



**Law
Commission**
Reforming the law

The Work of the Law Commission: The Thirteenth Programme and Other Projects



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The Work of the Law Commission



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This publication is available at www.lawcom.gov.uk.

THE LAW COMMISSION

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

The Law Commissioners are:

The Right Honourable Lord Justice Bean, Chair
Professor Nick Hopkins
Professor David Ormerod QC
Nicholas Paines QC
Stephen Lewis

The Chief Executive of the Law Commission is Phillip Golding.

The Law Commission is located at 1st Floor, Tower, 52 Queen Anne's Gate, London, SW1H 9AG.

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The text of this document is available on the Law Commission's website at www.lawcom.gov.uk.

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The The Work of the Law Commission

Chapter 1: Who we are and how we work

ABOUT THIS DOCUMENT

- 1.1 This document provides an overview of all of our current work. In so doing, it incorporates: ongoing projects arising from previous Programmes of Law Reform; all ongoing Ministerial references received from Government; 13th Programme projects which have either commenced or where there are firm plans in place to do so; new Ministerial references due to commence. For each project, we explain why we believe there is a need for law reform in the area and summarise the potential benefits of reforming the law.

ABOUT THE LAW COMMISSION

- 1.2 The Law Commission of England and Wales is an advisory, non-departmental public body which was created by the Law Commissions Act 1965. It has Arm's Length Body status, under the auspices of the Ministry of Justice.
- 1.3 Our statutory function is to keep the law of England and Wales under review and to recommend reform where it is needed. The aim of the Commission is to ensure that the law is fair, modern, simple, and cost effective.
- 1.4 We tackle any area of law that is suitable for consideration by an independent body of legal policy experts. Our work ranges from the highly technical, such as the repeal of obsolete enactments and the streamlining of over-complicated law, to formulation of new legal approaches to high-profile social policy issues. Our projects generally address relatively broad and complex areas of law rather than narrow legal issues.
- 1.5 Underpinning the way we work is our independence from Government and the objective way in which we conduct our work. It means that the public and stakeholders can be confident that our consultations will be genuinely open, we will try to achieve consensus where possible, and our proposals will be free from any political bias.
- 1.6 The Commission is funded through a mix of core budget provided by the Ministry of Justice and is also able to receive income from Whitehall Departments for individual projects. As our core budget has reduced, the Commission has become increasingly reliant on income-generating projects. These are mostly high priority areas for Government. Core-funded projects are now fewer in number but no less valuable.

“A core strength of the Law Commission is its approach to the law reform process. Working to a core programme that is developed in the light of public consultation, it approaches its task systematically.

“Working teams of lawyers are guided by acknowledged experts in the form of the Law Commissioners and the Chair of the Commission. It draws on a wealth of experience to ensure its proposals make the law more coherent and accessible.”

Lord Thomas of Cwmgiedd, Lord Chief Justice, Scarman Lecture, June 2017

HOW WE RECEIVE OUR WORK

- 1.7 The Law Commission is able to accept work through two channels. First, as part of a Programme of Law Reform, which must be approved by the Lord Chancellor and laid in Parliament. Such Programmes are developed every three to four years based on public consultation. We published our 13th Programme at the end of 2017. Second, by way of a Ministerial Reference, whereby any Minister or Welsh Minister can ask the Commission to consider undertaking a law reform project.
- 1.8 We have taken the approach that our 13th Programme should include as wide a range of potential projects as possible but we may not be able to initiate all of these projects in the normal three-year Programme cycle. We have not, therefore, included in this document detailed information on those projects where we do not have arrangements in place to start work in the very near future.

WHO WE ARE

- 1.9 The Commission has five statutory Commissioners. The Chair of the Law Commission is a Court of Appeal Judge, The Rt Hon Lord Justice Bean.
- 1.10 Each of the other four Commissioners is a leading legal expert overseeing four teams:
- Commercial and Common Law: Stephen Lewis
 - Criminal Law: Professor David Ormerod QC
 - Property, Family and Trust Law: Professor Nick Hopkins
 - Public Law and Welsh Law: Nicholas Paines QC
- 1.11 The Commission is led by the Chief Executive, Phil Golding, and is supported by a team of lawyers, research assistants, an in-house economist and Parliamentary Counsel and a small administrative team.
- 1.12 The Commission is also fortunate to be able to draw on the expertise of two Non-Executive Board Members: Sir David Bell (Vice-Chancellor, Reading University) and

Bronwen Maddox (Director, Institute for Government).

OUR STAKEHOLDERS

1.13 Our work is supported by a wide range of stakeholders. Their input and expertise helps us to ensure that our recommendations are realistic, well-considered and intellectually coherent. Our main stakeholders include: the judiciary; parliamentarians; legal practitioners and academics; subject experts from the third and private sector; government officials; ministers; and, members of the public who share their experiences of the law with us. We are very grateful to all those who take the time to support our work.

IMPLEMENTATION

1.14 We have produced more than 350 sets of law reform recommendations over more than 50 years; two thirds have been implemented in whole or in part. In order to increase the prospects of implementation, a number of steps have been put in place over the last few years.

1.15 First, the Law Commission Act 2009 set out a number of practical methods to ensure that reports are considered and, if accepted, implemented by Government in a timely way. It places a requirement on the Lord Chancellor to deliver an annual report to Parliament outlining Government progress in implementing our proposals.

1.16 Second, a Protocol was agreed in March 2010 which states that the Law Commission will not take on a project without an undertaking by the relevant minister that there is a serious intention to take forward law reform in that area. It also requires the relevant minister to provide an interim response within six months of a report being published, and a final response within a year.

1.17 Finally, in October 2010, the House of Lords approved a new Parliamentary procedure for “uncontroversial” Law Commission Bills. The procedure is intended to reduce the time that Law Commission Bills spend on the floor of the House by providing for certain stages to be carried out in Committee. This allows the Bills to be considered and scrutinised despite the pressures of Parliamentary time.

