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Part 4

Politics and Legal Change

Law Reform in a Political Environment: The Work of the Law Commissions

ELIZABETH COOKE AND HECTOR MACQUEEN*

I ELIZABETH COOKE'S ADDRESS

THANK YOU VERY much for giving me the opportunity to speak this afternoon. It is very good to be here at home with my academic colleagues. When I looked at the title of this session I did wonder: 'do I fit here'? As a Law Commissioner, I hear from a distance the stress and excitement of turning politics into law. But that is not what we do. So what I would like to speak about is the rather ambivalent relationship of independence and dependence that the Law Commissions have with government and with politics, and to talk about the implications of that relationship for the way in which our recommendations are turned into law.

The Law Commissions for England and Wales and for Scotland were created by the Law Commissions Act 1965. The Law Commission for Northern Ireland was created just a few years ago.¹ Our founding statute requires us to keep the law under review and to recommend reform to government.

Behind that statute was a 1960s dream of a law reform body unconstrained by politics. You can share that dream if you have a look at *Law Reform Now*,² the book written by Gerald Gardiner and Andrew Martin in 1963, with a collection of chapters setting out the elements of the law that so desperately needed reform at that date, largely due to their age. The idea was that a Law Commission would have the time, the resources and the intellectual freedom to get rid of that dead wood. There were no votes in that task. The idea was that the Commissions were needed precisely because they were not to turn politics into law, but to do a task that for which a government department might well not have the time or the resources because it was constrained by a political agenda.

* These addresses were originally given under the title 'Turning Politics into Law' at a plenary session of the Annual Conference of the Society of Legal Scholars in Cambridge in September 2011. In writing up these addresses in March 2013, we have retained references to time as it stood when the address was given in 2011, but have updated matters in the footnotes where relevant. So, for example, when we spoke in 2011 the project on the Electronic Communications Code had just begun, but at the time of writing the project has just been completed.

¹ Established in 2007 following the recommendations of the Criminal Justice Review Group. The Northern Ireland Law Commission is established under the Justice (Northern Ireland) Act 2002 (as amended by the Northern Ireland Act 1998 (Devolution of Policing and Justice Functions) Order 2010).

² G Gardiner and A Martin, *Law Reform Now* (London, Victor Gollancz, 1963).

What happened to the 1960s dream? In 1987, Richard Oerton wrote a book called *Lament for the Law Commission*.³ Richard was what we now call a team lawyer, working alongside commissioners and research assistants, with a voice in the development of policy. For Richard, the dream turned into a nightmare; he experienced deep frustration when valuable law reform projects were abandoned because they had no tie in with the political agenda or with government willingness to enact reform. His book is bitter and salutary and is required reading, I think, for anyone considering working for the Commission. I was very familiar with it before I applied for the job. I had a hunch, which I believe is correct, that things were not as bad as the picture he painted.

The reality is that law reform and politics are inevitably neighbours; they are perhaps uneasy neighbours, but they have to get on. Two practical points come to mind. One is that we are never wholly remote from items of political interest. Certainly we could not contemplate examining the death penalty or abortion. But we have considered divorce, cohabitation, rented homes, sale of goods, homicide – these are all issues on which the man on the street has a view and may cast a vote.

The other point is that at the end of every completed Law Commission project sits the goblin of implementation. The Law Commission is not a government department, and cannot take its own projects or its own Bills forward into law. We have the privilege of working with Parliamentary Counsel and producing draft Bills alongside our Reports. But do they become law? They have two routes. One is that the Government may adopt them. At that point the Bill ceases to be our baby. It becomes a government Bill. It will be sent to Parliamentary Counsel again and will be amended, possibly just for updating, possibly for more fundamental change but it is not ours anymore. And then it is taken forward by a Bill team; this is a very labour-intensive process. The other route is by becoming a Private Members Bill. You will be aware that Private Members may, literally, by the luck of the draw, get the right to introduce a Bill. It is not unknown for a successful Private Member, who has come near the top of the ballot, to pick up an unimplemented Law Commission Bill and take it through – as did Greg Knight MP earlier this year. The result was the snappily titled ‘Estates of Deceased Persons Forfeiture of Law and Succession Act 2011’ implementing a short Bill that we produced in 2005. In watching that happen I was struck by the aleatoric nature of the process. There were many points at which that Bill could have fallen – not through its own merits or demerits but because somebody else might have spoken a bit too long on another topic. It was not dissimilar, in terms of discomfort, to the process of watching sausages being made.

So implementation depends on either the chancy fortunes of a Private Member or on the willingness of government to invest time and resources in one of our Bills. It was expected by our founders that our recommendations would in the normal course of events be regarded, in the words of the authors of *1066 and All That*,⁴ as a Good Thing, and would of course be taken swiftly into law. But the reality is that although the rate of implementation is not directly proportional to political interest there is a correlation. Consider the Land Registration Act 2002. For some people (not for me) this is not the sexiest of topics, but it rode into Parliament on swift steeds two days before the Report was published; might this have had something to do with the fact that it was seen to promise cheaper conveyancing (for which there might be votes)?

³ RT Oerton, *A Lament for the Law Commission*, (Chichester, Countrywise Press, 1987).

⁴ WC Sellar and RJ Yeatman, *1066 and All That*, (London, Methuen Publishing, 1930).

