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LAW REFORM IN AUSTRALIA

Hon Justice M D Kirby

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The Hon. Mr. Justice M.D. Kirby *

"Reform" means not simply "change" but "change for the better", and opinions often differ on what is better. For this reason the work of the Law Commission is necessarily controversial".

A.L. Diamond, The Work of the Law Commission (1976)10 *J. Assn. Teachers of Law* 11

THINGS IN COMMON

Why on earth would Canadian lawyers be interested in the machinery and methods of law reform in Australia? You already have a handsome number of law reform agencies in Canada. You have the challenges and opportunities of bi-lingualism and bi-culturalism to mark you off. You have quite different approaches taken in the several Commissions that operate under your laws. What could there be to learn from the situation in Australia?

I set aside scholarly interest. Comparative law, even comparative institutional law may have its own special interest and merits. Discounting these considerations, there remain good practical reasons why we should keep an eye on the law reform developments that are taking place in our countries, on the opposite side of the world.

Our communities are similar, the economies are alike and we share common features in our history and constitutions. We share the problemsof a Parliamentary federation. But above all we have a common link in the common law of England and in the way in which we go about solving legal problems: including the reform of the law. There is no country which has closer parallels for law reform in Australia, than Canada. The Australian Law Reform Commission was established in 1975. It works co-operatively with its counterparts in Canada. The purpose of this article is to give something of the history and approach of the Australian Commission. It will not be enough to do more than touch the surface of law reform in Australia. But it may give the occasional reader the flavour of Antipodean law reform.

A POTTED HISTORY

Law reform existed in ancient Greece. Those who would propose the reform of the law did so, it is said, with a noose around the neck. If the village audience agreed to the reform proposed, the law was reformed. If it did not, the would-be reformer was despatched. It is said that this led to a certain conservatism in law reform in ancient Greece.

At about the turn of the sixteenth century, 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 a number of 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. It was not until 1965 the Parliament at Westminster got round to Bacon's proposals.[1]

In 1957, the Chief Justice of the High Court of Australia, Sir Owen Dixon spoke to a paper by Professor Shatwell *Some Reflections on the Problem of Law Reform.*[2] He 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 Commonwealth Parliament in Australia took only sixteen years to answer Sir Owen Dixon's questions. In 1973 the Law Reform Commission Act was passed with bipartisan support. The Act established a national law reform commission comprising full-time and part-time Commissioners. The first Members of the Commission were appointed in January 1975.[4] Now, the Commission comprises eleven Commissioners, nineteen staff. It has produced five Reports. It stands at the threshhold of its work.

But the Federal Commission in Australia 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. Although a number of States have enacted codes of particular areas of the law, Professor Hearn's is the last significant attempt for a civil law approach to the codification of law generally in Australia. For the rest, we have approached law making in the normal common law way: mixing case law and statute law in varying proportions.

In 1920, the State of New South Wales appointed Professor J. Peden a "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.[9] 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 1966. Canada's national Commission began work in 1971. Sri Lanka set one up i 1969 but subsequently wound it down. In 1973 the Australian Parliament decide 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 in Australia. 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. 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 no doubt shocks Quebec lawyers about their common law brethren. Whilst they may admire the independence, competence and standing of our judges, I know that they see our way of going about identifying 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 everynook and cranny of possible behaviour. In precedent, judges shy away from fundamental principles because to articulat 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.

Quite possibly because Canadian lawyers are consistently exposed to the necessities of accommodating the civil law approach, it is the Law Reform Commission of Canada that has helped other law reform commissions in the English speaking world to come to grips with the need to seek out and articulate first principles.

