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The Hon. Mr. Justice M.D. Kirby
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LAW REFORM IN AUSTRALIA

Growth of a Boom Industry: When the Australian colonies were settled at the end of the Eighteenth and early in the Nineteenth Centuries, the British colonists brought with them the common law and legislation of England. As the colonies gained a measure of self-government and later federated in the Commonwealth of Australia, it became obvious that this great transplantation of legal rules from one hemisphere to another, was not accomplished without significant defects requiring the attention of Australian law makers. Some defects could be cured by judges finding room to manouvre within the principles of the common law or the language of a statute. The need for a more conceptual approach to the modernisation, simplification, and reform of the inherited legal system was acknowleged in the oldest colony, New South Wales, in 1870. In that year, the first law reform commission was established

> "to inquire into the state of the Statute Law of this Colony, and submit proposals for its revision, consolidation and amendment; and also to make a like inquiry into the practice and procedure of the Colonial Courts ...".

The output of this body was small. The experiment quietly faded away. A century later, institutional law reform is a busy reality in all parts of the Australian continent. Every State has its own law reform agency, an official body

comprising, usually, judges, barristers, solicitors and sometimes laymen, charged with the responsibility of reviewing and modernising the law and the administration of justice. Mr. Bruce Piggott, an Australian who has taken an active part in the life of this Union, is Chairman of the Law Reform Commission of the State of Tasmania. The national Parliament has also established a law reform commission, the Australian Law Reform Commission, with responsibilities in areas of Federal law, assigned under the Australian Constitution to the Commonwealth or Federal Parliament. Such is the proliferation of organised law reform in Australia that one sceptical writer described it as a "booming" or "growth" industry.

The "boom" has not been confined to Australia. The establishment of law reform agencies is one of the most consistent recurring themes of legal organisation in the countries of the [British] Commonwealth of Nations in the last decade. In England and Scotland in 1965, Law Commissions were established to take the whole body of the English law under review. The English Law Commission became the modern model for the many jurisdictions of the English law countries. From India to Canada, from Zambia to New Zealand, countries of the Commonwealth of Nations have established independent law reform agencies to assist Parliaments in the design of modern laws suitable for the complex society of today. The latest country to establish a law reform commission is Fiji, whose commission was set up in mid-1979. There are now few jurisdictions of the Commonwealth of Nations in which a law reform agency has not been created. The contemporaneous proliferation of these bodies is a remarkable phenomenon. But more remarkable is the co-operation and mutual assistance that has grown up spontaneously between the agencies. Working from a generally common base, the inherited law of England, these agencies can speak to each other in a common tongue and can address common concepts of the law and common problems which call out for review and reform. The reports and consultative documents which will be described flow freely between these agencies. The coercive unity once enforced from London by the Judicial Committee of the Privy Council has been replaced by a co-operative endeavour, which is successful because of the many shared values of countries which follow the jurisprudence and legal procedure of England.

The Rationale of Law Reform: The modern law reform commission seeks to correct a basic structural weakness of the English common law legal system. That weakness is its resistance to broad statements of principle and concept and its attachment to pragmatic solutions to only those problems that have to be solved to set at rest a particular legal dispute.

Calls for the imposition of greater order upon the common law were heard at least by 1597 when Sir Francis Bacon urged the appointment of six Commissioners to investigate obsolete and contradictory laws and to report to Parliament regularly. In the early Nineteenth Century, Jeremy Bentham urged the appointment of a permanent, full-time body charged with the duty of revising the whole law of England and reducing it to an accessible code. There was some codification of the law, particularly business law, in the Nineteenth Century. But the basic problem remained. It is, perhaps, the reason why the common law has been so successfully transplanted in the four corners of the world. It is a highly practical legal system but, often, an unconceptual one which develops broad principles with diffidence and then usually from a multitude of single cases. It depends upon the chance factors of litigation, as to whether a vexed problem of the law will ever reach the final appellate courts, for definitive and principled exegesis. The development of the modern representative Parliament has tended to make common law judges less innovative than in times gone by. More and more, they become interpreters of specific Parliamentary legislation rather than expounders of broad principles of the common law. The aftermath of Empire, the vanishing jurisdiction of the Privy Council and the inevitable disinclination to look to London for new legal ideas on every subject has contributed to the felt need for home-grown machinery to review and modernise the legal system, and to do so in a principled way, based upon the best available information and opinion.

