

COMMONWEALTH ASSOCIATION OF LAW REFORM AGENCIES (CALRAs)

BIENNIAL CONFERENCE – LAW REFORM IN A FAST CHANGING WORLD

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THE LORD JUSTICE CLERK OF SCOTLAND, THE RT HON LORD CARLOWAY

“TO ‘MEND THE LAWES, THAT NEIDS MENDEMENT’: A SCOTTISH PERSPECTIVE
ON LAWYERS AS LAW REFORMERS”¹

The Lord Justice Clerk will examine the diverse roles and responsibilities of lawyers within the system of law reform prevailing in Scotland today. Particular attention will be given to the position of the Scottish Law Commission, in its 50th anniversary year, in the context of participation by the wider body of legal practitioners, academics, and the judiciary. His Lordship will also reflect on the mechanisms for effective delivery of law reform in the modern technological era.

1. Introduction

The Scottish Law Commission has been in existence for 50 years, but the origins of a body tasked with law reform were discernible in Scotland at least 5 centuries earlier. Before the creation of the Commission in 1965, “[f]or the purpose of promoting the reform of the law of Scotland”², the Statute Law Revision Act 1425 tasked its statutory predecessor ‘to see and examine the Buiks of Law of this realme, that is to say, *Regiam Majestatem* and *Quoniam Attachiamenta*, and mend the Lawes, that neids mendement’.³ The *Regiam Majestatem* dates from the early 14th Century and is “regarded as the Scottish mediaeval law-book *par*

¹ I would like to acknowledge the assistance of my law clerk, Jacqueline Fordyce, in the research for and preparation of this address.

² Law Commissions Act 1965 (c 22), s 2

³ On the two “buiks of law” see Lord Cooper, *Regiam Majestatem* and *Quoniam Attachiamenta* (Stair Society vol 11, 1947) and Fergus, *Quoniam Attachiamenta* (Stair Society vol 44, 1996).

excellence"⁴; a "supposedly authentic record of 'our most ancient law'"⁵. It is, in essence, the record of Scottish legislation and custom modifying the general civil law, or *ius commune*, derived from the Roman sources.

More commissions dedicated to reforming the ancient laws followed from 1469 to 1824.⁶ Thereafter, following the work of numerous royal commissions and government committees in the intervening period⁷, the (part-time) Law Reform Committee for Scotland was established in 1954.⁸ It continued until the 1970s, when it was replaced by the (full-time) Scottish Law Commission.⁹

On the occasion of its 20th anniversary, the Commission's efforts were tentatively greeted by one academic, somewhat uncharitably, with "muted cheer".¹⁰ The 40th anniversary prompted the question "Do we still need a Scottish Law Commission?", even if its author answered his own question affirmatively.¹¹ In the period 2008 to 2010, the Commission expressed its own concerns¹² over the rate of implementation of recommended

⁴ Fergus (*supra*), p 2.

⁵ Lord Cooper (*supra*), p 1.

⁶ See, generally, Macdonald *et al*, *Law Reform*, in the *Stair Memorial Encyclopaedia*, vol 22, at paras 627 *et seq.*

⁷ *Ibid*, paras 637 *et seq.*

⁸ *Ibid*, para 650 citing the *First Report of the Law Reform Committee for Scotland* (1957) (Cmnd 88).

⁹ See Stark, "The longer you can look back, the further you can look forward: the origins of the Scottish Law Commission", (2014) Edin LR 59.

¹⁰ Walker, *The Scottish Law Commission Under Review* 1987 Statute L Rev 115, 122; cf Lord Hunter, *Law Reform: The Scottish Law Commission* 1988 JR 158 at 182.

¹¹ Lord Hope, *Do we still need a Scottish Law Commission?* (2006) 10 Edin LR 10 at p 27

¹² SLC Annual Report 2008 (Scot Law Com No 214), p 5: "It is a matter of some concern that the number of Commission reports that remain unimplemented has risen significantly since devolution..."; SLC Annual Report 2009 (Scot Law Com No 221), p 7: "...both the Scottish Government and the Scottish Parliament have responded to our concerns... Unfortunately the desire...to promote the reform of Scots law is not replicated at a United Kingdom level..."; and SLC

reforms¹³, especially by the United Kingdom Parliament¹⁴. These concerns have resulted in the introduction of a “fast track” Scottish Parliamentary procedure for certain of the Commission’s proposed bills.¹⁵

The conversion rate of the Commission’s proposals into legislation is significant. However, the Commission, as a body of lawyers, does not stand alone and, as with rugby, the conversion rate says little about the performance of the rest of the team. What about the other lawyers, those who are not Commissioners? To what extent, if any, do they participate in the Commission’s work? To what extent do they play a part in law reform by other means, beyond the Commission’s prescribed programmed reform?

The Scottish Law Commission is the standard bearer for substantive law reform in Scotland. Other lawyers nevertheless have their parts to play in maintaining the efficacy of a legal system from which all lawyers derive a living and by which others maintain their liberty and vindicate their civil rights. The focus of this address is quite deliberately

Annual Report 2010 (Scot Law Com No 223, p 8): “Since 2007 no civil law statutes based on Scottish Law Commission recommendations have been passed by the Scottish Parliament, although we have produced seven reports on devolved civil law subjects since September 2006. In addition, several earlier reports remain unimplemented...”

¹³ See the correspondence between the Convenor of the Justice Committee and the Cabinet Secretary for Justice between June and August 2012: www.scotlawcom.gov.uk/publications/correspondence-on-the-progress-of-implementation/

¹⁴ The SLC’s remit is not limited to devolved areas of law. The SLC is, however, funded by the Scottish Government, and the Scottish Government’s budget is to be used for devolved matters.

¹⁵ The Delegated Powers & Law Reform Committee deals with the implementation of certain Commission Bills in terms of Rule 9.17A of the Standing Orders of the Scottish Parliament. See McMillan, *Law Reform: a new era?* (2015) 60(1) JLSS 21 – 22. This does not include bills which “relate directly to criminal law reform” (*ibid*; Scottish Parliament Standards, Procedures and Public Appointments Committee, 2nd Report, 2013 (Session 4), Implementing Scottish Law Commission reports, 18 April 2013, SP 307 <http://www.scottish.parliament.uk/S4StandardsProceduresandPublicAppointmentsCommittee/Reports/stpr-13-02w.pdf>). For an early critique of the lack of criminal law reform by the Commission, see Gane, *Criminal Law Reform in Scotland* (1998) 3 SLPQ 101. The first “Commission Bill” to proceed by the new accelerated procedure in Scotland (now the Legal Writings (Counterparts and Delivery) (Scotland) Act 2015) received Royal Assent on 1 April 2015.

specifically on lawyers. It is accepted that some, perhaps many, members of the profession have shown little interest in positive reform; preferring to defend a legal system preserved in aspic and in which they can be assured of a profitable place. That acceptance does not prevent an expression of how things ought to be.

