1991 Denning Lecture

Law reform now : The Law Commission 25 years on

It is a signal honour to be invited to deliver this year's Denning Lecture, daunting though it is for me to be following such distinguished predecessors in title. It is only natural that the thoughts of a Denning lecturer should turn immediately to the man who has given his name to these lectures. To some it may seem more than a little ironic that the Chairman of the Law Commission, a body whose mode of achieving law reform lies through the proposal of amending legislation, should be delivering a lecture named after a judge much of whose judicial career seemed to be dedicated to proving that law reform could be achieved without the assistance of Parliament. However it is right to acknowledge that Lord Denning, in the debate in the House of Lords on the second reading of the Law Commissions Bill in 1965, gave his support to the Bill, saying that each generation has its duty to keep the law in conformity with the needs of the time[1]. He expressed the view that the law should be such that it met with the approval of the right-thinking members of the community, adding characteristically that only second to that would be put certainty. Even in his nonagenarian retirement, Lord Denning retains an active interest in

developments in the law, as witness the typically kind letter which he sent to me a little while ago, praising a Law Commission report which had been published shortly before. It is comforting that if our radical proposals in The Ground for Divorce[2] are implemented, the new law of divorce would have the approval of so eminent and evidently right-thinking a member of the community as Lord Denning.

Within the last year the Law Commission, like its twin the Scottish Law Commission, has celebrated its silver jubilee. In 1965 the law reform aspirations of Mr. Gerald Gardiner and Professor Andrew Martin expressed in their seminal publication "Law Reform NOW" were fulfilled when the Law Commissions Bill promoted by the translated Lord Gardiner on the Woolsack entered the statute book and Andrew Martin became one of the first Law Commissioners. I suppose the modern equivalent in another field of law reform is Mr. Michael Heseltine's campaigning for his party leadership on reform of the poll tax and becoming Secretary of State for the Environment specifically charged with a review of the tax. In 1965 Lord Reid foresaw for the Commission 5 or 10 years of really useful work, by which time he thought that what he called lawyers' law ought to be in pretty good shape[3]. 25 years on what is the state of law reform now? Is the law in good or bad shape? Is there useful work yet for the Commission to do?

Lord Reid, I suspect, was not the only one who had high,

indeed extravagant, hopes of what the Commission would achieve and how quickly it would be achieved. No doubt it was because of the anticipated contrast with the previous machinery for law reform. In England there has never been a Ministry of Justice responsible for law reform. Within Government, each Department has regarded itself as responsible for the state of the law in the particular area in which it was interested, but no Department has had overall responsibility for the state of all the law and the dividing line between the areas of responsibility of particular Departments has not always been clear. Prior to 1934 there had been no standing body of lawyers charged with law reform. For a hundred years or more commissions and committees of the great and the good had from time to time been appointed ad hoc to review and reform particular branches of the law on a piecemeal basis. In 1934 however a standing committee was established by the Lord Chancellor, Lord Sankey, to consider how far, having regard to the statute law and judicial decisions, legal maxims and doctrines required revision in modern conditions, but only as and when the Lord Chancellor referred a particular topic to it. That Law Revision Committee became dormant with the outbreak of the War, and was not revived after the War because, it is said, no one wanted to tell its distinguished but elderly members that they should be replaced. But in 1952 a new committee the Lord Chancellor's Law Reform Committee was formed, again a standing committee of judges, barristers, solicitors and academics and again charged with

considering changes in such legal doctrines as the Lord Chancellor might refer to it. The proud record of the Law Reform Committee in its first 30 years was comprehensively reviewed by your Vice-Chairman in the Civil Justice Quarterly 9 years ago[4]. Its achievements both in the number of reports published and the high rate of implementation of its recommendations are all the more remarkable for the fact that its members were all part-timers, meeting from time to time after Court hours. But Lord Gardiner, who had long experience as a member of the Committee, felt that it and other committees set up about the same time (the Private International Law Committee acting on references from the Lord Chancellor and the Criminal Law Revision Committee acting on references from the Home Secretary) were only scratching the surface of the problem[5]. What he believed was needed was the creation of proper machinery for systematic law reform: a Law Commission established on a statutory basis of full-time Commissioners backed by an adequate legal staff, including Parliamentary Counsel seconded to the Commission to translate the Commission's proposals for legislative reform into Bills capable of immediate implementation if acceptable to Parliament. If the part-timers of the Law Reform Committee could produce 11 reports between 1952 and 1965, then surely a mini-Department of full time professional law reformers could do dramatically better than that.

