The Law Commission and the implementation of law reform

by Sir David Lloyd Jones

INTRODUCTION

The Sir William Dale Lecture for 2012 was given on November 12, 2012 by Sir David Lloyd Jones, Chairman of the Law Commission of England and Wales. This article is an edited and updated version of the lecture, taking account of some more recent developments.

BACKGROUND

At the time when the Law Commission of England and Wales was established by Parliament by the Law Commissions Act 1965, there was widespread concern that the law had become unclear, inaccessible, outdated and, in some instances, unjust. This concern had been most notably expressed by Gerald Gardiner QC and Andrew Martin in their influential book *Law Reform – Now* in which they argued that the problem of bringing the law up to date and keeping it up to date was largely one of machinery. The creation of the Law Commission as an independent body with the purpose of promoting the reform of the law was intended to be an essential element in remedying this situation. Its primary duty under the Law Commissions Act 1965, section 3 is:

> *"... to take and keep under review all the law of [England and Wales] ... with a view to its systematic development and reform, including in particular the codification of such law, the elimination of anomalies, the repeal of obsolete and unnecessary enactments, the reduction of the number of separate enactments and generally the simplification and modernisation of the law ..."*

The Law Commission is required to receive and consider proposals for law reform and to prepare and submit to the Lord Chancellor, from time to time, programmes for the examination of different branches of the law with a view to reform.

From the start there have been three main streams of work at the Commission. The best known is that which involves projects of law reform, which after detailed study and consultation result in recommendations by the Commission to the government for reform, usually accompanied by draft legislation. These may be included in a programme of law reform projects – we are currently in the Eleventh Programme – or may result from an ad hoc reference by a government department. The Eleventh Programme was adopted after four months of consultation with judges, lawyers, academics, central and local government, other public bodies, businesses, consumer organisations and the public (Law Commission, Eleventh Programme of Law Reform (Law Com No 330), July 19, 2011). Projects are assessed against three main criteria: the importance of reform, the suitability of the subject for consideration by the Commission and the available resources. We have recently completed consultation on our Twelfth Programme.

Secondly, the Commission undertakes consolidation of legislation. Whereas in the early days of the Commission there were programmes of consolidation projects, for many years now there has been no formal programme; projects are undertaken on a rolling basis. This work is led by the Parliamentary counsel who are "embedded" at the Law Commission, that is to say they are members of the Office of the Parliamentary Counsel, seconded for a term of years to the Commission. We currently have three Parliamentary counsel at the Commission.

Thirdly, the Commission's *statute law repeals* team focuses on repealing Acts of Parliament that have ceased to have any practical utility, because they are spent or obsolete.

In addition, from time to time, the Commission provides advice to government. (For example, in 2011 we were asked by the Ministry of Justice and the Department for Business, Innovation and Skills to advise on the advantages and disadvantages of a common European sales law.)

I propose to concentrate on the implementation of law reform resulting from the work of the Law Commission. The Law Commission is, of course, not a body with powers of implementation. It is an arm's length advisory body. We can recommend changes in the law but implementation is a matter usually for Parliament in the form of primary legislation or occasionally for the executive in the form of delegated legislation or guidance. While it is part of our function to

assist in the implementation of law reform, implementation is primarily a matter for others. On the other hand, we are not a mere think tank. We are independent of the executive but we have a special and privileged relationship both with the executive and with Parliament.

The reputation of a law reform body will ultimately depend on the quality of its work and its proposals for law reform. Nevertheless, the degree of success in securing changes in the law is a further important measure of the success of any law reform body. By this measure, how are we doing?

I propose to examine each of the three main streams of work I have identified in reverse order.

STATUTE LAW REPEALS

The Statute Law (Repeals) Act 2013 (Statute Law (Repeals) Bill, HL, Bill 42 2012-13) is the nineteenth such Act based on proposals by the Law Commission and the Scottish Law Commission. The previous 18 Statute Law (Repeals) Acts have resulted in the repeal of over 2,500 statutes and the partial repeal of thousands more. The 2013 Act is the largest of its kind the Commission has ever proposed. It repeals 817 obsolete Acts of Parliament in their entirety and repeals 50 more in part. These include Acts relating to the City of Dublin, lotteries, poor relief, turnpikes and railways (in this country and in India). Amongst the Acts repealed are an Act of 1856 passed to help imprisoned debtors secure their early release from prison, an Act of 1800 to permit a lottery in which the prize was to be the famous Pigot Diamond and an Act of 1696 to fund the rebuilding of St Paul's Cathedral after the Great Fire of 1666. In case you get entirely the wrong idea, I should tell you that it also includes the repeal of many more modern Acts, including repeals consequent on the Tax Law Rewrite project which lasted from 1996 to 2010.

