



Justice Committee

Oral evidence: The Work of the Law Commission,
HC 858

Wednesday 2 March 2016

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Written evidence from witnesses:

- The Law Commission

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Members present: Robert Neill (Chair); Alex Chalk; Alberto Costa; Philip Davies; Mr David Hanson; John Howell; Dr Rupa Huq; Victoria Prentis; and Marie Rimmer.

Questions 1–69

Witnesses: Rt Hon Sir David Bean, Chairman, Professor David Ormerod QC, Criminal Law Commissioner, and Elaine Lorimer, Chief Executive, the Law Commission.

Q1 Chair: Good morning Sir David, Professor Ormerod and Ms Lorimer. I am sorry to have kept you; we had some in-house business to attend to first. We are very grateful to you for coming to give evidence to the Select Committee. It is much appreciated. Thank you, too, for the other contact that we have had and the information you have provided to us since the Select Committee was established in the current Parliament.

I start with our declarations. It is the mantra we go through. I am a non-practising barrister.

Victoria Prentis: As am I.

Alex Chalk: I am a practising barrister, and I should probably make it clear that a member of my chambers is also seconded to the Law Commission.

Alberto Costa: I am a practising Scottish and English solicitor.

Q2 Chair: Sir David, I would like to start with the way the commission itself works, and perhaps then the current pressures and issues with which you are grappling. A statutory framework underpins your existence. I am conscious that you run a pretty lean operation and that you have to be pretty flexible about things. First of all, do the statutory framework and the other provisions give you enough flexibility to operate, to select projects and so on in the way in which you would wish?

Sir David Bean: I think they do, Chair. The 1965 Act was quite carefully drafted. It is an ambitious mission statement in some ways—to keep under review the whole of the law of

England and Wales. We have to get either the agreement of the Lord Chancellor or a request from another Minister in order to be able to pursue a project. We cannot just go off on a frolic of our own if a project does not have any support from Government for us to take it up. I do not see that as a constraint that stops us doing what we should be doing, because, if a project has no support from Government and no interest in our looking at it, it means that for us to tackle it would be rather an academic exercise. I do not think we should be in the business of writing essays or textbooks.

We go out to consultation for our programme, which I am sure we will talk about later. We invite suggestions from many people, but I think it is right that we should have to have some Government support before taking on a project. There might be scope for us to be able to accept references—for example, from the Supreme Court or from the Lord Chief Justice—but I do not think that we should be able to accept references from just anybody. Anyway, that is not what the 1965 Act provides.

Q3 Chair: It is a practical institution rather than a purely academic forum; I understand that.

Sir David Bean: Yes.

Q4 Chair: There might be some who would say that the need to have the work programme agreed by the Lord Chancellor could, effectively, give Government a veto.

Sir David Bean: It gives the Government a veto on what subjects we can study, but once the terms of reference are agreed and we embark on a project, of course the conclusions we come to are our conclusions.

Q5 Chair: They are entirely your own; I understand that. If we then think about the Supreme Court and something being referred, it is difficult to conceive that the Government would want to stop that.

Sir David Bean: I would hope so.

Q6 Chair: Would you need any change to legislation to enable that?

Sir David Bean: Strictly speaking, if there were to be a system where the Supreme Court could make a reference and we could embark on it without the agreement of the Lord Chancellor, yes, I think it would need amendment. As you say, one would hope that in practice consent would be given.

Q7 Chair: Some of us have had a look at the details of the way the commission works, but the broader public may not have an idea exactly as to what resource you have in terms of personnel, outside expertise and finances to tackle the very major statutory responsibility that you have.

Sir David Bean: I will ask the chief executive to speak to you about our resources and staffing.

Elaine Lorimer: Good morning, everybody. We currently stand at around 60 members of staff, including our commissioners and chairman. Over the years that has roughly been the size of the organisation. It may have fluctuated by 10% in terms of staffing. It is primarily made up of lawyers and legally qualified people. We are funded to the tune of £2.9 million through the Ministry of Justice. The balance of our funding, which takes us this year to

just over £4 million, comes to us via other Government Departments, who pay the marginal additional costs of projects they ask us to undertake.

The reach of the commission in terms of the resources we can access is much wider than that. Our standard operating model for working on a Law Commission law reform project invariably involves our accessing expertise within the UK, through the profession or through academia, or indeed internationally. We have terrific support on a pro bono basis from across those sorts of communities to work on our projects. Normally for a Law Commission law reform project, we set up a series of advisory groups, which include experts in the particular area of law we are looking at and practitioners or users of the law, not necessarily legal practitioners, so that when we produce our law reform proposals we really have tested them not only from a legal perspective but from a practical perspective in terms of all the work on the ground.

Q8 Chair: What are the main constraints you face in terms of resource, going forward?

Elaine Lorimer: The issues that we will face are obviously to do with funding. The majority of our costs are staff costs. If our budget is reduced in any significant way, the only way we can reduce our costs is to reduce our staffing. If we reduce our staffing, that reduces the capacity of the organisation to deliver. We are very much at the mercy of the overall funding package that we can agree with Government and Government Departments.

Q9 Victoria Prentis: You have had a budget cut this year like many other Government Departments. Has that had a real effect on the way you do your job?

Elaine Lorimer: We are still in discussion about our budgetary position for the spending review period that we are just entering, so we have not agreed our settlement for the current spending review round. We took a cut of 29% over the course of the last spending review period, which ended last year. The way in which we dealt with that was obviously to look very rigorously at our costs. I said that the majority of our costs are staff costs. We bore down on our staffing costs. We bore down on our general administrative expenditure. We made as many savings as we could around things like research, publications and that sort of thing.

Q10 Victoria Prentis: Did you make people redundant?

Elaine Lorimer: No; we were not in a position where we had to make people redundant. We went through a process of not replacing staff who were leaving. What we managed to do very successfully was to make up some of that gap through attracting additional funding from other Government Departments for projects for us to work on. Our funding model now is a split between the core funding and the additional funding that comes in. The challenge for us going forward is how much certainty there is. Of course, there is not a lot of certainty at all around what that additional funding availability may be.

