Sir William Dale Annual Lecture

The Law Commission and the Implementation of Law Reform*

The Rt. Hon. Sir David Lloyd Jones **

A. Introduction

I am delighted to be asked to deliver the Sir William Dale Annual Lecture. It is a particular pleasure to do so in the presence of Lady Dale.

Sir William was a good friend of my mentor Clive Parry, and in the 1970s and 1980s he was a frequent visitor to Downing College, Cambridge, where I was starting out on my legal career. As a result I came to know him well. By that time Sir William had already completed a number of careers in the law, including a period as Legal Advisor to the Commonwealth Relations Office, from which he had retired in 1966. However, even the distinction he achieved in his career in the civil service was to be exceeded by what he accomplished thereafter.

The Government Legal Advisors course, which Sir William initiated in 1964 and of which he became Director in 1976, was intended to train government lawyers in newly independent Commonwealth States so that they were proficient, in particular, in legislative drafting and international law. It was hugely successful and by the time of his death in 2000 it had trained over 600 lawyers from 60 States. I and many of my colleagues were press-ganged by Sir William into lecturing for the course – he could be very persuasive when he chose – and as a result I have many happy memories of the course and its students, including a moot on rights to mineral resources off the Falkland Islands argued only weeks before the Argentinean invasion.

Sir William was very forward looking in many ways – most notably in his views on legislative drafting. He quickly recognised that many of his students found the model of UK legislation daunting. In 1977 he published *Legislative Drafting: A NewApproach*, a comparative study of the approach to drafting legislation in France, Germany and Sweden. Sir William advocated a simpler, more conceptual style which was more accessible and which was enthusiastically received by his students. From this was to emerge this Centre for Legislative Studies dedicated to legislative drafting as a discipline in its own right, a Centre which now bears his name. I think Sir William would have been amused and, I hope, pleased to learn that I should be giving a lecture in his memory. For my part I am honoured to do so.

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** Chairman of the Law Commission of England and Wales.

B. Background

At the time when the Law Commission of England and Wales was established by Parliament by the Law Commissions Act of 1965, there was widespread concern that the law had become unclear, inaccessible, outdated and, in some instances, unjust. This concern had been most notably expressed by Gerald Gardiner QC and Andrew Martin in their influential book *Law Reform – Now*, in which they argued that the problem of bringing the law up to date and keeping it up to date was largely one of machinery. The creation of the Law Commission as an independent body with the purpose of promoting the reform of the law was intended to be an essential element in remedying this situation. Its primary duty is:

> [...] to take and keep under review all the law of [England and Wales] [...] with a view to its systematic development and reform, including in particular the codification of such law, the elimination of anomalies, the repeal of obsolete and unnecessary enactments, the reduction of the number of separate enactments and generally the simplification and modernisation of the law [...][1]

The Law Commission is required to receive and consider proposals for law reform and 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.

From the start there have been three main streams of work at the Commission:

- The best known is that which involves *projects of law reform*, which after detailed study and consultation result in recommendations by the Commission to the Government for reform, usually accompanied by draft legislation. These may be included in a programme of law reform projects – we are currently in the Eleventh Programme – or may result from an ad hoc reference by a Government department. The Eleventh Programme was adopted after four months of consultation with judges, lawyers, academics, central and local government, other public bodies, businesses, consumer organisations and the public.[2] Projects are assessed against three main criteria: the importance of reform, the suitability of the subject for consideration by the Commission and the available resources. We will be consulting on the Twelfth Programme in the summer of next year.
- Secondly, the Commission undertakes *consolidation* of legislation. Whereas in the early days of the Commission there were programmes of consolidation projects, for many years now there has been no formal programme; projects are undertaken on a rolling basis. This work is led by the Parliamentary counsel who are 'embedded' at the Law Commission, that is to say they are members of the Office of the Parliamentary Counsel, seconded for a term of years

1 Law Commissions Act, 1965, Section 3.

2 Law Commission, Eleventh Programme of Law Reform (Law Com. No. 330), 19 July 2011.

to the Commission. We currently have two Parliamentary counsel at the Commission whom we greatly value.

- Thirdly, the Commission's *statute law repeals* team focuses on repealing Acts of Parliament that have ceased to have any practical utility, because they are spent or obsolete.
- In addition, from time to time, the Commission provides advice to Government. (For example, last year we were asked by the Ministry of Justice and the Department for Business, Innovation and Skills to advise on the advantages and disadvantages of a common European Sales Law.)

