

Fifty Years of the Law Commissions

The Dynamics of Law Reform

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Introduction

MATTHEW DYSON, JAMES LEE AND SHONA WILSON STARK

This collection arises from a conference held at the United Kingdom Supreme Court in July 2015 which marked the fiftieth anniversary of the Law Commissions Act 1965. The book celebrates fifty years of institutional law reform in the United Kingdom, embracing the Law Commission of England and Wales and the Scottish Law Commission, as well as the Northern Ireland Law Commission. Law reform bodies are not a new concept in England. Attempts were made to tidy the statute book as far back as 1593,¹ and Sir Matthew Hale's seventeenth century commission has been described as the 'first law commission'.² Law reform bodies have at least as long a history in Scotland. As long ago as 1425, an Act sought to appoint a commission to 'examyn the bukis of law of this realme ... and mend the lawis that nedis mendment'.³ In the event, this early commission was 'fruitless', and over the years many other similarly unsuccessful attempts were made.⁴ The Law Commissions of 1965 appear to have been planted in more fertile soil.

The book is divided into eight parts reflecting the panels at the conference combined with the introductory and concluding keynote addresses. Each panel was chaired by a distinguished law reformer who has also written a brief introduction to that panel for this volume. The panels were selected to frame key aspects of the Commissions' role in law reform:

1. Introduction
2. The First Half-Century of the Commissions
Reflecting on the origins and development of the Commissions
3. Institutions, Commissions, Committees, Codifiers
Analysing the legal actors and configurations of reformers and their work
4. The Many Faces of Law Reform
Surveying and critiquing the non-legislative means of law reform

¹ For a summary of previous English law reform bodies, see M Kerr, 'Law Reform in Changing Times' (1980) 96 *LQR* 515, 518–521.

² S Sedley, *Lions under the Throne: Essays on the History of English Public Law* (Cambridge, Cambridge University Press, 2015) 92.

³ Statute Law Revision Act 1425 (APS II 10, c 10).

⁴ See HRM Macdonald, JC Mullin, TB Smith and JF Wallace, *The Laws of Scotland: Stair Memorial Encyclopaedia*, vol 22, (Edinburgh, 1987) para 627, and see paras 627–664 for a summary of the pre-1965 Scottish law reform bodies.

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5. Implementation by Statute
Examining the role of statute in calculating the success of reform
6. How Law Commissions Work
Exploring the ways the Commissions do, could and should function
7. Courts and Commissions
Studying the relationship between the Commissions' work and the courts
8. Commissioning the Future
Looking forward to the challenges and reforms of the future

This Introduction will pick out some of the themes that have emerged across the parts of the book. For the sake of convenience, when we refer here to 'the Commissions', we mean both the Law Commission of England and Wales (Law Commission) and the Scottish Law Commission.

The collection brings together judicial and academic perspectives with commentary from past and current Commissioners on the issues relating to law reform. Thus we have essays from those who have served as Chairs of the Law Commission (Ether-ton, Carnwath, Toulson, Arden, Munby, Lloyd Jones) and the Scottish Law Commission (Drummond Young and Pentland). In addition, there are essays by former and serving individual Commissioners from England and Wales (Hale, Burrows, Paines, Beale, Beatson, Lewis, Harpum, Ormerod, Cooke) and from Scotland (Hodge, Clive, Gretton, Dunlop, MacQueen, Johnston). The Chief Executives at the time of the conference (Lorimer and McMillan) offer comments on the operation of the Commissions today. There are external perspectives, from academics and parliamentarians independent of the Commissions (Mitchell, Beith, Dennis, Stark, Lee and Dyson) and from law reformers from other legal systems drawing comparisons on a wider scale: Northern Ireland (Faris), Australia (Cronin and McDonald), Canada (Le Bouthillier), Ireland (Binchy) and New Zealand (Hammond and Keith).⁵

I WHOSE ROLE IS LAW REFORM?

Lord Reid once opined that '[p]eople want two inconsistent things; that the law shall be certain, and that it shall be just and shall move with the times'.⁶ The need for a legal system to be both predictable and certain as well as to develop and adapt to societal changes is one of the fundamental tensions the Commissions were created to ease. The creation of statutory bodies to review law and recommend reform clearly raised questions of their relationships with other reforming bodies and which matters the Commissions are best suited to examine and on which to propose reform. Here we briefly consider the Commissions' relationship with four bodies: government, Parliament, the courts and the wider reform community.

⁵ See section IV below.

⁶ Lord Reid, 'The Judge as Law Maker' (1972–73) 12 *Journal of the Society of Public Teachers of Law* 22, 26.

