

Of Law Commissioning

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A. THE NATURE AND ORIGINS OF THE SCOTTISH LAW COMMISSION

(1) Introduction

Many factors shape legal history, among them, in recent decades, law reform commissions. Such commissions have attracted some literature,¹ but such is their importance that they deserve more. Many lawyers, practising or academic, know little of them. This paper is a small contribution by a former commissioner of the Scottish Law Commission.²

Playing a part in making legal history is fun. All the serving or former commissioners that I know on either side of the border have told me that they found the work fascinating and rewarding, and that was likewise my own experience. One has the privilege not only of enjoyable work, but also of learning about law in a new way. Long have I have bored anyone polite enough to listen with a little adage of my own making, which is that there are three ways to learn law, namely studying it, practising it and teaching it, and that each offers something that the others do not, but now I would add a fourth: one can learn about law by seeking to reform it. I do not mean simply learning new facts about law, though one certainly learns new facts. I mean new understandings about the nature of law, the way it works.

(2) The purpose of a law commission

What is a law reform commission? In most jurisdictions there are commissions that are set up for particular purposes, such as the drafting or redrafting of a civil code, or of a new insolvency law, and so on. They are single-purpose and time-limited. In the UK too there have been countless such commissions, committees, working parties and so on and they continue to be set up, live their lives and die.

1 Two books merit particular mention. R T Oerton, *A Lament for the Law Commission* (1987) is a personal, insightful and sometimes bitter account by one of the London commission's early staff members. Oerton believed passionately in law reform commissions but considered that the London commission had, after a good start, failed to follow its guiding star. W B Hurlburt, *Law Reform Commissions in the United Kingdom, Australia and Canada* (1986), though very different, is a work of great scholarship and remains important. Other sources are mentioned in the footnotes below, adding up to an extensive bibliography. Many of the papers are by former commissioners.

2 Hereafter referred to as the "SLC".

I have sat on some myself. What distinguishes a law reform commission is that it is not single-purpose but multi-purpose, and not time-limited but open-ended, at least in intention.

(3) Origins³

It is often supposed that the London and Edinburgh commissions were the beginning of the idea of law reform commissions. Indeed the Law Commissions Act 1965 began a trend, being copied in many countries, and neither *Law Reform Now*,⁴ the book that was the trigger for the 1965 Act, nor the 1965 White Paper,⁵ mention foreign precedents. But precedents there were,⁶ notably in the USA.⁷ The Louisiana State Law Institute dates to 1938.⁸ Older is the New York State Law Revision Commission, founded in 1934, which claims to be “the oldest continuous agency in the common-law world devoted to law reform through legislation”.⁹ This claim may be questioned. In 1923 was founded the still-flourishing American Law Institute.¹⁰ Perhaps the oldest of all is the National Conference of Commissioners on Uniform State Laws, also called the Uniform Law Commission,¹¹ founded in 1892 and still active. The work of these two groups overlaps and sometimes they have joint projects, the best-known being the Uniform Commercial Code, both in its original drafting and in its revisions.

There were also UK precedents. The Law Revision Committee was set up in 1934 and existed until the war. In 1952 a similar committee was set up, the Law Reform Committee.¹² Both of these were England-only, but Scotland fol-

3 For the history see Hurlburt, *Law Reform Commissions* (n 1); J H Farrar, *Law Reform and the Law Commission* (1974); David Hope, “Do we still need a Scottish Law Commission?” (2006) 10 EdinLR 10; S W Stark, “The longer you can look back, the further you can look forward: the origins of the Scottish Law Commission” EdinLR, forthcoming.

4 Gerald Gardiner and Andrew Martin (eds), *Law Reform Now* (1963). The wording on the title page is LAW REFORM NOW, but as the modern UK convention is to give book titles in italics, the emphasis is hard to reproduce. It is sometimes cited as *Law Reform NOW*.

5 Cmnd 2573: 1965.

6 Of course, something depends on what counts as a “law reform commission”. Some of the bodies about to be mentioned are in many ways unlike the SLC. One precedent that cannot be discussed here is the International Law Commission established by the UN in 1948.

7 And the Ontario Law Commission (formerly the Ontario Law Reform Commission) established in 1964, but (in the Canadian tradition) abolished in 1996. There is now a non-governmental successor, the Ontario Law Commission.

8 <http://www.lsi.org/>.

9 <http://www.lawrevision.state.ny.us/>. The word “revision” might suggest that its role is to revise legislation, but in fact its remit covers common law as well as statute.

10 <http://www.ali.org/>.

11 <http://uniformlaws.org/>.

12 The pre-war committee “was not revived because... no one wanted to tell its distinguished but elderly members that they should be replaced”: P Gibson, “Law reform now: the Law Commission

lowed suit. In 1936 a “Legal Reform Committee” was set up.¹³ Like the English committee it faded away during the war and a successor body was then set up in 1954 – the Law Reform Committee for Scotland. These committees were the forerunners of the two commissions. But they were non-statutory bodies (established by the Lord Chancellors and the Lord Advocates of the day), ran on a shoestring, had no premises and no paid members or staff. Given those limitations it is remarkable what they achieved. The English committee continued to exist for at least 20 years after the London commission had been set up.¹⁴ The Scottish committee “was not formally abolished, but was given no further work to do. In the early 1970s it was wound up at Lord Kissen’s suggestion.”¹⁵ In England there was also the Criminal Law Revision Committee founded in 1959. I have not discovered when it gave up the ghost but the last report that I know of is dated 1986.¹⁶

The immediate trigger for the UK law commissions was *Law Reform Now*.¹⁷ Written from an English standpoint, it proposed the creation of a law commission in London, as a unit within the Lord Chancellor’s Department. The index mentions Scotland twice, on both occasions only by way of comparative law. The basic story of the origins of the commissions has often been told, and will not be discussed here. But one aspect is worth mention: the fact that a commission was set up in Edinburgh in addition to the London commission. Logically there were three possibilities:¹⁸ (i) what in fact emerged, namely two commissions; (ii) a single commission with a cross-border remit; and (iii) a single commission, with an England/Wales remit, or (more likely) a remit that covered all law except specifically “Scots” law, this last being essentially the approach that the 1965 Act adopted for Northern Ireland.¹⁹

25 years on” (Denning Lecture, 1991) at 27, available at http://lawcommission.justice.gov.uk/docs/1991_Denning_Lecture_Mr_Justice_Peter_Gibson.pdf. For the second committee see M Blair, “The Law Reform Committee: the first thirty years” (1982) 1 Civil Justice Q 64 and “More legislation from the Law Reform Committee” (1982) 1 Civil Justice Q 289.

13 See H L MacQueen, “Legal nationalism: the case of Lord Cooper”, in N M Dawson (ed), *Reflections on Law and History* (2006) 83 at 93.

14 I have not discovered the date of death. In 1986 Hurlburt noted that “it continues to function”: *Law Reform Commissions* (n 1) 38.

15 H R M Macdonald, J C Mullin, T B Smith and J F Wallace, “Law reform”, in *The Laws of Scotland: Stair Memorial Encyclopaedia* vol 22 (1987) para 650. There were complaints about the disappearance of the Scottish committee: see Hope (n 3) at 12. The White Paper (for which see n 23 below) said that the SLC was “to replace the Scottish Law Reform Committee” but did not say the same for England.

16 Criminal Law Revision Committee, *Conspiracy to Defraud* (Cmnd 9873: 1986).

17 See n 4 above. It was the second in a trilogy. The first and third – more or less forgotten today – were G Williams (ed), *The Reform of the Law* (1951) and P Archer and A Martin (eds), *More Law Reform Now* (1983).

18 Leaving out of account Northern Ireland (for which see n 19 below).

19 A few words about Northern Ireland – a subject meriting more than a few words. The 1965 Act gave to the London commission power to review the law of Northern Ireland, except “any law of Northern

The Queen's Speech on 3 November 1964 announced: "My Government will propose the appointment of Law Commissioners to advance reform of the law".²⁰ The wording is non-committal. Ten days later there was a meeting of the Home Affairs Committee. The new Lord Advocate, Gordon Stott was present: "The Lord Chancellor [Gardiner] outlined his proposals for a law reform commission. I do not think he has a clear idea of what he wants. He is proposing a high-powered commission of 5 with status equivalent to High Court judges, but as an example of what they might do he mentioned the need to tidy up the law of waterways."²¹ So at that time only a single commission was in contemplation. Evidently Stott himself said nothing of the need for a separate commission in Edinburgh. It was the new Secretary of State for Scotland, Willie Ross, who stepped in to secure a separate Scottish commission. There are various indicators of this, including the evidence of Gardiner himself: Ross "knew a good thing when he saw one and was anxious to be in on the Act".²² The White Paper²³ appeared in January 1965, stating that there would be two commissions, but in its grand total of two and a half pages said little.

What would have happened if there had been just one commission? It would have been based in London, and either it would have been limited to English law, or it would have had a cross-border remit. In the latter case there would no doubt have been one Scottish commissioner. But a lone Scottish voice in a large London office would have had only limited influence. Today the laws of the two countries would have been much more assimilated than in fact they are. Perhaps that would have been a good thing, perhaps a bad thing, or perhaps partly the one and partly the other. Be that as it may, assimilation would have been the result.

Ireland which the Parliament of Northern Ireland has power to amend" (s 1(5)). The word "amend" suggests only statutory law. If that is right then the London commission's purview extended to all Northern Ireland common law plus all reserved areas of Northern Ireland statutory law. But that seems absurd. It seems more likely that the intention was that the London commission's purview should cover all reserved, but no devolved, areas. The London commission has in fact tended to keep off Ireland's green lawns, whether reserved or devolved. The Northern Ireland Parliament could have set up its own commission in Belfast but did not do so. Section 50 of the Justice (Northern Ireland) Act 2002 (a Westminster statute) established a commission in Belfast, though the doors did not open until 2007. (It may be added that its funding is exiguous.) At the same time sch 12 para 8 and sch 13 para 1 of the 2002 Act took Northern Ireland outwith the purview of the London commission.

