

THE LAW COMMISSION

(LAW COM No 311)

TENTH 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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LAW COMMISSION
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CONTENTS

PART 1: THE TENTH PROGRAMME OF LAW REFORM	5
INTRODUCTION	5
Background	5
The future of codification	5
The Law Commission's project selection criteria	6
Consultation	7
Web forum	7
Confirmed projects for the forthcoming programme	8
Project 1: Adult social care	8
Project 2: Intestate Succession and the Inheritance (Provision for Family and Dependants) Act 1975	8
Project 3: Level crossings legislation	8
Project 4: Marital property agreements	8
Project 5: Private rights of redress under Unfair Commercial Practices Directive	8
Project 6: Simplification of criminal law	8
Project 7: Unfitness to plead and the insanity defence	9
Method of working	9
Further projects	9
Ninth Programme completed projects	9
PART 2: THE NEW PROJECTS	10
Adult social care	10
Intestate Succession and the Inheritance (Provision for Family and Dependants) Act 1975	12
Level crossings legislation	13

Marital property agreements	13
Private rights of redress under Unfair Commercial Practices Directive	14
Simplification of criminal law	15
Treason	16
Public nuisance	16
Ransom kidnappings	17
Unfitness to plead and the insanity defence	17
SCOTTISH LAW COMMISSION'S SEVENTH PROGRAMME OF LAW REFORM	19
Unincorporated associations	19
PART 3: ONGOING WORK	20
PROJECTS TO BE CARRIED OVER	20
Bribery	21
Capital and income in trusts: classification and apportionment	21
Conspiracy and attempt	21
Consumer law: consumer remedies for faulty goods	22
Corporate criminal liability	22
Easements and covenants	23
Expert evidence in criminal proceedings	23
The High Court's jurisdiction in relation to criminal proceedings	24
Illegal transactions	24
Insurance contract law	25
Remedies against public bodies	25
Rights of third parties against trustees and trust funds	26
CONSOLIDATION OF LEGISLATION	26
STATUTE LAW REPEALS	28
ADVISORY WORK	29

PART 4: DEFERRED LAW REFORM PROJECTS	30
FEUDAL LAND LAW	30
TRANSFER OF TITLE TO GOODS BY NON-OWNERS	30
PART 5: OTHER LAW REFORM PROJECTS	32
SHARIA'A COMPLIANT HOME PURCHASE PRODUCTS	32
ANCILLARY RELIEF ON DIVORCE: SECTION 25 OF THE MATRIMONIAL CAUSES ACT 1973	32
AGENCY WORKERS	33
INTELLECTUAL PROPERTY LAW	34
ESTATE AGENCY REGULATION	34
SECURITY INTERESTS GRANTED BY UNINCORPORATED BUSINESSES	35
APPENDIX A: LIST OF CONSULTEES	36
APPENDIX B: LIST OF COMPLETED PROJECTS	42

PART 1

THE TENTH PROGRAMME OF LAW REFORM

To the Right Honourable Jack Straw MP, Lord Chancellor and Secretary of State for Justice

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 period of the Commission's programme of law reform is aligned with the period of the Government's spending plans to ensure that the Commission can match its programme of reform with the funding it can expect from the Government. The Tenth Programme of law reform runs from 1 April 2008. It is expected that the Eleventh Programme of law reform will commence on 1 April 2011.

The future of codification

- 1.2 With forty-two years' experience of seeking to codify the law, the Commission has taken the opportunity of the Tenth Programme to reappraise whether projects with codification as their principal outcome are realistic and whether effort and resources should explicitly be given to achieving that outcome.
- 1.3 Our founding fathers clearly saw codification as a goal that could not be achieved ahead of reform. Gerald Gardiner QC (later Lord Gardiner), in the opening chapter of *Law Reform Now*,¹ devoted a section to the need for it. Having explained the difficulty for anyone seeking to know what English law is on any given subject, he went on to say:

There is an extremely strong case for the progressive codification of English law in the sense of reducing to one statute, or a small collection of statutes, the whole of the law on any particular subject. The relatively few codes we have ... have proved their worth ...

...

Although progressive codification of the English law is much overdue, we are not suggesting that this should be given a high priority in the programme of law reform.

...

These considerations leave us with one single argument against the high priority of codification; but this one argument we regard as valid and decisive. The condition of English law being what it is, codification, if it is to be helpful, must of necessity be preceded by reform; there would be no point in including in any code that

¹ Gardiner and Martin (eds), *Law Reform Now* (2nd imp 1964), pp 1 to 14.

Parliament could be persuaded to enact great masses of obsolete or unjust law; it would only have to be taken out again.²

- 1.4 The complexity of the common law in 2007 is no less than it was in 1965. Further, the increased pace of legislation, layers of legislation on a topic being placed one on another with bewildering speed, and the influence of European legislation, continue to make codification ever more difficult.
- 1.5 The Commission continues to believe that codification is desirable, but considers that it needs to redefine its approach to make codification more achievable. Accordingly the Commission has decided that:
 - (1) It will continue to use the definition of codification used by Gerald Gardiner in *Law Reform Now*, that is, “reducing to one statute, or a small collection of statutes, the whole of the law on any particular subject”.
 - (2) Consistently with Gardiner’s concerns in 1964, the Commission’s main priority is first to reform an area of the law sufficiently to enable it to return and codify the law at a subsequent stage. If it can codify at the same time as reforming, it will do so.
- 1.6 The first direct effect of these decisions is that the Commission has removed from this Programme mention of a codification project in relation to criminal law. The duty in reforming the criminal law, as elsewhere, is to identify reform projects that will make the law accessible, remove uncertainties and bring it up to date with the aim that in the future we will return and codify the area if we cannot do so as part of the project. Rather than specifically referring to codification as the intended outcome, we have introduced a new item, which seeks to undertake projects to simplify the criminal law (this is explained in more detail at paragraph 2.24, below). We see this work as the necessary precursor to any attempts to codify the criminal law.

The Law Commission’s project selection criteria

- 1.7 To be included in a Programme, projects are 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 judgments.

² Gardiner and Martin (eds), *Law Reform Now* (2nd imp 1964), pp 11 to 12.

- (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

- 1.8 The Tenth Programme of law reform is the result of a long process of consultation. The Commission opened a period of general consultation between 19 January 2007 and 30 March 2007, during which Government departments, Parliamentary Committees, the judiciary, the academic community, other interested bodies and specialist organisations, and the general public were consulted as to areas of law that they considered to be in need of reform. We received a total number of 191 responses constituting 119 potential projects. A number of potential projects were subsequently consolidated into a single potential project, whilst in some cases what was previously dealt with as a single project was broken down into separate projects. A list of consultees is attached at Appendix A. The Commission is most grateful to all those who responded to the consultation.

Web forum

- 1.9 The Ninth Programme of law reform stated that the Commission would be marking its 40th Anniversary by implementing better means of conducting consultation exercises. Rapid developments in technology have shifted the way in which information is transmitted and received. In its drive to adopt the most inclusive of approaches, the Commission is keen to embrace new online methods of engagement to enhance consultation.
- 1.10 As part of this drive, the Commission launched a web discussion forum where members of the public had the opportunity to post Tenth Programme consultation responses online and engage in dialogue with one another and the Commission. This forum was part of the “Digital Dialogues” initiative, a pilot scheme commissioned by the then Department for Constitutional Affairs (now Ministry of Justice) and carried out by the Hansard Society. The aim of the pilot was to explore the potential of information and communication technology to support central government communications and consultations.
- 1.11 There were a total of 79 registrants on the forum, 3,384 visitors, 1,709 unique users (who spent a significant amount of time on the site) and 47 comments posted. The consultation responses received through the web forum were analysed in the same way as all other responses received through other media. Participation in this pilot gave the Commission a unique opportunity to trial how online tools can significantly enhance consultation. More work on this is planned for the future. The web forum is available for viewing at <http://forum.lawcom.gov.uk>.
- 1.12 The Commission is grateful for the assistance and support of the Digital Dialogues team at the Hansard Society, particularly Ross Ferguson and Laura Miller. For further information on the Digital Dialogues project see <http://www.hansardsociety.org.uk>.

Confirmed projects for the forthcoming programme

- 1.13 Inevitably the Commission can only undertake a number of projects in a three year programme. Decisions are made applying the criteria set out above. New projects confirmed for the forthcoming Programme are:

PROJECT 1: ADULT SOCIAL CARE

- 1.14 The purpose of this ambitious project is to review the law under which residential care, community care and support for carers is provided. The law is currently fragmented and difficult to understand and apply, for both users and service providers. The ultimate aim would be to provide a coherent legal structure, preferably in the form of a single statute, for these services.

PROJECT 2: INTESTATE SUCCESSION AND THE INHERITANCE (PROVISION FOR FAMILY AND DEPENDANTS) ACT 1975

- 1.15 This project will involve a general review of the law of intestacy (the rules governing the inheritance of assets where a person dies without leaving a will which disposes of the entirety of his or her estate). It will also consider the legislation under which family members and dependants may apply to court for reasonable financial provision from the estate of a person who has died.