These are the principal reasons why law reform agencies have been established. They complement the work of the courts in fashioning the law to meet new circumstances. They receive and act upon suggestions made from many quarters for the improvement of the law and the removal of anomalies and

defects in it. They assist Parliaments in dealing with the technical, sensitive or multi-faceted problems which laymen tend to shy away from or to postpone to the "too hard" basket. The precise composition of law reform commissions varies from jurisdiction to jurisdiction, as does the extent to which they can initiate items for inquiry and the extent to which they are limited to technical legal questions or released to examine the more controversial issues that involve complex questions of social policy. Most of the law reform agencies deliver reports that include draft legislation for consideration by Parliament. Many of them have excellent records of the adoption of their proposals and the consequent reform of the law. Often proposals advanced in one jurisdiction are adopted in another, for the defects in the common law tend to appear simultaneously in many parts of the world. Perhaps the most remarkable example of the adoption of a law reform proposal is afforded by the acceptance in many jurisdictions of the English speaking world of the single criterion for divorce ("irretrievable breakdown of the marriage") put forward by the English Law Commission in its seminal Sixth Report in 1966, Reform of the Grounds of Divorce: The Field of Choice. This proposal, to do away with the collection of grounds of divorce based on proof of a matrimonial offence, continues to work its influence through many jurisdictions, including Australia.

Through all the differences of composition, initiation, achievement and precise methodology, one common theme links the law reform agencies. It is consultation. Unlike the preparation of much public law, the first knowledge of which may advise when the Bill is tabled in Parliament, all law reform reports are prepared after an exhaustive procedure of consulting expert and other opinion. Here too, there is room for experimentation. Different approaches have been taken in different countries and even within the same country, by law reform agencies of State or Provincial jurisdiction. The purpose of this paper is to explore the procedures that have been adopted in Australia to involve a wider community in participation, with the legal profession in improving the laws and legal procedures of the country. This endeavour is bearing fruit and has tended to encourage a rapprochement between lawyer and citizen, to the mutual education and benefit of each.

THE WORKING PAPER: A MAJOR CONTRIBUTION TO METHODOLOGY

The Green Paper: Soon after it was established in 1965, the English Law Commission published its first "Working Paper". The notion of a consultative paper is now a common feature of law reform bodies and the development of the "working paper" has been described as a "major contribution towards the methodology of law reform". Its design in the English Commission is now fairly well established. It starts with a thorough presentation of the existing law. It identifies problems and difficulties in that law. It explores the possible ways of reforming the law, listing the advantages and disadvantages of each. Finally, it opts for certain reforms and indicates why these have been recommended.

The English Law Commission has now issued 73 working papers and many of them have formed the basis, after consultation, for final reports of that Commission. The cover of the working paper is in a distinctive green hue. So popular has become the notion of a consultative document and so useful is the subsequent discussion for the improvement of proposals for future laws, that governments in Britain, Australia and elsewhere have now themselves taken to producing discussion papers. Significantly enough, in England, these have come to be know as "Green Papers".

Private Consultations: In addition to the distribution of working papers and consideration of comments on them, the English Commission pioneered various procedures of private consultation in which the legal profession especially has taken a key role. Informal oral consultations are later supplemented by weekend seminars held at Oxford or Cambridge. Attendance is by invitation and is not confined to those who have submitted written comments. All of these meetings are held in private. In addition to the procedures of consultation mentioned, the Law Commissioners have embarked upon a taxing round of public lectures, speeches and the preparation of scholarly articles. These activities have raised the awareness, particularly in government, legal and university circles, of the vital work being done by the Law Commission on its programme.

When the Australian Law Reform Commission was established, ten years after the English Law Commission, it immediately adopted the English view that

> "What lies between the topic's ... referral and the final report is what determines the value of the Commission's work". Lord Scarman, Second Nehru Lecture, January 1979, 4.

However, a number of additional techniques of consultation have been tried.

NEW AUSTRALIAN METHODS OF CONSULTATION

Statutory Consultants: Under the Act which establishes the Australian Law Reform Commission, the Chairman is empowered, with the approval of the Attorney-General of Australia, to engage persons having suitable qualifications and experience as consultants to the Commission. In each of the projects of the Australian Law Reform Commission, a team of consultants, sometimes numbering up to 35, is engaged. Because all of the Law Reform Commissioners save one are lawyers and many of the projects referred to the Commission for report involve non-legal expertise, an effort is made at an early stage in every inquiry to secure as consultants persons, lawyers and non-lawyers, who will have relevant expertise to offer in the project in hand.

