

# THE LAW COMMISSION

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

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# **THE LAW COMMISSION**

## **THIRTY-FIRST ANNUAL REPORT 1996**

### *Working for Better Law*

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

I have the honour to present to you, on behalf of the Law Commission, our Thirty-First Annual Report for the year 1996, pursuant to the Law Commissions Act 1965.

In 1996 the Law Commission continued to work for better law. The year was one of steady progress. We produced five consultation papers and four reports containing (in the latter case) recommendations designed to modernise and clarify the law. We also gave advice to government departments on a number of law reform proposals made by others.

We are pleased that eight reports, mainly from prior years, were (in whole or part) implemented by Parliament. These relate to family law, criminal law, property law and other areas.

#### **IMPLEMENTATION**

It is a striking fact, worthy of repetition, that the public do not obtain the benefit of our work until it is implemented. There are nearly 20 Law Commission reports listed in this Report which the Government has either accepted but not implemented, or to which it has not yet given its response.

Last year we called for urgent implementation of six reports, one of which - our Conspiracy to Defraud report (December 1994) - was among the reports implemented in 1996.

However, delayed implementation of the recommendation for a very small, but critical, change in the law in that report meant that many mortgage frauds were not prosecuted - a result that could have been avoided if greater priority had been given to implementing our report.

Our widely-welcomed Report on Offences against the Person (November 1993) would modernise and rationalise an area of the criminal law in constant use. Yet this remains neither accepted, rejected nor implemented - a public asset from which the public is not getting any benefit.

We for our part are not complacent about this. We have directed efforts to increasing our contact with Government. Moreover we can say that the response from Government departments to that effort has been positive and increasingly supportive. We hope that this trend will be maintained in 1997 and that greater priority will be given by Government to implementing our law reform recommendations.

#### **APPRECIATION**

We thank you and your Department for your and their very real support. We believe, as you do, that the Law Commission is a valuable institution. The rapidly changing social environment in this country makes major overhaul of whole areas of law desirable or necessary. This is the sort of law reform that is best done by the Law Commission, as an independent agency.

The support for the Law Commission in 1996 has also been broadly-based in Parliament, and we thank all those in both Houses who have assisted in the implementation of the Law Commission's work.

CHAIRMAN

# HIGHLIGHTS OF THE ANNUAL REPORT FOR 1996

## **GENERAL** – *SEE PART I*

- ◆ Role of the Commission – working for better law
- ◆ Chronological Table of Local Legislation
- ◆ Theft (Amendment) Act 1996
- ◆ Relations with Government

## **COMMON LAW** – *FOR FULL REPORT SEE PART II*

- ◆ PUBLICATIONS ISSUED OR APPROVED
  - report on contracts for the benefit of third parties
  - consultation paper on damages for non-pecuniary loss
  - consultation paper on damages for medical, nursing and other expenses
- ◆ WORK IN PROGRESS
  - aggravated, exemplary and restitutionary damages
  - damages for personal injury and death
  - limitation periods

## **COMPANY AND COMMERCIAL LAW** – *FOR FULL REPORT SEE PART III*

- ◆ PUBLICATIONS
  - consultation paper on shareholder remedies
- ◆ ADVISORY WORK
  - Limited liability partnerships
- ◆ WORK IN PROGRESS
  - Third Parties (Rights Against Insurers) Act 1930

## **CRIMINAL LAW AND EVIDENCE** – *FOR FULL REPORT SEE PART IV*

- ◆ PUBLICATIONS
  - report on involuntary manslaughter
  - report on money transfers
  - consultation paper on previous misconduct of a defendant

- ◆ WORK IN PROGRESS
  - hearsay
  - corruption
  - dishonesty offences

## **PROPERTY AND TRUST LAW – FOR FULL REPORT SEE PART V**

- ◆ PUBLICATIONS
  - report on landlord and tenant: responsibility for state and condition of property
  - consultation paper on the execution of deeds and documents by or on behalf of bodies corporate
- ◆ ADVISORY WORK
  - Consultation Paper by H M Treasury on reforming the Trustee Investments Act 1961
- ◆ WORK IN PROGRESS
  - land registration
  - delegation by trustees
  - formalities for the creation of trusts
  - rules against perpetuities and excessive accumulations
  - property rights of homesharers

## **FAMILY LAW – FOR FULL REPORT SEE PART VI**

- ◆ Family Law Act 1996

## **STATUTE LAW – FOR FULL REPORT SEE PART VII**

- ◆ PUBLICATION
  - Chronological Table of Local Legislation
- ◆ WORK COMPLETED
  - 5 consolidation Bills
- ◆ WORK IN PROGRESS
  - Statute Law (Repeals) Bill
  - consolidation of armed forces legislation
  - consolidation of financial services legislation
  - sentencing consolidation

# **PART I**

## **OVERVIEW OF THE YEAR**

### **Introduction**

- 1.1 The Law Commission is an independent, publicly funded body. We set out in Appendix A a summary of our role and methods. In essence, the role of the Law Commission is to work for better law. As the Foreword states, 1996 has been a year of steady progress in this direction. The Highlights show the principal work which we have in hand or have completed during the year, and the subsequent Parts relating to each of the areas of the Commission's work give further details. In particular we completed two very different projects in 1996: first, after 20 years, the Chronological Table of Local Legislation, the first comprehensive listing of local legislation enacted in the last 200 years, and the second, completed within four months, the report on Offences of Dishonesty: Money Transfers, which led to the enactment of the Theft (Amendment) Act 1996 in December. These two very different projects demonstrate the versatility and flexibility of the Commission's approach.

### ***Chronological Table of Local Legislation***

- 1.2 The Table of Local Legislation occupies four large volumes and covers some 26,500 statutes. With the Scottish Law Commission, we have been working on the Table since 1974. It is effectively the only publication which states what local legislation is now in force and if and in what manner it has been amended since it was enacted. It will be an important tool for those concerned with local legislation. The launch of the Table was marked by a reception in the House of Lords. The Lord Chancellor gave a speech in which he said that:

“[The Chronological Table of Local Legislation] is a magnificent achievement on the part of the two Law Commissions and all those who have worked on it there. It will be immensely useful, indeed indispensable, not just to lawyers, but to all who have occasion to consult or advise on local Acts.”

More details of the Table are given in Part VII and it was a major achievement of our Statute Law Revision Team. It is however only one aspect of their work, which is directed to identifying legislation which has become redundant and can safely be removed from the statute book. As this work is little known, Part VII gives an account not only of the work done by this Team in 1996 but also a more general explanation of statute law revision.

### ***Money transfers***

- 1.3 In 1996 we demonstrated how speedily this Commission can respond in cases of genuine urgency. On 10 July 1996, the House of Lords exposed important lacunae in the law of dishonesty.<sup>1</sup> That month we decided to look at these problems as a matter of

<sup>1</sup> Further details are set out in paras 4.1-4.2 below.

great urgency and issued an informal consultation document on 2 August. In the light of the very helpful responses, we were able to publish our report in October.<sup>2</sup>

### **Other major work completed during the year**

- 1.4 In 1996 we completed our projects on involuntary manslaughter,<sup>3</sup> responsibility for repairs to leasehold property<sup>4</sup> and the right of third parties to enforce contracts made for their benefit.<sup>5</sup> In our report on involuntary manslaughter we advocated a new offence of corporate killing as well as the replacement of the present offence of involuntary manslaughter by offences of reckless killing and killing by gross carelessness.<sup>6</sup> We explained our principal recommendations regarding responsibility for repairs to leasehold property in our annual report for 1995.<sup>7</sup> Our report received a generally favourable response. We are holding discussions with the Department of the Environment about it, and we hope that the Government may be able to give us their response to it in whole or part in the near future. Our report on contracts for the benefit of third parties recommends reform to the legal rule known as “privity of contract”. The proposed reform, which is summarised elsewhere in this report,<sup>8</sup> would enable contracting parties to confer a right to enforce a contract on third parties, where that is their intention.

### **New projects**

- 1.5 We hope to be invited by the Department of Trade and Industry to carry out a review of the law on partnerships. Our 1994 Feasibility Study on the Law Applicable to Private Companies<sup>9</sup> noted the importance of partnerships to the small business community and highlighted a number of perceived deficiencies in partnership law.
- 1.6 In May 1996, we decided to look at the law of corruption which had been the subject of cogent and repeated criticism.<sup>10</sup> We received encouragement from others to carry out this review. A consultation paper will be published in March 1997.

<sup>2</sup> Offences of Dishonesty: Money Transfers (Law Com No 243) described in greater detail in paras 4.2-4.4 below.

<sup>3</sup> Legislating the Criminal Code: Involuntary Manslaughter (Law Com No 237) published on 5 March 1996.

<sup>4</sup> Landlord and Tenant: Responsibility for State and Condition of Property (Law Com No 238), published on 20 March 1996

<sup>5</sup> Privity of Contract: Contracts for the benefit of Third Parties (Law Com No 242) published on 31 July 1996.

<sup>6</sup> Further details are set out in the Law Commission’s Thirtieth Annual Report 1995 (1996) Law Com. No 239, paras 4.1-4.4.

<sup>7</sup> Law Commission’s Thirtieth Annual Report 1995 (1996) Law Com. No 239, para 5.10.

<sup>8</sup> See paras 2.1-2.4 below.

<sup>9</sup> Produced for the DTI in response to a request made by the Parliamentary Under-Secretary for Corporate Affairs. See Twenty-Ninth Annual Report 1994 (1995) Law Com No 232, paras 2.20-2.24.

<sup>10</sup> For example, the *Royal Commission on Standards of Conduct in Public Life* (1974-1976) - Chairman: Lord Salmon, Cmnd 6524, para 18.7, recommended the rationalisation of the statute law on bribery while the *First Report of the Committee on Standards in Public Life* (1995) - Chairman: Lord Nolan, Cm 2850, para 2.104, pointed out that, as the

## **Sixth Programme of Law Reform**

- 1.7 Many of the projects on which we are engaged are in the Sixth Programme of Law Reform which was approved by the Lord Chancellor in June 1995. This covers the work of the Commission down to the end of 1998. By then, most of the projects will have been commenced and completed, or be in progress. We will be considering in the course of 1997 our future programme of work.

## **Relations with Government**

- 1.8 The Commission attaches considerable importance to its relationship with Government departments. We have therefore, as indicated in the Foreword, made efforts to increase the level of contact that we have with Government departments, particularly those who are most closely involved with our current or unimplemented work. The departments involved are the Home Office, the Department of the Environment and the Department of Trade and Industry. We are pleased at the positive and practical approach adopted by these departments. We would stress that these steps have not been at the expense of the Commission's independence. The Commission exercises its independent judgment in deciding what projects it should seek to pursue and in determining its provisional views and the form of its final recommendations. We are mindful that in these matters the real value of the Law Commission lies in its ability to be independent and to stand apart from Government departments.
- 1.9 Some of our efforts are directed to giving information about our work to those outside the Commission, including Government departments. As part of that work, we are planning a conference in March 1997 for the Permanent Secretaries of the Government departments which have most to do with the areas of law in which we most frequently work. We hope to convey an up-to-date insight into the role of the Law Commission in government. We believe that we shall ourselves also benefit greatly from hearing their views about our work and methods. The conference, which we are limiting to some two hours, has the full support of the Lord Chancellor and his Department.

## **Implementation of Law Commission recommendations in 1996**

### *Family Law*

- 1.10 A series of Law Commission reports on family law has passed into statute law over the years. The Family Law Act 1996 is one of the most important statutes to result. It substantially enacted two of our reports.<sup>11</sup> When the Act is in full operation, the law and practice of divorce in this country will be transformed, and the civil law of domestic violence will be greatly modernised and rationalised. The Act and its history are summarised later in this report.<sup>12</sup>

Government had accepted those proposals and as this work had still not been done, it might be a task which this Commission could take forward.

<sup>11</sup> Family Law: The Ground for Divorce (1990) Law Com No 192; Family Law: Domestic Violence and Occupation of the Family Home (1992) Law Com No 207.

<sup>12</sup> Paras 6.1-6.10.

### *Damages*

- 1.11 The Damages Act 1996 completes the implementation of nearly all the outstanding recommendations in our report on structured settlements and interim and provisional damages. The provisions implementing recommendations in that report are shown in the following table:

<b>Subject</b>	<b>Law Com No 224 paragraph numbers</b>	<b>Implementing provisions</b>
Tax treatment of structured settlements	Paras 3.54-3.58	Finance Act 1995, s.142; Income and Corporation Taxes Act 1988, ss.329A and 329B (new)*
Admissibility, as evidence, of the actuarial tables issued by the Government Actuary's Department (the Ogden Tables)	Paras 2.9-2.23	Civil Evidence Act 1995, s.10 (Awaiting being brought into force).
Other recommendations		Damages Act 1996

\* now replaced by the Finance Act 1996, s 50 and the Income and Corporation Taxes Act 1988, ss 329AA and 329AB.

### *Trusts of Land*

- 1.12 The Trusts of Land and Appointment of Trustees Act 1996 implemented (with some modifications) our 1989 report on trusts of land<sup>13</sup> and also part of our report of the same year on overreaching.<sup>14</sup> By replacing the somewhat artificial trust for sale and the cumbersome strict settlement with the new "trust of land", the Act modernises and simplifies some of the most fundamental rules of English land law. It also enables the beneficiaries under a trust to appoint new trustees where, collectively, they are absolutely entitled to the trust property.<sup>15</sup> The amendments that were made to the Bill in its passage through Parliament demonstrate the value of expert scrutiny. The contributions from The Law Society in particular added considerably to the quality of the legislation that finally emerged.

### *Theft (Amendment) Act 1996*

- 1.13 This Act which was introduced into the House of Lords by Lord Goff of Chieveley implemented the recommendations in our reports on money transfers<sup>16</sup> and conspiracy to defraud,<sup>17</sup> and we are grateful to him.

<sup>13</sup> Transfer of Land - Trusts of Land (1989) Law Com No 181.

<sup>14</sup> Transfer of Land - Overreaching: Beneficiaries in Occupation (1989) Law Com No 188.

<sup>15</sup> Thereby reversing the decision in *Re Brockbank* [1948] Ch 206.

<sup>16</sup> Offences of Dishonesty: Money Transfers (Law Com No 243), which is described in greater detail in paras 4.1-4.4 below.

<sup>17</sup> Offences of Dishonesty: Conspiracy to Defraud (1994) Law Com No 228.



*Law Reform (Year and a Day Rule) Act 1996*

- 1.14 This Act implemented with slight amendments our proposals on the year and a day rule in homicide<sup>18</sup>. It was introduced by Mr Doug Hoyle MP, who had been successful in the Private Member's Ballot and we are grateful to him.

*Homelessness appeals*

- 1.15 The Housing Act 1996 contained a provision<sup>19</sup> implementing the recommendation in our report *Administrative Law: Judicial Review and Statutory Appeals*<sup>20</sup> that there should be a right of appeal to a court or tribunal in homelessness cases.<sup>21</sup>

*Consolidation*

- 1.16 We are pleased to report that in 1996 five consolidation bills were presented to Parliament and passed. Further details appear in Part VII.

**Law Commission recommendations in course of implementation**

- 1.17 The Land Registration Bill will, if enacted, implement the recommendations in the First Report of the Joint Working Group on Land Registration.<sup>22</sup> It will extend the triggers for the compulsory registration of unregistered land, enable H M Land Registry to charge lower fees to encourage voluntary registration and make fairer provision for the payment of indemnity to cover cases where it has not hitherto been available.<sup>23</sup> The Law Commission has on many occasions been grateful for the practical support that it has received from a number of Lords of Appeal in Ordinary who, in spite of the pressures on their time, have introduced our Bills into Parliament. On this occasion we are indebted to Lord Browne-Wilkinson who kindly agreed to take the Land Registration Bill through the House of Lords where it was supported on all sides. We are also very grateful to Mr Michael Stephen MP who is steering the Bill through the House of Commons.

**Current position of some of the outstanding Law Commission reports<sup>24</sup>**

*Criminal Law*

- 1.18 There are four reports dealing with criminal law and procedure which are awaiting implementation. Our widely acclaimed report on offences against the person and

<sup>18</sup> Legislating the Criminal Code: the Year and a Day Rule in Homicide (1995) Law Com No 230.

<sup>19</sup> Section 204, which came into force on 20 January 1997.

<sup>20</sup> Law Com No 226, paras 2.24-2.27.

<sup>21</sup> The right of appeal created by the section is to the County Court.

<sup>22</sup> Transfer of Land: Land Registration: First Report of a Joint Working Group on the Implementation of the Law Commission's Third and Fourth Reports on Land Registration (1995) Law Com No 235. The Joint Working Group has representatives from the Law Commission, H M Land Registry and the Lord Chancellor's Department. For its establishment, see Twenty-Ninth Annual Report 1994 (1995) Law Com No 232, paras 2.67-2.70.

<sup>23</sup> See paras 5.1-5.4 below, where the provisions of the Bill are more fully explained.

<sup>24</sup> A full list of outstanding reports appears in Appendix C.

general principles<sup>25</sup> contains proposals which would simplify and rationalise a very important area of criminal law in constant use. In 1994, we recommended the abolition of binding over.<sup>26</sup> In our report on intoxication and criminal liability<sup>27</sup> we made proposals for the codification and clarification of the present law subject to certain modifications.<sup>28</sup> The Government has yet to state whether it accepts or rejects the recommendations in any of these reports, or our report on involuntary manslaughter.<sup>29</sup> We have been pressing particularly for a response on the first of these reports and on Involuntary Manslaughter.

