ARTICLES

Implementation of Law Reform Proposals in the United Kingdom: A Continuing Dilemma?

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Abstract

Law reform in the joint jurisdiction of England and Wales, and in Scotland, was put on a formal footing in 1965. Down the years the two Law Commissions (as statutory independent bodies) worked diligently to produce a significant number of reports advising government on steps to be taken to update and simplify swathes of the law. But by 2009 the legislative implementation rate had slipped badly and Parliament then passed an Act which (for England and Wales) facilitated a governmental protocol designed to make parliamentary review of progress more transparent. The Ministry of Justice acts as gatekeeper for the implementation process. In the short term implementation was taken more seriously, driven by the incentive of the MoJ having to report annually to parliament on progress. In more recent years, however, both implementation and the statutory reporting mechanism have been allowed to slip: there are few signs that the situation is likely to improve. This article examines the position and seeks to explain, notwithstanding some of the real obstacles to swifter implementation, that both parliament through its select committees, and government, need to give the issue greater priority. Systematic review of the law, and the delivering of legislative change, underpin both the rule of law and the essence of the democratic settlement.

Keywords: law reform, government, legislation, parliament, implementation.

A Introduction

The purpose of this article is to review and analyse the steps taken by the UK government to ensure that the law within its jurisdiction is kept up-to-date and fit for purpose. As with any modern society, cultural, economic and international events impact the law's daily functioning in the United Kingdom. The key is to ensure that the body of law which serves and underpins society is regularly and expertly reviewed. Where a need for reform is identified, the new legislation needs to be clear, accessible and in tune with society's aspirations. The mechanism chosen

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by Parliament back in 1965 was to establish independent Commissions tasked with advising the government on the law's "systematic development and reform". The issue today is: how far have we come in that endeavour? Has the vision come to pass?

There are limitations – advisers advise, but ministers decide. The question examined here turns on the willingness – or otherwise – of the government to listen to its independent advisers and take steps to effect change where change is shown to be necessary. Has the government maintained the impetus which was seen as important over fifty years ago, and has it sought to respond to the need to update the law in a timely and transparent manner? The answer is: the government could do better. This article seeks to analyse the implementation rates over the decade from 2008 (when the Law Commission first intimated its very real concerns to the government) to 2018 (when the Ministry of Justice produced its last implementation report), and to explore the hurdles which still lie ahead.

B 1965 – The Watershed Moment

When, in 1965, the UK Parliament established the first two Law Commissions – for England and Wales, and for Scotland – it was envisaged that their function would be to review the existing law, both common and statute based, and to make recommendations on those aspects which required modification, updating, clarification or simplification. From the outset, Parliament recognized that the principal means of achieving reform would be by the promulgation of new legislative provisions. The law reform process was always designed to be a practical mechanism. As one commentator has written, the Commissions (both in the United Kingdom and in a swathe of common law jurisdictions) operate as "applied research institutions" that are "in the business of legal change".[1] This was not designed to be merely an academic exercise.

Legal change would be delivered by a two-stage process: a report carrying recommendations to the government for reform, accompanied by a draft bill which would facilitate those recommendations being translated into legislation. The Law Commissions Act 1965[2] provided that the two new Commissions would be under a legal duty to keep under review *all* the law with which they were concerned so as to achieve "its systematic development and reform", leading to "simplification and modernisation".[3] This was a tall order given that, at that time, there were already over 3,000 statutes dating back to 1235, many thousands more delegated statutory

1 Sir Grant Hammond, 'The Legislative Implementation of Law Reform Proposals', *in Fifty Years of the Law Commissions: The Dynamics of Law Reform*, ed M. Dyson, J. Lee & S. Wilson Stark (Bloomsbury, Oxford, 2016) at Chapter 19, p. 175.

2 1965 (c.22), as now amended, principally by the Law Commission Act 2009 (c.14). This was one of the first pieces of legislation promoted and enacted under the new Wilson Labour Government (1965-1970).

3 Section 3(1).

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instruments and some 300,000 reported judicial decisions.[4] Faced with this body of law, the Commissions had to consider any proposals for reform which were submitted to them, produce periodic programmes for future work and then set about examining the law on those topics which were given ministerial approval. The aim was to formulate proposals for reform "by means of draft Bills or otherwise".[5] Given that the law to be examined was frequently technical and complex, and the recommendations for reform had to be formulated with immense precision, legislation was the most satisfactory way of achieving change. Other implementation routes existed – for example, by urging the higher courts to adopt revised principles or new judicial doctrines or by suggesting change via delegated legislation (neither of which routes would require the jostle for parliamentary time) – but these would be far less appropriate for the substantial changes in criminal law or family or property law which eventually were to come out of the law reform machines. Originally, it was thought – somewhat naively – that a tranche of newly codified and simplified law could be produced and pushed through Parliament within ten years rather than the fifty-plus (and counting) years which were actually needed. The notion of codification, which was seen by some legislators and lawyers as alien to the common law system, was high on the agenda and meant that the number of topics which could be examined at any one time had to be constrained by the available resources, both financial and human.[6] At first, progress was ponderous because the two Commissions had to wrestle with the breadth of their brief, but given the willingness of parliamentarians to give the task a fair wind and to support the overall objectives (notwithstanding the feeling by some that the existing ad hoc departmental law reform arrangements which remained in place were already sufficient),[7] the rate of statutory implementation was sufficient. Throughout the parliamentary debates on the 1965 Bill in both Houses, the two particular concerns voiced were the availability of parliamentary counsel to draft the new legislation, on top of the Office of the Parliamentary Council's (OPC) existing government-driven workload, and the need to ensure that parliamentary processes for bill handling were fit for purpose. These concerns remained a continuing theme for the next decades.

4 *See* Second Reading debates on the bill per Sir Eric Fletcher, MP (minister without portfolio), who introduced the bill in the House of Commons: 706 Official Report (Hansard) col 48, 8 February 1965. The figure for Acts of Parliament was probably an underestimate based solely on public general Acts. They were – and are – greatly outnumbered by extant local Acts.

5 Section 3(1)(c). Additionally, the Commissions were charged with preparing programmes for statutory consolidation and statute law revision (essentially repealing legislation which was either obsolete or superseded or no longer of practical value) and, again, delivering the outcomes through draft bills.

6 On the issue of codification and the challenges which it posed, *see* J. Teasdale, 'Codification: A Civil Law Solution to a Common Law Conundrum?' (2017) 19 *EJLR* 247 and more detailed comparisons in the articles by Professor Patricia Popelier, 'Codification in a Civil Law Jurisdiction: A Northern European Perspective' (2017) 19 *EJLR* 253 and Enrico Albanesi, 'Codification in a Civil Law Jurisdiction: An Italian Perspective' (2017) 19 *EJLR* 264.