Government. The Commissions are advisory bodies and the primary addressee of their advice is the government. The government is vital in approving programmes of reform and indicating willingness to reform in the areas examined in specific projects, as well as playing a role in the Commissions' long-term funding. The relationship between the Law Commission of England and Wales and government has seen significant changes recently, with the Law Commission Act 2009 and the protocol made under it, as discussed in, for instance, Sir Terence Etherton's chapter, and our section II below. Recent changes made by the Wales Act 2014 have increased the Welsh Government's stake in Commission-driven law reform, as discussed in Sir David Lloyd Jones' chapter.

While the legal framework may be different, the Scottish Law Commission too has been nurturing its relationship with the Scottish Government, as the chapters by Hector MacQueen and Malcolm McMillan demonstrate. In fact, these relationships have changed and developed over time, however much it is easy to imagine the events of today are particularly important or novel. The relationships depend strongly on the actors involved at the relevant time. The cycle of re-negotiating the formal and institutional connections can also function as a strengthening of the underlying personal relationships and their legacies. The Commissions' relationships with government require a careful balancing of the need to maintain implementation rates with the need for independence in project selection and reform proposals. That balance is explored in various essays in this volume, particularly those by Sir Terence Etherton and Sir Jack Beatson.

Legislators. Even if the government is the first addressee of the Commissions' work, the Westminster and Scottish Parliaments and the Welsh Assembly are key to the success of the Commissions' goals. The governmental duty to lay Commission reports before the legislatures is crucial in disseminating the Commissions' work to a wider audience. This volume contains numerous examples of the importance of parliamentary support and supporters. Just like government, this relationship requires care and respect, as well as periodic renewal. As Sir Terence Etherton notes, reform of the governmental mechanisms for law reform naturally dovetail with giving Parliament greater oversight of the work of the Commission in England. The relationship with Parliament is also a two-way street, independent lanes but ideas moving in both directions. On the one hand, the Law Commission's Bills must go through Parliament, surviving whatever changes are made or attempted during that passage. The Law Commission also needs more general political support for its mission. Going even further, Kathryn Cronin in her chapter stresses the need for reformers to attend to delegated legislation, especially in a federal system. On the other hand, parliamentarians recognise the expertise of both Commissions and the quality of their work. Lord Beith provides good examples of the problems and possibilities of parliamentary engagement. As chairman of the House of Commons Justice Committee, he himself had called for the Law Commission to examine or re-examine areas of law.⁷ Competition for parliamentary time and attention has led to procedures where uncontentious Commission Bills can more easily

⁷ eg House of Commons Justice Committee, *Joint Enterprise: Follow-up* (2014–15, HC 310) 20.

find a place in the parliamentary timetable. This procedure is used carefully, for fear of one even mildly contentious Bill being met with a backlash and the closing of the route altogether. Further innovation for more than completely uncontroversial Bills could well be important for the future. The possibilities are fascinating: Sir Grant Hammond considers some alternatives in parliamentary practice, and Matthew Dyson considers comparisons in law making both internationally, and between Commission proposals and the quality of non-Commission proposals. Similarly, the story does not end with legislation: as Andrew Burrows notes, post-legislative scrutiny is an important part of gauging the success of a law reform enterprise, and it is one that the legislator could meaningfully be involved in.

Courts. The Commissions and the courts are engaged in, as Lord Drummond Young puts it in his paper, a ‘continuing dialogue’. Several chapters throughout the volume consider when it is appropriate for the courts to develop the law and when reform should be enacted by legislation, what Andrew Burrows calls the ‘elusive boundary’.⁸ Lady Hale and Sir Kenneth Keith each argue for flexible approaches, depending upon the context. As James Lee points out, there are many reasons why Commission material might be used, let alone why it might be decisive. For his part, Burrows’ view is that the Commissions should focus their energies on areas which the higher courts cannot realistically be expected to reform. For the future, English higher courts will hopefully continue to receive the cases that allow difficult areas to come to light and then be resolved, but that is not certain. Movements away from expensive litigation, whether towards arbitration or mediation, or other forms of resolution, may deprive courts of the material. The lack of material is a problem known well to the Scottish legal system. As Hector MacQueen notes, Scotland lacks the ‘steady stream and quality of case law’ which might give judges the opportunity to develop the law and this, he argues, contributes to the distinctive role of the Scottish Law Commission. Lord Pentland also sees the Commission’s role as particularly important in contrast with the constraints and political priorities affecting government departments.

Occasionally, a Commission may appeal directly to the courts to develop the law. In certain cases, the courts do pick up Law Commission recommendations and run with them, as happened in respect of damages for personal injury, as Lords Toulson and Carnwath note. In Lee’s essay, the recent history of the illegality defence in private law is given as an unfortunate example of the Law Commission deferring to the courts but the judges only muddying the waters further. Charles Harpum’s chapter details the uncertainty over the extent to which a Commission report which led to legislation may be used by the courts when it comes to statutory interpretation. Harpum uses the Land Registration Act 2002 as a case study, but his analysis has application well beyond that landmark statute.

