



SHAPING THE LAW – THE LAW COMMISSION AT THE CROSSROADS

The Denning Lecture for 2011 presented to BACFI by Lord Justice Munby, Chairman of the Law Commission at the Inner Temple on 29 November 2011

Thank you for inviting me to give this prestigious lecture. The magnitude of the honour you do me is apparent from the distinguished roll call of those who have preceded me.

Lord Denning was, as you might expect, a supporter of the Law Commission. Speaking in support of the Law Commissions Bill in its second reading in the House of Lords in 1965, he said that “Each generation has its duty to keep the law in conformity with the needs of the time.” Would he think we are achieving that? I should like to think so, but I have to confess to having some doubts.

I am not, of course, the first speaker from the Law Commission you have had. Not that long ago, in 2008, you heard Baroness Hale of Richmond. As a Law Commissioner, she oversaw a number of vitally important reforms in family law during the nine years she spent with the Commission, in particular the Children Act 1989, which revolutionised the law for our children and of which we are still rightly proud. But understandably she chose to speak to you about the Supreme Court. Ten years earlier, in 1998, the then Chairman of the Commission, Mrs Justice Arden (as she then was), spoke to you about the accountability of company directors. More significant for my purpose, therefore, is the lecture that a previous Chairman, Mr Justice Peter Gibson (as he then was), gave in 1991.

When Peter Gibson spoke, the Law Commission had celebrated its silver jubilee the year before. We are now approaching our golden anniversary. So perhaps it is time to take stock, and not least to see how matters have changed over the last twenty years.

The founding fathers and architects of the Law Commission were Gerald Gardiner QC, who went on to become Lord Chancellor in 1964, and Professor Andrew Martin, who went on to become one of the first Law Commissioners. They set out the blueprint for a law reform commission in their 1963 book, “*Law Reform Now*”. Their vision became reality with the enactment of the Law Commissions Act 1965 and the establishment of the Commission under the inspirational leadership of its first Chairman, Mr Justice (later Lord) Scarman. At the time, their vision was considered fairly radical, almost revolutionary.

It is as well to remind ourselves of what the 1965 Act has to say about our remit. Now, as then, our statutory “purpose” (section 1(1)) is “promoting the reform of the law.” Our duty (section 3(1)) is “to take and keep under review all the law” of England and Wales “with a view to its systematic development and reform, including in particular the codification of such law, the elimination of anomalies, the repeal of obsolete and unnecessary enactments, the reduction of the number of separate enactments and generally the simplification and modernisation of the law.” For that purpose we are required to “prepare and submit to the Minister from time to time programmes for the examination of different branches of the law with a view to reform” (section 3(1)(b)); to “undertake, pursuant to any such recommendations approved by the Minister, the examination of particular branches of the law and the formulation, by means of draft Bills or otherwise, of proposals for reform therein” (section 3(1)(c)); and to “prepare from time to time at the request of the Minister comprehensive programmes of consolidation and statute law revision, and to undertake the preparation of draft Bills pursuant to any such programme approved by the Minister” (section 3(1)(d)).

If then, from the outset, the Commission’s key functions have been to update the law, advise on the repeal of old laws and make recommendations for new ones, the breadth of the vision as spelled out in the Act needs to be noted. Our task is the “systematic” reform of the entire law, in particular pursuant to programmes for the reform of what the Act refers to as “particular branches of the law.” I shall return to this in due course.

Here I merely assert that the reasons for establishing the Law Commission remain as strong as ever. Despite the better part of fifty years' endeavour, much remains to be done. It is a noble cause. The Law Commission has been copied around the world. Nonetheless we remain under threat.

Under the chairmanship of my immediate predecessor, Lord Justice Etherton, important steps were taken to improve the implementation, and speed of implementation, of our recommendations – matters which have been of grave concern to many of my predecessors.

