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LAW REFORM IN AUSTRALIA : ANTIPODEAN REFLECTIONS

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SUMMARY

This essay begins with a background to law reform in Australia. The history of organised reform is traced from the colonial era through early reform in the States "to keep abreast of England" to the establishment in the 1960s of many law reform agencies. The Australian Commission did not commence operations until 1975. It is only one of many sources of law reform in the Australian federation. Some of the others are mentioned. The eleven permanent agencies are then listed, together with details of their composition, structure and location. The background concludes with details of some of the current references before Australian agencies, a list of the major projects before the Australian Commission and a statement of the ways in which the Australian agencies co-operate.

The essay then turns to examine some of the issues, universal to law reform, which presently face reformers in Austral The need for reform is briefly dealt with and the occasions for reform are analysed. They include the repair of inadequacies in t law, removal of outmoded laws, reflection of new social values anc the remedying of injustices, including by simplification.

The composition of agencies in Australia is scrutinised and the effective way in which part-time commissioners contribute examined. The controversy about lay members is mentioned and the way consultants and special interests have been used is outlined.

The agency's independence from government is then considered and the degree of involvement in the Parliamentary process in Australia is mentioned. The way in which programmes of law reform are initiated and the priorities fixed within those programmes are examined in the Australian context. The author then acknowledges the need to take reform beyond mere statute drawing. Mention is made of the Australian Commission's special project on sanctions and remedies in law reform. The research organisation in Australia is briefly dealt with and the special difficulties of law reform in a federation are then listed. The Australian way of seeking to overcome these difficulties and to co-ordinate work of law reform is outlined.

A critical look is then taken at the accepted procedures of law reform. In Australia law reform is now being taken "into

the living rooms of the nation". The use of the media, preparatio of draft legislation and attention to follow-up of proposals mark the approach of the Australian Commission. The Australian Senate has now ordered an inquiry into the adequacy of follow-up machiner and the processing of law reform suggestions generally in Australi The importance of a sympathetic relationship with the law minister is not overlooked.

Methods of collaboration among law reform agencies to reduce duplication of research and like efforts are then explored The key to acceleration of law reform is said to be the resources devoted to the task and new attention by Parliaments to the machinery of processing law reform proposals, including those received from law reform agencies.

AUSTRALIAN LAW REFORM AGENCIES

A.L.R.C.	: Australian Law Reform Commission	: Sydney
N.S.W.L.R.C.	: New South Wales Law Reform Commission	: Sydney
N.T.L.R.C.	: Northern Territory Law Review Committee	: Darwin
Q.L.R.C.	: Queensland Law Reform Commission	: Brisbane
S.A.C.L.R.C.	: South Australia Criminal Law and Penal Methods Reform Committee	: Adelaide
S.A.L.R.C.	: South Australian Law Reform Committee	: Adelaide
Tas. L.R.C.	: Tasmanian Law Reform Commission	: Hobart
V.C.J.C.	: Victorian Chief Justice's Law Reform Committee	: Melbourne
V.L.R.C.	: Victorian Law Reform Commissioner	: Melbourne
V.S.L.R.C.	: Victorian Statute Law Revision Committee	: Melbourne
W.A.L.R.C.	: Western Australia Law Reform Commission	: Perth

BACKGROUND

HISTORY OF AUSTRALIAN LAW REFORM

1. *Colonial Law Reform*. Law reform is not new in Australia. Complaints about the legal system accompanied the first convicts and settlers coming to the continent. During the 19th century a number of innovative reforms were introduced in the Australian colonies and grafted upon the inherited common law of England. These included the registered (Torrens) system of land title, rules governing testator's family maintenance and the system of compulsory industrial arbitration. In 1870 a law reform commission was established in New South Wales to submit proposals for the revision, consolidation and amendment of the laws and practices of the colony. It soon folded up. An attempt by a law professor to codify the law of Victoria in the 1870s and 1880s met stout opposition from the common lawyers and came to nothing.

2. *Reform in the States*. After federation in 1901 a number of efforts were made to put law reform on an orderly basis. In 1920 a professor of law was named Commissioner of Law Reform in New South Wales. He held the position until 1931 but his suggestions were never accepted. In 1916, the precursor to the Statute Law Revision Committee was established in the Victorian Parliament. The system was formalised in 1928 and the Committee still operates vigorously. A number of ad hoc committees were set up in the States of Australia in the 1940s and 1950s, principally to "keep abreast of the reform effected in other States and in England". The legal profession took a leading part in organising committees to review the law. However, these worked on a part-time basis and lacked proper funding and statutory authority.

3. *Establishing Law Reform Commissions*. In 1957 at the Australian Legal Convention, the then Chief Justice of Australia Sir Owen Dixon, made an urgent plea for a fresh approach to law reform :

> "Is it not possible to place law reform on an Australia-wide basis? Might not there be a Federal Committee for Law Reform? ...

> 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. ... 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 first properly funded law reform agency established in Australia was set up in the State of New South Wales in 1966. The New South Wales Law Reform Commission was established as a "permanent full-time law reform commission composed of a Supreme Court Judge, a practising solicitor and an academic". Its establishment has been followed by like moves in other States. In Victoria, in 1973, a Law Reform Commissioner, as a body corporate, was established by Parliament. This statutory officer joined the Parliamentary Committee previously described and a Law Reform Committee organised by the Chief Justice of Victoria in 1944, to make three law reform bodies in that State. In Queensland a commission was established by Parliament in 1968, comprising full-time and part-time members. In Western Australia, an informal non-statutory committee was constituted a Commission by Act of the Western Australian Parliament in 1972. In comprises three part-time Commissioners and a full-time staff. Tasmania secured its commission in 1974. South Australia has no statutory commission but has two law reform bodies established by Proclamation. The first is the Law Reform Committee of South Australia comprising judges and other lawyers. The second is a special committee whose terms of reference are focused on criminal law and reform of penal methods. The position has therefore been reached that each State of Australia has a law reform agency, most are established by statute and all are busily engaged upon the reform of the law of that State.

4. *Federal Law Reform*. Australia is a federal Commonwealth. Certain powers are conferred by the Australian Constitution upon the national (Commonwealth) Parliament. The residue of legal powers remains with the States. The Federal Government

is a relative latecomer to organised law reform, despite Sir Owen Dixon's call for a national approach to the problem in 1957. This is not to say that the Federal Parliament did not concern itself in law reform. Quite the contrary. The early years of federation saw a number of important, complex and imaginative Acts passed. The way law reform was done on a national level was by the establishment of Royal Commissions, ad hoc inquiries and work in the Departments of State. Major reform of the *Trade Marks Act*, *Bankruptcy Act*, *Copyright Act*, *Patents Act*, *Trade Practices Act* and *Family Law Act* were achieved in this way. Even in 1977, important reform of administrative law and procedure is being achieved in Australia by the passage of legislation based upon searching review of this matter in the late 1960s. In 1970 a law reform body was established in the Australian Capital Territory, for whose laws the Federal Parliament has plenary constitutional powers. Initially it was predicted that this body would be properly funded and would set the pace for law reform throughout Australia. But the Commissioners appointed were part-time and the hope was not realised. In 1976 the work of the A.C.T. Commission was taken over by the national Commission. In the Northern Territory of Australia, moves are afoot to replace lawmaking from Canberra by responsible government in the Territory Legislative Assembly. Consistent with these moves an ad hoc, non-legislative committee has been established in 1977 known as the Northern Territory Law Review Committee. It comprises part-time members, including judges.

5. The Law Reform Commission of Australia was established by the *Law Reform Commission Act 1973*, an Act supported in the Parliament by all shades of party opinion. That Act establishes commission with duties to modernise the law, eliminate defects, simplify the law and adopt new or more effective methods for the administration of law and dispensation of justice. The first commissioners were not appointed until 1975 and the Commission is now set up in Sydney with a total establishment of 11 Commissioners (7 part-time) and 19 staff. It is a Commonwealth Commission, in the sense that it is funded and its members appointed by the Commonwealth (national) government.

In 1973 it was suggested that, following Sir Owen Dixon's proposal, the States and Commonwealth should "participate" together in one, well-funded, truly national body. However, the law in Australia is divided by the Constitution between the States and the Commonwealth. This division and the constitutional consequences of them are hard to ignore. The proposal for "participation" as partners in the federal body was not accepted by the States. That is why in Australia we have no fewer than 11 law reform agencies, differently constituted, differently funded and scattered in all parts of the country, working to their respective legislative bodies.

