

The Law Commission

Ninth Programme of Law Reform

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

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The terms of this report were agreed on 21 December 2004

The text of this report is available on the Internet at:
<http://www.lawcom.gov.u>

¹ At the date this report was signed, Dr Horder had not been appointed a Law Commissioner. His predecessor, the Honourable Mr Justice Wilkie, was not involved in discussions about the final text.

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PART 1

THE NINTH PROGRAMME OF LAW REFORM

To the Right Honourable the Lord Falconer of Thoroton, Lord Chancellor of Great Britain and Secretary of State for Constitutional Affairs.

INTRODUCTION

Background

- 1.1 The Law Commission is required to prepare and submit to the Lord Chancellor programmes for the examination of different branches of the law with a view to reform. The Ninth Programme of law reform begins in the 40th year of the Commission's existence. For the first time, the period of the Law Commission programme of law reform has been aligned with the period of the Government's public spending plans. This will ensure that the Commission can match its programme of reform with the funding it can expect from the Government. Each period lasts for three years with the last year of one plan forming the first year of the next. In April 2005 the Ninth Programme of law reform and the Government's new spending plan for 2005-8 will commence. It is expected that the Tenth Programme of Law Reform will commence on 1 April 2007, and the Eleventh on 1 April 2009.
- 1.2 The Commission's 40th Anniversary is on 15 June 2005. The Commission will be marking this Anniversary in a number of ways, not least by implementing better means of conducting consultation exercises. More details on this will be available in the 39th Annual Report and on the Commission website in due course.

The Law Commission's project selection criteria

- 1.3 To be included in a programme, projects have to be assessed against the following criteria:
 - (1) Importance: the extent to which the law is unsatisfactory (for example, unfair, unduly complex, unclear, inaccessible or outdated); and the potential benefits likely to accrue from undertaking reform, consolidation or repeal of the law.
 - (2) Suitability: whether changes and improvements in the law can appropriately be put forward by a body of lawyers after legal (including socio-legal) research and consultation. This would tend to exclude subjects where the considerations are shaped primarily by political judgements.
 - (3) Resources: the qualification and experience of the Commissioners and their legal staff; the funding likely to be available to the Commission; and the need for a good mix of projects in terms of the scale and timing to facilitate effective management of the programme.

Consultation

- 1.4 The programme of work has resulted from a long process of consultation with a number of interested bodies. A list of all those consulted is attached at Annex A. The Commission is most grateful to all those who responded to the consultation.
- 1.5 Inevitably the Commission can only undertake a number of projects in a three-year programme. Decisions are made following the above criteria. Confirmed projects for the forthcoming programme are:

PROJECT 1: CODIFICATION OF CRIMINAL EVIDENCE

- 1.6 The law of criminal evidence consists of a jumble of statutes and common law rules, lacking clarity and coherence. This project would seek to clarify and improve the law.

PROJECT 2: COHABITATION

- 1.7 The Commission has been asked by the Department for Constitutional Affairs to consider the law as it applies to cohabiting couples on the termination of their relationship by separation or by death. The project will place special emphasis on reducing potential financial hardship suffered by cohabitants or their children in these circumstances.

PROJECT 3: CONSUMER LAW

- 1.8 Consumer law needs to be as simple as possible, clear and accessible to both businesses and consumer advisors. This project would alleviate the confusion surrounding large areas of consumer law.

PROJECT 4: FEUDAL LAND LAW

- 1.9 Land law still contains certain material elements of feudalism which have continuing technical and practical consequences. This project will examine the case for reform and the implications of statutory intervention.

PROJECT 5: HOUSING LAW – ENSURING RESPONSIBLE RENTING

- 1.10 The current law on illegal eviction and harassment by landlords is out of date and difficult to understand. There is also a continued focus on anti-social behaviour of tenants and the adequacy of the law in relation to the role of landlords in ensuring that tenants behave properly. The project will look at both of these areas. More broadly it will look at the multiplicity of regulatory devices - from licensing to criminal prosecution which are designed to promote good behaviour of both landlords and tenants. It will make recommendations designed to achieve, for the first time, a coherent but flexible regulatory framework to manage the landlord and tenant relationship effectively and to promote best practice on both sides.

PROJECT 6: HOMICIDE

- 1.11 We anticipate undertaking a review of the law of homicide to contribute to the Government's review of the law of murder announced in October 2004. The precise details of our involvement will be agreed during the course of 2005.

PROJECT 7: INSURANCE CONTRACT LAW

- 1.12 The current law is incoherent and arguably unfair to the insured. It is made tolerable only by codes of practice that in effect disapply parts of the law. The result is not comprehensible to the consumer, while businesses are not covered by the codes of practice. The law also contains uncertainties that encourage unnecessary litigation. It has been suggested that these defects are adversely affecting confidence in the UK market. This review will ensure the law reflects the need of modern insurance practice and allows both insured and insurer to know their rights and obligations.

PROJECT 8: POST LEGISLATIVE SCRUTINY

- 1.13 The statutory function of the Law Commission is to keep under review all the law with which it is concerned. The Commission has discussed with the Deputy Leader of the House of Commons a study into the appropriate means of achieving post-legislative scrutiny of legislation. We would wish to give this project some priority and hope to be able to begin work from the start of the Ninth Programme.

PROJECT 9: PROPERTY INTERESTS IN INVESTMENT SECURITIES

- 1.14 The way in which investment securities are held has changed radically in recent years. Electronic entries have replaced paper shares, and assets are increasingly pooled in the hands of intermediaries, and chains of intermediaries. It is necessary for the law to catch up with current trading practice. This work will need to consider the wider EU context and it is possible, and indeed to be hoped, that the UK may lead the way for forming EU law on this issue.

PROJECT 10: REMEDIES AGAINST PUBLIC AUTHORITIES

- 1.15 This project is designed to provide a simpler more coherent structure of remedies for administrative law. At present remedies exist through the courts, tribunals and various forms of ombudsman procedure. The procedures and remedies available are varied and inconsistent. This lead to unnecessary complexity and cost to both the citizen and to public authorities.

PROJECT 11: TRANSFER OF TITLE TO GOODS BY NON-OWNERS

- 1.16 The case of *Shogun Finance v Hudson* has highlighted long-standing problems with the way the law deals with circumstances where property is purportedly transferred by someone who does not have good title to it. The law is extremely technical, depending on distinctions that are no longer always relevant, and can be criticised because the loss is not borne by the party most able to prevent it.

Eighth Programme completed projects

- 1.17 The one-page summary in Appendix B outlines the projects which were completed during the Eighth Programme, together with the relevant report number. Copies of most reports are available from our website. Older reports are available electronically from the Law Commission Communications team by calling 020 7453 1235.

Further projects

- 1.18 New projects are expected to come to the Commission over the course of the Ninth Programme. These will be incorporated into the Programme depending on resources, the volume of ongoing work, and the urgency of the new project. Following the appointment of a new Criminal Law Commissioner in January 2005, the Commission hopes to review the law governing burglary and robbery under the Theft Act 1968, which has hitherto been left untouched by the Commission's proposals to reform the law of theft, fraud and deception.

PART 2

ONGOING PROJECTS

- 2.1 This part sets out the work being carried over from the 8th Programme of Law Reform. The Ninth Programme consolidates and supersedes previous programmes. Ongoing projects from the eighth programme are:

| Name of Project | Lead Department. | Key dates |
|--|---------------------|---|
| Assisting and Encouraging Crime (AEC) | Home Office | August 2005 – Consultative Report and Draft Bill April 2006 - Final Report |
| Codification of Criminal Law | Home Office | October 2005 – Consultation Paper December 2006 – Report |
| Judicial Review of Decisions of the Crown Court | Home Office and DCA | November 2005 – Consultation Paper December 2006 – Report |
| Termination of Tenancies | DCA | December 2005 – Report |
| Easements and Land Obligation | DCA | October 2005 – Consultation Paper |
| Trustee Exemption Clauses | DCA | November 2005 – Report |
| Capital and Income in Trusts: Classification and Apportionment | DCA | May 2006 - Report |
| Rights of Creditors Against Trustees and Trust Funds | DCA | Commences on completion of the above two projects |
| Illegal Transactions | DCA | December 2005 – Report |
| Forfeiture and Succession | DCA | July 2005 - Report |
| Company Security Interests | DTI | August 2005 –Report |
| Renting Homes | ODPM | August 2005 - Report |
| Resolving housing disputes | DCA | July 2005 – Consultation Paper September 2007 – Report |

Assisting and Encouraging Crime

- 2.2 This project is concerned with the extent to which persons who do not themselves commit a substantive offence should be subject to sanctions for assisting and encouraging others to commit offences. The present law on these topics is complicated and uncertain and even where the law is clear it is problematic. The policy decisions that are raised are important and difficult.
- 2.3 The prospective benefits of this project are that it will enable the existing uncertain and complicated common law to be replaced by a statutory statement of law which will be characterised by clear rules and agreed statements of principle.
- 2.4 The Commission produced a consultation paper¹ and the responses were analysed. It was thought wise to await the decision of the House of Lords in *Powell and English*² and priority was given to other projects.
- 2.5 This project was part of the Eighth Programme and, in spring 2003, Commissioners approved and adopted a policy paper. Instructions in relation to a draft Bill have since been delivered to Parliamentary Counsel. However since the Commission issued its consultation paper the law on complicity has developed particularly in relation to homicide in significant ways. Commissioners intend therefore to issue a Consultative Report and draft Bill in the summer of 2005.

Codification of the criminal law

- 2.6 The aim of this work is to review criminal law to make it more intelligible and accessible by being properly and rationally organised and expressed in clear and modern language. A draft Criminal Code was published in 1989.³ It contained comprehensive provisions on the general principles of liability and a number of substantive offences including offences against the person, sexual offences, theft, fraud and related offences.
- 2.7 It became apparent that there was no prospect of parliamentary time being found to implement such a large measure. The Commission did not take the Code further, but instead reviewed discrete topics of the criminal law.
- 2.8 The White Paper "Criminal Justice: The Way Ahead",⁴ published in February 2001, set out the Government's goal of reform and codification of the criminal law. After discussion with the relevant Departments it was agreed that the Commission could assist by reviewing and revising the general principles of the criminal law in Part I of our Draft Criminal Code of 1989.
- 2.9 Work started on developing a draft General Part of the Code as part of the Eighth Programme. The potential benefits of the project are to make the law governing

¹ Assisting and Encouraging Crime (1993) Consultation Paper No 131.