One part of the relationship between courts and the Commissions is the role performed by the apex court, now the Supreme Court. The Commissions were

⁸ Chapter 20 (Andrew Burrows). See also AS Burrows, ‘The Relationship between Common Law and Statute in the Law of Obligations’ (2012) 128 *LQR* 232.

created one year before the House of Lords Practice Statement on Judicial Precedent, in which their Lordships adopted the power to depart from their own previous decisions.⁹ The Practice Statement was a direct result of the establishment of the Commissions. The subject of precedent was a topic in the Scottish Law Commission's *First Programme of Law Reform*.¹⁰ The project was no doubt selected by one of the first Commissioners, TB Smith, who had previously criticised the prospect of English rules of precedent creeping into Scots law.¹¹ Lord Gardiner who, as it is widely known, was instrumental in the establishment of the Commissions, was alerted to the project and devised the Practice Statement on the back of the 'Scottish initiative'.¹² Such a move was crucially linked to the Commissions' duty to codify the law. Precedent could no longer be allowed to be 'sovereign' if codification was to be pursued and so the 'rigidities' of the House of Lords being bound by its own decisions had to be removed.¹³

The close relationship between the Commissions and the courts continues today. Of our 12 current Supreme Court Justices, four have previously held roles at the Commissions.¹⁴ They, and the other Justices, make reasonably frequent use of materials published by both the Law Commission and the Scottish Law Commission,¹⁵ as well as recommending that certain areas of law are studied by the Commissions.¹⁶ It is not just a matter of the Supreme Court. Sir Jack Beatson discusses his long-lasting connections with the Law Commission's work in his contribution. Elizabeth Cooke details her own personal experience of this in her paper. A former Commissioner of the Law Commission of England and Wales, she is now Principal Judge of the Land Registration Division of the First Tier Tribunal (Property Chamber)—a post created by legislation based on a Law Commission proposal.

The wider community is also vital for many aspects of the Commissions' work. One obvious form of this is in terms of personnel. While the Chairman of each Commission is a senior judge, the bulk of the Commissions is made up of practitioners and academics, in roughly equal measure. Another important form of this connection is in the consultees who give their time and expertise without remuneration, not

⁹ In *Austin v Southwark London Borough Council* [2010] UKSC 28, [2011] 1 AC 355 Lord Hope confirmed that the Supreme Court had inherited the power to use the Practice Statement if it so wished (at [25]).

¹⁰ SLC 1 (1965) paras 16–19.

¹¹ TB Smith, *The Doctrines of Judicial Precedent in Scots Law* (Edinburgh, W Green and Son, 1952); TB Smith, *British Justice: The Scottish Contribution (The Hamlyn Lectures)* (London, Stevens, 1961) 84–85.

¹² L Blom-Cooper, '1966 and All That: The Story of the Practice Statement' in L Blom-Cooper, B Dickson and G Drewry (eds), *The Judicial House of Lords 1876–2009* (Oxford, OUP, 2009) 134.

¹³ L Scarman, 'A Code of English Law?', Lecture given at the University of Hull (1966) 14; L Scarman, 'Codification and Judge-made Law: A Problem of Co-Existence', University of Birmingham Lecture (1966) 17.

¹⁴ Lady Hale DPSC was in 1984 the first woman to be appointed as a Law Commissioner in England and Wales, Lord Carnwath JSC (1999–2002) and Lord Toulson JSC (2002–06) were Chairmen of the Law Commission of England and Wales, and Lord Hodge JSC was a part-time Commissioner for the Scottish Law Commission (1997–2003).

¹⁵ See, eg, *Granatino v Radmacher* [2010] UKSC 42, [2011] 1 AC 534; *HM Advocate v P* [2011] UKSC 44, 2012 SC (UKSC) 108; *Gow v Grant* [2012] UKSC 29, 2013 SC (UKSC) 1.

¹⁶ See, eg, *Joseph v Spiller* [2010] UKSC 53, [2011] 1 AC 852; *Jones v Kaney* [2011] UKSC 13, [2011] 2 AC 398.

just the legal profession but other interested parties. Depending on the project such parties could include Land Registry, banks, insurance companies, other businesses, victims' groups, charities and even the general public. In this volume, Lord Hodge praises the Commissions' practice of consultation as greatly enhancing the authority of their reports and it is easy to see why. The Commissions are trusted to consult widely, listen carefully and reform appropriately and the whole endeavour marks them out in legislation and law reform. The role of the wider community is vital, as Stephen Lewis so ably shows in reference to the reform of various aspects of the law of insurance. Indeed, Lewis shows how the congruence of different communities, where individual interests align and ideally even where they do not, is a powerful force for reform.

