

**LAW COMMISSION
SIXTH PROGRAMME OF
LAW REFORM**



LAW COM No 234

LAW COMMISSION

THE LAW COMMISSION SIXTH PROGRAMME OF LAW REFORM

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pursuant to section 3(2) of the Law Commissions Act 1965*

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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.

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LAW COMMISSION

SIXTH PROGRAMME OF LAW REFORM

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LAW COMMISSION

SIXTH PROGRAMME OF LAW REFORM

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

PART I INTRODUCTION

Introductory

- 1.1 As you will know, the Law Commissions Act 1965 imposes on the Commission a duty to prepare and submit to you from time to time programmes for the examination of different branches of the law with a view to reform. In the first 30 years of the Commission's life there have been two major programmes. The First,¹ published in 1965, consisted of 17 items and the Fourth,² published in 1989, consisted of 9 items. The remaining three programmes³ contained 6 items between them.
- 1.2 We have now decided that the time has come for us to prepare and submit to you a new, Sixth, Programme of law reform. On this occasion our approach is rather different from our predecessors'. While the proper performance of our statutory duties necessarily involves us in long term thinking and planning, in this Programme we have concentrated on identifying the detailed items of work which will represent most of our law reform agenda until the end of 1998. We hope that this will help your officials to ensure that we are furnished with the resources to meet what are comparatively short term targets.
- 1.3 When preparing our new programme, we believed it would be valuable if we took the opportunity of restating in clear terms the purposes of the Commission in the field of law reform, and this we do in the remainder of this Part. In Part II we describe what the Commission has done in forwarding these purposes since September 1989, when you approved the Fourth Programme. In Part III we set out our new Programme, and in Part IV we set out the other law reform studies we are now conducting pursuant to references we have received from Ministers, including yourself.
- 1.4 In Appendix A there is a full list of the reports, working papers and consultation papers which are referred to by number in the main body of the report, in which reports published jointly with the Scottish Law Commission are marked with an asterisk.

¹ (1965) Law Com No 1.

² (1989) Law Com No 185.

³ (1968) Law Com No 14; (1973) Law Com No 54; (1991) Law Com No 200.

- 1.5 In addition to our work on law reform, we will continue to take forward our work on the consolidation of statute law, and also our work on statute law revision, which has as its principal aim the repeal of statutes which now serve no useful purpose. The latter work includes the formulation of proposals to rationalise the legislation relating to certain local authorities. Between September 1989 and April 1995 there were presented to Parliament⁴ 30 consolidation Bills which were prepared by draftsmen at the Commission, or in whose preparation the Commission was otherwise involved; and we also delivered to you two Statute Law (Repeals) Bills.⁵ Some of this work was undertaken in conjunction with the Scottish Law Commission. The next draft Statute Law (Repeals) Bill is unlikely to be ready before 1998. We hope to publish the Chronological Table of Local Legislation in the next 12 months, and the Chronological Table of Private Legislation by the end of 1998.
- 1.6 Another feature of our work is assuming much greater significance. After our reports are delivered to you, experience has shown that it is valuable if the Commission, and draftsmen at the Commission, assist your Department in the tasks of preparing the necessary Bills for Parliament, of incorporating any changes required by the Government, and of giving evidence to the new Special Public Bill Committees in the House of Lords. While we are happy to assist in this work, provided that the main policy of our report remains intact, it is extremely demanding on our resources, particularly as there is still such a long backlog of unimplemented reports.
- 1.7 We believe that the publication of this new programme, accompanied by a clear restatement of our aims, will furnish clear evidence of the importance and contemporary relevance of our work as we embark on the second 30 years of our existence.

The Commission's Task

- 1.8 The Commission exists for the purpose of promoting the reform of the law,⁶ and it is our duty to keep the whole of the law of England and Wales under review.⁷ Parliament has directed us to have a view to the systematic development and reform of the law, and has drawn particular attention⁸ to the desirability of:

◆ codification

⁴ They are listed in Appendix B, which shows the year of enactment and chapter number for those introduced in 1994 or earlier.

⁵ (1993) Law Com No 211; (1995) Law Com No 233.

⁶ Law Commissions Act 1965, s 1(1).

⁷ Law Commissions Act 1965, s 3(1); see also *ibid*, s 1(1) and (5).

⁸ Law Commissions Act 1965, s 3(1).

- ◆ 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.

1.9 In short, the Commission exists to make the law simpler, fairer, more modern and cheaper to use.⁹

The Problems with the Law

1.10 The law in England and Wales has developed over many years. Much of it is excellent. But there are many areas of the law which are in great need of reform and modernisation. As we all know, society has been changing at a great pace. For example, there have been enormous and rapid changes in our social attitudes, in our national culture, in our economic life and in the world of technology. Too often the substantive law has failed to keep up with these developments. This leads to situations where the law is:

- ◆ unfair
- ◆ out of date
- ◆ uncertain
- ◆ expensive

Unfair

1.11 Sometimes the courts have had to resolve policy conflicts on an ad hoc basis, and there is a need for a systematic review. The effect of intoxication on criminal liability is a good recent example, where two important principles of the criminal law point in different ways.¹⁰ On the one hand, nobody should be convicted of a serious offence unless he acted voluntarily and was at least aware at that time that his conduct might cause damage of the kind forbidden. On the other hand, a person who has become intoxicated of his own volition should not be entitled to an acquittal merely because he did not know what he was doing.

1.12 The faults in our law can also cause injustice, with the law only being clarified when cases go to appeal courts - so that the injustices remain for the many cases which do not go that far.

⁹ See (1993) Law Com No 210, paras 1.13-1.15; (1994) Law Com No 223, paras 1.1-1.9; (1995) Law Com No 232, pp 1-8.

¹⁰ (1995) Law Com No 229, para 1.14: "The topic covered by this report is controversial because it involves a direct clash between two very basic principles of liability."

- 1.13 The laws which provide protection against domestic violence and which regulate the occupation of a family home have grown up piecemeal and there are many obvious gaps and anomalies in the protection they offer.¹¹
- 1.14 If a buyer pays for his goods when they are part of an undivided bulk cargo and the seller becomes insolvent, the buyer is treated as an unsecured creditor even though he has paid the whole of the purchase price¹².

Out of Date

- 1.15 While the common law has many advantages, there are areas where the case for simplifying the law in a modern statute is extremely strong. The most obvious is the criminal law. Here great tracts of the law are still embraced in very old statutes or complicated case-law, and there is a great need to make the law more accessible to the courts, the police and the prosecutors, and to the citizen and those who represent him.¹³
- 1.16 Demographic and social changes have made more urgent the need to reform the law that governs decision-making for those who lack the capacity to take decisions for themselves. An ageing population, community care, medical advances, wider ownership of property and increasing awareness of "rights" and discrimination issues¹⁴ revealed a gaping hole in the law relating to decision-making for the mentally incapacitated which our recent report was designed to fill.¹⁵
- 1.17 Sometimes changes in the way people choose to lead their lives reveal the law's inadequacies. For example, the growing incidence of cohabitation outside marriage and other home-sharing arrangements have shown up the inadequacies of trust law as a means of resolving disputes over property.¹⁶

¹¹ (1992) Law Com No 207, paras 2.23, 2.25 and 2.28: "[M]any inconsistencies and anomalies ... The criteria applicable under the different Acts are also diverse and ... unsatisfactory in themselves ... no protection for a number of people who ... have a clear need for ... protection."

¹² (1993) Law Com No 215, paras 3.6 and 3.22. "[A] clear feeling that [the rule] was unjust and anomalous ... little commercial morality in allowing the creditors to keep both the price and the goods."

¹³ (1995) Law Com No 232, para 1.13: "The draft Bill [on Offences Against the Person and General Principles], ... which received an enthusiastic welcome on publication, defines the relevant concepts ... in clear, intelligible, modern language which everyone can understand."

¹⁴ (1995) Law Com No 231, paras 2.31-2.44.

¹⁵ (1995) Law Com No 232, para 2.93. "The legal background is one of ... incoherence, inconsistency and historical accident."

¹⁶ *Ibid*, para 2.78 "... the present law has been the cause of considerable hardship and ... the subject of considerable criticism".

- 1.18 Applications of modern technology are showing up gaps in our dishonesty laws.¹⁷
- 1.19 Landlords can still distrain their tenants' property for rent without a court order in accordance with procedures which are antique, unclear and very often unfair.¹⁸
- 1.20 Until one of our Bills was enacted in 1994 sellers of land gave implied covenants, or promises, to the buyers which were expressed in very complex archaic language. These covenants did not give the buyers the clear rights to which they should be entitled.¹⁹

Uncertain

- 1.21 Important parts of our law are obscure and obsolescent. Good examples are to be found in:
- ◆ criminal law²⁰
 - ◆ landlord and tenant law²¹
 - ◆ trust law²²
- 1.22 These problems burden the courts, and those who give legal advice to their clients, with avoidable extra work, so that other cases needing adjudication take longer to be determined and legal advice takes longer to provide.

