

Minister Responsible for the Law Commission

BRIEFING ON THE LAW COMMISSION October 2005

Background

- 1 The Law Commission is an Independent Crown Entity established by the Law Commission Act 1985 for the purpose of promoting the systematic review, reform, and development of the law of New Zealand.
- 2 The principal functions of the Law Commission prescribed in the statute are:
 - (a) To take and keep under review in a systematic way the law of New Zealand:
 - (b) To make recommendations for the reform and development of the law of New Zealand:
 - (c) To advise on the review of any aspect of the law of New Zealand conducted by any Government department or organisation (as defined in section 8(2) of the Law Commission Act 1985) and on proposals made as a result of the review:
 - (d) To advise the Minister of Justice [and the responsible Minister] on ways in which the law of New Zealand can be made as understandable and accessible as is practicable.

In making its recommendations, the Commission:

- (a) Shall take into account te ao Maori (the Maori dimension) and shall also give consideration to the multicultural character of New Zealand society; and
 - (b) Shall have regard to the desirability of simplifying the expression and content of the law, as far as that is practicable.¹
- 3 Prior to the creation of the Law Commission in 1986, responsibility for law reform in New Zealand rested primarily with the Department of Justice, with the assistance of a number of part-time committees administered by the Department and primarily comprising judges and legal practitioners. The quality, effectiveness and efficiency of government agencies and these committees in carrying out law reform projects was variable.

¹ Section 5 Law Commission Act 1985

- 4 Establishment of an independent law reform body, with expert commissioners appointed for fixed terms to lead projects, is in line with the practice in most similar jurisdictions. Recognition of the shared basis of law in Commonwealth countries, and commitment to consistency of approach and international quality standards in law reform, have forged strong links between law commissions internationally. An association of Law Commissions, the Commonwealth Association of Law Reform Agencies, with 20 member countries, was formally established in 2003. (See Appendix One for a list of law reform bodies similar to the Law Commission).
- 5 Sir Geoffrey Palmer in his review of the Law Commission in 2000 gave a positive endorsement of its contribution but recommended some changes to align its operation more effectively with the law reform objectives of the Government of the day.² Sir Geoffrey looked at the implementation rate of Law Commission reports in terms of legislation passed, and found that legislation was under consideration by Government in relation to almost all reports but had only been passed in response to 48% of them.
- 6 Sir Geoffrey regarded it as important to increase this rate and made a number of recommendations to that end. Changes as a result have included a Cabinet directive that a Government response should be tabled within six months of publication of a Law Commission report; the appointment of a separate Minister Responsible for the Law Commission; and regular scrutiny by the Justice and Electoral Select Committee of Government's uptake of Law Commission recommendations. The Law Commission has also worked more closely with Government in the selection of topics and the completion of projects, thus enhancing the probability of implementation.
- 7 As at 2005, there have been 71 final reports since the inception of the Law Commission,³ 53 of which have contributed, or are contributing, to Government's policy and legislative programme.⁴ While this may be a less rigorous test than was applied by Sir Geoffrey, it certainly suggests significant improvement in the impact of Commission reports since his report was written. However, the influence of a Law Commission report on subsequent legislation can be difficult to assess without detailed analysis, and as Sir Geoffrey said, "it is vital to observe that enactment is not the only measure". Ultimately, the success of the Commission in contributing to policy making is determined by the extent to which it both influences law reform and fosters public understanding of the need for that reform.
- 8 The Crown Entities Act 2004, which establishes consistent governance relationships between all crown entities and government, now applies to the Law Commission except to the extent that the Law Commission Act expressly

² Rt. Hon Sir Geoffrey Palmer; Evaluation of the Law Commission, *Report for the Associate Minister of Justice and Attorney-General Hon. Margaret Wilson*; 2000.

³ This number excludes 55 preliminary reports, 15 study papers and 12 miscellaneous papers (the latter all between 1996 and 1999), which do not have recommendations for Government.

