Law Reform in the United Kingdom: A New Institutional Approach

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The minds of men are the great wheels of things; thence come alterations and changes in the world; teeming freedom exerts and puts forth itself, the unjust world would suppress its appearance; many fall in this conflict, but freedom will at last prevail, and give law to all things.**

I

The seventeenth century author of the quotation was too optimistic. The movement for law reform between 1640 and 1660 was not lacking in good ideas; many of them have been adopted in later times and have proven their practical value, and others are in the process of being carried out or at least actively debated.¹

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¹ See D. Veall, The Popular Movement for Law Reform 1640-1660, 235-36 (1970), which mentions among the reforms which already had been anticipated or proposed in the period 1640-1660, if not earlier, the admission of counsel for the defence on a charge of treason in 1697 and of felony in 1738, likewise of witnesses for the defence in 1695 and 1702 respectively; the abolition of *peine forte et dure* in 1772, leading in 1827 to a refusal to plead being treated as a plea of not guilty; the drastic reduction in the number of capital offences between 1808 and 1861 (leading, it may be added, to the suspension of the death penalty in 1965 and its abolition in 1970, except for treason and certain forms of arson, with the death penalty for the latter (Royal dockyards, etc.) proposed for abolition in Law Commission, Report on Offences of Damage to Property, Law Com. No. 29 (1970)); the abolition of benefit of clergy for all except peers in 1827 and for peers in 1841; and the abolition of forfeiture for felony and treason and of drawing and quartering of persons condemned to death for treason in 1870. More generally, in the sphere of criminal law Veall refers to the anticipation by seventeenth century reformers of the modern concern for the causes of crime and for humane and individualized forms of punishment. As far as civil proceedings are concerned, Veall lists the introduction of English as the legal language in 1731; the tentative beginning of registration in connection with land in the eighteenth and nineteenth centuries, only now clearly among at registration of titles on a compulsory basis for the whole country; the Fatal Accidents Act 1846; the setting up of County Courts on a country-wide basis in 1846; and the reorganisation of the higher courts and the fusion of law and equity between 1873 and 1875. And, lastly, Veall sees the achievement of a seventeenth century proposal in the appointment of Law Commissioners in 1965.
The law reformers of that period, however, failed to achieve any very substantial changes capable of resisting the inevitable reaction in the years immediately following the Restoration in 1660. No doubt an important reason for this failure was the fact that “Cromwell’s government was never able to free itself from the vice of its origin.” For the purposes of this article, however, it is important to draw attention to another factor which crippled the work of the reformers. Although it is far from true that the reformers were without practical experience in the law, they were opposed by the majority of the bar and the judiciary. The reform of the law was—and is—a highly technical process. Without a broad measure of support among lawyers as a whole, the reformers were all too easily checked by the delaying manoeuvres or simple non-cooperation of those on whom the responsibility for working out the practical implications of the reforms necessarily fell.

The reforming lawyers were not in the magic circle of privileged lawyers, but they could have been put into positions of authority where they would have been able to ensure that law reform was implemented. Cromwell had created the New Model Army from men who knew what they fought for and loved what they knew, and it was this Army which had brought victory in the Civil War. What was wanted was a New Model Justiciary of lawyers who had clear ideas about law reform and felt strongly about them.

The lesson of the period seems to be that law reform will be most successful when it forms part of the institutional functioning of the legal system itself. It is not that the lawyers all want the reforms, but they are much more ready to accept them when they appear to come out of the legal system itself. Although Lord Chancellor Gardiner may have had a rather different point particularly in mind, his remarks in the Lords’ debate on the Law Commissions Bill in 1965 gained added weight in the present context: “It may be your Lordships’ experience that things in life do not get done unless it is somebody’s job to do them. It has never been anybody’s job in England who would do it to see that our law is in good working order and kept up to date.” It is “anybody’s job in England who would do it.” (Emphasis supplied). The qualifica-

3. See, e.g., VEALL, supra note 1, at ch. IV
4. Id. at 239.
tion is obviously important, but it requires some elaboration. In the first place, we may ask what is the nature of the job in question, in other words, what is meant precisely by law reform in this particular context. Obviously we are concerned with a good deal more than lawyer's law, if the latter means only technicalities of law which are of exclusive concern to lawyers themselves. On the other hand, we must recognize that there will be changes effected by law—for example, the setting-up of a National Health Service or the nationalisation or de-nationalisation of an industry—which, in regard to the broad principle involved, cannot be said to involve special legal expertise. The kind of law reform which in the United Kingdom has presented a legal problem of machinery and institutions concerns those areas of law, which, whether or not they involve deep economic, social, or political issues, are in danger of being neglected because (a) the non-lawyers who are interested in them are frightened off by their legal complexities, and (b) the lawyers either do not want, or feel it is not their business to initiate, change in those areas.

The sphere of contract, for example, is of every-day importance to the layman in business and to other non-lawyers in many relationships, such as that between landlord and tenant. One of its fundamental social, rather than legal, issues is the extent to which it is desirable to assume an equality of bargaining power between contracting parties or to make adjustments in the law of contract to allow for inequality. But legal expertise is required to untangle the legal knots in which the courts can all too easily become enmeshed in the effort to effect a working compromise between unrestricted freedom of contract and protection of the less powerful, and legal expertise and practical legal experience are equally required to ensure that a tangle once cleared up does not recur. Whether the solution lies to some extent in statutory prohibitions of clauses excluding the ordinary obligations of contract or, in certain areas, may demand a more sophisticated formula, allowing a court or some other body to distinguish between “reasonable” and “unreasonable” exclusion clauses depends on the proper application of these types of expertise.6

6. When Lord Reid in Suisse Atlantique Societe d’Armement Maritime S.A. v. N.V Rotterdamsche Kolen Centrale, [1967] A.C. 361, 406 said that the so-called doctrine of “fundamental breach” [as to the history of which in the English courts see G. Creswell & C. Fifoot, Law of Contract 119-27 (7th ed. 1969) and Harbutt’s Plasticine Ltd. v. Wayne Tank & Pump Co. Ltd., [1970] 2 Q.B. 447] was an attempt to conceal behind a phrase the real social and economic issue of equality of bargaining which "is a com-
Given that Lord Gardiner was concerned with law reform in this sense, his suggestion that there has been no one in England whose job it is to carry it out requires further explanation in a second respect. How is it possible to make such an assertion, bearing in mind the great contribution made by the English judges to the development of the law? Of course, the law cannot stand still. As new problems arising from hitherto unthought of factual situations come before the courts, the law must in the nature of things develop; but whether that development will amount to reform is another matter. Five considerations, some of which, if not entirely new, have at least intensified in recent years, and others, more or less inherent in a system of judge-made law, suggest that English law cannot, at least for the future, rely on that system as the main instrument of law reform.

First, it is no longer possible for the judge in modern English society to make those bold assumptions about family life and about relations between landlord and tenant, employer and employee, citizen and the State which underlie many reforms of a seemingly legal character. On the one hand, he lives in an era where many value assumptions are being challenged; on the other, he does not enjoy quite the unquestioned prestige, the charismatic authority, enjoyed by his Victorian forbearers.

plex problem [affecting] millions of people” and that “the solution should be kept to Parliament,” he was concerned only to draw the line between judicial law-making and law reform ultimately embodied in a statute. But how much should be put in a statute, in what way it should be expressed, and how much experience and policy, are areas where Parliament may be assisted by expert advice. ENGLISH & SCOTTISH LAW COMMISSIONS, JOINT REPORT ON EXEMPTION CLAUSES IN CONTRACTS (1969); LAW COMMISSION, FIRST REPORT: AMENDMENTS TO THE SALE OF GOODS ACT 1893, LAW COM. No. 24 (1969) recommended that in consumer contracts, clauses exempting a party from liability under sections 12-15 of the Sale of Goods Act 1893 should be prohibited, and they have reviewed the arguments for and against control by a judicial test of reasonableness of similar exclusion clauses in other contracts, although they were equally divided as to the desirability of such a test. The English Law Commission has also recommended a total prohibition on exclusion clauses providing for exemption from liability which would otherwise arise between vendor and purchaser or lessor and lessee in respect of quality defects in the dwellings (or of dangerous defects in any premises) dealt with by the contract. See LAW COMMISSION, CIVIL LIABILITY FOR VENDORS AND LESSORS FOR DEFECTIVE PREMISES, LAW COM. No. 40 (1970).

7. There are many reasons for this. The anthropologist and the social psychiatrist may attach some importance to a changed climate in which the father-figure (a judicial role according to JEROME FRANK, LAW AND THE MODERN MIND, 203 (1970)), in the past facilitating judge-made law, has been dethroned. The statistically-minded legal historian may emphasise the relatively high income and consequent sense of security which English judges of the superior courts formerly enjoyed (£5,000 per annum from early in the nineteenth century until 1954). This figure should be compared with the modest salary
As the House of Lords recognised, after a decade or more of attempted judicial innovations designed to provide protection in the matrimonial home for the deserted wife, and after an even longer period of judicial experiments aimed at protecting the economically weaker party to a contract from unfair exemption clauses, reform of the law may raise issues which in present conditions are more appropriately dealt with by the legislature.