7 The Lord Chancellor already had in place the departmental Law Reform Committee (for civil law matters) and the Statute Law Revision Committee, and the Home Secretary was advised by the Criminal Law Revision Committee, each of which would continue in being for some time.

C Stumbling Blocks

The practical problems which stymied implementation of law reform proposals stemmed from two sources. First, the government, which had given advance approval to the programmes of work and had, in some instances, actually referred additional projects to the Commissions– particularly that for England and Wales – for research and advice, simply failed to ensure that the Commission's recommendations were considered in a timely manner. This fault lay within individual departments of state and at the Cabinet level. Reports which tackled technical issues (some would call that 'lawyers' law') failed to grasp the attention of policymakers, who were concerned to promote legislation which advanced social or economic causes or which originated in political manifestos. Even when they surmounted the hurdle of departmental interest, they had to jockey for position in the government's overall bill programme. The usual cry was that parliamentary time was in short supply, and (party) political priorities drove the agenda.

Parliament itself was the first body to try to remedy the situation. Recognizing that Law Commission bills were ordinarily non-contentious, certainly when they dealt with mechanical issues flowing from trust or insurance or partnership law, the House of Lords took the view that their House was an appropriate vehicle for a bill's parliamentary introduction and carriage. In October 2010, the Lords Procedure Committee recommendation (of 2008) that strictly 'uncontroversial' bills should follow a new route was approved as a permanent measure by the whole House. Writing in the Commission's Annual Report for 2008-2009, the then Chairman, Sir Terence Etherton (later Master of the Rolls), welcomed the enhanced procedure for the consideration of technical and politically non-controversial Law Commission bills.

> Under this procedure, the House of Lords can resolve to take the Second Reading of such Bills off the floor of the House. The first Bill to be scrutinised in this way is the Perpetuities and Accumulations Bill, based on the Commission's 1998 Report, which was introduced in the House of Lords on 1 April 2009. This new procedure should enable more technical Law Commission Bills to be taken forward, while leaving the floor of the House free for other business. The Commission is particularly grateful to Baroness Ashton, the former Leader of the House of Lords, for her initiative and persistence in taking forward this procedural change.[8]

8 *See* Annual Report 2008-2009 at p. 2 and implementation details on p. 52 (at App. A). This new procedure in effect replaced the seemingly dormant 'Jellicoe' procedure in the Lords, whereby, after the second reading, a non-controversial bill could be referred to a Special Public Bill Committee which then received written and oral evidence and acted as a substitute for the normal committee stage. Only three bills have been referred to that 'fast track' form of committee: the Law of Property (Miscellaneous Provisions) Bill of 1994, the Private International Law (Miscellaneous Provisions) Bill of 1995 and the Family Law and Domestic Violence Bill, also of 1995. Jellicoe Committees lacked the report publication powers of Full Select Committees, which may explain their seeming demise.

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This was a significant step forward, and by early 2022, some nine bills had followed the procedure, namely, the following:

- The Charities Act 2022, which received Royal Assent on 24 February 2022
- The Sentencing (Pre-consolidation Amendments) Bill, which was introduced into the House of Lords on 22 May 2019 and received Royal Assent on 8 June 2020 (and which was followed by the consolidating Sentencing Act 2020 (c.17))[9]
- The Intellectual Property (Unjustified Threats) Act 2017, which received Royal Assent on 27 April 2017
- The Insurance Act 2015, which received Royal Assent on 12 February 2015
- The Inheritance and Trustees' Powers Act 2014, which received Royal Assent on 14 May 2014
- The Trusts (Capital and Income) Act 2013, which received Royal Assent on 31 January 2013
- The Consumer Insurance (Disclosure and Representations) Act 2012, which received Royal Assent on 8 March 2012
- The Third Parties (Rights against Insurers) Act 2010, which received Royal Assent on 25 March 2010
- The Perpetuities and Accumulations Act 2009, which received Royal Assent on 12 November 2009[10]

Over the decades, parliamentarians of both Houses have recognized the value of the painstaking work undertaken by the two British Commissions and have been supportive of efforts to rationalize the ever-growing statute book through the repeal of obsolete or superseded legislation and the consolidation of statutes where layer upon layer of additions and amendments have made access and comprehension a complex task. The government, however, has been a wholly different matter. Although Lord Chancellors down the years have paid tribute to the work carried out to facilitate law reform, willingness by their own civil servants and fellow cabinet ministers to translate recommendations into law has been less forthcoming.

The government has always been the conduit for the introduction of 'pure' law reform bills (as well as bills designed for repeal or consolidation). Neither the Commons nor the Lords can determine or influence the speed with which recommendations are considered within the government, and apart from the highly constrained mechanism reserved for private member's bills, neither MPs nor Lords can dictate when draft legislation is to be fed into the parliamentary machine.[11]

9 On the mechanisms for achieving a comprehensive and intelligible sentencing code for England and Wales, *see* Harry O'Sullivan & Professor David Ormerod, 'Time for a Code: Reform of Sentencing Law in England and Wales' (2017) 19 *EJLR* 285 *et seq.*

10 *See* Annual Report 2018-2019 at p. 37. The Partnerships (Prosecution) (Scotland) Act 2013, promoted by the Scottish Law Commission, also followed this fast-track route.

11 For an authoritative overview of the parliamentary procedures for handling law reform bills – both non-controversial and controversial – *see* Andrew Makower & Liam Laurence Smyth, 'Law Reform Bills in the Parliament of the United Kingdom' (2020) 22 *EJLR* 164, especially at pp. 167-169.

D Measuring Success

Rates of implementation are by no means the only indicator of success or achievement by a law reform body, but they are important for two reasons. First, they point to how seriously those in the government take the need to keep the law under review and to put in place arrangements to ensure that when seriously considered recommendations have been made, they are then carried through. Second, as with any publicly funded body, they demonstrate – certainly up to a point – whether that body is delivering value for the money invested in it. Up to 31 March 2019, the Commission for England and Wales had published 231 reports since its inception in 1965. Of those 231, some 150 had been implemented in whole or in part, representing an implementation rate of 65%.[12] Put another way, some two-thirds of reports had found favour with the government, but one-third of that output had dropped by the wayside.[13]

There are a variety of reasons why the government took the view that implementation was either unnecessary or inappropriate. Some reports dealt with matters which had been overtaken by events (such as work on related topics being undertaken within government departments) or which had become politically too uncomfortable. Others simply slipped through the legislative sieve because they were seen as too technical or because the government felt the need to undertake more work on the subject matter in-house before proceeding with legislative proposals. Inevitably that led to delays, which meant that the reports' original shelf-life expired, overtaken by developments either of law (judge made or statutory) or of policy. And, frequently, the governmental reason (some would say excuse) was that there was simply an inadequacy of administrator resource or parliamentary time to take matters forward, albeit that one arm of government had previously approved the reform work programme or had, in the first instance, referred the issue to the Commission for advice.

