**Scottish Public Law Group Seminar - 19 November, 2015**

**Address by David Johnston QC**

How Law Commissions Work: Some Lessons from the Past

There are just a few weeks left of this 50th birthday year for the law commissions. Lord Pentland has already sketched the social background at the time the law commissions were set up in 1965. I wondered what other events of global significance took place in that year. Finding out is not difficult, thanks to Wikipedia. Here are a few, more or less randomly selected: the introduction of comprehensive schools; the inauguration of the Mont Blanc tunnel; the banning of cigarete advertising on British television; and the release of *Highway 61 Revisited*. I may have missed it but I did not spot a reference to the establishment of the law commissions.

I have been at the law commission for rather less than 50 years, in fact only since the end of January this year. So while this is an occasion to look back and reflect, I cannot do that from the perspective of a well-seasoned law reformer. Instead my aim is to look back from the point of view of someone who is new to the task of law reform but now has a responsibility to try to advance it. The purpose is to see if from the past we can learn anything about how best to meet the challenges of law reform in future.

In the later part of his paper Lord Pentland explored one important aspect of this: how the programme of the Commission might be co-ordinated better with government in order to improve the prospects of efficient implementation of projects of law reform. My own talk is not about high-level strategic thinking of this kind. It is more about the nuts and bolts: how best to conduct a project of law reform in order to engage with the interested public.

In the time available I can only sketch some points that have emerged in the course of my current law reform project, which is on the law of prescription. More tentatively, I go on to suggest some wider implications.

In the prescription project, one of the issues we are examining is section 11(3) of the Prescription and Limitation (S) Act 1973, the so-called 'discoverability' provision. It postpones the start of the prescriptive period for claims in relation to latent damage until the pursuer has knowledge of certain matters. Everyone here will be aware that the decision of the UKSC last year in *Morrison v ICL Plastics* was that what might be called the received interpretation of section 11(3) of the 1973 Act was too generous. The correct interpretation was held to be that section 11(3) required the pursuer to be aware of only one thing, the fact that loss or damage had occurred. Knowledge of how it had been caused or by whom was not relevant.

The decision caused consternation among lawyers and those who work in the construction and insurance industries in particular. The minority judgment also recommended that the Commission should re-examine the matter. So that is what we are doing.

It is an area which has potential as a case study for today's purposes. This is the third time that the Commission has travelled over this terrain, which allows us to ask: what can we learn from our previous endeavours? It is true that Hegel declared that peoples and governments have never learned anything from history.[1] But that need not deter us from continuing to try.

I begin by summarizing the two previous Commission ventures into this territory, before drawing some threads together.

Phase 1

[1] GWF Hegel, *Lectures on the Philosophy of World History* (HB Nisbet tr, Cambridge, CUP, 1975) 21.

In the beginning was a consultative memorandum, *Memorandum No 9: Prescription and Limitation of Actions*.[2] It covered the whole law of prescription and limitation of actions in about 80 pages. It did not, as discussion papers do nowadays, contain a list of questions for consultees. Indeed the only clue for those who opened it about what they should do with it is a marginal note at the top of the first page. It says: 'NB This Memorandum is designed to elicit comments upon and criticism of the proposals which it contains. ...'.[3]

The memorandum was followed by a report in 1970. It is 75 pages long. It records that 23 organisations and 11 individuals had commented on the memorandum.[4] So far as discoverability is concerned, it was very brief: it did not spell out the various options; it did not consider the position in any other legal system; and it stated only that 'the period should run from the date when the damage is, or could reasonably have been, ascertained by the aggrieved party'.[5] It did not contain a draft Bill.

Phase 2

Problems with discoverability surfaced in various cases. The same problems arose south of the border, leading there to the enactment of the Latent Damage Act 1986. There was no legislation in Scotland, but the government referred the issue back to the Commission.

In 1987 a consultative memorandum appeared.[6] It contains both provisional proposals and questions for consultees. They are set out in a rather elaborate way which makes it difficult to be precise even about how many questions there are. This was followed by a report in 1989.[7] In the report there is a full discussion of difficulties that had arisen in interpreting section 11(3).[8]

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[2] SLC Memorandum 9 (1968).
[3] ibid, 58–67.
[4] SLC 15, annex A.
[5] ibid, para 97.
[6] Scottish Law Commission, SLC Memorandum 74, *Prescription and Limitation of Actions (Latent Damage)* (1987).
[7] Scottish Law Commission, SLC 122, *Report on Prescription and Limitation of Actions (Latent Damage and Other Related Issues)* (1989).
[8] Prescription and Limitation (Scotland) Act 1973, s 11(3).

Interestingly, in the report the Commission points out that it is questionable whether the drafting of section 11(3) accurately reflected the policy that the Commission had set out in its 1970 report.[9] The report contains a draft Bill complete with explanatory notes. It also records that 23 organisations and nine individuals had submitted written comments.[10] Among those commenting were organisations representing insurers, architects, civil engineers, chartered surveyors, building employers and local authorities. The 1989 report has never been implemented. I will come back to this.

