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50 YEARS ON: THE LAW COMMISSION AT 50

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2015, according to The Times, is a year of anniversaries. While I confess that I do not entirely share the current obsession with round numbers, they certainly provide an opportunity to remember some of the more significant milestones in our nation's history. I do not suggest for a moment that the 50th anniversary of the Law Commission, which falls this year, it is in any way comparable with Magna Carta, Agincourt or Waterloo, but I would suggest that it is worthy of note and celebration. As a result, I am particularly grateful to your Chairman and Committee for the invitation to speak to you this evening. It provides a very welcome opportunity, at the start of this anniversary year, for me to say something – not so much about the successes and failures over the last 50 years, a topic more suitable for legal historians in due course – but about the present state and work of the Commission and to consider whether it is an effective engine of law reform.

Prior to 1965 there had been a number of *ad hoc* and more permanent committees which were charged with considering law reform, most notably the Home Secretary's Criminal Law Revision Committee and the Lord Chancellor's Law Reform Committee. However, in 1963 there appeared an influential book by a number of practising and academic lawyers and edited by Gerald Gardiner QC and Dr. Andrew Martin, which called for a more radical approach to law reform. Entitled "Law Reform *Now*" – with the "*Now*" in italics – its message was nothing if not direct. The editors raised a number of crucial questions:

- how to keep under review the whole field of English law;

- how to enquire into those sections of it that do not meet the current needs of society; and
- how to make sure that whenever a case for law reform is made out Parliament should be presented and be given adequate time to deal with concrete proposals.

They argued that the problem of bringing the law up to date and keeping it up to date is largely one of machinery and that, if the machinery is to work efficiently at a time of rapid technological, economic and social change, it must be kept in continuous operation and minded by full-time personnel. By way of answer they proposed the creation within the Lord Chancellor's Office, as it then was, of "a strong unit concerned exclusively with law reform". It should be headed by a Vice-Chancellor who should carry the rank of a Minister of State, who would be exclusively concerned with law reform and who should sit in the House of Commons. He should preside over a committee of not less than five highly qualified lawyers - Law Commissioners – who should be full time appointees but who – and this the editors considered vital – should not be ordinary civil servants but should enjoy a high degree of independence. In addition, the Government should be required to find Parliamentary time for the consideration of any legislation proposed by the Law Commissioners.

The following year the Labour Party led by Harold Wilson won the general election. Gerald Gardiner became Lord Chancellor and in 1965 Parliament passed the Law Commissions Act which created two Law Commissions, one for England and Wales and one for Scotland. The primary duty of the Law Commission of England and Wales is:

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

So you will understand that we are under absolutely no pressure.

[1] Law Commissions Act, 1965, section 3.

The model adopted was, however, rather different from that proposed by the authors of "Law Reform Now". Crucially, the Law Commissions were to be independent of the Government and the Chairman was not to be a politician but a High Court Judge. The Law Commission of England and Wales made a good start. It enjoyed the strong support of the Government which had set it up and had the great good fortune to have in its first Chairman, Mr. Justice Scarman, an outstanding lawyer who was dedicated to the cause of law reform.

He and the newly appointed Commissioners took up their duties on 21st June 1965. In that first year the Commission comprised a Chairman, 4 Commissioners, 1 special consultant, 9 other lawyers, 4 draftsmen, the Secretary to the Commission and 21 non-legal members of staff.[2] Today – fifty years on - the Law Commission consists of a Chairman – who is required to be a High Court Judge or a Lord Justice of Appeal – and 4 full-time Commissioners. Each Commissioner heads a team devoted to a subject area: criminal law, public law, common and commercial law and family, property and trusts. We are an organisation of around 55 staff. We currently have 24 lawyers and 18 research assistants who support Commissioners in their work. We have 3 in-house Parliamentary counsel who are seconded from the Office of Parliamentary Counsel. (Most of our reports are accompanied by a draft Bill which would implement our recommended reforms.) We also have an in-house economist. (All of our reports are accompanied by economic impact assessments.) In addition, we have a chief executive who leads a small team of professional support staff.