Very recently we have seen two major new developments. One is the introduction of the Special Public Bill procedure for uncontroversial Law Commission Bills. Two Bills have gone through so far. One is the Perpetuities and Accumulations Act 2009 and the other is Third Parties (Rights Against Insurers) Act 2010. The procedure is initiated by the introduction of a bill in the House of Lords. It is a Government Bill, managed by a Government Bill team, but the magic of the procedure – and the reason why it opens a door into Parliament that might otherwise be closed – is that Second Reading takes place in Committee and in a Committee Room. It does not take time on the floor of the House. However, it is not a fast-track procedure. Second Reading takes as long as it would otherwise take; scrutiny in Second Reading Committee may even be more rigorous because the calm and rather intellectual atmosphere of a House of Lords Committee Room lends itself to expert probing of technical issues. The Bill must be a Law Commission Bill; but it is unlikely to be unamended from its original form. The perpetuities Bill was a case in point, since it was 10–years-old by the time of its introduction and needed considerable updating.⁵ It is not known how far the process of updating and adjustment can go before a Bill ceases to be a Law Commission Bill and so ceases to be eligible for the procedure. But certainly a Bill going through this procedure cannot be a vehicle for a piece of non-Law Commission policy, and it must be ‘uncontroversial’ – an undefined term. What does that mean? Does it mean that the Bill must be so boring that no one cares? Clearly not, perpetuities arouse passions. Does it mean there can be no amendments? Apparently not.⁶ What is clear is that it must not be politically controversial. Support and opposition must not fall on party lines. So the new procedure is not a way to turn politics into law.

The other recent development is for England and Wales only. It is the new Protocol signed in 2010⁷ regulating the relationship between government and the Commission in the adoption, execution and completion of our projects, and it is intended to put an end to the problem of unimplemented reports sitting on the shelf. It states that when the Commission takes on a project, there must be a government department expressing a serious intention to carry forward law reform in that area. At first blush that is music to the ears of the law reformer; but it is modern music which does not take the listener quite where he expected to go, because the corollary of that statement is that we *cannot* take on a project in which the relevant department is not able to express a commitment to reform.

A year ago we consulted on our Eleventh Programme of law reform, which has just begun.⁸ Many of you made suggestions. Most of those suggestions could not be taken forward. They were all good but most fell at the first fence because they were not ones in which a department had an interest.

Many of you will be gestating law reform babies. If you wish to use a Law Commission midwife for those babies, it is worth thinking now, two years in advance, of the next consultation and how you are going to get a government department interested. That is something we should work on together. The Law Commission for England and Wales has never had a wholly free hand in setting its agenda because we have always had to have our programme approved by the Lord Chancellor. But certainly the Protocol changes things. We

⁵ Law Commission, *The Rules Against Perpetuities and Excessive Accumulations* (Law Com No 251, 1998).

⁶ As I write up this paper in March 2013, two further Acts have been passed by means of the procedure, of which the latest was the Trusts (Capital and Income) Act 2013. Two amendments were put forward in Second Reading Committee, both were voted upon and both were defeated.

⁷ <http://lawcommission.justice.gov.uk/publications/940.htm>.

⁸ http://lawcommission.justice.gov.uk/docs/lc330_eleventh_programme.pdf.

retain and jealously guard the right to say ‘no’ to projects even if government wants us to do them. But the Protocol curtails our freedom to say ‘yes’ to suitable projects that we want to do, if government and the relevant department will not express an interest.

One of the effects that that will inevitably have is on the size and scale of our projects. In the past we have done very successful work on what we might call investment law reform; long term projects which take time to produce profound recommendations, which may well be implemented not immediately but later when there is time – the perpetuities work was a good example. But it is very hard to imagine a government department expressing interest and support in that sort of long term project. I and my team have just completed a report on Easements, Covenants and Profits à Prendre, again very close to my heart.⁹ Work on that began in 2003, under my predecessor Stuart Bridge. It is very hard to imagine a project like that being taken on now.

So the new and closer link with government and its own reform priorities carries obvious risks for independent law reform. It does however open the door to new co-operation. We are starting the first batch of new projects under the Eleventh Programme; the experience of doing so in a context where a government department is interested and to some extent committed – not necessarily to our policy, but certainly to reform – is new and refreshing.

Three particular examples spring to mind. One is our project on Adult Social Care.¹⁰ It was not negotiated under the new Protocol, but it is the sort of project that the Protocol most readily facilitates. We worked on the legal organisation of the topic and reported in May 2011, while at the same time the Commission on Funding of Care and Support (‘the Dilnot Commission’) was looking at the truly central and political question of funding. That meant that instead of riding the lonely bicycle of aspiration we were riding a tandem, with a government department waiting to pick up both pieces of work, produce a Bill and take it through.¹¹ It meant we had to tread a very careful line, and you can look at the first few pages of our Report to see how we define what we could consider and what we could not.