LAW REFORM IN WALES

1.18 We are the Law Commission of England and Wales. Law reform in Wales has always been an essential part of our work, but its nature has changed as devolution in the UK has gathered pace. The Commission remains committed to meeting the law reform needs of both England and Wales in this evolving constitutional context.

1.19 The Wales Act 2014 amended the Law Commissions Act 1965 to take account of Welsh devolution, allowing Welsh Ministers to refer law reform projects directly to the Commission for the first time. Our work for Welsh Ministers is now governed by a protocol, signed in Cardiff by Sir David (now Lord) Lloyd Jones, our then Chair, and the First Minister of Wales, and presented to the National Assembly for Wales in July 2015.

- 1.20 The Law Commission's relationship with the Welsh Government is now well established. The 12th Programme of Law Reform included two projects exclusively for Wales. Our report on the *Form and Accessibility of the Law Applicable in Wales* was published in June 2016. The Counsel General, on behalf of Welsh Ministers, accepted the majority of our recommendations in June 2017. The Welsh Government has expressed its intention to pursue a long-term process of codification of the law within the National Assembly's competence, and a pilot project is currently underway.
- 1.21 On 20 March 2018, the Welsh Government launched a consultation on its draft Legislation (Wales) Bill. Part 1 of the draft Bill would require the Welsh Ministers to prepare programmes to keep the law in Wales accessible, which may be undertaken in collaboration with the Law Commission. We welcome this development and will continue to provide whatever assistance we can.
- 1.22 We published a major consultation paper, *Planning Law in Wales*, in November 2017. The results of that consultation will inform our Report setting out proposals for the simplification of planning law in Wales. This Report should in turn inform a new Planning Bill, which will be the core of a proposed planning Code for Wales. We are working closely and productively with the Welsh Government's planning directorate, and the Office of the Legislative Counsel on this project.
- 1.23 We continue to keep the machinery for law reform in Wales under review, making improvements where we can. We now operate under a new Welsh language policy, which was arrived at in consultation with the Welsh Language Commissioner, and publish appropriate papers bilingually. We have recently expanded the role of one of our Commissioners, Nicholas Paines QC, to give him special responsibility for the law in Wales. We are grateful to members of the Law Commission's Welsh Advisory Committee who have given their time and experience to help support our work in Wales.
- 1.24 The 13th Programme consultation document suggested two possible projects relating exclusively to Wales and we received numerous consultation responses from Welsh consultees, including proposals for projects in devolved areas of the law. The Welsh Advisory Committee provided valuable input, both in relation to the Wales-only projects and to the impact in Wales of other suggested projects.
- 1.25 Given the focus on leaving the European Union, as well as the pilot in relation to codification, our discussions with the Welsh Government have not yet yielded a specific area suitable for a Wales-only law reform project. We have discussed with the Welsh Government, judiciary and other stakeholders undertaking a project in relation to the devolved tribunals in Wales and will develop these ideas over the coming months. Any such work would be taken on as a Ministerial reference from the Welsh Government and conducted alongside the main Programme.

HOW WE WORK

Pre-consultation

- 1.26 When we start a law reform project, we will agree terms of reference with the relevant sponsoring Department which is underpinned by a Memorandum of Understanding. Once the Commission has been asked to undertake a project, the project team will

begin research into the particular area of law in question and start preliminary discussions with influential stakeholders so as to refine the areas of focus.

Consultation

- 1.27 The Commission is asked to consider some of the most challenging areas of the law. We have the capacity to work through the issues and understand the differing perspectives before we put forward recommendations for reform. The Commission is therefore wedded to the principles of genuine public consultation with the widest possible audience. This enables thorough scrutiny of our proposals, which will often be developed or adjusted in light of the contributions of stakeholders, both in the UK and overseas.
- 1.28 Our approach usually involves a significant amount of face-to-face engagement with expert individuals and representative bodies. This tends to be through meetings and public events as well as rigorous formal public consultation which ensures a wide range of consultation responses, from the views of members of the public with personal experience of the law in a given area to detailed technical analysis from subject experts. While this process is time consuming, it leads to well-considered recommendations which can be demonstrated to be based on the best possible evidence.

Recommendations

- 1.29 Once the analysis has been completed, Commissioners will consider and agree the policy that will be recommended in the final report. Our in-house economist will also be advising on an economic impact assessment and, where requested, in-house Parliamentary Counsel will be working on draft legislation.
- 1.30 We set out proposals in a report to Government, which is laid before Parliament. These could be in the form of guidance, advice to government or law reform recommendations. It is then for the Government to decide whether to accept the recommendations and introduce any necessary legislation, often working in partnership with the Commissioner, members of the relevant legal team and the Parliamentary Counsel who drafted the legislation.

STATUTE LAW

- 1.31 Consolidation of statute law and the repeal of statutes that are obsolete or no longer serve any useful purpose have been important functions of the Law Commission since its creation. Regrettably, in the case of repeals, such work has rather fallen out of favour with Government and the resource the Commission is able to allocate to this work has therefore reduced. Nevertheless, we remain committed to performing this important aspect of our work.

Statute Law Repeals

- 1.32 By modernising the statute book and leaving it clearer, shorter and more accessible, our statute law repeals work helps to save time and cost for practitioners who work with the law and others who need to use it. Ultimately, it also makes it easier for the citizen to access justice.
- 1.33 Since 1965, 19 Statute Law Repeals Bills have been enacted, repealing more than 3000 Acts in their entirety and thousands more in part. On 3 June 2015, we published our

20th Statute Law Repeals Report with a Bill. Unfortunately, this has not yet been introduced into Parliament.