Those within the legal profession (ie all those engaged in the law in a professional capacity) are peculiarly placed to propose reform of the law where others cannot.¹⁶ By virtue of their technical knowledge and skills, they have a unique ability to notice when change in the system is necessary or desirable. They ought to be able to detect when a system, or more often a part of it, is failing; not in terms of their own professional or financial success but in relation to the needs of the wider community. That community is not restricted to the particular client base which the lawyer happens to represent. The lawyers have an equally singular awareness of how to promote and secure that appropriate change is achieved.

The essential proposition is that those within the legal fraternity should consider themselves to be the guardians of the legal system for the benefit of wider society and future generations. Their capacity to contemplate and to effect change brings with it the responsibility to seek to exercise it on behalf of others. It is thus the duty of the lawyer to be pro-active in evaluating and maintaining a legal system that is fit for purpose; that purpose being to meet the constantly evolving needs of the society which it serves.¹⁷ The identified

¹⁶ Lord Hunter, *Law Reform: The Scottish Law Commission (supra)* at 182: It is "quite impossible for anyone to set up as a law reformer unless he or she...has a wide and accurate grasp of the existing law..."

¹⁷ Lord Rodger (*supra*) at 346: "People in Scotland...have a right to expect a system of law which is adapted and reformed to meet changing needs. If one asks whether Scots law is indeed being reformed and adapted in this way, then the answer is not to be found simply by concentrating on the number of unimplemented reports of the Scottish Law Commission..."

purpose is, or ought to be, mutual to both the legal system and the profession; both being the servants of society and not its masters.¹⁸

If it is correct to assert that, subject to the overriding need for proper democratic analysis and scrutiny by government and legislature, lawyers should be at the heart of law reform, it is important to consider the extent to which the Commission does, and should, reflect the views of the wider legal profession in the promotion of reform. There are two immediately obvious areas for examination. The first is the direct representation of the legal profession on the Commission by virtue of the professional categorisation of individual Commissioners. The second is the indirect representation by way of consultation with the various professional organisations and individuals.¹⁹ Looking beyond those legislative reforms originating from the Commission, there are the law reform measures successfully promoted or devised by others.²⁰

Returning to the central theme, who are the law reformers amongst the lawyers in Scotland? Who amongst them perform, or ought to perform, a meaningful role in shaping the Scottish legal system of the future?

2. A preliminary question – what is law reform?

¹⁸ See Moran *et al*, *Legal Profession*, in the *Stair Memorial Encyclopaedia*, vol 11 (reissue), para 251: “The [solicitor] profession does not exist to act as some type of interest group, trade union or lobbyist; it exists purely for the protection of the public interest and for the betterment of the service rendered by its members.”

¹⁹ Cusine, *Civil law reform: where are we and where are we going?* 2015 SLT 27 at 28: “...the Faculty of Advocates and the Law Society of Scotland comment on all...discussion papers.”

²⁰ Gretton : *Of Law Commissioning* (2013) 17 Edin LR 119 at 130: “A great deal of law reform does *not* involve the Scottish Law Commission.” See, also, McBryde, *Law reform: the Scottish experience* (1998) 3 SLPQ 86 at 98: “I have observed how the Scottish Law Commission can be bypassed on issues of law reform.”

Law reform is a difficult concept. Its precise meaning is elusive; it is susceptible to different meanings in different contexts. Attempts to define law reform will often be affected by underlying value judgments, including those relating to the person who should properly be concerned with the task. There is some circularity in seeking to define law reform in order to identify the law reformers.

Is law reform simply the making of new law, or changes in the law²¹, particularly in response to certain triggers: reactions to “philosophical and moral developments, to new social habits and patterns, to scientific and technological changes, ...and international obligations”²² If it is, then it includes developments inherent in the ordinary course of legal interpretation and day-to-day application of the law by the courts. The mixed character of the Scottish legal system allows for the development of the law through doctrines of judicial precedent, even if the proper scope of so-called judge-made law is controversial. This broad definition may be problematic, therefore, insofar as it might legitimise the role of the judge as a law reformer. It might also be criticised more generally as encompassing “lawmakers not law reformers”²³, if such a distinction may be usefully drawn.²⁴

²¹ Including “the negative function – the repeal of what is obsolete and unnecessary”, in *Stair Memorial Encyclopaedia*, vol 22 (*supra*), para 626.

²² *Ibid*, para 623.

²³ du Vergier, *Instruments of Law Reform: The Supreme Court and the Law Commissions of the United Kingdom*, (2012) CJICL 47 at 50.

²⁴ See, eg, Lord Kilbrandon, *The Scottish Law Commission (1967 – 1968)* 2 Georgia Law Review 193 at 197: “Legislators spend their whole time altering the law. That is what legislation means... How then can there be any intelligible difference between the process of law making and that of law reforming? ...if we are going to be realistic about it, we have to agree that there is some difference in kind between the common-place progress of a parliamentary programme and...serious grievances...tackled in a systematic way.”

A better definition may be that 'reform' does not mean simply any change to the law but only one which involves "positive, and significant, development in the law".²⁵ This reflects more fully the need for law reform to be seen to involve an underlying intention, that new developments should be positive and/or significant.²⁶ The defining feature may be that law reform must involve a deliberate purpose to effect improvement, as a primary goal and not as an incidental consequence. The formal process of law reform, such as is pursued by the Scottish Law Commission, is the classic example, characterised by a former chairman as the "improvement of the law of Scotland by means of deeply researched and considered changes which by and large are thought likely to be accepted by... society ... and by Parliament".²⁷ This definition introduces a second defining aspect that law reform involves a systematic or methodical approach to change. A third aspect is the fact that, to some, the process of law reform is dull; the pedants' preserve of lawyers' law.²⁸ That demonstrates that the language of law *reform* may be a barrier to a fair appraisal of the subject. A shift in focus is required.

The fact that it is difficult to draw a clear distinction between law making and law reform, or to encapsulate in precise language the scope of reform, is of wider significance. If the boundaries of law reform cannot be precisely delineated, neither can responsibility for it be neatly packaged and delegated to a nominated public body, such as the Scottish Law

²⁵ du Vergier (*supra*) at 47.

²⁶ McBryde (*supra*), at 86: "Law Reform ... suggests more than a change in the law, or even an improvement in the law. A change could be an alteration in tax rates. An improvement cannot be judged until after the event."

²⁷ Lord Hunter, *Law Reform: The Scottish Law Commission* (*supra*) at 158.

²⁸ McBryde (*supra*) at 88 highlights Lord Gardiner's remarks in the course of Parliamentary debates (1964-65, 264, HL Deb 1218) that "all the law" referred to in the Law Commissions Act 1965 simply meant "lawyers' law".

Commission.²⁹ Even the statutory remit of the Commission does not denote “law reform” as a single overarching objective. Rather it refers to the “systematic development and reform” of the law under the banner of taking and keeping under review the law of Scotland.³⁰ This may come as no surprise given that “Reform” was not included in the Commission’s title³¹ as it is in that of many sister bodies throughout the Commonwealth.