We work closely with Government departments in Whitehall, in particular the Ministry of Justice which is our sponsoring department. However, we are not part of the Government. We are a non-departmental arm's length body. We were created by Parliament to act independently of the Government and that independence - and the public perception of that independence - are vital to our work. In particular, we are not an in-house legal department for the Ministry of Justice or any other Government department. Sometimes we are critical of Government policies; sometimes the Government will disagree with us on our proposals for law reform. Members of the public or stakeholders (to use the current term) are often willing to work with an

[2] Law Commission, First Annual Report 1965-66, para. 11. The first Law Commissioners were Mr. L.C.B. Gower M.B.E., Mr. Neil Lawson Q.C., Mr. N.S. Marsh and Mr. Andrew Martin Q.C.

independent Law Commission on a project in a way in which they would not be prepared to participate with a Government Department. On the other hand, we are not a mere pressure group. We are a public body, uniquely placed because we are both independent of government and close enough to government to be able to influence decisions on law reform.

I do not consider that during my time as Chairman our actual independence has been threatened in any way by the executive. However, we have had to be constantly on our guard to protect the public perception of our independence from the executive. We have successfully defeated a proposal which would have required us to use standard government branding – as opposed to our distinctive logo – and a proposal which would have closed our independent website. Less satisfactory has been our enforced move in November 2013 into the Ministry of Justice building in Petty France. Although the accommodation is superior to that we previously occupied, we had considerable misgivings over the likely impact of this move on the perception of our independence. In the event, we have been able to mark out a distinctive Law Commission territory within the MoJ building - by establishing something of a cordon sanitaire – and we draw comfort from the fact that a number of other arm's length bodies, such as the Judicial College, the Judicial Appointments Commission and the Parole Board, are now located in the same building.

What can I say about the present standing of the Commission?

- In the first 50 years of its existence
    - The Commission has published 356 law reform reports of which approximately 69% have been implemented in whole or in part.
    - The Commission has been responsible for 222 consolidation Acts of Parliament.
    - The Commission has been responsible for 19 Statute Law Repeal Acts which have repealed 3,117 statutes in their entirety and 3,982 in part because they are no longer of any practical utility.

- The Law Commission survived the bonfire of the quangos in the Public Bodies Act 2011. Since then it has undergone a triennial review. I am pleased

to say that in its report in March 2014 the Government recognised the continuing need for the Commission's existing functions. It also acknowledged the value that stakeholders place on the independence and impartiality of the Commission and confirmed that its present model is the most appropriate for maintaining that independence. Indeed it expressly stated that "the Commission's ability to deliver its functions is dependent on its freedom from external pressures, in particular political influence".

- 2014 has been the busiest and most productive year in the Commission's history. In 2014 the Commission published reports on:
    - Wildlife Law: Control of Invasive Non-native Species (LC342) 11/02/14
    - Matrimonial Property, Needs and Agreements (LC343) 27/02/14
    - Contempt of Court (2): Court Reporting (LC344) 26/03/14
    - Regulation of Health Care Professionals: Regulation of Social Care Professionals in England (LC345) 02/04/14
    - Patents, Trade Marks and Design Rights: Groundless Threats (LC346) 15/04/14
    - Taxi and Private Hire Services (LC347) 23/05/14
    - Hate Crime: Should the Current Offences be Extended? (LC348) 28/05/14
    - Conservation Covenants (LC349) 24/06/14
    - Fiduciary Duties of Investment Intermediaries (LC 350) 30/6/14
    - Data Sharing between Public Bodies (LC 351) 11/07/14
    - Insurance Contract Law: Business Disclosure; Warranties' Insurers' Remedies for Fraudulent Claims; Late Payment. (LC 353) 17/07/14
    - Social Investment by Charities (Recommendations Paper) 24/09/14
    - Simplification of Criminal Law: Kidnapping and Related Offences (LC355) 20/11/14
    - Rights to Light (LC356) 04/12/14

- In 2014 the Commission also published the following papers:

- Social Investment by Charities: A Consultation Paper (LCCP216) 24/04/14
- Unfitness to Plead (Issues Paper) 02/05/14
- Reform of Offences against the Person: A Scoping Consultation Paper (LCCP217) 12/11/14
- General Statute Law Repeals: A Consultation Paper (SLR 03/14) 27/11/14
- Electoral Law: A Joint Consultation Paper (LCCP218) 09/12/14

