

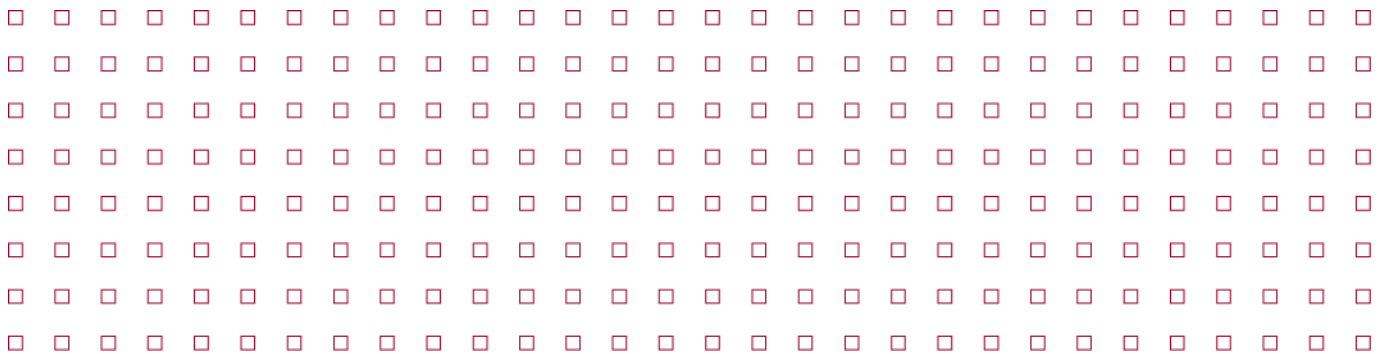


Ministry of
JUSTICE

Triennial Review

Law Commission

Report of Stage One





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Contents

Introduction	3
Functions of the Law Commission	6
Form of the Law Commission	18
Summary and Recommendations	26
Annex A: Call for evidence	27
Annex B: List of respondents	29
Annex C: Critical Friends Group	31
Annex D: Law Commissions Act 1965 section 3	32

Introduction

1. The Law Commission for England and Wales ('the Law Commission' or 'the Commission' hereafter) was established by the Law Commissions Act 1965 (LCA 1965) and is an independent advisory Non-Departmental Public Body.
2. The Law Commission was established for the purpose of promoting reform of the law.¹ Its organisational structure and functions are set out in its founding statute. This statute was later amended by the Law Commission Act 2009, which introduced a statutory Protocol² governing ways of working between the Law Commission and the Government (s2), and the requirement that the Lord Chancellor report annually to Parliament on the implementation of Law Commission reports by Government (s1).
3. The LCA 1965 also established a very similar Commission in Scotland (the Scottish Law Commission). However, the Scottish Law Commission is responsible to the Scottish Government and, as such, is outside the scope of this review. Similarly, the Northern Ireland Law Commission (established separately) is also not the subject of this review, reporting as it does to the Northern Ireland Assembly.
4. The Commission is being reviewed as part of the Triennial Review programme, set up following a Government commitment to triennially review NDPBs. This report will set out the purpose of the Triennial Review, describe the process and methodology used to review the Law Commission, and analyse the functions of the body and options for how to deliver those functions. It will make formal recommendations on the functions and appropriate forms.

Public Bodies Reform Agenda

5. The Public Bodies Reform Agenda is led by the Cabinet Office, using HM Treasury rules and standards. In 2010, over 900 bodies were subject to a cross-Government review undertaken by all departments. This included all Non-Departmental Public Bodies, along with a number of Non-Ministerial Departments and public corporations.
6. The Secretary of State for Justice considered MoJ public bodies, applying the Coalition Government's test on whether the function should be carried out by the state. It was decided in June 2010 that the Law Commission would be retained on the grounds of performing a technical function which requires impartiality. The Triennial Review process was then established in 2011 to ensure that all NDPBs remaining in place following these reforms were regularly reviewed. The decision taken in 2010 does not pre-determine the outcome of this Triennial Review, which is based on evidence, but is a relevant consideration.

Scope and Purpose of Triennial Reviews – Stage 1

7. The Cabinet Office has identified two principal aims for Triennial Reviews:
 - to provide robust challenge to the continuing need for individual NDPBs – both their functions and their form (stage one); and
 - where it is agreed that a particular body should remain as an NDPB, to review the control and governance arrangements in place to ensure that the public body is complying with recognised principles of good corporate governance (stage two).

¹ Law Commissions Act 1965 s1(1) available at www.legislation.gov.uk/ukpga/1965/22/section/1

² Protocol between the Lord Chancellor (on behalf of the Government) and the Law Commission (Law Com No 321, 29 March 2010). Available at <http://lawcommission.justice.gov.uk/publications/940.htm>

This report covers stage one of the review of the Law Commission.

8. All reviews are to be conducted in line with the following principles:
- i. **Proportionate**: not overly bureaucratic; appropriate for the size and nature of the NDPB.
 - ii. **Timely**: completed quickly to minimise disruption and reduce uncertainty.
 - iii. **Challenging**: robust and rigorous, evidencing the continuing need for functions and examining and evaluating a wide range of delivery options.
 - iv. **Inclusive**: open and inclusive. Individual NDPBs must be engaged, key users and stakeholders should have the opportunity to contribute. Parliament should be informed about the commencement and conclusions.
 - v. **Transparent**: all reviews should be announced and reports should be published.
 - vi. **Value for Money**: conducted to ensure value for money for the taxpayer.

Process and Methodologies

Cabinet Office guidance

This Review has been completed in line with Cabinet Office guidance³.

9. Cabinet Office guidance requires that the first stage of the review should identify and examine the key functions of the NDPB. It should assess how the functions contribute to the core business of the NDPB and the sponsor department and consider whether the functions are still needed. Where the department concludes that a particular function is still needed, the review should then examine how this function might best be delivered.
10. When assessing how functions should be delivered, the review should examine a wide range of delivery options. This should include whether the function can be delivered by local government or the voluntary or private sectors. It should also include an examination of different central government delivery models, including whether the function can be delivered by the sponsoring department, by a new or existing Executive Agency or by another existing central government body. It is Government policy that NDPBs should only be set up, and remain in existence, where the NDPB model can be clearly evidenced as the most appropriate and cost-effective model for delivering the function in question. Reviews must evidence that functions have been assessed against a wide range of delivery options.
11. In many cases, some delivery options can be quickly rejected. However, for each function under consideration, the review should identify all viable delivery options and undertake a fuller assessment of these options. Where appropriate, this should include a cost and benefits analysis. If one of the delivery options is the NDPB option, this must also include an assessment against the government's 'three tests':
- a) Is this a technical function (which needs external expertise to deliver)?
 - b) Is this a function which needs to be, and be seen to be, delivered with absolute political impartiality (such as certain regulatory or funding functions)?
 - c) Is this a function which needs to be delivered independently of Ministers to establish facts and/or figures with integrity?
12. Based on these fuller assessments, the department can then make an informed decision on how the function should be delivered in the future:
- Abolish
 - Move out of Central Government (e.g. to voluntary or private sector)

³ See also <http://www.cabinetoffice.gov.uk/sites/default/files/resources/Cabinet-Office-Guidance-on-Reviews-of-Non-Departmental-Public-Bodies.pdf>

- Bring in-house (e.g. to an existing Executive Agency)
- Merge with another body
- Delivery by a new Executive Agency
- Continued delivery by an NDPB

The Ministry of Justice approach

13. To ensure consistency of approach to the programme of MoJ Triennial Reviews, guidance was issued for use by all the review teams to be set up for each NDPB. The guidance was based on that issued by the Cabinet Office and was developed to the particular needs of the Department. The MoJ programme of reviews is also overseen by a central Senior Responsible Officer. The Law Commission is the fifth MoJ body to be reviewed in this way.
14. The review has been governed by a Project Board and supported by a Critical Friends Group. The Project Board is comprised of officials from the review team as well as representation from the legal, finance and communications directorates and the Arm's Length Body Governance Division. The Chief Executive of the Law Commission also has observer status on the board. A full list of members is at Annex C.
15. The Critical Friends Group provides robust challenge to the review and includes representation from the MoJ's triennial review programme, the Department for Business Innovation and Skills (BIS), the Department of Health (DH), Cabinet Office and the Nuffield Foundation, and is chaired by the Deputy Director from MoJ responsible for Triennial Reviews.