There is no demarcation between what is “development” and what is “reform” in the Commission’s statutorily described particular duties. These include “codification..., 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”.³² It is anticipated in the description of the Commission’s detailed functions that other bodies may properly be concerned in the reform of any branch of the law.³³ In such circumstances, the Commission’s role is primarily a supervisory and/or advisory one.³⁴

Of course, the entire burden of law reform is not set upon the shoulders of the Commission alone. Yet the Commission’s jurisdiction, according to the terms of its

²⁹ For a similar view, see Lord Rodger : *The Bell of Law Reform* 1993 SLT (news) 339

³⁰ Law Commissions Act 1965, s 3.

³¹ Cf. 21 of 29 CALRAs members: (Alberta, Australia, British Virgin Islands, Ghana, Kenya, Ireland, Nova Scotia, Tanzania, Lesotho, Manitoba, Mauritius, Namibia, New South Wales, Nigeria, Northern Territory, Queensland, Sierra Leone, South Africa, Trinidad and Tobago, Victoria, Western Australia).

³² Cf du Vergier (*supra*), at 49: “proper law reform” is associated with “formal improvements to aspects of the law by the profession itself. This category is clearly illustrated by the codification and consolidation of legal principles.”

³³ Law Commissions Act 1965, s 3(1)(b) and (e).

³⁴ 1965 Act, s 3(1) “It shall be the duty of ... the Commissions...(b) to prepare and submit... programmes ... with a view to reform, including recommendations as to the agency (*whether the Commission or another body*) by which any such examination should be carried out;...(e) to provide advice and information to government departments *and other authorities or bodies concerned at the instance of the Government...with proposals for the reform or amendment of any branch of the law...*” (emphases added).

founding statute, supports the premise that its essential role is one of overview and co-ordination of reform across the legal system. In some instances, that may require no more than cultivating an active awareness of the wider law reform landscape, including the efforts of the whole profession, which the Commission should take into account in the performance of its duties. In others, the promotion of increased dialogue may be beneficial in the co-ordination of effort. In this way, the Commission's work should be viewed as integral to the efforts of the wider legal profession. Put colloquially, the statute calls for "joined up thinking" for the advancement and maintenance of a modern legal system.

It may not be possible to articulate a universal concept of law reform. Law reform will mean different things to different people, depending on their perspective and capacity to effect change. If that is so, it becomes more meaningful to consider the manner in which a legal system develops, and the ways in which those within the system (ie the lawyers) participate in the development process. Whether the nomenclature of reform or development is adopted, the underlying theme is one of progress.³⁵ Rather than examining the concept any further in the abstract, it is more profitable to consider the methods by which lawyers should participate in the reform or development of the modern law.

3. Collegiate law reform – the Scottish Law Commission model

A vibrant and dynamic legal system, which reflects the needs of contemporary society, requires each sector of the wider legal profession to perform its particular role in order to ensure that the system remains, or becomes, comprehensive, valuable, and truly

³⁵ Rt Hon Sir Geoffrey Palmer QC, *The Law Reform Enterprise: Evaluating the Past and Charting the Future*, The Scarman Lecture 2015, 24 March 2015, p 4:
http://lawcommission.justice.gov.uk/docs/Scarman_Lecture_2015_as_delivered.pdf

progressive. An effective process of law reform, as of democracy generally, functions at its best where the degree and diversity of engagement is greatest. Reactionary or excessively defensive forces amongst the legal profession can, and often do, behave in a manner obstructive to progressive law reform, especially where there is transparent perceived financial self interest.

Ongoing reform of the law ought to be sympathetic to a system's domestic historical traditions as well as forward thinking in creating a shape in tune with modern and international legal thinking. In Scotland, it is impossible to contemplate a well-functioning legal system without positive contributions from all sectors of the legal community. The courts, the solicitors and advocates who practice in them, those who advise clients in offices of greater or lesser opulence, the academics and the students, all have a role to play not only in the practice of the law but also in its reform. There ought to be "a partnership among the legislators, the Law Commissions, the judges, the practitioners and the universities. All are involved"³⁶, even if the importance of each in the context of a particular proposal for change will inevitably fluctuate. It would be a tragedy, in terms of democracy, to contemplate silence in response to proposed legislative change. For these reasons, the reform of the law requires the positive participation of all lawyers across the legal profession as a whole, and not just in the form of sniping from windows provided by the popular press or political opportunism.

With an eye to proper contextual and historical development, the Scottish Law Commission reflects the enduring model or philosophy behind law reform. In terms of its

³⁶ Lord Rodger (*supra*) at 346; Lord Hunter, *Law reform: The meanings and the methods* in *Proceedings and Papers of the Fifth Commonwealth Law Conference* (Edinburgh, 1977), p 1.

statutory foundations, the Commissioners “shall be persons...suitably qualified by the holding of judicial office or by experience as an advocate or solicitor or as a teacher of law in a university”.³⁷ Thus, “the Chairman and not more than four other Commissioners”³⁸ are appointed on the basis, not just of their formal qualifications in law but of their experience on the Bench, at the Bar (or, as reflected in the most recent appointment, in the practice of solicitor³⁹), or in the Universities on an equal footing. Whereas it is the convention that the Chairman is the holder of high judicial office⁴⁰, the statutory model envisages “collegiate law reform” as the desirable means by which the law should be modernised. Such a model, of law reform by lawyers, reflects the finest traditions of collegiality inherent in Scotland, with its judges and many of its lawyers remaining part of the College of Justice, instituted in 1532, which subsists to this day.⁴¹

The persona of the Commission serves to disguise the underlying identity of the individual Commissioners. Nevertheless, the Commission is intended as a microcosm of the legal profession in Scotland. The Commissioners are drawn from the highest echelons of the

³⁷ Law Commissions Act 1965, s 2(2).

³⁸ Law Commissions Act 1965, s 2(1).

³⁹ With effect from early 2015, two Commissioners were appointed: David Johnston QC and Caroline Drummond, solicitor. As to the latter, and the appointment of solicitors generally, see Nicholson, *Lease of life* (2015) 60(3) JLSS 13, available at: <http://www.journalonline.co.uk/Magazine/60-3/1019023.aspx>.

⁴⁰ There is no statutory requirement that the Chairman shall be a judge, but it has without exception been the case to date.

⁴¹ See Hannay, *The College of Justice: essays* (Stair Society, 1990).

Bench and Bar, practice and academia. It is by collaboration across those spheres that the law will stand the best prospects of developing rationally, coherently and pragmatically.⁴²

The Commission exemplifies law reform in the formal sense. It has the benefit of being able to conduct wide ranging research, consultation and impact assessment.⁴³ It makes considerable efforts to publicise its work and to engage the public and the media in the evaluation of proposed reforms; albeit with varying degrees of success.⁴⁴ A significant challenge to the efficacy of the work of the Commission is, however, that it bears the considerable burden of considering reform in the abstract. As any experienced judge will attest, there is great danger in seeking to pronounce a judgment that goes beyond the confines of the particular case under consideration. It is difficult to formulate principled reforms of general application which anticipate all conceivable circumstances. Whereas the judge must always give an answer, in order to dispense justice in practice, the Commission may decline to reach a conclusion even in the abstract.⁴⁵

The luxury of having the opportunity to consider large scale reform⁴⁶ must be tempered by a recognition that an examination of aspects of a legal system at such a high

⁴² Lord Hunter, *Law reform: The meanings and the methods (supra)* p 4: “the accepted pattern for manning and staffing a Law Reform Commission”.

