

The Work of the British Law Commissions

Law Reform... Now?

Shona Wilson Stark



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Introduction

Many of us interact with the work of the Law Commissions on a regular basis. We may interact directly, such as when we consult a Commission report, or when we respond to a consultation. Or we may interact indirectly, and even unknowingly, when we make use of a law which resulted from a Commission proposal. We may interact as lawyers or, for example, as bankers, Land Registry workers, police officers, shopkeepers, landlords or company directors. We may even interact as individual citizens, usually without realising it, when we benefit from a law proposed by the Commissions, such as in the field of consumer or tenants' rights. But how many of us stop to consider why the Commissions exist, how they choose their projects, how they craft their proposals and how their reforms end up on the statute book—or why they do not? This book addresses those questions. It does so shortly after the Commissions celebrated their golden anniversaries in June 2015. Such a landmark signalled an appropriate time to look back and consider the achievements of the Commissions, as well as whether there is room for improvement. In particular, after 50 years, are there any changes that need to be made to ensure that the Commissions remain relevant? The main reason for the Commissions' existence is that the law cannot stand still—neither, it will be argued, can our law reform machinery.

In examining the work of the Law Commission for England and Wales (LCEW) and the Scottish Law Commission (SLC; together the Commissions) this book first details the Commissions' formation on the premise that, as Winston Churchill once said, 'the longer you can look back, the further you can look forward'.¹ In other words, before we can ascertain what the proper role of the Commissions is today, it is important to consider what their role was intended to be at the outset. The Commissions were established by the Law Commissions Act 1965 (the 1965 Act). It is argued in this book that the 1965 Act should be both clarified and updated. Certain of its provisions have caused a lack of clarity from the outset, such as the Commissions' duty to 'take and keep under review all the law',² a duty which

¹ See SW Stark, 'The Longer You Can Look Back, the Further You Can Look Forward: The Origins of the Scottish Law Commission' (2014) 18 *Edinburgh Law Review* 59 ('The Longer You Can Look Back').

² 1965 Act, s 3(1).

has been described as ‘mission impossible’.³ Because of their limited resources, the Commissions cannot possibly examine ‘all the law’, and the 1965 Act gives no guidance to the Commissions as to what they should prioritise. Contrary to what may be expected by those familiar with the Commissions’ more technical work, the Act does not give any priority to so-called ‘lawyers’ law’.⁴ The proper scope of the Commissions’ activity (how the use of their resources should be prioritised) therefore remains unclear from the face of their founding statute. ‘The challenge’, as Lady Hale has put it, ‘is to work out the most valuable tasks the Commission[s] can accomplish’.⁵ The Commissions have tried to meet that challenge by structuring their exercise of discretion according to non-statutory project-selection criteria. A way of determining the appropriate scope of their activity through the development and increased use of those criteria is advanced in this book.

Many changes occurred during the Commissions’ first five decades. Certain changes have been internal (such as the changing personalities of the Commissioners and other staff) and others have been external (such as devolution, the UK’s changing relationship with the European Union (EU), increasing calls for transparency, reduced governmental funding and the changed role of the Lord Chancellor). This book considers how those changes have affected (or should affect) the role the Commissions play today. New developments pose new challenges for the Commissions and force us to re-evaluate our expectations of them as law reform bodies. For example, the 1965 Act directs the Commissions to work towards the codification of the law.⁶ Codification and harmonisation were high on the agenda in the 1960s due to the UK’s impending entry into what is now the EU. For various reasons advanced in this book, including the fact that EU membership is probably no longer a relevant concern, codification should no longer be one of the Commissions’ aims. Additionally, the Commissions now face the challenge of working in an increasingly devolved and fragmented UK. We should not expect the same of our Commissions as we did in 1965.