#### *Landlord and Tenant Law*

- 1.19 In conjunction with both the Department of the Environment and the Lord Chancellor's Department, the Property and Trust Law Team is reviewing the Commission's recommendations on distress for rent and the termination of tenancies.<sup>30</sup> Concerns have been raised as regards certain aspects of the Commission's recommendations, and we are exploring ways in which these may be met. In relation to termination of tenancies, we have undertaken further fact-finding to ascertain the impact of the present law on interested parties.<sup>31</sup>

#### *Family Law*

- 1.20 The Commission no longer has a Commissioner or full team specialising in family law or undertaking projects of a purely family law nature.<sup>32</sup> Even so, we continue to take a considerable interest in the progress of the reports and other work which the Commission has produced in this area in the past, assisting where we can. In January 1996 the Government announced that it had decided to undertake a further consultation on issues raised by our report on mental incapacity. Given the importance of this report in the light of current medical advances, we hope that the proposed consultation paper will be published as soon as possible. We report in Part VI on the Family Law Act 1996, mental incapacity and adoption.

<sup>25</sup> Legislating the Criminal Code: Offences against the Person and General Principles (1993) Law Com No 218, described in greater detail in our Twenty-Eighth Annual Report 1993(1994) Law Com No 223, paras 2.26-2.31.

<sup>26</sup> *Binding Over* (1994) Law Com No 222, described in greater detail in our Twenty-Eighth Annual Report 1993 (1994) Law Com No 223, paras 2.42-2.44.

<sup>27</sup> Legislating the Criminal Code: Intoxication and Criminal Liability (1995) Law Com No 229.

<sup>28</sup> Full details are set out in our Twenty-Ninth Annual Report 1994 (1995) Law Com No 232, paras 2.46-2.49.

<sup>29</sup> Legislating the Criminal Code: Involuntary Manslaughter (1996) Law Com No 237.

<sup>30</sup> See respectively Landlord and Tenant: Distress for Rent (1991) Law Com No 194, and Landlord and Tenant: Termination of Tenancies Bill (1994) Law Com No 221.

<sup>31</sup> We are particularly grateful to the Council of Mortgage Lenders and the Financial Law Panel for the considerable assistance that each has given us, especially by the enquiries that they have kindly made on our behalf.

<sup>32</sup> Law Commission's Twenty-Eighth Annual Report 1993 (1994) Law Com No 223, para 2.52.

### *Judicial Review*

- 1.21 A response from the Government is still awaited in relation to the bulk of the recommendations contained in our report *Administrative Law: Judicial Review and Statutory Appeals*, which we published in 1994.<sup>33</sup> We were pleased that in his final report on “Access to Justice”<sup>34</sup> Lord Woolf for the most part warmly endorsed our recommendations for procedural reform and went on to specify several recommendations which he particularly supported.<sup>35</sup>

### **Law Commission Bills and Parliament**

#### *Time taken by Law Commission Bills on the floor of the House*

- 1.22 We have noted in the past how little time most of our Bills take for their passage through Parliament: the 15 smaller Bills in the 10 years from 1984/85 onwards took an average of three hours on the floor of the two Houses of Parliament together.<sup>36</sup> Of our Bills in Parliament this year, two took only 80 minutes altogether in Parliament: the Law Reform (Year and A Day Rule) Act 1996 took 13 minutes in the House of Lords; the Theft (Amendment) Act 1996 took 65 minutes in the House of Lords; and each took one minute in the House of Commons.

#### *The Queen’s Speech*

- 1.23 For the third successive year, the Queen’s Speech at the beginning of the Parliamentary Session in October 1996 stated that the Government would promote “measures of law reform”, which we regard as an excellent commitment. We are grateful to the Lord Chancellor for saying during the debate on the Queen’s Speech that the Government would “continue to implement the valuable work of the Law Commission by introducing measures of law reform as time allows”.<sup>37</sup>

#### *Special Public Bill Procedure (the Jellicoe Procedure)*

- 1.24 In our annual report for 1995 we referred to the new Special Public Bill procedure in the House of Lords, and to the fact that it had been used for two Law Commission Bills in 1995. The procedure was not used for Law Commission Bills in 1996 but we note that the House of Lords decided to consider whether to make procedural improvements in it. We adhere to the view which we expressed in 1995 that the Special Public Bill procedure is an invaluable addition to the machinery of Parliament because it enables technical Bills to receive appropriate expert scrutiny without delaying business on the floor of either House.

### **Advisory work**

- 1.25 In the course of 1996 each of the law reform Teams was asked to give advice to Government departments. For example, the Company and Commercial Law Team gave advice to the Department of Trade and Industry on their proposals for limited

<sup>33</sup> Law Com No 226.

<sup>34</sup> Chapter 18, paras 12, 14, 20, 22 and 28.

<sup>35</sup> Chapter 18, para 3.

<sup>36</sup> Thirtieth Annual Report 1995 (1996) Law Com No 239, para 5.17.

<sup>37</sup> *Hansard* (HL), 24 October 1996, vol 575, col 28.

liability partnerships. In June 1996 the Common Law Team were consulted by the Lord Chancellor's Department in relation to civil remedies for stalking. The team subsequently responded to a consultation paper<sup>38</sup> on the possible reform of the civil and criminal law on stalking, which was issued jointly by the Home Office and the Lord Chancellor's Department on 5 December 1996. Following this consultation exercise, the Government introduced the Protection from Harassment Bill.<sup>39</sup> In addition the Property and Trust Law Team responded to the Lord Chancellor's Department's consultation paper on the Commonhold Bill.

- 1.26 We have commenced work on a consolidation of the sentencing powers of the criminal courts, which we regard as an important project.<sup>40</sup>

### **Other work**

#### *Relationship between the work of the Commission and "Access to Justice"*

- 1.27 In his final report on Access to Justice,<sup>41</sup> published in July 1996, Lord Woolf recommended that the Law Commission "should be invited to carry out a review of housing law with a view to consolidating the various statutory and other provisions in a clear and straightforward form".<sup>42</sup> We are exploring with the Department of the Environment and the Lord Chancellor's Department whether there are any ways in which this might be done. We note that, if our report on repairing liabilities in leasehold property<sup>43</sup> were to be implemented, the law governing leasehold repair would become much more coherent and rational.
- 1.28 Lord Woolf's final report on Access to Justice called for major procedural reforms designed to make the civil justice system cheaper simpler and quicker. In October 1996, the Lord Chancellor accepted the principal recommendations in this report on behalf of the Government. The work being done to improve the administration of justice in civil cases, and the improvements in substantive civil law recommended by the Commission, are both necessary to produce justice. As the Lord Chancellor said in a speech in June 1996:

"[A] party should have as clear a view as possible of the likely outcome of the case. And there are some obvious ways in which legislators and the government can help in that regard. Clearer law, in addition to reducing the need to litigate, may also help a party to gain a clearer picture of the chances of success and the likely benefits that would flow. That is why I have been and remain committed to encouraging and implementing the Law Commission's work in clarifying the law."

<sup>38</sup> *Stalking - The Solutions* (June 1996).

<sup>39</sup> At the time when this Report was finalised the Bill had completed its passage through the House of Commons and was awaiting introduction into the House of Lords.

<sup>40</sup> See para 4.22 below.

<sup>41</sup> Chapter 16, paras 7-9.

<sup>42</sup> *Ibid*, para 1.8.

<sup>43</sup> Landlord and Tenant: Responsibility for State and Condition of Property (1996) Law Com No 238, para 1.4 above.

Both the reform of the system of civil justice and the law reform work of the Commission in civil law have the same objective, namely that of facilitating justice in individual cases. There is a need for both types of reform. However, occasionally a law reform project done by the Commission raises problems which the Commission considers need to be addressed by means of procedural reform, as in the consultation paper issued in 1996 on shareholder remedies.

#### *Meeting of Commonwealth Law Reform Agencies*

- 1.29 A number of law reform agencies have been established throughout the Commonwealth.<sup>44</sup> In August 1996, representatives of some of these agencies met in Vancouver immediately before the start of the Eleventh Commonwealth Law Conference and spent a day discussing issues of common concern. Those present included representatives from Australia, Canada, New Zealand, Sri Lanka, Hong Kong, Fiji and Namibia and on page 54 is a photograph taken during the meeting. The Chairman gave an address on the implementation of Law reform recommendations. There was lively discussion on many issues, which confirmed the usefulness of independent law reform agencies in a modern state, though to some extent their functions differ according to the needs of the society they serve. The triennial meeting is only one of the ways in which contact takes place between Commonwealth law reform agencies. The Commission welcomes a number of visitors from such agencies each year, and in its own work it has regard to their work. In addition, the British Columbia Law Reform Commission has compiled a database of much of their and other law reform agencies' published material which facilitates searching. The Victoria Law Reform Committee offers a link on the World Wide Web to facilitate enquiries between law reform agencies across the Commonwealth.

#### **Wider issues**

- 1.30 The priorities in law reform do not remain static. So far as possible we keep our approach under review. Among other issues, we are considering how we can contribute to the general discussion concerning legislative drafting and its techniques. We are planning to hold a seminar on legislation jointly with the Judicial Studies Board at which we hope that some of the issues of legislative drafting can be debated.

#### **Tributes**

- 1.31 We are very grateful to all our staff, to whom we express our appreciation. We give further details of our staff in the subsequent Parts and Appendix E.

<sup>44</sup> For a recent account of the creation of this Commission, and some of the issues raised, see S M Cretney, *The Law Commission: True Dawns and False Dawns* (1996) 59 MLR 631.

#### COMMISSIONERS AND STAFF (SUMMER 1996)

- 1.32 In September 1996 Lord Davidson, Chairman of the Scottish Law Commission, retired. We are indebted to him for many useful contributions to our work and for the major part he played in the beneficial relationship we have with the Scottish Law Commission. We look forward to continuing that relationship with his successor, Lord Gill.
- 1.33 In January 1997 Lord Justice Carswell, Chairman of the Law Reform Advisory Committee for Northern Ireland, became Lord Chief Justice of Northern Ireland. Lord Justice Carswell gave us much help and support, and we look forward to maintaining a strong link with the Law Reform Advisory Committee through his successor, when appointed.
- 1.34 In October 1996 Professor Edward Griew, Professor Emeritus of Common Law at the University of Nottingham died. For more than 20 years, he had acted as a consultant to the Commission on several projects and we are indebted to him for his assistance and guidance.
- 1.35 Michael Saunders CB, Treasury Solicitor, died suddenly on 17 December 1996. He had given us valuable help and advice, and we will miss him and his support.
- 1.36 In May 1996 Alan Cope retired after more than 23 years' service as a lawyer at the Commission. He made an invaluable contribution to a wide variety of projects and will be remembered for his great learning as well as his admirable writing style.

#### **Resources**

- 1.37 As we said in our annual report for 1995, the Commission has always had to schedule its work taking into account the limits on its resources. Information on

the cost of the Commission is given in paragraph 9.8 and in Appendix F. The reduction in our resources in 1996, which was in line with other reductions in public expenditure, was significant but was managed without the severe impact on our programme of work which is liable to result from the further reduction proposed for 1997/98.

**Survey of readership of the Law Commission's Annual Report**

- 1.38 This year we are inviting readers of this report to complete a short questionnaire, to help us ensure that our annual reports meet the needs of our readers.

## PART II

# COMMON LAW

### TEAM MEMBERS °

#### Government Legal Service

Mr D R Symes (*Team Manager*)  
Ms E M Barmes, Ms N S Pittam

#### Research Assistants

Mr J Horne, Mr T J Polli, Mr G J Tolhurst  
Mr S W Watterson

° as at the end of 1996

Professor Andrew Burrows  
(**Commissioner**)

#### Contracts for the benefit of third parties

- 2.1 In our last annual report we said that we expected to publish our report in 1996,<sup>1</sup> and this was achieved in July.<sup>2</sup> The report recommends reforms of the privity of contract rule, which prevents a person who is not a party to a contract from enforcing that contract,<sup>3</sup> and which has long been the subject of criticism by judges, practitioners and academics alike. For example, in 1995, Steyn LJ<sup>4</sup> described the case for recognising a contract for the benefit of a third party as “simple and straightforward”, and said that “there is no doctrinal, logical or policy reason why the law should deny effectiveness to a contract for the benefit of a third party where that is the expressed intention of the parties.”<sup>5</sup>
- 2.2 In our report and draft Bill we recommended that new rules be embodied in a detailed legislative scheme, with four main elements, namely:
- (1) A third party will have a right to enforce a contract where:
    - (a) the contract expressly states that the third party is to be able to do so; or
    - (b) the contract purports to confer a benefit on a third party who is expressly identified in the contract unless, on a true construction of

<sup>1</sup> Thirtieth Annual Report 1995 (1996) Law Com No 239, para 2.2.

<sup>2</sup> Law Com No 242. See also (1991) Consultation Paper No 121.

<sup>3</sup> Note that the report does not deal with the imposition of any *burdens* on third parties.

<sup>4</sup> Now Lord Steyn.

<sup>5</sup> *Darlington BC v Wiltshier Northern Ltd* [1995] 1 WLR 68, 76.



the contract, the contracting parties did not intend the third party to be able to enforce the contract.<sup>6</sup>

- (2) The third party's right will in general not be open to variation or cancellation by the contracting parties without the consent of the third party once:
  - (a) the third party has informed the contracting parties that he accepts the contract, or
  - (b) the third party has acted in reliance on the contract.<sup>7</sup>
- (3) The third party's right will in general be subject to the defences that the contracting parties would have had against each other.<sup>8</sup>
- (4) The new third party right created will in no way diminish any pre-existing rights that a third party may have to enforce a contract.<sup>9</sup>

2.3 The reforms which we recommend would make the law simpler and fairer in many situations commonly encountered by both businesses and consumers. These include:

- ◆ *New buildings.* Subsequent purchasers of property could be given the right to enforce the architect's or building contractor's contractual obligation without having to arrange separate contracts first with the architect or contractor;
- ◆ *Group health insurance.* Employers could take out medical expenses insurance for their employees and ensure that the employees would be able to enforce it against the insurer;
- ◆ *Life insurance.* A life insurance policy could be taken out for the benefit of a stepchild that could be enforced by the child;
- ◆ *Protection against liability.* If a company agreed with its customers that its employees or sub-contractors were to be protected from a particular legal liability, the employees or sub-contractors could avail themselves of that exclusion clause.

2.4 Professor Burrows gave a paper on our report at the Society of Public Teachers of Law Conference in Cambridge in September, which has subsequently been published in the November edition of Lloyd's Maritime and Commercial Law Quarterly.<sup>10</sup> We await the response of the Government to our recommendations.

<sup>6</sup> Law Com No 242, para 7.6.

<sup>7</sup> *Ibid*, para 9.26.

<sup>8</sup> *Ibid*, para 10.12.

<sup>9</sup> *Ibid*, para 12.2.

<sup>10</sup> [1996] LMCLQ 467.

## Damages

- 2.5 The review of the principles governing the remedy of damages for monetary and non-monetary loss, with particular regard to personal injury litigation,<sup>11</sup> moved further forward in 1996. We expect to complete the series of consultation papers on damages for personal injury and death in the first half of 1997. We are heartened that the work which we completed at the earlier stages of the project has already borne legislative fruit.<sup>12</sup>

### *(a) Structured settlements and interim and provisional damages*

- 2.6 In 1994 we published our report on Structured Settlements and Interim and Provisional Damages.<sup>13</sup> This covered not only structured settlements, interim damages and provisional damages, but also aspects of lump sum damages, including methods of calculation of future pecuniary loss. Implementation of our recommendations, a process which had begun in the previous year,<sup>14</sup> was substantially completed by the passing of the Damages Act 1996.<sup>15</sup>

### *(b) Damages for personal injury: non-pecuniary loss*

- 2.7 We published our consultation paper on non-pecuniary loss in January 1996.<sup>16</sup> The consultation period ended on 1 May 1996, and we are analysing the responses, which number more than 160.<sup>17</sup>

### *(c) Damages for personal injury: medical, nursing and other expenses*

- 2.8 We published our consultation paper on medical, nursing and other expenses on 12 December<sup>18</sup> and the consultation period runs until 1 April 1997. The paper has attracted considerable attention, in the media and elsewhere.

<sup>11</sup> See Sixth Programme of Law Reform (1995) Law Com No 234, item 2.

<sup>12</sup> See para 2.6 below.

<sup>13</sup> Law Com No 224.

<sup>14</sup> See Thirtieth Annual Report 1995 (1996) Law Com No 239, para 2.4.

<sup>15</sup> See para 1.11 above. Section 1 of the Damages Act 1996 differs from the corresponding recommendation in Law Com No 224, in providing that the court, in determining the discount rate to be applied in the calculation of damages for future pecuniary loss, is to take into account a rate which may be prescribed by the Lord Chancellor, rather than providing that the rate used should be the rate of return on index-linked government securities (ILGS). During the passage of the Damages Bill the Lord Chancellor had indicated that in exercising his power to set the rate he would be guided by the decisions of the courts in litigation which was then under appeal (see *Hansard* (HL) 4 June 1996, vol 572, col 1233). The Court of Appeal in those cases subsequently rejected the use of ILGS and reaffirmed the traditional rate of 4.5%: *Wells v Wells*, *Thomas v Brighton HA* and *Page v Sheerness Steel plc*, *The Times* 24 October 1996. However, we understand that the plaintiff in at least one of those cases may be petitioning the House of Lords for leave to appeal from that decision.

