IDEAS AND IDEOLOGIES

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INSTITUTIONAL LAW REFORM IN AUSTRALIA

Starting Without Definitions

It is generally thought logical to commence an exercise of this kind with a definition or two. What is "law reform?" leads to the question "What is law?" The questions "What is the proper function of a law reform commission?" or "What fundamental values does law reform respect?" are entirely reasonable interrogatories for a professional law reformer to face. These are the nagging questions that must be answered if law reform is to be more than a thing of shreds and patches. I will revert to these questions. But I intend to do so after sketching the institutional framework within which much that is called "law reform" in Australia is done. This is not to say that what is done is always worthy of that name. But a study of current institutions and their history may provide the background against which a realistic scrutiny of the more difficult questions can be usefully conducted.

Law reform institutions do not, of course, claim a monopoly in law reform activity in Australia, any more than in other like communities. The legislatures of the Commonwealth, States and Territories of Australia annually produce more than a thousand Acts between them. Nobody would claim that these or even a majority of them represented "reform" measures, however widely that term is defined. But some legislation would certainly assert a claim to be "reform" of the law. Occasionally such legislation is produced as a result of a report of a Royal Commission.[1] More frequently it follows the report of an ad hoc governmental committee of inquiry.[2] Occasionally such legislation will follow work by an ad hoc committee quite outside the governmental system : at least it may be inspired by such

work.[3] More usually the preparation of legislation, with the aim of achieving substantial "reform", takes place in the Departments of State,[4] sometimes with and sometimes without the benefit of external consultation and assistance.

The role of the courts in reforming the law is nowadays generally considered to be in decline. The recent revival of enthusiasm for judicial law reform in some quarters cannot mask the fact that the judges, in the age of the active, democratic Parliament, may be less inclined to fundamental law reform today than were their precedessors, even in times recently gone by. When Sir Leslie Scarman (now Lord Scarman) returned to the Bench from his work as first Chairman of the Law Commission, he took an early opportunity to point out that the courtroom may not be a suitable place for major tasks of law reform :

> "Consistency is necessary to certainty - one of the great objectives of the law. ... The Court of Appeal - at the very centre of our legal system - is responsible for its stability, its consistency and its predictability ... The task of law reform, which calls for wide-ranging techniques of consultation and discussion, that cannot be compressed into the forensic medium, is for others".[5]

Much work that will be called "law reform" is done in Parliament, by expert committees and commissions, in the Departments of State and, even today, in the courts. This essay is not concerned with that work but with the increasing output of institutions

specifically established to "reform" the law. Such has been the proliferation of these institutions that one scholar has unkindly called law reform a "booming industry".[6] In August 1977, nearly 50 representatives from 20 States of the Commonwealth of Nations gathered in London : a multi-national meeting to review the business of the boom industry. Th Fifth Commonwealth Law Conference in Edinburgh in 1977 took as its first and major theme "Law Reform in the Commonwealth". Scarcely an issue of any worthwile law review today is not concerned with one aspect or other of the institutions of law reform or their burgeoning output. Even the public (at least in Australia) is becoming aware of and, perhaps, interested in law reform, as done by these institutions. Mr. R.J. Ellicott, when Attorney-General of Australia, described this movement as the taking of law reform "into the living rooms of the nation, by television and by other means". "We are all", he declared, "becoming involved in it".[7]

Without avoiding the fundamental questions concerning why we should have law reform commissions and what criteria they should observe in discharging their functions, it may prove helpful to examine the history and organisation of these institutions. A scrutiny of what successive generations have taken to be "law reform" may throw light on the proper role and function of law reform in present day Australia.

Colonial Beginnings

Although efforts to institutionalise and regularise the "review, modernisation and simplification"[8] of English law preceeded the mid 19th century, it was not until the writings of Jeremy Bentham that a concerted drive emerged for the establishment of permanent institutions charged with the duty of revising the whole body of the law and reducing it to an accessible form. Bentham's call was reflected in the reports

of the Common Law Commissioners, of the Real Property Commissioner and of the Ecclesiastical Court Commissioners who inquired into law reform in the first half of the 19th century. Sir Owen Dixon once described these reports as showing "a tremendous body of learning, industrious inquiry and careful consideration". The reports, he said, were "themselves ... legal works of the greatest erudition, exact information and at the same time, of great wisdom."[9]

In 1859, Lord Westbury, later to be Lord Chancellor, advocated the establishment of a Ministry of Public Justice. His call was heard in distant parts of the Empire, including in the Australian colonies :

> "... We have no machinery for noting, arranging, generalising and deducing conclusions from the observations which every scientific mind could naturally make on the way in which the law is worked in the country ... Why is there not a body of men in this country, whose duty it is to collect a body of judicial statistics, or, in more common phrase, make the necessary experiments to see how far the law is fitted to the exigencies of society, the necessities of the times, the growth of wealth and the progress of mankind?"[10]

In the Australian colonies, the early colonial judges showed an innovative spirit in revising the rules of court in order to reduce anomalies as they were perceived in the infant communities. The conservatism of the profession and apathy of Parliament stood as impediments to any more radical attempt at reform.

There was an upsurge of interest in improving the law towards the end of the 19th century. This no doubt took its inspiration from the work of the Commissioners in England, the Benthamite spirit, the confidence of Empire and the drive for codification, particularly commercial codification evidenced in the great codes enacted at that time.[11]

The first flowering of this enthusiasm in Australia was the establishment of a New South Wales Law Reform Commission by Letters Patent in July 1870. Its functions look modern and familiar :

> "To inquire into the state of the Statute Law of this Colony, and submit proposals for its revision, consolidation and amendment; and also to make a like inquiry into the Practice and Procedure of the Colonial Courts, and propose amendments therein with a view to the simplification and improvement of the same, and to the removal of the inconveniences arising from the separation of jurisdictions at Law and in Equity".[12]

This was the first effort at institutional law reform in Australia. Its members, all part-time lawyers, worked under the chairmanship of the State Chief Justice. The inefficiency of part-time operations and the indifference of Parliament to its recommendations finally killed this experiment. The Commission quietly faded away and the initiative for an organised institutional review of the law was lost.

What followed, in the colonies, was little more than the adaptation of reforms adopted at Westminster. Most important of these was the fusion of law and equity achieved by the *Judicature Act 1873* at Westminister and by a succession of Colonial Acts, except in New South Wales. It took a hundred years and the work of the second New South Wales Law Reform Commission to accomplish the "removal of the inconveniences" referred to in the charter of the first New South Wales Commission.[13]

Drawing strength from the same forces as those which produced the great codes in England was the attempt of Professor Hearn to codify the whole substantive law of Victoria in the 1870s and 1880s. This attempt produced a Bill called "the General Code, 1885". This Bill was laid before the Victorian Parliament and its protagonists praised the effort to produce a settled law "instead of depending upon a great number of fluctuating decisions".[14] Antagonists, typical common lawyers, condemned the Bill for its uncertainty and lack of specificity. Hearn died in the middle of this debate and the one significant move for general codification of the whole law in Australia did not long survive him.[15]

After Federation

The federation of the Australian colonies tapped afresh the general enthusiasm for new legal ideas at the close of the 19th century. The statutes enacted by the new Commonwealth Parliament, including the *Customs Act* 1901, the *Judiciary Act* 1902, and the *Navigation Act* 1912 reflected the enthusiasm for the succinct collection of legal rights and duties in a comprehensive statute.[16] The New Zealand experiment in compulsory industrial arbitration was adopted first in New South Wales and later by the new Commonwealth. It has become of the most durable of our indigenous experiments. It began the Australian fad to judicialise its institutions : a tendency that has lately escalated.[17]

After the first flush of enthusiasm, the forces for the orderly re-examination and review of the law lost their impetus. Increased legislation there was; but much of it had "little or no impact in the traditional field of public and private law which is regularly applied by courts in determining the rights of parties".[18] Some have ascribed the dampening of enthusiasm to the First World War with its destruction of confidence in the steady, ordered progression of mankind through settled principles rooted deep in history.[19] Whatever the cause, the fact remains that with a few fitful exceptions, the self-examination[20] and lawyers' agonising which is usually vital for effective law reform went into a kind of hibernation. In 1969, Mr. Justice Zelling lamented this Australian neglect of

law reform :

> "We have unfortunately in the last sixty years had the years which the locusts have eaten. There was a tremendous upsurge in 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".[21]

New Beginnings of Institutionalised Reform

As usual, the impetus for a revival of interest in law reform, as a regular and institutional phenomenon, came from England. In January 1934 Lord Sankey L.C. set up a Law Revision Committee. Its terms of reference were :

> "To consider how far, having regard to the statute law and to judicial decisions, such legal maxims and doctrines as the Lord Chancellor may from time to time refer to the Committee require revision in modern conditions".[22]

The Committee sat until the War and produced a number of reports, many of them designed to redress the more obnoxious principles that had crept into the common law of torts and contracts. The influence of the committee spread to Australia. Committees were set up in New South Wales and Tasmania specifically to consider the implementation of reform adopted in England.[23] In Victoria a Committee was established in 1944 by the Chief Justice, Sir Edmund Herring. Within six months of his appointment, the new Chief Justice had summoned the first meeting of a committee the purpose of which was "to consider the necessity of forming some permanent body in the legal profession to formulate schemes for reform of the law on non-political lines".[24] Out of this initial meeting emerged the Chief Justice's Law Reform Committee, a body that is still extant and which has seen a great number of its proposals pass into the law of Victoria.[25]

Meanwhile, in England, the Law Revision Committee was resuscitated in 1952 by Lord Simonds, L.C., under the new name "The Law Reform Committee". This part-time body comprised of judges and legal practitioners still exists and has a notable list of reports to its credit, many of which have passed into law in England and throughout the Commonwealth of Nations.[26] Inevitably, the work of this committee and of the Criminal Law Revision Committee established in 1959, was small and the pace cautious.[27] In many cases, reports were simply ignored.

In 1963, Mr. Gerald Gardiner, later to be Lord Chancellor wrote (with Mr. A. Martin) the challenging book "*Law Reform* Now". The first Bill Lord Gardiner introduced as Lord Chancellor was one for the constitution of the Law Commissions for England and Wales and for Scotland. The duty of the Commissions is set out in the *Law Commissions Act*.

