

Justice Committee

Oral evidence: [The work of the Law Commission](#), HC 1357

Monday 2 July 2018

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Members present: Robert Neill (Chair); Mrs Kemi Badenoch; Ruth Cadbury; Alex Chalk; Bambos Charalambous; David Hanson; John Howell; Victoria Prentis; Ellie Reeves.

Questions 1 - 56

Witnesses

[I](#): The Rt Hon Sir David Bean, Chairman, Law Commission; and Phillip Golding, Chief Executive, Law Commission.



Examination of witnesses

Witnesses: Sir David Bean and Phillip Golding.

Chair: Good morning and welcome to our evidence session. Sir David, Mr Golding, it is very nice to see you both. We will start with the formalities and declarations of interest. I am a non-practising member of the Bar and a consultant to a law firm.

Victoria Prentis: I am a non-practising barrister.

Alex Chalk: Barrister.

Ellie Reeves: Non-practising barrister.

Bambos Charalambous: Non-practising solicitor.

Q1 **Chair:** And there are some non-lawyers here too.

You have kindly sent us a memorandum of evidence that sets out some of the issues around the work of the commission and the funding thereof. Sir David, you have been in post for about three years and are coming towards the end of your tenure. Mr Golding, it is about two years in your case. Sir David, how would you characterise the role that the commission plays, or should play, in our public life, and does it? If not, what is the obstacle?

Sir David Bean: We do law reform and simplification of the law, which does not involve sharply party political issues. In many cases, it is work that nobody else would do at all if we did not do it. As you can see from the subject matter of our new programme, and the references from Departments that will also form part of our work, the subject matter is very varied. It covers many aspects of English law, but the subject matter has in common that, if we did not do it, in many cases nobody would.

Q2 **Chair:** You have been established since 1965. About 65% of the recommendations that you have made have been accepted in whole or part over the years.

Sir David Bean: Yes. As you know, we have no power to do anything. We cannot make orders, and we certainly cannot legislate. We throw the ball to Government and Parliament as to whether to do something, but in about two thirds of the reports we have done legislation has ensued, not necessarily to implement the whole of what we recommend, but in many cases to implement most of it, or some of it.

Q3 **Chair:** We have seen the structure of the commission—yourself and about half a dozen commissioners. Am I right?

Sir David Bean: It is a total of five, including the Chair.

Q4 **Chair:** There is also a support staff who do the preparatory work. How many would that be?



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Phillip Golding: Currently, we are at about 20 or so lawyers and a similar number of research assistants who do the main proportion of our work. We also have in-house parliamentary counsel and an economist. We have a very, very small non-legal staff, which has been reduced considerably over the last couple of years.

Q5 **Chair:** What is your budget for this year? Remind me.

Phillip Golding: If I may, I will give the headline figures.

Chair: Yes.

Phillip Golding: We have had a 54% reduction since 2010 to our headline figure for 2019-20, which will be down to £1.9 million from about £4 million in our core funding.

Q6 **Chair:** Sir David, as the chairman of the commission and the person who is driving it, you have had to preside over a very significant reduction.

Sir David Bean: Yes. It is a reduction in our core funding. We are fortunately able to accept references from Departments, with specific funding attached. For example, we are starting an important project on surrogacy where the sponsoring Department is Health. They are paying us to do it. If we were not able to supplement our core funding from references, we would have gone out of business by now, but, as you know Chair, I am concerned that the more we become dependent on supplementary income from references, the more it stops us doing important work that does not attract funding but that needs to be done.

Q7 **Chair:** Could you give some examples of the sorts of areas that might be impacted?

Sir David Bean: In our programme of future work, there are a number of items—in fact the majority of items—where we have no specific funding. It might be something quite large like, say, administrative review, or something small and targeted like chancel repair liability. If our core funding is cut as much as it has been, with the prospect of a further cut next year, it means that we do not have enough funding to do work that does not come with a dowry or specific funding, so that work will not get done.

Q8 **Alex Chalk:** Can I pick up on that a little further? There is a helpful list of topics in the 13th programme on page 13, if anyone is following the agenda. As you rightly say, there are some that are funded from the core budget: a modern framework for disposing of the dead, intermediated securities, modernising trust law for a global Britain and registered land and chancel repair liability, which you referred to. Could you give an indication of what additional topics would have been on that list were the original funding structure in place? In other words, what has been crowded out by the fact that you now have, effectively, a blockbuster scheme?



