LAW COMMISSION
TWENTY-EIGHTH ANNUAL REPORT
1993

LAW COM No 223

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

The Commissioners are:

The Honourable Mr Justice Brooke, *Chairman*
Professor Jack Beatson
Miss Diana Faber
Mr Charles Harpum
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In 1993 the Commissioners were:

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Mr Trevor M. Aldridge QC
Professor Jack Beatson
Mr Richard Buxton QC (now the Honourable Mr Justice Buxton)
Professor Brenda Hoggett QC (now the Honourable Mrs Justice Hale DBE)

THE LAW COMMISSION

TWENTY-EIGHTH ANNUAL REPORT: 1993

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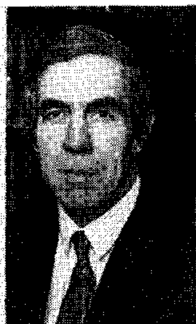
THE LAW COMMISSION
TWENTY-EIGHTH ANNUAL REPORT

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



I have the honour to present to you, on behalf of the Law Commission, our Twenty-Eighth Annual Report for the year 1993, pursuant to section 3(3) of the Law Commissions Act 1965.

I would invite you to pay particular attention to the Overview in Part I of the Report. In it we describe a remarkable year in the life of the Commission. We have published a cascade of reports and consultation papers which have commanded attention, I believe, as much for their quality as their quantity. We demonstrate the relevance of our work in so many different contemporary corners of national life – in the fight against violent crime, for example; in resolving problems in banking, accountancy and commerce; in the way we all deal with our property; in the way in which lay people may give their evidence in court.

We go on to describe how a year which began with high hopes of a breakthrough in Parliament's recognition of our work turned sour. The backlog of unimplemented law reform reports continued to grow, and the breakdown of working relationships between the two main parties in the House of Commons saw an effort of ours to modernise and simplify the law of property among the early casualties. Much of our law is riddled with faults and flaws, as you know well, and it is often only the imagination and ingenuity of our judges which conceals with judicial sticking-plaster the depth of the fault-lines. The position is now serious. It is not of course cataclysmic. But history shows that a nation which neglects the ordinary care of its laws is neglecting something which is very important to its national well-being.

Next, we reflect on the way in which the end of the year marked the start of a period of great change. Three very experienced Commissioners left us, one to retirement, and two to the High Court Bench. A fourth goes next autumn to a prestigious professorship at Cambridge.

And we end that Part by saying good-bye to a remarkable public servant, and by paying tribute to the devoted hard work of the Commission's staff.

The rest of the report follows a familiar course. It reveals the astonishing breadth of the topics we deal with and their importance in so many different aspects of personal and business life in this country. New features include a review of what has been achieved in the field of family law, and a clear description of some of our recent reports which are waiting for parliamentary attention.

It would be wrong to finish this Introduction without expressing our gratitude to you personally for the great interest you have shown in our work throughout the year and for the support and encouragement we have received from your officials, and from the officials in other departments of state with whom we have had dealings.

Henry Brooke

CHAIRMAN

PART I
OVERVIEW OF THE YEAR
SERIOUS PROBLEMS WITH THE PARLIAMENTARY PROCESS

1.1 In our last annual report we said that we hoped to be able to deliver to the Lord Chancellor in 1993 reports recommending legislation on eight, and possibly nine, law reform topics, together with two draft Bills encapsulating recommendations we made in earlier reports. In the event we completed seven reports and both the draft Bills. We will describe these in greater detail in Part II of this report. Here we offer a thumbnail sketch of them in order to bring to life the breadth of the Commission's work in the year under review and its contemporary relevance. We also comment on recent important contributions to the debate about law reform and the legislative process.

Our most significant report this year was on Offences against the Person and General Principles[1] in criminal cases. This was the first substantive report in our plans to create, by slow degrees, a Criminal Code of which this country could justly feel proud, in the place of the ragbag of different statutory and common law provisions, often expressed in impenetrably obscure language, which passes for our criminal law today. In our report we took an axe to most of the surviving remnants of the Offences against the Person Act 1861, and we proposed in their place three simple new offences which reflected in a rational way the level and seriousness of different types of assault. Once our proposals are enacted, they will save a huge amount of time and money[2] – almost always taxpayers' money – because that part of the criminal law will be so much clearer and easier to use. The report received an enthusiastic reception when it was published.

1.3 Our joint report with the Scottish Law Commission on the Sale of Goods forming Part of a Bulk[3] was widely acclaimed by traders who are prevented by the present law from claiming their share of a larger bulk of goods. Next, we examined the Hearsay Rule in Civil Proceedings.[4] We concluded that there was no good reason for retaining it; its abolition would facilitate the reception of computer generated evidence; the courts are as well if not better qualified as anyone to decide on the appropriate weight to give to hearsay evidence. Our report on Contributory Negligence as a Defence in

[1] (1993) Law Com No 218, Cm 2370.

[2] In our report (*op cit*, para 4.7) we referred to a single case in which a man had been wrongly convicted because the law was so obscure and difficult to use. We showed how this one case had cost the taxpayer £50,000 quite apart from the human costs involved in wrongful imprisonment.

[3] (1993) Law Com No 215, Scot Law Com No 145. See paras 2.12–2.13 below.

[4] (1993) Law Com No 216, Cm 2321. See paras 2.49–2.50 below.

Contract[5] addressed another anomalous situation. We could find no rational ground for the courts being allowed to reduce a plaintiff's damages by reason of his own contributory fault when the defendant's duty was in tort, but not when it was only in contract.

1.4 Two of our reports were concerned to put right the difficulties caused by the wording of relatively recent Acts of Parliament. The first report, on the Effect of Divorce on Wills,[6] is designed to ensure that it is only the divorced spouse who is cut out of the testator's will, and that the statutory provision does not, as now, have an unintended wider effect. A 1985 statute also in our view went too far in allowing trustees to delegate their powers without providing adequate safeguards for beneficiaries, and our report on Delegation by Individual Trustees[7] seeks to correct this. It also proposes ways of simplifying the rigid requirements of trust law in relation to people who own their houses jointly.

1.5 Finally, in our last report of the year we completed a long study of binding over to keep the peace.[8] We decided that this ancient law was difficult to ascertain, unfair, and incompatible with our international human rights obligations; and that there was no acceptable way of correcting this without ridding the institution of the informality which its adherents prized. We therefore recommended its abolition without replacement.

1.6 The two Bills we delivered to the Lord Chancellor in 1993[9] will also have the effect, when enacted, of bringing other important parts of our law in line with modern social and business needs. The antique law of forfeiture of tenancies, and the dual system of settled land and trusts for sale introduced in 1925, both badly need a modern overhaul, and the enactment of these measures would greatly simplify the law in two areas in constant use today and reduce the expense which is incurred by those who have to use the unreformed law.

1.7 In addition to this battery of reports and draft Bills, we also completed six new Consultation Papers during 1993. Two of these related to our work on the law relating to Mentally Incapacitated Adults[10] and two to our work on the criminal law.[11]

[5] (1993) Law Com No 219. See paras 2.14–2.15 below.

[6] (1993) Law Com No 217. See paras 2.59–2.60 below.

[7] (1994) Law Com No 220. See paras 2.68–2.70 below.

[8] (1994) Law Com No 222. See paras 2.42–2.44 below.

[9] Termination of Tenancies Bill (1994) Law Com No 221; Trusts of Land Bill (unpublished). See paras 2.65–2.67 and 2.73 below.

[10] Mentally Incapacitated Adults and Decision-Making: Medical Treatment and Research, Consultation Paper No 129; Mentally Incapacitated and Other Vulnerable Adults: Public Law Protection, Consultation Paper No 130. See para 2.55 below.

[11] Assisting and Encouraging Crime, Consultation Paper No 131; Consent and Offences against the Person, Consultation Paper No 134. See paras 2.36–2.38 and 2.33–2.35 below.

We also published a second paper in our programme of work on the law of damages,[12] and a second paper in our new programme on the Law of Trusts.[13] When we add to these a major new Statute Law (Repeals) Bill and six new consolidation Bills[14] it can be readily recognised that this was a year of intense productivity across every field of the Commission's work.

1.8 During the course of 1993 we detected a growing realisation of the importance of the work the Commission is doing and is capable of doing. Our work on Mentally Incapacitated Adults has attracted great interest, and was referred to by the House of Lords Select Committee on Medical Ethics in its recent report.[15] Apart from this, on three occasions during the year judges in our higher courts have said that the law is in such a confused state that it calls for examination by the Commission. This was said in the context of different aspects of the law of involuntary manslaughter by the Lord Chief Justice[16] and Lord Justice Beldam,[17] and in the context of illegality and the enforcement of contractual remedies by Lord Goff.[18] We hope that our consultation paper on involuntary manslaughter will be of as much value to the House of Lords in a forthcoming appeal in that field of law[19] as our papers on Rape within Marriage[20] and on Restitution of Payments Made Under a Mistake of Law[21] were found to be in landmark cases in the recent past.[22]

1.9 In Part III of this report we pay particular attention to the major contribution the Commission has made to the creation of a modern, coherent system of family law, and two of our recent major reports[23] were seldom out of the public eye last year. But we also detected much more interest in the practical value of our work in the field of criminal law. The list in Appendix 4 reveals the contributions we have recently made in the Public Order Act 1986, the Malicious Communications Act 1988, the Computer Misuse Act 1990 and Part I of the Criminal Justice Act 1993. In *Cheema*[24] the Lord Chief Justice showed that he shared our view that the law of corroboration

[12] Aggravated, Exemplary and Restitutionary Damages, Consultation Paper No 132. See para 2.17 below.

[13] The Rules against Perpetuities and Excessive Accumulations, Consultation Paper No 133. See paras 2.71-2.72 below.

[14] See paras 2.77 and 2.74 below.

[15] (1993-94) HL 21-I. See para 2.56 below.

[16] *Prentice* [1993] 3 WLR 927, 952-3.

[17] *Scarlett* [1993] 4 All ER 629, 631, 638.

[18] *Tinsley v Milligan* [1993] 3 WLR 126, 141.

[19] *Adomako* [1994] 1 WLR 15.

[20] Criminal Law: Rape within Marriage (1992) Law Com No 205.

[21] Restitution of Payments Made Under a Mistake of Law (1991) Consultation Paper No 120. See paras 2.21-2.23 below.

[22] *R v R* [1992] 1 AC 599; *Woolwich Equitable Building Society v Inland Revenue Commissioners* [1993] AC 70.

[23] The Ground for Divorce (1990) Law Com No 192; Domestic Violence and Occupation of the Family Home (1992) Law Com No 207.

[24] [1994] 1 WLR 147, 158.

had become arcane, technical and difficult to convey to jurors, and this powerful backing, together with the support we received from the Royal Commission on Criminal Justice,[25] must have helped towards the inclusion of our recommendations in the Criminal Justice and Public Order Bill now before Parliament.[26] And the enthusiasm and relief with which our report on Offences against the Person and General Principles[27] was received in all quarters lead us to believe that an important message in our annual report for 1992 has now been heard and understood: that if the criminal law were made simpler and more coherent it would be easier to enforce for police, prosecutors and the courts alike, and that the potential rewards to the taxpayer are high if trials can be made shorter and appeals reduced in number and in complexity, because the law is easier to understand.

1.10 In our last annual report we commented on serious contemporary difficulties over the implementation of our past law reform reports. Only four have been implemented since 1990,[28] and of these only one formed part of the Government's legislative programme. We appreciate that this is only one aspect of a wider problem on which we comment below.[29] But the picture today is, as we said last year,[30] in sharp contrast to what happened twenty years ago, when of the thirty law reform reports submitted between 1966 and 1973, twenty-eight were implemented in an average time of two years. This year we present this history graphically. The lines on the chart opposite show vividly how the gap between the numbers of law reform reports published and the numbers implemented has widened very significantly in recent years.

[25] Royal Commission on Criminal Justice, Cm 2263, pp 127–8. The Royal Commission also recommended that our services should be sought in connection with a review of other aspects of the law of evidence in criminal courts: *ibid*, pp 124–127 and 161.

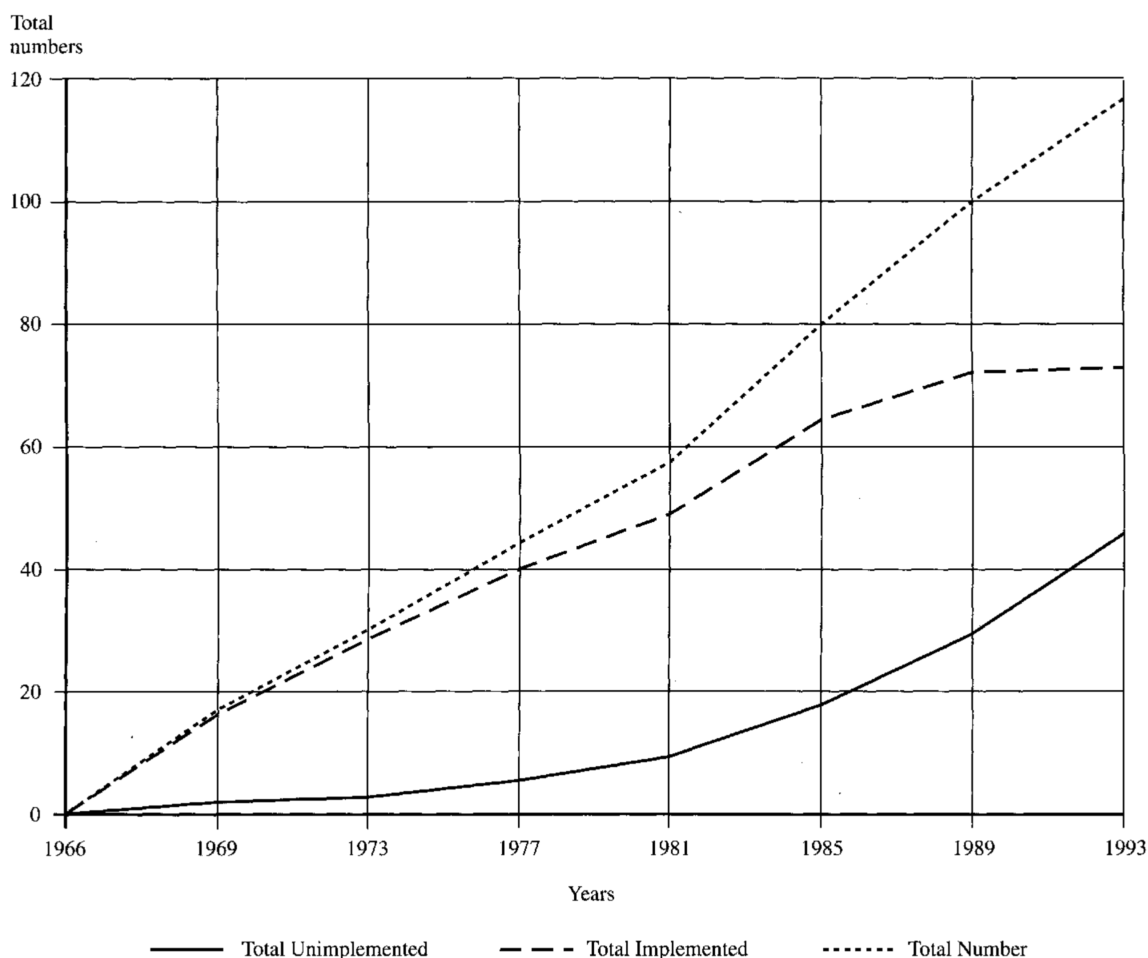
[26] See paras 1.15 and 2.51 below.

[27] See paras 1.2 above and 2.26 – 2.31 below.

[28] Rights of Access to Neighbouring Land (1985) Law Com No 151, Cmnd 9692, by the Access to Neighbouring Land Act 1992; Jurisdiction over Offences of Fraud and Dishonesty with a Foreign Element (1989) Law Com No 180, by the Criminal Justice Act 1993; Computer Misuse (1989) Law Com No 186, Cm 819, by the Computer Misuse Act 1990; and Rights of Suit in Respect of Carriage of Goods by Sea (1991) Law Com No 186, Scot Law Com No 130, by the Carriage of Goods by Sea Act 1992.

[29] See para 1.23 below.

[30] Twenty-Seventh Annual Report 1992 (1993) Law Com No 210, p 27.



LAW COMMISSION REPORTS RECOMMENDING REFORM IN FOUR YEAR CYCLES

1.11 The year under review nevertheless saw some welcome stirrings of interest in this issue. In his 1993 Denning Lecture[31] the Master of the Rolls referred to the large number of our reports which currently await implementation. He said:

> These reports, produced at quite considerable public expense, represent clear, well-argued and compelling proposals for improving the law; only two of the 38 have been specifically rejected by the government of the day; they gather dust not because their value is doubted but because there is inadequate parliamentary time to enact them.

[31] Sir Thomas Bingham: The European Convention on Human Rights: Time to Incorporate (1993) 109 LQR 390.