> "To take and keep under review all the law with which they are respectively concerned and with a view to its systematic development and reform, including in particular the codification of such law, the elimination of anomalies, the repeal of obsolete and unnecessary enactments, the reduction of the number of separate enactments and generally the simplification and modernisation of the law".[28]

It would be impossible to under-estimate the impact of the establishment of the Law Commissions upon the common law world. In little more than a decade, most of the jurisdictions of the Commonwealth of Nations have established law reform bodies after the model of the independent law commissions of the United Kingdom. Even in developing countries, where the firm hand of the Executive might have been expected over matters of policy (often involved in law reform), reform commissions, after Lord Gardiner's model, have been established and continue to proliferate. The Papua New Guinea Law Reform Commission even has a role under that country's Constitution. In one country of the Commonwealth, Sri Lanka, a Law Commission was established and then disbanded. The recent change of government

has produced the promise to re-establish the Law Commission of Sri Lanka. The work given to these new bodies, the way they operate and their achievements vary from place to place. But the establishment of an institution with a statutory charter to review the body of the law, modernise and simplify it is a common theme of almost all countries of the Commonwealth of Nations.

Australia has not been exempt from this movement. On the contrary, it has embraced it with enthusiasm and now has ten law reform agencies, at least one (and sometimes more) in each of the States as well as a Federal and Territorial body.

In 1966, following an election promise, the new Premier of New South Wales announced that the Cabinet had approved a proposal to establish "a permanent full-time law reform commission composed of a Supreme Court judge, a practising solicitor and an academic".[29] Without waiting for legislation, the New South Wales Commission was established and later formalised by the *Law Reform Commission Act* 1967. This State Commission is the oldest established full-time law reform body in operation in Australia. In has had a succession of four Supreme Court judges as Chairmen and its other members presently comprise a District Court judge, a Professor of Law, a Barrister, Solicitor and Legal Academic. All members must be lawyers and the Commission is supported by a research staff. It has produced a large number of reports, most of which have been adopted, although sometimes after "unexplained delay".[30]

Queensland was the next State to pass its *Law Reform Commission Act* 1968. It established a permanent commission "to take and keep under review all the law applicable to the State of Queensland with a view to its systematic development and reform".[31] The original Act provided only for part-time members but it was amended in 1972 to permit appointment of full-time members. One only of the members of the Commission is full-time. Other members include a Supreme Court judge and legal practitioners. The Queensland Commission has followed the North American procedure of "briefing out" particular tasks to selected experts, usually barristers.[32] The output

of the Queensland Commission is limited by the fact that only one of its members enjoys full-time appointment.

Before 1969, the work of law reform in South Australia was generally carried out by unofficial voluntary bodies. In 1967 the then government expressed reservations about the appointment of permanent law reform bodies. However, a change of government produced the establishment, in 1969, not by legislation but by Proclamation, of the Law Reform Committee of South Australia.[33] The committee comprises presently eight members, of whom four are judges, three, legal practitioners and one an academic lawyer. Alone of the States, South Australia has no statutory commission. The Committee has no right to have its reports tabled in the Parliament. In one case, a report delivered to the State Attorney-General has never been made public.

Consistent with the procedures preferred in South Australia, a specific committee was established in November 1971 to make recommendations in relation to the criminal law of the State. This is the South Australian Criminal Law and Penal Methods Reform Committee which has now completed its programme and will, presumably, expire. All members of the committee were part-time, the Chairman being a judge.

A Law Reform Committee was established in Western Australia in 1967 pursuant to Executive decision. The committee members, numbering three, were part-time, one each a representati of the Law Society, the Law School and the Crown Law Office. Reports were confidential to the Minister. This non-statutory arrangement was altered by the passage of the *Law Reform Commission Act* 1972. The new Commission was to comprise the same three members drawn from the same sources. The Commission's duty, in examining a law, is to ascertain and report whether it :

(a) is obsolete, unnecessary, incomplete or otherwise defective;

(b) ought to be changed so as to accord with modern conditions;

(c) contains anomalies; or

(d) ought to be simplifed, consolidated, codified, repealed or revised.[34]

Victoria, which had the Chief Justice's Committee, already described, from 1944, also had a Parliamentary Committee, the Statute Law Revision Committee, which traces its precursors back to 1916.[35] However, the first establishment of an independent statutory office did not come until 1973 when the Victorian Parliament passed the *Law Reform Act*.[36] This Act establishes the office of a Law Reform Commissioner, a single, full-time officer assisted by a part-time Council which includes laymen. The first Commissioner was a retired Supreme Court judge who had formerly sat as Chairman of the Chief Justice's Committee. The second Commissioner, recently appointed, is the retired Chief Justice of Papua New Guinea, Sir John Minogue.

Tasmania was the last State to establish a Law Reform Commission. The pattern of the other States was followed. A committee, akin to the Western Australian Committee, had been established on a part-time basis in 1941. Its specific warrant was to :

"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".[37]

The committee was reconsituted in October 1969 under a Supreme Court judge as Chairman but with other persons appointed by the Attorney-General for specific projects. In 1974 this committee too was converted into a statutory commission. Its Chairman is a judicial officer and its members include academic and professional lawyers but also, uniquely, lay members.

The Commonwealth's Territories, despite their unique features and small populations, have not escaped the law reform boom. In May 1970 the Commonwealth Attorney-General, Mr. Hughes, announced the decision to establish a law reform commission for the Capital Territory.[38] It was perceived as a body that could assist materially "in the reform of those areas

of the law that do not involve significant policy".[39] In this, it was to supplement the work of government departments. The *Law Reform Commission Ordinance* 1971 was duly proclaimed and the first members appointed in August 1971. Six items were referred to the Commission whose function was declared to be, within references given to it, to :

> (a) examine critically the law in force in the Territory with respect to the matters mentioned in the reference; and
>
> (b) report to the Attorney-General its consideration of the law and make any recommendations with respect to the reform of that law, whether by way of amendment or the making of new laws, that it considers to be desirable.[40]

Great hopes were entertained that the Capital Territory Commission, being properly funded by the Commonwealth and because of the distinction of its members, would provide model laws, useful for the whole development of the law throughout Australia, with wider application beyond the Territory.[41] However, the Commission never really secured adequate funding. Its members were part-time and its reports have had indifferent attention from successive Governments, preoccupied apparently with wider issues. Following the establishment of the national Commission, with specific Territorial competence,[42] and the completion of the programme initially given to it in 1971, the Australian Capital Territory Law Reform Commission expired on 30 September 1976 upon the completion, by all Members, of their commissions.

In the Northern Territory, where no law reform body has e been established by Executive or Legislative act, a Law Review Committee was set up on the initiative of local judges and legal practitioners in 1977. The formation of the committee had the support of the then Cabinet Minister for Law. A constitution of the committee has been approved by it and already a consultative paper on *Tribal Marriages* has been produced and distributed. Without the allocation of any public funds and without full-time research, to say nothing of full-time members, the potential output of the committee is necessarily small.

THE AUSTRALIAN LAW REFORM COMMISSION

Establishment of the Federal Commission

With the exception of the Northern Territory Committee, the Commonwealth's Law Reform Commission is the last law reform agency to be established in Australia.

Calls for the establishment of a national Law Commission in Australia preceeded even the establishment of the Law Commissions of the United Kingdom. In 1957, the then Chief Justice of Australia, Sir Owen Dixon, gave the clue as to how it should be done :

> "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 onstitutional 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 of the 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?"[43]

In 1964, before the moves to establish separate State agencies got under way, Mr. J.R. Kerr (as he then was) took up the call :

> "Probably it would be too expensive for each State to have separate and properly staffed law reform commissions but all the States and the Commonwealth together could provide a very sound organisation to investigate problems of law reform on a full-time basis".[44]

Demands of this kind were made with increasing frequency and were not fully damped down by the rapid expansion in State law reform committees and commissions which occurred in the decade after 1965. Indeed, the very proliferation of State bodies in Australia led some writers to doubt the wisdom of dividing the available resources, talents and enthusiasm in this way. Sir Anthony Mason, writing in 1971 (by which time most of the State bodies had been established) put it this way :

> "It is debateable whether this country should have or can afford to have seven law commissions, one in association with each government and legislature, State and Federal. After all, the United Kingdom manages with two, the English and Scots. Why should we contemplate the luxury, or more accurately perhaps, the penury of seven? For it may transpire that the price to be paid for seven is the inadequate establishment of at least some of that number. It may be that the national interest would be better served by the establishment as an independent corporation of a national law commission or, as has recently been suggested, a national institute of law reform than by a further proliferation of individual commissions." [45]

In July 1973 the Commonwealth Attorney-General proposed to the Standing Committee of Attorneys-General of the Commonwealth and States in Perth that a national commission should be established in which the States would "participate". Some States baulked at the notion of "participation". Although a model for "participation" was provided in the Criminology Research Council established under the *Criminology Research Act* 1971 and although many outside politics saw the advantage of a properly funded, single, national law reform body, the notion was not accepted by the States. Jealous of their own areas of legislative competence (then under pressure from a new Commonwealth Government with expansionist views concerning federal activity) some of the States insisted on the retention

of their own State law reform agencies. "Co-operation" was one thing. "Participation", so it seemed, was another. It was in this way that the separate Commonwealth Commission came to be established as an authority only of the Commonwealth Parliament with functions, save in one matter, limited to the laws in respect of which the Commonwealth Parliament has competence under the Australian Constitution.

Functions and Organisation

The *Law Reform Commission Act* 1973[46] was assented to on 20 December 1973 and commenced on 1 January 1975. It established a body with the confusing title of "The Law Reform Commission", confusing because the definite article claims a competence which, in recent negotiations, the States had been at pains to deny. To distinguish it from State counterparts, and despite the limitations of its authority, the Commission has become known as "The Australian Law Reform Commission". In describing it as such, it is important to remember the constitutional limits of its statutory functions.

The charter of the Commission is set out in s.6 of the Act.

> "The functions of the Commission are, in pursuance of references to the Commission made by the Attorney-General, whether at the suggestion of the Commission or otherwise -
>
> (a) To review laws to which this Act applies with a view to the systematic development and reform of the law, including, in particular -
>
> (i) the modernisation of the law by bringing it into accord with current conditions;
>
> (ii) the elimination of defects in the law;
>
> (iii) the simplification of the law; and
>
> (iv) the adoption of new or more effective methods for the administration of the law and the dispensation of justice;
>
> (b) to consider proposals for the making of laws to which this Act applies;

(c) to consider proposals relating to -

(i) the consolidation of laws to which this Act applies; or

(ii) the repeal of laws to which this Act applies that are obsolete or unnecessary; and

(d) to consider proposals for uniformity between laws of the Territories and laws of the States,

and to make reports to the Attorney-General arising out of such review or consideration and, in such reports, to make such recommendations as the Commission thinks fit."[46]

The obligation to "consider proposals for uniformity" set out in para. (d) is the only statutory function which takes the Commission beyond the functions of a purely Commonwealth advisory body.

