

Strategies of the Early Law Commission

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It is our hope that those amendments will be as acceptable to Parliament as they have been to those whom we have consulted.

Law Commission and Scottish Law Commission, *Report on the Consolidation of Certain Enactments Relating to Shellfish Fisheries and Shellfish* (1967)

I

Writing in the year that the statute was passed, Leo Chorley and Gerald Dworkin observed that the Law Commissions Act 1965 ‘may well prove a landmark in the history of English law’.¹ As their cautious phrasing suggested, they had their doubts. Some of their concerns related to the failure to integrate the Law Commission into the machinery of government: there was, for instance, no intention to give the Commission’s proposals any special status in the parliamentary process, and the provision for the involvement of Parliamentary Counsel looked worryingly sketchy.² Perhaps more damagingly, Chorley and Dworkin also pointed to what they saw as problems with the constitution of the Commission itself. All the Law Commissioners were to be lawyers, and the two authors echoed a point made by WT Wells (in the parliamentary debates) that years ‘in the higher reaches of the legal profession’ might not be the best way to learn where ‘the shoe pinches the foot of the ordinary man’.³ Chorley and Dworkin also both reported and shared in the widespread apprehension about the political leanings of the first Law Commissioners; their widely known sympathy with the Labour Party, it was feared, might lend the Commission’s proposals a political slant that would provoke parliamentary resistance.⁴ WT Wells, writing an ‘interim appraisal’ of the Law Commission as early as 1966, put the point more starkly: the Commissioners’ fixed terms of office were

¹ L Chorley and G Dworkin, ‘The Law Commissions Act, 1965’ (1965) 28 *MLR* 675, 675.

² *ibid* 681–82 and 683 respectively.

³ *ibid* 683.

⁴ *ibid* 684–85.

due to expire around the time of the next General Election, and a future Conservative government might be ‘not only critical, but hostile’ in assessing the Commission’s performance.⁵ The Law Commissioners, Wells pointed out, had a ‘general image ... of being rather to the left of centre, and this fact could, conceivably, after 1970, operate to the detriment of the Commission and their work’.⁶

A vivid illustration of how deeply these difficulties were felt by those involved is provided by a public lecture given by Lord Kilbrandon, the Chairman of the Scottish Law Commission, in 1966.⁷ He began his lecture by acknowledging that the phrase ‘law reform’ suggested change ‘after some immense popular outburst having radical, revolutionary or even Marxist characteristics. In fact we think of something like the constitutional changes of the years 1832, 1867 and 1918’.⁸ Kilbrandon was quick to distance both himself and (implicitly) his Commission from this conception of law reform; the Law Commission’s remit must be narrower, but he struggled to define it:

[I]s there any dividing line which can be discerned between law reform and social legislation? In practice, the answer to this question must be in the affirmative, otherwise the Law Commissions would never have been set up. If all law is social legislation, then all law reform is social reform. You would not set up commissions consisting exclusively of legally-qualified persons in order to investigate matters of that kind and to report thereon.⁹

This tortured passage, full of self-doubt and circularity, set the scene for Kilbrandon’s attempt to identify what, exactly, the Law Commissions should be looking at. He started with ‘lawyers’ law’, but quickly found this ‘an expression which seems to be full of epigrammatic meaning when you hear it first, but the more you think about it the less attractive it be-

⁵ WT Wells, ‘The Law Reform Commission: An Interim Appraisal’ (1966) 37 *Political Quarterly* 291, 292.

⁶ *ibid* 294.

⁷ On the founding history of the Scottish Commission, see chapter 34 (Lord Pentland), especially sections II, III and V.

⁸ Lord Kilbrandon, ‘The Prospects of Law Reform’ (1966) 17 *NILQ* 484, 484.

⁹ *ibid* 485.

comes'.¹⁰ He put forward his own version of 'lawyers' law' as the law concerned with the transfer (as opposed to the establishment) of rights; but then, almost immediately, he undermined it by proposing that a no-fault compensation scheme for personal injury would be a matter of 'lawyers' law'.¹¹ This was an extraordinary public crisis of confidence, purpose and identity to be experiencing at such an early stage.

The English and Welsh Law Commission's experience, however, seems to have been happier – or, at least, its crises less public. Its first Commissioners, led by Lord Scarman (the Commission's first Chairman), were prolific and highly effective: all the reports produced during Scarman's tenure were implemented.¹² The first Commissioners also established methods and patterns of working that remain fundamental to the Commission's role and identity today. How did they do it? This essay examines the Commission's earliest publications – its programmes, annual reports, working papers and reports on individual legal topics – to identify and analyse some of its strategies.

II

In asking ourselves 'how they did it' some stress must be placed on 'they'. It seems clear that that no one individual was the dominating or driving force. Indeed, it is quite striking that in the *Oxford Dictionary of National Biography's* entries on the only two early Law Commissioners it includes, both biographers emphasise that their subjects suppressed or concealed their true views when working at the Law Commission.¹³ The implicit suggestion here that both Lord Scarman and LCB Gower recognised that they had roles to play, and adapted their activities accordingly, could be equally applied to other leading figures. Lord Gardiner, whose energetic advocacy of a permanent law reform body had put law reform on the political agenda,¹⁴ and who was rumoured to have insisted on the creation of the Law Commission as a condition of accepting the Lord Chancellorship,¹⁵ characterised the Commission's work

¹⁰ *ibid* 486.

