REFORM! REFORM!

An Introduction to The Australian Law Reform Commission

by

The Hon. Mr. Justice M.D.Kirby

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A DASH OF HISTORY

Round about the turn of the Century, the 16th Century that is, Sir Francis Bacon voiced a complaint which will not seem novel to modern readers -

> "Heaping up of laws without digesting them maketh but chaos and confusion and turneth the laws many times to become snares for the people".

Bacon made a proposal. It was that six Commissioners should be appointed to investigate obsolete and contradictory laws and to report regularly to Parliament. Although he was Attorney-General in 1613 and Chancellor in 1618 he did nothing to advance this proposal. But as you know, the law never rushes these things and in 1965 the Parliament at Westminster got round to Bacon's proposals.[1]

In 1957 Sir Owen Dixon, speaking to the paper by the then Dean of this Faculty "Some Reflections on the Problem of Law Reform"[2] took up Bacon's call in an Australian context -

> "Is it not possible to place law reform on an Australia wide basis? Might not there be a Federal Committee for Law Reform? In spite of the absence of constitutional power to enact the reforms as law, it is open to the federal legislature to authorise the formation of a body for inquiry into law reform. Such a body might prepare and promulgate draft reforms which would merely await adoption. In all or nearly all matters of private law there is no geographical reason why the law should be different in any part of Australia. Local conditions have nothing

> to do with it. Is it not unworthy of Australia as a nation to have varying laws affecting the relations between man and man? Is it beyond us to make some attempt to obtain a uniform system of private law in Australia? The Law Council can, of course, do much. But it is a voluntary association and, without a governmental status and the resources which that will give, a reforming body will accomplish no great reforms".[3]

The Australian Parliament took only sixteen years to answer Sir Owen Dixon's questions, by enacting the Law Reform Commission Act 1973. The first Members of the Australian Law Reform Commission were appointed in January 1975.[4] The Commission has already produced three reports. It stands at the threshold of its work.

The Australian Commission is only the latest attempt at an organised approach to law reform in this country. In fact, a Law Reform Commission was established by Letters Patent on 14 July 1870 in New South Wales. It comprised five lawyers working part-time under Stephen C.J.[5] Its output was small and it never quite succeeded in moving the New South Wales Supreme Court into the Judicature era. That reform took until 1970 prompting Professor Sutton's rebuke -

> "One must agree ... that law reform is necessarily slow, complex and a matter to be dealt with by experts but it does not have to be as slow as this".[6]

Under the impact of Bentham's idea that the whole body of the law of England should be reduced to an accessible code, Professor Hearn of Melbourne University Law School tried in the 1870s and 1880s to interest the Victorian Government in his "General Code". It was laid before the Victorian Parliament in 1885. Its admirers said of it that once enacted -

> "Parliament will lay down definitely one way or another what is the law upon a

> particular point and the law will remain settled, instead of depending upon a great number of fluctuating decisions".[7]

One antagonist was a little brutal -

> "A team of six can be driven through any Act of Parliament, but through this code, if it be passed, I believe that a team of 50 elephants abreast could be driven".[8]

Unhappily, Professor Hearn died in the midst of this furore and his code did not long survive him.

In 1920 Professor J. Peden, a famous Dean of this Law School, was appointed Commissioner of Law Reform. He held the position until 1931. Although his brief was wide, including the review and simplification of the law, substantive and procedural, his proposals came to nothing. Various other fitful attempts were made by appointing judges, constituting committees of part-time gentlemen and briefing out to a barrister or two. It took the establishment of the Law Commission in England in 1965 to produce a properly funded Law Reform Commission in Australia. This is the New South Wales Law Reform Commission. Since its establishment in 1966, every State and the Capital Territory have set up a Commission or Committee of some kind. Indeed one author described law reform as a "booming industry".[10] The last decade has certainly seen an explosion of law reform commissions. Botswana got one in 1966. Malta set hers up in 1968. Sri Lanka set one up in 1969 and subsequently wound it down, hopefully because all the law had been reformed. In 1973 the Australian Parliament decided that the time had come for Australia to have a national Commission.

