past few years we have embarked upon a wholesale and searching review of the way we work. This has involved reviewing how we recruit. It has covered the way in which we seek out disaffected or marginalised groups so that we can obtain their views on law reform topics. It has included developing internal toolkits and impact assessment techniques whereby we can better measure the risk of unintended consequences in proposals that we put forward.[36] We have also instructed independent diversity and inclusion auditors to review our organisation from top to bottom, knowing that any report would present us with challenges. By obtaining rigorous external benchmarking we avoid the risk of complacency. This work, I emphasise, is not undertaken from any desire to be politically correct. We have undertaken this exercise because ensuring that society trusts us to be fair, impartial and inclusive goes to the very essence of our work.

Conclusion

I have sought in this introduction to bring the work of the Law Commission to life – to sketch out how we came into being, who we are, what we do and why and how we do it. The first chapter will look more closely at how we safeguard our independence, as this is at the core of our identity. After that, we look at the unique work we do in Wales. The chapters which follow will describe how we craft law reform recommendations – from the process of project selection and working with Government and Parliament, through to our relationships with stakeholders, consultation, policymaking and report publication. We draw this together in a chapter on the implementation of our reports. We then take a look at consolidation and repeal work as a

distinct Law Commission function. Finally, we look at our international relationships and the opportunities they offer to enrich our work.

Sir Nicholas Green, Chair
November 2023

Notes

1 The term "stakeholder" is examined in more detail at para 5.1 below.
2 Ch 11 considers the benefits of international co-operation.
3 D Jones and R Wainwright, *Value of Law Reform* (2019), https://www.lawcom.gov.uk/law-commission-reforms-provide-gains-of-3-billion-over-10-years/.
4 *Paperless trade for UK businesses to boost growth*, https://www.gov.uk/government/news/paperless-trade-for-uk-businesses-to-boost-growth.
5 Zenzic, *Case Studies: Safe, secure, first. Finding a "golden mean" between innovation and regulation with selfdriving vehicles* (2019), https://zenzic.io/case-studies/safe-secure-first-finding-a-golden-mean-between-innovation-and-regulation-with-self-driving-vehicles/.
6 D Jones, *Automated Vehicles (AV) Strategic Economic Analysis* (2021), prepared for the Centre for Connected and Autonomous Vehicles, the Law Commission of England and Wales and the Scottish Law Commission, https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2021/07/Automated-Vehicles-Strategic-Analysis.pdf.
7 International Chamber of Commerce United Kingdom and Coriolis, *Creating a Modern Digital Trade Ecosystem, UK Business Case* (2021), https://www.wto.org/english/tratop_e/msmes_e/iccuk_240621.pdf.
8 *Hansard* (HC), 1 March 2023, vol 728, col 876.
9 While there had been *ad hoc* law reform committees in the early part of the 20th century (the Law Revision Committee, replaced after the Second World War by the Law Reform Committee; the Private International Law Committee; and the Criminal Law Revision Committee), these bodies did not come close to the law reform body Lord Cranworth had envisaged. Members worked on a voluntary part-time basis and had no power to decide what areas of law to examine: see S Wilson Stark, *The Work of the British Law Commissions, Law Reform… Now?* (2017) pp 14 to 15.
10 The Law Commissions Act 1965 brought two Law Commissions into being, one for England and Wales and one for Scotland. See p 18.
11 Lord Gardiner had already set out a blueprint for the Law Commission in G Gardiner and A Martin, "The Machinery of Law Reform", in G Gardiner and A Martin (eds), *Law Reform Now* (1963).
12 R J Sutton, "The English Law Commission: A New Philosophy of Law Reform" (1967) 20 *Vanderbilt Law Review* 1009, 1021.
13 Above, 1023.
14 Above, 1024.

15 A project we have recently agreed to accept on social care for disabled children will be our first England-only project: https://www.lawcom.gov.uk/law-commission-invited-to-review-legislation-on-social-care-for-disabled-children/.
16 The protocol is considered further at para 1.4 below.
17 Law Commissions Act 1965, s 3(1).
18 Law Commissions Act 1965, s 3(1)(a) to (f).
19 We say much more about the process of consultation analysis in ch 5.
20 Cabinet Office, *Guide to Handling Correspondence* (2021), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1008447/Guide_to_Handling_Correspondence_-_July_2021.pdf.
21 Peer review meetings are described in detail in ch 6.
22 We discuss the appointment of Commissioners in more detail in ch 1.
23 The Senedd Cymru is the Welsh Parliament. It is commonly known as the Senedd.
24 Commissioners' engagement with Government and Parliament is considered in ch 4. Their role as the "public face" of projects for stakeholders and the media is described in ch 5.
25 The role of Commissioners in the peer review process is described in ch 6.
26 Blind recruitment is a process by which the candidate's name and identifying factors such as age and university details are removed from their application. All recruitment at the Law Commission is name and university blind.
27 As of 2022, the non-executives included Joshua Rozenberg, a broadcaster and journalist; Bronwen Maddox, the then Director of the Institute for Government; and Baroness Ruth Deech, crossbench peer, former Chair of the Bar Standards Board and the Human Fertilisation and Embryology Authority, legal academic and one of the first Research Assistants to work at the Commission in 1965 under the Chairmanship of Mr Justice Scarman. As of 2023, the composition has changed to include Dr Hannah White, Director of the Institute for Government; Baroness Shaista Gohir, crossbench peer, and, amongst other things, founder of the Muslim Women's Network; and Claire Bassett, who has wide experience on public boards.
28 See paras 3.30 to 3.32 below for a further discussion of suitability as a criterion of project selection.
29 I say more about the value of the Law Commission from the Government's perspective at p 38.
30 See para 3.11 below.
31 See the evidence of Sir David Bean, then Chair of the Law Commission, to the House of Commons Justice Select Committee, 3 July 2018, https://old.parliament.uk/business/committees/committees-a-z/commons-select/justice-committee/

inquiries/parliament-2017/work-of-the-law-commission-17-19/publications/. This is discussed further at para 3.15 below.

32 *Paperless trade for UK businesses to boost growth*, https://www.gov.uk/government/news/paperless-trade-for-uk-businesses-to-boost-growth.

33 Protection of Official Data (2020) Law Com No 395, paras 1.23 to 1.25.

34 *Hansard* (HC), 1 March 2023, vol 728, col 880.

35 See my speech to the Legal Wales conference, *Deepening and broadening the relationship between the Law Commission and Wales*, given on 6 October 2023: https://www.lawcom.gov.uk.

36 We examine these techniques further at paras 7.11 to 7.19 below.

Chapter 1

Independence

1.1 The Law Commission's independence is one of our most prized qualities. It is central to our effectiveness in reforming the law.

How independence is secured

1.2 The Law Commissions Act 1965 does not expressly say that the Commission should be an independent body, in contrast to some other jurisdictions' law reform commissions.[1] But several features ensure its independence.

Statutory entrenchment

1.3 Most fundamentally, the Commission is a creation of primary legislation. The 1965 Act provides that "there shall be" a Law Commission.[2] The Commission therefore cannot be abolished other than by a further Act of Parliament.

People

1.4 The composition of the Commission also ensures its independence. As explained in the introduction, the Chair, appointed by the Lord Chancellor, must be a judge of the High Court or Court of Appeal.[3] In recent years, by protocol, the Government appoints only judges of the Court of Appeal (Lords Justices of Appeal) or High Court Judges who will be recommended for promotion to the Court of Appeal.[4] The choice of a judge is significant, because of the constitutional requirement that judges act independently. As the *Guide to Judicial Conduct* for England and Wales explains, this

means not only being independent from the executive and legislature, but also being "independent of all sources of power or influence in society, including the media and commercial interests".[5] Lord Tunnicliffe, speaking in 2008 on behalf of the Government, said that "having a senior member of the judiciary as the head of the Commission acts as … a guarantee of its independence".[6] Similar sentiments have been expressed by Lord Etherton, a former Law Commission Chair.[7]

1.5 The other four Commissioners must be judges, practising lawyers, or legal academics.[8] While not (necessarily) bound by judicial standards, they are nevertheless required to act impartially and avoid conflicts of interest.[9] They are selected by an open competition which is regulated by the Commissioner for Public Appointments, and appointed for a term of up to five years (although their appointments may be extended). As explained in the introduction, they have the status of "Crown appointees"; they are not civil servants and are not bound by the Civil Service Code and the requirement to serve the Government of the day. Commissioners tend to be individuals who have had outstanding careers in legal practice or academia.[10] They have no need to use their role as a stepping stone to advancement, and are used to being forthright in presenting their own independent views when advising clients or in their writing.

1.6 Following the recommendations of the Ministry of Justice's Triennial Review in 2013 to 2014, the Commission has also appointed non-executive Board Members to provide independent challenge to the way it operates, as well as expertise on issues of governance and strategic management.[11]

1.7 The Commissioners are supported by a staff of politically-impartial civil servants, who work exclusively for the Commission, rather than being loaned by Government departments.[12] The staff is almost entirely composed of lawyers and research assistants. They are headed by a Chief Executive, the Commission's budget holder, who is also a civil servant. The Chief Executive participates in discussions with the Chair and other Commissioners about the strategic direction of the Commission, and has responsibility for the overall organisation, management, staffing and allocation of resources of the Commission, as well as for the day-to-day management of the Commission's relationship with the Ministry of Justice. The Chief Executive is responsible

to the accounting officer of the Ministry of Justice for the resources under his or her control.[13]

Statutory functions

1.8 The 1965 Act confers independence on the Law Commission in the exercise of its functions. It establishes a broad duty "to take and keep under review all the law with which they are … concerned with a view to its systematic development and reform".[14] The Act goes on to break down more precisely how this duty is to be performed, using terms which permit the Law Commission to operate with unrestricted freedom of thought. The Commission is required, for example, to "consider … proposals for the reform of the law" and to "undertake … the formulation … of proposals for reform".[15]

Funding

1.9 The Commission is funded solely from public funds; it receives no private income. It is therefore not beholden to any private interests.[16]

Relationship with the Ministry of Justice

1.10 The Law Commission has ongoing relationships with Whitehall as a whole. However, the Commission operates as an arm's length body sponsored by the Ministry of Justice. A Framework Document sets out the relationship between the Commission and the Ministry of Justice.[17] The Document makes it clear that, while the sponsorship team within the Ministry of Justice have a role in monitoring the Commission's activities, the Ministry of Justice has "no involvement in the exercise of the Commissioners' judgement in relation to the exercise of their functions".[18]

Benefits of independence

1.11 Our independence provides us with a number of benefits. As we describe in Chapter 5, which considers our engagement with stakeholders, our effectiveness depends on having the trust and support of those individuals and organisations affected by potential reforms. Being independent means that stakeholders have confidence that our decisions will be based on careful evaluation of the views, rather than partisan political considerations or indebtedness to particular interest groups.

1.12 An extract from a letter received by the Law Commission from David Allison, former Chair of Resolution, a leading family law association in England and Wales, illustrates this point:

> Inevitably Government consultations were aimed to support the incumbent Government's policy objectives and so, whilst compliant with requirements for such, were not seen as coming from a neutral standpoint or one that was truly aimed at doing what was right by the people who would be affected by the particular policy objective. Often such consultations were rushed and were not backed by significant research.
>
> Conversely Law Commission consultations were seen (and continue to be seen) as a very different animal. They were never undertaken with a view to achieving a particular policy objective. They were thoroughly researched and considered and as such where implemented led to better law. As a consequence Resolution put considerable time and effort in responding to requests from the Law Commission.[19]

1.13 The confidence engendered by our independent status is a factor which can lead a Government department to entrust us with a project rather than conducting its investigations in-house. Consultation conducted by a trusted independent body can remove any perception of political partiality in the development of proposals for law reform, particularly in areas where the policy underlying the subject matter is controversial. An independent consultation process builds consensus and bestows legitimacy on our recommendations.[20]

1.14 Freedom from government influence or control is also important as a means of ensuring the quality of the Commission's recommendations. As the Commonwealth Secretariat's *Guide to Law Reform* explains:

> Independence is critical to demonstrating that the views of a reform agency are the result of rational enquiry based on meticulous research and consultation.[21]

The Kenyan Law Commission describes this as "intellectual independence".[22]

1.15 The status of the Law Commission as an independent and trusted public body lay behind the decision to introduce a special procedure in the House of Lords to secure the passage of uncontroversial Law Commission bills. This procedure, introduced by the Procedure Committee of the House of Lords, ensures proper and detailed scrutiny of the bills passing through it, but creates more opportunities for Law Commission bills to be implemented by ensuring that they do not compete for time with the Government's main legislative programme.[23] Lord Etherton has described the obstacles in the way of its introduction:

> There was some caution, even opposition, to the idea in a number of quarters and there was the difficulty of persuading the powerful Procedure Committee of the House of Lords and the government's business managers in the House of Lords that any such new procedure was both practical and desirable.[24]

Without the trust placed in the independent Commission, it is unlikely that the special procedure would have been possible.

Working independently but not in isolation

1.16 The fact that the Law Commission is independent does not mean that we conduct our work in isolation. Indeed, we could not effectively discharge our functions without maintaining close relationships with Government, Parliament, and all of our stakeholders.

1.17 As Chapter 3 explains, while independent in its operations, the Commission is subject to Government control relating to project selection. The 1965 Act requires the Commission to undertake projects that form part of a larger programme of work approved by the Lord Chancellor or are referred by a Minister. The changes brought about by the Law Commission Act 2009 led to the agreement of a Protocol in 2010 which obliges the Government to provide an undertaking that there is a "serious intention to take forward law reform" in the area being considered for a Law Commission project.[25] This is intended to improve implementation rates, considered in more detail in Chapter 8, and to ensure an effective use of public funds. In effect, it prevents the Commission from going ahead with a project without Government support. The formula is of benefit to the Commission, as it

facilitates implementation, but it does not allow Government to oblige Commissioners to take on a project which they do not consider to be suitable and does not prevent the Commission from reaching its own law reform conclusions once the project is agreed. The shared interest of the Government and the Commission is recognised in the 2010 Protocol:

> The Commission – while independent of Government – shares common purpose with the Government, in a commitment to law that is simple, fair, modern, accessible, fit for purpose ... and cost effective.[26]

1.18 Beyond project selection, relationships with Government, Parliament and the Senedd throughout the project cycle are considered in Chapter 4, and with other stakeholders in Chapter 5. Chapter 6 considers policymaking, and the importance of independence in this process. But first we take a closer look at the distinct characteristics of the work of the Law Commission in Wales. This will ensure that, as we go on to consider each step in the law reform process, this is conveyed through the lens of our work as the Law Commission for both England and Wales.

Notes

1 See, for example, legislation in New Zealand and Malawi: M Jolley, "Independence and Implementation: In Harmony and in Tension" (2019) 21 *European Journal of Law Reform* 562, 564.

2 Law Commissions Act 1965, s 1(1).

3 Law Commissions Act 1965, s 1(1A). This was the practice from the time of the creation of the Law Commission, but only became a statutory requirement following amendment of the 1965 Act by the Tribunals, Courts and Enforcement Act 2007, s 60(2). In a Parliamentary debate on the amendment, the policy was described by Lord Hunt of Kings Heath as bringing "significant advantages of independence, expertise and prestige to the Commission": Hansard (HL), 17 July 2007, vol 694. See also p 18.

4 The protocol was entered into between the Ministry of Justice, the Judicial Appointments Committee and the judiciary: see T Etherton, "Memoir of a Reforming Chairman", in M Dyson, J Lee and S Wilson Stark (eds), *Fifty Years of the Law Commissions: The Dynamics of Law Reform* (2016) p 87. Where a successful applicant is a High Court Judge, he or she will be put forward to the Court of Appeal panel to be promoted to the Court of Appeal at the earliest available opportunity. The request for selection is made to the Judicial Appointments Commission by the Lord Chancellor under the Constitutional Reform Act 2005, s 78.

5 Courts and Tribunals Judiciary, *Guide to Judicial Conduct* (2020) p 6.

6 *Hansard* (HL), 12 June 2008, vol 702, col 748.

7 T Etherton, "Law Reform in England and Wales: A Shattered Dream or Triumph of Political Vision?" (2008) 73 *Amicus Curiae* 3, 4.

8 Law Commissions Act 1965, s 1(2).

9 Committee on Standards in Public Life, *Seven Principles of Public Life* (1995); Law Commission, *Code of Best Practice for Law Commissioners* (2009), https://www.lawcom.gov.uk/about/our-policies-and-procedures/, which draws on the Treasury's *Code of Conduct for Board Members of Public Bodies* (latest ed 2019).

10 See p 23.

11 Ministry of Justice, *Triennial Review: Law Commission, Report of Stage 2* (2014), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/294391/law-commission-tr-stage-2-report.pdf, para 47(d).

12 The Law Commissions Act 1965, s 5 states that it is for the Ministry of Justice to appoint the Law Commission staff, so Law Commission civil servants are technically employed by the Ministry of Justice, but, with the exception of the Chief Executive, they are managed within the Commission. The Chief Executive

is managed by the Director of the Ministry of Justice's sponsorship team. The role of this team is considered further at para 1.10 below.

13 *Code of Best Practice for Law Commissioners* (2009), https://www.lawcom.gov.uk/about/our-policies-and-procedures/.

14 Law Commissions Act 1965, s 3(1).

15 Law Commissions Act, 1965, s 3(1). For further discussion of functional independence, see M Jolley, "Independence and Implementation: In Harmony and in Tension" (2019) 21 *European Journal of Law Reform* 562, 566.

16 The funding of the Law Commission is considered further in ch 3.

17 *Framework Document: Ministry of Justice and the Law Commission for England and Wales* (2015), https://www.lawcom.gov.uk/document/framework-document/. The document is currently being updated: Law Commission, *Annual Report 2021-22*, https://www.lawcom.gov.uk/annual-report-2021-2-published/.

18 *Framework Document: Ministry of Justice and the Law Commission for England and* Wales (2015) para 3.15.

19 Law Commission evidence to the Triennial Review, 9 February 2013, https://www.lawcom.gov.uk/document/law-commission-triennial-review/.

20 The consultation process is considered further in ch 5.

21 Commonwealth Secretariat, *Changing the Law: A Practical Guide to Law Reform* (2017) p 22, cited by M Jolley, "Independence and Implementation: In Harmony and in Tension" (2019) 21 *European Journal of Law Reform* 562, 566.

22 Commonwealth Secretariat, *Changing the Law: A Practical Guide to Law Reform* (2017) p 23.

23 The special procedure for Law Commission bills is considered further in ch 8.

24 T Etherton, "Memoir of a Reforming Chairman", in M Dyson, J Lee and S Wilson Stark (eds), *Fifty Years of the Law Commissions: The Dynamics of Law Reform* (2016) p 81.

25 *Protocol between the Lord Chancellor (on behalf of the Government) and the Law Commission* (2010) Law Com No 321, https://www.lawcom.gov.uk/document/protocol-between-the-lord-chancellor-on-behalf-of-the-government-and-the-law-commission/. The 2010 Protocol is considered further in ch 3.

26 Above, para 2.

Chapter 2

Our role in Wales

2.1 The Law Commissions Act 1965 established the Law Commission "for the purpose of promoting the reform of the law".[1] The "law" was defined to exclude the law of Scotland, and any law of Northern Ireland which the Parliament of Northern Ireland had power to amend.[2] The Act separately established the Scottish Law Commission.[3] In 2007, when the Northern Ireland Law Commission was established, the purpose of the Law Commission under the 1965 Act was amended to provide for "reform of the law of England and Wales". We are, for this reason, the Law Commission of England and Wales.

2.2 The constitutional status of the government of Wales has undergone major changes over the last two decades as part of a process of devolution. This has seen the introduction of a body of devolved Welsh law, made for and in Wales. As a result, the functions of the Law Commission in relation to Wales are now split between reform projects where we are working on laws applicable across both England and Wales, and projects relevant only to Wales. Before looking more closely at the work of the Law Commission of England and Wales as a whole, it is important to look briefly at the changes brought by devolution in order to understand the work of the Law Commission in relation to Welsh law.

Phases of devolution

2.3 The first phase of devolution under the Government of Wales Act 1998 established the National Assembly for Wales. The Assembly had no

power to pass or amend primary legislation, although it had executive powers to make and amend subordinate legislation in the fields for which it was granted responsibility.[4]

2.4 The Government of Wales Act 2006 formally separated the executive and the legislature and created the Welsh Assembly Government and the Welsh Ministers.[5] The Welsh Assembly Government comprised the executive arm of government, and the National Assembly the legislative arm. The Act gave the Assembly limited powers to enact primary legislation in the form of Assembly Measures. The UK Government retained all law-making power unless it was explicitly devolved to the Assembly. The Assembly could only legislate on a matter if it was listed within a "field". A matter could be added to a field only by an Act of the UK Parliament or through a Legislative Competence Order approved by the National Assembly for Wales and by both Houses of Parliament.[6] The 2006 Act, following a number of amendments, eventually listed 20 devolved fields.[7]

2.5 Following a referendum in 2011, provisions in the 2006 Act giving the Assembly primary law-making powers in respect of all matters within the 20 subject areas were brought into force. Under these powers, the Assembly could pass Acts instead of Measures.[8] Under the Wales Act 2014, the Welsh Assembly Government became the Welsh Government and was given some powers of taxation.

2.6 The Wales Act 2017 altered the basis for determining what is devolved from a "conferred powers" model to a "reserved powers" model. Instead of specifying which subjects the Assembly could legislate for, it amended the 2006 Act by providing a list of matters expressly reserved to the UK Parliament. The effect of this is to permit the Welsh Government to legislate on any matter save where it is expressly prevented from doing so. This brought Welsh devolution into line with the approach taken to Scottish devolution. The list of subjects reserved to the UK Parliament largely leaves unaltered the matters on which the Welsh Government is permitted to legislate.[9] The Act also sets out a new test of legislative competence (the ability of the Assembly to pass legislation in a particular area).[10]

2.7 The 2017 Act enshrined the Welsh Government, the Assembly and the laws they make as a permanent part of the UK constitution. It devolved

further executive powers to the Assembly and the Welsh Ministers. This included a power for the Assembly to decide its own name. The Assembly became the Senedd Cymru or Welsh Parliament in 2020.[11]

The Law Commission's responsibilities in Wales

2.8 The Wales Act 2014 amended the Law Commissions Act 1965 to take account of Welsh devolution.[12] The Welsh Ministers were given the power to ask the Law Commission to undertake law reform projects.[13] They were also empowered to enter into a protocol with the Law Commission about its work on Welsh devolved matters, following the equivalent provision for the Lord Chancellor.[14] A requirement was introduced, once again mirroring an equivalent duty on the Lord Chancellor, for the Welsh Ministers to report annually to the Senedd on the implementation of Law Commission proposals relating to devolved Welsh matters.[15]

2.9 Law Commission work is defined as "relating to a Welsh devolved matter" where it relates to matters which would be within the legislative competence of the Senedd if contained in an Act of the Senedd. In addition, work falls within this definition where it relates to functions exercisable by the Welsh Ministers, the First Minister for Wales, the Counsel General to the Welsh Government or the Senedd Commission.[16]

2.10 The Protocol between the Welsh Ministers and the Law Commission was signed in 2015. The Protocol explains that the Commission may undertake a law reform project relating to Welsh devolved matters either by including it in a programme of law reform or by accepting the project on a reference from the Welsh Ministers. It sets out in detail how the Commission and the Welsh Ministers would work together on such projects.[17] Project selection in Wales is discussed further in Chapter 3.[18]

2.11 The Wales Advisory Committee was established by the Law Commission in 2013. The Committee advises the Commission on the exercise of our statutory functions in relation to Wales on both devolved and reserved matters, and helps us identify the law reform needs of Wales. It also helps us to identify and take into account specific Welsh issues in all of our law reform projects. The Committee is largely composed of judges, academics, legal practitioners and public sector bodies with expertise or an

interest in the development of Welsh law. Membership of the Committee is kept under regular review to ensure that it represents key groups and interests relating to the law in Wales.[19] In order to ensure independence, the Committee does not include representatives of the Welsh Government.

2.12 The Law Commission participates, by invitation, in the annual Legal Wales conference. Legal Wales is a forum of the Welsh legal community. The annual conference provides a platform for contributions to a national dialogue on constitutional and legal developments in Wales. The Lord Chief Justice of England and Wales attends and gives a keynote address.[20] We attend meetings of the Legal Wales Board as an observer. Our Chair also sits as a member of the Law Council of Wales, a body established, following the recommendation of the Commission on Justice in Wales, to support the growth of the legal sector in Wales.

2.13 The Chair, the Chief Executive and the Commissioner for Public Law and the Law in Wales hold regular meetings with representatives of the Welsh Government including the First Minister, the Counsel General and First Legislative Counsel. The Commissioner's title reflects the importance to us of our work in Wales. Historically, Welsh projects have been in the public law field. The nature of devolved competence makes it likely though not inevitable that this will continue to be the case. The Commission's relationship with the Welsh Ministers and the Senedd is considered further in Chapter 4.

Wales-only projects

2.14 Lord Lloyd-Jones, a former Chair of the Law Commission and current Supreme Court Justice who made an immense contribution to the Commission's role as the Law Commission of Wales, has identified the complexity of the task facing Wales. In 2015, when addressing our Fiftieth Anniversary conference, he described the inherently evolving nature of the challenge.

> Devolution brings new responsibilities for the Commission and will open up many new opportunities in the future. In particular, we are already seeing a divergence of English law and Welsh law in the devolved areas within the shared legal system of England and Wales and this divergence is now accelerating rapidly.[21]

2.15 The Commission's determination to meet the challenges posed by devolution is illustrated by the Wales-only projects developed since Wales acquired primary legislative powers. Our 12th programme of law reform, launched in 2014, included two law reform projects relating only to Wales.

Form and Accessibility of the Law Applicable to Wales

2.16 The first, concerning the form and accessibility of the law applicable in Wales, was proposed to us by the Welsh Government and our Wales Advisory Committee. This provided a significant opportunity for the Commission to help Welsh law to establish itself. As a result of the incremental process of devolution described above, a substantial body of primary and secondary legislation in Wales was developing. Complexity was introduced by the different phases of devolution, and the rapidly increasing divergence of the law applicable in Wales from that applicable in England. It was difficult to access and understand the law that applied in Wales.

2.17 The project, in the form of an Advice to Government, considered how existing legislation could be simplified and made more accessible, and how future legislation could reduce rather than multiply problems of complexity. We recommended a new approach to law-making in Wales and ways to make the existing law applicable in Wales clearer, simpler and easier to access. We also recommended that significant areas of the law in Wales should be consolidated and codified, for example in relation to areas such as education, housing, health and planning. Any amendments or future legislation should be made only by amending or adding to the code. We also recommended ways to improve practices for drafting and interpreting bilingual legislation.[22]

2.18 In responding to our consultation paper, the Welsh Government summarised the challenges:

> For Welsh laws to be accessible it is essential that they are intelligible, clear and predictable in their effect. They must also be easily available.[23]

2.19 The Counsel General described our report as a "blueprint" for the laws of Wales and of "historic significance". He agreed with the Commission that:

> a sustained, long term programme of consolidation and codification of Welsh law would deliver societal and economic benefits, and is necessary to ensure that the laws of Wales are easily accessible.[24]

2.20 The recommendation that significant areas of Welsh law should be consolidated and codified led to the Legislation (Wales) Act 2019. Part One imposes a duty on the Counsel General to keep the accessibility of Welsh law under review, and a duty on the Counsel General and the Welsh Ministers jointly to prepare a programme for each Senedd term setting out how the Government intends to improve its accessibility. There is no definition of "accessibility" but it embraces, at the least, promoting awareness and understanding of the law and facilitating the use of the Welsh language. As a result, there is a unique momentum for consolidation work in Wales. The first Senedd programme, *The Future of Welsh Law*, was published by the Counsel General in September 2021. It covers the period 2021 to 2026.[25]

Planning Law in Wales

2.21 The second project, concerning planning law in Wales, illustrates the specific value of consolidation work in Wales. As Lord Lloyd-Jones put it in 2015:

> In addition to the usual benefits, a consolidating Act of the Welsh Assembly would have the significant additional value of disentangling Welsh from English and UK legislation, making both more accessible.[26]

2.22 The project was undertaken at the request of the Welsh Government. It had become increasingly difficult to determine what the planning law of Wales actually was. New legislation was being passed in both Cardiff and Westminster and might apply to Wales only, to England only, or to both England and Wales. We identified a need for the law in the area to be simplified and modernised.[27] The Welsh Government described our report as "a detailed, robust and independent evidence base to support the consolidation and simplification of planning law".[28] It accepted the majority of our recommendations and began drafting a Historic Environment (Wales) Bill and a Planning Consolidation Bill.[29]

2.23 The Senedd has also developed specific rules for consolidation bills by way of a new Senedd standing order, and the Historic Environment (Wales) Bill was the first to come before it under this procedure.[30] The new rules enable a wider range of technical changes to be enacted under the procedure, on the basis of a Law Commission recommendation, than would be permissible in a consolidation bill in the Westminster Parliament.[31]

Devolved Tribunals in Wales

2.24 The first project referred to us by Welsh Ministers under the power to make a reference conferred by the Wales Act 2014 was our devolved tribunals in Wales project. This fulfilled our ambition to have a further Welsh project in or alongside our 13th programme. Here we turned our attention to how the tribunal system in Wales could be improved. Tribunals play an important part in upholding the law by settling disputes, usually following public bodies' decisions. In Wales the rules and procedures for devolved tribunals had become complicated and inconsistent as a result of their piecemeal development pursuant to a wide range of different legislation. Devolution meant that many Welsh tribunals were, unlike their English counterparts, not included in the new, unified structure of tribunals introduced by the Tribunals, Courts and Enforcement Act 2007. Instead the Welsh tribunals continued to be governed by the previous pieces of legislation. That legislation had become progressively more outdated: for example, changes made by the Wales Act 2017 had not been taken into account at all.

2.25 Our report recommended replacing existing Welsh tribunals with a unified First-tier Tribunal for Wales and the creation of an Appeal Tribunal for Wales to hear appeals from the First-tier Tribunal. We recommended reinforcing the new structure with provisions to keep procedural rules up to date and protect judicial independence.[32]

2.26 The Welsh Government strongly endorsed the principle of a unified, single, structurally independent system of tribunals in Wales. In their view, as expressed by the Counsel General, "the Law Commission's proposals go a long way to creating the capability for Welsh legislation to be enforced through Welsh institutions".[33]

2.27 Like our project on form and accessibility, the Welsh tribunals project was of substantial constitutional significance, contributing to the

development of the Welsh legal system. Our next Welsh project was of a different sort, and concerned an issue of totemic importance to Welsh people.

Regulating Coal Tip Safety in Wales

2.28 Our project on regulating coal tip safety in Wales arose from an urgent reference by Welsh Ministers following a coal tip slide in South Wales triggered by extreme weather. The Welsh Government was concerned that the existing regulatory framework did not effectively address the risks posed by disused tips. The system had been designed in an era of operational coal mines rather than to deal with their legacy. The project identified, in consultation with a wide range of stakeholders across Wales, respects in which the system was not working well. We made recommendations for new legislation to promote consistency in the management of disused tips and avert danger by introducing a proactive rather than a reactive approach.[34] The Government's final response accepted the majority of our recommendations in full or with modifications and thanked the Commission for its "thorough and seminal" review.[35] The Welsh Government has announced its intention to introduce a Disused Tips Safety Bill in its legislative programme for 2023-24.[36]

2.29 A former Lord Chancellor, Sir Robert Buckland KC MP, praised the collaboration between the Law Commission and the Welsh Government on the project and the speed with which the report will be followed by legislation, describing it as "a good example in Wales of everybody working together".[37]

Development of the Welsh legal system

2.30 The Law Commission also works with the Welsh Government outside of individual projects to assist with the development of the Welsh legal system. As highlighted by the Chair in his introduction, our goal over the years to come is to deepen our connection with the Welsh Government and to replicate the relationship that has evolved over the decades with Whitehall.[38] There is also potential for the experience we gain in Wales to enrich our work with Whitehall. We look more closely at the way these relationships work over the next two chapters.

Notes

1 Law Commissions Act 1965, s 1(1).
2 Law Commissions Act 1965, s 1(5).
3 Law Commissions Act 1965, s 2.
4 Government of Wales Act 1998, sch 2.
5 Government of Wales Act 2006, s 48.
6 A Legislative Competence Order was an Order in Council made specifically in relation to the legislative competence of the National Assembly for Wales under provisions in s 95(1) of the Government of Wales Act 2006.
7 For a fuller account of these phases of the devolution process, see Form and Accessibility of the Law Applicable to Wales (2016) Law Commission Consultation Paper No 223, ch 2. The Law Commission's Wales work during this time was confined to these fields. Projects were conducted in relation to adult social care and renting homes: https://www.lawcom.gov.uk/project/adult-social-care/; https://www.lawcom.gov.uk/project/renting-homes/.
8 Government of Wales Act 2006, pt IV.
9 The list of reserved matters is provided by sch 7A. A further list of restrictions which apply even where legislative provisions do not relate to reserved matters is provided by sch 7B. For a fuller account of the devolutionary framework following the Wales Act 2017, see Devolved Tribunals in Wales (2020) Law Commission Consultation Paper No 251, paras 2.3 to 2.12.
10 Government of Wales Act 2006, s 108A. A provision will be outside its competence if: (1) it extends otherwise than only to England and Wales; (2) it applies otherwise than in relation to Wales, or confers, imposes, modifies or removes (or gives power to confer, impose, modify or remove) functions exercisable otherwise than in relation to Wales; (3) it "relates to" any of the reserved matters listed in Schedule 7A; (4) it breaches any of the general restrictions listed in Schedule 7B; or (5) it is incompatible with the Convention rights or with EU law.
11 Senedd and Elections (Wales) Act 2020.
12 Wales Act 2014, s 25.
13 Law Commissions Act 1965, s 3(1)(ea).
14 Law Commissions Act 1965, s 3D.
15 Law Commissions Act 1965, s 3C. The annual reporting duty for both the Lord Chancellor and the Welsh Ministers is discussed further at paras 8.70 to 8.76 below.
16 Law Commissions Act 1965, s 3D(8).
17 Protocol Between the Welsh Ministers and the Law Commission (2015), https://www.lawcom.gov.uk/document/protocol-rhwng-gweinidogion-cymru-a-comisiwn-y-gyfraith-protocol-between-the-welsh-ministers-and-the-law-

commission. The wording is very similar to that used in the Protocol between the Lord Chancellor and the Law Commission discussed in ch 3.

18 See paras 3.51 to 3.54 below.

19 Law Commission, *Annual Report 2020-21*, https://www.lawcom.gov.uk/document/annual-reports/.

20 https://www.legalwales.org/.

21 D Lloyd Jones, "Looking to the Future", in M Dyson, J Lee and S Wilson Stark (eds), *Fifty Years of the Law Commissions: The Dynamics of Law Reform* (2016) p 359.

22 Form and Accessibility of the Law Applicable to Wales (2016) Law Com No 366. Consolidation and codification are considered further in ch 9.

23 Above, para 1.2.

24 Letter from Mick Antoniw MS/AS, Counsel General, to the Law Commission, 19 July 2017, https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2016/06/2017-07-19-Law-Commission-Final-Response.pdf.

25 https://gov.wales/the-future-of-welsh-law-accessibility-programme-2021-to-2026-html.

26 D Lloyd Jones, "Looking to the Future", in M Dyson, J Lee and S Wilson Stark (eds), *Fifty Years of the Law Commissions* (2016) p 356.

27 Planning Law in Wales (2018) Law Com No 383.

28 Welsh Government, Detailed Response to the Law Commission's Report on Planning Law in Wales,10 November 2020, https://www.gov.wales/detailed-response-law-commission-report-planning-law-wales.

29 The progression of the Welsh Government's consolidation legislation is considered further at paras 9.26 to 9.28 below.

30 Standing Order 26C, https://research.senedd.wales/research-articles/first-consolidation-bill-introduced-into-the-senedd-to-make-welsh-historic-environment-law-more-accessible/. Standing Order 26C is considered further at para 9.10 below.

31 The intrinsic limits to this procedure are considered in a speech by Sir Nicholas Green, *Deepening and broadening the relationship between the Law Commission and Wales*, given to the Legal Wales conference on 6 October 2023: https://www.lawcom.gov.uk.

32 Devolved Tribunals in Wales (2021) Law Com No 403.

33 Written statement: Devolved Tribunals in Wales, Mick Antoniw MS/AS, Counsel General and Minister for the Constitution, 9 December 2021, https://www.gov.wales/written-statement-devolved-tribunals-wales.

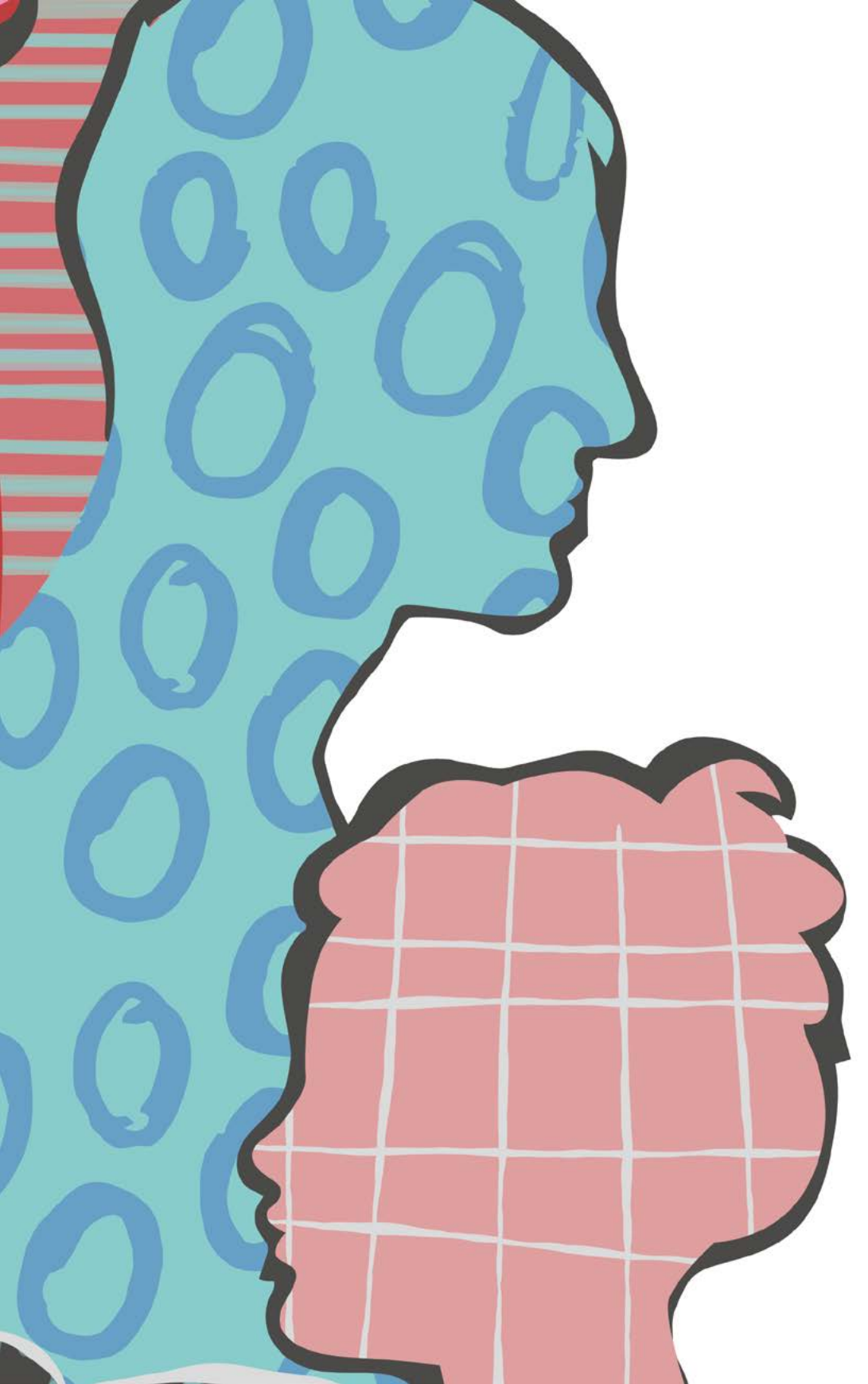
34 Regulating Coal Tip Safety in Wales (2022) Law Com No 406.

