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# Implementation by Statute: What the Future Holds?

HECTOR MACQUEEN\*

## I Introduction

There is no doubt in my mind that the Law Commissions Act 1965 anticipated passage of statutes as the primary method by which the proposals of the bodies it created would be carried out. Equally I have no doubt that Law Commission work can lead at least to development of the law in the courts. But in my view the ‘systematic development and reform’ which the 1965 Act envisages is not something which can be done by courts deciding particular cases.<sup>1</sup> The perspective given by the particular facts of a case, or even a group of cases, is not necessarily, or even often, a sound basis on which to generalise or go very far beyond whatever may be the present state of the law. To give an example, twenty-odd years ago the Scottish Law Commission began a detailed review of the whole law of unjustified enrichment. The publications which emerged from that were undoubtedly influential in a subsequent shift of direction in the Scottish courts; but there has been insufficient case law since, especially appellate case law, to consolidate the details of the ‘enrichment revolution’.<sup>2</sup> That task has fallen instead to writers on the law, who have fortunately shown a fair degree of consensus as to what the outcomes are, or should be;<sup>3</sup> but much of this still awaits the imprimatur of high-level judicial confirmation, and meanwhile a degree of confusion and uncertainty remains apparent in at least some of the first instance lower court decisions.<sup>4</sup>

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<sup>1</sup> Law Commissions Act 1965, s 3(1).

<sup>2</sup> See the following Scottish Law Commission Discussion Papers: SLC DP 95, *Recovery of Benefits Conferred under Error of Law* (2 vols, 1993); SLC DP 99, *Judicial Abolition of the Error of Law Rule and its Aftermath* (1996); SLC DP 100, *Recovery of Ultra Vires Public Authority Receipts and Disbursements* (1996); also Scottish Law Commission, SLC 169, *Unjustified Enrichment, Error of Law and Public Authority Receipts and Disbursements* (1999). The major cases manifesting the influence of the Commission’s work on the subject are *Morgan Guaranty Trust Co of New York v Lothian Regional Council* 1995 SC 151 (IH) and *Shilliday v Smith* 1998 SC 725 (IH). See also Laura Dunlop’s chapter in this volume.

<sup>3</sup> R Evans-Jones, *Unjustified Enrichment*, 2 vols (Edinburgh, W Green for the Scottish Universities Law Institute, 2003, 2013); Lord Eassie and HL MacQueen (eds), *Gloag and Henderson: The Law of Scotland* 12th edn (Edinburgh, W Green, 2012), ch 24; M Hogg, *Obligations* 2nd edn (Edinburgh, Avizandum, 2006), 201–41. It is to be anticipated that Niall Whitty’s treatment of the subject within the forthcoming *Laws of Scotland: Stair Memorial Encyclopaedia Reissue Obligations*, will also follow a similar general approach.

<sup>4</sup> See, eg: *Corrie v Craig* 2013 GWD 1-55 (Sheriffdom of South Strathclyde, Dumfries and Galloway at Kirkcudbright), criticised by M Hogg, ‘Continued Uncertainty in the Analysis of Unjustified Enrichment’ 2013 *Scots Law Times (News)* 111; *Virdee v Stewart* [2011] CSOH 50 (criticised by M Hogg, ‘Unjustified Enrichment Claims: When Does the Prescriptive Clock begin to Run?’ (2013) 17 *Edinburgh Law Review* 405).

Again, one of my present projects in contract law in the Scottish Commission is third party rights, where Scots law went badly wrong in a House of Lords decision in 1920.<sup>5</sup> It is possible that if the right case were to come along and go all the way to the UK Supreme Court, the difficulties could be sorted out, not least with the help the Scottish Law Commission has already offered in its publications on the subject; but meanwhile contracts that are ‘naturally’ Scots law are made subject to English law instead in order to use the Contracts (Rights of Third Parties) Act 1999, or, where that option is not possible or impracticable, go through horrible drafting contortions in order to negotiate the hairpin bends and skid pans which the House of Lords put in their path nearly a century ago.<sup>6</sup> In a system which lacks a steady stream and quality of case law, law reform by statute is actually critical to its health and well-being, and perhaps the only way it can respond quickly enough to changing social and economic conditions as well as to the correction of the errors of the past. Indeed it can sort out the errors of the present. The Legal Writings (Counterparts and Delivery) (Scotland) Act 2015, which completed its passage through the Scottish Parliament at the end of February 2014, received Royal Assent on the auspicious date of 1 April 2015, and came into force on 1 July, reintroduced execution in counterpart into Scots law. This was made necessary by the general belief in the Scottish legal profession that such execution was not possible. The researches of the Scottish Law Commission, based on the advanced technique of searching on ‘execution in counterpart’ amongst Scottish cases on Westlaw, showed that in fact counterpart execution had been recognised and widely practised in Scotland before the Anglo–Scottish Union of 1707, and had indeed been accepted in Glasgow Sheriff Court as recently as 1957.<sup>7</sup> But such research alone was never going to be enough to shake the entrenched opinion of the profession, and in any event legislative modernisation was certainly needed to recognise electronic transmission of facsimiles of signed paper documents as delivery of these documents for the purpose of making them legally effective. Hence the Act.

