Keynote speech to Law Works pro bono conference – 30 June 2023
Delivered by Joanna Otterburn[1]

Good morning and thank you Nick for the introduction, and congratulations on your presidency of the Law Society.

Back in March I received a message from Rebecca inviting me and my job share partner, Stephanie Hack, to deliver this key note speech. I was pleased to get that message, and I'm privileged to be standing here at this first Law Works pro bono conference.

But, I confess, when I got Rebecca's message I did wonder if she had forgotten that Steph and I had recently changed roles. We had the great pleasure of working with Rebecca in our previous job on legal support policy, and I wondered if it was in that capacity that Rebecca had made the link to our work and your conference.

But of course, Rebecca knew exactly what she was doing, and it just took me a little bit longer to catch up.

I suspect many of you will have heard of the Law Commission. There are a lot of lawyers here – perhaps you will remember as law students, like me, long reading lists full of Law Commission reports. Hopefully these are largely fond, not painful, memories!

The Law Commission does have a long history – we were established by the Law Commission Act in 1965. But today, I am going to argue that the Law Commission, working alongside good people like you, plays a critical role in upholding access to justice in 2023.

Just looking at the names of other speakers and panellists who you will hear from today, I know that many of you have been working with commitment to pro bono for decades.

And as our society has encountered challenges presented by the financial crash, the pandemic, and the cost of living crisis you – the practitioners, students, volunteers, pro bono clinic coordinators – have been right there on the front line the whole time, helping people. You understand the difference it makes for someone to have really high quality advice at an extremely difficult and vulnerable time in their lives.

It is important though for all of us to have opportunities like this to lift up our heads and consider how the work we each do fits into the bigger picture.

The Law Commission is a body which is independent of Government. Our purpose, as set out in the Act, is pretty modest - to review all of the laws of England and Wales. Not too much to be getting on with, then.

We research, consult and recommend reforms to Government, in order to make the law simpler, and fairer.

[1] I would like to record my thanks to Andrew Bazeley for his invaluable work in preparing this speech.

We are funded by Government, and we only take on work that the sponsoring Department has an interest in legislating for. But, Ministers have no involvement in the exercise of our Commissioners' judgement when it comes to our recommendations.

So why was the Law Commission created?

The case for creating the Commission was made in a report in 1964, Law Reform Now, written by Gerald Gardiner and Andrew Martin – the "Now" was in italics, because the need truly was urgent.

They took as their starting point the view that "much of our English law is out of date, and some of it shockingly so."

After over fifty years of work, I think we have made quite a dent in that statement. The law is not so shockingly out of date.

A whole range of misdemeanours and actions whose names are bizarre or offensive to our minds have been swept away by Law Commission reforms. Things like champerty, scolding, eavesdropping, and jactition of marriage.

More importantly, Law Commission reports have led to Acts which are now the keystones of their areas of law, and which represented significant steps forward.

- Like the Land Registration Act 2002 and TOLATA 1996 in property law;
- the Mental Capacity Act 2005 and Adult Social Care Act 2014, in relation to vulnerable adults;
- Or the Children Act 1989 and the Marital Causes Act 1973 in family law.

Those are works of law reform which have stood the test of time, and are emulated abroad. Our work today continues in that vein.
Today, our projects continue to tailor the expanse of the law to fit new times; we now also create law for entirely new technologies: making recommendations for reform on automated vehicles, bitcoin, surrogate parenthood, and even new methods of disposal of the bodies of our loved ones after death.

Our work has real impact. Over the long term, almost two thirds of our reports are implemented by Government in whole or in part.

A 2020 analysis of the value of our reforms by some independent economists found that our five highest-value projects created economic gains of more than £3 billion over a decade.

Those projects positively affected the lives of at least 27 million individuals.

That's some indication of the scale of the Law Commission's reach.

But when I was preparing to come to speak to you today, I was considering the role that we have in promoting access to justice.

Yes, the law is less out of date than it might have been but for our work. But too often, as you know, the law is still inaccessible – some of it shockingly so.

In their seminal 1978 paper on the issue, Garth and Cappelletti said of access to justice that it is “not easily defined”.

They ask us to “focus on two basic purposes of the legal system”:
First, the system must be equally accessible to all; and second, it must lead to results that are individually and socially just.

Many different aspects of the system affect whether a person who comes into contact with it can navigate their way towards a just outcome.

It is important to acknowledge that even where the state of the law is at its best, in many cases people will still need to have access to representation and advice.

Those of you here today who lead, manage and deliver the high quality, pro bono support that Law Works offer, and those involved beyond that in the wider world of pro bono, play a critical role in providing that access.

We have also got to acknowledge that you are working in a difficult context, with significant reforms over the last decade, and reductions in the overall spend on legal aid.

Having sat as a magistrate, and worked in the Royal Courts of Justice - I know, just as you do, that when a litigant walks into a court or tribunal building – whether it’s Bromley magistrates court or the Rolls Building, whatever best efforts might be made - it is intimidating.