The *Law Reform Commission Act* 1973 has several features, unusual by the standards of the State and Territory bodies which preceded it. Whilst allowing for judicial, legal profession and legal academic appointments, the Act contemplates membership of the Commission going beyond lawyers to others who, by reason of "special qualifications, training or experience", are "suitable for appointment to the Commission".[47] One such person has been appointed, namely an Associate Professor in Criminology. In Canada, members of the equivalent national commission have included a Professor of Sociology, who proved his special worth by challenging many of the received doctrines of institutional law reform.[48]

Also unique is the provision requiring the Commission in the performance of its functions to review laws and consider proposals with a view to ensuring that such laws and proposals do not trespass unduly on personal rights and liberties, nor unduly make rights and liberties dependent upon administrative rather than judicial decisions.[49] There is also an unusual obligation, as far as practicable, to ensure that proposals made are "consistent with the Articles of the International Covenant on Civil and Political Rights".[50] As events have shown, this is not a pious utterance but a statutory duty and one which the

Commission takes seriously.[51]

The foregoing unusual provisions were accepted during the passage of the Bill through Parliament. At the same time, the government accepted an amendment contemplating the right of the Commission to make suggestions concerning the references that could be made to the Commission.[52] The Commission has made a number of suggestions for its programme to successive Attorneys-General. Some suggestions are still under consideration Only in one case was a suggestion rejected, but even then, a later Attorney-General was persuaded to the merits of the suggestion and duly gave the reference.[53] Of course, some important items in the Commission's programme originate in the government of the day. One major reference was the subject of an election promise.[54] Others, though conceived during a former administration, were embraced following a change of government and given by the new Attorney-General.[55]

From the point of view of machinery provisions, the Act is sparse. Proposals that the Commission should have compulsive powers akin to those of a Royal Commission were deleted from the Bill. Instead, it is provided simply that the Commission "has power to do all things necessary or convenient to be done for or in connection with the performance of its function". The Commission has not been inhibited so far by the absence of specific sanctions in its statute.

Two machinery provisions that have proved of particular use should be mentioned. The first is the power of the Chairman, with the approval of the Attorney-General, to "engage persons having suitable qualifications and experience as consultants to the Commission".[56] The successive reports,[57] including the *Annual Reports*,[58] bear witness to the very considerable use made of consultants, most of whom receive no financial reward for their services but are nevertheless prepared to make much time available to the Commissioners in the hope of contributing to a project of national law reform.

Section 27 of the Act empowers the Chairman of the

Commission to constitute a Division of not less than three members for the purpose of particular references. Such a Division is, for the purpose of the reference in respect of which it is constituted and for the purpose of making a report and recommendations, deemed to be the Commission.[59] The Commission has in this way utilised its full-time and part-time members economically, husbanding the resources available to it to best effect in the numerous references which are simultaneously under study.[60] No other Commission in Australia enjoys this facility. It has permitted the Australian Commission to avoid the disbandonment of part-time membership which was thought inevitable in the Canadian national commission. Part-time members play a vigorous and active part in the life of the Australian Commission. They connect the Commission to legal communities especially in different parts of the country. They bring a background of the differing laws of the various States and Territories of Australia. They give the Commission a presence, however small, in numerous centres throughout the country. They enable the Commission to harness the talents and special interests of persons of high calibre who would not otherwise be available for full-time appointment.

The first appointments to the Australian Commission have followed orthodox lines, with the one exception mentioned. Of the first full-time Commissioners, apart from the Chairman, one was a barrister, one a solicitor and one a legal academic. The expertise of the part-time members range from a background in government service, university administration and legal scholarship, legal practice, legal academic life and legislative drafting. There are currently eleven Commissioners, of whom four only, including the Chairman, are full-time. The Commission is established in Sydney, not in the Federal Capital, Canberra. It has a staff of 19 of whom eight, including the Secretary, are engaged in legal research, one is a librarian, and the balance provides stenographic and other support. The list of staff positions which the Commission is permitted to fill, was altered, on its suggestion, to include two positions for legislative draftsmen. These positions have not been filled because of current restraints on recruitment.

Attention to Proposals for Reform

The Commission has had to improvise in order to fulfil its commitment to accompany its reports with appropriate drafts of legislation.[61] In all reports delivered so far, draft legislation for a Commonwealth Act or a Territory Ordinance has been annexed to the report. The experience of law reform bodies in Australia and overseas teaches that proposals have a greater chance of being enacted if accompanied by draft legislation.[62] One of the problems which bedevilled the Australian Capital Territory Law Reform Commission was the absence of a drafting facility. The Commission has so far delivered eight reports. Of these, five include substantive proposals for reform and three are "Annual Reports". Of the five substantive reports, two were tabled in the closing weeks of the life of the 30th Commonwealth Parliament, before its dissolution on 10 November 1977. Of the remaining three reports, one has been substantially adopted[63] and the proposals contained in it have passed, with minor exceptions, into law.[64] The other two reports were accepted by successive governments and in each case the substance of proposals was introduced in the form of a Bill.[65] In each case, the dissolution of Parliament saw the expiry of the Bill. In the case of the Commission's report on *Complaints Against Police*[66] a request was made, following a change of government, that the Commission should reconsider its proposals to see whether a scheme proposed for a single national force of the Commonwealth's police officers was suitable for separate Territorial and Commonwealth police units. A report in discharge of this supplementary reference will be tabled in the 31st Parliament.[67] The Criminal Investigation Bill 1977, with some variations, adopted the recommendations of the Commission's other report.[68] It was, as the Attorney-General said in introducing it "a major measure of reform".[69]

Even the *Annual Reports* of the Commission[70] have not been overlooked by Parliament. These reports called attention to certain recurrent problems that confront institutional law reform in Australia. In summary, these are three. First, the peculiar and special difficulties of reforming the law in a federation, where responsibility for legal change is divided between the Commonwealth and the various States and Territories.[71] Secondly, the unexplained delays, log jams and apathetic indifference by legislatures and the

Executive to reports once delivered. The various law reform statutes of the Commonwealth and the States that have been mentioned devote attention to the processes of institutional law reform from the stage before a reference is made or a project commenced until the stage where a report is delivered and, in most cases, tabled in Parliament. But the statutes are uniformly silent as to what happens after this. The need for Parliamentary and Party machinery to scrutinise this problem has been called to attention.[72] Thirdly, the *Annual Reports* refer to the need for a new mechanism to collect and facilitate the retrieval of the numerous suggestions that are made in many quarters for the improvement in the law. At the moment, all too often, suggestions are not made because of the conviction that there is no utility in making the suggestion. Judges frequently despair of the legislative and governmental indifference to their protests about the inadequacy of this law or the injustice of that.[73] In the hurried and often secret preparation of legislation, whether such complaints as are made are included in changes in the law, depends quite often on the vicissitudes of the memory and opportunities for reading of particular departmental officers and hard-pressed Parliamentary Counsel. The system bears all the hallmarks of the English love of the "inspired amateur" and distrust of professionalism.

Now even these issues have been taken under Parliamentary study. The Senate Standing Committee on Constitution and Legal Affairs in the 30th Parliament received a reference from the Senate in the following terms :

"To inquire into :

(a) Methods of ensuring that proposals for law reform by the (Australian) Law Reform Commission are implemented or are otherwise processed;

(b) the adequacy of existing machinery for the collection and assessment of proposals for law reform put forward by judges, commissions, committees and organisations or individuals; and

(c) the effectiveness of existing machinery for co-ordination of the work of the various law reform agencies in Australia."[74]

Although not discharged by the time of the dissolution of the 30th Parliament, it is unlikely that the next Parliament will fail to take up this examination, critical for the future effectiveness of institutionalised law reform in this country. Therefore, if law reform is a matter of "new laws for old"[75] and it is apt to consider the effectiveness of law reform bodies in terms of the "legislative pay-off", the new Australian Law Reform Commission is not doing too badly.[76] By identifying the problems of indifference to reports and the "peril" of the pigeon-hole and by asserting that it will "monitor its" performance by the actual reforms it can assist Parliament to achieve"[77] the Australian Commission has adopted an avowedly "practical" approach to the fulfilment of its statutory role. This may not meet with everybody's approval. There are alternative interpretations of law reform, as we shall see. But by its own standards, and given the controversial matters which successive governments have referred to it, the Commission is enjoying greater attention from Government and Parliament than is normal in most of the equivalent Australian bodies.[78] Time will tell whether the Commission's standards are appropriate and whether its command of Parliamentary and Executiv attention can be sustained.

Beyond "lawyers' law"

I have said that the references before the Commission have been "controversial" ones. The original concept of law reform commissions involved the avoidance of matters of high policy.[79] Such matters were appropriately left to elected Parliaments and responsible Governments, not to external advisory and unelected bodies who might harrass Parliament with its views and embarrass Ministries with unwelcomed opinions.[80] Most State law reform agencies have avoided the pitfalls of policy pregnant issues. In one case, the Victorian Chief Justice's Committee actually refused a reference from the State Attorney-General concerning abortion law reform.[81] Other bodies, not in a position to reject references, have simply not received them. Mr. Hughes, explaining the establishment of the

Australian Capital Territory Commission, expressed the view of the Standing Committee of Attorneys-General that law reform and similar bodies could materially assist "in the reform of those areas of the law *that do not involve significant policy*".[82]

Increasingly of late, and uniformly in the case of the Australian Commission, institutions of law reform have acquired tasks, the resolution of which inevitably involve the consideration of matters of policy, beyond mere "lawyers' law", whatever that expression may mean.[83]

A scrutiny of references currently before State law reform bodies reveals the New South Wales Commission at work on a review of the organisation, functions and discipline of the legal profession; the South Australia Committee reporting on the introduction of class actions and the legal implications of solar energy; the Tasmanian Law Reform Commission reporting on various aspects of discimination on the grounds of sex; the Western Australian Commission at working paper stage on whether privilege should be extended to journalists, to protect their sources and so on. Not all of the references to State agencies are of this order. Indeed the list is not typical of the references given to State bodies, the majority of which relate to more technical and less controversial subjects. The point for present purposes is that governments in Australia are showing an increasing preparedness to remit the investigation of issues of policy to independent law reform bodies.