⁴³ See SLC Annual Report 2011 (Scot Law Com No 225), p 8: “As part of the development of new procedures, we have undertaken to provide a detailed business and regulatory impact assessment for each of our bills.”

⁴⁴ See Gretton (*supra*) at 144: “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... Most reports are ignored by the media.” Cf. Lord Hunter, *Law Reform: The Scottish Law Commission (supra)* at 171 – 172.

⁴⁵ Gretton (*supra*) at 128: “The report came to no conclusion [on the question as to whether parents should be able *wholly* to disinherit their children].” [Scot Law Com No 215, on *Succession*, 2009]

⁴⁶ Cf. Scot Law Com No 152, highlighted by McBryde (*supra*) at 98: “Conversely, if the reform has an obvious need there can be a quick response. A recent example is the 1996 Report... which resulted in

level of abstraction is vulnerable to unforeseen difficulties arising at the coal face.⁴⁷ That much is true by virtue of the nature of the task, irrespective of the variety of experience embodied in the Commissioners appointed from time to time.

The Commission's remit is confined to a relatively narrow sphere; that is the recommendation of legislative reform.⁴⁸ Whilst it is independent of government, the Commission is necessarily dependent upon governmental will to approve of its suggested programmes of reform⁴⁹ and ultimately, to implement its detailed recommendations in legislation. A relevant factor in selecting programme items must be the likelihood of their implementation.⁵⁰ Scarcity of Parliamentary time to deal with Scottish Bills in the pre-devolution era was notorious. The pressures are now very much reduced, but have not altogether disappeared, now that there is a proximate and responsive Government and Parliament.⁵¹ Whether or not the Commission's intentions are faithfully translated into law, by virtue of coincidence with the will of Government and Parliament, remains necessarily

the Contract (Scotland) Act 1997; just over a year from publication of a Report to Royal Assent to the Act."

⁴⁷ Lord Hunter, *Law reform: The meanings and the methods (supra)*, p 4: "The academic lawyer... is usually to be found in a balloon or helicopter surveying wide vistas of law... The figure kneeling on the ground in the middle of a field examining through a microscope individual blades of grass is the practising lawyer."

⁴⁸ Gretton (*supra*) at 140: "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*." (citing Scot Law Com No 163, 1998)

⁴⁹ *Ibid*, at 144: "...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."

⁵⁰ McBryde (*supra*) at 97: "Proposals are one thing. Why is an item included in the work of the Commission? ...One of the factors should be the likelihood of legislation... It is a truism that a law reform body achieves most of its success through Parliament."

⁵¹ For a scathing account of the effects of the Parliamentary process, see Walker *Reform, Restatement and the Law Commissions (supra)* at 254: "the parliamentary bottleneck".

unpredictable in a democratic society.⁵² Returning to the theme of capacity to effect change, the Commission's position, despite its own inner strengths, is in those respects relatively weak.

Is the Commission greater than the sum total of its parts? It certainly lacks the power to make law, in the manner open to its judicial members. Some of its recommendations, in the abstract, are less likely to become law than untested arguments of its practitioner members presented to the court for endorsement. The status of its recommendations may be elevated only slightly higher than agitating commentaries of its academic quota. If that is so, the role of the wider legal profession in supporting and promoting the Commission's work⁵³ becomes all the more important to the credibility of its recommendations.⁵⁴

The Commission thus requires to look to the wider profession to participate in the process leading to the preparation of a final report on recommended reforms. It needs direction on those areas of the law that are most in need of remedial intervention through its process of consultation on programming.⁵⁵ Expert advice in the preparation of discussion

⁵² For an example of reforms that may have been 'lost in translation', albeit not originating from the Scottish Law Commission, see the judicial interpretation of the MacLean Committee report on serious violent and sexual offenders in *Ferguson v HM Advocate* 2014 SLT 431.

⁵³ See, eg, McBryde (*supra*) at 95: "the public duty of lecturers and professors in law faculties in Scotland", and (at 97) "a problem with the lack of response from the legal profession." See, also, SLC Annual Report 1996-7 (Scot Law Com No 161), pp 32 – 33 ("drawing on the resources of the wider legal community" (para 6.9) and "integrating more fully into our work the advice and assistance of legal practitioners") (para 6.14).

⁵⁴ See, eg, SLC Annual Report 2014 (Scot Law Com No 241), p 7: "At the heart of our work is a commitment to openness and engagement with Scottish civil society. In developing proposals for law reform, we take account of the views of all relevant stakeholders – members of the public, the business community, public authorities and the professions. Understanding what happens at the sharp end of legal issues helps to give us a solid foundation for the changes we recommend should be made to the law."

⁵⁵ The Commission is required "to receive and consider any proposals for the reform of the law which may be made or referred to them..." (1965 Act, s 3(1)(a)).

papers setting out the current state of particular areas of law may be essential. Once a programme has the approval of the Government, the Commission must again, as it does, seek to engage the profession, and others, in the formulation of its detailed proposals.⁵⁶ The Commission must, therefore, receive adequate support from that profession, beyond the diversity of the Commissioners *inter se*.

It is by participation in the various stages of the Commission's work, alongside the performance of their ordinary and complementary individual roles in the development of the law, that the members of the legal profession can fulfil their duty of active legal citizenship⁵⁷ for the benefit of the wider society.

4. Active legal citizenship – collegiate law reform in practice

(i) *The Scottish Law Commission*

This is not the forum in which to conduct a detailed survey of the substantive work of the Scottish Law Commission over the last 50 years. The intricacies of domestic Scots law are of limited interest to those beyond the seas or South of the border. Such a survey has been ably carried out by others with the benefit of personal knowledge and familiarity with the subject of "law commissioning".⁵⁸

⁵⁶ See the illustrative flow chart produced by the Commission, which shows the various stages of a law reform project: www.scotlawcom.gov.uk/about-us/flow-chart-of-a-law-reform-project/.

⁵⁷ The phrase is derived from the discussion of "law reform and active citizenship" in McMillan, *The role of law reform in constitutionalism: Rule of law and democratic governance: Reflections by the Scottish Law Commission*, Conference of the Association of Law Reform Agencies of Eastern and Southern Africa, Malawi (November 2011), p 8.

⁵⁸ See, eg, the works of former Scottish Law Commissioners: Gretton (*supra*); Lord Hope (*supra*); Lord Hunter, *Law Reform: The Scottish Law Commission* (*supra*); Lecture by Lady Clark of Calton to SCOLAG,

Suffice it to say, the Commission enjoys a high reputation. However, of the 229 Acts of the Scottish Parliament enacted to date, the Commission takes credit (at least in part) for only 22 of them.⁵⁹ *Quantum valeat*, of the 12 Acts of the Scottish Parliament containing express reference to the controversial word “reform” in the short title⁶⁰, none are claimed to have originated with the Commission.