6. Only a small part of law reform in Australia is done by law reform commissions. The High Court of Australia is the country's federal Supreme Court. It is a general court of law and hears appeals not only on constitutional matters but on cases involving important legal principles. In this way judicial reform can sometimes be achieved with a uniform effect throughout the country. For various reasons, not least the growth of legislation, this avenue of reform has diminished of late. In 1976 more than 1,000 Acts were passed by the various Parliaments and legislatures of Australia. Against this tide, the common law is in retreat. Legislators are today's great reformers. That means, substantially, that the bulk of legal renewal is done in the Departments of State attached to each government. These departments are aided not only by law reform bodies but by inquiries and committees through which major or sensitive proposals for reform are often passed. Special bodies have been established at the national level to keep under review particular, specialised areas of the law. An Administrative Review Council has been established at the federal level, to review administrative law and procedures. Though in its first year, it has already made signifi proposals which have been accepted in Bills presented to the Federal Parliament. A Family Law Council has been set up to assist in the ongoing review of family law. These statutory bodies comprise not only lawyers but persons with other disciplines relevant to legal reform. More than most countries, Australia has used judicial officers in Royal Commissions

designed to promote reform of the law. For all this, the new focus of attention on law reform in Australia is the law reform agency. Busy Parliaments are looking to the law reform bodies for assistance of a different kind than that available in the Public Service. It has been said that we live in a "new age of reform". This assertion is becoming increasingly apparent in Australia.

ORGANISATION OF AUSTRALIAN LAW REFORM AGENCIES

7. *Eleven Agencies*. The 11 law reform bodies in Australia are as follows :

A.L.R.C. : Australian Law Reform Commission. A statutory commission established by the Australian Parliament to review, modernise and simplify federal law (including in the Territories A permanent corporation, the Commission numbers 4 full-time Commissioners, 7 part-time Commissioners and is located in Sydney.

N.S.W.L.R.C. : New South Wales Law Reform Commission. A permanent statutory commission established by the N.S.W. Parliament, it comprises a Chairman (Wootten J.) a Deputy Chairman and 4 full-time Commissioners. It is located in Sydney and was established in 1966.

N.T.L.R.C. : Northern Territory Law Review Committee. An ad hoc non-statutory body, established recently in Darwin to review the law of that territory. A constitution has been agreed and a number of judges of the Supreme Court are taking part in its work, on a part time basis with others, mostly lawyer

Q.L.R.C. : Queensland Law Reform Commission. A permanent statutory commission established by Act in 1968. The Chairman (Andrews J.) and a number of members are part-time. One Commissioner is full-time and the Commission operates in Brisbane.

S.A.C.L.R.C. : South Australia Criminal Law and Penal Methods Reform Committee. An ad hoc committee appointed in 1971 by the South Australian Government to look into aspects of criminal law, procedure and penal methods. The Committee will discharge its reference and complete its functions in 1977. The Chairman is Roma Mitchell J. and it operates in Adelaide.

S.A.L.R.C. : South Australian Law Reform Committee. A non-statutory committee established in 1969 by Proclamation comprising part-time members including a judge as Chairman (Zelling J.), two judges as Deputy Chairmen and other part-time members. The Committee currently has a challenging reference on solar energy. It is located in Adelaide.

Tas. L.R.C. : Tasmanian Law Reform Commission. A permanent statutory corporation established by Act of the Tasmanian Parliam in 1974. The Commission took over the work of a committee that had been constituted in 1969. It comprises one full-time member (the Deputy Chairman) and a number of part-time members chosen from the legal profession but including two lay members with a background in community affairs. The Chairman was a judge (Neasey J.) and is now the Master of the Supreme Court (Mr. C.G. Brettingham-Moore). The Commission is located in Hobart

V.C.J.C. : Victorian Chief Justice's Law Reform Committee. This is a non-statutory committee established in 1944 by the Chief Justice of Victoria. It comprises judges of the Supreme Court, County Court and representatives from the legal profession and universities. It is entirely a part-time operation and largely confined to technical questions, avoiding issues of broad policy. It initiates its own projects. The Chairman is a judge (Gillard J.) and it meets in Melbourne.

V.L.R.C. : Victorian Law Reform Commissioner. A statutory body corporate established in 1973, the Commissioner's office works under one full-time Commissioner and an advisory council which includes lay members. The first Commissioner was a retired judge (Smith J.) The office has been vacant since January 1977, following the retirement of the first incumbent. The office is situated in Melbourne.

V.S.L.R.C. : Victorian Statute Law Revision Committee. This committee is a bi-cameral committee of each House of the Victorian Parliament. It is established by Act and works substantially on a bi-partisan basis dealing essentially with technical statutory rules. Inevitably, many of its members are not lawyers and the Chairman (Mr. A.T. Evans, M.L.A.) is not a lawyer. The Committee meets regularly during the Parliamentary session at Parliament House, Melbourne.

W.A.L.R.C. : Western Australian Law Reform Commission. Originally founded as an ad hoc committee, the Commission was established by Act in 1972. It comprises three part-time members who hold office as Chairman by rotation. One member is a legal practitioner, the other a Crown Law officer and the third an academic. The part-time Commission is supported by a full-time research staff. The present Chairman is a senior officer of the Crown Law Department (Mr. E.G. Freeman).

8. *Australian Law Reform Commission.* The national Commission comprises 11 Commissioners and 19 staff. The Commissioners comprise two judges (The Chairman and Brennan J.) two barristers, three solicitors and four academics. One of the academics, although not a layman, is not specifically a lawyer. The Act envisages the appointment of non-lawyers as Commissioners. One of the part-time Commissioners, Professor Gordon Hawkins, is a criminologist. The full-time Commissioners are a judge, a barrister, a solicitor and a legal academic. The staff comprise a Secretary and Director of Research, 7 researchers, a librarian and ancillary staff. The Commission has used extensively the services of consultants, including voluntary consultants, in many disciplines outside the law. An attempt has been made, particularly through the use of part-time members, to establish a link with the legal profession scattered over the vast distances of Australia. The part-time members travel to Commission meetings in Sydney, from Brisbane, Canberra, Melbourne and Adelaide. In addition, close links are kept with State law reform bodies in every capital.

9. *Current References.* The majority of law reform bodies in Australia work upon references assigned to them by their respective law ministers. Among the most interesting references currently under study are a major reference on the reform of the legal profession (N.S.W.L.R.C.), children's courts (Q.L.R.C.) criminal code (S.A.C.L.R.C.), solar energy (S.A.L.R.C.), discrimination in the law (Tas.L.R.C.), unincorporated associations (V.C.J.C.), innocent misrepresentation in contract (V.L.R.C.), infancy and age of majority (V.S.L.R.C.), mental disorder in criminal proceedings (W.A.L.R.C.)

10. The work of the Australian Commission falls into three classes. The first is its activity as a clearing house for the Australasian Law Reform Agencies (including the Papua New Guinea Commission and the five Committees in New Zealand). The second is the review of laws of the Commonwealth in Australia referred for review by the Federal Attorney-General. The third is review of the laws of the Territories, similarly referred by the Attorney. The current references before the A.L.R.C. are :

Privacy: A review of laws governing the protection of privacy in Australia, in the Territories and generally.

Bankruptcy Act: A review of the Commonwealth's bankruptcy and insolvency powers to deal with the total debt problems of small but honest debtors by repayment plans.

Human Tissue Transplants: The modernisation of the laws of the Australian Capital Territory to cope with the advances in transplantation. This will involve a definition of death by reference to cessation of brain function and the provision of new laws for anatomy and autopsy.

Defamation: An attempt to secure a uniform defamation law throughout Australia, to replace the 8 separate laws and systems presently operating and to modernise and make more relevant law and procedure here.

Insurance Contracts: The review, within the Commonwealth's insurance power, of laws governing insurance contracts, arbitration clauses, "basis of contract" clauses, agency and unfair conditions.

Locus Standi and Class Actions: A review of these questions in federal courts and courts exercising federal jurisdiction in Australia.

Aboriginal Customary Laws: The question of whether Aboriginal Tribal laws can be incorporated for the first time into the domestic law of Australia and if so by use of courts or village communities.

Complaints Against Police : Supplementary Report: A review of the Commission's previous recommendation for an independent review system, bearing in mind the abandonment of the concept of a national police force in Australia, following change of Government in 1975.

11. Other references have recently been proposed for the Commission. The Commission also has the facility to suggest references and has done so from time to time.

