Independence and Implementation

In Harmony and in Tension

Matthew Jolley[*]

Abstract

This article examines the factors that have influenced the independence of the Law Commission of England and Wales and the implementation of its recommendations. It discusses innovations in Parliamentary procedure for Law Commission Bills, the Protocol between Government and the Law Commission; and the requirement for the Lord Chancellor to report annually to Parliament on the implementation of the Law Commission's proposals. It makes the case that the relationship between independence and implementation is complex: at times the two pull in opposite directions, and at times they support each other.

Keywords: Law Commission, law reform, legislation, independence, implementation.

A Introduction

This article analyses the factors determining the independence of the Law Commission and the implementation of its recommendations. It explores the complex relationship between independence and implementation.

The article starts by considering the framework established by the original constitution of the Commission as a body with complete freedom of thought but subject to some control over its project selection. It describes the evolution of further direct and indirect controls on the Commission, introduced in part in order to support the implementation of the Commission's recommendations. Some of those controls have reinforced the Commission's independence; some have challenged it. Some were introduced with the Commission's agreement; others were introduced against a backdrop of Commissioner and stakeholder concerns about the consequences for independence.

The article concludes that the independence of the Law Commission and the implementation of its recommendations are in both harmony and in tension. It was important at the end of the first decade of this century to take steps to support implementation, and some of the developments during that period have

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enhanced the prospects of implementation of the Commission's recommendations with no adverse impact on its independence. However, the article notes criticisms of a key provision of the protocol between Government and the Commission that aims to support implementation but that some consider to go too far in restricting the freedom of the Commission to select its own work. And the article welcomes the review of the financial model of the Commission recently announced by Government following suggestions by the Commission that the current arrangements may compromise the Commission's independence.

The article comments solely on the experience in England and Wales. In particular, it does not address the position of the Scottish Law Commission. While constituted under the same founding Act, the Scottish Law Commission has a distinct history. The establishment of the Scottish Government[1] in 1999 and the enactment of the Law Commission Act 2009 solely in relation to the Law Commission of England and Wales have heightened the distinctiveness of the two Commissions.

The nature of the independence of the Law Commission and the implementation of its recommendations are complex topics that have been considered in depth by commentators. Some important areas are not covered in this article, including the range of possible meanings of 'independence'[2] and different methods of implementation beyond legislation.[3] In particular, it does not discuss the much-debated issue of how far implementation rates should be taken as the sole performance indicator of a law reform agency. The article takes as a starting point that Sir Terence Etherton[4] was correct in suggesting that "[l]egislative implementation of reports is, of course, a very important measure of success. It is not, however, the only measure".[5] But even if "[a]cceptance of recommendations and their implementation are not the entire story",[6] implementation is clearly an important objective that must be supported if the Law Commission is going to change the law.

B The Original Vision and the Early Years

I Independence

The Law Commissions of England and Wales, and of Scotland, were built on the vision of Gerald Gardiner and Andrew Martin in their seminal 1963 work *Law*

1 Initially the Scottish Executive.

2 For one view on this issue see G. McLay 'Institutional Law Reform in New Zealand: The Importance of Independence', *The Theory and Practice of Legislation*, Vol. 6, No. 2, 2018, pp. 167-191. Professor McLay is a former New Zealand Law Commissioner.

3 *See, e.g.*, S.W. Stark, 'Promoting Law Reform: By Means of Draft Bills or Otherwise', *in* M. Dyson, J. Lee & S.W. Stark (Eds.), *Fifty Years of the Law Commissions: The Dynamics of Law Reform*, Hart, Oxford, 2016.

4 Chair of the Law Commission 2006-2009.

5 T. Etherton, 'Law Reform in England and Wales: A Shattered Dream or Triumph of Political Vision?', *Amicus Curiae*, Vol. 73, 2008, p. 8.

6 T. Etherton, 'Memoir of a Reforming Chairman', *in* M. Dyson, J. Lee & S.W. Stark (Eds.), *Fifty Years of the Law Commissions: The Dynamics of Law Reform*, Hart, Oxford, 2016, p. 77.

Reform Now. Independence was a key component of their vision for the new Commissions: "[I]t is vitally important that the Law Commissioners should … enjoy a high degree of independence."[7]

Yet the Act that established the Commissions – the Law Commissions Act 1965 – does not mention the word 'independence'. That is in contrast to, for example, the equivalent New Zealand legislation, which provides: "Except as expressly provided otherwise in this or any other Act, the Commission must act independently in performing its statutory functions and duties, and exercising its statutory powers…"[8] Likewise, the Malawi Constitution prescribes that "[t]he Law Commission shall exercise its functions and powers independent of the direction or interference of any other person or authority".[9]

Rather than expressly asserting the independence of the Law Commissions, the 1965 Act creates a distinct body to carry out law reform within a framework of independence, subject to limited checks by Government.

1 *A Body of Independent Commissioners*

The 1965 Act creates a new body constituted by Commissioners:

> For the purpose of promoting the reform of the law of England and Wales there shall be constituted in accordance with this section a body of Commissioners, to be known as the Law Commission…[10]

This establishment of a distinct body is significant. Government could have set up a Law Commission without founding legislation, particularly if the intention had to be to create a specialist unit within a Government department rather than an independent organization. The statutory creation of a new entity therefore suggests separation from Government. The legislation also provides the new body with a degree of permanence; there 'shall be' a Law Commission unless Parliament amends or repeals the 1965 Act.

The 1965 Act cements the independence of the new body by specifying the characteristics of the five Commissioners. Crucially, the Chair must be senior judge – a requirement that Sir Terence Etherton has described as "a powerful symbolic reflection of … independence".[11] This is important as under the doctrine of the separation of powers, the judiciary of England and Wales are not subject to the control of the executive.

The four other Commissioners must be:

> …persons appearing to the Lord Chancellor to be suitably qualified by the holding of judicial office or by experience as a person having a general qualifi-

7 G. Gardiner & A. Martin (Eds.), *Law Reform Now*, Victor Gollancz, London, 1963, p. 9.
8 Law Commission Act 1985 (New Zealand), s. 5(3).
9 Malawi Constitution, s. 136.
10 Law Commissions Act 1965, s. 1(1).
11 Etherton, 2008, p. 4.

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> cation (within the meaning of section 71 of the Courts and Legal Services Act 1990) or as a teacher of law in a university.[12]

In other words, the Commissioners must be a judge, a barrister, a solicitor or other qualifying legal professional or a legal academic. While legal professionals and academics do not have the constitutional independence given to judges,[13] the Act's requirements result in the selection of Commissioners on the basis of their legal expertise and profile. Today they are recruited through open competition by the Commissioner for Public Appointment and have the status of 'Crown Appointees'. While Commissioners are subject to a Code of Best Practice for Law Commissioners, and the seven principles of public life,[14] they are not civil servants and so are not bound by the Civil Service Code and the requirement to serve the Government of the day.

2 Functional Independence

The 1965 Act sets out an ambitious statutory function for the Law Commission:

> It shall be the duty of each of the Commissions to take and keep under review all the law with which they are respectively concerned with a view to its systematic development and reform…[15]

The Act breaks down how that function is to be performed, setting out a range of statutory duties:

1 to receive and consider any proposals for the reform of the law which may be made or referred to them;
2 to prepare and submit to the Lord Chancellor from time to time programmes for the examination of different branches of the law 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;
3 to undertake, pursuant to any such recommendations approved by the Lord Chancellor, the examination of particular branches of the law and the formulation, by means of draft Bills or otherwise, of proposals for reform therein;
4 to prepare from time to time at the request of the Lord Chancellor comprehensive programmes of consolidation and statute law revision, and to undertake the preparation of draft Bills pursuant to any such programme approved by the Lord Chancellor;
5 to provide advice and information to government departments and other authorities or bodies concerned at the instance of the Government of the

12 Law Commissions Act 1965, s. 1(2).
13 Academics do, of course, have a strong 'tradition' of academic freedom of thought, and legal practitioners have professional standards.
14 Committee on Standards in Public Life, 'The 7 Principles of Public Life', 31 May 1995. Available at: https://www.gov.uk/government/publications/the-7-principles-of-public-life/the-7-principles-of-public-life--2 (last accessed 5 November 2019).
15 Law Commissions Act 1965, s. 3(1).