I propose to concentrate this evening on the **implementation** of law reform resulting from the work of the Law Commission. The Law Commission is, of course, not a body with powers of implementation. It is an arm's length advisory body. We can recommend changes in the law, but implementation is a matter usually for Parliament in the form of primary legislation or occasionally for the executive in the form of delegated legislation or guidance. While it is part of our function to assist in the implementation of law reform, implementation is primarily a matter for others. On the other hand, we are not a mere think tank. We are independent of the executive, but we have a special and privileged relationship both with the executive and with Parliament.

The reputation of a law reform body will ultimately depend on the quality of its work and its proposals for law reform. Nevertheless, it is a further important measure of the success of any law reform body to ask what degree of success it has had in actually securing changes in the law. By this measure, how are we doing?

Taking each of the three streams of work I have identified in reverse order:

C. Statute Law Repeals

The Statute Law (Repeals) Bill,[3] which received its second reading in the House of Lords on 5 November is the nineteenth such Bill produced by the Law Commission. It is based on a report produced jointly with the Scottish Law Commission. The previous eighteen Statute Law (Repeals) Bills have all been enacted, resulting in the total repeal of over 2,500 statutes and the partial repeal of thousands more. The current Bill is the largest of its kind the Commission has ever produced. It proposes the repeal of 817 obsolete Acts of Parliament in their entirety and the partial repeal of 50 other Acts. These include Acts relating to the City of Dublin, lotteries, poor relief, turnpikes and railways (in this country and in India). Amongst the Acts which will be repealed are:

- An Act of 1856 passed to help imprisoned debtors secure their early release from prison.
- An Act of 1800 to permit a lottery in which the prize was to be the famous Pigot Diamond.

3 Statute Law (Repeals) Bill, HL, Bill 42 2012-13.

- An Act of 1696 to fund the rebuilding of St Paul's Cathedral after the Great Fire of 1666.

In case you get entirely the wrong idea, I should tell you that it also includes the repeal of many more modern Acts, including repeals consequent on the Tax Law Rewrite project, which lasted from 1996 to 2010.

Statute Law Repeals Bills enjoy a fast-track route into and through Parliament. They are generally introduced into the House of Lords within weeks of their publication by the Commission. After their second reading in the House of Lords they are considered by the Joint Committee of both Houses on Consolidation Bills. At that hearing members of the specialist team at the Law Commission who have prepared the report and the Bill give evidence. The Ministry of Justice has responsibility for statute law repeals Bills in both Houses. The Joint Committee hearing on the current Bill took place yesterday. It passed without mishap, and the Bill will shortly go to the House of Commons.

There is, therefore, a special machinery which has been devised to secure the speedy implementation of these measures, which are entirely uncontroversial. It seems to work well and efficiently. In this field, at least, implementation does not appear to be a problem.

D. Consolidation

What about consolidation? The picture here is considerably less rosy. A consolidation draws together a number of existing enactments on the same subject, usually in one Bill, to form a rational structure and to make the cumulative effect of different layers of amendment more intelligible and accessible.

Since its creation in 1965 the Law Commission has been responsible for over 220 enacted consolidation Bills. However, this stream of work has declined significantly in the last few years. This is not, I emphasise, because there is a reduced need for such consolidation; on the contrary, the massive increase in the volume of primary and secondary legislation in recent years makes this work all the more important.

A major consolidation can take a long time to complete, in some cases as long as two or three years. Such consolidation projects therefore call for a substantial commitment of resources on the part of the Commission and the responsible Government department. Our recent experiences on consolidation projects have not been entirely happy.

In 2006 the Commission began a consolidation of the legislation on private pensions at the request of the Department for Work and Pensions. That Department decided in October 2010 that it would no longer support the project. The work therefore had to be abandoned, as we did not have the resources to complete it ourselves. It was a huge exercise, and by October 2010 we were within less than five months of the planned date for publishing a draft Bill for consultation.

At that time, the draft Bill ran to 848 clauses and 21 Schedules. The whole exercise was an enormous waste of time and resources.[4]

This experience led my predecessor, James Munby, to observe that it is hard work to get a consolidation project off the ground, and then it is hard work to keep it flying. In 2011 the Commission announced that, in light of our available resources and the fact that recently it had, in certain instances, proved hard to obtain and then maintain departmental support for consolidation projects, the Commission had decided to adopt a more rigorous approach. It stated that in future the Commission should not proactively pursue new consolidation projects itself. As before, it would be able to undertake one only if it had or could secure sufficient drafting capacity to do so.

However, in addition, it would in future also be looking for a firmer commitment from the relevant department, in terms of will, time and resources, to see a consolidation project through to the passing of a consolidation Act.