12. *Co-operation Between Agencies*. Short of establishing a national commission, in which the Commonwealth and States participate, efforts have been made to co-ordinate, to some extent, the work of the various Australian law reform bodies. They meet annually. The Australian Commission collects and disseminates information about current projects. They share in a bulletin *Reform*. A digest of law reform recommendations has been prepared and will shortly be published. An interim digest of Australian law reform proposals has been prepared and is used widely in Australia. There are regular meetings between the personnel involved in law reform, other than at annual law reform conferences. In a number of isolated cases, law reform agencies are co-operating in the same or similar projects. Finally, on 21 April 1977 the Australian Senate resolved to refer to its Standing Committee on Constitutional and Legal Affairs a number of questions, one of which is the "effectiveness of existing machinery for co-ordination of the work of the various law reform agencies in Australia".

LAW REFORM ISSUES

THE NEED FOR LAW REFORM

13. *Australian Approach*. About the need for constant reform of the legal system and re-examination of institutions, there is little dispute in Australia, certainly now. The Prime Minister, Mr. Fraser, recently put it this way :

> "Australia has always been a country where constructive reform has been welcomed and

> encouraged. Achieving a better life for all Australians through progressive reform will be a continuing concern of the government. The debate in Australian politics has never been over whether reform is desirable. Australians, whatever their politics, are too much realists to believe that no further improvement is possible and too much idealists to refuse to take action where it is needed. The debate has rather been about the kinds of reforms and the methods of reform that are desirable".

Certainly in recent years, there has been a growing recognition of the need for the law to catch up to date and re-examine itself for improvement, modernisation and simplification. The debate in Australia has centred not upon whether there is a need for law reform or even for law reform bodies. The issues in controversy have been the matters needing the most urgent reform and the priorities that should be assigned to their treatment. Although the Prime Minister suggested some fundamental values ("Reform is needed wherever our democratic institutions work less well than they might ... Wherever the operation of the law shows itself to be unjust or undesirable in its consequences ... Wherever our institutions fail to enhance the freedom and self respect of the individual ...") the general tendency in Australia has been to avoid these controversies and to focus upon practical questions where improvement of the laws or practices observed is needed.

14. *Reasons for Reform*. There is general agreement that law reform means not just change, but change for the better. Most people agree that "change for the sake of change" is not a proper function of reform. To "reform" implies the retention of what is good in the present law, adapting and modifying it to meet changed circumstances. In the Australian Commission's second Annual Report a number of grounds were advanced to justify reform :

* To repair inadequacies of the law. Where no law or no adequate law governs social

relationships, the need for the community to say what is acceptable and what is not and to give guidance to its members is plain. The reference on Privacy upon which the Australian Commission is working is a case in point.

* To remove outmoded laws. Cases arise where the law is overtaken by technology. The effort of the report and Bill on Criminal Investigation is to bring the procedures of police investigation of crime up to date with modern scientific developments : the tape recorder, videotape, telephones and so on. The thrust of our work on human tissue transplants is in the same direction : removing antique provisions of the common law developed long before the miracles of transplant surgery.

* To reflect new social values. Cases arise where the law falls quite out of line with current thinking, morality and social values. Our report on the independent handling of complaints against police is a case in point. The changing authority relationships in society are reflected in many legislative and other changes that have wide ramifications for the legal system. The reform of bankruptcy laws to reflect the need for honest debtors to have counselling and not the stigma of bankruptcy indicates the modern approach to the problem of debt in the credit society. The concern about Aboriginal tribal laws reflects the new compact which Australian society is seeking to make with the indigenous Aboriginal people of Australia.

* To remedy injustices. Reform may also be needed where the law is working injustices. Inevitably the common law has on occasions taken turns which seem to modern eyes to be quite unfair. For example, it has been held

that a policeman is denied the protection of Crown indemnity for torts committed by him in the course of duties. He is "an independent office holder", not an employee. This principle requires change and change was recommended. Likewise in defamation, remedies are too often denied by the courts until years later. But reputation, if it can be restored at all, can only be restored promptly and if possible by correction - not a "pot of gold". The Australian Commission's tentative suggestions on defamation law reform introduce new correction and retraction procedures, as well as prompt return before the court, so that the remedy fashioned by the law can be apt for the problem with which the law is seeking to grapple.

* To simplify confused, inconsistent or hidden laws. Few problems are more important and urgent than providing access to the law and simplifying its language, diminishing its mysteries. In the Australian Commission's reports we seek to dispose of antique language. Thus in reform of bail law and procedures, new, modern language is used. "Undertaking" replaces "recognisance". "Guarantor" replaces "surety". "Renewal" takes the place of "respital". "Forfeiture" is substituted for "estreat". So long as the law remains a mystery capable of unravelment only by highly paid initiates, it will not command respect but will be looked upon with bewilderment and amusement, if not contempt.

15. *Statutory Purposes*. Most law reform statutes in Australia set out the rationale for reform and for the existence of the law reform body. The functions of the national Commission have already been mentioned. They include the review,

modernisation, simplification and consolidation of laws. They include the elimination of defects in the law and the adoption of new or more effective methods for administering law and dispensing justice. They extend to the repeal of obsolete or unnecessary laws. Finally, they require the Australian Commissio

> "(d) To consider proposals for uniformity between the laws of the Territories and laws of the States".

Law is a force for stability and predictability in society. But societies are changing, never more than at present. These changes add tensions to the legal system and require constant review of the laws at a level above "band-aiding" and "patchwork" Review is also needed with the help of non-lawyers and in the end must pass the test of Parliamentary scrutiny and be capable of enforcement in real terms. Reformers must not be content with yet another statute added to the burgeoning growth of legislation emanating from Parliaments.

16. In a statutory sense, most law reform bodies in Australia have the "need" for reform determined by their respective Attorneys-General. He signs the reference and initiates the project. In this way law ministers, sensitive to social issues and to the needs for reform, can discern the "problem areas" for the law and fix the priorities of legal renovation. But the very growth of legislation and the retreat of the common law has an effect upon the need for reform. In the age of active Parliaments, judges are less willing and have le scope to develop the law, preferring rather to leave this task to Parliaments. In a federation, this tendency is exacerbated by the very proliferation of different statutory approaches, which take the jurisdictions of the federation further away from the common law mean. Higher courts, instead of developing legal principles of general application, must devote their time increasingly to tasks of statutory interpretation. In these circumstances, who is to review the broad directions in which the law is going? Who is to grapple with the difficult, technical, even boring areas of the law where no votes are to be won for legislators? Who in the age of Parliaments will be concerned to reform the rule against perpetuities and accumulations? Who

will assist sensitive legislators to deal with the "hot potatoes" from which political caution may send them scurrying? The occasions for law reform are many. Certainly there is much work of a detailed and specialist kind that will interest lawyers only. Unless law reform bodies do such work, it will often remain undone. But the need for law reform, at least as seen in Australia, goes beyond this. It encompasses matters full of policy and controversy. Law reform bodies must not shy from the task of assisting legislators. Unless they help, legal renewal may not take place.

COMPOSITION OF LAW REFORM AGENCIES

17. *Full-time and Part-time.* There is now really no doubt that the core of any law reform body, if it is to be productive, must be a full-time establishment which can give undivided attent to the difficult task of reforming the law. The job is not one for the "fag end of the day". It is a task requiring full-time concentration of expert personnel giving their undivided attentio to the intricate problems and implications of changing the law. That debate was fought out in the 60s and must now be taken to be settled. It is not a subject of controversy in Australia. The debate is rather about the utility and role of part-time Commissioners and the composition of law reform agencies, including the participation of laymen.

18. In the Australian Commission, the original members were part-time only until the Chairman (who must be full-time) was appointed in February 1975. The seven part-time members have contributed significantly to the national Commission, as have their equivalents to various State agencies. But in the Australian Commission the part-time members play the additional role of linking the agency to the legal profession in different parts of the country. Inevitably this produces cross-fertilisatic of ideas, based upon differing ways of doing things. It also permits the acquisition of personnel as decision-makers who would not otherwise be available for full-time appointment. In the case of Sir Zelman Cowen, Vice Chancellor of one of the country's largest universities, he brings to bear a lifetime devoted to legal scholarship. Brennan J., also a part-time

member, is President of the Administrative Appeals Tribunal and Chairman of the Administrative Review Council. His membership secures a reciprocal relationship with the body working on administrative law reform in Australia. The practising professi is also involved in this way, to an extent that would simply not be possible, were the Commission limited to full-time members. Although part-time membership was abandoned in the Canadian federal Commission, it is alive and working well in Australia. The Commission is organised by Divisions working upon particular references according to the skills and interests of the members. Divisions always comprise a number of full-time and part-time members. Meetings of the full Commission occur in Sydney once every six weeks. Meetings of Divisions occur much more frequent often in weekends. Not only do the part-time members bring their ideas to the table. They take the Commission's proposals out to the academic and professional audience in a way that woul not happen if the Commission were limited to a full-time unit. The combination of part-time appointments and Divisions to work on particular projects, is an effective one. The commissions of the part-time members are normally for two to four years, thereby ensuring a turnover of personnel and the gradual involvement of a large audience in the work of national law reform in Australia.