It will be no secret that other law reform bodies take a different approach: one that they would no doubt characterize as more "practical" and certainly one that is more comfortable to lawyers brought up in the common law mode. Take, for example, the Law Commission of England and Wales. 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 put its approach 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 in Australia, any more than it would be in Canada, for the Commissioners of the Federal Law Reform Commission to sit around a table and work out a"total" approach to the reform of the law. The constraints of the Constitution and the limited areas of legal competence assigned to the Australian Commonwealth 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 commissi in Australia could carefully plan an encyclopaedic approach to revision of Australian law. The history of uniform law revision in Australia does not inspire excessive enthusiasm.[16] In the United States since 1892, there has been a Uniformity Conference. In Canada such a Conference has existed since 1918. Although I am alive to Canadian criticism concerning the effectiveness of the Uniformity Conference, this much can be said: its exists. In Austral a Standing Committee of the Commonwealth and State Attorneys-General has been established to give political direction and"push"to the move for uniform laws in appropriate areas. Although it 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 Australian 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. Perhaps we can develop a hybrid creature combining the hard headed, practical wisdom of the English Commission with the challengi forward looking scholarship of Canadian reform agencies.

TECHNIQUES OF LAW REFORM

Law Commissions have been operating long enough now to provide a "received wisdom" upon techniques to be followed. Working papers are prepare which outline the law as it stands, its apparent defects and "fields of choic 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 first 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".[2] The Commission is established to assist the Parliament in the development of modern laws which embody the popular values of Australian society.

Now, it is perhaps in this connection that we have secured greatest assistance from the example of Canadian Commissions. Any reader of the Annual Reports of the Law Reform Commission of Canada will know of th premium placed by that Commission upon public ventilation of ideas. The *Third Annual Report 1973-1974: A True Reflection* p.4 put it this way -

> "Law reform then must look beyond the letter of the law. It must find out how the law is understood by those applying it and those to whom it is applied. It must discover how the

> law really operates - what judges, lawyers officials and ordinary citizens actually do...There has to be empirical research...and there has to be an examination in moral and philosophical terms of the aims the law pursues, the functions it performs, the values it enshrines. Lastly there must be dialogue and consultation with the public in order to unearth and to articulate public opinion on the law".[24]

In a sense, the involvement of the public is part of the rationale of changing the law through a law reform agency. It is an attribute of open government. Most people agree with it. The problem is to find the proper way to do it and to ensure that bodies such as law reform commissions are adequately equipped by their statutes. Whilst we experiment with public sittings in Australia, it is instructive to us to read the Second Annual Report of the Saskatchewan Law Reform Commission which describes its meetings with interested groups and its use of the media to tap public opinion. Whilst we use public opinion polls, newspaper campaigns and open hearings in suburban centres, we take heart from the 1976 Annual Report of the Alberta Institute of Law Research and Reform which asserts that "a law reform body should seek public opinion" but cautions "we are still not sure of the best way of finding facts and public opinions".[25] In fact, we could conclude our position in the language of our Albertan colleagues -

> "We shall continue to regard the finding of facts and opinions to be vital to our work. We shall also continue to experiment".[26]

Unlike the Canadian National Commission, the Australian Law Reform Commission has been established not in the Federal Capital of Canberra but in Sydney. It is hoped that our propinquity will develop responsiveness to legal ideas, especially in the practising profession and will attract the participation of the best that the Australian legal profession can offer. Already, the Commissioners come from all parts of Australia and bring a balance between backgrounds in legal offices, at the Bar and in universities. I am aware that in the Canadian national commission, the experiment with part-time commissioners was abandoned. However, in Australia the system works well largely because of a provision in the Act which empowers the Chairman to constitute Divisions for the purposes of particular References.[27] For the purpose of such a Reference, the Commission is the Division. In this way

the special skills and interests of part-time lawyers of the highest distinction can be made available to the national Commission. It has the additional merit of keeping the Commission, for a relatively small expense, in close touch with professional and academic opinion in all parts of the country. In a large country, such as Australia is, this can be a bracing stimulus. The facility of Divisions prevents excessive work load upon the part-time commissioners which was at the heart, I believe, of the failure of the Canadian experiment. One of the part-time Commissioners, Emeritus Professor Sir Zelman Cowan was added to give specific help to the Commission in a Reference concerning privacy, a matter upon which he has written widely. He comes to our meetings from Brisbane in Queensland. Mr. Justice Brennan, a Federal Judge, is resident in Canberra. Professor Alex Castles comes to us from the University of Adelaide. Mr. John Cain is a Member of the Victorian Parliament and lives in Melbourne. There are three part-time Commissioners from Sydney. I believe that the mixture of full-time and part-time Members work well and opens lines of communication that would otherwise not exist.