The comprehensive role envisaged for the Commission can be

seen from the way its duty was formulated in the Law Commissions Act. Instead of acting only on the reference of a Lord Chancellor or a Home Secretary, its primary duty is no less than to take and keep under review all the law of England and Wales with a view to its systematic development and reform[6]. Included in particular in that objective are the codification of the law, the elimination of anomalies, the repeal of obsolete and unnecessary enactments, the reduction in the number of separate enactments and generally the simplification and modernisation of the law. Broadly speaking, two main functions are laid down for the Commission. One is the statute law revision and consolidation function to get rid of obsolete statutes and to combine in a single statute those still in force in a particular area of the law. For example all the various revenue statutes are in the process of being consolidated. The Income and Corporation Taxes Acts were done in 1988, the Capital Allowances Acts in 1990. The capital gains legislation is currently being consolidated and we hope that we shall soon tackle the Stamp Duty legislation consolidation of which is so long overdue. Other consolidations on which work is proceeding include those of the Water Acts, the Education Acts and the Merchant Shipping Acts. This is the less glamorous side of law reform and not every practitioner will thank us for forcing him or her to relearn the section numbers of familiar statutory provisions; but this nuts and bolts form of law reform is important if statute law is to be made more accessible and the work on it is never-ending. The

other function is law reform as it is generally understood, the alteration of the substantive law itself, and you will note the specific inclusion in the Law Commissions Act of codification as a statutory objective.

The Law Commissions Act envisages that the Commission will work on law reform projects originating from two sources. One is that the Commission itself, whether from keeping all the law under review or from receiving law reform proposals from others (and part of the Commission's duties is to receive and consider any such proposals from any source), will decide that a branch of the law needs examination with a view to reform. The Commission is required to prepare and submit to the Lord Chancellor from time to time programmes of law reform, but it can only carry out work pursuant to such programmes if the Lord Chancellor gives his approval[7]. The initial programme, as one might expect, was an ambitious one, the branches of the law to be examined reading like an index to Halsbury's Laws[8]. Three more programmes have subsequently been approved[9], the last in 1989, and a fifth programme is under discussion with the Lord Chancellor's Department. The other source is from the Government, the Commission receiving references from Government on particular topics on which it would like the Commission to advise and report[10]. There has never been any shortage of law reform projects to keep the Commission busy. At any one time there are some 25 to 30 such projects on which the Commission is currently

working.

Law reform has been likened to making love to an elephant: it is extremely difficult to achieve and it takes 2 years to produce anything. Indeed the gestation period has at times been considerably longer than that. The delay between conception of the project and its completion is largely attributable to the careful procedures which have been adopted by the Commission. From the outset the technique practised has been first to prepare a consultation paper setting out the existing law on particular topics and the problems that have arisen, describing the laws of other countries which address similar problems or proposals for reform made in such countries, and raising questions to which responses are sought, in many cases doing so by making provisional recommendations and inviting views thereon. Many consultation papers contain as good a discussion of the present law as can be found in any text book and some would say that is putting it too modestly; this can only be done with much detailed research and thorough analysis. The consultation papers are distributed widely to a range of bodies and individuals who might, we feel, take the trouble to let us have their views, including of course this Association. They are also obtainable by the public at HMSO and other bookshops.

The Commission is not obliged to limit its procedure to what I have just outlined and there are times when it takes additional

steps to ensure that it has the information and views needed to enable it to perform its functions satisfactorily. Let me give 3 examples.

In 1985 the Commission was approached by an international commodity trade association who asked it to consider examining the law relating to the rights of purchasers of goods at sea forming part of a larger bulk. The request was made in the light of what had been said by the Commercial Court in Rotterdam in a case called The Gosforth[11]. That Court had decided that case according to English law and had drawn attention to the fact that s.16 of the Sale of Goods Act 1979 prevented the passing of property in unascertained goods from the seller to the purchaser, and whilst the case did not break new ground, it reminded traders that although goods, part of a particular cargo, had been paid for by the purchaser, they might be arrested or seized by creditors of the seller at any time before they were appropriated to the purchaser. The Commission decided to carry out preliminary research to establish the extent of any problems which occur in practice in relation not only to bulk goods at sea but also to goods on land which formed part of a larger bulk. A questionnaire was sent to trade associations for circulation to their members. In the light of the responses a working paper[12] was issued in which there was discussion of two problems. One was that as between seller and buyer of part of a bulk, the buyer cannot acquire title to the goods unless and until they have

