

THE LAW COMMISSION

(LAW COM No 288)

ANNUAL REPORT 2003/04

The Thirty-eighth Annual Report of the Law Commission

*Laid before Parliament by the Secretary of State
for Constitutional Affairs and Lord Chancellor pursuant to
section 3(3) of the Law Commissions Act 1965*

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THE LAW COMMISSION

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

The Commissioners are: The Honourable Mr Justice Toulson, *Chairman*
Professor Hugh Beale QC
Mr Stuart Bridge
Professor Martin Partington CBE
Judge Alan Wilkie QC

The Chief Executive of the Law Commission is Mr Steve Humphreys and its offices are at Conquest House, 37-38 John Street, Theobalds Road, London, WC1N 2BQ.

The terms of this report were agreed on 15 June 2004.

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

THE LAW COMMISSION
ANNUAL REPORT 2003/04

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ANNUAL REPORT 2003/04

To the Right Honourable the Lord Falconer of Thoroton, Secretary of State for Constitutional Affairs and Lord Chancellor

Not many people outside the law know what the Law Commission does. This is a pity because it is a matter of real public importance that laws which affect so many aspects of people's lives should be as clear, well considered and accessible as possible. Our function is to examine areas of the law which are unsatisfactory and to make recommendations for their reform and simplification.

During this year we have produced reports which cover a wide variety of areas. These are described in further detail in this report.

A key to our work is the consultation process. We never produce recommendations for law reform without first testing our ideas by a thorough process of public consultation. We are very grateful to all who have given their time to help us in our work by responding to our consultation papers or attending seminars. Quite simply, they have made an indispensable contribution to our work.



We are keen to engage not only with professionals in the legal world but with the public and voluntary sector. During the year we have had helpful meetings with the National Council of Voluntary Organisations and the National Association of Citizens Advice Bureaux. We also took the opportunity, with the help of the BBC, to analyse the responses of the public to the Today Programme's "Listeners Law" competition.

The year sadly saw the death of a distinguished and much respected former Chairman of the Law Commission, Sir Ralph Gibson. One of the Commissioners appointed during his term of chairmanship was Brenda Hale, who served as a Law Commissioner until her appointment to the High Court Bench. We were delighted when this year she became the first woman appointee to the House of Lords. The projects which she led as a Law Commissioner included what is now the Children Act and a report and draft bill on mental incapacity, which is now in the process of being taken through Parliament (under the title of the Mental Capacity Bill).

At the end of 2003 our Chief Executive, Michael Sayers, retired after several years of excellent service to the Commission. He has been succeeded by Steve Humphreys. I am delighted to take this opportunity to express my appreciation of all who work at the Commission. They are dedicated to the task of producing better law and their work is done to an excellent standard.

I am also grateful for the help and support which we have received from ministers and officers within your department and other departments.

A handwritten signature in blue ink that reads "Roger Toulson". The signature is written in a cursive, flowing style.

ROGER TOULSON, CHAIRMAN

PART I

SUMMARY

The year covered by this report was another eventful one for the Law Commission in various ways. Some examples are:

- We published the first part of our report on Renting Homes, a project which affects a third of the population.
- We completed a joint project with the Scottish Law Commission on the law of partnership. There are over 500,000 partnerships in the United Kingdom, producing an annual turnover of £136 billion. Partnerships represent an important part of the economy, but they operate under legislation which is over 100 years old and in need of updating.
- We completed a project to produce a code of compensation for those whose land is compulsory purchased or affected by development schemes. The present rules are needlessly complex and uncertain.
- The Criminal Justice Act 2003 enacted wholly or in part four of our reports:
Evidence in Criminal Proceedings: Hearsay and Related Topics¹
Double Jeopardy and Prosecution Appeals²
Bail and the Human Rights Act 1998³
Evidence of Bad Character in Criminal Proceedings⁴
- We started a new high profile law reform project on Partial Defences to Murder.
- Michael Sayers, our long-serving and highly regarded Chief Executive, retired from the Law Commission on 31 December 2003.

¹ Law Com No 245.

² Law Com No 267.

³ Law Com No 269.

⁴ Law Com No 273.

PART II

SOME FEATURES

- 2.1 The Commission's main task is to review areas of law and to make recommendations for change. In our law reform work we seek to ensure that the law is as simple, fair, modern and cost-effective as possible. We believe that this will be of real benefit to a very large number and variety of people. Our methods concentrate on systematic law reform: careful selection of projects, following consultation; close study; comparison with the law in other countries; thorough consultation; and a final report which usually incorporates a draft Bill. A summary of our role and methods appears at Appendix A.



The Law Commission: (*seated*) Sir Roger Toulson (Chairman); (*standing, from left to right*) Alan Wilkie, Steve Humphreys (Chief Executive), Stuart Bridge, Hugh Beale and Martin Partington

THIS REPORT

- 2.2 This Part picks out some key features of the period of this report ie 1 April 2003 until 31 March 2004. Part III sets out progress in implementing our past reports and in Parts IV to VIII we summarise our main work over the year. Part IX covers external relations and Part X relates to the Commission's staff and resources.

TARGETS FOR 2003/04 AND 2004/05

- 2.3 The two tables at the end of this Part summarise our major targets for 2003/04 (with the outcomes) and the major targets we have set for 2004/05.

OUR PUBLICATIONS IN 2003/04

- 2.4 In the period of this report we issued 12 publications. These included seven law reform reports, one Statute Law Revision report, the Annual Report for 2002/03 and three consultation papers.

The law reform reports were on:-

Non-accidental Death and Injury to Children (2)
Land Valuation and Housing Tribunals
Partnership
Housing Law – Tenure
Compulsory Purchase – Compensation
Pre-Judgment Interest on Debts and Damages

The consultation papers were on:-

Forfeiture and Intestacy
Partial Defences to Murder
Termination of Tenancies for Tenant Default

We also issued:-

Our Annual Report for 2002/03 (a report which, exceptionally, covered a period of 15 months from January 2002 until March 2003)

More detail on these publications can be found in the Parts below. The publications appear in full and in summary on our website, <http://www.lawcom.gov.uk>.

NEW LAW REFORM WORK

- 2.5 During the period Government Departments asked us to undertake reviews of two areas of law:-

Partial Defences to Murder
The Forfeiture Rule and the Law of Succession

QUINQUENNIAL REVIEW

- 2.6 During the year we have worked closely with DCA to give effect to the recommendations of the Quinquennial Review report.¹ Of the 42 recommendations 16 have been implemented in full. Work is in progress on a

¹ Available on the DCA website at <http://www.dca.gov.uk/majrep/lawcom/halliday.htm>.

further 15 and is planned to commence later in the year on all the others, bar 3 which it has been agreed are for the longer term.

- 2.7 In September, in line with the recommendations of the Quinquennial Review (QQR), the post of Secretary was re-designated Chief Executive and the post of Assistant Secretary was re-designated Deputy Chief Executive. In January, following another recommendation of the QQR, the Chief Executive's post (the nature of which is predominantly managerial) was opened up to a non-lawyer when Steve Humphreys succeeded Michael Sayers, upon the latter's retirement.



Steve Humphreys, the Commission's new Chief Executive

EQUALITY AND DIVERSITY

- 2.8 The Law Commission serves a diverse society. That is a society made up of men and women; of people of different races, cultures and religions; of people with and without disabilities; of young people and older people; of straight and gay people; of people with and without caring responsibilities; and of people with many other differences. We recognise, respect and value that diversity and will strive in all we do to serve the interests of people from all sections of society. The Commissioners and staff are committed to ensuring that equality and diversity issues are taken fully into account in law reform and personnel matters. Each member of staff receives diversity training. The Commission is committed to reviewing progress in this vital area. The Commission's Equality and Diversity Action Statement may be seen on our website, <http://www.lawcom.gov.uk>.

TRIBUTES

- 2.9 The Commission noted with sadness the death of its former chairman, Sir Ralph Gibson. He was chairman from 1981 to 1985. During his chairmanship the Commission produced important reports on Family Law which were given effect by the Enduring Powers of Attorney Act 1983 and the Family Law Act 1986; Public Order (enacted in 1986); and Land Law leading, among other things, to provisions in the Landlord and Tenant Act 1988 and the Land Registration Acts in 1986 and 1988.
- 2.10 Michael Sayers was the Secretary for over nine years, from 1994 until 2003. He had previously worked at the Commission on law reform from February 1976 until July 1978, first as a Legal Assistant and then as a Senior Legal Assistant. Michael invested a tremendous amount of time, energy and enthusiasm in the work of the Commission. He has made a significant contribution to the work of law reform over this time and the Commission wishes to place on record its gratitude for all his efforts.

- 2.11 His colleagues marked his formal retirement in summer 2003 with tokens of their esteem and presentations made at the party he gave in the Commission's garden. Michael agreed to continue in the new role of Chief Executive until the end of 2003, when his successor could be released to take up appointment. Since that time Michael has been helping the Commission as a consultant, preparing a Guide to the Law Reform Process. Michael continues to be very much involved in law reform in the role (to which he was elected shortly after the period of this Report) of General Secretary to the newly formed Commonwealth Association of Law Reform Agencies.

CODE OF BEST PRACTICE FOR LAW COMMISSIONERS

- 2.12 In accordance with Government policy for all non-departmental bodies, we have a written code for Law Commissioners, agreed with the Department for Constitutional Affairs (formerly the Lord Chancellor's Department). It incorporates the Seven Principles of Public Life and covers matters like the role and responsibilities of Commissioners. Copies are available from the Law Commission.

MAJOR TARGETS FOR 2003/2004

TARGET	OUTCOME
<p>To complete reports on:</p> <ul style="list-style-type: none"> • Non-accidental Death and Injury to Children (2) • Housing Law – Tenure • Compulsory Purchase – Compensation • Land Valuation and Housing Tribunals • Partnership – General and Limited* • Publication of Local Authority Reports • Compound interest • Unfair Contract Terms <p>To complete consultation papers on:</p> <ul style="list-style-type: none"> • Partial Defences to Murder • Termination of Tenancies for Tenant Default • Forfeiture and Intestacy <p>To complete:</p> <ul style="list-style-type: none"> • Statute law repeal Seventeenth Report and legislation* • Consolidation of legislation on Parliamentary and local government elections* • Consolidation of legislation on wireless telegraphy* <p>* jointly with the Scottish Law Commission</p>	<ul style="list-style-type: none"> • published in April and September 2003 • published in November 2003 • published in December 2003 • published in September 2003 • published in November 2003 • delayed: see para 6.14 • published in January 2004 • delayed: see para 4.16 <ul style="list-style-type: none"> • published in October 2003 • published in January 2003 • published in October 2004 <ul style="list-style-type: none"> • published in December 2003 • delayed: see para 8.9 • delayed: see para 8.11
<p>ALL TARGETS WERE SUBJECT TO AVAILABILITY OF RESOURCES</p>	

MAJOR TARGETS FOR 2004/05

To complete reports on:

- Assisting and Encouraging Crime
- Partial Defences to Murder
- Publication of Local Authority Reports
- Housing Law – Tenure (Renting Homes)
- Forfeiture and Intestacy
- Unfair Contract Terms*
- Company Charges/Registration of Security Interests – Consultative Report in 2004 and Final Report in 2005
- Compulsory Purchase – Procedure
- Trustee Exemption Clauses

To complete consultation papers on:

- Codification of the General Principles of Criminal Law
- Capital and Income in Trusts: Classification and Apportionment

To complete:

- Consolidation of legislation on Parliamentary and Local Government Elections*
- Consolidation of Legislation on Wireless Telegraphy*
- Preparation of the Ninth Programme of Law Reform

* JOINTLY WITH THE SCOTTISH LAW COMMISSION

Each of the above topics is described in more detail elsewhere in this report.

