THE LAW COMMISSION: METHODS AND STRESSES*

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When the Bill which became the Law Commissions Act 1965 was being debated in the House of Lords, Lord Wilberforce suggested that its objectives were to provide "a fresh incentive and stimulus", and "really to enter into a new dimension of law reform rather than to expand the existing methods".1 Those eminently worthy aims were expressed nearly fifteen years ago and the task that I set myself tonight is to attempt to report on the progress made along this path of law reform and to identify some of the pitfalls and potholes along the road. Such an account to be complete should seek to answer three questions: How does the Law Commission decide what to do? How does it set about making proposals for the reform of those areas of the law that it takes on board; and what happens to the final proposals that it makes? I have come to realise, however, that the answer to each question deserves a separate lecture. I doubted whether your patience on even so compulsive a topic as the Law Commission would last for three hours, and so I intend to concentrate on the third of the questions. I have chosen this question for two reasons. There exist already accounts by former Commissioners of how we decide what to do and how we do it, though both these elements of our work are not without difficulty at the moment. Secondly, the purely factual information on these matters is available in our Annual Reports, whereas the consideration of our proposals once we have reported is often concealed in the interstices of the procedures of Whitehall and of Parliament.

Perhaps I might start to answer the question: "What happens to the final proposals of the Law Commission?" by providing some statistics. The Law Commission has produced 102 reports, of which about 70 proposed legislative change. Some of these took the form of proposals for minor amendments, followed by consolidation. Others are the 9 reports proposing repeal of obsolete legislation in whole or in part, i.e., Statute Law Revision. What remains are substantive proposals for law reform with draft Bills appended to the reports. There are about 50 of them, of which just over a dozen have not been implemented. There is, however, an inevitable time lag between the submission of a report to the Lord Chancellor and the time

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when it is realistic to expect the introduction of the proposals into Parliament, they having been given either a fair wind, or at least an undertaking of *nihil obstat*, by the Government of the day. If one can reasonably say that reports submitted within the last two or even three years fall into this category, the figure of unimplemented reports (excluding those now under active consideration by Parliament) falls to about 7. Two of these relate to the law of landlord and tenant, on which we are due to produce two more reports fairly shortly, as part of a projected codification of this area of the law. The view in Whitehall has been that a decision as to the implementation of this stage of the work on landlord and tenant ought to be taken once the two reports which are in their final stages, have been completed. That leaves our important report on interpretation of statutes, submitted in 1969, and reports on the formalities for the solemnisation of marriage (1973) (to which a Bill was not appended), on the law of forgery and counterfeiting (1973), assessment of damages in personal injury cases (1973) (which had to await the report of the Royal Commission on Civil Liability and Compensation for Personal Injury) and on occupiers' liability to trespassers (1976) as the older unimplemented reports. Indeed, I do not despair of some of these being introduced into Parliament in whole or in part in the reasonably near future.

These rather bald statistics suggest that there is no serious legislative bottleneck and that our proposals, if regarded in Whitehall as meritorious, will find their way into the statute book. In fact some elements of the legislative machinery work extremely well; others, however, contain the elements of potential stress. Consolidation and statute law revision are important, if unexciting, aspects of our work. Our role in consolidation is mainly that of a planner of the topics to be consolidated, in conjunction with the senior of the Parliamentary Counsel seconded to the Law Commission. The actual work is done by Parliamentary Counsel, either those working on secondment in our office, or in their own office in Whitehall. Straightforward codification, without any amendment of the law, involves no work on our part and is assured of a speedy passage through Parliament. Sometimes, however, consolidation may not be possible or desirable without minor amendments being made to the legislation to be consolidated. In such a case, the Law Commission appends a report recommending amendments of the law to the draft consolidation Bill and this report is submitted to a Joint Committee of both Houses of Parliament who consider the consolidation Bill which normally includes the proposed amendments, with the benefit of evidence from the draftsman as to the reasons for, and implications of, any amendments. Approval by this Joint Committee almost inevitably assures speedy passage of the Bill through Parliament. Similarly, Statute Law (Repeals) Bills are examined by a Joint Committee and, again, the draftsman and the members of our staff responsible for the detailed preparation of the proposals for repeal give evidence before the Committee which takes great care to ensure that the legislation proposed for repeal really is spent or obsolete. Again, approval by the Joint Committee