become ascertained and will suffer loss on the seller's insolvency. The other problem was that as between buyer and carrier the buyer does not without more acquire the right to sue the carrier for loss of or damage to the goods during carriage. Reforms to s.16 of the Sale of Goods Act 1979 and to s.1 of the Bills of Lading Act 1855 were canvassed. In turn the responses to that revealed additional concerns. Rights of suit problems were seen to arise in practice not only on sales of goods forming part of a bulk cargo, but also on sales of complete cargoes and where documents other than bills of lading were issued by carriers. These concerns were discussed at a seminar convened early last year and attended by judges, barristers, solicitors, academics and representatives of commodity traders, shipowners, bankers, insurers and Government. The views then expressed have helped us to formulate our policy, and we are about to publish a report entitled Carriage of Goods by Sea making recommendations for reform in this area of the law. We are now turning our attention to whether s.16 of the Sale of Goods Act should be reformed. Is reform to give the buyer a proprietary interest in part of a bulk practical, having regard to the insolvency implications and other problems such as when the total purchased exceeds the available bulk, and can a satisfactory reform be fashioned, perhaps on the lines of one of the American models, the Uniform Sales Act or the Uniform Commercial Code, whereby purchasers become co-owners of the bulk?

By way of a second example, many of you will know that the Commission last year on a reference from the D.T.I. embarked on a project to consider the interrelationship between the fiduciary duties owed in equity by professionals and businesses subject to public law regulation and the duties imposed by statutory and self-regulatory rules, particularly in the financial services area. The equitable rules governing the conduct of fiduciaries require for example that a fiduciary should not place himself in a position where his own interest conflicts with that of his client, the beneficiary, that the fiduciary should not profit from his position at the expense of his client and that the fiduciary owes undivided loyalty to his client as well as a duty of confidentiality. How, in the post - Big Bang City, do such rules tie in with the provisions of the Financial Services Act 1986 and the regulatory rules? Does compliance with those provisions and rules provide a defence to an action in equity? Do devices such as Chinese walls adequately deal with conflicts that arise within an institution performing a variety of functions for a variety of clients? We were aware of the problems that could in theory arise, but we had insufficient knowledge of whether actual problems had arisen and how they had been dealt with. Accordingly in November we sent out an Issues Paper seeking answers to a number of questions. We are now analysing the responses and with that information we expect to publish a consultation paper, identifying the problems and the options for their solution.

To give a third example, before the Commission reported on The Ground for Divorce[13], a public opinion survey was commissioned. This gave us an insight into whether the public was satisfied with the existing law and into what changes would be acceptable to the public, and it assisted us in making our recommendations when we reported last autumn.

Once the Commission has completed the consultation process, it decides its policy in relation to law reform in that area, and the final report is prepared. If legislative reform is recommended the practice is to append a Bill to implement the recommendations. It is a salutary discipline, though often a time-consuming exercise, to work out the details of the legislative provisions needed, and frequently the exchanges with Parliamentary draftsmen will reveal points of weakness or details which have not been thought through adequately. On one of our current projects the Bill went through 19 drafts. But the final product, in the form of a report with the draft Bill attached, provides Parliament, with as much help as possible.

One other factor that affects the speed at which the Commission works is the joint responsibility that the Commissioners take for every publication of the Commission. The Commission consists of a Chairman, thus far always a High Court Judge seconded usually for 3 years or so, and 4 other

Commissioners each appointed for an initial term of 5 years which sometimes is extended. These 4 Commissioners will typically comprise those who before appointment to the Commission were a practising barrister, a practising solicitor and two academics, though often the academics will also be barristers or solicitors as well. Each of those Commissioners is put in charge of the law in a particular area and heads a team of two or three Government lawyers and two or three research assistants who come to the Commission for a year after obtaining a law degree. One Commissioner is in charge of criminal law, another in charge of family law, another in charge of property law and the fourth in charge of what is loosely termed common law, comprising everything not falling under the other heads. But whilst the draft of each consultation paper or report will be produced within a team, what is published will have been examined critically by each Commissioner and discussed at length by all the Commissioners together.

