Scottish Public Law Group Seminar - 19 November, 2015

The Scottish Law Commission and the future of law reform in Scotland

Keynote address by Lord Pentland

Introduction

It is a great pleasure to address this meeting of the Scottish Public Law Group and to have the opportunity to offer some thoughts about the Scottish Law Commission and the future of law reform in Scotland. It seems timely to do so for at least two reasons. First, 2015 marks the 50th anniversary of the establishment of law commissions in Scotland and in England and Wales; on attaining middle age there is, I have been reliably informed, a tendency to look back and to take stock. Secondly, law reform in recent times has been something of a hot topic in Scottish public life, as the vigorous public and political debates over proposed reforms to aspects of our criminal law and to the court structure have amply demonstrated. And only this week a number of Scottish writers and others have pressed publicly for urgent reform of defamation law; a project on which the Scottish Law Commission is currently engaged and on which we intend to issue a discussion paper in the early part of next year.

So I would like to say something about our origins, a few words about the past 50 years and the principles underlying our work and finally to offer some thoughts on the future.

Origins

As every law reformer knows, Law Commissions for Scotland and for England and Wales were created in 1965 under the Law Commissions Act passed in that year by the United Kingdom Parliament. These bodies came to be the model for law reform agencies subsequently established in many Commonwealth countries and further afield. A key feature is that the law reform agency is intended to be independent from the state it is designed to serve. Sometimes that independence is made the subject of a specific statutory guarantee, although that was not done in the case of the UK commissions. Alongside that independence (and constantly rubbing up against it) there is the harsh reality that the law reform agency depends for financial support, usually extending to the provision of staff and other resources, on the state. The state retains the power to dissolve the law reform agency or to withdraw its funding, as has happened recently in Northern Ireland.

It is interesting to recall that the UK law commissions were created at a time when life in the United Kingdom and elsewhere was changing rapidly. The law commissions owe their existence to that changing world. As the 1960s dawned, the grey and dreary post-war years of food rationing and conscription were soon to be in the past. Rebellion was in the air and deference to established authority was on the way out. The new decade brought with it seismic shifts in the ways people thought and behaved. In 1964 a Labour Government was narrowly elected under the technocratic leadership of Harold Wilson on a manifesto entitled, “A modern Britain”; at 48 he was the youngest prime minister of this country for 70 years. Within a few years many of the old

taboos would be dismantled. Restrictive laws on censorship, divorce, homosexuality, immigration, and abortion were relaxed and capital punishment was abolished.

As part of this tidal wave of social change, the view gathered force amongst some lawyers in England (mainly in the Labour Party), that the law had fallen badly behind the times and that the machinery for reforming it was not working adequately. The new Lord Chancellor in the Labour government, Gerald Gardiner QC, believed that effective law reform required there to be a new standing body with general responsibility for keeping the whole of the law under review. The new agency would be independent of government. Its head (originally conceived as a Minister of State) would preside over a committee of at least five highly qualified lawyers to be known as law commissioners. That was the ambitious vision behind the 1965 Act. It was largely the brainchild of English lawyers and its mission was focussed on the reform of the law of England and Wales.

Despite Scots Law being in that era a legal system without its own dedicated legislature, there was in the 1960s no real drive for new law reform machinery in Scotland. The legal establishment in Edinburgh appears to have been content with the existing *ad hoc* and part-time law reform committees. There was scepticism and even outright hostility in important and influential quarters towards the establishment of the Scottish Law Commission, not least from Scotland's most senior judge, the Lord President of the Court of Session, the former Conservative MP and Lord Advocate, Lord Clyde.

Moreover, though perhaps never a fully paid-up member of the Edinburgh legal establishment, the Lord Advocate in the new Labour Government of 1964, the formidable Gordon Stott QC, was distinctly under-whelmed by Lord Gardiner's vision of law reform. He remarked in his diary that he did not think that the Lord Chancellor had a clear idea of what he wanted and he went on to argue at a Cabinet Committee that the Commission might turn out to be a source of delay rather than expedition[1]. Prescient? I leave others to judge.

Initially, Lord Gardiner thought that it would be sufficient to have an English Law Commission, which if it proved to be successful, could be extended to Scotland. Scottish ministers in the Labour government, including the Secretary of State[2] and the Lord Advocate eventually took the view that a new body for England alone would be politically unacceptable in Scotland. After some hesitation it was, therefore, decided that if there was to be a Law Commission for England and Wales then the Scots had better be given one too.