Consolidation

- 1.34 Over 200 consolidation Acts have been enacted since the Commission was established in 1965. The aim of this work is to make statute law more accessible and comprehensible.
- 1.35 A consolidation Bill draws together different enactments on the same subject to produce a single statutory text while preserving the effect of current law. The text usually replaces provisions in a number of different Acts or instruments. It is important work; the cumulative effect of amendments and new law can distort the structure of legislation. Consolidation will make it more rational and intelligible. It will also aim to remove obsolete material, modernise language and resolve minor inconsistencies or ambiguities that have arisen.
- 1.36 Consolidation Bills are enacted through a Parliamentary procedure which takes very little time on the floor of the House; the Bills are introduced into the House of Lords and, after Lords Second Reading, are scrutinised by the Joint Committee on Consolidation Bills, which is appointed by both Houses specifically to consider consolidation and statute law repeal Bills, before returning to the House of Lords for the remaining stages. This process ensures that Bills take up a minimum of parliamentary time on the floor of each House.
- 1.37 The Commission is currently engaged on a major consolidation exercise involving sentencing law. The Commission has undertaken a wide-ranging consultation exercise which has demonstrated that there is widespread support for this work. Enabling clauses are required in primary legislation and we hope Parliamentary time can be found.

Chapter 2: Law reform projects

INTRODUCTION

- 2.1 In this section we set out the 21 current law reform projects that are ongoing, the department's responsible, timelines and possible outcomes.

AUTOMATED VEHICLES

Source: 13th Programme of Law Reform

Lead Department: Ministry of Justice

Start: January 2018

Scheduled completion: Spring 2021

Outcome: To be determined after scoping study

- 2.2 We were asked by the Centre for Connected and Automated Vehicles (CCAV) to review the law affecting automated vehicles, also sometimes called "driverless cars", to ensure that it is fit for purpose. This is a joint project with the Scottish Law Commission and is part of the 13th Programme of work. The project was formally launched in March 2018.
- 2.3 We are researching current laws which regulate cars and drivers, from the type approval and testing stage of new cars to the road. This review spans a wide array of legal issues and will begin with a scoping study in the first year of what will be a three-year project.
- 2.4 Automated vehicles which are driven by a computer system rather than by a human driver present new challenges for regulation. Currently the laws relating to driving offences assume the presence of a human driver, and standard requirements for cars include a steering wheel and foot pedals. We will be reviewing questions about who will be responsible for automated vehicles where there is no obvious 'driver', who would currently be responsible for insurance, roadworthiness of the car as well as the way the car is driven.
- 2.5 We will be looking at insurance (building on the government's work as part of the Automated and Electric Vehicles Bill), product liability, civil and criminal liability and how it can be appropriately allocated when automated vehicles are on the roads. The project also takes into account the need for reliable safety standards and regulation of new vehicles, and the business models which underpin the way that automated vehicles are used by the public.

CONFISCATION

Source: Ministerial reference

Lead Department: Home Office

Start: August 2018

Scheduled completion: Autumn 2020

Outcome: Law reform recommendations

- 2.6 The law on confiscation of criminal assets in Part 2 of the Proceeds of Crime Act 2002 (POCA) enables the state to deprive offenders of the benefit of their criminal conduct. During the call for ideas for the 13th Programme of Law Reform the Law Commission suggested a reform on the law of confiscation found in the Proceeds of Crime Act 2002 (POCA). The idea was very well supported, with over 200 responses agreeing that the Law Commission should examine this area of the law. As a result the Law Commission has agreed with the Home Office to review the law on confiscation, with the intention of improving the process by which confiscation orders are made, while ensuring the fairness of the confiscation regime, and optimising the enforcement of confiscation orders.
- 2.7 It has been suggested that there are pressing problems with the law, including the irregular compensation of victims in confiscation proceedings; the frequent imposition of unrealistic confiscation orders; the ineffective incentives and sanctions of the confiscation regime; the interplay between civil and criminal investigations under POCA, the complexity of the relevant legislative provisions and related case law; the role of restraint and the insufficient enforcement powers of magistrates' courts and Crown Courts. This project will evaluate these problems and formulate proposals for reform.
- 2.8 Work on this project is scheduled to start in August 2018. We expect it to take two years to complete.

ANTI-MONEY LAUNDERING

Source: Ministerial reference

Lead Department: Home Office

Start: February 2018

Scheduled consultation: June 2018

Scheduled completion: By the end of 2018

Outcome: Law reform recommendations

- 2.9 The anti-money laundering provisions of POCA are very broad and it is essential to provide mechanisms to allow businesses to continue to function. The central such mechanism is the consent regime under Part 7 of POCA. This regime enables

businesses to seek the consent of the Financial Intelligence Unit of the National Crime Agency (NCA) to continue with a transaction where they suspect that money laundering may be occurring. This consent regime is central to the functioning of the UK's anti-money laundering regime.

- 2.10 The consent regime provides a defence to each of the principal money laundering offences. In practice this involves consent being sought from the NCA in the form of a suspicious activity report (SARs) completed by a nominated officer (an employee at a business nominated to submit SARs).
- 2.11 The counter terrorism financing regime in Part 3 of the Terrorism Act 2000 contains a consent regime similar to that found in POCA. The project will focus on the consent regime found in POCA whilst being mindful of the impact any recommendations may have on the Terrorism Act 2000.
- 2.12 Among the problems in the current law are the defensive reporting, the sheer number of SARs which are submitted to the NCA, and the relatively low intelligence value of many of the SARs.
- 2.13 We will publish a consultation paper in June, and hold a symposium during a public consultation in July. We intend to publish our final report before the end of 2018.