It should not be thought that reforming the law had been totally ignored by the Federal Parliament but the approach taken at the national level was either to deal with the matter in the Departments of State or to establish

an ad hoc committee which could suggest reforms to the Parliament.[11] Whilst not underestimating the achievements secured in this way, no ordered, principled approach to renewing the law[12] was possible whilst such a languid, spasmodic procedure was adopted. Everyone knows that the amount of legislation pouring from our busy Parliaments is on the rapid increase. The role of judge-made law began its decline in the last century.[13] Much of this legislation could be called "reform". But whilst Parliaments can be made very interested in such vote-catching issues as housing, school assistance and the provision of hospitals, there are not too many votes in re-examining the legal rights of prisoners in our society, the laws relating to defamation, the rules of evidence that should govern court proceedings and the recognition of interstate grants of Probate. Such topics are technical, complicated and sometimes even boring. But unless they are to be left forever in the natural state of their creation a century or two ago, some means must be found to revise these laws, review, simplify and renew them.

A PINCH OF PHILOSOPHY

Now, we all know that lawyers of our tradition become embarrassed by the mention of philosophy. There are not too many of us like Dr. Johnson's lawyer harbouring a philosopher within struggling to get out. This is what shocks continental lawyers about their common law brethren. Whilst they admire the independence, competence and standing of our judges, they see our way of going about the law as topsy-turvy. Instead of seeking to lay down a code with a general philosophy thoroughly worked out, we tend to approach the law in a much more pragmatic way. In legislation, we seek to cover any nook and cranny of possible behaviour. In precedent, judges shy away from fundamental principles because to articulate them would go beyond the needs of the issue for trial.

Obviously a Law Reform Commission cannot afford to be a purely pragmatic operation. Otherwise its

recommendations will be no more consistent and rational than a series of ad hoc committees, paid considerably less for their labours.

The Canadian Law Reform Commission saw this problem and from the outset concentrated on seeking to find first principles, i.e. a modern set of rules to guide the Commission in reforming the law of Canada to make it relevant to the modern age. No doubt the problems of bilingualism and the challenge of a concurrent civil law system within the federation demanded such an approach.

Predictably enough, the English Law Commission takes a more practical approach. Within six weeks of its establishment it had formulated a programme of work[13] with topics as diverse as the law of contract, family law and landlord and tenant law. Professor Gower recently put it this way -

> "I was often asked (how law reformers make - and should make - their value judgments) and was compelled to reply that we had never clearly articulated our philosophy. The best I would do was to say that I guessed that we adopted a vague utilitarianism, asking ourselves (subconsciously rather than consciously) what would conduct to the greatest good of the greatest number. In answering that I think we placed great weight on convenience, intelligibility, avoidance of needless expense, and on what we thought would make people happy because they would regard it as just. On the other hand, we placed little weight on elegance as such - except to the extent that it promoted intelligibility and simplicity. This was the best I could do and I don't know that any of my colleagues did any better. But it seemed to me at the time - and still seems to me - pretty thin. Yet on the basis of it

> we made some pretty sweeping value judgments and were not ashamed to articulate them. In many of our reports we stated categorically what we regarded as the desirable objectives of the body of law concerned; one example was our often quoted and, and I think I may say, generally commended statement of the objects of a good divorce law. But what were the basic beliefs that enabled us to declare so dogmatically and with such assurance that it was a good thing to buttress live marriages and to give a decent burial to dead ones? Yet, somehow it seemed to work."[14]

It just is not possible for the Australian Commissioners of Law Reform to sit around a table and work out a "total" approach to the reform of the law of Australia. The constraints of the Constitution and the limited areas of legal competence assigned to the Australian Parliament prevent this. Although it is probable that the private law element in federal law in Australia will expand significantly in the future[15] it would be unrealistic to think that a national law Commission in this country could carefully plan an encyclopaedic approach to revision of Australian law. The history of uniform law revision in this country does not inspire excessive enthusiasm.[16] Although the Standing Committee of Attorneys-General was constituted formally in February 1961 and has met on a rotation base ever since, it is not primarily a law reform body.[17] Its major opus, the uniform companies legislation, demonstrates the fact that even when a uniform law is achieved in a particular area, its updating and amendment can progress only at the pace of the slowest of the States.[18]

Therefore, the Australian Commission will approach its task conscious of the need for something better than a purely pragmatic response to each reference as it comes. But in national matters, we will be required to work substantially within those borders mapped out by s.51 of the Constitution. It is difficult, at first blush, to see much common philosophy emerging from projects on "weights

and measures" or "fisheries in Australian waters beyond the territorial limits" or "marriage". But we will look for it.