The second example is a new project on the Electronic Communications Code – otherwise known as schedule 2 to the Telecommunications Act 1984. It is the legal means of getting electronic communications apparatus on to land in order to maintain and complete the networks on which we depend so closely for so many forms of communication. In 1984, of course, the internet barely existed and there were no mobile telephones; the original Code was designed for landline telephones and adapted by amendment in 2003 for the modern range of telecommunications providers. Its drafting has been criticised from the High Court bench,¹² and a fresh start is needed. But the interests involved – those of land-owners and of telecommunications operators – are in some ways opposed. The Department for Culture, Media and Sport asked us to take on the project precisely because they needed an *independent* consultation; and because we offer independence and expertise they are funding a project.¹³

⁹ Law Commission, *Easements, Covenants and Profits à Prendre* (Law Com No 327, 2011).

¹⁰ As I write in 2013, this project is completed: Law Commission, *Adult Social Care* (Law Com No 326, 2011).

¹¹ The Department of Health published the draft Care and Support Bill for pre-legislative scrutiny in July 2012. The Joint Committee on the Draft Care and Support Bill issued a report which recommended changes to the draft Bill and the next stage will be the introduction of the revised Bill into Parliament in autumn 2013. The Social Services and Well-being (Wales) Bill was introduced into the National Assembly for Wales in January 2013.

¹² *Geo Networks Ltd v The Bridgewater Canal Company Ltd* [2010] EWHC 548 (Ch), [2010] 1 WLR 2576 [7] (Lewison J).

¹³ See now Law Commission, *Electronic Communications Code* (Law Com No 336, 2013).

The third example of corporate endeavour takes us back to the Parliamentary process. One of the costly aspects of a Bill is the work required of the Bill team that takes it through Parliament. The next candidate for the special procedure is the Trusts (Capital and Income) Bill, appended to our 2009 Report *Capital and Income Trusts Classification and Apportionment*,¹⁴ affectionately known as ‘Citcat’. Work is going on quietly behind the scenes to get ready for introduction – it is much more work than I thought it would be. The Bill team is composed not of several Ministry lawyers and policy officials, as would formerly have been the case, but one Ministry official and the Law Commission project team. That would have been beyond the imagination of our founders but it is a very efficient way of using the team’s expertise.

We do not ‘turn politics into law’ at the Law Commission. But we do have an ambivalent relationship with politics and the politicians. That relationship has been facilitated through the new Parliamentary procedure, and redefined by the protocol which brings us a little closer to politics, makes our dependence on the political process a little more explicit, bringing risks and bringing potential.

The Law Commissions need you as our academic partners and we are immensely grateful for all you do, some of you very generously work with us directly by talking to us when we are doing projects. Many of you provide the research upon which we draw, many of you propose new projects. We are very grateful for that work and we bring these developments to your attention in order to give you a better idea of our relationship with the political process of what we can’t do and what we can do. Thank you.

II HECTOR MACQUEEN’S ADDRESS

Thank you, Lizzie, for that very helpful conspectus. I certainly learned one or two things that I wasn’t quite aware of before. When we come to the Scottish Law Commission, much of what Lizzie has been talking about applies but not the Protocol with which she finished, unless we are working together on joint projects.¹⁵ However, things are moving on in Scotland as well.

I should however first stress that whilst the Scottish Parliament and the Scottish Government are, as it were, our main customers from the point of view of translating what we propose into legislation, we too are part of the UK structure (at least for the moment), and the Westminster Parliament’s doings are of considerable interest to us. One of the things on which we at the Scottish Law Commission work is those parts of Scots law which under the devolution settlement remain reserved to the exclusive legislative competence of Westminster. That is actually a complete nightmare of a dividing line. One can draw very crude overall pictures, to the effect that Scots private law is devolved, while ‘single market’ commercial, consumer and employment law are reserved. But what is the difference between Scots private law, for example contract, the area in which I am much involved at the moment, and commercial law? One of the examples we have run into recently was a Report on what we call Unincorporated Associations – clubs and so on.¹⁶ We realised only

¹⁴ Law Commission, *Capital and Income Trusts Classification and Apportionment* (Law Com No 315, 2009).

¹⁵ An example is the Advice to the Department of Business, Innovation and Skills on Unfair Terms in Consumer Contracts, commissioned by the Department and published in March 2013. This is expected to be implemented in the so-called ‘Consumer Bill of Rights’.

¹⁶ Scottish Law Commission, *Report on Unincorporated Associations* (Scot Law Com No 217, 2009). All the Commission’s publications are available at www.scotlawcom.gov.uk/publications/.

quite late that, although this is very much a classic area of Scots private law quite distinct in content from its English counterpart, it is a reserved area under the Scotland Act 1998 and so can only be implemented at Westminster.¹⁷ The present law is very unsatisfactory – if the members of such associations realised the liability risks they run as a result, they would if sensible immediately disband themselves. But such organisations are of considerable significance, I think it is fair to say, for a wide variety of activities in the third or voluntary sector and, of course, by implication, for the ‘Big Society’ idea so dear to the heart of the Prime Minister. I am afraid we have made slightly shameless use of that idea in promoting the implementation of the draft Bill attached to our Report in the Westminster Parliament through the Special Public Bill procedure that Lizzie described in her remarks. Somewhere in the pipeline, probably after the Bills that Lizzie was talking about, will be a Bill applying entirely to Scotland. That will most likely be our Unincorporated Associations Report Bill where we are currently trying to persuade the Advocate General for Scotland and the Scotland Office that no controversy is likely to derail our Bill on this matter. So, having used politics in the sense of attaching our project to the Big Society agenda, we are now trying to say that actually it is not really political at all.¹⁸

The basic point is that Law Commissions exist to reform the law through legislation. In Scotland, however, we are not necessarily as tied to the Law Commissions’ success being entirely measured in the actual legislation emerging from it because we can see that our material has impact on the courts, sometimes explicitly by reference in judicial decisions. From time to time, a law reform project has explicitly concluded that development is best left to the courts. Law Commission reports are quite frequently referred to in the Scottish courts as part of the background material to help in the understanding of legislation resulting from those Reports. The key really is the achievement of law reform, and the process is not necessarily entirely by means of legislation.