PROJECT 3: LEVEL CROSSINGS LEGISLATION

- 1.16 The law regulating the use, safety requirements, closure and other aspects of railway level crossings is antiquated – much of it being in nineteenth century private legislation – and inadequate. This project will undertake a general review of the law with a view to providing a modern, accessible and balanced legal structure for their regulation.

PROJECT 4: MARITAL PROPERTY AGREEMENTS

- 1.17 This project will examine the status and enforceability of agreements made between spouses or civil partners (or those contemplating marriage or civil partnership) concerning their property and finances. Such agreements are not currently enforceable in the event of the spouses' divorce or the dissolution of the civil partnership. The court may, however, have regard to them in determining what ancillary relief is appropriate.

PROJECT 5: PRIVATE RIGHTS OF REDRESS UNDER UNFAIR COMMERCIAL PRACTICES DIRECTIVE

- 1.18 In May 2008 the Unfair Commercial Practices Directive was implemented, overhauling current consumer protection regulation. Breaches of the Directive will be enforced by administrative measures or through the criminal courts. Currently the regulations provide no private rights to consumers, who will have to rely on current private law doctrines for redress. This project will consider how far a private right of redress for unfair commercial practices would simplify and extend consumer law.

PROJECT 6: SIMPLIFICATION OF CRIMINAL LAW

- 1.19 Changing political and social conditions mean that criminal offences that once served an important purpose have ceased to do so. Likewise, existing offences (statutory and common law) that once had an important role to play no longer do

so because they have been overtaken by the creation of new offences. This project would seek to identify those offences with a view to their abolition or repeal. This simplification of the criminal law would be a necessary precursor to any attempt to codify the criminal law.

PROJECT 7: UNFITNESS TO PLEAD AND THE INSANITY DEFENCE

- 1.20 The current law is based on rules formulated in the first half of the nineteenth century when the science of psychiatry was in its infancy. Those rules are in need of reform. There are important unresolved issues which include the scope of a trial of the facts following a finding of unfitness to plead. In addition, there is a need to reconsider the relationship between automatism and insanity and that between diminished responsibility and insanity.

Method of working

- 1.21 The Commission has a long established reputation for the excellence of its legal research and analysis and has always looked to the legal impact of its proposals in assessing their desirability. However, Government departments have not always found it easy to analyse the economic impact of the Commission's proposals and this has made it harder for departments to implement recommendations. The Commission has therefore agreed that its proposals under the Tenth Programme will be accompanied by impact assessments prepared, so far as it can, to the standard expected of Government departments. Development of the impact assessment will in future form an integral part of all projects from commencement to completion.

Further projects

- 1.22 New projects are expected to come to the Commission over the course of the Tenth Programme. These will be incorporated into the Programme depending on resources, the volume of ongoing work and the urgency of the new project.

Ninth Programme completed projects

- 1.23 The one-page summary in Appendix B outlines the projects which were completed during the Ninth 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.

PART 2

THE NEW PROJECTS

- 2.1 In this Part 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	Projected Key Dates
Adult social care	Department of Health	Scoping review April to November 2008; substantive project to begin January 2009; report April 2011; report and draft Bill July 2012
Intestate Succession and the Inheritance (Provision for Family and Dependents) Act 1975	Ministry of Justice	Begin September 2008; report and draft Bill September 2011
Level crossings legislation	Department for Transport	Begin April 2008, report and draft Bill June 2011
Marital property agreements	Ministry of Justice	Begin September 2009; report and draft Bill September 2012
Private rights of redress under Unfair Commercial Practices Directive	Department for Business, Enterprise and Regulatory Reform	Begin April 2010; scoping study autumn 2010
Simplification of criminal law	Ministry of Justice	On-going project beginning in 2009
Unfitness to plead and the insanity defence	Ministry of Justice	Begin September 2008; report and draft Bill December 2010

Adult social care

- 2.2 The legislative framework for adult residential care, community care and support for carers is inadequate, often incomprehensible and outdated. It remains a confusing patchwork of conflicting statutes enacted over a period of 50 years. There is no single, modern statute to which service providers and service users

can look to understand whether services can or should be provided, and what kinds of services. For example, there are currently four different statutes covering carers' assessments, all of which differ in a number of respects. In addition to a number of different statutes, there is also a great deal of "soft law" in the form of guidance, departmental circulars and the like. For example, the community care assessment process is covered by two sets of general guidance (the Fair Access to Care Services Guidance (2002) and Care Management and Assessment: Practitioners' Guide (1991)), plus various client group-specific documents, such as the Single Assessment Process (2002), which applies to older people.

- 2.3 The current state of the law leads, first, to inefficiency in the system – negotiating complex and outdated law takes longer and is less certain. Too much time and money are spent on understanding the law and on litigation. Difficult law may also stifle innovation. It is also likely to lead to arbitrary differences in legal rights and status between different service users and different kinds of service.
- 2.4 Secondly, and more fundamentally, the law tends to reflect the policy imperatives and understandings current at the time it was made. For example, the core definition of disability in community care law, which can determine in some circumstances whether services must be provided, is contained in the National Assistance Act 1948. It uses outdated concepts such as “mentally disordered”, “handicapped” and “suffer[ing] from congenital deformity”. This definition is at odds with the modern definition of disability set out in the Disability Discrimination Act 1995 which focuses on the impact of the person's disability. Given that the law has grown up piece-meal since 1948, it is not likely to provide a clear and principled approach to assessment and service provision. For example, the community care assessment process is based on conflicting principles and outcomes. The Chronically Sick and Disabled Persons Act 1970 provides a community care assessment process based on identifying people's medical conditions, while the NHS and Community Care Act 1990 provides an alternative system based on identifying people's needs which may (or may not) result from a medical condition.
- 2.5 This project would be a major undertaking, potentially affecting large numbers of people and huge resources. There are about 1.75 million clients for adult social care services. Expenditure on such services by local and central government amounts to £19.3 billion annually. By improving the efficiency and effectiveness of service delivery, a modernised legal structure could have a positive effect on the lives of very many people.
- 2.6 The Commission considers that, particularly in a project of this size and scope, it is of the first importance that there should be a continuing and positive commitment from Ministers. It will also involve a substantial commitment of Commission resources. Accordingly, the intention is to split the project into three phases, providing break points for both the Commission and the Department.
- 2.7 The first phase would be a scoping report. This would aim to delineate clearly the scope of the project and provide it with a detailed agenda for reform. In doing so, it would be important to draw clear lines between law reform, on the one hand, and pure policy matters, on the other. The second stage would be the substantive project. This would involve the Commission consulting on and developing law reform policy proposals in the normal way, which would be reported on without

producing a draft Bill. This would give both Government and Commission the opportunity to consider the desirability of the third stage, the drafting of a Bill.

- 2.8 The review would be expected to work on a broadly expenditure-neutral basis. The ultimate aim would be to produce an overarching legal structure that would work at any given level of resources.

Intestate Succession and the Inheritance (Provision for Family and Dependents) Act 1975

- 2.9 This project will involve a general review of the law of intestacy and the 1975 Act. The two areas are distinct but complementary (the 1975 Act applies in relation to both testate and intestate estates).
- 2.10 The consideration of intestacy would entail a review of the current rules governing the inheritance of assets where a person dies without leaving a will which disposes of the entirety of his or her estate. Aspects of the current law that are likely to be examined include the entitlements of different members of the deceased's family, the role of the statutory legacy, the effect of other gifts by the deceased (the "rules of hotchpot"), the rules of *bona vacantia* and the relevance of various factors not taken into account by the current rules. The review of the 1975 Act will address the classes of person eligible to apply under the Act, the remedies available and the procedure governing the making of applications.
- 2.11 In 2005, the Department for Constitutional Affairs (as it then was) carried out a consultation on the statutory legacy currently paid to surviving spouses on an intestacy.¹ It concluded on the basis of that consultation that a wide-ranging review of intestacy and family provision was required and asked the Law Commission to carry out that review. The Scottish Law Commission is currently undertaking a project on the Scottish law of succession and issued a Discussion Paper in August 2007.²
- 2.12 Intestacy and family provision are important areas of the law, affecting a large number of families at times of financial and emotional vulnerability. Many tens of thousands of people die intestate each year, and it appears that this figure is rising. National Consumer Council research suggests that more than 27 million adults in England and Wales do not have a will and that those who need one most are the least likely to have one.³ The NCC claims that nearly one quarter of 55 to 64 year-olds have personal experience of the human and economic costs associated with intestacy or know someone who has. The consequences of the problems caused by the current law may be severe. For example, a surviving spouse or partner may have to sell the family home to satisfy other entitlements.

¹ Department for Constitutional Affairs, *Administration of Estates: Review of the Statutory Legacy* (CP 11/05, 2005).

² See Seventh Programme of Law Reform (2005) Scot Law Com No 198, paras 2.21 to 2.30.

³ National Consumer Council, *Finding the Will: a Report on Will-Writing Behaviour in England and Wales* (September 2007). According to the NCC sample, rates are particularly low amongst cohabitants (only 17% have a will), parents with dependent children (21%), those in low socio-economic groups (27% in category DE compared to 70% of those in AB) and Black and Minority Ethnic groups (12%).

In other cases, excluded family members may be forced to make applications for relief. This is expensive and can damage family relationships.