It is not, therefore, just the Commissions which must change, but also our perceptions of them. Such change needs to occur not only in the types of projects we expect our Commissions to undertake (ie, not just ‘lawyers’ law’), but also in the evaluation of the success (or otherwise) of a Commission project. Given that it is the usual desired outcome of a project, we may have a tendency to equate the success of a Commission project with its legislative implementation. Legislative implementation cannot be ignored, but we must give more consideration to what

³ B Hale, ‘Fifty Years of the Law Commissions: The Dynamics of Law Reform Now, Then and Next’ in M Dyson, J Lee and SW Stark (eds), *Fifty Years of the Law Commissions: The Dynamics of Law Reform* (Oxford, Hart Publishing, 2016) 19 (‘The Dynamics of Law Reform’; and Dyson, Lee and Stark, *Fifty Years of the Law Commissions*).

⁴ See E Clive, ‘Law Reform and Social Policy’ in Dyson, Lee and Stark, *Fifty Years of the Law Commissions*, 66.

⁵ Hale, ‘The Dynamics of Law Reform’ 19.

⁶ 1965 Act, s 3(1).

it means for a proposal to be ‘implemented’, especially in the light of increasing use of methods other than primary legislation (for example, secondary legislation, court rules or judicial decisions). Furthermore, overconcentration on legislative implementation as the sole or main measure of success naturally increases the probability of attempts to improve implementation rates. This book details such attempts, many of which have been noble efforts to raise the Commissions’ profiles. Certain efforts can, however, jeopardise the Commissions’ independence from government. For example, projects may be chosen according to their likelihood of implementation rather than proper consideration of the non-statutory project-selection criteria. This book advances a more sophisticated method of evaluating the outcome of a Commission project which can consequently better protect the Commissions’ independence—the benefits of which are advanced in this book.⁷

The Commissions are technically independent from government, yet they rely on government for their funding and for approval of their proposed projects. In addition, governmental approval of Commission recommendations is the main route to their implementation.⁸ A tension between independence and implementation is therefore inevitable to a certain degree. But the heat behind that tension must be carefully controlled. By both clarifying and updating the 1965 Act, the Commissions’ position could be improved, thereby securing the future of independent law reform in Great Britain.

I. Lifting the Law Reform Bonnet

Comparatively little has been written about the machinery of the Commissions compared with the ink that has been spilled over their specific proposals. George Gretton, a former SLC Commissioner, has remarked that a lot of Commission work is of an ‘under the bonnet’ type—dealing with the laws that most people take for granted and only notice when they are in need of repair.⁹ The same can be said about the Commissions themselves, separate from their individual projects. We arguably take their work for granted, not stopping to consider why they exist, how they function, why they have chosen a specific project, or why they have drafted a specific proposal. This book lifts the bonnet on the Commissions to probe deeper into the machinery of law reform. The Commissions’ working methods are not

⁷ For a robust defence of the need for independence in a law reform body, see W Binchy, ‘Law Commissions, Courts and Society: A Sceptical View’ in Dyson, Lee and Stark, *Fifty Years of the Law Commissions*, ch 16.

⁸ Other routes include, eg, implementation by Private Members’ Bills, court rules or judicial decisions.

⁹ G Gretton, ‘Of Law Commissioning’ (2013) 17 *Edinburgh Law Review* 119, 127 (‘Of Law Commissioning’).

a complete mystery, but many accounts of their work are outdated.¹⁰ A growing field of legal scholarship, a large amount of which is written by previous Commissioners or staff, examines the machinery of law reform.¹¹ This book contributes to that field by providing a current analysis of both the LCEW and the SLC from an external perspective. As one former LCEW Commissioner has noted, a ‘degree of disinterestedness’ is needed to properly assess the ‘strengths and weaknesses, successes and failures’ of the Commissions.¹²

