



## **CONSTITUTIONAL AND LEGISLATIVE AFFAIRS COMMITTEE**

### **MAKING LAWS IN THE FOURTH ASSEMBLY**

#### **WRITTEN EVIDENCE SUBMITTED BY THE LAW COMMISSION OF ENGLAND AND WALES, DECEMBER 2014**

- 1.1 The Law Commission of England and Wales (“the Commission”) welcomes the invitation to give evidence to the Constitutional and Legislative Affairs Committee (“the Committee”) in relation to how laws are being made by the National Assembly for Wales. As this Inquiry considers “the principles applied to the legislative drafting of Bills, and amendments, for the Assembly and identifying respects in which they conform with or depart from best practice in the United Kingdom and comparable jurisdictions”, we hope that it may be of assistance to the Committee to outline our experience at the Law Commission.
- 1.2 In producing this evidence, we have drawn from our 50 years experience of law reform work, including statute law repeals and the consolidation of legislation. We also offer some thoughts on principles for better legislation, which might usefully be applied outside the Commission.
- 1.3 This note is divided into four sections:
  - (1) Background to the Law Commission and the importance of good legislative drafting;
  - (2) The ways in which the Commission seeks to improve legislative standards in its approach to its work;
  - (3) Implementation; and
  - (4) Principles for better legislation, which might usefully apply outside the Commission.

#### **SECTION 1: ABOUT THE LAW COMMISSION**

- 1.4 Established by the Law Commissions Act 1965, the role of the Law Commission includes keeping all the law of England and Wales under review, providing advice and information to Government, and recommending reform where it is needed. The driving principle of all our law reform work is to ensure that the law is fair, modern, accessible and as cost-effective as possible. We believe that, for the law to be fair, it must be capable of being understood. We strive to remove ambiguity and make the law easy to understand and use for the courts, legal practitioners and citizens.

- 1.5 Recommendations that the Law Commission should review an area of law are made by the judiciary, often in judgments, by Members of Parliament, Government Departments and other Government bodies, as well as by many voluntary and private sector organisations and individuals. Periodically the Commission holds a consultation, calling for ideas for projects for the next 3 year programme of law reform.

### **The Law Commission's work in Wales**

- 1.6 The Commission has undertaken a number of law reform projects relating to Welsh devolved matters. In particular, our recommendations on Adult Social Care have been implemented by the National Assembly in the Social Services and Well-being (Wales) Act 2014.<sup>1</sup> Welsh Ministers have announced their intention to introduce into the Assembly in 2015 a Bill which would implement in Wales the Commission's recommendations on Renting Homes.<sup>2</sup> The Commission has recently begun two further projects on Welsh law: Planning Law in Wales and The Form and Accessibility of the Law in force in Wales.
- 1.7 Clauses in the Wales Bill, currently before Parliament, will, once they are in force, amend the Law Commissions Act 1965. The amendments will authorise the Commission to provide advice and information to Welsh Ministers.<sup>3</sup> It will then be possible for Welsh Ministers to refer law reform projects directly to the Commission. In addition, once these amending provisions are brought into force, they will impose on Welsh Ministers a duty to report annually to the National Assembly on progress made in implementation of Commission proposals relating to Welsh devolved matters.<sup>4</sup>
- 1.8 The Bill makes provision for the Welsh Ministers and the Commission to agree a protocol about the Commission's work relating to Welsh devolved matters. It provides that the protocol may include provision about
- (1) the principles and methods to be applied in deciding the work relating to such matters to be carried out by the Law Commission and in the carrying out of that work;
  - (2) the assistance and information that the Welsh Ministers and the Commission are to give each other;
  - (3) the way in which the Welsh Ministers are to deal with Commission proposals so far as they relate to Welsh devolved matters.<sup>5</sup>

<sup>1</sup> Adult Social Care, Law Commission No. 326, April 2011.

<sup>2</sup> Renting Homes: The Final Report, Law Commission No. 297, May 2006. Further updated in Renting Homes in Wales / Rhentu Cartrefi yng Nghymru, Law Commission No. 337, March 2013 as a result of discussions with the Welsh Government.

