

THE LAW COMMISSION
THIRTY-SECOND ANNUAL
REPORT 1997

Modern Law for Modern Needs

LAW COM No 250

THE LAW COMMISSION

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THE LAW COMMISSION

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Modern Law for Modern Needs

To the Right Honourable the Lord Irvine of Lairg, Lord High Chancellor of Great Britain

I have the honour to present to you, on behalf of the Law Commission, our Thirty-Second Annual Report for the year 1997, pursuant to the Law Commissions Act 1965.

Modern society faces many challenges, not least the need to keep its laws up to date.

In 1997 the Law Commission completed 12 publications: three reports and nine consultation papers. They cover a wide range of areas – from damages to trade secrets.

In these reports we have recommended reforms to make the law fairer, more efficient and more up to date.

In one we recommended sweeping changes in the law to allow juries and magistrates to receive cogent hearsay evidence and to assist frightened witnesses. In another we made recommendations to improve the remedies open to shareholders through the courts. The other report (on punitive damages) is a striking example of why the law needs to be kept up to date. Punitive damages can deter wrongdoers in appropriate cases, but they are limited to wrongs for which punitive damages were awarded before 1964. We recommended that that limitation should now be removed.

What does this mean for the ordinary people of this country? People do not generally obtain the benefit of the recommendations we make until Parliament changes the law by Act of Parliament. But, since the General Election, there have been no law reform Bills before Parliament to make the changes we recommend, due to the Government's own heavy legislative programme.

We hope that the position will be different in the 1998/99 Session. We urge that priority be given to our recommendations on:

Mental Incapacity

Offences Against the Person

Forfeiture of Leases

Manslaughter

Contracts for the Benefit of Third Parties

Hearsay in Criminal Cases

Punitive Damages

Shareholder Remedies

We very much hope that your Department will give the lead on implementation in the next Session.

This Annual Report also records significant progress in establishing strong working relationships with the Departments with whom we principally deal, most recently with the Department of Trade and Industry and the Home Office. We believe that this progress will bear fruit in future. We are grateful to you and your Department for the support and assistance you have given us in our work.

MARY ARDEN
Chairman

HIGHLIGHTS OF THE ANNUAL REPORT FOR 1997

GENERAL – *SEE PART I*

- ◆ Publications
- ◆ Implementation of recommendations
- ◆ Impact of reports
- ◆ Codification of the Criminal Law
- ◆ Relationship with “Access to Justice”
- ◆ Future programmes of law reform
- ◆ Work in 1998

COMMON LAW – *FOR FULL REPORT SEE PART II*

- ◆ PUBLICATIONS
 - report on aggravated, exemplary and restitutionary damages
 - report on liability for psychiatric illness
 - consultation paper on collateral benefits
 - consultation paper on claims for wrongful death
 - consultation paper on limitation of actions
- ◆ WORK IN PROGRESS
 - damages for personal injury: non-pecuniary loss – medical and nursing expenses
 - damages for personal injury
 - illegal transactions

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

- ◆ PUBLICATIONS
 - report on shareholder remedies
 - consultation paper on third parties (rights against insurers)
- ◆ WORK IN PROGRESS
 - partnership law
 - execution of deeds and documents by bodies corporate
 - Part X of the Companies Act 1985

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

◆ PUBLICATIONS

- report on hearsay evidence
- consultation paper and report on corruption
- consultation paper on consents to prosecution
- consultation paper on misuse of trade secrets

◆ WORK IN PROGRESS

- fraud
- previous misconduct
- consents to prosecution

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

◆ PUBLICATIONS

- consultative document on peaceable re-entry
- consultation paper on trustees' powers and duties

◆ WORK IN PROGRESS

- land registration
- property rights of homesharers
- rules against perpetuities and excessive accumulations

STATUTE LAW – *FOR FULL REPORT SEE PART VI*

◆ WORK COMPLETED

- 2 consolidation Bills

◆ WORK IN PROGRESS

- Statute Law (Repeals) Bill
- consolidation of armed forces legislation
- sentencing consolidation

PART I

OVERVIEW OF THE YEAR

Introduction

- 1.1 The Law Commission is an independent but statutory and publicly funded body. Our role and methods are summarised in Appendix A. As the Foreword shows, 1997 was significant at the Commission for the publications we issued and for the relationships we forged. The Highlights pages in this report show the main work which we have been doing during the year, and the later Parts give details in each area of the Commission's work.

Publications in 1997

- 1.2 This report is the 250th report issued by the Law Commission. During 1997, there were twelve law reform publications which we issued or approved for issue. They included our 150th consultation paper and eight other consultation papers. They also included our final reports, with Bills, on hearsay in criminal cases, shareholder remedies and punitive damages.¹ In our report on punitive damages we recommended rationalisation and modernisation of the law in this area. Our report on shareholder remedies recommended changes to make those remedies more affordable and modern. In our report on hearsay in criminal cases we recommended simpler rules about the admissibility of hearsay evidence.

Implementation of Law Commission recommendations

- 1.3 We describe below² the Law Commission recommendations which have been implemented in 1997. We then³ summarise the current position on several of our reports which are awaiting implementation. We would draw particular attention here, first, to the position on offences against the person on which the Government has announced acceptance of our recommendations in principle⁴ and, secondly, to the new commitment by the Lord Chancellor's Department to dealing with the backlog of unimplemented reports on subjects for which they are responsible.⁵

(a) In 1997

- 1.4 Only one Law Commission law reform Bill has been taken through Parliament in 1997. However, other significant pieces of Law Commission legislation came into force, as did several consolidation Acts. In addition there are prospects of other Consolidation Acts and a Statute Law (Repeals) Act later in the 1997/98 Parliamentary Session.

¹ See respectively, paras 4.3-4.6, 3.11-3.16 and 2.1-2.4 below.

² Paras 1.4-1.9.

³ Paras 1.11-1.18.

⁴ Para 1.17 below.

⁵ Para 1.12 below.

(i) Land Registration Act 1997

- 1.5 The Land Registration Act 1997 implemented the recommendations in the First Report of the Joint Working Group on Land Registration.⁶ HM Land Registry estimate that the Act will increase by one-third the number of new titles coming on to the Register. The Act has three main effects. First, it adds certain new triggers for compulsory registration of land, including gifts, transfers of land on death, and first mortgages of land. Secondly, it enables HM Land Registry to charge lower fees to encourage voluntary registration. Thirdly, it makes fairer provision for the payment of indemnity to cover cases where that has not been previously available.⁷ We were most grateful to Lord Browne-Wilkinson, a Lord of Appeal in Ordinary, who kindly took the Bill through the House of Lords; and to Mr Michael Stephen MP who steered it through the House of Commons.

(ii) Domestic violence

- 1.6 On 1 October a major Part of the Family Law Act 1996 came into operation. It substantially implemented the recommendations in our report on the civil law of domestic violence⁸. Our recommendations were designed to reform the complex and inconsistent procedures facing victims of domestic violence, by creating a single, clear set of remedies available in all courts with jurisdiction in family matters. The Act provides a new code of civil remedies, to apply to a wider group of people than under the previous law. Two flexible orders are established: a non-molestation order to protect people with a close family connection; and an occupation order which regulates who is allowed to occupy the home, and can direct another party to leave the home. The Lord Chancellor's Department undertook a major initiative to let the public know about the new laws.⁹

(iii) Trusts of Land

- 1.7 In January 1997 the Trusts of Land and Appointment of Trustees Act 1996 was brought into operation. This Act implemented, with some modifications, our 1989 report on trusts of land¹⁰ and also part of our report of the same year on overreaching.¹¹ The Act modernises and simplifies some of the most fundamental rules of English law, in particular replacing the somewhat artificial trust for sale and the cumbersome strict settlement with the new "trust of land".

⁶ (1995) Law Com No 235.

⁷ The new provisions on indemnity came into force on 27 April 1997. The new triggers for compulsory registration come into force on 1 April 1998.

⁸ Family Law: Domestic Violence and Occupation of the Family Home (1992) Law Com No 207. In recent annual reports (e.g. 1996 Annual Report at paras. 6.8-6.9) we outlined the consideration which had been given to our report by the then Government since it was published.

⁹ This included 700,000 leaflets targeted at the victims, including translations into seven languages other than English; 100,000 posters aimed at victims; and separate booklets for practitioners, and for agencies and professionals helping victims of domestic violence.

¹⁰ Transfer of Land - Trusts of Land (1989) Law Com No 181.

¹¹ Transfer of Land - Overreaching: Beneficiaries in Occupation (1989) Law Com No 188.

(iv) Homelessness appeals

- 1.8 January also saw the commencement of a provision in the Housing Act 1996 (section 204) to implement the recommendation in our report on judicial review¹² that there should be a right of appeal to a court or tribunal in homelessness cases.

(v) Consolidations

- 1.9 Four consolidation Bills were passed during the year, including two drafted at the Commission.¹³

(b) More generally

- 1.10 The extent to which Law Commission law reform recommendations have been implemented has varied over the years. However, the overall rate of implementation of our law reform reports is over 70%,¹⁴ including both full and partial implementation. The last Parliament implemented the most, largely because of a record of nine in 1995. 22 published reports currently await implementation. Since the current Government took office, it has indicated full or partial acceptance of three of them.¹⁵ Twelve of the 22 are the responsibility of the Lord Chancellor's Department.

Current position of some of the Law Commission reports awaiting implementation

(i) General

- 1.11 Appendix B lists the 45 Law Commission reports implemented since 1984.¹⁶ At the end of 1997 there were 22 Law Commission reports which had neither been rejected nor been implemented in full or in part. Appendix C lists them. We have continued to urge the Government of the day to implement our reports, and have taken steps to ensure that the new Government is aware of our unimplemented and current work and of the role of the Commission. As paragraph 1.10 above shows, the rate at which Parliament has ultimately implemented our work, in full or in part, is high, if viewed over a long timespan. The developments explained in the next two paragraphs are designed to lead to a reduction in delays in implementation, where these can be avoided.
- 1.12 First, in October the Lord Chancellor's Department (LCD) gave us a specific assurance that they would enable Ministers to respond by Easter 1998 to all

¹² Administrative Law: Judicial Review and Statutory Appeals (1994) Law Com No 226, paras 2.24 - 2.27.

¹³ See para 6.2 below.

¹⁴ A very small number of our reports have not included draft legislation and were not intended for direct implementation.

¹⁵ The Law of Trusts: Delegation by Individual Trustees (1994) Law Com No 220; Restitution: Mistakes of Law and Ultra Vires Public Authority Receipts and Payments (1994) Law Com No 227; and Legislating the Criminal Code: Offences against the Person and General Principles (1993) Law Com No 218. We hope to know whether the Government accepts further reports shortly: see para 1.12 below.

¹⁶ In addition, 18 consolidation reports were implemented in that period.

12 outstanding Law Commission reports for which LCD has the lead responsibility for the legislation – unless otherwise agreed between the Commission and LCD in respect of particular reports. An additional member of staff, a lawyer, was moved temporarily to the relevant part of LCD for the purpose. In addition, in the context of the quinquennial review of the Law Commission, LCD agreed to plan to avoid a significant future backlog in Law Commission reports awaiting a Government response.

- 1.13 Secondly, we now have in place agreements with the main Government departments who have the leading responsibility for the particular areas of law on which we are currently working.¹⁷ We keep them informed about our progress. They have agreed such matters as normally to give the Law Commission:

an initial response to a Commission report within six months;

a final response to a report without unreasonable delay; and

an opportunity to comment on any major obstacle they see to implementing the report.

In December, the President of the Board of Trade met with Commissioners and signed such an agreement. We have also reached similar agreements with the Home Secretary and with what is now the Department of the Environment, Transport and the Regions. We have also had a long-standing agreement with our sponsor department, the Lord Chancellor's Department, on the most important points.¹⁸

- 1.14 No reference was made to law reform measures in the Queen's speech in May 1997. However, in the course of giving evidence to the Home Affairs Select Committee in October, when asked how he was going to ensure a speedier implementation of Law Commission reports, the Lord Chancellor said as follows:

Obviously we want to carry Law Commission reports forward as quickly and as fast as we can. I recognise that there is nothing more frustrating for the Law Commission than producing reports which are of high quality and they just gather dust in Whitehall unnoticed, but we have a legislative programme at the moment which is do-able but bang up at the outer limits of do-ability.