This was, I am afraid, unavoidable. Nevertheless it is unfortunate that the Commission is not able to do more on this front. Consolidation is a particularly valuable contribution to improving the state of the statute book. The need for it is especially acute after there has been considerable legislative activity in an area of law without the original legislation having been replaced or rewritten. The language can become out of date and the content obsolete or out of step with developments in the general law. No doubt, modern methods of updating legislation – in particular online updates – have made it much easier to access reliable, up-to-date versions of a statute and have reduced the pressure to consolidate simply to take account of amendments. Nevertheless, there is still a need for consolidation in cases where the law is found in more than one statute or instrument, or because layers of amending legislation have distorted the structure of the original Act. Parliamentarians have voiced their desire to see more rather than fewer consolidation Bills. The Law Commission has a statutory responsibility in this field, and it is anxious to discharge it.

One area in which there exists an urgent need for consolidation is the law of sentencing, which is to be found at present in a large number of different statutes that employ different techniques and approaches. This leads to unnecessary complexity in the law, and often makes sentencing a very difficult task. I have no doubt that it is in part responsible for the very high numbers of successful appeals against sentence from the Crown Court to the Court of Appeal, and, in particular, for the high number of unlawful sentences that are passed. A number of senior judges, including the Lord Chief Justice, have expressed serious dissatisfaction with the current state of sentencing law.[5]

When we went out to consultation on the projects to be included in our Eleventh Programme of Law Reform, Lord Justice Leveson, the Head of the Sentencing Council, proposed that the Law Commission should undertake the simplifica-

4 *See, generally*, Law Commission Annual Report 2010-11 (Law Com. No. 328), 22 June 2011, para. 2.83.

5 *R (Noone) v. Governor of Drake Hall Prison* [2010] UKSC 30 per Lord Judge CJ at paras. 78-80; *Wells v. Parole Board* [2009] UKHL 22 per Lord Carswell at para. 23.

tion and codification of the entire law on sentencing. That proposal – I accept – went beyond mere codification and would have involved a measure of reform in the interest of simplification. The proposal received widespread support from judges and academic commentators.[6] However, the then Lord Chancellor indicated that he would not support a simplification/consolidation project of sentencing legislation at that time, although he did indicate that a project of this nature may be requested by the Government in the future.[7]

Part of the problem here is, of course, the ceaseless flow of legislation; the resulting lack of stability in the law can make a consolidation exercise extremely complex. However, it is difficult to think of any area in which it is more important that the law should be accessible and readily intelligible to the public, and so I hope that the opportunity may soon arise for the Law Commission to deal with this subject.

The picture on this front is not, however, entirely black. Following the enactment of the Charities Act 2006, the Cabinet Office made funds available to enable the Law Commission to undertake the consolidation of legislation on charities. After a number of interruptions the work was eventually completed, and the consolidation Bill received Royal Assent in December 2011.[8]

Furthermore, we have two current projects on consolidation. One is a project on co-operative societies and public benefit societies at the request of the Treasury. The other will consolidate the statute law on bail. The Commission will continue to do all it can to encourage government departments to see consolidation as a higher priority.

E. Law Reform

What about the Commission's law reform projects? What success has the Commission had there in getting its reforms onto the statute book?

If one considers the entire work of the Law Commission since its creation in 1965, about 69% of its law reform reports have been implemented in whole or in part. Over 100 Acts of Parliament enacted since 1965 have implemented Law Commission recommendations. On the face of it, therefore, the record is not bad at all. However, on closer examination it appears that the implementation rate has fallen significantly in each decade since the 1960s and that in the first decade of this century about 55% of Law Commission proposals were accepted or implemented in whole or in part. So this is a rather different picture.

This is, of course, very frustrating for lawyers at the Law Commission, some of whom may have devoted years of work to a project only to see it come to nothing. But it is more serious than that. It is a waste of resources – both financially and in terms of the wasted expertise of Law Commission staff – which could have

6 *See, e.g.*, J. Spencer, 'The Drafting of Criminal Legislation: Need It Be So Impenetrable?', 67 *Cambridge Law Journal* 2008, p. 585; and Editorial, 'New Legislation?', 2010 *Sentencing News*, p. 8.

7 Law Commission, Eleventh Programme of Law Reform (Law Com. No. 330), 19 July 2011, paras. 3.14-3.21.

8 Charities Act 2011 c. 25.

been better devoted to a different project in a different area of law deserving of reform. But most fundamentally, society is being denied law reform in areas where there is a need to bring the law up to date or simply to alter it so that it better reflects modern ideas of fairness and justice.

