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FIFTH AUSTRALIAN LAW REFORM AGENCIES CONFERENCE

PERTH, 29 JUNE 1979

INTERNATIONAL CO-OPERATION IN LAW REFORM

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

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LAW REFORM AND OVERSEAS TRANSPLANTS

The "growth industry"[1] of law reform is taking on an international complexion. The regular conference of Australian law reform agencies now attracts participants from a number of overseas countries. The Third Conference, held in Canberra in 1976, had representatives from the Commonwealth Secretariat, the Law Reform Commissions of Canada, Fiji, Malaysia, Mauritius, Nauru, New Zealand, Nigeria, Papua New Guinea and Sri Lanka. At the close of the conference the representative of Sri Lanka, the Secretary of Justice at that time, indicated that he had been "completely overwhelmed and brainwashed" by the participants into committing Sri Lanka to the restoration of the Law Reform Commission of that country.[2] Whatever the cause, the fact is that Sri Lanka has reinstituted its Law Reform Commission. Since the Third Conference, Fiji and Nigeria have established Law Reform Commissions. The growth of organised law reform continues unabated. The Fifth Australian Law Reform Agencies Conference also sees distinguished visitors from overseas. They are certainly welcome. They will help Australian law reformers to lift their sights beyond a myopic concentration on domestic concerns. The participation of Dr. Olivier from France is a unique opportunity to explore the ways in which that country, with its very different legal traditions, approaches the organised modernisation and review of its laws.

The development of law reform agencies has been one of the most persistently universal phenomena in the administration of justice in the Commonwealth of Nations since the early 1960s. In Australia, the Commonwealth and each State, as well as the Northern Territory, have their own law reform agencies. In Victoria, there are no fewer than three law reform bodies. Most, if not all, of the Australian agencies exchange their publications with sister institutions throughout the world. The gratis exchange of consultative papers (working papers, discussion papers, occasional papers and the like) and reports is a well established feature of international co-operation in law reform. This exchange is neither limited to law reform bodies, nor is it confined to the Commonwealth of Nations. In the case of the Federal Commission in Australia, exchange arrangements have been established with libraries, law reviews, Royal Commissions, committees of inquiry and other institutions with work relevant to the reform of the law. Furthermore, exchange arrangements exist with those law reform bodies established in the United States, with Ministries of Justice in many overseas countries and with the Legal Secretariat of various international organisations.

The amount of international exchange and the constant flow of ideas between libraries and across desks in many lands is a remarkable phenomenon. The mutual exchange of publications is the result of no international meeting or convention. It simply happened as a consequence of perceived self-interest and mutual interest in encouraging the flow of ideas. The countries of the Commonwealth of Nations, until the Second World War, borrowed substantially from United Kingdom law reform developments. A committee established by the Attorney-General of Tasmania in 1941 had as its charter to :

> "consider the reform of the law in Tasmania in order to remove anomalies and to keep abreast of the reform effected in other States and in England".[3]

The developments which have followed the Second World War, including the development of the Commonwealth of Nations, have reduced the dependence of the common law jurisidctions upon reformative innovations in Britain. In many jurisdictions, the same legal problems have had to be faced. Like developments in technology have unveiled the inadequacy or irrelevance of the common law. Like advances in society and social attitudes have required law reform projects to come to grips with perceived defects in the common law that transcend jurisdictional borders.

The purpose of this paper is not to recount the international co-operation that already exists. It is to explore new means by which, in the reform of substantive and procedural law in Australia, we can call upon developments overseas. I will seek to identify a number of illustrations of the way in which, in the Australian Law Reform Commission, we have endeavoured to do this. I will close with a number of proposals for expanding international co-operation.

TRANSPLANTS IN TIMES GONE BY

Australia is, of course, no stranger to legal transplantation. Our legal system originates in major transplant of the common and statutory laws of England upon the foundation of the settlements and colonies beginning at Sydney Cove. The earliest such transplant of the English common law occurred when Henry II is said to have brought that legal system to Ireland in 1171.[4] Despite the War of Independence and the villification of the common law in pre-Independence days as a "malign system imposed on the Irish people by an alien conquerer"[5] it is perhaps significant that it contains very much in possession and still profoundly influences Irish jurisprudence. A recent comment on this suggests that in the 1960s a fruitful period of law reform in Ireland saw innovative statutes which took the development of Irish law away from its English sources in a number of areas.

