



# **The Law Commission**

**(LAW COM. No. 200)**

## **FIFTH PROGRAMME OF LAW REFORM**

*Presented to Parliament by the Lord High Chancellor  
by Command of Her Majesty  
June 1991*

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

The Law Commissioners are -

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Mr Trevor M. Aldridge

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## **FIFTH PROGRAMME OF LAW REFORM**

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## THE LAW COMMISSION

### FIFTH PROGRAMME OF LAW REFORM

*To the Right Honourable the Lord Mackay of Clashfern,  
Lord High Chancellor of Great Britain*

#### INTRODUCTION

Our last programme of law reform, the Fourth Programme, was approved by you in July 1989 and published in September 1989.<sup>1</sup> It was our view at that time that the Commission should once again turn its attention to common law but that the choice of projects should await the appointment of a new Commissioner with responsibility for this broad area. This is the reason why the Fourth Programme contained no new programme items relating to common law. We have now identified two branches of law much in need of further examination and suitable for examination by us, and accordingly submit a Fifth Programme containing those two items by way of addition to the items consolidated in the Fourth Programme.<sup>2</sup> The two new items are:-

- (i) examination of the mechanism of judicial review, and the connected subject of statutory appeals and applications to quash made to the High Court from inferior courts, tribunals and other bodies (Item 10); and
- (ii) examination of the principles governing, and the effectiveness of, the present remedy of damages for monetary and non-monetary loss, with particular regard to personal injury litigation (Item 11).

*(Signed)*

PETER GIBSON, *Chairman*  
TREVOR M. ALDRIDGE  
JACK BEATSON  
RICHARD BUXTON  
BRENDA HOGGETT

MICHAEL COLLON, *Secretary*  
15 May 1991

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1. Law Com. No. 185.

2. As the two new Items are additional to those contained in the consolidated Fourth Programme, they are numbered Items 10 and 11.

## FIFTH PROGRAMME OF LAW REFORM: PROGRAMME ITEMS

### ITEM 10: JUDICIAL REVIEW

*Recommended:* (a) that the procedures and forms of relief available by way of judicial review be examined, with particular regard to

- (i) the effect of the decision in *O'Reilly v. Mackman* [1983] 2 AC 237;
- (ii) the current position on time limits governing judicial review;
- (iii) the circumstances and form in which interim relief should be available;
- (iv) discovery and the principles applicable to its grant;
- (v) whether the rules as to standing require further development;
- (vi) whether claims for restitution should be able to be joined in applications for judicial review;
- (vii) the extent of the power to award costs;
- (viii) the right of appeal against the refusal of a substantive application for judicial review;
- (ix) whether there should be a power in the High Court in relation to proceedings before inferior courts, tribunals and other bodies, to substitute its own order for that impugned;

(b) that the procedures governing statutory appeals and applications to the High Court from the decisions of inferior courts, tribunals and other bodies should be examined, and in particular whether there should be special Crown Office rules of procedure.

*Examining Agency:* the Commission.

In our view it is particularly apposite that the Commission should embark at this time on an enquiry into judicial review. In 1976 we published a Report on Remedies in Administrative Law,<sup>3</sup> which paved the way for the modern procedure in R.S.C. Order 53. Since that time, not only has there been a remarkable increase in the number of applications for judicial review, but also an unparalleled development of the substantive law itself. Calls for a further examination of this field have come from a number of sources, including the Committee of Justice/All Souls Review of Administrative Law and Lord Justice Woolf's Hamlyn lectures in 1989. We do not, however, propose to look at the substantive grounds relevant to the application for relief as this is a field in which the substantive law remains most appropriately the subject of judicial development. Our main focus will be on the effectiveness of the procedural mechanisms put in place in 1977 and revised in 1980, and our hope is that this will enable us to make recommendations which will ensure that the continuing development of the substantive law is well served by its attendant procedure.

We have also included, as a second head, the procedure governing statutory applications to quash and appeals to the High Court from inferior courts, tribunals and other bodies. There are two particular issues here which are related to our examination of the topic of judicial review: the disorganised and unstructured nature of the procedure for making such applications and appeals, and the issue as to the proper relationship between avenues of appeal and the availability of judicial review.

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3. Law Com. No. 73.

## ITEM 11: DAMAGES

*Recommended:* an examination of the principles governing and the effectiveness of the present remedy of damages for monetary and non-monetary loss, with particular regard to personal injury litigation. Certain matters to which specific consideration is to be given include

- (i) the use of structured settlements as an alternative to, or in conjunction with, lump sum awards;
- (ii) deductions and set-offs against monetary loss (other than the recovery provisions of the Social Security Acts 1989 and 1990);
- (iii) awards to cover medical and nursing expenses;
- (iv) bereavement damages;
- (v) the principles relevant to awards of punitive or exemplary damages;
- (vi) the effectiveness of the present remedy of damages in multi-party litigation, examining in particular whether awards of damages should be assessed for the class as a whole and the means for determining their allocation to individual parties.

*Examining Agency:* the Commission.

The principles upon which courts assess damages, and the continuing effectiveness of the remedy in serving these principles are matters of fundamental importance to the common law and ones which you have yourself invited us to consider. We believe that the time is now ripe to return to a further examination of this topic. In tort law, the recommendations we made in 1973,<sup>4</sup> and those made in 1978 by the Royal Commission chaired by Lord Pearson,<sup>5</sup> were only partially implemented by the Administration of Justice Act 1982. Other issues raised in those Reports remain unresolved and new issues - not all confined to the law of tort - have arisen since then. For example, bereavement damages, which was covered in our earlier report, deductions and set-offs against monetary loss and awards to cover medical and nursing expenses continue to provoke debate as to the principles concerned. It is our intention, however, to look only at the remedy of damages as applicable within the traditional common law system; we do not propose to consider alternative forms of compensation outside that system.

We shall pay particular attention to personal injury litigation, but we recognise the need to consider the principles which apply to the assessment of damages in other fields of civil litigation. The newer developments which have drawn our attention include the increasing use here and in other common law jurisdictions of structured settlements in personal injury litigation, the calls to reconsider the availability of punitive damages, and the suggestion that new powers are needed by courts in multi-party litigation to make global awards of damages. These new demands on the traditional common law remedy pose a challenge to the courts. We see our role in examining the principles and effectiveness of damages as helping a more rational basis to be applied and understood by all those affected by civil litigation.

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4. Report on Personal Injury Litigation - Assessment of Damages, (1973) Law Com. No. 56 (which was the outcome of Item VI(b) of the Commission's First Programme).

5. Report of the Royal Commission on Civil Liability and Compensation for Personal Injury, (1978) Cmnd. 7054.



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