¹¹ *ibid* 486–87.

¹² S Sedley, 'Scarman, Leslie George' in *Oxford Dictionary of National Biography* (online edn).

¹³ *ibid*; S Cretney 'Gower, Laurence Cecil Bartlett [Jim]' *Oxford Dictionary of National Biography* (online edn).

¹⁴ See, particularly his co-editorship of, and contribution to, G Gardiner and A Martin (eds), *Law Reform Now* (London, Victor Gollancz, 1963).

¹⁵ Chorley and Dworkin, n 1 above, 679.

as ‘part of that process on which we are now engaged, the modernization of Britain’.¹⁶ To proclaim the Commission as an agent of modernisation was very much to align both the institution and its aims with a central theme of political discourse in 1960s Britain. The Labour Party had come to power in 1964 following an election campaign in which it had dwelt on the unrealised potential of the British economy and the urgent need to make more use of new technology. Once in power, the drive to modernise inspired a wealth of policies beyond industry including new road signage, postcodes and decimalisation.¹⁷ A Law Commission that said it was setting out to modernise the law was, therefore, very astutely positioning itself in the prevailing political landscape.

It was also possible for the Commission to draw on two related, dominant political values: professionalism and planning. An appeal to professionalism had been an important aspect of the argument for creating a Law Commission in the first place, with Lord Gardiner making much of the limited achievements of the Commission’s part-time predecessors;¹⁸ it remained central to the Commission’s identity.¹⁹ Professionalism was a particularly powerful concept to invoke at that time as it was one of the factors that the Labour Party had used to differentiate itself from the Conservatives, and was something which the Prime Minister, Harold Wilson, took great personal pride in.²⁰ The full-time nature of a Law Commissioner’s role, and the Commission’s practice of submitting annual reports were reflections of professionalism, as also, perhaps, was the Commission’s over-ambitious *First Programme of Reform*²¹ (Wilson was notorious for his conflation of professionalism and overwork).²²

¹⁶ G Gardiner, ‘Comparative Law Reform’ (1966) 52 *American Bar Association Journal* 1021, 1023.

¹⁷ D Sandbrook, *White Heat: A History of Britain in the Swinging Sixties* (London, Abacus, 2007) 167–69.

¹⁸ Chorley and Dworkin, n 1 above, 680–81; J Farrar, *Law Reform and the Law Commission* (London, Sweet & Maxwell, 1974) 13.

¹⁹ See, eg, the emphasis given to professionalism by the Commission’s first Chairman in lectures to international audiences: L Scarman, ‘The Work of the Law Commission for England and Wales’ (1969) 8 *University of Western Ontario Law Review* 33, 33–34; L Scarman, ‘Inside the English Law Commission’ (1971) 57 *American Bar Association Journal* 867, 867.

²⁰ Sandbrook, n 17 above, 41. Edward Heath, the Leader of the Opposition in the same period also emphasised his professionalism (ibid 164).

²¹ LC 1 (1965).

²² The annual reports began with Law Commission, LC 4, *First Annual Report* (1966). The amount of work that the *First Annual Report* described alarmed CP Harvey: see ‘The Law Commission: First Annual Report 1965–1966’ (1966) 29 *MLR* 649, 650: ‘it fairly staggers one with the revelation of the amount of work that the Commission have already got through, are currently getting through and are proposing to get through in the immediate future’.

The importance of planning in government policies of the period was embodied in the creation of a new government ministry, the Department of Economic Affairs, which was designed to formulate strategic economic policy.²³ The Department's main role proved to be the creation of a National Plan for economic growth, which would achieve a 25 per cent increase in output by 1970. As it turned out, the government had been wildly optimistic about its ability to control the economic conditions that would have made such extraordinary growth possible, but, in 1965, planning was still seen as the route to modernisation. The centrality of planning can be seen immediately in the Law Commission's first published document, its *First Programme*.²⁴ By identifying the areas that it proposed to examine, the Commission was obviously engaging in making a plan; but how it explained the choice of those topics, and how it proposed that they should be examined, revealed a different dimension of the Commission's strategy. Right at the outset there was an emphasis on 'practical considerations': 'we have excluded those projects on which we cannot hope to make an immediate start'.²⁵ There was also, equally prominently, an insistence on co-ordination between the Commission and other agencies: alongside the exclusion of projects on which an immediate start could not be made, the Commission stated that for the 'avoidance of duplication of effort' it had excluded matters already under consideration by other agencies, and that it proposed to give active consideration to studies by other reform bodies that had not yet been implemented.²⁶ The Law Commission had instantly adopted the mentality and language of an efficiency-driven public body – the 'immediate start' implicitly promised prompt conclusions²⁷ – but it was not seeking to dominate. The themes of collaboration and co-ordination were carried through in the individual programme items: for instance, item II, on contractual exemption clauses in general, explained that it was building on the work of an earlier committee, and proposed dividing up the new investigation between an interdepartmental committee and the Commission.²⁸ Item V proposed to revisit the vexed question of civil liability

²³ Sandbrook, n 17 above, 170–77.

