SIXTH ROYAL AUSTRALIAN NAVAL LEGAL CONFERENCE

SYDNEY, 19 JANUARY 1977

LAW REFORM : A SPECIES OF LEGAL SALVAGE

Hon Justice M D Kirby

January 1977

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The Hon. Mr.Justice M.D. Kirby
Chairman of the Law Reform Commission of Australia

"When the authority of the military has such a sweeping capacity for affecting the lives of our citizenary, the wisdom of treating the military establishment as an enclave beyond the reach of the civilian courts almost inevitably is drawn into question".
Chief Justice E. Warren[1].

HAT IS THE RELEVANCY OF THIS?

At the last Naval Legal Conference, Captain D.G. Robertson, R.N.,[2] ited Kennedy's definition of salvage "saves...a recognized subject of salvage hen in danger". It would be a mistake to conceive of the ship of the Law as stranded" or "on "fire". Nor is it yet "sunken" or "under attack of pirates". f Professor Richardson's recent statements about the excessive production of aw graduates are correct, it is certainly not "dangerously short-handed". or all that, we can all recognize the need for a rescue operation of two. he vessel is old. Lately, things have become a bit turbulent.

"Reform" does not just mean "change". It means "change for the better".[3] ut it is not difficult to imagine that there will be some members of a disciplined orce, especially one with traditions of the Navy, who look askance at the pressures hat exist today for reform and change in the law. Gone are the settled days of ranquility and certainty. Is this part of a general decline in discipline and rder? Are these reformers salvagers or are they pirates?

The Australian Law Reform Commission works upon References given to it. y the Commonwealth Attorney-General. It does not initiate its own programme. one of the current and none of the past References before the Commission has ad specific relevance to the defence forces as such. On the contrary, the ajor current Reference before the Commission on *Privacy* specifically excludes he Commission's enquiries from "matters relating to national security or defence".

. E. Warren, The Bill of Rights and the Military 37 *N.Y. L.Rev.* 181 at p.188 (1962).

. D.G. Robertson,"Salvage", in Fifth Naval Legal Conference (Syd) *Record* 23 at p.25(19

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

But the work of the Commission is not for that reason irrelevant to this Conference

Chief Justice Warren's assertion was made in the context of the United States. Peacetime military populations of the United States have grown as follows:[4]

1789	718
1845	20,726
1900	125,923
1935	251,799
1960	2,476,000
1974	2,174,000

Despite our historical origins and present restraints, I imagine that the Australian position would bear similarities. Defence personnel are also citizens, in a service that is under increasing pressure from surrounding society.

But it goes further than this. The Navy has retained its traditions but not at the price of ignoring the forces for modernization required by science and technology. There is a clear tension between law and technology. Paul Tillic, a renowned theologian, described law as "the attempt to impose what belonged to a special time, on all times". It tends to deal in absolutes. It rests upon "the search for certainty". Science, on the other hand, has presented developments which have lately produced a kind of social technological "jet lag". Toffler has described it as "future shock". Often we seek to preserve and conserve because we regard what exists as essential to our identity, integral to the values we hold. But neither the law nor the Navy can ignore the pressures for change posed by forces at work in society, including science and technology. Each of these disciplines must find machinery to strike the new balances. One of the engines developed by the law is the Law Reform Commission.

The purpose of this paper, then, is to give something of the history and background of law reform: "a boom industry". I want to examine the general approach of the Commission and the techniques that have been adopted to achieve reform. I will then outline the work and future programme of the Commission with special reference to one or two aspects of that work which may have particular interest to the defence forces and their personnel.

A POTTED HISTORY OF LAW REFORM

Ancient Greece to Old England

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

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4. Table in J.S.Facter: Federal Civilian Court Intervention in Pending Courts-Martial and the Proper Scope of Military Jurisdiction over Criminal Defendant 11 *Harvard Civil Rights - Civil Libs L. Rev.* 432 (1976).

led to a certain conservatism in law reform in ancient Greece.

