Law Commission
Reforming the law

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The Law Reform Enterprise: Evaluating the Past and Charting the Future

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1. Lord Scarman and Reform

It is perhaps a reflection of the common law tradition that resonates still for a New Zealander to be invited to deliver this lecture on law reform in London. The occasion is the fiftieth anniversary of the passage of the Law Commissions Act 1965. Then we lived in the twilight of Empire, where the legal connections were deep and they remained influential long after the trumpets had fallen silent.[1]

The Commonwealth has kept the common law tradition alive. The institutions of law reform devised in the United Kingdom were imitated to a remarkable degree in many countries, but not in that significant common law country, the United States. The two most influential reform institutions there, the American Law Institute and the National Conference of Commissioners on Uniform State Laws, are essentially

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[1] It should be noted that the Law Commission of India was established in 1955, <www.lawcommissionofindia.nic.in>.

private organisations.[2] Law Commissions or kindred institutions exist in more than thirty Commonwealth countries. They also occur within Australia and its states and the provinces of Canada, but no longer the federal Canadian Government, that Commission was effectively abolished twice. Agencies exist also in Ireland and Hong Kong.[3] The proliferation of Law Commissions within a relatively short space of time must have been in response to widely held views that something was wrong with the state of the law and needed putting right.

Teaching the law of torts in American law schools in the 1970s and again in 1990s I reached the view that, at least in the common law of torts, legal doctrine was more unified within the Commonwealth than it was within the several states of the United States.[4] Further, the American courts were much more active in fashioning new common law remedies, such as strict liability for dangerous and defective products, than were the courts of the Commonwealth. Legislatures, on the other hand, were more active in the Commonwealth than within the United States in reshaping and recalibrating the law. In no area of tort law was that tendency more strikingly illustrated than in the New Zealand's no-fault reform of personal injury law. This substituted a state scheme of earnings-related compensation for damages actions in the courts. The change resulted from the 1967 report of the Royal Commission chaired by Sir Owen Woodhouse. It was the first law reform project I worked on and infused in me a permanent taste for big, ambitious law reform.[5]

The career of Lord Scarman illustrates markedly the preference for legislative solutions to repair the law compared with pushing out the boundaries by the methods of the common law. The point was emphatically developed in the Scarman lecture delivered in 2006 by my

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[2] The closest institution to the Law Commission in the United States is the New York Law Revision Commission, established by state statute and whose website says it is the oldest continuous agency in the common law world devoted to law reform through legislation. <www.lawrevision.state.ny.us>.Similar agencies exist in California, Connecticut, Michigan, New Jersey and Oregon. But their work does not seem as ambitious as that done by the Commission for England and Wales. See also N. E. H. Hull "Restatement and Reform: A New Perspective on the Origins of the American Law Institute" (1990) 8 Law and History Review 55 at 85.

[3] The best comprehensive list of Law Commissions is to be found on the Australian Law Reform Commission's website <www.alrc.gov.au/links/overseas-law-reform-agencies>. There exists also the International Law Commission of the United Nations.

[4] G. Palmer, "Defamation and Privacy Down Under" (1979) 64 Iowa L.R. 1209 at 1210.

[5] For a detailed record of efforts to reform personal injury, see G. Palmer, *Compensation for Incapacity - A Study of Law and Social Change in New Zealand and Australia* (Wellington: Oxford University Press, 1979) for a later reprise see G. Palmer *Reform-A Memoir* (Wellington: Victoria University Press, 2013) at 198-226.The current legislation in New Zealand is the Accident Compensation Act 2001.

Australian friend Justice Michael Kirby. [6] He characterised Lord Scarman the judge as a traditionalist rather than as a creative judge. The ultimate way to justice was not by departure from precedent but by legislation. Scarman as law reformer, as first chair of the English Law Commission, showed strong and powerful reforming tendencies. As early as 1974 in his Hamlyn lectures of that year, he championed acceptance of the idea of a charter of fundamental rights and freedoms. [7]

I owe Lord Scarman a debt of gratitude. The New Zealand Law Society Triennial Conference in Rotorua in 1984 was held a few weeks before the general election of 1984. As Deputy Leader of the Labour Opposition I gave a paper to the Conference to promote the idea of a Bill of Rights for New Zealand. I was fortunate enough to share the platform with Lord Scarman the ranking visiting overseas Judge. His contribution to the Conference was downright and very helpful to my cause. [8] He told the Conference that the United Kingdom had historically enjoyed a very successful constitutional system but it was "showing signs of bursting at its seams". [9] His solution was a Bill of Rights founded on the European Convention on Human Rights and Fundamental Freedoms. He made both a legal case and a political case for taking this step.

The New Zealand Bill of Rights Act 1990, enacted as an ordinary statute, had life breathed into it by the New Zealand Court of Appeal, especially under Lord Cooke of Thorndon. The New Zealand model was influential in the United Kingdom's decision to enact the Human Rights Act 1998. [10] Constitutional change is not easy to achieve, especially in countries with flexible, uncodified constitutions, as in the United Kingdom, New Zealand and Israel, the constitutional outliers on this planet. I believe Scarman would not have approved of a retreat from the Human Rights Act 1998. [11]

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[6] Hon Justice Michael Kirby, "Law Reform and Human Rights: Scarman's Great Legacy" (Inaugural Leslie Scarman Lecture, The Law Commission of England and Wales, Gray's Inn, London, 20 February 2006).

[7] L. Scarman, *English Law - The New Dimension* (London: Stevens and Sons, 1974).

[8] Lord Scarman, "Britain and the Protection of Human Rights" [1984] N.Z.L.J. 175; see also G. Palmer, "The Separation of Powers in 1984" [1984] N.Z.L.J. 178.

[9] [1984] N.Z.L.J at 175.

[10] A. Lester, "Parliamentary Scrutiny of Legislation under the Human Rights Act 1998" (2002) 33 VUWLR 1; Lord Lester and D. Pannick QC, *Human Rights Law and Practice*, 2nd edn. (United Kingdom, LexisNexis, 2004) at 13, 16.

[11] The Conservative Party "The Conservatives' Proposals for Changing Britain's Human Rights Laws: Protecting Human Rights in the UK" *The Guardian* (online ed, London, 3 October 2014).

2. The Original Vision

Any analysis of Law Commissions, their performance and their future, must confront the awkward issue of politics. Reforming the law requires legislation. The making and passing of legislation is central to the law reform enterprise. Only the state can make legislation and the making of it is critical to the framework of any legal system. While not every activity of a Law Commission requires legislation, the achievement of its fundamental purpose does. Who makes legislation, how they make it and where a Law Commission fits into the legislative system becomes a critical issue in charting the future. Recently a Law Commissioner for England and Wales, Elizabeth Cooke, has written that the dream of the 1960s was of "a law reform body unconstrained by politics". [12] Politics speaks the language of priorities. The clash between legal approaches to reform of the law and political approaches lies at the heart of this lecture. My thesis is that each realm has lessons for the other. I have played on both sides of this street and hope to bring insights from each for your consideration.
The conclusion that emerges revolves around parliamentary reform. In order to reach this rather ambitious destination, I shall traverse the original vision surrounding the Law Commissions Act 1965, make some general observations on the performance, then move to an analysis of lessons that can be extracted from the experience, concluding with some suggestions on what should happen next.