Statute Law Repeals Bills enjoy a fast-track route into and through Parliament. They are generally introduced into the House of Lords within weeks of their publication by the Commission. After their second reading in the House of Lords they are considered by the Joint Committee of both Houses on Consolidation Bills. At that hearing members of the specialist team at the Law Commission who have prepared the report and the Bill give evidence. The Ministry of Justice has responsibility for statute law repeals Bills in both Houses. This is a special machinery which has been devised to secure the speedy implementation of these uncontroversial measures. It works well and efficiently because the Law Commission has the confidence of Parliament. In this field, at least, implementation does not appear to be a problem.

CONSOLIDATION

The recent picture in relation to consolidation is considerably less rosy. A consolidation draws together a number of existing enactments on the same subject, usually in one Bill, to form a rational structure and to make the cumulative effect of different layers of amendment more intelligible and accessible.

Since its creation in 1965 the Law Commission has been responsible for over 220 enacted consolidation Bills. This is a considerable achievement. However, this stream of work has declined significantly in the last few years. This is not, I emphasise, because there is a reduced need for such consolidation; on the contrary, the massive increase in the volume of primary and secondary legislation in recent years makes this work all the more important.

A major consolidation can take a long time to complete, in some cases as long as two or three years. Such consolidation projects therefore call for a substantial commitment of resources on the part of the Commission and the responsible government department. Our recent experiences on consolidation projects have not been entirely happy.

In 2006 the Commission began a consolidation of the legislation on private pensions at the request of the Department for Work and Pensions. That Department decided in October 2010 that it would no longer support the project. The work therefore had to be abandoned, as we did not have the resources to complete it ourselves. It was a huge exercise and by October 2010 we were within less than five months of the planned date for publishing a draft Bill for consultation. At that time, the draft Bill ran to 848 clauses and 21 Schedules. The whole exercise was an enormous waste of time and resources (see, generally, Law Commission Annual Report 2010-11, (Law Com No 328), June 22, 2011, para. 2.83).

This experience led my predecessor, James Munby, to observe that it is hard work to get a consolidation project off the ground and then it is hard work to keep it flying. In 2011 the Commission announced that, in light of our available resources and the fact that recently it had, in certain instances, proved hard to obtain and then maintain departmental support for consolidation projects, the Commission had decided to adopt a more rigorous approach. It stated that in future the Commission should not proactively pursue new consolidation projects itself. As before, it would be able to undertake one only if it had or could secure sufficient drafting capacity to do so. However, in addition, it would in future also be looking for a firmer commitment from the relevant department, in terms of will, time and resources, to see a consolidation project through to the passing of a consolidation Act.

It is unfortunate that the Commission is not able to do more on this front. Consolidation is a particularly valuable contribution to improving the state of the statute book. The

need for it is especially acute after there has been considerable legislative activity in an area of law without the original legislation having been replaced or rewritten. The language can become out of date and the content obsolete or out of step with developments in the general law. No doubt, modern methods of updating legislation – in particular online updates – have made it much easier to gain access to reliable, up to date versions of a statute and have reduced the pressure to consolidate simply to take account of amendments. Nevertheless, there is still a need for consolidation in cases where the law is found in more than one statute or instrument, or because layers of amending legislation have distorted the structure of the original Act. Parliamentarians have voiced their desire to see more rather than fewer consolidation Bills. The Law Commission has a statutory responsibility in this field and it is anxious to discharge it.

The picture on this front is not, however, entirely black. Following the enactment of the Charities Act 2006, the Cabinet Office made funds available to enable the Law Commission to undertake the consolidation of legislation on charities. After a number of interruptions the work was eventually completed and the consolidation Bill received Royal Assent in December 2011 (Charities Act 2011 c 25).

I am pleased to report another recent success in this area. In December 2013 the Co-operative and Community Benefit Societies Bill was introduced into Parliament. This consolidating Bill, which is the work of a team at the Law Commission, will make the law in this important field clearer and much more readily accessible.