It is not entirely straightforward to produce statistics demonstrative of the true levels of implementation of the Commission’s proposals.⁶¹ In most cases, only some of a number of recommendations in any one report will be implemented in any particular statute or statutes. In some cases, more than one report contributes to a single statute. In others, it has been recommended that no legislation is required and therefore there is no scope for

26 September 2012: <http://www.scotlawcom.gov.uk/news/lecture-by-lady-clark-of-calton/>; Speech by Lord Drummond Young on Law Reform hosted by the Malawi Law Commission, 22 March 2011: http://www.scotlawcom.gov.uk/index.php/download_file/view/695/685/260/.

⁵⁹ Abolition of Feudal Tenure etc (Scotland) Act 2000; Adults with Incapacity (Scotland) Act 2000; Leasehold Casualties (Scotland) Act 2001; Debt Arrangement and Attachment (Scotland) Act 2002; Agricultural Holdings (Scotland) Act 2003; Mental Health (Care and Treatment) (Scotland) Act 2003; Salmon and Freshwater Fisheries (Consolidation) (Scotland) Act 2003; Title Conditions (Scotland) Act 2003; Tenements (Scotland) Act 2004; Vulnerable Witnesses (Scotland) Act 2004; Charities and Trustee Investment (Scotland) Act 2005; Family Law (Scotland) Act 2006; Adult Support and Protection (Scotland) Act 2007; Bankruptcy and Diligence etc (Scotland) Act 2007; Sexual Offences (Scotland) Act 2009; Criminal Justice and Licensing (Scotland) Act 2010; Damages (Scotland) Act 2011; Double Jeopardy (Scotland) Act 2011; Land Registration (Scotland) Act 2012; Long Leases (Scotland) Act 2012; Bankruptcy and Debt Advice (Scotland) Act 2014; Legal Writings (Counterparts and Delivery (Scotland) Act 2015.

⁶⁰ Land Reform (Scotland) Act 2003; National Health Service Reform (Scotland) Act 2004; Criminal Proceedings etc (Reform) (Scotland) Act 2007; Crofting Reform etc Act 2007; Crofting Reform (Scotland) Act 2010; Interpretation and Legislative Reform (Scotland) Act 2010; Public Services Reform (Scotland) Act 2010; Police and Fire Reform (Scotland) Act 2012; Welfare Reform (Further Provisions) (Scotland) Act 2012; Courts Reform (Scotland) Act 2014; Procurement Reform (Scotland) Act 2014; Regulatory Reform (Scotland) Act 2014.

⁶¹ See the table of implementing legislation produced by the Commission: www.scotlawcom.gov.uk/publications/reports/table-of-implementing-legislation/.

implementation except by implied legislative assent through inaction.⁶² Some of the Commission's proposals may be implemented by the United Kingdom Parliament on matters reserved to it, but affecting Scotland.⁶³

A significant proportion of the legislative output of the devolved Scottish Parliament has accordingly originated from non-Commission sources. It is not the purpose of this paper to comment on the reasons for "abandoned projects"⁶⁴ or the rejection of Commission recommendations. The pertinent point, for present purposes, is the diversity of sources of legislative reform.

The title of this address anticipates a Scottish perspective on lawyers as law reformers. It is more accurately a Scottish *judge's* perspective on the topic. The Scottish Law Commission is chaired by a serving member of the senior judiciary.⁶⁵ Beyond the judge-led work of the Commission, of particular note are the legislative and other developments deriving from independent, judge-led reviews of discrete areas of law,

⁶² See, eg, Erskine, I, 147 cited in Lord Mackay of Clashfern, *Can judges change the law?* Maccabean Lecture in Jurisprudence, 2 December 1987 in Proceedings of the British Academy, 1987, 285 at 291: "Decisions...are frequently the occasion of establishing usages which after they have gathered force by a sufficient length of time must from the tacit assent of the state make part of our unwritten law."

⁶³ Post-devolution, United Kingdom legislation implementing (at least in part) recommendations of the Scottish Law Commission includes the Companies Act 2006, the Powers of Criminal Courts (Sentencing) Act 2000; Third Parties (Rights against Insurers) Act 2010; Insurance Act 2015; Consumer Rights Act 2015; Parliamentary Costs Act 2006; Statute Law Repeals Acts 2008 and 2013; Consumer Insurance (Disclosure and Representations) Act 2012; Partnerships (Prosecution) (Scotland) Act 2013; Co-Operative and Community Benefit Societies Act 2014; Insurance Act 2015.

⁶⁴ For early examples, see McBryde (*supra*) at 95.

⁶⁵ Of the current senior judiciary, 6 (out of 34) have acted as Commissioners, including the Lord President (Lord Gill). Another former Commissioner is currently a Justice of the United Kingdom Supreme Court. The current chairman, Lord Pentland, took up his post only relatively recently, on 1 January 2014.

notably evidence and procedure. Separately, the role of judges in reforming the law by judicial decision merits investigation.

(ii) *Judicial reviews (not to be confused with judicial review)*

During the infancy of the Scottish Law Commission, it was thought⁶⁶ that “measures dealing with the courts themselves, their powers, their limitations, the way they operate and so on, probably come within [the] class of law reform” that is so-called “lawyers’ law”.⁶⁷ It is a sign of changed times that the topic of courts reform, at least in Scotland, is now on the political agenda. What might easily be dismissed as of interest only to the legal profession touches upon fundamental rights, such as access to justice and fairness in criminal trials, particularly in the context of efforts to modernise the presentation of evidence in court.⁶⁸ In these areas, the major reforms in recent years have originated not from the Commission, or piecemeal procedural reforms or judicial decision making, but as a result of judge-led reviews.

Beyond the courts, therefore, the role of judges has been prominent in the development of both substantive and procedural, far-reaching legal topics, including review of the practices and procedures of our highest criminal court⁶⁹, of summary criminal justice⁷⁰

⁶⁶ Lord Kilbrandon (*supra*) at 197.

⁶⁷ For objections to the use of the phrase, see Gretton (*supra*) at 127: “Nobody speaks of plumbers’ plumbing: lawyers’ law is absurd.”

⁶⁸ See the Scottish Court Service *Evidence and Procedure Review Report* (March 2015) chaired by the Lord Justice Clerk (Lord Carloway): <http://www.scotcourts.gov.uk/docs/default-source/aboutscs/reports-and-data/reports-data/evidence-and-procedure-full-report--publication-version-pdf.pdf?sfvrsn=2> .