⁴ Five reports either did not make recommendations or the recommendations did not relate to the Government and in nine cases Government has said further work will proceed when there is capacity to do so. Only in four cases is no further work currently envisaged.

provides otherwise. Several minor changes to processes are being implemented in compliance with the timeframes required by the statute.

The Role of the Law Commission

- 9 The Law Commission, as an independent and specialist law reform agency, is able to take an inclusive, objective and professional approach to reform of the laws that govern society. It is particularly suited to topics where independent, non-partisan investigation would assist in establishing the credibility of law reform proposals, or where collaboration or consultation with a wide range of stakeholders is needed.
- 10 Specialist legal topics, that require close consultation with the legal profession or a particular industry, often have these attributes - for example, the *Review of the Life Insurance Act 1908* published in 2004 and the *Review of Part 14 of the Customs and Excise Act 1995* due to be published in October 2005. So too do a number of social policy issues requiring broad and open consultation - for example, the issues addressed in *Delivering Justice: Review of Courts and Tribunals* published in 2004 and *New Issues in Legal Parenthood* published in 2005.
- 11 Projects undertaken by the Commission are usually substantial, possibly involving new concepts or fundamental review, which government agencies are sometimes unable to undertake because of time constraints and the electoral cycle. Projects can run from six months to two or three years, or occasionally even longer where the area under investigation is large and complex.
- 12 Since the beginning of this financial year, the Law Commission has also been providing reports on new legislation to the Legislation Advisory Committee (LAC), assessing government bills for compliance with the guidelines published by LAC. The commission has agreed to provide the resource equivalent of .5 of an FTE for this purpose.
- 13 The appointment of a Minister Responsible for the Law Commission has led to a better understanding of the Law Commission's particular contribution to law reform, and to the development of an improved process for selection of projects. The process recognises the Law Commission's independence and specialist capacity, as well as the need for its projects to contribute to Government's overall strategic outcomes and priorities.
- 14 The Cabinet Office Circular that invites Ministers to submit proposals for possible inclusion in the Law Commission's annual work programme now includes criteria that clearly differentiate the Commission's contribution from advice provided by core government agencies, and reflects the particular niche the Law Commission occupies in law reform. All proposals, from whatever source, should be assessed against these criteria.

- 15 They are the extent to which projects:
- Involve issues that span the interests of a number of government agencies and professional groups;
 - Require substantial long-term commitment and fundamental review;
 - Involve extensive public or professional consultation;
 - Need to be done independently of central government agencies because of the existence of vested interests, or a significant difference of views;
 - Require independent consideration in order to promote informed public debate on future policy direction.
- 16 The range and type of topics suitable for the Law Commission is illustrated by the following list of the reports completed in the past two years and some projects in the current work programme. (Appendix Two provides a short description of projects currently underway and Appendix Three lists the publications over the last five years.)

Reports published in the last two years

- Delivering Justice: Review of Courts and Tribunals
- New Issues in Legal Parenthood
- Review of the Life Insurance Act 1908
- Covert Filming
- Pre-Trial Criminal Processes: Justice through Efficiency
- Review of Infringement Offences

Current projects

- Review of access to courts records
- Entry, Search and Seizure
- Review of the forfeiture powers in the Customs Act
- Criminal Defences
- Maori Legal Entities
- Human Rights in the Pacific

Relationship with the Minister, Government and Parliament

- 17 In May or June each year, the responsible Minister and President of the Law Commission sign a Memorandum of Understanding (MoU), which includes an agreed work programme for the new financial year. Development of the work programme requires the Minister to liaise with Cabinet colleagues and officials on possible projects that the Commission might undertake. The Commission is sometimes asked to collaborate with agencies on projects already in train and in that case usually writes a study paper rather than a report to be tabled in Parliament.