Q11 Victoria Prentis: Would you like to tell us about the current negotiations with the MOJ and how they are going?

Elaine Lorimer: I do not really feel that I am in a position to do that, and I do not think it would be appropriate for me to do so. It is fair to say that we are still in discussion.

Q12 Chair: We have heard evidence that other bodies are being asked to consider options for reductions of 30% and 50% in their budgets. Is that the position as far as you are concerned?

Elaine Lorimer: It is well known that the Ministry itself is having to make significant reductions in its budget. Because we are primarily funded through the Ministry, obviously they have asked us to look at what is within the art of the possible. As all other arm's length bodies have done, we have had to produce modelling for the Ministry around a whole range of cuts, including those you suggested. We have not agreed anything yet; we are still in discussion.

Q13 Chair: That is a standard piece of modelling that is being done: 30%, 50% and other options.

Elaine Lorimer: Yes. Everybody has been asked to produce that.

Q14 Victoria Prentis: Do you have concerns about the fact that you are so much under the control of the MOJ?

Elaine Lorimer: What kind of control are you thinking of?

Q15 Victoria Prentis: Any type. You can interpret that as broadly as you like.

Elaine Lorimer: We are certainly not under the control of the Ministry of Justice in terms of the law reform proposals we come up with, as our chairman just said.

Q16 Victoria Prentis: But you are for the bulk of your funding.

Elaine Lorimer: For the majority of our funding, yes; it is routed through the Ministry of Justice. The 1965 Act makes provision for us to be funded via the parliamentary vote. In practice, what has happened over the years is that it has been routed through the Ministry of Justice and forms part of their overall funding.

Sir David Bean: Perhaps I can say, as a newcomer to the game, that I find the way we are classified very odd. In the Chancellor's autumn statement there was the Red Book with hundreds of pages of appendices. One of those I lighted on was a table headed "Small and Independent Bodies". The small and independent bodies include, for example, the Charity Commission, the Competition and Markets Authority, the Food Standards Agency and The National Archives, among others. I would say that we are a small and independent body, yet somehow we are classified as if we were MOJ admin. We are not really part of the MOJ and we are certainly not admin.

Q17 Chair: That does seem quite bizarre. I appreciate that you will be tied to how the negotiations turn out. Remind me of your total budget again. Is it £2.5 million or something like that?

Elaine Lorimer: Our core funding is £2.9 million.

Q18 Chair: What is 30% of that?

Elaine Lorimer: It would be in the order of £1 million.

Q19 Chair: What impact would that saving of £1 million have on the work of the commission?

Elaine Lorimer: As I have explained, it is primarily staffing costs. We would have to reduce our staffing.

Q20 Chair: You would have to let people go.

Elaine Lorimer: We would have to reduce our staffing. We would also have to look at the position of commissioners and whether commissioners could remain full-time.

Q21 Chair: How many full-time commissioners do you have?

Elaine Lorimer: They are all full-time commissioners. We would have to look very fundamentally at how the commission operates. We would have to come up with quite a radically different model. It is fair to say that there is a core expertise that exists within the commission that we would be worried about losing. That is all about how to do law reform work. I know from having spent four years at the commission that there is a definite expertise in how we do our law reform work, which you cannot easily bring in. You have to learn through experience. My main concern with any further reduction would be to try to protect that core expertise.

Q22 Chair: Of course, some bodies by their nature may be administrative transactional staff heavy; others will be much more policy professional staff heavy. How would you characterise the Law Commission?

Elaine Lorimer: We are definitely in the latter category. Our lawyers and research assistants who work at the Law Commission are working on legal policy.

Q23 Chair: You cannot shed lots of backroom people.

Elaine Lorimer: No.

Q24 Chair: There will be a reduction in your ability to deliver policy change.

Elaine Lorimer: Yes.

Sir David Bean: That is right, Chair. As to the possibility of commissioners working part-time, in the sense of, say half, it might be helpful for you to hear from David Ormerod, who has been a commissioner for five years, as to how he spends his time.

Chair: That would be very helpful.

Professor Ormerod: It is really a full-time job. Each of the commissioners takes responsibility for each project within their own team—each of the ongoing criminal law projects. I am involved on a daily basis in the construction of that, in stakeholder engagement, in the drafting of consultation papers and reports and in the development of policy. We also have collective responsibility across the commission. Each commissioner reads, comments and advises on policy across the work of the other teams as well. It really is a full-time role.

That is one aspect. If you anticipate that it would be easy to make the position part-time, you have to consider that it would reduce the pool of likely candidates. It is very difficult for somebody to be a part-time practitioner and to juggle their commitments, whether it be as a solicitor or a barrister. Similarly with academic work, it would be very difficult to juggle responsibilities to an academic institution and do them justice, but also be committed to the work of the commission. It is a full-time role, and it deserves to be.

Q25 Chair: I can understand that. Could you make a case that reform of the law is not just a social good but can actually produce savings as well in some areas of activity?

Sir David Bean: It certainly can. It does not always. It is not our primary objective under the statute to produce proposals that save money, but some do. As you know, we recently published a report on the Offences Against the Person Act 1861, which for reasons David can expand on is archaic and unsatisfactory in some respects. One of the proposals we make is to introduce an offence of aggravated assault with a maximum sentence of 12 months triable only in the magistrates court. Anybody who has practised in the criminal courts will be familiar with the phenomenon of a case of assault occasioning actual bodily harm where it is really very slight bodily harm and no judge would think of a sentence of anywhere near five years, yet the defendant is entitled to have the case tried in the Crown court. The economic impact assessors tell us that that proposal alone, if it is put before Parliament and you enact it, might be expected to save the Treasury £17 million a year. That is several times our total annual running cost. As I say, it is not our prime objective, but we can make proposals that produce efficiency savings.

Professor Ormerod: It might be worth adding that there is always keen interest from the very outset, when we are anticipating whether to take on a project, that we engage in some analysis. We have our in-house economist who works with whichever Department it is, usually the MOJ analysts, to produce those detailed impact assessments. On the Offences Against the Person project, as we say, they demonstrated a significant saving.