Commissioners, academics and commentators had for a long while expressed concern that government inactivity on this scale was a waste of valuable expertise and resource. The serious backlog meant that when some reports were progressed, the Commission's recommendations predated implementation by several years. Former Commissioner Andrew Burrows QC, writing in 2003, put the matter concisely when he said that up to the end of 2001 about half of (the then 282) Commission reports had been implemented, acknowledging the fact that there were different ways of counting[14] (e.g., some reports – albeit a small minority – were capable of implementation by the senior courts where issues of pure law were concerned, while others could be given effect through subordinate rather than

12 *See* Annual Report 2018-2019, at p. 37.

13 This position contrasts with that in Ireland, where the legislative implementation rate is around 70%. The Law Reform Commission of Ireland was formed in 1975. *See*, *generally*, the detailed article by Professor Ciaran Burke, 'Parliamentary Follow-up of Law Commission Bills: An Irish Perspective' (2020) 22 *EJLR* 136, especially pp. 149-151. As with the English model, the 'vast majority' of Irish LRC reform reports are accompanied by a draft bill.

14 See A. Burrows, 'Some Reflections on Law Reform in England and Canada' (2003) 39 Can Bus LJ 320, at 326.

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primary legislation). Much of the problem turned on the availability of parliamentary time. The reason, Burrows said, was that "Government departments fight each other for the time to put forward their own policy-driven bills. In that environment it is hardly surprising that non-sexy independent law reform proposals are squeezed out of the legislative timetable. This is so despite research showing that Law Commission bills take up very little time on the floor of either House" (citing a research report undertaken for the Commission in 1994).[15]

This unease has been echoed down the years. In the Commission's Annual Report for 2008-2009, the then Chairman, Sir Terence Etherton, wrote that although governments had accepted and implemented 135 of the Commission's 180 published final reports (with another 12 waiting in the wings), itself "an impressive track record", nonetheless "the speed of implementation has been a cause of concern".[16]

> It remains [...] a challenge to find legislative time to implement our law reform recommendations, which by their nature are not generally high on the political agenda. During my time as Chairman, I have sought to encourage Government to adopt measures to enhance the standing and effectiveness of the Commission.
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> The first step was the amendment of the Law Commissions Act 1965 to provide that the Chair of the Commission must be a judge of the High Court or of the Court of Appeal.[17] This both enhances the standing of the Commission, and is powerfully symbolic of its independence and political neutrality.
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> The next significant development was the Lord Chancellor's statement to Parliament, introducing the Constitutional Renewal White Paper on 25 March 2008. In this statement he announced his intention to bring forward proposals to place a statutory duty on the Lord Chancellor to report annually to Parliament on the Government's intentions regarding outstanding Law Commission recommendations. He also announced the provision of statutory backing to a protocol to underpin the way the Government works with the Law Commission.
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> At the time of writing, the Constitutional Renewal Bill, which was intended to contain these provisions, has yet to be introduced. The Commission is very grateful to Lord Lloyd of Berwick, who in the meantime has introduced a private peer's Bill to give effect to the Lord Chancellor's statement. This Bill was introduced on 23 January 2009 and passed to the House of Commons on 1 June. These changes will allow Parliament to hold the Government to account for its response to the work of the Commission; and they will provide a stronger working relationship with the Executive, so increasing the likelihood that more reports of the Commission are passed into law.[18]

15 See at p. 328 citing the research study of Philippa Hopkins, Parliamentary Procedures and the Law Commission (Essex Court Chambers, 1994).

16 Annual Report 2008-2009 (Law Com No 316), Chairman's Introduction at pp. 1,2.

17 *See* Tribunals, Courts and Enforcement Act 2007 (c.15), s60.

18 *See* Annual Report 2018-2019, at p. 37.

The Law Commission Act 2009[19] (which applied only to the England and Wales body) was a significant step forward. It provided for two changes. First, it imposed a statutory duty on the Lord Chancellor (who is also the Secretary of State for Justice) to prepare a report for Parliament annually on Law Commission proposals which (a) have been implemented in whole or in part during the "reporting year" and (b) have not been implemented in whole or in part as at the end of that year. Where a decision has been taken *not* to implement particular proposals, the report must also set out "the reasons for the decision".[20] The first "reporting year" is defined as running from the day on which Section 1 comes into force (12 January 2010), and subsequent years carry on thereafter.[21] A "proposal" encompasses both a law reform proposal formulated by the Commission (ordinarily in a final report) and a proposal for consolidation or statute law revision (which ordinarily means proposals for repeal of obsolete statutes) for which a draft bill has been prepared and submitted.[22] What is important about this 2009 Act's first provision is that it creates a clear obligation to report, establishes precisely the meaning of "each reporting year" and requires compliance "as soon as practicable" after the end of the year in question. The downside is that no mechanism for enforcement is spelt out in the legislation and no patent consequences flow for either non-compliance or contumelious delay. These issues are addressed later in this article.

The second change brought about by the 2009 Act is a power for the Lord Chancellor and the Law Commission to prepare and agree on a "protocol" about the Law Commission's work.[23] This provision is not cast as an obligation: the parties simply "may agree" the document. Likewise, its contents appear discretionary; however, interestingly, once it has been finalized and agreed upon, specific duties apply: to review it "from time to time" with a view to possible revision, to lay the text (and any later revision) before Parliament and for both ministers of the Crown and the Law Commission to have regard to it in their ongoing work.[24]

19 2009 (c.14).

20 Section 3A(1), (2) of the 1965 Act as inserted by Section 1 of the 2009 Act.

21 *See* inserted Section 3A(3) of the 1965 Act and Section 3(1) of the 2009 Act. The 2009 Act does not operate retrospectively, so there is no requirement to report on *decisions* not to implement taken in the years prior to the first reporting year: Section 3A(4). Note, however, that this restriction applies only to the situation where specific decisions have been taken and recorded; it does not apply to those situations where no decision has been taken and matters have simply been allowed to drift.

22 Section 3A(6).

23 Section 3B(1) of the 1965 Act as inserted by Section 2 of the 2009 Act. The protocol does not have retrospective effect, although the parties agreed to take it into account "so far as practicable" in connection with ongoing projects: *Protocol* para 3

24 *See* Section 3B(3)-(5). "Ministers of the Crown" is plural and means all government ministers within departments of state, and not simply the Lord Chancellor. In other words, what the Lord Chancellor signs up to is, then, binding on all of their ministerial colleagues, including, presumably, the prime minister. In each of the cited instances, the duty is reinforced by the adoption of the word "must" before each of the procedural requirements.