1.12 At about the same time the very knowledgeable all-party Commission of the Hansard Society on the Legislative Process reported on much the same lines:

> The problem of Governments not being able to find time for Law Commission bills in their legislative programmes – even the majority of such bills to which they have no objection – is serious, especially after much time has been spent on consultations, and much attention has been given to their preparation and drafting ... In our view, Law Commission bills are probably the most carefully prepared of all bills: these legislative cakes are properly baked. Conflicting views have usually been reconciled and objections overcome. Therefore, unless they arouse opposition on political, moral or social grounds (a divorce bill for example), they should be ready for a simple passage into law.
>
> The main reason this has not happened in recent years appears to be because law reform bills tend to lack positive political appeal and Governments' business managers find it difficult to fit them in to tight programmes packed with bills – often controversial and therefore time consuming – that Ministers consider politically important. To put it bluntly, we suspect that the Whips do not want to waste precious time on Law Commission bills.
>
> This is not satisfactory. Most of these bills, by general agreement, ought to become law. Unless they actually disagree with the Commissions' proposals, we believe that Governments should normally give time for the consideration and passage of all Law Commission bills. Anything that can be done to encourage this would be welcome.[32]

1.13 The Hansard Society Commission reported[33] that it had received evidence from a high court judge,[34] speaking on behalf of the Judges' Council, who said that "it seemed to many of the judges of the High Court to be deplorable that Law Commission Bills were neglected in the way they were." This evidence coincides with our own knowledge of the views of many judges at all levels of seniority.

[32] Making the law: the report of the Hansard Society Commission on the Legislative Process (1993), pp 118–119.

[33] *Ibid*, p 118.

[34] Mr Justice Kennedy, now Lord Justice Kennedy.

1.14 In 1993 we have the same gloomy story to tell as in recent years. Only one of our law reform measures found its way into an Act of Parliament,[35] and a watered down part of another report[36] passed into law through a statutory instrument. The rest was silence, so far as the implementation of our work was concerned.

1.15 For the 1993–4 session we are pleased that our recommendations on Corroboration[37] form part of the Government's Criminal Justice and Public Order Bill. These sweep away the very rigid rules which govern the need for corroboration in criminal cases involving sexual offences and accomplices. In particular, they will abolish the wording of the very old-fashioned warning the judge has been obliged to give the jury about those who give evidence about sexual offences committed against them, a matter which has caused great offence to women in recent years. Another set of recommendations[38] forms part of a Bill which was introduced in December 1993 by Mr David Clelland MP, who secured thirteenth place in the private members' ballot. If this Bill, which has Government support, is enacted, the word "merchantable" will be replaced by the modern word "acceptable" in disputes about the quality of goods sold, and consumers will be given new rights, such as a right of partial rejection, if the goods bought are substandard.[39] And that, subject to one proviso, is all.

1.16 This proviso relates to the recent arrangements which have been approved in the House of Lords for taking our measures forward. The situation has altered radically since 1882 when Lord Mountararat first sang with approval how "noble statesmen do not itch to interfere with matters which they do not understand".[40] The modern House of Lords understands very clearly the problems we face, and it has recently taken steps to create a special standing committee procedure to ensure detailed and well-informed parliamentary scrutiny of our law reform Bills.[41]

1.17 Twelve months ago we reported[42] that we hoped that a small Government Bill which incorporated two totally non-controversial but useful property law reports would be helped on its way into law through the use of this new machinery. One set of our recommendations[43] would make changes which would remove a number of practical, and easily avoidable, difficulties which occur under our present law when

[35] Jurisdiction over Offences of Fraud and Dishonesty with a Foreign Element (1989) Law Com No 180, implemented by the Criminal Justice Act 1993.

[36] Distribution on Intestacy (1989) Law Com No 187: see paras 3.6–3.8 below.

[37] Corroboration of Evidence in Criminal Trials (1991) Law Com No 202, Cm 1620.

[38] Sale and Supply of Goods (1987) Law Com No 160, Scot Law Com No 104, Cm 137.

[39] Under our proposals, the implied term as to the quality of goods sold will also be reformulated in order to make it clear that it also applies to minor defects and covers the durability of the goods.

[40] W S Gilbert, Iolanthe, Act II.

[41] See the Report from the Select Committee on the Committee Work of the House of Lords, (1991–92) HL 35–I.

[42] Twenty-Seventh Annual Report 1992 (1993) Law Com No 210, para 1.10.

[43] Property Law: Title on Death (1989) Law Com No 184, Cm 777.

the owner of land dies. The other[44] involves the replacement of unwritten, implied covenants for title which are given to the purchaser of land by new covenants which are clearer and stronger: the guarantees which they provide will also be strengthened and they will be made easier to enforce. We had reason to hope, too, that this Bill would be followed last session by a Bill incorporating three of our private international law recommendations which have been waiting for Parliamentary attention for a very long time. These would make it possible for people who obtain a judgment abroad in a foreign currency to receive an appropriate rate of interest on the sums due to them,[45] would make the law more just in relation to the recognition of the validity of the marriages of certain people who were married abroad, where our law is in some respects both harsh and discriminatory,[46] and would make things fairer for people who wish to recover damages for civil wrongs done to them in cases which involve a foreign element.[47]

1.18 In the event nothing happened at all. The successful use of this procedure is critically dependent on the existence of good working relationships between the Whips in the House of Commons to permit the Bill to go to a second reading committee there. Agreement was not forthcoming and five small, but useful, law reform measures remained on the shelf.

1.19 At the start of the 1993–4 session the House of Lords returned to the subject. In the debate on the Queen's Speech both the Lord Chancellor and the Lord Advocate expressed their wish, subject to all-party agreement, that this machinery should be activated. In addition to them, three other speakers of great experience articulated in different terms their deep anxiety about the present position and their keenness that the new machinery should be used. Lord Wilberforce, a former Law Lord of 18 years' judicial experience in the House of Lords, said:

> "We ought to recognise that defects in the law are not just technical matters: they have important social consequences. One only has to think of the areas of divorce, tenancies, privacy and the family home. They spread throughout society and reflect the needs of society. There are numerous measures in that area which are ripe for reform."[48]

[44] Transfer of Land: Implied Covenants for Title (1991) Law Com No 199.

[45] Private International Law: Foreign Money Liabilities (1983) Law Com No 124, Cmnd 9064.

[46] Private International Law: Polygamous Marriages. Capacity to Contract a Polygamous Marriage and Related Issues (1985) Law Com No 146, Scot Law Com No 96, Cmnd 9595. At present the recognition in this country of the validity of a marriage celebrated abroad which although polygamous in form, is in fact monogamous, depends on whether the marriage predated August 1971 and whether the person settled here is male or female.

[47] Private International Law: Choice of Law in Tort and Delict (1990) Law Com No 193, Scot Law Com No 129. Our report recommends the abolition of the double actionability rule in cases with a foreign element.

[48] *Hansard* (HL) 23 November 1993, col 159.

Lord Alexander of Weedon QC, the Chairman of National Westminster Bank and a former Chairman of the Bar, said:

> "The Law Commission is highly competent, does detailed work, is a national resource paid for out of the public purse and we do not serve ourselves well or use that resource well if we do not find an opportunity to implement its work through legislation."[49]

And, finally, Lord Henderson of Brompton, a former Clerk of the Parliaments, said that he was pleased to hear the Lord Chancellor comment on his success in obtaining what he presumed was all-party agreement for special procedures in both Houses of Parliament for certain Law Commission Bills. He added:

> "It is a very important procedural, innovative parliamentary matter . . . It is a notable victory and bodes well for the Law Commission which deserves all the attention that they will receive."[50]

Nothing has happened since then. Working relationships in the House of Commons have again broken down and have prevented any progress being made. As a direct consequence our useful non-controversial measures to cure anomalies and remedy shortcomings in undramatic parts of the law fail to pass into law, despite their importance to very many people. In short, it is the integrity of our law which suffers.

1.20 When the third Chairman of this Commission, Sir Michael Kerr, raised the same concerns in the early 1980s, the House of Commons came to the rescue. Four of our Bills passed into law[51] through recourse to a Special Standing Committee of the House of Commons, similar to the one now envisaged for the House of Lords. However, this procedure has not been used at all since 1984 so far as our Bills are concerned.

1.21 It is not for this Commission to tell the Government or Parliament how to do their work. However, we have been created for the purpose of promoting the reform of the law,[52] and we would be failing in that purpose if we did not report that there is now serious unease among very many people who are concerned about the quality of English law about the way our work is being neglected; laws which so many people have to use, often at great personal expense, remain unsimple, unmodern,

[49] *Ibid*, col 192.

[50] *Ibid*, col 197.

[51] The Criminal Attempts Act 1981 implemented our report on Attempt, and Impossibility in relation to Attempt, Conspiracy and Incitement (1980) Law Com No 102; and the Matrimonial and Family Proceedings Act 1984 implemented three of our reports on Family Law: The Financial Consequences of Divorce (1981) Law Com No 112, Time Restrictions on Presentation of Divorce and Nullity Petitions (1982) Law Com No 116, and Financial Relief after Foreign Divorce (1982) Law Com No 117.

[52] Law Commissions Act 1965, s 1(1).

inaccessible and unreformed. A prudent householder always makes provision in his budget each year for routine care and maintenance. The routine care and maintenance of a country's laws surely demand nothing less.

1.22 Any modern Parliament, whatever the Government in power, will face exactly the same difficulties because of the sheer scale of modern parliamentary government. But the problem on which we report is a very serious one, and it is bound to get steadily worse unless the House of Commons is able to devise an enduring solution to it. Our consolidation Bills and our Statute Law (Repeals) Bills usually pass into law quickly with little difficulty: our law reform Bills, however small the measure and however glaring the mistake they are correcting, all face the same titanic struggle for parliamentary time and are all alike brushed to one side at the very smallest sign of a parliamentary contretemps. This surely is not a very sensible way to keep our law relevant and up to date.

1.23 We are aware that the problems which we are now describing are only examples of the much more formidable problems facing the parliamentary process which are described in the Hansard Society Commission's report. It is, however, paradoxical that our carefully tried and tested recommendations receive such cavalier treatment, while very far-reaching directives from Brussels receive the force of law in this country with far less expert scrutiny than each of our reports reflects.[53] In January of this year, proposals were made by the Department of Trade and Industry designed at enabling the President of the Board of Trade to achieve deregulation by secondary legislation, and this is another contemporary example of the great difficulties under which Parliament and Government are now labouring in this field. But we would not wish these wider issues to camouflage the very serious problems which we address in this report.

1.24 To return to our domestic activities, the year has not, however, only been a year of intense activity. It also marks the start of a period of great change, since the end of 1993 marked the beginning of the end of a remarkable era in the life of the Commission. On 31 December 1993 three very experienced Commissioners[54] all left the Commission, each completing a very distinguished period of office, and a fourth[55] has been pre-elected Rouse Ball Professor of English Law at Cambridge University, for which he will leave at the end of September 1994. By October 1994

[53] See, for example, the note by Professor F M B Reynolds, Unfair Contract Terms, (1994) 110 LQR 1, about the way in which the new EEC Directive on Unfair Terms in Consumer Contracts is to be implemented almost *verbatim* by way of statutory instrument with no attempt to repeal, modify or secure some interconnection with the Unfair Contract Terms Act 1977. Professor Reynolds comments that this proposal seems likely to produce a situation of nightmarish complexity in an area, that of consumer law, where simple and "user-friendly" rules should be the order of the day.

[54] Professor Brenda Hoggett QC, Mr Trevor Aldridge QC, Mr Richard Buxton QC.

[55] Mr Jack Beatson.

only the Chairman, himself a comparative newcomer, will be left out of the Commissioners who were in office during the whole of the year now under review.

1.25 Only twice in the previous history of the Commission have Law Commissioners been appointed to the High Court Bench.[56] Now there are four, and the news about the two new appointments, each of whom took office as judges on successive days in January 1994, gave as much pleasure to the Commission as it did to those who have admired the quality of Brenda Hoggett's and Richard Buxton's work in their dealings with them during their periods of service here.

1.26 We will end this introductory chapter by paying some well-earned tributes and saying a little about the future. We will first refer to the three Commissioners who retired at the end of 1993.

1.27 Brenda Hoggett's appointment as the first member of the High Court Bench with a non-practising background was a fitting end to nearly 10 years as a Law Commissioner. She brought energy and enthusiasm to all she did. She will be particularly remembered for the fruitful collaboration between the family law work of the Commission and the Interdepartmental Working Party which led to the Children Act 1989. The private law provisions of this Act flow directly from our Report on Guardianship and Custody[57] and she was also a member of the Interdepartmental Working Party which developed the public law provisions. Part III of this report describes the recent reports on family law for which she was responsible, most notably those on the Ground for Divorce[58] and on Domestic Violence and Occupation of the Family Home.[59] She was instrumental in introducing the law governing Mentally Incapacitated Adults into the Commission's law reform programme and this was her last major project. Although it has yet to be completed, she set it firmly on its course before she left us, and we benefited greatly from her experience and learning in this important field of law.

1.28 Trevor Aldridge's career as a Law Commissioner was nearly as long: his term of office here began on 1 October 1984. He had specialised in the law of landlord and tenant in practice and it was on these topics that he led law reform work until the departure of Julian Farrand at the end of 1988 when he took over responsibility for the whole spectrum of property and trusts law. He gave a great deal of assistance with the passage into law of the Enduring Powers of Attorney Act 1985 and the Landlord and

56 Neil Lawson QC on 19 April 1971, Derek Hodgson QC on 1 October 1977.

57 Family Law: Review of Child Law: Guardianship and Custody (1988) Law Com No 172.

58 Family Law: The Ground for Divorce (1990) Law Com No 192. See paras 3.2–3.3 below.

59 Family Law: Domestic Violence and Occupation of the Family Home (1992) Law Com No 207. See paras 3.4–3.5 below.

Tenant Act 1988 which implemented three Commission reports,[60] and more recently with the Access to Neighbouring Land Act 1992.[61] Sadly, in recent years the impetus for legislation in the field of property law has been overtaken by other priorities. As a result valuable reports, like those on Privity of Contract and Estate[62] and Distress for Rent,[63] still await implementation. He brought a wealth of practical experience to our deliberations and heightened our awareness of the non-contentious perspective on law reform. He would have us believe that he left the Commission in order to retire; but his active mind will continue its vigorous pursuit of any legal topic which he finds of interest, as readers of the Solicitors Journal will already know.

1.29 Richard Buxton was appointed to the Commission at the beginning of 1989. He came from a busy commercial practice, specialising in competition law, but he returned to the criminal law, a subject in which he had made a mark as a scholar and a teacher. He joined the Commission at a significant moment, just after the completion of the Criminal Code. He devoted his considerable energies to taking forward the code project, appreciating that the most realistic way forward was by identifying and developing separate topics within a code framework which, once enacted, might one day be consolidated into a complete code. It was towards this goal that he firmly aimed throughout his five years at the Commission. It is only fitting that, in the month before his departure, we should have published the major report on Offences against the Person and General Principles.[64] He was responsible for the later stages of the project on computer misuse which led to the Computer Misuse Act 1990, and for the Report on Corroboration.[65] He also did much to raise consciousness of the importance of both European Community Law and the European Convention on Human Rights to the law reform process.

1.30 Each of these three Commissioners was more than just a specialist. They all took a full part in the collective deliberations which are so important to the work of the Commission. Each had the lively, inquiring mind which is always ready to seek to promote what is best in any law reform project, and also to identify any weaknesses which that project may contain. The departure of any one of them would have been a blow to the Commission; the departure of all three together, something unprecedented in our history, gives their successors an enviable example to live up to.

[60] The Incapacitated Principal (1983) Law Com No 122, Cmnd 8977; Covenants Restricting Dispositions, Alterations and Change of User (1985) Law Com No 141; and Leasehold Conveyancing (1987) Law Com No 161.

[61] Implementing the report on Rights of Access to Neighbouring Land (1985) Law Com No 151, Cmnd 9692.

[62] (1988) Law Com No 174.

[63] (1991) Law Com No 194.

[64] See paras 1.2 above and 2.26–2.31 below.

[65] See paras 1.9 and 1.15 above and para 2.51 below.

1.31 Their fellow Commissioners have already welcomed two of their replacements. Charles Harpum, a Fellow of Downing College, Cambridge, joined the Commission on 1 January 1994, and he was rapidly followed by Diana Faber, a partner in Richards Butler, the city firm of solicitors. Charles Harpum will lead work on property law and trust law and Diana Faber on company law and commercial law. During the course of the year two further new Commissioners will join us to lead work on criminal law and on common law and public law respectively.

1.32 These changes also mark a shift in the Commission's work. Although we are under a statutory duty to keep the whole of the law under review, our governing statute only provides for four Commissioners (apart from the Chairman) and the work the Commission undertakes will inevitably reflect to a considerable extent the expertise of individual Commissioners. Thus the combination of Julian Farrand and Trevor Aldridge in the 1980s led to a cascade of reports in the field of property law; Brenda Hoggett, as Stephen Cretney's successor, continued to build up our reputation in the field of family law; and Peter North's time at the Commission up to September 1984 led to the publication of a number of influential reports in the field of private international law.