Q26 Alex Chalk: Stepping back for a second, is there not a wider point? You want the law to be working correctly so that there are not the kind of mishaps that take place in day-to-day matters, which mean that cases have to come back to court under the slip rule because judges have not understood the sentencing or whatever. Your job is to make the law work properly because a smoother and better working system is a cheaper system. Would that be fair?

Professor Ormerod: Absolutely right. Our work in so many projects achieves exactly that. The sentencing that you referred to is a very good example of the current obscurity of the legislation. There are some 1,300 pages of legislation currently in force in relation to sentencing procedure. Struggling to identify what the correct law is obviously causes delay in courts. It generates error. There was a significant survey conducted by somebody demonstrating that around 29% of sentencing appeals in the Court of Appeal Criminal Division included an unlawful element to the sentence.

Q27 Alex Chalk: We will come back to that in a bit more detail. I just wanted to make the point that a smoother running system is a cheaper system.

Professor Ormerod: Yes.

Chair: It is very helpful to have that overview as to the way you are working and the pressures you are immediately facing. We want to go through some of the other specifics of the work you are undertaking, both now and in the past.

Q28 Mr Hanson: I am just looking at the 12th work programme that you have undertaken. It is quite detailed. At the moment, reports on land registration and firearms have been completed and there are a number of policy developments. What have been the particular challenges in the 12th report? Have there been any budgetary or policy issues that have driven real challenges in the production of that review?

Sir David Bean: The 12th programme contains nine projects. Obviously, although I was not there at the time, the fact that there were nine was dictated by the resources available at the time. As to delivering them, all but one will be the subject of a report or consultation paper this year. Indeed, the firearms project has already resulted in a final report and draft legislation in part 6 of the Policing and Crime Bill, which is now before your House.

The one that has been a bit held up is a project to look at the law on wills. That was at the start of the programme, but then the Ministry of Justice asked us to produce a scoping paper on the law of marriage—wedding ceremonies. We produced that scoping paper at the end of last year. We will come back to wills shortly and hope to produce a consultation paper at the start of 2017.

Q29 Mr Hanson: May I ask a general question? There are three or so years' work on the 12th programme—a lot of investment and a lot of time. What is your expectation of the take-up rate by Government of the recommendations at the end of it? If I look back on the 12th programme in two years' time, what will have changed? How many of the nine projects will have been implemented?

Elaine Lorimer: The challenge for us is that at the end of the day it is for Government to decide whether or not to take forward our proposals.

Q30 Mr Hanson: I am just interested in what the outcome might be.

Elaine Lorimer: It might be helpful if I set out for you the relationship we develop with the relevant Government Departments—there might be more than one—who hold policy responsibility for the area of law on which we are working. At the commencement of the 12th programme, before it gets sign-off by the Lord Chancellor, it has to go round the Home Affairs Committee. Each of the relevant Government Departments has to agree that they are happy for us to take this work on. We then enter into a memorandum of understanding with the relevant Government Department. That sets out in broad terms what the scope of the project will be and how long it will take us to do it. It will have milestones set out in it. It will have key points of contact within the relevant Government Department, so that over the course of the project we are in regular contact with the relevant policy officials and can keep abreast of what policy developments there may be in the area we are looking at. We can also keep them up to date with the work we are embarking on.

Q31 Mr Hanson: Perhaps I could phrase it another way. How much of your 11th programme is currently on the statute book? You do not have to answer now, but it would be interesting to know.

Elaine Lorimer: We can come back to you with the detail on that. The ways in which our projects are taken forward by Government vary. It does not always result in legislation. It can result in guidance or some other form of soft law.

Q32 Mr Hanson: I am just evaluating. A lot of effort, determination and planning have gone into this, together with discussion with the Department. At the end of the day, what is the output in terms of actual guidance or legislation in relation to the effort that you put in? It might be 100%, which is great, or it might be less. I am just interested in what the output is.

Sir David Bean: It has never been 100%. The implementation rate over the whole life of the commission has been about 70%. In the pioneering days, when Sir Leslie Scarman was chair of the commission and Lord Gardiner was Lord Chancellor, everything was implemented. There was a dip in the 1970s and 1980s, and it has improved a great deal since then. Sometimes there is a quick result and sometimes there is a slower result. Usually implementation is by way of legislation, but not always.

To give you an example of a slow result—I cannot remember which number programme it was from—in 1999 our predecessors published a report on damages for wrongful death, damages in fatal accident cases. The 1999 report considered, among others, two decisions of the House of Lords in 1979 and 1983. It said that they were wrong, that something ought to be done about it and made an alternative proposal. Nothing happened on the legislative front until last week. The Supreme Court gave a decision accepting the Law Commission’s recommendations, overruling the previous decision of the House of Lords. That is a very slow burn outcome—17 years after the Law Commission recommendation—but we got there in the end.

Elaine Lorimer: I have some of the information; I just needed to find it and remind myself. I have done a quick count, and since 2012 there have been 13 pieces of legislation brought before Westminster implementing Law Commission projects. Some of these will be 11th programme projects and some will be earlier projects.

Q33 Mr Hanson: When do you start on the 13th?

Elaine Lorimer: We are due to go out to consultation this year. In the ordinary course of events we would hope to get the Lord Chancellor’s approval before summer recess next year.

Q34 Mr Hanson: I have one final question. Some of the projects are for England and Wales. I notice in the 12th programme that there are projects that are Welsh Government projects. Does the changing devolution settlement for Wales have any impact upon your 13th programme?

Sir David Bean: We most certainly hope to continue doing projects at the request of the Welsh Government, or in discussion with them. As you say, we have two in the 12th programme. The first is on the form and accessibility of the law in Wales, which is a fascinating project and may have implications for form and accessibility of the law in England and Wales generally. We will be producing a final report on that immediately after the Welsh Assembly elections. The second one is planning and development control in Wales, which is at an earlier stage, but we should be producing a scoping paper, again shortly after the elections.