Sir David Bean: It has not, but can I put it the other way around? Phil will correct me if I am wrong, but of the 14 items in the programme, only four are funded. The other 10 are to be done if and when resources permit. Perhaps for the first time in our history, there may be items that we just do not get round to because core funding does not permit it. This is what we hope to do, or start on, in the next three years or so—it is not a fixed period—but we may not do the work at all.

Q9 **Alex Chalk:** I am not expressing myself as well as I should. This list contains, exactly as you indicate, some things where you are acting, in your words, like a barrister waiting for a brief. Effectively, you have been commissioned to do the electronic signatures by the Ministry of Justice and you have been commissioned to do employment law hearing structures by the Ministry of Justice.

What are the priorities you are now not able to pursue because you necessarily have to follow the money—to use an inelegant expression? You have to do these projects because that is what keeps the show on the road, but are there a whole load of pressing priorities that do not have political impetus behind them and are therefore falling by the wayside? Could you identify any?

Sir David Bean: Over the past few years, we have noticed a tendency, which will accelerate, for the paid work to elbow aside the unpaid work. The paid work very often comes with quite tight time schedules. A Government Department says, “We would like you to do this work, but we want a report in 12 months.” In order to do that, with our comparatively small teams of lawyers and research assistants, we may have to put projects on hold. For example, one of my favourites among our projects, because it is so interesting, is wills. That has taken quite a long time. We started six years ago, before my time obviously, and it was put on hold when funded projects elbowed it aside. It is now back on track. That is an example. Another one we have taken a long time over is misconduct in public office.

Alex Chalk: Yes.

Sir David Bean: That was started in 2011 and almost immediately shelved for three years because there were other more pressing priorities that attracted funding.

Q10 **Alex Chalk:** Is it always the case that a Department comes to you, knocks on the door, metaphorically speaking, and says, “We really need this work doing”? Or is it a two-way street where you can say, “Have you thought, by the way MOJ, of these three? Do any of these take your interest? We think this all needs doing and we would certainly welcome some funding to do whichever you think is appropriate”?

Sir David Bean: It can operate either way. The programme generally consists of items that we suggest to Government. We have to get the support of the relevant Department—for example, Health for surrogacy.



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Then we put those items to the Lord Chancellor for approval. I am glad to say that approval is not withheld, and then that is the programme.

References are simply a bilateral transaction not involving the Lord Chancellor. A Minister in a sponsoring Department or Welsh Ministers ask us to do something. The answer is usually, "Yes, but you'll have to pay for it." Then we agree to do it. Sometimes, we suggest to a Department, "Why don't you ask us to do this?"

- Q11 **Alex Chalk:** At the moment, do you feel that your independence is being compromised unacceptably or do you think it is a two-way street? It is a bit of push me, pull you, but ultimately you get to a point where you are doing relevant and important stuff and it does not matter too much; or do you think there is an unacceptable curtailment of your independence, which means you are not focusing on what might be legally important rather than politically expedient?

Sir David Bean: It is potentially dangerous in the way you suggest. I do not think we have got to that stage yet. Our independence is not compromised in the sense that we are told what conclusions to reach, but our independence would be compromised if we were confined to taking up subjects where Departments wanted to pay us. It is very important that we should be able to suggest projects to Government, provided they have protocol support, which is relevant Departments saying, "We agree that there is a problem that needs looking into and we have an intention to take forward reform if you recommend it." Provided we have that, imposing the additional requirement that it must be something the Department is prepared to pay for is dangerous for our independence.

- Q12 **Alex Chalk:** Can you think of an example of an area of law that you might think needs looking at but which would be politically inconvenient for the potential sponsoring Department?

Sir David Bean: If an area is politically contentious, we should not be doing it. That is my view. As you all know, there are plenty of ways of getting things done in this building if it is a subject that will be at the top of a party's manifesto or has been the subject of a big trailed announcement at the party conference, whoever is in Government. It is the items that are not that are the problem.

- Q13 **Chair:** It is something like the sentencing code. The code is desirable whatever your view on sentencing.

Sir David Bean: Exactly so. May I put in a plug for the sentencing code? We have had great difficulties in achieving the introduction of paving clauses for the consolidation Bill. Although it is described as a sentencing code and it will be a very important work of simplification, it is not—repeat not—designed either to increase or decrease the prison population.

- Q14 **Chair:** It is a codification process.



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Sir David Bean: It is a codification process that the team led by my colleague Professor David Ormerod has been working on for years and, if enacted, would make the sentencing process in the Crown courts and magistrates courts a lot simpler. That would bring benefits in money, benefits in less wasted time and resources and so forth.

