LAW COMMISSION
THIRTIETH ANNUAL REPORT
1995

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LAW COM No 239

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Laid before Parliament by the Lord High Chancellor
pursuant to section 3(3) of the Law Commissions Act 1965

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THE LAW COMMISSION

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

The Commissioners are: The Honourable Mrs Justice Arden DBE, *Chairman* o
Professor Andrew Burrows
Miss Diana Faber
Mr Charles Harpum
Mr Stephen Silber QC

The Secretary of the Law Commission is Mr Michael Sayers and its offices are at Conquest House, 37-38 John Street, Theobalds Road, London, WC1N 2BQ.

o During the period covered by this report, the Chairman of the Law Commission was the Honourable Mr Justice Brooke.

THE LAW COMMISSION
THIRTIETH 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 Thirtieth Annual Report for the year 1995, pursuant to the Law Commissions Act 1965.

At the beginning of the Report we have summarised the highlights of the year. The Report includes an Overview of the Year, and a section for each of the teams.

A major event of 1995 was, as the Overview reports, that ten Law Commission reports were implemented by legislation in whole or in part. This could not have been achieved without your support, and the support of members of both Houses of Parliament, for the work of the Law Commission. We are very grateful for this support.

However, much needs to be done to reduce the backlog of unimplemented law reform reports. In the Overview we identify particular unimplemented reports for the reform of landlord and tenant law and criminal law, all of which would bring the public the major benefits which we there describe. They include our report on Criminal Law: Conspiracy to Defraud which recommends a single, short amendment to the Theft Act 1978. If Parliament enacted this small change, many mortgage frauds, which are at present not covered by our criminal law because of a technical loophole, could be prosecuted.

The need for law reform is ongoing. Time moves on, so laws become out of date. A continuous rolling programme of law reform legislation is an essential, not a luxury.

1995 was the third and final year of the chairmanship of the Honourable Mr Justice Brooke. In his very active time here he raised the general level of awareness of the work done by the Commission. The rate of implementation of Law Commission reports rose rapidly during his period of office. We would like to record our gratitude to him.

At the time of writing, I have only just begun my period of office as Chairman. Like my distinguished predecessors I am committed to the cause of law reform. To a newcomer the skills and dedication of all those who work here is striking. I am confident that the Law Commission is well placed to deliver recommendations which, if implemented, will go a long way to improving the law.

Mary Arden

CHAIRMAN

HIGHLIGHTS OF THE ANNUAL REPORT FOR 1995

GENERAL - *SEE PART I*

- The Commission celebrates its Thirtieth Anniversary and looks to the future
- Significant progress in implementing Commission recommendations in many areas

COMMON LAW - *FOR FULL REPORT SEE PART II*

- PUBLICATIONS ISSUED OR APPROVED:
  - consultation paper on liability for psychiatric illness
  - consultation paper on damages for non-pecuniary loss
  - consultation paper on joint and several liability, published by DTI
- WORK IN PROGRESS
  - contracts for the benefit of third parties
  - aggravated, exemplary and restitutionary damages
  - damages for personal injury and death
  - limitation periods
  - illegal transactions

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

- PUBLICATIONS
  - report on fiduciary duties and regulatory rules
- WORK IN PROGRESS
  - shareholders' remedies
  - Third Parties (Rights against Insurers) Act 1930
- ADVISORY WORK
  - briefing paper on facilitating electronic commerce through law reform

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

- PUBLICATIONS
  - report on the year and a day rule in homicide
  - report on intoxication
  - consultation paper on hearsay and related topics
  - consultation paper on consent

  PUBLICATION APPROVED
  - report on involuntary manslaughter

- ADVISORY WORK
  - counts in an indictment

- WORK IN PROGRESS
  - hearsay
  - previous misconduct
  - dishonesty offences
  - trade secrets

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

- PUBLICATIONS APPROVED OR ISSUED
  - report on landlord and tenant: responsibility for state and condition of property
  - report on transfer of land: land registration (report of joint working group)

- WORK IN PROGRESS
  - trustee investment
  - delegation by trustees
  - land registration
  - execution of deeds and documents by companies
  - rules against perpetuities and excessive accumulations
  - formalities for the creation of trusts
  - personal remedies for the recovery of trust property

FAMILY LAW - *FOR FULL REPORT SEE PART VI*

- REPORT
  - mental incapacity

- WORK IN PROGRESS
  - property rights of home-sharers

STATUTE LAW - *FOR FULL REPORT SEE PART VII*

- PUBLICATION
  - statute law revision: fifteenth report

- WORK COMPLETED
  - 5 consolidation Bills
  - chronological table of local legislation

- WORK IN PROGRESS
  - Statute Law (Repeals) Bill
  - 8 further consolidation Bills

PART I
OVERVIEW OF THE YEAR

Law Commission: Thirtieth Anniversary

1.1 1995 was an important year in the Law Commission's history because it marked the end of its first thirty years. The Law Commission and the Scottish Law Commission jointly hosted an occasion on 14 June 1995[1] in Inner Temple Hall to celebrate the founding of both Law Commissions. Lord Davidson, Chairman of the Scottish Law Commission, took the chair. The Lord Chancellor[2] gave an address, followed by Dr Peter North[3] and Mr Justice Brooke.[4]

1.2 The Lord Chancellor paid tribute to the fact that Law Commission reports are always based on careful research and wide consultation. He said that his normal assumption as Lord Chancellor was that one would wish to give effect to Law Commission proposals, and he knew that this view was shared by the main Opposition spokesman in the House of Lords.[5] He also expressed particular gratitude to those who respond to the Commission's consultation papers. He described them as a group of people who play a critical part in the process of law reform.

1.3 Dr North spoke about the work of the Commission from the perspective of an academic lawyer. He described the way the Commission's consultation papers had opened the eyes of academic lawyers to the real, practical problems of making law reform a reality, so playing an important role in shaping the development of legal education. He also described the impact of the work of the Commission elsewhere in the European Union, where other countries lacked a body that was capable of careful analysis of the law, of its defects, and of ways in which it might be reformed.

1.4 The Chairman, Mr Justice Brooke, referred to the Parliamentary debates which led to the creation of the Commissions. There was as clear a perception then, as now, of the need for the law to be not only just, but also up to date, accessible and intelligible. 87 Bills or parts of Bills from the Commission had been enacted in the ensuing thirty years, together with 15 statute law revision Bills and what he described as a whole galaxy of consolidation Bills. He said that he believed that there was now a much

[1] The House of Commons gave its final approval to the Law Commissions Bill in the late evening of 14 June 1965, and the Bill received the Royal Assent the following day.

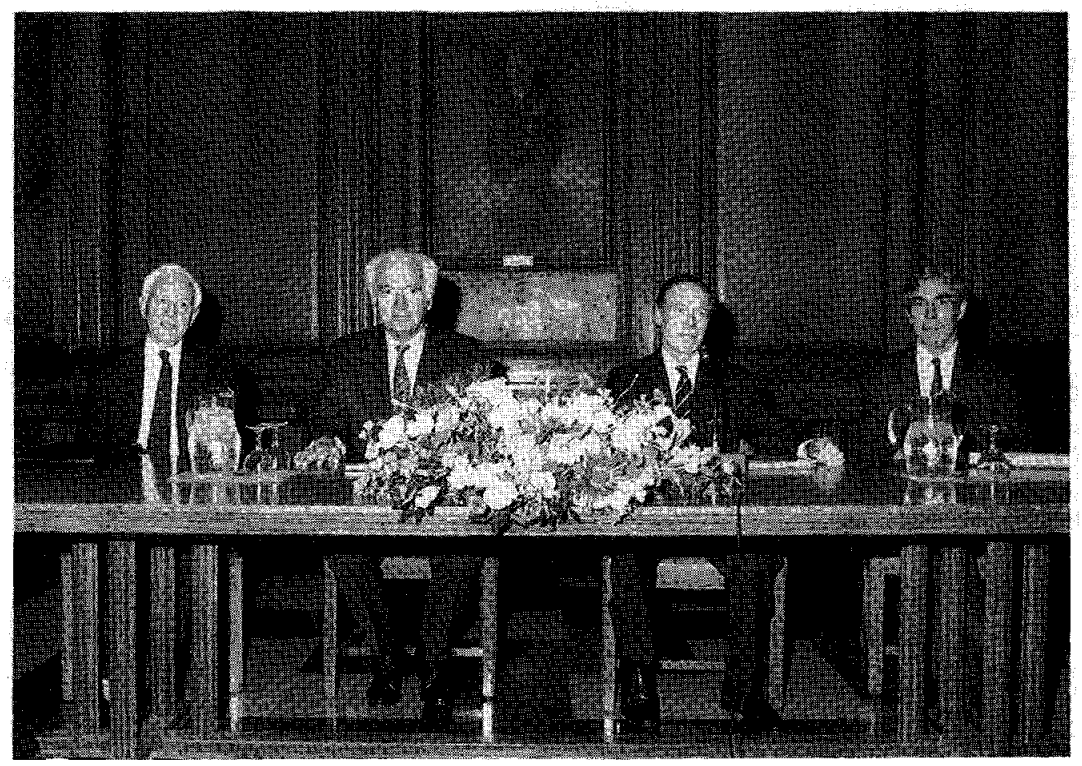
[2] Lord Mackay of Clashfern was a Scottish Law Commissioner between 1976 and 1979.

[3] Dr North was a Law Commissioner between 1976 and 1984 and is now Principal of Jesus College, Oxford and Vice-Chancellor of Oxford University.

[4] The three addresses are being published separately by the Law Commission.

[5] Lord Irvine of Lairg QC. For Lord Irvine's views, see *Hansard* (HL) 13 February 1995, vol 561, cols 505-6.

clearer understanding in Whitehall of departments' interdependence with the Commission.



THE THREE SPEAKERS AT THE THIRTIETH ANNIVERSARY CELEBRATIONS, WITH LORD DAVIDSON (SECOND FROM THE RIGHT) CHAIRING THE SESSION

The Future - the Sixth Programme of Law Reform

1.5 The Law Commission's work is largely undertaken under programmes of law reform, approved by the Lord Chancellor. In 1995 we launched our Sixth Programme of Law Reform.[6] It set out our law reform agenda until the end of 1998. New projects include:-

- the effect of illegal transactions;
- a systematic review of the law on limitation periods; and
- a re-examination of third parties' rights against insurers.

The complete Programme includes work under 11 separate headings. We are also conducting three other projects on references from Ministers.[7]

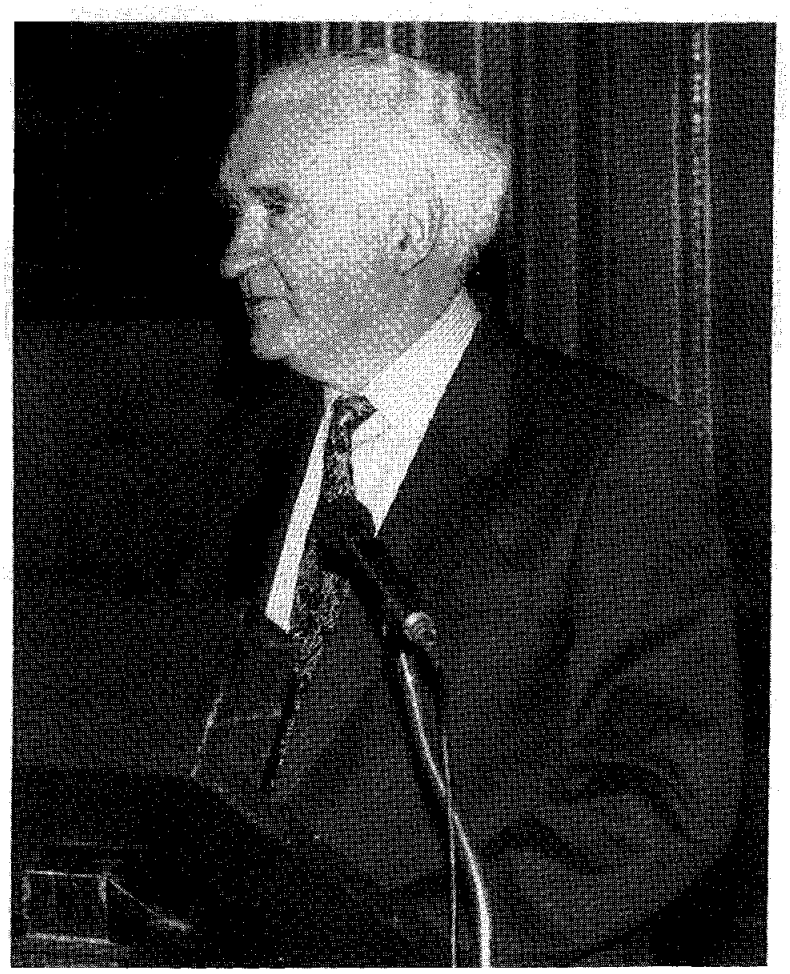
[6] Published on 13 June 1995. Law Com No 234.

[7] Shareholders' remedies; evidence in criminal cases: hearsay and previous misconduct; and the execution of deeds and documents by bodies corporate.

1.6 We took the opportunity in our Sixth Programme to set out our aims. They are to ensure, so far as possible, that the law is:

- fair
- modern
- simple
- cost-effective.

We drew attention to the fact that law which is out of date can cause unnecessary expense to users of the law and the taxpayer. We also described the work which we had completed since September 1989, during the Fourth and Fifth Programmes.[8]



THE LORD CHANCELLOR, SPEAKING AT THE COMMISSIONS' THIRTIETH ANNIVERSARY

1.7 In carrying out the Sixth Programme we will as before endeavour to consult widely and to produce well-researched and carefully considered recommendations. The Commission takes into account the views which it receives. The views of consultees are important to our work: indeed sometimes those views draw attention to drawbacks of which we were previously unaware. We will continue to exercise our independent judgment in formulating our recommendations.

[8] Law Com Nos 185 and 200.

1.8 Any law reform recommendations made today are made against the background of high public expectations as to the role of law in our modern society. There has probably never been a time when the law has been subject to such interest among members of the public and in the media. These factors are welcomed but they make the business of producing law reform proposals more demanding. We are mindful of the demands which increased public expectations and awareness make on our work. For our part we are committed to producing recommendations of the highest standard to improve the law and to fit it for our fast-changing society.

Progress on Implementation in 1995

1.9 The Annual Report for 1994 was cautiously optimistic that the tide had turned. This optimism was well placed, so far as 1995 was concerned. Members of both Houses of Parliament expressed their support for the Law Commission's work in simplifying and modernising the law, and there was a greater willingness to achieve cross-party agreement aimed at ensuring that a reasonable number of our law reform reports passed into law each session.[9] Ten reports were implemented, seven in full, and three with modifications or deletions.[10] A Bill to implement an eleventh report had almost completed all its stages through Parliament when for exceptional reasons it was withdrawn. It was incorporated with modifications into another Bill, which was submitted to Parliament at the start of the present Session.[11]

[9] Eg, the Lord Chancellor and Lord Irvine of Lairg QC during Second Reading of the Law Reform (Succession) Bill on 13 February 1995, *Hansard* (HL), vol 561, cols 502 and 505, and during the Second Reading of the Civil Evidence Bill on 25 May 1995, *Hansard* (HL) vol 564, cols 1048 and 1057; and Mr Paul Boateng MP during Second Reading of the Statute Law (Repeals) Bill on 31 October 1995, *Hansard* (HC), vol 265, col 185.

[10] Ie, Civil Evidence Act (see para 1.14 below), implementing our report on the Hearsay Rule in Civil Proceedings (1993) Law Com No 216 and part of our report on Structured Settlements and Interim and Provisional Damages (1995) Law Com No 224; another part of that report was implemented by s 142 of the Finance Act 1995 (see para 1.16 below); Private International Law (Miscellaneous Provisions) Act (see para 1.15 below), largely implementing the report on Private International Law: Foreign Money Liabilities (1983) Law Com No 124; Private International Law: Polygamous Marriages (1985) Law Com No 146, Scot Law Com No 96; and Private International Law: Choice of Law in Tort and Delict (1990) Law Com No 193, Scot Law Com No 129; Sale of Goods (Amendment) Act (see para 1.13 below), implementing the report on Sale of Goods Forming Part of a Bulk (1993) Law Com No 215, Scot Law Com No 145; Law Reform (Succession) Act (see para 1.12 below) which implemented our report on the Effect of Divorce on Wills (1993) Law Com No 217 and also parts of our report on Distribution on Intestacy (1989) Law Com No 187; Landlord and Tenant (Covenants) Act (see para 1.21 below), loosely based on the principles set out in the report on Privity of Contract and Estate (1988) Law Com No 174; and the Statute Law (Repeals) Act (see para 7.5 below), implementing Statute Law Revision: Fifteenth Report (1995) Law Com No 233, Scot Law Com No 150.

[11] Family Homes and Domestic Violence Bill 1995 (HL) which would have largely implemented our report on Domestic Violence and Occupation of the Family Home (1992) Law Com No 207. The contents of that Bill, with minor modifications, now form Part III of the Government's Family Law Bill, which had its Second Reading in the House of Lords before the end of 1995 (see *Hansard* (HL), 30 November 1995, vol 567, cols. 700-790).