What is atypical in the case of State Commissions has been entirely typical in the case of the Australian Commission. A change of government has made absolutely no difference. The Labor Administration referred to the Commission an inquiry into how complaints against police should be handled[84] and how the whole process of criminal investigation should be restructured. The preamble in the terms of reference called attention to the commitment of the government to bring Australian law and practice into conformity with the standards laid down in the International Covenant on Civil and Political Rights and the policy of the government :

> "to provide for human rights and civil liberties and the need to maintain a proper balance between protection for individual rights and liberties on the one hand and the community's need for practical and effective law enforcement on the other".[85]

The references received from the present Government have ranged from a review of privacy laws, defamation law, insurance contracts and insolvency procedures to the laws governing standing to sue in federal courts and class actions, the rules that should govern the performance of human tissue transplantation and the consideration of Aboriginal customary law against the background of the Australian legal system. Each one of these references has important implications for the policy of the law. Each raises squarely the standards which should guide a law reform body. Each commits to the Law Reform Commission matters which, in former times, would almost certainly have been determined in the Party and departmental machinery of government. What issues are raised when law reform agencies receive references of this kind?

WHY REFORM?

Continuity and Change

The word "reform" is a word of approbation. In history it has been used to describe the movements which restored peace, renewed the religious order and renovated the system of Parliamentary representation. In the English language, the word is almost universally used to describe an advance, an improvement, not just a change : a change for the better.[86] That is why everybody in his right senses is in favour of "reform". Change, we may oppose, particularly change for the sake of change. But "reform" is by definition desirable because we all desire improvement. What is an improvement in the law, and in a particular case, may be a matter of controversy, Whether a particular proposal is worthy of the name "reform" may be a matter of dispute.

But "reform" itself attracts almost universal admiration and support. The only doubters are those who see the injustices of the law and the problems of society as so daunting that they demand a revolutionary solution : one which entirely throws over the established order and starts afresh on a new page.

In a reasonably prosperous and quietly governed country such as Australia, calls for "revolution" do come. But they are infrequent and would not appear to command significant popular support. Therefore, it is to "reform" of the legal system that those who seek its practical improvement, in day-to-day application, must look. Speaking in the debate on the *First Reform Bill* Macauley gives us the clue which the etymology of the English word already suggests. "Reform" he urged "that you may preserve". "Reform" implies some degree of preservation or conservation of the subject matter of the reform exercise. What is produced at the end of the day is re-formed. It may well be changed, with a view to improvement. But the product is designed to fit within the order that is being "reformed", the latter being modified, developed and adapted to new times, new needs, new circumstances.

All societies are submitted to pressures for change, including legal change. The mere passage of time and the interaction on events of succeeding generations, with new ideas, ensures that this will ever be so. Just now, the pressures for change are very considerable, including in Australia. Science and technology present many challenges to laws which were developed in times gone by.[88] Indeed, there are some who assert that science is the greatest force for law reform.[89] Whether this is true or not, science, technology and the changes they bring to society frequently require the radical reconsideration of established legal rules. Two illustrations will suffice. One of the most recent reports of the Australian Law Reform Commission concerns transplantation of organs and tissues.[90] Developments of surgical techniques of this kind require the fundamental re-examination of many rules of law, including the rule that surgery should be performed for the benefit of the

recipient only,[91] the rules governing descendants' property rights in circumstances of artificial insemination, the rights to and limitations on the use of aborted foetuses and so on. A fundamental question raised concerned the definition of "death". Once the artificial respiration ventilator was invented, the common sense definition of death, in terms of circulation of the blood, was no longer of universal validity.[92]

These are dramatic instances but not atypical. The development of computing has revolutionised, in the space of fifteen years, the supply and distribution of information in our society. But information can include highly personal material, to which society would currently attach values of privacy. Computers can store vastly increased amounts of information and retrieve them much more quickly and at far lower cost than manual filing systems. Furthermore, they can integrate data supplied for differing purposes. They are also susceptible to centralised control and often produce their material in a form that is unintelligible, except to the trained expert.[93] The development of this resource and its rapid proliferation throughout our society poses many new problems for the legal system. These include the rules that should govern the admission into evidence of information in computerised form, the copyright of computer programmes, the development of the criminal law adequately to cope with theft by the use of computers and, relevantly to the Law Reform Commission, the protection of personal information stored in computers. If nothing is done to adjust the legal system to the scientific developments I have mentioned, things will not just remain the same. Inconveniences and sometimes perceived injustices will occur because old rules of law have become irrelevant or positively obstructive or because situations have arisen affecting members of society, upon which current laws are perfectly silent.

The law is, necessarily, a force for stability, conservation and predictability in society. The very formal procedures through which a rule must emerge, whether from the legislative, executive or judicial branches of government, tends to guarantee laws a certain durability. Once a law is achieved,

are numerous forces which tend to obstruct change, including even change "for the better". These forces include inertia, the desire for stability, legitimacy and predictability in legal rules.[94]

> "The notion of law is a static one. I do not mean thereby that laws have not changed and will not or ought not to change. But I wish to affirm that it is in their nature to endure and not in their nature to change".[95]

Having acknowledged this important characteristic of law, it is important, equally, to acknowledge the interaction that exists between the forces of continuity and the forces of change. Scientific developments have been mentioned, but there are others. They include keeping the legal system abreast of (or helping it to catch up to) changing social circumstances and changing values, including moral values.[96] In some cases little more is done than to bring normative rules into line with actual practices.[97] In other cases the reform of the law may mould and hasten community attitudes. Lord Devlin has instanced the reform of capital punishment and homosexual law reform as examples in point.[98] These cases he took to prove that, whilst the law is the "gatekeeper of the status quo" in society and acts as a valve, it does not mindlessly oppose change. It may at first resist but if the idea of reform is accepted in the battle of ideas, the law submits and becomes the servant of the new idea. It may even promote its acceptance and observance in society.

These things can therefore be said about "reform" of the law in societies such as ours. They explain why it has been thought appropriate to establish institutions such as law reform commissions to assist in the process of "reform". Three considerations make "reform" an attractive concept, almost by definition. The first is that the process implies the conservation of what is good in the existing order and the moulding of that which is proposed as a "reform" so that it will fit comfortably into the present state of things. The role of the law and of legal rules as providing a measure of certainty in life, is not overlooked. Change for the sake of change is rejected.[99] The fear that anarchy is loosed upon the world[100] is mollified. Reform is not anarchy.

The second reason why "reform" is an attractive word is to be discovered in the antithetical notion, which is inherent in it, that there will be some action, some movement forward and the "production of new things".[101] There is a general recognition of the fact that "times are changing". Dissatisfaction with lawyers and the legal system is endemic. Tolerance to change, particularly if it is not too frequent and too disconcerting, is therefore general. Public acceptance of this need for movement and change is now said to be "widespread".

The third source of support comes in the standards by which the activity of "reform" is to be measured. To "reform" something implies improvement of it. It implies changing it "for the better".[103] Now, views will differ about what is an improvement. Many express their standards in terms of a concern with "justice"[104] or a "hatred of injustice".[105] Whatever the standard used, the basic endeavour of law reform, in practical terms, can be simply stated. It involves the three elements that have been identified. First, the proposed "reform" must fit, without anarchy, into the system that is the subject of reform. Secondly, it will involve, generally at least, action, movement, advance. Thirdly, the "reform" will seek to improve things. Mere change does not deserve the name "reform". That word is reserved to the product of stability and change which tends to maximise, or at least improve, the actual performance of the legal system.

According to What Values?

To some extent the statutory charter of a law reform institution states the values which should be pursued. Typically these include "modernisation of the law", "elimination of defects", "simplification", "adoption of new or more effective methods" of administering law and justice, "repeal of obsolete or unnecessary laws" and so on. However, such statutory language gives little but general guidance for those set upon the path of "reform". The position of Royal Commissioners, committees of inquiry, departmental officers, Parliamentary Counsel and even judges faced with a new, unique problem is much the same. The answers proffered may be expressed in terms of what is considered to be "fair" or "just"[106] or "rational and

"supportable".[107] It is rare to find scrutiny of the standards of reform going beyond categories of indeterminate reference such as these.

In the day-to-day operation of institutional law reform, whether in a law commission or a Department of State, ultimate decisions are usually made by a limited number of experienced and highly educated persons. Generally those decisions follow a great deal of work by many others at a lower level. Responsibility is accepted, especially in legislative change, by a relatively small number of identifiable individuals. Their attitudes to the role of the law in society and to the standards by which it should be transformed and updated inevitably leave their mark on the law as it emerges to govern people's conduct in society.

Increasingly, of late, there has been a demand that values should be spelt out. The reasons for this call vary. The present contentment with generalities is criticised as "ad hoc, impressionistic, casual".[108] Without a "theory" and without a clear perception of some fundamental value or values, law reform may be nothing more than mere "hobby horsing"[109] or "tinkering with the superstructure"[110] of the legal system. If that is all it is, it will fail to question the validity of the settled principles and assumptions on which the legal order rests.

Whatever may be the position of governments, in the secret preparation of legislation (including reform legislation) one apparent reason for utilising a law reform body is to procure the open discussion of priorities and values in law reform so that they will be the subject of scrutiny and public debate.[111] Yet, when it gets beyond the pursuit of general values such as the promotion of fairness or the removal of anomalies, the clarification of what was unclear or the achievemer of "justice", law reform bodies, like judges and legislators generally fail to spell out their "fundamental values". They do not state these values or, if they attempt to do so they do it in ways that are generally inconclusive and vague.[112] Numerous "sub-values" may be stated, as indeed they

are (to some extent) in the statutory charters. Geoffrey Sawer, for example, has suggested four : the achievement of intelligibility, clarity and simplicity; the saving of costs; the appropriateness to contemporary needs and compatibility with contemporary society and its views and sense of justice.[113] M.A. Waldron also suggests a number of criteria including service of the needs of the community, clarity and accessibility to the layman, the meaningfulness of rules and so on.[114] The Law Reform Commission of Canada in its paper on the criminal law, *Towards a Codification*,[115] articulated certain features which it proposed for Canadian criminal law :

> "It ought to be flexible ... avoiding hardships ... reasonably predictable ...; accessible so that it may be known and understood ... It ought to come to grips with the real problems and genuine concerns to be a dynamic force for progress".[116]

But attempts to state these values, however commendable, inevitably attract critical attention. They are described as a "collection of vague and superficially innocent statements" behind which lies "a wealth of undisclosed and undiscussed assumptions about the nature of Canadian society and democratic society in general as it is and as it should be".[117] Some of this criticism may be directed at the specific recommendations made. But the call for the flushing out of hidden assumptions and undisclosed premises is an entirely proper one. It becomes even more justifiable when, as in Australia, references to institutional law reform bodies come to include matters with a significant social content. It is simply not possible to answer a reference on whether Aboriginal customary laws should be recognised in some way in the Australian legal system[118] without first making some fairly important decisions about the nature of "law", particularly "customary law" and its role in modern Australian society. It is just not possible to answer a reference on standing to sue in federal jurisdiction and to say whether a private citizen or taxpayer should, without more, have "standing" to challenge an alleged breach of the Australian Constitution, without some notion of the purposes of courts in our society, now and in the future.[119] It is not feasible to draw a new law governing the

treatment of insolvent persons without first discovering certain economic verities that go without question in our kind of economy and considering the impact of competing claims put forward to protect the position of honest debtors and hard pressed creditors.[120] Nor is it feasible to draw a uniform defamation law for Australia without considering the competition between the values of free speech and a free press, on the one hand, and individual honour, reputation and privacy, on the other.[121] The list extends to every reference of the Australian Law Reform Commission. Even the most innocuous looking law reform measure will usually contain social or economic considerations of significance.[122] It is far too simplistic to say that social policy can be avoided, let alone that it should.