However, as Sir Jack Beatson notes, 'all worthwhile law reform has winners and losers'. Certain objections will simply be that developing a more nuanced position may be too difficult or not a priority. As former Scottish Law Commission Chairman Lord Davidson remarked, '[m]any lawyers are cool, or even hostile, to large-scale law reform' simply because 'they regard it as an intolerable extra burden to have to learn a whole new scheme of law'.¹⁷ Indeed, such hostility has been advanced by the government as one reason to reject a Law Commission proposal.¹⁸ The task of the Commissions is to engage all sides throughout the process of reform and implementation, which is clearly a tall order. Beatson suggests 'education and persuasion' as the tools of the Commission(s). The Commissions succeed in producing incredibly valuable and educational materials in their consultations and their reports, as is evident from the perusal of any law library shelf. However, behind the scenes *persuasion* must be far more nuanced and flexible, with the Commissions constantly seeking to understand a proposal from the stakeholder's perspective and to persuade all and sundry about its overall benefits. This process starts, as David Johnston notes, from the very conception of a project, and continues after implementation. The task of engaging with stakeholders merges with the task of persuading government and Parliament, who will also react to and be lobbied by the same stakeholders in due course. Such coalition building, previously rare amongst British political parties, is certainly the reality of the Commissions as law reformers, as Sir James Munby points out.

While all of these four groups—government, legislators, courts and the wider community—each combine with the Commissions in law reform, the Commissions are perhaps in a special position in rarely being directly blamed when reforms do not occur. It may be that we have not reached the position when the Commissions are thought to have the obligation to make change happen, such that a failure to reform can be pinned on them. Clearly such a label would be unfair given the complexity of the law reform process, but the need to do, or be seen to do, 'something' in the face of a legal problem is a problem for many of the Commissions' partners.

¹⁷ Lord Davidson, 'Law Reform—Who Cares?' (1992) 37(4) *Journal of the Law Society of Scotland* 130, 132.

¹⁸ Ministry of Justice, *Report on the Implementation of Law Commission Proposals* (HC 1900, 2012) para 50, where the government rejected LC 314, *Intoxication and Criminal Liability* (2009) on the basis that (inter alia) it would replace 'a complex but well understood process with a complicated new test which practitioners would need to master'.

The Commissions have, as yet, rightly been given the benefit of the doubt in taking some time to craft most of their proposals. Of course, there are exceptions, whether by very fast turnaround, such as the urgent work Beatson has noted, or by delayed results which are no less important for being delayed, as Hale and Stark note. The result has also been that sending a matter to the Commissions can be doing ‘something’ and, it should be said, one of the better forms of ‘something’ that could be done. Projects should not, however, be referred to the Commissions simply as a way of kicking difficult issues into the long grass. The protocols in England and Wales should ensure this does not happen, together with the project-selection criteria used by both Commissions (importance, suitability and resources) which should ensure that the Commissions’ finite resources are targeted towards the most deserving projects.

In what areas should the Commissions propose reform? Given what has just been said, it will come as no surprise that this is in part a question of relative competence. That is, based on the relationship enjoyed at that time between the Commissions and the other bodies just mentioned, who should propose law reform? This is a matter addressed head on by Sir Kenneth Keith, who notes that matters to consider include the constitutional importance of the issue, any international dimension and whether a practical answer, without legislation, would be more effective or whether it could lead to a fudge. He concludes with a functional question: ‘which body or combination of bodies, is best qualified, following what procedures and with what principles and product in mind to undertake the task?’

One of the questions arising repeatedly in this volume is how the Commissions should prioritise their resources. In particular, the question of whether the Commissions should be limited to ‘lawyers’ law’, focusing on technicalities otherwise unlikely to be examined, is raised by numerous contributors. This question was addressed shortly before our conference by Sir Geoffrey Palmer in his Scarman Lecture, where he put forward the view that the Commissions should not shy away from ‘big policy’ issues.¹⁹ Such a view may not be widely shared in the British jurisdictions despite experiences of law commissions elsewhere having responsibility for such topics. For example, Dame Mary Arden highlights that the South African Law Commission has dealt with euthanasia, a topic which is instinctively not one with which the Great British Commissions might deal. It is striking that Palmer is both former Prime Minister of New Zealand and former President of the New Zealand Law Commission. Such a mixture of politics and law reform would be unlikely to be seen in Commissions on these shores and may have influenced Palmer’s perspective. Contrary to Palmer, Sir David Lloyd Jones argues that the Commissions may be at their best when delivering on lawyers’ law. But there is no universal formula. While accepting that there is no ‘bright line’, Lloyd Jones indicates his view that the more politically controversial a topic, the less likely it is to be appropriate for the Commissions.²⁰ Lord Toulson offers an examination of the role for the

¹⁹ G Palmer, ‘The Law Reform Enterprise: Evaluating the Past and Charting the Future’ (2015) 131 *LQR* 402, 414.