Expensive

- 1.23 The problems with our law cause unnecessary expense:
- ◆ to ordinary citizens
 - ◆ to businesses
 - ◆ to the legal aid system

¹⁷ (1994) Law Com No 228, para 1.16, n 37: "The [Jack] Committee [on Banking Services] pointed out that ... the Forgery and Counterfeiting Act 1981 ... does not extend to debit cards, charge cards or 'any new types of payment yet to be devised.'"

¹⁸ (1991) Law Com No 194, paras 1.2 and 2.17: "[A] complex and sometimes anachronistic set of rules developed over the centuries in a haphazard fashion ... Many of the rules are arbitrary and artificial."

¹⁹ (1991) Law Com No 199, para 3.23: "archaic and unnecessarily complex" ... "a jungle of verbiage" ... "clumsy and obscure".

²⁰ See (1993) Law Com No 218, paras 4.1-4.3. "Law that is muddled, irrational, unclear or simply difficult of access, is almost certain to produce injustice."

²¹ See (1987) Law Com No 162, para 1.1. "The content of the law is hard to ascertain and sometimes confused."

²² See (1993) Consultation Paper No 133, paras 1.8-1.9. "Dauntingly complex ... the difficulty of ready comprehension."

◆ to the taxpayer, who funds the court system.

- 1.24 This burden of unnecessary cost bedevils quite ordinary transactions, like buying flats or houses or making agreements. It also makes the resolution of disputes more costly.²³
- 1.25 The legislation governing land registration is widely acknowledged to be low grade. Its comprehensive reform would lead to very substantial savings.²⁴

Disrespect for the Law

- 1.26 Where these problems arise, the law needs to be examined, to see if changes are appropriate. If this is not done, and if the necessary changes are not made, the law itself will fall into disrespect, because it is unfair, out of date²⁵, muddled or costly, or has all these attributes. Such law cannot command public respect.²⁶

The Law Commission's Aims

- 1.27 In seeking to fulfil our statutory duty, we aim to ensure that the law is:

Fair

- 1.28 It is vital that the law is fair. It must therefore be based on sound principles. A balance needs to be maintained between competing interests. The law should respect the dignity of the individual, and also his or her fallibility. It should ensure fair and equal treatment for everybody. It should enable disputes to be resolved speedily without unnecessary confrontation and litigation. The law should not trespass unduly on personal rights and liberties, or make the rights and liberties of citizens unduly dependent on administrative rather than judicial decisions.

Modern

- 1.29 The law should be modern, so that it accords with contemporary conditions and is relevant to current needs. It must keep pace with scientific and technological

²³ (1993) Law Com No 210, para 1.13: "Every criminal lawyer and every conveyancer, to take only two examples, knows on a daily basis how much money is spent needlessly by public or private sector organisations or by ordinary citizens because relevant parts of our criminal law or property law are arcane or abstruse."

²⁴ (1995) Law Com No 232, para 1.11: "Land registration is a system which affects vast numbers of properties ... 21 million registered and potentially registrable titles ... We are now driving forward a new project ... with the aim of making the whole system cheaper and more accessible."

²⁵ (1993) Law Com No 216, para 1.6: "We acknowledge that if rules of evidence are difficult for laymen to understand or accept, public confidence in the judicial system may ultimately be diminished."

²⁶ (1993) Law Com No 218, paras 4.3-4.4: "A nation whose basic rules of criminal law are in this condition is sending the wrong message to those who engage in violence ... It is ridiculous that the expense to the public exchequer should be further inflated by avoidable disputes among lawyers about the basic terms of the law they have to use."

development, with changes in society and with community and cultural attitudes and expectations. It must also be consistent with our international obligations. The process of law reform draws out many new legal principles which arise from emerging standards of justice and are in accordance with the basic values of society. A systematic approach to law reform is necessary to ensure consistency in the law.

Simple

- 1.30 The law should be as easy to understand as possible. It should therefore be simple and clear, without unnecessary complications. It needs to be logical and certain, and therefore predictable. This will make it accessible to those who have to use it. Defects and anomalies should be eliminated. Laws which are obsolete or unnecessary should be repealed. Different laws dealing with the same subject matter should be consolidated wherever possible.

Cost-effective

- 1.31 Questions of cost are important, if the law is to be usable and accessible. The law needs to maintain proper standards while at the same time causing as little expense as possible to all who have to use it, whether the ordinary citizen, business or the State.

The Law Commission's Methods

- 1.32 The Commission uses the following methods to achieve its aims.
- 1.33 The Commission's work is based on thorough and thoughtful research and analysis of case law, legislation, academic and other writing, law reports and other relevant sources of information both in the United Kingdom and overseas. It takes full account both of the European Convention on Human Rights and of European Community law.
- 1.34 The Commission consults extensively by issuing public consultation papers which describe the present law and its shortcomings and set out possible options for reform. This consultation extends to a wide range of people. It includes the legal and other professions, members of interest groups, business people, consumers of goods and services, central and local Government and the public at large.
- 1.35 Some of the Commission's projects have important social or economic aspects. In these instances we commission or use empirical research to assist our work, eg on compensation for personal injury²⁷ and on the property rights of homesharers.²⁸

²⁷ See p21 n19 below.

²⁸ See p34 below.

- 1.36 The Commission publishes reports, setting out its final conclusions and recommendations in straightforward terms.
- 1.37 The Commission prepares draft legislation in the form of Bills attached to nearly all its reports.
- 1.38 The Commission takes into account the consequences of the changes it recommends, ranging from their practical effect upon the public to their cost implications for Government and others.
- 1.39 The Commission follows up its recommendations by way of further assistance to Government Ministers and Departments when its Bills are being prepared for implementation by Parliament.²⁹
- 1.40 The Commission provides high quality, relevant and timely legal advice on law reform to the Lord Chancellor and the Government.

The Advantages of Having a Law Commission

- 1.41 The existence of a permanent and separate law reform body has enormous advantages. The main advantages are as follows:

Independence

- 1.42 The Law Commission was established as a statutory body by Act of Parliament in 1965. It was designed to have complete independence, including independence from Government. It is therefore able to form objective and impartial views about the ways in which the law should be reformed. Its independence, together with its practice of wide public consultation, enhances the credibility of its work with everyone, including politicians of all parties. You fund it and appoint the Commissioners and staff. The Commission is publicly accountable in that it reports to you each year, and you lay all its reports and programmes before Parliament.

Purpose

- 1.43 The Commission has a single, central purpose: promoting the reform of the law. It benefits greatly from having a purpose which is so closely focused. As a result it can concentrate its energy and resources on this single purpose and is saved from the distractions and interruptions faced by many other bodies, not least by Ministers and Government Departments. It is able to devote most of its resources, time and energy to this purpose. The Commission also provides a focus for law reform activity throughout England and Wales, so reducing duplication of effort.

²⁹ See para 1.6 above.

Expertise

1.44 In its 30 years of existence the Commission has built up a fund of knowledge, expertise and expert contacts in both the law and law reform. Its independence and its reputation have attracted to it over the years Commissioners and staff of considerable ability. You have appointed Commissioners against the background of both the requirements of the statute³⁰ and the need to appoint Commissioners and staff who are well suited for the particular purpose of law reform and who are to be fully engaged in that task for several years.

³⁰ Commissioners must be persons holding judicial office, barristers, solicitors or teachers of law in a university: Law Commissions Act 1965, s 2(2).

PART II WORK COMPLETED DURING THE FOURTH AND FIFTH PROGRAMMES

- 2.1 In this Part we set out the law reform work undertaken by the Commission between September 1989, when the Fourth Programme was launched, and the end of April 1995. Reports published jointly with the Scottish Law Commission are marked with an asterisk.
- 2.2 During this period we published 26 law reform reports, the report of a special empirical survey, and 20 consultation papers¹ in the course of work carried out pursuant to programme items. We also published four reports and four consultation papers in pursuance of references received from Ministers.
- 2.3 We describe the present status of each report which recommended a change in the law. It is disappointing that only five of these reports have so far been implemented, although Bills to implement a further six reports, in whole or in part, are at present before Parliament. We also mention reports published pursuant to earlier programmes which remain unimplemented.²
- 2.4 We have also included in this Part a mention of five other significant contributions to law reform made by Commissioners or the staff of the Commission during this period.

¹ These were described as Working Papers until 1991 when the nomenclature was changed.

² We make no mention of reports which have been expressly or impliedly rejected by the Government.