ALL TARGETS ARE SUBJECT TO AVAILABILITY OF RESOURCES

PART III

IMPLEMENTATION OF LAW COMMISSION REPORTS

INTRODUCTION

- 3.1 Most of the Commission's law reform reports include recommendations for changing the law. The most frequent method of implementing those recommendations is by Act of Parliament, if the Government and Parliament accept the recommendations.

However, a small but significant number of our reports

- Do not call for legislation at all, for example because they do not recommend any change in the law or because they are intended as advice or guidance rather than as vehicles for law reform;
- Are in effect implemented by the courts;
- Could possibly be implemented by Statutory Instrument; or
- Are scoping studies.

This Part sets out the position on implementation,¹ referring first to action taken during April 2003 to March 2004 inclusive and then to the overall position.

ACTION DURING THIS PERIOD

Summary

- 3.2 At the end of March 2003:
- (a) Legislation had yet to be introduced in respect of seventeen of our reports which had been accepted by the Government, in full or in part, and
 - (b) Thirteen other reports still awaited decisions by the Government.
- 3.3 By the end of March 2004:
- (a) Seven of our law reform reports had been enacted in Parliament;
 - (b) The number of law reform reports that had been accepted by the Government and were still awaiting implementation stood at seventeen.

¹ We are here referring to implementation of our work on law reform, rather than on consolidation or on statute law revision.

- (c) Thirteen other reports of ours awaited decisions by the Government.

(A) IMPLEMENTATION

Double Jeopardy and Prosecution Appeals

- 3.4 In March 2001 we published a report on both these issues.² They arose from separate references³ from the Home Secretary but, for convenience, we published a single report. In relation to double jeopardy our recommendation was that it ought to be possible for there to be a retrial in cases of murder where there was reliable and compelling new evidence. With regard to prosecution appeals we recommended that the prosecution should be able to appeal against an acquittal which results either directly from any ruling made by a judge at any stage prior to the conclusion of the prosecution case or from a ruling at the close of the prosecution's case that there is no evidence of the alleged offence.⁴ The Criminal Justice Act 2003 contains provisions on both double jeopardy and prosecution appeals which substantially reproduce the schemes of our recommendations, although the legislation on each goes beyond what we had recommended.

Hearsay in Criminal Proceedings

- 3.5 In 1997 we published a report and draft Bill in which we made recommendations for the reform of the law governing the admissibility of hearsay evidence in criminal proceedings.⁵ In essence we recommended that there should be three separate categories of automatic admissibility – unavailability of defendants, reliable hearsay and admissions/confessions. In addition, we recommended that there should be a limited inclusionary discretion to admit hearsay where the court is satisfied that, despite the difficulties in challenging the statement, its probative value is such that the interests of justice require it to be admissible. One of our recommendations (the repeal of section 69 of the Police and Criminal Evidence Act 1984, relating to evidence generated by computers) was implemented by section 60 of the Youth Justice and Criminal Evidence Act 1999. The substance of the remainder of our recommendations has been effected by the Criminal Justice Act 2003.

Evidence of Bad Character in Criminal Proceedings

- 3.6 In October 2001 we published a report and draft Bill on the admissibility in criminal proceedings of evidence of bad character, including previous convictions.⁶

² Double Jeopardy and Prosecution Appeals, Law Com No 267.

³ In respectively, July 1999 and May 2000.

⁴ Under the first limb of *Galbraith* [1981] 1 WLR 1039.

⁵ Evidence in Criminal Proceedings: Hearsay and Related Topics, Law Com No 245.

⁶ Evidence of Bad Character in Criminal Proceedings, Law Com No 273.

- 3.7 We recommended that, with certain exceptions, evidence of the bad character of any person should only be admissible with the leave of the court, and that such leave should only be granted in certain defined circumstances. In the case of a defendant's bad character, we recommended that the court should normally⁷ grant leave only if it is satisfied that the interests of justice required the evidence to be admitted notwithstanding any risk of prejudice. The relevant provisions in the Criminal Justice Act 2003 reproduce our recommendations in relation to persons other than the defendant. With regard to the latter, the Act in some important respects differs from and goes further than our recommendations.

Bail and the Human Rights Act 1998

- 3.8 In June 2001 we published a report on this topic.⁸ Our primary object was not to reform the existing legislation but to determine whether it can be applied in a way which is compatible with the European Convention on Human Rights. We concluded that it can, although we suggested ways in which it might be clarified so as to minimise the risk of the Convention being infringed.
- 3.9 We made three recommendations all of which related to amending specific provisions of the Bail Act 1976. The Criminal Justice Act 2003 implements the thrust of those recommendations.

Execution of Deeds and Documents

- 3.10 Our report, published in 1998, aimed to simplify the formal requirements for deeds and company documents. In July 1999 the Government announced that it accepted our recommendations. In September 2002 it issued a consultation paper which suggested implementing the recommendations through a Regulatory Reform Order.⁹ In January 2004 it published an analysis of responses, which showed that most respondents welcomed our proposals.¹⁰ A draft Regulatory Reform Order is being prepared for presentation to the relevant scrutiny committee.

Business Tenancies

- 3.11 A Regulatory Reform Order¹¹ was made on 1 December 2003 and will come into effect on 1 June 2004. The Order implements a package of reforms based substantially on our report¹² and amends the provisions of Part II of the Landlord and Tenant Act 1954.

⁷ Except where it is another defendant who seeks to adduce the evidence.

⁸ Bail and the Human Rights Act 1998, Law Com No 269.

⁹ Lord Chancellor's Department, *The Execution of Deeds and Documents: A Consultation Paper on the implementation of the Law Commission's report by way of a Regulatory Reform Order*, September 2002.

¹⁰ Department of Constitutional Affairs, *Response to the Consultation Paper, The Execution of Deeds and Documents*, January 2004.

¹¹ The Regulatory Reform (Business Tenancies) (England and Wales) Order 2003.

¹² Landlord and Tenant: Business Tenancies - A Periodic Review of the Landlord and Tenant Act 1954 Part II (1992) Law Com No 208.

(B) GOVERNMENT DECISIONS ON OUR REPORTS

The Effective Prosecution of Multiple Offending

- 3.12 In October 2002 we published a report on this topic.¹³ We recommended that in cases of those who commit multiple offences there should be a two stage trial procedure. The first stage of the trial will take place before judge and jury in the normal way, on an indictment containing specimen counts. In the event of conviction on one or more counts, the second stage of the trial may follow, in which the defendant would be tried by judge alone in respect of any scheduled offences linked to a specimen count of which the defendant has been convicted.
- 3.13 The Government accepted the recommendations in our report and they are reflected in clauses of the Domestic Violence, Crime and Victims Bill which is currently before Parliament.

Non-accidental Death of or Serious Injury to Children

- 3.14 In September 2003 we published a report and draft Bill¹⁴ which we refer to in Part V of this Report.¹⁵ The Domestic Violence, Crime and Victims Bill incorporates a scheme for addressing the problem which we addressed. The Government's proposed scheme adopts a number of the key features and concepts contained in our recommendations but is different in its structure, extent and effect.

Third Parties' Rights against Insurers

- 3.15 Our report, conducted jointly with the Scottish Law Commission, was published in July 2001. It was designed to strengthen the rights of claimants to seek a remedy against their defendant's insurer where the defendant was in financial difficulties. In July 2002 the Government accepted our recommendations in principle. Then in September 2002 it issued a consultation paper stating that it intended to implement our report by way of Regulatory Reform Order (RRO).¹⁶ In February 2004 it published an analysis of responses, in which it reported that the Law Officers had advised that only certain recommendations could be carried out by way of an RRO. The others do not fall within the scope of the Regulatory Reform Act 2001.¹⁷
- 3.16 As a result, some of our recommendations will be implemented by RRO. These will simplify the procedural hurdles, so that a claimant need only issue one set of proceedings. Claimants will not be required to restore a defendant company to the register so that it can be sued in its own name before the insurer is involved. Claimants will also be granted improved rights to obtain information about the

¹³ The Effective Prosecution of Multiple Offending, Law Com No 277.

¹⁴ Children: Their Non-accidental Death or Serious Injury (Criminal Trials), Law Com No 282.

¹⁵ See Part V, para 5.2.

¹⁶ Lord Chancellor's Department, *Third Parties – Rights against Insurers: A Consultation Paper on the implementation of the joint Law Commission and Scottish Law Commission report by way of a Regulatory Reform Order*, September 2002.

¹⁷ Department of Constitutional Affairs, *Analysis of Responses to the Consultation Paper, Third Parties – Rights against Insurers* February 2004.

defendant's insurance policy. However, other proposals will require primary legislation. These include widening the list of situations where an insurer may be pursued directly, and removing insurers' ability to rely on certain technical defences. The Government has said that these will be implemented "when an opportunity arises".

(C) CURRENT POSITION OF SOME OF OUR REPORTS AWAITING IMPLEMENTATION

Offences against the Person

- 3.17 It was eleven years ago that we published our report¹⁸ and draft Bill recommending an extremely important overhaul of the current legislation, which dates back to 1861. In 1998 the Home Office published a consultation paper ("Violence: Reforming the Offences against the Person Act 1861") setting out their initial proposals for reforming the law in this area, based on our report. More recently the Court of Appeal has referred to the "need for radical reform" of section 20 of the 1861 Act.¹⁹ We continue to press for implementation.

Involuntary Manslaughter

- 3.18 In 1996 we published a report and draft Bill on Involuntary Manslaughter²⁰ in which we recommended the replacement of the common law offence with statutory offences of "reckless killing" and "killing by gross recklessness", together with a new offence of corporate killing. We regard this as of considerable importance. In the past ten years, despite the fact that over 3000 workers and 1000 members of the public have died, very few companies have been prosecuted for corporate manslaughter and the majority of prosecutions have been successful. We are pleased to note that the Government has announced its intention to legislate on corporate manslaughter.

Corruption Offences

- 3.19 In 1998 we published a report²¹ and draft Bill in which we recommended the creation of four new offences to replace those in the Prevention of Corruption Acts 1889-1916. In March 2003 the Government published its own draft Bill (Cm 5777) which included giving broad effect to our recommendations. Subsequently the Bill was scrutinised by a House of Lords and House of Commons Joint Committee. The Joint Committee was critical of a number of aspects of the Bill and invited the Home Office to bring forward a revised Bill taking account of the criticisms advanced by the Joint Committee.
- 3.20 In December 2003 the Government published a reply to the critique of the Joint Committee. It stated that it was unable to agree with the view of the Joint

¹⁸ Legislating the Criminal Code: Offences against the Person and General Principles (1993) Law Com No 218.

¹⁹ *Cort* [2003] 3 WLR 1300, 1304.

²⁰ Legislating the Criminal Code: Involuntary Manslaughter, Law Com No 237.

²¹ Legislating the Criminal Code: Corruption, Law Com No 248.

Committee as to the definition of “corruption” but that it would take into account some of the Joint Committee’s other recommendations.

Fraud

- 3.21 In July 2002 we published a report and draft Bill on the law of Fraud.²² It recommended the introduction of a single general offence of fraud. We believe that this offence would make the law more comprehensible to juries, especially in serious fraud trials, and provide a useful tool for the effective prosecution of fraud. The single, clearly defined, offence would replace the current patchwork of offences.
- 3.22 We also recommended an offence of obtaining services dishonestly. This is intended to be a “theft-like” offence which would make it unlawful to “steal” services by simply helping oneself to them. It would not require proof of deception or fraud.
- 3.23 After the period covered by this report the Government issued a consultation paper in which it sought views on legislation to reform the law of fraud in accordance with our recommendations.