²⁰ HL Deb 3 Nov 1964 cols 9-13.

²¹ G Stott, *Lord Advocate's Diary* (1991) 143-144. One of my projects was to tidy up the law of level crossings.

²² Lord Gardiner, "The role of the Lord Chancellor in the field of law reform" (1971) 87 LQR 326 at 328-329.

²³ Cmnd 2573: 1965. This was published only just before the Bill itself (which had its first reading on 20 Jan 1965 and its second on 8 Feb 1965), and later than the date (3 Nov 1964) when the Government announced the bill.

In mapping Scottish legal history people think of such dates as 1532 and 1707 and so on. 1965 should be added, in part for what did happen, namely the creation of the SLC, but also for what did not happen: a single law commission.²⁴

It goes without saying that the London commission was to be called “the Law Commission” and the Edinburgh commission was to be called “the Scottish Law Commission.” In the same vein, whilst the Act required the London Commission to pursue “the reform of the law”,²⁵ the job of the Edinburgh Commission was “the reform of the law of Scotland”.²⁶ Eric Fletcher, on introducing the bill to the House of Commons, said that in areas “where the laws of England and Scotland are uniform. . . I imagine that the English Commission will assume final responsibility.”²⁷ Perhaps this was because of “the superiority of English law over Roman law and other foreign systems”.²⁸ At all events, the 1965 Act gave the London commission no casting vote.

(4) An Anglophone phenomenon? A “Common Law” phenomenon?

Are law reform commissions an institution of the Common Law world? Or, what is nearly but not quite the same thing, an institution of the English-speaking world? The broad answer is yes. They exist in most countries where English is the official language or one of the official languages. There is of course a close though incomplete alignment between jurisdictions that use English and Common Law jurisdictions, so one would expect Common Law jurisdictions to have law reform commissions and others to lack them. That is what one generally finds. As for the mixed systems – though that is a slippery term – law reform commissions exist in some, Scotland and South Africa being examples.²⁹ But they are not universal. There are no law reform commissions in, for instance, Quebec³⁰ or Sri Lanka.

The reason may be, in part, that civilian systems have traditionally had justice ministries, one of whose functions is law reform, whereas in the Common Law and mixed systems there traditionally was no justice ministry. Eventually the

24 D M Walker says much the same in “Reform, restatement and the Law Commissions” 1965 JR 245 at 247.

25 Law Commissions Act 1965 s 1(1).

26 s 2(1). This irritated both Lord Kilbrandon (“The Scottish Law Commission” (1967-68) 2 Georgia LR 193 at 194) and Lord Hunter (“Law reform: the Scottish Law Commission” 1988 JR 158 at 159). One might suppose that such attitudes are purely English. Not so. Edinburgh University Library catalogues the London commission as “The Law Commission (Great Britain)”. Ditto the National Library of Scotland.

27 HC Deb 8 Feb 1964 col 56.

28 Col 55.

29 And there is the Louisiana Law Institute, but this is rather different from the UK commissions.

30 1992 legislation establishing a law reform commission (L’institut québécois de réforme du droit) was never brought into force.

Common Law and (some) mixed systems began to feel that not enough was being done to keep the law up to date, but fifty years ago the idea of setting up ministries of justice was politically difficult.³¹ It would have been possible to re-fashion some existing government department, such as, in England, the Lord Chancellor's Department, and indeed *Law Reform Now* envisaged the new English commission as a unit within that department. Had that happened then it might have become the standard pattern in the Anglophone world.

B. WHAT THE SLC IS SUPPOSED TO DO

(1) What are the SLC's functions under the 1965 Act?

I find many statutes hard to understand, among them the Law Commissions Act 1965. Its omissions and obscurities can perhaps be attributed to the high speed of its drafting in December/January 1964/65.³² Sorting it out would be a perfect project for the two law commissions.³³ But any attempt to analyse the Act would require a long article to itself.³⁴

Section (3)(1)'s chapeau sets out the main objectives:

It shall be the duty of each of the Commissions 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, 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.

Leslie Scarman, first head of the London commission, wrote:³⁵

This comprehensive approach is important; the Act gives the Law Commission wider terms of reference than any previous law reform agency has ever had and enables it

31 The very name sounded alien (cf Gardiner and Martin (eds), *Law Reform Now* (n 4) 7). Since 2007 there has been a Ministry of Justice in London. But, so far at least, the London commission survives.

32 Though its drafters, Noel Hutton and Francis Bennion, were distinguished (see the latter's (untitled) paper in G Zellick (ed), *The Law Commission and Law Reform* (1988) 60).

33 A starting point would be: what *are* the commissions? Juristic persons (bodies corporate)? Many, probably most, law reform agencies are. Examples include the Dublin commission (Law Reform Commission Act 1975 s 3(6)), the Belfast commission (Justice (Northern Ireland) Act 2002 s 50(1)), the Australian Law Reform Commission (Australian Law Reform Commission Act 1996 s 5(2)) and the American Law Institute, but not the Uniform Law Commission. As Colin Tyre pointed out to me, the 1965 Act is silent. Possibly personality is implied by some of the language in the 1965 Act. For instance, section (4) speaks of each commission (singular) having "servants". A nonperson cannot contract, so there can be no contract of employment. (The issue is avoided in practice because all staff are civil servants on loan to the commissions.)

34 One overview comment is that amendments have increased the differences between the two commissions.

35 L Scarman, "The Law Commission" (1972) 1 *Anglo-American LR* 31 at 33.

to consider proposals against the background of the law as a whole. A patchwork quilt of improvements unrelated to the whole pattern of the law is apt to create as many problems as it solves; each reform must be fitted into a coherent structure and this can only be achieved if the law reform agency has a general planning responsibility for the entire law.

That was the vision expressed by the 1965 Act and that was the vision of the early years. It was the era of national economic planning, the era when extensive urban areas were to be bulldozed and redeveloped, and at weekends the people would enjoy themselves at the new concrete municipal leisure centres.³⁶ Demolish the past; plan the future. The commissions were part of that vision. They have survived its death, but patchwork reform has replaced the ideal of comprehensive redevelopment.

Traditionally the s 3 objectives have been unpacked and sorted into five piles: (i) law reform, (ii) consolidation, (iii) statute law revision, (iv) codification, and (v) advice to Government. These will be discussed in due course, but it should be said immediately that the bulk of commission work has always been taken up by the first. This has always outweighed the other four functions combined.

(2) What areas of law are covered?

“The terms of the Act are . . . breathtakingly wide”.³⁷ The Act places *all* the law of England and Wales within the purview of the London commission and *all* the law of Scotland within the purview of the SLC.³⁸ The latter does not mean just the law of Scotland in so far as it differs from the law of England and Wales. (But in areas of law which are very similar on both sides of the border, it would be usual, albeit not necessary,³⁹ to proceed by way of joint projects.) The commissions are sometimes thought of as dealing only with private law. There is no such limitation in the 1965 Act, nor have the commissions so limited themselves in practice. Whilst substantive law is to the fore, procedural law can be and sometimes is dealt with.⁴⁰ Even law that has been established at EU level is within the purview, but there

36 With thanks to Scott Styles.

37 S Cretney, “The politics of law reform—a view from the inside” (1985) 48 MLR 493 at 493.

38 For the effect of devolution, see D.4 below.

39 There were separate projects on damages for psychiatric harm: see the Report on *Liability for Psychiatric Illness* (Law Com No 249, 1998) and the Report on *Damages for Psychiatric Injury* (Scot Law Com No 196, 2004).

40 For a controversial position, see L C B Gower, “Reflections on law reform” (1973) 23 U Toronto LJ 257 at 265: “Procedural reforms—using procedure in the broadest sense to cover the machinery of justice and of legal transactions such as conveyancing—are infinitely more important than reforms of the substantive law” and at 266: “Most standing law reform bodies, and certainly the Law Commission, have concentrated too much on substantive law and too little on the more important and more needed reform of legal procedures.”

would normally be little point in undertaking new projects in such areas, though the commissions are sometimes consulted by the UK government in formulating responses to EU initiatives, and also in the implementation of EU law.

Despite the universality of their remit, the commissions are selective. “Lawyers’ law” is the phrase often used. But what law is just for lawyers? The Solicitors (Scotland) Acts? It is sometimes suggested that “technical law reform” is for the benefit of lawyers. That is evidently untrue. “Technical law” exists for the benefit of citizens, including citizens who have to pay their lawyers fees for research and for litigation that better “technical law” would have rendered unnecessary. A good analogy is engineering. Motorists want the engine to work well but few could knowledgeably compare Volkswagen technology with Ford technology. People know vaguely that under city streets are various pipes and cables but they are unlikely to have views about their construction, so long as the power supply, the water supply, the drainage and so on work. Much commission work is of this “under the bonnet” or “under the street” type.⁴¹ Nobody speaks of plumbers’ plumbing; lawyers’ law is as absurd.⁴² As well as the engineering metaphor, there is a good housekeeping metaphor: washing-up, floor-sweeping, bath-scrubbing, redecorating, re-wiring, roof-maintenance and so on is unglamorous and therefore often neglected. Politicians prefer the *éclat* of the new extension. Yet without routine law reform a legal system degenerates into a slum.

Of course, it is all a matter of degree. But the more likely an initiative is to be reported on the front pages, the less likely is it to be a commission initiative. That is surely as it should be: law reform commissions have great technical expertise, but have no particular claim to wisdom in matters of social, economic or political reform. One might add that the more often commission projects appear on the front pages, the greater the risk that commissions will incur opposition, and run the risk of abolition. Having said that, there is no firm boundary, and undoubtedly some projects have gone well beyond technical law reform.

41 I often felt like an automotive engine designer when working on the project that resulted in the Land Registration etc (Scotland) Act 2012. Land registration law is valuable even if few people know much about it, or even that it exists. Indeed, the better it works the less noticeable it is likely to be.

