

GOVERNMENT PARTIES COMMITTEE ON LAW & GOVERNMENT

LAW REFORM IN AUSTRALIA

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

May, 1978

THE LAW REFORM COMMISSION

FULL-TIME COMMISSIONERS

The Hon. Mr. Justice M.D. Kirby (Chairman)
Deputy President of the Australian Conciliation & Arbitration
Commission
Member of the Administrative Review Council

Mr. David St.L. Kelly
Formerly Reader in Law, University of Adelaide

Mr. Russell Scott
Solicitor of the Supreme Court of New South Wales

PART-TIME COMMISSIONERS

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Formerly First Parliamentary Counsel of the Commonwealth (Canberra)

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Associate Professor G.J. Hawkins
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Mr. Howard Schreiber
Solicitor of the Supreme Court of New South Wales (Sydney)

Mr. James Spigelman
Barrister of the Supreme Court of New South Wales (Sydney)

Mr. Brian Shaw Q.C.
Barrister of the Supreme Court of Victoria (Melbourne)

Mr. M.R. Wilcox Q.C.
Barrister of the Supreme Court of New South Wales (Sydney)
Lately a full-time Commissioner (retired 1 January 1978)

RETIRED COMMISSIONERS

His Excellency the Governor-General of Australia

The Hon. Mr. Justice F.G. Brennan

Mr. John Cain M.P.

Senator Elect G.J. Evans

RESEARCH STAFF

Mr. G.E.P. Brouwer
Secretary & Director of Research

Seven research officers, legally qualified

One officer of the Department of Aboriginal Affairs is seconded
to the Commission for six months

REPORTS OF THE COMMISSION

- A.L.R.C.1. *Complaints Against Police*
- A.L.R.C.2. *Criminal Investigation*
- A.L.R.C.3. *Annual Report 1975*
- A.L.R.C.4. *Alcohol, Drugs & Driving*
- A.L.R.C.5. *Annual Report 1976*
- A.L.R.C.6. *Insolvency : The Regular Payment of Debts*
- A.L.R.C.7. *Human Tissue Transplants*
- A.L.R.C.8. *Annual Report 1977*

OTHER PUBLICATIONS OF THE COMMISSION

- Interim Australian Law Reform Digest and Supplements (Quarterly)
- Australian Law Reform Agencies' Conference Papers and Record (Third Conference 1976)
- Reform Nos. 1-10 (Quarterly)
- Discussion Paper No. 1 - Defamation - Options for Reform
- Discussion Paper No. 2 - Privacy and Publication - Proposals
- Discussion Paper No. 3 - Defamation and Publication Privacy -
- Discussion Paper No. 4 - Access to the Courts - I Standing : Public Interest Suits
- Discussion Paper No. 5 - Lands Acquisition Law : Reform Proposals
- Working Paper No. 1 - *Complaints Against Police* 1975
- Working Paper No. 2 - *Alcohol, Drugs & Driving* 1976
- Working Paper No. 3 - *Consumers in Debt* 1976
- Working Paper No. 4 - *Defamation* 1976
- Working Paper No. 5 - *Human Tissue Transplants* 1976
- Working Paper No. 6 - *Complaints Against Police : Supplementary Report*
- Working Paper No. 7 - *Access to the Courts - I*
- Working Paper No. 8 - *Lands Acquisition Law*

CURRENT PROGRAMME OF THE COMMISSION

- * *Complaints Against Police (Supplementary Report) - with printed*
- * *Defamation and Publication Privacy (Uniform Defamation and Unfair Publications Act).*
- * *Privacy.*
- * *Insurance Contracts.*
- * *Access to the Courts : Standing to Sue & Federal Class Actions*
- * *Aboriginal Customary Laws.*
- * *Debt Recovery.*
- * *Lands Acquisition Law.*
- * *Australian Law Reform Digest*
- * *The differential effectiveness of legislation in law reform (Sanctions and Remedies)*

GOVERNMENT PARTIES' COMMITTEE ON LAW & GOVERNMENT

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TEN LAW REFORM BODIES

In 1957 Sir Owen Dixon proposed a national approach to law reform in Australia:

"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 reports 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?" (1957) 31 *A.L.J.* 325 at 342.