I fear that this may sound a touch arrogant in that it assumes that Law Commission proposals for reform deserve to be enacted. Let me say at once that I believe that our work at the Law Commission is of a high quality. Each of the four Commissioners is outstanding in his or her field, and together they have a wide range of experience; two are professors of law, one is a city solicitor and one a QC. Each heads a team of expert lawyers devoted to a particular subject area: criminal law, public law, common and commercial law, and family, property and trusts. Each law reform project involves detailed study of the present state of the law followed by very extensive public consultation, which, I believe, contributes a great deal to the quality of the end product. This will be a report, usually accompanied by draft legislation. That report will have been the subject of rigorous peer review by the Chairman and all four Commissioners. We are jointly responsible for all recommendations.

There have, of course, been occasions when the recommendations of the Law Commission for reform have been rejected by the Government of the day as a matter of policy. That, of course, is its prerogative. One example is our report on intoxication and criminal liability, published in January 2009, which recommended codification of the law and changes, which, we considered, would make it more logical and consistent. Here the Government decided not to implement the recommendations on the ground that it was not persuaded that they would result in improvement to the administration of justice. It considered that whilst the Commission's proposals may resolve some uncertainty in the law, particularly around the distinction between offences of 'specific intent' and 'basic intent', they may also increase its complexity.

> Furthermore, we do not consider that there would be a risk of miscarriage of justice if the reforms were not introduced; nor are we persuaded that the cost of introducing the changes, for example the courts getting to grips with the new definitions, would be outweighed by any benefits.[9]

However, there are many other instances in which proposals emanating from the Law Commission have not been implemented not because of any disagreement as to the desirability of the proposed reforms but because of a lack of Parliamentary time, a lack of resources, or because the Government of the day does not consider them to be a priority.

For example:

- A major Law Commission project on *Murder, Manslaughter and Infanticide* resulted in a report in 2006 which reviewed the law of homicide, including the relationship between the law of murder and manslaughter, defences and

9 Report on the Implementation of Law Commission Proposals (HC 1900), 22 March 2012, paras. 49-50.

partial defences to murder, and complicity in murder.[10] It recommended restructuring the law of homicide into three tiers and within that structure, reform of secondary liability for murder. The Coroners and Justice Act 2009 did reform the law on provocation, diminished responsibility and infanticide, although it is fair to say that the resulting provisions on provocation – now loss of control – bear little resemblance to the Law Commission proposals and have been heavily criticised by academic commentators. The remainder of the proposals have not been implemented, the then Lord Chancellor simply observing in his 2011 report on the implementation of Law Commission proposals that the Government had come to the conclusion that the time was not right to take forward such a substantial reform of our criminal law.[11]

- The Law Commission Report on *Participation in Crime*, published in 2007,[12] examined the law of secondary liability for assisting and encouraging crime. The report concluded that the principles governing liability were unclear and could result in injustice. Again, the Law Commission Report on *Conspiracy and Attempts*, published in December 2009,[13] recommended reform to resolve problems with the current law governing statutory conspiracy (under the Criminal Law Act 1977) and attempt (under the Criminal Attempts Act 1981). In due course the Government accepted the recommendations for reform contained in both these reports. However, in his report to Parliament in March of this year the then Lord Chancellor stated:

  In other circumstances, the Government would look to implement the recommendations but unfortunately they cannot be considered a priority in the current climate.[14]

I cannot conceal the fact that this response was a huge disappointment to the Commission. We were dismayed that, despite accepting our proposals for reform and acknowledging the significant benefits they could bring to the administration of justice, Government had come to this conclusion. However, it is fair to say that in some other areas of the criminal law there are examples of Governments having shown a greater interest in implementing our recommendations:

- One example is the Bribery Act 2010, which implemented Law Commission recommendations.[15] Here the Government clearly considered that there was an urgent need to legislate, in light of the OECD Anti-Bribery Convention.