> "... [H]opefully the growing volume of indigenous legislation will provoke the national legal literature which will be necessary to sustain a distinctive Irish jurisprudence. The omens are good and, last year, the first comprehensive book on Irish land law, since the inception of the state, was published. ... The first colony of the common law is now set, inexorably, on the path of decolonisation, a process which can only be accelerated by the recent appointment of a permanent Law Reform Commission".[6]

Perhaps more extraordinary than the transplants to Ireland and Australia were the achievements of the British administrators in introducing to India and other colonies the intricacies of the English law of contract. Even the English criminal law, law of civil procedure and evidence, was imported into India, although, obviously, the law of marriage and various aspects of family law were inappropriate and were not imposed on the general population.[7] The tale of the spread of European legal systems extends beyond colonies. As is well know, Japan under the Meiji adopted the German law of contract and civil torts. The Turks, under Kemal Ataturk, took over the entire Swiss civil code.

Occasionally, laws develop elsewhere and for different circumstances and earlier times produced bizarre results that stand as a warning to the law reformer. Differences emerge between the law "in the books" and the law "in actual operation". The recent decision of the High Court of Australia in Dugan v. Mirror Newspapers[9] illustrates one of the more unexpected results of the importation of the English law into the infant colonies of Australia. According to that decision, a capital felon (and perhaps other felons) is not entitled, whilst serving his sentence in prison, to sue in the courts. Notions such as attainder, forfeiture and "corruption of the blood", although repealed or modified by statute in the country of their source, remain, unmodified by statute, part of the law

of New South Wales. In connection with its Reference on the Sentencing of Commonwealth Offenders, the Australian Law Reform Commission has recently proposed the statutory removal of these notions in respect of Commonwealth and Territory offenders.[10] Similar recommendations were earlier made by the Law Reform Commission of Tasmania.[11] As envisaged in Ireland, one of the tasks of the modern law reform commission is the adaption of the transplanted dominant laws to new circumstances and "modern notions".[12]

USES AND MISUSES OF COMPARATIVE LAW

The charter of the English and Scottish Law Commissions, specifically imposes upon each of them the obligation :

> "to obtain such information as to the legal systems of other countries as appears to the Commissioners likely to facilitate the performance of any of their functions".[13]

Even where the equivalent Australian statutes do not make specific reference to the adoption of overseas reforms, typically they do so by inference. The Commonwealth Act, for example, lists among the functions of the Federal Commission

> "the adoption of new or more effective methods for the administration of the law and the dispensation of justice".[14]

The assumption upon which the furtherance of international co-operation in law reform is based, runs counter to an opinion expressed by Montesquieu, whose profound influence upon the Australian Constitution is most clearly recognised in the doctrine of the Separation of Powers. In his *Esprit des Lois*, Montesquieu expressed the view that it was very dangerous to seek to graft the laws, procedures and institutions of one country upon another :

> *"Les lois politiques et civiles de chaque nation ... doivent etre tellement propres au peuple pour lequel elles sont faites, que c'est un grand hazard si celles d'une nation peuvent convenir a une autre".*[15]

It is now generally recognised that Montesquieu badly under-estimated the extent to which successful borrowing had taken place and was to continue, at an even greater pace, in respect of the legal regime of his country, France, when the influence of Napoleon's codes was spread throughout Europe and beyond in the early 19th century.[16] Nowadays, Montesquieu's assertion remains as nothing more than a warning against over-enthusiastic legal borrowings. In particular, the opinion has been expressed that substantive law is more readily adapted to another jurisdiction than is procedural law.

> "Comparative law has far greater utility in substantive law than in the law of procedure, and the attempt to use foreign models of judicial organisation and procedure may lead to frustration and may thus be a misuse of the comparative method."[17]

Additionally, the need to scrutinise the whole history, background and, hardest of all, ethos of the legal regime, is urged before endeavouring a major transplant relevant to social policy. The attempt to transfer the industrial relations law of Australia in certain provisions of the English *Industrial Relations Act* of 1971 failed for, amongst other reasons, the inadequate understanding that the provisions on union registration in the Australian model were a precondition for full participation in long-established machinery of compulsory conciliation and arbitration.[18] Remove the necessities and advantages of compulsory arbitration, and the motivation for union registration is likewise removed.

The need to approach with caution advising on overseas law reform with the use of domestic models is emphasised by Mr. Justice Richardson of New Zealand in a recent article describing his own experience in preparing fiscal and banking legislation for Mauritius, Tonga and Western Samoa.[19]

> "All of us are prisoners of our background. Our social, economic and political values are conditioned by our upbringing and our experiences. No-one sheds his social philosophy on being appointed an adviser to a foreign government. It continues to colour his thinking and his advice. That must be recognised. In his home country his attitudes are likely to be known to others in the field. They will have different views. The balancing of competing views, while difficult enough, is usually possible and obviously desirable. The role of the overseas expert is a more difficult one ... The objective is to formulate legislation that will, so far as possible, meet the needs of that particular society. And they, the local people, are the proper judges of that".[20]

The successful use of overseas legal ideas is now so well established that we need not tarry too long over Montesquieu's pessimistic injunction. The point must be made, however, that co-operation in law reform, across international borders, must occur with some degree of caution. The circumstances and needs of different countries, to say nothing of their judicial and administrative procedures, may be so different as to make transplantation unworkable, irrelevant or even positively mischievous. Having recorded these cautionary words, it is still possible to approach the study of international co-operation in law reform with enthusiasm.

