

## [Review] Matthew Dyson, James Lee and Shona Wilson Stark (2016) Fifty years of the Law Commissions the dynamics of law reform

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# **Fifty Years of the Law Commission: The Dynamics of Law Reform**

## ***(Review)***

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Fitting to a modern-day Law Commission publication, this collection of essays is rather lengthy (some 39 chapters over 400 pages), but it has been built to last.<sup>1</sup> From conference to collection,<sup>2</sup> the editors have brought together a strikingly impressive range of contributors, including past and present Commissioners, Chairs of the Law Commissions, Chief Executives, as well as independent academics and parliamentarians. Marking the fiftieth anniversary of the Law Commission of England and Wales and the Scottish Law Commission,<sup>3</sup> the collection offers something of a celebration of the Commissions' good works, but principally stands as a unique insight into the dynamics (personal and institutional) of a cherished reform institution.

Throughout the collection, the reader is invited to join authors in examining and reflecting on how the Law Commissions have evolved. From precarious origins, the collection traces how the status of the Law Commissions have increased, how Commissions in different jurisdictions have diverged in their work, as well as detailed commentary on a number of specific reform projects. The reflections within these pages should not, however, be mistaken for complacency; the collection is certainly not an obituary. Rather, the quality of the book lies in the critical analysis of its contributors, and a focus on debates past, present, and perhaps most often future. We are constantly reminded that the Law Commissions are not impervious to challenge on both intellectual and practical grounds, but exist within an uncertain and changeable political space.<sup>4</sup> Indeed, cautionary tales from Canada<sup>5</sup> and Northern Ireland<sup>6</sup> remind us that Law Commissions must not be taken for granted, or their continued existence simply assumed.

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<sup>1</sup> M Dyson, J Lee and S Stark, 'Fifty Years of the Law Commissions The Dynamics of Law Reform' (Hart, 2016).

<sup>2</sup> The book originates from a conference held at the Supreme Court in July 2015.

<sup>3</sup> Both Commissions were established by the Law Commissions Act 1965.

<sup>4</sup> See, in particular, Chapter 36, E Lorimer, 'Commissioning the Future-A Chief Executive's Perspective Elaine'.

<sup>5</sup> Chapter 11: Y Le Bouthillier, 'The Former Law Commission of Canada: The Road Less Travelled'.

<sup>6</sup> Chapter 5: N Faris, 'Fifty Years of Law Reform - A Note on the Northern Ireland Style'.

The collection will appeal to a variety of readers. For those working close to the Law Commissions or other reform institutions, many of the debates within the collection will be familiar, and provide an opportunity to reflect and perhaps reconsider core aspects of the reform agenda. But the collection also reaches beyond this audience to reform minded academics and other legal experts, providing often compelling insight into the challenges facing reformers of the law, both substantive and structural. The collection contains too many of these debates, of course, for me to comment on each of them within this short review. However, in what follows I provide a broad brush impression of three core areas of debate which span much of the collection: a) What kind of work should Law Commissions undertake? b) What is success for the Law Commissions? and c) What is the future for the Law Commissions?

Before entering these debates, however, it is appropriate to provide some specific acknowledgement to the editors Matthew Dyson, James Lee and Shona Wilson Stark. They should be commended for bringing together such an impressive range of contributors, but also, considering the number of chapters, for compiling a thematically coherent and focused collection, aided in no small part by the wide ranging and provocative chapters written by the editors themselves.<sup>7</sup> As an impressive landmark publication, I hope we will not have to wait another fifty years for the follow up.

## **WHAT TYPE OF WORK SHOULD LAW COMMISSIONS UNDERTAKE?**

The Law Commissions were established ‘to take and keep under review *all the law* with ... a view to its systematic development and reform’.<sup>8</sup> This is quite a task, and one that places the Law Commissions in an unusual space between the legislature and the courts. However, it is a task that the Law Commissions have risen to, working hard to establish positive working relationships with both groups (under variously testing conditions<sup>9</sup>), whilst also working to provide a more concrete definition of their own role. But the specific question of which reform projects to take on within a Programme of Law Reform remains testing.