One of the problems that has bedevilled law reform work in Australia has been the lack of drafting capacity in law reform agencies. We have taken to heart the lesson of the Law Commission in England. There is no doubt that a draft bill eases the Parliamentary implementation of law reform reports.[28] We have been fortunate to secure such a drafting facility and to all of the Australian Commission's reports, draft legislation is attached.

In addition to the Commissioners and the research and other staff, the Commission has been able to expand its output by the use of consultants, many of whom seek no reward other than participation in the work of national service. Not only were police, academic and civil liberties personnel used in the first reports of the Commission. In a report on motor traffic laws, the cross-section of expert opinion ranged from instrument scientists, experts on road safety, medical personnel assisting alcoholics and drug dependants, chemists and so on. A like cross-section of interdisciplinary help is to be found in every one of the Commission's current projects.

One final matter of methodology might be mentioned. Because of the proliferation of law reform agencies in this part of the world (fourteen if we include New Zealand and Papua New Guinea) there was a strong feeling that some effort should be made to co-ordinate information concerning the work of

the law reform bodies. Duplication in law reform effort can scarcely be afforded in view of the priorities fixed by society and the funds and manpower made available for the work of renewing the legal system. With the consent of the other law reform bodies throughout Australia, the Australian Commission has taken a number of steps that will, in time, promote efficiency and knowledge of the work progressing in the several Commissions. A Law Reform Agencies Conference has been established. It now meets annually and brings together representatives of all Commissions in Australasia. The fourth meeting is to be held in Sydney on 1 July 1977. At each of the first three meetings there has been an observer present from at least one Canadian agency. At the first meeting in 1973, Professor R.D. Gibson of the Manitoba Commission attended. At the second meeting in 1975, Mr. W.R. Poole, Q.C., of the Ontario Commission and Mr. R.P. Frazer, Q.C., of the Alberta Institute attended. The third meeting was attended by M. Jean Côté of the Law Reform Commission of Canada.

But the effort to pool and distribute information has not been confined to the narrow circle of experts. After the example of the national Canadian Commission efforts have been made through the media, public speeches, law journals and the bulletins of the Australian Commission to approach a wider audience. The "dialogue and consultation with the public" is pursued to seek out the values which the public believes the law should enshrine, the functions it should perform and the aims it should pursue.[29]

THE WORK OF THE COMMISSION

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 Australian 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" 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 inquiries overseas (including in Canada) and in Australia on this question. In the result, the 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's proposal was

presented to the Australian Parliament as part of the *Australia Police Bill 1975*. With the change of Government in late 1975 in Australia, this Bill has lapsed. The proposal is still under the consideration of the new Australian Government. Law reform, however, works in mysterious ways. Now, the Premier of New South Wales, Mr. Wran has indicated that he proposes to introduce a system based upon the Commission's Report in that State, which has the largest police force in Australia. As well, a recent Board of Inquiry in the State of Victoria has recommended an identical scheme for the police force of that State, modelled upon the report of the Australian Commission.[30] The adoption by the States of law reform proposals made at a federal level may have an importance transcending even the subject matter of this report.

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.[31] 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: tape-recorders, 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 was put forward as an interim report so that further commentary, criticism and suggestions can be received upon our proposals. 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.[32] Whilst this is un doubtedly 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 even remote 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 Australian Commission to ensure that its "proposals do not trespass unduly on personal rights and liberties".[33] No matter could have been closer to the rights and liberties of the Australian community than its first Reference.

In December 1976, the Australian Attorney-General, Mr. Ellicott announced the intention of the new Government to proceed with legislation in 1977 based substantially on the Commission's second Report. Lord Gardiner has said the changes of Government present law reformers with very real problems. However, the Australian Attorney-General's indication of the Government's intention to proceed with a modern criminal investigation code suggests that Lord Gardiner's aphorism may have less application in Australia than elsewhere.

