



Ministry of
JUSTICE

Report on the implementation of Law Commission proposals

March 2012

Report on the implementation of Law Commission proposals

Presented to Parliament pursuant to section 3A of the
Law Commissions Act 1965 as amended by section 1 of
the Law Commission Act 2009.

Ordered by the House of Commons to be printed 22 March 2012

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Any enquiries regarding this publication should be sent to us at tania.williams@justice.gsi.gov.uk.

This publication is available for download at www.official-documents.gov.uk and on our website at www.justice.gov.uk

ISBN 9780102976304

Printed in the UK by The Stationery Office Limited
on behalf of the Controller of Her Majesty's Stationery Office
ID 2482610 03/12

Printed on paper containing 75% recycled fibre content minimum.

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Report on the implementation of Law Commission proposals

Introduction

I am pleased to present this report which relates to the implementation of Law Commission proposals. This is the second annual report to be presented following the passing of the Law Commission Act 2009.

The Law Commission Act 2009, which came into force on 12 January 2010, amends the Law Commissions Act 1965 to place a duty on the Lord Chancellor to report to Parliament each year on the extent to which Law Commission proposals have been implemented by the Government. This report covers the period 12 January 2011 to 11 January 2012.

It is a challenging time for the Government at present: we are having to take very difficult decisions to reduce the budget deficit and stimulate economic growth at a time of shrinking departmental resources. The Government continues to hold the excellent work of the Law Commission in very high regard and remains committed to law reform. However, the Government's current focus is on dealing with the severe economic situation, which has unfortunately meant that very worthwhile but less immediately pressing law reform projects have, in some cases, been delayed.

This report demonstrates that progress is being made to implement the recommendations of the Law Commission. In particular, the new House of Lords procedure for Law Commission Bills is proving to be effective in implementing uncontroversial changes. The Consumer Insurance (Disclosure and Representations) Bill received Royal Assent on 8 March 2012 and the Trusts (Capital and Income) Bill has recently been introduced as a carry-over Bill via the new procedure. I expect the procedure to be used to implement more of the Commission's recommendations over the coming years.

The Right Honourable Kenneth Clarke QC MP

Lord Chancellor

March 2012

Scope of the report

1. Section 3A of the Law Commissions Act 1965, as inserted by section 1 of the Law Commission Act 2009, places a duty on the Lord Chancellor to report to Parliament each year on the extent to which Law Commission proposals have been implemented by the Government.
2. This is the second annual report to be published by the Government under the Act. The report covers the period 12 January 2011 to 11 January 2012.
3. As stipulated by the Act, the report covers Law Commission proposals that have been implemented by the Government during the year, proposals that have not been implemented, including plans for implementation, and decisions taken not to implement proposals.
4. The report covers only the reports of the Law Commission of England and Wales, although it notes when these reports were done jointly with the Scottish Law Commission.
5. The report addresses Law Commission proposals that are for HM Government to implement. Some proposals are for the Welsh Government to implement in respect of Wales; these are noted in the report.

Proposals that have been implemented

The Forfeiture Rule and the Law of Succession¹

6. This report seeks to solve a specific problem in succession law. There is a rule that a murderer may not inherit from the person he or she has killed. But the law also cuts out the murderer's descendants from the line of succession. This project asked whether it was right to bar the descendants in this way and addressed an analogous problem where a beneficiary rejected (disclaimed) an inheritance. The report also recommended that the law be amended so that a child is able to inherit his or her parent's interest in an intestate estate, where the parent dies neither married nor civil partnered before the age of 18 and the child is alive at the time of the intestate's death.
7. The proposals contained within this report were accepted by the previous Government and were included in the draft Civil Law Reform Bill which was published for pre-legislative scrutiny during the 2009/2010 session of Parliament. The Government supported Greg Knight MP's Private Member's Bill which implemented the Commission's recommendations with some modifications. The Estates of Deceased Persons (Forfeiture Rule and Law of Succession) Act 2011 received Royal Assent on 11 July 2011 and was brought into force on 1 February 2012.

¹ The Forfeiture Rule and the Law of Succession (LC 295) (04.07.2005).