10 Law Commission Report: Murder, Manslaughter and Infanticide (Law Com. No. 304), 29 November 2006.

11 Report on the Implementation of Law Commission Proposals (HC 719), 24 January 2011, paras. 9, 10, 51, 52.

12 Law Commission Report: Participation in Crime (Law Com. No. 305), May 2007.

13 Law Commission Report: Conspiracy and Attempts (Law Com. No. 318), 9 December 2009.

14 Report on the Implementation of Law Commission Proposals (HC 1900), 22 March 2012, paras. 19-21, 28, 29.

15 Law Commission Report: Reforming Bribery (Law Com. No. 313), 20 November 2008.

- The Law Commission Report on Expert Evidence in Criminal Proceedings, published in March 2011,[16] recommended that there should be a new statutory test of reliability which would need to be applied by the judge to any expert opinion evidence tendered for admission in criminal proceedings whose reliability was in doubt. We are currently engaged in discussions with the Ministry of Justice as to what measures are required to implement this reform, and we are hopeful that the important reforms which we recommend will reach the statute book.
- The criminal law team is currently working on an important project on contempt of court. Here there seems to be considerable enthusiasm on the part of the Government for the project. It has been accelerated at the request of the Attorney General, with the result that virtually all of the lawyers in our criminal team were working on this project until recently. We have already published a consultation paper on the abolition of the offence of scandalising the court, and our consultation paper on other topics in the law of contempt – including contempt by publication and juror misconduct – will be published next Wednesday.

F. A New Approach

My predecessors as chairmen of the Law Commission – Roger Toulson, Terence Etherton and James Munby – became increasingly concerned at the low implementation rate of Law Commission reports and the waste which this represented. Bearing in mind the view of Gerald Gardiner and Andrew Martin in Law Reform – Now that the problem of bringing the law up to date and keeping it up to date was largely one of machinery, they turned their attention to how the machinery of law reform could be amended to deal with this problem.[17] In the event, Parliament and Government have been persuaded to bring about a number of important reforms. This is a considerable achievement on the part of my predecessors.

G. The Protocol

The first important reform brought about by the Law Commission Act 2009 is to permit the Lord Chancellor (on behalf of the Government) and the Commission to agree a protocol about the Commission's work, which may include provision about:

- principles and methods to be applied in deciding the work to be carried out by the Law Commission and the carrying out of that work;

16 Law Commission Report: Expert Evidence in Criminal Proceedings in England and Wales (Law Com. No. 325), 21 March 2011.

17 Sir Terence Etherton, 'Law Reform in England and Wales: A Shattered Dream or Triumph of Political Vision?', 10 *European Journal of Law Reform* 2008, p. 135; J. Sir Munby, *Shaping the Law: The Law Commission at the Crossroads*, Denning Lecture 2011, <www.lawcom.gov.uk>.

- the assistance and information that Ministers and the Commission are to give each other;
- the way in which Ministers are to deal with the Commission's proposals for reform.[18]

The resulting Protocol was signed by Jack Straw and James Munby in March 2010.[19] As previously, most Commission law reform projects will in future originate as part of a three-yearly programme of law reform, which requires the approval of the Lord Chancellor. Where the Commission is considering including a project in a Commission programme, it will notify the Minister with relevant policy responsibility, who, in deciding how to respond, will bear in mind that before approving the inclusion of the project the Lord Chancellor will expect the Minister with the support of the Permanent Secretary:

- to agree that the department will provide sufficient staff to liaise with the Commission during the currency of the project; and
- to give an undertaking that there is a serious intention to take forward law reform in this area.

Similar provision is made in the case of projects referred to the Commission by Ministers.

If a project is adopted by the Law Commission and approved by the Lord Chancellor, the Protocol requires, at the outset, agreement as to the terms of reference of the project, the appropriate review points at which to consult the Minister and the overall timescale for the project. During the project, officials and the Commission will communicate promptly and openly about their progress and about wider policy developments and changes in priorities that may affect implementation.

The Protocol also makes provision for what is to happen after the Commission has published its report. The Minister responsible is required to provide an interim response to the Commission as soon as possible, and in any event within six months of publication of the report, and a full response within twelve months of publication of the report, unless otherwise agreed with the Commission. The full response is to set out which recommendations the Minister accepts, rejects or intends to implement in modified form. If applicable, the Minister will also provide the timescale for implementation. If a Department is minded to reject or substantially modify any significant recommendations, it must first give the Commission the opportunity to discuss and comment on its reason before finalising the decision.

From the point of view of implementation, it seems to me that the Protocol is a very welcome development. Of central importance is the fact that, in future, the Commission will not take on a project unless there is an undertaking by the relevant Minister that there is a serious intention to take forward law reform in this area. That, of course, does not amount to a binding commitment to implement Law Commission recommendations. It would be unreasonable to seek such a

18 Law Commission Act, 2009, Section 2.

19 Protocol between the Lord Chancellor (on behalf of the Government) and the Law Commission (Law Com. No. 321; HC 499), 29 March 2009.

blank cheque, and it certainly would not be forthcoming. But to my mind, the statement of a serious intention to take forward law reform is as specific an undertaking as could reasonably be sought at the outset of a project and is a sound basis for the Commission's undertaking the work. Moreover, the fact that the Commission and the Department will be working closely together throughout the project, sharing information about how it is developing and about wider policy developments and any changes in priorities should substantially increase the likelihood that the resulting proposals will be carried forward into legislation. While it is too early yet to say with confidence that this has in fact been the case, we are hopeful.