- In addition, in July 2014 the Lord Chancellor gave his approval to our Twelfth Programme of Law Reform which will form a major part of our work over the next three years. (The Commission takes on new law reform projects in one of two ways. A project may be referred to us directly by a Government Department. However, every three years we go out to public consultation on a new programme of law reform. This permits anyone to make proposals for law reform projects.) On this most recent occasion we received over 250 proposals for new projects and we ended up selecting 9 for inclusion in the programme. These include projects on
  - Bills of sale
  - Protecting consumer prepayments on retailer insolvency
  - Land registration
  - Wills
  - Mental capacity and detention
  - Firearms
  - Sentencing procedure

- That there is no shortage of demand for our services in the field of law reform is also apparent from the fact in December 2014 the MoJ asked us to look at the law of marriage and the Justice Committee asked us to look, not for the first time, at joint enterprise in the criminal law. Last week the Justice Committee asked us to look at manorial rights.

So, it would appear that, at the moment at least, the standing of the Law Commission is high. Indeed, we would seem to be on something of a roll. However, we cannot afford to be complacent about this – not least as we are not and cannot expect to be insulated from the chilly financial winds currently blowing through Whitehall. I believe that it is remarkable that such a small organisation can produce the quantity and quality of work that we do and – as I keep telling Ministers - we represent very good value for money. Over the life of the current Parliament our core funding which is received through the MoJ – currently just under £3million per annum - has been cut by 25%. To date, we have been able to continue to function at the same level of activity by charging other Government departments for particular projects. However, these bodies are themselves likely to be in the firing line for further savings. Any further cuts will inevitably force us to reduce the scale of our operations and the number of law reform projects which we can undertake. This is problematic for us because it is only by producing high quality proposals for law reform across the whole of the law that we can demonstrate the need for law reform and the advantages of an independent Law Commission.

Moreover, Law Commissions – as some recent precedents demonstrate – are often considered disposable luxuries.

- Over the years Canada has had a number of provincial Commissions including the Law Commission of Ontario which was established in 1964 (a year before we were) and which lost its funding in 1996. Canada also established a federal law reform body, the Law Reform Commission of Canada in 1971. It was disbanded in 1993 and its successor, the Law Commission of Canada, although created by statute in 1997 did not have its funding renewed in 2006.
- Much closer to home is the current position of the Northern Ireland Law Commission. The Northern Ireland Commission was created by an amendment to the Justice (Northern Ireland) Act 2002.[3] For some time now it has been operating in a limited manner and in November 2014 the Minister of Justice in the Northern Ireland Executive announced that the Commission will close on 31 March 2015. The reason for its closure is simply that there is no available funding. The closing of the Northern Ireland Commission is

[3] Sections 50-52, Justice (Northern Ireland) Act 2002 (c. 26).

> troubling at a number of different levels. It is troubling that a Law Commission can be considered to be so readily disposable. It also poses practical problems for us. We undertake certain projects on a UK-wide basis jointly with the Scottish Law Commission and the Northern Ireland Law Commission. These may concern subjects within a devolved area, e.g. our recent project on Regulation of Health Care Professionals, or in a reserved area, e.g. our current project on the Law of Elections on which we published a consultation paper last month. The Elections project is a good example of a law reform project that can sensibly be undertaken only on a UK-wide basis. Yet, such a project requires the expert input of an independent law reform body in each of the jurisdictions concerned. We are currently giving urgent consideration to possible ways ahead for the Elections project and we are hopeful of finding a solution.

I am anxious not to be misunderstood. I am not suggesting that there is any current threat to the continued existence of the Law Commission of England and Wales – or indeed to the Scottish Law Commission – but it is important that we should remain aware of the continuing need to justify our role by the quality of the work we produce. In that regard, we enjoy a number of advantages. [4]

- Within the Commission there is considerable legal expertise in many different fields.
- We are in a position to consult widely and thoroughly on the state of the existing law, perceived deficiencies and proposals for reform.
- Our independence from government permits engagement with a wide range of parties who value our objectivity and our impartiality.
- Our system of peer review involves expert scrutiny of reports and draft legislation.
- We have our own embedded Parliamentary Counsel.
- We have the advantage of a special parliamentary procedure, which is particularly suited to law reform measures.