1.33 The concentration of work in those fields led, inevitably, to the comparative neglect of other areas of law. And the very success of the Commission's work in the field of family law, for example, meant that it was difficult to justify having a new Commissioner who would lead work exclusively on family law. We are now exploring ways in which the Commission's family law capability can be kept alive while there is no member of the Commission who is a specialist family lawyer.[66] In the meantime, although we have been able to take on some commercial law work in the recent past, we welcome the prospect of moving into and giving a higher profile to areas of business law which have not occupied our attention much in recent years.

1.34 In the autumn we held a very enjoyable party to do honour to R H (Frank) Streeten CBE. Frank Streeten first came to the Commission in December 1967 and his retirement at the end of August marked the end of twenty-five years service to the Commission in the field of statute law revision. He was involved in the preparation and implementation of each of the Commission's reports on this recondite subject, from the First Report, implemented by the Statute Law (Repeals) Act 1969, to the latest, Fourteenth Report, implemented by the Statute Law (Repeals) Act 1993. For 15 of those 25 years he headed our statute law revision team, with a brief interruption in the early 1980s, when he was Acting Secretary. In October a large number of former Commissioners, former Secretaries to the Commission, and Parliamentary Counsel, past and present, joined us to pay tribute to a remarkable, perhaps unique period of public service devoted to the simplification of the statute book.

[66] See para 2.52 below.

1.35 We were delighted to welcome back as his successor Christopher Dyment who had served at the Commission between 1969 and 1985 before leaving us to become Secretary of the Council on Tribunals. We also welcome as head of our team of Parliamentary draftsmen Peter Knowles. He succeeds Geoffrey Sellers to whom we were very grateful for much wise advice and skilful draftsmanship.

1.36 It would be invidious to mention members of our staff individually. On the other hand it would be wrong not to acknowledge the debt we owe to the Secretary, Michael Collon, and the Assistant Secretary, Chris Porter, for ensuring that the administrative base for our work operates so smoothly. We were delighted by the special Departmental award given to the Senior Messenger, Reta Mabbs, for her services in connection with the recent refurbishment of our building. And in a year of such intense productivity it would be churlish not to mention the effective way in which the Editor, Dan Leighton, has successfully and almost single-handedly masterminded the publication (through HMSO) and distribution of all our reports and consultation papers. He has also watched over the smooth transition to our new format and style of publication. We hope this will meet with general approval and make our publications even more attractive and easy to read in future.

PART II
THE YEAR UNDER REVIEW

LAW REFORM REPORTS AND CONSULTATION PAPERS

2.1 We list below the law reform reports which we submitted to the Lord Chancellor during 1993:

Law Com No	*Title*
215	Sale of Goods Forming Part of a Bulk (Scot Law Com No 145)
216	The Hearsay Rule in Civil Proceedings
217	The Effect of Divorce on Wills
218	Offences against the Person and General Principles
219	Contributory Negligence as a Defence in Contract
220	Delegation by Individual Trustees
221	Termination of Tenancies Bill
222	Binding Over

The last three of these reports were not published until January and February 1994. We also submitted to the Lord Chancellor in 1993 a revised draft Bill on Trusts of Land, which implemented the recommendations in our 1989 report.[1]

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

Consultation Paper No	*Title*
129	Mentally Incapacitated Adults and Decision-Making: Medical Treatment and Research
130	Mentally Incapacitated and Other Vulnerable Adults: Public Law Protection
131	Assisting and Encouraging Crime
132	Aggravated, Exemplary and Restitutionary Damages
133	The Rules Against Perpetuities and Excessive Accumulations
134	Consent and Offences against the Person[2]

[1] Transfer of Land: Trusts of Land, Law Com No 181. See para 2.73 below. We do not intend to publish this draft Bill.

[2] This paper was approved in December 1993 but not issued until February 1994.

REPORT ON PROGRESS

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

Public Law and Regulatory Law

Judicial Review and Statutory Appeals

2.4 Work is continuing on the production of a report on the procedures and forms of relief which are available by way of judicial review, and on those which govern statutory appeals and applications to the High Court from the decisions of inferior courts, tribunals and other bodies.[3] We have been considering the very large number of submissions we received in response to the consultation paper published in January 1993.[4] The year also saw the important decision of the House of Lords in *M v Home Office*[5] in which it was held that in judicial review proceedings there is jurisdiction to make coercive orders such as interim injunctions against Ministers of the Crown acting in their official capacity and against central government departments.

2.5 In addition to written submitted responses, the issues raised by the consultation paper have been considered at a number of meetings. Robinson College, Cambridge and Dr C F Forsyth organised a conference on judicial review on 15 May, and earlier that month the Commission and the Institute of Advanced Legal Studies held two evening seminars on judicial review and statutory rights of appeal. Our Chairman chaired the first and Lord Archer of Sandwell QC, the chairman of the Council on Tribunals, chaired the second of these seminars. Professor Beatson and the Chairman also spoke at conferences on judicial review held in London in September and December 1993 respectively. These occasions provided much valuable material for the project. In September the Chairman and Professor Beatson visited the Combined Taxes Tribunal Centre in London to discuss rights of appeal in that context with the Presiding Special Commissioner and President of the Value Added Tax Tribunals and a number of Tribunal Chairmen and Special Commissioners. Consultations scheduled for 1994 include a meeting with the Nominated Judges of the Queen's Bench Division, further co-operation with the Council of Tribunals and a meeting with the Legal Aid Board. Sir Derek Oulton GCB QC, Fellow of Magdalene College, Cambridge, is assisting us in this project.

2.6 In the consultation paper we referred to research on access to and the use of judicial review which was being carried out by the Public Law Project in conjunction with Maurice Sunkin of the University of Essex.[6] The results of this research have now

[3] See also Appeals to the Court of Appeal (Civil Division) – Leave to Appeal, Lord Chancellor's Department (May 1993).

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

[5] [1993] 3 WLR 433.

[6] 'Judicial Review in Perspective', The Public Law Project, Sunkin, Bridges, Mezzaros (June 1993).

been published and its findings mirror the experience of many of those who responded to our consultation paper. For many the scale of the present delays was a major preoccupation. A recent report by an influential working party has pointed out that "there is something absurd about telling an applicant that he is out of time because his complaint has not been made within three months (see RSC Order 53 rule 4) when the state of lists is such that after he has made his complaint it cannot be adjudicated upon for well over a year".[7] In fact the delays now often exceed two years.

2.7 The progress of this project was severely affected by staffing difficulties between April and September, to which we refer in Part V of this report. We now hope to finalise a report by September 1994, when Professor Beatson will be leaving us for Cambridge University, and to publish it before the end of the year.

Fiduciary Duties and Regulatory Rules

2.8 Our examination of the principles which should govern the way in which statutory and self-regulatory controls can exist in harmony with the fiduciary duties which are owed by those who carry on certain types of professional and business activity (primarily relating to the provision of financial services) is progressing. The responses to the consultation paper[8] have been analysed and we are now considering questions of policy. We are sensitive to the number of important changes in the legal and regulatory environment which have taken place since the publication of our consultation paper, and we are conscious that our recommendations must be sufficiently flexible to cope with a variety of contingencies.

2.9 The principal legal developments have been decisions of the Privy Council. The most significant is *Kelly v Cooper*,[9] an appeal from the Court of Appeal of Bermuda. This, and the case of *Mouat v Clark Boyce*,[10] an appeal from New Zealand, indicate that contractual methods may go a long way towards avoiding the problems identified in the consultation paper, and we will analyse them carefully in our final report. Another legal development which we are considering is the Investment Services Directive[11] which must be implemented by Member States by 31 December 1995.

2.10 The main regulatory development we need to take into account stems from the publication in May 1993 of the report by Andrew Large, the Chairman of the Securities and Investments Board, on the future regulation of financial services.[12]

7 Review of the High Court Judges' Work, Deployment & Numbers, Lord Chancellor's Department (1993).

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

9 [1993] AC 205 .

10 [1993] 4 All ER 268.

11 Council Directive 93/22/EEC (OJ L 141, 11.6.93, p 27).

12 Large, *Financial Services Regulation – Making the Two Tier System Work.*

This report recommends that the Securities and Investments Board should in future move away from rule-making and that it should concentrate on setting standards of regulation and investor protection and on its supervisory function. Greater responsibility for rule-making will be given to the recognised self-regulating organisations and, in due course, the Securities and Investments Board will "de-designate" existing core conduct of business rules. This means that any solution which depended upon the designation of core rules (as did some of the solutions suggested by consultees) would be out of harmony with the new regulatory approach and would not be practical.

2.11 In November 1993 together with the Securities and Investments Board we held a seminar at Merton College, Oxford to assess the impact of the recent legal and regulatory developments and to consider what options for reform were realistic in the light of these developments and the responses we had received on consultation. This seminar was attended by representatives of the Treasury, the Securities and Investments Board, the Company Law Committee of The Law Society, the British Merchant Banking and Securities Houses Association and the Bank of England. It was very useful in enabling us to identify the common ground which now existed between the different interest groups. We have also had a meeting with the chief executive of the Financial Law Panel. Our timetable has recently been affected by staffing difficulties[13] which will mean that we will not be able to publish our report as soon as we had hoped: we still hope to report within a year. We continue to be assisted on this project by Professor D D Prentice of the University of Oxford.

Contract Law

Sale of Goods

2.12 In July 1993 we published our joint report with the Scottish Law Commission on Sale of Goods Forming Part of a Bulk.[14] Our main recommendation was that the buyer of an undivided share in a bulk should be able to become owner of a proportionate part of the undivided bulk corresponding to the quantity of the goods paid for and due to him out of the bulk. We made various subsidiary recommendations which were designed to ensure that the proposed new rule would not interfere with normal trading or with the contractual arrangements which operate in some trades, such as the grain trade, for the mutual adjustment of shortfalls or excessive deliveries. The report is a response to concerns expressed by commodity traders and their advisers that section 16 of the Sale of Goods Act 1979 presents an undesirable impediment to freedom of contract because it prevents contracting parties from achieving the results which they want to achieve. A leading oil company, urging reform, told us that

[13] For the nature of these difficulties see paras 5.2–5.5 below.

[14] Law Com No 215, Scot Law Com No 145. This concludes our work on bulk goods. Our earlier report on Rights of Suit in Respect of Carriage of Goods by Sea (1991) Law Com No 196, Scot Law Com No 130, which was implemented by the Carriage of Goods by Sea Act 1992, dealt only with one unfortunate consequence of s 16 of the Sale of Goods Act 1979.

"one of the strongest arguments for changing the law is the fact that the law is now lagging so far behind the commercial requirements of the day".[15] Although our proposals are likely to be of most significance in relation to commercial sales of commodities such as grain and oils which are commonly dealt with in bulk, they may also apply to consumer contracts. For example, a consumer might buy and pay for an agreed number of bottles of wine which are stated in the contract to form part of an identified bin containing identical bottles, or for a length of carpet which formed part of a roll identified in the contract.

2.13 Our report has been warmly welcomed[16] by a number of trading organisations because it is widely recognised that our law in this field lags a long way behind the requirements of modern commerce. It was also welcomed by the Commercial Court Users' Committee, which has expressed the hope that means will be found to give legislative effect to the proposals without delay. It is now being considered by the Government, primary responsibility lying with the Department of Trade and Industry.

Contributory Negligence as a Defence in Contract

2.14 Our report was published in December 1993.[17] We recommended that the court should have the power to reduce a plaintiff's damages for breach of a contractual duty to take reasonable care or exercise reasonable skill (or both) where the plaintiff has contributed to his own loss by failing to take reasonable care for the protection of himself or his interests. However, we recognised that it was essential that the parties to a contract should be able to apportion the risk of loss caused by the plaintiff's contributory negligence as they think fit, and that the justification for apportionment applied only where the parties had not made any contractual provision as to who should bear the loss. We therefore recommended that parties to a contract should be able to exclude the apportionment rule. In the consultation paper we had expressed the provisional view that the court should also have the power to reduce damages on the ground of contributory negligence in cases involving the breach of a "strict" contractual duty. However, we were persuaded by the views expressed to us on consultation that it would be inappropriate to recommend this wider reform.[18]

2.15 Under the present law a court may only apportion damages for breach of contract in circumstances where the plaintiff has contributed to his own loss if the defendant is in breach of both a contractual duty of care and a tortious duty of care. However, whether a duty of care is contractual or tortious does not affect its content and it is anomalous that the availability of apportionment should depend on the way the duty is classified. Calls for reform to increase the role of apportionment in contract cases

[15] Law Com No 215, Scot Law Com No 145, para 3.3. See also para 2.13 below.

[16] See para 2.12 above.

[17] Law Com No 219.

[18] Our reasons are set out *op cit*, paras 4.2 – 4.6.

came from a wide variety of legal and professional sources, including, most recently, the Review Committee on Banking Services Law,[19] the Auditors Study Team on Professional Liability,[20] and the Auditing Practices Board.[21]

Contracts for the Benefit of Third Parties

2.16 Sir Wilfrid Bourne KCB QC has now completed the analysis of the responses to the consultation paper[22] in which we provisionally recommended a reform of the rule that non-parties may not bring claims on a contract made for their benefit. Unfortunately chronic staffing difficulties[23] have meant that for most of the year we were unable to make progress on this project. Since the autumn, however, a working party consisting of Professor Beatson, Professor H Beale of the University of Warwick, Professor Aubrey Diamond, a former Law Commissioner and now of the Notre Dame University Law Centre, London, and Dr S Wheeler of the University of Nottingham has been meeting with the aim of preparing a policy paper. We hope that we may soon be able to allocate a member of our own staff to the project and we aim to complete the policy paper during the summer of 1994. These delays mean that we will probably not be able to report now until 1995.

Damages in Civil Litigation

2.17 We are continuing our review of the principles which govern the present remedy of damages for monetary and non-monetary loss, and the effectiveness of that remedy. Our second consultation paper, on Aggravated, Exemplary and Restitutionary Damages,[24] was published in October 1993. In this paper we expressed the provisional view that exemplary damages should be retained but that the remedy should be put on a more principled basis. This might be done by introducing a general statutory rule whereby such damages would be available where a person who has committed a civil wrong has acted maliciously or otherwise outrageously with deliberate disregard or reckless indifference to the rights of another. Alternatively the result might be achieved through a more detailed legislative scheme. We favoured the latter idea. Under this scheme such damages would be available where the parties had been in a relationship of inequality at the time of the wrong, and the wrongdoer had acted consciously and deliberately, showing a contemptuous disregard for the plaintiff's rights. The types of relationships we had in mind were landlord and tenant, public official or police officer and citizen, employer and employee, and newspaper and the subject of published material. The timeliness of our review was illustrated by

[19] *Banking Services: Law and Practice, Report by the Review Committee* (Chairman, Professor R B Jack) (1989) Cm 622, paras 6.14–6.15.

[20] *Professional Liability, Report of the Study Teams* (Chairman, Professor A Likierman) (1989) HMSO, Report of the Auditors Study Team, para 9.7.

[21] *The Future Development of Auditing: A Paper to Promote Public Debate* (November 1992) The Auditing Practices Board, para 5.2.

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

[23] See paras 5.2–5.5 below for the nature of these difficulties.

[24] Consultation Paper No 132.

the case of *Elton John v Mirror Group Newspapers*.[25] This was a defamation case heard just after the publication of our paper, which elicited a good deal of comment in the media because a large sum of exemplary damages was awarded. It is now the subject of an appeal. Our paper also asked questions about the roles of aggravated and restitutionary damages, since these remedies co-exist and, to an extent, overlap with exemplary damages. In November 1993 Professor Beatson addressed the Annual Conference of the Association of Personal Injury Lawyers on Aggravated and Exemplary Damages.

2.18 We have now finished analysing the responses to our first consultation paper in this series[26] which was mainly concerned with structured settlements.[27] We received a substantial response from a good cross-section of interested parties: barristers and solicitors, academic lawyers, the judiciary, intermediaries, insurance companies, professional bodies and government departments. We have held meetings with some of these to follow up the responses we received and to assess the practicality of the various options for reform in the light of the views expressed to us. We hope to report on this topic later this year and we know that the outcome of our study is awaited with interest. We are aware, for instance, that the insurance and specialist intermediary industries believe that our recommendations will significantly affect their markets.

2.19 1993 also saw the completion of the practical work involved in our empirical research into the way victims of personal injury use the awards of damages they received. Our purpose was to seek answers to a number of questions relevant to our present study. We asked, for example, how plaintiffs used their damages; whether their damages effectively covered past, present and future costs; and what their views were about receiving compensation. Our consultant, Professor Hazel Genn of Queen Mary and Westfield College, London, also supervised a survey of a smaller sample of those who had been interviewed in the main survey. This work involved examining the legal files in the offices of plaintiffs' solicitors to match up the information their lay clients had given on such matters as the amount and breakdown of their damages and what offers had been made and accepted. The information thus collected is now being processed and analysed for inclusion in a report which we hope to publish on its own in the first half of 1994: its findings will also form an important component in our consideration of relevant policy issues and of possible reforms to the law of damages for personal injury. We were interested to read a report by Paul Cornes on *Coping With Catastrophic Injury*,[28] sponsored by the Association of British Insurers, which was based on a similar but smaller study conducted in 1991–92. This study, which took place 10 years after injury, yielded some interesting results. For example, there were

[25] 4 November 1993 (Drake J, unreported).