Limitation of Actions

- 3.24 In 2001 we published a report and draft Bill on Limitation of Actions, in which we recommended replacing the many complex rules with a single “core regime”. Most claimants would have three years to bring an action, starting with when they knew, or ought reasonably to have known, the relevant facts. Except in personal injury claims, defendants would be protected by a “long stop”, preventing claims brought more than 10 years after the relevant events took place. The Court of Appeal recently commended our proposals, commenting that “early statutory implementation of it would obviate much arid and highly wasteful litigation turning on a distinction of no apparent principle or other merit”.²³
- 3.25 In July 2002 the Government accepted our recommendations in principle, saying it “would give further consideration to some aspects of the report, with a view to introducing legislation when an opportunity arises”.²⁴ We receive many enquiries about whether there has been any more progress on implementing this report. Unfortunately, we have heard nothing further. The position remains as it did in 2002.

Damages for Personal Injury

- 3.26 During the late 1990s we carried out a major review of damages, which resulted in reports on Liability for Psychiatric Illness,²⁵ Damages for Non-Pecuniary

²² Fraud, Law Com No 276.

²³ *KR v Bryn Alyn Community (Holdings) Ltd (in liquidation)* [2004] 2 All ER 716.

²⁴ *Hansard* (HL), 16 July 2002, col 127.

²⁵ (1998) Law Com No 249.

Loss,²⁶ Damages for Medical, Nursing and Other Expenses²⁷ and Claims for Wrongful Death.²⁸

- 3.27 Some of our recommendations have been implemented. Most notably, in February 2000, the Court of Appeal increased the level of awards for non-pecuniary loss in cases of severe injury.²⁹ In April 2002, the Government increased the level of bereavement damages from £7,500 to £10,000. The Government has also made provision to extend the recovery of National Health Service costs from road traffic accidents to all personal injury claims.³⁰
- 3.28 However, many recommendations await a decision on implementation. In November 1999, the Government announced that it had carefully considered our reports and would undertake a comprehensive assessment of their individual and aggregate effects. We understand that this work is nearing completion, and that the Government intends to consult further on the issue.

Aggravated, Exemplary and Restitutionary Damages

- 3.29 We published a report on this in 1997.³¹ In November 1999 the Government said that it accepted our recommendations on aggravated and restitutionary damages and would legislate when a suitable opportunity arose. In practice, such an opportunity is unlikely to arise before a decision is taken on our other damages reports, discussed above. Meanwhile, the Government rejected our recommendations to extend the availability of exemplary damages, in the absence of a clear consensus on whether they should be extended or abolished. However, as we reported last year, the House of Lords' decision in *Kuddus v Chief Constable of Leicestershire* goes some way towards implementing our recommendations, by widening the types of action where exemplary damages are available.³²

²⁶ (1999) Law Com No 257.

²⁷ Damages for Personal Injury: Medical, Nursing and Other Expenses; Collateral Benefits, (1999) Law Com No 262.

²⁸ (1999) Law Com No 263.

²⁹ *Heil v Rankin* [2000] 3 WLR 117.

³⁰ This was raised in Law Com 262, above. The Department of Health produced a consultation paper on the issue in September 2002 (The recovery of NHS costs in cases involving person injury compensation) and published a summary of the outcome in September 2003. Provision for the extension is included in the Health and Social Care (Community Health and Standards) Act 2003, s 150.

³¹ (1997) Law Com No 247.

³² [2002] 2 AC 122. The case abolished the extremely technical rule in *AB v South West Water* [1993] QB 507 that exemplary damages could only be granted if a pre-1964 precedent established that they were available for that particular cause of action.

Company Law

- 3.30 We have published reports on Directors' Duties³³ and Shareholder Remedies.³⁴ Both were endorsed by the Company Law Review Steering Group.³⁵ In its 2002 White Paper the Government broadly accepted our proposals on directors' duties.³⁶ Although the White Paper did not specifically mention shareholder remedies we remain hopeful that these will form part of any comprehensive review of company law.
- 3.31 In July 2003 the Government announced that its plans for reforming company law would be implemented in two stages. Early legislation would concentrate on preventing major corporate failures. Meanwhile a second Bill on more comprehensive company law reform would be postponed until later. We anticipate that our reports would be implemented as part of the second stage.

Mental Incapacity

- 3.32 We published our report and draft Bill on this topic in 1995.³⁷ The Government published a Green Paper³⁸ in 1997 and a statement of its plans to reform this area of the law in 1999.³⁹ This statement accepted the majority of, but not all, our recommendations.
- 3.33 The Government published a draft Mental Incapacity Bill in June 2003. A pre-legislative Joint Scrutiny Committee considered details of the Bill and reported in November 2003. The Government published its response in February 2004. The Bill will be introduced in the current Parliamentary Session.

Perpetuities and Accumulations

- 3.34 The Government announced its acceptance of our report⁴⁰ in answer to a parliamentary question in March 2001. Since then, attempts to implement the report in part by way of a regulatory reform order and Private Member's Handout Bill have been unsuccessful. The Department for Constitutional Affairs, with assistance from the Law Commission, is working towards introducing a Bill when Parliamentary time allows.

³³ Company Directors: Regulating Conflicts of Interest and Formulating a Statement of Duties (1999) Law Com No 246.

³⁴ (1997) Law Com No 246.

³⁵ *Final Report*, DTI, June 2001.

³⁶ Department of Trade and Industry, *Modernising Company Law*, Cm 5553, July 2002.

³⁷ Mental Incapacity (1995) Law Com No 231.

³⁸ Who Decides? Making Decisions on Behalf of Mentally Incapacitated Adults (Cm 3803).

³⁹ Making Decisions (Cm 4465).

⁴⁰ The Rules Against Perpetuities and Excessive Accumulations (1998) Law Com No 251.

Distress for Rent

- 3.35 We published our report on this subject in 1991.⁴¹ It recommended the abolition of distress for unpaid rent for both commercial and residential leases.
- 3.36 Following a consultation exercise by the Lord Chancellor's Department (as it then was) in May 2001⁴² the Government published a White Paper and its Enforcement Review,⁴³ in March 2003. It confirmed the Government's acceptance of our recommendations to abolish distress as it concerned residential leases, but proposed the reform rather than the abolition of distress in commercial cases. We understand that the Government is looking to implement these changes by legislation as soon as Parliamentary time allows.

Responsibility for State and Condition of Property

- 3.37 A Housing Bill containing clauses on a new Housing Health and Safety System is currently before Parliament. The Bill modernises the enforcement regime in respect of residential property found to be in an unsatisfactory condition for occupation. Following the enactment of the new legislation, the Office of the Deputy Prime Minister will reconsider the proposals in our report on Responsibility for State and Condition of Property.⁴⁴ The recommendations in that report concerned private law rights rather than enforcement but were complementary to the criminal sanctions that existed at the time in respect of unfit properties.

Compulsory Purchase

- 3.38 The Law Commission published its first report on Compulsory Purchase in December 2003.⁴⁵ This is due to be followed by a second report, dealing with procedure. The Office of the Deputy Prime Minister intends to prepare a formal response to the two reports once the second one has been published.

⁴¹ Landlord and Tenant: Distress for Rent (1991) Law Com No 194.

⁴² Distress for Rent, Enforcement Review Consultation Paper No 5.

⁴³ Effective Enforcement Cm 5744.

⁴⁴ Landlord and Tenant: Responsibility for the State and Condition of Property (1996) Law Com No 238.

⁴⁵ Towards a Compulsory Purchase Code (1) Compensation (2003) Law Com No 286.

PART IV

COMMERCIAL LAW AND COMMON LAW



Professor Hugh Beale QC
(Commissioner)

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Partnership Law

- 4.1 A major outcome for the year was the publication of our report on Partnership Law, written jointly with the Scottish Law Commission. The report includes a new Partnership Bill to replace the current outdated legislation – the Partnership Act 1890 and Limited Partnerships Act 1907.² We had previously published two consultation papers, the first on general partnerships and the second on limited partnerships.³
- 4.2 Partnerships play an important role in the economy. There are over 500,000 partnerships in the United Kingdom with a combined turnover approaching £150 billion. The main advantages of partnership as a business vehicle are its flexibility and informality.
- 4.3 Our reforms aim to:
- encourage continuity of business by facilitating continuity of a partnership after changes of partners;
 - preserve partnerships as a flexible and informal business vehicle

¹ Including lawyers who were at the Commission for part of the period.

² Law Com No. 283; Scot Law Com No 192.

³ (2000) Law Commission Consultation Paper No 159/Scottish Law Commission Discussion Paper No 111 and (2001) Consultation Paper No 161/Scottish Law Commission Discussion Paper No118.

- preserve mutual trust and good faith as critical components of the relationship between partners; and
 - provide a modern law of partnership based on concepts which can be readily understood by partners, advisers and clients alike.
- 4.4 As a means of providing for continuity of business following changes of partners we propose that partnerships in England and Wales should be legal entities, as they already are in Scotland.
- 4.5 Many partnerships do not have formal partnership agreements. The draft Bill contains default provisions which would apply unless the partners agree otherwise, and these are designed particularly with small partnerships in mind.
- 4.6 In our project we were greatly assisted by, among others, Roderick Banks, who acted as our consultant, Tony Sacker and the Association of Partnership Practitioners and the Scottish Law Commission's Advisory Group. We are also grateful to all who responded to our Consultation Papers⁴ and to the Institute of Advanced Legal Studies at London University, the Manchester Law Society and Manchester Chamber of Commerce who organised conferences during the consultation process.

Pre-judgment Interest on Debts and Damages

- 4.7 In February we published our final report and draft bill, Pre-Judgment Interest on Debts and Damages (Law Com No 287).
- 4.8 At present, statutes give the courts little guidance about what interest rates to apply in the absence of contractual provisions. In practice, litigants often claim and receive the judgment rate. This was set at 8% in 1993 and has not been changed since. Commercial rates are now much lower and 8% often over-compensates claimants.
- 4.9 Furthermore, the courts have no power to award compound interest, even though this is the most accurate measure of the interest lost: claimants will either have had to borrow at compound rates, or will have lost the opportunity to invest (also at compound rates). Compound interest was not recommended in the past because it was thought too difficult to calculate – an argument that no longer applies in the computer age.
- 4.10 The Report recommends that the courts should normally award a “specified rate”, set each year at 1% above the Bank of England base rate. The courts should also have a power to award compound interest in appropriate circumstances. We are keen that interest calculations should be made as straightforward as possible, and we recommend that the Court Service should provide a computer programme and tables to help with this.

⁴ There were 84 responses to the Consultation Paper on General Partnerships and 42 responses to the Consultation Paper on Limited Partnerships.

Registration of Security Interests

- 4.11 Creditors often attempt to secure loans or other obligations by “taking security” on property other than land. This project looks at when and how such security must be registered and, where more than one security interest exists, which takes priority. At present, companies must register most of the mortgages or charges they grant. However, creditors use many devices (known as “quasi-securities”) which act as security, but which the law does not treat as security and which do not need to be registered. Examples include finance leasing, hire purchase or retention of title clauses.
- 4.12 In July 2002 our consultation paper provisionally proposed a new system of “notice filing”.⁵ This would be easier than the present system for registering a company charge, and we consulted on whether it should apply not only to company charges but also to “quasi-securities”. Over the last year, we have continued to develop a comprehensive scheme for the attachment, perfection and priority of security interests created by companies, applicable to both “traditional security” and “quasi-security”. We plan to undertake further consultation by publishing a paper containing draft Regulations in the summer of 2004.
- 4.13 We would like to thank those who have acted as consultants to this project: Professor Sir Roy Goode QC, Professor Harry Sigman, Mrs Louise Gullifer and Professor Sarah Worthington. We are also extremely grateful to the many practitioners who have given freely of their time and advice. In Autumn 2003 we held a half-day seminar and four evening seminars to discuss aspects of our developing policy. We thank the Society for Advanced Legal Studies, Norton Rose, Clifford Chance, Allen & Overy, Berwin Leighton Paisner and Freshfields Bruckhaus Derringer for their help with these.