Events abroad

If we leave Scotland for a moment but stick with the same subject-matter, we can usefully compare the Law Commission's 1998 consultation paper on limitation of actions.[11] That runs to 456 pages and contains full discussion of the various permutations for reform of the core limitation regime. Another striking feature of that paper is the extensive use of comparative material. That did not feature much in the Scottish Law Commission publications I have mentioned. Of course, if you remember your Roman law, you will be aware that the use of comparative material was by no means a novelty: in the fifth century BC, for the purposes of compiling the XII Tables, the Romans sent a delegation to Athens to study the laws of Solon.[12]

That was just one foreign system. Nowadays comparative law has taken on a life of its own: the 1998 consultation paper has 60 pages of comparative legal material.[13] I do not think the Scottish Law Commission has ever taken with such unalloyed enthusiasm to the field of comparative law, but there is no doubt that much greater use is now made of comparative material. The 1998 paper was followed by a report in 2001. None of its proposals has been implemented.[14]

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[9] SLC 122, para 2.8.
[10] ibid, app B.
[11] Law Commission, LC CP 151, *Limitation of Actions* (1998).
[12] D.1.2.2.4, Pomponius, libro singulari enchiridii.
[13] LC CP 151, 180–240.
[14] Law Commission, LC 270, *Report on Limitation of Actions* (2001).

That was the background: so to the question. Does anything of wider significance emerge from it? I will focus on two main issues. First, consultation and implementation. Second, the content of commission publications.

Issue 1: Consultation and implementation

What I have called Phase 1 –the 1968 consultation and 1970 report– was successful: there was implementing legislation. The 1989 report was not. It did not. Given the consultation that was carried out, it cannot be said that the Commission failed to engage with the right interested parties.

What went wrong? In briefest summary, everything seems to have turned on the 20-year 'long stop' prescription under section 7 of the 1973 Act. In the 1989 report, the Commission had reviewed this and concluded that the law should not be changed: so the 20-year period should begin from the date the pursuer sustained loss or damage. There was concern in the construction industry that this meant that in a latent damage claim the starting date even for the long-stop prescription came very late: only when damage had materialized, which might be long after the date of construction. It was suggested that the 20-year period ought instead to run either from the date the work was done or else the date of completion of the construction works. The Commission considered this but stood by its earlier recommendation. Its main reason for doing so was that it regarded its own analysis of the structure of the law as analytically preferable. It thought there was a conceptual difficulty about having an obligation prescribe before loss had flowed from an act or omission and so completed the cause of action. Ultimately in 1995 the government took the view that there was an impasse and that in these circumstances it could not take the recommendations forward.

In England the Law Commission's 2001 report also remains unimplemented. Initially (in 2002) the government accepted the recommendations in principle. But in 2009 the government announced that following what was described as 'a recent consultation with key stakeholders' it had been

demonstrated 'that there are insufficient benefits and potentially large-scale costs associated with the reform'.[15]

These are cautionary tales for the law reformer. So far as non-implementation of the 1989 report is concerned, one lesson I would draw (without intending to criticise the Commission) is that it is crucial not to be wedded to a Platonic form of legal or analytical purity –in this instance, that was the notion that there was a single correct conceptual rule on when causes of action accrue. As Lord Pentland has already mentioned, we do not inhabit an ivory tower. Nor is the Commission a research laboratory in which we carry out esoteric experiments. So when we are faced with substantial arguments that in practice the cost/benefit ratio of a rule is unfavourable, we do need to examine whether there is in fact another way forward. Otherwise the likelihood of any reform of the law is remote.

A second point is this: back in 1989 (or even in 2001) it was not yet standard practice to carry out an impact assessment and to publish it with the report. Nowadays we do that, and we rely substantially on consultees to draw to our attention issues relating to costs and benefits as they affect them. It seems to me that from the point of view of implementation, this may be almost as important as the soundness of the proposals for reform. It will be interesting to see in due course whether reports backed up by a thorough impact assessment fare better in terms of implementation.[16]

Issue 2: Content of commission publications
What actually needs to be in a consultation paper or a report?

The publications I have mentioned occupy two poles. On the one hand, the

[15] The Parliamentary Under-Secretary of State for Justice (Bridget Prentice), Written Ministerial Statement on the draft Civil Law Reform Bill, 19 Nov 2009 : Column 13WS.
[16] It is still early to draw firm conclusions on this point: the Scottish Law Commission appears first to have provided an impact assessment in 2010; and the Law Commission a couple of years earlier.

Scottish Law Commission publications were, by contemporary standards, brief, even though they were dealing with many and complex issues. The Law Commission paper was long and detailed. Which is preferable?

There is a lot to be said for brevity, which is the soul of wit. But can it perhaps go too far? The answer is surely 'yes'. In its 1970 report the Scottish Law Commission actually did — in one sentence — clearly state its policy intention on discoverability: that time should start to run against a claimant once he or she knew or ought to have known of the fact of loss or damage (and nothing more). That is precisely what the UK Supreme Court decided in 2014 that section 11(3) means. But in the previous 30 years or so, the Scottish courts had headed down an entirely different interpretative route. Probably there is no single explanation for that, but it may be significant that, even if the single sentence in the 1970 report was clear, it was only a single sentence, easily missed. It would have been easy to miss because the report did not discuss what the various options were or articulate the reasoning for the particular policy choice. It may not even have been obvious that a choice had been made at all. So in this instance it might have been better for the report to say more. But how much more?