[4] See generally, Evidence of David Lloyd Jones to House of Commons, Political and Constitutional Reform Committee, *Ensuring Standards in the Quality of Legislation* (HC 85, 20 May 2013) at Ev. 69.

- We have time within which to consider law reform and draft legislation in depth.

In addition, it seems to me that the Commission has succeeded to the extent that it has because it has limited its activities to the field of lawyers' law and has, unlike Law Commissions in some other Commonwealth States, generally avoided projects which have at their heart major issues of social policy, morality or political controversy. That is not to say that we only takes on projects which are not controversial – that is certainly not the case. For example in our recent work on contempt of court and juror misconduct we have had to address issues of freedom of expression and permissible limitations on reporting in the media. But I doubt that the Law Commission would be the appropriate body to address reform of the law relating, for example, to assisted suicide. In my view, the great strength of the Law Commission is in its legal expertise. It excels in dealing with projects where, after thorough research and consultation, defects in the law are capable of remedy as a result of lawyers finding lawyers' solutions.

How does one assess the success of a law reform body like the Law Commission? One approach is to ask to what extent the Law Commission has succeeded in performing its statutory duty to secure the systematic development and reform, the simplification and modernisation of the law. Early in the Commission's history, great emphasis was placed on the need for the codification of the law. Looking back over the last 50 years it does seem that very little has been achieved in that direction. The Commission's first programme of law reform proposed, inter alia, the codification of the law of contract which has not been achieved. Similarly, our project on the codification of the criminal law was suspended, simply because the Commission came to the view that codification – while remaining a desirable objective – had to be preceded by a process of simplification of the law. That process continues with the publication in November 2014 of our report on Kidnapping and Related Offences and our forthcoming report this spring on Public Nuisance and Outraging Public Decency. That will be followed by a report on Misconduct in Public Office. (It is interesting to note here that this, in a sense, confirms the good sense shown by Gardiner and Martin in "Law Reform *Now*" where they wrote that codification should not be given too high a priority, for the sole reason that the condition of English law was so encumbered with obsolete and unjust

law that codification would have to be preceded by reform.[5]) But I do not think that we should despair over this. Codification may well be a desirable ultimate objective, but there can also be real value in the reforms which are achieved along the way.

As for the quality of the reforms proposed by the Commission over the last 50 years – this is a matter probably best left to others. However, what I can say is that the great majority of our recent proposals for law reform have generally been well received by those most concerned with the area of law in question. Thus, our recent proposals for the reform of the regulation of health care and social care professionals have received the enthusiastic support of patient groups and all 9 of the professional regulatory bodies regulating the 32 professions concerned. Similarly, our reforms of the law of insurance have been possible only because our recommendations have generally won the support of both the insurance industry and consumer groups.

Of course, an important yardstick of the success of any law reform body must be the extent to which its proposals have become law. Here, there is a widespread perception among the otherwise well informed public that most of our reports are gathering dust because of an unwillingness on the part of Government to act to secure their implementation. When I am introduced to people as Chairman of the Law Commission, I usually notice a look of pity cross their face before they ask, "Tell me, are you having any better luck nowadays in getting your proposals implemented?" The truth is rather different. Over the last 50 years, 69% of the Commission's recommendations have been implemented in whole or in part – not a bad rate of implementation, I would suggest. It is fair to point out though that that is an average over the whole period and it conceals the fact that the implementation rate fell in each decade. It is also the case that the first decade of the 21st century brought some particular disappointments in this regard. For example only a small part of our 2006 report on Murder, Manslaughter and Infanticide was implemented. However, in the last couple of years we do seem to have turned the corner so far as implementation is concerned. Let me draw to your attention one particularly striking fact. David Hertzell, who retired in December 2014 after 7 years as the Commercial and Common Law Commissioner, has seen every single one of his reports accepted by the

[5] Law Reform *Now*, pp. 11-12.