² [1999] 1 AC 1.

³ Criminal Law: A Criminal Code for England and Wales (1989) Law Co No 177.

⁴ Cm 5074.

the general principles of criminal liability more intelligible and accessible by being properly and rationally organised and expressed in clear and modern language.

- 2.10 The project comprises seven tranches: external elements of offences; fault; parties to offences; incapacity and mental disorder; defences; preliminary offences (for example, conspiracy and attempts); and proof.
- 2.11 A consultation paper will be published in October 2005, and a Report is expected at the end of 2006. The final Report will be submitted to both the Home Office and the Department for Constitutional Affairs.

Judicial Review of decisions of the Crown Court

- 2.12 A decision of the Crown Court is a decision made by a public body. As a general rule the decisions of public bodies are amenable to Judicial Review. It does not follow, however, that all decisions of public bodies are susceptible to Judicial Review. Decisions of the Crown Court are an illustration. Such decisions are only reviewable if they are not "matters relating to trial on indictment."⁵
- 2.13 The rationale for the exclusion is easily identifiable. Judicial Review should not be a means of delaying trials and clogging up the criminal justice process. Any challenges should await the end of the trial. The defendant can challenge the conduct of the trial by appealing against conviction to the Court of Appeal.
- 2.14 Although the rationale is clear, the problem is locating the boundary of the exclusion. According to Rose LJ the expression "matters relating to trial on indictment" has:

... in recent years attracted perhaps more judicial consideration, in not always apparently reconcilable decisions, than any other statutory provision.⁶

- 2.15 He also observed:

... the arguments in relation to jurisdiction arise from a statutory problem which the courts have done their best to resolve. It is ... now time for Parliament to introduce, as a matter of urgency, clarifying legislation which addresses the problems arising not only from section 29(3) itself but also from its relationship with other legislation. It may well be, if Parliament considers these matters, also necessary for them to consider the impact of Article 6 of the European Conventional for the Protection of Human Rights and Fundamental Freedoms.⁷

- 2.16 There is, therefore, considerable concern amongst the senior judiciary regarding the current statutory scheme. In particular:

⁵ S.29(3) of the Supreme Court Act 1981.

⁶ *R v Crown Court at Manchester, ex p H* [2000] 1 WLR 760, 766.

⁷ *Ibid*, pp 765-766.

- (1) it is a fertile source of argument giving rise on numerous occasions to lengthy, time-wasting and expensive litigation on the question whether an appeal is on a matter “relating to trial on indictment”;
- (2) there may be cases where a matter does relate to trial on indictment but the defendant is without any right of appeal to the Court of Appeal, for example a defendant who is found not guilty by reason of insanity.

2.17 The terms of reference of the project invite the Commission to consider:

- (1) the origins and nature of, and the limitations upon the High Court’s criminal jurisdictions by cases stated and judicial review over the Crown Court as set out in sections 28 and 29 of the Supreme Court Act 1981;
- (2) how those jurisdictions are best transferred to the Court of Appeal, simplified and, if appropriate, modified;
- (3) the implications of (1) and (2) for the High Court’s criminal jurisdiction over the magistrates’ court and for courts martial;
- (4) and to make recommendations.

2.18 The terms of reference will enable the Commission to address:

- (1) the timings of challenges to the trial process;
- (2) resource implications;
- (3) rights of third parties to challenge orders of the Crown Court;
- (4) what should be the jurisdiction of the Court of appeal;
- (5) ECHR implications;
- (6) and the impact on decisions made by magistrates’ courts and courts martial.

2.19 A consultation paper will be issued in November 2005. The final Report will be submitted to both the Home Office and the Department for Constitutional Affairs at the end of 2006.

Termination of Tenancies for Tenant Default

2.20 This project examines the means whereby a landlord can terminate a lease where the tenant has not complied with his or her obligations. This is an issue of practical importance for many landlords and tenants of both residential and commercial properties. The current law is a mix of statute and common law developed over time on an ad hoc basis. It is difficult to use and littered with pitfalls for both the lay person and the unwary practitioner.

- 2.21 The current project builds on earlier work.⁸ As a result of responses to the recommendations contained in a 1994 draft Termination of Tenancies Bill,⁹ the Commission conducted a further consultation exercise on the question of whether some form of right of physical re-entry should be retained in any new scheme. The conclusions were announced in 1999, after which the project was suspended, pending work by the Department of the Environment, Transport and the Regions¹⁰ on options for leasehold reform. The results of that Department's work can be seen in Part V of the Commonhold and Leasehold Reform Act 2002.
- 2.22 When the project recommenced a review of the Commission's earlier findings was required in order to take into account the implementation of the Human Rights Act 1998, the Civil Procedure Rules and more recent developments in case law. Following the review, it was necessary to depart from some of the Commission's earlier recommendations to accommodate these legal developments. In January 2004 the Commission published a consultation paper¹¹ setting out new provisional proposals. They relate to termination of tenancies for tenant default only and will apply largely to fixed term commercial leases and residential leases in excess of 21 years.
- 2.23 The Commission received a total of 55 consultation responses and is working on the final report and draft bill. The Commission expects to complete the project by the end of 2005. Though the final report will be addressed to the Department of Constitutional Affairs, the Commission's work on this topic has historically enjoyed the support and interest of the Office of the Deputy Prime Minister (and its predecessors), particularly in the context of that Department's work on leasehold reform. It has also attracted interest and comment from practitioners, academics and groups representing both landlord and tenant interests.

Easements and Land Obligations

- 2.24 An easement is a right enjoyed by one landowner over the land of another. A positive easement involves a landowner going onto or making use of some installation on his neighbour's land (such as a right of way or a right to install and use a pipe or drain). A negative easement is essentially a right to receive something from the land of another without obstruction or interference. For example, an easement may prevent a landowner from building on his or her land if it obstructs the light to his or her neighbour's windows.
- 2.25 The law of easements, analogous rights and covenants is of practical importance to a large number of landowners. For example, many landowners depend on easements in order to obtain access to their property, for support or for drainage rights. The relevant law has never been subject to a comprehensive review, and many aspects are now outdated and a cause of difficulty.
- 2.26 The Commission intends to tie in its examination of easements and analogous private law rights with a reconsideration of the Commission's earlier work on land

⁸ Forfeiture of Tenancies (1985) Law Com No 142.

⁹ Termination of Tenancies Bill (1994) Law Com No 221.

¹⁰ DETR, now the Office of the Deputy Prime Minister.

¹¹ Termination of Tenancies for Tenant Default (2004) Law Com No 174.

obligations (which included an examination of positive and restrictive covenants).¹² Although the Government decided not to implement the Commission's previous report on this subject, it is understood that this was due to the need to consider how future developments in property law (in particular, the introduction of a commonhold system) might affect the recommendations contained in it.¹³ Following the enactment of the Commonhold and Leasehold Reform Act 2002, the Commission's aim has been to produce a coherent scheme of land obligations and easements which will be compatible with both the commonhold system and the system of registration introduced by the Land Registration Act 2002. The Commission intends to publish a consultation paper towards the end of 2005.

Trustee Exemption Clauses

- 2.27 Many trust deeds include a clause which excludes or restricts a trustee's liability for breach of trust, either by expressly excluding liability or by modifying the trustee's powers and duties. Case law has established that such clauses are able to relieve the trustee from liability for anything except dishonest conduct. Therefore, beneficiaries will in many cases find themselves with no remedy against a trustee who has caused loss to the trust fund by his or her actions or omissions.
- 2.28 This position was criticised in the House of Lords during the Second Reading of the Trustee Bill in 2000¹⁴ and it has been judicially acknowledged that "the view is widely held that these clauses have gone too far".¹⁵ The independent Trust Law Committee issued a consultation paper on the subject recommending reform.
- 2.29 In January 2003 the Commission published a consultation paper¹⁶ on trustee exemption clauses, which included several provisional proposals which would require legislation. The paper also invited the views of consultees on other possible options for reform and on the economic implications of any regulation of trustee exemption clauses. 119 consultation responses were received, including a detailed paper from a Working Group of the Financial Markets Law Committee on the impact of the provisional proposals on trusts in financial markets. A report and draft Bill are expected towards the end of 2005.

Capital and Income in Trusts: Classification and Apportionment

- 2.30 The treatment of a receipt by trustees will usually depend on whether that receipt constitutes income or capital for trust law purposes. For example, private trusts will often provide that income goes initially to certain beneficiaries and that capital is held for others.

¹² See *Transfer of Land: The Law of Positive and Restrictive Covenants* (1984) Law Com No 127.

¹³ Written Answer, *Hansard* (HL) 19 March 1998, vol 587, col 213.

¹⁴ *Hansard* (HL) 14 April 2000, vol 612 col 383-384, *per* Lord Goodhart.

¹⁵ See *Armitage v Nurse* [1998] Ch 241, 256, *per* Millett LJ.

¹⁶ *Trustee Exemption Clauses* (2003) Law Com No 171.

- 2.31 The law on the classification of trust receipts and outgoings as income or capital is complex and can give rise to surprising results (and so perceived injustice). For example, where shares in a new company are issued to the shareholders of an existing company on what is known as an “indirect” demerger, those shares will be treated for trust purposes as capital. Where the demerger is “direct” the shares received will be treated as income in the trustee’s hands.
- 2.32 Trust law has also developed complicated rules which oblige trustees to apportion between income and capital in order to keep a fair balance between different beneficiaries. It is widely acknowledged¹⁷ that the current rules are unsatisfactory. They are highly technical, rigid and outdated, often causing more difficulties in practice than they solve. Consequently, the application of the rules is often expressly excluded in modern trust instruments. In cases where the rules still apply (generally older trusts and home-made will trusts) the rules are either ignored or require the trustee to undertake complex calculations which are unlikely to have been envisaged by the settlor when setting up the trust.
- 2.33 The distinction between trust income and capital receipts is also an important issue for charities. Many charitable trusts have permanent capital endowments which cannot be expended to further the charity’s objects; only the income generated can be used and there is generally no power to convert capital into income. This may inhibit performance of the charity’s objects and encourage investment practices which concentrate on the form of return rather than on maximising overall return.
- 2.34 The Commission published a consultation paper in July 2004.¹⁸ It provisionally proposed new, simpler rules for the classification of corporate receipts by trustee-shareholders, a new power to allocate investment returns and trust expenses as income or capital (in place of the existing rules of apportionment) and the clarification of the mechanism by which trustees of permanently endowed charities may invest on a “total return”.¹⁹
- 2.35 A report and draft Bill are expected in Summer 2006, dependent on the team’s work on trustee exemption clauses,

The rights of creditors against trustees and trust funds

- 2.36 Whenever trustees enter into a contract they do so personally, incurring personal contractual obligations and (subject to any express contractual provision limiting liability) personal liability to the other contracting party. A trustee does have a right to be indemnified from the trust fund for obligations properly incurred. However, where the obligation was not properly incurred no such right exists and the trustee will have to make good any liability out of his or her own pocket (even if the trust fund is sufficient to meet it).