- 18 The Commission can also put forward proposals arising from its own awareness of important law reform issues or from suggestions received from the public, legal practitioners, judges or Government agencies. However, the vast majority of projects on the work programme in recent years have been references from Government. Self-referred topics are uncommon, and are discussed with the Minister in advance before incorporation into the agreed work programme.
- 19 When Ministers and their agencies were asked to put forward possible projects for the work programme in May 2005, the response was disappointing. As a result, it was agreed that a further cabinet office circular should be sent to new ministers after the election, with a view to adding further projects to the work programme for the second half of 2005/06.
- 20 Discussions between the Minister, Commission and officials about the work programme focus on the appropriateness of particular projects in terms of the agreed criteria, the capacity of the Commission to undertake them and their terms of reference. Although some Ministers recognise the opportunity this provides for law reform in their portfolios, it is also true that the role of the Commission and the distinctive contribution it is able to make is not always well understood by either Ministers or their departments.
- 21 As a result, although more work has been referred to the Commission in recent years than it has resources to undertake, that work has not always fitted the recently agreed criteria for referral of projects to the Commission. Instead, it has sometimes been work that departments have not regarded as having sufficient priority to place on their own work programme. To the extent that this has occurred, it has militated against the chances of implementation of the Commission's recommendations.
- 22 The Law Commission provides quarterly reports on progress with the work programme and the President has regular, but not usually frequent, meetings with the Minister during the year to discuss projects and any issues that may arise. The President usually invites the Minister to visit the Law Commission and meet with the other commissioners and staff on a suitable occasion.
- 23 Law Commission reports are published after being tabled in Parliament by the responsible Minister and the Government Response is tabled in Parliament within six months.
- 24 As an independent agency, the Law Commission is also sometimes asked to contribute to select committees on topics where they have some expertise, or may choose to make a submission. The President usually has contact with the Chairs of the Justice Select Committees during the year, and commissioners and select committee members have sometimes met together to discuss law reform generally or topics of mutual interest.

Operation of the Law Commission

- 25 The Governor-General can appoint up to six Commissioners, with one being the President and Chief Executive. Commissioners are appointed for three to five years, and can be reappointed. There is usually a mix of full-time and part-time Commissioners. The Ministry of Justice co-ordinates the appointment processes.
- 26 Each Commissioner leads one or more projects in their area of expertise and contributes to other projects. Collectively all commissioners are responsible for the Commission's published reports. There are between eight and ten FTE legal research staff, who are appointed on fixed term contracts relating to the work programme, and there are currently nine administrative support staff. The Commission has a well resourced library. (An organisation chart is provided in Appendix Four).
- 27 At any time there are six or so projects underway. Ideally each project has both a lead and contributing commissioner, and is usually supported by 2 to 3 legal researchers at various stages. Sometimes a preliminary discussion paper seeking public submissions is published; other projects may undertake consultation through the production of research papers or the circulation of a draft final report.
- 28 In order to advise the Minister on the government response to a report from the Law Commission, officials need to be well informed about the project. This has sometimes meant that they have needed to go over much of the ground already covered by the Commission, which has not only been frustrating for those involved but a poor use of public resources. The Commission believes it is important that relevant government agencies are fully informed and consulted about Commission projects while they are being undertaken, so that the extent to which work is duplicated in the preparation of the government response to Commission reports is kept to a minimum. To that end, in recent years the Commission has been promoting systematic linkages with the Ministers and government agencies responsible for the legislation and practice to which each project relates.
- 29 In particular, it is trying to encourage the appointment of liaison staff within the relevant government agencies to allow dialogue and participation throughout the life of the project. This encourages wider commitment and understanding of the policy approach, before completion of the project. Officials provide better advice to Ministers when they have a good knowledge of the issues. While the views finally expressed by the Commission and the Government may still, at times, be different, linkages during the project should ensure there is a clear understanding of the proposals and reasons for any differences.

