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50 YEARS ON: THE LAW COMMISSION AT 50

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I am particularly grateful for the invitation to speak at this conference today. At the outset, on behalf of the Law Commission of England and Wales I extend our warmest on congratulations to the Scottish Law Commission on its 50th anniversary and on its outstanding achievements over that period.

This conference provides a very welcome opportunity, at the start of what is also the 50th anniversary year of the Law Commission of England and Wales, for me to say something – not so much about the successes and failures that Commission over the last 50 years, a topic more suitable for legal historians in due course – but about the present state and work of that Commission and to consider whether it is an effective engine of law reform.

Prior to 1965 there had been a number of *ad hoc* and more permanent committees which were charged with considering law reform, most notably the Home Secretary's Criminal Law Revision Committee and the Lord Chancellor's Law Reform Committee. However, in 1963 there appeared an influential book by a number of practising and academic lawyers and edited by Gerald Gardiner QC and Dr. Andrew Martin, which called for a more radical approach to law reform. Entitled "Law Reform *Now*" – with the "*Now*" in italics – its message was nothing if not direct. The editors raised a number of crucial questions:

- how to keep under review the whole field of English law;
- how to enquire into those sections of it that do not meet the current needs of society; and
- how to make sure that whenever a case for law reform is made out Parliament should be presented and be given adequate time to deal with concrete proposals.

They argued that the problem of bringing the law up to date and keeping it up to date is largely one of machinery and that, if the machinery is to work efficiently at a time of rapid technological, economic and social change, it must be kept in continuous operation and minded by full-time personnel. By way of answer they proposed the creation within the Lord Chancellor's Office, as it then was, of "a strong unit concerned exclusively with law reform". It should be headed by a Vice-Chancellor who should carry the rank of a Minister of State, who would be exclusively concerned with law reform and who should sit in the House of Commons. He should preside over a committee of not less than five highly qualified lawyers - Law Commissioners – who should be full time appointees but who – and this the editors considered vital – should not be ordinary civil servants but should enjoy a high degree of independence. In addition, the Government should be required to find Parliamentary time for the consideration of any legislation proposed by the Law Commissioners.

The following year the Labour Party led by Harold Wilson won the general election. Gerald Gardiner became Lord Chancellor and in 1965 Parliament passed the Law Commissions Act which created two Law Commissions, one for England and Wales and one for Scotland. The primary duty of the Law Commission of England and Wales 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 …"[1]

So you will understand that we are under absolutely no pressure.

The model adopted was, however, rather different from that proposed by the authors of "Law Reform Now". Crucially, the Law Commissions were to be independent of the Government and the Chairman was not to be a politician but a High Court Judge. The Law Commission of England and Wales made a good start. It enjoyed the strong support of the Government which had set it up and had the great good fortune to have

[1] Law Commissions Act, 1965, section 3.

in its first Chairman, Mr. Justice Scarman, an outstanding lawyer who was dedicated to the cause of law reform.

He and the newly appointed Commissioners took up their duties on 21st June 1965. In that first year the Commission comprised a Chairman, 4 Commissioners, 1 special consultant, 9 other lawyers, 4 draftsmen, the Secretary to the Commission and 21 non-legal members of staff.[2] Today – fifty years on - the Law Commission consists of a Chairman – who is required to be a High Court Judge or a Lord Justice of Appeal – and 4 full-time Commissioners. Each Commissioner heads a team devoted to a subject area: criminal law, public law, common and commercial law and family, property and trusts. We are an organisation of around 55 staff. We currently have 24 lawyers and 18 research assistants who support Commissioners in their work. We have 3 in-house Parliamentary counsel who are seconded from the Office of Parliamentary Counsel. (Most of our reports are accompanied by a draft Bill which would implement our recommended reforms.) We also have an in-house economist. (All of our reports are accompanied by economic impact assessments.) In addition, we have a chief executive who leads a small team of professional support staff.

We work closely with Government departments in Whitehall, in particular the Ministry of Justice which is our sponsoring department. However, we are not part of the Government. We are a non-departmental arm's length body. We were created by Parliament to act independently of the Government and that independence - and the public perception of that independence - are vital to our work. In particular, we are not an in-house legal department for the Ministry of Justice or any other Government department. Sometimes we are critical of Government policies; sometimes the Government will disagree with us on our proposals for law reform. Members of the public or stakeholders (to use the current term) are often willing to work with an independent Law Commission on a project in a way in which they would not be prepared to participate with a Government Department. On the other hand, we are not a mere pressure group. We are a public body, uniquely placed because we are both independent of government and close enough to government to be able to influence decisions on law reform.