2. This call was heeded by the Federal Parliament in 1973 with the passage of the *Law Reform Commission Act*. The Act was supported by the present Government Parties and two

important amendments were inserted on the motion of the late Senator Greenwood :

- * Empowering the Commission to suggest matters suitable for reference
- * Requiring the Commission to ensure that its proposals are, so far as practicable, consistent with the International Covenant on Civil and Political Rights and do not trespass unduly on personal rights and liberties (s.7)

The Hon. Mr. Justice M. D. Kirby

3. The Commonwealth sought to secure State "participation" in the work of a national commission. At the Standing Committee of Commonwealth and State Attorneys-General some of the State Attorneys-General opposed "participation" and offered instead "co-operation". One Attorney-General at least indicated a preparedness on the part of his State to "participate". In the end, a separate Commonwealth law reform agency was established. It works upon references received from the Commonwealth Attorney-General. Some of its references relate to Territorial matters and many of them are relevant to areas of the law within the responsibility of the States.

4. The Commonwealth's commission is only one of ten law-reform agencies in Australia. Following is the list of Australian agencies :

- * *Australian Law Reform Commission.*
Chairman, Mr. Justice Kirby, Sydney. Ten Commissioners (three full-time). Permanent statutory authority of the Commonwealth with full-time and part-time Commissioners and a staff of nineteen.
- * *N.S.W. Law Reform Commission.*
Chairman, Mr. Justice Wootten. Permanent statutory authority, established by the N.S.W. Parliament. Five full-time Commissioners and a small research staff.
- * *Northern Territory Law Review Committee.*
Chairman, Mr. Justice Muirhead. A part-time committee of judges, Crown Officers and practitioners in Darwin, no permanent staff.

- * *Queensland Law Reform Commission.*
Chairman, Mr. Justice Andrews. A permanent authority established by the Queensland Parliament with five part-time Commissioners, including the Chairman and one full-time Commissioner (Dr. Morris) and executive staff. Located in Brisbane.
- * *South Australian Law Reform Committee.*
Chairman, Mr. Justice Zelling, Adelaide S.A. A part-time committee comprising judges, Crown Law Officers and practitioners. No permanent staff. Established by Executive Order, not pursuant to statute.
- * *Tasmanian Law Reform Commission.*
Chairman, Mr. C.G. Brettingham-Moore (Master, Supreme Court, Hobart). One permanent executive member (Deputy Chairman) and six part-time members including two laymen, small executive staff.
- * *Victorian Chief Justice's Law Reform Committee.*
Chairman, Hon. Sir Oliver Gillard (Supreme Court of Victoria). Committee of part-time members comprising judges, Crown Law Officers and legal practitioners. Established 1944. No permanent staff. No statutory authority. Secretary: Professor H. Luntz, University of Melbourne (part-time). -- Located in Melbourne.
- * *Victorian Law Reform Commissioner.*
Commissioner: Hon. Sir John Minogue. A sole Commissioner assisted by a part-time advisory council. One research staff. Established 1975 in Melbourne.
- * *Victorian Statute Law Revision Committee.*
Chairman, Mr. A.T. Evans, M.P. A Parliamentary committee originally established in 1916 comprising representatives of all Parties and both Houses of the Victorian Parliament. Part-time. Serviced by parliamentary officers. No research staff. Many non-lawyers amongst the members.
- * *Western Australian Law Reform Commission.*
Chairman, Mr. N. Crago (part-time). A permanent statutory authority established by the W.A. Parliament. There are three Commissioners, all part-time: one Crown Law Officer, a legal academic and a practitioner. They are supported by a research staff of four.

A SMALL INVESTMENT IN LAW REFORM

5. The brief examination above indicates the modest investment in law reform in Australia. Most of the law reform agencies are small, have a large part-time component which limits productivity and utility to their respective Parliaments. All have severe staff limitations and funding difficulties. A paper prepared by the Chairman of the W.A.L.R.C. for the last Legal Convention showed that per capita, Australians spend about 10 cents per year on organised law reform:

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

6. The Australian Law Reform Commission has been held at a staff ceiling of 19 since 1975, although since that date many important references have been given to it by the government. It is understood that the ceiling may recently have been increased to 20.

THE PROBLEMS OF DIVERSITY

7. The disadvantages of the present arrangements are fairly clear:

- * What could be a single, relatively well funded national committee, as proposed by Sir Owen Dixon, is instead a scattered group of ill funded local bodies.
- * Many projects of general national importance are beyond the resources of the small States, at least if they are to be done to the highest standards.

