

**LAW COMMISSION
TWENTY-NINTH ANNUAL REPORT
1994**



LAW COM No 232

LAW COMMISSION

THE LAW COMMISSION TWENTY-NINTH ANNUAL REPORT 1994

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

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LAW COMMISSION

TWENTY-NINTH ANNUAL REPORT: 1994

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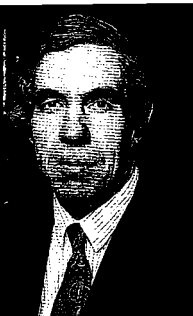
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THE LAW COMMISSION TWENTY-NINTH ANNUAL REPORT

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



I have the honour to present to you, on behalf of the Law Commission, our Twenty-Ninth Annual Report for the year 1994, pursuant to section 3(3) of the Law Commissions Act 1965.

The need for better laws has been constantly in the news. Public consciousness has focused attention on the law-making process and our work has, at long last, been the beneficiary. Both Houses of Parliament changed their procedures in the last quarter of 1994 to accommodate us, and we are now permitted to go to Westminster to explain our Bills to a knowledgeable Parliamentary Committee.

The long term success of these changes depends on whether we can keep the trust of Parliament. Our mission is to make the law simpler, fairer and cheaper to use. The hallmarks of our work are wide consultation, meticulous thoroughness and robust independence. Government and its agencies are consulted before we choose a project, to ensure that our work is needed. And they are consulted during its course to ensure that our recommendations take practical realities into account. Our final conclusions, however, are ours and ours alone.

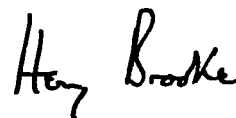
Four matters stand out in this report. At present, our Bills, like all other public Bills, fall at the end of a Session. This means that Parliament cannot receive evidence on them after June each year. If, once they are approved for the new procedures, they could remain alive for 12 months, the backlog could be cleared more quickly, and the quality of our law enhanced.

Secondly, similar procedures are needed, perhaps through both Houses working jointly, for our criminal law Bills. These Bills address very difficult, technical issues. The ordinary procedures are inappropriate. Evidence-giving to a Parliamentary Committee needs to be combined with the opportunity for debate on the floor of each House for any new policy issues within the Bill. Concern about the poor quality of our criminal law has been expressed to us throughout the year, often from very high places indeed. Bad law is unfair law.

Thirdly, bad law also wastes money. Not only in the criminal courts. Large swathes of trust law and landlord and tenant law, to cite only two examples, are antique, obscure or impenetrable, and the bill for bad law goes to those who have to use it. Your department's budget has to meet most of the costs of bad law borne by central government, and we have had very constructive talks with your senior officials about ways in which the scale of this problem can be more widely understood in Whitehall and Westminster.

Fourthly, we describe one task completed in four months, and another completed in ten months from start to finish. This shows how quickly we can respond to the immediate concerns of Ministers and MPs, if only we are given the resources we need.

We are very grateful to you for the interest you continue to show in our work, culminating in your visit here in November, which was greatly appreciated. It has been a good year for the Commission.



CHAIRMAN

PART I OVERVIEW OF THE YEAR: THE RELEVANCE OF THE COMMISSION'S WORK

- 1.1 "Give us good laws, not more laws". This headline in *The Times* in November¹ caught a national mood. In the article which lay beneath the headline, Peter Riddell picked up two important contemporary themes. The first is that there is a need to ensure that Bills are properly drafted before they are formally presented to Parliament: this entails, he said, sufficient pre-legislative consultation. The other is that there is a need to ensure that the policy behind them has been carefully thought out, so that they are immune from the hazards caused by pressures of time. Careful consideration of policy and meticulous care in the preparation of draft Bills have always formed part of this Commission's stock in trade.
- 1.2 We are repeatedly being told by non-lawyers how little has been known about our work in the past in places not peopled by lawyers. Our task is to make the law simpler, fairer and cheaper to use, and one of the most striking features of our work is its relevance to the everyday life of the ordinary citizen. In all we do we are seeking to update and simplify the law, to make it directly relevant to today's society and readily intelligible by those who need to use it. We believe that there is now a steadily growing public awareness of the importance of this work and of the ways in which we are seeking to meet a real contemporary need. We give a few examples here; others will follow in Part II.

Our recent publications

- 1.3 During 1994 we approved for publication seven reports, two consultation papers and a special study.² They all demonstrate our commitment to creating laws which are relevant to contemporary society. The topics covered by the reports ranged from Damages for Personal Injuries to Judicial Review, from Mental Incapacity to Conspiracy to Defraud. We also published an illuminating study into Parliamentary Procedures as they relate to the Law Commission.³
- (i) *Homicide*
- 1.4 Our two consultation papers related to different aspects of the law of homicide. One of them was concerned with a rule that much exercised the minds of MPs and

¹ "Give us good laws, not more laws: Good government is a matter of quality, not quantity", writes Peter Riddell, *The Times* 14 November 1994.

² See paras 2.1-2.2 for a list of these publications.

³ *Parliamentary Procedures and the Law Commission, A Research Study* by Philippa Hopkins, with a Foreword by the Law Commission, November 1994. See, further, para 5.17 below.

Ministers during the debates on the Criminal Justice and Public Order Bill in 1994.⁴ Under this antique rule nobody can be convicted of homicide unless the victim has died within a year and a day of the injury that caused the death; the problems this causes are growing because of the increasing number of people being kept alive on life-support machines⁵. The other paper discussed involuntary manslaughter, the part of the criminal law which embraces certain cases where death has been caused by someone who has no intention to kill or to cause really serious harm. Again, this paper has contemporary relevance. The single word "manslaughter" embraces cases of serious criminal recklessness, which warrant long periods of imprisonment,⁶ and also pathetic cases where death is caused by accident, where a probation order is sometimes the appropriate penalty.⁷ We are concerned to try to introduce some order into a chaotic corner of the law which is often in the public eye.⁸

(ii) Damages for personal injury

1.5 Many people are concerned every year with claims for compensation for personal injuries. We published two reports this year as part of our major study of the law of damages. One of them⁹ described the findings of the largest empirical research study into the experiences and feelings of personal injury victims¹⁰ ever conducted in this country. The other¹¹ made recommendations designed to simplify and

⁴ The application of this rule following the death of Michael Gibson, who survived for 16 months in a persistent vegetative state after being attacked in the town centre of Darlington, was the incident which sparked off the parliamentary debate.

⁵ The House of Lords was told in December 1992 that there were between 1,000 and 1,500 PVS (persistent vegetative state) cases in this country: see *Airedale NHS Trust v Bland* [1993] AC 789,879.

⁶ In *Tominey* (1986) 8 Cr App R (S) 161 two armed robbers were trying to rob a security van when one of their shotguns was accidentally discharged, killing a security guard. They received sentences of 18 years imprisonment.

⁷ A sentence sometimes imposed on very young mothers following the death of a baby through inadequate handling which amounted to an unlawful assault.

⁸ There has been much public discussion of the possible recourse to the law of manslaughter following recent public transport disasters. In December 1994, OLL Ltd, a company which ran an activity centre responsible for a canoeing disaster in Lyme Bay in which four children were killed, became the first company in Britain ever to be convicted of manslaughter.

⁹ Personal Injury Compensation: How Much Is Enough? (1994) Law Com No 225. See paras 2.8-2.9 below.

¹⁰ The survey covered 761 people living in England and Wales who had received damages arising out of personal injury and fatal accident claims between January 1987 and December 1991.

¹¹ Structured Settlements and Interim and Provisional Damages (1994) Law Com No 224. See paras 2.10-2.12 below.

modernise the law¹² relating to the way damages are calculated and awards can be structured to provide a lifelong flow of income.

(iii) Judicial review

- 1.6 Judicial review is now constantly in the public eye. Thanks to earlier work by the Commission,¹³ it has grown into a very significant remedy in English law, covering issues as varied as housing benefit and homelessness, the rights of prisoners, , the commissioning of nuclear reprocessing plant and, most recently, the payment of economic aid to overseas countries. The number of applications for leave to apply for judicial review has grown from about 500 in 1980 to nearly 3,000 by 1993 when almost half the non-criminal applications were homelessness and immigration cases. Our report¹⁴ in 1994 made a number of recommendations for simplifying the procedures and improving the available remedies, as well as for making the rules relating to public interest challenges more transparent. It was warmly welcomed.

(iv) Mental Incapacity

- 1.7 The subject of decision-making for those without capacity to make their own decisions is of growing significance - not least because of increased life expectancy, medical advances and community care policies. Cases like those of Tony Bland¹⁵ have caught the public imagination, and there has been increasing interest in what are sometimes, rather inappropriately, called "advance directives".¹⁶ In December we approved our report on Mental Incapacity which we will publish in March 1995¹⁷. The report covers decision-making in medical and financial matters and in matters concerned with personal welfare. It recommends the creation of a much needed new comprehensive jurisdiction under which the courts would have power, as a last resort, to take effective decisions in all these matters at the same time.

¹² For example, by making it more likely that the courts will take account of modern actuarial thinking, and by requiring them to take into account the returns on contemporary index-linked gilts when they make their calculations.

¹³ See Report on Remedies in Administrative Law (1976) Law Com No 76.

¹⁴ Administrative Law: Judicial Review and Statutory Appeals (1994) Law Com No 226. See paras 2.4-2.6 below.

¹⁵ Who survived for over three years in a persistent vegetative state following the Hillsborough football ground disaster. See *Airedale NHS Trust v Bland* [1993] AC 789.

¹⁶ Whereby people may give directions about the way in which they wish to be cared for if they should lose the capacity to take these decisions for themselves.

¹⁷ See paras 2.88-2.96 below.

Our current projects

(i) Company and commercial law

1.8 In 1994 we established a new team to consider areas of company and commercial law which needed to be simplified or modernised. We have never previously had the opportunity or expertise to engage as fully as we would have wished in these areas of the law. The Department of Trade and Industry had approached us some time ago in connection with company law reform, and we are very pleased that we now have the capacity to respond to their request for help.

1.9 A mention of just a few of the topics on which we have been working in this first year will be enough to demonstrate their contemporary importance. We have conducted a swift feasibility study to assess the importance of company law reform in the eyes of those who run small private businesses.¹⁸ We have embarked on a project to overhaul and modernise the remedies available to a company's dissatisfied shareholders.¹⁹ And we have also started work on EDI,²⁰ a communications medium which is being used increasingly in the commercial sector, where we are considering what changes in the law are needed to accommodate the use of this new technology.

(ii) The property rights of home-sharers

1.10 Changes in society have led to the need for a review of the law which governs property disputes between unmarried cohabitants or other home-sharers on the break-up of their relationship. We have therefore embarked on a major new project to consider the resolution of disputes about the property rights of those in all such forms of cohabitation,²¹ for which we have commissioned socio-legal research to assist us.

(iii) Land registration

1.11 Land registration is a system which affects vast numbers of properties, and therefore vast numbers of people. There are estimated to be some 21 million registered and potentially registrable titles in England and Wales. Land registration law is well known to be low grade law, and we have been working on possible reforms of it for a number of years. We are now driving forward a new project,²² in collaboration with the Land Registry and the Lord Chancellor's Department, with the aim of making the whole system cheaper and more accessible.

¹⁸ See paras 2.20-2.24 below.

¹⁹ See paras 2.25-2.27 below.

²⁰ Electronic Data Interchange: the way in which communications between computers are conducted. See paras 2.28-2.30 below.

²¹ These range from people who are cohabiting outside marriage to elderly people living together, or with their grown-up children, for company and convenience. See, further, paras 2.78-2.79 below.

²² See paras 2.67-2.70 below.

(iv) *Criminal law*

1.12 Our work in the field of criminal law is extremely varied. Among our current projects, we have just embarked on a major new review of offences of dishonesty.²³ We are examining the law relating to dangerous sports²⁴ and consensual sado-masochistic practices.²⁵ We are reviewing the principles on which a person might or should be convicted of helping someone else to commit a crime.²⁶ And we are also undertaking major studies, at the Home Secretary's request,²⁷ into the principles on which hearsay evidence should be admissible in criminal courts, and the rules which should govern the admissibility of the evidence relating to previous misconduct of a defendant.²⁸

1.13 At the same time we are also very anxious to see the early implementation of our reports in this field, most notably our major report on *Offences Against the Person and General Principles*,²⁹ published in November 1993, which forms the first stage of the clear, easily accessible criminal code this country so badly needs. At the end of 1994, there was widespread publicity after the Crown Prosecution Service had valiantly tried to adapt a law which, unbelievably, still refers to "whosoever shall unlawfully and maliciously inflict any grievous bodily harm"³⁰ to a case of harm allegedly inflicted over the telephone. It was said at the trial that a bank clerk had subjected a female customer of the bank to a "psychological battering" by making persistent obscene telephone calls, but both the mental element of the offence and the factual content of the offence gave rise to very great difficulties.³¹ The draft Bill

²³ The dishonest theft of trade secrets is among the first matters which will receive our attention. Today this familiar kind of dishonesty goes largely unpunished because the criminal law has not yet been adapted to accommodate it. See, further, paras 2.43-2.45 below.

²⁴ Some of the modern martial arts, for example.

²⁵ See paras 2.50-2.51 below.

²⁶ For example, by selling jemmies to someone known to be a burglar, or offering yet another drink to someone known to be about to drive his car home. See para 2.52 below.

²⁷ In accordance with a recommendation by the Royal Commission on Criminal Justice that we should be asked to undertake this work.

²⁸ See paras 2.61-2.64 below.

²⁹ *Criminal Law: Legislating the Criminal Code: Offences Against the Person and General Principles* (1993) Law Com No 218.

³⁰ *Offences Against the Person Act 1861*, s 20. See the exasperated comments of Lord Mustill, cited in n 25 to para 5.12 below, and of Sir John Smith QC in n 29 to para 5.13.

³¹ An article headed "Judge's error frees clerk jailed for GBH by telephone", *The Times* 16 December 1994, describes how the Court of Appeal quashed the conviction and 18-month prison sentence imposed on 25-year old Christopher Gelder because of a misdirection by the trial judge on the mens rea required for the offence, without having to go on to

contained in our recent report, which received an enthusiastic welcome on publication, defines the relevant concepts of “intentionally”, “recklessly” and “injury” in clear, intelligible modern language which everyone can understand.

(v) Family law

- 1.14 We described in detail in our last annual report the very striking achievements of the Commission over the years in the field of family law.³² During 1994, the International Year of the Family, we have been concerned with two major projects, on mental incapacity and the property rights of home-sharers, both of which have a substantial family law dimension. We no longer have a family law team led by a specialised Commissioner.³³ We are determined however to maintain a family law capability at the Commission, because family law reform cannot simply stand still for five years.³⁴ How much we will be able to do will depend on the Government’s willingness to supply us with the small amount of additional resources we need to enable us to undertake essential smaller projects and to provide the back-up advice it will undoubtedly require in connection with implementing our completed reports³⁵.

IMPLEMENTATION OF OUR REPORTS

- 1.15 In recent years we have been troubled by Parliament’s neglect of our work. We are happy to report that the political climate has now altered, and there seems to be a much sounder understanding at Westminster of the value of the work we do. In Part V we sing a song which is altogether more tuneful than the depressing siren sounds we have had to utter in recent years. Acts, or sections of Acts, based on five of our reports passed through Parliament in the 1993/94 Session,³⁶ and we are at present confident that even more will be implemented during the current Session. And what is of greater importance in the long term is that each House of Parliament adapted its procedures during the last three months of 1994 in order to create a more streamlined machinery which provides for detailed scrutiny of our rather technical

consider whether it was possible as a matter of law to inflict grievous bodily harm, pursuant to an 1861 statute, over the telephone.

³² Twenty-Eighth Annual Report 1993 (1994) Law Com No 223, Part III.

³³ *Ibid*, para 1.33.

³⁴ Parliament has imposed on the Commission the statutory duty of keeping all the law of England and Wales under review (Law Commissions Act 1965, s 3(1)) and we are the only public agency which possesses the library and other research facilities, the contacts and the expertise to carry out much-needed continuing work in this field.

³⁵ See para 1.23 below.

³⁶ In contrast to a total of four in the last four Sessions, only one of which (Part I of the Criminal Justice Act 1993) was promoted by the Government.

Bills in the House of Lords and a Second Reading in the House of Commons off the floor of that House.³⁷

- 1.16 Most of our Bills are uncontroversial, at any rate in party political terms. We usually tackle areas of the law which are known to be bad or seriously out of date, and our recommendations are always based on in-depth research and detailed consultation. They often represent our best judgment of the appropriate way to balance competing interests in the search for a workable consensus; of course we recognise the right of both the Government and Parliament to reach a different view from ours, which may be more sensitive than ours to the current political breezes. What is very encouraging is the emergence of parliamentary procedures which will enable us to explain directly to a knowledgeable committee in Parliament the reasons why we have adopted a particular line, and also, so far as it is not already set out in the report under consideration, the evidence which led us to the conclusion we reached.
- 1.17 This procedure is not at all suitable for any case where we strongly disagree with the Government's treatment of one of our reports,³⁸ but subject to this caveat the procedures which we describe in Part V represent a most encouraging new step forward in which the Commission can work with the Government and members of all parties in both Houses of Parliament in a collaborative enterprise to improve the quality of our laws. It is far too early to express a long term judgment on the efficacy of the procedures which have now been devised, and we know that the authorities in both Houses of Parliament are going to keep them carefully under review. But it is not too early to make two important points.
- 1.18 The first is that we hope some thought can be given to the desirability of enabling Law Commission law reform Bills which have been cleared for this procedure to survive at the end of a Session. If they could remain "live" for, say, 12 months from their first introduction to Parliament, we would be able to attend Parliament to give evidence about them throughout the year and not, as now, in a period limited to the first six months of a calendar year.³⁹
- 1.19 The second is that Parliament has not yet shown itself willing to create or use procedures which are suitable for the carriage of our criminal law Bills. Much of the

³⁷ See, further, para 5.14 below.

³⁸ The history of the Criminal Attempts Bill 1981 before a Special Standing Committee of the House of Commons is a good example of what should be avoided in future, if at all possible.

³⁹ We will be giving evidence to the first "Jellicoe Committee" of the session in the third week of January 1995, and our present understanding is that evidence on any Bills which are likely to become law this session will have to be completed by the end of June 1995 if they are to have any hope of completing all their stages, however quickly, in each House before the end of the session. For Jellicoe Committees see para 5.2 and n 2, below.

criminal law is in a parlous state,⁴⁰ and the work we do by way of simplification and modernisation is usually very technical. It warrants the use of the kind of procedure which now exists in both Houses (but not on a joint basis) whereby we can explain our work direct to a committee in Parliament. The difficulty is that the House of Commons has always interested itself in the criminal law, and some way must be discovered whereby the needs of members of the House of Commons can be effectively reconciled⁴¹ with the need to convert the bedraggled state of the criminal law into an efficient working tool for law enforcement.

OTHER FEATURES OF THE YEAR

(i) Meeting with the Home Affairs Committee

- 1.20 For the first time ever the Home Affairs Committee of the House of Commons invited us to give evidence to them about our work. We appreciated the keen interest they took in what we had to tell them, and we look forward to continuing this very constructive dialogue on future occasions.⁴²

(ii) Work following the publication of our reports

- 1.21 During the year we have had to devote an unprecedented amount of time to work connected with the handling of our reports after they have been completed, laid before Parliament and published.⁴³ We do this work in furtherance of our statutory purpose to promote the reform of the law,⁴⁴ although it represents a considerable strain on our limited resources. This work has taken four main forms.
- 1.22 The first involves a constructive dialogue with the Government department — usually the Lord Chancellor's Department — which has the carriage of our report. We are happy to supply them with any further information they may need about it, and to comment, when requested to do so, on any responses on which they wish to receive our advice before they submit the report to a Minister for decision. The Lord Chancellor's Department has now agreed to give us their reasons if they are minded to recommend the rejection of any part of a report, and to give us the opportunity for comment before they finalise their advice for the Lord Chancellor.

⁴⁰ See paras 1.13 above and 5.11-5.13 below.

⁴¹ It is doubtful whether many of those who added amendments to the Criminal Justice and Public Order Bill 1994 during its passage through Parliament realised that the police, the prosecutors and the courts can only make them work in practice by reference to principles of caselaw which are not in the statute book and are often thoroughly uncertain or otherwise inaccessible.

⁴² A fuller account of this meeting is given at paras 5.10-5.13 below.