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The content of the protocol is not absolute: the Act sets out matters which may be included, but does not seek to be exhaustive. Thus, it is expected to make provision for the following:

a The "principles and methods" to be applied in two situations – the decisions on what law reform work should be carried out (which, in practice, means the formation of the sequential work programmes and the referral of specific topics for consideration and advice) and the manner of carrying out the work
b The "assistance and information" that ministers and the Commission are to give to each other
c The way in which ministers are to deal with the Commission's proposals for "reform, consolidation or statute law revision".[25]

The protocol itself was drafted and came into force in March 2010. In its introduction, the then Lord Chancellor (Jack Straw, MP) and Commission chairman (Lord Justice Munby) set out two clear understandings which underpinned its existence: that it was designed to ensure "a more productive relationship, with improved rates of implementation" of Commission reports and to demonstrate "our joint determination to increase the momentum of law reform".[26] The overall shared aim was to deliver "[l]aw that is fair, modern, simple and accessible"[27] through "planned and co-ordinated review".[28]

The protocol spanned four scenarios: the position before the Commission takes on a project (both within a three-year programme and on an individual referral), the agreements required at the outset of a project once a decision has been made to proceed, the lines of communication during the currency of a project and the obligations once a project report has been delivered to the relevant minister.

In the first instance, before a project is agreed in principle (and subject to the Lord Chancellor's approval in the case of a programme project), the relevant minister and their permanent secretary must agree to provide sufficient staff to liaise with the Commission for the project's duration (a nominated policy lead, a lawyer and an economist) and must "give an undertaking that there is a serious intention to take forward law reform" in the subject area.[29] As an integral part of this stage, the department is required to tell the Commission what it considers to be the most appropriate output for the project (*e.g.*, a report with policy recommendations and a draft bill) and the "likely method of implementation". It must also provide a view on "any risks associated with the method of implementation" which might cause either significant implementation delay or even non-implementation.[30] Likewise, where a project is referred to the Commission

25 *See* Section 3B(2) of the 1965 Act as inserted by Section 2 of the 2009 Act.
26 *Protocol between the Lord Chancellor (on behalf of the Government) and the Law Commission* (Law Com No 321) tabled in the House of Commons on 29 March 2010 (TSO: HC 499), p. 1.
27 *Protocol*, Introduction, at p. 1.
28 *Protocol* Scope, Para. 2, n. 2.
29 *Protocol*, Para. 6.
30 *Protocol*, Para 7.

(under Section 3(1)(e) of the 1965 Act), an undertaking must be given by the department that there is "a serious intention" to progress law reform where that is an appropriate course of action. The Commission itself must then assess several factors prior to acceptance, including whether sufficient experience and funding is available, and the degree of priority which the project merits.[31]

Once the project is current, the department and the Commission are obliged to keep in regular contact and to review progress. The Commission reserves the right to discontinue a project if circumstances dictate, but the minister is not empowered unilaterally to require cessation. However, in considering possible discontinuance, the Commission must "take full account of the Minister's views and all relevant factors affecting the prospects for implementation".[32] In other words, implementation and its likelihood remain germane issues right from the start of a project through to its completion – and the government, as signatory to the protocol document, is aware of this fact.

When the project is complete, and the final report has been published, the minister must provide an interim response within six months and a full response within 12 months (unless otherwise agreed between the parties). The twelve months' window is a maximum period; the hope is that the full response will be provided "as soon as possible after delivery of the interim response".[33] The full response must indicate the recommendations which are accepted, rejected or to be implemented in "modified form", together with a "timetable for implementation" where that is applicable.[34] Again, the issue of implementation is an important and recurring theme. And, as Section 3B(5) reminds the parties – both the relevant minister and the Commission – "must have regard" to it (and implicitly to its requirements). Although the protocol applies to law reform projects, it specifically excluded Commission proposals for consolidation or statute law revision (which includes recommendations and draft bills for statute law repeals),[35] an unfortunate omission given the immense amount of effort and skill which is invested in those projects.

Cumulatively, therefore, these three procedural steps taken across 2008-2010 were designed to ensure that concerns about implementation, which had been voiced by the Commission chairmen and commissioners down the years, would be addressed and, as far as possible, remedied. Given that the annual budget of the Law Commission today is around £4.1m (and that figure is substantially less compared with the budget allocation of previous years), the Commission itself is anxious to deliver value for money and to see that the results of its work take practical effect. Its output, which is regarded highly in parliamentary, academic

31 *Protocol*, Paras. 8, 9.

32 *Protocol*, Paras. 12-15.

33 *Protocol*, Paras. 18, 19.

34 *Protocol*, Para. 19. Where the department is minded either to reject the recommendations or to "substantially modify" any of those which are significant, reasons must be provided, and the Commission given the opportunity to comment prior to a final ministerial decision: Para. 20.

35 *Protocol*, Para. 3. The last report and draft bill on statute law repeals (the 20th) was produced seven years ago in June 2015 and as yet remains unconsidered and unimplemented. It encompassed some 272 Acts in whole or in part.

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and practitioner spheres, is acknowledged to be prodigious and of significant quality. However, all that is practically for nought if its recommendations – or at least a sizeable proportion of them – are not implemented by one means or another. Inevitably, there will be occasions where, for political reasons (such as a change of government) or through development of the law by other means, proposals need to be reassessed or deferred, pending additional work on the subject matter. The constraints of parliamentary time do not help. However, if the Commission uses its best endeavours to expedite projects, and ministers react in a timely manner, the risk of recommendations being overtaken by events is clearly minimized. Political will is a fickle thing. Over the course of a project, it is not unheard of for departmental ministers to come and go or for a project's initial allure to wane.[36] The protocol was designed to mitigate this risk. The questions that flow are:

– Did the changes produce an enhanced rate of implementation?
– If they did not, what actually occurred?
– What steps should now be taken to rectify matters?

E Diagnosis

The answer to the first point is that the rate of parliamentary implementation rose from around 68% to a peak of 73% by early 2013, but, thereafter, impetus was lost, and over the succeeding years, it gradually slipped back to 64%. Inevitably that decline was fuelled in part by the then government's own politically driven legislative agenda which mopped up available parliamentary time, especially in the Commons, and latterly by a combination of the Brexit legislative debacle and the coronavirus pandemic. An examination of the number of law reform bills which found their way on to the statute book illustrates the point (see Table 1).

Table 1 *Law Commission (England & Wales) annual reports for 2009-2021 (pursuant to the Law Commissions Act 1965, s3(3))*

Implementation of law reform proposals by Westminster Statute		
Law Commission annual reports (2009-2021)	**No. of law reform reports published from 1965 onwards**	**Reports implemented in whole or in part (and percentage implementation rate)**
Report 2009-2010 (to 31 March 2010)	185	125 (= 68% rate)
Report 2010-2011 (to 31 March 2011)	187	128 (= 68% rate)
Report 2011-2012 (to 31 March 2012)	191	131 (= 69% rate)

36 For example, over the previous twelve years, since 2010, there have been eleven ministers for housing in the government: *see The Times*, 9 February 2022 and the lead article 'Absentee Landlord', 10 February 2022. The absence of continuity, in terms of both policy and legislative action, is an obvious issue.