What effect has the Protocol had on the independence of the Commission? In the short time I have been at the Commission it has become very clear to me that it is essential to the performance of its functions that the Commission should be and should be seen to be independent of the executive arm of Government. The Law Commission operates independently of the Government of the day. We cannot be required by Government to perform our functions in any particular manner nor can we be directed to make recommendations to suit political expediency. The value of our independence has been recognised by Government. In October 2010, it concluded in its Public Bodies Reform Review that the Law Commission should be retained on the grounds of its "performing a technical function which should remain independent of Government". But it is also crucial to our engagement with the public. The quality of our law reform proposals depends in large measure on the effectiveness of public consultation, and often consultees are willing to participate because they see us as independent of Government and at liberty to conduct the work of law reform with a legal rigour that is free from any political constraint.

The new arrangements under the Protocol could be seen to be a restriction on the Commission's independence. The effect of the Protocol, it might be said, is to restrict what the Lord Chancellor is willing to approve because he will now only give approval where there is a serious intention on the part of Government to take forward law reform in this area. However, I think it is possible to overstate this. After all, the Lord Chancellor's consent has always been necessary before the Commission could take on a project under a programme of law reform. The Protocol brings the conversation on implementation forward to an earlier stage in the process, with the result that a project will not now be undertaken if it has little prospect of implementation.

Under the Protocol the Commission will keep the progress of the project under review and may decide, in discussion with the relevant department, to change one or more elements of the project or to discontinue a project. There are also instances in which we have agreed break points with the Department concerned. Thus, in our project on the regulation of wildlife we have agreed that in the spring of 2013, by which time we will have analysed the results of consultation and produced a position statement, either the Law Commission or DEFRA may discontinue the project.

However – and this is vital – in the absence of such an agreement, a Minister may not unilaterally require the Commission to stop working on an ongoing proj-

ect. That is a matter for the Commission, although it will, of course, take account of the Minister's views and all relevant factors affecting the prospects for implementation.

What has really changed here, I would suggest, is the willingness of successive Governments to implement the Commission's law reform proposals, and the Protocol is simply a pragmatic response to that. It seems to me that it establishes a useful working relationship with Government, which *should* change the Government's approach to implementation.

H. The Lord Chancellor's Reporting Obligation

The second reform of machinery brought about by the Law Commission Act 2009 is to require the Lord Chancellor, as soon as practicable after the end of each reporting year, to report to Parliament on the Law Commission proposals implemented in whole or in part during the year and those not implemented. In the latter case the report must include a statement of plans for dealing with any of the proposals and any decision not to implement any of the proposals.[20]

This is a small step but an important one. It introduces a greater degree of transparency into the attitude of Government to Commission proposals for law reform. The reporting obligation and the obligation to respond to reports mean that, in future, it will not be possible simply to leave proposals to gather dust indefinitely without any response. The Government will be required to take a public position on its response to Law Commission reports. It is in everyone's interests to know promptly whether a proposal is to be implemented, whether there is an objection in principle or whether the proposed reform simply does not attract sufficient priority to proceed.

So far there have been two annual reports by the Lord Chancellor.[21] I have already quoted from those reports where they give various reasons for not proceeding with a recommendation. The reasons given in each case tend to be very brief. Even where the Government does not consider the need for reform to be a priority, a fuller public explanation of the reasons for that conclusion would be valuable. In those instances where proposals are rejected on grounds of principle, a more detailed response by the Lord Chancellor in his report to Parliament would certainly promote public debate on the merits of the proposals.

The Lord Chancellor's 2012 Report to Parliament was prefaced by a warning that "the Government's current focus is on dealing with the severe economic situation, which has unfortunately meant that very worthwhile but less immediately pressing law reform projects have, in some cases, been delayed."[22] The Commission is, as you might expect, alive to the present economic situation and the need to shape projects to available resources. Since 2007 the Commission has had its own in-house economist to advise on the economic impact of proposals for law

20 Law Commission Act, 2009, Section 1.

21 Report on the Implementation of Law Commission Proposals (HC 719), 24 January 2011; Report on the Implementation of Law Commission Proposals (HC 1900), 22 March 2012.