Later in this volume, Elaine Lorimer and Malcolm McMillan, Chief Executives of respectively the Law Commission and the Scottish Law Commission, describe and discuss still new procedures in each of the Westminster and Holyrood Parliaments for the

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<sup>5</sup> *Carmichael v Carmichael's Executrix* 1920 SC (HL) 195.

<sup>6</sup> See generally Scottish Law Commission, SLC DP 157, *Third Party Rights in Contract* (2014).

<sup>7</sup> See generally Scottish Law Commission, SLC 231, *Formation of Contract: Execution in Counterpart* (2013); *Wilson v Fenton Brothers (Glasgow) Ltd* 1957 SLT (Sh Ct) 3.

implementation of certain kinds of Commission proposals for law reform.<sup>8</sup> I will leave the detail to them; the papers by Sir Terence Etherton and Sir Grant Hammond have already touched on some of it.<sup>9</sup> The critical point for my purposes is that the Bills taken through under them must not be of even a potentially political controversial nature, and their substance must have widespread support in the stakeholder communities primarily affected by the measures.<sup>10</sup> I have been lucky enough to be involved in legislation of the relevant kind going through Westminster, the subject-matter being the law of insurance; and also to be the Commission's lead in the first Bill under the Holyrood procedure, the Legal Writings Bill already mentioned. As I have also seen the passage of Commission legislation outside the procedures in both Parliaments, I have had plenty of opportunity to reflect on implementation of law reform by statute, and what follows gives the present state of those reflections, driven by the thought that the best way of predicting the future is by means of extrapolation from the most recent past. After some thoughts on Westminster, the paper focuses mainly on the recent Scottish experience.

## II The Westminster Procedure

The initiation of a Special Public Bill procedure for uncontroversial Law Commission Bills was largely the result of pressure applied by the Scottish Law Commission's sister body, the Law Commission of England and Wales, but it can be — and has been — used to implement joint reports of the two bodies and also reports brought forward by one of them alone. The details of the procedure have been set out fully in other contributions to this volume.<sup>11</sup> The features to which I would draw particular attention here are that the membership of the Special Public Bill Committee is ad hoc, determined in relation to each Bill; that the Committee can (and generally does) take evidence; and that the Bill receives the usual clause-by-clause scrutiny. Despite the membership's ad hoc composition, scrutiny in a Special Public Bill Committee may even be more rigorous than usual because at least some of the

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<sup>8</sup> See the chapters in this volume by Malcolm McMillan and Elaine Lorimer. See also M McMillan, 'Law Reform in the Scottish Parliament: A New Process—A New Era?' (2014) 3 *Scottish Parliamentary Review* 95.

<sup>9</sup> See, for example, the chapters in this volume by Terence Etherton and Grant Hammond.

<sup>10</sup> For Westminster, see House of Lords Procedure Committee, *Law Commission Bills* (2007–08, HL 63) and (2010–11, HL 30); House of Lords, *Companion to the Standing Orders and Guide to the Proceedings of the House of Lords* (2013 edn), paras 3.16, 8.43, 8.112. For Holyrood, see Standing Orders of the Scottish Parliament, 4th edn (2014), rule 9.17A ('Scottish Law Commission Bills'); and further criteria for the procedure set down by the Presiding Officer and published on 6 June 2013: Scottish Parliament Business Bulletin (93/2013) 1.

<sup>11</sup> See particularly the chapter by Malcolm McMillan. See also E Cooke and H MacQueen, 'Law Reform in a Political Environment: The Work of the Law Commissions', in D Feldman (ed), *Law in Politics, Politics in Law* (Oxford, Hart, 2013) ch 9.

committee members will already have knowledge and understanding of the Bill's subject matter. The hollow-square table arrangements and wood-panelled atmosphere of a House of Lords committee room also lend themselves to expert seminar-style discussion of technical issues between committee members and witnesses. The procedure is not in any way 'fast-track': the process takes as long as it needs to take, although that will be controlled by the managers of parliamentary business. After this procedure, the House of Commons has not tended to spend very much time over the Bill once it has been scrutinised and passed in the House of Lords Committee.