Funding

- 30 The Commission is funded from money allocated in the budget under Vote: Justice, and has received the same allocation of about \$3 million (without GST) since 1995/96. The average operating expenditure for the past ten years has been in the range of \$3.3 million and the deficit has been funded, with the agreement of government, from cash reserves.

- 31 Approximately two thirds of the Law Commission's budget relates to salaries of commissioners and staff. The Remuneration Authority sets the salaries of commissioners. It has been recognised that there will be no increase in the Commission's appropriation until the cash reserves are exhausted, and successive Ministers have given assurances that Government will reconsider the appropriation when that occurs. That point will be reached this year.
- 32 The budgeted operating expenditure for the current financial year is \$3.5 million, which includes an assumption that new appointments to the presidency and commission will not be made before 1 February 2006. The budget projection is for cash reserves to be exhausted at the end of 2005/2006 and the Commission will be preparing a business case to put to Government before Christmas this year. If there is no increase in funding in 2006/07, the operation of the Commission will have to be significantly curtailed with fewer Commissioners, research staff and support staff, and as a result fewer projects undertaken.
- 33 The Commission's budget bids are received, analysed and prioritised along with other bids by Ministry of Justice officials, who also facilitate preparation of the Memorandum of Understanding and receive the quarterly reports from the Commission in the first instance.

Review of the operation of the Law Commission

- 34 Commissioners have recognised the need to examine the way in which functions are carried out in order to ensure that operations are cost-effective, accord with best practice in other similar organisations and provide value for money to the taxpayer.
- 35 Accordingly an external review is underway, with a report due at the end of October, to provide guidance as to ways to improve efficiency and to provide a basis for determining the budget levels required to provide the service expected of us by the government. (Terms of Reference for the review are found in Appendix Five).
- 36 The critical issue that is being addressed by the review is the optimal organisational structure and processes to enable the Law Commission to continue to make a cost effective contribution to law reform. This will include identifying the Commission's critical mass and the requisite number of Commissioners and research staff to justify the infrastructure needed to support them.

Current Commissioners

- 37 There are nominally five commissioners at present, although in practice there are only four.
- Dr Warren Young, Acting President: full-time; expertise - criminal law; term expires 2/5/07.
 - Helen Aikman QC: part-time; expertise - public law, commercial; term expires 6/6/08.

- Hon Justice Durie: full-time; expertise – general law, knowledge and experience in Maori matters; term expires 30/6/07.
- Frances Joychild: full time; expertise – public law, employment, human rights; term expires 9/2/06.
- Dr Ngatata Love: part-time; knowledge and experience in Maori matters; term expires 30/4/07. (Ngatata has not been participating for some time and has indicated that he intends to resign.)

38 Hon Justice Bruce Robertson was President until June this year but resigned on his appointment to the Court of Appeal. Dr Warren Young is the Acting President pending the appointment of a new President after the general election.

Issues for the New Minister

- 39 There are several matters requiring the early attention of the new Minister:
- Following the review of the operation of the Law Commission, potential changes to the organisation and budget will be discussed with the new Minister. Decisions about the way forward will impact on future planning for the work programme and appointment of commissioners. The options will include preparation of a business case for an increase in baseline funding.
 - The current Memorandum of Understanding notes that further projects may be added to the work programme for the second half of 2005/06. We would like to circulate a fresh request for bids from the new Cabinet ministers as soon as practicable.
 - It would be desirable to put in place a systematic strategy to inform Ministers and government agencies as to the role and value of the Commission, so that the benefits it can provide are maximised.
 - The Commission currently has fewer Commissioners than usual. There are effectively 3.5 FTE Commissioners, whereas the maximum number allowed under the Law Commission Act is 6. The vacancies include the Presidency. In light of the budgetary bid to be put forward, consideration will need to be given to the number of Commissioners to be appointed and the process to be followed in appointing them. It will also be important to ensure that the skills and experience of the appointed Commissioners match the requirements of the work programme envisaged for the Commission.
- 40 The Law Commission looks forward to the challenge of implementing the recommendations from the review and continuing its contribution to the development of practical, relevant and understandable laws.