42 Law and plumbing would merit an article to itself. William Twining in his “Pericles and the plumber” (1967) 83 LQR 396 (reprinted in his *Law in Context: Enlarging a Discipline* (1997)) distinguishes (at 397-398) two visions of the lawyer: Pericles, who would typically be a “law commissioner or an appellate judge” and the plumber, who would typically be a “small-town solicitor” (399). For me, the good law commissioner is a good plumber – no doubt a Periclean plumber, but still a plumber. Peter North uses the term “legal plumbing”, in which to my eye is a slightly disparaging way, in his “Is law reform too important to be left to lawyers?” (1985) 5 LS 119 at 129. Stephen Sedley has contributed a charming *jeu d’esprit* in his “Law and plumbing” ((2008) 28 LS 629). For him it is the first-instance judge who is the plumber, called in when there is a crisis.

An interesting tactic was adopted by the SLC on the controversial question as to whether parents should be able *wholly* to disinherit their children. The report came to no conclusion but left the matter to the Scottish Parliament, but setting out the options from a technical standpoint.⁴³

(3) What is the point – if any – of a law reform commission?⁴⁴

Law reform commissions are not necessary. Most jurisdictions do not have them. In some places where they have existed they have been abolished: Canada has twice set up a federal commission, and twice abolished it. Law reform can be done by governments in-house. So what is the point? The predominant view in the UK is that the main job should be Good Housekeeping, because although governments *can* do legal housekeeping, usually they *don't*, or do it in a cursory and slovenly manner. The alternative view, held by many in Australia and in Canada, is that technical law reform should be done by governments in-house and that commissions should have other objectives. The Canadian Minister of Justice who launched the first Canadian law reform commission, John Turner, thought that “law reform goes to the core of defining the kind of society we will have as Canadian people”.⁴⁵ The language of the Canadian Law Reform Commission Act (1970), and its successor, the Law Commission of Canada Act (1996), was noticeably different from the 1965 Act. For instance the second Canadian statute called for the commission to be “inclusive” and “multidisciplinary”⁴⁶ and to seek “the development of new approaches to, and new concepts of, law” and “the stimulation of critical debate in, and the forging of productive networks”.⁴⁷ The task of evolving “new concepts of law” was taken seriously. According to Natalie Des Rosiers, its president from 2000 to 2004, the second commission “defined its focus of inquiry as being ‘relationships’ – personal, social, economic and of governance – and not criminal law, administrative law and so on”.⁴⁸ Projects had names such as *Beyond Conjuality*.⁴⁹ The commission’s final programme, announced even as the axe was falling.⁵⁰

43 Report on *Succession* (Scot Law Com No 215, 2009).

44 Among the many valuable things in Hurlburt’s *Law Reform Commissions* (n 1) is a chapter titled “Why Law Reform Commissions?”

45 J Turner, “Law for the seventies: a manifesto for law reform” (1971) 17 McGill LJ 1 at 2.

46 Both these are from the preamble.

47 These are from section (3)(a) and (c).

48 N Des Rosiers, “Leadership and ideas: law reform in a federation” in B Opeskin and D Weisbrot (eds), *The Promise of Law Reform* (2005) 233 at 235. See also her “In memoriam: La Commission du Droit du Canada” (2007) 22 Canadian J of L and Soc 145.

49 Law Commission of Canada, *Beyond Conjuality: Recognizing and Supporting Close Personal Adult Relationships* (2001).

50 Law Commission of Canada, *Report on Plans and Priorities: 2006-2007 Estimates* (2006) 1.

This 2006-2007 Report on Plans and Priorities puts forward a road map providing directions to the Commission for the next two years. Work will be primarily focussed on six projects: Age and Law, Vulnerable Worker, Globalization and Law, Indigenous Legal Traditions, What Is a Crime and Financing on Reserves.

The first head of the second commission, Roderick Macdonald, thought that it should not be “necessary to sponsor projects on the law of wills, or matrimonial property, or contracts, or mortgages, or intellectual property, or criminal law, understood as such. Projects may well involve themes such as: the City; or the Homeless; or the Automobile; or Working Careers.”⁵¹ And he wrote that “a law reform commission could, conceivably, commission symphonies, put on plays, sponsor art exhibitions, undertake sports activities, and so on”.⁵² The first commission announced that its role was “not to change, or recommend changes in, the law”.⁵³ Its role was to educate, to challenge, to provoke. Mere law reform was condescendingly dismissed as the job of a “repairman”.⁵⁴ For the first ten years not a single piece of legislation emerged from its work.⁵⁵

The first commission (1970-71 to 1992-93) was set up by the Liberals and scrapped by the Conservatives. The second commission (1996-97 to 2006) was set up by the Liberals and scrapped by the Conservatives. So far as I know, both commissions maintained independence from government. But their outlook—perhaps the word “ideology” would be appropriate—had definite political associations. Such commissions should not be surprised if they do not long survive the next change in the political wind. It seems to me that those law reform commissions are wiser that aspire to be merely useful,⁵⁶ to be good plumbers.

(4) Effect of devolution?

Before devolution, the SLC reported to the Lord Advocate⁵⁷ and its reports were laid before the UK Parliament (the London commission reported to the Lord Chancellor). But at devolution, the 1965 Act was amended so that the

51 R Macdonald, “Recommissioning law reform” (1996-97) 35 Alberta LR 831 at 873. This extraordinary article, little of which is as clear as the passage quoted, is criticised by W Hurlburt, “The origin and nature of law reform commissions” (1996-97) 35 Alberta LR 880.

52 Macdonald (n 51) at 856. He liked this so much that he repeated it verbatim in “Jamais deux sans trois. . . once commission, twice reform, thrice law” (2007) 22 Canadian J of L and Soc 117 at 134-135.

53 From its Third Annual Report: quoted by Hurlburt, *Law Reform Commissions* (n 1) 183.

54 A former commissioner, W F Ryan: quoted by Hurlburt, *Law Reform Commissions* (n 1) 183.

55 Hurlburt, *Law Reform Commissions* (n 1) 196.

56 Which, however, gives no guarantee against abolition.

57 Originally the role was shared between the Lord Advocate and the Secretary of State. The former assumed sole responsibility under the Transfer of Functions (Secretary of State and Lord Advocate) Order 1972, SI 1972/2002.

SLC reports to the Scottish Ministers and the Scottish Parliament.⁵⁸ These amendments are odd; arguably they presuppose that the SLC would henceforth be working only in devolved areas of law. Yet at the same time no amendment was made to the SLC's objectives, namely to keep an eye on the *whole* law of Scotland.

Whether for this or some other reason, at the time of devolution views were expressed in the London commission that in future the SLC's functions would be limited to devolved areas of law.⁵⁹ This the SLC successfully fought off, so that today, as before devolution, the SLC has the whole of the law of Scotland in its purview. But the oddity of the devolution amendments cannot be denied. For example, in 2009 the SLC published a report on the law of unincorporated associations.⁶⁰ The Scotland Act 1998 says (strangely) that all unincorporated associations are "business organisations" and therefore the law is reserved.⁶¹ So the SLC report could be implemented only by Westminster legislation. Yet the report was submitted to the Secretary for Justice in the Scottish Government and laid before the Scottish Parliament. Logically it should have been submitted to either the Advocate General or the Secretary of State for Scotland, and laid before the Westminster Parliament, but that was not contemplated by the amended 1965 Act, and so did not happen. It may be added that there is also a funding issue. The SLC is funded by the Scottish Government, and the Scottish Government's budget is supposed to be used for devolved matters.

(5) Law reform

Law reform is what the SLC is perceived as devoting most of its energies to, and that perception is right. Most of the history of the SLC is a history of law reform. A great deal of law reform does *not* involve the SLC,⁶² and moreover some of the legislation that has sprung from SLC reports would probably have happened anyway, albeit in a different form. But even so, it is hard to overestimate the influence that the SLC has had on the evolution of Scots law. Consider, for example, property law, or family law, or criminal law, or the law of diligence, or the law of bankruptcy, to mention just some fields. Without the SLC, we would today be looking out on a different legal landscape.

58 Scotland Act 1998 (Consequential Modifications) (No 2) Order 1999, SI 1999/1820.

59 I cannot document this, except by my memory of files I saw while a commissioner.

60 Report on *Unincorporated Associations* (Scot Law Com No 217, 2009).

61 Scotland Act 1998 sch 5 head C1. The meaning is arguable, but this is the accepted view. The result is odd, but cannot be explored here.

62 A point that Alan Rodger liked to stress: see for example "The bell of law reform" 1993 SLT (News) 339.

(6) Consolidation and statute law revision

Consolidation is the restating of statutory law, by repealing the grimy old enactments and replacing them with shiny new ones. It does not alter the substance of the law. Its importance is less than it used to be because of the advent of databases, which give statutes in their amended form. But these are not always accurate. Even if they were, consolidation is still valuable. Sometimes several separate statutes can be brought under one roof. At the moment the SLC is working on the consolidation of bankruptcy law. This relates essentially to a single statute, the Bankruptcy (Scotland) Act 1985, but as anyone knows who has worked with it, nearly 30 years of amendments have turned what was once a fairly neat statute into a teenage boy's bedroom. Useful though the task is, this is only the second consolidation project that the SLC has undertaken since devolution. (The other was the project that led to the Salmon and Freshwater Fisheries (Consolidation) (Scotland) Act 2003.) The problem is one of resources. Many areas of law need consolidation. The job does not get done and the statute book degenerates. If there is a duty owed by government to citizens to maintain an accessible statute book, that duty is not being discharged by government, either in London or in Edinburgh. A messy statute book is not just a question of aesthetics. It makes legal work dearer, because it is more time-consuming. Sometimes it leads to downright mistakes.

Statute law revision means the identification of spent legislation with a view to its repeal. These projects are in practice done jointly. Is that dull? Often it is not. Who could resist reading about the presence in the UK statute book of the Nawab of the Carnatic, the Rajah of Tandore and the Zemindar of Mustaphanagar?⁶³

(7) Codification

The law commissions are obliged by statute to pursue codification. In the early years the SLC made fitful attempts to obey that command. In the First Programme of Law Reform, published in 1965, announced that the law of evidence would be codified and also the whole law of obligations.⁶⁴ Of course neither happened and gradually the idea of codification was more or less abandoned.⁶⁵ Bennion called the London commission's record "disastrous".⁶⁶

63 *Statute Law Repeals: Eighteenth Report* (Law Com No 308, Scot Law Com No 210, 2008) part 4.