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United Kingdom with proposals for the reform or amendment of any branch of the law;

6 to provide advice and information to the Welsh Ministers; and

7 to obtain such information as to the legal systems of other countries as appears to the Commissioners likely to facilitate the performance of any of their functions.[16]

These functions combine independence of operation with a degree of Government control.

The Act grants independence by enabling the Law Commission to operate with unrestricted freedom of thought: the Commission is to 'consider', to 'examine' and to 'make proposals' and 'recommendations' without any fetter. The Commissioners have the intellectual freedom to come up with whatever recommendations they think correct, without influence from Government or elsewhere. This is essential to the value of a law reform agency's work, as the Commonwealth Secretariat's guide to law reform explains: "…independence is critical to demonstrating that the views of a reform agency are the result of rational enquiry based on meticulous research and consultation."[17]

While the Commission is therefore free to conduct its projects without interference from Government or stakeholders, it is nevertheless subject to some Government control relating to project selection. The 1965 Act requires the Commission to undertake projects that form part of a larger work programme or that are referred by a Minister. The Commission is free to prepare programmes of law reform, but such programmes must be submitted to and approved by the Lord Chancellor. Ministerial references (where the Commission is asked to conduct a project by a Minister in addition to work in the law reform programme) will by definition only be made where Government wishes the work to be done.

This control – whereby the Law Commission can only undertake a project with the agreement of Government – is a relatively standard arrangement for law reform agencies:

> Often, it will be the government that asks the law reform agency to investigate a particular topic. The government may also exercise a veto over consideration of a topic by the agency. However, what is critical is that the agency is independent in how it comes to its own law reform conclusions.[18]

The Commission's constitution therefore ensures that, as a publicly funded body, the Commission only carries out the projects that Government agrees it should undertake. Given that the Commission's role is to recommend change to Government, and that the decision whether to implement change is Government's alone, this is a sensible balance to ensure that the Commission is not simply a talking

16 *Ibid*.

17 Commonwealth Secretariat, *Changing the Law: A Practical Guide to Law Reform*, London, Commonwealth Secretariat, 2017, p. 22.

18 *Ibid*., p. 23.

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shop, thinking great thoughts that have no actual impact on the law of England and Wales.

Government's direct control over project selection only goes in one direction; Government cannot force the Commission to carry out a particular piece of work. In that sense, the 1965 Act only grants negative control. Indirect pressure could in theory be brought to bear to control the Commission's project selection more positively. If Government were to refuse to approve all or most of the projects suggested by the Commission, then the Commission would be faced with the choice of Government's preferred projects or no work at all. There is, however, no evidence that in 1965 Government had any intention of closely controlling the Commission in this way. And history demonstrates the Lord Chancellor approving the programmes that the Commission has submitted.

The 1965 Act therefore fulfilled its originators' vision. The Act set up a distinct body constituted of independent Commissioners, chaired by a senior judge. The new body was charged with forming its own view on law reform, subject only to controls as to which projects it was able to undertake.

II Implementation

Just as the word 'independence' did not appear in the 1965 Act, neither was there any mention of 'implementation'. Yet the initial implementation results of the early Commission were impressive.

In its 1974 Annual Report, the Law Commission set out implementation statistics for 47 reports that had been published during its first decade. Of those, the Annual Report shows that only eight were unimplemented in 1974 (83 per cent implementation rate). By the time the 1977 Annual Report was published, only four of those 47 reports published remained unimplemented (91 per cent implementation rate).

It is very difficult to establish any correlation between the relative independence of the early Law Commission and high levels of implementation. The new body was no doubt enthusiastically supported by the Government that had created it; indeed, Lord Gardener was the Lord Chancellor in its initial years. There was also strong demand for law reform; the inadequacies of the law that had fuelled the creation of the Commission presented pressing problems that needed to be solved. And, as the relative size of the statute book over time shows,[19] the Commission's recommendations were competing with fewer legislative changes by central Government. There are, therefore, a range of reasons behind the initial widespread acceptance and implementation of the Commission's recommendations. Nevertheless, it is clear that the new independent Law Commission was being listened to and its recommendations were becoming law.

19 *See, e.g.*, Etherton, 2016, pp. 78-79, which describes the number of pages of legislation nearly trebling in the 40 years from 1965 to 2005.

C Changing Times: A New Procedure, the Law Commission Act 2009 and Changes in the Law Commission's Funding Model

Perhaps inevitably, the high levels of implementation enjoyed in the early days of the Law Commission could not be sustained.

Shona Wilson Stark has calculated implementation rates by decade as follows:

- 1965-1974: 96 per cent
- 1975-1984: 85 per cent
- 1985-1994: 83 per cent
- 1995-2004: 72 per cent
- 2005-2014: 50 per cent[20]

The means of calculation of implementation rates are debated.[21] And, as discussed above, it is impossible to capture the success or otherwise of law reform by statistics alone.

Statistics cannot present the full story, and they can be particularly misleading as a basis for conclusions about the current impact of the Commission's work, or its performance over recent years. Ongoing work cannot be implemented, and it is not realistic to expect recent recommendations to find their way into law immediately. The time gap before implementation can also affect older reports. Recommendations made during the 2005 to 2014 period outlined previously may yet be implemented. For example, Government has announced its intention to take forward the Law Commission's recommendations in its 2011 Report Making Land Work and 2014 Report on Conservation Covenants.[22] And Government's recent response to another report from that period on Hate Crime[23] has asked the Commission to conduct a more wide-ranging review of the hate crime legislation, with discussions ongoing about two further related projects (offensive and abusive on-line communications and the non-consensual taking and sharing of intimate images).

Nevertheless, the statistics suggest an overall trend of declining implementation since the establishment of the Law Commission. Commentators have put forward several reasons that may explain the falling rates. Commenting as Chair in 2008, Sir Terence Etherton focused on the changed political landscape and "the reality … that [today] the Lord Chancellorship is a facet of being the Secretary of State for Justice".[24] He also pointed to "a marked increase in legislative activity

20 S.W. Stark, *The Work of the British Law Commissions*, Hart, Oxford, 2017, p. 93. These figures include consolidation and repeals and partially implemented projects.

21 *See, e.g.*, Stark, 2017, pp. 94 *et seq*.

22 Law Commission, *Making Land Work: Easements, Covenants and Profits a Prendre* (Law Com No. 327, 2011) and Law Commission, *Conservation Covenants* (Law Com No. 349, 2014).

23 Law Commission, *Hate Crime: Should the Current Offences be Extended?* (Law Com No. 348, 2014).

24 Etherton, 2008, p. 6.

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across Government"[25] and "the increased movement of Ministers, particularly junior Ministers, between and within Departments".[26]

Sir Terence – while stressing that he did not consider the Commission to be unsuccessful notwithstanding falling implementation rates – was determined to address what he called 'the historical pattern of success':

> What we have to face ... is the clear evidence that the effectiveness of the Commission within government has been steadily undermined by all the historical developments and changes since 1965 which I have mentioned earlier. Those trends will only intensify, not diminish. There is therefore an urgent need to seek solutions to the political, and what may be described as structural, problems facing the Commission in relation to timely consideration, acceptance and implementation of our reports by government.[27]

Led by Sir Terence, the Law Commission, Government and Parliament set to find those solutions. The outcome was a number of important developments intended to address falling implementation rates and recommendations sitting on shelves without any Government response.

The following section describes those developments before going on to analyse their impact on independence and implementation.