Proposals that have not yet been implemented

Third Parties – Rights against Insurers²

8. The Third Parties (Rights against Insurers) Act 2010 implements with some modifications the proposals contained within the joint Law Commission and Scottish Law Commission report on this issue. When implemented the Act will replace legislation from 1930, streamlining and improving the procedures under which a person with a claim against an insolvent but insured wrongdoer can claim against the insurer. Most importantly the new Act will allow the claimant to proceed against the insurer directly without first establishing the liability of the insolvent person.
9. Implementation of the Act has been delayed by work on other priorities, but we have nonetheless been working to ensure a smooth commencement when a decision is taken to bring it into force. As part of this work we have provisionally concluded that some rules of court will be necessary; that the Act requires a small amendment to cover all forms of administration; and that the Act should be extended to the newly introduced Debt Relief Orders in Northern Ireland. In view of this it is unlikely that the Act will be commenced until 2013.

Partnership Law³

10. The report was a joint Law Commission and Scottish Law Commission report on the law relating to partnerships, including the law specifically relating to limited partnerships. The report recommended weaving together the law on general and limited partnerships. Under the current law a partnership in England and Wales is not a legal entity separate from its members. There is therefore no separate legal person which can enter contracts and hold property; and a partnership is automatically dissolved on any change of partner (although the remaining partners can agree to continue in partnership).
11. Reforms were recommended to the law specifically relating to limited partnerships, which are widely used for venture capital funds. A general partner manages the business, while the limited partner is not involved in management and has limited liability. The recommendations clarify and modernise the law on limited partnerships, which has been little changed since its introduction in 1907.
12. In 2006, the then Government announced after consultation that it would not implement the Law Commission's recommendations in relation to general partnerships, but that it did intend (broadly speaking) to implement

² Third Parties – Rights against Insurers (LC 272) (31.07.2001).

³ Partnership Law (LC 283) (18.11.2003).

those specifically relating to limited partnerships. The Legislative Reform (Limited Partnerships) Order 2009, which implements two of those recommendations, came into force on 1 October 2009. The Government plans to address the remaining recommendations as and when resources and priorities allow.

Unfair Terms in Contracts⁴

13. The present law on unfair contract terms is covered by two pieces of UK legislation which are confusing and contain inconsistent and overlapping provisions.
14. This report, which was a joint Law Commission and Scottish Law Commission report, was accepted in principle by the previous Government in 2006. Implementation of the Commissions' recommendations was put on hold pending negotiation of the draft EU Consumer Rights Directive but the scope of the Directive reduced in 2011 and unfair contract terms were no longer included when the Directive was adopted in late 2011. The Law Commissions are currently updating their report.

Company Security Interests⁵

15. Companies often grant charges and other security interests over their assets to secure loans. This project looked at how such security interests should be registered. It also considered how to resolve conflicts between different secured lenders and between lenders and borrowers.
16. A power to amend the scheme for registration of charges, which could be used to implement some of the Law Commission's recommendations contained within this report, was included in the Companies Act 2006. During 2011, the Government continued detailed discussions with stakeholders over their proposed revisions to the current scheme as announced in December 2010. These revisions will provide a single UK-wide scheme that applies to all companies incorporated under the Companies Act 2006 or its predecessors. Electronic filing will be possible. The revised scheme for registration of charges is likely to come into force in late 2012 or early 2013. Consideration will be given to the rest of the Law Commission's recommendations after decisions have been made with regards to registration of charges.

Termination of Tenancies⁶

17. This report examined the means whereby a landlord can take back a property let to a tenant because the tenant has not complied with his or her obligations under the lease. This is an issue of great practical importance

⁴ Unfair Terms in Contracts (LC 292) (24.02.2005).

⁵ Company Security Interests (LC 296) (07.07.2005).

⁶ Termination of Tenancies (LC 303) (31.10.2006).

for many landlords and tenants of residential and commercial properties. The current law is difficult to use and littered with pitfalls for both the lay person and the unwary practitioner.