Our founding fathers could not arrange it so that everything we recommend is automatically implemented. We are, as we always have been, subject to Government control of the legislative timetable. Democratic accountability must, of course, rest with Parliament, but although all our reports are laid before Parliament, we cannot ourselves introduce a Bill. For that we are dependent upon either the decision of Government or, occasionally (as very recently with the Estates of Deceased Persons (Forfeiture Rule and Law of Succession) Act 2011), upon the support of an individual Parliamentarian who is willing to carry our work forward by means of a private member's Bill.

That said, our implementation rate is not too bad. We have a good record. Of the 187 final reports we have produced to date, 76% have been accepted by Government and 68% implemented, in whole or in part. Note the qualifying words! Recent successes include, in addition to the Act I have just mentioned, the Bribery Act 2010 and the Third Parties (Rights Against Insurers) Act 2010. We hope for successful passage of the Consumer Insurance Bill currently before the House of Lords.

Three measures have been taken aimed at improving matters.

The first two arise out of the Law Commission Act 2009, passed in November 2009, which came into force on 12 January 2010. Section 1 inserts a new section 3A in the 1965 Act, requiring the Lord Chancellor to make an annual report to Parliament on (a) the Law Commission's proposals implemented during the year and (b) the proposals that have not been implemented, including "plans for dealing with any of those

proposals” and, where any decision has been taken not to implement, “the reasons for the decision.” This is a hugely important development, both for the Commission and for the public we serve. For the first time we shall have an annual report produced by Government and presented to Parliament that explains what has happened and when action might be expected. This new statutory requirement on the Lord Chancellor increases the transparency of the Government’s approach to our work and is to be warmly welcomed, not least because of the pressure it puts on Government to respond to our reports.

Section 2 of the 2009 Act inserts a new section 3B in the 1965 Act providing for the Lord Chancellor and the Commission to agree a protocol on how the Government and the Law Commission should work together. The Protocol was laid before Parliament and came into force on 29 March 2010. The protocol places obligations on both the Commission and the Government. The most crucial of these is that which states that the Lord Chancellor will expect the Minister of the relevant policy department to give an undertaking that there is a “serious intention” to take forward law reform in the specific area proposed. Scarcely less important is the obligation on Government to provide an interim response to every Law Commission report “as soon as possible and in any event within six months” and a final response “as soon as possible after delivery of the interim response and in any event within one year of publication of the response”, in each case unless otherwise agreed with the Commission. If Government is minded either to reject or substantially modify any significant recommendation of the Commission it must first give the Commission the opportunity to discuss and comments on its reasons before finalising the decision. Although the Protocol applies only to projects taken on since March 2010, Government has agreed to take it into account, so far as practicable, in relation to existing projects.

When it comes to implementation, the Law Commission, as I have said, has a good record but we believe it could – and should – be considerably better. Too many pieces of the Commission’s work that would, if implemented, clarify and simplify many areas of law and make justice more accessible and more fair, lie waiting for attention across Whitehall. There are of course different reasons for this: changes in policy, changes in Government and other, less straightforward, reasons. But by obliging Ministers to make sure we receive an undertaking of serious intention to implement before we

consider an area of law for reform, and by speeding up the process of post-report decision making, the Commission is firmly of the belief that the protocol will make a sizeable contribution to ensuring that our work is implemented, as indeed it should be.

The third reform is the new House of Lords procedure for scrutinising Law Commission Bills, adopted by the House as a permanent feature in October 2010 following a successful trial agreed in April 2008. The procedure allows for the Second Reading of technical and non-controversial Law Commission Bills to be taken off the floor of the House. Two Bills went through under the trial procedure, both of which received Royal Assent: the Perpetuities and Accumulations Act 2009 and the Third Parties (Rights Against Insurers) Act 2010. A third Bill is currently before the House, the Consumer Insurance Bill, and a fourth is waiting in the wings. This special procedure allows valuable legislation to proceed to the statute book that would previously have found it difficult to secure a place in the main legislative programme. It represents another important step forward in ensuring the implementation of Law Commission recommendations.

So when I took over from Terry Etherton all the signs were good for a new golden age.