The 1965 Act and the early days of the Scottish Law Commission

Under the 1965 Act the Commission is responsible for promoting reform of the law of Scotland. The Act goes on to say that this is to be done with a view to the systematic development and reform of the law (i.e. the whole of the law). And if that were not daunting enough, the Act added, for good measure, that this duty was to include, in particular, codification of the law, the elimination

[1] Lord Advocate's Diary pp. 143/144
[2] The Rt. Hon William Ross, MP

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. Undoubtedly, a tall order.

Read literally, all this was unrealistically ambitious. Writing about the Scottish Law Commission as Lord Advocate some 30 years after the passing of the 1965 Act, Alan Rodger (Lord Rodger of Earlsferry), an experienced parliamentarian as well as distinguished judge and jurist and always something of a sceptic about the Commission, was struck by the naïveté of the debates in Parliament about what the new law reform bodies would achieve[3].

Sir Geoffrey Palmer, a former Prime Minister of New Zealand and President of that country's Law Commission, observed in a recent lecture that one could detect in the early literature on law reform agencies a crusading sense of legal renewal. But he acknowledged that the great expectations of 1965 had not been realised[4].

Notwithstanding its somewhat inauspicious start, the new Scottish Law Commissioners, under the chairmanship of Lord Kilbrandon, were determined that the Commission should not be strangled at birth and that it should not operate simply as a branch of government. In their first annual report they expressly rejected any suggestion that the Commission should be concerned only with so-called “lawyers’ law”. They said that all law had social implications and they thought it was impossible to draw any dividing line between “social law” and “lawyers’ law”. They interpreted the terms of the Act as imposing on

[3] "The Bell of Law Reform", 1993 SLT 339
[4] “The Law Reform Enterprise: Evaluating the Past and Charting the Future”, Scarman Lecture, 24 March 2015

them a duty to see to the development and reform of *all* the law systematically. When any question of social policy arose in connection with any branch of law they were examining, they would draw attention to it and express their views upon it so far as it affected the legal point under consideration. The decision upon it would be a matter for others – ultimately for the Government of the day.[5]

In the final paragraph of the first annual report three key points were made. First, it was stated that the Commission's work had to be intelligible and acceptable to the general public, in whose interests, fundamentally, all the Commission's work was done. Secondly, the Commission stressed that it had to be accessible to the public. Thirdly, the Commission had to be independent; constitutionally this was thought to be the most important of its attributes.

Independence from government has remained a key principle throughout our existence and it is one to which we at the Commission remain strongly committed today. The principle has become so firmly entrenched that it would be unthinkable for the government to seek to influence the approach we resolve to take towards reform of any branch of the law; whether they choose to accept our recommendations is, of course, another matter altogether.

I will come back to the current relevance of these principles in a few moments.

The first 50 years

Over the past 50 years the Scottish Law Commission has been responsible for reforming the law of Scotland in a vast number of areas. One

[5] First Annual Report of the Scottish Law Commission for the year ended 15 June 1966, paragraph 9

needs only to think for a moment of family law and of the law of property to see that the Commission has had a major impact on Scots Law. Had it not been for the Commission's work, the legal landscape in Scotland would look very different today.

Many of our projects have involved systemic reforms to fundamental principles of Scots Law - the sort of law reform that is particularly well-suited to a specialist law reform agency, which has built up substantial knowledge and expertise in comparative analysis, in conducting comprehensive public consultations, in policy development and in the preparation of legislation. For various reasons a government department may find it difficult to undertake this type of law reform work – amongst the difficulties may be a lack of resources (especially in times of economic difficulty) and more pressing political priorities. It is not realistic to expect such reforms to emanate from decisions of the courts, especially in a small system such as ours.

The future of law reform in Scotland

At the Scottish Law Commission we are not at all complacent about our place in the legal fabric of the country. We fully understand that we must continuously justify our value to Scots Law and to Scottish society. Particularly in times of great pressure on public spending, we need to be flexible and forward-thinking in our outlook and approach. Since we cover both devolved and reserved areas of Scots Law, we must ensure that we work effectively with both the Holyrood and Westminster governments; to reflect the importance of these relationships it was particularly appropriate and pleasing that both the Secretary of State for Scotland and the First Minister made visits to the

Commission this year. We must also engage constructively with the two legislatures and with the legal profession and all other relevant interests in the community we serve. We must work hard to explain who we are, what we do and how we go about our work.