<sup>3</sup> Wales Bill 2014, clause 25(2) amending section 3(1), Law Commissions Act 1965.

<sup>4</sup> Wales Bill 2014, clause 25(4) inserting a new section 3C into the Law Commissions Act 1965.

<sup>5</sup> Wales Bill 2014, clause 25(4) inserting section 3D(2) into the Law Commissions Act 1965.

- 1.9 The protocol and any amendment of it are required to be approved by the Lord Chancellor.<sup>6</sup>

### **The importance of good legislative drafting**

- 1.10 The Commission is frequently made aware of the impact on the courts and the citizen of legislation that has been poorly drafted or badly conceived. For example, our current project on Sentencing Procedure in Criminal Courts has become necessary because the frequency of amendments to the statutory provisions has resulted in a statutory scheme of such complexity that even judges and other expert professionals are experiencing acute difficulty in identifying and applying the applicable law.
- 1.11 In some situations, existing legislative provisions need review in light of ambiguity or incoherence. The project on the Form and Accessibility of the Law in force in Wales was proposed by the Commission's Welsh Advisory Committee and will address how access to the emerging body of Welsh law may be improved.
- 1.12 Finally, some areas of law have simply fallen out of step with modern society. Our statute law repeals (SLR) team makes proposals for the repeal of laws that have become obsolete. The purpose of SLR is to modernise and simplify the statute book, reduce its size and save the time of lawyers and others who use it. This in turn helps to avoid unnecessary costs. It also stops people being misled by obsolete laws that masquerade as live law.
- 1.13 It is also the case that legislation on a topic can become disjointed and inaccessible as Parliament passes successive Acts over several years. Our consolidation work can greatly improve the form, structure and accessibility of legislation.

## **SECTION 2: THE WAYS IN WHICH THE COMMISSION SEEKS TO IMPROVE LEGISLATIVE STANDARDS**

- 1.14 In this section we describe for the Committee the part played in the design and delivery of draft Bills by:
- (a) the way in which the Commission works
  - (b) the process by which we conduct law reform
  - (c) how we use consultation and specialist advice to inform our work
  - (d) our independent status, and
  - (e) scrutiny and review.

<sup>6</sup> Wales Bill 2014, clause 25(4) inserting section 3D(4) into the Law Commissions Act 1965.

## ***How the Commission works***

### *Specialist teams led by experts*

- 1.15 The Commission is led by a Lord Justice of Appeal as Chairman. Four specialist teams of lawyers and researchers work under the supervision of the Chairman and 4 full-time Law Commissioners. The reputation of the Law Commission – as expert, authoritative and independent – and the respect with which it is held in the legal and academic arenas, enables us to attract Commissioners of the highest calibre.
- 1.16 Having teams that are able to devote their attention to specialist areas of law reform improves legislation by allowing us to undertake projects of a length and complexity that may not be possible for Government Departments. It has, for example, enabled us to undertake a long and demanding project on insurance contract law. Since starting work on this project in 2007, the Commercial Law team has been able to accumulate a high degree of knowledge and expertise in the area of insurance contract law, and build solid and productive relationships with highly influential stakeholders. The team is responsible for the Third Parties (Rights against Insurers) Act 2010 and the Consumer Insurance (Disclosure and Representations) Act 2012. A third Law Commission Bill, the Insurance Bill 2014 which is currently before the House of Lords, addresses pre-contract disclosure and misrepresentation in business insurance law and warranties.