1.10 Two of the Bills[12] presented in 1995 to implement Law Commission reports used the new Special Public Bill Committee procedure in the House of Lords.[13] In 1995 the first of these committees received 44 written submissions and conducted six sessions for hearing oral evidence.[14] The other received over 50 written submissions and also held six oral sessions.[15] In the first of these sessions the committees heard evidence from the Lord Chancellor and an opening statement by the Chairman of the Commission describing the policy and purpose of the Bill. They then questioned the responsible Commissioner or former Commissioner, clause by clause, on points raised in the written evidence they had received, before hearing a small amount of oral evidence from witnesses not called by the Government. Each committee was chaired by Lord Brightman, a former Law Lord, and the Lord Chancellor was a member of each. Although the procedure makes great demands on the members of the Committees, the Commission and its witnesses, the draftsman and the staff of the Public Bill Office, it is an invaluable addition to the machinery of Parliament. It enables technical Bills to receive appropriate expert scrutiny without delaying business on the floor of either House.

1.11 The following legislation was passed in the 1994/95 Session, following earlier Law Commission Reports.[16]

Law Reform (Succession) Act 1995

1.12 The Law Reform (Succession) Act 1995 implemented many of the recommendations contained in two of our reports, Family Law: Distribution on Intestacy[17] and Family Law: The Effect of Divorce on Wills.[18] The Act:

- makes provision for a surviving spouse to take on intestacy only if he or she survives the deceased by 28 days, and abolishes the complex hotchpot rules;

- extends the range of persons who can apply for financial provision under the Inheritance (Provision for Family and Dependants) Act 1975 to include a person

[12] Private International Law (Miscellaneous Provisions) Bill 1995 (HL); and Family Homes and Domestic Violence Bill (1995) HL: see n 11 above.

[13] For a description of the procedure, see Sir Henry Brooke, Special Public Bill Committees (1995) Public Law 351. These committees are generally known as "Jellicoe Committees", since they are derived from the Report of the Select Committee on the Committee Work of the House of Lords, chaired by Earl Jellicoe (1991-92) HL 35-I.

[14] See Private International Law (Miscellaneous Provisions) Bill (HL), Proceedings of the Special Public Bill Committee (1994-5) HL 36.

[15] See Family Homes and Domestic Violence Bill (HL), Proceedings of the Special Public Bill Committee (1994-5) HL 55. See para 1.18 below.

[16] For a full list of our implemented reports since 1983, see Appendix 3.

[17] (1989) Law Com No 187.

[18] (1993) Law Com No 217.

who has lived together with the deceased in the same household, as the deceased's husband or wife, for a period of two years;

- provides that, where a person leaves property by will to his or her former spouse, then in the absence of contrary intention the property will pass as if that former spouse had died on the date on which the marriage terminated;

- provides that when a marriage is terminated by divorce or annulment, an appointment by one of the former spouses of the other as a guardian of a child is revoked, in the absence of contrary intention.

The Act took effect on 1 January 1996.

Sale of Goods (Amendment) Act 1995

1.13 This important Act implemented our Report on Sale of Goods Forming Part of a Bulk.[19] It allows property in an unspecified bulk to pass to the buyer at the agreed time, provided the price for some or all of the goods was paid, but in such a way as to enable dealings in bulk goods to continue. The Act took effect on 19 September 1995.

Civil Evidence Act 1995

1.14 This Act [20] implemented our Report on the Hearsay Rule in Civil Proceedings [21] and part of our Report on Structured Settlements.[22] The Act abolishes the hearsay rule in civil proceedings. This rule had prevented one person testifying in court to the truth of what he had been told by another person. It had been described as the most confusing of the rules of evidence and one which could in certain circumstances operate to exclude convincing and necessary evidence. It had been limited in many ways, both by case law and statute. The Act introduces a number of safeguards against the potential weakness of using hearsay evidence rather than direct evidence. It also renders admissible as evidence the actuarial tables published by the Government Actuary's Department for use in personal injury and fatal accident cases, which are commonly referred to as the "Ogden tables".[23]

[19] Law Com No 215; Scot Law Com No 145.

[20] It currently awaits being brought into force.

[21] Law Com No 216.

[22] Law Com No 224; see also para 1.17 below.

[23] After Sir Michael Ogden QC, who chaired the working party with responsibility for producing the tables.

Private International Law (Miscellaneous Provisions) Act 1995

1.15 The Private International Law (Miscellaneous Provisions) Act 1995 largely implemented three of our Reports, dating from 1983, 1985 and 1990.[24] The new Jellicoe procedure was used in the House of Lords.[25] The Act introduces reforms to modify and clarify conflict of law rules in three areas:-

- the payment in England and Wales of interest on judgment debts and arbitral awards expressed in foreign currency;
- the validity under the law of England and Wales and the law of Scotland of marriages which are actually monogamous but were entered into under a law which permits polygamy; and
- the choice of law to be applied where an action is brought in a part of the United Kingdom in respect of a tort or delict committed abroad or in another part of the United Kingdom.

The Act was partly brought into effect on 8 January 1996, and is partly yet to be brought into effect.

Finance Act 1995, section 142 (Structured Settlements), and Damages Bill

1.16 Section 142 of the Finance Act 1995 implemented the recommendations relating to the tax treatment of structured settlements contained in our Report on Structured Settlements and Interim and Provisional Damages.[26] As a result of this section,[27] a life office can make payments free of tax direct to the plaintiff under an annuity forming part of a structured settlement.

1.17 On 8 February 1996 the Lord Chancellor introduced the Damages Bill into the House of Lords.[28] This Bill substantially implements the other recommendations contained in the Report. Its provisions include:

- the power for courts to make a consent order, in personal injury cases, for damages by way of periodical payments;

[24] Private International Law: Foreign Money Liabilities (1983) Law Com No 124; Private International Law: Polygamous Marriages (1985) Law Com No 146, Scot Law Com No 96; Private International Law: Choice of Law in Tort and Delict (1990) Law Com No 193, Scot Law Com No 129. This left just one outstanding report of ours on private international law, concerning domicile: (1987) Law Com No 168. The Government announced on 16 January 1996 that it was rejecting this report.

[25] See para 1.10 above.

[26] (1994) Law Com No 224.

[27] Inserting ss 329A and 329B into the Income and Corporation Taxes Act 1988.

[28] *Hansard* (HL) 8 February 1996, vol 569, col 339.

- the enhancement of protection under the Policyholders Protection Act 1975 for plaintiffs with an annuity under a structured settlement; and

- the removal of the possibility that an award of provisional damages might bar a claim by dependants under the Fatal Accidents Act 1976, if the plaintiff dies.

Section 142 was brought into effect on 1 May 1995.

Family Homes and Domestic Violence Bill

1.18 By October 1995 the provisions of our Family Homes and Domestic Violence Bill had been exhaustively considered on a number of different occasions: by this Commission during the long consultation that led up to our report;[29] by the Government after that report was published; and by the Home Affairs Committee of the House of Commons.[30] The Government accepted almost all of the provisions of our Bill and introduced its own Bill into Parliament in substantially the same terms. The Government Bill was the subject of careful and detailed consideration by the Special Public Bill Committee of the House of Lords in 1995. On each of these occasions the great majority of our recommendations were warmly welcomed by virtually everyone.

1.19 Our recommendations had been designed to reform the complex and inconsistent procedures facing victims of domestic violence by creating a single, clear set of remedies available in all courts with jurisdiction in family matters. Two flexible orders were proposed, to replace a variety of different orders available under different heads of the old law: a non-molestation order to protect a wider range of people with a close family connection; and an occupation order regulating the occupation of the family home. Unlike the old law, the new law would contain coherent criteria for the making of any order. It would require the courts to attach a power of arrest in cases of violence or threatened violence unless satisfied this was not necessary to protect the victim. It would also provide additional protection for children of unmarried couples who were the victims of domestic violence or abuse.

1.20 At a late stage in the course of the Government's Bill before Parliament it became apparent that the Bill was contentious and was opposed by a small number of Members of Parliament on the ground that the proposals undermined the status of marriage. The Bill was also criticised by a small minority of commentators in the national press, but other press commentators[31] saw the benefits that the changes would bring. However, the Government was forced to reconsider the Bill and the Bill was

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

[30] Home Affairs Committee, Third Report, Domestic Violence (1992-3) HC 245-I .

[31] See, eg, *The Guardian* 27 October 1995, *The Independent* 27 October 1995 and *The Daily Telegraph* 27 October 1995.

withdrawn for that purpose. Many of its provisions were, however, subsequently incorporated in the Family Law Bill presented to Parliament in November 1995.

Landlord and Tenant (Covenants) Act 1995

1.21 A description of the passage of the Landlord and Tenant (Covenants) Act 1995 is given in Part V under Property Law. The Act was brought into effect on 1 January 1996.

Future implementation of Law Commission recommendations

1.22 The Commission hopes that it will be able to report yet further progress on implementation.[32] Legislation resulting from five Law Commission Reports has been introduced in Parliament so far in the 1995/96 Session.[33] The outlook is far more encouraging than it was in the dark days of the early 1990s when the Law Commission complained vigorously at the way the law of England was being neglected by Parliament.[34] However, there are two specific areas where a major impetus is needed.

Landlord and Tenant

1.23 We have some hope that parts of two of our reports which have been accepted by the Department of the Environment may be implemented in the near future. These are Landlord and Tenant: Compensation for Tenants' Improvements[35] and Landlord and Tenant: Business Tenancies - A Periodic Review of the Landlord and Tenant Act 1954, Part II.[36] **However there are four other reports which in our view should urgently be considered for implementation:**

- **Codification of the Law of Landlord and Tenant: Forfeiture of Tenancies**[37]
- **Landlord and Tenant: Termination of Tenancies Bill**[38]
- **Landlord and Tenant: Distress for Rent**[39]
- **Landlord and Tenant: Responsibility for State and Condition of Property.**[40]

[32] Appendix 4 lists our reports awaiting implementation.

[33] The Family Law Bill, from the Ground for Divorce (1990) Law Com No 192 and Domestic Violence and Occupation of the Family Home (1992) Law Com No 207; Trusts of Land Bill from Trusts of Land (1989) Law Com No 181; Law Reform (Year and a Day Rule) Bill from Year and a Day Rule (1995) Law Com No 230; and Damages Bill, from Structured Settlements and Interim and Provisional Damages (1994) Law Com No 224.

[34] The Law Commission's Twenty-Fifth Annual Report 1990 (1991) Law Com No 195, paras 1.5-1.7; and Twenty-Sixth Annual Report 1991 (1992) Law Com No 206, paras 1.2-1.3.

[35] (1989) Law Com No 177

[36] (1992) Law Com No 208.

[37] (1985) Law Com No 142.

[38] (1994) Law Com No 221.

[39] (1991) Law Com No 194.

[40] (1995) Law Com No 238. See paras 5.10-5.13 below.

1.24 The first two are concerned with the forfeiture of leases for breach of a covenant, a subject of enormous everyday importance, that is presently governed by legislation that is both illogical and complex.[41] If our proposals in Codification of the Law of Landlord and Tenant: Forfeiture of Tenancies and Landlord and Tenant: Termination of Tenancies Bill were enacted, the law would be considerably more coherent as well as being simpler and cheaper to administer. The third report, Landlord and Tenant: Distress for Rent, would, if implemented, abolish the arcane and complex law on distress.[42] We also consider that our final report on landlord and tenant law, Landlord and Tenant: Responsibility for State and Condition of Property, could make a very significant difference to the quality of leasehold accommodation in this country were it to become law.

Criminal law

1.25 We are troubled by the continuing failure to implement our reports on criminal law, which would do much to improve the law. For instance, the law on offences against the person continues to be criticised by judges[43] and the calls for the implementation of our major report on **Offences Against the Person**[44] have been made continuously and loudly by judges[45] and academics.[46] We are particularly concerned that Parliament has not been able to find time to implement our generally acclaimed two clause Bill included in our report on **Conspiracy to Defraud**.[47] This makes obtaining money

[41] The main legislative provisions are the Common Law Procedure Act 1852, ss 210-212, Law of Property Act 1925, s 146, and the County Courts Act 1984, ss 138-140. Different rules apply according to whether proceedings are brought in respect of non-payment of rent, or for breach of some other covenant. As regards non-payment of rent, there are different rules according to whether proceedings are brought in the High Court or the County Court.

[42] In *Salford Van Hire (Contracts) Ltd v Bocholt Developments Ltd* [1995] 2 EGLR 50, 54, Hirst LJ expressed "the fervent hope that Parliament will adopt the Law Commission's recommendation to abolish the procedure of distress for rent, thus bringing the law of landlord and tenant in this respect into line with the modern law of bankruptcy." Sir Ralph Gibson agreed and added that "[t]he remedy of distress, on the terms set out in the current legislation, appears to have outlived its usefulness": *ibid*, p 54.

[43] "The reappearance of s 20 (of the 1861 Act) before your Lordships' House barely two years after it was minutely examined in [*Savage*] demonstrates once again that this unsatisfactory statute is long due for repeal and replacement by legislation which is soundly based in logic and expressed in language which everyone can understand", *per* Lord Mustill in *Mandair* [1995] AC 208, 221 and also note the comments of Lord Ackner in *Savage* [1992] 1 AC 699, 752.

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

[45] "Most, if not all, legal practitioners and commentators agree that the law concerning non-fatal offences against the person is in urgent need of comprehensive reform to simplify it, rationalise it and make it trap-free: the remedy is with Parliament. They have the Law Commission's paper [ie, Law Com No 218] and its draft Bill before them and have had it since November 1993" *per* Henry LJ in *Lyndsey* [1995] 3 All ER 654, 654-5.

[46] See for example Sir John Smith, "the enactment of [the Bill in Law Com No 218] cannot come *too soon*" (our emphasis), [1995] Crim LR 743.

[47] Criminal Law: Conspiracy to Defraud (1994) Law Com No 228.

by way of a loan by deception an offence of dishonestly obtaining services by deception contrary to section 1 of the Theft Act 1978. Such an amendment would fill a major lacuna in criminal law.

1.26 The Chairman, Mr Justice Brooke, pointed out that Parliament possesses no mechanism for examining our criminal law reform reports on a routine basis after they are published.[48] We agree with him that procedures need to be found for the creation of a committee which will be able to scrutinise our criminal law reform proposals thoughtfully off the floor of either House. The Commission has expressed a preference for a joint committee of both Houses, combining the formidable legal expertise in the House of Lords with the political sensitivity possessed by the House of Commons.[49]

1.27 The Law Commission again gave evidence this year to the Home Affairs Committee of the House of Commons. This was an important opportunity to discuss the prospects for implementation of the Commission's recommendations on criminal law. In addition, the Chairman, Mr Justice Brooke, addressed the Criminal Justice Consultative Council on the same theme.

1.28 On 20 November 1995 Lord Wilberforce, a former Law Lord, made a memorable speech in the House of Lords.[50] In it, he said:

> "English criminal law is, as everyone knows, complex and antiquated, an illogical mixture of common law and statute, and worst of all, is inaccessible to the citizen. ... The Commission ... has produced a draft code dealing with offences against the person and general principles and offences. The paper received an enthusiastic welcome, this being an area of the law which is most particularly antiquated and full of absurd provisions. ...
>
> A similar case can be made for the law of landlord and tenant. That is an area which affects thousands of people in their daily lives. It is full of obscurities and difficulties. ... Again the case for comprehensive reform is undoubted and incontrovertible."

The Commission's debt to Mr Justice Brooke

1.29 In December 1995 Sir Henry Brooke left the Law Commission at the end of his term of office, having been its Chairman since 1 January 1993. He will be best remembered for his energetic and successful campaign to have outstanding Law Commission

[48] Sir Henry Brooke, "The Law Commission and Criminal Law Reform", [1995] Crim LR 911, 918, which contains a valuable account of the work of the Law Commission in the field of criminal law.

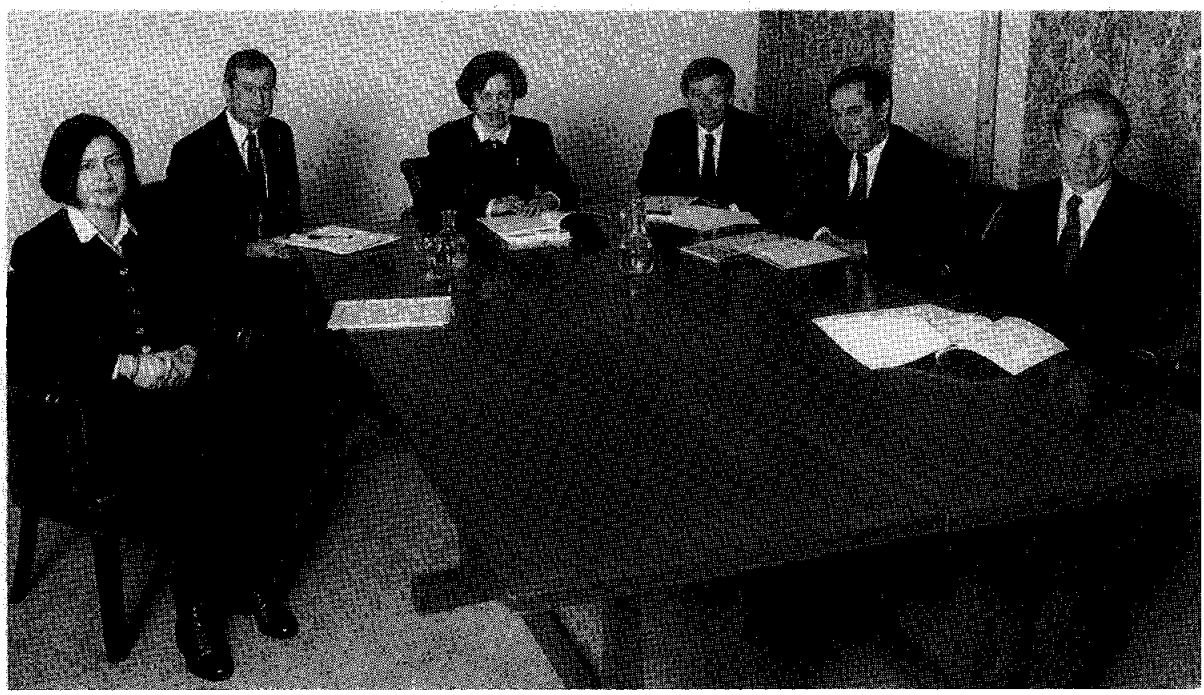
[49] For this suggestion, made at the request of the Home Affairs Committee, see minutes of the Home Affairs Committee: The Work of the Law Commission, 18 May 1994, HC 418 - i (1993-4) pp 21-24.