I do not think that changes in the powers devolved under the Wales Bill—I am aware of the discussions which are going on—need affect the work we do for the Welsh Government. Taking, for example, the form and accessibility project, the recommendations we are likely to make in the report will be designed to work, whatever the disposition of powers as between here and Cardiff.

Q35 Alberto Costa: You touched on the issue of wills; 40% or more of the adult population do not appear to have a will. Indeed, of those who have a will there is a question mark over whether or not those wills are valid or fully valid in law. The commission has listed a number of criticisms of the current law on wills: for example, that it is out of step with medical and social developments. You have also stated that the current law may be discouraging people from making wills. I know it is not directly an area for the Law Commission, but I wonder whether you have any comments about the ongoing debate as to whether or not providers of wills should be regulated, given the complexity of the law in this area.

Sir David Bean: The terms of reference for the wills project have not yet been agreed in detail. I am not sure whether it is envisaged that we would consider whether will providers should be regulated. If I may say so personally, it is an interesting question. It will be clear that the wills project will not include rules about intestacy or succession. It is mainly about the formalities of wills, which, as you say, may be resulting in more wills being invalid than any sensible system would provide. Regulation is an interesting thought. I do not know whether either of my colleagues knows.

Professor Ormerod: The overarching aim is to ensure that the formation of wills and the ability of the law to deal with people with difficulty in terms of capacity is brought up to date, so that people can be confident that their intentions as to their property and belongings can be achieved. I am sure that the project can be flexible, look at the entire picture and make a holistic review of the formalities, capacity and so on, and the potential deterrent for people from forming wills and being prepared to do so. It is clear that its scope is bound by the criteria that the chairman has just described. It is not dealing with intestacy, succession rights and so on. Beyond that, it is about how we can make sure that legislation is brought up to date to maximise the opportunity for people to use wills to meet their testamentary intention.

Elaine Lorimer: We can check and send you some separate briefing on it, if that would be helpful, but my current understanding is that we are not looking at will providers and their regulation as part of the project.

Q36 Alberto Costa: Are you familiar with the ongoing debate?

Elaine Lorimer: Yes, I am.

Q37 Alberto Costa: Given that you have indicated that the current law may be discouraging people from making wills, the point I am making is that if the providers of wills are not regulated—for example, you might pick up a template will from a petrol station—how can consumers be confident that the law, complex as it is in this area, is being applied appropriately? If the suggestions that might be made by the commission include rationalising the law in this area and making it simpler for the consumer ultimately, how would the consumer know if those providing wills are not regulated?

Elaine Lorimer: That is a really interesting point. It is something we will take away and ask the question of our team looking into it. Of course, the regulation is not a matter for the Law Commission; it is a matter for regulatory bodies such as the Legal Services Board, and so on.

Q38 Alberto Costa: The Legal Services Board conducted a review of this, as far as I recall, a couple of years ago. They approached the relevant stakeholders. Was the Law Commission approached at all on the matter?

Elaine Lorimer: That was within my time as chief executive, and, no, I am not aware of them approaching us about it.

Q39 Alberto Costa: I would be grateful if you could update the Committee further to this hearing on whether you have given consideration to what I have said and what the outcome is of that consideration.

Elaine Lorimer: I would be very happy to do that.

Q40 John Howell: I have a question in relation to this Committee's predecessor in the last Parliament. We came to the conclusion that there should be a review, which we suggested you should undertake, of the Court of Appeal's grounds for allowing appeals against criminal convictions. I understand that the Ministry told you to back off from that; they were not interested in pursuing it. There is still a nagging doubt in my mind that this is something that should be investigated. Professor Ormerod, you are nodding.

Professor Ormerod: I was nodding only at your nagging doubt. You might also say lurking doubt, given that that is one of the tests applied in the Court of Appeal.

Q41 John Howell: Overall, do you think you would welcome the chance to have a look at that?

Sir David Bean: It is a possible topic for inclusion in the 13th programme. I do not think we should be saying today that either that or anything else is a dead cert because there is huge competition to get into the final list of nine or 10, or whatever it is, for submission to the Lord Chancellor. We would need to look at what the leading two or three criminal projects are for submission in that list, but I certainly would not rule that one out.

Professor Ormerod: It is fair to say that your recommendation was not the first. The Donovan Committee and the Runciman Commission also raised questions about the test applied by the Court of Appeal Criminal Division and the way that it sat, particularly with the Criminal Cases Review Commission.

Q42 Chair: The nagging doubt about the application of the test has not gone away, has it?

Professor Ormerod: The answer is that it has changed since the Donovan Committee and then the Runciman Commission and the 1995 Criminal Appeal Act changed the test. It is a question of doing some legal analysis of the way the test has been applied since then and the outcomes.

Q43 Chair: As you say, it is something that is not long off the agenda, but let us see. Another thing that we asked in the last Parliament, or suggested should be referred, was the operation of the joint enterprise doctrine in murder cases. In fact, along has come the decision

of the Supreme Court in *Jogee* saying authoritatively from the Court's point of view that the doctrine took a wrong turn in *Chan Wing-Siu*. On the basis of that decision, from the commission's aspect and the work you have done, does that comprehensively deal with the issues that raised concern around the operation of joint enterprise, or are there still any loose ends that we should recommend you should look at again?

Professor Ormerod: As you say, it is a welcome decision in many respects and it certainly meets the challenge that this Committee put down 18 months ago. More generally, I think it is too early to say whether or not there are still ambiguities to be resolved by legislation. Certainly the decision is clearly common law, so it is bound by dealing with the facts of the cases before it, but that is not to detract from the very welcome unanimous simple restatement by the Supreme Court. There are issues that it was not capable of addressing as a court, such as the question of whether or not somebody had withdrawn from a joint enterprise or a joint venture. That is something that is still ambiguous. There may be a prospect for further work in legislative terms by the commission, but it is too early to say. It will also depend, of course, on how the Court of Appeal deals with the fallout from the out-of-time appeals that will no doubt follow from that decision, and perhaps—looking to the longer term—how juries deal with the change in the law. It seems that one of the implications of the decision is to create a greater burden on the jury or to pass responsibility to the jury. Under the previous law, the question of whether or not somebody was guilty of murder was clearer in one sense, because the test was whether or not the defendant foresaw the likely event and so on. If so, that was sufficient to constitute murder. The test now is that the secondary party has to have intended, but that the jury may infer that intention from foresight. There is a greater obligation on the jury to make the decision, to bridge that gap. We will see how juries deal with that. Several years ago, this Committee recommended the collation of statistics on joint enterprise so we will be able to identify the patterns that emerge.