### *In house Parliamentary Counsel*

- 1.17 Most of our reports on law reform are accompanied by draft legislation which would implement our proposed reforms. From the start, the Law Commission has always included a team of Parliamentary Counsel within the organisation.
- 1.18 The Parliamentary Counsel team is responsible for drafting the Law Commission's law reform Bills on the instructions of the relevant law reform team. Working closely with the teams on a daily basis enables Parliamentary Counsel to develop a thorough understanding of the team's intentions and to ensure that these are reflected accurately and appropriately in draft legislation. The discipline of translating proposals for law reform into draft legislation is also of enormous benefit in our development of good law, in that it provides us with an opportunity to test the viability of our provisional proposals.
- 1.19 The team of Parliamentary Counsel is also available to give advice on questions relating to legislation and Parliamentary procedure arising in the course of the Commission's work. This has been particularly valuable on the occasions when we have supported the implementation of Law Commission Bills.

## ***The process by which we conduct law reform***

### *Programmes of law reform and selection of projects*

- 1.20 The Law Commission is required, by the 1965 Act, to “prepare and submit to the Minister from time to time programmes for the examination of different branches of the law with a view to reform” (section 3(1)(b)). We received 250 suggestions for projects for inclusion in our 12th Programme and formally adopted nine new projects in July 2014, two of which relate to Welsh devolved law. Under the terms of the Protocol agreed between the Lord Chancellor (on behalf of the Government) and the Law Commission, only projects that are appropriate for the Commission and have a reasonable expectation of implementation are selected for the Programme. The selection criteria include an examination of the extent to which the law is unsatisfactory (for example, unfair, unduly complex, inaccessible or outdated).
- 1.21 In addition to our programmes of law reform, we also undertake projects referred directly to us by Ministers. For example, in March 2014 we completed a law reform project on the regulation of health care professionals and social workers, referred to the Commission by the Department of Health.<sup>7</sup>

### *Consolidation of legislation*

- 1.22 The consolidation of statute law has been an important function of the Law Commission since its creation. The Commission has been responsible for over 200 enacted consolidation Bills since it was established in 1965.<sup>8</sup> Consolidation aims to make statute law more accessible and comprehensible by drawing together different enactments on the same subject matter to form a rational structure and making the cumulative effect of different layers of amendment more intelligible. In all purely consolidation exercises, the intention is that the effect of the current law should be preserved. However, there is usually scope for modernising language and removing the minor inconsistencies or ambiguities that can result both from successive Acts on the same subject and more general changes in the law.
- 1.23 Modern methods of updating legislation have reduced the pressure to consolidate simply to take account of amendments. There is still, however, a need for consolidation as a process. This is usually because the law on a subject is found in a number of different Acts or instruments, or because layers of amending legislation have distorted the structure of the original Act. A good consolidation does much more than produce an updated text. And the need to consolidate may be particularly acute after repeated legislative activity in a particular area of law over a period of several years, without the original legislation having been replaced. The language can become out of date and the content obsolete or out of step with developments in the general law.

<sup>7</sup> Regulation of Health Care Professionals, Law Commission No. 345, March 2014.

<sup>8</sup> Our most recent consolidation exercise resulted in the Co-operative and Community Benefit Societies Act 2014.

- 1.24 It is not always possible to remedy minor defects in legislation without altering its effect. We have, therefore, established a procedure whereby the Commission may recommend that small changes of substance be made in order to facilitate consolidation.
- 1.25 In approaching consolidation, the senior Parliamentary Counsel at the Commission will consider any proposed topic for consolidation with a view to determining whether it is suitable, how acute is the need for consolidation and whether there is likely to be anyone available to draft it within a reasonable time. Larger consolidations can take two or three years to complete. Usually, there is little point in starting a consolidation unless the underlying law is likely to remain stable for the period the project will take.
- 1.26 Since 2010, the Commission will not agree to a proposal that it produce a consolidated statute unless that Department is fully committed to supporting the project by making contributions both in terms of human resources (typically, a lawyer made available to answer queries from the drafter and to comment on his or her work) and funding. It is also now expected that a draft consolidation Bill will usually be published by the Department for wider consultation before it is introduced.