35 Letter from Julie James MS/AS, Minister for Climate Change, to Sir Nicholas Green, 22 March 2023, https://www.gov.wales/response-report-regulating-coal-tip-safety-wales-letter; Written Statement: Welsh Government Detailed Response to the Law Commission's Report on Coal Tip Safety in Wales, 22 March 2023, https://www.gov.wales/written-statement-welsh-government-detailed-response-law-commissions-report-coal-tip-safety-wales.

36 First Minister announces Welsh Government's legislative programme, https://www.gov.wales/first-minister-announces-welsh-governments-legislative-programme.

37 *Hansard* (HC), 1 March 2023, vol 728, col 878.

38 See p 42 above.



Chapter 3

Factors affecting project selection

3.1 The Law Commissions Act 1965 tasks us with "keep[ing] under review all the law" of England and Wales.[1] Within that extremely broad remit, we primarily focus our attention on discrete projects concerned with particular areas of law. The time frame for projects depends, amongst other things, on their subject matter and the required output, but they typically last between one and three years.

3.2 The framework for how we select our projects is set out in the 1965 Act, which contains a list of the Commission's functions.[2] They distil down to two mechanisms. First, periodical programmes of law reform, devised by the Commission and approved by the Lord Chancellor, contain a number of projects across a range of areas.[3] Secondly, individual projects on behalf of the Government are referred to the Commission by the UK and Welsh Ministers.

3.3 Within that framework, the decision whether to accept any given project has always been, and remains, one for Commissioners alone. The ability to choose our own work is one of the facets of the Commission's independence, and a distinguishing characteristic compared to previous, *ad hoc* law reform bodies.[4]

3.4 The exercise of this discretion has always involved balancing competing calls upon our limited resources. This chapter looks at the criteria and process that Commissioners apply when conducting that balancing exercise. At the outset, though, it is worth saying something more about a thread that runs through the entire subject of project selection: the extent

to which, and manner in which, Government influences the shape of our workload. This includes consideration of how the Commission is funded.

Project selection and implementation

3.5 Given the importance of our independence, it might not be obvious why Government should have any influence on what work we take on. In fact, it is our very independence that means some degree of connection between Government's priorities and our own is necessary. As an independent agency, we cannot change the law. We recommend reforms; in most cases it is up to Government (and where primary or secondary legislation is needed, Parliament) to decide whether to implement them, although the courts and other bodies also have a role to play. While implementation is not the only value that flows from our work, no law reform agency could justify its existence if that work did not result in concrete changes in the law.[5] Throughout the Commission's history, therefore, implementation has been a focus of attention both within and without the Commission.[6]

3.6 We say more about implementation elsewhere in this work. Chapter 8 discusses routes to implementation, including by Government, the courts and other bodies, and the role the Commission plays in relation to them. The chapter also considers the many other benefits offered by our work whether or not our recommendations are implemented. And many of the subjects covered in other chapters are about how we produce the high-quality work that persuades lawmakers to implement our recommendations. The reason implementation is relevant to our discussion of project selection is because of the concern that, in choosing its projects, the Commission should undertake work in areas that have the most realistic chance of resulting in implementation.

Improving the likelihood of implementation

3.7 The criteria we apply to project selection are in part calculated to filter out subjects that are unlikely to result in implementation, for example because they would lack impact.[7] Nevertheless, the reality is that implementation happens via a political and democratic process.

3.8 It was recognised at the outset that Government should exercise some degree of influence over the Commission's choice of projects. Under the Law

Commissions Act 1965, our programmes of law reform must be approved by the Lord Chancellor, exercising collective responsibility as a Government minister.[8] Project references made by ministers are by definition endorsed by Government.

3.9 Operating under this relationship with Government for much of our existence, the Commission had great success in seeing its recommendations become law.[9] However, during the 2000s, concern began to build that too many of our reports were languishing unimplemented.[10] Non-implementation was not necessarily because reports were being explicitly rejected, but rather because no response at all was forthcoming from Government. The fact that our undertaking a project was endorsed by Government – whether via the Lord Chancellor's approval of a programme or via a ministerial reference – could no longer be considered an adequate guarantee of Government's interest in implementing change based on our work.[11]

3.10 A number of innovations have been introduced to make implementation more likely. These are discussed further in Chapter 8.[12] So far as project selection goes, the major change has been the introduction of the 2010 Protocol between the Lord Chancellor and the Law Commission. The Protocol requires that before a project is approved for inclusion in a programme of law reform, or referred to the Commission by Government, the minister with policy responsibility must give an undertaking that there is a serious intention to take forward law reform in the area.[13] The Protocol was given a statutory basis by the Law Commission Act 2009,[14] and builds on an earlier 2004 agreement.[15] There is an equivalent provision, in relation to ministerial referrals, in the 2015 Protocol between the Welsh Ministers and the Law Commission.[16]

Funding

3.11 In recent years, budgetary matters have taken on increasing prominence in influencing our project selection. The Law Commission is paid for solely from public funds. Our core funding comes from the Ministry of Justice, in relation to which the Commission is an "arm's length body". The Commission decides how to allocate that funding amongst its law reform projects. As the Chair explained in his introduction, our funding was cut significantly from 2010 onwards.[17] In the financial year 2009 to 2010, our core funding

stood at £4.1 million.[18] By 2019 to 2020 it had declined to £1.9 million, a reduction of 54%, reflecting wider budget cuts in the Ministry of Justice and across the public sector.[19]

3.12 We spend the vast majority of our budget on our legal staff.[20] It follows that a reduced budget would mean fewer staff supporting the work of the Commissioners, which in turn would mean Commissioners would be able to conduct fewer projects and generate less public benefit. To compensate for reduced core funding, the Commission increasingly sought direct funding for individual projects from the responsible Government department.[21] In the financial year 2018 to 2019, for example, we generated £1.8 million of project-specific income. This figure amounted to nearly half of our total budget.

3.13 Our success in attracting funded work is a mark of the high regard in which the organisation is held within Whitehall. It meant that, despite the reduction in core funding, the five Commissioners were sufficiently supported to be able to continue producing consultation papers and reports at a quick pace, and our overall funding remained relatively steady. However, our heavy reliance on income-generating projects caused problems. On a practical level, the need to secure individual funding for a substantial proportion of our work caused a measure of volatility. We explained in our 2018 evidence to the House of Commons Justice Select Committee that "whether or not a given law reform project will attract funding is extremely unpredictable and outside our control".[22] This model of funding gives no guarantee of continuity of income. It became increasingly necessary to recruit staff on temporary contracts to work on specific projects, making it difficult to retain their skills for the longer term.

3.14 The impact of our funding model was also felt in relation to project selection. On the one hand, it has been suggested that the greater emphasis on departmentally-funded projects was intended "to ensure that the Law Commission was incentivised to focus on areas of law reform which would be implemented by the relevant government department".[23] No doubt, it is possible to identify departmentally-funded projects where a decision has come relatively quickly to implement our recommendations, such as projects on intimate image abuse and regulating coal tip safety in Wales. However, tying our catalogue of work more closely to immediate departmental priorities also had unwelcome effects. There have been two aspects to the problem.

3.15 The first aspect is that the funding model forced Commissioners to give priority to projects that came with funding attached, ahead of other projects that might otherwise have been felt to be more pressing. It impaired our ability to deploy our resources in the way that produced the greatest benefit, instead requiring us to react to immediate departmental needs, often on a tight time schedule. The effect was to "elbow aside" projects which did not have funding attached.[24] In evidence given to the House of Commons Justice Select Committee in 2018, Sir David Bean, then Chair of the Law Commission, gave the example of the misconduct in public office project. This started in 2011 and had to be shelved for three years when it was overtaken by funded projects.[25]

3.16 An inability to find a department willing to fund a project does not indicate a lack of importance. A project may offer increased fairness, clarity or legal efficiency of critical significance to individuals, businesses or the third sector, but fall between Government departmental responsibilities or lack political appeal. Government departments were also affected by funding cuts over this period. At the time of the launch of our 13th programme of law reform in 2017, for example, only four of the fourteen projects in the programme had departmental funding, and ten were reliant on the availability of core funds.[26] Those ten were to proceed only "if and when resources permit".[27]

3.17 The second aspect is one of appearance. There was a risk, adverted to by the Law Commission and other stakeholders during the Ministry of Justice's Tailored Review of the Law Commission conducted in 2019, of stakeholders forming the impression that we were undertaking projects principally to secure the funding that came attached to them.[28] The effect was to undermine the perception of independence which has been so integral to the success of the Commission and the respect in which it is held.

3.18 The Tailored Review identified a need for further work to determine whether changes were needed to the funding model "to improve its stability and robustness, and to remove any perception of a lack of independence". The Review recommended revisiting the balance between core funding and paid projects.[29]

3.19 As a result of that work, in 2020 a new funding arrangement was agreed in a Memorandum of Understanding between the Lord Chancellor

and the Law Commission.[30] This provides for all Law Commission funding to come from the Ministry of Justice. Under the arrangements, the Ministry of Justice will seek to recoup these costs from other Government departments where the Law Commission undertakes projects in areas for which the departments are responsible. The Commission may retain income from other Government departments in certain cases.

3.20 The Chair of the Law Commission explained the new funding model in evidence given to the Justice Select Committee in 2020.

> In summary, the Law Commission will no longer rely on income generation from Whitehall departments to supplement its core funding from the Ministry of Justice. Instead, the Law Commission will receive its entire operating budget from the Ministry direct. This budget should be sufficient for all five Statutory Commissioners to be fully utilised. The aim of this new model is to give the Commission financial stability, enabling it to operate more strategically, applying its resources to law reform priorities and having capacity to identify new areas of work.[31]

3.21 Under the new model, the Commission's budget for 2023/24 is just under £4.7 million.

3.22 Our new funding model is still young. Combined with the timescales to which Law Commission projects operate, this means that the full impact of the change is yet to be felt. We also caution that, owing to the many factors that feed into project selection, it may not be possible definitively to attribute any single piece of work to the new model. Nevertheless, funding has become a less dominant issue, allowing more breathing space to consider our project selection criteria in a holistic way. Recently-initiated projects on contempt of court and criminal appeals – which both reflect a perhaps more traditional approach of examining root and branch reform to a whole area of law – have benefitted from this change.

Criteria for project selection

3.23 The criteria we apply when deciding whether to take on a project are set out in the Protocols with the UK Government and the Welsh Ministers.[32] Earlier versions of the criteria had been developed from the early 1990's onward to introduce greater transparency into the project selection process. A former Chair, Sir Henry Brooke, recalled in a contribution to research conducted by Wilson Stark that the criteria were developed to ensure that projects were chosen which had genuine merit and might for that reason have a better chance of implementation.[33]

3.24 The Protocol criteria are developed in the 2020 Memorandum of Understanding to reflect the way in which they apply to current societal and economic issues.

1 Impact: The extent to which law reform will impact upon the lives of individuals, on business, on the third sector and on the Government. Benefits derived from law reform can include:
   a) modernisation, for example supporting and facilitating technological and digital development;
   b) economic advantage, for example reducing costs or generating funds;
   c) fairness, for example supporting individual and social justice;
   d) improving the efficiency and/or simplicity of the law, for example ensuring the law is clearly drafted and coherent to those who need to use it;
   e) supporting the rule of law, for example ensuring that the law is transparent; and
   f) improving access to justice, for example, ensuring procedures do not unnecessarily add to complexity or cost.
2 Suitability: Whether an independent, non-political, Law Commission is the most suitable body to conduct a proposed project.
3 Opinion: The extent to which proposed law reform is supported by ministers/Whitehall, the public, key stakeholders, Parliament and senior judiciary.[34]

4 Urgency: Whether there are pressing reasons (for example, practical or political) why reform is required. To ensure a manageable programme of work, the Commission will seek a mix of: (a) urgent projects with tight or fixed timeframes and (b) longer-term projects where there is more flexibility over delivery. It is recognised that there has to be a realistic assessment of the time and resource required to undertake the work to the quality expected from the Law Commission.
5 Balance: So far as possible the Commission will seek a portfolio of work which takes account of: (a) the statutory requirement to keep all areas of the law under review; (b) the balance of work across Government departments (i.e. different departmental law reform priorities); and (c) the balance of legal skills and expertise available to the Commission.[35]

3.25 It will be apparent that these criteria are incommensurable: it is not possible, for example, to measure the objective of improving access to justice against the question of urgency with any sort of precision. The application of these criteria is not formulaic, therefore. It would not be possible meaningfully to apply a points system to decide what project to take on. Instead, as with the substantive policymaking process, Commissioners exercise their own collective judgement when deciding whether to take on a project. The following sections look at each of the criteria more closely.

Impact

3.26 As recognised by the 2020 Memorandum, the potential benefits that can flow from law reform can take many forms. Measuring the impact, including but not limited to economic impact, of recommended reforms is an important part of each project. This is considered further in Chapter 7.[36]

3.27 The Chair drew attention in his introduction to the remarkable findings of a 2019 report on the value of law reform.[37] The report, commissioned by the Law Commission and undertaken by independent economists, found that the predicted economic gains from the five highest value projects in the five years preceding the report exceeded more than £3 billion over ten years.[38] The report identified a wide range of types of beneficial impact. These more indirect impacts positively affect millions of individuals and businesses in ways which need not be measured only in monetary terms,

although from a financial perspective alone they can produce significant consequential benefits.[39] These benefits were broadly summarised in seven key themes.

- Efficiency gains: projects which streamline and clarify the law reduce costs and lead to a more efficient allocation of resources for businesses, publicly funded organisations and individuals.
- Technology-driven growth: recommendations which seek to bring the legal system up to date with modern technology and introduce legislation to facilitate innovation allow technological gains to be realised.
- Well-being improvement: by ensuring that the welfare of citizens is fully taken into account by decision-makers, projects can improve well-being and help to bring about a more just and tolerant society.
- Harm prevention: reforms can prevent harm, for example by reducing environmental degradation and promoting sustainable growth.
- Rule of law: reforms improving confidence in the rule of law promote compliance, confidence in good government and reduce costs elsewhere in the system, for example in civil and criminal justice.
- Access to justice: projects which promote access to justice make the legal system more inclusive and offer better protection to the vulnerable.
- Modernising the legal system: recommendations which modernise the legal system increase confidence among citizens and the UK's standing internationally.[40]

3.28 The economic gains from implementation of our recommendations very considerably outweigh the cost of conducting the projects and implementing the recommendations.[41]

3.29 For politicians across the spectrum, the prospect of economic benefits is likely to be highly attractive. However, it is important to guard against any temptation simply to choose the projects that have the greatest economic potential. To do so would be contrary to our obligation to keep under review "all the law". Impact must be weighed against the need for a balanced range of work, which is discussed below. It is also important to bear in mind that, at

the project selection stage, the full impact of law reform in a given area cannot be known. Proposed reforms might look very different after consultation.

Suitability

3.30 The selection criteria ask whether an independent, non-political, Law Commission is the most suitable body to carry out the project. Although this is not spelled out further in the 2010 Protocol, the essence of the criterion is that the Commission does not take on projects which are "political" in nature and cannot be solved by legal analysis. "Political" is not defined, but it is clear that it means that the Commission will not take on "party political" subjects.

3.31 The exclusion of "political" questions does not mean, however, that the Commission is concerned only with technical matters and shies away from controversial projects. As Wilson Stark explains, "controversial sounding projects can be technical, and technical sounding projects can be controversial".[42] In the past, work suitable for the Commission has been described as confined to "lawyers' law", indicating a realm of technical, uncontroversial areas of law.[43] But it is because it is now understood that it would be rare for any area of law to be totally uncontroversial that that term is no longer viewed as an appropriate way to decide whether a project is suitable for the Commission. As Lord Scarman observed, "there is no cosy little world of lawyers' law in which learned men may frolic without raising socially controversial issues".[44]

3.32 The surrogacy project is a good example of where a "controversial-sounding" project can also be technical. Surrogacy, which arises where a woman bears a child on behalf of another couple or individual who intend to become the child's legal parents, is an issue which raises the policy question of whether the practice should be permitted or prohibited. This was not for the Commission to determine. It has long been the Government's view that surrogacy is a valid form of creating a family. As the practice has become more common, significant problems with the law have become apparent. In its current form, the law requires the intended parents to wait until the child has been born and then apply to court to become the child's legal parents. As a result, the surrogate is the legal parent during that period. This does not reflect the reality of the child's family life and can affect the intended parents' ability to make decisions about the child in their care.

Opinion

3.33 Stakeholder support is often indispensable to undertaking a law reform project. For one thing, it is an indicator that reform is needed. There need not be unanimity amongst stakeholders, but if none of those who use or are affected by a particular body of law are calling for reform, it is unlikely that any need exists.

3.34 Stakeholder support can also be powerful in impressing upon Government not only the need for reform in a particular area, but also the need for the type of in-depth consideration that the Commission can bring to a topic. If both the problem and the solution are obvious, the need for our involvement will be considerably less so.

3.35 Consultation with stakeholders includes contact with Parliamentarians and Members of the Senedd, often through All-Party Parliamentary Groups, and the judiciary. Opinions expressed through these channels will be important indicators of a need for reform in a particular area. Academic research also provides a reliable measure of the existence of a problem with the law.

Urgency

3.36 Where a project is urgent, it might have to take priority over other projects within a programme of law reform or referred by Government. It can even displace a current project. This happened when the Welsh Government referred the regulation of coal tip safety to the Commission following a serious tip slide. The project displaced a 13th programme project, administrative review, which, although approved as part of the programme, was not a priority to commence and could be paused.

3.37 The Commission's power to pause or slow work is recognised in the 2020 Memorandum of Understanding. Specific reference is made to the pausing or slowing of work for departments which have made no financial contribution to allow a Ministry of Justice project with higher priority to proceed.[45]

Balance

3.38 The new financial model set out in the 2020 Memorandum of Understanding identifies three criteria indicative of balance: the Commission's

statutory duty to keep all areas of the law under review; the balance of work across Government departments; and the balance of legal skills and expertise available to the Commission. At the same time, it introduces additional criteria in weighing the balance. For example, because of the central role of the Ministry of Justice in the justice system, there will often be a relatively high proportion of Ministry of Justice projects included in law reform programmes and by way of reference.[46]

3.39 The Memorandum requires that competing priorities, for example between a programme project or an urgent reference, or between the Ministry of Justice and other departments, "should be discussed transparently and promptly".[47]

3.40 The Memorandum provides an illustrative, non-exhaustive list of the types of work that might be found in a balanced portfolio:

- projects which address complex matters of legal policy where the law is at present failing individuals, business or the third sector;
- cutting-edge projects which look at new or future technological, economic or societal legal challenges;
- projects where timescales are likely to be tight, for example because of legislative priorities;
- longer-term law reform projects which address a diverse range of issues and deep-rooted complex and technical problems; and
- projects relating to consolidation, codification and statute law repeals work, aimed at streamlining and simplifying the law thereby increasing legal certainty.[48]

3.41 The Memorandum recognises the role of the Law Commission in relation to Wales, and states that each Law Commission programme should contain at least one Wales-specific project.[49]

Process of project selection

Programmes of law reform

3.42 One of our statutory functions is to prepare "programmes for the examination of different branches of the law with a view to reform".[50] There is no statutory time frame for programmes; in practice, they have tended

to last around three to five years.[51] Our 13th programme dates from 2017. At the time of writing, we are looking ahead to our 14th programme of law reform. The timetable for finalising the programme has had to be extended in view of Government priorities for the remainder of this Parliament. It is now unlikely to be concluded until after the next general election. The 13th programme has therefore run for longer than expected, with its original projects supplemented by ministerial references.

3.43 In the build up to a new programme, we conduct informal soundings with stakeholders to gather together initial ideas about prospective projects. Many of the lawyers who work at the Commission have expertise from private practice or elsewhere in Government and the public sector, and so have their ear to the ground in relation to current sentiment about areas of the law that are causing problems. The consultation process for existing projects may also generate an awareness of pressing issues related to the subject matter of a project but distinct from its terms of reference.

3.44 Based on this preliminary work, we build a short non-exhaustive catalogue of suggestions for what might be included in the programme. This catalogue is published at the launch of a formal public consultation on the content of the programme. We impose no restrictions on the ideas that consultees can submit to us, but we find it useful to prompt stakeholders to give their thoughts on the ideas we have already heard about, as well as making suggestions of their own. In the case of our 14th programme, this process led us to identify a number of broad themes for law reform which we presented as part of our public consultation. In our view, these common themes are likely to run across many future law reform projects.[52]

3.45 In addition to proposing themes for law reform and suggesting potential projects, we also strive to assist consultees to make the best case for their own ideas for projects. We do so with a structured consultation form, which includes questions about the possible impacts of reform, and how the problem they are describing has been dealt with in other jurisdictions.

3.46 Under the 1965 Act, programmes must be submitted to the Lord Chancellor for approval.[53] The requirement is, in effect, an instruction from Parliament to the Lord Chancellor to agree a programme on behalf of the Government as a whole. In practice, the Commission engages in a dialogue

with officials and ministers across a range of Government departments, including with the Lord Chancellor, about the projects that Commissioners are considering, before formally submitting any programme.[54] In the case of programme projects concerning Welsh devolved matters, the Welsh Protocol requires the Commission to consider the views of Welsh Ministers on the proposed project.[55] Once approved, programmes are laid before Parliament.[56]

3.47 Conducting programmes of law reform allows us to take a long-term strategic view of our law reform priorities. The consultation on our programmes means that stakeholders can feed in their opinion on the balance of work we should be conducting. The process of formulating a programme is perhaps the time when we most clearly keep under review all the law of England and Wales with a view to reform. The benefits of our programme work are cumulative. Projects suggested but not selected for one programme may be revisited for a later programme.

References

3.48 Formally, references always come from Government. References can be requested at any stage by any minister or Welsh Minister.[57] The 2020 Memorandum of Understanding envisages that approximately one-third of the Commission's work will be generated outside the law reform programme by way of a ministerial reference.[58] In practice, the ratio of references to programme work is variable, particularly during the period when a programme of work nears completion and the next programme has yet to be finalised. There is in any event a dynamic between the Commission and Government departments arising from our day-to-day interaction which can lead to ideas for new projects. The genesis of a reference may be a suggestion made by the Commission to a department: "why don't you ask us to do a project on X", or it may be that the idea for a project is raised by the department.

3.49 As the programme of work is formulated on the basis that the work will keep the Commission fully utilised, it is necessary to make decisions as to the priority to be given to projects as and when ministerial references are received.

Soliciting ideas from the public

3.50 Our statutory obligation to receive and consider law reform proposals is open-ended.[59] Proposals can be made by anyone at all, and we have always

welcomed information about the need for law reform in particular areas. Historically, however, our active solicitation of law reform ideas from the public was limited to our consultations on our programmes of law reform. Since 2022, we have published on our website a web form for anyone to send us their ideas for law reform projects. Like our programme consultations, the web form helps responders to structure their submissions in a way that most effectively informs us in the application of our selection criteria.

Project selection in Wales

3.51 The Welsh Government has had the power to refer projects directly to the Commission since 2015.[60] Meetings at a senior level between the Commission and the First Minister, the Counsel General and officials of the Welsh Government ensure that there are effective channels of communication to pave the way for a ministerial reference. Alternatively, the Commission may undertake a law reform project relating to Welsh law by including it in a programme of law reform.[61]

3.52 As explained above, the Protocol between the Welsh Government and the Law Commission, which largely mirrors the 2010 Protocol with the Lord Chancellor, sets out the approach to be taken to the selection of appropriate law reform work related to Welsh devolved matters.[62] We have additional mechanisms to help to ensure an effective Welsh voice in project selection.

3.53 Our Wales Advisory Committee advises us on project selection. The Committee meets twice a year. In establishing the Committee, our former Chair Lord Lloyd-Jones envisaged that one of the ways it would "promote Welsh-centred law reform" would be

> in the assessment of proposed projects which lie in policy areas wholly or partly devolved to the Welsh Assembly or the Welsh Government or which impact significantly on devolved responsibilities … by providing in each case an objective assessment of the need for reform and the context in which the law operates.[63]

3.54 The Law Commission's attendance at the annual Legal Wales conference helps to ensure that we remain well versed in constitutional and

legal developments in Wales and well informed about possible new project areas.[64] We also attend other events with a Welsh focus, for example the Association of London Welsh Lawyers' Annual Lecture, for the same purpose.[65]

Refining a project's scope

3.55 Whether a project has been included in a programme of law reform or has come to us by way of a ministerial reference, project selection cannot be said to be complete until the scope of the project has been identified. The scope and focus of the proposed work must be determined. The 2010 Protocol and the Welsh Protocol stipulate that, at the outset of a project, the Commission and the department with policy responsibility must agree the terms of reference for the project, including the output; appropriate review points at which to consult with the minister on the progress of the project; and the overall timescale.[66] To this end, we meet with officials from the department to discuss the scope of the project, including any limitations, for example in areas where the department has already decided its policy. We formulate and agree terms of reference. Once all the Protocol requirements have been agreed, these are usually incorporated into a formal Memorandum of Understanding. This document also identifies nominated project officers who maintain lines of communication over the currency of the project.

3.56 In some cases, it may not be possible reliably to determine the detailed scope of a project at the outset. Where the scope of a project is potentially very broad, it may be agreed with the department that we will begin with a formal scoping phase to narrow down the issues that should be considered. A scoping phase can help to ensure that the resulting law reform project is confined to issues that properly fall within the purview of the Commission. In our electoral law scoping paper, for example, we decided to exclude the franchise, electoral boundaries, and voting systems from further consideration.[67] We concluded that these were subjects best left to democratic or political consensus. Scoping work can also be used to hone a project to a manageable scale, prioritising areas most in need of reform. Occasionally we undertake a project that is purely concerned with scoping, in which we produce a report on the scope for law reform work in an area. A recent example is our project on data sharing.[68]

3.57 A degree of policymaking is also possible at the scoping phase. In our scoping paper on weddings law, we considered what should be the principles and objectives of an eventual law reform project.[69] We concluded that the project should not look to introduce universal civil marriage,[70] because it "would remove choice rather than accommodating it and would potentially add to the cost of marrying".[71] Accordingly, introducing universal civil marriage was excluded from the terms of reference of the full project.[72] Taking this option "off the table" at a preliminary stage meant that the subsequent consultation could be more focused on the detail of how a reformed law should work, unburdened by discussions around a potentially contentious option for reform.

3.58 During a scoping phase we will call upon input from stakeholders. Much of what we say about consultation in Chapter 5 is relevant to such scoping exercises. There is no set scheme for how we do a scoping consultation. In our planning law in Wales project, we published a scoping paper with questions for consultees, which marked the beginning of a formal public consultation period.[73] The results of the scoping consultation informed the scope of the project, as set out in the full consultation paper that followed.[74] A similar approach was taken in our elections project, save that our response to the consultation was published in a "scoping report", with the full consultation paper coming later.[75] While conducting a formal public consultation on scope gives us the fullest input, it does take more time, and risks consuming stakeholders' appetite for engagement before we even reach the stage of considering substantive reforms. We will sometimes therefore opt for more targeted informal consultations, as in the scoping phase of our project on weddings law, when we engaged extensively with stakeholders, including in order to understand how the current law operates for different faith groups.[76]

3.59 Terms of reference may change over the course of a project. This might be because some aspects of the project have been superseded by events. Alternatively, the department or the Commission might identify additional issues during the course of the project that cause the terms of reference to be expanded. The programme of communication between the Commission and department officials agreed at the outset will help to ensure that developments in the project, including any wider policy developments and changes in departmental priorities, will be communicated openly and

promptly.[77] Any formal change to the terms of reference must be clearly agreed and recorded and communicated to stakeholders.

Working with Scotland and Northern Ireland

3.60 The Scottish Law Commission, also established by the Law Commissions Act 1965, undertakes work arising from its own programmes of work or on a reference from the Scottish Ministers or UK Government.[78] These projects may concern either devolved and/or reserved areas of law. The Commissions have a statutory duty to consult with each other, and this interaction may influence project selection.[79] Many areas of law examined by the Commissions are the same or similar, and in others there is a substantial cross-border element. In practice the two Commissions know each other well and from time to time hold joint meetings and events to discuss issues of common concern and interest. We have worked jointly with the Scottish Law Commission on many projects, and in other cases have consulted with our Scottish counterparts where a project may affect Scots law.[80] This collaboration has been described as "extremely strong and positive".[81] Recent joint projects have included surrogacy, automated vehicles and electoral law.[82]

3.61 The Northern Ireland Law Commission was established in 2007[83] but has not operated since 2015 due to budgetary constraints.[84] Prior to this, all three Commissions worked jointly on projects such as the regulation of health and social care professionals project which ran between 2010 and 2014. The Northern Ireland Law Commission has recently appointed a Chair.[85] We are strongly supportive of its resurrection. The absence of a Commission in Northern Ireland hinders our ability to recommend law reform which would cover the entirety of the jurisdiction of the UK including Northern Ireland. In the event that the Commission is fully revived, we look forward to exploring new avenues for co-operation.

3.62 Our remit is to make recommendations for England and Wales. It is a matter for Government whether recommendations in relation to reserved/excepted matters are extended UK-wide. The communications offences in the Online Safety Act 2023 are an example of this approach. Telecommunications is reserved/excepted.[86]

Notes

1 Law Commissions Act 1965, s 3.
2 Law Commissions Act 1965, s 3.
3 There are fourteen projects in the most recent programme.
4 S Wilson Stark, *The Work of the British Law Commissions: Law Reform… Now?* (2017) p 41.
5 Above, pp 118 to 132.
6 The Law Commission's Annual Reports provide an analysis of the implementation status of all Law Commission reports as a measure of the Commission's overall achievements since its creation: see, most recently, Law Commission, *Annual Report 2021-22*, app A, https://www.lawcom.gov.uk/annual-report-2021-2-published/. See also M Jolley, "Independence and Implementation: In Harmony and in Tension" (2019) 21 *European Journal of Law Reform* 562; J Teasdale, "Implementation of Law Reform Proposals in the United Kingdom: A Continuing Dilemma?" (2021) 23 *European Journal of Law Reform* 405; and M Dyson, J Lee & S Wilson Stark (eds), *Fifty Years of the Law Commissions: The Dynamics of Law Reform* (2016) pt V.
7 See paras 3.23 to 3.41 below for further discussion of the criteria we employ in the selection process.
8 Law Commissions Act 1965, ss 3(2) and 6(2).
9 For historical accounts of the Law Commission's work, see Lady Hale, "Fifty Years of the Law Commissions: the Dynamics of Law Reform Now, Then and Next" and P Mitchell, "Strategies of the Early Law Commission" in M Dyson, J Lee & S Wilson Stark (eds), *Fifty Years of the Law Commissions: The Dynamics of Law Reform* (2016); and S Wilson Stark, *The Work of the British Law Commissions: Law Reform… Now?* (2017).
10 T Etherton, "Law reform in England and Wales: a shattered dream or triumph of political vision?" (2008) 73 *Amicus Curiae* 3, 8; J Munby, *Shaping the Law – The Law Commission at the Crossroads*, Denning Lecture (29 November 2011) p 3; D Lloyd Jones, *The Law Commission and the Implementation of Law Reform*, Sir William Dale Annual Lecture (22 November 2012) pp 14 to 15.
11 Implementation rates are considered more fully at paras 8.7 and 8.8 below.
12 See paras 8.9 to 8.14 below.
13 *Protocol between the Lord Chancellor (on behalf of the Government) and the Law Commission* (2010) Law Com No 321, https://www.lawcom.gov.uk/document/protocol-between-the-lord-chancellor-on-behalf-of-the-government-and-the-law-commission/, paras 6(2) and 8(3).
14 Law Commission Act 2009, s 2, inserting s 3B into the Law Commissions Act 1965.

15 Law Commission, *The Law Commission and Government: Working Together to Deliver the Benefits of Clear, Simple, Modern Law* (2004).

16 Protocol Between the Welsh Ministers and the Law Commission (2015), https://www.lawcom.gov.uk/document/protocol-rhwng-gweinidogion-cymru-a-comisiwn-y-gyfraith-protocol-between-the-welsh-ministers-and-the-law-commission. See also para 2.10 above.

17 See p 31 above.

18 Law Commission evidence to the House of Commons Justice Select Committee, 2 March 2016, https://www.lawcom.gov.uk/document/evidence-to-justice-select-committee-2-march-2016/.

19 Law Commission evidence to the House of Commons Justice Select Committee, 3 July 2018, https://old.parliament.uk/business/committees/committees-a-z/commons-select/justice-committee/inquiries/parliament-2017/work-of-the-law-commission-17-19/publications/.

20 Law Commission, *Annual Report 2021-22*, app B provides a breakdown of our spending. This shows that staffing costs account for some 84% of the Law Commission's budget: https://www.lawcom.gov.uk/annual-report-2021-2-published/. All of our spending is non-property related, as we do not pay rent for our premises.

21 Every project area in which we operate has a responsible department. One example of direct funding for an individual project is our project on autonomous vehicles, which was funded directly from the Department for Transport and the Department for Business, Energy & Industrial Strategy through the Centre for Connected and Autonomous Vehicles.

22 Law Commission written evidence to the House of Commons Justice Select Committee, 3 July 2018, https://old.parliament.uk/business/committees/committees-a-z/commons-select/justice-committee/inquiries/parliament-2017/work-of-the-law-commission-17-19/publications/, para 18.

23 Ministry of Justice, *Tailored Review of the Law Commission of England and Wales* (2019), https://www.gov.uk/government/publications/tailored-review-of-the-law-commission, para 7.2. For a contrasting view, see M Jolley, "Independence and Implementation: In Harmony and in Tension" (2019) 21 *European Journal of Law Reform* 562, 581.

24 Law Commission oral evidence to the House of Commons Justice Select Committee, 3 July 2018, https://old.parliament.uk/business/committees/committees-a-z/commons-select/justice-committee/inquiries/parliament-2017/work-of-the-law-commission-17-19/publications/.

25 Above.

26 One of the funded projects was residential leasehold and commonhold, which consisted of three sub-projects, each of which was being funded.

27 Law Commission oral evidence to the House of Commons Justice Select Committee, 3 July 2018, https://old.parliament.uk/business/committees/committees-a-z/commons-select/justice-committee/inquiries/parliament-2017/work-of-the-law-commission-17-19/publications/.

28 Ministry of Justice, *Tailored Review of the Law Commission* (2019) https://www.gov.uk/government/publications/tailored-review-of-the-law-commission, para 7.5.

29 Above, para 7.7.

30 *Memorandum of Understanding between the Law Commission and Lord Chancellor (on behalf of Government): Law Commission funding model* (2020), https://www.lawcom.gov.uk/new-funding-model-agreed-with-ministry-of-justice/.

31 Law Commission written evidence to the Justice Select Committee, 24 November 2020, https://committees.parliament.uk/work/818/work-of-the-law-commission/publications/3/correspondence/, para 25.

32 *Protocol between the Lord Chancellor (on behalf of the Government) and the Law Commission* (2010) Law Com No 321, https://www.lawcom.gov.uk/document/protocol-between-the-lord-chancellor-on-behalf-of-the-government-and-the-law-commission/, paras 5 and 9; *Protocol Between the Welsh Ministers and the Law Commission* (2015), https://www.lawcom.gov.uk/document/protocol-rhwng-gweinidogion-cymru-a-comisiwn-y-gyfraith-protocol-between-the-welsh-ministers-and-the-law-commission, para 7. The project selection criteria link to the statutory duties of the Law Commission set out in the Law Commissions Act 1965, s 3: see p 19 of the Chair's introduction above.

33 The research was conducted in 2015 and included discussions with a number of former Commissioners about the introduction of project selection criteria: S Wilson Stark, *The Work of the British Law Commissions: Law Reform… Now?* (2017) pp 63 to 64 and 137.

34 In the case of projects concerning Welsh devolved matters, the Protocol with Welsh Ministers requires consideration of the views of Welsh Ministers: *Protocol Between the Welsh Ministers and the Law Commission* (2015), https://www.lawcom.gov.uk/document/protocol-rhwng-gweinidogion-cymru-a-comisiwn-y-gyfraith-protocol-between-the-welsh-ministers-and-the-law-commission, para 7.

35 *Memorandum of Understanding between the Law Commission and Lord Chancellor (on behalf of Government): Law Commission funding model* (2020), https://www.lawcom.gov.uk/new-funding-model-agreed-with-ministry-of-justice/, annex A.

36 See paras 7.11 to 7.19 below, which consider economic and equality impact assessments, and other specific impact assessments used in projects to which they have particular relevance.
37 See p 14 above.
38 D Jones and R Wainwright, *Value of Law Reform* (2019), https://www.lawcom.gov.uk/law-commission-reforms-provide-gains-of-3-billion-over-10-years/.
39 See the Chair's introduction at p 14 above for recent examples.
40 D Jones and R Wainwright, *Value of Law Reform* (2019), https://www.lawcom.gov.uk/law-commission-reforms-provide-gains-of-3-billion-over-10-years/, pp 13 to 16.
41 See the Chair's introduction at p 31 above for a closer look at the cost of projects and of running the Law Commission as a whole.
42 S Wilson Stark, *The Work of the British Law Commissions: Law Reform… Now?* (2017) p 78.
43 Above, p 74.
44 L Scarman, *Law Reform: The New Pattern (The Lindsay Memorial Lectures)* (1968) p 27, cited by S Wilson Stark, *The Work of the British Law Commissions: Law Reform… Now?* (2017) pp 74 to 75.
45 *Memorandum of Understanding between the Law Commission and Lord Chancellor (on behalf of Government): Law Commission funding model* (2020), https://www.lawcom.gov.uk/new-funding-model-agreed-with-ministry-of-justice/, para 11.
46 Above, para 10 and annex A.
47 Above, para 10.
48 Above, annex A.
49 *Memorandum of Understanding between the Law Commission and Lord Chancellor (on behalf of Government): Law Commission funding model* (2020), https://www.lawcom.gov.uk/new-funding-model-agreed-with-ministry-of-justice/, para 15.
50 Law Commissions Act 1965, s 3(1)(b) and (2).
51 In contrast, the Scottish Law Commission has fixed the length of its programmes. It stipulated, for example, that the 10th programme of law reform would run for five years from the beginning of 2018 to the end of 2022, with each project within the programme classified as short, medium or long-term: Scottish Law Commission, *Tenth Programme of Law Reform* (2018) Scot Law Com No 250, https://www.scotlawcom.gov.uk/files/5615/1922/5058/Tenth_Programme_of_Law_Reform_Scot_Law_Com_No_250.PDF, paras 1.1 and 1.12.
52 These are: emerging technology; leaving the EU; the environment and carbon neutrality; legal resilience; and simplification of the law. See the Chair's introduction at p 40 above and https://www.lawcom.gov.uk/14th-programme/#theme.
53 Law Commissions Act 1965, s 3(1)(b).

54 See para 3.10 above.

55 *Protocol Between the Welsh Ministers and the Law Commission* (2015), https://www.lawcom.gov.uk/document/protocol-rhwng-gweinidogion-cymru-a-comisiwn-y-gyfraith-protocol-between-the-welsh-ministers-and-the-law-commission, para 7.

56 Law Commissions Act 1965, s 3(3).

57 Law Commissions Act 1965, s 3(1)(e) and (ea).

58 *Memorandum of Understanding between the Law Commission and Lord Chancellor (on behalf of Government): Law Commission funding model* (2020), https://www.lawcom.gov.uk/new-funding-model-agreed-with-ministry-of-justice/, para 14.

59 Law Commissions Act 1965, s 3(1)(a).

60 See para 2.8 above. The Wales Act 2014 amended the Law Commissions Act 1965 to take account of Welsh devolution: s 3D provides the statutory basis for making the Protocol and s 3(1)(ea) enables the Law Commission to accept law reform projects referred to it by the Welsh Ministers.

61 Wales-only projects carried out since 2015 are described at paras 2.14 to 2.29 above.

62 Protocol Between the Welsh Ministers and the Law Commission (2015), https://www.lawcom.gov.uk/document/protocol-rhwng-gweinidogion-cymru-a-comisiwn-y-gyfraith-protocol-between-the-welsh-ministers-and-the-law-commission/, para 6. See para 3.23 above. See para 2.9 above for the definition of a "Welsh devolved matter".

63 D Lloyd Jones, *The Law Commission and Law Reform in a Devolved Wales*, Wales Governance Centre Annual Lecture 2013, https://www.lawcom.gov.uk/lectures-talks/the-law-commission-and-law-reform-in-a-devolved-wales/.

64 See para 2.12 above.

65 The Association's most recent lecture, *The practicalities of legislating for Wales (and other nations) at Westminster – UKIM, REUL, Levelling-Up, Strikes and other matters*, was given by Lord Thomas of Cwmgiedd on 27 April 2023: https://www.alwl.co.uk/.