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<sup>7</sup> Chapters 1, 15, 29 and 38: M Dyson et al, ‘Introduction’; S Stark, ‘Promoting Law Reform: By Means of Draft Bills or Otherwise’; J Lee, ‘The Etiquette of Law Reform’; M Dyson, ‘The Future is a Foreign Country, They Do Things Differently There’.

<sup>8</sup> The Law Commissions Act 1965, s3 (emphasis added).

<sup>9</sup> On the early years of the Law Commission for England and Wales, see Chapters 2, 3 and 4: Lady Hale, ‘Fifty Years of the Law Commissions: The Dynamics of Law Reform Now, Then and Next’; Lord Hodge, ‘Introduction’; P Mitchell, ‘Strategies of the Early Law Commission’. On the Scottish Law Commission, see Chapters 17 and 34: L Dunlop, ‘A Good Name, a Long Game’; Lord Pentland, ‘The Scottish Law Commission and the Future of Law Reform in Scotland’.

The appropriate subject and scope of Law Commission work gives rise complex and ongoing debates, surfacing in several chapters. When considering subjects of reform, as an organisation made up of appointed legal experts as opposed to elected politicians, it is often said that the Commissions should focus on issues of technical as opposed to social reform, so called ‘lawyers law’.<sup>10</sup> However, for others, the Law Commission’s duty to review *all the law* means that they should not self-restrain in this way, and should be open to big issues of social and political significance.<sup>11</sup> Similarly in terms of scope, there are several chapters that look back to the larger codification projects that typified the early years of the Commissions, highlighting these as best practice.<sup>12</sup> But against this, particularly within the domestic Commissions, there are voices calling for narrower projects that can be successfully pursued with more limited time and resource.<sup>13</sup>

These debates are not new, but the personal insights of the various contributors make interesting reading, as well as the comparative analysis provided in relation to other jurisdictions. For example, although the domestic Law Commissions have remained somewhat conservative in their choice of topics (although by no means confined to lawyers law), experiences in New Zealand,<sup>14</sup> Australia,<sup>15</sup> South Africa<sup>16</sup> and Canada<sup>17</sup> demonstrate that Law Commissions can still work effectively in areas of social and political reform, as well as in areas of non-substantive legal reform. The experience of the Canadian Law Commission is particularly interesting, with the conscious decision of the Commission in 1997 to undertake broader social projects, including questions of legal reasoning and context. Chapter 38 similarly canvasses the reform institutions and mechanisms from several jurisdictions,

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<sup>10</sup> For example, see discussion in Chapters 35 and 7: D.L. Jones, ‘Looking to the Future’; E Clive, ‘Law Reform and Social Policy’.

<sup>11</sup> For example, see discussion in Chapter 10: G Gretton, ‘The Duty to Make the Law More Accessible? The Two C-Words’. See also G Palmer, ‘The Law Reform Enterprise: Evaluating the Past and Charting the Future’ (2015) 131 *LQR* 402.

<sup>12</sup> For example, see discussion in Chapters 10 and 34: G Gretton, ‘The Duty to Make the Law More Accessible? The Two C-Words’; Lord Pentland, ‘The Scottish Law Commission and the Future of Law Reform in Scotland’.

<sup>13</sup> For example, see discussion in Chapters 12, 21, 32 and 35: I Dennis, ‘The Law Commission and the Criminal Law: Reflections on the Codification Project’; N Paines, ‘Reflections on Statutory Implementation in the Law Commission’; D Ormerod, ‘Reflections on the Courts and the Commission’; D.L. Jones, ‘Looking to the Future’.

<sup>14</sup> Chapter 39: KJ Keith, ‘Making Law-Who, How and What?’