Government and implemented or in the process of implementation. Across the board the picture is very encouraging.

In Westminster:

- The Inheritance and Trustees' Powers Act, which received Royal Assent on 14 May 2014, implements Law Commission recommendations on Intestacy.
- The Care Act, which received Royal Assent on 14 May 2014, implements Law Commission recommendations on Adult Social Care.
- The Co-operative and Community Benefit Societies Act 2014, which received Royal Assent on 14 May 2014 is a Law Commission consolidation Act.
- The Consumer Rights Bill, currently before Parliament (Third Reading, House of Lords, 8 December 2014), will implement Law Commission recommendations in three reports: Unfair Contract Terms, Consumer Redress for Misleading and Aggressive Practices, and Consumer Remedies for Faulty Goods.
- The Infrastructure Bill, currently before Parliament (Committee Debate, House of Commons, Third Sitting, 18 December 2014) will implement Law Commission recommendations on Control of Invasive Non-native Species.
- The Criminal Justice and Courts Bill, which completed its passage through Parliament on 21 January 2015, will implement Law Commission recommendations in relation to Juror Misconduct and Internet Publications.
- The Insurance Bill, currently before Parliament (Second Reading Committee, House of Commons, 27 January 2015) will implement recommendations in the Law Commission's most recent report on insurance law.
- The Government has announced that it has adopted the recommendations in the Law Commission report on Fiduciary Duties of Investment Intermediaries.
- The recommendations in the Law Commission report on Expert Evidence in Criminal Proceedings have been implemented in the Criminal Procedure Rules.

In the Welsh Assembly:

- The Social Services and Well-being (Wales) Act, which received Royal Assent on 1 May 2014, implements in Wales Law Commission proposals on Adult Social Care. This represents an important milestone for the Law Commission and the National Assembly for Wales as this is the first occasion on which Law Commission recommendations have been implemented by the National Assembly using its powers under Part 4, Government of Wales Act 2006.
- The Welsh Government has announced its intention of introducing a Bill in the National Assembly for Wales in 2015 which will implement the Law Commission's 2006 report on Renting Homes, updated in Renting Homes in Wales/ Rhentu Cartrefi yng Nghymru (LC337) 09/04/13

This turning of the tide has come about, I believe, largely as a result of three important reforms to the machinery of law reform secured by my predecessors – in particular Sir Terence Etherton and Sir James Munby.

First, pursuant to the Law Commission Act 2009 the Lord Chancellor and the Law Commission have agreed a protocol about the Commission's work. From the point of view of implementation, this Protocol is a very welcome development. Its effect is that, in future, the Commission will not take on a project unless there is an undertaking by the relevant Minister that there is a serious intention to take forward law reform in this area. That, of course, does not amount to a binding commitment to implement Law Commission recommendations but it is valuable. Moreover, the fact that the Commission and the Department will be working closely together throughout the project, sharing information about how it is developing and about wider policy developments and any changes in priorities, should substantially increase the likelihood that the resulting proposals will be carried forward into legislation. The signs are that this is working well and bearing fruit. This development has been criticised by one academic writer as a compromise of the independence of the Law Commission. However, this criticism seems to me to be misplaced. It has always been the case that the Commission requires the consent of the Lord Chancellor or the Department concerned before taking on a law reform project. It remains for the Commission to decide whether or not it will undertake a project. Once it does, it will,

of course, liaise closely with the Government Department concerned as with other interested parties, but it remains totally independent in the formulation of its recommendations. It does seem to me that it far better that the Commission should concentrate its energies and resources on projects where there is a real prospect of reforms reaching the statute book.

Secondly, under the 2009 Act the Lord Chancellor is required to make an annual report to Parliament on the Law Commission proposals implemented in whole or in part during the reporting year, including a statement of plans for dealing with proposals and any decision not to implement proposals. This is a small step but potentially an important one. The Lord Chancellor published his fourth report on implementation in May 2014. In each of the reports published to date the reasons given for non-implementation tend to be very brief. Even where the Government does not consider the need for reform to be a priority, a fuller public explanation of the reasons for that conclusion would be valuable. In those instances where proposals are rejected on grounds of principle, a more detailed response by the Lord Chancellor in his report to Parliament would certainly promote public debate on the merits of the proposals. There is also room for Parliament to exercise greater scrutiny on these issues of implementation.