⁴³ We have come to describe this work as "after-sales" service.

⁴⁴ Law Commissions Act 1965, s 1(1). To allow ourselves to become reconciled to the neglect of our reports once we have completed them at very considerable public expense would be at variance with the purpose for which Parliament has created us.

We hope that other departments may now be persuaded to follow this lead and the other excellent example now being set by the Lord Chancellor's Department of giving us an initial response to each of our reports within six months of publication and announcing their final response to Parliament without unreasonable delay. It is very discouraging when our reports are simply ignored by the responsible department after so much trouble and public money have been devoted to their preparation.

- 1.23 The second is more burdensome. We have found that our help is increasingly being sought when the recommendations we have made are being adapted to accommodate points made within or to Government, often in connection with instructions being given to Parliamentary Counsel to resettle the draft Bill for presentation to Parliament. Again we are happy to assist, but both Mr Aldridge (last year) and Mr Harpum (this year), the Commissioners most affected to date, have found that this work, which is not easily delegated, takes up an increasing amount of their time. There are additional difficulties when time has been allowed to elapse before our help is sought, because caselaw, statute or society generally may have moved on, and substantial further work may be needed to update the thinking which underlay the original recommendations.
- 1.24 Thirdly, the use of the Jellicoe procedure⁴⁵ will cause further strains. In these early days there are going to be extra problems connected with the need to recall the responsible Commissioner, who will have gone on to retirement or other work,⁴⁶ and to provide him or her with back-up by a Commission which has had no direct personal involvement, at Commissioner or staff level, with the report in question. And although these Bills are Government Bills, each of them will require the personal attention of a current Commissioner, usually the Chairman, during its Special Public Bill Committee stage, to ensure the Commission is giving the committee all the help it needs.
- 1.25 Finally — although we hope that less time will have to be given to this work in future — there has been a need to devote time to the task of raising awareness generally of the importance and contemporary significance of the Commission's work.⁴⁷ All this work has taken Commissioners away, often for significant periods of time, from their primary task of preparing new law reform reports and advice for Ministers and Parliament.

⁴⁵ See para 5.2 and n 2 below.

⁴⁶ For example, Dr Peter North, the Vice-Chancellor of Oxford University, who left the Commission in 1984, has kindly agreed to return to give evidence to a Jellicoe Committee on the Private International Law (Miscellaneous Provisions) Bill. This Bill incorporates recommendations made by the Commission in reports published in 1983, 1985 and 1990, in all of which he played a major role.

⁴⁷ See, for example, para 5.9 below.

COMMISSIONERS

- 1.26 As we anticipated in our last report, this has been an unprecedented period of change for the Commission. We paid tribute last year to the three Commissioners who retired at the end of 1993.⁴⁸ 1994 saw the end of Professor Beatson's term of appointment as a Commissioner, and the arrival of four new Commissioners.
- 1.27 Jack Beatson came to us in 1989 from Oxford⁴⁹ and he left us in September to go to Cambridge.⁵⁰ He made an outstanding contribution to our work while he was with us, and his meticulous scholarship, his sound understanding of the practical operation of the law, and his down to earth commonsense made him a formidably equipped colleague. He was of particular assistance to new Commissioners. He began by rounding off our joint report on tort and delict,⁵¹ and he completed two more joint reports with the Scottish Law Commission, relating to different aspects of the sale of goods.⁵² He also turned his hand to a wide variety of different subjects in his area of responsibility,⁵³ including our major project on the law of damages.⁵⁴ But it is for his work as a public lawyer and a restitutionary lawyer that he will be particularly remembered. The Consultation Paper on Restitution of Payments Made under a Mistake of Law was a formidable piece of scholarship,⁵⁵ and he completed

⁴⁸ Professor Brenda Hoggett QC (now Mrs Justice Hale), Trevor Aldridge QC and Richard Buxton QC (now Mr Justice Buxton). See Twenty-Eighth Annual Report 1993 (1994) Law Com No 223, paras 1.26-1.30.

⁴⁹ He was a Fellow of Merton College, Oxford, until 1994.

⁵⁰ As Rouse Ball Professor of English Law.

⁵¹ Private International Law: Choice of Law in Tort and Delict (1990) Law Com No 193, Scot Law Com No 129.

⁵² Rights of Suit in Respect of Carriage of Goods by Sea (1991) Law Com No 196; Scot Law Com No 130; Sale of Goods Forming Part of a Bulk (1993) Law Com No 215; Scot Law Com No 145.

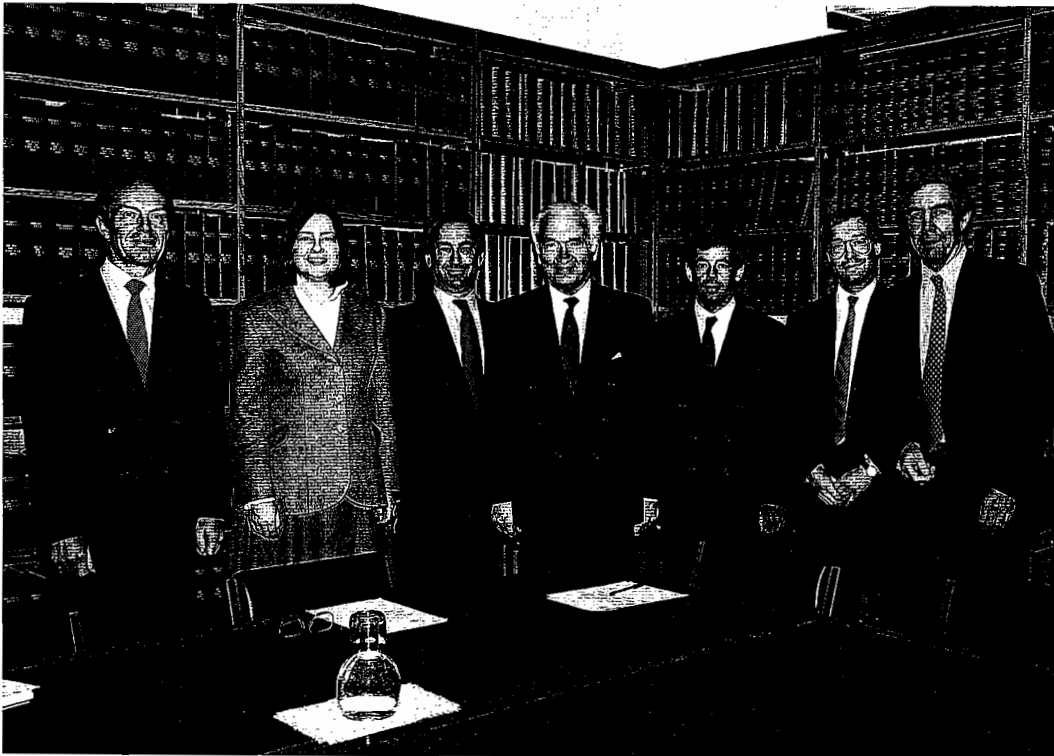
⁵³ His work included the following reports and consultation papers: The Hearsay Rule in Civil Proceedings (1993) Law Com No 216; Fiduciary Duties and Regulatory Rules, Consultation Paper No 124; Privity of Contract: Contracts for the Benefit of Third Parties, Consultation Paper No 121; and Contributory Negligence as a Defence in Contract (1993) Law Com No 219. For descriptions of two of these projects see further paras 2.7 and 2.31-2.34 below.

⁵⁴ See further paras 2.8-2.14 below.

⁵⁵ The House of Lords derived great assistance from it when it decided the leading case of *Woolwich Equitable Building Society v IRC* [1993] AC 70 in July 1992

that project with the report we published in November.⁵⁶ And the report on Judicial Review and Statutory Appeals has been praised on all sides.⁵⁷

1.28 The first of the new Commissioners to take up appointment was Charles Harpum, who came with the New Year. A Fellow of Downing College, Cambridge, he is leading the work on property law and trust law. Diana Faber, then a partner in Richards Butler, the city solicitors, arrived shortly afterwards, to lead our new business law team. Stephen Silber QC joined us after Easter from chambers at 3 Gray's Inn Place to lead our work on criminal law. And, finally, Andrew Burrows joined us in October as the Commissioner in charge of common law and public law. Formerly a Fellow and Lecturer in Law at Lady Margaret Hall, Oxford, he now combines a professorship in law at University College, London with his post at the Law Commission.⁵⁸ Yet again the Commission has a balanced team: a judge, a barrister, a solicitor and two academic lawyers. The mix between academics and practitioners has always been one of the Commission's strengths, and it is good that this tradition is being continued.



THE LORD CHANCELLOR (CENTRE), WITH THE CHAIRMAN, COMMISSIONERS AND SECRETARY

⁵⁶ Restitution: Mistakes of Law and Ultra Vires Public Authority Receipts and Payments (1993) Law Com No 227. See further paras 2.15-2.18 below.

⁵⁷ Administrative Law: Judicial Review and Statutory Appeals (1994) Law Com No 226. See further paras 2.4-2.6 below.

⁵⁸ Professor Burrows has been seconded from University College, London, for the five year term of his appointment.

- 1.29 These are the last in a complete round of new appointments to the Commission, starting with the appointment of a new Chairman in January 1993. As these changes were combined with the departure of all six members of the Commission's senior legal staff, including the Secretary, between August 1993 and July 1994, it will be seen that this has been a period of massive change. Fortunately, the inbuilt corporate strength of the Commission and the marvellous support we have received from our dedicated legal and administrative staff have seen us safely through what has in many respects been a very unsettling period.

THE SECRETARY

- 1.30 Michael Collon, our Secretary since 1987, left us in July to take up a post as Head of a new Division in the Lord Chancellor's Department. That the Commission has been such a happy place owes much to his personal characteristics. His sound judgment in choosing staff served us well and he could not have been more helpful to incoming Commissioners. Our only regret was that the size of his administrative and managerial burdens meant that the Commission was not able to make appropriate use of his skills as a lawyer.

- 1.31 We welcomed Michael Sayers as our new Secretary in July. Once a member of the Commission's legal staff, his recent posts have included a spell as Secretary of the Council on Tribunals, responsibility for a wide variety of appointments in the Lord Chancellor's Judicial Appointments Group, and Head of the Family Law Division in the Lord Chancellor's Department, so he has much valuable practical experience to offer us.

CONCLUSION

- 1.32 All in all, therefore, it has been a good year for the Commission. We believe that the importance and the relevance of our work is now much more widely understood, both inside and outside Government, and we look forward to the start of the second thirty years of our life next June with quiet but unassuming confidence.

PART II THE YEAR UNDER REVIEW

LAW REFORM REPORTS AND CONSULTATION PAPERS

- 2.1 We list below the law reform reports which we approved for publication during 1994:

<i>Law Com No</i>	<i>Title</i>
224	- Structured Settlements and Interim and Provisional Damages
225	Personal Injury Compensation: How Much is Enough? A study of the compensation experiences of victims of personal injury
226	Administrative Law: Judicial Review and statutory Appeals
227	Restitution: Mistakes of Law and Ultra Vires Public Authority Receipts and Payments
228	Criminal Law: Conspiracy to Defraud
229	Criminal Law: Intoxication and Criminal Liability
230	Criminal Law: The Year and a Day Rule in Homicide
231	Mental Incapacity

- 2.2 Since our last annual report we have issued the following two consultation papers:

<i>Consultation Paper No</i>	<i>Title</i>
135	Involuntary Manslaughter
136	The Year and a Day Rule in Homicide

PROGRESS REPORT

- 2.3 There follows a description of the substance of these reports and consultation papers, and a summary of other work in progress or in contemplation.

Common Law and Public Law

Judicial Review and Statutory Appeals

- 2.4 This year saw the completion of our three-year study of the procedures both for judicial review and for statutory appeals and applications to the High Court from the decisions of inferior courts, tribunals and other bodies, and of the remedies available in each case. The report on Judicial Review and Statutory Appeals,¹ which was published in October, was a continuation of the Commission's important involvement in the development of administrative law. It was our 1976 report on

¹ Administrative Law: Judicial Review and Statutory Appeals, (1993) Law Com No 226.

this subject² which led to the creation of the modern unified and comprehensive framework for judicial review.³

2.5 Following the pattern presaged by the consultation paper,⁴ our main recommendations dealt with the early stages of the procedure for applying for judicial review. We recommended that the first stage should be known as a "preliminary consideration" and that it should revert to being an informal procedure, handled mainly on the papers alone. To help to eliminate uncertainty and inefficiency, our recommendations included the identification of clearer criteria at the preliminary stage - before a case is allowed to proceed - and the need for explicit provision in the rules to enable appropriate public interest issues to be brought before the court. On remedies we recommended that the availability of interim relief against the Crown and Ministers should be put beyond doubt,⁵ that the court should be given power to grant interim declarations and advisory declarations as well as a new type of order allowing for restitution, and that the names for the three prerogative remedies of mandamus, prohibition and certiorari should be recast in simple English. Although we recommended the creation of a right of appeal on a point of law in homelessness cases, the report otherwise reflects the fact that there was little support for a major overhaul of the statutory appeal system from those who are accustomed to use it.

2.6 The report received widespread support and was the main topic of discussion at two national conferences held in December 1994.⁶ It is now being considered by the Government: primary responsibility lies with the Lord Chancellor's Department.

Contracts for the Benefit of Third Parties

2.7 We published a consultation paper on this topic⁷ as long ago as October 1991. Last year we reported⁸ that the analysis of consultation responses had been completed, and that a working party had been set up⁹ to assist with the preparation of a policy

² Report on Remedies in Administrative Law (1976) Law Com No 76.

³ See the Rules of the Supreme Court (Amendment No 3) 1977 SI 1977 No 1955; and the Supreme Court Act 1981, s 31.

⁴ Administrative Law: Judicial Review and Statutory Appeals, Consultation Paper No 126.

⁵ Following the decision of the House of Lords in *In re M* [1994] 1 AC 377.

⁶ A Day Conference organised by the Public Law Project at the University of Warwick on 3 December 1994 and the 1994 Sweet & Maxwell Annual Administrative Law Conference on 16 December. The Chairman and Professor Beatson also spoke to a seminar of senior Government lawyers about the report in November, and the Chairman will be addressing a meeting of the Administrative Law Bar Association on the same subject in January 1995.

⁷ Privity of Contract: Contracts for the Benefit of Third Parties, Consultation Paper No 121.

⁸ Twenty-Eighth Annual Report 1993 (1994) Law Com No 223, para 2.16.

⁹ The working party consisted of Professors Beatson, Hugh Beale, Aubrey Diamond QC and Sally Wheeler.

paper. We also described how chronic staffing difficulties led to our being unable to allocate a member of our own staff to this project, which had meant continuing delays. Unfortunately, the spin-off from these staffing difficulties continued for most of the year, and it was only on the completion of our report on restitution¹⁰ that we were in a position to allocate a member of our permanent legal staff to this project on a substantial basis. We hope to approve our report for publication before the end of 1995.

Damages in Civil Litigation

2.8 Our review of the principles which govern the remedy of damages for monetary and non-monetary loss¹¹ continued during 1994. One of the main highlights of this work to date was the publication in October 1994 of a special 250-page report¹² by our consultant Professor Hazel Genn.¹³ This report summarised the findings of an empirical study of the compensation experiences of a nationwide sample of victims of personal injury.¹⁴ We commissioned this work from Social and Community Planning Research,¹⁵ who carried out the major quantitative survey on which the report is based during 1993. The research was designed not only to provide statistical backing to our own analytical and consultative research,¹⁶ but also to assist in the consideration and formulation of policy on compensation for personal injury generally. It should also be of considerable use to many people who are involved in the recovery and rehabilitation of victims, and to those who are concerned with the administration of civil litigation.

2.9 Some of the findings in the report are striking:

- ◆ It appears that minor injuries may have unexpectedly severe consequences while relatively serious injuries may not necessarily result in substantial settlements. Four in five victims were still experiencing pain at the time of interview, and two in five were in constant pain.

¹⁰ Restitution: Mistakes of Law and Ultra Vires Public Authority Receipts and Payments, (1994) Law Com No 227: see paras 2.15-2.18 below.

¹¹ See Fifth Programme of Law Reform (1991) Law Com No 200, Item 11.

¹² Personal Injury Compensation: How Much is Enough? (1994) Law Com No 225.

¹³ Of University College, London, and formerly of Queen Mary and Westfield College, London. The report included a brief Introduction by the Commission.

¹⁴ The sample consisted of 761 people living in England and Wales who had received damages arising out of personal injury and fatal accident claims between January 1987 and December 1991.

¹⁵ SCPR, a non profit-making research body. The project was led by Mr Bob Erens.

¹⁶ We referred to relevant initial data in our report on Structured Settlements and Interim and Provisional Damages (1994) Law Com No 224, paras 3.79, 3.81, 4.6 and 5.22.

- ◆ A high proportion of accident victims in all settlement ranges do not return to work at all after their accident, or return for a time but are forced to leave due to the continuing effect of the injuries.
- ◆ There is a significant burden of unpaid care shouldered by parents, spouses and friends of injury victims.
- ◆ Although most victims experience satisfaction at the time of settlement when faced with what appears to be a substantial sum of money, this satisfaction drains away over time when the reality of long-term ill-effects and their reduced capacity for work start to bite.
- ◆ Many respondents are unprepared for the impact of their injuries on their capacity for work. A high proportion of those who eventually returned to a different job received much lower average earnings than those they received in the job they had before the accident.
- ◆ Most victims are keen to preserve the value of their damages for the future. On the whole, however, they do not appear to be in the best position to obtain the maximum yield from their damages award. The availability of independent financial advice is patchy. Accident victims are not profligate, but they often regret the choices they make.



THE LORD CHANCELLOR BEING INTRODUCED TO SOME MEMBERS OF THE COMMON LAW TEAM

- 2.10 Turning to other parts of our review of damages, we published our report on Structured Settlements and Interim and Provisional Damages¹⁷ in September 1994. The bulk of this report dealt with structured settlements. We did not recommend that the courts should have power to impose a structured settlement. Instead, we proposed legislation to establish a much simplified and rationalised statutory framework which would exist alongside the current commercial and self-funding systems. The proposed scheme would effectively codify the existing scheme, but it would also remove some of the administrative difficulties now experienced by insurers. Our proposals would also provide legislative protection for structured settlements under the Policyholders Protection Act 1975, a reform which we knew to be desired by plaintiffs and supported by the insurance industry. We also proposed enabling courts to make consent orders for structured settlements, enabling interim and provisional damages to be structured, and enabling the Motor Insurers' Bureau to offer structured settlements where it has agreed to settle claims against uninsured drivers. Our proposals, if implemented, should lead to a greater use of structured settlements, which we see as a desirable option. In particular, accident victims who have suffered serious injury find that structured periodical payments provide them with certainty about future income.
- 2.11 In the report we attempted to clarify the law relating to interim damages, and we made two minor proposals in relation to provisional damages. We also sought to dispel suspicion and ignorance, among both the judiciary and practitioners, of the actuarial tables known as the Ogden tables¹⁸, and we included a draft sub-section which would make such tables admissible in evidence in actions for personal injury. Our draft Bill also contained clauses requiring courts to take into account the net return on an index-linked government security in calculating and discounting future losses. These proposals were intended to render the process of assessing lump sum losses in cases of personal injury more accurate and up-to-date.
- 2.12 In October 1994, Ms Ursula Cheer, the lawyer then co-ordinating the damages review in the Common Law Team,¹⁹ spoke about the report at conferences held by the Association of British Insurers and the Structured Settlements Association. The report was generally very well received, particularly by plaintiffs' lawyers and by the insurance industry. It is our hope that implementation will be considered promptly.

¹⁷ Structured Settlements and Interim and Provisional Damages (1994) Law Com No 224.

¹⁸ A Second Edition of Actuarial Tables, With Explanatory Notes in Personal Injury and Fatal Accident cases, was published by HMSO in the Autumn of 1994. The Tables were prepared by an Inter-Professional Working Party of Actuaries and Lawyers (Chairman: Sir Michael Ogden QC).

¹⁹ Ms Cheer has now returned to her native New Zealand. We would like to pay tribute to her for her invaluable work in connection with the damages project.