But then the storm broke. During the summer of 2010 we were presented with perhaps the biggest threats ever faced by the Commission, which put at risk not just our independence and our ability to function, but even our very existence. The Commission was examined as part of the Government's overall review of arms'-length bodies, the outcome of which is the Public Bodies Bill now making its way through Parliament. For a short period abolition seemed a possibility, though in time the Government decided that the Commission should continue to exist on the basis that there remains a need for a law reform body that is "technically expert and independent". Despite this, the Commission, with 150 other public bodies, was swept up into Schedule 7, perhaps the most controversial part of the Public Bodies Bill. This would have enabled the statutory provisions governing the Law Commission to be amended by secondary legislation, making it possible for the Government to adjust not just the composition but also the functions of the Law Commission by statutory instrument.

Thankfully, on 28 February 2011, the Cabinet Office Minister, Lord Taylor of Holbeach, told the House of Lords that Schedule 7 would be dropped. He acknowledged that “the Government absolutely recognises that some public functions need to be carried out independently of ministers”. Schedule 7, we were told, “was never intended to hinder or threaten that independence”. Whatever the intention, it plainly did.

Simultaneously, and again in common with many other government bodies, we learned that the income we would receive from our sponsoring department, the Ministry of Justice, was to be very significantly reduced. There followed several months of hopeful attempts at negotiation on our part, which were met with a sympathetic but unbending response. Having already weathered a modest reduction in 2010-2011, we must now prepare ourselves for further, much deeper and more painful reductions over the next four years. Cuts that would otherwise have been insupportable and profoundly damaging to the Commission have been made tolerable only because we have been able to persuade a number of other government departments to contribute to the cost of the law reform projects they are sponsoring.

So we survived the summer with our existence and purpose intact and the value of our independence re-affirmed by Government. We continue to receive strong expressions of support from politicians. And we have supporters across the legal world, the third sector, the business community and, indeed, from society at large, many representatives of whom contribute to our work in so many ways including acting on our advisory groups.

It is of course early days for the changes embodied in the 2009 Act. On one level things are as we would hope. The Lord Chancellor’s first annual report was published on 24 January 2011. He acknowledged that Government holds the “excellent” work of the Law Commission in very high regard. We were gratified to see clearly spelled out the Government’s commitment to the Law Commission’s primary objectives of ensuring that the law is modern, simple and accessible.

The substance and detail of the report, however, was much less reassuring. While it showed that a number of the Law Commission’s proposals had been implemented

during the preceding year, it was disappointing in the account it gave of those that have not been, or in some cases will now never be, implemented.

The report listed fifteen Law Commission projects that had not yet been implemented and five that had been rejected.

Of the fifteen projects that had not yet been implemented, a number had lain on Government shelves for far too long – in the case of our Partnership Law project, over seven years when the Lord Chancellor reported. Not only is this unsatisfactory. Delay of this kind means that the reports become out of date and may need a considerable amount of work to refresh, if the decision is ever taken to implement. But even worse, the delays continue.

Although there was more or less positive progress reported in relation to four of these fifteen reports,¹ in no fewer than nine cases² the best that the Lord Chancellor was able to say was that the Government aimed to respond or make an announcement “early this year” or, in one case, “in late Spring”. In the other two cases³ a much longer timescale was envisaged before any further consideration could be given.

The early part of the year passed without any further news in relation to any of the nine reports. Spring turned into summer before we heard anything more. We still await responses on two of them. And Christmas is not that far away.

¹ Unfair Terms in Contracts; The Forfeiture Rule and the Law of Succession; Capital and Income in Trusts: Classification and Apportionment; and Consumer Remedies for Faulty Goods.

² Termination of Tenancies; Participating in Crime; Cohabitation: The Financial Consequences of Relationship Breakdown; Intoxication and Criminal Liability; Conspiracy and Attempts; Consumer Insurance Law: Pre-Contract Disclosure and Misrepresentation; The Illegality Defence; Administrative Redress: Public Bodies and the Citizen; and The High Court’s Jurisdiction in relation to Criminal Proceedings.

³ Partnership Law; and Company Security Interests.

Since the protocol came into force in March 2010 we have published six reports.⁴ In relation to three of these, the six month period referred to in the protocol has passed; in none has an interim response yet been received.