#### *Statute Law Repeals (SLR)*

- 1.27 SLR work is carried out by a specialist team at the Law Commission, with assistance from colleagues at the Scottish Law Commission. The team examines the statute law in particular fields, publishing a report recommending the repeal of those Acts or provisions which have been identified as obsolete.
- 1.28 Implementation of the Law Commission's SLR proposals is by means of Statute Law (Repeals) Bills. The Commission's most recent SLR Bill, its nineteenth, resulted in the Statute Law (Repeals) Act 2013 which repealed 817 Acts in their entirety and partially repealed a further 50 Acts. On 27 November 2014 the Commissions published a consultation paper which involves proposals for the twentieth SLR Bill. These concentrate primarily on obsolete legislation from the twentieth century under subject heads including agriculture, criminal law, police, social security and taxation.
- 1.29 SLR Bills are drafted by the SLR team; but they have the facility of consulting the Law Commission's Parliamentary Council on points of difficulty or for assistance in specialist details (for example savings provisions).

#### ***How we use consultation and specialist advice to inform our work***

##### *Consultation*

- 1.30 Our law reform and statute law repeals projects involve extensive public consultation.
- 1.31 Consultation is the fulcrum of our law reform projects. It is critical to the final outcome of quality legislation in that it allows us to gain a thorough understanding of the operation of the area of law with which we are concerned, the problems that arise and how they are experienced by the public. Driven by the publication of a detailed consultation paper, our extensive consultation process informs and strengthens our final recommendations.

- 1.32 Our consultees will normally include politicians, officials and legal advisers from Government departments, the judiciary, practising lawyers, legal academics, local government, trade and industry, consumer groups, representative and campaigning organisations in the business and voluntary sectors and the public at large.
- 1.33 We make substantial efforts to ensure our target audiences are aware of our consultations. These include direct contact from the legal teams or via the members of our advisory groups, issuing notices via the traditional media and the tailored use of social media. We conduct a large number of face-to-face meetings with interested consultees. For example, in our project on adult social care and that on taxis and private hire services we conducted, in each case, between 60 and 80 meetings, seminars, workshops and conferences as part of the consultation process.
- 1.34 Our experience suggests that developing concrete provisional proposals leads to a more productive consultation process, and consequently better law, than asking open-ended, high-level, abstract questions.
- 1.35 To encourage response we publish all our papers online, along with executive summaries. We use a range of accessible formats, including short video clips, to provide information to specific audiences, in particular those who are not legal experts. In line with the Government's "Digital by Default" initiative, we have begun to offer consultees an opportunity to respond to our consultations online.
- 1.36 We also invite and receive a great many written responses. These often provide us with an enormously detailed exposition of an issue, set out by people who are experts and experienced practitioners in the field under consideration.

*Specialist advice*

- 1.37 For many of our projects we will convene an advisory group to give us specialist advice. They can give us a unique insight into the impact of legal issues on, for example, the courts, practitioners, business interests and the public. They help us to build a clear understanding of an existing situation, the experiences of those upon whom it impacts and the likely implications of reform. This assists us in the preparation of our provisional consultation proposals and impact assessments, and to ensure that we are able to reach and engage all potential interested parties. Depending on the project, an advisory group might consist of half a dozen legal experts, or 50 organisations representing a far greater number of relevant stakeholders.

### ***The Commission's independent status***

- 1.38 The Commission is an independent body created by Parliament. This improves our ability to draft good law in a number of ways. First, it means that when Parliament considers Bills produced by the Commission it knows that they have not been influenced in any way by political considerations. Secondly, many stakeholders are willing to engage with the Commission precisely because it is independent. This perception of the Commission proved particularly valuable in our work on disclosure and misrepresentation in insurance contracts. The Commission achieved such a level of consensus between the insurance industry and consumer groups that the Government was able to introduce the Bill which became the Consumer Insurance (Disclosure and Representations) Act 2012 under the House of Lords procedure for non-controversial Law Commission Bills.
- 1.39 The independence of the Commission can allow it to propose reform in areas where the public might have reservations about Government formulation of policy. For example, a current project on misconduct in public office stems from the March 2010 report of the Committee on Issues of Privilege (Police Searches on the Parliamentary Estate).
- 1.40 Often, necessary law reform is concerned with highly technical matters which are unlikely to capture the imagination of the public or the attention of politicians. An independent Commission is free to review areas of law that may not be high on the political agenda, popular or easy to deal with. It is also able to complete long-term projects that might not otherwise survive a change in Government.