66 *Protocol between the Lord Chancellor (on behalf of the Government) and the Law Commission* (2010) Law Com No 321, https://www.lawcom.gov.uk/document/protocol-between-the-lord-chancellor-on-behalf-of-the-government-and-the-law-commission/, para 10; *Protocol Between the Welsh Ministers and the Law Commission* (2015), https://www.lawcom.gov.uk/document/protocol-rhwng-gweinidogion-cymru-a-comisiwn-y-gyfraith-protocol-between-the-welsh-ministers-and-the-law-commission, para 8.

67 Law Commission, *Electoral Law in the United Kingdom: A Scoping Report* (2012) paras 3.2 to 3.33.

68 Data Sharing for Public Bodies (2014) Law Com No 351.
69 Law Commission, *Getting Married: A Scoping Paper* (2015) ch 3.
70 A system of weddings law in which the only legally recognised marriage ceremonies are civil marriage ceremonies.
71 Law Commission, *Getting Married: A Scoping Paper* (2015) para 4.68(1).
72 Getting Married: A Consultation Paper on Weddings Law (2020) Law Commission Consultation Paper No 247, paras 1.68 to 1.76 and app 1.
73 Law Commission, *Planning Law in Wales: Scoping Paper* (2016).
74 Planning Law in Wales (2017) Law Commission Consultation Paper No 233.
75 Law Commission, *Electoral Law in the United Kingdom: A Scoping Consultation Paper* (2012); Law Commission, *Electoral Law in the United Kingdom: A Scoping Report* (2012); Electoral Law: A Joint Consultation Paper (2014) Law Commission Consultation Paper No 218; Scottish Law Commission Discussion Paper No 158; Northern Ireland Law Commission Consultation Paper No 20.
76 Law Commission, *Getting Married: A Scoping Paper* (2015), para 1.43.
77 *Protocol between the Lord Chancellor (on behalf of the Government) and the Law Commission* (2010) Law Com No 321, https://www.lawcom.gov.uk/document/protocol-between-the-lord-chancellor-on-behalf-of-the-government-and-the-law-commission/, paras 12 to 14; *Protocol Between the Welsh Ministers and the Law Commission* (2015), https://www.lawcom.gov.uk/document/protocol-rhwng-gweinidogion-cymru-a-comisiwn-y-gyfraith-protocol-between-the-welsh-ministers-and-the-law-commission, paras 10 to 12.
78 Law Commissions Act 1965, s 3(1)(e).
79 Law Commissions Act 1965, s 3(4).
80 See, for example, Employment Law Hearing Structures (2020) Law Com No 390, paras 1.8 to 1.15, and Patents, Trade Marks and Designs: Unjustified Threats (2015) Law Com No 360.
81 Lord Pentland, "The Scottish Law Commission and the Future of Law Reform in Scotland", in M Dyson, J Lee and S Wilson Stark (eds), *Fifty Years of the Law Commissions: The Dynamics of Law Reform* (2016) p 346.
82 See the surrogacy, automated vehicles and electoral law project pages: https://www.lawcom.gov.uk/project/surrogacy/, https://www.lawcom.gov.uk/project/automated-vehicles/ and https://www.lawcom.gov.uk/project/electoral-law/. For older joint projects on consumer law which have been largely implemented, see Consumer Remedies for Faulty Goods Report (2009) Law Com No 317; SLC No 216 and Unfair Terms in Consumer Contracts: Advice to Government (2013). For other recent joint projects, see https://www.scotlawcom.gov.uk/law-reform/tenth-programme-of-law-reform-consultation/.

83 The Northern Ireland Law Commission was established by the Justice (Northern Ireland) Act 2002, ss 50 to 52, which came into effect in 2007.
84 http://www.nilawcommission.gov.uk/.
85 Sir David Scoffield, a Judge of the High Court of Northern Ireland, was appointed Chair of the Northern Ireland Law Commission on 1 July 2021.
86 The Law Commission's recommendations to reform the communications offences were made in Modernising Communications Offences (2021) Law Com No 399.

Chapter 4

Working with Government, Parliament and the Senedd

4.1 The Law Commission's relationship with both the UK Government and Parliament and the Welsh Government and the Senedd is essential to its effectiveness. This relationship has both formal and informal aspects.

Government

4.2 Our relationship with Government is led by our Chair – who is a Court of Appeal judge – and our Chief Executive – a post held by a senior civil servant. As an arm's length body of the Ministry of Justice, the Chair and Chief Executive keep close contact with its ministers and officials, discussing budget, staffing and other strategic issues. Under the Law Commissions Act 1965, we have a particular relationship with the Lord Chancellor – who is also the Secretary of State for Justice. At the time that the 1965 Act was passed, the Lord Chancellor was both a Cabinet minister and a judge. Under the Constitutional Reform Act 2005 the Lord Chancellor no longer has to be a lawyer.[1] The Lord Chancellor is responsible for appointing the Chair and other Commissioners. We make annual reports to the Lord Chancellor, and he or she has the function of approving our programmes of law reform.[2] Save in the case of Wales-only projects, our law reform reports are addressed to the Lord Chancellor. In turn, the Lord Chancellor lays our law reform recommendations, annual reports, and programmes of law reform before Parliament and has a duty to report each year to Parliament on Law Commission proposals for reform.[3]

4.3 Outside these formal aspects of our relationship, the Chair and the Lord Chancellor maintain an informal relationship, meeting from time to time to discuss our work. The Chief Executive's day-to-day management of the Commission's relationship with the Ministry of Justice includes engaging with senior departmental officials.

4.4 Communication with Government is not, however, limited to the Ministry of Justice. The Chair and the Chief Executive, together with all the Commissioners, have a role in engaging with ministers and senior officials from all UK Government departments and with Welsh Government to increase awareness of the Law Commission and its work. The Chief Executive in particular works to promote contacts and present the Commission's perspective, assisted by the Head of Legal Services, one of the senior lawyers at the Commission. The Chief Executive, Head of Legal Services and senior legal staff meet with legal and policy officials across Government to discuss the Commission, its work and the potential for new projects. That might, for example, include meeting with senior members of the Government Legal Department, the Number 10 Policy Unit and departmental strategy teams.

4.5 This informal engagement is important in securing references. Ministers and their advisers might know they have a policy problem, but may not immediately realise the Law Commission would be the right body to deal with it. It is important that we remain visible and relevant to Government departments.

4.6 The Law Commission's independent law reform projects are often of interest to Parliamentarians from across the political divide and it is in the public interest for them to have an informed understanding of the Law Commission and its work. That is particularly the case when Government is likely to present legislation to Parliament to implement the Law Commission's recommendations. The Chair and Commissioners therefore also communicate with HM Opposition and other political parties.

4.7 From time to time, the Law Commission is asked by opposition politicians (MPs and peers) to provide information about its law reform work in general, or about specific projects. The Commission's work can be extremely detailed and therefore briefings and discussion can help these stakeholders to understand what the Commission is proposing and how

it will have an impact on people. These requests are treated on a case-by-case basis but the Commission considers it important to respond to these requests and ensure accurate information is provided.

4.8 All Law Commission staff, and Commissioners and the Chair, ensure they maintain the Commission's politically neutral stance when engaging with opposition or crossbench politicians. Any briefing, information or discussion is given for the purpose of providing accurate information rather than for any political purpose.

Government's role during our projects

4.9 For each of the projects that we undertake, there is a Government department, known as our departmental "sponsor", with corresponding policy responsibility.[4] Under our Protocols with the Lord Chancellor and the Welsh Ministers, the relevant department provides staff to liaise with us during the project (to include, unless otherwise agreed, a policy lead, a lawyer and an economist) and a programme of regular communications will be agreed.[5]

4.10 During the currency of a project, our relationship with this "lead" department is twofold. First, there is an administrative aspect to the relationship. Our project selection criteria are designed to ensure that we only undertake work in areas where Government has an active interest.[6] The Commission's project team therefore has regular meetings with designated officials to keep the department updated about the progress of our work. These meetings, typically held each month, are also an opportunity for the Commission and the department to share relevant developments in the area. In some cases, the department will itself be pursuing related policy work. It will be important for the project team to be aware of these initiatives. Outside of meetings, the project team maintains an open line of communication with their departmental counterparts. Especially in the early stages of a project, we often look to departmental officials to put us in contact with stakeholders with whom they have an existing relationship.

4.11 The purpose of this interaction is to ensure that both the project team and the department remain up to date about policy developments of relevance to the subject matter of the project. In this sense, this continuing relationship is mutually beneficial. In the case of the residential leasehold

project, for example, this led to the updating of the project's terms of reference to make specific provision for the extent to which the work would consider shared ownership leases.[7]

4.12 We may share drafts of our work with the department as they develop, and, once a consultation paper or report is ready for circulation to Commissioners for peer review, our general practice is to give sight of it to the department. This gives the department advance notice of our likely recommendations, and the opportunity to make factual comments. It would not be appropriate for the department to seek to influence the Commission's policy at this stage, other than by pointing out misconceptions or inaccuracies that Commissioners would wish to take into account when reaching their conclusions. We generally also share the final draft before publication.

4.13 The second aspect to our relationship stems from the fact that Government is itself a stakeholder in relation to the substantive legal issues our projects address. As the democratic representative of the public interest, Government has a general interest in the quality of the law. Government is also one of the entities that would be subject to the laws we recommend – for example as a user of documents executed with electronic signatures, or as a party to arbitration proceedings. Government, or public organisations for which it is responsible, have particular responsibilities in relation to the functioning of much of the law we examine – for example authorising automated vehicles, registering transactions of land, or applying the immigration rules to applications. And Government often holds data that informs our policymaking.

4.14 For all these reasons, Government is an important stakeholder, and it is vital that we consult it about reforms. As with any other stakeholder, this typically involves bilateral meetings where we discuss the problems with the law and possible solutions.[8] These meetings are distinct from the regular meetings with our departmental sponsor described above. They are chiefly with officials from the "lead" department, being the department with the relevant policy responsibility. But in some projects, Government's policy interest can span multiple departments. For example, in our project on weddings law, we held consultation meetings with the Department for Levelling Up, Housing and Communities; the Department for Transport; the Foreign and Commonwealth Office; the Government Equalities Office;

HM Treasury; the Home Office; the Ministry of Defence; and the Ministry of Justice. In our project on the protection of official data, we held meetings with a number of senior Government representatives, including from the security services, to learn about security- related risks.

4.15 In projects where the policy area concerned is not devolved to Wales, we will seek the views of the Welsh Government about whether there are any Wales-specific matters that need to be considered.

4.16 The technical nature of much of our work means that as well as ministerial departments, we often consult executive agencies (like the Maritime & Coastguard Agency and the Driver and Vehicle Standards Agency), non-departmental public bodies (like the Criminal Cases Review Commission and HM Land Registry), and non-ministerial departments (like the Crown Prosecution Service). As well as meeting with us, Government can also submit a formal written consultation response.

4.17 As with other stakeholders, it is important that we are able to have frank discussions with Government. Our project teams need to be able to share their provisional policy thinking, so that Government can give its opinion. And Government should be able to share its concerns and ambitions around reform. We work on the basis that our discussions with Government are in confidence, unless and to the extent it is agreed that we may disclose the views expressed. It is important that topics can be explored freely, and there is a pragmatic awareness that policy positions may still be developing. This is in contrast to a formal consultation response, which represents the stakeholder's concluded view. Both we and Government officials are clear, however, that the Commission is independent of Government, and consultation meetings are not an opportunity for Government to direct our policymaking. As with all stakeholders, the function of consultation is instead to inform Commissioners in the exercise of their own policymaking judgement.[9]

4.18 Moreover, just as with non-governmental consultees, we do not allow the confidentiality of our meetings to impede the transparency of our policymaking process. We state openly in our publications how the information shared and views expressed by consultees – governmental or otherwise – have impacted on the development of our policy.[10] In practice we prefer to rely on formal consultation responses to explain our reasoning,

as properly representative of the stakeholder's position, but if necessary, we obtain approval for sharing what consultees have said in their meetings with us.[11] If Government does not agree to such publication, its views cannot have the same bearing on Commissioners' decisions, and we may refuse to consider them altogether.

4.19 This tension between confidentiality and transparency was particularly acute in our work on the protection of official data. There, some of the information provided by Government was classified as SECRET or TOP SECRET. As the Chair explains in his introduction, we could not publish that information, and so we agreed a special procedure for dealing with confidential and secret evidence to enable us to maintain transparency to the greatest degree possible.[12]

4.20 After we publish our final report, there are a number of ways in which we can continue to support Government in the implementation of our recommendations. We say more about what this involves in Chapter 8.

Informal advice

4.21 Outside of our own projects, our staff and Commissioners are sometimes in a position to provide a limited level of informal specialist advice to colleagues in Government. For example, before legislating to allow wills to be witnessed by video link during the COVID pandemic, officials at the Ministry of Justice consulted with Law Commission staff (who had built up an understanding of the law and practice in this area from working on the Commission's separate wills project) about the implications of the Government's proposed reform.[13] This was emergency legislation designed to address urgent problems, and, as explained in the explanatory memorandum to the legislation, for that reason it was not possible for Government to conduct a formal public consultation.[14]

4.22 Those offering advice were doing so as experts at the Commission, and not as the representatives of Government, which has its own policy officials and lawyers. Accordingly, this was not formal advice given by the Commission (through its process of consultation and peer review). It follows that the Commission makes clear to Government that any advice given by a Commission official which the Government chooses to accept must then be "owned" by the Government.

Parliament and the Senedd

4.23 There are a number of formal mechanisms through which the Law Commission interacts with the UK Parliament and the Senedd. Some of these are mediated through the Lord Chancellor, who has particular functions and duties in relation to the Law Commission.[15] The Lord Chancellor lays before the UK Parliament our law reform recommendations, our annual reports, and our programmes of law reform. The Lord Chancellor must also report each year to Parliament, setting out the Law Commission proposals for reform that have been implemented during the year and those that have not yet been implemented, including "plans for dealing with any of those proposals" and, where any decision has been taken not to implement, "the reasons for the decision". The annual reporting duty is discussed further in Chapter 8.[16] In Wales, the Welsh Ministers are required to report annually to the Senedd on the implementation of Law Commission proposals relating to devolved Welsh matters.[17]

4.24 In addition, the Commission's Chief Executive is, as a matter of best administrative practice, accountable to the Ministry of Justice's Principal Accounting Officer (the Permanent Secretary) for the management of the Law Commission's resources.[18] He or she may be required to give evidence to the Public Accounts Committee, normally with the Principal Accounting Officer, on the stewardship and use of public funds by the Law Commission.

4.25 We also have a direct relationship with Parliament.[19] Commissioners and project staff maintain *ad hoc* contact with a number of committee chairs. We give evidence to committees which are scrutinising bills intended to implement our recommendations.[20] We have more regular contact with the House of Commons Justice Select Committee and the House of Lords Justice and Home Affairs Committee. The Chair, for example, has appeared before the Justice Select Committee to discuss our work from a more strategic perspective.[21] In 2018, the Chair appeared together with the Chief Executive before the House of Commons Justice Select Committee to give evidence in relation to the funding of the Law Commission.[22]

4.26 We have also given evidence in relation to our reports and ongoing project work. In recent years, this has included evidence to the House of Commons Select Committee on Leasehold Reform;[23] House of Commons Women and Equalities Committee in relation to the rights of cohabiting

partners;[24] House of Commons Petitions Committee on online abuse;[25] and House of Commons Home Affairs Committee and Justice Committee on evidence in sexual offences prosecutions.[26] Another example, going a little further back, was our evidence to the Public Administration and Constitutional Affairs Select Committee on the need for reform of electoral law.[27]

4.27 In relation to our Welsh work, this direct relationship extends to the Senedd and includes appearances before Senedd Committees. We have given evidence to the Senedd's Legislation, Justice and Constitutional Affairs Select Committee in relation to the implementation of our report on the form and accessibility of the law in Wales by the Legislation (Wales) Bill,[28] and answered questions concerning justice in Wales and the devolved tribunals.[29] We also gave evidence to the same Committee on the Historic Environment (Wales) Bill.[30] We gave evidence to the Finance Committee of the National Assembly of Wales in relation to our project reviewing the powers of public service ombudsmen.[31]

4.28 Our relationship with individual MPs and peers is also important. The Law Commission proactively undertakes briefing for groups of politicians, for example by attending All-Party Parliamentary Groups or providing open briefings. These may relate to specific projects, or may be of a more general nature to enhance understanding of the Law Commission or to support the Law Commission's statutory duty to keep all the law under review.

4.29 In relation to specific projects, Parliamentarians can be powerful voices to persuade Government of the need for reform both before and after we undertake a project. Given that our recommendations are, for the most part, implemented by legislation passed and scrutinised by Parliament, we are keen to provide Parliamentarians with a thorough understanding of our work.

4.30 For members of the public, MPs are often an early port of call when seeking assistance with problems whose root cause lies in the state of the law. MPs can therefore be an important conduit for public concern, either by directly putting individuals in touch with us, or by relaying to us what they are hearing in surgeries and in their inboxes. This type of information is especially valuable when we are building a case for taking on a law reform project.

4.31 Members of the UK Parliament and the Senedd may themselves have an interest in our projects. It is not uncommon for us to hold consultation meetings with them or receive written consultation submissions from them. This was the case, for example, in the consultation on coal tip safety in Wales.[32]

4.32 Working with All-Party Parliamentary Groups can be an effective way of communicating with Parliamentarians with particular interests. These are subject-specific groupings of MPs and peers that work on a cross-party basis. In many cases their members choose to involve individuals and organisations from outside Parliament who share an interest in the subject matter of the group.[33] For example, Professor Nick Hopkins addressed the Leasehold and Commonhold All-Party Parliamentary Group on a number of occasions during the currency of the Commission's residential leasehold and commonhold project, and launched the final reports at one of their meetings.[34] He and his team, together with the Scottish Law Commission, also engaged regularly with the Surrogacy All-Party Parliamentary Group over the course of the surrogacy project.[35] The automated vehicles team, including Nicholas Paines KC and team lawyers, together with their Scottish Law Commission counterparts, presented the Law Commissions' recommendations regarding automated vehicles at three sessions of the Connected and Automated Mobility All-Party Parliamentary Group.[36] Professor Sarah Green gave evidence to the Crypto and Digital Assets All-Party Parliamentary Group inquiry.[37]

4.33 All-Party Parliamentary Groups also offer an important tool when gauging the need for law reform in a new project area or in its early stages. This was the case with our burial, cremation and new funerary methods project. An interaction with an All-Party Parliamentary Group when we were about to start the scoping stage of the project provided early views on the issues in need of reform and introductions to useful stakeholders. Another example of early engagement is with the All-Party Parliamentary Group on Miscarriages of Justice. Professor Penny Lewis addressed the group in the preliminary stages of the criminal appeals project. This has led to continued beneficial contact with the group and its members.

Notes

1 Constitutional Reform Act 2005, s 2.
2 Law Commissions Act 1965, ss 3(1)(b) and 3(3).
3 The Lord Chancellor's accountability to Parliament is considered further below at para 4.23.
4 The sponsor will not necessarily fund the project. The term denotes policy responsibility rather than any financial relationship.
5 *Protocol between the Lord Chancellor (on behalf of the Government) and the Law Commission* (2010) Law Com No 321, https://www.lawcom.gov.uk/document/protocol-between-the-lord-chancellor-on-behalf-of-the-government-and-the-law-commission/, para 11; *Protocol Between the Welsh Ministers and the Law Commission* (2015) https://www.lawcom.gov.uk/document/protocol-rhwng-gweinidogion-cymru-a-comisiwn-y-gyfraith-protocol-between-the-welsh-ministers-and-the-law-commission, para 9.
6 See para 3.10 above.
7 https://www.lawcom.gov.uk/project/residential-leasehold-and-commonhold/.
8 See ch 5 for a discussion of our relationship with stakeholders generally.
9 See paras 5.36 and 5.37 below.
10 See paras 7.6 to 7.7 below.
11 See para 5.27 below.
12 Protection of Official Data (2020) Law Com No 395, paras 1.23 to 1.25 and 1.89, and see the Chair's introduction at pp 35 to 37 above.
13 The Wills Act 1837 (Electronic Communications) (Amendment) (Coronavirus) Order SI 2020/952. See https://www.gov.uk/government/news/video-witnessed-wills-to-be-made-legal-during-coronavirus-pandemic.
14 See the explanatory memorandum to the legislation: https://www.legislation.gov.uk/uksi/2020/952/pdfs/uksiem_20200952_en.pdf.
15 In the usual way that Government ministers are accountable to Parliament: see Cabinet Office, *Ministerial Code* (27 May 2022) para 1.3(b).
16 Law Commissions Act 1965, s 3A. See paras 8.70 to 8.76 below.
17 Law Commissions Act 1965, s 3C.
18 Code of Best Practice for Law Commissioners (2009), https://www.lawcom.gov.uk/about/our-policies-and-procedures/.
19 This relationship is recognised in the *Framework Document: Ministry of Justice and the Law Commission for England and Wales* (2015), https://www.lawcom.gov.uk/document/framework-document/, para 3.9.
20 Recent examples include the evidence of Professor Penny Lewis and Dr Nicholas Hoggard to the House of Commons Public Bills Committee on the National

Security Bill, and the evidence of Professor Nick Hopkins to the House of Lords Special Public Bills Committee in relation to the Charities Bill. The Charities Bill was introduced under the special procedure for Law Commission bills. See paras 8.22 to 8.34 below for further discussion of the special procedure.

21 See paras 8.15 to 8.16 below.

22 Law Commission oral evidence to the House of Commons Justice Select Committee, 3 July 2018, https://old.parliament.uk/business/committees/committees-a-z/commons-select/justice-committee/inquiries/parliament-2017/work-of-the-law-commission-17-19/publications/. See also para 3.13 above.

23 Professor Nick Hopkins, 14 January 2019, http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/housing-communities-and-local-government-committee/leasehold-reform/oral/95161.html.

24 Professor Nick Hopkins, 2 February 2022, https://committees.parliament.uk/publications/23321/documents/170094/default/.

25 Professor Penney Lewis and Dr Nicholas Hoggard, 23 November 2021, https://committees.parliament.uk/committee/326/petitions-committee/news/158971/petitions-committee-hears-from-legal-experts-and-social-media-companies/, and Professor Penney Lewis, 26 June 2023, https://committees.parliament.uk/event/18576/formal-meeting-oral-evidence-session/.

26 Professor Penney Lewis, 1 December 2021, https://committees.parliament.uk/work/1160/investigation-and-prosecution-of-rape/publications/.

27 Nicholas Paines KC and Henni Ouahes, 2 July 2019, https://publications.parliament.uk/pa/cm201919/cmselect/cmpubadm/244/24404.htm.

28 Sir Nicholas Green, Nicholas Paines KC, Henni Ouahes and Dr Charles Mynors, 14 January 2019, https://record.senedd.wales/Committee/5027#C154956.

29 Nicholas Paines KC, Henni Ouahes and Sarah Smith, 22 February 2021, https://business.senedd.wales/ieListDocuments.aspx?CId=434&MId=11065&Ver=4.

30 Sir Nicholas Green, Nicholas Paines KC and Dr Charles Mynors, 26 September 2022, https://business.senedd.wales/ieListDocuments.aspx?CId=725&MId=12968&Ver=4/.

31 Nicholas Paines KC, 5 March 2015, https://senedd.wales/laid%20documents/cr-ld10200/cr-ld10200-e.pdf.

32 https://www.lawcom.gov.uk/redacted-responses-to-coal-tip-safety-consultation-paper/. In addition to their involvement in consultations, Members of Parliament and Members of the Senedd may also introduce their own private members' bills which may relate to a Law Commission recommendation. This is considered at para 8.38 below.

33 https://www.parliament.uk/about/mps-and-lords/members/apg/. All-Party Parliamentary Groups have no official status, but the Parliamentary Commissioner

for Standards keeps a register of all active groups and Parliament sets rules for their operation.

34 See, for example, 27 April 2018, https://www.lawcom.gov.uk/leasehold-law-reform-work-will-improve-lives-of-millions-hopkins/.

35 For an account of the Law Commissions' engagement, see All-Party Parliamentary Group on Surrogacy, *Report on understandings of the law and practice of surrogacy* (2021), https://www.andrewpercy.org/storage/app/media/appgs/Surrogacy%20APPG%204.pdf.

36 Nicholas Paines KC, Jessica Uguccioni and Connor Champ, 27 January 2021, 17 March 2021, and 2 March 2022: https://appgconnectedandautomatedmobilitycar.files.wordpress.com/2021/02/minutes-appg-1.pdf; https://appgconnectedandautomatedmobilitycar.files.wordpress.com/2021/03/minutes-appg-2.pdf.

37 The inquiry led to the publication of a report in June 2023 which includes reference to the Law Commission's work: https://cryptouk.io/wp-content/uploads/2023/06/Crypto-and-Digital-Assets-APPG-Inquiry-Full-Report.pdf.

Chapter 5

Stakeholders, consultations and public engagement

5.1 Our relationship with people who are affected by and interested in our work – our stakeholders[1] – lies at the heart of how Law Commission does its job. Individual stakeholders belong to groups as diverse as homeowners at risk from unstable coal tips in Wales, the victims of intimate image abuse, and businesses seeking to digitise their trade documents. As well as members of the general public, stakeholders include professional and other organised groups with an interest in specific projects or law reform generally, including Parliamentarians, the judiciary, academics, journalists, legal professionals and representative groups, and of course central and local government.

5.2 Reforming the law in the best way possible requires in-depth engagement with stakeholders. Everyone in England and Wales has an interest in the law being modern, simple, cost-effective, and fair, and so we strive to ensure that engagement with our work is as broad as possible. Stakeholders also have a vital role to play as a source of expertise and challenge to our work.

5.3 Engagement with stakeholders takes place principally through consultation. That involves informal consultation that extends through the lifetime of each law reform project, and a formal process of soliciting written submissions on the basis of a consultation paper. Much of this chapter is therefore concerned with how we consult, including discussion of how we are using technology to make our consultations more accessible. Our analysis of what consultees tell us informs our final recommendations for reform, and involves careful judgement in weighing up responses. Our

independence, our genuine desire to listen, and our reputation for producing high-quality reforms means we enjoy a good relationship with stakeholders, who are eager to offer their assistance. But we are not complacent. We are hugely appreciative of the time stakeholders give in responding to our consultations, and are always looking for new ways to make sure we reach as wide an audience as possible.

Why consult?

5.4 Consultation is so integral to how the Law Commission works that it is surprising that the only mention of consultation in the Commission's governing statute is a requirement to consult with the UK's other Law Commissions.[2] It is worth briefly reflecting, then, on what we see as the purpose of consultation.

1. Consultation is a public good in its own right, or even a "civil right".[3] While there is no general duty for public authorities to consult those affected by their decisions, a duty to consult may arise either expressly or impliedly by statute. It may also arise under common and public law principles, for example because an authority has promised to do so or has consulted in similar circumstances before, or where a failure to consult would lead to unfairness.[4] Consultation is now a deeply embedded element of the process by which decisions are made in a democratic society. In the wider context of public policymaking, a former head of the Civil Service has described it as "one of the most important activities Government can undertake".[5]
2. Consultation improves our policymaking. Consultees are a source of expertise – both legal and non-legal – that is essential to improving the law. They are a source of information and evidence: about technical aspects of the current law; about how the law works in practice; and about the potential impact of changes to the law. And they provide a challenge to our thinking. In areas where reform has the potential to be contentious, understanding stakeholders' perspectives can open up the way for compromise and allow consensus to be built.
3. Consultation legitimises our output. Or as Wilson Stark has written, it "imbue[s Law Commission] reports with an authority

that reforms crafted solely by lawyers would not otherwise have".[6] For Government and Parliament, the quality of our consultation provides critical assurance that, notwithstanding our lack of direct democratic mandate, there is backing for our recommendations that extends beyond legal experts. As Baroness Fraser of Craigmaddie remarked when speaking in the House of Lords about the Charities Bill, which implemented our report on technical issues in charity law:

> A great deal of assurance is to be had from the extensive consultation with the sector and other interested parties before the Law Commission's report was published, allowing a good level of confidence in the conclusions and recommendations coming out of that work.[7]

Pre-consultation

5.5 In the first stage of a law reform project, we consult with individuals and groups who are expert in and affected by the area of law concerned. This process, known as "pre-consultation", can be by way of bilateral meetings, roundtable events, and informal correspondence. Stakeholders possess considerable legal or technical expertise. Those most directly affected by how the law operates provide us with "lived experience". Consulting with these individuals and groups is an essential part of the research that underpins the Commission's provisional proposals for reform. For example, in our project on coal tip safety in Wales, meetings with the Coal Authority were invaluable in understanding how mine waste has been dealt with in Wales in the past.[8]

5.6 Pre-consultation allows the Commission better to understand problems caused by the existing law, and stakeholders' ambitions for or concerns about reform. It is not unusual for us to engage with 50 to 100 individuals and groups. In our work on confiscation of the proceeds of crime, we had discussions with 128 separate individuals and organisations over the course of preparing our consultation paper.[9] In our business tenancies project, we have engaged with representative groups that reflect the huge numbers and range of businesses and their advisors which may be impacted by changes to commercial leasehold legislation. These operate across many sectors, from cafes and shops in town centres to businesses occupying offices, warehouse and factories, and both landlords' and tenants' businesses vary widely in size

and type, including, for example, both sole traders and large corporations. Some groups may be harder to reach than others, and may benefit from a tailored event to facilitate their participation.[10] Pre-consultation was also particularly important in our projects on arbitration, smart contracts and digital assets. In this way, pre-consultation ensures that the consultation paper presents an informed and balanced picture, and asks the right questions.

5.7 It is sometimes beneficial to issue a more formal pre-consultation document inviting written responses. For example, our work on commonhold home ownership and on digital assets began with calls for evidence, in which we sought information about the law and practice in relation to each of these areas.[11] Whether we do this might depend on a variety of factors, including the novelty of the issue and whether there is existing literature or comparative material to study. In the case of digital assets, it was because we were aware that knowledge of the workings of the market and its problems is often in the hands of technologists or a small group of very specialist legal advisers and is not even recorded in trade literature.

5.8 As we mentioned in Chapter 3, in some projects we also use consultation processes to inform our decision-making on the scope of a project.[12]

Consultation papers

5.9 A Law Commission consultation paper typically serves four broad purposes. First, it explains the current law. While we try to avoid overly painstaking detail, we may nevertheless dedicate a substantial portion of the paper to setting out the existing state of affairs. Providing an accessible explanation of the law is particularly important for lay readers to be able to evaluate our proposals from an informed position. Even for those more familiar with the law, our expositions can be useful. Our consultation papers are sometimes cited by courts as an authoritative statement of the law.[13] And we regularly receive feedback from practitioners and students that our papers are go-to texts for understanding difficult legal issues. The explanatory part of a consultation paper also provides the opportunity for consultees to challenge our understanding of the current law.

5.10 Second, consultation papers seek to identify problems with the law and make the case for reform. It may seem obvious that, after a detailed

process of project selection, there must be problems with the relevant area of law. And for stakeholders affected by or with close knowledge of those problems, the case for reform may seem clear-cut. But the consultation paper is often the first opportunity for us to present the issues to a wider audience, many of whom will be encountering them for the first time. For many stakeholders, including Government, the mere fact that there are problems with the law may not be enough to make it a priority for reform. It is important for us to explain the scale and severity of the impact of those problems in order to convince stakeholders that the issues are more than merely theoretical and to begin building a broad base of support for reform. Some stakeholders may take a different view on the existence or nature of problems with the current law, and therefore feel that no reform – or a fundamentally different type of reform – is necessary.[14] For this constituency, it is right that we provide a thorough explanation of our provisional view, so that stakeholders can put their counterpoints to us in consultation.

5.11 Third, the consultation paper is where we explain our analysis of the law and our reasons for our suggested policy responses. Our suggestions are always provisional, meaning that they may, and quite frequently do, change after consultation. By the time we publish a consultation paper, we will have undertaken a great deal of pre-consultation, research, and policy thinking. Our intention is that suggestions published at the consultation stage should at least be capable of being carried over to become final recommendations at the report stage, notwithstanding that we might eventually come to a different conclusion. Where possible, we will set out what we provisionally see as the single best option for reform in relation to any given issue. Even where an issue is finely balanced, we will eventually have to come to a settled view, and it is better to test that view in consultation where we can. In such cases, we provide a detailed explanation of why we favour our preferred option over others. When we propose a provisional view, we will do so with the express intention of stimulating a focused response on the issue. An example of this approach is our digital assets project, when we set out the criteria for our proposed "third thing". This provoked strong and helpful responses that altered, and improved, the ultimate recommendations we made.[15] But there are times when there genuinely is no clear best option at the consultation stage, and so we explore a range of possibilities, discussing the "pros" and "cons" of each.

5.12 Fourth, we ask stakeholders about our suggested ideas and their views about reform. A great deal of thought goes into the form and content of the questions we pose. Historically, consultation papers simply invited consultees to comment, in whatever form they chose, on the paper as a whole.[16] We do still sometimes ask questions with a high degree of generality, when we are seeking guidance from consultees about overall direction for reform. For example, in our simplification of the immigration rules consultation paper, we said:

> We provisionally consider that the Immigration Rules should be drafted so as to be accessible to a non-expert user.
>
> Do consultees agree?[17]

Most commonly though, questions take the form of a provisional proposal for a specific reform, followed by asking consultees whether they agree with the proposal. To take an example from our consultation paper on leaseholders' right to manage:

> We provisionally propose that the Right To Manage company should be required to instruct professional managing agents, satisfying applicable regulatory standards, for any buildings containing commercial premises which represent more than 25% of the total internal floor area.
>
> Do consultees agree?[18]

This form of question reflects our nature as a technical law reform body. We are not simply asking about reform in outline, while saying, "leave the detail to us". Asking about specific proposals allows us directly to test our provisional view on the best way forward, and best gauge the level of agreement amongst consultees. By setting out a provisional view, we generate a much more focused response, both for and against that view.

5.13 In other cases, we ask so-called "open questions", without making an accompanying provisional proposal. Such questions can be useful where we have not been able to reach a provisional view on the best option for reform, and so seek consultees' opinions on the possibilities we have discussed. In

our consultation paper on intimate image abuse, we considered whether images that are considered to be intimate within particular religious groups should be included within a proposed offence. We explained:

> While we recognise that there are strong arguments in favour of including images that are intimate to particular religious groups, we also recognise the difficulties with defining the scope of these images. It would also be unusual for a criminal offence to be defined differently according to the beliefs of particular groups within society. As a result, we do not feel that we have sufficient information, or a sufficient sense of public opinion, to make a provisional proposal on this issue. We would therefore welcome consultees' views on the inclusion of these images.[19]

5.14 Open questions may also be preferable to specific provisional proposals where we want to invite consultees' general thoughts on a topic and are concerned that more narrowly targeted questions about specific proposals might hamper their ability to do so.

5.15 Finally, some questions are designed to gather evidence. Types of evidence that we commonly seek are about how the current law works in practice, and about the potential impact of reform. For example:

> We invite consultees to share with us their experience of how search warrant hearings are arranged.[20] (Search warrants consultation paper)

> We invite consultees' views [in relation to weddings on board ships] on the potential benefits to the United Kingdom ship register and the maritime industry of our proposed scheme.[21] (Weddings consultation paper)

Although we will already have conducted a large amount of evidence-gathering during project selection and pre-consultation, a public consultation necessarily has the potential for us to elicit information from a much larger pool of stakeholders. As we explain in Chapter 6, it is a core principle that our policy has a sound evidential basis.[22] In Chapter 7, we explain that the steps we take to make an assessment of the impact of reform now include

an undertaking to ask at least one consultation question about the equality impacts of our proposals, whether positive or negative.[23]

Background papers and issues papers

5.16 It will be apparent from the various functions they serve that consultation papers tend to be substantial documents. A vast amount of research underpins them, and there may an instinctive temptation to "show our workings" by demonstrating that research in the finished product. Indeed, one of the distinctive qualities for which Law Commission consultation papers are valued is their thoroughness.[24] It was this thoroughness, for example, that led Judge Glenn, in the *Celsius* proceedings in the United States Bankruptcy Court, to suggest that the analysis contained in our 529 page digital assets consultation paper be treated, in the absence of legal precedent in the US, as persuasive of US law.[25] But there is always a balance to be struck between detail and brevity. David Johnston KC, a former Scottish Law Commissioner, has warned of a "tendency to overburden publications with fine points of analysis" which "may discourage or deter" engagement.[26] The length of our consultation papers has been a source of criticism from some stakeholders.[27]

5.17 While we consider it essential to provide stakeholders with the fullest possible account of our evidence and our reasoning, we also employ a number of techniques to offer greater accessibility while preserving detail for those who need to see it. We discuss below how accompanying summary publications, and even summary consultations, can improve accessibility.[28] Another technique we have employed is to carve out parts from the main body of our consultation papers, giving readers an "a la carte menu", depending on the level of detail they prefer. Sometimes this has meant including some material in an appendix to the consultation paper. For example, in our consultation paper on the protection of official data, we published 87 pages of comparative legal analysis and 29 pages of statutory material as appendices, helping us to restrict the main body to 196 pages.[29] At other times we have published the additional material separately in background papers. Alongside our consultation paper on electoral law,[30] we published 456 pages of explanatory research material across eight background papers.[31] We published two background papers over the course of our automated vehicles project.[32]

5.18 Another option is to break down the consultation with a series of issues papers, as in our work on insurance contract law, where we published 11 issues papers jointly with the Scottish Law Commission. While not suitable for all projects, this approach meant that each paper only dealt with one issue, and was therefore shorter and more accessible than a full-length consultation paper. Responses to these papers helped to refine our ideas to the point that they were sufficiently well-developed for inclusion in a series of three consultation papers.[33]

Consultation period

5.19 The publication of a consultation paper marks the beginning of a formal period of consultation, during which we invite written submissions. Consultations typically last for three months, although the period may be shorter – for example where the consultation is limited to a narrow set of issues – or longer – for example where a consultation spans summer or Christmas holidays. In our experience, three months is the optimal period for securing stakeholder responses to our substantial consultation exercises without importing unnecessary delay into the project. We believe that this is in line with the flexible approach set out in Government guidance on consultations, which stipulates that they should last for "a proportionate length of time", taking into account the nature and impact of the proposal. The guidance adds: "consulting too quickly will not give enough time for consideration and will reduce the quality of responses".[34] In recent years, it is observable that shorter consultation periods are more frequently employed in Government.[35] Law Commission consultation papers, however, raise vastly more complex and detailed questions than a typical Whitehall consultation.

Consultation events

5.20 Besides soliciting written submissions, we are active in seeking out views from stakeholders during the consultation period. There is no single model for what a consultation looks like, and the types of event we hold depend largely on the subject-matter of the consultation. Almost invariably it will include the same sorts of bilateral or small group meetings we conduct with stakeholders at other times during a project's lifetime, and in some cases we establish formal advisory panels.[36] But we also hold larger-scale events where we are able to meet bigger groups of people and capture a

wider cross-section of opinion. This helps to ensure that our consultees are as fully representative as possible of the population as a whole.

5.21 We make a great effort to identify relevant groups. Targeted events help us to contact groups who may otherwise be hard to reach. In our consultation on wills, for example, we held roundtable-style events with groups as diverse as the Chancery Bar Association, an association for barristers practising in finance, business and property law, and young people involved with the social mobility charity Big Voice. The latter event gave us valuable perspective on the issue of children making wills. In the same project, we also identified stakeholders with a specific focus on older people, such as the Older People's Commissioner for Wales, who could help us to ensure that we heard the viewpoint of the elderly. In our immigration rules project, we conducted a workshop specifically for Let Us Learn, a youth-led group which campaigns for young migrants with insecure immigration status. We also designed an online poster campaign which was sent to a range of educational and charitable organisations involved in outreach work with migrant groups and circulated on social media. Consultation events for our coal tip safety in Wales project were advertised in Welsh and English, including on posters circulated online to churches and farming associations in order to contact remote communities of small farmers. In our weddings project, we held one roundtable session with a focus on religious weddings, and one on non-legally binding religious weddings, and invited representatives from a wide range of religious groups, including minority religions, to attend.

5.22 Where we are aware of an individual or a group with a specialist interest, we will reach out to invite a consultation response on a one-to-one basis.