DEVOLVED TRIBUNALS IN WALES

Source: Ministerial reference

Lead Department: Welsh Government

Start: Not yet known

Outcome: Law reform recommendations

- 2.14 We noted in our 13th Programme document that while our discussions with the Welsh Government had not yet yielded a dedicated Wales-only law reform project, we remain committed to including at least one such when an appropriate area of work was identified.
- 2.15 We have since held very constructive discussions with Welsh Government officials. Although it has not yet been formally agreed, we understand that there is considerable appetite in Cardiff for the Commission to investigate issues relating to devolved tribunals. Such a project would in particular examine the need for a new Tribunals (Wales) Bill, designed to regulate the operation of a single system for tribunals in Wales. This work follows naturally from the provision made for devolved tribunals in the Wales Act 2017, would consider issues including the scope of a Welsh tribunal system, and the role of the President of Welsh Tribunals. It would also allow consideration of procedure and process in relation to judicial appointments, the power to make and standardise procedural rules, and processes for appeals and complaints
- 2.16 Subject to agreement between the Welsh Ministers and the Commission, we hope to start this work in late 2018 or early 2019, and to report within 12 months.

ELECTORAL LAW

Source: 11th Programme of Law Reform

Lead Department: Cabinet Office

Start: July 2011

Scoping consultation: June-September 2012

Consultation: December 2014-March 2015

Scheduled completion: Early 2019

Outcome: Law reform recommendations and draft legislation

- 2.17 Electoral law in the UK is spread across 17 statutes and some 30 sets of regulations. It has become increasingly complex and fragmented; it is difficult to access, apply, and update. Much of the law is rooted in 19th century language and practice, and doesn't reflect modern electoral administration.
- 2.18 The electoral law reform project is part of the Law Commission for England and Wales' 11th Programme of Law Reform published on 19 July 2011. It was initiated as tripartite project with the Law Commissions of Scotland and Northern Ireland.
- 2.19 The twin aims of this project are to ensure, first, that electoral laws are presented within a rational, modern legislative framework, governing all elections and referendums under statute. Second, that the law governing the conduct of elections and referendums is modern, simple, and fit for purpose.
- 2.20 The Law Commissions published a joint interim report on 4 February 2016, recommending: that the process for challenging elections should be modernised, making it easier for parties to understand and use and that judges be given the power to limit the potential costs for challengers. existing electoral offences should be updated and made easier for the electorate, officials and prosecutors to understand that the maximum sentence for serious electoral offences be increased to ten years.
- 2.21 After reviewing our interim report, the UK Government stated in late 2016 that work on leaving the European Union, and the attendant unprecedented demand on parliamentary time, means there will not be capacity for an electoral bill to take forward recommendations which a specific bill.
- 2.22 However, we are working with the Cabinet Office on ways of implementing our recommendations which do not require primary legislation, including statutory instruments to simplify and bring together the various conduct rules concerning electoral events in England and the Police and Crime Commissioner elections in Wales. This work is ongoing and we hope to report in early 2019.

ELECTRONIC EXECUTION OF DOCUMENTS

Source: 13th Programme of Law Reform

Lead Department: Ministry of Justice

Start: January 2018

Scheduled completion: Spring 2019

Outcome: To be determined after consultation

- 2.23 Most modern businesses have embraced technology to conduct transactions online and electronically. However, we have been told that the uncertainty around the electronic execution of documents is preventing some businesses from moving towards fully electronic transactions, which could be faster and more efficient.
- 2.24 A review of general principles and relevant case law suggests that English law is sufficiently flexible to accommodate electronic signatures. This also reflects the conclusion of a 2016 practice note issued by a joint working party of The Law Society Company Law Committee and The City of London Law Society Company Law and Financial Law Committees, which was developed to help parties who wished to execute commercial contracts using an electronic signature. However, some stakeholders have suggested that this issue could be usefully clarified and confirmed.
- 2.25 Stakeholders have also told the Law Commission that there are other issues around the electronic execution of documents that merit consideration. For example, stakeholders have suggested that we should consider issues around the electronic execution of deeds, including the requirements that deeds must be witnessed and delivered. We have also been referred to the implications of *R (on the application of Mercury Tax Group Ltd) v HMRC* [2008] EWHC 2721 (Admin).
- 2.26 In these circumstances, the purpose of the project is to address any uncertainty as to the formalities around the electronic execution of documents and to ensure that the law governing these formalities is sufficiently certain and flexible to remain competitive in a post-Brexit environment. This project is linked to our planned project on smart contracts, on which the Law Commission will commence work in 2018.

EMPLOYMENT LAW HEARING STRUCTURES

Source: 13th Programme of Law Reform

Lead Department: Ministry of Justice

Start: April 2018

Scheduled consultation: July 2018

Scheduled completion: The end of 2018

Outcome: Law reform recommendations

- 2.27 This project forms part of our 13th Programme of Law Reform. It involves a review of the jurisdiction of the employment tribunal, employment appeal tribunal and the civil courts in employment and discrimination matters and make recommendations for their reform. In particular, the project will consider issues raised by:
- (1) the shared jurisdiction between civil courts and tribunals in relation to certain employment and discrimination matters, including equal pay;
 - (2) the restrictions on the employment tribunal's existing jurisdiction;
 - (3) the exclusive jurisdiction of the county court in certain types of discrimination claim; and
 - (4) the handling of employment disputes in the civil courts.
- 2.28 The Civil Courts Structure Review led by Briggs LJ noted that there is an "awkward area" of shared and exclusive jurisdiction in the fields of discrimination and employment law, which has generated boundary issues between the courts and the employment tribunal system (the employment tribunal and the employment appeals tribunal). These issues are well known amongst employment law experts, judges and practitioners; they can cause delay and can also prevent cases being determined by the judges best equipped to handle them.
- 2.29 The project will seek to resolve problems caused by this allocation of jurisdiction, as well as investigating the outdated and in some respects arbitrary limits on the employment tribunal's jurisdiction.
- 2.30 The Ministry of Justice and the Department of Business, Energy, Innovation and Skills (BEIS) are in the process of reforming the employment tribunal system as part of the modernisation of the courts and tribunals system, and have indicated that there are no plans to consider radical structural change. This project will work within the boundaries set out by the Government's position, considering ways of addressing the jurisdictional problems of the employment tribunal system by means short of major restructuring.

