



Protocol between the Lord Chancellor (on behalf of the Government) and the Law Commission



The Law Commission

(LAW COM No 321)

PROTOCOL BETWEEN THE LORD CHANCELLOR (ON BEHALF OF THE GOVERNMENT) AND THE LAW COMMISSION

Presented to Parliament pursuant to section 3B(4) of the Law
Commissions Act 1965 as amended by section 2 of the Law
Commission Act 2009

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Introduction

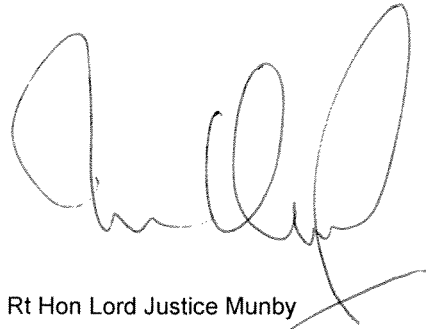
We are pleased to present this protocol, agreed between the Lord Chancellor and the Law Commission for England and Wales, on how Ministers of the Crown, Government departments and the Law Commission should work together on law reform projects. We see it as key to ensuring a more productive relationship, with improved rates of implementation of Law Commission reports.

The Law Commission Act 2009, which came into force on 12 January 2010, amends the Law Commissions Act 1965 to provide the statutory basis for the protocol. The Act also introduces a duty on the Lord Chancellor to report annually to Parliament on the extent to which Law Commission reports have been implemented by Government.

Law that is fair, modern, simple and accessible is an aim shared by both the Law Commission and the Lord Chancellor, on behalf of the Government. This document and the commitments in the 2009 Act demonstrate our joint determination to increase the momentum of law reform.



The Rt Hon Jack Straw MP
Lord Chancellor and Secretary of State for Justice



The Rt Hon Lord Justice Munby
Chairman, Law Commission

March 2010

SCOPE

1. This protocol sets out how Government departments and the Law Commission (“the Commission”) agree to work together to deliver law reform in the most effective way possible.¹
2. The Commission was set up under the Law Commissions Act 1965². In fulfilling its statutory duties under that Act, the Commission – while independent of Government - shares common purpose with the Government, in a commitment to law that is simple, fair, modern, accessible, fit for purpose (from the point of view of those who use it – whether professional practitioners, business users or the public) and cost effective.
3. This protocol covers the various stages of a project (before the Commission takes the project on; at the outset of the project; during the currency of the project; after the project). It applies both to projects set out in a Commission programme of law reform and to projects which arise out of individual referrals made to the Commission. The protocol applies only to projects which the Commission takes on after the date on which the protocol has been agreed, although Government departments and the Commission have agreed to take it into account, so far as practicable, in relation to projects which are ongoing as at that date. This protocol does not apply to Commission proposals for consolidation or statute law revision.³

BEFORE TAKING ON A PROJECT

Projects set out in a Commission programme of law reform

4. Most Commission projects originate as part of a three yearly Commission programme of law reform which must be approved by the Lord Chancellor.⁴
5. In deciding whether to include a project in the programme, the Commission will take account of:
 - (1) the extent to which the law in that area is unsatisfactory;
 - (2) the potential benefits that would flow from reform;
 - (3) whether the independent non-political Commission is the most suitable body to conduct a review in that area of the law;
 - (4) whether the Commissioners and staff have or have access to the relevant experience;

¹ The protocol is made under section 3B(1) of the Law Commissions Act 1965 (as amended by section 2 of the Law Commission Act 2009).

² Before the establishment of the Law Commission, a series of law reform committees had not proved equal to the task of planned and co-ordinated review, attracting criticism that the law remained unclear, inaccessible, outdated and unjust. The Law Commission was established as a full-time law reform body to keep all the law of England and Wales under review and to make recommendations for reform.

³ The term “statute law revision” includes statute law repeals.

⁴ Section 3(1)(b) of Law Commissions Act 1965.

- (5) whether project-specific funding is available (if relevant);
- (6) the degree of departmental support, and the information provided by the department in accordance with paragraph 7 below;
- (7) the priority that should attach to the project when compared with other ongoing or potential projects;
- (8) whether there is a Scottish or Northern Irish dimension to the project that would need the involvement of the Scottish and/or Northern Ireland Law Commissions;
- (9) whether there is a Welsh dimension that would need the involvement of the Welsh Assembly Government.

6. Where the Commission is considering including a project in a Commission programme, the Commission will notify the Minister with relevant policy responsibility. In deciding how to respond to the Commission, the Minister will bear in mind that, before approving the inclusion of the project in the overall programme, the Lord Chancellor will expect the Minister (with the support of the Permanent Secretary):

- (1) to agree that the department will provide sufficient staff to liaise with the Commission during the currency of the project (normally, a policy lead, a lawyer and an economist);
- (2) to give an undertaking that there is a serious intention to take forward law reform in this area (if applicable in the case of the particular project).