When the Commission was formed it was recognised that the task facing it was enormous. The problems affecting the state of English law were often described by reference to the number at that time of Acts of Parliament (some 3,000 going back to 1235), of volumes of delegated legislation (99) and of reported cases (over 350,000)[14]; but whilst these statistics provide ammunition for statute law revision and consolidation and codification, they do not shed light on the extent of the problem thrown up by the

haphazard development of the law through piecemeal statutory intervention and the operation of the doctrine of precedent over centuries. It was appreciated that the Commission alone could not itself undertake all the law reform projects that were likely to be needed and that other bodies like the Law Reform Committee and the Criminal Law Revision Committee would continue to operate alongside the Commission; and that has happened. The Law Commissions Act itself provides that when the Commission submits to the Lord Chancellor programmes for law reform it will recommend the agency, whether the Commission or another body, by whom the work is to be done[15]. I suspect that the intention was that the Commission would have the role of coordinator of virtually all law reform so that only such areas of the law which the Commission thought should be examined with a view to law reform would be examined, even if by other agencies when the Commission so recommended and the Lord Chancellor accepted the recommendation. But Government Departments have been reluctant to surrender to a body independent of Government (the Commission) the decision on whether or not areas of the law for which they have been responsible should be examined with a view to law reform. One of the services provided by the Commission is the publication every quarter of a bulletin of law reform projects currently being undertaken. The December bulletin shows 74 such projects still in progress of which only 30 are Commission projects and none of the other 44 originates from a Law Commission recommendation[16]. It is right to add that on some of

the projects undertaken outside the Commission, the views of the Commission are sought. Thus when the Office of Fair Trading last year produced a paper on Trading Malpractices our comments were requested and supplied.

Initially codification was seen to be the objective in a number of important areas. It is a topic which invokes strong views. Ever since the time of Jeremy Bentham, that great advocate of a code, the merits and demerits of codification have been debated. Some lawyers regard codification as a Continental trick; they see it as the enemy to the genius of the common law, by its rigidity destroying the common law's flexibility and capacity to adapt. Others, including, we must assume, Parliament in 1965, considered codification to be the ultimate means of making the law simpler, more certain and more accessible.

I have already mentioned the law of contract, the examination of which with a view to its codification was in the Commission's first programme. The ambition of that item was such that it was envisaged that there would be a uniform code for the United Kingdom, and the Scottish Commission was to work with the Commission to that end. But by 1973 the Scots had withdrawn from

the enterprise, defeated by the major differences between the

law in Scotland and that in England, and the English Commission announced a change of tack, deciding to direct its efforts to particular aspects of the law of contract which needed reform whilst retaining codification as its ultimate though distant aim[17].

Since then a number of projects have been completed and other are under way. I have already mentioned the projects relating to the Bills of Lading Act and s.16 of the Sale of the Goods Act. Additionally we have a project on contributory negligence as a defence in contract. Should a plaintiff's damages be reduced where his loss has been caused partly by the defendant's breach of contract but partly by the plaintiff's own conduct? A working paper on this controversial question was issued last year[18] and we are proceeding to consider what our policy ought to be in the light of the sharply different responses evoked. We have also embarked on the examination of one of the fundamental doctrines of contract law, that which prevents a non-party from bringing a claim on a contract made for his benefit and the promisee under the contract from recovering damages in respect of a loss suffered only by a third party. This will entail a critical scrutiny of the meaning, development and rationale of the privity rule.

A second area of the law seen to be appropriate for codification was the law of landlord and tenant, the examination

of which with a view to codification again featured in the Commission's first programme[19]. Again, work on particular areas has been completed, most recently on distress for rent. Our report published last month[20] recommended its abolition but not before improvements to the Court system have been effected so as to enable landlords to have a speedy and effective remedy for recovering rent arrears through the Courts. We also recommended a procedural change such as would enable rent accrued between the commencement of proceedings and judgment to be recovered without the need to commence fresh proceedings. In this, as in other areas of the law, the Commission is conscious of the need to maintain a just balance between the interested groups; we want neither landlords nor tenants to feel aggrieved by our proposals. Another project under way relates to repairing obligations between landlord and tenant. Is it satisfactory, for example, that the law with few exceptions does not imply into a lease any covenant of fitness for the tenant's purpose in taking the lease? Should the statutorily implied covenant of fitness for habitation in respect of low rental housing be extended to all rented dwellings? These and other questions will be examined in a consultation paper.