A FEW TECHNIQUES

Law commissions have been operating long enough now to provide a "received wisdom" upon techniques to be followed. Working papers are prepared which outline the law as it stands, its apparent defects and "fields of choice" for reform.[19] The rationale of this procedure is to be found in the need to elicit comment and participation in reforming the law.[20] Law Commissions ought not to be seen as a "brains trust" of lawyers, isolated from the community whom the law is to serve. Indeed, lawyers do not have an unassailable authority to decide what the law ought to be. They are frequently blinkered by their training and background when new insights are needed. The participation of non-lawyers in law reform exercises is not much favoured in England[21] and has not been much practised outside North America.[22] It is not, of course, easy to get the "representative defamee" in the reform of defamation laws. In fact, it is easier to think of that man on the Clapham Omnibus than to find him. However, it is obviously important to get his assistance and ideas in law reform work. In the first exercise of the Australian Commission, concerning police, participation of police officers and civil liberties personnel was secured, not just at public sittings but around the table when the decisions on what the law ought to be were being made. We see it as quite vital that the Commission should not become just an "overpowerful enclave of an elitist faceless few".[23] We are established to assist the Parliament in the development of modern laws which embody the popular values of Australian society.

The Commission has been set up in Sydney across the road from the Law Courts and the Law School. This propinquity will hopefully develop responsiveness to legal ideas and attract the participation of the best that the Australian legal profession can offer. The approved establishment of the Commission is now some thirty eight

persons, twenty seven of these will be recruited before June 1976. They will come from all parts of Australia and will bring a proper balance between backgrounds in legal offices, at the Bar and in universities.[24] Two of the first recruits will be experienced legislative draftsmen. One of the problems which has bedevilled law reform work in Australia has been the lack of drafting capacity. We have taken to heart the lesson of the Law Commission: a draft Bill eases Parliamentary implementation.[25] Now, as

Now, as law commissions go, the Australian Commission will be one of the biggest. There is little doubt that lawyers will in the future be more flexible in their careers than they have been in the past. A period of service with a practical law reform agency should be seen as a perfectly natural, interesting and rewarding period of a lawyer's life. It offers the chance which neither private practice nor academic life can offer: the opportunity to design the law as it ought to be and not just apply or teach it as it is.

A LOT OF WORK

Without waiting for the Commission's full team to be assembled, the Attorney-General of Australia gave the Commission a Reference related to the proposal to establish an Australia Police Force. The Reference required the Commission to look into two matters which are now the subject of Reports by the Commission. The first, "Complaints Against Police"[26] involved the Commission in the consideration of how complaints within the police force and from members of the public against national police officers ought to be investigated and determined. There have been numerous reports by commissions overseas and in Australia on this question. In the result, this Commission reached the hardly startling conclusion that, in a modern context, it was not acceptable to leave the investigation and resolution of such complaints from first to last in police hands. The time had come to stop talking about infusing an independent element and to do something. The Commission appended draft legislation to its report. This subsequently became part of a Bill for presentation to the Australian Parliament.

The second Report dealt with Criminal Investigation. This exercise took the Commission substantially over the same ground as the ill-starred Eleventh Report of the Criminal Law Revision Committee in England.[27] Delicate is the balance between necessary police power and traditional citizens' liberty. The report proposes a leap into the 20th Century by the use of modern devices: taperecorders, telephones, computers and copiers to the advantage of the accused as well as the police. It is suggested that emphasis should be taken off arrest and that proceeding by summons should be encouraged. Numerous other proposals are made to modernise and liberalise police procedures. That there is a need to make police procedures more appropriate to an educated society, aware of its rights can scarcely be doubted. The report has been put forward as an Interim Report so that further commentary, criticism and suggestions can be received upon our proposals. It deserves the examination of all who are concerned with criminal law and procedure in our society. Nothing so closely touches the nature of a free society as the manner in which it deals with those accused of offences against it.