At about the turn of the sixteenth century, Sir Francis Bacon voiced a complaint which will not seem novel to modern readers -

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

Bacon made a proposal. It was that a number of Commissioners should be appointed to investigate obsolete and contradictory laws and to report regularly to Parliament. Although he was Attorney-General in 1613 and Chancellor in 1618 he did nothing to advance his proposal. But as you know, the law never rushes these things. It was not until 1965 the Parliament at Westminster got around to Bacon's proposal.[5]

An Australian Proposal

In 1957, the Chief Justice of the High Court of Australia, Sir Owen Dixon spoke to a paper by Professor Shatwell *Some Reflections on the Problem of Law Reform*.[6] He took up Bacon's call in an Australian context -

> "Is it not possible to place law reform on an Australia wide basis? Might not there be a Federal Committee for Law Reform? In spite of the absence of constitutional power to enact the reforms as law, it is open to the federal legislature to authorise the formation of a body for inquiry into law reform. Such a body might prepare and promulgate draft reforms which would merely await adoption. In all or nearly all matters of private law there is no geographical reason why the law should be different in any part of Australia. Local conditions have nothing to do with it. Is it not unworthy of Australia as a nation to have varying laws affecting the relations between man and man? Is it beyond us to make some attempt to obtain a uniform system of private law in Australia? The Law Council can, of course, do much. But it is a voluntary association and, without a governmental status and the resources which that will give, a reforming body will accomplish no great reforms".[7]

The Commonwealth Parliament in Australia took only sixteen years to answer Sir Owen Dixon's questions. In 1973 the Law Reform Commission Act was passed with bipartisan support. The Act established a national law reform commission comprising full-time and part-time Commissioners. The first Members

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5. Law Commissions Act 1965 (G.B.), chapter 22.
6. K.O. Shatwell (1957-1958) 31 *Australian L.J.* p.325. Sir Owen Dixon's Observations appear *ibid* p.340ff.
7. *ibid* p.342.

of the Commission were appointed in January 1975.[8] Now, the Commission comprises eleven Commissioners, nineteen staff. It has produced five Reports. It stands at the threshold of its work.

Pre Federation Law Reform: N.S.W. & Victoria

But the Federal Commission in Australia is only the latest attempt at an organised approach to law reform in this country. In fact, a Law Reform Commission was established by Letters Patent on 14 July 1870 in New South Wales. It comprised five lawyers working part-time under Stephen C.J.[9] Its output was small and it never quite succeeded in moving the New South Wales Supreme Court into the Judicature era. That reform took until 1970 prompting Professor Sutton's rebuke -

> "One must agree...that law reform is necessarily slow, complex and a matter to be dealt with by experts but it does not have to be as slow as this".[10]

Under the impact of Bentham's idea that the whole body of the law of England should be reduced to an accessible code, Professor Hearn of Melbourne University Law School tried in the 1860s and 1880s to interest the Victorian Government in his "General Code". It was laid before the Victorian Parliament in 1885. Its admirers said of it that once enacted -

> "Parliament will lay down definitely one way or another what is the law upon a particular point and the law will remain settled, instead of depending upon a great number of fluctuating decisions".[11]

One antagonist was a little brutal -

> "A team of six can be driven through any Act of Parliament, but through this code, if it is passed, I believe that a team of 50 elephants abreast could be driven".[12]

Unhappily, Professor Hearn died in the midst of this furore and his code did not long survive him. Although a number of States have enacted codes of paricular areas of the law, Professor Hearn's is the last significant attempt for a civil law approach to the codification of law generally in Australia. For the

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8. Until 1976 all Commissioners, other than the Chairman, served part-time. In mid 1976 three additional full-time Commissioners were appointed. They are Mr. D.St.L. Kelly, formerly Reader in Law in the University of Adelaide; Mr. R. Scott, a Sydney Solicitor and Mr. M.R. Wilcox of the New South Wales Ba

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

10. K. Sutton *"The Pattern of Law Reform in Australia"*, 1969, Qld. Uni., p.9.

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

12. J. Gavan Duffy cited *ibid* p.215.

rest, we have approached law making in the normal common law way: mixing case law and statute law in varying proportions.