19. *Laymen*. The *Law Reform Commission Act 1973* envisages that the Australian Commission could include non-lawyers as Commissioners. A person may be appointed who -

> "in the opinion of the Governor-General is, by reason of his special qualifications, training or experience suitable for appointment to the Commission".

Professor Gordon Hawkins, a criminologist, is not specifically a lawyer, though he can scarcely be called a layman. In Australia the Victorian Statute Law Revision Committee and the Tasmanian Commission are the only agencies that include laymen as members. The Law Reform Commissioner in Victoria is assisted by a council including laymen. Where there is a mixture of lawyers and laymen, experience suggests that the laymen tend to defer to lawyers in respect of reform ideas and their contribut

has not, to date, been marked. On the other hand, the inclusion of a sociologist, after the precedent of Professor Mohr in the Canadian Commission, could well add new dimensions to the work of law reform. In the end, most of the work of the law reform body must be submitted to the scrutiny of laymen in Parliament. Given the scarce resources devoted to reforming the law, the question is not so much one of principle as one of utilising the available posts to best advantage.

20. *Consultants and Special Interests*. The Australian Commission has secured the appointment of numerous consultants, most of whom are non-lawyers, to assist in the preparation of reports. They are invited to meetings of the Divisions of the Commission working on particular projects. They sit down as equals with the Commissioners and help to give fresh perspectives to their work. For example, in a project concerning human tissue transplants, a large team of medical practitioners with different specialties joined with philosophers, theologians and psychologis to test the Commission's proposals, comment on drafts and debate the issues from their earliest stages. Likewise in a project on privacy protection, a number of computer technologists have joined with philosophers writing on the subject to help the Commissioners. In the project on defamation, newspaper and broadcasting editors sit down with journalists, government office and consumer organisations at the very earliest stages of work on the reference. In a project concerning police investigation procedures, 7 police representatives both federal and state, a ju practitioners and numerous legal academics worked to give several perspectives which would not necessarily have occurred to the Commissioners but were vital for an informed and balanced proposal for reform. In short, the procedure for appointing consultants has worked well. Our experience has been that people from different disciplines are only too happy to be involved in the processes of law reform and particularly where that involveme starts at the initial stages and continues with a degree of formal attachment to the exercise, from beginning to end. Althou some of our consultants are paid, most are fully prepared to lend their service for the cost of expenses and the opportunity of participating in a useful project of legal renovation. The

facility of appointing consultants may be an arrangement to be preferred over adding laymen to the membership of the Commission.

21. *Federal Geography*. There is one additional considerati that has to be borne in mind in a large federal union such as Australia. It is the need to balance the composition of the Commission with at least an eye on the federal nature of the country. The future for co-operation in law reform in Australia may hold some form of participation by the States in appointment to the national law commission. Some form of secondment or participation may yet be worked out. In the meantime, it is important for local sensitivities to ensure that a number of centres in the country are represented. The Commission tries to do this in the appointment of staff and consultants. Successive Attorneys-General have tried to do it, with some success, in the appointment of Commissioners. Part-time Commissioners presently come from five of the eight jurisdictions in Australia In time, all States and Territories will be represented. A number of impediments make the appointment of full-time Commissioners from distant parts of Australia more difficult. These include salaries, family commitments, interruption to professional advancement and so on. Even here, however, the attempt has been made. Of the first five full-time Commissioner one was appointed from Melbourne and the other from Adelaide.

22. *Turnover*. In most State Commissions in Australia, the membership has been fairly stable and often extends over many years. In the national Commission the maximum term of appointme is 7 years, although it may be extended. In fact, the present full-time Commissioners hold commissions for 18 months, 2 years and 3 years respectively. Turnover is important to ensure the continuing generation of new ideas and because it has proved the best means of attracting participation from the practising profession where much higher salaries can be enjoyed than in government service. Stability is needed to give continuity of ideas and to permit the completion of projects begun under the direction of certain Commissioners. Striking the proper balance between these requirements is not easy. The answer, in our experience, is dictated as much by the availability of

persons appropriate for appointment as by the needs of the Commission. The fact is that salary levels are such in Australia that any person accepting appointment as a federal Commissioner will almost certainly suffer a financial loss.

INDEPENDENCE FROM GOVERNMENT

23. *The Problem*. The very reason for creating a law reform commission as a statutory corporation is to ensure its independe of the executive government so that the government and the Parliament can receive advice of a different kind, certainly a different origin, to that offered by the Public Service. Some Australian agencies are not even part of the public sector at all. The Victorian Chief Justice's Committee, for example, is a private body and has, on occasions, refused the invitation to look into matters because of the policy issue involved. For example, it refused to consider a request by the Victorian Government to advise on the law relating to abortion. In the Western Australian Commission, one member must be a Crown Law officer. Of course, as a member of the Commission, he enjoys a special statutory position. But the requirement was no doubt intended to ensure that there would be an input of ideas from persons whose day-to-day tasks involved working to the executive government.

24. In most Australian Commissions the balance is struck by the statute. On the one hand the executive government may, exclusively or otherwise, initiate the work of the Commissic It may even require (as in the Australian Commission), an interim report or fix the order in which the Commission is to deal with references. It may not, having committed a matter to reference, dictate the result. Independence is ensured by the statutory obligation to table the report in Parliament within a fixed period of its receipt by the Attorney-General. The South Australian Committees do not enjoy this facility as their reports are private to the Attorney-General, until he chooses to release them, although in practice, with one exception, he has always done so.

25. In the view of some, the problem is not so much that

of independence as of indifference. Although law reform agencies have been cautioned by the Public Service to be vigila of their independence, it is perhaps equally vital that they dc not cherish it to the extent that they deny all contact with th bureaucracy who must advise on the implementation of proposals for reform, whether legislative or otherwise. It is for that reason that a wise reformer seeks to discuss the implications of projects with appropriate departmental officers, and not onl those in the Attorney-General's Department. In the Australian Commission, no project is started without discussions with relevant points of contact in the Public Service, Federal and State. Often government initiatives which have not been public disclosed and which have implications for reform measures must be borne in mind. No one suggests that a law reform agency should tailor its proposals to suit the policies or advantage of the government of the day. Governments come and go and any attempt to adopt that approach is fraught with danger. By the same token, it would be naive and unreal to so divorce a law reform agency from the government machinery that it does not inform itself about concurrent developments. Certainly in Australia many important measures for reform originate within the government or government agencies. An attempt must be made by the law reform body to get a perspective of concurrent moves for reform in allied areas before delivering its report. In some cases, the government sector is the"customer"of reform. Thus, in the Australian Commission's reference on privacy laws, a major concern is the potential intrusion into privacy of the Public Service. Detailed discussions are had with every department and major instrumentality of government with a view to understanding their problems. A view of independence which de a law reform body this facility would go too far.

26. *Parliamentary Involvement*. Although most Australian commissions receive references from their respective Attorneys-General and report back to the law minister, they are, in a sense, servants of parliament. They must report to Parliament. In the case of the Australian Commission they must, if required t Parliament or a Parliamentary Committee, supply such informatio as is required concerning the performance of functions and

the exercise of powers. Appearances have been made before Parliamentary Committees, including Party Committees of both major political parties to explain proposals and to discuss tentative suggestions. This is in no way a diminution of the independence of the Commission. Rather, it is part of the necessary process of gathering information and views from a particularly important source. Although great care must be taken in striking the balance between independence and irrelevance, the danger of past approaches has been an excessive adherence to the judicial model and the attachment of excessive value to complete and absolute independence, both of the executive and of Parliament. The Australian Commission is seeking to strike a new balance. It has the support of the Australian Parliament in this, doubtless because of the plain need of Parliament in modern times for expert assistance. In April 1977 the Australian Senate referred to its Constitutional and Legal Affairs Committee an inquiry into three matters, the first of which is :