Another area in which there exists an urgent need for reform and consolidation is the law of sentencing which is to be found at present in a large number of different statutes which employ different techniques and approaches. This leads to unnecessary complexity in the law and often makes sentencing a very difficult task. I have no doubt that it is in part responsible for the high numbers of unlawful sentences which are passed and which have to be rectified. A number of senior judges, including the former Lord Chief Justice, and senior academics have expressed serious dissatisfaction with the current state of sentencing law (*R (Noone) v Governor of Drake Hall Prison* [2010] UKSC 30 per Lord Judge CJ at paras 78-80; *Wells v Parole Board* [2009] UKHL 22 per Lord Carswell at para 23. See, for example, J Spencer "The Drafting of Criminal Legislation: Need it be so Impenetrable?" (2008) 67 Cambridge Law Journal 585; and Editorial, "New Legislation?" [2010] *Sentencing News 8*).

The Law Commission has recently completed a consultation on suitable projects for inclusion in its forthcoming Twelfth Programme of Law Reform. The responses have revealed widespread support for a project which would simplify and reform the law of sentencing.

LAW REFORM

What about the Commission's law reform projects? What success has the Commission had there in getting its reforms on to the statute book?

If one considers the entire work of the Law Commission since its creation in 1965, about 69 per cent of its law reform reports have been implemented in whole or in part. Over one hundred Acts of Parliament enacted since 1965 have implemented Law Commission recommendations. On the face of it, therefore, the record is not bad at all. However, on closer examination it appears that the implementation rate has fallen significantly in each decade since the 1960s and that in the first decade of this century about 55 per cent of Law Commission proposals were accepted or implemented in whole or in part. So this is a rather different picture.

This is, of course, very frustrating for lawyers at the Law Commission, some of whom may have devoted years of work to a project only to see it come to nothing, but it is also a waste of resources – both financially and in terms of the wasted expertise of Law Commission staff. But most fundamentally, society is being denied law reform in areas where there is a need to bring the law up to date or simply to alter it so that it better reflects modern ideas of fairness and justice.

I fear that this may sound a touch arrogant in that it assumes that Law Commission proposals for reform deserve to be enacted. Let me say at once that I believe that our work at the Law Commission is of a high quality. Each of the four Commissioners is outstanding in his or her field and together they have a wide range of experience; two are professors of law, one is a city solicitor and one a QC. Each heads a team of expert lawyers devoted to a particular subject area: criminal law, public law, common and commercial law, and family, property and trusts. Each law reform project involves detailed study of the present state of the law followed by very extensive public consultation which, I believe, contributes a great deal to the quality of the end product. This will be a report, usually accompanied by draft legislation. That report will have been the subject of rigorous peer review by the Chairman and all four Commissioners. We are jointly responsible for all recommendations.

There have been occasions when the recommendations of the Law Commission for reform have been rejected by the government of the day as a matter of policy. It is, of course, entitled to do so. One example is our report on intoxication and criminal liability, published in January 2009, which recommended codification of the law and changes which, we considered, would make it more logical and consistent. Here the government decided not to implement the recommendations on the ground that it was not persuaded that they would result in improvement to the administration of justice. It considered that whilst the Commission's proposals

may resolve some uncertainty in the law, particularly around the distinction between offences of "specific intent" and "basic intent", they may also increase its complexity.

> *"Furthermore, we do not consider that there would be a risk of miscarriage of justice if the reforms were not introduced; nor are we persuaded that the cost of introducing the changes, for example the courts getting to grips with the new definitions, would be outweighed by any benefits" (Report on the Implementation of Law Commission Proposals (HC 1900), March 22, 2012, paras 49-50.*

However, there are many other instances in which proposals emanating from the Law Commission have not been implemented not because of any disagreement as to the desirability of the proposed reforms but because of a lack of Parliamentary time, a lack of resources, or because the government of the day does not consider them to be a priority.