- 2.13 The Commission carried out work on intestacy in the late 1980s.⁴ Commissioners are of the view that subsequent changes in family structures and individual property holding are sufficiently great to justify a re-examination.⁵ The 1975 Act, which was based on Commission recommendations,⁶ has not been subject to a fundamental review since its introduction.

Level crossings legislation

- 2.14 The law relating to the 7,700 level crossings on the railway system is hopelessly complicated and inaccessible. The law is initially determined by the legislation (mostly, but not exclusively, private) governing the establishment of the railway line in question. Two nineteenth century public Acts made provision for model clauses on (among many other things) level crossings, one on an opt-out and one on an opt-in basis. There is a further customary characterisation of level crossings on the basis of their purpose or justification (in the case of level crossings of private rights of way). Highways law also has an impact, different provision being made for different sorts of public roads, and different notions of “public” applying in different contexts. There is modern legislation concerned with safety at level crossings (the Level Crossings Act 1983), but it has to operate on the base of the pre-existing law. The law relating to the creation of *new* railways has also been modernised (Works and Transport Act 1992). The absurdity of the current law is demonstrated by the fact that, in an order re-making some of the model clauses from the nineteenth century acts, an order in 2006 had to refer to turnpike roads, a category abolished by an Act of 1878.
- 2.15 The consequence of the complexity and inaccessibility of the law is, first, that it is difficult and expensive to operate. Secondly, questions arise relating to change at level crossings – proposals to change safety provision, closure, and the impact of environmental change in the locality of level crossings, such as new developments increasing usage of the road in question. The Office of Rail Regulation, the industry regulator, sees the current law as an impediment to its ability to balance the competing interests in play. A modernised and simplified law would, therefore, facilitate appropriate regulation.
- 2.16 The objective of the project should be a single modern public statute or regulatory reform order governing level crossings.

Marital property agreements

- 2.17 This project will examine the status and enforceability of agreements made between spouses and civil partners (or those contemplating marriage or civil

⁴ Distribution on Intestacy (1989) Law Com No 187.

⁵ The Scottish Law Commission’s current project follows its consideration of the same issues towards the end of the 1980s, culminating in a Report on Succession published in 1990 (Scot Law Com No 124). The recommendations in that Report were not implemented.

⁶ Second Report on Family Property: Family Provision on Death (1974) Law Com No 61.

partnership) concerning their property and finances. Such agreements might regulate the couple's financial affairs during the course of their relationship; equally they might seek to determine how the parties would divide their property in the event of divorce, dissolution or separation. They might be made before marriage (often called "pre-nups") or during the course of marriage or civil partnership. They need not be made in anticipation of impending separation; but they might constitute separation agreements reached at the point of relationship breakdown.

- 2.18 Unlike in many other jurisdictions, marital property agreements are not currently enforceable in the event of the spouses' divorce or the dissolution of the civil partnership. The court may, however, have regard to them in determining what ancillary relief is appropriate.
- 2.19 The legal recognition of marital property agreements is of great social importance. Relationship breakdown remains a significant phenomenon⁷ and financial and property disputes between separating spouses and civil partners often lead to distress and expense for all involved. There is a view that the fact that pre-nuptial agreements are not currently binding may deter people from marrying or entering into civil partnerships in some cases. The issue may be of particular importance to those who have experienced divorce and wish to protect their assets, however extensive, from a future claim for ancillary relief. It may also be crucial for couples who have entered into marital property agreements in jurisdictions in which such agreements are enforceable.
- 2.20 The Commission has recently considered some of the issues relevant to this project in the context of its work on cohabitation. The Commission's Report⁸ made recommendations about cohabitation agreements. The Marital Property Agreements project will not consider the treatment of cohabitation agreements; its scope is limited to financial and property agreements between spouses and civil partners.

Private rights of redress under Unfair Commercial Practices Directive

- 2.21 In May 2008, the Unfair Commercial Practices Directive⁹ was implemented, overhauling consumer protection regulation as currently enforced by the Office of Fair Trading and trading standards officers. Many detailed rules about, for example, trade descriptions, misleading price indications and harassment of debtors were replaced by broad "standards" of good practice. Breaches of the Directive are enforced by administrative measures or through the criminal courts. Currently the regulations provide no private rights to consumers, who will have to rely on current private law doctrines for redress. Consumer organisations have argued strongly for such a private right, and the Department for Business, Enterprise and Regulatory Reform has asked us to consider whether such a right is appropriate.

⁷ In 2006 there were 132,562 divorces in England and Wales (Office for National Statistics).

⁸ Cohabitation: The Financial Consequences of Relationship Breakdown (2007) Law Com No 307.

⁹ 2005/29/EC.

- 2.22 The advantages of such a new right are that it may simplify the law, and would extend protection into new areas. However, the scope of the Directive is wide, and many of its effects are uncertain. We would need to proceed cautiously to avoid unintended consequences. We think it would be helpful to gain more experience of how the new rights will work in the UK – and to learn from the Irish experience of introducing a general right to redress into their law.
- 2.23 We cannot begin work until we have completed our work on the consumer remedies project in April 2010. Our intention is to publish a scoping study in autumn 2010 to consider the advantages and disadvantages of a private right of redress in the light of experience.

Simplification of criminal law

- 2.24 In Part 1 we explained that the Commission continues to support the objective of codifying the law, and will continue to codify where it can, but considers that it needs to redefine its approach to make codification more achievable. This project is an important component of that redefinition. We believe that simplification of the criminal law is a necessary step in furtherance of its codification. The aim of the project would be to identify those areas of the criminal law where the law could be simplified and improved by the abolition or repeal of offences that had passed their sell-by date. We provide some examples in the next section. Unlike most of our projects on criminal law which often result in the replacement of existing offences with new offences, the potential fruits of this project would be the simplification of the criminal law by reducing the number of criminal offences.
- 2.25 This is a highly suitable project for the Commission to undertake. It is consistent with the Commission's statutory duty to keep the whole of the law under review. As with Statute Law Repeals ("SLR"), it would seek to modernise the law and simplify the statute book (and also the common law) by making it clearer, shorter and more accessible. Further, it is a project that is not inconsistent with codification of the criminal law but a necessary precursor to it. However, the project would not impinge on the Commission's existing work on SLR. SLR involves the identification and repeal of statutes that are obsolete, or which otherwise serve no useful purpose, provided that repeal would not be controversial in the sense that Parliamentarians would not wish to fully debate it. A project involving simplification of the criminal law would involve looking at areas of the law where repeal of statutory offences would not be uncontroversial in the sense described above. Further, SLR by definition does not consider repeal of common law offences.
- 2.26 The scope of this project is open-ended in that it is not a project that is devoted to a discrete area of the law. It will therefore be necessary to identify from time to time the precise areas of law to be simplified. To ensure our work is as relevant and useful as it can be, we will seek the agreement of Ministers to the individual areas of the law that we wish to simplify before embarking on a specific simplification exercise. We have not formally agreed any such areas with Ministers at present, but we can illustrate the potential scope of the project by reference to three areas of the criminal law.

Treason

- 2.27 Treason is an ancient crime. There are a number of offences of high treason contained in ancient statutes dating back to 1351. They are a somewhat motley lot and include violating various members of the Royal Family, murdering various members of the Royal Family, levying war against the sovereign and adhering to the sovereign's enemies in the realm.
- 2.28 The Law Commission published a Working Paper on the topic in 1977. Its provisional view was that there should be an offence to penalise conduct aimed at the overthrow by force of the constitutional government. However, this is not an offence of treason but one of sedition since it is an offence against the State. The Commission, in making the proposal, did not consider the extent to which this was already covered by the Treason Felony Act 1848.
- 2.29 There is a need to consider the justification for the existing treason offences. In the Middle Ages, England was more often than not at war. It is questionable whether treason offences are required in peacetime. In the eighteenth century there were serious rebellions bordering on civil war. Nowadays, we have offences such as riot to cope with serious civil unrest. Terrorism is a modern phenomenon and the treason offences are ill-equipped to deal with it. Instead, we now have discrete terrorism offences.
- 2.30 Treason is an area where the criminal law could be simplified and pruned. It is an example of an area of the law shaped by political and social conditions that have ceased to be of contemporary relevance. Offences which once served a useful purpose no longer do so, in part because new offences have been developed which are far better suited for tackling the problems that currently afflict society.
- 2.31 The law of treason applies to England and Wales and also Scotland. The Scottish Law Commission has informed us that this would be an area where a joint project would be appropriate.

Public nuisance

- 2.32 Public nuisance is an example of a common law offence which arguably has outlived its utility. In *Rimmington*,¹⁰ the House of Lords considered the common law offence of public nuisance. Lord Bingham referred to a number of statutory offences which address the sort of conduct that common law authorities suggested was covered by the common law offence of public nuisance. He said that the existence of such offences meant that "the circumstances in which, in future, there can properly be resort to the common law crime of public nuisance will be relatively rare".¹¹ Agreeing that there may be a strong case for abolishing the crime, he said "That is a task for Parliament, following careful consideration (perhaps undertaken in the first instance by the Law Commission) ...".¹²

¹⁰ [2005] UKHL 63, [2006] 1 AC 459.

¹¹ Above, at [31].

¹² Above. Lord Bingham emphasised that the judges cannot abolish offences.