²⁰ See also chapter 7 (Eric Clive).

Commissions in a legislative system of what he identifies as ever-increasing complexity, complemented on this point by Barbara McDonald's insights from her involvement in the Australian attempts at privacy reform. Similarly, Yves Le Bouthillier frames the discussion of the work of a Commission not just in terms of its successes, but in its role in bringing together disparate legal actors and examining social issues rather than 'lawyers' law'. Le Bouthillier has defended the now defunct Law Commission of Canada from those who have suggested that its broad remit caused its demise. As Le Bouthillier argues, the first Law Reform Commission of Canada had a more 'traditional' remit yet it too was abolished. In creating the second Law Commission of Canada, a different approach was deliberately chosen. Le Bouthillier ends with the hope that a new Commission for Canada will be established—and that hopefully the third time will be the charm. Dyson discusses the objects of law reform, particularly outside of the classic domain of substantive law and in the light of what the law will need to be in the future.

William Binchy's provocative chapter argues that Commissions need carefully to consider their independence, not only from the branches of government, but also from external bodies. Le Bouthillier's essay also emphasises the importance of the independence of a Commission for the authority which its recommendations may command.

II THE BUSINESS OF LAW REFORM: IMPLEMENTATION AND BEYOND

Many of the essays in this collection engage with the idea of implementation. Stark's essay offers a detailed assessment of implementation rates for the Law Commission and Scottish Law Commission, and suggests revisions to how the Commissions themselves should calculate their rates, in terms of both what counts as 'implementation', and the applicable timeframe. Dunlop, in her chapter, details the 'value added' by the Commissions beyond implementation by primary legislation. Hammond's paper provides a statistical analysis of implementation rates across a range of 12 law reform bodies: Sir Grant concludes that the failure of some reports to be implemented tends to lie at the feet of parliamentary processes, rather than in inherent deficiencies of Commission proposals.

In the 50 years of the Commissions, lessons have been learned. It is instructive to trace the evolution of the Commissions' roles and positioning through their first 50 years. Paul Mitchell's essay details the strategy of the Law Commission in its early years. The Commissions now occupy an established space in our machinery of law reform and appear to behave slightly differently. Similarly, Lord Pentland's essay contextualises the challenges faced by the Scottish Law Commission in establishing itself as an independent driver of law reform in Scotland. He argues that the early Scottish Law Commission demonstrated its independence immediately by tackling the controversial topic of corroboration, a 'sacred icon' of Scots law. In so doing, the Scottish Law Commission set the tone for the decades which have followed. Sir Jack Beatson's chapter gives a survey of the many practical intricacies of the work of the Law Commission in the late 1980s and early 1990s.

As noted already, the fiftieth anniversary came at a time of evolution for the Commissions in the nature of their work and their relationships with government. Many of the chapters engage with this evolution. For the Law Commission of England and Wales, the new regime is detailed in the chapter by Sir Terence Etherton, who was Chairman at the time of the changes. The changes are potentially far-reaching and set the format for Commission work for decades to come.

On the one hand, there have been fears that the Law Commission Act 2009 focuses any assessment of the Law Commission on the implementation of reports, rather than seeing any value in the extensive research, consultation, drafting and promulgation of reports.

On the other hand, the 2009 Act and its accompanying protocol are silent on these issues, and the Law Commission itself disputes this effect. The 2009 Act introduces new governmental accountability for the implementation of Law Commission reports, in that an annual report must be issued by the Lord Chancellor, indicating what decisions have been made about proposals submitted to him during that year. Political considerations, both practical and policy-based, are given a specific role in shaping Law Commission policy: there is also now an agreed protocol between the government and the Law Commission (and a separate protocol between the Law Commission and Welsh Ministers), which requires the specific endorsement of a government department before the Law Commission can even begin a project. Although ministerial approval has always been required before embarking on a project,²¹ the 2009 Act arguably brings the Law Commission closer to government. As noted above, the question considered at various points in this volume is whether that compromise in independence is necessary to improve implementation rates. In the summer of 2014, the Law Commission published its *Twelfth Programme of Law Reform*, which was the second to be developed under the new scheme.²² Given that neither the production of Commission reports nor their implementation can necessarily be expected quickly, it is too soon to tell whether the Law Commission's compromise has been worthwhile.