²⁴ See n 21 above.

²⁵ *ibid* para 1(ii).

²⁶ *ibid* paras 1(i) and 1(iii).

²⁷ Some topics were added in the hope that they would yield impressively speedy recommendations: LCB Gower, 'Reflections on Law Reform' (1973) 23 *University of Toronto Law Journal* 257, 263.

²⁸ *First Programme*, n 21 above, 6–7.

for animals, which had been the subject of an unimplemented report in 1953.²⁹ The programme also called for the creation of new ad hoc committees – on jurisdiction and procedure in personal injury litigation, on financial limits on magistrates’ orders in domestic and affiliation proceedings, and on the Judicature Act in its application to Northern Ireland.³⁰ What this approach suggested, in addition to the importance of planning, was that the Commission was being very careful about relying on its own status and authority in bringing about legal change.

III

The anxieties about authority implicit in the Law Commission’s *First Programme* were made explicit in the Commissioners’ later unofficial writings. Both LCB Gower and Norman Marsh explained that ‘as a new and untried body’ the Commission had not felt able to do battle with vested professional interests by pushing for widespread procedural reforms.³¹ Marsh’s essay also contained a very eloquent passage explaining why judicial development of the common law was no longer adequate:

[I]t is no longer possible for the judge in modern English society to make those bold assumptions about family life and about relations between landlord and tenant, employer and employee, citizen and State which underlie many reforms of a seemingly legal character. On the one hand, he lives in an era where many value assumptions are being challenged; on the other he does not enjoy quite the unquestioned privilege, the charismatic authority, enjoyed by his Victorian forebearers.³²

A footnote to this passage identified the dethronement of the father-figure as one of several reasons for this development. What is particularly striking about Marsh’s comments, for our purposes, is that they apply equally forcefully to attempts at law reform by four late-middle

²⁹ *ibid* 8.

³⁰ *ibid* 9, 12 and 14 respectively.

³¹ Gower, n 27 above, 266 (from which the quotation is taken); N Marsh, ‘Law Reform in the United Kingdom: A New Institutional Approach’ (1971–72) 13 *William & Mary Law Review* 263, 275 n 31.

³² Marsh, n 31 above, 266.

aged lawyers led by a judge. What moral authority, what credibility could such figures lay claim to? It is one of the most remarkable features of the early Law Commission publications that they hardly ever make such claims.

In the first 20 publications, only once, in its report on civil liability for animals, does the Commission unapologetically rely on its own judgement about social conditions mandating legal change.³³ More characteristic is the report on imputed criminal intent, where the Commission's discomfort in having to advance its own test (consultees having disagreed) is palpable.³⁴ The Commission's preferred approach, however, was to either play down or minimise its own agency, and to depict the true impetus for change as emanating from elsewhere.

'Elsewhere' might be taken literally – the working paper on administrative law, for instance, cast envious glances towards France, and suggested that we needed to be keeping up with the neighbours³⁵ – but even representations from a single solicitor could trigger an investigation.³⁶ More significantly, the Commission might seek to arrogate an external body's authority when taking up that body's reform proposal. In its report *Proceedings against Estates*, the Commission supported a proposal from the Law Society to abolish a special limitation rule that applied only in respect of such proceedings.³⁷ The Commission reported the Law Society's view that the existing rule was failing to achieve its intended policy purpose, and added that 'solicitors are more likely to be familiar with the practical consequences and those whom we consulted did not believe that the abolition of the rule would cause serious delay'.³⁸ This was, of course, technically the Law Commission's proposal; but the Law Commission was presenting itself as little more than an obliging intermediary.

The Commission's publications on the reform of root of title to freehold land provide a particularly vivid illustration of its enthusiasm for depicting itself as a messenger.³⁹ Both

³³ Law Commission, LC 13, *Civil Liability for Animals* (1967) para 40.

³⁴ Law Commission, LC 10, *Imputed Criminal Intent (Director of Public Prosecutions v Smith)* (1966) para 20.

³⁵ Law Commission, LC WP 13, *Exploratory Working Paper on Administrative Law* (1967) paras 6 and 9. The Commission's *Second Annual Report* (LC 12, 1967) para 25 recorded that a member of the Commission's staff had been to see the Conseil d'Etat at work. See also Law Commission, LC WP 4, *Should English Wills be Registrable?* (1966) which gave striking prominence to Dutch law.

³⁶ *Should English Wills be Registrable?*, n 35 above, para 1.

³⁷ Law Commission, LC 19, *Proceedings against Estates* (1969).

³⁸ *ibid* para 18.