Those familiar with our premises in Causewayside will perhaps agree that we do not inhabit an ivory tower. But we must address any lingering misconception about that. Amongst other things, we must take full advantage of modern technologies to reach the widest possible audience. Consultation exercises must be carried out in a way that allows for maximum engagement with civil society; this should extend to creative use of social media. This is increasingly used by other law reform agencies as a means of promoting meaningful public debate. We need, in short, to continue to be accessible and to produce work that is intelligible, as was noted in our first annual report, and we must jealously protect our independence as the first Scottish Law Commissioners also recognised.

At the same time as doing all this, we must ensure that we do not compromise on the high quality of our work. Worthwhile law reform, particularly when it involves major structural changes to established principles of private law, takes time. It has to be thought through rigorously and developed carefully, in close consultation with stakeholders. In this regard, the input of our project advisory groups has been crucial, as naturally our knowledge of day to day experience in particular areas is sometimes limited. However, we also have to accept that if we are perceived to take too long with major projects this can

affect our reputation, particularly among stakeholders who seek change at the earliest opportunity.

Is it possible then to articulate a clear vision for the Scottish Law Commission in the modern era? I do not myself think that it is necessary to amend the Law Commissions Act of 1965 in order to achieve this or to replace it with a new piece of legislation. No doubt it can be said that in some respects the 1965 Act is expressed in language that is of wide and general reach and that, compared with many modern statutes, an exhaustively detailed specification of administrative matters does not feature; some may think there are advantages in that. Our core responsibilities are not, however, left in any doubt by the terms of the 1965 Act and the values and principles underlying the Commission are clear.

I would like to take this opportunity to make two suggestions for possible improvements in the way the Scottish Law Commission works.

First, I believe that law reform in Scotland would benefit from a re-examination of the relationship between the Scottish government and the Scottish Law Commission. If such an exercise has ever been carried out, it has not been done for some time. I do not suggest that the constitutional independence of the Commission from government should be at all weakened. Rather, the emphasis should be on improving the system for planning and carrying out our work in a way that seeks to promote a more concrete assurance of government support for our legislative proposals from an earlier stage. There should also, I think, be closer contact and stronger engagement between the Commission and the relevant directorates of the Scottish

government during the currency of projects. The basic objective is to improve the prospects for earlier legislative implementation of the Commission's recommendations. Earlier implementation must, I think, continue to be an important aim. Prompt implementation should reduce the need for further consultation and for reworking of our proposals. Over the years there has been too great a delay in implementing some of the Commission's work; the reasons for this are complex and now is not the time to go into them. One of the main challenges for the future is to address this issue. I acknowledge that there have been important improvements in recent times with the advent of a new procedure in the Scottish Parliament for certain uncontroversial law reform measures; these can now be dealt with by the Delegated Powers and Law Reform Committee procedure. The Scottish government has been a strong supporter of this procedure and I commend it for that. The procedure has already been successfully used for one measure (on counterpart execution of documents and electronic delivery) and another (on succession) is currently going through it. But we must go further and try to move more quickly to ensure that Scots Law is kept up to date and meets the rapidly changing needs of modern society.

With these thoughts in mind, the following points occur to me as a possible outline for a new scheme; they are not, in any sense, intended to be exhaustive or prescriptive; others may well have different and better ideas; my purpose is to stimulate debate with a view to improving the work of law reform.

- There is, I believe, a need to align the planning of our work more closely with government directorates when projects are being considered for

inclusion in our programmes of law reform. The Commission needs to take full account of the Scottish government's strategic objectives when deciding on our proposed work programmes. The government, for its part, requires to be cognisant of the Commission's considered views on the areas of Scots Law that are in need of reform.

- Of course, ideas for law reform cannot be the sole preserve or responsibility of government; they can come from many directions, not least from within the Law Commission itself or from stakeholders in the context of a public consultation exercise on the content of each programme. It is ultimately up to the Commission to select its proposed projects on the basis of transparent criteria - that much flows from the principle of independence. And it is, at the end of the day, for the government to approve the Commission's proposed programme.
- I believe that the selection of projects needs to take full account of the realistic prospects for legislative implementation within a reasonable time; to achieve this there has to be real and meaningful engagement between the government and the Commission focussed on this issue when projects are being considered for inclusion in our programmes of work.
- To promote orderly and systematic planning, there should be a specific requirement for each directorate of the Scottish government to consider, sufficiently far in advance of the formulation of each new programme of law reform, whether to propose law reform projects for the Commission from within their areas of responsibility.