Secondly, judge-made reforms are dependent on the issue coming before the courts, and more particularly on the issue reaching an instance which places the court in a position to overrule, ignore, or distinguish any awkward precedents which stand in the way of reform. This chance element is accentuated by another factor, namely, the respective means of the parties to the litigation in question. Between the litigant who qualifies for legal aid and the man, or more often the corporation or government body, for whom costs matter less than a satisfactory legal result, there is a large group of potential litigants deterred by lack of means from fighting a case through the courts and, if necessary, to the House of Lords. Sometimes it may profit a litigant with a business in which the same issue may reoccur, to settle a case in spite of a favourable ruling in, say, the Court of Appeal, in order to prevent a possible rever-

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sal in the House of Lords. Indeed, this is rather more likely since the House of Lords assumed power to overrule its own decisions. In such circumstances the average party to a case is likely to prefer the cash in hand to the doubtful distinction of running a large financial risk in the interests of a possible reform of the law. 

A third and even more important consideration may be summed up by a slight modification of a well-known aphorism: hard cases make not so much bad as unsystematic, incoherent and therefore, from the point of view of the law as a whole, uncertain law. In other words, the hard case invites an equitable decision, which is not bad in itself, but requires a broader base of principle than the judge in that particular case is entitled to provide. If he does reach such a decision, he only prepares the way for a further spate of litigation which may ultimately have to be stemmed by legislation.

An excellent example of this kind of legal development is provided, as far as English law is concerned, by the efforts of the courts to free the principles of liability governing occupiers of land in relation to their visitors from the rigid categorisation of such visitors into invitees, licensees, and trespassers. Before the Occupiers Liability Act 1957 some judges, either by widening the conception of invitee or by stiffening the lower standard of duty required of an occupier vis-à-vis a licensee, had in effect, come near to anticipating the Act of 1957. But the law remained in a very unsatisfactory state because it lacked the broad general principle of a common duty of care owed to visitors in general, which was at last supplied by the Act. The example is by no means of only historical interest. The complexities of the invitee and licensee distinction are still relevant in a number of jurisdictions within the common law area—for example, in the United States and in Canada; and, as far as liability to trespassers is concerned, the English courts are now in a dilemma very similar to that which faced them before the Occupiers Liability Act.

10. American lawyers will bear in mind that in England cases cannot be accepted by solicitors and counsel on a contingent fee basis.

11. See also the history of the wife's "equity" in the matrimonial home (Note 8 supra). These remarks should by no means be taken as showing any lack of appreciation for the bold, reforming judge. It is he who frequently alerts the public to the need for reform. The point made here is that the inherent nature of his function limits his capacity to achieve satisfactory reform.

12. See Herrington v. British Railways Board, [1971] 2 Q.B. 107 in which the Court of Appeal deplored the confused state of the law as to the liability of an occupier toward
Fourthly, it must be remembered that the reforming decision, which is welcomed by the critical academic lawyer, long familiar and impatient with some outdated but hitherto accepted piece of conventional legal wisdom, may be extremely unjust to the unsuccessful party. The latter is, in effect, the victim in a case of retrospective law-making. The danger of injustice by departing from the expected patterns of judicial behaviour was emphasised by the House of Lords when they announced in 1966 that they would no longer be necessarily bound by their own previous decisions. They would, they said, “bear in mind the danger of disturbing retrospectively the basis on which contracts, settlements of property and final arrangements have been entered into and also the especial need for certainty as to the criminal law.”

There is a fifth consideration which it would, in the context of English law, seem natural to bear in mind when assessing the potentialities of the judiciary as a source of law reform. It concerns, of course, the important part played by stare decisis in the English legal system. Clearly there is less scope, at least for rapid change, where that principle prevails than by the clean-sweeping enunciation by the legislature of some new general principle. On the other hand, there is now, as has already been mentioned, the announcement, admittedly in very guarded terms, of the House of Lords that it no longer regards itself as necessarily bound by its own decisions. Although advantage has already been taken of this new power, or rather the assertion of freedom from a self-imposed restriction, and although there are some indications of freedom from their earlier decisions spreading to courts below the level of the House of Lords, it would seem premature to welcome in a new era of judge-trespassers and clearly thought that liability, even toward trespassers, should depend on what was reasonable in the circumstances.


14. Compare, for example, the gradual extension of “cruelty” in matrimonial law, particularly since the Matrimonial Causes Act 1937, culminating in Gollins v. Gollins, [1964] A.C. 644 and Williams v. Williams, [1964] A.C. 698, with the generality of the grounds of divorce set out in the Divorce Reform Act 1970, §§ 1, 2 namely breakdown of marriage proved by, inter alia, behaviour of the respondent “in such a way that the petitioner cannot reasonably be expected to live with the respondent.”


16. Lord Denning M.R. at all events has expressed the view that the Court of Appeal is no longer bound by its own decisions: Eastwood v. Herrod, [1968] 2 Q.B. 923, 934; Ballie v. Lee, [1969] 2 Ch. 17
made reforms. By way of illustration, many of the judiciary are themselves aware of the limitations on this method of law reform, whether or not the individual judge happens by temperament to be a reformer. This awareness may be illustrated by two passages from a book by a former Lord of Appeal, Lord Devlin, who himself brought a critical mind to existing law:

I doubt if judges will now of their own motion contribute much more to the development of the law. Statute is a more powerful and flexible instrument for the alteration of the law than any judge can wield. Its stretch is unlimited; it can overturn existing law, extend an old principle to any distance or reach out for a new one.\textsuperscript{17}

And again:

I feel that I can hear someone saying that you did not make me President of the Bentham Society \[which Lord Devlin was addressing\] in order to preside over the liquidation of the common law. I have not, it is true, paid all the usual tributes to Our Lady the Common Law. I have ventured instead to say that she is not as young as she once was and that she cannot any more indulge in activities which in her youth she would have taken in her stride. Perhaps the time has come for her to hand over a part of her former responsibilities.\textsuperscript{18}

Returning to Lord Gardiner's bold assertion that "it has never been anybody's job in England who would do it to see that our law is in good working order and kept up to date," there is a third and perhaps most obvious question which suggests itself, at least in the mind of the lawyer who has not come to take the English legal system for granted. In many countries it is usual for a Ministry of Justice to keep the whole of the law under review and to plan for its systematic reform;\textsuperscript{19} it would

\textsuperscript{17} Lord Devlin, \textit{Samples of Lawmaking} 23 (1962).
\textsuperscript{18} \textit{Id.} at 119-20.
\textsuperscript{19} For a detailed analysis of the law reforming responsibilities of Ministers of Justice in Continental Europe, see the inaugural lecture of my former colleague on the Law Commission, Professor Andrew Martin, Q.C. He says (\textit{Methods of Law Reform, University of Southampton, 1967} at 8):

It is everywhere the responsibility of the Ministry of Justice to take notice of defects and obsolescence in the law long before these have led to the piling up of unsatisfactory judicial or administrative decisions. Judicial observations, academic comment, parliamentary questions, memoranda from
be natural to think that in England a similar function would be performed by the Lord Chancellor and his Department. But although the Lord Chancellor's Department has greatly expanded in recent years it still bears some marks of its origin in a private secretariat, serving a chief with multifarious responsibilities. 20

To deal specifically with problems of law reform a Law Revision Committee was appointed in 1934, and, that body having ceased to function on the outbreak of war in 1939, a Lord Chancellor's Law Reform Committee was set up in 1952. 21 The latter committee deals only with the civil law, as the responsibility for the criminal law rests with the Home Secretary, who in turn appointed his Criminal Law Revision Committee in 1959

The achievements of these standing committees on law reform 22 have professional organizations and other representative bodies, and complaints from members of the public are carefully noted. The general trend is towards some kind of an early warning system, so designed that all responsible criticism (even isolated criticism, by one single judge or academic lawyer of standing) should come almost automatically to the notice of whoever on the staff of the Ministry is responsible for keeping that particular branch of the law under constant review. In the larger Ministries of Justice, where the Legal Division is sub-divided into specialist sections, the work of preparing for consolidation, reform and codification is to some extent decentralised. In practice, however, there is a great deal of central planning everywhere, and much of it is medium-term or long-term planning.

20. What was written in The Reform of the Law 13 (G. Williams ed. 1951) is still broadly true:

He [the Lord Chancellor] is the principal legal adviser to [and it may be added involved in the general political decisions of] the Cabinet; he is Speaker [i.e., presides over] and a leading Government spokesman in the House of Lords where he assists in most of the major legislative measures; he is chairman of the House of Lords in its aspect of final court of appeal; as "Keeper of the King's Conscience" he has a substantial ecclesiastical patronage—three times as much as the two Archbishops together—which takes up much of his time; he is the President of the Supreme Court, which involves much legal patronage and important procedural responsibilities in connection with the administration of the courts. Over fifty years ago a very energetic Lord Chancellor described his position as a "two men's job"; and twenty years later Lord Haldane said he doubted if two men could then do the job properly. It has not become lighter in the interval.