Because the Commissions have not been studied in much depth so far in their 50-year existences, the appropriate scope of their activity remains unclear to outsiders. The Commissions have been criticised for acting, or failing to act, in certain areas.¹³ At the Commissions’ outset, certain views were expressed that they were best suited to examining so-called ‘lawyers’ law’.¹⁴ If that view persists today it would fundamentally misunderstand the Commissions’ role because they also work (frequently and successfully) in more obviously controversial areas, such as criminal law or family law. This book answers such criticisms and alleviates such misunderstandings by clarifying the Commissions’ proper scope of activity. Such clarification is important if we are to properly engage with the Commissions by, for example, suggesting appropriate projects for them to study in their *Programmes of Law Reform*.¹⁵

¹⁰ eg, JH Farrar, *Law Reform and the Law Commission* (London, Sweet & Maxwell, 1974); WH Hurlburt, *Law Reform Commissions in the United Kingdom, Australia and Canada* (Edmonton, Juriliber, 1986); and G Zellick (ed), *The Law Commission and Law Reform* (London, Sweet & Maxwell, 1988).

¹¹ See, eg, over the past decade alone: T Etherton, ‘Law Reform in England and Wales: A Shattered Dream or Triumph of Political Vision?’ (Bar Law Reform Committee Lecture, 2007); N Brochie, ‘The Scottish Law Commission: Promoting Law Reform in Scotland’ (2009) 9 *Legal Information Management* 30; L Blom-Cooper, ‘Reform? Reform? Aren’t Things Bad Enough Already?’ [2010] *PL* 441; M McMillan, ‘The Role of Law Reform in Constitutionalism, Rule of Law and Democratic Governance: Reflections by the Scottish Law Commission’ (Association of Law Reform Agencies of Eastern and Southern Africa Lecture, 2011); J Munby, ‘Shaping the Law—The Law Commission at the Crossroads’ (Denning Lecture, 2011); L Clark, ‘Law Reform and the Work of the Scottish Law Commission’ (lecture at the Annual General Meeting of the Scottish Legal Action Group, 2012); B Dempsey, ‘Law Reform and Devolution: Consultation Processes and Divorce Law in Scotland’ (2012) 63 *Northern Ireland Legal Quarterly* 227; J Horder, *Homicide and the Politics of Law Reform* (Oxford, OUP, 2012); Gretton, ‘Of Law Commissioning’; D Lloyd Jones, ‘The Law Commission and Law Reform in a Devolved Wales’ (Wales Governance Centre Annual Lecture, 2013); E Cooke and HL MacQueen, ‘Law Reform in a Political Environment: The Work of the Law Commissions’ in D Feldman (ed), *Law in Politics, Politics in Law* (Oxford, Hart Publishing, 2013); G Maher, ‘Principles and Politics in Law Reform: Sexual Offences in Scots Law’ 2013 *Juridical Review* 563; S Wilson, ‘Reforming the Law (Commission): A Crisis of Identity?’ [2013] *PL* 20; Stark, ‘The Longer You Can Look Back’; G Palmer, ‘The Law Reform Enterprise: Evaluating the Past and Charting the Future’ (2015) 131 *LQR* 402 (‘The Law Reform Enterprise’); Lord Carloway, ‘To “Mend the Laws, That Neids Mendment”: A Scottish Perspective on Lawyers as Law Reformers’ (speech at the Commonwealth Association of Law Reform Agencies Conference, Edinburgh, 2015); Dyson, Lee and Stark, *Fifty Years of the Law Commissions*; and Lord Pentland, ‘The Scottish Law Commission and the Future of Law Reform in Scotland’ 2016 *Juridical Review* 169.

¹² P North, ‘Law Reform: Processes and Problems’ (1985) 101 *LQR* 338, 338.

¹³ See, eg, GJ Borrie, ‘Law Reform: A Damp Squib?’ (Inaugural Lecture, University of Birmingham, 1970).

¹⁴ See, eg, HL Deb vol 264 col 1160 (1 April 1965) (Viscount Dilhorne).

¹⁵ And such suggestions are actively sought by both Commissions in consultations to those programmes.