Q15 **Alex Chalk:** Is there a danger, going back to the first point, that something so important, which you can see could have enormous knock-on benefits, could be slowed down because you are having to chase specific briefs, as it were, by sponsoring Departments?

Sir David Bean: Indeed. If we were asked now to embark on the sentencing code project unfunded, as it was, we simply could not do it.

Q16 **Alex Chalk:** That is a very important point. Are there examples of really large magisterial inquiries that you simply could not do under this new regime?

Sir David Bean: We do not know, because we have not asked. As I said, I would put it rather that we will not be able to do even the 14 projects in the programme, or at least we may not be able to do all of them, if the present funding situation increases. Whether we could have done other more ambitious projects if our resources had been greater I do not know, but even just looking at what is in the programme I am worried about that.

Phillip Golding: In terms of the figures, if it is helpful, we cost about £1.3 million a year in fixed costs. The rest, after that, is all salaries for lawyers and staff. If our budget reduces to £1.9 million, £600,000 left does not buy many lawyers and staff to do core-funded projects.

Q17 **Chair:** Is there anything you can take out now or put aside? You have already cut the administration, by about 50%, when you came in.

Phillip Golding: Indeed. Anything else now is what I would term as frontline staff, which is lawyers and researchers doing law reform work.

Q18 **Chair:** Less reform work will be done. It is as simple as that. There is nothing else to give.

Phillip Golding: Yes.

Q19 **David Hanson:** You indicated that the project specific income is going to be about £1.8 million by 2019-20. What is the going rate for a project? If I am a Government Department, how do you cost it?

Phillip Golding: Essentially, it is marginal costs. We do not make money on projects, so it is staff costs, typically £80,000 for a lawyer and £35,000 for a research assistant, and then some covering costs for publication, translations and the like. That tends to work on the basis of a one lawyer, one research assistant project, which a lot of our projects are, so that is £150,000 a year. Our informal analysis suggests that a



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Department or a consultancy could not do the work for less, with what we produce.

Q20 **David Hanson:** Just so that I am clear, if 10 Government Departments came along and said, "There are 10 projects and we are willing to fund them," would you ever consider taking on additional staff for the course of the project? If so, does that work for you and for the Department?

Phillip Golding: It can. Certainly with residential leasehold we bought in something like nine additional staff to focus on what is a very big funded project. Obviously, the funds we bring in pay for those staff. It is not that I can channel them around the organisation to offset cuts elsewhere. My take on it is that we need a core number of staff to function as an organisation. We need to maintain that experience and expertise. There is only so much work you can get through with, I suppose, five commissioners and the like, so there is an optimum size.

Q21 **David Hanson:** What is the benefit to the Department? The Department of Health—you mentioned surrogacy for example—is a big Department. Just out of interest, why would they commission you to do that as opposed to looking in-house? They are doing legislation issues and policy issues all the time.

Sir David Bean: I like to think we get work on our merits. We do extensive consultation and then we produce a report based on that consultation. As you all know, Government legal departments are under enormous pressure at the moment, partly but not entirely because of Brexit, and there is value in getting a non-party consultative body to carry out consultation and report to Parliament.

Q22 **Chair:** The sense I got when I was a Minister was that the departmental lawyers I had from the Government legal services were excellent people, but their job was essentially transacting the legal business of the Department—

Sir David Bean: Yes.

Q23 **Chair:** As opposed to having the opportunity to step back and perhaps look in a more reflective and considered manner at reform that may have a broader implication and a different timeframe from the pressures of legislation or governmental programmes.

Sir David Bean: Exactly so.

Q24 **Ruth Cadbury:** I want to get a sense of what happens to work that does not go anywhere. Some projects in your programmes were not able to be pursued because of the budget issues, and that is, in a sense, a form of efficiency, but the work does not get done. If you have a choice on the unfunded projects, who decides what gets pursued and what does not if there is only so much cash in the pot?



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Sir David Bean: Once the projects are in the programme, commissioners, with the chief executive, have to decide each year what we can start.

Q25 **Ruth Cadbury:** Is there work that you had in past programmes that did not come to fruition?

Sir David Bean: If you are talking about the implementation of recommendations in our reports, the initiative passes to Government and Parliament as to whether to implement them. That is not a decision for us, although we are obviously happy to help and advise on any questions that arise.

Q26 **Ruth Cadbury:** I will come on to that. All the topics in past programmes have been completed and handed over as recommendations.

Phillip Golding: Not quite. This programme, the 13th programme, is slightly different. Previous programmes have tended to contain projects that the commission expects to be able to start within the period of that programme, and pretty much without exception we have started projects. Some may have been paused on occasions for resource issues, as we discussed. Some are not yet quite finished, from previous programmes; a few are carrying on and work is still ongoing. This programme is slightly different in that we know that it contains more projects than we have funding to be able to carry forward, if that answers your point.