In the early days of the Australian Commission, funds were available to pay consultants for their services and a handsome, but not generous, retainer and daily fee was paid to those consultants who helped the Commission in its first two reports. A like arrangement still exists in the Law Reform Commission of Canada where there is extensive contracting of legal and other research to paid consultants. Because of budgetary restraints common in the public sector in many countries, including Australia, the funds available for consultants are now extremely small. Despite this, it has not been difficult to recruit large teams of honorary consultants who will work with the Commissioners and bring to meetings with them, a wide range of relevant expertise and information. Universities, government administration, Federal and State, private corporations and institutions have all proved willing to release busy people to take an active part in the steps

leading to a law reform report. Self-employed members of the legal profession and other professions have likewise made themselves available free of charge.

Because Australia is a large country with a scattered population reflecting differing local attitudes to society and the law, every effort is made to ensure not only a balance of expertise and viewpoint, but also a geographical distribution, including legal practitioners from different parts of the country. The end result has been a remarkable collection of inter-disciplinary talent which has greatly enriched the thinking of the law commissioners. The duties of consultants include the attendance at several meetings with the Commissioners, generally at weekends, during which draft Commission documents are studied and criticised. It is the continuing association of the consultants with the Commission, from the earliest phase to the final report that marks their special role. Both in conference and individually they become closely associated with the Commission in its work. They read and criticise in-house publications and are frequently to be seen in the Commission's offices debating this or that proposal with the Commissioners and staff, bringing along colleagues, producing further information for the assistance of the Commission and otherwise associating themselves formally and informally with the life of the institution. In more than four years the numbers of consultants appointed have exceeded 100. Consultants are appointed in every reference.

Discussion Papers: A discussion paper fulfils the same purpose as the working paper. It is a consultative document advancing tentative proposals for law reform. It differs from the orthodox working paper in that it is deliberately written in less technical language and is designed to be read by the interested layman, as well as by the expert lawyer. Moreover, it is generally a briefer document. It contains less examination of the current law and more emphasis on the social issues that are under consideration. An effort is made to illustrate, with practical cases, the kind of defect in the law to which reform is being addressed. These are drawn from complaints to the Commission or from reports.

In addition to the "official" discussion paper, efforts are now being made to "translate" this document into an even more simple and readable form, suitable for the disadvantaged, migrant and less well educated groups, whose legitimate interest in law reform may be as great as that of the educated middle class. Lawyers and other "experts" tend to speak a special patois. New efforts must be made to translate this language into simple terms. In connection with proposals for major reform of debt recovery laws, the Australian Law Reform Commission is experimenting with a "rewrite" of the discussion paper in a simplified version. This will present simple examples of the way in which the present laws operate and the way the reformed laws would change things. Illustrations and cartoons are used to attract interest. Whilst some legal problems are complex and over-simplification can distort the law, every effort should be made to communicate the problems of the law and options for reform beyond the expert audience to the great mass of people who will be affected by the law, reformed or unreformed.

As an effort to disseminate proposals for reform, a pamphlet summary of discussion papers is now produced in large numbers and distributed throughout Australia. The pamphlet is generally no more than four pages. It summarises the issues in the discussion paper and indicates where the full discussion paper can be obtained. The practice has now been adopted of sending this pamphlet out with every issue of the Australian Law Journal and various other regularly circulating legal publications in Australia, including the Legal Service Bulletin and the Law Reform Commission's own Bulletin Reform. By this means, the Commission ensures that the great bulk of the 11,000 lawyers in Australia are kept informed of the principal proposals of the national Law Commission. The Australian Law Journal, for example, has a distribution of 8,000 in Australia and overseas. There would be few legal offices that did not receive the Journal and, thus, the summary of the Law Reform Commission's discussion papers. The cost of this enterprise is small, partly because of the willing co-operation of the publishers of the Law Journal. In addition to distributing the discussion paper pamphlet throughout the legal profession, a special effort is made to ensure that other relevant professions and organisations are likewise circulated.

