A NATIONAL APPROACH TO LAW REFORM

AN INTRODUCTION TO THE NEW LAW REFORM COMMISSION OF AUSTRALIA

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HISTORICAL INTRODUCTION TO A BOOM INDUSTRY

Something of a laggard, the Commonwealth has at last joined the "booming industry" of organised law reform.[1] Law reform is nothing new. Justinian had his Tribonian In English law, the call for a rational approach to legal revision occurred at least as early as Sir Francis Bacon. He urged the appointment of six commissioners to provide on-going scrutiny of the law.

> "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's call, repeated in Cromwell's time and after, was partl heeded under Bentham's influence in England in the 19th Century. In 1934 Lord Sankey set up his Law Revision Committee. In 1952 Simonds set up a Law Reform Committee. These were typically English organisations of gifted, busy, part-time professionals. It was not until 1965 that a full-time Commission, after Bacon's model, was established in England. This is the Law Commission, the doyen and model for the "boom industry".

Australia was not immune from the influence of Bentham. In the 19th Century, various steps were taken in the colonies to rationalise and improve the inherited common law. The tale has been well told by John Bennett[2]. It contains many lessons for the modern reformer. It is appropriate to cast a glance at it to put the new Australian Commission in its context.

New South Wales led the way by the establishment of a Law Reform Commission in 1870 with functions to enquire

into the state of the statute law and submit proposals for its revision, consolidation and amendment.[3] The first Chairman was Stephen C.J. The participants worked part-time and the output was small. This proved self-defeating. Criticism was attracted and the venture, which was imaginative for its time, quietly faded away.[4]

The passage of the Judicature Acts by the Imperial Parliament in 1873 exerted pressure upon the colonies and their courts to follow suit. The pattern of emulating English statutory reforms (which lasted for three parts of a century) was set. Lilley and Griffith secured like reforms in Queensland by 1878. South Australia by the same year, Western Australia by 1880 and Victoria by 1883 followed suit. New South Wales resisted until 1970 prompting the jibe of Jacobs J. that is well-known and 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".[5]

Perhaps the most interesting experiment of the colonial era was Professor Hearn's code in Victoria. We all know the boasts of civil lawyers that they, unlike common lawyers, start rationally with principle and avoid the wilderness of single instances. Hearn promised to do this for Victoria. But when his code was tabled in Parliament J. Gavan Duffy declared

> "A team and six can be driven through any Act of Parliament but through this code, if it were passed, I believe that a team of fifty elephants abreast could be driven".[6]

Hearne died and his experiment with him.

Legislatures (including the new Commonwealth Parliament) proved fertile at the turn of the century: introducing imaginative solutions to social problems, with the true antipodean flavour. Novel approaches to industrial

arbitration, Torrens title and testators family maintenance are but a few.[7] The early Acts of the Commonwealth Parliament remain today as monuments to the brilliance and vigour of the first draftsman.[8]

Then something went wrong in law reform in Australia. The impetus of imaginative legislation in private law fields was lost. Mr. Justice Zelling in 1969 lamented:

> "We have unfortunately in the last sixty years had the years which the locusts have eaten. There was a tremendous upsurge of law reform in the 1880s and the 1890s much of which particularly in the social sphere made Australia a leader in the world.
> And then we said:
> "Look how wonderful we are" and we sat back and other nations came up to us and in fact surpassed us".

Although various fitful attempts were made at an organised approach to reforming the law in the States, nothing much was done until the establishment of the Law Commission in England in 1965. Following this, in 1966 the New South Wales Law Reform Commission was established following an election promise.[10] The substantial and successful programme of that Commission has been recently recounted.[11] It comprises five Commissioners at the moment including Meares J. of the N.S.W. Supreme Court, who is Chairman.

Victoria has no less than three law reform agencies. The oldest, the Statute Law Revision Committee is a joint committee of the Victorian Parliament organised to deal with technical rules.[12] As well, in 1944, the Chief Justuce established a committee which still operates and has produced a large number of proposals which have found their way into law, although with less frequency of late.[13] It is a committee of part-time busy Judges and practitioners. It has always avoided highly charged areas. In 1968 it refused a request from the Attorney-General concerning the law of abortions.[14]

In 1973 the Victorian Parliament passed the Law Reform Act creating a Law Reform Commissioner. An Advisory Council assists the Commissioner.[15]