Unfair Contract Terms

- 4.14 We are working with the Scottish Law Commission to review the law of unfair contract terms. The central problem is that the law is extremely confusing. It is governed by two overlapping pieces of legislation, the Unfair Contract Terms Act 1977 and Unfair Terms in Consumer Contracts Regulations 1999, which use different concepts and definitions and can reach different results. In August 2002 we published a consultation paper⁶ that recommended replacing both with a single, unified Act written in accessible language. Our proposals on consumer contracts were widely welcomed, and we are presently drafting a new Bill to implement them.
- 4.15 The consultation paper also proposed extending the controls in business contracts, to allow challenges to a wider variety of potentially unfair terms. This provoked some concerns among larger businesses that we were reducing

⁵ Registration of Security Interests: Company Charges and Property other than Land, Consultation Paper No 164.

⁶ Unfair Terms in Contract, Law Commission Consultation Paper No 166/Scottish Law Commission Discussion Paper No 119.

certainty in commercial contracts and interfering with their freedom to contract as they wished.

- 4.16 We have re-thought our proposals in the light of the comments we received. We have been persuaded that the need for additional protection is confined to very small businesses (often labelled “micro-businesses”) that employ fewer than 10 people. Following a very useful seminar held at the Institute of Advanced Legal Studies in August 2003, we are concentrating on ways to extend protection to cases where very small businesses contract on the other party’s standard written terms. We intend to publish a final report and draft Bill later in 2004.

The Forfeiture Rule and the Law of Succession

- 4.17 As part of our review into the law of illegality, we have considered a particular problem that arose from the case of *Re DWS (deceased)* [2001] Ch 568. The claimant’s two grandparents had been murdered by their only son (the claimant’s father). The grandparents died intestate, and the question was who should inherit their estate. The father was disqualified from inheriting under the “forfeiture rule”, by which a murderer cannot inherit from his victims. The court found that the grandchild could not inherit either, because under intestacy law grandchildren can only inherit once their parents are dead. The property went to more distant relatives.
- 4.18 In October 2003 we published a short consultation paper,⁷ in which we proposed a change to intestacy law that where a potential heir is disqualified the property should be distributed as if that person had died. We received 29 responses. We plan to publish a report and draft bill in 2005.

Illegal Transactions

- 4.19 We are continuing with our wider review of the law of illegal transactions, looking at the effect of illegality on claims in contract and trusts. The law on illegality has been criticised for being complex, uncertain and, on occasions, unjust. We originally proposed that where a contract is held to be illegal, the court should have a structured discretion to enforce the contract.⁸ We are re-examining this proposal to see whether a solution to allow the court to grant restitution or financial adjustment would achieve the same benefits. We intend to publish a report in 2005.

⁷ The Forfeiture Rule and the Law of Succession, Consultation Paper No 172.

⁸ Illegal Transactions: the Effect of Illegality on Contracts and Trusts, Consultation Paper No 154 (1999).

PART V

CRIMINAL LAW, EVIDENCE AND PROCEDURE



His Honour Judge Alan Wilkie QC
(Commissioner)

TEAM MEMBERS¹

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Assisting and Encouraging Crime

- 5.1 We had considered in the past² the scope and structure of the law relating to the liability of those who assist and encourage others to commit offences. That law was, and remains, complicated, uncertain and anomalous, while the policy decisions which it raises are both important and difficult. Commissioners have agreed a policy and instructions have been delivered to Parliamentary Counsel. We hope to publish a report and draft Bill in summer 2004.

Non-accidental Death of or Serious Injury to Children

- 5.2 This project, which we began in September 2002, arose from our work on criminal liability for assisting and encouraging crime. The problem it sought to address was how to establish criminal liability in cases where a child is non-accidentally killed or seriously injured and it is apparent that one or more of a limited number of defendants must have committed the crime, but there is no evidence which allows the court to identify which of the defendants so as to properly apportion liability. Following the publication in April 2003 of a consultative report, in September 2003 we published a report and draft Bill.³ Our recommendations are designed on the one hand to remove tactical advantages which, in these cases, operate adventitiously and illogically for the benefit of defendants and on the other to try and ensure that the simple expedient of

¹ Including lawyers who were at the Commission for part of the period.

² Assisting and Encouraging Crime (1993) Consultation Paper No 131.

³ Children: Their Non-accidental Death or Serious Injury (Criminal Trials), Law Com No 282.

determined silence should not be enough to render the criminal justice system powerless where it is known that one or more of a very limited number of suspects must have committed the offence. To these ends we have made recommendations for reform of procedural, evidential and substantive law.

- 5.3 We recommend that there should be an aggravated form of the existing offence of child cruelty. This aggravated form of the offence would apply where the basic offence was committed and the child dies. The offence would be punishable by a maximum term of imprisonment of fourteen years. We also recommend that there should be a new offence whereby a person of 16 years or over would be criminally liable if he or she has responsibility for a child under 16 years, is aware or ought to be aware that there is a real risk that an offence involving death or serious harm might be committed against the child and yet fails to take such steps as it would be reasonable for him or her to take to prevent the offence being committed against the child. This offence would be punishable by a maximum term of imprisonment of seven years.
- 5.4 We make recommendations for procedural and evidential reforms in cases where a child under 16 has suffered non-accidental death or serious injury, the defendants form the whole of, or are within a defined group of, individuals, one or more of whom must be guilty of causing the death or serious injury and at least one of those defendants had responsibility for the welfare of the child during the time when the death or serious injury occurred. We recommend that those having responsibility for the child at the relevant time should be under a statutory responsibility to assist the police and the court by providing as much information as they can regarding whether and, if so, by whom and in what circumstances the offence was committed. Further, in such cases the decision as to whether there is a case to answer against each defendant should be postponed until the close of the defence case. Finally, we recommend that if a defendant, who is subject to the statutory responsibility, does not give evidence, the jury should, in determining the guilt of that defendant, be permitted to draw such inferences from the failure as appear proper, taking into account any explanation for the failure.

Codification of the Criminal Law

- 5.5 In its July 2002 White Paper "Justice for All"⁴ the Government confirmed their intention to codify the criminal law. In 2001, after discussion with the relevant Government Departments, it was agreed that we would review and revise what was said about the general principles of the criminal law in Part I of our Draft Criminal Code of 1989.⁵ The project consists of seven tranches. The first two tranches to be considered were External Elements and Criminal Liability and Mental Disorder. In the last year we have continued our work in respect of another four tranches, namely Fault, Defences, Parties to Offences (Corporations/Children) and Preliminary Offences. We are grateful for the assistance which we have received from Professor Ian Dennis (University

⁴ Cm 5563.

⁵ Criminal Law: A Criminal Code for England and Wales, Law Com No 177.

College, London) and Sir Roy Beldam. We hope to issue a consultation paper in the forthcoming year.

Partial Defences to Murder

- 5.6 In June 2003 we were asked by the Home Office to review the operation of two of the partial defences to murder, namely diminished responsibility and provocation. We were asked to do this in the overall context of murder but with particular reference to murders committed in the context of domestic violence. In addition, we were asked to consider whether there should be a new partial defence to murder where a person kills in circumstances in which the current complete defence of self-defence is not available because the force used was excessive.
- 5.7 In order to assist our project we commissioned comparative law papers from distinguished jurists on the law of Australia, Canada, India, Ireland, New Zealand, Scotland and South Africa. We are deeply indebted to the authors of those papers, namely Professor Stanley Yeo of Southern Cross University (New South Wales, Australia); Professor Warren Brookbanks, University of Auckland (New Zealand); Professor Jonathan Burchell, University of Cape Town (South Africa); James Chalmers, Dr Fiona Leverick and Professor Christopher Gane, University of Aberdeen (Scotland); Assistant Professor Dale Ives, University of Western Ontario (Canada); and Professor Sanford H Kadish, University of California. A paper was also sent to us by the Law Reform Commission of Ireland (the Commissioner with responsibility for criminal law being Professor Finbarr McAuley).
- 5.8 In addition to our own empirical research, the project has benefited from a variety of socio-legal research conducted by individuals and organisations. For details see paragraph 9.6. We are grateful to all of those who have assisted us.
- 5.9 At the end of October 2003 we published a consultation paper⁶ in which, contrary to our usual practice of setting out provisional proposals, we identified and considered various options for reform.⁷ Responses were invited on those options. This departure from our usual practice was because we were aware that the Government intended to introduce legislation to address the issue of domestic violence as early as Parliamentary session 2003-4. The purpose of our project is both to assist the Government in considering its proposals and to inform public debate. In the circumstances we were keen to begin the public debate as soon as we could. In order to enhance the quality of the consultation process we have participated in a number of different meetings held in different parts of England and Wales arranged under the auspices of professional, academic and other interested bodies.
- 5.10 Following publication of the consultation paper, the Criminal Law Team, in the course of their project on Partial Defences to Murder, conducted a number of “roadshows” throughout the country. Our Chairman spoke at events organised by

⁶ Partial Defences to Murder (2003) Consultation Paper No 173.

⁷ We also published a much shorter summary paper.

the Bar of the Western Circuit, the Bar of the Wales and Chester Circuit, the Bar of the Midlands Circuit and the Bar of the North-Eastern Circuit. In addition he spoke at a meeting organised by the Society of Legal Scholars in Leeds. A number of seminars and meetings were also held in connection with this project. They were attended by the Chairman and/or Judge Wilkie and members of the team and involved the Law Society, Criminal Bar Association, LIBERTY, Legal Action Group, The Old Bailey Judges, the Rose Committee, Judicial Studies Board, Rights of Women, Justice for Women, JUSTICE, Victim Support and Support after Murder and Manslaughter. In addition, the Chairman delivered a lecture at the Institute of Advanced Legal Studies.

- 5.11 We have completed the process of analysing the responses which we have received to the consultation paper. We published our provisional conclusions in April 2004 and hope to publish our report in the summer of 2004.
- 5.12 We are grateful to our academic consultant Professor David Ormerod (Leeds University) for his invaluable criticism of draft papers produced in connection with the project. We are also grateful to Tamsin Stubbing, a former Research Assistant, who subsequently helped to analyse data in connection with the Partial Defences to Murder project.

PART VI

HOUSING AND ADMINISTRATIVE JUSTICE



Professor Martin Partington CBE
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Research Assistants

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Change of Name

- 6.1 At the end of the period covered by this report it was decided to change the Housing and Administrative Justice team into the Public Law team. We felt that, with preparations for the Law Commission's Ninth Programme of work being started, the name of the team should be somewhat less specific. This has not altered the focus of our current work, but gives some additional flexibility in the determination of future projects in the field of public and administrative law.

Housing Law Reform

- 6.2 The major project on the reform of housing law has remained the central feature of the team's work. Since we last reported, we have digested the very considerable number of responses we received to our two Consultation Papers on the reform of housing law. In the light of these responses, we determined the policy which should underpin our final recommendations. We also prepared the instructions to Parliamentary Counsel for the drafting of the Housing Bill which will be the end-product of our work.
- 6.3 Given the magnitude of the task we were undertaking, it became clear that the Final Report and Bill would not be complete during 2003. However we were also aware that there was considerable interest both in Government and in the wider housing world in the recommendations we were planning to make. We therefore decided to publish a report setting out our recommendations.

¹ Including lawyers who were at the Commission for part of the period.

Renting Homes

- 6.4 The report, *Renting Homes*, appeared in November 2003. It builds on the approach to the reform of housing law which we proposed in the original consultation papers. The key features of the recommendations are:
- Flexibility, allowing much greater freedom for the providers of rented housing in both the public and private sectors to work together in the provision of rented accommodation; and
 - The consumer approach, with a clear statement of the rights and obligations of both landlords and occupiers set out in the occupation agreement.
- 6.5 In addition to our recommendations on the general scheme, we have also been undertaking more detailed work on the appropriate regime for those who provide supported housing to those often in the most dire need of housing accommodation. We were assisted in this by advice from a group of practitioners with particular experience of the problems relating to the provision of supported housing. Their names are set out in Report No 284 *Renting Homes*, at Appendix B. We are most grateful for their assistance.
- 6.6 We have also been undertaking further work on the possible structure and content of the model agreements which are an important feature of our proposals, and which we hope will be widely used by landlords in both the public and private sectors of the rented homes market.
- 6.7 Following on the proactive programme of consultation undertaken by the Team following publication of the Consultation Papers, Martin Partington and members of the team have accepted many invitations to talk to meetings around the country about the recommendations in *Renting Homes*.