- * There is much duplication in the programmes of the several law reform agencies. Nearly all, for example, have produced reports on *Commercial Arbitration*. Several are currently working on *Unincorporated Associations*. Most of them have dealt with *Rape Reform*. There are many examples.
- * Sometimes research proceeds in ignorance of the fact that much the same research has been done elsewhere in Australia. The same lines of inquiry are frequently repeated.
- * Furthermore, the multiplicity of bodies inevitably produces disparity of recommendations. This disparity sometimes undermines the cause of reform by presenting to parliamentarians, conflicting or at least different recommendations. The nett result of such differences is, sometimes, the failure to achieve any reforms at all.
- * Australia's record in uniform law reform is poor. It compares poorly with Canada which has had a Uniform Law Conference since 1918 and even more poorly with the United States which, despite the greatly increased number of jurisdictions, has achieved much through the Conference of Commissioners on Uniform Laws established in 1892. The great Commercial Code has been adopted in all States of the United States, except Louisiana, through the work of the Uniformity Commissioners. There is no equivalent professional body in Australia.

PROPOSALS FOR CHANGE : STANDING COMMITTEE OF ATTORNEYS-GENERAL

8. In 1975 a meeting of the law reform agencies proposed a modest degree of co-operation among them in an endeavour to co-ordinate their work. They unanimously suggested to the Standing Committee of Attorneys-General that it should be competent for the conference of law reform agencies to propose subjects suitable for uniform laws which the Standing Committee could decide to refer to a particular law reform agency. In this way it was hoped that the agencies could be harnessed to work for the whole Standing Committee. The proposal was not

accepted by the Ministers. Details appear in the Australian Commission's *Annual Reports* 1975, 50, 1976, 5-7. There is some co-operation between law reform agencies on an ad hoc basis. For example the Australian Commission is working with the Western Australian Commission on privacy laws and defamation laws, as each has parallel references on the subject. The Australian Commission is working with the N.S.W. Commission on debt recovery laws as each has relevant references on the subject. The Queensland and Western Australian Commissions are working on oaths and affirmations at the request of their respective Attorneys. The general co-ordination of law reform activity remains a matter for the future.

SERVICING THE AGENCIES.

9. At the request of the Standing Committee and with the approval of the agencies, the Australian Commission has taken over the function of clearing house for law reform information throughout Australia. To this end it produces a number of services :

- * *Reform*. A quarterly bulletin of law reform news and information. Copies of this are distributed widely in government service, political circles, the judiciary, academic institutions and elsewhere. Each issue contains information on the current programme of law reform agencies, in the hope of cutting down duplicated work performed in ignorance of similar projects current elsewhere.
- * *Interim Law Reform Digest*. An index of law reform reports has been arranged and collected by the Australian Commission. This is updated by quarterly supplements. It organises under familiar headings the great numbers of law reform reports, Royal Commission, Parliamentary and other inquiry reports from Australia and overseas.

* *Australian Law Reform Digest.* The Australian Commission is working on a complete digest of all Australian law reform reports since 1916. This will be produced as a book and should ensure that valuable work already done is collected and made available for law makers and future law reform projects. It is hoped to publish this work in 1978 or early 1979. Special support has been forthcoming from the Attorney-General, Senator Durack, to provide staff for the detailed work necessary on this project.

* *Australian Law Reform Agencies Conference.* The ten agencies, together with New Zealand and Papua New Guinea agencies, meet regularly but the hope of 1975 that there could be some co-ordination of their activity has been rather dampened by the discouraging response of the Standing Committee to the proposed scheme of co-operation.