A third branch of the law which the Commission has been examining first on a reference from Government relating to divorce and second since its second programme in 1968[21] with a view to its systematic reform and eventual codification is family

law. It provides an example of the truth that a law reform satisfactory for its time may itself need reform after a period of time. In our report last autumn on The Ground for Divorce[23], we recommended radical changes to the present divorce laws which themselves are based on the Commission's recommendations more than 20 years ago[23]. If our proposals are implemented, whilst irretrievable breakdown would continue to be the sole ground for divorce, fault would be eliminated from the means of proving that breakdown. This would be proved instead by the passage of a minimum twelve-month period of time from commencing the procedure to the granting of divorce, such period to provide an opportunity both to reflect on whether the marriage had in fact broken down irretrievably and to resolve the practical consequences of such breakdown. The Children Act 1989, much of which is based on what the Commission had earlier recommended[24], will come into effect in October of this year, and represents the most comprehensive and far-reaching reform of child law to take place this century. It integrates nearly all the law relating to parental responsibility for bringing up children, court orders concerning them and the social services to be provided for children and their families. Another important family law topic under present examination is Domestic Violence and the Occupation of the Family Home. Are the remedies provided by the present law relating to occupation of the home and the protection of family members from violence at home, sexual abuse and other forms of molestation adequate? This and other questions were canvassed in a

consultation paper[25] and we are proceeding to consider our policy in the light of the many responses received.

If ever an area of the law calls for codification it is surely the criminal law, affecting as it does the liberty of the individual who is entitled to find the criminal law accessible and stated in readily understandable and unambiguous language. But attempts to codify the English criminal law have had a long and chequered history. It was done a century ago for India by Sir James Stephen and that code was copied for New Zealand and several Australian states. But what was good enough for parts of the British Empire was evidently not good enough for England and Wales. However thanks to the prodigious efforts of three of the leading professors in criminal law in this country[26], the Commission in 1989 published a criminal code covering a substantial part of the criminal law[27]. Two years later while the Government has neither formally rejected nor accepted the Code proposals, the Commission has recognised the legislative difficulties which the introduction of a bill of the size of the Code would involve. We see the way ahead as lying in putting forward legislation relating to more readily digestible parts of the Code. Accordingly a self-contained bill relating to non-fatal offences against the person and incorporating Code concepts is in course of preparation and we envisage publishing this with a view to consulting thereon. We hope that this will be followed by bills relating to other areas of crime, so that

ultimately the whole of the criminal law will be codified.

Of course the work of the Commission has not been limited to these four codification projects. In numerous other areas of the law the Commission has made law reform recommendations and work continues in a variety of others. Let me illustrate that by reference to some of our current projects.

In the common law field the Lord Chancellor last year referred to the Commission for examination the law relating to payments made but not lawfully due. Should the common law rule that payments made under a mistake of law are irrecoverable continue to apply today? Is it satisfactory to maintain a distinction between mistake of law and mistake of fact for restitution purposes? If not, should it be a defence that the recipient has changed his position? Ought there to be a different regime for payments made to public authorities including payments made in response to unauthorised demands, and how does European Community law affect payments made but not due in respect of unlawfully levied charges arising from that law? We are about to publish a consultation paper in which we examine the existing law and invite comment on questions such as these.

The topics under consideration in the criminal law field include some old chestnuts. One is Binding Over. The ancient powers to bind over to keep the peace and to be of good behaviour

have their common law origins in the 10th century and their statutory origins in the Justices of the Peace Act 1361 enacted to deal with soldiers returning from the Hundred Years War and misbehaving on their way home. Are such powers, capable as they are of being exercised in respect of persons not found guilty of any crime including those who have been acquitted and even witnesses, and requiring good behaviour in such imprecise terms appropriate today? Questions such as this were raised in our working paper[28]. Then there is Conspiracy to Defraud on which we have also been consulting[29]. Is it right that there should be a crime that enables persons to be prosecuted for acting or agreeing to act in a manner that would not be criminal if engaged in by one person alone? Or does the utility of the present law that allows those alleged to have participated in large-scale frauds to be brought to trial on a charge comprehensible to the jury justify the continued existence of the crime? Last November we published a consultation paper on Rape within Marriage[30]. Is it under English law a crime for a husband to rape his wife or does a marital immunity based on an implied consent to sexual relations on marriage obtain? If it is not a crime, ought it to be one or would that bring the criminal law into marital relationships in an undesirable way, a policeman and a consent form by every bed, as one critic insists? Some recent conflicting decisions at first instance had drawn attention to the problem[31]. But work on law reform is always in danger of being overtaken by events. Last week the Court of Appeal boldly,

in a manner which I feel sure Lord Denning (though possibly not every constitutional lawyer) would approve, by judicial decision abolished the immunity[32]. However the last word on this will be spoken by the House of Lords to whom there is to be an appeal.