Of the seven Law Commission Bills (just about one a year) that have gone through the procedure to date, three were the product of joint English and Scottish Law Commission reports, with the resultant legislation applying throughout the United Kingdom: the Third Parties (Rights Against Insurers) Act 2010, the Consumer Insurance (Disclosure and Representation) Act 2012; and the Insurance Act 2015. The four other Bills were either England and Wales only (the Perpetuities and Accumulations Act 2009, the Trusts (Capital and Income) Act 2013, and the Inheritance and Trustees' Powers Act 2014) or Scotland only (the Partnerships (Prosecution) (Scotland) Act 2013). In each of these four cases, therefore, the Bill was the result of one Commission's work only. Given the extent to which matters of purely Scots law are reserved under the devolution settlement, the procedure's capacity to deal with Scotland-only Bills remains significant. The Partnerships (Prosecution) (Scotland) Bill had to go through Westminster because the law of partnership is not devolved even in those aspects which are peculiar to Scotland, such as the juristic personality of the partnership.<sup>12</sup> Another possible future candidate for a Scottish Bill at Westminster arises from the Scottish Law Commission's as yet unimplemented report on unincorporated associations, another matter reserved under the Scotland Act 1998 even though Scots law in this area is much more distinct from its English counterpart than is true for partnership.<sup>13</sup>

As the Scottish Commissioner responsible from late 2009 in the joint project on insurance law, I was closely involved with all the insurance Bills throughout, although I gave oral evidence only in relation to what became the 2015 Act.<sup>14</sup> The progress of that Bill was an excellent illustration of some of the major features of the special procedure. As initially presented to the committee by the government, the Bill was not wholly un-amended from its

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<sup>12</sup> Scotland Act 1998, sch 5, part 2, head C1; and see further the unimplemented report by the Commissions: Law Commission and Scottish Law Commission, LC 283 and SLC 193, *Partnership Law* (2003).

<sup>13</sup> Scotland Act 1998, sch 5, part 2, head C1; and see further Scottish Law Commission, SLC 217, *Unincorporated Associations* (2009).

<sup>14</sup> See House of Lords Special Public Bill Committee, *Insurance Bill* (2014, HL 81) 2–11.

original form as appended to the relevant Law Commissions report. Two clauses were omitted: one on warranties (although others on the same subject were retained) and the other on damages against insurers guilty of late payment of claims. The argument against their inclusion was that both were controversial in the sense that there was no consensus of support amongst stakeholders, that is, the insurance industry. Although the Special Public Bills Committee showed some initial inclination to seek to include the clause on late payment damages in the Bill, in the end this did not happen. The concern about it expressed in evidence to the committee by significant parties such as the Lloyds Market Association — namely that it would expose UK insurers to speculative litigation, especially from foreign policy-holders — was sufficient to confirm the government’s position. The clause on warranties was eventually reinstated, however, after some redrafting by the Law Commissions was taken to have removed the controversy.<sup>15</sup> This shows that a Bill can be subject to substantive amendment during its progress without thereby falling outside the scope of the special procedure. But an amendment to introduce something that had not been in the Law Commissions’ report would clearly have meant the Bill being moved to ordinary legislative procedures, or failing altogether.

It is not known, however, how far the process of updating and adjustment, whether by the government before introduction or during a Bill’s parliamentary progress, can go before it ceases to be a Law Commission Bill and so ineligible for the procedure. Certainly a Bill going through this procedure cannot be a vehicle for a piece of non-Law Commission policy. Hence, for example, although the government’s Consumer Rights Bill 2014 implemented two sets of Law Commission recommendations, one on remedies in the supply of goods and the other on protection against unfair contract terms, it could not be a Law Commissions Bill, since it additionally provided in considerable detail for implied terms in contracts for the supply of services as well as goods, for rules on the supply of digital content, and for various other aspects of consumer protection.<sup>16</sup> It further seems that where a Bill is dealing with English law alone, it must not seek to impact also upon Scots law without any prior consultation in Scotland. The Inheritance and Trustees’ Powers Bill 2013 as originally laid before Parliament contained a provision (*not* recommended by the Law Commission in the relevant report, a fact by itself possibly making the Bill unsuitable for the procedure) that would have allowed English and Welsh courts to undo the outcomes of Scottish succession

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<sup>15</sup> For the parliamentary debates on the passage of the Bill, see [services.parliament.uk/bills/2014-15/insurance/stages.html](http://services.parliament.uk/bills/2014-15/insurance/stages.html).

<sup>16</sup> For the Consumer Rights Bill 2014 in Parliament, see [services.parliament.uk/bills/2014-15/consumerrights.html](http://services.parliament.uk/bills/2014-15/consumerrights.html).

law in certain circumstances, at least insofar as they took effect in England and Wales. The provision was withdrawn without ever reaching the Special Public Bill Committee after fierce opposition from Scottish interests.<sup>17</sup>

Finally, my experience of giving evidence before the Special Public Bill Committee contrasted rather sharply in some ways with my earlier appearance before the House of Commons Committee appointed to consider the Consumer Rights Bill in February 2014.<sup>18</sup> Both the membership of the latter committee and the room in which it sat in Portcullis House were much larger and less intimate than the House of Lords. The committee members had been gathered together only the day before they began to hear evidence, and it was fairly clear from the questioning that few had had time to acquaint themselves with the content of the Bill (admittedly a much larger text than the Insurance Bill). A number did, however, have knowledge of consumer affairs and resultant agendas which they wished to pursue, even though there was nothing relevant in the Bill and little prospect of persuading the government to take action by means of this vehicle. The initial discussion was thus less focused than was later to be the case with the Insurance Bill in the House of Lords. But in due course the Consumer Rights Bill was subjected to such detailed line-by-line scrutiny and amendment in both Commons and Lords that it was virtually the last Act to be passed before Parliament rose for the May 2015 General Election.<sup>19</sup>