64 Not only the law of contract. At this stage the possibility of a joint project with London on contract law (only) still lay in the future.

65 Of course, it depends on what you mean by codification. There is no sharp demarcation between codes and other statutes. Such SLC-based statutes as the Prescription and Limitation (Scotland) Act 1973, the Family Law (Scotland) Act 1985, the Age of Legal Capacity (Scotland) Act 1991 and the Title Conditions (Scotland) Act 2003 have codal aspects.

66 See Bennion (n 32) at 63. Of course the SLC's record is similar.

Why did this happen? The specific reason for the failure of the contract project was disagreement between London and Edinburgh, especially on the topics of consideration, third party rights and specific implement.⁶⁷ But there is the more general question. One reason is shortage of resources. The SLC is a small organisation with much to do. In the Republic of Ireland there was a political decision to codify the criminal law, and it was accepted that this would be beyond the available resources of the Law Reform Commission of Ireland and so a separate Criminal Law Codification Advisory Committee was set up by statute.⁶⁸ Perhaps the SLC might be able to undertake some codification, but if it did so it would have to scale back other work—justifiable only if the codification project had a sporting chance of being enacted. And here we come to the second reason. There is not much enthusiasm for codification. Politicians seem to be uninterested. Tell them that the law needs to be made simpler, more accessible and more coherent and they look bored. Would a code promote the Scottish economy? That is the question the politicians ask. At Parliament House the general opinion lies midway between lack of interest and positive opposition. (Solicitors in my experience are more open-minded.) In this climate, devoting resources to preparing draft codes would be a questionable use of public resources.⁶⁹

A few years ago four distinguished academic lawyers, Eric Clive, Pamela Ferguson, Christopher Gane, and Alexander McCall Smith, prepared a draft criminal code. The SLC published it in 2003. Nothing followed.⁷⁰ That four people could carry through such a project in their spare time shows that the project is one that could be carried through even with the SLC's limited resources.⁷¹ A complete civil code would of course be much more difficult.

The debate about the merits and demerits of codification will not be discussed here. There is force in the arguments deployed on both sides of that debate. On balance, but only just on balance, I think that the arguments of the codifiers

67 For the failure of this project see A E Anton, "Obstacles to law reform" 1982 JR 15; C K Davidson, "Law reform: the case for caution in an age of revolution" (1990) 35 JLSS 219; H L MacQueen "Glory with Gloag or the Stake with Stair? T B Smith and the Scots law of Contract", in E C Reid and D L Carey Miller (eds), *A Mixed Legal System in Transition: T B Smith and the Progress of Scots Law* (2005) 138.

68 Criminal Justice Act 2006 (Ireland). See <http://www.criminalcode.ie>.

69 For the whole question see E Clive, "A Scottish civil code", in H L MacQueen (ed), *Scots Law into the 21st Century* (1996) 82. For Alan Rodger's code-scepticism see Rodger (n 62).

70 See E Clive, "Codification of Scottish criminal law" 2008 SCL 747; E Clive, "Codification of the criminal law", in J Chalmers, F Leverick and L Farmer (eds), *Essays in Criminal Law in Honour of Sir Gerald Gordon* (2010) 54.

71 James Chalmers has pointed out to me that in South Africa Snyman did the job singlehanded: C R Snyman, *A Draft Criminal Code for South Africa* (1995).

are better. The priority would be a criminal code.⁷² Often have I have seen the eyes of foreign lawyers bulge on discovering that the main planks of our criminal law are largely unenacted.⁷³ But let us leave the merits of the question on one side. What is odd is that in Scotland there is almost no debate. In England there is at least some debate, albeit that the anti-codifiers generally have the upper hand.⁷⁴ For example, on 28 November 2011 Lord Neuberger in his Renton Lecture suggested that codification might be desirable.⁷⁵ I can think of no similar statement by any senior Scottish judge. I will end by quoting, but not discussing, a comment made in 1988 by one of the SLC's chairs, Lord Hunter: "[C]odification in anything like the continental sense must be a pipedream so long as the methods of drafting and processing legislation in the Westminster Parliament take their present form and so long as the methods of interpretation of statutes by courts in this country remain... unchanged."⁷⁶

(8) The (in)accessibility of legal information

Picture the following scene. The date is 17 October 2008, the location the Court of Criminal Appeal in London:⁷⁷

LORD JUSTICE TOULSON: This was to be hand down judgment, but events have moved on. Mr Cammerman we have had your further submissions. We accept your personal explanation, how you came to misunderstand what the law was and present the appeal on a false basis.

MR CAMMERMAN: I am much obliged.

LORD JUSTICE TOULSON: But it is a matter of concern. Was this a CPS or a Customs prosecution?

MR CAMMERMAN: This was a Customs prosecution, my Lord.

LORD JUSTICE TOULSON: So how did it come about that this mistake was spotted only at very much the 11th hour?

72 This "criminal law first" view is widely held. See for example R Toulson, "Law reform in the twenty-first century" (2006) 26 LS 321 at 325.

73 An important change came with the SLC project on sexual offences, resulting in the Sexual Offences (Scotland) Act 2009.

74 At least in respect of the civil law. English criminal law has been partially codified for many decades, and there has long been substantial support for a full code. In 2002 the Government of the day promised a code: *Justice for All* (Cm 5563). In 2008 the London commission, which had worked on a criminal code project for many years, announced that it was suspending work, but only in a tactical sense: it remained committed to a criminal code (Law Commission, *Tenth Programme of Law Reform* (Law Com No 311, 2008) paras 1.2-1.6). The literature on criminal codification in England is too large to cite, though an exception might be made for T Bingham, "A criminal code: must we wait for ever?" [1998] Crim LR 694.

75 "General, equal and certain: law reform today and tomorrow" at para 50, available at http://www.statutelawsociety.org/_data/assets/pdf_file/0014/101381/RentonLectureNov2011Final.pdf.

76 "Law reform: the Scottish Law Commission" 1988 JR 158 at 163.

77 *R v Chambers* [2008] EWCA Crim 2467. The case is too long to quote in full, but every line is worth devouring.

MR CAMMERMAN: An assiduous lawyer at the office of the RCPO, Revenue and Customs Prosecutions Office, came into possession of the knowledge... (Pause) There was a lawyer in Manchester who had noticed that the Regulations, as no doubt did a number of other lawyers in different departments at the Revenue and Customs, that the Regulations had been superseded, or should I say amended. A lawyer for Revenue and Customs, when considering a different case, came upon the consideration of that lawyer yesterday. She was considering a s 16 Proceeds of Crime Act application in respect of another case. When the observations of that lawyer in Manchester came to her attention, she immediately realised the importance of it and left a message on my telephone in chambers yesterday evening.

LORD JUSTICE TOULSON: So effectively it was a fortunate accident?

MR CAMMERMAN: My Lord, I regret to say it was a fortunate accident.

LORD JUSTICE TOULSON: By fortunate accident the draft judgment came to the attention of a lawyer in the RCPO, who was aware that the Regulations had been superseded and very properly took prompt steps to see that the court was alerted.

MR CAMMERMAN: Became aware I think yesterday and —

LORD JUSTICE TOULSON: Meanwhile, others in the RCPO have in recent years been proceeding on the erroneous basis.

MR CAMMERMAN: My Lord, yes, and —

LORD JUSTICE TOULSON: Have you any information how many confiscation orders may have been obtained where the court has not been told what the relevant Regulations are? (Pause)

MR CAMMERMAN: In the light of what my Lord describes as a fortunate accident, a review is currently underway to answer the question your Lordship understandably asks. So the answer to the question is that there is no — I do not know...

And so it went on, Mr Cammerman no doubt wishing that the ground would swallow him up. The Excise Goods Regulations 1992 under which the defendant had been convicted had been superseded in relation to tobacco by the Tobacco Product Regulations 2001. But prosecutions continued under the old legislation, and people went to prison. It was only in 2008 — seven years later — that a junior lawyer in the RCPO noticed and alerted the Court of Appeal, which was within hours of issuing a judgment upholding the defendant's conviction under the old regulations. As a result the conviction was in fact quashed. The prosecution had been relying on the Statute Law database (it seems that Westlaw was also wrong).⁷⁸

Toulson LJ commented:⁷⁹

To a worryingly large extent, statutory law is not practically accessible today, even to the courts whose constitutional duty it is to interpret and enforce it. There are four principal reasons. First, the majority of legislation is secondary legislation. Secondly, the volume of legislation has increased very greatly over the last 40 years. The Law Commission's Report on Post-Legislative Scrutiny, (2006) Law Com 302, gave some figures in Appendix C. In 2005 there were 2868 pages of new Public General Acts

⁷⁸ On Westlaw, see para 30. Given the last words of that paragraph I assume that "amended" is a misprint for "unamended".

⁷⁹ Paras 64-68 and 72.

and approximately 13,000 pages of new Statutory Instruments, making a total well in excess of 15,000 pages (which is equivalent to over 300 pages a week) excluding European Directives and European Regulations, which were responsible for over 5,000 additional pages of legislation. Thirdly, on many subjects the legislation cannot be found in a single place, but in a patchwork of primary and secondary legislation. Fourthly, there is no comprehensive statute law database with hyperlinks which would enable an intelligent person, by using a search engine, to find out all the legislation on a particular topic. This means that the courts are in many cases unable to discover what the law is, or was at the date with which the court is concerned, and are entirely dependent on the parties for being able to inform them what were the relevant statutory provisions which the court has to apply. This lamentable state of affairs has been raised by responsible bodies on many occasions. . . . Although the problem has in this case arisen in an excise context, it is part of a wider problem of substantial constitutional importance.

The Statute Law Database continues to be unreliable. Westlaw and Lexis are better, but even they are imperfect, and of course they are commercial databases, unavailable to the ordinary citizen.