⁶⁹ Lord Bonomy, *The 2002 Review of the Practices and Procedures of the High Court of Justiciary* (December 2002). The key recommendations of the Review were implemented by the Criminal Procedure (Amendment) (Scotland) Act 2004.

and criminal jury procedure⁷¹ in our lower courts, of our entire civil courts structure⁷², key elements of our criminal law and practice⁷³, and of expenses and funding of civil litigation in Scotland⁷⁴. One particularly radical, and thus controversial, recommendation of the Carloway Review (that is the abolition of the requirement for corroboration in criminal trials) has itself resulted in a “spin-off” review, by a different, albeit now retired, judge, to examine the potential need for safeguards in the event of abolition.⁷⁵

It is undoubtedly the case that such “judicial reviews” offer a highly personalised approach to the reform of areas of law in which the reviewer is thought by Government to possess particular expertise and to be generally suitable to perform the task. That in itself is an advantage over the Law Commissioners, whose collective specialist expertise from time to time is largely arbitrary, and may or may not coincide with perceived requirements for reform prevailing during their period of tenure. The down-side is, however, a tendency in some quarters, notably the media, some politicians and certain reactionary elements of the legal profession, to personalise the attack on any reforms recommended by judicial

⁷⁰ Sheriff Principal McInnes, *The Summary Justice Review Committee Report to Ministers* (January 2004). The review formed the basis of the Criminal Proceedings etc (Reform) (Scotland) Act 2007.

⁷¹ Sheriff Principal Bowen, *Independent Review of Sheriff and Jury Procedure* (June 2010). The review, along with the Carloway Review (*infra*), forms the basis of many of the provisions of the Criminal Justice (Scotland) Bill (SP Bill 35) currently before the Scottish Parliament.

⁷² Lord Gill, *Report of the Scottish Civil Courts Review* (September 2009). The recommendations of the review are substantially reflected in the Courts Reform (Scotland) Act 2014.

⁷³ Lord Carloway, *The Carloway Review, Report and Recommendations* (November 2011): <http://www.gov.scot/About/Review/CarlowayReview>. The review, along with the Bowen Review (*supra*) forms the basis of many of the provisions of the Criminal Justice (Scotland) Bill (*supra*).

⁷⁴ Sheriff Principal Taylor, *The Taylor Review of Expenses and Funding of Civil Litigation in Scotland* (September 2013). The Scottish Government is currently consulting on those elements of the Taylor Review requiring implementation by primary legislation. The consultation closes on 24 April 2015: <http://news.scotland.gov.uk/News/Better-Access-to-Justice-156b.aspx>

⁷⁵ Lord Bonomy, *Post-corroboration Safeguards Review* (report awaited).

figureheads that they wish to undermine. There is considerable benefit in the homogeneity of corporate branding of the Commission's output.⁷⁶ It insulates individual Commissioners from the excesses of what can be real hostility.

From the perspective of one who has had experience of both means of judicial development of the law, the role of judges in undertaking formal projects of wide-ranging and systematic review stands in stark contrast to the traditional and far more limited judicial role within the confines of the courtroom. The decisions of the courts are still a significant and enduring source of Scots law and law reform.⁷⁷

(iii) The judge as law reformer⁷⁸

An interesting parallel has been drawn between the work of the Commission and the scope for law reform in the courts. It has been said⁷⁹ that "through its selection of cases the [United Kingdom] Supreme Court can be seen as adopting programmes of law reform by selecting those areas of the law that require adjustment in light of wider social issues." Subject to the existence of suitable appeal cases of "general public importance"⁸⁰, the United

⁷⁶ The Commission adopted a new corporate identity, having been dubbed "too establishment", with the publication of its Annual Report in 2003 (Scot Law Com No 194). See *ibid*, p.27.

⁷⁷ *First Programme of the Scottish Law Commission* (1965), paras 16 – 18 ("the effect of judicial decisions as a source of law", including "the collegiate powers...to reconsider and reorientate existing trends established by judge-made law").

⁷⁸ The chapter heading is not original. See the speech delivered by the Lord President (Lord Gill) to a combined meeting of the SSSC, SYLA and SSA on 3 December 2013 (not currently available online).

⁷⁹ du Vergier (*supra*) at 51, citing *Office of Fair Trading v Abbey National plc* [2009] UKSC 6, Lord Walker at [52].

⁸⁰ *Uprichard v Scottish Ministers* 2013 SC (UKSC) 219, Lord Reed at paras 58 - 63.

Kingdom Supreme Court⁸¹, which has hitherto sat only in London, may be deemed to exercise greater autonomy in the selection of topics for the reform of Scots civil law, including purely domestic (that is to say Scots) legal procedures, and in the direct (self-implemented) effect of intended Scots law reform, than the Scottish Law Commission itself. A similar comparison may be drawn between the work of the United Kingdom Supreme Court and the Supreme Courts of Scotland, where the former has “the final word” in many significant matters of Scots civil law.⁸²

In some respects, the oversight of Scots law from a position that is relatively remote, far removed from the practical realities of operating the Scottish legal system and of Scots society as a whole, is apt to have a depressing influence on the efforts of those operating positively within the jurisdiction.⁸³

Judges are often criticised insofar as they may be reckoned to engage, with a conscious agenda, in the process of law reform as opposed to its incidental and incremental development.⁸⁴ The judge as law reformer may be characterised pejoratively as a judicial

⁸¹ Formerly the House of Lords sitting in its judicial capacity

⁸² See, eg, *Carlyle v Royal Bank of Scotland* 2015 SLT 206, on “facing up to the restricted role of the appellate function” in appeals on questions of fact (Lord Hodge at para 23).

⁸³ See, eg, Lord Drummond Young, *Scotland and the Supreme Court*, 2013 CJICL 67 at 68: “It is perhaps a matter of some concern that the Supreme Court has shown itself willing to overturn well-established Scottish practice on an essentially formal basis, without having much regard to the underlying substance of the law.”

⁸⁴ For a benign account, see *Stair Memorial Encyclopaedia*, vol 22 (*supra*), para 623. A particularly clear example of judicial intention to reform is, of course, the convening of a larger bench in anticipation of overturning or reversing the effect of an apparently “erroneous” precedent. See, *Paterson v Harvie* (*infra*). This does, however, have legislative approval to a certain extent – see the Court of Session Act 1988, s 36. See MacQueen, *Judicial Reform of Private Law* (1998) 3 SLPQ 134.

activist.⁸⁵ The dangers of judicial activism are obvious, and the complexities that can arise in the course of judicial development of the law are well-illustrated in two particular areas. First, there have been the recent difficulties experienced in re-defining what ought to be clear and simple; the essentials of the crime of rape.⁸⁶ Unfortunately, it is difficult to advance the proposition that the judicial tampering in this area has been improved by legislative intervention following Scottish Law Commission recommendations.⁸⁷ Secondly, the amorphous common law offence of “breach of the peace” has presented its own definitional challenges⁸⁸, both at common law and in the context of the related statutory offence of threatening and abusive behaviour, often referred to as “statutory breach of the peace”,⁸⁹ itself enacted because of the court’s redefinition of the common law offence. What was once well-settled law may well have required adjustment, but the amendments of the Courts, the Commission, the Government and the Parliament have undoubtedly resulted in

⁸⁵ du Vergier (*supra*) at 50: “...where lawyers and judges preside upon cases or direct the development of the law in a way that changes the *status quo*. Changes of this kind often provoke those who sound charges of judicial activism and undemocratic judicial policymaking... [B]oth the Supreme Court and the Law Commissions have instituted changes of this type.”