Ransom kidnappings

- 2.33 The lack of a compendious offence to cover ransom kidnappings means that the prosecution is obliged to include a number of separate counts in the indictment, for example, false imprisonment, kidnapping, blackmail and threats to kill. This means that, in summing up to a jury, a judge has to give directions in relation to a range of different offences. In addition, there are particular anomalies in the way that the Firearms Act 1968 and the defence of duress apply to the different substantive offences. Arguably, it would be far better if in ransom kidnapping cases, which are not unusual, the prosecution could proceed by way of a compendious offence. If so, this would be an example of the law being simplified by the creation of a new offence to replace, in a particular context, an array of common law and statutory offences. However, those offences would not be abolished or repealed because they have an important role to play in other contexts.

Unfitness to plead and the insanity defence

- 2.34 Those who are mentally ill are amongst the most vulnerable of society's citizens. One would hope and expect that the rules governing the criminal liability of the mentally ill would be informed by humane principles while recognising the Government's legitimate concern that the public should be adequately protected from harm. Above all, one would hope and expect that the criminal justice system would be informed by modern science, in particular modern psychiatric thinking.
- 2.35 All of this would be true even if the number of mentally ill persons encountering the criminal justice system was small. However, the numbers are increasing and there is no reason to believe that the trend will reverse. It is now recognised that there is a close link between mental illness and the consumption of intoxicants, such as alcohol, cannabis and cocaine. The consumption of intoxicants has been steadily increasing and the consumption is now starting at an earlier age. The link between crime, mental illness and intoxicants can be seen in our prisons where many inmates have a history of abuse of intoxicants combined with mental health problems.
- 2.36 The problems with the current law are many and deep. They are not problems that exist merely at the margins. It was noted above that one would expect the law to be informed by modern psychiatric thinking. Yet, the current test for determining fitness to plead dates from 1836. The current rules for determining legal insanity date from 1842. In those days, the science of psychiatry was in its infancy.
- 2.37 It is hardly surprising that the rules have proved difficult to apply. For example, a key concept in the 1842 rules is "disease of the mind". However, the phrase has no agreed psychiatric meaning. As interpreted by the courts, it has even come to include conditions that are not mental disorders, such as epilepsy and diabetes. In addition, the 1842 rules focus exclusively on the cognitive and fail to include the conative. This issue of principle needs to be re-evaluated. The stringent 1836 test of capacity for the purposes of fitness to plead needs to be reconsidered and should be contrasted with the much wider test contained in the Mental Capacity Act 2005.

- 2.38 As well as the test for determining fitness to plead being antiquated, there are unanswered questions as to the scope of the trial of the facts following a finding of unfitness to plead. For example, it is unclear what issues can be raised by the defendant, in particular “defences” of accident, mistake and self-defence.
- 2.39 There are other fundamental issues that need to be addressed. One is the relationship between insanity and automatism. The relationship is unsatisfactory because of the “external factor” doctrine. This doctrine needs to be re-evaluated. The relationship between insanity and the partial defence of diminished responsibility is also complex and needs to be re-evaluated, particularly in the light of the recommendations that the Commission has recently made for reform of the partial defence. Other issues are whether the adversarial approach to deciding fitness to plead is appropriate and whether there are issues that are peculiar to children and young persons.
- 2.40 The above is not an exhaustive account of the problems but it does serve to illustrate the wide-ranging and profound problems associated with the current law.
- 2.41 From what has been said already, it is apparent that this would be a substantial project that would involve the Commission considering two discrete but inter-related areas. The issues that would need to be examined are extensive and difficult. The project will involve very considerable consultation with the psychiatric profession, legal practitioners and with interested organisations, for example, Epilepsy Action.
- 2.42 There would also need to be an extensive examination of comparative law not only as regards the substantive law but also procedural issues. For example, some jurisdictions have dedicated Mental Health Courts and the desirability of introducing such courts is something that would need to be considered.
- 2.43 It would be a project in which the gathering of empirical evidence would be important. How often is fitness to plead an issue? Have the numbers of findings of unfitness to plead remained constant? Is unfitness to plead raised more often in relation to some offences, for example, murder, than others? The same questions need to be asked in relation to the insanity defence. Professor R D Mackay, the leading legal academic in England and Wales on mental conditions and the criminal law, has an unrivalled data base covering cases of fitness to plead and insanity dating back to 1991. He has indicated that he would be pleased to assist the Commission.
- 2.44 The area is highly suitable for a Law Commission project. The foundations of the current law rest on judicial rulings made in the first half of the nineteenth century. As a result, the legal tests consist of concepts on which there is no agreed psychiatric meaning. A finding of insanity attracts huge stigma and it is a finding which, under the current law, may be made in cases where the defendant was not mentally disordered.
- 2.45 There has been no review of the criteria and terminology of insanity and unfitness to plead since the Butler Committee reported in 1975. In the years since, there

has been legislation which has tinkered at the edges, mainly in relation to disposals of those found unfit to plead or legally insane.¹³ This has been done in order to ensure that our domestic law is compliant with the European Convention on Human Rights and Fundamental Freedoms.

- 2.46 The core of the project would be to identify better and more up to date legal tests and rules for determining fitness to plead and legal insanity. The issues are not the exclusive province of lawyers because, for example, modern psychiatric thinking and practice would be likely to profoundly influence the content of any recommendations. Nevertheless, this does not detract from its suitability. Further, the appropriate legal tests and rules are not matters on which one would expect political considerations to encroach. Although it is a controversial area, it is not so in the party political sense.

SCOTTISH LAW COMMISSION'S SEVENTH PROGRAMME OF LAW REFORM

Unincorporated associations

- 2.47 A review of the law in relation to unincorporated associations is included in the Seventh Programme of the Scottish Law Commission. Work started on this project in the middle of 2007. Among the issues which will be examined are the legal status and legal personality of unincorporated associations, and the liability of the club or its representatives for damages in respect of injuries sustained by club members or third parties.¹⁴
- 2.48 The Scottish Law Commission will inform and consult us as their work progresses. We intend to monitor this project with a view to considering from time to time whether any proposed reform should be the subject of recommendations by us in relation to England and Wales.

¹³ Criminal Procedure (Insanity and Unfitness to Plead) Act 1991; Domestic Violence, Crime and Victims Act 2004, s 25.

¹⁴ For further information see Seventh Programme of Law Reform (2005-2009) Scot Law Com No 198, paras 2.40 to 2.45.

PART 3 ONGOING WORK

- 3.1 This Part sets out the work being carried over from the Ninth Programme of law reform. It also outlines other ongoing work at the Commission.

PROJECTS TO BE CARRIED OVER

- 3.2 The Tenth Programme consolidates and supersedes the previous programmes. Ongoing projects from the Ninth Programme are:

Name of Project	Lead Department	Projected Key Dates
Bribery	Ministry of Justice	Report and draft Bill autumn 2008
Capital and income in trusts: classification and apportionment	Ministry of Justice	Report and draft Bill April 2009
Conspiracy and attempt	Ministry of Justice	Report and draft Bill spring 2009
Consumer law: consumer remedies for faulty goods	Department for Business, Enterprise and Regulatory Reform	Consultation paper autumn 2008; report spring 2010
Corporate criminal liability	Ministry of Justice	Consultation paper autumn 2009; report 2010
Easements and covenants	Ministry of Justice	Report and draft Bill July 2010
Expert evidence	Ministry of Justice	Consultation paper summer 2008; report spring 2009
High Court's jurisdiction in relation to criminal proceedings	Ministry of Justice	Report and draft Bill summer/autumn 2009
Illegal transactions	Ministry of Justice	Report and draft Bill autumn 2008
Insurance contract law	HM Treasury	Second consultation paper 2009; final report 2010
Remedies against public bodies	Ministry of Justice	Report 2009
Rights of third parties against trustees and trust funds	Ministry of Justice	Begin August 2010

Bribery

- 3.3 This project builds on earlier Law Commission and Government work on corruption. Most recently, the Government published a consultation paper in December 2005 which revealed that there is broad support for reform of the existing law but no consensus as to how it can best be achieved. The Government has recently asked the Law Commission to take forward the findings of the consultation. Our review considers the full range of structural options for a scheme of bribery offences. It will also look at the wider context of corrupt practices so that it will be clear how existing provisions complement the law of bribery. We published a consultation paper in November 2007 to be followed by the publication of a final report and draft Bill in autumn 2008.

Capital and income in trusts: classification and apportionment

- 3.4 This project considers the complicated rules governing (1) the classification of trust receipts and expenses as capital or income and (2) the requirement that trustees apportion capital and income in order to keep a fair balance between different beneficiaries. The Commission published a consultation paper in July 2004 (Law Com No 175) provisionally proposing: new, simpler rules for the classification of corporate receipts by trustee-shareholders; a new trustee power to allocate investment returns and trust outgoings as capital or income (in place of the existing rules of apportionment); and clarification of the mechanism by which trustees of permanently endowed charities may invest on a "total return" basis.
- 3.5 The project was suspended in 2004 pending completion of the Commission's work on trustee exemption clauses and cohabitation. The Commission has now returned to the project and is in the process of finalising its policy with a view to instructing Parliamentary Counsel to produce a draft Bill. We aim to publish a report and draft Bill in April 2009.