We should start with asking what is meant by "reform." The expression "law reform" has no precise meaning. [13] To reform something is not so much to form it again as to change it. Reform is the amendment or altering for the better of some faulty state of things. [14] The idea of reform carries the prospect of controversy over contestable ideas. For some, reform is a road to ruin. Things are bad enough and anything that is done is likely to make them worse. Reform is not the exclusive province of Law's Empire. Improvement in the law can come about in many ways. Legal evolution and change are inevitable. Law must respond to social and economic changes and provide a framework for future development. Law reform is attached to the idea of progress.

The provenance of the Law Commission for England and Wales flowed from the activities of Lord Gardiner, Lord Chancellor in the Wilson

[12] E. Cooke, "Law Reform in a Political Environment: The Work of the Law Commissions" in D. Feldman (ed.), *Law in Politics, Politics in Law* (Oxford: Hart Publishing, 2013) 141 at 141.
[13] L. Friedman, "Law Reform in Historical Perspective" (1961) 13 Saint Louis U.L.R. 351 at 351.
[14] The Oxford English Dictionary, Vol XIII, 2nd ed (Oxford: Clarendon Press, 1998).

Government elected in 1964. In 1951, Glanville Williams edited a book entitled "The Reform of the Law". [15] Twelve years later the Society of Labour Lawyers sponsored a new book "on the same lines" as the one in 1951. [16] Its name was "Law Reform *Now*". The opening chapter dealt with the machinery of law reform and was co-written by Gerald Gardiner and Andrew Martin. The book had a number of leading contributors who discussed the case for law reform across different areas of the law. But it was the opening sentence of the first chapter that set out the justification for a Law Commission:[17]

> "We think we are justified in treating as axiomatic the proposition that much of our English law is out of date, and some of it shockingly so. The fact that this view is shared by the overwhelming part of the legal profession is significant; for, taken as a whole, no profession could be more conservative."

The public did not campaign for change because "the system is not only unknown to the community but unknowable […]." The problem of keeping the law up to date was in the view of the editors "largely one of machinery". [18] It was necessary to subject the whole of English law to review. Where the case for reform was made out, Parliament should be presented with concrete proposals and given adequate time to deal with them. The authors reviewed the machinery finding it not geared to steady, planned and coordinated operation.[19]

The solution advocated was to strengthen the Lord Chancellor's Office by establishing a strong new unit presided over by a Minister of State called a Vice-Chancellor, and he would be exclusively concerned with law reform. The Vice Chancellor would be responsible for a committee of not less than five highly qualified lawyers to be called law commissioners. They would be full time, appointed for three years and eligible for reappointment. They would be recruited from among the practising and academic lawyers "of exceptional merit". [20] The Commissioners needed a legal staff, including skilled parliamentary draftsmen.

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[15] Glanville Williams, *The Reform of the Law* (London: Victor Gollancz, 1951).
[16] G. Gardiner QC and A. Martin (eds), *Law Reform Now* **(**London: Victor Gollancz, 1963) at ix. The word "Now" was underlined on the cover and in italics on the title page.
[17] *Law Reform Now* at 1.
[18] *Law Reform Now* at 1.
[19] *Law Reform Now* at 6.
[20] *Law Reform Now* at 8.

The chief responsibility of the Law Commissioners would be to review, bring up to date and keep up to date what may be called "the general law": the common law and equity, and also that part of statute law which does not fall within the province of any government department. For the most part the Commissioners would not be concerned with that part of statute law wholly or chiefly administered by a department. But, as to the general law, the Commissioners would be free to roam widely and take up proposals coming from the public, commerce and the professions.

The authors went on to say there was a strong case for the progressive codification of English law and, indeed, it was overdue. The state of English law was so deficient that codification would have to be preceded by reform. But codification should have second place.[21] Changes in the legislative process were also called for. And the Government should be required to find parliamentary time for consideration of any report that recommends a change in the law.[22]

The proposal, somewhat altered, did reach the statute book quickly in 1965. It featured as part of Harold Wilson's strategy of modernisation forged in the "white heat of the technological revolution".[23] Law reform appears to have been a significant feature of the winning election campaign of 1964. A short White Paper was published on the proposal and the Parliamentary debates disclosed support for the idea.

A Scottish Law Commission also eventuated after the general election, due to advocacy by the Secretary of State for Scotland.[24] It was not suggested in 1963. The White Paper published in January 1965 proposed both English and Scottish Law Commissions. The statute passed was commendably brief, perhaps too brief to prevail over forces within the Executive Government intent upon taming the vision. Perhaps significant was the omission of the Minister of State that featured in the 1963 book.

[21] *Law Reform Now* at 10-13.
[22] *Law Reform Now* at 13-14. It was said that the nature of any legislative proposals should be developed in a memorandum and, where a statute of major importance was passed by Parliament, a White Paper should be published setting out changes made to a Bill during parliamentary passage and the Government's interpretation of the statute as it was finally passed. This was to clarify the issue of parliamentary intention.
[23] S.M. Cretney, "The Politics of Law Reform - A View from the Inside" (1985) 48 M.L.R 493 at 494.
[24] G.L. Gretton, "Of Law Commissioning" (2013) Edinburgh L.R. 119 at 123.

Both Commissions were infused with the same functions. They were enjoined to "keep under review all the law with which they are respectively concerned with a view to its systematic development and reform, including, in particular, the codification of such law, the elimination of anomalies, the repeal of obsolete and unnecessary enactments, the reduction of the number of separate enactments and generally the simplification and modernisation of the law […]".[25] There follow a number of more detailed matters.[26]

The Commission was required to review the whole of the law from the angle of its systematic development and reform. It was to prepare and submit to the Lord Chancellor programmes for examining parts of the law with a view to reform. The Lord Chancellor would approve the programme and lay it before Parliament. The recommendations, were for the Law Commission. Whether the final proposal would go ahead was for the Government. Thus, there was from the very beginning a tension between the Commission's independence and the implementation of its proposals.

Law reform was thus transformed into a professional activity with a permanent institution, staffed by full time commissioners led by a High Court Judge so that the reputation and prestige of judicial office was to be used in this context not in applying the law but in changing it. The enterprise was to be resourced by the government, yet independent from it.

3. The Performance

The model was followed with variations in many Commonwealth jurisdictions. It has been successful because of the high ability of the people appointed as Commissioners and the quality of their work. The fortunes of the model have waxed and waned over the years. It has even been suggested that "Institutional law reform began to unravel, perhaps because it no longer reflected mainstream political ideology". [27] I am far from convinced, however, that the popularity of law reform diminishes with Conservative Governments as has been suggested.

[25] Law Commissions Act 1965, s. 3(1).

[26] The Commissions' duties are to consider any proposals for law reform given or directed to them; to prepare recommendations for programmes of law reform; to undertake reviews of the law and prepare draft bills or other documents for such programmes; to prepare statute law revision or consolidation programmes; to provide legal advice to government departments concerning law reform and to examine the legal systems of other nations to obtain any information that would facilitate programmes of law reform, see Law Commissions Act 1965, s. 3(1)(a)-(f).

[27] N. Rees,"The Birth and Rebirth of Law Reform Agencies" (Paper to Australian Law Reform Agencies Conference 2008, Vanuatu, 10-12 September 2008) at 2.

Certainly in Britain Lord Hailsham, as a later Lord Chancellor, expressed gratitude to Lord Gardiner for the machinery of law reform inherited and he used it. He judged the Commissions to be "an invaluable mechanism for reform".[28] The problem lies perhaps not so much with political ideology as in the determination of priorities. These fluctuate naturally. Since 1965 there has been a proliferation of public bodies that have an interest in law reform within specialist areas and make proposals for it. Law Commissions have many competitors and the mightiest of these are departments of state. There is invariably a shortage of money. Continued funding for an independent agency will not occur unless the work product adds real value in the opinion of ministers.