Public Hearings: The Australian Commission from its first reference has experimented with public hearings at which experts, lobby groups, interested bodies and institutions as well as the ordinary citizen can come forward to express their views on the tentative proposals for reform of the law. The English Law Commission has never conducted public sittings of this kind. Professor Diamond a former Law Commissioner explained that this failure was the result of scepticism about the "limited number of people out of the total population that public meetings would reach". Lord Scarman has said that the possible use of public sessions of the English Commission cannot be ruled out:

> "Lord Chancellor Gardiner frequently suggested to me, when I was chairman, that consultation could not be complete without public meetings held in various parts of the country to discuss the tentative proposals contained in a working paper. Kirby J. ... Chairman of the Australian Law Reform Commission tells me that they hold such meetings in Australia. Though we have not felt the need for them in the United Kingdom, I would not rule them out. Perhaps, for us, they are unnecessary because of the existence of so many societies, lobbies and pressure groups upon every conceivable topic of social or economic importance. Our consultations embrace them: they all have their say: and there is little left to be said when they have finished": Lord Scarman, Second Nehru Lecture, 1972, 5.

Former Law Commissioner, Norman Marsh, expressed a fear that public meetings of this kind would involve the Law Commissioners in "many irrelevant time-wasting suggestions".

In Australia, public hearings of the Law Reform Commission have now become a regular feature of the operations of the Australian Commission. The list of public hearings is contained in the published discussion paper. Sessions are scheduled in every State of Australia and in Darwin in the Northern Territory and Canberra in the Australian Capital Territory. The venue, date and time are advertised in the local and national press. Notification is given to the broadcasting and television media. Publicity is generally given to the hearings in news broadcasts and current affairs programmes. In addition to this form of advertisement, specific letters of invitation to attend the public hearings are now sent to all individuals and groups who have written

with submissions or suggestions or comments, whether on the discussion paper or otherwise. The local Law Society and Bar Association are informed and generally send representatives to comment on the discussion paper from a local point of view. The public hearings are normally appointed four or five months in advance. This gives the discussion paper sufficient time to be distributed and considered.

The public hearings are conducted informally. If held in a court room, it has been the practice of the Commissioners to sit at the Bar table. It is not necessary for the person making a submission to produce a written document, although many do. The proceedings are conducted after the inquisitorial rather than the adversary model. The chairman of the proceedings, one of the Law Reform Commissioners, takes the witness through his submission and elicits economically the chief points to be made. Questions are then addressed by the Commissioners. Interested parties are not legally represented. In recent public hearings where a particular Federal authority was closely concerned, leave was given to a representative of the authority to ask questions of witnesses and later to comment on individual submissions. The rules of evidence are not observed. Hearsay evidence, so long as it is reliable, is received. Opinions are expressed by laymen and a great deal of written and oral information is gathered in this way.

Until now, the public hearings have been conducted in normal court hours. Forthcoming public hearings on the proposals for class actions in Australia will be conducted in two sessions, the second of which will run from 1800 hrs to 2100 hrs. The aim of this modification will be to ensure that individuals and organisations which cannot attend during working hours, will be able to express their views in sessions that do not involve them in loss of time. This consideration is not unimportant for voluntary and community groups, which must often depend upon enthusiasts, working in their own time.

The notion of conducting public hearings was suggested many years ago by Professor Geoffrey Sawer, who pointed to the legislative committees in the United States of America and

their utility in gathering information and opinion and involving the community, as well as the experts, in the process of legislative change. It must be conceded that the business of sitting in all parts of a large country like Australia is a time-consuming and physically exhausting one. The hearings have many uses. In the first place, they "flush out" the lobby groups and interests, including those of the legal profession itself. It is useful to have openly and publicly stated the interests protected by present laws which are under consideration for reform. It is useful to have present representatives of those interests who are then submitted to questioning by the Commissioners in a public venue which is generally well attended by the media. It is also useful to have ordinary citizens come forward to explain their experience with the law and to personalise the problems which the Law Commissioners have hitherto often seen only as abstract questions of justice and fairness. The presence of citizens to explain their unhappy experiences provides a salutory balance to the administrative and professional calls to leave well alone. In a number of specific cases, most particularly in relation to reform of lands acquisition law, individual citizens have provided personal experiences which have helped the Commission to identify the injustices that need to be corrected. Often, the problem that emerges is not so much one of the substantive law or even of the procedures written in the statute. Often, it is the practical impediments of cost, delay and simply fear of legal process, that stand in the way of the individual's access to justice and the impartial umpire. Law reform, if it is to be effective, must address itself to such impediments.