¹⁷ See, for example, the Law Reform Committee’s Twenty-Third Report, “The Powers and Duties of Trustees” (1982) Cmd 8733 and the Trust Law Committee’s consultation paper “Capital and Income of Trusts” (1999).

¹⁸ Capital and Income in Trusts: Classification and Apportionment (2004) Law Com No 175.

¹⁹ Following the Government’s recent review of charity law the Commission considered that the question of whether charity trustees should be permitted to distribute a permanent endowment as if it were income lies outside the scope of the project.

- 2.37 There are various reasons why a trustee may lose the right to be indemnified out of the trust fund.²⁰ In such circumstances the contracting party will have to rely on the solvency of the trustee.
- 2.38 Many trustees and creditors are unaware of these rules, believing that, in effect, the trust itself is entering into the contract and that as a result the trust fund will always be available to meet trust obligations. Even if the contracting party is aware of the true position it will often be difficult or impossible for it to assess with certainty whether the trustee will be able to indemnify him or herself out of the trust fund.
- 2.39 The Lord Chancellor has asked the Commission to examine the law governing the rights of creditors against trustees and the trust fund for liabilities incurred by the trustees on behalf of the trust.
- 2.40 In considering how, if at all, this situation could be improved the Commission will have to balance the position of creditors with the competing interests of beneficiaries who benefit from the current protection given to the trust fund. This project will commence when both current trust projects have been completed, which is expected to be no later than 2006.

Illegal Transactions

- 2.41 There is considerable confusion over the legal rules that govern when and how litigants are prevented from enforcing their normal contractual or property rights because they have been involved in an illegal activity. The law is excessively technical, uncertain and, occasionally, unfair.
- 2.42 One particular difficulty was highlighted by the House of Lords' decision in *Tinsley v Milligan*.²¹ The plaintiff and defendant had bought a house together, which had been put in the plaintiff's sole name in order to defraud the Department of Social Security. By a majority, the House of Lords decided that, despite this illegal purpose, the defendant was entitled to enforce the interest in a resulting trust that would normally arise in her favour. The outcome has generally been welcomed, because depriving the defendant of her property would be disproportionate to her illegality. However, the reasoning has been questioned. It was based on the highly technical point that the defendant did not need to rely on her own illegality to establish her rights. On slightly different facts²² this would lead to a different result, bringing the law into disrepute and arguably producing an unfair result.
- 2.43 Other problems arise in employment contracts. In July 2003 the Trade Union Congress referred to the "grey area" of whether someone working without official

²⁰ For example, because entry into the contract was in breach of the trustee's equitable duties.

²¹ [1994] 1 AC 340.

²² If, for example, the parties had been father and daughter, a presumption of advancement would have arisen, which could only be overturned by pleading the illegality.

sanction has any rights at all”, a problem which meant that legal protections for migrant workers were often “wholly inadequate”.²³

- 2.44 The project was first recommended in the Sixth Programme, and continued in the Seventh and Eighth Programmes. A consultation paper on illegality in contracts and trusts was published in January 1999.²⁴ A further consultation paper on illegality in tort was published in June 2001.²⁵ The final report is expected by the end of 2005. The main provisional proposal was that the complex rules in these areas should be replaced by a structured statutory discretion. This proved controversial, however, and the Commission is rethinking the proposals in the light of the detailed comments received.

Forfeiture and Succession

- 2.45 A short consultation paper was published in October 2003 on the issue of whether intestacy law should be amended in the light of the decision in *Re DWS (deceased)* [2001] Ch 568. In this case a son murdered his parents who died intestate. The son was debarred from inheriting under the forfeiture rule, and the Court held that his children could not inherit because he was not dead. The Commission proposed that the law should be changed to treat a potential heir that had been disqualified as if they had died. We expect to publish a draft report and bill by July 2005.

Security interests

- 2.46 It is common for lenders to ask borrowers to provide security for loans. Such security may be over a wide range of different assets, including tangibles such as machinery and motor vehicles and intangibles such as debts, investments and patents. It may also take a wide variety of legal forms (from traditional forms of security such as fixed and floating company charges, through transactions that have a similar economic function, such as hire-purchase, finance leasing and retention of title clauses, to factoring agreements and “repos” involving the sale and repurchase of investment securities). Some securities are required to be registered; others are registered voluntarily; and many are not registered at all.
- 2.47 In 2001, the Company Law Review Steering Group highlighted problems with the current system for registering company charges. It was cumbersome; it failed to provide coherent rules for deciding which charges took priority; and the list of registrable charges no longer accorded with current commercial practice.²⁶
- 2.48 In May 2002 the Department of Trade and Industry asked the Commission to examine the law on the registration, perfection and priority of company charges. The review was to look at whether such a scheme should apply not only to security in the strict sense but also to “quasi-security” interests such as hire-

²³ Trades Union Congress, *Overworked, Underpaid and Over Here: Migrant Workers in Britain*, 14 July 2003.

²⁴ *Illegal Transactions: the effect of Illegality on Contracts and Trusts* (1999) Consultation Paper No 154.

²⁵ *The Illegality Defence in Tort* (2001) Consultation Paper No 160.

²⁶ Department of Trade and Industry, *Modern Company Law for a Competitive Economy*, URN 01/942, chapter 12.

purchase agreements and finance leases. It was also to consider whether the new scheme should apply to security interests granted by unincorporated businesses and individuals.²⁷

- 2.49 A consultation paper, provisionally proposing to introduce a notice-filing system, was published in July 2002. This would simplify the registration process (by requiring less information to be sent to Companies House) and clarify which creditors took priority when a company became insolvent. It also argued that there was a need to register 'quasi-securities' to provide more information to future creditors and would-be buyers. Although many proposals were widely welcomed, several consultees wished to see more details of how they would work before giving a final view.
- 2.50 A further Consultative Report, together with draft regulations, was published in August 2004. This showed in detail how a notice filing scheme would apply to interests granted by companies. It set out a company scheme intended to form part of the DTI's plans to modernise company law. 67 responses are being analysed.
- 2.51 The plan is to produce a final report on company charges in Summer 2005. This will give a concluded view on the scheme to be included in the anticipated Companies Bill and will consider how far the scheme should be extended to unincorporated businesses and individuals. Separate reports may be issued later on (a) a statutory restatement of the law affecting security over personal property and (b), after the proposed review of the law of transfer of title by non-owners, extension of the scheme to title-retention transactions such as hire-purchase and finance leases.

Renting Homes

- 2.52 Housing law affects the third of the population in England and Wales who rent their homes – 5.983 million households.²⁸ In March 2001, the Commission published a scoping review of housing tenure law that found that the root problem with the law was its extreme and unnecessary complexity. It is difficult to understand, irrational, cumbersome and expensive to use.
- 2.53 The Renting Homes project on housing tenure law was designed to correct this. The project was originally to be the first part of a two-phased programme of law reform. The second phase was to consist of two projects: the first dealing with the rules relating to statutory succession to tenancies, the second with the law on harassment and unlawful eviction. It became apparent that the first would have to be brought into the Renting Homes project. This was done with the agreement of the Government. The result was that two consultation papers were required. The first, Renting Homes 1: Status and Security, set out our provisional proposals for a radically new regime for housing tenure. It was published in April 2002. The second, Renting Homes 2: Co-occupation, Transfer and Succession dealt not only with the succession issues which had been brought forward, but also the

²⁷ The full terms of reference are set out in Registration of Security Interests: Company Charges and Property other than land (2002) Consultation Paper No.164, p.5.

²⁸ Survey of English Housing 2001-2.

difficult legal issues relating to joint occupation and transfer of agreements to rent a home. It was published in September 2002.

- 2.54 An unusually intense consultation process followed the publication of the two papers. An extraordinarily large number of written responses were received (349 for the first paper, 77 for the second). In addition, the Commissioner and other members of the team spoke at a large number of conferences, seminars, workshops and other meetings, addressing landlords and tenants from both the social and the private sectors as well as academics, housing professionals, lawyers and others.²⁹ Three pieces of research were also commissioned. One was specifically aimed at tenants of social landlords, and involved both focus groups and other methods (including the first ever live “web-chat” with a Law Commissioner). The second involved focus group work with social tenants, private tenants and small landlords in areas of both high and low housing demand. A third research project was designed to assess the effectiveness of different forms of prescribed written agreements.
- 2.55 The widespread interest in the conclusions, both in the Office of the Deputy Prime Minister and in the wider housing world, encouraged the Commission to publish a narrative report on 5 November 2003,³⁰ setting out their conclusions on the issues raised in the consultation papers. The process of drafting the bill will continue to refine the details of the recommendations. Consequent changes will be fully set out in the final report, which will accompany the draft bill when it is published in mid-2005.

Resolving housing disputes

- 2.56 There has long been criticism of the way in which the courts deal with housing disputes. Calls for the creation of a specialist housing court or tribunal go back many years. This dissatisfaction was manifested in the consultation process for Renting Homes, when, although the Commission did not specifically seek views on the issue, many respondents drew attention to what they saw as the shortcomings of the current system. Consequently, the Renting Homes report recommended that the Commission should be asked to undertake further work in this area. Concurrently, various independent developments supported the extension of this project. In particular, DCA were developing a user perspective for civil justice generally, and had published a wide-ranging white paper in relation to administrative justice. Proposals were also coming forward for community justice approaches in criminal law, and new thinking was emerging in relation to the development of the Community Legal Service.
- 2.57 In June 2004, DCA referred a project to the Commission, with broad terms of reference:

To review the law and procedure relating to the resolution of housing disputes, and how in practice they serve landlords, tenants and other users, and to make such recommendations for reform as are necessary to secure a simple, effective and fair system.

²⁹ The full list of such meetings before, during and after the consultation period amounts to over 100.

³⁰ Renting Homes (November 2003) Law Com 284.