⁸⁶ See *Lord Advocate’s Reference (No 1 of 2001)* 2002 SLT 466, esp Lords Marnoch and McCluskey (dissenting). *Per* Lord Marnoch at para 12: “it is...an essential part of our unwritten constitution that changes, particularly fundamental changes, in the law should be left to Parliament which can, of course, call on the services and expertise...of numerous other bodies including the Scottish Law Commission. I cannot, myself, think of anything much more fundamental than an attempted redefinition of the crime of rape, when the existing definition has stood for at least 140 years...”

⁸⁷ See *Drummond v HM Advocate* [2015] HCJAC 30, LJC (Carloway) at para 20, anent proof of the offence of rape committed “without any reasonable belief that [the complainer] consents” in terms of the Sexual Offences (Scotland) Act 2009, s 1.

⁸⁸ See *Smith v Donnelly* 2002 JC 65, Lord Coulsfield at para 17: “The crime of breach of the peace can be committed in a wide variety of circumstances... [I]t has therefore been said, more than once, that a comprehensive definition which would cover all possible circumstances is neither possible nor desirable... 19 At one stage, it was suggested that it might be appropriate to convene a larger court to review some of the decisions but we do not think that it is necessary to take that step...”

⁸⁹ Cf. *Paterson v Harvie* 2014 SLT 857, a Five Bench Judge decision to reconcile conflicting *dicta* on the proper interpretation of the Criminal Justice and Licensing (Scotland) Act 2010, section 38 (aka “statutory breach of the peace”).

flurries of new, and often ingenious, arguments in the many appeals which have been generated by the well intentioned changes.

The judiciary in Scotland continue to perform a vital role in the everyday development of the law; by landmark decisions resolving particular uncertainties in the civil law⁹⁰ and the issuing of guideline judgments to explain or rationalise matters of criminal law.⁹¹ The creation of the Scottish Law Commission did not relieve the judges of their responsibility “to take stock of areas of our law from time to time and, where the opportunity arises, to introduce adjustments which will take account of relevant changes in circumstances or thinking”.⁹² In this context, it is conceivable that the Commission’s recommendations may be given effect by the judiciary, notwithstanding the absence of express legislative implementation.⁹³ It has been accurately observed⁹⁴ that “[t]he extensive memoranda produced by the Commission on a variety of subjects have probably, due to the

⁹⁰ See, eg, whether there can be “ownerless land” in Scotland: *Joint Liquidators of Scottish Coal v SEPA* 2014 SC 372.

⁹¹ Criminal Procedure (Scotland) Act 1995, s 118(7): “In disposing of an appeal...the High Court may...pronounce an opinion on – (a) the sentence or other disposal or order which is appropriate in any similar case.” See, eg, *Gemmell v HM Advocate* 2012 JC 223 (on sentence discounting).

⁹² Lord Rodger (*supra*) at 344 – 345. See, also, Lord Gill, *The judge as law reformer*, 3 December 2013. For a recent example of statutory interpretation in the shadow of “the current economic climate”, see *Tortolano v Ogilvie Construction* 2013 SC 313. See, also, the terms and effect of the judicial oath: Lord Mackay of Clashfern (*supra*).

⁹³ Lady Clark of Calton (*supra*), p 6. McBryde (*supra*) cites the example (at 98): “Law reform does not always take place through Parliament. The work of Niall Whitty on unjustified enrichment received praise from Lord President Hope in *Morgan Guaranty Trust Co of New York v Lothian Regional Council* [1995] SC 151 at 157]. The material gathered by Mr Whitty and the Commission almost certainly had an influence on the five judges who changed the law on the *condictio indebiti*.” See, also, Lord Hope, *Helping Each Other to Make Law*, (1997) 2 SLPQ 93.

⁹⁴ McBryde (*supra*) at 98.

high quality of the research, had an effect, in immeasurable ways, on ... those who argue in our courts.”⁹⁵

In the particular Scottish context, namely the devolved constitutional settlement and the historic preservation of Scotland’s distinct and distinctive legal system notwithstanding the Union with England in 1707⁹⁶, the more pertinent concern is not the proper scope of judicial reform *per se*, about which much has been written elsewhere⁹⁷, but its proper scope when carried out by judges sitting beyond the borders of the jurisdiction under consideration.⁹⁸ It must be recognised that so-called judge-made law is subject to the ultimate safeguard of the exercise of legislative power to remedy the consequences of any perceived misjudgement.⁹⁹ Notwithstanding its supremacy, at least in the absolute terms of the hierarchy of precedent, even the United Kingdom Supreme Court is not immune from the corrective will of the Scottish Parliament, should it be perceived that the boundaries of

⁹⁵ See, also, SLC Annual Report 2014 (Scot Law Com No 241), p 12 (References to the Commission’s work: “The Commission’s work is widely quoted in court judgments, in academic journals and in the media. ... During 2014 our monitoring service identified 27 references in court judgments to Commission publications.”)

⁹⁶ Union with England Act 1707 (c 7), Art. XIX: “That the Court of Session or Colledge of Justice do after the Union and notwithstanding thereof remain in all time coming within Scotland as it is now constituted by the Laws of that Kingdom and with the same Authority and Priviledges as before the Union.”

⁹⁷ For a recent analysis, see Lord Neuberger, ‘*Judge not, that ye be not judged*’: *judging judicial decision-making*, F A Mann Lecture 2015, 29 January 2015: <https://www.supremecourt.uk/docs/speech-150129.pdf>

⁹⁸ See, eg, *David T Morrison v ICL Plastics* 2014 SC (UKSC) 222, overruling what had “for almost 30 years been a consistent line of Scottish case law...imposing a requirement of knowledge of causation” (Lord Hodge at para 69) in the time barring of claims; *Cadder v HM Advocate* 2011 SC (UKSC) 13 overruling the approach of a Full Bench (seven judges) in *HM Advocate v MacLean* 2010 SCCR 59 regarding a suspect’s right of access to a lawyer prior to police questioning, as to which see, generally, the Carloway Review (*supra*).

⁹⁹ Lord Fraser, *Law reform: The Judicial Contribution* 1988 JR 26 at 27: “...in the end Parliament can always win the argument if it wishes to.”

proper judicial innovation have been crossed.¹⁰⁰ A contemporary example of the principle is the Damages (Asbestos-related Conditions) (Scotland) Act 2009; the purpose of which was to ensure that a judgment of the House of Lords¹⁰¹, otherwise highly persuasive precedent, would not have effect in Scotland so as to bar claims for damages in respect of wrongful exposure to asbestos.¹⁰²

5. The future of law reform in the digital era

Notwithstanding the varying roles of lawyers in the promotion of law reform throughout the legal system, an effective democracy requires positive engagement of the public in order to ensure that those affected by the legal system have an opportunity to have their views both heard and actually taken into account in the formulation of those laws. There is scope, in that context, to distinguish those proposed reforms that ought properly to be the subject of assessment by the Commission, or Parliament¹⁰³, and thereby subject to formal consultation¹⁰⁴, as opposed to those involving incremental development permissible and possibly inevitable at common law.