Be that as it may, a law reform body which makes proposals for law reform, which then lie unimplemented by the legislature, is, I think, probably rightly to be described as a failing law reform body. So in Scotland we have noticed with interest the Law Commissions Act of 2009 and we have been in quite significant discussions for some years now with the Scottish Government about achieving better implementation rates for our proposals that fall within the legislative competence of the Scottish Parliament. We are in the relatively fortunate position, possibly, that the SNP Government has an absolute majority in a Scottish Parliament allowing it to pursue its policies with an expectation of success that it did not have in its 2007–11 incarnation as a minority government. I cannot stress enough how remarkable the present situation is: the electoral system for the Scottish Parliament was designed to produce coalition governments, the politics of which make the achievement of any legislation necessarily more complex, whether or not its content is political in the

¹⁷ Scotland Act 1998 sch 5 Head C1.

¹⁸ In the event the public consultation by the Scotland Office on the subject in 2012 extended beyond unincorporated associations to include another more recent Report by the Scottish Law Commission on the prosecution of dissolved partnerships (Scottish Law Commission, *The Criminal Liability of Partnerships* (Scot Law Com No 224, 2011)). The consultation showed a small number of unresolved issues of detail with unincorporated associations, but none with prosecuting dissolved partnerships, see: www.gov.uk/government/consultations/reforming-the-law-on-scottish-unincorporated-associations-and-criminal-liability-of-scottish-partnerships. As a result, the Partnerships (Prosecution) (Scotland) Bill was laid before the Westminster Parliament on 1 December 2012, the first purely Scottish Bill to be brought forward in this way. The Bill made unamended progress towards the statute book and received the Royal Assent on 25 April 2013; see: <http://services.parliament.uk/bills/2012-13/partnershipsprosecutionscotland.html>.

sense of dividing parties from each other. The SNP Government has achieved its present pre-eminence, it is generally thought amongst other key factors, on the basis that it was managerially competent in its first term of office, keeping Scotland ticking over in general through their four years in power in a way that had not been so apparent with their coalition predecessors from 1999 to 2007. The SNP is now extremely keen to play on this perception, not least for what it might in due course entail in the coming debates on the possibility of Scottish independence. Further, not only does it have the obvious advantage of its overall majority, it also has a five rather than a four-year term. The normal Scottish Parliament term is four years, but for various reasons to do with the fixing of the date of the next UK General Election in 2015, we are going to have a Scottish Parliament running until May 2016. So the SNP Government has been given an opportunity, unparalleled in the admittedly very short history of Scottish devolution, to really achieve things, to do things that it thinks it wants to do.

What has emerged in the process since May 2011, apart of course from the pursuit of the SNP's primary goal of Scottish independence, is that it wants to do law reform. Law reform, that is, not in the general sense that any legislation reforms the law in some way, but in the very specific Law Commissions sense that Lizzie has described, ie non-political, but the sort of stuff that will help to shape Scottish civil society and enable, as one of my fellow Commissioners put it, the plumbing of the legal system to be kept in good order.¹⁹

This law reform objective has been carried forward in discussion with us although what this means so far is that the relevant civil servants turn up for meetings, we talk a lot about what is possible, and they then walk away and deliberate further on what can be done. The Scottish Parliament is involved as well, since the creation of a specific procedure akin to that at Westminster may be needed, and that would involve one of the Parliament's committees assuming a new responsibility. We are still currently awaiting an outcome, although we do have some idea of where our projects (and, indeed, more recent unimplemented Reports) stand in the current legislative queue. Although there is no annual Queen's Speech in the Scottish Parliament, the First Minister announces every September what the legislative programme for the coming year is going to be, and there is an ongoing (and regularly revised) list inside the Scottish Government associated with that. In addition, legislation not passed during the year does not thereby fall. It will only do so if it is not passed at the end of the five-year period now underway. So Bills can run for quite a long time, although that should also remind us of one of Lizzie's points which applies as much in the Scottish as in the UK context, Bills are resource-intensive in the Civil Service.

In sum, what we have in Scotland at the moment is a law reform element in the programme for the five-year period of this present Scottish Parliament under its majority SNP Government. The content of what it is looking for in that law reform package is more or less precisely what Lizzie was describing as coming under the special procedure at Westminster: Bills that are essentially politically non-controversial, while also likely to attract significant extra-Parliamentary support (eg from the legal profession or the business sector), and that can accordingly be time-managed very clearly, with a schedule set down in advance that is likely to be kept.²⁰ This will not be a 'fast track', any more than the Westminster procedure is,

¹⁹ See text accompanying n 21 below.