Conspiracy and attempt

- 3.6 Following the decision of the House of Lords in *Saik*,¹ the Government asked the Law Commission to review the offence of statutory conspiracy as defined in the Criminal Law Act 1977. As it had been the Commission's aim to undertake a general review of inchoate liability and secondary liability,² we took the opportunity this request provided to also review the inchoate offence of criminal attempt.
- 3.7 In *Saik* the defendant had been charged with conspiracy to 'launder' the proceeds of crime. He pleaded guilty on the basis that he suspected that his dealing involved 'dirty' money. However, the House of Lords held that the defendant's suspicion about the source of the money was an insufficient basis for a conviction. It was held that under the current law in order to convict him it would have to be shown that he intended or knew that the money was the proceeds of

¹ [2006] UKHL 18, [2007] 1 AC 18.

² See Inchoate Liability for Assisting and Encouraging Crime (2006) Law Com No 300 and Participating in Crime (2007) Law Com No 305.

crime. In our review, amongst other issues, we are considering whether the law is right to require such a high fault threshold.

- 3.8 A key aim of the Criminal Attempts Act 1981 was to ensure that the law of criminal attempt was neither under nor over-inclusive. Unfortunately, the courts have taken widely divergent views on how best to conduct this balancing exercise. In our review, we are considering how the law can be improved in this respect. We published a consultation paper in October 2007 to be followed by a final report and draft Bill in Spring 2009.

Consumer law: consumer remedies for faulty goods

- 3.9 Consumer law affects everyone in their everyday life. It is therefore important that it should be simple and accessible. Unfortunately, the remedies for faulty goods are particularly complex. The traditional UK remedies of rejection and damages have been overlain by four new European remedies: repair, replacement, rescission and reduction in price. Even trained advisers find it difficult to understand how these six remedies relate to each other. In November 2006, the Davidson Review drew attention to the urgent need for the law to be simplified.³
- 3.10 This is a joint project with the Scottish Law Commission, which was referred to us by the Department for Business, Enterprise and Regulatory Reform in December 2007. Our aim is to simplify the remedies available to consumers for goods that do not conform to contract; to bring the law into line with accepted good practice, where practicable; and to provide appropriate remedies that allow consumers to participate with confidence in the market place.
- 3.11 At the same time the European Commission is reviewing the eight existing directives on consumer law. The Department has also asked us to advise them on issues raised in the course of this review which relate to the reform of the Consumer Sales Directive and/or remedies for breach of a consumer contract. This will include, for example, the European Commission's proposal that remedies for goods should be extended to software. This would mean, for example, that consumers should have similar protections whether they buy a CD or download music over the internet.
- 3.12 We intend to publish a consultation paper in autumn 2008 and a final report by spring 2010.

Corporate criminal liability

- 3.13 The current law relating to corporate criminal liability has attracted a great deal of criticism. For some offences, a company can be held criminally liable on the basis of strict liability. For some offences which involve a fault element, a company can be held criminally liable on the basis of the doctrines of vicarious liability and delegation. For other offences which involve a fault element, it may be possible to convict a company on the basis of vicarious corporate liability, if the offence concerns retail regulation or market regulation. For serious, stigmatic offences

³ The Davidson Review was set up under the aegis of the Better Regulation Executive to consider the implementation of the EU Directives: see Final Report, November 2006, para 3.23.

which involve a fault element, a company can only be held criminally liable if a high-ranking officer or employee of the company satisfies the fault element of the offence – the “identification” theory. In the context of manslaughter, the problems associated with the identification theory resulted in the Corporate Manslaughter and Corporate Homicide Act 2007. However, the identification theory is still relevant to other serious, stigmatic offences.

- 3.14 As part of the Commission’s previous project on codification of the substantive criminal law, we have already undertaken a considerable amount of work. It was our intention to publish a consultation paper by the end of 2007 but, following the request by the Government to review the law of bribery, we had to defer further work. Our work in relation to bribery has confirmed our view that a general review of the law of corporate criminal liability is essential. We intend to return to this topic and to publish a consultation paper in autumn 2009.

Easements and covenants

- 3.15 An easement is a right enjoyed by one landowner over the land of another. The law has never been subject to a comprehensive review, and many aspects are now outdated and a cause of difficulty. The Commission’s project ties together an examination of easements with a reconsideration of the Commission’s earlier work on the law of positive and restrictive covenants relating to land.⁴
- 3.16 The law of easements and covenants is of practical importance to a large number of landowners. Recent Land Registry figures suggest that at least 65% of freehold titles are subject to one or more easements and 79% are subject to one or more restrictive covenants. These rights can be fundamental to the enjoyment of property. For example, many landowners depend on easements in order to obtain access to their property, for support or for drainage rights.
- 3.17 The Commission published a consultation paper on the general law of easements, profits and covenants on 28 March 2008. The paper addresses the characteristics of such rights, how they are created, how they come to an end and how they can be modified. It provisionally proposes a range of reforms of the law of easements and the creation of a new interest in land – the Land Obligation – to take the place of positive and restrictive covenants.

Expert evidence in criminal proceedings

- 3.18 Originally, it was envisaged that, as part of the Ninth Programme, the Commission would undertake a project that would seek to clarify and improve the law of evidence by codifying the law which at present comprises a mixture of statutory and common law rules. The precise terms of the project and the timetable for completing the work were not set at the time that the content of the Ninth Programme was confirmed. It was recognised that progress on the project would be greatly influenced by the Commission’s involvement in the general review of the law of homicide.

⁴ The project does not consider covenants entered into between landlord and tenant in the capacity of landlord and tenant.

- 3.19 Our work on homicide and the subsequent requests by Government to review the law of bribery and the law of conspiracy meant that the resources that we were able to devote to this project were severely restricted. Accordingly, we thought it preferable to focus on a specific area. We chose expert evidence because recent case law suggested that there were considerable problems associated with the admissibility of expert evidence.
- 3.20 It is recognised that specialised areas of knowledge, where relevant to the determination of a disputed factual issue, should be explained to the jury by experts in the field. This is to ensure that juries do not draw erroneous inferences from the evidence. Juries should not defer to experts' knowledge and opinions but there is always a danger that they will do so, especially if the field of expertise is particularly difficult to comprehend.
- 3.21 This gives rise to a real danger if there are legitimate questions about the validity of the expert's opinion. This may be because the expert's field of knowledge may be a new or developing science with little in the way of peer review or because there are doubts as to the validity of the methodology employed. The problem is accentuated if there is no available expert in the same field who can be called by the opposing party to provide an effective criticism. In such cases, the jury may have no option but to defer to the view of the expert.
- 3.22 A related problem is that judges, advocates and jurors may have an insufficient understanding of the limitations of expert evidence, scientific evidence in particular.
- 3.23 A number of cases in recent years suggest that there is a real on-going problem which requires a solution. In this project we are seeking to address the problems outlined above associated with the admissibility and understanding of expert evidence in criminal proceedings. We intend to publish a consultation paper in summer 2008 to be followed by a final report in spring 2009.

The High Court's jurisdiction in relation to criminal proceedings

- 3.24 Under the Supreme Court Act 1981, the High Court has jurisdiction to entertain challenges to decisions made in criminal proceedings in the Crown Court, but only if the decision is not a "matter relating to trial on indictment". Although the rationale for the exclusion is easily identifiable (challenges to decisions should not be a means of unnecessarily delaying trials and clogging up the criminal justice process) the precise meaning of the exclusion has given rise on numerous occasions to lengthy and expensive litigation. The Commission has been considering how the High Court's jurisdiction in relation to criminal proceedings in the Crown Court might best be transferred to the Court of Appeal, simplified, and, if appropriate, modified, together with the implications for the High Court's criminal jurisdiction in relation to criminal proceedings in magistrates' courts and The Courts Martial. The Commission published a consultation paper in October 2007 to be followed by a final report and draft Bill in summer/autumn 2009.

Illegal transactions

- 3.25 There is considerable confusion over the legal rules that govern how and when 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.

- 3.26 This project was included in our Sixth Programme as a result of the House of Lords decision in *Tinsley v Milligan*.⁵ 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 the illegal purpose, the defendant was entitled to enforce the interest in the resulting trust that would normally arise in her favour. The outcome has been generally welcomed, but the reasoning has the capacity to produce arbitrary results.
- 3.27 In 1999, the Commission published a consultation paper, which provisionally proposed that the complex legal rules should be replaced by a wide statutory discretion. This proved controversial, however, as it would add some uncertainty to the law. The Commission is currently considering a more limited statutory discretion, which would only affect trusts used to conceal property for an illegal purpose. We are hoping to publish a final report and draft Bill by the end of 2008.

Insurance contract law

- 3.28 UK insurance law is largely based on the Marine Insurance Act 1906. The Act is now outdated. For consumer insurance, the law is overlain by a confusing variety of statements of practice, regulation and ombudsman discretion, which leaves some consumers without protection. For business insurance it often fails to correspond to good business practice. This project, which is being conducted jointly with the Scottish Law Commission, is designed to make the law clear and accessible, and bring it into line with good practice.
- 3.29 In July 2007 we published our first consultation paper looking at the law of non-disclosure, misrepresentation and warranties. A second paper, on insurable interest, post-contractual good faith and damages for late payment of claim is scheduled for 2009. We will produce a final report and draft Bill in 2010.