[50] Debate on the Address, *Hansard* (HL) 20 November 1995, vol 567, cols 160-163.

reports implemented. Building enthusiastically on the substantial work of his predecessors, and with the assistance of Parliamentary managers and many others, he ensured that there is now widespread support for implementing much of the excellent work of former Commissioners. He was always anxious to ensure that Law Commission publications were as readable and cogent as possible, and he was concerned to ensure the welfare of all who worked at the Commission. Especially to those of us who had the pleasure and benefit of working with him, he will be remembered as a thoughtful, conscientious and dynamic Chairman who has done much to ensure that the Law Commission starts the fourth decade of its existence with confidence and optimism.

New Chairman

1.30 The Lord Chancellor appointed as the eighth Chairman of the Law Commission Dame Mary Arden, a judge of the Chancery Division of the High Court. Her fellow Commissioners are very pleased to welcome her as the Chairman of the Law Commission. She succeeded Mr Justice Brooke on 1 January 1996.



THE COMMISSIONERS AND THE SECRETARY

Tribute to the late Sir Neil Lawson

1.31 The Commission notes with regret the death of Sir Neil Lawson on 26 January 1996. Sir Neil Lawson was one of the first Law Commissioners, and he brought to the Law Commission the skills and experience of one of the busiest silks of his day. He was a Law Commissioner from 1965 to 1971, when he was appointed to the High Court Bench.

Parliamentary Counsel: Mr Peter Knowles CB

1.32 Mr Peter Knowles, Parliamentary Counsel at the Law Commission, is congratulated upon his appointment as a Companion, Order of the Bath, in the 1996 New Year's

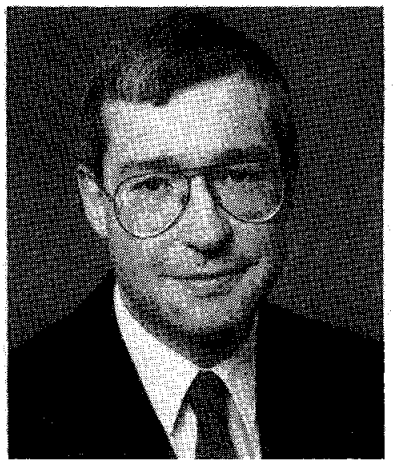
Honours List. His work here has been invaluable, and the Law Commission will be very sorry indeed when he returns to Whitehall later this year.

Resources

1.33 The Commission's statutory duty is to keep all the law of England under review but this is obviously subject to the limitations on the resources made available to it by Government. The Commission has always had to schedule its work taking into account the limits on its resources. In 1996 there will be some reduction in its resources in line with reductions in other public expenditure. The reduction may affect its future output.

1.34 There is a summary of the cost of the Commission at Appendix 5.

PART II
COMMON LAW



Professor Andrew Burrows
(Commissioner)

TEAM MEMBERS °

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Mr D Symes *(Team Manager)*
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Ms I Maclean, Mr P Sharples, Miss I A M Taylor, Mr L M Taylor

° as at the end of 1995

Contracts for the Benefit of Third Parties

2.1 A contract cannot generally confer rights or impose obligations arising under it on any person except the parties to it. We have been considering this doctrine, the doctrine of privity of contract. We reported last year[1] that we had been unable to make significant progress with this project due to serious staffing difficulties, which were only resolved in 1995. Since then, with the invaluable aid of our consultants,[2] we have been able to make substantial progress.

2.2 It is vital that any reform of privity of contract should be sufficiently wide to solve cases where genuine injustice would otherwise result, while being sufficiently narrow to ensure that contractual rights in favour of third parties are not created in circumstances where the contracting parties could have had nothing of the sort in mind. We have found the striking of this balance difficult. We were greatly assisted, however, by comments made at, and subsequent to, the lecture which Professor Burrows gave in April 1995 to members of the Society of Construction Law, outlining current thinking within the Commission on likely options for reform. Approval was given by the Commissioners to policy proposals in June 1995, and we have since begun to prepare our draft Report together with the necessary implementing legislation. The need to formulate both Report and legislation in sufficiently precise terms has caused us to give fresh consideration to several of the issues raised in the

[1] Twenty-Ninth Annual Report 1994 (1995) Law Com No 232, para 2.7.

[2] Professor Jack Beatson, Rouse Ball Professor of English Law at the University of Cambridge; Professor Hugh Beale, Professor of English Law at the University of Warwick; Professor Sally Wheeler of the University of Leeds; and Professor Aubrey Diamond QC of Notre Dame University. Professors Beatson and Diamond are former Law Commissioners.

draft policy paper, and this has resulted in some slight delay to the overall process. We will be publishing our Report and draft legislation in 1996.

Damages

2.3 Our major review of the principles governing the remedy of damages for monetary and non-monetary loss, with particular regard to personal injury litigation,[3] has made much progress in 1995.

(a) Structured Settlements and Interim and Provisional Damages

2.4 In our Annual Report last year,[4] we reported the publication of our Report on Structured Settlements and Interim and Provisional Damages.[5] We were pleased to hear, in March, that the Government had accepted all our recommendations.[6] Indeed, some of those recommendations have since become law.[7]

(b) Liability for Psychiatric Illness

2.5 We said in our last Annual Report that we expected to publish a Consultation Paper on Liability for Psychiatric Illness in the Spring of 1995,[8] and we did so in March.[9] The paper looked at various aspects of liability for psychiatric illness, but it focused particularly on the law in situations where a person suffers a psychiatric illness such as post-traumatic stress disorder (PTSD) as a result of death or injury caused to someone else through a defendant's negligence.[10] The relatively strict rules for determining liability in these situations were laid down by the House of Lords in *Alcock v Chief Constable of South Yorkshire Police*,[11] the case relating to the claim brought by close relations of people killed in the disaster at the Hillsborough football stadium in 1989. It was held that in order to succeed in a claim for damages for shock-

[3] See Sixth Programme of Law Reform (1995) Law Com No 234, Item 2. This project was formerly Item 11 of the Fifth Programme of Law Reform (1991) Law Com No 200.

[4] Twenty-Ninth Annual Report 1994 (1995) Law Com No 232, paras 2.10-2.11.

[5] Law Com No 224.

[6] Written Answer, *Hansard* (HL) 22 March 1995, vol 562, col WA 73.

[7] Finance Act 1995, s 142, inserting new ss 329A and 329B into the Income and Corporation Taxes Act 1988 (tax treatment of structured settlements: Law Com No 224, paras 3.54-3.58); Civil Evidence Act 1995, s 10 (admissibility of Government actuarial tables: Law Com No 224, paras 2.9-2.23). The Civil Evidence Act 1995, which is awaiting being brought into force, also implements the recommendations contained in the Commission's Report on the Hearsay Rule in Civil Proceedings (1993) Law Com No 216.

[8] Twenty-Ninth Annual Report 1994 (1995) Law Com No 232, para 2.14.

[9] Consultation Paper No 137.

[10] This damage was traditionally known as "nervous shock", but that expression has become subject to increasing judicial criticism.

[11] [1992] 1 AC 310.

induced psychiatric illness a plaintiff would have to show, in addition to the usual requirements that apply in cases of negligently caused personal injury:[12]

- that the plaintiff has a close tie of love and affection to the person killed or injured or is a rescuer;
- that the plaintiff was close to the accident in time and space; and
- that the plaintiff perceived the accident through his or her unaided senses rather than hearing of it from another or seeing it on television.

2.6 Our provisional view is that these requirements are too strict, but that the risk of "opening the floodgates" to unlimited litigation necessitates a degree of control on liability over and above that which exists for physical injury. We have therefore recommended provisionally that the second and third of the requirements should be removed where the first requirement is satisfied.[13]

2.7 Much attention has been paid, in the media and elsewhere, to the position of professional rescuers such as firefighters and police officers, especially in the wake of the High Court's decision in *Frost v Chief Constable of South Yorkshire Police*,[14] which related to the claim brought by a number of police officers on duty at Hillsborough at the time of the disaster. Waller J held that the plaintiff officers, though present, were not sufficiently actively involved in the rescue operation to qualify as rescuers. In our Consultation Paper we invited views as to whether professional rescuers should be precluded from recovering damages for negligently inflicted psychiatric illness.[15]

2.8 Other important questions which were addressed by the paper included:

- whether the list of plaintiffs whom the law recognises as having a sufficiently close tie of love and affection to enable damages to be recovered should be extended and, indeed, whether there should be a list at all;[16]

[12] The existence of negligence; and causation between the defendant's conduct and the plaintiff's illness; the illness suffered not being too remote; and the absence of a valid defence.

[13] (1995) Consultation Paper No 137, paras 5.7-5.30.

[14] 10 April 1995. *The Times* 3 July 1995. This case was decided shortly after the publication of the Consultation Paper. For press comment see, eg, "Trauma in uniform", *The Times* 11 April 1995 and "In the course of duty", *The Daily Telegraph* 11 April 1995.

[15] Consultation Paper No 137, paras 5.31-5.35. We did not make any provisional recommendation on this question.

[16] Consultation Paper No 137, paras 5.14-5.17.

- whether the requirement that the psychiatric illness be shock-induced should be retained;[17]

- whether the law is correct[18] to hold that an employer may be liable for psychiatric illness caused by negligently overburdening its employee with work.[19]

2.9 Subsequent to the publication of our Consultation Paper, the House of Lords decided *Page v Smith*.[20] In reversing the decision of the Court of Appeal, their Lordships[21] expanded the ambit of liability in situations where the plaintiff suffers psychiatric illness as a result of a perceived threat to his or her own safety, as opposed to that of a third party. In doing so, they applied the distinction (which also ran through our paper) between a primary victim, such as the plaintiff in *Page v Smith*, who suffers psychiatric illness through direct involvement in an accident, and a secondary victim, who suffers psychiatric illness through observation of the accident or its effects.[22] While their Lordships upheld the existence of special controls on liability in the case of secondary victims, they held that a *primary* victim need only prove that it was reasonably foreseeable that he or she would suffer some personal injury. It was therefore not necessary for a primary victim to prove that psychiatric illness was reasonably foreseeable, whether in a person of reasonable fortitude or otherwise.

2.10 The consultation period set by the Consultation Paper ended on 31 July 1995, and we are analysing the responses received, which number nearly 150. We have tried to ensure that as far as possible our work has been informed by up-to-date medical thinking as, in our view, this is the only way in which the debate on liability for psychiatric illness can be carried forward. We are confident that our Consultation Paper has made a positive contribution to that debate.

(c) Non-pecuniary Loss

2.11 Our next consultation paper in the series, on damages for non-pecuniary loss in personal injury cases, was approved in November 1995, and published on 4 January 1996.[23] It covers damages for pain and suffering and loss of amenity. We examine the questions of whether or not the levels of damages for non-pecuniary loss are satisfactory, and whether improvements can be made to the means by which these levels are set. At present, the general levels of damages for non-pecuniary loss are set

[17] *Ibid*, paras 5.38-5.40.

[18] The leading case is *Walker v Northumberland CC* [1995] 1 All ER 737.

[19] Consultation Paper No 137, paras 5.61-5.63.

[20] [1996] 1 AC 155.

[21] Lord Ackner, Lord Browne-Wilkinson and Lord Lloyd of Berwick; Lord Keith of Kinkel and Lord Jauncey of Tullichettle dissenting.

[22] [1996] 1 AC 155, 182.

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

in relation to types of injury by way of an informal judicial tariff, and we ask whether this is the best means of assessment, or whether some alternative means might be adopted such as, for example, a legislative tariff, or a "Compensation Advisory Board".[24] We also provisionally recommend that judges, in directing juries assessing damages in defamation cases, should draw jurors' attention to the levels of damages being awarded for non-pecuniary loss in personal injury cases.[25]

2.12 Other issues discussed in the paper include:

- the unconscious plaintiff;
- whether a threshold for the recovery of damages for non-pecuniary loss should be introduced so as to rule out relatively small claims;
- the award of interest on damages for non-pecuniary loss; and
- the survival, where a plaintiff dies, of the right to damages for the benefit of the plaintiff's estate.

(d) Aggravated, Exemplary and Restitutionary Damages

2.13 We have been continuing our work on aggravated, exemplary and restitutionary damages, on which we published a Consultation Paper in 1993.[26] Following the analysis of the many responses, we have been engaged in the formulation of our policy on this extremely complex topic. We also received a great deal of useful feedback at a seminar entitled "Pressing Problems in the Law: Exceptional Measures of Damages", which was held at All Souls College, Oxford, in July 1995 under the aegis of the Society of Public Teachers of Law. The seminar was chaired by the Commission's Chairman, Mr Justice Brooke, and Professor Burrows presented a paper entitled "Reforming Exemplary Damages: Expansion or Abolition?".[27] To assist us further, we circulated a Supplementary Consultation Paper on exemplary damages in August, principally among those who had responded to the original Consultation Paper. This identified three models for reform: an "expansionist" model, in which the availability of exemplary damages is expanded; an "abolitionist" model, in which exemplary damages are abolished; and a "hybrid" model, in which exemplary damages

[24] A Compensation Advisory Board was proposed in the Citizens' Compensation Bill which was unsuccessfully introduced as a Private Member's Bill in 1988.

[25] This approach received the support of the Court of Appeal in the case of *John v MGN Limited*, the libel action brought by the singer Elton John (*The Times* 14 December 1995).

[26] Aggravated, Exemplary and Restitutionary Damages, Consultation Paper No 132.

[27] Papers were also presented by Professor Hugh Beale, Professor Tony Downes, Nicholas McBride and Dr Harvey McGregor QC.

are abolished except in a very limited range of cases.[28] We hope that publication of our final Report will take place in 1996.

(e) Fatal Accidents; Medical, Nursing and Other Expenses

2.14 Meanwhile, work is still proceeding on the next two damages topics on which we commenced work in 1994.[29] The first of those topics is fatal accidents, including bereavement damages. The second is medical, nursing and other expenses: we expect to be looking, in the same paper, at collateral benefits.[30] We hope to publish the remaining Consultation Papers in 1996.

Limitation Periods

2.15 Under the Sixth Programme of Law Reform we have started two entirely new projects. The first of these is "a comprehensive review of the law on limitation periods with a view to its simplification and rationalisation."[31] The current law on limitation periods is mainly, but not exclusively, contained in the Limitation Act 1980. That law is unnecessarily complex. Different limitation periods apply to different types of action. Where there was a delay before the plaintiff discovered the facts relevant to the claim, the commencement of the limitation period will be delayed in some cases but not others. In some cases the limitation period is subject to an overall "long-stop" date, but this date is not uniform for all actions to which a long-stop applies. And in some cases the court has a discretion to waive the time limit.

2.16 Apart from the sheer complexity of the law, which has arisen from the largely piecemeal way in which reform has previously been carried out, there are particular areas which will need scrutiny. These include the operation of two different limitation periods where a plaintiff has concurrent claims in contract and tort; the effect on the limitation period of fraudulent concealment of the existence of a possible claim;[32] the lack of clear limitation periods in the rapidly-growing area of claims for restitution and unjust enrichment; and the apparently less favourable nature of the limitation rules for trespass to the person, compared with those for negligence.[33]

[28] Ie, torts which are committed with a deliberate and outrageous disregard of the plaintiff's rights, by servants of government in the purported exercise of powers entrusted to them by the state, and which are capable of amounting to crimes.

[29] Twenty-Ninth Annual Report 1994 (1995) Law Com No 232, para 2.14.

[30] These will not include the recovery provisions of the Social Security Administration Act 1992 unless we receive the Lord Chancellor's approval: see Sixth Programme of Law Reform (1995) Law Com No 234, Item 2.

[31] Sixth Programme of Law Reform (1995) Law Com No 234, Item 3.

[32] See *Sheldon v RHM Outhwaite (Underwriting Agencies) Ltd* [1995] 2 WLR 570 (HL).

[33] See *Stubbings v Webb* [1993] AC 498 (HL). We understand that the unsuccessful plaintiff in that case has petitioned the European Commission of Human Rights, which has referred the case to the European Court of Human Rights.

2.17 We began the project earlier this year, and we have engaged Professor Andrew McGee[34] to act as our consultant. We expect to publish a Consultation Paper in 1996 or 1997.