INSURABLE INTEREST

Source: 9th Programme of Law Reform

Lead Department: HM Treasury

Start: January 2006 (inception of the whole insurance contract law project)

Scheduled completion: The end of 2018

Outcome: Law reform recommendations and draft Bill

- 2.31 Together with the Scottish Law Commission, we have been working on a joint review of insurance contract law since 2006. To date, our work has led to the Consumer Insurance (Disclosure and Representations) Act 2012 and the Insurance Act 2015. The final area of review is the law concerning insurable interest.
- 2.32 At its simplest, the requirement for insurable interest means that, for a contract of insurance to be valid, the person taking out the insurance must stand to gain a benefit from the preservation of the subject matter of the insurance, or to suffer a disadvantage should it be lost or damaged.
- 2.33 Stakeholders have told us that the current law, particularly for life and life-related insurances such as health and accident cover, is antiquated and overly restrictive. It prevents, for example, socially useful insurances for children or cohabitants.
- 2.34 We have consulted on policy proposals several times: in 2008, 2011 and 2015. We consulted on draft clauses in 2016. Although most consultees agree with the overall direction of our proposals, concerns have been expressed over some of the details, and in particular their interaction with current market practice. We are committed to working with stakeholders to resolve these issues.
- 2.35 This project has been on hold due to other priorities within the Commission, but we aim to publish a revised draft of the bill in the first half of 2018.

LAND REGISTRATION

Source: 12th Programme of Law Reform

Lead Department: Department for Business, Energy and Industrial Strategy and the Land Registry

Start: Early 2015

Scheduled completion: Summer 2018

Outcome: Law reform recommendations and draft Bill

- 2.36 This project, which originated in our 12th Programme of Law Reform, started in Spring 2015. It is designed to update the current law governing land registration contained in

the Land Registration Act 2002, in light of the experience of its operation since it came into force in October 2003.

- 2.37 The land registration regime is of enormous and growing importance. Over 85 per cent of land in England and Wales is registered, with HM Land Registry maintaining more than 25 million titles. Dealings and disputes that engage the land registration regime can be complex and require expert advice. Uncertainty in the regime creates doubt as to people's rights that can delay property transactions and increase costs for landowners, as well as incentivise litigation.
- 2.38 Evidence suggests that some areas of the current law would benefit from revision or clarification. We consulted between March and June 2016, and our work to date has revealed a range of often highly technical issues that have important implications for those who own land (whether the land is a home, a business or an investment), those with an interest in land (including mortgage providers), and HM Land Registry. This project therefore comprises a wide-ranging review of the 2002 Act, with a view to amending the parts that could be improved. In particular, it examines the extent of Land Registry's guarantee of title, rectification and alteration of the register, and the impact of registered title fraud. It also re-examines the legal framework for electronic conveyancing.
- 2.39 This project is scheduled to be completed in Summer 2018, at which time we will be publishing our law reform recommendations and a draft Bill.

MAKING LAND WORK – EASEMENTS, COVENANTS AND PROFITS À PRENDRE

Lead Department: Ministry of Justice

Outcome: Implementation support

- 2.40 Our report, Making Land Work, was published in June 2011 and examined the general law governing:
- (1) Easements – rights enjoyed by one landowner over the land of another, such as rights of way.
 - (2) Covenants – promises to do or not do something on one's own land, such as to mend a boundary fence or to refrain from using the land as anything other than a private residence.
 - (3) Profits à prendre – rights to take products of natural growth from land, such as rights to fish.
- 2.41 These rights are of great practical importance to landowners and can be fundamental to the use and enjoyment of property. We looked closely at the characteristics of these rights, how they are created, how they come to an end and how they can be modified.

- 2.42 Our report recommended reforms to modernise and simplify the law underpinning these rights, making it fit for the 21st century and a modern registration system. The recommendations would remove anomalies, inconsistencies and complications in the current law, saving time and money by making it more accessible and easier to use for those who rely on and engage with these interests most: homeowners, businesses, mortgage lenders and those involved in the conveyancing process.
- 2.43 They would give new legal tools to landowners to enable them to manage better their relationships with neighbours and facilitate land transactions. Furthermore, the reforms would give greater flexibility to developers when building estates where there would be multiple owners and users.
- 2.44 The Government announced in its Housing White Paper¹ published on 7 February 2017 that:

“The Government also intends to simplify the current restrictive covenant regime by implementing the Law Commission’s recommendations for reform and will publish a draft Bill for consultation as announced in the Queen’s Speech.”²

- 2.45 A draft Bill is being prepared for publication and we are assisting Government with its preparation.

¹ Department for Communities and Local Government, Fixing our broken housing market (Cm 9352), Annex A para 35, available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/590043/Fixing_our_broken_housing_market_-_housing_white_paper.pdf.

² Government had previously, and has subsequently, announced that it intends to bring forward proposals in a draft Law of Property Bill to respond to the Commission’s recommendations: Queen’s Speech 2016: background briefing notes (18 May 2016), page 61, available at <https://www.gov.uk/government/publications/queens-speech-2016-background-briefing-notes>; Department for Communities and Local Government, Tackling unfair practices in the leasehold market, Summary of consultation responses and Government response (December 2017), para 36, available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/670204/Tackling_Unfair_Practices_-_gov_response.pdf

MISCONDUCT IN PUBLIC OFFICE

Source: 11th Programme of Law Reform

Lead Department: Ministry of Justice

Start: Summer 2014

First consultation: January-March 2016

Second consultation: September 2016-January 2017

Scheduled completion: Autumn 2018

Outcome: Law reform recommendations

- 2.46 A review of the offence of misconduct in public office was included in our 11th Programme of law reform.
- 2.47 Misconduct in public office is a common law offence but there is no exhaustive definition. As a result the boundaries of the offence are uncertain and despite there being relatively few prosecutions each year a disproportionately high number of those cases are the subject of appeal. Areas of difficulty identified in recent appeals include the fact that the fault element of the offence varies according to the conduct that is the subject of prosecution and that there is uncertainty as regards the liability of private individuals who discharge public functions.
- 2.48 This project has sought to clarify, simplify and codify the common law offence. We published an issues paper in January 2016, and a further consultation paper in September 2016. In our consultation paper we suggested that a reformed offence, or offences, could address one or both of the following wrongs: breach of duty leading to a risk of serious harm; and corrupt behaviour – the abuse of a position for personal advantage or to cause harm to another. We are currently working towards publication of a final report with recommendations for reform in Autumn 2018.