APPENDIX ONE

OVERSEAS LAW COMMISSIONS⁵

Australia

Australian Law Reform Commission
ACT Law Reform Commission
New South Wales Law Reform Commission
Northern Territory Law Reform Committee
Queensland Law Reform Commission
Tasmanian Law Reform Institute
Victorian Law Reform Commission
Victorian Parliamentary Law Reform Committee
Victorian Scrutiny of Acts and Regulations Committee
Western Australian Law Reform Commission

Canada

Alberta Law Reform Institute
British Columbia Law Institute
Law Commission of Canada
Law Reform Commission of Nova Scotia
Manitoba Law Reform Commission
Quebec Civil Code Revision Office
Saskatchewan Law Reform Commission

United Kingdom

The Law Commission (for England and Wales)
Law Reform Advisory Committee for Northern Ireland
Office of Law Reform (Northern Ireland)
The Jersey Law Commission
The Scottish Law Commission

United States

California Law Revision Commission
Connecticut Law Revision Commission
Commonwealth of the Northern Mariana Islands Law Revision Commission
Michigan Law Revision Commission
New Jersey Law Revision Commission
New York State Law Revision Commission
Oregon Law Commission

Other Countries

Law and Justice Commission of Pakistan
Law Commission of India
Law Reform and Revision Division (Attorney General's Chambers of Singapore)
Law Reform Commission of Ireland
Law Reform Commission of Hong Kong
Law Reform Commission of Tanzania
Law Reform Commission of Trinidad and Tobago
Law Reform Committee (Singapore Academy of Law)
Malawi Law Commission
South African Law Commission

⁵ Taken from Law Reform Commission New South Wales
<<http://www.lawlink.nsw.gov.au/lawlink/lrc/II>> (last accessed 13 September 2005).

APPENDIX TWO

CURRENT WORK PROGRAMME

Review of Customs Powers of Forfeiture & Seizure

This project is reviewing the forfeiture provisions under Part XIV of the Customs and Excise Act 1996, having regard to any analogous border control practices in comparable jurisdictions. Publication planned for October 2005.

Maori Legal Entities

This project is seeking to develop a new legal framework that would, if implemented, be available to Māori groups wishing to incorporate for the purpose of managing communally-owned assets and giving effect to communal rights and responsibilities on behalf of the members of the group. Publication planned for early 2006.

Entry, Search and Seizure

This project is reviewing the scope and adequacy of current powers to search (persons, places and vehicles) and to seize relevant items. It also considers the search and seizure of computer data, interception of communications, tracking and visual and audio surveillance. It is seeking an appropriate balance between law enforcement powers and the protection of individual rights in relation to all such powers. Publication planned for April 2006.

Access to Court Records

This project is reviewing existing rules providing access to Court records and developing principles to govern access to Court and Tribunal records, the retention and archiving of records. It is considering the appropriateness of a single code providing rules for all jurisdictions. Publication planned for April 2006.

Custom and Human Rights in the Pacific

This project explores the interaction between custom and human rights in the Pacific, including New Zealand, by articulating some of the issues arising from this interaction and how the two can inform each other. Publication planned for May 2006.

Criminal Defences (Insanity & Partial Defences)

This project is undertaking further work on the defences of provocation and diminished responsibility, following the Commission's earlier report *Some Criminal Defences with Particular Reference to Battered Defendants* (NZLC R73). It is also reviewing the defences of insanity and infanticide. First publication planned for April 2006.