### ***Scrutiny and review***

- 1.41 Scrutiny of the Law Commission's work comes both internally and externally. The internal process of peer review greatly enhances the quality of proposals we make for reform. Fortnightly meetings allow each Commissioner to draw on the considerable expertise of his or her fellow Commissioners, and provide Commissioners as a group with an opportunity to challenge each other's work. This adds to the external scrutiny of projects through consultation. Peer review takes place at each of the key stages in a project, up to and including the final report and draft Bill.

### ***Parliamentary scrutiny of Law Commission law reform***

- 1.42 The work of the Law Commission is transparent and available at a number of stages for scrutiny by Parliament. The Commission lays detailed information about its programmes of reform before Parliament prior to commencement, in accordance with the Law Commissions Act 1965. It also lays before Parliament its recommendations for reform in the form of Law Commission reports. These reports include a full statement of the existing law and the issues and problems identified, a summary of the consultation and responses received, and an assessment of the likely economic and social impact of the proposed reforms, were they to be implemented.



- 1.43 The Commission also produces an annual report to the Lord Chancellor in which it gives a full account of the progress and status of all its work.

**We should be grateful for the opportunity to discuss with the Committee the most appropriate procedures by which the Commission may in future report to the Welsh Assembly on its activities.**

*The Lord Chancellor's annual report*

- 1.44 The Law Commission Act 2009 imposes a duty on the Lord Chancellor to report to Parliament annually on implementation of Law Commission proposals.<sup>9</sup> The Lord Chancellor's annual report must set out the Law Commission's proposals for reform that have been implemented during the year and those that have not yet been implemented, including "plans for dealing with any of those proposals" and, where any decision has been taken not to implement, "the reasons for the decision". This is important in that it increases the transparency of the Government's approach to the Commission's work and allows Parliament an opportunity to exercise oversight of Government's response to our proposals.
- 1.45 When the provisions currently in the Wales Bill are brought into force, the Welsh Ministers will be subject to corresponding duties to report to the Assembly on progress made in implementation of Commission proposals relating to Welsh devolved matters.<sup>10</sup>

**SECTION 3: IMPLEMENTATION**

- 1.46 The Law Commission cannot introduce a Bill into Parliament. To implement legislative reform, we are dependent on Government or occasionally, as with the Estates of Deceased Persons (Forfeiture Rule and the Law of Succession) Act 2011, upon the support of an individual Parliamentarian who can carry our work forward by means of a private member's Bill.
- 1.47 Once Government is ready to introduce a Law Commission Bill in Parliament, there are two additional routes that can be taken: the Law Commission House of Lords procedure and the procedures for statute law repeals and consolidation.

***House of Lords Procedure***

- 1.48 The House of Lords procedure for scrutinising Law Commission Bills was adopted by the House in October 2010, following a successful trial. The procedure allows for the second reading of uncontroversial Law Commission Bills to be taken off the floor of the House, enabling valuable legislation to proceed to the statute book that might otherwise find it difficult to secure a place in the main legislative programme. The Insurance Bill currently before the House of Lords was introduced under this procedure in July 2014. While this procedure is efficient and economical in its use of Parliamentary time, it is in no sense an easy route to the statute book. The Lords Committee stage has been the occasion of rigorous scrutiny of the provisions of each Bill.

<sup>9</sup> Section 1.

<sup>10</sup> Wales Bill, clause 25(4) inserting a new section 3C into the Law Commissions Act 1965.