In Queensland in 1967 Parliament was told that public funds could not afford a law commission. Those funds were apparently found by 1968 when the Law Reform Commission Act was passed constituting a Commission of four part-time Members.[16] The Act was subsequently changed to allow full-time Members and to provide for the tabling of Annual Reports so that at least some public outlet is afforded to the Commission.[17] Alone amongst the Australian commissions the Queensland Commission has widely used the system, much in favour in North America of "briefing out" some of its work.[18]

South Australia came into the "growth industry" in 1967 but by the means of a Proclamation rather than an Act. The Law Reform Committee of South Australia is still a creature of Proclamation. It comprises two Judges, representatives of the Law Society, Faculty of Law and the Opposition. It is part-time but has produced a large number of reports on a whole range of topics, some of them pregnant with social controversy.[19] Its part-time character has been criticised, as inhibiting its output.[20]

In 1971 a special ad hoc committee to review criminal law and penal methods was set up under Roma Mitchell J. It has already produced two substantial reports and a third is awaited.

Western Australia provided the model for the Queensland Act. A Committee was set up in 1967, subsequently converted to a Commission by Act of 1972. The Commissioners are part-time comprising an academic, a practitioner and a Crown Law officer. No Judges are allowed.[21] Chairmanship of the Commission rotates annually and there is a back-up staff.

Tasmania was the first to leap into the modern era of organised law reform. A Committee was established in 1941 with terms of reference which now appear somewhat anachronistic but evidence the change in our society in so short a time:

> "Consider the reform of the law in Tasmania in order to remove anomalies and to keep abreast of the reform effected in other States and in England".[22]

This Committee was reconstituted in 1969 under the Chairmanship of a Supreme Court Judge but reports were private to the Attorney-General. In 1974 a Commission was established in Tasmania. A novel feature was the inclusion of lay participants as Members of the Commission. All Commissioners are part-time.

The Commonwealth tended to approach law reform either through the Attorney-General's Department or by the vehicle of ad hoc committees. These fecund committees often achieved nothing more than pigeon-holes. But the Patents Act 1952, the Trade Marks Act 1955, Bankruptcy Act 1966, Copyright Act 1968 and Administrative Appeals Tribunal Act 1975 all bear witness to the work of ad hoc committees. Numerous other reformatory Acts were drawn in the Department, notably the Trade Practices Act 1965-74 and the Family Law Act 1975. A Law Reform Commission for the A.C.T. was established in 1970 [23] but no similar commission was established for the whole Commonwealth. The Standing Committee of Attorneys-General, comprising the first law officers of the Commonwealth and the States produced more uniform legislation than the Companies Act of 1961.[24] However, the mechanism has not worked well in on-going reform of such legislation, once produced. Attorney-General Murphy, justifying the establishment of a national law commission said:

> "The Standing Committee of Attorneys-General has not been conspicuous for its success in promoting law reform on a uniform basis. While it is a very useful instrument for exchanging

> views ... it is clearly not equipped to deal with law reform on a comprehensive and uniform basis. This cannot be achieved unless an expert body, working full time on the task and removed from the pressures of day-to-day politics is established for this purpose".[25]

ESTABLISHMENT OF THE AUSTRALIAN COMMISSION

Sir Owen Dixon in 1957 voiced his call for a national commission in terms which Bacon would undoubtedly have approved:

> "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".[26]

Between that call in 1957 and 1973 many like pleas were made, notably from Sir John Kerr[27] and Sir Anthony Mason.[28]

Substantially, the call was for a national Commission which would embrace the State Commissions, remove "part-timeism" and provide well-funded full time national research facility. Such a proposal was voiced in 1973 to the Standing Committee of Attorneys-General by Attorney-General Murphy. The proposal for "participation" by the States in a Commonwealth Commission was rejected by some State Attorneys-General. Mr. McCaw (N.S.W.) preferred the word "co-operation" rather than "participation". Upon this basis, yet another Commission was established which did not embrace the State organisations, although, with a territorial role under the Act, it was announced as designed to take over the work of the A.C.T. Commission.[29]

The statutory warrant of this new commission is to review the laws within the competence of the Australian Parliament with a view to their modernisation, the elimination of defects, simplification and the adoption of new methods for the administration of justice. But the Commission is also authorised:

> "to consider proposals for uniformity between laws of the Territories and laws of the States".[30]

Happily, before the Parliament, the Law Reform Commission Bill 1973 attracted the support of all political parties in both Houses. One amendment, moved by Senator Greenwood Q.C. and accepted by the Government cast upon the Commission a novel duty. It is to ensure that its proposals as far as practicable are consistent with the Articles of the International Covenant of Civil and Political Rights and do not trespass unduly on personal rights and liberties.[31] This amendment was accepted and is part of the Commission's obligations. The speeches in the Parliament emphasised, on both sides, the desirability of promoting uniform laws in Australia.[32] This is, of course, an urgent

problem with the decline of judge-made law, the great increase in statute law and the proliferation of legislation in private law matters along quite different lines in the various States.