The public hearings have also become a regular procedure for fact-gathering. True it is, this is partly because the Commission specifically invites the attendance of certain persons and organisations known to have relevant views and be able to provide information necessary for an informed report. One recent development has been the partial "orchestration" by interested groups of the attendance at the public hearings of protagonists for competing points of view raised in the discussion paper. During the last national Census in Australia, the Australian Bureau of Statistics was criticised on various grounds, including privacy invasion.

During public hearing addressed to the protection of privacy in relation to the census, the Bureau organised many of its "clients" to come forward and to explain to the Commission perceived defects in proposals advanced, designed to ensure a greater protection of privacy in the 1981 Census. Councils for Civil Liberties and other community groups came forward to put the opposite point of view. The result was not strictly a public seminar or debate, for the protagonists addressed the Commission separately and in turn. But it was a public articulation of the social and legal issues that have to be resolved in the design of new laws for the protection of privacy in relation to the census.

Surprisingly enough, despite all the labours of preparing consultative papers and studying an issue for months and perhaps years, pubic hearings often identify aspects of a problem (or of a suggested solution) which have simply not been considered by the Commissioners. For example, in a Canberra public hearing relevant to defamation law reform, a witness raised for the first time a difficulty in one of the procedural suggestions of the Commission, which had not been perceived before. This was the difficulty of adapting "correction orders" and the "right of reply" (droit de response) from defamatory publications in news media to books and like permanent or non-recurring publications. Doubtless the problem should have been considered before. The fact is that it had not been.

Apart from these arguments of utility, there is a point of principle. It is that the business of reform is not just a technical exercise. It is the business of improving society by improving its laws, practices and procedures. This involves a consideration of competing values. Lawyers inevitably tend to see social problems in a special way, often blinkered by the comfortable and familiar approaches of the past, designed in times less sensitive to the poor, deprived and minority groups in the community. There is a greater chance of avoiding lawyers' myopia if a window is opened to the lay community and the myriad of interests, lobbies and groups that make it up. Of course, it is impossible to consult

everybody. The articulate business interests and middle class may be able to use a public hearing with greater efficiency and apparent effect than the poor, deprived, under-privileged and their spokesmen. But that is not an argument against public hearings. Rather, it is an argument about the venue, frequency and organisation of those hearings and the supplements that are necessary to ensure that other interests are heard. In point of principle, it is important in a democracy that citizens should be entitled to have a say in the design of the laws that will govern them. Increasingly, there is an awareness that a theoretical "say" through the elected representatives is not always adequate because of the pressures of party politics and heady political debates. What is needed is new machinery which realistically acknowledges the impossibility of hearing everybody but affords those who wish to voice their grievances and share their knowledge, the opportunity to do so.

Before leaving this subject, it is appropriate to say that the cases of abuse of the public hearings have been rare, at least in the experience of the Australian Law Reform Commission. The fears of irrelevant and long-winded submissions or of hordes of unbalanced or nuisance witnesses have not been born out. Many laymen are extremely nervous and need reassurance before they can present a useful submission. This hurdle having been overcome, the experience has been that they will quickly and briefly come to their point and do so in an entirely constructive way. There is a clear appreciation, too, of the inability of the Law Reform Commission to deal with their particular grievance or to provide relief for the experience they complain of. The distinction between helping them in their case and using their case to improve the legal system is one that very few fail to perceive. As a side-wind of the public hearings, it has been possible, on occasion, to steer people with a genuine complaint in the direction of appropriate advice.

Use of the Media: Another feature of law reform in Australia has been the use of the public media: the newspapers, radio stations and television. The use of the public media has its dangers. The tendency of those in command of information

distribution to sensationalise, personalise and trivialise information frighten away many scholars from the obligation to communicate issues to the wider community. The Australian Law Reform Commission has consciously sought to engage in a public debate in order more effectively to discharge the obligation of consultation. The realities of life today are that the printed word is no longer the means of mass communciation for the ordinary citizen. The caravan has moved on. The electronic media are the means by which most people in today's society receive news and information and consider topics of public interest and concern. A realisation of this self-evident fact will oblige the law reformer interested in communication and consultation to use the new means of doing so.