Future Work

- 6.8 It was always envisaged that our work on the law of housing tenure would only be the first stage in a comprehensive review of housing law. In *Renting Homes* we indicated the areas of further work which we thought should follow on the completion of this stage of the project. These related to how good behaviour, by both landlords and occupiers, could be encouraged (and bad behaviour discouraged). In addition, we thought further work needed doing on the resolution and adjudication of housing disputes. We have been discussing with Government how both of these projects might be taken forward.
- 6.9 By the end of this reporting period, considerable progress has been made on agreement that there should be a further project on the resolution of housing disputes. Final details of this have not been settled at the time of writing, but we hope public announcements will be made in the near future. Discussions on a project on appropriate regulatory frameworks for the promotion of responsible landlordism and occupier behaviour are still under discussion.

Land, Valuation and Housing Tribunals

- 6.10 This project was referred to us in November 2002. Following on the publication of Sir Andrew Leggatt's review of tribunals, published in 2001, we were asked to

consider how existing tribunals dealing with a number of issues relating to land, property and valuation matters might, in accordance with the spirit and intent of Sir Andrew's approach, be made more coherent.

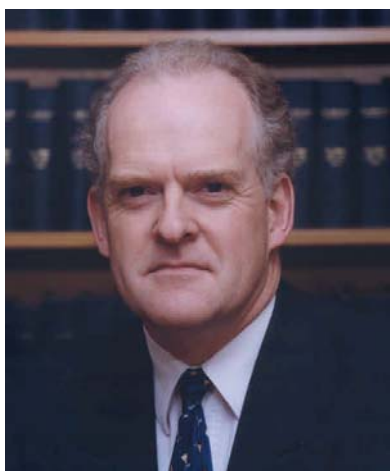
- 6.11 Last year we reported on the consultation process which we undertook in relation to this project. We received many constructive and helpful suggestions in response to ideas we had set out in our Consultation Paper, which resulted in important and significant changes to the options we had initially proposed.
- 6.12 Our final report, *Land, Valuation and Housing Tribunals: The Future* was published in September 2003. In essence we recommended that rationalisation of the current system of tribunals could be achieved by the creation of a single Property and Valuation Tribunal, which would take on work currently handled by Valuation Tribunals, Residential Property Tribunal Service tribunals, and Agricultural Lands Tribunals. In addition there would be a Reformed Lands Tribunal which would retain the current functions of the Lands Tribunal, take in the work of the Commons Commissioner and the Adjudicator to HM Land Registry, and act as the appeal body for appeals arising from the Property and Valuation Tribunal.
- 6.13 The project dealt with a particular aspect of a wider reform of tribunals being considered by Government as a result of the Leggatt Report. To date we have yet to receive a formal response to our recommendations. We expect a White Paper on the future of the tribunals system to be published in the summer of 2004.

Publication of Local Authority Reports

- 6.14 Our work on reform of the law relating to the publication of the reports of *ad hoc* inquiries set up by local authorities to investigate failures in the provision of their services has continued. It has not proved possible to publish our Final Report and Bill in this reporting year. The project will be completed and published in the summer of 2004. A fuller account will appear in next year's Annual Report.

PART VII

PROPERTY AND TRUST LAW



Stuart Bridge
(Commissioner)

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Termination of Tenancies

- 7.1 In January 2004 we published a consultation paper² on the termination of tenancies. The paper sets out provisional proposals for reform of the law governing the means by which a landlord can terminate a lease³ because the tenant has not complied with the terms of that lease. This is an issue of immense practical importance for many landlords and tenants of private and commercial properties.
- 7.2 Our provisional proposals were based on earlier Law Commission work in this area and took account of the introduction of the Civil Procedure Rules, the Human Rights Act 1998 and recent developments in case law. The key elements of the proposed new scheme are as follows:
- (1) The principal means of termination of a tenancy for tenant default⁴ will be by means of an order of the court: a “termination order”.
 - (2) The effect of a termination order will be to terminate the tenancy at a specified date and to extinguish all interests (such as sub-tenancies and

¹ Including lawyers who were at the Commission for part of the period.

² Termination of Tenancies for Tenant Default (2004) Law Com No 174.

³ The provisional proposals apply to all leases except residential tenancies for a term of less than 21 years. Shorter residential tenancies were considered in the Report on Renting Homes (2003) Law Com No 284.

⁴ “Tenant default” will comprise breaches of covenant or obligation, including certain “disguised” breaches ie where the tenancy provides that it will determine on the occurrence of a specified event.

mortgages) which derive from it. Unless and until such an order takes effect, the tenancy will remain in existence.

- (3) In all cases, prior to commencing any proceedings, the landlord must serve a notice, in prescribed form, on the tenant and any sub-tenants or mortgagees (the “pre-action notice”).
- (4) The pre-action notice will inform the tenant of the details of the default. The tenant may refer the pre-action notice to the court. The court may then exercise its case management powers to safeguard the parties’ interests and to ensure that the court’s overriding objective (of dealing with cases justly) is complied with.
- (5) The court will be able to make an absolute termination order terminating the tenancy from a stated future date (without giving the tenant any further chances) or a remedial order adjourning the application on terms that the tenant be allowed to continue as tenant (provided that certain conditions are satisfied).
- (6) There will be four specific grounds on which an absolute termination order can be sought. The pre-action notice must state which of these is relied upon by the landlord.
- (7) Greater protection will be given to sub-tenants and mortgagees and possibly others holding interests deriving out of the tenancy. They will be entitled to be served with the pre-action notice and may protect their interests by applying for relief from the court.
- (8) Exceptionally, in tightly defined circumstances, a landlord may instigate the termination process by recovering possession unilaterally without the prior sanction of a court order. The landlord will only be able to do this where due warning has been given in the pre-action notice, and where the premises are not currently occupied as a residence. In every case, the tenant may refer the matter to court. If the landlord does recover possession unilaterally, the tenancy will terminate (in the absence of any application by the tenant) on the expiry of one month.
- (9) Special provision is made concerning termination of tenancy for non-payment of service or administration charges.
- (10) The inter-related doctrines of re-entry and waiver should both be abolished.

7.3 We expect to produce our final report and a draft Bill during 2005.

7.4 We are grateful to the Property Litigation Association, the Council of Mortgage Lenders, the British Banking Association and the Office of the Deputy Prime Minister for their assistance in relation to this project.

Easements and Analogous Rights and Land Obligations

- 7.5 The law of easements,⁵ analogous rights and land obligations is of great practical importance to large numbers of landowners. Despite this, the relevant law has never been subject to a comprehensive review, and many aspects are now outdated and a cause of difficulty. The latest edition of the leading practitioner's work in this area comments "...it cannot be denied that there is much that is unsatisfactory about the law of easements."⁶
- 7.6 We are continuing our review of the current law and exploring options for reform and rationalisation. We intend to tie this work in with a reconsideration of the Law Commission's earlier work on land obligations⁷ with a view to producing a coherent scheme of land obligations and easements that is compatible with the Land Registration Act 2002 and the commonhold system.
- 7.7 We are grateful to the members of an Advisory Group - Professor David Clarke (Bristol University), Professor Elizabeth Cooke (Reading University), Michael Croker (HM Land Registry), Philip Freedman (Mishcon de Reya), Jonathan Gaunt QC and Paul Morgan QC (both of Falcon Chambers) and Emma Slessenger (Dechert) – for their assistance on this project.
- 7.8 We hope to publish a consultation paper on this topic during 2005.

Compulsory Purchase

- 7.9 To lose a home or a business to compulsory purchase is a devastating experience. Those who suffer such a loss have the right to fair compensation, expeditiously paid.
- 7.10 Where land is compulsorily acquired by the state, or by other statutory bodies, it is essential for all those affected that there are clear, up-to-date, and readily accessible principles for the assessment of compensation. The current law is a patchwork of diverse and sometimes conflicting rules contained in a variety of statutes and cases spanning 150 years. The complexity and inaccessibility of the current principles governing assessment of compensation for that loss are wholly unacceptable and make effective compromise of claims much more difficult than it should be.
- 7.11 A report by the Compulsory Purchase Policy Review Advisory Group, established by the Department of the Environment, Transport and the Regions (now the Office of the Deputy Prime Minister) proposed a direct role for the Law Commission in preparing new legislation "consolidating, codifying, and simplifying the law". The Lord Chancellor asked the Commission:

⁵ An easement is the right enjoyed by one landowner over the land of another. Common examples are rights of way and rights to light.

⁶ *Gale on Easements* (17th ed 2002) p vi.

⁷ See *Transfer of Land: The Law of Positive and Restrictive Covenants* (1984) Law Com No 127.

to review the law (legislation, case law and common law rules) relating to compulsory purchase of land and compensation, with particular regard to

- (i) the implementation of compulsory purchase orders
- (ii) the principles for the assessment of compensation on the acquisition of land
- (iii) compensation where compulsory purchase orders are not proceeded with
- (iv) compensation for injurious affection

and to make proposals for simplifying, consolidating and codifying the law.

7.12 In December 2003 the Commission published its final report on Compensation for Compulsory Purchase.⁸ This Report recommends the replacement of the patchwork of rules by legislation to simplify, consolidate and codify the legal principles and to remove unfairness or anomalies. It contains the framework for a Compensation Code. Legislative adoption by government of the Commission's Compensation Code would reduce the time spent on legislative interpretation and facilitate and expedite the negotiation of settlements.

7.13 The Report builds on the consultative report on Compensation published in July 2002.⁹ Later in 2004 the Commission will publish its second final report on Compulsory Purchase, which will address procedural issues, as outlined in our consultative report on Procedure, published in December 2002.¹⁰

7.14 Contrary to normal Law Commission practice in a final report, neither of our final reports has or will have a draft Bill to accompany our recommendations. This is for two connected reasons. First, this is not a self-contained study. It has been designed to contribute to a project initiated by the government involving the fundamental review of the law in this area. We are grateful to the ODPM for the close collaboration we have been able to enjoy. The Commission's work has proceeded in parallel with the preparation by the ODPM, and presentation to Parliament, of a Bill relating to the same subject-matter. Further legislation will need to take account of the progress and final form of that Bill. Secondly, our primary task within the overall project has been to sort out the existing law, and to make recommendations for the general content and shape of the new Code, and for repeals of existing legislation. Until those issues have been considered by government, in the light of our recommendations, it would not have been a sensible use of our limited drafting resources, to embark on the preparation of a detailed Bill.

⁸ Towards a Compulsory Purchase Code (1) Compensation (2003) Law Com 286.

⁹ Towards a Compulsory Purchase Code: (1) Compensation (2002) Consultation Paper No 165.

¹⁰ Towards a Compulsory Purchase Code: (2) Procedure (2002) Consultation Paper No 169.

7.15 The Commission has benefited greatly from the informal help freely given to it by organisations and individuals who have specialist and practical knowledge in the field. The former Chairman, Lord Justice Carnwath, has acted as consultant on this project and his help has been invaluable.