- 2.13 In our last report we described²⁰ how the second consultation paper in the series, on aggravated, exemplary and restitutionary damages,²¹ was published in October 1993. The consultation period expired in the first half of 1994, and over one hundred responses were received. An analysis of these responses was begun by the Common Law Team, but it had to be put aside for much of the year due to pressure of other work. It has now been prepared in readiness for the development of policy, and we hope to be able to approve our report for publication before the end of 1995.
- 2.14 Work on two further consultation papers in this series, on liability for psychiatric illness (nervous shock), and on non-pecuniary loss, including pain and suffering, made steady progress during 1994. We hope to publish the first of these papers in Spring 1995, and the second in Summer 1995. Work has also begun on the fifth and sixth consultation papers in the series. One of these will deal with medical and nursing expenses and with deduction and set-off in relation to pecuniary loss.²² The other paper will deal with the Fatal Accidents Act 1976 (including bereavement damages). This new work will make use of the evidence contained in our special empirical report.²³

Restitution: Mistakes of Law and Ultra Vires Public Authority Receipts and Payments

- 2.15 In November 1994, we published our report on Restitution.²⁴ Our consultation paper on this topic had been published in June 1991.²⁵ Staffing difficulties had stopped us from making progress with this report in 1993,²⁶ but with the arrival of a new staff member who was allocated to this project in February 1994, we were able to complete the report and approve it for publication before Professor Beatson left the Commission in September.
- 2.16 The main private law recommendation is that the present rule which forbids restitution for payments made under a mistake of law²⁷ should be abolished. The law has always permitted restitution for mistakes of fact, and the difficulty of distinguishing between the two, as well as the unjust effects of the rule, have led to an overcomplicated body of law. The mistake of law rule has long been the subject

²⁰ Twenty-Eighth Annual Report 1993 (1994) Law Com No 223, para 2.17.

²¹ Aggravated, Exemplary and Restitutionary Damages, Consultation Paper No 132.

²² This will not include the recovery provisions of the Social Security Acts: see the Fifth Programme of Law Reform (1991) Law Com No 200, Item 11.

²³ See paras 2.8-2.9 above.

²⁴ Restitution: Mistakes of Law and Ultra Vires Public Authority Receipts and Payments (1994) Law Com No 227.

²⁵ Restitution of Payments Made Under a Mistake of Law, Consultation Paper No 120.

²⁶ See Twenty-Eighth Annual Report (1993) Law Com No 223, para 2.23.

²⁷ The rule also applied to benefits conferred and services rendered under a mistake of law.

of criticism, both by academic writers and judges, and indeed one commentator has said that “[i]t would be difficult to identify another private law doctrine which has been so universally condemned”.²⁸ Recommendations similar to ours have been made, and in some cases enacted into legislation, in other Commonwealth jurisdictions.²⁹ And in yet other jurisdictions the rule has been abrogated by the courts.³⁰

2.17 The second aspect of this report addresses cases where taxes or charges are paid in response to a demand made by a public authority, or payments are made by a public authority, and the authority had no power to make the demand or payment in question. At common law no automatic right to recover ultra vires taxes or charges from the levying body was believed to exist until the House of Lords recognised the existence of such a right in 1992 in the *Woolwich* case.³¹

2.18 In our report we considered and rejected a statutory codification of the *Woolwich* rule since, although it would have been possible to achieve the necessary degree of certainty in many areas, it would still have left an unacceptable degree of uncertainty in others. We also decided not to recommend the creation by statute of defences to a rule whose scope was still undetermined. The main body of this part of the report was concerned with identifying which, if any, of the present statutory recovery provisions for the principal taxes should be preserved in the light of the *Woolwich* decision. A summary of our main recommendations is set out in the table on the next page. As appears from the Budget Statement, published on 29 November 1994, the Government has accepted the need for a statutory recovery right for excise duties and has introduced such a right as part of the Finance Bill 1995, on the lines of the draft clause contained in our report.³²

²⁸ McCamus (1983) 17 UBCLR 233, 236.

²⁹ New Zealand (New Zealand Judicature Amendment Act 1908 (as amended by the Judicature Act 1958, s 2) s 94A(1)); Western Australia (Law Reform (Property, Perpetuities and Succession) Act 1962, s 231(1)); New South Wales (New South Wales Law Reform Commission Paper No 53 (1987)); South Australia (Law Reform Commission of South Australia (84th Report, 1984)); British Columbia (Law Reform Commission of British Columbia Report No 51 (1981)). See also New York (New York Civ Prac Law s 3005)).

³⁰ Scotland is the most recent example: *Morgan Guaranty Trust Company of New York v Lothian Regional Council*, 1 December 1994. See also *David Securities Pty Ltd v Commonwealth of Australia* (1992) 109 ALR 57 (Australia).

³¹ *Woolwich-Equitable Building Society v Inland Revenue Commissioners* [1993] AC 70.

³² Law Com No 227, p 208: Draft Tax Clause C. See HM Treasury “Financial Statement and Budget Report 1995-96”, HC No 12, para 5.46.

**SUMMARY OF MAIN RECOMMENDATIONS RELATING TO TAX IN THE
COMMISSION'S REPORT ON RESTITUTION: MISTAKES OF LAW AND ULTRA VIRES
PUBLIC AUTHORITY RECEIPTS AND PAYMENTS, LAW COM NO 227**

Tax	Existing statutory provision	Commission's recommendations
Value Added Tax	Value Added Tax Act 1994, s 80	No change
Insurance Premium Tax	Finance Act 1994, Sched 7, para 8	No change
Excise Duty	Finance Act 1989, s 29	New recovery right (Draft Tax Clause C) analogous to existing VAT rules
Income Tax, Corporation Tax, Capital Gains Tax and Petroleum Revenue Tax	Taxes Management Act 1970, s 33	Repeal and replace with Commission's Draft Tax Clause A
Inheritance Tax	Inheritance Tax Act 1984, ss 241 and 255	Repeal and replace with Commission's Draft Tax Clause B
Stamp Duty	Stamp Act 1891, s 59(6); Stamp Duties Management Act 1891, ss 9 and 10	Repeal and replace with provisions analogous to Commission's Draft Tax Clauses A and B.

Company and Commercial Law

General

- 2.19 The team was set up in February 1994 with the arrival of Diana Faber as the new business law Commissioner. In the first few months the team spent a lot of time building up contacts with a number of Government departments, in particular the Department of Trade and Industry ("DTI"). This has contributed to the Commission becoming involved in the Department's work in the company law field,³³ as well as in the area of Electronic Data Interchange.³⁴ The team took over

³³ See paras 2.20-2.27 below. Preliminary discussions with the Department took place in 1993, but it was not possible to take them forward until Miss Faber's arrival.

responsibility for the fiduciary duties project from the common law team,³⁵ and has also been engaged in preparing preliminary working papers on various topics of commercial law (including insurance and banking) for consideration as possible future projects.

Private Companies - a feasibility study

- 2.20 The DTI asked us, in consultation with the Scottish Law Commission, to take forward some preliminary work which it had initiated on the law relating to private companies. The Department wished us to build on the proposals of a working group which had drawn up three models for reform of the law relating to small private companies, one of which comprised a new form of incorporation. We were delighted to have been invited to work with the Department for the first time in the field of company law but we were worried about the limited number of different options we were being asked to consider. We were also concerned that not enough consideration appeared to have been given to the question whether reform of the kind now being proposed would in fact assist a significant number of small businesses in this country. It did not make sense for the Commission to spend considerable time and resources drawing up a blueprint for a new form of incorporation if this is not what small businesses really require.
- 2.21 Following discussions with officials at the Department it was agreed that we would carry out a feasibility study over a period of 3-4 months, and at the end of March 1994 the then Parliamentary Under-Secretary of State for Corporate Affairs³⁶ formally requested the Commission to carry out such a study in consultation with the Scottish Law Commission.³⁷ The objective of this study was to assess the relative importance of company law problems to small businesses compared with their other concerns. This was a very different exercise from the traditional Law Commission law reform process of publishing a consultation document and then a subsequent report.
- 2.22 This study was carried out between April and the end of July and the team concentrated on obtaining the views of small businesses and their representative organisations. We also sought to take account of the views of other Government departments in their dealings with small businesses. We had numerous meetings and obtained input from about 70 individuals and organisations. Our written advice was

³⁴ See paras 2.28-2.30 below.

³⁵ See paras 2.31-2.34 below.

³⁶ Mr Neil Hamilton MP.

³⁷ This request was made pursuant to s 3(1)(e) of the Law Commissions Act 1965 which imposes a duty on the Commissions to provide advice and information to Government departments. The way the Commission responds to such a request will depend on the time and other constraints imposed by the department which is seeking advice.

sent to the Minister in August and was used by the Department as the basis for a consultation document it issued in November,³⁸ in which it sought comments on the findings we had made.

2.23 In our study we found that small businesses did not regard problematic areas of company law as a high priority compared with the other problems they faced, and also that there was no overwhelming case for a new form of incorporation at this stage. A particular factor which contributed to this second finding was that legislation creating a new legal structure would have to contain provisions relating to some of the difficult areas of company law which the Department was considering in separate studies.³⁹ It followed that such a structure could not usefully be created before it was clear how the Department had resolved how it would deal with those problems.

2.24 We did identify, however, a number of areas of company law that do cause difficulties to small businesses. These include the duties owed by directors and the remedies available to shareholders. We also found that a reform of partnership law could be of benefit to small businesses. The Commission is very pleased that it has been able to agree with the Department a programme for further co-operation which involves us in undertaking work on the law relating to shareholders' remedies.⁴⁰

Shareholders' remedies

2.25 Under the present law dissatisfied shareholders of a company may be able to bring an action in their personal capacity as a member of the company ("personal action") or they may be able to bring an action on behalf of and in the name of the company itself ("derivative action"). The rules which govern such actions (which include what are often referred to as the exceptions to the rule in *Foss v Harbottle*⁴¹) are far from clear. In addition, sections 459-461 of the Companies Act 1985, as amended by the Companies Act 1989, make available certain remedies to shareholders on the basis of "unfair prejudice" to the interests of members generally or to some part of the company's membership. The operation of these sections has also created difficulties.⁴²

³⁸ Company Law Review: The law applicable to private companies. A Consultative Document, DTI, November 1994. URN 94/529.

³⁹ Such as financial assistance for the purchase of shares, and groups.

⁴⁰ See "Enforcement of Shareholders' Rights to be Reviewed" DTI Press Notice D/94/77, 22 December 1994.

⁴¹ (1843) 2 Hare 361.

⁴² In respect of which the Law Commission has received unsolicited correspondence from members of the legal profession.

- 2.26 Towards the end of the year the DTI invited us, in consultation with the Scottish Law Commission, to consider the remedies currently available to shareholders and to suggest ways in which the law could be rationalised and improved.⁴³ The Department is itself conducting a review of the law relating to directors' duties and Part X of the Companies Act 1985⁴⁴ and will be producing its own consultation paper on these topics during the early part of 1995. This work will have a bearing on our consideration of shareholders' remedies and we will therefore be liaising closely with the Department throughout.
- 2.27 It is envisaged that we will publish an initial consultation paper at the end of July 1995 in which we will be making proposals for the general direction of further work in this field. We are being assisted on this project by Professor D D Prentice of the University of Oxford and by Ms Brenda Hannigan, senior lecturer at the University of Southampton.

Electronic Data Interchange

- 2.28 Electronic Data Interchange (EDI) is the term used to describe communication between one computer and another. The communication is conducted on previously agreed formats which are designed to increase speed and minimise human error. EDI is now being used more and more in such fields as banking and finance, insurance, transport and logistics. The absence of any written documentation can, however, cause problems, for example where the law requires that an agreement must be evidenced in writing.
- 2.29 Various initiatives aimed at resolving these difficulties are now being undertaken at an international level. For example, the United Nations Commission on International Trade Law is preparing draft model statutory provisions and the European Commission is considering future European legislation.
- 2.30 Miss Faber and her team are now assisting the Department of Trade and Industry with its work in this field. The core question which the Department is addressing is whether, and if so in what way, the increasing use of EDI for commercial purposes will require the introduction of new law or the amendment of existing law, so that any legal impediments to communicating and recording information in this way can be effectively removed.

Fiduciary duties

- 2.31 In this project we are examining the principles which should govern the relationship between statutory and self-regulatory controls and the fiduciary duties which are

⁴³ In February 1995 the Commission received a joint reference in relation to this work from the President of the Board of Trade and the Lord Chancellor pursuant to s 3(1)(e) of the Law Commissions Act 1965. For this subsection see n 37 above.

⁴⁴ This part of the Act places statutory restrictions on certain transactions by directors.

owed by those who carry on certain types of professional and business activity. The project is of particular importance to the financial services industry but its significance also extends to the activities of others, including accountants, estate agents and lawyers.

- 2.32 In the last annual report we explained⁴⁵ that there had been a number of important legal and regulatory developments since the publication of our consultation paper⁴⁶ and we were conscious that our recommendations should be sufficiently flexible to cope with a number of different possible contingencies. In the context of regulatory developments we drew attention to the report by Andrew Large, the Chairman of the Securities and Investments Board ("SIB"), on the future of financial services,⁴⁷ which recommended that SIB should in future move away from rule-making and concentrate on setting standards of regulation and investor protection and on its supervisory function. Some of the changes foreshadowed in that report are now being implemented. In November 1994 SIB issued new rules and regulations⁴⁸ removing designated status from most of the Core Rules and certain other rules which have hitherto applied directly to members of the self-regulating organisations (SROs). In an important exception, SIB has retained Core Rule 36 (which deals with Chinese walls). Any solutions we may devise must take account of this new regulatory approach and the possibility of further change in future. 1994 also saw the setting up of a new SRO, the Personal Investment Authority, to regulate investment business primarily done with or for private customers.
- 2.33 While there have been no new decisions of quite the same significance as *Kelly v Cooper*⁴⁹ and *Clark Boyce v Mouat*,⁵⁰ to which we referred in our last annual report, there have been other significant developments. In particular, the Treasury and SIB have published consultation documents on the implementation of the Investment Services Directive,⁵¹ and regulations have been laid before Parliament to implement in July 1995 the Directive on Unfair Terms in Consumer Contracts.⁵²

⁴⁵ See Twenty-Eighth Annual Report 1993 (1994) Law Com No 223, paras 2.8-2.10.

⁴⁶ Fiduciary Duties and Regulatory Rules, Consultation Paper No 124.

⁴⁷ Large, *Financial Services Regulation - Making the Two Tier System Work* (May 1993).

⁴⁸ The Financial Services (Dedesignation) Rules and Regulations 1994.

⁴⁹ [1993] AC 205.

⁵⁰ [1993] 4 All ER 268.

⁵¹ HM Treasury, *Implementation of the Investment Services Directive and Capital Adequacy Directive* (July 1994); Securities and Investments Board, *Implementation of the Investment Services Directive and Capital Adequacy Directive* (July 1994). A number of recognised self-regulating organisations have also published consultation documents.

2.34 Inevitably, the handing over of this project to a new team has impeded progress on the finalisation of the policy paper. The work is now well advanced, however, and we hope to publish our report in the first half of 1995. We continue to be assisted by Professor D D Prentice of the University of Oxford.

Execution of Deeds and Documents by Bodies Corporate

2.35 The Property and Trust Law Team is undertaking one project in the field of commercial law. In October 1994 we received a joint reference from the Lord Chancellor and the President of the Board of Trade, requesting us to review the law relating to the execution of deeds and documents by or on behalf of bodies corporate, whether sole or aggregate. This review was occasioned by concern about the operation of the law governing the execution of documents by companies incorporated under the Companies Acts⁵³ but its additional scope will allow us to attempt to simplify the whole of the law relating to the execution of documents by corporations generally.⁵⁴

2.36 At present the existence of three different sets of rules based on common law and statute for the execution of documents by the three different types of corporation, some requiring the use of a seal,⁵⁵ others not,⁵⁶ appears to be needlessly complex. In addition, the rules governing the execution of documents by an attorney for a company and the delivery of a deed are uncertain.

2.37 We have begun our investigation of the present law and we hope to publish a consultation paper before the end of 1995. We are being assisted in our investigations by Mr Richard Coleman, a recently retired partner of Clifford Chance, the City of London solicitors. We are very grateful to him for the work that he has undertaken and for the benefit of his experience and knowledge.

⁵² The Unfair Terms in Consumer Contracts Regulations 1994, SI 1994 No 3159.

⁵³ Companies Act 1989, s 130, by which any document (including a deed) will be presumed to have been duly executed by the company if it purports to have been signed by a director and the secretary or two directors.

⁵⁴ Notwithstanding our earlier conclusion that no substantial reform was necessary: see Deeds and Escrows (1987) Law Com No 163, para 5.2.

⁵⁵ Corporations (excluding those incorporated under the Companies Acts) must use a seal to execute a deed but not other documents (Bodies Corporate Contracts Act 1960).

⁵⁶ Companies Act 1989, s 130, enables companies incorporated under the Companies Acts to execute documents (including deeds) without using a seal.

Criminal Law

Conspiracy to Defraud

- 2.38 In December we published our report on conspiracy to defraud.⁵⁷ After publication of our consultation paper in 1987⁵⁸ the continued progress of this project ran into a number of difficulties. First, we found ourselves having to devote an increased level of resources to other projects which justified a higher degree of priority. Secondly, after we had completed our analysis of the responses on consultation, further studies demonstrated to us the complex nature of the difficulties involved in this subject. This in turn led us to conduct another round of detailed consultations with interested parties.
- 2.39 And finally, by the time we prepared our report, we had already decided to embark on a comprehensive review of offences of dishonesty. Our present report on conspiracy to defraud is therefore in effect an interim report on this topic. We considered, but rejected, the idea of postponing this report until the completion of our dishonesty project as there was a general wish that we should indicate as soon as reasonably possible our present views on the subject. The comprehensive nature and size of our dishonesty project means that a long time is bound to elapse before it is finally completed.
- 2.40 We considered carefully the many criticisms of conspiracy to defraud, for instance, that it is too wide and has uncertain boundaries: as a result it infringes the principle that everyone should be able to know in advance whether their conduct will be regarded as criminal.⁵⁹ We also took into account the objection that conspiracy makes unlawful what one person could do lawfully.
- 2.41 However, there were counterbalancing factors which influenced us in favour of the continuing existence of the offence. For example, a whole range of obviously criminal conduct would cease to be criminal if it were abolished without replacement.⁶⁰ It became clear to us that charging a conspiracy to defraud, as opposed to charging substantive offences or statutory conspiracy, paints a more accurate and clearer picture of the overall fraud. It also enables a trial to be simpler and overcomes the very great complexity which can arise if many separate counts have to be laid against a number of different defendants.

⁵⁷ Criminal Law: Conspiracy to Defraud (1994) Law Com No 228.

⁵⁸ Criminal Law: Conspiracy to Defraud (1987) Working Paper No 104.

⁵⁹ For a clear statement of this important principle, see *Binding Over* (1994) Law Com No 222, para 4.12.

⁶⁰ Criminal Law: Conspiracy to Defraud (1994) Law Com No 228, Part IV.

2.42 We also considered the situation in which a financial institution is induced by deception to advance money by way of a loan. In *Halai*⁶¹ the Court of Appeal held that this did not amount to the offence of dishonestly obtaining services by deception contrary to section 1 of the Theft Act 1978. We believed that this important case was wrongly decided,⁶² and indeed it is often difficult to bring such increasingly common conduct within any other offence. We therefore recommended that section 1 of the 1978 Act should be amended so as to make it clear that it extends to the obtaining of loans by deception.

Dishonesty offences

2.43 As we have already said,⁶³ we have now embarked on a comprehensive review of offences of dishonesty, including those created by the Theft Acts 1968 and 1978.⁶⁴ We are doing this for a number of reasons. The first reason for this review is that there was cogent judicial criticism during 1994 that “the law of theft is in urgent need of simplification and modernisation”.⁶⁵ Secondly, in the period since the enactment of the Theft Act 1968 and the Forgery and Counterfeiting Act 1981, there have been radical and multifarious technological advances. In consequence, it is likely that some acts of dishonesty are not effectively covered by present legislation because Parliament could not possibly have envisaged all the technical advances which are now creating such problems for the courts.⁶⁶

2.44 Thirdly, there has been much criticism of the length and complexity of fraud trials.⁶⁷ We are concerned to discover whether it might be possible to reduce the length and

⁶¹ [1983] Crim LR 624.

⁶² See Criminal Law: Conspiracy to Defraud (1994) Law Com No 228, paras 4.31 - 4.33. Our view was shared by Lord Lane CJ in *Teong Sun Chuah* [1991] Crim LR 463, but only the House of Lords could reverse the decision.

⁶³ See para 2.39 above.

⁶⁴ See our report Criminal Law: Conspiracy to Defraud (1994) Law Com No 228, para 1.16.