18. The Government is continuing discussions with the Commission about this report. No final decision has been taken.

Participating in Crime⁷

19. This report examined the law of secondary liability for assisting and encouraging crime. The principles determining when someone can be found liable for a crime on the basis of help or encouragement have become less clear and can result in some defendants being treated too leniently and others too harshly.
20. The Government has accepted the recommendations contained in this report, along with those contained in the Commission's report on Conspiracy and Attempts (paragraphs 27 and 28 below). However, whilst the Government considers that both reports are worthwhile projects for the future, they are not priority areas in the shorter term when resources are scarce. Therefore, neither set of recommendations will be implemented during the lifetime of this Parliament.
21. The recommendations in both reports seem to offer potential and possibly significant benefits to the administration of justice, both in terms of facilitating prosecutions and in better targeting what behaviour should or should not be viewed as criminal. It also appears that there could be potential savings for the criminal justice system in the longer term in respect of a reduction of appeals and a more streamlined approach to prosecutions, although there would inevitably be associated costs arising from developing and implementing the measures. In other circumstances, the Government would look to implement the recommendations but unfortunately they cannot be considered a priority in the current climate.

Cohabitation: The Financial Consequences of Relationship Breakdown⁸

22. This report examined the financial consequences of the termination of cohabitants' relationships by separation or death. The existing law is a patchwork of legal rules, sometimes providing cohabitants with interests in their partners' property. The law is unsatisfactory: it is complex, uncertain, and expensive to rely on. It gives rise to hardship for many cohabitants and, as a consequence, their children.
23. The Government considered the research on the impact of the Family Law (Scotland) Act 2006 along with the proposals set out in the Law

⁷ Participating in Crime (LC 305) (10.05.2007).

⁸ Cohabitation: The Financial Consequences of Relationship Breakdown (LC 307) (31.07.2007).

Commission's report and announced in September 2011 that the recommendations for reform would not be taken forward in this Parliament. The Scottish legislation did not provide a sufficient basis for a change in the law and the family justice system is currently in a transitional period with major reforms on the horizon.

Capital and Income in Trusts: Classification and Apportionment⁹

24. This report examined the complicated rules governing the treatment of trust receipts and outgoings as capital or income. It considered the extent to which trustees who have to distinguish between income and capital should be able to invest on a "total return" basis balancing overall risk and return rather than having to produce receipts in a particular form.
25. The Government has accepted the proposals contained in this report and, following the response to the Ministry of Justice consultation,¹⁰ has agreed certain modifications to the proposals with the Commission. The Trusts (Capital and Income) Bill was introduced on 29 February 2012.

Consumer Remedies for Faulty Goods¹¹

26. This report, which was a joint Law Commission and Scottish Law Commission report, recommended ways to simplify the law on the remedies available to consumers who buy goods which "do not conform to contract". This area of law is particularly complex. Currently, UK consumers have a right to a full refund, provided they act within "a reasonable time". However, how long the right to reject lasts is unclear. The report proposes to clarify this by setting a normal 30 day period within which consumers may obtain a full refund. The report also recommends a number of other amendments to clarify when a consumer may pursue a refund outside this 30 day period, what proportion of the original cost should be reimbursed and with whom the burden of proof should lie.
27. The Government is currently working to develop a new Consumer Bill of Rights and is considering which of the Law Commissions' proposals will be included in this Bill. The Department for Business Innovation and Skills will be consulting on detailed proposals early in 2012.

Conspiracy and Attempts¹²

28. This report addresses the law governing statutory conspiracy (under the Criminal Law Act 1977) and attempt (under the Criminal Attempts Act 1981). It recommends reform to resolve the problems with the current law

⁹ Capital and Income in Trusts: Classification and Apportionment (LC 315) (06.05.2009).

¹⁰ Trusts (Capital and Income) Bill response to Consultation (CP(R) 07/10) published 17 January 2011.

¹¹ Consumer Remedies for Faulty Goods (LC 317) (04.11.2009).

¹² Conspiracy and Attempts (LC 318) (10.12.2009).

which amongst other things sets the fault element too high in respect of conspiracies to commit certain offences.

29. The Government has accepted the recommendations contained in this report, along with those contained in the Commission's report on Participating in Crime (paragraphs 18 – 19 above). However, whilst the Government considers that both reports are worthwhile projects for the future, they are not priority areas in the shorter term. Therefore, neither set of recommendations will be implemented during the lifetime of this Parliament.

Consumer Insurance Law: Pre-Contract Disclosure and Misrepresentation¹³

30. This joint Law Commission and Scottish Law Commission report addresses the issue of what a consumer must tell an insurer before taking out insurance. Under the current law, consumers are required to volunteer information about anything which might be material to a "prudent insurer". A failure to do so allows the insurer to treat the insurance contract as if it never existed and refuse all claims under the policy, which may be regarded as overly harsh.
31. The Consumer Insurance (Disclosure and Representations) Bill passed successfully through the Law Commission special procedure and received Royal Assent on 8 March 2012.