Illegal Transactions

2.18 The second of our two new projects is an examination of the law on illegal transactions.[35] The current rules relating to illegal contracts have been developed by the common law over many years, and are now in need of a thorough overhaul. In a sophisticated economy it is essential that there should be clear and fair laws governing any situation where a contract is, or might be, affected by illegality, so that businesses, individuals and their advisers are able to know exactly where they stand. Other common law jurisdictions have already made sweeping reforms to the law in this area.[36]

2.19 Concern about the law of illegal transactions is not, however, limited to illegal contracts, and our project is also concerned with the effect of illegality on trusts. This is strongly illustrated by the case of *Tinsley v Milligan*.[37] In his dissenting judgment, Lord Goff of Chieveley, after reviewing the English authorities and the reformed law in New Zealand,[38] said:

> ... speaking for myself, I would welcome an investigation by the Law Commission, if this is considered desirable and practicable by the authorities concerned; and ... I would be more than happy if a new system could be evolved which was both satisfactory in its effect and capable of avoiding the kind of result which flows from the established rules of law in cases such as the present.[39]

2.20 We are pleased to be undertaking an investigation of the kind advocated by Lord Goff. We have enlisted the assistance of Professor Richard Buckley[40] as our consultant. We hope to publish a consultation paper in 1997.

[34] Professor of Business Law at the University of Leeds.

[35] Sixth Programme of Law Reform (1995) Law Com No 234, Item 4.

[36] See, eg, New Zealand's Illegal Contracts Act 1970.

[37] [1994] 1 AC 340. A majority of the House of Lords (Lord Jauncey of Tullichettle, Lord Lowry and Lord Browne-Wilkinson; Lord Keith of Kinkel and Lord Goff of Chieveley dissenting) upheld a claim by the defendant in possession for a beneficial interest in a house, the legal title to which was held in the plaintiff's sole name, despite the plaintiff's argument that the arrangements with the property had been made as part of a scheme to defraud the Department of Social Security.

[38] See para 2.18, n 36 above.

[39] [1994] 1 AC 340, 364.

[40] Professor of Law at the University of Reading.

Feasibility Investigation on Joint and Several Liability

2.21 On 29 December 1995 the Common Law team completed its feasibility investigation into possible reform of joint and several liability, and the report was published by the Department of Trade and Industry in February 1996.[41] Publication of the report commences a Government consultation exercise to determine whether amendments are necessary in aspects of the law relating to professional liability. The principal conclusion of the investigation is that abolition of the present doctrine of joint and several liability, which applies among multiple wrongdoers, and its replacement with either full proportionate liability,[42] or some modified form of this, would be contrary to principle. The two main reasons why we reached this conclusion were that:

(i) it is unfair for a legally blameless plaintiff to have to bear the risk of a defendant's insolvency; and

(ii) it is misleading to say that "defendants can be called upon to provide 100 per cent of damages even though they are only 1 per cent at fault": as a matter of causation and blameworthiness *relative to the plaintiff*, joint and several liability follows from each defendant being 100 per cent responsible for the whole of the plaintiff's loss.

2.22 The investigation recognises the genuine concern of the professions at the mounting levels of claims against them, and the increased difficulties they face in obtaining adequate levels of indemnity insurance, and suggests a number of alternative mechanisms whereby professionals might control their liability to clients.

Other work

2.23 In addition to the work described in the preceding paragraphs, the Common Law team was involved in 1995 in responding to Government consultations on three areas of law:

- *Construction law.* A Consultation Paper was issued in April 1995 by the Department of the Environment entitled *Liability for Latent Defects and BUILD Insurance*, followed by a second paper, *Fair Construction Contracts*, issued in May 1995.

[41] Department of Trade and Industry Consultation Document, *Feasibility Investigation of Joint and Several Liability by the Common Law Team of the Law Commission*, HMSO 1996. We were assisted in the preparation of the investigation by our consultant, Professor Anthony Dugdale, Professor of Negligence Law at the University of Keele.

[42] Whereby damages would be awarded and calculated against each defendant strictly in accordance with that defendant's apportioned fault.

- *Compensation recovery*. In October 1995 the Government published a reply, incorporating a consultation paper,[43] to a report published by the Social Security Select Committee in the summer of 1995.[44] The Select Committee's report recommended change to the provisions contained in the Social Security Administration Act 1992, concerning the recovery from damages for personal injury of social security benefits paid in respect of the injury for which the damages were received.[45]

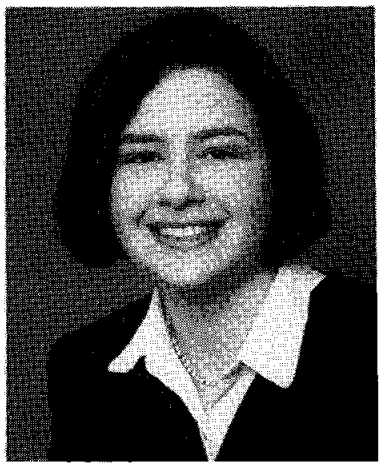
- *Defamation*. A consultation paper entitled *Reforming Defamation Law and Procedure*, incorporating a draft Bill, was issued by the Lord Chancellor's Department in July 1995.

[43] Reply by the Government to the Fourth Report of the Select Committee on Compensation Recovery (1995) Cm 2997.

[44] Fourth Report: Compensation Recovery.

[45] Sections 82-104, formerly Social Security Act 1989, s 22 and Schedule 4.

PART III
COMPANY AND COMMERCIAL LAW



Miss Diana Faber
(Commissioner)

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Research Assistants
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° as at the end of 1995

Shareholders' Remedies

3.1 This is a project which has been jointly referred to us by the President of the Board of Trade and the Lord Chancellor.[1] It examines the remedies available to shareholders of a company who are dissatisfied with the way in which the company is being run or who consider that their rights have been infringed in some way. A common procedure is for a shareholder to petition for relief under section 459 of the Companies Act 1985 on the ground that the company's affairs are being or have been conducted in a manner which is unfairly prejudicial to its members generally or some part of its members. Such petitions have been likened to old fashioned divorce proceedings because the wide wording of the section and the way in which the courts have interpreted it to date have meant that parties will often go over the entire history of the company since its incorporation, citing every disagreement during this time, in order to establish their claim. This leads to extremely long and expensive cases.

3.2 Section 459 overlaps with other remedies available to a shareholder, in particular the enforcement of a shareholder's personal rights under the articles of association and the shareholder's right to bring an action on behalf of the company under what are commonly referred to as the exceptions to the rule in *Foss v Harbottle*.[2] The circumstances in which such actions can be brought are by no means clear and they have largely fallen into disuse in recent years, not least because section 459 covers much of the same ground. We are considering ways in which the law in this area can be rationalised, updated and improved.

[1] It follows earlier work we carried out for the Department of Trade and Industry on the law relating to private companies; see Twenty-Ninth Annual Report 1994 (1995) Law Com No 232, paras 2.20-2.24.

[2] (1843) 2 Hare 461.

3.3 The original timetable for this project has been extended with the agreement of the Department of Trade and Industry ("DTI") and we are proposing to publish a consultation paper in Summer 1996. The project is being carried out in consultation with the Scottish Law Commission and we are being assisted by Professor Dan Prentice of the University of Oxford and Ms Brenda Hannigan, senior lecturer at the University of Southampton.

Fiduciary Duties and Regulatory Rules

3.4 We published our report on this topic in December.[3] In it we consider the relationship between regulatory rules and the fiduciary duties[4] owed by certain professional and business persons who are subject to them, in particular by those involved in the financial services industry. The Financial Services Act 1986 introduced a new system of regulation for firms carrying on business in this area under which a great deal of responsibility was delegated to self-regulatory bodies. However, the Act did not expressly provide how the rules made by such bodies would tie in with traditional fiduciary duties and it was not clear in particular how any mismatch between the two should be resolved. It was as a result of concerns expressed on this point by firms operating in the financial services sphere, and their legal advisers, that this matter was referred to the Commission.[5]

3.5 From the responses to our consultation paper[6] we found that, while there is a potential mismatch between what is permitted by regulatory rules and what is required by traditional fiduciary duties in a number of areas in the financial services sphere, this is not regarded as causing significant problems in practice. Moreover, recent legal developments[7] have confirmed that it is open to firms to limit the extent of their fiduciary obligations in their contracts with their customers so as to deal, to a large degree, with any problems which might arise as a result of such a mismatch. We also consider that recent cases such as *Kelly v Cooper*[8] and *Target Holdings v Redferns*[9] have indicated that the courts are prepared to look at fiduciary duties in the modern commercial context and we consider that this approach tends to support the view that

[3] Fiduciary Duties and Regulatory Rules (1995) Law Com No 236.

[4] The obligations owed by a fiduciary will vary depending on the circumstances but may include (i) an obligation to disclose or use all relevant information for the benefit of his customer, the beneficiary; and (ii) an obligation not to place himself in a position where his own interest conflicts with that of his customer or where he owes conflicting duties to two customers.

[5] Although the focus of the project was on the financial services industry, the scope of the reference in fact extended to all forms of professional and business activity which are subject to public law regulation by statutory or self-regulatory control.

[6] Fiduciary Duties and Regulatory Rules, Consultation Paper No 124.

[7] In particular the case of *Kelly v Cooper* [1993] AC 205.

[8] [1993] AC 205.

[9] [1995] 3 WLR 352.

they will adopt the solution we proposed in our consultation paper[10] and take account of reasonable regulatory rules in determining the content of common law and equitable obligations.

3.6 However, we do recommend in the report that there should be legislation to clarify the effect of Chinese walls. Very broadly, Chinese walls are procedures for restricting flows of information within a firm to ensure that information which is confidential to one department is not improperly communicated to any other department within the firm. They are widely used in the financial services sector to manage or avoid conflicts between the duties owed to different customers, or conflicts between the firm's interests and the duties owed to customers, which arise out of the different activities of the component parts of the firm on different sides of the wall. They are particularly vital to the operation of modern financial conglomerates because the range of services they provide, the composition of their customer base, and the different capacities in which they conduct business inevitably give rise to such conflicts which could breach the conglomerate's fiduciary obligations.[11]

3.7 Section 48(2)(h) of the Financial Services Act 1986 gives the Securities and Investments Board ("the SIB") power to make rules enabling or requiring a firm to withhold information obtained in the course of carrying on one part of its business from customers with whom it is dealing in the course of carrying on another part of its business[12] and the SIB has exercised this power by making a rule which specifically permits the use of Chinese walls.[13] We consider that the SIB rule is likely to have the effect of modifying inconsistent fiduciary obligations but, in view of the importance of Chinese wall arrangements to the operation of the financial services industry, we consider that it is essential to remove any lingering doubts about their effectiveness (in the absence of express contractual provisions). Accordingly we recommend in our report that there should be legislation to clarify the effect of section 48(2)(h) so as to give statutory protection to a firm which operates an established Chinese wall arrangement which complies with rules made by the SIB under section 48(2)(h).

Third Parties (Rights Against Insurers) Act 1930

3.8 This is a new project which we announced in our Sixth Programme[14] and which we are to carry out jointly with the Scottish Law Commission. Substantive work will start early in 1996 although we have carried out some preliminary work and had initial discussions with representatives of the industry and the DTI.

[10] Consultation Paper No 124, paras 7.22-7.23.

[11] See para 3.4, n 4 above.

[12] And for that purpose enabling or requiring persons employed in one part of that business to withhold information from those employed in another part.

[13] Rule 36 of the Core Conduct of Business Rules.

[14] Law Commission Sixth Programme of Law Reform (1995) Law Com No 234, Item 10.

3.9 The Third Parties (Rights Against Insurers) Act 1930 was introduced to remedy the perceived injustice of the case of *Re Harrington Motor Co Ltd* [15] where the proceeds of a third party liability policy were held to form part of the general assets of an insolvent company and could not be claimed directly by the third party whose injuries (for which the insolvent company was liable) had given rise to the claim under the policy. The injured party had to prove for a dividend along with the other unsecured creditors of the company. The Act operates by transferring to the third party the rights of the insured in the event of the latter becoming insolvent. It also provides a mechanism whereby the third party may obtain information about the insurance policy.

3.10 However, it has been held that these features of the Act only come into play once the insured's liability to the third party has been established.[16] It can be wasteful in time and costs to require the third party to pursue to judgment an insolvent insured who has no interest in the outcome of the proceedings, thereby deferring the real dispute with the insurer to a later stage. It can also cause injustice because of limitation difficulties[17] or because it is no longer possible to obtain judgment against the insured.[18]

3.11 Moreover, problems have emerged from the application of the Act in the context of modern insurance practice. A particular difficulty, which has been highlighted by recent Lloyd's litigation, relates to multiple claims policies where the total value of claims exceeds the policy limit. The distribution of the proceeds of the insurance policy in those circumstances depends at present on the order in which each claimant establishes liability and quantum,[19] although this may be complicated by the presence of an "excess" clause.[20] This may lead to unfair and arbitrary results. Further, the uncertainty surrounding the distribution of the insurance proceeds, which may be complicated by the lack of information about the cover, may contribute to unnecessary litigation and wasted costs.

[15] [1928] 1 Ch 105.

[16] *Post Office v Norwich Union Fire Insurance Society Ltd* [1967] 2 QB 363, *Bradley v Eagle Star Insurance Co Ltd* [1989] AC 957 on the transfer of rights; *Nigel Upchurch v Aldridge Estates Investment Co Ltd* [1993] 1 Lloyd's Rep 535, *Woolwich Building Society v Taylor and Another* [1995] 1 BCLC 132 on the right to information.

[17] The insolvency (and therefore the transfer of rights) may not occur until after the limitation period against the insurer has expired; *Lefevre v White* [1990] 1 Lloyd's Rep 569, *The Felicie (London Steamship Owners Mutual Insurance Association Ltd v Bombay Trading Co Ltd)* [1990] 2 Lloyd's Rep 21.

[18] If the insured is a company which has been dissolved, proceedings cannot be commenced against it. However, in most cases where proceedings are to be brought it is possible to have the dissolution declared void under s 651 of the Companies Act 1985. The requirement to restore the company to the register adds to the costs.

[19] *Cox v Bankside Members Agency Ltd and others* [1995] 2 Lloyd's Rep 437.

[20] In *Cox* it was common ground that, where claims were subject to an excess, the early claimants had no entitlement until the excess had been applied.

3.12 We will be considering, with the Scottish Law Commission, ways in which the law can be updated in line with modern needs and practices. We are proposing to publish a consultation paper during the course of 1997.

Execution of Deeds and Documents by Corporations

3.13 This project is being undertaken by the Property and Trust Law team, since the subject matter is closely associated with the Commission's previous work in the property field.[21] We received a joint reference from the Lord Chancellor and the President of the Board of Trade to review the law relating to the execution of deeds and documents by or on behalf of corporate bodies, occasioned largely by concern about the operation of the law governing the execution of documents by companies incorporated under the Companies Acts.[22] The project will, however, enable us to attempt to simplify the law on the execution of documents by corporations generally.[23] We hope to publish a consultation paper shortly. We gratefully acknowledge the continuing assistance on this project of Mr Richard Coleman, a consultant at Clifford Chance.

Facilitating Electronic Commerce through Law Reform

3.14 In May the Team provided the DTI with a briefing paper which examined whether requirements of form in English law inhibited the use and effectiveness of EDI[24] and whether legislative reform to facilitate electronic commerce is necessary. It concluded, on a preliminary basis, that requirements for "writing", "signature" and "document", among others, could potentially inhibit electronic commerce and that legislative reform may be necessary.

3.15 The Commission does not have sufficient resources to carry out a detailed study of the law or to gauge the strength of commercial pressure for change. Miss Faber therefore initiated discussion between the DTI, the Lord Chancellor's Department and the Society for Computers and Law with a view to finding a way to carry this work forward. The result of these discussions is that the Society has convened a legislative working party consisting of representatives from industry and commerce and practising and academic lawyers. The working party will produce a report identifying the main barriers to the use of digital communication and make recommendations for legislative reform. Miss Faber serves as a member of the working party which hopes to report in the first half of 1996.

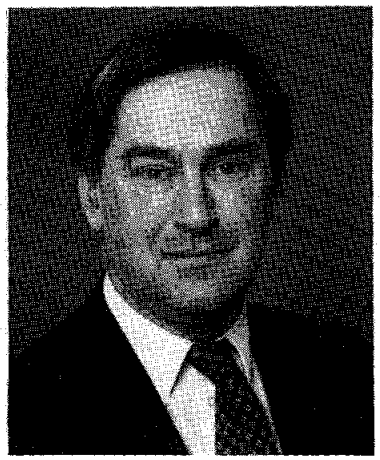
[21] See, eg, Formalities for Contracts for Sale etc of Land (1987) Law Com No 164, and Deeds and Escrows (1987) Law Com No 163.

[22] Companies Act 1985, ss 36 and 36A, as substituted and inserted by Companies Act 1989, s 130.

[23] We had previously concluded that execution under seal remained the appropriate method for corporations (see (1987) Law Com No 163, para 5.2), but the changes to the execution rules for companies made by the Companies Act 1989, s 130, exacerbate the differences in the necessary formalities between companies and other corporations, and justify a wider review.

[24] This is the term used to describe communication between one computer and another which is conducted on previously agreed formats designed to increase speed and minimise human error.

PART IV
CRIMINAL LAW AND EVIDENCE



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Involuntary manslaughter

4.1 In April 1994 we published a consultation paper[1] on the law of involuntary manslaughter – that is, the unintentional causing of death by recklessness or gross negligence, or by means of an unlawful act. This is one of the few remaining common law offences; and the existing law is uncertain and in some respects anomalous. We completed our report in December and it was published in March 1996.[2]

4.2 Our recommendations are based on the principle that criminal liability ought to depend primarily on the extent to which a defendant is at fault – that is, the consequences that he intends, or foresees, or ought to have foreseen – rather than on the consequences that happen to result. It follows from this principle, and we recommend in our report, that a person ought not to be guilty of manslaughter merely because he commits a minor assault which, through some unforeseeable mischance, results in death. A prosecution for homicide ought in our view to require proof that, if the defendant did not actually realise that his conduct might cause death or serious injury, he *ought* to have realised it.