³⁹ Law Commission, LC WP 1, *Law Commission First Programme, Item IX — Transfer of Land, B — Root of Title to Freehold Land* (1966); Law Commission, LC 9, *Transfer of Land: Interim Report on Root of Title to Freehold Land* (1966).

the working paper (the Commission's first) and the report proposed that vendors of freehold land should only need to prove that they had good title that could be traced back for a minimum of 15 years (the requirement at the time was 30 years), but the working paper was quick to acknowledge that any such reform must have the support of conveyancers: 'it would ... be realistic to propose a reduction only if it would be acceptable generally to the public and to those in the legal profession on whom the public normally rely for guidance in land purchase'.⁴⁰ The Commission went out of its way to trail this implied invitation to the conveyancing profession by publishing the paper in the *New Law Journal*, and the confident reiteration of the 15-year proposal in its subsequent report showed that the Commission had received the responses it had hoped for.⁴¹ The report went even further than the working paper in its extravagant deference to conveyancers – 'we appreciate' the Commission gushed, 'that, on a question such as this, it is easier for experts to know the answer than to prove it'⁴² – and it also offered a much more elaborate, historical account of conveyancers as agents of legal change. In this account, the statutory reduction in root of title effected by the Vendor and Purchaser Act 1874 was partly attributable to the changing practices of conveyancers;⁴³ in the same way, current conveyancing practice could be seen as 'repeating the historical pattern whereby a move to reduce the period has been preceded by the voluntary adoption of a shorter period'.⁴⁴ The reform was presented as having an inevitability about it, and the Law Commission as being little more than the amanuensis of a cyclical historical process. The last thing the Commission could have been accused of was acting on its own initiative.

IV

Invoking the external sources of reform proposals glossed over the Law Commission's own limitations; but sometimes those limitations could not be avoided. In such circumstances the Commission went out of its way to signal that it fully appreciated where the line was. Thus, where its researches brought to light an indefensible disparity between the level of fines for selling lobsters carrying spawn and for selling crabs in the same condition, the Commission

⁴⁰ WP 1, n 39 above, para 11.

⁴¹ LC 9, n 39 above, para 31 records the publication; the 15-year recommendation is at para 36.

⁴² *ibid* para 28.

⁴³ *ibid* para 17.

⁴⁴ *ibid* para 26.

proposed assimilating the penalties, but refused to be drawn on what the appropriate fine should be: ‘we do not think that Parliament would look to us for advice on the proper level of a fine’.⁴⁵ An appreciation of its own limitations also seems to have motivated the Commission’s proposals to allocate certain law reform tasks to entities other than itself (as we saw in the *First Programme*),⁴⁶ and was expressly given as its reason for entrusting the reform of administrative law to a Royal Commission or similar body.⁴⁷

These public demonstrations that the Commission was aware of the limitations of its role and functions may well have had the paradoxical general effect of increasing its standing – a confident understanding of the limits of one’s role might, after all, imply a confident understanding of the role itself. But in one particularly significant instance the Commission went further, and exploited its own self-proclaimed limitations to create a uniquely authoritative and influential position for itself. This was its report *Reform of the Grounds of Divorce: The Field of Choice*,⁴⁸ which was the Commission’s response to *Putting Asunder*, a report by a group appointed by the Archbishop of Canterbury.⁴⁹

The opening paragraphs of *Reform of the Grounds of Divorce* suggested an acute self-consciousness. ‘It is not, of course, for us but for Parliament to settle such controversial social issues as the advisability of extending the present grounds of divorce’, said the Commission.⁵⁰ ‘Our function ... must be to assist the Legislature and the general public in considering these questions by pointing out the implications of various courses of action’.⁵¹ This ‘limited task’ had an apparently modest ambition:

As lawyers we recognise that the improvement of the divorce law is too important a matter to be left to specialists, whether they be churchmen, sociologists or lawyers. Nevertheless public discussion of the subject should be more constructive

⁴⁵ Law Commission and Scottish Law Commission, LC 11A and SLC 6A, *Sea Fisheries (Shellfish) Bill: Report on the Consolidation of Certain Enactments Relating to Shellfish Fisheries and Shellfish* (1967) para 7.

⁴⁶ See text accompanying nn 27–29 above.

⁴⁷ Law Commission, LC 20, *Administrative Law* (1969) para 10.

⁴⁸ LC 6 (1966).

⁴⁹ Church of England Group on Divorce Law, *Putting Asunder: A Divorce Law for Contemporary Society* (London, SPCK, 1966).

⁵⁰ *Reform of the Grounds of Divorce*, n 48 above, para 2.