[26] Structured Settlements and Interim and Provisional Damages, Consultation Paper No 125.

[27] The paper also considered interim and provisional damages and methods of assessing future loss.

[28] A follow-up survey of personal injury claimants who received awards of £150,000 or more in 1987 and 1988 (January 1993) Disability Management Research Group, the University of Edinburgh.

noticeable disparities between expert opinions on an injured party's future requirements for care and supervision, and on the equipment and adaptations he or she needed on the one hand, and on the other hand the arrangements which were actually in place. There was also the interesting finding that anecdotal reports of dissipation of damages appear to be incorrect. In general, the evidence contained in that study revealed careful preservation of funds.

2.20 Work on the next topic in the damages study, non-pecuniary loss, has continued during 1993. This subject has proved to be a substantial one, both in the complexity of its subject matter and in its scale. We therefore decided to deal with pain and suffering, nervous shock and bereavement damages in one consultation paper and to tackle issues relating to the operation of the Fatal Accidents Acts in a separate smaller paper to be published later. We hope to publish the first of these papers during 1994.

Restitution

Payments Made Under a Mistake of Law and Ultra Vires Public Authority Receipts and Disbursements

2.21 We have been considering the implications and scope of the principle enunciated by the House of Lords in *Woolwich Equitable Building Society v Inland Revenue Commissioners*[29] in the light of the reservations of the Scottish Law Commission.[30] In the first three months of the year we met representatives of a number of regulatory bodies (OFGAS, OFWAT and OFFER) to discuss the implications of a right of restitution in respect of overpayments to privatised utilities. The question of recovery of overpayments to public authorities and utilities continues to arouse interest. Early in 1993 it was estimated that businesses were being overcharged by up to £100 million per year by privatised utilities.[31] We also understand that building societies which have been prevented by legislation from recovering overpayments of composite rate tax, as the Woolwich Equitable Building Society did, have taken steps to bring the matter before the European Court of Human Rights at Strasbourg.

2.22 In October Professor Beatson participated in a conference organised by the Scottish Law Commission and the University of Strathclyde in Edinburgh at which there was a discussion of the Scottish Law Commission's discussion paper on error of law and a position paper by the Scottish team on the recovery of ultra vires public authority receipts and disbursements.

[29] [1993] AC 70. See J Beatson, "Restitution of Taxes, Levies and Other Imposts: Defining the Extent of the *Woolwich* Principle" (1993) 109 LQR 401, based on a lecture at King's College London.

[30] 28th Annual Report (1992–93) Scot Law Com No 146, para 2.32; The Recovery of Benefits Conferred under Error of Law (1993) Scot Law Com Discussion Paper No 95, para 1.9.

[31] *The Observer* 21 February 1993.

2.23 Unfortunately, concentration of resources on other projects has impeded progress on this subject and has delayed the preparation of a policy paper. We hope that by the time this report is published the position will have improved, and we now hope to report before the end of 1994. Professor S L Arrowsmith of the University College of Wales, Aberystwyth continues to act as our consultant.

Breach of Confidence and Privacy

2.24 The Commission reported on breach of confidence in 1981[32] and although the Government has accepted the main recommendation that the law should be put on a statutory basis, it did not accord it a high priority because the Commission's proposals amounted "essentially to a recommendation for a restatement of the common law".[33] The current debate about the introduction of a civil remedy for the infringement of privacy has reawakened interest in our report on breach of confidence. In its evidence to the Calcutt Committee and to the National Heritage Select Committee the Bar Council expressed the view that breach of confidence remained a fertile area of the law for the protection of privacy and the Select Committee recommended that consideration be given to introducing legislation on breach of confidence as a valuable part of a Protection of Privacy Bill.[34] In the Government's consultation paper on infringement of privacy, in the preparation of which Professor Beatson assisted, it is stated that further consideration is now being given to the Law Commission's proposals on breach of confidence.[35]

2.25 We believe that the need for the law on breach of confidence to be put on a statutory basis has not been removed by judicial developments.[36] The doubts which concerned many trading organisations as to the circumstances in which a duty of confidence arises still remain.[37] So do the problems about the appropriateness of the existing monetary remedies for breach of confidence which stem from its equitable basis. Furthermore, the scope of the public interest defence will be of particular importance if a civil remedy for infringement of privacy is introduced. If privacy, but not breach of confidence, is subject to defences to ensure that freedom of expression is protected there would be a danger that the limitations of the statutory wrong could be avoided by suing for breach of confidence.

[32] Breach of Confidence (1981) Law Com No 110, Cmnd 8388.

[33] *Hansard* 12 March 1985; 2 February 1987; 2 March 1989.

[34] Privacy and Media Intrusion, National Heritage Select Committee, 4th Report HC 294–1, (1993) para 50.

[35] Infringement of privacy consultation (the Lord Chancellor's Department and the Scottish Office) (1993) para 4.4 and annex C, para 42.

[36] The most important of these is the "Spycatcher" case, *A G v Guardian Newspapers* (No 2) [1990] 1 AC 109.

[37] Law Com No 110, paras 5.3 and 6.10.

Criminal Law

Criminal Code: Offences against the Person and General Principles

2.26 As we observed in 1993,[38] Parliament has imposed on the Commission the important duty of promoting the codification of the law.[39] From its earliest days the Commission has seen the codification of the criminal law as a central feature of that work; this is an objective that has been achieved in almost all other common law jurisdictions.

2.27 We explained last year[40] how codification is important for two quite different reasons. The criminal law controls the exercise of state power against citizens, and the protection of citizens against unlawful behaviour, and it is important that its rules should be determined by Parliament and not by the sometimes haphazard methods of the common law. This can be achieved only if the law is put into statutory form in a comprehensive manner. It is also important from the standpoints of efficiency, economy and the proper administration of justice that the law should be stated in clear and easily accessible terms.

2.28 These principles are well demonstrated by the report[41] that we published in November 1993 on the law of non-fatal offences against the person and on general principles and defences applying throughout the criminal law.

2.29 This report followed a consultation paper[42] in which we proposed that there should be a new law, expressed in modern and simple language, to deal with the whole range of offences involving violence and assault. We received a large response to that paper, including detailed submissions from judges, criminal practitioners, prosecutors, police and academic commentators. This consultation evidenced an overwhelming dissatisfaction with the present state of the law, contained in the Offences against the Person Act 1861, which uses concepts and language which were outdated even at the time it was passed. Comment on consultation was also very strongly in favour of the introduction of our proposed new law.

2.30 The report and the annexed Criminal Law Bill therefore largely repeat the recommendations put forward in our consultation paper. We recommended in clear terms that the present law should be replaced by three simple offences: intentionally causing serious injury; recklessly causing serious injury; and intentionally or recklessly causing injury.

[38] Twenty-Seventh Annual Report 1992 (1993) Law Com No 210, para 2.14.

[39] Law Commissions Act 1965, s 3(1).

[40] Twenty-Seventh Annual Report 1992 (1993) Law Com No 210, para 2.15.

[41] Legislating the Criminal Code: Offences against the Person and General Principles (1993) Law Com No 218, Cm 2730.

[42] Legislating the Criminal Code: Offences against the Person and General Principles, Consultation Paper No 122.

2.31 The second part of the Criminal Law Bill sets out in accessible statutory form the law of self-defence, duress, and other defences and general principles. These principles and defences, also the subject of wide consultation, can arise in any criminal case. At present they are still mainly a matter of common law. For the reasons observed at paragraph 2.27, it is important that these rules too should be codified. The most striking recommendation in this part of our report was that the defence of duress should be extended to cases of murder and attempted murder, but that in any case the burden of proof should rest on the defendant to prove, on the balance of probabilities, that he acted under duress when he committed the crime charged against him.[43]

Intoxication

2.32 As part of our continuing programme of codification, we published a consultation paper[44] in February 1993 which was concerned with the legal rules relating to the effect of intoxication on criminal liability. This elicited a wide range of responses. We have now finished analysing these responses and we have started to consider the policy which should inform the recommendations in our final report. We would have been able to report in 1994, but for the pending appeal to the House of Lords in *Kingston.*[45]

The Effect of the Victim's Consent on Criminal Liability for Physical Injury

2.33 While we were preparing our report on Offences against the Person and General Principles,[46] we had to consider the effect of the victim's consent on criminal liability for physical injury. There are two distinct features in the present law on this subject. In the case of assault, but not of more serious offences against the person, no offence is committed if the victim consented to what was done and the act done was not intended or likely to cause actual bodily harm. And there are certain situations in which conduct which would normally be an offence under the general rule is not criminal because of the circumstances in which it takes place.

2.34 In Consultation Paper No 122 we expressed the provisional view that the Criminal Law Bill attached to our report on non-fatal offences against the person should reproduce the common law in this area, and that the exceptions we have just mentioned should be left to be developed by the courts. We were, however, impressed by the response from several commentators on that consultation paper who argued that our objective of reviewing the whole of the criminal law, with a view to putting

[43] The defence of duress continues to cause difficulties. The Court of Appeal recently stated that Parliament should consider the need for a defendant to serve a notice that a defence of duress was to be raised, giving the prosecution time to investigate the facts: *Hurst, The Times* 2 February 1994, *per* Beldam LJ. See also *Cole, The Independent* 21 February 1994 (CA).

[44] Intoxication and Criminal Liability, Consultation Paper No 127.

[45] [1993] 3 WLR 676 (CA).

[46] Law Com No 218; see paras 2.28-2.31 above.

it on a statutory basis, would not be satisfactorily achieved unless all the common law rules in this area were subjected to critical scrutiny. In this way we would be able to examine whether it might be possible to reach agreement on their limits and to express them in statutory form.

2.35 In response to these submissions we initiated a separate project on the effect of consent on criminal liability for physical injury. A consultation paper[47] we completed before the end of 1993 addresses these issues. First, should there be a general rule, and if so in what terms, as to the level of injury which may be inflicted on a victim with his consent without the injurer incurring criminal liability? Second, in what particular situations, and according to what detailed rules, should it be permissible to inflict injury, including injury which goes beyond that permitted by the general rule?

Assisting and Encouraging Crime

2.36 In September 1993 we published a substantial consultation paper[48] calling for critical comments on the question of the future scope of the criminal law in relation to those who assist or encourage others to commit criminal offences. This was the first major review of this area of the law carried out by a public body in this country this century, and once again it revealed serious deficiencies in vague common law concepts, such as aiding, assisting, counselling or procuring, which go back to Victorian times.

2.37 In this study two policy goals were sometimes in conflict. On the one hand it can be argued that conduct of this kind is seriously anti-social because it tends to encourage the commission of crime, or may bolster the determination of those who intend to commit crime. On the other hand it can be argued that the criminal law should not stretch too far, and when somebody has not himself committed a defined crime, but has merely helped or encouraged somebody else to do so, the criminal law should only intervene in clear and particularly serious cases.

2.38 Our paper also raised questions about the state of mind which an assister should be shown to have before he can be convicted of an offence. Should he have an intention or purpose that the crime he assists should in fact be committed? Or should it be enough to show that he is aware that the crime may be committed but is indifferent as to whether it is in fact committed or not? We suggested a possible new scheme of offences of assisting and encouraging crime, and invited opinions on the extent to which the law should be extended to cover these controversial areas of human activity.

[47] Consent and Offences against the Person, Consultation Paper No 134, published in February 1994.

[48] Assisting and Encouraging Crime, Consultation Paper No 131.

Involuntary Manslaughter

2.39 With the completion of our work on the law relating to non-fatal offences against the person it was logical that we should turn our attention next to the law of homicide. It would be difficult to envisage an unreformed law of homicide, largely based on common law concepts, lasting for very long alongside a modern law relating to non-fatal offences, expressed in clear statutory language.

2.40 We decided, however, not to include the whole of the law of homicide in our next project, but to limit ourselves to the law of involuntary manslaughter, that is, causing death in the course of doing an unlawful act or causing death by gross negligence or recklessness. It does *not* include those parts of the law of manslaughter which depend on the presence of the necessary intention for murder coupled with one of the three statutory defences (diminished responsibility, provocation, or agreement to enter into a suicide pact) which may reduce that crime to the crime of voluntary manslaughter. Our reasons for doing this were twofold. The first was that the law of murder (including the three statutory defences) has been reviewed on two occasions recently by very authoritative public bodies,[49] and the Government has made it very clear that it refuses to accept their recommendations. In those circumstances we considered that we would not be justified in devoting any of our limited resources in conducting a further study so soon. The second was that experience has shown that our efforts are more effective if we limit our individual law reform projects to relatively manageable, discrete portions of the law.

2.41 In the event, the timing of our new project was very appropriate, because in May 1993 two different divisions of the Court of Appeal (Criminal Division)[50] expressed dismay at the present state of the law which governs the two main types of manslaughter,[51] and asked us to review the law urgently. In addition there is now great interest in the possibility of corporations being indicted for manslaughter following public service disasters[52] and our study will include a consideration of this topic, too. We hope to publish a consultation paper soon after Easter 1994.

[49] Criminal Law Revision Committee, Fourteenth Report, Offences Against the Person (1980) Cmnd 7844; House of Lords Select Committee on Murder and Life Imprisonment (1989) HL 78–I.

[50] *Scarlett* [1993] 4 All ER 629, 631, 638; and *Prentice* [1993] 3 WLR 927, 952–3.

[51] These are commonly described as unlawful act manslaughter and gross negligence manslaughter. The other species of involuntary manslaughter involves killing with what is often described as "subjective recklessness".

[52] Such as the Zeebrugge ferry disaster, the fire at King's Cross Underground Station or the railway disaster near Clapham Junction in the 1980s.

Binding Over

2.42 Shortly before the end of 1993 we approved our long-delayed report on Binding Over, which was published in February 1994.[53] It was as long ago as November 1980 that the then Lord Chancellor, Lord Hailsham of St Marylebone, referred this topic to us, and we found that it was a very controversial one. Our study related to the law of binding over to keep the peace and be of good behaviour, which has formed part of our law for over a thousand years, and is mentioned in one of the oldest statutes, the Justices of the Peace Act 1361. Its adherents admired it for its flexibility and relative informality. Its critics condemned it for its vagueness, its harshness,[54] and its alleged incompatibility with modern concepts of due process and natural justice.

2.43 In the event, the long period of our study made our eventual recommendation less difficult to arrive at. The 1980s had seen the steady criminalisation by statute of different acts of anti-social conduct which had previously been obvious candidates for a binding over order. This was done by different Acts of Parliament, most notably by section 5 of the Public Order Act 1986. There had also been a great development of different types of diversionary schemes, such as cautions or "caution-plus" which took away from the criminal courts altogether many who would previously have been brought to court, only to be bound over. And there is also now a much greater awareness of the nature of this country's international obligations under the European Convention on Human Rights than there was in 1980 when our study began.

2.44 We explored the possibility of replacing binding over by some form of judicial warning scheme, but those we consulted were not greatly enamoured of this idea, which we therefore did not pursue. In the end we came to the view that when judged by modern standards of what our law should be, clear and accessible and fair, binding over had too many faults to survive without being substantially altered, and once these alterations were made an institution would emerge which lacked the flexibility and informality its supporters most prized. We were satisfied that its abolition would not leave an undesirable gap in the powers available to a court, and we therefore recommended its abolition without replacement.

Conspiracy to Defraud

2.45 During the course of the year we have been concerned to analyse the practical implications of any changes in the substantive law which we might recommend at the end of this project. The Criminal Law team has therefore conducted detailed consultations with the Serious Fraud Office and the Fraud Investigation Group of the Crown Prosecution Service; and, under the aegis of the Confederation of British

[53] Law Com No 222.

[54] Although nobody can be ordered to be bound over without their consent they can be imprisoned if they refuse to be bound over.

Industry and the British Bankers' Association, with a range of commercial and industrial organisations.

2.46 In January 1993 a Working Party of the Bar, under the chairmanship of Jeremy Roberts QC, published a Report on long fraud trials, in which it made proposals for reform of the substantive law. We have borne these in mind as well as the comments on the present law made by Professor Michael Levi in a published Research Study prepared for the Royal Commission on Criminal Justice, in which he drew attention to the practical problems to which the present state of the law relating to the requirement of dishonesty gives rise.[55]

2.47 The impending departure of Richard Buxton from the Commission resulted in some reordering of priorities within the team this year, but we hope we may be able to produce our report within 12 months of his successor joining us.

The Form of Counts in an Indictment

2.48 At the request of the Lord Chancellor's Department our Criminal Law team has been considering the ways in which the counts in an indictment might be drafted in a form which would indicate to the jury, much more clearly than under the existing practice, the nature and limits of the issues to be decided at a trial. A revised paper which the team completed early in 1993 was well received by the Royal Commission on Criminal Justice, which encouraged more work to be done in developing the ideas set out in that paper. The team has been considering this recommendation with representatives of the Lord Chancellor's Department and the Crown Prosecution Service, and a Consultation Paper will be issued by the team in the early months of 1994 to the judiciary and interested practitioners. This is an example of work being done by one of the Commission's teams at the request of Government and not by the Commission as a whole: the Family Law team has been particularly successful in undertaking collaborative projects of this kind.