Evaluating the performance of Law Commissions poses many challenges. There is no agreed methodology for doing it, although most countries have an external reviewer report upon the agency from time to time. Law reform agencies have different functions, some of them do much general advisory work. The diversity of function makes measurement complicated. Establishing key performance indicators in a way that is measurable raises difficulties, given the range of projects and their different characteristics. [29] Some projects are merely difficult, others are truly "wicked." The efficient and careful use of resources is easy enough to measure through the public audit process. Timeliness and meeting deadlines is another item that is measurable and for which Law Commissions are often criticised. Items such as public education, media exposure, internet usage and citation in the courts can be gathered to show the Commissions add value. Outputs such as reports produced, working papers completed, consultations, and staff employed can be recorded.

Most agree success does not depend alone upon the number of reports that are taken up by Government, although the agency must be sufficiently valued to survive the endless rounds of expenditure cuts that characterise all modern governments. There is no value to any government in fine academic analyses of a theoretical nature if none of the work reaches the statute book. Lord Thring, who in 1869 became the first Parliamentary Counsel appointed in England, apparently said "Bills

[28] Lord Hailsham, *A Sparrow's Flight - Memoirs* (London: Fontana, 1991) at 383.
[29] B. Opeskin, "Measuring Success" in B. Opeskin and D. Weisbrot (eds) *The Promise of Law Reform* (Sydney: Federation Press, 2005) 202.

are made to pass". [30] The principle applies to proposals of Law Commissions. Yet when it comes to outcomes from the work, these are no easier to evaluate than for other Acts of Parliament. As President of the New Zealand Law Commission, I had some interesting discussions with the Auditor-General about how to measure the Commission's outcomes, since she did not attempt to evaluate the legislative work of Parliament.

Looking at the history of the Commission of England and Wales over a period of fifty years as an outsider it seems clear that the Commission has enjoyed fluctuating fortunes. The Commission started strongly with Lord Scarman at the helm, although the codification effort produced little return. The Commission has been through patches of difficulty but in other periods has flourished, as it is now. In 2014 the Commission published 18 reports and five papers, prodigious productivity by any standard.

The rate of implementation of Law Commission proposals for reform over a period of fifty years is impressive. As at May 2014, 202 law reform reports have been published. Of these 135 or 66.8 per cent have been implemented in whole or in part. A total of 143 reports have been accepted or implemented in whole or in part. Eight reports have been accepted in whole or in part and were awaiting implementation. Five reports were accepted but will not be implemented. Eleven reports were awaiting a response from Government. Only 31 reports, or 15 per cent, were rejected. Eight reports have been superseded by events. [31]

Changes to the Law Commission Act made in 2009 by Parliament require the Law Chancellor to report to Parliament annually on the Government's progress in implementing Law Commission reports. A Protocol agreed between the Law Commission and the Government established departmental responsibilities once a report has been published. One important new feature flows from the fact that a report must not be started unless a serious intention to take any future recommendations forward has been expressed by the relevant government department. An interim response must be published within six months. [32] Parliament adopted a special procedure for non-

[30] G. Engle "'Bills are Made to Pass as Razors are Made to Sell': Practical Constraints in the Preparation of Legislation" (1983) 4(2) Statute L.R. 7.
[31] Law Commission of England and Wales, *Annual Report 2013-14* (EWLC 352, 2014) at Appendix A.
[32] This change will prevent a problem that occurred in New Zealand with the Property Law Act 2007 (NZ). It took twelve years for this important piece of legal infrastructure to reach the statute book. It occurred because the Commissioner who had earlier been in charge and was by then a Supreme

contentious Law Commission Bills. These changes have improved the situation, since the easiest motion to move successfully in political environments is the motion to defer.

The projects upon which the Law Commission has embarked cover important areas of law: criminal, family, tort, contract, equity, property, evidence, landlord and tenant, contempt of court, administrative law, limitations and consumer law. The diet has been rich but limited. The concentration until recently has been on areas that may loosely be called "lawyers' law." They have been projects where detailed and demanding legal research is required as opposed to policy research. I also hazard the observation that had the projects not been done by the Commission it is doubtful that some of them would ever have been done at all. That is not to say, however, that such projects should not be done. To progress any law reform project requires political commitment, sufficient resources and parliamentary time. To secure these, remorseless advocacy must be engaged in. Law reform mostly lacks political sex appeal and struggles in all jurisdictions to secure political priority.

The performance of the Commission, within the constitutional constraints in which it operates, has been brilliantly successful. When the Commission's work on statute law is added into the mix, the record looks even better. While consolidation of statutes is a difficult task, it produces better law and the work on statute law repeals is essential in a jurisdiction where the Parliament has been churning out statutes from a time that the memory of man runneth not to the contrary. [33] The Commission has been responsible for 222 consolidation Acts. It has been also responsible for 19 Statute Law Repeal Acts that have repealed 3,117 statutes in their entirety and 3,982 in part. But these days nothing in public administration is permanent and such institutions are vulnerable to changing fashions, expenditure cuts and departmental scepticism. The Law Commission has recently been reviewed and

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Court Judge raised the issue with the Prime Minister at a social function as to why the matter had not been attended to. The Prime Minister knew nothing of it and this led not only to enactment of the measure (after six months of hard work to bring it up to date with legal developments that had occurred since the report) and also a new process for the Law Commission in New Zealand to ensure its work was properly considered by the Government. See Rt Hon Helen Clark, Prime Minister of New Zealand (Address at Book Launch of *Reflections on the New Zealand Law Commission: Papers from the Twentieth Anniversary Seminar* (New Zealand Law Commission, Wellington, 24 July 2007)). A number of old reports were also implemented by legislation in this period. See G. Palmer, *Reform - A Memoir* (Wellington: Victoria University Press, 2013) at 593-620.

[33] New Zealand has been enacting statutes only since 1841, yet we are drowning in a sea of statute law that amounts to 65,000 pages or 100,000 pages if the amending Acts are included. Looking at the Law Commission's current task of examining 18th and 19th century statutes raising money for churches, I am grateful we are as new as we are.

received a favourable report on both the quality of its work and the value of that work, having survived a heavy dose of quangocide.[34]

Despite the solid record, the Law Commission has had its share of critics. R T Oerton, a former staff member of the Law Commission, published in 1987 *A Lament for the Law Commission*, a book I studied carefully when it came out because as Minister of Justice I had been responsible for the Law Commission Act 1986 in New Zealand. Oerton observed, "the frustrations and disappointments of the job done by a member of the Law Commission's staff were such as to make it unsuitable for anyone who was emotionally committed to the purposes for which the Commission was set up to fulfill".[35] His main point was that the Commission had no power of its own because governments decide the fate of its work. The point can be relatively easily overcome by ensuring that the topics that are embarked upon are ones which the Government has an interest in pursuing, as is now the case.

The Law Commission's activities have produced other critical observations over the years, but nothing sufficiently serious to place the enterprise in any sort of jeopardy. A book of essays published after the Commission's twentieth anniversary conference organised around the theme "Can we do better?" found many problems.[36] These centred around two main institutions: the Executive and Parliament.