<sup>16</sup> Damages for Personal Injury: Non-Pecuniary Loss (1996) Consultation Paper No 140. See Thirtieth Annual Report 1995 (1996) Law Com No 239, paras 2.11-2.12. The principal questions which it examined were the linked ones of whether the levels of damages for pain and suffering and loss of amenity are satisfactory, and whether better ways could be devised for fixing levels of damages for non-pecuniary loss.

<sup>17</sup> We are grateful to our consultant, Mrs Ann Smart, for her assistance with the analysis of the responses to this consultation paper, and likewise in respect of our consultation paper on Liability for Psychiatric Illness (1995) Consultation Paper No 137.

- 2.9 The consultation paper asked whether there ought to be a right for the National Health Service (“the NHS”) to recover from defendants the cost of providing treatment which is needed as a result of a tort such as negligence, or another legal wrong.<sup>19</sup> We examined a number of arguments for and against such a right and we looked in outline at the sorts of recoupment scheme which might be adopted. In advance of hearing the views of consultees, particularly opinions on the policy or practical objections to recoupment (including its costs implications), we made no provisional proposal as to whether a recoupment scheme should be introduced. However, if such a scheme were to be introduced, our provisional view was that it should take the form of the NHS having a direct claim against the defendant which is dependent on the victim having recovered damages.<sup>20</sup>
- 2.10 The consultation paper also examines the question of care provided free of charge to an injured plaintiff by relations or other private individuals.<sup>21</sup> Our empirical research showed a high degree of dependence on this type of care.<sup>22</sup> Following the landmark decision of the House of Lords in *Hunt v Severs*,<sup>23</sup> a plaintiff must hold damages recovered in respect of gratuitous care on trust for the carer. In the consultation paper we agreed provisionally with their Lordships’ reasoning that damages awarded under this head are intended to compensate a loss on the part of the carer.<sup>24</sup> However, we agreed with many of the criticisms that have been levelled at their Lordships’ conclusion that no damages should be awarded under this head where the defendant is the carer,<sup>25</sup> and so we provisionally recommended that *Hunt v Severs* should be legislatively reversed to enable a plaintiff to recover damages for care gratuitously provided by the defendant.

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<sup>18</sup> Damages for Personal Injury: Medical, Nursing and Other Expenses (1996) Consultation Paper No 144.

<sup>19</sup> *Ibid*, paras 3.19-3.42.

<sup>20</sup> *Ibid*, paras 3.36-3.42.

<sup>21</sup> *Ibid*, paras 2.16-2.36 and 3.43-3.72.

<sup>22</sup> See Personal Injury Compensation: How Much is Enough? (1994) Law Com No 225, paras 3.8 and 8.3. See also Consultation Paper No 144, para 2.16.

<sup>23</sup> [1994] 2 AC 350.

<sup>24</sup> See Consultation Paper No 144, paras 3.43-3.56. The main alternative view, which represented the law in England before *Hunt v Severs*, was that the need for the care represented a loss on the part of the injured victim: see *Donnelly v Joyce* [1974] QB 454 (CA).

<sup>25</sup> See Consultation Paper No 144, paras 3.60-3.68.

- 2.11 The consultation paper covers a number of other issues, including:
- ◆ Section 2(4) of the Law Reform (Personal Injuries) Act 1948;<sup>26</sup>
  - ◆ Damages in respect of a plaintiff's additional accommodation costs;<sup>27</sup>
  - ◆ Damages for losses arising out of financial arrangements made on a divorce foreseeably caused by an actionable personal injury.<sup>28</sup>

*(d) Liability for psychiatric illness*

- 2.12 In 1995 we published our consultation paper on liability for psychiatric illness.<sup>29</sup> Since then the common law has continued to be developed by the courts.<sup>30</sup> We completed the analysis of responses to our consultation paper earlier in 1996. We hope to publish a report in late 1997 or early 1998.

*(e) Damages for personal injury: collateral benefits*

- 2.13 We hope to publish a consultation paper on collateral benefits in the first half of 1997. The paper will ask whether sums received as a result of an actionable injury, in respect of which damages are obtained, should be deducted from the damages, whether they should be ignored, and whether the provider of the benefit should be able to recover them.

*(f) Fatal accidents*

- 2.14 We hope to publish this consultation paper in the first half of 1997. The paper will contain a comprehensive review of the Fatal Accidents Act 1976 and will examine in particular:
- ◆ The nature of a dependant's claim for damages under the 1976 Act;
  - ◆ The class of persons who should be entitled to make a dependency claim; and
  - ◆ Bereavement damages under section 1A of the 1976 Act.

*(g) Aggravated, exemplary and restitutionary damages*

- 2.15 We issued a supplementary consultation paper in September 1995 in order to assist us to formulate our policy on exemplary damages.<sup>31</sup> We now hope to publish a report in the first half of 1997.

<sup>26</sup> This subsection provides that the possibility of avoiding expense by using the NHS must be disregarded by the court in awarding a plaintiff damages for the expenses of private medical and nursing care. See Consultation Paper No 144, paras 2.5-2.15 and 3.2-3.18.

<sup>27</sup> *Ibid*, paras 2.39-2.47 and 3.81-3.97.

<sup>28</sup> *Ibid*, paras 2.59-2.63 and 3.104-3.111. Such damages are not recoverable at present.

<sup>29</sup> Consultation Paper No 137. See Thirtieth Annual Report 1995 (1996) Law Com No 239, paras 2.5-2.10.

<sup>30</sup> See, eg, *Page v Smith* [1996] 1 AC 155 (HL); *Frost v Chief Constable of South Yorkshire Police*, *The Times* 6 November 1996 (CA).

<sup>31</sup> See Thirtieth Annual Report 1995 (1996) Law Com No 239, para 2.13.

### **Limitation periods**

- 2.16 We are currently conducting “a comprehensive review of the law on limitation periods with a view to its simplification and ratification.”<sup>32</sup> We commenced work on a consultation paper in 1995,<sup>33</sup> with the assistance of our consultant, Professor Andrew McGee.<sup>34</sup> Work is well advanced and we expect to publish the consultation paper in 1997.

### **Illegal transactions**

- 2.17 Work is still proceeding on our review of the law on illegal transactions, including contract and trusts,<sup>35</sup> which began in 1995.<sup>36</sup> We are being assisted by our consultant, Professor Richard Buckley,<sup>37</sup> and we hope to publish a consultation paper in late 1997 or the first half of 1998.

### **Joint and several liability: feasibility investigation**

- 2.18 In last year’s annual report we reported that the Common Law Team had completed a feasibility investigation into possible reform of joint and several liability, and that the investigation had been published as part of a consultation exercise by the Department of Trade and Industry.<sup>38</sup> The consultation paper has been in the forefront of the wide-ranging debate on this issue. Professor Burrows has spoken on the subject on several occasions, notably at a seminar organised by Deloitte and Touche in March, a Euro Forum conference on “Accountants’ Liability” in June, and the Financial Times conference on “Limiting Professional Liability” in November.<sup>39</sup>

<sup>32</sup> Sixth Programme of Law Reform (1995) Law Com No 234, item 3.

<sup>33</sup> See Thirtieth Annual Report 1995 (1996) Law Com No 239, paras 2.15-2.17.

<sup>34</sup> Professor of Business Law at the University of Leeds.

<sup>35</sup> Sixth Programme of Law Reform (1995) Law Com No 234, item 4.

<sup>36</sup> See Thirtieth Annual Report 1995 (1996) Law Com No 239, paras 2.18-2.20.

<sup>37</sup> Professor of Law at the University of Reading.

<sup>38</sup> Department of Trade and Industry Consultation Document, *Feasibility Investigation of Joint and Several Liability*, by the Common Law Team of the Law Commission, HMSO 1996. See Thirtieth Annual Report 1995 (1996) Law Com No 239, para 2.21.

<sup>39</sup> See “Burden of liability”, *Financial Times* 7 November 1996.

# PART III

## COMPANY AND COMMERCIAL LAW

### TEAM MEMBERS °

#### Government Legal Service

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Ms F R Lloyd, Mr A C Scott

#### Research Assistants

Ms C Jackson, Mr S E Jelf,

Ms C J McCafferty, Mr A-T Shohid

° as at the end of 1996

Miss Diana Faber

**(Commissioner)**

#### Shareholder remedies

- 3.1 Our consultation paper on this topic was published in October.<sup>1</sup> In it we made provisional recommendations for changes affecting legal proceedings brought by shareholders to enforce their and their company's rights.
- 3.2 The paper concentrated on two main problems. The first is the obscurity and complexity of the law relating to the ability of a shareholder to bring proceedings on behalf of his company. He may wish to do so to enforce liability for a breach by one of the directors of his duties to the company.<sup>2</sup> Generally it is for the company itself, acting in accordance with the will of the majority of its members, to bring any such proceedings. This is as a result of principles commonly known as the rule in *Foss v Harbottle*.<sup>3</sup> However, if the wrongdoing director(s) control the majority of votes they may prevent legal proceedings being brought. There are therefore exceptions to the rule which enable a minority shareholder to bring an action to enforce the company's rights. But the law relating to these exceptions is rigid, old fashioned and unclear. It is inaccessible save to lawyers specialising in this field because, to obtain a proper understanding of it, it is necessary to examine numerous reported cases decided over a period of 150 years. The procedure is also lengthy and costly. It involves a preliminary stage which in one case took 18 days of court time to resolve.<sup>4</sup>

<sup>1</sup> Shareholder Remedies (1996) Consultation Paper No 142.

<sup>2</sup> These duties include fiduciary duties of loyalty and good faith, which mean that directors are obliged to act honestly and in good faith in the interests of the company, to exercise their powers for a proper purpose and not to place themselves in a position where their interests conflict with their duties to the company. They also include duties of skill and care in relation to the management of the company's business.

<sup>3</sup> (1843) 2 Hare 461; 67 ER 189.

<sup>4</sup> *Smith v Croft (No 2)* [1988] Ch 114.

- 3.3 The second main problem relates to the efficiency of the remedy which is most widely used by minority shareholders to obtain some personal remedy in the event of unsatisfactory conduct of a company's business. This is the remedy for unfairly prejudicial conduct contained in sections 459-461 of the Companies Act 1985. Although the remedy can be used in companies of any size and for unfairly prejudicial conduct of any kind,<sup>5</sup> it is most often used where there is a breakdown in relations between the owner-managers of small private companies and one of them is prevented from taking part in management. We carried out a statistical survey of proceedings brought in the Companies Court by shareholders in 1994 and 1995 to pursue this remedy, and found that<sup>6</sup> 96% of claims related to private companies and 84% of claims related to companies which had five or fewer shareholders. 67% of the claims brought in the period alleged exclusion from management.
- 3.4 The dissatisfied shareholder can obtain a variety of types of relief but the most popular is a court order requiring the majority shareholder(s) to purchase his shares. Just under 70% of the claims surveyed sought the purchase of the applicant's shares. Cases under section 459 are costly and cumbersome. Small companies are particularly badly affected by such lengthy proceedings because of the management time used in fighting them and because the disproportionate costs can bring an end to an otherwise viable business. For example, one case<sup>7</sup> lasted 43 days, cost some £320,000 and concerned shares ultimately valued at only £24,000.
- 3.5 A third problem which the paper examined is the enforcement of shareholders' contractual rights under the articles of association. This includes the extent to which a shareholder can insist on the affairs of the company being conducted in accordance with the articles of association.
- 3.6 The Commission made a number of provisional recommendations for reform of the law including:
- (1) the introduction of a new derivative action to be set out in rules of court governing the conditions under which a derivative action may be brought in future;
  - (2) proposals for case management of all shareholder proceedings; and
  - (3) the introduction of new regulations into Table A designed to avoid litigation of disputes between minority shareholders and the majority.
- 3.7 The Commission also invited views on whether an additional remedy should be introduced to enable a shareholder in a small owner-managed company who is excluded from management to obtain an order for the purchase of his shares, valued on a non-discounted basis. A number of further possible reforms were also discussed.

<sup>5</sup> Including breaches of directors' duties.

<sup>6</sup> Of the petitions examined.

<sup>7</sup> *Re Elgindata Ltd* [1991] BCLC 959.

- 3.8 The project has been carried out in consultation with the Scottish Law Commission and we have been assisted by Professor Dan Prentice of the University of Oxford and Ms Brenda Hannigan, senior lecturer at the University of Southampton. The consultation period ends on 22 January 1997 and we shall be proceeding to prepare our final report and recommendations. The Chairman has agreed to be in charge of this report in view both of the pressure of work on the Team resulting from the proposed project on partnership and of her own interest and experience in the field of company law.

### **Third Parties (Rights Against Insurers) Act 1930**

- 3.9 This is a project which we are carrying out jointly with the Scottish Law Commission. Work started at the beginning of the year, and we are hoping to publish a consultation paper during the course of 1997.
- 3.10 The 1930 Act was introduced to remedy the perceived injustice of the case of *Re Harrington Motor Co Ltd*<sup>8</sup> where the proceeds of a third party liability policy were held to form part of the general assets of an insolvent company and could not be claimed directly by the third party whose injuries (for which the insolvent company was liable) had given rise to the claim under the policy. The injured party was only entitled to a share of the proceeds of the policy along with the other unsecured creditors of 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.
- 3.11 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. 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 deferring the real dispute with the insurer to a later stage. Also, problems have arisen in the way in which the Act applies to multiple claims policies where the total value of claims exceeds the policy limit. The distribution of the proceeds of the insurance policy in these circumstances depends at present on the order in which each claimant establishes liability and quantum and, as the recent Lloyds litigation has demonstrated, this can lead to unfair and arbitrary results.
- 3.12 We will be considering ways in which the legislation can be modernised and simplified. We are being assisted on this project by Dr Malcolm Clarke of St John's College, Cambridge.

### **Limited liability partnerships**

- 3.13 The Company and Commercial Law Team has been assisting the Department of Trade and Industry (DTI) with certain technical aspects of its work on limited liability partnerships.
- 3.14 Partners act as agents of each other. As a result, they are liable jointly and severally for any loss or damage arising from the wrongful acts or omissions of every partner

<sup>8</sup> [1928] Ch 105.



in the ordinary course of the partnership business. The fact that a partner is jointly and severally liable for the negligent acts of one of his co-partners means that a judgment creditor has the right to execute judgment against any individual partner, even though he is personally blameless. The recent increase in the number of large claims against professional firms<sup>9</sup> has meant that the prospect of a claim bankrupting every partner in a professional partnership is all too real. Professional partnerships may be able to protect themselves from personal liability by incorporation; but this is felt to be unacceptable to the professional partnerships for numerous reasons, not least its impact on the partnership culture.

- 3.15 Last year, the Common Law Team conducted a feasibility investigation into possible reform of joint and several liability for the DTI.<sup>10</sup> The DTI consulted on the conclusions contained in this investigation and, as part of the general debate on the liability of the professions, gave consideration to the question of whether the UK should have a limited liability partnership structure for professional firms, protecting partners from liability for the torts of others. Similar structures have been implemented in other jurisdictions, notably in Jersey and the United States of America.
- 3.16 The DTI has decided to put forward proposals for the introduction of a limited liability partnership structure<sup>11</sup> and the Company and Commercial Law team has been giving help and advice to the DTI on technical legal aspects of this work.

#### **Electronic commerce<sup>12</sup>**

- 3.17 The Commissioner of the Company and Commercial Law Team continued to sit, in a private capacity, on the Society for Computers and Law's Legislative Working Party, which examined the main legal barriers to the use of digital communication for commercial purposes. The Legislative Working Party was set up following discussions, initiated by Miss Faber, between the DTI, the Lord Chancellor's Department and the Society for Computers and Law, and consisted of representatives from industry and commerce and practising and academic lawyers. It carried forward the work undertaken by our Company and Commercial Law Team for the DTI in 1995, during the course of which the team concluded, on a preliminary basis, that requirements in English law for "writing", "signature" and

<sup>9</sup> See for example, the judgment for £105m obtained against the accountancy firm, Binder Hamlyn, in December 1995, discussed in *Financial Times* 4 July 1996. This case is on appeal. Other examples include the claim for £5.2 billion brought by the liquidators of Bank of Credit and Commerce International against accountants Price Waterhouse and Ernst & Young (see *Financial Times* 17 February 1994), and the claim for £610 million brought against solicitors Clifford Chance by four Canadian banks which suffered heavy losses in the collapse of the Canary Wharf office development (see *Financial Times* 21 September 1996).

<sup>10</sup> See para 2.18 above.

<sup>11</sup> Which will be published before Easter 1997; see DTI Press Notice P/96/831 (7 November 1996).

<sup>12</sup> This incorporates electronic data interchange, which is the term used to describe communications between one computer and another which is conducted on previously agreed formats designed to increase speed and minimise human error.

“document”, among others, could potentially inhibit electronic commerce and that legislative reform may be necessary.