In February 2015, the Scottish Law Commission began its *Ninth Programme of Law Reform*.²³ Although the 2009 Act does not apply to the Scottish Law Commission, both Commissions benefit from a separate new House of Lords procedure for their most technical and uncontroversial Bills. Such Bills can be introduced in the Lords and their second reading is then debated in a Committee, rather than on the floor of the House. Since 2008, seven Bills have been passed using this new procedure. A similar Committee-based procedure has recently been introduced in the Scottish Parliament for technical and uncontroversial Scottish Law Commission proposals on devolved issues, with the first Bill having been introduced on 14 May 2014.²⁴ These reforms are considered in detail by Hector MacQueen and Malcolm McMillan in their chapters.

²¹ Law Commissions Act 1965, s 3(1)(b) and (c).

²² LC 354, (2014).

²³ SLC 242 (2015).

²⁴ The Legal Writings (Counterparts and Delivery) (Scotland) Act 2015 implemented SLC 231, *Review of Contract Law—Report on Formation of Contract: Execution in Counterpart* (2013).

The essays by current members of the Commissions contain many insights into the operation of these revised procedures, with Nicholas Paines and Stephen Lewis offering examples from their own experiences of the challenges of implementation. The evolution of the Commissions' work can also be seen in reflection over their engagement with other parties. The efforts to change the working relationships of the Commissions with governments can be understood from this perspective. Several essays also emphasise the efforts of the Commissions to engage more widely: a feature which emerges particularly in the contributions from Chief Executives Elaine Lorimer and Malcolm McMillan. David Johnston of the Scottish Law Commission stresses the need for Commissions to engage with those directly interested in the area of law under reform. For its *Twelfth Programme of Reform*, the Law Commission received 'over 250 proposals from 180 consultees',²⁵ demonstrating the extent of stakeholder engagement in potential reforms.

It is also strongly argued by contributors that there are other roles which the Commissions might assume. As mentioned above, Burrows' essay makes a compelling case for greater attention to be paid to the quality of legislation once implemented. Post-legislative scrutiny is also mentioned by Sir Grant Hammond, who gives the example of the New Zealand Evidence Act 2006, which provides its own mechanism for quinquennial review by the New Zealand Law Commission. It remains to be seen whether the Commissions develop a more rounded approach to scrutiny, what we might call an 'after sales' service as part of their obligations, in addition to the after sales services already provided by both Commissions to help generally with their draft Bill's onward journey.

III CODIFICATION

Numerous chapters take as their starting point section 3 of the Law Commissions Act 1965, which lists the functions of the Commissions. The Commissions' duties are 'to take and keep under review all the law with which they are respectively concerned with a view to its systematic development and reform, including in particular the codification of such law'.²⁶ Codification was an attractive proposition when the Commissions were established. Thankfully long gone was what one of the criminal code commissioners of the nineteenth century had called English lawyers' and government's 'codiphobia'.²⁷ It was even believed that codification would be 'essential' for the United Kingdom's entry into what is now the European Union.²⁸ The Commissions began their codification task with 'enthusiastic innocence'.²⁹

²⁵ LC 354, n 22 above, para 1.8.

²⁶ The section continues with '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'.

²⁷ A Amos, *Ruins of Time: Exemplified in Sir Mathew Hale's History of the Pleas of the Crown* (London, V and R Stevens, 1856) xvi, xix.

²⁸ LCB Gower, 'A Comment' (1967) 30 *MLR* 259, 260.

²⁹ TB Smith, 'Law Reform in a Mixed "Civil Law" and "Common Law" Jurisdiction' (1974–75) 35 *Louisiana Law Review* 927, 942.

In its *First Programme of Law Reform*, the Law Commission set out ambitious plans for a contract code, a code of landlord and tenant law and a code of family law,³⁰ followed in its *Second Programme* by a criminal code.³¹ In its *First Programme of Law Reform*,³² the Scottish Law Commission proposed to codify the law of evidence and the law of obligations. The two Commissions worked together on a joint contract code, which was later abandoned. Most of the Commissions' other attempts at codification were divided up into less ambitious projects. In fact, the Commissions have been said to have had a 'disastrous' record of codification,³³ and have steadily moved away from explicitly pursuing it. In 2011, while still Chairman, Sir James Munby remarked that codification was 'little more than a distant memory' for the Commissions.³⁴

In his Scarman Lecture, however, Sir Geoffrey Palmer argued that the Law Commission's interest in codification should be revived.³⁵ The Scottish Law Commission's track record in codification (as well as consolidation) is examined by George Gretton in his chapter. He laments the fact that codification and consolidation are not governmental priorities. On balance, he thinks the Commissions are doing the right thing in not pursuing work that is unlikely to be enacted. He nonetheless encourages the Commissions not to abandon completely their duties under the 1965 Act.