Q27 **Ruth Cadbury:** When you say, "Look, we cannot do everything. Which do we pursue?", who makes the decision?

Sir David Bean: We do.

Q28 **Ruth Cadbury:** Right. You said that two thirds turn into legislation of some form. Therefore a third do not. Why do they not?

Sir David Bean: It is quite a complex question to answer. It is quite rare for Government to reject a Law Commission report, but sometimes it takes a long time for anything to happen. Occasionally, when something happens, it is not Government or Parliament but the courts. To give you one example, there was a report of the Law Commission in the late 1990s about damages in fatal accident cases. Nobody did anything about it and successive Governments came and went. Then a case went up to the Supreme Court three years ago, and they decided to make the change the Law Commission had recommended in 1999, so it took 16 or 17 years to get there and in the end it was the judges who did it.

Sometimes Governments and Parliament take up the baton after a long interval. I always tell our staff that law reformers have to be patient because it is quite unusual for things to happen quickly here.

Q29 **Ruth Cadbury:** Can I move to the current, the 13th, programme of law reform. You consulted in July two years ago and announced the final programme in December last year—almost 18 months. What was the reason for the delay?



Sir David Bean: The process usually takes a year, but in spring last year an election was announced, as you all know. The effect of the purdah rule is that we cannot get any decisions out of Ministers between the announcement of the election and the holding of the election. The election was held in June. We had to be realistic; our new programme was not something that incoming Ministers wanted to deal with in their first four or five weeks in office.

Then it was the summer holidays and then it was the party conference season. Putting all those things together, the programme negotiations were paused for the best part of six months, so what would have taken 12 months took 18. It cannot be helped, and I am grateful to the MOJ for the fact that it recognises that those were circumstances out of our control, because they led to a very serious loss of income in the second half of last year, but it was not our fault.

Q30 **Ruth Cadbury:** Six months on, how is the work on the programme progressing? Are there any risks to the delivery, such as Brexit or anything else?

Sir David Bean: I do not think Brexit, as such, is a risk to the delivery of the programme. We are still working on some items from the previous programme. It is not as though everything stops on 17 December 2017 and then you start a new programme. We are still working on items from previous programmes. We are working on references outside the programme, and we have started work on some of the items in the programme—automated vehicles, electronic signatures, employment law hearing structures, residential leaseholds. Is there anything I have forgotten, Phil?

Phillip Golding: The Immigration Rules.

Sir David Bean: Yes, simplifying the Immigration Rules. And surrogacy, so we have made a start on six out of 14.

Phillip Golding: In relation to Brexit and the risks, I do not think it necessarily will have too much of an impact unless Government carve out a particular role that they think the Law Commission could undertake on Brexit legal work, which is a possibility.

Q31 **Chair:** People might think some of these things are arcane—21st century means of disposal of the dead or reform of wills. Can you just give us a quick snapshot of the sort of effect the current state of the law has on people's lives, or why it is desired to make changes?

Sir David Bean: Yes. Can I go back to the small item of chancel repair liability?

Chair: Yes.

Sir David Bean: It is not the greatest problem facing the nation, but, following a decision of the House of Lords Judicial Committee in 2003 and



a possible ambiguity in the Land Registration Act 2002, there is now the position that people buying a house may suddenly find that they are under a liability to contribute possibly substantial sums to repair the chancel of the local Anglican church. Because of this small but, if it hits you, very financially significant risk, people are now advised to insure, so the nation is spending something like £20 million a year on those insurance premiums. If only we were able to start the project—it is not very long and complicated—and make recommendations that you folk could enact, the nation would save £20 million a year in insurance premiums. That is just one very small example, but we do projects that, I hope, make people's lives better.

Another larger project is the wills project, on which I hope we will report next year. We issued a consultation paper not long ago, which attracted a lot of interest. The present legislation on wills was enacted in the year in which Queen Victoria came to the throne. Not much has been done to it since. The requirements of formality are very strict, such as if one of the two witnesses to a will was not in the room when the testator signed, but signed later somewhere else, the whole will is invalidated and you get an intestacy. That is the sort of feature of the law that can cause very serious hardship if you happen to be in the family affected by it. Those are two examples, one small, one rather larger, of unsatisfactory features of the law that we look into.

Chair: The problem is picking up all the bills and so on, and sorting out the estate if there is that kind of failure in intestacy. That is very helpful.