### **Fiduciary duties and regulatory rules**

- 3.18 A fuller description of this project can be found in last year’s annual report.<sup>13</sup> The Commission’s detailed study of the law, and extensive consultation with those involved in the financial services industry and with their regulators, drew attention to the difficult legal issues, highlighted ways in which the problems could be dealt with and enabled the government to conclude that the initial concerns as to the existence and consequences of a mismatch between fiduciary duties and regulatory rules in this field were largely unjustified. The Commission included in its report<sup>14</sup> a recommendation for legislation to clarify the current provisions on Chinese walls.<sup>15</sup> However, in the light of the views expressed by representatives within the financial services sector that their use did not cause significant problems in practice, the Treasury has decided not to amend the Financial Services Act 1986 in this respect.<sup>16</sup>

### **Partnership law**

- 3.19 This is a project which we hope to start shortly. We are in discussion with the DTI, the Lord Chancellor’s Department and the Scottish Law Commission.
- 3.20 In November 1994 the DTI published a feasibility study by the Law Commission, “Company law review: the law applicable to private companies”.<sup>17</sup> The Commission had been asked to investigate the reform of the law applicable to private companies in the context of the needs of small business. Although its focus was primarily directed to small businesses operating as private companies, the 1994 study noted the importance of partnerships in the small business community.<sup>18</sup> The study highlighted perceived deficiencies in partnership law<sup>19</sup> and concluded that a reform of partnership law “may well be of benefit to small

<sup>13</sup> Thirtieth Annual Report 1995 (1995) Law Com No 239, paras 3.4-3.7. The Scottish Law Commission had a similar project and the two Commissions consulted each other during their work. Details of the Scottish Law Commission’s work is given in paras 2.46-2.49 of their Annual Report for 1995/96, Scot Law Com No 156.

<sup>14</sup> Fiduciary Duties and Regulatory Rules (1995) Law Com No 236.

<sup>15</sup> Section 48(2)(h) of the Financial Services Act 1986. Chinese walls are procedures for restricting flows of information within a firm to ensure that information which is confidential to one department is not improperly communicated to any other department within the firm. They are widely used in the financial services sector to manage or avoid conflicts between the duties owed to different customers, or conflicts between the firm’s interests and the duties owed to customers, which arise out of the different activities of the component parts of the firm on different sides of the wall.

<sup>16</sup> See *Hansard* (HC) 27 June 1996, vol 280, cols 235-6W.

<sup>17</sup> URN 94/529

<sup>18</sup> *Ibid*, para 5.62

<sup>19</sup> *Ibid*, para 5.63

businesses.”<sup>20</sup> This conclusion was supported by the responses to the study which the DTI received.

- 3.21 The 1994 study highlighted the following three difficulties which partnerships currently encounter. First, in the absence of agreement to the contrary, the retirement or death of a partner dissolves the partnership: the assets of the firm must be realised and distributed. Secondly, partnerships do not have a legal personality separate from the individual partners who compose it. Consequently they cannot hold property in the firm’s name. Independent legal personality may simplify commercial relationships, such as the borrowing of money. Thirdly, there is currently no standard form partnership agreement. In the absence of an expressly drawn-up partnership agreement, the relations between the partners will be governed by the default provisions of the Partnership Act 1890, which may not give effect to the actual intentions of the individual partners. The drafting of a suitable partnership agreement, therefore, may increase establishment costs for those wishing to run their businesses as partnerships.
- 3.22 We envisage considering all of these matters in our partnership project. However there are likely to be many other issues of practical concern to partnerships, which we would also need to investigate. One example is the practical difficulties in winding-up solvent partnerships.
- 3.23 The DTI proposals on limited liability partnerships discussed in paras 3.13-3.16 above have focused professional partnerships’ attention on the issue of limited liability. Our partnership law project would consider whether and how the intended limited liability partnership structure might be made available to a wide range of businesses. Additionally we would give thought generally to limited partnerships established under the Limited Partnerships Act 1907, and to whether and how far this legislation should be reformed in the light of the discussions on limited liability partnerships.
- 3.24 The breadth of a project to reform partnership law is potentially enormous. Accordingly, as an initial step we propose to build upon the November 1994 study by consulting with interested parties on the practical and legal issues which are currently of most concern to partnerships. The ambit of the project would be clearly focused after this preliminary work had been completed.

<sup>20</sup> *Ibid*, para 6.5

# PART IV

## CRIMINAL LAW AND EVIDENCE

### TEAM MEMBERS °

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Miss T Baxter, Mr R J Howells,  
Miss L J Skinner, Ms J V Wardale

° as at the end of 1996

Mr Stephen Silber QC  
(**Commissioner**)

#### Money transfers

- 4.1 On 10 July 1996, the House of Lords unanimously allowed the appeals of *Preddy and others*,<sup>1</sup> who were alleged to have committed mortgage frauds and had been convicted under section 15(1) of the Theft Act 1968.<sup>2</sup> The basis of the House of Lords' decision was that the borrowers, the alleged mortgage fraudsters, had not obtained "property belonging to another" as required by section 15.<sup>3</sup>
- 4.2 As a result of this decision it became difficult to prosecute an individual<sup>4</sup> who had obtained by deception any form of payment by any form of banking transfer. Although there were possible alternative offences, we considered that it was unlikely that they would be appropriate.<sup>5</sup> In the light of the House of Lords' decision, we believed that we would be failing in our duty to keep the law under review if we did not examine this topic as a matter of great urgency and we decided to do so on 31 July. After an informal consultation process, we produced a

<sup>1</sup> [1996] 3 WLR 255.

<sup>2</sup> Section 15 (1) provides (emphasis added) that "A person who by deception dishonestly obtains *property belonging to another*, with the intention of permanently depriving the other of it, shall on conviction on indictment be liable to imprisonment for a term not exceeding ten years".

<sup>3</sup> According to the House of Lords, the proper analysis is that the lending institution's credit balance was a chose in action (the debt owed to the institution by the bank) which was *extinguished* and subsequently the defendant obtained something different, namely the chose in action constituted by the debt owed to him by his bank as represented by credit in his own bank account. This asset was *created* for him and had therefore *never* belonged to anyone else.

<sup>4</sup> If the individual is acting in concert, he can be prosecuted for conspiracy to defraud.

<sup>5</sup> Subsequently, the Court of Appeal in *Graham and others* (25 October 1996) (*The Times* 29 October 1996) took a similar view.

report which was approved by Commissioners on 18 September and published on 15 October.<sup>6</sup>

- 4.3 We recommended that there should be inserted into the Theft Act 1968 a new section 15A, to create an offence of dishonestly obtaining a money transfer by deception, and that this offence should extend to payments made by cheque as well as those made electronically. We also recommended that a new section 24A should be inserted to create an offence of retaining a wrongful credit to an account. This would be committed where a payment made to an account was obtained wrongfully<sup>7</sup> and the holder of the account, knowing or believing the credit to be wrongful, dishonestly fails to take steps to cancel it. We recommended that, where a person commits this offence in relation to a credit made to an account, any money which was subsequently withdrawn by that person from that account and which derives from that credit should be regarded as stolen goods.
- 4.4 We were delighted that the Home Secretary within hours of the publication of the report announced that the Government accepted its recommendations.<sup>8</sup> Lord Goff of Chieveley kindly introduced the Theft (Amendment) Bill, which contained our recommendations, into the House of Lords. It received Royal Assent on 18 December.

#### **Conspiracy to defraud**

- 4.5 In our report on Conspiracy to Defraud<sup>9</sup> we recommended an amendment to the Theft Act 1978 so that those who obtained a loan dishonestly would be guilty of theft. The effect would be to reverse a much criticised decision of the Court of Appeal in *Halai*<sup>10</sup> referred to in our last Annual Report<sup>11</sup>. The Government accepted our recommendations, which were included in our Report on Money Transfers<sup>12</sup> and implemented in the Theft (Amendment) Act.

#### **Dishonesty offences**

- 4.6 We have previously explained our intention to embark on a comprehensive review of the law of dishonesty.<sup>13</sup> We had started this when the House of Lords gave their

<sup>6</sup> Offences of Dishonesty: Money Transfers (1996) Law Com No 243.

<sup>7</sup> A credit to an account is wrongful if it is the credit side of a money transfer obtained by deception. It is also wrongful to the extent that it is derived from theft, obtaining a money transfer by deception, blackmail or stolen goods.

<sup>8</sup> *Hansard* (HC) 15 October 1996, vol 282, col 879W.

<sup>9</sup> Conspiracy to Defraud (1994) Law Com No 228.

<sup>10</sup> [1983] Crim L R 624.

<sup>11</sup> Thirtieth Annual Report 1995 (1996) Law Com No 239, para 4.7.

<sup>12</sup> Offences of Dishonesty: Money Transfers (1996) Law Com No 243, referred to in para 4.2 above.

<sup>13</sup> Twenty-Ninth Annual Report 1994 (1995) Law Com No 232, para 2.39. The need to give priority to other projects has prevented us from publishing our consultation paper on Misuse of Trade Secrets as soon as we would have wished, but we hope to do so as soon as staffing resources permit.

decision in *Preddy*;<sup>14</sup> our work on money transfers delayed some of the more general work that we had been hoping to do on the law of dishonesty. We did, however, learn much from the responses in the informal consultation process: in particular, that there is great concern about the present law of dishonesty and its failure to keep up with the ever increasing complexity of modern commercial life.<sup>15</sup>

- 4.7 During the Second Reading debate in the House of Lords on the Theft (Amendment) Bill (which embodied the recommendations set out in our Report on Money Transfers<sup>16</sup>) Lord Williams of Mostyn QC expressed the view that the whole law of theft is in urgent need of simplification and modernisation.<sup>17</sup> Our attention has repeatedly been drawn to considering whether we should have a general law of fraud as in Scotland:<sup>18</sup> we are hoping, if adequate resources are available to us, to produce a consultation paper dealing with some of these matters during the course of 1997.

### **Corruption**

- 4.8 As we mentioned above,<sup>19</sup> the law of corruption has been much criticised. The responses to our informal consultations indicated a clear and well-reasoned wish for us to look at the law of corruption - which is what we have decided to do. At present, the law is confused and obscure, being comprised in many statutes which live together with common law offences. The current law draws a distinction between “public bodies and other bodies” which presents great difficulties in a society in which there are many privatised industries. We have also been asked to see if the police should be given greater investigatory powers in cases of alleged corruption. Professor A T H Smith of Cambridge University has acted as a consultant and we are hoping to publish a consultation paper early in 1997.

### **Involuntary manslaughter**

- 4.9 Our report was published in March 1996<sup>20</sup> and we outlined those recommendations in our annual report for 1995.<sup>21</sup> We recommended a new offence of corporate killing<sup>22</sup> and the replacement of the present offence of involuntary manslaughter by two new offences, one of “reckless killing” (that is,

<sup>14</sup> See paras 4.1-4.5 above for further details.

<sup>15</sup> See the comments of Lord Wilberforce in *Hansard* (HL) 14 November 1996, vol 575, col 1071.

<sup>16</sup> See para 4.2 above.

<sup>17</sup> *Hansard* (HL) 14 November 1996, vol 575, col 1075.

<sup>18</sup> See the comments of Lord Goff of Chieveley, *ibid*, col 1077 and Lord Donaldson of Lynton, *ibid*, col 1073.

<sup>19</sup> Para 1.6.

<sup>20</sup> Legislating the Criminal Code: Involuntary Manslaughter (1996) Law Com No 237.

<sup>21</sup> Thirtieth Annual Report 1995 (1996) Law Com No 239, paras. 4.1-4.4.

<sup>22</sup> This recommendation was widely welcomed: for example, the Financial Times in an editorial on 6 March 1996 recommended its immediate implementation.

causing death in the awareness that death or serious injury may result) and one of “killing by gross carelessness”.<sup>23</sup> We are awaiting the Government’s response.

#### **Offences against the person**

- 4.10 In our major report on Offences against the Person<sup>24</sup> we demonstrated the clear need to modernise the antiquated law. Last year its implementation was called for in the Court of Appeal.<sup>25</sup> This year, further demands have been made for its implementation.<sup>26</sup> We very much hope that the Government will now accept this report which was published in 1993.
- 4.11 Parliament has imposed on the Commission the important duty of promoting the codification of the law<sup>27</sup> and from its earliest days the Commission has seen the codification of the criminal law as a central feature of that work. The criminal law controls the exercise of state power against citizens and the protection of citizens against unlawful behaviour: the importance of these matters requires that the criminal law should be put into statutory form in a comprehensive and comprehensible manner. We see the implementation of our proposals on Offences against the Person as being an essential and long overdue first step towards the implementation of this policy.

#### **Consent in the criminal law**

- 4.12 In December 1995 we published a further consultation paper,<sup>28</sup> the contents of which were summarised in our last annual report.<sup>29</sup> We have received many responses and, because of many requests for a longer period in which to consider the far-reaching and important points raised in the paper, we extended the consultation period to 31 December 1996.

<sup>23</sup> That would require proof not only that the risk would have been obvious to a reasonable person but also that the defendant was capable of appreciating that risk and that his or her conduct fell far below what could be reasonably expected. That last requirement would in effect be deemed to be satisfied if he or she intended to cause some injury or was reckless as to whether injury resulted.

<sup>24</sup> Criminal Law: Legislating the Criminal Code: Offences against the Person and General Principles (1993) Law Com No 218.

<sup>25</sup> “Most, if not all, legal practitioners and commentators agree that the law concerning non-fatal offences against the person is in urgent need of comprehensive reform to simplify it, rationalise it and make it trap-free: the remedy is with Parliament. They have the Law Commission’s paper [i.e., Law Com No. 218] and its draft Bill before them and have had it since November 1993” *per* Henry LJ in *Lyndsey* [1995] 3 All ER 654, 654-5.

<sup>26</sup> “In our judgment this case would not have troubled this court at all if the relevant principles had been set out clearly in codified form after the models drafted by Parliamentary Counsel on the instructions of the Law Commission. We hope very much the executive and the legislature will soon be able to afford a higher priority to important technical measures designed to codify the criminal law and make it more accessible to those having to use it than has apparently been possible in recent years” *per* Brooke LJ in *Baker and Wilkins*: Court of Appeal (Criminal Division): 17 October 1996.

<sup>27</sup> Law Commissions Act 1965, s 3 (1).

<sup>28</sup> Consent in the Criminal Law (1995) Consultation Paper No 139.

<sup>29</sup> Thirtieth Annual Report 1995 (1996) Law Com No 239, paras 4.24 - 4.28.

### **Previous misconduct of the defendant**

- 4.13 In July 1996 we published our consultation paper *Evidence in Criminal Proceedings: Previous Misconduct of a Defendant*.<sup>30</sup> There had been much criticism of the law relating to similar fact evidence<sup>31</sup> and of section 1 of the Criminal Evidence Act 1898 which deals with the right to cross-examine a defendant in respect of previous misconduct.<sup>32</sup>
- 4.14 At the heart of this paper is the difficulty of assessing the ability of fact finders - whether juries or magistrates - to evaluate the significance and relevance of a defendant's previous convictions and in particular to determine whether they are unfairly prejudiced. As we could not carry out research on real juries,<sup>33</sup> we were pleased to be able to include some information about the results of research conducted on simulated juries by the Oxford Centre for Socio-Legal Studies at the request of the Home Office.<sup>34</sup> One of the main findings was that the mock juries were prejudiced against a defendant who had previous convictions for sex offences or similar offences to the one charged.
- 4.15 Our provisional view was that we should retain an exclusionary rule with separate exceptions for evidence admissible in chief and for evidence which subsequently becomes admissible.
- 4.16 On the issue of adducing bad character evidence in chief, we provisionally concluded that prejudicial evidence should be admissible in chief if it is relevant to a specific issue and its probative value outweighs its prejudicial effect (together with any other factors which militate against its admissions). We suggested some guidelines for the "structure" of the balancing exercise that this proposal would entail.
- 4.17 We were concerned about the provisions in the Criminal Evidence Act 1898 which permit the defendant to be cross-examined about his or her previous misconduct where he or she makes imputations against a prosecution witness. The stark and inflexible nature of the statutory provision<sup>35</sup> has led the courts to rely on a wide-ranging discretion to mitigate its effects. There is uncertainty, not only about what counts as an imputation but also on the extent of the discretion. We consider that

<sup>30</sup> (1996) Consultation Paper No. 141. The matter had been referred to us by the Home Secretary as a result of a recommendation to that effect by the Royal Commission on Criminal Justice (1993) Cm 2263.

<sup>31</sup> It was described as a "pitted battlefield" by Lord Hailsham in *Boardman* [1975] AC 421, 445.

<sup>32</sup> It has been described as "a nightmare of construction": *Anderson* [1988] QB 678, 686 *per* Lord Lane CJ.

<sup>33</sup> Because of the prohibition contained in s 8 of the Contempt of Court Act 1981. The Royal Commission on Criminal Justice recommended that this section should be amended to enable research to be conducted into juries' reasons for their verdict "so that informed debate can take place rather than arguments based on surmise and anecdote": (1993) Cm 2263, chapter 1, para. 8 and recommendation 1.

<sup>34</sup> Their findings are set out in Appendix D of Consultation Paper No 141.

<sup>35</sup> "... the nature or conduct of the defence is such as to involve imputations on the character of the prosecutor or the witnesses for the prosecution": part of s1 (f) (ii) of the 1898 Act.



this is an area where the circumstances in which the discretion should be exercised should be specified and our provisional proposal is that imputations should result in the loss of the shield only if they do not relate to the witness's conduct in *the incident or investigation in question*.

- 4.18 We also considered the circumstances in which a defendant should lose the shield because he or she claimed to be of good character. There is some doubt about when the shield is lost and we provisionally proposed that in any case in which the defendant, of his or her own volition, makes an assertion, express or implied, of good character, it will result in the loss of the shield. By the same token, if a witness for the defence in the course of the examination in chief or in cross-examination makes an assertion of the defendant's good character, the defendant will lose the shield unless the assertion is made in response to a question which does not appear to the court to have been intended to elicit the assertion.
- 4.19 The consultation period closed on 31 October 1996 and we have received over 100 responses, which will be analysed. We hope that a report can be produced by the end of 1997 provided that we have adequate resources.