The Commission's Report on *Alcohol, Drugs and Driving* was, like its predecessors, prepared to a deadline of six months. The Commission was required to modernize the motor traffic laws of the Capital Territory for dealing with drivers whose skills were impeded by the consumption of alcohol or other drugs. One of the issues before the Commission was whether "random tests" should be introduced. On this issue the Commission reached a view similar to that incorporated in the Canadian Criminal Law Amendment Act 1976 (C-71) s.15. Whilst simplifying the preconditions necessary to justify a test the Commission was not pursuaded to recommend a facility of testing without preconditions. This view was reached after appropriate expert and public opinion had been sounded, the latter by way of a public opinion poll conducted by a Canberra newspaper and by a public sitting held, under television scrutin in the National Capital. Already, the Minister for the Capital Territory, Mr. Staley, has indicated the Government's intention to implement the proposal put forward by the Commission in this Report.

FUTURE PROGRAMME

The Commission has before it a varied programme. Its principal Reference requires a review of the laws relating to privacy, at least in respect of those matters which are within Commonwealth power. The current

legislative developments in Canada particularly Bill C-25 (*Canadian Human Rights Bill*, 1976) and also the report of the Privacy and Computer Task Force are constantly before us. Problems are similar and the difficulty of providing flexible, appropriate, workable solutions need no elaboration.

In addition to this Reference the Commission is engaged in a major attempt to achieve a national law on defamation, a matter not committed by the Australian Constitution to the Commonwealth and therefore one requiring close co-operation with the State law departments and their officers. The national distribution of publications and national broadcasting and television make the solution of this deficiency in the law, an urgent one in Australia.

The Commission is working to a deadline of July 1977 to produce a report on human tissue transplants. In this project, we are travelling along the same path as the Manitoba Commission did in its *Report on a Statutory Definition of Death*.[34] Certain work of the Canadian Commission and of the Uniformity Commissioners in Canada is also before us as a guide. In this, as in other matters, the parallel nature of our interests and concerns demonstrate the advantages to be secured from regular exchanges of ideas between law reform bodies.

The Commission also has before it projects concerning reform of insolvency laws and of the laws relating to insurance contracts, in each of which Canadian developments present helpful analogues for us. This is not the occasion to recount the proposals made for other items in the future programme of the Commission. These include matters as diverse as the law relating to locus standi and class actions, the incorporation of Aboriginal customary law into the domestic law of Australia and the principles that should govern the compulsory acquisition of land and property by the Commonwealth of Australia and its instrumentalities. I mention these possibilities simply to demonstrate the variety which, short of a "total" approach to the law in Australia, may nevertheless come before the Federal law commission.

THE BEST OF PARLIAMENTARY LUCK

A recent article on law reform in New Zealand pronounced the "harsh reality" that the only criterion in matters of law reform is, in the last analysis, "what finally appears in the Statute Books".[35] True it is that law reform commissions can influence thinking of judges and legal

scholars. Their proposals can affect administrators and those who implement the law "on the ground". But all too frequently, a law reform proposal will evaporate into the ether, unless it secures the accolade of Parliamentary approval. Through the path of suggestion, reference, consultants' reports, working paper, public sittings, draft legislation and final report, the proposal should usually find its way into Parliament for consideration. Anything less may render 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.[36] There is no such tradition in Australia. 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 authorities, with ultimate power of disallowance in the Parliament. I hope for nothing less than that in the fullness of time the Australian 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 is not in the slightest embarrassed by the task of assisting its proposals through the legislature[37] playing a role as part of the "machinery of government in the widest sense".[38] In fact, a close relationship with the Parliament is just as important as independence of it.

Recent announcements in Canada[39] and Australia[40] make it plain that the First Law Officers of each country recognize the obligation of government to give ear to the proposals made by Commissions established to assist in the reform of the law. Otherwise valuable public funds are thrown away and all that remains is a shelf full of handsome documents. The urgencies of change are too great. The impediment of enertia, indifference and Parliamentary inactivity impose upon law reform commissions the duty to monitor their performance on an operational level and to test their success by the degree to which they can pursuade law makers to adopt their proposals as part of the law of the land. That, at least, is the way we approach it in the Antipodes. Let it be called a pragmatic approach of a common lawyer. The need is clearly there for machinery that will complement the forces at work in our societies to keep the law as it is, and not as it should be.