### **III Parliamentary Recognition of the Importance of Law Reform Legislation**

It is evident after six years that the Westminster special procedure has been successful. Important reforms have been carried through even though at least some of the Bills attracted discussion and debate en route. The procedures are not ‘fast-tracks’ or rubber stamps for the Commissions’ proposals. The Bills are as subject to the democratic process as any others, albeit the bulk of the work is done in the unelected second chamber. But the procedure seems to have established its credentials with government and parliamentarians, and its future thus seems assured for at least the lifetime of the next Parliament to 2020.

The first experience of the parallel process at Holyrood in 2014–15 led the Scottish Parliament as a whole — that is, across party divides — to acknowledge the significance of

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<sup>17</sup> For the progress of the Inheritance and Trustees’ Powers Bill 2013, see [services.parliament.uk/bills/2013-14/inheritanceandtrusteespowers.html](http://services.parliament.uk/bills/2013-14/inheritanceandtrusteespowers.html).

<sup>18</sup> Consumer Rights Bill Deb 11 February 2014, cols 16–24.

<sup>19</sup> The Bill received Royal Assent on 26 March 2015, the same day on which the prorogation of Parliament took place, with dissolution following on 30 March.

its own a- or non-political role in keeping the Scottish legal system and Scots law up-to-date and not too drastically out of line with developments elsewhere. In the Scottish Law Commission's fiftieth year, its role as a public but independent body charged with making recommendations for simplifying, updating and improving the law was also significantly enhanced by an increased visibility in the Scottish parliamentary and governmental processes.

So, for example, in a Stage 1 debate on the Legal Writings Bill held on 25 November 2014, a Labour MSP, Richard Baker, said:

I reflect on the fact that dealing with bills introduced by the Scottish Law Commission will be beneficial generally to legislative reform in the Parliament... Too many bills on important issues, which could have been equally as beneficial as the one that we are considering, were not progressed, so it is good that with our committee's parliamentary consideration, we can look forward to more progress with such legislation... In this process, the committee's work will be beneficial not just to Parliament but to the quality of law.<sup>20</sup>

An SNP MSP, John Mason, added another general observation in the same debate:

As a non-lawyer, I have to ask where Scotland is positioning herself in the global market. The legal system is not just another product such as whisky or cheese. It is much more than a product, but it is a product nonetheless. If Scotland is to compete on quality with the best food and drink, top-of-the-range engineering and one of the cleanest environments in the world, similarly we want one of the best legal systems in the world. From that perspective, I do not see today's debate as being of narrow interest only to the legal profession. It has a much wider economic impact. If this Parliament cannot fight the corner of Scots law, I do not know who can.<sup>21</sup>

The concluding Stage 3 debate on the Bill took place in the full Scottish Parliament on 24 February 2015.<sup>22</sup> There were no amendments to discuss, and the debate largely consisted of speeches from the Minister and the spokespersons for the various parties, along with contributions from the members of the committee (the Delegated Powers and Law Reform

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<sup>20</sup> Scottish Parliament Official Report 25 November 2014, cols 52–53.

<sup>21</sup> *ibid*, col 56.

<sup>22</sup> Scottish Parliament Official Report 24 February 2015, cols 8–28.

Committee (DPLRC)) which had worked on the Bill. These speeches included a number of general statements about the significance of the Scottish Law Commission Bill procedure. Opening the agenda item, the Presiding Officer, Tricia Marwick, declared:

I put on record my gratitude to the committee for the work that it has carried out on the bill and for its contribution to improving the Parliament's capacity to legislate. I expect further Law Commission bills to be considered in this way.<sup>23</sup>

This was picked up straightaway by Fergus Ewing in his opening statement:

[I]t is an important new development of our parliamentary procedure, and I am extremely grateful to the Scottish Law Commission for its work in providing us with the legislation... I hope and expect that the new process, which we see coming to its conclusion in respect of the first bill today, will go some way towards increasing the implementation rate of commission reports... I was particularly impressed with the way in which the committee took on its new role, so I look forward to successive commission bills being considered in this way. To use a non-parliamentary expression, bring them on.<sup>24</sup>

Opening for Labour, Lewis MacDonald noted a devolved Scottish Parliament provided greater opportunities for keeping Scots law up to date than had been available at Westminster pre-devolution:

It is fair to say that this devolved Parliament has taken a little time to work out the best way to deliver that objective, but there is no need to apologise for that. This is, after all, a maturing institution ... However, we are now moving on to a new phase, and I think that the committee's focus on law reform will prove useful to both the Parliament and the legal profession, while the whole Parliament remains responsible—as it is today—for the final outcome.