[2] Law Commission, First Annual Report 1965-66, para. 11. The first Law Commissioners were Mr. L.C.B. Gower M.B.E., Mr. Neil Lawson Q.C., Mr. N.S. Marsh and Mr. Andrew Martin Q.C.

What can I say about the present standing of the Commission?

- In the first 50 years of its existence
    - The Commission has published 202 law reform reports of which approximately 69% have been implemented in whole or in part.
    - The Commission has been responsible for 222 consolidation Acts of Parliament.
    - The Commission has been responsible for 19 Statute Law Repeal Acts which have repealed 3,117 statutes in their entirety and 3,982 in part because they are no longer of any practical utility.

- The Law Commission survived the bonfire of the quangos in the Public Bodies Act 2011. Since then it has undergone a triennial review. I am pleased to say that in its report in March 2014 the Government recognised the continuing need for the Commission's existing functions. It also acknowledged the value that stakeholders place on the independence and impartiality of the Commission and confirmed that its present model is the most appropriate for maintaining that independence. Indeed it expressly stated that "the Commission's ability to deliver its functions is dependent on its freedom from external pressures, in particular political influence".

- 2014 was the busiest and most productive year in the Commission's history. In 2014 the Commission published reports on:
    - Wildlife Law: Control of Invasive Non-native Species (LC342) 11/02/14
    - Matrimonial Property, Needs and Agreements (LC343) 27/02/14
    - Contempt of Court (2): Court Reporting (LC344) 26/03/14
    - Regulation of Health Care Professionals: Regulation of Social Care Professionals in England (LC345) 02/04/14
    - Patents, Trade Marks and Design Rights: Groundless Threats (LC346) 15/04/14
    - Taxi and Private Hire Services (LC347) 23/05/14

- Hate Crime: Should the Current Offences be Extended? (LC348) 28/05/14
- Conservation Covenants (LC349) 24/06/14
- Fiduciary Duties of Investment Intermediaries (LC 350) 30/6/14
- Data Sharing between Public Bodies (LC 351) 11/07/14
- Insurance Contract Law: Business Disclosure; Warranties' Insurers' Remedies for Fraudulent Claims; Late Payment. (LC 353) 17/07/14
- Social Investment by Charities (Recommendations Paper) 24/09/14
- Simplification of Criminal Law: Kidnapping and Related Offences (LC355) 20/11/14
- Rights to Light (LC356) 04/12/14

- In addition, in July 2014 the Lord Chancellor gave his approval to our Twelfth Programme of Law Reform which will form a major part of our work over the next three years. (The Commission takes on new law reform projects in one of two ways. A project may be referred to us directly by a Government Department. However, every three years we go out to public consultation on a new programme of law reform. This permits anyone to make proposals for law reform projects.) On this most recent occasion we received over 250 proposals for new projects and we ended up selecting 9 for inclusion in the programme. These include projects on
  - Bills of sale
  - Protecting consumer prepayments on retailer insolvency
  - Land registration
  - Wills
  - Mental capacity and detention
  - Firearms
  - Sentencing procedure

- That there is no shortage of demand for our services in the field of law reform is also apparent from the fact in December 2014 the MoJ asked us to look at the law of marriage and the Justice Committee asked us to look, not for the

first time, at joint enterprise in the criminal law. Last week the Justice Committee asked us to look at manorial rights.

So, it would appear that, at the moment at least, the standing of the Law Commission is high. However, it is important that we should remain aware of the continuing need to justify our role by the quality of the work we produce.
In that regard, we enjoy a number of advantages. [3]

- Within the Commission there is considerable legal expertise in many different fields.
- We are in a position to consult widely and thoroughly on the state of the existing law, perceived deficiencies and proposals for reform.
- Our independence from government permits engagement with a wide range of parties who value our objectivity and our impartiality.
- Our system of peer review involves expert scrutiny of reports and draft legislation.
- We have our own embedded Parliamentary Counsel.
- We have the advantage of a special parliamentary procedure, which is particularly suited to law reform measures.
- We have time within which to consider law reform and draft legislation in depth.