⁶⁵ *Hallam*, *The Times* 27 May 1994, per Beldam LJ.

⁶⁶ In 1989 the Jack Committee on Banking Services (Banking Services: Law and Practice - Report by the Review Committee (1989) Cm 622) drew attention to various acts of dishonesty which were not covered by the present legislation; since then, of course, there have been further advances in the use of modern technology never dreamt of in 1968.

⁶⁷ For example Lord Alexander of Weedon QC, a former Chairman of the Bar and the present Chairman of the National Westminster Bank, drew attention in an address to the Commercial Bar Association on 15 May 1994 to problems with serious fraud trials, pointing out that on occasions they were “unfairly protracted, casting long shadows over reputation, and in the end simply fail to do any kind of justice to anyone”.

complexity of trials by simplifying the law, while always ensuring that the defendant is fully protected.

2.45 Finally, we are very conscious of the duty imposed upon us by Parliament to promote the codification of the law.⁶⁸ In our report on Offences against the Person and General Principles,⁶⁹ we set out the first stage of our proposed criminal code for England and Wales, incorporating modern law reform treatment by the Commission. The draft Bill in that report will be supplemented by all the work we describe in paragraphs 2.46 to 2.58 below. It therefore seems logical to turn to review the law of dishonesty.⁷⁰ We propose to carry out a very far-ranging review, looking not only at the Theft Acts 1968-1978 and the Forgery and Counterfeiting Act 1981, but also at areas in which the law of dishonesty has not previously intervened, such as trade secrets. We will be publishing a series of consultation papers in due course.



THE LORD CHANCELLOR WITH MEMBERS OF THE CRIMINAL LAW TEAM AND THE CHAIRMAN

⁶⁸ Law Commissions Act 1965, s 3(1).

⁶⁹ (1993) Law Com No 218.

⁷⁰ Theft, Fraud and Related Offences formed Chapter III of Part II of the draft Criminal Code published by the Commission in 1989. See Criminal Law: A Criminal Code for England and Wales (1989) Law Com No 177, Vol 1. This draft Code did not incorporate any contemporary law reform treatment by the Commission.

Intoxication and Criminal Liability

- 2.46 We approved our report on this subject before the end of 1994, and it will be published on 8 February 1995.⁷¹ In it we ask how our criminal law should take account of the fact that a defendant on a criminal charge was or may have been affected by intoxication at the time he acted in the manner complained of. The topic involves a direct clash between two principles of central importance in the criminal law. The first is that nobody should be convicted of a serious offence unless he acted voluntarily and unless he was, at least, aware when he acted that his conduct might cause damage of the kind forbidden by the offence with which he is charged. The conflicting principle is that a person who becomes voluntarily intoxicated “shall have no privilege by this voluntary contracted madness, but shall have the same judgment as if he were in his right senses”.⁷²
- 2.47 This dilemma arises in cases involving voluntary intoxication. It is at present resolved in different ways depending on whether the offence charged has been categorised by the courts as one of “basic” or of “specific” intent, by what is known as the “*Majewski* approach”, after the leading case.⁷³
- 2.48 Difficulties have arisen since the law was settled in its present form by the House of Lords. For example, it is difficult to tell in advance whether an offence will be characterised by the courts as one of “specific” or of “basic” intent. The meaning of “voluntary” intoxication is also unclear. As a result of the very strong views expressed to us on consultation, we decided not to adopt either of the alternative solutions we had canvassed in our Consultation Paper,⁷⁴ and recommended that the *Majewski* approach should be codified and clarified subject to certain modifications.
- 2.49 If our recommendations were adopted, offences would not be characterised as being of basic or specific intent, and the *Majewski* approach, under which the fact that the defendant was intoxicated is ignored in offences of basic intent, would be confined to allegations of subjective recklessness⁷⁵ or of voluntary conduct. Where the

⁷¹ Legislating the Criminal Code: Intoxication and Criminal Liability (1995) Law Com No 229.

⁷² Hale's *Pleas of the Crown* vol 1, p 32, cited with approval by Lord Denning in *Attorney General for Northern Ireland v Gallagher* [1963] AC 349, 380.

⁷³ *DPP v Majewski* [1977] AC 443.

⁷⁴ Intoxication and Criminal Liability, Consultation Paper No 127. We described these solutions in our Twenty-Seventh Annual Report 1992 (1993) Law Com No 210, at para 2.22.

⁷⁵ Under clause 1(b) of the draft Bill contained in *Legislating the Criminal Code: Offences Against the Person and General Principles* (1993) Law Com No 218, a person acts “recklessly” with respect to (i) a circumstance, when he is aware of a risk that it exists or will exist, and (ii) a result, when he is aware of a risk that it will occur, and it is

prosecution has to prove any purpose or intention, evidence of intoxication would be taken into account with all the other evidence in determining whether that allegation was proved. For the purpose of any allegation of recklessness, a voluntarily intoxicated defendant would be treated as having been aware of anything of which he would have been aware had he been sober. The draft Bill contained in our report provides definitions of "intoxicated", "intoxicant" and "voluntary intoxication", and includes a defence which would be available if the intoxicant was taken for medicinal purposes. We intend in due course to consolidate the provisions of this draft Bill into the draft Bill contained in our 1993 Report on non-fatal Offences Against the Person and General Principles.⁷⁶

Consent and Offences against the Person

2.50 We described the origins and scope of this project in our last report.⁷⁷ We published our Consultation Paper in February,⁷⁸ and the consultation period ended at the end of June. We received responses from nearly 120 individuals and organisations, and these included a wealth of valuable firsthand evidence which will help to inform our policy decisions. The kind of questions we will have to address are these: how should the criminal law protect those who take part in certain dangerous modern martial arts which are now becoming more popular in this country? Given the increasing internationalism of sport, is it still reasonable for a Crown Court jury to be invited to consider the reasonableness of the laws of a recognised sport if the defendant, charged with a reckless assault, maintains that he was playing within the rules? What does recognition mean in this context? Should the laws on consensual sado-masochistic activities be altered? Why is the infliction of pain for religious ends immune from the criminal law, and the infliction of pain for sexual ends criminalised? Should those concerned in consensual drunken horseplay be immune from the criminal law when their activities get dangerously out of control? What protections should the law provide for the young and the vulnerable?

2.51 Ultimately the answers to all these questions will have to be provided by Parliament, after a well-informed public debate. But the evidence we have received has made it clear to us that there is a valuable task for a Commission like ours to play in sorting out the evidence dispassionately, and placing it in a clear conceptual

unreasonable, having regard to the circumstances known to him, to take that risk. See *ibid*, paras 8.1 - 10.4 for a discussion of the concept of subjective recklessness. Voluntary drunkenness may lead to a person being in fact unaware of a risk, but under the *Majewski* approach this is disregarded.

⁷⁶ Legislating the Criminal Code: Offences against the Person and General Principles (1993) Law Com No 218, Cm 2370.

⁷⁷ Twenty-Eighth Annual Report 1993 (1994) Law Com No 223, paras 2.33-2.35.

⁷⁸ Criminal Law: Consent and Offences Against the Person (1994) Consultation Paper No 134.

framework, and this will be our task this year. The analysis of the responses is now complete, and we will be considering the best way to take this difficult project forward in the middle of next year.

Assisting and Encouraging Crime

- 2.52 In September 1993 we published a Consultation Paper⁷⁹ in which we invited comments on the scope and structure of that part of the criminal law which relates to those who assist or encourage others to commit offences. We suggested a possible new scheme and invited opinions on how the law should deal with these controversial activities. The consultation period closed at the end of June 1994. The responses have been analysed, and we will decide on our policy this year. How soon we will be able to report depends on the resolution of competing priorities within the work of the criminal law team, but we would hope to report before the end of 1996.

Involuntary Manslaughter

- 2.53 Having completed our work on the law relating to non-fatal offences against the person, it was logical that we should turn our attention next to the law of homicide. We decided, however, not to include the whole of the law of homicide in this project but to limit ourselves to the law of involuntary manslaughter — that is, causing death in the course of doing an unlawful act, or causing death by recklessness or gross negligence. We specifically excluded from this project any consideration of voluntary manslaughter — that is, cases in which a charge of murder results in a conviction for manslaughter by reason of one or other of three partial defences (diminished responsibility, provocation or an agreement to enter into a suicide pact).
- 2.54 We published our consultation paper, accompanied by a short Overview Paper, in April 1994.⁸⁰ In it we reviewed the present state of the law and concluded that it was characterised by a large degree of uncertainty and inconsistency. We made a number of provisional recommendations. One of these was the abolition of unlawful act manslaughter, on the ground that it is based on the discredited principle of constructive liability.⁸¹ We also put forward a provisional formulation for gross

⁷⁹ Assisting and Encouraging Crime, Consultation Paper No 131.

⁸⁰ Criminal Law: Involuntary Manslaughter, Consultation Paper No 135, and Consultation Paper No 135 (Overview).

⁸¹ We suggested, very tentatively, that it might be replaced by a species of “causing death” offence, to take account of any feeling prevalent among the general public that where a person has caused the death of another by an act of violence, he or she should be dealt with more severely because of the accident that death was caused by that act, and invited views on a possible alternative along these lines.

negligence manslaughter,⁸² proposed a scheme to make the law of corporate liability for manslaughter easier to operate, and made recommendations in connection with deaths caused by bad driving. A long consultation period closed at the end of October 1994, and we have received a large response which is now being analysed. We hope we may be able to approve our report for publication before the end of 1995.

The year and a day rule in homicide

- 2.55 In April we decided to review the long-established common law rule under which a person cannot be convicted of murder, manslaughter, infanticide, aiding and abetting suicide or (probably) motoring offences of causing death⁸³ where death does not occur within a year and a day after the act or omission that caused it. We undertook this review for several reasons. First, problems with the rule were becoming more evident because of the increasing use of life-support machines to keep people alive for more than a year and a day after a life-threatening event. Secondly, when the rule was most recently reviewed by both the House of Lords Select Committee on Murder and Life Imprisonment⁸⁴ and the Divisional Court,⁸⁵ the view was taken that the rule could not be abolished for one offence but left in force for others: thus the only way in which the rule could be given comprehensive consideration was as a discrete subject in its own right. Thirdly, in many cases of gross negligence manslaughter there was no alternative offence for which the wrongdoer could be prosecuted if his victim survived for more than a year and a day. And finally, there had been much recent controversy in Parliament as to whether the rule should be abolished.
- 2.56 We published a consultation paper in July,⁸⁶ and we approved our report for publication before the end of the year.⁸⁷ Our main proposal is that the rule should be abolished with prospective effect in relation to murder, manslaughter, infanticide, aiding and abetting suicide, motoring offences in which the causing of death is an

⁸² Since our Consultation Paper was published, the House of Lords in *Adomako* [1995] 1 AC 171 has resolved a number of the more glaring problems which we described in that paper.

⁸³ Causing death by dangerous driving contrary to s 1 of the Road Traffic Act 1988, causing death by careless driving while under the influence of drink or drugs contrary to s 3A of the Road Traffic Act 1988 and causing death by aggravated vehicle taking contrary to s 12A of the Theft Act 1968.

⁸⁴ The Report of the House of Lords Select Committee on Murder and Life Imprisonment (1989) HL Paper 78-1.

⁸⁵ *R v Inner West London Coroner, ex p De Luca* [1989] QB 249.

⁸⁶ Criminal Law: The Year and a Day Rule in Homicide, Consultation Paper No 136.

⁸⁷ Legislating the Criminal Code: The Year and a Day Rule in Homicide (1995) Law Com No 230.

ingredient, and suicide for the purpose of coroners' verdicts. The original basis of the rule was that it was not possible to ascertain the cause of death, and in particular to point to a *specific* cause, if it had arisen more than a year and a day earlier: in the light of advances in modern medical science, this justification is out of date. The rule now operates in some cases to prevent any convictions⁸⁸ when the cause of death can be shown, to the required standard of proof, to be a wrongful act which occurred more than a year and a day before the death. In many cases, the rule has led to convictions for lesser offences such as attempted murder or inflicting grievous bodily harm (with or without intent). We were encouraged to reach our conclusion by the experience in Scotland which shows that a criminal justice system can and does operate fairly and effectively without the rule.



PETITIONERS BEING RECEIVED AT THE COMMISSION: THE "DARLINGTON" CASE⁸⁹

2.57 Our second recommendation is that in order to protect defendants against delayed or repeated prosecutions no prosecution should be brought for offences covered by the rule⁹⁰ without the consent of the Attorney-General when more than three years has elapsed since the defendant's wrongful act or omission or where the defendant

⁸⁸ i.e. the death has been caused by the serious or gross negligence of another: Criminal Law: Involuntary Manslaughter, Consultation Paper No 135, Part III, and in particular the analysis at paras 3.145-3.155.

⁸⁹ Reproduced with the permission of The Northern Echo. The petition refers to the case of Michael Gibson, who died 16 months after an attack on him.

⁹⁰ See para 2.55 above for a list of those offences.

has previously been sentenced to a term of two or more years' imprisonment for the act or omission in respect of which a further prosecution is proposed.

- 2.58 This project will have been completed in under ten months between inception and publication of our report. This shows that we can and will review matters of law swiftly if the circumstances demand it and if we are provided with adequate resources.

Counts in an Indictment

- 2.59 The Royal Commission on Criminal Justice concluded⁹¹ that the indictment nowadays is a formal document which gives very little information about the facts that are alleged to make up the offence charged. It felt that there were strong reasons of justice and efficiency why the particulars of an indictment should contain sufficiently clear factual allegations to inform the jury of the issues they would have to decide, and more generally to enable the indictment to operate as a practical agenda for the trial. It was confident that a system of particularized indictments would be of benefit in the clearer and more efficient conduct of trials, and therefore recommended that the judiciary and legal practitioners be consulted in order to explore the issues further.⁹²

- 2.60 In September 1994 the Lord Chancellor's Department circulated widely a consultation paper⁹³ which our criminal law team had prepared in conjunction with the Crown Prosecution Service ("CPS"). It included the scheme the team had put before the Royal Commission, in which the facts were set out in greater detail than at present, and an alternative scheme suggested by the CPS in which in a limited number of cases, where it appeared that the issues needed further clarification, a further supplementary "case statement" would be prepared. The decision to prepare a case statement would be initially that of the prosecution, but at a pre-trial review the defence could apply for one or the court could order it. The consultation period closes on 31 January 1995. The responses will then be analysed by the Lord Chancellor's Department.

Evidence in criminal cases

- 2.61 In April the Home Secretary made two references to us,⁹⁴ in which he invited us to consider the law relating to hearsay evidence and evidence of previous misconduct

⁹¹ Report of the Royal Commission on Criminal Justice (1993) Cm 2263. For the earlier history of this project, see Twenty-Eighth Annual Report 1993 (1994) Law Com No 223.

⁹² Report of the Royal Commission on Criminal Justice (1993) Cm 2263, chapter 8, paras 5-6.

⁹³ Counts in an Indictment: A Consultation Paper prepared by the Criminal Law Team of the Law Commission (September 1994).

⁹⁴ Pursuant to s 3(1)(a) of the Law Commissions Act 1965.

in criminal proceedings, following recommendations to that effect by the Royal Commission on Criminal Justice.⁹⁵

(i) *Hearsay*

2.62 In the course of this project we are anxious to identify not only the faults in the theory of the law on hearsay, but also the practical problems it is now causing. We have therefore devised questionnaires which we have sent to many interested parties. We have also discussed current problems with judges and with colleagues in the Scottish Law Commission, which is carrying out a similar project. We have been studying the rules on admissibility, and proposals for reform, in other jurisdictions and have examined the impact of the European Convention on Human Rights. We have engaged Mr John Spencer, Reader in Common Law at the University of Cambridge, as a consultant on this project. We are now drafting the consultation paper, which we hope to publish in the first half of 1995.

(ii) *Previous misconduct of the defendant*

2.63 This subject covers not only the question of whether, and if so when, an accused person's previous convictions should be admitted in evidence at his trial, but also what is broadly called "similar fact evidence" that is, the admissibility of evidence of similar conduct by the accused. We have engaged Mr Peter Mirfield, Fellow of Jesus College and Lecturer in Law at the University of Oxford, as a consultant.

2.64 We shall need to direct our attention to the effect, if any, on a jury or magistrates of their being told of the accused's criminal record. In the absence of sufficient relevant research, we were anxious that some should be undertaken for the purpose of our project. Regrettably, section 8 of the Contempt of Court Act 1981 still prohibits research into juries' reasons for their verdicts.⁹⁶ The Home Office has kindly agreed to arrange for research to be carried out in which suitable sample juries will be asked how they would have reacted to certain facts. This aspect of the project is being supervised by Dr Sally Lloyd-Bostock of Oxford University's Centre for Socio-Legal Research. From this we hope we shall be able to draw useful inferences about the relevance of previous convictions to juries' deliberations. We will complete and publish our consultation paper as soon as reasonably possible after the conclusion of the research.

⁹⁵ Report of the Royal Commission on Criminal Justice (1993) Cm 2263, chapter 8, paras 26 and 30.

⁹⁶ In its report (1993) Cm 2663, Recommendation No 1, the Royal Commission on Criminal Justice advocated the amendment of this section in order "to enable research to be conducted into juries' reasons for their verdicts". We have told the Government that we hope that this recommendation will be implemented as soon as possible, since findings obtained from such research would greatly strengthen the confidence with which we are able to make our eventual recommendations in a number of the law reform projects we are currently undertaking.

Criminal Libel

- 2.65 The criminal law still contains a few very archaic common law offences. It has always been an important part of the policy of this Commission that wherever practicable these offences should be codified or abolished, so that our law can be certain and easily accessible to the citizen and the courts. Very often they embody thinking and philosophies which are irredeemably out of date. The law of criminal defamatory libel, which is a mixture of common law and obsolete statute law, is a prime example. In our 1985 report⁹⁷ we observed⁹⁸ that section 6 of the Libel Act 1843 places the burden inappropriately on the defendant not only to prove that the defamatory matter is true but also that its publication was for the public benefit.⁹⁹ There are other very objectionable features of this part of our law,¹⁰⁰ which we accurately described as “awful” in our last Annual Report.¹⁰¹ The Government has now made it clear that it does not intend to implement our report at present. It does not challenge our strictures about the present state of the law. It believes, however, that there have been no prosecutions for this offence since 1985 and only 4 in the previous 14 years. In these circumstances it does not consider it can justify taking up Parliamentary time now to repeal an offence which in practice is not used.

Property Law

Repairing Obligations

- 2.66 We reported last year that the responses to our consultation paper on repairing liabilities in leases¹⁰² had been analysed by Sir Wilfrid Bourne KCB QC, but that work on the project had been suspended in order to pursue other projects. The Commission has now approved the policy for our report, and following discussions with the Department of the Environment, for whose assistance we are most grateful, parliamentary counsel has been instructed to draft a Bill to implement our recommendations. We hope to publish our report in the autumn of 1995.

⁹⁷ Criminal Law: Report on Criminal Libel (1985) Law Com No 149.

⁹⁸ *Ibid*, para 4.2.

⁹⁹ In *Gleaves v Deakin* [1980] AC 477, 483, Lord Diplock rightly observed that this provision turns Article 10 of the European Convention on Human Rights on its head.

¹⁰⁰ Such as the requirement pursuant to s 8 of the Law of Libel Amendment Act 1888 that the leave of a judge is required before a prosecution can be brought against anyone responsible for the publication of a newspaper allegedly containing a libel. In constitutional terms this provision is extremely odd.

¹⁰¹ Twenty-Eighth Annual Report 1993 (1994) Law Com No 223, para 4.5.

¹⁰² Landlord and Tenant: Responsibility for State and Condition of Property (1992) Consultation Paper No 123.