The bill is useful, not because it will bring businesses flocking to these shores, but because it will ensure that Scotland and Scots law do not get left behind. The process of law reform as it is exemplified by today's debate does not give Scotland a

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<sup>23</sup> *ibid*, col 8.

<sup>24</sup> *ibid*.

novel competitive advantage, but ensures that we are not at a disadvantage and that our Parliament delivers on one of the purposes of devolution... The bill can help to ensure that we also have a legal system that is modern, up to date and fit for purpose.<sup>25</sup>

For the Conservatives, Annabel Goldie associated herself with the tributes to the work of the Scottish Law Commission and the DPLRC, and their ‘important functions’.<sup>26</sup> In her closing speech, she again added her acknowledgement of ‘the need to adapt and change our centuries-old legal system to meet the exigencies of the modern age’.<sup>27</sup> Nigel Don, the SNP convener of the DPLRC, laid especial emphasis upon this aspect of the significance of the Law Commission Bill procedure as a response to changing socio-economic conditions:

Parliament has historically never found enough time for the repair and maintenance of Scottish law. We now have the opportunity to do that... I suggest that we will need to do more of the kind of thing that we have done... I therefore suggest to you, Presiding Officer, and the chamber that we need to start thinking about whether there should be a wider remit for my committee or any other; I would not want to say what the process should be. We need to ensure that we can look after the repair and maintenance of Scots law—in particular, perhaps, private law.<sup>28</sup>

Fergus Ewing picked this point up in his closing statement:

I can say that the Scottish Government echoes the sentiment that he expressed and which I think underlay his criticism, which is that we require to have a process for the repair and maintenance of Scots law. That was a prudent comment and one on which it may be sensible to ponder further.<sup>29</sup>

The significance of this and the other contributions quoted lies, as it seems to me, in the acceptance that the Scottish Parliament’s function in passing legislation is not only to deal with the political issues of the day, but also to engage with the care and maintenance of the

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<sup>25</sup> *ibid*, cols 12–13.

<sup>26</sup> *ibid*, col 13.

<sup>27</sup> *ibid*, col 22.

<sup>28</sup> *ibid*, cols 20–22.

<sup>29</sup> *ibid*, col 26.

law and the legal system of Scotland to ensure that as far as possible it keeps pace with the basic requirements of contemporary life, including those of legal and business practice. For the moment, the new procedure represents the Parliament's best attempt to get to grips with this function, but it is possible to see, especially in Nigel Don's speech and the Minister's direct response, that there may still be room for further development in the not too distant future.

It is also worth noting that members of the DPLRC suggested that they would not object to a more active role in developing Bills brought before them under the procedure. A SNP member, Stewart Stevenson, expressed a modicum of concern during the Stage 3 debate on the Legal Writings Bill:

[T]he danger with the process that the Law Commission undertakes—it involves a rigorous examination before fully developed proposals are brought to Parliament, which is extremely helpful—is that all the contentious and difficult bits have been removed from the proposals, so we end up with something that is the lowest common denominator, to some extent.<sup>30</sup>

This concern was probably shared at least by his convenor, who remarked early on in the progress of the Bill: 'I suspect that there are few bills before the Parliament that have been consulted on quite so much and have been so consensually put together.'<sup>31</sup> It was certainly true that a great deal of effort went into the preparation of the Legal Writings Bill as the pilot for the new procedure; but the effort on the part of the Scottish Law Commission at least would have been no less, since at the time of most of its substantive work on counterpart execution, the new procedure was by no means certain to come about. Nor was there an absence of contentious or difficult elements, as, for example, the Faculty of Advocates undoubtedly brought out in its written and oral submissions to the DPLRC, which dealt with the possibility of increased risk of fraud and error if counterpart execution was used.<sup>32</sup> So the Commission at least should not be deterred by contention or difficulty in bringing forward its recommendations; and the result put before the DPLRC should therefore not be the minimum that all stakeholders involved are prepared to accept. With future Bills under the procedure there will surely be opportunities for the DPLRC to play a more creative role, while

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<sup>30</sup> *ibid*, col 17.

<sup>31</sup> Scottish Parliament Official Report (DPLRC) 17 June 2014, col 1510.

<sup>32</sup> See further H MacQueen, C Garland and L Smith, 'Law Reform in the Scottish Parliament' (2015) 4 *Scottish Parliamentary Review*, forthcoming.

remembering that from the perspective of those bringing legislative proposals forward, Bills are made to pass as razors are to sell.<sup>33</sup> Whether, however, present Holyrood procedures could ever match the multi-level line-by-line scrutiny to be observed at Westminster is unclear to me; certainly the text of the Legal Writings Bill received nothing like the attention I have seen with, not only the insurance Bills, but also the Consumer Rights Bill, at Westminster.