- 1.49 This is a convenient point at which to draw attention to a recent development in the procedure of the Scottish Parliament which has created a Delegated Powers and Law Reform Committee, the functions of which include scrutinising Bills proposed by the Scottish Law Commission. The first Bill chosen by the Scottish Parliament to go through this new procedure is the Legal Writings (Counterparts and Delivery) (Scotland) Bill which was introduced on 14 May 2014.<sup>11</sup>

### ***Statute Law Repeals***

- 1.50 The Law Commission's draft Statute Law (Repeals) Bills and associated reports are laid before Parliament as Command Papers. SLR Bills enjoy a fast-track route into and through Parliament. They are generally introduced into the House of Lords within weeks of their publication by the Commission. After Lords Second Reading, SLR Bills are considered by the Joint Committee on Consolidation Bills, a Committee appointed by both Houses to consider consolidation Bills and SLR Bills, before returning to the House of Lords for the remaining stages. The Ministry of Justice has responsibility for SLR Bills in both Houses.

### ***Consolidation***

- 1.51 Consolidation Bills benefit from a special Parliamentary procedure similar to that used for SLR Bills: being considered by a joint committee before following more or less formal proceedings through the other Parliamentary stages. A Law Commission consolidation would not recommend changes that were sufficiently significant to require the introduction of a normal Bill. For that reason, some Consolidation Bills are preceded by a programme Bill that includes amendments to the legislation being consolidated.

## **SECTION 4: PRINCIPLES FOR BETTER LEGISLATION – TRANSFERABLE TO OTHER ORGANISATIONS?**

- 1.52 In the preceding sections we have concentrated on describing the functions and working practices of the Commission. It might be of assistance to the Committee if we focus more closely on the advantages we enjoy in the Commission when preparing proposals for substantive law reform and whether these may be transferrable to draft legislation which does not emanate from the Commission. In doing so we make clear that we do not suggest for a moment that legislation which has its origins in the work of the Commission should be regarded as a paragon; on the contrary there is always room for improvement when seeking to achieve accuracy, clarity and accessibility in legislation.

<sup>11</sup> The new procedure is described in Malcolm McMillan, "Law Reform in the Scottish Parliament: A New Process – A New Era?" (2014) *The Scottish Parliamentary Review* 95.

## **1. Policy formulation**

- 1.53 In the context of policy formulation, the Law Commission is in a very different position from government. The Commission is an advisory rather than an executive body; it is politically and intellectually independent; and its projects are rarely driven by political imperatives or event-led timings. Our particular focus and corporate structure, underpinned by lawyers with specialist knowledge, mean that we can tackle longer, more complex and more technical projects, which government departments may not find practicable through lack of time or resources.
- 1.54 The Law Commission seeks to ensure that its policy proposals are formulated only after detailed research into the problems at which they are targeted. Before embarking on a project, it assesses the benefits that are likely to flow from legal reform through a scoping exercise and preliminary research. It then undertakes detailed research into the law and its policy context. At this stage, the Commission benefits from the specialist expertise of its Commissioners and lawyers, who bring a high level of technical background knowledge to the table. However, it also holds extensive consultations with experts in the field and, where appropriate, creates specialist advisory groups to help with the formulation of proposals. For example, our consultation on adult social care included:
- (1) workshops with disabled people and carers, service providers and local authority staff in Camden, Conwy and Newport organised, inter alia by Sense, Conwy Connect and Reach;
  - (2) a joint conference organised by the Older People's Commissioner for Wales and Age Cymru for over 100 people in Cardiff, including service users, carers, professionals and academics;
  - (3) a consultation stand at a Young Carers' Festival in Southampton
  - (4) a full-day conference with local authority lawyers, social workers and advocates in Newcastle, and
  - (5) visiting disabled service users in their own homes in Newport, Barry and Neath.
- 1.55 This allowed us to engage directly with service users, to gain a deeper understanding of the problems with the current law, and to formulate policy in an informed and contextual manner.
- 1.56 Once the Commission's analysis and preliminary proposals have been presented to the public and to specific stakeholders in a consultation paper, we carefully analyse and evaluate their responses. The Commission then reconsiders its views in the light of this new evidence. The recommendations in the final report are accompanied by economic impact assessments, and usually by a draft bill.
- 1.57 We consider that better legislation can be promoted by:
- identifying and analysing the underlying policy issues in a way which will highlight clearly the problems to be addressed and possible solutions;

- formulating well thought-through policy objectives, with transparent impact assessment;
- carefully assessing whether a legislative or non-legislative solution would be more appropriate; and
- setting aside adequate time and resources for pre-introduction public consultation and solution-testing.