Call for Evidence

16. The call for evidence on the Triennial Review was issued on 9 January 2013, lasting until 6 February 2013. This was published as a public consultation open to all respondents, via the MoJ website,⁴ and publicised directly to interested stakeholders. A written ministerial statement was made in both Houses of Parliament⁵ confirming the start of the call for evidence and the process being used by the MoJ in the review.
17. The call for evidence received 46 responses: eleven from Government, devolved administrations and the wider public sector; four from practitioners, 15 from academics, six from professional groups, three from the judiciary and seven others. The Law Commission itself also put in extensive evidence. The call for evidence and a list of respondents are included at the end of this report.

Evidence from the call for evidence has been incorporated into this report at the appropriate stages of the analysis. This evidence has been supplemented by comparative evidence from other jurisdictions based on research undertaken by the review team.

⁴ <https://consult.justice.gov.uk/digital-communications/law-comm-triennial-review>

⁵ Official Report 9 Jan 2013: Column 18WS.

Functions of the Law Commission

18. This section of the report will look at the functions of the Law Commission, which are set out in LCA 1965 s3 (reproduced in full at Annex D). The Commission's functions are expressed in two ways: firstly, the substantive function it exists to undertake (its duty); and, secondly, the procedural functions that give effect to that duty.
19. The Law Commission's jurisdiction covers England and Wales, and will be referred to in this way throughout this report. However, it should be noted that this also includes reserved areas of law applicable across the whole of Britain or the UK. The Law Commission undertakes projects on these areas in partnership with its sister organisations in Scotland and Northern Ireland.
20. This review extends to the statutory provisions governing the functioning of the Law Commission. Both the Law Commission and the Welsh Government have drawn attention to certain concerns about the current arrangements, having regard to the fact that the Welsh Government now has extensive legislative powers pursuant to the Government of Wales Act 2006 Part 4. In this regard, both have pointed to the lack of any statutory machinery which would permit the Welsh Government to refer a law reform matter directly to the Commission pursuant to the LCA 1965 s3(1)(e). In addition, the Welsh Government has drawn attention to certain other features of the statutory scheme governing its relationship with the Law Commission which it considers need to be reformed.
21. While falling within the scope of the Triennial Review because they relate to the powers and functions of the Law Commission, these submissions also raise wider questions relating to the devolution settlement and it is therefore proposed that they should not be pursued within the mechanism of the Triennial Review but considered separately by both Governments and the Commission.

Substantive functions

22. The Law Commission's purpose is to keep the law under review and to recommend reform where it is needed. It aims to ensure that the law is fair, modern, simple and as cost-effective as possible. This function is expressed in the LCA 1965 s3(1) as:

"To take and keep under review all the law [of England and Wales] with a view to its development and reform, including in particular the codification of such law, the elimination of anomalies, the repeal of obsolete and unnecessary enactments, the reduction of the number of separate enactments and generally the simplification and modernisation of the law."

23. This provision breaks down into a number of different areas, which need to be considered separately. Firstly, there is the general, over-arching function, or duty, of keeping the law under review, with a view to development and reform. Underpinning this are three more specific aspects that are mentioned as part of the main function.
24. These three specific aspects represent the main strands of the Law Commission's work and are described in more detail below.

i) The codification of... law, the elimination of anomalies, [...], the reduction of the number of separate enactments

25. This essentially covers codification and consolidation of areas of law, which are two different functions that share some similar characteristics. In both instances, the aim is to clarify and simplify the law. Codification is the bringing together of a particular area of law into statute, in

cases where some or all of it has previously existed only at common law. Consolidation, by contrast, brings together into one place the legislation in a particular area that is distributed over a number of statutes. Consolidation will usually be appropriate where there is a need to rationalise the form and structure of the legislation as well as to modernise or improve the language – but this has to be done without changing the effect of the law. There is some scope for minor changes of substance to improve the consolidation on the recommendation of the Commission.

26. The Commission has in the past pursued some separate codification projects, though often the codification element was an aspiration rather than an immediate aim. The Commission has undertaken some more recent stand-alone projects involving codification of specific parts of the law, for example its ongoing projects on the simplification of law on kidnapping and public nuisance, which could be a precursor to full codification. However in practice codification work is currently only undertaken in the context of law reform projects (see below), so that the law is simultaneously brought into one place and up to date.
27. Consolidation, by contrast, is undertaken as a stand-alone exercise that is separate from the Commission's law reform projects. Since 1965 the Commission has been responsible for over 200 consolidation Acts, having taken over a function previously carried out elsewhere in Government. Most of the work on a consolidation is done by an experienced Parliamentary Counsel (whether based at the Law Commission or working under arrangements made by the Commission) with some support from the responsible department. The most recent example is the Charities Act 2012, which brought together a large number of complex (and often arcane) charity law statutes into a single Act and has been very much welcomed by the charity sector and practitioners.
28. The Commission's consolidation Bills have the advantage of a truncated Parliamentary procedure that prevents significant debate on the merits of the law being consolidated. A consolidation Bill will be scrutinised for its technical accuracy by a Joint Committee, but other proceedings in Parliament are usually largely formal and do not take up much time on the floor of either House. This means not only that a consolidation Bill will almost inevitably be enacted, but that it is relatively easy to secure collective agreement to the introduction of a completed Bill. Consolidation Bills do not have to compete for Parliamentary time with other Government Bills.

ii) The repeal of obsolete and unnecessary enactments

29. This function is in many ways self-explanatory, in that the Commission undertakes a regular process to identify and repeal Acts, or parts of Acts, which are obsolete and therefore no longer need to remain on the statute book. This process works in a four-yearly cycle involving the identification of potential candidates for repeal (by the Commission and external stakeholders), consultation with interested parties to test that provisions are truly obsolete, and the production of a report and accompanying Bill setting out a list of provisions deemed appropriate for repeal. While the majority of the measures included will be relatively old, there is also scope to include more modern provisions where appropriate. The most recent Bill included some tax measures from 2010.
30. A Statute Law (Repeals) Bill recommended by the Law Commission (usually by a joint Report made with the Scottish Law Commission) passes through the same truncated Parliamentary procedure as a consolidation Bill. The most recent Statute Law (Repeals) Act, which was the 19th, received Royal Assent on 31 January 2013. It repealed 817 Acts and parts of 50 other Acts.

iii) Generally the simplification and modernisation of the law

31. This final element of the overarching duty is something of a catch-all category for the general work of law reform. It is designed to give the Commission flexibility and in practice actually incorporates the vast majority of the Law Commission's work, the development and delivery

of law reform programmes. Much of the process for developing and delivering Programmes is set out in the Commission's procedural functions, which are discussed below.

32. Law reform programmes are currently produced on a three-yearly cycle, and the Commission is now mid-way through its 11th Programme, which runs from 2011-14 and covers 14 individual projects. Projects are selected by the Commission based on extensive consultation with stakeholders, including Government departments, the judiciary, academics, practitioners and the general public. Once suggestions have been sifted and a final list drawn up, the list is approved by the Lord Chancellor and laid before Parliament.
33. Depending on their size, law reform projects are usually around three years in delivery. The Commission will look at the area of law in a high degree of detail and identify both potential reform proposals and areas for further consideration. These are then consulted upon with experts and the wider public, before being refined into a final report (which will in many cases be accompanied by a draft Bill to give effect to the recommendations). This report is then presented to Parliament and Government decides whether to accept or reject the proposals. Accepted proposals will usually be implemented, frequently via primary legislation. The most recent example is the Trusts (Capital and Incomes) Act 2013, which resulted from the Commission's report, *Capital and income in trusts: categorisation and apportionment*.⁶
34. Bills published alongside law reform reports which are technical and uncontroversial (which is the majority) have also been accorded their own Parliamentary procedure in the House of Lords which enables much of the debate to take place off the floor of the House, avoiding the need to take up a slot in the main legislative programme and facilitating more rapid progress. The House of Lords introduced this procedure in order to help speed the implementation of a larger number of Law Commission measures and full details of its operation can be found in the relevant Procedure Committee report.⁷

Analysis of functions

i) The over-arching duty to keep the law under review

35. The purpose of the over-arching duty to review, develop and reform the law is to maintain the law and ensure it is fit for purpose.
36. The Government has a commitment to "*assuring better law*," which is set out in the fourth strand of MoJ's Business Plan and seeks to "*assure that law-making is transparent and accountable, safeguarding civil liberties and enabling citizens to receive the proper protection of the law*."⁸ This function therefore has a clear grounding in MoJ's work and priorities.
37. All respondents to the call for evidence felt this function should be maintained.