One example is the major Law Commission project on *Murder, Manslaughter and Infanticide* which resulted in a report in 2006 which reviewed the law of homicide, including the relationship between the law of murder and manslaughter, defences and partial defences to murder, and complicity in murder (Law Commission Report: *Murder, Manslaughter and Infanticide*, (Law Com No 304), November 29 2006). It recommended restructuring the law of homicide into three tiers and, within that structure, reform of secondary liability for murder. The Coroners and Justice Act 2009 did reform the law on provocation, diminished responsibility and infanticide, although it is fair to say that the resulting provisions on provocation – now loss of control – bear little resemblance to the Law Commission proposals and have been heavily criticised by academic commentators. The remainder of the proposals have not been implemented, the then Lord Chancellor simply observing in his 2011 report on the implementation of Law Commission proposals that the government had come to the conclusion that the time was not right to take forward such a substantial reform of our criminal law (Report on the Implementation of Law Commission Proposals (HC 719), January 24, 2011, paras. 9, 10, 51, 52).

The Law Commission Report on *Participation in Crime* ((Law Com No 305), May 2007) , examined the law of secondary liability for assisting and encouraging crime. The report concluded that the principles governing liability were unclear and could result in injustice. Again, the Law Commission Report on *Conspiracy and Attempts* ((Law Com No 318), December 9, 2009), recommended reform to remedy problems with the current law governing statutory conspiracy (under the Criminal Law Act 1977) and attempt (under the Criminal Attempts Act 1981). In due course the government accepted the recommendations for reform contained in both these reports. However, in his report to Parliament (Report on the Implementation of Law Commission Proposals (HC 1900), March 22, 2012, paras. 19-21, 28, 29) the then Lord Chancellor stated:

> *"In other circumstances, the government would look to implement the recommendations but unfortunately they cannot be considered a priority in the current climate."*

I cannot conceal the fact that this response was a huge disappointment to the Commission.

However, it is fair to say that in some other areas of the criminal law there are examples of governments having shown a greater interest in implementing our recommendations. One example is the Bribery Act 2010 which implemented Law Commission recommendations advanced in the report *Reforming Bribery,* ((Law Com No 313), November 20, 2008). Here the government clearly considered that there was an urgent need to legislate, in light of the OECD Anti-Bribery Convention.

A NEW APPROACH

My predecessors as Chairman of the Law Commission – Sir Roger Toulson, Sir Terence Etherton and Sir James Munby – became increasingly concerned at the low implementation rate of Law Commission reports and the waste which this represented. Bearing in mind the view of Gerald Gardiner and Andrew Martin in *Law Reform – Now* that the problem of bringing the law up to date and keeping it up to date was largely one of machinery, they turned their attention to how the machinery of law reform could be amended to deal with this problem (see Sir Terence Etherton, "Law Reform in England and Wales: A Shattered Dream or Triumph of Political Vision?", 10 *Eur J L Reform* 135; Sir James Munby, "Shaping the Law – The Law Commission at the Crossroads," Denning Lecture 2011, www.lawcom.gov.uk).

In the event, Parliament and government have been persuaded to bring about a number of important reforms. This is a considerable achievement on the part of my predecessors.

THE PROTOCOL

The first important reform brought about by the Law Commission Act 2009 is to permit the Lord Chancellor (on behalf of the government) and the Commission to agree a protocol about the Commission's work which may include provision about principles and methods to be applied in deciding the work to be carried out by the Law Commission and the carrying out of that work, the assistance and information that Ministers and the Commission are to give each other and the way in which Ministers are to deal with the Commission's proposals for reform (Law Commission Act 2009, s 2).

The resulting Protocol was signed by Jack Straw and James Munby in March 2010 (Protocol between the Lord Chancellor (on behalf of the Government) and the Law Commission, (Law Com No 321; HC 499), March 29, 2009). As previously, most Commission law reform projects will in future originate as part of a three yearly programme of law reform which requires the approval of the Lord Chancellor. Where the Commission is considering including a project in a Commission programme it will notify the Minister with relevant policy responsibility who, in deciding how to respond, will bear in mind that before approving the inclusion of the project the Lord Chancellor will expect the Minister with the support of the Permanent Secretary to agree that the department will provide sufficient staff to liaise with the Commission during the currency of the project and to give an undertaking that there is a serious intention to take forward law reform in this area. Similar provision is made in the case of projects referred to the Commission by Ministers.

If a project is adopted by the Law Commission and approved by the Lord Chancellor, the Protocol requires, at the outset, agreement as to the terms of reference of the project, the appropriate review points at which to consult the Minister and the overall timescale for the project. During the project, officials and the Commission will communicate promptly and openly about their progress and about wider policy developments and changes in priorities that may affect implementation.