(a) FOURTH PROGRAMME

ITEM 1: THE LAW OF CONTRACT

Recommended: that the law of contract be examined.

Between September 1989 and April 1995 we published the following reports:

| YEAR | LAW COM NO | TITLE | DESTINATION |
|------|------------|---|-------------------------------------|
| 1991 | 196* | Rights of Suit in Respect of Carriage of Goods by Sea | Carriage of Goods by Sea Act 1992 |
| 1993 | 215* | Sale of Goods Forming Part of a Bulk | Sale of Goods (Amendment) Bill 1995 |
| 1993 | 219 | Contributory Negligence as a Defence in Contract ³ | Under consideration |

We also published the following Consultation Paper during this period:

| YEAR | CP NO | TITLE |
|------|-------|--|
| 1991 | 121 | Privity of Contract: Contracts for the Benefit of Third Parties ⁴ |

³ We published Working Paper No 114 on this topic in 1990.

⁴ The delays to this project caused by staffing shortages are described in (1993) Law Com No 210, para 2.8; (1994) Law Com No 223, para 2.16; and (1995) Law Com No 232, para 2.7.

ITEM 2: CIVIL LIABILITY FOR DANGEROUS THINGS AND ACTIVITIES

Recommended: **that an examination be made of the basic principles of liability applicable to dangerous things and activities, with a view to clarifying and harmonising and, so far as may be expedient, unifying the principles in question.**

No work has been carried out since September 1989 under this Programme item. We recommend that in the light of our current priorities this item should be discontinued.

ITEM 3: THE LAW OF LANDLORD AND TENANT

- Recommended:* (a) that an examination be made of the law on waste and distress for rent;
- (b) that an examination be made of the basic law of landlord and tenant with a view to its modernisation and simplification and the codification of such parts as may appear appropriate.

Between September 1989 and April 1995 we published the following reports:

| YEAR | LAW COM NO | TITLE | DESTINATION |
|------|------------|---|--|
| 1991 | 194 | Distress for Rent | Under consideration |
| 1992 | 208 | Business Tenancies: A Periodic Review of the Landlord and Tenant Act 1954 Part II | Accepted in part; part under consideration |
| 1994 | 221 | Termination of Tenancies Bill ⁵ | Under consideration |

Notwithstanding the serious deficiencies in Landlord and Tenant law, we are not recommending that any new work on this branch of the law should be initiated in our next Programme in view of the serious backlog of unimplemented recommendations.

We also published the following Consultation Paper during this period:

| YEAR | CP NO | TITLE |
|------|-------|--|
| 1992 | 123 | Responsibility for State and Condition of Property |

The following reports, published under the equivalent item in the Third Programme, remain unimplemented:

| YEAR | LAW COM NO | TITLE | DESTINATION |
|------|------------|--|-------------------------------|
| 1988 | 174 | Privity of Contract and Estate | Accepted in part ⁶ |
| 1989 | 178 | Compensation for Tenants' Improvements | Accepted |

⁵ This is a draft Bill to implement the scheme for landlords' termination orders recommended in (1985) Law Com No 142.

⁶ This report is now being implemented, in substantially modified form, in the Landlord and Tenant (Covenants) Bill 1995.

ITEM 4: TRANSFER OF LAND

Recommended: that an examination be made of the system of conveying land with a view to its modernisation and simplification.

Between September 1989 and April 1995 we published the following reports:

| YEAR | LAW COM NO | TITLE | DESTINATION |
|------|------------|---|---|
| 1989 | 188 | Overreaching: Beneficiaries in Occupation | Under consideration |
| 1990 | 191 | Risk of Damage after Contract for Sale ⁷ | --- |
| 1991 | 199 | Implied Covenants for Title | Law of Property (Miscellaneous Provisions) Act 1994 |
| 1991 | 201 | Obsolete Restrictive Covenants | Under consideration |
| 1991 | 204 | Land Mortgages | Under consideration |

The following reports, published under the equivalent item in the Third Programme, remain unimplemented:

| YEAR | LAW COM NO | TITLE | DESTINATION |
|------|------------|---|---------------------|
| 1985 | 152 | Chancel Repair Liability | Under consideration |
| 1988 | 173 | Fourth Report on Land Registration ⁸ | Under consideration |
| 1989 | 181 | Trusts of Land ⁹ | Accepted |

⁷ This report contained no legislative proposals.

⁸ We have described the new work we are now carrying out on this topic in (1995) Law Com No 232, paras 2.67-2.70.

⁹ We submitted a revised draft Bill to the Government in November 1993: see (1994) Law Com No 223, para 2.73.

ITEM 5: CRIMINAL LAW

Recommended: that a comprehensive examination be made of the criminal law, extending to general principles and specific topics, including bigamy, offences against the marriage law, and extra-territorial jurisdiction in criminal offences.

Between September 1989 and April 1995 we published the following reports:

| YEAR | LAW COM NO | TITLE | DESTINATION |
|------|------------|--|--|
| 1989 | 186 | Computer Misuse | Computer Misuse Act 1990 |
| 1992 | 205 | Rape Within Marriage ¹⁰ | Criminal Justice and Public Order Act 1994 |
| 1993 | 218 | Offences Against the Person and General Principles ¹¹ | Under consideration |
| 1994 | 228 | Conspiracy to Defraud | Under consideration |
| 1995 | 229 | Intoxication and Criminal Liability ¹² | Under consideration |
| 1995 | 230 | The Year and a Day Rule in Homicide ¹³ | Under consideration |

We also published the following Consultation Papers during this period:

| YEAR | CP NO | TITLE |
|------|-------|---|
| 1993 | 131 | Assisting and Encouraging Crime |
| 1994 | 134 | Consent and Offences Against the Person |
| 1994 | 135 | Involuntary Manslaughter |

¹⁰ We published Working Paper No 116 on this topic in 1990.

¹¹ We published Consultation Paper No 122 on this topic in 1992.

¹² We published Consultation Paper No 127 on this topic in 1993.

¹³ We published Consultation Paper No 136 on this topic in 1994.

ITEM 6: FAMILY LAW

***Recommended:* that a comprehensive examination of family law be undertaken with a view to its systematic reform and eventual codification.**

Between September 1989 and April 1995 we published the following reports:

| YEAR | LAW COM NO | TITLE | DESTINATION |
|------|------------|---|--|
| 1989 | 187 | Distribution on Intestacy | Law Reform (Succession) Bill 1995 |
| 1990 | 192 | The Ground for Divorce | Accepted |
| 1992 | 207 | Domestic Violence and Occupation of the Family Home ¹⁴ | Family Homes and Domestic Violence Bill 1995 |
| 1993 | 217 | The Effect of Divorce on Wills | Law Reform (Succession) Bill 1995 |

¹⁴ We published Working Paper No 113 on this topic in 1989.

ITEM 7: PRIVATE INTERNATIONAL LAW

Recommended: that, in co-operation with the Scottish Law Commission, the Law Commission take under review when considered appropriate rules of private international law relating to obligations, property, family relationships and to any other matter which may be the subject of negotiations or agreements between Member States of the European Economic Community or of The Hague Convention on Private International Law.

Between September 1989 and April 1995 we published the following joint report:

| YEAR | LAW COM NO | TITLE | DESTINATION |
|------|------------|---|--|
| 1990 | 193* | Private International Law: Choice of Law in Tort and Delict | Private International Law (Miscellaneous Provisions) Bill 1995 |

No work has been carried out since 1990 on this programme item. In the light of the completion of the joint programme of work with the Scottish Law Commission, we are discontinuing work on this Programme item for the period of this Programme, although we may of course do work on private international law where it is related to our other law reform work.

The following report, published under the equivalent item in the Third Programme, remains unimplemented:

| YEAR | LAW COM NO | TITLE | DESTINATION |
|------|------------|--|---|
| 1987 | 168* | Private International Law: Law of Domicile | Accepted in 1991, but under consideration again now |

ITEM 8: THE LAW OF TRUSTS

***Recommended:* that an examination be made of the use of powers of attorney by trustees; of the rule against perpetuities; and of such other aspects of the law of trusts as may from time to time appear to the [Commission] and to your Department to require reform.**

Between September 1989 and April 1995 we published the following report:

| YEAR | LAW COM NO | TITLE | DESTINATION |
|------|------------|---|-------------|
| 1994 | 220 | Delegation by Individual Trustees ¹⁵ | Accepted |

We also published the following Consultation Paper during this period:

| YEAR | LAW COM NO | TITLE |
|------|------------|---|
| 1993 | 133 | The Rule Against Perpetuities and Excessive Accumulations |

¹⁵ We published Consultation Paper No 118 on this topic in 1991.