#### **Hearsay in criminal proceedings**

- 4.20 We published our consultation paper in 1995<sup>36</sup> and we received many helpful and useful responses which have now been analysed. In the light of the complex issues raised, we held a seminar in London in February 1996. Lord Justice Brooke kindly acted as chairman for this seminar which gave us many helpful and thoughtful ideas. Professor Diane Birch of Nottingham University has assisted as our consultant, and we hope to publish our report in the first half of 1997.

#### **Assisting and encouraging crime**

- 4.21 As we explained in our last annual report,<sup>37</sup> we have been unable to take this matter forward since analysing the responses to our consultation paper.<sup>38</sup> An important decision of the House of Lords is awaited but we are anxious to produce a report as soon as staffing resources permit and hope that might be possible in the later part of 1997.

#### **Consolidation of sentencing statutes**

- 4.22 We mentioned in our last annual report<sup>39</sup> that we had been encouraged by many judges, magistrates, academics and practitioners to start to consolidate the statutory provisions on the courts' sentencing powers which are scattered over more than thirty statutes and many statutory instruments. Since then, the Lord

<sup>36</sup> Evidence in Criminal Proceedings: Hearsay and Related Topics (1995) Consultation Paper No. 138.

<sup>37</sup> Thirtieth Annual Report 1995 (1996) Law Com No 239, para 4.15.

<sup>38</sup> Assisting and Encouraging Crime (1993) Consultation Paper No 131.

<sup>39</sup> Thirtieth Annual Report 1995 (1996) Law Com No 239, para 4.30.

Chief Justice and other members of the Divisional Court<sup>40</sup> have expressed the view that there is an urgent need for a statutory consolidation of sentencing provisions and the hope that “this may be seen as a task commanding a high degree of priority”. Work on the consolidation is however at a comparatively early stage and we await receipt of responses to our detailed queries on the existing law from the Home Office.<sup>41</sup> We hope that eventually a consolidated statute will be produced and implemented as has recently happened in Scotland.<sup>42</sup>

<sup>40</sup> Rose LJ and Blofeld J in *R v Governor of Brockhill Prison, ex parte Michelle Evans* (15 November 1996). See also *R v Secretary of State for the Home Department, ex parte Naughton* (DC) (4 September 1996).

<sup>41</sup> The Government stated in a Written Answer on 2 December 1996, *Hansard* (HL), vol 576, col W31, that it recognises the importance of this work and is committed to taking it forward.

<sup>42</sup> Powers of Criminal Courts Act 1996.

# PART V

## PROPERTY AND TRUST LAW

### TEAM MEMBERS °

#### Government Legal Service

Mr R Cooke (*Team Manager*)  
Ms R Ellis, MMr M P Hughes

#### Research Assistants

Miss S T Chandrasekhar, Mr P M Dougan,  
Mrs A M Edwards

° as at the end of 1996

Mr Charles Harpum  
(**Commissioner**)

### LAW OF PROPERTY

#### Land registration

- 5.1 There are now nearly 16 million registered titles in England and Wales<sup>1</sup> - about three quarters of the total number of titles. Of these, some 86 per cent are computerised. There is now a real prospect that, within a few years, unregistered conveyancing will be largely a thing of the past. For those practitioners that have direct access to the register by computer,<sup>2</sup> a title can be called up instantly: no more the time-consuming preparation of abstracts or epitomes of title. Furthermore, the electronic transfer of title to land within a few years is now a distinct possibility.
- 5.2 It is against this background that a review of the legislation governing land registration - the Land Registration Act 1925 - is being undertaken by a joint working group from the Law Commission, HM Land Registry and the Lord Chancellor's Department.<sup>3</sup> Its first report was published in September 1995<sup>4</sup> and is now before Parliament as the Land Registration Bill.<sup>5</sup> The Bill has two objectives. The first is to expedite the completion of the land register by a mixture of stick (compelling the registration of title when certain dispositions of unregistered land are made) and carrot (encouraging voluntary registration).<sup>6</sup> The second is to

<sup>1</sup> H M Land Registry's Annual Report and Accounts (1995 - 96), p 8.

<sup>2</sup> Direct access was introduced by HM Land Registry at the start of 1995.

<sup>3</sup> For the establishment of this joint working group, see our Twenty-Ninth Annual Report 1994 (1995) Law Com No 232, paras 2.67 - 2.70; and our Thirtieth Annual Report (1995) Law Com No 239, para 5.1.

<sup>4</sup> Transfer of Land: - Land Registration (1995) Law Com No 235. See the Thirtieth Annual Report 1995 (1996) Law Com No 239, para 5.2.

<sup>5</sup> For the Parliamentary history of the Bill, see para 1.17 above.

<sup>6</sup> HM Land Registry estimate that the effect of the Bill would be to increase by one third the number of new titles coming on to the register.

make fairer provision for compensation in cases where an error or omission occurs in a registered title.

- 5.3 To achieve these twin aims, the Bill will, if enacted, have three main effects. First, it will replace the existing provision which requires compulsory registration of certain dispositions of unregistered land.<sup>7</sup> It will add certain new triggers for compulsory registration including gifts, transfers of land on death, and first mortgages of land.<sup>8</sup> It will also recast the statutory provisions governing compulsory first registration that had been the subject of adverse criticism.<sup>9</sup> Secondly, it will empower HM Land Registry to charge reduced fees on voluntary first registration and to make different provision for different types of registration (including provision that no fees are chargeable at all).<sup>10</sup> Thirdly, the Bill will replace the existing provisions on indemnity with a new section that remedies a number of well-known defects in the present law.<sup>11</sup>
- 5.4 The Commission believes that land registration should be underpinned by high quality law, based on free-standing land registration principles, and that the present law relies too heavily on concepts “borrowed” from unregistered property. To this end, the joint working group has made good progress with its second report. This is a very much more substantial project, since the intention is to replace the Land Registration Act 1925 in its entirety. The sheer size and importance of the project, and the need always to keep in mind the practical and logistical changes which this would entail in Land Registry practice, means that work on the report is likely to continue for most of 1997.

#### **The execution of deeds and documents**

- 5.5 In November we published a consultation paper on the execution of deeds and documents,<sup>12</sup> at the joint request of the Department of Trade and Industry and the Lord Chancellor’s Department. The paper undertakes a comprehensive review of the present law on the execution of deeds and documents by companies and corporations of all types, including local authorities, building societies and

<sup>7</sup> Clause 1 substitutes new ss 123 and 123A for s 123 of the Land Registration Act 1925.

<sup>8</sup> These new triggers were added following public consultation by HM Land Registry in its consultation paper, *Completing the Land Register in England and Wales (1992)*. Other new triggers that were proposed in that paper were not adopted because they were not supported on consultation.

<sup>9</sup> See, eg D G Barnsley, “Compulsory registration of title - the effect of failure to register” (1968) 32 Conv (NS) 391.

<sup>10</sup> Clause 3, substituting new subsections (3) and (3A) for s 145(3) of the Land Registration Act 1925.

<sup>11</sup> Clause 2, substituting a new s 83 of the Land Registration Act 1925. The changes would include the provision of indemnity where the register is rectified but where the applicant still suffers loss; the introduction of a principle of contributory negligence (at present any negligence which caused or substantially contributed to the loss completely bars a claim to indemnity); fairer provision as to when claims for indemnity are time-barred; and improved rights of recourse for HM Land Registry to make recovery against those who have caused the loss in respect of which indemnity is paid.

<sup>12</sup> *The Execution of Deeds and Documents by or on Behalf of Bodies Corporate (1996)*, Consultation Paper No 143.

corporations sole.<sup>13</sup> The picture which emerges is one of quite unnecessary complexity, where modern practice and old legal rules do not always coincide.

- 5.6 The emphasis of the paper is on the removal of practical difficulties, including the present inconsistencies between the relevant parts of the Law of Property Act 1925, Companies Act 1985 and Law of Property (Miscellaneous Provisions) Act 1989. This extends to the way in which deeds should be executed on behalf of a company by an attorney, liquidator or receiver. There is also, however, a wider consideration of the methods of execution available (for example whether companies should still be permitted to use the common seal for this purpose), the distinctions between deeds and other documents, and the lack of consistency and uniformity in the law between different types of corporation. The consultation period has now closed, and we have begun our analysis of the comments received from those who have kindly responded to the paper.

### **Trusts of land**

- 5.7 We have already noted the passage of the Trusts of Land and Appointment of Trustees Act 1996 through Parliament.<sup>14</sup> The Commission - and Charles Harpum in particular - gave considerable support and assistance to the Lord Chancellor's Department during the passage of the Bill, especially in relation to amendments tabled in the House of Lords.

### **Homesharing**

- 5.8 This project is concerned with the property rights of all those who share a home, and was explained more fully in last year's annual report.<sup>15</sup> The subject is a complex and difficult one, and further work has only served to confirm the team's view both that the present law is unsatisfactory and deserves thorough review, and that any such review must be sensitive to the widely differing views which are held upon the subject. Publication of the consultation paper has been somewhat delayed by staffing difficulties, but we hope to publish it during 1997. The team has, however, been able to continue its "pre-consultation" process, discussing the project with those specialising in this area of the law, and with a range of outside interest groups.<sup>16</sup> We are also grateful to a number of bodies which have kindly assisted us with the project this year.<sup>17</sup>

### **Other matters**

- 5.9 Our involvement with the Trusts of Land Act and the Land Registration Bill illustrate the fact that the Commission's work does not end with the publication of a report. We are often called upon to give legal advice and assistance when it

<sup>13</sup> Eg, Government Ministers, and ecclesiastical offices such as Anglican bishops.

<sup>14</sup> See para 1.12 above.

<sup>15</sup> Thirtieth Annual Report 1995 (1996) Law Com No 239, paras 6.7 - 6.12.

<sup>16</sup> In particular, a seminar of academic property and family lawyers was held at the Commission in May, and the Commissioner, Charles Harpum, addressed the Society of Public Teachers of Law (SPTL) Family Law Group on the subject at the SPTL Conference in Cambridge in September 1996: see the report in [1996] 26 Fam Law 696.

<sup>17</sup> We would like to thank in particular the Association of British Insurers.

comes to the implementation of our recommendations. Another aspect of this may be seen in the areas of distress for rent and the termination of tenancies (in particular forfeiture), which are both the subject of previous reports.<sup>18</sup> We recognise that, on one view, the replacement of these two unsatisfactory “self-help” remedies is dependent on the ready availability and speed of more suitable court-based alternatives. We have been able to discuss such remedies with both the Lord Chancellor’s Department and the Department of the Environment during the year, as well as undertaking further fact-finding to determine the impact of the present law on interested parties.<sup>19</sup>

## **LAW OF TRUSTS**

### **Trustees’ powers and duties**

- 5.10 We described in last year’s annual report how we had come to add two new trust law projects to those mentioned in our Sixth Programme, concerning investment and delegation by trustees.<sup>20</sup> This year we are able to report on the progress made. We have been pleased to continue working with the Trust Law Committee on these two projects during the year, and would like to thank them for giving us the benefit of their expertise, support and assistance.<sup>21</sup>

### **Trustee investment**

- 5.11 The Trustee Investments Act 1961, which governs the investment powers of certain trustees, has long been seen as outdated, unduly restrictive, and expensive to operate for those to whom it applies. On 21 November 1995 the Economic Secretary to the Treasury, Mrs Angela Knight, announced that a fundamental deregulatory reform of the Act was required, and that the Government would be issuing a consultation document by 1 May 1996, drawing on detailed work to be undertaken by the Commission, the Scottish Law Commission and the Trust Law Committee.
- 5.12 The Commission’s Property and Trust Law Team prepared proposals, and arranged a meeting at the Commission on 24 January 1996, which was attended by representatives of H M Treasury, the Deregulation Unit, the Scottish Law Commission, the Northern Ireland Office of Law Reform, the Law Reform Advisory Committee (Northern Ireland) and the Trust Law Committee. As a result, the Team was asked to prepare a consultation paper under the Deregulation and Contracting Out Act 1994. A first draft of the paper was sent to the Treasury by the Team on 15 February. After the necessary consideration within the Treasury, and some revision, the paper was published by the Treasury on 1 May.

<sup>18</sup> Landlord and Tenant: Distress for Rent (1991) Law Com No 194, and Landlord and Tenant Law: Termination of Tenancies Bill (1994) Law Com No 221.

<sup>19</sup> We are particularly grateful for the assistance of the Council of Mortgage Lenders and of the Financial Law Panel in this respect.

<sup>20</sup> Thirtieth Annual Report 1995 (1996) Law Com No 239, paras 5.14 - 5.18, and see also the Sixth Programme of Law Reform (1995) Law Com No 234, item 7.

<sup>21</sup> The Trust Law Committee is a group of practising trust lawyers and academics which was formed under the chairmanship of Sir John Vinelot to press for reform of trust law.

It is anticipated that an order to amend the Trustee Investments Act 1961 will be laid under the Deregulation and Contracting Out Act early in February 1997.

### **Trustee delegation**

- 5.13 This project asks how far trustees should be able to delegate their powers and duties. There is a clear connection with our work on trustee investment, given the pressing commercial need to clarify the ability of trustees to delegate matters such as the management and custody of investments. Indeed, earlier in the year, the team asked whether a limited package of reforms on the custody of investments and the use of nominee services could be implemented by means of an order under the Deregulation and Contracting Out Act. In the event it was not possible - for reasons beyond our control - to take the matter forward in this way, but this will at least enable the team to tackle these issues as part of a more comprehensive treatment of trustee delegation, building on the work in this area already carried out by the Trust Law Committee. A consultation paper is intended for the first half of 1997.

### **Perpetuities and accumulations**

- 5.14 Our 1993 consultation paper contained a detailed examination of the notoriously complex rules which govern perpetuities and accumulations.<sup>22</sup> As is well known, these rules have sought to maintain a balance between the interests of a settlor or testator - who, it has traditionally been thought, may wish to tie up their property in trust for a lengthy period - and the claims of the beneficiaries to have the use of that property.<sup>23</sup> Work is well advanced on the Commission's recommendations, and we hope to publish our report in the first half of 1997.

### **Trust formalities**

- 5.15 This project concerns the formalities required for the creation of a trust.<sup>24</sup> There is an obvious connection with the work on homesharing, since disputes in that area often turn upon whether an informal trust has arisen. There is also a well known lack of clarity and principle in the relevant statutory provisions, which are mainly found in section 53 of the Law of Property Act 1925. We hope to publish a consultation paper in 1997.

### **Remedies for recovery of trust property**

- 5.16 Work on this project - which was described in some detail in our annual report for 1994<sup>25</sup> - has had to be suspended to allow other matters to proceed. The team attaches considerable importance to it, but the need to complete other projects

<sup>22</sup> The Law of Trusts - The Rules Against Perpetuities and Excessive Accumulations (1993) Consultation Paper No 133.

<sup>23</sup> The issue has been graphically described as balancing the rights of the living against "dead-hand control".

<sup>24</sup> A detailed description may be found in our Twenty-Ninth Annual Report 1995 (1994) Law Com No 232, paras 2.74 - 2.75.

<sup>25</sup> Twenty-Ninth Annual Report 1995 (1994) Law Com No 232, paras 2.76 - 2.77.

and the resources available mean that work on it is unlikely to be resumed for some time yet.



# PART VI

## FAMILY LAW

Mr M W Sayers °

° as at the end of 1996

### Family Law Act 1996

#### (i) *Divorce*

- 6.1 In 1990 we published our report on the ground for divorce<sup>1</sup>, following extensive consultation and consideration. The heart of this report recommended that it should no longer be possible to obtain a divorce quickly and easily by the simple but often unjust and painful expedient of one party claiming that the other had committed adultery or behaved intolerably. Instead, we recommended that there should be a minimum period of one year during which both parties could consider the arrangements needed if they were to be divorced and decide whether or not their marriage had indeed irretrievably broken down, without the inevitable pressures imposed by having to make hostile accusations one against the other or to live apart for a considerable length of time.
- 6.2 In due course the Government published its own consultation paper<sup>2</sup>, linking our recommendations to its own proposals about mediation and about other arrangements on the breakdown of marriage. In April 1995 the Government published a White Paper,<sup>3</sup> largely building on the proposals in its consultation paper. In November 1995 the Government introduced into Parliament legislation based on its White Paper, as Part II of the Family Law Bill. Following very full debate in Parliament, the Bill received Royal Assent in July 1996.
- 6.3 Under the Family Law Act, a person who wishes to obtain a divorce will first need to attend an information meeting, to receive all the relevant information about what a divorce involves. Divorcing couples will then have a three month cooling off period before they can make a statement of marriage breakdown. There is then a period of reflection and consideration, to allow couples time to think through their decision, to be fully aware of all its consequences and to have the opportunity to make proper arrangements for living apart before a divorce order is granted (rather than afterwards, as under the current law). The period of reflection and consideration is a minimum of nine months, apart from the minimum three month cooling off period. The nine months will be extended by a further six if one of the parties requests or if there are children aged 16 or under. The period may not be extended if there is a domestic violence order in force against one of the couple, or if the court is satisfied that the delay would be significantly detrimental to the welfare of any child of the family. The couple will also be able to have an additional 12 months (“the lapse period”) to decide arrangements before applying for divorce. In addition, couples can suspend the

<sup>1</sup> Family Law: The Ground for Divorce (1990) Law Com No 192.

<sup>2</sup> *Looking to the Future: Mediation and the Ground for Divorce* (1993) Cm 2424.