The lesson of Australian experience is that the public media are only too willing to allow time and space to permit an informed discussion of the issues of law reform. Certainly, in the subjects referred to the Australian Commission for report, significant questions of social policy and a great deal of human interest make it relatively simple to present issues in a lively and interesting way. The law is not, of course, a dull business as any of its practitioners know. Defects in the law and in legal procedures impinge on the lives of ordinary citizens. Avoiding the perils of trivialisation and over-simplification is not always easy. A five-minute television interview or a half-hour "talk-back" radio programme scarcely provide the perfect forum for identifying the problems that law reformers are tackling. But the discipline of brevity and simplicity is the price that must be paid for informing the community of what is going on. It is a discipline accepted by other groups in our society, including political leaders and social commentators. Lawyers, whose craft is words, must learn to use the modern media of communication. Disparaging comments on "media lawyers" voiced by critics of the use of broadcasting and television represent backward looking intellectual snobbery.

In Australia, the technique of discussing law reform projects in the media is now common place. Not only are news broadcasts utilised, to coincide with the release of discussion papers, or reports, or the conduct of public hearings in

different centres. Commissioners also take part in television debates, radio talk-back programmes and national television fora with audiences numbered in millions. The use of the media is uncongenial to many people who resist the discipline of simplification and fear the undoubted perils, intellectual and personal which use of the media involves. In the past, lawyers have not tended to use the public media in Australia. Judges and public administrators have been inhibited by the traditions of their office and the rule limiting the extent to which they can express personal opinions or reveal public secrets. Practising lawyers have been inhibited by ethical rules against publicity and by the sheer burden of day-to-day practice. Legal academics have tended to disdain the use of journalism. The net result has been very little public discussion of legal issues. Judges, lawyers and legal academics have exchanged information amongst themselves. Little attention has been paid to revealing the problems of the law to the wider lay community and engaging that community in discussion about the options for reform.

In part, the typical social background of lawyers in Australia may discourage the notion that the community has anything useful to add to technical legal questions. Furthermore, it may reinforce the view that it was somehow not "gentlemanly" to engage in a public airing of dirty linen, for which the legal profession, however unjustly, would be blamed. Times change. There is now an increasing necessity for lawyers, along with other professional and community groups, to debate their problems in the public forum. This is a healthy development and will, I believe, expand enormously now that the wall has been breached.

In addition to the use of the media for specific proposals of reform, the Australian Law Reform Commissioners have also accepted invitations to talk generally about the law, the work of the Commission and the problems of law reform. Discussion of this general kind, although not addressed to a particular proposal, may have a cumulative affect of encouraging the creation of a climate of opinion favourable to the reform of the law. It may also contribute to narrowing the

gap between an uncommunicative legal profession, on the one hand, and a critical, sceptical and even fearful public, on the other:

> "There is a great and growing interest in all things legal. Any proposal for reform of the legal system that stands the remotest chance of acceptance ought to be able to secure some attention in the press. The attraction of enlisting the interest of journalists is, of course, the greater because the authorities - whether in government or the profession - tend to have a considerable dread of the media". Professor Michael Zander, Promoting Change in the Legal System, mimeo, 1978, 16-17.

In Australia, the authorities, at least in government, have welcomed the public ventilation of sensitive questions of law reform. In part this may be because such public discussion deflects criticism and debate away from politicians towards the Law Reform Commission. In part, it comes, I believe, from the conviction by busy politicians that a law reform proposal that has been put to this modern "test of fire" is more likely to be workable and publicly sustainable than something drawn up behind closed doors by a group of people however scholarly and however "expert". In the end, politicians introducing controversial reform legislation must face the media. Their path may be smoother if the reformer has gone before and debated, in a thoroughly public and open way, the issues which reformed legislation has to address.

Other Means of Consultation: The above list does not exhaust the procedures of consultation developed in Australia. For example, in conjunction with the public hearings of the Law Reform Commission, the practice has now developed of organising public seminars in the different centres of Australia. In the past, the organisation of these seminars has been left to industry groups in all States. A full day seminar is organised, to coincide with the visit of Commissioners to the State in question. The visiting Commissioners take part in the seminars, chair the proceedings, present papers and make opening and closing remarks. A series of papers is presented by local industry experts and some effort is made to get a balance of opinion and to promote useful debate. Typically, these seminars are attended by hundreds of people in each centre. Lawyers and the other professional and industry groups