When forced to reflect on our views of the Commissions as institutions, separate from any praise for, or criticism of, particular projects, reactions are overwhelmingly positive. Such reactions can be seen, for example, from the respondents to the first *Triennial Review* of the LCEW who unanimously expressed ‘extremely strong support for the functions of the Law Commission to continue’.¹⁶ There were, however, only 46 respondents to that review. Although that is not a trivial number (and it included many eminent names and groups)¹⁷ it is a fraction of the number of people who interact with the Commissions or their work. If we view the Commissions as positive additions to our law reform machinery, we should not take them for granted. And if we have criticisms to make, those are equally important. The Commissions, being government-funded bodies, have had to struggle to justify their existence in times of austerity. The LCEW was one of the bodies at risk of abolition in the Coalition Government’s so-called ‘bonfire of the quangos’ in the Public Bodies Act 2011.¹⁸ The LCEW survived, but the Commissions now operate with increasingly tight funding and under closer scrutiny. For example, the funding received by the LCEW in 2015–16 had not increased in real terms from the amount it received 20 years earlier.¹⁹ The LCEW is also now scrutinised regularly by way of triennial review by the Ministry of Justice as part of the greater accountability of the public bodies that survived the Public Bodies Act. The Commissions therefore need our support to survive, both in the form of interaction with their work, and in understanding how and why they operate in order to maximise such interaction.

The SLC and the LCEW were established by the same legislation, but have always operated slightly differently. Changes made over the years, particularly the enactment of the Law Commission Act 2009, which only applies to the LCEW, have exacerbated such differences. We will see in chapter two that the SLC would not have been created were it not for the establishment of the LCEW. The bodies have had different experiences, particularly with regard to their relationships with government. Those different relationships have resulted, for example, in different responses to pressure caused by falling implementation rates of Commission proposals. Despite both structural and jurisdictional differences, the Commissions have a duty to act in consultation with one another under the 1965 Act.²⁰ By comparing the two Commissions, this book, like the Commissions themselves, promotes the sharing of valuable lessons between jurisdictions.

¹⁶ Ministry of Justice, *Triennial Review: Law Commission, Report of Stage One* (2013) para 115.

¹⁷ *ibid* app B.

¹⁸ Public Bodies Bill as introduced, sch 7.

¹⁹ £4.5 million in 1995 and £4.6 million in 2015–16: LCEW, *Thirtieth Annual Report: 1995* (Law Com No 239 (1996)) app 5 and *Annual Report 2015–16* (Law Com No 367 (2016)) app B respectively.

²⁰ 1965 Act, s 3(4).

II. Beyond Great Britain

The sharing of lessons between jurisdictions applies beyond Great Britain. The Commissions were inspired by, and have inspired, other law reform bodies around the world. The Commissions' predecessors, as well as previous domestic bodies, include the New York State Law Revision Commission (established in 1934) and the Louisiana State Law Institute (established in 1938). Law reform bodies modelled on the LCEW and the SLC include the South African Law Reform Commission (established in 1973),²¹ the Australian Law Reform Commission (established in 1975),²² the Law Reform Commission of Ireland (also established in 1975), the New Zealand Law Commission (established in 1986) and the Northern Ireland Law Commission (NILC; established in 2008). Many other law reform bodies across the world pre- and post-date the Commissions. In total, there are at least 30 law commissions, in almost every corner of the world, including, in particular, in Africa, the Caribbean, the Indian subcontinent and the Pacific.²³ Certain aspects of different law reform bodies' experiences are mentioned in this book, where appropriate, to show similarities to, or contrasts with, the LCEW and the SLC. Questions of resources and priorities, as well as commission structure and size, may be very different across the world. The commission model, which has spread (mainly across the Commonwealth), has been adapted from country to country. The Australian Law Reform Commission, for example, has no power to choose its own projects, and faces the challenge of being a federal commission operating alongside regional law reform bodies.²⁴ In New Zealand, Sir Geoffrey Palmer is both former Prime Minister and former President of the New Zealand Law Commission—a career path one would not expect to see in the UK. Furthermore, the typical projects undertaken by a commission are likely to vary from country to country. For example, the Malawi Law Commission's *Annual Work Programme* for 2012 listed ongoing projects on the review of statutes relating to witchcraft and to traditional leaders ('chiefs').²⁵ In smaller jurisdictions or provinces, part-time solutions may be preferred, such as in Northern Ireland,²⁶ or 'unique'