Growth of a "boom industry":

In 1920, the State of New South Wales appointed Professor J. Peden a "Commissioner of Law Reform". He held the position until 1931. Although his brief was wide, including the review and simplification of the law, substantive and procedural, his proposals came to nothing. Various other fitful attempts were made by appointing judges, constituting committees of part-time gentlemen and briefing out to a barrister or two. It took the establishment of the Law Commission in England in 1965 to produce a properly funded Law Reform Commission in Australia. This is the New South Wales Law Reform Commission.[13] Since its establishment in 1966, every State and the Capital Territory have set up a Commission or Committee of some kind. Indeed one author described law reform as a "booming industry".[14] The last decade has certainly seen an explosion of law reform commissions. Botswana got one in 1966. Canada's national Commission began work in 1971. Sri Lanka set one up in 1969 but subsequently wound it down. In 1973 the Australian Parliament decided that the time had come for Australia to have a national Commission.

Reform by Federal Parliament:

It should not be thought that reforming the law had been totally ignored by the Federal Parliament in Australia. The approach taken at the national level was either to deal with the matter in the Departments of State or to establish an *ad hoc* committee which could suggest reforms to the Parliament.[15] Whilst not underestimating the achievements secured in this way, no ordered, principled approach to renewing the law[16] was possible whilst such a languid, spasmodic procedure was adopted. Everyone knows that the amount of legislation pouring from our busy Parliaments is on the rapid increase. The role of judge-made law began its decline in the last century. Much of this legislation could be called "reform". Whilst Parliaments can be made very interested in such vote-catching issues as housing, school assistance and the provision of hospitals, there are not too many votes in re-examining the legal rights of prisoners in our society, the laws relating to defamation, the rules of evidence that should govern court proceedings and the recognition of inter-state grants of Probate. Such topics are technical, complicated and sometimes even boring. But unless they are to be left forever in the natural state of their creation a century or two ago, some means must be found to revise these laws, review, simplify and renew them.

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

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

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

16. This is Sir John Kerr's preferred expression: Kerr p.157.

A "NCH OF PHILOSOPHY

The Common Law v Civil Law Approach:

Now, we all know that lawyers of our tradition become embarrassed by the mention of philosophy. There are not too many of us like Dr. Johnson's lawyer harbouring a philosopher within, struggling to get out. This is what no doubt shocks civil lawyers about their common law brethren. Whilst they may admire the independence, competence and standing of our judges, they see our way of going about identifying the law, as topsy-turvy. Instead of seeking to lay down a code with a general philosophy thoroughly worked out, we tend to approach the law in a much more pragmatic way. In legislation, we seek to cover every nook and cranny of possible behaviour. In precedent, judges shy away from "fundamental" principles because to articulate them would go beyond the needs of the issue for trial.

Obviously a Law Reform Commission cannot afford to be a purely pragmatic operation. Otherwise its recommendations will be no more consistent and rational than a series of *ad hoc* committees, paid considerably less for their labours.

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

Other law reform bodies take a different approach: one that they would no doubt characterize as more "practical" and certainly one that is more comfortable to lawyers brought up in the common law mode. Take, for example, the Law Commission of England and Wales. Within six weeks of its establishment it had formulated a programme of work[17] with topics as diverse as the law of contract, family law and landlord and tenant law. Professor Gower put its approach this way -

> "I was often asked [how law reformers make - and should make - their value judgments] and was compelled to reply that we had never clearly articulated our philosophy. The best I would do was to say that I guessed that we adopted a vague utilitarianism, asking ourselves (subconsciously rather than consciously) what would conduce to the greatest good of the greatest number. In answering that I think we placed great weight on convenience, intelligibility, avoidance of needless expense, and on what we thought would make people happy because they would regard it as just. On the other hand, we placed little weight on

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

> elegance as such - except to the extent that it prompted intelligibility and simplicity. This was the best I could do and I don't know that any of my colleagues did any better. But it seemed to me at the time - and still seems to me - pretty thin. Yet on the basis of it we made some pretty sweeping value judgments and were not ashamed to articulate them. In many of our reports we stated categorically what we regarded as the desirable objectives of the body of law concerned; one example was our often quoted and, and I think I may say, generally commended statement of the objects of a good divorce law. But what were the basic beliefs that enabled us to declare so dogmatically and with such assurance that it was a good thing to buttress live marriages and to give a decent burial to dead ones? Yet, somehow it seemed to work".[18]

he special problems of Federal law reform:

It just is not possible in Australia, for the Commissioners of the ederal Law Reform Commission to sit around a table and work out a "total" pproach to the reform of the law. The constraints of the Constitution and he limited areas of legal competence assigned to the Australian Commonwealth arliament prevent this. Although it is probable that the private law element n federal law in Australia will expand significantly in the future,[19] it would e unrealistic to think that a national law commission in Australia could carefully lan an "encyclopaedic approach" to revision of Australian law. The history of niform law revision in Australia does not inspire excessive enthusiasm.[20] In he United States since 1892, there has been a Uniformity Conference. In Canada uch a Conference has existed since 1918. Although I am alive to Canadian and U.S. riticism concerning the effectiveness of the Uniformity Conference, this much an be said: it exists. In Australia, a Standing Committee of the Commonwealth nd State Attorneys-General has been established to give political direction and push" to the move for uniform laws in appropriate areas. Although it was con-tituted formally in February 1961 and has met on a rotation base ever since, it s not primarily a law reform body.[21] Its major opus, the uniform companies egislation, demonstrates the fact that even when a uniform law is achieved in particular area, its updating and amendment can progress only at the pace of he slowest of the States.[22]

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8. *Ibid* p.268. For a statement of the author's approach to the rationale of law reform see "Law Reform, Why?" (1976) 50 *Australian L.J.*459.
9. Mason, pp.210-211.
0. R. Cranston "Uniform Laws in Australia" (1971) 30 *Journal of Public Administratio* (Aust) p.229.
1. Mason p.205.
2. Cranston p.242.

Therefore, the Australian Commission will approach its task conscious of the need for something better than a purely pragmatic response to each Reference as it comes. But in national matters, we will be required to work substantially within those borders mapped out by s.51 of the Australian Constitution. It is difficult, at first blush, to see much common philosophy emerging from projects on "weights and measures: or "fisheries in Australian waters beyond the territorial limits" or "marriage". But we will look for it. Perhaps we can develop a hybrid creature combining the hard headed, practical wisdom of the English Commission with the challenging, forward looking scholarship of Canadian reform agencies.

TECHNIQUES OF LAW REFORM

Why involve others in reform?

Law Commissions have been operating long enough now to provide a "reeeived wisdom" upon techniques to be followed. Working papers are prepared which outline the law as it stands, its apparent defects and "fields of choice" for reform.[23] The rationale of this procedure is to be found in the need to elicit comment and participation in reforming the law.[24] Law Commissions ought not to be seen as a "brains trust" of lawyers, isolated from the community whom the law is to serve. Indeed, lawyers do not have an unassailable authority to decide what the law ought to be. They are frequently blinkered by their training and background when new insights are needed. The participation of non-lawyers in law reform exercises is not much favoured in England[25] and has not been much practised outside North America.[26] It is not, of course, easy to get the "representative defamee" in the reform of defamation laws. In fact, it is easier to think of that man on the Clapham Omnibus than to find him. However, it is obviously important to get his assistance and ideas in law reform work. In the first exercise of the Australian Commission, concerning police, participatio of police officers and civil liberties personnel was secured, not just at public sittings but around the table when first decisions on what the law ought to be were being made. We see it as quite vital that the Commission should not become just an "overpowerful enclave of an elitist faceless few".[27] The Commission is established to assist the Parliament in the development of modern laws which embody the popular values of Australian society.

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

24. Mason p.215.

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

26. Conacher p. 259. Cf. Lord Wilberforce in (1969) 43 *Australian L.J.* p.258, Mason p.215.

27. J. Barnes "The Law Reform Commission of Canada" (1975) 2 *Dalhousie Law Journal* p.62 at p.80. *Cf.* To the same effect the pungent article of J.N. Lyon "Law Reform Needs Reform" (1974) 12 *Osgoode Hall L.J.* 421 at p.426.