(ii) *Mental incapacity*

- 1.15 Our report on mental incapacity¹⁹ was published in 1995, following considerable work including the issue of four consultation papers. It made important recommendations in a field of great relevance to modern society. It recommended the introduction of a single comprehensive piece of legislation to make new provision in relation to the personal welfare, health care and financial affairs of people who lack mental incapacity. We recommended that decisions made on

¹⁷ We deal more generally with our relations with Government at paras 1.30 - 1.31 below.

¹⁸ See para 1.22 of our 1994 Annual Report.

¹⁹ Mental Incapacity (1995) Law Com No 231.

their behalf should be made in their best interests. We also recommended the introduction of a new type of power of attorney (“continuing powers of attorney”) to replace the present type (“enduring powers of attorney”), and new safeguards if serious medical decisions are taken on behalf of those who lack capacity. It covered anticipatory refusal of medical treatment, intended to take effect if and when the maker is later incapacitated.

- 1.16 We have outlined in previous annual reports²⁰ the steps which the previous Government took in the years following publication of our report. In December the new Government published a Green Paper,²¹ inviting comments on a wide range of questions relating to mental incapacity. Most of the consultation paper was based on our report.²² We were pleased that the Government welcomed our report, although we note that the Government is seeking views on, among other matters, whether to introduce legislation at all in some areas.

(iii) Offences against the person

- 1.17 In July the Home Secretary accepted²³ in principle the proposals for the reform of the offences contained in the Offences Against the Person Act 1861 as set out in our report.²⁴ He added that the Home Office had decided to publish a draft Bill and a consultation paper; this would set out the Home Office’s initial proposals for reforming the law in this area, based on our report, and would seek views on some of the difficult issues raised. He also explained that the part of our report dealing with general defences of duress and the justifiable use of force raised some very difficult questions which would be considered separately and over a longer time-scale. We very much hope that those proposals will also be accepted, and that all the proposals in our report will be implemented speedily.

(iv) Late payment of debts

- 1.18 The Commission published a report in 1978²⁵ which recommended legislation under which - subject to contracting out - a creditor would have an automatic right to interest on an unpaid contractual debt. The main recommendation was not implemented, although another was, namely to give the courts a discretion to order the payment of interest on contractual debts or damages where proceedings had been commenced.²⁶ In July 1997 the Department of Trade and Industry

²⁰ Eg Thirty-First Annual Report 1996 (1997) Law Com No 244, para 6.12.

²¹ “Who Decides? Making Decisions on Behalf of Mentally Incapacitated Adults”.

²² When announcing the publication of the Green Paper, the Lord Chancellor informed Parliament that, in preparing the Green Paper, the Government acknowledged two debts. One was to the House of Lords Select Committee on Medical Ethics, whose report was published in 1994. The other was to the Law Commission: “The Green Paper published today is based closely on the [Commission’s] wide-ranging and coherent set of recommendations”. *Hansard* (HL) 10 December 1997, vol 584, col 1012.

²³ *Hansard* (HC) 31 July 1997, vol 294, cols 578-579.

²⁴ *Offences Against the Person: General Principles* (1993) Law Com No 218.

²⁵ Report on Interest, Law Com No. 88.

²⁶ Administration of Justice Act 1982, s 15.

published a consultation paper²⁷ proposing a statutory right to claim interest on the late payment of commercial debts.²⁸ A Bill to implement the DTI's proposals is now before Parliament.²⁹

House of Commons: Modernisation Committee

- 1.19 The Select Committee on Modernisation of the House of Commons published its first (interim) report³⁰ in June. It examined possible procedural improvements for the examination of legislation.
- 1.20 The Law Commission made a submission to the Committee to highlight the legislative bottleneck in Parliament and the delay which this caused for implementation of our recommendations after acceptance. It also drew attention to how little time most Law Commission Bills take on the floor of the House.³¹ It stressed the amount of consultation carried out prior to the preparation of our Bills. It welcomed some recent changes in Parliamentary procedure: one example is the provision for a public bill normally to be referred automatically to Second Reading Committee, if the main purpose of the Bill is to give effect to proposals contained in a Law Commission report; another example is the introduction of the Special Public Bill Committee procedure in the House of Lords (the "Jellicoe" procedure). However, it called for a more radical overhaul and argued that there should be some streamlined procedure for consideration of our Bills. We are grateful to the Judges' Council who made a submission expressing support for our anxiety that proper time should be found for the House to consider legislation designed specifically to simplify and improve the quality of the law. Another submission to the Committee suggested that Parliament should have a permanent legislative committee which would formally consult the Law Commission and the Scottish Law Commission. It would not be concerned with the legislative programme designed to implement the policies of the Government of the day, but would bring forward proposals for updating, consolidating and developing the law in relation to relatively uncontentious matters.
- 1.21 In its report the Committee considered that many of our points would be met by specific but generally applicable proposals which they made: for example, selective carry-over of Bills from one Session to the next; greater use of Joint Committees of both Houses; and Report Stage and the consideration of the House of Lords' amendments being taken in Committee. We shall continue to press for more fundamental change.

²⁷ *Improving the Payment Culture*.

²⁸ See para 2.17 below.

²⁹ The Late Payment of Commercial Debts (Interest) Bill received its First Reading in the House of Lords on 10 December 1997.

³⁰ First Report of the Select Committee on Modernisation of the House of Commons: The Legislative Process (1997-98) HC190.

³¹ 15 smaller Law Commission 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: Parliamentary Procedures and the Law Commission, a Research Study, 1994.

- 1.22 In its second report³² the Select Committee accepted proposals by First Parliamentary Counsel for the existing Explanatory Memoranda and Notes On Clauses to be replaced by “Explanatory Notes”, which would accompany the Bill on publication and would be available to Members of each House and to those outside Parliament who may be interested. In his submission First Parliamentary Counsel had referred, as an example of what he had in mind, to the notes which the Law Commission publishes with draft Bills to explain their provisions.

The impact of Law Commission reports

- 1.23 The normal means by which Law Commission reports result in a change in the law is legislation. However, Law Commission reports are also a valuable resource for the judiciary, practitioners and teachers and students of the law. They can often influence judicial decisions and legal thought before they are implemented. For instance, in *Woolwich Equitable Building Society v Inland Revenue Commissioners*,³³ the House of Lords broke new ground in deciding that money paid to a public authority pursuant to an ultra vires demand is prima facie recoverable as of right. Lord Goff, giving the leading speech, explicitly paid tribute to the Law Commission’s “most valuable” consultation paper.³⁴ His Lordship also pointed out that it was an “almost ideal moment” for recognising the new ground for restitution because, given the Law Commission’s on-going work, there was an immediate opportunity, should it be thought necessary, for legislative bounds to be set to the common law principle.³⁵

Codification of the criminal law

- 1.24 The Law Commission is charged with the duty to keep the law under review “with a view to its systematic development and reform, including in particular the codification of [the] law”.³⁶ In 1989 the Commission produced a draft Criminal Code³⁷ but it was in many respects a statement of the existing law or the fairly recent proposals for reform which were open to criticism. Accordingly, the Commission subsequently adopted a policy of reviewing areas of criminal law so that one by one they would be modernised where appropriate before being assembled in a code.³⁸ This remains its policy. Under its codification project the Commission has completed reports on offences against the person,³⁹ involuntary

³² “Explanatory Material For Bills” (1997-98) HC 389, published on 3 December 1997.

³³ [1993] AC 70.

³⁴ Restitution of Payments Made Under a Mistake of Law, Consultation Paper No 120.

³⁵ See our final recommendations in *Restitution: Mistakes of Law and Ultra Vires Public Authority Receipts and Payments*, Law Com No 227 (1994), Section C.

³⁶ Law Commissions Act 1965, s 3(1).

³⁷ *Criminal Law: A Code for England and Wales* (1989) Law Com No 177. The codification work done by the Law Commission in criminal law is summarised in Dame Mary Arden, “Time for an English Commercial Code?” [1997] CLJ 516 at 523-4.

³⁸ Law Commission’s Twenty-Seventh Annual Report 1992 (1993) Law Com No 210, paras 2.14 - 2.17.

³⁹ *Legislating the Criminal Code: Offences against the Person and General Principles* (1993) Law Com No 218.

manslaughter,⁴⁰ the year and a day rule in homicide,⁴¹ money transfers,⁴² rape within marriage,⁴³ computer misuse,⁴⁴ intoxication,⁴⁵ and hearsay.⁴⁶

- 1.25 There are many reasons for having a modern criminal code. It would make the criminal law more accessible and comprehensible to ordinary people. At present much of it is unclear, inconsistent or out of date. Its clarification and rationalisation would also lead to a substantial saving of both time and money. In addition, codification would ensure compliance with the European Convention on Human Rights. Article 7 of that Convention, as applied by the European Court of Human Rights, requires criminal offences to be defined with reasonable precision.⁴⁷ As a matter also of constitutional principle Parliament should clearly identify what conduct is illegal. Furthermore, the existence of a modern and up to date code would show clearly the seriousness with which society regards the control and punishment of crimes.
- 1.26 Apart from substantive criminal law, a Code could ultimately include other matters relating to procedure, evidence and sentencing. As explained below,⁴⁸ the Law Commission is currently engaged on a consolidation of the sentencing powers of the courts, which will be a sentencing code in all but name.

Legislation: seminar

- 1.27 In April, jointly with the Judicial Studies Board, we held a seminar on legislation. Chaired by Lord Browne-Wilkinson, it was attended by judiciary from the House of Lords, the Court of Appeal and the High Court. It received a warm reception. Geoffrey Bowman (Senior Parliamentary Counsel at the Law Commission), John Vaux (the then Legal Adviser to the European Secretariat of the Cabinet Office) and our Chairman spoke respectively on *The Preparation of Legislation*,⁴⁹ *Implementation of European Legislation* and *Improving the Statute Book*.

⁴⁰ Legislating the Criminal Code: Involuntary Manslaughter (1996) Law Com No 237.

⁴¹ Legislating the Criminal Code: The Year and a Day Rule in Homicide (1995) Law Com No 230: now the Law Reform (Year and a Day Rule) Act 1996.

⁴² Offences of Dishonesty: Money Transfers (1996) Law Com No 243: now the Theft (Amendment) Act 1996.

⁴³ Criminal Law: Rape within Marriage (1992) Law Com No 205: now implemented by the Criminal Justice and Public Order Act 1994.

⁴⁴ Criminal Law: Computer Misuse (1989) Law Com No 186: now the Computer Misuse Act 1990.

⁴⁵ Legislating the Criminal Code: Intoxication and Criminal Liability (1995) Law Com No 229.

⁴⁶ Criminal Hearsay (1997) Law Com No 245.

⁴⁷ *G v Federal Republic of Germany*, 6 March 1989 (1989) 6OD R256; see also *Handyside UK* 5494/73, Yearbook 17 228-288.

⁴⁸ Para 6.4.

⁴⁹ “*Pepper v Hart* - a draftsman’s view”, by Geoffrey Bowman, published in the Journal of the Judicial Studies Board, Issue 2, p15, drew on this talk.