The first Members of the Commission were appointed in 1975. The Commission has an approved "establishment" of 38 persons. This makes it one of the largest such commissions in the world. The emphasis is upon the recruitment of trained professional lawyers from all parts of Australia.

As the Act envisages, there will be a core of full-time Commissioners working at the principal venue of the Commission. For the time being, this has been fixed in Sydney at the hub of the legal profession in that city. Apart from the Chairman, only part-time Commissioners have so far been appointed, although full-time Members will be appointed shortly. The present federal Commissioners of law reform are:

* The Hon. Mr. Justice M.D. Kirby, B.A., LL.M., B.Ec. (Syd).
Deputy President of the Australian Conciliation and Arbitration Commission
Chairman of the Law Reform Commission (Full time).

* Mr. F.G. Brennan Q.C., B.A., LL.B.(Old).
President of the Australian Bar Association and Queensland Association.
Executive Member of the Law Council of Australia.

* Mr. J. Cain, LL.B.(Melb).
Executive Member of the Law Council of Australia.
Past President of the Law Institute of Victoria.

* Professor A.C. Castles, LL.B.(Melb), J.D. (Chicago)
Professor of Law, The University of Adelaide.

* Mr. G.J. Evans, B.A., LL.B.(Melb), B.A.(Oxon).
Senior Lecturer in Law, University of Melbourne.

* Associate Professor G.J. Hawkins, B.A.(Wales)
Deputy Director of the Institute of Criminology Faculty of Law, University of Sydney.

For the core of full-time Commissioners, the choice will not be easy. A number of factors have to be balanced. They

include a balance between academic and practising lawyers, a need for expertise relevant to Commonwealth power and special references and geographical factors which must always be considered in federal appointments. With these considerations in mind, the Australian Government agreed to the suggestion of the Commission that national advertisements should be distributed to see just who was interested in appointment either now or in the future. It is hoped that although the salary offered is not, on its own, sufficient to attract the greatest legal talents of the country, the fascination of playing a practical role in national law reform will secure, from time to time, the active interest of practitioners around Australia in the Commission's work. The legal profession in Australia must learn to be more mobile, as it is in the United States. Law Reform Commissions present themselves as a half-way house between academic life and practice. With a bit of luck, they can achieve something in producing the law as it should be, not just practising or teaching it as it is.

Apart from the commissioners there is a substantial team of researchers and provision is made for two Parliamentary draftsmen. The addition of this facility should step up the productivity of the Commission. The Law Commission in England has five draftsmen on its staff.[33] There are special problems in drawing Acts based upon federal power, which are not under-estimated. One of the duties cast upon the Commission by the Act is to simplify the law. This duty it takes seriously and part of it is involved in the expression of the law in statutory form.

THE WORK SO FAR

Setting up any new authority from scratch is a painful but exciting task. The finding of premises, the fixing of the staff establishment, the purchase of library and other facilities, advertisements for personnel and so on represent humdrum but necessary preliminaries to the collection of a viable unit to answer the challenge of

reforming the laws of Australia.

In the midst of this activity, on 16 May 1975, the Attorney-General of Australia, Mr. Enderby Q.C., referred to the Commission for inquiry and report a number of matters concerned with the organisation and methods of a proposed Australia Police Force. This involved the Commission in its first exercise of law reform. The project required the participation of a large number of consultants from all parts of Australia. Two reports have now been produced, namely "Complaints Against Police" (A.L.R.C.1) and "Criminal Investigation" (A.L.R.C.2). To each of these reports has been appended the draft legislation designed to implement the Commission's proposals.

In much the same manner as the Law Commission in England, the team working on the project met at the National University and hammered out proposals which became, in the Complaints section, a Working Paper which was distributed throughout the country. The Commission then set upon the task of public sittings in all capitals of Australia and in Alice Springs and Darwin. Submissions were received from about 150 persons and organisations. These were then considered with the consultants and finally by the Commissioners. Reports were then prepared and sent to the Attorney-General. Under the Act they must be (as they were) tabled in the Parliament.