In relation to the Executive:

- Government resists large scale reform proposals from an agency over which it has no control;
- Government departments are wary of the Law Commission and departments have an uneasy relationship with it;
- The responsibilities of departments for law reform was left unaltered when the Commission was set up, making tension inevitable and bifurcating the responsibility for law reform;
- The Law Commission needs to advocate for its proposals more effectively;
- Is the degree of governmental control of the Law Commission too great?

[34] Law Commission of England and Wales, *Annual Report 2013-14* (EWLC 352, 2014) at 28-29.
[35] R. T. Oerton, *A Lament for the Law Commission* (Chichester: Countrywise Press, 1987) at 3.
[36] G. Zellick (ed.), *The Law Commission and Law Reform* (London: Sweet and Maxwell, 1988) at 1.

On Parliament:

- Parliament has a chronic indifference and distaste for law reform;
- Parliament should reform its procedure to deal with law reform proposals in a better way;
- Pressure on parliamentary time means priority does not go to Law Commission projects;
- Reforming technical lawyers' law has no appeal to political parties or the public;
- Parliament and its procedures are outside the control of the Law Commission and subject to the control of the Executive.
- There are no political rewards in passing consolidation statutes;
- All law reform projects contain within them the seeds of political controversy;
- Using law to improve society inevitably has ideological consequences as it involves the choice between competing values.

These issues have a familiar ring to them. Problems with the Executive and Parliament are central to the vice in which all Law Commissions find themselves squeezed. The methods of making law in both the Executive and Parliament need to change.

An analysis of the Commission in England and Wales appeared in 2013.[37] It examines concerns about non-implementation of reports and the 2009 amendment to produce an expedited parliamentary process. The conclusion was that the precise role of the Commission remains unclear. The more collaborative role with central Government as a result of the 2009 amendments will ensure that more technical and less controversial Bills will find their way onto the statute book. It was suggested, however, that the Commission as a result is less independent.

The Scottish Law Commission naturally is smaller than that of England and Wales. Since constitutional devolution in 1999, the Commission has had a different focus. Most of its work now revolves around Edinburgh with Scottish ministers. In the early years of devolution a number of important enactments were made based on Scottish Law Commission reports, for example land tenure reforms. Gradually, however, the rate of implementation dropped. The profile of the Scottish Commission has risen since the adoption of a new procedure in 2013 in the Scottish Parliament for dealing with the Commission's reports. The new process

[37] S. Wilson, "Reforming the Law (Commission): A Crisis of Identity" [2013] P.L. 20-29. A thoughtful review from experience is Sir Terence Etherton "Law Reform in England and Wales: a shattered dream or a triumph of political vision" 73 Amicus Curiae 3 (Spring 2008).

reflects a common understanding that it is important to find ways for Parliament to consider Bills that would implement Commission recommendations.[38] Scots law is quite distinct from English law, although sometimes the Commissions work on joint projects. The literature shows positive evaluations of its impact on Scots law. One former Commissioner wrote in 2013:[39]

> "[I]t is hard to overestimate the influence that the SLC has had on the evolution of Scots law. Consider, for example, property law, or family law or criminal law, or the law of diligence, or the law of bankruptcy, to mention just some fields. Without the SLC, we would today be looking out on a different legal landscape."

In a recent analysis of the work of Scottish Commission on property law Andrew J. M. Steven has written the Scottish Commission has created a golden era in the area of land law.[40]

In my judgment the perceived difficulties faced by both Law Commissions established under the 1965 Act have to be acknowledged. The difficulties have not disabled the Commissions nor prevented their performing excellent work and securing valuable legal change. Getting a statute onto the books is much harder than anyone who has not tried it may believe. The Commissions may not have achieved the commanding high-level vision that launched them. We should, however, celebrate both Commissions' real and enduring accomplishments. We can learn from the experiences of both Commissions and work toward the original vision of the Law Commissions in a different way.

4. What are the lessons?

Many different lessons can be extracted from the rich experience of all Law Commissions. I want now to widen the frame of reference to include the other Law Commissions in Commonwealth countries. In particular, I rely on my own experience in Australia and New Zealand. Things have been done differently there. There has been perhaps less concentration upon black letter law and more engagement with

[38] M. McMillan, "Law Reform in the Scottish Parliament: A New Process - A New Era" (2014) 2(1) Scottish Parliamentary Review 95 at 114.
[39] G. L Gretton, "Of Law Commissioning" (2013) Edinburgh L.R.119 at 130.
[40] A. J. M. Steven "A Golden Era? The Impact of the Scottish Law Commission on Property Law" (Manuscript, 2014) at 24. Northern Ireland has had a Law Commission since 2007. The activities of the Commission for England and Wales has taken on new significance and new duties given the increasing divergence between English law and Welsh law resulting from devolution: David Lloyd Jones, Address to the Association of London Welsh Lawyers, "Law Reform in a Devolved Wales", March 2014.

important social policy issues. The problem that Law Commissions were designed to deal with should be redefined. Law Commissions have developed and utilise systematic methods for designing law, but they often struggle to get their proposals enacted. The analysis will drive toward the conclusion that the experience of Law Commissions is indicative of a wider problem with how legislation is made generally, and that this needs to be tackled head on.

We need to salvage from the original vision items that should remain on the agenda. Most notable of these is codification. It is also necessary to confront the weakness that legal thinking encounters in the policy environments of governments in order to understand why tensions arise. Law Commissions' capacity to deal with big policy issues needs discussion. The exacting processes of rigorous research, public consultation, submissions and transparency involved in the development of reform proposals are real strengths of the Law Commission process. The reality remains, however, that the central difficulty of almost all Law Commissions lies in securing attention for their reports and parliamentary time for their enactment. These points lead inexorably to a discussion of the constitutional issues in play given the dominance of the Executive in Westminster systems. So long as tight political control over the development of legislative proposals generated within the Executive branch in secret is maintained and these are enacted with processes in which there is a deficit of public participation, then the production of high quality and durable law will struggle.

Codification

It seems clear 50 years later that the law reform enterprise has not delivered upon the wider vision and aspirations that were pursued in the beginning, such as codification of the criminal law, the law of contract and the law relating to landlord and tenant, as laid down in the Commission's first published programme. These have never been achieved.

The ghost of Jeremy Bentham haunts the English legal system and common law systems generally. Bentham had no time for Judge & Co. and he offered to codify laws for all countries professing liberal opinions because "[i]n every political state, the greatest happiness of the greatest number requires, that it be provided with an all-comprehensive body of law. All-comprehensiveness, practicable and indispensable".[41] Bentham

[41] P. Schofield and J. Harris (eds), *The Collected Works of Jeremy Bentham: Legislator of the World - Writing on Codification, Law and Education* (Oxford: Clarendon Press, 2007) at 245. See also J. H.

abhorred Blackstone's *Commentaries on the Laws of England*, having heard Blackstone lecture at Oxford, and he had a much sharper eye for defects in English law than Blackstone. Bentham wanted judges to make no law at all because all law had to be knowable and accessible. If a matter was not in the code, it was not the law. He coined the word "codification".[42] One does not have to share Bentham's distaste for judge-made common law to appreciate he was on to something.

Scarman certainly believed in codification. His lecture at the University of Hull in 1966, "A Code of English Law?" carefully canvassed the issues. Rejecting the Benthamite view, he said:[43]

> "I have in mind enacted law which, while it may cover the whole legal field or only part, yet within the limits of its application is intended, at the moment of its enactment, to supersede all previous law - statute and judge-made. It differs from a comprehensive textbook in that it has itself the authority of law. It is more than a mere re-statement because, where appropriate it will contain provisions modifying and reforming existing law. […] A code, however, while it will both revise and consolidate existing statute law, does much else besides. It reduces into statutory form all the law relating to its subject-matter wherever that law may be found, and from whatever source it may be drawn."