<sup>3</sup> *Looking to the Future: Mediation and the ground for divorce* (1995) Cm 2799.

period for reflection and consideration and the lapse period, for a maximum of 18 months in order to attempt a reconciliation. At the end of the period, an application for a divorce order may be made to the court.

- 6.4 The Act encourages greater use of mediation, as opposed to legal representation, for couples to resolve matters. Mediation is a process in which an impartial mediator helps couples considering divorce to meet together to deal with the arrangements to be made for the future. The Act allows public funds to meet the cost of mediation for those eligible for legal aid. The Act does not make mediation compulsory, but legally aided couples are required to attend an initial meeting with a mediator.
- 6.5 Some aspects of the new system, such as mediation and the information meetings, will be piloted before implementation. The Lord Chancellor has established a new advisory board to advise on implementation, and to monitor the operation of the Act when it is in force. The new system is expected to come into force around the end of 1998.
- 6.6 We are extremely pleased that most of the basic recommendations of our own report are being implemented by the Act.

*(ii) Domestic violence*

- 6.7 The Family Law Act also substantially implements the recommendations in our report on domestic violence<sup>4</sup>. Our recommendations were designed to reform the complex and inconsistent procedures facing victims of domestic violence by creating a single, clear set of remedies available in all courts with jurisdiction in family matters. In accordance with our recommendations, Part IV of the Act provides a new code of civil remedies, to apply to a wider group of people than under the current law. Two flexible orders are established, to replace a variety of different orders available under different heads of the old law: a non-molestation order to protect people with a close family connection; and an occupation order which regulates who is allowed to occupy the home, and can direct another party to leave the home. We recommended: coherent criteria for the making of an order; and a requirement for the courts to attach a power of arrest in cases of violence or threat of violence unless they are satisfied that this is not necessary to protect the victim.
- 6.8 Since our work in this area started, our Bill has been exhaustively considered: by us during the long consultation which led up to our report; by the Government after that report was published; and by the Home Affairs Committee of the House of Commons<sup>5</sup>. The Government had accepted almost all of the provisions of our Bill and introduced its own Bill into Parliament in substantially the same terms. The Special Public Bill Committee of the House of Lords gave it careful and detailed consideration in 1995. On each of these occasions the great majority of our recommendations were warmly welcomed.

<sup>4</sup> Family Law: Domestic Violence and Occupation of the Family Home (1992) Law Com No 207.

<sup>5</sup> Home Affairs Committee, Third Report, Domestic Violence (1992-3) HC 245 - I.

- 6.9 However, as we noted in our last annual report<sup>6</sup>, at a late stage in the course of the Bill's passage through Parliament, it was criticised by a small number of Members of Parliament and by a small minority of commentators in the national press. The Government withdrew the Bill from Parliament, reconsidered it and then reintroduced most of its provisions in the Family Law Bill in November 1995.
- 6.10 Again, the main thrust of our own recommendations is being implemented by the Act. This Part of the Act is likely to come into force in October 1997.

### **Mental incapacity**

- 6.11 Our report on mental incapacity<sup>7</sup> was published in March 1995. It made important recommendations in a field of great relevance to modern society. Substantial demographic, social and medical changes have taken place in recent years, at the same time as a recognition by the courts that there is no person or court in England and Wales who can lawfully take personal welfare or medical decisions on behalf of adults who lack the capacity to take those decisions for themselves. Our report recommended the introduction of a single comprehensive piece of legislation to make new provision in relation to the personal welfare, health care and financial affairs of people who lack mental capacity. Implementation of our recommendations would ensure that decisions made on their behalf were made in their best interests. It would provide a new and integrated statutory jurisdiction for the making of those different types of decision. The report recommended a new continuing power of attorney to replace enduring powers of attorney, and new safeguards if serious medical decisions are taken on behalf of those who lack capacity. It covered anticipatory refusal of medical treatment, intended to take effect if and when the maker is later incapacitated. It would provide protection at public law for vulnerable people at risk and would confer new functions on local authorities for the protection of vulnerable adults from abuse and neglect.
- 6.12 The Lord Chancellor established an inter-departmental working group to consider our report, to co-ordinate the Government's response to it and to make an initial report to Ministers by September 1995. In January 1996 the Lord Chancellor stated in answer to a Parliamentary Question<sup>8</sup> that the Government had decided not to legislate on the basis of our proposals in their current form and that it proposed to issue a consultation paper on mental incapacity in due course. The Commission was informed by the Lord Chancellor's Department in mid-1996 that it was hoped that the consultation paper would be published by December 1996. In a Written Answer in November<sup>9</sup> the Lord Chancellor said that no date had yet been set for publication of the Government's consultation paper. We agree with the Answer that it is a complex and sensitive subject which requires thorough and careful consideration. While noting the Answer that "the Government do not wish questions of timing to affect its ability to produce a paper which deals fully

<sup>6</sup> Thirtieth Annual Report 1995 (1996) Law Com No 239, paras 1.9 and 1.20.

<sup>7</sup> (1995) Law Com No 231.

<sup>8</sup> *Hansard* (HL) 16 January 1996, vol 568, WA 43; also (HC) 16 January 1996, vol 269, col 487W.

<sup>9</sup> *Hansard* (HL) 28 November 1996, vol 576, WA 19.

with all the issues”, we ourselves had undertaken extensive work and consultation.<sup>10</sup> We very much hope that it will not be much longer before publication of the consultation paper, and that our report will then be accepted.

- 6.13 During 1996 the British Medical Association and the Law Society held two joint conferences on mental incapacity at which our recommendations for law reform were considered and strongly endorsed by a majority of participants.
- 6.14 The Scottish Law Commission published their report on incapable adults in September 1995.<sup>11</sup> Its general approach was similar to ours, although there were differences of detail, not least because of differences between our respective laws and differences in the responses on consultation. The Secretary of State announced in June 1996<sup>12</sup> that, having given careful consideration to their report, he had decided in favour of further consultation on the basis of these proposals and that he intended to issue a consultation paper in the summer of 1996. It had not been issued by the end of 1996. Meanwhile, the Scottish Law Commission have submitted their report on the interim and emergency powers available to public authorities for the protection of vulnerable adults, which is to be published in early 1997.

### **Adoption**

- 6.15 The Commission’s Family Law Team contributed substantially a few years ago to the legal research and analysis for the interdepartmental working group which in 1992 produced the Review of Adoption Law.<sup>13</sup> In 1993 the Government published a White Paper,<sup>14</sup> incorporating most of the recommendations made by the Review.
- 6.16 In March 1996 the Government published a consultative document,<sup>15</sup> which substantially consisted of a draft Adoption Bill. The draft Bill reflected the Government’s policy on adoption announced in the 1993 White Paper. The Government intended that publication of the Bill in advance of its introduction into Parliament would provide an opportunity for comment on the provisions of the draft Bill. There was a consultation period of three months.

<sup>10</sup> Mentally Incapacitated Adults and Decision-Making: An Overview (1993) Consultation Paper No 128; Mentally Incapacitated Adults and Decision-Making: A New Jurisdiction (1993) Consultation Paper No 128; Mentally Incapacitated Adults and Decision-Making: Medical Treatment and Research (1993) Consultation Paper No 129; and Mentally Incapacitated and Other Vulnerable Adults: Public Law Protection (1993) Consultation Paper No 130.

<sup>11</sup> (1995) Scot Law Com No 151.

<sup>12</sup> *Hansard*, (HC) 18 June 1996. vol 279, col 409W.

<sup>13</sup> Department of Health and Welsh Office, *Review of Adoption Law, Report to Ministers of an Interdepartmental Working Group* (1992).

<sup>14</sup> Department of Health et al, *Adoption: The Future* (1993) Cm 2283.

<sup>15</sup> Department of Health and Welsh Office, *Adoption - A Service for Children*, (1996).

# PART VII

## STATUTE LAW

### TEAM MEMBERS<sup>o</sup>

*Consolidation:* Chairman, Mr E G Bowman CB, Dr H J Caldwell, Miss J M Piesse, Mrs A M Bertlin, Mr E J Stell, Ms R J Lane

*Statute Law Revision (including Local Legislation):* Chairman, Mr C W Dymment, Mr R D Maitland, Mr A M Rowland, Ms A Hiscock

<sup>o</sup> as at the end of 1996

### CONSOLIDATION

- 7.1 The Law Commission has a duty to keep under review all the law with which it is concerned, with a view to reducing the number of separate enactments and generally simplifying and modernising the law. An important aspect of this function is consolidation. The need for this arises if over a period of time several statutes are enacted on the same subject, making it difficult to find out what the law is. The process of consolidation involves different enactments on the subject concerned being drawn together to form a rational structure in a single statute. This makes the law more comprehensible, both to those who apply it and to those affected by it. If anomalies are revealed in the process of consolidation, various devices (such as amendments recommended by the Law Commission) are available to rectify them. But, if a change needed to rectify an anomaly is of such a nature that it ought to be made by Parliament in the normal way, a paving Bill is required or else the anomaly has to be reproduced. The process of consolidation requires however the support and participation of the Department within whose responsibility the subject matter falls.
- 7.2 Five consolidation Bills based on work done by draftsmen at the Commission received Royal Assent during 1996. The Police Act 1996, the Industrial Tribunals Act 1996 and the Employment Rights Act 1996 were “straight” consolidations reproducing the existing law without amendments giving effect to Law Commission recommendations.<sup>1</sup> The Education Act 1996 and the School Inspections Act 1996 were consolidations with amendments to give effect to Law Commission recommendations; the Opposition Spokesman on Education revealed that he had been moved to compute both the total number of pages contained in these two Bills (835) and their total weight (1246 grams). Details of the Bills which received Royal Assent during 1996 are given in the following table:

<sup>1</sup> We are grateful to the Parliamentary Counsel Office for making it possible for further progress to be made on the latter two after the draftsman responsible for them returned to the Office from the Commission.

<b>Title of Act</b>	<b>Royal Assent</b>	<b>Chapter Number</b>	<b>Law Com No.</b>
Police Act 1996	22 May 1996	16	-
Industrial Tribunals Act 1996	22 May 1996	17	-
Employment Rights Act 1996	22 May 1996	18	-
Education Act 1996	24 July 1996	56	240
School Inspections Act 1996	24 July 1996	57	240

- 7.3 The Parliamentary Session beginning in 1996 will be a short one because of the General Election, and that means that any consolidation will have to be introduced earlier than would otherwise be the case. Since the end of the year, two consolidation Bills have in fact been introduced, one on nurses, midwives and health visitors<sup>2</sup> and one on justices of the peace.<sup>3</sup>
- 7.4 Work on other consolidation Bills had not been completed by the time those Bills had been introduced. For instance, it was hoped to introduce a consolidation Bill relating to the national health service in 1996 or early 1997. However, this hope has had to be abandoned because of the Government's proposal to amend the underlying law. It is now hoped to introduce this consolidation Bill in the first Session of the new Parliament.
- 7.5 Consolidation projects vary in size. Some projects require substantial work and these include a consolidation relating to financial services, on which work is continuing. We also have a very large project relating to the armed forces legislation. Work on this has resumed now that the Armed Forces Act 1996, which changes the underlying law, has been passed. We are mindful that the Select Committee of the House of Commons on the Armed Forces Bill (which became the 1996 Act) was critical of the failure to complete consolidation work begun earlier. The position regarding the consolidation of the sentencing powers of criminal courts is dealt with in para 4.22 above.
- 7.6 A number of other consolidations have been considered from time to time, and work has started on some. They have not made progress for various reasons, such as intervening amending legislation or lack of resources in departments to service them. This lack of resources continues to be a major factor in determining the progress of the consolidation programme as a whole.

<sup>2</sup> Introduced into the House of Lords on 13 January 1997.

<sup>3</sup> Introduced into the House of Lords on 28 January 1997.

## STATUTE LAW REVISION

### Introduction

- 7.7 Statute law revision (SLR) is the process whereby legislation which has lost any useful modern purpose is removed from the statute book. It is effected principally by means of Acts of Parliament specifically drafted for the purpose. Without a sustained effort to secure enactment of such legislation the “statute book” - a loose and non-technical term referring to all the legislation enacted by Parliaments of or within what is now the United Kingdom which is currently in force<sup>4</sup> - would become so cluttered as to be wholly unmanageable, with adverse consequences for those making or advising on it. Work on SLR in a recognisably modern form began in the mid-19th century and thirty-five Statute Law Revision Acts were passed between 1861 and 1908, which repealed some 21,000 enactments including 13,000 whole Acts. Thereafter the impetus slackened until 1948<sup>5</sup> when intensive work resumed. The series of SLR Acts passed between 1958-1966 were all drafted by Parliamentary Counsel; before then the work was done by the Statute Law Committee (since 1991 the Lord Chancellor’s Advisory Committee on Statute Law) and by the Statutory Publications Office.

### The role of the Commission

- 7.8 Since the enactment of the Law Commissions Act 1965 work on SLR has been undertaken by us jointly with the Scottish Law Commission.<sup>6</sup> Our distinctive contribution has been the development of new criteria for SLR which has permitted repeal work to be carried out more systematically and with a wider scope. Whereas the Acts passed up to 1966 were concerned only to repeal

<sup>4</sup> The “statute book” includes the following series of enactments:

*Series of Acts passed at Westminster*

(i) Acts of the Parliament of England	1235-1706
(ii) Acts of the Parliament of Great Britain	1707-1800
(iii) Acts of the Parliament of the United Kingdom	1800 -
(iv) Public Local and Personal Acts of the Parliaments of Great Britain and the United Kingdom	1797 -
(v) Private Acts of the Parliaments of England, Great Britain and the United Kingdom	1539 -

*Other series*

(vi) Acts of the Parliament of Scotland	1424-1707
(vii) Acts of the Parliament of Ireland	1310-1800
(viii) Acts of the Parliament of Northern Ireland	1921-1973
(ix) Church Assembly Measures and General Synod Measures	1920 -

<sup>5</sup> This was because of Parliamentary opposition, first expressed in the 1890s, to the process of consolidation based on the notion that it was impossible to consolidate anything which was put into different words: see Lord Simon of Glaisdale and JVD Webb, “Consolidation and Statute Law Revision” 1975 PL 285 at p.292. This halted all work on consolidation and until 1948 there was only one further Statute Law Revision Act, in 1927.

<sup>6</sup> Our statutory duty under s 3(1) of the Law Commissions Act 1965 is (so far as it refers to statute law revision) to keep the law under review with a view to its systematic development and reform, including in particular the repeal of obsolete and unnecessary enactments; and for that purpose to prepare from time to time comprehensive programmes of statute law revision and to undertake the preparation of draft Bills pursuant to such programmes.

enactments which fell within certain technical categories,<sup>7</sup> we advocated the repeal of enactments which no longer served any useful purpose or, as we termed it, were no longer of practical utility.<sup>8</sup> This concept implies the making of a value judgment and its introduction opened the way to a more thorough-going revision of statute law. The new type of Bill devised to take account of this development was the Statute Law (Repeals) Bill (SL(R) Bill), and the change was reflected and defined in the terms of reference of the Joint Committee on Consolidation Bills etc. which examines them.<sup>9</sup> The first SL(R) Bill was enacted in 1969, and between 1969 and 1995 we published fifteen draft Bills containing statute law repeals, each accompanied by a SLR (or equivalent) Report embracing recommendations by one or both Commissions. All the Bills have been enacted and have to date repealed nearly 4,300 enactments, including some 1,800 whole Acts.

### **What kinds of statutes are repealed?**

- 7.9 All the statutory provisions included in the repeal schedules of SL(R) Bills are, by definition, of no practical utility: they may (and often do) fall within one of the technical categories of statutes included in the old SLR Acts; but many also fall within the broader category which we introduced. Our SLR team examines in detail the history and purpose of each major enactment proposed for repeal to demonstrate, for the purposes of Parliamentary scrutiny, that there is nothing left of practical value in it. Beyond this, little generalisation is possible about the types of enactment repealed by modern SL(R) Acts. However, areas of current interest and controversy are unlikely to be productive of material of “no practical utility”; the most productive areas, in which the search for potential candidates for SL(R) Bills is concentrated, are those which interested parliament in the past and so generated substantial amounts of legislation, but which are no longer of current concern: legislative slums which - on proper examination - nobody now needs. But it is rarely the case that any subject-matter, taken as a whole, is without some current utility or a focus of concern on the part of particular interest groups. So it is essential to undertake careful sifting and drafting of enactments proposed for repeal together with comprehensive consultation with all those having an immediate interest in them.

### **Current work**

- 7.10 Since the enactment of the SL(R) Act 1995 in November 1995 the SLR team has planned and taken forward work on repeals intended for inclusion in a draft SL(R) Bill which we expect to be ready for introduction in 1998. SLR work encompasses both public general Acts and local legislation and the considerations which determine our approach to each are quite distinct.

<sup>7</sup> I.e. enactments which were obsolete, spent, superseded, expired, repealed in general terms, virtually repealed or unnecessary.

<sup>8</sup> See First and Second Programmes of Consolidation and Statute Law Revision (1966) Law Com No 2 and (1971) Law Com No 44.

<sup>9</sup> "Bills prepared by one of both of the Law Commissions to promote the reform of the statute law by the repeal, in accordance with Law Commission recommendations, of certain enactments which (except so far as their effect is preserved) are no longer of practical utility, whether or not they make other provision in connection with the repeal of those enactments".