That the Government found the Commission's proposals in respect of Complaints Against Police acceptable is evidenced by the incorporation of the Commission's suggestions in the Australia Police Bill. The Commission took the opportunity to deal with a number of anomolous common law rules, including the principle that the Crown is not vicariously liable for the torts of police officers.[34]

The second report was produced as an Interim Report because of the Commission's strongly felt view that its proposals should be the subject of public scrutiny and comment. We are not, and do not regard ourselves as, a

"think tank" of "experts". The law touches people. The need to secure at least the opportunity of public comment, criticism and refinement of ideas is one which the Australian Commission regards as quite axiomatic.

In April 1975 the Commissioners attended the conference of Law Reform Agencies organised in Sydney. The Australian Commission is the host of the next conference to be held in Canberra in 1976. It is expected that by regular, annual meetings of law reform personnel, some of the disadvantages of proliferation can be avoided. With this disadvantage clearly in mind, the Commission offered to become a clearing house for law reform agencies throughout Australia and this offer was accepted both by the law reform bodies themselves and later by the Standing Committee of Attorneys-General. There is, in Australia, a substantial amount of duplication in law reform work and some wasted effort which a proper husbanding of scarce resources might diminish.[35] The Commission has to look beyond Australia in assuming this clearing house function. Conversations have already been had with the Attorney-General of New Zealand and there is much to be said for an attempt at least to co-ordinate the work of reforming the common law in those countries of South East Asia and the Pacific who have inhereted the system but lost the umbilical cord to the mother country which formerly secured revision and updating.

Other motions were passed by the conference which, unhappily it must be recorded, were not so fruitful. These were designed to get uniform law reform projects off the ground. It was proposed that the law reform conference should be empowered to suggest projects to the Standing Committee of Attorneys-General for assignment to particular agencies. For example, a new national law of Defamation to the Australian Commission. A new national Sale of Goods Act to the New South Wales Commission. A national law on Consumer Protection to the South Australian Committee and the Australian Commission working together. Eight such projects were suggested.[36] But when the proposal came to the officers, unidentified civil servants

assisting the law ministers, they were objected to on the basis that initiative and control should remain with the Ministers. Not surprisingly, the Ministers were persuaded by this advice. A major modern and practical effort to secure national approaches to law reform has failed. In the United States, a conference of Uniformity Commissioners was established in 1892. In the Canadian federation, such a conference was established in 1918.[37] No one suggested dull, uniform conformity in Australia. But a significant step backwards is evidenced in these unhappy developments.

FUTURE PROGRAMME

Under the Act, the Australian Commission is entitled to suggest matters suitable for reference. A number of topics are currently under study and research papers by suitable specialists have been prepared to propose references in the following areas:

* Insurance Law
* A national law of Defamation
* Banking Law
* Class actions and locus standi in federal Courts
* A national Bail law
* Protection of Privacy law
* Civil Rights Review of Legislation
* Rights of Children
* Rights of Prisoners
* A national motor traffic code
* Consumer protection law
* Interstate aspects of Consumer Transactions.

In the Territories a number of topics have been proposed including Statute Law Revision, Consolidation, a review of the laws governing the punishment of Aboriginals in the Northern Territory, an organ and tissue transplant law and statutory mortgage law revision. The Territories open the window of the national Commission to the whole area of private law in Australia.

Government and Opposition Members of Parliament

have expressed great interest in the work of the Commission. Its future transcends party political differences. It will hopefully become in time nothing less than a valuable organ of government, capable of grasping and modernising those laws of the Parliament which are outside or only on the periphery of, partisan controversy.

A FEW PROBLEMS

This article is not the occasion for an analysis of the philosophy and approach of the Australian Law Reform Commission. The history of organised law reform in Australia is a sobering one. The resistance to uniform law reform, although seemingly irrational and inefficient, has roots deep in the country's history. Fear of"things federal" is very real in some quarters, not least at the moment. Quite apart from such mundane problems as efficiency and economy, it is difficult in a country the size of Australia, to promote a rational approach to large areas of law reform except on a national basis. Ideal solutions to modern legal and social problems cannot always be found within federal power. The solution to procedures for handling complaints against police, for example, required constant consideration of the constitutional impossibility of conferring administrative functions upon federal courts. The point to be made is that law reform in a federation such as Australia will require constant adjustment of solutions proposed to ensure that they fit the constraints of constitutional power. Those national law reform bodies, as in England and New Zeland, that can grasp the whole body of the law and seek to instil an encyclopaedic rationality and design to it, earn the envy of those who must of constitutional necessity set their philosophical sights somewhat lower.