There are two current projects on the law of evidence. Last year we published a consultation paper[33] on corroboration of evidence in criminal proceedings, looking at the detailed rules relating to the need for certain categories of testimony tendered for the prosecution to be corroborated and the type of evidence that is capable of meeting that requirement. Is it right that the law should require a warning to be given that it is dangerous to convict on the uncorroborated evidence of the complainant in a trial for a sexual offence or on the uncorroborated evidence of an accomplice? In our consultation paper we provisionally proposed that the present rules should be abolished and we invited suggestions on whether any and if so what rules should replace them. The other project relates to the rule that hearsay is at common law inadmissible in civil proceedings. The Civil Justice Review had recommended that there should be an enquiry into the usefulness of that rule and the current machinery for rendering hearsay admissible under the Civil Evidence Act 1968. It appears that the rule is frequently not observed in practice and that the notification procedures of the 1968 Act are found by many to be too cumbersome. We have this year published a consultation paper[34] inviting comments on two options in

particular: the abolition of the rule and reform of the 1968 Act machinery.

The Commission has commenced a major investigation into the adequacy of legal and other procedures for the making of decisions on behalf of mentally incapacitated adults. The area covered by this project is vast, and in a population which is living longer, the problems of adults unable to take decisions adequately or at all for themselves are becoming more prevalent. Does the law cater appropriately for the young adult woman who is mentally incapable through congenital defects and cannot take decisions for herself but who, who in the view of some, needs sterilisation or other medical treatment, or for the man or woman who has suffered a stroke and is unable to communicate or who has Alzheimer's disease but for whom every day decisions affecting the way he or she lives or his or her property need to be taken? We are of course not unique in this country in having to face up to such difficulties and the experiences of other countries may be particularly helpful in determining the way ahead.

In the field of property law the Commission, as part of its programme of examining conveyancing with a view to its modernisation and simplification, has been considering the notoriously difficult law of land mortgages. Such has been the growth in home-ownership largely financed by mortgages that there has been a vast increase in the number of mortgages taken out

throughout the country in the last 20 years. These generally give remarkably wide powers to mortgagees in terms of rights both to repossess and sell and to change the amounts payable by way of interest. Yet mortgage documents are largely incomprehensible to the layman. Earlier this century Lord Macnaghten said "no one, I am sure, by the light of nature ever understood an English mortgage of real estate"[35] and the 1925 legislation, although ingenious in its creation of a mortgage by demise, added to the artificiality attendant on mortgages. In response to a consultation paper[36] in which the provisional view was expressed that the mortgage law should be simplified and rationalised, the Commission has received overwhelming support for that view. We expect to publish our report later this year. Another topic where it seemed to us[37] that there was scope for modernisation and simplification is the implied covenants for title which by the Law of Property Act 1925 are read into most conveyances using certain key words. When these were first standardised by statute over a hundred years ago, they represented a considerable saving of unnecessary verbiage in conveyancing documents. But their language has been much criticised and difficulties have been caused by the statutory provisions governing them. Again a report containing our recommendations will be published soon.

Finally, there are two areas in the law of trusts under consideration by the Commission. One relates to powers of attorney granted by trustees. In what circumstances should an

individual trustee be entitled to delegate his powers and duties by appointing an attorney to act on his behalf? Prior to 1985 a trustee only had power to appoint an attorney for a limited period. In 1985 during the passage of the Enduring Powers of Attorney bill, itself implementing Law Commission recommendations[38], by a late amendment power was given to trustees to grant an enduring power of attorney[39] in such wide terms as to merit the description by one commentator of a "legislative blunder"[40]. Should the law be further reformed? The other area is the rules against perpetuities and excessive accumulations. Many lawyers, particularly those who learnt their trust law before the Perpetuities and Accumulations Act 1964, will recall without much affection the teasing problems posed by fertile octogenarians and precocious toddlers, not to mention inexhaustible gravel pits. Is there still a need for the rules or should they be done away with or modified? We shall be consulting on this before long.

As can be seen from this lengthy recital both of the uncompleted codification exercises and of some (but not all) of the other topics currently under examination by the Commission, we are not in any danger of running out of work. Further topics which may be tackled by the Commission in the future are under consideration. I have already mentioned that a fifth programme is in contemplation. The reason why a fifth programme may follow so swiftly after the fourth programme approved only in 1989 is