The Protocol also makes provision for what is to happen after the Commission has published its report. The Minister responsible is required to provide an interim response to the Commission as soon as possible and in any event within six months of publication of the report, and a full response within 12 months of publication of the report, unless otherwise agreed with the Commission. The full response is to set out which recommendations the Minister accepts, rejects or intends to implement in modified form. If applicable, the Minister will also provide the timescale for implementation. If a Department is minded to reject or substantially modify any significant recommendations, it must first give the Commission the opportunity to discuss and comment on its reason before finalising the decision.

From the point of view of implementation, the Protocol is a very welcome development. Of central importance is the fact that, in future, the Commission will not take on a project unless there is an undertaking by the relevant Minister that there is a serious intention to take forward law reform in this area. That, of course, does not amount to a binding commitment to implement Law Commission recommendations. It would be unreasonable to seek such a blank cheque and it certainly would not be forthcoming. But to my mind, the statement of a serious intention to take forward law reform is as specific an undertaking as could reasonably be sought at the outset of a project and is a sound basis for the Commission's undertaking the work. Moreover, the fact that the Commission and the Department will be working closely together throughout the project, sharing information about how it is developing and about wider policy developments and any changes in priorities, should substantially increase the prospect that the resulting proposals will be carried forward into legislation.

What effect has the Protocol had on the independence of the Commission? It is essential to the performance of its functions that the Commission should be and should be seen to be independent of the executive arm of government. The Law Commission operates independently of the government of the day. We cannot be required by government to perform our functions in any particular manner nor can we be directed to make recommendations to suit political expediency. The value of our independence has been recognised by government. In October 2010, it concluded in its Public Bodies Reform Review that the Law Commission should be retained on the grounds of its "performing a technical function which should remain independent of government". That conclusion has recently been endorsed by a Triennial Review of the Law Commission. Furthermore, it is crucial to our engagement with the public. The quality of our law reform proposals depends in large measure on the effectiveness of public consultation and often consultees are willing to participate because they see the Law Commission as independent of government and at liberty to conduct the work of law reform with a legal rigour that is free from any political constraint.

The new arrangements under the Protocol could be seen to be a restriction on the Commission's independence. The effect of the Protocol, it might be said, is to restrict what the Lord Chancellor is willing to approve because he will now only give approval where there is a serious intention on the part of government to take forward law reform in this area. However, I think it is possible to over-state this. After all, the Lord Chancellor's consent has always been necessary before the Commission could take on a project under a programme of law reform. The Protocol brings the conversation on implementation forward to an earlier stage in the process, with the result that a project will not now be undertaken if it has little prospect of implementation.

Under the Protocol the Commission will keep the progress of the project under review and may decide, in discussion with the relevant department, to change one or more elements of the project or to discontinue a project. There are also instances in which we have agreed review points with the Department concerned. An example is our project on the regulation of wildlife where the Law Commission and DEFRA considered the results of consultation before agreeing to continue the project. However – and this is vital – in the absence of an

agreement for review a Minister may not unilaterally require the Commission to stop working on an ongoing project. That is a matter for the Commission, although it will, of course, take account of the Minister's views and all relevant factors affecting the prospects for implementation.

What has really changed here, I would suggest, is the willingness of successive governments to implement the Commission's law reform proposals and the Protocol is simply a pragmatic response to that. It seems to me that it establishes a useful working relationship with government which should change the government's approach to implementation.

THE LORD CHANCELLOR'S REPORTING OBLIGATION

The second reform of machinery brought about by the Law Commission Act 2009 is to require the Lord Chancellor, as soon as practicable after the end of each reporting year, to report to Parliament on the Law Commission proposals implemented in whole or in part during the year and those not implemented. In the latter case the report must include a statement of plans for dealing with any of the proposals and any decision not to implement any of the proposals (Law Commission Act 2009, s 1).

This is a small step but an important one. It introduces a greater degree of transparency into the attitude of government to Commission proposals for law reform. The reporting obligation and the obligation to respond to reports mean that, in future, it will not be possible simply to leave proposals to gather dust indefinitely without any response. The government will be required to take a public position on its response to Law Commission reports. It is in everyone's interests to know promptly whether a proposal is to be implemented, whether there is an objection in principle, or whether the proposed reform simply does not attract sufficient priority to proceed.