The review of procedures followed on the first reference demonstrates the importance attached to involving the profession and the wider community in the work of law reform. Although the pace of law reform cannot be rushed and granting that "haste is the enemy of sound law

reform"[38] it is important that law reform bodies should be able promptly to "deliver the goods". Professor Gower has said that "the best (is often) the enemy of the good".[39] The Australian Commission will not hesitate to impose on itself rigorous deadlines. Nothing less is demanded by the pace of life today. The years of languid contemplative reforms have come and gone. Dr. Johnson's lawyer always wanted to be a philosopher. Those who join the service of the new national Law Reform Commission in Australia will certainly have something of that about them. But the breakdown of parliamentary capacity to revise and modernise the law is too urgent a responsibility to allow law commissions the luxury of an academic pace. Whilst never losing sight of the high ideals set out in its statutory warrant, the Australian Law Reform Commission will be alert to the needs of the times. Within references received by it from the Attorney-General of Australia, it will seek to grasp quickly and reform in a thoroughly professional way, the laws of this country which have become, in Bacon's phrase, snares for the people.

FOOTNOTES

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

1. B. Shtein "Law Reform - A Booming Industry" (1970) 2 Australian Current Law Review, p.18.

2. J.N. Bennett. Historical Trends in Australian Law Reform (1969-1970) 9 University of Western Australia Law Review, p.211.

3. Cited Bennett p.213.

4. Ibid.

5. K.C.T. Sutton"The Pattern of Law Reform in Australia" 1969, p.9.

6. Cited in Bennett p.215.

7. A.F. Mason "Law Reform in Australia" (1971) 4 Fed. Law Review at p.197.

8. Loc cit.

9. (1969) 43 A.L.J. at p.526.

10. D.G. Benjafield " Methods of Law Reform". Record of the 3rd Commonwealth & Empire Law Conference, 1965 393 at p.395-6.

11. J.N. Bennett "Law Reform : Work of the Law Reform Commission of New South Wales, 1966-75" (1975) 49 A.L.J. 199.

12. Parliamentary Committees Act 1968 (No. 772)(Victoria) ss.37ff.

13. F.C. O'Brien "The Victorian Chief Justices" Law Reform Committee" (1972) 3 Melbourne University Law Review p.440 at p.472.

14. Ibid p.450.

15. Law Reform Act 1973 (No. 8483) (Victoria).

16. W.B. Campbell "Law Reform in Queensland" (1971) 7 University of Queensland Law Journal p.221.

17. D. Kelly "The South Australian Law Reform Committee" (1967-1970) 3 Adelaide Law Review p.481.

18. Campbell p.223. Cf. R.D. Conacher "Law Reform in Action and in Prospect" (1969) 43 A.L.J. 513.

19. Kelly p.482.

20. Ibid p.485.

21. Law Reform Commission Act 1972 (W.A.) s.6.

22. Tasmanian Law Reform Committee Report 1946, mimeo p.28.

23. Law Reform Commission Ordinance 1971 (A.C.T.)

24. R. Cranston "Uniform Laws in Australia" (1970) 30 Journal of Public Administration p.229 at p.235.

25. Sen. L.K. Murphy Parliamentary Debates, The Senate, 23 October 1973, p.1345.

26. (1957) 31 A.L.J. 340 at p.342.

27. J.R. Kerr "Uniformity in the Law - Trends and Techniques", Garran Memorial Oration, 11 November 1974, p.9.

28. C.L.D. Meares "Law Reform in Australia". Record of the Fourth Commonwealth Law Reform Conference, New Delhi, 1971 p.247 at p.258.

29. Sen. L.K. Murphy op cit supra n.25.

30. s.6 Law Reform Commission Act 1973 (Aust).

31. Ibid. s.7

32. Parliamentary Debates (The Senate) 31 October 1973 pp.1345ff; ibid 6 December 1973 pp.2794-5.

33. Sutton p.6; Mason p.207.

34. Enever v. R. (1905) 3 C.L.R. 969; Fisher v. Oldham Corporation [1930] 3 K.B. 364. Cf. Police Act 1964 (U.K.) s.48.

35. Shtein p.30.

36. Record of the Second Conference of Australian Law Reform Agencies, Sydney 3-4 April 1975, pp.67-8.

37. Cranston p.237; Meares p.251.

38. First Annual Report of the Law Commission 1965-66 para. 135 page 25.

39. L.C.B. Gower "Reflections on Law Reform" (1973) 23 University of Toronto Law Journal 257 at p.267.