⁵¹ *ibid.*

and fruitful if it can be focussed on practical possibilities. We have therefore tried to restrict this Report to a consideration of what appears from a lawyer's point of view to be practicable.⁵²

However, when the report turned to consider the proposals advanced by the *Putting Asunder* committee, the analytical and persuasive power of the practical lawyer's perspective became apparent. The *Putting Asunder* report had called for the replacement of matrimonial offences as grounds of divorce with a sole ground of breakdown of marriage. So far as the principle was concerned, the Law Commission was quick to acknowledge its own incompetence to judge: 'many of the arguments for and against the breakdown test', it commented, 'depend on judgments of personal and social morality. To these we can only draw attention; it is not for us to determine their validity'.⁵³ But what the Law Commission emphatically did feel itself competent to evaluate was the adjudicatory mechanism proposed in *Putting Asunder*. This required positive proof of breakdown, to the satisfaction of the judge, in every case whether defended or not. In the Law Commission's view, this made the proposals impractical: litigation would take longer and cost more.⁵⁴ A more practical solution, the Commission suggested, would be 'Breakdown without Inquest', in which an investigation of the marriage would not be mandatory, and breakdown could be assumed on proof of a six-month separation.⁵⁵ The Commission portrayed itself as helpfully proposing alternative legal machinery to give effect to the same principle – of matrimonial breakdown as the ground of divorce – that *Putting Asunder* had adopted. But the reality was that, in its application to ordinary litigants, this was an entirely different system: the paternalistic, invasive procedure required by *Putting Asunder* was being replaced by an approach in which the parties' own feelings, desires and evaluations – in short, their autonomy – was determinative. The Commission's sardonic observation that 'The parties are likely to be better judges of the viability of their own marriage than a court can hope to be' underlined its awareness that its proposals would shift the balance of power in divorce litigation away from (professional) judges, thereby giving the par-

⁵² *ibid* para 3.

⁵³ *ibid* para 59.

⁵⁴ *ibid* paras 62, 70.

⁵⁵ *ibid* paras 71–72, 76.

ties control.⁵⁶ The Commission's proposal formed the basis of subsequent reforms,⁵⁷ and the strategy it employed in its report illustrated the advantages that could be gained by (paradoxically) emphasising its own limited expertise. For here professions of limited expertise served *both* as expressions of appropriate modesty, and, simultaneously, as peculiarly compelling demands to be listened to on the self-identified specialism.

V

The Law Commission's response to *Putting Asunder* was a compelling illustration of the way that, by claiming to speak *as lawyers*, the Law Commission could fashion for itself a position of authority and influence in a debate with wide-ranging social and political dimensions. The Commission also had notable success, as we have seen in the previous section, when it depicted itself as speaking *for lawyers* – as, for instance, when it supported the Law Society's proposal to amend the limitation period for claims against estates. In order to adopt this position it had to be *representative* of the legal profession, and the way it did this was by using the fundamentally important process of consultation.

Contemporaries had absolutely no doubt about the significance of consultation in the early Law Commission's activities. Gower described it as 'vital',⁵⁸ and Marsh went so far as suggesting that 'the techniques of consultation which the Law Commissions have developed are at least as important as the actual reforms which they have proposed'.⁵⁹ As the Commission explained in its *First Annual Report*, it envisaged an integral role for consultation as part of a structural process: the Commission first undertook research, which yielded a working paper, and this paper was then put out for consultation.⁶⁰ In the *First Annual Report* this account of the Commission's working methods was preceded by the *caveat* that '[f]rom the outset we have taken the view that it would be inexpedient to lay down hard and fast rules of procedure'.⁶¹ By the *Third Annual Report* the tone had changed: 'Our role in law reform demands research and then consultation', it proclaimed. 'The working paper marks the transi-

⁵⁶ *ibid* para 71; the point is repeated at para 73.

⁵⁷ See Law Commission, LC 12, *Second Annual Report* (1967) para 75 and Law Commission, LC 15, *Third Annual Report* (1968) paras 50–51 and app III (30–32).

⁵⁸ Gower, n 27 above, 262.

⁵⁹ Marsh, n 31 above, 278.

⁶⁰ Law Commission, LC 4, *First Annual Report* (1966) paras 15–16.

⁶¹ *ibid* para 14.

tion from research to consultation'.⁶² This striking self-confidence about the demands of the Law Commission's role had a certain irony, for the *Third Annual Report* highlighted that the attractive simplicity of the binary model under which the Commission worked up its ideas first, before bringing in external consultees later, was already starting to unravel. Thus, the project on personal injury damages had involved circulating a paper 'to a limited number of experts' which was then being developed into a working paper; the project on appurtenant rights to land had made use of 'a consultative group of lawyers and surveyors with expert knowledge', whose responses to preparatory studies would inform a forthcoming working paper; and the land registration project had also undertaken an extraordinarily wide consultation in advance of producing a working paper.⁶³ Clearly the Commission regarded consultation as fundamental.

It is also clear that the Commission regarded consultation as having a substantive contribution to make – it was never a case of simply going through the formal motions for the sake of appearances. The point is made negatively in the *Proposals to Abolish Certain Ancient Criminal Offences*, where the obsolescence of the offences proposed for abolition led the Commission to explain that 'their abolition, as now proposed, is more akin to statute law revision than to law reform. It is for this reason that the Commission has not thought it necessary to consult the profession formally on the proposal'.⁶⁴ In other words, it was only where consultation had something to add that it would be undertaken.