involved make up the majority of the audience. On the insistence of the Commission, a number of places are reserved for spokesmen of a non-industry viewpoint. The result is a vigorous debate, highly critical of the Law Reform Commission at times, with a great deal of frank talking and taxing questions addressed to the Commissioners. Frequently, the large group has been divided into smaller groups to examine particular aspects of the discussion paper to report back at the end of the day to a plenary session. This measure has been introduced to overcome the inhibitions of large meetings where, prepared papers, experts and "leaders" might otherwise dominate. The Commission is continuing to experiment with these public seminars and ideally would wish to develop means to ensure a better balance in the debates which, in the past, have sometimes taken on a flavour of mobilised resistance to reform rather than open-minded consideration of reform proposals.

To gain an international perspective in the projects assigned to it, the Australian Commission has secured the assistance of Australian missions overseas to collect local information on the law and its development that may be of help in the improvement of the administration of justice in Australia. This is not just window-dressing. The proposals for the reform of defamation law contain, as has already been stated, suggestions for important reforms in defamation procedure which include the adoption of civil law remedies of right of reply (droit de response) and right to a correction order, to supplement the English common law's obsession with money damages as a sanction.

SURVEYS AND QUESTIONNAIRES

The idea of using surveys for the purposes of law reform consultation is not new. Calls for greater use of surveys in England and elsewhere tended to fall on deaf ears. Lawyers, by and large, have a well developed aversion to the social sciences and empirical research generally and statistics in particular. A willingness to use surveys was evidenced by Professor Diamond who expressed a preference for this technique over public hearings, although the two need not be

alternatives. In the work of Australian law reform bodies, different types of surveys have been utilised to assist in the gathering of relevant facts and opinions.

For example, in the project on the reform of child welfare laws, a survey is being administered to police in respect of all matters involving children and young persons over a given period. In this way, it is hoped to isolate the considerations that lead to some children being charged and others being cautioned or warned. Examination of court files over a period of a year and questionnaries administered to children in institutions and those coming before the Children's Court will seek out perceptions of the child welfare process as seen by the "consumers". As Professor Diamond quite rightly infers, they are unlikely ever to attend a public hearing or seminar or ever to respond to a television interview or radio talk-back programme, let alone see, read and comment on a working paper or discussion paper.

Statistics and social surveys provide a means by which the inarticulate and disadvantaged can speak to law makers. Both for the gathering of facts and the eliciting of relevant opinion, they have a very important role to play in the processes of law reform. The gathering of facts by surveys is not now very controversial. The use to which the data is put is more controversial. Most vexed is the utility of surveys for the gathering of opinion.

It does seem to me that sometimes the gathering of opinion of a limited group whose opinions are especially important, can be readily justified. In its project on the reform of sentencing law in Australia, the Australian Law Reform Commission has distributed a national survey to all 506 judges and magistrates in the country. So far as is known, this is the first national survey of the judiciary in any English speaking country. The survey as distributed was voluntary and anonymous. Its completion took, at a minimum, one and a half hours and was addressed to an extremely busy group of supposedly conservative professionals. The questions raised included uncomplicated yes/no questions of a specific and practical kind, e.g., "Should Defence Counsel be entitled

as of right to have access to pre-sentence reports?"; "Should imprisonment for non-payment of fines be abolished, imposed only for wilful neglect to pay or imposed automatically in default of payment?"

Other questions, however, were more controversial and sought to identify attitudes to important questions of social policy. These included whether guidelines could and should be formulated for the imposition of the sentence of imprisonment, whether there were circumstances in which the imposition of the death penalty could be favoured, whether plea bargaining and other negotiations take place and, if so, attitudes to such negotiations and so on. Questions directed at the future of parole, the availability of options for punishment (including community service orders) and attitudes to the use of imprisonment in respect of various categories of offence were all raised by the survey.

The final returns to the survey numbered nearly 80% of the judges and magistrates of the country. The results are now being submitted to computer analysis. Their significance for the direction of sentencing reform will have to be carefully weighed by the Law Reform Commission. The extent of the return will ensure a clear understanding of the views and opinions of judicial officers in all parts of Australia. Such views are obviously important, given the nature of the process of sentencing and the role of judicial officers in imposing punishment. Any measure of reform which ignored or overlooked those views would be likely to be of transient effect at best. The use of surveys as a tool of reform has been well argued in Britain where the danger of basing law reform on hunch and guess is now increasingly perceived. The battle has now begun to persuade Australians that the road to sound reform lies through a process of empirical research and surveys.