Evidence

The Hearsay Rule in Civil Proceedings

2.49 We published a report on the Hearsay Rule in Civil Proceedings in September 1993.[56] Our main recommendation was that the hearsay rule in civil proceedings should be abolished. We recognised, however, the need to retain a widespread awareness of the limitations of using hearsay rather than direct evidence. We therefore proposed a number of safeguards, including a duty to give notice, however informally, of the intention to rely on hearsay evidence; guidelines to help the courts in assessing the weight they should attach to hearsay evidence; and a power to allow a party to call and cross-examine a witness whose evidence has been tendered as

[55] Research Study No 14, The Investigation, Prosecution, and Trial of Serious Fraud, at p 224.
[56] Law Com No 216, Cm 2321.

hearsay by another party who does not call the witness himself. We also recommended the abolition of the present elaborate provisions governing the reception of computerised records as evidence and the simplification of the provisions governing the proof of business records.

2.50 The Lord Chancellor referred this matter to us in 1989 following the recommendation of the Civil Justice Review that an enquiry by a law reform agency should be commissioned into the usefulness of the hearsay rule in civil proceedings and the current machinery for rendering hearsay inadmissible.[57] There was widespread support on consultation for the abolition of the rule excluding hearsay evidence. Our recommendations are in harmony with the new approach pointed to by recent developments in the law and practice of civil litigation, where the main emphasis is upon ensuring that, so far as possible, and subject to considerations of reliability and weight, all relevant evidence is capable of being adduced,[58] and upon a more "cards on the table" approach. The report also considers the existing power of the court to deal with superfluous and repetitious evidence. Reactions to the report have been very favourable and the Government has accepted our recommendations.[59]

Corroboration of Evidence in Criminal Trials

2.51 The Home Secretary announced at the time of the 1993 Conservative Party Conference his decision to implement in full the Commission's recommendations contained in its report on Corroboration of Evidence in Criminal Trials.[60]

Family Law

General

2.52 We are marking Professor Brenda Hoggett's departure, and the fact that for the first time since 1978 we shall not have a specialist family lawyer as a member of the Commission,[61] by including as Part III of this report some reflections on our work in the field of family law since the Commission was established in 1965. We also identify some areas of law in which there is still work to be done over the next ten years. Of the three topics mentioned in our last annual report as warranting particular attention[62] we intend to start work during 1994 on a project concerned with the property rights of cohabitants.

[57] Report of the Review Body on Civil Justice (1988) Cm 394, recommendation 26.

[58] *Ventouris v Mountain (No 2)* [1992] 1 WLR 887, 899 *per* Balcombe LJ.

[59] Written Answer, *Hansard* (HL) 25 January 1994, vol 551, col 69.

[60] (1991) Law Com No 202, Cm 1620. See paras 1.9 and 1.15 above.

[61] See para 1.33 above.

[62] Twenty-Seventh Annual Report 1992 (1993) Law Com No 210, paras 2.38–2.40.

2.53 During 1993 the Family Law team devoted most of its time and resources towards taking forward its major project on Mentally Incapacitated Adults and Decision-Making. However, it also completed its work on The Effect of Divorce on Wills, and took part in other activities which are more fully reported in Part III.[63]

Mentally Incapacitated Adults and Decision-Making

2.54 As we have recorded in earlier reports[64] our work in this area of the law arose out of a growing concern that the rights of mentally incapacitated people and those who care for them in making decisions on a wide range of issues were inadequately protected by the existing law which is complicated, inflexible and piecemeal.[65] Just as we started our investigation into the adequacy of legal and other procedures for the making of decisions on behalf of mentally incapacitated adults, the House of Lords decided the case of *Re F (Mental Patient: Sterilisation)*.[66] That case revealed the shortcomings of the existing law and the difficulty of the common law in providing a solution to the whole range of problems which are likely to arise in relation to incapacitated adults. Our preliminary work in this area resulted in the publication in April 1991 of a consultation paper, Mentally Incapacitated Adults and Decision-Making: An Overview.[67] That paper did not put forward particular proposals for reform but invited comment on the extent of the need for reform and the most practicable way forward in a difficult and diffuse area.

2.55 During 1993 the Family Law team made considerable progress in this project. Because of its breadth we decided to divide it into a number of discrete but interlocking areas. Between February and May 1993 we published three further consultation papers. The first proposed the establishment of a new integrated jurisdiction in which decisions relating to both personal care and financial affairs of incapacitated persons could be made.[68] The type of decision discussed in this paper related to where the incapacitated person should live, for example, with whom he or she should have contact,[69] or who should be able to take decisions about spending his or her money. The second paper[70] explored the idea of creating a legal machinery by which substitute decisions about medical treatment could be authorised. It also

[63] For example, the team's involvement in the Lord Chancellor's Department consultation paper on Access to and Reporting of Family Law Proceedings published in August 1993 (see para 3.13 below).

[64] See eg Twenty-Fourth Annual Report 1989 (1990) Law Com No 190, paras 2.28–2.29.

[65] Fourth Programme of Law Reform (1989) Law Com No 185, Item 9.

[66] [1990] 2 AC 1.

[67] Consultation Paper No 119.

[68] Mentally Incapacitated Adults and Decision-Making: A New Jurisdiction, Consultation Paper No 128.

[69] In one recent case it was held that the High Court has jurisdiction to make a declaration in respect of persons with whom an incapacitated person should have contact, see *Re Conlon* [1993] 1 FLR 940.

[70] Mentally Incapacitated Adults and Decision-Making: Medical Treatment and Research, Consultation Paper No 129.

considered the scope and validity of advance directives.[71] The third paper in this series addressed the role of public authorities in relation to incapacitated persons and it also considered whether and to what extent public authorities need powers to protect other vulnerable persons from abuse and neglect.[72]

2.56 Following the publication of the consultation paper on medical treatment and research the Commission submitted written evidence to the House of Lords Select Committee on Medical Ethics which considered, among other things, the implications of a person's right to withhold consent to life-prolonging treatment, and the position of those who are not able to give or withhold consent.[73] We were very pleased that we were able to assist that committee in its work, to the extent that it overlapped our own study.

2.57 During the consultation periods we held over 20 meetings with Government departments, the Law Society and other professional bodies, voluntary organisations, academics and other interested parties to listen to their views on our proposals. We also received more than 220 responses to the three consultation papers. We are very grateful to all those who attended the meetings or responded in writing. Throughout our work we have kept in close contact with the Scottish Law Commission who are undertaking a similar review.[74]

2.58 Public interest in the whole range of problems associated with decision-making on behalf of incapacitated adults continues to grow. Genetic testing is just one recent example of the problems unresolved by the current law governing those who provide treatment to the mentally incapacitated. A report of the Nuffield Council on Bioethics expresses the view that it is not clear whether such a procedure, if not intended to benefit the individual incapacitated adult, should ever be conducted.[75] Developments such as this confirm our strongly held belief that a systematic and comprehensive reform of the law is necessary. We are now in the process of finalising policy and we hope to publish our final report with a draft Bill during 1994.

[71] In another recent case, *Re C (Refusal of Medical Treatment)* [1994] 1 FLR 31, it was decided that the High Court may grant a declaration or injunction that an individual is capable of refusing or consenting to medical treatment and can determine the effect of a purported advance directive as to future treatment.

[72] Mentally Incapacitated and Other Vulnerable Adults: Public Law Protection, Consultation Paper No 130.

[73] Report of the Select Committee on Medical Ethics, (1993–94) HL 21–I, paras 171, 176–177, 208 and 215.

[74] See Mentally Disabled Adults: Legal Arrangements for Managing their Welfare and Finances (1991) Scot Law Com Discussion Paper No 94, and Mentally Disabled and Vulnerable Adults: Public Authority Powers (1993) Scot Law Com Discussion Paper No 96.

[75] Nuffield Council on Bioethics, *Genetic Screening – Ethical Issues* (1993) para 4.26.

The Effect of Divorce on Wills

2.59 In September 1993 we published a report[76] which was designed to clear up a problem which has arisen with the present law on the effect of divorce on wills. Unlike marriage, divorce does not revoke a will, because this would often disinherit children or other relatives when the deceased would not have wanted this. The object of the present law is simply to cut the divorced spouse out of the will. But it does so in a way which can defeat the deceased's intentions about what should happen instead.

2.60 In November 1992 we distributed an informal consultation paper inviting comments on what we thought was a small technical issue. This paper attracted a large response, mostly in favour of the solution which we had proposed, although a small number argued that the whole will should be revoked. In our report we recommended that, unless the testator had shown a different intention, any gift to a former spouse should be treated as if that spouse had died on the date of the divorce. This would be a simple, easily understood rule which could be printed clearly on all divorce decrees, so that all divorced people would know where they stood and could make a new will if they wanted to do so. This sort of law reform, although less eye-catching than the larger projects, is an important part of our everyday task of keeping our law up to date and in line with the needs of modern society.

Property Law

Repairing Obligations

2.61 Leases and tenancy agreements commonly allocate, between the landlord and the tenant, the responsibility of keeping in repair property which is let. It is clearly important that they should do so, because without any contractual obligation or statutory intervention there is little that either party can do to ensure that the premises are kept in good condition. The bargain between the parties may place sole responsibility on one of them, may divide it between them or may ignore the matter completely. Nevertheless, even in the absence of an express obligation, the tenant has an interest in ensuring that the property is in a fit state for the purpose to which he wishes to put it, and the landlord needs to be sure that it is maintained to a standard which will ensure that its value does not diminish.

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

2.62 This is an area of the law in which in the past there has been piecemeal statutory intervention to impose repairing obligations[77] and to regulate the sanctions available for neglect to repair, both restricting[78] and extending[79] them. In 1987 we pointed out there were other unsatisfactory features of the law which merited reform.[80]

2.63 Accordingly, in April 1992, we published a consultation paper,[81] which examined the scope of both the contractual and the implied repairing obligations between landlord and tenant, together with issues relating to their enforcement. We put forward two alternative options for reform without expressing a preference for either. The first would be to adopt a new approach, which would replace the obligation to repair with an obligation linked to the use of the property. Either party to a lease would be responsible for ensuring that the property was fit for use for the purpose for which it was let.[82] The parties would be able to agree who had to do the work. If nothing was said, the duty would fall on the landlord. The alternative reform option would be to tackle the problems piecemeal.[83]

2.64 We received a substantial and detailed response[84] to the consultation paper, which was analysed by Sir Wilfrid Bourne KCB QC. We are very grateful to him for his help. Since the completion of this analysis in April 1993, further work on this project has had to give way to work on other Property and Trusts Law projects. However, we have recently resumed work on this topic with a view to examining the policy options for reform in the light of the responses to the consultation paper. Our aim is to submit a report during the first half of 1995.

[77] Now, Landlord and Tenant Act 1985, ss 10, 11, 13; Housing Act 1985, s 151(1), Sched 6, para 14(2).

[78] Landlord and Tenant Act 1927, s 18(1).

[79] Now, Landlord and Tenant Act 1985, s 17.

[80] Report on Landlord and Tenant: Reform of the Law, Law Com No 162, paras 4.69–4.71. Eg ensuring that one or other party should always be responsible for repairing the premises, defining the scope of the obligation, making provision for the consequences of inherent defects in buildings and extending rights of entry.

[81] Landlord and Tenant: Responsibility for State and Condition of Property, Consultation Paper No 123.

[82] The intended purpose would be that stated in the lease. If the lease was silent on the point, the intended purpose would be ascertained by reference to the use to which the premises were last put, or to the use to which they were physically adapted.

[83] Eg the duty to repair would include more items of work; the duty to keep homes fit for human habitation would no longer be subject to the present low rent levels; the primary remedy for a party would be an order to do the work; damages for failure could be more closely related to the cost of doing the work.

[84] Some 70 replies were received. Most of these came from landlords and tenants of property, practising lawyers, professional property managers and advisers, and local authorities.

Forfeiture of Tenancies

2.65 Our report entitled Termination of Tenancies Bill[85] was published on 2 February 1994. Apart from a few changes,[86] the draft Bill contained in the report seeks to implement the scheme for landlords' termination orders, which is designed to replace the present complex, confused and defective law of forfeiture, as recommended in our report on Forfeiture of Tenancies,[87] which was published in 1985.

2.66 A landlord needs to have sanctions to apply against a tenant who is in breach of his obligations. The ultimate sanction is the forfeiture of the lease. This is available in almost every case of a lease granted for a fixed period. Accordingly, the rules relating to forfeiture have a wide impact; they are in daily use and affect a very large number of people. Furthermore, the leasing of property is an important sector of the country's economy, and there is therefore a public interest that it should operate smoothly, and this public interest extends to the premature termination of a lease when this is justified. Accordingly, it is of considerable importance that the law should be principled, workable and just. The present confused state of the law, however, makes its application unnecessarily protracted and uncertain. As we reported in 1985, the law "besides being unnecessarily complicated, is no longer coherent and may give rise to injustice",[88] and "[t]he needless complication adds to the costs incurred by people caught up in the working of the law".[89] Reform is urgently needed.

2.67 The purpose of the landlords' termination order scheme is to rationalise and simplify the law. Our draft Bill would abolish the present law of forfeiture and, with it, the doctrine of re-entry,[90] and replace them with a scheme under which a court order would generally be required for the premature termination of a lease (unless consensual), and under which the tenancy will continue in force until the date on which the court orders that it should terminate. There would no longer be a distinction between termination of a lease for non-payment of rent and termination for other reasons. The right to take proceedings would no longer depend on the lease containing any special provision allowing the landlord to terminate for a breach of obligation by the tenant; however, it could be excluded by an express term in the lease.

[85] Law Com No 221.

[86] These are explained in the report.

[87] (1985) Law Com No 142. The proposals made in this report for reform of the law of forfeiture were well received. Commentators agreed that this branch of the law should be reformed along the lines proposed: see our Report on Termination of Tenancies Bill, Law Com No 221, para 1.12.

[88] Law Com No 142, para 1.3.

[89] *Op cit*, para 1.8.

[90] This practice has been criticised as "the dubious and dangerous method of determining the lease by re-entering the premises": *Billson v Residential Apartments Ltd* [1992] 1 AC 494, 536 *per* Lord Templeman.

Law of Trusts

Delegation by Individual Trustees

2.68 Our report, together with a draft Bill, was published in January 1994.[91] It examines the circumstances in which an individual trustee – as distinct from all the trustees as a body – should be entitled to delegate his powers and discretions to an attorney, the procedure for implementing any delegation and the constraints which should apply.

2.69 For almost 70 years, statute[92] has permitted individual trustees to delegate their powers and duties. However, since trustees are chosen for their personal qualities, some limits were placed as a safeguard for the beneficiaries. A recent change in the law[93] went further than may have been appropriate in enabling a trustee to delegate without any safeguards. Any reconsideration of the matter needs to take account of the fact that there are now many more people who own their homes jointly,[94] a fact which, for technical reasons, makes them trustees.[95] Any regulation of the powers of trustees which is too restrictive would cause unnecessary difficulty for these joint owners. Similarly, it is important that a joint owner should be able to make provision, by granting an enduring power of attorney, to manage and dispose of jointly owned property.

2.70 Accordingly, our report proposes that the untidy and confusing overlap between the two existing statutory provisions should be removed. In the result, a trustee who holds the trust property for a third party would have only a limited power to delegate,[96] so that the beneficiaries are protected. On the other hand, in the case of joint owners of land, who are themselves both trustees and beneficiaries, the rules safeguarding beneficiaries would be relaxed, thereby allowing a joint owner greater freedom to delegate.

The Rules against Perpetuities and Excessive Accumulations

2.71 Our consultation paper[97] on this topic was published in November 1993, with a request for comments by the end of June 1994. In it we consider possible changes to the notoriously complex legal rules which place restrictions on the ways in which owners may give away their property, whether during their lifetime or by will, on terms which give a number of people limited interests. The rules effectively limit the

[91] The Law of Trusts: Delegation by Individual Trustees, Law Com No 220.

[92] Trustee Act 1925, s 25.

[93] Enduring Powers of Attorney Act 1985, s 3(3).

[94] There has been a major change in the pattern of house ownership since 1925. The number of dwellings in England and Wales has risen by 215%, and the proportion which is owner-occupied has more than doubled. Fifty-one per cent of all owner-occupied homes bought in 1960–61 were purchased in joint names; in 1970–71 the equivalent figure was 74%: Todd & Jones, *Matrimonial Property* (1972) p 80. Experience suggests that this increasing trend has continued.

[95] Law of Property Act 1925, s 34.

[96] Eg the trustee would not be able to delegate for more than 12 months at a time.

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

period during which property can be held in trust, and restrict the distance into the future over which it is possible to benefit recipients.