²⁰ Candidates in our current projects include Scottish Law Commission, *Report on Execution in Counterpart* (Scot Law Com No 231, April 2013) and Scottish Law Commission, *Report on Judicial Factors* (Scot Law Com No 233, August 2013).

as Lizzie explained; but it should allow for better implementation rates of Law Commission Reports than have been previously achieved.²¹

The plumbing metaphor already mentioned for law reform actually appears in the opening paragraph of our Report on Land Registration published in 2011.²² That Report has been very successful and we are going to have a Land Registration Bill very shortly.²³ One of the things that I learned more or less straightaway when I came on to the Commission in September 2009 was the vital necessity in one's law reform projects and proposals to think about and articulate what good this would do for Scottish society, particularly in relation to economic activity. Talk of land registration as part of the country's legal plumbing played into this as well as the SNP Government's self-image of managerial competence. So Law Commission Reports can, to adapt Sir Henry Thring's famous dictum that Bills are designed to pass as razors are to sell,²⁴ be written to catch the prevailing wind in government.

I came into the Commission with the notion of doing a review of contract law pre-eminent in my thinking; but that that would happen was not a given. It was a gamble, if you like, that I took when I accepted the appointment because what I had to do first was to share in the formulation of our Eighth Programme of Law Reform.²⁵ Lizzie has described exactly how that process works. The Scottish Law Commission is free to propose, but government disposes and it has the power to refuse our proposals.²⁶ This is not yet a matter of our doing only what government has said it is interested in implementing (ie what Lizzie has described for our English colleagues as arising through the 2010 Protocol). But in proposing a review of general contract law I had first to give my colleagues some explanation of why that was a good idea when I couldn't in all fairness point to popular outcry and rebellions across the country, demand from the legal profession, or even perhaps to particular problems in the courts or decisions that were going manifestly wrong in either law or policy terms. But the idea which ultimately appealed to the Scottish Government in accepting the contract law proposal was that a health check would be useful. Contract law is of importance to a thriving economy, as the legal basis upon which it will operate. There was merit therefore in having a look at the law of contract to see whether there are rules or factors in the Scots law – and this was perhaps a bit of play to an SNP Government – that were pushing business people, when otherwise they were operating in a Scottish context, to choose another legal system as their contract's governing law. One mentioned English law in particular in this context, of course, to get the SNP Justice Secretary's hackles rising. But

²¹ The Scottish Parliament decided on 28 May 2013 to accept recommendations for changes to its Standing Orders to allow Commission Bills where the need for reform is widely agreed, but no major or contentious political or financial issues arise, to be referred to the Subordinate Legislation Committee, which is accordingly to be re-named the Committee the Delegated Powers and Law Reform Committee. See the Official Report for 28 May 2013 (www.scottish.parliament.uk/parliamentarybusiness/28862.aspx?r=8173&mode=pdf), cols 20374–79.

²² Scottish Law Commission, *Report on Land Registration* (Scot Law Com No 222, 2010).

²³ See now the Land Registration etc (Scotland) Act 2012.

²⁴ Found quoted in Lord Rodger of Earlsferry, *The Form and Language of Legislation* (Holdsworth Club, University of Birmingham, 1998) 17, reprinted in this volume, ch 4 above, p 65. Lord Rodger's observations on the preparation and progress of legislation, written mostly from the perspective gained as a Scottish Law Officer, frequently chime with my own as a Law Commissioner. See also on the parallel experience within the recodification project of the Louisiana Law Institute, S Herman, 'Civil Recodification in an Anglophone Mixed Jurisdiction: A Bricoleur's Playbook' (2012) 58 *Loyola Law Review* 487–558.

²⁵ Scot Law Com No 220, 2010.

²⁶ Government may, and often has done so, refer issues to the Scottish Law Commission for review – see eg the criminal law reference following the World's End murders trial in 2007 and resulting in three reports on Crown appeals, double jeopardy, and similar factual evidence between 2009 and 2012. The Commission may refuse the reference but does not generally do so. The Reports on Crown appeals and double jeopardy have both been implemented in legislation.

there were other points. The context in which the proposal was framed in the programme was to look at the law in a European and modernising context. That is in fact the primary purpose of the project, but it was rather important to set it out for the Government in a way that would attract its interest and, in the end, its support, albeit without any commitment to legislate on whatever might emerge.²⁷ Support was forthcoming and we are now embarked upon the project. It will form part of the law reform programme already mentioned,

The one other thing that I would like to mention in this is just to clarify one or two elements in procedure. One is consultation. Both Commissions do a lot of consultation in formulating the discussion paper or consultation paper that is the first public manifestation of a law reform project, and obviously the paper itself then stimulates further responses which are taken into account at the Report and draft Bill stage. What we are increasingly finding is that it is actually vital, not just to put out your discussion or consultation paper, receive your comments back, and then proceed thereafter without thought of further consultation. We have to do more consultation because quite often what comes out of the initial round of responses to a paper is actually contradictory or perhaps unclear in certain respects; or there is silence from potential consultees whom you would wish to have heard. So we are engaging in more active consultation of our own initiative at all stages of our projects.