5.23 In projects where we anticipate a general interest, we hold public events open to anyone. We try to run such public events at several different locations and dates around England and Wales (and for joint consultations, Scotland and Northern Ireland), to give consultees the best chance of being able to attend. For example, during our surrogacy consultation, we held public events in Aberdeen, Belfast, Birmingham, Brighton, Cardiff, Edinburgh, Exeter, London, Manchester, and Newcastle. At events in Wales, in accordance with the principle of equality set out in the Welsh Language Act 1993, and our Welsh language policy, contributions are welcomed in both English and

Welsh. Translation services are provided where an intention to contribute in Welsh is indicated or where it is otherwise thought appropriate to do so.[37] We publicise events on our website and social media channels, and encourage stakeholders to spread the word via their own networks of contacts. A sign of the breadth of these exercises is that we spoke to over 1,400 people during our consultation on sentencing procedure.

5.24 In many cases, we are able to participate in events organised by interested stakeholders rather than by the Commission directly. In Walthamstow Town Hall in 2019, for example, the Chair, the then Commissioner for Criminal Law (Professor David Ormerod) and members of the hate crime project team attended an event organised by Stella Creasey MP at which they met with schoolchildren to discuss and collect evidence about hate crime. During the consultation for our project on coal tip safety in Wales, the Institution of Chartered Engineers Wales Cymru organised an event for engineering experts, with a ministerial address by the Minister for Climate Change, Julie James MS/AS.[38]

5.25 We also consult widely with the judiciary by organising and participating in judicial seminars and roundtables. In recent years we have done this on topics such as surrogacy, search warrants, employment tribunal procedural rules, digital assets and smart contracts.

5.26 During consultation we go into intensive listening mode. All the views we hear during the consultation period are valuable to us. Our task is to collect evidence and not form a view upon it there and then. When we are working on sensitive and controversial issues where there is a range of competing views we are sometimes caught in cross-fire. We pride ourselves on maintaining a professional stance. Our experience is that once consultees understand that we genuinely do wish to hear from them we get high quality evidence including from those who take a more radical line and who might otherwise be suspicious of us.

5.27 We make a record of what we are told at consultation events, and use that record to feed into our final policy. Just as importantly, consultation events are an opportunity for us to publicise the consultation paper, and encourage responses to it. Where possible, however, we prefer to rely on written consultation submissions, even short ones. They represent the

considered view of the consultee, reached after having had time for reflection, and recorded in their own words. For membership organisations, submitting a written response allows the consultee to conduct their own internal consultation beforehand, affording us a fuller picture of their members' opinions. Where it is not possible to obtain a written response, we will seek approval for sharing what consultees have said in their meetings with us.[39]

Online consultation

5.28 The COVID pandemic presented a major challenge to public engagement. During certain periods, public health laws and Government guidance meant that in-person meetings with stakeholders were not possible. In short order, we therefore had to move to conducting events online. Even during periods when meetings were legally possible, the rapidly changing situation made them difficult to plan.

5.29 It was relatively straightforward to replicate bilateral meetings using videoconferencing. Larger events required a more innovative approach. Our project on weddings law is an example. We produced a set of video talks outlining our provisional proposals, each one focused on issues of interest to particular stakeholder groups: Anglican weddings, other religious weddings, non-religious belief weddings, weddings conducted by independent celebrants, the registration service, and wedding venues. These talks were published on YouTube and promoted on our website. We encouraged consultees to view the videos before attending one of a series of live question and answer events using Microsoft Teams. During these events, we gave a brief introduction of the consultation, after which consultees could type their questions and comments in to a chat function to be answered by members of the project team.

5.30 We recognise that online consultation cannot fully substitute for in-person events. Even with current technology, conversation does not always flow as freely via a computer or smartphone screen. Some of the informal spontaneity that is possible in an in-person discussion, and the non-verbal cues that inform a conversation, are lost online. Moreover, online events are not universally accessible: some people do not have a connection to the internet[40] or otherwise lack the ability to participate.

5.31 On the other hand, our online events have been generally well-received, and have had benefits beyond simply allowing us to remain productive during

the height of the pandemic. Participants in our question-and-answer events appeared to feel less inhibited than at face-to-face events; more willing to ask questions about our proposals and to offer frank criticisms of them. This may have been because participants had the option to remain anonymous, or otherwise because of a greater sense of detachment that online forums engender. Technology can facilitate discussion in other ways, for example, with quick electronic polling, or by allowing participants to hold "sidebar" text conversations simultaneously with the main oral conversation. There are also accessibility benefits: for people who do not have the time or means to travel to an in-person event, an online event may be much more attractive. And as a practical matter, there is no technical limit on the number of people who can participate in an online event, compared to a physical venue which has a finite capacity. Where a presentation is recorded, stakeholders can replay the recording at their convenience.

5.32 As we have emerged from the public health restrictions that have characterised recent times, we have been keen to retain the benefits that technology can bring to consultation. It is apparent that for many consultees, videoconferencing has become the norm; it is an option we usually now offer when setting up a meeting. Where our work has an international dimension, we have found that the ability to hold videoconference meetings with individuals in multiple different time zones has meant we have been able to speak with many more people than would otherwise have been possible. We have consulted internationally in many projects involving commercial law and emerging technology, for example our projects on arbitration, digital assets, smart contracts, decentralised autonomous organisations and electronic trade documents. This took the form of both individual meetings with stakeholders from other jurisdictions and hosting online roundtables for practitioners and academics from across the world. Another example is our project on evidence in sexual offences prosecutions, when we have set up meetings with Australian and New Zealand academics and practitioners, and a roundtable with Canadian academics.[41] We met with the US aviation regulator, the Federal Aviation Administration, for our autonomy in aviation project, with participants joining the call from all over the US. We also conduct "hybrid" events, combining in-person and video-link participation.

5.33 The greater use of remote meeting methods which resulted from the pandemic has also made us more proactive in seeking out relevant groups

and in identifying more innovative avenues of communication. For example in the world of software coders or the crypto currency trade, we identified the modes of social media that such stakeholders inhabit and then used those to reach out to individuals for help and information.

Consultation responses

5.34 We try to make it as simple as possible to submit a written response to a consultation. For some years we have provided the option of submitting consultation responses using an online consultation platform known as Citizen Space. This is a service widely used for public sector consultations. After being invited to tell us their name and some basic information about themselves, consultees are presented with each question followed by a text box for writing their answers. Where the question is about agreement with a provisional proposal, there are "yes," "no", and "other" tick boxes. Users can save their draft answers, and return to complete them later. They do not need to register an account to do so. For some consultees, the online platform makes it easier to respond to our consultations. They can respond on any device (Mac, PC, or smartphone) and the forms are designed to work with screen readers. The large majority of consultees choose to use the platform to submit their responses. The platform also brings considerable efficiency benefits to the Commission, in that we receive consultation responses in a uniform electronic format that can group consultees' responses by question.

5.35 There are nevertheless disadvantages to the use of an online platform. Access to an online form increases the risk that consultees will view the questions as inviting an off-the-cuff response more appropriate to a survey. Although the platform provides a link to the consultation paper and summary and encourages consultees to read the documents first, consultees may be more likely to answer the list of questions without engaging first with the consultation paper or summary. In taking this approach, they risk misunderstanding the relevant current law and its operation, and the reasons for our provisional proposals. We noted in our weddings law report that:

> It appears that many consultees may not have been aware that we published a consultation paper in which we explained the current law and the problems in practice that led us to our provisional proposals.[42]

5.36 There is no single solution to these problems, and we are constantly trying to refine how we ask questions and provide guidance on responding to us. We continue to welcome consultation responses in any format, including by email and by post.

Analysing consultation responses

5.37 After the consultation period closes, analysis of consultees' responses begins. Staff read each and every response in full. Typically, consultees' answers are grouped together question-by-question, and organised thematically. It is by reference to consultation answers that the project staff and the lead Commissioner – and ultimately the Commissioners acting collectively – discuss the final policy recommendations to be made in the report.[43] Consultees' answers not infrequently raise new considerations and prompt the need for further research.

5.38 As we say at the beginning of each consultation paper, consultation responses "inform our final recommendations";[44] they do not dictate what those recommendations will be. A consultation paper never gives a definitive view. We take a professional pride in being open minded. We frequently alter and modify the views we, even tentatively, held at the consultation stage. In our trustee exemption clauses project, for example, we initially contemplated a form of statutory regulation, but eventually recommended a professional rule of practice. The Better Regulation Executive praised our report, noting that it would have been "all too easy to play it safe and legislate". Instead, it said that the Commission had "listened to people on all sides of the debate and developed a proportionate risk-based approach to the issue".[45] It is a source of frustration for us that that the press tends to describe our provisional proposals as conclusions.

Principles

5.39 In common with the policymaking exercise more generally, analysis of responses involves careful judgement, and a considerable amount of time and effort. It is not possible to reduce the process to a simple rule or formula. But there are some general principles that guide our approach.

5.40 The greatest value we derive from consultation responses is the reasoning they contain. A single persuasive consultation response is capable

of changing the direction of analysis: a good point is a good point, regardless of where it comes from.

5.41 That said, we do place weight on the identity of consultees. This is not because we are biased towards any particular group or pre-judge the value of a response on the basis of who has offered it. But we recognise that a response informed by relevant knowledge and experience may be more persuasive than one that is not. As one might expect, practising lawyers and legal academics have long been welcome contributors of that knowledge and experience to our consultations. But knowledge and experience can come from diverse sources: from motor manufacturers who responded to our consultations on automated vehicles to victim support groups who responded to our consultation on intimate image abuse. The most eminent specialist in the field is entitled to be treated with considerable deference, compared to the amateur with strong view. But the weight to be attached to a submission is also a function of its quality.

5.42 Knowledge and professional experience tend to have less relevance in relation to matters that skew more towards "pure" policy: as for instance where we asked about the fees that should be chargeable for weddings involving terminally ill people.[46] In such cases, the lived experience of a member of the public carries more weight than theoretical postulations from legal experts. In a project raising issues of social sensitivity, such as hate crime, responses vary hugely. Individuals who have been victims might tell us their stories, with the opportunity to do so with the protection of anonymity. Representative groups might provide qualitative or quantitative evidence and detailed legal analysis. Some of the most useful evidence is about possible solutions and how they would work in practice.

5.43 Responses from representative organisations are likely to capture the views of many more stakeholders than responses from individuals. This is all the more so if the response is informed by internal consultation conducted by the organisation. We do not however assume that every single member of a representative organisation will have views that align precisely with those expressed in the organisation's consultation response. Institutional responses may be a result of compromise amongst members who have varying degrees of disagreement or ambivalence about the organisation's eventual submission. Representative organisations are sometimes explicit about differences of

opinion amongst their membership. The weight attributable to a response from a representative organisation cannot therefore be precisely derived from the size of its membership. There is no sense in which a response from an organisation with 1,000 members is worth 1,000 times more than an individual's response. But we do think it is right to recognise the force of a response that can fairly be said to be endorsed by a broader constituency.

5.44 It is also relevant to consider consultees' identity when thinking about how consensus might be built. Our analysis builds a composite of responses, often grouping responses by sector. The principal areas of disagreement may correlate to particular groups. This may suggest a path towards their resolution. We explain in Chapter 6 that, to the extent possible, we seek to formulate policy that enjoys broad support amongst stakeholders.[47]

5.45 Special considerations apply when engaging with particular consultee groups. As one of the pillars of the state, the judiciary has to be impartial. It can therefore be difficult for the judiciary to express a view on a Government consultation because this might be seen to be expressing a view on a political matter and one which might in due course turn up as an issue for a judge to rule upon. On the other hand there are many matters on which the judiciary will have a view, for instance in relation to a law reform project which involves a court-based set of rules. Judges have unique technical experience as well as expertise in understanding how the law is being applied in practice.[48]

5.46 For the Commission, being able to tap into the view of the judges is very important. One of the benefits of the Chair's position as a senior judge is that she or he can provide a bridge between the Commission and judiciary. Individual judges can provide valuable views concerning the day-to-day practice of the courts and the likely impact of a change in the rules. When we receive these we do not usually attribute a view to a named individual. We may say instead that "a County Court judge told us…". Sometimes judges' associations will submit formal responses which they are also content to have made public. For instance we have in the past received written submissions on issues of criminal law from HM Council of Circuit Judges. We have also on occasion received written submissions from the senior judiciary. But we also benefit from the broader view of the senior judiciary on issues of wider legal and judicial policy. Ultimately it is

for the judiciary to work out, in each given case, how they wish to respond and whether they wish to be attributed with a formal view.[49]

5.47 The boundaries of our consultations are set by the scope of the project as agreed in our terms of reference. However, we do not ignore consultation responses that address issues falling outside scope. If a common theme or themes emerge, we may draw attention to such responses within the final report, not least because they might indicate a need for reform to be considered in a related area. But ultimately, we cannot make recommendations that exceed the mandate we have assumed when undertaking a project.

5.48 The corollary of the value we place on the reasoning contained in consultation responses is that consultation is never about simply counting the number of responses that express agreement with our provisional proposals, versus those that express disagreement. We do of course take note of the numbers, and they can influence our policymaking. But as a matter of principle, consultation is not a vote. We are engaged in a qualitative process of legal analysis, not a quantitative one and responses are "weighed, not counted". And as a matter of practicality, our consultations are not designed to secure a statistically representative sample of opinion, whether amongst particular groups or amongst the public at large.[50]

5.49 The process of analysis of consultation responses needs to be conducted in a way which preserves transparency. It is important that stakeholders can see the reasoning which underlies our policymaking and leads to our recommendations. This includes clear expression in our publications of the reasons why a view expressed by a consultee is or is not accepted. Our consultation papers explain to consultees that their responses may be published, and that, where a consultee does not want information provided to be disclosed, a specific request for confidentiality must be made.

5.50 These principles are not novel. They are in line with the Commission's longstanding practices. The way we treat consultation responses, has, however, come into particular focus in light of recent high-profile consultations. A number of recent consultations have attracted a high volume of responses, especially from members of the public. We received over 1,000 responses to our consultation on leasehold enfranchisement; over 500 to our consultation on commonhold; over 1,200 to our consultation on protection of official data;

nearly 2,500 to our consultation on hate crime; over 600 to our consultation on surrogacy; and over 1,600 to our consultation on weddings. In some cases, as some of these responses were by groups representing significant numbers of individuals, the number of individuals responding was very much higher.

Template responses

5.51 We are always pleased to receive a large response to our consultations. That thousands of people want to comment on our proposals is an indication of the importance of our work to society. But we are alert to the risk that a larger sample size may not necessarily equate with broader public opinion. Selection biases may simply be amplified. The makeup of the consultation population might reflect our greater success in reaching certain stakeholder groups compared to others. Those who are dissatisfied with our provisional proposals may be more likely to respond to the consultation than those who are content. And it might reflect the relative strength of a "snowballing" effect amongst different types of stakeholders.[51]

5.52 The effect of snowballing has been apparent in consultations where a substantial proportion of consultation responses have used a standard template provided by another stakeholder. This was the case, for example, in our surrogacy consultation. A pressure group might take our consultation paper and rework the question we have posed for consideration and then send it out in the form of a short questionnaire to its members. The reworking of our strategically posed question is often designed to solicit but one answer: "yes we agree" or "no we (vehemently) disagree". Alternatively, a template reason for agreeing or objecting is provided. The group's members are then instructed to send their own completed questionnaire to us. In some projects we can get many hundreds of such template submissions sent to us. If they come from a pressure group with a strong view then, for instance, we might have 500 identical forms all saying – very loudly indeed – "no". As we have explained at paragraph 6.47 above, our policy is not determined by a numerical count of responses. Our surrogacy report explains our approach to template responses:

> The fact that we receive a large percentage of responses based on the template does not determine our recommendations for reform. We take into account the views of all individuals who engaged with the topic and sent in a response. We also take into account that some responses, for example those received

> from representative bodies, represent the views of the members of that organisation, who may be numerous, and who have relied on their organisation's response to convey their views, rather than sending in individual responses.[52]

5.53 We do not encourage stakeholders to use template answers, or even to adapt template answers into their own words. It is more useful for us to hear consultees' own views and experiences, even if expressed briefly or only in relation to a few of our questions. Because we are looking first and foremost at the reasoning contained in consultation responses, it is of relatively limited assistance to receive only a "yes" or a "no", or for template reasoning to be repeated or paraphrased many times over. But we take into account the views of all individuals who have engaged with a topic and sent in a response. When confronted with template responses we always seek to glean what we can from them. A coordinated writing campaign can legitimately tell us that a number of individuals feel sufficiently strongly about a topic to take the time to respond to our consultation.

5.54 A sensibly prepared template prepared by an organisation to obtain, in an accessible fashion, the views of individuals who might otherwise be oblivious to our consultation can provide useful information and evidence. In the intimate image abuse project, for example, the dating and social networking app Bumble got in touch with us during our consultation period and submitted a response that included findings from a survey they commissioned amongst their users. Their survey gathered over 1,000 responses. The questions they asked did not always match exactly with our consultation questions but we were able to use the survey responses to feed in to specific questions. We quoted from their survey results a number of times in the final report.[53]

Responses which do not address the consultation

5.55 There are other challenges associated with reaching an audience that is less familiar with how we work. These concern the nature of the responses provided to us. As explained above, the use of web-based response forms can work to reduce understanding of the relevant law and problems with it that led to the development of our provisional proposals.[54] Unfamiliarity with the scope of our work can also mean that consultation answers call

for reforms that we are not able to recommend. In our report on leasehold enfranchisement, we noted a number of these submissions, including a significant minority of leaseholders who called for us to abolish the leasehold system, a matter which fell outside of the terms of reference.

5.56 Analysing responses can be especially challenging where consultees reject the underlying premise of the consultation. For example, we explained in our report on hate crime that many of the individuals who responded did not directly answer the questions we asked, because they were implacably opposed to hate crime laws altogether, or any extension of those that currently exist.[55] Consultees who were opposed to hate crime laws also rejected proposals that one might logically have expected them to have supported, such as the introduction of freedom of expression protections. This type of consultation submission demands a more nuanced approach to analysis, that recognises the concerns that animate consultees' answers, even where the reasoning advanced within those answers may appear inconsistent. In our final recommendations on hate crime, this approach to analysis influenced us to take a more conservative approach to reform compared with some of the provisional proposals in our consultation paper. But it did not deter us from making specific recommendations solely because they did not enjoy the support of a majority of those who responded.

5.57 None of these experiences lead us to question our commitment to the broadest possible consultation. There is plainly a strong appetite for people to share with us their opinions about law reform, and we want to foster that appetite. But we are keen to channel public enthusiasm for engaging with our work in a way that can most effectively feed into our policymaking. One way of doing this is to ensure that our online consultation questions are easily understood. We are working to ensure that our consultation questions are formulated in a way that ensures that they make sense to someone who is only looking at the online platform rather than reading any supporting text. In the future there may be ways to use technology to assist staff in analysing consultation answers more efficiently, without displacing the careful judgement that law reform experts apply to the process. And it is more incumbent upon us than ever to explain carefully how we have taken into account consultation responses, especially where we recommend an option for reform that did not attract majority support.

Supplementary consultation

5.58 The close of the consultation period does not mark the end of the listening process for us. We often continue to have informal contact with stakeholders right up until the end of our work on a project. This may involve seeking clarification or elaboration of a stakeholder's written consultation submission, or further testing of our policy thinking as it develops in the light of consultation responses.

5.59 In some cases, the consultation process has highlighted gaps which require us to conduct additional, targeted consultation. When we consulted on reform of the Land Registration Act 2002, we asked questions about mines and minerals, but received no responses from consultees who practise primarily in the mines and minerals sector. We therefore engaged in post-consultation discussions with two stakeholders who were specialist in that area.[56]

5.60 In our project on charity law, consultation responses threw up issues that we had not anticipated when we initially consulted. We took the view that the best way to address these issues was to publish a supplementary consultation paper, and hold another public consultation.[57] This also occurred in our arbitration project. In this case the consultation not only identified a new topic for discussion, but produced roughly divided views on two particularly controversial issues. This led us to review our proposals and develop our analysis, which we presented in a second consultation paper.[58] Inevitably, such an exercise tends to delay the progress of the project. There is also a risk of "consultation fatigue" from having to return to stakeholders shortly after they have generously dedicated time to sharing their views with us. These factors need to be weighed against the benefits of supplementary consultation in deciding whether it is worth undertaking.

Securing public engagement

Summary publications

5.61 Since consultation papers and reports are at the core of how we interact with stakeholders, we write publications so they can be understood as far as possible by a non-specialist readership. We encourage anyone who is interested in our work to read them. But we recognise that not everyone has the time or inclination to digest what are voluminous documents. Nor can everyone take part in our consultation events.

5.62 One way we frequently bridge the gap with a wider audience is by publishing shorter documents that summarise our consultation papers and reports. There is no one-size-fits all for summary documents, which are tailored to the subject matter and likely audience. Examples include:

1 a single, general-purpose summary document, such as the 26-page document that accompanied our 502-page report on intimate image abuse;
2 two different lengths of summary document, as in the case of the 32-page summary and 4-page overview we published alongside our 292-page report on automated vehicles;
3 different summaries targeted to specific audiences, as where our consultation paper on leasehold enfranchisement was accompanied by a general summary, and by shorter summaries of what our proposals meant for leaseholders of houses, leaseholders of flats, and freeholders; and
4 easy-read summaries,[59] which we published alongside our consultation papers on hate crime, surrogacy and mental capacity and deprivation of liberty.

5.63 The objective is to convey the pith of our provisional proposals or recommendations, while omitting much of the background reasoning contained in the "parent" publication. We know that for many stakeholders, the summary will be the first or even only point of contact with our work. The summary is written by the project's lead Commissioner and project team. They put a lot of effort into ensuring that summaries give the reader a proper understanding of the issues on which we are consulting, or the reforms we are recommending, and signpost readers to detail in the full consultation paper. In many recent instances, we have worked with professional designers to create summary documents containing images, infographics and illustrations that more concisely communicate our ideas.[60]

Simplified consultation questions

5.64 We also know that the large number of consultation questions that we ask can be off-putting. We always make clear that consultees are free to answer as many or as few of the questions as they wish. But it is understandable that being faced with a long list of questions can have a deterrent effect. To make it easier for people to share their views, we have experimented with

offering an alternative, shorter set of core consultation questions in the summary of a consultation paper.[61]

5.65 In our intimate image abuse consultation paper, for example, we asked 47 questions, which were accompanied by 17 "summary consultation questions" in the summary document. Questions on some issues were simplified and condensed: our three, multi-part consultation questions on liability for sharing of intimate images were condensed to a single question in the summary. And we omitted some questions altogether, for example about the availability of "special measures" for giving evidence at trial. In our work on leasehold enfranchisement, instead of providing a summary version of the main consultation, we published a survey specifically targeted at leaseholders, to gather their experiences of the enfranchisement process.

5.66 Providing simplified consultation questions in the summary or a supplementary survey may not be appropriate for all projects. There might be a risk of readers forming the impression that there is no benefit in responding to the full consultation, notwithstanding any statement we make to the contrary. But we continue to think that giving stakeholders a more concise response option is a potentially useful tool in making our work more accessible. In our intimate image abuse project, we received six times as many responses to our summary consultation paper as we did for the full consultation, and a total of 354 responses. Over 1,500 consultees responded to our leaseholder survey, in addition to the over 1,000 responses to our main leasehold enfranchisement consultation. It is vitally important that the scale of participation does not limit the range of voices from which we hear. We are keen to avoid the risk of which Dyson has warned of a "divide between the working of ordinary people and the lawyers writing their laws".[62]

Welsh translations

5.67 We translate our consultation papers and reports into Welsh in accordance with a categorisation scheme contained in our Welsh language policy.[63] In summary, that means that we always translate consultation papers and reports in full where they are concerned only with the law in Wales.[64] Where we have in-house Welsh language speakers, we provide additional Welsh language content for stakeholders in Wales-only projects, for example by translating the online consultation pages. For consultations

concerned with the law in both England and Wales, or directed at a wider audience, we might translate only the summary documents, depending on the complexity of the area of law concerned.

Other modes of communication

5.68 Summary publications and simplified approaches to consultation questions are part of our wider strategy for communicating our work to the world. Public communication is simply one component aspect of our commitment to transparency. It is right that, as a public body, we should make efforts to ensure that people know what we are doing on their behalf. Good communication helps to spark greater engagement with our consultation and builds momentum in support of implementing our recommendations once a report is published.

5.69 The Commission employs a Communications Manager, who works with Commissioners and project staff to devise a communications strategy for each project. Strategies are tailored to the subject matter of the project. Over the lifetime of a project, we compile a contact list of stakeholders, which includes all those involved in the consultation process. We are always grateful to stakeholders who are able to spread awareness of our own work via their own channels. Our Communications Manager co-ordinates with counterparts in the relevant Government department. It is common that news stories we post on our website, particularly when launching a consultation or publication, include a comment from the Government minister responsible for the area of law that we are considering.

5.70 We distribute a press release to coincide with publications, helping journalists to summarise the complicated issues we deal with, and to avoid misreporting. In Wales-only projects, press releases are translated into Welsh. Our publications have a good record of being reported on by both specialist and generalist print media, reflecting the breadth of interest our work generates.[65] Commissioners and staff frequently author articles for the press that give us the chance to tell the publication's audience about our work in our own words.[66] Commissioners receive professional media training to help them perform their role as the public "face" of our work. They are interviewed on radio and television and deliver podcasts to explain our projects and generate interest for consultations.[67]

5.71 Whereas much of our communication work gravitates around projects and project publications, we are keen to talk about our work more generally, including internationally. Examples include the following.

1 Commissioners give lectures at academic conferences and other professional events.[68] They also participate in a wide range of other events associated with their particular expertise.[69]
2 The Chair of the Commission periodically gives evidence to the House of Common Justice Committee.[70] Other Commissioners give evidence to other Select Committees and Senedd Committees on an *ad hoc* basis.[71]
3 Our staff have delivered "Model Law Commission" workshops for young people at the Big Voice social mobility charity and Commissioners have spoken to sixth formers about law reform.
4 The Chair routinely attends the Government Legal Department annual conference for students and others from underprivileged backgrounds who are interested in working the Government Legal Services.
5 The Chair and Commissioners have spoken about the Commission's work internationally. Recent events include the attendance of the Chair and Professor Penney Lewis at a session of the French Assemblée Nationale, when they spoke about combatting discrimination.[72] Professor Lewis spoke in Gibraltar at a session of British Islands and Mediterranean Region, Commonwealth Women Parliamentarians Conference on legislating against online harms.[73] Professor Nick Hopkins addressed the Second International Surrogacy Forum in Copenhagen,[74] and, together with Matthew Jolley, spoke about law reform and the Commission's work on family law at the official launch of the Nordic Centre for Comparative and International Family Law (NorFam) at Aalborg University.[75]

5.72 We have an active presence on X (formerly Twitter) and LinkedIn where we promote our work.[76] Our X account has over 23,700 followers, and in the 12 months ending August 2022 received 593,000 impressions.[77]

5.73 Our website contains comprehensive information about all our work.[78] Each project has its own webpage, showing the stage within its lifecycle to

which it has progressed, and providing contact details for the project team. It also contains an archive of all our publications.

5.74 For Welsh language users, the website has a section in Welsh containing core details of the Commission's work and details of all of its projects that potentially impact on the law applicable to Wales. It also contains links to online versions of our Welsh language publications.[79] For projects concerned only with Wales, the project webpage is also translated into Welsh.[80]

5.75 The website is also a repository for corporate information such as our annual reports, programmes of law reform, business plans, registers of interests, and board meeting minutes. In the year ending 31 March 2023, we had 435,396 web page views. We have solicited feedback from visitors about how we can improve our website, with a three-minute survey recently promoted on our homepage.

Notes

1 We acknowledge that use of the word "stakeholder" in this way has been criticised (for example, S Poole, "10 of the worst examples of management-speak" (25 April 2013) *The Guardian*, https://www.theguardian.com/books/2013/apr/25/top-10-worst-management-speak; J M Sharfstein, "Banishing 'Stakeholders'" (2016) 94 *Milbank Quarterly* 476) but we use it here as a convenient catch-all that has wide recognition within the public sector.

2 Law Commissions Act 1965, s 3(4).

3 Commonwealth Secretariat, *Changing the Law: A Practical Guide to Law Reform* (2017) p 108.

4 See R (Plantagenet Alliance Ltd) v Secretary of State for Justice [2014] EWHC 1662 (QB), [2015] 3 All ER 261.

5 J Heywood, *Consultations – what's new and why they are so important* (16 January 2016), https://civilservice.blog.gov.uk/2016/01/15/consultations-whats-new-and-why-they-are-so-important/. For an elaboration of the principles underpinning the Government's approach to consultation, see Cabinet Office, *Consultation Principles* (2012, updated 2018), https://www.gov.uk/government/publications/consultation-principles-guidance.

6 S Wilson Stark, *The Work of the British Law Commissions: Law Reform… Now?* (2017) p 249.

7 *Hansard* (HL), 7 July 2021, vol 813, col 357GC.

8 https://www.lawcom.gov.uk/project/regulating-coal-tip-safety-in-wales/.

9 https://www.lawcom.gov.uk/project/confiscation-under-part-2-of-the-proceeds-of-crime-act-2002/.

10 https://www.lawcom.gov.uk/project/business-tenancies-the-right-to-renew/.

11 Law Commission, *Commonhold: A Call for Evidence* (2018); Law Commission, *Digital assets: Call for evidence* (2021).

12 See para 3.58 above.

13 Examples include *Waghorn v Fry* [2015] EWHC 744 (QB), [2016] 1 WLR 571 at [32] to [33] citing Electoral Law: A Joint Consultation Paper (2014) Law Commission Consultation Paper No 218; Scottish Law Commission Discussion Paper No 158; Northern Ireland Law Commission Consultation Paper No 20; *Johnson v Westminster Magistrates' Court* [2019] EWHC 1709 (Admin), [2019] 1 WLR 6238 at [28] citing Law Commission, *Misconduct in Public Office: Issues Paper 1: The Current Law* (2016); *Attorney General v Crosland* [2021] UKSC 58, [2022] 1 WLR 36 at [146] citing Contempt of Court (2012) Law Commission Consultation Paper No 209.

14 See, for example, in relation to surrogacy law: Nordic Model Now, *The Law Commission's Surrogacy Consultation: How to bamboozle through a dangerous new law* (15 August 2019), https://nordicmodelnow.org/2019/08/15/the-law-commissions-surrogacy-consultation-how-to-bamboozle-through-a-dangerous-new-law/.
15 Digital Assets (2022) Law Commission Consultation Paper No 256.
16 *Sale and Supply of Goods* (1983) Law Commission Working Paper No 85; Scottish Law Commission Consultative Memorandum No 58, para 7.1.
17 Devolved Tribunals in Wales (2020) Law Commission Consultation Paper No 251, para 3.103.
18 Leasehold home ownership: exercising the right to manage (2019) Law Commission Consultation Paper No 243, para 2.149.
19 Intimate Image Abuse (2021) Law Commission Consultation Paper No 253, para 6.124.
20 Search Warrants (2018) Law Commission Consultation Paper No 235, para 4.97.
21 Getting Married: A Consultation Paper on Weddings Law (2020) Law Commission Consultation Paper No 247, para 14.107.
22 See para 6.24 below.
23 See para 7.16 below.
24 For example, A Gillespie, "Reforming misconduct in public office" (2017) 4 *Criminal Law Review* 266.
25 Order of Judge Martin Glenn, Chief United States Bankruptcy Judge, United States Bankruptcy Court, Southern District of New York, in Re Celsius Network LLC et al, Case No. 22-10964 (MG), 17 October 2022, https://cases.stretto.com/public/x191/11749/PLEADINGS/1174910172280000000017.pdf.
26 D Johnston, "How Law Commissions Work: Some Lessons from the Past" in M Dyson, J Lee and S Wilson Stark (eds), *Fifty Years of the Law Commissions: The Dynamics of Law Reform* (2016) p 240.
27 For example, C Wide, *Hostility crime and the Law Commission* (2021) p 13.
28 See paras 5.60 to 5.65 below.
29 Protection of Official Data (2017) Law Commission Consultation Paper No 230.
30 Electoral Law: A Joint Consultation Paper (2014) Law Commission Consultation Paper No 218; Scottish Law Commission Discussion Paper No 158; Northern Ireland Law Commission Consultation Paper No 20.
31 https://www.lawcom.gov.uk/project/electoral-law/.
32 https://www.lawcom.gov.uk/project/automated-vehicles/.

33 Insurance Contract Law: Business Disclosure; Warranties; Insurers' Remedies for Fraudulent Claims; and Late Payment (2014) Law Com No 353; Scot Law Com No 238.
34 Cabinet Office, *Consultation principles* (2012, updated 2018), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/691383/Consultation_Principles__1_.pdf.
35 See, for example, the analysis of the House of Lords Secondary Legislation Scrutiny Committee, in "The Government's new approach to consultation – 'Work in Progress'" (2013), https://publications.parliament.uk/pa/ld201213/ldselect/ldsecleg/100/10004.htm; and National Audit Office, Central Government's implementation of the national Compact (2015), https://www.nao.org.uk/wp-content/uploads/2022/08/Central-governments-implementation-of-the-national-Compact-a-followup.pdf.
36 We say more about advisory panels at paras 6.20 and 6.21 below.
37 Welsh Language Act 1993, ss 5 and 7; Law Commission, *Welsh Language Policy* (2015) and *Review of the Welsh Language Policy* (2021), https://www.lawcom.gov.uk/about/our-policies-and-procedures/, app A.
38 https://www.ice.org.uk/events/past-events-and-recordings/recorded-lectures/consultation-on-coal-tip-safety-in-wales-including-ministerial-address.
39 See also para 4.18 above in relation to Government stakeholder responses.
40 Drawing on data from the 2021 census, the Office for National Statistics found that, in Great Britain in 2020, 4% of all households, and 20% of households with 1 adult aged over 64, did not have internet access: Office for National Statistics, Internet access – households and individuals, Great Britain: 2020 (7 August 2020), https://www.ons.gov.uk/peoplepopulationandcommunity/householdcharacteristics/homeinternetandsocialmediausage/bulletins/internetaccesshouseholdsandindividuals/2020.
41 Models from these jurisdictions are considered in the consultation paper, for example in relation to personal records and sexual behaviour evidence: Evidence in Sexual Offences Prosecutions (2023) Law Commission Consultation Paper No 259.
42 Celebrating Marriage: A New Weddings Law (2022) Law Com No 408, para 1.97.
43 See ch 6 for further discussion of policymaking.
44 For example, Digital Assets (2022) Law Commission Consultation Paper No 256, p i.
45 https://www.lawcom.gov.uk/project/trustee-exemption-clauses/.
46 Getting Married: A Consultation Paper on Weddings Law (2020) Law Commission Consultation Paper No 247, para 12.62.
47 See paras 6.30 to 6.31 below.

48 For differing views on the judiciary's dialogue with the Law Commission, see W Binchy, "Law Commission, Courts and Society: A Sceptical View" and J Lee, The Etiquette of Law Reform", in M Dyson, J Lee and S Wilson Stark (eds), *Fifty Years of the Law Commissions: The Dynamics of Law Reform* (2016).

49 Our approach to a view expressed to us by a judge, for example in relation to how a rule works in practice, as distinct from a statement of the official position of the judiciary, is set out in Evidence in Sexual Offence Prosecutions (2023) Law Commission Consultation Paper No 259, para 1.23.

50 We consider the benefits of collaboration with other research bodies conducting quantitative research at paras 6.39 and 6.40 below.

51 By "snowballing", we mean the process by which consultees encourage their own contacts to complete the consultation: see generally B Frey, "Snowball Sampling", in T Crouse and P A Lowe, *The SAGE Encyclopaedia of Educational Research, Measurement, and Evaluation* (2018).

52 Building families through surrogacy: a new law, Volume II: Full Report (2023) Law Com No 411; Scot Law Com No 262, para 1.47. See paras 1.46 to 1.49 for a full account of our approach.

53 See Intimate Image Abuse (2022) Law Com No 407, paras 3.149, 6.18, 9.26 and 13.23.

54 See para 5.35 above.

55 Hate crime laws (2021) Law Com No 402.

56 Updating the Land Registration Act 2002 (2018) Law Com No 380, para 3.58.

57 Law Commission, *Technical Issues in Charity Law: Supplementary Consultation* (2016).

58 Review of the Arbitration Act 1996: Second Consultation Paper (2013) Law Commission Consultation Paper No 258.

59 Easy-read documents use simplified language and pictures. They were originally created to help people with learning disabilities, but can be preferred by readers without learning disabilities too: Cabinet Office and Disability Unit, *Accessible communication formats* (15 March 2021), https://www.gov.uk/government/publications/inclusive-communication/accessible-communication-formats.

60 See, for example, Law Commission, *Simplifying the Immigration Rules illustrated summary* (2020).

61 See Law Commission, *Harmful Online Communications: The Criminal Offences: Summary of the Consultation Paper* (2020); Law Commission, *Confiscation of the Proceeds of Crime After Conviction: Summary of our Consultation Paper* (2020); Law Commission, *Hate Crime: Consultation Paper Summary* (2020); Law Commission, *Intimate Image Abuse: Summary of the Consultation Paper* (2021).

62 M Dyson, "The Future is a Foreign Country, They Do Things Differently There", in M Dyson, J Lee and S Wilson Stark (eds), *Fifty Years of the Law Commissions: The Dynamics of Law Reform* (2016) p 382.

63 Law Commission, *Welsh Language Policy* (2015) and *Review of the Welsh Language Policy* (2021), https://www.lawcom.gov.uk/about/our-policies-and-procedures/, app C.

64 See, for example, Welsh translations of the Law Commission's recent consultation papers on devolved tribunals in Wales and regulating coal tip safety in Wales: https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2020/12/Cymru-Devolved-Tribunals-in-Wales-Consultation-Paper-2-WEB.pdf; https://www.lawcom.gov.uk/project/rheoleiddio-diogelwch-tomennydd-glo-yng-nghymru/.

65 For just a few examples, see L Heath, "Law Commission publishes package of reforms to 'transform' leasehold system" (21 August 2020) *Inside Housing*, https://www.insidehousing.co.uk/news/law-commission-publishes-package-of-reforms-to-transform-leasehold-system-67229; J Wakefield, "Major legal changes needed for driverless car era" (26 January 2022) *BBC News*, https://www.bbc.co.uk/news/technology-60126014; N Kajastie, "Push continues for coal tip supervisory body and preventive maintenance" (24 March 2022) *Ground Engineering*, https://www.geplus.co.uk/news/continued-push-for-coal-tip-supervisory-body-and-preventive-maintenance-24-03-2022/; D Barrett, "Outlaw 'down-blousing': Taking pictures down a person's shirt or sharing fake porn images should be made illegal, experts say" (7 July 2022) *Daily Mail*.

66 P Lewis, "Hate crime laws are not the solution to violence against women and girls"(10 December 2021) *The Independent* ; N Hopkins, "Want to get wed in a forest or a field? A makeover of marriage laws could be love at first sight" (19 July 2022) *The Guardian*; S Green, "A safe space for digital assets" (10 November 2022) *The Times*.

67 For example, Professor Nick Hopkins, "Leasehold Reform" (20 January 2021) *Money Box*, BBC Radio 4; Nicholas Paines KC, interview on coal tip safety law (22 June 2021) *Law in Action,* BBC Radio 4; Professor Penney Lewis, interview on hate crime (7 December 2021) *Woman's Hour*, BBC Radio 4, interview on intimate image abuse (25 November 2022) *Today Programme*, BBC Radio 4, and interview on criminal appeals (26 July 2023) *Newsnight*, BBC2; Professor Sarah Green, Creating the Electronic Trade Documents Bill, Trade Finance Distribution initiative podcast, episode 20, (23 November 2022); Professor Nick Hopkins, interviews on surrogacy (29 March 2023) Times Radio with John Pienaar and (12 April 2023) ITV News London.

68 For example, Professor Nick Hopkins spoke at the Resolution national conference on 17 May 2021; Professor Sarah Green gave the Annual Halsbury Lecture on 27 February 2023 and, as part of the "Current Legal Problems" series at UCL, "Time for the Tertium Quid", 25 May 2023, a lecture chaired by Sir Nicholas Green; and Nicholas Paines KC gave a keynote address at the annual conference of the Compulsory Purchase Association on 5 July 2023.

69 For example, Professor Sarah Green has been a panellist on London International Disputes Week, 15 to 19 May 2023; given the keynote address in the Second Annual Crypto in Disputes, 28 June 2023, part of the ThoughtLeaders4 series; and participated in many podcasts, for example for the Digital Bytes Show, 12 July 2023. Nicholas Paines KC was a panellist at a session of the MOVE conference entitled *New Strategies for the SAFE deployment of ADAS and autonomous tech*, 21 June 2023.