Relationship between the work of the Commission and “Access to Justice”

- 1.28 Lord Woolf’s final report on Access to Justice, published in 1996, recommended major reforms to the procedures of the civil justice system, so as to make it quicker, simpler and cheaper. The Lord Chancellor accepted the principal recommendations in the report, following a review by Sir Peter Middleton. The work which is being done to improve procedures in civil cases, and our work in recommending changes to the substance of the civil law, are separate but coherent parts of current efforts to improve civil justice. Some of our work involves examining the operation of civil remedies. For example, in our report on shareholder remedies, our recommendations included a new rule of court for derivative actions and changes leading to more active case management by the courts.⁵⁰ A second example is our earlier work on judicial review, on which Lord Woolf largely endorsed our recommendations for procedural reform in his final report.⁵¹ There is also the example of our continuing work on limitation periods, where we are seeking to rationalise the current law.⁵²

Quinquennial review of the Law Commission

- 1.29 The last Government required all non-departmental public bodies, of which the Law Commission is one, to be reviewed every five years. In accordance with this quinquennial cycle, in 1996 the Secretary established a working party to review our work over the previous five years. It reported to the Lord Chancellor’s Department (LCD) later that year. After the General Election the Lord Chancellor indicated that quinquennial reviews, such as that of the Law Commission, should continue. LCD’s part of the review of the Commission was completed towards the end of 1997. Both the Commission and the Department concluded, without hesitation, that law reform is an important activity and that the Law Commission is the most appropriate way of providing for it systematically, within the general framework of the Law Commissions Act 1965. We had been developing a number of initiatives as part of our ongoing improvements to the workings of the Commission. The review confirmed the value of those initiatives, encouraging their continuation or development, and made some further suggestions. We are taking all of this forward, with LCD where appropriate, and we believe it will make the working of the Commission more efficient and more effective.

Relations with Government

- 1.30 The Law Commission is, of course, totally outside party politics. It also makes law reform recommendations independently of the Executive. A change of Government in itself makes no difference to our membership, programme of work, or actual recommendations. While being very careful to maintain our independence, we also seek to have good working relationships with the Government of the day and, in particular, with the Government departments⁵³

⁵⁰ See para 3.14 below.

⁵¹ See para 1.21 of our Annual Report for 1996 (Law Com No 244).

⁵² See paras 2.14 - 2.15 below.

⁵³ See also para 1.13 above.

which have the leading responsibility for the law with which we are currently concerned - as indeed we do with relevant bodies outside Government.

- 1.31 In March, with the Lord Chancellor's Department, we organised a two-hour conference for the Permanent Secretaries of the major Government departments with which we have the most contact, to explain the Commission's role and relevance, and to invite views about our work and methods. Sir Thomas Legg, the Permanent Secretary at the Lord Chancellor's Department, opened the conference, which was addressed by representatives of the Commission. We were delighted that Sir Robin Butler, then the Secretary of the Cabinet and the Head of the Home Civil Service, and about 20 Permanent Secretaries and very senior civil servants attended and took great interest in our work. Two Scottish Law Commissioners, the Chairman (Lord Gill) and Dr Eric Clive, attended as observers.

Outside law reform bodies

- 1.32 We give details⁵⁴ below of our many contacts with law reform bodies in other countries. The Law Commission and the Scottish Law Commission have a statutory duty to work in consultation with each other. Now that our working relationships with the departments with whom we principally deal are on a firmer footing, we and the Scottish Law Commission are putting together a concordat in relation to our work together. We are also benefiting greatly from our contacts with the Law Reform Advisory Committee for Northern Ireland and with the Office of Law Reform there.

Programmes of Law Reform

- 1.33 Most of the law reform projects on which we are engaged are in the Sixth Programme of Law Reform, which was approved by the then Lord Chancellor in June 1995. This covers the bulk of the Law Commission's law reform work until the end of 1998.
- 1.34 We have begun to consider our future programme of work, especially the Seventh Programme of Law Reform which we shall be submitting to the Lord Chancellor in 1998. Most of our previous Programmes of Law Reform have set out work which was unfinished from previous Programmes and which was to be carried forward, and have added just a few new items; for example, the Sixth Programme added three new items. We also undertake projects following references from Ministers, as well as law reform advisory work, consolidation and statute law revision. Bearing all that in mind, we shall inevitably be limited in the amount of new work which we can undertake. We expect the next Programme to be a two year, rolling, programme. In the first part of 1998 we shall be considering, with others, what new projects we could undertake, bearing in mind our project selection criteria.⁵⁵

⁵⁴ Paras 7.8 - 7.9.

⁵⁵ Outlined in Appendix A, at the second paragraph.

Our programme of work for 1998

- 1.35 For the first time in our Annual Reports, we have brought together in one place⁵⁶ a summary of the work which we are undertaking in 1998. In our next Annual Report we shall report on the extent to which we have succeeded.

Resources

- 1.36 Information on the cost of the Commission is given in paragraph 8.6 and in Appendix F. The funds made available to the Commission by the Government are of course limited, as for any public body. However, our programme of work depends heavily on our having adequate resources, and continuing financial constraints are having an increasing effect upon it. For example, we sometimes have to leave staff posts unfilled for periods, to save money. Also, our consultation papers are our main method of consulting and we have had to curtail the number of copies of each of our consultation papers (previously about 600 copies, and now about 300) which we can distribute without charge - although we are hoping that Internet will provide many readers with an alternative means of obtaining them. We do not have significant funds for commissioning empirical research and, although we can seek such funds from the Lord Chancellor's Department, there are many competing claims for their limited research budget. Financial restrictions on a similar scale in 1998/99 will have a serious effect on our work, despite all our efforts to minimise the impact.

Tributes

- 1.37 The Commission's staff are hard-working and dedicated. They provide valuable service to the Commission and to the community, and we are very grateful to them. We give further details of our staff in the subsequent Parts and in Appendix E.
- 1.38 Professor Laurence (Jim) Gower, who died in December, was one of the first Law Commissioners, appointed upon the establishment of the Commission in 1965. He came to the Commission from Nigeria, where he had been Professor and Dean of the Faculty of Law at the University of Lagos. He served as a Law Commissioner until his appointment as Vice-Chancellor of Southampton University in 1971. He contributed greatly to the Commission's work during that period, not least the Commission's work on reforming divorce law, including our first report on that subject, *The Field of Choice*. He was a leading authority on company law for many years. In 1981 he was commissioned by the Secretary of State for Trade to advise on reform of the law protecting investors. His report⁵⁷ provided the basis from which the Financial Services Act 1986 was built.
- 1.39 R H (Frank) Streeten, CBE, formerly head of statute law revision at the Commission for 15 years, died in April 1997. Frank first came to the Commission in 1967 and his retirement in 1993 marked the end of nearly 26 years' service to the Commission in the field of statute law revision. He was involved in the preparation and implementation of the Commission's First to Fourteenth reports

⁵⁶ See p 16 below.

⁵⁷ Review of Investor Protection: report, Parts 1 (1984) and 2 (1985) Cmnd 9125.

on this subject. The importance of his work was recognised by the award of the CBE in 1991. He will be remembered with affection by all his colleagues here.

- 1.40 Another of our long-serving lawyers, Christopher Dymont, retired this year. Christopher originally started work at the Commission in 1969 as a member of the Criminal Law Team. He remained on that team for 16 years, during which time he became its head. After a period of work elsewhere, he rejoined us in 1993 as head of the Statute Law Revision Team. We shall greatly miss his experience and advice and the meticulous scholarship that was the hallmark of his work. We wish him well in his retirement.

MAJOR TARGETS FOR 1998

<p>PUBLICATIONS</p> <p>To complete consultation papers on:</p> <ul style="list-style-type: none"> • limitation periods ⁺ • land registration • peaceable re-entry ⁺ • partnership* • Part X of the Companies Act 1985* • illegal transactions • third parties' rights against insurers ⁺ <p>To complete reports on:</p> <ul style="list-style-type: none"> • corruption • liability for psychiatric illness • evidence of previous misconduct • perpetuities and accumulations • trustees' powers and duties • execution of deeds and documents by bodies corporate <p>To publish:</p> <ul style="list-style-type: none"> • Statute Law (Repeals) Bill* • our Seventh Programme of Law Reform • Consolidation Bills/Reports: <ul style="list-style-type: none"> Armed Forces Audit Commission ⁺ • our Annual Report <p>* with the Scottish Law Commission</p> <p>⁺ published in January 1998</p> <p>ALL TARGETS ARE SUBJECT TO AVAILABILITY OF RESOURCES</p>	<p>WORK TOWARDS LONGER-TERM AIMS</p> <p>To take advantage of any appropriate opportunity to:</p> <ul style="list-style-type: none"> • seek streamlined Parliamentary procedures for Law Commission Bills • press for criminal law to be codified • promote good relations between the Law Commission and Government Departments, other law reform bodies, professional bodies and others • increase awareness of the Law Commission's work • press for implementation of the Law Commission's unimplemented reports
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PART II

COMMON LAW

TEAM MEMBERS ^o

Professor Andrew Burrows
(**Commissioner**)

Government Legal Service

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

Research Assistants

Mr J Horne, Mr T G Raphael, Mr S W Watterson

^o as at the end of 1997

DAMAGES¹

(a) Aggravated, exemplary and restitutionary damages

- 2.1 We published our Report on Aggravated, Exemplary and Restitutionary Damages² in December 1997. This followed a lengthy but invaluable consultation process.³
- 2.2 The law on exemplary damages is widely regarded as irrational and in need of modernisation.⁴ We recommend that exemplary damages should not be abolished, but that they should be retained (under the name of “punitive damages”) on a principled basis. Punitive damages should be available for any tort or equitable wrong, and for statutory wrongs if an award would be consistent with the policy of the statute under which the wrong arises.⁵ We recommend that an award of punitive damages should be made only if the defendant’s conduct showed a deliberate and outrageous disregard of the plaintiff’s rights *and* the other remedies awarded would be inadequate to punish the defendant for his conduct.
- 2.3 Our recommendations would build into the system further controls on the award of punitive damages. In particular, the decision whether to award punitive damages - and, if so, how much - would always be made by a judge rather than a jury. No

¹ See Sixth Programme of Law Reform (1995) Law Com No 234, item 2.

² Law Com No 247.

³ See Aggravated, Exemplary and Restitutionary Damages (1993) Consultation Paper No 132. We issued a supplementary consultation paper on exemplary damages in 1995.

⁴ See, eg, *Riches v News Group Newspapers Ltd* [1986] QB 256, 269, where Stephenson LJ described the law as “cr[ying] aloud for Parliamentary intervention”.

⁵ We take the view that punitive damages should not be awarded for breach of contract.

award would usually be made where the defendant had already been convicted of an offence involving the conduct which founded the claim to punitive damages. When deciding whether punitive damages were necessary and therefore available, the court would be required to take into account any other sanctions which may have been imposed. The court would retain a “safety-valve” discretion to refuse punitive damages.

- 2.4 The report recommends legislation to make it clear that aggravated damages are concerned to compensate and not to punish the wrongdoer, and that, wherever possible, the label “damages for mental distress” should be used instead of the misleading phrase “aggravated damages”. In relation to restitutionary damages, we take the view that development of the law on restitution for wrongs is in general most appropriately left to the courts.⁶

(b) Damages for personal injury: collateral benefits

- 2.5 We published a consultation paper on 17 September.⁷ The paper examined how one should calculate damages where a person injured by another’s tort has already received payments because of the injury (known as “collateral benefits”).⁸ The primary question is whether or not collateral benefits should be deducted in assessing damages.
- 2.6 There are presently different rules for different collateral benefits, and the law can be criticised as being uncertain and inconsistent. For example, long-term sick pay is deducted from damages, but payments under a disablement pension are not. We put forward five main options for reform (together with the sixth option of leaving the law unchanged), on which we seek consultees’ views: (i) deduct all collateral benefits; (ii) the same as option (i), except that charitable payments are not deducted; (iii) deduct collateral benefits except where the provider intended them to be in addition to tort damages; (iv) deduct payments under disablement pensions, but otherwise no change; and (v) no deductions.
- 2.7 The paper also looked at whether the third party provider of a collateral benefit should have the right to recover the value of the benefit from the victim or the tortfeasor.

⁶ But we do recommend that statute should provide that restitutionary damages should be available (at least) where punitive damages can be awarded.

⁷ Damages for Personal Injury: Collateral Benefits (1997) Consultation Paper No 147. The consultation period ended on 31 December 1997.

⁸ These might include charitable payments, insurance payments, sick pay, disablement or retirement pensions, or redundancy pay. Social security benefits may also be regarded as a collateral benefit but they are outside the scope of the paper.