INTERNATIONAL INSTITUTIONS

One of the most interesting developments of the past decade has been the growth in the interest in the harmonisation of laws, a process that is encouraged by greater ease of movement between nations and telecommunications and other technologies that have reduced the tyranny of distance. These developments have special relevance for Australia which, internally and internationally, has tended to suffer by reason of its geographical remoteness. The commercial and technological pressures that have encouraged efforts towards

the harmonisation of national laws in certain areas have generally required a close study of domestic law and practice, before such harmonisation can be achieved. British membership of the European Communities has required a number of changes to bring English law into line with directives issued under the Treaty of Rome. The European Convention on Human Rights is also exerting its influence on English private law. The recent decision of the European Court of Human Rights, narrowly, condemning the English law of contempt of court, has already produced results.[21] In the Queen's Speech outlining the programme of Mrs. Thatcher's government, an undertaking is given that legislation will be introduced to reform the law of contempt. English law will be brought into line with the requirements of the European Convention on Human Rights and thereby, presumably, with the majority European view about the proper limits of the powers of courts to protect their process from adverse comment in the media.[22]

Although Australia takes a part in a number of the international efforts at harmonisation of laws, notably UNCITRAL we have no place in the major efforts at harmonisation of European laws now proceeding in the European Communities (in Brussels) or the Council of Europe (in Strasbourg).

A review of the list of Conventions and Agreements drawn up by the Council of Europe and available for signature and ratification by member countries in Europe (and sometimes beyond) presents a sorry contrast with the achievements of harmonised and unified law of which Australia can boast.

The European Treaty series lists more than 100 Draft Conventions available for signature as at 1978. They range from the most important Convention for the protection of Human Rights and Fundamental Freedoms (1950-1952),[23] through Conventions on privileges and immunities, social security, public health, cultural, patents, television and many diverse legal subjects. The lastmentioned class includes such matters as multiple nationality,[24] the registration of

wills,[25] motor vehicle insurance,[26] liability of hotel-keepers,[2] a uniform of law on civil arbitration,[28] extradition,[29] supervision of offenders,[30] and the movement of citizens freely between member countries.[31] Anyone who has recently visited Europe will know of the influence of the lastmentioned agreements which have led to the significant reduction in formalities involving crossing frontiers.

Although some Council of Europe Conventions are available for ratification by countries outside Europe, Australia has not yet ratified any of them. Australia is a member of the Organisation for Economic Co-operation and Development (O.E.C.D.) in Paris. That organisation, in addition to its membership from Western Europe, contains a number of non-European countries with developed economies, namely the United States, Canada, Japan, New Zealandand Australia. Recently, I attended sessions of an intergovernmental group established by the O.E.C.D. to inquire into privacy protection in the context of trans border flows of data. The existence of a Committee of Experts in the Council of Europe inquiring into the same subject and contemporaneous developments in the European Parliament, the European Communities Commission, UNESCO and other United Nations bodies reflects nothing more than the commonality of computing and telecommunications technology and the identical challenge which it poses for privacy protection, or data protection, in Western countries.

The effort of the O.E.C.D. Expert Group has been to identify the "basic rules" for privacy protection. Its methodology has involved the drafting of Guidelines rather than a Convention. These Guidelines have been exposed, in their successive drafts, to national seminars held in Canberra. Three have been held to date, attended, after the law reform method, by representatives of government departments, computer and telecommunications suppliers and users, and academics. Additionally, colleagues from State law reform agencies who are examining privacy protection have attended. The exercise has been useful not only at an international but also at a national level. The whole aim of the project

is, by getting broad agreement on the principles of privacy legislation, to reduce the impediments that might otherwise spring up against the general free flow of information between differing legal jurisdictions.

I believe that international discussions of this kind will increase as perceptions of shared interests increase. The greater ease of travel today and the increasing acceptance of the English language as an international medium of communication, make it likely that international co-operation of this kind will continue to expand. It is already well developed in Europe. The achievements of so many countries with differing histories, cultures and languages make the achievements of our Standing Committee of Attorneys-General look, I regret to say, rather thin. Australia's involvement in the O.E.C.D., and the practical bias of that organisation, make this one of the more hopeful ways in which international co-operation in law reform, involving Australia, can be developed.