Involving the public:

The Annual Reports of the Law Reform Commission of Canada show the premium placed by that Commission upon public ventilation of ideas. The *Third Annual Report 1973-1974: A True Reflection* put it this way -

> "Law reform then must look beyond the letter of the law. It must find out how the law is understood by those applying it and those to whom it is applied. It must discover how the law really operates - what judges, lawyers officials and ordinary citizens actually do... There has to be empirical research...and there has to be an examination in moral and philosophical terms of the aims the law pursues, the functions it performs, the values it enshrines. Lastly there must be dialogue and consultation with the public in order to unearth and to articulate public opinion on the law".[28]

In a sense, the involvement of the public is part of the rationale of changing the law through a law reform agency. It is an attribute of open government. Most people agree with it. The problem is to find the proper way to do it and to ensure that bodies such as law reform commissions are adequately equipped by their statutes. The most unusual innovation of the Australian Commission is our experiment with public sittings in Australia. Like the Saskatchewan Law Reform Commission we have meetings with interested groups and use of the media to tap public opinion. We use public opinion polls, newspaper campaigns and open hearings in suburban centres. Yet we reach the same conclusion as the 1976 Annual Report of the Alberta Institute of Law Research and Reform which admits that "we are still not sure of the best way of finding facts and public opinions".[29] In fact, our approach in the language of our Albertan colleagues, is as follows:-

> "We shall continue to regard the findings of facts and opinions to be vital to our work. We shall also continue to experiment".[30]

Involving the legal profession:

The Australian Law Reform Commission has been established not as one might have expected in Canberra, but in Sydney. It is hoped that our propinquity will develop responsiveness to legal ideas, especially in the practising profession and will attract the participation of the best that the Australian legal profession can offer. Already, the Commissioners come from all parts of Australia and bring a balance between backgrounds in legal offices, at the Bar and in universities.

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

29. The Alberta Institute of Law Research and Reform, *Annual Report 1975-6*, p.19; *Cf.* Law Reform Commission of Saskatchewan, *Second Annual Report 1975*, at pp.4,13.

30. The Alberta Institute. *op cit* at p.21.

In the Canadian national commission, the experiment with part-time commissioners wa abandoned. However, in Australia the system works well largely because of a provision in the Act which empowers the Chairman to constitute Divisions for the purposes of particular References.[31] For the purpose of such a Reference, the Commission is the Division. In this way the special skills and interests of part-time lawyers of the highest distinction can be made available to the nationa Commission. It has the additional merit of keeping the Commission, for a relativ small expense, in close touch with professional and academic opinion in all parts of the country. In a large country, such as Australia is, this can be a bracing stimulus. The facility of Divisions prevents excessive work load upon the part-time commissioners which was at the heart, I believe, of the failure of the Canadian experiment. One of the part-time Commissioners, Emeritus Professor Sir Zelman Cowen was added to give specific help to the Commission in a Reference concerning privacy, a matter upon which he has written widely. He comes to our meetings from Brisbane in Queensland. Mr. Justice Brennan, a Federal Judge, is resident in Canberra. Professor Alex Castles comes to us from the University of Adelaide. Mr. John Cain is a Member of the Victorian Parliament and lives in Melbourne. There are three part-time Commissioners from Sydney. I believe that the mixture of full-time and part-time Members work well and opens lines of communication that would otherwise not exist.

Involving the legislative draftsman:

One of the problems that has bedevilled law reform work in Australia has been the lack of drafting capacity in law reform agencies. We have taken to heart the lesson of the Law Commission in England. There is no doubt that a draft bill eases the Parliamentary implementation of law reform reports.[32] We have been fortunate to secure such a drafting facility and to all of the Australian Commission's reports, draft legislation is attached.

Involving consultants:

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

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31. Law Reform Commission Act 1973 s.27.

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

Co-ordinating law reform effort:

One final matter of methodology might be mentioned. Because of the proliferation of law reform agencies in this part of the world (fourteen if we include New Zealand and Papua New Guinea) there was a strong feeling that some effort should be made to co-ordinate information concerning the work of the law reform bodies. Duplication in law reform effort can scarcely be afforded in view of the priorities fixed by society and the funds and manpower made available for the work of renewing the legal system. With the consent of the other law reform bodies throughout Australia, the Australian Commission has taken a number of steps that will, in time, promote efficiency and knowledge of the work progressing in the several Commissions. A Law Reform Agencies Conference has been established. It now meets annually and brings together representatives of all Commissions in Australasia. The fourth meeting is to be held in Sydney on 1 July 1977.