And on top of that, it’s an environment with stretched resources, dealing with the aftermath of the pandemic, and with growing demand. So the work you do is critical.

But I think there are other aspects to access to justice, beyond the importance of advice and representation, that are additionally important.

One of those is the work of reforming the law so that when that individual comes to navigate the justice system, they find that they can understand the basic rules in play, that their rights under it are meaningful, and that the system makes sense.

To do that, am going to talk about three ways in which better laws can help realise the promise of access to justice:

(1) First, by making the law simpler;
(2) Second, by making rights a reality;
(3) And third, by making fairer laws which prevent problems arising, and help people resolve them when they do.

In 1593, Francis Bacon, the law reformer and later Lord Chancellor, introduced a project into Parliament to reduce the volume of statutes.

He said that they were “so many in number that neither the common people can practise them nor the lawyers sufficiently understand them”.

He also sadly died as a result of a botched experiment with a frozen chicken, but you can’t get everything right. I’ll leave you all to google that one afterwards.

Last year alone there were 32 Acts passed and one thousand three hundred and eighty-one statutory instruments made covering the UK – let alone orders, rules or devolved legislation.

And that was a lighter year. The sheer amount of legislation that governs our lives is bafflingly vast, but perhaps necessarily so in these complex times.

So first, we can make the law more accessible by making it simpler. One way we do that is through consolidation – bringing together the law that governs a particular area when it is located across many disparate statutes.

Consolidating the law has been part of the Law Commission’s remit since its inception, often quietly happening in the background, the housekeeping work of law reform.

Not always so quietly though. Our current consolidation project stems from Recommendation 21 of the Windrush Lessons Learned Review, a high profile and important piece of work.

That recommendation highlighted the very real problems faced by applicants, their lawyers, and Government decision-makers as a result of immigration rules that had been changed at least 19 times since 2010, in a landscape featuring 16 immigration statutes published since the 1971 Immigration Act.

Government accepted our recommendations on the principles for simplifying the immigration rules in 2020, and following the Windrush report our in-house parliamentary counsel are hard at work consolidating the statute.

This work will not affect the substance of our immigration law – that was not in the remit of the project – but it will mean that those affected by the law, their representatives, and Government decision makers know where to find it, resulting in better applications and better decisions.

Consolidation work like that is often integrated into our other projects. For example, within our 2014 report on the enforcement of family financial orders. We recommended consolidating the rules used when making an application, which had been unhelpfully spread across different sources.

Our work which led to the Sentencing Act 2020 went beyond consolidation, but still sought to make the law simpler and clearer.

We set out a code which simplified layers of historical provisions on criminal sentences, and placed the law on sentencing procedure into a single Act of Parliament.

The complex law which existed before our reforms was viewed as difficult to understand not only for victims and offenders, but for experienced judges and lawyers, with real problems in finding the right law in a particular case – which could result in sentencers making mistakes.

When judges struggle to understand the law, it cannot be considered accessible. When the law has inconsistent outcomes it cannot be considered accessible.

It is interesting to note, too, that our work to make the law simpler and more accessible is very often not just aimed at the woman on the Clapham omnibus, but rather at the people – judges, officials – who make decisions which affect her.

I'm sure many of you, in cases you've handled, will have at some point wished the decision-makers you deal with had a better grasp of the law, and that's something our work can help achieve.

Secondly, Law reform can also provide access to justice by making the processes by which justice is done more effective.

It is important that we recognise people's rights in the law, whether those are their rights to a fair workplace or to a fair division of finances on divorce.
But if the system by which those rights can be met is not up to scratch, the right is not meaningful.

For example, at present if you experience unfair practices at work and want to bring a claim against your employer with multiple different elements such as breach of contract and discrimination, you may need to apply to different courts, with different financial limits and different time limits.

We recommended reform to that system in 2020 in our report on Employment Law Hearing Structures, to reduce delays and complexity.

Not all of those recommendations have been accepted, but our report stands as a marker for how the law could be reformed to improve access to justice.

Sometimes our work can take a very long time to come into effect – our 1995 report on Mental Incapacity led to the Mental Capacity Act 2005. And our work on perpetuities and accumulations, which began in 1993, took until 2009 to become law. We prefer to see change more quickly, but our recommendations are designed to stand the test of time, rather than being tailored to the Government of the day.

Our current work on evidence in sexual offences prosecutions also speaks to issues of procedural fairness.

Rape myths – misconceptions about the nature and impact of sexual harm – have been shown in academic research to persist among some people. Such as, the myth that rape will always be reported promptly. In reality, most rapes are never reported, and delay is common.

We are currently consulting on proposals for reform which would seek to counter the effect of those myths, improving the treatment of complainants and ensuring a fair trial for defendants.

Our proposals aim to improve the treatment of sexual offences complainants and to increase their confidence in the trial process. For example, we provisionally propose moving towards a system of automatic entitlement to a range of measures to assist them in giving evidence. This would include the right to give their evidence without the public present. We are the only jurisdiction in the UK where complainants routinely give their evidence in public. Excluding the public would allow complainants to give evidence without additional stress and concern about giving very sensitive evidence in public and being observed and possibly identified.

