

LAW REFORM IN A DEVOLVED SCOTLAND: LAW IN PROGRESS, NOT IN RETREAT

[] In 1998, Scotland acquired its own Parliament. In terms of the Scotland Act, only “reserved matters” remain with the UK Parliament (for example, immigration and nationality; employment and industrial relations; and elections). This fundamental constitutional change – “devolution” – affected law reform in Scotland, both in method and in content. Prior to devolution, any proposals for reform went to London to be dealt with by the UK Parliament. But following devolution, many important reforms have been channeled through the Scottish Parliament in Edinburgh. Interestingly, devolution appears to have resulted in a proliferation of routes for law reform. The result has been a vibrant and thriving atmosphere for law reform, with considerable interest being shown by the Scottish people, clearly demonstrating the law in progress, not in retreat.

[] Law reform is, of course, essential for the proper functioning of modern society. Simplification, modernisation, transparency and fitness for purpose, are the goals. As Lord Drummond Young observed when addressing the Malawi Law Commission at Lilongwe on 22 March 2011:

“In the modern world, regular and systematic reform of the law is essential. Throughout the world, technological change and economic change are taking place with a speed that is much more rapid than anything previously experienced. The economic change, in particular, is producing enormous social changes. The law has to keep up with these changes in how we live and work. If the law is outdated, or if it is unnecessarily complex, that is likely to produce injustice and inefficiency. The speed of change at the present day means that the law can rapidly move out of step with the needs of ordinary people and of economic development ...
... [e]very legal system must be kept up to date, and it is in that task that law reform bodies play a vital role ...”

[] What, then, are the post-devolution “**routes to law reform**” in Scotland? In this paper, I suggest that there are at least three identifiable – and equally important - routes, perhaps reflecting the egalitarian and non-hierarchical nature of the country.

[] The first route is the **Scottish Law Commission**. This is an independent law reform agency constituted by the Law Commissions Act 1965. It is a long-established and highly-respected body, comprising 5 commissioners and their project teams. They consult widely and conduct research, including comparative research

into other legal systems. They produce consistently high quality discussion papers, reports and draft bills. Much modern Scottish legislation is based upon the Commission's recommendations: for example, divorce legislation providing for fairer financial provision, division of property, and occupancy rights; legislation equipping legitimacy and illegitimacy; legislation setting out appropriate principles and procedures in child abductions; legislation abolishing out-dated systems of land tenure; and legislation modernising the laws of contract and negligence. So the Scottish Law Commission is a power-house of law reform, and is certainly not in retreat.

[] A second law reform route which has emerged since devolution is the **Scottish Government** itself. Now based mainly in two impressive buildings (St Andrews House and the more modern Victoria Quay, both situated in Edinburgh), the government has policy units and in-house lawyers, working on areas of the law which appear to need reform. The government consults on a particular topic, issuing its own discussion paper and seeking comments and views from a wide range of respondents. Government-sponsored draft bills then proceed to legislation via the Scottish Parliament.

[] A third route to law reform which is currently emerging is by way of **judge-led review**, in the shape of a committee chaired by a senior judge, consulting and taking evidence, and producing proposals for change which may be adopted by the government.

[] With such a **choice of law reform routes**, an obvious question arises: how are individual topics shared out for research, avoiding duplication of effort and demarcation disputes? By what process are the areas of law requiring reform identified and distributed?

[] In practice, an amicable and collaborative division of labour takes place. Scotland is a very small country, and those engaged in the avenues of reform (e.g. the Commission, the government, the courts, the Law Society, the Faculty of Advocates and others) have little difficulty discussing issues, problems, and approaches, resulting in a co-operative and collaborative approach to law reform projects.

[] The first body, the **Scottish Law Commission**, consults widely, and then compiles and submits a programme (3 or 5 years) outlining areas of the law which would benefit from reform. Projects may be joint, involving the Law Commission for England and Wales. The programme has to be approved by the Scottish Ministers and laid before the Scottish Parliament. The current 10th programme includes homicide, surrogacy (joint project), damages for death, driverless vehicles (joint project) and family law. In addition to approved programmes, the government may decide to refer a particular matter to the Commission, for example where it is considered that in-depth legal study is required, or where an area is particularly specialised (conveyancing, leases, and planning law). Recent law reforms attributable to the Commission's research and recommendations include important changes in criminal law and procedure: for example, provisions entitling the prosecution (a) to appeal against a trial judge's ruling of "no case to answer"; and (b) to seek a second trial against an accused who would, under the previous law, have been held to have "tholed his assize" (the Double Jeopardy (Scotland) Act 2001).

[] The second body, the **Scottish government**, has unlimited power to select any area of devolved law and to conduct research and consultation with a view to reform. The areas chosen are often high-profile, and (preferably) politically rewarding. Frequently, a policy decision is required. Having selected an area for reform, the government may rely on the thorough research already carried out by the Commission, although reaching a different policy conclusion. One such example concerned adult survivors of abuse perpetrated when they were children in residential care, who found themselves unable to pursue damages actions because of a three-year timebar. The Commission in a report many years ago did not recommend abolition of the timebar in their case: but with changed circumstances over the years, including a great awareness of the issues, cross-party support emerged for such abolition, and using the Commission's research, this resulted in a government-backed Bill which passed through Parliament without opposition.

[] A recent example of the third route for law reform (a **judge-led review**) has been the Evidence and Procedure Review, chaired by Lady Dorrian, the Lord Justice Clerk. This led to a Bill incorporating important procedural changes in trials involving vulnerable complainers. In particular, there is provision for joint investigative interviews and the recording of the complainer's evidence by commission as soon as possible after the alleged offence and prior to the trial, all with a view to avoiding the

secondary victimisation caused when a complainer is subjected to multiple interviews followed by giving evidence at the trial. A further judge-led review concerning the management of trials for sexual offences will shortly commence (the National Sex Crimes Review) while another independent review, initiated by Mental Health Minister Clare Haughey, seeks to modernise Scotland's mental health legislation in the light of developments in care, treatment, and human rights.

[] In conclusion, therefore, as a consequence of the co-operative and collaborative approach adopted by these law reforming bodies, the output of modernising legislation from the Scottish Parliament has been considerable.

[] One cautionary note must be sounded. There are currently so many commendable proposals for law reform coming forward that not all of them can be dealt with by the legislature. So despite Scotland having its own Parliament, and despite the creation in 2013 of a new Scottish parliamentary committee to expedite certain types of law reform (non-criminal, attracting general agreement, causing no financial or human rights repercussions, and not currently being researched by the government), nevertheless some important recommendations for law reform remain unimplemented. The Scottish Law Commission, the Scottish Government, and the Scottish Parliament all recognise that this is an important issue, and are working together to address it. This in itself is a clear illustration of "law in progress" in Scotland, and not "law in retreat".

Lady Ann Paton
Scottish Law Commission
Edinburgh, Scotland

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