I Special Law Commission House of Lords Procedure

The first development was the introduction of a new Parliamentary procedure for Law Commission Bills. There had been (and remains today) a special procedure for dealing with Law Commission Bills in the House of Commons.[28] While that procedure expedited the Commons stages of legislation, it had no impact on the time taken by Bills in the Lords, the House where many technical pieces of legislation are introduced and receive the majority of their scrutiny. As a result, it was felt that Law Commission Bills were hampered by an absence of Parliamentary time.

There had been previous attempts to introduce special Lords procedures for Law Commission Bills, but these had not presented a lasting solution.[29] In 2008 the Procedure Committee of the House of Lords agreed to adopt a new procedure for non-controversial Law Commission Bills on a trial basis, in the hope that this

25 *Ibid*., p. 6.

26 *Ibid*., p. 7. Sir Terence gave as an example the fact that within the 15 months since he was appointed chairman of the Commission, there had been four junior Ministers in the Department for Constitutional Affairs/Ministry of Justice with responsibility for the Law Commission, averaging less than four months each.

27 *Ibid*., p. 8.

28 Standing Order No. 59, 1995.

29 In the 1990s, two Law Commission Bills were introduced following a legislative procedure for non-controversial but technical Bills, known as the 'Jellicoe Procedure'. However, in 1995 there was a failed attempt to use this procedure for a Law Commission Bill on domestic violence, and use of the procedure was dropped.

would free up more opportunities for Law Commission Bills to be implemented.[30] This procedure does not involve lesser scrutiny of Bills. Rather, it allows Second Reading to take the form of a 'Second Reading Committee', functioning like a Grand Committee, with unlimited membership. After Second Reading, the Bill proceeds to a Special Public Bill Committee. The remaining stages, Report and Third Reading, follow in the usual way.

The net result of the innovations introduced by the Lords Committee was to reduce the time that qualifying Law Commission Bills would have to spend on the floor of the House. Crucially, this would enable eligible Bills to be introduced alongside, rather than competing for time with, Government's main legislative programme.

II The Law Commission Act 2009

In 2009, a second piece of legislation relating to the Law Commission was enacted, this time just dealing with the Law Commission of England and Wales (and not Scotland).[31] The intention behind the Act was to increase the implementation of Law Commission recommendations.

The Act introduced two new provisions relating to the Law Commission and its relationship with Government. First, it imposed an obligation on the Lord Chancellor to prepare and lay before Parliament an annual report on the implementation of Law Commission proposals. Secondly, it enabled the Lord Chancellor and the Law Commission to agree a protocol about the Commission's work.

1 Lord Chancellor's Implementation Report

The 2009 Act specifies what the Lord Chancellor's report to Parliament must contain. The report must set out (a) what has been implemented during the year; (b) any decisions to reject proposals; and (c) what proposals remain unimplemented, and plans for dealing with them. The report must be produced "as soon as practicable after the end of each reporting year".[32]

There have been seven Lord Chancellor's reports since the 2009 Act, the most recent in July 2017. All the reports are available on the UK Government website.[33]

2 Protocol between the Law Commission and Government

The 2009 Act inserted a new section into the Law Commissions Act 1965 providing that:

1 The Lord Chancellor and the Law Commission may agree for the purposes of this section a statement (a "protocol") about the Law Commission's work.
2 The protocol may include (among other things) provision about

30 Procedure Committee, *Law Commission Bills* (HL 2007-08, 63).
31 Similar provisions were included for Wales-only law in the Wales Act 2014 (s. 25).
32 Law Commissions Act 1965, s. 3A(1), inserted by the Law Commission Act 2009, s. 1.
33 Ministry of Justice, 'Implementation of the Law Commission proposals'. Available at: https://www.gov.uk/government/collections/implementation-of-the-law-commission-proposals (last accessed 5 November 2019).

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a principles and methods to be applied in deciding the work to be carried out by the Law Commission and in the carrying out of that work;
b the assistance and information that Ministers of the Crown and the Law Commission are to give each other;
c the way in which Ministers of the Crown are to deal with the Law Commission's proposals for reform, consolidation or statute law revision.

3 The Lord Chancellor and the Law Commission must from time to time review the protocol and may agree to revise it.
4 The Lord Chancellor must lay the protocol (and any revision of it) before Parliament.
5 Ministers of the Crown and the Law Commission must have regard to the protocol.[34]

A protocol between the Commission and the Lord Chancellor on behalf of Government came into force on 29 March 2010 (the 'Protocol').[35] A protocol with the Welsh Government was presented to the National Assembly for Wales on 10 July 2015 and is substantially identical to the 2010 Protocol.[36]

The Protocol focuses on the process by which projects are taken on by the Commission. The Protocol sets out the steps that the Commissioners must follow when deciding whether or not to agree to commence a project, and establishes what is needed from Government in order for the Commission to be able to start the work. There are separate sections for programme items and Ministerial references, but the requirements do not differ greatly in substance between the two.

The Protocol obliges the Law Commission to take account of specified factors when considering taking on a project. These include the importance of the project, its suitability for the Law Commission and its resource implications. The main obligations on Government are that 'Minister with relevant policy responsibility' must agree to supply sufficient staff to liaise with the Law Commission during the currency of the project and must give an undertaking that 'there is a serious intention to take forward law reform' in the relevant area.[37] In addition, the Protocol requires departments to provide an interim response within six months of the publication of a Law Commission report, and a final response within 12 months.[38]

In practice, the most significant provision of the Protocol is the requirement that the responsible Minister indicates a serious intention to take forward reform

34 Law Commissions Act 1965, s. 3B, inserted by the Law Commission Act 2009, s. 2.
35 *Protocol between the Lord Chancellor (on behalf of the Government) and the Law Commission* (Law Com No. 321). Available at: https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2015/06/lc321_Protocol_web.pdf (last accessed 5 November 2019).
36 *Protocol between the Welsh Ministers and the Law Commission*. Available at: https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2015/07/Law_Commission_Welsh_Protocol.pdf (last accessed 5 November 2019).
37 *Protocol between the Lord Chancellor (on behalf of the Government) and the Law Commission* (Law Com No. 321), para. 6. Available at: https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2015/06/lc321_Protocol_web.pdf (last accessed 5 November 2019).
38 *Ibid*., paras. 18 and 19.

in the area being considered for Law Commission consideration. While this is framed as an obligation on Government, the effect of this requirement is to require the Commission to gain the support necessary to obtain Ministerial agreement. A new project can only go ahead with Ministerial support; without such support the Commission is unable to proceed.

III Funding Model

At around the same time as the introduction of the special Parliamentary procedure and the Law Commissions Act 2009, another less formal change began: the core funding of the Law Commission provided by the Ministry of Justice started to be reduced. In his 2018 evidence to the Justice Committee's inquiry on the work of the Law Commission, the then-Chair Sir David Bean commented:

> The changes in our funding over the last two spending reviews can be seen from the following headline figures:
> – In 2010 our core funding was approximately £4m
> – By 2019/20 our core funding is forecast to be £1.9m
> – This is a reduction of some 54%[39]

Sir David's evidence explains that as the vast majority of the Law Commission's budget is spent on the lawyers conducting law reform, the Commission was forced to respond to the reducing budget by adapting its operating model in order to continue as a viable organization. The Commission did so by supplementing the core funding provided by the Ministry of Justice with project-specific funding from other Government departments. Departments may, as Sir David outlined to the Justice Committee, be willing to pay for a project in an area for which they are responsible if, for example, the work responds to a Ministerial priority or offers obvious departmental savings. His written evidence noted that:

> Our increasing reliance on project-specific income is such that our forecast project-specific income for 2018/19 of £1.8m almost matches our forecast core funding for 2019/20. This compares to £200k project-specific income in 2010 against a budget of approximately £4m.[40]

Overall, the Law Commission's cost to the taxpayer has therefore remained constant at around £4 million (not accounting for inflation). But the profile of the funding, and the Commission's operating model, has altered significantly as a consequence of the falling core budget.