Remedies against public bodies

- 3.30 This project considers the remedies, particularly monetary remedies, available to individuals where a public authority has acted unlawfully or negligently. At the moment, compensation is available where an authority has acted unlawfully in some situations – including where there is a breach of human rights, or European Union law – but not in others. Where compensation is available, for example, in relation to negligence, the underlying principles and procedures governing liability do not always seem appropriate. In preparation for the issue of a consultation paper the Commission is working with the Ministry of Justice and other Government departments to consider the evidence base against which proposals would need to be analysed, and the wider redress policy context within which they would need to be considered. This work is ongoing.

⁵ [1994] 1 AC 340.

Rights of third parties against trustees and trust funds

- 3.31 This project will 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.
- 3.32 Whenever trustees enter into a contract they do so personally, thereby undertaking personal contractual obligations and (subject to any express contractual limitation) exposing themselves to potential personal liability to the other contracting party. A trustee has the right to be indemnified from the trust fund for obligations properly incurred. However, where the obligation was not properly incurred⁶ 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). In such circumstances the contracting party will have to rely on the solvency of the trustee.
- 3.33 Many trustees and creditors are unaware of these rules, believing that 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 party contracting with a trustee is aware of the true position it will often find it difficult or impossible to assess with any degree of confidence whether the trustee will be able to indemnify him or herself out of the trust fund. This can cause significant problems in practice, especially where trusts are used in commercial transactions. It has been suggested that the problems faced in enforcing rights against successor trustees and trust assets may be a substantial discouragement to those civil law jurisdictions currently considering the introduction of the equivalent of the English concept of trust into their domestic law. Resolution of those problems could be expected to result in a considerable expansion of trust business.

CONSOLIDATION OF LEGISLATION

- 3.34 The programme of consolidation which was outlined in the Law Commission's Ninth Programme of Law Reform⁷ has been successfully pursued, and is still in progress. Consolidation is in fact a rolling programme, and since the Commission's Ninth Programme was prepared we have also embarked on a consolidation of the legislation on charities.
- 3.35 The large and complicated consolidation of the legislation on the National Health Service which was mentioned in the Ninth Programme⁸ has been completed, and takes the form of the National Health Service Act 2006 (c 41), the National Health Service (Wales) Act 2006 (c 42), and the National Health Service (Consequential Provisions) Act 2006 (c 43). A consolidation of the legislation on wireless telegraphy has also been completed,⁹ as has a small consolidation of the legislation on Parliamentary costs.¹⁰ The possibility mentioned in the Ninth

⁶ Eg, because entry into the contract was in breach of the trustee's equitable duties.

⁷ Ninth Programme of Law Reform (2005) Law Com No 293, para 3.58 and following.

⁸ Ninth Programme of Law Reform (2005) Law Com No 293, paras 3.59 to 3.60.

⁹ The Wireless Telegraphy Act 2006 (c 36): see Ninth Programme of Law Reform (2005) Law Com No 293, para 3.61.

¹⁰ The Parliamentary Costs Act 2006 (c 37): see Ninth Programme of Law Reform (2005) Law Com No 293, para 3.66.

Programme¹¹ of a consolidation of the legislation about the ordnance survey has not been further pursued.

- 3.36 Work is well advanced on a small consolidation of the legislation relating to the Health Service Commissioner for England: this is related to the consolidation of the National Health Service legislation which has already been completed.
- 3.37 As was stated in the Commission's Ninth Programme, work on consolidation is sometimes affected by factors over which the Commission has no control. A consolidation of the legislation on representation of the people was suspended at the request of the Department for Constitutional Affairs pending the Government's response to the Electoral Commission's Report *Voting for Change*.¹² Following the enactment of the Electoral Administration Act 2006, we are now updating work done on that consolidation. However, while the work was suspended there was another development, in the form of the decision of the European Court of Human Rights in the case of *Hirst v United Kingdom (No 2)*.¹³ It was held in that case that our law on prisoners' voting rights was not compatible with Article 3 of Protocol 1 to the European Convention on Human Rights. The Department for Constitutional Affairs published a consultation paper on the subject,¹⁴ and until the matter is resolved the consolidation cannot be completed, although we shall continue to update the work done already.
- 3.38 In its Ninth Programme the Commission also mentioned work on a consolidation of the legislation relating to pensions. The Department for Work and Pensions has made funds available to enable the Law Commission to engage the additional drafting resources needed for this project, which is a very large one (albeit relating only to private pensions). Work has started on this consolidation, but it is hard to forecast how long it will take. Much will depend on, for example, whether there is further legislation in the field which needs to be incorporated into the consolidation.
- 3.39 It was apparent even before the Charities Act 2006 was passed that its passing would create a need for the legislation on charities to be consolidated. Work has started on that consolidation, though at the request of the Department concerned it has been suspended pending the implementation of the 2006 Act. We are expecting work on the consolidation to resume when the implementation has been completed. This is another large project which will extend over more than a year.
- 3.40 We constantly keep under review the scope for new consolidations, and are always open to suggestions for them from outside the Law Commission. However, any consolidation requires not only Law Commission resources, but also resources from the Department responsible for the relevant area of law; and, not surprisingly, there are often competing priorities for such resources. Before

¹¹ Ninth Programme of Law Reform (2005) Law Com No 293, para 3.67.

¹² See Ninth Programme of Law Reform (2005) Law Com No 293, para 3.63.

¹³ (2006) 42 EHRR 41.

¹⁴ *Voting Rights of Convicted Prisoners Detained within the United Kingdom*, CP29/06, 14 December 2006.

embarking on any consolidation we explore with the Department concerned whether they would be able to devote the necessary resources to it. If they are not in a position to do so, we are unable to proceed with the consolidation at that time.

STATUTE LAW REPEALS

- 3.41 Statute Law Repeals (SLR) is an integral part of the general process of statute law reform.¹⁵ It focuses on 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 Acts that masquerade as live law. The vehicle for repealing legislation is the Statute Law (Repeals) Bill. The Law Commission has drafted 18 such Bills since 1965. All have been enacted. They have repealed nearly 2500 Acts in their entirety and have achieved the partial repeal of thousands of other Acts.
- 3.42 Work on the next (19th) SLR report will continue during the period of the Tenth Programme. Major projects to be featured in the report will include:
- Railways
 - Dublin
 - Poor laws
 - Lotteries
- 3.43 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 Ministry of Justice's objective of providing effective and accessible justice.
- 3.44 Each project is likely to take about six months to research with a further three months being allowed for consultation. All the projects, together with a number of other projects, will be included in the next SLR report, which should be published during 2012. The report, which will be submitted to the Ministry of Justice in the

¹⁵ The Law Commission has previously referred to this work as statute law *revision*. The decision now to describe this work as statute law *repeals* reflects the reality that the process involves repealing obsolete enactments rather than revising them.

usual way, will include a draft Statute Law (Repeals) Bill to repeal the various obsolete enactments identified by each project.

ADVISORY WORK

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

PART 4

DEFERRED LAW REFORM PROJECTS

FEUDAL LAND LAW

- 4.1 The Ninth Programme included a review of feudal land law. The project was to consider the several residual but significant feudal elements that remain part of the law of England and Wales. The Commission has not been able to carry out work in this area during the Ninth Programme because of the demands of other projects. The feudal land law project was automatically considered for inclusion in the Tenth Programme, alongside proposals for new projects suggested by consultees. Commissioners remain of the view that this is an important area of the law suitable for consideration by the Law Commission. However, they have concluded that the extent and nature of the problems presented by competing law reform work suggests that greater public benefit would flow from conducting those projects before a review of feudal land law. Consequently, this project is deferred and will be put forward for consideration for the Eleventh Programme.

TRANSFER OF TITLE TO GOODS BY NON-OWNERS

- 4.2 This project was included within our Ninth Programme, and was designed to cover the situation where someone buys an item in good faith only to discover that the seller did not own it, or that it is subject to a claim by a third party. The basic rule is summed up by the maxim “nemo dat quod non habet” (no-one can give what they do not have). However the rule is subject to an array of piecemeal exceptions and has been criticised as overly harsh on innocent buyers.
- 4.3 In our consultative report on Company Security Interests, we provisionally recommended a scheme designed to address the problem where innocent buyers acquire property held subject to a lease or hire-purchase agreement.¹ We thought that lenders should register such interests in a central register; and if they did not, the buyer would take free.² However, the scheme proved controversial, with strongly held opinions both for and against it. Our final report³ recommended a more limited scheme, which would apply only to company charges. Commissioners thought that we should return to the issue of a central register in the course of a more general review.

¹ (2004) Law Commission Consultation Paper No 176.

² The industry has established voluntary registers, but the lender suffers no penalty if it does not use them: see *Moorgate Mercantile Co Ltd v Twitchings* [1977] AC 890.

³ See Company Security Interests (2005) Law Com No 296, paras 1.60 to 1.66.

- 4.4 The issues involved in this project remain controversial. Following the Companies Act 2006, there appears to be little enthusiasm within Government or industry for reform at this particular time. However, Commissioners will consider this project as part of their Eleventh Programme, to see whether the climate has become more conducive to tackling this long-standing problem.