Land Registration

- 2.67 In 1988 we published our Fourth Report on Land Registration¹⁰³ which contained a draft Bill. This was intended both to implement the recommendations in our Third Report on Land Registration¹⁰⁴ and to replace the Land Registration Act 1925 with a simple modern statute. During the Lord Chancellor's Department's usual consultations on our Third and Fourth Reports it became clear that there was significant opposition to some of their principal recommendations, not least from HM Land Registry.¹⁰⁵ To try to resolve these disagreements and to reach a consensus as to which reforms were desirable, a meeting was held in November 1993 between representatives of the Department, the Commission and the Land Registry, and as a result of this and subsequent meetings, a joint working group¹⁰⁶ was established to examine the Third and Fourth Reports and to make recommendations for reform.
- 2.68 The group met several times during the year and has now instructed parliamentary counsel to draft a bill to implement the recommendations in its first report, which has been accepted by the Lord Chancellor in its entirety. This report, which will be published in 1995 when the draft bill has been completed, recommends the immediate implementation of:
- (a) new triggers for first registration of title;¹⁰⁷
 - (b) fee concessions to promote voluntary registration;¹⁰⁸ and
 - (c) certain reforms to the provisions of the Land Registration Act 1925 relating to indemnity.¹⁰⁹
- 2.69 The group hopes to deliver its second and final report to the Lord Chancellor before the end of 1995. This report will take the form of a consultation paper and will include a reconsideration of virtually the whole of the Land Registration Act 1925 as well as parts of the Land Registration Rules 1925. The shortcomings of the Land

¹⁰³ Property Law: Fourth Report on Land Registration (1988) Law Com No 173.

¹⁰⁴ Property Law: Third Report on Land Registration (1987) Law Com No 158.

¹⁰⁵ See the Annual Report of the Land Registry for 1988-89, para 48.

¹⁰⁶ This tripartite working group consists of representatives from the three bodies which attended the November 1993 meeting.

¹⁰⁷ These proposals arose from HM Land Registry's own discussion and consultation paper *Completing the Land Register in England & Wales* (November 1992).

¹⁰⁸ *Ibid.*

¹⁰⁹ Land Registration Act 1925, s 83. See Property Law: Third Report on Land Registration (1987) Law Com No 158, Part III.

Registration Act 1925 are well known,¹¹⁰ but the objective of the working group is to do more than merely improve the quality and intelligibility of the legislation. It intends to present proposals designed to modernise and simplify the present law to take account of the opportunities provided by the extension of compulsory registration of title to the whole of England and Wales,¹¹¹ the introduction of the open register,¹¹² and the computerisation of the register - developments which had not occurred when our Third and Fourth Reports were published.¹¹³

2.70 Since it was first introduced in 1862,¹¹⁴ registration of title has transformed the system of conveyancing in England and Wales, making it cheaper, quicker and more certain. The public interest in an efficient and inexpensive system of registration of title is self-evident given both the spread of home ownership and the importance of the extensive commercial property market. That system should be regulated by legislation that is based on coherent, clearly expressed and free-standing principles that do not refer back to the system of unregistered land which will become increasingly unfamiliar.¹¹⁵ The Commission is anxious that its work on land registration, begun in the 1970s, should at long last be brought to fruition. We have allocated a significant part of the resources of our Property and Trust Law team to achieve this objective. The success of working closely with the Land Registry and with the Lord Chancellor's Department has demonstrated the value and efficacy of a collaborative approach to reform in an area where the practical working of the law is of the first importance.

¹¹⁰ See Property Law: Fourth Report on Land Registration (1988) Law Com No 173, para 2.1; and the comments of the Court of Appeal in *Clark v Chief Land Registrar* [1994] Ch 370,382.

¹¹¹ Which occurred in December 1990.

¹¹² Land Registration Act 1988.

¹¹³ In 1987 and 1988 respectively.

¹¹⁴ Land Transfer Act 1862.

¹¹⁵ H.M.Land Registry estimate that there are some 21 million registered and potentially registrable titles in England and Wales and that 19 million will be registered by 2011 (*Completing the Land Register in England & Wales* (November 1992)).



THE LORD CHANCELLOR MEETS MEMBERS OF THE PROPERTY LAW TEAM AND OTHERS

Law of Trusts

- 2.71 The Commission has continued to work on the one outstanding item in the original Trusts Programme¹¹⁶, and it has now started work on two new projects with the agreement of the Lord Chancellor's Department.¹¹⁷

The Rules against Perpetuities and Excessive Accumulations

- 2.72 The consultation period for our consultation paper¹¹⁸ on this topic closed at the end of June 1994. In that paper we examined the notoriously complex legal rules that regulate the extent to which it is possible to create future interests in property. The operation of these rules may defeat commercial¹¹⁹ and family arrangements,¹²⁰ by restricting both the period during which property can be held in trust and the

¹¹⁶ The rules against perpetuities.

¹¹⁷ See the Law Commission: Fourth Programme of Law Reform (1989) Law Com No 185, Item 8.

¹¹⁸ The Law of Trusts: The Rules against Perpetuities and Excessive Accumulations, Consultation Paper No 133.

¹¹⁹ Contracts, options and grants of easements are all subject to perpetuity periods.

¹²⁰ Where a person gives away property, by will or *inter vivos* on terms which give a number of people limited interests.

distance in the future at which it is possible to benefit intended recipients. The principal policy issue is whether it is still necessary or appropriate to restrict the ways in which owners may deal with, or give away, their property by rules which were evolved in earlier times to prevent the tying-up of economic resources by the so-called "dead hand" of the testator or settlor.

- 2.73 We received 60 responses to our consultation paper, many of which were very detailed. We have started to analyse them and we hope to complete this task in the first half of 1995. We are most grateful to all those who responded. We have appointed an expert on law and economics, Dr Diane Dawson of the Department of Land Economy at the University of Cambridge, to advise us as to the potential economic consequences of any changes in the law. We have also sought the views of leading lawyers in other jurisdictions (both common law and civil) where the rules either do not apply or are less restrictive than they are in this country. We are most grateful for their comments, and in particular for the assistance that we have received from a number of distinguished Scottish academic writers and practitioners. Subject to the availability of staff we hope to be able to settle our policy recommendations by the end of 1995 and to publish our report in 1996.

Formalities for the Creation of Trusts

- 2.74 The first of our new projects on trust law is concerned with the formal requirements for the creation of trusts and interests in land and for the disposition of equitable interests. The present rules, which are mainly statutory,¹²¹ have not worked well. The manner in which the statutory provisions have been interpreted reveals no clear policy objectives behind them, and this has been the cause of much litigation. In particular, although it is clear that a 'disposition' of an equitable interest must be in writing,¹²² what constitutes a 'disposition' can only be discovered by studying a number of judicial decisions that provide no clear guiding thread of principle.¹²³ Furthermore, the requirement that an interest in land can only be created in writing¹²⁴ is in practice superfluous.¹²⁵ Finally, the requirement that trusts respecting

¹²¹ Law of Property Act 1925, s.53.

¹²² *Ibid.* s 53(1)(c).

¹²³ See *eg*, *Grey v IRC* [1960] AC 1; *Oughtred v IRC* [1960] AC 206; *Vandervell v IRC* [1967] 2 AC 291; *Re Vandervell's Trusts* [1974] Ch 269. We note that in Hong Kong, the equivalent provision of the Conveyancing and Property Ordinance 1984 (s 5) has been amended in the light of these decisions so that it applies only to dispositions of equitable interests in land.

¹²⁴ Law of Property Act 1925, s 53(1)(a).

¹²⁵ This is in part because the commonest types of interest in land (such as restrictive covenants) are invariably granted by deed and in part because of other statutory provisions. These are Law of Property Act 1925, s 52 (conveyances to be by deed); s 53(1)(b) (declaration of trust relating to land or an interest in land to be in writing); s

land or any interest in land must be evidenced in writing¹²⁶ is not as absolute as it may appear. It can be overridden by estoppel or in cases of fraud¹²⁷ and applies only if it is pleaded.¹²⁸ In any event, the concept that trusts respecting land may be valid but unenforceable if not evidenced in writing is open to the same objections which persuaded us to recommend, and Parliament to enact, the replacement of a similar requirement in relation to contracts for the sale of land.¹²⁹

- 2.75 It is obvious that the existence of a trust can have important consequences in many areas of personal and commercial life.¹³⁰ If there are to be rules which regulate the formalities required to create trusts and to deal with interests in property, they should have a clearly defined function. Preliminary research for this project was started in October 1994; no date has yet been set for the publication of a consultation paper.

Personal Remedies for the Recovery of Trust Property

- 2.76 Our second new trust law project involves an examination of the remedies available for the recovery of property that has been transferred in breach of trust or fiduciary duty, or in circumstances which constitute a devastavit by personal representatives. This subject has assumed a major significance in commercial dealings over the last 30 years and has led to much expensive litigation.¹³¹ There are at present a plethora of remedies for recovery. None of them is wholly satisfactory, and both their requirements and their precise interrelationship are uncertain. Furthermore, in spite of the number of personal remedies, there are still gaps in the substantive law. In cases where no personal action lies the claimant is compelled to pursue the more

53(1)(c) (disposition of an equitable interest to be in writing); and Law of Property (Miscellaneous Provisions) Act 1989, s 2 (contracts for the sale or disposition of land or an interest in land to be in writing).

¹²⁶ Law of Property Act 1925, s 53(1)(b).

¹²⁷ See *Rochefoucauld v Boustead* [1897] 1 Ch 196.

¹²⁸ See *Ottaway v Norman* [1972] 1 Ch 698.

¹²⁹ Law of Property Act 1925, s 40 repealed by Law of Property (Miscellaneous Provisions) Act 1989, s 2(8). See *Transfer of Land: Formalities for Contracts for Sale etc of Land* (1987) Law Com No 164, paras 1.7 and 3.2-3.5.

¹³⁰ Co-owned residences are usually held on trust for sale (Law of Property Act 1925, s 36). Money held in bank accounts may be impressed with a trust even though in a single name: *Paul v Constance* [1977] 1 WLR 527. In commerce, trusts have been imposed on money held by a firm for its customers: *Re Kayford* [1975] WLR 279; and by a landlord for its tenants: *Re Chelsea Cloisters* (1981) 41 P & CR 98. Similarly, property held by an insolvent person as trustee is not available to that person's creditors.

¹³¹ For recent examples, see *Agip (Africa) Ltd v Jackson* [1990] Ch 265 (Millett J), [1991] Ch 547 (CA); *Polly Peck International Plc v Nadir (No 2)* [1992] 4 All ER 769; *Polly Peck International Plc v Nadir (No 3)* (CA), *The Times* 22 March 1993; *El Ajou v Dollar Land Holdings Plc* [1993] 3 All ER 717 (Millett J), [1994] 2 All ER 685 (CA); *Macmillan Inc v Bishopsgate Investment Trust* unreported, 10 December 1993 (Millett J).

expensive tracing remedies. We have also identified a number of shortcomings on matters of procedure and evidence which can hinder recovery.

- 2.77 We have undertaken a good deal of research on this subject during 1994 and we have also had a number of meetings with practitioners who have given generously of their time to help us. Although work on this project had to be temporarily suspended due to staffing difficulties, it has now started again, and we aim to publish a consultation paper in 1996. The Lord Chancellor's Department has agreed that we should also examine proprietary, as opposed to personal, remedies for the recovery of trust property. We plan to start this work once our consultation paper on personal remedies is complete.

Family Law

Property Rights of Unmarried Cohabitants

- 2.78 As part of our Programme Item on Family Law¹³² the Property and Trust Law Team, with assistance from family lawyers, has begun a project on the property rights of unmarried cohabitants on the break-up of their relationship.¹³³ Cohabitation outside marriage is increasingly common. Often the relationship is similar to that of man and wife, but it is not necessarily so. Elderly people may live together for companionship, or a person may move in with a relative to look after him or her. The scope of our project embraces all home-sharers. At present, the legal position of such cohabitants, should their relationship break up, is governed entirely by principles of the law of property, principally the law on resulting and constructive trusts¹³⁴ and on proprietary estoppel.¹³⁵ Normally, a home-sharer will acquire no interest in the property unless he or she has made some financial contribution towards the acquisition or improvement of the common home. In the absence of a direct contribution to the cost of acquiring the property, it will usually be necessary to prove a common intention by the parties that the claimant should have some interest in the property, a requirement that has proved to be very troublesome in practice.¹³⁶ There is no doubt that the present law has been the

¹³² See the Law Commission: Fourth Programme of Law Reform (1989) Law Com No 185.

¹³³ In our Twenty-Seventh Annual Report 1992 (1993) Law Com No 210, at para 2.40, we identified the law relating to cohabitation outside marriage as one of the three broad areas of family law in which further work might be appropriate to complete the process of codifying family law with which the Commission has been concerned since 1968.

¹³⁴ See *Burns v Burns* [1984] Ch 317; *Grant v Edwards* [1986] Ch 638; *Lloyds Bank plc v Rosset* [1991] 1 AC 107.

¹³⁵ *Dodsworth v Dodsworth* (1973) 228 EG 1115; *Baker v Baker* [1993] 2 FLR 247.

¹³⁶ See *Hammond v Mitchell* [1991] 1 WLR 1127.

cause of considerable hardship¹³⁷ and it has also been the subject of considerable criticism.¹³⁸

2.79 Most of the legal research for this project has now been completed. We have recently commissioned Mavis Maclean of the Centre for Socio-Legal Studies at Wolfson College, Oxford, to undertake a study of what happens in practice on the break-up of non-marital home-sharing. This study will concentrate primarily on material obtained from legal aid records. We are also setting up a steering group with membership drawn from a wide spectrum of relevant interests to help us in the preparation of a consultation paper. Our present hope is that we will be able to publish this paper before the end of June 1996.

Domestic Violence and Occupation of the Family Home

2.80 In June 1994 the Government announced¹³⁹ that it had decided to accept almost all the recommendations made in our 1992 report.¹⁴⁰ These were designed to improve the protection available to victims of domestic violence and to reform the complex and inconsistent procedures which face such victims when they seek the help of the courts.

2.81 Statutory remedies for domestic violence are at present restricted to married people, or those cohabiting as husband and wife. We recommended a new code of civil remedies which would apply to a wider group of "associated persons". We regret that the Government did not favour the extension of the new unified scheme to two of the further groups of people identified in our report.¹⁴¹

2.82 We also regretted that the Government had rejected our recommendation that where the police have been involved in an incident of molestation or actual or threatened violence, or its aftermath, they should have power to apply for civil

¹³⁷ See, eg, *Burns v Burns* [1984] Ch 317, where a couple lived together for 17 years as man and wife although they were in fact unmarried. Although Mrs Burns (as she was known) raised their family and carried out all the normal domestic tasks of a spouse, she made no financial contribution to the acquisition of the property. On the break-up of the relationship she received nothing.

¹³⁸ See, eg, J Eekelaar [1987] Conv 93; S Gardner (1993) 109 LQR 263.

¹³⁹ Written Answer, *Hansard* (HC) 15 June 1994, vol 244, col 562.

¹⁴⁰ Family Law: Domestic Violence and Occupation of the Family Home (1992) Law Com No 207. A Bill based on the report is due to be presented early in 1995: see paras 5.5-5.6 below.

¹⁴¹ Persons who "have at any time agreed to marry each other" and persons who "have or have had a sexual relationship with each other." It appears to us that the majority decision of the Court of Appeal in *Khorasandjian v Bush* [1993] QB 727 confirms the desirability of a clear statutory remedy as between people who have had a brief "relationship", one of whom refuses to accept that it has come to an end.

remedies on behalf of the victim. This recommendation was closely linked with the philosophy which underlay our report on Binding Over,¹⁴² where the police often do fulfil a comparable role at present in a wholly inappropriate context. We regret the Government's unwillingness to recast the practices and procedures of the police in handling domestic violence cases on a principled modern footing.

The Ground for Divorce

- 2.83 Our report on The Ground for Divorce¹⁴³ is still being considered by the Government. In December 1993 it published a consultation paper¹⁴⁴ linking our recommendations to proposals of its own about mediation and other arrangements on the breakdown of marriage. The Lord Chancellor has recently said that there is overwhelming agreement on the need for reform of divorce law.¹⁴⁵ We await developments with interest.

Distribution on Intestacy

- 2.84 We reported last year that the Government had accepted some of the subsidiary recommendations made in our 1989 report,¹⁴⁶ while rejecting our principal recommendation for reform.¹⁴⁷ A Bill based on the accepted proposals is due to be presented this Session¹⁴⁸ and its enactment would resolve certain technical difficulties which arise at present in relation to intestate estates. It would also permit a cohabitant to make a claim for financial provision from the estate of a deceased partner who died intestate without having to prove dependence on that partner.

The Effect of Divorce on Wills

- 2.85 In July 1994 the Government announced¹⁴⁹ that it had accepted the recommendations we made in our 1993 report.¹⁵⁰ These were designed to remedy a problem created by the wording of the present statutory provision whereby a

¹⁴² See Binding Over (1994) Law Com No 222, paras 6.9-6.19.

¹⁴³ Family Law: The Ground for Divorce (1990) Law Com No 192.

¹⁴⁴ Looking to the Future: Mediation and the Ground for Divorce (1993) Cm 2424. The consultation period closed on 11 March 1994.

¹⁴⁵ In a speech to the Annual General Meeting of National Family Mediation on 7 December 1994.

¹⁴⁶ Family Law: Distribution on Intestacy (1989) Law Com No 187.

¹⁴⁷ Twenty-Eight Annual Report 1993 (1994) Law Com No 223, paras 3.6-3.8.

¹⁴⁸ See paras 5.5-5.6 below.

¹⁴⁹ Written Answer, *Hansard* (HC) 14 July 1994, vol 246, col 696.

¹⁵⁰ Family Law: The Effect of Divorce on Wills (1993) Law Com No 217.

legacy to a divorced spouse is cut out of a will. The present provision can mean that the testator's clear intentions about what should happen in the event of the spouse not taking the legacy are frustrated. A Bill based on this report is also due to be presented this Session.¹⁵¹

Adoption Law Review

- 2.86 We have not been asked to make any further contribution to the Government's work on adoption law. The Department of Health is leading the review of adoption law and we understand that proposals for reform will be implemented when legislative time permits.

Access to and Reporting of Family Proceedings

- 2.87 We have not been asked for any further assistance on this project. We understand that the analysis of the responses to the Lord Chancellor's Department's consultation paper is complete.

Mental Incapacity

- 2.88 We have been engaged on wide-ranging work on this topic for five years, and this culminated in our approving our report on Mental Incapacity in December 1994.¹⁵² Professor Brenda Hoggett QC (now Mrs Justice Hale) was responsible for this project while she was a Commissioner, and most of the essential work on formation of policy had been completed and approved before she left the Commission. The Chairman took over direct responsibility for the project during 1994, but we are very grateful to her for finding time to act as our honorary consultant throughout the year when her expertise and experience have been invaluable. A number of the issues and problems addressed by our earlier consultation papers were again in the news during the course of the year.

Medical decision-making

- 2.89 Public and media interest in the problem of medical decision-making for those who lack capacity was fuelled by the publication of the report of the House of Lords Select Committee on Medical Ethics in January 1994.¹⁵³ This committee's remit extended beyond decision-making for patients who lack capacity but it made recommendations on a number of issues which overlap with our project, and the Government has made it clear that any such recommendations will be examined

¹⁵¹ See paras 5.5-5.6 below.

¹⁵² We hope to publish the report on 1 March 1995 under the title *Mental Incapacity (1995) Law Com No 231*. It will cover the issues discussed in paras 2.89-2.96 below.

¹⁵³ Report of the Select Committee on Medical Ethics (1993-94) HL 21-I.

alongside our own.¹⁵⁴ In response to one of its recommendations, the British Medical Association and the Royal College of Nursing have convened a steering group to consider a Code of Practice on advance statements about health care.

- 2.90 Case-law has continued to expose the need for a jurisdiction within which a medical decision could be taken on behalf of a person who lacks capacity. In the meantime the High Court's declaratory jurisdiction is still being used to fill the gap. One case¹⁵⁵ was concerned with a patient in "persistent vegetative state" whose doctors sought a declaration that it would be lawful not to re-insert a feeding tube into the patient's stomach. In another¹⁵⁶ it was declared that a patient detained in a hospital pursuant to the Mental Health Act 1983 had capacity to refuse the treatment in question and had refused it, but that the treatment could lawfully be given because of the terms of section 63 of the Act.

Personal welfare decision-making

- 2.91 Case-law has also highlighted the deficiencies of the present law if a decision about a personal, rather than a financial, matter has to be taken on behalf of a person whose own decision-making capacity is in doubt. Again, in the absence of any statutory provisions, there has been imaginative resort to the declaratory jurisdiction of the High Court. In one of these cases¹⁵⁷ a local authority, which was anxious to protect an adult woman with learning disabilities, sought declarations from the High Court in the exercise of its inherent jurisdiction. It was held, however, that the court had no jurisdiction to make the declarations applied for. In another¹⁵⁸ there was a dispute as to where a man who had suffered a stroke should live, and an action was started against his son using the unwieldy mechanism of an application for a declaration.