Q32 **Mrs Kemi Badenoch:** Sir David, eight of the 14 projects in the 13th programme happen to fall within the area of responsibility of the MOJ. Is that a coincidence or is it deliberate?

Sir David Bean: It is not deliberate. It is right to say that one should take the programme along with the references. A higher proportion of the references are the work of other Departments, and it is slightly random whether something is programme or reference. It depends partly on timing. The MOJ, in times gone by when it was the Lord Chancellor's Department, was really very much involved with everything we did and saw the whole of our work as coming within its responsibility. It paid for everything. The Lord Chancellor's Department in those days was much smaller and focused on law reform. It did not have prisons and so forth.

The MOJ is still the Department responsible for a good deal of the law, and we have been able to include, with its support under the protocol, a number of items in the programme. The proportion, as you say, is a bit higher than usual, but I do not think it represents a deliberate policy decision on our part.

Q33 **Mrs Kemi Badenoch:** My next question is about the projects you have outlined to help boost global Britain and increase competitiveness when we leave the EU. Quite a few of them are around innovation—for example, smart contracts or e-signatures. Are there other jurisdictions



that have successfully implemented this sort of legislation, and, if not, is it likely that people might be looking to us to see how we enact?

Sir David Bean: I am afraid I do not know whether there has been legislation on smart contracts elsewhere. I will ask my commercial colleague Stephen Lewis to write to you, if I may, Mrs Badenoch. I am sorry I do not know.

Automated vehicles, which have been mentioned, is a fascinating project, where we are ahead of the game. It is unusual, in a law reform project, in that you will have to do something in the next few years. The status quo is that any motor vehicle on a public highway in England must be driven by somebody at the wheel who is entirely responsible. In about 10 years, they tell me, the technology will be sufficiently advanced that you could have driverless vehicles on English roads, but the law does not allow it. Unless the prohibition is maintained in perpetuity, and Parliament says, "No way are we going to have driverless vehicles on English roads, thank you," and that is the policy decision, which would be a pretty strange one, legal provision will have to be made. It is an example of a very modern law reform project where you will have to do something and we will do our best to produce a viable package for your consideration.

Phillip Golding: But there is a risk of us falling behind as a jurisdiction. With electronic signatures for example, there are other jurisdictions that have legislation in place, and clarity around the law. From a competitiveness point of view, our setting out the position clearly could be a welcome step. It is certainly the case that other jurisdictions have legislated on automated vehicles, Australia being an example where the regime is slightly clearer. We do a lot of comparative work internationally and it will be really important, with these sorts of global Britain emerging tech projects, to make sure that we are completely tapped into what is going on internationally, and we are doing that.

Q34 **Victoria Prentis:** I have two questions about workstreams that you have mentioned already. On the misconduct in public office work, we are still expecting your final report this autumn. You said that it had been shelved for three years, because you felt there were more pressing priorities, probably. Do you think there is anything more to it than that?

Sir David Bean: The period of three years on the shelf was before my time. It was 2011-14, or thereabouts. We resumed it just before I came in as Chair. It is a very difficult problem, as you probably know. It is a common law offence created by the judges many, many years ago. The statement of it by the Court of Appeal, in an Attorney General's reference about 15 years ago, was that a public officer wilfully misconducts himself or neglects to perform his duty, without reasonable excuse, to such a degree as to amount to an abuse of the public's trust. That is a bit vague, and it would be a mistake to recommend a new statutory offence that simply reproduced that vagueness. That is the difficult problem we have



been grappling with, and I hope we will come up with a solution, but it is not easy.

- Q35 **Victoria Prentis:** The other piece of work I want to ask you about is the sentencing code, which is universally accepted as a useful piece of work not only in money-saving terms but for transparency and public trust in the justice system. Do you think that the Government will make parliamentary time for the draft Bill?

Sir David Bean: The consolidation Bill itself, which is part two of the parliamentary project, should not be a problem even in very difficult times, because there is a long-established Joint Committee on Consolidation Bills, which means that that part of the project really needs no Floor time at all. The difficulty is the paving clauses. If there were a criminal justice Bill before your House or the other House at the moment, no doubt the paving clauses could be put on the end of it and would, I hope, go through in about 10 minutes, because, as you rightly say Ms Prentis, nobody is opposed to this.

However, there is no criminal justice Bill this year, so we have been exploring with Government and with parliamentary staff what other vehicle could be used. I appeared recently before the House of Lords Liaison Committee with Professor Ormerod, and we suggested to them that perhaps it would be suitable for a Law Commission special procedure Bill.