## **2. Drafting of bills**

- 1.58 Law Commission policy is refined twice before it is translated into instructions to parliamentary counsel: once in the consultation paper and once before working up the final report. In most cases, a draft bill encompassing and elaborating on our recommendations is annexed to our report. If accepted for implementation, the draft bill may then be subjected to reworking by its receiving department before it is introduced.
- 1.59 Law Commission bills are drafted by specially seconded parliamentary counsel, to the same exacting standards as government programme bills. Counsel prepare bills based on written instructions, which are underpinned by the draft text of the Commission's final report. The quality of their drafting work is facilitated by the finality of the bill's underlying policy, and by the physical proximity of the bill's legal and policy team, who can aid in the refining process.
- 1.60 With government bills, these advantages are sometimes lost. If policy is still evolving through the drafting process, there is a risk that bill instructions may be undermined. The bill may fail accurately to reflect the initial policy thrust behind it. Furthermore, the mechanisms for implementing that policy can have unintended consequences. As the Renton Committee Report (1975) observed, awareness of this risk can lead to the drafting of statutes in exhaustive detail, in an attempt to forestall any unintended construction of the text. This in turn can make a bill difficult to understand. In its 1969 report on Interpretation of Statutes, the Law Commission argued that over-refinement of drafting can damage the "general intelligibility of the law", and is often fruitless, owing to the "inherent frailty of language" and the impossibility of foreseeing every contingency.<sup>12</sup>
- 1.61 Inadequate initial preparation can also give rise to the tabling of a disproportionate number of government amendments. These take up valuable Parliamentary time and can compromise the integrity of a bill. The Law Commission's 1969 Report observed that late amendments are more likely to result in a text that loses sight of the Bill's overall structure.
- 1.62 We consider therefore that the quality of legislation could be improved by:
- ensuring that instructions to counsel are comprehensive and clear and reflect fully thought out and agreed policy;

<sup>12</sup> The Interpretation of Statutes (1969) Law Commission No 21; Scot Law Commission No 11, para 5.

- having departments work closely with drafters to ensure that Bills are clear, concise, consistent, unambiguous, and easily intelligible, keeping technical terminology to a minimum;
- minimising the need for government to table its own amendments to a Bill after it has entered the legislative process;
- making greater use of Keeling Schedules (as part of the Explanatory Notes) to clarify changes that a bill makes to previous enactments; and
- providing for the clear repeal of any existing enactments that are superseded by the bill.

### **3. Pre-enactment scrutiny**

- 1.63 The Law Commission is a recommending body only, and has no direct responsibility for implementing its bills. Any Law Commission bills entering the Parliamentary process will have been adopted by the government (or, occasionally, a private member). However, there are certain aspects to the passage of Law Commission legislation which are noteworthy.
- 1.64 By the time the Law Commission drafts a bill, the proposals on which it is based have already been subject to significant public scrutiny. The bill must then pass the hurdle of acceptance (and possible modification) by the relevant government department, before being approved by the Cabinet PBL committee. The Law Commission report acts as the detailed explanatory note on the bill as originally drafted. Special Parliamentary procedures exist for consolidation and statute law repeal bills, and for certain technical or non-controversial law reform bills. This speeds up the passage of such bills and reduces their impact on a crowded legislative programme.
- 1.65 Publication of draft bills by government is meant to be the default position. However, time pressure means that relatively few Bills go down this route. For example, we understand that during the 2009-10 session, the government introduced 23 bills, only four of which had previously been published in draft, and two of which drafts had been scrutinised by a select committee. (By contrast, we understand that eight draft bills have been published in the current session of Parliament). Leaving scrutiny to post-introduction consideration by a Public Bill Committee has its downsides. Committees have limited time to consider policy and drafting, and can be hampered by government tabling late (and sometimes voluminous) amendments. In this way the effectiveness of Parliamentary scrutiny can be compromised.
- 1.66 We consider that better legislation could be promoted by:
- government ensuring that there is adequate opportunity for pre-legislative scrutiny;
  - thorough scrutiny of bills by a relevant committee, with proper opportunity to review public comments; and
  - setting aside adequate time for debate both on the bill and on any tabled amendments.