21. In 1952 the Lord Chancellor also set up a Private International Law Committee.

22. A survey and assessment of the work of these committees was made by Professor E. C. S. Wade, The Machinery of Law Reform, 24 Mod. L. Rev. 3 (1961). As Professor Martin (supra note 19 at 13) points out, it is indicative of their position that it was left to the private initiative of an academic lawyer to undertake such a comprehensive survey. Since Professor Wade's article, it should be added, the Criminal Law Revision Committee has made eight further reports, as has the Law Reform Committee. Among
been important, but of limited scope. They can only deal with such matters as are specifically referred to them by the Lord Chancellor and the Home Secretary respectively, and these two Ministers have many pressing preoccupations apart from law reform. The members of the committees, drawn from the judiciary and the legal profession, practising and academic, with the assistance of legally trained officials acting as secretaries, have neither the jurisdiction nor, in view of the commitments of their everyday jobs, the time to consider law in the round and on that basis to work out an overall strategy of reform with all the implications of wide-sweeping consultation in and outside the sphere of the law which such a programme would involve.

II

The foregoing critical sketch of the machinery of law reform which existed in England before the Law Commissions Act 1965 may help to explain the underlying purposes of that Act and the aims of the Law Commissions in giving effect to it. In describing the main features of the Act, and in summarising the work done under it, attention has been directed mainly to the deficiencies of the earlier system—or lack of system—for dealing with law reform and to the ways in which the Act, and more than five years of practical work by the Commissions, have dealt with these deficiencies.

It is not suggested that the innovations introduced by or under the Act can claim originality on the world scale, although it may well be that, in its combination of various features, what may be called the British "Law Commission approach" to the problem of effecting law

the former, should be mentioned Criminal Law Revision Committee, report on Theft and Related Offences, CMND. No. 2977 (1966) now substantially implemented in the Theft Act of 1968.

23. In Appendix 4 to its Law Commission, Fourth Annual Report, Law Com. No. 27 (1968-69) the Law Commission listed 42 reform agencies in the Commonwealth, the United States and other countries, with some common law tradition. The oldest body mentioned is the National Conference of Commissioners on Uniform State Laws of the United States, set up in 1892; the most recent is the Ceylon Law Commission, set up by an Act of 16 January 1969, which closely follows the United Kingdom Law Commissions Act. To this list must now be added the Canadian Law Reform Commission 1970. The Chairman of the English Law Commission, Mr. Justice Scarman, and the present writer have contributed a joint paper to the Commonwealth Law Conference at New Delhi, 1971, in which they find it possible to say that, at least as far as the Commonwealth is concerned, "lawyers have come to accept that a fully developed legal system should contain a legal institution whose duty it is to keep the law under review, with the object of promoting its systematic development and reform."
reform in a democratic country does mark a significant advance of more than purely local interest. And in the United Kingdom, although there has never been any earlier institution set up by Act of Parliament as a permanent agency to keep all the laws under review, it may be said that some precedent was provided by the attempts at law reform made between 1640 and 166024 and the appointment in the nineteenth century of Criminal Law and Real Property Commissions.25 Yet the influence of these not very exact precedents was minimal compared with the much more recent proposals for a new law reform agency made by Lord Devlin in 196226 and, in greater detail, by the authors of a chapter on “The Machinery of Law Reform” in Law Reform Now, published in 1963. One of those authors, Gerald Gardiner, Q.C., became Lord Chancellor in the two following Labour governments and in that capacity was responsible for introducing the Law Commissions Act 1965, the other, Andrew Martin, Q.C., served five years as one of the first Law Commissioners.

The text of the Law Commissions Act is given as Appendix A to this article. At the risk of over-simplification, comment is here concentrated under four main headings, prefaced by a note on the implications of the Act for the United Kingdom as a whole and followed by a short note on the typically British problem of the consolidation and revision of statutes.

Geographical Scope of the Law Commissions Act

Scotland, unlike Wales, has a legal system and body of law separate from that of England. Therefore, the Act of 1965 provides Scotland with a Scottish Law Commission consisting, like its English counterpart, of five members.27 Again like England, the chairman of the Commission is a judge, first Lord Kilbrandon, now Lord Hunter of the Court of Session. The Act requires the two Commissions to work in close cooperation.

24. See Veall, supra note 1, at 79-84.
26. Lord Devlin, Samples of Lawmaking 27 (1962). “I believe that it would be beneficial if there were a small body of men who devoted the whole of their time, working perhaps with the aid of a larger body of consultants meeting from time to time, to a systematic tidying-up of the law as well as to making proposals for wider reforms.”
27. Only two, however, have full time appointments. It is a consideration of some general interest—not only in the British context—that the problems of a separate system of law applying to a relatively small population may not be substantially less than those arising under a system covering a large population, but it is common to think that the former justifies a more modest law reform agency than the latter.
tion, and in fact a number of their projects have been 28 or are being 29 jointly run. This article has looked at the institutional machinery for law reform mainly from the English and Welsh point of view, and the same limitation applies to the following review of the practical working of the Law Commissions Act, but, broadly speaking, it is thought that, both in respect of the past deficiencies of the machinery for law reform and with regard to experience under the Act, it is possible to speak for Great Britain as a whole. As far as Northern Ireland is concerned, the Law Commission is responsible for the field of law which is reserved to the Parliament at Westminster. A Director of Law Reform was appointed in 1965 by administrative order in Northern Ireland to deal with matters within the legislative competence of the Province.

The Law Commissions System

Comprehensiveness

The Law Commissions take under review all the law. This comprehensive approach is important, because, as has already been indicated, judicial innovations introduced when a particular case comes before the courts—indeed even statutes passed to deal with special topics—are apt to create almost as many problems as they solve.

This does not mean that nothing can be done within or independently of the Commissions until they have ready a complete codification of the whole of the law. In the first place, the Commissions have used their power under section 3(1) of their Act to make an "immediate remedial response" to situations which call for urgent attention, whether called to their notice from outside the Commissions or raised on their own initiative. This normally leads to a formal request by the government agency concerned to make a report with proposals for reform under section 3(1)(c) 30. Second, the former agencies for law reform can still


29. The two Commissions are jointly engaged in the preparation of a common contract code for their two countries.

30. A recent example is provided by the advice given in Law Commission, Limitation Act of 1963, Law Com. No. 38 (1970). It was particularly concerned with hardship created by a decision of the Court of Appeal, Lucy v. Henley, [1970] 2 Q.B. 393 (C.A.), in interpreting that Act, as a result of which the dependents or personal representatives of persons who die as a result of diseases contracted in industry might, where the nature of the disease and its cause does not become immediately obvious, find themselves deprived of any remedy a year after the death of the victim of the disease.
be used to supplement the work of the Law Commission. Indeed, the Law Commissions can and sometimes do recommend that a particular problem be investigated by another body rather than themselves. In the third place, the Law Commissions are adopting for the most part a "gradualist" rather than an "all-at-once" technique of reform. What is important is that the Commissions seek to maintain a general awareness of the whole pattern of the law into which a specific change can be specifically fitted. Moreover, it is becoming increasingly common for government departments concerned with "programme legislation," with which in its initial stages the Law Commissions have not been concerned, to ask the advice of the Commissions under section 3(1)(e) of the Act to ensure that their legislation is in keeping with other branches of the law, either as at present or as likely to be reformed. This comprehensive approach of the Law Commissions, however, raises the question whether it can be reconciled with undoubted ultimate responsibility of the government of the day for the general pattern of the law. This question can only be answered in the light of the second feature of the Law Commissions system here considered.

**Independence of Advisory Function**

As the function of the Law Commissions is, in any event, advisory only—it is for the government or for a private member, who succeeds in getting the necessary Parliamentary time, to introduce legislation implementing the Commissions' proposal—it may be thought that the independence of the Commissions is a matter of somewhat theoretical importance. But governments have many other preoccupations than law reform. In the democratic party system of government, law reform is not a topic which normally excites the party whips who are anxious to

31. An important recent example of an ad hoc Royal Commission on a law reform subject is that on assizes and quarter sessions of which Lord Beeching was Chairman. The Royal Commission Report, Cmd. No. 4153 (1970), has been substantially implemented in the Courts Bill of 1970. Generally speaking, the Law Commissions have left procedure and organisation of the courts alone and concentrated on substantive law. They would not regard this as a permanent feature of their work, but would probably feel that, in the initial phase of new institutions, before the Commissions have gathered weight and momentum, these matters, perhaps the most resistant to change owing to the many powerfully entrenched interests affected, are better left for the special treatment of a Royal Commission or direct governmental initiative.

give preference to proposals which will win a favourable response from the electorate. It is, therefore, important that there should be an independent body which can put forward proposals for law reform on their merits without undue regard to passing political considerations.