As I said in our annual report for 2010-11, published in June 2011, “I remain generally extremely concerned about the time that it takes for Government to respond to our reports.”

I have mentioned the five projects listed by the Lord Chancellor in his report as having been rejected. Subsequently others have been rejected or deferred. In many cases the explanations given are brief and not easy to understand. It is disappointing to say the least that the report and subsequent correspondence did not give either the Commission or the public a fuller explanation of the Government thinking behind the rejection or deferral of our proposals. The majority of projects undertaken by the Commission represent a considerable amount of work, not just by the Commission itself but also, and very importantly, by the many consultees who devote time and trouble voluntarily to assist us. And each project, after all, is taken on either with the approval of the Lord Chancellor or as a specific reference to us by Government. As I said in our last annual report, “If reports are to be rejected, at the very least there should be a detailed and reasoned explanation.”

And, at the end of the day, in each case the rejection of our proposals or the long delayed response from Government represents a missed opportunity to make the law more understandable and fit for the purpose for which it was intended.

The next report to Parliament from the Lord Chancellor is due very shortly in January 2012. I hope that it makes for more satisfactory reading than the previous one and that I will not have to repeat in the Commission’s next annual report what unhappily I was obliged to say in the last.

⁴ LC 322, Administrative Redress: Public Bodies and the Citizen, in May 2010; LC 324, The High Court’s Jurisdiction in relation to Criminal Proceedings, in July 2010; LC 325, Expert Evidence in Criminal Proceedings in England and Wales, in March 2011; LC 326, Adult Social Care, in May 2011; LC 327, Making Land Work: Easements, Covenants and Profits à Prendre, in June 2011; and LC 329, Public Services Ombudsmen, in July 2011.

It is clear that together the Law Commission Act 2009, in creating the duty of the Lord Chancellor to account for Government's response to Law Commission recommendations for reform, and the Protocol represent a landmark in the development of a more productive working relationship between the Commission and the Government. We fully expect they will make a significant contribution to ensuring that the Law Commission's work is implemented. The deal is that, in return for us seeking clearance with Departments to take up a piece of work, before we start, they must declare their "serious intention to take forward" reform and Government must respond promptly to our reports. The Commission has stuck to the deal in its Eleventh Programme. We need to see when we report whether Government does.

Some aspects of the Commission's work are timeless. Many of the themes of which Peter Gibson spoke in 1991 still resonate today.

He spoke about the time it can take for the Commission to complete a law reform project and reach the point when it can make recommendations to Government for reform. This may be perceived by some as a weakness; to us it is one of our strengths. The time spent between the conception of a project, in a project initiation document or scoping report, and its completion with the publication of a report, almost always including a draft Bill prepared by our in-house Parliamentary Counsel, can in large part be attributed to our careful procedures: in-depth research, often looking into the laws of other countries, culminating in the publication of a Consultation Paper; followed by wide and thorough consultation and carefully considered analysis of responses; through the formulation of policy informed by impact assessments; and culminating in a final report.

Consultations are an extremely important part of our work, directly refining our thinking and shaping our recommendations. The Law Commission is a signatory to the Government Code of Practice on Consultations. The Code sets out what people can expect from the Government when it runs formal, written consultation exercises on matters of policy or policy implementation. Under the Code, we agree to making the purpose and scope of the consultation clear, ensuring it is accessible and, most importantly, keeping the burden of contributing to a minimum.

The people and organisations who add value to our projects through consultation come from across the whole of society and include Ministers and other Members of Parliament, officials and legal advisers from across Whitehall, the judiciary, practising lawyers and legal academics, local government, and myriad representative and campaigning organisations in the business and voluntary sectors. In addition to appealing directly to our known audiences, we extend the invitation to contribute to a wider audience via the media. As the type of project we undertake gradually moves away from a focus on lawyers' law to embrace in addition projects with a much wider business or social scope, the importance of consultation increases just as the range of those we consult with widens.