### *Public general legislation*

- 7.11 An efficient repeal programme is needed here not only because the disposal of statutory waste is desirable in itself, but because the accumulation of such waste creates two quite distinct problems: it makes it increasingly difficult for practitioners to advise on the law on certain topics and increasingly expensive for them to purchase a complete statute law service. This redounds to the disadvantage not only of practitioners themselves but also of those, including the taxpayer, who pay for their services. In the programme of work for the next SL(R) Bill the team is therefore paying particular attention to areas of law where it appears that major repeal projects would have a significant effect in reducing the volume of statute law which has had to be transferred to the official Statute Law Database or reproduced in commercial publications, of which *Halsbury's Statutes* provides an obvious yardstick. So the "Halsbury count" has become as significant a criterion of results as the number of items in the repeal schedule of the Bill.<sup>10</sup> Of course, whether an Act is reproduced in *Halsbury* should properly be only one factor in deciding that attention should be directed towards it for SLR purposes, because what is omitted from *Halsbury* may, from the viewpoint of SLR, be as important as what is included. But where there are competing priorities in choosing areas of work upon which to concentrate - and also where prolonged and detailed work by the team may well be necessary in order to secure results - we think it right that the contemporary needs of practitioners and their clients should be borne in mind in relation to our SLR work. Significant progress has been made by the team during 1996 in securing agreement to the repeal of some major items of legislation; we expect to propose their repeal in our next draft SL(R) Bill.

### *Local and personal Acts*

- 7.12 Our work on the repeal of other legislation, in particular of local Acts, has always been subject to the peculiar difficulty that the content of the "statute book" has in this context never been adequately identified. Thus our repeal work has necessarily had to be accompanied, indeed in large measure preceded, by extensive research to map out the terrain in detail. We report first on a significant milestone in this work before referring to our programme of repeals.

#### **(i) The chronological table of local legislation**

- 7.13 In July 1996 HMSO published our Chronological Table of Local Legislation 1797-1994 (the Table), a four-volume work of 2,681 pages. This was the culmination of over twenty years' work undertaken by members of the SLR team, most notably by our specialist on local legislation, Anthony Rowland, closely supervising a number of researchers. Work on the Table was authorised in 1974 by the Statute Law Committee and has continued throughout the period. During 1996 the team undertook the final checking of the printed text, compiled the introductory material and drafted our Report on the Chronological Table of Local Legislation.<sup>11</sup>

<sup>10</sup> To take an obvious example, nearly two hundred pages of the current edition of *Halsbury's Statutes*, vol.41, were made redundant by the repeal of most of the Short Titles Act 1896 by the SL(R) Act 1995, s 1 and Sch 1, Pt IV.

<sup>11</sup> Law Com No 241, Scot Law Com No 155.

THE CHRONOLOGICAL TABLE OF LOCAL LEGISLATION – LAUNCH EVENT AT THE HOUSE OF LORDS: JULY 1996

- 7.14 Since 1870 the Statutory Publications Office's Chronological Table of the Statutes, published annually since 1898, has chronicled which public general Acts are in force, which have been repealed or amended (and how amended) and by which enactments these changes have been effected. No similar work has been available until now covering the 26,500 local Acts passed since 1797. Hitherto the very identification of this legislation has therefore not been easy, and the rights and obligations arising under particular Acts have been obscure, a matter of particular concern to, for example, public utility companies, many of whose rights and duties are buried in local legislation.
- 7.15 The publication of the Table transformed the position by providing details of local Acts which form a precise parallel to the Chronological Table of the Statutes.<sup>12</sup> Our Report on the Table, published simultaneously with it, outlines the functions and history of local legislation and shows how the absence of any systematic compilation of it has led to uncertainty in the law. With the ease of identification now provided by the Table, the Report commits us to continuing our programme of repeals in the field of local legislation, but also recommends greater efforts on the part of the Departments to rationalise and repeal the many redundant local Acts.
- 7.16 While it was never envisaged that we ourselves would keep the Table up to date, we have naturally been concerned to ensure the continued utility of this vast project for the future. We are glad to report that negotiations with HMSO and the

<sup>12</sup> The Table is complemented by the Index to the Local and Personal Acts 1850-1995, compiled by Rosemary Devine, Examiner of Private Acts, House of Lords, which was published simultaneously.

Stationery Office are likely to ensure that the Table is both kept up to date and made available in an alternative electronic format.

**(ii) The chronological table of private legislation**

- 7.17 The work authorised by the Statute Law Committee in 1974 extended also to the compilation of a Table of private (since 1948, personal) Acts, which commenced as a separate series in 1539, dealing principally with marriage, divorce, settlements and also local enclosures. There are some 10,000 such Acts, many of them spent or obsolete, and research on them was completed some years ago. During the last year the team has made substantial progress in computerising the data and it is expected that work on this Table will be substantially complete in 1997. This Table will be far shorter and substantially less important than the Chronological Table of Local Legislation. Nevertheless, our objective is to secure publication in a format similar to that Table.

**(iii) Repeal of local legislation**

- 7.18 As we noted in paragraph 7.15, our view is that the Chronological Table of Local Legislation provides a tool and a stimulus for efforts to rationalise and repeal redundant local legislation. Large-scale repeals of such legislation were effected by the SL(R) Acts 1989<sup>13</sup> and 1995.<sup>14</sup> Those repeals, and our team's current work on the repeal of local Acts, are a legacy of the partial failure of a scheme<sup>15</sup> authorised by section 262(9) of the Local Government Act 1972; this subsection provided that local enactments to which it applied<sup>16</sup> should "cease to have effect" by a specified date, several times extended but finally expiring at the end of 1987. Under the scheme local authorities were to review this legislation, choosing what they still needed and identifying what they did not need. They were to promote Bills re-enacting the former and repealing in specific terms the latter. In the event, while some authorities did what was intended, others merely promoted Bills specifying what they needed, leaving the rest to be repealed in general terms, or failed to promote legislation at all. Consequently a vast number of redundant local enactments has remained unrepealed, or has been repealed in general terms only without specific identification.
- 7.19 Research carried out for the Commission between 1985-1995 identified a large number of these local enactments which awaited specific repeal. As noted above, instalments of these have already been repealed by two SL(R) Acts; but on our present resources the work of processing the remaining research already done will take many more years. Furthermore, much additional research will be needed to ascertain all redundant local legislation left in place as a consequence of the partial failure of the 1974 scheme. The team's immediate efforts are being concentrated on processing some of the completed research with a view to incorporating a large-

<sup>13</sup> See Sch 1, Pt IX.

<sup>14</sup> See Sch 1, Pt I.

<sup>15</sup> The scheme for England and Wales was set out in DoE Circular 14/74 and a circular letter dated 10 May 1974.

<sup>16</sup> The cesser applied in general to local legislation promoted or applied for by local authorities outside Greater London which was in force immediately before 1 April 1974.

scale repeals project covering local legislation relating to Hereford and Worcester in the next SL(R) Bill. This processing, which involves extended consultation with the local authorities involved, is not expected to be completed until the latter part of 1997.

## **PART VIII**

### **EXTERNAL RELATIONS**

- 8.1 This report has already referred to some of the many contacts we have with those outside the Commission.<sup>1</sup> This Part refers to some of the types of contact which we have. We have discussions with a wide range of organisations and individuals during many of our projects. Naturally, they are well aware of our independence, but their contribution to our work is often inestimable. This contact often runs from the time when we are considering possible future law reform projects, and then from the early stages of the law reform process, when we are assessing the difficulties in the relevant field of law, through the various stages of the project. It often continues through until we are finalising our report.

#### **Responses to consultation**

- 8.2 Following publication of our consultation papers, as in previous years we received a considerable number of responses to them from individuals, professional bodies, academics and others. For instance, there were over 150 responses to each of our consultation papers on damages.<sup>2</sup> We consider these responses most carefully and take the views expressed into account. We would like to pay tribute to the time and effort consultees put into their responses. Their contributions play an essential part in the Commission's process.

#### **Consultants and research**

- 8.3 We often appoint a legal or other consultant to assist us on part of a project, perhaps because of his or her particular expertise in the field of law. On occasion we have socio-legal or other research undertaken on a project, when appropriate and feasible.<sup>3</sup> In recent years we have been represented at the annual conference of the Socio-Legal Studies Association.

#### **Relations with Ministers and Government departments**

- 8.4 We have referred above to our relations with Government.<sup>4</sup> We have a regular programme of meetings with the Lord Chancellor and with his senior officials; with the Home Secretary and with senior officials in his Department; with senior officials in the Department of Trade and Industry; and - a new feature - we are now starting such meetings with senior officials in the Department of the Environment.
- 8.5 We also have a range of contacts with the Law Officers and those in senior positions in other departments and in organisations such as HM Land Registry,

<sup>1</sup> Eg, paras 1.29, 3.17, 4.20, 5.2, 5.8, 5.10 and 5.12

<sup>2</sup> See paras 2.7 and 2.12 above.

<sup>3</sup> See paras 2.10 and 4.14 above.

<sup>4</sup> Paras 1.8 - 1.9.

the Treasury Solicitor's Department,<sup>5</sup> the Crown Prosecution Service and the Serious Fraud Office.

- 8.6 Both Commissioners and staff have frequent contact with the Lord Chancellor's Department, who are our sponsoring department. We are especially grateful to the many officials there for their assistance. In 1996 we held what has now become an annual, albeit brief, residential conference with very senior officials of the Lord Chancellor's Department. This was again an important occasion and provided an excellent forum for discussion of matters of mutual interest, without the distraction of the usual pressure of daily business.

### **Relations with Parliament**

- 8.7 We are most grateful to the members of each House who have introduced the following Bills of ours into Parliament. Lord Goff of Chieveley introduced the Theft (Amendment) Bill into the House of Lords.<sup>6</sup> Lord Browne-Wilkinson took the Land Registration Bill through the House of Lords, and Michael Stephen MP is steering it through the House of Commons.<sup>7</sup> Doug Hoyle MP introduced the Law Reform (Year and a Day Rule) into the House of Commons.<sup>8</sup> We have also maintained our other contacts with Parliament. In addition, the Chairman spoke to the Bar Parliamentary Group and to the Cross-Bench Peers.

### **Relations with law reform and other bodies elsewhere**

- 8.8 The Scottish Law Commission was established by the same statute as ourselves. We work closely with them in a number of ways. For example, some projects are undertaken jointly or in close consultation. For many others, each Commission finds it helpful from time to time to contact the other, perhaps to learn from its experience. We were pleased to receive a visit from the new Chairman of the Scottish Law Commission,<sup>9</sup> which our Chairman reciprocated. Our Secretary also visited the Scottish Law Commission and had useful informal discussions with the Chairman and with the Secretary and Secretary designate. One of the Commissioners, Charles Harpum, attended a one-day conference in Edinburgh in October on Constructive Trusts, organised jointly by the Scottish Law Commission and the Universities of Edinburgh and Strathclyde, and chaired by Lord Gill.<sup>10</sup>
- 8.9 We are often in contact also with the Law Reform Advisory Committee for Northern Ireland, as there are frequently matters of mutual interest. We were pleased to receive a visit from its Chairman.<sup>11</sup> He also attended our seminar on

<sup>5</sup> See para 1.35 above.

<sup>6</sup> See para 4.4 above.

<sup>7</sup> Paras 1.17 and 5.1 - 5.4 above.

<sup>8</sup> Para 1.14 above.

<sup>9</sup> See para 1.33 above.

<sup>10</sup> He delivered a paper, "The Uses and Abuses of Constructive Trusts: the Experience in England and Wales", which will be published in the *Edinburgh Law Review* later in 1997.

<sup>11</sup> See para 1.32.

hearsay in criminal proceedings<sup>12</sup> and a meeting on trustee investment.<sup>13</sup> As usual, we were pleased to welcome for fruitful discussion the visitors from overseas who are listed in Appendix D, including representatives of seven overseas law reform commissions or equivalent bodies. We also received a visit from six Nuffield Fellows from different Commonwealth countries who were studying at the Institute of Advanced Legal Studies.

- 8.10 This report has referred earlier to the particular opportunity which our Chairman had to meet with those from other law reform agencies this year.<sup>14</sup> One Commissioner, Charles Harpum (together with Professor Malcolm Grant of Cambridge University), attended a workshop on 25 - 26 March in Dar es salaam on the draft Tanzanian Land Code.<sup>15</sup> This was organised by the British Council. In addition, the Secretary participated in a seminar in Chile about The Effectiveness of the Law, and particularly how to achieve reform and consolidation of existing law. It was held in the Chamber of Deputies and he was invited by the Chilean Government, with the support of the Foreign and Commonwealth Office. There was particular interest in the possibility of establishing a body with a similar purpose to the Law Commission's.

REPRESENTATIVES OF COMMONWEALTH LAW REFORM AGENCIES ATTENDING  
THE 11TH COMMONWEALTH LAW CONFERENCE – VANCOUVER: AUGUST 1996  
(PHOTOGRAPH REPRODUCED COURTESY OF LAW REFORM COMMISSION OF BRITISH COLUMBIA)

<sup>12</sup> Para 4.20 above.

<sup>13</sup> Para 5.12 above.

<sup>14</sup> Para 1.29 above.

<sup>15</sup> This was combined with an address by Charles Harpum to the Tanganyika Bar Association on 22 March on the role of the Law Commission.

### **Other contacts**

- 8.11 Our contacts with the judiciary are particularly beneficial to us. We have continued to have very worthwhile contacts with the Law Society, the Bar Council, and the Society of Public Teachers of Law, and with a good number of those whom they each represent. We had our annual meeting with each of those bodies. We had assistance from a wide range of other individuals and organisations, such as the Financial Law Panel and the Council of Mortgage Lenders.
- 8.12 Besides talks recorded elsewhere in this report,<sup>16</sup> the Chairman or other Commissioners spoke this year to, among others, the Annual Conference of the Society of Public Teachers of Law and the Law Society's Oxford Conference. Mr Harpum addressed the SPTL Annual Conference in Cambridge in September on our Report, *Landlord and Tenant: Responsibility for State and Condition of Property*<sup>17</sup>; and he gave a paper at an SPTL Seminar, "Fiduciaries in Context", held in September at All Souls College, Oxford, and chaired by Lord Browne-Wilkinson.<sup>18</sup> Mr Silber also gave an address at the SPTL Annual Conference, and to a meeting of Home Office lawyers. Our senior draftsman, Mr Bowman, also spoke at the SPTL Annual Conference. Commissioners have considerable contact with the media and often appear on radio and television to talk about our work. The Chairman spoke to a large number of members of the Government Legal Service, and also to a meeting of Government lawyers in the Department of Social Security. The Secretary has also spoken at meetings about the work of the Government lawyers at the Commission.

### **Publications**

- 8.13 Most of our publications are law reform consultation papers or reports, or consolidation reports, and have been referred to in this report. We also publish, first, "Working for Better Law", a small booklet about our work for the ordinary reader and, secondly, a complete list of all our publications since our establishment, including related legislation: a copy may be obtained from our office without charge. In addition, and importantly, we publish "*Law Under Review*". This is a quarterly bulletin which we have now been publishing for 10 years. It gives details of Government or Government-sponsored law reform projects in this or other countries, besides listing our reports which are awaiting implementation. The latest edition summarises over 150 current or recent projects. We are pleased that its circulation is increasing. New subscribers are welcome.

<sup>16</sup> See paras 1.29, 2.4 and 2.18 above.

<sup>17</sup> (1996) Law Com No 238.

<sup>18</sup> The paper was entitled "Fiduciary Obligations and Fiduciary Powers - Where are We Going" and is to be published in 1997 by Oxford University Press in a volume edited by Professor Peter Birks.



## PART IX

# STAFF AND ADMINISTRATION

### Staff

- 9.1 We are pleased to acknowledge the skill and dedication of the Commission's staff. Each has a vital part to play in the overall work of the Commission. We had a number of changes in our personnel during the year, as is usual in an organisation such as ours. The most notable was the retirement of one long-standing lawyer (see para 1.36 above). We also saw the departure, following their term of secondment, of several Parliamentary Counsel; and the arrival of their successors, under the leadership of Geoffrey Bowman CB as Senior Draftsman at the Commission.<sup>1</sup>

#### *(i) Legal staff*

- 9.2 The range of legal expertise among our staff is wide, quite apart from the experience they have had in practice, the Civil Service or academic life. We have the great benefit of having Parliamentary Counsel working with us, mainly on secondment from their main office. We have an invaluable team of Government Legal Service lawyers. We also have a team of bright and ever-helpful research assistants, generally recruited to work with us for a year before moving on to the next stage of their legal or academic careers. The names of the legal staff are set out at the head of Parts II to VII above.

#### *(ii) Non-legal staff*

- 9.3 The types of work undertaken by the Commission's Library, information technology, secretarial and administrative staff is extremely varied - for example: considerable work is involved in issuing 12 publications, as we did in 1996; the recruitment and selection of 26 new staff during the year, including 14 research assistants, is a substantial commitment,<sup>2</sup> especially when taken with other personnel matters; our new computer system is now well-established, under the care of the systems manager, a new post; and our accommodation needs continue to grow and to become more complex.

#### *(iii) Training and Investors in People*

- 9.4 There is a firm commitment to staff training and development as a source of benefit both for the individuals concerned, whether in their current jobs or in their future careers, and for the Commission. Managers and staff are encouraged to take advantage of the many training opportunities which are available to them, whether by way of formal courses or of practical experience. The Law Commission are also playing a full part together with the Lord Chancellor's Department in working towards Investors in People accreditation, a national

<sup>1</sup> We referred in our last Annual Report to the CB which was awarded to his predecessor, Peter Knowles, in the 1996 New Year's Honours List: Thirtieth Annual Report 1996 (1996), Law Com No 239, para 1.32.