But one of the aspects of the law reform programme under discussion at the moment in Scotland is the question of whether the Scottish Government will take over the proposals and draft Bills that we have made. Should the Government then engage in a further process of consultation? They have always done that up until now, so that there is a potential for duplication. My wife is a civil servant and has engaged in consultations on Law Commission proposals, and what she says to me (and I can well believe it) is that the Scottish Government finds things that the Scottish Law Commission never uncovered in its consultation. So a contradiction sometimes emerges between the two processes: possibly because the two bodies are reaching different audiences, or perhaps because consultees are more alert when the Scottish Government is consulting since they realise that action is now quite likely. Now part of the law reform package of ascertaining whether Law Commission Bills are indeed uncontroversial, unlikely to attract significant opposition on their way through the Parliamentary process, and indeed widely supported by relevant stakeholders, is this process of consultation. What I suspect is going to happen is that the Law Commissions are going to be engaging in yet more consultation than is already the case as part of the process of trying to find out what the support for and opposition to particular proposals may be. The success we had with the Land Registration project mentioned earlier was because the Commissioner in charge worked with the stakeholder constituency – the conveyancers, the Land Registry people themselves, the civil servants who are backing all that – and took them with him all the way in the development of the proposals that eventually appeared in the report.²⁸ So the end result was an extremely short government consultation in the summer of 2011 which was extremely uncontroversial because everyone was already on board.

I think this is the way forward for the Law Commission, in this new world where government actually wants to be seen to be implementing these reports. Why otherwise would

²⁷ Eighth Programme of Law Reform, paras 2.16–2.21.

²⁸ We have tried to follow this example in the project on execution in counterpart as well as publishing a draft Bill on the Commission website and inviting (and receiving) comment. We also shared later drafts privately with interested practitioners.

you fund a Law Commission? And perhaps the final point to make is the overall context of this is cuts in government expenditure.

We are seeing huge cuts in government expenditure and not only in the Civil Service. The Scottish Law Commission itself is facing up to a very deep cut over the next two or three years. It is trying to make the best use of the resources that remain available. What that is doing at the moment, I think, is drawing the Law Commission and Government closer together. The interesting question, indeed the political question, which arises from this, is that is it going to be a good thing in the end? Is this going to compromise the independence which has been the hallmark of what the Law Commission has done up until this time?

Thank you.

III QUESTIONS

(Q1) This is really directed to the Law Commissioners. I am wondering if you have become aware of any directed lobby activity in the consultation process? Obviously that is possible, obviously it is not wrong per se and obviously it is potentially – well it would raise some questions. So are you aware of it happening and if you are, or if you are not, what is your opinion upon it?

(A1) (Elizabeth Cooke (EJC)) I am just wondering what lobbying means. People do talk to us; we do a very longitudinal consultation process so we talk to people as much as we can before we publish a consultation paper. Then, when we have got responses we talk to people again after that because, as Hector says, there may be contradictory responses and indeed lack of consensus.

There is lobbying in the sense that sometimes an organisation responds and then lots of individuals write in to express their agreement; that is one reason why it is very important that consultation responses are weighed and not counted – it is not a voting process, nor is it a statistically significant representation of public opinion.

(Hector MacQueen (HMacQ)) The only other comment I would like to make is when you are in the process of formulating your programme you are particularly open to lobby groups and I was fascinated by that when I arrived in a Commission already in the middle of the process of formulating that programme.

(Q2) A question about the relationship between the Law Commission and the courts – the judiciary. Not so much in the sense of providing material to help with statutory interpretation when reports are implemented, but when they either have not been implemented or are yet to be. Particularly in the Supreme Court in the House of Lords in areas under Professor Cooke's expertise (although I don't want to put her on the spot), there has been a dispute amongst their Lordships and Justices over whether it is appropriate to pre-empt an area that has been considered by the Law Commission. And then equally the Government, and sometimes the Law Commission, has given a reason for not recommending reform or pressing ahead with reform, the courts have got on with it and seem to be dealing with it. Sometimes because it has been 10 years since the Law Commission reported. So do Law Commissioners view their reports as being material for the judges as well as Parliament and what do judges make of Law Commission reports that haven't been implemented?

(A2) (HMacQ) Yes, perhaps I should start. One of the key points about Scotland and the Scottish legal system is that it is a very small community and everybody knows everybody else. And yes, you can be writing bits that are aimed as much at the courts as at the legislators. The judges are consultees, of course, but quite often it is an informal sort of thing. What you are looking to do is to provide what one of my Edinburgh University colleagues once described as ‘pabulum’ for the courts.²⁹ I had to look the word ‘pabulum’ up – it is basically foodstuff. Perhaps more specifically it is fodder for the Bar arguing before the court, drawing counsel’s attention to various ways of approaching or structuring the existing material. There was a bit in our recent discussion paper on Interpretation of Contract where I tried to draw the threads of a whole string of unreported cases together in a way I knew practitioners would love. There were seven bullet points, each with authority attached to it, most of it unreported.³⁰ This has been picked up, not least in the lower courts.³¹ The rest of it, I am afraid, less so.³² But the statement of what I think the current law is, in that listed form, was quite deliberately intended to get into circulation, as it were, a reasonably authoritative statement of what the position is at the moment.

(EJC) That is another difference between Scotland and England: we are not supposed to use Latin! I agree that there is a judgement call sometimes to be made as to whether we should recommend legislation on a point or should recommend that the courts should take a particular approach. The problem with taking the latter option is that it depends upon the right case getting to the right level of the court system in order to produce an authoritative precedent. So it is quite a difficult one. We did take that approach in our report on illegality.³³ We are aware that we are indeed producing fodder for the courts, but fodder that they can choose whether or not to eat.