Table 1 (Continued)

Implementation of law reform proposals by Westminster Statute		
Law Commission annual reports (2009-2021)	**No. of law reform reports published from 1965 onwards**	**Reports implemented in whole or in part (and percentage implementation rate)**
Report 2012-2013 (to 31 March 2013)	195	133 (= 68% rate)
Report 2013-2014 (to 31 March 2014)	202	135 (= 66.8% rate)
Report 2014-2015 (to 31 March 2015)	212	143 (= 67.5% rate)
Report 2015-2016 (to 31 March 2016)	217	143 (= 66% rate)
Report 2016-2017 (to 31 March 2017)	227	149 (= 66% rate)
Report 2017-2018 (to 31 March 2018)	228	149 (= 65% rate)
Report 2018-2019 (to 31 March 2019)	231	150 (= 65% rate)
Report 2019-2020 (to 31 March 2020)	236	151 (= 64% rate)
Report 2020-2021 (to 31 March 2021)	243	155 (= 64% rate)

A simple analysis of statutes enacted by the UK Parliament over the past fourteen years shows the variation in numbers of Acts gaining Royal Assent, from forty-six in 2010 down to twenty-five in the following two years (under a coalition government) and, finally, emerging as thirty-five in 2021 (see Table 2). In theory, at least, when the number of government-driven bills in any given year is relatively low, there should be sufficient parliamentary time available to secure the passage of law reform legislation.

Table 2 Statutes enacted by the UK Parliament from 2008 to 2021

Year enacted	Public general acts	Local acts	Total enacted
2008	33	3	36
2009	27	1	28
2010*	41	5	46
2011	25	Nil	25
2012	23	2	25
2013	33	7	40
2014	30	2	32
2015*	37	Nil	37
2016	25	2	27

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Table 2 (Continued)

Year enacted	Public general acts	Local acts	Total enacted
2017*	35	2	37
2018	34	3	37
2019*	31	Nil	31
2020	29	Nil	29
2021	35	Nil	35

* Parliamentary general elections were held in 2010, 2015, 2017 and 2019. Excepting 2019, the occurrence of general elections (and the formation of new Parliaments) in three of the years accounts – at least in part – for the increased number of statutes formally enacted. Much of 2019 (the exception) was taken up by the parliamentary debate on Brexit legislation.

Commentators in recent years have drawn attention to the decline in implementation and its impact on law reform generally. The academic Shona Wilson Stark, for instance, indicated that, in her view, a "significant number of proposals can remain unimplemented without threatening the Commissions' [E&W and Scottish] reputation or very existence", but – on the basis of the implementation of other Commissions' proposals – a rate of 75%-85% "seems desirable", even if implementation is achieved not entirely through legislation alone.[37] Nonetheless, even though unimplemented reports are like dissenting judgments which can mark out territory ahead of their time, the expectation is that carefully researched and reasoned reports will find their way on to the statute book. Why else would legal issues have been identified and work be commissioned in the first place?

When comparing the track records of other Commissions it is not possible, as Sir Grant Hammond wrote, accurately to map the degrees of "success" where parliamentary implementation is concerned, but a broad examination does give an indication of their contribution to legal development. Law Commissions are, after all, "applied research institutions" which are "in the business of legal change".[38] His concern was not so much about research output as about the ability to secure government consideration and endorsement, preferably in a timely manner. He rather favoured the notion that by requiring governments to acknowledge receipt of reports "in the face of the House" and indicating their future that approach would focus minds. Reports could not so easily be "swept under the carpet".[39] And, at the end of the day, as former Commissioner Nicholas Paines QC opined, non-implementation feels – if not a failure by the Commission itself – at least "a

37 Other mechanisms include secondary legislation, judicial decision or the instigation of policy or legal debate. *See* S. Wilson Clark, 'Promoting Law Reform: By Means of Draft Bills or Otherwise', *in Fifty Years of the Law Commissions: The Dynamics of Law Reform*, ed Matthew Dyson, James Lee & Shona Wilson Stark (Hart Publishing, 2016) at Chapter 15, pp. 148-150.

38 *See* Grant Hammond, 'The Legislative Implementation of Law Reform Proposals', *supra* note 2 above, Chapter 19 at pp. 177, 178. Sir Grant Hammond was formerly a New Zealand appeal court judge and president (2010-2016) of the New Zealand Law Commission.

39 *Ibid.*, at p. 183.

failure of the system", if only because taxpayers' money has been invested in a product which is going nowhere.[40]

Given that over the years the implementation rate peaked marginally and then dropped again, it is worth examining how and why the techniques put in place had, seemingly, lacked the vim to make things happen better.

The two principal hurdles to be overcome were government resistance or intransigence and Parliament's lack of will or resource to make time for legislative passage.

The changes brought about by the Law Commission Act 2009 and its resultant protocol signalled a brighter age. Here was a new mechanism whereby Law Commission reports were to be properly logged and thought about within the government and Parliament itself would benefit from greater executive transparency. This, of course, required the government to be more open about its intentions and parliamentarians to be more alert about progress. Departments, especially the Ministry of Justice, would need to see law reform as an important adjunct to their own mainstream work, and parliamentary select committees (especially the Justice Committee) would need to keep a weather eye on the righting (or, at least, ameliorating) of injustices or inadequacies which their expert advisers sought to bring to their attention. The government is, as always, the gateway to a smooth legislative passage, particularly on the floor of the lower House. The point was compellingly made by Professor Andrew Burrows back in 2003:

> The major problem in relation to implementation, which has been present since the creation of the Law Commission, is finding Parliamentary time. Government departments fight each other for the time to put forward their own policy-driven bills. In that environment it is hardly surprising that non-sexy independent law reform proposals are squeezed out of the legislative timetable. This is so despite research showing that Law Commission bills take up very little time on the floor of either House. Over the years there have been many calls for special fast-track procedures for the implementation of Law Commission bills. But all initiatives and ideas have, thus far, run into the sand, although sometimes only after having been tried out and failing.[41]

On paper, at least, of the two most recent procedures (introducing non-contentious or "uncontroversial" bills for England and Wales into the House of Lords [2008] and the MoJ Protocol for England [2010]), the former has been the more

40 *See* Nicholas Paines, 'Reflections on Statutory Implementation in the Law Commission', *in Fifty Years of the Law Commissions*, ed Matthew Dyson, James Lee & Shona Wilson Stark (Hart Publishing, London, 2016), at Chapter 21, at p. 199.

41 *See* Andrew Burrows, 'Some reflections on law reform in England and Canada' (2003) 39 *Can Bus LJ* 320, at 327, 328.

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successful.[42] To date, some nine reports have been implemented via the Lords' procedure (the last being the Charities Act 2022).