JUSTIFYING DISPARITY

10. There are some supporters of the proliferation of law reform agencies. They point to the sovereign rights of the States under our Constitution, the need for local experimentation, different legal traditions in differing Australian communities, the desirability of each Attorney-General having his own body to assist the respective Parliaments, the merit of decentralising law reform work and involving local professions in the obligations of reform. The valuable work done by local and part-time bodies is often referred to. Nevertheless, there is recognition in most circles of the need for properly funded, well researched and thoroughly debated projects of reform which small local law reform agencies could not afford to produce. It is here that the Australian Commission's role through the vehicle of references affecting the Territories has its greatest utility. Already, this utility is being reflected in action. For example, the N.S.W. Government has announced its intention to act on the A.L.R.C. report, *Complaints Against Police*. The Northern Territory Government adopted many of the proposals in that report in its recent *Ombudsman Ordinance*. The Victorian

and South Australian Police have administratively adopted some of the proposals as has the A.C.T. Police. The South Australian Government has introduced legislation based upon some of the proposals contained in the A.L.R.C. Report, *Insolvency: The Regular Payment of Debts*. Consideration is being given in several of the States to legislation based on the Commission's report, *Human Tissue Transplants*. Good working relations have been established with the Officers of Law Departments in all parts of the country as well as with law reform agencies and the judiciary.

SOME THOUGHTS FOR THE FUTURE

11. *Processing Law Reform*. On 21 April 1977 the Senate resolved to refer to the Standing Committee on Constitutional and Legal Affairs a number of matters relevant to the processing of law reform proposals. As Senator Missen is Chairman of that Committee, the terms of reference are not repeated. The Chairman of the Australian Commission and several Commissioners have appeared before the committee which is currently gathering views. The importance of the work of that committee is commended. In particular its consideration of the possible introduction of parliamentary machinery for processing law reform is called to attention. The Australian Commission has had excellent support from the government and much interest from Members of Parliament on both sides. It is conscious of the fact that its long-run success depends upon the practical assistance it can give to the Parliament. In the A.C.T. and the Northern Territory the Commissioners appear regularly before Members of the Legislative Assembly to discuss law reform projects before report. This has proved most beneficial in feeding into the thinking of the Law Reform Commission, the sensitivity of elected members upon the controversial matters under reference. It may be possible to devise a similar parliamentary machinery at a Commonwealth level so that the Commission's assistance to Parliament and its Members can be maximised.

12. *A National Bank of Law Reform Suggestions.* At the moment many proposals for law reform made by highly paid and expert people simply disappear. Such proposals are made in judges' decisions, committee reports, parliamentary speeches, law reform reports, citizens' letters and many other sources. No country in the English-speaking world has yet established a "national bank" to collect these proposals. Many people refrain from making proposals because of their doubt as to the utility of doing so. The Commission has suggested that a national (and possibly computerised) system of collecting in an orderly way the suggestions for reform could be quite cheaply set up. This is a matter under the consideration of the Senate Committee.

13. *State Participation.* To promote Sir Owen Dixon's idea of a truly federal co-operative venture in law reform (as distinct from agencies limited to their particular jurisdiction) it might be possible to amend the Commonwealth's *Law Reform Commission Act* to provide for the establishment of State Divisions of the Commonwealth Commission and, possibly, a facility for State Attorneys-General to make references, possibly after consultation with the Commonwealth Attorney-General. A model for Commonwealth-State co-operation is the Criminology Research Council established by the *Criminology Research Act 1971 (Cth)*. Some means for co-ordinating, in appropriate (possibly agreed) subjects, State and Commonwealth efforts at law reform could be in the interests of the whole country. Amendments to the Commonwealth's Act would, however, be needed.

CURRENT LAW REFORM PROGRAMMES

14. The current programmes of law reform agencies throughout Australasia are collected each quarter in the Australian Commission's bulletin *Reform*. Copy of the latest issue is attached. The current projects under study are to be found at pp.34-35.

ATTENDANCE BEFORE THE COMMITTEE

15. The Chairman of the Law Reform Commission will attend before the Committee on 9 May 1978 at 6 p.m. The Commission welcomes the opportunity of informal meetings with Members of Parliament. The purpose of the Commission under its statute is to assist the Parliament to review, modernise and simplify the law. It can do this best if it can relate its work to the Government and the Parliament and enjoy the confidence and support of both. The Commission is currently working on a national (and possibly computerised) system of collecting and analysing legal suggestions. It would be a pleasure to have you set up. This is a matter under the consideration of the Sydney office.

3 May 1978

To promote the Commission's work, it is necessary to have a regular liaison with the various agencies involved in the law reform process. It is therefore possible to send the Commission's reports to the various agencies and to provide an opportunity for the Commission to discuss its work with the various agencies. It is also possible to have a regular liaison with the various agencies and to provide an opportunity for the Commission to discuss its work with the various agencies.