22 *Ibid.*, at 3.

reform. A preliminary cost/benefit analysis of the proposed projects was carried out before the Eleventh Programme of law reform was adopted. In addition, each report produced by the Law Commission includes a detailed economic impact assessment. *However, it has to be borne in mind that law reform often has the power to bring about a real improvement in the quality of people's lives and that such benefits are often of a value which is not readily quantifiable in terms of price.*

The fact that the report is to Parliament is also significant. It is to be hoped that, as this procedure becomes more established, Parliamentarians may take a greater interest in the reasons for non-implementation of Law Commission reports. I think that there is a role for the Commission here in making Parliament more aware of its work and its proposals for law reform.

We are currently awaiting decisions from the Lord Chancellor on five law reform projects:

1. Jurisdiction of the High Court in Criminal Cases
2. Admissibility of Expert Evidence in Criminal Cases
3. Easements
4. Intestacy
5. The Role of the Public Services Ombudsman

I. The New House of Lords Procedure

The third development in the machinery of law reform to which I wish to draw attention has been achieved not by legislation but by a new procedure adopted by Parliament. On 7th October 2010 the House of Lords Rules Committee accepted a new procedure for non-controversial Law Commission Bills following a successful trial in which the procedure was piloted with what became the *Perpetuities and Accumulations Act 2009* and the *Third Parties (Rights against Insurers) Act 2010*. Under this procedure the Second Reading debate is held in a Second Reading Committee instead of on the floor of the House, and the Committee stage is held before a Special Public Bill Committee. This has the advantage that it enables valuable legislation to proceed to the statute book, which otherwise might not have found a slot in the main legislative programme.

The procedure is available only in the case of uncontroversial proposals for law reform. However, it should not be imagined that these proposals go through on the nod. The procedure is in no sense a fast track to the statute book. The Second Reading of each of the measures to follow this procedure to date has involved rigorous scrutiny and keen and informed debate.

The first measure to reach the statute book by this route since it was formally adopted was the *Consumer Insurance (Disclosure and Representations) Act 2012*, which received the Royal Assent on 8th March 2012 and which is due to come into force early next year. This Act is a great achievement for the Law Commission and in particular for Commissioner David Hertzell and his team. (I am allowed to say that because I played no part in it.)

This is a striking example of a situation in which the law was totally out of touch with modern needs and practice and there was, as a result, an urgent need

for reform. David Hertzell and his team consulted widely with the insurance industry and with consumer groups and were able to achieve such a degree of consensus that it was possible to introduce the measure into Parliament by this new procedure for uncontroversial Bills.

I note that the British Insurance Law Association has stated publicly that throughout this exercise the Law Commission showed itself to be assiduously fair in its dealing with both policy holders and insurers. It seems to me that the work on this project provides a very good example of how the Commission is close enough to Government to be able to influence outcomes, while at the same time being sufficiently removed from Government to be able to act independently and to achieve balanced results.

The team has now moved on to the second phase of the project on reforming the law of insurance, which will include disclosure and misrepresentation in commercial transactions. We hope to be able to build further on what has already been achieved.

Another Law Commission Bill, the *Trusts (Capital and Income) Bill*, has recently completed its passage before the House of Lords under this procedure. As in the case of the Insurance Bill, the lead Commissioner (in this case Professor Elizabeth Cooke) was able to give a briefing to members of the Lords Committee in advance of the second reading. During the second reading she was present alongside the policy official and able to send notes to the Minister, Lord McNally. During the Committee stage she spoke jointly with Lord McNally, and they were both questioned by the Committee. Once again, the measure was subjected to very thorough scrutiny.

A Bill emanating from the Scottish Law Commission on the law of partnerships in Scotland will be the next Bill to be introduced under this procedure. We have a number of candidates lined up to follow that. We feel very strongly that this new procedure has been a success. In our view the quality of debate has been improved, and this has been reflected in the legislation that emerges.

J. The Impact of Devolution

The final matter to which I wish to draw attention this evening is the effect of the devolution settlements within the United Kingdom on the implementation of legislation. This, it seems to me, has added a new dimension to the implementation of law reform measures.

I. Scotland and Northern Ireland

There are within the United Kingdom three Law Commissions. The Scottish Law Commission was created in 1965 at the same time as the Law Commission for England and Wales.[23] The Northern Ireland Law Commission was created in 2007 under the Justice (Northern Ireland) Act 2002, as amended.[24]

23 Law Commissions Act, 1965.

24 Sections 50-52, Justice (Northern Ireland) Act 2002 (c. 26).

Each Law Commission corresponds to a distinct legal system, and each undertakes projects specific to its own jurisdiction. Ministers of devolved governments in Scotland and Northern Ireland are empowered to refer law reform projects to their respective Law Commissions. In each case programmes of law reform are approved by the devolved executive, and proposals for reform in the devolved fields are implemented by the devolved legislatures.