Financial decision-making

- 2.92 The National Audit Office's report on the effectiveness and efficiency of the Public Trust Office was published in March 1994.¹⁵⁹ On the basis of this report, the Public Accounts Committee of the House of Commons examined the workings of the

¹⁵⁴ Government Response to the Report of the Select Committee on Medical Ethics (1993-94) Cm 2553, para 4.

¹⁵⁵ *Frenchay NHS Trust v S* [1994] 1 WLR 601.

¹⁵⁶ *Bright v Croydon District Health Authority*, 20 July 1994, Family Division, unreported judgment of Thorpe J.

¹⁵⁷ *Cambridgeshire County Council v R and others* [1994] 2 FCR 973.

¹⁵⁸ *Re S*, 26 September 1994, Family Division, unreported judgment of Hale J.

¹⁵⁹ Report by the Comptroller and Auditor General, *Looking after the Financial Affairs of People with Mental Incapacity* (1994).

Office, reported a number of serious concerns and made recommendations.¹⁶⁰ The Public Accounts Committee acknowledged that our own work might present an important opportunity for looking afresh at the workings of the Public Trust Office.¹⁶¹

Our report

- 2.93 Our consultation process confirmed that the legal background to the contemporary issues about mental incapacity and decision-making which are covered by our project is one of incoherence, inconsistency and historical accident. A number of social changes have now conspired to make reform of the unsatisfactory state of the law an urgent necessity. Foremost among these are community care policies, greatly increased life expectancy, medical advances and the increasing awareness of “rights” and discrimination issues. Our report recommends a clear, modern and integrated scheme which can be used whenever action has to be taken or a decision made on behalf of a person who lacks the mental capacity to make the decision in question for himself or herself. We have included in our report a single draft Bill which would implement all our recommendations. It will not matter whether the decision in question is financial, medical or personal in nature. The reality is that many decisions involve all of these elements.
- 2.94 The first main feature of the new statutory scheme we recommend is a clear statutory definition of lack of capacity which stresses that lack of capacity is “decision-specific”. We then recommend that action taken or decisions made on behalf of people who lack capacity should always be taken in their “best interests”, with a statutory check-list of factors to be taken into account. We recommend clarification of the law where action is taken, as it often can be, without formal procedures or judicial intervention. We deal with the vexed question of “advance directives” about health care decisions. We propose an improved and extended scheme of Continuing Powers of Attorney, to cover all types of decision, rather than just those concerned with financial matters. Finally, we recommend that, in the last resort, the court should have power to make a decision itself, or appoint a manager to take decisions in the future. We suggest that the Court of Protection should be reconstituted as a superior court of record within the normal court system, comprising a range of judges at different levels who would have power to make a wide range of orders, and to sit outside London; and that the Public Trust Office should perform administrative and supervisory functions.
- 2.95 Our consultation process also revealed increasing concern about abuse of both older people and people with learning disabilities. This was matched by concern about the

¹⁶⁰ Committee of Public Accounts 39th Report, *Looking After the Financial Affairs of People with Mental Incapacity* (1993-94) HC 308, para 3.

¹⁶¹ *Ibid*, paras 58-60.

inadequacies of the outdated and inappropriate laws which are now available to the statutory authorities when they seek to protect such people. We therefore make a number of recommendations to reform the emergency short-term public law powers which are needed to protect vulnerable adults who are at risk of harm. The new powers, unlike those they would replace, seek to strike a careful and consistent balance between the obligation to protect such people and the need to respect their autonomy.

- 2.96 The numerous views expressed on consultation by organisations and individuals with many different perspectives on this area of law have enabled us to construct a comprehensive scheme based on sound principles. We are convinced that our recommendations address a pressing problem in a responsible way which will maximise the possibility of amicable agreed settlements when disputes or difficulties arise. The absence of clear principles or simple procedures promotes uncertainty and distress for many, as well as expensive and often inconclusive litigation for the few who can afford it. We hope that our recommendations will receive urgent attention.

Statute Law

Consolidation

- 2.97 All three of the consolidation Acts passed during 1994 were prepared by draftsmen working at or for the Law Commission. All of them were "straight" consolidations in which the existing law was reproduced without any amendments giving effect to Law Commission recommendations. The details are given in the following table:

<i>Title of Act</i>	<i>Chapter No</i>	<i>Commencement Date</i>
Vehicle Excise and Registration Act 1994 ¹⁶²	c 22	1.9.94
Value Added Tax Act 1994	c 23	1.9.94
Drug Trafficking Act 1994	c 37	3.2.95

- 2.98 We hope that certain consolidation Bills which were not ready for introduction in the 1993/94 Session of Parliament will now be introduced in the 1994/95 Session. The Bills in question would consolidate the legislation relating to employment rights, industrial assurance, industrial tribunals and merchant shipping. Other consolidations which, we hope, will be introduced this Session are Bills on Heavy Goods Vehicle operator licensing; nurses, midwives and health visitors; the police; and the protection of animals.

¹⁶² This Act was able to take advantage of pre-consolidation amendments contained in the Finance Act 1994.

2.99 Further progress has been made on a consolidation relating to schools, but progress on one relating to the National Health Service has been delayed pending the Government's latest proposals for the NHS. Progress on a consolidation relating to the reciprocal enforcement of maintenance orders is not possible until certain proposed Northern Ireland legislation has been made. Longer term projects include consolidations on the armed forces, financial services and friendly societies. Consolidation of the legislation relating to the powers of criminal courts is, however, not thought to be a practical proposition at present.

Statute Law Revision

2.100 Work on our Fifteenth Report on Statute Law Revision recommending a draft Statute Law (Repeals) Bill has been completed jointly with the Scottish Law Commission and we expect to submit it to the Lord Chancellor during the first quarter of 1995.

2.101 The draft Bill includes proposals to rationalise the legislation of Bedfordshire, Warwickshire, the county and city of Nottingham and the former Derwent Valley Water Board. Research and preliminary consultation on these proposals were undertaken for us by Mr J S Phipps, who was Chief Executive of Leicester City Council between 1973 and 1982. Since 1985 Mr Phipps has undertaken similar work for us in relation to the local legislation of a considerable number of local authorities. His work on the legislation relating to South Yorkshire formed the basis of the recommendations we made for its rationalisation in our Thirteenth Report on Statute Law Revision, subsequently enacted as the Statute Law (Repeals) Act 1989. We expect his work on the legislation of other local authorities to provide the basis for recommendations in future Reports on Statute Law Revision. Mr Phipps is shortly to complete his work for us and we take this opportunity to record our sincere appreciation of all the valuable help he has given us in recent years.

Chronological Table of Local Legislation

2.102 The purpose of the *Chronological Table of Local Legislation* is to provide reliable and detailed information as to the extent to which Acts of Parliament, other than public general Acts, are in force. The table will eventually cover some 26,000 public local Acts in the series which began in 1797, and over 10,000 private or personal Acts commencing in 1539.

2.103 The work on public local Acts is now approaching completion. This is by far the largest part of the project in both bulk and complexity. During the course of the year a first draft of the text was produced. We have approved its format and final editing of the text is now proceeding, with a view to publication later this year or early in 1996.

2.104 Research work on the part of the project dealing with private or personal Acts was completed in 1992. Work has now started on the preparation of the final text of the private Act table.

PART III EXTERNAL RELATIONS

(i) Visit by the Lord Chancellor

- 3.1 We were honoured to receive the Lord Chancellor on a visit to our offices in November. He spent a whole morning with us, during which he met most of the staff of the Commission. He then joined Commissioners for a discussion on topics of mutual interest before an informal meeting with senior legal and administrative staff. We were greatly encouraged by his keen and well-informed interest in the work we were doing: even in the dark days when nothing seemed to be happening we always knew that the Lord Chancellor himself, as befitted a former Scottish Law Commissioner, was a strong and loyal supporter of our work. We have of course been in frequent contact with him in other ways, particularly in correspondence, and the Chairman now meets him at least twice a year to discuss the affairs of the Commission. There is no doubt, however, that a visit of this kind is most valuable in itself and as a very distinct boost to morale.

(ii) Visit by the Parliamentary Secretary

- 3.2 Our morale had also been boosted by a visit by the Lord Chancellor's Parliamentary Secretary, Mr John Taylor MP, in July. A former Government whip, Mr Taylor has been assiduously fighting the Commission's cause in the House of Commons, and we owe a debt of gratitude to him for the effective way in which his quiet work has helped to bring about the changed parliamentary atmosphere.¹ We greatly enjoyed his visit, and before he left he told us percipiently, and accurately, what a happy place the Commission seemed to be.²

(iii) Relations with Government departments and others

- 3.3 In the course of our projects we are frequently in contact with Government departments and other agencies who have very close links with the area of the law on which we are working. This contact first arises at the very early stages of the law reform process. We usually consult Government departments, the legal and other professions and other interested parties in the course of ascertaining what problems exist in particular areas, before we prepare one of our consultation papers.
- 3.4 When we come to prepare our reports, there can be no question that responsibility for deciding our final views and for making our final recommendations must rest on us alone, following our customary very thorough consultations. We have found a widespread understanding in Government and elsewhere that this is the proper approach for an independent law reform commission, and in large measure it is the

¹ The Chairman has also been having regular half-yearly meetings with the Opposition spokesperson for legal affairs, Paul Boateng MP, over the last two years, and these meetings have contributed to the improved lines of communications the Commission now enjoys with interested parliamentarians on all sides of the political divide at Westminster.

² See further para 1.30 above.

feature of our work which gives our reports their authority and makes them acceptable vehicles for all-party agreement on law reform.

3.5 At the same time, however, we find that it is often of immense value to discuss our projects with those in Government and other public agencies during the period before we report. These discussions may cover procedural matters such as the progress we are making, the anticipated timing of the publication of our report, or any need for additional resources, such as empirical research or the funding for an additional research assistant. We also find value in discussions on points of substance before we actually finalise our recommendations, for example if a Government department or other agency has day-to-day experience of the working of the law, or an insight into other practical difficulties which it is important for us to understand before we finalise our views.

3.6 We give just a few examples of ways in which we have used these methods during the course of our work this year.

- ◆ **On land registration**, we established a joint working party with the Land Registry and the Lord Chancellor's Department³;
- ◆ **On company law**, we had detailed discussions with the Department of Trade and Industry, leading to agreement that we should undertake work on private companies⁴ and on shareholders' remedies⁵;
- ◆ **On mental incapacity**, we discussed aspects of our proposals with the Lord Chancellor's Department, the Master of the Court of Protection and the Official Solicitor - quite apart from many other very varied contacts throughout the project⁶;
- ◆ **On property rights of home-sharers**, we have established a steering group drawn from a wide range of interests⁷.

(iv) Annual meeting with the Lord Chancellor's Department

3.7 A new event this year was a two-day residential meeting with very senior officials of the Lord Chancellor's Department in December, which took the place of the half-day annual meetings we have had with them in recent years. This was a most valuable and timely conference, taking place when there was a new team of

³ See paras 2.67-2.70 above.

⁴ See paras 2.20-2.24 above.

⁵ See paras 2.25-2.27 above.

⁶ See paras 2.88-2.96 above.

⁷ See paras 2.78-2.79 above.

Commissioners and a new Secretary, and a forthcoming reorganisation of the Lord Chancellor's Department headquarters alongside the establishment of the Court Service Agency. We were able to discuss our work and its significance in much greater depth than had previously been possible, and we believe that both sides left the meeting with a clearer understanding of their respective roles and of the ways in which we can work together most effectively without imperilling our independence.⁸

3.8 The Department's published Fundamental Aim is to ensure the efficient and effective administration of justice at an affordable cost.⁹ Before the meeting the relevance of our work was, we believe, perceived only in relation to the Departmental Key Challenge which refers to law reform.¹⁰ By the end of the meeting we think we were all persuaded that our work was also of great importance in relation to what many may regard as the most significant Key Challenge of all, which is to ensure access to justice at a reasonable cost.¹¹

3.9 English lawyers are so accustomed to regarding their journeys through English law as if it was G K Chesterton's rolling English road¹² that they do not always appreciate that if the law was made simpler their clients' bills would be smaller. And the whole paraphernalia of English law is usually so inaccessible to non-lawyers that they see lawmaking only in the context of creating new legal structures or new legal obligations to implement new policies; and not as a tool for simplifying and modernising what exists already.

3.10 Another thought which emerged from the meeting was that it is the Lord Chancellor's budget which usually picks up the bill for the effect of bad, out of date law,¹³ while other Departments which may be responsible for the law in specific

⁸ We stressed our concern to make the law more comprehensible and cheaper to use, and our belief in the importance of socio-legal and other research as an essential working tool for law reformers.

⁹ The Lord Chancellor's Department: A Programme for the Future: Strategic Plan 1994/95 - 1996/97, p 6.

¹⁰ Key Challenge Five: to develop a range of policies which contribute to the protection of the rights of the individual, the family and property and, where appropriate, to support these policies with an effective law reform process. *Ibid*, p 7.

¹¹ Key Challenge One: to ensure access to justice while reducing its cost to the parties and the taxpayer. *Ibid*, p 7.

¹² "A reeling road, a rolling road, that rambles round the shire." G.K. Chesterton, "The Rolling English Road", verse 1.

¹³ Through the cost of legal aid and the provision of court services, including the judiciary. The Law Officers' Department also carries a significant burden of the cost of bad, out of date law, because it is responsible for funding the prosecution process.

areas¹⁴ are not so directly affected if they fail to keep up to date the law for which they are responsible.

(v) Relations with other law reform bodies

- 3.11 Once again we have enjoyed cordial relations with other law reform commissions. Our working relationship with the Scottish Law Commission involves frequent consultation with each other, as with our new work on company law. We have been in constant touch at all levels, and the Chairman particularly enjoyed a visit to Edinburgh in January for a full day of talks on our mental incapacity project and on several other matters of mutual interest. Mr Silber has also paid a visit to the Scottish Law Commission to discuss criminal law projects. We maintain frequent contact with the Law Reform Advisory Committee for Northern Ireland and our Secretary took the opportunity to meet Lord Justice Carswell, the Chairman of the Committee, during a visit to Belfast in the autumn. We have been pleased to welcome two New Zealand Law Commissioners¹⁵ as visitors here this year. We were also delighted to hear from Professor Beatson of the Canadian Department of Justice's consultation meeting he attended in Toronto in October: it was held to discuss plans to create a new Canadian Law Reform Commission out of the ashes of its predecessor. We hope that more representatives of overseas law reform commissions (or equivalent bodies) will come and see us on their visits to London, as we always have much to discuss on such occasions. Our visitors from overseas are listed in Appendix 4.

(vi) Other contacts

- 3.12 We continue to enjoy excellent working relationships with the Bar Council, the Law Society and the Society of Public Teachers of Law. In each case we welcomed them to the Commission for a very valuable annual discussion, and we are in touch with them or their representatives constantly throughout the year. Again, this is a good example of the way in which this Commission bridges the academic world and the world of the practitioner, enabling us to communicate to Government and Parliament the current state of thinking in both these complementary worlds.
- 3.13 In recent years we have established a regular schedule of meetings with the Home Secretary and with his senior officials; with senior officials in the Department of Trade and Industry; and with the Lord Chancellor and senior officials in his Department. We also arrange other ad hoc discussions and meetings, when necessary, from time to time: for example, Sir Franklin Berman, the chief legal adviser at the Foreign and Commonwealth Office, came with two of his senior lawyers to address the Commission's legal staff on the European Convention of Human Rights in November. In addition to what is recorded elsewhere in the

¹⁴ For example, the Home Office in relation to criminal law, and the Department of the Environment in relation to landlord and tenant law.

¹⁵ Mr Justice Wallace and Professor Richard Sutton.

report, the Chairman or other Commissioners spoke this year to the Statute Law Society and the Law Society's Local Government Group, and at the Annual Conferences of the Society of Public Teachers of Law and the District Land Registrars. We also had meetings this year with representatives of the Institute of Directors and the CBI and with several committees of the Law Society. The Chairman and other Commissioners have spoken to five different meetings attended by Government lawyers about different aspects of the Commission's work, and Commissioners often appear on radio and television to explain their work.¹⁶

¹⁶ The Chairman twice took part in interviews which formed part of training videos for lawyers and accountants produced by the Television Educational Network.

PART IV STAFF AND ADMINISTRATION

(i) Responsibilities for Commission Projects

- 4.1 The responsibilities for projects falling within particular fields of law are shown in Appendix 2, which reflects the position at the end of December.

(ii) Lawyers

- 4.2 Apart from obtaining four new Commissioners and a new Secretary during 1994,¹ we also saw substantial changes to our legal staff. After the heads of two of our law reform teams left the Commission in the second half of 1993, the heads of the other two moved elsewhere this year. Anwar Akbar left us in July to take up a post as Assistant Counsel to the Speaker. It was a shame that he just missed the silver jubilee of his long years of devoted service at the Commission, which he joined in December 1969, and we miss his wise counsel and practical legal skills. And Mrs Jenny Jenkins, who had been with the Commission since 1988, most recently as team leader of the highly successful family law team, left us in February, although we have been very pleased to welcome her back in a part-time capacity in recent months. We had a very happy gathering here in June to mark Michael Collon's and Anwar Akbar's departure, and it was very good to welcome back former Commissioners, including 86-year old Sir Neil Lawson, for whom Anwar had first worked when he joined the Commission all those years ago.
- 4.3 We have welcomed Peter Fish, formerly of Wilde Sapte, as team manager of the business law team; Jacques Parry, who followed a distinguished academic career with a period at the Crown Prosecution Service, as manager of the criminal law team; and David Symes, formerly with Frere Cholmeley Bischoff, as manager of the common law team. It is very good to have them all with us. Anwar Akbar's post remains, as yet, unfilled.
- 4.4 It would be wrong in this context if we did not record our anxiety about the arrangements for replacing our senior legal staff. Although we have received admirable support from the chief personnel officer in the Lord Chancellor's Department, six months have elapsed, on average, between the departure of any of our team managers and the arrival of his or her successor. No private sector organisation with responsibilities as massive as ours² would contemplate such a situation with equanimity for more than five minutes. We wrote anxiously about these problems in our last report³ but, although strenuous efforts have recently been

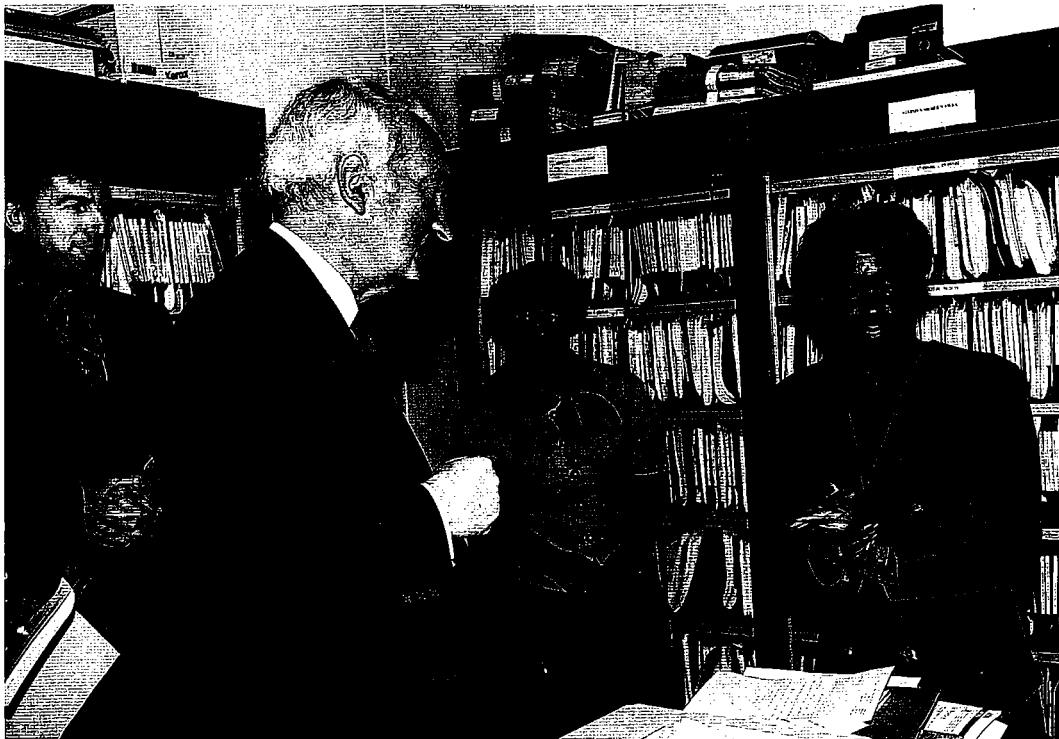
¹ See paras 1.29 and 1.31 above.