OFFENSIVE ONLINE COMMUNICATIONS

Source: Ministerial reference

Lead Department: Department for Digital, Culture, Media and Sport

Start: April 2018

Scheduled completion (phase one): October 2018

Outcome (phase one): Review of the current law

- 2.49 As part of our 13th Programme consultation process, we asked consultees for their views on the Law Commission undertaking work to reform the law around offensive online communications. More than 200 consultees wrote to us about this issue, the overwhelming majority of whom were in favour of some kind of reform of the law.

- 2.50 The Department of Digital, Culture, Media and Sport asked the Law Commission to review the law around offensive communications in two phases. In phase 1 the Commission will take 6 months to analyse the framework of offensive communications legislation as it applies to online communication; and set out the impact of any deficiencies identified in the current legal framework, including whether the current law is effective in ensuring that what is illegal offline is also illegal online.
- 2.51 If deficiencies in the current law are identified, we have agreed to do further work looking at potential options for reform. The terms of reference for this second phase will be agreed after the completion of the first.

PLANNING LAW IN WALES

Source: 12th Programme of Law Reform

Lead Department: Welsh Government

Start: Summer 2014

Scoping consultation: June-September 2016

Consultation: November 2017-March 2018

Scheduled completion: Autumn 2018

Outcome: Law reform recommendations

- 2.52 Planning law in Wales is unnecessarily complicated and, in places, difficult to understand. The legislation has not been consolidated since the Town and Country Planning Act 1990, and that has been supplemented by a succession of piecemeal changes ever since. Furthermore, the increasing divergence between the law in England and Wales has made it difficult to identify what the planning law of Wales actually is.
- 2.53 As part of our 12th Programme of Law Reform the Law Commission was asked by the Welsh Government to examine the operation of the development management system. We did not see there was a need for further major policy changes in this area, but there is clearly a need for planning law in Wales to be simplified and modernised.
- 2.54 The Welsh Government is now preparing a new Planning Consolidation Bill, incorporating almost all of the 1990 Act and many of the other Acts that added to it. And the Commission is working on technical reforms, to improve how the system works in practice.
- 2.55 We produced a scoping paper in June 2016, setting out our preliminary proposals, and in November 2017 published a full Consultation Paper, setting out our conclusions as to the scope of the project and outlining our proposals for technical reforms. The consultation process lasted for three months, closing on 1 March 2018.
- 2.56 We are now analysing the responses, and will produce a final report to the Welsh Government later in the year. This report should will inform the production of the new Planning Code.

PROTECTION OF OFFICIAL DATA

Source: Ministerial reference

Lead Department: Cabinet Office

Start: February 2016

Consultation: February-May 2017

Scheduled completion: Summer 2018

Outcome: Law reform recommendations

- 2.57 In 2015 the Cabinet Office, on behalf of Government, asked the Law Commission to review the effectiveness of the criminal law provisions that protect official information from unauthorised disclosure. Our work commenced in 2016. The focus has been primarily upon the Official Secrets Acts 1911 – 1989. We have also analysed the numerous other offences (over 120) that exist to criminalise the unauthorised disclosure of information. In addition, we have examined matters that might arise in the investigation and prosecution of Official Secrets Act cases. Finally, we have examined the argument that could be made for the introduction of a statutory public interest defence to the unauthorised disclosure offences contained in the Official Secrets Act 1989.
- 2.58 We published a consultation paper in February 2017, and conducted a consultation which ran until May 2017. The project attracted a great deal of interest, and we received over 1500 responses.
- 2.59 We are now analysing responses and will report back our final recommendations in late Summer or Autumn 2018.

RESIDENTIAL LEASEHOLD AND COMMONHOLD

Source: 13th Programme of Law Reform

Lead Department: Ministry of Housing, Communities and Local Government

Start: December 2017

Scheduled completion: March 2020

Outcome: To be determined after consultation

- 2.60 In England, properties are usually owned either as freehold or as leasehold. Leasehold is a form of ownership where a person owns a property for a set number of years (typically, 99 or 125 years) on a lease from a landlord, who owns the freehold. Flats are almost always owned using leasehold, but in recent years it has also increasingly been used for newly built houses.

- 2.61 It is estimated that there are at least 4 million leasehold properties in England alone. However, we have been told that the law which applies to leasehold is far from satisfactory.
- 2.62 The Government has said that leasehold has "far too many problems including disproportionate costs to extend leases; poor value property management; and a slow and costly sales process". Respondents to the consultation on our 13th Programme of Law Reform also identified numerous problems with residential leasehold law.
- 2.63 We have therefore been tasked with improving consumer choice, and with providing greater fairness and transparency for leaseholders.
- 2.64 Our project will, in the first instance, address two issues:
- leasehold enfranchisement; and
 - commonhold, which provides an alternative form of ownership to residential leasehold.
- 2.65 We previously discussed with Government the possibility of our involvement in a review of managing agent regulation. Following the Ministry of Housing, Communities and Local Government's call for evidence on the subject, the Government has decided to take forward work on the regulation of managing agents, alongside the regulation of letting agents, through a Working Group.
- 2.66 Our project may still be expanded to address other concerns with leases.