- Ministers, who intend to propose a project, should identify how the project aligns with the government's priorities and strategic objectives and why it would be a suitable project for the Commission to undertake.
- It would remain the responsibility of the Commission to decide whether to include any project nominated by the government in its proposed programme of law reform. There would, however, be an understanding that government nominated projects would be treated seriously as candidates for inclusion in the programme.
- In the event that a project nominated by a minister is accepted by the Commission for inclusion in the programme, the government directorate would be bound to support the Commission's work during the course of the project and to provide advice to Ministers in responding promptly to the final report of the Commission on the project. The nature and level of the support would vary as between projects and would have to be worked out on a case by case basis. It might in some instances extend to the secondment of officials to the Commission for a project or some part of it.
- The relevant portfolio minister, whose directorate has promoted and supported a law reform project, would be responsible for preparing an analysis of the Law Commission's report and draft Bill within a period to be agreed; in general a period of 6 months would seem reasonable. The purpose of the analysis would be to recommend whether legislation should be introduced. Under current arrangements the Scottish Government has agreed to provide a public response to Commission reports within 3 months of their publication, but this system is not working

adequately. The 3 month time limit is too short to allow for a properly considered response to be provided.

- If the government accepts a ministerial recommendation for legislation, it should introduce a Bill to the Scottish Parliament as soon as practicable. Many Bills would be appropriate for the new parliamentary process before the Delegated Powers and Law Reform Committee, particularly if the criteria for using the procedure were to be widened.
- If a Commission recommendation for legislation is rejected, the government would be bound to submit a report explaining the reasons for its decision to the Scottish Parliament within a period to be agreed; 3 months would appear to be reasonable. Any MSP would then be able to call for a parliamentary debate on the matter[6]. This would open the way towards the Parliament itself becoming more actively engaged in the Commission's work.

In my opinion, arrangements along these lines (or something similar) would assist in trying to ensure that the work of the Commission is in tune with the Scottish government's strategic objectives and, therefore, stands an improved prospect of being implemented within a reasonable time.

To some these proposals may appear unduly ambitious. I acknowledge that they would involve changes in established practices and that the fine details would require refinement and careful thinking through. There are always problems and negative points that can be identified with any new system of this type. The attraction of such a scheme, however, is that it would provide a

[6] Douglas Cusine has suggested that there should be a convention that SLC reports are at least debated in the Scottish Parliament - see "Civil Law Reform - where we are and where we are going" 2015 SLT (news) 27

framework for addressing the difficulties that are liable to arise where too great a distance develops between government and the Commission during our project work; the result of such a distancing effect can be that valuable law reform work is wasted or becomes out of date or has to be redone.

The second area where I consider that there may be some possible scope for developing the way in which we go about our work relates to the harnessing of legal expertise for our projects. Greater flexibility may have some attractions. Partnership arrangements between the Commission and the University Law Schools might be one possible option; thus allowing for academic staff to be seconded to the Commission to work on projects in which they have particular expertise and to which they can bring the benefit of their research. I would have thought that the type of intensive analytical work carried out in the course of a law reform project would be recognised as having scholarly merit and practical impact for the purposes of receiving accreditation as acceptable published academic work.

In voicing these thoughts, I do not for one moment intend to imply any criticism of current or past Commissioners; or indeed of the Commission's legal staff, all of whom are solicitors seconded from the Government Legal Service for Scotland; they do an excellent job in difficult and demanding circumstances. It seems to me, however, that there may be advantages, in the case of some projects, in considering whether the engagement of academic or other

consultants (perhaps even from the private sector) with established knowledge in particular areas would add value to our work[7].

All public bodies should constantly be looking critically at how they operate to ensure that they deliver value for public money in times of great economic pressure. The Scottish Law Commission is no exception and we need to think creatively about how we utilise our limited budget and small staff for the purpose of ensuring that we fulfil our statutory responsibilities in the most effective manner.

Thank you.

Paul Cullen

[7] There have been some instances in the past where the Commission engaged the assistance of outside experts, but this has not happened for a good number of years.