There is another international body of which Australia is a member which has already done a great deal for international co-operation and promises to do more. This is the Commonwealth Secretariat in London. The Commonwealth of Nations links together countries which (with some exceptions) inherited the English common law and the traditions of the administration of justice laid down in the United Kingdom. This gives the member countries of the Commonwealth, and the several jurisdictions in federations, many lively common interests. The expansion of the *Commonwealth Law Bulletin* to a major publication with regular features of sustained interest to law reformers is a tangible contribution to international co-operation in this field. The summaries of important legislation, judicial decisions and law reform reports in member countries are accurate, up-to-date and interestingly presented. Scrutiny of this quarterly bulletin which is now in its fifth year, repays the time spent. With the gradual decline in the role of the Judicial Committee of the Privy Council and the inevitable tendency to look

beyond the United Kingdom alone for ideas in law reform, the Legal Division of the Commonwealth Secretariat has provided a useful and non-coercive means of keeping abreast of developments in countries which share a generally common legal tradition. Reading the pages of the bulletin, it is more remarkable to note the points of similarity in the problems recurring in the many jurisdictions of the Commonwealth than the points of difference or purely domestic concern. There is much else that the Commonwealth Secretariat does. The organisation of a regular meeting of law reform agencies of the Commonwealth of Nations has now been proposed, to coincide with the recurrent Commonwealth law conferences. Such a meeting was held after the last conference in Britain in 1977. The next meeting is to be held in Lagos, Nigeria, in 1980. Although substantive matters can scarcely be dealt with in such meetings, they will prove useful for the exchange of ideas and suggestions, particularly about the techniques of consultation and the developing methodology of institutional law reform.

APPLICATION OF OVERSEAS IDEAS

This is not the occasion for a rigorous study of the application of overseas legal ideas in the Australian legal system. Perhaps the most far-reaching recent example was the adoption of the *Family Law Act* 1975 which turned its back on the idea of dissolution of marriage as a relief for fault or sin and adopted instead the principle that marriages which had failed were best dissolved as a misfortune for both parties.

The paramount importance of the report of the English Law Commission, *Reform of the Grounds of Divorce. The Field of Choice*,[32] cannot be over-emphasised in this connection. It remains the most important report of the Law Commission to date and one which is still continuing to work its persuasive influence throughout English speaking jurisdictions.

Perhaps we are now to witness yet a further development of this kind in the sphere of accident compensation. The

moves to no-fault liability in motor vehicle cases, already adopted in Tasmania and Victoria and under inquiry in South Australia, represent a staging post on the way to a more conceptually valid approach to the compensation of victims of accidents than that afforded by the tort of negligence. The New Zealand *Accident Compensation Act* 1972 was adopted, not surprisingly, in the model proposed by the Australian National Commission of Inquiry into Compensation and Rehabilitation.[33] (The Woodhouse Report). Although not yet implemented in Australia, it is significant that the proposals which are operating in New Zealand and which were put forward in the 1974 Australian report are now under consideration in a number of Commonwealth countries including Cyprus and Sri Lanka.

Leaving aside major law reform developments of this order, it is possible to point to good ideas, advanced in law reform reports, which originate from a study of overseas laws and procedures. Because I am more familiar with them, I will confine my remarks to the reports of the Australian Law Reform Commission. I have no doubt that similar remarks could be made in respect of the reports of the State law reform agencies in Australia and similar bodies overseas.

The first report of the Australian Commission proposed major changes to render more independent the investigation of complaints against federal police. It proposed the use of the new Commonwealth Ombudsman, himself an important Scandinavian transplant. But it also adopted a specific administrative measure introduced with some success in England by the then Metropolitan Police Commissioner, Sir Robert Mark. This was the A.10 section, a special elite unit of police, devoted exclusively to investigating complaints against their number. In England, this procedure has resulted in removing from the force at least 400 and possibly 700 police officers, the subject of complaint. The idea has been adopted in legislation in New South Wales.[34] More recently, the Commonwealth Government announced its intention to introduce the scheme for the new Federal Police Force of Australia.

Without legislation, special units of the kind indicated have been set up in a number of the States following the Commission's report.

The second report, *Criminal Investigation*, is the source not only of the Commonwealth's Criminal Investigation Bill 1977 but also of the number of State and Territory measures dealing with particular aspects of the modernisation of criminal investigation processes.[35]

The report called on official publications from jurisdictions as wide apart as Manitoba, Britain, New Zealand and the United States. The Eleventh Report of the Criminal Law Revision Committee, in particular, was considered in detail. Several proposals advanced in overseas reports were adopted and have passed into the Federal Australian Bill.