It is crucial that our work is informed by the specialists, the representative bodies and ordinary people who have direct experience in and knowledge of the fields we are examining. During a consultation period and indeed throughout the course of a project our legal teams engage with these individuals and organisations through conferences, seminars and other face-to-face events. For example, in the space of just four months, the team who conducted our recent Adult Social Care project attended over 70 events, hearing from local authorities; voluntary organisations; social-care staff; providers; users; and carers. Our purpose was to make sure that the people who provide, deliver and most importantly those who use adult social care services, had a say in how the system should be changed for the better.

The value to the Commission of the input we gain from these processes, as also from the expert advisory groups who assist us on so many of our projects, is incalculable. Peter Gibson observed that many of our consultation documents contain “as good a discussion of the present law as can be found in any text book and some would say that is putting it too modestly; this can be done only with much detailed research and thorough analysis.” This still holds true today.

Another factor that affects the speed at which the Commission works is the joint responsibility that the Commissioners take for every publication of the Commission. While the draft of each consultation paper or report will be produced by one of the legal teams, supervised by the Commissioner directly responsible for the particular project, in every case what is published will have been examined critically by the

Chairman and by each of the four other Commissioners and discussed at length by all the Commissioners together. This process of peer review is exhilarating if always exacting and at times challenging.

Another theme that Peter Gibson highlighted, as many other Chairmen have down the years, is the gap between recommendation and implementation. His complaint in 1991 was that there was no obligation in Parliament to debate Commission Bills nor any procedure to expedite their passage. As I have explained, we have made significant progress on the latter, with the new House of Lords procedure for taking technical and non-controversial Law Commission Bills off the floor of the House. And, I suppose, we have made some progress on the former, inasmuch as the Lord Chancellor is now under a duty to report annually to Parliament on Government's responses to our recommendations. However, there is still no obligation on Government to place Law Commission Bills before Parliament nor, unless a Bill is presented, any obligation on Parliament to debate them. There is no standing committee to consider them. It remains the case, unhappily, that many worthwhile reforms never see the light of day.

Nevertheless, there is much that has changed since Peter Gibson addressed you in 1991. The institutional changes I have already described. But there have been other fundamental changes.

Codification was placed by the 1965 Act at the heart of our functions. It was surely central to the vision of the founding fathers. Even back in 1991, the enormity of this task was becoming obvious. Today it is little more than a distant memory and, I fear, an even more distant aspiration.

Peter Gibson referred to the possible codification of four areas of the law: the law of contract; the law of landlord and tenant; family law; and criminal law. The first two sank almost without trace. An immense amount of reform of family law has been achieved – I do not think it is just because I am a family lawyer that I see the Commission's work in this area as amongst its greatest achievements – but although a vast proportion of family law has now been put on a modern statutory basis the obvious ultimate goal, a Code of Family Law, has never been achieved. The story of

the Law Commission's attempts to codify the criminal law sheds a harsh light on the deficiencies in our system of Government.

In 1989 the Commission had published a criminal code covering a substantial part of the criminal law. Speaking to this audience two years after the code was published, Peter Gibson noted that, while the Government had neither formally rejected nor accepted the Code proposals, the Commission itself had recognised the legislative difficulties which the introduction of a Bill of the size of the Code would involve and had decided that the future lay in putting forward legislation relating to more readily digestible parts of the Code. At the time, Peter Gibson referred to codification as a "distant" aim. It remains so to this day. As a preliminary step, and to prepare the ground for possible codification, our criminal law team is working on a number of projects that aim to simplify aspects of the criminal law. Recent work has looked at public nuisance, outraging public decency and kidnapping. The work continues. I should like to be able to see our simplification projects as a precursor to eventual codification but the task remains not just incomplete but seemingly out of reach.

The Commission believes that the law would be more accessible to the citizen, and easier for the courts to understand and apply, if it were presented as a series of statutory codes. Nowhere is this imperative more pressing than in relation to the criminal law. But, to speak plainly, codification requires political will; and that is sadly lacking. The sad reality, I fear, is that there is simply no appetite for codification either in Whitehall or in Westminster – indeed little enthusiasm for any kind of systematic law reform. And Parliamentary processes remain today as great an obstacle to codification as when James Fitzjames Stephen's great endeavours in the late 19th century repeatedly ran into the sand.