Q44 Chair: Do you think any clarity is required from the prosecution point of view as to whether or not it may be appropriate to charge the secondary parties with manslaughter at the outset rather than leaving it as an alternative verdict for the jury? Is that something where we need to wait and see what actually happens in practice?

Professor Ormerod: I think that is the safer course. No doubt the Crown Prosecution Service will be updating its guidance in light of *Jogee* so we will have to wait to see what transpires.

Q45 Chair: Both of us—your side and our side—should be keeping an eye on what develops.

Professor Ormerod: Very much so.

Q46 Philip Davies: I am a bit concerned about the way things are moving on joint enterprise. They seem to ignore a whole category of offences where it is pretty clear that one of a small number of people was responsible for a murder, yet nobody is brought to account for it. There is the case of Kevin Lavelle. He was murdered and in the Court of Appeal Lord Justice Hooper actually said in his summing-up that one of three people killed him. The coroner gave a verdict of unlawful killing, yet none of the three was ever brought to task for that person's murder, because they could not be clear which one of them had actually done it.

Andrew Jones's son from Liverpool was murdered by one of a group of people. The local paper named him and challenged him to sue them if they were wrong. Again, there was a conspiracy of silence and that killer was protected.

The wife and daughter of Donald Banfield had their convictions overturned. Everyone accepts that one of them killed him but both of them are walking free. None of the things on joint enterprise seems to want to deal with those gross injustices, where we know that one of a very small number of people, if not all or some of them, was responsible for deaths but nobody was brought to account. I wondered where those family victims fitted into your views on joint enterprise.

Professor Ormerod: Can we leave aside the Banfield case for the moment because it falls into a slightly separate category? In relation to the other situations where you have a group of individuals, all engaged in an act of violence against the victim and the victim dies as a result of a blow by one of them, and it is clear that the blow was delivered with intent to kill or do serious injury, my understanding is that the present law allows for the conviction of those individuals for murder. In relation to any one of them, it is not for the jury necessarily to be confident whether he was the killer or the accessory, provided they are sure that he was one or the other. There is very good authority on that, including a House of Lords authority from 2008. It is complicated for juries and it is complicated for judges in directing, but it is possible for there to be a conviction for murder where it is unclear to the jury which of the individuals involved delivered the fatal blow. I can provide further examples in writing, if you like, of the way that the doctrine has developed in common law to meet that challenge. In one of the leading cases it was unclear whether or not the defendant had been present perpetrating the murder of his wife or some distance away making the call for the killing to take place. The Court of Appeal confirmed that it was not necessary for the jury to be sure whether he was doing the act or—

Q47 Philip Davies: But these are real-life cases where nobody has been brought to justice.

Professor Ormerod: I do not know the facts of those individual cases, but I am very happy to give you some further written evidence about the way that the law in relation to joint party cases works. The Banfield case is a slightly different situation, and it is one that the Law Commission has addressed in other contexts. This is a situation where you have two individuals and there has been a death as a result of the activity, but it is not clear in relation to either of them whether they were the killer or, if they were not the killer, that they were the assister. In the previous category of cases we talked about, it is clear that the individual was either the killer or was an accessory.

In the Banfield scenario, you are talking about a situation where you cannot be confident that the individual was the killer and, if not the killer, was playing a part. It often arose in relation to significant injuries and deaths of children. The parents would say, "It wasn't me," and say no more. You could never prove to the criminal standard that either dad killed and mum was helping or mum killed and dad was helping. It may be that the party who did not do the killing had absolutely nothing to do with it. The Law Commission addressed that in a report, and the Domestic Violence, Crime and Victims Act 2004 took forward our recommendations. The 2012 amendment extended them to apply in relation to serious injury caused to children and vulnerable adults as well as to deaths. That has worked effectively in meeting that challenge.

Q48 Philip Davies: There was one thing I proposed in the Criminal Justice and Courts Bill and I wonder what you think about it. I designed it as an alternative to the joint enterprise issue. It was to extend the offence of causing or allowing the death of a child or vulnerable adult to cover everyone. Why should it just apply to children and vulnerable adults? If that was extended so that the offence was causing or allowing the death of anybody, it may be an alternative to a joint enterprise prosecution.

Professor Ormerod: I would answer that in two parts. The reason that it was felt to be appropriate in relation to children and vulnerable adults was that otherwise you might not get any evidence, because the victims themselves were not going to come forward and say, "It was dad and not mum." If you extend it in that way, the danger is that you may create liability for somebody when they have not actually played a part, but they are so intimidated by the principal offender that they do not feel in a position to be able to defend themselves, raise a defence or challenge the evidence of the principal. It would be a significant extension.

Alex Chalk: It is the sin of omission and we do not have that in English law. It would be a massive change.

Chair: Yes, it would be a completely new concept. It would be guilty by omission.

Sir David Bean: It is worth noting that some people have not noted in public discussion that the Jogee judgment begins with a resounding affirmation of the fact that it always has been, and will continue to be, possible to be convicted of murder without being the person who put the knife in; the concept of an accessory will still continue. It is a question of whether you need intention to do something or intention to assist or encourage, rather than mere foresight.

Q49 Alex Chalk: It is worth repeating that, as I understand it, post-Jogee, a person who is on the periphery still needs only to have intended that GBH was caused even if it ultimately goes on to lead to someone's death. In other words, somebody who might never in a million years have wanted the victim to die, albeit wanting him to be roughed up pretty badly, can still go down for murder.

Professor Ormerod: That is true of the principal as well.

Q50 Alex Chalk: Of course, but it is worth making the point that when one looks at how it has been curtailed there is still scope for people to be convicted of murder under joint enterprise even if they did not necessarily intend death to result.