"I can state unequivocally that in my view the Law Commission continues to play a vital role in helping to shape the criminal law in England and Wales and that its functions are still very much required."

Keir Starmer QC, Director of Public Prosecutions

38. Respondents highlighted that the cumulative effect of the piecemeal development of common law and the process of amending statute law by separate, subsequent Acts is that the law in many areas can and does, over time, become voluminous, complex, outdated and difficult for citizens to understand. Separately from these technical issues, the pace of

⁶ Law Com No 315 (7 May 2009)

⁷ The Procedure Committee, First Report of Session 2007-08 (HL 63, 29 February 2008)

⁸ MoJ Business Plan 2011-15, page 18.

change in wider society often means that laws become obsolete or ineffective if left unamended. For example, the growth of the internet and social media has had significant implications for the conduct of criminal trials (for example, jurors conducting internet searches about defendants), a point which is being considered by the Commission in its current review of contempt of court.⁹

39. In view of both the complexity of the law in many areas, and the speed at which both law and society develop, there is a clear need for Government to be able to review the law regularly, as it would otherwise become increasingly complex and opaque, resulting in uncertainty, a greater reliance by individuals and organisations on legal advice and greater expense in procuring that advice.

“The increasing complexity of personal, business and social relations and the rapid pace of development and change means that the duty to keep the law under review is now even more vital.”

The Society of Legal Scholars

“UK insurance law is outdated and in need of reform. This need is both to protect consumers and also to maintain the UK's competitive position in global insurance. The Law Commission have been driving this reform [and] no other body could have achieved these important results for UK businesses.”

AIRMIC (trade body)

40. The Government has also considered whether, in the face of the high volume of change and the inevitable limitations on the resources available to the Commission, this function continues to be justified in terms of the amount of change it is able to effect. However, it would be unrealistic to expect the Commission (or any other body) to be able to take an exhaustive approach to reforming the law. The Commission rightly focuses its resources on the most suited to its technical remit and most urgently in need of consideration. In these areas, it has a strong track record of delivering practical change; a recent example is reforms to adult social care, which are now the subject of the Draft Care and Support Bill, currently undergoing pre-legislative scrutiny.
41. Some consultees specifically raised the fact that the function is very wide, encompassing as it does ‘all the law’, and went on to consider whether that breadth was required. They too concluded that the breadth was necessary on grounds that the flexibility is helpful.

“While its limited but very well-used resources necessarily limit the number of areas of law which the Law Commission can at any one time be addressing, it is important that in principle its remit remain comprehensive of the whole law, not least because attempts to remove some specific areas from its remit might turn out to be counterproductive.”

Academic

42. The continuing need for the function is also borne out by comparative evidence from overseas. Since the creation of the Law Commission, not only have the devolved administrations found it helpful to establish or maintain similar bodies in their own jurisdictions, but a number of other common law jurisdictions, including Ireland, Australia and New Zealand, have adopted not only the same idea of creating a specific body to discharge the function of law review and reform, but a very similar structure and approach.

⁹ See <http://lawcommission.justice.gov.uk/areas/contempt.htm> for further information on this project

ii) *The codification of... law, the elimination of anomalies, [...], the reduction of the number of separate enactments*

43. All but two respondents to the call for evidence favoured maintaining the codification function overall. The minority who favoured removal felt that codification was something of an anachronism (though did not have the same objection to consolidation).

“The 1960s fashion for codification that helped to create the Law Commission has largely fallen away, but the need for a body to keep our law under review is as pressing now as it was then.”

Academic

44. Some of those in favour of retention saw a need for the codification function but considered that its delivery could be improved. The issues of concern are that not many codification projects on any scale have been attempted and that the chances of success are limited. Their perception was that there was always a risk such projects could end in failure or non-implementation, due to the inherent complexity and difficulty of the exercise in many cases, in particular the delicate balances that have to be drawn on the extent to which law can and should be changed to enable it to be brought together effectively.

“I am a little unsure as to the codification function. Personally, I think codification is desirable. If, however, the Commission continues to have a poor track record in implementing more ambitious codification projects (e.g. a criminal code), then it is a waste of resources to allow it to continue to pursue this function.”

Academic

45. The Commission itself acknowledges in its evidence that while codification is a desirable aim for some areas of law the practicalities mean that in many cases specific law reform projects are a higher priority. But they can and do consider whether specific projects should include an element of codification. We have considered whether, in light of this, it is necessary to maintain the codification function separately from the general simplification and modernisation function below. However, we have concluded that codification is a qualitatively different function from reform of statutes that already exist and that the function of bringing into statute law that has not existed in that form before should be explicitly recognised as a function in its own right (albeit one that operates alongside simplification).

46. As for consolidation, the respondents who addressed it all favoured maintaining it as one of the Law Commission’s functions. That supports the Commission’s own view that there is a continuing need for consolidation, not least because of the volume of new and amending legislation produced each year.

47. Respondents also highlighted that, where projects are successful, the clarity they bring is extremely helpful and can produce benefits such as reduced red tape for individuals and businesses.

“The English habit of amending legislation by the insertion of new sections but without re-enacting the new complete text also makes attempts to discover what the current law is unduly burdensome for the layperson... [T]he rule of law is not aided by having laws apparently in force which are in fact obsolete and this may have a chilling effect on economically valuable activity.”

Academic

48. The overwhelming support for the consolidation function is also supported by the fact that Government continues to value work of this type: the Prime Minister last year announced the consolidation of the law on co-operative societies in order to facilitate the growth of mutual societies and co-operatives, which the Commission has accepted as a project.

49. A number of consultees made the point that, as a matter of principle, codifying and consolidating law is particularly important in relation to the criminal law. Their view was that the state's rules on what conduct will and will not be punished should be as clear as possible in order for citizens to comply with them. These functions are necessary in order to achieve that and are also clearly supportive of the Government's drive to prevent the proliferation of criminal offences¹⁰ via the criminal offences gateway process.¹¹

"It is an important aspect of the rule of law that the law be accessible by those who are subject to it. This cannot be said of whole swathes of English law, not least criminal law, which ought arguably to be the first candidate for codification on this basis since this is the law used coercively by the state against its citizens, an arena where the rule of law is of the highest importance."

Academic

iii) *The repeal of obsolete and unnecessary enactments*

50. This function has an important role in reducing regulation and red tape, helping to remove unnecessary law and making the statute book more accessible for individuals and businesses applying it. For example, as noted above, the most recent Statute Law (Repeals) Bill included tax law provisions from 2010 that had been overtaken by subsequent changes but were still technically in force and therefore a potential source of confusion. This function of removing obsolete and unnecessary legislation complements the Government's Red Tape Challenge process, which aims to identify and remove legislation that, while still in active use, is deemed unnecessary and unhelpful.¹²

51. There was some limited discussion of the value of the repeals function among a few respondents to the call for evidence. This minority felt that the function was not perhaps the best use of limited resources, as obsolete law has no practical effect and therefore does no harm.

"We consider that there is a case for repealing some provisions which are outdated...particularly old criminal offences. However, we remain to be convinced that in these straitened times the Law Commission should spend too much of its precious time and resources in considering whether other obsolete provisions should be repealed."