- 2.58 The project is designed to go beyond narrow questions of jurisdiction and the relative advantages of courts and tribunals. Rather, the aim is to start with a consideration of how housing problems and disputes arise in the first place, how they may be linked with other problems, and whether the existing system in fact distorts problems. The project will also consider what other countries can teach us about the resolution of housing disputes. Based on this broad approach, the project will move to consider what outcomes are desirable, and how a flexible dispute resolution system can be designed to secure them.
- 2.59 Preliminary meetings to discuss the broader policy context were held during 2004. The aim is to publish a consultation paper in the summer of 2005, with a final report and draft bill in 2007.

PART 3

THE NEW PROJECTS

- 3.1 In this section we set out the areas in which we will be undertaking new projects over the life of the programme. Some of these projects are already well defined; some will only be defined after a scoping study; and others are at an early stage of development to define the precise project. In each case however, Commissioners have discussed the need for the project with the lead Department of State.

| Name of Project | Lead Department. | Key dates |
|--|------------------------------------|---|
| Codification of the Law of Criminal Evidence | Home Office | To be determined |
| Cohabitation | DCA | Begins June 2005 Report June 2007 |
| Consumer Law | DTI | To Be Determined |
| Feudal Land Law | DCA | Begins January 2006 Report December 2008 |
| Homicide | Home Office | To be determined |
| Housing Law – Ensuring Responsible Renting | ODPM National Assembly of Wales | Begins April 2005 Report August 2007 |
| Insurance Contract Law | HMT | Begins April 2005 |
| Post Legislative Scrutiny | Leader of the House of Commons | Scoping Study 2005/06 |
| Property Interests in Investment Securities | HM Treasury | Begins July 2005 Report July 2008 |
| Remedies against Public Authorities | DCA | Scoping Study 2005/06 |
| Transfer of Title of Goods by Non-owners | DCA | To be determined |

Codification of the law of criminal evidence

- 3.2 The law of criminal evidence consists of a jumble of statutes and common law rules, lacking in clarity and coherence. This project would seek to clarify and improve the law. The precise terms of the project and the timetable for completing this work will be set after consultation with the Home Office and once the extent of our involvement in reviewing the law of homicide is known.

Cohabitation

- 3.3 In July 2002, the Commission published the Discussion Paper *Sharing Homes*,¹ examining the property rights of those who share homes. The paper was wider in scope than the cohabitation project now proposed in that it covered a broad range of people – not just “couples” (married or unmarried) but also friends, relatives and others living together for a variety of reasons, including companionship or care and support. It was also narrower in scope in that it focused on a single area of activity – the home. The paper concluded that it was not possible to devise a statutory scheme for the ascertainment and quantification of beneficial interests in the shared home which could operate fairly and evenly across the diversity of domestic circumstances now being encountered. At the same time, the Commission identified a wider need for the law to recognise and to respond to that diversity, and expressed the view that further consideration should be given to the adoption of new legal approaches to personal relationships outside marriage. The Commission indicated a future willingness to contribute to further work in this area insofar as is appropriate to a body concerned with law reform rather than social policy.
- 3.4 An important development in the legislative regulation of personal relationships has taken place since *Sharing Homes* with the introduction of the Civil Partnership Bill. This offers to same-sex couples the opportunity of registering their relationship and thereby obtaining rights and obligations broadly equivalent to those of married couples.
- 3.5 However, where persons live together, but do not either marry or (in the case of same sex couples) register their partnership, there remains a serious risk of financial hardship being incurred on the cessation of the parties’ relationship whether by separation or by death. Parliamentary debate on the Civil Partnership Bill highlighted the case for fundamental legislative reform for cohabitants. In a letter of 12 May 2004 Lord Filkin, then Parliamentary Secretary at the Department for Constitutional Affairs, indicated to Peers that he had asked the Commission to consider a request to include a review of cohabitation in the Ninth Programme.
- 3.6 Given the subject matter, it is vital that the terms of reference of any project on cohabitation should be tightly defined (though broad enough to allow a thorough examination of the full range of options for reform). The project will focus on the financial hardship suffered by cohabitants or their children on the termination of the relationship by breakdown or death. It will only consider opposite sex or same sex couples in clearly defined relationships.² Particular attention will be given to:
- (1) Capital provision where there is a dependent child or children;
 - (2) Capital and income provision on relationship breakdown;

¹ Law Com No 278.

² While there need not necessarily be a sexual element to the relationship, at the very least the relationship should involve cohabitation and bear the hallmarks of intimacy and exclusivity, giving rise to mutual trust and confidence between partners. Relationships between blood relatives (such as elderly parents and their adult children, and siblings), “caring” relationships, and “commercial” relationships (landlord and tenant, or landlord and lodger) will be specifically excluded from consideration.

- (3) Intestate succession and family provision on death; and
 - (4) The Inheritance (Provision for Family and Dependants) Act 1975.
- 3.7 The project will also consider the place of cohabitation contracts and the extent to which cohabitants should be free to make and to enforce agreements concerning their respective liabilities to provide and to maintain following separation. The Commission will require guidance from the Department of Constitutional Affairs on all socio-political (as opposed to legal) issues relating to cohabitation.³ A number of other issues will be specifically excluded from the review.⁴
- 3.8 Cohabitation is now an established part of our society. According to figures provided by the Department of Constitutional Affairs, 67% of respondents to the British Social Attitude Survey in 2000 thought cohabitation was acceptable. The extent of social recognition can also be gauged by the recent motion passed on 7th May 2004 by the General Synod of the Church of England. This motion recognised that there were issues of hardship and vulnerability for people whose relationships were not based on marriage which needed to be addressed by the creation of new legal rights. A project on cohabitation would be of wide social significance.

Consumer Law

- 3.9 In October 2004 the Commission responded to the Department of Trade and Industry's consultation document on consumer strategy. The Commission firmly believes that Consumer Law ought to be clear and accessible to the businesses and consumers (or at least their advisors) who have to use it. This can be achieved only by some form of restatement of the law. We will be discussing with the DTI ways in which we can assist it in its desire to achieve its aims. For the present we do not have specific projects in mind, but we wish to include in our programme this area of the law as in urgent need of review. We envisage that this work would probably be conducted jointly with the Scottish Law Commission.

Feudal land law

- 3.10 The land law of England and Wales contains several residual but significant elements dating from 1066. During feudal times all land was ultimately held "of the monarch" (that is, by grant from the monarch) in return for services, usually of an agricultural or military nature. After various reforms⁵ land was no longer held on tenure by service but the concept of tenured landholding survives. The majority of land ownership comprises an estate in land that is held of the Crown because the Crown remains the ultimate or "allodial" owner of the land. In certain

³ Such as whether any new system would be opt out or opt in and how long couples would need to live together to qualify.

⁴ Parental responsibility will be excluded on the grounds that it has already been recently considered and legislated upon in the Adoption and Children Act 2002. Next of kin rights will be excluded on the basis that the Department of Health has recently amended its policy guidance to NHS staff to extend consultation with next of kin to include unmarried partners. The Department for Constitutional Affairs have asked that insolvency, tax and social security should be excluded on the basis that a consideration of these issues would not address the most immediate policy needs.

⁵ Including Quia Emptores in 1290 and the Tenures Abolition Act of 1660.

circumstances even the fee simple, the greatest estate in land, ends with the land reverting to the Crown in a feudal process called escheat.

- 3.11 The Commission initially sought to reform this area of the law as part of its project on Land Registration.⁶ During the course of the project, however, far-ranging reform of feudal land law was postponed and “stop-gap” measures substituted. It was felt that more time and further research was needed to understand fully both the law and the best means of reforming it and to gain the agreement of interested parties.⁷ Nevertheless, the report called in very strong terms for wholesale reform to follow as “the present law is indefensible”.⁸
- 3.12 Reform is necessary for a number of technical and practical reasons. First, it makes little sense to have a partial retention of feudal land law for 21st century land holdings. Land law has, in most major respects, moved on from ancient concepts and practices and it is inconsistent that remnants remain in operation. Secondly, the remnants that do remain cause uncertainty to members of the public, to practitioners and to the courts due to their complex and archaic nature and their incompatibility with modern case and statute law. Finally, there is an unnecessary and confusing overlap in the main area in which feudal land law finds modern expression: the treatment of ownerless land.⁹
- 3.13 The main beneficiaries of reform will be:
- (1) the general public (if a means of dealing with onerous properties can be devised which will assist in reducing the risk those properties pose to individuals and to the environment);
 - (2) individuals who have an interest in, or wish to purchase property, that has become ownerless; and
 - (3) individuals dealing with the Crown and Royal Duchies, both of whom have large commercial property portfolios and who perform important public functions relating to land.¹⁰

Homicide

- 3.14 The Commission published a report on Partial Defences to Murder in August 2004. Reflecting the views of many respondents to the consultation paper, one of the key recommendations was that the law of murder should be comprehensively reviewed. The Home Office announced in October 2004 that such a review would

⁶ Land Registration for the Twenty-First Century – A Conveyancing Revolution (Law Com No 271). This joint project with HM Land Registry was implemented in the Land Registration Act 2002.

⁷ See Law Com 271, para 11.27.

⁸ Law Com 271, para 11.26.

⁹ That is, the doctrines of escheat and *bona vacantia*.

¹⁰ See Law Com No 271, para 2.36. Even after the reforms implemented under the Land Registration Act 2002, the law currently impedes the efficient operation of these functions and creates difficulties for those who deal with the Crown and Duchies. In formulating proposals for reform, it will be necessary to fit Crown land into the modern land registration system to enable efficient operations by the Crown and Royal Duchies.

be undertaken. We are discussing with the Government the extent of our involvement. We would accord work on this project priority for the Criminal Law Team and other project timetables might need to be adjusted to free resources to work in this area.