One might say that the provision by government of a reliable statutory database is an administrative issue, not a law reform issue, though the London commission has in fact made precisely this recommendation.⁸⁰ Actually the distinction is imprecise because there could be a legislative requirement for a good database. But the unreliability of the existing public database, and also of the commercial databases, derive in part from the dreadful state of the statute book. And the statute book gets worse year by year. Dealing with that problem is a complex issue, but consolidation and codification are a substantial part of the answer.⁸¹ Both assist in “the reduction of the number of separate enactments”.⁸² Pure law reform projects can also help, the best example being the feudal law project, which led to the repeal of 46 entire statutes.⁸³

C. HOW THE SLC WORKS

(1) Programmes

The 1965 Act calls for the SLC to submit “programmes” to government. This obligation has been carried out but only fitfully: 1965: First Programme of Law

⁸⁰ Law Commission, Report on *Post-Legislative Scrutiny* (Law Com No 302, 2006) para 4.15. The recommendation is quoted by Toulson LJ.

⁸¹ On the inaccessibility of our law see C Munro, “K in Scotland”, in H L MacQueen (ed), *Scots Law into the 21st Century* (1996) 138.

⁸² Law Commissions Act 1965 s 3(1).

⁸³ Abolition of Feudal Tenure etc (Scotland) Act 2000 sch 13.

Reform;⁸⁴ 1968: Second Programme of Law Reform; 1973: Third Programme of Law Reform; 1990: Fourth Programme of Law Reform; 1997: Fifth Programme of Law Reform; 2000: Sixth Programme of Law Reform; 2005: Seventh Programme of Law Reform; 2010: Eighth Programme of Law Reform. Sometimes a project is taken on without having been announced in the programme. And sometimes a project is not finished by the time the next programme is published, so it runs on (some are never finished, but merely abandoned, though this is rarer nowadays). Anyone wishing to know what the SLC is up to would do better to read the annual reports. The value of the published programmes, which have always reminded me of Stalin's Five Year Plans, is open to debate, and the SLC seemed to manage without them from 1973 to 1990.⁸⁵ But at the very least there is a value in consulting the public about what projects should be taken on.⁸⁶

(2) Who are the Commissioners and staff?

There are five commissioners.⁸⁷ The convention is for there to be an Outer House judge, who takes the chair,⁸⁸ a QC and three others, two of them, and sometimes all three, being academics. The current practice is for the judge and the QC to be part time and the others to be full time.⁸⁹ The practice is that the judge, if raised to the Inner House, steps down from the SLC. Commissioners are generally appointed for five years. They may seek reappointment. Each project normally has one commissioner to lead it; occasionally two commissioners share a project. At any given time a commissioner might have oversight of anything from one to five projects.

The SLC is supported by administrative staff and by about five civil service solicitors, called project managers. A botanical comparison might be made with those plants that are actually two separate species, such as lichen, composed of a

84 Which promised codification of the law of evidence and of the law of obligations (including not only contract but also delict and unjustified enrichment).

85 The London commission's programmes have also appeared at less than regular intervals. Its current aim is a new programme every three years, rather than five as with the SLC.

86 For a defence of the programme system see S Cretney, "Programmes: milestones or millstones" in Zellick (ed), *The Law Commission* (n 32) 3.

87 Whereas the 1965 Act says that the London commission is to have five, it says that the SLC is to have not more than five. Nevertheless, the number has always been five, apart from transitional periods between the departure of one commissioner and the arrival of the replacement.

88 The 1965 Act does not require this, but it has been invariable practice. In England the rule has now been made statutory: Tribunals, Courts and Enforcement Act 2007 s 60. Oerton, *Lament for the Law Commission* (n 1) 21-22, condemns the practice on the ground that judges tend to be too conservative-minded. Daniel Greenberg praises it as a conduit by which judicial experiences of unsatisfactory law can influence legislation: *Laying Down the Law* (2011) 125.

89 There have been changes in practice over the years. The earlier chairs were full time. On that change see Hope (n 2) at 22.

fungus and an alga (as to whether the commissioners are the fungus or the alga, I will not speculate). In theory the Scottish government legal service might choose not to lend these five solicitors. But at all events they are merely on loan, and remain part of the government legal service. The commissioners do not appoint them. Each of the civil service solicitors is the project manager for more than one project. These projects may be all led by one commissioner, or it may be that a project manager will be involved with different commissioners. Whereas the London commission has four permanent departments, called teams,⁹⁰ the SLC is really a single department. In recent years there have also been about five legal assistants. These are usually recent graduates who work for the SLC for a limited period, typically a year.

How much a commissioner delegates to the project manager and to the research assistant varies hugely, according to the personalities involved and the nature of the project (I delegated little). In the London commission there are also five commissioners, but, having a larger budget,⁹¹ they have more support staff, and a good deal of delegation happens.

(3) Meetings

Commissioners meet about fortnightly, usually on a Monday, because the scheduling of business in the Court of Session means that Mondays are likely to be more available for the judge and for the QC. At each meeting, the commissioners discuss drafts—draft discussion papers, draft policy papers (see below), draft reports and draft bills. These all have to be read before the meeting, and one of the major tasks for every commissioner is reading papers generated in *other* projects. In the London commission the practice is for commissioners to send in written comments several days before the meeting. But at Edinburgh the system is one of oral rather than of written pleadings. I think the London system (which tended to be adopted for joint projects) better. It gives the team advance warning of issues, and it is a good discipline for the other commissioners. Written comments do not preclude oral discussion.

90 These being: (i) Commercial and common law, (ii) criminal law, (iii) property, family and trust and (iv) public law.

91 The latest figures are £3,493,000 and £1,626,839 respectively: see Law Commission, *Annual Report 2011-12* (Law Com No 334, 2012) 68; Scottish Law Commission, *Annual Report 2011* (Scot Law Com No 225, 2012) 34. Until recently the difference was larger; the London commission has undergone deeper cuts than the SLC. The amount of law with which each commission is concerned is the same. These figures are small—the scale of a single modest commercial property transaction, and yet the commissions are responsible for commercial contract law and for land registration law. (The Land Registration Act 2002 and the Land Registration etc (Scotland) Act 2012 were both based on Commission projects.)

These meetings are often lively affairs, though in my time usually good-tempered. Five is a good number, small enough to allow free and fast debate, but at the same time large enough to ensure a broad range of background and expertise. (One of the pleasures of being a commissioner is learning from other commissioners.) Usually a consensus is reached by discussion, but sometimes there is a show of hands. Bad feeling is rare, and the minority seldom seeks to have the report reflect their dissent, but this does occasionally happen. I have not researched the point, but during my tenure of office there were dissents in two reports, in both of them the dissent being recorded merely by a footnote.⁹² In one or two cases where a commissioner indicated a wish to publish a note of dissent, the text was modified to make the expression of dissent unnecessary. Thus the general understanding among commissioners was that Commission reports should if at all possible give a united view. The report on double jeopardy⁹³ was a special case. We agreed on certain recommendations, but not on whether there should be an exception for new evidence. At the time we had only four commissioners, and were evenly divided.

I speak of reports. It is true that discussion papers have to be agreed by commissioners, and so there could be dissent as to provisional proposals in a discussion paper. But as far as I know there has never been such a dissent. Perhaps that is unfortunate, because discussion papers, though in theory tentative and provisional, in practice have great influence over the final report. There was one discussion paper which I was unhappy with, but did not dissent, and now wish that I had.⁹⁴

(4) Method of working: law reform projects

Once a project has been decided on, the first stage involves research and some preliminary consultation, sometimes called pre-consultation. For instance, the Commission may contact organisations that are affected by the area of law in question, to seek views. At this stage it is usual to set up an “advisory group”, mainly practitioners, whose views are valuable as a project progresses. They receive no remuneration. Some of them can command high hourly fees, and on occasion after a meeting of an advisory group I have reflected that if the SLC had

⁹² Scottish Law Commission, Report on *Succession* (Scot Law Com No 215, 2009) para 2.15 n 32 and para 4.2 n 5; Scottish Law Commission, Report on *Crown Appeals* (Scot Law Com No 212, 2009) para 2.25 n 58. A notable earlier case was Eric Clive’s dissent in the joint Report on *Rights of Suit in Respect of Carriage of Goods by Sea* (Law Com No 196, Scot Law Com No 130, 1991) 41.

⁹³ Scottish Law Commission, Report on *Double Jeopardy* (Scot Law Com No 218, 2009).

⁹⁴ Scottish Law Commission, Discussion Paper on *Succession* (Scot Law Com DP No 136, 2007), in relation to legitim.

had to compensate these people for their time, the meeting would never have happened in the first place. It is a reflection on the public-spiritedness of so many people, not least in the legal profession. A cynic might think that these people join advisory groups so as to lobby for their interests, or those of their clients. That was not my experience. Comparative work is often done, depending of course on the topic concerned.⁹⁵

In due course the team begins composing the discussion paper,⁹⁶ drafts of which will go before full meetings of commissioners. The first phase culminates in the publication of a discussion paper—the equivalent term in the London commission is consultation paper.⁹⁷ This outlines the law, suggests what may be wrong with it, and canvasses options for reform. It has numerous “questions” and “proposals”,⁹⁸ some of them truly open-ended questions, and some with a steer. Consultation in this form is today normal, but in the 1960s it was pioneering. For example, the law reform committees published no consultation papers.

The consultation period is usually three months. In some projects there is more than one consultation paper. This can be a good idea but there is the danger of consultation fatigue.⁹⁹ The highest number has been in the trusts project where there have been ten.

How many respondents there are varies of course from project to project but often the number is low, between 10 and 20, some being from organisations and some from individuals. Occasionally there is an eccentric response but most are sensible and some are very valuable. Unlike some public sector consultations, commission consultation is real consultation. Responses are taken seriously and it is rare for some proposals not to be changed as a result. The way that responses are assessed is not straightforward. If all or almost all consultees take a certain view of a certain matter, that view will usually prevail. But a simple majority is not decisive. Quality and provenance are important.