Trustee Exemption Clauses

7.16 A trustee exemption clause is a clause in a trust instrument which excludes or restricts a trustee's liability for breach of trust.¹¹ Such clauses are able to relieve a trustee from liability for anything except dishonest conduct. As a result, beneficiaries can in many cases find themselves with no remedy against a trustee who has caused loss to the trust fund by his or her actions or omissions.¹²

7.17 Our 2003 consultation paper¹³ made the following key provisional proposals for the reform of trustee exemption clauses, all of which would require legislation:

- (1) All trustees should be given power to make payments out of the trust fund to purchase indemnity insurance to cover their liability for breach of trust;
- (2) Professional trustees should not be able to rely on clauses which exclude their liability for breach of trust arising from negligence;
- (3) In so far as professional trustees may not exclude liability for breach of trust they should not be permitted to claim indemnity from the trust fund; and
- (4) In determining whether professional trustees have been negligent, the court should have power to disapply duty exclusion clauses or extended powers clauses where reliance on such clauses would be inconsistent with the overall purposes of the trust and it would be unreasonable in the circumstances for the trustees to be exempted from liability.

7.18 Following a number of seminars across the country we received a total of 118 responses to the consultation paper. We have been awaiting (and shortly before publication of this Annual Report have received) detailed comments from a Working Group of the Financial Markets Law Committee on the impact of our provisional proposals on trusts in financial markets.

7.19 We intend to publish our report and a draft Bill in early 2005.

Capital and Income in Trusts: Classification and Apportionment

7.20 The treatment of a receipt by trustees will usually depend on whether that receipt constitutes income or capital for trust law purposes. For example, private trusts

¹¹ Either by expressly excluding liability or by restricting or otherwise modifying the trustee's duties.

¹² A state of affairs that has been widely criticised, for example by Lord Goodhart during the Second Reading of the Trustee Bill in 2000.

¹³ Trustee Exemption Clauses (2003) Law Com No 171.

will often provide that income goes initially to certain beneficiaries and that capital is held for others.

- 7.21 The law on the classification of trust receipts as income or capital is complex and can give rise to surprising results (and so perceived injustice). Trust law has also developed complicated rules which oblige trustees to apportion between income and capital in order to keep a fair balance between different beneficiaries. It is widely acknowledged¹⁴ that the current rules are unsatisfactory, often causing more difficulties in practice than they solve. As a result, the application of the rules is often expressly excluded in modern trust instruments.
- 7.22 The distinction between trust income and capital receipts is also an important issue for charities. Many charitable trusts have permanent capital endowments which cannot be expended to further the charity's objects; only the income generated can be used and there is generally no power to convert capital into income. This may inhibit performance of the charity's objects and provoke investment practices which concentrate on the form of return rather than on maximising overall return.
- 7.23 We plan to publish a consultation paper on these issues in late 2004.

The Rights of Creditors against Trustees and Trust Funds

- 7.24 Under the current law, whenever trustees enter into a contract they do so personally, incurring personal contractual obligations and (subject to any express contractual provision limiting liability) personal liability to the other contracting party. A trustee will only have a right to be indemnified from the trust fund for obligations properly incurred.¹⁵ If obligations were not properly incurred, the trustee will have to make good any liability out of his or her own wealth.
- 7.25 We will be reviewing the current law and assessing whether it is possible to better balance the interests of creditors, trustees and beneficiaries.
- 7.26 We are grateful to the Charity Commission and to the Trust Law Committee for their continuing assistance in relation to the Law Commission's trust law projects.

¹⁴ See, for example, the Law Reform Committee's Twenty-Third Report, "The Powers and Duties of Trustees" (1982) Cmd 8733 and the Trust Law Committee's consultation paper "Capital and Income of Trusts" (1999).

¹⁵ There are various reasons why a trustee may lose the right to be indemnified out of the trust fund; for example, because entry into the contract was in breach of the trustee's equitable duties.

PART VIII

STATUTE LAW

TEAM MEMBERS

*Consolidation*¹

The Chairman, Edward Caldwell, Mark Hudson, Jessica de Mounteney, Catherine O’Riordan, Chris Packer, Bernadette Walsh

Statute Law Revision

The Chairman, John Saunders, Elizabeth McElhinney, Claire Fox

CONSOLIDATION

- 8.1 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 is consolidation. The need for this arises when, over a period of time, separate statutes are enacted on the same general subject matter or particular legislation is repeatedly amended. In either case, the law can become difficult to piece together.
- 8.2 Consolidation consists of drawing together different enactments on the same subject matter to form a rational structure and of making more intelligible the cumulative effect of different layers of textual amendment. Usually this is done by means of a single statute. However, in the case of a large consolidation, it may be done by means of several statutes. The aim is to make the statutory law more comprehensible, both to those who have to apply it and to those who are affected by it.
- 8.3 If anomalies are revealed in the process of consolidation, various devices (such as amendments recommended by the Law Commission) are available to rectify them. Some anomalies are beyond the scope of these devices. They must either be reproduced or be altered by an Act passed (or where there is sufficient power, subordinate legislation made) before the actual consolidation Bill is introduced.
- 8.4 The process of consolidation requires the support and participation of the government department or departments within whose responsibility the subject matter falls.
- 8.5 No consolidations have been enacted in the period since the Commission’s last annual report.
- 8.6 For a number of reasons it is much more difficult to consolidate now than it was when the Law Commission was set up in 1965. One problem is sheer size. The

¹ Including Parliamentary Counsel who were at the Commission for part of the period.

statute book grows inexorably. Parliament enacts several thousand pages of new primary law every year and repeals relatively little.

- 8.7 The need for consolidation is felt most acutely in those areas where there has been a considerable amount of legislative activity. So when the Commission comes to consolidate the legislation on a particular subject it tends to find that the total amount of legislation to be consolidated is large and this can be expected to place a serious strain on resources — both within the Law Commission and in the responsible department.
- 8.8 It is hoped that the Commission's consolidation programme will soon be back on track.
- 8.9 Work on the consolidation of the legislation about representation of the people is well advanced but has had to be suspended on several occasions. In some cases that has been because of a reorganisation of Ministerial responsibility (and there has been more than one affecting this project). Moving the subject of electoral law from one department to another inevitably causes delay.
- 8.10 The Department for Constitutional Affairs has asked for work on the consolidation to be suspended while the government considers its response to the Electoral Commission's report *Voting for Change*, which recommended significant changes to the law.
- 8.11 Work on consolidation of the legislation on wireless telegraphy has also been delayed. The consolidation was anticipated when the Communications Act 2003 was being prepared (and a power to make pre-consolidation amendments by order was included in the Act) but the work involved in setting up the new regulatory regime created by the Act has delayed progress on the consolidation.
- 8.12 On a more encouraging note, a consolidation of the legislation about the national health service has been started. This is an area of the statute book in which there has been a considerable amount of activity since 1997. Indeed, the Commission had a consolidation nearly ready for introduction in 1997 when the election of a new government, with plans for remodelling the NHS, led to the decision that the consolidation should be dropped. The new attempt at a consolidation has the full support of the Department of Health and an additional draftsman has been seconded to the Commission from the Parliamentary Counsel Office to undertake the consolidation. Work is now well under way.

STATUTE LAW REVISION

- 8.13 The principal purpose of statute law revision is the repeal of statutes that are obsolete or which otherwise no longer serve any useful purpose, so modernising the statute book and leaving it clearer and shorter. This helps to save the time of lawyers and others who need to use it. Our work is carried out by means of Statute Law (Repeals) Bills, which we publish periodically in our Statute Law Revision reports. There have been 17 such Bills since 1965. All have been enacted (the seventeenth is currently being considered by Parliament), so repealing more than 2000 Acts in their entirety and achieving partial repeals in thousands of other Acts.

- 8.14 Our Seventeenth Report on Statute Law Revision² was published on 16 December 2003. Annexed to it was the draft Statute Law (Repeals) Bill that was introduced into the House of Lords the same day and which is expected to receive Royal Assent later this year. This will result in the repeal of 68 whole Acts and the removal of redundant provisions from over 400 other Acts. The repeals include the Apprentices Act 1814, the Queen Anne's Bounty Act 1838 and a wide range of obsolete enactments from topics as varied as agriculture, aviation, public health and road traffic.
- 8.15 Work on the next Statute Law Revision Report has already started. This will, as always, contain proposals for the repeal of statutes which are no longer of practical utility. Topics being considered include criminal law, the armed forces, the police and tax. In all our work we produce a consultation document inviting comments on a selection of repeals in each area. These documents are then circulated to Departments and other interested bodies and individuals. Subject to the response that we receive we hope to include repeals relating to all the projects mentioned above in our next Statute Law Revision report.
- 8.16 Much of our work on statute law revision is conducted jointly with the Scottish Law Commission and many of the repeal candidates contained in our Report extend to Scotland. Although the establishment of the Scottish Parliament alters the way that the statute law revision work of the two Commissions is carried out, the Scottish Executive has been content that our Report should include provisions that extend to Scotland even where the subject matter of a repeal has been devolved for the purposes of the Scotland Act 1998.
- 8.17 Because our Statute Law (Repeals) Acts extend throughout the United Kingdom and the Isle of Man, we liaise regularly on our proposals not only with the Scottish Law Commission but also with the authorities in Wales (the Office of the Secretary of State for Wales and the Counsel General to the National Assembly for Wales) and with the authorities in Northern Ireland and in the Isle of Man. We much appreciate their help and support in considering and responding to our proposals.

² Joint Report with the Scottish Law Commission: Law Com No 285; Scot Law Com No 193, Cm 6070, SE/2003/313.

PART IX

EXTERNAL RELATIONS

- 9.1 At the Law Commission we value our strong links with a wide range of organisations and individuals concerned with the reform of the law. We rely very heavily on the feedback to our consultation papers and we are grateful to all those who give their time to help us with our work.
- 9.2 Some of the notable external contacts we have had since April 2003 are as follows.

Parliament, Ministers and Government Departments

- 9.3 We have continued to enjoy close links with the Department for Constitutional Affairs (DCA – formerly the Lord Chancellor’s Department), our “sponsor” Department.

The Chairman met:

The Right Honourable Baroness Scotland of Asthal QC
the Attorney General
the Department of Trade and Industry in connection with the project on Partnership
the Chief Executive of the National Council for Voluntary Organisations.

The Commissioners and staff have had significant contact with a number of Ministers and officials in other Government Departments.

Judge Alan Wilkie has attended meetings and had contacts with a number of Ministers and officials:

Baroness Scotland (Minister of State, Home Office)
the Attorney-General (Lord Goldsmith QC)
the Solicitor-General (The Right Honourable Harriet Harman QC)
Lord Falconer of Thoroton, QC, as Minister of State for Criminal Justice, Sentencing and Law Reform and later as Lord Chancellor.

We have also dealt with:

the Home Office
the Cabinet Office
the Office of the Deputy Prime Minister
the Department of Trade and Industry
the Department of Transport

We have maintained contact with the National Assembly for Wales.

In May 2003, Michael Sayers (then Chief Executive) and Julia Jarzabkowski (a lawyer in the Property and Trust Law Team) spoke about the Law Commission to members of the ODPM/dTp Legal Directorate at a seminar.

Seminars, conferences, lectures and working parties

- 9.4 In addition to the seminars and conference already mentioned in earlier Parts, we arranged or participated in the following events.

Our Chairman gave lectures to the Personal Injury Bar Association, the Society for Advanced Legal Studies, and students of the Inner Temple; and as guest of honour and guest speaker, at the Oriel Law Society Dinner.

He also took part in:

the Legal Services Commission Causes of Action seminar;
the Franco British Lawyers' Society Annual Reception;
a Symposium on Legal Risk in Financial Transactions at Freshfields;
the Internet Services Providers' Association Awards Ceremony;
a Chancery Bar Association Seminar; and
meetings of the Financial Markets Law Committee.

Professor Hugh Beale is a member of the Co-ordinating Committee and of the Drafting Group of a Study Group on a European Civil Code.

He chaired the ERA Conference 'European Contract Law – The Action Plan 2003' in Trier (Germany) and was active in organising various groups working in field into submitting a joint bid for funding under the European Commission's Sixth Framework Programme.

He took part in a Law Society seminar on the Action Plan and spoke on the Action Plan, at the British Institute for International and Comparative Law conference on the Action Plan.