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

There is little use in a law reform body enjoying perfect independence if the end product of its work is the pigeon hole. New machinery, within the political parties and Parliament must be discovered to ensure that proposals for reform receive proper consideration. Otherwise, large sums of public money are simply thrown away and law reform is merely window-dressing. If the price of ensuring the effectiveness of reform bodies is a closer contact with relevant legislatures, meetings with Parliamentarians and public servants to explain proposals and to secure suggestions and ideas, it is a price which the Australian Commission believes should be paid. The notion that a law reform body should work in complete isolation and that its task is finished when it delivers its report is one which the Australian Commission has not followed. It is certainly not my

PROGRAMMES OF LAW REFORM

27. *Initiation*. In Australia, a whole range of possibilites exists in connection with the initiation of the wor of law reform bodies. The statute of the New South Wales Commission limits it to work upon matters referred by the Attorn General. The Victorian Chief Justice's Committee can initiate its own work, although it often accepts projects from government and Parliamentary sources. The Australian Commission's statute was amended during its passage through the Parliament by the addition of words indicating that the Commission may suggest matters appropriate for reference. Such suggestions have been made. In every case but one, the suggestion has been accepted and even in that case, although not accepted by one Attorney, it was approved by the present Attorney-General (Locus Standi an Class Actions). Although this is the statutory position, in practical terms, there is probably not a great deal of differenc from agency to agency. Discussion is had with the Minister. In some cases major matters are referred because they are import to the government of the day. This is the origin of the Australi Commission's project on privacy, the New South Wales Commission's reference on reform of the legal profession and the South Australian Committee's inquiry into the legal implications of solar energy. The obvious advantage of the Attorney-General's reference is often spoken about but real nonetheless. It is the judgment made that a matter has sufficient priority to warrant consideration : a judgment that it is hoped will preserve the ultimate report from indifference. The capacity to suggest references allied with the obligation to secure the Attorney-General's "green light" and the government's capacity to refer thos matters to which it attaches primary importance, strike an appropriate balance that has worked well in Australia. About half of the Australian Commission's references originated in suggestions made by the Commission.

28. *Priorities*. The priorities for the discharge of references are substantially left to law reform agencies themsel in this part of the world. In the case of the Australian Commission there are statutory and other limits which should be listed. Section 6(2)(b) of the Act authorises the Attorney-

General to "give directions to the Commission as to the order in which it is to deal with references". Section 9 permits the Parliament to require information and requires the Commission to comply. Section 10 empowers the Attorney-General at any time before the Commission makes a report to direct the Commission "to make an interim report on its work under the reference". Although the Senate Committee previously mentioned has requested information under s.9 concerning its current inquiry into law reform machinery in Australia, no directions have been given by the Attorney-General pursuant to the other provisions of the Act. In a number of cases, the terms of reference received by the Commission have included a deadline for report. The major review which has now resulted in the *Criminal Investigation Bill 1977* was required to be completed within six months. The review of motoring laws in the Capital Territory was an urgent task and a time limit of six months was mentioned in the terms of reference. The Commission is about to discharge, within its time limit, a major review of transplant laws. Although there appears to be no statutory basis for compliance with the deadline fixed by the Attorney-General, in every case the Commission has endeavoured to meet the deadline and has succeeded. Views differ on this. Haste, it has been said, is the enemy of true reform. But so, it seems to us, is tardiness. Governments change, Ministers and Parliaments change, priorities are altered and the enthusiasm for particular projects sometimes passes, the opportunity to achieve reform being lost as a consequence. The numbers of tasks requiring attention and the pressures of modern society are such that it seems likely, in Australia at least, that attempts to impose a time for report will increase rather than diminish. It began with the Australian Commission. It is understood to have spread to at least one State Commission. Other inquiries and even Royal Commissions have been asked to report by a certain time. If law reform bodies resist this kind of pressure, the consequence will inevitably be that governments will look elsewhere for advice, notably to their departmental officers who are entirely used to working under such pressure. Such a consequence may produce a lowering of sights, especially in projects of a technical or sensitive kind where law reform bodies have

a particular advantage to offer. Compromises must be struck and provided adequate time is initially allowed and some flexibility permitted for report, it must be said that fixing a deadline concentrates the mind and ensures the team effort which may make up in diligence and application much of what is lost in "perfection" and contemplative leisure.

29. Apart from external review of priorities, inevitably the Commission itself fixes the way in which it will tackle its programme. In the Australian Commission, with multiple projects the process has been one of assigning to a particular full-time Commissioner, the charge of particular references. The Act permits the Chairman to constitute Divisions for the purpose of handling references and this facility has been of enormous benefit, allowing the appropriate use of manpower : staff, consultants and commissioners. The true limits on the work of law reform agencies in Australia are fixed by budgets and staff ceilings. These, and the consequent limitations that can be imposed upon a hard pressed staff tackling multiple references chart the outer limits of the extent to which work can be done by a particular time or according to particular priorities (however well intentioned).

SUBSTANCE OF LAW REFORM

30. *Reform Beyond Statutes*. The Australian audience has been watching the Canadian debate about the limited role of legislation in law reform. Certainly Professor Hans Mohr and the other Canadian Commissioners are right to draw attention to the fact that the mere passage of an Act does not necessarily effect reform. In its first report the Australian Commission adopted the terms used in Canada :

> "Often ... the letter of the law isn't the main problem. The rules themselves, not just their wording, need change. Official practice - the operation of the rule - may need to alter. The values which those rules enshrine may be untenable or no longer be the values of the society those rules serve. ... 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. It must consider how the law is thought of and accepted by the society it serves. It must examine how far the law and social attitudes to it are justified".

31. Efforts have been made in Australia to tackle this problem by empirical research, surveys, examination of public opinion and finally education of the audience to whom reform proposals are addressed. There are many in Australia, as in other countries, who condemn the great body of law emanating from Parliaments throughout the country. It is important for lawyers, and legislators, to avoid the self-deception that the mere passage of an Act will in every case achieve the desired reform. There is no provision in the legislation of any law reform body in Australia for follow-up or monitoring the effectiveness of proposals for reform. A first step has been taken in this direction by the Australian *Family Law Act*. Apart from establishing a Family Law Council, it envisages an Institute of Family Studies which will review the actual operation of this reforming statute. It is expected that appointments will be made to the Institute in 1978. Obviously, it suggests the way in which law reform efforts should be judged, according to their actual effectiveness in practice.

32. *Procedure or Substance*. To some extent the projects before most law reform bodies in Australia and their concentration upon substantive or procedural law depend upon the actual terms of reference given by the Attorney-General. In some cases, the reference requires reform of procedures. The Australian Commission's first exercises relating to the handling of complaints against police and criminal investigation required careful scrutiny of police practices. Indeed, the report set itself the task of bringing "the law in the books closer to the

practice on the ground". Likewise, in tackling laws to govern drinking and driving, it was not thought adequate simply to impose severe statutory penalties. Detailed proposals were suggested in the endeavour to cope with the basic problem for the law at its source : treatment and assistance to people with alcohol and other drug dependency. Reform of *Bankruptcy Act* provisions has taken the Australian Commission into a careful survey, over several years, of the characteristics, background, property and needs of individual bankrupts. To modernise the law to deal with transplantation of human tissues and organs, public and private discussions have been had with donors and recipients of transplants, the relatives involved, hospital staff and so on. Discussion about the reformed procedures for handling complaints against police have continued over two years. In that time, there has been a process of mutual education of the participants, including police. The result has been the diminution of tensions and opposition to change and the gradual acceptance throughout the country, on an administrat level, of proposals put forward against opposition two years ago. The lesson of this is that law reform may sometimes require time to be effective. It is more likely to be effective if supported by proper empirical research and an understanding of current practice and difficulties. The mere passage of legislation may be only the beginning of the task. More resourc should be devoted to prior research and resources should be made available to monitor the results of reform proposals. At preser all we do is to wait for legislative or academic or public criticism and this is clearly not enough.

33. *Sanctions and Remedies*. One special project upon which the Australian Commission has been engaged, has involved the full-time attention of Commissioner J.J. Spigelman. He has prepared a report on Sanctions and Remedies in law reform which seeks to bring together the issues to be weighed by law reformer concerned with the efficacy of their recommendations. To test the effectiveness of proposals, it is necessary to start with an explicit understanding of the purposes to be served and the available information concerning factors limiting the effic of legal regulation. The paper then proposes a check list of

the wide range of public and private remedies and sanctions available. Unless law reformers attempt to be systematic, important variables may not be properly considered and the remedies and methods chosen to enforce the policy proposed may prove inapt. Amongst the public remedies assessed are penal sanctions, regulatory powers, controls of various kinds and compensation. Among private remedies are compensation, dispute settlement, behaviour modification, social denunciation and costs. There is a growing concern amongst law reformers in Australia that attention should be addressed to effective reform, avoiding reflex resort to stereotyped legislation which may not prove efficacious, simply because there is so much of it.