What consultation did add varied across the range of projects. Sometimes its contribution could be modest yet subtle. A good example can be seen by comparing the Commission's working paper on powers of the Court of Appeal to sit in private in legitimacy proceedings with its report on the same subject.⁶⁵ The substantive proposals and arguments of principle advanced in support of those proposals were essentially the same in both documents. But the report gave a sense of being grounded in practicalities, which the working paper lacked; for instance, it drew on judges' impressions of the 'acute and stultifying embar-

⁶² Law Commission, LC 15, *Third Annual Report* (1968) para 4.

⁶³ *ibid* paras 18, 29 and 34 respectively.

⁶⁴ Law Commission, LC 3, *Proposals to Abolish Certain Ancient Criminal Offences* (1966) para 7. The sentence went on to report that there had been 'informal reference' to the profession.

⁶⁵ Law Commission, LC WP 2, *Law Commission's Draft Proposals on Powers of the Court of Appeal to Sit in Private and Restrictions upon Publicity in Legitimacy [sic] Proceedings* (1966); Law Commission, LC 8, *Report on the Powers of Appeal Courts to Sit in Private and the Restrictions upon Publicity in Domestic Proceedings* (1966).

rassment' of parties who were required to give evidence about their sexual behaviour in open court, and proposed making use of the Bar Library to disseminate judgments on important points of principle that had been delivered in closed proceedings.⁶⁶ Consultees' approval might also be relied on as, in itself, an additional reason to proceed with a reform. As we saw earlier, as part of its strategy to minimise assertions of its own (fragile) authority, the Commission attributed the initiative for its proposals to reform the rules on root of title to freehold land to the conveyancing profession; when conveyancers responded positively to the consultation paper this was, in itself, a strong reason to implement the proposal.⁶⁷

Perhaps the most powerful illustrations of the centrality of consultation, however, could be seen where the consultation process changed the substantive content of reform proposals. In its project on restrictive covenants, for instance, the Commission had initially proposed abolishing the need to register such covenants affecting unregistered land on the Land Charges Register; it had also proposed allowing the legal member of the Lands Tribunal to adjudicate on the validity of restrictive covenants.⁶⁸ Both proposals were abandoned following consultation.⁶⁹ More dramatically, the consultation process might persuade the Commission to abstain from intervention altogether, as occurred with its *Interim Report on Distress for Rent*.⁷⁰

It was not necessary to read beyond the second page of this report to find out what the Commission thought of a landlord's right to seize his tenant's goods to satisfy a demand for rent: distress was 'a relic of feudalism', and the self-help remedy 'an obvious anachronism'.⁷¹ Readers of these opening pages must have felt that they could see what was coming. But then the mood shifted, as the Commission recounted the results of its extensive consultations, which showed that '[t]here is no evidence that wrongful distress is at all widespread'; that there was 'little indication' of the threat of distraint being abused, and that 'the practice of most landlords [was] to stay their hand'.⁷² Landlords, indeed, deserved more sympathetic treatment, said the report, since, unlike other creditors, they were forced to continue giving

⁶⁶ LC 8, n 65 above, paras 11 and 24 respectively.

⁶⁷ Law Commission, LC 9, *Transfer of Land: Interim Report on Root of Title to Freehold Land* (1966) para 34.

⁶⁸ Law Commission, LC WP 3, *Restrictive Covenants* (1966) paras 8(ii)–(iii) and 22 respectively.

⁶⁹ Law Commission, LC 11, *Transfer of Land: Report on Restrictive Covenants* (1967) 18 and 24–25 respectively.

⁷⁰ Law Commission, LC 5, *Landlord and Tenant: Interim Report on Distress for Rent* (1966).

⁷¹ *ibid* para 5.

⁷² *ibid* paras 14–15.

credit until they could recover possession of the premises.⁷³ What was needed, the Commission concluded, was a better system of remedies; but, pending that, and ‘in view of the state of opinion emerging’, the remedy of distress should be retained.⁷⁴ Here, then, consultation had been determinative, and it is worthwhile pausing for a moment to register quite how powerful its effects had been. For, if ever a legal doctrine invited sweeping, ideologically-inspired abolition by a left-leaning law reform agency, surely it was distress for rent. It needed very little imagination to see this doctrine as dramatising, and furthering, the effects of unequal distribution of wealth, yet the Law Commission was making very clear that it was not partisan: it had its views, of course (which were expressed at the start of the report), but the responses and experiences of consultees could dissuade the Commission from following its instincts.

VI

If the Commission’s publications give ample illustrations of the importance and influence of consultations, they are perhaps less forthcoming in explaining its significance. Why was it, exactly, that the Commission had felt able to assert, in its *Third Annual Report*, that its ‘role ... demands ... consultation’?⁷⁵ Some rationales can, perhaps, be inferred from the use of consultation in the Commission’s reports, but more explicit discussions can be found in lectures given by the first Commissioners, particularly by the Commission’s first Chairman, Lord Scarman. Scarman gave a series of lectures in Canada in the autumn of 1967;⁷⁶ in a chilling reminder of the limitations of in-flight entertainment of that era, he told one lecture audience that he had spent the journey pondering the ambiguities in the following sentence: ‘That fellow Thomas, whenever he met his uncle in the street, he removed his hat’.⁷⁷ He had also, evidently, been thinking about the Law Commission’s operations, and about the functions of consultation. He told his audience in Manitoba that ‘consultation is vital’. ‘It means’, he explained:

⁷³ *ibid* para 18.