95 The 1965 Act (s 1(3)(f)) directs the commissions to look at other legal systems. They could perhaps be criticised for insufficient comparative work. Writing in 2000, Mary Arden, chair of the London commission from 1996 to 1999, offered only one instance in which that commission had looked outside the Common Law world, and even that was in a joint London/Edinburgh project. (M Arden, “The work of the Law Commission” (2000) 53 CLP 559 at 562).

96 In the SLC the original term was “memorandum” which later (1981) became “consultative memorandum” and finally (in 1987) “discussion paper.” Recently the SLC has also begun to publish (web only, not print) unnumbered “consultation papers” which are supplementary to discussion papers.

97 P North, “Law reform: processes and problems” (1985) 101 LQR 338 has much about the consultation process, with sceptical conclusions.

98 In SLC terminology, a “proposal” is a tentative suggestion, contained in a discussion paper, whereas a “recommendation” is a final suggestion, contained in a report.

99 Another cause of consultation fatigue is that Government usually re-consults before introducing a bill.

One thing that struck me during my period of office was that legal academics are seldom substantial contributors. (There are important exceptions, and I thank them here).¹⁰⁰ No doubt there are good reasons. Legal academics are under time pressure, and wading your way through a densely-argued discussion paper is a slow business. One would like to think that things could change because of the new “impact” element of the Research Excellence Framework.¹⁰¹

After the responses are in, the next phase is to consider them, and to continue with research and, it may be, further discussions with the Advisory Group and others. For example, in the Land Registration project the commission had discussions with the Law Society of Scotland long after the third and last discussion paper. After that, the lead commissioner decides on “policy”, and prepares and submits to fellow commissioners a “policy paper”; in some cases there is a series of policy papers. Once there is agreement, the lead commissioner can begin two tasks: preparing the final report, and getting the bill drafted. Publishing a draft bill¹⁰² as part of a report is not compulsory. In the early years of the commission, there was often no draft bill. Over the years the inclusion of a bill gradually became the norm. I think that the last bill-less report was the 2001 Report on *Diligence*.¹⁰³ A report might say that no legislation is needed, but that is rare. The only example I can think of is the Report on *Boundary Walls*.¹⁰⁴

Which comes first: the drafting of the report or the drafting of the bill? Either can be done first, or they can be done at the same time. My view is that it is better for the bill to be drafted first.¹⁰⁵ Drafting a bill is a discipline. It forces you to be absolutely clear as to what the law should be, whereas a policy paper can to some extent get away with generalities. So until you have drafted the bill you cannot be quite sure what the report should say. Drafting a bill not only makes you clarify points of detail, but it also sometimes makes you realise that even the main planks of policy have not been fully thought through. So it is best to leave the report until the bill is either finished, or at least in a fairly advanced state.

100 Bill McBryde thought that responding to SLC discussion papers is “part of the public duty of lecturers and professors in law faculties in Scotland: W W McBryde, “Law reform: the Scottish experience” (1998) 3 SLPQ 86 at 95.

101 The system whereby UK universities are formally assessed on their research.

102 Called a “draft” bill on the footing that a text can only be called a bill when it is introduced to the Westminster or Holyrood Parliaments.

103 Scot Law Com No 183, 2001.

104 Scot Law Com No 163, 1998.

105 Oerton, *Lament for the Law Commission* (n 1) 67-68 discusses the issue, but with less than his usual perfect clarity, for he writes that it “makes little sense” to draft the instructions before the report has been completed, but at that same time that to complete the report first “is not an ideal solution”.

(5) Bill drafting

“Policy” is for those who instruct a bill (whether a commission bill or not) and “drafting” is for the drafter, parliamentary counsel. Bill drafting is regarded as a specialised art, of which the adepts are parliamentary counsel.¹⁰⁶ So commissioners do not draft. I did not challenge this division of labour. But there is a case for commissioners drafting their own bills.¹⁰⁷ After all, every SLC report that ends up as a Bill will in any event have to pass through the Office of the Scottish Parliamentary Counsel (Holyrood bills) or the Office of the Parliamentary Counsel (Westminster bills), where it can be given the appropriate makeover. Whilst there is an undoubted value in having the services, within the SLC, of an expert legislative drafter, there is also, it seems to me a downside. At times I felt like a discarnate spirit attempting to communicate at a séance.

Parliamentary counsel is sent “instructions”. These are challenging to prepare. Some commissioners leave the task to a team member, but I always did my own. The instructions say what is wanted: the extent to which the instructions explain the reasons is a matter of choice. In my view it is best when concise reasons are given.¹⁰⁸ In a substantial bill, there will be many separate sets of instructions. Whenever revision is asked for, fresh instructions are needed. I found the drafting of instructions often made me reconsider some point of policy, for there is nothing like setting something out on paper for the eyes of someone else to make you realise that you have not fully thought something through.

Kenneth Reid and I did something that, as far as I know, has not been done by others¹⁰⁹ which is that we did our own private bill drafting before writing up the instructions.¹¹⁰ This is doubly useful. First, it forces you to be clear as to what you want. (Though this is a process – as already mentioned, instructing counsel takes the process a step further, as does reviewing counsel’s drafts.) Secondly it provides a useful platform for instructing counsel. I usually instructed counsel thus: an outline of current law and its defects, explanation of the new policy, all with

106 For discussion see e.g. D Greenberg, *Laying Down the Law* (2011).

107 “The French principle is that the drafting of a law . . . is best placed in the hands of those who have expert knowledge of the subject.” (W Dale, *Legislative Drafting: A New Approach* (1977) 86.) This is true not only for France.

108 Counsel also has, of course, a copy of the discussion paper(s).

109 Except for Gower (n 40) at 261: “I was a particular thorn in their [Parliamentary counsel] flesh by insisting on presenting them with my proposals in legislative form since, only by working them out, could I be sure that they were right and practicable.” Unlike Gower I did not (usually) present my draft directly to counsel. See the following text.

110 My own Land Registration (Scotland) Bill went through about thirty iterations. The bill prepared thereafter by Parliamentary Counsel went through about fifty. But these figures have only limited meaning, because both bills were assembled in stages. While in the hands of the government bill team, there were several more iterations before the bill was finally introduced to the Scottish Parliament.

appropriate references to the discussion paper, and then a culminating section saying “so what is wanted is. . .” followed essentially by the text of my own draft bill. I like to think that this that this approach makes things easier for counsel. The reality is that often – and here I am thinking of bills promoted from other parts of the public sector – counsel receive vague instructions and are expected just to do the best job they can, often within an absurdly short time frame. Burrows quotes a note (which he chanced across in a photocopier) written by a drafter in relation to a non-commission bill: “I have had 36 hours to draft this complex bill. The policy instructions I was given were very sketchy. In consequence I have sometimes had to resort to making up the details of the policy.”¹¹¹ This sort of thing is all too common, but happily not with commission bills.

As these remarks may indicate, whilst the policy/drafting distinction is taken as fundamental, and in itself is generally right, it is an oversimplified distinction. Policy formation without reference to drafting tends to be unfocussed and may lead to unworkable ideas, while the process of drafting throws up issues of policy that should not be left to the drafter. I think that the quality of legislation might be improved if the distinction were not regarded as wholly sacrosanct. At its worst,¹¹² legislative policy formation can be like this method of aircraft design: the policy is that the new type of aircraft should have five hundred seats, all with ample legroom, travel at Mach 2, be perfectly safe, be fuel-efficient and have soundless engines. This policy is then handed over to the engineers, who are supposed to get on with the merely technical business of implementing the policy.

The relationship between commissioner and drafter varies. Some commissioners ask for numerous revisions while others do not. Whatever the attitude of the individual commissioner, the bill will, like the draft report, be scrutinised at full commission meetings.¹¹³ The drafter attends such meetings. Indeed, during my period of office the SLC had its own in-house drafter, who attended all commission meetings even if a bill was not being scrutinised.

That legendary Whitehall chief, Lord Bridges, told Gower, soon after the latter’s appointment to the London commission: “You’ll never achieve anything; the Parliamentary counsel will defeat you.”¹¹⁴ Gower adds: “Up to the time when I left I think I can say that we had won more battles than we had lost – but the war

111 A Burrows, “Some Reflections on Law Reform in England and Canada” (2003) 39 *Canadian Bus LJ* 320 at 329. See also J M Moran, “The parliamentary draftsman: drawing the curtain aside” (1974) 19 *JLSS* 361.

112 This of course does not happen in commission work.

113 Thus commission meeting will examine (a) draft discussion papers, (b) policy papers leading to reports, (c) draft reports and (d) draft bills. Commission meetings do not scrutinise instructions to the drafter.

114 Gower (n 40) at 261.

still continues.” There was no war in my time, but that may be a criticism; perhaps things were too peaceful. In an early joint report the two commissions said that one objective was “ensuring that any statute can be understood, as readily as its subject matters allows, by all affected by it”.¹¹⁵ That has not been achieved. In 1982 Stephen Woolman commented that the SLC “has not taken the opportunity to produce a new style of clearer legislation. Instead the mode of drafting mirrors that of normal parliamentary legislation: it is lengthy, abstruse and extremely technical.”¹¹⁶ The position remains unsatisfactory. Of one London bill Tony Weir wrote that “the draftsmanship is so heavy as to make angels weep”.¹¹⁷ The only significant inroad into drafting tradition that I attempted concerned statutory examples. It is said to have been Bentham who first advocated this idea. The first person to draft thus was that great genius, Macaulay, in his Indian Criminal Code.¹¹⁸ This rational idea has always been rejected in the UK, following the honourable tradition of statutory obscurity.¹¹⁹ The New Zealand commission not only tried to do something about their own bills but issued a report recommending radical changes for the format of all legislation,¹²⁰ and this bore fruit.¹²¹ I think that the SLC should do the same, but confess that I did not press for this. However, the draft bill in the Report on *Land Registration*¹²² had several worked examples of how advance notices operate, something particularly valuable given their conceptual novelty. These examples were omitted from the Land Registration etc (Scotland) Act 2012.