ITEM 9: MENTALLY INCAPACITATED ADULTS

Recommended: that an investigation be carried out into the adequacy of legal and other procedures for the making of decisions on behalf of mentally incapacitated adults.

Between September 1989 and April 1995 we published the following report:

| YEAR | LAW COM NO | TITLE | DESTINATION |
|------|------------|---------------------------------|---------------------|
| 1995 | 231 | Mental Incapacity ¹⁶ | Under consideration |

All the work under this programme item has now been completed.

¹⁶ We published Consultation Papers Nos 119 and 128-130 on this topic between 1991 and 1993.

(b) FIFTH PROGRAMME

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.

Between May 1991 and April 1995 we published the following report:

| YEAR | LAW COM NO | TITLE | DESTINATION |
|------|------------|---|---------------------|
| 1994 | 226 | Judicial Review and Statutory Appeals ¹⁷ | Under consideration |

All the work under this Programme item has now been completed. We are discontinuing work on judicial review for the period of the Sixth Programme.

¹⁷ We published Consultation Paper No 126 on this topic in 1993.

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.

Between May 1991 and April 1995 we published the following reports:

| YEAR | LAW COM NO | TITLE | DESTINATION |
|------|------------|--|-------------|
| 1994 | 224 | Structured Settlements and Interim and Provisional Damages ¹⁸ | Accepted |
| 1994 | 225 | Personal Injury Compensation: How Much is Enough? ¹⁹ | --- |

We also published the following Consultation Papers during this period:

| YEAR | LAW COM NO | TITLE |
|------|------------|--|
| 1993 | 132 | Aggravated, Exemplary and Restitutionary Damages |
| 1995 | 137 | Liability for Psychiatric Illness |

¹⁸ We published Consultation Paper No 125 on this topic in 1992.

¹⁹ A study of the compensation experiences of victims of personal injury. This report contained no legislative proposals.

(c) OTHER WORK DURING THE FOURTH AND FIFTH PROGRAMMES

REFERENCES

Between September 1989 and April 1995 we delivered the following reports to you pursuant to references you or your predecessor Lord Hailsham of St Marylebone made to us under section 3(1)(e) of the Law Commissions Act 1965:

| YEAR | LAW COM NO | TITLE | DESTINATION |
|------|------------|---|--|
| 1991 | 202 | Corroboration of Evidence in Criminal Trials ²⁰ | Criminal Justice and Public Order Act 1994 |
| 1993 | 216 | The Hearsay Rule in Civil Proceedings ²¹ | Civil Evidence Bill 1995 |
| 1994 | 222 | Binding Over ²² | Under consideration |
| 1994 | 227 | Restitution: Mistakes of Law and Ultra Vires Public Authority Receipts and Payments ²³ | Under consideration |

We also published the following Consultation Paper during the same period pursuant to a reference by the Minister for Corporate Affairs:

| YEAR | LAW COM NO | TITLE |
|------|------------|---------------------------------------|
| 1992 | 124 | Fiduciary Duties and Regulatory Rules |

In 1994 we carried out, in consultation with the Scottish Law Commission, a feasibility study into the relative importance of company law problems to small businesses, pursuant to a reference by the Minister for Corporate Affairs.

²⁰ This reference was made in 1988. We published Working Paper No 115 on this topic in 1990.

²¹ This reference was made in 1989. We published Consultation Paper No 117 on this topic in 1991.

²² This reference was made in 1980. The delays in this project, which went out to consultation twice, were caused by the irreconcilability of the opposing views and the need to give other criminal law studies a higher priority.

²³ This reference was made in 1990. We published Consultation Paper No 120 on this topic in 1991.

MISCELLANEOUS OTHER WORK

Between September 1989 and April 1995:

- (1) Members of the Commission's family law team participated in Government working parties concerned with the Adoption Law Review²⁴ and with Access to and the Reporting of Family Proceedings²⁵ as part of the Government's Family Law Review.
- (2) The Commission prepared a draft Bill on Commonhold at the request of your Department.
- (3) Commissioners assisted in the work of the Department of the Environment's Relationship Breakdown Working Party.²⁶
- (4) A Commissioner assisted your Department in the preparation of a consultation paper on the infringement of privacy.²⁷
- (5) The Commission's criminal law team prepared, in conjunction with the Crown Prosecution Service, a consultation paper on the Form of Counts in an Indictment, which was published by your Department.²⁸

²⁴ Review of Adoption Law, Report to Ministers of an Inter-departmental Working Group (Department of Health, 1992).

²⁵ Lord Chancellor's Department Consultation Paper, Review of Access to and Reporting of Family Proceedings (1993).

²⁶ Department of the Environment, Relationship Breakdown and Secure Local Authority Tenants (1993).

²⁷ Infringement of privacy consultation (the Lord Chancellor's Department and the Scottish Office (1993)).

²⁸ Counts in an Indictment: A Consultation Paper prepared by the Criminal Law Team of the Law Commission (1994).

PART III

SIXTH PROGRAMME OF LAW REFORM: PROGRAMME ITEMS

- 3.1 In this Part we set out for your approval our Sixth Programme of Law Reform, as the programme which will occupy most of our time and resources between now and the end of 1998. Items 3 (Limitation Periods), 4 (Illegal Transactions), 9 (Company Law) and 10 (Third Parties' Rights Against Insurers) are entirely new. Other items are carried forward from the Fourth and Fifth Programmes, but we have taken the opportunity to omit work we have completed, to add any new projects and to alter the text of the programme item where appropriate. We are required by statute¹ to identify the Examining Agency, and in every case we recommend that the Law Commission itself should undertake the examination, working jointly with the Scottish Law Commission in respect of Item 10. In respect of other items, particularly Items 6, 7 and 9, we will be working in close association with others. We draw your attention in this context to what we say about the possibility of the Commission working jointly with others, subject to your approval, under Item 7(d) (Other aspects of the law of trusts).
- 3.2 Business law is largely a new field for us and our proposals are not yet complete. Law reform projects under contemplation include the law of contracts of guarantee and indemnity, non-disclosure in insurance contracts, and partnership law. If we wish to embark on either of the first two of these topics we would seek appropriate approval under Item 1 (The Law of Contract). For the third we would seek a Ministerial reference pursuant to section 3(1)(e) of the Law Commissions Act 1965.

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

ITEM 1: THE LAW OF CONTRACT

Recommended: that an examination of the law of contract be made, with particular reference during the period of this Programme to the completion of an examination of the law relating to contracts entered into for the benefit of third parties.

An examination of the law of contract has formed part of the Commission's work since it was included as Item I in the First Programme. This recommended that the law of contract should be examined with a view to codification.² Although the Commission suspended work on codification in 1973,³ our work on the law of contract, much of it carried out jointly with the Scottish Law Commission, has led to important legislation on areas including exemption clauses and the supply of goods and services,⁴ contribution,⁵ and minors' contracts.⁶ We hope to publish our report on contracts for the benefit of third parties before the end of the year.

Aspects of contract law continue to attract criticism from the judiciary, practitioners and academics alike, and to cause difficulties for those who have to use it for resolution of their affairs. Contract law underpins both international trade and the business of the market place. Its imperfections can cause injustice and expense to big businesses and individual consumers alike. We therefore consider it important that we should continue to be able to overhaul such parts of the law of contract as may from time to time appear to us and your Department to require examination. We have mentioned other work we may wish to undertake under this Item in the Introduction to this Part.

² (1965) Law Com No 1. The First Programme also recommended an examination of aspects of the law relating to exemption clauses in contracts (Item II) and of the doctrine of consideration, third party rights and contracts under seal (Item III: this became merged with Item I). In 1989 this item became Item 1 of the Fourth Programme (see p11 above).

³ With the approval of the Lord Chancellor: *Hansard* (HL) 9 July 1973, vol 344, cols 624-625.

⁴ Supply of Goods (Implied Terms) Act 1973, based on (1969) Law Com No 24, Scot Law Com No 12; Unfair Contract Terms Act 1977, implementing recommendations in (1975) Law Com No 69, Scot Law Com No 39; Supply of Goods and Services Act 1982, implementing recommendations in (1979) Law Com No 95; and Sale and Supply of Goods Act 1994, implementing recommendations in (1987) Law Com No 160, Scot Law Com No 104. A Private Member's Bill has been introduced in the House of Lords which, if it becomes law, will implement recommendations contained in (1993) Law Com No 215, Scot Law Com No 145.

⁵ Civil Liability (Contribution) Act 1978, implementing recommendations in (1977) Law Com No 79.

⁶ Minors' Contracts Act 1987, implementing recommendations in (1984) Law Com No 134.