4.3 On the other hand we think that there is an important distinction between a person who *is* aware of a risk and a person who is not, but ought to be; and for this reason we recommend that the offence of involuntary manslaughter should be replaced by *two* new offences, one of "reckless killing" (that is, causing death in the awareness that

[1] Criminal Law: Involuntary Manslaughter (1994) Consultation Paper No 135.

[2] Legislating the Criminal Code: Involuntary Manslaughter (1996) Law Com No 237.We received a great deal of help after the end of the consultation period from those listed in Appendix D of the report, and also from Bob Sullivan of Durham University and Graham Virgo of Cambridge University.

death or serious injury may result) and one of "killing by gross carelessness" (requiring proof only that the risk would have been obvious to a reasonable person, that the defendant was capable of appreciating that risk, and that his or her conduct fell far below what could reasonably be expected – which last requirement would in effect be deemed to be satisfied if he or she intended to cause some injury or was reckless whether injury resulted).

4.4 We also considered the difficulty, under the present law, of proving that a *company* is guilty of manslaughter. This difficulty arises from the rule that a company cannot be said to have committed a crime unless that crime is committed by a person of such seniority within the company hierarchy that his or her acts are in reality the acts of the company itself. In the case of a fatality arising out of the operations of a large company, it is rarely possible to identify any sufficiently senior individual who can be proved to have been sufficiently at fault to render the company guilty of manslaughter.[3] We think this position is unsatisfactory, since it may well be possible to say with confidence that the *company* is seriously at fault even if it is not possible to identify the individual or individuals responsible. We therefore recommend the creation of a new offence of "corporate killing", which would be essentially similar to that of killing by gross carelessness but could be committed only by a corporation. It would require proof that the death resulted from a "management failure" – that is, a failure by the corporation, in the management or organisation of its activities, to ensure the safety of persons employed in or affected by those activities – and that that failure constituted conduct falling far below what could reasonably be expected of the corporation. We believe that these proposals would make companies properly accountable, in the criminal courts as well as the civil, for gross corporate mismanagement that results in death.

Dishonesty offences

4.5 In 1994 we announced our intention to embark on a comprehensive review of the law of dishonesty. That is to include not only the offences under the Theft Acts 1968 and 1978 but also a wide range of other offences, together with various kinds of dishonest conduct that do not clearly fall within any of the existing offences – except perhaps the common law offence of conspiracy to defraud; we recommended in 1994 that that should remain in existence until our review of dishonesty had revealed whether it was practicable to abolish it.[4]

4.6 In the course of the year we made progress in identifying the problems that appear to exist in the present law, and possible ways in which they might be remedied. We have engaged as our consultant Professor Edward Griew of the University of Nottingham. In May, with the kind assistance of Central Law Training Ltd, we organised a seminar

[3] In *R v P&O European Ferries (Dover) Ltd* Central Criminal Court - 5 June 1990 - Turner J directed the jury to enter a verdict of not guilty for this reason.

[4] Criminal Law: Conspiracy to Defraud (1994) Law Com No 228.

attended by a number of eminent judges, barristers, solicitors, prosecutors, police officers and academics, all of whom contributed interesting and helpful insights which continue to give us much food for thought. We hope to publish a consultation paper on the Theft Acts in 1997 if resources permit.

Conspiracy to defraud

4.7 In our report on Conspiracy to Defraud we made one recommendation for legislation, namely an amendment to the Theft Act 1978 which would make clear (contrary to the decision of the Court of Appeal in *Halai*)[5] that the dishonest obtaining of a *loan* can amount to the offence of obtaining services by deception. This simple amendment would solve a serious problem currently faced by prosecutors in cases of mortgage fraud, where there are often technical difficulties in bringing a case within the terms of any other deception offence; moreover, it would do so without extending the offence any further than was originally intended. The recommendation has been widely welcomed and we are disappointed that it has not yet been implemented.

The misuse of trade secrets

4.8 One of the aspects of dishonesty that concern us is the deliberate infringement of rights in intellectual property, such as trade secrets. From the work that we have done so far, it would appear that intellectual property is not adequately protected by the criminal law against dishonest conduct. For example, it is an offence to steal a pencil from one's employer; but it is not an offence to "steal", and to sell to the employer's rivals, highly secret information worth millions of pounds. We have decided to treat this aspect of dishonesty as a project in its own right, and have engaged as a consultant Professor W R Cornish FBA, Herchel Smith Professor of Intellectual Property Law at the University of Cambridge. We hope to publish a consultation paper in late 1996 if resources permit.

Intoxication and criminal liability

4.9 We published our report on this subject in February.[6] In it we asked how our criminal law should take account of the fact that a defendant on a criminal charge was or may have been affected by intoxication at the time he acted in the manner complained of. This problem is at present resolved in different ways depending on whether the offence charged has been categorised by the courts as one of "specific" or of "basic" intent, by what is known as the "*Majewski* approach", after the leading case.[7] We recommended that the *Majewski* approach should be codified and clarified subject to certain modifications. Further details of our recommendations may be found in our

[5] [1983] Crim LR 624.

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

[7] *DPP v Majewski* [1977] AC 443.

Annual Report for 1994.[8]

The year and a day rule in homicide

4.10 In February we published our report[9] in which we recommended the abolition of this antiquated rule. We were also mindful of the problems of a defendant, who might be prosecuted many years after he has committed the wrongful act in circumstances where it would be difficult for him to remember what had happened and where other evidence might no longer be available. We were also conscious of the position of the defendant who had already received a custodial sentence for a non-fatal offence and then might be prosecuted when death ensued. We were very conscious that there might be very substantial public pressure for a prosecution to be brought where a death occurred, even though a substantial time had elapsed since the wrongful act and the defendant had already served a period of imprisonment. The prosecution would be faced with a difficult decision and we regarded it as appropriate that the consent of the Attorney-General should be required for a homicide prosecution where (i) three or more years had elapsed between the wrongful act or omission and the subsequent proceedings for homicide and (ii) the defendant had already received a custodial sentence of two years or more for a non-fatal offence arising out of the same episode as the homicide offence. This report and the rule were considered by the Home Affairs Committee of the House of Commons, and the Chairman, Mr Silber and Mr Parry gave oral evidence to them.

4.11 In their report the Home Affairs Committee[10] accepted our conclusions, save that the consent of the Attorney-General would not be required if three or more years elapsed between the wrongful act or omission and the subsequent proceedings for homicide. The Government replied[11] by agreeing to the abolition of the rule subject to the consent of the Attorney-General being required where (i) the victim dies three years or more after the initial injury and (ii) the defendant has already been convicted of an offence arising out of the injury.

4.12 Legislation to abolish the rule[12] has been introduced by a private Member[13] in the current session of Parliament, and has completed its passage through the House of Commons. It is worthwhile pointing out that we produced our consultation paper

[8] Twenty-Ninth Annual Report 1994 (1995) Law Com No 232, paras 2.46-2.49.

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

[10] The Second Report from the Home Affairs Committee (session 1994-5): The "Year and a Day" rule in Homicide HC 428.

[11] *The Government Reply to the Second Report from the Home Affairs Committee session 1994-5:* HC 428 - the "Year and a Day" rule in Homicide (1995) Cm 2928.

[12] The Law Reform (Year and a Day Rule) Bill.

[13] Mr Doug Hoyle MP.

and our report on this subject within ten months of the project starting: the Home Affairs Committee of the House of Commons and the Home Office concluded their deliberations within a further five months. This is an important reminder of how speedily a discrete matter of law reform can be handled.

Counts in an indictment

4.13 At the suggestion of the Royal Commission on Criminal Justice[14] the Lord Chancellor's Department published a consultation paper written by our Criminal Law team and designed to focus attention on the question whether the indictment used in criminal trials could be drafted in a form that would make the trial easier to conduct and which gave the jury clearer guidance as to the issues they had to decide. One of the schemes suggested was greater particularisation, and the other, which had been formulated by the Crown Prosecution Service, provided for an additional document to supplement the indictment in appropriate cases.

4.14 A large number of responses were received and they were analysed by Mr Don Howe, the former Circuit Administrator of the Wales and Chester Circuit. The Government's decision on the outcome is awaited.

Assisting and encouraging crime

4.15 We published a consultation paper [15] in September 1993 on the scope and structure of the law concerning the liability of those who assist or encourage others to commit offences. The consultation period closed at the end of June 1994, and the responses have been analysed. The need to give priority to other projects has prevented us from publishing our report as soon as we would have wished, but we hope to do so as soon as staffing resources permit.

Evidence in criminal proceedings

4.16 In April 1994 the Home Secretary made two references to us,[16] in which he invited us to consider the law relating to hearsay evidence and to evidence of previous misconduct in criminal proceedings, following recommendations to that effect by the Royal Commission on Criminal Justice.[17]

(a) Hearsay

4.17 We welcomed this reference as we were conscious that hearsay is "one of the oldest,

[14] Report of the Royal Commission on Criminal Justice (1993) Cm 2263, Chapter 8, paras 5-6.

[15] Assisting and Encouraging Crime (1993) Consultation Paper No 131.

[16] Pursuant to s 3(1)(a) of the Law Commissions Act 1965.

[17] Report of the Royal Commission on Criminal Justice (1993) Cm 2263, Chapter 8, paras 26 and 30.

most complex and most confusing of the exclusionary rules of evidence".[18] Lord Reid said in 1964 that it "[was] difficult to make any general statement about the law of hearsay evidence which is entirely accurate",[19] while Diplock LJ said two years later that hearsay is a branch of the law "which has little to do with common sense."[20] One of the reasons is that "its definition, and the ambit of exceptions to it are both unclear".[21] A consultation paper [22] was published in July, with the consultation period finishing on 31 October 1995.

4.18 It provisionally proposed a clarification of the definition of hearsay, that hearsay should be automatically admitted in certain specified circumstances where the maker of the statement was unavailable, and that there would be a "safety-valve" provision which would enable hearsay evidence to be adduced where a failure to do so would lead to an injustice. We proposed the repeal of section 69 of the Police and Criminal Evidence Act 1984, which precludes the admission of evidence produced by a computer unless it is shown that the computer was working properly. We also made provisional proposals to enable an expert to rely on hearsay given to him by his subordinates.

4.19 The large number of responses have been analysed and we hope to publish our report in 1996. Professor John R Spencer, Professor of Common Law at the University of Cambridge, has acted as our consultant on the consultation paper .

(b) Previous misconduct

4.20 This subject covers not only the question of whether and, if so, when an accused person's criminal record or other discreditable conduct should be admitted in evidence at his or her trial, but also what is broadly called "similar fact evidence", that is evidence which shows that the accused has done similar things before.

4.21 It is a dearly-held principle of English law that a person should only be tried on the charge before the court, and that a verdict should not be reached on the basis of what is known about his or her character. However, the law recognises exceptions to this principle: evidence of similar acts by the accused may be admitted as part of the prosecution case, and in certain circumstances his or her criminal record may be put before the court. In this project we examine the exceptions to this principle and consider whether there is a need for changes to the current law.

[18] *Cross and Tapper on Evidence* (8th ed 1995, ed C Tapper) p 563.

[19] *Myers v DPP* [1965] AC 1001, 1019-1020.

[20] *Jones v Metcalf* [1967] 1 WLR 1286, 1290 and 1291, with whom Widgery LJ agreed.

[21] *Cross and Tapper,* p 563. Revealingly, more than 150 pages in the latest edition are devoted to the rule (including the rule against previous consistent statements) and the exceptions.

[22] Evidence in Criminal Proceedings: Hearsay and Related Topics (1995) Consultation Paper No 138.

4.22 In last year's annual report we referred to research which was going to be carried out into the effect on juries of hearing an accused's previous convictions. This research was undertaken in 1995, with the support of the Home Office, by Dr Sally Lloyd-Bostock of the Centre for Socio-Legal Studies at Wolfson College, Oxford. We are considering the implications of the findings for the current law.

4.23 Sir Donald Farquharson, a recently retired Lord Justice of Appeal, and Peter Mirfield, Fellow of Jesus College and Lecturer in Law at the University of Oxford, have been engaged as consultants on this project. We hope to publish our consultation paper in mid-1996.

Consent in the criminal law

4.24 In our last annual report [23] we described the progress made on this important project since the publication of our first consultation paper in February 1994.[24] During 1995 we were able to take this project much further and, after drawing heavily on the responses we received to the first consultation paper and our own further research, we have now come up with a coherent set of provisional proposals which answer the questions we referred to in our last annual report.[25] These provisional proposals are contained in a further Consultation Paper, *Consent in the Criminal Law* ("CP No 139"),[26] which we published in December 1995.

4.25 There were a number of reasons why we believed that a further consultation process was necessary. First, we have had the opportunity to set out the very detailed evidence we received during the first consultation process. In addition, we have been able to examine three important areas of activity which we mentioned only briefly in the first consultation paper because, at that time, we believed them to have only a very tangential, if any, connection with issues of consent. CP No 139 contains an extensive part which examines and makes proposals in respect of the criminal law's treatment of medical and surgical treatment; an area which we now recognise to be fundamentally tied to issues of consent, even if other issues are also involved. We also consider boxing as part of our general survey of the sports which are likely to involve questions of consent. We remain of the view, expressed in the first consultation paper, that the legality of boxing should continue to be subject to Parliamentary review, but we have been able to set out a conceptual framework, embracing all dangerous sports, within which issues of legality should be approached. The first consultation paper also

[23] Twenty-Ninth Annual Report 1994 (1995) Law Com No 232, paras 2.50-2.51.

[24] Criminal Law: Consent and Offences against the Person (1994) Consultation Paper No 134.

[25] Eg we asked, inter alia: how should the criminal law protect those who take part in certain dangerous modern martial arts? is it still reasonable for a Crown Court jury to be invited to consider the reasonableness of the laws of a recognised sport if the defendant, charged with a reckless assault, maintains that he was playing within the rules? what does recognition mean in this context? should the laws on consensual sado-masochistic activities be altered? what protections should the law provide for the young and the vulnerable?

[26] Criminal Law: Consent in the Criminal Law (1995) Consultation Paper No 139.

omitted any examination of lawful correction. While it is still our belief that this area has very little to do with the law of consent we have, in deference to our critics, set out the existing law. Above all we saw that it was essential to extend the scope of the project to include issues relating to consent in other parts of the criminal law, particularly sexual offences.

4.26 The most important of the many questions we have had to consider was where, if anywhere, the criminal law should set the limit on the level of injury to which a competent adult should be able to consent. As we make clear in CP No 139,[27] the responses we received on this central question diverged very widely and it became clear that difficult issues of moral philosophy were involved.[28] We ultimately decided to take a pragmatic line and, after examining recent Parliamentary decisions which have had an impact on issues of personal freedom and human rights,[29] we have suggested setting the limit at what we now term "seriously disabling injury".[30] We believe that to allow a competent adult to consent to the causing of injury, or the risk of it, up to *but not including* seriously disabling injury, would be to steer a sensible middle course between the rival approaches of the liberal, whose proposals would go far beyond what public opinion would tolerate, and the legal moralist, who would propose a far greater level of state intervention than would, in our view, be either desirable or practicable in society today.

4.27 It was unfortunate that the media coverage given to CP No 139 largely ignored two very important areas of activity in respect of which we have made detailed provisional proposals: dangerous sports and surgical treatment. It is our view that the level of regulation involved in these fields of activity, or which is included in our proposals,[31] justifies making them an exception to our general proposals and allowing a higher level of lawful injury than would otherwise be the case. We also propose a further exception:

[27] CP No 139, paras 2.13–2.19.

[28] In considering the philosophical issues we were greatly assisted by the advice of our consultant, Mr Paul Roberts, a lecturer in law at the University of Nottingham, who analysed the three main philosophical approaches to issues of consent. While we were unable to accept the liberal approach which Mr Roberts advocates, we did think that respondents would be assisted by reading the gist of the advice he gave us which we have attached as an Appendix to CP No 139.

[29] See CP No 139, paras 2.14–2.16.

[30] We have provisionally adopted a definition suggested some years ago by Professor Glanville Williams. See G Williams, "Force, injury and serious injury" (1990) 140 NLJ 1227, 1229. See also CP No 139, para 4.34, where the definition is reproduced in full.

[31] We propose that the common law rules governing the legality of medical and surgical treatment be put on a more secure footing. We also propose a scheme by which a sport can be recognised as lawful by a statutory recognition body which will examine and monitor the rules of the different sports, games or martial arts that seek to be treated as lawful activities for the purposes of the criminal law.

we believe that injury[32] sustained in the course of fighting, otherwise than in the course of a lawful sport, should always lead to criminal liability, regardless of any consent.

4.28 CP No 139 also proposes reforms which would place an emphasis on the free consent of competent adults and makes special provision for the young and vulnerable.[33] We were concerned that a consent to which legal recognition is given should be free and voluntary: the defendant who is prepared to resort to force and fraud to obtain another's consent should not be immune from criminal sanction.[34]

4.29 We look forward to analysing the responses to CP No 139. The consultation period closes on 30 June 1996.

Consolidation of sentencing statutes

4.30 An important feature of any criminal justice system is that the sentencing provisions should be accessible and comprehensible. Regrettably, as a result of many changes in criminal legislation, the present statutory provisions are to be found in over 30 statutes and many statutory instruments. Encouraged by many judges, magistrates, academics and practitioners, the Parliamentary Counsel at the Commission have started to consolidate the statutory provisions on the courts' sentencing powers [35] and, hopefully, eventually a consolidated statute will be produced and implemented, as has recently happened in Scotland.