The difficulty that then arises is getting any agreement upon the fundamental values beyond the "sub-values" identified by statute or in scholarly works. The confidence in the Benthamite principle of utility is shared by some but fewer nowadays than was the case when modern era of law reform began last century.[123] Nor do the other attempts to state a universal principle secure unanimous endorsement. Whether expressed in terms of maximising social interests[124] or searching for the maximum allocation of resources,[125] seeking to promote "the fullest realisation of human powers" or "reasoned harmony" based on "human nature itself",[126] none of these formulae leave us fully satisfied. Certainly none is embraced by the practical individuals who must do the day-to-day work of "reform".[127]

A common attempt to seek an acceptable "fundamental value" (and one relevant to the methodology of institutional reform) is expressed in terms of what is acceptable to this or that society, at its present stage of development or in the foreseeable future. This notion is relevant to law reform procedures because, if the views of society are the touchstone by which law reform is to be judged acceptable or not, certain consequences flow for the methods of consultation necessary in designing reformed laws. But even this is not good enough, as Lord Diplock illustrated, in cases where the reform of the law was in advance of, and itself in part instrumental in, the

reform of social attitudes.[128] William Morison has put this point well :

> "Some conception of "society", like the conception of the State in national socialism, can operate and has historically operated to destroy the independence of individuals, institutions and groups within society as a whole. Totalitarianism in the name of Society is a horse of the same colour as totalitarianism in the name of the State, and the two kinds are likely to be in fact combined in any ideology we can recognise as totalitarian . . ."[129]

What, in practical terms, follows from this? Law reformers must be alive to the demand that they will at least recognise what they are about. All law reform involves the evaluation of competing social, economic and other claims. Given the individuals who make up law reform bodies, it is unlikely that there can ever be agreement on the "fundamental values" they are seeking to promote and advance, unless expressed in terms so vague and general as to be unhelpful or even meaningless. Appeals to "fairness" and "justice" or to "what will work" or "what is acceptable to society" may describe the psychology of individual reformers. It throws little light on the silent ultimate values that fuel their reform proposals.

The appeals to institutional reformers are constant and conflicting. On the one hand, they are urged to be bold and not to concern themselves too much with practicalities and costs, with whether a proposal will be acceptable to the government of the day and will pass into the actual law of the land.[130] On the other hand, there are many who question the value of costly institutional law reform machinery, unless practical benefits to the ordinary citizens accrue as a result of their labours. A recent New Zealand report asserted this view

> "It cannot be stressed too strongly that the only valid test of any law reform machinery is in terms of enacted legislation. A great body of well researched and well reasoned reports is of little more than academic value if for any reason they are not given effect to by legislation".[131]

This evaluation need not be accepted in its entirety. In particular, some reforms may be achieved without recourse to legislation.[132] Furthermore, others may take time to secure acceptance, particularly bold proposals for reform or those which would involve significant expenditure. But whatever the ultimate values sought, the needs for reform to diminish the anomalies and unfairness in the law are such that a reformer must not ignore the practicalities of life. In Australia, these include the constitutional limitations within which he must work, the general legal setting in which reforms must find a place and even economic considerations, costs of reform proposals and the dislocation or rearrangements they may involve.[133] If it is not appropriate to tailor reform suggestions to the attitudes of particular governments, it is surely not unwise at least to ask the question whether a given proposal is likely so to offend those specially interested in the reform measure as to ensure its repeated defeat, were it to be submitted for Parliamentary approval. The institutional framework within which only actual measures of reform can be secured ought not, in my view, to be ignored. The academic scholar may be bolder. He should lead the way.[134] If no-one heeds his critique and proposals, positive harm is rarely done. An institutional reformer will generally be more conscious of the practical limitations that are upon him. He will be aware of the difficulty of translating good ideas into laws that are reformed, not only in the letter but in operation too. Conscious of the needs and public demand for reform of the law and of the small resources devoted to funding reform, the institutional reformer cannot afford the luxury of too many missed opportunities.[135]

SOME PRACTICAL ISSUES : THE SEVEN DEADLY CONSTRAINTS

The Federal Setting

Just as responsibility for laws is distributed in the Australian federation, so responsibility for law reform is divided. Not only does this mean that we lack the advantage of prompt, uniform acceptance of reform ideas. We also work with the intellectual constraints which the division of powers imposes.[136] Unlike other federations, Australia has not yet developed routine machinery for securing and maintaining uniform laws.[137] For the reformer, this failure has practical consequences. First, the relatively small resources made available to institutional reform have often been devoted to duplicated effort on the same subjects, sometimes simultaneously.[138] Meanwhile, the traditional unifying forces in Australian law continue to suffer a decline.[139] Giving full weight to the advantages of experimentation and the dangers of blanket uniformity, there are nevertheless occasions where injustice, inconvenience and confusion are caused by differing laws within the federation.[140]

Most of the references given to the Australian Law Reform Commission raise the threshold point of whether it is better to proceed to reform by means of Commonwealth legislation based upon perceived Commonwealth power or, instead, to suggest Territorial or other legislation as a model, hoping that this will prove attractive in the States. In some cases our references have chartered the course. Where a reference calls specifically for a Territory law, the Commission is not empowered to go further.[141] Similarly, if the reference is limited in terms to a clear and narrow subject, plainly within the Commonwealth's responsibilities, a Commonwealth law will be suggested.[142] Unfortunately, many references blur this distinction or direct attention to matters upon which the Commonwealth has only partial power. What is then to be done?

This issue is a practical one and must constantly recur in law reform within a federation. It will present itself to State agencies, whenever their projects take them into an area in which the Commonwealth has enacted legislation. It is the constant companion of the Commonwealth's Commission. Take,

for example, the report on *Criminal Investigation*. A preliminary question arose as to whether the Commission could or should make recommendations imposing the reformed code of police investigation upon State police officers whenever they dealt with federal offenders. In the event, for a number of reasons,[143] the Commission decided to postpone consideration of the constitutional and practical difficulties inherent in this possibility. The code was therefore (with minor exceptions) attached to Commonwealth police officers only. In terms of practicalities, if the Criminal Investigation Bill 1977 had applied not only to Commonwealth Police but also to State Police investigating federal offences, and if this were a valid law of the Commonwealth, the pace of reform would *de facto* be forced, possibly at a price of disruption, confusion and animosity.

Like questions of policy confront the Commission in other references. The reference to review defamation laws is expressed in terms not only of the Commonwealth's powers in the Territories but also "in relation to other areas of Commonwealth responsibility, including radio and television".[144] But the Commonwealth's power to enact defamation laws (even confined to radio and television) is not absolutely clear and beyond argument, however likely it may appear.[145] It is even less certain (though not beyond argument) in respect of discipline of the printed media.[146] The points for present purposes are these : a law reform body confronting the divisions of constitutional power must first make a judgment, where the territory is relatively unexplored, as to the chances of supporting Commonwealth legislation, if this were adopted but then submitted to challenge. Secondly, it must consider the limitations which the use of Commonwealth power may impose, either in the scope of the legislation that can be enacted[147] or the way in which the machinery must be tailored to submit to one or other of the artificial limitations of our Constitution.[148] Although a Commonwealth law may effect perceived reforms and do so with a uniformity and speed not otherwise readily attainable the end result may be unsatisfactory from the overall point of view of reform of the law. Vital categories of conduct may have to be omitted because of the boundaries beyond which the Commonwealth has no constitutional power to legislate.[149]

Alternatively, the constitutional power may be ample but the approach dictated by, say, the doctrine of separation of power may impose artificial or second-best machinery to effect the reformer's will.[150] Limitations of this kind are not usually appreciated by reformers who are unhampered by the constraints of a federal constitution. They can look upon the law in an encyclopaedic fashion. The intellectual categories of times gone by present no straightjacket either of substance or procedure. It is not so in a federation. Of course, the reformer can ignore constitutional restraints. Perhaps on occasions he should do so and propose frank amendment of the Constitution, reference of powers or novel constitutional experiments.[151] Given the history of constitutional readjustment of this kind in Australia, most reformers feel obliged to work within the constraints of the Constitution as it is. Those constraints impose, in almost every reference to the Commonwealth Commission, decisions of significant policy concerning the distribution of legal powers in the Australian federation.[152]

Resources Devoted to Reform

The second constraint on the reformer is an endemic one. The funds devoted to institutional law reform in Australia are extremely small. They represent little more than ten cents per adult annually. A list, taken from annual reports, was included in a recent paper by the Chairman of the Western Australian Commission :[153]

Australian Law Reform Commission	Over $600,000
New South Wales Law Reform Commission	$270,000
Western Australian Law Reform Commission	$134,000
Queensland Law Reform Commission	$108,000
Victorian Law Reform Commissioner's Office	$ 52,000
Tasmanian Law Reform Commission	$ 47,000
South Australian Law Reform Committee	$ 16,000
N.T. Law Review Committee (Voluntary)	Nil
Victorian Chief Justice's Law Reform Committee (Voluntary)	Nil
Victorian Statute Law Revision Commission (Parliamentary)	Nil
	$1,227,000

The table needs explanation. For example it omits judicial salaries. It makes no allowance for non-institutional reform. It gives no credit for voluntary assistance, as by consultants. Some of the figures are now a little higher.[154] Making every allowance for these considerations, the amount expended on law reform is clearly small, divided and uneven.