I would invite anyone who thinks I may be taking too gloomy a view to ponder what I had to say in our most recent annual report about Government's response to a number of our reports relating to murder. The state of our law of homicide is, as I said, a discredit to our legal system. It is long overdue for reform. Yet although some of our recommendations have been implemented, too many have not been, and some have simply been rejected. Government's response to our work on Cohabitation, The Financial Consequences of Relationship Breakdown, is also illuminating if depressing.

When Peter Gibson spoke to you, we were discussing our Fifth Programme of Law Reform with the Lord Chancellor. This year, we have launched our Eleventh Programme.

It is interesting to compare the projects which Peter Gibson described to you in 1991 with what is in our latest programme. He described a flourishing programme of statutory consolidation. As I had occasion to remark in our most recent annual report, our recent experiences on consolidation projects have not been uniformly happy. (The details and the causes can be found explained in the annual report.) The consequence is that consolidation is less likely in future to be a prominent part of the Commission's endeavours. In contrast, our Statute Law Repeals work continues to flourish with unabated vigour.

As I have explained, the Law Commission has a statutory duty to recommend the repeal of obsolete statutes. Since 1965, eighteen Statute Law (Repeals) Acts have been enacted, repealing around 2,300 whole Acts and partially repealing thousands of others. We are, I think, the only law reform agency in the world that has a dedicated team whose sole purpose is to identify and research obsolete statutes. The statute book reaches across the policy issues of every Government Department. As an independent agency that sits at arm's length from individual Departments, the Commission is uniquely able to review the whole statute book systematically and with a legal rigour that is free from political constraint. Every four years, the Statute Law Repeals team gathers together its recommendations for repeal into a Statute Law (Repeals) Bill. The Bill and accompanying report are presented to Government, and Parliament is invited to enact our proposals. The next report and Bill are due to be published in spring next year. They will embrace a greater number of statutes, and cover a longer period – from 1267 to 2010 – than any of their predecessors.

The other programme projects that Peter Gibson described in 1991 embraced mainly traditional areas of law reform: lawyers' law. In contrast, our latest programme, listing fourteen projects, has a very different flavour, reflecting the movement of the Commission away from lawyer's law and black-letter law projects to work with a much wider social scope.

Eight of these projects can be seen as traditional lawyers' law, even if the driver for reform is often the commercial rather than the legal sector as shown by the identity of the relevant lead department: Charity Law – selected issues (Cabinet Office); Contempt (MoJ); European Contract Law (MoJ and BIS); Family financial orders – enforcement (MoJ); Misconduct in public office (MoJ); Offences against the Person (MoJ); Rights to Light (DGLG); and Trademark and design litigation – unjustified threats (IPO). The other six projects are very different: Conservation Covenants (DEFRA); Data sharing between public bodies (MoJ); Electoral Law (Cabinet Office); Electronic Communications Code (DCMS); Taxis and private hire vehicle – regulation (DfT); and Wildlife (DEFRA).

You will note the wide range of lead departments and the extent to which we are now becoming involved in what for want of a better label I refer to as regulatory law. Also, and this is an important aspect of the new programme, a number of lead departments have agreed to make significant financial contributions to the cost of some of these projects.

I do not have time to go through the entire programme, and you would probably not thank me if I did. Can I therefore select just three of these new projects as examples which may be of interest to you as showing just how relevant our work is for the wider business community.

But first I should explain our selection criteria

When considering whether to include a project in the next programme of law reform, the Law Commission assesses each proposal against the following broad selection criteria:

- Importance: the extent to which the law is unsatisfactory (for example, unfair, unduly complex, inaccessible or outdated); and the potential benefits likely to accrue from undertaking reform.
- Suitability: whether the reform would be suitable to be put forward by a body of lawyers after legal research and consultation (this would tend to exclude subjects where the considerations are shaped primarily by political judgements).

- Resources: internal and external resources needed, and whether those resources are likely to be available; and the need for a good mix of projects in terms of the scale and timing so as to enable effective management of the programme.