It is as useful as it is apt for me to remind you of what the former Chairman of the Law Reform Commission of Canada, Mr. Justice Hartt has stressed and which we drew to the attention of the Australian Parliament in our last Annual Report -

> "Ultimately the government's commitment to law reform will be tested in its willingness to facilitate the enactment into law of the Commission's proposals. It is a commitment which will have to find expression in action rather than rhetoric".[41]

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, a varied programme and a great deal of luck in the Parliamentary process. The Australian Law Reform Commission seeks to give Australian law searching, critical and innovative scrutiny. We have transplanted the English law to 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 of Australia.

1. Law Commissions Act 1965 (G.B.), chapter 22.
2. K.O. Shatwell (1957-1958) 31 *Australian L.J.* p.325. Sir Owen Dixon's observations appear *ibid* p.340ff.
3. *Ibid* p.342.
4. Until 1976 all Commissioners, other than the Chairman, served part-time. In mid 1976 three additional full-time Commissioners were appointed. They are Mr. D. St.L. Kelly, formerly Reader in Law in the University of Adelaide; Mr. R. Scott, a Sydney Solicitor and Mr. M.R. Wilcox of the New South Wales Bar.
5. J.M. Bennett "Historical Trends in Australian Law Reform (1969-70) 9. *West Australian L.Rev.* p.211 at p.213.
6. K. Sutton *"The Pattern of Law Reform in Australia"*, 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 *Australian L.J.* 513. See also J.M. Bennett's note in (1975) 49 *Australian 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. *Cf.* L.G.B. Gower, "Reflections on Law Reform" (1973) 23 *University of Toronto Law Journal* 257 at pp.258f.

14. *Ibid* p.268. For a statement of the Author's approach to the rationale of law reform see "Law Reform, Why?" (1976) 50 *Australian L.J.* 459.

15. Mason, pp.210-211.

16. R. Cranston "Uniform Laws in Australia" (1971) 30 *Journal of Public Administration* (Aust.) 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 *Australian 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. *Cf.* To the same effect the pungent article of J.N. Lyon "Law Reform Needs Reform" (1974) 12 *Osgoode Hall L.J.* 421 at p.426.

24. Law Reform Commission of Canada *Third Annual Report 1973-74: A True Reflection,* p.4, cited in the Law Reform Commission (Aust) *Annual Report 1975,* A.L.R.C.3, p.41.

25. The Alberta Institute of Law Research and Reform, *Annual Report 1975-76* p.19 *Cf.* Law Reform Commission of Saskatchewan, *Second Annual Report 1975,* at pp.4, 13.

26. The Alberta Institute, *op cit* at p. 21.

27. Law Reform Commission Act 1973 s.27.

28. Lord Elwyn Jones L.C. in "The Lord Chancellor on the Law Commissions, Law Reform and Legal Aid" in 1975 *Law Institute Journal* (Victoria) p.218; *Cf.* Conacher p.515.

29. See n.24.

30. Board of Inquiry (Mr. B. Beach, Q.C.) *Addenda to Report on Complaints Against Members of the Victoria Police Force* 1976.

31. 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.

32. The Law Commission (Eng) *First Annual Report 1965-66.*

33. Law Reform Commission Act 1973 (Aust) s.7.

34. The Manitoba Law Reform Commission *Report on a Statutory Definition of Death* Report 16, May 1974.

35. R.G. Hammond "Reflections on Law Reform in New Zealand" [1976] *New Zealand L.J.* 353.

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

37. *Cf.* Sir Leslie Scarman *ibid* p.93.

38. *Ibid.*

39. R. Basford, Minister of Justice, Reported in (1976) 3 *Canadian Bar Assn. National,* Pt.7, pp.1,14. *Cf. ibid,* Pt.5, p.4.

40. R.J. Ellicott "Law Reform - The Challenge for Governments" (1976) Press Releases Speeches & Interviews 100 at p.102 (No.38a).

41. E.P. Hartt *Federal Law Reform in Canada*, Speech to the Ninth International Symposium on Comparative Law, University of Ottawa, 7 September 1971 *mimeo* pp.9-10 cited in the Law Reform Commission (Aust) *Annual Report 1976,* A.L.R.C.5 p.10.