The third development in the machinery of law reform to which I wish to draw attention is a new streamlined procedure adopted by Parliament in 2010 in respect of non-controversial Law Commission Bills. Under this procedure the Second Reading debate is held in a Second Reading Committee instead of on the floor of the House and the Committee stage is held before a Special Public Bill Committee. This has the advantage that it enables valuable legislation to proceed to the statute book which otherwise might not have found a slot in the main legislative programme. A number of Law Commission measures have reached the statute book through this new procedure

- Perpetuities and Accumulations Act 2009
- Third Parties (Rights against Insurers) Act 2010
- Consumer Insurance (Disclosure and Representations) Act 2012
- Trusts (Capital and Income) Act 2013

- The Inheritance and Trustees' Powers Act 2014

The Insurance Bill, currently before Parliament, was also introduced into the House of Lords under this procedure.

So there are clear signs that the tide may have turned so far as implementation is concerned.

Alternative methods of securing law reform

From its infancy, the work of the Law Commission has been geared to achieving law reform through legislation. Legislation, of course, is the most effective route to law reform because it has the advantage that it permits the replacement of a whole body of law by a new statutory scheme. Law reform through judicial decisions, by contrast, suffers from the disadvantage that judges can only act when an appropriate case presents itself for decision and, even then, they are often unable to effect reforms to an extent which might be achieved by the introduction of a new statutory scheme. Judicial law reform is, from necessity, often piecemeal and a prolonged process. Law reform on the scale of the recent and current reforms of insurance law, for example, would be difficult to achieve efficiently through judicial decisions. A further disadvantage of judge made law is that the focus of the judges – just like the focus of counsel in any particular case – is necessarily geared to the issues as they are relevant in the context of that particular case. As a result we are often deprived of the broad view of a whole area of the law. But that is precisely what the Commission seeks to do in its assessment of whether an area of law is in need of reform and of how that might best be achieved. It seems to me, therefore, that in situations where, for whatever reason, Parliament has not implemented recommendations for reform originating from the Commission, Law Commission reports may well be of particular use to judges presented with disputes in that field. And there are occasions on which the Commission could be instrumental in bringing about desirable judicial law reform.

Recent events in relation to the Law Commission report on Expert Evidence in Criminal Cases show that primary legislation is not the only way of achieving law reform. The Commission undertook this project because of growing public concerns that evidence was being admitted which was not truly expert evidence at all. The report found that "expert evidence" was being admitted too readily and having

received insufficient scrutiny. Accordingly, we recommended the introduction of a statutory test of admissibility: where doubt was raised about an expert's opinion, the evidence would have to satisfy a preliminary test of reliability. We also proposed a statutory list of factors to assist judges in applying the test and recommended the codification of the law. To our dismay, the Government, inexplicably, rejected the recommendation for primary legislation.[6] Nevertheless, a great deal has been achieved by other means. First, as the Lord Chief Justice explained in his Kalisher Lecture to the Criminal Bar Association in October 2014[7], the Rule Committee has adopted as many of the recommendations as it could adopt through the Criminal Procedure Rules and accompanying Practice Directions. As a result, while the common law remains the source of the criteria by reference to which the court must assess admissibility, the Rules list those matters which must be covered in the experts' report so that the court can conduct such an assessment and the Practice Directions list the factors the court may take into account in determining the reliability of expert opinion. Secondly, meanwhile, in a parallel development, a series of cases concerned mainly with the use of Low Template DNA has established a requirement that the court can only admit expert evidence if it is reliable.[8] Thirdly, in a development at least as significant as the other two, the Advocacy Training Council has adopted our recommendations in this report as the basis for its training and is aiming to produce a toolkit to equip advocates to deal more effectively with expert evidence. In this way, we are confident that the entire approach of the profession to expert evidence in both criminal and civil proceedings can be fundamentally reformed and the risk of miscarriages of justice reduced.