PART 5

OTHER LAW REFORM PROJECTS

- 5.1 A number of branches of law and specific projects were suggested to us during consultation. Inevitably choices have to be made as to which projects to include in a programme of law reform. This Part sets out those particular branches of law or specific projects which we believe merit consideration for the Eleventh Programme, or where despite strong support we were not able for the reasons given to include the project in the Tenth Programme.

SHARIA'A COMPLIANT HOME PURCHASE PRODUCTS

- 5.2 This project was proposed by a number of prominent consultees, including our sponsor department, the Ministry of Justice. Sharia'a compliant home purchase products have developed as a means of financing house purchases in a manner which does not contravene Islamic law. Specifically, the products are, in contrast to conventional mortgages, not based on lending at interest.
- 5.3 After careful consideration, the Commission has decided not to include this project in the Tenth Programme. As with all the projects we have rejected, this is in part simply a result of the relative suitability and importance of competing projects that we are including in the Programme. However, the Commission also had concerns about two major elements of the proposed work. First, the Commission was asked to address the current inability of purchasers using Sharia'a compliant home purchase products to take advantage of low-cost ownership schemes such as right to buy and shared ownership. The Commission does not consider that it is the most appropriate body to balance the Government's competing policy objectives of equality of access and protection from third party abuse in this specific context. Secondly, the Commission was asked to review the inapplicability of a number of statutory and equitable protections that benefit mortgagors to consumers of Sharia'a compliant home purchase products. The Financial Services Authority has recently extended the mortgage conduct of business rules to cover firms which provide or mediate such products. The FSA considers that this new regulatory regime provides adequate protection for consumers. It intends to undertake a post-implementation review to ensure that the regime is delivering the regulatory protections it was designed to confer and will take appropriate action if it is not. The FSA notes that there is little evidence of abuse in what is currently a small market. Further regulation would have the potential to harm the market, in particular to the extent that it could be taken to suggest that the products are functionally equivalent to interest-bearing mortgages. The Commission heeds these warnings and considers that, although it may be possible to design and carry out a more focused exercise as a standalone reference, it is premature to examine alternative statutory reforms until the success or otherwise of the FSA's regulation has been properly assessed.

ANCILLARY RELIEF ON DIVORCE: SECTION 25 OF THE MATRIMONIAL CAUSES ACT 1973

- 5.4 A number of prominent consultees suggested that the Commission should consider the basis upon which the property and finances of spouses and civil

partners should be divided in the event of nullity, judicial separation, divorce and dissolution.

- 5.5 After serious consideration, Commissioners have decided not to include this project in the Tenth Programme. The Commission recognises that the proper division of assets by way of ancillary relief is an issue of considerable social importance. And, as recent comments of the Court of Appeal demonstrate, there is wide dissatisfaction with the current basis for such division. These factors tend to support the view that there should be an in-depth review of the relevant law.
- 5.6 However, there are strong arguments against the Commission conducting such a project. Issues concerning marriage and civil partnership are becoming increasingly politicised. A project conducted in the current climate would, no matter how closely it was focused on legal issues, inevitably have to engage with highly controversial socio-political debate. The project would also have to engage with socio-economic considerations and, we believe, would need to be underpinned by large-scale empirical research which is not currently available. It would be a major undertaking and would have significant resource implications.
- 5.7 The Ministry of Justice, which requested and funded the Commission's recent cohabitation project, has indicated that it would prefer the Commission to examine the law governing the status and enforceability of marital property agreements rather than the wider issue of ancillary relief.
- 5.8 A project on marital property agreements could reduce the impact of some of the most heavily criticised elements of the law of ancillary relief. Marital property agreements have the potential to offer couples a means of ensuring more certain outcomes on divorce. There is a greater possibility of securing a consensus on this more limited area and as a result the Commission's recommendations have better chance of implementation.
- 5.9 The Commission has decided in the light of all these considerations to include an examination of marital property agreements in the programme rather than a comprehensive review of ancillary relief on divorce.

AGENCY WORKERS

- 5.10 Employment law is noted for its complexity. Although historically the Law Commission has never considered employment law issues, there is no principled reason why we should not do so in the future.
- 5.11 We received a suggestion that we should look at the rights of agency workers. Where workers are employed by an agency, it is often unclear whether they have a contract of employment at all, and, if so, whether the contract is with the agency or the end-user.
- 5.12 We gave some thought to whether we could clarify the law in this area. However, the Government has decided not to extend unfair dismissal to all agency workers; and it would be equally unacceptable to abolish it for all agency workers. Any review would need to work within the existing parameters, by giving guidance to tribunals on how to distinguish genuine flexible arrangements from shams. It is not clear that the Law Commission would be better placed to give this guidance

than the courts. By its nature, the test needs to be flexible, and to respond to changing circumstances.

- 5.13 However, this should not be taken to indicate a lack of interest in simplifying employment law. We would be interested to hear of other areas in need of simplification.

INTELLECTUAL PROPERTY LAW

- 5.14 Several respondents recommended that we should consider projects in the field of intellectual property law, which affects the success of the most innovative and creative sectors of the economy. The most pressing issues were considered by the Gowers Report in December 2006, and are being taken forward by the UK Intellectual Property Office and Department of Innovation, Universities and Skills. However, we would be interested to hear about any new issues that have arisen, with a view to possible projects in future programmes.

ESTATE AGENCY REGULATION

- 5.15 The Royal Institution of Chartered Surveyors suggested a project on the regulation of estate agents. They regard the current approach to regulation as limited and reactive, noting that the principal legislation, the Estate Agents Act 1979 is now nearly 30 years old. They have a particular concern that they claim the activities of estate agents as letting agents are not subject to any real regulation at all. They also express disappointment with the Consumers, Estate Agents and Redress Act 2007.
- 5.16 After consideration, we felt that, while there may be some important issues in this area of the law, it would be more appropriate to reconsider it in due course in the context of our Eleventh Programme of law reform. First, the concern with the regulation of estate agents' letting agency business would be affected by our recently completed project on Encouraging Responsible Letting, on the regulation of the private rented sector generally. It would be right to consider the Government's response to that report before embarking on further consideration of letting agency from the perspective of estate agents. Secondly, we understand that applying the 1979 Act to the lettings business of estate agents was specifically rejected by the Government during the Parliamentary passage of what has become the 2007 Act. Thirdly, and more generally, we considered that it would be sensible to allow the provisions in relation to redress and enforcement in the 2007 Act to come into effect before considering further the general issue of regulation of estate agents. Finally, more recently we have become aware of the "Government Review of Regulation and Redress in the UK Housing Market", for which research is being carried out by academics at Heriot-Watt University. These provide additional reasons for postponing consideration until the outcome of the reviews, and any further processes they set in train, are known.

SECURITY INTERESTS GRANTED BY UNINCORPORATED BUSINESSES

- 5.17 In 2005, the Law Commission published a final report on Company Security Interests.¹ We recommended a new system for registering company charges cheaply and instantaneously, together with a simpler system of priorities between charges (based on the “first to register” principle).
- 5.18 The report looked only at company charges and sales of receivables by companies. It did not cover charges granted by unincorporated businesses or by consumers. Nor did it look at other forms of security using title retention devices, such as finance leasing or conditional sales. In the report we said there were three issues on which we intended to carry out further work. These were:
- (1) whether the scheme we had proposed for companies should be extended to unincorporated business, sole traders or possibly consumers;
 - (2) whether a scheme that applies to both companies and other debtors should include title-retention devices; and
 - (3) whether there should be a statutory restatement of the law of security over personal property.²
- 5.19 We were particularly concerned about the difficulties faced by partnerships and sole proprietors when granting charges over their current property. At present, unincorporated businesses are not permitted to grant floating charges at all. They may grant fixed charges only if they meet the outdated and extremely technical requirements of the Bills of Sale Acts 1878 and 1882.
- 5.20 The Government was unable to implement our recommendations on company charges in the Companies Act 2006. We have not yet received a formal response about whether our report has been accepted in principle and, if so, how it may be implemented. Without such a response, we are reluctant to commit further resources to this area.
- 5.21 However, if the Government were to express an interest in making it easier for unincorporated businesses to grant fixed and floating charges, we would be happy to receive a reference on this issue.

(Signed) SIR TERENCE ETHERTON, *Chairman*
STUART BRIDGE
DAVID HERTZELL
JEREMY HORDER
KENNETH PARKER

WILLIAM ARNOLD, *Chief Executive*

30 May 2008

¹ Law Com No 296.

² Above, para 1.45. For further discussion of these issues, see paras 1.46 to 1.70.