2.72 The consultation paper examines these rules, their effect[98] and the underlying principles in detail, to see whether in modern conditions they can any longer be justified, and if so, whether they can be simplified and modernised. It invites views on whether the rules should be left alone, changed or abolished. We recognise that these questions are not exclusively legal ones, and that changes in this area of the law could have social and economic consequences.[99] Accordingly, we have drawn attention to these matters in the paper, and invited comments on the wider non-legal effect of possible changes in the law.

Trusts of Land

2.73 As we mentioned in our last annual report,[100] our Property Law team has, at the Lord Chancellor's request, been engaged in reconsidering the draft Bill appended to our report on Trusts of Land,[101] which recommended the replacement of the present dual system of settled land[102] and trusts of sale[103] by a new and unified system of trusts of land. The purpose of this further examination was to implement changes proposed by the Lord Chancellor's Department, and to cure certain possible technical problems with the Bill.[104] This further work has been completed, and a revised draft of the Bill was submitted to the Department on 1 November 1993. The new draft Bill preserves the basic policy for reform which we recommended in our 1989 report.[105]

Statute Law

Consolidation

2.74 Six consolidation Acts extending to England and Wales were passed during 1993. Four of them had the benefit of amendments giving effect to recommendations of the

[98] Eg carefully thought out dispositions of property run the risk of being declared wholly or partly invalid because through technicalities they infringe the rule against perpetuities.

[99] Among the issues raised in the consultation paper are: whether it is desirable to restrict the ability of a property owner to "reach out from beyond the grave" to prevent his successors in title from freely disposing of the property; if an estate is tied up for a long time, whether this would have the effect of unreasonably hampering or discouraging the economic use of land; whether accumulating money for a long time would damagingly concentrate wealth in the hands of only a few people.

[100] Twenty-Seventh Annual Report 1992 (1993) Law Com No 210, paras 2.63–2.64.

[101] Transfer of Land: Trusts of Land (1989) Law Com No 181.

[102] Under the Settled Land Act 1925.

[103] Mainly governed by the Law of Property Act 1925.

[104] These related mainly to the transitional and consequential provisions in the draft Bill.

[105] Because the policy which the Bill implements remains unchanged, we have no plans to publish it.

Law Commission – jointly with the Scottish Law Commission, in the case of the three extending also to Scotland. The details are given in the following table:

Title of Act	*Royal Assent*	*Date of Report*	*Law Com No*	*Scot Law Com No*
Charities Act 1993[106]	27.5.93	–	–	–
Clean Air Act 1993	27.5.93	20.10.92	209	138
Health Service Commissioners Act 1993	5.11.93	3.6.93	213	143
Pensions Schemes Act 1993	5.11.93	26.4.93	212	142
Probation Service Act 1993[107]	5.11.93	27.5.93	214	–
Radioactive Substances Act 1993[108]	27.5.93	–	–	–

2.75 Pre-consolidation amendments of the legislation relating to merchant shipping are contained in the Merchant Shipping (Registration etc) Act 1993, and it is hoped to introduce a consolidation Bill on this topic in the 1993/4 Session of Parliament. Other consolidations which it is hoped will be introduced during this Session are Bills on the following topics: drug trafficking offences, employment rights and industrial tribunals, friendly societies and industrial assurance, reciprocal enforcement of maintenance orders, value added tax and vehicles excise duty.

2.76 Other consolidation projects which are being actively pursued are those relating to education and the protection of animals. Longer term projects include consolidations on the armed forces, the National Health Service and the powers of criminal courts. Work on the consolidation of the legislation on stamp duties has been shelved as a result of the cancellation of the Stock Exchange TAURUS system; and the proposed consolidation of the legislation on solicitors is not being proceeded with at present pending consideration by the Lord Chancellor's Department of proposals for the amendment of that legislation.

Statute Law Revision

2.77 The Statute Law (Repeals) Act 1993 enacted, with minor amendments, the draft Bill set out in the Fourteenth Report on Statute Law Revision recommended jointly by this Commission and the Scottish Law Commission.[109] The Act effects over

[106] This was a "straight" consolidation because the existing law had recently been extensively amended by the Charities Act 1992.

[107] This Act extends to England and Wales only.

[108] Although minor corrections and improvements were required, they could not be achieved by means of Law Commission recommendations because of the restrictions imposed as regards the law of Northern Ireland by s 1(5) of the Law Commissions Act 1965; the Bill for this Act therefore proceeded under the Consolidation of Enactments (Procedure) Act 1949.

[109] Statute Law Revision: Fourteenth Report (1993) Law Com No 211, Scot Law Com No 140, Cm 2176.

600 repeals,[110] including 154 whole Acts or Orders. It is by a substantial margin the largest of its kind recommended by the two Commissions and is thus a major contribution to the process of bringing statute law up to date.

2.78 Work is advanced on a further draft Statute Law (Repeals) Bill. This will include proposals to rationalise the legislation of Bedfordshire, Warwickshire, the county and city of Nottingham and the former Derwent Valley Water Board, which could not be incorporated in the Fourteenth Report. Research and preliminary consultation by Mr J S Phipps (Chief Executive of Leicester City Council, 1973–1982) on the project to rationalise the local legislation of Gloucestershire, Hereford and Worcester, and Shropshire, has advanced substantially during the year. We are grateful to Mr Phipps for his continued help in this field.

Chronological Table of Local Legislation

2.79 The purpose of the *Chronological Table of Local Legislation* is to provide reliable and detailed information as to the extent to which Acts of Parliament, other than public general Acts, are in force. The project covers some 37,000 Acts, including in particular the series of public local Acts which began in 1797. Publication of this work of reference will therefore be an important addition to the available information about statute law. The first stage of the project (2 vols, 781 pp) was published in 1985.

2.80 During 1993 a vital stage of this project was reached with the completion of a draft text covering all the available information on primary legislation in the series of local Acts beginning in 1797. This has involved checking the research done in previous years and transferring all the data to a computer database. In 1994 decisions will be taken on the format and medium through which this major work of reference[111] will be made available to those who wish to use it.

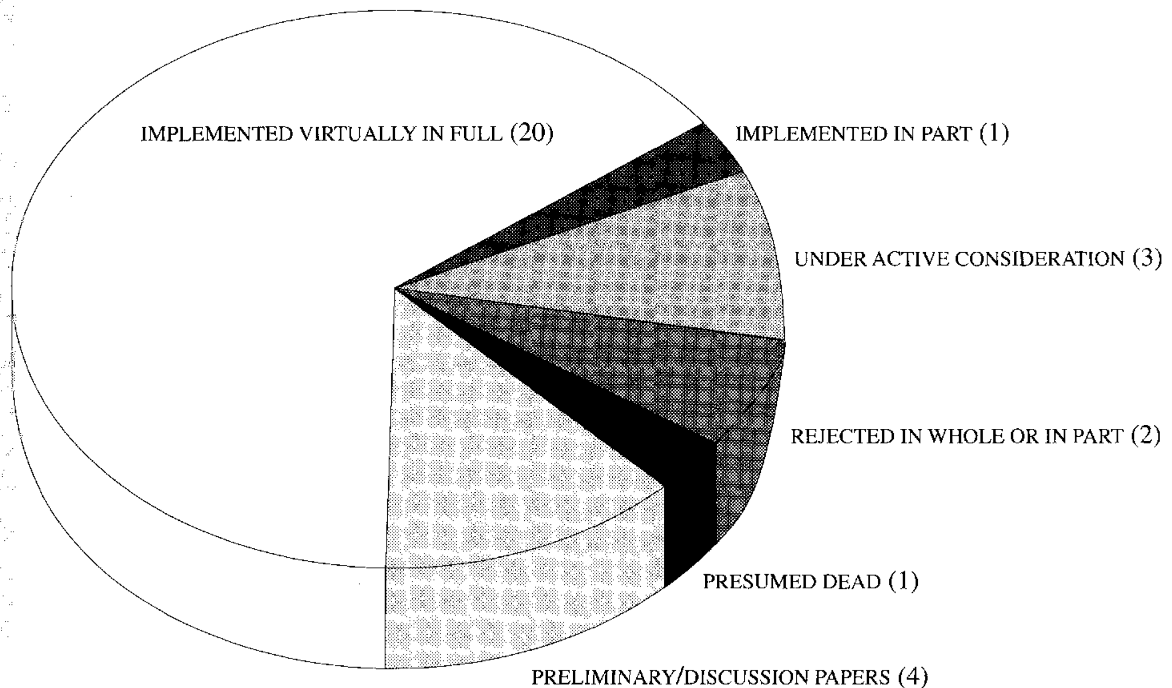
[110] The repeals included the repeal of the only extant section of the liberalising Beerhouses Act 1830, of which Sydney Smith wrote to John Murray on 24 October 1830: "The new Beer Bill has begun its operations. Everybody is drunk. Those who are not singing are sprawling. The sovereign people are in a beastly state." They also included the long delayed repeal of s 7 of the Piracy Act 1698 which was aimed at establishing that any privateer attacking English shipping under colour of a commission issued by the deposed James II was, if a natural-born English subject, to be treated as a pirate. *Ibid*, pp 89, 158.

[111] When printed it is likely to extend to nearly 3,000 pages.

PART III
THE LAW COMMISSION AND FAMILY LAW

A Law Commission success story?

3.1 Family law has always been one of the most important and productive areas of the Law Commission's work. With one or two notable exceptions, we cannot complain about lack of implementation here. The present position is demonstrated in the chart below:



Since the Commission was established in 1965, we have published 31 reports on the reform of family law and one consolidation report. Of these, four[1] were preliminary or discussion papers not making specific recommendations for legislation,[2]

[1] Reform of the Grounds of Divorce: The Field of Choice (1966) Law Com No 6; First Report on Family Property: A New Approach (1971) Law Com No 52; The Financial Consequences of Divorce: The Basic Policy. A Discussion Paper (1980) Law Com No 103; and Facing the Future: A Discussion Paper on the Ground for Divorce (1988) Law Com No 170.

[2] Although Law Com No 6, Reform of the Grounds of Divorce: The Field of Choice, did eventually lead to the Divorce Reform Act 1969, now consolidated in the Matrimonial Causes Act 1973.

twenty have been implemented virtually in full[3] and one has been implemented in part.[4] By any standards this is a formidable success story. Of the remaining six, one, published in 1993, is considered in Part II.[5] It is now worth taking a closer look at the remaining five, two of which are still under active consideration.

The Ground for Divorce

3.2 Far and away the most important of these is our report on the Ground for Divorce,[6] in which we proposed that it should no longer be possible to obtain a divorce quickly and easily by the simple but often unjust and painful expedient of one party claiming that the other had committed adultery or behaved intolerably. Instead there should be a minimum period of one year during which both parties could consider the arrangements needed if they were to be divorced and decide whether or not their marriage had indeed irretrievably broken down, without the inevitable pressures imposed by having to make hostile accusations one against the other or to live apart for a considerable length of time.

3.3 The Government has been considering these proposals, together with the role of mediation and conciliation services, as part of its wider review of the Family Justice system.[7] We are delighted that the Government has taken this process a step further with the publication of its own consultation paper, *Looking to the Future: Mediation*

[3] Report on the Powers of Appeal Courts to Sit in Private and the Restrictions upon Publicity in Domestic Proceedings (1966) Law Com No 8; Blood Tests and the Proof of Paternity in Civil Proceedings (1968) Law Com No 16; Proposal for the Abolition of the Matrimonial Remedy of Restitution of Conjugal Rights (1969) Law Com No 23; Report on Financial Provision in Matrimonial Proceedings (1969) Law Com No 25; Breach of Promise of Marriage (1969) Law Com No 26; Report on Nullity of Marriage (1970) Law Com No 33; Report on Polygamous Marriages (1971) Law Com No 42; Report on Jurisdiction in Matrimonial Causes (1971) Law Com No 48; Matrimonial Causes Bill: Report on the Consolidation of Certain Enactments Relating to Matrimonial Proceedings, Maintenance Agreements, and Declarations of Legitimacy, Validity of Marriage and British Nationality (1972) Law Com No 51; Second Report on Family Property. Family Provision on Death (1974) Law Com No 61; Report on Matrimonial Proceedings in Magistrates' Courts (1976) Law Com No 77; Orders for Sale of Property under the Matrimonial Causes Act 1973 (1980) Law Com No 99; The Financial Consequences of Divorce. The Response to the Law Commission's Discussion Paper, and Recommendations on the Policy of the Law (1981) Law Com No 112; Time Restrictions on Presentation of Divorce and Nullity Petitions (1982) Law Com No 116; Financial Relief after Foreign Divorce (1982) Law Com No 117; Illegitimacy (1982) Law Com No 118; Declarations in Family Matters (1984) Law Com No 132; Conflicts of Jurisdiction Affecting the Custody of Children (1985) Law Com No 138, Scot Law Com No 91, Cmnd 9419; Illegitimacy (Second Report) (1986) Law Com No 157; and Review of Child Law: Guardianship and Custody (1988) Law Com No 172.

[4] Family Law: Third Report on Family Property. The Matrimonial Home (Co-Ownership and Occupation Rights) and Household Goods (1978) Law Com No 86. However, the major recommendations have not been implemented: see para 3.9 and n 24 below.

[5] The Effect of Divorce on Wills, Law Com No 217: see paras 2.59–2.60 above.

[6] Family Law: The Ground for Divorce (1990) Law Com No 192.

[7] Written Answer, *Hansard* (HL) 4 March 1992, vol 536, cols 25–26, and Written Answer, *Hansard* (HC) 4 March 1992, vol 205, cols 171–172.

and the Ground for Divorce,[8] in December 1993. In this, the Lord Chancellor states his view[9] that the Law Commission's proposals

> "require serious consideration and it seems right, therefore, for the Government to focus the debate on what should be done by the development of mediation and other more detailed arrangements to accompany the Law Commission proposals and to avoid expenditure on bitter and costly disputes between the parties."

We hope that this will pave the way for a completely new system of divorce, which will address the serious problems presented by the breakdown of marriage, both for individual families and for society as a whole, in a more constructive and humane way than does the present law.[10]

Domestic Violence and Occupation of the Family Home

3.4 This too is an important subject which concerns many people. In our report,[11] published in 1992, we proposed a single, clear and modern code of civil remedies to help protect family members from violence and other forms of abuse and to decide who most needs to stay in the home, particularly when there is a risk of harm if they stay together. We were pleased to see that the House of Commons Home Affairs Committee[12] endorsed almost all the recommendations in our report. The Government in its response to the Committee's report[13] has said that our recommendations are important and persuasive but that if it was decided to introduce legislation along the lines of our draft Bill, this would depend upon the availability of Parliamentary time. The Lord Chancellor's Department made the implementation of our report one of its key targets in its strategic plan for 1993–1996.[14]

3.5 The Working Party established by the Department of the Environment to consider the implications of relationship breakdown for public sector housing law and practice has now submitted its report[15] to ministers.[16] We were delighted that the Working

[8] Cm 2424.

[9] Page iv.

[10] After a debate on 22 February 1994 the General Synod of the Church of England supported the proposals in the Government consultation paper by 202 votes to 2.

[11] Family Law: Domestic Violence and Occupation of the Family Home (1992) Law Com No 207.

[12] Home Affairs Committee, Third Report, Domestic Violence (1992–93) HC 245–I.

[13] The Government Reply to the Third Report from the Home Affairs Committee, Cm 2269, para 97.

[14] Lord Chancellor's Department, *A Programme for the Future* (1993) p 24.

[15] Department of the Environment, *Relationship Breakdown and Secure Local Authority Tenants* (1993).

[16] Accompanying the recommendations of the Working Party is a research report commissioned by the Department from the Social Policy Research Unit at York University which was asked to consider the housing effects of the relationship breakdown.

Party recommended[17] the implementation of the proposals in our report on Domestic Violence and Occupation of the Family Home[18] which relate to the transfer of tenancies between cohabitants and to the new criteria we suggested for occupation and ouster orders.[19]

Distribution on Intestacy

3.6 The main recommendation in this report,[20] published in 1989, was that if a deceased person had left no will the whole of the estate should go to the surviving spouse, if there was one. The main reason for this was that the present law, under which the surviving spouse takes a fixed sum and a life share in anything left after that,[21] cannot take account of the many and varied ways in which families now hold their assets. The result is that the survivor can be comfortably off or comparatively poor depending, not on how wealthy the couple were, but on whether their wealth was in pensions, life assurance, investments or the family home, on how the family home was owned or tenanted, and on what part of the country they lived in.

3.7 We recommended that the survivor should take the whole estate, on the basis that if there were children who needed support they would either get it direct from their surviving parent or in proceedings under the Inheritance (Provision for Family and Dependants) Act 1975, and that in any event if the deceased had wanted to do something different he or she could always have made a will. An alternative solution we suggested would have involved raising the sum to which the survivor is automatically entitled to a large enough figure, perhaps of the order of half a million pounds, to ensure that he or she could always keep the family home and thus to avoid the arbitrary and inconsistent results of the present law.

3.8 In the event, the Government has rejected not only the principal recommendation, which was always likely to be controversial, but also the alternative. The sum payable to the surviving spouse has been raised, but not to a figure which resolves the serious injustices of the present law in modern times.[22] Concern that children from earlier

[17] *Op cit*, recommendations h and i, p 8.