The Commission was required to report upon its first Reference within four months and this it did. It has been said that haste is an enemy of sound law reform.[28] Whilst this is undoubtedly true, the search for perfection can itself sometimes diminish the effectiveness of a Commission, faced with a multitude of urgent tasks. As in everything else, a balance must be struck. The Australian Commission is committed to promptly answering the urgent tasks of reforming the law. To achieve the deadline in its first exercise, required the recruitment of a team of Consultants from all parts of the country: experts in a wide variety of fields. It also required public sittings in all parts of Australia including Alice Springs and Darwin so that the views of organisations and of the public could be elicited, tested and reflected upon. The Law Reform Commission Act requires the Commission to ensure that its "proposals do not trespass unduly on personal rights and liberties."[29] No matter could have been closer to the rights and liberties of the Australian community than this first exercise.

But this is just the beginning. The Commission is entitled to suggest matters to the Attorney-General suitable for law reform projects. Some of the matters presently under consideration with this in mind are the following:

* A national law of Defamation.
* An Australian code of the private law of Insurance.
* An Australian code of the private law of Banking including consideration of American developments concerning "truth in lending" etc.
* A law concerning locus standi in federal courts and Class Actions generally.
* A national law of Bail.
* A national law concerning the protection of Privacy.
* A law concerning the examination of legislation of the Australian Parliament to ensure compliance with s.7 of the Law Reform Commission Act (observance of the rights and liberties of citizens).
* A law relating to the rights of Children.
* A law relating to the rights of federal Prisoners.
* A national Motor Traffic Code.
* A law relating to the interstate aspects of Consumer Transactions.

Numerous other proposals are also under scrutiny within the Commission. Through its responsibilities in the Territories, the fastest growing "growth areas" in Australia, the Commission has a window on the whole range of the private law of this country. It has also accepted the role of clearing house for all of the law reform agencies in Australia. Although uniform law reform may be years away, the pointless waste of funds on duplicated research and parallel projects may be avoided by the efficient use of the Commission's capacity to keep all those involved in law reform in Australia aware of developments here and overseas.[30]

Another matter which obviously demands early attention is a fresh approach to the proliferation of legal data in Australia. The need to have a truly national set of law reports and modern computerised approach to the presentation of statutory and other legal information needs no real argument. Much has been done in the Canadian federation but whether it will be possible within Australia remains to be seen. One experienced Silk recently said that a warehouse not a room was required to contain the mass of legislation pouring forth every other day. With due allowance for silken hyperbole everyone who uses legal materials knows how urgent is the task in Australia of rendering legal information more accessible, more up-to-date and available on a national basis.

AND THE BEST OF PARLIAMENTARY LUCK

The ultimate destination of a law reform proposal must be the Parliament. Through the path of suggestion, reference, consultants' reports, working paper, public sittings, draft legislation and final report, the proposal will hopefully find its way into Parliament consideration. Anything less renders the whole exercise little more than academic. In England the device of the Private Member's Bill has been used to get proposals through "on the nod" on a Friday afternoon.[31] There is no such tradition in this country. Whilst some casualties are inevitable, the greatest hope is that the Parliament will recognise that the times demand a new procedure for bringing the laws up to date. With an active Parliament, judges are now less willing to assume the mantle of inventiveness. The Parliament itself must devise a means of efficiently coping with non-contentious revision of the law. It has not been thought inconsistent with Parliamentary sovereignty to assign the law-making role to other statutory authories, with ultimate power of disallowance in the Parliament. I hope for nothing less than that in the fullness of time the Law Reform Commission will be seen as a useful adjunct to the work of the Australian Parliament. Like the Law Commission in England, the Australian Commission will not be in the slightest embarrassed by the task of assisting its proposals through

the legislature[32] playing a role as part of the "machinery of government in the widest sense".[33] In fact, a close relationship with the Parliament is just as important as independence of it.