39 House of Commons Justice Committee, 'Written Evidence from the Law Commission of England and Wales (LAW0001)', July 2018, para. 15. Available at: http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/justice-committee/the-work-of-the-law-commission/written/86371.html (last accessed 5 November 2019).

40 *Ibid*., para. 17.

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D Impact of the Changes on Implementation

I Parliamentary Procedure

The special House of Lords procedure was confirmed in October 2010 following the successful passage of two trial Bills.[41] So far, eight Bills have been enacted using the procedure.

It seems unlikely that some of these Bills would have had a high chance of implementation as part of Government's main legislative programme. Reform of capital and income in trusts and of perpetuities and accumulations are legally and practically important, and of great interest to those that deal with those areas. But they are not top of any Minister's agenda.

The procedure has become an important route to the implementation of the Law Commission's recommendations. In addition to the projects successfully implemented, the potential availability of the procedure enables projects to be undertaken that might otherwise not be considered realistic contenders for primary legislation. The procedure cannot, however, be employed for all Law Commission projects as it is only available for non-controversial recommendations. And even if the recommendations that are being considered for the procedure are uncontroversial, the scope of the Bill may be such as to allow controversial amendments to be laid, which in some circumstances can lead to caution in the procedure's use.

The procedure has had an entirely positive impact on implementation and is almost universally judged to have been a success. It is, however, inherently limited by the requirement that the subject matter is uncontroversial. Over-reliance on the procedure as a means to implement the Commission's recommendations would narrow the focus of the Commission's work and miss opportunities to examine more controversial areas of the law that are nevertheless suitable for the Commission to review.

II Lord Chancellor's Report

The Justice Minister Michael Wills introduced the reporting requirement as:

> ...a significant factor in ensuring that the Government respond in a more timely and appropriate fashion to the constant stream of good reports from the commission.[42]

The report was intended to make public in a single accessible way what Government has and has not done in respect of the Commission's recommendations over the last year. As the report is laid before Parliament, Parliamentarians have the opportunity to ask questions about it. By making Government's treatment of the Law Commission's recommendations more transparent it was hoped that the

41 The Perpetuities and Accumulations Act 2009 and the Third Parties (Rights Against Insurers) Act 2010.

42 Law Commission Bill Deb 8 July 2009, Col. 7.

chances of implementation would increase as it would be uncomfortable for Government to be seen not to be taking recommendations seriously.

Lord Lloyd of Berwick described the effect of the reporting requirement as follows:

> Clause 1 imposes the statutory duty on the Lord Chancellor to report annually to Parliament. He will give an account of Law Commission proposals that have been implemented during the year. Perhaps more important, he will also have to give an account of those proposals that have not been implemented and the reasons for any delay. This will enable Parliament for the first time to hold the Government to account in relation to the important subject of law reform.[43]

Lord Kingsland agreed:

> Clause 1 does two things. It introduces, first, a desirable element of certainty and, secondly, an ingredient of accountability. The certainty is there because the Lord Chancellor, from now on, will have to set out the Government's views about the likely implementation of Law Commission reports and drafts. That position will have to be taken publicly. The consequence of that is to introduce into our arrangements an element of accountability for the Law Commission's work by the Government that did not exist before. In effect, the Government have got to put up or shut up about Law Commission proposals. That will concentrate the minds of this and future Lord Chancellors.[44]

The first report was published on 24 January 2011 when Sir James Munby was Chair of the Commission. Sir James welcomed the introduction of the obligation to report:

> This new statutory requirement on the Lord Chancellor increases the transparency of the Government's approach to our work and is to be warmly welcomed, not least because of the pressure it puts on Government to respond to our reports.[45]

However, Sir James was much less welcoming of the 'substance and detail' of the first report, which he described as 'much less reassuring', and in particular "disappointing in the account it gave of [proposals] that have not been, or in some cases will now never be, implemented".[46]

It continues to be the case that some of Government's commentary on unimplemented recommendations is not particularly illuminating. For example, the

43 HL Deb 24 April 2009, Vol. 709, Col. 1735.
44 *Ibid*., Col. 1736
45 J. Munby, *Shaping the Law – The Law Commission at the Crossroads*, Denning Lecture, 2011, p. 4.
46 *Ibid*., pp. 6-7.

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Commission published a report on the Termination of Tenancies for Tenant Default in 2006.[47] Government's report on the implementation status of those recommendations has been as follows:

- Report for the period 12 January 2010 to 11 January 2011: "The Government is undertaking work to study and consider this report and aims to respond early this year."
- Report for the period 12 January 2011 to 11 January 2012: "The Government is continuing discussions with the Commission about this report. No final decision has been taken."
- Report for the period 12 January 2012 to 11 January 2013: "The Government has discussed the proposals with a number of stakeholders and is continuing discussions with the Commission about this report. No final decision has been taken."
- Report for the period 12 January 2013 to 11 January 2014:
  In the 2013 Implementation Report the Government stated that it had discussed the proposals with a number of stakeholders and was continuing discussions with the Commission about this report, in relation to commercial tenancies, but that no final decision had been taken. Although work has been delayed by other priorities the Government has continued to consider the proposals and intends to reach a final decision in 2014.
- Report for the period 12 January 2014 to 11 January 2015:
  The Government stated in the 2013-2014 report that it intended to reach a final decision on these recommendations in 2014. However, discussions with some stakeholders have highlighted concerns about the summary termination procedure proposed by the Commission. The Government is considering how these concerns might be overcome and intends to reach a conclusion as soon as practicable in 2015.
- Report for the period 12 January 2015 to 11 January 2016:
  In the 2014-2015 report the Government stated that it intended to reach a conclusion on how to overcome concerns raised by some stakeholders as soon as practicable in 2015. Consideration of these issues is continuing and decision will be reached in 2016.
- Report for the period January 2017 to 30 July 2018:
  Unfortunately, due to work on other government priorities, consideration of the proposals has not been able to progress over the last year. Work will resume as soon as is practicable, so that a decision can be made in due course.

It was envisaged that the Lord Chancellor's report would be subject to Parliamentary scrutiny. One example of the process operating as it should can be seen during the House of Lords' consideration of the Inheritance and Trustees' Powers Bill 2013. This Bill implemented some, but not all, of the Law Commission's 2011 recommendations in its report Inheritance and Family Provisions Claims on Death. Lord Marks of Henley-on-Thames commented:

47 Law Commission, *Termination of Tenancies for Tenant Default* (Law Com No. 303, 2006).

> Under the protocol set out in the Law Commission Act 2009, agreed between government and the Commission the Lord Chancellor is under a duty to report annually to Parliament on progress in implementing Law Commission reports. The Government must take that protocol seriously and indicate a high duty in this area. The progress on cohabitation reform suggests that such a duty has not been taken sufficiently seriously to date. The Bill is welcome but does not go far enough. One is left with an uncomfortable sense that we are implementing the easy and non-controversial proposals and ducking those that are more controversial. I adapt the words of the noble and learned Baroness, Lady Hale: the Law Commission's proposals deserve better than that.[48]

This level of Parliamentary interest does, however, appear to be very much the exception rather than the norm. For the most part, reports have been laid without significant comment from Parliamentarians.

That does not mean that the requirement to produce the report has had no impact. One would expect that the requirement to feed into the report to Parliament has focused the minds of the officials who have had to account for unimplemented recommendations. And in giving the report the Lord Chancellor is made aware of the current state of play.

The requirement for an annual report by the Lord Chancellor must therefore be considered an overall benefit in terms of implementation. Government is forced to account for its actions or inactivity, and there is an opportunity for Parliamentarians to follow up if they are dissatisfied with the explanation given. The report provides a greater opportunity for Parliament to support implementation than it is perhaps currently taking.