#### IV What Next?

The agreement by which the Scottish Parliament's Law Commission Bill procedure was set up provides for a review after either two Bills had gone through it or, in any event, two years. The Legal Writings Bill was the first Bill. The question of which is to be the second has now been answered. The Succession (Scotland) Bill, introduced to the Parliament on 16 June 2015, has been referred to the DPLRC. The Bill implements some of the more technical aspects of the report on succession published by the Scottish Law Commission in April 2009.<sup>34</sup> The committee began its Stage 1 processes in September 2015.<sup>35</sup> Meantime, the Scottish Parliament's Standards, Procedures and Public Appointments Committee began its review of the procedure in August 2015 in accordance with the two-year provision made at the time of its introduction.<sup>36</sup>

The Succession Bill presents a number of important differences from the Legal Writings Bill, and not just in its subject matter. First, where the latter Bill implemented a report made the year before it was introduced, it is already more than six years since the Scottish Law Commission reported on succession. I do not think there has been so long a gap after the relevant report on any of the Bills going through the Westminster special procedure, with the rather exceptional exception of the very first, the one on third party rights against insurers in 2009–10, where the joint report had been published in 2001.<sup>37</sup> So how this works out now is bound to be of interest, if only with regard to other older unimplemented reports in both Commissions. Second, whereas the Legal Writings Bill was only seven sections long,

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<sup>33</sup> The famous aphorism attributed to the great Parliamentary Counsel of the Victorian era, Sir Henry Thring; found quoted in A Rodger, 'The Form and Language of Legislation', in D Feldman (ed), *Law in Politics, Politics in Law* (Oxford, Hart, 2013) 65, 80.

<sup>34</sup> Scottish Law Commission, SLC 215, *Succession* (2009).

<sup>35</sup> See the websites of the DPLRC:

[www.scottish.parliament.uk/parliamentarybusiness/CurrentCommittees/90922.aspx](http://www.scottish.parliament.uk/parliamentarybusiness/CurrentCommittees/90922.aspx); and for the Bill:

[www.scottish.parliament.uk/parliamentarybusiness/Bills/90123.aspx](http://www.scottish.parliament.uk/parliamentarybusiness/Bills/90123.aspx).

<sup>36</sup> See the committee's website:

[www.scottish.parliament.uk/parliamentarybusiness/CurrentCommittees/29890.aspx](http://www.scottish.parliament.uk/parliamentarybusiness/CurrentCommittees/29890.aspx).

<sup>37</sup> Law Commission and Scottish Law Commission, LC 272 and SLC 183, *Joint Report on Third Parties—Rights against Insurers* (2001).

the Succession Bill has 27 sections and also covers a fairly wide and rather miscellaneous range of matters. On the other hand, the Bill affects potentially everyone living in Scotland, and not just the business and legal profession communities. It is about wills, survivorship of potential heirs, forfeiture for parricide, gifts made in contemplation of death, and mourning expenses; so it has plenty of human interest to put alongside the more technical issues also covered, such as estate administration, liferents and destinations giving rise to conditional institutes. The Bill will thus provide a helpful test of the DPLRC's capacity to deal, not only with a longer Bill, but also one touching on diverse matters. Successful completion by the Committee would encourage the bringing forward of further more substantial Bills in future.

Finally, one of the criteria which a Scottish Law Commission Bill has to meet to go to the DPLRC is that the Scottish Government must not be planning wider work in that particular subject area.<sup>38</sup> But it was already clear at the time of the Succession Bill's introduction that the Scottish Government is planning further legislation on succession in implementation of those parts of the Commission's 2009 report not covered by the Bill. A consultation indicating the government's intention so to legislate was published on 26 June 2015.<sup>39</sup> It covers intestate succession (including the abolition of the distinction between heritable and moveable property in that context), the scope for disinheritance (to be less restricted than in the present law, especially in relation to children), and the protection of cohabitants. This can be read as broadly covering succession where there is no will, and the extent of a testator's power to override these rules in a will, whereas the Succession Bill is primarily about cases where there is a will and about the system by which a deceased person's executor is authorised to administer the estate. So there is a distinction to be drawn, even if the overall substance of the two pieces of prospective legislation comes from a single Scottish Law Commission report. The crucial point is that the relevant criterion has been read as narrowly as possible; and the development suggests that this particular restriction is a candidate for reconsideration in the review of the procedure.

If the other existing criteria continue to apply, a 2013 report on judicial factors<sup>40</sup> and forthcoming work on contract<sup>41</sup> and negative prescription<sup>42</sup> seem likely candidates for the procedure. There are however other topics on the current Scottish Law Commission agenda likely to fall foul of one or other of the criteria. Amongst more recent, as yet, unimplemented

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<sup>38</sup> For the criteria see n 10 above.

<sup>39</sup> Scottish Government, *Consultation on the Law of Succession* (2015).

<sup>40</sup> Scottish Law Commission, SLC 233, *Judicial Factors* (2013).

<sup>41</sup> eg the work on third party rights mentioned above, text accompanying nn 5–6.