The Bar Council

52. However, as with other functions, most respondents were in favour of its retention. This was not only based on the principle of rule of law and the benefits of an accessible statute book but also reflected the fact that the function remains in regular use, an argument borne out by the function's links to Government priorities. As the volume of statute law passed in 2009 alone stood at 23 Acts and 2247 pages,¹³ the need for repeal is likely to remain in future.

"Our legislative history is incredibly rich, but also incredibly complex...referring to legislation dating back centuries, or gumming searches and statute books by being in force but without effect through obsolescence is not sensible."

Academic

"It is still easier to get law onto statute books than to clear it off, so repeal and consolidation [and] codification are perennial issues, particularly as they are rarely Ministerial or legislative priorities."

Nuffield Foundation

¹⁰ *The Coalition: Our programme for Government* (May 2010), page 11

¹¹ See <http://www.justice.gov.uk/legislation/criminal-offences-gateway>

¹² See <http://www.redtapechallenge.cabinetoffice.gov.uk/home/index/>

¹³ P Vollmer and A Creagh, *House of Lords Library Note: Volume of Legislation*, LLN 2011/028 (September 2011)

“The fact that [the most recent Statute Law Repeals report] was the 19th such report and that this latest work led to the repeal of 817 whole Acts (and 50 others in part) suggests that this function is still rather necessary.”

Society of Legal Scholars

iv) Generally the simplification and modernisation of the law

53. Much of the rationale for this function is the same as for the overall objective of reviewing, developing and reforming the law; simple, modern, effective law is important as a matter of principle. Law reform projects give effect to this function in relation to the specific branch of law they consider. This function was supported by all respondents to the call for evidence on these grounds.

“The value of the work of the Law Commission is to consider areas where the law is in need of reform and make proposals to Parliament who can reform the law. Many of these issues are not significantly political matters and can be considered by some as rather arcane and technical. This means that they do not necessarily come to the attention of other parts of the Government, Parliament or the wider public. However, this does not mean that such work is not important. The work that resulted in the Perpetuities and Accumulations Act 2009 within trust law is a classic example of this.”

Academic

54. Many respondents also pointed to the value that this function has delivered over the years in terms of improving the law. While acknowledging the technical nature of many of these areas, respondents pointed to the practical need for reform and the value of the work done by the Commission in pushing law forward in a range of areas.

“The project considering election law is vital work, as it is an area in need of simplification and rationalisation, but there is no other appropriate body to undertake such a task.”

Academic

“The law on recklessness in criminal law is now that put forward by the Law Commission in its draft criminal code... in the case of R v G in 2003, [2004] 1 AC 1034, Lord Bingham expressly drew upon the careful analysis of the Law Commission and incorporated it into the law of England. [...] There are many, many examples of the Law Commission's work being of immense value to judges, academics, politicians, charities and students.”

Academic

55. Whilst it is clear that this catch-all function has the potential to go wider than the law reform programme work that is currently its main substance, no respondents recommended narrowing the focus. Change in law and society is unpredictable and it is helpful for the Law Commission to have flexibility to adapt its work built into its founding statute, in order for it to meet identified needs now and in future without recourse to amending legislation.

The overwhelming weight of evidence from respondents to the call for evidence is in favour of retaining all of the Commission's substantive functions. The Government agrees with this conclusion, in view of the clear contribution these functions make to the development of better and more effective law.

Procedural functions

56. In order for the Law Commission to deliver the substantive objectives above, the LCA 1965 s3(1) also sets out a number of specific process functions as follows:

(a) to receive and consider any proposals for the reform of the law which may be made or referred to them;

(b) to prepare and submit to the Minister from time to time programmes for the examination of different branches of the law with a view to reform, including recommendations as to the agency (whether the Commission or another body) by which any such examination should be carried out;

(c) to undertake, pursuant to any such recommendations approved by the Minister, the examination of particular branches of the law and the formulation, by means of draft Bills or otherwise, of proposals for reform therein;

(d) to prepare from time to time at the request of the Minister comprehensive programmes of consolidation and statute law revision, and to undertake the preparation of draft Bills pursuant to any such programme approved by the Minister;

(e) to provide advice and information to government departments and other authorities or bodies concerned at the instance of the Government [of the United Kingdom or the Scottish Administration] with proposals for the reform or amendment of any branch of the law;

(f) to obtain such information as to the legal systems of other countries as appears to the Commissioners likely to facilitate the performance of any of their functions.

57. The first three of these functions provide the underpinning for the Commission's law reform programmes that, as noted above, form the bulk of their work. The fourth supports consolidation and statute law repeals.

58. The fifth and sixth are less directly linked to a particular function. While the sixth is self-explanatory, the fifth function, providing advice and information, covers a number of areas. Most notably, it allows Ministers to refer requests for advice or recommendations on a particular area of law to the Law Commission for their consideration outside the scope of the three-year Programme cycle (for example, the recent request for the Commission to consider the potential expansion of a number of hate crime offences, pursuant to the Government's Hate Crime Action Plan¹⁴).

59. The advisory function also underpins the Commission's work in providing legal advice to Government on technical matters where reform recommendations are not appropriate. For example, the Law Commission is supporting the Department for Business, Innovation and Skills by advising on the proposed European contract law system¹⁵ and was recently approached again to provide advice on the Kay review¹⁶ of the effect of UK equity markets on the competitiveness of UK businesses.

Analysis of functions

60. Considering these functions requires a temporary assumption that the Law Commission will continue as the delivery model for these substantive functions but this is unavoidable given the structure of the underlying statute. Should the existing organisational form be deemed the most appropriate, this analysis will be applied. However, if the Commission does not continue, it may also provide helpful guidance for the design and operation of alternative delivery models.

(a) To receive and consider any proposals for the reform of the law which may be made or referred to them;

61. All respondents to the call for evidence supported retention of this function, as it was held to serve two important purposes. Firstly, it underpins the Commission's very thorough and robust approach to consultation on its Programmes of law reform. The Commission begins

¹⁴ See <http://lawcommission.justice.gov.uk/areas/hate-crime.htm>

¹⁵ See http://lawcommission.justice.gov.uk/areas/unfair_terms_in_contracts.htm

¹⁶ Professor John Kay, *The Kay Review of UK equity markets and long-term decision-making: final report* (July 2012)

the development of every Programme by consulting as widely as possible for suggestions; anyone, including the general public, can submit ideas, and the Commission engages proactively with a very wide range of groups including Government, businesses, professional bodies, academia and practitioners. This open and inclusive approach to policy development, at a very early stage, is a good example of the principles of open policy-making in action.

“The Law Commission is the only body currently in a position to undertake a neutral, in-depth analysis of the legal issues/reform needs, being able to liaise with practitioners, judges and academics in a way that no other body, governmental or otherwise, can. This is most clearly evidenced by consultation papers recently published by Government departments, which not only lacked intellectual rigour and left little room for actual consultation but also were misconceived... The Law Commission, on the other hand, is in a position to consult more widely at even the initial stages, unrestrained by departmental and political pressures.”

Academic

62. In addition, this function ensures transparency and accountability in the Commission’s relationships with Government, Parliament and its wider stakeholders, in that the Commission cannot simply operate in a vacuum but must work with stakeholders, including Government, to decide its approach.

63. In turn, the function also gives stakeholders involved in the Commission’s work reassurance as to the Commission’s independence and the level of control it has over its own work. Respondents to the call for evidence emphasised very strongly that it is this independence on which much of the Commission’s reputation, and ability to engage with senior stakeholders, is based and that it therefore must be retained. Engagement with senior academics, practitioners and other groups adds a great deal of value to the Commission’s work, in that they have pro bono access to the benefit of large volumes of expert advice.

“It is important that it retain at least the degree of freedom that it currently enjoys to pursue its programme of work free from political interference or the appearance of/potential for that.”

Academic

“It is very important that it retain its independence and not be merged or placed closer to government. Its functions and success depend on its independence.”