The two Commissions are not, strictly speaking, departments of government, although they are part of the machinery of government. Those appointed as Commissioners—five for each Commission, with a maximum term of office of five years, subject to renewal—\(^3\)—are all lawyers.\(^4\) But they do not formally represent the views of the different branches of the law, although the fact that the chairman of each Commission is (while not under the Act required to be) a member of the higher judiciary is an indication of the independent role the Commissions are expected to play.

The Commissions take the initiative in proposing programmes of items for investigation with a view to reform, and then their reports on these items, once made, must be presented to Parliament and published. The appropriate Ministers (the Lord Chancellor for the Law Commission, the Secretary of State for Scotland, and the Lord Advocate for the Scottish Law Commission) have, it is true, a power to veto a proposed investigation, but the power has been rarely used. In any event, the proposed investigation is normally set out by the Commissions in very general terms in a situation where it would be politically difficult for an administration to refuse to allow even an enquiry. However, it must be mentioned that the Law Commission was unable to pursue further an enquiry into liability for "dangerous things and activities" when it came to the

\(^3\) The first English Commissioners were all appointed for five years. Four were reappointed for varying terms, to provide continuity of experience, in 1970, and one returned to practice at the Bar. The Scottish Law Commission was originally appointed with a full-time Chairman and three part-time Commissioners. On the completion of the term of office of one of the latter in 1968, his place was taken by another part-time Commissioner and a further Commissioner was appointed on a full-time basis. Subject to these changes, the Law Commissions have begun their second quinquennium with the same body of Commissioners as initially in 1965.

\(^4\) The Law Commission originally consisted of a High Court Judge (chairman), a Queen's Counsel who had had an extensive common law practice, a second Queen's Counsel who had combined practice with a part-time university chair in international and comparative law, a professor of commercial law who had also had a considerable number of years experience of practice as a solicitor, and the present writer. There was at the time some feeling that the point of view of solicitors should be more strongly represented, and a special consultant, a very experienced solicitor, was therefore attached to the Commission, constituting in effect a sixth Commissioner. As the new appointee in 1970 was a solicitor, the post of special consultant was allowed to lapse, although the solicitor concerned continued to assist the Commission in a part-time capacity.
conclusion that what was really involved was the whole principle of liability for negligence in personal injury cases, 35 which it was not allowed to question even by launching an investigation. Further, the Law Commission's proposal that an enquiry should be undertaken on a broad basis into administrative law, although not by the Commission but by a widely representative committee or Royal Commission, 36 was not accepted. The Commission was asked by the government to undertake, as a first step, a more modest enquiry into the present remedies for the judicial control of administrative decisions.

Delicate issues are at stake in these fields. It can at least be said that, in the long run, the existence of the Commissions ensures that the areas of law affected, even if not immediately subject to a full investigation with proposals for reform, are in one way or another brought to the notice of the public. For one thing, no veto can prevent the Commissions from making such comments on their work, as they think fit in the Annual Report which each Commission is required to make and which the appropriate Ministers are bound to present to Parliament.

The independence of the Commissions is not a right to give un instructed and arbitrary advice, but rather entails independence in reaching decisions after an exceptional degree of consultation with all the interests affected. The independence of the Commissions is thereby strengthened, because Parliament may be more ready to accept their advice when it knows these proposals have been made only after a wide canvassing of different viewpoints. Consultation is nothing new in law reform. Nevertheless, because in scale and method of consultation the

35. See Law Commission, Civil Liability for Dangerous Things and Activities, Law Com. No. 32 (1970). The report, although in a sense leading to no conclusion, was able to analyse, at length, the present very confused law governing strict liability at common law for dangerous things and activities. It also clearly rejected any proposal for reform on lines similar to those laid down in the American Law Institute's Restatement of Torts, §§ 519-20 (1938) which imposes strict liability for "ultra-hazardous activities." It was not at all opposed to strict liability as such, but it considered that the test proposed in the Restatement would make for uncertainty. Further, after a seminar attended by a wide cross section of lawyers (a frequent preliminary consultative device of the Commissions), the Commission took the view that what was more relevant to strict liability was not the nature of the danger involved, but the respective positions of the plaintiff and the defendant with regard to the practical possibility of insuring against the accident in question. This in turn led to the insurance position in regard to personal injury and to the question of substitution of strict liability for the negligence principle there applicable, and thus the report brought the veto into operation.

Commissions have made many innovations, it seems justifiable to give it special prominence. It may be that the techniques of consultation which the Law Commissions have developed are at least as important as the actual reforms which they have proposed because much of the difficulty of achieving law reform has been a problem of means rather than ends.

Consultation

What is perhaps new in the consultative techniques evolved by the Commissions—not, it must be noted, laid down in their Act—is the manner, the timing and the scale of the consultation. The process can best be illustrated by following the course of a project of the Law Commissions from the time that it appears as an item in an approved Programme until the stage when the completed report on the item is laid before Parliament with a draft Bill giving effect to the recommendations made in the report.87

First, a detailed Working Paper with provisional recommendations, usually including information about the relevant legal position in other countries,88 is prepared by a small team in the Law Commission, headed by one or two Commissioners. After the Working Paper has been discussed at length by the Commission as a whole and, as a result, often rewritten or amended, it is distributed in an edition of about 1500 copies, not only to the various interests in the legal sphere—the judiciary, practising, and academic lawyers (the latter two categories have set up special committees to deal with Law Commission papers)—but also to many lay organisations particularly interested in the subject-matter. Further, it is sent, as a matter of course, to the relevant government departments and to the national press, both general and legal.89 It is worthy of note

87. The practice of accompanying reports with a draft Bill, always an excellent test of the feasibility of a proposal, was rare before 1965. Following the example set by the Law Commissions, which normally attach a draft Bill to each of their Reports, it has become more common for any body making proposals involving legislation.

88. The Law Commissions are required by § 3(1)(f) of the Act to obtain information on the relevant law of other countries.

89. The legal “weeklys” generally print a summary of the Working Paper which the Commissions are careful to provide. Working Papers occasionally feature in the general press. Final reports, however, are given very considerable coverage in the national “dailys,” sometimes with “leader” articles commenting on them. The Law Commissions take considerable pains to prepare appropriate press summaries which may bring out the salient issues of interest to lay readers. In general, it may be said that the Law Commissions have attached great importance to keeping their work before the general public
that the Commissions, although they welcome informal oral consultations, do not hold anything in the nature of formal hearings. On the whole their experience is that the most satisfactory results are obtained from carefully prepared Working Papers which are not content to ask questions but which also set out in detail the basic material from which answers can be given, with some guidance as to the provisional thinking of the Commissioners, and a survey of other possible solutions with their accompanying advantages and drawbacks. It has been found that although this technique involves much work, in the long run it spares the Commission many irrelevant and time-wasting suggestions.

After an interval of perhaps six months to a year the comments received on the Working Paper are considered, first by a specialist team within the Commission who, with or without a general consultation with the Commission as a whole depending on the tenor of the comments received, proceed to prepare a draft Report. This Report, generally at this stage without an accompanying draft Bill, is debated by the whole Commission and sent back for any necessary amendments and the addition of the Bill, which is supplied by Parliamentary draftsmen attached to the Commission, in often prolonged consultation with the Commissioners and their staff. The Report as presented to the Lord Chancellor (in the case of the Law Commission for England and Wales) will not only outline the present law in the area covered by the Report and set forth the recommendations therewith, together with the implementing draft Bill, but it will also deal in detail with the process of consultation, including the names of those consulted and (unless there is some problem of confidentiality) the views they have expressed. The Law Commissions see the ultimate object of the elaborate process of consultation as assisting Parliament on matters of often great technical detail which can seldom be adequately investigated in the course of Parliamentary

and the individual Commissioners speak quite frequently on the subject at meetings, over the radio, and in the form of articles for the legal and general press. Their underlying thought has been that law reform is a cause which must be kept in the public eye if it is to achieve practical results.

40. Daily contact in a common organisation between representatives of the highly specialized and expert small corps of Parliamentary Draftsmen and the lawyers of the Commission, without such training but with sometimes critical ideas on British drafting, has probably been of considerable advantage to both sides and to the draft legislation for which the Law Commissions are responsible. In the past, this kind of dialogue, at least in such a close and continuous form, was more uncommon in the normal relationship between the office of Parliamentary Counsel and the government department promoting legislation.
debate. This assistance is ineffective unless the scope and nature of the consultation is clearly set out on the face of the Report.

Adequacy of Technical Resources

The English Commissioners are assisted by a total staff of about 50, of whom slightly over half are trained lawyers. The Scottish Law Commissioners have a relatively small staff. The resources which have been made available to the Law Commission, although not particularly striking by comparison with, for example, the departments concerned with law reform in some European Ministries of Justice, are considerable by earlier British standards. The Law Commission has thereby undoubtedly been helped to produce, within five years, a large number of Working Papers and final reports, a fact which, even apart from their content, is not without importance. A new institution, in a sense on trial, has been seen by Parliament and the public as capable of producing results.