However, the existing law often operates on a United Kingdom-wide basis, and in these circumstances it is often appropriate for the Law Commissions to carry out joint projects. The Law Commission for England and Wales and the Scottish Law Commission have carried out a number of joint projects, and the three Law Commissions in the United Kingdom are currently working jointly on a project on the regulation of healthcare professionals. More UK-wide projects are likely in the future.

The constitutional changes flowing from devolution often bring new challenges for the implementation of law reform. For example, legislative consent motions are required from the devolved assemblies if Westminster is to legislate for a devolved matter. For our part, we will need to be sensitive to the political and cultural currents which underlie devolution.

II. Wales

Wales is in a rather different position. Wales is not a separate jurisdiction, although the Welsh Government and the Welsh Assembly have both recently carried out consultations as to whether a separate jurisdiction should be created. Furthermore, there is one Law Commission in respect of the shared jurisdiction of England and Wales.

We are very conscious of the fact that we are the Law Commission for both England and Wales. We actively engage with the Welsh Government and the Welsh Assembly, and our consultation exercises extend throughout Wales.

However, the effect of the Government of Wales Act 2006 is that the Welsh Assembly now has primary legislative powers in the devolved areas, and as a result we can expect to see – indeed we are already seeing – a divergence between the law in force in England and that in Wales. This has important implications for the implementation of law reform. The demands of law reform will undoubtedly be different in a devolved Wales with its own legislative powers. We are currently looking closely at how we can best meet those needs and how the internal structure of the Law Commission might be reorganised to accommodate the new situation.

A striking example of how the situation has changed is provided by the report of the Law Commission for England and Wales on *Housing Tenancy Reform*. We reported our recommendations in this ambitious project on renting homes in 2006.[25] In our annual report for 2007-2008, we expressly contrasted the lack of interest in our proposals in England with "the imaginative and positive policy

25 Law Commission Report: Renting Homes (Law Com. No. 297), 5 May 2006.

reaction [...] in Wales".[26] In due course, our proposals were rejected in England,[27] but accepted in principle in Wales. We were delighted when in June of this year the Welsh Government announced that a *further* housing bill would be added to the legislative programme for the current Assembly with the aim of implementing these proposals. Since then, we have been working with the Welsh Government to update our recommendations, to tease out any devolution issues and to examine how the proposals can assist with other current policy initiatives in the field. We will be publishing a report on these issues early next year.

We are currently in the process of agreeing a concordat with the Welsh Government that is intended to provide a formal framework for the relationship between the Government and the Law Commission. However, one deficiency in the present statutory scheme has already become clear. As matters stand, there is no route under the Law Commissions Act 1965 by which the Welsh Government can make a reference in respect of a law reform matter directly to the Law Commission. In the case of Scotland, the 1965 Act was amended to enable both the United Kingdom Government and the Scottish Government to make such references to the Scottish Law Commission.[28] Similarly, the statute creating the Northern Ireland Law Commission made provision for references from the Northern Ireland Executive to the Northern Ireland Law Commission.[29] There is a clear case for similar provision to be made in the case of Wales. Of course, in practice, a reference could be made by the Wales Office on behalf of the Welsh Government, but that might not always be an entirely satisfactory route.

K. Conclusion

Sir William Dale was a pragmatic and realistic lawyer with a deep understanding of the workings of Government and a keen sense of what is and what is not achievable. I am sure that he would have approved of the steps that have been taken to modify the machinery of law reform so as to avoid waste and to enable the Law Commission to work more effectively with Government and with Parliament. However, I am confident that he would also have understood the need for an independent Law Commission which will remain vigilant to identify areas where the law is leading to injustice and which will speak out in the cause of law reform.

26 Law Commission, Annual Report 2007-8 (Law Com. No. 310; HC 540), paras. 3.42-44.

27 The Lord Chancellor's Report for 2011 stated that "while some of the proposals [...] were accepted in principle by the previous Government [...] reform of this area of the law is not in line with the current government's deregulatory priorities" (at para. 56).

28 Section 2, Law Commissions Act 1965, as amended by the Scotland Act 1998 (Consequential Modifications) (No. 2) Order 1999 (SI 1999/1820).

29 Section 51, Justice (Northern Ireland) Act 2002, as amended by the Northern Ireland Act 1998 (Devolution of Policing and Justice Functions) Order 2010 (SI 2010/976).