[32] This is the term we use in our proposals for the reform of the law of offences against the person: it can roughly be equated with actual bodily harm under the present law. See Legislating the Criminal Code: Offences against the Person and General Principles (1993) Law Com No 218, paras 15.1–15.31.

[33] See CP No 139, Part V.

[34] See CP No 139, Part VI.

[35] See para 7.4 below.

PART V
PROPERTY AND TRUST LAW

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LAW OF PROPERTY

Land Registration

5.1 Although it has generally worked well, the land registration system is largely governed by legislation which is seventy years old[1] and widely perceived to be in need of modernisation.[2] The Commission published a series of Reports in the 1980s,[3] culminating in the Third and Fourth Reports on Land Registration, which proposed significant changes to the present system and a Bill to replace the 1925 Act. It became clear that there was no consensus for the implementation of these reforms, but discussions with H M Land Registry led to the conclusion that a further consideration of them might be productive. As a result, a joint working group was established to take this work forward, consisting of representatives from the Commission, H M Land Registry and the Lord Chancellor's Department.

5.2 The first report of the joint working group was published, with a Bill to implement its recommendations, in September 1995. It recommended that:

(a) the type of dispositions of unregistered land that trigger a requirement for compulsory registration of title should be extended to include gifts, transfers of land on death, and first mortgages of land;

1 Land Registration Act 1925.

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

3 Law Com Nos 125 (1983), 148 (1985), 158 (1987) and 173 (1988).

(b) the power to allow fee concessions should be extended, to encourage landowners to register the title to their property voluntarily; and

(c) fairer provision for compensation should be introduced in cases where an error or omission occurs in a registered title.

5.3 The first two recommendations derive from H M Land Registry's 1992 consultation paper *Completing the Land Register in England and Wales* and are intended to accelerate the rate at which land is brought on to the register. The third is intended to make the rules[4] governing the payment of an indemnity in such circumstances more flexible, and also fairer to both the public and H M Land Registry, but without fundamental alteration of the present system. We hope that an opportunity may present itself to implement these proposals in the near future.

5.4 The joint working group is now progressing with the more substantial part of its work, and the preparation of a second report. This will propose a complete overhaul and up-dating of the land registration system, with a view to the replacement of the Land Registration Act 1925. The aim is to produce legislation based on free-standing land registration principles, rather than relying on concepts "borrowed" from unregistered property, which sometimes sit uneasily with a system of registered title. We believe that such an Act will provide a firm foundation for the administration of a modern, efficient and effective land registration system in the 21st century. We hope that the second report will be published in 1996. We are pleased to be part of this collaborative approach to law reform, and we are most grateful to H M Land Registry and to the Lord Chancellor's Department for their assistance and co-operation.

Privity of Contract and Estate

5.5 The fact that both the original tenant and landlord remain liable on the covenants in a lease throughout its term, even after disposing of its interest in the lease, had long been one of the most notable features of the English law of landlord and tenant. The commercial property recession of recent years had brought this sharply into focus in a way not seen for some years, as increasing numbers of former tenants received demands for rent in respect of premises that they had left years before.[5] Even though they paid the arrears they were not entitled to take the premises back.

[4] Land Registration Act 1925, s 83.

[5] For a graphic illustration see *Olympia & York Ltd v Oil Property Investment Ltd* (1995) 69 P & CR 43, where the liability of the original tenant had a current capitalised value estimated to be in the region of £7 to £8 million.

5.6 In 1988 the Commission published a report[6] which recommended the abolition of original tenant and landlord liability.[7] In 1995 many of the recommendations in that report were at last implemented, although not without significant qualifications, by the Landlord and Tenant (Covenants) Act 1995.[8] The Property Law team was so closely involved in every stage of the Bill that this project formed the largest single item in the team's workload for the year.

5.7 To explain why this was so, it is necessary to tell, very briefly, the rather unusual story of the Bill's passage through Parliament. Peter Thurnham MP introduced a Landlord and Tenant (Covenants) Bill in May 1994.[9] In the event, the Bill did not receive a Second Reading,[10] but work was undertaken by the team, the Lord Chancellor's Department and Parliamentary Counsel at the Commission to amend the Bill so that it would only apply to future leases. This work revealed significant difficulties in integrating the proposals into the existing law. The Commission decided that the best solution was to codify the present law[11] in statutory form as a preliminary to applying a modified form of that code to future leases. In early December 1994 it was agreed with the Lord Chancellor's Department and the Department of the Environment that the Commission should prepare a consultative document for publication at the beginning of March 1995, with a view to preparing a Bill for introduction in the 1995/96 session of Parliament. Publication was, however, cancelled at a late stage, when the government indicated that it would support Mr Thurnham's Bill, if its own consultation[12] revealed support for a compromise package which had meanwhile been proposed by the British Property Federation and the British Retail Consortium. Any reform of privity had always aroused strongly conflicting views in the property industry, and it was felt that this compromise proposal should be given its chance.

6 Landlord and Tenant Law: Privity of Contract and Estate (1988) Law Com No 174.

7 The release from future liability on disposal of the relevant interest in the property would be automatic in the case of tenants, and for landlords on the service of notice, except in cases where it would be reasonable for their liability to continue (*ibid* p v).

8 The Bill received Royal Assent in July 1995. The Act came into force on 1 January 1996. The major qualifications are the restriction of the reform to future leases, and those terms of the compromise package agreed between the British Property Federation and the British Retail Consortium relating to the terms upon which a landlord may restrict the ability of the tenant to assign a lease (see *Hansard* (HL) 25 May 1995, vol 564, cols 1089-1090, and ss 16-20 and 22 of the Act).

9 First Reading: see *Hansard* (HC) 16 May 1994, vol 243, col 554. John Fraser MP had done likewise in May 1993 (*Hansard* (HC) 5 May 1993, vol 224, cols 193-194).

10 *Hansard* (HC) 15 July 1994, vol 246, col 1350.

11 The present law was a somewhat complicated amalgam of statute and common law. For a summary see Megarry and Wade, *The Law of Real Property* (5th ed 1984) pp 742-760.

12 Rights and Duties of Landlords and Tenants (March 1995), published by the Lord Chancellor's Department.

5.8 On 14 February 1995, with the gift of a red rose and a Valentine's Day card for the Speaker,[13] Mr Thurnham introduced a further Landlord and Tenant (Covenants) Bill. The Bill passed the remaining Commons' stages in half an hour on 21 April 1995[14] but did not as yet include any provisions to implement the compromise package, nor was there adequate provision to restrict its effect to future leases. These matters were to be dealt with by amendment in the House of Lords and, when the Bill returned to the Commons on 14 July 1995,[15] there were eighty-nine amendments to be considered. All were approved. The team's work on the unpublished document was not wasted. Those amendments included provisions governing the enforcement and transmission of covenants, which derived from our draft document,[16] and the Commission gave detailed consideration to and commented on all of the proposed amendments, working to the tightest of deadlines.

5.9 We are grateful for the many tributes which the Commission received in both Houses of Parliament from the Lord Chancellor and others,[17] but must pay our own tribute to the others with whom we worked, under these wholly exceptional circumstances, particularly Parliamentary Counsel at the Commission, Mr Peter Knowles, who, despite the difficult subject matter and the pressure of time, worked wonders in transforming the mass of amendment into a coherent and effective Bill. We must also mention Mr Wallace of the Lord Chancellor's Department, who prepared the instructions to Counsel, and played a prominent part in the work on the Bill.

Repairing Obligations

5.10 Our Report *Landlord and Tenant: Responsibility for State and Condition of Property* with a draft Bill to implement our recommendations was published in March 1996.[18] Our recommendations address four discrete areas of the law relating to repair on which there was a substantial measure of consensus in response to our consultation paper.[19] First, the allocation of responsibility for repairs where the lease is silent; secondly, repairing obligations and fitness for human habitation in short residential leases; thirdly, the landlord's remedies for breach of repairing obligations; and finally, the law of waste. If enacted, the reforms will:

[13] Estates Times, 17 February 1995, p 1.

[14] Second Reading, Committee, Report and Third Reading: *Hansard* (HC) vol 258, cols 485-491.

[15] *Hansard* (HC) 14 July 1995, vol 263, cols 1236-1269.

[16] See especially Landlord and Tenant (Covenants) Act 1995, ss 3-4 and 15.

[17] *Hansard* (HL) 25 May 1995, vol 564, cols 1090 and 1097 (Earl of Courtown); 1095-1096 (Lord Chancellor); 12 July 1995, vol 565, col 1682 (Earl of Northesk); *Hansard* (HC) 14 July 1995, vol 263, cols 1236 (Peter Thurnham MP) and 1240 (The Parliamentary Secretary, Lord Chancellor's Department).

[18] Law Com No 238.

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

(a) ensure that someone will always be responsible for the repair of the premises, unless the parties expressly agree otherwise;[20]

(b) revive the statutory implied covenant that residential accommodation should be fit for human habitation,[21] by removing the present archaic rent limits,[22] and applying the covenant instead to all leases of residential accommodation for a term of less than seven years;

(c) confirm that specific performance is available as a remedy in actions for breach of covenant by tenants, and make the remedy available for landlords as well; and

(d) abolish the law of waste as between landlord and tenant, and replace both the duty not to commit waste and the duty of tenantlike user by a modern implied covenant to similar effect.[23]

5.11 With the exception of (b) above, these reforms are in essence a straightforward modernisation and clarification of the present law. They will not impose any obligation which the parties cannot avoid by express provision, nor will they affect existing leases or tenancies, and we do not anticipate that they will be contentious.

5.12 We are of course aware that the Department of the Environment must have regard to the possible public expenditure consequences of any reform. However, we would point out that our proposals do not apply retrospectively and in many cases will be used instead of some other remedy.[24] The relevant legislation is failing to fulfil the role which Parliament intended, and will continue to do so unless our recommendation is implemented. If Parliament considers that a legal right to housing which is fit for human habitation is no longer necessary, then it should be repealed. It cannot be right to leave these provisions on the statute book with the current outdated rental limits.[25]

[20] We intend to achieve this by implying an excludable obligation to repair into every lease. This will remove the need to rely on the notoriously uncertain operation of general contractual principles to imply a term as to repair (see eg *Liverpool City Council v Irwin* [1977] AC 239; *Duke of Westminster v Guild* [1985] QB 688 and *Hafton Properties Ltd v Camp* [1994] 1 EGLR 67).

[21] Landlord and Tenant Act 1985, s 8, which consolidated earlier legislation.

[22] £80 pa for houses in London and £52 pa elsewhere. These limits have not been significantly changed since 1957.

[23] This recommendation also applies to licences and tenancies at sufferance.

[24] In the course of the preparation of the Report we carried out a limited consultation concerning housing disrepair cases. We found a significant degree of local variation in the use of public and private law remedies (eg Environmental Protection Act 1990, s 82, and Landlord and Tenant Act 1985, s 11).

[25] As to the need for such a right, according to the English House Condition Survey 1991, 20.5% of dwellings in the private rented sector and 6.9% in the public sector are unfit for human habitation. The figures for Wales are 25.6% and 15.8% (Welsh House Condition Survey 1993).

5.13 In our Sixth Programme of Law Reform we stated that "in view of the serious backlog of unimplemented recommendations" in landlord and tenant law we were not intending to initiate any new work in this field. This Report is therefore likely to be the last for some time in relation to landlord and tenant matters. We hope, however, that once the backlog is cleared it will be possible to agree a programme of reform in conjunction with the relevant Government departments to remedy the remaining deficiencies of the present law.

LAW OF TRUSTS

5.14 Work has continued on the three trust law projects set out in our Sixth Programme of Law Reform,[26] and we have been able to take advantage of developments elsewhere to add a major new project, on the powers and duties of trustees, to which we refer first.

The Powers and Duties of Trustees

5.15 It is clear that trusts are increasingly important in everyday life. They are employed in many ways - as vehicles for investment,[27] in business, by charities, in the provision of pensions,[28] and of course for their traditional purpose of making provision for members of a person's family. However, trustees depend for many of their powers and duties on legislation, much of which has been unchanged for seventy years,[29] and on case-law which is sometimes difficult to apply to modern conditions.[30] As a result, there is considerable uncertainty about the extent of the powers and duties of trustees, and trustees may find that they are unable to take steps which they consider would be in the best interests of the beneficiaries.[31]

(a) Trustee Investment

5.16 An examination of the powers and duties of trustees had been part of our plans for some time, as reflected in the Commission's Sixth Programme of Law Reform.[32] However, in the latter part of the year a welcome opportunity arose to bring this work

[26] (1995) Law Com No 234, Item 7.

[27] Although at the time of writing it seems possible that open ended investment companies (a hybrid form of company with some of the features of a unit trust) may eventually take a significant share of the market.

[28] The concept of the trust is at the heart of the Pensions Act 1995.

[29] The Trustee Act 1925.

[30] There is an echo of this in the distinction recently drawn by Lord Browne-Wilkinson on the consequences of breach of trust between traditional trusts where there are interests in succession on the one hand and a bare trust, such as a client account, on the other: *Target Holdings Ltd v Redferns* [1995] 3 WLR 352, 361, 362.

[31] Such as appointing a discretionary investment manager, or because the range of permitted investment for the trust fund is too narrow.

[32] (1995) Law Com No 234. Item 7(d) included such other aspects of the law of trusts as may appear from time to time to require examination.

forward. During the course of the year H M Treasury had been consulting on the Trustee Investment Act 1961. The Act sets out the range of investments which trustees are permitted to make, in the absence of wider powers in the trust instrument.[33] Although the object of the consultation was to ask whether the proportion of the trust fund which could be invested in wider range investments (principally equities) should be increased from 50% to 75%, which is the maximum variation permitted by order under the Act,[34] the majority of responses, including our own, called for the replacement of the Act, because it was wholly out-dated. This view has been accepted, and on 21 November 1995 the Economic Secretary to the Treasury, Mrs Angela Knight, announced in response to a Parliamentary Question that a fundamental deregulatory reform of the Act was now called for, and that the Government would be issuing a consultation document on options for reform by 1 May 1996, drawing on detailed work to be undertaken by the Commission and the Scottish Law Commission, in conjunction with the Trust Law Committee. To enable us to do so, the Lord Chancellor's Department agreed to the extension of our programme on the law of trusts to include the powers and duties of trustees generally. We are pleased to be undertaking this work in conjunction with the Trust Law Committee, a group of practising trust lawyers and academics which was formed under the chairmanship of Sir John Vinelott to press for the reform of trust law.[35]

5.17 As mentioned above, the reform will be deregulatory in character, and the consultation document is therefore likely to be issued under the procedures set out in the Deregulation and Contracting Out Act 1994.

(b) Delegation by Trustees

5.18 The extension of our programme mentioned above will enable us to consider other aspects of the powers and duties of trustees which require attention. In addition to trustee investment, we are also considering the question of the delegation of their functions by trustees as a body,[36] again working on this jointly with the Trust Law Committee. In the absence of express provision in the trust instrument, the ability of trustees as a body to delegate their functions is both uncertain, and unduly restrictive as the law stands.[37] For example, they are unable safely to delegate their discretion on

[33] Although the practice of granting wider investment powers in the trust instrument is now almost universal, the number of trusts still governed by the Trustee Investment Act is still significant, including older trusts, and statutory trusts arising on intestacy under the Administration of Estates Act 1925 (as amended).

[34] Trustee Investment Act 1961, s 13.

[35] The possibility of working jointly with another body was also recognised in Item 7 of our Sixth Programme of Law Reform (1995) Law Com No 234.

[36] This should be distinguished from the question of delegation by individual trustees, which was the subject of Law Com No 220.

[37] See *eg* Trustee Act 1925, ss 23 and 25, and *Speight v Gaunt* (1883) 9 App Cas 1. The use of an agent is permitted where this is in "the usual course of business" (*Ex p Belchier* (1754) Amb 218) but it is uncertain how far this can be pressed into service to support delegation to

investment to an investment manager, even though this may be commonplace for other types of investor. There is also a need to clarify the standard of care applicable on selecting and monitoring any agent.[38] We hope to issue a consultation paper in the first half of 1996.

The Rules against Perpetuities and Excessive Accumulations

5.19 This aspect of the law was first identified as one in need of examination in our Fourth Programme of Law Reform.[39] The rules governing the creation of future interests in property, or any requirement for income to be accumulated, are notoriously complicated. Our consultation paper was issued in 1993.[40] One of the responses, from an eminent academic, included the comment that "the technicalities of the rule[against perpetuities] ... bring the law into disrepute. They bewilder those who try to understand them ... and they are a trap for the unwary." Analysis of the responses has been completed, and we are in the process of settling our policy recommendations, with a view to publishing a report in 1996.

Formalities for the Creation of Trusts

5.20 A detailed description of this project may be found in last year's annual report.[41] Preliminary research has been completed, and the preparation of a consultation paper is in hand, for publication in 1996.

Personal Remedies for the Recovery of Trust Property

5.21 This was also a new project, and described in some detail in last year's annual report.[42] The need to complete existing projects, pressing matters such as privity of contract,[43] and continuing staff shortages in the first half of the year, have meant that all significant work on the project has had to be suspended during 1995, although we have been able to use the time to seek further views from practitioners on the problems experienced in this area. We expect to be able to return to the project - which we consider to be very important - in the second half of 1996.

a custodian or investment manager.