(c) Claims for wrongful death

- 2.8 The consultation paper on claims for wrongful death⁹ was also published on 17 September. It examines the question of who can claim compensation, and how much, where a person is killed by another's tort.
- 2.9 Under the Fatal Accidents Act 1976 a limited range of "dependants" can claim for pecuniary loss as a result of another's death.¹⁰ We provisionally proposed that, instead of a list of eligible claimants, any individual should have a right of recovery who had a reasonable expectation of a non-business benefit from continuation of the deceased's life or, under the alternative test which we put to consultees, who was, or but for the death would have been, dependent wholly or partly on the deceased.
- 2.10 We provisionally recommended expanding the list of those eligible to receive bereavement damages,¹¹ to include parents, regardless of the age of the deceased at the time of death, and children and siblings of the deceased and we sought views as to whether a cohabitant of the deceased should be able to claim bereavement damages. We also provisionally proposed that the award of bereavement damages be increased (from its present level of £7,500) to £10,000, index-linked for the future, and that each claimant should be entitled to that higher sum (subject, perhaps, to an overall ceiling figure of, say, £50,000).¹² Other issues examined in the paper include the question of whether a claimant's remarriage or prospects of remarriage should be taken into account in the assessment of damages.

(d) Liability for psychiatric illness

- 2.11 By the time this Annual Report is published, we expect to have published our Report on Liability for Psychiatric Illness.¹³ In that report, we shall be recommending legislation to remove some unwarranted restrictions that presently apply in relation to liability for negligently inflicted psychiatric illness. Under the present law, as laid down in *Alcock v Chief Constable of South Yorkshire Police*,¹⁴ a person who suffers a reasonably foreseeable recognisable psychiatric illness, as a result of another's death, injury or imperilment, cannot recover damages for negligence unless he or she can satisfy three main requirements: (i) that he or she had a close tie of love and affection with the person killed, injured or imperilled; (ii) that he or she was close to the "accident" in time and space; and (iii) that he or she directly perceived the "accident" rather than, for example, hearing about it from a third person. Our principal recommendation (which was overwhelmingly supported on consultation) will be that the restrictions based on the plaintiff's

⁹ Consultation Paper No 148. We were grateful to the Scottish Law Commission for their assistance, especially about the position in Scotland. The consultation period ended on 31 December 1997.

¹⁰ Section 1(3).

¹¹ Currently limited to a spouse of the deceased or parents of an unmarried child under 18 years old: Fatal Accidents Act 1976, s 1A.

¹² At present, if both parents claim, the award must be split between them.

¹³ This follows our consultation paper Liability for Psychiatric Illness (1995) Consultation Paper No 137.

¹⁴ [1992] 1 AC 310.

physical and temporal proximity to the accident, and the means by which he or she learned of it, should be removed; but that the first control - the need for a close tie of love and affection - should be retained.

(e) Damages for personal injury: non-pecuniary loss

- 2.12 We are currently working on our final recommendations, following our consultation paper on non-pecuniary loss.¹⁵ We expect to publish them in one or two reports which will encompass all the outstanding topics on damages for personal injury and wrongful death.¹⁶ We hope to publish this report in 1998, or very soon thereafter.

(f) Damages for personal injury: medical, nursing and other expenses

- 2.13 Following publication of our consultation paper on medical, nursing and other expenses,¹⁷ we have conducted a detailed analysis of the responses received. One of the main issues examined in the paper is whether or not the NHS should have the right to recoup from tortfeasors the cost of caring for people injured by the fault of another, and the Chancellor of the Exchequer referred to this topic in his Budget speech in July 1997.¹⁸

LIMITATION OF ACTIONS

- 2.14 Following our Sixth Programme of Law Reform we have carried out “a comprehensive review of the law on limitation periods with a view to its simplification and rationalisation.”¹⁹ We have now published a consultation paper on this topic.²⁰ We were assisted with the preparatory stages of this paper by a consultant, Professor Andrew McGee, Professor of Business Law at the University of Leeds. The consultation period ends on 21 April 1998.
- 2.15 Our consultation paper is long and detailed. It suggests that the existing law, which is found largely in the Limitation Act 1980, is incoherent, needlessly complex, outdated, uncertain and unfair and wastes costs. At the centre of the Commission’s provisional proposals is a scheme - the “core regime” - which could form the basis for a new limitation statute. The central elements of the suggested core regime are:

¹⁵ Damages for Personal Injury: Non-Pecuniary Loss (1996) Consultation Paper No 140.

¹⁶ Ie non-pecuniary loss; medical, nursing and other expenses; collateral benefits; and claims for wrongful death.

¹⁷ Damages for Personal Injury: Medical, Nursing and Other Expenses (1996) Consultation Paper No 144. The consultation period closed on 1 April 1997.

¹⁸ “We shall also act to recoup in full the cost of treating road traffic accidents from insurance companies.” *Hansard* (HC) 2 July 1997, vol 296, col 315. On 4 December 1997 the Department of Health announced measures to increase the sums recouped by hospitals under the provisions contained in ss 157 and 158 of the Road Traffic Act 1988, which enable the NHS to recover some of its costs of caring for victims of motor accidents.

¹⁹ Sixth Programme of Law Reform (1995) Law Com No 234, item 3.

²⁰ Consultation Paper No 151, published on 6 January 1998. The work on the paper was completed in 1997.

- An initial limitation period of three years running from the date when the plaintiff knows, or ought reasonably to know, that he or she has a cause of action.²¹
- A long-stop limitation period of 10 years (30 years for personal injury claims) from the date of the act or omission which gives rise to the claim.

Given the length of the consultation paper, we have also produced a collection of extracts from the paper – available on request.

ILLEGAL TRANSACTIONS

- 2.16 Pressure of work on the team - in particular the need to complete the huge consultation paper on limitation of action - meant that work on our consultation paper on illegal transactions, including contracts and trusts,²² was suspended for the latter part of 1997. We hope to publish the consultation paper in 1998. We acknowledge the assistance of our consultant, Professor Richard Buckley, Professor of Law at the University of Reading.

OTHER WORK

- 2.17 The Common Law Team responded to a consultation paper²³ published by the Department of Trade and Industry on the proposed statutory right to claim interest on the late payment of commercial debts. The team also assisted the DTI with some technical matters consequent on our response. In addition the team responded to a DTI consultation paper on proposals for the implementation of the Vienna Convention.²⁴

²¹ This is our provisionally preferred choice for the date when the limitation period should start and is one of five options. The other options are: date of discoverability or accrual of the cause of action; date of accrual of the cause of action; date of the act or omission giving rise to the cause of action; and date of accrual of the cause of action for contract claims, date of discoverability for tort claims.

²² Sixth Programme of Law Reform (1995) Law Com No 234, item 4.

²³ *Improving the Payment Culture, A Statutory Right to Claim Interest on Late Payment of Commercial Debt* (July 1997). See para 1.18 above about the link with an earlier Law Commission Report.

²⁴ The United Nations Convention on Contracts for the International Sale of Goods.

PART III

COMPANY AND COMMERCIAL LAW

TEAM MEMBERS ^o

Miss Diana Faber
(**Commissioner**)

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Mr P J R Fish (*Team Manager*)
Ms F R Lloyd, Ms A Moore-Williams, Mr A C Scott

Research Assistants

Ms S M Conneely, Mr S E Jelf, Mr A-T Shohid, Mr R Webb (Chairman's Research Assistant)

^o as at the end of 1997

COMMERCIAL LAW

Third Parties (Rights Against Insurers) Act 1930

- 3.1 We completed a consultation paper¹ on this topic jointly with the Scottish Law Commission.
- 3.2 The 1930 Act provides protection to the victims of negligent or wrongful acts by persons (individuals or companies) who become insolvent² by giving them direct rights to the proceeds of liability insurance policies taken out by the insolvent person. The victims (known as "third parties") can also obtain information about the insurance policy.
- 3.3 However, it has been held that a third party's rights to take action against the insurer and to obtain disclosure of policy information only come into play once the insured's liability to him has been established. It can be wasteful in time and costs to require the third party to pursue to judgment an insolvent insured who has no interest in the outcome of the proceedings. The real dispute with the insurer may be deferred and, without access to policy information, the third party may find that his claim is thwarted as the insurer has repudiated cover.

¹ The consultation paper, *The Third Parties (Rights Against Insurers) Act 1930 (1998)* Consultation Paper No 152, was published on 13 January 1998.

² The Act sets out certain insolvency "events" which are necessary for the provisions to come into effect. These include, inter alia, a bankruptcy order being made against an individual and a winding up order being made against a company.

- 3.4 The provisional recommendations in our consultation paper include giving the third party an immediate right, once a bankruptcy or winding up order³ is made against the insured, to seek a declaration that, on liability of the insured being established, the insurer will be liable to pay to the third party the amount due under the insurance policy in respect of that liability. This will enable the liability of the insolvent insured to the third party and of the insurer to the insured under the insurance cover to be resolved in the same action. We also provisionally recommend that certain policy information should be available to the third party as soon as the insolvency event occurs.
- 3.5 The consultation period runs until 21 April 1998. We have been assisted in this project by a consultant, Dr Malcolm Clarke of St John's College, Cambridge.

Partnership law

- 3.6 In early 1997 we were invited by the Department of Trade and Industry to carry out a review of the law on partnerships. The project is being carried out jointly with the Scottish Law Commission. Our Feasibility Study on the Law Applicable to Private Companies⁴ noted the importance of partnerships to the small business community and highlighted a number of perceived deficiencies in partnership law. Responses to the Department's consultation document,⁵ which was based on our feasibility study, showed widespread support for a review of partnership law.
- 3.7 We prepared an initial discussion document and met with a large number of individuals and organisations (from Government, the judiciary, the legal and accountancy professions, academics and small business advisers). Work is now proceeding on drafting a consultation paper on general partnerships which we hope to publish in the second half of 1998.⁶

Execution of deeds and documents by bodies corporate

- 3.8 Our consultation paper⁷ on this topic resulted from a comprehensive review of the way in which companies and other corporations execute deeds and other documents. The picture which emerged was one of quite unnecessary complexity. A particular difficulty highlighted by practitioners was that section 36A of the Companies Act 1985 (where the rules for companies are now set out) is both complicated and uncertain, and also difficult to reconcile with other overlapping statutory provisions.⁸ The consultation paper offered a number of possible

³ Or once any other insolvency "event" occurs; see n 2 above.

⁴ Produced in 1994 for the DTI in response to a request made by the Parliamentary Under-Secretary for Corporate Affairs. See Twenty-Ninth Annual Report 1994 (1995) Law Com No 232, paras 2.20-2.24.

⁵ DTI, *Company Law Review: The Law Applicable to Private Companies. A Consultative Document* (November 1994). URN 94/529.

⁶ As part of the project we will also be considering the position of limited partnerships, which is likely to form the basis of a separate consultation document.

⁷ The Execution of Deeds and Documents by or on behalf of Bodies Corporate (1996) Consultation Paper No 143.

⁸ Particularly s 74 of the Law of Property Act 1925, and s 1 of the Law of Property (Miscellaneous Provisions) Act 1989.

reforms, ranging from fundamental changes in the method of execution (such as abolishing the use of common seals) to detailed amendments to the existing legislation.

- 3.9 Responsibility for this project was transferred to the Company and Commercial Law Team during the year. We have completed the analysis of responses to the consultation paper and we hope to publish our final report and recommendations by the autumn of 1998.

COMPANY LAW

General

- 3.10 The Chairman of the Commission has taken a close interest in the work of the team in the area of company law in view of her particular experience in this field. She oversaw the later stages of the project on Shareholder Remedies and is taking primary responsibility for a new project on Part X of the Companies Act 1985.