While in large measure codification failed, I argue it should be revived. New Zealand has had a criminal code since 1893 and Canada has one. In 2006, after more than a decade's work by the Law Commission, New Zealand passed the Evidence Act, a measure close to meeting Lord Scarman's definition of a code. Despite being leery about it, the Judges would now not be without it. Professor Rupert Cross observed in 1961, "[…] it is difficult to believe that codification of English law will not become a live issue within the next fifty years or so".[44] An organisation with the characteristics of a Law Commission is the ideal one to engage in the drafting of codes. There should be a recommitment to that task everywhere in the common law world. Few measures would do more to assist the rule of law.

Burns and H. L. A. Hart (eds), *Jeremy Bentham - A Fragment on Government* (Cambridge: Cambridge University Press, 1988).

[42] D. Alfange, "Jeremy Bentham and the Codification of Law" (1969) 55 Cornell L.R. 58 at 63, 71.

[43] L. Scarman, *A Code of English Law?* (Hull: University of Hull, 1966) at 5.

[44] R. Cross, *Precedent in English Law* (Oxford: Clarendon Press, 1961) at 199. The Chief Justice and another Judge appeared in front of the Select Committee considering the Evidence Bill in New Zealand and argued that it should not be enacted.

It should be noted that the Americans had a number of Benthamite codifiers, the most famous of which was David Dudley Field, who thought five codifications were required to cover all fields of law. He succeeded in the State of New York with civil procedure in 1851 but his civil code foundered due to opposition from the bar.[45]

Lawyers, Legislation and Policy

The intellectual training of lawyers and their methods of work have many strengths. But they do not fit easily with the methods used in departmental policy shops nor the methods of politics practised by ministers. These differences of approach may have some explanatory power as to why tensions arise between Governments and Law Commissions. Law, policy and politics all have their own different methods and cultures. MPs and Ministers speak the language of politics, negotiation, log-rolling, persuasion and compromise. Civil servants speak the language of policy. Lawyers use the methods of the common law.[46] Different methods have developed within the policy-making government departments over the last fifty years. Legal analysis and legal reasoning are not enough in the policy world. Lawyers and Judges and their tool kit are a necessary condition in the world of policy-making, but they are not a sufficient condition. Both these worlds can learn from each other.

The common law itself is the work of the judges. Common law systems use the building blocks of precedents. Doctrine accumulates over time. The past greatly influences the future. Common law precedent is based on reasoning by judges. When judges are faced with a novel or new issue, they look to see what the precedents can tell them about how to resolve it. The common law proceeds by a process of inductive reasoning.[47] It reasons from the particular dispute to a general rule and is inherently grounded in the context of specific fact situations.

While reform can be accomplished without statute, the future belongs to statute and not common law. Statute now is not merely king, it is

[45] G. A. Weiss, "The Enchantment of Codification in the Common-Law World" (2000) 25 Yale Journal of International Law 435.

[46] I am indebted to my son, Dr M. S. R. Palmer Q.C. for this point and its development in "Open the Doors and Where are the People? Constitutional Dialogue in the Shadow of the People" in C. Charters and D.R. Knight (eds) *We the People(s) - Participation in Government* (Wellington:Victoria University Press, 2011) 50 at 58-61.

[47] M.S.R. Palmer, "Thinking about Law and Policy: Lessons for Lawyers" (Seminar presented to the New Zealand Law Commission, Wellington, 23 November 2006) at 4.

emperor. The concentration has to be on the design of statutes and that raises a whole range of different issues that common law methodology cannot address. How does one decide the policy that will be contained in the statute? How does one assemble the support to get it passed? How can one demonstrate that what is proposed will be better than what went before? The methods of the policy analyst tend to be those of Plato, not Aristotle.

Lawyers have much to contribute but many other disciplines are needed. The most critical legal skill without which nothing else is possible is the drafting of a bill. No policy proposal can be properly understood and tested unless there is a bill drafted by Parliamentary Counsel. Embedding Parliamentary Counsel in the Commission in London was a stroke of genius. Lawyers also have valuable contributions to make on the form of the law as well as its substance, the structure of government, the methods of public decision making and constitutional limits..

It is necessary to consider what Richard Posner has called the decline of law as an autonomous discipline. As did Oliver Wendell Holmes, Posner argued that economists, statisticians and other social scientists will have a far more prominent role in legal reforms than has traditionally been the case.[48] Social science data, pure science, empirical studies, statistical analysis, economic analysis, sociology, anthropology and many other branches of the social sciences, depending on the subject matter of the inquiry, means that broad policy-making is not the same as deciding individual cases according to law.[49] Legislative facts are different from adjudicative facts.

Policy analysis requires the understanding of the general objectives of the government, a definition of the problem that requires resolution, assembly of all relevant information and an analysis of the options for resolving the issue. Also required are financial costings, economic analysis and detailed plans as to how the new policy will be delivered and administered. Important detailed, practical knowledge is also needed about how the Executive and Parliament actually make statutes.

Lawyers' Law v Big Policy

In the legislative process at Westminster itself on the Law Commissions Bill in 1965 it struck me as significant that most speakers in the

[48] R. A. Posner, "The Decline of Law as an Autonomous Discipline: 1962-1987" (1987) 100 Harvard L.R. 761.
[49] K. C. Davis, *Discretionary Justice – A Preliminary Inquiry* (Urbana:University of Illinois Press, 1971) at 6.

Commons and the Lords thought that the Law Commission had to steer away from anything that was politically controversial. The lawyers in the House of Lords were adamant on the point. Lord Denning observed, "I am sure it would be wrong for a Commission of this kind to take over broad questions of policy in the law, which must be the province of Parliament."[50]

I do not find this reasoning convincing. After all, governments not infrequently set up Royal Commissions or independent inquiries to investigate and report on questions of broad policy. There are areas where lawyers will have more to contribute than in others. Technical legal issues such as the recent reform of the law of perpetuities here is such an example.[51] Yet even the most technical legal area can throw up tricky political problems. In my own experience, for example, the review in New Zealand of the Limitation Act raised the issue of how to deal with historical sex abuse claims.[52]

Big projects including heavy social policy can be successfully completed by Law Commissions. This is particularly the case where a project touches upon several departments of state. I personally led two projects that resulted in massive changes to the law and required significant journeys into controversial areas of social policy: a revision of the entire law relating to the sale of alcohol and another on war veterans' pensions. On liquor many departments had an interest and those interests were often conflicting. We had at the Commission an interdisciplinary team of eight. We received nearly 3,000 submissions and conducted many public meetings and used digital technology to interact with the public.

A respected New Zealand Judge, formerly President of the Court of Appeal, Sir Ivor Richardson, characterised the New Zealand Law Commission in the following way: "It is the statutory equivalent of a semi-permanent Royal Commission with a roving function […]."[53] That is a good way of looking at it. Law Commissions properly staffed should not be reluctant to take on projects with big policy and social content and nor should governments be reluctant to so entrust them. It is cheaper than setting up a Royal Commission.