#### 4. Post-legislative scrutiny

1.67 In 2006 the Law Commission undertook a project on post-legislative scrutiny. It was asked to undertake a study of the options as to post-legislative scrutiny and who would most appropriately take on the role. In its report<sup>13</sup> the Commission concluded that the reasons for having more systematic post-legislative scrutiny included the following

- to see whether legislation is working out in practice as intended
- to contribute to better regulation
- to improve the focus on implementation and delivery of policy aims
- to identify and disseminate good practice so that lessons may be drawn from the successes and failures revealed by the scrutiny work.

1.68 More specifically, it considered that

- The clarification of policy objectives is critical and that Regulatory Impact Assessments should be enhanced in order to provide clarification of policy objectives and to set out criteria for monitoring and review.
- Strengthened guidance from the centre of government to departments would help to ensure that there is greater commitment from departments to post-enactment review work.
- Consideration should be given to the setting up of a new Parliamentary joint committee on post-legislative scrutiny. Under this proposal select committees would retain the power to undertake post-legislative review but if they decided not to do so, the potential for review would then pass to a dedicated committee. That committee, supported by the Scrutiny Unit, could be involved at pre-legislative as well as post-legislative stages in considering what should be reviewed, could undertake the review work itself or commission others to do so and would develop organically within its broad terms of reference.
- There was no need to create a new body independent of Parliament to carry out post legislative scrutiny.
- Whether or not a Bill has formal pre-legislative scrutiny, departments should give routine consideration to whether and if so how legislation will be monitored and reviewed. A new joint committee on post-legislative scrutiny might also consider Bills and whether and, if so, how they should be reviewed post enactment.
- Any system of post-legislative scrutiny should ensure that interested parties are able to channel their concerns about the operation of legislation to the reviewing body and participate in any subsequent review.

<sup>13</sup> Post-legislative Scrutiny, Law Commission No. 302, September 2006.

- For Parliamentary review, a new joint committee would be best placed to decide which legislation should be reviewed. For departmental review, the decision should be for the department in accordance with guidance from the centre of Government.

1.69 The Commission also considered that there was scope for Parliamentary post-legislative scrutiny of secondary legislation. In addition it recommended that government give more thought to consolidation of secondary legislation with the aim of improving the management and accessibility of secondary legislation.

1.70 In its response to the Law Commission report the government accepted that there were clear benefits in selective post-legislative scrutiny of Acts. However, it considered that the basis for a new process for post-legislative scrutiny should be for the Commons departmental select committees themselves, on the basis of a Memorandum on appropriate Acts submitted by the relevant government department and published as a Command paper, to decide whether to conduct post-legislative scrutiny of the Act in question. It accepted that in some cases it might be appropriate for a different parliamentary body to conduct further scrutiny. The government stated that in this way the prime role of the Commons committees would be recognised and duplication of work would be avoided.

1.71 The Commission understands that since about 2009 government departments have been expected to carry out a post-legislative review of most new Acts (other than Finance Acts and certain other categories of Act listed in the Cabinet Office's Guide to Legislation). This takes place between 3 and 5 years after enactment and will culminate in a memorandum on the Act in question that is published as a Command paper and submitted to the relevant select Committee. That committee can if it wishes enquire further into the matter or to carry out their own review of the operation of the particular Act. However, the Commission is not in a position to offer an opinion as to how the system is operating in practice or whether it could be improved (for example by adopting our recommendation that a joint committee of both Houses should be tasked with a more systematic role in reviewing the operation of Acts).