² "It shall be the duty of... the Commission... to take and keep under review all the law with which [it is] concerned with a view to its systematic development and reform.." Law Commissions Act 1965, s 3(1),

³ Twenty-Eighth Annual Report 1993 (1994) Law Com No 223, para 5.3.

made to improve things both in the short term and for the future, we are not convinced that a satisfactory long term solution has yet been found. The increasing calls on Commissioners to perform after-sales service⁴ make it even more important that we should enjoy stability in staffing. Readers of this and our other recent reports will have noticed how often our projects have been thrown out of kilter, or delayed interminably with substantial concomitant public expense,⁵ by staffing crises which are not within our control. Perhaps Parliament's new appreciation of the importance of our work will bring with it a determination by the appropriate authorities to see that we are adequately and consistently staffed.

4.5 These problems apart, we have continued to be extremely fortunate in the dedication, enthusiasm and professionalism of the staff who work for us. This is not to mention the team of Parliamentary Counsel, admirably led by Peter Knowles, who are seconded to us from their main office at 36 Whitehall. To all of them we express our very sincere gratitude.



THE LORD CHANCELLOR SPEAKING WITH TWO OF THE PERSONAL SECRETARIES, WITH THE ASSISTANT SECRETARY IN THE BACKGROUND

⁴ See para 1:21 and n 43 above.

⁵ Because new staff, and sometimes new Commissioners, have to read their way into very complicated projects.

(iii) Administrative staff

- 4.6 The Commissioners, Parliamentary Counsel and legal staff are supported in their work by the administrative staff who are listed in Appendix 3. Their work covers a wide variety of activities, which they carry out with a commitment and expertise which are very greatly appreciated.

(iv) Library

- 4.7 A new Librarian and Assistant Librarian have joined us this year and are helping us to make the most of our excellent library facilities. We are as always grateful to the libraries in the Supreme Court, in the Headquarters of the Lord Chancellor's Department, and in many other Government departments, for materials not available here. We also have access to the library of the Institute of Advanced Legal Studies, and are grateful for the assistance provided by the British Institute of International and Comparative Law.

(v) Law Under Review

- 4.8 We have been publishing this quarterly bulletin for eight years, giving details of Government or Government-sponsored law reform projects. It has an increasing worldwide circulation, particularly in the common law countries.

(vi) The cost of the Commission

- 4.9 There is a summary of the cost of the Commission at Appendix 7.

PART V THE IMPLEMENTATION OF LAW COMMISSION REPORTS

- 5.1 In our last four annual reports we have reported, with mounting concern, on the way in which very little action has been taken by Parliament to implement our reports.¹ This year we have a much happier story to tell.

Law Commission Bills in Parliament

- 5.2 In July 1992 the House of Lords adopted a proposal from its Select Committee on Procedure that there should be an experiment with special standing committees.² These new committees were to have power to take written and oral evidence within a period of 28 days after the Second Reading of a Bill in that House.³ We described in our last two reports how our hopes that this procedure might be used from early 1993 onwards were dashed because of continuing deadlock between the two main parties in the House of Commons.⁴
- 5.3 After Easter 1994 this deadlock was at last removed, and the procedure was used for the first time in connection with the Law of Property (Miscellaneous Provisions) Bill.⁵ This Bill was committed to a Special Standing Committee,⁶ which received written and oral evidence⁷ during May before turning itself into a Public Bill Committee to debate amendments to the Bill. The Chairman, Mr Harpum and Mr Aldridge gave evidence at three sittings of the committee, and Mr Harpum also provided two Briefing Notes and other assistance to the committee during its deliberations. The great advantage of this new procedure from a parliamentary

¹ Twenty-Fifth Annual Report (1990) Law Com No 195, paras 1.5-1.7; Twenty-Sixth Annual Report (1991) Law Com No 206, paras 1.2-1.3; Twenty-Seventh Annual Report (1992) Law Com No 210, paras 1.9-1.18 and Appendix 1; Twenty-Eighth Annual Report (1993) Law Com No 223, Introduction, paras 1.10-1.23 and Part IV.

² See *Hansard* (HL) 9 July 1992, vol 538, cols 1271-1295. These committees are generally known as "Jellicoe Committees", since they were originally begotten in the Report of the Select Committee on the Committee Work of the House of Lords, chaired by Earl Jellicoe (1991-92) HL 35-I.

³ First Report of the Select Committee on Procedure 1992-93 (1992-93) HL 11, para 6.

⁴ Law Com No 210, paras 1.10-1.11; Law Com No 223, paras 1.16-1.20.

⁵ This Bill implemented two Law Commission reports: Property Law: Title on Death (1989) Law Com No 184, Cm 777; and Transfer of Land, Implied Covenants for Title (1991) Law Com No 199.

⁶ The members of the committee were Lord Brightman (chairman), Lord Coleraine, Baroness Flather, Lord Lucas, Lord Mackay of Clashfern (Lord Chancellor), Baroness Mallalieu, Lord Mishcon, Baroness Robson of Kiddington and Lord Wilberforce.

⁷ Written evidence was submitted by The Law Society, the Institute of Legal Executives, the Council of Mortgage Lenders, the London Chamber of Commerce and Industry, the Halifax Building Society, the Northern Chancery Bar Association, Mr Edward Nugee QC, Professor Graham Battersby and Professor Mark Thompson. The Lord Chancellor, the Public Trustee, The Law Society and the Law Commission gave oral evidence.

perspective was that, although this very technical Bill was considered for over 8 hours in committee, it occupied only just over an hour for all its stages on the floor of the House of Lords. We were pleased to see that when the Bill reached the House of Commons, there was cross-party appreciation of the detailed scrutiny of the Bill undertaken in the House of Lords and a wish that this new "fast-track" procedure should be used more frequently for Law Commission Bills.⁸

- 5.4 These were not the only Law Commission measures passed into law last Session. Mr David Clelland MP successfully ferried our Sale and Supply of Goods Bill into law as a Private Member's Bill starting in the House of Commons.⁹ And as we reported last year, our recommendations on Corroboration¹⁰ formed part of the Government's Criminal Justice and Public Order Bill and are now law.¹¹ The Government also accepted an amendment to that Bill, moved by Lord Lester of Herne Hill, a Liberal Democrat peer, which gave effect to the most important draft clause in our report on Rape Within Marriage.¹² After four lean years, in which only one of our reports was implemented each year, the 1993-94 Session saw Parliament giving effect to the main recommendations in five of them.¹³ In an article in *The House* magazine in October 1994 the Chairman wrote:

"The recent past has been wintry. There is now a rosy hue on the horizon, but should I fear a false dawn? We shall see."

The 1994-95 Parliamentary Session

- 5.5 We did not have long to wait. The Queen's Speech on 16 November 1994 ended with the sentence: "My Government will promote further measures of law reform." On the same day the Lord Chancellor's Department published a Background Note, which described the new Jellicoe procedure and said that it had been generally welcomed, and then announced that the Government intended to make further use

⁸ The Bill took less than half an hour for all its stages in the House of Commons where it was first sent to a Second Reading Committee off the floor of the House. At the committee stage the Labour Party's spokesman, Paul Boateng MP, said that the Opposition hoped that a rolling programme of non-controversial law reform might be introduced through these procedures: *Hansard* (HC) Standing Committee A, Law of Property (Miscellaneous Provisions) Bill, 19 October 1994.

⁹ This Bill, based on our report *Sale and Supply of Goods* (1987) Law Com No 160, Scot Law Com No 104, Cm 137, was described in our last Annual Report, Law Com No 223, para 1.15.

¹⁰ *Corroboration of Evidence in Criminal Trials* (1991) Law Com No 202, Cm 1620. These recommendations were also described in Law Com No 223, para 1.15.

¹¹ See Criminal Justice and Public Order Act 1994, ss 32-33.

¹² *Criminal Law: Rape within Marriage* (1992) Law Com No 205, HC 167. The clause, now s 142 of the Criminal Justice and Public Order Act 1994, places the House of Lords decision in *R v R* [1992] 1 AC 599 on a statutory basis. The consequential amendments and repeals which we recommended are to be found in Schedule 9 to the Act.

¹³ A list of the Commission's Implemented Reports since 1982 is at Appendix 5.

of it in giving effect to Law Commission reports. The Note mentioned seven of our reports which had been approved by the Government and were awaiting Parliamentary time for implementation:

Law Com No	Scot Law Com No	Title
124		Private International Law: Foreign Money Liabilities
146	96	Private International Law: Polygamous Marriages
193	129	Private International Law: Choice of Law in Tort and Delict
207		Family Law: Domestic Violence and Occupation of the Family Home
216		The Hearsay Rule in Civil Proceedings
217		The Effect of Divorce on Wills
187		Distribution on Intestacy

5.6 We have now been told that “the usual channels” in both Houses have cleared all these measures as appropriate for the Jellicoe procedure, and at the end of 1994 we were preparing to give evidence to a Special Public Bill Committee¹⁴ on the Private International Law (Miscellaneous Provisions) Bill which is the vehicle for the first three of these reports.¹⁵

5.7 Lord Mustill has also agreed to present a Bill to implement our report on Sale of Goods Forming Part of a Bulk¹⁶ as a Private Member’s Bill in the House of Lords with Government support. After the disappointments we have experienced in the past we are prepared for anything, but the last three months of 1994, which showed five reports being substantially implemented and active steps being taken to prepare eight more for presentation in the new Session, have been immensely encouraging.

¹⁴ The Select Committee on Procedure of the House of Lords in its Third Report 1993-94, HL Paper 81, recommended this new name for the former Special Standing Committees, and this recommendation was adopted by the House in October 1994, *Hansard* (HL) 20 October 1994, cols 338, 356.

¹⁵ The Private International Law (Miscellaneous Provisions) Bill received its Second Reading in the House of Lords on 6 December 1994 and was committed to a Special Public Bill Committee (*Hansard* (HL) 6 December 1994, cols 830-848). The members of that committee are Lord Brightman (chairman), Lord Coleraine, Lord Irvine of Lairg, Lord Mackay of Clashfern (Lord Chancellor), Lord Meston, Baroness Rawlings, Lord Skelmersdale and Lord Wilberforce.

¹⁶ Sale of Goods Forming Part of a Bulk (1993) Law Com No 215; Scot Law Com No 145.

Publicity for the Commission's work

- 5.8 It may be of value to examine what has caused this new appreciation of the importance of law reform. Experienced Parliamentarians in both Houses told us that law reform measures were not regarded as very important or very relevant to the real business at Westminster. Hard-pressed constituency MPs saw no connection between Law Commission Bills and the stock in trade of their constituents' worries at surgeries or in their mail-bags, and Ministers and party managers knew there were no votes in law reform. We have been very heartened by the support we have received from leading lawyers in all three main parties in both Houses,¹⁷ but there was a real need to bring to life to non-lawyers the work we are doing in terms of its contemporary relevance to the life of the nation.
- 5.9 Readers of our Annual Reports will have been able to see for themselves the efforts we have been making to explain our work better through this medium. In addition to enlarging our circulation list we are now sending a Press Notice pinpointing the main points in our Annual Reports to a large number of interested members of both Houses. In January the Chairman was a guest at a lunch hosted by the Solicitors' Parliamentary Group; in July he and Mr Silber had a very constructive meeting with the Bar Parliamentary Group; and in October, as noted above¹⁸, he wrote an article for *The House* magazine¹⁹ summarising the nature and relevance of our work. In the same month he addressed the opening plenary session of the Bar Conference on the need for Parliament to take the Commission's work more seriously.²⁰

Meeting with the Home Affairs Committee

- 5.10 More significantly, on 18 May 1994 the Chairman, Professor Beatson and Mr Silber gave evidence to the Home Affairs Committee of the House of Commons.²¹ This was the first time the Commission had ever discussed the general nature of its work with a committee of that House, and the flavour of its evidence can be picked up from a short passage in a memorandum it submitted before the meeting, which is reproduced on the following page.

¹⁷ By way of example only, Lord Alexander of Weedon QC, Lord Rippon of Hexham QC and Sir Ivan Lawrence QC, MP (Conservative); Lord Irvine of Lairg QC, Lord Archer of Sandwell QC and Mr Paul Boateng MP (Labour); and Lord Lester of Herne Hill QC and Mr Alex Carlile QC, MP (Liberal Democrat), in addition, of course, to the Lord Chancellor and his Parliamentary Secretary, Mr John Taylor MP, for whom see paras 3.1-3.2 above.

¹⁸ See para 5.4 above.

¹⁹ The parliamentary weekly magazine which prides itself on being the most widely read magazine in Parliament.

²⁰ A copy of his address is to be found at Appendix 1 below.

²¹ Home Affairs Committee: The work of the Law Commission, Minutes of Evidence, 18 May 1994 (House of Commons, Session 1993-94, 418-i, HMSO).

5.11 Our discussion about the implementation of our Criminal Code proposals was particularly illuminating. Mr Peter Butler MP told us how impressed he had been on a recent visit to America at how easy it was to take out a criminal law statute and find all the law on offences against the person in an easily accessible form.²² Mr Gerald Bermingham MP, another lawyer with great experience of the criminal law in practice, remarked that anyone who practised in the criminal courts knew:

that the law is an absolute shambles and you get the wrong charge, wrongly drafted on the wrong indictment, and you have destroyed the offence and the offender walks free.²³

B. Why is the non-implementation of Law Commission proposals getting so serious?

1. Nobody who knows the state our laws are in has ever questioned the need for the Law Commission's work.

2. Nor is the Commission aware of any serious criticism of the quality and thoroughness of its work. People may, of course, hold differing views on matters of policy.

3. Lawyers are costing more and more. Legal Aid is being cut. Law centres are being closed because local authorities can no longer find funds to support them.

4. Much of the Commission's work is concerned to simplify the laws relating to very ordinary activities: buying a house, making a will, renting a flat, running a small business, getting your money back when a public authority has got the law wrong, buying a secondhand car.

5. If the Commission's proposals are enacted, laws like these will be simpler and fairer, and less money will have to be spent on lawyers.

6. One of the Commission's new projects, on remedies for breach of trust, should lead to the law being much simpler if pension funds are ever stolen again: less money would have to be spent on accountants and lawyers in trying to get it back ...

5.12 But it was clear that the committee was very anxious about the difficulties which would face Parliament if it tried to accommodate criminal law Bills of the type produced by the Commission. Their current experience with the Criminal Justice and Public Order Bill, which had spawned many amendments on topics never directly addressed by the Bill's draftsman, left them disillusioned about the

²² *Ibid*, p5.

²³ *Ibid*, p12.

prospects of survival of a very technical Bill designed solely to improve the quality of the criminal law. One exchange²⁴ gives a flavour of the discussion:

MR JOHN GREENWAY MP: *You see when we look at the debates we have had, for example on the Criminal Justice and Public Order Bill here in the Commons, a record number of new clauses put down by Members of Parliament adding new offences, dealing with particular problems that they see as requiring the strengthening of the law. It is this controversial aspect of the criminal law which I think influences the attitudes and the view of politicians and makes it much more contentious than it appears to be to the practising lawyer.*

MR JUSTICE BROOKE: *This is fundamental. As a country are we willing to go on with our criminal law in a mess because we do not have the machinery to sort out the mess, or are we not? That is the fundamental question.*

MR JOHN GREENWAY MP: *You are saying we politicians should, in actual fact, bury the party political hatchet on all of this, accept the advice that you give from all the work that you have done, and try a completely different approach to the one which has hitherto been adopted?*

MR JUSTICE BROOKE: *I think there has to be exploration of what might be possible. Law reform cannot work in our field except by agreement and unless machinery is devised for taking forward the proposition you have just put to me, we really will stay, as a country, with the criminal law in a ghastly mess.²⁵*

5.13 After the meeting we submitted a Memorandum, at the committee's request, in which we dealt at rather greater length with some of the issues discussed at the

²⁴ *Ibid*, p11.

²⁵ On the following day, 19 May 1994, Lord Mustill handed down his speech in *R v Mandair* [1994] 2 WLR 700 in which he said at p709: "The reappearance of section 20 [of the Offences Against the Person Act 1861] before your Lordships' House barely two years after it was minutely examined in *R v Parmenter* [1992] 1 AC 699 demonstrates once again that this unsatisfactory statute is long overdue for repeal and replacement by legislation which is soundly based in logic and expressed in language which everyone can understand."

meeting and we suggested possible ways forward.²⁶ We were pleased to see that the committee's Chairman²⁷ took up these themes in a speech he made in the House of Commons soon afterwards when he raised the possibility of creating a Select Committee, perhaps composed of members of both Houses of Parliament, with the sole function of reforming the criminal law.²⁸ In the same month Professor Sir John Smith QC uttered a cry of almost total despair about the unreformed law of offences against the person in the pages of the *Criminal Law Review*.²⁹

New support for our work

5.14 When Parliament resumed in the autumn it was pleasant to see that the need to accommodate Law Commission law reform Bills into a fast-track parliamentary process, provided they were politically non-contentious, was accepted on all sides of both Houses, and by lawyers and non-lawyers alike.³⁰ The House of Lords has now modified the arrangements by which Jellicoe committees may receive evidence,³¹ and towards the very end of the year the House of Commons resolved that Bills based on our reports should be referred automatically to a Second Reading Committee off the floor of the House unless the House otherwise orders.³²

5.15 While changes were taking place in Parliament's perception of the importance and relevance of our work, equally striking changes were taking place in the Press's treatment of it. In the earlier part of the year we were receiving increasingly

²⁶ Minutes, pp 15-24. See n 21 above.

²⁷ Sir Ivan Lawrence QC, MP.

²⁸ *Hansard* (HC) 27 June 1994, vol 245, cols 595-6. He added: "Almost everyone agrees that what would most reform the criminal law is the creation of a code of criminal law. However, that is light years away under our present system. There is simply no machinery for dealing comprehensively with such a large subject ... because there is no time in the parliamentary year to deal with it, even though much of what would be agreed by a commission ... would be entirely non-contentious."

²⁹ In a note to *Pearson* [1994] Crim LR 534, he wrote: "It is almost beyond belief that so simple and common an offence as that under section 20 [of the Offences Against the Person Act 1861] goes on giving the courts so much trouble... There is an overwhelming case for the urgent implementation of the Law Commission's draft Criminal Law Bill, restating the law of non-fatal offences against the person."

³⁰ See *Hansard* (HL) 2 November 1994, cols 853 (Lord Richard QC), 858-9 (Lord Rippon of Hexham QC), 873-5 (Lord Archer of Sandwell QC), 876 (Lord Brightman), 898 (Viscount Cranborne); *Hansard* (HL) 22 November 1994, cols 160 (Baroness Blatch), 166 (Lord McIntosh of Haringey), 171 (Lord Rodgers of Quarry Bank), 194-195 (Lord Wilberforce), 253 (Earl Russell), 269-270 (Lord Mackay of Ardracknish); *Hansard* (HC) 31 October 1994, col 139 (Mr John Taylor MP and Mr Paul Boateng MP); *Hansard* (HC) 18 November 1994, col 252 (Mr Jack Straw MP).

³¹ The 28 days now run from the first meeting of the committee instead of the Second Reading of the Bill. See *Hansard* (HL) 20 October 1994, cols 338, 356.

³² Other than Private Members' Bills or consolidation Bills. See *Hansard* (HC) 19 December 1994, cols 1456, 1463 (Mr Anthony Newton MP), 1470 (Mrs Anne Taylor MP) and 1497-8.

prominent treatment in articles by legal correspondents and legal writers.³³ By the end of the year home affairs editors and political editors were evincing keen interest in our theme that it was high time that more was done to make the law simpler, fairer and cheaper to use,³⁴ which is after all the reason for our existence.

Implementation - the current position

- 5.16 Our last two reports have included a bar chart which illustrated the gloomy story of non-implementation. This year there is no need to repeat this device. If all the hopes we have set out in this Part are realised, only 2 of the 13 reports on page 28 of our 1992 Annual Report³⁵ will still be waiting for Parliamentary attention at the end of the present Session.³⁶ The picture is rather less rosy in relation to the property law backlog, although 2 out of the 14 reports on page 29 of that report were implemented last Session, but we have been having very constructive discussions with the Lord Chancellor's Department about the best method to tackle this unhappy backlog.³⁷ We will no doubt return to this topic in our next report.