70 See, for example, the evidence of Sir Nicholas Green to the Commons Justice Committee on 24 November 2020, https://committees.parliament.uk/oralevidence/1292/pdf/.

71 For examples see paras 4.26 and 4.27 above.

72 26 November 2020.

73 4 to 7 October 2022.

74 8 to 9 June 2023.

75 27 April 2023.

76 https://twitter.com/Law_Commission; https://www.linkedin.com/company/law-commission-england-and-wales-.

77 Meaning the number of "times a user is served a Tweet in timeline or search results": *About your activity dashboard*, https://help.twitter.com/en/managing-your-account/using-the-tweet-activity-dashboard.

78 https://www.lawcom.gov.uk.

79 Law Commission, *Welsh Language Policy* (2015) and *Review of the Welsh Language Policy* (2021), https://www.lawcom.gov.uk/about/our-policies-and-procedures. The coal tip safety project is an example of this approach.

80 See, for example, https://www.lawcom.gov.uk/project/rheoleiddio-diogelwch-tomennydd-glo-yng-nghymru/.

Chapter 6

Policymaking

6.1 If our relationship with stakeholders is at the core of *how* the Law Commission works, policymaking is at the core of *what* the Law Commission does. Our function is to reform the law, and so our value as an organisation rests on reaching the best possible conclusions about the reforms that should be made. This chapter seeks to provide insight into how we go about our task.

6.2 Policy is made by the five Commissioners acting collectively. Each Commissioner leads policy development on a number of projects for which they have principal responsibility, and in which they are supported by teams of lawyers and research assistants. Final decisions about policies are however made through a process of peer review by Commissioners, involving challenge and refinement of project teams' internal thinking. "Peer review" is a term used at the Commission to describe a process by which Commissioners all comment on an unpublished draft. Through this exercise joint authorship is assumed.[1]

6.3 Besides the expertise offered by their Commissioner, teams draw upon expertise from a variety of external sources over the course of a project, including legal practitioners, academics, the judiciary, and other subject specialists, either acting individually or as part of an advisory group. Together with the results of our consultations, these contributions feed into the substantive decisions we make.[2] Our decision-making is independent and impartial as between different interest groups. But it is also principled: we strive for policy that is evidence-based, pragmatic, and, wherever possible, built around consensus.

6.4 Academic research is a key source of the evidence that informs our policy. Via both project-specific doctrinal and socio-economic research, and the wider body of scholarly writing, academics can have a direct impact on our proposals and recommendations, and ultimately influence how the law is reformed.[3] Another major source of evidence comes from other jurisdictions. We conduct extensive comparative research to inform our policy, and to ensure that reforms we recommend for the law of England and Wales will help the United Kingdom to keep pace with legal and technological developments around the world.[4]

Policy development

6.5 The Chair has described the overall structure of the Commission in his introduction.[5] Each of the Commission's projects is allocated to one of four law reform teams.[6] An individual project team is, in all cases, headed by a Commissioner, who leads policy formation on their team's projects. Some project teams will have one lawyer and one research assistant, but others will be larger as a result either of the extent of the project or other demands. In joint projects with the Scottish Law Commission, the project team is usually an amalgam of lead Commissioners and staff from both Commissions. Commissioners hold regular meetings with the project team to discuss research and consultation findings and to steer policy direction. Lawyers and research assistants play an active role in assisting the lead Commissioner with devising and testing policy ideas. As the policy takes shape, it is incorporated into either a draft publication (typically first a consultation paper and then a final report) or sometimes an internal policy paper on which a final report will be based.[7] A policy paper may be produced following the team's analysis of consultation responses where it is considered necessary to test Commissioners' views on a proposed policy direction before embarking on the final report. The paper sets out the framework of the proposed policy without including the detail.

6.6 The use of small project teams allows the Commission to make best use of its modest resources. It means that each Commissioner is usually working on about five or six projects at a time, and often more than this, particularly when implementation work is included. Each project usually has two or more staff members dedicated entirely to it. That said, some

projects may call for broader input from across the Commission at an early stage. We work in teams, but not in silos. Collaborative work across teams can involve a project being conducted jointly by multiple teams. Our work on corporate criminal liability was carried out jointly by the Criminal and Commercial and Common Law teams; our contempt of court project is being conducted jointly by the Criminal and Public Law and Law in Wales teams. In other cases, cross-team input is provided on discrete issues. For example, in the Property, Family and Trust Law team's project on weddings, members of the Criminal Law team had input at an early stage to ensure that the recommended criminal offences would be workable in practice and achieve the desired aim. The Criminal Law team has advised other teams on matters such as the appropriate type and level of criminal sanctions to be built into a civil law regime.

Peer review

6.7 Once the lead Commissioner and his or her project team have developed policy to a sufficiently mature stage, it is reviewed by the other Commissioners. This involves a "peer review" of the draft publication. This is the process by which the Chair and the four Commissioners agree on the content of all reports and other documents published in the name of the Commission.

6.8 Peer review is an extensive process that can span weeks and even months. It starts with the relevant team sending out a draft document to Commissioners for their review and comments. A number of weeks will be set aside for this process. We use a digital form to collect comments. These enable Commissioners to set out general comments and then, in a tabulated form, identify points arising from different paragraphs of the draft. Comments are broadly divided into main discussion points and secondary points. Commissioners will often also identify syntax and editorial points. Parliamentary counsel is also invited to prepare comments. These are then sent to the team who use them to prepare their response. A covering memorandum sets out the discussion points and the team's preliminary response. They team also prepare a table which sets out all the secondary points, again with the team's response. In most projects there are around 20 or 30 discussion items, and in some projects there may be considerably more.

6.9 In preparation for the peer review meeting the relevant Commissioner will meet with the Chair to go through the main issues and to discuss how the meeting is to be structured. The task of the Chair is also to go through the covering memorandum and table to identify the main issues and to consider how they are best dealt with during the meeting.

6.10 The peer review meeting is attended by the Chair and all the Commissioners. The relevant team is also invited to attend as is the Chief Executive and Parliamentary counsel. The meeting focuses first on the discussion and then on secondary points. Views are thoroughly tested. The function of the Chair is to seek to secure consensus on how a matter is to be dealt with. This can take the form of a clear agreement on the precise line to be taken. But in some cases Commissioners agree only on the broad line to be adopted and the matter is then remitted back to the team with the steer in mind. The process is detailed and comprehensive with the responsible Commissioner leading the defence of the draft, supported by the team. It is not uncommon for a peer review meeting to take an entire day.

6.11 When Commissioners comment they do so from a professional perspective. They do not espouse personal views or beliefs. A good peer review is a collegiate exercise albeit one involving extremely rigorous analysis and debate. Commissioners seek to arrive at a final conclusion, but there are important limits. It is quite common to arrive at a crossroads in the analysis where there are a number of alternative routes to go down. It might be that the best path to follow can be identified by applying traditional legal skills. But sometimes the choices are political, ethical, moral or religious. If Commissioners reach this point they have arrived at the limits of what they can properly do. They then will set out the options, with associated pros and cons, but expressly leave the choice of option to the Government and Parliament. The instinct for being able to spot the dividing line, a form of institutional judgement developed over the decades since the Commission's inception, is an important safeguard against stepping into the political arena.

6.12 At the end of the meeting the Chair will discuss next steps with Commissioners. These usually involve the team preparing a series of notes and draft sections of text to be resubmitted to the Commissioners. Usually this follow-up process can occur by email exchange but sometimes another meeting is convened.

6.13 Until recently, for projects conducted jointly with the Scottish Law Commission, we held two peer review meetings: one in Edinburgh and one in London, with the respective lead Commissioners attending both meetings. Prompted by the exigencies of the COVID pandemic, we now hold a single, joint peer review meeting using video conferencing. This allows both sets of Commissioners to discuss the issues in a single discussion, in real time, and to form a collective view.

6.14 The peer review process serves two functions. First, it is the mechanism by which Commissioners exercise their collective responsibility for the Commission's work, and reach a consensus about policy. Under the Law Commissions Act 1965, the Law Commission is comprised of "the" Commissioners. It is in their names that reports are published. Commissioners must be satisfied that everything the Commission publishes represents their independent and collective view of how the law should be reformed.

6.15 Secondly, peer review provides an internal check on the work produced by the project team. It enables five Commissioners to provide a critique, often from different perspectives, on important legal issues. Each Commissioner brings careful scrutiny to the reasoning and conclusions provisionally reached by the project team. In areas that the project team have found particularly difficult, Commissioners may be asked to choose between a number of policy options. Even where the project team are confident of the best course of action, Commissioners are not deterred from providing challenge and requiring other options to be re-examined. Compared to the lead Commissioner and project staff, who will have been working intensely on the project for many months, the reviewing Commissioners bring a degree of detachment and objective assessment to the matter, as well as expertise in their particular areas of specialisation. The fact that the reviewing Commissioners are usually less well versed in the subject matter also makes them well placed to test how effective the draft publication is in explaining itself to the non-specialist reader.

6.16 The peer review process is a powerful guarantor of independence and objectivity. The fact that the final say on a publication lies solely with the five Crown-appointed Commissioners as a group protects independence. The process invariably improves the quality of our publications and results in policy that is more well-rounded, and able to hold up under the robust scrutiny it will rightly receive once published.

Sources of expertise

6.17 Law Commissioners are individuals who have excelled in their chosen field of law. They also bring to their role the ability quickly to develop an advanced understanding of new subject areas. Naturally, however, no five individuals can be expert in every area of law that the Commission deals with. Indeed, the role of the Commissioners is not to be a repository of expertise that can be mechanistically applied to solve legal problems. Rather, they must draw upon a wider body of knowledge to inform the exercise of their own judgement about how best to reform the law.

6.18 The Commissioners' expertise may be supplemented by that of the Commission's lawyers and research assistants, many of whom bring with them prior experience from working in private legal practice, academia, charities, Government departments, and other public bodies. Non-lawyers may also be included in teams where their expertise is required for a project. This was the case, for example, in our leasehold enfranchisement project, when a surveyor formed part of our team. Occasionally, lawyers are recruited on a short-term basis precisely because of their specialist background in relation to a particular project. But we also attempt to retain staff on permanent contracts, so that they work on successive projects spanning disparate areas of law. Staff become law reform specialists, beyond just subject area specialists. Whatever their prior specialism, both the project staff and the Commissioner leading a project gain a deep understanding of the area in question in the course of conducting a detailed, in-depth examination of an area.

6.19 We have described in Chapter 5 how consultees are a major source of the expertise upon which we rely.[8] Their input is not limited to formal consultation submissions. As our relationship with consultees develops, we often return to them multiple times through the course of a project. Contact may be face to face, or by telephone, video call or email. At the pre-consultation stage, we might use this form of contact to test our nascent ideas. After receiving the views of consultees on consultation questions, we may need to follow up on submissions, for example where there is a lack of clarity or additional issues have been raised, to help us refine policy. And where a report is accompanied by a draft bill, we might seek opinions on whether draft clauses would have their desired effect.

6.20 In many projects, we put this type of relationship on a more formal footing by constituting an advisory panel of experts. Recent projects to have been aided by advisory panels have included those on digital assets, the electronic execution of documents, event fees in retirement properties, and devolved tribunals in Wales. The way in which panels work depends upon the needs of the project and the availability of panel members. The more traditional model has been to hold meetings facilitated by the project team, with a formal agenda including questions for discussions distributed beforehand. Other panels have adopted a more *ad hoc* working format, for example with staff posing questions to the panel by email, and panel members holding discussions via message chains. Whatever the format, we try to foster an open discussion amongst panel members. We share with them the direction in which the project team's thinking is heading, but emphasise that final policy is always a matter for Commissioners. In our publications we may highlight how panel members' views have informed our decision-making, but the policies we arrive at are ours alone.

6.21 Our advisory panels are unremunerated.[9] The value of the advice they provide is far in excess of what we could afford to pay for on a commercial basis; many advisory group meetings represent thousands of pounds-worth of experts' time. We are extremely grateful for panel members' generosity and are always careful to acknowledge it expressly in our publications. In a few cases, however, we have felt it is proportionate to engage a paid external expert such as a subject matter specialist or an economist or surveyor on a more sustained basis. This may be needed both to provide additional specialism and as an extra project resource. In projects on weddings and on electronic trade documents, law professors who were experts in the respective subject areas were seconded to the Commission to work with the project teams on a day-to-day basis.

6.22 In this way, experts work as part of our project teams, and, as with other members of staff, their input is incorporated into our publications. In our project on residential leasehold enfranchisement, however, we decided that it was important to have a fully independent opinion on the compatibility of various options for reform with landlords' rights under article 1 of the First Protocol to the European Convention on Human Rights. We therefore instructed a specialist barrister to provide a written opinion.

In the interest of transparency, we published both our instructions and the barrister's opinion.[10] Similarly, alongside our work on automated vehicles, we commissioned an independent economist to provide a strategic economic analysis to "consider key economic issues raised by automated vehicles and how they can be addressed".[11]

Policy principles

6.23 We describe in Chapter 1 how the Law Commission is an independent body that is not bound by Government policy, nor beholden to any other interests. Accordingly, there is no particular Law Commission "flavour" of law reform. We do not, for example, pursue either a conservative or a liberal policy agenda. Nor do we favour any particular type of stakeholder over another.[12] But that does not mean that policy is developed as an expression of Commissioners' own preferences. There are important principles that guide policy formation.

Evidence

6.24 One of the most fundamental of those principles is that policy should be evidence- based. We describe the importance of consultation as an evidence-gathering exercise in the previous chapter. And later in the present chapter we touch on two other evidence sources: academic literature and international comparisons. An example of the importance of a strong evidence base can be found in our work on land registration. In our 2016 consultation paper, we provisionally proposed changes to the rules governing the priority of certain interests in land.[13] But despite a majority of consultees supporting our proposals, the evidence was that the existing priority rules caused few problems in practice.[14] We do not propose change for the sake of it. We therefore changed our minds, and decided against recommending reform on this point.

6.25 Another example is our consumer sales contracts project. The issue here concerned consumers who had paid in advance for consumer products only to find that the supplier became insolvent and they had no title to the goods that they had paid for. On the face of it this seemed to give rise to serious injustice. However, the evidence we received indicated, strongly, that the problem was more illusory than real. In particular, we identified a common practice among retailers of delaying the point at which the sales

contract is formed, until the goods are dispatched to the consumer. There was no real case for necessary reform. We concluded that:

> There may not be sufficient justification for implementation of the final draft Bill as a standalone measure at the present time. We have reached this conclusion based on evidence that the proposed reforms would have only a limited benefit for consumers while resulting in potentially substantial costs.[15]

We limited our recommendations to a proposal that the Competition and Markets Authority monitor the situation to see if a problem did over time emerge in which case the need for reform could be revisited. Our intestacy project, in contrast, is an example of where the evidence base fortified a recommendation. The policy we developed was supported by attitudinal research funded by the Nuffield Foundation.[16]

Pragmatism

6.26 We strive to make policy that is pragmatic and capable of achieving its intended benefits in the real world. In our residential leasehold enfranchisement consultation paper, we provisionally proposed the creation of a new "right to participate" in a collective freehold acquisition claim, after the initial completion of that claim.[17] The vast majority of consultees agreed. In our report we maintained that the right to participate would, in principle, be a practical and desirable addition.[18] But consultees' responses also showed that there were many questions to be resolved. These included the price payable by leaseholders exercising the right to participate, and how measures calculated to frustrate the right to participate could be devised without stifling the freedom and control sought by leaseholders exercising the right of collective freehold acquisition. We said:

> If the right to participate is to be introduced, we want to ensure that the detail of the scheme is thorough and that the right will operate effectively for both those who participated in a collective freehold acquisition originally and those who seek to join later. We are not yet at this stage. We have concluded, with some reluctance, that the outstanding difficulties which we have identified are too significant for us to recommend the introduction of the right to participate at present.[19]

We therefore argued that further consultation with stakeholders was needed, and welcomed discussions with Government around when and how that might be done.

6.27 It is also pragmatic to recognise that on occasions Government has a fixed policy and, in such cases, we would seek to avoid that issue by excluding it from the terms of reference governing a project's scope.[20] It is not always possible to avoid such policy overlaps. The Commission guards its independence jealously, and is not afraid publicly to disagree with Government. For example, in its submission to our consultation on the protection of official data, Government argued that there should be no public interest defence to criminal liability for unauthorised disclosures of official data.[21] Persuaded by compelling arguments from other consultees, we ultimately disagreed because we concluded that such a public interest defence was required by article 10 of the European Convention on Human Rights.

6.28 There is a balance to be struck between intellectual purity and independence on the one hand, and the pragmatic desire to see reforms implemented on the other. An example from the latter category comes from our hate crime project. Through our consultation, we found a good deal of enthusiasm amongst stakeholders for explicitly including caste in the definition of "race" in hate crime laws.[22] We expressed sympathy for this desire, but explained that we did not recommend changing the definition. In light of our terms of reference, and in the absence of further consultation on the issue, we concluded that:

> Given that the Government has made a clear policy decision to remove the current duty to add caste to the Equality Act 2010, to recommend the reverse course in hate crime laws could lead to significant confusion in the meaning and scope of protection of caste across these two sets of laws.

6.29 Another example arose in the surrogacy project. We undertook to explore alternatives to our provisional proposal enabling the intended parents to register the births in their names, after Government crystallised its own policy (in litigation) that the person who gives birth must be registered as the mother. We still made a recommendation in the report based on our

provisional proposal, but also provided an alternative scheme for Government that could be used if the surrogate continued to be named as mother on the birth certificate. In cases where we are influenced by the existence of an overlapping Government policy, we will always be transparent in saying so. Equally, while pragmatism is important, we recognise that we are under no duty to accept that policy. Our role is to identify areas where we think the law should be changed, and this would include areas of Government policy.

Consensus

6.30 We seek to build consensus around our policy for reform. That our recommendations enjoy wide support is an important aspect of their legitimacy. In turn, this legitimacy has the pragmatic benefit that our recommendations are more likely to be accepted by Government and in Parliament. Consensus is especially important where recommendations are to be implemented by a bill passed using the "special procedure" in the House of Lords, which is reserved for uncontroversial reforms.[23]

6.31 There are however limits. We are mindful not to allow the desire for consensus to lead to policy paralysis. As Government Minister Lord Newby observed when steering the Insurance Bill – which implemented our recommendations on insurance contract law – through Parliament in 2014:

> The Law Commission proceeds on consensus, but I do not think that means that in every single case every last person has to approve – this is not about unanimity.[24]

Moreover, we are not in the business of counting votes or running opinion polls about reform: that a consultation does not produce a consensus will not necessarily cause us to favour the status quo.[25] More starkly, we do not shrink from taking on subjects where it is obvious from the outset that consensus is not a realistic objective. We told readers of our consultation paper on residential leasehold enfranchisement that "the interests of landlords and leaseholders are diametrically opposed, and establishing consensus between the two interest groups … will be impossible".[26] It is possible for an independent law reform agency to be successful in such heavily contested fields, provided that it is transparent about its objectives, and precise in delineating matters of political judgement that must be deferred to Government.

Relationship with academia

6.32 The Law Commission maintains a strong and mutually beneficial relationship with the world of academia. The importance of academia to the Commission's work is reflected in the fact that "teacher[s] of law in a university" are one of the three categories of person eligible to serve as Commissioners.[27] Four of the five Commissioners currently serving are or have been legal academics (one being the Chair). When we recruit lawyers, academics are among our target groups. As lawyers on our teams they then often help expand and build our relationships with academia. We also collaborate with academic professional associations, such as the Society of Legal Scholars, the Socio-Legal Studies Association and the Association of Law Teachers, to develop opportunities for academic engagement with us and input into our projects.

6.33 Academic research is typically an important element in the evidence base that shows a need for reform in a particular area, and therefore contributes to the project selection process.[28] Once we begin a project, scholarly literature is amongst our first stops for better understanding the problems and possible solutions. It has a particular value in policymaking, because of the high standards that underpin it.

6.34 During the lifetime of a project, academic input to our policymaking can take various forms. We are always keen to receive written consultation submissions from academics with relevant expertise. We also seek academic input during the wider consultation process. That can be during one-to-one meetings, at conferences and symposiums, or in correspondence. Academics may be members of an advisory panel or group supporting a project.[29] At different stages of a project, we may call upon them to discuss or test policy or scrutinise draft Bill provisions. In some cases, it may be possible for us to engage with funding bodies to discuss the mutual benefits of funding academic research that is connected to a specific Law Commission project. Academic research can also play a crucial role in providing the evidence base required to establish the need for law reform.[30]

6.35 Beyond direct consultation with academics, our work can be the anchor point for a public dialogue about reform. It is common for authors, including academics, to publish critiques of our provisional proposals, which can inform

the final policy in our reports.[31] We ourselves welcome the opportunity to contribute to journal articles to explain our proposals to an academic audience, and hopefully in the process encourage consultation responses.[32] And after a final report, academic writing might critique our recommendations,[33] advocate for further reform,[34] or seek to connect our work with a wider audience in mainstream media.[35] Even years after a project ends, our recommendations can continue to be a starting point for academic discussion.[36]

6.36 This all said, it is important not to lose sight of the differences between the work of academics and the work of the Law Commission. Like the Law Commission, academics are independent, in the sense of having the academic freedom to express their own views.[37] But unlike the Law Commission, which is apolitical, academics' independence means that they are relatively unconstrained in what they can argue or the ways they seek to influence change. Traditionally, legal academic writers generally sought to persuade an audience of their peers, sometimes with the courts in mind. Increasingly, they also seek to engage directly with and persuade governments, legislatures and others involved in law reform, including the Law Commission. They may also work with or support campaigning groups who are seeking to change specific aspects of law and policy. In so doing, they enjoy a free hand, able to advocate reform that is idealistic or prioritises some policy goals or values over others, or which is provocative or even polemical. Their proposals may rely not only on legal change, but also, for example, on changes in public spending, borrowing or taxation. It is also worth noting that the work of academics in fields other than the law may be relevant. For example, we used criminological research on the experience of victims of crime in the hate crime project, and psychological research on rape myths and misconceptions about sexual harm in the evidence in sexual offences prosecutions consultation paper.[38]

6.37 By contrast, law reform tends to be most persuasive when it is based on a candid recognition of the merits of competing viewpoints. Our work often involves compromise, given the need for a viable prospect of implementation, and is always confined by the parameters within which an independent law reform agency must operate. It should also be stressed that academic literature is an addition to our consultation and policymaking process; it is not a shortcut. It would be rare for academic writing to deliver up a definitive answer to the type of complex issues with which we are faced.

Project-specific research

6.38 Academic research has provided more targeted assistance to the Commission in some projects through studies designed specifically to inform our policymaking. These can be qualitative or quantitative. An example of a qualitative study is the work of investigators funded by the Nuffield Foundation during the course of our weddings project, who conducted research on non-legally binding wedding ceremonies.[39] They set up focus groups and interviews with 170 participants, gathering information about why marriage ceremonies are conducted outside the legal framework, the nature of these ceremonies and the motivations of those involved.[40] The research specifically sought to understand the potential impact of the Law Commission's provisional proposals for reform. The scale and level of detail of this empirical research added considerably to the evidence base for the project, in a way that would not have been possible solely through the consultation which we undertook on the project. It informed our decision-making about how to ensure that couples who want a legally binding wedding are able to have one, for example, by highlighting the value placed by couples on having a ceremony in a place that is meaningful to them.

6.39 Quantitative research is equally important to us. As we explained in our report on intestacy:

> A consultation exercise cannot generate statistically significant data because the sample of public opinion that it elicits is too small, and is self-selecting (which means that we are likely to hear from members of the public about unusual experiences and particularly strong views, which are important but do not tell us how the law impacts on people in general).[41]

To support our policymaking, researchers from the National Centre for Social Research and Cardiff University surveyed 1,556 participants on their attitudes to will-making and intestacy.[42] This work was very helpful to us because it provided statistically representative data about public attitudes, something that we would not otherwise have been well-equipped to gather.

6.40 We have had similar collaborations with other research organisations, employing their own staff rather than funding academics, where there is an intersection with a Law Commission project. The Nuffield Council on

Bioethics, for example, produced a report on surrogacy which was prompted, at least in part, by the fact that we were working on the topic.[43]

6.41 For the academics conducting such research, feeding into our work provides an opportunity to promote their findings to a wider audience, and to achieve a direct impact on law reform. This impact can be an important element in securing research funding, and in the Research Excellence Framework evaluation which assesses the quality of research in UK higher education institutions. While we are careful never to impinge on researchers' independence, we always offer recognition of academic contributions to ensure any output is mutually beneficial. In appropriate cases, the Commission has provided references to evidence the value that academic research has brought to our work, and that can be used, for example, to provide an evidence base in relation to the Research Excellence Framework. The Commission has also provided letters of support for applications for funding being made by academics so that funding bodies are aware of the potential relevance of the research to the Law Commission's work. In addition, scholarship on law reform processes and institutions has informed and continues to inform the Commission's work and practices.[44]

Comparative research

6.42 Amongst our statutory duties is "to obtain such information as to the legal systems of other countries as appears to the Commissioners likely to facilitate the performance of any of their functions".[45] Comparative research runs through our work. Policymaking on most projects involves looking to other jurisdictions to learn how they have solved comparable problems, and then considering how translatable those solutions are for this jurisdiction. A large element of our research is based on existing primary and secondary sources, and Commission staff are able to call on resources including the libraries of the Royal Courts of Justice and the Institute of Advanced Legal Studies, where necessary. But our comparative research goes beyond just understanding what the law is in other places. We are concerned with practical law reform, and so it is important for us to understand how the law actually works in those places. The terms of reference for a scoping paper in our financial remedies on divorce project, for example, directly reflect this statutory function. They expressly require a comparative review of "laws governing finances on divorce in other jurisdictions, such as in Scotland,

other common law jurisdictions (such as Australia, New Zealand, Canada and the United States), as well as civil law jurisdictions which operate choice of matrimonial property regimes".[46]

6.43 We often engage with those in other jurisdictions who can help us understand the practical experience of their laws.[47] Our strong relationships with other law reform agencies mean that they are often our first port of call. Our sister agencies can be a source of knowledge themselves, or they may be able to put us in contact with others in their jurisdictions who can help. International co-operation can also involve making a "cold" approach to individuals and organisations with whom we have no existing relationship. In this regard, we find that the fact that the Commission is a statutory public body and that our Commissioners are leaders in their fields ensures that we are treated as credible and serious. Our happy experience is that those on whom we call for assistance are invariably generous with their time and knowledge. We are always eager to reciprocate wherever we can.

6.44 As with our public consultations, modern technology has made it much easier to hold discussions with people located long distances away. For a small organisation such as ourselves, videoconferencing has boosted the scale of the comparative work that we are able to conduct within a timeframe and at a cost that is proportionate to our modest resources.

6.45 When considering particular reforms, comparative research about similar laws elsewhere can provide reassurance that our recommendations will not produce unintended consequences. For example, in our weddings project, we benefitted from speaking with public officials in Ireland, Northern Ireland, Scotland, Jersey and Guernsey about the day-to-day operation of weddings legislation in those jurisdictions. The law in each of those places allows weddings to take place in a wider range of locations than under the existing law of England and Wales. In recommending that restrictions on where weddings can be celebrated in England and Wales be loosened, we said:

> We are confident from the experience in those other jurisdictions that giving couples wider choice over locations does not result in weddings taking place in inappropriate venues.[48]

6.46 Another example of the capacity of international co-operation to enrich our research is our surrogacy project, when we attended international academic and practitioner conferences in Hong Kong and Cambridge with international speakers setting out the law and experiences in their jurisdictions. This helped to ensure an informed discussion in our consultation paper of comparative surrogacy laws.[49] In the same project, we went on a fact-finding mission to Ukraine in 2019 to collect evidence about surrogacy practices.[50]

6.47 Other projects involve ensuring the law is fit to take advantage of emerging technologies such as cryptoassets and automated vehicles. In these fields, comparative research is less a case of borrowing tried and tested solutions from elsewhere, and more about sharing ideas with lawyers in other countries who are simultaneously tackling the same legal challenges. In our work on digital assets, we were invited to sit as observers to two sets of policymakers working on the relationship between such assets and property law (the UNIDROIT Digital Assets and Private Law Working Group and the American Law Institute and the Uniform Law Commission's Uniform Commercial Code and Emerging Technologies Committee). And in our automated vehicles project, the team participated regularly in the UN Economic Commission for Europe's Global Forum for Road Traffic Safety and its informal group of experts on automated driving (IGEAD). It also engaged with transport agencies from around the world including the European Commission's Joint Research Centre, Transport Canada, the United States' National Highway Traffic Safety Administration, Australia's National Transport Commission, Singapore's Land Transport Authority and Israel's Smart Mobility Initiative.

6.48 Being able to draw on a diversity of thinking from around the world is in itself beneficial to our policymaking task. But there are two additional reasons for us seeking first-hand insight about international developments. First, where the subject matter of a project involves a substantial cross border element, it can be important to ensure that the law of England and Wales is developed in a way that is not radically inconsistent with that of other jurisdictions. In our consultation paper on digital assets, for example, we stated that consistency with international reform was one reason to support the creation of a new category of personal property in the law of England and Wales.[51]

6.49 Second, especially in the field of commercial law, international competitiveness is one of the considerations that shapes national laws.

Our policy choices can have a substantial impact on the attractiveness of the United Kingdom as a place to visit and do business. This is true not only in relation to new technologies like cryptoassets, but also long-established practices like arbitration.[52] One of the objectives set out in the terms of reference for our arbitration project is to:

> enhance the competitiveness of the UK as a global centre for dispute resolution and the attractiveness of English and Welsh law as the law of choice for international commerce.[53]

Hence, while we always approach international engagement in a spirit of co-operation and intellectual openness, we do not disguise the fact that it also informs our strategy to further the United Kingdom's own interests.

Notes

1 This differs from the academic practice to which the expression is usually applied. In relation to academic publications, peer review is used to describe a process by which a reviewer or reviewers comment on the work of an author or co-authors in an anonymous or "blind" process, so that the identity of the author or co-authors and of the reviewer(s) are unknown to each other.

2 The process of drawing on sources of expertise in the policymaking process is considered further below at paras 6.17 to 6.22.

3 Our relationship with academia is considered further below at paras 6.32 to 6.41.

4 Comparative research is considered further below at paras 6.42 to 6.49.

5 See the Chair's introduction at pp 21 to 27 above.

6 The teams are currently Property, Family and Trust Law; Criminal Law; Commercial and Common Law; and Public Law and the Law in Wales: see the Chair's introduction at p 22 above. The names and focus of the teams have changed over time since the Law Commission's inception to reflect need.

7 Ch 5 considers the development of a consultation paper; ch 7 considers final reports and other publications.

8 See para 5.4 above.

9 Advisory panel members are sometimes paid expenses.

10 Catherine Callaghan KC, *In the matter of the Law Commission and leasehold enfranchisement reform and the compatibility of the various options for reform with article 1 of the First Protocol of the European Convention on Human Rights: Opinion on options to reduce the price and human rights law*, https://www.lawcom.gov.uk/project/leasehold-enfranchisement/.

11 D Jones, *Automated Vehicles (AV) strategic economic analysis* (2021), https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2021/07/Automated-Vehicles-Strategic-Analysis.pdf, p 6. This research was paid for by the Department for Transport.

12 There is an exception where it is agreed with Government at the outset of a project that the very purpose of reform is to improve the position of a particular constituency, as in our work on residential leasehold enfranchisement. This will be included expressly within the project's terms of reference.

13 Updating the Land Registration Act 2002 (2016) Law Commission Consultation Paper No 227, ch 6.

14 Updating the Land Registration Act 2002 (2018) Law Com No 380, ch 6.

15 Consumer sales contracts: transfer of ownership (2021) Law Com No 398, para 1.16.

16 Intestacy and family provision claims on death (2011) Law Com No 331. See para 7.39 below for further consideration of this research.
17 Leasehold home ownership: buying your freehold or extending your lease (2018) Law Commission Consultation Paper No 238, para 6.157.
18 Leasehold home ownership: buying your freehold or extending your lease (2020) Law Com No 288, para 5.246.
19 Above, para 5.245.
20 Paras 3.55 to 3.59 above discuss how the scope of a project is decided.
21 Protection of Official Data: Report (2020) Law Com No 295, para 8.56.
22 Hate crime laws (2021) Law Com No 402, paras 4.56 to 4.61.
23 See paras 8.22 to 8.34 below.
24 House of Lords Special Public Bill Committee Inquiry on Insurance Bill: Evidence Session No 1 (2 December 2014).
25 See the discussion of the principles which inform consultation analysis at paras 5.38 to 5.48 above.
26 Leasehold home ownership: buying your freehold or extending your lease (2018) Law Commission Consultation Paper No 238, para 1.63.
27 The others are judges and practising lawyers: Law Commissions Act 1965, s 1(2).
28 See para 3.35 above.
29 See paras 5.20, 6.20 and 6.21 above for a discussion of the work of advisory groups and panels.
30 For example, the museums project in the 13th programme resulted from an academic's research.
31 For example, T Cummings, "Equality as a central principle? – The Law Commission's solutions to the religious-only marriage problem" (2021) 33 *Child and Family Law Quarterly* 63, which we cited in Celebrating Marriage: A New Weddings Law (2022) Law Com No 408, and A Arden and J Bates, "Homelessness and Hate Crime" (2021) 24(1) *Journal of Housing Law* 1, which we cited in Hate crime laws (2021) Law Com No 402.
32 For example, W Vaudry and S Green, "Electronic trade documents: the Law Commission's provisional proposals, the MLETR, and the concept of possession" (2021) *Journal of Business Law* 625.
33 For example, N Papworth, "Making an arrest in order to activate PACE entry and search powers: the Law Commission and a missed opportunity for clarification" (2021) 85 *Journal of Criminal Law* 394.
34 For example, J V Roberts and U Azmeh, "Cleansing the Augean Stables: a commentary on the Law Commission's Sentencing Code for England and Wales" (2019) 8 *Criminal Law Review* 694.

35 For example, L Thompson, "Cyberflashing could be criminalised: here's how a change in the law would help victims" (26 November 2021) *The Conversation*, https://theconversation.com/cyberflashing-could-be-criminalised-heres-how-a-change-in-the-law-would-help-victims-172090.

36 R Mackay and D Hughes, "Insanity and blaming the mentally ill – a critique of the prior fault principle in the Law Commission's discussion paper" (2022) 1 *Criminal Law Review* 21, 22; L Woods, L McNamara and J Townend, "Executive Accountability and National Security" (2021) 84 *Modern Law Review* 553.

37 Academic freedom is protected by statute: the Education Reform Act 1988, s 202(2)(a) requires universities to ensure that academic staff "have freedom within the law to question and test received wisdom, and to put forward new ideas and controversial or unpopular opinions, without placing themselves in jeopardy of losing their jobs or privileges they may have at their institutions".

38 Hate crime laws (2020) Law Commission Consultation Paper No 250, ch 7; Evidence in sexual offences prosecutions (2023) Law Commission Consultation Paper No 259, chs 1 and 2.

39 R Probert, R Akhtar, and S Blake, *When is a wedding not a marriage?: Exploring non-legally binding ceremonies: Final Report* (March 2022), https://www.nuffieldfoundation.org/project/wedding-not-marriage-exploring-non-legally-binding-ceremonies.

40 Above, p 5.

41 Intestacy and family provision claims on death (2011) Law Com No 331, para 1.32.

42 A Humphrey, L Mills, G Morrell, G Douglas, and H Woodward, *Inheritance and the family: attitudes to will-making and intestacy* (2010), https://www.nuffieldfoundation.org/sites/default/files/files/Inheritance%20and%20the%20family%20Natcen%20August%202010.pdf.

43 Nuffield Council on Bioethics, Policy Briefing, *Surrogacy law in the UK* (16 March 2023), https://www.nuffieldbioethics.org/assets/pdfs/Surrogacy-law-in-the-UK-ethical-considerations-1.pdf.

44 See, for example, M Dyson, J Lee and S Wilson Stark (eds), *Fifty Years of the Law Commissions: The Dynamics of Law Reform* (2016); S Wilson Stark, *The Work of the British Law Commissions: Law Reform… Now?* (2017); and J Lee, "'Not Time to Make a Change?' Reviewing the Rhetoric of Law Reform" (2023) *Current Legal Problems,* cuad004, https://doi.org/10.1093/clp/cuad004.

45 Law Commissions Act 1965, s 3(1)(f).

46 https://www.lawcom.gov.uk/project/financial-remedies-on-divorce/.

47 We consider the Commission's relationships with other law reform agencies outside of project-related work in ch 10 of this publication.
48 Celebrating Marriage: A New Weddings Law (2022) Law Com No 408, para 2.72.
49 Building families through surrogacy: a new law (2019) Law Commission Consultation Paper No 244, paras 7.91 to 7.100, 9.25 to 9.27, 11.47 to 11.49 and 14.75 to 14.90, drawing on "Eastern and Western Perspectives on Surrogacy", University of Hong Kong (September 2016), https://www.family.law.cam.ac.uk/press/news/2016/10/eastern-and-western-perspectives-surrogacy-conference-organised-claire-fenton; "Law and Practice of Surrogacy", University of Cambridge (June 2018), https://www.family.law.cam.ac.uk/research-and-eventspast-eventsinternational-surrogacy-forum-2019/law-and-practice-surrogacy; and the International Surrogacy Forum, University of Cambridge (June 2019), https://www.family.law.cam.ac.uk/research-and-eventspast-events/international-surrogacy-forum-2019.
50 The trip was organised and funded by the Foreign, Commonwealth and Development Office in response to problems arising from surrogacy practices in the region.
51 Digital Assets (2022) Law Commission Consultation Paper No 256, paras 4.68(3) and 4.88 to 4.93.
52 As we explain in our recent consultation paper, arbitration has a long history in England and Wales, for example operating as a common way of settling disputes in Anglo-Saxon times: Review of the Arbitration Act 1996 (2022) Law Commission Consultation Paper No 257, paras 1.21 to 1.32.
53 Arbitration Act 1996 (2022) Law Commission Consultation Paper No 257, app 1.

Chapter 7

Reports and other publications

7.1 The product of the Law Commission's work is contained in our written publications. We publish two principal types of document: consultative documents, and reports on the outcome of our work. We discuss our consultation papers and other consultative documents in Chapter 5. In this chapter, we look at our final reports and other associated types of publication.

7.2 The Law Commissions Act 1965 is not prescriptive of the form our publications should take. It says only that the Commission's proposals for reform of the law shall be "by means of draft bills or otherwise", and that the Lord Chancellor must lay such proposals before Parliament.[1] In consequence, we enjoy a great deal of flexibility in how we report on our work. Draft bills are an important part of our output, but they are only one of the ways we discharge our function of modernising the law. Most commonly, we publish detailed narrative reports with recommendations for reform that mark the culmination of the project to which they relate. These reports are sometimes – but not always – accompanied by a draft bill to implement their recommendations. Reports are laid as a House Paper in the House of Commons and Welsh reports are laid in the Senedd. We have also, especially in recent years, adopted a range of other types of publication, tailored to the particular needs of the project and calculated to best serve our statutory functions.

Publishing recommendations and options for reform

7.3 The final output of a project is most often a detailed narrative report which contains a number of formal "recommendations" for reform of the law addressed to Government. The number of recommendations is dictated in part by the breadth of the project and the complexity of the issues. But the number of recommendations does not scale precisely to the "size" of the project. Some policies simply happen to be better expressed using a greater or lesser number of recommendations. For example, there were seven recommendations in the 2019 report on the electronic execution of documents;[2] 121 in the 2020 report on reinvigorating commonhold.[3] The expectation is that Government will respond to recommendations individually, stating whether it accepts, rejects or has another response to each one.

7.4 In some reports, we have set out to Government options for reform of the law, instead of or in addition to making recommendations for reform. In our work on residential leasehold enfranchisement, separately from our main report recommending reforms, we published a report containing options to reduce the price payable by leaseholders upon enfranchisement.[4] This choice of output reflected the dual nature of the subject matter. On the one hand, enfranchisement valuation is a highly technical area of law, and any reform efforts would require precisely the sort of legal expertise which the Commission provides. On the other hand, the decision about how to reform the law on enfranchisement valuation was not just a legal question: it involved considerations of law, valuation, social policy, and political judgement. Publishing an options report therefore allowed us to provide considerable value in formulating workable options for reform, without trespassing on matters that were properly for Government, and ultimately, Parliament to decide. Another example is our corporate criminal liability options paper.[5] This presented options including a new corporate offence of failure to prevent fraud, and a new form of the doctrine for attributing criminal liability to a corporation. The Government has chosen to implement these as part of the Economic Crime and Corporate Transparency Act 2023. Sometimes presenting options provides what is needed to allow Government to make a policy decision, particularly where there has already been considerable consultative work undertaken before our involvement, as there had been in this case.