III Protocol

The introduction to the Protocol makes it clear that it is intended to support implementation:

> We are pleased to present this protocol, agreed between the Lord Chancellor and the Law Commission for England and Wales, on how Ministers of the Crown, Government departments and the Law Commission should work together on law reform projects. We see it as key to ensuring a more productive relationship, with improved rates of implementation of Law Commission reports.[49]

The Protocol introduced two main provisions to achieve this aim.

48 HL Deb 22 October 2013, Vol. 748, Col. 349.

49 *Protocol between the Lord Chancellor (on behalf of the Government) and the Law Commission* (Law Com No. 321) p. 1. Available at: https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2015/06/lc321_Protocol_web.pdf (last accessed 5 November 2019).

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1 Deadlines for Government Responses

The more straightforward provision is the obligation on Government to provide an interim response within six months of a report and a final response within a year. This, alongside the annual implementation report, was intended to avoid the position of recommendations sitting on the shelf for many years without Government giving any indication as to whether it accepted or rejected them.

This provision has had an impact. Government departments are aware of the Protocol requirements for a response. In many cases they comply with the timings set out in the Protocol. Some detailed responses have been issued in accordance with the timings of the Protocol that might otherwise have not been forthcoming.

In other cases, the Protocol appears to have had limited effect. Government has still not responded to some reports several years after publication. On other occasions compliance has been more in line with the letter of the Protocol than the spirit. Interim responses often merely state that Government 'is considering' the Law Commission's recommendations. Some final responses say little more than that.

Criticism of delay or inadequate responses must be tempered with realism. Delay may in some areas be inescapable. And it is important that pressure to provide a response does not lead a department to reject proposals on the basis that Government is not currently in a position to implement them. The timing requirement provides a basis for the Law Commission and others to press Government on implementation plans even if that is not always successful. As a result, this provision of the Protocol must also be considered a positive step in supporting implementation.

2 Requirement for a Ministerial Undertaking

The second relevant provision of the Protocol is the requirement that, before a project can be taken on, a Minister should give an undertaking that there is a serious intention to take forward reform in the area being considered for Law Commission consideration. This provision was intended to ensure that Government is serious about reforming an area before the Commission can start a work in that area. The aim was to reduce the chances of Government using the Law Commission as 'long grass', or the Law Commission going off on a frolic of its own where there was no realistic prospect of reform. The theory, then, is that the Protocol requires the Commission to take on projects that are of a higher priority for Ministers and so have a better chance of being implemented.

There are, however, reasons to question how far that theory is likely to be born out in practice. How realistic is it for a Minister to indicate a serious intention to take forward as-yet-unknown law reform proposals at some time down the line – often a number of years? Government tends to plan on a shorter-term basis than the duration of most Law Commission projects. Ministers cannot know whether Government will take forward recommendations made a number of years in the future. What they currently consider a priority may fall out of fashion or favour. Other priorities may emerge. This risk is exacerbated by the turnover of Ministers; for example, between 2016 and 2019, the Commission's Event

Fees project saw four different Ministers – Brandon Lewis, Gavin Barwell, Alok Sharma and Heather Wheeler. As a result, it is more likely than not that the Minister considering the implementation of Law Commission recommendations will not be the same person who initially authorized the project.

This concern should not be overstated. Departments endeavour to have longer-term policy continuity beyond individual Ministers' period in office, and the fact that a Minister has supported a project on the advice of his or her officials is a useful indication that the Law Commission's interest aligns with Government's. In principle, some sort of Ministerial backing for Law Commission work at the outset of a project must therefore be a positive in terms of the likely chance of implementation, even if it is a very long way from a guarantee of implementation.

This benefit does, however, come at a cost – at least, in the way that the requirement is currently framed. The Protocol prevents the Commission from undertaking a project if no Minister indicates a serious intention to take forward reform. But a Law Commission review can be valuable even if there is no immediate prospect of implementation. That may be the case in circumstances where the Commission is anticipating problems of the future, or addressing issues that Government has not yet appreciated. In many such cases the necessary undertaking may be unobtainable because there is no Minister with obvious responsibility for an area, or responsibility is split between a number of departments.

Even with a focus purely on implementation, a requirement for a Ministerial undertaking as a precondition for taking on a project can be counterproductive. Potential projects that Ministers and departments do not wish to support might have proved over time to be strong contenders for implementation. The difficulties discussed above of judging whether the output of a project is likely to be implemented apply equally to projects that Ministers are minded not to support as to those that they do. Times change and the case for reform may grow during the duration of the Law Commission's work. That might be as a result of the Commission's own efforts (for example, in demonstrating the benefits of reform or overcoming opposition to it), of the influence of stakeholders or of extraneous unexpected events. The barrier presented by a requirement of the sort set out in the Protocol may therefore impede potentially successful law reform as well as supporting it.

The requirement for Ministerial support may also have an impact on the type of projects that the Commission undertakes, and so which can be implemented. Ministers are more likely to have a serious intention to take forward reform in relation to high-profile issues that they encounter regularly, especially where Government has an active interest (financial or otherwise). It may be less easy to gain the necessary Ministerial undertaking in relation to technical projects that do not have a high profile.

It is not yet possible to gauge the impact of this aspect of the Protocol in practice. According to the most recent Annual Report, of the 45 reports published between 2010 and 2017, 15 have been implemented, 11 accepted, 15 pending, 2

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rejected and 2 superseded.[50] That is a 33 per cent implementation rate. But these figures are likely to change over time given the inevitable delay between reporting and implementation; nearly half the unimplemented recommendations are either accepted or awaiting a decision.

Even once Government's final decisions on these recommendations is known, the number of recommendations made by the Commission since the Protocol was signed does not provide a sufficiently large sample to conduct a reliable evaluation of the effect of this aspect of the Protocol on implementation. And it would in any case be very difficult to demonstrate that the Protocol had been the cause of any implementation trends. Just as it has been suggested that extraneous influences caused implementation rates to fall prior to the signing of the Protocol, a range of factors will have impacted on implementation since 2010. Changes in the Law Commission's funding model over that period are commented upon below. There are also a range of external variables. Since 2010 the UK has suffered economic crisis and recession. In 2010 there was the first change in governing party since 1997 that took the form of a Coalition Government. More recently, the country, Government and Parliament have been focused on preparations for leaving the European Union, resulting in an unprecedented paralysis of Parliamentary business.

It is, however, possible to demonstrate that the Protocol requirement for a Ministerial undertaking has had an impact on the Commission's project selection. Each of the Programmes of Law Reform published since the Protocol was signed have included sections highlighting projects that have not been included in the Programme as a result, among other things, of a lack of the necessary Ministerial support. While it cannot be guaranteed that all of these projects would have ultimately found their way into the Programme if they had been supported, there clearly are projects that have been effectively blocked by the requirement for a Ministerial undertaking.

It could be suggested that it was right that these projects were blocked as they would not have been implemented if they had gone ahead. One example clearly demonstrates that this does not necessarily follow. The Commission proposed a project on a sentencing law for its 11th Programme of law reform. However, despite strong judicial and academic enthusiasm for the work, the Lord Chancellor "indicated that he would not support a simplification/consolidation project of sentencing legislation at this time",[51] and so the project could not be included in the programme. That project was, however, later included in the 12th Programme. The Commission published its report in 2018, and a Sentencing (Preconsolidation Amendments) Bill was introduced into the House of Lord Lords on 22 May 2019 with expectations of significant savings to the public purse. The Protocol therefore initially had the effect of blocking a project that has turned out to be on track for implementation.

Individual cases cannot demonstrate the overall impact of the Protocol's requirement for Ministerial support. As a matter of principle, the requirement for

50 Law Commission, *Annual Report 2017-18* (Law Com No. 379, 2018) App. A.
51 Law Commission, *11th Programme of Law Reform* (Law Com No. 330, 2011), para. 3.21.