Shareholder remedies

- 3.11 Our report on this topic was published in October 1997.⁹ It was prepared in consultation with the Scottish Law Commission, and followed the publication of a consultation paper in October 1996.¹⁰ In the report we recommended changes designed to make shareholder remedies more affordable and more appropriate to modern conditions.
- 3.12 There are three main shareholder remedies: the "unfair prejudice" remedy under section 459 of the Companies Act 1985, in which a member seeks redress for action by the company which injures his interest as a member; the derivative action, in which a member seeks to enforce a claim belonging to his company; and action to enforce the company's constitution. The report confirmed the findings of the consultation paper on the two main problems affecting these remedies. These are the length and cost of proceedings brought under section 459, and the obscurity and complexity of the law relating to derivative actions.
- 3.13 In the report we recommended statutory and other changes to simplify the unfair prejudice remedy, and help reduce its high cost to litigant and taxpayer alike. In line with the recommendations in Lord Woolf's Final Report on Access to Justice, these included proposals for more active case management by the courts.
- 3.14 We also recommended the introduction of a new procedure for derivative actions with more modern, flexible and accessible criteria for determining when a derivative action can be brought. The Lord Chancellor's Department has since issued "Access to Justice -Specialist Jurisdictions: Proposed New Procedures - A Consultation Paper" (December 1997), in which it sought views on the Commission's recommendation for the derivative action and certain other recommendations which can be implemented in conjunction with the new Civil

⁹ Shareholder Remedies (1997) Law Com No 246.

¹⁰ Shareholder Remedies (1996) Consultation Paper No 142.

Procedure Rules. These are being introduced as a part of the current civil justice reforms.

- 3.15 Finally, we considered ways in which litigation can be avoided, and recommended, in particular, the addition of a new article to Table A, which is the statutory model form of a company's articles of association, with the aim of encouraging shareholders in future to have pre-agreed routes to resolve disputes without litigation.
- 3.16 We were assisted throughout this project by Professor Dan Prentice of the University of Oxford and Ms Brenda Hannigan, senior lecturer at the University of Southampton.

Directors' duties and Part X of the Companies Act 1985

- 3.17 The Law Commission, and the Scottish Law Commission, have been asked by the Department of Trade and Industry to carry out a review of directors' duties with a view to making recommendations for simplifying and modernising Part X of the Companies Act 1985 (which contains detailed and complex provisions regarding the enforcement of fair dealing by directors). The review is also to consider a statutory statement of the fiduciary duties and duty of care owed by directors to their company. We hope to publish a consultation paper in the first half of 1998. We are being assisted in this project by Professor Dan Prentice of the University of Oxford, Richard Nolan of the University of Cambridge and Dr Simon Deakin of the Economic and Social Research Council Centre for Business Research in Cambridge.

PART IV

CRIMINAL LAW AND EVIDENCE

TEAM MEMBERS °

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(Commissioner)

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Ms C M Hughes, Ms C Salmon, Ms S V Phillimore

Research Assistants

Mr E M Levey, Ms A C Savage, Mr K Soar

° as at the end of 1997

Corruption

- 4.1 In March 1997 we published our consultation paper¹ on this important topic. We have received a large number of very helpful responses and the report will be published in March 1998.
- 4.2 We recommend replacing the existing common law offences of bribery and statutory law of corruption with a modern statute creating four offences, namely: corruptly conferring, or offering or agreeing to confer, an advantage; corruptly obtaining, soliciting or agreeing to obtain an advantage; corrupt performance by an agent of his or her functions as an agent; and the receipt by an agent of a benefit which consists of, or is derived from, an advantage which the agent knows or believes to have been corruptly obtained. We give a wide meaning to the term “agent”. We also define when something has been done “corruptly”. By contrast with the present law, we propose that no distinction should be drawn between the public and private sectors although, obviously, this might be reflected in the sentence imposed.

Hearsay in criminal proceedings

- 4.3 We published our report on this topic in June.² Our basic philosophy was that oral evidence is preferable to hearsay, principally because in the former case the witness can be cross-examined. We were also satisfied that the discretionary provisions in the Criminal Justice Act 1988 have not worked satisfactorily: for example, in many cases discretion is consistently exercised against admitting evidence under that Act. Uncertainty as to the admissibility of evidence means that

¹ Legislating the Criminal Code: Corruption (1997) Consultation Paper No 145.

² Evidence in Criminal Proceedings: Hearsay and Related Topics (1997) Law Com No 245.

the prosecution cannot confidently assess the prospects of a conviction in deciding whether to prosecute and, if so, on what charges; and those acting for the defendant cannot confidently advise on plea or on the conduct of the defence. We therefore recommended that there should continue to be an exclusionary hearsay rule (which we defined), but that there should be three categories of automatic admissibility – first, where the maker of the statement is *unavailable* to testify, for one of certain specified reasons; second, a number of situations where the evidence came into being in such circumstances that it is sufficiently *reliable* to be admissible; and third, admissions and confessions, subject to existing statutory safeguards.

- 4.4 Experience in this country and abroad convinced us that, however much thought goes into defining the categories of automatic admissibility, some unforeseeable instances of very cogent hearsay will fall outside them. We therefore recommended a form of “safety valve” – a limited inclusionary discretion to admit hearsay where the court is satisfied that, despite the difficulties of challenging the statement, its probative value is such that the *interests of justice* require it to be admissible. We also made provision for greater admissibility of the evidence of frightened witnesses, evidence of assistants to experts, and computer evidence.
- 4.5 We also examined the circumstances in which the previous statements of witnesses can be admitted. At present there are very limited exceptions to the rule that such statements are inadmissible, and they have been strongly criticised as being anomalous and unsatisfactory. We sought to rationalise these rules and to make it easier for previous statements to be admitted; and, in contrast to the present position, such statements would then be evidence of their truth. We believe that these, like many of our recommendations, would be of great value to rape victims.
- 4.6 Our consultant on this project was Professor Diane Birch of the University of Nottingham.

Consents to prosecution

- 4.7 With strong encouragement from the new Law Officers, we decided to review the rules which require the consent of either the Attorney-General or the Director of Public Prosecutions before a prosecution can be brought for certain criminal offences. The number of such offences is very diverse, and “any attempt to derive a set of uniform principles that would provide a rational basis for the various categories of consent provisions is frankly an impossible task”.³ There have been demands for the rationalisation of this branch of the law.
- 4.8 We published a consultation paper in September.⁴ Our broad provisional conclusion was that a requirement of consent should be used to control prosecutions with respect to three categories of offences: those which directly affect freedom of expression; those which may involve national security or have some international element; and those in respect of which it is particularly likely,

³ L J Edwards, *The Attorney General, Politics and the Public Interest* (1984) p 25.

⁴ Criminal Law: Consents to Prosecution (1997) Consultation Paper No 149.

given the availability of civil proceedings in respect of the same conduct, that the public interest will not require a prosecution.

- 4.9 As for which officer should be the designated authority in respect of which offences, we provisionally concluded that a Law Officer should be the relevant officer as regards those offences which fall within the “international element” category and that the DPP should be the relevant officer as regards offences in the remaining categories. We provisionally concluded that the DPP’s consent decision should be made either by the DPP personally or by a senior Crown Prosecutor. Given that, if our provisional conclusions were brought into effect, some transfers of consent powers between the Law Officers and the DPP would result, we provisionally proposed that provision should be made to enable such transfers to be made by way of statutory instrument, subject to the affirmative resolution procedure, rather than by primary legislation.

Trade secrets

- 4.10 In a consultation paper published in November⁵ we considered whether the misuse of trade secrets should in certain circumstances amount to a criminal offence. We provisionally concluded that there is a strong case for such an offence, provided that it can be drafted in sufficiently precise terms. Our provisional view was that it should be an offence to *use or disclose* another’s trade secret without the other’s consent, knowing it to be a trade secret. We defined a “trade secret” as information which is not generally known, which derives its value from that fact, and as to which its “owner” has indicated (expressly or impliedly) a wish to preserve its quality of secrecy.
- 4.11 We were concerned that our proposed offence, or the threat of prosecution for it, could be used to apply undue pressure on defendants to settle civil claims. We therefore provisionally suggested that prosecutions for the offence be brought only by or with the consent of the Director of Public Prosecutions.
- 4.12 We provisionally proposed certain exclusions from the scope of the offence – for example, confidential information which it was in the public interest to use or disclose; information acquired by the defendant in ignorance of the fact that it was a trade secret, or that its previous acquisition involved the commission of an indictable offence (or the summary offence of “hacking” into a computer under section 1 of the Computer Misuse Act 1990); and information disclosed in accordance with a statutory obligation or power, or pursuant to a court order, or otherwise for the purpose of legal proceedings.
- 4.13 We provisionally proposed that a person should not be excused from answering questions or producing documents in civil proceedings on the ground that it might incriminate him or her of our proposed offence, or of any conspiracy involving that offence.
- 4.14 Professor William Cornish QC FBA acted as our consultant, and we were also assisted by Mr David Ormerod, Lecturer in Law at the University of Nottingham.

⁵ Legislating the Criminal Code: Misuse of Trade Secrets (1997) Consultation Paper No 150.

Fraud

- 4.15 We have continued our work on the law of dishonesty, which we started with our reports on *Conspiracy to Defraud*⁶ and *Money Transfers*.⁷ At the request of the Home Office we expect now to concentrate on the law of fraud.

Evidence of previous misconduct

- 4.16 We have finished analysing the responses to our consultation paper,⁸ and hope to publish our report late in 1998. We are grateful to the Lord Chancellor's Department for financing research by the Oxford Centre for Socio-Legal Studies into the effect on magistrates of knowledge of a defendant's previous convictions. We shall be making use of this research alongside similar research conducted on simulated juries.⁹

Consent and offences against the person

- 4.17 In 1995 we published a consultation paper¹⁰ on consent as a defence, principally to offences against the person and sexual offences. The responses to the consultation paper are being analysed by Mr Paul Roberts, Lecturer in Law at the University of Nottingham. We will then decide on the future course of this project.

Assisting and encouraging crime

- 4.18 In 1993 we published a consultation paper¹¹ on the scope and structure of that part of the criminal law which relates to those who assist or encourage others to commit offences. If resources permit, we hope to start formulating our policy on this project during 1998.

Misuse of public office

- 4.19 The Committee on Standards in Public Life produced a consultation paper recommending the replacement of the existing surcharge provisions with a new

⁶ Criminal Law: Conspiracy to Defraud (1994) Law Com No 228.

⁷ Offences of Dishonesty: Money Transfers (1996) Law Com No 243.

⁸ Evidence in Criminal Proceedings: Previous Misconduct of a Defendant (1996) Consultation Paper No 141.

⁹ Summarised in para 4.14 of our Annual Report for 1996.

¹⁰ Criminal Law: Consent in the Criminal Law (1995) Consultation Paper No 139.

¹¹ Assisting and Encouraging Crime (1993) Consultation Paper No 131.

offence of misuse of public office. It considered that the details of the offence and of how the legislation might best be framed should be carried forward in consultation with the Law Commissioner responsible for criminal law matters, who has now been engaged on this project.

Codification of criminal law

- 4.20 We have described our approach to codifying the criminal law in paragraphs 1.24-1.26 above.

PART V

PROPERTY AND TRUST LAW

TEAM MEMBERS ^o

Mr Charles Harpum
(**Commissioner**)

Government Legal Service

Mr J W Holbrook (*Team Manager*)
Mr M P Hughes, Miss R Ellis

Research Assistants

Mr R J Dew, Miss A N Marshall, Miss M Ni Dhonnchadha

^o as at the end of 1997

LAW OF PROPERTY

Land registration

- 5.1 We have already noted the passage of the Land Registration Act 1997 through Parliament.¹ The Law Commission, together with HM Land Registry, gave considerable support and assistance to the Lord Chancellor's Department during the passage of the Bill.
- 5.2 That Act implemented the First Report of the joint working group,² which has representatives from the Law Commission, HM Land Registry and the Law Commission, and which was set up to take forward the reform of the legislation governing land registration.³ However, this is by no means the end of the project on which the joint working group has embarked. As we mentioned in last year's Annual Report,⁴ it is now engaged on the much more substantial task of replacing the Land Registration Act 1925 in its entirety. The objectives are twofold. The first is to have clear modern legislation that can be readily understood by those who have to use it. The second is to have in place a legislative framework for the introduction of the electronic transfer of and creation of rights in land. This is likely to come about in the comparatively near future and it has fundamental implications for the content of any legislation. It is hoped that the joint working group will be in a position to publish its second report in mid-1998.