Academic

(b) To prepare and submit to the Minister from time to time programmes for the examination of different branches of the law with a view to reform, including recommendations as to the agency (whether the Commission or another body) by which any such examination should be carried out;

64. There are a number of obvious benefits of the Law Commission being charged with producing lists of projects in advance, in terms of allowing both the Commission and Government to plan resources and engage with those affected by the work at an early stage.

65. However, this function, like the one above, was seen by respondents as delineating the relationship between the Law Commission and its stakeholders, in this case Government. This again goes to the independence of the Commission, the importance of which is discussed above.

66. A small minority of respondents to the call for evidence queried the role of Ministers in Programme sign-off.

“Subject to the usual Treasury control, it should have complete freedom regarding choice of work topics, except that exceptionally the Lord Chancellor should be able to require it to undertake specific work.”

Academic

67. The alternative view put forward, with which the Government agrees, is that for Government to have no oversight of the Commission's work programme would be inappropriate, given that public money is being used to fund the work. Having this relationship on a clear statutory footing is a transparent way of preserving the independence of the Commission, while allowing the Government an appropriate degree of oversight.

"That the programme of the Commission has to be canvassed with and agreed by the Minister is an essential democratic safeguard but the independence of the Commission allows the programme to take open submissions from outside Government."

Nuffield Foundation

68. Mechanisms of statutory oversight are common in international practice, though the examples show that the balance can be drawn at a number of points. The Law Reform Commission of Ireland operates a very similar system to the Law Commission here for how its work is determined. By contrast, in Australia, the Law Reform Commission can only accept projects referred by the Attorney General (though it can make its own suggestions for projects that the Attorney could refer). The New York State Law Revision Commission chooses its own programmes entirely, though its structure contains state Senate representatives in an ex-officio capacity, offering an alternative oversight mechanism.

(c) To undertake, pursuant to any such recommendations approved by the Minister, the examination of particular branches of the law and the formulation, by means of draft Bills or otherwise, of proposals for reform therein;

69. This function is essential to the delivery of the Commission's work on law reform programmes and follows naturally on from the function of setting lists of projects to complete. Its necessity was agreed by all respondents to the call for evidence.
70. However, the power to prepare draft Bills has advantages in its own right. It ensures research and drafting work are well-joined up and removes the need for a detailed and complex handover to Government.

"[D]rafting of Bills [is] essential to delivering to government a reform which is ready to go before Parliament - the discipline of drafting also ensures well-honed, workable policy and so is indispensable."

Academic

71. As noted in relation to its substantive functions, above, the Law Commission is also able to take advantage of an adapted legislative process for passing uncontroversial Bills that is not afforded to other types of legislation. This reduces pressure on the Parliamentary timetable and offers Government a quick and efficient route to introducing such reforms.

(d) to prepare from time to time at the request of the Minister comprehensive programmes of consolidation and statute law revision, and to undertake the preparation of draft Bills pursuant to any such programme approved by the Minister;

72. This function is a necessary corollary of retaining the substantive consolidation and statute law repeal functions above. This was recognised by responses to the call for evidence, all of whom were in favour of retaining this function.
73. As the purpose of consolidation and repeals work is to produce a Bill, it follows that a power to do so is a necessary part of the function. However, there are also efficiency arguments in favour, in that Bills of both type have the advantage of a special procedure in Parliament which ensures that they are adequately scrutinised for their accuracy, while taking up the minimum time on the floor of either House.

(v) Providing advice and information as requested to Government departments and other bodies who are undertaking work on the reform or amendment of the law;

74. All respondents to the call for evidence supported retention of this function. The ability to refer new issues to the Commission under this function provides useful flexibility for Government and the Commission to deal with important matters as they arise, without the delay of waiting for a new Programme, as in the hate crime example discussed above. More generally, this function allows effective sharing of information across Government and other bodies.

“The [Law Commission] role supporting Departments perhaps should grow, because in these cases the work feeds into an active policy process and is more likely to result in change.”

Individual

75. The Law Commission has built up a huge amount of expertise in both the law itself and robust reform methodologies, and giving them a clear mandate to share that knowledge gives Government a valuable source of evidence to underpin policy and reform work. The two examples given above (para 59), of European contract law and the Kay Review, demonstrate this in practice. Making use of the Law Commission’s existing expertise is also a very cost-effective approach.

76. In the call for evidence, there was one concern that this advisory function clashed with, and potentially undermined, the Commission’s role as an independent NDPB.

“The advice function is slightly problematic in that there does appear to be another identity crisis in precisely how independent the Commission is from Government. Perhaps there is a need for the Commission to be split into two parts (or two bodies) - one which works on programmes of law reform and the other which acts more as a Government think tank.”

Academic

77. However, the majority felt it was helpful and an acceptable use of the Commission’s resources.

“Having an experienced body of lawyers able to advise departments is a useful resource”

Individual

(vi) *Information-gathering on the legal systems of other countries to help the Commission perform any of its functions.*

78. All respondents to the call for evidence except one were supportive of this function remaining. International evidence and comparison is a helpful form of research, providing fresh perspectives on difficult issues and helping to avoid duplication of effort through adopting existing approaches.

“With growing internationalisation of law comparison is essential.”

Individual

“As part of its review of the law of contempt, the Law Commission carried out research on the laws of contempt in other common law jurisdictions... This is a role it is well-placed to fulfil given its connections and resources, and helps ensure that its ultimate recommendations will be well-informed by relevant experience from other countries.”

Attorney General’s Office

79. The one respondent in favour of removing this function argued not that the Law Commission should not be undertaking comparative work but that it was unnecessary for the function to have a statutory underpinning. The respondent therefore felt it could safely be removed and the Commission left to continue its work in this field regardless. Whilst the Government can see force in the view that this function need not be statutory, the resources required to amend the legislation would be significant and the practical benefits very limited. It is

therefore our view that repeal of this sub-provision alone would be disproportionate. Should other, more substantial amendments be required as a result of this review, this sub-clause will be considered for inclusion within that process.

Again, the vast majority of evidence received is in favour of retaining all functions. While it is arguable that international comparative work need not exist as a statutory function as it requires no legal underpinning, the Government's view is that to make this small amendment to the statute would be disproportionate in view of the time and resource required to make what would be an entirely symbolic change. We have therefore concluded that, should the Law Commission continue to exist in its current form, these functions should all be retained.

Additional functions

80. As part of the call for evidence, respondents were asked whether the Law Commission should be given any additional functions. Not all respondents felt anything should be added but those who did divided into two broad groups.
81. Firstly, a significant number of respondents saw a need for the Commission to have more resources (in terms of both staff and money). This was to allow it to deliver its existing functions more easily and, ideally, in higher volume. Secondly, and in some cases linked to the first point, a number of respondents felt that implementation rates for Law Commission reports should be improved, though there were no suggestions as to specific powers that would achieve this. Some felt closer alignment with Government would be helpful, while others felt an increased degree of independence would be more effective though, again, the routes to achieving this were unclear.
82. As resourcing is not a statutory function, it is outside the scope of this area of the Review. Similarly, improving implementation cannot be a function and it is not apparent, nor were there any suggestions, as to how implementation of its own reports could be undertaken by the Commission itself. However, should this review move to Stage 2, these issues will be considered insofar as they are within the scope of the governance matters concerned.

In view of the evidence received and the considerations above, the Government has concluded the Law Commission should not be given any additional statutory functions at this time.

Form of the Law Commission

83. Following on from the conclusion that the Law Commission's functions remain necessary to Government, this section considers the most appropriate mechanism for delivery of the substantive functions. In light of the conclusion that the functions remain necessary, and to provide a fair basis for comparison of different models, the analysis assumes that the volume of work currently undertaken by the Commission would continue.¹⁷
84. The analysis considers each model from the point of view of both cost and quality of outcome.
85. Consideration has been given to whether the Law Commission's functions could be divided and delivered using different mechanisms. While the options below explore this in more specific contexts, it should be noted that delivery of the Law Commission's functions through a single mechanism was found to have advantages. Not only does this allow the organisation to retain its institutional memory but it allows different areas of work to be brought together in the same project, with beneficial results, for example combining codification and simplification work. A strong case will therefore need to be made for functions to be divided.