The Commission's report on *Alcohol, Drugs & Driving* examines at some length the overseas efforts to combat the international phenomenon of alcohol and drug affected drivers. This examination was the first conducted with the assistance of Australian missions overseas. It was not confined to our traditional sources in the United Kingdom and English-speaking jurisidictions. It analysed and drew upon the Strassenverkehrsgesetz of the Federal German Republic, the Code de la Route of France, the Codice Stradale of Italy, the Wegenverkeerswet of the Netherlands and various other European laws, particularly from Scandinavia. International approaches to countermeasures were examined in an effort to design sanctions and remedies that would be more effective. The law proposed by the Commission has been enacted in the Australian Capital Territory.[36] The Parliamentary Committee on Road Safety is presently considering a study of the effectiveness of the new law, for it should not be assumed that law reform proposals which look excellent in a scholarly report will necessarily work effectively in operation.

The Commission's report, *Insolvency : The Regular Payment of Debts*, calls heavily upon North American experience in proposing major changes to Australia's insolvency and debt recovery laws. As it is pointed out in the report :

> "The Commission is not forced to rely solely on the somewhat fitful local experience. It has also had access to information concerning the extent of counselling facilities, governmental and other, which are available in North America. ... Of particular relevance is the experience in British Columbia and Alberta where Debtors' Assistance Divisions exist. ..."[37]

In fact, the principal proposals of the Commission represent the suggestions that North American approaches to debt recovery, in the largest credit communities in the world, should be now adopted to replace laws which were developed in an earlier time when being in debt was regarded as morally undesirable and cash payment was the norm. The proposals for a means of securing a short moratorium during which debt counselling could be available and consolidation and marshalling of the total debt could be organised was not specially novel. It represents an adaptation of United States and Canadian models, particularly the "wage earner plans" which have been operating in the United States for more than 30 years.[38] This report was the first in which the Australian Commission invited an overseas specialist to be a consultant to the Commission. Professor Vern Countryman, Professor of Law in the Harvard Law School, a United States expert on credit and bankruptcy laws, accepting an honorary appointment which was made with the approval of the Attorney-General. Written briefs were exchanged and on one occasion the Commissioners conversed with Professor Countryman by telephone, securing in this way up to date overseas experience at the highest level.

The report on *Human Tissue Transplants* also bears the mark of international co-operation. Our common human body and the identical nature of transplant surgery make the

study of comparative legislation in this area of the law especially useful. The report refers to and draws upon legislation supplied by Australian missions in countries as far apart in every way as Bermuda, Brazil, Czechoslovakia, Denmark, Finland, France, Germany, Hungary, Italy, Mexico, Norway, South Africa, Sweden and Switzerland as well as the more traditional Anglophone sources.

The result has been an analysis which has not only been adopted in the Capital Territory and will be adopted in various States of Australia. The report was praised in the *British Medical Journal* and urged upon United Kingdom legislators : surely a rare event in the legal relationships between Australia and Britain. Recently, the report was the subject of much comment in South America. Permission has been given for the report's translation into Spanish for use by governments throughout Latin America, a happy development for the export of legal ideas and international co-operation in law reform.

No less eclectic is the latest report of the Australian Law Reform Commission, *Unfair Publication : Defamation and Privacy*. Again, an overseas consultant of the highest distinction, was appointed with the approval of the Attorney-General. He was Mr. P.F. Carter-Ruck of London, author of a wellknown text on *Libel and Slander*. He took an active part in commenting on successive drafts and giving the Commissioners the benefit of his catholic knowledge of defamation law in many countries.

The report carefully examined overseas defamation developments, notably the development of the concept of special treatment of "public figures" in the United States.[39]

More unusual was the proposal for new remedies to supplement the English common law's attachment to money damages as the orthodox tort remedy. One proposal was for the facility of a defence in certain circumstances where a right of reply had been offered to the plaintiff. As the

report points out[40] Article 13 of the French Press law provides a right of reply (*Droit de Reponse*) legally enforceable by a court order. A similar provision is made in German law. Officers of the Law Reform Commission examined the operation of these procedures, in Europe, and studied Canadian experience where a right of reply is conferred by the law of four Provinces. The Commission expressed the view that reply would work satisfactorily in Australia. It has been well received by all commentators, including the media themselves.