An Addendum on Consolidation of Statutes and Statue Law Revision

There is an as yet unmentioned aspect of the Law Commissions' work specifically referred to in their Act, which requires some comment. The comment should be brief, first, because the problems involved are of a peculiarly British character—they are by no means so acute even in those parts of the Commonwealth which in general follow the common law tradition; and second, because it is doubtful how strictly relevant they are to an article primarily concerned with the institutional machinery for law reform. Nevertheless, it would give a misleading impression of the work of the Law Commissions to suppress all reference to the consolidation of statutes and to statute law revision.

By consolidation is meant the preparation for re-enactment of a number of older statutes, dealing with the same or allied subject-matter, in a single new Act rationally arranged and, as far as possible, expressed in modern language. The present state of the Statute Book, including statutes on an enormous variety of subjects that spread over some 700 years, is a formidable barrier to the understanding and use of that very large part of the law in the United Kingdom which is embodied in a statutory form. But the Law Commission did not invent the technique

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41. The total average cost of the Law Commission for the years 1967-68, 1968-69, and 1969-70 was about £160,000 per annum (independent of rent and rates for buildings and stationery). The comparable figure for the Scottish Law Commission was £40,000.
of consolidation—it has been going on for over a hundred years—although, it is true that it has been to some extent a secondary responsibility of the relatively small and much overworked office of Parliamentary Counsel, the primary function of which is to draft all of the central government Bills, irrespective of the department from which the proposal for legislation comes. What the Law Commissions have done, pursuant to their statutory responsibilities in this field, is to provide, from time to time, a programme of statutes to be consolidated and a scheme of priorities. Thus, it was decided at an early stage, for example, to concentrate on two masses of legislation, namely those concerned with taxation and with rent restriction, which are of great practical importance to lawyer and layman alike. The work undertaken has resulted in the consolidation of two statutes, the Income and Corporation Taxes Act 1970 and the Rent Act 1968.

In one respect, the Law Commissions have made a new contribution to the technique of consolidation. A particular difficulty of consolidation is to satisfy the Joint Select Committee of the two Houses of Parliament, to which Consolidation Bills are sent, that no change has been made in the law. Some latitude to cover minor matters is allowed by the Consolidation of Enactments (Procedure) Act 1949, but the Law Commissions have found that work on consolidation could easily be frustrated because it could not be sensibly done without some adjustments of the law of little real importance but too substantial to come within the procedure of the 1949 Act. The Law Commissions have now been able to secure agreement on a procedure whereby what is essentially a Consolidation Bill is accompanied by reasonable Law Commission recommendations for change. If approved by the Joint Select Committee, the Bill goes forward like a pure Consolidation Bill and is normally ensured of a speedy formal enactment.

Closely allied with consolidation is what is technically called statute law revision. This involves not reform or even re-enactment, in an organised and modern form, of old statutes, but the total repeal of statutes which no longer have any practical effect, because they have, without being ever formally repealed, been entirely superseded by later Acts or they deal with situations which, in their nature, can never arise again—i.e., they are "spent."

Parliamentary Counsel have in recent years been responsible for statute law revision, as well as consolidation and statute law revision Bills, which also go before a Joint Select Committee. Here too, under their general
responsibility for the planning of statute law revision, the Law Commissions have attempted some innovations of technique. They have tried to widen the category of obsolete statutes—i.e., not merely those which have been superseded or spent but also those which have ceased to have any practical utility. The task is delicate, as Parliament is properly jealous of its prerogative in these matters; but a procedure has come to be accepted whereby, in a Bill of statute law revision type, statutes which are for all practical purposes dead letters (although not formally superseded or “spent”) may be included. The important point is that these Bills are given the relatively speedy procedure of the Joint Select Committee of the two Houses and do not have to compete for a place with ordinary legislation.

III

An article which is concerned with the institutional problems of law reform—with methods rather than with results—would seem misdirected if it devoted too much attention to the actual reforms which have been proposed or are under consideration by two particular law reform agencies in the context of their interconnected legal systems. In any event, the information is easily available in the Annual Reports of the Law Commission and of the Scottish Law Commission from 1965-66 and 1970-71.

Nevertheless, a member of the Law Commission may reasonably be expected to give some general impression of the fields of law with which he, together with his colleagues, has been concerned over the past five years and some indication of the Commission’s activities in the future. Such a survey, however, must be distinguished from a list of “achievements.” A more reliable test for the latter is the list of reports of the Law Commission given in Appendix C, together with


43. In Appendix B are set out the Published Working Papers (in Scottish terminology Memoranda) and Reports of the two Commissions from 1965 to January 1971.
the extent to which they have been or are in the process of being translated into legislation.

The Law Commission is engaged in codifying the law of contract (jointly with the Scottish Law Commission), the law of landlord and tenant, the criminal law, and family law. The contract code and the landlord and tenant code are being drafted more or less as a single operation. This has not, however, ruled out projects in advance of the codes, such as a report on sections 12-15 of the Sale of Goods Act 1893 and the extent to which parties should be permitted to contract out liability under those sections and another report on commercial tenancies under Part II of the Landlord and Tenant Act 1954. The criminal code and the code of family law are being built up stage by stage. Thus, before the Law Commission was established the Criminal Law Revision Committee had taken in hand the drastic simplification of a number of crimes involving dishonesty which finally resulted in the Theft Act 1968. The Law Commission followed with a draft Bill on broadly similar lines covering crimes of damage to property, and is at present engaged in preparing reports on forgery and perjury. At the same time, with the assistance of an outside Working Party, it is working out the general principles (mental element, parties to crime, inchoate offences, etc.) applicable over the whole field of the criminal law. Similarly in the sphere of family law a number of reports of the Law Commission have

47. See Published Working Papers 17, 29, 30, and 31. No. 17 is an introductory paper on the general principles of the criminal law. No. 29 deals with the territorial and extraterritorial extent of the criminal law. Nos. 30 and 31 are concerned with strict liability in regulatory legislation and the mental element in crime generally.
48. Law Commission, Reform of the Grounds of Divorce: The Field of Choice, Law Com. No. 6, Cmdn. No. 3123 (1966) is interesting in regard to its technique. It was in the form of an Advice by the Lord Chancellor to consider the practical implications of the proposals put forward in the report, "Putting Asunder," of the Group appointed by the Archbishop of Canterbury to consider from the point of view of the Church of England the grounds for divorce. The Law Commission did not, in view of the socially controversial issue involved, directly make recommendations but set out various possible courses of reform and their practical implications. The matter was taken further by two Private Members' Bills, on which the Law Commission gave assistance, and the second of these eventually became law as the Divorce Reform Act of 1969. On family law matters see also Law Commission, Blood Tests and Proof of Paternity, Law Com. No. 16 (1969); Law Commission, Conjugal Rights, Law Com.
been published, some of which have already been implemented by Parliament. The Law Commission is now preparing a report on matrimonial property.

Apart from work on codes, the Law Commission is working on a variety of reforms concerned with the transfer of land, and, at different points, has touched on the law of torts, as, for example, with regard to the limitation of actions, assessment of damages, civil liability for animals and for defective buildings, and the categories of strict liability (Rylands v. Fletcher liability and liability for nuisance and for independent contractors) which exist at common law. It has recently been engaged in a simplification of the remedies—in particular certiorari, prohibition, and mandamus—available for judicial control of the administration. To these topics should be added a miscellaneous category of projects which usually arise from requests for advice from government departments or from suggestions from the legal or general public.

Finally, mention should be made of a report on the interpretation of statutes, a subject of direct importance to the Commissions (the report was made jointly with the Scottish Law Commission) which must necessarily use the instrument of statutes to bring about their proposals. The report has not as yet resulted in legislation, but it may have served a useful purpose in reviewing the rather confused case law in this field and in helping to encourage a more purpose-directed approach to interpretation than the rather literal approach which has often characterized, at

49. These include the Divorce Reform Act of 1969, establishing “breakdown” as the basic ground for divorce; the Matrimonial Causes and Property Act of 1970, dealing with financial provision in matrimonial proceedings; and the Law Reform (Miscellaneous Provisions) Act of 1970, abolishing the old action for breach of promise of marriage.

50. But see note 35 supra.

51. See note 36 supra and the accompanying text which explains the narrow scope of this enquiry.

52. A typical example is the report Law Commission, Administrative Bonds, Law Com. No. 31 (1970). The necessity for administrative bonds had been questioned in a suggestion for reform made by the Law Society, the professional organisation of solicitors. It is also interesting in that it concerned a question of procedure; on the whole—at least on a major scale—the Law Commission has been rather slow to take up procedural matters for the reasons given in note 31 supra.

least until recently, the interpretation of statutes by judges in the United Kingdom.