- Q36 **Victoria Prentis:** Yes. We have not had one of those for a long time, have we?

Sir David Bean: That is right. We have not had one in the present Session. A Law Commission special procedure Bill on intellectual property was passed just before the 2017 election. We would say that it was high time for another. Obviously, a controversial Bill about criminal justice would not be suitable for special procedure, but this one is so uncontroversial that surely there must be some way of getting it done. If the rules on scope are such that anything that has the word “sentencing” opens up a full-day debate on the death penalty, a debate on penalties for sexual offences or whatever, surely there is something wrong with the rules. This is a very technical fix that has unanimous support from those who have responded to our consultation.

- Q37 **Victoria Prentis:** Is there anything we can do to help?

Sir David Bean: Is there anything you can do to help? Please. This really is a very worthwhile project and somehow I hope Parliament can cope with putting it through.

Chair: That is very helpful, and the point is taken.

- Q38 **Ellie Reeves:** As you know, this Select Committee reported on the disclosure of youth criminal records last October. That is something you have done your own work on, commissioned by the Home Office. You



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reported in January 2017, but the Home Office has not taken the issue further, as I understand it. Are you surprised?

Sir David Bean: We produced a very technical report on the Disclosure and Barring Service where we asked to make the list of offences more intelligible. We were not asked to go into the merits, although in one chapter in our report we suggested that the present operation of the scheme, as contained in the legislation, needs looking into. I was glad, if I am allowed to say so, that this Committee said so more emphatically recently.

It really is not very satisfactory that two convictions for very minor offences, when somebody was a child, can still haunt them decades later, but that is as much as I ought to say sitting where I am. The initiative perhaps passes to Government and Parliament. If we were asked to do a consultation and a report on the merits of the scheme, of course we would do so.

Q39 **Ellie Reeves:** You said that there was a compelling case for a wider review of the whole system. Is that something that from your understanding, from conversations at the Home Office, is not going to happen? Can you shed any more light on that?

Sir David Bean: I do not think we have had any recent information, certainly not since your Committee produced its report.

Phillip Golding: We are still in touch with the Home Office about it, but we are still awaiting the formal response to the project. It may well be that cases in the Supreme Court prompt a response.

Q40 **Chair:** Some of these problems have been around for a long time, as we highlighted with sentencing and criminal justice.

Sir David Bean: Yes.

Q41 **Chair:** The previous Lord Chief Justice said that the sentencing code was long overdue as a piece of simplification.

Sir David Bean: Yes.

Q42 **Bambos Charalambous:** I am going to focus my questions on the tailored review of the Law Commission. Picking up the last point by the Chair, the 2013 triennial review of the Law Commission praised the organisation's engagement with stakeholders and your regular contact with sponsors. Obviously, one of the sponsors is the MOJ. Given the constraints on funding, have you been able to maintain that level of engagement?

Sir David Bean: With stakeholders?

Bambos Charalambous: Yes.

Sir David Bean: It is essential that we should. There are two reasons for not trying to do projects too quickly. One is that it might reduce



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standards. The other is that we seek to consult to the point where we develop consensus, and you cannot develop consensus in five minutes, so we make a point of inviting contributions from stakeholders, listening to them and talking to them as much as we can.

- Q43 Bambos Charalambous:** What about the relationship with sponsors such as the MOJ? I am surprised about the sentencing code not being picked up by the MOJ. I would have thought it was the sort of thing they would be very interested in picking up. It is non-controversial and can be done relatively straightforwardly, without too much fuss. How do things work in your interaction with the MOJ?

Sir David Bean: Successive Lord Chancellors have said that they are supportive of the sentencing code project but have pointed to the difficulty of getting things through here at the moment. I do not think it is any lack of good will. I am due to see the Lord Chancellor tomorrow, when this subject may come up, among many others. We have a good relationship with the Ministry, including our sponsoring team of civil servants. I recognise that life is not easy for them, either on the funding side or from the aspect of pressures on legislative time, but we all do the best we can.

- Q44 Bambos Charalambous:** Going back to the tailored review, have you been able to respond to all the recommendations of the review, or have any of them caused you any difficulties?

Sir David Bean: Are you referring to the triennial review, so-called, of 2012, 2013 and 2014?

Bambos Charalambous: Yes, 2013.

Sir David Bean: There is a current tailored review in progress, but the triennial review was a fundamental one. Part one, in 2012-13, questioned the very existence of the Law Commission, in that it asked from first principles, "What is the best way of delivering law reform out of the following seven models?" I can't remember what Nos. 2 to 7 were, but No. 1 was the Law Commission. The answer, I am glad to say, was No. 1: the Law Commission is the best way of delivering this method. I am also glad to say that we are not being put through that every three years, because the Cabinet Office has recognised that if, every three years, you ask organisations such as ours to justify their existence from first principles, there is not much time and energy left for anything else.