In addition, it seems to me that the Commission has succeeded to the extent that it has because it has limited its activities to the field of lawyers' law and has, unlike Law Commissions in some other Commonwealth States, generally avoided projects which have at their heart major issues of social policy, morality or political controversy. That is not to say that we only take on projects which are not controversial – that is certainly not the case. For example in our recent work on contempt of court and juror misconduct we have had to address issues of freedom of expression and permissible limitations on reporting in the media. But I doubt that the Law Commission would be the appropriate body to address reform of the law relating, for example, to assisted suicide. In my view, the great strength of the Law Commission is in its legal expertise.

[3] See generally, Evidence of David Lloyd Jones to House of Commons, Political and Constitutional Reform Committee, *Ensuring Standards in the Quality of Legislation* (HC 85, 20 May 2013) at Ev. 69.

It excels in dealing with projects where, after thorough research and consultation, defects in the law are capable of remedy as a result of lawyers finding lawyers' solutions.

How does one assess the success of a law reform body like the Law Commission? One approach is to ask to what extent the Law Commission has succeeded in performing its statutory duty to secure the systematic development and reform, the simplification and modernisation of the law. Early in the Commission's history, great emphasis was placed on the need for the codification of the law. Looking back over the last 50 years it does seem that very little has been achieved in that direction. The Commission's first programme of law reform proposed, inter alia, the codification of the law of contract which has not been achieved. Similarly, our project on the codification of the criminal law was suspended, simply because the Commission came to the view that codification – while remaining a desirable objective – had to be preceded by a process of simplification of the law. That process continues with the publication in November 2014 of our report on Kidnapping and Related Offences and our forthcoming report this spring on Public Nuisance and Outraging Public Decency. That will be followed by a report on Misconduct in Public Office. (It is interesting to note here that this, in a sense, confirms the good sense shown by Gardiner and Martin in "Law Reform *Now*" where they wrote that codification should not be given too high a priority, for the sole reason that the condition of English law was so encumbered with obsolete and unjust law that codification would have to be preceded by reform.[4]) But I do not think that we should despair over this. Codification may well be a desirable ultimate objective, but there can also be real value in the reforms which are achieved along the way.

As for the quality of the reforms proposed by the Commission over the last 50 years – this is a matter probably best left to others. However, what I can say is that the great majority of our recent proposals for law reform have generally been well received by those most concerned with the area of law in question. Thus, our recent proposals for the reform of the regulation of health care and social care professionals have received the enthusiastic support of patient groups and all 9 of the professional regulatory bodies regulating the 32 professions concerned. Similarly, our reforms of the law of

[4] Law Reform *Now*, pp. 11-12.

insurance have been possible only because our recommendations have generally won the support of both the insurance industry and consumer groups.

Implementation

This is of course an important indicator of the success of a law reform body. Elaine Lorimer is going to speak later this morning on how we have set about trying to improve our implementation rate.

At this point I should like to say something about other means of securing law reform.

Alternative methods of securing law reform

From its infancy, the work of the Law Commission has been geared to achieving law reform through legislation. Legislation, of course, is the most effective route to law reform because it has the advantage that it permits the replacement of a whole body of law by a new statutory scheme. Law reform through judicial decisions, by contrast, suffers from the disadvantage that judges can only act when an appropriate case presents itself for decision and, even then, they are often unable to effect reforms to an extent which might be achieved by the introduction of a new statutory scheme. Judicial law reform is, from necessity, often piecemeal and a prolonged process. Law reform on the scale of the recent and current reforms of insurance law, for example, would be difficult to achieve efficiently through judicial decisions. A further disadvantage of judge made law is that the focus of the judges – just like the focus of counsel in any particular case – is necessarily geared to the issues as they are relevant in the context of that particular case. As a result we are often deprived of the broad view of a whole area of the law. But that is precisely what the Commission seeks to do in its assessment of whether an area of law is in need of reform and of how that might best be achieved. It seems to me, therefore, that in situations where, for whatever reason, Parliament has not implemented recommendations for reform originating from the Commission, Law Commission reports may well be of particular use to judges presented with disputes in that field. And there are occasions on which the Commission could be instrumental in bringing about desirable judicial law reform.