Obviously, the quantity, speed and quality of law reform effort varies with the funds which society is prepared to devote to this activity. Nowhere is this more so than in the getting of empirical evidence. Much writing now recognises the wisdom of basing suggestions for reforms that will work upon a clear understanding of current laws and practices, social attitudes, and the practical costs and implications of various changes.[155] Gathering evidence of this kind takes time and is often labour-intensive and therefore costly.[156] Computerisation of information may eventually prove useful in law reform efforts, particularly with the rapid and inexpensive supply of essential social and economic statistics and other data.[157] For the present, research of this kind is all too often beyond the pocket of the Australian law reformer. He is forced to improvise and compromise. Occasionally, social surveys are conducted with the assistance of the media.[158] Legal and other experts are appointed as consultants, usually without fee, and contribute generously to the production of initial ideas, criticism of early drafts and working sessions considering draft legislation and the final form of the report.[159] In the variety of matters that have been referred to the Australian Commission, it has been essential to procure assistance of this kind. Nearly one hundred consultants have been appointed, including judges, medical experts, computer scientists, finance specialists, police and others relevant to the particular project in hand. Payment of a fee is exceptional, yet only two persons approached have refused honorary appointment of this kind. Necessarily, the calls that can fairly be made on honorary consultants are limited. Furthermore some useful people are just not in a financial or employment position to be able to offer free services Organisations may be even less ready to offer a government body free assistance.

References Given

The third constraint arises from the subjects chosen for reference to the law reformer. Some law reform bodies in Australia can initiate their own projects. Most cannot. A table illustrates the current position.[160]

Source	Statutory Body							
	A.L.R.C.	A.C.T. L.R.C.	N.S.W. L.R.C.	Q. L.R.C.	Tas. L.R.C.	Vic. L.R.C.	Vic. S.L.R.C.	W.A. L.R.C.
Reference from Attorney-General or Minister	x	x	x		x	x	x	x
The statutory body itself: — for consideration				x		x	x	
— for consideration, subject to Attorney-General's or Minister's approval	x	x		x	x			x
The public: — for Attorney-General's or Minister's approval	x	x		x				x

Views differ about the desirability of a law reform body having entire control of its own programme. Some see the control of government as a constraint on freedom[161] and an inhibition in the way of tackling the real causes of injustice and unfairness in the law. By the same token, law reform bodies are a relatively new development still finding their proper place in the established order of Responsible Government and Cabinet Government. Sir Robert Menzies once explained the inherent tension presented by creating independent bodies which have a right to the tabling, and therefore publication of, their reports.[162] He said that such bodies "fetter the choice of Parliament because [they] have a coercive influence on government and upon the elected representatives of the people".[163]

During the passage of the Law Reform Commission Bill 1973, an amendment was moved and accepted by which the Commission was empowered to suggest items for its programme.[164] This it has done, generally with success. In practical terms, about half of the Australian Commission's projects were conceived in the Commission and half in Government. The experience of other commissions suggests that, whatever the letter of the statute, consultation generally takes place between an Attorney-General and the Minister before references are given. The obligation to procure Ministerial support (or acquiesence) is an insurance against governmental and Parliamentary indifference

to a project and the possible consequent waste of significant public funds.

Consultation

The common feature of institutional law reform is the practice of consultation, usually after a tentative proposal is put forward, before a reform suggestion is finally made to the lawmakers. It is this which distinguishes institutional law reform from the preparation of most legislation in Australia (including governmental reforms)[165] and judicial law reform.[166] The reason for this procedure is easily seen. It lies in the need to identify problems, test suggestions against expert, lobby and other groups, invite public participation in the design of new laws[167] and allow time for reflection. The procedure is now being adopted by governments.[168] Apart from anything else, the procedure helps to elicit public opinion and to identify the values which the reformer is seeking to attain. Because law reform seeks an improvement in the law and because what is an "improvement" is a matter of controversy, it is important that the controversy should be as fully ventilated as possible before the report stage. Another practical reason has been suggested for taking this course. Not only will it tend to protect the reformer against the error of overlooking particular facts or important opinions. It will also make it less easy for lawmakers to overlook proposals that have been put through such a process.[169]

This much is not doubted. Debate arises in relation to how consultation should be carried on. Until recently, most law reform bodies have been content with the distribution of scholarly working papers to the interested audience. They are "available" to the public but not pressed upon it. Times are changing. New methods of consultation are being used. Both at a Commonwealth[170] and State[171] level in Australia public sittings, seminars and other procedures of consultation with the general public are becoming common. A call for similar procedures has been made in England.[172] Although the public response is not always encouraging[173] and although in a large country the procedure is expensive and exhausting[174] the public participation in law reform is manifestly desirable in

principle, particularly where the matters under reference are controversial. Working within the constraints of available funds, manpower and time, law reform bodies must develop new ways of addressing the various different audiences to whom they speak.[175] The modern means of communication must be enlisted to involve the affected community in the processes of law reform. Retreat to stereotyped, wordy and technical documents pays lip service to the theory of consultation. It runs the serious risk of overlooking the experience and opinion of those who will be affected by the reform proposal, if it is adopted.[176]

> "The truth is that there are no experts when it comes to reform. There are various complimentary skills and experience that are necessary to the reform process, and the important question is how and where you should use them in order to get the best return in actual results".[177]

Speed of Report

Sometimes a constraint of time is imposed upon a reformer by a deadline fixed in terms by the reference or arising out of circumstances. The first four reports of the Australian Commission were prepared to meet time limits of this kind, set out in the Attorney-General's terms of reference.[178] In every case the time limit fixed was met. The statutory warrant for this command was, to say the least, dubious.[179] Criticism of haste in law reform is a recurrent theme in scholarly writing on the subject. Haste, it is said, is the enemy of true law reform.[180] The need for patient and extended research is not always appreciated by Ministers and public servants who become accustomed to severe time constraints. Faced with limited funds and manpower and other references, meeting a deadline imposes priorities on the reformer. Inevitably, the time for reflection is limited and the extent of consultation must be tailored to meet the given programme. For all this, there may be good reason why governments in the future will fix limitations of time as a condition for referring matters to bodies outside their immediate direction and control.[181] One of the criticisms that has attached to governmental

inquiries in the past has been the slow pace of their reporting. Usually this can be ascribed to "nagging self doubts rather than sloth or conservatism".[182] Social conditions are changing rapidly. Events can overtake institutional law reform unless it can show an ability to deal promptly with pressing social problems. Some will say that the sacrifices in scholarship are too great and that law reform should confine itself to more fundamental reforms that require no such pressures of urgency. For the Australian Commission, the terms of reference given by successive Attorneys-General have tended to carry their own urgency either in the nature of the subject matter or in the request for prompt report. I should not like to see law reform, with its advantages of consultation and open debate, removed entirely from relevant work in areas requiring profound but also rapid change in the law.

Processing Law Reform Proposals. Ending the Log Jam.

The sixth constraint relates to the effectiveness of institutional law reform. Whereas a judge (subject to appeal) may himself effect reform and the Executive Government and Parliament may enact such proposals as they will, law reform bodies merely propose. Their statutes are uniformly silent upon what happens after a report is presented.[183] The result, all too frequently, is inaction upon reports, indifference to proposals or unexplained delays in giving consideration to suggestions for reform.[184] Sometimes this indifference is born of opposition. Law reform bodies, being unelected, have no right to the "carte blanche" acceptance of their proposals. The list of government follow-up to the reports of institutional law reform bodies in Australia discloses a serious log-jam of proposals not acted upon. Various excuses are given. They range from alleged lack of adequate Parliamentary time,[185] the confusion of multiple reports in complex and technical issues,[186] the indifference of politicians to reforms that do not "suit the interests of the government of the day and become part of its strategy",[187] a failure in communication of ideas on the part of law reformers,[188] an inability to attach draft legislation or indifference and obstruction on the part of the regular departmental bureaucracy.[189]

Whatever the cause, it is clear that the ultimate effectiveness of law reform proposals is generally outside the power of the law reform institution itself. It is also clear that indifference to proposals causes despondency on the part of reformers and those who encourage and help them. It is cold comfort to say that good ideas will triumph in the end.

Various ways have been tried to break the log jam and to ensure the consideration, at least, of law reform proposals. The publication of reports and their wide distribution, assured by Parliamentary tabling, promotes some debate Personal communication between Ministers, departmental officers and law reformers maintains a dialogue.[190] The commitment of government, and particularly of its Law Minister to the orderly processing of reports is vitally important. The litmus is the Minister's willingness to consider and facilitate the enactment into law of approved proposals.[191] Otherwise institutional law reform is little more than window dressing : a handy receptacle to which may be passed the embarrassing, boring or highly controversial subjects that must be dealt with "some day , but not just now." Occasionally, following a change of government or an unexpected break in the Parliamentary programme, ready-made law reform legislation is conveniently adopted to fill the Parliamentary gap.[192] The catalogue of impediments and the improvisations developed to overcome them illustrate just how chancy is the business of translating a proposal into the law of the land.

Suggestions have been made to ensure speedy passage of acceptable recommendations. In Australia, a Senate Committee is currently looking at these proposals. One idea, advanced by Sir Anthony Mason, a Justice of the High Court, envisages a limited delegation of legislative powers to law reform bodies. Subject to disallowance, in the manner of delegated legislation, law reform proposals, in some areas at least, could avoid the obligation of a full scale Parliamentary debate.[193] A like proposal is that Parliaments should enact laws in the broadest terms, leaving it to a law reform body to flesh out the law.[194] Another possibility is the establishment of Parliament and Party machinery to permit bipartisan consideration of some at

least of the proposals for reform.[195] At Westminster, a committee already gives some measures this consideration.[196] In some of the Canadian Provinces law reform reports have been referred to all party committees of the legislature.[197] In Australia, Commissioners of the Australian Commission have appeared before Party and Parliamentary Committees.[198]

Inevitably there will be objections to this assertion of a distinct Parliamentary role in considering law reform proposals. The Executive Government and the departmental officers may resist developments of this kind. In the end all that may be hoped for is a Parliamentary (and Party) mechanism that can remind the hard pressed Executive when, pre-occupied with the more diverting and headier business of government, it overlooks the obligations of law reform.

But Does It Work?

The seventh and last constraint is the effectiveness in operation of a reformed law. Institutional reformers, and legislators generally, tend to assume that laws, once passed, are self executing. Especially in circumstances of proliferating laws, this may not be so. Furthermore, the variable ways in which available sanctions and remedies are used in reform legislation may well determine the success of reform "on the ground". Law reformers and others proposing new laws should have a clear idea of the social purposes which the laws, and their sanctions and remedies, are designed to serve. There is no "correct" categorisation of purposes or objectives. The categorisation will be simply more or less useful.