Leasehold

- 2.67 Our project on leasehold enfranchisement will involve a review of leaseholders' rights to:
- purchase the freehold of their house;
 - participate, with other leaseholders, in the collective purchase of the freehold of a group of flats; and
 - extend the lease of their house or flat.
- 2.68 Responses to our 13th Programme consultation criticised the current legislation as being complex, inconsistent and costly.
- 2.69 We will be reviewing the enfranchisement process and valuation procedure to make enfranchisement simpler, fairer and cheaper. We will publish a consultation paper later this year.

Commonhold

- 2.70 Commonhold was introduced in 2002 as a new way to own property in England and Wales. It allows a person to own the freehold of their individual property (such as a flat) within a building or development and become a member of a "commonhold association" which owns and manages the shared areas.

- 2.71 By enabling the freehold ownership of flats within a residential block of flats, commonhold provides an alternative to leasehold. Commonhold may also be used in a commercial context, for instance to regulate relations between individual shops in a retail park or offices in an office block.
- 2.72 Very few commonholds have been set up since the existing law came into force. Our 13th Programme consultees told us that there are a number of issues within the current commonhold model which could make it unattractive to homeowners, developers, mortgage lenders and others across the wider property sector.
- 2.73 The Government has announced that it wishes to reinvigorate commonhold. Our project will therefore look at why commonhold has failed, and what changes can be made to the current law to make it an attractive and workable form of ownership. We published a call for evidence on 22 February 2018, and will consult on proposals for reform later this year.

SEARCH WARRANTS

Source: Ministerial reference

Lead Department: Home Office

Start: December 2016

Consultation: May 2018

Scheduled completion: The end of 2018

Outcome: Law reform recommendations

- 2.74 We started work on this project at the request of the Home Office in December 2016.
- 2.75 This followed from comments made by senior members of the judiciary suggesting that the law governing search warrants in criminal investigations is overly complex, uncertain and liable to give rise to challenges. This is evidenced by the number of cases in recent years in which search warrants have been challenged and quashed on judicial review: in the reported cases alone, there have been some thirty judicial reviews concerning search warrants since 2009.
- 2.76 Our purpose is to consider ways in which the law of search warrants can be simplified, clarified and rationalised, in order to reduce the number of errors and challenges and to assist both applicants for warrants and those against whom warrants are sought in understanding and using the system.
- 2.77 We published a consultation paper in May 2018, and will hold a public consultation through to July. We intend to publish our final report and recommendations by the end of 2018.

THE SENTENCING CODE

Source: 12th Programme of Law Reform

Lead Department: Ministry of Justice

Start: January 2015

First consultation: July-August 2015

Second consultation: July 2017-January 2018

Supplementary consultation: March-April 2018

Scheduled completion: Autumn 2018

Outcome: Law reform recommendations and draft consolidation Bill

- 2.78 The law on sentencing affects all criminal cases, and is applied in hundreds of thousands of them. Currently, the law lacks coherence and clarity and can be difficult for practitioners and the courts to understand and apply.
- 2.79 Our aim in this project is to introduce a single sentencing statute that will act as the comprehensive source of sentencing law – the “Sentencing Code”. This would help stop unlawful sentences and save up to £255 million over the next decade by avoiding unnecessary appeals and reducing delays in sentencing clogging up the court system.
- 2.80 Over the last three years, working alongside the Office of the Parliamentary Counsel, we have produced a Bill consolidating sentencing procedure law. We held a public consultation on our proposals and the draft Bill between July 2017 and January 2018. We are conducting a supplementary consultation on our proposals for the consolidation of the youth justice provisions of the Sentencing Code in April 2018.
- 2.81 We expect to publish our final report and draft Bill in late 2018.

SIMPLIFICATION OF THE IMMIGRATION RULES

Source: 13th Programme of Law Reform

Lead Department: Home Office

Start: January 2018

Scheduled consultation: June 2018

Scheduled completion: The end of 2018

Outcome: Law reform recommendations

- 2.82 This project, which forms part of the 13th Programme of Law Reform, will consider way to simplify and clarify the Immigration Rules.
- 2.83 The Immigration Rules are crucial in setting out the way in which the Government intends the immigration system as a whole to operate, and affect a large number of

individuals seeking leave to enter or remain in the UK. However, they are widely criticised for being long, complex and difficult to use. They total 1033 pages in length. Statements of changes to the Rules are now frequent and detailed. Between 2012 and 2016, for example, and driven mainly by the introduction of a “points based” immigration system, the Rules increased in length by about 25%.

- 2.84 It has also been suggested that the Rules are poorly drafted. The numbering system is inconsistent: as well as the familiar hybrid paragraph numbering due to insertion of new paragraphs (adding “As” and “ABs” and the like), several appendices have been introduced which have their own different numbering system.
- 2.85 The project also provides an opportunity to review the balance between the Rules and external material which contains guidance or supplementary information, and to seek underlying causes of excessive length and complexity in the Rules and make recommendations to improve them for the future.
- 2.86 This project will not involve any substantive policy changes or any legislation, but will instead aim to identify principles by reference to which the Rules could be redrafted to make them simpler and more accessible to the user.
- 2.87 We will consult in Spring 2018 with a view to publishing a final report before the end of the year.

SMART CONTRACTS

Source: 13th Programme of Law Reform

Lead Department: Ministry of Justice

Start: Summer 2018

Scheduled consultation: To be confirmed

Outcome: A scoping study

- 2.88 There has been much press coverage recently in relation to the use of “smart contracts”, particularly in FinTech. By “smart contracts” we refer to the technology which runs on blockchain and by which legal contracts may “self-execute” or may be executed automatically, at least in part. The use of smart contracts is expected to increase efficiency in business transactions and it is suggested that the use of blockchain technology will increase trust and certainty.
- 2.89 It is important to ensure that English courts and law remain a competitive choice for business. Therefore, there is a compelling case for a Law Commission scoping study to review the current English legal framework. The purpose of this project would be to ensure that the law is sufficiently certain and flexible to apply in a global, digitalised context and to highlight any topics which lack clarity or certainty.
- 2.90 For example, historical data recorded in blockchains cannot be easily erased or rewritten. Although this is usually presented as an advantageous feature of blockchain,

it also means that it may be difficult for a third-party arbiter (such as a court) to correct any perceived mistakes, or unfairness. There are questions about how this feature would interact with contract law concepts such as implied terms, or contracts which are held to have been void or voidable from the outset.