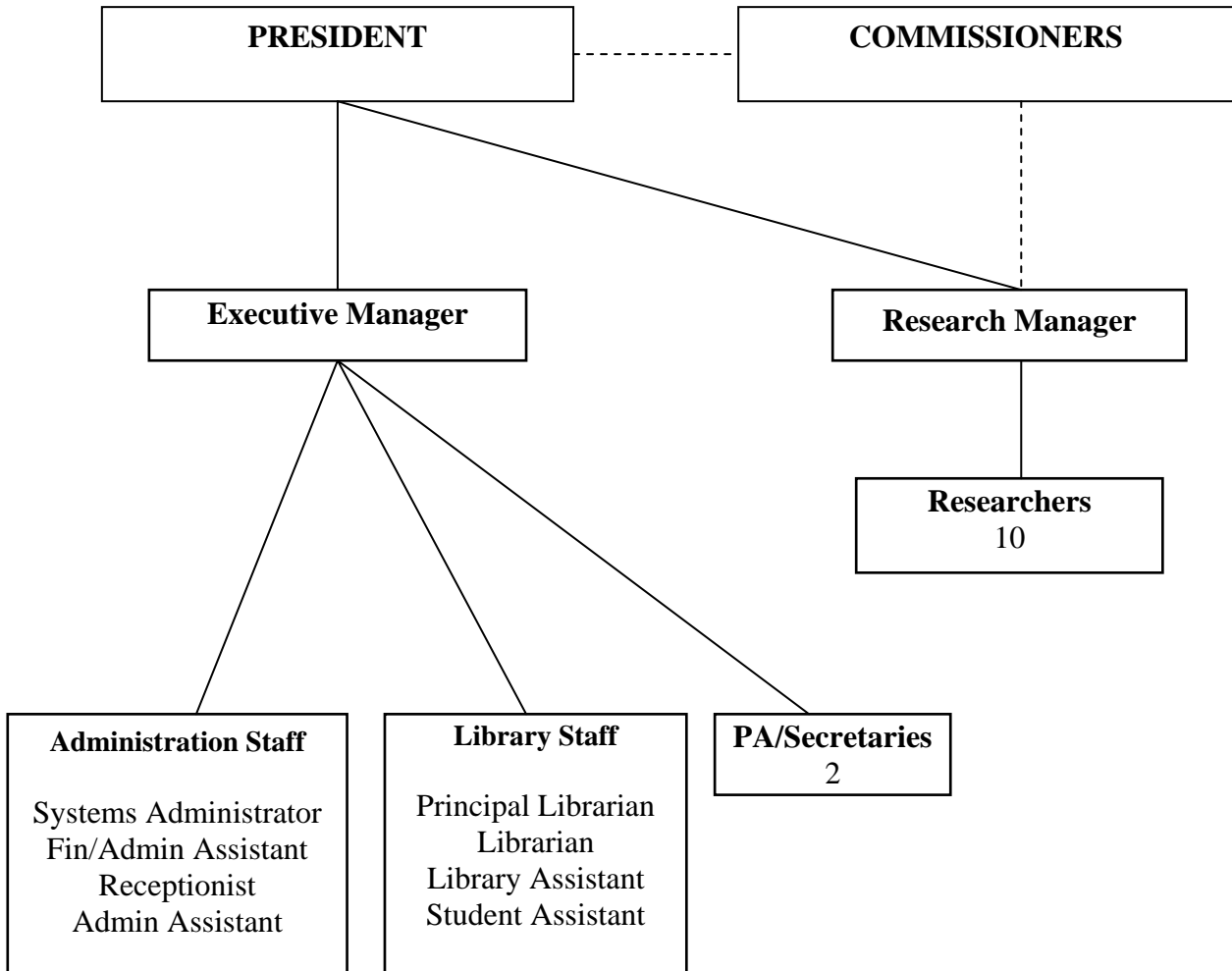
APPENDIX THREE

| LAW COMMISSION PUBLICATIONS SINCE 1999/2000⁶ | | | | | |
|--|--|---|--|---|---|
| Public Law | Commercial Law | Criminal Law | Treaty of Waitangi | Family Law | Other |
| Defaming Politicians, R64, 2000 | Retirement Villages, R57, 9/1999 | Costs in Criminal Cases, R60, 2000 | Coroners (with reference to cultural values), R62, 2000 | Adoption and its Alternatives, R65, 2000 | Evidence, R55, 1999 |
| To Bind Kings in Chains: Liability of the Crown, SP6, 2000 | Shared Ownership of Land, R59, 11/1999 | Criminal Prosecution, R66, 2000 | Maori Custom & Values in New Zealand Law, SP9, 2001 | Family Court Dispute Resolution, R82, 2003 | Total Recall: Reliability of Witness Testimony, MP13, 8/1999 |
| Acquittal Following Perversion of the Course of Justice, R70, 2001 | Electronic Commerce Part 2: Basic Legal Framework, R58, 11/1999 | Juries in Criminal Trials, R69, 2001 | Determining Representation Rights under Te Ture Whenua Maori Act 1993, SP8, 2001 | Some Problems in the Law of Trusts, R79, 2002 | Recognising Same-Sex Relationships, SP4, 12/1999 |
| Mandatory Orders against the Crown- Judicial Review, SP10, 2001 | International Trade Conventions, SP5, 2000 | Some Criminal Defences re Battered Defendants, R77, 2001 | Treaty of Waitangi Claims: Post Settlement Phase, SP12, 2002 | Protections some disadvantaged people may need, R80, 2002 | Tidying the Limitation Act, R61, 2000 |
| Misuse of Enduring Powers of Attorney, R71, 2001 | Electronic Commerce Part 3: Remaining Issues, R68, 2000 | Simplification of Criminal Procedure Legislation, SP7, 2001 | | Review of the Joint Family Homes Act, R76, 2002 | Tax and Privilege: Powers of Commissioner of Inland Revenue, R67, 2000 |
| Protecting Personal Information from Disclosure, PP49, 2002 | Insolvency: Promoting Trust & Confidence, SP11, 2001 | Proof of Disputed Facts in Sentencing, R76, 2001 | | New Issues in Legal Parenthood, R88, 2005 | Subsidising Litigation, R72, 2001 |