So far there have been three annual reports by the Lord Chancellor: Report on the Implementation of Law Commission Proposals (HC 719), January 24, 2011; Report on the Implementation of Law Commission Proposals (HC 1900), March 22, 2012; Report on the Implementation of Law Commission Proposals (HC 908), January 2013.The reasons given in each case tend to be very brief. Even where the government does not consider the need for reform to be a priority, a fuller public explanation of the reasons for that conclusion would be valuable. In those instances where proposals are rejected on grounds of principle, a more detailed response by the Lord Chancellor in his report to Parliament would certainly promote public debate on the merits of the proposals.

The Lord Chancellor's 2012 Report to Parliament was prefaced by a warning (at p 3) that "the government's current focus is on dealing with the severe economic situation, which has unfortunately meant that very worthwhile but less immediately pressing law reform projects have, in some cases, been delayed." The Commission is, as you might expect, alive to the present economic situation and the need to shape projects to available resources. Since 2007 the Commission has had its own in-house economist to advise on the economic impact of proposals for law reform. A preliminary cost/benefit analysis of the proposed projects was carried out before the Eleventh Programme of law reform was adopted. In addition, reports produced by the Law Commission usually include a detailed economic impact assessment. However, it has to be borne in mind that law reform frequently has the power to bring about a real improvement in the quality of people's lives and that such benefits are often of a value which is not readily quantifiable in terms of price.

The fact that the report is to Parliament is also significant. It is to be hoped that, as this procedure becomes more established, Parliamentarians may take a greater interest in the reasons for non-implementation of Law Commission reports. There is a role for the Commission here in making Parliament more aware of its work and its proposals for law reform.

THE NEW HOUSE OF LORDS PROCEDURE

The third development in the machinery of law reform to which I wish to draw attention has been achieved not by legislation but by a new procedure adopted by Parliament. On October 7, 2010 the House of Lords Rules Committee adopted a new procedure for non-controversial Law Commission Bills following a successful pilot with what became the Perpetuities and Accumulations Act 2009 and the Third Parties (Rights against Insurers) Act 2010. Under this procedure the second reading debate is held in a Second Reading Committee instead of on the floor of the House and the committee stage is held before a Special Public Bill Committee. This has the advantage that it enables valuable legislation to proceed to the statute book which otherwise might not have found a slot in the main legislative programme.

The procedure is available only in the case of uncontroversial proposals for law reform. However, it should not be imagined that these proposals go through on the nod. The procedure is in no sense a fast track to the statute book. The second reading of each of the measures to follow this procedure to date has involved rigorous scrutiny and keen and informed debate.

The first measure to reach the statute book by this procedure since it was formally adopted was the Consumer Insurance (Disclosure and Representations) Act 2012 which received the Royal assent on March 8, 2012 and came into force onApril 6,

2013. This Act is a great achievement for the Law Commission and in particular for Commissioner David Hertzell and his team. The law of consumer insurance had become totally out of touch with modern needs and practice and there was, as a result, an urgent need for reform. David Hertzell and his team consulted widely with the insurance industry and with consumer groups and were able to achieve such a degree of consensus that it was possible to introduce the measure into Parliament by this new procedure for uncontroversial Bills.

The British Insurance Law Association has stated publicly that throughout this exercise the Law Commission showed itself to be assiduously fair in its dealings with both policy holders and insurers. It seems to me that the work on this project provides a very good example of how the Commission is close enough to government to be able to influence outcomes, while at the same time being sufficiently removed from government to be able to act independently and to achieve balanced results.

The team has now moved on to the second phase of the project on reforming the law of insurance which will include disclosure and misrepresentation in commercial transactions. We hope to be able to build further on what has already been achieved.

The Trusts (Capital and Income) Act also followed this procedure. As in the case of the Insurance Bill, the lead Commissioner (in this case Professor Elizabeth Cooke) was able to give a briefing to members of the Lords Committee in advance of the second reading. During the second reading she was present alongside the policy official and able to send notes to the Minister, Lord McNally. During the committee stage she spoke jointly with Lord McNally and they were both questioned by the Committee. Once again, the measure was subjected to very thorough scrutiny.