7.5 Publishing options for reform has also allowed the Commission to provide added value to our core law reform expertise. In 2014 we published a report on the fiduciary duties of investment intermediaries.[6] It included guidance for pension trustees about their legal obligations.[7] In 2017, we applied that guidance to the contemporary pensions landscape, to examine whether there were legal or regulatory barriers to using pension funds for social impact.[8] We concluded that the most significant barriers to social investment were structural and behavioural issues within the pensions industry, rather than legal or regulatory barriers. We recognised that, as a law reform body, we were not best placed to make recommendations in these areas (although we made law reform recommendations on other matters). Accordingly, we identified steps which could be taken by others, such as the Financial Conduct Authority and the Pensions Regulator, to address these matters. In a project lasting just ten months, we were thus able to add substantially to the impact of our earlier work by going beyond traditional law reform recommendations. In 2018 Government agreed to take forward many of the recommendations and options for reform we had suggested.[9]

Explaining our reasoning

7.6 Just as important as the recommendations themselves is the reasoning which supports them. In our reports, we evaluate the responses we received to our consultation questions, and discuss how those responses have informed our thinking. We are candid where we disagree with particular opinions. Where we have discounted alternative options for reform, we explain why.

7.7 Transparency is important for several reasons.

1 Intellectual openness is in itself an important value for public bodies.[10]
2 It allows the readers of our reports to evaluate our recommendations. Most prominently, Government will wish fully to understand our recommendations when deciding whether to implement them. Our detailed reasoning forms a basis by reference to which Government can provide its own explanation for its decision to accept, or not to accept, our recommendations.[11] More broadly, charities and interest groups use our reasons to inform their future

campaigning strategy; academics to inform their research; and journalists for holding us and other public bodies to account. The courts use our reasoning to assist with their own development of the law, a topic discussed further in Chapter 8.

3 It is one of the ways in which we demonstrate independence. Independence requires not only that we reach our conclusions free from improper influence, but that we are seen to be doing so. We must "show our workings". Where we have found an issue particularly difficult to decide, we say so. If we have changed our mind since publishing the consultation paper, we explain why. A recent example is our project on hate crime, in which we provisionally proposed that "sex or gender" should be added as a protected characteristic, but came to the opposite conclusion in our final report.[12] Sometimes, just as significantly, we explain why we *have not* changed our mind, despite strong opposition to our provisional conclusions from some stakeholders. This happened, for example, in our recent surrogacy report, in which we recommend a new regulatory regime for surrogacy to replace the current law.[13]

4 If Government introduces legislation to implement our recommendations, our published reasons assist Parliament in scrutinising its provisions. Equally, Parliament is empowered by the reasons expressed in our publications to scrutinise a Government decision not to legislate. If legislation is enacted, the reasons given in the preceding Law Commission report can be used by the courts as an aid to interpretation.[14]

5 It is inevitable that, in areas where different stakeholders have divergent interests, our recommendations will be unwelcome for some. It is important that we demonstrate how we have taken into account those viewpoints we have rejected when making policy decisions, especially given the considerable time and effort stakeholders invest in engaging with our work. Stakeholders must always feel that it was worthwhile participating in our consultations, and that it would be worthwhile doing so in the future.

Reporting on consultation responses

7.8 In the course of explaining our reasoning, we invariably make extensive reference to what consultees have told us. But given the number and detail of the consultation responses we receive, it is not feasible to refer to all of them within the main body of a report. Instead, we sometimes publish a separate "analysis of responses" document with or shortly after the report. This document gives a more comprehensive picture of consultees' views, often quoting at length from their submissions.[15]

7.9 An alternative is to publish the consultation responses themselves, with redactions of personal and other information.[16] This option is one we have tended to adopt, albeit not exclusively, in projects which have received a very large number of consultation responses, and in which it would therefore require disproportionate resources to write an analysis of responses document.[17] In such cases, we have generally published a statistical breakdown of responses to each consultation question, showing what proportion of consultees agreed with, disagreed with, or had other comments about our provisional proposals.[18]

7.10 Whatever form is adopted, reporting on consultation responses bolsters the transparency that underpins our publications. It allows readers of our reports to scrutinise our conclusions better, measuring what we say against what we have been told by consultees. Consultees' views are a crucial contribution to the public debate about the legal issues our work often grapples with (and consultees are free to, and sometimes do, publish their own responses).

Impact assessments

7.11 An essential part of any project is to consider the impact of our recommendations. As we considered in Chapter 3 in relation to the project selection criteria, impact concerns not only economic impact, but also the non-financial benefits of law reform. In some cases these can also be valued monetarily. In most projects, a separate formal impact assessment is prepared to accompany the report. This is a standard form document used to appraise different policy options. It is a different exercise from the assessment of impact which occurs at the project selection stage, as it is

addressed to the policy options which form the outcome of a project. We compare our recommended policy option with one or more alternatives, which might include partial reform and doing nothing. The anticipated costs and benefits to society of each option are weighed up, and the net result calculated. To the extent possible, costs and benefits are valued monetarily. In those projects not accompanied by a separate formal impact assessment, it is recognised that impact has been or will be addressed by Government.[19] In some cases, this is because the project forms part of a larger group of projects or broader ongoing work conducted by Government, and it would be pointless to draw up an impact assessment in isolation from the others.

7.12 The Commission employs an economist who provides specialist advice, and provides an essential link with the Ministry of Justice and other Government department analytical teams. These teams help to provide the evidence needed to support the assessment. We often ask consultees questions about the economic and other impacts of the current law and potential impact of our proposed reforms, and draw on the evidence submitted in the preparation of the assessment. Where the impact assessment has been left to Government to prepare, we ensure that any evidence gathered from consultees will be taken into consideration.

7.13 Conducting an impact assessment is an important part of our work. Law reform is a means to an end of creating positive impact for people in England and Wales, not an end in itself. During the currency of a project, the impact assessment process is one of the tools which helps shape policy to achieve that objective. It ensures that our policies are not just sound as a matter of legal theory, but also are good value for society. For example, the impact assessment for the simplifying the immigration rules project, focusing on the cost of complexity and potential effects of simpler rules on applicants, decision-makers and the courts, influenced our recommendations. We concluded that the potential savings to all these groups justified the outlay required for technological improvements.[20] The relative costs of proceedings in the county court and employment tribunals also impacted on our thinking in the employment law hearings structures project.[21]

7.14 We also prepare an equality impact assessment initial screening to accompany a project's final report. Our law reform recommendations encompass a broad range of social issues, covering, for example, weddings,

surrogacy, and hate crime laws. In making such recommendations, it is vital we understand the issues affecting different communities living in England and Wales. A robust and well-informed equality impact screening is one mechanism for doing so.[22]

7.15 The assessment considers the impact of our proposals on different communities and groups of people, capturing all impacts on characteristics protected under the Equality Act 2010, including indirect impacts. It also extends in many cases to the impact policies may have on other characteristics or groups that may not be covered by the law.[23] We complete an initial screening section of the assessment in all projects to assess the extent to which a proposal might have a beneficial or adverse equality impact. If we were to identify that our proposal could have adverse consequences for equality, we would proceed to complete a full evaluation. It has never been necessary for us to do so. Given our role in ensuring that the law is fair, it would be very unusual for a Law Commission project to require a full assessment.

7.16 We have recently enhanced this strategy to ensure that we prepare a first draft of this document early on in the lifecycle of a project. In this way we identify any evidence gaps at a stage at which we are able to consider ways of filling them, for example by requesting information from stakeholders. A new requirement has been introduced to include questions about equality impacts in all consultation papers, drafted sufficiently broadly to allow consultees to raise any impacts, positive or negative, including those which might not yet have been identified. Teams also consider equality impacts in developing their communications strategy and planning their consultation events. We review the possibility of equality impacts at regular intervals over the course of the project.

7.17 In Wales-only projects, we prepare a Welsh language assessment to assess the impact of our recommendations on the Welsh language. This is in line with the national strategy in Wales for increasing the number of Welsh speakers to a million by 2050. A thriving Welsh language is included as one of the seven well-being goals in the Well-Being of Future Generations (Wales) Act 2015. The Welsh Government is under a statutory obligation to consider fully the effects of its work on the Welsh language.[24] This means that any Welsh Government policy should consider how its policies affect the language and those who speak it.[25]

7.18 Other specific assessments may be used in projects to which they have particular relevance. These include health, environment, small firms, human rights, justice, competition and trade implications. These impacts would be considered in any event in a robust impact assessment, but the specific assessments allow us to highlight areas where adverse consequences would be particularly problematic.[26]

7.19 Our assessment of impact contributes to the implementation process. Policy cannot be implemented by Government without an accompanying impact assessment which has been signed off as fit for purpose by the Regulatory Policy Committee. In some cases it may be necessary for the Regulatory Policy Committee – an independent non-departmental public body – to approve our impact assessment before ministers make a decision on implementation. This is particularly important where a proposed approach is controversial or where implementation is required within an urgent timescale. Even where this step is not required, Government departments may welcome an assessment of the impact of reform proposals presented in a standard form which is used across the Civil Service. This can be helpful in persuading officials and ministers of the merits of our recommendations.

Draft bills

7.20 Draft bills are a significant aspect of our output. These are appended to reports to help with the implementation of the recommendations we have made. Each bill is prepared by the Parliamentary counsel who are seconded to the Commission from the Office of the Parliamentary Counsel. The bill is typically accompanied by explanatory notes authored by the Commission.

7.21 A key benefit of preparing a draft bill alongside the report is the opportunity it affords to refine our recommended reforms. Working with Parliamentary counsel helps to reveal and remedy any contradictions, anomalies and gaps in policy. The process involves the responsible Commissioner and staff drafting a formal set or sets of "instructions" to Parliamentary counsel, explaining the problem with the current law and how it is sought to be solved. Counsel use these instructions to write draft clauses to give effect to the Commission's recommendations. The Commission will review these draft clauses, testing them against the policy objective. Through an iterative process, the policy and the draft legislation will be refined. In

the goods mortgages project, for example, the drafting process prompted a change in policy. In our 2016 report, we recommended that parties to a goods mortgage should have a choice between a "true" mortgage (which transfers ownership) and a charge (which does not).[27] However, through the drafting process that followed, we decided that this choice was "unnecessarily complex, adding to the length of the legislation without providing any benefits to either lenders or borrowers".[28]

7.22 Having a bill ready to be introduced to Parliament provides a more complete law reform "package" to Government. It means that Government does not have to allocate time and resources to preparing a bill, but can begin implementation as soon as an opportunity in the legislative timetable is found. Having a bill prepared can be especially useful for subject matters that are not high on ministers' agendas. It is in relation to subject matter of this kind that there would otherwise be greater inertia to overcome before Government would decide to implement our recommendations. It is also highly efficient, as the project team is already very experienced in the subject matter.

7.23 Historically, these advantages of publishing draft bills have held sway and most reports were accompanied by a draft bill. There remain many advantages to this approach, and usually these prevail. But it has become apparent over the years that, in some cases, this may not be appropriate.

7.24 Preparing a bill alongside a final report adds to the overall timeframe for a project, even if it ultimately enables the Government to move to implementation more rapidly. Notwithstanding that in overall terms it is more efficient to prepare a bill alongside a report, there will be occasions where there is demand to produce recommendations first without a bill because of the initial time-savings offered by that approach. That could, for example, be considered advantageous to allow ministers to consider our conclusions sooner, not only to decide whether to accept them, but to inform their own policy development across the wider area. An example of this is our elections project, in which we were required to produce an interim report without a bill so that the Government could review our recommendations before bill drafting took place.[29] In some cases, our consultation process can build enthusiasm for change amongst stakeholders, momentum which is more easily sustained if we are able to move quickly to a final report.[30] As we explain in Chapter 8, stakeholder support can be critical for implementation.[31]

7.25 Sometimes our recommendations cannot contain the complete policy picture that will be presented to Parliament. This may be because our report explicitly leaves open certain questions for Government to decide before a final policy decision can be taken. In such cases there is a difficult balance to be found between the benefits of leaving a Government department to prepare the bill in order to resolve these choices, and the disadvantages of relinquishing the preparation of a draft bill. It may be wasteful to attempt to translate each policy option into legislative provision, knowing that much of that provision would ultimately have to be discarded, but it can be equally wasteful not to capture the experience of the project team by providing draft options at the time that the report is published.

7.26 Even where a report does not itself call for further decision making by Government, it may be that our recommendations relate to a subject matter that forms part of a wider Government reform agenda. In such cases, our recommendations, if accepted, are likely to be implemented by one or more Acts which also make provision for other matters. For example, most of the recommendations in our report on modernising communications offences were introduced to Parliament in an Online Safety Bill, the larger part of which concerned the regulation by OFCOM of certain internet services.[32]

7.27 Sometimes a better approach can be to prepare draft clauses, or even "illustrative clauses". Such separate clauses can be applied more flexibly. Draft clauses can be particularly useful in the case of criminal law reform, where recommendations are often made for individual offences. These, if implemented, would typically go into a criminal justice bill containing a range of different criminal justice matters, rather than a self-contained bill.

7.28 It is unavoidable that bill drafting is resource intensive. Whether a project is funded directly by a commissioning department or from the Commission's core budget, there is good reason to be prudent about paying to draft a bill before ministers have decided whether it will be introduced to Parliament. If ministers reject our recommendations, or if a long period elapses between publication of our draft bill and a Government decision to implement, so that the draft requires substantial updating, that extra time and expense will have been to a large degree wasted. But it is more often good value for money to get the draft bill done by the original project team. Returning to it at a later stage with a new team, whether from the department

or from within the Law Commission, is much more time consuming, as the team will have to get up to speed with the law and policy, and therefore costly.[33] The final product may not be as satisfactory as it would have been if the bill had been produced alongside the development of the policy.

7.29 In many cases, the decision as to whether to append a draft bill may ultimately be determined by pragmatic considerations of timescales and resources. Drafting resources are finite and need to be prioritised. But even if a draft bill is not prepared by the Commission, there are other ways in which the project team can assist with the preparation of a bill, for example by drafting instructions to the Office of the Parliamentary Counsel. These contributions are considered further in Chapter 8.[34]

7.30 There are also cases where the contents of the report mean that a draft bill is not required. Sometimes, we make a positive choice at the outset of a project to direct our work towards matters where implementation would not need primary legislation. In so doing, we avoid the bottleneck that a bill would face in competing for Parliamentary time, and therefore increase the chances of implementation.[35] For example, in our project on employment law hearing structures, we excluded consideration of major re-structuring of the employment tribunals system, because this would have required primary legislation.[36] In other cases, we reach the conclusion that no legislative reform is needed, as in our report on the electronic execution of documents.[37] And by their nature, our reports giving advice to Government – discussed at paragraphs 7.36 to 7.38 below – do not call for draft bills.

7.31 Finally, we do not prepare draft bills for projects to reform the law in Wales. Legislation enacted by the Senedd Cymru is drafted in Welsh and in English by the Welsh Government's Office of the Legislative Counsel. We can nevertheless give assistance with drafting instructions, and have done so, for example, in our Planning Law in Wales project.

Interim reports

7.32 On occasion, we have published an interim report allowing us to provide stakeholders with a formal update on the progress of our work. This is especially valuable where the timeline for the project means that there will be a long period following consultation before the report is published, and

the department sponsoring the project is keen to reassure the public that the area of reform remains a priority. It is an approach which needs to be employed sparingly, as preparation of an interim report is time-consuming and may extend the overall project timetable.

7.33 Interim reports set out our initial findings about what consultees have told us, and our policy thinking. We might do so in relatively summary fashion, as in our 11-page update paper on event fees in retirement properties;[38] or with detail approaching that of a final report, as in our 220-page interim report on electoral law.[39] We may also publish an interim statement to reassure consultees, as we did in our taxis project. This outlined the key decisions we had reached, including as to our stance on a matter that had provoked intense controversy.[40] Interim publications can also be an opportunity to test new ideas that have developed since the consultation. We discuss this type of supplementary consultation in Chapter 5.[41]

Report summaries and other supporting documents

7.34 While the nature of the Law Commission's work does not lend itself to brevity, we are acutely aware of the need for our work to be accessible to a wide audience. Law reform may be a technical subject, but its effects are wide-ranging. The length of our consultation papers has on occasion been a source of criticism from stakeholders.[42] The same holds true of our reports.[43] One of the ways in which we promote understanding of our work is by publishing summary documents, which have been discussed in the context of stakeholder engagement in Chapter 5.[44] We also explained in that chapter that other supporting documents such as background papers and issues papers can provide further explanatory detail at the consultation stage, while limiting the overall length of the consultation paper.[45] The same approach has been taken to limit the length of our main reports.

7.35 We always provide a summary of the report itself. Whether we provide other types of supporting document will depend on the individual project. For example, alongside our report on automated vehicles,[46] we published background papers about who is liable for road traffic offences and the role of the driver in passenger licensing.[47] This allowed us to keep a substantial amount of material (49 pages) out of the report, while providing readers new to the subject with a rounded understanding of the law. In our

work on residential leasehold enfranchisement,[48] we published with our report a separate note explaining why we had ultimately decided against recommending a right for leaseholders to participate in a previous collective freehold acquisition claim.[49] On our bills of sale project, our final report was accompanied by a background paper comparing legislative solutions in other countries.[50]

Advisory reports

7.36 In line with our statutory function,[51] we occasionally publish reports and other documents giving Government advice about the law. Government has its own legal advisers within the Government Legal Department and elsewhere. The purpose of our advisory documents is not to supplant that advice, which in the ordinary course is confidential. Rather, it allows us to bring our independent expertise to bear by making a public contribution to the understanding and improvement of the law in England and Wales.

7.37 For example, in 2011, we gave advice about the advantages and disadvantages of the European Commission's proposal for an optional common European sales law. We noted that the proposal was "a dense document which is not always easy to read or understand", and said that our aim was to "explain the contents [of the proposal] and highlight the policy choices which have been made".[52] We hoped that our contribution would "promote discussion and debate" about a common European sales law.[53]

7.38 More recently, we provided advice to Government on smart contracts. We explained that our purpose was to

> provide an analysis of the current law as it applies to smart legal contracts, highlighting any uncertainties or gaps, and identifying such further work as may be required now or in the future.[54]

Our advice was informed by the detailed responses we received to a call for evidence. We concluded that the current legal framework in England and Wales, including in particular the common law, was able to facilitate and support the use of smart legal contracts without the need for statutory law reform. We have also provided recent advice to Government on remote

driving. Building on our automated vehicles report, we were asked to provide speedy advice on options for reform to address potential problems.[55]

Welsh language reports

7.39 As explained in Chapter 5, we translate our publications into Welsh in accordance with a categorisation scheme contained in our Welsh language policy.[56] At the final report stage, that means that we always translate reports that are concerned only with the law in Wales.[57] For reports concerned with the law in both England and Wales, or directed at a wider audience, we might translate the report itself, or its summary document, depending on the complexity of the area of law concerned.

Notes

1 Law Commissions Act 1965, s 3(1)(c) and (2).
2 Electronic execution of documents (2019) Law Com No 386.
3 Reinvigorating commonhold: the alternative to leasehold ownership (2020) Law Com No 394.
4 Leasehold home ownership: buying your freehold or extending your lease: Report on options to reduce the price payable (2020) Law Com No 387.
5 Law Commission, *Corporate Criminal Liability: An Options Paper* (2022)
6 Fiduciary Duties of Investment Intermediaries (2014) Law Com No 350.
7 Law Commission, *"Is it always about the money?" Pension trustees' duties when setting an investment strategy: Guidance from the Law Commission* (2014), https://www.lawcom.gov.uk/app/uploads/2015/03/lc350_fiduciary_duties_guidance.pdf.
8 Pension Funds and Social Investment (2017) Law Com No 374.
9 Department for Digital, Culture, Media & Sport and Department for Work & Pensions, *Pension funds and social investment: the Government's final response* (June 2018), https://www.gov.uk/government/publications/pension-funds-and-social-investment-final-response. The contribution made by the report to an understanding of the law in this area was noted by the Supreme Court in *R (Palestine Solidarity Campaign and Ors) v Secretary of State for Housing, Communities and Local Government* [2020] UKSC16, [2020] 1 WLR 1774.
10 For a general statement of this principle, see OECD, *Openness and Transparency: pillars for democracy, trust and progress*, https://web-archive.oecd.org/2012-06-17/59756-opennessandtransparency-pillarsfordemocracytrustandprogress.htm.
11 For example, see Department for Digital, Culture, Media & Sport and Office for Civil Society, *Government response to the Law Commission report 'Technical Issues in Charity Law'* (22 March 2021), https://www.gov.uk/government/publications/government-response-to-law-commission-report-on-technical-issues-in-charity-law/government-response-to-the-law-commission-report-technical-issues-in-charity-law.
12 Hate crime laws (2021) Law Com No 402, ch 5.
13 Building families through surrogacy: a new law, Volume II: Full Report (2023) Law Com No 411; Scot Law Com No 262, See in particular paras 1.32 to 1.69.
14 For example, see Lord Carnwath in *Cooke v United Bristol Health Care* [2003] EWCA Civ 1370, [2004] 1 All ER 797 at [54]: "Where a bill is based wholly or partly on a Law Commission recommendation, it is appropriate to take account of the report to find the mischief to which the provision was directed". The case concerned the calculation of damages for future loss in personal injury claims,

and considered a number of different Law Commission publications on the issue, including Structured Settlements and Interim and Provisional Damages (1994) Law Com No 224. The report's recommendations formed the background to the Damages Act 1996, s 1.

15 See, for example, Law Commission, *Automated Vehicles Consultation Paper 3: Analysis of Responses* (2022).

16 See, for example, the hate crime project page, which provides a link to redacted consultation responses: https://www.lawcom.gov.uk/project/hate-crime/.

17 For context, we received a relatively modest 70 responses to our consultation on updating the Land Registration Act 2002, and the analysis of responses document ran to 550 pages, almost the same length as the report itself.

18 See, for example, Law Commission, *Leasehold home ownership: buying or extending your lease, Law Commission Consultation Paper, Statistical Analysis of Responses* (2020).

19 This was the case in the residential leasehold project, which raised complex macro-economic issues: Leasehold home ownership: buying your freehold or extending your lease (2020) Law Com No 392, paras 6.62 and 2.62.

20 https://www.lawcom.gov.uk/project/simplifying-the-immigration-rules/.

21 https://www.lawcom.gov.uk/project/employment-law-hearing-structures/.

22 See Law Commission, *Equality and Inclusion Strategy 2021-22*, https://www.lawcom.gov.uk/working-for-the-law-commission/our-approach-to-diversity-and-inclusion/. Our equality impact assessment, following the Ministry of Justice template, is designed to ensure that recommendations for policies and services are compatible with the Public Sector Equality Duty established by the Equality Act 2010, s 149. For a recent example of a published equality impact assessment initial screening, see the surrogacy project: https://www.lawcom.gov.uk/project/surrogacy/.

23 There are nine protected characteristics under the Equality Act 2010, s 4: age; disability; gender reassignment; marriage and civil partnership; pregnancy and maternity; race; religion or belief; sex; sexual orientation. Other characteristics we might consider include gender, transgender identity, socio-economic status, immigration status, status as a single parent and geographical location.

24 Welsh Language (Wales) Measure 2011.

25 See, for example, the Welsh language assessment prepared for our devolved tribunals report: https://www.lawcom.gov.uk/project/devolved-tribunals-in-wales/.

26 See, for example, the impact assessment which accompanied the taxi and private hire services report, applying specific impact tests in relation to competition, small firms, the environment, health, human rights, and the justice system: https://s3-eu-

west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2015/03/lc347_taxi-and-private-hire-services_impact-assessment.pdf.

27 Bills of Sale (2016) Law Com No 369.

28 Law Commission, *Replacing bills of sale: a new Goods Mortgages Bill: Consultation on draft clauses* (2017) para 3.13.

29 Law Commission, Scottish Law Commission and Northern Ireland Law Commission, *Electoral Law: A Joint Interim Report* (2016).

30 Although we discuss at paras 7.32 and 7.33 below the option of publishing an interim report.

31 See para 8.4 below.

32 Modernising Communications Offences (2021) Law Com No 399.

33 An example of the formation of a later team at the Law Commission arose in the bills of sale project, where we were asked to draft a bill following publication of our report. A new project lawyer drafted a further report accompanied by a bill: https://www.lawcom.gov.uk/project/bills-of-sale/. Another example was our project on consumer prepayments on retailer insolvency, when we were asked to draft a bill implementing one of our recommendations. This ended up forming a separate project which produced a report accompanied by a draft bill: https://www.lawcom.gov.uk/project/consumer-sales-contracts-transfer-of-ownership/.

34 See paras 8.64 and 8.65 below.

35 See paras 8.40 to 8.61 below for discussion of avenues of reform which do not require primary legislation.

36 Employment Law Hearing Structures (2020) Law Com No 390, para 1.6. The report explained that primary legislation in the area could prove to be contentious, and that the Government had no current plans to re-structure the employment tribunal system. For this reason, the project had focused on how to improve the existing system without a major re-structuring.

37 Electronic execution of documents (2019) Law Com No 386. We did, however, include for Government's consideration a draft provision codifying the existing law. The implementation of this report is considered at para 8.6 below.

38 Law Commission, *Residential leases: fees on transfer of title, change of occupancy and other events: progress report* (2016).

39 Law Commission, Scottish Law Commission, and Northern Ireland Law Commission, *Electoral Law: A Joint Interim Report* (2016).

40 Law Commission, *Taxis and Private Hire Services: Interim statement* (2013).

41 See paras 5.57 to 5.59 above.

42 See para 5.16 above.

43 The *Guardian* commented, at the time of publication of our report on simplifying the immigration rules, that, while the immigration rules could be described as overly lengthy and complex, the "Law Commission's report is not itself a model of brevity: it runs to 220 pages": https://www.theguardian.com/uk-news/2020/jan/14/uk-immigration-rules-unworkable-law-commission.
44 See paras 5.60 to 5.62 above.
45 See paras 5.17 and 5.18 above.
46 Automated Vehicles: joint report (2022) Law Com No 404; Scot Law Com No 258.
47 https://www.lawcom.gov.uk/project/automated-vehicles/.
48 Leasehold home ownership: buying your freehold or extending your lease (2020) Law Com No 392.
49 Law Commission, *The right to participate: the issues, possible solutions and remaining difficulties* (2020).
50 Law Commission, *Registering a Goods Mortgage: Lessons from Other Systems* (2017).
51 The Law Commissions Act 1965, s 3(1)(e) provides that we are "to provide advice and information to government departments".
52 Law Commission and Scottish Law Commission, *An Optional Common European Sales Law: Advantages and Problems* (2011), para 1.39.
53 Above, para S.2.
54 Smart legal contracts: Advice to Government (2021) Law Com No 401, para 1.9.
55 Law Commission, *Remote Driving: Advice to Government* (2023).
56 Law Commission, *Welsh Language Policy* (2015) and *Review of the Welsh Language Policy* (2021), https://www.lawcom.gov.uk/about/our-policies-and-procedures/. See paras 5.23, 5.66, 5.69 and 5.73 above for an account of our Welsh language policy as it relates to stakeholder relationships and consultations.
57 See, for example, recent reports on devolved tribunals in Wales and regulating coal tip safety in Wales: Adroddiad Tribiwnlysoedd Datganoledig yng Nghymru (2021) Comisiwn y Gyfraith, Rhif 403; Rheoleiddio Diogelwch Tomennydd Glo yng Nghymru: Adroddiad (2022) Comisiwn y Gyfraith, Rhif 406.

Chapter 8

Implementation

8.1 Our reports are addressed to Government. The decision whether the law should be reformed as we recommend is for Government and, where legislation is required, for Parliament.

8.2 Our primary objective is for our work to be implemented. As Dame Mary Arden, a former Chair of the Law Commission, pithily stated in 2015: "it is not much good having a Law Commission that produces reports which are never implemented".[1] Nevertheless, there are other benefits to our work besides legislative implementation.[2] For example, courts may use the reasoning in our reports to assist in their development of the law.[3] More generally, our reports may inform legal and policy debate.[4] Sir Grant Hammond, former President of the New Zealand Law Commission, observed that Law Commissions may influence "the general climate of informed legal opinion so that individuals, courts or other entities can change their views or practices".[5] And that our work is sometimes not implemented may be a necessary consequence of our independence:

> A 100 per cent implementation rate is neither necessary nor desirable. Such an implementation rate could indicate that a commission was merely undertaking the projects and proposing the reforms the government wanted to hear… .[6]

8.3 We do not lobby for implementation: our definitive statement on how the law should be reformed is contained in our report. However, we

do a considerable amount of work towards securing the implementation of our reports after they are published, as we explain below.

8.4 Stakeholders have an important role in relation to implementation. They can be influential in persuading Government that implementation is (still) needed, should be prioritised and would be supported by key constituencies.

8.5 Implementation is usually by primary legislation, but this is not the only route to implementation and should not be considered the sole barometer of success. The Law Commissions Act 1965 speaks of law reform "by means of draft bills or otherwise".[7] Implementation by secondary legislation, the courts and other bodies may also be effective. This chapter explores all these avenues.

8.6 A small section of our work might be described as "self-implementing". For example, the chief output of our work on electronic signatures was a statement of the existing law, intended to "assist users and potential users of electronic signatures to proceed with confidence".[8] There was therefore no need for additional actions to be taken (although we did make a number of supplementary recommendations).

Securing Government support

8.7 Before looking at the ways in which recommendations may be implemented, it is important to look briefly at implementation rates. Overall, the Law Commission's *Annual Report 2021-22* explains the implementation rate as follows. Between 1965 and 2022, 64% of Law Commission law reform reports were implemented in whole or in part.[9] In addition, 7% had been accepted in whole or in part, and were awaiting implementation, 3% had been accepted in whole or in part but would not be implemented, 9% were awaiting a response from Government, 13% had been rejected and 5% superseded.[10] These rates cover implementation not only by primary legislation but also by alternative routes such as secondary legislation and the courts.[11]

8.8 Fluctuations in the proportion of Law Commission recommendations implemented over the period since 1965 have influenced the development of measures to promote and secure Government support for the recommended

reforms. Implementation rates following the Law Commissions Act 1965 were initially high. Wilson Stark calculates an implementation rate of 96% for the Commission's first decade, dropping slightly to 85% in 1975 to 1984, and 83% in 1985 to 1994. This fell to a low of 50% over the decade from 2005 to 2014, a period of decline which prompted the Law Commission Act 2009.[12] Lord Etherton, a former Chair of the Commission, saw one of the causes of declining implementation rates as a changing political landscape and, in particular, "the reality ... that [today] the Lord Chancellorship is a facet of being the Secretary of State for Justice". Writing in 2008, he also pointed to "a marked increase in legislative activity across Government", and "increased movement of ministers, particularly junior ministers, between and within departments" as factors undermining implementation rates.[13]

8.9 The Law Commission Act 2009 sought to address these difficulties. As explained in Chapter 3, the 2009 Act provided the statutory basis for the Lord Chancellor and the Commission to agree a protocol about the Commission's work. This led to the 2010 Protocol which introduced a number of features that help to make implementation more likely. One of the most important of these, arising at the project selection stage, is the requirement that the minister with policy responsibility must give an undertaking that there is a serious intention to take forward law reform in the area before a project is approved for inclusion in a programme of law reform.[14]

8.10 The "serious intention" requirement is not a requirement for there to be an advance promise of law reform or of the implementation of the Commission's recommendations. That would be unrealistic. Aside from immediate top Government priorities, it is impossible to predict future legislative choices; the legislative programme is only settled in the months leading up to each Parliamentary Session. Legislative priorities, and ministers, may change. The strength of the Government's majority is an important factor.[15] It is accepted within Government that a significant amount of departmental policy work, however important and properly conducted, will not ultimately bear immediate fruit because of uncontrollable external factors. And in the case of Law Commission work, Government cannot be bound in advance to take forward recommendations with which it may turn out not to agree. It would not be in the Commission's or Government's interests to impose too high a hurdle for the commencement of law reform work. Doing so would serve to block both more controversial and technical

projects of less political interest from ever being taken on, and so prevent work which would have in fact been implemented.

8.11 What the "serious intention" Protocol requirement has achieved is to ensure that there is an open and advance discussion between the Commission and Government about the merits of work in a particular area. That rightly prevents the Commission from spending public money on projects that have no prospect of implementation. And it flags to ministers that the Law Commission should not be used as "long grass" to relieve political, press or stakeholder pressure and justify continued procrastination. The fact that there have to be such discussions before work can take place has also had more general benefits. The Commission has had to develop a better understanding of Government's priorities and identify law reform that is likely to lead to actual change. Where proposed work does not obviously fit Government's priorities, the Commission has had to make the case for law reform. As a result of the Commission working more closely with Government in this regard, Government has a better understanding of the value of projects from their outset. Ministers and senior officials are more aware of the Law Commission and more likely to look to the Commission as a potential solution to problems.

8.12 Greater Government engagement with Law Commission work also leads to greater interest in projects as they are conducted. This is supported by provisions in the Protocol for robust lines of communication between the Commission and the Government department during the currency of a project help to ensure that this intention is maintained.[16]

8.13 The reforms flowing from the Law Commission Act 2009 also imposed duties on Government intended to prevent completed projects being forgotten and "lying on the shelf". The Protocol requires the department to provide an interim response within six months of a report and a final response within a year.[17] Even though this obligation is not always complied with, it signals the need for timely Government responses, and provides a basis for the Commission and stakeholders to ask questions where responses are not forthcoming.

8.14 The other duty requiring the Government to account for completed Law Commission work is found in the 2009 Act itself. Section 1 of the Act

imposes an obligation on the Lord Chancellor to prepare and lay before Parliament an annual report on implementation. That is discussed further at the end of this chapter.[18]

8.15 The measures introduced by the 2009 Act helped to boost implementation to a peak of 73% in 2013, but implementation rates had slipped back to 64% by 2021.[19] Teasdale considers that the cause of this renewed decline has been twofold: the priority given by Government to its own legislative agenda, and the combined effects of Brexit and the COVID pandemic.[20] Sir Nicholas Green, our current Chair, has spoken of "Parliamentary paralysis".[21] Increasingly, particularly in light of these unusual and exceptional constraints upon Parliamentary time and capacity, it has been important to bear in mind non-legislative methods of implementation.[22]

8.16 In evaluating the extent to which Law Commission recommendations are becoming law, focusing on implementation rates over shorter periods can be misleading. A report may be implemented many years down the line. Our current Chair explained this to the Commons Justice Committee in 2020:

> Timescales are critical. Some of our reports can sit in the public domain for some years and they frame and shape public debate. Then they return and become implemented. A recent example was a report we published in 2014 on conservation covenants—arrangements between landowners and third parties about improving the countryside and respecting the heritage of the countryside. They are now being implemented in the Environment Bill. That is six years.[23]

8.17 One very striking example of such a delay was the implementation of the Commission's recommendation to abolish the crime of blasphemy, which took 23 years.[24] Wilson Stark argues that recognising the value of recommendations over a longer time frame is part of a need to "re-educate" ourselves about what we mean when we calculate implementation rates and expectations of the Commission. In considering the case of the reform of blasphemy laws, she observes:

> The importance of such proposals is that they challenge the orthodoxy by pushing the boundaries of law reform – one of

> the real benefits of having an independent law reform body. It is crucial that implementation is not expected to occur too quickly, otherwise we risk losing the Commissions' ability to examine areas and draft proposals which a body closer to government might not be able to do.[25]

8.18 There are other examples of extended time frames for implementation. The Commission's report on perpetuities and accumulations, accompanied by a draft bill, was published in 1998. The Perpetuities and Accumulations Act 2009 implemented its recommendations. The Mental Capacity Act 2005 implemented the recommendations of our report on Mental Incapacity ten years after its publication.[26] There are other older projects which may yet be implemented. One example is our work on compulsory purchase. This produced two reports in 2003 and 2004 which were favourably received but not implemented in full. The Government has now asked us to take on a fresh review of the law in this area with a view to its consolidation and modernisation.[27]

8.19 Even where a report has not been implemented, it can continue to shape debate and discussion around law reform. Our report on cohabitation is a good example of this ongoing influence. In 2007 we recommended the introduction of a new statutory scheme to deal with the financial consequences that arise when a cohabiting couple's relationship comes to an end by separation or death.[28] The scheme was designed to prevent financial hardship being suffered by cohabitants and their children at the end of the relationship, without equating cohabitants with married couples or giving them equivalent rights. Our recommendations have not been implemented. However, when the Woman and Equalities Committee undertook a review of the rights of cohabiting parties in 2022-2023, we were called to give evidence to the Committee. In its report, the Committee recommended the adoption of the scheme proposed by the Law Commission.[29] Echoing our approach, the Committee concluded that the law should protect people regardless of whether they are married, in a civil partnership, or cohabitants, without treating cohabitants in the same way as those who are married or in a civil partnership.[30]

8.20 Where Government has concluded that it will not implement Law Commission recommendations, it has given a variety of reasons. It may decide

that the reforms are no longer necessary or have become inappropriate, for example as having been overtaken by events, or as requiring further work, or having become politically sensitive. The recommended changes may be viewed as overly technical, or departmental resources or Parliamentary time may be considered to be too scarce.[31] The number of reports rejected outright in recent years has been very small.[32]

Means of implementation

Primary legislation

8.21 There are a number of pathways to securing implementation by way of primary legislation.

Special Law Commission House of Lords Procedure

8.22 Lack of Parliamentary time has been commonly cited as a cause of declining implementation rates. In particular, as noted above, it has been given by Government as a reason for non-implementation.[33] Recognising that most Law Commission bills were non-contentious, particularly when dealing with technical issues,[34] Parliament sought to remedy this by the creation of a "special procedure" in the House of Lords for non-controversial Law Commission bills.[35] There was already a special procedure for Law Commission bills in the House of Commons which streamlined the Commons stage of legislation by referring a bill directly, when set down for Second Reading, to a Second Reading Committee "unless the House … otherwise orders".[36] But while that procedure expedited the Commons stages of legislation, it had no impact on the time taken by bills in the Lords. It is in the House of Lords where many technical pieces of legislation are introduced and receive the majority of their scrutiny.[37]

8.23 The new procedure was adopted by the Procedure Committee of the House of Lords in 2008 in the hope that this would free up more opportunities for Law Commission bills to be implemented. After a two-year trial, it was adopted on a permanent basis in 2010.[38] The procedure allows the Second Reading to take the form of a "Second Reading Committee", functioning like a Grand Committee, with unlimited membership. After Second Reading, the bill proceeds to a Special Public Bill Committee, which is empowered to take evidence from witnesses as well as to conduct a clause-by-clause examination of the bill. This Committee provides expert scrutiny.[39] The remaining stages,

Report and Third Reading, follow in the usual way. The net result is to reduce the time that qualifying Law Commission bills have to spend on the floor of the House without reducing the scrutiny given to them. Crucially, the procedure enables eligible bills to be introduced alongside, rather than competing for time with, Government's main legislative programme.[40]

8.24 The procedure can be used only where the bill is "uncontroversial". There is no definition of what "uncontroversial" means, other than an assurance from the Lord Chancellor in 2017, in response to concerns that any objections to a policy by consultees would prevent use of the procedure, that "there is no requirement for unanimity among stakeholders".[41] Makower and Laurence Smyth have described the process for deciding whether the special procedure can be used in the following terms.

> The decision as to whether a bill is uncontroversial is made in the "usual channels" in the House of Lords – i.e. the opposition and third party leaderships, in discussion with the government behind the scenes.[42]

8.25 Lord Newby, during the passage of the Insurance Bill in 2014-15, explained to the Special Public Bill Committee that whether matters raised by a bill were controversial was determined by "whether they could reasonably be expected to prejudice its passage through either your Lordships' House or the House of Commons".[43]

8.26 The procedural rules on scope operate in relation to a special procedure bill as they do any other bill. Amendments that are not in scope (that is, very broadly speaking, amendments that are not relevant to the subject matter of the bill) are not admissible and so cannot be proposed. These rules can, therefore, play a role in preserving the uncontroversial nature of a special procedure bill.