One of the special projects which is under study in the Australian Commission is one designed to clarify the structure of sanctions and remedies used to effect desired changes in social conditions and behaviour.[199] In an age of increased law-making, it is obviously vital that law makers generally and law reformers in particular should fashion their draft laws with a view to using procedures available, within constitutional constraints, in such a way as to focus the impact of the law specifically on those whom it is planned to affect. It is also desirable that the operation of reformed laws, once passed,

should be the subject of study, to see whether the proposals work in precisely the way that was expected or planned. Frank experimentation in different parts of the one jurisdiction may not be acceptable. However, federal divisions permit differentiated experiments and may provide reformers with opportunities that would not be available in a unitary state. There has been insufficient study of the effect of reform measures, once enacted. The establishment of an Institute of Family Studies to review the actual operation of the reformed *Family Law Act* in Australia[200] may show the way for legislation in the future. It is probable that to the present statutory tasks of law reform bodies there will be added an obligation to monitor the effectiveness of their proposals by the day to day operation of the law, once passed.

CONCLUSION

Law reform is taking a new course in Australia. It has become a subject of some public interest and occasional public participation. These are hopeful signs. The history of institutional reform is a sobering one. As well, the reformer inevitably leaves many in his audience dissatisfied. Either he fails to achieve worthwhile, fundamental change, or he tinkers unreasonably disrupting things once advisedly settled. In Australia he works under many constraints, some of which have been outlined. The beginning of wisdom is a recognition of one's problems. For the law reformer in Australia, a catalogue of problems is never difficult to draw.

FOOTNOTES

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1. A recent example is the *Office of National Assessment Act* 1977 (Cth) which followed the report of the Royal Commission in Intelligence and Security.

2. A sample list is contained in the *Annual Report 1975* of the Law Reform Commission (Aust), A.L.R.C.3, 21. Commission reports are referred to by the Commission reference.

3. *e.g.* The *Family Law Act* 1975 (Cth) which was initiated, in part, by a committee of the Law Council of Australia.

4. A.L.R.C.3, 21.

5. Per Scarman L.J. (as he then was), *Farrell v. Alexander* [1976] 1 *Q.B.* 345, 371.

6. B. Shtein, "Law Reform - a Booming Industry" (1970) 2 *Australian Current Law Review* 18.

7. R.J. Ellicott, Speech to the Symposium and Law and Justice (1977) 2 *Cth. Record* 376.

8. *Law Reform Commission Act* 1973 (Cth) s.6(1).

9. (1957) 31 *A.L.J.* 340.

10. Lord Westbury cited in J.W. MacDonald, "The New York Law Revision Commission" (1965) 28 *Mod.L.Rev.* 1,2.

11. A.L.R.C.3, 5.

12. (1870-1) 2 *Votes and Proceedings of Parliament* (N.S.W.) 117; A.L.R.C.3, 3.

13. *Supreme Court Act* 1970 (N.S.W.).

14. Attorney-General Wrixon cited in J.M. Bennett, "Historica Trends in Australian Law Reform" (1969-70) 9 *West Aust. L.Rev.* 211, 215.

15. A.L.R.C.3, 3.

16. A.F. Mason, "Law Reform in Australia" (1971) 4 *Fed.L.Rev.* 197.

17. *cf.* C.A. Hughes,"Government Action and the Judicial Model".

18. Mason, 198.

19. K.C.T. Sutton, *The Pattern of Law Reform in Australia,* Brisbane, 1969, 3.

20. W.L. Morison, "Frames of Reference for Legal Ideas" (1975) 2 *Dalhousie L.J.* 1, 39.

21. (1969) 43 *A.L.J.* 526; A.L.R.C.3, 2.

22. Cited in E.C.F. Wade, "The Machinery of Law Reform" (196: 24 *Mod.L.Rev.* 3, 10.

23. A.L.R.C.3, 13, 20.

24. F.C. O'Brien, "The Victorian Chief Justice's Law Reform Committee" (1972) 3 *Melb.Uni.L.Rev.* 440.

25. *Ibid,* 472.

26. Wade, 10ff.

27. Glanville Williams, Presidential Address, "The Work of Criminal Law Reform" (1975) 13 *J.Soc.Public Teachers of Law* 183.

28. *Law Commissions Act* 1965 (G.B.), s.3(1). *Cf.* Lord Gardiner, "Some Aspects of Law Reform" [1969] *N.Z.L.J.* 171, 175.

29. D.G. Benjafield, "Methods of Law Reform", *Record of the Third Commonwealth and Empire Law Conference*, Sydney, 1965, 393, 395-6.

30. Law Reform Commission (N.S.W.) *Annual Report* 1976, 10. The Law Reform Commission (Aust) *Annual Report* 1977, A.L.R.C.8, 3.

31. *Law Reform Commission Act* 1968 (Qld).

32. A.L.R.C.3, 17.

33. Proclamation, South Australian Government *Gazette*, 19 September 1968, 853 (clause 3). D.St.L. Kelly, "The South Australian Law Reform Committee" (1967-70) 3 *Adel.L.Rev.* 481.

34. s.11.

35. A.L.R.C.3, 15.

36. A.L.R.C.3, 16 (Act No. 8484).

37. A.L.R.C.3, 20

38. *Cth. Parliamentary Debates (H of R)* Vol. 67, 1970, 2353-5 Mason, 202.

39. *Ibid.*

40. *Law Reform Commission Ordinance* 1971 (A.C.T.), s.12.

41. Mason, 211.

42. *Law Reform Commission Act* 1973 (Cth) s.6(1) and s.3 (Laws to which this Act applies).

43. (1957) 31 *A.L.J.* 342.

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

45. Mason, 212.

46. *Law Reform Commission Act* 1973 (Cth) s.6(1).

47. *Ibid*, s.12(1)(f).

48. Professor Hans Mohr.

49. *Law Reform Commission Act* 1973 (Cth) s.7(a).

50. *Ibid*, s.7(b).

51. The Law Reform Commission (Aust), *Alcohol, Drugs & Driving*, A.L.R.C.4, 1976, 109.

52. A.L.R.C.3, 27.

53. The reference on Standing to Sue in Federal Courts and Class Actions, A.L.R.C.8, 33ff.

54. The reference on Privacy Protection, the Law Reform Commission, *Annual Report*, 1976, A.L.R.C.5., 44.

55. Examples include the references on Drinking and Driving Laws (A.L.R.C.4), Organ Transplantation (A.L.R.C.7), Defamation and the supplementary reference on Complaints Against Police.

56. *Law Reform Commission Act* 1973 (Cth), s.23(1).

57. The Commission has now published eight reports. Apart from those already mentioned, others are *Complaints Against Police*, A.L.R.C.1., 1975, *Criminal Investigation*, A.L.R.C.2., 1975 and *Insolvency : The Regular Payment of Debts*, A.L.R.C.6, 1977. In all of these, particulars have included consultants appointed under the Act.

58. A.L.R.C.3, 38; A.L.R.C.5, 22; A.L.R.C.8, 17.

59. s.27(2) of the Act.

60. A.L.R.C.8, 12-14.

61. A.L.R.C.8, 5.

62. A.L.R.C.3, 34; A.L.R.C.8, 5.

63. *Motor Traffic (Alcohol and Drugs) Ordinance* 1977 (A.C.T.) based on A.L.R.C.4.

64. The major exception related to an interpretive provision. A.L.R.C.4, 138 [1977] *Reform* 46.

65. Australia Police Bill, 1975 (A.L.R.C.1); Criminal Investigation Bill 1977 (A.L.R.C.2).

66. A.L.R.C.8, 29.

67. *Complaints Against Police : Supplementary Report*, A.L.R.C. 1978.

68. The variations related to the adoption by the government of a minority opinion on one aspect of the report. A.L.R.C.2, 32ff; A.L.R.C.8, 26.

69. R.J. Ellicott, *Cth. Parliamentary Debates (H of R)*, 24 March 1977, 562.

70. A.L.R.C.8, 3.

71. A.L.R.C.5, 13; A.L.R.C.8, 1.

72. A.L.R.C.8, 2. *Cf.* R.J. Ellicott, Opening Speech, the Law Reform Commission (Aust), *Third Australian Law Reform Agencies Conference Record*, Canberra, 1976, 37.

73. Mr. Justice Fox cited A.L.R.C.5., 33. *Cf.* (1974) 48 *A.L.J.* 416. There are many illustrations of judicial despair, see Bowen C.J. in Eq. (as he then was) in *Deputy Commissioner of Taxation v. Roma Industries Pty. Ltd.* (1976) ref. Supreme Court of N.S.W, 29 March 1976, 76 A.T.C. 4113.

74. *Cth. Parliamentary Debates (Senate)* 21 April 1977, 887.

75. J. Barnes, "The Law Reform Commission of Canada" (1975) 2 *Dalhousie L.J.* 68.

76. *Loc cit.*

77. A.L.R.C.5, xiii; A.L.R.C.8, xi.

78. A.L.R.C.8, 2; *Cf.* A.L.R.C.5, 11 (Table).

79. N. Marsh, "Law Reform in the United Kingdom : A New Institutional Approach' (1971) 13 *Wm. & Mary Rev.* 263, 275.

80. R.G. Menzies cited in Mason, 209.

81. O'Brien, 450.

82. *Cth. Parliamentary Debates (H of R)* 19 May 1970, 2355.

83. K.W. Wedderbury, "Reflections on Law Reform", *The Listener*, 16 May 1965, 656.

84. *Complaints Against Police,* A.L.R.C.1., 1975.

85. A.L.R.C.2, *ix.*

86. L.M. Friedman, "Law Reform in Historical Perspective" (1968-69) 13 *St. Louis L.J.* 351; A.L.R.C.5, *xii.*

87. J. Beetz, "Reflections on Continuity and Change in Law Reform" (1972) 22 *Uni.Toronto L.J.* 129, 138.

88. C.G. Weeramantry,"The Law in Crisis", London, 1975, 249.

89. *Ibid,* citing Justice Frankfurter.

90. *Human Tissue Transplants,* A.L.R.C.7, 1977.

91. *Ibid,* 23f.

92. *Ibid,* 25, 52ff.

93. *Computers and Privacy,* London, 1975, Cmnd. 6353.

94. Beetz, 131.

95. George Ripert cited in Beetz, 132.

96. A.K. Turner, "Changing the Law" (1968-69) *N.Z.New L.Rev.* 404, 424.

97. H.A. Finlay, "Farewell to Affinity" (1975) 5 *Uni.Tas. L.Rev.* 18.

98. Lord Devlin, "Judges and Law Makers" (1976) 39 *Mod.L.Rev* 1. Compulsory use of seatbelts may be another case.

99. Turner, 424; Lord Mancroft, "Stop the Clock : We've Made Too Much Progress", *The Australian Director,* April 1976, 10.

100. W.B. Yates cited by Zelman Cowen, The Way We Live Now in *Prospects for Constitutional Democracy,*(ed. J.H. Hallowell) 1976, 20.