More recently, the Partnerships (Prosecution) (Scotland) Act 2013, legislation based on a report of the Scottish Law Commission, has reached the statute book by this procedure and the House of Lords is currently considering the Inheritance and Trustees' Powers Bill. In due course we hope that Bills resulting from the second stage of our insurance project and our project on easements may follow the same procedure. This new procedure has been a considerable success. In the Commission's view the quality of debate has been improved and this has been reflected in the legislation which emerges.

THE TURNING OF THE TIDE?

We have recently been greatly encouraged by some excellent news on implementation of our proposals for law reform. In addition to the matters I have already mentioned:

- The Crime and Courts Act 2013 abolishes the offence of scandalising the court, following an amendment in the House of Lords moved by Lord Lester and Lord Pannick. This virtually coincided with the publication of our report recommending abolition of the offence *(Contempt of Court: Scandalising the Court,* Law Commission No 335, December 18, 2012).

- In April 2013 the Ministry of Justice announced its intention to introduce legislation to amend the Third Parties (Rights against Insurers) Act 2010, which is based on Law Commission recommendations, and to bring it into force as soon as reasonably possible after it has been amended.

- The Care Bill, announced in the Queen's speech, will implement, in England, Law Commission recommendations contained in its report *Adult Social Care* (Law Commission No 326, May 10, 2011).

- The Consumer Rights Bill, also announced in the Queen's speech, and associated regulations will implement recommendations contained in three Law Commission reports on Unfair Contract Terms (*Unfair Terms in Contracts,* Law Commission No 292, Scottish Law Commission No 199, February 2005); *Consumer Redress for Misleading and Aggressive Practices* (Consumer Redress for Misleading and Aggressive Practices, Law Commission No 332, Scottish Law Commission No 226, March 2012); and Remedies for Faulty Goods (*Consumer Remedies for Faulty Goods*, Law Commission No 317, Scottish Law Commission No 216, November 2009).

It is perhaps too early to express any concluded view as to whether the changes in the machinery of law reform described above will result in an improved rate of implementation of Law Commission recommendations for law reform. However, the results to date have been most encouraging and suggest that the tide may have turned.

THE IMPACT OF DEVOLUTION

The devolution settlements within the United Kingdom have had an important effect on the implementation of law reform. Devolution has added a new dimension to implementation.

(1) Scotland and Northern Ireland

There are within the United Kingdom three Law Commissions. The Scottish Law Commission was created in 1965 at the same time as the Law Commission for England and Wales (Law Commissions Act 1965). The Northern Ireland Law Commission was created in 2007 under the Justice (Northern Ireland) Act 2002, as amended (ss 50-52, Justice (Northern Ireland) Act 2002 (c 26)).

Each Law Commission corresponds to a distinct legal system and each undertakes projects specific to its own jurisdiction. Ministers of devolved governments in Scotland and Northern Ireland are empowered to refer law reform projects to their respective Law Commissions. In each case programmes of law

reform are approved by the devolved executive and proposals for reform in the devolved fields are implemented by the devolved legislatures.

However, the existing law often operates on a United Kingdom-wide basis and in these circumstances it is often appropriate for the Law Commissions to carry out joint projects. The Law Commission for England and Wales and the Scottish Law Commission have carried out a number of joint projects, and the three Law Commissions in the United Kingdom are currently working jointly on a project on the regulation of healthcare professionals. More UK-wide projects are likely in the future.

The constitutional changes flowing from devolution often bring new challenges for the implementation of law reform. For example, legislative consent motions are required from the devolved legislatures if Westminster is to legislate for a devolved matter. For our part, we will need to be sensitive to the political and cultural currents which underlie devolution.

(2) Wales

Wales is in a rather different position. Wales is not a separate jurisdiction, although the Silk Commission is currently considering whether a separate jurisdiction should be created in Wales. Furthermore, there is one Law Commission in respect of the shared jurisdiction of England and Wales.

We are very conscious of the fact that we are the Law Commission for both England and Wales. We actively engage with the Welsh Government and the Welsh Assembly and our consultation exercises extend throughout Wales.

However, the effect of the Government of Wales Act 2006, Part 4 is that the Welsh Assembly now has direct primary legislative powers in the devolved areas and as a result we can expect to see – indeed we are already seeing – a divergence between the law in force in England and that in Wales. This has important implications for the implementation of law reform. The demands of law reform will undoubtedly be different in a devolved Wales with its own legislative powers. With a view to accommodating this we are currently looking closely at how we can best meet those needs.