RESEARCH

34. *Sources of Research*. The research capacity of Australian agencies vary. Most have a core of legal researchers. None has full-time non-legal research capacity. For the latter we must uniformly look outside, principally to universities but also to interested bodies and to consultants. The Law Foundations in New South Wales and Victoria have assisted in the funding of research for law reform. The New South Wales Commission's project on civil procedure was assisted when a number of lawyers were sent to examine civil procedure in North America, Europe and Japan. There are limits on the use that can be made of research by interested groups because it is important to preserve the reality and appearance of independence. In the Australian Commission's project for the reform of insuranc contract law, every insurer operating in Australia has been asked to deliver the documentation used for scrutiny and analysis A retired insurance executive has been appointed as a consultant and is presently engaged in this specialised, painstaking and necessary task, from which an understanding of the present practices will emerge. For these services, he is paid. Many other consultants have been used, without fee. Many of them have prepared sizeable written contributions. The help of the media (newspapers, radio and television) has been enlisted to assist in the survey of public views and opinion. In relation to the reform of drinking driver legislation, a public opinion

poll was conducted in the Australian Capital Territory by a loc newspaper. The limits upon empirical research are those fixed by available funds and, in some cases, the constraints of time and available manpower.

35. *Organisation of Work.* Upon the receipt of a reference in the Australian Commission, one full-time Commissioner is assigned to take charge of the project and to direct research and investigation upon it. Other members, full-time and part-time are then added to the Division to work on the reference and, under the Act, to be the Commission for the purposes of the reference. The Chairman is a member of all Divisions. Ther is a general review of progress in all references at the six-weekly meetings of the whole Commission. Each Division then has assigned to it research staff so that no member of staff is working on one project only. Work progresses through various stages of report, described below, meetings with consultants, in-house discussions, seminars, public sittings in all parts of the country until finally a report is presented. In every case the academic community throughout Australia is consulted so that those members, legal and non-legal who have an intellectual contribution to make can be invited to take part in the project. Although the methods of consultation differ throughout the country and vary in accordance with the nature of references given, it is fairly uniform for a law reform agency to prepare a statement of tentative proposals before delivering the final report. The Australian Commission has conducted public sittings in relation to all of its references, after the delivery of a working paper or discussion paper. The Tasmanian Commission has also experimented with public hearings and the New South Wales Law Reform Commission has now begun "open house" consultation with the public concerning the reference on the legal profession Although views differ about the utility of public hearings, a number of reasons are advanced for conducting them in Australi The country is large and the communities are scattered. Law reform, particularly in the matters referred to the Australian Commission, is not a matter for "lawyers only". Where important issues of policy are before an agency, they ought not to be resolved behind closed doors. It is much more likely that ideas

will be refined and perfected if they are first tested by debate in the public media and open for scrutiny and criticism before the Commissioners in public sittings conducted in all parts of the country. It can then be truly said to Parliament that every point of view has been given an adequate forum, not simply the priestly caste of initiates, "experts" and specially interested persons.

FEDERAL LAW REFORM

36. *The Difficulties of Federalism.* A number of special problems are involved in law reform in a federation such as Australia. No single law reform agency has the constitutional power to deal with the whole law in an encyclopaedic way. Even the national Commission is limited, the Territories apart, to that group of categories of subject matter which were assigned to the Commonwealth at the turn of the century by the Australian Constitution. In a sense, the categories import legal "pigeon holes". The reform of family law has been inhibited to an extent by the fact that federal power in Australia is limited to "marriage" and "divorce and matrimonial causes; and in relation thereto, parental rights and the custody and guardianship of infants". Although the boundaries are wide, they do not extend to all of the issues of family law, some of which are dealt with by a special federal court (the Family Court of Australia) and others of which must be assigned to the State court system. This illustration is typical and it demonstrates the difficulty of taking any particular subject matter afresh and dealing with it in novel ways. The constitutional division of powers imposes limitations upon inventiveness. Take, for example, the reference before the Australian Commission concerning defamation. The Commonwealth has power under the Constitution which has been interpreted to extend to radio and television. Quite possibly national legislation could be passed under this power to remove the inconveniences and confusion caused by eight different systems of defamation law in a country where information is distributed nationally. However, it is almost certain that the Constitution does not permit a Commonwealth Act to cover the whole field of defamation : regulating the electronic media, the printed word and slander by individuals. It is for

that reason that we are embarked on the effort to secure a uniform Act, by agreement between the States. The history of uniform laws in Australia is a sorry one. Apart from uniform companies legislation, fairly uniform hire-purchase legislation and one or two other minor exceptions, there have been no significant efforts to secure uniform laws. There is no regular machinery to prepare uniform laws, although the Standing Committee of Attorneys-General of the Commonwealth and States provides the political council in which the necessary decisions of policy could be made. A proposal to reform, simplify and unify the credit laws of Australia was first made in 1966. It has moved through three Committees but not a single clause has yet passed into law. There is no uniformity conference in Australia. Conscious of this, the second meeting of Law Reform Agencies in 1975 suggested a procedure by which the agencies could propose subjects ripe for uniform law reform. The proposa was rejected by the Standing Committee of Attorneys-General and has come to nothing. Some of the proposals of the national Commission may be adopted as models in the States. The Premier of New South Wales has indicated his intention to introduce legislation based on the Commission's report concerning complain against police. Inquiries are presently proceeding that may lead to uniform adoption of the reformed criminal investigation code. But in the end, uniform law reform moves at the pace of the tardiest State. Even when achieved, no regular machinery ha been created to update uniform laws. Not every subject is appropriate for uniform treatment. Where there is movement of goods and services throughout the nation, differences of law can be a significant and expensive burden. This is one of the most important unresolved problems facing the law in the Australian federation. Its importance increases with the retreat of the common law and the diminution of the unifying influence which the common law could once exert.

37. *The Problems of Duplication and Conflict.* One cost of federalism is the duplication of work upon the same or similar topics of reform. A glance at the current programmes before Australian law reform agencies and of recent reports indicates that the same subjects repeatedly come up for scrutiny

in several jurisdictions. Rationalisation of this effort, given the scarce resources available for the reform of the law, seems an imperative. A large number of reform bodies are examining rape law and procedures. Three at least are looking at aspects of privacy. Several are scrutinising the law of evidence. The list of duplication is a long one. The peril of separate inquiries is, of course, different conclusions which may actually hold up the progress of any reform because the "experts" have not agreed. These problems of law reform in a federation have led successive governments in Canberra to a close scrutiny of the Australian Constitution, with a view to exploring, once efforts at uniform laws have failed, the outer limits of the Commonwealth's power to enact national law reform.

38. *Co-operation in Law Reform*. Efforts are made to achieve co-operation between the 11 agencies in Australia and indeed sister agencies in Papua New Guinea and New Zealand, the Law Council of Australia and the Law Foundations. Each year these bodies meet as the "Australian Law Reform Agencies' Conference". Techniques and methods are discussed and evaluated. Uniform law reform is always on the agenda. The proposal for a formal mechanism of co-operation having been rejected by the Law Ministers, other, informal procedures of co-operation have been exhausted instead. A digest of law reform reports has been prepared by the Australian Commission and quarterly supplements of it are issued collecting law reform reports, papers and proposals. A bulletin of law reform news is widely distributed each quarter throughout Australia to judges, agencies, government departments, Members of Parliament, practitioners and others who may have a concern in law reform. The Australian Commission in its peripatetic sittings in all parts of the country keeps close contact with State bodies and with the local profession. Parallel references by Attorneys-General to particular agencies allow some rationalisation of effort and this may be the way of the future. It seems unlikely in the short run at least that Sir Owen Dixon's call for a national law commission in Australia, servicing the Commonwealth and States alike, will come to fruition

FORM OF REPORTS

39. *A Critical Look at Procedures*. It must be acknowledge that present law reform procedures are less than perfect. The preparation of a working paper, its distribution to a limited audience and the subsequent delivery of a report is the accepte stereotype. Some references are relevant to wide audiences of differing interests. Law reform papers and reports speak not only to the expert. Ultimately, they speak to Parliaments, made up substantially of laymen. Because the audience addresse may be diffuse, a scholarly working paper may simply fail to communicate to a relevant, affected group. Many are the complaints about the bulk of legal literature, not least law reform literature. If the report is addressed to Parliament an to busy Ministers and their departments, a balance must be stru between realistically putting the proposals in a brief and not misleading form and arguing the merit of the proposals, not simply asserting them. If, especially at the early stages, the papers are addressed to the general community, the use of "legalese" and the "pepper and salt" treatment with footnotes will surely have an inhibiting effect and stifle true communica The limits imposed by funds prevent, in most countries (certain Australia), lavish publication. What can be done about this?