IV

In concluding this article, it seems desirable to return to its starting point. Law reform, in the sense of changes in the law which require the goodwill and technical cooperation of lawyers, if it is ever to be achieved, needs an institutional framework. In the nineteenth century great reforms were effected under the all-pervading influence of Benthamite philosophy, but the task was easier because law was assigned a severely limited role in society. Today much more is expected of the legal system, but there is no immediately obvious scale of values by which the law reformer can operate. An adequately staffed legal institution, independent of the executive but forming part of the machinery of government, is needed as a preliminary to the democratic decisions of the legislature: (1) to organise a system of wide-reaching consultation regarding the aims to be pursued; (2) to devise, in the light of the best technical experience, the means to those aims, and (3) to symbolize and to maintain the interest of the community in securing a legal system which brings modern law to the needs of modern man.

APPENDIX A

THE LAW COMMISSIONS ACT 1965

An Act to provide for the constitution of Commissions for the reform of the law [15th June 1965]

The Law Commission. 1.—(1) For the purpose of promoting the reform of the law there shall be constituted in accordance with this section a body of Commissioners, to be known as the Law Commission, consisting of a Chairman and four other Commissioners appointed by the Lord Chancellor.

(2) The persons appointed to be Commissioners shall be persons appearing to the Lord Chancellor to be suitably qualified by the holding of judicial office or by experience as a barrister or solicitor or as a teacher of law in a university.

(3) A person appointed to be a Commissioner shall be appointed for such term (not exceeding five years)
and subject to such conditions as may be determined by the Lord Chancellor at the time of his appointment, but a Commissioner may at any time resign his office and a person who ceases to be a Commissioner shall be eligible for reappointment.

(4) A person who holds judicial office may be appointed as a Commissioner without relinquishing that office, but shall not (unless otherwise provided by the terms of his appointment) be required to perform his duties as the holder of that office while he remains a member of the Commission.

(5) In this section “the law” does not include the law of Scotland or any law of Northern Ireland which the Parliament of Northern Ireland has power to amend.
the terms of his appointment) be required to perform his duties as the holder of that office while he remains a member of the Commission.

1907 c. 51. (5) Subsection (4) above shall have effect, in relation to a salaried sheriff-substitute, notwithstanding anything in section 21 of the Sheriff Courts (Scotland) Act 1907 (which among other things prohibits such a sheriff-substitute from being appointed to any office except such office as shall be by statute attached to the office of sheriff-substitute).

Functions of the Commissions. 3.—(1) It shall be the duty of each of the Commissions to take and keep under review all the law with which they are respectively concerned with a view to its systematic development and reform, 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, and for that purpose—

(a) to receive and consider any proposals for the reform of the law which may be made or referred to them;
(b) to prepare and submit to the Minister from time to time programmes for the examination of different branches of the law with a view to reform, including recommendations as to the agency (whether the Commission or another body) by which any such examination should be carried out;
(c) to undertake, pursuant to any such recommendations approved by the Minister, the examination of particular branches of the law and the formulation, by means of draft Bills or otherwise, of proposals for reform thereto;
(d) to prepare from time to time at the request of the Minister comprehensive programmes of consolidation and statute law revision, and to
undertake the preparation of draft Bills pursuant to any such programme approved by the Minister;

(e) to provide advice and information to government departments and other authorities or bodies concerned at the instance of the Government with proposals for the reform or amendment of any branch of the law;

(f) to obtain such information as to the legal systems of other countries as appears to the Commissioners likely to facilitate the performance of any of their functions.

(2) The Minister shall lay before Parliament any programmes prepared by the Commission and approved by him and any proposals for reform formulated by the Commission pursuant to such programmes.

(3) Each of the Commissions shall make an annual report to the Minister on their proceedings, and the Minister shall lay the report before Parliament with such comments (if any) as he thinks fit.

(4) In the exercise of their functions under this Act the Commissions shall act in consultation with each other.

4.-(1) There shall be paid to the Commissioners of the Law Commission and the Scottish Law Commission, other than a Commissioner who holds high judicial office, such salaries or remuneration as may be determined, with the approval of the Treasury, by the Lord Chancellor or the Secretary of State, as the case may be.

(2) In the case of any such holder of the office of Commissioner as may be so determined, there shall be paid such pension, allowance or gratuity to or in respect of him on his retirement or death, or such contributions or other payments towards provision for such a pension, allowance or gratuity, as may be so determined.
(3) As soon as may be after the making of any determination under subsection (2) of this section, the Lord Chancellor or the Secretary of State, as the case may be, shall lay before each House of Parliament a statement of the amount of the pension, allowance or gratuity, or contributions or other payments towards the pension, allowance or gratuity, payable in pursuance of the determination.

(4) The salaries or remuneration of the Commissioners, and any sums payable to or in respect of the Commissions under subsection (2) of this section, shall be paid out of moneys provided by Parliament.

5.--(1) The Lord Chancellor may appoint such officers and servants of the Law Commission, and the Secretary of State may appoint such officers and servants of the Scottish Law Commission, as he may, with the approval of the Treasury as to number and conditions of service, determine.

(2) The Treasury may make regulations providing for the counting of service as an officer or servant of either of the Commissions as pensionable service in any other capacity under the Crown and vice versa.

(3) The power of the Treasury to make regulations under subsection (2) of this section shall be exercisable by statutory instrument, and any statutory instrument made by virtue of that subsection shall be subject to annulment in pursuance of a resolution of either House of Parliament.

(4) The expenses of the Law Commission and the Scottish Law Commission, including the remuneration of officers and servants appointed under this section, shall be defrayed out of moneys provided by Parliament.

Supplemental.

6.—(1) In Part II of Schedule I to the House of Commons Disqualification Act 1957 (bodies of which all members are disqualified under that Act)—

(a) after the entry "The Lands Tribunal for Scot-
land” there shall be inserted the entry “The Law Commission”, and
(b) after the entry “The Scottish Land Court” there shall be inserted the entry “The Scottish Law Commission”,

and the like amendments shall be made in the Part substituted for the said Part II by Schedule 3 to that Act in its application to the Senate and House of Commons of Northern Ireland.

1876 c. 59 1887 c. 70.

(2) In this Act “high judicial office” has the same meaning as in the Appellate Jurisdiction Act 1876 as amended by the Appellate Jurisdiction Act 1887, and “the Minister” means, in relation to the Law Commission the Lord Chancellor and in relation to the Scottish Law Commission the Secretary of State and the Lord Advocate.

Short title. 7 This Act may be cited as the Law Commissions Act 1965

APPENDIX B

LIST OF THE LAW COMMISSION’S PUBLICATIONS

1. Working Papers published:

No. 1. Transfer of Land: Root of Title to Freehold Land (this is the subject of Law Com. No. 9)

No. 2. Draft Proposals on Powers of the Court of Appeal to Sit in Private and Restrictions upon Publicity in Legitimacy Proceedings (this subject was covered by Law Com. No. 8)

No. 3 Restrictive Covenants (this is the subject of Law Com. No. 11)

No. 4. Should English Wills be Registrable?

No. 5 Liability of Trade Vendors of New Dwelling Houses to First and Subsequent Purchasers (First Paper)

No. 6. Liability of Vendors and Lessors for Defective Premises (Second Paper) (This Working Paper and No. 5 above are dealt with in Law Com. No. 40)
No. 7. Provisional Proposals for Amendments to the Landlord and Tenant Act 1954, Part II (Business Tenancies) (this is the subject of Law Com. No. 17)

No. 8. Provisional Proposals Relating to Obligations of Landlords and Tenants

No. 9. Family Law: Matrimonial and Related Proceedings—Financial Relief (this is the subject of Law Com. No. 25)

No. 10. Proposals for Changes in the Law Relating to Land Charges Affecting Unregistered Land and to Local Land Charges (partly covered by Law Com. No. 18)

No. 11. Powers of Attorney (this is the subject of Law Com. No. 30)

No. 12. Proof of Paternity in Civil Proceedings (this is the subject of Law Com. No. 16)

No. 13. Exploratory Working Paper on Administrative Law (this is the subject of Law Com. No. 20)

No. 14. Interpretation of Statutes (Joint Working Paper—Scottish Law Commission Memorandum No. 6) (this is the subject of Law Com. No. 21)

No. 15. Family Law: Arrangements for the Care and Upbringing of Children

No. 16. Provisional Proposals Relating to Termination of Tenancies

No. 17. Codification of the Criminal Law—General Principles—The Field of Enquiry

No. 18. Provisional Proposals Relating to Amendments to Sections 12-15 of the Sale of Goods Act 1893 and Contracting out of the Conditions and Warranties Implied by those Sections (Joint Working Paper—Scottish Law Commission Memorandum No. 7) (this is the subject of Law Com. No. 24)

No. 19. Loss of Services

No. 20. Nullity of Marriage (this is the subject of Law Com. No. 33)

No. 21. Polygamous Marriages (this is the subject of Law Com. No. 42)