ITEM 2: DAMAGES

Recommended: that an examination be made 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:

- (a) deductions and set-offs against monetary loss (excluding, unless expressly approved, the recovery provisions of the Social Security Administration Act 1992);
- (b) awards to cover medical, nursing and other expenses incurred by the plaintiff;
- (c) the law relating to fatal accidents, including bereavement damages;
- (d) the principles relevant to awards of aggravated, exemplary and restitutionary damages;
- (e) the award of damages for pain and suffering and other forms of non-pecuniary loss;
- (f) liability for psychiatric illness, including "nervous shock";
- (g) 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.

A review of the law of damages, with particular regard to personal injuries, was one of the two new items in the Fifth Programme. This review is now in its most active phase, so that most of the resources of our Common Law Team are currently committed to it.

We are in the course of working on a number of topics within this project. They include non-pecuniary loss; bereavement; plaintiffs' medical, nursing and other expenses; and set-offs and other deductions. In relation to the last of these, the terms of reference set by item 11 of the Fifth Programme expressly excluded the recovery provisions of the Social Security Acts 1989 and 1990, which are now found in the Social Security Administration Act 1992. We consider that it will be difficult

to examine other areas of collateral benefit on a principled basis while observing this exception, and we may therefore be seeking your approval to its removal from this programme item. We hope to publish a consultation paper on non-pecuniary loss before the end of 1995 and on the other topics mentioned at the start of this paragraph by the end of 1996. The consultation period for our consultation paper on liability for psychiatric illness closes on 31 July 1995.⁷ It has attracted a great deal of interest.

While this item has particular reference to damages for personal injuries, it is not intended to be limited to personal injuries, and we have undertaken a study of aggravated, exemplary and restitutionary damages, an area in which the law is widely seen as lacking in principle and logic and in need of reform. We hope to publish our report within the next twelve months.⁸

⁷ (1995) Consultation Paper No 137.

⁸ We published Consultation Paper No 132 on this topic in 1993.

ITEM 3: LIMITATION PERIODS

***Recommended:* that there be a comprehensive review of the law on limitation periods with a view to its simplification and rationalisation.**

Needless complexity in the law costs money. The law on limitation periods, which is largely contained in the Limitation Act 1980, is uneven, uncertain and unnecessarily complex. For example, the period of limitation in most personal injury cases is three years after the later of two possible dates, subject to a discretionary power not to apply the limit; in relation to liability under the Consumer Protection Act 1987, the period is similar, but subject to a maximum of 10 years; in latent damage cases, it is the later of three years after one date or six years after another, subject to a maximum of 15 years. Concern has also been expressed at the existence of situations where limitation periods can be less favourable from the plaintiff's point of view for intentionally inflicted injury than for negligence. Other concerns include, for example, the possibility of there being different limitation periods in contract and tort in cases of concurrent liability; the different limitation periods for contracts made by deed as opposed to contracts supported by consideration; and the lack of clarity in the 1980 Act in respect of the limitation periods for restitutionary claims against a defendant who has been unjustly enriched, which is becoming an increasingly important area of the law.

We believe, therefore, that the law in this area is in need of a comprehensive review which gives an opportunity to simplify, rationalise and update it. This will be a major project, but we are of the opinion that the desirability of systematic development and reform amply justifies the commitment of resources which will be necessary. Resources permitting, we hope to complete our report before the end of 1998.

ITEM 4: ILLEGAL TRANSACTIONS

***Recommended:* that an examination be made of the law on illegal transactions, including contracts and trusts.**

The law in relation to illegal contracts should be clear and fair. The present law in England and Wales is wanting in both respects. It is, for example, uncertain when money or property may be recovered if it has been transferred pursuant to a contract which contravenes statute or common law. Systematic development and reform are required.

Moreover, we are of the opinion that this project, and the possible reform which may flow from it, should not be confined to illegal contracts, but should extend to illegality in trusts. The need for reform in this area was highlighted by Lord Goff of Chieveley in his dissenting speech in *Tinsley v Milligan*.⁹ In that case, the defendant in possession proceedings claimed a beneficial interest in a house, the legal title to which was held in the plaintiff's sole name. This claim was based on the defendant's contribution to the purchase price. The plaintiff resisted it on the basis that she and the defendant had been defrauding the Department of Social Security, and that the arrangements with the property had been made with this illegal purpose in mind. A majority of the House of Lords¹⁰ held that, notwithstanding the illegality, the defendant was entitled to the beneficial interest she claimed. In order to raise a presumption of a resulting trust the defendant had merely to establish her contribution and her mutual understanding with the plaintiff that the property was to be beneficially owned in equal shares, without regard to the reason why the legal title was held in the plaintiff's sole name.

Some have also argued that a related area of the law needs to be clarified. This is concerned with claims in tort where the plaintiff has been involved in some illegality. We would like to be able to include this topic in our study as our work proceeds, if this turns out to be appropriate.

Resources permitting, we hope to be able to complete our report before the end of 1998.

⁹ [1994] 1 AC 340, 364.

¹⁰ Lord Jauncey of Tullichettle, Lord Lowry and Lord Browne-Wilkinson; Lord Keith of Kinkel and Lord Goff of Chieveley dissenting.

ITEM 5: THE LAW OF LANDLORD AND TENANT

- Recommended:* (a) that an examination be made of the obligations of landlords and tenants in relation to the state and condition of the property let;
- (b) that an examination be made of the law of waste so far as it applies to tenants and licensees;
- (c) that, to facilitate the implementation of the reports which we have previously published, an examination be made of such parts of the basic law of landlord and tenant as may appear appropriate with a view to their modernisation, simplification and codification.

We intend to publish a report in the autumn of 1995 on the obligations of landlords and tenants in relation to the state and condition of the property and on the law of waste as it applies to tenants and licensees.

Both landlords and tenants have an interest in ensuring the proper maintenance of property which is let. There is at present no general obligation on either party to repair and maintain the property or to see that it is fit for human habitation. Although the law does imply such obligations in certain circumstances, their scope is not comprehensive and their effect is limited. In our consultation paper,¹¹ we identified several unsatisfactory features of the present law. We offered a choice between a fundamental recasting of the obligations of landlord and tenant in relation to the state and condition of the property let, and a series of more limited individual reforms intended to address specific deficiencies in the law. We will be making recommendations in the light of the responses we received.

Of all those parts of the law on which the Law Commission has worked, landlord and tenant has been the least successful in terms of implementation. In view of the backlog of unimplemented reports, we do not recommend that any new work under this item should be carried out. We shall however undertake all necessary work, including where necessary the examination and codification of parts of the law, to ensure that the recommendations that we have made in our previous reports on the law of landlord and tenant can be implemented by legislation in the most effective way.

¹¹ (1992) Consultation Paper No 123.

ITEM 6: TRANSFER OF LAND

Recommended: that an examination be made of the creation, transfer and extinction of rights in or over registered and unregistered land with a view to the modernisation and simplification of the law.¹²

We are at present reviewing the entirety of the legislation governing the land registration system in conjunction with both your Department and the Land Registry. A joint working group was set up in 1994 for this purpose, and its work is based upon the Law Commission's Third and Fourth Reports on Land Registration.¹³

Since December 1990, the whole of England and Wales has been subject to compulsory registration of title. Of an estimated 21 million titles in this country, over 15 million have now been registered. By the early years of the next century registered conveyancing will for most practical purposes have replaced the unregistered system. The present legislation - the Land Registration Act 1925 together with the rules made under it - is widely acknowledged to be of poor quality and needless complexity. The objective of the working group is to make proposals for the modernisation and simplification of the legislation with a view to creating a coherent body of law based upon the principles of registered land.

The working group submitted its first report to you in 1994, recommending reforms in relation to first registration, indemnity and the powers of the Registry to make fee orders, and a Bill has been prepared to implement that report. The working group is preparing a consultation paper on the remaining aspects of registered land including overriding interests, the protection of minor interests, priorities and rectification of the register. It is hoped that this paper will be published by the end of 1995 with a view to drafting legislation in 1996 in the light of the responses we receive.

¹² Item IX of the First Programme originally applied only to unregistered land, but in February 1966 the Lord Chancellor approved a recommendation that this Item "should be widened to cover the whole law relating to transfer of both registered and unregistered land": (1966) Law Com No 4, para 70. This then became Item 4 of the Fourth Programme: see p14 above.

¹³ (1987) Law Com No 158; (1988) Law Com No 173.

ITEM 7: THE LAW OF TRUSTS

Recommended: that an examination be made of:

- (a) the rule against perpetuities and excessive accumulations;
- (b) the formal requirements for the creation of trusts and interests in land and for the disposition of equitable interests;
- (c) the personal and proprietary remedies available for the recovery of property that has been transferred in breach of trust or fiduciary duty or in circumstances which constitute a *devastavit* by personal representatives;
- (d) such other aspects of the law of trusts as may from time to time appear to the examining agency and to your Department to require examination.