CONCLUSIONS

This paper has outlined the new efforts being made in Australia to communicate the problems and difficulties of the law to the legal profession and to the community and to enlist the support of each in efforts directed at the improvement of substantive and procedural laws.

The establishment of law reform bodies throughout the English-speaking world has a common theme. This is, consultation in order to procure information and opinion that will lead to the improvement of the law and of the administration of justice.

The process of consultation was given an enormous boost by the development in the English Law Commission of the working paper. So successful has this innovation become, that it is a common-place technique of law reform agencies throughout the world and is now frequently adopted by other inquiring agencies and indeed by government itself.

To the consultative working paper, the weekend university seminar and scholarly articles and lectures, the Australian Law Reform Commission, and law reform agencies in Australia have added a number of new procedures of consultation. These include the appointment of a team of inter-disciplinary consultants, the widespread, free distribution of discussion papers and pamphlets outlining in a brief and interesting way proposals for reform, the conduct of public hearings and industry seminars in all parts of the country and the use of the printed and electronic media to bring law reform "into the living rooms of the nation".

More recently, experiments have been conducted with new procedures of consultation, including surveys, questionnaires and public opinion polls. Special efforts are also made to reach out to particular groups that may be affected by proposals for reform, including Aboriginals, prisoners, children and ethnic or linguistic minorities.

If there is a justification for the establishment of law reform commissions to help develop the law, it is principally in their capacity to do a better job than other agencies because they can consult more widely and involve the relevant, interested audience in the business of improving law. Being independent of government, they will not embarrass political leaders by the appearance of either commitment or indecision on their part. But they will ensure that controversial, difficult issues are properly discussed in the community before reformed laws are proposed.

The justification of this exhaustive effort of consultation can be briefly stated. It permits the gathering of factual information, particularly expert information. It secures a statement of relevant experiences, especially experiences which illustrate and individualize the defects in the law. It procures a practical bias in law reform proposals because they must be submitted to the scrutiny of those who can say how much the reforms will cost and whether or not they will work. It gathers commentary on tentative ideas which allow the Commissioners of law reform to confirm their views, modify them or retreat, if shown to be wrong. It aids the Commissioners in their task by assisting the clearer public articulation of issues and arguments for and against reform proposals. The whole process raises the public debate about law reform, ensures that the antagonists get to know each other, and usually, to respect each other's views. It raises community expectation, both of specific improvements to the legal system and routine, on-going consideration of law reform generally. Expectations of the latter may well promote the devotion of more resources to the legal science than has been the case in the past. [illegible]

Beyond these practical advantages, there are certain long-run effects which the procedures of consultation may have, advantageous to the law and its practitioners. In a sense, the whole procedure of public debate about the social policy behind the law mirrors the growing openness of government, law making and public administration in Western societies. This is in turn a reflection of a population with higher standards of general education and better facilities of knowledge and information. The procedures of open, public consultation permit a more public statement of competing vested interests. They tend to "flush out" the competing lobbies and to bring into the open the social values which the law seeks to protect.

The pace at which different countries move towards greater openness in law making and public administration will differ according to their needs and traditions. In Australia, it is, I believe, a healthy sign that political leaders of all shades of opinion embrace the new philosophy and encourage its manifestations, including "participatory law reform".

The accession of so many young, enthusiastic and often idealistic lawyers into the legal profession brings in its train the danger of Disraeli's "two nations". It is important that lawyers of the shopfront and in the community legal service and lawyers of the publicly funded Legal Aid Commissions should continue to see themselves as part of the one profession with lawyers of the established firms and leaders of the Bar. There will be more chance of communication and less danger of bifurcation of our profession if it is accepted that effective means exist to right wrongs in the law and that regular, routine machinery exists to identify injustice in a public way and to argue in the public forum for the cure. The alternative to this is the despair that our legal system is beyond redemption, that it perpetuates injustice to the poor, disadvantaged and underprivileged and that means are not available to rectify demonstrated wrongs.

A lasting value of law reform commissions may be that by involving the community and the legal profession together in the improvement and modernisation of the law, they contribute to the stability of society. The Rule of Law, that unique feature of the Western community is, after all, only worth boasting of if the rules which the law will enforce are just and in tune with today's society.

FURTHER INFORMATION

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