²¹ Originally called the South African Law Commission.

²² Originally called the Law Reform Commission.

²³ Palmer, 'The Law Reform Enterprise' 402. The Commonwealth Association of Law Reform Agencies lists 35 commissions, including provincial commissions in Canada and Australia, as members or associated bodies: www.calras.org/Membership/current.htm. The website also notes, however, that there are 'more than 60 law reform commissions and other permanent law reform agencies' worldwide: 'Background, History and Support' www.calras.org/About/history.html.

²⁴ See K Cronin, 'Working on the Larger Canvas—Law Reform in a Federal System: Thoughts on Forty Years of the Australian Law Reform Commission' in Dyson, Lee and Stark, *Fifty Years of the Law Commissions*, ch 6.

²⁵ Malawi Law Commission, *Annual Work Programme* (2012) para 1.2. Although it must be noted that the same programme contains projects on, eg, sentencing guidelines (para 1.1) and patents (para 1.2).

²⁶ On the pros and cons of part-time commissions, see SW Stark and N Faris, 'Law Reform in Northern Ireland: Cheshire Cat or Potemkin Commission?' [2016] *PL* 651, 664.

structures may be found, such as in Alberta.²⁷ Certain countries will have to strive harder than others to ensure that all their people are represented. For example, the federal Law Commission of Canada, now abolished, had a particularly difficult task to ensure that it was ‘broadly representative of the socio-economic and cultural diversity of Canada, represent[ed] various disciplines and reflect[ed] knowledge of the common law and civil law systems’.²⁸ That meant recruiting Commissioners from different regions of Canada; Francophones, Anglophones and Indigenous Canadians; and common lawyers and civil lawyers; in addition to the usual task of trying to secure a gender balance and representation from various areas of law and branches of the legal profession.²⁹

Despite various differences, given the shared roots from which many law reform bodies stem it may be that other jurisdictions will find material in this book that is familiar or helpful to them. It may even be that countries seeking to establish a new law reform body may find inspiration within these pages for techniques to employ, and those to avoid. It has even been suggested that the Commissions’ ‘method’ could be employed by other bodies such as the EU.³⁰ It may be, therefore, that this book can inspire other bodies which seek to mimic the Commissions’ approach. And of course, there may be elements from other jurisdictions which can be adopted by, or adapted for, the GB Commissions.

III. Overview

Understanding the reasons for the Commissions’ establishment is important in order to ascertain whether those reasons still endure today. If not, it follows that we might expect the present-day Commissions to function differently from how they did in 1965. In chapter two, therefore, archival material is used to trace the background to the Commissions’ formation.

The legislation which established the Commissions, the 1965 Act, is vague and lacks definition. For example, the 1965 Act leaves the scope of the Commissions’ activity unclear by mandating that they should ‘take and keep under review all the law’.³¹ Because of the size of the Commissions, they must select only certain areas of law to examine.³² As the Law Commissions Bill progressed through

²⁷ M Kirby, ‘Forty Years of the Alberta Law Reform Institute—Past, Present, Future’ (2008–09) 46 *Alberta Law Review* 831, 845.

²⁸ Law Commission of Canada Act 1996, s 7(3).

²⁹ Y Le Bouthillier, ‘The Former Law Commission of Canada: The Road Less Travelled’ in Dyson, Lee and Stark, *Fifty Years of the Law Commissions*, 102.