¹⁰⁰ As to the boundary, see Lord Rodger (*supra*) at 345, citing Lord Goff in *Woolwich Equitable Building Society v IRC* [1993] AC 70: "...although I am well aware of the existence of the boundary, I am never quite sure where to find it. Its position seems to vary from case to case..."

¹⁰¹ *Rothwell v Chemical & Insulating Co* 2008 1 AC 281.

¹⁰² See, now, *AXA General Insurance v Lord Advocate* 2012 SC (UKSC) 122 which upheld the validity of the 2009 Act but altered the fundamental basis for the raising of judicial review proceedings in Scotland, rejecting the test of "title and interest" in favour of "standing" on the part of claimants.

¹⁰³ See, eg, Lord Mackay of Clashfern (*supra*) at 300 – 301: "...with the advice of the two Law Commissions following extensive and unhurried consultations geared to the systematic development and reform of the law"

¹⁰⁴ There would appear to be no statutory obligation, however, to consult at regular intervals on proposed programmes of reform. See Gretton (*supra*) at 135 – 136: "The value of the published

There is scope to improve the wider engagement of the legal profession and others in law reform in the digital era. Despite the significant advances in the diffusion of legal information created by the use of internet technology, the accessibility of the law remains a fundamental problem not only to non-lawyers but even to lawyers who have subscribed to reasonable online resources.¹⁰⁵ Distinguishing what is truly relevant and applicable becomes more and more difficult with the increase in available data. Whatever the nature of substantive reforms, their impact will be undermined if they cannot be identified and understood in a straightforward manner. There is little merit in a reputedly good legal system of uncertain or practically unknowable extent.¹⁰⁶ Yet our public records of our laws, including those online, as they must be in the modern era, remain perpetually incomplete and thus “unreliable”.¹⁰⁷ This is an issue of substantial constitutional importance.¹⁰⁸ As a

programmes...is open to debate, and the SLC seemed to manage without them from 1973 to 1990. But at the very least there is a value in consulting the public about what projects should be taken on.”

¹⁰⁵ *R v Chambers* [2008] EWCA Crim 2467, Lord Toulson at para 72: “the Government’s own public information website...is incomplete and the prosecution in an excise case unintentionally misleads the court as to the relevant Regulations in force.”

¹⁰⁶ For a darkly humorous characterisation of the problem, see C Munro, *K in Scotland* in HL Macqueen (ed), *Scots Law into the 21st Century* (1996), p 138.

¹⁰⁷ Gretton (supra) at 135. See, also, <http://www.legislation.gov.uk/changes>: “Changes made by legislation enacted prior to 2002 have already been incorporated into the content... Note: Where changes and effects have yet to be applied...any ‘Changes to Legislation’ are also displayed alongside the content of the legislation at provision level.” See, eg, the Scotland Act 1998, s 98, against which some 29 outstanding changes are listed.

¹⁰⁸ *R v Chambers* (supra), Lord Toulson at para 72.

necessary precursor to substantive law reform, the accessibility¹⁰⁹ of existing law to all those who are affected by it is quite properly the concern of law reformers.¹¹⁰

The process of law reform can itself be reformed by taking advantage of opportunities to harness the obvious appetite for commenting upon, and participating in, current legal issues via social media¹¹¹, and particularly through the dissemination of materials in digital format.¹¹² Hard copy tomes may sit untouched on desks.¹¹³ They may rightly be regarded as environmentally unfriendly and, in those countries having readily available internet access, unnecessary. Of course, the system may have to cope with the occasional dinosaur who smugly maintains that he prefers his law in hard copy. As time goes on, and again assuming readily available internet, society should be less tolerant of outdated thinking.

¹⁰⁹ Accessibility includes the accessibility of the law in linguistic terms, as is the concern of the rather Orwellian sounding “Good Law” project. See the Scarman Lecture 2015 (*supra*) at p 24. See, generally, <https://www.gov.uk/good-law>.

¹¹⁰ Gretton (*supra*) at 135: “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.” [Law Com No 302 (2006), para 4.15.]

¹¹¹ The Scottish Law Commission currently operates a *Twitter* account (@scotlawcom) and issues twice yearly e-bulletins to registered recipients. Notably, too, the Law Commission (@Law_Commission) “live tweeted” the highlights of the Scarman Lecture 2015 (*supra*), with users following and interacting with updates via #scarman15.

¹¹² The Carloway Review (*supra*) was made available predominantly in online format only. See, also, Gretton (*supra*) at 139, n 96: “...Recently the SLC has also begun to publish (web only, not print) unnumbered ‘consultation papers’ which are supplementary to discussion papers.” (See, eg, Scot Law Com No 236, p 11; Scot Law Com No 230, p 12; Scot Law Com No 225, p 12; Scot Law Com No 223, p 9.)

¹¹³ and in the Judges’ Library at Parliament House, Edinburgh. As at April 2015, not one person had borrowed the hard copy Carloway Review report, and only 4 had borrowed the Gill Review report.

The practical value of face-to-face consultations may be limited.¹¹⁴ New methods of engagement must be devised in order to provide a platform for constructive and ongoing dialogue. In the context of recent initiatives to modernise the functioning of our courts in the digital era¹¹⁵, law reform should not be left behind. It must continually innovate in order to progress.

6. Conclusion

With the undoubted increased capacity and willingness of Government and Parliament to seek to forge ahead with the implementation of long overdue reforms through the devolved constitutional settlement, it would be hard not to be optimistic in anticipating a new era of law reform in Scotland.¹¹⁶ The contribution of the technical expertise of the Scottish Law Commission is undoubtedly extremely valuable, particularly in notoriously complex areas such as the abolition of our hitherto long-standing yet baffling system of feudal land tenure.¹¹⁷ The challenge for the future will be to promote collegiate law reform, to maximise the potential, that already exists within the statutory foundations of the Commission, to pursue collaborative and coordinated efforts to develop the Scottish legal system now and in the future.

¹¹⁴ Whilst there remains value in carrying out consultation exercises, such as the Carloway Review “roadshows”, such intensive measures will not be feasible in all circumstances.

¹¹⁵ Scottish Court Service *Evidence and Procedure Review Report* (*supra*). See, also, The Digital Strategy for Justice in Scotland (August 2014): <http://www.gov.scot/Resource/0045/00458026.pdf> and Lady Dorrian, *Digital Justice Strategy: A view from the courts*, 20 August 2014: <http://www.scotland-judiciary.org.uk/26/1301/Speech-by-Lady-Dorrian-at-the-launch-of-The-Digital-Strategy-for-Justice-in-Scotland>.

¹¹⁶ See, eg, McMillan, *Law Reform: a new era?* (2015) 60(1) JLSS 21 – 22.

¹¹⁷ See Gretton (*supra*) at 135: “...the feudal law project [Scot Law Com No 168; Abolition of Feudal Tenure etc (Scotland) Act 2000]...led to the repeal of 46 entire statutes”.

The answer, to the question originally posed about who the law reformers are in the legal community, ought to be the obvious one: “all of us”.

Lord Carloway

11 April 2015