Although the Commission is the examining agency for the first three projects listed above, we envisage that we may wish to work jointly with one or more other bodies on some or all of any future projects under this Item which may be agreed with your Department.

Perpetuities and Excessive Accumulations

In 1993 we published our consultation paper *The Law of Trusts: The Rules against Perpetuities and Excessive Accumulations*.¹⁴ In this paper we examined the policy behind these notoriously complex rules, which restrict the power of owners to make dispositions of their property, to ascertain whether they could still be justified in modern conditions and, if they could, whether they might be simplified or modernised. We are examining the responses to consultation and hope to publish our report in 1996.

Formalities

The present rules which regulate the formal requirements for the creation of trusts and interests in land and for the disposition of equitable interests are largely statutory.¹⁵ They have not worked well in practice and have been the cause of considerable litigation.¹⁶ Our concern is to ensure that the formal requirements fulfil a clearly defined function which will facilitate rather than inhibit both the creation

¹⁴ (1993) Consultation Paper No 133.

¹⁵ Law of Property Act 1925, s 53.

¹⁶ See *eg*, *Grey v IRC* [1960] AC 1; *Oughtred v IRC* [1960] AC 206; *Vandervell v IRC* [1967] 2 AC 291; *Re Vandervell's Trusts* [1974] Ch 269.

of trusts and dealings with equitable interests.¹⁷ We hope to publish a consultation paper in 1996.

Remedies

The remedies available for the recovery of trust property transferred in breach of trust or fiduciary duty have assumed a major significance in commercial dealings and have been the subject of much litigation.¹⁸ Although a wide range of remedies exist, none of them is wholly satisfactory and their interrelationship is uncertain. In addition, there are procedural and evidential shortcomings which can impede recovery, and in some cases no personal action is available so that the claimant is obliged to pursue the more expensive tracing remedy. We have begun an examination of personal remedies and hope to publish a consultation paper in 1996. We shall then commence work on a consultation paper on proprietary remedies.

¹⁷ This work is a continuation of our work in the 1980s which led to the enactment of the Law of Property (Miscellaneous Provisions) Act 1989, ss 1 and 2: (1987) Law Com No 163; and (1987) Law Com No 164.

¹⁸ For recent examples, see *Agip (Africa) Ltd v Jackson* [1990] Ch 265 (Millett J); [1991] Ch 547 (CA); *Polly Peck International Plc v Nadir (No 2)* [1992] 4 All ER 769; *Polly Peck International Plc v Nadir (No 3)* (CA) *The Times* 22 March 1993; *El Ajou v Dollar Land Holdings Plc* [1993] 3 All ER 717 (Millett J); [1994] 2 All ER 685 (CA); *El Ajou v Dollar Land Holdings Plc (No 2)* [1995] 2 All ER 213; *Macmillan Inc v Bishopsgate Investment Trust*, unreported, 10 December 1993 (Millett J).

ITEM 8: FAMILY LAW

Recommended: that an examination be made (a) of the property rights of home-sharers and (b) of such other aspects of family law as may from time to time appear to require examination, with a view to the systematic reform and eventual codification of family law.

The property rights of home-sharers

We are examining the property rights of unmarried home-sharers both on the breakdown of their relationship and on death. At present, when the relationship breaks down, the legal position of the parties is governed entirely by applications of the law of property, principally the law on resulting and constructive trusts and on proprietary estoppel. The most that a claimant can hope to receive is a share in some particular property, usually the common home. Such a claim is usually dependent upon the claimant showing that he or she has made some contribution towards the cost of acquiring or improving that property. The performance of domestic duties, even over a substantial period of time, will not suffice. The present legal rules are uncertain and difficult to apply and can lead to serious injustice.¹⁹ As part of this study, we are also examining the position of any children who are living with such home-sharers when the relationship terminates. We are reviewing the law with the aid of a steering group and hope to publish a consultation paper in 1996.

Other aspects of family law

An examination of family law has always formed an important part of the Commission's work. Since 1968,²⁰ with the approval of successive Lord Chancellors, we have been working towards the systematic reform and eventual codification of family law, and the substantial contribution the Commission has made to the modern development of family law was described in our Twenty-Eighth Annual Report.²¹

The need for systematic reform and codification continues, and you described particular aspects of the reform of family law, jurisdiction and procedure in your rolling programme of family law reform, announced in March 1992. Although we now have no specialist family law Commissioner for the first time since 1978, we would be able to undertake some small and useful projects on family law during this programme period if we had a small increase in staff, and we attach great

¹⁹ See eg, *Burns v Burns* [1984] Ch 317.

²⁰ (1968) Law Com No 14. "As our work has progressed it has become clear that there is a need for the Commission to conduct a comprehensive examination of family law with a view to its codification".

²¹ (1994) Law Com No 223, Part III. "Family law has always been one of the most important and productive areas of the Law Commission's work".

importance to acquiring the capacity to do so. This programme item will enable us to undertake work on topics which appear to your Department and ourselves to need examination.

ITEM 9: COMPANY LAW

Recommended: that an examination be made of such aspects of company law as may from time to time appear to the Law Commission and to the Department of Trade and Industry to require examination.

Company law is vital to the country's prosperity as it sets out the framework within which a large part of its economic activity is carried out. Company law is detailed and complex. In certain respects, it is unclear. This can deter investment and imposes unnecessary costs on businesses. They have to seek legal advice to resolve difficult issues and devote considerable management time to compliance with detailed statutory requirements. Ultimately, lack of certainty and clarity can also lead to lengthy litigation. This is not only detrimental to the businesses themselves but also clogs up the courts and wastes public resources.

Practitioners, academics and the judiciary continue to draw to our attention specific areas of the law that cause particular difficulty. We consider it essential that these should be addressed in a coherent and systematic manner. The existence of this programme item will enable us to play an appropriate role, in co-operation with the Scottish Law Commission, in the overhaul of parts of our company law to meet modern needs.²²

²² We are at present carrying out a review of the remedies available to shareholders, pursuant to a reference by the Lord Chancellor and the President of the Board of Trade: see p43 below.

ITEM 10: THIRD PARTIES' RIGHTS AGAINST INSURERS

Recommended: that the Law Commission, jointly with the Scottish Law Commission, examine the scope and operation of the Third Parties (Rights Against Insurers) Act 1930 in the light of the current law and market practices of the insurance industry.

The Third Parties (Rights Against Insurers) Act 1930 was introduced to remedy the perceived injustice of the decision in *Re Harrington Motor Co Ltd*.²³ In that case the court held that the proceeds of a third party liability policy held by an insolvent company formed part of the general assets of the company for distribution among its creditors. They could not therefore be claimed directly by the successful third party in respect of whose claim the insurance monies were paid to the company. The Act operates by transferring to the third party the rights of the insured in the event of the latter becoming insolvent. It also provides a mechanism whereby the third party may obtain information about the insurance policy.

However, it has been held that these features of the Act only come into play once the insured's liability to the third party has been established.²⁴ It can be wasteful in time and costs to require the third party to pursue to judgment an insolvent insured who has no interest in the outcome of the proceedings so that the real dispute with the insurer has to be deferred to a later stage. It can also cause injustice because of limitation difficulties²⁵ or because it is no longer possible to obtain judgment against the insured.²⁶

Moreover, problems have emerged from the application of the Act in the context of modern insurance practice. A particular difficulty relates to multiple claims policies where the total value of claims exceeds the policy limit. The distribution of the proceeds of the insurance policy in such circumstances depends at present on the order in which each claimant establishes liability and quantum,²⁷ although this may

²³ [1928] 1 Ch 105.

²⁴ *Post Office v Norwich Union Fire Insurance Society Ltd* [1967] 2 QB 363, *Bradley v Eagle Star Insurance Co Ltd* [1989] AC 957 on the transfer of rights; *Nigel Upchurch v The Aldridge Estates Investment Co Ltd* [1993] 1 Lloyds Rep 535, *Woolwich Building Society v Taylor and Another* [1995] 1 BCLC 132 on the right to information.

²⁵ The insolvency (and therefore the transfer of rights) may only occur after the limitation period against the insurer has expired; *Lefevre v White* [1990] 1 Lloyds Rep 569, *Felicie (London Steamship Owners Mutual)* [1990] 2 Lloyds Rep 21.

²⁶ If the insured is a company which has been dissolved, proceedings cannot be commenced against it. However, in most cases where proceedings are to be brought it is possible to have the dissolution declared void under s 651 of the Companies Act 1985. The requirement to restore the company to the register adds to the costs.