Housing: Ensuring Responsible Renting

- 3.15 The Renting Homes project was originally conceived as the first stage of a two stage programme of work (see paragraphs 2.52 – 2.59 above). Phase 2 included a further project on the law relating to harassment and unlawful eviction. By the time the Commission published Renting Homes, however, it was convinced that such a project, although valuable, would be too narrow.
- 3.16 The Renting Homes proposals place particular importance on the written occupation contract, which specifies, and makes effective, the legal rights and obligations of both landlord and occupier. In the private rented sector, the landlord will be able to seek possession simply by giving a minimum of two months' notice (as is the case now with an assured shorthold tenancy). This immediately raises the question: how can an individual occupier enforce his or her rights against the landlord when he or she may be evicted on such short notice. The Commission therefore recommended that, rather than conducting a narrow project on harassment and unlawful eviction (the extreme end of landlord malpractice) it should examine the full range of options for regulating and promoting good landlord behaviour, in order to ensure that the contractual arrangements at the centre of Renting Homes could be delivered in practice. This broader project should consider both the incentives that could be created to encourage responsible behaviour, and the sanctions that might be imposed when landlords did not behave responsibly.
- 3.17 Another element of Renting Homes was anti-social behaviour. Initially, the Commission considered the issue as a problem to be dealt with by the powers of social landlords (local authorities and housing associations). The consultation process revealed that anti-social behaviour was not tenure specific; it took place in the private sector as well as the social sector. Here, not only may the legal problems be different, but also private landlords may be less willing to engage constructively with an occupier's behaviour, as compared with a social landlord. Thus, Renting Homes strongly recommended that work be undertaken on anti-social behaviour in the private sector.
- 3.18 The Commission originally saw these two projects as being distinct. However, as it developed its thinking, the similarities between the approaches needed became more apparent. This was particularly so in respect of the role of third party regulators, crucial in relation to both sets of issues. This approach does not, however, obviate the need to consider the appropriate private law rights of, for instance, neighbours of those engaging in anti-social behaviour. However, following discussions with ODPM, it was decided that they could best be considered as part of the same project.
- 3.19 Accordingly, the work on both aspects will go forward as a single project. The proposed terms of reference are:

- (1) To review the relevant housing law, and proposals for reform of the law, and to make recommendations in relation to:
 - (a) the appropriate legal framework necessary to promote and secure compliance by both landlords and occupiers with their existing or proposed legal obligations;
 - (b) the procedures available to landlords, occupiers and affected third parties in relation to such compliance, with particular regard to preventing or remedying anti-social behaviour; and
 - (c) such provisions of the criminal law as may be necessary to reinforce the above.
- (2) To consider the extent to which the principles and procedures available in connection with anti-social behaviour by rental-occupiers should also apply to similar behaviour by owner-occupiers.

3.20 The terms of reference limit the review to “the relevant housing law”, thus excluding consideration of the general criminal law to anti-social behaviour. However, they are broad enough to allow the Commission to consider the use of criminal offences within any proposed regulatory structure, and such specific matters as the criminal law aspects of anti-social behaviour orders.

3.21 The terms of reference are specifically designed to enable the Commission to consider both the law as it currently is, and as it might develop should proposals for reform of the law (in particular, those in Renting Homes) be introduced. The Commission sees the project as constituting a third pillar of housing law reform, sitting alongside the Renting Homes project and the resolution of housing disputes project. It will nevertheless be valuable even if the Government decides not to implement the recommendations in Renting Homes. The Commission is aware that there are already in existence a wide variety of mechanisms designed to achieve the objective of promoting good landlord and occupier behaviour, for example local authority landlord accreditation schemes, local authority tenant accreditation schemes, and private sector industry self-regulation schemes. But these have grown up piece-meal and often without any legislative backing. This project will, for the first time, provide the opportunity for developing proposals for a coherent regulatory approach for the operation of the rented housing market.

3.22 The Law Commission has an agreement with the Welsh Assembly Government regulating the relations between the Commission and the devolved institutions. The agreement provides that a project will be a joint project, on the Government side, in certain circumstances. One of those is where

the project is likely to consider matters in relation to which powers have already been devolved to the National Assembly for Wales to a significant extent.

3.23 Housing is recognised as one of the areas in which the National Assembly has primary policy responsibility. It has therefore been agreed that for the purposes of the Ninth Programme, the Welsh Assembly Government should be identified jointly with ODPM as the lead department in relation to this project.

Insurance contract law

- 3.24 There have been strong representations that the underlying law of insurance contracts is in need of reform. The British Insurance Law Association, the National Consumer Council, the judiciary and others¹¹ have argued that the law is incoherent and unfair to the insured and that it encourages unnecessary litigation.
- 3.25 Many of the problems are long-standing. The Commission's (unimplemented) 1980 report, *Insurance Law: Non-Disclosure and Breach of Warranty*,¹² found that the duty of disclosure was too stringent and could operate as a trap to the unwary. It required the insured to disclose facts which a "prudent insurer" would consider to be material, even if an honest and reasonable insured would not realise that they should be disclosed. For example, insurers could refuse to pay a claim where a policyholder had correctly answered all the questions on the proposal form, because she had not volunteered information about her husband's previous convictions that she did not realise were relevant.¹³ Furthermore, breaches of warranty could operate to prevent claims with which they had no causal connection: for example, a failure to maintain a burglar alarm could prevent a claim for flooding.
- 3.26 The Association of British Insurers (ABI) has long accepted that it is not good practice for an insurer to refuse to pay because a consumer has not disclosed facts which a reasonable person would not realise were relevant. Similarly, consumers should not suffer because they have breached a warranty that has no connection with the loss. However, the ABI has argued that the issue should be dealt with as a matter of voluntary practice rather than law. In 1980, they produced a voluntary Statement of General Insurance Practice, which applies to consumer claims. The Financial Ombudsman Service uses the Statement to resolve disputes involving consumers and small businesses. Since January 2005, parts of the Statement have been given regulatory force under new Financial Services Authority (FSA) rules.¹⁴
- 3.27 However, serious problems remain:
- (1) For large businesses, the rules generate unnecessary litigation: since 1980, a stream of cases has occupied the appellate courts.
 - (2) English law is out-of-step with that of other jurisdictions and it has been suggested that its perceived unfairness may undermine the reputation of the UK market.

¹¹ See British Insurance Law Association, *Insurance Contract Law Reform: Recommendations to the Law Commission, A Report of the Sub-Committee* (2002); National Consumer Council, *Insurance Law Reform: the consumer case for a review of insurance law* (1997); Sir Andrew Longmore, "An Insurance Contracts Act for a New Century" [2001] LMCLQ 356; and John Birds, "Good Faith in the Reform of Insurance Law", Lecture at the Institute of Advanced Legal Studies, 10 December 2003.

¹² *Insurance Law: Non-Disclosure and Breach of Warranty* (1980) Law Com No 104.

¹³ *Lambert v Co-Operative Insurance Society Ltd* [1975] 2 Lloyd's Rep 485.

¹⁴ Insurance Conduct of Business Rule 7.3.6.

- (3) Medium-sized businesses find that their legitimate expectations are not met.
- (4) Small businesses may take a claim to the Financial Ombudsman Service, but they are not covered by the ABI's Statement or by FSA rules. At present, they are in an anomalous position: ombudsman practice is to apply "consumer" type rules, although the law and regulations affecting them are much harsher.
- (5) For consumers, the law is unnecessarily complex. To find the answer to some fairly common questions, it is necessary to examine multiple layers of law, regulation and ombudsman decisions. Insurers sometimes misunderstand the rules, and follow the law rather than the Statement, regulations or ombudsman case law.
- (6) Consumers may also suffer from the harshness of the present law as it affects those with whom they deal. For example, where a client sues a professional firm, whose professional indemnity cover is avoided because of an innocent non-disclosure, the result may well be that the client will be unable to recover. This means that the client will be left without a remedy in practice.

3.28 There is a need to return to the issues considered in the 1980 report to consider possible reforms. The Commission intends to consult on whether there is a need to review other areas of insurance contract law that may cause difficulties, such as the law on insurable interest and joint policies. We will also consider whether there is a need to produce a simpler and more accessible statement of the law. We envisage that this work would probably be conducted jointly with the Scottish Law Commission.

Post legislative scrutiny

3.29 The Commission has discussed informally with the Deputy Leader of the House of Commons the possibility of carrying out a project to try to devise an effective system of post legislative scrutiny. This would complement the introduction of pre-legislative scrutiny. The Commission is keen to undertake work in this area but it will need to consider carefully the nature and scope of any project.

3.30 As the body charged with keeping all the law under review we naturally are concerned both at the volume of legislation that is passed by Parliament each year and whether it accurately gives effect to the policy aims avowed. We are also concerned if the law has unintended consequences which makes the law in general less certain and more complex. There are many issues that immediately arise when one considers the purpose of post legislative scrutiny, not least whether such a scrutiny would apply to every measure passed by Parliament or only some of them. Any body undertaking the scrutiny would need a wide and ever changing range of skills properly to undertake effective scrutiny. We shall begin work in defining the scope of the project from the beginning of the Ninth Programme and set dates for completion of the work by the autumn of 2005.

Property interests in investment securities

3.31 The Financial Markets Law Committee (FMLC) has expressed concern that the law on the ownership of investment securities has not kept pace with changes in market practice. Recent years have seen a revolution in how stocks and shares are held, which can be summarised as:

- (1) “dematerialisation” (paper share certificates have been replaced with computerised records);
- (2) “intermediation” (custodian banks, brokers and depositories increasingly hold shares on behalf of others); and
- (3) “pooling” (where an intermediary holds like investments for more than one customer, these are customarily not held separately but are pooled in a single client account maintained with the intermediary's own intermediary.)

3.32 In July 2004, the FMLC published a report highlighting problems and uncertainties in the current law applying to intermediated securities. The basic law is sound: an investor's interest in an intermediary's holding will usually be characterised as a beneficial interest in a trust, so that if the intermediary becomes insolvent the investor will be protected against the intermediary's creditors. However, difficult questions remain. These present risks to various parties, including:

- (1) *Risks to clients*: What would happen if an intermediary became insolvent, leaving a shortfall in their client account? Would the loss be borne proportionately by all pooled clients, or would the courts apply traditional rules of equitable tracing (so that some would bear all the risk, while others would bear none)?
- (2) *Risks to intermediaries*: intermediaries are contractually obliged to implement instructions given by authorised individuals in the prescribed form. What if the instruction was given by another intermediary, who was in breach of their duty to the true owner of the assets? In what circumstances would the intermediary be held liable?
- (3) *Risks to purchasers*: financial transactions take place so quickly that it is not possible for purchasers to check the seller's title prior to trading. Those who buy debt instruments have traditionally been protected by the rules of mercantile law, which protect the good faith purchaser of negotiable instruments. However, these rules do not apply to electronic assets.
- (4) *Risks to collateral takers*: clients routinely use their intermediated securities holdings as collateral for credit, granting the lender a “security interest in the security”. Often the same holdings may be subject to two or more security interests. It is important to be clear about priority rules, especially where one of the creditors is the intermediary themselves.