The Protocol also requires consideration of:

- whether project-specific funding is available (if relevant);
- the degree of departmental support;
- whether there is a Scottish or Northern Irish dimension to the project that would need the involvement of the Scottish and/or Northern Ireland Law Commissions; and
- whether there is a Welsh dimension that would need the involvement of the Welsh Assembly Government.

What then of specific projects?

First, European contract law.

Earlier this month, we provided an Advice to Government on the advantages and disadvantages of an optional instrument for EU contract law. The European Commission has been working towards a “more coherent” European contract law since 2003. It has now assembled an expert group to produce an optional instrument of European contract law and last year published a Green Paper presenting seven options, ranging from the publication of findings of the expert group, to setting up an optional instrument as an alternative legal structure, to legislating for a European Civil Code. The purpose of the Law Commission’s project, which we undertook jointly with the Scottish Law Commission at the request of the Ministry of Justice and the Department for Business, Innovation and Skills, was to produce an Advice that focuses on the potential ramifications of option 4, setting up an optional instrument as a 29th body of applicable law under which parties can choose to contract.

The adoption of a European optional instrument will have potentially dramatic consequences. Firstly, it is designed to bypass existing rules of private international law which preserve mandatory rules in member states, and it will be important to assess the extent to which the optional instrument will undermine UK consumer protection law. Secondly, the inherent difficulties of implementing a new legal regime

without accompanying jurisprudence are self-evident, and there is concern that basic contract principles will evolve differently between states, with consistency only being achieved once cases reach the Court of Justice. More widely, the optional instrument clearly deviates from English contract law in a number of important and long-settled areas, and this will have important implications in both consumer and business-to-business contracts. Nevertheless, the implementation of the optional instrument remains a very real possibility. The Advice we produced will be crucial to the Government's understanding of the potential advantages and disadvantages of an optional instrument and will enable it to negotiate constructively with its European partners.

Next, the Electronic Communications Code.

The Code is instrumental in delivering broadband networks to the furthest reaches of the UK. It sets out the regime that governs the rights of telecommunication providers to maintain infrastructure on public and private land. The Code steps in when the rights to access private land cannot be agreed with a landowner. The Code allows for the provider to apply to the court for an order to dispense with the need for agreement, in which case, the court can make a financial award in favour of the landowner.

However, the current drafting of the Code has been criticised by the courts and practitioners as being unclear and inaccessible. Our project will provide a general review of the Code as it applies to England and Wales and examine whether it remains fit for purpose. We aim to identify, and provide recommendations to overcome, the existing problems and provide a more transparent and user-friendly system. We are looking at how disputes are resolved and considering how the Code interacts with other statutory regimes. We expect to open this project up to consultation in late summer next year and make our recommendations to Government in the spring of 2013. Our work on this important project will inform Government's wider review of the Communications Act 2003 and how its target of creating the best superfast broadband network in Europe by 2015 can be delivered.

Third, in April next year we will begin work on a project that focuses on unjustified threats in trade mark and design litigation. This is an area of law fraught with

problems. It is completely at odds with the general thrust of the rules governing the conduct of litigation, and there is evident dissatisfaction within the legal profession.

In the project we will consider whether to repeal, reform, or extend four provisions that impose liability to pay damages on the makers of an unjustified threat of certain types of intellectual property litigation. The problems caused by these provisions stem from the wide concept of a “threat”. The case law has reached the point where it is all but impossible to even discuss whether an intellectual property right has been violated without that being deemed a tacit threat. This only serves to encourage litigation, in contrast to the culture promoted by the Civil Procedure Rules, which seek to promote settlement and frank pre-action conduct between parties.

Moreover, not only are rights holders themselves potentially liable, their legal advisers and employees too are liable for making threats. In the case of legal advisers, the rules create an unhelpful ethical dilemma that may impede their ability to give effective advice to their clients.