101. J.W. Mohr, "Law Reform and Social Change", Gibson Memorial Lecture, *mimeo,* Sep. 1975, 2.

102. J.M. Fraser, Speech to the Australian Legal Convention, (1977) 2 *Cth. Record* 863.

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

104. Beetz, 140.

105. Lord Gardiner cited in Ontario Law Reform Commission, 9th Annual Report 1975, para.47

106. Law Reform Commission (N.S.W.) *First Annual Report*, 1968

107. Law Reform Commission of Canada, *Fifth Annual Report*, 1976, 3.

108. G. Woodman, "A Basis for a Theory for Law Reform" (1975) 12 *Uni.Ghana L.J.* 1, 2.

109. (1976) 50 *A.L.J.* 259.

110. (1976) 126 *New L.J.* 1006.

111. Beetz, 140.

112. F.E. Dowrick, "Lawyers' Values for Law Reform" (1963) 79 *L.Q.R.* 556; *Cf.* H. Gray, "A Rationale of Law Reform", (1966-67) 2 *N.Z.Uni.L.Rev.* 162.

113. G. Sawer, "The Legal Theory of Law Reform" (1970) 20 *Uni.Toronto L.J.* 183, 188.

114. M.A. Waldron, "The Process of Law Reform : The New B.C. Companies Act" (1976) 10 *Uni.B.C.L.Rev.* 179, 197.

115. Study Paper (Ottawa, 1976).

116. *Ibid*, 2.

117. M.R. Goode, "Political Ideology of Criminal Process Law Reform" (1976) 54 *Can.Bar.Rev.* 653, 655.

118. A.L.R.C.8, 36; (1977) 51 *A.L.J.* 110.

119. A.L.R.C.8, 33f.

120. A.L.R.C.6, 6, 19.

121. A.L.R.C.8, 31f; *A.L.R.C. Discn.P.* Defamation - Options fc Reform, 1977 (No. 1); *Privacy and Publication - Proposals for Protection*, 1977 (No. 2).

122. Wedderburn, 656, Waldron, 192.

123. Woodman, 4; J.H. Farrar, "Law Reform Now - A Comparative View" (1976) 25 *I.C.L.Q.* 214.

124. Pound cited in Woodman, *ibid.*

125. J.N. Lyon, "Law Reform Needs Reform" (1974) 12 *Osgoode Hall L.J.* 421.

126. Lon Fuller cited in Morison, 23.

127. Even within the one Institution, the different individual may have quite different value systems, yet reach the same conclusion.

128. Lord Devlin.

129. Morison, 36-7.

130. C.W. Harders, "Getting Law Reform Proposals Enacted, *mimeo*, Paper for Law Reform Agencies Conference, 1976, 10. "My first inclination was to look to results, but I now doubt that that is the correct approach. A Commission should, I think, state its conclusions as it sees them"

131. New Zealand Department of Justice, *Report*, 1977, 7.

132. Mohr, 15. Proposal may on occasion be susceptible to administrative implementation. A.L.R.C.2 has been implemented, in part, in Customs procedures, without legislation.

133. A.L.R.C.6, 98 (Rejection of the election of creditors' remedies "in the present economic conditions").

134. A.L. Sheridan, "Law Teachers and Law Reform" (1976) 10 *Law Teacher* 89; Magarry, 698.

135. A.L.R.C.5, *xiii*; A.L.R.C.8, *xi*.

136. M.D. Kirby, "Uniform Law Reform : Will We Live to See It?" (1977) 8 *Sydney L.Rev.* 1.

137. A.L.R.C.3, 48f; A.L.R.C.5, 1ff.

138. Kirby, n.136, 4.

139. *Ibid.*

140. *Ibid*, 7.

141. *E.g.* A.L.R.C.4, *xi*; A.L.R.C.7, *v*.

142. A.L.R.C.1, *v*.

143. A.L.R.C.2, 8-9.

144. (1976) 50 *A.L.J.* 541; A.L.R.C.8, 31.

145. R. Miller, "The Commonwealth Broadcasting Power and Defamation by Radio or Television" (1971-2) 4 *Uni.Tas. L.Rev.* 70.

146. M.D. Kirby, "The Purest Treasure?" National Defamation law reform in Australia (1977) 8 *Fed.L.Rev.* 113, 134ff.

147. Family Law Council (Aust), *First Annual Report* 1977, paras. 43ff. (s.51(xxi), (xxii) Constitution).

148. Especially in respect of the exercise of Commonwealth judicial power. *Cf.* A.L.R.C.1., 55.

149. For example, the power of the Parliament with respect to insurance is limited by s.51(xiv) of the Constitution to "insurance, other than State insurance; also State insurance extending beyond the limits of the State concerned." The Law Reform Commission Issues P. 2 *Insurance Contracts*, 1977 2f.

150. A.L.R.C.1., 55f; A.L.R.C.2, 8f.

151. Kirby, n.146, 133f. G. Greenwood, "The Future of Australian Federalism" (2nd Ed.), 1976, 335ff.

152. *Cf.* A.L.R.C.6, 11ff. (Use of the insolvency power to reform judgment debt recovery legislation).

153. E. Freeman, Commentary on Law Reform and the Legal Profession, July 1977, *mimeo*.

154. A.L.R.C.8, 42.

155. A.L.R.C.6, 57ff; (1976) 126 *New L.J.* 529.

156. See for example, the survey conducted by the Younger Committee in 1972 concerning attitudes to privacy, Appendix "E".

157. D. Whalan, Book Review, (1976) 3 *Monash U.L.Rev.* 177, 178.

158. A.L.R.C.4, 90ff.

159. A.L.R.C.3, 38ff; A.L.R.C.5, 24ff; A.L.R.C.8, 17f.

160. R.D. Nicholson, "Law Reform and the Legal Profession" (1977) 51 *A.L.J.* 408, 419. For commentary on this issue *Cf.* Alberta Law Reform Commission *Annual Report* 1976, 3; (1976) 2 *L.S.B.* 59.

161. (1976) 126 *New L.J.* 1.

162. *Law Reform Commission Act* 1973 (Cth), ss.35, 37.

163. Mason, 209: As to relationships with government departments *Cf.* Farrar, 120; Waldron, 188.

164. A.L.R.C.3, 27.

165. R. Baxt, Editorial (1975) 3 *Aust.Bus.L.Rev.* 240.

166. See n.5 above.

167. Fraser, 863; A.L.R.C.8, 23.

168. *Ibid.*

169. Waldron, 187. "Scarman presents a picture of a strong independent body with a right to appeal to public opinio

170. A.L.R.C.5, 49f; A.L.R.C.8, 22ff.

171. [1977] *Reform* 23. F. Walker, *N.S.W. Parliamentary Debate (L.A.)* 6 October 1976, 1548.

172. (1976) 126 *New L.J.* 79; *Cf.* Marsh, 279.

173. Waldron, 190.

174. A.L.R.C.8, 24.

175. *Ibid*, 22.

176. Lyon, 425.

177. *Ibid*, 426.

178. A.L.R.C.1. (6 months); A.L.R.C.2 (7 months); A.L.R.C.4 (6 months); A.L.R.C.7 (one year).

179. The *Law Reform Commission Act* 1973 (Cth) makes no reference to time limits. It does empower the Attorney-General to give directions to the Commission as to the order in which it is to deal with references (s.6(2)(b)) It also empowers the Attorney-General to direct the Commission to make an interim report on its work under the reference (s.10(b)).

180. R. Goss, "The Role of Law Reform in the Quest for Justice" (1969) 19 *Uni.New Brunswick L.J.* 29; Turner, 424-5; Wedderburn, 655.

181. T.R. Walanin, "Presidential Advisory Commissions" reviewed (1976) 54 *Public Admin.* (G.B.) 235.

182. T. Hartt cited (1974) *Manitoba L.J.* 217. *Cf.* Magarry, 701; Lord Diplock (1974) 33 *Cam.L.J.* 245.

183. A.L.R.C.8, 2.

184. A.L.R.C.5, 11. The total number of reports to 1976 issues by Australasian law reform agencies was 647. Of these, 311 (48%) were followed by legislation. Some were Annual Reports. Some proposed no legislation. The figures are different now, but not significantly so.

185. Lord Devlin, 16; Magarry, 701; J.R. Kerr, Opening Speech, 1977 Spring Meeting of the Interparliamentary, Canberra, April 1977, *mimeo*, 3. "Time has to be found to consider multifarious law reform proposals in addition to a government's general legislative programme'

186. (1976) 126 *New L.J.* 103.

187. D. Wood, "Millstone of Too Much Law Making" (*London*) *Times*, 26 July 1976, 15. Some simply blame Parkinson's Law of Delay (1976) 14 *Alberta L.R.* 256. (A.B. Weir).

188. *Cf.* P.R. Glazebrook, (1976) 92 *L.Q.R.* 301, 303.

189. A. Samuels, "Improving the Quality of Legislation" (1974) 3 *Anglo-American L.R.* 523, 531; Farrar, 120; Friedland, 21.

190. Lord Hunter, *The Meanings and the Methods*, Fifth Commonwealth Law Conference, Edinburgh, 25 July 1977 [1977] *Reform* 64.

191. P. Hartt cited, A.L.R.C.5, 10.

192. Lord Hunter, 7; F. Walker, *N.S.W. Parliamentary Debates (L.A.)* 28 September 1976, 1075; *ibid*, 29 September 1976, 1181.

193. A.F. Mason, "Where Now?" (1975) 49 *A.L.J.* 570, 573; F.G. Brennan, *ibid*, 672; G. Sawer, "Who Controls the Law in Australia? The Instigators of Change and the Obstacles Confonting Them" *Australian Lawyers and Social Change* (Eds. Hambly & Goldring) 118, 179. But see Harders, 9; R.J. Ellicott cited in A.L.R.C.5, 12f; P.D. Durack, Address to the North Queensland Legal Convention, Townsville, 8 October 1977, *mimeo* 14-15.

194. (1976) 126 *New L.J.* 929. *Cf.* B. Herman, "Who Legislates in the Modern World?" (1976) 57 *The Parliamentarian* 93.

195. A.L.R.C.8, 6.

196. This is the Second Reading Committee established in the House of Commons.

197. Canadian Bar Association *National*, December 1976, 11 (Manitoba).

198. A.L.R.C.8, 4-5.

199. A.L.R.C.8, 37f.

200. *Family Law Act* 1975 (Cth) s.116. *Cf.* D.L. Martin, "Civi Remedies Available to Residential Tenants in Ontario : The Case for Assertive Action" (1976) 14 *Osgoode Hall L.J.* 65; A.L.R.C.8, 38.