Professor Ormerod: Very much so.

Q51 Philip Davies: But there are cases where it is pretty clear who or which small group of people were responsible for somebody's death and nobody has ever been brought to justice. I hope that you will have as much thought about those people and those families, who are grieving for people who have been murdered and they know pretty much who did it. They deserve some justice as well, but they are not getting it at the moment.

Professor Ormerod: We will have to wait and see what happens in relation to Jogie, but the way that the case law will play out in those cases is that, where the jury can be satisfied to the criminal standard that somebody intended, they will be convicting for

murder. Where they were satisfied that the defendant—the individual involved—lacked that intention they will still be convicted of manslaughter. Of course, the maximum sentence for manslaughter is still up to life, so in situations where there has been common venture and violence perpetrated by all the parties it is unlikely that somebody would be acquitted of all offences of violence and/or homicide.

Q52 Chair: The newspaper reporting that hundreds of people were going to walk out scot-free was some of the most grossly misleading reporting of the judgment imaginable, wasn't it? That is simply not going to happen on the basis of the judgment.

Sir David Bean: It may raise expectations that—

Chair: Yes, and it may have been very unfair to raise expectations for some people. In most cases, people will be guilty of a form of homicide.

Sir David Bean: Yes.

Q53 Chair: Does that perhaps leave a broader issue as to whether or not the law of homicide itself might at some point in the future warrant some rationalisation?

Alex Chalk: In 2006, there was an excellent Law Commission report.

Professor Ormerod: It is still awaiting—

Chair: Another piece of work that has not yet been implemented. That is very helpful.

Q54 Dr Huq: I want to ask a couple of questions about the Government's triennial review of the Law Commission. In the last one from 2014, they praised stakeholder engagement. Could you tell us how the Law Commission engages with stakeholders and how we can all learn from this best practice?

Professor Ormerod: It is gratifying to see the triennial review make that point, because we take our stakeholder engagement very seriously. One of the strengths we have developed over our 50 years is expertise in that engagement. It is important to realise that we begin our consultation and our stakeholder engagement even before we have taken on a project. We begin liaising with the relevant stakeholders before we have decided whether or not a project should be taken on, because we want to understand the full scale and scope of the problem and the possible alternative solutions. That stakeholder engagement persists throughout, not only at the formal consultation phase where we have a public consultation open. We want to ensure that we are engaged in that iterative process, because we want our conclusions to be evidence-based and to have considered all the arguments.

Our fitness to plead project, which reported earlier this year, is a good example of that dialogue. We began the project some years ago. We had a scoping paper where we asked individuals what the pressing problems were that we were trying to identify. That was not just from lawyers, but from psychiatrists, psychologists, those working in the court centres and those with communication difficulties and so on. We asked what experiences they were having.

Q55 Dr Huq: Was it people like pressure groups, and academics, as you are from that sector?

Professor Ormerod: Very much so, yes. As the chief executive said, we set up our advisory groups, and we usually have academic members on them. We then had an issues paper where we set out particular problems. We had a consultation paper. We had a symposium and a one-day conference, which we now tend to do on most criminal projects. There were over 100 delegates, not only psychologists, psychiatrists, legal practitioners and judges but also victims and bereaved relatives of those who had suffered crime at the hands of people who were subsequently unfit to be tried. Quite innovatively, we went on a visit to court centres with a group of individuals with autism to learn from them what experience they had of being in a court setting, how alien that was and what accommodation might be needed to make them comfortable in that setting so that they could perhaps give evidence and have a trial in which they could effectively participate. We engaged with hundreds of stakeholders throughout that project. We even did our own empirical work. We were conscious of the paucity of information about the number of unfitness to plead cases—the number of instances where people were claiming unfitness. We did our own empirical work in Crown court centres so that we could be confident that we were doing it on an appropriate evidence base.

Q56 Dr Huq: Was that interviewing people and stuff like that?

Professor Ormerod: In that instance, it was a case of collecting data about the number of cases in which fitness to plead was raised as an issue, the number of cases where expert evidence reports were then commissioned and the number of cases where subsequently there was an actual plea of unfitness raised at the trial. That was very valuable, going back to the earlier discussion we had, in informing our impact assessment and demonstrating potentially quite significant savings because of the recommendations we made about streamlining the way expert reports could be gathered. As I said, we met victims of crimes perpetrated by those who were unfit as well. It was a very serious part of our research. That is one of the reasons why we sometimes think that consultees will be more candid with us than they would if there was a formal Government consultation on an issue.

Q57 Dr Huq: That same review commended you for being in regular contact with your sponsor. It comes back to the question about control. How do you feel your relationship is with the MOJ?

Elaine Lorimer: Perhaps I should comment, because I believe the relationship with the MOJ sponsorship team—

Q58 Dr Huq: And with other Government Departments such as the Home Office.

Elaine Lorimer: It is standard practice for arm's length bodies to have regular contact with their sponsoring Ministry. There is nothing unusual in the fact that we have regular discussions with our sponsorship team. I have to say, though, that our sponsorship team are very cognisant of our independence; so it is simply a discussion about where we are at with our projects. Sometimes they can be very helpful in terms of opening doors for us in the Ministry to get access to data or expertise. It enables them to offer briefing to Ministers if it is required of them in relation to the work of the commission. I would describe the relationship with the Ministry and how we conduct that relationship with the sponsorship team as very mature.

In relation to other Government Departments, a quick look at the projects that we are working on at the moment would show you that we are working right across Whitehall Departments—the Home Office, the Cabinet Office, BIS, DCLG and the Treasury, to name but a few. As I described earlier in answer to a question about how we conduct our projects, when we have a memorandum of understanding set up with the relevant policy Department, it sets out how we will conduct relationships with that Department over the life of a project. That will enable us to access the relevant officials and relevant information and data if we need it, which we very often do for our impact assessments, for example. It also enables us to go to see the relevant Minister at the appropriate point in our project to brief them on the work we are doing.

Q59 Dr Huq: The triennial review recommended having non-executive board members as a critical friend, or whatever it is.