³⁰ H Beale, ‘The Law Commission Method: Exportable to the EU?’ in Dyson, Lee and Stark, *Fifty Years of the Law Commissions*, ch 24.

³¹ 1965 Act, s 3(1).

³² Each Commission consists of five Commissioners (including the Chairman) and supporting staff. The smaller number of SLC supporting staff is considered in ch 6.

Parliament, concerns were raised about other issues not dealt with in the legislation. It was unclear, for example, how parliamentary time would be found for the Commissions' proposals,³³ or how they would manage to codify the law.³⁴ Concern had also been expressed, particularly in Scotland, as to what the purpose of the Commissions' duty to cooperate was,³⁵ and whether Scots law would be completely harmonised with English law.³⁶ Because the 1965 Act still provides the Commissions' basis, the questions it did not address remain unanswered to this day. Answers to those questions are proposed in the remainder of the book.

The first ambiguity which must be resolved is the proper scope of the Commissions' activity, and the 1965 Act's broad duty to 'take and keep under review all the law' is our starting point.³⁷ The Commissions, the Ministers³⁸ and government have discretion to select, approve or refer suitable projects for the Commissions' examination. Such discretion is essential because the Commissions cannot, due to their limited resources, examine all the law at any given time. Commission, ministerial and governmental discretion must, however, be properly structured and exercised in order to target the Commissions' resources to the most deserving projects. To address the fact that the 1965 Act leaves the Commissions' scope of activity extremely broad, the Commissions have developed their own methods of attempting to ensure that the most deserving projects are embarked on. Since 1997, in an attempt to structure its exercise of discretion, the LCEW has used three criteria when selecting a project: availability of resources; suitability of the project; and importance of the project.³⁹ The same criteria were adopted by the SLC in 2005.⁴⁰ Chapter three demonstrates how those criteria should be developed in both their content and their use. The discretion enjoyed by Commissioners, Ministers and government can be controlled to improve the Commissions' output and the assessment of that output. Properly developed, the criteria provide a way of securing the scope of the Commissions' activity to protect them from arbitrary control (whether by the Ministers, the rest of government or their own Commissioners). Careful application of the criteria would ensure that the Commissions' limited resources are allocated wisely, and transparent project selection would protect them from criticism for acting, or failing to act, in certain areas. The project-selection criteria are central to this book and further reasons for their importance are advanced in subsequent chapters.

Implementation by legislation has historically been the main measure of a Commission project's success. Lord Scarman, the LCEW's first Chairman, said

³³ eg, HC Deb vol 706 cols 60, 64–65 (8 February 1965) (Sir John Hobson); col 88 (Sir David Renton).

³⁴ 1965 Act, s 3(1); eg, HC Deb vol 706 col 146 (8 February 1965) (Norman Wylie).

³⁵ 1965 Act, s 3(4).

³⁶ eg, 'No Complete Assimilation with English Law: Mr Ross Gives Assurance' *The Scotsman* (9 February 1965).

³⁷ 1965 Act, s 3(1).

³⁸ The Lord Chancellor for the LCEW and Scottish Ministers for the SLC: 1965 Act, s 6(2).

³⁹ LCEW, *Thirty-First Annual Report: 1996* (Law Com No 244 (1997)) app A.

⁴⁰ SLC, *Seventh Programme of Law Reform* (Scot Law Com No 198 (2005)) para 1.2.