The Commission is looking more and more at means of effecting law reform other than through primary legislation.

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[6] The explanation given by the Government was that they were concerned that there could be costs implications which could not be predicted with precision.

[7] Lord Thomas of Cwmgiedd, Expert Evidence: The Future of Forensic Evidence in Criminal Trials, The 2014 Criminal Bar Association Kalisher Lecture.

[8] In its judgment in R v Dlugosz and Others [2013] EWCA Crim 2, the Court of Appeal observed (at paragraph 11): "It is essential to recall the principle which is applicable, namely in determining the issue of admissibility, the court must be satisfied that there is a sufficiently reliable scientific basis for the evidence to be admitted. If there is then the court leaves the opposing views to be tested before the jury." Nothing at common law precludes assessment by the court of the reliability of an expert opinion by reference to substantially similar factors to those the Law Commission recommended as conditions of admissibility, and courts are encouraged actively to enquire into such factors.

In 2014 we published a report on court reporting of criminal proceedings in which we proposed new procedures which could greatly reduce the risk of inadvertent contempt of court by the breach by the media of reporting restrictions.[9] In consultation the media told us that their principal concern was the difficulty of finding out whether an order was in place in a given case. Our core recommendation was the introduction of a publicly accessible online list of the orders under section 4(2), Contempt of Court Act 1981 which are in force at any given time, which would provide all prospective publishers with a single, easy point of reference in order to check whether a court order exists or is in force. [In addition, we recommend the creation of a further database which would include the terms of the section 4(2) orders and which would be open only to accredited media representatives.] It seems to us that this modest and inexpensive reform would:

- Enable publishers to produce accurate, contemporaneous reports of proceedings without the risk of liability for contempt of court;
- Avoid any undesirable chilling effect arising from the current uncertainty;
- Promote the principle of open justice.

We hope that this will be implemented in the near future by HMCTS. The ball is very much in their court at the moment.

In our current project on Enforcement of Financial Orders in Family Proceedings – the CP will be published in February 2015 – we are looking not only at the possible reform of enforcement procedures (which would generally require primary legislation) but also at

- How courts could use their case management powers more effectively;
- Whether there could be greater use of ADR
- How guidance for the public – in particular litigants in person – could be improved;
- How improved training for practitioners and the judiciary might assist;

[9] Section 4(2), Contempt of Court Act 1981 empowers the court to make an order postponing the reporting of proceedings where it appears to be necessary for avoiding a substantial risk of prejudice to the administration of justice.

- The need for HMCTS to collect more comprehensive statistics to inform legal and procedural reform.

WALES

In assessing the Law Commission at its 50th anniversary, I need to say something about the role of the Law Commission in relation to Wales. Please do not switch off or head for the doors. What I have to say is of relevance to all legal practitioners in the shared jurisdiction of England and Wales.

As a result of devolution we have arrived at a most unusual situation. Following the implementation of Part 4, Government of Wales Act 2006, we have within the single legal system of England and Wales two legislative bodies with the power to make primary legislation: a sovereign Parliament in Westminster with the power to make law for the United Kingdom, including England and Wales, and a National Assembly in Cardiff Bay with the power to make law within the devolved areas for Wales. As a result, for the first time in almost four centuries – for the first time since the Act of Union in 1536 – it is meaningful to speak of Welsh law as a living body of law.

The Law Commission is the Law Commission of England and Wales and we have a clear responsibility in respect of Welsh law. Throughout the development of devolution we have worked closely with the devolved institutions in Wales. However, unfortunately, the statutory machinery of law reform did not keep pace with the speed of constitutional change in Wales. In particular, there was no power for the Welsh Government (strictly the Welsh Ministers) to refer a law reform project to the Commission. At the request of the Commission and the Welsh Government, that has now been remedied by the Wales Act 2014, which received Royal assent on 17 December 2014, and which amends our statute - the Law Commissions Act 1965. It also requires a protocol to be agreed between the Commission and the Welsh Government and requires the Welsh Ministers to report annually to the National Assembly on what steps have been taken to implement Law Commission recommendations for law reform in the devolved areas. These reforms should assist the Law Commission in remaining, in these changed circumstances, an effective law reform body for Wales as well as for England.