The tale of codification for the Law Commission has been primarily limited to criminal law, and the particular challenges of codification in that field are explored in the chapters by Ian Dennis and David Ormerod. Ormerod sets out the Commission's new approach as being to consider codification of particular areas rather than an overall rationalisation or restatement of the law. The approach of dividing up the aim of codification into 'manageable chunks' is endorsed by Clive in his essay, while Lloyd Jones notes that codification 'may be coming back into fashion'. McDonald's chapter provides valuable reflections on the differences of more systematic reform of private law and the limits of what legislation can reasonably be expected to achieve.

Codification is a good example of the intricate nature of the Commissions' work. It is easy to criticise the Commissions for seeming to have given up on the task of codification. Their reform programmes no longer have the scope in codification they once did, nor does it appear that they push hard for that codification behind the scenes. This may be the result of being pragmatic about what can be legislated on effectively, given that codification will require significant legislation. It is also a shift in principle and it is here that criticism of the Commissions can be undermined. There is no reason why codification should be brought in at once, even though that is the norm in most other countries. Even where that does happen,

³⁰ LC 1 (1965), items I, VIII and X respectively.

³¹ LC 14 (1968), item XVIII.

³² SLC 1 (1965).

³³ F Bennion, 'Additional Comments' in G Zellick (ed), *The Law Commission and Law Reform* (London, Sweet & Maxwell, 1988) 63.

³⁴ J Munby, 'Shaping the Law—the Law Commission at the Crossroads', Denning Lecture (2011) 11.

³⁵ Palmer, n 19 above, 412.

there are usually a series of codes for different core components of the law, such as procedure, civil law and criminal law. The purpose of codification, creating a highly coherent and interrelated set of norms, expressing concepts through consistent terms does not require just one, or a small group of statutes. It could be carried out over a longer time, in a decidedly British model of codification.

A piecemeal approach itself is not new, as the furious effort towards codification in England in the nineteenth century led not to a criminal code, but did lead to the Bills of Exchange Act 1882, the Partnership Act 1890, the Sale of Goods Act 1893, the Arbitration Act 1889 and the Marine Insurance Act 1906. These provisions were easier to legislate and avoided the apparent finality of codification, particularly as contrasted with the earlier judicial power to develop law.³⁶ The difficulty is in drawing the right line between codification and, in effect, suggesting that any single provision is itself 'a code', any more than these 'mini codes' to use Dennis' language, are really codes. As Scarman noted, codification is not a 'term of art' in this country.³⁷ The term 'code' is, however, harder to substantiate the narrower its scope, since codification does imply some level of generality or universality. However, individual provisions getting the law right can always be aggregated later in what would in effect be a further step in the long tradition of consolidation, rather than codification. So long as a clear intellectual thread links each area set of proposals, it can do so across many fields of law and across decades of enactments. Indeed, the Law Commission has aimed to do just that, by breaking up its criminal code into smaller enactments with the view that they can eventually be 'welded together into a Code'.³⁸ The difficulty with that approach is that certain of the Law Commission's criminal reforms were implemented in small parts only.³⁹ Any resultant code would thus not be as comprehensive as one might hope for.

Nevertheless, the Commissions are willing to work, patiently and far-sightedly, towards codification; indeed, perhaps the less obviously that codification work is done, the more successful it will be. That is a troubling statement for a legal system, but if true, renders the Commissions' change of language significantly less problematic to those willing to bend to the pressures of real life. Just like any effect from the new protocols on reducing the independence or wider utility of the Commissions' work in England and Wales, it may well be that a strong and able Commission is the best hope for any legislative environment.

³⁶ See, eg, A Braun, 'The English Codification Debate and the Role of Jurists in the Development of Legal Doctrines' in M Lobban and J Moses (eds), *The Impact of Ideas on Legal Development* (Cambridge, CUP, 2012).

³⁷ L Scarman, 'A Code of English Law?', Lecture given at the University of Hull (1966) 4; L Scarman, 'Codification and Judge-made Law: A Problem of Co-Existence', University of Birmingham Lecture (1966) 3.

³⁸ LC 259, *Seventh Programme of Law Reform* (1999) 19.

³⁹ eg LC 218, *Legislating the Criminal Code: Offences against the Person and General Principles* (1993) (only one recommendation implemented by the Domestic Violence, Crime and Victims Act 2004) and LC 237, *Legislating the Criminal Code: Involuntary Manslaughter* (1996) (partially implemented by the Corporate Manslaughter and Corporate Homicide Act 2007).