⁷⁴ *ibid* para 24.

⁷⁵ Law Commission, LC 15, *Third Annual Report* (1968) para 4.

⁷⁶ *ibid* para 95.

⁷⁷ L Scarman, ‘Law Reform by Legislative Techniques’ (1967) 32 *Saskatchewan Law Review* 217, 221.

[K]eeping in touch with the social realities around us, finding out what interested people want, finding out their criticisms and their views, going to the practising profession, seeing where the shoe pinches, seeing what's wrong and how it can be put right.⁷⁸

'Controversy disappears', he added, 'largely in the process of consultation'.⁷⁹ In Western Ontario, a rather more muted account of the benefits of consultation was offered:

[P]rovided the Law Commission remains aware of its limitations as a specialist body it can make a valuable contribution to the resolution of social problems ... through the processes of consultation and research, as a medium for the collection and assimilation of information gleaned from other fields such as the social and economic sciences.⁸⁰

Scarman was back in North America in 1971, when he put forward a rather different justification for consultation in the *American Bar Association Journal*: 'The Law Commission sees the ultimate object of the elaborate process of consultation as assisting Parliament on matters often of great technical detail which can seldom be adequately investigated in the course of Parliamentary debate.'⁸¹ A year later, in the pages of the *Anglo-American Law Review*, he offered his most elaborate account:

I have already mentioned one of the advantages of open consultation: it enables the layman's voice to be heard in the process of law reform and it ensures that the Commission's first tentative proposals are subject to the criticism of those who know where the shoe pinches. But consultation offers other advantages. It helps to dispose of possible misconceptions regarding the possible effects of the Com-

⁷⁸ L Scarman, 'Law Reform – Lessons from English Experience' (1968–69) 3 *Manitoba Law Journal* 47, 58.

⁷⁹ *ibid.*

⁸⁰ L Scarman, 'The Work of the Law Commission for England and Wales' (1969) 8 *University of Western Ontario Law Review* 33, 41.

⁸¹ L Scarman, 'Inside the English Law Commission' (1971) 57 *American Bar Association Journal* 867, 869.

mission's proposals and thus improves the chance of our recommendations, when finally put forward, being acceptable to a large section of the informed public. Further, it helps to stimulate interest in law reform. And last, but not the least of the advantages of open consultation: it helps the legislature in the field of law reform. The Law Commission is an advisory body and if it is to render effective assistance to Parliament it must consult widely and set out in its final report the scope and nature of the consultation.⁸²

What is immediately striking about these passages is their shifting contents and emphases – Scarman did not have one simple, stable rationale in mind that underpinned the Commission's commitment to consultation. In effect he describes a cluster of substantively and functionally distinct techniques having in common only the formal procedures of consultation. To take the narrowest first: consultation as a method of casting light on technical details calls for the involvement of specialists, typically professionals but not necessarily lawyers, whose expertise gives them a heightened alertness to the likely consequences and side-effects of reforms. An illustration of this kind of consultation at work can be seen in *Blood Tests and the Proof of Paternity in Civil Proceedings*, where the Commission withdrew its earlier suggestion that the law should permit a person to refuse a blood test on health grounds, because medical respondents to the working paper had said that blood tests posed no risk to health.⁸³ Crucially, what makes this kind of consultation valuable is that it is targeted at experts.

Broader, more representative consultation had different merits. Scarman spoke of 'keeping in touch with the social realities',⁸⁴ just as the *First Annual Report* had claimed that 'whenever any proposed reform of the law originates from social or economic considerations or is likely to have social or economic consequences, it is imperative to consult with those qualified to speak for the social and economic interests concerned'.⁸⁵ The *Interim Report on Distress for Rent* provided a model example here, having involved 'Government Departments which have proprietary interests, housing authorities, professional bodies, and organizations

⁸² L Scarman, 'The Law Commission' (1972) 1 *Anglo-American Law Review* 31, 36.

⁸³ Law Commission, LC 16, *Blood Tests and the Proof of Paternity in Civil Proceedings* (1968) para 40; the earlier proposal was made in Law Commission, LC WP 12, *Family Law Proof of Paternity in Civil Proceedings* (1967) para 36.

⁸⁴ Scarman, n 78 above, 58.

⁸⁵ Law Commission, LC 4, *First Annual Report* (1966) para 16.

representing landlords on the one hand and tenants on the other'.⁸⁶ For this kind of consultation to be valuable, it was essential to involve representatives of all those potentially affected by the reform.