Elaine Lorimer: Yes.

Q60 Dr Huq: The first one is Sir David Bell, who is an academic. How is that working out, and what value do non-executive board members provide to your work?

Elaine Lorimer: He is not an academic.

Sir David Bean: He is vice-chancellor of Reading but a former permanent secretary at Education. He is the first. There is provision for two. We were going to set about recruiting a second non-executive, when Elaine gave us notice that she is leaving us, alas, at the end of the week. I thought it would be better to see who the new chief executive was before recruiting a second non-executive board member so that we could get somebody with a different skillset. We have found it invaluable to have Sir David as a critical friend. He is not a lawyer. He can say to this bunch of five lawyers, “Why do you do things in this way?” That is very valuable, and I am sure that when we have a second, who will be somebody different in kind from Sir David, it will give another dimension. It is very helpful.

Chair: We sometimes find that the non-lawyers are very helpful on the Select Committee, too. They are critical friends to the rest of us.

Q61 Alex Chalk: I have two topics. I will try and get through the first one reasonably promptly because the second one, on one view, is perhaps the most important. I will start with OAPA. There is a proposal, effectively, to shelve assault occasioning actual bodily harm and to have aggravated assault. Given that everything up to grievous bodily harm could in fact be quite a serious matter—think of a pub fight with very significant soft tissue injuries, big black eyes everywhere and potentially under your proposals a maximum of 12 months in the magistrates court—is there not a danger through that proposal of denying somebody with perhaps no previous convictions the opportunity to have their day in the Crown court before a jury of their peers? This is something that is life-changing for anybody convicted of it; it is extremely serious and they could go to prison for potentially a long period of time. Is that not magistrates court overreach?

Professor Ormerod: Of course, the 2003 Criminal Justice Act already has—

Alex Chalk: It has not come into force yet.

Professor Ormerod: That is right, but Parliament has at least acknowledged that magistrates could be trusted with 12 months. The picture you paint is not the entire one. The reform of the 1861 Act would still leave a clear structure. In fact, it would improve the structure of the offences: we would have intentional serious injury carrying life; we would have seven years for reckless serious injury and so on. It is not that the work to be done by the aggravated assault offence would overreach in that sense. It is bridging a gap. At present, because of the lack of structure in the 1861 Act, we end up with the CPS in a position where they under or over charge. Looking at the statistics, 34% of cases taken into the Crown court for ABH result in a sentence of six months or less. If you look at that in terms of 12 months, it is 74% or 75%. That is 5,000 or 6,000 cases a year where the sentence imposed in the Crown court is under 12 months.

It seems proportionate for those cases to be dealt with in the magistrates court. It is an entirely proportionate response, it seems, to that type of offending. Other inroads, if I can put it that way, have been made into the sanctity of the jury trial. We have a number of summary-only offences, but of course we also have situations—criminal damage is one—where unless the threshold is met—

Q62 Alex Chalk: This is pretty fundamental, isn't it? It is talking about an offence against the individual. There is potential for quite an unpleasant incident but the jury do not get a chance to decide. Anyway, I have heard the explanation, so thank you very much. I am keen to move on to what, on one view, is very important indeed: the proposals for codifying or regularising the sentencing regime. I would be interested in a brief rehearsal of the problems that face sentencing judges at the moment and why you think your proposal would make a difference.

Professor Ormerod: This is something of a flagship project for the criminal team. The principal problems stem from the volume. We are looking at legislation that, as I said, runs to 1,300 pages spread across several decades. With the annual amendment of that legislation—every criminal justice Bill seems to have amendments to the sentencing procedure—you end up with a multiplicity of sentencing regimes. Somebody sentencing an offender today would have to have very close regard to the date of the commission of the offence, or the date of conviction, to identify whether or not the most recent changes in the 2012 Act, 2014 Act or whatever it may be are in force. You end up with regimes overlapping parallel regimes because of the transitional provisions.

All of that generates inaccessibility. Even lawyers, judges and those expert in the area cannot confidently state the law. We see that in the volume of errors, as I mentioned earlier. There is research done by Robert Banks, who is eminent in the field, demonstrating that some 29% of cases in the Court of Appeal Criminal Division contained an unlawful element. It was not disagreement simply about the tariff or the period to be served, but about the lawful nature of the sentence imposed. That is not only a problem in terms of difficulties for legal practitioners and judges but, of course, it sends a very poor message when we cannot confidently declare sentence in a criminal court. One of the key steps in the criminal justice process is that you are denouncing the individual and making it very clear what penalty is being imposed by society for the wrongdoing.

As I say, all of that fuels the ongoing problem with the state of the law being inaccessible. The frequent amendments fuel that problem. Our vision on how we are going to try to solve it is by reducing all that law into a single statutory source. We will produce one

sentencing code Bill, which will be the first and only port of call for a judge. We hope the code will be structured in such a robust manner—because we are consulting judges about the order of the provisions within it—that it will withstand and accommodate change. We have to exorcise that transitional devil. That is the problem. Every time an amendment is made there are those multiplicities.

Last year in a paper on transition we consulted on the radical proposal, which has met with universal support, that we can have a clean sweep. If we introduced the criminal code, say in 2019, it would be perfectly lawful and permissible to have a provision that allows a judge dealing with any offender convicted on or after the date of the commencement of that code to deal with the individual under that code. The provisions in the code are the only ones that will apply and we can sweep away all the previous procedural law. The only safeguard of course is that the judge would have to go back to check what the maximum available penalty was at the date of the commission of the offence, but the sentencing procedure that then applies and the individual types of penalty, whether community order or unpaid work requirements and so on, will all be contained within the single code, irrespective of the date of the commission of the offence. That will make the sentencing judge's job much easier and much more efficient.

We are also trying to simplify the legislation in as many ways as we can to make it more user-friendly. There are innovative drafting techniques including, perhaps, tables on the face of the Bill, or if not on the face of the Bill at least in the material supplementing it, produced by National Archives on their legislation.gov website. One of the most common causes of unlawful sentences are judges passing impermissible combinations, such as a suspended sentence with some other sentence that is not permitted. That is because the provisions regulating each of those are scattered across the legislative framework. It is much better to have a table where you have a list of all the available penalties on each axis and you can look it up, rather as you might have done with an old mileage chart.