Similarly, the report proposed the adoption of a remedy of correction orders so that courts could be armed with the power to order a defendant to correct a false statement defamatory of the plaintiff. This proposal drew on experience in a number of overseas countries and again has been generally well received.[41] Examining overseas innovations was one means of releasing Australian defamation law from what Professor Fleming has described as the "preoccupation with damages ... a crippling experience over the centuries".[42]

No less than the reports, the discussion papers of the Australian Law Reform Commission debate the adoption of overseas experience in the Australian legal order. The discussion paper on class actions[43] is almost entirely devoted to the issue of whether this variety of representative, group litigation should be introduced into the Australian federal jurisdiction from the United States, where it has lately flourished. The discussion paper on the reform of lands acquisition law examines the *Land Compensation Act* 1973 of the United Kingdom and its provisions for a wider right of injurious affection compensation than that afforded by current Australian law.[44] The paper on child welfare, examined innovations in the treatment of "children in trouble" in Scotland, England, New Zealand and the United States. The borrowing of legal ideas in this area is not made easier by the fact that the direction for reform has taken a precisely opposite turn in Scotland (where informal panels dealing with the "whole child" have been established) and the United States (where due process of law has been stressed).[45]

The project on reform of insurance contracts calls in aid the recent *Insurance Law Reform Act* 1977 of New Zealand.[46] Now it is possible to compare and contrast the approaches taken by the English Law Commission in its working paper No. 73, *Insurance Law : Non-disclosure and Breach of Warranty*.

Proposals for reform of sentencing pose perhaps the most universal problem of all. Accordingly it is not surprising that the recent discussion paper on this subject refers to much overseas experience in such topics as community service orders, probation reform and methods of compensating the victims of violent crimes.

EXTENDING INTERNATIONAL CO-OPERATION

The position that emerges from this short review can be briefly stated. Some law reform commissions are enjoined by their statute to have regard to overseas legal developments. Others, without such a direct statutory duty, have nonetheless pursued international co-operation with enthusiasm.

The transplantation of legal ideas from overseas is not new. The common law is perhaps the hardiest and certainly the most universal legal transplant in history. It still flourishes as the basic legal framework for about one third of mankind. The Third Law Reform Agencies Conference was opened with these words by Mr. Ellicott :

> "We must never forget our dependence on and indebtedness to the common law. The dynamics of the common law in its formative stages embodies the true spirit of law reform - law and lawyers responding to new situations demanding just solutions. It is symbolic of its acceptance in the four corners of the world, that we are able to sit down at this stage and discuss the problems associated with its reform. It is not so many years ago that in many places law reform was simply

> a matter of considering the adoption of proposals originating at Westminster. We have all come a long way since those days. Yet none of us should forget the indebtedness we all have to the common law of England and the principles which it secures".[47]

Nowadays, law reform bodies go beyond the common law, even beyond English-speaking sources. No one now accepts Montisquieu's extreme reservation about the ability to adapt good ideas for law reform that have originated in other countries in the context of different legal systems. True it is, care must be displayed in importing such ideas as otherwise great mistakes can occur that may do mischief and will miss the target of the proposed reform. Nevertheless, many illustrations can be given of important and major changes developed in one jurisdiction and transplanted with care in another.

The methodology of co-operation is varied. It can include working in a multi-national international forum. But it can also include direct and bilateral borrowing from one jurisdiction to another. A few illustrations of such borrowings have been given from the reports of the Australian Law Reform Commission. In every other project which is currently before that Commission careful attention is being paid to analogous experience overseas.

What can be done to improve an expand international co-operation in law reform? I propose a number of ideas, all of which deserve, I suggest, the consideration of law reformers in Australia and beyond :

(1) *The Digest* : the forthcoming publication of the *Australian Law Reform Digest* will provide researchers in many countries with an epitome of the important proposals for reform of the law collected in the reports of the Australian law reform agencies between 1916 and 1978. The collection of the proposals in a summary form, readily accessible under wellknown legal titles,

will spread knowledge about the work of the Australian agencies, without which international co-operation may be little more than a pious cliche.

(2) *Reform* : the distribution of the bulletin, Reform, is now widespread and perhaps the most useful material contained in it is the collection of a short statement of projects that are current in the several law reform agencies of Australasia. The utility of this record and the associated list of reports and brief statements on major law reform developments has attracted considerable interest overseas. This bulletin which began as nothing much more than an in-house pamphlet of the Australian agencies is now collecting a growing number of subscription readers in Australia and overseas.

(3) *Exchange of Reports etc.* : the Australian agencies should consider updating the lists of law reform bodies with whom reciprocal exchanges of publications are established. Cursory reference to the Interim Law Reform Digest demonstrates the commonality of law reform projects before the commissions of many countries. There can be no better start to work upon a new reference than ready access to a law reform publication in which the common law is analysed and the policy issues that need to be considered are listed and identified. The Commonwealth Secretariat publishes from time to time in the *Commonwealth Law Bulletin* a list of the law reform agencies of the Commonwealth of Nations. There could be value in the preparation of a national list of law reform and like bodies with which exchange arrangements can be established.