Current organisational form and structure of the Law Commission

86. The Law Commission pre-dates the current classification system for Arm's Length Bodies and therefore has a somewhat unusual structure, though it is now categorised as an advisory NDPB as the most appropriate classification given its form and functions.
87. Legally speaking, under LCA 1965 s1(1), the Commission itself actually consists only of the Chair and four other Law Commissioners. While the Chair has overall responsibility for the work of the Commission, as well as special responsibility for consolidation and repeals projects, each of the Commissioners leads on a particular area or areas of law; commercial and common law, criminal law, public law and property, family and trust law.
88. However, the Chair and Commissioners are in practice supported by a team of Civil Servants, as envisaged by LCA 1965 s5(1). There are currently 19 lawyers, who work directly to the Commissioners on delivery of law reform projects and other substantive functions. The Commission also employs around 18-21 Research Assistants on an annual basis to further support its substantive work. The Commission also has two Parliamentary Counsel on full-time loan to undertake Bill-drafting work. On the corporate side, the Commission has a Chief Executive and a small number of other supporting staff, giving an overall headcount of around 60 FTE.
89. The Law Commission receives its core funding via the Ministry of Justice. Its funding for the financial year 2012/13 was £3.4m.
90. To assist in demonstrating the value for money of the service the Law Commission provides, set out below is a table showing a breakdown between staff and non-staff costs for the last three to five years:

¹⁷ The Commission's programmes of work usually consist of around 12-15 projects (depending on size of project). In addition, it undertakes the four-year cycle of statute law repeals work plus 1-2 consolidation projects at any one time (which will take, on average, 2 years per project).

Financial year	Allocation	Staff costs	Other	Income
2010-11	£4,119,120	£3,701,015	£418,105	0
2011-12	£3,442,930	£3,395,540	£267,831	-£220,441
2012-13	£3,400,000	£3,647,000	£473,467	-£720,467
2013-14	£3,112,000	£4,011,000	£300,000	-£1,199,000*

* Please note the income for 2013-14 is estimated

Options analysis

91. The table below sets out an overview of the different possibilities for delivery of the Law Commission's functions and whether they are potentially viable as an approach. Those which are in principle viable (shaded yellow) have been considered in more detail below. The different models considered are those set out in the Cabinet Office guidance on Triennial Reviews.

Delivery model	Potentially appropriate?	Comments
Abolish	No	<ul style="list-style-type: none"> As this Review has determined the Commission's functions should continue, abolition is only appropriate in the context of replacement by an alternative delivery model.
Maintain the status quo (NDPB – using the three tests)	Yes	<ul style="list-style-type: none"> The Law Commission currently exists as an NDPB. This is the most appropriate model due to the need to maintain both its technical expertise and independence from Government. It was also found to be the most cost-effective approach. This model was supported by all respondents to the call for evidence.
Bring inside Government department (MoJ)	Yes	<ul style="list-style-type: none"> It would be possible in principle for all the functions of the Law Commission to be delivered by MoJ and this option is explored further below. However, this would be unlikely to save significant amounts of resource. It is also unlikely that MoJ would be able to deliver the same volume of work to the same quality as the Law Commission. In particular, the loss (or at least perceived loss) of independence from external pressure would likely result in a loss of the expert support the Commission currently enjoys, with consequent effects on the work produced. There would also be concerns about the potential to reflect the full range of cross-Government legal issues and topics within a single department. No respondents supported delivery through this model.

Delivery model	Potentially appropriate?	Comments
Move to the local, voluntary or private sector	Yes	<ul style="list-style-type: none"> • Devolution of responsibility to local government would not be appropriate (or possible) as these functions concern reform of national law. • It would be possible in principle for law reform projects to be undertaken by the private or voluntary sectors, and this option is explored further below. • However, it is very unlikely that repeals, consolidation and codification could be delivered externally due to the highly specialist skills required. This work would have to be moved into a Government department or continued by a smaller version of the Commission. • The loss (or at least perceived loss) of independence from external pressure would likely result in a loss of the expert support the Commission currently enjoys, with consequent effects on the work produced. • It is also unlikely this work could be delivered as cost-effectively as under the current model. • No respondents to the call for evidence supported this model.
Establish new NDPB	No	<ul style="list-style-type: none"> • The Law Commission already exists as an NDPB. • If delivery of law reform projects were to be through the private or voluntary sector, there would be an argument for creating a new NDPB from the existing Commission to continue repeals, consolidation and codification work.
Move to an executive agency	No	<ul style="list-style-type: none"> • This would not be appropriate for the Law Commission as it has no executive functions to deliver; its role is advisory only. • No respondents to the call for evidence supported this model.
Merge with another body	No	<ul style="list-style-type: none"> • No existing NDPBs have been found with whom the Commission shares any similar functions, so it is unlikely that merger would deliver any benefits. • No respondents to the call for evidence identified any candidates for merger, with some explicitly stating that none existed.

Continued delivery as an NDPB

92. In order for the Law Commission to continue as an NDPB, it must meet at least one of the Government's three tests:
- Does the body perform a technical function?
 - Do its activities require political impartiality?
 - Does it need to act independently to establish facts?
93. The original Public Bodies Review in 2010 concluded that the Law Commission delivered a technical function that required independence from Government (impartiality).
94. All respondents to the call for evidence were in favour of retaining the Commission in its current form. The need for the Commission to be politically impartial, and the strong support

for this from respondents, remains important for two reasons, as has been discussed elsewhere in this paper.

95. Firstly, in the delivery of all its law reform projects, the Commission enjoys the support of a wide range of academics, research bodies and other experts who contribute to the Commission's work (often on a pro bono basis) because it is an independent body producing impartial, evidence-based recommendations. The value placed on this by those who responded to the call for evidence was extremely clear.

"It is crucial that the Commission is an arms length body. To convert it into an Executive Agency compromises all the independence and freedom to range widely in its work that exists at present... I hope I have made it clear I feel very strongly about this matter."

Practitioner

"The idea of the Law Commission being brought in-house/merged or delivered by a new Executive Agency seems fundamentally to misunderstand the nature of the Law Commission's role. The Law Commission is meant to be a fully independent body with the right (and resources) to consider the law in the round, without political or resourcing pressure dictating its remit... The bottom line is that the Law Commission needs to be as independent (in terms of governance and funding) as possible - this is best achieved as a well-supported [NDPB]."

Academic

96. This access to high-quality expert advice and research support (for example, the population-level survey carried out by the National Centre for Social Research through grant-funding from the Nuffield Foundation to support the Commission's work on intestacy and the expert advisory groups formed from external advisers at the start of each project) helps the Commission to provide work which is academically very high quality but which also delivers very good value for money. It allows the Commission to draw on a complete and balanced range of evidence that would simply not be available to another type of body, often including information that is commercially confidential. It is highly unlikely that the same level of external support would be available to Government or to private and voluntary sector providers, as at least the appearance, even if not the reality, of impartiality would be compromised.
97. Similarly, impartiality allows the Commission to bring together stakeholders in areas of polarised views and to help create consensus around difficult issues. Removing the political dimension from the debate and grounding conclusions firmly in evidence and research allows the Commission to overcome barriers that bodies more closely connected to Government could not surmount. This is highly beneficial in delivering recommendations capable of being implemented in practice and ensuring work can be followed through into practical effect.
98. This is evidenced by the Commission's work on insurance law, and its role in driving forward reform there is mentioned in para 39 above. The Commission, in their evidence, also highlighted the comments of the Department for Transport on their decision to ask the Commission to take on a project on taxi licensing.

"The Minister decided to opt for a review by the Law Commission even though it meant resisting a recommendation from the Transport Select Committee for an in-house review. Naturally one of the main reasons for doing so was because of the Law Commission's experience and expertise in unravelling and restructuring complex and archaic legislation. But the principal consideration was the independence of the Law Commission."

"We consider that the quality of the review is vastly improved by being undertaken by a body which is independent and is seen to be independent."