Communicating our work:

But the effort to pool and distribute information has not been confined to the narrow circle of experts. After the example of the national Canadian Commission efforts have been made through the media, public speeches, law journals and the bulletins of the Australian Commission to approach a wider audience. The "dialogue and consultation with the public" is pursued to seek out the values which the public believes the law should enshrine, the functions it should perform and the aims it should pursue.[33]

THE WORK OF THE COMMISSION

Complaints Against Police

Without waiting for the Commission's full team to be assembled, the Attorney-General gave the Commission a Reference related to the proposal of the former Commonwealth Government to establish an Australia Police Force. The Reference required the Commission to look into two matters which are now the subject of reports by the Commission. The first *Complaints Against Police* involved the Commission in th consideration of an issue which is relevant to this Conference. How should complaints within a disciplined, para-military force such as the police and from members of the public against national police officers, be investigated and determined There have been numerous reports by overseas enquiries into this question. The Commission's Terms of Reference were confined to the proposed national police. Different considerations might very well arise in respect of the much more attenuated relationship between members of the public and members of the defence forces. In the result, the Commission reached the hardly startling conclusion that, in the modern age, it was not acceptable to leavethe investigation and resolution of such complaints from first to last in police hands. The Commission's proposal was presented to the Australian Parliament as part of the *Australia Police Bill 1975.*

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33. See n.24.

With the change of Government in late 1975, the Bill lapsed. But the proposal is still under the consideration of the Commonwealth Government. The Report contained a detailed scheme which would involve the Commonwealth Ombudsman as the recipient (and in some cases investigator) of complaints against the police. A tribunal of judicial officers was proposed to resolve serious cases. A special section of the police was suggested to conduct investigations.

Two other matters were dealt with in the first Report which are relevant. The first concerned the content of the police disciplinary code. One matter which was raised related to whether or not, in a disciplined force, it was necessary or desirable to have a general provision in the discipline code such as "conduct unbecoming". The Commission concluded in favour of a clause of this kind in terms such as:

> "*Discreditable conduct*", which offence is committed when a member of the Police acts in a disorderly manner or is responsible for any act or omission prejudicial to discipline or reasonably likely to bring discredit on the reputation of the Police".[34]

In the course of argument the Commission had before it the second draft of the Report of the Working Party on the *Defence Force Disciplinary Code* which provides, in clause 68, for an offence on the part of a person who:

> "By act or omission behaves in a manner likely to prejudice the discipline of, or bring discredit upon, the part of the Defence Force to which he belongs". [35]

The Commission was informed that much the same debate took place before the Working Party on this issue as had occurred before the Commission. I have no doubt that the "catch-all" provision was recommended for much the same reason. Although the Commonwealth Government has not yet made its decision in respect of the implementation of this first Report, law reform works in mysterious ways. The Premier of New South Wales, Mr. Wran, has indicated that he proposes to introduce a system based upon this Report in New South Wales, which has the largest police force in Australia. As well, the recent report by Mr. Beach Q.C., in Victoria has recommended a virtually identical scheme for the police force of that State.[36] The adoption by the States of law reform proposals made at a federal level may have an importance transcending even the subject matter of this Report.

The other relevant issue concerned vicarious liability and police officers.

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34. The Law Reform Commission (Aust) *Complaints Againgst Police*, A.L.R.C1, p.65.

35. Working Party Report *Defence Force Disciplinary Code*, (Second Draft), A.G.P.S.19 p.68.

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

Criminal Investigation

The second report of the Commission took it substantially over the same ground as the ill-starred eleventh report of the Criminal Law Revision Committee in England.[37] Delicate is the balance between necessary police power and traditional citizens' liberty in British countries. The report had to deal with a large number of matters also covered in the report of the Working Party on the *Defence Force Disciplinary Code*. The question of arrest with and without warrant, the force that might be used in arrest, the taking of finger prints, release on bail, conduct of physical examinations and of searches dealt with in part V of the Working Party's report, were also dealt with in this report of the Commission. The Commission's report proposes a leap into the 20th Century on the part of the police by the use of modern devices: tape recorders, telephones, computers, cameras and copiers to the advantage of the accused as well as the police. It is suggested that the emphasis should be taken off arrest and that proceeding by summons should be encouraged. Numerous other proposals are made to modernise and liberalise police procedures. That there is a need to make police procedures more appropriate to an educated society, aware of its rights can scarcely be doubted. The report was put forward as an interim report so that further commentary, criticism and suggestions can be received upon our proposals. Nothing so closely touches the nature of a free society as the manner in which it deals with those accused of offences against it.