In Scotland, for those matters of Scots law which are devolved, the Scottish Law Commission's annual reports show a rate of legislative implementation through the Scottish Parliament which outstrips the achievements at Westminster. From 2010 to 2021 the implementation rate has only varied by some 5%, reaching a high of 88% in 2011 and levelling off at 83 and 84% in the eight years from 2014 to 2021 (see Table 3).

Table 3 Scottish Law Commission annual reports for 2010-2021 (pursuant to the Law Commissions Act 1965, s3(3))

Implementation of *Scotland-only* law reform proposals by Act of the Scottish Parliament (ASP)			
Scottish Law Commission annual reports (2010-2021)[a]	**No. of law reform reports published from 1965 onwards**	**No. of bills introduced into Scottish Parliament and Acts (ASP) passed**	**Reports implemented by ASP in whole or in part (and overall implementation rate)**
Report for 2010	168	3 Bills + 1 Act	147 (= 87%)
Report for 2011	169	2 Bills + 2 Acts	149 (= 88%)
Report for 2012	173	Nil Bills + 2 Acts (and 1 Scotland Bill introduced at Westminster)[b]	151 (= 87%)
Report for 2013	178	Nil Bills + nil Acts	151 (= 85%)
Report for 2014	182	1 Bill[c] + 1 Act	152 (= 83%)
Report for 2015	183	2 Bills + 1 Act	153 (= 84%)
Report for 2016	184	Nil Bills + 2 Acts	155 (= 84%)
Report for 2017	187	1 Bill + 2 Acts	157 (= 84%)
Report for 2018	188	1 Bill + 1 Act	158 (= 84%)
Report for 2019	189	1 Bill + nil Acts	158 (= 84%)
Report for 2020	190	Nil Bills + nil Acts	158 (= 83%)
Report for 2021	190	Nil Bills + 1 Act	159 (= 84%)

[a] Scottish Law Commission annual reports cover the calendar year 1 January to 31 December.
[b] Subsequently enacted as the Partnerships (Prosecution) (Scotland) Act 2013 (c.21).
[c] Bill passage facilitated by the new Scottish parliamentary procedure (effective from 2014 onwards). Bills are selected in accordance with the presiding officer's criteria and considered by the Delegated Powers and Law Reform Committee of the Parliament. A parliamentary working party reviewed and reported on the criteria in November 2020. Revised criteria were issued in March 2021.

For England and Wales, the Lord Chancellor, acting through the Ministry of Justice, is required to report annually to the Westminster Parliament on the extent

42 In October 2010, the House of Lords Procedure Committee extended the English special arrangement to bills from the Scottish Law Commission on reserved areas of Scots law. The first of the bills to benefit was the Partnerships (Prosecution) (Scotland) Bill 2012-2013.

to which his department (and other government departments) have progressed completed reports of the Law Commission (following enactment of the Law Commission Act 2009). The purpose of these reports is to make more transparent the rate of progress both as to implementation and as to the handling of proposals which either are in the course of being implemented or are awaiting political decision. From January 2011, when the first report for the year 2010-2011 was published, the rate of implementation has varied, and the regularity and quality of the reports have become increasingly erratic. Table 4 illustrates the extent to which reform proposals for England and Wales have been implemented and the considerable number of proposals where the department has yet to complete implementation or where no decision on taking matters forward has yet been made. From 2013 to 2014 onwards, the department broke down the statistic into its two constituent parts, but from 2014 to 2015 onwards, it became increasingly clear that the total number of reports awaiting even formal decision on legislative activity was reaching a significant proportion.

Table 4 ***Ministry of Justice reports on the implementation of Law Commission proposals for England and Wales for 2010-2021 pursuant to the Law Commissions Act 1965, s3A (as amended)***

MoJ annual reports	Publication dates	Periods covered	Proposals that have been	Proposals not yet implemented	Proposals not to be implemented
First report for 2010-2011	January 2011	Jan 2010 to Jan 2011	5	15	5
Second report for 2011-2012	March 2012	Jan 2011 to Jan 2012	1	18	2
Third report for 2012-2013	January 2013	Jan 2012 to Jan 2013	Nil	18	Nil
Fourth report for 2013-2014	May 2014	Jan 2013 to Jan 2014	5	(i) being implemented 7 + (ii) awaiting decision 8 = total 15	2
Fifth report for 2014-2015	March 2015	Jan 2014 to Jan 2015	5	(i) being implemented 8 + (ii) awaiting decision 15 = total 23	1
Sixth report for 2015-2016	January 2017	Jan 2015 to Jan 2016	4	(i) being implemented 4 + (ii) awaiting decision 20 = total 24	Nil
[Seventh] report for 2016-2017	*No report published*	Jan 2016 to Jan 2017	*Figure not produced*	*Figures not produced*	*Figure not produced*

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Table 4 (Continued)

MoJ annual reports	Publication dates	Periods covered	Proposals that have been	Proposals not yet implemented	Proposals not to be implemented
Seventh report for 2017-2018	July 2018	Jan 2017 to July 2018	5	(i) being implemented 4 + (ii) awaiting decision 24 = total 28	1
Eighth report for 2018-2019	*No report published (due by early 2020*[a]*)*	July 2018 to July 2019	*Figure not produced*	*Figures not produced*	*Figure not produced*
Ninth report for 2019-2020	*No report published: (due by early 2021)*	July 2019 to July 2020	*Figure not produced*	*Figures not produced*	*Figure not produced*
Tenth report for 2020-2021	*No report published (due by early 2022)*	July 2020 to July 2021	*Figure not produced*	*Figures not produced*	*Figure not produced*

[a] In response to a formal Freedom of Information Act request the Ministry of Justice indicated on 26 May 2020 that the Eighth report would be published 'in due course', although no timeframe was specified.

Later in this article we will return to the manner in which the Ministry of Justice seeks to explain to Parliament the reasons for not implementing individual reports. However, the other point of note is that, from 2018 to 2019 onwards, notwithstanding the statutory requirement to do so, the Ministry of Justice has simply failed to prepare or publish the required annual reports. No statistics are, therefore, available. This is a highly unsatisfactory default by the government.

So far as Scotland is concerned, the Ministry of Justice has no obligation under the 2009 Act (or any other legislation) to provide details of the Scottish Law Commission proposals being implemented insofar as they relate to reserved (i.e., non-devolved) areas of Scots law. However, in 2011, the then Ministry of Justice minister responsible for law reform affairs had agreed with the Scottish Commission chairman that, on an informal basis, the Ministry of Justice would provide annual letters detailing the implementation position. Table 5 shows the figures drawn from those letters.