Since the start of devolution the Law Commission has worked closely with lawyers and officials in the Welsh Government. However, in March 2013 the Commission took the further step of establishing a Welsh Advisory Committee, the function of which will be to advise the Law Commission on the exercise of its statutory functions in relation to Wales. This role will not be limited to law reform in devolved areas but will also include the Welsh dimension of reserved matters.

The Social Services and Wellbeing (Wales) Bill, currently before the National Assembly, seeks to reform the structure of social services for both children and adults, and represents a major change in the law. The proposals in relation to adults will implement the proposals in our report on *Adult Social Care,* which we published in May 2011 (Law Commission Report No 326). For us in the Law Commission, this Bill is an important milestone. It is the first time that the Assembly has sought to implement a Law Commission report, using its powers under Part 4 of the Government of Wales Act 2006. In our report we said that "it would be constitutionally infelicitous to propose that the UK Parliament legislate for Welsh adult social care, whether in one UK Bill covering both England and Wales, or in separate Westminster Bills for each country." We went on to recommend that our proposals should be implemented in Wales by an Act of the National Assembly. We said "this would allow for the legislation itself to be made in Wales and would give the Welsh Assembly the freedom to implement our recommendations in the way they preferred". In the event, that is what has happened.

I should add that the Department of Health has also accepted the report for England, and our proposals form part of the Care Bill currently before Parliament.

An even more striking example of how the situation has changed is provided by the Law Commission report on the reform of the law on housing tenancies. We reported our recommendations in this ambitious project on renting homes in 2006 (Law Commission Report: *Renting Homes* (Law Com No 297), May 5, 2006). In our annual report for 2007-8, we expressly contrasted the lack of interest in our proposals in England with "the imaginative and positive policy reaction … in Wales" (Law Commission, Annual Report 2007-8, (Law Com No 310; HC 540), paras 3.42-44). In due course, our proposals were rejected in England, but accepted in principle in Wales. The Lord Chancellor's Report for 2011 stated that "while some of the proposals … were accepted in principle by the previous government …reform of this area of the law is not in line with the current government's deregulatory priorities" (at para 56). We were delighted when the Welsh Government announced that a further housing Bill would be added to the legislative programme for the current Assembly with the aim of implementing these proposals. Since then, we have been working with the Welsh Government to update our recommendations, to tease out any devolution issues and to examine how the proposals can assist with other current policy initiatives in the field. Our report on these issues was published in April 2013 in both English and Welsh *(Rhentu Cartrefi yng Nghymru/Renting Homes in Wales*, Law Commission No 337, April 2013). In the result, therefore, the Law Commission proposals will be implemented in Wales but not in England.

One deficiency in the present statutory scheme has already become clear. As matters stand there is no route under the Law Commissions Act 1965 by which the Welsh Government can make a reference in respect of a law reform matter directly to the Law Commission. In the case of Scotland, the 1965 Act was amended to enable both the United Kingdom Government and the Scottish Government to make such references to the Scottish Law Commission (s 2, Law Commissions Act 1965, as amended by the Scotland Act 1998 (Consequential Modifications) (No 2) Order 1999 (SI 1999/1820)). Similarly, the statute creating the Northern Ireland Law Commission made provision for references from the Northern Ireland Executive to the Northern Ireland Law Commission (s 51, Justice (Northern Ireland) Act 2002, as amended by the Northern Ireland Act 1998 (Devolution of Policing and Justice Functions) Order 2010 (SI 2010/976)). There is a clear case for similar provision to be made in the case of Wales and we are confident that this deficiency will soon be remedied

THE FUTURE

The Law Commission has recently completed a public consultation on projects to be included in its Twelfth Programme of law reform and is currently engaged in assessing the proposals received. We expect to make our proposals to the Lord Chancellor in the late spring of 2014. In doing so we are encouraged by the improving situation in relation to implementation. The forthcoming Twelfth Programme will be the second adopted under the Protocol and we are hopeful that the improvements the Protocol effects in the machinery of law reform will result in more effective law reform.

The Rt Hon Sir David Lloyd Jones

Chairman of the Law Commission of England and Wales

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