that in that year a new Commissioner with special interests in the common law field was appointed, but his appointment came too late for the inclusion in that programme of new common law items. One of the topics under consideration for inclusion in a fifth programme is the remedy of damages. The Commission last looked at this in 1973 in a report on the assessment of damages in personal injury litigation, and in 1978 the Royal Commission chaired by Lord Pearson reported[41]. Some of the recommendations which we made and some made by Pearson were implemented by the Administration of Justice Act 1982, but there are several issues raised in those reports which are unresolved and other issues have arisen since. For example there is an increasing use both in England and in other common law jurisdictions of structured settlements in personal injury litigation, the continued availability of punitive damages has long been the subject of criticism and the Courts are increasingly faced with litigation[42] following some medical or other disaster involving numerous plaintiffs which may justify a different approach in both the procedural and substantive law to enable the many parties to sue and be bound by a decision in a single action, involving, if necessary, an award of a global sum by way of damages to compensate all the interested plaintiffs. More generally, there may be greater scope for work to be done by the Commission as a result of the attitude displayed in recent years by the Courts to refrain from judicial development of the law in areas where statute has already intervened, Thus in Murphy v Brentwood

District Council[43] reluctance was expressed by members of the House of Lords to extend the ambit of tortious liability in the field of defective premises when Parliament had by the Defective Premises Act 1972 set out how far it was prepared to go in this area.

The fact that the Commission has examined a branch of the law and delivered its recommendations for law reform does not of course mean that that branch of the law has been or will be reformed. The implementation of the proposed reform depends on the Government of the day, who may procure the passing of the bill containing the Commission's proposals either by putting the bill in its legislative programme or by supporting a private member who has been fortunate in the ballot for private member's bills and who chooses to introduce a Commission bill. Whilst the Government has power under the Law Commissions Act to prevent the Commission from examining a branch of the law with a view to reform, it cannot and does not seek to dictate to the Commission what conclusions the Commission should reach. The very independence of the Commission from Government means that the Government cannot be expected to find every recommendation of the Commission acceptable. Further the pressures on Parliamentary time are notorious.

Nevertheless the observant bystander might wonder how it is that Parliament should, with a great fanfare of trumpets, set up

an institution grandly charged with systematic law reform, now having some 40 lawyers plus a quantity of administrative staff supporting them and costing the taxpayer an estimated £2.5 million a year, and yet make so little provision to ensure that there is a substantive end product of actual law reform. True it is that each report is laid before Parliament, which means that it is there in the library at Westminster for members to pick up or ignore as they choose. But there is no special procedure to expedite the passage of a Commission bill, however uncontentious, there is no standing committee to consider it, there is no obligation to debate it, not even by a "Take Note" debate, and all the work put into it could be wasted not because Government opposed the recommendations but because they were simply never taken up. For example, a modest but useful reform to allow an owner of property access to neighbouring land to carry out work on his own land was recommended in 1985[44] but never enacted, though recently the Government has stated that it intends to implement the recommendation when Parliamentary time becomes available[45]. I recognise that some reports are hardly likely to fire the busy politician's imagination (for example the report on Liability for Chancel Repairs[46]), whilst others bear the label of "Too controversial" on their face, like the report on Blasphemy[47] on which the Commission divided 3:2, but many worthwhile reforms languish neglected, the very passage of time since they were put forward being a disincentive for picking them up.

I must not paint too gloomy a picture because the overall record on implementation is not discreditable to the Commission. If one leaves aside reports recommending consolidation and statute law revision and looks only at reports recommending law reform, 70 out of 104 have been implemented in whole or in part. But the observant bystander might notice a disturbing trend. Since the end of 1984 only 11 out of 33 such reports have been so implemented. Of course it is only to be expected that often there will be a time-lag between the report and the introduction of the implementing bill whilst the proposals are considered and soundings taken by Government. There are exceptions: witness the speed with which the Computer Misuse Bill implementing Commission recommendations[48] reached the statute book within a year of the report. But it is a matter of concern that for the second successive Parliamentary session no Bill implementing a Commission report is included in the Government's legislative programme and whilst we have a private member[49] to thank for the Computer Misuse Bill being enacted in 1990, 1991 looks likely to be the first year (with one exception) in the history of the Commission when no Bill implementing the Commission's recommendations will reach the statute book. The one exception is 1983 when there was a general election. We shall soon know whether a future historian is able to excuse 1991 for the same reason.