| Delivering Justice: Review of Courts & Tribunals, R85, 2004 | Minority Buy-Outs, R74, 2001 | Electronic Technology and Police Investigations, SP12, 2002 | | | Discovery in Civil Cases, R78, 2002 |
| Entry, Search and Seizure, PP50, 2004 | Improving the Arbitration Act 1996, R83, 2003 | Pre-Trial Criminal Processes, R89, 2005 | | | Genetically Modified Organisms: Liability for Loss, SP14, 2002 |
| | Life Insurance, R87, 2004 | Review of Infringement Offences, SP16, 2005 | | | Intimate Covert Filming, SP 15, 2004 |

⁶ R denotes a final report, PP denotes a preliminary paper (the list excludes PPs if the final report was also published during this time period), SP denotes a study paper, and MP denotes a miscellaneous paper.

APPENDIX FOUR

LAW COMMISSION ORGANISATION CHART



APPENDIX FIVE

TERMS OF REFERENCE FOR REVIEW OF THE OPERATION OF THE LAW COMMISSION

The terms of reference for the review are:

- How should the respective roles of researchers and Commissioners be organised so as to ensure that the work is undertaken efficiently and effectively?
- How should the governance and management functions of the Commission be undertaken, in the light of the requirements of the Law Commission Act 1985 and the Crown Entities Act 2004? In particular, how should the functions be best divided between position descriptions?
- Are current administrative functions being undertaken in the most cost-effective manner/ Are they appropriately organised to support good practice for planning, project management, ensuring accountability and meeting reporting requirements/ Is there an appropriate alignment between required functions and present position descriptions?
- Does the current division of responsibilities between administrative staff match workload demands?
- Are library/information management services being provided in the most cost-effective manner?