We will be working closely on this project with the Intellectual Property Office in consulting on the operation of the provisions and making recommendations for reform. Reforming the law in this area will make it easier for rights holders making justified threats to those infringing their intellectual property rights to observe the courts’ pre-action protocols, and so avoid the need for legislation in a higher proportion of cases. In line with current Government priorities, it will remove a burden on businesses who infringe intellectual property rights by giving them a better chance to cease the infringement and avoid becoming embroiled in often costly litigation. It will bring consistency to the law governing unjustified threats and help to clarify what is, or is not, lawful.

This programme is the first to be agreed in accordance with the protocol. And it will in many ways be the acid test of the protocol. But it raises wider issues.

The protocol prompts questions that go to the soul of the Law Commission. The question has been raised in some quarters as to whether the role that the protocol now

plays in how we select our programmes of law reform represents a loss of independence for the Commission. And it is a good question.

At one end of the spectrum there is a free-wheeling body, reporting on what it thinks fit; at the other is a body bound by the Government's wishes and agenda. The attraction of the former is that it allows priority problems to be addressed, even if Government is not interested in them. It is a seductively pure existence. But the danger is that the work is not implemented, with all the lost opportunities, waste of resources and depression of morale that entails. The attraction of the latter option is that the Commission is working on an agenda that will actually change lives and the law; the danger is that it pushes us to take up projects that we would not have otherwise selected and which could damage the Commission's integrity.

The protocol puts the Commission more towards the latter camp. It remains extremely important that the Commission is independent of Government. This is a matter of fundamental importance; after all, we have built our reputation upon that independence. That we are able to do our work and make our recommendations free from any political influence is absolutely crucial and something on which the Commission will never compromise. But, in reality, our programmes of Law Reform have always had to be laid before the Lord Chancellor for his approval, and, while there may be great reform work to be done in many areas of law for their own sake, we must in today's climate be pragmatic if we are to achieve our essential aims.

We believe that the Eleventh Programme has not compromised either our independence or our integrity, while it provides the clearest answer to the charge sometimes heard that the Commission's work is not relevant. The greatest risk may be that, if Government does not keep its side of the deal, the Commission will not see the point of 'collaborating'. That would be a tragedy, and not just for the Commission.

The Law Commission has changed and developed down the years and will, and must, continue to do so.

There is the evolution in types of project which I have mentioned. To take just one more example, our Adult Social Care project, a key component of the radical reforms

to which the Government is committed, is indicative of the changing nature of the Commission and the shift from lawyers' law to working with a range of ministries on projects that have immediate and clear relevance to the general community. There is the introduction of financial contributions from Departments, though this welcome financial support brings with it obvious potential concerns. And, something I have not yet mentioned, there is the added flexibility to be gained from including in our work, as we are doing, a number of shorter projects.

The founding fathers and architects of the Law Commission had a remarkable vision and established a Commission to update the law, advise on the repeal of old laws and make recommendations for new ones. We are the proud inheritors of a great heritage. Not just, I emphasise, for ourselves but for the nation. As my predecessor, Terry Etherton, so rightly said in the Commission's annual report for 2008-09, "The establishment of the Law Commission was an inspired act of Government, born of the belief that accessible, intelligible, fair and modern law is the constitutional right of every citizen." Could anyone disagree?

At the second reading of the Law Commissions Bill in the House of Lords in 1965, Lord Reid foresaw for the Commission five or ten years of "really useful work", by which time he thought that what he called lawyers' law ought to be in "pretty good shape". In that prediction he was, perhaps, unduly optimistic. We are now approaching our half century. We have had a number of notable successes, and are confident of more to come, but there is still so much to do. There is, in truth, no end in sight.

Twenty years ago Peter Gibson asked, 25 years on from the birth of the Law Commission, whether there was useful work yet for the Commission to do. The answer now as then is that there is plenty of work for us to do, not merely useful work but work that is vital if we are to honour the vision of our founding fathers and continue to perform our statutory duties.

Some of what I have said may have sounded rather downbeat, even depressing. These things need to be said, if only so that Government may hear them. But I should not want you to go away downhearted on our behalf. The Law Commission has never been in finer shape. The morale and enthusiasm of our staff ride high. It is a privilege indeed

to lead so dedicated and committed a team. We have survived the storm. The future holds great promise.