No. 22. Restitution of Conjugal Rights (this is the subject of Law Com. No. 23)
No. 23. Malicious Damage to Property (this is the subject of Law Com. No. 29)

No. 24. Transfer of Land—Rentcharges


No. 26. Criminal Law—Forgery

No. 27. Personal Injury Litigation: Assessment of Damages, Itemisation of Pecuniary Loss and the Use of Actuarial Tables as an Aid to Assessment

No. 28. Family Law: Jurisdiction in Matrimonial Causes (other than Nullity)

No. 29. Codification of the Criminal Law: Subject III: Territorial and Extra-territorial Extent of the Criminal Law


No. 31. Codification of the Criminal Law: General Principles—the Mental Element in Crime

No. 32. Transfer of Land: Land Registration (First Paper)

No. 33. Criminal Law: Perjury and Kindred Offences

No. 34. Family Law: Jactitation of Marriage

No. 35. Family Law: Solemnisation of Marriage

No. 36. Transfer of Land: Appurtenant Rights

No. 37. Transfer of Land: Registration (Second Paper)

No. 38. Family Law: Jurisdiction in Suits for Nullity of Marriage


No. 40. Administrative Law

No. 41. Personal Injury Litigation—Assessment of Damages

No. 42. Family Law: Family Property Law

2. Publications which have been laid before Parliament under sections 3(2) and (3) of the Law Commissions Act 1965 and publications which have been presented to Parliament as Command Papers:

Law Com. No. 1. First Programme of the Law Commission

Law Com. No. 2. Law Commission’s First Programme on Consolidation and Statute Law Revision
<table>
<thead>
<tr>
<th>Law Com. No.</th>
<th>Title</th>
</tr>
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<tbody>
<tr>
<td>3</td>
<td>Proposals to abolish Certain Ancient Criminal Offences</td>
</tr>
<tr>
<td>4</td>
<td>First Annual Report 1965-66</td>
</tr>
<tr>
<td>5</td>
<td>Landlord and Tenant: Interim Report on Distress for Rent</td>
</tr>
<tr>
<td>6</td>
<td>Reform of the Grounds of Divorce: The Field of Choice (1966 Cmnd. 3123)</td>
</tr>
<tr>
<td>7</td>
<td>Proposals for Reform of the Law Relating to Maintenance and Champerty</td>
</tr>
<tr>
<td>9</td>
<td>Transfer of Land: Interim Report on Root of Title to Freehold Land</td>
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<td>10</td>
<td>Imputed Criminal Intent (Director of Public Prosecutions v. Smith)</td>
</tr>
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<td>11</td>
<td>Transfer of Land: Report on Restrictive Covenants</td>
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<td>11A</td>
<td>Sea Fisheries (Shellfish) Bill. Report by the Law Commission and the Scottish Law Commission on the Consolidation of Certain Enactments Relating to Shellfish Fisheries and Shellfish (1967 Cmnd. 3267)</td>
</tr>
<tr>
<td>12</td>
<td>Second Annual Report 1966-67</td>
</tr>
<tr>
<td>13</td>
<td>Civil Liability for Animals</td>
</tr>
<tr>
<td>14</td>
<td>Second Programme of Law Reform</td>
</tr>
<tr>
<td>15</td>
<td>Third Annual Report 1967-68</td>
</tr>
<tr>
<td>16</td>
<td>Blood Tests and the Proof of Paternity in Civil Proceedings</td>
</tr>
<tr>
<td>17</td>
<td>Landlord and Tenant: Report on the Landlord and Tenant Act 1954, Part II</td>
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<td>18</td>
<td>Transfer of Land: Report on Land Charges Affecting Unregistered Land</td>
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Law Com. No. 19  Proceedings against Estates (1969 Cmnd. 4010)

Law Com. No. 20  Administrative Law (1969 Cmnd. 4059)


Law Com. No. 23  Proposal for the Abolition of the Matrimonial Remedy of Restitution of Conjugal Rights


Law Com. No. 26  Breach of Promise of Marriage

Law Com. No. 27  Fourth Annual Report 1968-69


Law Com. No. 29  Criminal Law Report on Offences of Damage to Property

Law Com. No. 30  Powers of Attorney (Cmd. 4473)


Law Com. No. 32  Civil Liability for Dangerous Things and Activities

Law Com. No. 33  Nullity of Marriage


Law Com. No. 35  Limitation Act 1963 (1970 Cmnd. 4532)
Law Com. No. 36. Fifth Annual Report 1969-70
Law Com. No. 39 Vehicliess Excise Bill. Report by the Law Commission and the Scottish Law Commission on the consolidation of certain enactments relating to excise duties on mechanically propelled vehicles and to the licensing and registration of such vehicles (1970 Cmnd. 4547)
Law Com. No. 40. Civil Liability of Vendors and Lessors for Defective Premises
Law Com. No. 42. Polygamous Marriages
Law Com. No. 43. Taxation of Income and Gains derived from Land. Report by the Law Commission and the Scottish Law Commission (Cmmd. 4654)
Law Com. No. 44. Second Programme on Consolidation and Statute Law Revision
Law Com. No. 45. Town and Country Planning Bill. Report on the Consolidation of Certain Enactments relating to Town and Country Planning (Cmmd. 4684)
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1. Papers published by Her Majesty's Stationery Office

First Programme of Law Reform
First Programme of Consolidation and Statute Law Revision
First Annual Report 1965-66
Proposals for Reform of the Law of Evidence relating to Corroboration
Reform of the Law Relating to Legitimation
  per subsequens matrimonum
Divorce—The Grounds Considered
Report by the Law Commission and the Scottish Law Commission on the Consolidation of Certain Enactments relating to Shellfish Fisheries and Shellfish—Sea Fisheries (Shellfish) Bill
Second Annual Report 1966-67
Second Programme of Law Reform
Third Annual Report 1967-68
Report by the Law Commission and the Scottish Law Commission on the Interpretation of Statutes
Fourth Annual Report 1968-69
Report on the Companies (Floating Charges) Scotland Act 1961
Fifth Annual Report 1969-70
Report on the Consolidation of Certain Enactments relating to coinage—Comage Bill
Report on the Consolidation of Certain Enactments relating to Excise Duty on Mechanically Propelled Vehicles, and to the Licensing and Registration of such Vehicles—Vehicles Excise Bill
Report on the Consolidation of Enactments relating to the National Savings Bank—National Savings Bank Bill
Report on the Taxation of Income and Gains derived from Land
Report on the Consolidation of Certain Enactments relating to Road Traffic—Road Traffic Bill
Sixth Annual Report 1970-71

(Cmnd. 3223)
(Cmnd. 3236)
(Cmnd. 3267)
(Scot. Law Com. No. 7)
(Scot. Law Com. No. 8)
(Scot. Law Com. No. 9)
(Scot. Law Com. No. 11)
(Scot. Law Com. No. 12)
(Scot. Law Com. No. 13)
(Cmnd. 4004)
(Scot. Law Com. No. 17)
(Scot. Law Com. No. 18)
(Scot. Law Com. No. 19)
(Scot. Law Com. No. 20)
(Scot. Law Com. No. 21)
(Scot. Law Com. No. 22)
(Scot. Law Com. No. 23)
2. **Memoranda circulated for comment and criticism**

Mem. No. 1  Probate or Letters of Administration as Links in Title to Heritable Property under the Succession (Scotland) Act 1964