Ministerial support as a precondition for taking on projects would seem to have value as a filter, preventing wasted work that might otherwise have been undertaken. And subjectively, the list of projects undertaken by the Commission since the Protocol was signed feels relevant, addressing real problems rather than theoretical concerns. But how much that can be attributed to the Protocol is uncertain. It seems unlikely that in modern conditions the Commission would commence work without engaging closely with Government and taking into account Government's interest in reform.

The safest conclusion may be that the Protocol requirement for Ministerial support focused the Commission's mind on something that it should be doing anyway and provided a structure for demonstrating that this was being done. That positive impact does, however, have to be weighed against the potential for the Protocol to block projects that could prove valuable and be implemented, and to influence the type of work that the Commission is able to take on. Questions can be asked as to whether the 'serious intention' requirement as currently framed is the best way to achieve the intended ends or whether there are alternative means of supporting the Commission to select appropriate work that do not carry those risks.

IV Funding

The agreement of the Protocol was a deliberate attempt by the Law Commission and Government to enhance the prospect of Law Commission work being implemented. Changes in the Commission's funding model represent a less obvious mechanism for supporting implementation.

Intuitively, the halving of an organization's core budget ought to lead to a reduction in effectiveness and, consequently, a decrease in the numbers (if not necessarily the proportion) of projects implemented. However, as noted earlier, the Law Commission's overall budget has remained relatively constant, with project-specific funding from responsible departments replacing some of the core funding from the Ministry of Justice.

It has been suggested that the Law Commission's budget was reduced (at least in part) to encourage implementation. The 2019 Tailored Review of the Law Commission noted:

> This revised funding model not only addressed the need for all parts of government and its public bodies to reduce cost, but was intended by the MoJ to ensure that the Law Commission was incentivised to focus on areas of law reform which would be implemented by the relevant government department. This assumed that departments would only contract the Law Commission to undertake work if they were supportive of reform in this area. ... It

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> was envisaged that this new funding model would further increase the implementation rate and consequently make the organisation more impactful.[52]

That is not an intention that had been generally advertised prior to the statement in the Tailored Review; and the Tailored Review notes the Law Commission's concerns about the new funding model. It cannot be demonstrated whether the theory that reduced core funding will increase the implementation rate is reflected in practice. As discussed, the small sample size and the number of variables affecting implementation make it impossible to assess the specific impact of an individual factor such as the funding on implementation.

But how far is it realistic to expect that recommendations from a funded project are more likely to be implemented? Even before budget reductions, the Law Commission occasionally received project-specific funding. Between 2005 and 2007 the Commission was funded by the Department for Constitutional Affairs (as it then was) to examine the law governing the financial consequences of termination of the cohabitation relationships. The Law Commission reported on that project in 2007. Government has yet to give a final response, over a decade later. By contrast, three core-funded projects reported on in the previous year have been implemented.[53] Since the reduction in the Commission's financial model a number of recommendations that benefited from project-specific funding have failed to be implemented. And over the same period projects that relied on core funding have been implemented. There is nothing in the funding model that prevents a project being funded by a Minister in order to relieve pressure for reform or that guarantees that Ministerial priorities that are suitable for the Law Commission can be funded.

Many of the same arguments that have been discussed in relation to the Protocol requirement for Ministerial support apply to the claim that incentivizing the Commission to seek funding improves the chances of implementation. Ministers come and go; Government priorities change and so on. One can imagine circumstances where a department's willingness to fund a project would have as much to do with the profile of the issue and the availability of funds as with the seriousness of the intention to implement the output of that work.

There are therefore a number of reasons to be sceptical of claims that effectively forcing the Commission to seek funded projects assists implementation. That does not necessarily mean that it is a bad idea to seek to incentivize the Commission to identify Government priorities that may be suitable for its consideration or that in particular cases that process will not create a greater chance of implementation. Whether that possibility alone is sufficient to justify an operat-

52 Ministry of Justice, 'Tailored Review of the Law Commission', February 2019, para. 7.2. Available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/777177/tailored-review-of-the-law-commission-of-england-and-wales.pdf (last accessed 5 November 2019).

53 Law Commission, *Inchoate Liability for Assisting and Encouraging Crime* (Law Com No. 300, 2006); Law Commission, *Trustee Exemption Clauses* (Law Com No. 301, 2006); Law Commission, *Post-Legislative Scrutiny* (Law Com No. 302, 2006).

ing model reliant on income has to be judged in light of the other consequences that model brings, discussed below.

E Impact of Recent Changes on Independence

The special Parliamentary procedure and the Protocol requirement to respond to recommendations within prescribed periods do not have any significant direct impact on the Law Commission's independence. Parliament's willingness to apply a different (but not lesser) type of scrutiny to Bills passing under the special procedure is perhaps a response to that independence.

The Protocol requirement for Ministerial support and the changes in the Commission's funding model do, however, have the potential to give Government closer control over the Commission's operations, with consequences for its actual and perceived independence.

I Protocol Requirement for Ministerial Support

Speaking in 2011, the then-Chair, Sir James Munby, commented on the implications of the new Protocol on the Law Commission's independence:

> The protocol prompts questions that go to the soul of the Law Commission. The question has been raised in some quarters as to whether the role that the protocol now plays in how we select our programmes of law reform represents a loss of independence for the Commission. And it is a good question.[54]

On one analysis, the Protocol does not appear to impose any significantly greater restrictions than the 1965 Act. The Act precludes the Commission embarking on a Programme without the Lord Chancellor's approval; the Protocol precludes the Commission undertaking a project without Ministerial support. However, that similarity obscures two important differences between the two requirements.

First, the Protocol imposes much more specific conditions on the Minister than the 1965 Act does on the Lord Chancellor. The Protocol requires an intention on the Minister's part to take reform forward. The 1965 Act, on the other hand, is much less specific in its control; the Lord Chancellor chooses to approve or not to approve. Likelihood of implementation may play a part in the Lord Chancellor's thinking, but equally the Lord Chancellor might consider work intrinsically worthwhile even if the chances of implementation do not appear to be high. Ministers are required by the Protocol to do more; to commit by way of an undertaking that they have a serious intention to undertake a future course of action. The Protocol is therefore asking a lot more of Ministers than the Act does of the Lord Chancellor.

Precisely how much more is required by the Protocol is unclear. The phrase 'serious intention to take forward law reform' is open to different interpretations. The provision cannot be taken to require an advance commitment to implemen-

54 Munby, 2011, pp. 17-18.

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tation; no Minister would agree to implement recommendations that have not yet been formulated. The correct interpretation must involve an openness to implement recommendations if they are acceptable to Government. But what exactly does that mean? Is an 'in principle' openness to reform the law at some unspecified time if the opportunity arises sufficient? Or does there need to be a more certain and proximate positive ambition to change the law? The greater the certainty required, the higher the bar.

The second difference between the 1965 Act's requirement for approval and the Protocol requirement lies in the identity of the approver. The Protocol puts the obligation on the Minister with relevant policy responsibility. This individual may have little or no understanding of the Law Commission or law reform, and will be understandably focused on his or her own priorities. That is in contrast with the Lord Chancellor who has a closer relationship with the Commission and a wider responsibility for the upkeep of the law.

As a result, there is a greater likelihood of a project failing – whether through caution, inertia or outright opposition – to gain Protocol support than there is of the Lord Chancellor to refuse to approve all or part of a Programme. In effect, the Protocol gives an individual Minister total control over whether the Law Commission can undertake work in a particular area.

Why did the Commission agree to cede control to Government in this way? The answer is that at the time the Protocol was signed, the Commission and Government were united in a desire to improve the rate of implementation of the Commission's recommendations against a backdrop of falling numbers of recommendations becoming law. The concern about implementation was a principled and sensible one. The Commissioners will have been aware of concerns about restricting the Commission's independence and judged that the Protocol offered a reasonable balance between independence and becoming irrelevant.