¹ See para 1.5 above.

² See (1995) Law Com No 235.

³ For the background to the joint working group, see Twenty-Ninth Annual Report 1994 (1995) Law Com No 232.

⁴ Thirty-First Annual Report 1996 (1997) Law Com No 244, para 5.4.

Termination of tenancies

- 5.3 Last year we reported⁵ on our continuing efforts to secure the acceptance by the Government of our previous recommendations to replace the present complex, confused and defective law which governs forfeiture of tenancies with a new coherent statutory scheme of termination orders.⁶ The essence of our proposed scheme is that, in future, a tenancy would only determine for breach of covenant or condition by consent or by court order. Instead of the right to forfeit, the landlord would have the right to bring termination order proceedings to end the tenancy.
- 5.4 As originally proposed, the scheme would have involved the abolition of the landlord's right to forfeit by peaceable re-entry. However, through our discussions with the Lord Chancellor's Department, the Department of the Environment, Transport and the Regions and with property professionals, it has become apparent that, although the proposed reforms are generally welcomed, the ability to determine a tenancy in appropriate circumstances without recourse to the courts is seen as an effective management tool. There are fears that its abolition may have an adverse effect on the commercial property sector and on the availability of rented property.⁷
- 5.5 In response to these concerns we have re-examined this aspect of our original recommendations and we have published a consultative document⁸ in which we consider the retention of a right of termination by re-entry under the new termination scheme. However, this would be achieved by integrating such a right with the scheme as a whole, so that the legitimate interests of tenants would be adequately protected without making it significantly more difficult, time-consuming and expensive for landlords to terminate tenancies in cases where there was little prospect of the tenant being granted relief from forfeiture.

Homesharing

- 5.6 This project is concerned with the property rights of all those who share a home.⁹ Work has continued on it to the extent that resources have permitted. However, the demands of the team's other projects, including those on termination of tenancies, trustee delegation and trustee investment¹⁰ (which are in addition to those mentioned in our Sixth Programme¹¹) have been such that it will not be possible to complete the consultation paper before the second half of 1998.

⁵ See the Thirty-First Annual Report 1996, para 5.9.

⁶ Landlord and Tenant: Termination of Tenancies Bill (1994) Law Com No 221.

⁷ The right of peaceable re-entry cannot be exercised in relation to property let as a dwelling while any person is lawfully residing in it: Protection from Eviction Act 1977, s 2.

⁸ Landlord and Tenant Law: Termination of Tenancies by Physical Re-entry, published on 22 January 1998.

⁹ The project was explained more fully in the Thirtieth Annual Report 1995 (1996) Law Com No 239, paras 6.7 - 6.12.

¹⁰ See paras 5.7 - 5.12 below.

¹¹ Sixth Programme of Law Reform (1995) Law Com No 234.

LAW OF TRUSTS

- 5.7 Trust law is of wider application than is perhaps commonly appreciated. Trusts are not confined to the world of wills and family settlements. They also have considerable, and increasing, relevance to many commercial enterprises from international financial transactions to the management of pension and other investment funds. Trust law is also of course of major significance to charities. In an effort to ensure that the law keeps pace with the demands made upon it, we have been engaged in two related projects; one on a range of trustees' powers and duties and another specifically on powers of investment.

Trustees' powers and duties

- 5.8 Central to the law of trusts is the body of case law and statutory provision which governs the powers and duties of trustees. However, trusteeship is an increasingly specialised task. As a result of changes both in the way in which financial markets operate and in the purposes for which trusts are now employed, the present law is no longer always adequate to enable trustees to administer a trust to the best advantage of the beneficiaries or the objects of the trust. This is particularly the case in relation to the investment and management of trust property. In June we published a consultation paper in which we explored the implications of the narrow default powers which trustees have under the present law.¹² The consultation paper contained provisional proposals which were intended to make it easier for trustees to fulfil their duties and, in particular, to enable them to employ persons with professional expertise in circumstances where at present they cannot, to use nominees, to purchase land, to insure trust property and to remunerate a trustee with professional skills. The consultation period ended on 30 September and we are now analysing the large number of responses which were received. We hope to publish our final report during the third quarter of 1998.
- 5.9 We have been assisted in our work on this topic (and on the related project on trustee investment) by the Trust Law Committee,¹³ and we are most grateful for their continuing support.

Trustee investment

- 5.10 Of particular concern to those involved with the administration of trusts are the rules governing trustees' powers of investment. In our last two annual reports¹⁴ we charted our involvement in the last Government's work in this field. Last year we reported¹⁵ that, in response to growing concern about deficiencies in the present law, and in the Trustee Investments Act 1961 in particular, a consultation paper was published by HM Treasury in May 1996 under the Deregulation and Contracting Out Act 1994. The paper (which had been prepared by the Commission's Property and Trust Law Team) made proposals for the abolition of

¹² Trustees' Powers and Duties (1997), Consultation Paper No 146.

¹³ The Trust Law Committee is a group of practising trust lawyers and academics which was formed under the chairmanship of Sir John Vinelott to press for reform of trust law.

¹⁴ Thirtieth Annual Report 1995 (1996) Law Com No 239, paras 5.16 and 5.17; Thirty-First Annual Report 1996 (1997) Law Com No 244, paras 5.11 and 5.12.

¹⁵ Thirty-First Annual Report 1996 (1997) Law Com No 244, para 5.12.

the Trustee Investments Act 1961 and its replacement with a more modern power of investment for trustees.

- 5.11 As anticipated, a draft Order under the 1994 Act was brought forward in February. Progress on the Order was halted by the General Election, but the Report on the matter by the Delegated Powers Scrutiny Committee (House of Lords) issued prior to dissolution confirmed that the draft order satisfied the requirements of the 1994 Act. It took careful note of a response submitted by the Commission in support of the Order. The Committee concluded with the following comment:

We have also noted the Law Commission's hope that its current work will lead to new primary legislation on the powers of trustees, and the opportunity that that would provide to codify the reforms set out in the draft Deregulation Order. There is little doubt in our minds that the present proposal is only a first step in the long-overdue reform of trustee investment law, and that other proposals will follow. But it is an important first step, and one which we are satisfied is proper to be taken under the Deregulation and Contracting Out Act.¹⁶

- 5.12 We are currently waiting to hear whether the matter will be taken up by the present Government and, if so, by what means.

Perpetuities and accumulations

- 5.13 Following our consultation paper,¹⁷ work on the reform of the notoriously complex rules which govern perpetuities and accumulations had to be put into abeyance because of other pressing work. However, our final report will be published in the early months of 1998 and it is likely to make radical proposals for recasting and simplifying the law.

Trust formalities

- 5.14 Further work on our project concerning the formalities required for the creation of a trust¹⁸ has been delayed for the same reasons as our work on homesharing. Before we undertake any further work on this project, we intend to explore more

¹⁶ Twenty-first Report of the Select Committee on Delegated Powers and Deregulation (1996-97) HL 70, para 78.

¹⁷ The Law of Trusts — The Rules Against Perpetuities and Excessive Accumulations (1993) Consultation Paper No 133.

¹⁸ A detailed description may be found in our Twenty-Ninth Annual Report 1994 (1995) Law Com No 232, paras 2.74 - 2.75.

fully the practical difficulties caused by the present law, particularly in relation to commercial transactions.

PART VI

STATUTE LAW

TEAM MEMBERS^o

Consolidation

The Chairman, Mr E G Bowman CB, Dr H J Caldwell, Miss B A Waplington, Mrs A M Bertlin, Mr E J Stell, Ms E L Jones

Statute Law Revision (including Local Legislation)

The Chairman, Mr J D Saunders, Mr R D Maitland, Mr A M Rowland, Mr M J Coggins

^o as at the end of 1997

CONSOLIDATION

- 6.1 The Law Commission has a duty – among other matters – to keep under review all the law with which it is concerned, with a view to reducing the number of separate enactments and generally simplifying and modernising the law. An important aspect of this function is consolidation. The need for this arises if over a period of time several statutes are enacted on the same subject, making it difficult to find out what the law is. The process of consolidation involves different enactments on the same subject being drawn together to form a rational structure in a single statute. This makes the law more comprehensible, both to those who apply it and to those affected by it. If anomalies are revealed in the process of consolidation, various devices (such as amendments recommended by the Law Commission) are available to rectify them. But, if a change needed to rectify an anomaly is of such a nature that it ought to be made by Parliament in the normal way, a paving Bill is required or else the anomaly has to be reproduced. The process of consolidation requires the support and participation of the Government department within whose responsibility the subject matter falls.
- 6.2 Four consolidation Bills received Royal Assent during 1997. Two of them were drafted at the Commission; they are the Nurses, Midwives and Health Visitors Act 1997 and the Justices of the Peace Act 1997. The other two were drafted at the Parliamentary Counsel Office; they are the Architects Act 1997 and the Lieutenancies Act 1997. All four are “straight” consolidations reproducing the existing law, ie without amendments giving effect to Law Commission recommendations.
- 6.3 Work on the very large consolidation relating to the armed forces is continuing; it is such a large task that it is taking up most of the time of three Counsel based at the Commission. Work has also proceeded on consolidations relating to petroleum and to the Audit Commission. It is hoped to introduce all these consolidations before the end of 1998.¹

¹ The Petroleum Bill and the Audit Commission Bill were introduced in the House of Lords on, respectively, 15 December 1997 and 22 January 1998.

- 6.4 Work is also continuing on a difficult and complex consolidation relating to the sentencing powers of courts. The Commission has engaged a consultant, a former member of the Parliamentary Counsel Office, to undertake this. Dr David Thomas QC (Hon), Editor of "Current Sentencing Practice", has also agreed to assist with advice.
- 6.5 Our last annual report recorded that it was hoped to introduce a consolidation Bill relating to the national health service in the first session of the new Parliament. However, the new Government decided not to proceed with the consolidation. In our annual report for 1995, we mentioned that the consolidation on the protection of animals was then at an advanced stage of preparation. Before the General Election the Government decided not to proceed with the Bill. It is doubtful whether it is now the right time to pursue the Bill; the underlying law might be changed in light of current issues, especially hunting.
- 6.6 Our last annual report recorded that work on a financial services consolidation was continuing. This has now been abandoned in view of the Government's announced intention to amend the underlying law.
- 6.7 These three instances (national health service, animal protection and financial services) illustrate how hazardous the course of a consolidation can be. While every effort is made to ensure that work will not be wasted, the unforeseen can always arise.

STATUTE LAW REVISION

- 6.8 Statute law revision is the process by which legislation which has lost any practical utility or is obsolete is removed from the statute book. It is a weeding-out of the statute book and is mainly achieved by means of Acts of Parliament specifically prepared by us jointly with the Scottish Law Commission. It is an integral part of the general process of statute law reform, other parts including consolidation and more ambitious projects for revising the whole of the existing law on a particular topic. Our remit on statute law revision covers local and personal Acts as well as public general Acts. Our vehicle for repealing legislation is the Statute Law (Repeals) Bill. We have drafted 15 such Bills in the period 1969 to 1995. All have been enacted and have to date repealed nearly 4300 enactments, including some 1800 whole Acts.

Statute Law (Repeals) Bill

- 6.9 Work is progressing with the Scottish Law Commission on the next Statute Law (Repeals) Bill which we hope to be able to publish by Summer 1998 with a view to its enactment during the 1997/98 Parliamentary Session. The Bill is expected to include proposals to rationalise the local legislation of the counties of Hereford and Worcester and to recommend repeals in the areas of education, finance and property. A large number of Scottish local Acts are also expected to be recommended for repeal.