40. *Australian Solutions*. In Australia we have watched with fascination the presentation of reports from Canada, to a publishing standard that exceeds Antipodean budgets. In the Australian Commission a compromise has been struck, born partly of funding and partly of inclination. During the early stages of any project a number of papers are prepared for distribution. These include amongst others, *Seminar Papers, Issues Papers, Discussion Papers* and *Working Papers*. An attempt has been made to achieve brevity without too much loss of detailed exposition. Realising that we speak to differing audiences, we are now experimenting with a new method of communication : the *Discussion Paper*. Ten thousand of these have been distributed with the *Australian Law Journal* and to individuals and interested groups. These papers put in short form (about 20 pages) a summary of the Commission's proposals. There is a short argument, a pithy analysis of the problem and an

epitome of the Commission's proposals (including in one case draft legislation). In this way, we hope to tap the audience that would not be interested to read and comment upon a detailed working paper. The price of brevity is "some over-simplification and a dogmatic tone", as was acknowledged in the first of these papers. Certainly, the reaction from the profession and the public has been far greater than to more detailed working papers and, generally, more useful. The Australian Commission will persist with this procedure, at least in major projects. To compete with the enormous range of legal literature now being produced, law reformers must learn not only clarity but also brevity of expression. They must also learn to use the public media as an inexpensive assistant to generate discussion and promote debate. There are, of course, dangers in this : superficiality, sensationalism or excessive controversy. The Australian experience has been that if the media are properly assisted and if the issues are attractively presented, law reform can be made interesting and public participation encouraged. The Australian Attorney-General recently put it this way :

> "What we are seeing in this country today is that law reform is being taken into the living rooms of the nation, by television and by other means. We are all becoming involved in it".

The use of the media to promote discussion and secure ideas has not been limited to the Australian Commission. The New South Wales Commission's inquiry into the legal profession has conducted public sessions under television lights, the South Australian Committee's inquiry into legal aspects of solar energy has produced much media attention. There are some who balk at the idea of judges and Commissioners discussing the issues of law reform on television and in the press. These inhibitions are falling away in Australia. The intellectual community of the country is growing rapidly. Education standards have increased drastically in the space of a generation. Adhering to communicati by the printed word is akin to sticking to the cavalry horse when the rest of the world has moved on. Much law reform is inescapably controversial. Controversies that have been settled after wide public discussion are more likely to find acceptance

than those dealt with, in however scholarly a fashion, behind closed doors, with a minimum of input from the community ultimately involved in the law.

41. *Draft Legislation.* The Law Commission taught us all that draft legislation can promote speedy attention to law reform in Parliament. Although legislation is not the answer to every problem of reform, in the modern age, it is certainly an important part. In every proposal for reform so far presented by the Australian Commission, draft legislation has been attached. Many of the State Commissions also attach drafts notably the New South Wales Commission. The value of draft legislation is the assistance it provides for the focusing of attention upon the specifics of reform proposals. In a federal body, it also concentrates the mind upon the limits of constitutional power that always exist and must affect the reform proposals advanced. It helps the reformer to clarify his ideas and identifies any implications of reform proposals or other laws affected by them. Drafting legislation, particularly in a federation, is a task for experts. Those who can do the job effectively, according to the accepted style adopted in Australia, are few. Unlike the Law Commission, which, from the first, has had a number of draftsmen attached to its staff, the Australian Commission has had to borrow or second such assistanc as each project develops. The importance of maintaining a capacity to translate raw proposals into acceptable legislative form, is one of the matters which the Commission has drawn to the attention of the Australian Senate in its inquiry into law reform machinery. The duty of the Commission to simplify the law may ultimately involve it in an attempt to change the style of drafting legislation that is adopted throughout Australia. It is a highly detailed and specific style which parallels the methods of judicial interpretation of statutes inherited from England. The beginning of reform in this area may well be the acceptance of the Law Commission's proposals concerning statutor interpretation. No doubt this matter should be high on the list of priorities of all law reform bodies.

FOLLOW-UP

42. *The Problems of Implementation.* There are some agencies including some in Australia, which take the view that their role is finished once they report. The history of implementation of law reform reports in Australasia bears witness to some degree of legislative indifference. A table, produced in the last Annual Report of the Australian Commission, gives the record for legislative follow-up.

TABLE OF LEGISLATIVE ENACTMENT OF LAW REFORM REPORTS[60]

Law Reform Agencies	*Total Number of Reports*	*Reports followed by Legislation*
A.L.R.C.	3	0 (0%)
A.C.T.L.R.C.	7	1 (14%)
N.S.W.L.R.C.	24	11 (46%)
N.Z.C.C.L.R.C.	28	9 (32%)
N.Z.C.L.R.C.	23	4 (17%)
N.Z.P.L.E.R.C.	31	8 (26%)
N.Z.P.A.L.R.C.	20	5 (25%)
N.Z.T.G.L.R.C.	13	3 (23%)
N.Z. ad hoc Committees	2	1 (50%)
P.N.G.L.R.C.	3	0 (0%)
Q.L.R.C.	20	15 (75%)
S.A.C.L.R.C.	3	1 (33%)
S.A.L.R.C.	35	19 (54%)
TAS. L.R.C.	13	10 (77%)
V.C.J.C.	188	67 (36%)
V.L.R.C.	4	0 (0%)
V.S.L.R.C.	192	146 (76%)
W.A.L.R.C.	40	11 (28%)
Total	647	311 (48%)

43. The figures in the above table need clarification. In some cases the report was an Annual Report not apt for legislative follow-up. In some cases no change was recommended. In other cases changes were introduced on an administrative basis. In many cases legislation has followed since the table was prepared. On the other hand, in some instances, the implementation is over-stated by legislative action on part only

of the law reform proposal. The table is therefore only a general guide. It does indicate, however, that if law reform is to be more than the presentation of scholarly reports, some attention must be given to the methodology of implementation.

44. *Suggestions*. Several suggestions have been made concerning the implementation of law reform agency proposals. The most important, in Australia, was made by Sir Anthony Mason a Justice of the High Court. He proposed that, subject to Parliamentary disallowance, law reform commissions could be charged with proposing legislation that would automatically secure the force of law after lying for a time on the Parliament table. The proposal has had a mixed reception. The Australian Attorney-General has sounded a note of caution. The Senate inquiry in Australia extends to methods of ensuring the process of law reform proposals. The Australian Commission has suggeste that further thought should be given to Sir Anthony Mason's proposal, at least for some law reform projects, and possibly after a lengthy period, following report to Parliament. The New South Wales Commission in its last *Annual Report* stated the problem pungently :

> "We find the implementation of our reports has tended to be slow and uncertain ... Twelve of our twenty six reports have not been implemented. We do not suggest that our reports should be implemented without modification. But we see little value to the public, to government or the Commission if, without explanation, our work does not lead to changes in the law".

45. *Current Procedures*. The Australian Commission has not retreated from controversy because much law reform (certainly in the references given to us) is necessarily controversial. Nor has the Australian Commission taken the stand that once it has reported, its task is finished. On the contrary, it has suggested to the Australian Parliament that the assistance it gives Parliament should be monitored by the "actual reforms it can assist Parliament to achieve". Of course, no law reform bod being unelected, is entitled to dispute a decision of Parliament

or the elected government not to accept (or to reject) proposals advanced for the reform of the law. In the end, law reform agencies propose. Parliaments dispose. With a clear understandir of this, it still seems proper to explain reports, elaborate proposals in public speeches and ensure that suggestions for reform get proper consideration. The appearance of Commissioners before Parliamentary and Party Committees has become a commonplace at the national level. Each major Party in Australia has established a committee concerned with legal affairs. Regular invitations to attend before these Committees, to brief members and inform them of proposals is one means of ensuring Parliamentar interest in law reform. The inquiry by the Senate Committee on Constitutional and Legal Affairs will undoubtedly involve consideration of Sir Anthony Mason's suggestion. But even if this is rejected, there are alternatives. Standing orders could be amended to provide machinery for processing reports. A Parliamentary Committee could be established to give bipartisan consideration to proposals emanating from law reform and like bodies. If the Parliamentary institution is to cope with the many organisations now established to provide proposals for reform (to say nothing of judicial and other suggestions) it is vital that the system should be regularised. These points were made in the Australian Commission's first two Annual Reports. Happily, they have attracted the interest of the Senate in Australia. One of the matters referred to the Senate Committee is :

> "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".