(4) *Commonwealth Secretariat* : the remarkable work of the Legal Division of the Commonwealth Secretariat should be encouraged and expanded. The inherited legal system is a living link between the members of the Commonwealth of Nations. Those who believe

in the utility of the Commonwealth will seek to encourage and expand that link. The regular up to date and airmail supply of publications to the Legal Division, possibly with summaries and other helpful material, leads to the better coverage of local developments and the expansion of knowledge of current projects throughout the Commonwealth. This will supplement and complement bilateral exchanges that already occur. In time one would hope that a proper system of computerised legal data will be established by the Commonwealth Secretariat, accessible in member countries of the Commonwealth of Nations, including reference to law reform projects and implementing legislation.

(5) *Commonwealth Meetings* : the first meeting of the law reform agencies of the Commonwealth of Nations which took place in London in 1977 was a successful venture in the exchange of ideas, principally about the techniques of law reform. A further such meeting should be held to coincide with the Commonwealth Law Conference in Lagos in 1980 and a vigorous participation by Australia, is to be hoped for.

(6) *Joint Meetings* : the opportunity should be taken by visiting Australian law reform commissioners who are overseas, to call on their counterparts not just for courtesy purposes but to exchange information on current projects of mutual interest. There generally are such projects, either still in being or completed. Correspondence is no substitute for personal meetings of this kind. Nor need they be restricted to law reform agencies strictly so called. On a recent visit to London I was invited to discuss the Australian Commission's report on *Criminal Investigation* with the Royal Commission on Criminal Procedure. The discussion was a lively and, I believe, useful one which helped to clear up several misapprehensions and which will be followed

through when some of the Royal Commissioners visit Australia later in 1979.

(7) *Personnel* : every attempt shouldbe made to facilitate overseas visits by Australian Commissioners and law reform staff and, where possible, reciprocal visits to Australia by overseas colleages interested in law reform. One interesting innovation which is proving of great benefit to the Australian Law Reform Commission is the offer by legal academics to perform study leave, working upon projects of direct relevanceto the references before the Commission. One Sydney legal academic has recently completed his overseas study leave in the United States, examining, on the spot, the operation of class actions in that country. Obviously, there can be no substitute for field work of this kind.

(8) Another interesting innovation which is now being tried is the acceptance of an overseas law graduate as a visiting scholar working with the Commission. In the Australian Commission, Mr. Paul Peters, a graduate in Law of the Katholieke Universiteit, Nijmegen in The Netherlands, is presently working with the research team examining the Commission's reference on Aboriginal customary laws. His participation with the Commission is made possible through the Australian-European awards programme for post-graduate study in Australia. It was negotiated with the assistance of the relevant Commonwealth officers and the encouragement of his professor in the Instituut voor Volksrecht at Nijmegen, Professor G. van den Steenhoven.

(9) *International Participation* : the opportunities for Australia to take part in international discussions at which domestic private law will be developed are limited. It would in my judgment be useful if officers of the Australian Embassy in Paris kept the law reform agencies specifically advised about developments in the Council of Europe where many projects are under way of great importance for law reform throughout

Australasia. In addition, the link having been established, it will be important to keep contact with the Australian Permanent Delegation to the O.E.C.D., where many major studies in the field of consumer protection, environment protection, intellectual property and the like have either already commenced or may shortly be launched. The Australian Commission should, through the pages of Reform, and otherwise, keep Australian agencies generally informed about international developments, particularly in the Council of Europe, the European Communities Commission and the O.E.C.D.

(10) *Australian Missions* : discussions have already been had with officers of the Department of Foreign Affairs with a view to securing the nomination of the particular officer in a number of key Australian missions overseas. Such a person could help with specific information about local legal developments. Sometimes assistance with translation may also be available from the larger embassies. Formerly, the Commonwealth Attorney-General's Department had representatives at the missions in London and Washington. The former has now been withdrawn but a counsellor is still stationed at the Australian Embassy to the United States. He has proved most helpful with relevant United States information. In a number of embassies, personnel with legal qualifications have proved only too happy to supply up-to-date and accurate information on local innovations. The future role of the Australian foreign service will change radically with the impact of greater ease of travel and speed and economy of telecommunications. It seems to me that the supply of specialist advice of the kind mentioned is precisely the direction in which the foreign service should be moving. Fortunately, this is a view shared by many Ambassadors and High Commissioners. It is a view which the law reform agencies should encourage and utilise.

(11) *Law Reform as Overseas Aid* : international co-operation is not purely selfish process. It involves the giving as well as the receiving of information and assistance. Foreign Affairs officers have proposed that in some jurisdictions the spread of knowledge about Australia's intellectual developments should go beyond the local law reform agencies. The supply of Australian legal material to local Ministries of Justice and affected departments could help to redress the flow of information which is generally in Australia's favour. Many people overseas, including educated lawyers, conceive of Australia as a large farm or mineral deposit. Few are fully alive to the overwhelmingly metropolitan nature of our country and the innovative legal thinking which, increasingly, is taking place here. It seems to me that the law reform agencies has a catalyst for these innovations, should take their part in correcting overseas misapprehensions. If at the same time, they can supply material that is useful to overseas colleagues, whether in law reform or elsewhere connected with the administration of justice, this is to be encouraged and will, I believe, have the support of our foreign representatives.