<sup>15</sup> Chapters 6 and 30: K Cronin, ‘Working on the Larger Canvas-Law Reform in a Federal System: Thoughts on Forty Years of the Australian Law Reform Commission’; B McDonald, ‘Law Reform in Private Law: The Role of Statutes in Supplementing or Supplanting the Common Law’.

<sup>16</sup> Discussed in Chapter 18: M Arden, ‘Introduction’.

<sup>17</sup> Chapter 11: Y Le Bouthillier, ‘The Former Law Commission of Canada: The Road Less Travelled’.

highlighting the potential benefits of broadening reform horizons for our domestic Commissions.<sup>18</sup>

However, alongside discussion of the potential creative expansion of Law Commission agendas, we are also (repeatedly) reminded of the practical and political realities of Law Commission success and survival.<sup>19</sup> Every author within the collection shares the same ambition to see positive reforms to the law, but they must also be conscious of what can be achieved, and of what success looks like for a publicly funded institution that must demonstrate its value.

### **WHAT IS SUCCESS FOR THE LAW COMMISSIONS?**

The collection reflects a general sense of pride and/or admiration as to the good work of the Law Commissions over the last fifty years. From this sense of positive reflection, however, emerges an interesting debate as to what success looks like for a Law Commission, and several chapters provide thought-provoking critical analysis of this question.

Perhaps the most obvious marker of success for a Law Commission, and the theme of Part 5 of the collection, is achieving the implementation of its recommendations through legislation. Success in this regard can be difficult to measure (eg, what about partial implementation, or implementation that happens many years after the Commission's project ends), but it is certainly the most visible Commission product. It is also a measure by which Law Commissions across jurisdictions appear to perform well, with Chapter 19 charting a consistent implementation rate of around 66%.<sup>20</sup> It is a success, however, that requires close cooperation and coordination with government and parliamentary processes, and here again the experience of Commissioners past and present is illuminating. Evolving from cooperation based almost entirely on personal relationships and specific backing, the Commissions have had to evolve with changing political realities including shorter term parliamentary allies, increasingly competitive legislative calendars, and (perhaps) a reduced political appetite for

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<sup>18</sup> M Dyson, 'The Future is a Foreign Country, They Do Things Differently There'.

<sup>19</sup> See, for example, Chapters 12 and 32, both describing these tensions in relation to criminal law reform: I Dennis, 'The Law Commission and the Criminal Law: Reflections on the Codification Project'; D Ormerod, 'Reflections on the Courts and the Commission'.

<sup>20</sup> The detailed breakdown of figures in this chapter is extremely enlightening, although, as the author highlights, should be treated with some critical care: G Hammond, 'The Legislative Implementation of Law Reform Proposals'.

codification and consolidation.<sup>21</sup> The last decade has been particularly interesting in this regard, with the Law Commissions agreeing and securing new methods for implementing certain non-controversial recommendations, securing formal mechanisms for governmental responses to all recommendations, and organising new working relationships with devolved authorities in Wales and Scotland. Again, these developments are discussed across several chapters.<sup>22</sup>

A good working relationship with the government is essential for the Law Commissions to maintain their current successes in legislative implementation, but there may also be a cost. Arguably the central debate within the collection, spanning almost every chapter, analyses how closer ties to government can risk the independence of the Commission, and thereby risk the whole endeavour.<sup>23</sup> An interesting corollary of this is the debate about what it means to be independent, and what aspects of independence are the most important to protect. For example, some commentators accept (or even welcome) a role for government in selecting reform projects, as this increases the chances that the relevant department will take the Commissions' recommendations forward.<sup>24</sup> However, for others, such involvement should be minimised, with a concern that deserving projects will not be undertaken because of short-term or politicised priorities that should be resisted.<sup>25</sup> Perhaps most common, though, is a general sense in which the Commissions' interactions with government must be kept under careful consideration; that there is no simple line which marks the Commissions independence, but rather a need for ongoing vigilance.<sup>26</sup> And it is the subtleties here which are often most interesting.<sup>27</sup>

Alongside the implementation debate, several other discussions emerge about what it means for the Commissions to be successful. These include indirect influences on the substance of the law, for example, through influencing appellate courts in particular,<sup>28</sup> but also the

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<sup>21</sup> These changes are discussed in several chapters. See, in particular, Chapters 4, 9 and 35: P Mitchell, 'Strategies of the Early Law Commission'; T Etherton, 'Memoir of a Reforming Chairman'; D.L. Jones, 'Looking to the Future'.