Nevertheless, concern has been expressed about the impact of the Protocol on independence. For example, Shona Wilson Stark has argued that

> The 2009 Act demonstrates how too much emphasis, and too narrow a focus, on immediate implementation can be dangerous in threatening the Commissions' independence from Government. Such independence is required for the Commissions to fulfil their valuable function of pursuing law reform in neglected areas, consulting widely and proposing independently chosen reforms.[55]

II Funding

In contrast to the Protocol that was voluntarily entered into by Commissioners, the change in financial model was imposed on the Commission. There is a concern that this change has the potential to have a much more dangerous effect than the Protocol on the Law Commission's freedom to select projects on their merits. Reduced funding requires the Commission to take on income-generating work in order to achieve an overall budget sufficient to support the organization.

55 Stark, 2017, p 135.

This is seen by many stakeholders as a threat to the Commission's independence. That is because the requirement to generate income not only prevents the Commission from carrying out certain projects but risks the Commission feeling under pressure to undertake work that it might otherwise have declined.

We have seen that both the 1965 Act and the Protocol prevent the Commission from carrying out projects that Government does not support. Reduced core funding goes beyond this in removing the Commission's ability to take on work. The new funding model inescapably limits the amount of work the Commission can do that does not generate income – even if that work has Protocol support and would be approved by the Lord Chancellor.

Project-specific funding is unlikely to be available for projects that have less immediate benefits to Government, or are otherwise not in Ministerial contemplation. As a result, there is a risk that areas of the law that the Commission, stakeholders and even Government itself agree are in need of reform cannot be addressed because they are not a sufficient priority to secure funding. Sir David Bean made this point in his evidence to the Justice Committee:

> The fact that we cannot find a department willing to fund a law reform project does not mean that the work is not important. Many projects which aim at ensuring fairness, increasing legal efficiency or improving the transparency and accessibility of the law will struggle to attract funding. That can be because of competing Ministerial priorities, because the subject area falls between the responsibilities of Government departments or simply because the work has no political appeal and offers insufficient obvious direct payback to a department. Such projects are often, however, of critical importance to individuals, businesses and the third sector; for example, because they improve access to justice or have other wider social importance, or because they support business by reducing avoidable legal red tape.[56]

The requirement to gain project-specific funding therefore has the potential to skew the type of projects that the Commission takes on. The Law Commission's 13th Programme of Law Reform contains a range of projects that can only be undertaken 'as and when resources allow'. In some cases – for example, Disposal of the Dead – well-supported projects that would have very significant social benefits are not currently being commenced because there is insufficient core funding to do so.

The requirement to generate income brings with it a further, even more concerning, challenge to independence. That is that the Commission is effectively forced to take on work that should not be a priority just because it brings in money. This was explained in the Sir David Bean's evidence to the Justice Committee:

> The cumulative effect of the reduction in our core funding is that the Law Commission is in danger of becoming like a barrister waiting for the next

56 House of Commons Justice Committee, July 2018, para. 21.

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> brief, with no choice in the projects we take on and no ability to give sufficient priority to important work that will benefit a great many people. The independence of the Commission, its standing in the eyes of stakeholders and the statutory functions for which it was set up may be compromised by the impression of skewed priorities and limited independence.[57]

There is a risk that the practical need to generate income could have further implications still. In many cases, departments will offer project funding with 'no strings attached'; the Commission will be paid to carry out a project that it is keen to conduct, and will do so in exactly the same way as if it was not being paid. But the Commission's reliance on project-specific funding puts it in a weak negotiating position when discussing projects with Government. There is a danger that the Commission could be pressured to accept unsuitable work, or to accept terms of reference or timetables that inhibit its ability to conduct detailed, high-quality work with sufficient consultation with stakeholders. The Commission has so far resisted that pressure, and Commissioners will no doubt continue to do all they can do safeguard the intellectual freedom that lies at the core of what the Commission is designed to do. But clearly, the more the Commission is obliged to take on paid work in order to balance the books, the greater the risk that the way the Commission undertakes that work will be adversely affected.

The dangers presented by the current funding model therefore go far beyond the controls imposed by the 1965 Act and the Protocol. There is, of course, not necessarily a disjunct between projects that Ministers consider sufficient priorities to fund and work that the Law Commission would want to take on; the 13th Programme includes a number of such projects. But the fact that the Commission is forced to generate income is a concern for both the Commission and the stakeholders.

F Harmony or Tension?

In considering the impact of changes intended to increase the implementation of the Law Commission's recommendations, we have seen how some such changes have the potential to limit independence. Where that is the case, independence and implementation are in tension.

However, in many other respects, independence and implementation are in harmony.

I Value of Independence to Key Groups

In order for legislative recommendations to be implemented, a number of different groups need to accept the merits of reform: stakeholders, Government and Parliament. The Commonwealth Secretariat's law reform guide emphasizes the value of independence in dealing with these groups:

57 *Ibid*., para. 23.

> An essential feature, and a key advantage, of a law reform agency is its independence. … The executive and the legislature frequently need and value specialist advice in the planning and formulation of law reform. This advice is best provided by an objective, impartial and independent body.
>
> …
>
> Independence … enhances the credibility of a law reform agency's work, including with opposition members of the legislature.[58]

1 Stakeholders

Stakeholders are encouraged to engage closely with the Law Commission's work and are generally keen to do so. This is largely because stakeholders know that their submissions will be open-mindedly and independently considered and as a result have a fair chance of influencing policy. One academic is quoted in the 2013 Triennial Review of the Law Commission in relation to the Commission's open policymaking:

> The Law Commission is the only body currently in a position to undertake a neutral, in-depth analysis of the legal issues/reform needs, being able to liaise with practitioners, judges and academics in a way that no other body, governmental or otherwise, can…[59]

The Review reported that:

> Respondents to the call for evidence emphasised very strongly that it is this independence on which much of the Commission's reputation, and ability to engage with senior stakeholders, is based and that it therefore must be retained.[60]

If the Law Commission has taken account of stakeholders' views, there is a greater chance of those views being reflected in recommendations and thus gaining those stakeholders' support. Even where the Commission takes a different course, stakeholders will often be less inclined to oppose reform, or at least may frame their opposition in less extreme terms, if they can see that policy has been reached following an open process, taking account of their views.

The support (or lack of opposition) of stakeholders often influences Government's decision whether or not to implement the Law Commission's recommendations. Government may feel more pressure to implement reform where stakeholders lobby for change. Stakeholders may generate press interest that in turn

58 Commonwealth Secretariat, 2017, pp. 22-23.

59 Ministry of Justice, 'Triennial Review: Law Commission: Report of Stage One', 2013, para. 61. Available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/226315/law-commission-triennial-review-stage-1.PDF (last accessed 5 November 2019).

60 *Ibid*., para. 63.

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brings pressure to bear. Stakeholders may persuade Parliamentarians to take an interest, ask questions publicly and privately try to influence Ministers to back reform.

The support of stakeholders can also encourage Government that reform is likely to progress smoothly. Bill teams are forced to address these issues at an early stage, by including a Parliamentary handling strategy when submitting a bid for a slot in the legislative programme.[61] Ministers are likely to consider reform lower risk, and more likely to proceed smoothly, if they can see that stakeholders will support the proposed changes.

The independence of the Law Commission is therefore an essential building block in gaining the stakeholder engagement and backing necessary for projects to be implemented.

2 Government

The independent nature of the Commission and its work can also have a more direct influence on Government and its decisions about implementation. While inevitably many legal changes are politically driven, there are also areas in which Ministers are openly looking for assistance in finding the right answer. Knowing that the Law Commission has considered an area independently can be a key factor when deciding whether or not to take recommendations forward. And it can be a badge of good faith by Government to be seen to be accepting independently developed recommendations when dealing with difficult technical or policy issues.