Chronological Table of Private Acts

- 6.10 Following the publication in 1996 of the Chronological Table of Local Legislation 1797-1994, covering the 26,500 local Acts passed since 1797, work has been continuing on the compilation of a Table of private (since 1948, personal) Acts. There are about 10,000 such Acts dealing principally with such matters as

marriage, divorce, the settlement of estates and local inclosures. Many of these Acts are believed to be spent or obsolete but until they have been properly listed, and the Table has been completed, it will be impossible to begin the process of systematically repealing those which are no longer needed. The main work needed to produce an authoritative private Act Table is now nearly complete, and we hope that it will be possible for the Table to be published during 1998, and in a format similar to that of the Chronological Table of Local Legislation.

Other matters

- 6.11 During the year Anthony Rowland, a member of our statute law revision team, addressed the British and Irish Association of Law Librarians at their annual conference on the Law Commissions' work on local legislation. Law librarians feature prominently among those who take a keen interest in our statute law revision work, especially in relation to local Acts. This support has been particularly important in the preparation of the Chronological Table of Local Legislation and we look forward to having their continued assistance in our future work on the rationalisation of local Acts.

PART VII

EXTERNAL RELATIONS

- 7.1 We have referred above to some of the many contacts that we have with those outside the Commission.¹ During many of our projects we have discussions with a wide range of organisations and of individuals. Like us, they recognise our independence, but their contribution to our work is of considerable value. This Part refers to some of the types of contact which we have. This contact often runs from the time when we are considering possible future law reform projects, continues when we are assessing the difficulties with the current law and with possible options for reform, and through all the various stages of the law reform project. It often continues to the stage when we are finalising our report, and even in discussions following publication of our report.

Consultation

- 7.2 This year the Commission published its 150th consultation paper and approved a total of nine consultation documents for publication. We are very committed to consultation, which we take extremely seriously. This is demonstrated by the fact that the Commission has published a virtually identical number of final reports.² We are conscious of the time and effort which consultees give and we provide consultation periods which allow for that, generally at least a three month consultation period. We also use a range of less formal consultation processes. We consider all the responses most carefully and take full account of the views expressed. We are most grateful to consultees, whose assistance is essential to our process for law reform.

Consultants and research

- 7.3 In many of our projects we engage a legal or other consultant to assist us, often because of his or her particular expertise in the field of law. Also, we sometimes have empirical research undertaken on a project.³ We are represented at the Annual Conference of the Socio-Legal Studies Association, and a representative of the Association attended our Annual Meeting with the Society of Public Teachers of Law this year⁴. The Secretary has been a member of the Socio-Legal Research Users Forum since its inception in 1994. The Chairman is a member of the Advisory Council of the Centre for Socio-Legal Studies at the University of Oxford, of the Board of the Institute of Advanced Legal Studies and of the

¹ Paras 1.5, 1.13, 1.27, 1.30-1.32, 2.17, 3.7, 5.2, 5.4, 5.9 and 6.11.

² The Commission has published 150 law reform reports, as at the end of 1997. By that date we had published 150 consultation papers, apart from other less formal consultation documents. We almost invariably issue a consultation paper on every law reform project, and on occasion issue more than one.

³ For example, on the effect on magistrates of knowledge of a defendant's previous convictions: see para 4.16 above.

⁴ See para 7.10 below.

Advisory Committee for the Sir William Dale Centre for Legislative Drafting (at the same Institute).

Relations with Parliament, Ministers and Government departments

- 7.4 We are most grateful to the individual members of each House who take an interest in our work. We are encouraged by their commendations of the Commission's work, often in the House. We are particularly grateful to those who are willing to introduce Law Commission Bills into Parliament, for example what became the Land Registration Act 1997.⁵ We have maintained other contacts with Parliament, and made a submission to the Modernisation Committee.⁶
- 7.5 We were very pleased to welcome the new Parliamentary Secretary at the Lord Chancellor's Department, Mr Geoff Hoon, to visit the Commission in July. He showed considerable knowledge of, and interest in, our work. We are particularly grateful to all the Lord Chancellor's Department officials who give us their assistance. We again held a brief but most useful residential conference with some of the most senior officials in the Department.
- 7.6 We have already referred to our relations with Government,⁷ to the conference we arranged with LCD this year for many Permanent Secretaries of Government departments⁸ and to the co-operation agreements which we have established with several departments.⁹ The Commission also has a regular programme of meetings with the Lord Chancellor and with senior officials in his Department; with the Home Secretary and with his senior officials; also, respectively, with senior officials in the Department of Trade and Industry,¹⁰ and in the Department of the Environment, Transport and the Regions. One of the Commissioners has served on Home Office-led working parties on offences against the person and on manslaughter.
- 7.7 We also have significant contact with the Law Officers and those in senior positions in other departments and in organisations such as HM Land Registry, the Treasury Solicitor's Department, the Crown Prosecution Service and the Serious Fraud Office.

Relations with law reform and other bodies elsewhere¹¹

- 7.8 In the course of the year we have had frequent and useful discussions with Scottish Law Commissioners, about particular topics or about more general matters of mutual concern. Our Chairman has visited the Scottish Law Commission, and a Scottish Law Commissioner has visited our Commission. We have been pleased to welcome Mr Justice Girvan, the new Chairman of the Law Reform Advisory

⁵ See para 1.5 above.

⁶ See paras 1.19-1.22 above.

⁷ See para 1.30 above.

⁸ Para 1.31 above.

⁹ Para 1.13 above.

¹⁰ Para 1.13 above.

¹¹ See also para 1.32 above.

Committee for Northern Ireland, on a visit to our Commission. Our Chairman has also visited that Committee, and the Office of Law Reform in Northern Ireland.

- 7.9 Our Chairman visited the Indian Law Commission during the course of a visit to India and had a valuable meeting with the Chairman of the Commission and other Commissioners, the Honourable Justice B P Jeevan Reddy, Chief Justice Leila Seth, Dr N R Madlava Menon and Mr R L Meena. As always, we were pleased to welcome to the Commission the visitors from overseas who are listed in Appendix D, including representatives of eight overseas law reform Commissions or equivalent bodies. We find these discussions most helpful. We also received a visit from six Nuffield Fellows from various Commonwealth countries who were studying at the Institute of Advanced Legal Studies. We hosted a four week visit by two representatives of the Tanzanian Law Reform Commission, Mr Justice Anthony Nabiji Bahati (the Chairman) and Mr Albert Adiel Msangi (Principal Research Officer). The Scottish Law Commission kindly hosted them for one of the weeks.

Other contacts

- 7.10 We have continued our extremely useful contacts with the Law Society, the Bar and the Society of Public Teachers of Law. Apart from our annual meeting with each of them, we have frequent contact with many of their committees and members. We have continued to develop our contacts with the judiciary, who are also extremely helpful to us. We are also grateful for all the assistance we receive from a large number of individuals and organisations.
- 7.11 Apart from talks mentioned elsewhere in this report,¹² the Chairman gave the COMBAR Lecture¹³ and the Harry Street Lecture¹⁴ on Public Law at Manchester University, and the Chairman or other Commissioners spoke this year to, among others, the Law Faculty at the University of Tsukuba in Japan, an Association of British Insurers conference, The Royal Society for the Prevention of Accidents, the Statute Law Society¹⁵, Judicial Studies Board seminars, the Cambridge Law Faculty, King's College London¹⁶ and the John Moores University, Liverpool.¹⁷
- 7.12 We have had considerable contact with the media. There have been some extremely useful articles in newspapers and journals. We ourselves have also taken the opportunity to write several articles about our reports and to speak about them on radio and television.

¹² Paras 1.27 and 1.31.

¹³ Time for an English Commercial Code? 1997 CLJ 516

¹⁴ Modernisation Legislation (to be published in Public Law).

¹⁵ Improving the Statute Book: A Law Reformer's Viewpoint (to be published in the Statute Law Review).

¹⁶ The Future of the Law of Privacy (to be published on the King's College Law Journal).

¹⁷ Law and Law Reform: Are We Ready for the Twenty-first Century? (to be published in the Liverpool Law Review).

Publications

- 7.13 We mainly publish consultation papers and reports about law reform matters, and consolidation reports, and many have been mentioned in this report.¹⁸ We also publish “Law Under Review” three times a year, a bulletin which we have been issuing for over 10 years. It gives details of Government or Government-sponsored law reform projects in this and other countries, besides listing our reports which are awaiting implementation. The latest edition summarises nearly 150 projects. It is now available on Internet instead of hard copy. We also have available, upon request, a list of the Commission’s publications since our establishment in 1965, briefly setting out the reports which resulted from consultation papers, and the enacted legislation which resulted from reports.

Survey of readership of the Law Commission’s Annual Reports

- 7.14 When publishing our last Annual Report, we carried out a readership survey and included a short questionnaire inviting comments and suggestions. We are most grateful to those who took the trouble to respond. We have taken their views into consideration when compiling this year’s Annual Report. Two-thirds of the 59 who responded stated that they were either already linked to the Internet, or shortly expected to be. We noted this with interest, particularly as we already had under way our strategy for putting all new publications on the Internet, in addition of course to their continued publication in hard copy format. Other points from the survey were:

not surprisingly, the greatest response (64%) came from the legal world (the judiciary and the profession), Government and Parliamentary contacts, and the academic world;

the most popular section in the Annual Report was stated to be the Overview of the Year, which attracted 63%; and

the current layout was found overwhelmingly to be helpful and/or attractive (93%).

¹⁸ We are most grateful to The Stationery Office for all their assistance in publishing our work.

PART VIII

STAFF AND MANAGEMENT

Staff

(i) Legal staff

- 8.1 The Commission is very fortunate to have a number of Parliamentary Counsel here on secondment under the leadership of Geoffrey Bowman CB. The Commission's own legal staff consists of barristers and solicitors who, besides having excellent academic backgrounds, between them also have a very wide range of experience. They are supported by research assistants, all of whom are recent graduates in law; many of them stay with us for a relatively short period between different stages of their legal or academic careers, but all make an invaluable contribution to our work. The names of most of the legal staff are set out at the head of Parts II to VI above.

(ii) Non-legal staff

- 8.2 As a semi-autonomous office the Commission relies heavily on its team of administrative staff for assistance in the practical matters associated with running a modern organisation. Efforts are constantly made to improve and update the facilities available to us. At the same time, ever-increasing financial pressures have required a correspondingly rigorous approach to spending in order to make the best use of scarce resources.

(iii) Training and Investors in People

- 8.3 All staff are actively encouraged to evaluate their own training needs and to discuss with their managers any training or development opportunities which may be helpful. Managers themselves are well aware of the benefits of the appropriate training and make every effort to ensure that their staff have the chance to participate. The Commission is continuing to co-operate with the Lord Chancellor's Department in seeking Investors in People accreditation.

Library

- 8.4 Our Library has continued to support the legal work of the Commission. Apart from material held there, the Library staff have obtained materials from a wide variety of other libraries. We are especially grateful to the Libraries of the Supreme Court, the Institute of Advanced Legal Studies and the Headquarters of the Lord Chancellor's Department for their help throughout the year.

Information Technology

- 8.5 The Law Commission is committed to the advantages that can be brought from the latest developments in computing. New equipment has been purchased in the Commission's continuing drive to maintain efficiency. In keeping with this commitment, the Commission has launched its Internet site (<http://www.open.gov.uk/lawcomm/>), giving the public immediate access to the latest

Law Commission's publications. In addition, there is now direct e-mail access to the Commission, so that there is a far wider consultation base between us and those outside the Commission who, for example, wish to respond to our consultation papers.

The cost of the Commission

- 8.6 We have already commented¹ on problems caused by continuing financial restraints. There is a summary of the cost of the Commission at Appendix F . It is less than last year. The Lord Chancellor's Department is our sponsoring department. In addition the Commission is most grateful to all those who contribute to the Commission's work without payment, notably those many who respond to our many formal and informal consultations.

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

MICHAEL SAYERS, *Secretary*
9 February 1998

¹ Para 1.36.