I do not underestimate the difficulties in the way of a Lord

Chancellor anxious to promote law reform, but they can be overcome with sufficient political will. Lord Hailsham in his recent memoirs,[50] after describing the Commission's methodology in producing proposals for legislative reform, continued: "You then have to struggle for a place in an overcrowded legislative programme. You have to overcome the resistance of the obscurantists and the forces of inertia. You have to control the enthusiasts, and finally, if you are lucky, and after immense discussion in both Houses of Parliament, you may have achieved a worthwhile change. On the way you may have to face a number of unnecessary obstacles, the division of responsibility between departments, each like the DTI and the Home Office, sovereign in its own field and each embued with an orthodox tradition deeply embedded in the thinking of its own departmental officials. In Parliament you have to reckon with the loquacity and insensate zeal of enthusiasts, the hostility of single-purpose pressure groups, nearly always well motivated but sometimes wholly misguided... The task of the reformer is strewn with pitfalls." Lord Hailsham gave his own view of how the system could be improved in this way: "that the Lord Chancellor's office should carry the initiative even outside his own departmental interests - the Law Commission's sensible proposals[51] for simple interest in delayed - contract debts has always been blocked by the DTI ... and that almost all proposals, except those required by an emergency, should be processed by the methodology I have described, that the length of parliamentary procedures by oral

discussion should be curtailed by the use of written documents, and that it should be recognised, apart from Private Member's Bills, that at least one law reform measure should be included in every session of Parliament, as part of the government programme." It remains to be seen whether Lord Mackay, with his unrivalled experience of law reform as a former Scottish Law Commissioner, as a former Lord Advocate to whom the Scottish Law Commission reported and as the Lord Chancellor to whom the Law Commission reports, will take it upon himself to try to procure the permanent means of translating the Commission's proposals approved by Government into actual law reform.

Let me return to the questions I posed at the start of this lecture. 25 years on the law is in a significantly better shape than it was before the Commission was founded, and the Commission can be proud of what it has achieved. But it cannot afford to be smug. Much useful work remains to be done and more will always remain to be done as the law, like the Firth of Forth bridge, is ever in need of maintenance and repair. Whatever the state of business generally, the business of law reform is not in recession.

Footnotes

1. (1965) 264 H.L. Deb. col. 1210
2. (1990) Law Com. No. 192
3. (1965) 264 H.L. Deb. col. 1202
4. (1982) 1 Civil Justice Quarterly 64
5. (1964) 258 H.L. Deb. col. 1087
6. Law Commissions Act 1965, s.3(1)
7. Ibid., s.3(1)(b)
8. (1965) Law Com. No.1
9. (1968) Law Com. No.14, (1973) Law Com. No.54, (1989) Law Com. No.185
10. Law Commissions Act s.3 (1)(e)
11. S. en S. 1985 No.91
12. (1981) W.P. No.112
13. (1990) Law Com. No.192
14. (1965) 264 H.L. Deb. 1965 264 H.L.C. Deb. 1141,2
15. Law Commissions Act 1965 s.3(1)(b)
16. Law Under Review No.16
17. (1973) Law Com. No.58 paras. 2-5
18. (1990) W.P. No.114
19. (1965) Law Com. No.1
20. (1991) Law Com. No.194
21. (1968) Law Com. No.14
22. (1990) Law Com. No.192
23. (1966) Law Com. No.6
24. (1988) Law Com. No.172
25. (1989) W.P. No.113
26. Professor J.C. Smith, Professor Edward Griew and Professor Ian Dennis
27. (1989) Law Com. No. 177
28. (1987) W.P. No.103
29. (1987) W.P. No.104
30. (1990) W.P. No.116
31. R v R (per Owen J.) [1991] 1 All E. R. 747, R.v C (per Simon Brown J.) [1991] 1 All E.R. 755, R.v J per (Rougier J.) [1991] 1 All E.R. 759
32. R v R The Times 15 March 1991
33. (1990) W.P. No.115
34. (1991) C.P. No.117
35. Samuel v Jarrah Timber [1904] A.C. 323 at 326
36. (1986) W.P. No.99
37. (1988) W.P. No.107
38. (1983) Law Com. No. 122
39. S.3(3) Enduring Powers of Attorney Act 1985
40. R. T. Oerton, (1986) 130 S.J. 23
41. Report on Civil Liability and Compensation for Personal Injury : Cmnd. 7054

42. E.g. the Opren litigation; see Davies v Eli Lilly & Co. [1987] 1 W.L.R. 1136
43. [1990] 3 W.L.R. 414
44. (1985) Law Com. No.151
45. Hansard (HC) 25 February 1991 col. 389
46. (1985) Law Com. No.152
47. (1985) Law Com. No.145
48. (1989) Law Com. No.186
49. Mr. Ian Colvin M.P.
50. Lord Hailsham: A Sparrow's Flight (1990) pp. 420,1
51. (1978) Law Com. No.78