[18] (1992) Law Com No 207.

[19] *Ibid*, paras 6.1–6.2, 4.22–4.37 and 6.15–6.22.

[20] Family Law: Distribution on Intestacy (1989) Law Com No 187.

[21] If there are surviving issue of the deceased, the spouse receives a fixed sum, or "statutory legacy", the deceased person's chattels and a life interest in half the residue; the other half is held on statutory trusts for the issue. If there are no issue but parents or siblings of the whole blood (or their issue) who survive, the spouse receives a larger statutory legacy, the deceased's personal chattels and half the remainder absolutely. If there are no issue, parents or siblings of the whole blood (or their issue), the spouse receives the whole estate. The statutory legacies are uprated from time to time by statutory instrument, but no criteria are laid down for doing so. It was the difficulty in devising such criteria which led to our project.

[22] See the Family Provision (Intestate Succession) Order 1993 (SI 1993 No 2906) which raised the statutory legacies in respect of a person dying on or after 1 December 1993 from £75,000 to £125,000 (where there are issue) and from £125,000 to £200,000 (where there are not).

relationships might feel aggrieved if their deceased parent's property went in full to the surviving spouse does not explain why, when there are no such children, the survivor cannot inherit the whole estate. It was unfortunate that this outcome was presented to the public as an implementation of our report,[23] when in reality it was no such thing. However, the Government has accepted some of the useful subsidiary recommendations in the report, including our suggestion that the remedies available under the Inheritance (Provision for Family and Dependants) Act 1975 be extended to cohabitants of deceased people who died intestate.

Matrimonial Property

3.9 The two other major recommendations which have not been implemented also relate to matrimonial property. The first, in a report[24] published as long ago as 1978, recommended automatic joint ownership of the matrimonial home. The scheme put forward was complex and technical, and might be criticised on that account, but it was rejected as a matter of principle by the then Lord Chancellor, when introduced as a private member's Bill in 1980.[25] The second,[26] published in 1988, recommended a simple rule that property (apart from land) acquired by, and money transferred between, married people for their joint use and benefit should be jointly owned unless they had agreed to the contrary. Many people may think that this is the law already. It is certainly very close to what is already the law in Scotland.[27] We have, however, recently[28] been informed that the Lord Chancellor has decided not to accept our recommendations .

Solemnisation of Marriage

3.10 This report,[29] published in 1973, must be regarded as indubitably dead. The subject, however, is of growing importance in today's world. The law on getting married in this country is extraordinarily complicated and obscure; does not achieve its objective of ensuring so far as possible that all marriages are valid, freely entered into, and properly recorded; and discriminates against those who do not want a religious wedding but would prefer a rather different type of celebration from that currently offered in many registry offices. There have been recent changes of practice[30]

[23] Lord Chancellor's Department Press Notice, *Proposed Changes to Intestacy Laws* (1 July 1993).

[24] Family Law: Third Report on Family Property. The Matrimonial Home (Co-Ownership and Occupation Rights) and Household Goods (1978) Law Com No 86. The minor recommendations for improving the operation of the Matrimonial Homes Act 1967 were implemented: see n 4 above.

[25] *Hansard* (HL) 12 February 1980, vol 405, cols 144–151.

[26] Family Law: Matrimonial Property (1988) Law Com No 175.

[27] See Family Law (Scotland) Act 1985, ss 25 and 26, implementing recommendations of the Scottish Law Commission: Family Law: Report on Matrimonial Property (1984) Scot Law Com No 86.

[28] In February 1994. This decision was made public by Written Answers in both Houses on 8 March 1994: see *Hansard* (HL) WA 99, (HC) WA 97.

[29] Family Law: Report on Solemnisation of Marriage in England and Wales (1973) Law Com No 53.

[30] See also Registration: Proposals for Change (1990) Cm 939, paras 3.22–3.26.

designed to make civil ceremonies more varied and attractive than they used to be, but the law still discriminates against people who want or are obliged to have a non-religious ceremony. This is hard to justify in an increasingly secular and multi-cultural society.

Adoption Law Review

3.11 The Adoption Law Review was the successor to the Government's Review of Child Care Law[31] and the Commission's review of the private law relating to children[32] which together led to the Children Act 1989. A similar review of adoption law was clearly needed, not only to bring it into line with the policy and concepts of the 1989 Act, but more importantly to reflect the major changes in adoption policy and practice which had taken place since the last review reported in 1972.[33] The Family Law team did most of the legal research and analysis for the interdepartmental working group which produced the Review of Adoption Law,[34] published in 1992. The team was therefore delighted when the Government published in August a White Paper[35] which incorporated most of the recommendations made by the Review.

Children Act 1989

3.12 The Children Act 1989, in force since October 1991, continues to generate considerable interest overseas. In July 1993 Professor Hoggett presented papers dealing with the Act's private law provisions at the National Family Court Conference and at the First World Congress on Family Law and Children's Rights, both held in Sydney, Australia.

Access to and Reporting of Family Proceedings

3.13 The Children Act has led to other projects, in particular to a review of the present complex, obscure and inconsistent rules about who may be present during family proceedings and what may be reported in the media about them. For example, the press may be present throughout if a case concerning sexual abuse or other ill-treatment of a child is heard in a magistrates' court but not if the same case is transferred to a higher court. The team helped with a consultation paper prepared by a sub-committee of the Family Law and Administration Working Party,[36] which was published in August 1993.

[31] Department of Health and Social Security, *Review of Child Care Law, Report to Ministers of an Interdepartmental Working Party* (1985).

[32] Family Law: Review of Child Law: Guardianship and Custody (1988) Law Com No 172.

[33] *Report of the Departmental Committee on the Adoption of Children* (1972) Cmnd 5107.

[34] Department of Health and Welsh Office, *Review of Adoption Law, Report to Ministers of an Interdepartmental Working Group* (1992).

[35] Department of Health et al, *Adoption: The Future* (1993) Cm 2283.

[36] Lord Chancellor's Department, *Review of Access to and Reporting of Family Proceedings* (1993).

Conclusion

3.14 We remain committed to our programme item in family law and to the eventual goals of modernisation and codification. Modernisation requires regular reviews as patterns of family life and social attitudes change. Codification requires the systematic examination of each topic and we plan to turn next to the subject of cohabitation, the last major area which has not yet been examined in its own right rather than as part of other topics. But after such a record, stretching back throughout the Commission's history, the time has come to attack new areas of the law with similar vigour. To them we hope to be able to apply some of the lessons we have learned in our work on family law, in particular the opportunities we have taken to work in partnership with Government departments and others charged with the never-ending task of keeping our laws up to date and in tune with the needs of modern society.

PART IV
IMPLEMENTATION OF LAW COMMISSION REPORTS

4.1 In all our previous annual reports we have included in an Appendix a list of all Commission publications to date: papers issued for consultation, programmes, and reports, whether implemented or not. Inevitably this list has grown ever longer: last year it occupied 25 pages of our 57-page report. This year we include in Appendix 4 a two-page list of the law reform and Statute Law Revision reports submitted since 1983 which have been implemented.[1] We prefer to spend a few pages describing in this Part the scale and contents of the backlog of unimplemented law reform reports which are now awaiting Parliamentary attention.

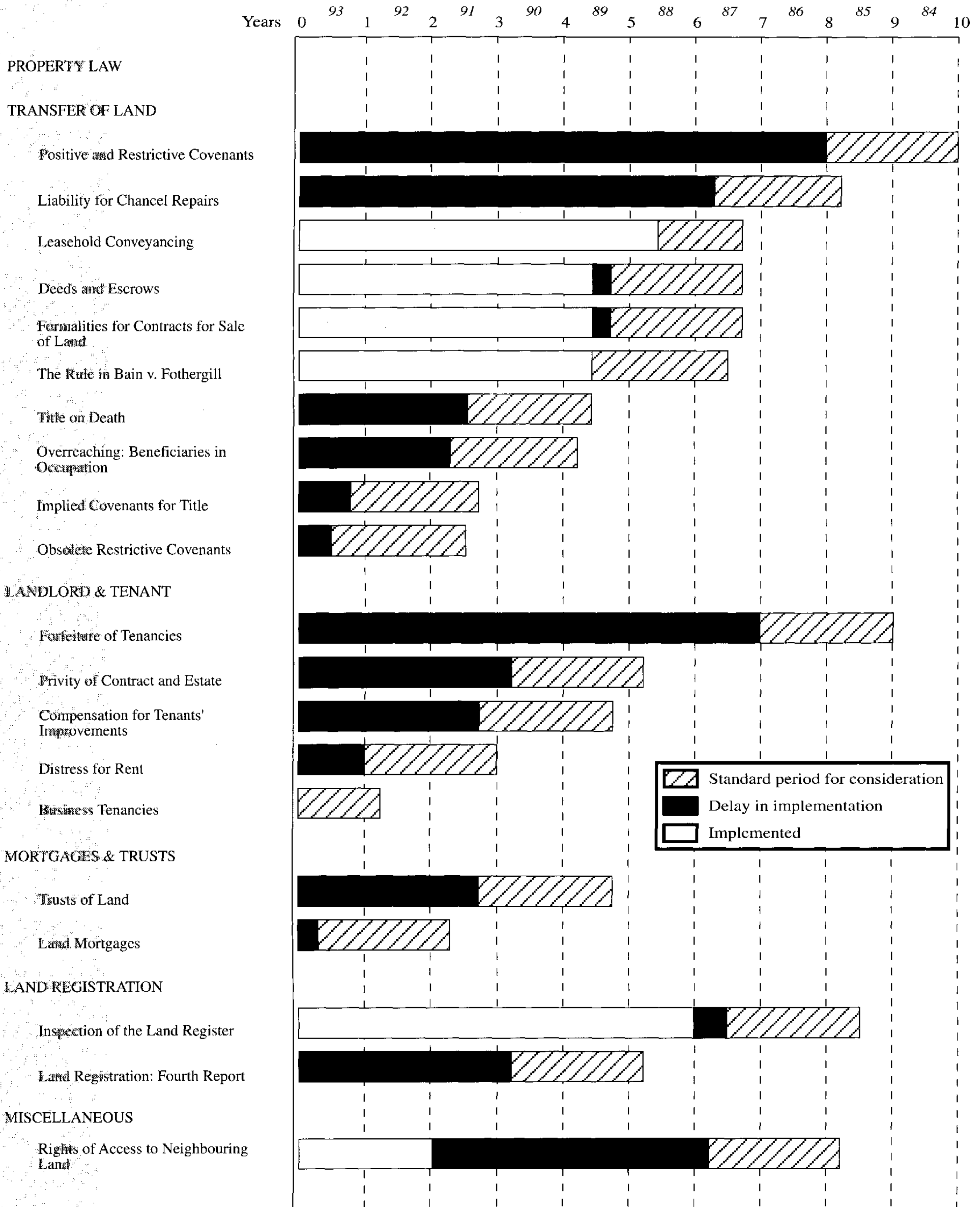
4.2 In our last annual report[2] we included for the first time a two-page bar-chart in which we listed all the reports containing recommendations for law reform which we have submitted since 1984. We explained in that report[3] the basis on which that list was compiled, and we will not repeat that explanation here.

4.3 We have now brought that bar-chart up to date, and we have added to it the five new law reform reports which we published during 1993. The only change of substance since last year has been the enactment, as part of the Criminal Justice Act 1993, of our report on Jurisdiction over Offences of Fraud and Dishonesty with a Foreign Element.[4] On the other hand, we have now been told by the Department of the Environment that the Government does not intend to implement any of the remaining recommendations in our report on Covenants Restricting Dispositions, Alterations and Change of User[5] which was implemented only in part,[6] and by the Lord Chancellor's Department that the Lord Chancellor has decided not to accept the recommendations in our report on Matrimonial Property.[7] These two reports therefore no longer appear in the chart.

1 A full list of all the Law Commission's publications can still be obtained free of charge from the Editor (Tel: 071-411 1235).
2 Twenty-Seventh Annual Report 1992 (1993) Law Com No 210, pp 27–29.
3 *Ibid*, p 27.
4 (1989) Law Com No 180.
5 (1985) Law Com No 141.
6 By the Landlord and Tenant Act 1988.
7 (1988) Law Com No 175; see para 3.9 above.

THE LAW COMMISSION: IMPLEMENTATION OF REPORTS
(JANUARY 1984 - DECEMBER 1993)

THE LAW COMMISSION: IMPLEMENTATION OF REPORTS
(JANUARY 1984 - DECEMBER 1993)



4.4 In our bar-chart we have again allowed in each case two years as a standard period for the consideration of the report by the relevant Department and by Parliament. This is followed by a darker line which shows the period up to the date of implementation, if any. The white sections of the bar start when Royal Assent was given to an Act of Parliament which implemented the recommendations in our report in whole or in part. If recommendations pass quickly into law then the first section of the bar will be proportionately shorter. None of the law reform reports listed has been wholly rejected: any which have been rejected do not appear in the chart.

4.5 In order to bring the contents of the backlog to life, we will now describe in summary form the contents of the unimplemented reports since 1983 which are listed on the bar-chart. Because a report has not been implemented it should not be thought that our recommendations are unimportant. In nearly every case the law identified for simplification or replacement is known to be bad, confusing or out of date. In some cases it is awful. For instance, in *Gleaves v Deakin*[8] Lord Diplock said that the only available public interest defence to a publisher accused of criminal libel turned Article 10 of the European Convention on Human Rights on its head. And the law of chancel repair responsibility, by which, for example, a wealthy Muslim may incur a six-figure legal liability to repair the chancel of a local parish church which his solicitor had no means of warning him about, has been described, correctly, as "one of the more unsightly blots on the history of English jurisprudence".[9] Nothing at all has been done to reform the law in either case.

4.6 Even pre-1983 reports are not necessarily dead. We have already discussed[10] the renewed interest in our 1981 report on Breach of Confidence;[11] and we were pleased that, following concern by small businesses, the Government is now consulting on our 1978 report on the payment of interest.[12]

8 [1980] AC 477, 483.

9 Dr J H Baker (1984) 100 LQR 186, quoted in Liability for Chancel Repairs (1985) Law Com No 152, para 1.4.

10 See paras 2.24–2.25 above.

11 Law Com No 110, Cmnd 8388.

12 Law of Contract: Report on Interest (1978) Law Com No 88, Cmnd 7229. See the consultative document on Late Payment of Commercial Debt issued by the Department of Trade and Industry in November 1993.

REPORTS SUBMITTED BETWEEN 1983 AND 1992 WHICH THE GOVERNMENT HAS EITHER AGREED TO IMPLEMENT OR ON WHICH IT HAS EXPRESSED NO OPINION, BUT WHICH REMAIN EITHER WHOLLY OR PARTLY UNIMPLEMENTED [13]

Law Com No	*1983*
*124	Private International Law: Foreign Money Liabilities. See para 1.17 above.
	1984
127	Positive and Restrictive Covenants. Recommends a comprehensive review of this area of the law. A Bill might include provisions implementing the Commonhold report (Cm 179), not strictly speaking a Law Commission report.
	1985
142	Forfeiture of Tenancies. See paras 2.62–2.64 above.
*146	Private International Law: Capacity to Contract a Polygamous Marriage. See para 1.17 above.
149	Criminal Libel. Recommends a new statutory offence of criminal defamation, to replace the common law offence of criminal libel, which was severely condemned by the House of Lords in *Gleaves v Deakin* in 1979.[14]
152	Liability for Chancel Repairs. Recommends the abolition of this liability, under which the purchasers of land may find themselves under a joint and several legal liability, whose existence they had no means of discovering before they bought the land, to repair the chancel of a medieval parish church.
	1987
160	Sale and Supply of Goods. See para 1.15 above.
168	Private International Law: Law of Domicile. Recommends substantial reforms to the present complex, technical and artificial rules governing acquisition and loss of domicile.

[13] The asterisks mark the five reports which it was hoped would be implemented in the 1992–3 session of Parliament: see para 1.17 above.

[14] [1980] AC 477.

Law Com No	
	1988
173	Fourth Report on Land Registration. Codifies the whole of the law on land registration since the 1925 Act, with amendments including those proposed in the Third Report (Law Com No 158).
174	Privity of Contract and Estate. Recommends that obligations created by a lease should bind only those parties who for the time being have an interest in the land.
	1989
178	Compensation for Tenants' Improvements. Recommends that the little-used scheme in Part I of the Landlord and Tenant Act 1927 be abolished.
181	Trusts of Land. See para 2.70 above.
*184	Property Law: Title on Death. See para 1.17 above.
187	Distribution on Intestacy. See paras 3.6–3.8 above.
188	Overreaching: Beneficiaries in Occupation. Recommends that the interest of an adult beneficiary who has a right to occupy trust land and is in actual occupation should not be overreached.
	1990
192	The Ground for Divorce. See paras 3.2–3.3 above.
*193	Private International Law: Choice of Law in Tort and Delict. See para 1.17 above.
	1991
194	Landlord and Tenant: Distress for Rent. Concludes that distress is wrong in principle and should be abolished when improvements to the court system make the landlord's other remedies for recovery of rent effective alternatives.
*199	Implied Covenants for Title. See para 1.17 above.
201	Obsolete Restrictive Covenants. Recommends that all restrictive covenants should lapse 80 years after they were first created. Anyone entitled to the benefit of such a covenant would have the right to replace it with a land obligation to like effect.