<sup>22</sup> See, in particular, Chapters 9, 19, 22, 26, and 27: T Etherton, 'Memoir of a Reforming Chairman'; G Hammond, 'The Legislative Implementation of Law Reform Proposals'; H MacQueen, 'Implementation by Statute: What the Future Holds'; J Beatson, 'Challenges for Independent Law Reformers from Changing External Priorities and Shorter Timescales'; S Lewis, 'The Bill's Progress'.

<sup>23</sup> On the importance of independence, see Chapters 5 and 36: N Faris, 'Fifty Years of Law Reform-A Note on the Northern Ireland Style'; E Lorimer, 'Commissioning the Future-A Chief Executive's Perspective'.

<sup>24</sup> See, for example, discussion in Chapter 9: T Etherton, 'Memoir of a Reforming Chairman'.

<sup>25</sup> See discussion in Chapters 10 and 16: G Gretton, 'The Duty to Make the Law More Accessible? The Two C-Words'; W Binchy, 'Law Commissions, Courts and Society: A Sceptical View'.

<sup>26</sup> See discussion in Chapters 2, 19 and 36: Lady Hale, 'Fifty Years of the Law Commissions: The Dynamics of Law Reform Now, Then and Next'; G Hammond, 'The Legislative Implementation of Law Reform Proposals'; E Lorimer, 'Commissioning the Future-A Chief Executive's Perspective'.

<sup>27</sup> See also Horder, *Homicide and the Politics of Law Reform* (OUP, 2012).

<sup>28</sup> See Chapter 17, and chapters within Part 7. L Dunlop, 'A Good Name, a Long Game'.

reasoning of advocates, academics, and even students.<sup>29</sup> These influences are even harder to quantify than those focused on the legislature, but a number of contributors highlight their merit.<sup>30</sup> Beyond this, a further question emerges in the collection about the role of the Law Commissions' in setting standards for law reform through their work. The idea here is that the Law Commissions' have also been successful in promoting models of good law reform by thorough consultation, writing in plain English, and expert analysis.<sup>31</sup> Success in 'standard setting' seems entirely plausible in relation to the Commissions' work, but it is interesting that this too is questioned in terms of proof, with Chapter 20 highlighting the potential for research comparing the quality of enacted Commission proposals against other legislation.<sup>32</sup>

## **WHAT IS THE FUTURE FOR THE LAW COMMISSIONS?**

The collection provides space to reflect on the history of the Law Commissions, but as highlighted already, such discussions are invariably framed in a way that makes them relevant to current and future debates. The dynamics of law reform have always required dynamism from the Law Commissions if they are to survive and continue to provide a positive contribution to the law, carefully managing relationships with the government of the day, Parliament, the courts, as well as the wider community. Change should not be misrepresented as a purely modern phenomenon.<sup>33</sup> The question, however, is exactly what the future should look like from this point in the Commissions' evolution; and this becomes central to several chapters.

Debating the future direction of the Law Commissions involves many of the discussions introduced above, about the content and scope of individual projects, as well as the role of the Commissions in setting standards for law reform (and potentially collecting evidence to prove those standards). Of the more substantial changes advocated or discussed in the collection,

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<sup>29</sup> See discussion in Chapter 32: D Ormerod, 'Reflections on the Courts and the Commission'.