Professor Beale has lectured on the following topics:

- 'What has been done, what is going on, what is to be expected: principles, model laws, regulations or ...?' (on the Action Plan) in Helsinki
- 'General clauses and specific rules in the Principles of European Contract Law: the "good faith" clause' (Society for European Contract Law, Paris)
- 'The General Nature of English Contract Law' (Gothenburg)
- 'The Registration and Priority of Security Interests: the Law Commission's project' (University of Manchester, and Max-Planck Institute for Private International and Comparative Law, Hamburg)
- 'The work of the Law Commission' (Lincoln's Inn study weekend, West Dean)
- 'The Law Commission Project on Registration of Security Interests' (Finance and Leasing Association, Motor Finance Convention)
- 'Reform of Security Interests over Personal Property' (The Roy Goode Commercial Law Lecture Series, Queen Mary, University of London).

As General Editor, Professor Beale published:

- "Third Cumulative Supplement to Chitty on Contracts";
- and, with Oliver Radley-Gardiner, Reinhard Zimmermann and Reiner Schulze, he published "Fundamental Texts on European Private Law".

As a member and co-ordinator of the British-Hungarian Joint Academic Research Programme: Policy Issues in Legal Development (funded by the British Council and Hungarian Scholarship Board) Professor Beale advises on reform of the Hungarian Civil Code.

In the course of the year Mr Stuart Bridge spoke at the following events:

- seminars organised by the Society of Trust and Estate Practitioners (“STEP”) on Trustee Exemption Clauses – held in Leeds, Manchester, Birmingham, Bristol, London and Plymouth; and the “STEP” Annual Conference
- the Society of Advanced Legal Studies seminars on: (i) Trustee Exemption Clauses and (ii) Termination of Tenancies – both held in London
- the Reading Property Law Conference (keynote speech) on “The Prescriptive Acquisition of Easements”.

Professor Partington spoke at the Valuation Tribunals Annual Conference.

He continues to be a member of the Civil Justice Council and chairs its Alternative Dispute Resolution Committee.

Judge Wilkie spoke on Partial Defences to Murder at a Judicial Studies Board course.

He also spoke at a meeting of the Combined South Eastern Circuit Family Law Bar Association in connection with our project on non-accidental injury to children.

In addition, in response to an invitation, he chaired one of the regular meetings organised by University College, London at which the guest speaker was Professor Andrew Simester of the Faculty of Law, University of Nottingham.

Judge Wilkie is a member of the Judicial Studies Board Criminal Committee and the Criminal Justice Council.

Socio-legal Research

9.5 Socio-legal, economic and empirical research is of great benefit in some of our law reform projects. It can provide sound evidence on which to base our conclusions, whether we use existing research or commission new research.

9.6 In connection with Partial Defences to Murder, we commissioned empirical research by Professor Barry Mitchell ie a public opinion research survey. In addition, empirical research was conducted into the defences of provocation and diminished responsibility by Professor Mackay on behalf of the Nuffield Foundation. Both the Foundation and Professor Mackay have very kindly made the results of the research available to us. We ourselves conducted empirical research by way of a survey of the Judges’ Reports, which are prepared in all cases (duly anonymised) where there has been a conviction for murder. This was

complemented by a survey undertaken at our request by the Crown Prosecution Service.

- 9.7 The Housing and Administrative Justice Team commissioned research by Diane Lister on user preferences in relation to forms of rental agreement.
- 9.8 We also have strong links with the socio-legal community. For example, several Commissioners and members of staff took part in the annual conference of the SLSA; and the Commission continues to be represented on the Socio-Legal Research Users' Forum, which is chaired by Professor Partington. In November Commissioners held an annual meeting with the Society of Legal Scholars, the SLSA and the Association of Law Teachers.

Scottish Law Commission

- 9.9 Our close contacts with the Scottish Law Commission have been sustained, and we have worked together on Unfair Contract Terms, Statute Law Revision, Consolidation and Partnership Law. Members of the Law Commission visited the Scottish Law Commission.

Other Contacts

- 9.10 Commissioners met with representatives of the Law Society.
- 9.11 A significant number of distinguished visitors came from overseas, as shown at Appendix D. All these discussions are of great benefit and interest to us.

Publishing and the Internet

- 9.12 Most of our publications are either consultation papers or reports, and most deal with law reform projects. We also publish reports about consolidation or statute law revision, and new programmes of law reform. In particular, this year we published our seventeenth report on statute law revision. It contained a draft Statute Law (Repeals) Bill, which was introduced in Parliament on 16 December 2003. This has not yet been enacted and awaits Royal Assent. Further details about the publications issued during the period can be found elsewhere in this report.
- 9.13 We continue to publish in traditional hard copy format,¹ while at the same time also making all our publications available electronically on the Internet.² Our website contains the full text of all the consultation papers and reports we have issued since March 1997, together with executive summaries of most of them. Some earlier publications have also been added. Full lists of all our publications are available on the website. These lists include those older publications that are not themselves available electronically. Resources do not allow us at present to archive the rest of our catalogue of previous publications.

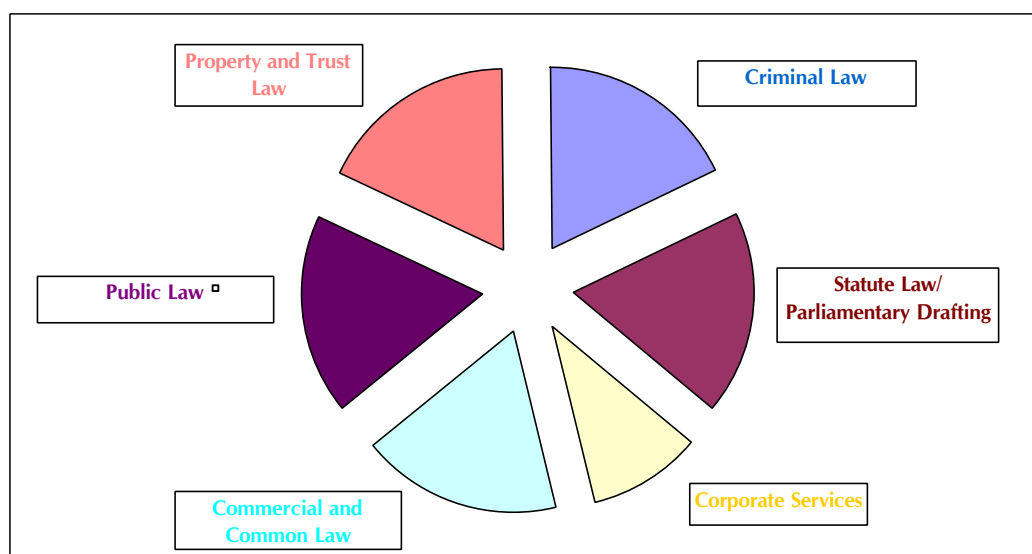
¹ We are grateful to TSO (The Stationery Office) for their assistance in publishing our consultation papers and reports.

² Our website address is <http://www.lawcom.gov.uk>.

- 9.14 A list, showing our implemented reports since 1985, is reproduced at Appendix B to this report. A fuller list, including all publications issued since 1965, is available on request, without charge.
- 9.15 Our website contains details of all our current law reform projects, and other useful information about the Commission. Each team has its own page, which sets out the work that is currently under way, and which provides links to all the relevant publications. The website also includes a bulletin entitled “Law under Review”, which is published three times a year and is available free of charge. This contains details of a range of Government or Government-sponsored law reform projects, including our own, and also gives a list of our reports which are awaiting implementation. The latest edition summarises about 150 projects.
- 9.16 We are continuously seeking new ways of using the website for making more information available about what we are doing. For example, we use the website to publicise our yearly recruitment campaign for research assistants.³ Like all publicly funded bodies, there is a limit to the resources we can call upon to develop our Internet presence, but we always welcome suggestions for ways we can improve our communications.

³ See the section on Research Assistants under “Staff” in Part X.

PART X STAFF AND RESOURCES



- Referred to as Housing and Administrative Justice in Part VI

Staff

- 10.1 The expertise and dedication of all the Commission's staff is much appreciated by the Commissioners. In the usual way, several members of staff moved on for the sake of career development during the period of this Report. We are grateful for their work and for their contribution to the team effort. The names of all the staff are set out at the beginning of Parts IV to VIII above, or in Appendix E.

(a) Recruitment and Working Patterns

- 10.2 The Quinquennial Review found that the Law Commission had developed imaginative and successful recruitment policies that fitted its needs well. Staff in general liked their work and found the Commission to be an agreeable and friendly place in which to work. This has been a period of some stability. When posts are open to non-civil servants, vacancies are advertised on the Commission's website with brochures and application forms available there for downloading. We welcome loans, secondments and short-term appointments as well as permanent appointments.

(b) Legal Staff

- 10.3 The main legal staff are barristers or solicitors from a wide variety of professional backgrounds, including academia, private practice and public service. They are usually recruited through public advertisements.
- 10.4 We welcome those who have come to work here over the last year: Matthew Jolley became team manager of the Property and Trust Law Team in November

2003; and Dr Joanna Perkins joined the Common Law and Commercial Law team in October.

10.5 Lawyers who left the Commission between 1 April 2003 and 31 March 2004 were:

Hugh Boileau (on loan to the Office of the Parliamentary Counsel);

Catherine Button (an Australian lawyer who returned to Australia);

Philippa Draper (on her return to the Office of the Deputy Prime Minister);

Christina Hughes (on loan to the Crown Prosecution Service);

Angela Mouton (who had been working temporarily on Compulsory Purchase Order law);

Jacques Parry (who transferred permanently to the Treasury Solicitor's Office);

Michael Sayers (our former Secretary/Chief Executive);

Melanie Smith (a New Zealand lawyer on loan to the Department for Culture, Media & Sport);

Matthew Waddington (an academic lawyer who, after secondment to the Commission, accepted a post in the Ministry of Defence in Cyprus).

10.6 The draftsmen who prepare the draft Bills attached to our law reform reports, and who also undertake the consolidation of existing legislation, are seconded to the Law Commission from the Office of the Parliamentary Counsel. We are very grateful to them all for their expertise and hard work, but would particularly make mention of Chris Packer and Jessica de Mounteney (who joined us in this period) and Mark Hudson (who returned to the Parliamentary Counsel's office).

(c) Research Assistants

10.7 Each year a dozen or so well-qualified graduates are recruited to assist us with research, drafting and creative thinking. They generally spend a year at the Commission before moving on to the next stage of their legal training and career. The selection process is an extremely thorough one and the Commission seeks to attract a diverse range of candidates at university law fairs and through contact with careers advisers, as well as through advertisements in a wide variety of newspapers and journals. For a number of former Research Assistants, their work at the Commission has been a rung on the ladder to a highly successful career. The Commission recognises the contribution they make, not least through their enthusiastic commitment to the work of law reform and their lively participation in debate. The following Research Assistants left the Commission in the last twelve months:

Daniel Clarke	Neil Cobb	Ben Dean	Lee Farrington
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Amy Goymour	Ben Griffiths	Lowri Griffiths	Zoe Leventhal
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Philomena McFadden	Neil Martin	Jennifer Platt	Nerisha Singh
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Tamsin Stubbing

We would like to record our gratitude to them and wish them well in their future careers in chambers, or firms of solicitors and elsewhere.