This takes us to the other pole. Nowadays I think we sometimes say too much more. Recent practice has been to produce much longer and much more elaborate consultation papers and reports. There may be a tendency to overburden publications with fine points of analysis appropriate for academic monographs. That in turn may discourage or deter some who might otherwise engage with a consultation exercise. Take — purely as an example — comparative law. For the purposes of a consultation exercise, it is clearly valuable (perhaps essential) for the Commissions themselves to have a broad understanding of how other legal systems deal with the same issues. It is useful and important for the purpose of informing the Commissions about options that have been tried more or less successfully elsewhere. But it is far from obvious that the public at large (or the slightly smaller segment of the public who respond to consultations) needs to be burdened with all this material. It may well be that for the purposes of consultation little more is

needed than a footnote about how things are done elsewhere. I am not advocating myopia, far less chauvinism. But there is a cost to comparative exercises in terms of resources. And there must also be a concern that, the more Commission publications become burdened with complexity, whether this derives from comparative law or elsewhere, the less it is possible to engage the interested public in responding to consultation exercises.

More generally, it seems to me important always to focus on the purpose that Commission publications should serve. They should not be directed primarily, perhaps even at all, at seeking to resolve every point of legal controversy in the way that an academic work might. Since in any project of law reform detailed research does need to be carried out, it may be that the best way of presenting it, providing the necessary underpinning for the Commission's proposals, and demonstrating that they are based on rigorous scrutiny of the law and the options for reform, would be to publish it separately. The possibility of online publication makes this straightforward.

From the perspective of the consultation exercise, the touchstone seems to me to be that a consultation paper should spell out sufficiently what the policy options are and the main consequences which are thought to flow from adopting one or another. A report, on the other hand, will need to spell out sufficiently the policy issues that arise and the reasons for the ultimate policy recommendation. In order to optimise the prospects for implementation within a reasonable period, it will no doubt also be necessary for the report to convince government that the consultation has been extensive and thorough, and that the policy options have been adequately considered, balanced and assessed. It is far from clear that much more is required. It is, as the example of the single sentence in the 1970 report was intended to demonstrate, possible to say too little. But it is equally evident that it is possible to say so much that consultees lose the will to comment.

We can look at the same question from another perspective, when implementing legislation has followed on a Commission report.

It is interesting to note how much has changed. Back in 1970 or even 1989 nobody in the Commission would have imagined that the courts would deploy Commission publications as an aid to interpreting legislation. Since *Pepper v Hart*[17] and many other subsequent cases, nobody can be in any doubt that they will. The position of a person seeking to construe legislation is surely much improved if he or she has an underlying Commission report that clearly articulates the relevant policy issues and the reasons for the ultimate policy recommendation.

There is a further point. At the moment it is normal practice in the UK for Commission reports to contain draft Bills. That does not happen everywhere, and so it is clearly possible to operate a different system. Resource issues may no doubt place some strain on the practicability of always having a draft Bill to accompany a report. But, if at all possible, it is an extremely valuable—perhaps even a vital—element in the overall process.

A draft Bill can be a valuable tool for purposes of statutory construction. Recall the earlier example of the 1970 report, which did not contain a draft Bill. In its 1989 report, as already mentioned, the Commission doubted whether the implementing Act had correctly reflected the Commission's policy intentions. Had the report contained a draft Bill, that uncertainty might have been less likely to occur. As it is, I find myself that if there is a point of interpretative uncertainty in the 1973 Act (and there are many), it is not easy to link the terms of the Commission report with the way in which the Act is drafted. That seems unfortunate. Given the amount of detailed legal and policy work that goes into the production of a Commission report, it would surely always be preferable to have a draft Bill which made it possible to identify how the Commission crystallised its policy views and proposals in the crisp language of statute.

To sum up very generally. I have commented on only two points: engagement of the interested public in the exercise of shaping proposals for law reform; and the content of commission publications. Both of these lead to the same

[17] *Pepper v Hart* [1993] AC 593 (HL).

broad conclusion: that the Commission works best and achieves most when it engages most closely with, and makes its publications most accessible to, the interested public. That is easy to say, but as the examples from the previous prescription projects were intended to illustrate, not always straightforward to accomplish. And the target is a moving one: in the 1970s the only way of engaging with the public was on paper. Now all our publications are electronic (though not solely electronic). We are also considering how we can best make use of social media. You can follow us on Twitter. We already have quite a lot of followers –though more are always welcome. There is not time to discuss this in detail. But the overall message is the same: that we are always keen to engage with the public. Quite simply because that is the best way of getting the task of law reform done.

I conclude by saying simply that these views are personal views and not the views of the Commission. Equally, they have been shaped by only nine months' experience as a Law Commissioner. Since the term of appointment is five years, there is plenty of time yet to learn more from the past about how best to reform the law in the future.