Part two of the triennial review went on to consider governance issues and made a number of recommendations, the most important of which was that we should have a commission board, including two non-executive board members in addition to the commissioners. We have two: Bronwen Maddox, head of the Institute for Government, and Sir David Bell, vice-chancellor of Reading University and a former Education permanent secretary. They make a valuable contribution to our governance.



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We have now moved on to a current tailored review, as I said, which is not existential in first principles, thank goodness, and we are having useful discussions. That review has not yet concluded. Phil, I do not know whether there is anything you would like to add.

Phillip Golding: On other recommendations in the triennial review, we have picked up pretty much everything that is in there. We have strengthened governance arrangements since the triennial review was produced, both at board level and at senior management team level, so we have a fairly clean bill of health from the triennial review.

Q45 **Bambos Charalambous:** One of the things that came out was the framework document codifying your relationship with the MOJ. Have you found that helpful?

Sir David Bean: Yes. It is, as it says on the tin, a framework. It provides, for example, that I should meet the Lord Chancellor regularly; that I should meet the sponsoring Minister regularly—at present, Lord Keen of Elie; that I should have an annual meeting to review performance with the director general who is responsible for our affairs; and that we present budgets and business plans and so forth. That is working pretty smoothly.

Q46 **Bambos Charalambous:** How is the tailored review progressing and what outcomes do you hope will come out of the review?

Sir David Bean: It is progressing in the sense that we are to meet the official who has been conducting it just a day or two before I leave office. It will be finalised and published under my successor, but Phil will still be in post to deal with it. Phil, I do not know whether you have had any further discussions.

Phillip Golding: The anecdotal feedback we have had is that the stakeholders the review has spoken to, who include the Justice Committee, have given us a relatively positive billing, and we are not expecting any dramatic recommendations in the tailored review, given that it is fairly light touch. Obviously, anything that we can do to improve, we will consider.

Q47 **Chair:** I noticed that, in the memorandum you submitted to us, you talk about work that might be done going forward around some of the technical legal reforms that we are going to be confronted with post Brexit. I am thinking of some of the debates we have had on the withdrawal Bill about how retained law is dealt with in certain circumstances—ambulatory references, for example, and impacts on the law of contract, which it seems to be conceded by Government will often require quite swift technical movement to make sure there is no contractual uncertainty. Are there areas specifically where the commission is placed to assist with that, and what discussions have you had with Government about it?



Sir David Bean: We were never going to be asked to take part in the negotiations, obviously. Our consultation model is not well suited to a process where things might have to be negotiated in detail over a weekend, under great pressure of time. We understood that. What we have been suggesting to Government, for the last year and more, is that after 29 March next year this country will have the freedom to amend its laws in whatever way it wants.

There are many areas of law that are at present quite Euro-driven but are not deeply party political. Two examples are consumer safety and environmental protection. When the direction of travel is settled, in the coming months, it might be the time for Government to say, "Well, we now have the freedom to amend environmental protection law as we like. We are a bit preoccupied at the moment with big policy issues. Would you like to look into this, this or this area of detail of the law and report back?" Likewise, consumer safety or many other areas you can think of. That is the sort of post-Brexit work where I envisage we could be of use.

There are some highly technical legal areas, such as recognition of foreign civil judgments or foreign divorce judgments, or conflict of laws issues. It may be that they are being dealt with in the negotiations—I do not know—but if there are unresolved issues after next March we might be able to help with those too. We are there if we are asked and, if we are not asked, so be it.

Phillip Golding: We are engaging with Departments about the potential to help out. They seem to have their hands quite full at the moment, but we are on their radar.

Q48 **John Howell:** How would you like to see the relationship between the commission and this Committee develop?

Sir David Bean: I hope we will continue to engage regularly with you. We are grateful for the invitation. If there are particular areas on which you would like us to assist at a particular time, of course we will always be delighted to help. You might want to have a session on criminal law, property law or a specific project. We very much value your interest.

Q49 **John Howell:** What about other Select Committees? When you were here last time, you said you were going to try to develop relationships with other Select Committees. How has that gone?

Sir David Bean: It would probably, with other Select Committees, tend to relate to particular projects. We mentioned surrogacy earlier in the discussion, for example. I hope that, when we get to the stage of working up a consultation paper, we might engage with the Health Select Committee and ask them if they have suggestions to make to us, or they might want to ask us to give an account of what we are up to. We are very happy to do that. There may be criminal law projects that either you or the Home Affairs Select Committee want to ask about as well.