Department of Transport

99. The technical expertise required in delivering the Commission's work was also clearly identified by respondents to the call for evidence. The Commission's statutory functions are clearly focused on technical maintenance and update of the law, such as simplification, codification and elimination of anomalies. Identifying and rectifying these highly technical problems in a practical way is a function unique to the Law Commission and therefore requires similarly unique skills. The current delivery model is, in turn, uniquely able to deliver this; while independence is one element of this, in terms of the expertise and range of views it provides, another is the fact it sits outside Government, able to work across Departmental boundaries and address issues in the round.

"Parliament can and does make more radical changes where needed but in many areas it is rightly reluctant to step in unless it can have confidence that the complex issues have been thoroughly examined by an expert body which can take account of a wide variety of perspectives and provide informed and objective proposals or advice on possible solutions to difficult legal questions."

Society of Legal Scholars

"Many of its important projects in areas such as business, property, planning, housing and so on have arisen because constituencies were having problems that only law reform could address. Often these are issues of real importance but do not map neatly onto political or governmental priorities, or where extensive understanding of practice and practitioner issues (for instance, how practitioners interpret contradictory statutes) is important."

Nuffield Foundation

100. The Law Commission model has also been adopted by a large number of other jurisdictions over the years: both Scotland and Northern Ireland have equivalent bodies set up on the same lines, and a large number of other Commonwealth (and common law) jurisdictions have followed the same example. International practice has not yet identified an alternative model that can deliver better results, which, while not definitive, helps to demonstrate the validity of the model.

Delivery via the private or voluntary sector

101. Law reform work, as has been discussed above, requires a significant degree of legal expertise and academic rigour. The two private and voluntary sector groups who are therefore likely to be able to deliver work of this type are research bodies in the legal field, such as universities, and legal practitioners. This option would require the Commission's functions to be divided, as it would not be possible for codification, consolidation and repeals to be conducted by external providers. These are highly specialist functions that do not exist in academia or private practice and therefore could not be commissioned. These functions would therefore have to be taken in-house or continued in a smaller version of the Commission.
102. The costs and benefits of each type of provider have been carefully considered. However, there are a number of factors, applying across both options, that mean neither would be an appropriate delivery mechanism for these functions. It should be noted at the outset that no respondents to the call for evidence favoured this approach. One respondent to the call for evidence felt that universities might have a role to play in delivering work of this type, though this was alongside the Law Commission rather than in its stead.

"Own-initiative reports' should continue [...] to provide independent challenge. This role could perhaps be shared with Universities and emphasised a bit less. But the organisation needs critical mass of core work in order to have capacity to respond to requests for help from Departments."

Individual

103. While university academics and experienced practitioners are among the pools of candidates from whom Law Commissioners are drawn (LCA 1965 s1) and could therefore deliver a similar level of subject-matter expertise to the current model, there was some concern among respondents to the call for evidence around the inevitable loss of the high-profile Law Commissioner role under this approach.

“The Law Commissioner, David Hertzell, is a highly respected and experienced individual in the insurance industry who leverages his personal credibility throughout the industry to bring about the changes in attitudes and, in some cases, market practices, to create an environment for positive change”

AIRMIC

104. Based on the evidence received it is also extremely unlikely that practitioners and universities would be able to draw on the same pro bono support from organisations and other experts as the existing Commission, nor the same frankness of view, given the commercial context. In addition, any recommendations that emerged from a private firm under contract would be likely to attract criticism for being (at least perceived as) subject to the influence of vested interests, for example the needs of their client group.
105. External contractors would be unable to commission Parliamentary Counsel directly to draft Bills to accompany their reports. This represents an additional expense as the full costs of two Parliamentary Counsel are already included within the existing cost to MoJ of the Law Commission. Similarly, more MoJ staff time, in terms of both the procurement and sponsorship functions, would be needed in order to manage the various projects and contracts. This too would present an additional cost and also require more staff training due to the change in skills needed.
106. It is highly likely that the special House of Lords legislative procedure that has been made available for Law Commission Bills by Parliament would not be available for work produced by external contractors (certainly at first), a point noted in response to the call for evidence. This would require recommendations to be included in other Government Bills (which would depend on an appropriate vehicle being available) or to have their own slot in the legislative programme. The additional cost of longer legislative processes and more staff time will therefore need to be factored in.
107. Finally, all the evidence gathered by the Review indicates that not only is there no support among stakeholders for delivering the Law Commission’s functions through external groups, but that to do so would not be cost effective. It is not possible to compare specific project costs, as no similar work has been externally commissioned by the Government and the Law Commission has limited data on the cost of specific projects. However the review has carefully considered evidence around the commissioning process for such work (approximately 14 projects lasting around three years) and concluded that the cost and complexity of the process would mean this option would not deliver the same quality of work at the same cost as the Commission.

Delivery by a Government department

108. In-house delivery is, in principle, a possible way of delivering all the Commission’s functions, although it would require the repeal of both the LCA 1965 and the Law Commission Act 2009. However, all the evidence gathered by the review indicates that in-house delivery is highly unlikely to be effective in practice.
109. Taking on the required volume of additional work would need extra legal resource, as the volume of the Commission’s work could not be absorbed by existing teams. While recruitment would not in itself be costly, as it would be possible to transfer in staff directly from the Commission itself, any savings would be limited as the majority of Commission staff

would be retained and the organisation has very few non-staff costs. For the financial year of 2013/14, these costs totalled £300,000 of a £3.112m budget.

110. Transferring Commission lawyers would retain some of the expertise built up in the Commission over many years. However, the importance of the loss of the Law Commissioner function should not be underestimated, as their expertise could not be replicated within Government departments and its loss is likely to significantly impact on the quality of the work produced.
111. It would also become more difficult to engage with external experts using an in-house delivery model, due to the lack of independence, the effects of which have already been noted in this report.

“Any perceived alignment of the Law Commission with Government will make it considerably more difficult to engage the support and contributions of members of the public, professionals, academics and politicians across political divides.”

*Rt Hon Sir Terence Etherton,
Chancellor of the High Court and former Law Commission Chair*

“The Law Commission could not be brought in house and yet retain the independence of thought necessary for the validity of its work. Parliament, the executive and political parties already have in-house bodies doing their own pale imitation of the Commission’s work. The disastrous framing of the Sexual Offences Act 2003 is testament to the undesirability of such an elision.”

Academic

112. Pressure on resources also means there is a risk that staff dedicated to law reform work may, in practice, be asked to take on other work, which could compromise the timely delivery of reform projects. Making such projects subject to the direct control of Ministers would also put continued delivery at risk (for example, projects could be discontinued following a change of Government), meaning resources could be wasted.
113. Furthermore, although Government could as a matter of practice maintain accountability to Parliament in the manner of the current model, it is unlikely that in-house projects, like external ones, would enjoy the same level of Parliamentary confidence and access to special legislative procedures, increasing complexity and cost of implementation and putting additional pressure on legislative programmes. There are, consequently, risks that the benefits of reform work may not be realised to the extent they are now.

“Much of [the Commission’s] work is referred to the Commission precisely because Government Departments do not have the expertise or resources to carry out this work and we doubt that the work would be carried out at all if it were brought in-house.”

The Law Society

114. While, therefore, in-house delivery could result in a small cost saving, it is by no means certain this could always deliver the same volume and quality of work. No respondents to the call for evidence felt that in-house delivery would be appropriate, for these reasons, and this included a number of Government departments and agencies themselves. There is also an important question around the ability of a unit based in a particular department to deliver work falling within the remit of various other departments. This would be extremely difficult to commission and manage, in terms of accountability and governance.

“My gut feeling is that it does make sense for the Commission to be at arm’s length from Government; the fact that it is chaired by a senior judge gives it a certain credibility and independence.”

Home Office

“We think there is an obvious advantage in [the Law Commission] being independent and not part of any Government department; that way, it can clearly carry out its duties objectively, having regard to the general good rather than, for example, the short-term interests of a particular department.”

The Land Registry

All the evidence gathered by the review is overwhelmingly in favour of maintaining the current delivery model. The Law Commission demonstrably fulfils two of the three possible requirements justifying NDPB status, in that it delivers a technical function that requires impartiality. The Commission’s ability to deliver its functions is dependent on its freedom from external pressures, in particular political influence.