²⁷ *Cox v Bankside Members Agency Ltd and others*, *The Times* 27 January 1995.

be complicated by the presence of an "excess" clause.²⁸ This may lead to unfair and arbitrary results. Further, the uncertainty surrounding the distribution of the insurance proceeds, which may be compounded by the lack of information about the cover, may contribute to unnecessary litigation and wasted costs.

This project will give the English and Scottish Law Commissions the opportunity to work together to ensure that the law in this area is updated in line with modern needs and practices. Resources permitting, we hope to be able to complete this report before the end of 1998.

²⁸ In *Cox* it was common ground that, where claims were subject to an excess, the early claimants had no entitlement until the excess had been applied and exhausted.

ITEM 11: CRIMINAL LAW

Recommended: that a comprehensive examination be made of the criminal law, extending to general principles and specific topics including:

- (a) all offences of dishonesty, including those arising under the Theft Acts 1968 and 1978 and the Forgery and Counterfeiting Act 1981;
- (b) the law relating to offences against the person, with particular reference to the law of involuntary manslaughter;
- (c) the law relating to consent, with particular reference to offences against the person and sexual offences;
- (d) the law relating to the liability of those who assist and encourage others to commit crime.

Offences of Dishonesty

There has been cogent judicial criticism that “the law of theft is in urgent need of simplification and modernization”.²⁹ There has also been much criticism of the length, cost and complexity of fraud trials: our enquiry will ascertain if it is possible to eliminate or reduce this criticism by simplifying the law while always ensuring that the defendant is fully protected. In any event, we believe that it is desirable to re-examine a country’s dishonesty laws at least once in every generation. We consider it important that we should be able to recommend the reform of such parts of this branch of the law as require reform, bearing in mind the importance of the law of dishonesty and the criticisms that the present law is too complex, too difficult to ascertain and outdated.

Consideration will also be given to extending criminal liability for offences of dishonesty to matters which are at present outside the ambit of the criminal law. In the period since the enactment of the Theft Acts 1968 and 1978 and the Forgery and Counterfeiting Act 1981 there have been radical and multifarious technological advances. In consequence, it is likely that some acts of dishonesty are not effectively covered by present legislation because the legislators could not possibly have envisaged all the technical advances which are now creating problems for the courts.

²⁹ *Hallam, The Times* 27 May 1994, per Beldam LJ.

Offences against the Person

This review of the law relating to offences against the person is a continuation of work undertaken under the Fourth Programme and forms part of our systematic study of this branch of the law. Our work on involuntary manslaughter started in 1993 and we published a consultation paper in 1994.³⁰ It is difficult to identify any sound bedrock of principle on which the existing law is based, and it is widely accepted that the law is in need of reform. We hope to publish our report in the next 12 months.

Consent

This work started as part of our systematic review of the law relating to offences against the person, and we published a consultation paper in 1994.³¹ We have now broadened the project to include an examination of consent as part of the law relating to sexual offences, and to consider the implications of our recommendations in relation to other aspects of consent in the criminal law. We hope to publish a further consultation paper this autumn and to publish our report before the end of 1996.

Assisting and encouraging crime

The present law on this topic is complicated and uncertain. It has grown up haphazardly. Seriously anti-social and dishonest behaviour often goes unpunished if the principal crime is not in the event committed. In contrast, people may be convicted of serious crime when their involvement is at best technical. The law in this area is generally regarded as lacking in both principle and logic. A consultation paper was issued in 1993³² and a report will be published as soon as resources permit.

³⁰ (1994) Consultation Paper No 135.

³¹ (1993) Consultation Paper No 134.

³² (1993) Consultation Paper No 131.

PART IV CURRENT REFERENCES TO THE COMMISSION BY MINISTERS

- 4.1 In addition to our work on programme items, we are currently in receipt of four references from Ministers pursuant to section 3(1)(e) of the Law Commissions Act 1965, the last of these being conducted, at the Minister's request, in consultation with the Scottish Law Commission. We will complete our work on these references during the currency of the Sixth Programme.
- 4.2 We set out these references below in the order we received them.

FIDUCIARY DUTIES AND REGULATORY RULES

Referred by: The Minister for Corporate Affairs

Date: April 1990

Topic: **Certain professional and business activities are subject to public law regulation by statutory and self-regulatory control. The Law Commission is to consider the principles which should govern the effect of such controls on the fiduciary and analogous duties of those carrying on such activities. The inquiry will consider examples from differing areas of activity but will be with particular reference to financial services.**

The Financial Services Act 1986 introduced a new system of regulation for firms carrying on business in this area which delegated a great deal of responsibility to self-regulatory bodies. However, the Act did not expressly provide how the rules made by such bodies would tie in with traditional fiduciary duties and it was not clear in particular how any mismatch between the two would be resolved. This uncertainty in a crucial area of business activity was unacceptable. It was as a result of concerns about the possibility of such a mismatch expressed by firms operating in the financial services sphere, and their legal advisers, that the matter was referred to the Commission.³³ We published a consultation paper in April 1992³⁴ and we hope to publish our report before the end of 1995.

³³ Although the focus of the project was on the financial services industry, the scope of the reference in fact extended to all forms of professional and business activity which are subject to public law regulation by statutory and self-regulatory control.

³⁴ (1992) Consultation Paper No 124.

EVIDENCE IN CRIMINAL CASES

Referred by: The Home Secretary

Date: April 1994

Topic: **An examination of the principles relating to the admission of hearsay evidence and evidence of previous misconduct of the defendant in criminal proceedings.**

The law in respect of both of these areas has been heavily and frequently criticised as being illogical, uncertain and leading to potential miscarriages of justice. Pursuant to a recommendation by the Royal Commission on Criminal Justice,³⁵ the Home Secretary invited the Commission to consider these matters, and to make appropriate recommendations, including, if they appear to be necessary in consequence of changes proposed to the law of evidence, changes to the trial process.

It is of great importance that the law of evidence should be not only just and fair but perceived to be so and that it should be based on sound principles. It should also be simple and clear without unnecessary complications. The present law on each of these matters fails to meet these requirements. We hope to publish a consultation paper on hearsay during the summer of 1995 and on previous misconduct in early 1996.

THE EXECUTION OF DEEDS AND DOCUMENTS BY BODIES CORPORATE

Referred by: The Lord Chancellor and the President of the Board of Trade.

Date: October 1994

Topic: **A review of the law on the execution of deeds and documents by or on behalf of bodies corporate.**

Despite recent legislation,³⁶ the present law on the formal requirements for deeds and documents executed by such bodies or their attorneys is complex, inconsistent and in some respects uncertain, with different rules applicable to different types of corporation. We are reviewing the law to see if it is possible to create a coherent and simpler set of rules that will meet the needs of the business community. Our work is an extension of a project undertaken in the 1980s in relation to the execution of deeds by individuals.³⁷ Resources permitting, we hope to publish a consultation paper before the end of 1995, and a report before the end of 1997.

³⁵ (1993) Cm 2263, Chapter 8, para 25 and Recommendation 189.

³⁶ Companies Act 1989, s 130.

³⁷ (1987) Law Com No 163, implemented by the Law of Property (Miscellaneous Provisions) Act 1989, s 1.

SHAREHOLDER REMEDIES

Referred by: The Lord Chancellor and the President of the Board of Trade

Date: February 1995

Topic: **A review, in consultation with the Scottish Law Commission, of shareholder remedies, with particular reference to the rule in *Foss v Harbottle* (1843) 2 Hare 461 and its exceptions, sections 459 to 461 of the Companies Act 1985, and the enforcement of the rights of shareholders under the articles of association.**

This review is to be conducted under the present law and under proposals to be made by the Department of Trade and Industry as to the reform of the law relating to duties of the directors of companies and as to Part X of the Companies Act.

This project examines the remedies available to shareholders of a company who are dissatisfied with the way in which the company is being run or who consider that their rights have been infringed in some way.

Petitions under section 459 of the Companies Act 1985³⁸ have been likened to old fashioned divorce proceedings because the wide wording of the section and the way in which the courts have interpreted it to date mean that parties will often go over the entire history of the company since its incorporation, citing every disagreement during that time, in order to establish their claim. This leads to extremely long and expensive cases with costs often far exceeding the value of the assets in dispute.³⁹ Apart from the costs involved, such disputes will obviously have a detrimental effect on the management of the business, and can in some cases paralyse it for long periods or force it to close down.

Section 459 overlaps with other remedies available to a shareholder.⁴⁰ In addition, there are numerous statutory provisions which address specific situations arising in practice.⁴¹ This project gives the Commission, in consultation with the Scottish Law Commission, the opportunity to review the law in this area and to consider ways in

³⁸ Which allows a court to grant relief on the ground that a company's affairs are being or have been conducted in a manner which is unfairly prejudicial to its members generally or some part of its members.