(d) Corporate Service Team

- 10.8 The Commission has continued to benefit from the experience, expertise and commitment of its small Corporate Service Team (CST) of administrative staff, led by Chris Porter. The services the team provide include accommodation, health and safety, human resources, information technology, programme management, publishing (including electronic publishing), records management, resource accounting, secretarial assistance and security. Without these services the Commission would have been unable to function effectively and smoothly.
- 10.9 The Quinquennial Review (QQR) of the Law Commission, reporting in March 2003, recognised the need for the Secretary and the Lord Chancellor's Department (LCD) to initiate a review of the resources needed in the CST to meet current and foreseeable expectations, including related skills and expertise. A review of those resources has taken place in the period of this Report. Implementation of the changes will take place during the early part of 2004/05.
- 10.10 The CST values the help available to them from colleagues in the DCA, in particular from the Civil Law and Justice Division and the Human Resources Directorate. The CST is also very grateful to the Facilities and Departmental Security Division.
- 10.11 Two members of the team (Francesca Hammond from the Registry and Vicky Smith, Trainee Librarian) moved on to new jobs in the last year, with their colleagues' good wishes for their future success.

(e) Library

- 10.12 Our library service continues to provide a vital information service in support of the legal work of the Commission. We make use, reciprocally, of a number of other libraries in our work and particular thanks are due to the libraries of the Supreme Court, the Department for Constitutional Affairs, and the Institute of Advanced Legal Studies. Our library makes full use of the Internet and other electronic services and databases; where possible, these are also made available via each individual desktop PC. In addition, a large collection of printed sources is available for research. Our library staff also provide training and advice in all areas of legal information research. In co-operation with the Department for Constitutional Affairs our library also provides a one-year library trainee programme for graduates intending to pursue a professional library and information studies course.
- 10.13 We have a wide variety of work/life balance arrangements in place where possible, such as home-working and working compressed hours.

Resources

10.14 Information on resources can be found in Appendix F.

(Signed) **ROGER TOULSON, *Chairman***
HUGH BEALE
STUART BRIDGE
MARTIN PARTINGTON
ALAN WILKIE

STEVE HUMPHREYS, *Chief Executive*

15 June 2004



APPENDIX A

THE LAW COMMISSION'S ROLE AND METHODS

The Law Commission has now been in operation for 38 years. It was established by the Law Commissions Act 1965 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
- ◆ 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 Eighth Programme, approved in 2001. 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 takes full account both of the European Convention on Human Rights and of other European law. It acts in consultation with the Scottish Law Commission. 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 1985

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.

Law Com No	Title	Implementing Legislation
1985		
138+	Family Law: Conflicts of Jurisdiction Affecting the Custody of Children (Joint Report - Scot Law Com No 91) (Cmnd 9419)	Family Law Act 1986 Part I (c 55)
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)
1986		
157	Family Law: Illegitimacy (2nd Report) (Cmnd 9913)	Family Law Reform Act 1987 (c 42)
1987		
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)
1988		
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)
1989		
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 Part I (c 36)
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)
1990		
192	Family Law: The Ground for Divorce (HC 636)	Family Law Act 1996 (c 27)
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)

Law Com No	Title	Implementing Legislation
1991		
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)
1992		
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)
208	Landlord and Tenant: Business Tenancies: A Periodic Review of the Landlord and Tenant Act 1954 Part II (HC 224)	Regulatory Reform (Business Tenancies) (England and Wales) Order 2003
1993		
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)
1994		
220	The Law of Trusts: Delegation by Individual Trustees (HC 110)	Trustee Delegation Act 1999 (c 15)
224	Structured Settlements and Interim and Provisional Damages (Cm 2646)	In part by Finance Act 1995 (c 4); Civil Evidence Act 1995 (c 38); and Damages Act 1996 (c 48)
226	Administrative Law: Judicial Review and Statutory Appeals (HC 669)	In part by Housing Act 1996 (c 52)
227+	Restitution: Mistakes of Law and Ultra Vires Public Authority Receipts and Payments (Cm 2731)	Part implemented – see note below
228	Criminal Law: Conspiracy to Defraud (HC 11)	Theft (Amendment) Act 1996 (c 62)
1995		
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) (c 44)
235	Transfer of Land: Land Registration (jointly with H M Land Registry) (Cm 2950)	Land Registration Act 1997 (c 2)
1996		
242	Privity of Contract: Contracts for the Benefit of Third Parties (Cm 3329)	Contracts (Rights of Third Parties) Act 1999 (c 31)
243	Offences of Dishonesty: Money Transfers (HC 690)	Theft (Amendment) Act 1996 (c 62)
1997		
245+	Evidence in Criminal Proceedings: Hearsay and Related Topics (Cm 3670)	Criminal Justice Act 2003 (c 44)
1998		
252	Statute Law Revision: Sixteenth Report (Joint Report - Scot Law Com No 166) (Cm 3939)	Statute Law (Repeals) Act 1998 (c 43)
1999		
260	Trustees' Powers and Duties (Joint Report - Scot Law Com No 166) (HC 538/SE 2)	Trustee Act 2000 (c 29)
2001		
267+	Double Jeopardy and Prosecution Appeals (Cm 5048)	Criminal Justice Act 2003 (c 44)
269	Bail and the Human Rights Act 1998 (HC 7)	Criminal Justice Act 2003 (c 44)
271	Land Registration for the Twenty-First Century (Joint Report with HM Land Registry) (HC 114)	Land Registration Act 2002 (c 9)
273+	Evidence of Bad Character in Criminal Proceedings (Cm 5257)	Criminal Justice Act 2003 (c 44)

NOTE ON LAW COM NO 227 Part of this report was implemented by the House of Lords in the case of *Kleinwort Benson v Lincoln City Council* [1999] 2AC 349; another part is outstanding: see our Eighth Programme of Law Reform at para 2.13, and our Annual Report for 1998 at para 1.22.

APPENDIX C

LAW COMMISSION LAW REFORM REPORTS AWAITING IMPLEMENTATION

Of all the Law Commission's 170 law reform reports, the 29 listed below remain outstanding. 17 of these, marked *, have been accepted by the Government in full or in part, subject to Parliamentary time being available.

<i>Year</i>	<i>Law Com No</i>	<i>Title</i>
1991	194	* Distress for Rent
1993	218	* Offences against the Person and General Principles
1994	222	* Binding Over
	226	* Judicial Review and Statutory Appeals
1995	229	Intoxication and Criminal Liability
	231	* Mental Incapacity
1996	237	* Involuntary Manslaughter
	238	Landlord and Tenant: Responsibility for State and Condition of Property
1997	246	* Shareholder Remedies
	247	* Aggravated, Exemplary and Restitutionary Damages
1998	248	* Corruption Offences
	249	Liability for Psychiatric Illness
	251	* The Rules Against Perpetuities and Excessive Accumulations
	253	* The Execution of Deeds and Documents by or on behalf of Bodies Corporate
	255	* Consents to Prosecution
1999	257	Damages for Personal Injury: Non-Pecuniary Loss
	261	* Company Directors: Regulating Conflicts of Interests and Formulating a Statement of Duties
	262	Damages for Personal Injury: Medical, Nursing and other Expenses; Collateral Benefits
1999	263	Claims for Wrongful Death
2001	270	* Limitation of Actions
	272	* Third Parties – Rights against Insurers
2002	276	Fraud
	277	* The Effective Prosecution of Multiple Offending
2003	281	Land, Valuation and Housing Tribunals: The Future
	282	* Children: Their Non-accidental Death or Serious Injury
	283	Partnership Law
	284	Renting Homes
	286	Towards a Compulsory Purchase Code: (1) Compensation
2004	287	Pre-Judgment Interest on Debts and Damages

APPENDIX D

VISITORS FROM OVERSEAS

Among the visitors to the Law Commission during the period covered by this report were:

<i>Australia</i>	Professor Marcia Neave (Chair, Victoria Law Reform Commission)
<i>Egypt</i>	Chief Justice Mamdouh Marree (Egyptian Supreme Constitutional Court) Deputy Chief Justice Adel Omar El Sharif (Egyptian Supreme Constitutional Court)
<i>Germany</i>	Judge Dr Herr Shoppmeyer (Ninth Senate of the German Supreme Court)
<i>Israel</i>	Dr Susan Hattis Rolef (Head of the International Desk, Knesset Research and Information Centre)
<i>Sierra Leone</i>	Mr Peter Tucker (Chairman, Law Reform Commission)
<i>Spain</i>	Sr Javier Torre de Silva (Council of State)

DELEGATIONS:	Chile
	China
	Commonwealth Secretariat (Public Administration International Study Programme: "Lawyers and Government – Managing Change")
	Egypt
	United Arab Emirates
	United States of America (Penn State University, Harrisburg)

APPENDIX E

STAFF

(AS AT THE END OF MARCH 2004)

The names of the Commission's legal staff are set out, by their teams, at the head of Parts IV-VIII.

In addition, the Law Commission's Corporate Service Team comprises:

Chief Executive

Mr Steve Humphreys

Deputy Chief Executive and Budget Manager

Mr C K Porter

Personnel, Policy and Planning

Miss C J Smith

Personnel/Recruitment/ Resource Accounting

Miss J A Griffiths

Printing, Publishing and Website

Mr D R Leighton
Editor and Web Manager

Facilities and Registry

Ms A L Peries
Facilities Manager

Mr T D Cronin
Registry

Library Services

Mr K Tree
Librarian

Secretarial Support

Miss C P Cawe
Mrs H C McFarlane

Ms C Ferguson
Registry

Mr M Hallissey
Assistant Librarian

Miss A J Meager
Miss A Piper

Miss R Mabbs
Office Keeper

Miss C McCaughren
Library Trainee

Ms J R Samuel

Mrs A Menditta
Messenger

Chairman's Support

Ms N Hajazi
Clerk

CONTACT POINTS:

- ◆ The general enquiry telephone number is: 020-7453-1220
- ◆ The general fax number is: 020-7453-1297
- ◆ The Law Commission's website address is: <http://www.lawcom.gov.uk>

Email addresses

- General email address (except library services): chief.executive@lawcommission.gsi.gov.uk
- Library email address: library@lawcommission.gsi.gov.uk
- The law reform teams and the statute law revision team have individual email addresses, which can be found on the team pages of the Commission's website

APPENDIX F

THE COST OF THE COMMISSION

The Commission's resources are mainly made available through the Department for Constitutional Affairs (DCA) in accordance with section 5 of the Law Commissions Act 1965. The cost of most items (in particular, accommodation charges,¹ salaries, superannuation and headquarters' overheads) is not determined by the Commission. The figures given for 2003/2004 cover the period April 2003 to March 2004 inclusive. The figures given for 2002/2003 cover the 15 months from January 2002 to March 2003 inclusive. These figures cannot therefore be related to those in Supply Estimates and Appropriation Accounts.

	2003/2004 (April/March)		2002/2003 (Jan/March)	
	£000	£000	£000	£000
Accommodation charges ²	1,038.0		1,362.3	
LCD Headquarters' overheads ³	952.1		1,176.3	
		1,990.1		2,538.6
Salaries and pensions of Commissioners ⁴	448.7		534.7	
Salaries of legal staff ⁴ and secondees and payments to consultants	1,945.6		2,323.9	
Salaries of non-legal staff ⁴	363.8		430.3	
		2,758.1		3,288.9
Printing and publishing; supply of information technology; office equipment and books	268.9		314.3	
Utilities (inc telecommunications) and postage	36.4		49.9	
Travel and subsistence	25.4		15.7	
Miscellaneous (inc recruitment); fees & services	34.7		60.3	
Entertainment	5.5		4.4	
		370.9		444.6
TOTAL		5,119.1		6,272.1

- 1 The way the Department charges out all centrally incurred costs was again reviewed during 2003/2004 and is now based on apportionment.
- 2 The figure for 2002/03 includes all centrally incurred costs (eg capital, depreciation charges, ground rent, rates, furniture, cleaning, security, and all works supplied by DCA).
- 3 The decrease in the figure for 2003/2004 is again due to a change in the methodology of apportionment of DCA overheads to the Law Commission.
- 4 These figures include ERNIC and Superannuation.

NOTE

The Commissioners are full time. The Chairman and Judge Alan Wilkie QC receive judicial salaries, as a high court judge and a circuit judge respectively. The salary of each of the other Commissioners is £103,829 per annum.