Our proposals also consider how to enhance procedural fairness for complainants. Currently, they do not have a right to participate in applications, which commonly arise in sexual offences prosecutions, regarding access to their personal records or the use of evidence of their sexual behaviour.

These applications directly engage complainants' right to respect for their private life and they may have unique insights to share with the court. We therefore provisionally propose that for these types of applications, complainants should have access to independent legal advice, assistance, and representation at pre-trial and trial hearings (without the jury present).

These examples show how the work of law reform sits alongside the work done by law clinics and pro bono, in enabling more people to navigate our justice system, without finding that it is blocked by an unfair time limit, an overly complex application, or the fear of an intrusive and traumatising experience.

Thirdly, our work at the Commission makes justice more accessible when it drives to the second of Garth and Cappelletti's aims, by leading to results that are individually and socially just.

Across the board, that is a principle that drives our work, seeking a fairer outcome for groups like leaseholders, cohabitees, and victims of hate crime.

In some cases, reformed, fairer laws can reduce the need for people to shift from operating under the shadow of expectations and behaviour that the law casts, and into a courtroom.

For example, in March we published a report recommending reforms to the law on surrogacy.

At present, the surrogate is the legal parent of a child born through a surrogacy agreement at their birth. The intended parents have to apply to the courts for a parental order to change that. That can take six months to a year, typically.

Our proposed reforms would enable the surrogate and intended parents to complete screening and safeguarding checks with a non-profit organisation so that they can

avoid the need to apply to the court, with the intended parents being the child's legal parents at birth, in line with the parties' intentions.

Or, take the work we are currently scoping on the law that applies to dealing with the bodies of our loved ones.

At present, a person's wishes as to where and how they are buried, cremated – or resomated – are afforded very little legal status. That can result in difficult, painful legal disputes between family and friends after death. Could reform that shifts that legal position prevent disputes in the first place?

I hope I've made a compelling case for the role of law reform in promoting access to justice.

If our work matters, then the question of "who does it?" also matters.

One answer is that you do, or you can.

First, by engaging in our projects. Open consultation is at the heart of what we do.

The thousands of consultation responses we receive in a typical year are published online at the end of our projects – we are transparent about who we hear from, and seek to be transparent in how we came to our decisions within our reports.

We consider every response carefully, whether it is from a single member of the public or an established representative body.

And we make decisions on the strength of the arguments presented, not the bare number of responses we receive. So, your input has a real impact.

I know from speaking with Rebecca that there is eagerness among clinics and lawyers with pro bono experience to engage with our work.

Your experience of working with people for whom representation might otherwise be out of reach financially means you have a particularly important perspective to bring to the table when we consult, because of the differences in how law and policy impact along socio-economic lines.

That's why I'd strongly encourage you to engage with our projects. Follow our activities, and respond to our consultations when you feel you have something to contribute.

You don't have to answer every question, or be an expert on every issue when we consult. Sometimes simpler responses based on real experience can be just as impactful for us as more complex ones. Just offer what you can, and we will run with it.

There is so much going on at present.

If you have experience that relates to sexual offence prosecution, disabled children's social care, burying the dead, divorce, business tenancies or many other topics, we would hugely value the input that experience can offer to our projects.

We acknowledge there are huge demands on your time given the pressures the sector faces, so there are many ways to feed in – whether that's attending consultation meetings, joint responses, or submitting a short written response. It's a chance to make the law more accessible in a different way to the way you do the rest of the time.

Another answer to the question of who does law reform is… again, you. Or potentially you, or someone you work with. We are recruiting for lawyers in our Property, Family and Trusts law team, working on a variety of projects. Our work shadowing scheme is also a good way for lawyers to understand a bit more about what the role entails.

And, each year in January, we recruit around twenty research assistants – early career lawyers and law graduates with excellent research skills who want to spend at least a year on the kind of law reform work I've been describing.

So please, check those opportunities out if you'd like to come and join us to try making the law accessible from a different angle.

I think we all have a role to play in ensuring that as citizens of this country we have access to justice.

At the Law Commission we help to do that by making the law simpler, more effective, and fairer. And we do that with your help.

I hope you go away today with a better understanding of the impact the Law Commission has, of the values that we share with the pro bono community, and the ways that you can get involved to make our work as effective as it can be.

In 2009 I took on my first pro bono case when I was a trainee at Hogan Lovells. It was a domestic violence non-molestation and occupation order application. It remains one of the most vivid moments of my career because I knew I was the difference between that person going into the Principal Registry on their own or with an ally. What you do makes a huge difference.

So let me conclude by saying: thank you. Thank you for inviting me to speak today on behalf of the Law Commission. Thank you for the tireless work you do, in extremely difficult circumstances. Thank you for your stamina, purpose, and belief in the value of pro bono. And thank you very much for listening. Enjoy the rest of the conference.