(6) Publication of reports

Projects culminate in the publication of a report. A press release is drafted and released. It is good fun trying to sum up a project in just a few lines that might

115 Report on the *Interpretation of Statutes* (Law Com No 21, Scot Law Com No 11, 1969) 3. “All” is too strong. But legislation should at least be comprehensible to *lawyers*. Often it is not. Much legislation coming from Brussels, Edinburgh and London I cannot understand (Brussels legislation deserves a special place in the Hall of Shame). Legislation cannot always be easy to understand, but we do it worse in the UK than in many other countries. The classic study is W Dale, *Legislative Drafting* (n 107). My favourite sentence, at 103: “The Swedish Lawbook, containing for most purposes the complete law of Sweden, is some 500 pages short of the length of the official index to the UK statutes.”

116 S Woolman, “The Scottish Law Commission” (1982) 3 Stat LR 164 at 166.

117 T Weir, *A Casebook on Tort*, 9th edn (2000) 4. The passage does not appear in the 10th edition.

118 On which see W-C Chan, B Wright and S Yeo (eds), *Codification, Macaulay and the Indian Penal Code* (2011).

119 A very limited exception is Sch 2 to the Consumer Credit Act 1974, but this is only terminological. Another very limited exception is s 35(1) of the Bills of Exchange Act 1882. Some statutes have illustrative styles.

120 Report on the *Format of Legislation* (NZ Law Com R27, 1993).

121 For instance, the New Zealand Personal Property Securities Act contains worked examples.

122 Scot Law Com No 222, 2010.

make sense to a busy news desk. In the past there was often a press conference but over the years attendance declined and today a press conference is rare unless the report is likely to attract public interest, as happened, for example, in the 2007 Report on *Rape and Other Sexual Offences*.¹²³ Most reports are ignored by the media.

(7) Advice to government, including aftercare

General advice to government is not usually a significant drain on resources. I was involved in giving such advice more often than was average, for I found that the Scottish civil service quite often contacted me on a variety of property-related issues. But government may ask the SLC to assist a bill team, both before introduction to parliament and in respect of amendments as the bill proceeds, and this can be time-consuming.¹²⁴ I took up office in May 2006 and much of my first six months or so was devoted to the bill that became the Bankruptcy and Diligence etc (Scotland) Act 2007.¹²⁵

D. THE SLC'S EXTERNAL RELATIONS

(1) Relationship to government

Justice ministries are not independent of government. They are part of government. What about law reform commissions? Wikipedia states: "A Law Commission or Law Reform Commission is an independent body set up by a government to conduct law reform."¹²⁶ In fact not all law reform commissions are established by government. Examples include the Alberta Law Reform Institute,¹²⁷ the American Law Institute, and the National Conference of Commissioners on Uniform State Laws. What about independence? There is a tension here. In the case of the SLC (and indeed many law reform commissions around the world) government (a) chooses the commissioners and (b) funds the commission. Moreover (c) decisions as to what projects are undertaken are co-decisions between commission and government, or, to put it in other words, the commission cannot take on a project without government consent.¹²⁸ For

123 Scot Law Com No 209, 2007.

124 This "after-sales service" as it is sometimes called did not exist at first, in either London or Edinburgh. Cf Burrows (n 111) at 326.

125 It was a large bill and I was not involved in all of it.

126 http://en.wikipedia.org/wiki/Law_commission.

127 <http://www.law.ualberta.ca/>.

128 Whether right or wrong, this is the accepted interpretation of the 1965 Act. For some discussion see Oerton, *Lament for the Law Commission* (n 1) 62 and Gower (n 40) at 260.

reasons such as these Oerton concluded that the independence of the London commission was a “myth”.¹²⁹ The Public Services Reform (Scotland) Act 2010 has now conferred upon the Scottish Government powers (a) to modify the constitutions of numerous public bodies, including the SLC, and even to close them.¹³⁰ A parallel attempt in relation to the London commission was beaten off, for the Public Bodies Bill as introduced included the Law Commission, but in the Public Bodies Act 2011 the Law Commission did not appear. The SLC was less fortunate.

Despite all this, I always felt that the SLC was as independent as any government-funded public body can reasonably expect to be.¹³¹ I never felt any pressure from Government as to what we should recommend. We did of course think often and hard about how government might react to proposals. But that was simply a question of *realpolitik*, as to what might or might not end up on the statute book, not because we wanted to curry favour. If this was lack of independence, then no organisation pressing for law reform, however remote from government, is independent.¹³²

Until 2008 both commissions were physically separate from government. In October 2008 the London commission left its pleasant home at Conquest House in legal London,¹³³ where it had been ever since its establishment, and moved to Steel House in civil service London,¹³⁴ a Ministry of Justice building. The website is that of the Ministry of Justice.¹³⁵ The SLC at first occupied rooms in Old College in Edinburgh University, the same building as the law faculty.¹³⁶ In 1976 it moved to an ugly edifice at 140 Causewayside (HMS Causewayside as Lord Eassie called it) where it remains. This is within walking distance of Old College, and the close links between the SLC and the University’s law faculty have continued. This academic connection has been an important theme in the SLC’s history,

129 Oerton, *Lament for the Law Commission* (n 1) 107. At 63 he calls independence a “mockery”.

130 Sections 14 to 16. Section 26 says that before closing any such organisation “the Scottish Ministers ... must ... in such cases as they consider appropriate consult the Scottish Law Commission.” That seems to make the abolition of the SLC impossible. It is true that the Ministers need not consult the Commission in every case, but they must always have the *possibility* of consulting it. Or perhaps the Ministers could close the Commission, but if so they could never thereafter exercise the section 14 closure power in relation to any *other* public body.

131 The position of the London commission is similar.

132 Cf the comments North (n 97) at 347-348. Possibly the London commission’s independence from government has declined in recent years. See further S Wilson, “Reforming the Law (Commission): a crisis of identity?” [2013] PL 20.

133 37-38 John Street, Theobalds Road.

134 11 Tothill Street.

135 <http://www.justice.gov.uk/lawcommission/>.

136 Though at first it camped at 1 Grosvenor Crescent: see 1965 SLT (News) 148.

one that has been less pronounced for the London commission, albeit that the latter has of course also had academics as commissioners. It would be unfortunate if SLC were, like the London commission, to be moved into government premises.

As to the choosing of projects, the SLC's independence is not complete.¹³⁷ But if government can veto the SLC's suggestions, the SLC can also veto those of government. I think nobody reviewing the SLC projects over the years would conclude that government had excessive influence. The word "excessive" implies that I think that some government influence on choice of projects is reasonable, and I do so believe. It is a question of balance. Geoffrey Palmer, chair of the New Zealand Law Commission from 2005 to 2010, and earlier Prime Minister of New Zealand, likened law commissions to space satellites. Too far from government and they become irrelevant; too close to government and they will be trapped and perhaps even destroyed. It seems to me that the SLC has in general kept about the right distance.

Selection of commissioners could be done in such a way as to produce a non-independent commission. But that has not happened and one reason lies in the fact that commissioners are (a) almost always appointed from outside government and (b) usually hold office for limited periods.¹³⁸ For example, I came from the university world and to the university world I have returned. I was not beholden to government. Commissioners' future careers do not depend on being agreeable to government.¹³⁹ Commissioners do not accept office to buy bread. They are people with successful other careers.¹⁴⁰

The independence of the commissions in Edinburgh and London is thus really a matter of convention and practice. If government wanted to, it could appoint placemen. But that has not happened. On the whole the commissions' independence is recognised by informed public opinion, for when government says that it is referring a matter to one or both commissions, the general view is that the result will be an independent investigation.

137 "Given the importance of topic selection to the mandate of expert Commissions, there has been little material published, either by the Commissions or by commentators, on the process of topic selection" (Macdonald (n 51) at 848). This seems to me true then and still true today.

138 The 1965 Act says the appointment is for a period "not exceeding five years". In practice appointments are usually for three to five years. A continuation is possible, and sometimes happens. There have been three very long tenures: T B Smith (1965 to 1980), A E Anton (1966 to 1982) and Eric Clive (1981 to 1999).

139 For Oerton's different view see *Lament for the Law Commissions* (n 1) 103.

140 It is true that the salary is higher than a professorial salary. But the latter is adequate, and anyway legal experts who are strongly motivated by money do not become academics.

(2) Joint projects

Some projects are carried out jointly between London and Edinburgh. Now that there is a commission in Belfast, there can be projects involving all three commissions, and indeed one has begun,¹⁴¹ but the Belfast commission's budget is small, so its input to joint projects may be limited.¹⁴² Joint London/Edinburgh projects got off to a bad start with the common contract code.¹⁴³ There have been many since, and they have seldom proved easy.¹⁴⁴ Getting agreement from five commissioners is hard enough. It becomes harder when there are ten to satisfy, plus the fact that the two teams may disagree. And a repeated problem has been timing. Involving a second team, and satisfying ten commissioners rather than just five, inevitably adds time to a project. My experience is that the additional time needed is invariably underestimated, leading to repeated crises, especially if a public statement has been made as to when the discussion paper or report will be published. Here there is some difference between London and Edinburgh, the former being, at least during my period of office, keener on the idea of announcing deadlines. It always seemed to me a bad idea. Doing law reform projects is not like manufacturing matchboxes. Each project is a one-off. How long each will take cannot be known in advance. Good law reform is not done on the procrustean bed.

Another problem about joint projects is their selection. They tend to originate in London, with the London commission being asked by a Whitehall department to take something on. If it does so, and if the area of law is a cross-border one, then one of two things happens. The first is that the project is taken on by the London commission just for English law, but with the likelihood that if the eventual recommendations are enacted they will apply to Scotland too.¹⁴⁵ That fact may be regarded as a reason why the project should have been joint. The other possibility is that the project is indeed done as a joint one. But that often means that Edinburgh has to participate in projects that are chosen in London. This is a particular problem because Edinburgh's resources are smaller, and diversion of resources from more important projects may be the result. This dilemma can apply to projects of any type, but perhaps the problem has grown in

141 *Regulation of Health Care Professionals* (Law Com CP No 202, Scot Law Com DP No 153, NILC 12, 2012).

142 Its running costs in 2011-12 were £875,000: Northern Ireland Law Commission, *Annual Report for the Year Ended 31 March 2012* (2012) 22.