8.27 The question whether an amendment is in scope is for the Speaker in the Commons (or the Chair if the bill is in committee) to decide and in the Lords it is ultimately for the House itself. In practice the advice of the public bill offices is generally followed.[44] Given that the scope of a bill is not always clear-cut, whether an amendment will be found to be out of scope can be difficult to predict.

8.28 By mid-2022, nine bills had followed the special procedure.[45] The benefits of the procedure have been recognised in Parliament. In 2009, during the trial stage of the procedure, the Under-Secretary of State for Justice, Lord Bach, said:

> I thank those who have been instrumental in developing this new procedure. I cannot possibly predict whether the procedure will be made permanent—that is a matter for the Procedure Committee and the House—but I am encouraged by the experience of helping to take through the House the Perpetuities and Accumulations Bill, as it then was, and I believe that a permanent procedure could make a real difference to the rate at which Law Commission recommendations can be implemented.[46]

8.29 Lord Faulks, speaking as Minister of State for Justice in 2014 in a Parliamentary debate in the House of Lords about how to prioritise Law Commission bills awaiting parliamentary consideration, observed that "the special procedure has helped to clear the previous backlog and significantly reduce delays".[47] Lord McNally, speaking as Minister of State for Justice in 2013, warmly endorsed use of the procedure when introducing the Inheritance and Trustees' Powers Bill to the House of Lords Special Public Bill Committee:

> I am a great supporter of the House using its powers in this area to get Law Commission reports into law. There was a period when, for far too long, they gathered dust on the shelves. The process that we have adopted enables us to do some useful work.[48]

8.30 Academic commentary concurs. Wilson Stark has observed that the procedure is "working well".[49] Jolley, currently Head of Legal Services at the Law Commission, describes its introduction as having had "an entirely positive impact on implementation", while acknowledging the inherent limitations on the current procedure and the implications of these limitations for the scope of legislation introduced under it.

> The procedure has become an important route to the implementation of the Law Commission's recommendations.

> In addition to the projects successfully implemented, the potential availability of the procedure enables projects to be undertaken that might otherwise not be considered realistic contenders for primary legislation. The procedure cannot, however, be employed for all Law Commission projects as it is only available for non-controversial recommendations. And even if the recommendations that are being considered for the procedure are uncontroversial, the scope of the Bill may be such as to allow controversial amendments to be laid, which in some circumstances can lead to caution in the procedure's use.[50]

8.31 As a result of these constraints, it may be necessary to limit what can go in the bill, for risk of it being too controversial to get it through the special procedure. An example is the Insurance Act 2015. The report it implemented contained a recommendation for dealing with late payments, and a clause in the accompanying draft bill. This was omitted from the bill when it was introduced by the Government, because certain insurance stakeholders did not support it.[51] As it happens, after the 2015 Act was enacted, the late payment clause was eventually added back in by the Enterprise Act 2016 (now section 13A of the 2015 Act).

8.32 Jolley concludes that:

> Over-reliance on the procedure as a means to implement the Commission's recommendations would narrow the focus of the Commission's work and miss opportunities to examine more controversial areas of the law that are nevertheless suitable for the Commission to review.

8.33 Some commentators have questioned the proposition that lack of Parliamentary time has impeded implementation. Makower and Laurence Smyth cite research conducted in 1994, well before the introduction of the special procedure, which found that Law Commission bills did not take up large amounts of time on the floor of either House. The average time taken up by minor bills incorporating Law Commission reform proposals from 1984-1985 to 1992-1993 in the Lords was 1 hour and 49 minutes and in the Commons was 1 hour and 11 minutes.[52] Since the new procedure was introduced, Makower and Laurence Smyth's study of the sessional

diaries published by the House of Commons Journal Office shows that Law Commission bills have taken 0.05% of any session on the floor of the House.[53]

8.34 Makower and Laurence Smyth conclude that the Law Commission's free-standing bills "struggle to get picked up" among the competing proposals for the Government's legislative priorities brought before the Cabinet's Parliamentary Business and Legislation Committee for determination. They found that there was a better chance of implementation where Law Commission recommendations contribute to or complement a government priority, permitting incorporation into a flagship bill.[54]

Programme bills

8.35 Where the special procedure is not followed, legislation to implement Law Commission recommendations for reform will need to form part of the Government's legislative programme, either as a "programme bill" in its own right or as part of another bill. The Government has a legislative programme for each session of Parliament. This is a plan of the bills it will ask Parliament to consider in that session. If a government department has a proposal for a bill that it wants to be included in the legislative programme for a session, it must submit a bid for the bill to the Parliamentary Business and Legislation Committee of the Cabinet. This Committee will consider all the bids for that session and make a recommendation to Cabinet about the provisional content of the programme.

8.36 Competition for a slot in the programme is fierce. In considering whether to recommend that a bill should be given a provisional slot, the Committee will consider factors such as the need for the bill (and whether a similar outcome can be achieved by secondary legislation or without legislation), its relationship to the political priorities of the government, the progress that has been made in working up the proposals for the bill and whether the bill has been published in draft for consultation.[55]

8.37 Once the bill has secured a slot, it will pass through the usual five stages of legislation in each House: first reading, second reading, Committee stage, report stage and third reading.[56] Recent examples of implementation of recommendations by way of a programme bill, or provisions in a programme bill, include the Mental Capacity (Amendment) Act 2019, the Policing and Crime Act 2017 and the Infrastructure Act 2015.[57]

Private members' bills

8.38 It is possible for Law Commission recommendations to be implemented, both in the UK Parliament and in the Senedd, by a private member's bill. This occurred in the case of the recommendations made in our report on forfeiture and the law of succession in 2005 which resulted in the Estates of Deceased Persons (Forfeiture Rule and Law and Law of Succession) Act 2011.[58] The bill was based on the draft bill annexed to our report, with some modifications. The Law Commission Act 2009 was itself a private member's bill.[59] There have been other instances where private members' bills have attempted to implement our recommendations, but have not been passed. This happened, for example, in the case of our recommendations for reform of the law relating to cohabiting couples.[60] In reality, implementation by a private member's bill still relies on Government having a benevolent attitude to the allocation of Parliamentary time, and is not something we can depend upon.

Consolidation bills

8.39 There is a separate Parliamentary procedure for Law Commission bills which consolidate the law.[61] Some change to the substantive effect of the law is permissible, but only where the change is to produce a satisfactory consolidated text. The Senedd has also developed a special procedure for consolidation bills.[62] These procedures will be examined more closely in Chapter 9.[63]

Secondary legislation

8.40 Sometimes it is possible to introduce the changes we have recommended, or at least parts of the changes, through secondary legislation, also known as statutory instruments. This route avoids many of the problems with primary legislation we have described, and may make implementation easier to achieve. There may be less competition for a Parliamentary slot, and less official and ministerial time will be needed, although the extent of Parliamentary activity depends on whether the secondary legislation will be enacted by affirmative or negative procedure. The affirmative procedure requires endorsement by both Houses and a debate on the floor of the House or in a Delegated Legislation Committee. Under the negative procedure, a statutory instrument made by a minister becomes law unless action is taken to prevent it. A motion to annul the instrument may be moved in either House within 40 days after the day on which the order is made.

8.41 The Commission's elections project, which reported on an interim basis in 2016 and in a final report in 2020, is an example of the appropriate use of secondary legislation to implement recommendations. As well as recommending a single, consistent legislative framework, requiring primary legislation, the project considered the reallocation of existing electoral rules as between primary and secondary legislation. One of the problems with Victorian legislation for UK Parliamentary elections was that it placed all the law, including the detail of administering a poll, in primary legislation. In contrast, nearly all the laws governing other types of elections fell into secondary legislation. Our recommendations were aimed at ensuring that substantial changes to electoral law were reserved to primary legislation, while rules on matters of detail relating to purely technical or administrative aspects of electoral law, which might need to respond to changes in circumstances, were placed in secondary legislation. Although some primary legislation was required to "move" the matters of detail currently in primary into secondary legislation, recommendations in relation to technical or administrative aspects of the law could thereafter be implemented by secondary legislation.[64]

8.42 The Immigration Rules project which ran from 2017 to 2020, and by its very nature involved implementation by secondary legislation, recommended a complete overhaul of the Immigration Rules based on the principles identified in the simplifying the immigration rules report.[65] The Government accepted the recommendation, undertaking to produce a new set of consolidated and simplified Rules.[66]

8.43 The recommendation made in our charities report that the Government should expand the pool of "designated advisers" (the people who can give advice to charities on disposals of land) was implemented by secondary legislation, alongside primary legislation.[67] Another example of this approach is the recommendation in our inheritance report for an automatic five-yearly inflation adjustment by way of secondary legislation to change the statutory legacy. We recommended primary legislation to create the power to do so, and a requirement to exercise the power by secondary legislation every five years.[68] In our advice to Government on remote driving, where we were asked to look at both short-term and long-term measures, we recommended amendment of the Road Vehicles (Construction and Use) Regulations 1986 as a suboptimal but desirable short-term fix to prevent unregulated remote driving.[69]

Legislative Reform Orders

8.44 Legislative reform orders are a type of statutory instrument which can amend primary legislation independently of a Parliamentary bill. Under the Legislative and Regulatory Reform Act 2006, legislative reform orders can be used to change the law to remove or reduce burdens imposed by legislation or to promote better regulation. A "burden" can be financial cost, administrative inconvenience, an obstacle impeding efficiency, productivity or profitability, or a sanction which affects the carrying on of any lawful activity. The promotion of better regulation is defined as ensuring that regulatory functions are exercised in accordance with principles of transparency, accountability, proportionality and consistency, and targeted only at cases in which action is needed.[70]

8.45 The level of Parliamentary scrutiny of such orders is not fixed. When ministers formally lay an order, they are required to propose the level of scrutiny it should be given. Two cross-party committees, the Regulatory Reform Committee in the House of Commons and the Delegated Powers and Regulatory Reform Committee in the House of Lords, examine all legislative reform orders. They consider whether the minister has recommended the appropriate level of scrutiny for the order and can require a higher level.[71]

8.46 To date, little use has been made of this procedure as a way of implementing Law Commission recommendations, but it provides a possible avenue for future implementation.[72]

Courts

8.47 Reports can be implemented by the senior courts through the development of the common law. When a suitable case presents itself, a Law Commission report can assist the judiciary by providing a broad view of the whole area of law. This helps to overcome the piecemeal nature of much judge-made law. This is a tendency described by Lord Lloyd-Jones, a former Chair of the Law Commission, as arising from the fact that "the focus of the judges – just like the focus of counsel in any particular case – is necessarily geared to the issues as they are relevant in the context of that particular case".[73]

8.48 Our report on damages for personal injury, for example, specifically recommended implementation by the courts.[74] In *Wells v Wells*, the House of Lords referred, in deciding to change the law, to both the recommendations

made and the research which underlay them. In *Heil v Rankin*, the Court of Appeal raised the level of general damages for personal injury in accordance with the report, although not as far as the Commission had recommended.[75]

8.49 Another example is our report on electronic signatures.[76] While the initial view of Commissioners was that legislation was not needed to liberalise the law, we explored with Parliamentary counsel whether there was a straightforward legislative device which could help reassure stakeholders of the validity of electronic signatures. Counsel's advice was that any such legislative proposition was likely to be unwieldy and so we decided to set out a statement of the common law in our report. To this end we prepared a one-page summary of key legal propositions. We also recommended that the Lord Chief Justice convene a working group of legal and non-legal interests, incorporating representation from the judiciary and industry, to create a framework for immediate introduction of our reforms. The Commissioner for Commercial and Common Law, Professor Sarah Green, acted as co-Chair for the group. Extensive guidance has been given which has materially facilitated the implementation of our report.

8.50 In other projects we have consulted the senior and specialist judiciary widely on possible common law solutions. We did this, for instance, in relation to smart contracts and digital assets. Our report on smart contracts, in the form of an Advice to Government, concluded that the legal framework in England and Wales was able to facilitate and support the use of smart legal contracts without the need for statutory reform. We found that current legal principles do not need to change to apply to smart legal contracts, but that their factual application will in some contexts look different to their conventional application. Our Advice set out how and where this would be the case.[77] In the case of digital assets, we found that some legal rules would need to be modified and developed, but concluded that, in order to future-proof such changes and retain technology neutrality, such changes would best be achieved through common law means. Our final report was written with a view to providing a judicial guide and a framework for this purpose.[78] None of this would operate to bind the discretion of the courts or judiciary in the future.

8.51 Law Commission reports influence development of the common law. Our reports have been cited by the Supreme Court when developing a line

of case law. For example, our report on the illegality defence recommended that it should be "open to the courts to develop the law in ways that would render it considerably clearer, more certain and less arbitrary".[79] The report was referred to in the case of *Patel v Mirza*.[80] Lady Hale (as she then was) subsequently stated:

> This was clearly an area of judge-made law where the judges had got us into a mess and Parliament was most unlikely to get us out of it. A thorough investigation by the Law Commission was a great help to us in trying to do so.[81]

8.52 Law Commission recommendations may also be implemented by way of amendments to procedure rules or court practice directions. Some of the recommendations in the expert evidence in criminal proceedings project, for example, were implemented by using the Criminal Procedure Rules and the Criminal Practice Directions.[82] Shortly after these developments, the Court of Appeal endorsed the new approach as a matter of common law.[83] The expert evidence project also illustrates the way in which implementation may be achieved through an unexpected route. In this case, our recommendation had been for implementation of our recommendations by way of primary legislation.

8.53 Another example of implementation by way of court procedure is the enforcement of family financial orders project. This made recommendations for non-statutory reforms to improve the enforcement system which could be implemented through changes to court rules and practice directions, court administration and the provision of guidance.[84] The then Justice Minister Lucy Frazer KC MP confirmed in her response to the report that the Government would engage the assistance of the senior family judiciary, the Family Procedure Rule Committee and HM Courts and Tribunals in order to implement the recommendations. This would enable amendments to the Family Procedure Rules 2010 and operational procedures.[85]

Other bodies

8.54 Reports can be implemented by other bodies using non-legislative means. One way to do this is by recommending the introduction or amendment of codes of practice or guidance. In some cases, regulatory bodies are required or empowered by statute to create codes of practice.

8.55 Our report on the fiduciary duties of investment intermediaries recommended that the Pensions Regulator endorse its conclusions either by exercising its statutory power to issue a code of practice, or by updating its "trustee toolkit". Unless the relevant statute specifies a procedure for producing the code, this can be a relatively informal and flexible route to implementation, as long as the subject matter is appropriate for incorporation into such a code or guidance, rather than requiring legislation.[86]

8.56 Many other regulatory bodies produce codes of practice or guidance even where they are under no statutory obligation to do so. This type of guidance may have a significant impact on how the law is interpreted or change behaviour because of the professional consequences of failing to comply. Implementation is quick and easy, subject only to such formalities as required by the regulator's constitution or good practice, and easy to update. For example, in our project on trustee exemption clauses, we recommended a professional rule of practice requiring transparency when a trustee is seeking to limit liability.[87] This rule was adopted by several regulatory bodies, including the Law Society. The Commission was able to announce the bodies' commitment to the rule of practice at the same time as issuing its report, with Government "acceptance" of the recommendation following some time later. Our technical issues in charity law project also included recommendations that the Charity Commission should revise some of its guidance and practices. These have been implemented.[88]

8.57 If a code of practice is envisaged by a project, we can consult on its terms and prepare a draft to include with the report. This is what happened in our events fees project, for example.[89] Even where the Commission does not present a drafted code, we can make recommendations as to the content of guidance. In our report on matrimonial property, needs and agreements, we recommended that the Family Justice Council produce guidance on the concept of financial needs on divorce, and made suggestions about what the guidance should say.[90]

8.58 It is important to avoid an "all or nothing" approach to law reform. Sometimes a project team may consider that the best policy approach to a legal problem would involve legislation, but that an alternative such as guidance or other regulatory action would improve matters to a lesser extent. The report can consider both approaches, including the greater benefits of

the legislative approach. If Government does not agree with the legislative route, more limited reform may still take place.

8.59 The draft bill seeking to implement recommendations in our expert evidence in criminal proceedings project, for example, was rejected by Government. However, as mentioned above at paragraph 8.52, alternative methods of implementation were pursued through changes to the court procedure rules. In addition, the Advocacy Training Council adopted the recommendations in the report as the basis for its training.[91] In this way, the report, intended to address the problem of unreliable or inappropriate expert evidence, achieved many of its objectives without Government support for legislation.

Advisory reports

8.60 In some cases, the Law Commission undertakes advisory projects which contribute to law reform without aiming to make "hard" law reform proposals.[92] In such projects, there is no simple measure of successful implementation. Our project on the form and accessibility of the law in Wales looked at how to ensure that Welsh laws are easily available, intelligible, clear and predictable in their effect. The report recommended practical, long-term approaches to law-making in Wales, including a model of consolidation and codification to make primary legislation more accessible. The project recognised that it would not be possible to do everything at once. Its objective was to design a process that could be undertaken at "a faster or slower pace as resources permit".[93]

8.61 Our report on smart contracts mentioned above also took the form of an advice to Government.[94] Another example of advisory work is our project on property interests in intermediated securities. The legal issues raised by intermediated securities have international ramifications. From 2006 to 2008, the Commission advised the Government on successive drafts of the UNIDROIT Convention on Substantive Rules for Intermediated Securities.[95]

Implementation support

8.62 Where our work is implemented by a bill annexed to our report, that bill will have been drafted by Parliamentary counsel who is seconded to

the Law Commission and instructed by the Commission to give effect to our recommendations. The bill will be piloted through Parliament by the relevant minister and their officials. Where our report is not accompanied by a bill, and primary legislation is necessary, Government will get its own Parliamentary counsel to draft a bill.

8.63 We can provide a variety of forms of support to Government at different stages of the implementation process. While this is at a considerable cost to the Commission in terms of resources, we think that collaboration can work well for all concerned. For us it means that the quality of implementation is enhanced and for the department and minister concerned it means that they have to hand a source of expert advice. The end result is better legislation.

8.64 At a minimum, we may assist the departmental bill team, the team which supports the minister with responsibility for the bill and manages the bill's progress through Parliament and up to commencement. Team members include policy officials and Government lawyers. We can provide help at any point by answering legal and policy questions as they arise. We can provide more structured assistance by producing or commenting on briefings or memos. In some cases, Government departments have asked us to write instructions to Parliamentary counsel rather than using their own departmental lawyers.[96] Alternatively, they may ask us to second a lawyer to the bill team to assist with the preparation of the bill and its introduction and passage through Parliament or the Senedd.[97] Where a draft bill has been produced by our own counsel, we can offer continued support throughout the Parliamentary process.

8.65 Where a bill is introduced using the special procedure, it is likely that the Commissioner and sometimes a team lawyer will give oral and written evidence to the Special Public Bill Committee.[98] Team lawyers will also work closely with officials preparing the bill for introduction and support its progress through Parliament.

8.66 Care is required, however, to ensure that the Commission and its staff play an appropriate role, and that lines of independence are not forgotten. In cases where, post-publication of a report, the Commission goes on to assist Government with the preparation of a bill to implement its recommendations, the resulting Government bill is not peer reviewed

and approved by Commissioners. We are clear with Government and transparent with stakeholders that the bill does not have the imprimatur of Commissioners, in the same way that a bill published with a report does.

8.67 We are also clear when assisting Government in the production of a bill after we have reported that our function is principally to translate the Commissioners' policy recommendations into statutory language. This can involve the lead Commissioner and Commission staff making decisions about how to fill in minor policy gaps which occur in the ordinary course of drafting legislation. But where a policy issue falls outside of the scope of the Commission's prior recommendations, or where Government wishes to depart from those recommendations, decision-making is a matter for Government. The lead Commissioner and Commission staff can provide some assistance to Government officials as they draw up policy, but cannot provide legal advice or a Law Commission view about what the policy should be. Ultimately decisions must be made by ministers on the policy advice of officials and the legal advice of Government lawyers.

8.68 There are other more novel ways in which the Law Commission can support implementation. These measures illustrate the flexibility the Commission can bring to the law reform process. In the Commonhold project, for example, our report was accompanied by an open letter to mortgage lenders, designed to "outline the steps we have taken to address concerns raised with us by and on behalf of mortgage lenders during our work on commonhold".[99] Following our report on commonhold home ownership, Government formed a Commonhold Council to advise it on the implementation of a reformed commonhold regime.[100] The project's lead Commissioner sits on the Council's Technical Support Group.

8.69 We can provide support for implementation long after publication of a report. For example, some years after our final report on conservation covenants, we did additional work at the request of Government to update our draft bill. As mentioned above at paragraph 8.16, the Commission's recommended scheme for conservation covenants has now been enacted in the Environment Act 2021. Another example is our report on public nuisance and outraging public decency.[101] Our report was published in 2015. Our recommendations in relation to an offence of public nuisance were included in the Police, Crime, Sentencing and Courts Bill in 2021.

We provided support at that time by answering questions and submitting written evidence to the Public Bill Committee.[102]

Lord Chancellor and Welsh Government annual reports

8.70 One of the measures introduced by the Law Commission Act 2009 to improve implementation rates was the requirement for the Lord Chancellor to report to Parliament each year on the progress made in implementing the Commission's recommendations.[103] Constitutionally, the provision is also important for the Government's accountability to Parliament. The provision requires the Lord Chancellor to list Law Commission proposals implemented in whole or in part during the year, and those that have not been implemented by the end of the year, including plans for dealing with any of those proposals and any decision not to implement, with reasons. This is, in our view, an important opportunity to give both Parliament and the public a regular indication of the Government's intentions in relation to our work. According to Teasdale, "the purpose of these reports is to make more transparent the rate of progress both as to implementation and as to the handling of proposals which either are in the course of being implemented or are awaiting political decision".[104]

8.71 The first report, for 2010-2011, was published in January 2011. Six further reports followed, at erratic intervals, up until July 2018, after which a gap of five years ensued without a report. This is an approach described by Teasdale, writing in 2021, as "highly unsatisfactory".[105] He also notes a steady rise between 2013 and 2018 in the number of reports for which a decision on whether to implement remained outstanding.[106] The latest report, covering the intervening five-year period, was published in July 2023.[107]

8.72 The reports laid so far have provided the information required by statute, but in some cases have kept detail on the Government's position on a project to a minimum, particularly where a report is awaiting a Government response on implementation.[108] This reflects the time it can take for a report to be fully considered by Government. As we have described in this chapter, the timescale for implementation of our recommendations can extend over many years, and it is important that the requirement to report does not act to force the rejection of recommendations prematurely.

8.73 Wilson Stark observes that the statutory obligation is to report on how the Government has dealt with, or intends to deal with, the Commission's proposals from the previous year. There is no obligation, where there has been a decision not to implement, to report on it again, even where the Lord Chancellor has reported only that the proposal is not a priority at present. She suggests that it would be beneficial to report on rejected reports annually, as a useful reminder that the work is there, and may be considered more useful or achievable in subsequent years.[109]

8.74 It has also been observed that other mechanisms to oversee government action on law reform might be more effective than the annual reporting requirement. Lee describes proposals over the years to establish a body with this specific function: a joint committee of both Houses of Parliament, a Select Committee, and an All-Party Group on Law Reform have been variously suggested.[110]

8.75 As the annual report is laid before Parliament, Parliamentarians have the opportunity to ask questions about it, and equally to raise questions about the absence of an annual report. For the most part, reports have to date been laid without significant comment. As this is a good opportunity for Parliament to support implementation, further debate about their content would be a welcome development.

8.76 In Wales, following amendment to the Law Commissions Act 1965 by the Wales Act 2014, the Welsh Government has also been required to produce annual reports on the implementation of law reform proposals for legislative matters devolved to the Senedd.[111] The Welsh Government has produced eight annual reports to date, covering the period from 2015, when the obligation was introduced, to 2023.[112]

Notes

1 M Arden, "Introduction", pt 5, Implementation by Statute, in M Dyson, J Lee & S Wilson Stark (eds), *Fifty Years of the Law Commissions: The Dynamics of Law Reform* (2016) p 173.

2 S Wilson Stark, *The Work of the British Law Commissions: Law Reform… Now?* (2017) pp 118 to 132.

3 See S Wilson Stark, "Promoting Law Reform: By Means of Draft Bills or Otherwise", and, for an analysis of the dialogue between the Supreme Court and the Law Commission, J Lee, "The Etiquette of Law Reform", in M Dyson, J Lee & S Wilson Stark (eds), *Fifty Years of the Law Commissions: The Dynamics of Law Reform* (2016). For the role of our reports in statutory interpretation by the courts, see for example *R (on the application of O (a minor)) v SSHD*, where Lord Hodge explained that external sources such as Law Commission reports "may disclose the background to a statute and assist the court to identify not only the mischief which it addresses but also the purpose of the legislation, thereby assisting a purposive interpretation of a particular statutory provision": [2022] UKSC 3, [2022] 2 WLR 343 at [30].

4 The Law Commission's *Annual Report 2021-22* records that, during the reporting period, the Commission was mentioned 93 times in judgments in England and Wales and appeared in Hansard 339 times: https://www.lawcom.gov.uk/annual-report-2021-2-published/, p 8. Such "mentions" can cite the source as authoritative, as material for argument, or for the purpose of making a change: see J Lee, "*The Etiquette of Law Reform*" in M Dyson, J Lee & S Wilson Stark (eds), Fifty Years of the Law Commissions: The Dynamics of Law Reform (2016) pp 280 to 283.

5 G Hammond, "The Legislative Implementation of Law Reform Proposals", in M Dyson, J Lee & S Wilson Stark (eds), *Fifty Years of the Law Commissions: The Dynamics of Law Reform* (2016) p 175.

6 S Wilson Stark, *The Work of the British Law Commissions: Law Reform… Now?* (2017) p 99.

7 Law Commissions Act 1965, s 3(1)(c). Wilson Stark contrasts this with the stipulation in s 3(1)(d) of the 1965 Act that consolidations and repeals, as distinct from substantive law reform, must be submitted to the government by way of a draft bill: S Wilson Stark, "Promoting Law Reform: By Means of Draft Bills or Otherwise", in M Dyson, J Lee & S Wilson Stark (eds), *Fifty Years of the Law Commissions: The Dynamics of Law Reform* (2016) p 140.

8 Electronic Execution of Documents (2019) Law Com No 386, para 1.2.

9 As a rough guide, although there are a number of approaches to the calculation of implementation rates, it may be stated that about two-thirds of the Law

Commission's reports have been implemented: N Paines, "Reflections on Statutory Implementation in the Law Commission", in M Dyson, J Lee & S Wilson Stark (eds), *Fifty Years of the Law Commissions: The Dynamics of Law Reform* (2016) p 198. For a differing view on how to calculate implementation rates, see the All-Party Parliamentary Humanist Group, *No Lawful Impediment* (2022), https://humanists.uk/wp-content/uploads/APPG-report_nolawfulimpediment_websingle.pdf, p 52.

10 These statistics are published in the Law Commission's *Annual Report 2021–22*, https://www.lawcom.gov.uk/annual-report-2021-2-published/, p 43. There is also a cumulative implementation table on our website: https://www.lawcom.gov.uk/our-work/implementation/table/.

11 See S Wilson Stark, "Promoting Law Reform: By Means of Draft Bills or Otherwise", in M Dyson, J Lee & S Wilson Stark (eds), *Fifty Years of the Law Commissions: The Dynamics of Law Reform* (2016) p 146.

12 S Wilson Stark, *The Work of the British Law Commissions: Law Reform… Now?* (2017) p 93.

13 T Etherton, "Law Reform in England and Wales: A Shattered Dream or Triumph of Political Vision?" (2008) 73 *Amicus Curiae*, 6, cited in M Jolley, "Independence and Implementation: In Harmony and in Tension" (2019) 21 *European Journal of Law Reform* 562, 568 to 569.

14 Law Commission, *Protocol between the Lord Chancellor (on behalf of the Government) and the Law Commission* (2010) Law Com No 321, https://www.lawcom.gov.uk/document/protocol-between-the-lord-chancellor-on-behalf-of-the-government-and-the-law-commission/, para 6. The requirement was considered at para 3.10 above in relation to project selection.

15 The impact of changing government priorities on Law Commission work is analysed in J Lee, "'Not Time to Make a Change'? Reviewing The Rhetoric of Law Reform" (2023) *Current Legal Problems*, cuad004, https://doi.org/10.1093/clp/cuad004.

16 Law Commission, *Protocol between the Lord Chancellor (on behalf of the Government) and the Law Commission* (2010) Law Com No 321, https://www.lawcom.gov.uk/document/protocol-between-the-lord-chancellor-on-behalf-of-the-government-and-the-law-commission/, para 11. See also paras 4.9 to 4.12 above.

17 Above, paras 18 and 19.

18 See paras 8.70 to 8.76 below.

19 J Teasdale, "Implementation of Law Reform Proposals in the United Kingdom: A Continuing Dilemma?" (2021) 23 *European Journal of Law Reform* 405, 415.

20 Above, 415.
21 Oral evidence of Sir Nicholas Green, Chair of the Law Commission, to the Commons Justice Committee, 24 November 2020, https://committees.parliament.uk/oralevidence/1292/pdf/.
22 In our report on electronic signatures, for example, we rejected the possibility of legislative intervention in favour of a combination of common law development through the courts and the creation of a working group combining judges, legal practitioners and representatives of business: see para 8.6 above. In our report on smart contracts, we emphasised that implementation should be through the courts: see para 8.50 below.
23 Above.
24 Criminal Law: Offences against Religion and Public Worship (1985) Law Com 145, implemented by the Criminal Justice and Immigration Act 2008.
25 S Wilson Stark, "Promoting Law Reform: By Means of Draft Bills or Otherwise", in M Dyson, J Lee & S Wilson Stark (eds), *Fifty Years of the Law Commissions: The Dynamics of Law Reform* (2016) p 146.
26 Mental Incapacity (1995) Law Com No 231.
27 https://www.lawcom.gov.uk/project/compulsory-purchase/.
28 Cohabitation: the financial consequences of relationship breakdown (2007) Law Com No 307.
29 House of Commons, Women and Equalities Committee, The Rights of Cohabiting Partners, Second Report of Session 2022-23, 4 August 2022, https://committees.parliament.uk/publications/23321/documents/170094/default/, para 63.
30 Above.
31 J Teasdale, "Implementation of Law Reform Proposals in the United Kingdom: A Continuing Dilemma?" (2021) 23 *European Journal of Law Reform* 405, 410.
32 Statistics for reports rejected outright by Government must be provided in the Lord Chancellor's annual report to Parliament. See para 8.70 below. Of the 58 reports published in the period 2011 to 2020, none has been rejected. In the period 1991 to 2010, 13 out of 82 published reports were rejected. See Law Commission's *Annual Report 2021–22*, https://www.lawcom.gov.uk/annual-report-2021-2-published/, annex A.
33 See, for example, J Teasdale, "Implementation of Law Reform Proposals in the United Kingdom: A Continuing Dilemma?" (2021) 23 *European Journal of Law Reform* 405, 410, 411 and 418.
34 Above, 408.

35 Law Commission Bills, Procedure Committee, First Report (2007-08) HL Paper 63. The procedure was created during the passage of the Legislative and Regulatory Reform Bill as an alternative to a contentious clause giving the Government powers to introduce Law Commission recommendations by order: see A Makower and L Laurence Smyth, "Law Reform Bills in the Parliament of the United Kingdom" (2020) 22 *European Journal of Law Reform* 164, 167.

36 House of Commons Standing Orders (Public Business) (2021), Standing Order 59, (passed 1995), https://publications.parliament.uk/pa/cm5802/cmstords/so_804_2021/so-804_02122021v2.pdf, p 55. A former Lord Chancellor, Robert Buckland KC MP, recently called in Parliament for the Leader of the House to work with the Procedure Committee to consider amending Standing Order 59 to allow Law Commission bills to go straight from Second Reading to Third Reading without the need for a full Committee stage: *Hansard* (HC), 1 March 2023, vol 728, col 878.

37 M Jolley, "Independence and Implementation: In Harmony and in Tension" (2019) 21 *European Journal of Law Reform* 562, 569.

38 Two bills were introduced under the procedure during the trial period, resulting in the Perpetuities and Accumulations Act 2009 and the Third Parties (Rights Against Insurers) Act 2010. The recommendation to make the procedure permanent was made in the Second Report of the House of Lords Procedure Committee 2010-2011, which noted the view of Lord Goodlad, former Chair of the Constitution Committee that the procedure "worked well": https://publications.parliament.uk/pa/ld201011/ldselect/ldprohse/30/3003.htm.

39 Recent special procedure Law Commission bills have been subject to scrutiny by committees led by previous Lord Chief Justices and a Master of the Rolls: Lord Judge chaired the Committee on the Sentencing Bill; Lord Thomas chaired the Committee on the Electronic Trade Documents Bill and Lord Etherton chaired the Committee on the Charities Bill.

40 The procedure is described in a House of Commons Library Note, The Law Commission and Law Commission Bill Procedures, SN/PC/7156, 27 March 2015, app 1, https://researchbriefings.files.parliament.uk/documents/SN07156/SN07156.pdf.

41 The Rt Hon David Lidington CBE MP, then Lord Chancellor, in a letter to Sir David Bean, 15 December 2017. The assurance was given after a decision by the Government not to proceed with the Goods Mortgages Bill, which the Law Commission had expected to be introduced under the special procedure.

42 A Makower and L Laurence Smyth, "Law Reform Bills in the Parliament of the United Kingdom" (2020) 22 *European Journal of Law Reform* 164, 167. The

"usual channels" is a term used to describe the working arrangements between the whips of the Government and the Opposition.

43 House of Lords Special Public Bill Committee, Insurance Bill (HL) HL Paper 81, 24 December 2014.

44 The public bill offices in both Houses are responsible for helping Members with the drafting of bills and amendments. Amendments to bills are tabled in the office. Each bill has an allocated Clerk who can help with the drafting of amendments, and may be able to suggest changes which improve an amendment's chance of being selected for debate: see further R Rogers, *"Servants of the house" – What the Clerks do* (2020), https://w4mp.org/w4mp/w4mp-guides/whos-who/servants-of-the-house-what-the-clerks-do/.

45 The nine bills are listed in the Law Commission's *Annual Report 2021-22*: https://www.lawcom.gov.uk/document/annual-reports/.

46 Third Parties (Rights against Insurers) Bill, *Hansard* (HL), 7 December 2009, vol 715, col 42GC.

47 *Hansard* (HL), 12 May 2014, vol 753, col 448GC.

48 Inheritance and Trustees' Powers Bill, *Hansard* (HL), 22 October 2013, vol 748, col 335.

49 S Wilson Stark, *The Work of the British Law Commissions: Law Reform… Now?* (2017) p 131.

50 M Jolley, "Independence and Implementation: In Harmony and in Tension" (2019) 21 European Journal of Law Reform 562, 573.

51 Evidence from Commissioner David Hertzell to the Special Public Bill Committee Inquiry on the Insurance Bill 2014, House of Lords (2 December 2014), https://publications.parliament.uk/pa/ld201415/ldselect/ldinsur/81/81.pdf.

52 P Hopkins, *Parliamentary Procedures and the Law Commission – a Research Study, Law Commission* (1994), cited in A Makower and L Laurence Smyth, "Law Reform Bills in the Parliament of the United Kingdom" (2020) 22 *European Journal of Law Reform* 164, 174.

53 Above, 174.

54 Above, 175.

55 https://www.gov.uk/guidance/legislative-process-taking-a-bill-through-parliament.

56 For a detailed explanation of the process, see Cabinet Office, *Guide to Making Legislation* (2022), https://www.gov.uk/government/publications/guide-to-making-legislation.

57 The Mental Capacity (Amendment) Act 2019 implemented in part the recommendations made in Mental Capacity and Deprivation of Liberty (2017) Law Com No 372; the Policing and Crime Act 2017 (pt 6) implemented the

recommendations made in Firearms Law: Reforms to Address Pressing Problems (2015) Law Com No 363; and the Infrastructure Act 2015 implemented in part the recommendations made in Wildlife Law: Control of Invasive Non-native Species (2014) Law Com No 342.

58 The Forfeiture Rules and the Law of Succession (2005) Law Com No 295.

59 Sponsored by Lord Lloyd of Berwick and Emily Thornberry MP, originating in the House of Lords, Session 2008-09, https://bills.parliament.uk/bills/420.

60 The Cohabitation Rights Bill 2019 was introduced in the House of Lords by Lord Marks of Henley-upon-Thames, Session 2017-19, https://bills.parliament.uk/bills/2026.

61 House of Lords Standing Orders (Public Business) (2021), Standing Order 50 and House of Commons Standing Orders (Public Business) (2021), Standing Orders 58 and 140.

62 Senedd Standing Order 26C on Consolidation Bills.

63 See paras 9.5 to 9.11 below.

64 Electoral Law: A Joint Final Report (2020) Law Com No 389; Scot Law Com No 256, paras 2.16 to 2.18.

65 Simplifying the Immigration Rules (2019) Law Com No 388.

66 Home Office, *Simplifying the Immigration Rules: a response* (March 2020) https://www.gov.uk/government/publications/simplifying-the-immigration-rules-a-response.

67 Technical Issues in Charity Law (2017) Law Com No 375, para 7.175.

68 Intestacy and Family Provision Claims on Death (2011) Law Com No 331, para 2.128.

69 Law Commission, *Remote Driving: Advice to Government* (2023), paras 5.16 and 5.30.

70 Legislative and Regulatory Reform Act 2006, ss 1 and 2.

71 Since the provisions into force in January 2007, 42 legislative reform orders have been made.

72 The Legislative Reform (Limited Partnerships) Order 2009 No 1940 implements two of the recommendations made in Partnership Law (2003) Law Com No 283; Scot Law Com No 192.

73 Lord Lloyd-Jones, speech to the London Common Law and Commercial Bar Association (27 January 2015).

74 Structured Settlements and Interim and Provisional Damages (1994) Law Com No 224.

75 *Wells v Wells* [1997] 1 WLR 652, CA; [1999] 1 AC 345; *Heil v Rankin* [2000] 3 WLR 117; [2001] QB 272. Both cases were discussed in a speech by Lady

Hale: *Impact in the Courts*, Impact and Law Reform Conference, Institute of Advanced Legal Studies (11 June 2019), https://www.supremecourt.uk/docs/speech-190611.pdf.

76 Electronic execution of documents (2019) Law Com No 386.

77 Smart legal contracts: Advice to Government (2021) Law Com No 401.

78 Digital assets (2023) Law Com No 412.

79 The Illegality Defence (2010) Law Com No 320, para 3.37, https://www.lawcom.gov.uk/project/illegality/. The illegality defence arises when the defendant in a private law action argues that the claimant should not be entitled to their normal rights or remedies because they have been involved in illegal conduct which is linked to the claim.

80 [2016] UKSC 42, [2017] AC 467.

81 Lady Hale, *Impact in the Courts*, Impact and Law Reform conference, Institute of Advanced Legal Studies, (11 June 2019), https://www.supremecourt.uk/docs/speech-190611.pdf. See also the discussion of earlier deliberations by the Supreme Court of possible reform of the illegality defence following the Law Commission report in J Lee, "The Etiquette of Law Reform" in M Dyson, J Lee & S Wilson Stark (eds), *Fifty Years of the Law Commissions: The Dynamics of Law Reform* (2016) pp 286 to 292, and, for further consideration of the issue following *Patel v Mirza*, J Lee, "Illegality, Familiarity and the Law Commission" in S Green and A Bogg (eds), *Illegality after Patel v Mirza* (2018).

82 D Ormerod, "Reflections on the Courts and the Commission", in M Dyson, J Lee & S Wilson Stark (eds) *Fifty Years of the Law Commissions: The Dynamics of Law Reform* (2016) p 334.

83 *R v H* [2014] EWCA Crim 1555, (2014) 140 BMLR 59, [43] – [44] (Sir Brian Leveson P).

84 Enforcement of Family Financial Orders (2016) Law Com No 370.

85 Letter to the Law Commission from Justice Minister Lucy Frazer (23 July 2016), https://www.lawcom.gov.uk/financial-order-reforms-set-to-boost-unfairly-treated-former-partners-and-families/.

86 The House of Lords Delegated Legislation Committee has warned against the use of guidance where this specifies legislative requirements or is otherwise determinative of matters which affect a person's legal rights or obligations. In such cases, the guidance is not properly guidance, and should be placed in secondary legislation subject to parliamentary scrutiny. See Thirty First Report, Delegated Powers and Regulatory Reform Committee (2017-19) HL 177, https://publications.parliament.uk/pa/ld201719/ldselect/lddelreg/177/17703.htm.

87 Trustee Exemption Clauses (2006) Law Com No 301, pt 6, https://www.lawcom.gov.uk/project/trustee-exemption-clauses/. The project is also considered at para 5.37 above.