<sup>42</sup> See Scottish Law Commission, SLC 242, *Ninth Programme of Law Reform* (2015) 20–21, for negative prescription as an agenda item.

reports, the one concerning adults with incapacity seems not to be a candidate for the DPLRC procedure since it involves significant engagement with human rights, indeed is really about the application of Convention rights in the context of care arrangements for incapable persons.<sup>43</sup> Also likely to be of this nature is the new project on defamation (because it relates significantly to freedom of expression).<sup>44</sup> At least for the moment, it is clear that the Scottish Law Commission is not putting all its law reform eggs into the DPLRC basket. In my view, it would be inappropriate and unwise to do so.

A question may be raised about whether criminal law reform should continue to be excluded, given that at Westminster the Partnerships (Prosecution) (Scotland) Act 2013 has been put through the equivalent process. But that Act is the only criminal law statute to go through the Westminster procedure so far; all the other Acts under it have related to non-criminal law. Nor was the 2013 Act entirely uncontroversial, despite its being a response to an outrageous case which had attracted much public attention and criticism of the law;<sup>45</sup> the Law Society of Scotland, worried about the consequences for solicitors' partnership arrangements, expressed difficulties with the Bill in its evidence, albeit these were eventually overcome.<sup>46</sup>

The second Succession Bill is, however, thought unlikely to be put to the DPLRC, even if (improbably) the Scottish Government's consultation shows a wide degree of consensus as to how the law should be reformed. Given that everyone dies but only a minority make wills, the social significance of the distribution of estates on intestacy, the extent to which the family of the deceased should be protected against disinheritance, and the mutual claims of cohabitants, means that these are bound to be matters on which MSPs in general have views, often based on the difficulties experienced by constituents and on personal social and moral positions. Because the proposed Bill would also abolish the distinction between moveable and heritable property for the purposes of succession, it has also been linked by the SNP government with its highly controversial land reform agenda. The Scottish Parliament and others of its committees will want to hold a detailed public debate on all these matters, of a kind probably making it unsuitable for the relatively low-key DPLRC procedure, even with its Stage 1 and Stage 3 full parliamentary debates. Whether or

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<sup>43</sup> Scottish Law Commission, SLC 240, *Adults with Incapacity* (2014).

<sup>44</sup> See the *Ninth Programme* (n 42 above), 19, for defamation as an agenda item.

<sup>45</sup> *Balmer v HM Advocate* [2008] HCJAC 44, 2008 SLT 799.

<sup>46</sup> See generally Scottish Law Commission, SLC 224, *Criminal Liability of Partnerships* (2011); and for the relevant committee proceedings and evidence see House of Lords Special Public Bill Committee, *Partnerships (Prosecution) (Scotland) Bill* (2013, HL 119).

not the reports on trust law<sup>47</sup> and on positive prescription in relation to moveable property,<sup>48</sup> and the forthcoming report on transactions secured over moveables will be viewed similarly remains to be seen.<sup>49</sup>

Even in its more technical aspects, therefore, reform of private law by statute often involves the sorts of issue in which MSPs are generally interested and want to have a say. Nigel Don's idea of a law reform committee limited to private law matters may also leave uncontroversial reforms of non-criminal public law in an awkward limbo. While it would be wrong to suggest that lack of general interest should be the basis for the division of law reform labour in the Scottish Parliament, it is also important to recognise that not all Scottish Law Commission work can be generally privileged in its access to legislative processes. What may be most important for the future development of special law reform procedures is not so much revision as generous interpretation of their criteria such as has been seen with the first Succession Bill, along with acceptance that there may be controversy about provisions within a Bill upon which the DPLRC will have to pass judgement (whether that involves rejecting criticism of the Bill, amending the Bill, or rejecting it completely as unsuitable for the procedure). There will have to be acceptance as well of the possibility of a full-scale parliamentary debate and vote at Stage 1 of the process when the DPLRC reports on the general principles of the Bill, recommending acceptance or rejection. The managers of parliamentary business will also have to be prepared to take these matters on board.

A final point is that there is much to be said in principle for a *standing* committee dealing with appropriate Law Commission Bills under special procedures.<sup>50</sup> My impression of Westminster was that Special Public Bill Committee members, appointed ad hoc for one Bill only, had to get up to speed with what the procedure did and did not enable them to do with it. The Holyrood committee (and, importantly, its supporting clerks) might in contrast be expected over a parliamentary session to develop a certain expertise in the procedure and matters of non-political law reform generally, always provided that its membership remained constant (which in fact it has not even between the Legal Writings and the Succession Bills). Perhaps in both instances a satisfactory compromise might be to have some permanency in the committee's convenership over time, with strong leaders committed to law reform (as

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<sup>47</sup> Scottish Law Commission, SLC 239, *Trust Law* (2014).

<sup>48</sup> Scottish Law Commission, SLC 228, *Prescription and Title to Moveable Property* (2012). The Scottish Government published a consultation on this report on 1 July 2015: Scottish Government, *Prescription and Title to Moveable Property (Scotland) Bill Consultation* (2015).

<sup>49</sup> For the progress of this project see its website: [www.scotlawcom.gov.uk/law-reform/law-reform-projects/security-over-corporeal-and-incorporeal-moveable-property/](http://www.scotlawcom.gov.uk/law-reform/law-reform-projects/security-over-corporeal-and-incorporeal-moveable-property/).