(Q3) This is directed to the Law Commissioners. You didn’t really touch on this, but it is essential to what you do, which is when you say you look into the present law, and you make proposals, for the preferable direction for the law, indicating that there is a choice. I want to press you on how you make the choice. I know Roy Goode and I, and perhaps some others here, are involved in the American Law Institute. Although the American Law Institute is known for restating the law, quite often what we do in the Institute is actually try to find what the better solution to an area of law is. The question I want to press you on is that when the Americans are looking across their 51 jurisdictions, the 50 states and the federal jurisdiction, for what might be the best rule, these are really the only catchment areas. There is no serious attempt to look outside to the rest of the common law world, and certainly not to European Union jurisdictions. That might be embedded somewhere in the reporters’ notes, an interesting sideline about what other people do, but it is not really the meat of the comparative study. Now in your work, obviously the rhetoric would be in some quarters when you are looking for the best rule, you should also be looking at, say, your partner’s law and European Union law. But to what degree do you actually do that?

(A3) (HMacQ) Well I think I can answer that fairly confidently, quite extensively. Contract law is specifically a review in the light of the Draft Common Frame of Reference

²⁹ WA Wilson, ‘Knowing the Law and Other Things’ (1982) *Juridical Review* 259, 260.

³⁰ Discussion Paper No 147 on Interpretation of Contract (2011) para 5.13.

³¹ See eg *Scotia Homes (South) Ltd v McLean*, Kirkcaldy Sheriff Court, 30 November 2012, accessible at www.scotcourts.gov.uk/opinions/A216_10_.html.

³² This has been apparent in the diverse consultation responses.

³³ Law Commission, *The Illegality Defence* (Law Com No 320, 2010).

on the basis that that is an attempt to state best rules of contract law for the European Union. Now you may agree or disagree. That is part of the discussions that we are having, that we explicitly used that as our point of departure and we have observed where our law differs from it. We also of course take close account of English law. We have to because that is our nearest neighbour and obviously our largest comparator. In trust law we are looking at the moment at all the trust law jurisdictions, including not only England but also the Channel Islands and places altogether outside Europe, to see what ideas they have that we could usefully deploy. This is because a justification for the Trust project is that the Scottish financial sector, a very significant economic player, is very interested in further developing Scotland as a trusts jurisdiction. There are limits to this, obviously, because Scotland does not have the power to vary the taxation rules relevant to trusts. But the SNP Government is of course lobbying like anything for more such powers. In land registration we looked at the German system in particular. We looked at others but the German system was the one that particularly took the eye. So we do use comparative law a great deal in the Scottish Law Commission because again it inevitably follows from being a small legal system. We have to look outside for our ideas.

(EJC) I would like to answer the question on two levels. One is a question about sources; a Law Commission project would be sadly lacking if it didn't take proper account of the relevant comparative materials. Scotland is a civil law jurisdiction and therefore, particularly in areas like land law and family law, more akin to the European systems. Those are areas where English lawyers would more naturally look to the common law world than to the European world. My colleagues doing commercial and contract law would look to Europe.

So the quick answer to what you are saying is, of course we do as much comparative law as we can in the context of time and resources. We will be publishing a report on intestacy in December 2011 where we have done a lot of work on 'conduit theory' (which is about wicked stepmothers) – an area developed particularly in the USA but not so far looked at very much by English lawyers.³⁴

The deeper question, to which I do not know the answer, is how we decide what to recommend. We can recommend what people want; we can recommend what works; but how do we decide the big issues of principle? To take a really practical and workmanlike group of projects: we have just started work on the Electronic Communications Code, and we are going to be working on Rights to Light; both of those raise deep questions about the relationship between my land and other people's rights, to which there is no one right answer. But there is a big issue there that has to be answered in order to decide what the law is going to be, and I do not think there is any one answer to how we decide that. If we were politicians we might find that our answer was dictated by our politics, but we are not.

(HMacQ) Just one further thought on this. From the Government's point of view, the Law Commission is a useful sounding board for alternative possibilities and in the end the Law Commission may have to decide between them. In this, you have to persuade your four fellow Commissioners to take the line that you personally think is indeed the right answer. They have all got to sign up to it. So there may well be compromise concealed within the bland assurances of the report that this is the way to go forward. But actually the key point is that you have canvassed the different issues as far as you can. That is apparently what the

³⁴ Law Commission, *Intestacy and Family Provision Claims on Death* (Law Com No 331, 2011) see also E Cooke, 'Wives, Widows and Wicked Step-Mothers: A Brief Examination of Spousal Entitlement on Intestacy' [2009] *Child and Family Law Quarterly* 423.

civil servants particularly appreciate in our papers and reports. It also helps them to decide whether this is, in my language, a law reform Bill, in Lizzie's language a Protocol Bill, or is it something that is going to have to run the political gamut. The example that is current in Scotland is a Succession Bill where we have the question of legal rights for spouses, cohabitants and children that cannot be willed away by a testator. Can you disinherit the children? Should you be allowed to do so, and if so, to what extent? We have come up with a specific set of proposals. I understand that a lot of people disagree with it. In the end there is no escape from that question; it is a social and political question. That Bill will not go into the law reform process I have tried to describe; but it is obviously a Bill that should be there. The law of succession, especially intestate succession, is in desperate need of modernisation for modern social conditions but it is going to be up to the politicians, using our thinking, one hopes, as a basis for decision-making in a rational fashion, to come up with the final answer.