that the LCEW's reputation would 'stand or fall by the contributions it makes to enacted law'.⁴¹ Although implementation cannot be ignored, it is misguided and dangerous to equate it with success for three reasons. First, concentrating solely on implementation risks usurping chapter three's project-selection criteria, which have been designed specifically to ensure that the most deserving projects are embarked on. A project selected according to proper consideration of those criteria should not be vetoed simply because its eventual implementation is an uncertain prospect. Second, too much emphasis on implementation risks reduction of the Commissions' independence by making it possible that they will pander to government in both the projects they select and the substantive reforms they propose. One of the project-selection criteria, the suitability of the project, involves considering the likelihood that the Commissions are the only bodies able or willing to examine an area of the law. One consequence of a loss of independence is, therefore, that the reform of such areas of law would be neglected. Third and finally, implementation gives no indication of the quality of the proposed reforms. Commission recommendations are not always uncontroversial and cannot always be assumed to be good.⁴² Furthermore, overconcentration on implementation puts the quality of the Commissions' recommendations at risk. They may be tailored to suit the government, rather than being based on the 'careful research and wide consultation' the Commissions are often admired for.⁴³ Because of an increasing focus on providing value for money, the Commissions perceive governmental pressure to measure their achievements by demonstrating the implementation of their proposals as legislation, as even a glance at any recent Commission annual report reveals. If the Commissions are not seen to score quick implementation points, they may be vulnerable to abolition.⁴⁴ Governments do not see any value in 'fine academic analyses of a theoretical nature if none of the work reaches the statute book'.⁴⁵ This book therefore addresses the question of how to balance independence and implementation satisfactorily by providing a more sophisticated way of assessing the outcome of Commission proposals than merely equating legislative implementation with success. In this book, 'implementation' is understood in its full, ordinary meaning, to include not only projects implemented (fully, substantially or partially) by primary legislation, but also by less usual means such as secondary legislation and judicial decision.

Three arguments to alter the way implementation is viewed are advanced in chapter four. First, it is argued that the broad interpretation of implementation (which includes, for example, proposals which have helped to shape the common law),

⁴¹ L Scarman, *Law Reform: The New Pattern (The Lindsay Memorial Lectures)* (London, Routledge & Kegan Paul, 1968) 17. *cf* Palmer, 'The Law Reform Enterprise' 407.

⁴² See, eg, ch 4, section V.

⁴³ LCEW, *Thirtieth Annual Report: 1995* (Law Com No 239 (1996)) para 1.2, quoting Lord Mackay when he was Lord Chancellor.

⁴⁴ Abolition of law commissions is not unheard of. For example, the federal Law Commission in Canada has been abolished twice, once in 1993 and once in 2006. The recent Northern Irish experience is discussed in ch 6, section III.C.

⁴⁵ Palmer, 'The Law Reform Enterprise' 407.

to a certain extent already used by the Commissions, should be more transparent. This interpretation better reflects the impact the Commissions have actually had on the law than slavish adherence to enacted law. Second, to reduce the expectation of immediate implementation, it is recommended that government should be obliged periodically to reconsider, and make public, its position regarding rejected Commission proposals. Third and finally, it is proposed that the Commissions' output should be viewed as a whole to reflect the fact that the selection criteria often pull in different directions. In particular, certain projects might be sufficiently important that their examination can be justified, notwithstanding the fact that immediate implementation is uncertain.

As already mentioned, one of the Commissions' specific tasks is to strive for the codification of the law.⁴⁶ Despite codification being a divisive topic in the British jurisdictions, it was made one of the Commissions' tasks due to dissatisfaction with the law in 1965—both the common law and the cluttered statute book—and a desire to harmonise and codify UK law for entry into what is now the EU.⁴⁷ In chapter five, it is argued that codification projects are less likely than certain other projects to satisfy the chapter three project-selection criteria. Because of their limited resources, the Commissions have achieved little by way of codification to date. They have discovered that reform and codification cannot happen simultaneously and now therefore prioritise reform, with a view to returning to codify the law at a later stage. The second, codificatory stage of such projects is less likely to satisfy the 'importance' project-selection criterion than projects proposing substantive reform. It is therefore entirely proper that the Commissions tend to dedicate their limited resources to projects not designed to codify the law immediately. Furthermore, certain developments have restored the reputation of the common law and its capacity to be a tool of law reform, reduced the need for decluttering the statute book, and entry into (and now likely exit from) the EU took place successfully without codification. In addition, the term 'codification' has been used inconsistently by the Commissions because it has no precise meaning. Removal of the specific codification duty would remove the confusion caused by the term, as well as the unrealistic pressure to codify, thereby silencing critics of the Commissions' 'disastrous' codification record.⁴⁸