Mem. No. 2  Expenses in Criminal Cases

Mem. No. 3  Restrictions on the Creation of Liferten

Mem. No. 4  Applications for Planning Permission

Mem. No. 5  Damages for Injuries Causing Death

*Mem. No. 6  Interpretation of Statutes

*Mem. No. 7  Provisional Proposals Relating to Sale of Goods

*Mem. No. 8  Draft Evidence Code—First Part

Mem. No. 9  Prescription and Limitation of Actions

Mem. No. 10  Examination of the Companies (Floating Charges) (Scotland) Act 1961

Mem. No. 11  Presumptions of Survivorship and Death

Mem. No. 12  Judgments Extension Acts

Mem. No. 13  Jurisdiction in Divorce

Mem. No. 14  Remedies in Administrative Law

*Mem. No. 15  Exemption Clauses in Contracts for Services

Mem. No. 16  Insolvency, Bankruptcy and Liquidation in Scotland

*Produced jointly with the Law Commission

**APPENDIX C**

**Implementation of the Law Commission's Proposals**

<table>
<thead>
<tr>
<th>Titles of Relevant Reports</th>
<th>Date of Publication</th>
<th>Whether implemented or in Bill being discussed in Parliament</th>
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</thead>
<tbody>
<tr>
<td>Proposals to abolish certain ancient criminal offences (Law Com. No. 3)</td>
<td>22/6/66</td>
<td>Criminal Law Act 1967</td>
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<tr>
<td>Proposals for reform of the law relating to maintenance and champerty (Law Com. No. 7)</td>
<td>22/11/66</td>
<td>Criminal Law Act 1967</td>
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<tr>
<td>Transfer of Land: Interim report on root of title to freehold land (Law Com. No. 9)</td>
<td>14/2/67</td>
<td>Law of Property Act 1969</td>
</tr>
<tr>
<td>Imputed criminal intent (<em>Director of Public Prosecutions v. Smith</em>) (Law Com. No. 10)</td>
<td>28/2/67</td>
<td>In part by section 8 of the Criminal Justice Act 1967</td>
</tr>
<tr>
<td>Civil Liability for animals (Law Com. No. 13)</td>
<td>21/12/67</td>
<td>Animals Bill 1970</td>
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<tr>
<td>Blood tests and the proof of paternity in civil proceedings (Law Com. No. 16)</td>
<td>31/10/68</td>
<td>Family Law Reform Act 1969</td>
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<tr>
<td>Proceedings against estates (Law Com. No. 19)</td>
<td>2/5/69</td>
<td>Proceedings against Estates Act 1970</td>
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<tr>
<td>Interpretation of Statutes (Joint Report with Scottish Law Commission) (Law Com. No. 21)</td>
<td>11/6/69</td>
<td>No</td>
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<tr>
<td>Statute Law Revision: First Report (Law Com. No. 22)</td>
<td>8/7/69</td>
<td>Statute Law (Repeals) Act 1969</td>
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<tr>
<td>Proposal for the abolition of the matrimonial remedy of restitution of conjugal rights (Law Com. No. 23)</td>
<td>26/8/69</td>
<td>Matrimonial Proceedings and Property Act 1970</td>
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<tr>
<td>Criminal Law—Offences of damage to property (Law Com. No. 29)</td>
<td>16/9/70</td>
<td>Criminal Damage Act 1971</td>
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<tr>
<td>Administration bonds, personal representatives’ rights of retainer and preference and related matters (Law Com. No. 31)</td>
<td>15/10/70</td>
<td>Administration of Estates Act 1971</td>
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<tr>
<td>Nullity of Marriage (Law Com. No. 33)</td>
<td>4/12/70</td>
<td>Nullity of Marriage Act 1971</td>
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<tr>
<td>Hague Convention on Recognition of Divorces and Legal Separations (Joint Report with Scottish Law Commission) (Law Com. No. 34)</td>
<td>1/12/70</td>
<td>Recognition of Divorces and Legal Separations Act 1971</td>
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<tr>
<td>Coinage Bill (Law Com. No. 38)</td>
<td>11/11/70</td>
<td>Coinage Act 1971</td>
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<td>Vehicles Excise Bill (Law Com. No. 39)</td>
<td>13/11/70</td>
<td>Vehicles Excise Act 1971</td>
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<tr>
<td>Civil Liability of Vendors and Lessees for Defective Premises (Law Com. No. 40)</td>
<td>15/11/70</td>
<td>Defective Premises Bill 1972</td>
</tr>
<tr>
<td>Taxation of Income and Gains Derived from Land (Joint Report with Scottish Law Commission) (Law Com. No. 43)</td>
<td>23/4/71</td>
<td>No</td>
</tr>
<tr>
<td>Town and Country Planning Bill (Law Com. No. 45)</td>
<td>10/6/71</td>
<td>Town and Country Planning Act 1971</td>
</tr>
<tr>
<td>Road Traffic Bill (Joint Report with Scottish Law Commission) (Law Com. No. 46)</td>
<td>26/7/71</td>
<td>Road Traffic Bill 1972</td>
</tr>
</tbody>
</table>

### APPENDIX D

**THE MACHINERY OF LAW REFORM IN THE UNITED KINGDOM.**

**A SELECT BIBLIOGRAPHY OF RECENT LITERATURE**

**Preliminary Note**

This list, which does not claim to be exhaustive, is concerned with publications mainly referring to the Law Commission and Scottish Law Commissions, and begins with the setting-up of those bodies in 1965. With regard to earlier literature, however, mention should at least be made of the main contributions since World War I.

Claud Mullins in *In Quest of Justice*,54 pinned his hopes of law reform on a Lord Chancellor relieved of his judicial duties and obligations as Speaker of the House of Lords. In *The Way to Justice*55 Herbert L. Hart favoured the concentration of responsibility for law reform in a Min-

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istry of Justice, able to take a "comprehensive and exhaustive view," which had been earlier argued by Lord Haldane in a section of the Report on the Machinery of Government, which he wrote himself.57

A similar solution was the "central proposal" of The Reform of the Law.58 But in Law Reform and Law Making: A Reprint of a Series of Broadcast Talks, Professor C. J. Hamson considered that what was required above all was a developing and expanding common law under the leadership of judges who were willing "to reassume a responsibility primarily theirs—namely again to enunciate, in a form adequate and appropriate to our times, the fundamental principles of the judge-made part of our law." Professor A. L. Goodhart,60 although recognizing that "perhaps the greatest hindrance to law reform is the lack of adequate machinery," mentioned only the work of committees, including the then recently formed Law Reform Committee, and the importance of support from lay public opinion.

In the first edition of The Machinery of Justice in England in 1940, Professor R. M. Jackson had regarded a Ministry of Justice as desirable in the interests of law reform, but by the third edition in 1960 he had come to attach less importance to such a proposal.61 While not unduly pessimistic under the existing arrangements regarding the prospects of reform of substantive law, he was inclined to attribute lack of progress in the modernization of procedure and organisation of the courts to the complacency of lawyers as a class: "The peculiarity of the legal system is its blind devotion to its own shortcomings." For this, Jackson appeared to suggest, the remedy lay in a reformed training of the legal profession.

Perhaps the most important single contribution to the discussion on the machinery of law reform came with Professor E. C. S. Wade's article on that subject.62 While mainly concerned to provide a dispassionate assessment of the achievements of the then existing law reform agencies of a standing and ad hoc type, and in particular of the Law Reform Committee set up in 1952, Professor Wade did suggest the formation

60. Id. at 14-23.
of an independent committee of research workers under a professorial 
chairman "who would be able to devote a fair part of their working 
time to producing studies relevant to current topics under examination 
by the Law Reform Committee." A body of a somewhat similar type, 
although at a higher level and with more direct responsibility for actual 
law reform, was suggested in Lord Devlin's *Samples of Lawmaking,*
which was skeptical about the possibility of law reform by judges and, 
preferring legislation, suggested that "it would be beneficial if there were 
a small body of men who devoted the whole of their time, working 
perhaps with the aid of a larger body of consultants meeting from time 
to time, to a systematic tidying-up of the law as well as to making pro-
posals for wider reforms," and he ventured "to prophesy that statutes 
prepared in some such way as this will be the most prolific source of 
law reform in the future." 

The most direct anticipation of the machinery set up by the Law 
Commissions Act 1965 is to be found in *Law Reform Now* although, 
unlike the basic proposal for full-time Law Commissions, certain other 
suggestions have not as yet been carried into effect. Thus, there is no 
"Vice-Chancellor" in the House of Commons responsible for law reform, 
although there was a Minister with this function, but with a different 
title, for a short time after 1965. There has not been, as a regular feature 
of parliamentary routine, an annual law reform Act, although there have 
been Acts implementing Law Commission proposals from 1966 to 1970 
inclusive. Bills have not been accompanied by a new type of mem-
orandum setting out the reasons for them and the objectives they seek 
to achieve. Still less has such a document or any White Paper relating 
to the Bill been made freely available for the interpretation by the courts 
of the resulting statute, although the Law Commissions have proposed 
in a joint Report that such a memorandum might be prepared for 
certain selected Bills and be available to the courts for that purpose.

The Law Commissions Act 1965 does not require the Government 
to find parliamentary time for considering proposals of the Law Com-
misions or other official law reform agencies, although, in fact, until 
the beginning of 1971 parliamentary time has been found for many of

63. LORD DEVLIN, SAMPLES OF LAWMAKING 1-27 (1962).
64. Id. at 27
66. ENGLISH & SCOTTISH LAW COMMISSION, JOINT REPORT ON THE INTERPRETATION OF 
STATUTES, ENG. LAW COM. No. 21 & SCOT. LAW COM. No. 11 (1969).
the Law Commissions' proposals. Finally, D. C. M. Yardley, while dealing for the most part with the substance of law reform and defending, on the ground that it prevents over-hasty reform, the standing and ad hoc committee system of law reform, conceded that the proposals of Law Reform Now for Law Commissioners deserved consideration.

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Martin, Methods of Law Reform, University of Southampton (1967).
New Law for a New World, Hamlyn Lecture for 1965, by Lord Tangle. Although principally concerned with the substance of law reform, the 4th lecture touches on the question of machinery, expressing skeptical views on codification (which as yet are neither proved nor discredited in the British context) and doubts regarding parliamentary time for law reform (as yet hardly justified by events).


Law Reform: The New Pattern, lecture by Sir Leslie Scarman, the Lindsay Me-

67. See Appendix C supra.