38 In particular, questions arising from the decision in *Re Vickery* [1931] 1 Ch 572.

39 (1989) Law Com No 185.

40 (1993) Consultation Paper No 133.

41 Law Com No 232, paras 2.74-2.75.

42 Law Com No 232, paras 2.76-2.77.

43 See paras 5.5-5.9 above.

PART VI
FAMILY LAW

Team Members ○

Mr M W Sayers, Ms C L Johnston, Mrs J Jenkins, Miss R Probert

○ as at the end of 1995

Mental Incapacity

6.1 Our report on Mental Incapacity[1] was published on 1 March 1995. [2]

MENTAL INCAPACITY: LAW COMMISSION'S PRINCIPAL RECOMMENDATIONS

- A clear definition of what it means to be without capacity, and a clear rule about acting reasonably in another person's "best interests".
- New safeguards if serious medical decisions are taken on behalf of those who lack capacity, and if they are involved in non-therapeutic research.
- Clarification of common law rules about advance statements about health care.
- Allowing attorneys appointed in advance to take decisions about health care and personal matters.
- A clear and comprehensive jurisdiction for a reformed Court of Protection to deal with disputes or difficulties.
- New procedures enabling social services authorities to protect vulnerable adults who are at risk of harm.

6.2 We reported a pressing need for legislation to put the law in this area into a clear and comprehensive modern form. On 15 March 1995 the Lord Chancellor announced the creation of an inter-departmental working group to co-ordinate the Government's response to our work, reporting to Ministers by 1 September 1995. Our colleagues in the Scottish Law Commission published their Report on Incapable Adults[3] in September 1995. Their general approach has much in common with ours, although there are divergences of detail arising from existing differences in our respective laws and different responses on consultation.

[1] (1995) Law Com No 231.

[2] So completing work under Item 9 of the Fourth Programme of Law Reform.

[3] (1995) Scot Law Com No 151.

6.3 The recommendations in our report sparked considerable press and public interest. The Chairman and Commissioners held a well-attended press conference to launch the report. In March 1995 the report was considered at the inaugural meeting of the new Medical Law Group of the Society of Public Teachers of Law. In April 1995 the Chairman spoke at the launch of the British Medical Association's code of good practice on the difficult issue of advance statements (so-called "living wills"). Claire Johnston, the lawyer responsible for the mental incapacity project in the Family Law team, had been an observer to the working party which drew up this code and contributed to two further codes of good practice produced by voluntary sector organisations during the year.[4] In June 1995 the Chairman chaired a session devoted to the issues in the report at an international conference sponsored by the University of Southampton. The Chairman and team lawyers have given talks on our recommendations. Particular interest has been shown by doctors and other professionals involved in the medical care of patients with dementia or mental health problems.

6.4 Many other countries are facing the same social and legal issues which revealed the need for the reforms recommended in our report. In April 1995 Claire Johnston attended the Council of Europe's Third European Conference on Family Law. A full day's discussion was devoted to the topic of mentally incapacitated and other vulnerable adults; Dr Clive, a Scottish Law Commissioner, acted as a rapporteur and Claire Johnston acted as a panellist. The law reform exercises carried out by the United Kingdom Law Commissions were commended by participants, and the conclusions of the conference on the topic of mental incapacity very largely reflected the United Kingdom's input. Later in the year we received a delegation of Japanese lawyers who were particularly interested in our recommendations for reform of the present law in relation to enduring powers of attorney.

6.5 A number of the recommendations about medical matters in our report raise difficult ethical as well as legal issues. This applies particularly in relation to advance statements, research involving those who cannot consent, and withdrawals of feeding from those in a persistent vegetative state. These matters have been wrongly confused with the question of euthanasia in the sense of positive intervention by a third party to end life, with which our proposals are not concerned. Our proposals about "advance refusals of treatment" were designed to clarify and improve the existing law, which already allows a person to make an effective advance refusal. The report also made recommendations about medical intervention and research in relation to people who lack the capacity to consent, designed to rationalise and strengthen the safeguards which apply in such circumstances. At present there are no statutory safeguards at all in many circumstances, so that treatments are given and research carried out without

[4] Citizen Advocacy with Older People: A Code of Good Practice (1995) Centre for Policy on Ageing; and Their Money: Their Choice: A guide for people living and working in care homes (forthcoming) Age Concern.

clear protections in place. There is a pressing need for a clear and comprehensible statutory framework based on sound modern principles.

6.6 In January 1996 the Lord Chancellor stated in a Written Answer[5] that the Government had decided not to legislate on the basis of our proposals in their current form and that it proposed to issue a consultation paper on mental incapacity in due course. It is clear that the Government is taking forward our work in this important area, and we look forward to the outcome.

Property Rights of Home-sharers

6.7 Work on this project began in 1994.[6] We hope to issue a consultation paper in late 1996. As our work has progressed, it has become clear to us that there are two distinct and discrete aspects of this project. The first is to consider the underlying property law which applies to all those who share a home,[7] whether married or unmarried, regardless of the nature of the relationship. The second is to consider whether it is appropriate and, if so, in what circumstances to give some form of legal recognition to contributions made by unmarried home-sharers that are properly outside the law of property.[8] By way of example, homemaking contributions, looking after a family and the sacrifice of career opportunities receive no recognition in English law at present, though they do in some other jurisdictions,[9] and the Scottish Law Commission has recommended that they should in Scotland.[10]

6.8 As regards the first aspect of the project, the steady flow of reported decisions concerning home-sharers of all kinds[11] has shown, if proof were needed, the thoroughly unsatisfactory nature of the law.

5 Written Answer, *Hansard* (HL) 16 January 1996, vol 568, WA 43; also (HC) 16 January 1996, vol 269, col 489.

6 See (1995) Law Com No 232, para 2.78. See the Sixth Programme of Law Reform (1995) Law Com No 234, Item 8. At their request, Charles Harpum, the Commissioner with prime responsibility for the project, addressed both The Law Society's Annual Conference and the Chancery Bar Association on the project in October.

7 Other than as a tenant or lodger, or by reason of employment.

8 At present, the law recognises (i) monetary contributions to the cost of acquiring property, whether made directly or indirectly, and (ii) the making of improvements to property if they are made pursuant to the common intention of the parties that the improver is to have an interest in the property as a result of his or her contribution. As regards the latter, there is (in effect) a statutory presumption of common intention when the parties are married or engaged and one of them makes a substantial improvement to the property: Matrimonial Proceedings and Property Act 1970, s 37.

9 Eg in New South Wales under the De Facto Relationships Act 1984.

10 Report on Family Law (1992) Scot Law Com No 135, Part XVI.

11 See, eg *Matharu v Matharu* (1994) 26 HLR 648 (dispute between father and daughter-in-law); *Ivin v Blake* [1995] 1 FLR 70 (dispute between brother and sister); *McGrath v Wallis* [1995] 2 FLR 114 (dispute between father and son).

6.9 In the most striking of these decisions, *Midland Bank plc v Cooke*,[12] Waite LJ referred to our project on home-sharers and said:

> ***The economic and social significance of home-ownership in modern society, and the frequency with which cases involving disputes as to property rights of home-sharers (married or unmarried) are coming before the courts, suggests that the Law Commission's intervention is well-timed and has the potential to save a lot of human heartache.***[13]

6.10 The second aspect of the project is concerned with unmarried home-sharers.[14] We are aware that some people view with concern proposals which might be seen to support or encourage couples to enter into non-marital cohabitation instead of marriage. We understand and respect the strength of these feelings and will take them fully into account before making any final recommendations.

6.11 We have been greatly assisted in our preliminary consideration of the law and on possible avenues of reform by a steering group on which the legal profession, legal academics, voluntary organisations, mortgage lenders and government departments were represented. The views expressed within the group demonstrated the wide range of opinions that are held on this subject. We are very grateful to those who so generously gave of their time and expertise to assist us in our deliberations. A number of meetings have been held with groups who have expressed an interest in our work, having read our published statements about the project.

6.12 We reported last year that we had commissioned Mavis Maclean of the Centre for Socio-Legal Studies at Wolfson College, Oxford, to co-ordinate a research project to supplement our examination of the law in this area. We received her report at the end of 1995. This work consisted of (1) a survey of practising solicitors and others who might advise those who intend to share a home, (2) an analysis of the circumstances of those involved in the reported cases, (3) an analysis of demographic information available about non-marital home-sharing, (4) an analysis of the course and costs of legally-aided litigation about the family home and (5) an attitudinal survey conducted on our behalf by the Office of Population, Censuses and Surveys. We have begun to study this research which has provided us with invaluable information about the prevalence of cohabitation and the range of current public attitudes and legal responses.

[12] [1995] 4 All ER 562. This decision, which concerned the property rights of a married couple as against the husband's creditor, is a controversial one, and certainly extends the law beyond the boundaries that had previously been laid down by the House of Lords in *Lloyds Bank plc v Rosset* [1991] 1 AC 107.

[13] [1995] 4 All ER at 565. In *Drake v Whipp*, *The Times* 19 December 1995, Peter Gibson LJ endorsed this welcome

[14] Where the parties are married, an adjustive regime exists under the Matrimonial Causes Act 1973 (as amended).

PART VII
STATUTE LAW

Team Members ○

Consolidation: Chairman, Mr P F A Knowles CB, Sir Henry de Waal KCB, QC, Mrs E A F Gardiner, Miss L A Nodder, Miss J Piesse, Mr P A Bedding

Statute Law Revision (including Local Legislation): Chairman, Mr C W Dyment, Mr R D Maitland, Mr A M Rowland, Ms S C Fahy

○ as at the end of 1995

Consolidation

7.1 Six consolidation Bills based on work done by draftsmen at the Commission[1] were introduced into Parliament during 1995. All of them were "straight" consolidations reproducing the existing law without amendments giving effect to Law Commission recommendations. Three received Royal Assent before the end of the 1994/95 Session of Parliament. The details are given in the following table:

Title of Act	*Chapter Number*	*Commencement Date*
Merchant Shipping Act 1995	c.21	1.1.96
Shipping and Trading Interests (Protection) Act 1995	c.22	1.1.96
Goods Vehicles (Licensing of Operators) Act 1995	c.23	1.1.96[2]

7.2 Two Bills, the Employment Rights Bill and the Industrial Tribunals Bill, were unable to complete all their stages during that Session as a result of certain late changes to the underlying law that were due to come into force after the end of the Session. These Bills were, however, introduced early in the 1995/96 Session, as was the remaining Bill, the Police Bill.

7.3 It is hoped that in addition consolidation Bills on the following topics will be introduced during the 1995/96 Session: education in schools; lords-lieutenants; and school inspections. Work has resumed on a consolidation relating to the National Health Service with the aim of introducing it, if possible, during 1996. Draft consolidation Bills relating to nurses, midwives and health visitors and to the

[1] We are grateful to the Parliamentary Counsel Office for making it possible for further progress to be made on consolidation Bills which had not been introduced by the time the draftsmen responsible for them returned to the Office from the Commission.

[2] For the majority of the Act's provisions.

protection of animals are at an advanced stage of preparation.

7.4 Work has begun on the preparation of a consolidation relating to the sentencing powers of criminal courts, in response to requests for such a consolidation emanating from several quarters.[3] A consolidation of the legislation relating to justices of the peace is also under active consideration. As always, a major factor in determining whether future progress is made on either of these topics will be whether resources can be made available by the responsible department to service the consolidation. Other longer term projects include consolidations relating to the armed forces and financial services. As to the former, although substantial progress has been made on consolidating the provisions relating to service discipline, it did not prove possible to complete this project in the time originally envisaged and work on it was suspended when it became clear that significant changes to the underlying legislation were to be incorporated in the current Armed Forces Bill. The proposed consolidation relating to immigration is not being proceeded with for the time being in view of the current legislative proposals in this field.

Statute Law Revision

7.5 The Statute Law (Repeals) Act 1995 enacted, with minor amendments, the draft Bill set out in the Fifteenth Report on Statute Law Revision, which was recommended jointly by this Commission and the Scottish Law Commission.[4] The Act effects nearly 500 repeals, including 223 whole Acts or Orders. It is notable for its repeal of a large amount of local authority legislation relating to Bedfordshire, the city and county of Nottingham and Warwickshire; this is the second of a series of projects for the rationalisation of local legislation to be included in Statute Law (Repeals) Acts.[5]

7.6 Work has started on further proposals for repeals to be included in the next Statute Law (Repeals) Bill, which is unlikely to be ready until 1998.

Chronological Table of Local Legislation

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

7.8 We expect the part of the project which covers public local Acts to be published in 1996. This will be by far the largest part of the project in both bulk and complexity.

[3] See para 4.30 above.

[4] Statute Law Revision: Fifteenth Report (1995) Law Com No 233; Scot Law Com No 150, Cm 2784.

[5] The first such project covered South Yorkshire and was included in the Statute Law (Repeals) Act 1989, Schedule 1, Part IX.

During the past year we have finalised the text of this part of the table and produced it in the form of camera-ready copy suitable for publication. Its publication will be accompanied by our Report, now in preparation, which will highlight the significance of the achievement and its potential as a tool for further extensive work in the field of statute law revision.

7.9 We reported last year that work had started on the preparation of the final text of the private Act table. While we have been able to make further limited progress on this, most of our effort in the past year has been directed towards checking and finalising the local Act table prior to its publication. We now expect there to be substantial progress in the coming year in compiling the private Act table.

PART VIII
EXTERNAL RELATIONS

8.1 We have referred elsewhere in this report to some of our many contacts with those outside the Commission.[1] We have discussions with a wide range of organisations and individuals during our work. This contact often runs from the time when we are considering possible future projects, and then from the early stages of the law reform process, when we are assessing the difficulties in the relevant field of law, through the various stages of a project. It of course continues, and is often extremely beneficial, during our informal and formal consultations in the period leading up to our reports. This Part refers to some of the wide range of contacts which we have.

8.2 We are careful to emphasise to them our independence. We are also mindful that ours is the responsibility for everything connected with the project, including our final recommendations.

Relations with Ministers and Government departments

8.3 We have a regular programme of meetings with the Home Secretary and with his senior officials; with senior officials in the Department of Trade and Industry; and with the Lord Chancellor and senior officials in his Department.

8.4 In the course of our work we also have frequent contact with Government departments and other agencies, especially with those who have responsibilities or experience in the relevant area of law. Examples are the Lord Advocate, the Director of the Serious Fraud Office, and those in the Crown Prosecution Service.

8.5 We have maintained particularly close contact with the Lord Chancellor's Department (our sponsoring Department), and we are always grateful to the officials there for all the assistance they give to us. In addition, for the last two years we have had a residential conference with very senior officials of that Department in December. Apart from providing an invaluable opportunity for a full and frank exchange of views, this year's conference had the added advantage of being timed to allow the attendance of our new Chairman designate and of the new Deputy Secretary in the Department.

Relations with Parliament

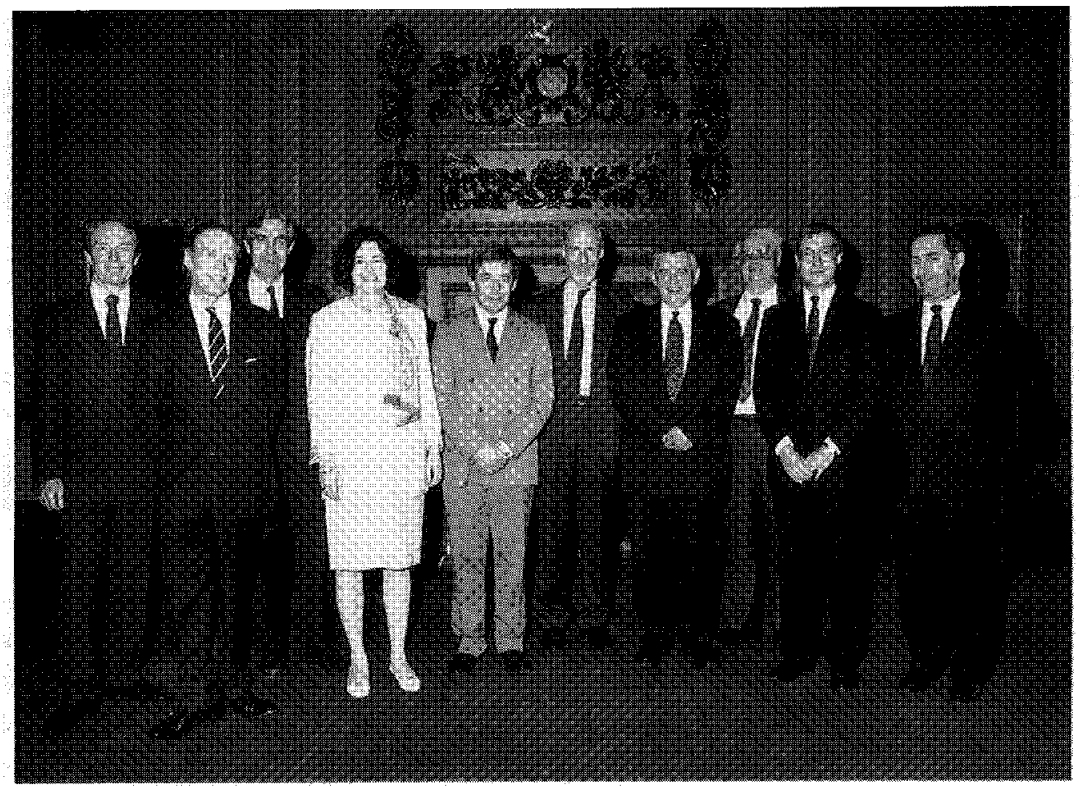
8.6 Apart from the matters we have mentioned above,[2] the Law Commission gave evidence to the Home Affairs Committee of the House of Commons. In addition, the Chairman, Mr Justice Brooke, addressed the Annual General Meeting of the Bar Parliamentary Group.