One inevitable consequence of devolution is that, within the shared legal system of England and Wales, we are going to see – we are already seeing - a divergence of English law and Welsh law.

- The Law Commission recommendations on Adult Social Care have been implemented throughout England and Wales. They have, however, been implemented in England by the Care Act 2014 (a Westminster Act) and in Wales by the Social Services and Wellbeing (Wales) Act 2014**,** an Act of the National Assembly. As a result there are important differences in the law of social care in force in Wales and that in force in England. For example, there are powers of forcible entry to property in the law applicable in Wales which do not exist in the law applicable in England.
- More striking is the position in relation to residential tenancies. In 2006 the Commission published its report on renting homes. It recommended substantial reforms including, in particular, the replacement of the dozens of different forms of residential leases and licences by two standard forms of tenancies.[10] The Westminster Government decided that these proposed reforms would not be implemented in relation to England but, following a further project by the Commission, the Welsh Government has announced that it will introduce a Bill in the National Assembly later this year to implement the proposals in Wales. (We can only hope that in due course England will catch up with Wales.) So we are going to see here a major divergence between English law and Welsh law, in an area which affects a very large proportion of the population: those who rent their homes. (Indeed, it is significant that the proportion of the population renting their homes is much greater in Wales than it is in England.)
- This, it is clear, is only the start. Whatever changes may or may not be made in the devolution settlement, we are going to see a growing divergence between English law and Welsh law within the single legal system in which you all practice.

[10] The standard contract is based on the current assured shorthold tenancy. The security of the contract holder is determined by the contract. Once any fixed term has expired the landlord can evict the tenant provided he has given two months' notice. The secure contract is based on the current secure tenancy. It offers greater security to the tenant. The landlord can generally only terminate the contract if the contract holder is found by the court to be in breach and eviction is determined by the court to be reasonable and proportionate.

Here, we all – practitioners and judges alike - face a particular challenge in that there is a major problem in being able to find the law applicable in Wales. These problems with the form and accessibility of the law relating to Wales have been apparent for some time and they are becoming more intense. In part this is due to the piecemeal manner in which powers have been devolved to Wales. In the fifteen years or so since devolution was first introduced in Wales, we have seen three different models of devolved government. The result has been that in many areas it can be very difficult to find and understand the law. A power conferred by a Westminster statute on the Secretary of State for Wales will, in many cases, in fact be exercisable by Welsh Ministers but it can take expertise, skill and perseverance to uncover this fact. The problem is particularly serious in relation to executive powers but it is by no means confined to them. There are many instances in which Westminster legislation is being amended both in Westminster and in the Assembly. As a result statutes have some sections and subsections relating to England and Wales, some to England only and some to Wales only.

As a result, the Law Commission has recently undertaken an advisory project on the form and accessibility of the law applicable in Wales which we hope will report by the end of 2015.[11] This is a particularly difficult area and we have no magic solutions. Nevertheless, it is important that these issues are examined now, while the situation may still be remediable. However, the picture is not all one of doom and gloom on this front. The fact that modern Welsh law is in its infancy opens up many opportunities. There is no reason why, in the future, the legislature and the executive in Wales should not develop their own innovative style of legislation. Some of us think that the style of Westminster legislation can be improved and that it does not need to be followed.[12] This is also a matter we will be addressing in our report.

[11] See, generally, Commission on Devolution in Wales, Second Report, 3 March 2014, para. 10.3.45.
[12] Lord Thomas of Cwmgiedd, Speech to Legal Wales Conference, 11 October 2013.

CONCLUSION.

I hope I may have persuaded at least some of you that the Law Commission is a valuable organisation which performs a useful role in its efforts to keep the law fair, accessible, intelligible and up to date with social, scientific and technological change. Key to its success, I believe, are

- its legal expertise,
- its reputation for objectivity and impartiality,
- its independence from government which permits engagement with a wide range of parties; and
- its ability to stand back from legal problems and to take a broad view.

On the occasion of its 50th birthday, it is still making an important contribution to the cause of law reform and I hope it will continue to do so for many years to come.