IV BROADER HORIZONS

Another theme running through the essays is the question of comparative experience. In this connection, we include, as noted above, contributions from a variety of common law jurisdictions: Northern Ireland, Australia, Canada, Ireland and New Zealand. Lord Neuberger PSC recently, on behalf of the Supreme Court, has extolled the virtues of common law jurisdictions ‘learning from each other’.⁴⁰ Le Bouthillier commends the British procedures for any resurrected Canadian Commission. The chapters by Dyson and Beale point to experience of civilian jurisdictions, and more broadly pan-European efforts at law reform. In his chapter, Sir Kenneth Keith addresses the work of international law commissions. The courts and Commissions also readily recognise the value of comparing the positions as between England and Scotland when proposing reforms.⁴¹ The Commissions’ duty to ‘act in consultation with each other’ facilitates the sharing of lessons and laws between the British jurisdictions.⁴² Clive in his chapter calls for the Commissions to undertake more comparative work—examining the law of other jurisdictions is, after all, one of the Commissions’ explicit duties.⁴³ Johnston, by contrast, urges caution in the deployment of scarce resources. Beatson’s essay further illustrates the difficulties of changing governmental priorities. The fates of the Commissions in Northern Ireland, where the commission is currently suspended, and Canada, which is currently without a federal commission, serve as timely reminders that the existence of law reform commissions cannot be taken for granted, not least in terms of financial restrictions on governmental spending. On the Northern Ireland and Canadian experiences, see the chapters by Faris and Le Bouthillier respectively.

An area of future development for the Law Commission’s work will be a renewed focus on Wales, which is increasingly a different legal system to that in England, as Sir David Lloyd Jones considers.⁴⁴ Section 25 of the Wales Act 2014 provides for a direct relationship between the Welsh Ministers and the Law Commission, so that the Ministers can now refer matters to the Commission. It also imposes an obligation on the Ministers to report to the National Assembly for Wales in respect of Commission proposals relating to Welsh devolved matters.

V CONCLUSION

One of the themes in this book is how the work and successes of the Commissions come in cycles, making a conclusion somewhat artificial. The relationships the

⁴⁰ ‘As overseas countries secede from the jurisdiction of the Privy Council, it is inevitable that inconsistencies in the common law will develop between different jurisdictions. However, it seems to us highly desirable for all those jurisdictions to learn from each other, and at least to lean in favour of harmonising the development of the common law round the world.’ *FHR European Ventures LLP v Cedar Capital Partners LLC* [2014] UKSC 45, [2014] 3 WLR 535, [45].

⁴¹ See, eg, Lord Neuberger in *Marley v Rawlings* [2014] UKSC 2, [2015] AC 129, [87].

⁴² Law Commissions Act 1965, s 3(4).

⁴³ Law Commissions Act 1965, s 3(1)(f).

⁴⁴ See section III of chapter 35 (Sir David Lloyd Jones).

Commissions must nurture require constant care and periodic renewal, the process of implementation feeds back into future projects, codification has become a long game of subtle form and any aspect of national reform has increasingly wide and international dimensions. The statute book gets ever larger, so the task of pruning it of legal curiosities is always a game of catch-up and returning to the same material, returning to the same subject matters over the years.⁴⁵ Perhaps this volume can best be seen as a chance to return to some of the most important aspects and themes in the Commissions' work, easily lost sight of in the drive to perfect or comment on the next report. It is a chance to reflect and plan for the future, informed by expert insights and scholarly debate.

Another cycle to which the Law Commission of England and Wales, as an Advisory Non-Departmental Public Body, is subject is a Triennial Review, with the next due to begin as this volume hits the bookshelves. We hope this book might be read by stakeholders and particularly the government, and that it may therefore be of benefit in supporting the vital role of the Commissions.

When the Law Commissions Bill was passing through Parliament in 1965, Lord Reid remarked that the Commissions could do 'five or ten years of really useful work' by which time 'lawyers' law ought to be in pretty good shape'.⁴⁶ That the Commissions have not achieved that ambitious target is neither a criticism of them, nor of Lord Reid. Neither could have predicted the continued growth in legislation, nor was the role that the Commissions would play really clear at that stage—indeed the debate between Palmer and Lloyd Jones highlighted above shows that it is still not settled. The Commissions continue to provide a valuable service of proposing reforms to lawyers' law and beyond. This volume is not, therefore, a eulogy for the Commissions. Indeed, Part 8 of the volume specifically looks to the future. It is hoped that the essays in this collection demonstrate the vitality of institutional law reform in Great Britain, with different ways of conceiving the contributions made by the Commissions to law reform then, now and next.

⁴⁵ See, eg, Law Commission Statute Law Repeals Team, 'Legal Curiosities: Fact or Fable?' www.lawcom.gov.uk/wp-content/uploads/2015/03/Legal_Oddities.pdf.

⁴⁶ HL Deb 1 April 1965, vol 264 col 1201.