[1] See paras 1.7, 2.2, 2.13 and 4.6 above.

[2] Eg at para 1.10 above.

Relations with law reform bodies elsewhere

8.7 We have continued to enjoy good relations with other law reform commissions. We are, naturally, in particularly close contact with the Scottish Law Commission. Indeed, several Reports mentioned in this Annual Report were produced jointly with the Scottish Law Commission. The two Commissions have a good relationship, which includes frequent consultation with each other. We have been in contact at all levels, on subjects such as shareholders' remedies, mental incapacity, trust law and criminal law. On the occasion of the thirtieth anniversary of the Scottish Law Commission and ourselves, we held a joint meeting of the two Commissions in our offices, before the evening described previously.[3] In addition, Mr Silber paid a visit to the Scottish Law Commission to discuss criminal law projects. Our Secretary also had useful informal discussions with their Commissioners and Secretary during a visit to the Scottish Law Commission.



THE TWO COMMISSIONS AT THE THIRTIETH ANNIVERSARY CELEBRATION

8.8 We also have frequent contacts with the Law Reform Advisory Committee for Northern Ireland on matters where there is a common interest. We were pleased to welcome Commissioners from three Law Reform Commissions as visitors here this year. We are always pleased to see representatives of overseas law reform commissions (or equivalent bodies) when they visit London, as we have much of mutual interest to discuss. Our visitors from overseas are listed in Appendix 2.

[3] Para 1.1 above.

Other contacts

8.9 Our other contacts sometimes develop into more formal working methods, in respect of particular projects. We give just a few examples of ways in which we have used these methods during the course of our work this year:

- **On trust law**, we worked closely with the Trust Law Committee;[4]
- **On land registration**, we had a joint working party with the Land Registry and the Lord Chancellor's Department;[5]
- **On property rights of home-sharers**, we had a steering group drawn from a wide range of interests;[6]
- **On shareholders' remedies**, we had a working party consisting of representatives of practising and academic lawyers and of officials from Government departments.[7]

8.10 We have particularly useful contact with the judiciary in England and Wales, and beyond. We have extremely helpful working relationships with the Law Society, the Bar Council, and the Society of Public Teachers of Law. We also had a very useful annual meeting with each of them. We are frequently in contact with them or their representatives throughout the year, and with representatives of many specialist Bar and Law Society organisations, and theirs are among the many valuable responses we receive to our consultation papers.

8.11 Besides what is recorded elsewhere in this report, the Chairman or other Commissioners spoke this year to, among others, the Criminal Justice Consultative Council, the Law Society's Annual Conference, the Council of Mortgage Lenders, the Association of Chief Police Officers, the Society of Construction Law, the Chancery Bar Association, a seminar on remedies for breach of contract organised by the Scottish Law Commission, and a joint conference of the Society for Computers and Law and the Electronic Data Interchange Association (now the Electronic Commerce Association), and at the Annual Conference of the Society of Public Teachers of Law. We also had meetings this year with representatives of, for example, the Association of British Insurers and the Association of Personal Injury Lawyers, and with several committees of the Law Society. Commissioners often appear on radio and television to talk about our work. The Secretary has also spoken to meetings attended by Government lawyers about different aspects of the Commission's work.

[4] See para 5.16 above.

[5] See para 5.1 above.

[6] See para 6.11 above.

[7] See paras 3.1-3.3 above.

8.12 We also arrange other ad hoc discussions and meetings, when necessary: for example, Professor Anthony Ogus, Professor of Law at Manchester University, spoke to Commissioners and our legal staff about the place of economics in law reform.

Law Under Review

8.13 We have been publishing this quarterly bulletin for nine years, giving details of Government or Government-sponsored law reform projects. It has an increasing worldwide circulation and we are glad to have new subscribers.

PART IX
STAFF AND ADMINISTRATION

Lawyers

9.1 We welcomed a number of new lawyers to the staff during the year, including Robert Cooke, formerly of Frere Cholmeley Bischoff, as team manager of the property and trust law team. Over the last part of the year we had a full legal team, in contrast to the position in recent years.[1]

9.2 Having assessed the work to which we were committed and the demands placed upon us by the Sixth Programme of Law Reform[2] and by other new work such as the Jellicoe procedure,[3] we submitted a full and reasoned bid to the Lord Chancellor's Department for additional staff and for the funds for them. We were particularly anxious to have two more lawyers. We also needed two additional research assistants.

9.3 Unfortunately, whatever the merits of our bid, the Department was not able to make the necessary financial resources available, especially in the light of forthcoming financial cuts imposed upon them.[4]

9.4 We are most grateful for the commitment and considerable abilities of all our legal staff. That is in addition to those of the team of Parliamentary Counsel, who are mainly on secondment to us from their office at 36 Whitehall and who are led by Peter Knowles:[5] his first assignment with the Law Commission was from 1979 to 1981, and he began his current assignment in 1993. This was due to end in August 1995 but was extended for one year.

Administrative staff

9.5 The administrative staff, who are listed in Appendix 1, play a vital role at the Commission. We have a substantial programme of publications. This year we have introduced a new networked computer system. There are heavy demands on support for personnel and accommodation services. The administrative staff handle these and many other needs with unobtrusive commitment and ability.

[1] See eg our Twenty-Ninth Annual Report 1994 (1995) Law Com No 232, para 4.4.

[2] See paras 1.5-1.8 above.

[3] See para 1.10 above.

[4] See para 1.33 above.

[5] See para 1.32 above.

Library

9.6 A new Librarian, Ms Jackie Cheeseman, joined us this year. We are fortunate to have very good library facilities. We are also grateful to the libraries in the Supreme Court, in the Headquarters of the Lord Chancellor's Department, and in many other Government departments, for materials not available here. We also have access to the library of the Institute of Advanced Legal Studies, and are grateful for the assistance provided by the British Institute of International and Comparative Law.

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

MICHAEL SAYERS, *Secretary*
6 March 1996

APPENDIX 1
ADMINISTRATIVE STAFF AT THE END OF 1995

ASSISTANT SECRETARY
Mr C K Porter

Accommodation Officer
Mr T D Cronin

Personnel Officer
Miss L A Collet

Editorial Team
Mr D R Leighton
Miss J A Griffiths

Library Services
Ms J Cheeseman (Librarian)
Miss C O'Connell (Assistant Librarian)
Ms C E Hughes (Trainee Librarian)

Registry
Mr T D Cronin Ms Y Vaughan

Chairman's Clerk
Mr C Day

I T Consultant
Mr D E Williams

Typing Manager
Mrs N L Spence

Secretarial Support
Mrs D E Munford
Miss C P Cawe
Ms H Gracie
Mrs H C McFarlane
Miss A J Meager
Ms J R Samuel
Mrs J Williams

Typing Support
Mrs M M Blenman

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

APPENDIX 2
VISITORS FROM OVERSEAS

Among the visitors to the Law Commission during 1995 were:

Australia	Mr Justice Williams (Chairman, Queensland Law Reform Commission)
	Mr W A Lee (Queensland Law Reform Commission)
	Professor Don R Chalmers (Tasmanian Law Reform Commissioner)
	The Hon Trevor Griffin (Attorney-General, South Australia)
Chile	Mr Raul Hernan Ampuero (Chief Information Officer, Chamber of Deputies, Chilean Congress)
Cyprus	Judge Taner Erginel (Supreme Court, Nicosia)
Czech Republic	Miroslava J Judr (Judge of Regional Appeal Court)
Fiji	Ms Florence Fenton (Acting Director, Fiji Law Reform Commission)
Ghana	The Hon Justice Isaac K Abban (Chief Justice)
Hong Kong	Mr Stuart Stoker (Secretary, Hong Kong Law Reform Commission)
Israel	Michael Herzberg (Legal Consultant to the Israeli Government)
	Zeer Sher (Legal Consultant to the Israeli Government)
Lithuania	Eduardas Juozenas (Chief Consultant, Ministry of Justice)
Romania	Judge Laura M Bucur (Law Courts, Croatia)
Russia	Dr Maria Antokolskaya (Professor, Moscow State Law Academy)
South Africa	Mr William Henegan (Secretary, South African Law Commission)
Sweden	Chief Judge Karin Bishop (District Court i Norrkoping)
	Ingrid Akerman (Senior Administrative Officer, National Board of Health and Welfare)
	Mats Sjosten (Associate Judge of Appeal)
Uganda	Mr Justice Platt (Court of Appeal)
USA	Professor Hamilton Bryson (Law School, University of Richmond, Virginia)

OUR REPRESENTATIVES ALSO MET THE FOLLOWING MEMBERS OF DELEGATIONS

From Albania comprising lawyers and Ministry of Justice officials:

Mr Arben Rakipi	Mr Dhimiter Valla
Mr Petit Qarri	Mr Llir Panda
Ms Luljeta Xhixho	Ms Mimoza Papa

From Sweden comprising the Parliamentary Standing Committee on Civil Litigation:

Ms Anita Persson	Mr Rune Berglund
Ms Karin Olssen	Mr Kerstin Heinemann
MsInger Segelstrom	Ms Tanja Linderborg
Mr Henrik Jarrel	Ms Yvonne Ruwaida
Ms Birgitta Carlsson	Mrs Karin Lindell (Associate Judge of Appeal)

From Norway, from the Norwegian Research Center on Computers and Law, Oslo:

Professor Dag Wiese Schartum Professor Olav Torvund Beate Jacobsen

APPENDIX 3
THE LAW COMMISSION'S IMPLEMENTED REPORTS SINCE 1983

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

Report Law Com No.	*Title*	*Implementing Legislation*
	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).
124+	Private International Law: Foreign Money Liabilities (Cmnd 9064)	Private International Law (Miscellaneous Provisions) Act 1995 (c 42).
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).
146	Private International Law: Polygamous Marriages. Capacity to Contract a Polygamous Marriage and Related Issues (Joint Report - Scot Law Com No 96) (Cmnd 9595)	Private International Law (Miscellaneous Provisions) 1995 (c 42).
147	Criminal Law: Report on Poison-Pen Letters (HC 519)	Malicious Communications Act 1988 (c 27).
148	Property Law: Second Report on Land Registration: Inspection of the Register (HC 551)	Land Registration Act 1988 (c 3).
150	Statute Law Revision: Twelfth Report (Joint Report - Scot Law Com No 99) (Cmnd 9648)	Statute Law (Repeals) Act 1986 (c 12); Patents, Designs and Marks Act 1986 (c 39).
151+	Rights of Access to Neighbouring Land (Cmnd 9692)	Access to Neighbouring Land Act 1992 (c 23).
	1986	
157	Family Law: Illegitimacy (Second Report) (Cmnd 9913)	Family Law Reform Act 1987 (c 42).
	1987	
160	Sale and Supply of Goods (Joint Report - Scot Law Com No 104) (Cm 137)	Sale and Supply of Goods Act 1994 (c 35)

161	Leasehold Conveyancing (HC 360)	Landlord and Tenant Act 1988 (c 26)
163	Deeds and Escrows (HC 1)	Law of Property (Miscellaneous Provisions) Act 1989 (c 34).
164	Transfer of Land: Formalities for Contracts for Sale etc of Land (HC 2)	Law of Property (Miscellaneous Provisions) Act 1989 (c 34).
165	Private International Law: Choice of Law Rules in Marriage (Joint Report - Scot Law Com No 105) (HC 3).	Foreign Marriage (Amendment) Act 1988 (c 44).
166	Transfer of Land: The Rule in *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).
174	Landlord and Tenant Law: Privity of Contract and Estate (HC 8)	Landlord and Tenant (Covenants) Act 1995 (c 30).
	1989	
179	Statute Law Revision: Thirteenth Report (Joint Report - Scot Law Com No 117) (Cm 671)	Statute Law (Repeals) Act 1989 (c 43).
180	Criminal Law: Jurisdiction over Offences of Fraud and Dishonesty with a Foreign Element (HC 318)	Criminal Justice Act 1993 (c 36) Part I.
184	Property Law: Title on Death (Cm 777)	Law of Property (Miscellaneous Provisions) Act 1994 (c 36)
186	Criminal Law: Computer Misuse (Cm 819)	Computer Misuse Act 1990 (c 18).
187	Family Law: Distribution on Intestacy (HC 60)	Law Reform (Succession) Act 1995 (c 41).
	1990	
193	Private International Law: Choice of Law in Tort and Delict (Joint Report - Scot Law Com No 129) (HC 65)	Private International Law (Miscellaneous Provisions) Act 1995 (c 42).
	1991	
196	Rights of Suit in Respect of Carriage of Goods by Sea (Joint Report - Scot Law Com No 130) (HC 250)	Carriage of Goods by Sea Act 1992 (c 50).
199	Transfer of Land: Implied Covenants for Title (HC 437)	Law of Property (Miscellaneous Provisions) Act 1994 (c 36)
202+	Criminal Law: Corroboration of Evidence in Criminal Trials (Cm 1620)	Criminal Justice and Public Order Act 1994 (c 33).
	1992	
205	Criminal Law: Rape within Marriage (HC 167)	Criminal Justice and Public Order Act 1994 (c 33).
	1993	
211	Statute Law Revision: Fourteenth Report (Joint Report - Scot Law Com No 140) (Cm 2176)	Statute Law (Repeals) Act 1993 (c 50).
215	Sale of Goods Forming Part of a Bulk (Joint Report - Scot Law Com No 145) (HC 807)	Sale of Goods (Amendment) Act 1995 (c 28).
216	The Hearsay Rule in Civil Proceedings (Cm 2321)	Civil Evidence Act 1995 (c 38).
217	Family Law: The Effect of Divorce on Wills	Law Reform (Succession) Act 1995 (c 41)
	1994	
224	Structured Settlements and Interim and Provisional Damages (Cm 2646)	Finance Act 1995 (c 4) - in part; Civil Evidence Act 1995 (c 38) - in part.
	1995	
233	Statute Law Revision: Fifteenth Report (Joint Report - Scot Law Com No 150) (Cm 2784)	Statute Law (Repeals) Act 1995 (c 44).

APPENDIX 4
LAW COMMISSION REPORTS AWAITING IMPLEMENTATION

Of all the Law Commission's law reform reports, 87 have been implemented in full or in part, 14 have been expressly or impliedly rejected, and 27, which are listed below, remain outstanding. 11 of these, marked + , have been expressly accepted by the Government, subject to Parliamentary time being available.

Presented in 1995-96 Session of Parliament (5)

Year	*No*	
1989	181	+ Trusts of Land
1990	192	+ The Ground for Divorce
1992	207	+ Domestic Violence
1994	224	+ Structured Settlements etc
1995	230	+ The Year and a Day Rule in Homicide

Other Reports awaiting Government decision and/or presentation to Parliament (22)

1981	110	+ Breach of Confidence
1984	127	+ Positive and Restrictive Covenants
1985	152	Liability for Chancel Repairs
1988	173	Fourth Report on Land Registration
1989	178	+ Compensation for Tenants' Improvements
	188	Overreaching: Beneficiaries in Occupation
1991	194	Distress for Rent
	201	Obsolete Restrictive Covenants
	204	Land Mortgages
1992	208	+ Business Tenancies: Landlord and Tenant Act 1954, Part II
1993	218	Offences Against the Person and General Principles
	219	Contributory Negligence as a Defence in Contract
1994	220	+ Delegation by Individual Trustees
	221	+ Termination of Tenancies Bill
	222	Binding Over
	226	Judicial Review and Statutory Appeals
	227	Restitution for Mistake of Law: Ultra Vires Public Authority Receipts and Payments
	228	Conspiracy to Defraud
1995	229	Intoxication and Criminal Liability
	231	Mental Incapacity
	235	Land Registration: joint report on implementation of Third and Fourth Reports
	236	Fiduciary Duties and Regulatory Rules

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.

	1995		1994	
	£000	*£000*	*£000*	*£000*
Accommodation charges[1]	830.3		916.9	
Headquarters' overheads[2]	790.5		603.8	
		1,620.8		1,520.7
Salaries and pensions of Commissioners[3]	375.5[4]		361.3[4]	
Salaries of draftsmen and secondees and payments to consultants[3]	1,504.5[5]		1,406.6	
Salaries of non-legal staff[3]	369.8		357.4	
		2,249.8		2,125.3
Printing and publishing; supply of information technology; office equipment and books	557.1[6]		187.1	
Telephone/postage	34.5		28.6	
Travel and subsistence	6.5		7.0	
Miscellaneous (including recruitment and entertainment)	9.8		15.2	
		607.9		237.9
TOTAL		4,478.5		3,883.9

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

2 This is the portion of the total cost of the Lord Chancellor's Department Headquarters notionally attributed to the Law Commission. The portion attributed to individual parts of the Department is proportional to the number of staff paid as established staff, including research assistants. This figure includes an additional amount for the information technology services provided by the Lord Chancellor's Department.

3 These salaries include ERNIC and Superannuation.

4 These figures also include lump sums paid on retirement.

5 The increase over the 1994 figure is because posts were filled which had remained vacant during all or part of 1994.

6 This increase in expenditure is almost entirely due to the replacement of the Commission's PCs, and installation of an IT Network.

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