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[50] (1 April 1965) 264 G.B.P.D. HL 1213.
[51] See, e.g., Perpetuities and Accumulations Act 2009 (UK).
[52] J. Burrows, "A New Zealand Perspective on Law Reform" (2010) 10 Canta. L.R. 117 at 123.
[53] I.L.M. Richardson, "F W Guest Memorial Lecture 1989: Commissions of Inquiry" (1989) 7 Otago L.R. 1 at 3. The two New Zealand statutes mentioned in the text are the Sale and Supply of Alcohol Act 2012 and the Veterans' Support Act 2014.

The Strengths of the Law Commission Process

Lawyers have much to contribute in terms of systematic methods of approaching problems and solving them. It seems to me that the methods of preparing their reports that have been adopted by Law Commissions have much to recommend them. I assert that they are superior to those usually adopted by the Executive Government for the legislative projects it promotes. It seems natural to lawyers accustomed to court rules to have a set of procedures for dealing with law commission projects. Systematic methods of problem definition, research and public consultation on the basis of carefully researched issues papers are vital. The Law Commissions produce legislation that is better thought through than that produced by governments, it is more likely to work and it has been rigorously tested before enactment.

I offer now a suggested rough guide of 12 points on how to organise procedures to ensure nothing is overlooked and all options are explored once a project has been embarked upon:

1. Set up an interdisciplinary team whose members have the skills and background relevant to the topic under review. High quality, exhaustive and objective legal research is required at every stage and this needs to be made public. Economic and other analyses relevant to the topic under review should be undertaken as necessary and also published.
2. Conducting discussions with interested parties to secure their views on the topic under review, and researching all the literature, both domestic and international assists greatly in arriving at the definition of the problem to be addressed.
3. Consultation is vital. Sir Peter North, an experienced Law Commissioner, described consultation as producing factual evidence as to the practical operation of the law; the provision of detailed technical advice; the creation of a democratic legitimacy for any ultimate solution; the assessment of the weight of public opinion on social issues; and to flush out opposition.[54]
4. Publication of an issues or working paper setting out the research done, defining and contextualising the issues and framing questions upon which submissions are sought assists in focusing submissions.

[54] P. M. North, "Law Reform: Processes and Problems" (1985) 101 L.Q.R. 338.

5. Designing a communications strategy is useful so the messages reach those whose attention needs to be engaged.
6. Taking submissions from the public and using the new media as a way of reaching and engaging ordinary people, even allowing for some interactive engagement with groups, and conducting public meetings can provide further insights.
7. Meeting with relevant government departments, trade or other organisations whose interests are touched by the topic is essential. Involving them in discussions about options and approaches that could be adopted will assist in arriving at the preferred option. Using expert consultants where required can be very useful. It is helpful to ensure there is input from all relevant disciplines that can contribute to the topic.
8. Encouraging public debate through the policy development process adds value and points to where difficult issues are located.
9. The crafting of a final report often determines the fate of the project. Many drafts are necessary. The inclusion of a draft bill prepared by Parliamentary Counsel ensures that the ramifications have been thought through.
10. The report should set out in detail the proposals, analysis of the options, and why the preferred option was selected. It should also discuss the methods of administration. The fiscal costs and economic impact assessments must be rigorously analysed and set out.
11. Maintain high standards of scholarship throughout. The work must be independent, objective and authoritative.
12. The work should be peer reviewed rigorously and highly qualified Commissioners should sign off on it.

Independence assists greatly in the credibility of the above process. The open and transparent process allows people to see how and why the proposals were developed. It allows for full public input into the development of the proposals. It provides some capacity to gauge the public acceptability of the proposals and the options. Such a process makes the final report more robust and practical.[55]

[55] Sir David Lloyd Jones put these points to the House of Commons, Political and Constitutional Reform Committee, *Ensuring Standards in the Quality of Legislation* (HC 85, 20 May 2013) at Ev. 69.

The take-away message is that Law Commissions have forged superior methods of designing law compared with those employed by Executive Governments and Parliaments. A robust set of transparent processes is bound to produce a better outcome that has been better tested than plans hatched by ministers and officials working behind closed doors. Furthermore, when the product comes to be considered by Parliament, there is a great deal more relevant information available to MPs and the public than is usually available on government Bills. If these methods are superior, then the question has to be asked why are they not used for other legislation?

Shortage of Parliamentary Time for Law Commission Projects

Law Commissions always struggle to get their work product enacted in a timely manner. The Australian Law Reform Commission was established in 1975. But, as Gough Whitlam famously put it, "[t]he way of the reformer is hard in Australia."[56] Justice Michael Kirby, its first chair, was there ten years and he had to innovate. The nature of Australian federalism forced Kirby to take some novel approaches in both the methods of public consultation and use of media to advance the cause of reform. Kirby's methods made a permanent impact upon the way many Law Commissions in the region and in the Australian states conduct themselves. His subsequent dual role of high judicial office, together with his continuing role as a public intellectual, kept the law reform candle alight in the public mind.[57]

New Zealand did not establish its full time Law Commission until 1986, having been well served before then by part-time Law Reform Committees and the Department of Justice. On the occasion of the twentieth anniversary of the New Zealand Law Commission in 2006, I invited Michael Kirby to give the keynote address. He concentrated upon the problems he had faced with well-considered reports that did not advance because the law minister of the day was just not interested. Too much good work simply gathered dust. Here was his plea:[58]

> "So what can be done about the apparent logjam that remains as much an impediment to law reform action today as it was in

[56] E.G. Whitlam, "Chifley Memorial Lecture" (University of Melbourne, Melbourne, 14 August 1957). See also E. G. Whitlam, *On Australia's Constitution* (Camberwell, Victoria: Widescope Publishers, 1977) at 193.

[57] For a detailed analysis of Michael Kirby's contribution to law reform in Australia and beyond see D. Weisbrot "Law Reform Australian-Style" in I. Freckelton and H. Selby (eds) *Appealing to the Future: Michael Kirby and His Legacy* (New South Wales: Lawbook Co., 2009) 607.

[58] Hon. Justice Kirby, "Reforming Thoughts from Across the Tasman" in G. Palmer (ed) *Reflections on the Law Commission* (Wellington: LexisNexis New Zealand, 2007) at 22.

> earlier times? What can be done to address the systemic obstacle to institutional effectiveness, that is as real in Britain and Australia as it is in New Zealand? Consistently with our notions of a democratic and responsible Parliament, is it impossible to alter the means by which law reform reports secure their appropriate share of Parliamentary time? This is the central issue that requires, and deserves our attention. Besides it, all other institutional problems seem readily capable of solution."

While these problems have been solved in some jurisdictions, every time a new government is elected with new priorities realignments are necessary. The obstacle to institutional effectiveness of a Law Commission lies within Executives and Parliaments. Partly as a result of the seminar at which Justice Kirby spoke we were able at that time to solve the issue in New Zealand and it has now been solved here. Parliamentary consideration of legislation needs to involve more input from the public. The brightest spot on the New Zealand law-making system resides in the consideration by Select Committees of submissions from the public on virtually all Bills and the conduct of public hearings on them.

The Constitutional Issues

There are no final victories in politics or in law reform. There is, I wish to persuade you, another way of storming the citadel to ensure we get better law. The citadel is Parliament and, in particular, the Executive. In Westminster systems the Cabinet sits in Parliament, as Walter Bagehot so famously observed in 1867:[59]

> "The efficient secret of the English Constitution may be described as the close union, the nearly complete fusion, of the executive and legislative powers."