3.33 The Committee comments that “over and above concern for their individual interests looms systemic risk: the risk that the failure of a major player in the market will have a domino effect and lead to other failures”.¹⁵

3.34 The issue is not just one of legal uncertainty. If English law is to be the law of choice of the parties to govern intermediated holdings,¹⁶ it must be made clear and accessible.

3.35 The FMLC wish to see the law made certain and more accessible through a new Investment Securities Act. The report sets out eight principles such a statute should follow, and says:

We have not attempted any detailed drafting. That and the working out of the principles and rules are best left to bodies such as the Law Commission, which is better equipped for the task.¹⁷

3.36 The issue clearly has international ramifications. Many countries have already reformed their laws to cope with paperless and intermediated share holdings. In the USA, Article 8 of the Uniform Commercial Code (‘Investment Securities’) was revised in 1994. Belgium, Luxembourg, France and Japan introduced reforms in 2003. At the international level, a first step has been made towards solving conflicts of laws problems through the Hague “PRIMA” convention. This has been accompanied by calls for individual states to improve the own domestic laws to reduce legal risk in this area:

- (1) In November 2001, the International Organisation of Securities Commissions (IOSCO) and Bank for International Settlements (BIS) issued 19 recommendations for reform. These were endorsed by the G30 January 2003 Plan of Action.
- (2) UNIDROIT has set up a new project to harmonise the substantive rules regarding securities held with an intermediary. In April 2004, it circulated a “preliminary discussion draft”, setting out the principles that such rules would need to meet.¹⁸
- (3) In April 2004, the EU Commission proposed to set up an expert group to analyse the issues and “eventually” help to draft legislation. The

¹⁵ Financial Markets Law Committee, Issue 3: Property Interests in Investment Securities, July 2004. p.4.

¹⁶ If the 2002 Hague Convention on the Law applicable to certain Rights in respect of Securities held with an Intermediary (the “PRIMA” Convention) comes into force, parties will have a largely free choice as to the law to govern the holding.

¹⁷ p.9.

¹⁸ Draft convention on substantive rules regarding securities held with an intermediary, Study LXXVII – Doc 13 prov 2.

Commission stressed that this was a long-term project which “may take some time to bring forward concrete proposals”.¹⁹

- 3.37 The Law Commission will examine the issue with the aim of providing information and recommendations to influence the work of the European Commission on intermediated investment securities, and which might be used in response to any proposals made by the European Commission. In the event that little or no progress is made at the European level, we will consider producing a Report with draft legislation for England and Wales.
- 3.38 The Law Commission may also examine the need for provisions on other issues related to indirectly-held investments (such as the obligations of intermediaries), and for a statutory scheme applying to directly-held investments (insofar as these are not already covered by legislation).

Remedies Against Public Authorities

- 3.39 During 2004, the Public Law Team started to consider issues relating to public law remedies in the context of preparations for the Ninth Programme. Underlying the work were a number of existing concerns. They included uncertainties within the law of tort as to its application to public bodies and the question of whether awards of damages, where no common law cause of action could be demonstrated, might or should become a remedy available in the course of proceedings for judicial review. More generally there was concern about the extent to which existing remedies for maladministration by public bodies, which fell short of negligence, were adequate to compensate those who suffered loss as the result of such maladministration.
- 3.40 To help the Commission form a view on what might be needed by way of law reform, a seminar was held in November 2004. The seminar was preceded by the publication of a discussion paper, Monetary Remedies in Public Law, made available on the Law Commission’s website in October. Presided over by Lord Phillips, Master of the Rolls, the seminar brought together judges, practitioners, ombudsmen, policymakers and academics.
- 3.41 Discussion at the seminar revealed a wide range of concerns about the present state of the law and the shape and structure of the remedies available. These included the extent to which the boundaries of liability in negligence could be shaped to achieve a reasonable balance between public and private interests – the public interest in good administration and the private interest in fair compensation where things had gone wrong. Many questioned whether awarding monetary compensation was necessarily the best way of making amends for the effects of maladministration. In many cases, money was not what the wronged citizen wanted. Further, awards to individuals might undermine the ability of public bodies to improve standards of administration.

¹⁹ Communication from the Commission to the Council and the European Parliament – Clearing and Settlement in the European Union – the way forward, 28.4.2002 Com (2004) 312 final, p.25. This follows concern expressed by the second Report by the Giovanni Group at insufficiencies in the legal framework for clearing and securities settlement systems.

- 3.42 It was also recognised that court action was very expensive, not just to bring, but also to defend. It was very hard to argue today for increasing levels of public expenditure on litigation, particularly if other remedial procedures were available. At the same time, procedural bars prevented, for instance, ombudsmen from pursuing cases where the courts were involved.
- 3.43 A project that could be seen as merely creating new liabilities for public bodies to pay compensation, in the context of traditional courtroom proceedings, was not likely to find favour.
- 3.44 The overwhelming, if not unanimous, view of those attending the seminar was that a project on remedies was very desirable, and that the Law Commission was ideally placed to undertake it. But it was equally strongly held that to focus the project on monetary remedies would be too narrow. It should be an integral feature of any reformed system of redress that it should enable feedback to be given to service providers.
- 3.45 The Commission also recognises other significant developments are taking place that will have relevance in this area. In particular the structural reform of the tribunals sector of the administrative justice system is now moving forward rapidly, following the confirmation of the decision to establish a new Tribunals Service as set out in the White Paper Transforming Public Services: Complaints, Redress and Tribunals (July 2004).
- 3.46 It is clear that the approach set out there has wider implications for the administration of justice generally. These include the prospect of a much more flexible system of administrative justice for the resolution of disputes, in which (for example) there would be clearer relationships between internal complaints procedures, specialist ombudsmen (such as the Independent Housing Ombudsman), generalist ombudsmen (such as the Parliamentary Commissioner for Administration), tribunals and courts.
- 3.47 Taking these developments together with the discussions at the seminar, the Law Commission considers that it could make a key contribution to achieving the more responsive structure of administrative justice that is envisaged. However much Ministers and policy makers may set aspirational goals about more coherence and integration, these are unlikely to be met without a detailed investigation of the law on what currently exists, how existing schemes operate, and what laws and rules of procedure need to be reformed to achieve those aspirational goals.
- 3.48 In undertaking a project in this area, it is already possible to see a number of objectives that should underpin the work:
- (1) Any programme of reform must enhance the ability of citizens to obtain their legal rights.
 - (2) When things go wrong, reforms should ensure that there are clearer pathways to the resolution of disputes. At present the citizen is confused. Which path to redress is taken will often be quite arbitrary.

- (3) The procedures that are available should be as cheap, and delivered in as timely a fashion, as practicable. Administrative justice must be appropriate and proportionate.
- (4) Courts should usually be forums of last resort, except in those cases where the particular authority of a judicial decision is required. It should normally be possible for non-court processes to be completed before the courts are used.
- (5) The system should enable public bodies to learn from experience by providing feedback from complaints and other redress mechanisms.
- (6) Any reformed scheme must be human rights and European law compliant.

3.49 As will be apparent, the potential scope of such a project is enormous. The Commission thinks that a scoping study should be undertaken to delineate more clearly a manageable law reform project. The study should consider in more detail:

- (1) the definition and categories of public bodies that would be subject to the new remedial structure;
- (2) the routes of complaint currently available;
- (3) the gaps in the present arrangements; and
- (4) the existing arrangements in Europe and other jurisdictions.

3.50 An initial, time limited, scoping study would address the preliminary issues set out in the preceding paragraph. This would provide the knowledge base that would be essential to enable the team to identify and shape the principal issues to be addressed in the more detailed full project on the reform of remedies available in public law which would follow.

Transfer of title to goods by non-owners

3.51 This project deals with the problems that arise when someone buys an item in good faith, only to discover that the seller did not own it, or that it was subject to a security interest in favour of a third party. English law on this issue has been criticised for being complex and arbitrary, and for granting insufficient protection to innocent buyers. Many of the criticisms are long-standing. The Law Reform Committee recommended reform in 1966,²⁰ as did the Diamond Review in 1989.²¹ However, nothing has been done.

3.52 English law starts with the rule that only the owner of property can pass ownership to another. The basic rule is summarised by the maxim “nemo dat quod non habet” (no-one can give what they do not have). The rule is then

²⁰ Transfer of Chattels: 12th Report (1966) Cmnd 2958.

²¹ A Diamond, *A Review of Security Interests in Property*, HMSO (1989).

subject to at least five statutory exceptions,²² which Professor Diamond criticised as piecemeal, uncertain and arbitrary. Diamond also thought that innocent purchasers deserved “better protection than they get at the moment”.²³

- 3.53 One aspect of the problem was highlighted in 2003 by the House of Lords’ decision in *Shogun Finance Ltd v Hudson*.²⁴ A fraudster attempted to obtain a car under a hire-purchase agreement by showing the dealer a stolen driving licence and submitting an application to Shogun Finance in a false name. Shogun Finance carried out a credit check on the name given to them, and approved the application. The fraudster thus acquired possession of the car and sold it to an innocent buyer, Mr Hudson.
- 3.54 The question was, to whom did the car belong: the finance company or the buyer? Eventually, by a majority of three to two, the House of Lords found for the finance company, because the contract was “void” rather than “voidable”. The result is extremely technical and may be too harsh to the innocent buyer. The question of which party should bear the loss, or whether (as sometimes suggested) it should be shared, involve difficult issues as to the extent to which rights of ownership must be protected, which party was in a better position to prevent fraud of this sort or to absorb the resulting loss.
- 3.55 There have also been difficulties when innocent buyers have bought property that the seller holds under a hire-purchase agreement or a lease.²⁵ Some buyers are protected by statute but the statutory scheme seems to be out-of-date.²⁶ In its Consultative Report, *Company Security Interests*,²⁷ the Commission provisionally recommended a scheme that would have resolved the problems that arise where innocent buyers acquire property that is held on lease or hire-purchase by a company. The responses to the Consultative Report have indicated that our scheme for company security interests should not cover such ‘title-retention devices’. However, a significant number of respondents to the Consultative Report suggested that the Commission should review the question of transfer of title by non-owners as a whole, covering all cases in which property is bought from a person who has no right to sell. This project will do this.²⁸ The timing of this project however cannot be determined until we have completed our work on Company Security Interests.
- 3.56 Transfer of title by non-owners is another area in which English law is markedly different to the laws of many of our continental neighbours and of some other common law jurisdictions. While this does not suggest that our law should be changed, it does suggest that we should review it to ensure that it does actually

²² See Factors Act 1889 s.2, Hire Purchase Act 1964 s.27 and Sale of Goods Act 1979 ss.21, 24 and 25.

