

REFORM? REFORM? AREN'T THINGS BAD ENOUGH ALREADY?

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- 1.1 The title of this talk is a remark attributed to many public figures: Lord Melbourne, Prime Minister, Lord Eldon, Lord Chancellor, and Mr Justice Astbury, a former Liberal MP¹ who was a Chancery judge from 1913 to 1929. I tend to favour Astbury, because he left a generous bequest to Middle Temple and I was one of the many students of the Inn who benefited from it. But whoever first said it, it is quite a common reaction to proposals for law reform. Another came from the clerk to Samuel Romilly, a barrister, MP and leading law reformer in the first half of the 19th century. Romilly was warned by his clerk that “a barrister’s practice depends on the good opinion of attorneys [as solicitors were then called] and attorneys could never think well of a man who troubled his head about reforming abuses when he ought to be profiting by them”
- 1.2 Not many practising lawyers spend their time reforming the law. If you get a job working as a lawyer for a pressure group which brings test cases to push back the frontiers of the law you will be one of the few who do. Turning to the judiciary, the Supreme Court reform the law fairly regularly; the Court of Appeal occasionally; and trial judges scarcely ever. But there is one senior judicial post which is an exception to these general rules, and it is the one I have been fortunate enough to occupy for the last three years: the Chair of the Law Commission.
- 1.3 Until the 1960s, the machinery of law reform in this country was almost non-existent. Lord Sankey LC set up a Law Revision Committee in 1934 which lasted until the outbreak of war in 1939. In 1952 a Law Reform Committee was established. This had as members five very senior judges, five barristers, two solicitors and three professors of law. None of them was doing law reform for a living. They met perhaps once a month after court. Their output was less than prodigious, although they did have one success in the Occupiers’ Liability Act 1957. One of the barrister members of the Committee, Gerald Gardiner QC, was later to observe that “you cannot reform the law of England in your spare time on an occasional afternoon”.²

¹ At the General Election of 1906 he defeated the far more famous barrister Edward Marshall Hall (Conservative) to become MP for Southport. Astbury did not enjoy politics and left the Commons in 1910.

² Hansard, House of Lords, Vol 264 Col 1153, Second Reading of the Law Commissions Bill 1965.

- 1.4 Gardiner was a distinguished silk who was Chairman of the Bar and one of the finest advocates of his day. In 1963 he was co-author of the book *Law Reform Now* which called for the establishment of a Law Commission. He was given a life peerage and became Lord Chancellor when Harold Wilson's first Government took office in October 1964. On 15 June 1965, the 750th anniversary of Magna Carta, Royal Assent was given to the Law Commissions Act 1965. This set up one Law Commission for England & Wales and another for Scotland, but it is only the England & Wales Commission about which I shall speak this evening. Gardiner made an inspired choice to be the first Chair of the Law Commission: Mr Justice Scarman, who would go on to be one of the outstanding English judges of the last half century³.
- 1.5 The Law Commission's statutory duty is set out in section 3(1) of the 1965 Act, It 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. ...”
- 1.6 Lady Hale, who served as a Law Commissioner for nine years, from 1984 to 1993, recently described this as “mission impossible”.
- 1.7 We do not have the resources to keep under review the whole of the law of England & Wales. Obviously we have to be selective. There are several factors which in practice limit our ability to choose any area of English law which we think might need reforming.
- 1.8 Firstly, we are a non-party body and we seek to steer clear of sharply partisan topics. My working rule is that if a proposal would result in a division on Second Reading in the House of Commons we should have nothing to do with it.
- 1.9 Secondly, we are a commission of lawyers. Not every possible amendment to English law requires the advice of lawyers. Take for example the minimum age for voting at a General Election. Some people say that it should be reduced from 18 to 17 or 16. Others support the status quo. But it is not a question on which the opinion of lawyers is of any value.
- 1.10 The third restriction is one which did not exist in the early days of the Law Commission, namely that the Department with policy responsibility for the relevant topic must indicate that there is a “serious intention to take forward law reform in the area” if the Commission so recommends. That requirement derives from the Protocol between the Lord Chancellor and the Law Commission agreed following the enactment of the Law Commission Act 2009. Before then our predecessors had

³ I paid a more extensive tribute to Lord Scarman in my introduction to the Law Commission's Scarman Lecture for 2017 given by the then Lord Chief Justice, Lord Thomas of Cwmgiedd: [<https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2017/06/Sir-David-Bean-Scarman-welcome.pdf>]

freedom to embark on any law reform project within the extremely wide remit of the 1965 Act to which I have referred.