Bagehot's pragmatic analysis is rather different from the political theory of John Locke, writing around the time of 1688 that the Executive and the Legislature should be separated. Locke says in a striking passage:[60]

[59] Walter Bagehot, *The English Constitution* (Glasgow: Fontana/Collins, 1977) at 65-66.

[60] John Locke, "Second treatise on Civil Government - An Essay concerning the True Original, Extent and End of Civil Government" in Sir Ernest Barker (ed), *Social Contract - Locke, Hume and Rousseau* (London: Oxford University Press, 1958) 1 at 122, para.143. There is a very interesting discussion of this in M. J. C. Vile, *Constitutionalism and the Separation of Powers* (Oxford: Clarendon Press, 1967) at 58-70.

> "And because it may be too great temptation to human frailty, apt to grasp at power, for the same persons who have the power of making laws, to have also in their hands the power to execute them, whereby they may exempt themselves from obedience to the laws they make, and suit the law, both in its making and execution, to their own private advantage, and thereby come to have a distinct interest from the rest of the community, contrary to the end of society and government."

The power of Cabinet, the "efficient secret", has strengthened massively in the years since Bagehot wrote. One does not have to embrace every point of Richard Crossman's view that Cabinet Government has passed into Prime Ministerial Government[61] or Lord Hailsham's view that British Government amounts to "an elective dictatorship"[62] to wonder whether some Lockean elements may be incorporated within Westminster Government to open up and change the way legislation is made so as to make better law. Westminster governments are characterised by powerful Executives that exercise great sway over the legislative process.

The question is whether Parliament makes law poorly, with insufficient consideration, defective research, not enough consultation, not enough transparency and often missing the mark. The law-making procedures are jealously guarded by the Executive. Parties in Opposition do not have much incentive to change them because their greatest wish is to become the Government. So there exists a Faustian bargain that Oppositions will rail about the abuses of the legislative process by Governments but do little to change them when they have the opportunity because the allure of great power is enticing and limiting it unattractive.

The case for curbing Executive power in relation to legislation can only stand if the present processes produce unsatisfactory legislation and alternative procedures would produce superior legislation. There have been in recent years rather persistent complaints about legislation and the legislative process followed at Westminster. The United Kingdom House of Commons Political and Constitutional Reform Committee published a report in May 2013, *Ensuring Standards in the Quality of*

[61] R. H. S. Crossman, "Introduction" Walter Bagehot, *The English Constitution*, (Glasgow: Fontana/Collins, 1977) at 51.
[62] Lord Hailsham, *The Dilemma of Democracy: Diagnosis and Prescription* (London: Collins, 1978) 125.

Legislation.[63] This was in response to repeated criticism in recent years about the quantity and quality of legislation that despite reforms seem to be getting worse. A succinct summary of the pressures that led to the inquiry is contained on the website.[64]

The Select Committee produced a long report and made recommendations calling for big changes. Sadly the main recommendations of the Committee were not adopted. That seems to me to be unfortunate. I do understand the recent changes in Westminster include pre-legislative scrutiny for some bills and some development toward post-legislative scrutiny, but more thorough measures are called for.

More recently Daniel Greenberg has published a trenchant criticism of trends in modern legislation. A former Parliamentary Counsel now in private practice, he laments the decline in standards that have led to dubious developments and a lack of propriety in primary legislation. All the specific instances he analyses result in increased power for the Executive and less control by Parliament. His objection to the reduction in trouble taken in the preparation of legislation is particularly telling:[65]

> "In the last few years a vast range of provisions of primary legislation have been passed with enormous impact on both individuals' lives within the community and on the constitutional structure of the UK as a whole. And they have been prepared and pushed through Parliament with a lack of thought that would have been completely inconceivable a few decades ago."

In the United Kingdom, the "Good Law Project" is designed to remedy some of the deficiencies. In the hands of Parliamentary Counsel, this is a promising initiative, harnessing new technology. The definition of the problem stated on the website says people find legislation difficult, the volume of it, the amendments, and its piecemeal structure. " It can

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63 House of Commons, Political and Constitutional Reform Committee, *Ensuring Standards in the Quality of Legislation*, (H.C. 85,20 May 2013) at Ev. 69. The New Zealand legislative process is subject to similar infirmities see G. Palmer, "The Harkness Henry Lecture, Law Making in New Zealand: Is There a Better way?" (2014) 22 Waikato L.R.1.

64 House of Commons Political and Constitutional Reform Committee <www.parliament.uk>

65 D. Greenberg, "Dangerous trends in modern legislation" [2015] P. L. 96 at 107. The particular trends he deals with are the breakdown of self-restraint, the increased use of quasi-legislation, the general anti-avoidance rule, efforts by the Executive to have endless bites of the cherry in order to try and control statute interpretation after enactment, obnoxious Henry VIII clauses, lack of preparation of primary legislation, and a lack of principle in providing the Executive with informal regulatory control.

obstruct good government, and it can undermine the rule of law."[66] The Good Law Project aims to ensure that law is necessary, clear, coherent, effective and accessible. There is also a segment on the website that states:[67]

> "The government is working to reform our political and constitutional system to help restore people's faith in politics and politicians."

That vital aim perhaps could be better achieved by reforming the way the Executive and Parliament make legislation. Significant reform of the legislative process is required in many jurisdictions but is not on any agenda.

5. What Should Happen Next?

Those interested in legal reform expected a lot from the development of law reform agencies. Reviewing the early literature now, one can detect in it a crusading sense of legal renewal.[68] The authors thought that a new world was at hand, where change and decay in the legal system could be arrested and fixed. Law reform would fill an institutional vacuum. Legal educators would take up law reform. The dead hand of the bureaucracies would not prevent progress. Law practitioners would take a vital interest in bringing the law up to date. The whole body of law should be reviewed and infused with a sense of social purpose. These things have not come to pass.

Law Commissions and similar agencies are not central to government policy or its development anywhere. Tax, welfare payments, and government expenditure plans all vitally affect the community. The economic and allocation decisions of governments rank ahead of law reform. Much of government is all about revenue, expenditure,

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[66] Cabinet Office and Office of Parliamentary Counsel <www.gov.uk/good-law>.
[67] Cabinet Office and Office of Parliamentary Counsel <www.gov.uk/good-law>.
[68] G. Gardiner and A. Martin, *Law Reform Now* (London:Victor Gollancz,1963).W. H. Hurlburt *Law Reform Commissions in the United Kingdom, Australia and Canada* (Edmonton:Juriliber, 1986); B. Opeskin and D. Weisbrot, *The Promise of Law Reform* (Sydney,Federation Press,2005). Michael Kirby *Reform the Law – Essays on the Renewal of the Australian Legal System* (London: Oxford University Press, 1983); G. Palmer "Law Reform and the Law Commission in New Zealand after 20 Years – We Need to Try a Little Harder" New Zealand Centre for Public Law, Occasional Paper No 18 (April 2007); L. Barnett, "The Process of Law Reform", (2011) 39 Fed. L.R. 161, Sir Grant Hammond, "The Challenge of Implementation: Getting Law Reform Reports onto the Statute Book (2013) 13 O.U.C.L.J. 239.

economic and regulatory policy. Law reform agencies will never be at the centre of those decisions.

The great expectations of 1965 have not been realised. The Commissions have added value. They have promoted, and quite often achieved, important legal reforms. But progress is not of the sort that would have impressed someone like Jeremy Bentham. No coherent philosophy for the law reform enterprise has emerged. Probably none can be devised because the Commissions occupy an awkward space between principle and expediency. We are still awaiting the golden age of law reform. While Law Commissions lifted law reform to a professional full time activity, the vision has stalled.