APPENDIX A

THE LAW COMMISSION'S ROLE AND METHODS

The Law Commission has now been in operation for 32 years. It was established by the Law Commissions Act 1965 to review the law of England and Wales with a view to its systematic development and reform. A number of specific types of reform were mentioned:

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

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

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

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

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

APPENDIX B

THE LAW COMMISSION'S IMPLEMENTED REPORTS SINCE 1984

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

Law Com No.	Title	Implementing Legislation
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).
146	Private International Law: Polygamous Marriages. Capacity to Contract a Polygamous Marriage and Related Issues (Joint Report - Scot Law Com No 96) (Cmnd 9595)	Private International Law (Miscellaneous Provisions) 1995 (c 42).
147	Criminal Law: Report on Poison-Pen Letters (HC 519)	Malicious Communications Act 1988 (c 27).
148	Property Law: Second Report on Land Registration: Inspection of the Register (HC 551)	Land Registration Act 1988 (c 3).
150	Statute Law Revision: Twelfth Report (Joint Report - Scot Law Com No 99) (Cmnd 9648)	Statute Law (Repeals) Act 1986 (c 12); Patents, Designs and Marks Act 1986 (c 39).
151+	Rights of Access to Neighbouring Land (Cmnd 9692) Act 1992 (c 23).	Access to Neighbouring Land
1986		
157	Family Law: Illegitimacy (Second Report) (Cmnd 9913)	Family Law Reform Act 1987 (c 42).

1987

160	Sale and Supply of Goods (Joint Report - Scot Law Com No 104) (Cm 137)	Sale and Supply of Goods Act 1994 (c 35)
161	Leasehold Conveyancing (HC 360)	Landlord and Tenant Act 1988 (c 26).
163	Deeds and Escrows (HC 1)	Law of Property (Miscellaneous Provisions) Act 1989 (c 34).
164	Transfer of Land: Formalities for Contracts for Sale etc of Land (HC 2)	Law of Property. (Miscellaneous Provisions) Act 1989 (c 34).
165	Private International Law: Choice of Law Rules in Marriage (Joint Report - Scot Law Com No 105) (HC 3).	Foreign Marriage (Amendment) Act 1988 (c 44).
166	Transfer of Land: The Rule in <i>Bain v Fothergill</i> (Cm 192)	Law of Property (Miscellaneous Provisions) Act 1989 (c 34).

1988

172	Family Law: Review of Child Law: Guardianship and Custody (HC 594)	Children Act 1989 (c 41).
174	Landlord and Tenant Law: Privity of Contract and Estate (HC 8)	Landlord and Tenant (Covenants) Act 1995 (c 30).

1989

179	Statute Law Revision: Thirteenth Report (Joint Report - Scot Law Com No 117) (Cm 671) 1989	Statute Law (Repeals) Act (c 43).
180	Criminal Law: Jurisdiction over Offences of Fraud and Dishonesty with a Foreign Element (HC 318)	Criminal Justice Act 1993 (c 36) Part I.
181	Transfer of Land: Trusts of Land (HC 391)	Trusts of Land and Appointment of Trustees Act 1996 (c 47)
184	Property Law: Title on Death (Cm 777)	Law of Property (Miscellaneous Provisions) Act 1994 (c 36)
186	Criminal Law: Computer Misuse (Cm 819)	Computer Misuse Act 1990 (c 18).
187	Family Law: Distribution on Intestacy (HC 60)	Law Reform (Succession) Act 1995 (c 41).
188	Transfer of Land: Overreaching: Beneficiaries in Occupation (HC 61)	Trusts of Land and Appointment of Trustees Act 1996 (c 47).

1990

192	Family Law: The Ground for Divorce (HC 636)	Family Law Act 1996 (c 27).
193	Private International Law: Choice of Law in Tort and Delict (Joint Report - Scot Law Com No 129) (HC 65)	Private International Law (Miscellaneous Provisions) Act 1995 (c 42).

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).
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199	Transfer of Land: Implied Covenants for Title (HC 437)	Law of Property (Miscellaneous Provisions) Act 1994 (c 36)
202+	Criminal Law: Corroboration of Evidence in Criminal Trials (Cm 1620)	Criminal Justice and Public Order Act 1994 (c 33).
1992		
205	Criminal Law: Rape within Marriage (HC 167)	Criminal Justice and Public Order Act 1994 (c 33).
207	Family Law: Domestic Violence and Occupation of the Family Home (HC 1)	Family Law Act 1996 (c 27).
1993		
211	Statute Law Revision: Fourteenth Report (Joint Report - Scot Law Com No 140) (Cm 2176)	Statute Law (Repeals) Act 1993 (c 50).
215	Sale of Goods Forming Part of a Bulk (Joint Report - Scot Law Com No 145) (HC 807)	Sale of Goods (Amendment) Act 1995 (c 28).
216	The Hearsay Rule in Civil Proceedings (Cm 2321)	Civil Evidence Act 1995 (c 38).
217	Family Law: The Effect of Divorce on Wills	Law Reform (Succession) Act 1995 (c 41).
1994		
224	Structured Settlements and Interim and Provisional Damages (Cm 2646)	Finance Act 1995 (c 4) - in part; Civil Evidence Act 1995 (c 38) - in part; Damages Act 1996 (c 48) - in part.
228	Criminal Law: Conspiracy to Defraud (HC 11)	Theft (Amendment) Act 1996 (c 62).
1995		
230	Legislating the Criminal Code: The Year and a Day Rule in Homicide (HC 183) Rule)	Law Reform (Year and a Day Act 1996 (c 19).
233	Statute Law Revision: Fifteenth Report (Joint Report - Scot Law Com No 150) (Cm 2784)	Statute Law (Repeals) Act 1995 (c 44).
235	Transfer of Land: Land Registration (jointly with H M Land Registry) (Cm 2950)	Land Registration Act 1997 (c 2).
1996		
243	Offences of Dishonesty: Money Transfers (HC 690)	Theft (Amendment) Act 1996 (c.62).

APPENDIX C

LAW COMMISSION REPORTS AWAITING IMPLEMENTATION

Of all the Law Commission's 150 law reform reports, the 22 listed below remain outstanding. Three of these, marked * , have been expressly accepted by the Government in full or in part, the first in principle, and the others subject to Parliamentary time being available.

<i>Year</i>	<i>No</i>	
1981	110	Breach of Confidence
1984	127	Positive and Restrictive Covenants
1985	152	Liability for Chancel Repairs
1989	178	Compensation for Tenants' Improvements
1991	194	Distress for Rent
	204	Land Mortgages
1992	208	Business Tenancies: Landlord and Tenant Act 1954, Part II
1993	218	* Legislating the Criminal Code: Offences against the Person and General Principles
	219	Contributory Negligence as a Defence in Contract
1994	220	* Delegation by Individual Trustees
	221	Termination of Tenancies Bill
	222	Binding Over
	226	Judicial Review and Statutory Appeals
	227	* Restitution: Mistakes of Law and Ultra Vires Public Authority Receipts and Payments
1995	229	Intoxication and Criminal Liability
	231	Mental Incapacity +
1996	237	Involuntary Manslaughter
	238	Landlord and Tenant: Responsibility for State and Condition of Property
	242	Privity of Contract: Contracts for the Benefit of Third Parties
1997	245	Evidence in Criminal Proceedings: Hearsay and Related Topics
	246	Shareholder Remedies
	247	Aggravated, Exemplary and Restitutionary Damages

+ The Government's response to this report is summarised at para 1.15 above.

APPENDIX D

VISITORS FROM OVERSEAS

Among the visitors to the Law Commission during 1997 were:

- Australia* Dr Kathryn Cronin (Commissioner, Australian Law Reform Commission)
Mr Philip Walker (Attorney-General's Office, Canberra)
Mr Geoff McDonald (Senior Adviser, Criminal Law Review Division, Attorney-General's Department of New South Wales)
- Canada* Mr Roderick A MacDonald (President, Law Commission of Canada)
- Cyprus* Mr Alecos Markides (Attorney-General)
- Fiji* Ms Daiana Buresova (Legal Officer, Law Reform Commission)
- The Gambia* Mrs Hawa Sisay-Sabally (Attorney General and Secretary of State for Justice)
- Hong Kong* Mr Stuart Stoker (Secretary, Law Reform Commission)
- Lithuania* Mrs Rasa Budbergyte (Secretary of the Ministry of Justice)
- Namibia* Mrs Vicki Ya Toivo (Deputy Chief Legal Adviser, Attorney-General's Chambers)
- New Zealand* The Hon Justice Baragwanath (President, Law Commission)
- Nigeria* Hon Justice P K Nwokedi (Chairman, Law Reform Commission)
- South Africa* Mr Malcolm Wallis (Chairman, General Council of the Bar)
Ms Zubeda Seedat (Law Commission)
- Tanzania* Mr Justice Anthony Bahati (Chairman, Law Reform Commission)
Mr Albert Msangi (Principal Law Research Officer, Law Reform Commission)
- Zimbabwe* The Hon Patrick Chinamasa (Attorney-General)

OUR REPRESENTATIVES ALSO MET THE FOLLOWING MEMBERS OF DELEGATIONS

From Kuwait

- Mr Mohammed Yousef Al-Rifai (Chief Justice of Kuwait)
Mr Saad Mohammed Al-Rokaibi (Director of Administration, Office of the Supreme Court)
Justice Ahmed MUSAED Al-Ajeel (Senior Appeal Court Judge and Director, Kuwait Institute for Legal and Judicial Studies)

From Sri Lanka

- Mr P Wijeratne (Chief Judge, Commercial High Court)
Mr Kurnar Ekaratne (District Judge, Gampaha District)
Mr Nishan Akrishna (Co-ordinating Secretary, Ministry of Justice)

Two Palestinian Lawyers

- Mr Tareq Touqan
Mr Firas Melham

Two Eastern European Judges

- Ms Ioana-Claudia Ilies (Romania)
Mrs Margarita Dimova (Republic of Bulgaria)

APPENDIX E

ADMINISTRATIVE STAFF *

THE LAW COMMISSION SECRETARIAT COMPRISES:

Secretary

Mr M W Sayers

Assistant Secretary

Mr C K Porter

Policy and Planning

Mrs S J Samuel

Personnel and Recruitment

Miss L A Collet

Personnel Officer

Computer Systems and IT Support

Mr G Ellis

Systems Manager

Accommodation, Registry and Accounts

Ms A L Peries

Accommodation Officer

Library Services

Mrs J King

Librarian

Mr M Cunningham

IT Consultant

Mr T D Cronin

Registry

Miss C O'Connell

Assistant Librarian

Mrs N L Spence

Local Computer Officer

Miss J A Griffiths

Registry and Accounts

Mr E Langley

Library Trainee

Mrs M M Blenman

Typing Support

Miss R Mabbs

Office Keeper

Mr J M Davies

Messenger

Chairman's Support

Mr A Parkinson MBE

Clerk

Publishing

Mr D R Leighton

Editor

Mrs P J Wickers

Messenger

Mr R Webb

Research Assistant

Secretarial Support

Mrs D E Munford

Miss C P Cawe

Mrs H C McFarlane

Miss A J Meager

Ms J R Samuel

CONTACT POINTS:

The general enquiry telephone number is: 0171 453 1220

The general fax number is: 0171 453 1297

The general e-mail address (except for library services) is: secretary.lawcomm@gtnet.gov.uk

The library e-mail address is: library.lawcomm@gtnet.gov.uk

The Law Commission's website address is: <http://www.open.gov.uk/lawcomm/>

* As at the end of 1997

APPENDIX F

THE COST OF THE COMMISSION

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

	1997		1996	
	£000	£000	£000	£000
Accommodation charges ¹	713.2		763.1	
Headquarters' overheads ²	432.9		501.0	
		1,146.1		1,264.1
Salaries and pensions of Commissioners ³	484.3		458.7	
Salaries of legal staff and secondees and payments to consultants ³	1,532.2		1,407.0	
Salaries of non-legal staff ³	373.5		424.5	
		2,390.0		2,290.2
Printing and publishing; supply of information technology; office equipment and books	241.4		265.7	
Telephone and postage	30.9		34.6	
Travel and subsistence	6.3		10.6	
Miscellaneous (including recruitment)	3.0		13.8	
Entertainment	0.8		1.4	
		282.4		326.1
TOTAL		3,818.5		3,880.4

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

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

³ These salaries include ERNIC and Superannuation.