

## THE LAW COMMISSION FOR ENGLAND AND WALES AND ITS USE OF EMPIRICAL RESEARCH

- 1.1 This note has been prepared following a meeting between the Law Commission for England and Wales and representatives of the SLS, SLSA and ALT on 14 December 2009. we all felt that it would be useful for the relevant associations' websites to link to a note on the Commission's website about the way in which the Law Commission uses empirical research, including why we use it, what we do with it, and how it happens. Some background information is set out below, together with some notes of a few examples and a study of one current project.

### BACKGROUND

- 1.2 The Law Commission was established in 1965 to keep the law under review and recommend reform to Government. Legal researchers will be familiar with our work and with the legislation that has been enacted as a result of our recommendations; and our website, at <http://www.lawcom.gov.uk/> gives details of our current projects. Throughout our history we have worked on the basis of consultation and, so far as possible, consensus, and in the course of each project we have endeavoured to make contact with as wide a range of relevant interest groups and individuals as is practicable. We welcome responses to our consultations from all sections of the population; often, however, responses come largely from those with a specialised view of our proposals arising from their professional experience of the relevant area of law and practice.
- 1.3 Our consultations can never, by themselves, provide a representative sample of public opinion. They do not represent a statistically significant sample size, for one thing; for another, they do not always come to the attention of a large section of the public; and for another, those members of the public who do contact us are a self-selecting sample, often with special reasons for making contact. That it is not to belittle that sample; it is valuable to us to hear different viewpoints. The caveat is that they cannot be regarded as representing a majority public view.<sup>1</sup>

<sup>1</sup> One obvious recent example of this derives from our Cohabitation project; more than half those who wrote in to us did not want to see cohabitants have a financial remedy on separation. But many of those wrote to us before publication of our Consultation paper and therefore without knowledge of our arguments. And a wholly different picture was derived from the 2007 British Social Attitudes Survey, which *did* derive from a representative sample of the population and showed clear majority support for financial remedies for cohabitants.

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- 1.4 From its earliest days, therefore, the Commission has had regard to the findings of both qualitative and quantitative research. One of the early examples was its project on family property, when research was commissioned to find out public views on the joint ownership of the family home.<sup>2</sup> These exercises have provided an essential supplement to our findings from our own consultation.
  - 1.5 The obvious limitation is cost. In the earlier days it appears to have been possible to fund some quite substantial work, but more recently that has become impossible. Accordingly we are dependant, in effect, upon other bodies funding the research that we need. This leads to a helpful symbiosis, because we are able to give our support to the funding applications made by academics in the areas in which we are interested.
  - 1.6 Commissioners and team lawyers attend SLS, SLSA and ALT conferences we value our conversations with the academic community and the insights that academic colleagues are able to offer to us. Academics who are familiar with the development of the law in the area they are teaching or researching will be well aware of what the Law Commission has done and is doing; our website gives up-to-date information on the progress of our projects, and of course we are always interested to hear from academics who are doing, or would like to do, research that is relevant to our work.
  - 1.7 Jobs at the Law Commission are advertised from time to time in accordance with Ministry of Justice guidance on procurements. Academic researchers have occasionally applied for these and there have been some very fruitful secondment arrangements as a result. The current public spending climate makes such arrangements very unlikely in the foreseeable future.

## **RECENT EXAMPLES**

### **Cohabitation**

- 1.8 The Cohabitation project (2005-2007) relied extensively on already-published empirical work, in particular the British Social Attitudes survey but also the work of Professor Anne Barlow and her colleagues on cohabitation and the common law marriage myth.

### **Consumer law**

- 1.9 We instructed a market research group FDS to undertake both quantitative and qualitative work into consumers' attitudes towards their rights when they purchase faulty goods. This was funded by us. There was no academic involvement.

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<sup>2</sup> J Todd and L Jones, *Matrimonial Property* (1972); and see the First Report on Family Property, Law Com no 52.

**Marital Property Agreements**

- 1.10 We were able to commission some small-scale interview and focus group-based research, in 2009, into solicitors' experiences of their clients. We advertised for an academic to undertake this work, and of the four who applied selected Dr Emma Hitchings of the University of Bristol.
- 1.11 In December 2009 we were approached by another academic with an idea for an application to a funding body which, if successful, will give us the large-scale quantitative data that is so difficult to generate in connection with this area of the law.