APPENDIX A

LIST OF CONSULTEES

A.1 We sent over 400 letters and emails to interested bodies and individuals. These included the following:

Administrative Law Bar Association
Advisory, Conciliation and Arbitration Service
Age Concern
Archbishops' Council
Association of Chief Police Officers
Association of Contentious Trust and Probate Specialists
Association of District Judges
Association of Lawyers for Children
Association of Medical Research Charities
Association of Muslim Lawyers
Association of Personal Injury Lawyers
Association of Teachers and Lecturers
Bar Association for Commerce Finance and Industry
Bar Association for Local Government and the Public Service
Bar Council
Bar European Group
Bar Law Reform Committee
Better Regulation Commission
Better Regulation Executive
Board of Deputies of British Jews
Bristol and Cardiff Chancery Bar Association
British Chambers of Commerce
British Council of Disabled People
British Insurance and Investment Brokers' Association
British Retail Consortium
British Standards Association
Cabinet Office
CARE
Catholic Bishops' Conference of England and Wales
Centre for Policy Studies
Chairmen of Parliamentary Select Committees
Chancery Bar Association
Charity Commission
Chief Magistrate
Churches Main Committee
Citizens Advice
Commercial Bar Association
Confederation of British Industry
Council of HM Circuit Judges
Criminal Bar Association
Criminal Cases Review Commission
Criminal Law Solicitors Association
Crown Prosecution Service
Demos
Department for Communities and Local Government
Department for Culture, Media and Sport
Department for Education and Skills
Department for Environment, Food and Rural Affairs
Department for International Development

Department of Trade and Industry
Department for Transport
Department of Health
Disability Alliance, Educational and Research Association
Disability Law Service
Economic and Social Research Council
Employment Law Bar Association
Equal Opportunities Commission
Family Law Bar Association
Financial Markets Law Committee
Financial Services Authority
Foreign and Commonwealth Office
Forum of Insurance Lawyers
GMB
Health and Safety Commission
Hindu Forum of Britain
HM Revenue and Customs
HM Treasury
Home Office
Information Commissioner
Insolvency Service
Institute of Business Ethics
Institute of Directors
Intellectual Property Bar Association
Joseph Rowntree Foundation
JUSTICE
Justice for Women
Justice Youth Board
Kidscape
Land Registry
Lands Tribunal
Law Society
Learning and Skills Council
Liberty
Local Government Association
London Common Law and Commercial Bar Association
London Criminal Courts Solicitors' Association
London Solicitors Litigation Association
Lords of Appeal in Ordinary
Magistrates Association
Methodist Church
Midland Chancery and Commercial Bar
MIND
Ministry of Justice
Muslim Council of Britain
National Association of Schoolmasters and Union of Women Teachers
National Consumer Council
National Council for Voluntary Organisations
National Union of Journalists
Northern Chancery Bar Association
Northern Circuit Commercial Bar Association
Northern Ireland Affairs Committee
NSPCC
Nuffield Foundation
Office of Fair Trading
Patents Office
Pensions Ombudsman

Personal Injuries Bar Association
Police Federation
Police Superintendents Association of England and Wales
Press Association
Professional Negligence Bar Association
Property Bar Association
Public and Commercial Services Union
Public Chairs Forum
Refuge
Resolution
Restorative Justice Consortium
Revenue Bar Association
Rights of Women
Royal College of Psychiatrists
Royal Institute of Chartered Surveyors
Salvation Army
Samaritans
Senior Judiciary (High Court judges, Appeal Court judges and Heads of Division)
Shelter
Small Business Bureau
Society for Advanced Legal Studies
Society for Computers and Law
Society of Labour Lawyers
Society of Legal Scholars
Society of Trust and Estate Practitioners
Socio-Legal Studies Association
Support After Murder and Manslaughter
Technology and Construction Bar Association
Trade Association Forum
Transport and General Workers Union
TUC
UK Environmental Law Association
Union of Construction, Allied Trades and Technicians
Union of Shop, Distributive and Allied Workers
UNISON
Valuation Tribunal Service
Value Added Tax Tribunals
Victim Support
Victims of Crime Trust
Wales Office
Wellcome Trust
Welsh Assembly

A.2 The following consultees suggested projects for inclusion in the Tenth Programme:

Mr Justice Aikens
Andrew Allen
Don Anderson
Helen Anthony, Association of Personal Injury Lawyers
Les Arnott
Liz Atkins, National Council for Voluntary Organisations
Lord Justice Auld
Vera Baird QC, MP, Department for Constitutional Affairs (now Ministry of Justice)
Lord Justice Scott Baker

Felicity Banks, Institute of Chartered Accountants
John Barlow
Mrs Justice Baron, Money and Property Committee of the Family Justice Council
Professor Hugh Beale, University of Warwick
Brian Bender, Department for Trade and Industry
Ismail Abdulhai Bhamjee
Jane Birkby
Anthony Branch
Yvonne Brown, Yvonne Brown, solicitors
Jan Bye, Law Reform Committee of the Bar Council of England and Wales
Lord Justice Carnwath
Vicki Chapman, Head of Law Reform and Legal Policy, The Law Society
David Chester
Ralph Clark
Oliver Coles
Mr Justice Colman
Professor Elizabeth Cooke, University of Reading
Monica Cooper, Epilepsy Action
Michael Coulshed, Association of Corporate Trustees
HHJ Coulson QC, Technology and Construction Court
C M Crozdale
Martin Day, Farrer & Co LLP, solicitors
Martyn Day, Leigh Day & Co, solicitors
Michael Devaney
Ian Diamond, Economic and Social Research Council and Arts and Humanities
Research Council
John Dilger, Trust Law Committee
Deirdre Dowling
Christopher Draycott
Mr Justice Elias, President of the Employment Appeal Tribunal
Collin Ettinger, Irwin Mitchell, solicitors
James Gormley
Lord Falconer
Susan Farran, University of Dundee
Miss J Flatley
Henry Frydenson, Association of Contentious Trust and Probate Specialists
Reg Gale
Professor Sir Roy Goode
Steven Gould, Royal Institution of Chartered Surveyors
Lady Justice Hale
Mike Hall
N Hayes
Mr Justice Henderson
Ralph Hodges
Michael Holden
Nick Hopkins, Property and Trusts section of the Society of Legal Scholars
Stella Howell, Euro Environmental Containers
Rachel Hughes
Mr Justice Irwin
David Iwi
P Janik
Lord Justice Jacob
Bill Jones, Society for Computers and Law
Claudie Jones
Emma Jones, Mind
Rt Hon Sir Igor Judge
Roger Kaw, Crown Prosecution Service

David King
Donald Laming, University of Cambridge
Mr Justice Langley
Mr Justice Langstaff
Daniel Lawrence, UK Environmental Law Association
Alexandra Layton QC, Bar European Group
Graham Lester
Ian Liddle
Geoffrey Lock
Lord Justice Longmore
Pascale Lorber, University of Leicester
Professor R D Mackay
David Maclean MP, Joint/Select Committee on Statutory Instruments
Adam Macleod
HHJ Judge Matheson QC
John McCarthy
Pat McFadden MP, Better Regulation Executive
Jo Miles, University of Cambridge
Andrew Miller MP, Regulatory Reform Committee
Margaret Mitchell
Rosalind Moffitt
Cheryl Morris
Joanna Perkins, Financial Markets Law Committee
Bridget Prentice MP, Ministry of Justice
Lyndsay Raviz
Morag Rawe
Philippa Carol Richardson
Joanne Rickards, Peters & Peters, solicitors
Chrissy Riley
Denzil Roden
Sir Richard Rougier
David Ruebain, Levenes, solicitors
Catherine Sara
Cathryn Scott, Department for Transport
Dr Seabourne, University of Bristol
Lord Justice Sedley
John Shale
Nicola Sharp, Refuge
Annette Shaw
Avrom Sherr, Institute of Advanced Legal Studies
Michael Shrimpton
Mr Justice Silber
John Simmonds, Registrar in Bankruptcy
Rabinder Singh, Constitutional and Administrative Law Bar Association
Jenny Sleep
Darren Smyth, Marks & Clerk, Patent & Trade Mark Attorneys
Tim Spencer-Lane, Policy Advisor – Mental Health & Disability, The Law Society
Michael and Henrietta Spink
David Stone, Howrey LLP, solicitors
Peter Thomas
Ahmad Thomson, Association of Muslim Lawyers
Lord Justice Thorpe
S M Towers
Claire Waines
District Judge Michael Walker, Association of District Judges
Freddie Watson
Jan Watson

Dr Ros Wells, University of Staffordshire
Jonathan Winegarten, Chief Chancery Master
Jonathan Wragg, Highgate Chambers, barrister
Professor Graham Zellick, Criminal Cases Review Commission

In addition to those listed above, 79 people registered to use the web forum that received a total of 47 comments, constituting 42 separate consultation responses provided by 38 distinct consultees.

APPENDIX B

LIST OF COMPLETED PROJECTS

Projects completed during the Ninth Programme March 2005 – May 2008:

- (1) Forfeiture and the Law of Succession (LC295) published 27.7.05
- (2) Company Security Interests (LC296) published 31.8.05
- (3) Renting Homes (LC297) published 5.5.06
- (4) Inchoate Liability for Assisting and Encouraging Crime (LC300) published 11.7.06
- (5) Trustee Exemption Clauses (LC301) published 19.7.06
- (6) Post-legislative Scrutiny (LC302) published 25.10.06
- (7) Termination of Tenancies for Tenant Default (LC303) published 31.10.06
- (8) Homicide: Murder, Manslaughter and Infanticide (LC304) published 29.11.06
- (9) Participating in Crime (LC305) published 10.5.07
- (10) Cohabitation (LC307) published 31.7.07
- (11) Housing: Proportionate Dispute Resolution (LC309) published 13.5.08