<sup>30</sup> See Chapter 15 in particular: S.W. Stark, 'Promoting Law Reform: By Means of Draft Bills or Otherwise'. For a useful discussion about quantifying the Law Commissions' influence on the judiciary, see Chapter 29: J Lee, 'The Etiquette of Law Reform'.

<sup>31</sup> See discussion in Chapters 14, 30, 32, and 37: Lord Toulson, 'Democracy, Law Reform and the Rule of Law'; B McDonald, 'Law Reform in Private Law: The Role of Statutes in Supplementing or Supplanting the Common Law'; D Ormerod, 'Reflections on the Courts and the Commission'; M McMillan, 'Implementation of Law Reform Reports: Developments in Scotland'.

<sup>32</sup> A Burrows, 'Post-legislative Scrutiny, Legislative Drafting and the 'Elusive Boundary''. Discussed further in Chapter 32: D Ormerod, 'Reflections on the Courts and the Commission'.

<sup>33</sup> See Chapters 33 and 34: E Cooke, 'Introduction'; Lord Pentland, 'The Scottish Law Commission and the Future of Law Reform in Scotland'.

however, three areas warrant particular mention. First, in terms of subject matter, a number of chapters discuss the potential for the Law Commissions to alter their work in order to engage more with social issues, questions of legal reasoning, procedure and evidence, as well as reviewing delegated legislation.<sup>34</sup> Second, complementing the comparative elements of the book, Chapter 24 provides an interesting discussion about whether the Law Commission model (or elements of it) could be incorporated into the reform of European Union law.<sup>35</sup> And finally, a third area of discussion, of particular interest to the current author,<sup>36</sup> is the potential for the Commissions to increase their interaction with the academic community.<sup>37</sup> The Law Commissions already work with academics in a variety of ways, but the high quality of academia in this jurisdiction surely makes the potential for further formalised links attractive. Indeed, since the fiftieth anniversary, we have seen such an agreement between the Scottish Law Commission and ten Scottish Law Schools.<sup>38</sup> Each of these areas requires a level of consideration outside the scope of this review, and provides more reason to engage with the collection as a whole.

When looking to the future of the Law Commissions it is clear that the great must not become the enemy of the (very) good; especially when few people agree what the great is! However, it is also clear the intellectual freedom to criticise and challenge the working of the Commissions is one of their great strengths, encouraging innovation and improvement. It is the same self-critical intelligence that lies at the heart of this book, and I hope will continue to characterise the next fifty years of the Commissions.

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<sup>34</sup> On social issues, see Chapters 11 and 34: Y Le Bouthillier, 'The Former Law Commission of Canada: The Road Less Travelled'; Lord Pentland, 'The Scottish Law Commission and the Future of Law Reform in Scotland'. On legal reasoning, see Chapters 11 again, and 38: M Dyson, 'The Future is a Foreign Country, They Do Things Differently There'. On procedure and evidence, see Chapters 38 again, and 12: I Dennis, 'The Law Commission and the Criminal Law: Reflections on the Codification Project'. On reviewing delegated legislation, see Chapter 6: K Cronin, 'Working on the Larger Canvas-Law Reform in a Federal System: Thoughts on Forty Years of the Australian Law Reform Commission'.

<sup>35</sup> H Beale, 'The Law Commission Method: Exportable to the EU?'

<sup>36</sup> Along with Dr Jonathan Rogers, I have begun an initiative to engage more academics and other legal experts with a reform agenda, under the banner 'Criminal Law Reform Now'.

<sup>37</sup> See, for example, Chapters 2, 24 and 38: Lady Hale, 'Fifty Years of the Law Commissions: The Dynamics of Law Reform Now, Then and Next'; H Beale, 'The Law Commission Method: Exportable to the EU?'; M Dyson, 'The Future is a Foreign Country, They Do Things Differently There'.

<sup>38</sup> See the Scottish Law Commission website, <https://www.scotlawcom.gov.uk/news/landmark-agreement-between-scottish-law-commission-and-the-scottish-law-schools/>.