143 See earlier discussion (B.7).

144 I refer to law reform projects. The same problems do not seem to arise with consolidation or with statute law revision.

145 For example, the Bribery Act 2010, which applies to Scotland as well as to England and Wales, was based on a project by the London commission alone.

recent years in that the London commission has arguably become more willing to accommodate Whitehall. The SLC should not become a mere handy resource for Whitehall departments that have donkey work to be done.

(3) Implementation

Reports may be (i) implemented, though sometimes after considerable delay,¹⁴⁶ (ii) partially implemented (iii) rejected or (iv) ignored. A reasoned rejection cannot be complained about. Law commissions are merely advisory bodies, and they cannot expect that everything they recommend will be accepted. But reasoned rejections are uncommon. If government does not take up a report, often no reason is given for the rejection, or a reason so lacking in specification and relevancy that it is no reason at all. Lack of legislative time is a common excuse.¹⁴⁷ Lack of interest is the usual reason. Hurlburt summed it up:¹⁴⁸

It is in the nature of things that law reform commissions often make law reform proposals about subjects in which their governments are not much interested. A law reform commission is established to do things that governments do not usually do, and the reason that a government does not do something is likely to be that it is not interested in doing it.

Roger Toulson has said:¹⁴⁹

Law reform has a low political priority. Senior departmental officials know that their minister would not be interested in bidding for scarce parliamentary time for a Bill whose only purpose was to simply and clarify the law. Individual departments will only be interested in proposals if they involve a change in the law which fits with the government's policy agenda.

Or, as it was put more than a hundred years ago, "for lawyers' law, Parliament has neither time nor taste".¹⁵⁰ South of the border two significant developments have happened, one statutory and the other non-statutory. The statutory

146 For example the Report on *Requirements of Writing* (Scot Law Com No 112, 1988) was implemented by the Requirements of Writing (Scotland) Act 1995. The most remarkable example is the Report on *Reform of the Ground for Divorce* (Scot Law Com No 116, 1989), implemented by the Family Law (Scotland) Act 2006.

147 "'Lack of Parliamentary Time' is complacently offered, and tamely accepted, as an excuse for what may amount to a national denial of justice. I do not know what the shareholders of a corporation would say to a board of directors who excused themselves for neglecting the interests of the company on the ground that they themselves had made, and were maintaining, rules of procedure which gave them no time to attend to their business." Kilbrandon (n 26) at 196.

148 Hurlburt, *Law Reform Commissions* (n 1) 369.

149 Toulson (n 72) at 323.

150 C Ilbert, *Legislative Methods and Forms* (1901) 213.

development is the Law Commission Act 2009,¹⁵¹ requiring the Lord Chancellor to make annual reports to Parliament about progress in implementing Law Commission reports and providing for a “protocol” on how the Government and the Law Commission should work together.¹⁵² The Act applied only to the London commission and there has been no corresponding legislation here. The non-statutory development, also dating from 2009, has been a new bill procedure in the Westminster Parliament, involving a special House of Lords committee. The Perpetuities and Accumulations Act 2009, the Third Parties (Rights against Insurers) Act 2010 and the Consumer Insurance (Disclosure and Representations) Act 2012 were passed in this way. The latter two were based on joint projects. This new procedure is also in fact available for bills based solely on SLC reports, though by the nature of things not many such cases are candidates for the Westminster Parliament. Discussions are taking place for some comparable procedure to be adopted in the Scottish Parliament. So there has been some progress. Nevertheless the overall picture is not good. James Munby, in giving the Denning Lecture in November 2011, took government to task, expressing disappointment and even sarcasm.¹⁵³ The situation in Scotland varies over time, and I will not attempt any verdict, though would draw attention to complaints by the former chair, James Drummond Young, in the SLC’s annual reports.¹⁵⁴

(4) Whitehall, alas

One cannot speak about law commissioning without mentioning Whitehall. It comes into the story in more than one way. Whitehall has never liked the commissions.¹⁵⁵ That was true in the beginning, and remains true. By contrast, the Scottish civil service has never been hostile to the SLC. This difference has had consequences. One is that the London commission has, it seems to me, drawn closer to Whitehall simply as a survival response, a development that, however understandable, has been unfortunate. What explains Whitehall’s attitude? In the

151 For the background, see T Etherton, “Law reform in England and Wales: a shattered dream or triumph of political vision?” (2008) 10 *Eur J of L Reform* 135.

152 *Protocol between the Lord Chancellor and the Law Commission* (Law Com No 321, 2010).

153 “Shaping the law: the Law Commission at the crossroads”, available at <http://www.bacfi.org/files/Denning%20Lecture%202011.pdf>. At the time he was the chair of the London commission. For the 2009 Act see Wilson (n 132).

154 See in particular Scottish Law Commission, *Annual Report 2008* (Scot Law Com No 214, 2009) 5. Evaluations of overall implementation rates vary. As well as Wilson (n 132), see e.g. Burrows (n 111) and Cretney (n 37).

155 Oerton, *Lament for the Law Commission* (n 1) illustrates that phenomenon. For general discussion see A L Diamond, “The Law Commission and government departments”, in Zellick (ed), *The Law Commission* (n 32) 28, whose paper opens thus: “The relationship that exists between the Law Commission and Government Departments can be summed up in one word: uneasy.”

first place there is departmental jealousy. The whole law has always been under the purview of one or another Whitehall department, so the London commission is seen as an interloper, as is the SLC in non-devolved areas. Yet this explanation calls for another, that I cannot furnish, because the SLC does not experience this jealousy from the Scottish civil service, in relation to devolved areas. The second source of hostility lies in what I call London legal conservatism, which Whitehall partakes of. On both sides of the border there are conservative and anti-conservative elements, but the balance is different. The partnership law project is typical. It was a joint project between the two commissions, with far-reaching recommendations.¹⁵⁶ In Scotland there was, and is, support. But in London there was opposition, and so the DTI, now DBIS, vetoed it. When we pressed Whitehall, we were told that England did not want reform. When we said that, in that case, Scotland, which did want reform, should have it, even if England opted out, we were told that what Scotland wanted did not matter, because the law had to be uniform in the UK, and uniform meant English law.¹⁵⁷ (Why the Scottish Parliament lacks legislative competence in this field, when the Northern Ireland assembly has it, is a question better not asked.) The attitude I am here describing – London legal conservatism – goes back well before 1965. I cannot explain it.

An argument often encountered in London is that to reform the law is to make it less certain, and uncertainty is unacceptable. Indeed, one hears that argument from other quarters. It is true: all new legislation creates new uncertainties. And all legal uncertainty is undesirable. What is too often forgotten is how steeped in uncertainty so much of existing law is – why else do the law reports bulge? Reform may or may not change the overall level of uncertainty. Sometimes it decreases it, and sometimes increases it, but even the latter may be acceptable if the reform attains other useful objectives. What struck me about London is the way this argument about uncertainty is so constantly and mindlessly repeated. Sometimes one struggles to resist a sense of despair at human rationality.

As for the attitude of the DBIS,¹⁵⁸ what can one say that would combine politeness with truth? In 1995 the chair of the SLC wrote: “Commissioners who had dealings with that Department¹⁵⁹ ... gained the impression that its officials were unsympathetic to the claims of Scotland to be accorded separate treatment, an impression strengthened by the fact that *not one member of its large legal staff*

156 Law Com No 283, Scot Law Com No 192, 2003.

157 See also Scottish Law Commission, *Annual Report 2009* (Scot Law Com No 221, 2009) 7.

158 And, more widely, Whitehall, and, more widely still, London. But there are exceptions.

159 Department of Trade and Industry, forerunner to the current DBIS.

in London was qualified in Scots law."¹⁶⁰ Little has changed. It seemed to me that DBIS saw Scots law as an anomaly; that whilst immediate abolition was out of the question, what could be insisted on is that any changes in Scots law should be in the direction of English law.¹⁶¹ There may be exceptions: Whitehall may not care about, say,crofting tenure. But the general picture is clear. The partnership project is an example: see above. Few people north of the Border emerge from extensive dealings with Whitehall without experiencing an urge to vote SNP.

E. CONCLUSION

Law reform is imperfect. It can be done badly. Even when done well, every change in the law has its costs—the public-sector costs of preparing the new legislation, and the user costs of the transition. Every change in the law de-skills those who know the current law, which explains, in part at least, why legal practitioners are often unenthusiastic about law reform. But retaining outdated, incoherent and inaccessible law has its costs too. I emerged from my five year term of office keener on law reform than I had been when I began. We need more law reform, not less. Governments have a duty to provide law of decent quality; they consistently fall short in that duty. Shoppers can reject goods of unsatisfactory quality, and, perhaps more importantly, they can take their custom elsewhere. But the state is a monopoly supplier of law, and as with most monopoly suppliers the quality is unsatisfactory. Perhaps the European Convention on Human Rights should have a new protocol, namely the right to law that is reasonably clear, coherent, accessible and workable. Were that to happen, the UK Government and indeed the Scottish Government would be in trouble. In *Roe v Russell*,¹⁶² Lord Justice Scrutton, sitting in the Court of Appeal, said:¹⁶³

An order for ejection should not have been made against the sub-tenant in this case, and his appeal must therefore be allowed and judgment entered for him with costs here and below. I regret that I cannot order the costs to be paid by the draftsmen of the Rent Restrictions Acts, and the members of the Legislature who passed them.

160 C K Davidson, "The Scottish Law Commission, 1965-95" (1995) 1 SLPQ 18 at 21-22, emphasis added.

161 Of course, a rational case might be made out for this view. But it would have to be the conclusion of the argument, not its starting-point (and it seems to me that much of the history of English law over the past two hundred years or so has been a history of assimilation to Scots law, whence much of the modern similarity of the two systems, though of course not all, for there has been much influence the other way as well).

162 [1928] 2 KB 117 at 130.

163 If this was an attack on statute law it was misconceived. It was also misconceived if the suggestion was that legislative perfection is humanly possible. It isn't. I read it as a general protest against substandard legislation.