A revealing study

- 5.17 Our discussions with parliamentarians led us to realise how sketchy was our knowledge of some of the more arcane parliamentary procedures that already existed. We therefore requested Philippa Hopkins, a very able graduate student, to conduct a three-week research study for us into these matters in July. This study elicited so much admiration when we showed it in draft to a number of very experienced observers of the parliamentary process - not to mention a few participants in it - that we invited her back in October to incorporate a number of comments we had received on points of detail, and then published it.³⁸ One of her more striking findings was that over the last 10 years Law Commission Bills, other

³³ See Sharon Wallach, "Reforms in the bottleneck", *The Independent* 22 April 1994; Frances Gibb, "Quick and easy law reforms blocked by 'cavalier Commons'", *The Times* 29 April 1994; Terence Shaw, "Vital law reform 'is blocked by party politics'", *The Daily Telegraph* 29 April 1994; David Pannick, QC, "Laws are 'simple and unreformed'", *The Times* 10 May 1994.

³⁴ Anthony Bevens, "Delays in reform 'benefit crooks'", *The Observer* 10 July 1994; Peter Riddell, "Give us good laws, not more laws", *The Times* 14 November 1994; Nick Cohen, "The law need not be an ass", *Independent on Sunday*, 20 November 1994; Valerie Elliott, "Law's bad language set for an overhaul", *The Sunday Telegraph* 11 December 1994.

³⁵ Twenty-Seventh Annual Report (1992) Law Com No 210.

³⁶ Private International Law: Law of Domicile (1987) Law Com No 168; and The Ground for Divorce (1990) Law Com No 192.

³⁷ A list of Law Commission reports now awaiting implementation is to be found at Appendix 6.

³⁸ Parliamentary Procedures and the Law Commission, A Research Study by Philippa Hopkins, with a Foreword by the Law Commission, 4 November 1994.

than those incorporated in major Government programme Bills, had taken up very little time on the floor of either House.³⁹



[CARTOON REPRODUCED WITH THE PERMISSION OF CHIC JACOB AND THE LAW SOCIETY'S GAZETTE: ISSUE PUBLISHED 11 MAY 1994]

Conclusion

- 5.18 The sea-change in attitudes we have recorded in this Part could not, of course, have been achieved without the dedicated work of the Lord Chancellor, his Parliamentary Secretary and their senior officials, and other supporters of the Commission at Whitehall and Westminster. But we believe that they would all be the first to acknowledge that our efforts had quite a lot to do with it, and we have dwelt at some length on these issues in this Part because we believe that it tells an interesting story of how attention to good lines of communication and a good, clear message can reap dividends.

³⁹ *Ibid*, Appendix 3 shows that the 15 smaller Bills from 1984-85 onwards took an average of 1 hour 49 minutes for all their stages on the floor of the House of Lords, and an average of 1 hour 11 minutes in the House of Commons. Indeed, 12 of them took up only 57 minutes of House of Commons time all told.

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

MICHAEL SAYERS, *Secretary*
25 January 1995

APPENDIX 1

ADDRESS BY MR JUSTICE BROOKE TO THE OPENING SESSION OF THE BAR CONFERENCE ON SATURDAY 1 OCTOBER 1994

I have been invited to speak to you for ten minutes to-day because the organisers of this conference believe that what I have to say deserves to be more widely known.

I am chairman of the Law Commission. The Commission's only purpose in life is to make the law simpler, fairer and cheaper to use. At a time when legal costs are rising — when legal aid is being slashed — and when more and more people are conscious of their legal rights — I believe that the work we do is of huge importance. I am now nearly two thirds of the way through my term of office. What I have seen and heard over most of the last 21 months has made me very anxious about the future care and upkeep - and the future quality — of our country's laws.

My basic message is now well known. Since March 1989 we have published 27 reports containing law reform Bills. Of the Commissioners who signed the first 26, two are now appeal court judges, three are high court judges, one has just left us for a top professorship at Cambridge, and the seventh, and last, is a leading text-book writer. Whatever else is being said by the tabloid press about our senior judges these days — and I read it all at the Commission — it is not often suggested that they don't know their law. On a very few occasions our reports, or parts of them, are rejected by the Government on policy grounds: I have never heard any serious criticism of their quality.

Only three of those 27 Bills have been made law. There are another 12 reports, all published before March 1989, none of them rejected by Government, seven expressly accepted, which have not yet been implemented. We hope to publish another four between now and Christmas, and a further four between then and Easter. That would bring the backlog up to 44. Our usual rate of production is five reports a year.

Our ongoing work is astonishingly varied: from the recoverability of damages for nervous shock to corporate liability for manslaughter; from the right to self-determination for the mentally frail under our civil law to the right to self-determination for adult SM gays under our criminal law; from the property rights of cohabitants to the rights of fiduciary duties and regulatory rules to peaceable co-existence in the City of London. We are overhauling the laws of land registration, recently described by the Court of Appeal as very low grade law, and we are setting out to tackle root and branch the astonishing - and expensive — complexities of the common law and equitable remedies which are available when trust money, such as pension funds, goes walkabout. Nobody could justly accuse us of taking on airy-fairy projects which are not of any real contemporary relevance to-day.

We are not alone in admiring the quality of what we do. The Master of the Rolls, for example, must see more of the often heart-breaking and expensive consequences of bad unreformed law than any other judge in the country. In his Denning lecture 18 months ago he was kind enough to say that our reports represented clear, well-argued and compelling proposals for improving the law. He added that they were not gathering dust at Westminster because anyone doubted their quality.

Since I took on this job in January last year, I have attached importance to the need to attract public attention to what I am telling you to-day. Many of you who treat our Annual Reports as bedside reading will know that in our most recent one, published last April, I wrote this: "The position is now serious. It is not of course cataclysmic. But history shows that a nation which neglects the ordinary care of its laws is neglecting something which is very important to its national well-being." In the same report the Commission said that it was not for us to tell the Government or Parliament how to do their work; but that we would be failing in our statutory purpose if we did not report that there is now serious unease among very many people who are concerned about the quality of English law about the way our work was being neglected. More and more people tell me this all the time, and successive chairmen of the Bar and Presidents of the Law Society are certainly included among their number.

Recently we have taken further steps to discover why our procedures for making our laws simpler and fairer and cheaper to use are in their present plight. I will tell you what we have found, and I hope we will be able to publish the full research study fairly soon. 73 Law Commission reports — a major success story — have led to changes in the law since 1967, 40 of them by the end of 1981. The Government introduced half of them, and private members of parliament the other half. Since then, very few of those successful in the ballot have been interested in promoting our Bills. The top ten get some assistance from public funds to help them draft their own Bills, but whatever the reason for the change, only three of our reports have been successfully piloted into law by private members since then. This session we have high hopes of a fourth — a very useful Bill to simplify some much used provisions in the Sale of Goods Act 1893.

At the same time the House of Commons created a new procedure for scrutinising our Bills. We liked it, lawyer ministers like Sir Patrick Mayhew liked it, and four of our Bills became law through that route between 1981 and 1985. But business managers — how many of them were lawyers? — did not like it. It has not been used since 1985. So that route was blocked off, too.

Between 1981 and 1985 the backlog doubled from 13 to 26. There was then a small spurt of mainly Governmental activity, and implementation outpaced output for the next four years. But since 1989, until very recently, we have been in a Grade One disaster area. On another occasion I have described those four years as the years the locusts ate.

Because the other routes were cut off, our only real hope of any effective progress at all now was that our measures should be included in a Government programme Bill. But by their very nature, they win few votes: ministers do not appear on television to say that they are reforming the laws relating to chancel repair liability or the delegation of trustees' powers. Between 1989 and 1993 the Government itself implemented only one of our Bills, and the backlog has now soared to 36. Only the use of a new high-risk device prevented the situation from becoming even worse. A private member of the House of Lords sometimes ferries our Bills through that House, with Government support. They have no hope of getting any further if a single member of the House of Commons objects to their progress there. Fortunately, since 1986 five of our Bills have been so utterly uncontroversial that they have been able to tiptoe into law by that very unpromising route.

The future is not all bleak. I have high hopes that five of our reports may have been implemented by the end of this session in November, in contrast to four in the last four years. There is a new procedure in the House of Lords which shows distinct signs of promise, and the House of Commons twice debated better ways to implement our reports in the last fortnight of June. The procedures are there, and if the all-party political will is there, I see no reason why even more of our reports should not be implemented next session. It is not as if they take up much Parliamentary time: putting on one side four special cases — the Children Act and the Public Order Act, for example our last 15 Bills have taken up an average of under two hours for all their stages in the House of Lords, and an average of 71 minutes for all their stages in the House of Commons.

So my message to-day is this. If we all care about the quality of our law, a search for a lasting solution to these problems needs to go right up the all-party political agenda. The recent past has been wintry. There is now a rosy hue on the horizon, but is it a false dawn? I have not yet seen any evidence of parliamentary procedures emerging which are robust enough to ensure that the quality of our law is indeed steadily improved, year by year, and that we do not slip back to the recent dark ages. I hope the Bar, which has always been very supportive of our work, will now throw all its energies into the search for a solution which will endure.

APPENDIX 2

RESPONSIBILITIES FOR COMMISSION PROJECTS AT THE END OF 1994

Common Law and Public Law

Professor A Burrows, Mr D Symes, Ms T Cockrell, Mr W B Flynn, Mr J S Goldspink, Ms I Maclean, Mr J K Moffett.

Company and Commercial Law

Miss D Faber, Mr P J R Fish, Ms L John, Mrs P Linsey, Mr M Nicholson, Mr A A Roycroft, Ms K Sherwood, Ms E R L Young.

Criminal Law

Mr S R Silber QC, Mr J Parry, Mr A Cope, Ms C Haskell, Ms C Hughes, Mr M Chapman, Miss S-J Davies, Mr P Doris, Mr P R Hardy, Ms A Rahmaan.

Family Law and Mentally Incapacitated Adults

Chairman, Secretary, Ms C L Johnston, Mr N D Lambe.

Property and Trust Law

Mr C Harpum, Mr M P Hughes, Mrs J Jenkins, Mr J W Fryer-Spedding, Mr N D Lambe, Miss R J Probert.

Statute Law

Consolidation: Chairman, Mr P F A Knowles, Sir Henry de Waal KCB QC, Mr P R DeVal, Miss L A Nodder, Mr P A Bedding.

Statute Law Revision (including Local Legislation): Chairman, Mr C W Dymont, Mr R D Maitland, Mr A M Rowland, Ms S C Fahy, Mrs T G Orange.

**APPENDIX 3
ADMINISTRATIVE STAFF
AT THE END OF 1994**

ASSISTANT SECRETARY

Mr C K Porter

Accommodation Officer

Miss A L Peries

Personnel Officer

Miss L A Collet

Editorial Team

Mr D R Leighton

Miss J A Griffiths

Library Services

Mrs J Harkin (Librarian)

Miss C O'Connell (Assistant Librarian)

Mr S Brindle (Trainee Librarian)

Ms M Brown (Library Assistance)

Registry

Miss T Coker Mr T D Cronin

Chairman's Clerk

Mr C Day

I T Consultant

Mr D E Williams

Typing Manager

Mrs N L Spence

Secretarial Support

Mrs D E Munford

Mrs K Browne

Miss C P Cawe

Mrs H C McFarlane

Miss A J Meager

Ms J R Samuel

Mrs J Williams

Typing Support

Mrs M M Blenman

Accommodation Support Services

Miss R Mabbs

Mr J M Davies

Mrs P J Wickers

APPENDIX 4

VISITORS FROM OVERSEAS

Among the visitors to the Law Commission during 1994 were:

- Australia* Mr Justice Pincus (Queensland Law Reform Commission)
Mr Philip A Selth (Pro-Vice-Chancellor, Australian National University,
Canberra)
- Bangladesh* Mr Lutfur Rahman
- Canada* Professor Patrick Healy (Magill University)
- Japan* Mrs Aiko Noda (Commissioner of the National Offenders Rehabilitation Commission,
Ministry of Justice)
- The Netherlands* Mr Johan Jacob Hermanus (Jan) Suyver (Secretary-General designate, Ministry
of Justice)
Herr Dik van Dijk (Legislative Division of the Ministry of Justice, The Hague)
Professor Jan Van Kreveld (Legislative Division of the Ministry of Justice,
The Hague)
- New Zealand* Professor Richard Sutton (New Zealand Law Commission).
Mr Justice Wallace (New Zealand Law Commission)
- Pakistan* Mr Khalil Ahmed Qureshi (Senior Member, Azad Kashmir Board of Revenue)
Mr Muhammad Ilyas Sulehri (Secretary, Azad Kashmir Prime Minister)
- Romania* Mrs N Constantinescu (Ministry of Justice)
- Tanzania* Ms Fauster Ngowi, (Tanzanian Law Reform Commission)
Chief Justice Francis L. Nyalali
- Zambia* Dr Sipula Kabanje (Director, Zambian Law Development Commission)
Mr F Kermit (Deputy Director, Zambian Law Development Commission)

The Chairman also met the following members of a delegation from Oman:

- HE Shaikh Abdullah bin Ali bin Muhammed Al-Qatabi (President of the Majlis)
HE Shaikh Aflah bin Hamed bin Salim Al-Rawahy (Vice-President of the Majlis)
HE Mr Amer Hamed Al-Suleimani
HE Mr Ali bin Hamoud Al-Busaigy
HE Mr Ahmed bin Rashed bin Hamed Al-Shamsi
HE Mr Said bin Suhail Al-Mashani
Mr Ali bin Abdullah Al-Khalili

APPENDIX 5

THE LAW COMMISSION'S IMPLEMENTED REPORTS SINCE 1982

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.

<i>Report Law Com No.</i>	<i>Title</i>	<i>Implementing Legislation</i>
1982		
114+	Classification of Limitation in Private International Law (Cmnd 8570)	Foreign Limitation Periods Act 1984 (c 16).
116	Family Law: Time Restrictions on Presentation of Divorce and Nullity Petitions (HC 513)	Matrimonial and Family Proceedings Act 1984 (c 42).
117	Family Law: Financial Relief after Foreign Divorce (HC 514)	Matrimonial and Family Proceedings Act 1984 (c 42).
118	Family Law: Illegitimacy (HC 98)	Family Law Reform Act 1987 (c 42).
1983		
122+	The Incapacitated Principal (Cmnd 8977)	Enduring Powers of Attorney Act 1985 (c 29).
123	Criminal Law: Offences Relating to Public Order (HC 85)	Public Order Act 1986 (c 64).
125	Property Law: Land Registration (HC 86)	Land Registration Act 1986 (c 26).
1984		
132	Family Law: Declarations in Family Matters (HC 263)	Family Law Act 1986 (c 55), Part III.
134	Law of Contract: Minors' Contracts (HC 494)	Minors' Contracts Act 1987 (c 13).
135	Statute Law Revision: Eleventh Report: Obsolete Provisions in the Companies Act 1948 (Cmnd 9236)	Companies Consolidation (Consequential Provisions) Act 1985 (c 9).
137	Private International Law: Recognition of Foreign Nullity Decrees and Related Matters (Joint Report - Scot Law Com No 88) (Cmnd 9347)	Family Law Act 1986 (c 55), Part II.
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 (c 55), Part I.
141	Codification of the Law of Landlord and Tenant: Covenants Restricting Dispositions, Alterations and Change of User (HC 278)	In part by Landlord and Tenant Act 1988 (c 26).
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

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| 157 | Family Law: Illegitimacy (Second Report)
(Cmnd 9913) | Family Law Reform Act 1987
(c 42). |
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1987

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| 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

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| 172 | Family Law: Review of Child Law: Guardianship
and Custody (HC 594) | Children Act 1989 (c 41). |
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1989

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| 179 | Statute Law Revision: Thirteenth Report (Joint
Report - Scot Law Com No 117) (Cm 671) | Statute Law (Repeals) Act
1989 (c 43). |
| 180 | Criminal Law: Jurisdiction over Offences of Fraud
and Dishonesty with a Foreign Element (HC 318) | Criminal Justice Act 1993
(c 36) Part I. |
| 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). |

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

- | | | |
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| 205 | Criminal Law: Rape within Marriage (HC 167) | Criminal Justice and Public
Order Act 1994 (c 33) |
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1993

- | | | |
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| 211 | Statute Law Revision: Fourteenth Report (Joint
Report - Scot Law Com No 140) (Cm 2176) | Statute Law (Repeals) Act
1993 (c 50). |
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APPENDIX 6

LAW COMMISSION REPORTS AWAITING IMPLEMENTATION

Of all the Law Commission's law reform reports, 78 have been implemented, 13 have been expressly or impliedly rejected, and 32, which are listed below, remain outstanding. 14 of these, marked +, have been expressly accepted by the Government, subject to Parliamentary time being available.

NOTE: PIL means Private International Law.

To be presented in 1994-95 Session of Parliament (8)

<i>Year</i>	<i>No</i>	
1983	124	+ PIL: Foreign Money Liabilities
1985	146	+ PIL: Capacity to Contract a Polygamous Marriage
1989	187	+ Distribution on Intestacy
1990	193	+ PIL: Choice of Law in Tort and Delict
1992	207	+ Domestic Violence
1993	215	+ Sale of Goods Forming Part of a Bulk
	216	+ Hearsay Rule in Civil Proceedings
	217	+ The Effect of Divorce on Wills

Other Reports awaiting Government decision and/or presentation to Parliament (24)

1981	110	+ Breach of Confidence
1984	127	+ Positive and Restrictive Covenants
1985	152	Liability for Chancel Repairs
1987	168	PIL: Law of Domicile
1988	173	Fourth Report on Land Registration
	174	+ Privity of Contract and Estate
1989	178	+ Compensation for Tenants' Improvements
	181	+ Trusts of Land
	188	Overreaching: Beneficiaries in Occupation
1990	192	The Ground for Divorce
1991	194	Distress for Rent
	201	Obsolete Restrictive Covenants
	204	Land Mortgages
1992	208	+ Business Tenancies: Landlord and Tenant Act 1954, Part II
1993	218	Offences Against the Person and General Principles
	219	Contributory Negligence as a Defence in Contract
1994	220	Delegation by Individual Trustees
	221	Termination of Tenancies Bill
	222	Binding Over
	224	Structured Settlements etc
	226	Judicial Review & Statutory Appeals
	227	Restitution for Mistake of Law: Ultra Vires Public Authority Receipts and Payments
	228	Conspiracy to Defraud

APPENDIX 7

THE COST OF THE COMMISSION

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

	1994		1993	
	£000	£000	£000	£000
Accommodation charges ¹	916.9		502.9	
Headquarters' overheads ²	<u>603.8</u>		<u>379.2</u>	
		1,520.7		882.1
Salaries and Pensions of Commissioners ³	361.3 ⁴		386.5	
Salaries of draftsmen, legal staff, secondees and consultants ³	1,406.6 ⁴		1,485.9	
Salaries of non-legal staff ³	<u>357.4⁵</u>		<u>401.4</u>	
		2,125.3		2,273.8
Printing and publishing; supply of information technology; office equipment and books	187.1		217.4	
Telephone/postage	28.6		33.5	
Travel and subsistence	7.0		10.3	
Miscellaneous (including Recruitment and Entertainment)	<u>15.2</u>		<u>26.2</u>	
		237.9		287.4
TOTAL		<u>3,883.9</u>		<u>3,443.3</u>

¹ Includes component relating to ground rent, rates, utilities (gas, water etc) and all works supplied by the Lord Chancellor's Department. The increase over last year's figure is due to i) a five yearly rent review in 1993 producing a 130% increase (£199K to £475K) and ii) necessary new works to the building (eg a new security system).

² Portion of the total cost of the Lord Chancellor's Department Headquarters notionally attributed to the Law Commission. The portion attributed to individual parts of the Department is proportional to the number of staff paid as established staff, including research assistants. The 1993 figure excluded any sum for the information technology services provided by the Lord Chancellor's Department as they were used very little by the Commission during that year. In 1994, however, we have used them very much more and a notional figure has therefore been attributed for these services in 1994.

³ Salaries include ERNIC and, since April 1993, Superannuation.

⁴ The reduction in both these figures, over 1993 figures, is due to Commissioner and staff vacancies.

⁵ Certain figures under this head have been reallocated, resulting in a reduced figure.

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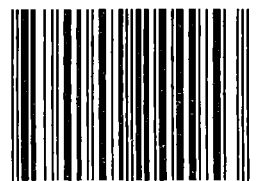
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