Recent events in relation to the Law Commission report on Expert Evidence in Criminal Cases show that primary legislation is not the only way of achieving law reform. The Commission undertook this project because of growing public concerns that evidence was being admitted which was not truly expert evidence at all. The report found that "expert evidence" was being admitted too readily and having received insufficient scrutiny. Accordingly, we recommended the introduction of a statutory test of admissibility: where doubt was raised about an expert's opinion, the evidence would have to satisfy a preliminary test of reliability. We also proposed a statutory list of factors to assist judges in applying the test and recommended the codification of the law. To our dismay, the Government, inexplicably, rejected the recommendation for primary legislation.[5] Nevertheless, a great deal has been achieved by other means. First, as the Lord Chief Justice explained in his Kalisher Lecture to the Criminal Bar Association in October 2014[6], the Rule Committee has adopted as many of the recommendations as it could adopt through the Criminal Procedure Rules and accompanying Practice Directions. As a result, while the common law remains the source of the criteria by reference to which the court must assess admissibility, the Rules list those matters which must be covered in the experts' report so that the court can conduct such an assessment and the Practice Directions list the factors the court may take into account in determining the reliability of expert opinion. Secondly, meanwhile, in a parallel development, a series of cases concerned mainly with the use of Low Template DNA has established a requirement that the court can only admit expert evidence if it is reliable.[7] Thirdly, in a development at least as significant as the other two, the Advocacy Training Council has adopted our recommendations in this report as the basis for its training and is aiming to produce a toolkit to equip advocates to deal more effectively with expert evidence. In this way, we are confident that the entire approach of the profession to expert evidence in both criminal and civil

[5] The explanation given by the Government was that they were concerned that there could be costs implications which could not be predicted with precision.

[6] Lord Thomas of Cwmgiedd, Expert Evidence: The Future of Forensic Evidence in Criminal Trials, The 2014 Criminal Bar Association Kalisher Lecture.

[7] In its judgment in R v Dlugosz and Others [2013] EWCA Crim 2, the Court of Appeal observed (at paragraph 11): "It is essential to recall the principle which is applicable, namely in determining the issue of admissibility, the court must be satisfied that there is a sufficiently reliable scientific basis for the evidence to be admitted. If there is then the court leaves the opposing views to be tested before the jury." Nothing at common law precludes assessment by the court of the reliability of an expert opinion by reference to substantially similar factors to those the Law Commission recommended as conditions of admissibility, and courts are encouraged actively to enquire into such factors.

proceedings can be fundamentally reformed and the risk of miscarriages of justice reduced.

The Commission is looking more and more at means of effecting law reform other than through primary legislation.

In 2014 we published a report on court reporting of criminal proceedings in which we proposed new procedures which could greatly reduce the risk of inadvertent contempt of court by the breach by the media of reporting restrictions.[8] In consultation the media told us that their principal concern was the difficulty of finding out whether an order was in place in a given case. Our core recommendation was the introduction of a publicly accessible online list of the orders under section 4(2), Contempt of Court Act 1981 which are in force at any given time, which would provide all prospective publishers with a single, easy point of reference in order to check whether a court order exists or is in force. In addition, we recommended the creation of a further database which would include the terms of the section 4(2) orders and which would be open only to accredited media representatives. It seems to us that this modest and inexpensive reform would:

- Enable publishers to produce accurate, contemporaneous reports of proceedings without the risk of liability for contempt of court;
- Avoid any undesirable chilling effect arising from the current uncertainty;
- Promote the principle of open justice.

We hope that this will be implemented in the near future by HMCTS. The ball is very much in their court at the moment.

In February 2015 we published a consultation paper on Enforcement of Financial Orders in Family Proceedings. We are looking not only at the possible reform of enforcement procedures (which would generally require primary legislation) but also at

[8] Section 4(2), Contempt of Court Act 1981 empowers the court to make an order postponing the reporting of proceedings where it appears to be necessary for avoiding a substantial risk of prejudice to the administration of justice.

- How courts could use their case management powers more effectively;
- Whether there could be greater use of ADR
- How guidance for the public – in particular litigants in person – could be improved;
- How improved training for practitioners and the judiciary might assist;
- The need for HMCTS to collect more comprehensive statistics to inform legal and procedural reform.

CONCLUSION.

On the evidence of the last 50 years, I do believe that the Law Commission is a valuable organisation.

It performs a useful role in its efforts to keep the law fair, accessible, intelligible and up to date with social, scientific and technological change.

Key to its success, I believe, are

- its legal expertise,
- its reputation for objectivity and impartiality,
- its independence from government which permits engagement with a wide range of parties; and
- its ability to stand back from legal problems and to take a broad view.

On the occasion of its 50th birthday, it is still making an important contribution to the cause of law reform.