²³ Above, paras 13.4.1 – 13.4.4.

²⁴ [2003] 3 WLR 1371.

²⁵ See *Moorgate Mercantile Co Ltd v Twitchings* [1977] AC 890.

²⁶ See Hire Purchase Act 1964, Part III, which protects non-trade buyers of vehicles that are held under a hire-purchase agreement but not those held under a finance lease.

²⁷ Law Com No 176, August 2004.

²⁸ When this review is complete, we will if necessary produce a separate report on other aspects of ‘title-retention security interests’. See paragraph 2.53 above.

meet the needs of business and private citizens in the modern world. We expect to undertake this project jointly with the Scottish Law Commission.

- 3.57 There is no intention to change the rule that a buyer of stolen goods receives no title.

CONSOLIDATION OF LEGISLATION

- 3.58 The Law Commission's work on consolidation has, in recent years, been adversely affected by a number of factors over which it has had no control. The Commission is pressing on with an expanded programme of consolidation and expects to show significant results (starting in 2005) so long as work is not disrupted by external events.
- 3.59 There is a new project, on which work is well under way, in a consolidation of the legislation on health. There has been a considerable amount of legislative activity in this area since the last consolidation in 1977. A new consolidation is badly needed. It will be large and complicated, one of the complications being the need to reflect the effect of the transfer of functions in this area to the National Assembly for Wales. The Commission is grateful to the First Parliamentary Counsel for letting us have an additional parliamentary counsel to undertake the consolidation.
- 3.60 It is difficult to forecast precisely when the health consolidation will be ready for introduction in Parliament. Much will depend on the extent to which (if at all) there is further government legislation in this area that needs to be incorporated in the consolidation. But good progress is being made.
- 3.61 Consolidation of the legislation on wireless telegraphy has been delayed by the work involved in setting up the new regulatory regime established by the Communications Act 2003. A draft consolidation Bill has been published for consultation and it is hoped that it will be possible to complete the drafting soon after the consultation period ends. It is expected that the consolidation will be enacted in 2005.
- 3.62 Another aspect of the programme is a consolidation of the legislation about representation of the people. But work on this has had to be suspended several times. On more than one occasion work has been interrupted by a reorganisation of Ministerial responsibility for the subject. Moving the subject of electoral law from one department to another has inevitably caused delay.
- 3.63 Although the consolidation is well advanced, the Department for Constitutional Affairs has asked for work to be suspended again while the government considers its response to the Electoral Commission's report *Voting for Change*, which recommended changes to the law. The Commission hopes to be able to resume work on the Bill in 2005.
- 3.64 During the passage of the recently enacted Pensions Act 2004, Ministers indicated the Government's wish to have a consolidation of the legislation about pensions. The Department of Work and Pensions has agreed to fund the cost of the additional drafting resources required for this major project. We will begin work on the consolidation bill shortly.

- 3.65 It is difficult at this stage to forecast how long a consolidation of the legislation about pensions would take. Much would turn on the nature of any problems unearthed as the work proceeded and on the amount (if any) of further legislation about pensions that had to be incorporated in the consolidation.
- 3.66 The Commission has begun to explore the possibility of using consolidation as a way of cleaning up old statutes that are still live, and so cannot be removed from the statute book by our statute law repeal Bills, but which have become corroded in one way or another by the passage of time. Work has started to explore with both Houses of Parliament the possibility of consolidating a number of 19th century Acts about Parliamentary costs. It is hoped that drafting would be completed in 2005.
- 3.67 There is also a possibility of exploring consolidation of the legislation about the Ordnance Survey. Any work on this subject may cause the responsible department to consider a more radical reform of the legislation. It is possible therefore that consolidation is not the best way forward.

STATUTE LAW REVISION

- 3.68 Statute law revision ('SLR') is about repealing Acts of Parliament that have ceased to have any practical utility, usually because they are spent or obsolete. The work is carried out in order to modernise and simplify the statute book, thereby leaving it clearer and shorter. This in turn saves the time of lawyers and others who use the statute book, thereby saving legal costs. SLR also helps to prevent people being misled by obsolete laws that masquerade as live law. In the absence of a systematic SLR process, many enactments that have been obsolete for years will be amended by Parliament during the enactment of new legislation, thereby wasting Parliamentary and Departmental time and adding further unnecessary material to the statute book.
- 3.69 Work on the next (18th) SLR Report will continue during the period of the Ninth Programme. Major projects to be featured in the Report include:
- (1) criminal law
 - (2) police
 - (3) armed forces
 - (4) stamp duties and tax
 - (5) London enactments
- 3.70 These projects have been selected both in terms of suitability for the SLR process and in terms of the reduction in the size of the statute book that each project will involve. The projects are consistent in terms of content and importance with all SLR work previously carried out by the Commission. By modernising the statute book, these projects support the DCA objective of providing effective and accessible justice for all.
- 3.71 Each project is likely to take 3-5 months research with a further 3 months being allowed for consultation. All the projects, together with a number of smaller

projects, will be included in the next SLR Report, which hopefully will be published during 2008. The Report, which will be submitted to the DCA in the usual way, will include a draft Statute Law (Repeals) Bill to repeal the various obsolete enactments identified by each project.

ADVISORY WORK

- 3.72 Where appropriate the Commission shall continue to undertake advisory and other work.

PART 4

OTHER LAW REFORM PROJECTS

- 4.1 In the course of consultation several projects were suggested to us that were worthy of inclusion. Two projects in particular however are worth particular mention. The first concerns public health law and the second contract law. The Commission could not undertake either project within its current resources. It is highly likely that we would wish to return to these projects as candidates for the Tenth Programme. In the case of the public health project we believe that reform is so necessary that, in the absence of further resources for the Commission, the government should undertake work in this area itself.

Public Health

- 4.2 In response to our consultation on the Ninth Programme, it was suggested that public health law in general was in need of modernisation. The Nuffield Trust had been in the process of developing an ambitious proposal for a new “Health of the People Act”. This was a very broad ranging project, which included wholesale reform of public health policy and institutions. Following discussions with those involved and others, the Law Commission concluded that taking on a broad policy-driven reform of this nature would not be appropriate. However, it was clear that a more limited, but nevertheless potentially very valuable project, could be identified in relation to the law relating to contagious and infectious diseases.
- 4.3 Since Victorian times, the law has recognised the need for certain unusual compulsory powers to be available to the authorities to deal with the spread of contagious and infectious diseases. The law had been consolidated in the Public Health (Control of Disease) Act 1984, but many of the provisions of the Act are directly derived from Victorian antecedents.
- 4.4 The existing law is, therefore, largely based on nineteenth century social conditions, and a nineteenth century understanding of the science behind the spread of diseases.
- 4.5 The 1984 Act accordingly includes provisions for things like the closure of common lodging houses and the inspection of canal boats, which obviously have no relevance to modern conditions; and for the disinfection of library books, which are no longer seen as making medical sense. If many of the provisions of the Act are now unnecessary or useless, the law may also fail to allow the authorities to take action which would be useful. A particular example is that, in combating the renewed prevalence of TB in some areas, doctors do not want to detain sufferers (as the Act may allow). They do, however, want to be able to require them to attend at specific times for observed treatment.
- 4.6 The Act contains certain provisions that would also allow the deprivation of liberty in circumstances that would breach the Human Rights Act 1998. This is, of course, undesirable in its own right. But it could also have serious consequences if human rights applications to the courts were to de-rail action to combat the spread of an outbreak of a contagious disease.

- 4.7 The Act provides for a procedure for the notification (and thereafter control) of incidence of a fixed list of diseases. While some of these continue to be relevant today, others have been eradicated (such as smallpox). The law in relation to notification and the powers of the disparate authorities in the event of an outbreak are complex, and there are doubts as to the efficacy of the notification regime. In addition, it is likely that the approach of a fixed list of diseases could be improved upon.
- 4.8 Following up the representations from respondents to the consultation on the Ninth Programme, the Law Commission entered into discussions with officials at the Department of Health. However, in November 2004, the Chief Medical Officer decided that it would not be appropriate to ask the Law Commission to work on the issue at that point.
- 4.9 The Commission remains of the view that modernisation of this area of the law is desirable. It is true that the powers in the 1984 Act are rarely invoked. It is also the case that the recently enacted Civil Contingencies Act 2004 sets out new powers to deal with civil contingencies, though these have been conceived primarily to deal with issues arising from terrorist attacks or other serious emergencies.
- 4.10 The fear remains, therefore, that the effectiveness of the British response to a major outbreak of contagious disease could be significantly impaired by the defects in the law. At the very least, a scoping exercise to determine the necessity for such a reform would be desirable. Such an exercise would be able to learn lessons from how the law was able to cope in recent outbreaks in other countries (such as SARS in Hong Kong and Canada). It might also be useful to consider how, in a parallel situation, the UK law coped with, for instance, the recent foot and mouth outbreak in animals.
- 4.11 The Law Commissions Act provides that in submitting programmes of law reform we may make recommendations as to the agency by which reform should be carried out. We have rarely used this provision but in respect of this project we believe it is necessary to do so. We therefore recommend that the Government should seek to reform the law in this area either directly or through some other agency on its behalf.

Mistake, misrepresentation and non-disclosure

- 4.12 The Law Commission believes that if English contract law is to serve businesses and other parties in England and Wales, and is to remain attractive as the 'law of choice' to govern international contracts, it is essential to keep the general law of contract under review to ensure it meets modern requirements. Further, when English contract law has become markedly different from the law of its major competitors in Europe or elsewhere, it should be reviewed to ensure that the differences are indeed desirable. These factors attracted us to consider reviewing these three inter-linked topics.
- 4.13 The law governing the effect of misrepresentation on contracts has been criticised as unnecessarily complex, and the effects of some of the provisions of Misrepresentation Act 1967 (particularly the fiction of fraud in section 2(1)) as undesirable.