Table 5 ***Ministry of Justice letters detailing implementation of Scottish Law Commission proposals on*** *reserved areas* ***of Scots Law from 2012 to 2022 (pursuant to 2011 informal agreement)***

MoJ letters to the Scottish Law Commission Chairman	No. of reports reviewed	Reports implemented in whole (or in part)	Reports not implemented	Responses on reports pending
November 2012	8	1 (+1 partial)	Nil	6 (+1 partial)
January 2013	3	Nil	1	2
May 2014	8	2 (+ 1 partial)	1 partial	5
March 2015	7	4	1	2
January 2017	4	3	Nil	1
July 2018	3	1	1	1
Years 2019-2022	*No implementation letters produced by MoJ*			

The resources available to the Scottish Law Commission are far more modest than those allocated to the Commission for England and Wales and, as a consequence, the proposal reports submitted to the government, either in Edinburgh or in Westminster, are inevitably fewer (as illustrated in Table 3). However, a proportion of the projects undertaken are carried out as joint projects with the London-based Law Commission. The Scottish output, thus, embraces matters of both devolved and non-devolved law. What Table 5 shows is that the implementation rate for Scotland, up until July 2018, was improving. However, it also shows that, just as with England and Wales, the Ministry of Justice failed to provide any annual review letters from 2019 to 2022, so those statistics are missing. Likewise, no statistics are available from the Scottish government as to the implementation of reports on devolved areas of Scots law. The Scottish government has no statutory obligation to provide annual reports to the Scottish Parliament and, to date, has resisted calls to produce them on a voluntary basis. That is unfortunate.

What is the situation for Wales? Since 2015, following amendment to the Law Commissions Act 1965 by the Wales Act 2014, the Welsh government has been required to produce annual reports on the implementation of law reform proposals for legislative matters devolved to the Senedd (formerly the National Assembly for Wales).[43] The Law Commission is responsible for progressing law reform projects for both England and Wales. Wales does not have its own statutory law reform

43 The Wales Act 2014 (c29), s25 empowered Welsh ministers to make direct referrals of law reform matters to the Law Commission in London and established a mandatory protocol (effected in 2015) between Welsh ministers and the Commission on the lines of that already in place for England. Acts passed by the Senedd are deemed a part of the law of England and Wales: Wales Act 2017 (c4), s 1.

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body,[44] but Welsh ministers can at least initiate their own projects for consideration and must subsequently review the proposal reports for implementation or non-implementation.

The Welsh government annual reports span 2015-2016 to date (at the time of writing, the last covered 2021-2022). Unlike the Ministry of Justice's reports, the Welsh reports on implementation have all been produced in a timely manner. Table 6 summarizes the seven reports produced to date.

Table 6 ***Welsh government (First Minister) reports on the implementation of Law Commission proposals – for devolved matters only – from 2015 to 2022 pursuant to the Law Commissions Act 1965, s3C (as amended)***

Annual reports	Publication dates	Periods covered	Proposals that have been implemented in whole or in part	Proposals not yet implemented (and current projects still pending)	Decisions taken not to implement
First report for 2015-2016	Feb 2016	Feb 2015 to Feb 2016	4	1 Still pending 4	Nil
Second report for 2016-2017	Feb 2017	Feb 2016 to Feb 2017	3	1 Still pending 3	1
Third report for 2017-2018	Feb 2018	Feb 2017 to Feb 2018	1	2 Still pending 1	Nil
Fourth report for 2018-2019	Feb 2019	Feb 2018 to Feb 2019	Nil	3 Still pending 2	Nil
Fifth report for 2019-2020	Feb 2020	Feb 2019 to Feb 2020	1	5 Still pending 2	Nil
Sixth report for 2020-2021	Feb 2021	Feb 2020 to Feb 2021	Nil	7 Still pending 3	Nil
Seventh report for 2021-2022	Feb 2022	Feb 2021 to Feb 2022	Nil	6 Still pending 2	Nil

The analysis in this article thus far establishes that the Ministry of Justice has – even against a backcloth of statutory obligation – failed consistently to produce the law reform implementation reports which are an integral part of the arrangements for ensuring that law in England (and non-devolved law in Wales and Scotland) is kept under proper review and that steps are taken by the government to ensure that the law keeps pace with cultural and economic changes

44 Wales remains a part of the England and Wales joint legal jurisdiction, notwithstanding its legislature's ability to enact primary and secondary legislation.

and technological advances within society. Alongside that, there is a continuing need to make law simpler, more accessible and of practical value.

F From Diagnosis to Prognosis

Is the Ministry of Justice's failure symptomatic of a more deep-rooted problem with law reform? Certainly, in terms of the rate of implementation of reform proposals, the picture in England and Wales is less than satisfactory. The government signed up to a protocol in March 2010 which was integral to facilitating and making more productive the work of the Law Commission. Work was to be more focussed and more in tune with the government's legislative aspirations. In practice, however, the implementation rate temporarily reached a high of 69%, but in later years, that figure gradually waned. Did the need for the government to be more transparent in its handling of Commission reports provide a greater incentive to ensure that the reports received adequate legislative time for enactment? And, were parliamentarians – particularly on the oversight Justice Select Committee – given the data to review how reform proposals were being processed? The answer to both of these questions is that, from 2016 onwards, no attempt was made by the Ministry of Justice to adhere to the agreed arrangements. Likewise, with the more modest requirements of the department relating to Scottish reserved matters, no monitoring letters were produced from 2019 onwards. Fortunately, in Scotland, the Scottish government has been more proactive in ensuring that Scottish Law Commission reports have been given a fair wind, so the implementation rate in recent years has settled at around 84% (albeit that represents a 4% drop on its best year of 2011).

What then of the quality of the reports which have been produced by the Ministry of Justice? Do the reports explain adequately to parliamentarians how Commission recommendations have progressed and why the government has decided not to implement others?A short analysis shows the quality of the reporting.

From 2010-2011 through to 2017-2018, some eleven reports containing law reform proposals were recorded as being not implemented for England and Wales (no Ministry of Justice reports at all were produced for subsequent years).

In 1996, the Law Commission produced a final report which examined the responsibilities of landlord and tenant for the repair and maintenance of leased premises and identified several areas where the law was unsatisfactory in terms of either its imprecision or lack of adequate enforcement mechanisms ('Landlord and Tenant: Responsibility for State and Condition of Property' (LC 238). In the 2010-2011 Ministry of Justice report, the department explained its decision not to implement the proposals with the following:

> The Government does not consider that the problems with the law in this area are sufficient to require legislative intervention. There are no current plans, therefore, to implement the proposals contained within this report.

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No further elucidation was provided in a public document. The Law Commission report ran to some 174 pages (plus a draft bill of 17 clauses) and contained a series of thirty-two substantive recommendations.

In 2009, the Commission published its report on 'Intoxication and Criminal Liability' (LC314). The report addressed the law governing the extent to which, in order to avoid liability, a defendant may rely on their drunken or otherwise intoxicated state at the time they committed a criminal offence. It recommended codifying the law to make it more logical and consistent.