Q63 Alex Chalk: If funding were cut, how would that affect your ability to devise this very helpful code? I hope that is not too much of a leading question.

Professor Ormerod: It is quite a leading question. Work is ongoing, but this is a project where we are very fortunate to have seconded to us full-time parliamentary counsel. It is an enormous drafting undertaking, as well of course as the background legal research being conducted by members of the team. It is a significant constraint on resource, but we have already committed 12 months' worth of work on this. We have already started drafting a Bill, so it would be very disappointing indeed if we were not able to bring it to fruition.

Q64 Chair: Again, there are potential savings in terms of proper justice and sentences being passed correctly. The time so frequently spent revisiting erroneous sentences is very significant, isn't it?

Sir David Bean: It is very striking for somebody who sits on criminal appeals, as I do, that very often the complexity is such that it is only a lawyer in the Criminal Appeal Office, because they are specialists in this, who notices that something has gone wrong in a Crown court that nobody spotted—not the judge, not the prosecution counsel or defence counsel. There is too much of that going on.

Chair: And in so many places.

Q65 Alex Chalk: Very often the less serious offence is more complex. Road traffic offences, for example, are a complete nightmare when you try to blend all the various orders together.

Professor Ormerod: Could I make one further point? If the code is enacted, as we hope it will be, we anticipate that it will be frequently amended. Parliamentarians obviously have a love of amending sentencing legislation. This is something that can only be brought about by cultural change and we cannot legislate for that. The intention is that future amendment of sentencing procedure, irrespective of the nature of that change, is brought about by amending the code. In 2022, if you want to introduce some new form of extended sentence, of course Parliament is sovereign and can do so, but we hope that the provisions in that subsequent legislation would be drafted in such a way that they could be inserted in the code, so that the judge for ever more has only one document to which to refer, which is the sentencing code. It has worked well in other jurisdictions, but it requires commitment from parliamentarians to achieve that.

Q66 Chair: That is very important. We have touched on some of the recommendations that you have made. Interestingly, I saw that you recommended the extension of threats to kill to include threats to injure and/or rape, to fill the gap that there appears to be where you have the 10-year indictable-only offence, or effectively a threat to assault, which is six months. You have recommended this matter in the interim. I can see the logic of that. One would imagine that quite a lot of that might include internet communication. Is that the intention?

Professor Ormerod: It could be. There is certainly already case law finding that you can have a conviction for threats to kill by internet or Facebook posts and so on. We anticipated that that would apply in relation to threats to kill and threats to rape. It seemed appropriate when we were modernising the statute to strip out offences that dealt with evils of the 1861 era. Obstructing a magistrate on his way to preserve a shipwreck is no longer relevant, but threats to rape—whether over the internet or otherwise—are a modern evil that needs to be tackled. As you say, there was a gap, because you had threats to kill and assault, with nothing in the middle. It is a recommendation to ensure that the legislation serves the purpose of protecting against modern-day evils, whether committed over the internet or elsewhere. Of course, there are other offences under the Malicious Communications Act but they are relatively low level, with a two-year maximum sentence.

Chair: That is the point. You have to have a sentence to reflect the level of the harm done or the gravity of the conduct.

Q67 John Howell: Let me state, first of all, that I am incredibly grateful to you for coming here. Looking back through the records, I cannot seem to find that you have actually given evidence to this Committee over the last 10 years. Is that because we have failed to call you or because you have had nothing to say? I will tell you where I am going with this question. How can you take the relationship forward in the future?

Sir David Bean: I was amazed to find that until today we had never given evidence to this Committee. My predecessors have appeared before other Committees of this House in the past, some of which no longer exist, but we have never appeared before this Committee.

We would welcome an ongoing relationship. Perhaps, if you felt it appropriate, you could see us once a year and we could report on what was going on.

Q68 John Howell: I think that would be good around the time of your report or something like that. We could perhaps call on you at other times, although we won't make it every week—don't worry—but when there are specific issues it would be very helpful if we could do that. On your relationship with other Select Committees of the House, presumably you send your reports to them. Do you also write a short letter bringing the attention of the Chair to the main thrust of the reports you are writing?

Elaine Lorimer: All our reports are laid before Parliament but we do not tend to send them to specific Committees, nor indeed do we write to specific Chairs of Committees to draw their attention to our reports. That is not something we have done historically. It is something we could do, but it is not something we have done historically.

Q69 John Howell: The trouble with laying things before Parliament is that they get lost and we do not pick them up very often. Something that brought your recommendations to the attention of individual Chairs of Select Committees would be quite helpful.

Sir David Bean: I would welcome that. In a sense that is only at the end of the process when we have made recommendations. I would like to see greater interaction with departmental Select Committees, not necessarily this one, both at the stage of gathering suggestions for the next programme and at the stage of consultation when the project is under way. We have some consultation with Parliament. For example, I chaired a meeting recently in the Jubilee Room about our project on deprivation of liberty safeguards for people lacking mental capacity—a classic Law Commission subject. It is difficult and involves legal input. We had attendance from parliamentarians of both Houses, all parties and Cross Benchers in the Lords. That was very useful, but I can see that that kind of meeting could be with the appropriate departmental Select Committee. If they would find it useful, we certainly would.

Chair: Although communication usually comes to us at the moment and we try to send it on, there is no constitutional problem if you want to communicate directly with Home Affairs or whatever when it is a matter that relates to them. That is very helpful, Sir David, and certainly we would welcome a regular slot for the commission. You have demonstrated the significance of the work that is done by the Law Commission, which is hugely important.

Sir David, Professor Ormerod and Ms Lorimer, thank you very much for your time today and for your evidence. It has been extremely valuable to us. Ms Lorimer, all of us wish you the very best once you have left the commission and moved on. Whether it will ever bring you before the Select Committee again, I do not know, but I am sure that your successor will be in touch with us in a number of ways. Thank you all very much.