Law Com No

204	Land Mortgages. Recommends that all existing methods of consensually mortgaging or charging interests in land should be abolished and replaced by a new form of mortgage to be used for mortgaging any interest in land, legal or equitable. The present complex structure would be replaced by a new simplified structure.
	1992
205	Rape within Marriage. Recommends that the House of Lords decision in *R v R*[15] should be put on a statutory basis and that the offences under sections 2 and 3 of the Sexual Offences Act 1956 should be extended to marital intercourse. Recommends that a wife should receive the same degree of protection from publicity as is received by any other female rape victim.
207	Domestic Violence and Occupation of the Family Home. See paras 3.4–3.5 above.
208	Landlord and Tenant: Business Tenancies. The report reviews Part II of the Landlord and Tenant Act 1954, and proposes streamlining the procedure which allows commercial tenants to renew their leases, cutting out unnecessary applications to the court.

[15] [1992] 1 AC 599.

PART V
GENERAL

Responsibilities for Commission Projects

5.1 The responsibilities for projects falling within particular fields of law are shown in Appendix 1, which reflects the position at the end of December.

Lawyers

5.2 As we mention elsewhere in this report, some of our work in 1993 was severely hampered by staffing difficulties. During the year the head of our Statute Law Revision team and the heads of our Common Law and Public Law team and our Criminal Law team all left the Commission, and in only one of these cases was the vacancy filled immediately. As a result, the Common Law and Public Law team has been without a head for 10 months and a long-predicted vacancy at the head of the Criminal Law team, which occurred when a period of secondment to the Commission was completed at the end of September, shows no sign of being filled as we go to press. These difficulties were compounded by other staffing problems which were not readily resolved.

5.3 It is very clear to us that able civil service lawyers thoroughly enjoy their period of secondment with the Commission. They are able to do long-term strategic thinking about what the law ought to be, alongside other able lawyers and working directly to one of the Commissioners, and their work is not hampered by the culture of short-term reactivism to the pressure of external events which is unhappily the lot of many lawyers in Whitehall. Unfortunately, the great advantages for a civil service lawyer of a period of secondment at the Commission in a long-term career structure do not seem to be widely appreciated now within Whitehall generally. In addition, there does not seem to be a realisation by civil service managers of the considerable benefits a period at the Commission can provide to their department as a result of their lawyers being exposed to the quality and independent-mindedness of the work we do here.

5.4 The frequency of these vacancies occurring in comparatively small, compact teams meant that we could not complete all the work we had planned to do in 1993, and some projects, as the report of the Common Law and Public Law team shows, were very badly affected. This is unfair to the Commissioner in charge of the team and it also throws an unfair burden on other members of the team. And it is unfair to the many people who contribute so generously of their time and their skills, at no charge, to our consultation papers if our final report has to be delayed for so long. Eventually, we decided to transfer a member of the family law team to help with the judicial review project, but this in turn meant that we were unable to make all the progress we had planned in our major project on Mentally Incapacitated Adults before Professor Hoggett left us at the end of the year.

5.5 We have had a continuing dialogue with the Lord Chancellor's Department about these difficulties throughout the year, and we hope there will be happier things to report next year. In the meantime we would like to pay tribute to the dedication, enthusiasm and hard work of all our legal staff, civil service lawyers and research assistants alike, without whose efforts we could not possibly have completed the programme of work which we describe in this report.

5.6 We welcomed ten new research assistants in September, but of the other six, four are now in their second year, and two in their third year. A year or two at the Commission is still a very popular option for able law students who have just finished their university career, and it gives them a very good insight into the processes of law reform, and considerable personal responsibility for the quality of the consultation papers and reports on which they are asked to work.

5.7 During the whole of 1993 we have never had less than five Parliamentary Counsel to assist us, and in the last few months a sixth came to assist us, giving us a full complement for the first time for many years. All but one of these draftsmen are serving on secondment from the Office of the Parliamentary Counsel.

Administrative Staff

5.8 In their legal work the Commissioners, Parliamentary Counsel and other legal staff are supported by the administrative staff who are listed in Appendix 2. They perform their very varied duties with a professionalism and dedication which matches that of the legal staff, and to them too we express our gratitude.

Library

5.9 Pressure of space in the library has been relieved in two ways. Shelving has been put up in a small conference room which now accommodates the earliest volumes in our collection of *Hansard* – a vital part of any law library, but not the most frequently used. Secondly, a physical reorganisation of the library was completed. Books are now grouped more rationally, and space has been made available for expansion. A new system of guiding has also been introduced to make the collection more accessible.

5.10 We are as always grateful to LCD Headquarters, to the Supreme Court, and to many other Government libraries for loans and photocopies of items not available in Conquest House. A subscription to the Institute of Advanced Legal Studies allows our legal staff and research assistants access to and the use of photocopying facilities in the Institute library.

Law Under Review

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

Meetings

5.12 Although we did not have a full meeting with the Scottish Law Commission in 1993, individual Commissioners have maintained regular contacts with their opposite numbers. The Chairman was delighted to have a visit from Lord Davidson, the Chairman of the Scottish Law Commission, and also from Mr Justice Carswell (now Lord Justice Carswell), the Chairman of the Law Reform Advisory Committee for Northern Ireland. We held our annual meeting with members of the Society of Public Teachers of Law on Thursday 10 June. On Wednesday 17 November members of the Bar Law Reform Committee visited us, and on Tuesday 30 November we were glad to accept an invitation to meet the President and Vice-President of the Council of The Law Society and their staff. At all three of these meetings we discussed current law reform projects, and suggestions for future projects; and we welcome the universal support we received for the need to give more publicity to the current difficulties over implementing our reports and the seriousness of the problem.

Visitors from Overseas

5.13 We have welcomed a number of visitors from overseas, and a full list of them can be found in Appendix 3. Particular mention should be made of Mr Stephen Ihema, the Secretary of the Law Reform Commission of Tanzania. He came on 24 May for a four week visit in which he had the opportunity to see all the various parts of the Law Commission at work, to meet lawyers working on law reform and on statute law revision and Parliamentary Counsel working on consolidation, and to attend Commissioners' meetings. He also visited our colleagues at the Scottish Law Commission and officials of the Lord Chancellor's Department, and saw Parliament and the courts in operation. We much enjoyed having him, and we hope that he found his visit profitable.

Commonwealth Law Conference

5.14 The Chairman and Professor Hoggett both attended the Commonwealth Law Conference at Nicosia in May. Of particular relevance to the work of the Commission was the day devoted to a meeting of Commonwealth law reform agencies. Representatives of relevant agencies in Scotland, Northern Ireland, India, New Zealand, New South Wales, Nigeria, Kenya and Tanzania also attended this meeting. In the morning there was a discussion of issues involved with the implementation of international law through national law and the role which law reform agencies should be playing in this process. This was followed by a discussion of the changing role of Law Reform Commissions, in which the Chairman was one of the four speakers. The day provided us with very valuable insights into the way law reform agencies

elsewhere in the world are tackling the kind of issues which we have discussed in our recent reports. In New Zealand, for example, the parliamentary processes are much better adapted to handle law reform recommendations, and we would do well to look at the experiences of other Commonwealth countries when searching for solutions to our domestic difficulties.

5.15 It was most encouraging to hear of the importance which is attached to our reports and consultation papers in many countries of the Commonwealth, which do not have the good fortune to have access to the library facilities and other resources which are made available to us here. We send copies of all our publications to the law reform agencies of nearly 50 overseas countries, often on the basis of mutual exchange, and we were pleased to hear from delegates at Nicosia how much they are appreciated.

(Signed) HENRY BROOKE, *Chairman*
JACK BEATSON
DIANA FABER
CHARLES HARPUM

MICHAEL COLLON, *Secretary*
25 February 1994

APPENDIX 1
RESPONSIBILITIES FOR COMMISSION PROJECTS AT THE END OF 1993

Common Law and Public Law
Professor J Beatson, Mrs R I Innes, Ms U Cheer, Ms T Cockrell, Mr N W Cox, Ms A R Hillman, Ms I Maclean, Mr A P Miller.

Criminal Law
Mr R J Buxton QC, Mr A Cope, Miss C Haskell, Ms M E Atraghji, Ms E L Hammond, Ms L A Merrett.

Family Law and Mentally Incapacitated Adults
Professor B M Hoggett QC, Mrs J M Jenkins, Ms C L Johnston, Dr F Banda, Mr N D Lambe, Miss D A Powell.

Property and Trust Law
Mr T M Aldridge QC, Mr A Akbar, Mr M P Hughes, Miss P R Ferguson, Mr R M Lander, Miss Z N Lynch.

Statute Law
Consolidation: Chairman, Mr P F A Knowles, Mr P J Davies, Mr A J Hogarth, Miss C T Balfour Davies, Sir Henry de Waal KCB QC, Mr P R DeVal, Miss C L Walker.

Statute Law Revision (including Local Legislation): Chairman, Mr C W Dyment, Mr R D Maitland, Mr A M Rowland, Miss E Barber, Mrs T G Orange.

APPENDIX 2
ADMINISTRATIVE STAFF

ASSISTANT SECRETARY
Mr C K Porter

Accommodation Officer
Ms A L Peries

Personnel Officer
Miss L A Collet

Editor
Mr D R Leighton

Library Services
Mr D C Baines (Librarian)
Ms J M Robertson (Assistant Librarian)
Miss O C Mitchell (Trainee Librarian)

Registry
Miss T Coker
Mr T D Cronin

Chairman's Clerk
Mr C Day

I T Consultant
Mr D E Williams

Typing Manager
Mrs N L Spence

Secretarial Support
Mrs D Munford
Mrs J P Davis
Mrs H C McFarlane
Miss C McTaggart
Mrs L Mason
Ms J R Samuel

Typing Support
Mrs M M Blenman

Accommodation Support Services
Miss R Mabbs
Mr J M Davies
Mrs P J Wickers

APPENDIX 3
VISITORS FROM OVERSEAS

Among the visitors to the Law Commission during 1993 were:

Members of a Delegation from Jordan

Judge Husni Jayyousi (Attorney-General)
Judge Eid Louzi (President of the High Court)
Dr Mefleh El-Qudah (General Manager of the Judicial Institute)
HE Rateb Wazani (Attorney at Law and Legal Consultant)

Dr M Ershadul Bari (Professor and Dean, Faculty of Law, Dhaka University, Bangladesh)
Mr Norman Geis (Attorney, Chicago, Illinois)
Mr Richard Green (Department of Psychiatry and Biobehavioral Sciences, University of California)
Dr Komal Hossain (Senior Advocate, Supreme Court of Bangladesh and Vice-Chairman, Bangladesh Bar Council)
Mr Stephen Ihema (Secretary, Law Reform Commission of Tanzania)
Sir Kenneth Keith (President, New Zealand Law Commission)
Mr John Mant (Commissioner appointed by the Governor of New South Wales to enquire into customer service bodies)
The Hon Justice P E Nygh (Judge of the Family Court, Sydney, Australia)
Mr Justice C W Pincus (Chairman, Queensland Litigation Reform Commission)
Mr Justice M H Rahman (Judge of the Appellate Division of the Supreme Court, Dhaka, Bangladesh)
Mrs Mary Lee Stapp (Fellow, Alabama Law Institute)
Mr Bernard Starkman (Senior Counsel, Criminal Law Policy, Department of Justice, Canada)
Mrs A A W van Unen (Free University, Amsterdam, Netherlands)

APPENDIX 4
THE LAW COMMISSION'S IMPLEMENTED REPORTS SINCE 1982

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

Report Law Com No.	*Title*	*Implementing Legislation*
	1982	
114+	Classification of Limitation in Private International Law (Cmnd 8570)	Foreign Limitation Periods Act 1984 (c 16).
116	Family Law: Time Restrictions on Presentation of Divorce and Nullity Petitions (HC 513)	Matrimonial and Family Proceedings Act 1984 (c 42).
117	Family Law: Financial Relief after Foreign Divorce (HC 514)	Matrimonial and Family Proceedings Act 1984 (c 42).
118	Family Law: Illegitimacy (HC 98)	Family Law Reform Act 1987 (c 42).
	1983	
122+	The Incapacitated Principal (Cmnd 8977)	Enduring Powers of Attorney Act 1985 (c 29).
123	Criminal Law: Offences Relating to Public Order (HC 85)	Public Order Act 1986 (c 64).
125	Property Law: Land Registration (HC 86)	Land Registration Act 1986 (c 26).
	1984	
132	Family Law: Declarations in Family Matters (HC 263)	Family Law Act 1986 (c 55), Part III.
134	Law of Contract: Minors' Contracts (HC 494)	Minors' Contracts Act 1987 (c 13).
135	Statute Law Revision: Eleventh Report: Obsolete Provisions in the Companies Act 1948 (Cmnd 9236)	Companies Consolidation (Consequential Provisions) Act 1985 (c 9).
137	Private International Law: Recognition of Foreign Nullity Decrees and Related Matters (Joint Report – Scot Law Com No 88) (Cmnd 9347)	Family Law Act 1986 (c 55), Part II.
	1985	
138+	Family Law: Conflicts of Jurisdiction Affecting the Custody of Children (Joint Report – Scot Law Com No 91) (Cmnd 9419)	Family Law Act 1986 (c 55), Part I.
141	Codification of the Law of Landlord and Tenant: Covenants Restricting Dispositions, Alterations and Change of User (HC 278)	In part by Landlord and Tenant Act 1988 (c 26).
147	Criminal Law: Report on Poison-Pen Letters (HC 519)	Malicious Communications Act 1988 (c 27).
148	Property Law: Second Report on Land Registration: Inspection of the Register (HC 551)	Land Registration Act 1988 (c 3).
150	Statute Law Revision: Twelfth Report (Joint Report – Scot Law Com No 99) (Cmnd 9648)	Statute Law (Repeals) Act 1986 (c 12); Patents, Designs and Marks Act 1986 (c 39).
151+	Rights of Access to Neighbouring Land (Cmnd 9692)	Access to Neighbouring Land Act 1992 (c 23).

Report Law Com No.	*Title*	*Implementing Legislation*
	1986	
157	Family Law: Illegitimacy (Second Report) (Cmnd 9913)	Family Law Reform Act 1987 (c 42).
	1987	
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 *Bain v Fothergill* (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).
	1989	
179	Statute Law Revision: Thirteenth Report (Joint Report – Scot Law Com No 117) (Cm 671)	Statute Law (Repeals) Act 1989 (c 43).
180	Criminal Law: Jurisdiction over Offences of Fraud and Dishonesty with a Foreign Element (HC 318)	Criminal Justice Act 1993 (c 36) Part I.
186	Criminal Law: Computer Misuse (Cm 819)	Computer Misuse Act 1990 (c 18).
	1991	
196	Rights of Suit in Respect of Carriage of Goods by Sea (Joint Report – Scot Law Com No 130) (HC 250)	Carriage of Goods by Sea Act 1992 (c 50).
	1993	
211	Statute Law Revision: Fourteenth Report (Joint Report – Scot Law Com No 140) (Cm 2176)	Statute Law (Repeals) Act 1993 (c 50).

APPENDIX 5

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.

	1993 *£000*	1992 *£000*
Accommodation charges[1]	502.9	465.5
Headquarters' overheads[2]	379.2	345.5
Printing and publishing; supply of information technology; office equipment and books	217.4	215.4
Salaries of Commissioners (including ERNIC and Superannuation)[3]	386.5[4]	300.3
Salaries of draftsmen, legal staff, secondees, and consultants (including ERNIC and Superannuation)[3]	1,485.9[5]	1,120.6
Salaries of non-legal staff (including ERNIC and Superannuation)[3]	401.4[5]	380.6
Superannuation[3]	–	308.1
Telephone/postage[6]	33.5	25.8
Travel and subsistence	10.3	8.4
Entertainment	0.5	0.5
Miscellaneous	25.7	18.3
	3,443.3	3,279.0

1 Includes component relating to ground rent, rates, and all works supplied by the Lord Chancellor's Department.

2 Portion of the total cost of the Lord Chancellor's Department headquarters notionally attributed to the Law Commission. The portion attributed to individual parts of the Department is proportional to the number of staff paid as established staff, including research assistants.

3 As of April 1993 superannuation is included in the Department's salary budget and is not shown separately. [Total of Salaries, ERNIC and Superannuation: 1992 – £2,109.6k; 1993 – £2,273.8k].

4 This figure includes not only Superannuation (see n 3) but also a lump sum paid on retirement.

5 Previous reports have shown salaries as a multiple of the December monthly salary figures, which gave an exaggerated figure. From 1993 we are giving the actual expenditure on salaries.

6 The increase from 1992 is due to (1) an increase in the number and distribution of consultation papers and reports, and (2) work on the telephone system.

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