SURROGACY

Source: 13th Programme of Law Reform

Lead Department: Department of Health and Social Care

Start: Spring 2018

Scheduled completion: Spring 2020 (without a Bill) or Spring 2021 (with a Bill)

Outcome: Law reform recommendations and draft Bill

- 2.91 Surrogacy describes the situation where a woman bears a child on behalf of another person or persons who intend to become the child's parents for all purposes. Typically, intended parents enter into a surrogacy arrangement because they have experienced fertility problems or are unable to conceive naturally. In the UK surrogacy is governed by the Surrogacy Arrangements Act 1985 and certain provisions of the Human Fertilisation and Embryology Act 2008. The intended parents can become the legal parents of the child born to the surrogate mother by obtaining a Parental Order after the child has been born.
- 2.92 Although it is likely that children born as a result of surrogacy arrangements to UK-based intended parents number only in the hundreds rather than thousands each year, the use of such arrangements has significantly increased over the last ten years, and is expected to continue to rise. The greater acceptance of same-sex relationships, with the introduction of civil partnerships and the extension of marriage, is one of a number of factors likely to result in an increase in the number of children born as a result of a surrogacy arrangement.
- 2.93 For a same-sex male couple, surrogacy is the only formal way of having a child who is biologically related to one of the intended parents. Surrogacy may also be an important route to parenthood for some transgender people. The law of surrogacy engages very important issues and rights for both the children and adults involved in such arrangements: these include questions of parentage and the prevention of exploitation of children and others.
- 2.94 It has therefore become a matter of concern that there are significant problems with the law. The law has fallen behind changing social attitudes and the increasing prevalence of surrogacy, including surrogacy arrangements with international aspects. For example, courts have struggled to implement the statutory conditions for a Parental Order because the paramount position of the child's best interests makes it difficult for the court to refuse to recognise an existing relationship between the intended parents and child. Consequently, courts have extended or modified many of the statutory requirements for a Parental Order, but case law has not been able to resolve the underlying problems in the statute, or find solutions to all difficulties. One requirement, that an application for a Parental Order be made by two people, has been declared to

be incompatible with the European Convention on Human Rights. Parliament is currently scrutinising a remedial order intended to remedy this incompatibility by allowing a single person to apply for a Parental Order. The law, as governed by the 1985 and 2008 Acts, may therefore be honoured more in the breach than in the observance.

- 2.95 There are, therefore, significant questions relating to the procedure for the grant of Parental Orders to the intended parents. But these are only some of the issues that arise. Surrogacy arrangements also engage issues of children’s rights to access information about their parentage, both genetic and gestational, and there are wider questions around the basis on which surrogacy arrangements should be permitted. International surrogacy arrangements bring into focus problems surrounding the nationality of children born to surrogates (including the risk of statelessness), bringing surrogate-born children into the UK, and the risk of exploitation of all the parties involved.
- 2.96 We take the view that the law relating to surrogacy is outdated and unclear, and requires comprehensive reform. Reform will deliver significant benefits of clarity, modernity and the protection of those who enter into surrogacy arrangements and, most importantly, of the children born as a result of such arrangements.
- 2.97 We hope to begin the project in Spring 2018 and expect that it will last two to three years.

WILLS

Source: 13th Programme of Law Reform

Lead Department: Ministry of Justice

Start: Early 2016

Consultation: July-November 2017

Scheduled completion: Mid 2019

Outcome: Law reform recommendations and draft Bill

- 2.98 A person’s will is an important document. People use wills to choose how to distribute their possessions after they have died, and often to express preferences about what happens to their bodies, and to appoint guardians who will take care of their children. Yet it is thought that around 40% of people do not have a valid will when they die. When someone dies intestate – that is, without leaving a will, or with a will that is not valid – it can cause difficulties for the family, adding to stress at a time of bereavement.
- 2.99 The law in England and Wales that governs wills is, in large part, a product of the 19th century: the main statute is the Wills Act 1837, and the law that specifies when a person has the capacity to make a will (“testamentary capacity”) is set out in the 1870 case of *Banks v Goodfellow*. The law of wills needs to be modernised to take account of the changes in society, technology and medical understanding that have taken place since the Victorian era.

- 2.100 The project is a wide-ranging review of the law of wills, with the central issues being testamentary capacity; the rules that govern when a will is valid (such as requirements for signing and witnessing), and what happens when those rules are not properly followed; protecting vulnerable testators; and making wills electronically.
- 2.101 Our consultation paper proposed reforms that have the potential to support testamentary freedom by ensuring that people's last wishes as to what should happen to their property are given effect, increase protection against fraud and undue influence for those making wills and increase the clarity and certainty of the law.
- 2.102 We consulted on this topic from July to November 2017, and we expect to complete the project by mid-2019.

POTENTIAL FUTURE WORK

- 2.103 To ensure this document presents a complete picture of our work, we draw attention to those projects for which we have secured the Lord Chancellor's support in the 13th Programme, but for which we do not yet have definite plans in place to commence work. We hope that, during the life of the 13th Programme, we will be able to take forward some, if not all, of the projects listed below:
- Administrative Review
 - A Modern Framework for Disposing of the Dead
 - Application of unfair terms law on lease assignment
 - Intermediated Securities
 - Modernising Trust Law for a Global Britain
 - Museum Collections
 - Registered Land and Chancel Repair Liability
- 2.104 Further details are available on our website.