Some of the problem lies in the inability to rigorously and neutrally evaluate legislation generally. Law making through legislatures is a political process. The tendency is to pass more laws but never devote sufficient resource or attention to find out whether they work, whether they have had unintended repercussions and whether costs they impose from the point of view of compliance and enforcement are worth the benefits. Nothing in modern governments is permanent. Government institutions do not have a guaranteed right to succeed or even exist. Agencies can be strangled by underfunding almost as effectively as by abolition. Legal nirvana is not yet on the horizon.

Law reform, like politics, is the art of the possible. Law reform is closely related to politics and that is one of its problems. There are not many votes in reform and often political costs. The present record is not satisfactory anywhere I know. It seems plausible to think that non-common law jurisdictions do better, especially when it comes to having an orderly statute book.[69]

There is also great comfort for a minister in the command of a well-resourced department of state based on the principle of ministerial responsibility that enables the minister to control the policy content at all stages of its development, despite the fact that many of them are not good at it and lack the necessary skills. Ministers tend to be reluctant to allow the lead advisers on matters particularly vital to them to be independent from them. The advisers in departments may not wish to surrender their influence either. The territorial imperative is alive and well in most government departments.

[69] W. Voermans and Others, "Codification and Consolidation in the European Union: A Means to Untie Red Tape" (2008) 29(2) Statute L.R. 65.

For law reform agencies to become an independent source of advice in the production of legislation in the first rank of importance poses a challenge to conventional Westminster governments' power alignments. The dance of legislation needs to be re-choreographed. Law Commissions' methods have shown up the flaws in the way the Executive and Parliament make law. Since providing the law is a fundamental constitutional duty of Parliament, the remedy lies in reform of Executive and Parliamentary processes. The increasing predominance of statute in the legal systems of common law countries also suggests that it would be appropriate to redesign and reform the way statutes are made and promulgated to the public.[70]

New methods need to be devised to make statutes that involve openness, public participation, rigorous research and the systematic process steps that Law Commissions have shown can produce more robust and durable laws. Those methods need to be adapted for use for all legislation and internalised within the Executive Government. Such a reform is a formidable undertaking, since it requires upending the whole method by which law is made by the Executive and Parliaments now. Fundamental revision is required within the Executive and Parliament as to how legislation is designed and enacted.

The stranglehold the Executive branch enjoys in most Westminster systems over legislative design and content needs to be relaxed and made a little more Lockean. A substantial portion of the legislative process is conducted within the privacy of the institutions of the Executive. That seems to be unsound and not within the normative framework of modern democratic government. More openness and transparency would likely produce a more robust legislative product that would work better and last longer. It would also give decision-makers, Ministers and MPs, better information upon which to base their final decisions.

This does not mean Governments should not set the priorities. They should. But once a Government has decided to travel in a particular policy direction that requires substantial new legislation then the design of that legislation should be fashioned in a different and more public way. The whole of the policy needs to be systematically developed. Ministers need to keep out of it until the detailed material has been produced and made publicly available. Cross-disciplinary teams should

[70]R. Susskind, *The Future of Law - Facing the Challenges of Information Technology* (Oxford: Clarendon Press, 1996) at 18-19. By promulgation, a lack noted by Jeremy Bentham, is meant the means by which the public becomes aware of the new law.

be established. Those teams should be separated out from the departments. Parliamentary Counsel should be involved from the beginning. All the methods used by Law Commissions should be employed.

There are many difficulties associated with how to implement this new vision. My suggestion for New Zealand was to erect a new Legislation Office in which Parliamentary Counsel would be the core.[71] The whole of government standards for legislative design could be secured by having all Bills prepared by this one agency following the twelve steps set out earlier, thus altering the present role of departments. The agency would be attached to Parliament not the Executive. With some trepidation I suggest that such a configuration could work at Westminster.

Such a process is likely to produce legislation that is better thought through and more enduring. It will ensure a much more rigorous scrutiny of the legislative proposals in Parliament because much more information will be available against which to judge them. The process will allow more public participation in legislative decisions. No longer will law be designed in a closed and secret process in the Executive. The primary disadvantage of the proposal is that legislation will take longer in preparation. I am not suggesting that all new statutes need go through such a procedure, only those involving big new policies requiring substantial legislative schemes.

Both pre- and post-legislative scrutiny of legislation have long been talked about but relatively little has been done to implement them, although pre-legislative scrutiny has made recent advances in Britain. The modern social science research tools need to be utilised for post-legislative scrutiny in order to find out what happened in the real world as a result of a legislative scheme. That always should be done before the issue is addressed again.

Taking more pains with the preparation of statute law feeds into a very important element of good governance. The rule of law is a somewhat contested concept but clearly statute law is at the heart of it. Statute law needs to be made as clear, effective and carefully calibrated as it can be. Lord Bingham has said "[t]he law must be accessible and so far as possible intelligible, clear and predictable…"[72]

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[71] G. Palmer "The Harkness Henry Lecture, Law Making in New Zealand: Is there a Better way?" (2014) 22 Waikato L.R. 1 at 37.

[72] T. Bingham, *The Rule of Law* (London: Allen Lane, 2010) at 37.

A respected American academic, Francis Fukuyama, has reached the conclusion that three elements distinguish nations that are a well governed from those that are not. Three sets of political institutions must exist in perfect balance: a competent state, strong rule of law, and democratic accountability.[73] Such institutions can decay. All those features are engaged in this issue. Parliament as the lawmaker has an obligation to make good law by open and transparent processes. Parliament is also accountable to the public for the law it makes and should allow adequate opportunity for the public to be involved in that process. Unfortunately, the general public is ignorant about the arcane law-making processes of Parliament and the Executive. If they did know they may be disposed to agree with Chancellor Otto von Bismark who asked, "What do legislation and sausages have in common? One sleeps better if one does not know how they are made".[74]

Unless current law making methods are reformed, decay could set in. The teaching from fifty years of Law Commissions is to use the methods of preparing legislation pioneered by Law Commissions and apply them more generally to the legislative process. Law making is a function of the utmost importance to a democratic society as a whole so it needs to be carried out as carefully and systematically as possible. Law Commissions have pointed the direction for achieving better methods of making law generally. Executives and Parliaments need to be persuaded they are not making law well and need to do better. To achieve such changes will require political leadership as there will be great resistance. In contemporary politics the fundamental features that matter most to the quality of governance tends to receive the least attention.

Law Commissions should be entrusted with wider responsibilities and their remits broadened to include big projects with social implications. Law Commission must cease being regarded as interesting appendages to the machinery of government and become central to legislative activities. Codification should be put on the agenda and pursued with determination. The independence of Commissions remains vital to their success and needs to be nourished.

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[73] F. Fukuyama, *Political Order and Political Decay* (New York: Farrar, Straus and Giroux), 2014, at 25-27.

[74] Quoted by Professor Petra Butler from Mario Martini "Normsetzungsdelegation zwischen parlamentarischer Steuerung und legislative Effizienz" (2008) 133 AöR 155 at 156 in Petra Butler "When is an Act of Parliament an Appropriate Form of Regulation? Regulating the Internet as an Example" in Susy Frankel and Deborah Ryder (eds) *Recalibrating Behaviour: Smarter Regulation in a Global World* (Wellington: LexisNexis New Zealand, 2013) at 489.