7. In discussion between the department and the Commission, the department will, insofar as is possible at this stage, provide views to the Commission on:

- (1) what it considers to be the most appropriate output for the project (for example, policy recommendations, a draft bill, draft guidance) and the likely method of implementation;
- (2) any risks associated with that method of implementation which might lead to non-implementation or significantly delayed implementation (for example, difficulties in obtaining legislative time if the method of implementation is legislation).

Projects referred to the Commission by Ministers

8. Some Commission projects arise as referrals from Ministers⁵. Where a Minister asks the Commission to take on a new project, he or she must (with the support of the Permanent Secretary in the case of points 2 and 3):

- (1) explain why the law in that area is unsatisfactory and the potential benefits that would flow from reform;

⁵ Section 3(1)(e) of the Law Commissions Act 1965.

- (2) agree that the department will provide sufficient staff to liaise with the Commission during the currency of the project (normally, a policy lead, a lawyer and an economist);
- (3) give an undertaking that there is a serious intention in the department to take forward law reform in this area (if applicable in the case of the particular project);
- (4) provide views on the matters listed at paragraph 7 above (insofar as is possible at this stage);
- (5) make funding proposals for the project.

9. In deciding whether or not to accept a referral, the Commission will take account of:

- (1) the extent to which the law in that area is unsatisfactory, and the potential benefits that would flow from reform (including the Minister's views on these matters – paragraph 8(1) above);
- (2) whether the independent non-political Commission is the most suitable body to conduct a review in that area of the law;
- (3) whether the Commissioners and staff have or have access to the relevant experience;
- (4) the information provided by the Minister (see above), including whether sufficient funding is available;
- (5) the priority that should attach to the project when compared with other ongoing or potential projects;
- (6) whether there is a Scottish or Northern Irish dimension to the project that would need the involvement of the Scottish and/or Northern Ireland Law Commissions
- (7) whether there is a Welsh dimension that would need the involvement of the Welsh Assembly Government.

OUTSET OF A PROJECT

10. At the outset of a project, the relevant department and the Commission will agree:

- (1) the terms of reference for the project, including the output;
- (2) appropriate review points at which to consult with the Minister on the progress of the project;
- (3) the overall timescale for the project.

11. At the outset of a project, the departmental officials (to include, unless otherwise agreed, a nominated policy lead, a lawyer and an economist) and the Commission will agree a programme of regular communication, to include meetings which will normally be at least every quarter while the project is live.

DURING THE CURRENCY OF A PROJECT

12. The officials and the Commission will maintain the programme of communication agreed at the outset of the project, subject to any agreed changes.

13. The Commission will communicate promptly and openly with the officials about the progress of the project. Officials will also communicate promptly and openly with the Commission about wider policy developments and changes in priorities that may affect implementation, on the mutual understanding that the confidentiality of information will be respected (subject to any applicable legal obligations).

14. The Commission will keep the progress of the project under review and may decide, in discussion with the relevant department, to change one or more elements of the project or to discontinue the project.

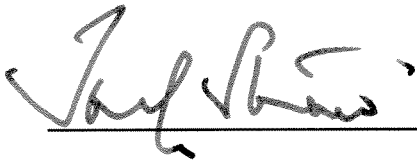
15. A Minister may not require the Commission to stop working on an ongoing project but in deciding whether, and if so how, to continue with the project at the review points, the Commission will take full account of the Minister's views and all relevant factors affecting the prospects for implementation.

16. The Commission will prepare an impact assessment (which will comply with the government guidance on impact assessments) to accompany a final report.

17. Officials will assist the Commission in drawing up the impact assessment, including by providing information (where available) and by commenting on the impact assessment in draft. Where possible, the impact assessment will be jointly agreed.


AFTER THE PROJECT

18. The Minister will provide an interim response to the Commission as soon as possible and in any event within six months of publication of the report unless otherwise agreed with the Commission.
19. The Minister will provide a full response to the Commission as soon as possible after delivery of the interim response and in any event within one year of publication of the report unless otherwise agreed with the Commission. The response will set out which recommendations the Minister accepts, rejects or intends to implement in modified form. If applicable, the Minister will also provide the timescale for implementation.
20. If the department is minded either to reject or substantially modify any significant recommendations, it will first give the Commission the opportunity to discuss and comment on its reasons before finalising the decision.
21. The Minister will send his or her final response to the Chairman of the Commission.
22. If the Minister intends to implement recommendations, the Commission and the department will agree what additional support (if any) the Commission will provide to the department to assist implementation and whether additional funding is necessary.



The Rt Hon Jack Straw MP

Lord Chancellor and Secretary of
State for Justice



The Rt Hon Lord Justice Munby

Chairman of the Law Commission

March 2010



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