Independence can therefore influence Government's decision whether or not to implement the Commission's recommendations. Independence can also affect Government's willingness to support the Commission's taking on work in the first place. For example, the written evidence submitted by the Law Commission to the Triennial Review quotes a letter received by the Commission from a policy adviser in the Department for Transport, in respect of the Commission's project on taxis and private hire vehicles.[62] The letter explains that when deciding to opt for a review by the Law Commission, rather than doing the work in-house, the "principal consideration was the independence of the Law Commission".[63]

Independence therefore supports the Commission's ability to take on work and the chances of Government agreeing to implement its recommendations.

3 Parliament

Finally, the independence of the Law Commission is significant once Government has decided to take forward law reform and the ball is in Parliament's court. We

61 Cabinet Office, 'Guide to Making Legislation', July 2017, para. 3.22. Available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/645652/Guide_to_Making_Legislation_Jul_2017.pdf (last accessed 5 November 2019).

62 Law Commission, 'Triennial Review of the Law Commission: Evidence from the Law Commission', February 2013, pp. 19-20. Available at: https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2015/05/Law_Commission_triennial_review_evidence.pdf (last accessed 5 November 2019).

63 *Ibid*., p. 20.

have seen that stakeholders may influence individual Parliamentarians to put pressure on Government to implement reform. The attitude of Parliamentarians and political parties when considering proposed legislation may in turn depend on the perception of whether the proposed reforms are seen to be well supported, and the position of individual stakeholder groups. Members of Parliament will commonly be lobbied by stakeholders during the passage of legislation, and supportive lobbying increases the chance of reform becoming law.

Parliamentarians may also be directly influenced by the provenance of suggested changes to the law. The fact that a Bill has the Law Commission's name attached to it may make a significant difference to how well or badly proposed reform is received. It is clear from debates that many Parliamentarians attach weight to the fact that reform has been recommended by the Law Commission and are more likely to agree to its passage.

Is it the Law Commission's independence that has this effect? There are other reasons why the fact that a Bill is based on Law Commission work may give Parliament confidence in the product. In particular, the Law Commission's ability to bring legal expertise to questions and the detailed consideration carefully explained in long reports is often important to Parliamentarians. But independence certainly plays a part as can be seen, for example, in the Report of Joint Committee on the Draft Deregulation Bill in the 2013-2014 Session:

> A second practical advantage of the Law Commissions, and one which reinforces the trust that Parliament places in the work of the Law Commissions … is the independence of the Law Commissions from Government. Lord Norton of Louth argued that 'the advantage' of the Law Commissions is that their work is 'detached'.[64]

There is therefore a range of reasons why a Commission that is, and is seen to be, independent is more likely to have its recommendations implemented. Efforts to support implementation that are seen to harm independence may consequently be counterproductive.

G Living with Complexity

So far as the Law Commission goes, independence and implementation have a complex relationship, both in tension and in harmony. This is well expressed by Shona Wilson Stark:

> The Commissions are technically independent from government, yet they reply on government for their funding and for approval of their proposed projects. In addition, governmental approval of Commission recommendations is the main route to their implementation. A tension between inde-

64 Joint Committee on the Draft Deregulation Bill, *Draft Deregulation Bill: Report* (2013-14, HL 101, HC 925), para. 64 (footnote omitted).

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> pendence and implementation is therefore inevitable to a certain degree. But the heat behind that tension must be carefully controlled.[65]

This challenge has been echoed by William Binchy:

> Independence is the fundamental bedrock of a Law Reform Commission. ... In echoing this call for independence for Law Reform Commissions, I am fully aware of the need for practicality. Law Reform Commissions should not exist in a political vacuum. They are generally creatures of the legislative process; a government Minister, Attorney-General or the legislature will have some say over their programme for reform; perhaps most importantly, whether their recommendations are translated into law depends on the goodwill and positive actions of the legislature (and, realistically, in most countries, the government). No sensible Law Reform Commission, however, conscious of its independence, can ignore these realities. Prudent Commissions will seek to smooth the lines of communication with the other organs of government. But there is a difference between doing that and transforming the role of Law Reform Commissions into one of alliance ....[66]

The Law Commission must be sufficiently close to Government to be aware of legal and policy developments that offer opportunities to take on suitable work that is likely to be implemented. But it should not be so closely controlled that it is unable to carry out essential work that Ministers are unlikely to make a priority but that still has a route to implementation; for example, via the Law Commission special Parliamentary procedure. As one respondent to the 2013 Triennial Review put it, "It is very important that [the Law Commission] retain its independence and not be merged or placed closer to government. Its functions and success depend on its independence."[67]

It was right that steps were taken in the early 2000s to support implementation. While it is unclear exactly how far the Protocol requirement for Ministerial support has given rise to a greater likelihood of implementation, that requirement provided the impetus that was needed at the time to make the Commission more attuned to the need to focus on Government interest at the start of the law reform process, and to make greater efforts to identify suitable areas that were Government priorities.

The way that the Protocol requirement for Ministerial support is framed and the impact on the Commission's independence has been questioned. Shona Wilson Stark, for example, has expressed concern that:

65 Stark, 2017, p. 3.

66 W. Binchy, 'Law Commissions, Courts and Society: A Sceptical View', *in* M. Dyson, J. Lee & S.W. Stark (Eds.), *Fifty Years of the Law Commissions: The Dynamics of Law Reform*, Hart, Oxford, 2016, pp. 151-152.

67 Ministry of Justice, 2013, para. 63.

> The 2009 Act jeopardises [the Law Commission's] detachment by forcing the LCEW to only examine things which please the government and, even more worryingly, by refusing it permission to examine things which the government does not wish to be examined.[68]

There is a danger that the requirement for a Ministerial undertaking that there is a serious intention to take forward law reform will prevent the Commission from undertaking work that it considers a priority and that would be successful. The Commission has so far been able to identify a sufficient number of suitable projects that are supported by Government to fill its programmes. In many cases, that is a result of a sensible interpretation being taken of the Protocol requirement, with Ministers supporting projects unless there is no, or very little, prospect of implementation. To a large extent, the practical impact of the Protocol's incursion into the Commission's independence has therefore been limited by the attitude of individual Ministers and the officials advising them. Nevertheless, the risk remains that in a particular case a high bar will be set and an important project will not be allowed to proceed as a result.

The changes to the Commission's financial model have taken matters further, treating the need to seek funding as a mechanism for focusing on work that is more likely to be implemented. The extent of the current requirement for project-specific funding is seen as risking independence and endangering the Law Commission as an institution. Sir David Bean's written evidence to the Justice Committee suggested that "this financial model is highly volatile and ultimately unsustainable, and the balance between core funding and project-specific income has tipped too far".[69]

Recognizing concerns about the funding model, the 2019 Tailored Review of the Law Commission recommended that:

> With a view to maintaining the independence and capability of the Law Commission, the MoJ ALB Centre of Expertise, Finance Business Partners, Policy Sponsors and the Law Commission should conduct a review of the current funding model and other funding arrangements to ensure that the Law Commission's funding model is sufficiently robust.[70]

This recommendation should be welcomed and the opportunity taken to investigate a more appropriate model.

In conclusion, the architects of the Law Commissions Act 1965 created an independent Law Commission, free to select projects subject to the approval of the Government responsible for the implementation of the Commission's recommendations. Independence and implementation were, and will forever remain, both in tension and in harmony. The challenge facing the Law Commission – and those in Government responsible for dealing with the organization – is to recog-

68 Stark, 2017, p. 143.
69 House of Commons Justice Committee, July 2018, para. 18.
70 Ministry of Justice, February 2019, p. 10.

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nize the existence of that complex relationship. Once that is done, appropriate mechanisms can be put in place to secure the correct balance between protecting the Commission's independence while ensuring that appropriate work is undertaken and, wherever possible, implemented.