Administrative Redress: Public Bodies and the Citizen¹⁴

32. The report expressed the Commission's conclusions that, in the light of responses to the consultation paper, it could not continue to develop proposals on the availability of compensation on judicial review and reform of the tort liability of public authorities. The project would, however, continue in relation to reform of the public sector ombudsmen, and a report has now been published finalising that project (see paragraphs 43 and 44 below). The report also made recommendations in relation to the reporting by public authorities of the costs of compensation.
33. The Government is considering the feasibility of the Law Commission's proposals on reporting compensation and associated litigation costs as part of future initiatives on improving the publication of public bodies' data in open and standardised formats. The Government has begun preliminary work on a pilot study on reporting compensation and associated litigation costs. This will include an assessment of what is reported, and how and where departments might present the data (e.g. as part of annual reports and accounts, or another annual publication).

¹³ Consumer Insurance Law: Pre-Contract Disclosure and Misrepresentation (LC 319) (15.12.2009).

¹⁴ Administrative Redress: Public Bodies and the Citizen (LC322) (26.05.2010).

The High Court's Jurisdiction in relation to Criminal Proceedings¹⁵

34. The report considered challenges which may be brought in the High Court in respect of decisions made in relation to cases in the Crown Court for trial. The current system is confusing and has produced anomalies.
35. A considerable amount of work has been carried out in response to this complex report, which raises many difficult and, in some cases, sensitive issues of principle. We recognise that that our response is now somewhat delayed. Work has had to give way, for substantial periods, to other pressing business for the teams responsible. We will issue a full response as soon as is practicable.

Expert Evidence in Criminal Proceedings¹⁶

36. The central recommendation of this report is that there should be a new statutory test of reliability which would need to be applied by the judge to any expert opinion evidence tendered for admission in criminal proceedings whose reliability was in doubt.
37. The Government has been considering its response to that and the other recommendations and has had informal discussion with the Commission about its emerging thinking. A formal response is in preparation and will be published when ready.

Adult Social Care¹⁷

38. The report recommends a unified legal framework for the provision of adult social care services to disabled people, older people and carers. The reforms would introduce single statutes for adult social care in England and in Wales. Dozens of landmark pieces of legislation would be repealed including the National Assistance Act 1948, Chronically Sick and Disabled Persons Act 1970 and NHS and Community Care Act 1990. The new statute would set out a single duty to assess, an eligibility framework for service provision and requirements to safeguard adults from abuse and neglect.
39. The Government warmly welcomed the publication of the Commission's report, *Adult Social Care*, on 11 May 2011. We agree with the Commission's analysis of the existing adult social care statute as opaque, outdated and confusing. The need for law reform is clear, and the Commission's report and its 76 recommendations provide a solid foundation and a way forward.
40. We are considering the Law Commission's recommendations alongside other reforms in adult social care, including the proposals of the

¹⁵ The High Court's Jurisdiction in relation to Criminal Proceedings (LC324) (27.07.2010).

¹⁶ Expert Evidence in Criminal Proceedings (LC325) (22.03.2011).

¹⁷ Adult Social Care (LC326) (11.05.2011).

Commission on the Funding of Care and Support, published in July 2011. Caring for our future, the stakeholder engagement exercise, ran from 15 September to 2 December 2011 to support our understanding of the priorities for reform.

41. The Government has committed to publishing a Care and Support White Paper in spring 2012 to set out its reform agenda for adult social care. The White Paper will include the formal response to the Law Commission's report. We remain committed to legislating for adult social care law reform at the earliest opportunity.
42. The Welsh Government is responsible for adult social care in Wales. It is currently consulting on its proposals for a Social Services Bill for Wales, with the Law Commission's recommendations being one of the major evidence bases for the Bill. The Welsh Government's intention is that the Bill will be introduced in to the National Assembly later this year.