The Commission was required to report upon its first Reference within six months and this it did. It has been said that haste is an enemy of sound law reform.[38] Whilst this is undoubtedly true, the search for perfection can itself sometimes diminish the effectiveness of a Commission, faced with a multitude of urgent tasks. As in everything else, a balance must be struck. The Australian Commission is committed to promptly answering the urgent tasks of reforming the law. To achieve the deadline in its first exercise, required the recruitment of a team of consultants from all parts of the country; experts in a wide variety of fields. It also required public sittings in all parts of Australia including Alice Springs and Darwin, so that the views of organisations and of the public could be elicited, tested and reflected upon. The *Law Reform Commission Act* requires the Australian Commission to ensure that its "proposals do not trespass unduly on personal rights and liberties".[39] No matter could could have been closer to the rights and liberties of the Australian community than the first Reference.

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

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

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

Although I am not aware of the fate that awaits the report of the Working Party on the Defence Force Code, in December 1976 the Commonwealth Attorney-General, Mr. Ellicott, announced the intention of the new Government to proceed with legislation in 1977 based substantially on the Commission's second Report. Lord Gardiner has said the changes of Government present law reformers with very real problems. However, the Commonwealth Attorney-General's indication of the Government's intention to proceed with a modern criminal investigation code suggests that Lord Gardiner's aphorism may have less application in Australia than elsewhere.

Alcohol, Drugs and Driving

This much can be said of the Commission's Report on *Alcohol, Drugs and Driving*, that it does not affect members of the defence forces, as such but may clearly affect them as citizens if they propose to drive in the Capital Territory. The Commission was required to modernize the motor traffic laws of the Capital Territory for dealing with drivers whose skills were impeded by the consumption of alcohol or other drugs. One of the issues before the Commission was whether "random tests" should be introduced. Whilst proposing the simplification of the preconditions necessary to justify a test, the Commission was not pursuaded to recommend a facility of testing without preconditions. This view was reached after appropriate expert and public opinion had been sounded, the latter by way of a public opinion poll conducted by a Canberra newspaper and by a public sitting held, under television scrutiny, in the National Capital. Already, the Minister for the Capital Territory, Mr. Staley, has indicated the Government's intention to implement the proposal put forward by the Commission in this Report.

CURRENT PROGRAMME

Privacy

The Commission has before it a varied programme. Its principal Reference requires a review of the laws relating to privacy, at least in respect of those matters which are within Commonwealth power. I have already mentioned that the Reference, as drafted by the Attorney-General, excludes the Commission from enquiries:

> "on matters fully within the Terms of Reference of the Royal Commission on Intelligence and Security or matters relating to national security or defence".

I am quite sure that there are many aspects of life in the Services that involve intrusions into privacy. Some of them will plainly be within the exclusion framed by our Terms of Reference. For example, I cannot imagine that it would be permissible for the Commission to enquire in to the privacy of, say, accommodation of Naval personnel on board Australian ships. Nor would communications about servicemen or citizens believed to be a threat to national security and defence (however intrusive into their privacy) be examinable. It is not unusual for the Executive to reserve these matters to itself. In Australia, Justice Hope is in

the midst of his Royal Commission which will doubtless consider some aspects of intrusions into privacy, done in the name of security and defence.

In a word, the problem before the Commission is the burgeoning growth of scientific means that ease the path of privacy intrusion (computers and electronic or other surveillance) and the ever expanding passion on the part of Government and business for information deemed necessary, efficiently to run a modern community. In Australia, the problem is compounded by the fact that the common law provides no general redress against privacy intrusion[40] and statutory protections are, for the most part, piece-meal or very specific.

Notwithstanding the exclusion in its Reference, it may be entirely proper for the Commission to consider some attributes of the workings of the defence forces which impinge on privacy but do not directly relate to national security or defence. The personnel records of every Commonwealth department are under close scrutiny. In a sense, these records within the defence forces are the fullest, most comprehensive and most protracted. Medical records are, for example, confidential between the medical practitioner and the department. Normally, members of the Forces would not have access to their own medical records. Although this accords with general Australian medical practice, there may well be special considerations in respect of servicemen or ex-servicemen because of the way in which such records "follow the man" throughout his whole period of service.