Q50 **John Howell:** Is the special parliamentary procedure to bring in Bills



dead?

Sir David Bean: I very much hope it isn't. We had a number of legislative successes in the 2015-17 Parliament. One was the special procedure Bill on intellectual property; the others were clauses in Government Bills on firearms and in the Enterprise Bill, on delayed insurance payments and so forth.

The special procedure is available for Bills introduced in the House of Lords that are agreed to be uncontroversial. Uncontroversial has never been defined, but it does not mean unanimous support in a House of 800 or 650 Members. There is a great deal that is very well suited to be given thorough examination by a committee of 12, but does not really justify the time of 650 or 800 people, and the special procedure is very well suited to that.

I recognise that at the moment the pressures are extraordinary, but I hope and think that there are good candidates in line for the special procedure. We have a Bill available on easements, for example. We had a Bill available on goods mortgages, bills of sale and logbook loans, which was lined up for introduction under the special procedure. Sadly, the Treasury decided not to introduce it, but I do not think that means, or should mean, that the special procedure is dead.

I should have mentioned—we mention it in the written evidence—that my point about special procedure Bills not requiring unanimity is not just our position; it is the Government's position as well. I had an exchange of letters to that effect with David Lidington, who was then Lord Chancellor, and, as you know, a former leader of this House, so he is an acknowledged figure in matters of parliamentary procedure. He agreed that unanimity is not required. At times when Floor time is under extraordinary pressure, as it is now, there is surely all the more reason for devising a procedure under which the more technical parts of our work can be taken forward in Committee rather than on the Floor of the House.

Q51 **Chair:** Sir David, you are going to return to the Court of Appeal after your three-year stint and Mr Justice Green is about to succeed you. I think you appointed him to the Court of Appeal. It is perhaps not always what you expect when you go on to the High Court Bench—that you are going to end up chairing a law reform body. Do you have any reflections on those three years—any messages for us and for your successor?

Sir David Bean: My message to my successor is that the commission is a great institution. It is a wonderful job to chair it. It has brilliant, talented lawyers, research assistants and staff, who are a pleasure to work with. It is quite unlike almost any other job that judges do, so you will have a great time, but you will have to keep fighting because there are always battles to be fought.



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My message to Parliament, if I may, is that it is an institution to be cherished. It does very valuable work and with just a little more resource we could do so much more.

- Q52 **Chair:** It has been suggested to me more than once that it was created in 1965 in an era of real enthusiasm for law reform, with Gerald Gardiner as Lord Chancellor and so on, but that predates the era of think-tanks. There are so many other bodies that can develop policy ideas and law reform ideas that therefore maybe, for some of the work that only the Law Commission could do, those ideas can be generated elsewhere. What is your response to that?

Sir David Bean: Think-tanks are a very good source of advice if you are looking for something to go into a manifesto and capture the headlines. If you want examination of something that is not going into anyone's manifesto and is not going to capture the headlines, the Law Commission remains, as it was in the 1960s, the best vehicle for taking it forward.

It was the genius of Gerald Gardiner to recognise that the then established mechanisms—something called the law reform committee or the law revision committee—which consisted of the great and the good meeting on a Thursday afternoon once a month after court, are no good; people do not have time to consult and they do not have time to research. Those are no use, and the more political think-tanks will always have more politically exciting things to do.

- Q53 **Chair:** They will always have an agenda.

Sir David Bean: They will always have an agenda.

- Q54 **Chair:** Statute makes sure that you do not, as I understand it.

Sir David Bean: My working rule is that, if there would be a Division in your House on Second Reading on a topic, we should have nothing to do with it. That still leaves quite a lot of the law for us to look at.

- Q55 **Chair:** That is the message you leave us with at the end of the day.

Sir David Bean: Yes, it is.

- Q56 **Chair:** Sir David, I am very grateful for the frankness and openness you have always shown us during your time. Mr Golding, I am grateful to you for the help you have given us and will continue to give as you remain in post.

As this is probably your last appearance before us, Sir David, we wish you well. Those of us who have dealt with the commission over the years endorse many of the sentiments you have just made. Thank you very much for what you have done and for the service you have given to the nation as chairman of the Law Commission. We wish you the very best going forward. I hope that our paths will cross in other ways in future, and I am sure they will.

Sir David Bean: Thank you very much for those kind words.



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Chair: We are very grateful. Thank you very much.