Examination of the changing constitutional landscape within which the Commissions operate reveals further reasons why development of chapter three's project-selection criteria is needed. In 1965, the Commissions were actively encouraged by government to harmonise the laws of England and Scotland 'wherever possible'.⁴⁹ The motivation for such harmonisation was impeding entry into the EU and the desirability of the UK being perceived as 'one unit'.⁵⁰

⁴⁶ 1965 Act, s 3(1).

⁴⁷ See ch 5, section II.

⁴⁸ F Bennion, 'Additional Comments' in G Zellick (ed), *The Law Commission and Law Reform* (London, Sweet & Maxwell, 1988) 63.

⁴⁹ AG Brand (SLC) to HHA Whitworth (Scottish Office), 'Full-time Commissioner', 29 September 1967, National Records of Scotland (NRS) HH83/702.

⁵⁰ LCB Gower, 'A Comment' (1967) 30 *MLR* 259, 260.

Since the turn of the twenty-first century, devolution signalled a new era for Scotland, Wales and Northern Ireland. Not only has devolution made the prospect of a harmonised ‘British’ law less likely (with the result that a project’s potential to harmonise the law is less important when deciding its viability), but it has also posed new practical challenges. For example, Welsh devolution has resulted in the LCEW having to adapt in order to effectively promote law reform in both England and Wales. The Wales Act 2014 has made significant changes to the 1965 Act to increase Welsh input into the LCEW. Since devolution, a greater number of governmental parties may interact with the Commissions, necessitating urgent adoption of clear project-selection criteria in order that the most appropriate Commission projects are selected, approved and referred.

The Commissions have a duty to ‘act in consultation with each other’,⁵¹ which sometimes leads to collaborative Commission projects. Tripartite projects with the establishment of the NILC in 2008 raised new challenges,⁵² although the fate of the NILC is presently uncertain, it having had its funds withdrawn in April 2015.⁵³ Collaborative projects raise difficulties, not only due to the legal differences between the jurisdictions, but also due to the practical problem of coordinating the Commissions. It is argued in chapter six that the project-selection criteria are essential in ensuring that the most valuable collaborative projects are embarked on. In fact, they are needed more than ever to ensure that both (or all three) Commissions are clear about which projects deserve the use of their limited resources.

IV. Some Final Preliminaries

To conclude this introductory chapter, a few short words on abbreviations and other practicalities are necessary. References to England and English law include Wales, except where specified. As noted above, the Law Commission for England and Wales is abbreviated as ‘LCEW’ in this book, although its official title is simply the ‘Law Commission’, something which agitated certain Scots during its creation.⁵⁴ The Scottish Law Commission is abbreviated as ‘SLC’. Any reference to ‘the Commissions’ or ‘Commission’ in the sense of, for example, ‘Commission work’ or ‘Commission proposals’ applies to both the LCEW and the SLC equally unless specified. The term ‘GB Commissions’ is used to refer to both the LCEW and the SLC where discussion of international bodies could cause any confusion.

Except where otherwise provided, the law is stated as at 31 December 2016.

⁵¹ 1965 Act, s 3(4).

⁵² 1965 Act, s 3(4) as amended by the Justice (Northern Ireland) Act 2002, sch 12, para 9.

⁵³ See further ch 6, section III.C; and SW Stark and N Faris, ‘Law Reform in Northern Ireland: Cheshire Cat or Potemkin Commission?’ [2016] *PL* 651.

⁵⁴ HL Deb vol 265 cols 399–400 (14 April 1965) (Earl of Selkirk).