Making Land Work: Easements, Covenants and Profits à Prendre¹⁸

43. The report makes recommendations to modernise and simplify the law relating to three interests in land – easements, covenants and profits à prendre. These interests are essential for the effective and efficient use of land. The recommendations 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 these interests most: homeowners, businesses, mortgage lenders and those involved in the conveyancing process. The recommendations also give new legal tools to landowners to enable them to manage better their relationships with neighbours, and to realise better the potential of their properties.
44. The Government's consideration of this Report has been delayed by work on other priorities. Nonetheless, we aim to give a substantive response by the anniversary of its publication, 8 June 2012.

Public Services Ombudsmen¹⁹

45. The report arose from the Law Commission's earlier project on administrative redress, and makes a number of recommendations in relation to the operation of the public services ombudsmen.
46. The Government is considering the Commission's recommendations and aims to respond by summer this year. Recommendations relating to the Public Services Ombudsman for Wales, who investigates complaints against devolved services, fall to the Welsh Government for consideration.

¹⁸ Making Land Work: Easements, Covenants and Profits à Prendre (LC327) (08.06.2011).

¹⁹ Public Services Ombudsmen (LC329) (14.07.2011).

Intestacy and Family Provision Claims on Death²⁰

47. This report examined two important aspects of the law of inheritance: the “intestacy rules” that determine the distribution of property in the tens of thousands of cases each year where someone dies without a will; and the legislation which allows certain bereaved family members and dependants to apply to the court for “family provision”. This report made a number of recommendations to update the entitlements of spouses and other family members. Complex and costly “life interests” would no longer be imposed; a simpler form of sharing would be substituted where there are children. Further recommendations would remove unnecessary obstacles to valid claims for family provision and modify the powers of trustees. The report also addressed the situation where one member of an unmarried couple dies without a will. It concluded that in some circumstances a surviving partner should inherit.
48. The Government is considering the Commission’s recommendations and aims to respond within the timescales set out in the protocol.

²⁰ Intestacy and Family Provision Claims on Death (LC331) (14.12.2011).

Decisions taken not to implement

Intoxication and Criminal Liability²¹

49. Many crimes, particularly crimes of violence, are committed when the offender is in a state of extreme or partial intoxication. This report addresses the law governing the extent to which, in order to avoid liability, a defendant may rely on his or her drunken or otherwise intoxicated state at the time he or she committed a criminal offence. It recommends codifying the law and making it more logical and consistent.
50. The Government is not minded to implement the Commission's recommendations on intoxication and criminal liability as it is not persuaded that they would deliver improvement to the administration of justice. Whilst the Commission's proposals may resolve some uncertainty in the law, particularly around the distinction between offences of "specific intent" and "basic intent"; they may also increase its complexity, in particular by replacing a complex but well understood process with a complicated new test which practitioners would need to master, yet arguably would be scarcely more intelligible. Furthermore, we do not consider that there would be a risk of miscarriage of justice if the reforms were not introduced; nor are we persuaded that the cost of introducing the changes, for example the courts getting to grips with the new definitions, would be outweighed by any benefits. We do not, therefore, intend to take forward the Commission's proposals and this decision has been communicated to the Commission.

The Illegality Defence²²

51. The report dealt with the illegality defence which arises when a defendant in a private law action argues that the claimant should not be entitled to his or her normal rights or remedies because he or she has been involved in illegal conduct which is linked to the claim. The defence is problematic as, if the courts accept the illegality defence, it often involves granting an unjustified windfall to the defendant. However, if the courts refuse, they may be seen to be helping a claimant who has behaved illegally.
52. The Government has decided not to implement this report because, overall, we are not satisfied that there is a sufficiently clear and pressing case for reform and we are not satisfied that if the draft Bill became law it would improve on the current situation sufficiently to make legislating worthwhile. The number of cases involving illegality in trusts which are taken to court each year is low, the case law in this area is highly controversial and it is not clear that there are significant numbers of cases

²¹ Intoxication and Criminal Liability (LC 314) (15.01.2009).

²² The Illegality Defence (LC 320) (17.03.2010).

that are being wrongly decided. In addition, section 199 of the Equality Act 2010 will, when commenced, abolish the presumption of advancement, which was a significant factor in why the Law Commission were concerned with the state of the current law. The application of the draft Bill is also very wide and there is some concern about the risk of unintended consequences and of a new statutory scheme introducing new uncertainties in the law. Therefore, on balance, and given that reform of this area of the law cannot be considered a pressing priority for the Government at present, we are minded not to implement the Commission's proposals.



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ISBN 978-0-10-297630-4



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