³⁹ Eg, in *Re Elgindata* [1991] BCLC 959 the trial lasted 43 days, costs totalled £320,000 and the shares, originally purchased for £40,000, were valued at £24,000.

⁴⁰ In particular, the enforcement of a shareholder's personal rights under the articles of association and the shareholder's right to bring an action on behalf of the company under what are commonly referred to as the exceptions to the rule in *Foss v Harbottle* (1843) 2 Hare 461. These have fallen largely into disuse in recent years, not least because s 459 covers much the same ground.

⁴¹ Such as the failure to call meetings (s 371), resolutions to remove directors (s 303) and objections to the variation of class rights (s 127).

which it could be rationalised, updated and improved. An initial consultation document will be published this year.

(Signed) HENRY BROOKE, *Chairman*
ANDREW BURROWS
DIANA FABER
CHARLES HARPUM
STEPHEN SILBER

MICHAEL SAYERS, *Secretary*

1 May 1995

APPENDIX A

(1) List of Law Commission Reports referred to in this Programme

| <i>DATE</i> | <i>LAW COM NO</i> | <i>SCOT LAW COM NO</i> | <i>REPORT</i> |
|-------------|-----------------------|----------------------------|---|
| 1965 | 1 | | First Programme of the Law Commission |
| 1966 | 4 | | First Annual Report |
| 1968 | 14 | | Second Programme of Law Reform |
| 1969 | 24 | 12 | Exemption Clauses in Contracts. First Report |
| 1973 | 54 | | Third Programme of Law Reform |
| 1975 | 69 | 39 | Exemption Clauses in Contract. Second Report |
| 1977 | 79 | | Report on Contribution |
| 1979 | 95 | | Implied Terms in Contracts for the Supply of Goods |
| 1980 | 104 | | Non-disclosure and Breach of Warranty |
| 1984 | 127 | | The Law of Positive and Restrictive Covenants |
| | 134 | | Minors' Contracts |
| 1985 | 142 | | Forfeiture of Tenancies |
| | 152 | | Liability for Chancel Repairs |
| | 158 | | Third Report on Land Registration |
| 1987 | 160 | 104 | Sale and Supply of Goods |
| | 162 | | Landlord and Tenant: Reform of the Law |
| | 163 | | Deeds and Escrows |
| | 164 | | Formalities for Contracts for Sale etc of Land |
| | 168 | 107 | Private International Law: The Law of Domicile |
| 1988 | 173 | | Fourth Report on Land Registration |
| | 174 | | Privity of Contract and Estate |
| 1989 | 179 | | Compensation for Tenants' Improvements |
| | 181 | | Trusts of Land |
| | 185 | | Fourth Programme of Law Reform |
| | 186 | | Computer Misuse |
| | 187 | | Distribution on Intestacy |
| | 188 | | Overreaching: Beneficiaries in Occupation |
| 1990 | 191 | | Risk of Damage after Contract for Sale |
| | 192 | | The Ground for Divorce |
| | 193 | 129 | Private International Law: Choice of Law in Tort and Delict |
| 1991 | 194 | | Distress for Rent |
| | 196 | 130 | Rights of Suit in Respect of Carriage of Goods by Sea |
| | 199 | | Implied Covenants for Title |
| | 200 | | Fifth Programme of Law Reform |
| | 201 | | Obsolete Restrictive Covenants. |
| | 202 | | Corroboration of Evidence in Criminal Trials |
| | 204 | | Land Mortgages |

| <i>DATE</i> | <i>LAW COM NO</i> | <i>SCOT LAW COM NO</i> | <i>REPORT</i> |
|-------------|-----------------------|----------------------------|--|
| 1992 | 205 | | Rape within Marriage |
| | 207 | | Domestic Violence and Occupation of the Family Home |
| | 208 | | Business Tenancies - A Periodic Review of the Landlord and Tenant Act 1954 Part II |
| 1993 | 210 | | Twenty-Seventh Annual Report |
| | 211 | 140 | Statute Law Revision: Fourteenth Report |
| | 215 | 145 | Sale of Goods Forming Part of a Bulk |
| | 216 | | The Hearsay Rule in Civil Proceedings |
| | 217 | | The Effect of Divorce on Wills |
| | 218 | | Offences Against the Person and General Principles |
| | 219 | | Contributory Negligence as a Defence in Contract |
| 1994 | 220 | | Delegation by Individual Trustees |
| | 221 | | Termination of Tenancies Bill |
| | 222 | | Binding Over |
| | 223 | | Twenty-Eighth Annual Report |
| | 224 | | Structured Settlements and Interim and Provisional Damages |
| | 225 | | Personal Injury Compensation: How Much is Enough? |
| | 226 | | Judicial Review and Statutory Appeals |
| | 227 | | Restitution: Mistakes of Law and Ultra Vires Public Authority |
| | | | Receipts and Payments |
| | 228 | | Conspiracy to Defraud |
| 1995 | 229 | | Intoxication and Criminal Liability |
| | 230 | | The Year and a Day Rule in Homicide |
| | 231 | | Mental Incapacity |
| | 232 | | Twenty-Ninth Annual Report |
| | 233 | 150 | Statute Law Revision: Fifteenth Report |

(2) List of Law Commission Working Papers and Consultation Papers referred to in this Programme

| <i>DATE</i> | <i>WP No</i> | <i>TITLE</i> |
|-------------|--------------|---|
| 1989 | 113 | Domestic Violence and Occupation of the Family Home |
| 1990 | 114 | Contributory Negligence as a Defence in Contract |
| | 115 | Corroboration of Evidence in criminal Trials |
| | 116 | Rape within Marriage |
| | <i>CP No</i> | |
| 1991 | 117 | The Hearsay Rule in Civil Proceedings |
| | 118 | Delegation by Individual Trustees |
| | 119 | Mentally Incapacitated Adults and Decision-Making: An Overview |
| | 120 | Restitution of Payments Made Under a Mistake of Law |
| | 121 | Privity of Contract: Contracts for the Benefit of third Parties |
| 1992 | 122 | Offences against the Person and General Principles |
| | 123 | Landlord and Tenant: Responsibility for State and Condition of Property |
| | 124 | Fiduciary Duties and Regulatory Rules |
| | 125 | Structured Settlements and Interim and Provisional Damages |
| 1993 | 126 | Judicial Review and Statutory Appeals |
| | 127 | Intoxication and Criminal Liability |
| | 128 | Mentally Incapacitated Adults and Decision-Making: A New Jurisdiction |
| | 129 | Mentally Incapacitated Adults and Decision-Making: Medical Treatment and Research |
| | 130 | Mentally Incapacitated Adults and Other Vulnerable Adults: Public Law Protection |
| | 131 | Assisting and Encouraging Crime |
| | 132 | Aggravated, Exemplary and Restitutionary Damages |
| | 133 | The Rule Against Perpetuities and Excessive Accumulations |
| 1994 | 134 | Consent and Offences against the Person |
| | 135 | Involuntary Manslaughter |
| | 136 | The Year and a Day Rule in Homicide |
| 1995 | 137 | Liability for Psychiatric Illness |

APPENDIX B

Consolidation Bills prepared during the Fourth and Fifth Programmes

Listed below are all the consolidation Bills which were prepared by draftsmen at the Law Commission, or in whose preparation the Commission was involved, during the period of the Fourth and Fifth Programmes of law reform. Those marked with an asterisk included recommendations of the Commission or joint recommendations of the Commission and the Scottish Law Commission.

1990

Capital Allowances (c.1)
Town and Country Planning (c.8)*
Planning (Listed Buildings and Conservation Areas) (c.9)*
Planning (Hazardous Substances) (c.10)*
Planning (Consequential Provisions) (c.11)*

1991

Deer (c.54)*
Water Industry (c.56)*
Water Resources (c.57)*
Statutory Water Companies (c.58)*
Land Drainage (c.59)*
Water Consolidation (Consequential Provisions) (c.60)*

1992

Social Security Contributions and Benefits (c.4)*
Social Security Administration (c.5)*
Social Security (Consequential Provisions) (c.6)*
Taxation of Chargeable Gains (c.12)
Protection of Badgers (c.51)
Trade Union and Labour Relations (Consolidation) (c.52)
Tribunals and Inquiries (c.53)

1993

Charities (c.10)
Clean Air (c.11)*
Radioactive Substances (c.12)
Health Service Commissioners (c.46)*
Probation Service (c.47)*
Pension Schemes (c.48)*

1994

Vehicle Excise and Registration (c.22)

Value Added Tax (c.23)

Drug Trafficking (c.37)

1995

Merchant Shipping Bill

Shipping and Trading Interests (Protection) Bill

Goods Vehicles (Licensing of Operators) Bill

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