(Q4) Mine is a question about audience, and to some extent looks to both groups of persons on stage. For my part I am quite sad that there will be in some sense a limit under the new Protocol. A number of major reforms of criminal law have happened because for instance the draft criminal code at the end of the 1980s was picked up by the courts. I am not entirely sure that I believe that legislation is the only way for the Law Commission to make a serious impact.

(EJC) So far as the English Law Commission is concerned, perhaps a very important reason for having academic Law Commissioners is that we are more conscious of the wider audience than perhaps practitioners are. 'Facing the Future' was the Law Commission's report on divorce reform.³⁵ It hasn't been implemented (or rather it has, but the statute hasn't been brought into force)³⁶ but we are still teaching it. It is still absolutely essential to thinking on grounds for divorce on how things should be. Law reform is a bigger process than the enactment of statutes; statutory implementation is often the best way forward, but if that fails the work is not wasted.

(HMacQ) The only thing I would add is that the way I have described it recently to friends, partly because I had experience in such bodies before I became a Commissioner, is that the Scottish Law Commission has a capacity to act as a think tank about law in Scotland, and what it says can have a wide influence on a whole variety of different ways on what happens in the legal system thereafter. So as I think I said in my presentation, legislation isn't everything, although it is the most important.

(Q5) The Government has introduced a regulatory reform regime which is designed, I think, to reduce regulation and has in fact succeeded in creating a massive bureaucracy which is designed to make it even harder to get ratification of an international convention than it is to put a camel through the eye of a needle. I am just wondering whether the Law Commission has some dispensation from this process which generally speaking requires not only that there has to be a good number of people supporting the project or even, as in the case of the Convention I am thinking of, almost the whole of the industry affected, but there has also got to be an economic impact assessment. There has got to be a quantitative assessment which shows exactly what benefits will ensue, what the costs will be and so on. The whole process is a nightmare. One would like to think that since you work on the

³⁵ Law Commission, *Facing the Future: A Discussion Paper on the Ground for Divorce* (Law Com No 170, 1988).

³⁶ Family Law Act 1996, Part II.

English Law Commission on the basis of references from relevant departments, that actually you won't have to go through those hoops. But I wonder whether that is the case?

(A5) (EJC) No. There is no dispensation. We do not yet know what effect that will have. We do indeed produce impact assessments with our reports, and we have constructive relationships with departmental economists. The impact assessment is crucial to implementation decisions; but the science or art of impact assessment is still evolving, particularly in areas that are extremely difficult to quantify.

Perhaps I might tell a short story about the reduction of regulation. Not long ago the House of Lords thought it would be a good idea if the Land Registry required joint purchasers of property to make a declaration of trust to say whether they were joint tenants or tenants under common law.³⁷ The difference is crucial, and it is important that joint owners choose which form of ownership to adopt – particularly in view of the difficulties which arise if they separate having left this question unresolved. It is also part of a solicitor's duty to advise on the point. In response to what the House of Lords said, the Land Registry set up a Working Party of which I was an academic member. We agreed that although it was not part of the Land Registry's function to require joint purchasers to set their house in order, we would recommend a new procedure that would make the declaration of trust a compulsory precondition to registration. Sadly, that recommendation could not be implemented because it was regarded as an increase in regulation. I have written at more length about this elsewhere;³⁸ as I understand it, the Land Registry has introduced a new form on which declarations of trust can be recorded, but without any compulsion and therefore without, in my view, the benefits to individuals that the Working Party's recommendation would have effected.

(HMacQ) I found the writing of an impact assessment, or attempt at an impact assessment, an intellectual challenge which I quite enjoyed but it was in the discussion paper and it was asking people to tell me things.³⁹ We have now got all the consultation stuff back and nobody has answered the questions about impact assessment, so we are no further forward. I have had one experience of impact assessment jointly with the English Commission⁴⁰ and it was great fun doing the sums.⁴¹

³⁷ *Stack v Dowden* [2007] UKHL 17, [2007] 2 AC 432.

³⁸ Elizabeth Cooke, 'In the Wake of *Stack v Dowden*: The Tale of TR1' [2011] *Family Law* 1142.

³⁹ Discussion Paper No 147 on Interpretation of Contract, paras 1.16–1.21.

⁴⁰ See the Joint Reports on Consumer Insurance Law: Pre-Contract Disclosure and Misrepresentation (Law Com No 319, Scot Law Com No 219, 2009), Part 11, and Consumer Redress for Misleading and Aggressive Practices (Law Com No 332, Scot Law Com No 226, 2012), Part 11.

⁴¹ The Scottish Law Commission is now required to provide a Business and Regulatory Impact Assessment (a BRIA) with its Reports. The first of these appeared online alongside our *Report on Prescription in Moveables* (Scot Law Com No 228, 2012) at www.scotlawcom.gov.uk/index.php/download_file/view/1000/138/. Another accompanied our *Report on Execution in Counterpart* (above, n 20).