In its 2011-2012 annual report, the Ministry of Justice said:

> Many crimes, particularly crimes of violence, are committed when the offender is in a state of extreme or partial intoxication. The Government is not minded to implement the Commission's recommendations on intoxication and criminal liability as it is not persuaded that they would deliver improvement to the administration of justice. Whilst the Commission's proposals may resolve some uncertainty in the law, particularly around the distinction between offences of "specific intent" and "basic intent", they may also increase its complexity, in particular by replacing a complex but well understood process with a complicated new test which practitioners would need to master, yet arguably would be scarcely more intelligible. Furthermore, we do not consider that there would be a risk of miscarriage of justice if the reforms were not introduced; nor are we persuaded that the cost of introducing the changes, for example the courts getting to grips with the new definitions, would be outweighed by any benefits. We do not, therefore, intend to take forward the Commission's proposals and this decision has been communicated to the Commission.

This was a more comprehensive explanation for refusal to proceed, but it was written in entirely subjective terms: we (the government) are not persuaded that the proposals would improve matters; we believe that criminal justice practitioners would find the revised process too "complicated" for them to "master" and that there would be no real risk of miscarriage of justice if things are simply left as they stand. Moreover, the department foresaw additional – but unspecified – costs arising because judges would have to get to "grips" with the "new definitions" (an issue which the judiciary has had to confront many times down the years).

In 2003, the two Commissions (Scotland and England & Wales) jointly produced a thorough report on 'Partnership Law' (LC283) which sought to reform the law of general partnerships and to clarify and modernize the law on limited partnerships, which had been little changed since its introduction in 1907. The Ministry of Justice, in its 2013-2014 report, indicated that two recommendations relating to limited partnerships had previously been implemented by way of the Legislative Reform (Limited Partnerships) Order 2009 (making a certificate of registration conclusive evidence that a limited partnership has been formed at the date shown on the certificate and requiring all new limited partnerships to include "Limited Partnership", "LP", or equivalent at the end of their names). However, on the remainder of the report, the department simply said: "The Government does

not expect to implement the remainder of the proposals in England and Wales." For Scotland, in its letter to the Scottish Law Commission of May 2014, it offered nothing further other than to say, having recited the decision for England and Wales: "[T]his leaves it open for you in Scotland to implement as you consider appropriate."

Seemingly (although not said explicitly), the Ministry of Justice decided that this was a devolved matter and that it need not amplify its previous comment.

These examples illustrate the manner in which the Ministry of Justice in London has responded to recommendations down the years and has recognized the obligation to provide parliamentarians with sufficient information to form their own judgment on the need or otherwise for new legislation.[45]

The position for Scotland is not dissimilar. Admittedly – as indicated earlier – the Scottish government has yet to be persuaded to be more open and transparent in its relations with the Scottish Law Commission, but for reserved/non-devolved matters, the Ministry of Justice has been less than forthcoming in its report-back letters. In September 2013, for example, the two Commissions produced a joint report relating to level crossings on railway lines with a view to modernizing the regulatory framework and enhancing public safety across the network. Amongst other recommendations were proposals to simplify the closure of crossings (and their allied rights) where the need to protect the public from harm had become apparent. There are some 8,000 level crossings across England, Wales and Scotland.

Having in October 2014 publicly accepted the case for legislative reform, the government – by the following May – backtracked, indicating that the Department of Transport ministers believed that administrative adjustment rather than legislation would be sufficient to remedy the perceived mischief. No explanation was provided in the July 2018 letter to the Scottish Law Commission as to what administrative steps could, or would, be taken or as to how the various issues raised in the Commissions' report were to be addressed on the ground. Nor was there any attempt to explain why legislation was an inappropriate mechanism. According to the Ministry of Justice annual report for 2017-2018 on the same topic, the alternative administrative route would be "in the spirit of" the Commissions' recommendations. There was no further elucidation.

This was – and remains – the position with the non-implementation of Law Commissions' reports. However, it should also be remembered that not only has the Ministry of Justice failed in recent years to provide any annual reports or statistics but also those reports which have been published show an increasing and not insignificant number of reports where decisions whether or not to implement are still pending. From 2013 to 2014 onwards, the Ministry of Justice saw fit to break down the annual figure into sub-categories: those reports which were in the course of being implemented (but where the implementation was not yet complete)

45 For a more comprehensive review see the article by Matthew Jolley, 'Independence and Implementation: In Harmony and in Tension' (2019) 21 *EJLR* 562, especially at pp. 573-576. The author there describes the degree of illumination (or lack of it) contained in the Ministry of Justice's annual reports to Parliament and concludes that the discipline of reporting should provide "a greater opportunity for Parliament to support implementation than it is perhaps currently taking".

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and those reports which still awaited decision. That latter figure stood at eight in 2013-2014 but steadily rose to twenty-four by the time of the last published report in 2017-2018. There is no way of knowing what it would have shown in 2020-2021.

G Proposals for Change

Given that the Law Commissions have consistently been praised down the years by both the government (of all political persuasions) and Parliament for making a valuable contribution to law reform in the United Kingdom (notwithstanding the apparent demise of the Northern Ireland Law Commission from April 2015, ostensibly as an austerity measure), it is important that the government of the day recognizes its own statutory duty to monitor its in-house performance in the field.

Several steps need to be taken by the executive, with proper and effective parliamentary oversight.

First, the Ministry of Justice needs to ensure that it produces in a timely manner the annual reports which were seen a decade or more ago as the means through which progress on law reform could be monitored.

Second, it would be helpful if the reporting years for both the Law Commissions and the government could be brought into line so that meaningful comparisons could be made. Both Scotland and Wales have ensured that their reports follow consistent patterns,[46] albeit using different reporting years, and in England and Wales, the Law Commission has reported as at the end of March (although where publication has been delayed, textual updates have been included). However, the Ministry of Justice reports have adopted a calendar year approach, even where publication has been delayed to the following July. So, some synchronization of reporting years would probably be useful.

Third, the reasoning provided by the government for non-implementation needs considerable amplification. It is not sufficient simply to say to parliamentarians that months of law reform work have been discarded because problems identified with the existing law are insufficient to warrant any legislative intervention. That is an opinion not a reason.

Finally, it has to be said that the government (and the Ministry of Justice in particular) is able to shirk its obligations because there is insufficient parliamentary oversight or departmental accountability. The prime candidate for the task of monitoring is the Commons Justice Select Committee. The Committee's remit is wide, and it operates diligently under the chairmanship of Sir Bob Neill, MP. However, it would be in the wider public interest if it could turn its spotlight on matters of law reform generally and the performance of the Ministry of Justice in particular. More stringent accountability would ensure that the original purpose behind the Law Commission Act 2009 and the March 2010 Protocol is properly and publicly honoured. At the end of the day, an implementation rate of two-thirds of Law Commission output is still capable of (and deserving of) improvement.

46 Scottish Law Commission reports cover the calendar year, starting in January 2010. The Welsh Government reports have been published annually each February since 2016, covering the previous twelve months.