<sup>2</sup> The Secretary and other staff receive considerable assistance from the Lord Chancellor's Department in the recruitment and selection of staff.

quality award given to organisations whose staff management and development practices meet a rigorous, practical standard.

### **Library**

- 9.5 This year has seen a number of developments in our Library service. Electronic sources of information have been introduced to assist with research, notably the “Lexis” and “Lawtel” on-line legal databases. In addition, the Library has been reorganised to make even more effective use of the restricted floor space. We continue to be grateful to many other Libraries, in particular those of the Supreme Court, the Headquarters of the Lord Chancellor’s Department and the Institute of Advanced Legal Studies, for their assistance in providing materials not held here.

### **Information technology**

- 9.6 The Commission’s new computer network is now fully operational. A transition from DOS to Windows-based software has taken place, involving a good deal of work in converting the Commission’s existing drafting tools (macros, templates, etc) to this new environment.

### **Public records**

- 9.7 Under the provisions of the Public Records Acts, from January 1997 most Law Commission papers up to 1966 are available to the public under the thirty year rule. Towards the end of 1996 all published reports, consultation papers and registry files meriting permanent preservation were transferred to the Public Records Office in Kew for public inspection. Much hard work had been done in completing this process.

### **The cost of the Commission**

- 9.8 There is a summary of the cost of the Commission at Appendix F. The Commission has far from unlimited funds available in any year. It has to gear its work in part to the funds which are available. As we anticipated in last year’s report,<sup>3</sup> during the financial year 1996/97 there has been a reduction in the Commission’s resources in line with other reductions in public expenditure. Likewise, there is to be a further reduction in the financial year 1997/98, in line with reductions throughout the Lord Chancellor’s Department and organisations similarly funded by the Lord Chancellor’s Department.

*(Signed)* MARY ARDEN, *Chairman*  
ANDREW BURROWS  
DIANA FABER  
CHARLES HARPUM  
STEPHEN SILBER

MICHAEL SAYERS, *Secretary*

*31 January 1997*

<sup>3</sup> Thirtieth Annual Report 1995 (1996) Law Com No 239, para 1.33.

## **APPENDIX A**

### **THE LAW COMMISSION'S ROLE AND METHODS**

The Law Commission has now been in operation for 31 years. It was established by the Law Commissions Act 1965 as an independent body, to review the law of England and Wales with a view to its systematic development and reform. A number of specific types of reform were mentioned:

- ◆ codification
- ◆ removal of anomalies
- ◆ repeal of obsolete and unnecessary enactments
- ◆ consolidation and
- ◆ generally the simplification and modernisation of the law.

Law reform projects may be included in a programme of work submitted to the Lord Chancellor, or be referred to the Commission usually by a Government department. The current programme of work is the Sixth Programme, approved in 1995. The Commission initiates or accepts a law reform project according to its assessment of the relevant considerations, the most significant of which are the importance of the issues, the availability of resources in terms of both expertise and funding and the suitability of the issues to be dealt with by the Commission. The Commission's general aims for law reform are to make the law simpler, fairer, more modern and cheaper to use.

The Commission's work is based on thorough research and analysis of case law, legislation, academic and other writing, law reports and other relevant sources of information both in the United Kingdom and overseas. It normally publishes a consultation paper inviting views before it finalises its recommendations. The consultation paper describes the present law and its shortcomings and sets out possible options for reform. The views expressed in response by consultees are analysed and considered very carefully.

The Commission's final recommendations are set out in a report which contains a draft Bill where the recommendations involve primary legislation. The report is laid before Parliament. It is then for the Government to decide whether it accepts the recommendations and to introduce any necessary Bill in Parliament, unless a Private Member or Peer does so. After publication of a report the Commission often gives further assistance to Government Ministers and departments, so as to ensure that the best value is obtained from the effort and resources devoted to the project by the Commission and others.

The Commission also has the task of consolidating statute law, substituting one Act, or a small group of Acts, for all the existing statutory provisions in several different Acts. In addition, the Commission prepares legislation to repeal statutes which are obsolete or unnecessary.

# APPENDIX B

## THE LAW COMMISSION'S IMPLEMENTED REPORTS SINCE 1984

Publications which have been laid before Parliament under section 3(2) of the Law Commissions Act 1965 and publications which have been presented to Parliament as Command Papers, excluding reports on consolidation, showing implementation. The date shows the year in which the report was published. Those marked + are the result of a reference under section 3(1)(e) of the Act.

Report Law Com No.	Title	Implementing Legislation
<b>1984</b>		
132	Family Law: Declarations in Family Matters (HC 263)	Family Law Act 1986 (c 55), Part III.
134	Law of Contract: Minors' Contracts (HC 494)	Minors' Contracts Act 1987 (c 13).
135	Statute Law Revision: Eleventh Report: Obsolete Provisions in the Companies Act 1948 (Cmnd 9236)	Companies Consolidation (Consequential Provisions) Act 1985 (c 9).
137	Private International Law: Recognition of Foreign Nullity Decrees and Related Matters (Joint Report - Scot Law Com No 88) (Cmnd 9347)	Family Law Act 1986 (c 55), Part II.
<b>1985</b>		
138+	Family Law: Conflicts of Jurisdiction Affecting the Custody of Children (Joint Report - Scot Law Com No 91) (Cmnd 9419)	Family Law Act 1986 (c 55), Part I.
141	Codification of the Law of Landlord and Tenant: Covenants Restricting Dispositions, Alterations and Change of User (HC 278)	In part by Landlord and Tenant Act 1988 (c 26).
146	Private International Law: Polygamous Marriages. Capacity to Contract a Polygamous Marriage and Related Issues (Joint Report - Scot Law Com No 96) (Cmnd 9595)	Private International Law (Miscellaneous Provisions) 1995 (c 42).
147	Criminal Law: Report on Poison-Pen Letters (HC 519)	Malicious Communications Act 1988 (c 27).
148	Property Law: Second Report on Land Registration: Inspection of the Register (HC 551)	Land Registration Act 1988 (c 3).
150	Statute Law Revision: Twelfth Report (Joint Report - Scot Law Com No 99) (Cmnd 9648)	Statute Law (Repeals) Act 1986 (c 12); Patents, Designs and Marks Act 1986 (c 39).
151+	Rights of Access to Neighbouring Land (Cmnd 9692)	Access to Neighbouring Land Act 1992 (c 23).
<b>1986</b>		
157	Family Law: Illegitimacy (Second Report) (Cmnd 9913)	Family Law Reform Act 1987 (c 42).
<b>1987</b>		
160	Sale and Supply of Goods (Joint Report - Scot Law Com No 104) (Cm 137)	Sale and Supply of Goods Act 1994 (c 35)
161	Leasehold Conveyancing (HC 360)	Landlord and Tenant Act 1988 (c 26).
163	Deeds and Escrows (HC 1)	Law of Property (Miscellaneous Provisions) Act 1989 (c 34).
164	Transfer of Land: Formalities for Contracts for Sale etc of Land (HC 2)	Law of Property. (Miscellaneous Provisions) Act 1989 (c 34).
165	Private International Law: Choice of Law Rules in Marriage (Joint Report - Scot Law Com No 105) (HC 3).	Foreign Marriage (Amendment) Act 1988 (c 44).
166	Transfer of Land: The Rule in <i>Bain v Fothergill</i> (Cm 192)	Law of Property (Miscellaneous Provisions) Act 1989 (c 34).

	<b>1988</b>	
172	Family Law: Review of Child Law: Guardianship and Custody (HC 594)	Children Act 1989 (c 41).
174	Landlord and Tenant Law: Privity of Contract and Estate (HC 8)	Landlord and Tenant (Covenants) Act 1995 (c 30).
	<b>1989</b>	
179	Statute Law Revision: Thirteenth Report (Joint Report - Scot Law Com No 117) (Cm 671)	Statute Law (Repeals) Act 1989 (c 43).
180	Criminal Law: Jurisdiction over Offences of Fraud and Dishonesty with a Foreign Element (HC 318)	Criminal Justice Act 1993 (c 36) Part I.
181	Transfer of Land: Trusts of Land (HC 391)	Trusts of Land and Appointment of Trustees Act 1996 (c 47)
184	Property Law: Title on Death (Cm 777)	Law of Property (Miscellaneous Provisions) Act 1994 (c 36)
186	Criminal Law: Computer Misuse (Cm 819)	Computer Misuse Act 1990 (c 18).
187	Family Law: Distribution on Intestacy (HC 60)	Law Reform (Succession) Act 1995 (c 41).
188	Transfer of Land: Overreaching: Beneficiaries in Occupation (HC 61)	Trusts of Land and Appointment of Trustees Act 1996 (c 47).
	<b>1990</b>	
193	Private International Law: Choice of Law in Tort and Delict (Joint Report - Scot Law Com No 129) (HC 65)	Private International Law (Miscellaneous Provisions) Act 1995 (c 42).
	<b>1991</b>	
196	Rights of Suit in Respect of Carriage of Goods by Sea (Joint Report - Scot Law Com No 130) (HC 250)	Carriage of Goods by Sea Act 1992 (c 50).
199	Transfer of Land: Implied Covenants for Title (HC 437)	Law of Property (Miscellaneous Provisions) Act 1994 (c 36)
202+	Criminal Law: Corroboration of Evidence in Criminal Trials (Cm 1620)	Criminal Justice and Public Order Act 1994 (c 33).
	<b>1992</b>	
205	Criminal Law: Rape within Marriage (HC 167)	Criminal Justice and Public Order Act 1994 (c 33).
207	Family Law: Domestic Violence and Occupation of the Family Home (HC 1)	Family Law Act 1996 (c 27).
	<b>1993</b>	
211	Statute Law Revision: Fourteenth Report (Joint Report - Scot Law Com No 140) (Cm 2176)	Statute Law (Repeals) Act 1993 (c 50).
215	Sale of Goods Forming Part of a Bulk (Joint Report - Scot Law Com No 145) (HC 807)	Sale of Goods (Amendment) Act 1995 (c 28).
216	The Hearsay Rule in Civil Proceedings (Cm 2321)	Civil Evidence Act 1995 (c 38).
217	Family Law: The Effect of Divorce on Wills	Law Reform (Succession) Act 1995 (c 41)
	<b>1994</b>	
224	Structured Settlements and Interim and Provisional Damages (Cm 2646)	Finance Act 1995 (c 4) - in part; Civil Evidence Act 1995 (c 38) - in part; Damages Act 1996 (c 48) - in part.
228	Criminal Law: Conspiracy to Defraud (HC 11)	Theft (Amendment) Act 1996 (c 62).
	<b>1995</b>	
230	Legislating the Criminal Code: The Year and a Day Rule in Homicide (HC 183)	Law Reform (Year and a Day Rule) Act 1996 (c 19).
233	Statute Law Revision: Fifteenth Report (Joint Report - Scot Law Com No 150) (Cm 2784)	Statute Law (Repeals) Act 1995 (c 44).
	<b>1996</b>	
243	Offences of Dishonesty: Money Transfers (HC 690)	Theft (Amendment) Act 1996 (c 62).

## APPENDIX C

### LAW COMMISSION REPORTS AWAITING IMPLEMENTATION

Of all the Law Commission's law reform reports, 112 have been implemented in full or in part, 16 have been expressly or impliedly rejected, and 19, which are listed below, remain outstanding.<sup>1</sup> 5 of these, marked \* , have been expressly accepted by the Government, subject to Parliamentary time being available.

<i>Year</i>	<i>No</i>	
1981	110	* Breach of Confidence
1984	127 <sup>2</sup>	* Positive and Restrictive Covenants
1985	152	Liability for Chancel Repairs
1989	178	* Compensation for Tenants' Improvements
1991	194	Distress for Rent
	204	Land Mortgages
1992	208	* Business Tenancies: Landlord and Tenant Act 1954, Part II
1993	218	Legislating the Criminal Code: 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
	226	Judicial Review and Statutory Appeals
	227	Restitution for Mistake of Law: Ultra Vires Public Authority Receipts and Payments
1995	229	Intoxication and Criminal Liability
	231	Mental Incapacity
1996	237	Involuntary Manslaughter
	238	Landlord and Tenant: Responsibility for State and Condition of Property
	242	Privity of Contract: Contracts for the Benefit of Third Parties

<sup>1</sup> The Land Registration Bill, from one further report (Law Com No 235), was in Parliament at the end of 1996.

<sup>2</sup> The Government has said that, following implementation of this report, it would keep under review (HL) the report on Transfer of Land: Obsolete Restrictive Covenants (Law Com No 201): *Hansard*, 17 October 1995, vol 566, col WA91.

## APPENDIX D

### VISITORS FROM OVERSEAS

Among the visitors to the Law Commission during 1996 were:

<i>Albania</i>	Mr Albert Bejo (Director of Legal and Consular Affairs, Ministry of Foreign Affairs)
<i>Australia</i>	Professor Michael Chesterman (Commissioner, New South Wales Law Reform Commission) The Hon Justice Paul de Jersey (Chairman, Queensland Law Reform Commission) Dr David Kinley (Australian Law Reform Commission) The Hon Justice Williams (Former Chairman, Queensland Law Reform Commission)
<i>Bangladesh</i>	Mr Syed Ishtaiq Ahmed (Senior Advocate, Supreme Court of Bangladesh)
<i>Chile</i>	Senor Luis Bates (President of the Council for the Defence of the State)
<i>Denmark</i>	Professor Ingrid Lund-Anderson (Faculty of Law, Aarhus University)
<i>Israel</i>	Professor Joshua Weiseman (Hebrew University of Jerusalem)
<i>Kenya</i>	Justice Joyce Alnoch (High Court Judge)
<i>Kuwait</i>	Dr Ayoub Khalid Al-Ayoub (Secretary-General, High Consultative Commission relating to Islamic Sharia Law)
<i>Namibia</i>	Advocate R V Rukoro MP (Attorney-General) B P Gawanas (Chairperson, Law Reform and Development Commission) Mr H L Awaseb (Principal Legal Officer, Attorney-General's Chambers)
<i>Nepal</i>	Ms S Pradhan (Advocate, Legal Aid and Consultancy Centre, Kathmandu)
<i>New Zealand</i>	The Hon Justice Baragwanath (President, New Zealand Law Commission)
<i>Sri Lanka</i>	Dr Jayatissa de Costa (Commissioner, Law Commission of Sri Lanka)
<i>Trinidad and Tobago</i>	Mr Michael de la Bastide (Chief Justice, Port of Spain)
<i>Uganda</i>	Mr Edgar Agaba (Legal Officer, Ugandan Law Reform Commission)
<i>Yemen</i>	Judge Nageeb Shamiry
<i>Zimbabwe</i>	Mr Yunus Omerjee (Permanent Secretary, Ministry of Justice)

# **APPENDIX E**

## **ADMINISTRATIVE STAFF \***

### **Assistant Secretary**

Mr C K Porter

### **Personnel Officer**

Miss L A Collet

### **Library Services**

Ms J Cheeseman

Miss C O'Connell

Ms A Deverell

### **Chairman's Clerk**

Mr A Parkinson MBE

### **Computer Systems**

Mr G Ellis

Mrs N L Spence

### **Editorial Team**

Mr D R Leighton

Miss J A Griffiths

### **Secretarial Support**

Mrs D E Munford

Miss C P Cawe

Mrs H C McFarlane

Miss A J Meager

Ms J R Samuel

### **Typing Support**

Mrs M M Blenman

### **Accommodation Officer**

Ms A L Peries

### **Accommodation Services**

Miss R Mabbs

Mr J M Davies

Mrs P J Wickers

### **Registry**

Mr T D Cronin

Ms Y Vaughan

\* As at the end of 1996



## APPENDIX F

### THE COST OF THE COMMISSION

The Commission's resources are made available through the Lord Chancellor's Department in accordance with section 5 of the Law Commissions Act 1965. The cost of most items (in particular accommodation, salaries, superannuation and Headquarters' overheads) is not determined by the Commission. The figures given are those for a calendar year and cannot be related to those in Supply Estimates and Appropriation Accounts.

	1996		1995	
	£000	£000	£000	£000
Accommodation charges <sup>1</sup>	763.1		830.3	
Headquarters' overheads <sup>2</sup>	<u>501.0</u>		<u>790.5</u>	
		1,264.1		1,520.7
Salaries and pensions of Commissioners <sup>3</sup>	458.7 <sup>4</sup>		375.5 <sup>4</sup>	
Salaries of legal staff and secondees and payments to consultants <sup>3</sup>	1,407.0		1,504.5	
Salaries of non-legal staff <sup>3</sup>	<u>424.5</u>		<u>369.8</u>	
		2,290.2		2,249.8
Printing and publishing; supply of information technology; office equipment and books	265.7		557.1	
Telephone and postage	34.6		34.5	
Travel and subsistence	10.6		6.5	
Miscellaneous (including recruitment)	13.8		6.8	
Entertainment	<u>1.4</u>		<u>3.0</u>	
		326.1		607.9
<b>TOTAL</b>		<u>3,880.4</u>		<u>4,478.5</u>

1 This figure includes a component relating to ground rent, rates, utilities (gas, water etc) and all works supplied by the Lord Chancellor's Department.

2 This is the portion of the total cost of the Lord Chancellor's Department Headquarters notionally attributed to the Law Commission. The portion attributed to offices such as the Law Commission is proportional to the number of staff paid as established staff, including research assistants.

3 These salaries include ERNIC and Superannuation.

4 These figures also include lump sums paid on retirement.