(12) The Law Reform Commission of Canada recently accepted an officer posted to work with the Commission by a Caribbean State. The details are found in the last Annual Report of the Canadian Commission. There is no reason why similar arrangements should not be worked out with the Australian agencies. The process could be one of mutual education and enlightenment.

International co-operation in law reform is a relatively new phenomenon. I predict that we will see it expand rapidly in the next decade. The scarce resources that can be devoted to the reform of the law, the universal shortage of legislative draftsmen and the general scarcity of legal talent available to do this work, make it practical and sensible that within

our country and beyond, we should share knowledge and experience. Many examples to date show the utility of doing so. I have no doubt that many more examples could be given and more ideas presented to further this useful contribution to international harmony.

FOOTNOTES

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

2. Australian Law Reform Agencies Conference, Minutes of the Third Conference, May 1976, 123.

3. For a short history of law reform in Australia, see the Law Reform Commission (Cth), Annual Report 1975 (A.L.R.C.3), 20.

4. J.C. Brady, "English Law in the Republic of Ireland" (1978) 6 U.Tas.L.Rev., 60.

5. Ibid, 60.

6. Id., 67-8.

7. O. Kahn-Freund, "On Uses and Misuses of Comparative Law" (1974) 37 Mod.L.Rev., 1, 16.

8. This was the case in Turkey and Japan. See Kahn-Freund, 16-17.

9. Dugan v. Mirror Newspapers Limited, (1979) 53 A.L.J.R. 166.

10. The Law Reform Commission (Aust), Sentencing : Reform Options (discussion paper No. 10), 1979, 60-61.

11. Law Reform Commission (Tas.), Civil Disabilities of Convicted Persons (Report #20, 1978, 5-6).

12. Samuels J.A. in Dugan, unreported decision of the Court of Appeal (N.S.W.) 9 August 1977 cited in A.L.R.C. D.P.10, 59.

13. Law Commissions Act, 1965 (G.B.), s.3(1)(f).

14. Law Reform Commission Act 1973 (Cth), s.6(1)(a)(iv).

15. Espirit des Lois, Book I, Chapter 3, cited in Kahn-Freund, 6.

16. A. Watson, "Legal Transplants and Law Reform" (1976) 92 L.Q.R. 79, 80.

17. Kahn-Freund, 20.

18. Kahn-Freund, 25.

19. I.L.M. Richardson, "Advising on Overseas Law Reform" (1978) Vic.Uni.of Wellington L.Rev. 385.

20. Ibid., 386.

21. European Court of Human Rights, The Sunday Times Case, judgment (Strasbourg, 26 April 1979), mimeo.

22. Queen's Speech, Hansard, House of Commons, 15 May 1979, 47, 51. "A Bill will be brought forward to amend the law of contempt of court".

23. Council of Europe, European Treaty Series, #5.

24. Ibid., #43, 95, 96.

25. Ibid., #77.

26. Ibid., #29.

27. Ibid., #41.

28. Ibid., #56.

29. Ibid., #24, 86, 98.

30. Ibid., #51.

31. Ibid., #25, 31, 37.

32. Cmnd. 3123, 1966.

33. National Committee of Inquiry into Rehabilitation and Compensation, Report, 1974 (Aust.)

34. Police Regulation (Allegations of Misconduct) Act, 1978 (N.S.W.)

35. Bail Act, 1978 (N.S.W.); Police Administration Act 1978 (N.T.)

36. Motor Traffic (Alcohol & Drugs) Ordinance 1977 (A.C.T.)

37. The Law Reform Commission (Aust), Insolvency : The Regular Payment of Debts (ALRC6), 40.

38. Ibid., 16.

39. The Law Reform Commission (Aust), Unfair Publication : Defamation and Privacy, (ALRC11), 1979, 247 (Appendix F).

40. Ibid., 95.

41. Ibid., 141.

42. J.G. Fleming, "Retraction and Reply : Alternative Remedies for Defamation" (1978) 12 Univ.B.C.Law Rev. 15.

43. The Law Reform Commission (Aust), "Access to the Courts - II, Class Actions" (D.P.11), 1979.

44. Id., "Lands Acqusition Law : Reform Proposals" (D.P.5), 1977, 18.

45. Id., "Child Welfare : Children in Trouble" (D.P.9), 1979, 20-21.

46. Id., "Insurance Contracts" (D.P.7), 1978, 28.

47. R.J. Ellicott, in Australian Law Reform Agencies, Minutes, 34.