**Murder, manslaughter and infanticide**

- 1.12 In our 2006 Report, 'Murder, Manslaughter and Infanticide', we were permitted by Nuffield to use/direct research being conducted into public attitudes to murder being conducted by Professor Barry Mitchell. We agreed with him some hypothetical scenarios that he would put to a cross-section of the public, including a relative of a murder victim. The result showed that the public had strong sympathy for a provocation defence that went beyond simply over-reacting to the use of force. The Government explicitly relied on this piece of research in their White Paper, when indicating that it had changed the course of their thinking, in that HMG had been intended to confine provocation to overreactions to the threat of violence.

**Partial defences to murder**

- 1.13 Our 2004 Report drew on research by Prof R Mackay that looked at the relative success of men and women in pleading partial defences. It was funded by the MoJ. It is printed as an Appendix at the back of that Report. The research showed that, in terms of simple results, there is no evidence of discrimination against women in the way that partial defences operate.

**Renting homes**

- 1.14 During the Renting Homes consultations in 2002, we commissioned two pieces of focus group work. One, which was funded by what is now DCLG, was undertaken by a voluntary organisation involved in tenant participation called TPAS. It sought to elicit the views of tenants on our proposals. The second was aimed at landlords, and was conducted by a free-lance researcher. In both cases, the final product was a report.

### Remedies against public bodies

- 1.15 In the remedies project, we commissioned Alex Marsh, Professor of Public Policy (and part-time secondee to the team) to undertake a literature survey in relation to the effect on the behaviour of public bodies of changes in liability. The range of literature was very broad, and included a lot of theoretical work, from a number of disciplines, as well as empirical work (indeed, a result of the research was the conclusion that there was very little empirical study of the question in the UK). The result was a report, an edited version of which appeared as an appendix in the CP. This had an important impact on our approach to the "defensive administration" issue in relation to changes in liability. Although properly described as "social-legal research", it was conducted by non-lawyers and mined learning largely from non-legal disciplines.

### Trustee Exemption Clauses

- 1.16 Looking at work within the Property, Family and Trusts team it is probably fair to say that empirical research has been more used in family law projects than in property law ones. However, our work on Trustee Exemption Clauses was supported by empirical research carried out at the University of Newcastle.

### A CURRENT PROJECT: INHERITANCE AND FAMILY PROVISION

- 1.17 This project is a good example of one which uses a mixture of data sources and, indeed, a mixture of resources. We have used all of the following:

- (1) Research already carried out. This has included the work of Janet Finch and her colleagues in the 1990s,<sup>3</sup> the large-scale qualitative work carried out in the course of the Scottish law commission's recent project on succession by MRUK,<sup>4</sup> and the student-executed work done by Professor Cathy Williams and others.<sup>5</sup>
- (2) Research commissioned by us. In the spring of 2009 we were able to commission a very small-scale focus group project by NatCen.<sup>6</sup>
- (3) Large-scale externally funded research. Professor Gillian Douglas of the University of Cardiff, with Alun Humphreys of NatCen, are carrying out a large-scale quantitative survey of attitudes to inheritance in England and Wales, funded by the Nuffield Foundation.

<sup>3</sup> See in particular J Finch and J Masson, *Passing on: kinship and inheritance in England* (2000).

<sup>4</sup> See Report on Succession (2009) Scot Law Com no 215.

<sup>5</sup> C Williams, G Potter and G Douglas, "Cohabitation and intestacy; public opinion and law reform" [2008] Child and Family Law Quarterly 499.

<sup>6</sup> National Centre for Social Research, *The Law of Intestate Succession: Exploring Attitudes Among Non-Traditional families – Final Report* (2009).

- (4) Work that we have done ourselves, in conjunction with HM Revenue and Customs and the Probate Service, on the value of intestate estates, which has resulted in the publication of previously unavailable figures on estate sizes.<sup>7</sup>

<sup>7</sup> See our Consultation Paper, Intestacy and Family Provision Claims on Death (2009), at 1.46.