The maintenance of records of non-serving members of the family of servicemen, especially those posted overseas, is probably inevitable. The question arises concerning the proper extent and intrusiveness of such records, the duration of maintenance of and limits on accessibility to them.

Those who criticise retention of detailed medical records over the whole period of man's service sometimes lay insufficient emphasis upon the value such records can afford claims for benefits. Complaints have been received, however, concerning refusal of the departments (Defence and Veterans Affairs) to allow access to the records where a dispute has arisen.

Another matter that concerns the Forces but may not be excluded from the Reference, relates to national disasters. The Darwin evacuation produced detailed records, including a list of evacuees, some of which were published generally. The motives were no doubt entirely pure. However, suggestions have been received that in some cases people did not want the public, or even their families knowing of their whereabouts, their possessions, the assistance they received and so on.

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40. *Victoria Park Racing & Recreation Grounds Co. Ltd. v Taylor* (1937) 58 C.L.R. 47

Some of the considerations for privacy raised by the activities of the defence forces are common to many other areas of Commonwealth activity. It is in the duration and comprehensiveness of files and dossiers held that unique problems arise. Some of these may be capable of recommendations by the Commission. Others will plainly be beyond our reach.

Organ and Tissue Transplants

The Commission is working to a deadline of July 1977 to produce a report on the laws to govern human tissue transplants. The development of means of artificial respiration can prolong the activity of the heart far beyond the irreversible cessation of brain function. What is to be done in such a case? Who is to be authorized to terminate life supporting equipment? How should decisions be made in such cases concerning the donation and transplantation of human tissues and organs, now possible by enormous advances in immunology and surgery?

Special issues arise here in respect of servicemen. Generally speaking, Anglo-American law starts with the premise of self-determination. Each man is considered to be the master of his own body. This rule must be modified in a disciplined force. Clearly, therefore, special issues of consent for medical treatment or consent to the use of tissues and organs arised in the case of serving members of the defence forces.[41]

Other References

In addition to these References, the Commission is engaged upon work relating to defamation, the reform of insolvency laws and of insurance contracts. Other References for the Commission's future programme are under consideration. None of these specifically involves the services. There is no reason to doubt, however, that the inter-disciplinary capacity of the Commission could at some stage involve it in exercises relating to the Forces and their members.

CONCLUSIONS

Recent announcements in Australia[42] make it plain that the Attorney-General recognizes the obligation of government to give ear to the proposals made by Commissions established to assist in the reform of the law. Otherwise valuable public funds are thrown away and all that remains is a shelf full of handsome documents. The urgencies of change are too great. The impediment of enertia, indifference and Parliamentary inactivity impose upon law reform commissions the duty to monitor their performance on an operational level and to test their success by the degree to which they can pursuade law makers to adopt their proposals as part of the law of the land. That, at least, is the way we approach it in Australia.

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41. T.A. Knapp, Problems of Consent in Medical Treatment 62 *Military Law Review* 105 (1974); *Cf.* G.S. Sharpe, The Minor Transplant Donor (1975) 7 *Ottawa L. Rev.* 85.

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

Let it be called a pragmatic approach of a common lawyer. The need is clearly there for machinery that will complement the forces at work in our society to keep the law as it is, and not as it should be.

The former Chairman of the Law Reform Commission of Canada, Mr. Justice Hartt, put it well and we drew his comment to the attention of the Australian Parliament in our last Annual Report -

> "Ultimately the government's commitment to law reform will be tested in its willingness to facilitate the enactment into law of the Commission's proposals. It is a commitment which will have to find expression in action rather than rhetoric".[43]

So there it is: a formula for law reform in Australia. A touch of history, a pinch of philosophy, a few techniques, a lot of work, a varied programme and a great deal of luck in the Parliamentary process. The Australian Law Reform Commission seeks to give Australian law searching, critical and innovative scrutiny. Some of our work also impinges on the lives of servicemen. All of it affects the lives of citizens. We have transplanted the English law to the Antipodes. Can future generations prove themselves as adept in renewing the law and making it accurately reflect the needs and ideals of Australian society.

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