A third form of consultation practised by the Commission involved a hybrid of the two forms already discussed. This consultation of representative groups of specialists was particularly useful to the Commission in its dealings with lawyers. Two of the first Commissioners expressed in print the view that the greatest obstacle to law reform was often lawyers themselves,⁸⁷ and it is tempting to see the Commission's strenuous efforts to involve the legal profession, to flatter it, to defer to it, and to publicise reform projects in the legal press as a way of managing an inherently conservative and potentially hostile group. Thus, when Gower wrote that 'The main reason [for consultation] is that if all those who think they ought to be consulted have not had an opportunity of objecting, they will take umbrage when the report is presented and be sure to raise objections then', we might suspect that he had primarily in mind lawyers, whom he described a couple of pages later as 'react[ing] violently against changes in their professional organization and methods'.⁸⁸ The pomposity, self-importance and pettiness that his description implied was hardly a compliment, and we can only speculate about how he endured consultative events like the 'widely representative Seminar on Administrative Law, organised by All Souls College' in December 1966.⁸⁹ Connoisseurs of irony can enjoy the conjunction of 'widely representative' and All Souls College under the Wardenship of John Sparrow,⁹⁰ and the event in many ways enacts the contradictory impulses underlying the Commission's consultation exercises. For this seminar was 'widely representative' only in the narrow sense of bringing together 'a number of lawyers and administrators'⁹¹ – no further information was given as to who had been invited, or why they were considered to be representative – and there is nothing to suggest that any section of the public affected by administrative law attended. Viewed as an exercise in 'keeping in touch with so-

⁸⁶ Law Commission, LC 5, *Landlord and Tenant: Interim Report on Distress for Rent* (1966) para 8.

⁸⁷ Marsh, n 31 above, 264; Gower, n 27 above, 266.

⁸⁸ Gower, n 27 above, 262–63, 266. The sweeping nature of this judgement does not seem to be borne out by, for instance, the conveyancing profession's response to the Commission's proposals to halve the period for root of title (see above, text at nn 39–44).

⁸⁹ Law Commission, LC 20, *Administrative Law* (1969) para 2.

⁹⁰ J Lowe, *The Warden: A Portrait of John Sparrow* (London, HarperCollins, 1999) gives a sympathetic account of Sparrow. Stefan Collini's review, 'From Bar to Bar-room Floor' *Times Higher Education Supplement* (18 January 1999) gives an invaluable account of the book's value and limitations.

⁹¹ Law Commission, LC WP 13, *Exploratory Working Paper on Administrative Law* (1967) para 2.

cial realities' the exercise was a failure; but seen in terms of embracing those interest groups who were articulate, organised and powerful enough to derail future proposals, one could not fault its strategy.

Finally, we might turn to consider why the Law Commission set such store by consultation. Was it really, as Gower argued, little more than a strategy for drawing out the sting of opposition before the proposals reached a delicate stage? My sense is that there was more to it, and that the Law Commission regarded consultation as giving its proposals an authority and legitimacy that they would otherwise have lacked. One clue is in the form of words used by Leslie Scarman, that enthusiast for ambiguity, when he spoke of consultation being valuable because 'it helps the legislature in the field of law reform'.⁹² Helps it to do what? The obvious answer is: to do what legislatures do – legislate. 'The assistance will be ineffective', he wrote, 'unless on the face of the report the scope and nature of the consultation are clearly set out'.⁹³ Again, we might ask why this should make a difference if the primary aim of consultation is to anticipate objections? The success of that more cynical strategy had to be judged by its results (the neutralisation of objections) not by the quality of the consultation. The answer must be that Scarman envisaged that Parliament should use the evidence of consultation as a *reason* to legislate. The Commission itself captured the potential symmetry between consultation and parliamentary decision-making in the sentence used as an epigraph to this chapter: 'It is our hope that those amendments will be as acceptable to Parliament as they have been to those whom we have consulted'.⁹⁴ Consultation was so important because it was a mimesis of democratic decision-making.

VII

At exactly the same time that the Law Commission was being created, Michel Foucault was writing *Les Mots et Les Choses*, a work in which he explored, among many other issues, questions about the authority and authorship of texts. One commentator has paraphrased part of Foucault's concerns in a way that is particularly suggestive for this chapter: it was, he said, 'the importance of always asking of a text, "Who is speaking? (who – from what historical

⁹² Scarman, n 82 above, 36.

⁹³ Scarman, n 81 above, 869.

⁹⁴ Law Commission and Scottish Law Commission, LC 11A and SLC 6A, *Sea Fisheries (Shellfish) Bill: Report on the Consolidation of Certain Enactments Relating to Shellfish Fisheries and Shellfish* (1967) 5.

position, with what particular interests – is claiming the authority to be listened to?)”⁹⁵ As we have seen, trying to think about this question in respect of the texts created by the early Law Commission gives a peculiarly rich and complex answer, for the circumstances of the Commission – as a newly-created, unrepresentative, advisory body operating in a sphere already densely populated by well-established, organised, authoritative and articulate actors – drove it in search of strategies that would lend its operations and proposals persuasive power. The success of those proposals, and the longevity of the Commission itself, reflect the sophistication, imagination and ingenuity of the strategies it chose.

⁹⁵ G Gutting, *Foucault: A Very Short Introduction* (Oxford, OUP, 2005) 12.