Furthermore, the two potential alternative delivery models are far less cost effective than the existing Commission, in that they would be unable to produce work of the same volume and quality at the same cost.

For these reasons, the Government has concluded that the Law Commission should remain an advisory NDPB.

Summary and Recommendations

Functions

115. There is extremely strong support for the functions of the Law Commission to continue. It is clear from both the responses to the call for evidence, and the evidence of value added to other Government priorities by this work, that both the substantive and procedural functions are still required.

Stage 1 Recommendation: Functions

Having considered all of the current functions of the Law Commission, the recommendation is to retain them unchanged.

Form

116. The call for evidence produced no calls for a change of form and there is no evidence to support the need for any changes. The Triennial Review also looks at the functions of the bodies according to the 'three tests':

Test	Conclusion
Is this a technical function (which needs external expertise to deliver)?	Yes
Is this a function which needs to be, and be seen to be, delivered with absolute political impartiality (such as certain regulatory or funding functions)?	Yes – both the practical support from expert stakeholders integral to the Commission's work and the ability to produce credible and well-supported recommendations on difficult issues depend on impartiality.
Is this a function which needs to be delivered independently of ministers to establish facts and/or figures with integrity?	No – the Commission is not required to establish facts or figures in this way.

117. The delivery options analysis set out above highlight the difficulties involved in making any changes to the current structure of the Law Commission. Even minor changes to function and form would require financial resource and legislative change and the associated resources which would be disproportionate to any benefit.

Stage 1 Recommendation: Form

In view of this, the recommendation is to retain the Law Commission as an advisory NDPB.

Conclusions

118. The recommendations above require Stage 2 of the Triennial Review to commence.

Annex A: Call for evidence

Triennial Review of the Law Commission 2012

Survey Questions

Introduction

This survey focuses on the specific, more detailed questions being considered by the Triennial Review in the context of its terms of reference. It looks at the functions, form and purpose of the Law Commission, in line with the stage 1 remit for Triennial Reviews mandated by Cabinet Office. While it is primarily aimed at those with some knowledge or experience of the work of the Commission, anyone may choose to use it as the basis for submitting their evidence. We would invite representative bodies to share the survey more widely with their members.

The survey is not designed to be exhaustive and any additional comments you may wish to make will be considered by the Review team.

1. **Please state whether or not there is a continuing need for the following functions of the Law Commission:**
 - (a) (i) **The overarching duty to take and keep under review all the law [of England and Wales] with a view to its development and reform.**
 - (ii) **The three particular duties that together form the overarching duty:**
 - **The codification of particular branches of law;**
 - **The repeal of obsolete and unnecessary statutes; and**
 - **The general simplification and modernisation of the law.**
 - (b) **The following specific functions, which are designed to give effect to the overarching duty:**
 - (i) **Considering proposals for the reform of the law which are submitted to them;**
 - (ii) **Preparing, and submitting to the Minister for approval, lists of projects (programmes) examining different branches of the law with a view to reform;**
 - (iii) **In line with the above, examining particular branches of the law and making proposals for reform (including by means of draft Bills where appropriate);**
 - (iv) **Preparing consolidation and statute law revision/repeal programmes, including preparing draft Bills that would deliver this;**
 - (v) **Providing advice and information as requested to Government departments and other bodies who are undertaking work on the reform or amendment of the law;**
 - (vi) **Information-gathering on the legal systems of other countries to help the Commission perform any of its functions.**
2. **Does the Law Commission require any additional powers or functions in order to discharge its mandate?**

3. How should the Commission's functions be delivered?

- (a) Should it be abolished?**
- (b) Does it need to be an Arms Length Body? Alternatively, could it be brought in-house or merged with another body?**
- (c) Could the function be delivered by a new Executive Agency and what would be the benefits of creating a new Agency?**
- (d) If it should remain an Arms Length Body, does the existing model provide the Commission with the right freedoms and flexibilities (e.g. governance, funding approach)?**

4. Do you have any further comment on the functions or form of the Law Commission?

Annex B: List of respondents

Group of respondent	Name
Government departments and agencies	Attorney General's Office
	Cabinet Office
	Department for Business, Innovation and Skills
	Department of Health
	Home Office
	Land Registry
Other public sector organisations	Director of Public Prosecutions
	Law Commission for England & Wales
	Scottish Law Commission
Devolved administrations	Department of Justice (Northern Ireland)
	Welsh Assembly Government
Judiciary	Rt Hon Lord Judge Lord Chief Justice
	Rt Hon Lord Dyson Master of the Rolls
	Rt Hon Sir Terence Etherton Chancellor of the High Court
Academics	Francis Bennion
	Ann Blair
	Judith Bray
	Ruth Deech
	Matt Dyson
	Donald MacDonald
	Joanna Miles
	Nicola Padfield
	Craig Prescott
	Professor Colin T Reid
	Jens Scherpe
	Findlay Stark
	Robert Stevens
	Dr Emma Waring
Shona Wilson	
Professional Groups	AIRMIC
	Bar Council
	Law Society
	Resolution
	Socio-Legal Studies Association
	The Society of Legal Scholars
Legal practitioners	Stuart Collingham
	Verity Eunson-Hickey
	Justin Lees
	Barbara Thorne

**Triennial Review: Law Commission
Report of Stage One**

Individuals	Sean Chiwawa
	Philippa Collins
	James Marshall Croft
	Christopher Jessel
	Mark Ormerod
Other	Justice Select Committee
	Nuffield Foundation

Annex C: Critical Friends Group

This Triennial Review, like all others, has benefited from the advice and support of a Critical Friends Group, who provide comment and challenge on the conclusions reached by the Review Team in order to ensure a robust approach.

The members of the Critical Friends Group for this review are listed below, and the Review Team and Programme Board are grateful for their support throughout this process:

Alison Wedge (Head of Arm's Length Body Governance Division, Ministry of Justice) – Chair

Claire Crawley (Department of Health)

Alan Evans (Department for Business, Innovation and Skills)

Sharon Witherspoon (Director, Nuffield Foundation)

Ben Connah (Ministry of Justice)

Tim Crouch (Cabinet Office)

Annex D: Law Commissions Act 1965 section 3

Functions of the Commissions

(1) It shall be the duty of each of the Commissions to take and keep under review all the law with which they are respectively concerned with a view to its systematic development and reform, including in particular the codification of such law, the elimination of anomalies, the repeal of obsolete and unnecessary enactments, the reduction of the number of separate enactments and generally the simplification and modernisation of the law, and for that purpose—

(a) to receive and consider any proposals for the reform of the law which may be made or referred to them;

(b) to prepare and submit to the Minister from time to time programmes for the examination of different branches of the law with a view to reform, including recommendations as to the agency (whether the Commission or another body) by which any such examination should be carried out;

(c) to undertake, pursuant to any such recommendations approved by the Minister, the examination of particular branches of the law and the formulation, by means of draft Bills or otherwise, of proposals for reform therein;

(d) to prepare from time to time at the request of the Minister comprehensive programmes of consolidation and statute law revision, and to undertake the preparation of draft Bills pursuant to any such programme approved by the Minister;

(e) to provide advice and information to government departments and other authorities or bodies concerned at the instance of the Government of the United Kingdom or the Scottish Administration with proposals for the reform or amendment of any branch of the law;

(f) to obtain such information as to the legal systems of other countries as appears to the Commissioners likely to facilitate the performance of any of their functions.

(2) The Minister shall lay before Parliament any programmes prepared by the Commission and approved by him and any proposals for reform formulated by the Commission pursuant to such programmes.

(3) Each of the Commissions shall make an annual report to the Minister on their proceedings, and the Minister shall lay the report before Parliament with such comments (if any) as he thinks fit.

(3A) Subsections (2) and (3) of this section shall have effect in relation to the Scottish Law Commission with the substitution of “the Scottish Parliament” for “Parliament”.

(4) In the exercise of their functions under this Act the Commissions shall act in consultation with each other.

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