<sup>50</sup> Cf. the discussion in Grand Hammond's chapter in this volume.

with Nigel Don of the DPLRC) being appointed or elected to the position. Were the Scottish Parliament ever to gain a second chamber, being the main forum for Scottish Law Commission Bills (whether through a committee or otherwise) might be one appropriate function for it.<sup>51</sup>

## V Selling the Law Reform

With the Legal Writings Bill, the Scottish Law Commission has found itself more in the business of ‘selling’ its recommendations both before and now after passage of the Bill. Extensive consultation with the legal profession was of course carried through during the preparation of the report and accompanying draft Bill published in 2013, but to adapt Thring’s already mentioned aphorism, Acts must be made to work as razors are to give a clean shave.<sup>52</sup> Aware of the need to ensure at least majority stakeholder consensus, the Commission team gave numerous presentations on the proposed Bill at professional CPD and other events in the run-up to, and during the course of, the parliamentary stages, and indeed on the very eve of the Act coming into force. That close identification with the Bill had other consequences after it passed. The Commission engaged with a reaction triggered by a remark of Annabel Goldie in the Stage 3 debate, to the effect that practice guidance notes on the Act would be necessary to ensure that practitioners did not go wrong in applying it.<sup>53</sup> The comment, made in the context of worries about the likelihood of fraud and error, has been taken up by a group of the Scottish commercial law firms who will be amongst the most regular users of execution in counterpart. The group has put together a mutually agreed protocol on how to apply the Act in the execution of documents, and sought the Commission’s (readily given) advice in its discussions.<sup>54</sup> The Commission team has also prepared articles and comments for professional journals with the aim of helping practitioners in general to understand the Act and the steps needed to make proper use of it.<sup>55</sup> The hope is

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<sup>51</sup> See further H MacQueen, ‘A Second Chamber for the Scottish Parliament?’ (2015) 24 *Scottish Affairs* 432.

<sup>52</sup> See text accompanying n 33 above.

<sup>53</sup> Scottish Parliament Official Report 24 February 2015, col 23.

<sup>54</sup> See A Stewart, ‘Are You Ready for Counterpart Signing?’ (2015) 60(7) *Journal of the Law Society of Scotland* 33. In August 2015, the Law Society of Scotland also prepared a practice note update on the application of the Act to conveyancing missives, accessible only online: see Law Society of Scotland, ‘Profession Practice Updates, August 2015, Electronic Delivery of Paper Documents’, [www.lawscot.org.uk/members/member-services/professional-practice/professional-practice-updates/#Electronic](http://www.lawscot.org.uk/members/member-services/professional-practice/professional-practice-updates/#Electronic).

<sup>55</sup> Scottish Law Commission, ‘Writings Redefined’ (2015) 60(3) *Journal of the Law Society of Scotland* 4, published in full online only at [www.journalonline.co.uk/Magazine/60-3/1019015.aspx](http://www.journalonline.co.uk/Magazine/60-3/1019015.aspx); H MacQueen, C Garland and L Smith, ‘The Legal Writings (Counterparts and Delivery) (Scotland) Act 2015’ 2015 *Scots Law Times (News)* 103.

to help develop a professional consensus as to how the Act operates and indeed should be operated. That ought at least to reduce the possibility of professional error, even if it will not stop those determined to commit fraud. A measure of the success of these efforts will be the number—or rather lack—of cases about the Act coming into court.

## **VI Conclusion**

Opening the Stage 3 debate on the Legal Writings Bill, Fergus Ewing, the responsible Minister, opined that ‘we are creating a piece of history today, albeit one that I suspect will appear in the minor footnotes rather than the front pages or forewords’.<sup>56</sup> While in general that is probably a fair assessment, the first steps under the new Scottish Law Commission Bill procedure have shown that it has at least some wider significance for the Scottish Parliament and legal system. The Parliament has manifested cross-party acceptance of the significance of its non-political role as the principal guardian of the well-being of the legal system. Scotland is a small legal system. Despite the strength of its common law, or precedent-based, dimensions, it simply does not generate enough cases to permit judicial development of the law to meet changing social and economic conditions, even if the judges felt inclined to try and do so. Legislation therefore provides the likeliest way forward. But it is critical that the legislation is as well prepared as it possibly can be; otherwise the cure may be worse than the disease. There is also a need to ensure as far as possible that those who will have to use and apply the Act do understand what it is meant to do, and how the statutory language achieves that. It is further significant that perceptions of the value of the Scottish Law Commission have been enhanced by a legislative procedure bringing the nature of its work to the attention of a widening group of MSPs and others. How far this will help improve implementation of Commission recommendations remains to be seen. If the possibilities can seem daunting at a time of ever-dwindling resources, they are also exciting, at least for an elderly Scottish Law Commissioner.

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<sup>56</sup> Scottish Parliament Official Report 24 February 2015, col 8.