88 Technical Issues in Charity Law (2017) Law Com No 375. See also the Commons Library Research Briefing, Commons Library Analysis of Charities Bill [HL] (21 February 2022), https://researchbriefings.files.parliament.uk/documents/CBP-9422/CBP-9422.pdf, para 3.4.

89 https://www.lawcom.gov.uk/project/event-fees-in-retirement-properties/.

90 https://www.lawcom.gov.uk/project/matrimonial-property-needs-and-agreements/.

91 See Law Commission *Annual Report 2014-15*, https://www.lawcom.gov.uk/document/annual-reports/, p 47, and Expert Evidence in Criminal Proceedings in England and Wales (2011) Law Com No 325, https://www.lawcom.gov.uk/project/expert-evidence-in-criminal-proceedings/.

92 N Paines, "Reflections on Statutory Implementation in the Law Commission", in M Dyson, J Lee & S Wilson Stark (eds), *Fifty Years of the Law Commissions: The Dynamics of Law Reform* (2016) p 199.

93 Form and Accessibility of the Law Applicable in Wales (2015) Law Com 366, para 1.9. The project is also considered, as an example of a Wales-only project, at paras 2.16 to 2.20 above and, in relation to codification, at paras 9.26 and 9.27 below.

94 See para 8.50 above.

95 https://www.lawcom.gov.uk/project/property-interests-in-intermediated-securities/.

96 This happened in relation to pt 10 of the Online Safety Bill, which implemented our report on modernising the communications offences. It is also happening with our work on residential leasehold, commonhold and the right to manage.

97 This happened, for example, with our planning law in Wales project. See para 9.28 below.

98 Some instances of Commissioner and lawyer evidence to the Special Public Bill Committee are given at para 4.25 above.

99 https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2020/07/Commonhold-open-letter-to-lenders---final-N17.pdf

100 *Commonhold Council*, https://www.gov.uk/government/groups/commonhold-council.

101 Simplification of the Criminal Law: Public Nuisance and Outraging Public Decency (2015) Law Com No 358.

102 https://publications.parliament.uk/pa/cm5802/cmpublic/PoliceCrimeSentencing/memo/PCSCB19.htm.

103 Law Commission Act 2009, s 1, inserting s 3A to the Law Commissions Act 1965.

104 J Teasdale, "Implementation of Law Reform Proposals in the United Kingdom: A Continuing Dilemma?" (2021) 23 *European Journal of Law Reform* 405, 420. See the list of Ministry of Justice annual reports with figures for implementation at 420 to 421. For further analysis of the reports published to date, see J Lee, "'Not Time to Make a Change'? Reviewing The Rhetoric of Law Reform" (2023) *Current Legal Problems*, cuad004, https://doi.org/10.1093/clp/cuad004.

105 J Teasdale, "Implementation of Law Reform Proposals in the United Kingdom: A Continuing Dilemma?" (2021) 23 European Journal of Law Reform 405, 421.

106 Above, 426.

107 https://www.gov.uk/government/publications/report-on-the-implementation-of-law-commission-proposals-january-2018-to-january-2023.

108 For further critique of the content of the Lord Chancellor's annual reports, see J Teasdale, "Implementation of Law Reform Proposals in the United Kingdom: A Continuing Dilemma?" (2021) 23 *European Journal of Law Reform* 405, 424 – 426 and M Jolley, "Independence and Implementation: In Harmony and in Tension" (2019) 21 *European Journal of Law Reform* 562, 573 to 576.

109 S Wilson Stark, "Promoting Law Reform: By Means of Draft Bills or Otherwise", in M Dyson, J Lee & S Wilson Stark (eds), *Fifty Years of the Law Commissions: The Dynamics of Law Reform* (2016) p 148.

110 J Lee, "'Not Time to Make a Change'? Reviewing The Rhetoric of Law Reform" (2023) *Current Legal Problems*, cuad004, https://doi.org/10.1093/clp/cuad004.

111 Law Commissions Act 1965, s 3C.

112 See the table of the first seven Welsh Government annual reports with figures for implementation in J Teasdale, "Implementation of Law Reform Proposals in the United Kingdom: A Continuing Dilemma?" (2021) 23 *European Journal of Law Reform* 405, 423. The eighth annual report covers the period February 2022 to February 2023: https://senedd.wales/media/lvdplyiz/gen-ld15675-e.pdf.

Chapter 9

Statute law work

9.1 This publication is, for the most part, concerned with the work of the Law Commission on substantive law reform. But it would not be complete without consideration of the Commission's statute law work. The Law Commissions Act 1965 includes, as one of the Commission's statutory functions, the preparation of "comprehensive programmes of consolidation and statute law revision".[1] This work is known as "statute law work". While statute law work is distinct from substantive law reform, the function is part of the Commission's overarching duty to keep the law under review "with a view to its systematic development and reform".

9.2 This duty is expressed in section 3 of the 1965 Act to include in particular:

> The codification of such law, the elimination of anomalies, the repeal of obsolete and unnecessary enactments, the reduction of the number of separate enactments and generally the simplification and modernisation of the law.[2]

The framing of the Commission's consolidation, codification and repeal functions in this way makes it clear that statute law work forms part of what Lee has described as "the general imperative" to simplify and modernise the law.[3] The first aspect of this work we consider in this chapter is consolidation. We then take a briefer look at codification, simplification and repeal work.

Consolidation

9.3 Consolidation replaces existing statutory provisions with a single Act or series of related Acts, drafted according to modern practice. The existing provisions may be spread across multiple Acts, may have been drafted decades ago and may have been amended multiple times. This process of "consolidation" does not alter the effect of the law, save to the limited extent considered below, but simply updates and modernises its form.[4] Erskine May defines a consolidation bill as re-enacting "a body of existing law in a single statute and an improved form without substantive change".[5]

9.4 Lord Lloyd-Jones, in a speech to the Association of London Welsh Lawyers in 2018, described the process of improvement of the law through consolidation as follows:

> Consolidation aims to make statute law more accessible and comprehensible by drawing together different enactments on the same subject matter to form a rational structure and making the cumulative effect of different layers of amendment more intelligible. In all purely consolidation exercises, the intention is that the effect of the current law should be preserved. However, there is usually scope for modernising language and removing the minor inconsistencies or ambiguities that can result both from successive Acts on the same subject and more general changes in the law.
>
> … A good consolidation does much more than produce an updated text.[6]

Parliamentary and Senedd procedures for consolidation bills

9.5 There is a longstanding dedicated Parliamentary procedure in Westminster for bills which consolidate the law. This procedure includes mechanisms for enabling the consolidation bill to make minor changes to the substantive law, but only if the purpose of that change is to produce a satisfactory consolidated text. The Consolidation of Enactments (Procedure) Act 1949 provides a procedure to permit "corrections and minor improvements" to be made for this purpose. In addition, the Parliamentary committee established to scrutinise consolidation bills – the Joint Committee on Consolidation etc Bills – will consider any recommendations which the

Law Commission may make for amendments as part of a consolidation bill. The Commission is empowered to make such recommendations under the Law Commissions Act 1965.[7]

9.6 The Joint Committee's view in relation to Law Commission amendments is that they

> should be for the following purposes: to tidy up errors of the past, to remove ambiguities, and generally to introduce common sense on points where the form of drafting in the past appeared to lead to a result which departed from common sense; though not to introduce any substantial change in the law or one that might be controversial — indeed, nothing that Parliament as a whole would wish to reserve for its consideration.[8]

A further test was enunciated by the Joint Committee in 1983. This stipulated that amendments arising from Law Commission recommendations should be necessary in order to produce a satisfactory consolidation.[9]

9.7 It has been suggested that this approach permits amendments which may be a little wider than those which can be made under the 1949 Act, as long as these fall "short of significant change of policy or substance".[10] Examples of the sort of changes that the Law Commission has recommended under this procedure are: correcting mistakes where it is apparent from the text that one provision does not produce the effect which another provision makes it clear was intended; resolving doubts and ambiguities where, for example, the intended effect of an unclear or ambiguous provision can be detected from the terms of other provisions; removing inconsistencies between provisions introduced by different Acts; or restating archaic provisions in contemporary language.[11]

9.8 Under the dedicated procedure, the consolidation bill is introduced into the House of Lords and, after the Lords Second Reading, is scrutinised by the Joint Committee on Consolidation etc Bills. The Committee is appointed by both Houses specifically to consider consolidation and statute law repeal bills and will hear evidence from the Law Commission. It will also consider any documents submitted in support of the bill such as the drafter's notes and any Law Commission recommendations for amendment.[12] The

Joint Committee may accept, reject or vary the changes, within the terms of the Law Commission recommendations. After the Joint Committee has reported, the bill is recommitted to a committee of the Lords and will go through its remaining Parliamentary stages before passing to the Commons. Proceedings in the Commons are normally a formality. There is no debate on Second Reading and all Commons stages are frequently taken on the same day. Given the nature of the bill, there is limited scope for amendment during its passage through Parliament, but amendments may be needed in certain circumstances. This might be, for example, if an inaccuracy is found in the text after introduction or the Joint Committee decides that a provision that gives effect to a Law Commission recommendation should be considered by the House as a whole.

9.9 This procedure ensures expert scrutiny, while taking remarkably little time on the floor of the House. For example, all Commons stages for the Co-operative and Community Benefit Societies Bill were held on the same day in a matter of minutes.[13]

9.10 The Senedd has recently introduced its own special procedure for consolidation bills. This follows the recommendation made in our report on The Form and Accessibility of the Law Applicable in Wales, which echoed an earlier call for the introduction of such a procedure from the Senedd's Constitutional and Legislative Affairs Committee.[14] The new Standing Order 26C sets out the procedure for introducing consolidation bills, including those implementing Law Commission recommendations.[15] There is scope under the procedure for the Law Commission to advise whether certain changes proposed in a bill are appropriate for inclusion in a consolidation bill under the standing order.[16]

9.11 The first bill to be introduced under the new standing order procedure was the Historic Environment (Wales) Bill.[17]

Pre-consolidation amendments

9.12 Where amendments will have substantive effects on an area of law, it is appropriate to subject the amendments to full scrutiny. In such cases, the pre-consolidation amendments may be included in a bill in advance of the consolidation bill.

9.13 This approach requires additional Parliamentary time for a separate pre-consolidation amendments bill, which might be able to take advantage of the special procedure for uncontroversial Law Commission bills.[18] Alternatively, a suitable bill in the legislative programme may be identified to carry the pre-consolidation amendments. The process involves having to determine what pre-consolidation amendments need to be made before preparing the consolidation. It is usually during preparation of the consolidation that the necessary pre-consolidation amendments are identified.

9.14 An alternative approach is to include a power in primary legislation to make pre-consolidation amendments by secondary legislation. For example, section 76 of the Charities Act 2006 provided the relevant minister with the power to "make such amendments of the enactments relating to charities as in his opinion facilitate, or are otherwise desirable in connection with, the consolidation of the whole or part of those enactments". This power was exercised in making the Charities (Pre-consolidation Amendments) Order 2011. This order made a number of amendments to charity legislation prior to the passing of the consolidating Charities Act 2011. However, the amendments that may be made under a pre-consolidation amendment power are much more limited than those which could be made by way of a general bill.

Preparation of a consolidation bill

9.15 The Law Commission's consolidation work is carried out by Parliamentary counsel working on secondment to the Law Commission. When preparing a consolidation bill, the drafters usually liaise directly with the relevant Government department's lawyers and officials as and when issues crop up.

9.16 A Law Commission consolidation bill is accompanied by a Table of Origins (previously known as a Table of Derivations) and a Table of Destinations. The Table of Origins sets out where the provisions of the bill have come from in the legislation being consolidated. Any text that does not originate in provisions repealed by the bill will also be indicated, such as text implementing a Law Commission recommendation. The Table of Destinations sets out where the repealed provisions have ended up in the bill. It will also identify existing text that is not reproduced in the bill with a brief reason for its omission, for example because it is spent.

9.17 A Law Commission Report in support of the bill will also be submitted to Parliament alongside the bill if there are any Law Commission recommendations for changes to the law being consolidated.[19]

Recent consolidation work

9.18 In the early days of the Commission, there were programmes of consolidation projects. Projects are now undertaken on a more intermittent basis. Between our establishment in 1965 and 2006, we were responsible for 220 consolidation Acts. Since that time we have produced three: the Charities Act 2011, the Co-operative and Community Benefit Societies Act 2014 and the Sentencing Act 2020. In our *Annual Report 2021-22*, we observed that "this change reflects the fact that, in a time of reduced funding in most areas of public services, consolidation is perhaps seen by the Government to be a lower priority".[20]

9.19 But there are signs that this is changing. Our recommendations for a Sentencing Code have been implemented. A change of approach is most observable in Wales, where consolidation has increasingly become a focus. We think that consolidation, as an aspect of the simplification and improved accessibility of the law, is as important as ever.

9.20 The Commission's sentencing code project sought to bring the law of sentencing procedure into one place, simplify the law and provide a coherent structure, while also repealing old and unnecessary provisions. The law on sentencing affects all criminal cases and is applied in hundreds of thousands of trials and thousands of appeals each year. The law was spread across a vast number of statutes. It was frequently amended, and amendments were frequently brought into force at different times for different cases. The result was that there were multiple versions of the law in force and it was difficult to identify which should apply to any given case. This made it difficult, if not impossible at times, for practitioners and the courts to understand what the relevant law of sentencing procedure actually was in any given case. This led to delays, costly appeals and unlawful sentences.

9.21 Our final report, published in 2018, recommended a major consolidation of the legislation which governs sentencing procedure, and included two draft bills, one of which contained the Sentencing Code and the other of which contained proposed pre-consolidation amendments.[21]

These amendments required a short technical Act, the Sentencing (Pre-consolidation Amendments) Act 2020. The law, as amended by this Act, was then consolidated into the Sentencing Code. The Sentencing Act 2020, which contains the Sentencing Code, came into force in 2020.

9.22 The consolidation, as highlighted by the Chair in his introduction, will save some £250 million over a ten year period.[22] The work was well received. In a debate on the Sentencing Bill in the House of Lords, Lord Campbell of Pittenweem observed:

> There can hardly ever have been a legal Bill that enjoys such judicial and professional support as this one. Indeed, as has been said on at least one previous occasion, we could almost pass this Bill by acclamation. The Law Commission has fulfilled its responsibility to make the law clearer, shorter and more accessible, having rightly judged that sentencing legislation was inefficient and lacking in transparency.[23]

9.23 In the same debate, Lord Hunt of Wirral added:

> The principle of consolidation is an excellent one and I am pleasantly struck by the near-universal support for it in this instance. The proposed new code will bring greater clarity, which in turn will assist legal professionals in accurately identifying and applying the law, reducing the risk of error, appeals and unnecessary delays.
>
> …
>
> Consolidation may lack the giddy excitement that we associate with so many debates in the House, but it is tremendously valuable to the courts, to those who support the courts and to society in general.[24]

Codification

9.24 Codification differs from traditional consolidation in that it is accompanied by a greater measure of reform of the legislation than is

traditional in consolidation. In some cases, when the law is scattered about to such an extent, reflecting "the analytical differences and policy preferences of the time when each statute was passed", reform rather than mere consolidation is required.[25] Where this is the case, the content of the law must be reconsidered in order to modernise and simplify it, rather than simply rearranging how it is organised.

9.25 A further distinct feature of codification is that it preserves for the future the advantages achieved by consolidation. Once a code is on the statute book, further legislation within its subject area (whether amending or adding to the existing text) is effected by amendment of or addition to the code and not in separate freestanding legislation. In this way, the code provides a rational format for future legislation. Once created, it stands as the main, or ideally the only, source of primary legislation covering the subject-matter. In other words, the establishment of a code is "a means of preventing consolidations from disintegrating".[26]

Codification of the law of Wales

9.26 In our report on the form and accessibility of the law in Wales, we recommended that the ultimate goal of the Welsh Government should be the organisation of primary legislation into a series of codes dealing comprehensively with particular areas of devolved law. We acknowledged that this would be a slow process. The first stage would be to identify the areas of law most in need of being brought together in legislation and to undertake an exercise to bring them together. Where the resulting piece of legislation contained the whole of the primary legislation on a discrete topic, we envisaged that the legislation should operate as a code.[27]

9.27 The Welsh Government enthusiastically endorsed our recommendation for a programme of codification. It introduced the Legislation (Wales) Act 2019, which required the Counsel General to publish programmes to improve the accessibility of Welsh Law. This has provided a considerable impetus for codification, with the first five-year programme to improve the accessibility of the law in Wales published in 2021.[28]

Planning law in Wales

9.28 The first significant step in the codification programme has been the consolidation of planning law. Our 2018 report proposed over 190 technical

reforms to planning legislation as it applies in Wales.[29] Most of these were accepted by the Welsh Government in 2020. The reforms will be implemented by both the Historic Environment (Wales) Act 2023 and the Planning (Wales) Bill (to be laid later this Senedd term)[30]. The Historic Environment (Wales) Act 2023 was the first consolidation legislation to be brought forward as part of the Welsh Government's first five-year programme to improve the accessibility of the law of Wales. This legislation, along with updated secondary legislation, will form a new, bilingual Planning Code for Wales. One of the Law Commission lawyers, who had drafted the Commission's report recommending technical amendments to be incorporated in a new consolidated Planning Bill, has been loaned to the Welsh Government for several years to assist in the drafting of the Bill and associated secondary legislation.

Simplification and accessibility

9.29 Simplification and accessibility of the law is an objective at the heart of our work. Consolidation and codification of legislation simplify the law and make it more accessible. But we also use the term "simplification" to describe technical (rather than policy-driven) reform of the law which goes beyond consolidation and codification.

9.30 One example of such work is our recent report on simplifying the Immigration Rules.[31] The rules, impacting on millions of people each year, were widely acknowledged to have become overly complex and unworkable.[32] Our report explained the importance of ensuring that the law is accessible not only in legislation but in any regulation affecting an individual:

> It is a basic principle of the rule of law that applicants should understand the requirements they need to fulfil. The law "must be accessible and so far as possible intelligible, clear and predictable".[33] Simplified and more easily accessible Rules offer increased legal certainty and transparency for applicants. For the Home Office, benefits include better and speedier decision-making. This leads to a potential reduction in administrative reviews, appeals and judicial reviews, and to a system which is easier and cheaper to maintain. A simpler and more accessible immigration system builds trust, increases public confidence and brings reputational benefit to the UK internationally.[34]

9.31 Our report identified the underlying causes of the complexity of the rules, and made recommendations for how they could be simplified and made more accessible. We identified the fundamental principles which should underpin a re-drafting of the rules, including suitability for the non-expert user, clarity, durability and capacity for presentation in a digital form. We recommended that the rules should be restructured in a way that users could more easily understand and navigate, supported by a guide to drafting style and technique to provide clarity. In order to control complexity and promote consistency over the course of successive changes to the rules, we recommended a more structured framework to keep the rules under review and to regulate the frequency of changes. We also looked at how to bring clarity to the process of making changes. We recognised the potential of modern technology to improve the accessibility and connectivity of the system as a whole, offering better navigation of the rules themselves and a more streamlined interaction between the rules, guidance and application forms.

Repeals

9.32 Outdated or obsolete legislation can cost time and money for those who work with the law. It makes the law more difficult to understand and interpret, and places a further obstacle in the way of accessibility. Many such examples came to light over the course of our planning law in Wales project. One instance was the provision for "rural development boards" under Part 3 of the Agriculture Act 1967. Only one was ever set up, in 1969, and it was scrapped in 1971, but the legislation remains in place. The Statute Law (Repeals) (Wales) Bill will remove a number of such redundant pieces of legislation. In the past, the Commission had a dedicated team to work on repeal, identifying candidates for repeal by research and consultation. The process involves examination of the legal background to an Act, together with its historical and social circumstances. This is followed by a consultation on the proposed repeal and preparation of a draft bill. The repeals are carried out by means of Statute Law (Repeals) Acts. Nineteen of these have been enacted so far, between them repealing over 3,000 Acts in their entirety and partially repealing thousands of others.[35]

9.33 In recent times, there has been a reduction in our repeals work. This perhaps reflects a reduced enthusiasm in Government for repeal as a technique for simplifying and modernising the law. Nevertheless, we will

continue to consider ways in which we can focus our attention on those areas of law which have the potential to cause confusion.[36]

What the future could bring

9.34 The House of Lords Select Committee on the Constitution has called for more consolidation work. In an inquiry into the legislative process held in 2017, the Committee found widespread agreement as to the value of consolidation. The Committee heard that, in the most complex areas of law, the work was "increasingly imperative". It also found that the development of access to legislation online provided an enhanced opportunity for consolidation while making the law more accessible.[37] Its report concluded:

> We recognise that consolidation is not a politically attractive use of Parliamentary time and the scarce resource of Parliamentary counsel. Yet consolidation is a more valuable activity now than ever before. The legislation.gov.uk website will, in effect, allow the law to be consolidated on a rolling basis in the future. This is a positive development. It will, in the longer term, make the law more accessible to both practitioners and the wider public. However, this will only be effective once an area of law is consolidated — it will not help resolve a situation where the relevant legislation is spread across the statutory landscape. Likewise it is clear that at a time when the resources of the court system are under pressure, both in terms of finance and in terms of staffing, consolidation offers the possibility of cost savings and increased efficiency.[38]

Post-Brexit opportunities

9.35 It may be that there are opportunities to reinvigorate both consolidation and repeal work in light of the UK's exit from the EU. With control re-established over the relevant legislation, this is a good time to bring greater coherence and enhanced accessibility to the areas of UK legislation most affected by leaving the EU. Some regulatory regimes are currently dispersed across a range of different sources of law. These include domestic legislation, EU Regulations, Directives and Decisions, statutory instruments and regulations passed to facilitate the UK's departure from the EU, and statutory and ministerial guidance. This complexity can create

legal uncertainty in some sectors of society and industry. This can then have a range of consequential impacts, including increasing the costs of doing business in the UK, deterring investment, hindering economic development, and diminishing public confidence in the law.

9.36 There is also a role for simplification in reviewing retained EU law. Consolidating different legislative sources may be insufficient to address underlying legal problems, such as where there is a mismatch between EU and domestic legislation. In such cases the Commission could restructure, simplify and modernise the law in the area. This would provide UK individuals and businesses with streamlined legislation that is easier to understand and to use.

Machine-coded legislation

9.37 There is scope for greater use of technology to enhance the benefits of consolidation and bring increased accessibility. Straightforwardly expressed legislation is not only easier to understand and navigate, it is also easier to code. In other words, legislation can be drafted in a machine-consumable language so that it can be read and used by a computer. This opens up many new possibilities, but also ethical issues arising from the application and interpretation of the law by the encoded version. One example of where law might usefully be written in code in future could be Traffic Regulation Orders. Writing them in code could enable them to be transmitted to automated vehicles, by-passing the need for programmers to update the programs in response to the making of the order.[39]

9.38 There are currently government initiatives in countries including New Zealand, Australia, France and Canada working to develop human-language text and official coded versions of legislation at the same time. This process, known as "Rules as Code", would allow the machine-consumable version of the rules to sit alongside its natural language counterpart. According to analysts, providing third parties with an official version of machine-consumable rules offers "potential for quicker service delivery, a more consistent application of the rules and greater efficiencies for rule takers".[40] Machine-consumable legislation would also make it possible to design apps to enable people to navigate the law more easily:

> People now expect there to be an app for anything significant to them, and they expect the app to work reliably. We may find that legislated rules that can be readily turned into apps are more popular than traditional legislation, and that the benefits might turn out to be a fresh driver for stalled rationalisation projects that we had given up on.[41]

Notes

1 Law Commissions Act 1965, s 3(1)(d).
2 Law Commissions Act 1965, s 3(1).
3 J Lee, "'Not Time to Make a Change'? Reviewing The Rhetoric of Law Reform" (2023) *Current Legal Problems*, cuad004, https://doi.org/10.1093/clp/cuad004.
4 The definition of consolidation is examined more closely in Form and Accessibility of the Law Applicable in Wales (2015) Law Commission Consultation Paper No 223, paras 7.4 to 7.10.
5 Erskine May, para. 29.73, https://erskinemay.parliament.uk/section/5507/consolidation-bills/.
6 Lord Lloyd-Jones, *Codification of Welsh Law*, speech to the Association of London Welsh Lawyers (8 March 2018), https://www.supremecourt.uk/news/speeches.html.
7 Law Commissions Act 1965, s 3(1). The function may be exercised for purposes which include reducing the number of separate enactments and simplifying and modernising the law.
8 Erskine May, para 41.9, https://erskinemay.parliament.uk/section/6181/joint-committee-on-consolidation-c-bills.
9 Above.
10 D Greenberg, *Craies on Legislation* (12th ed 2020) p 92.
11 Form and Accessibility of the Law Applicable in Wales (2016) Law Com No 366, para 3.13.
12 The drafter's notes give some background to the project, describe things the drafter has (or has not) done in consolidating the law and identify the more significant issues that have required the drafter to make a decision as to the best way of reproducing the law.
13 Business without Debate, *Hansard* (HC), 17 March 2014, vol 577, col 558.
14 Form and Accessibility of the Law Applicable in Wales (2016) Law Com No 366, paras 3.5 to 3.15 and 16.4.
15 Senedd Conduct, Rules and Guidance, https://senedd.wales/guidance. See also the guidance to the standing order: https://senedd.wales/media/cnvjmb33/guidance-to-support-the-operation-of-standing-order-26c-on-consolidation-bills.pdf.
16 Standing Order 26C.2(v). See the discussion of Standing Order 26C in a speech given by Sir Nicholas Green, *Deepening and broadening the relationship between the Law Commission and Wales*, Legal Wales conference (6 October 2023): https://www.lawcom.gov.uk.
17 Now the Historic Environment (Wales) Act 2023.

18 The Sentencing (Pre-consolidation Amendments) Bill, for example, followed the Law Commission special procedure. The sentencing project is discussed at paras 9.20 to 9.23 below.

19 House of Commons Standing Orders (Public Business) (2021), Standing Order 140(1)(d) and House of Lords Standing Orders (Public Business) (2021), Standing Order 50(4).

20 Law Commission, *Annual Report 2021-22*, https://www.lawcom.gov.uk/annual-report-2021-2-published/, p 72. See also D Lloyd Jones, "Looking to the Future" in M Dyson, J Lee & S Wilson Stark (eds), *Fifty Years of the Law Commissions: The Dynamics of Law Reform* (2016) pp 354 to 355, who ascribes the decline in consolidation work principally to a lack of Government interest, an unwillingness of departments to provide support and commitment and "in certain areas, an inability to leave the law alone for long enough to permit consolidation". In "The Duty to Make the Law More Accessible: the Two C-words", above, p 95, George L Gretton's view is that the Government is only able to get away with giving such low priority to the disorderly state of legislation because it is "a monopoly supplier".

21 Sentencing Code (2018) Law Com No 382.

22 See p 14 above.

23 *Hansard* (HL), 25 June 2020, vol 804, col 436.

24 Above, col 439.

25 Form and Accessibility of the Law Applicable in Wales (2015) Law Commission Consultation Paper No 223, para 8.14.

26 Form and Accessibility of the Law Applicable in Wales (2016) Law Com No 366, para 2.72. The term "codification" has a variety of meanings. The one put forward here is the one we attached to it in the form and accessibility project, which is not one of the traditional meanings. A fuller explanation of codification is provided in Form and Accessibility of the Law Applicable in Wales (2015) Law Commission Consultation Paper No 223, ch 8.

27 Form and Accessibility of the Law Applicable in Wales (2016) Law Com No 366, paras 2.55 to 2.60.

28 See para 2.20 above.

29 The project is also considered above at paras 2.21 and 2.22.

30 https://research.senedd.wales/research-articles/eight-new-laws-announced-by-the-welsh-government-for-the-year-ahead/.

31 Simplification of the Immigration Rules (2020) Law Com No 388.

32 Above, para 1.1. Our consultation paper provides the underlying data: Simplification of the Immigration Rules (2019) Law Commission Consultation Paper No 242, para 2.30.
33 T Bingham, *The Rule of Law* (2010) p 37.
34 Simplification of the Immigration Rules (2019) Law Com No 388, para 1.2.
35 Law Commission *Annual Report 2021-22*, https://www.lawcom.gov.uk/annual-report-2021-2-published/, p 72.
36 Above.
37 House of Lords Select Committee on the Constitution: The Legislative Process: Preparing Legislation for Parliament, 4th Report of Session 2017-19, 25 October 2017, https://publications.parliament.uk/pa/ld201719/ldselect/ldconst/27/2702.htm.
38 Above, para 145.
39 See, for example, Automated Vehicles: Consultation Paper 2 on Passenger Services and Public Transport (2019) Law Commission Consultation Paper No 245; Scottish Law Commission Discussion Paper 169, para 7.17.
40 OECD Working Papers in Public Governance No 42, J Mohun and A Roberts, *Cracking the Code: Rule-making for Humans and Machines* (2020), https://oecd-opsi.org/publications/cracking-the-code/.
41 M Waddington, "Machine-consumable legislation: a legislative drafter's perspective – human v artificial intelligence" (2019) *The Loophole,* Journal of the Commonwealth Association of Legislative Counsel 21.

Chapter 10

International co-operation

10.1 International co-operation brings enormous benefits to our policymaking in individual law reform projects. These have been examined in Chapter 6.[1] Looking at the wider picture, maintaining active links to law reform agencies around the world is of immense value in its own right. While the national contexts in which law reform bodies operate around the world vary widely, we are all confronted with many of the same challenges, and there is much we can learn from each other. International co-operation enriches the work of the Law Commission generally. There are a number of aspects to this co-operation.

Some examples of current and past international collaboration

Five jurisdictions conference

10.2 We attend an annual one or two day conference with our closest neighbours, the Scottish Law Commission, the Irish Law Reform Commission, the Northern Ireland Law Commission (when operational) and the Jersey Law Commission. This has become an established way by which the UK, Irish and Jersey law reform agencies keep in touch with each other. These meetings allow both the exchange of information and a platform for the organisations to build personal contacts and gain an in-depth understanding of each other's work and the context in which it takes place.

Commonwealth Association of Law Reform Agencies

10.3 The Commonwealth Association of Law Reform Agencies (CALRAs) was formed in 2003/04 in order to "encourage, facilitate and take forward co-operative initiatives in law reform – so as to improve the law and society across the world". The organisation

> provides capacity-building in law reform, for law reformers in government and for those working in law reform agencies. CALRAs supports good practice for high quality law reform. [2]

National law reform agencies exist in over half of all Commonwealth countries CALRAs has over 30 member organisations and a number of individual members. Large and small jurisdictions are both well represented among the membership, as are both developed and developing countries.

10.4 CALRAs represents the interests of law reform and of law reform bodies in the Commonwealth and beyond, including at Meetings of Commonwealth Justice Ministers and Ministers of Small States. It assists in working towards the objectives of the Commonwealth and the attainment of the UN Sustainable Development Goals.

10.5 The Law Commission has a strong association with CALRAs. A past Secretary of the Law Commission (the previous title for the Chief Executive Officer), Michael Sayers, was the General Secretary of CALRAs for many years. In 2017, we contributed to the production of a guide to law reform produced by the Commonwealth Secretariat jointly with CALRAs.[3] We continue to play an active role in CALRAs' biennial international conferences and are looking at how we can support the organisation to ensure its continued success.

Roundtable meetings

10.6 We are keen to continue to engage in virtual roundtable meetings with members of a range of international law reform agencies to discuss institutional issues and particular subject areas of joint interest. Earlier in 2023, for example, we held one such meeting with members of a range of Southern Hemisphere law agencies from New Zealand, Australia and South Africa to which we also invited Ireland, Northern Ireland and Scotland. We look forward to discussions on other topics of mutual interest, for example, artificial intelligence.

Hosting visiting individuals and delegations

10.7 We routinely host delegations from law reform agencies. Recently, this has included, for example, the South Australian Law Reform Institute. We have also held meetings with the Chair of the Queensland Law Reform Commission and the Chair of the Victorian Law Reform Commission. The newly appointed President of the Law Commission of Canada visited in July 2023 In September 2023, in relation to criminal law matters, we hosted the Australian Law Reform Commission, the Hong Kong Law Reform Commission and the New Jersey Law Revision Commission. Also in September, a delegation of Singapore prosecutors from the Attorney General's Chambers visited us to discuss our work on evidence in sexual offences prosecutions and intimate image abuse, and we hosted a South Korean delegation.

Providing advice and assistance to newly formed and developing law reform agencies

10.8 We have engaged virtually with a number of law reform agencies. Recent examples include law reformers in Somaliland and Eswatini. The meetings gave us the opportunity to answer a range of questions about our organisational set up and relationship with Government and law reform process. We provided a range of documentation about the organisation, such as the Value of Law Reform economic research.[4] We were able to provide support on issues such as website design.

Requests for help on comparative research

10.9 In the same way that we benefit from comparative research, so too do other law reform agencies around the world. We consider it part of our role to respond to requests for help. John Burrows, a New Zealand Law Commissioner, explained the advantages of such co-operation from his perspective:

> Whenever the [New Zealand] Law Commission is given a project, one of the first things it does is to see how that topic has been handled in overseas jurisdictions – in Australia particularly, and also in other common law jurisdictions such as Canada and England. We are often delighted to find that there have been recent reforms in those countries which we can study.[5]

Hosting delegations with an interest in law reform

10.10 Being amongst the earlier law reform agencies to be created, we are always keen to offer what assistance we can to countries looking to realise the benefits of having an independent law reform agency. In recent years we have met with ministers and officials from the Malaysian Prime Minister's Department to discuss their interest in the creation of a law reform body and offer guidance on aspects of law reform. The Chair visited Malaysia in November 2019. We have recently hosted a visit from the South Korean Office of Legal Counsel, part of the South Korean Ministry of Justice, in relation to law reform in the field of the digital economy, and have also met with officials from Morocco.

European collaboration

10.11 The Commission has been involved in activities aimed at fostering international collaboration on law reform in European jurisdictions that do not have law reform bodies. Collaboration provides a firmer basis on which to find out about other approaches to legal problems that we might look at, and helps to keep us informed of developing areas of legal focus in those jurisdictions.

10.12 One example of such involvement is the Commission's recent attendance at the launch of NorFam in Aalborg, Denmark. NorFam, the Nordic Centre for Comparative and International Family Law, provides a focal point for joint projects, programmes and events about family law and related areas in Nordic countries. Its aim is to stimulate debate in those countries and "to make Nordic law and Nordic legal scholarship available and accessible globally, thus adding a Nordic dimension to international and comparative debates".[6]

10.13 Our presentation at the event explained our perspective on law reform and how we do it. We also spoke about the benefits of international co-operation for our surrogacy project. There was a lot of interest in law reform and discussion about how changes to the law in non-political areas is taken forward in other jurisdictions.

International law reform training programmes

10.14 The Commission has in the past supported a number of international law reform training programmes. Our role in each case has been to host a session during which we present on the work of the Commission and discuss key topics of interest. Delegates have come from both overseas law reform

agencies and Governments (Ministries of Justice and Offices of Attorneys General). Although these sessions stopped during the pandemic, we look forward to participating when they resume.

Future international collaboration

10.15 We are committed to developing our international work, which we believe generates a range of benefits. The insights we gain on institutional issues, on the development of best practice in law reform and on particular law reform topics is hugely valuable to our organisational development and the quality of our law reform. Our interactions ensure that we have a reliable understanding of alternative legal approaches and developments around the globe. International collaboration also helps us to identify potential new areas of work and to remain at the forefront of international legal innovation. In this way, building strong overseas relationships contributes to our ongoing success as an institution.

10.16 Beyond that, capacity building in other jurisdictions supports the rule of law in accordance with Justice, Foreign and Commonwealth and wider Government and judicial objectives with which the Commission is happy to be aligned. The UK has committed itself to work for the full implementation of UN Sustainable Development Goals by 2030. Goal 16 is to:

> Promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels.[7]

This objective includes the obligation to "promote the rule of law at the national and international levels and to ensure equal access to justice for all".[8] Law reform is generally agreed to play an important role in supporting the rule of law.

10.17 More broadly, the UK is well-placed to provide international leadership in promoting the rule of law. Our work in law reform can contribute to its reputation and influence in this field.

10.18 In the years to come, we are looking forward to developing and deepening the international relationships and activities we have outlined above.

Notes

1 See, in particular, paras 6.42 to 6.49 above.
2 https://calras.org/background-history-and-support/.
3 Commonwealth Secretariat, *Changing the Law: A Practical Guide to Law Reform* (2017), https://calras.org/wp-content/uploads/2023/04/Changing-The-Law.pdf.
4 D Jones and R Wainwright, *Value of Law Reform* (2019), https://www.lawcom.gov.uk/law-commission-reforms-provide-gains-of-3-billion-over-10-years/. This research is discussed in the Chair's introduction at p 14 and at para 3.27 above.
5 J Burrows, "A New Zealand Perspective on Law Reform" (2010) 16 *Canterbury Law Review* 117, 124.
6 https://www.law.aau.dk/forskning/forskningsorganisering/NorFam/.
7 https://sdgs.un.org/goals.
8 Target 16.3: https://sdgs.un.org/goals/goal/16.

Conclusion

In this book we have described what we call "modern law reform". We have explained how our practice has evolved over time, and how we have adapted to operate effectively in changing environments. This development has been made possible by the immensely flexible framework established by the Law Commissions Act 1965. At the same time, the need for law reform and the aims and essential nature of the organisation have remained a constant. As a tribute to the prescience of the legislators who created the Law Commission, we conclude with an extract from the White Paper of January 1965 presenting the proposed legislation to Parliament. We believe that this guiding philosophy has present and future currency:

> One of the hallmarks of an advanced society is that its laws should not only be just but also that they should be kept up-to-date and be readily accessible to all who are affected by them. The state of the law today cannot be said to satisfy these requirements. It is true that the administration of justice in our courts is highly regarded, and rightly so, in other countries besides our own; and it is also true that the spread of ideas of personal liberty and respect for the rule of law which have been of such importance in the development of Western civilisation has been profoundly influenced by the importance which our law attaches to these concepts. But the very fact that English and Scottish law have a history stretching back for so many centuries is one of the reasons why the form of the law is now in such an unsatisfactory state.

…

English law today is contained in some 3000 Acts of Parliament, the earliest of which dates from the year 1235, in many volumes of delegated legislation made under the authority of those Acts, and in over 300,000 reported cases. Although Parliament has been actively at work for so many years, much of the law is still to be found in the decisions of the courts operating in fields which Parliament has not entered.

It is true that the law on certain subjects has from time to time been largely restated in codifying statutes, but these are few and far between and date mostly from the end of the nineteenth century. The result is that it is today extremely difficult for anyone without special training to discover what the law is on any given topic: and when the law is finally ascertained, it is found in many cases to be obsolete and in some cases to be unjust. This is plainly wrong. English law should be capable of being recast in a form which is accessible, intelligible and in accordance with modern needs. It was for this reason that the Queen's Speech on the Opening of Parliament announced the Government's intention to appoint Law Commissioners to advance the reform of the law.

There is at present no body charged with the duty of keeping the law as a whole under review and making recommendations for its systematic reform. Each Government department is responsible for keeping under review the state of the law in its own field and from time to time Royal Commissions or independent committees are set up to examine and make recommendations on particular subjects. There are standing bodies such as the Lord Chancellor's Law Reform Committee, whose task is to review such small fields of the civil law as may from time to time be referred to it, while a similar task is performed in the case of the criminal law by the Home Secretary's Criminal Law Review Committee. While valuable work has been done by these means and important changes in the law have been made as a result of the recommendations of

these and other bodies, this work has been done piecemeal and it is evident that comprehensive reform can be achieved only by a body whose sole task it is and which is equipped with a professional staff on the scale required.

The Government therefore propose, subject to the approval of Parliament, to set up a Law Commission for England and Wales.[1]

Notes

1 Proposals for English and Scottish Law Commissions, Presented to Parliament by the Lord Chancellor and Secretary of State for Scotland by Command of Her Majesty January 1965, Cmnd 2573.

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We would also like to take this opportunity to acknowledge the excellent scholarship which already exists in the area of law reform. Recent examples include *Fifty Years of the Law Commissions: The Dynamics of Law Reform*, edited by Matthew Dyson, James Lee and Shona Wilson Stark, and *The Work of the British Law Commissions: Law Reform… Now?* by Shona Wilson Stark. We have drawn on this work, as well as that of many other experts, throughout the book. The text has however been peer reviewed by the Chair and Commissioners who bear full and exclusive responsibility for its contents.

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