- 1.11 In the late 1960s they began to work on codification of the law of contract, but after some years this was abandoned as impracticable. In the 1980s, again after several years work, the Commission produced a two-volume draft Code of Criminal Law. This received favourable mention from a number of the great and the good in the House of Lords debate in 1989 but then disappeared from sight. There was no appetite in Whitehall and Westminster for any attempt to push such a potentially controversial Bill through Parliament.
- 1.12 We have very limited resources and we cannot expend them in attempting the impossible. We generally have to demonstrate to ministers that a proposed project would bring tangible public benefits if it resulted in legislation. It is not a sufficient reason for us to take on a project that it would make the law neater or make a leading textbook a few pages shorter.
- 1.13 Our working methods are tried and tested. We have five Commissioners. The Chair is either a member of the Court of Appeal already (as I was when I moved to the Law Commission) or is promoted to the Court of Appeal very soon after taking up post. The other four Commissioners currently in post are two professors (David Ormerod and Nick Hopkins), one commercial solicitor (Stephen Lewis) and one public law silk (Nicholas Paines QC). They are supported by teams of lawyers and research assistants. A typical project will have one or two lawyers working on it helped by one or two research assistants. The RAs, as we call them, are often law graduates on their first job after leaving university or qualifying as barristers or solicitors. Both the experienced lawyers and the RAs are highly talented and highly motivated and we are lucky to have them.
- 1.14 We always issue a consultation paper inviting submissions from anyone who takes the trouble to read it: you could say our motto is consultation, consultation, consultation. When the consultation responses have been received, we analyse them and move on to produce a final Report which is then laid before Parliament. We have, of course, no power to do anything. All we can do is make recommendations. The baton is then handed over to the politicians. Sometimes there is a quick response, sometimes a slow response and sometimes no response at all, but in recent years over two thirds of Law Commission reports have been implemented either in whole or in part.
- 1.15 Every three years or so the Law Commission compiles a draft Programme of future work and submits it to the Lord Chancellor for approval. As I have mentioned, a project does not qualify for inclusion in the Programme unless the relevant department has indicated an intention to take forward reform if the Law Commission recommends that it should. The Programme approved last December has 14 items – some large, some small, some ancient, some modern. Several have a “Global Britain” theme. These include electronic signatures; smart contracts; and automated vehicles, about which I should say a bit more.
- 1.16 At present the Road Traffic Acts assume that any motor vehicle being driven on a public highway in this country will have a qualified and licensed driver at the steering wheel who must keep control of the car and who is responsible in both criminal and civil law for anything that goes wrong. No one in the early days of cars could have

imagined otherwise. But within a decade or so technology will have made it possible for cars to be driven on the road without anyone at the steering wheel at all. A car could take children to school, then collect their elderly grandmother and take her to the doctor's surgery, then return empty and so on. If this is to be made legal, as surely it will have to be, it will involve consideration of criminal law, regulatory law, negligence liability, insurance, and perhaps other areas I haven't thought of.

- 1.17 Another interesting area on which we are just starting is the law of surrogacy. The main statute in force at present is the Surrogacy Arrangements Act 1985 (with some provisions of the Human Fertilisation and Embryology Act 2008). Since the 1985 Act the use of surrogacy arrangements has increased considerably. The law has fallen behind changing social attitudes. The intended parents can become the legal parents of the child born to the surrogate mother by obtaining a Parental Order from the courts. There are statutory conditions for making such an order but it is difficult for the court to refuse to recognise an existing relationship between the intended parents and the child given the paramount position which the child's best interests must have. The courts have been trying to resolve the underlying problems in the 1985 Act but it is now widely accepted that the law requires comprehensive review and reform.
- 1.18 At the other end of the scale from automated vehicles or surrogacy is the subject of liability for chancel repair. The House of Lords, in a case in 2003, found that a couple who had bought a house were liable to make contributions to maintain the chancel of the nearby Anglican church, even though they had no idea when they bought the property that this was what they were taking on. As a result of this decision and an ambiguity in the Land Registration Act 2002 purchasers of property up and down the land are being advised to take out insurance against the possibility of chancel repair liability and the nation is apparently spending about £20m on insurance premiums every year. This is a small piece of law which needs fixing, and if the Law Commission doesn't deal with it, no-one else will.
- 1.19 Because our reports deal with topics which are not the battleground at General Elections there has always been difficulty in getting Parliament to devote time and energy to legislating to implement what we recommend. Obviously the Parliamentary waters are particularly choppy at the moment and the pressures caused by Brexit are exceptional. But the problem is not a new one and has existed throughout the life of the Law Commission. Some of our reports will never engage the interest of 800 members of the House of Lords or 650 members of the House of Commons and there is no reason why they should. Ten years ago a special procedure was agreed by the House of Lords under which an uncontroversial bill to enact proposals from the Law Commission is scrutinised by a Special Procedure Bill Committee of 12 members, traditionally chaired by a retired judge. The Committee can summon witnesses to explain the proposals in the Bill and why they are uncontroversial. After that stage consideration on the floor of the House of Lords is reasonably brief and consideration in the House of Commons is briefer still. The most recent special procedure Bill was one that did not exactly capture the headlines: the Unjustified Threats (Intellectual Property) Bill. It was considered in detail by the Special Procedure Bill Committee. When it came to its report stage in the chamber of the House of Lords, which I went to observe, the attendance was again about 12 members and they bore a striking resemblance to the members who had served on the Special Procedure Bill Committee. Some amendments were proposed – indeed two were accepted by the

Government - but there were no divisions: the Government and opposition whips had sent everyone home. In the House of Commons there was just over half an hour's debate in Committee and none on the floor of the House. This is a good way of enacting technical law reform. It ought to happen more often and I hope that in future years it will.

- 1.20 When I was appointed to chair the Law Commission in 2015 I went to seek the advice of a number of former Commissioners in the senior judiciary. They all told me that I had got the best job in the system and how right they were. I hope that at least some of you might consider applying to work for the Commission in the years to come. But it is probably not the job for you if you are the sort of person who asks "Reform? Aren't things bad enough already?"