The Australian Commission has proposed the establishment of a single office to ensure that suggestions are collected and suitably acted upon. The Commission's proposals suggests that "the creation of such a participatory system would be a unique legal innovation, demonstrating Parliament's concern to regularise law reform machinery". Law reform agencies in other like jurisdictions may find the Australian Parliament's scrutiny of this subject informative.

46. *The Attorney-General*. Experience in Australia teaches that an interested law minister can make an enormous difference in the effectiveness of a law reform agency. The Australian Commission has had four Attorneys-General in little more than two years. Each of them has been a lawyer of standing and each has had a genuine interest in law reform. Sympathy at this level and co-operation from the Attorney-General's Department bear the greatest promise for effectiveness on the part of a law reform body. Particularly if draft legislation is prepared, the passage into law can be a relatively swift one. Where other Ministers are involved, delay inevitably arises. But the presen Australian Attorney-General has said many times that there is no point in referring matters to law reform bodies if it is not intended to act upon their proposals. This legislative commitment by the government and determination to make law refor work, represent the best insurance that a law reform agency can have against irrelevancy or unexplained delays.

COLLABORATION AMONG AGENCIES

47. *Present Collaboration*. Both within Australia and beyond, there is considerable collaboration among law reform agencies. They exchange reports and working papers. Frequently they cover the same ground as elsewhere and acknowledge the assistance they have found in earlier reviews. The personnel of law reform bodies meet, visit each other, correspond and personal contact of this kind is doubtless useful. In the Commonwealth of Nations a new innovation has been the *Commonweal Law Bulletin* which succinctly epitomises major law reform developments throughout the Commonwealth. The *Annual Survey* of law in the Commonwealth is also a fund of useful information. The *List of Official Committees, Commissions and Other Bodies Concerned with the Reform of the Law* published by the Institute of Advanced Legal Studies in London has now reached its 8th edition (October 1976). It collects and indexes the subject matter of inquiries by law reform and other bodies. At the request of the Standing Committee of Attorneys-General in Australia, the Australian Commission has acted for the past 18 months as clearing house for law reform information. It has published an *Interim Digest* indexing reports, working papers

and other material on law reform emanating from commissions, committees, Royal Commissions, judges, academic suggestions for reform and so on. The *Interim Digest* will be replaced this year by an *Australian Law Reform Digest*. The form of this book was settled at the last meeting of Australian law reform agencies It is organised on the basis of the *Australian Digest* so that research into law reform suggestions can be integrated into the principal system for legal research in Australia. The manuscript for this publication is complete. It is to be published by the Australian Government Publishing Service at a price of approximately $A23. The system will be maintained by regular supplements (probably yearly) and brought up to date from time to time by consolidation. The aim of this exercise is to avoid duplication of research through ignorance, maximise the utility of work already done, promote uniformity in law reform, so far as is thought proper and ensure that there is a constant record of proposals for law reform to which those who have the departmental and legislative responsibility of doing something about it can have ready, rapid access. The number of reports and working papers already epitomised totals 446. The publicatic should be of use beyond Australia and may take some of our proposals to other countries grappling with like difficulties or inadequacies in the law.

BEYOND THE COMMON LAW

48. *Ending Antipodean Introspection*. The original warrant of the Tasmanian Law Reform Committee was to consider proposals for law reform made in England to see whether they were appropriate for Tasmania. This approach once resulted in the adoption by the Tasmanian Parliament of a statute said "not to extend to Scotland". The days of such imperial borrowing are past. Without underestimating the usefulness of law reform proposals from England, there is a conscious endeavour in Australia to look to other legal systems, including those of Asia, and civil law countries. In the Australian Commission's proposals for defamation reform, it was suggested that reform of procedure was critical. The Commission looked to Quebec and Japanese models for correction procedures to replace the common law obsession with damages that has bedevilled defamation

law reform, whenever proposed. The problem of drinking drivers is universal. In proposed Australian solutions, the Commission received help, suggestions and information from law departments in Belgium, Denmark, Germany, Finland, France, Ireland, Italy, The Netherlands, Norway, Spain, Sweden, Switzerland as well as the United Kingdom. The radical legislation introduced in France in December 1976 sets the pace in laws governing transplant surgery, another universal problem. Australian missions overseas frequently contain lawyers who are interested to alert the Australian Commission to new developments relevant to our references. Of all overseas countries, Canada presents the greatest constitutional and social similarity to Australia and developments there are accordingly studied with special care Comparative law research is an obligation of all law reform agencies tackling references that go beyond the purely technical Although there are dangers that have to be recognised, there are also insights that will not be obtained from common law myopia. The New South Wales Commission in its study on civil procedure, has also engaged in on-the-spot research into court procedures in a number of overseas countries. Other State agenc in Australia have done likewise. We have come a long way from exclusive reliance on English proposals. Within the Commonwealt of Nations, there should be an expanded system of collaboration. A cursory examination of the latest list of the work before committees and commissions dealing with the reform of the law throughout the Commonwealth demonstrates beyond question the similarity of reform programmes and the value of sharing ideas.

ACCELERATION

49. *Resources*. The key to expediting the process of law reform is the efficient utilisation of present funds devoted to the task and persuasion of governments and citizens that there is a need to devote more in the way of national resources to the legal science. Efficiency can be promoted by co-operation, co-ordination of programmes, exchange of personnel, ideas and information and regular meetings. Within federations, the opportunities for inefficiency abound. They should be recognised and checked. Within the common law world, the opportunities for co-operation are significant but are rarely used to the full. More should be done.

50. To persuade governments, Parliaments and the people to spend more on law reform is difficult because the average citizen feels inadequate when measured against "the system". It is said that there are "no votes in law reform". Of many projects this is surely true. It is unlikely that the occasional citizen who runs foul of rules governing standing or the principles concerning lost and abandoned property or of the right of support by adjoining land will have his voice heard against those of others calling for social service benefits hospitals, roads and other more obvious achievements of which governments can boast. But law reform can be made interesting. It can be taken to the "living rooms of the nation". If law reform can be made relevant, there is little doubt that governments and Parliaments will be prepared to spend more on it. This is the key to acceleration and expedition of law reform Until adequate funds are made available, law reform will remain a small, ill-funded adjunct, seeking to cope with enormous demands under the strain of inadequate resources and manpower. The legal profession especially has a duty here. It should not quietly accept injustices when they appear. It should accept as a professional obligation the duty to alert the community and ensure that remedies are found.

51. *Machinery for Expedition.* Various proposals have been canvassed here to expedite the work of law reform. They range from Mason J's suggestion of automatic implementation of proposals (subject to Parliamentary disallowance) to fixing of priorities and time limits by Attorneys-General. In its report to the Australian Senate Committee, the Australian Commission has suggested a number of proposals. First, it proposes closer Parliamentary liaison between the law reform agency and the Parliament it serves. It cites as a precedent the meetings that have been held between the Australian Commission and the Legislative Assembly of the Capital Territory concerning law reform proposals for that Territory. These meetings have taken place at the working paper stage and after report and have allowed for a free exchange of views and an explanation of positions adopted. Secondly the Commission refers to the need to ensure that the facility is available for drafting legislation

to implement such proposals as are apt for legislation. Thirdly the Commission examined Mason J's proposal for procedures analogous to subordinate legislation.

52. *Processing Law Reform Suggestions*. Law reform proposals come from a wide range of sources of which law reform agencies are but one. The judiciary, the profession, academics, law journals, the newspapers and ordinary citizens make numerous suggestions for improvement, most of which disappear and are not acted upon. One Australian judge recently called attention to the fact that a provision described in 1922 as "unjust and even baleful" was still in the relevant Commonwealth Act. The process of law reform should be one in which all concerned members of the community take part. We are experimenting in Australia with new ways to secure this participation. This review has outlined the public discussion in the media, the open hearings by law reform agencies to which interested groups, experts and the public can put their views. The use of consultants is ensuring interdisciplinary communication. Personal contact with Ministers, Parliamentarians and department officers may reduce indifference to proposals that often holds up action. Australian society is in the midst of great change. The authority relationships which formerly bound society together are under question and strain. Pressures of science and technology upon the legal system are enormous. There is a growing conviction that Parliaments need extra assistance if they are to cope with today's challenges. The law reform agencies must show themselves equal to the pressures of the times. They must at once be relevant and useful in the advice they give, expeditious in their pace of work, lucid in their means of communication and courageous in controversy.