- 4.14 The doctrine of mistake was brought to the fore in *Great Peace Shipping v Tsavlis Salvage*.¹ The question was whether a party could avoid liability for contractual obligations because they had made a mistake about the subject matter of the contract, even though the other party had not induced the mistake.
- 4.15 The defendants had attempted to find rescue services for a ship in trouble in the Indian Ocean. They contracted with the claimants for assistance, in the mistaken belief that the claimant's ship was only 35 miles away. When they discovered that it was over 400 miles away they did not cancel the contract immediately, but sought another closer ship. They found one, cancelled the contract and refused to pay the contracted cancellation fee, arguing that the contract was void for common mistake. The claimants sued for the cancellation fee.
- 4.16 The Court of Appeal found for the claimants. Applying the narrow test set out in *Bell v Lever Brothers*,² it found that the additional distance did not render the subject matter of the contract essentially and radically different from that which was intended. The Court of Appeal held that the more flexible equitable doctrine of mistake claimed by Lord Denning in *Solle v Butcher*³ was not good law.
- 4.17 Two criticisms can be made of the law following *Great Peace*. The first is that where a mistake does affect a contract, the remedy operates inflexibly. The contract is treated as never having existed, which may, for example, affect the property rights of innocent third parties,⁴ and even as between the parties the court has little scope for making adjustments. The Court of Appeal highlighted this as a problem and suggested statutory reform. Lord Phillips commented:
- Just as the Law Reform (Frustrated Contracts) Act 1943 was needed to temper the effect of the common law doctrine of frustration, so there is scope for legislation to give greater flexibility to our law of mistake than the common law allows.⁵
- 4.18 Several academic commentators have echoed this call for statutory intervention.⁶
- 4.19 The second criticism is that the doctrine of mistake applies only in very narrow circumstances. In most cases it applies only when it was so serious that it made the "contractual adventure" impossible, and when the same mistake was made by both parties. Further, under the current law of misrepresentation there is no general duty to disclose relevant facts to the other party, even if you know that the other party is unaware of them and that they would have a major impact on the other party's decision whether or not to enter the contract.

¹ [2003] QB 679.

² [1932] AC 161.

³ [1950] 1 KB 671.

⁴ An example of this is *Shogun Finance Ltd v Hudson* [2003] 3 WLR 1371, discussed in connection with transfer of title.

⁵ [2003] QB 679, at para 161.

⁶ See Chandler, Devenney & Poole, "Common Mistake: Theoretical Justification and Remedial Inflexibility" (2004) JBL, Jan, 34 – 58 and C Hare "Inequitable Mistake (2003) CLJ 29.

- 4.20 In these respects English law differs markedly from that of several other European countries and of the United States, which allow contracts to be avoided in a wider set of circumstances, on the ground either of mistake or non-disclosure. The Commission considers that where English contract law differs from that of many other jurisdictions, it should do so for a good reason. Neither the fact that English law is different from its competitors' law, nor EU initiatives to harmonise contract law, mean that there is a need to standardise the law for its own sake. However, where English law is both open to criticism and out-of-line with other laws, the reasons for the differences need to be considered.
- 4.21 We would envisage a project that began by comparing the English law of non-disclosure, mistake and misrepresentation with that of other major European jurisdictions, including France and Germany, and other common law jurisdictions. It would go on to examine whether there are substantive differences (as opposed to mere differences of categorisation) between the common and civil law approaches and if so, whether these differences are justified. It would need to consider whether there is a need for greater flexibility in the remedies available, along the lines of (for example) the Law Reform (Frustrated Contracts) Act 1943 or the New Zealand Contractual Mistakes Act 1977; and whether the law can usefully be simplified.
- 4.22 Having considered the priority for projects for the Common and Commercial Law team we have had to conclude that this project has slightly less priority than those on Consumer Law, Insurance Contract Law, property interests in investment securities and transfer of title by a non-owner. It will however receive favourable consideration for inclusion in the next programme of law reform.

(Signed) SIR ROGER TOULSON, *Chairman*

HUGH BEALE

STUART BRIDGE

JEREMY HORDER

MARTIN PARTINGTON

APPENDIX A

LIST OF CONSULTEES

A.1 Full list of consultees who the Chairman or Chief Executive consulted on the contents of the Ninth Programme of Law Reform:

Ken MacDonald QC, Director of Public Prosecutions
The Right Honourable The Lord Bingham of Cornhill
The Right Honourable The Lord Woolf of Barnes, The Lord Chief Justice of England and Wales
The Right Honourable, The Lord Phillips of Worth Matravers, The Master of the Rolls
The Right Honourable, Dame Elizabeth Butler-Sloss GBE, The President of the Family Division
The Right Honourable, Sir Andrew Morritt, The Vice-Chancellor
His Honour Judge Shaun Lyons CBE, former Hon Secretary of the Council of Circuit Judges
Emma Pemberton, Secretary Judges' Council
Sir Nigel Crisp KCB
Marilynne Morgan CB
David Normington CB
Jonathon Jones, Legal Adviser
Gus O'Donnell CB
Sue Street
Isabel Letwin, Legal Adviser
Sir Brian Bender KCB
Donald Macrae, Solicitor & Director General, DEFRA
Sir Richard Broadbent KCB
David Pickup Customs Solicitor
Sir Nicholas Montagu KCB
P Ridd, Solicitor of Inland Revenue
Sir David Omand KCB
Timothy Walker
Robert Humm, Solicitor, Health and Safety Executive
Mrs Alison M Jackson
C Longville, Legal Adviser, Wales Office
David Rowlands CB
Chris Muttukumaru, Director, Legal Services, Dept for Transport
Desmond Flynn, The Insolvency Service
David Brummell, Attorney General's Chambers
Sir Michael Jay KCMG
Michael Wood CMG FCO
Winston Roddick QC, Welsh Assembly
Suma Chakrabarti, Department for International Development
Sir John Gieve KCB
David Seymour, Legal Adviser Home Office
Mavis McDonald CB
David Hogg CB, Director General Legal Group, ODPM
Sir Robin Young KCB
Anthony Inglese, Legal Services, DTI
Bernadette Kelly, Director, Corporate Law and Governance, DTI
Sally Moss, Head of Business Law Unit, DTI
Martin Wyn-Griffith, Small Business Service
Stephen Hadrill, Director-General, Fair Markets Group, DTI
Sir Richard Mottram KCB
Alex Allan, DCA
Richard Heaton, Director-General, Legal and International Group, DCA
Dame Juliet Wheldon DBE, HM Procurator General & Treasury Solicitor

Andrew Frazer, Civil Law Development, DCA
Deirdre Hutton CBE, National Consumer Council
Brendan Barber, General Secretary, Trades Union Congress
Martin Thomas, Financial Markets Law Committee
Mary Francis, Association of British Insurers
Jason Rowley, Federation of Insurance Lawyers
Peter Tyldesley, British Insurance Law Association
David Marshal, Association of Personal Injury Lawyers
Peter Williamson, Law Society
Matthias Kelly QC, The General Council of the Bar
Professor John Birds Society of Legal Scholars
Niall Morrison, The General Council of the Bar
Miss J L McLeod, Scottish Law Commission
Claire Irvine, Law Reform Advisory Committee for Northern Ireland
Professor Graham Zellick, Criminal Cases Review Commission
Sir John Egan, CBI
District Judge Jeremy Cochrane, Association of District Judges
District Judge Michael J Walker, Association of District Judges
David Harker OBE, National Association of Citizens Advice Bureaux
Dr Nich Pearson, Welsh Consumer Council
Stuart Etherington, National Council for Voluntary Organisations
Ms Rudi Reeves, Age Concern England
Michael Lake, Help the Aged
Sally Wheeler, Socio-Legal Studies Association
Michael Doherty, Association of Law Teachers
Dr Mads Andenas, British Institute of International and Comparative Law
Peter Hurst, Royal Courts of Justice
The Secretary, Board for Social Responsibility, Church of England
Hon. Barnabas Leith, Baha'i Community of the United Kingdom
Mr Paul Seto, The Buddhist Society
Dr Natubhai K Shah, Jain Samaj Europe
Mr Dorab Mistry, Zoroastrian Trust Funds of Europe
Dr David Goodbourn, Churches Together in Britain and Ireland
Henry Grunwald QC, Board of Deputies of British Jews
Mr Iqbal Sacranie OBE, The Muslim Council of Britain
Dr Indarjit Singh OBE, Network of Sikh Organisations (UK)
Bimal Krishna das, National Council of Hindu Temples
Nigel Karney, Commission for Local Administration in England
David Bowen, Commission for Local Administration in Wales
Walter Merricks, Financial Ombudsman Service
Dr Michael Biles, Independent Housing Ombudsman Scheme
Ann Abraham, Office of the Parliamentary Commissioner for Administration
Deborah Matthews, Judicial Studies Board
David Laverick, Pensions Ombudsman
Dame Sheila McKechnie DBE, Consumers' Association
John Tiner, Financial Services Authority

APPENDIX B

LIST OF COMPLETED PROJECTS

B.1 Programme items completed during the 8th Programme October 2001 – March 2005:

Item 1: Property Law

Sharing Homes: A Discussion Paper (LC278) published 15.11.02

Item 2: Electronic Commerce

Electronic Commerce: Formal Requirements in Commercial Transactions (website only) published 19.12.01

Item 4: Compound Interest

Pre-Judgment Interest on Debts and Damages (LC287) published 24.2.04

B.2 Referred items completed during the 8th Programme:

Compulsory Purchase

Towards a Compulsory Purchase Code: (1) Compensation (LC286) published 6.12.03

Towards a Compulsory Purchase Code: (2) Procedure (LC291) published 15.12.04

Defamation

Aspects of Defamation Procedure: A Scoping Study published March 2002

Defamation and the Internet: A preliminary investigation published 18.12.02

Housing

Renting Homes (LC284) published 5.11.03

Land, Valuation and Housing Tribunals: The Future (LC281) published 03.09.03

Publication of Local Authority Reports

In the Public Interest: Publication of Local Authority Inquiry Reports (LC289) published 13.7.04

Unfair Contract Terms

Unfair Terms in Contracts (LC292) published [stardate 250105]

Fraud

Fraud (LC276) published 30.7.02. The Home Office have accepted the bulk of our recommendations and will legislate when Parliamentary time allows.

Partnership Law

Partnership Law (Joint Report – LC283/SLC192) published 18.11.03

Evidence in Criminal Cases

Evidence of Bad Character in Criminal Proceedings (LC273) published 9.10.01

B.3 Other items completed during the 8th Programme:

Statute Law Revision Seventeenth Report (LC285; SLC193) published 15.12.03.

Implemented by Statute Law (Repeals) Act 2004 (came into force at Royal Assent on 22.7.04).