So there it is: a formula for law reform in Australia. A touch of history, a pinch of philosophy, a few techniques, a lot of work and a great deal of luck in the Parliamentary process. The Australian Law Reform Commission will shortly be in a position to give the law of this country searching, critical and innovative scrutiny. We have transplanted the English law in the Antipodes. Can future generations prove themselves as adept in renewing the law and making it accurately reflect the needs and ideals of Australian society?

FOOTNOTES

* B.A., LL.M., B.Ec., Chairman of the Law Reform Commission.

1. Law Commissions Act, 1965 (U.K.), chapter 22.

2. K.O. Shatwell (1957-1958) 31 A.L.J. p.325. Sir Owen Dixon's observations appear ibid p.340ff.

3. Ibid p.342.

4. Mr. F.G. Brennan Q.C. (President of the Queensland Bar); Professor A.C. Castles (Adelaide); Mr. J. Cain (Executive, Law Council of Australia); Mr. G.J. Evans (Melbourne University) and Assoc. Professor G.J. Hawkins. All Members appointed so far are Part Time Members.

5. J.M. Bennett "Historical Trends in Australian Law Reform" (1969-70) 9 West Aust. L. Rev. p.211 at p.213.

6. K. Sutton "The Pattern of Law Reform in Australia", 5 August 1969, Qld. Uni., p.9.

7. Attorney-General Wrixon cited in Bennett p.215.

8. J. Gavan Duffy cited ibid p.215.

9. Law Reform Commission Act 1967 (N.S.W.). See R.D. Conacher Law Reform in Action and Prospect (1969) 43 A.L.J. 513. See also J.M. Bennett's note in (1975) 49 A.L.J. p.199.

10. B. Shtein. "Law Reform - A Booming Industry" (1970) 2 Australian Current Law Review p.18. Cf. Sutton p.3 and Sir John Kerr "Renewing the Law" (1974) 7 Sydney Law Review p.157 at p.160.

11. Sir Anthony Mason. "Law Reform in Australia" (1971) 4 Federal Law Review p.197 at p.210f.

12. This is Sir John Kerr's preferred expression; Kerr p.157.

13. Sir Leslie Scarman "Law Reform - The Experience of the Law Commission" (1968) 10 Journal of the Society of Public Teachers of Law, p.91. L.G.B. Gower, "Reflections on Law Reform" (1973) 23 University of Toronto Law Journal 257 at pp.258f.

14. Ibid p.268.

15. Mason, pp.210-211.

16. R. Cranston "Uniform Laws in Australia" (1971) 30 Journal of Public Administration p.229.

17. Mason p.205.

18. Cranston p.242.

19. This is the expression of the Law Commission. Gower p.265.

20. Mason p.215.

21. L. Scarman and N.S. Marsh "Law Reform in the Commonwealth" Record of the Fourth Commonwealth Law Conference New Delhi; 1971 p.237.

22. Conacher p.529. Cf. Lord Wilberforce in (1969) 43 A.L.J. p.528, Mason p.215.

23. J. Barnes. "The Law Reform Commission of Canada" (1975) 2 Dalhousie Law Journal p.62 at p.80.

24. Sutton pp.9, 13.

25. Lord Elwyn Jones L.C. in "The Lord Chancellor on the Law Commissions, Law Reform and Legal Aid" in 1975 Law Institute Journal p.218. Cf. Conacher p.515.

26. A.L.R.C.1. A.G.P.S. Canberra 1975.

27. Glanville Williams. Presidential Address:"The Work of Criminal Law Reform"(1975) 13 Journal of the Society of Public Teachers of Law p.181 at p.186.

28. First Annual Report of the Law Commission 1965-66, para. 135, p.25. H.M.S.O., London, 1966.

29. Law Reform Commission Act 1973, s.7.

30. This role was assumed by invitation of all Australian law reform bodies at their Second Conference in April 1975 and confirmed by the Standing Committee of Attorneys-General in July 1975. Cf.Shtein p.30; Cranston p.518.

31. See W.T. Wells,"The Law Reform Commission - an Interim Appraisal"(1966) 37 Political Quarterly p.291 at p.299;Gower p.262.

32. Sir Leslie Scarman ibid p.93.